



Regular Session

RS

Milwaukie City Council



MINUTES
MILWAUKIE CITY COUNCIL
www.milwaukieoregon.gov

REGULAR SESSION
 MAY 6, 2014
 City Hall Council Chambers

Council President Hedges called the 2,173rd meeting of the Milwaukie City Council to order at 7:08 p.m.

Council Present: Council President Hedges and Councilors Scott Churchill, Mark Gamba, and Mike Miller

Staff Present: City Recorder Pat DuVal, Finance Director Casey Camors, Community Development Director Steve Butler, Engineering Director Jason Rice, and City Attorney Tim Ramis

CALL TO ORDER

PLEDGE OF ALLEGIANCE

PROCLAMATIONS, COMMENDATION, SPECIAL REPORTS AND AWARDS

A. Poppy Days Proclamation

Council President Hedges explained the history of Poppy Days, read the poem *In Flanders Fields*, and introduced the American Legion Auxiliary Unit 180's 2014 Miss Poppy Days, who distributed red poppies. Council President Hedges then read the proclamation and presented Miss Poppy Days with a copy.

B. North Clackamas Parks and Recreation District (NCPRD) Master Plan Update

Gary Barth, NCPRD Director, reviewed the NCPRD's Master Plan update process and the possible formation of an independent parks district. He reported the preliminary results of recent polling and noted the high positive ratings of the NCPRD and the broad support of an independent parks district; he discussed the support shown in the poll for the proposed funding solution. He also reported on an estimated compression loss for Milwaukie if a new parks district was created with the proposed funding solution. He described the next steps on forming the new parks district, including a Council Resolution supporting of the new district from the Milwaukie City Council in June.

Councilors Miller, Gamba, and Churchill voiced their continued support for an independent parks district and **Council President Hedges** discussed the possible funding phase-in and voiced his support for the independent parks district.

Council President Hedges announced that Mayor Ferguson and City Manager Monahan had been excused from the Regular Session.

CONSENT AGENDA

It was moved by Councilor Gamba and seconded by Councilor Churchill to approve the consent agenda as presented.

A. City Council Meeting Minutes:

1. April 15, 2014, Work Session;

2. April 15, 2014, Regular Session; and
3. April 17, 2014, Study Session

B. Board, Commission, and Committee Appointments.

1. Resolution No. 38-2014 Reappointing Charles Bird to the Kellogg Good Neighbor Committee;
2. Resolution No. 39-2014 Reappointing Neil Hankerson to the Kellogg Good Neighbor Committee; and
3. Resolution No. 40-2014 Reappointing Gary Klein to the Kellogg Good Neighbor Committee

C. Resolution No. 41-2014 Authorizing an Amendments to the Habitat Development Agreement and Initial Escrow Instructions (“Second Amendment”) between the City of Milwaukie and Wildlands’ Capital Partners, LLC

D. Resolution No. 42-2014 Extending the Contract for Photo Radar Services with Automatic Computer Systems (ACS) Inc. / Xerox, and Making Findings that Traffic Safety is Negatively Impacted by Speed at Locations on Hwy 99E and on Johnson Creek Blvd in the City of Milwaukie.

Motion passed with the following vote: Councilors Hedges, Gamba, Miller, and Churchill voting “aye.” [4:0]

AUDIENCE PARTICIPATION

Ms. DuVal reported the findings of the Office of the City Manager related to questions raised during Audience Participation at the April 15, 2014, meeting. The first question by Ed Parecki, in regards to business registration code enforcement procedures, she reviewed how each of the business citations in question were resolved; the second question by Michael Backus, regarding delivery of business registration mail, she reported how the Code Compliance officer verifies business addresses; and the third question, also by Mr. Backus, relating to Council’s role in setting business registration fine amounts, Ms. DuVal reported that the Municipal Court Judge has the authority to rule on all matters before the court and neither the Council nor staff should interfere.

Jim Bernard, Celebrate Milwaukie, Inc. (CMI) discussed the work done by CMI, including the Sunday Farmer’s Market, and thanked the City for supporting the market and allowing the free use of the parking lot. He thanked and introduced his colleagues at CMI and said they look forward to the market continuing to grow. Mr. Bernard also noted he is now the Clackamas County commission liaison to Milwaukie.

Council President Hedges thanked CMI for its work on the Sunday Farmers’ Market and asked Mr. Bernard about the possibility of the county refunding the money the City paid for county land to be used as part of Riverfront Park.

Mr. Bernard stated that he never thought the county should have charged the City for that land and said he would discuss it with his fellow county commissioners.

Willie Miller, American Federation of State, County, and Municipal Employees (AFSCME) Local 350-5 President, thanked the Council for its support and asked for public support for Milwaukie ballot measure 3-439, noting recent and upcoming phone banking sessions in support of the ballot measure. He also commented on his personal connection to Poppy Days, explaining that his grandfather served in World War I.

Lisa Batey, Milwaukie resident, noted the new banners on McLoughlin Blvd and the ad for the Sunday Farmers’ Market in the *Willamette Week*; she encouraged voters to mark ‘yes’ on the ballot for both City measures; and she announced the short film festival this coming weekend at the Milwaukie Masonic Lodge. She thanked Claudia Steinberg, with TriMet, who is retiring, for her outreach work in the community.

Richard Cayo, Milwaukie resident, noted his opposition to the light rail project and reported that he had sent the *Clackamas Review* newspaper a letter in opposition to the City-referred ballot measure authorizing the sale of bonds; he explained the newspaper had omitted several passages and proceeded to read the missing sentences.

PUBLIC HEARING

None scheduled.

OTHER BUSINESS

A. Milwaukie Riverfront Park Phase II – Oregon Department of Fish and Wildlife (ODFW) Project Agreement - Resolution

Mr. Rice introduced the topic and provided background information on the ODFW and Oregon Marine Board (OMB) grants; he clarified that the project funding includes \$200,000 from the OMB, \$1 million from the City through the Kellogg Good Neighbor Committee, and a matching \$1 million from the ODFW.

The group agreed to discuss agenda items 6. A. and 6. B. simultaneously; it was understood that Council would take action on the resolution under item 6. A.

Mr. Butler and **Mr. Rice** discussed the Riverfront Park Phase II project, including completion goals and timelines, funding sources, and groups consulted and contracted with to-date. They described the contractor bid process and explained that all bids received had come in over the projected project budget.

The group discussed the varying estimated project costs and work experience differences between the contractors who submitted bids on the project.

Mr. Rice discussed the budget gap between the estimated costs, funding secured, and the lowest contractor bid received. He presented and discussed strategies for funding the budget gap, including possible additional state funding, postponing construction of pathway bridges and lighting, using funds possibly returned from the county that had been used to purchase property for the project, and reconsidering the inclusion of non-essential elements of the plan. **Mr. Butler** discussed readjusting economic development funds for use on the Riverfront Park project to close the funding gap.

Councilor Churchill inquired about cost savings related to moving the Portland General Electric (PGE) power poles. **Mr. Rice** discussed the use of sub-contractors.

Councilor Gamba asked about the responsiveness of ODFW and OMB officials regarding additional funding. **Mr. Rice** and **Mr. Butler** described the timeline for presenting information to Council and reported their conversations with state contacts.

Councilor Gamba asked about any response from the consultants at David Evans and Associates (DEA) in regards to the budget gap. **Mr. Rice** said he had spoken to DEA and they had discussed various supply and labor cost estimate differences.

The group discussed the possibility of rejecting the received bids and calling for new bids based on revised requirements; it was noted that rejecting the received bids would delay the construction timeline into 2016. Change orders, price negotiations, and adjusting City-ordered project requirements were also discussed.

Councilor Churchill asked about project contingency funds and **Mr. Rice** replied that the project carried zero contingency and confirmed that the DEA estimate did not include contingency funding, which had been requested by staff.

The group discussed working with the lowest bidding contractor to reduce costs, possible additional state funding, and approaching members of the original Riverfront Board for private donations to support the project.

Council President Hedges supported seeking additional state funds and said he would work on getting a refund of the money used to purchase park property from the county.

Councilor Churchill asked staff to work with the lowest bidding contractor on value engineering on the pathway bridges before they would be removed from the scope of work; he also discussed the need for contingency funding as the project moved forward.

It was moved by **Councilor Churchill** and seconded by **Councilor Gamba** to approve the Resolution authorizing the City Manager to enter into a "Grant Agreement" with the Oregon Department of Fish and Wildlife in order to receive grant funding for the construction of Riverfront Park Phase II. Motion passed with the following vote: Councilors Hedges, Gamba, Miller, and Churchill voting "aye." [4:0]

Resolution No. 43-2014:

A Resolution of the City Council of the City of Milwaukie, Oregon, hereby authorizing the City Manager to enter into a "Grant Agreement" with the Oregon Department of Fish and Wildlife in order to receive grant funding for the construction of Riverfront Park Phase II.

B. Milwaukie Riverfront Park Phase II Contract Award

[Note: Council consideration of this agenda item was included under item 6. A.]

C. Council Reports

Councilor Gamba announced he would have pro-bond measure yard signs available and reported on events he had attended and events coming-up. He reported meeting with the editorial board of the *Clackamas Review* who planned to write editorials in favor of passing both City-referred ballot measures.

Councilor Miller reported attending a volunteer recognition event at the Milwaukie Center and encouraged citizen participation in the center's activities.

Councilor Churchill reported on the events he had attended and thanked Stacy Bluhm for her work on shortening the duration of downtown street closures due to light rail construction. He discussed walking around the sewage plant to monitor the odor and the input he has received from residents regarding Moving Forward Milwaukie (MFM) and proposed downtown building heights.

Council President Hedges summarized the meetings and events he had attended; he thanked the volunteers assisting with Shred Day, Drug Turn-in Day, and the bike donation program. He expressed his support for the City staff's union and frustration with rumors spread using his name. He announced various upcoming events and the birth of his second grandson, Brandon Michael Peas.

ADJOURNMENT

It was moved by **Councilor Churchill** and seconded by **Councilor Miller** to adjourn the Regular Session. Motion passed with the following vote: Councilors Hedges, Gamba, Miller and Churchill voting "aye." [4:0]

Council President Hedges adjourned the Regular Session at 8:48 p.m.

Respectfully submitted,



Scott S. Stauffer, Administrative Specialist II



MILWAUKIE CITY COUNCIL

Office of the City Recorder
10722 SE Main Street
P) 503-786-7502
F) 503-653-2444
ocr@milwaukieoregon.gov

Speaker Registration

The City of Milwaukie encourages all citizens to express their views to their elected city leaders in a **respectful** and **appropriate** manner. If you wish to speak before the City Council, fill out this card and hand it to the City Recorder.

Name: JIM BERNARD

Address: [REDACTED]

Organization: CMI

Phone: [REDACTED]

Email: [REDACTED]

Meeting Date: MAY 6, 14

Topic to Discuss:

Agenda Item You Wish to Speak to:

- #4 Audience Participation
- #5 Public Hearing
- #6 Other Business

You are Speaking...

- in Support
- in Opposition
- from a Neutral Position
- to ask a Question

Comments:



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Name:
Address:

Willie Miller

Organization:

AFSCME Union

Phone:

Email:

Meeting Date:

5-6-2014

Topic to Discuss:

Agenda Item You Wish to Speak to:

- #4 Audience Participation
- #5 Public Hearing
- #6 Other Business

You are Speaking...

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Comments:



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Name: *Lisa Batey*

Address: [REDACTED]

Organization: *self*

Phone:

Email:

Meeting Date: *5/6/14*

Topic to Discuss:

Agenda Item You Wish to Speak to:

- #4 Audience Participation
- #5 Public Hearing
- #6 Other Business

You are Speaking...

- in Support
- in Opposition
- from a Neutral Position
- to ask a Question

Comments:

*please don't put me
before Jim Bernard*



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Speaker Registration

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Name: **RICHARD CAYO**
Address: [REDACTED]

Organization: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]

Meeting Date:
may 06 2014 MILW, OR

Topic to Discuss:

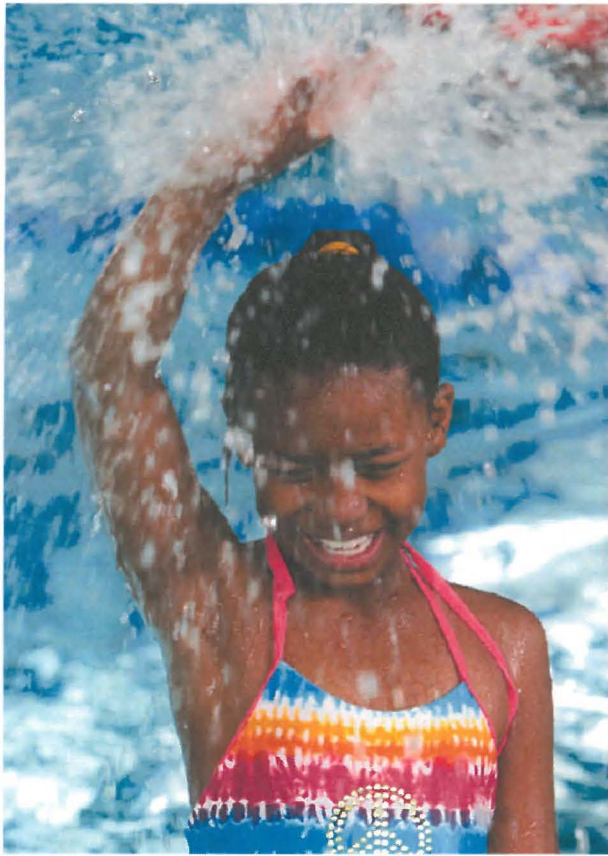
Agenda Item You Wish to Speak to:

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You are Speaking...

- in Support
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- from a Neutral Position
- to ask a Question

Comments:

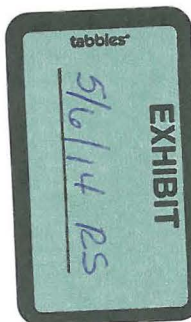


Research for Establishing an Independent North Clackamas Park and Recreation District

Key Findings from May Voter Survey & Compression Analysis



NORTH CLACKAMAS
PARKS & RECREATION DISTRICT



Polling Highlights:

Voters have high awareness of NCPRD and 72% give the District a favorable rating

61% of voters say that the District's mission is "extremely or very important" to them

At the beginning of the survey, 59% of all voters, and 65% of Milwaukie voters, voiced support for the establishment of an independent district

When given the rationale for the proposition, 67% of likely voters said they would support reforming the District to secure additional funding

Support for Uses of Additional Funding:

Repairing & maintaining existing parks 63%

Protecting land around rivers, creeks & lakes 61%

Preserving open space & natural areas 55%

Providing transportation services for seniors 54%

Providing after-school programs for youth 53%

- Additional neighborhood parks 25%

Amount of Funding

Likely voters were presented with a funding proposal including 7 new parks, major enhancements to 3 others and expanding recreational services

Even with an emphasis on developing new parks, 51% support providing an additional \$8/month to the District

64% of voters would support a more modest increase of \$4/month

Voters are near unanimous in calling for a public vote

89% of those polled thought voters should be given the chance to decide whether or not to form an independent parks district

Only **8%** thought that County Commissioners should keep the measure off the ballot

Milwaukie Estimated Compression Loss

Currently \$19,289

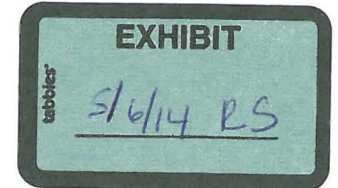
Would increase by \$7,829 at 74 cents

Would increase by \$17,677 at 94 cents



OREGON AFSCME

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Milwaukie City Council
CC: Budget Committee; City Manager, Finance Director

Dear Milwaukie City Council,

May 1, 2014

We are writing this letter to thank the City Council for their support of Bond Measure 3-439. We represent 74 employees working hard every day for this City. Together we support over 100 family members and dependents. We bring passion and professionalism to our work in Milwaukie. Our People power runs this City.

The tight budget situation in the City over the last few years has been experienced by *all* staff in all departments of this City. Since 2011, 15 positions across 7 departments have either been held open for many months or eliminated. Everyone feels the effects of this because we--your staff--work together as a team. We all understand teamwork is essential to how this City functions.

We are asking our community members, neighborhood leaders, board members, commission members and City Councilors to join us in that spirit of teamwork and to help us pass Bond Measure 3-439, thereby preventing further damaging cuts to essential City services.

On April 21 and 22nd we conducted two nights of phone banking to encourage support of Measure 3-439 and to get out the vote. Staff volunteered alongside Mayor Jeremy Ferguson, Councilor Mark Gamba and former Planning Commissioner, Lisa Batey. We made over 1,200 calls. The vast majority of respondents expressed support of the Bond Measure. We are very pleased that four of our neighborhood associations have published supportive letters in the voter's pamphlet and that several have sent in letters of support to our local newspapers. We are heartened that there is such broad support for the Measure 3-439 in our community—*but we still need to ensure that those voters send in their ballots by May 20.*

We strongly encourage City Council to continue to put every effort into passing Measure 3-439 and support it publicly in every way possible—including helping us to get out the vote.

On this Thursday, May 8th we will be phone banking from 530PM to 830 PM. We are asking each City Council member to attend and help. Can we count on you to sign up for a time slot?

If we continue these efforts to support Measure 3-439 we are confident that on May 21, 2014 we will be able to come together and celebrate our success, thank the community for their support and continue to work together to ensure a vibrant future for Milwaukie.

Respectfully,

City of Milwaukie Employees of OREGON AFSCME COUNCIL 75, LOCAL 350-5



5/6/2014




**Riverfront Park Phase II
Bid Discussion**

Steve Butler, Community Development Director
Jason Rice, Engineering Director

5/6/2014 May 6, 2014 - Regular Session

Bid Process

- Advertised (April 9th and 11th) in the DJC
- Staff also notified via email the entire Oregon State Marine Board "Proven Contractors" list.
- A mandatory On-Site Pre-bid Meeting was held on April 14th in which 19 separate contractors attended.
- Beyond the City's normal Bid Package, Staff also required bidders to submit a job history that included two projects of similar nature (included in-water work, boat ramps and/or boating docks) and fill out a Performance and Integrity Form.




May 6, 2014 Regular Session

Bid Opening

- Staff received 7 bids prior to the 11:00am deadline on April 30th.

Contractor	Bid Amount
1. Canby Excavating Inc.	\$ 2,697,946.00
2. Cof Construction Company	\$ 2,763,874.00
3. Wilish Standard Paving Co.	\$ 2,835,299.75
4. Brown Contracting Inc.	\$ 2,986,212.00
5. Elting Northwest Inc.	\$ 3,099,237.00
6. Tapani Inc.	\$ 3,182,313.00
7. PCR Inc.	\$ 3,308,055.50
* DEA Estimate	\$ 2,400,000.00



May 6, 2014 Regular Session

Bid Opening Cont.

- After reviewing Canby Excavating's bid as the lowest received, Staff found an error in which Canby omitted an answer to a question on the Performance and Integrity Form.
- After discussing this error with Legal Staff, advice was given to Staff to drop Canby's bid and to explore Colf's bid as the lowest Responsive and Responsible bidder.



May 6, 2014

Regular Session

Budget

Oregon Department of Fish and Wildlife	\$ 1,000,000
Kellogg Good Neighbor Fund	\$ 1,000,000
Oregon Marine Board	\$ 200,000
Oregon Parks and Recreation Department	\$ 221,000
City Match (Grant Obligations)	\$ 147,500
Total Project Funding	\$ 2,568,000
Lowest Responsive Bid (from Colf)	(\$2,763,874)
Additional Expenditures	
Permitting (Estimate)	(\$ 5,000)
ODOT Signal Adjustments (Estimate)	(\$ 75,000)
PGE Pole Relocation (Estimate)	(\$ 125,000)
Total Approximate Funding Gap	(\$ 400,874)



May 6, 2014

Regular Session

Funding Gap Strategies

- The following are options Staff believes the \$400,000 funding gap can be narrowed.
 - Prior to cutting anything from the project, Staff will continue to explore an option in which the OMB and/or the ODFW may contribute more money to the project if in fact the boating elements cost more than the allotted \$1,200,000. OMB has already mentioned contributing at much as \$115,000.
 - Postpone construction of the two pedestrian bridges, saving phase two approximately \$190,000.
 - Postpone construction of the pathway lighting bollards, saving phase two approximately \$95,000.
 - Not installing the ornamental hand railing on the top of two retaining walls saving the project \$29,000.
 - Community Development could shift some Economic Development Dollars included right now in the Recommended 2015-16 Budget.



May 6, 2014

Regular Session



MILWAUKIE CITY COUNCIL REGULAR SESSION

City Hall Council Chambers
10722 SE Main Street
www.milwaukieoregon.gov

REVISED AGENDA
MAY 6, 2014

2,173rd Meeting

1. CALL TO ORDER **Page #**
Pledge of Allegiance

2. PROCLAMATIONS, COMMENDATIONS, SPECIAL REPORTS, AND AWARDS

- A. Poppy Days Proclamation** **2**
B. North Clackamas Parks and Recreation (NCPRD) Master Plan **3**
Update
Staff: Gary Barth, District Director

3. CONSENT AGENDA

These items are considered to be routine, and therefore, will not be allotted discussion time on the agenda; the items may be passed by the Council in one blanket motion; any Councilor may remove an item from the "Consent" agenda for discussion or questions by requesting such action prior to consideration of that part of the agenda.

- A. City Council Meeting Minutes** **5**
1. April 15, 2014, Work Session;
2. April 15, 2014, Regular Session; and
3. April 17, 2014, Study Session
B. Board, Commission, and Committee Appointments **19**
1. Reappointing Charles Bird to the Kellogg Good Neighbor Committee Representing the Island Station Neighborhood
2. Reappointing Neil Hankerson Representing the Downtown Businesses to the Kellogg Good Neighbor Committee
3. Reappointing Gary Klein Representing the Historic Milwaukie Neighborhood District Association
C. Habitat Development Agreement, Extension of Wildlands' Feasibility Period – Resolution **22**
D. ACS Photo Radar Contract Extension – Resolution **80**
Staff Reports and Attachments added 5/1/14

4. AUDIENCE PARTICIPATION

The Presiding Officer will call for statements from citizens regarding issues relating to the City. Pursuant to Section 2.04.140 of the Milwaukie Municipal Code, only issues that are "not on the agenda" may be raised. In addition, issues that await a Council decision and for which the record is closed may not be discussed. Persons wishing to address the Council shall first complete a comment card and return it to the City Recorder. Pursuant to Section 2.04.360 of the Milwaukie Municipal Code, "all remarks shall be directed to the whole Council, and the Presiding Officer may limit comments or refuse recognition if the remarks become irrelevant, repetitious, personal, impertinent, or slanderous." The Presiding Officer may limit the time permitted for presentations and may request that a spokesperson be selected for a group of persons wishing to speak.

5. PUBLIC HEARING

Public Comment will be allowed on items under this part of the agenda following a brief staff report

presenting the item and action requested. The Mayor may limit testimony.

A. None scheduled

6. OTHER BUSINESS

These items will be presented individually by staff or other appropriate individuals. A synopsis of each item together with a brief statement of the action being requested shall be made by those appearing on behalf of an agenda item.

- A. Milwaukie Riverfront Park Phase II – Oregon Department of Fish and Wildlife Project Agreement – Resolution 91**
- B. Milwaukie Riverfront Park Phase II Contract Award – Resolution 150**
- C. Council Reports**

7. INFORMATION

8. ADJOURNMENT

Meeting Information

- Executive Sessions: The Milwaukie City Council may meet in executive session immediately following adjournment pursuant to ORS 192.660(2).
 - All Executive Session discussions are confidential and those present may disclose nothing.
 - Representatives of the news media are allowed to attend Executive Sessions as provided by ORS 192.660(3) but must not disclose any information discussed.
 - Executive Sessions may not be held for the purpose of taking final actions or making final decisions.
 - Executive Sessions are closed to the public.
- For assistance/service per the Americans with Disabilities Act (ADA), please dial TDD 503-786-7555
- During meetings the Council asks that all pagers and cell phones be set on silent mode or turned off.



**Regular Session
Agenda Item No.**

2

**Proclamations,
Commendations,
Special Reports,
& Awards**



CITY OF MILWAUKIE
"Dogwood City of the West"

PROCLAMATION

RS 2. A.

5/6/14

WHEREAS, the United States of America is an enduring symbol of freedom, preserved and protected willingly and freely by millions of citizen soldiers who answered the call to serve; and

WHEREAS, a nation at peace must never forget the sacrifices of war and the debt owed to those who answered the call to protect our right to life, liberty, and the pursuit of happiness; and

WHEREAS, the Red Poppy flower has come to memorialize the lives laid to rest in Flanders Field during the First World War and has since come to be a symbol of the lives lost and the sacrifices made in the service of all free peoples in conflicts around the world; and

WHEREAS, the American Legion Auxiliary has for over 90 years reminded all Americans of the sacrifices of those who served through distribution of the memorial Red Poppy flower; and

WHEREAS, this City's American Legion Unit 180 asks all citizens to pay tribute to those who have made the ultimate sacrifice in the name of freedom by wearing the memorial Red Poppy.

NOW, THEREFORE, I, Dave Hedges, City Council President of the City of Milwaukie, in the County of Clackamas, in the State of Oregon, do hereby proclaim **May 19th through 23rd, 2014** as **Poppy Days** in the City of Milwaukie and commend its observance to all citizens of the Dogwood City of the West.

IN WITNESS WHEREOF, and with the consent of the City Council of the City of Milwaukie, I have hereunto set my hand on this **Sixth** day of **May, Two Thousand and Fourteen**.

Dave Hedges, Council President

ATTEST:

Pat DuVal, City Recorder





MILWAUKIE CITY COUNCIL
STAFF REPORT

RS 2. B.

5/6/14

To: Mayor and City Council

Through: Bill Monahan, City Manager

Subject: **Report on North Clackamas County Parks and Recreation District's (NCPRD) Master Plan Update and Potential Governance Change**

From: Steve Butler, Community Development Director

Date: April 29, 2014 for May 6, 2014 Regular Session

ACTION REQUESTED

None. Informational only; presentation by NCPRD staff

BACKGROUND

The North Clackamas Parks and Recreation District (NCPRD) was formed in 1990, and its budget is approximately \$24 million, with a tax rate of 54 cents per \$1,000 of assessed valuation. NCPRD provides recreational and park maintenance services to the north part of Clackamas County, which includes maintenance of the City of Milwaukie's parks.

Since the summer of 2012, the NCPRD has undertaken a planning process to update its Parks and Recreation Master Plan; this effort has been done in conjunction with the District Advisory Board. NCPRD staff has recently presented background information about the District's past accomplishments and a proposed plan to meet future needs. The draft Master Plan was made available to the public in early May, 2014.

As a follow-up to the recent presentations to the City Council, NCPRD staff will present the results of recent polling regarding the possible change in governance and the maximum permanent tax rate that district residents would support in the formation of a new district. On May 13th, NCPRD staff will be presenting this same information to the NCPRD Board. If there appears to be support for formation of a new District at a higher rate, then the Board will have the option of directing that the measure be placed on the Nov 2014 ballot. If that were to be the case, then the City Council will need to pass a resolution at its Regular Session on May 20, stating that Milwaukie wants to be included in that new district boundary. The purpose of the May 6, 2014 presentation is to keep the City Council well informed of the timeline, decision dates, and necessary council action if a November vote ends up being the directive given to NCPRD.

FISCAL IMPACTS

None for the City at this point.

ATTACHMENTS – None.



**Regular Session
Agenda Item No.**

3

Consent Agenda



MINUTES
MILWAUKIE CITY COUNCIL
www.milwaukieoregon.gov

WORK SESSION
APRIL 15, 2014
City Hall Conference Room

Mayor Ferguson called the work session to order at 5:09 p.m.

Council Present: Council President Hedges and Councilors Scott Churchill, Mark Gamba, and Mike Miller

Staff Present: City Manager Bill Monahan, Assistant to the City Manager Teri Bankhead, City Recorder Pat DuVal, City Attorney Tim Ramis, Community Development Director Steve Butler, Engineering Director Jason Rice, Planning Director Denny Egner, Finance Director Casey Camors, Associate Planner Brett Kelter, and Associate Planner Vera Kolias

City Manager's Report

Mr. Monahan received no questions on the agenda; he reviewed audience participation responses, an update on the Wildlands Project, and previewed the public hearing on the proposed formation of a Hospital Facility Authority of Milwaukie.

Introduction of Hospital Facilities Authority Discussion

Vassar Byrd, Chief Executive Officer of Rose Villa senior living community (Rose Villa), introduced Debbie Senestraro Suchan, Rose Villa's Chief Financial Officer, and Sarkis Garabedian, with Ziegler Investment Banking. It was noted that Doug Goe and Greg Blonde from Orrick were also present. **Ms. Byrd** provided background on the Rose Villa facility and renovation plans; she discussed their financial needs to make the upgrades.

Councilor Churchill commented that it appeared this was a last minute effort.

Ms. Byrd explained that Rose Villa had pursued bank loans but had been declined. She discussed meeting construction season and financial deadlines; the renovation plan included a fitness facility to be used in collaboration with the Milwaukie Center.

Councilor Miller asked what the downside was for the City of Milwaukie.

Mr. Monahan responded that the City's credit rating and taxing authority were not at risk if Rose Villa were to default on the bonds.

Mr. Goe said that under the hospital facility statute, the debt would be solely the responsibility of Rose Villa; he encouraged thoughtfulness when institutions came before the City, but stated that the City would not be liable. He added that anyone could be named in a lawsuit, but in terms of liability it was fundamental at the first Hospital Facility Authority (HFA) Bboard meeting to sign an indemnification clause.

Councilor Churchill was concerned about the City's potential involvement in HFA-related lawsuits. Noting there may be some third party risk, he asked if Rose Villa could post a bond in the event something catastrophic happened.

Mr. Goe said that the indemnity would be extended to the HFA board members and City staff. He explained that Rose Villa, as a nonprofit, needed a governmental body to issue bonds on its behalf, and Rose Villa would cover all of those costs.

Mr. Garabedian explained that Rose Villa had tried going through the Clackamas County HFA, but it had been inactive and could not meet the timelines. He explained that Rose Villa would like to interact with the issuer and get dual tax exemption on both federal and state income taxes; they would also like to look at local options. He said that a national HFA was still an option but was not their preference. He discussed the background of his firm and this project, including the strict underwriting process and vetting process over a number of years to ensure it was viable and feasible. He also discussed non-rated organizations.

Mr. Monahan discussed what the process would be after the HFA was formed.

Mr. Ramis expressed concern that a bond might not be the best method for a short term construction project like this.

Mr. Goe discussed the deed of trust with the City as the prime debtor. Unlike General Obligation bonds where a tax or general fund stands behind the bond, revenue bonds were secured by Rose Villa's revenue stream, when an investor pool buys the bonds they look at the feasibility study and often tour the facility.

Councilor Churchill asked about any history of HFAs being third parties to lawsuits.

Mr. Goe replied that he was unaware of any third party HFA suits in Oregon.

Mr. Ramis talked about how the risk was not on the debt. It seemed the risk was fiduciary and whether the HFA board performed correctly; he said the defense to that was that the HFA would hire competent people who performed to industry standards.

Councilor Churchill said that he was not convinced there was no risk for the City.

Community Development Update

Mr. Rice discussed the Riverfront Park Project and a recent meeting with the Riverfront Park Task Force; he reported on a mandatory on-site pre-bid meeting attended by 12 primary contractors and 8 sub-contractors. The bids were due April 30.

Mr. Butler discussed planning activities including the Historic Milwaukie Neighborhood District Association's (NDAs) appeal of the Planning Commission's approval of the zone change for Northwest Housing Authority and the Moda Health application to expand its parking lot. He also provided an update on the Moving Forward Milwaukie Project.

Mr. Rice discussed the Oregon Department of Transportation's (ODOT) proposed Hwy 224 project, the Wastewater Main repair program, and the Monroe Street Water Project that was out for bid.

Mr. Kelder provided a brief update on the Monroe Street Greenway Project and ODOT Transportation and Growth Management (TGM) grant. He explained the consultant selection process and noted that he liked the consultant's public involvement process. The process going forward, included ODOT making the contract and the City Council being asked to approve an intergovernmental agreement.

Councilor Gamba said he has been happy with the process and liked the intention to tailor the project to what already existed on Monroe Street and the very intentional way they are using all the tools in the toolbox; he felt it would be a good fit for the City.

Economic Development Update

Mr. Butler reviewed the program and cycle of development, explaining the basic components of retention, expansion, and recruitment of business. He explained the program timeline with short term work to be done by the end of June and the expanded program after July 1. He discussed on-going activities including employment land data analysis, the collection of past and current businesses and data on development sites. He read a list of the City's top employers and described some of the activities he would like to conduct in the future, including a business development team, a quarterly

newsletter, and a marketing campaign. He then posed three follow-up and direction questions to the Council.

Councilor Gamba said that he felt the program was off to a great start and he found interesting that cluster of food and drink related businesses developing. He asked Mr. Butler to consider how to get good family wage jobs in the City. When Moving Forward Milwaukie (MFMF) ends he would like to be able to have some developers on tap and to continue this process on a development level. He would like periodic updates and encouraged staff, Council and citizens to tune to businesses that might want to expand.

Councilor Churchill inquired about the MFM timeline in terms of code amendments.

Mr. Butler said MFM is moving quickly into that phase with a list of actions to address code changes in downtown, central, and residential main streets zones. He also said they will look at industrial and commercial zones to try to eliminate roadblocks.

Mr. Egner said they hoped to have the downtown zones and code amendments by the end of the year; he noted that central Milwaukie changes will take a little longer.

Councilor Churchill discussed his hope to see code amendments as soon as possible.

Mr. Butler stated that we will know what the changes were before the end of the year.

Councilor Churchill said he would like to see more updates and would like some simple code fixes in the short term to encourage adaptive reuse.

Councilor Miller discussed not losing sight of old, established, small businesses that need help. He agreed that the effort was good and that some fixes did not have to wait before MFM was complete to be adopted. He would like to see periodic reports and more interaction of staff and small businesses to build rapport.

Council President Hedges discussed finding was to involve current businesses; he talked about a Public Safety Advisory Committee (PSAC) workshop that was sparsely attended by businesses. He said he liked the way Community Development was going.

Mayor Ferguson said he thought the program was on a good track and discussed the issue of multiple downtown business groups and how staff might reach out to them. He feels it is important to have one of the economic development staff people present at North Clackamas County Chamber of Commerce events. He also discussed staff and Council attendance at Rotary meetings and the GPI Small Cities Consortium.

Councilor Churchill noted that attending other metropolitan-wide meetings would encourage businesses to come into Milwaukie from Portland and Multnomah County.

Mayor Ferguson said would like to see blending MFM and the economic development program into a comprehensive, balanced report. He would be pleased with a monthly or quarterly report based on activity.

Councilor Gamba said he had initially hoped MFM would move quicker, but he said some NDA leaders felt it was moving forward too quickly. He said it was important to have time for conversations and for to people express their opinions.

Wildlands Project Update

Mr. Monahan reviewed the ongoing feasibility analysis period and the May 31 deadline; he noted the process was moving somewhat slowly and introduced Paul Sherman and Julie Mentzer with the Wildlands group.

Mr. Sherman reviewed the work since July 2013, including the deadline extension from December 2013 to May 30, 2014. He reported they are working on critical things with ODOT and the Portland Harbor Natural Resource Trustee Council (Trustees), Union Pacific Rail Road (UPRR), and the Division of State Lands (DSL).

Ms. Mentzer discussed meeting with the Trustees; she noted that ODOT wanted to be at the table but did not wish to be identified as a partner; the Trustees were still

supportive of the project and agreed to provide DSAY credits to Wildlands; they are working on getting the polygons from ODOT, but they appear hesitant to share. She said Wildlands hopes to build a better sharing relationship with ODOT.

Mr. Sherman explained the critical reliance on polygons and crediting; he reviewed their initial task of figuring out ownership in the area and reported that ODOT did own the bridge and would have to be a partner in the project; he explained the relationship, in terms of this project, as all partners needing each other.

Ms. Mentzer noted that when you take out the footprint and just removed the bridge the credit value would be very low, making the City and ODOT partnership critical.

Mr. Sherman reported that the Trustees had not looked at the ownership issue and it is still unknown how many acres are actually owned by the City. He explained that this process has taken so long because the Trustees are moving their record of decision out and therefore the potentially responsible parties (PRP) such as ODOT felt they had more time to make a decision. He said that they have been told ODOT wants to do this project and that they are doing a project review process; once that review is done Wildlands will meet with ODOT. He said they wanted to talk this out with Council and discuss interest in moving the project forward, the Trustees' effort to move the project forward, but the question was how to do so. He discussed the options of another extension or pausing until ODOT is ready to proceed.

Councilor Churchill commented on the value of DSAY credits to ODOT in relationship to the bridge replacement costs.

Council President Hedges said he wasn't surprised by the ODOT timelines and said he was happy for Wildlands to continue to work toward the ultimate goal of restoration.

Councilor Miller asked about the other lake property owners.

Mr. Sherman replied that they had focused on ODOT and the UPRR as the two main property owners; they have not reached out to the other property owners.

Councilor Gamba asked if there was any value in Senator Wyden getting involved.

Mr. Sherman replied that Senator Wyden didn't need to be involved yet, he noted that the ODOT the engineers were working through their process.

Ms. Mentzer added that the ODOT process goes through many levels of review.

Mr. Sherman discussed issues with the DSL, including initial conversations that makes them believe the Lake is owned by the City, which they are seeking written confirmation of from DSL, but they did not wish to do that until project was a go. Mr. Sherman said at this point he suggested extending the agreement for 45 days after the meeting with ODOT and then they would let Council know if it was worth moving forward.

The group discussed and agreed to incorporate the 12/31/14 extension date.

Mayor Ferguson announced that the City Council would meet in executive session pursuant to ORS 192.660(2)(d) to conduct deliberations with persons designated by the governing body to carry on labor negotiations immediately following adjournment of the work session.

Mayor Ferguson adjourned the work session at 6:40 p.m.

Respectfully submitted,

Scott S. Stauffer, Administrative Specialist II

MINUTES
MILWAUKIE CITY COUNCIL
www.milwaukieoregon.gov

REGULAR SESSION
APRIL 15, 2014
City Hall Council Chambers

Mayor Ferguson called the 2,172nd meeting of the City Council to order at 7:09 p.m.

Council Present: Council President Hedges and Councilors Scott Churchill, Mark Gamba, and Mike Miller

Staff Present: City Manager Bill Monahan, Assistant to the City Manager Teri Bankhead, City Recorder Pat DuVal, City Attorney Tim Ramis, Police Chief Steve Bartol, Police Captain Dave Rash, Finance Director Casey Camors, Community Development Director Steve Butler, Engineering Director Jason Rice, Building Official John Stelzenmueller, and Light Rail Construction Manager Stacy Bluhm.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

PROCLAMATIONS, COMMENDATION, SPECIAL REPORTS AND AWARDS

A. Introduction of Milwaukie Police Department Captain Mark Dye and Sergeant Luke Strait

Milwaukie Police Chief Steve Bartol introduced recently appointed Captain Mark Dye and Sergeant Luke Strait. The Mayor and Councilors congratulated the men on their promotions.

B. Outstanding Student Achievement Award to Stephanie Keller for the Month of April 2014

Principal Mark Pinder introduced Stephanie Keller and highlighted her achievements at Milwaukie High School. Mayor Ferguson and the Councilors congratulated Ms. Keller on her selection as the Outstanding Student Achievement Award recipient for April 2014.

C. Clackamas County Update with Commission Tootie Smith

Commissioner Smith briefly explained the Board of County Commissioners' (BCC) outreach efforts to various community organizations and discussed the County budget cycle. She commented on recent land use decisions and the Willamette Falls Heritage Project partnership. She hoped to help the City of Milwaukie with its Riverfront Park goals. She talked about the North Clackamas Parks and Recreation (NCPRD) Master Plan and plans for governance and funding of projects. When asked by Councilor Churchill about the County's Hospital Facility Authority (HFA) Commissioner Smith replied the BCC had not been briefed on that matter.

Council President Hedges was pleased the BCC was supportive of Milwaukie's Riverfront Park. He noted that when she and BCC Chair John Ludlow were campaigning, they had indicated they did not wish to charge the City for the Park easement. In the end, Milwaukie was charged \$63,000.

Commissioner Smith said that was not a BCC decision, but it was up to her, she would sign it over.

Mayor Ferguson commented on landscaping and odor control enhancements to the Kellogg Treatment Plant under the Good Neighbor Agreement. He noted Willamette River access for boaters was very limited.

Councilor Miller appreciated the BCC's support for the proposed NCPRD change of governance and funding.

Mayor Ferguson commented on the recently signed Urban Growth Management Agreement (UGMA) with Happy Valley, and he said Milwaukie would follow shortly. He discussed the County's Transportation System Plan (TSP) and the importance of communication to ensure things were going in the right direction for the time when Milwaukie took over.

Commissioner Smith said a recent survey was conducted to evaluate County road conditions with 71% of the respondents saying the roads were in good to excellent condition. She felt the public needed more education on how much money was required to make needed road improvements.

D. Portland Milwaukie Light Rail Project Update

Ms. Bluhm provided an update on bridges related to the project. The two sections of the Willamette River Bridge were within 16 feet of being connected, and the naming event was scheduled for April 16. The Tillamook Bridge was completed, and she showed slides of the Kellogg Lake Bridge that included the bike and pedestrian bridge. She discussed upcoming road closures including Washington Street west of 21st Avenue. She announced the Kellogg Lake and Kronberg Park Earth Day Cleanup events scheduled for April 26 that were organized by Stacy and Wittbeck and TriMet. She briefly commented on future maintenance responsibilities and infrastructure turnover.

Councilor Churchill asked for details on the business notification process for the Washington Street closure. He requested that Ms. Bluhm email the City Council with the notification plans.

Ms. Bluhm replied she was working with the contractor on the details and would provide information on available on street parking.

E. Earth Day Proclamation

Mayor Ferguson read a proclamation naming Tuesday, April 22, 2014, as *Earth Day* in the City of Milwaukie and urged all citizens to be mindful of local, state, and national laws that protect our environment and to continue to preserve the beauty and wonder of the land, air, and water of the Earth in all its diversity.

F. Building Safety and Public Works Month

Mr. Stelzenmueller provided a brief history of building regulations that started with the Code of Hammurabi.

Mayor Ferguson read a proclamation naming the month of May 2014 as *Building Safety and Public Works Month* in the City of Milwaukie and encouraged all citizens to participate in community activities.

CONSENT AGENDA

It was moved by Councilor Gamba and seconded by Councilor Miller to approve the consent agenda as presented.

A. City Council Meeting Minutes

- 1. March 20, 2014, Study Session;**
- 2. April 1, 2014, Work Session; and**
- 3. April 1, 2014, Regular Session**

B. Board, Commission, and Committee Appointments

1. **Resolution No. 33-2014: A Resolution of the City Council of the City of Milwaukie, Oregon, Reappointing James Fossen to the Milwaukie Design and Landmarks Committee**
2. **Resolution 34-2014: A Resolution of the City Council of the City of Milwaukie, Oregon, Reappointing Sherry Grau to the Milwaukie Design and Landmarks Committee**

Motion passed with the following vote: Councilors Churchill, Hedges, Gamba, and Miller and Mayor Ferguson voting “aye.” [5:0]

AUDIENCE PARTICIPATION

Mr. Monahan reported on his findings related to the business registration concerns posed by Ed Parecki at the April 1, 2014, meeting. Mr. Parecki had spoken on behalf of several downtown business people and expressed concern that they were being cited into court. He had been concerned about the process and if the City had the ability to impose a delinquency charge as well as issuing a citation. Mr. Monahan reported citation fees and administrative fees were not mutually exclusive.

Richard Cayo, Milwaukie resident, complimented the City Council and staff on implementing the quiet zones at three railroad crossings in Milwaukie. People can now enjoy the peace and quiet and watch their property values increase because of this action. He hoped sometime in the future that the Linwood Harmony crossing could undergo the same process. He expressed concern about the catchbasin at Johnson Creek Blvd and 37th Ave that needed repair although it was in the City of Portland.

Ed Parecki, Milwaukie business person, had received the response to his April 1 questions just prior to this meeting. He felt the City Council and staff should work on the bigger things and leave the little guy alone. He did not have a problem with the business tax but was concerned about the fine.

Councilor Churchill thought those were points well taken as the City works toward implementing the Moving Forward Milwaukie project.

Councilor Miller was concerned about small businesses surviving and thought it was time to take a hard look at this.

Michael Backus, Milwaukie business owner, stated he had not received the citation because correspondence was sent to his business address. He felt the citation should be delivered in person and not through the mail. Can the City Council do anything to help reduce costly fines? He had asked for an explanation of the fines but had not received one.

Jeremiah Johnson, running for Metro president, gave an overview of his campaign. He wanted to raise awareness of Metro and hold it accountable. He felt the vision should be expanded to include development on the east side of the river. Attention should be paid to closed shops and empty lots to get the most out of what was already developed and encourage small business.

Ed Zumwalt, Milwaukie resident, announced this seasons' First Friday opening on May 2. It promised to be better than ever with a Clackamas County Tourism grant. He read a press release outlining the First Friday activities.

PUBLIC HEARING

A. Creation of a Hospital Facility Authority by the City of Milwaukie.

Mayor Ferguson called the public hearing on the creation of The Hospital Facility Authority of the City of Milwaukie, Oregon, to order at 8:52 p.m.

The purpose of the hearing was to hear public comment on the advisability of the City's establishing a Hospital Facility Authority. Notice of the public hearing was published in *The Oregonian* on April 9, 2014.

Ms. Camors provided the staff report in which the City Council was requested to adopt a Resolution creating the Hospital Facility Authority (HFA) of the City of Milwaukie, Oregon. She described the series of events leading to this proposal including meetings with Doug Goe and Greg Blonde from Orrick, Herrington & Sutcliffe and Vassar Byrd, Chief Executive Officer, and Debbie Senestraro Suchan, Chief Financial Officer, for Rose Villa Senior Living Community. She outlined the responsibilities of the HFA Board and noted that staff believed this project would benefit both the local and extended community. The HFA could also help other facilities already in Milwaukie.

Doug Goe, Orrick, Herrington, and Sutcliffe, provided a brief overview of Oregon Revised Statute (ORS) 441 that empowered municipalities to create HFAs for the purpose of issuing tax exempt bonds on behalf of nonprofits to finance hospital facilities that included senior living facilities. Nonprofits cannot directly issue tax exempt bonds; however, the bonds issued by the Authority are secured by the revenues of the nonprofit organization. He outlined the minimal risks involve. Clackamas County has an HFA, but it has been inactive over the past several years and could not reconstitute within Rose Villa's timelines. Rose Villa had also considered the national and state authorities but were interested in being a good neighbor with the City. The HFA would have no liability; however, reputational risk was a key factor.

Councilor Churchill believed Orrick stood to gain if Milwaukie formed the HFA and did not feel it was appropriate for Mr. Goe to make the staff presentation.

Mr. Monahan said Mr. Goe was not engaged by the City Council on this project, and it was not uncommon for consultants to provide information in their areas of expertise.

Council President Hedges appreciated hearing from anyone who could help him make an informed decision.

Mr. Goe said the only potential risk was if the nonprofit came before the HFA Board and bonds were issued for a project that did not go as planned. The City could in some way be associated or named in a lawsuit. In these situations, the nonprofit borrower would indemnify the City and its agents and enter into a deed of trust. It would be important for the parties to have nationally recognized counsel. He understood this was not an obligation of the City, and its bond rating would not be affected.

Ms. Camors added the HFA was an entity separate from the City. Although she had not asked Standard & Poor's, she did not believe the City's bond rating was related.

Councilor Churchill continued to have concerns and felt more research needed to be done. He thought there were other resources and measures by which Rose Villa could meet its timeline.

Councilor Miller asked for clarification of the comment that the City's reputation could be on the line.

Mr. Goe replied the City officials would hear from their constituents about any concerns with the project or if there was a problem with the bond issue whether the City was liable or not.

Councilor Gamba understood this was simply the formation of the Authority without establishing a relationship with Rose Villa at this time. He did not see a risk in taking the first step of forming the Authority.

Ms. Camors said Rose Villa would make a presentation on the bond issuance if the HFA were formed, and the Board would decide whether or not to move forward.

Mayor Ferguson reviewed the conduct of the hearing.

No correspondence had been received on this matter.

Testimony in Support:

Vassar Byrd, Rose Villa Chief Executive Officer, Portland resident, discussed the limited opportunities to borrow money and noted the bank had told Rose Villa it could not follow through. She saw this as an opportunity to serve the local community by helping a nonprofit organization.

Craig Van Valkenburg, Willamette View Chief Executive Office, Lake Oswego resident, spoke in support of the formation of the HFA. The project was important to Rose Villa as well as other nonprofit organizations. He hoped to see Rose Villa succeed.

Councilor Churchill asked why Milwaukie would want to form an HFA when there were other venues available.

Mr. Van Valkenburg discussed working through a bank debt placement with Wells Fargo. He was not in a position to answer questions about simply forming the HFA.

Mr. Ramis had not heard anything that from his perspective was misleading.

Mr. Van Valkenburg said Willamette View was a charitable nonprofit. It used an entrance fee model, and people qualified based on their assets and taken care of for the rest of their lives.

Mayor Ferguson closed the public testimony portion of the hearing at 9:30 p.m. and asked if there was any Council discussion.

Council President Hedges said the only thing relevant to the discussion was whether or not to form the Authority and not about approving a project. He had heard nothing that would lead him to believe that forming the Authority was not something the City could do. The City may be in a position to offer service to its neighbors and other entities in the City which would be an HFA Board decision.

Councilor Miller expressed concern about Milwaukie's forming an HFA when others were available.

Councilor Gamba concurred with Council President Hedges and saw no risk in forming an HFA. He saw great benefit to Rose Villa and other nonprofits in the area and supported efforts to provide housing and care for the elderly.

Mayor Ferguson did not hear anything indicating there was a risk in forming the Authority. He would like to review the structure of the Board and suggested a 7 member group that included people from the community.

Councilor Churchill thought this was a rush job. He thought the HFA would be formed to serve a specific organization and noted the proposal to the City Council was only made earlier this month. There were other entities that could take on this matter, and he did not feel it was worth the risk when there were state and national HFAs.

Councilor Miller said he would be more supportive if Rose Villa was in the City of Milwaukie. He asked if annexation would be reasonable.

Mayor Ferguson suggested moving the boundary south in the next Urban Growth Management Agreement (UGMA).

Council President Hedges said the City Council would only be forming the HFA and putting the mechanism in place.

It was moved by Council President Hedges and seconded by Councilor Gamba to adopt the Resolution creating the Hospital Facility Authority of the City of Milwaukie, Oregon; appointing the initial Board of Directors of the Authority; naming the chair of the Authority, and related matters. Motion passed with the following vote: Councilors Hedges and Gamba, and Mayor Ferguson voting "aye." Councilors Churchill and Miller voting "no." [3:2]

RESOLUTION NO. 35-2014:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, CREATING A HOSPITAL FACILITY AUTHORITY OF THE CITY OF MILWAUKIE, OREGON; APPOINTING THE INITIAL BOARD OF DIRECTORS OF THE AUTHORITY; NAMING THE CHAIR OF THE AUTHORITY; AND RELATED MATTERS.

Mr. Goe discussed noticing of the HFA Board meeting.

OTHER BUSINESS

A. Amend Milwaukie Municipal Code Chapter 5.50 Related to Medical Marijuana Facilities and Declaring an Emergency – Ordinance

Mr. Butler provided the staff report in which the City Council was requested to adopt an Ordinance to extend the current moratorium on the siting of medical marijuana facilities in the City of Milwaukie from December 31, 2014, to April 30, 2015. When the City Council took action in February, no one knew what the legislature would determine, and the proposed amendment would provide additional cushion to address decisions coming out of Salem.

Council President Hedges was concerned about denying those who needed medical marijuana for severe or chronic health problems.

Mr. Ramis commented that the moratorium gave jurisdictions more time to enact their own regulations and offer some consistency.

Mr. Butler said he would work on draft ordinance language as the picture becomes clearer.

It was moved by Council President Hedges and seconded by Councilor Gamba for the first and second readings by title only and adoption of the Ordinance relating to medical marijuana facilities; amending Chapter 5.50; and declaring an emergency. Motion passed with the following vote: Councilors Churchill, Hedges, Gamba, and Miller and Mayor Ferguson. [5:0]

Mr. Monahan read the Ordinance two times by title only.

Ms. DuVal polled the City Council: Councilors Churchill, Hedges, Gamba, and Miller and Mayor Ferguson voting “aye.” [5:0]

ORDINANCE NO. 2077:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, RELATING TO MEDICAL MARIJUANA FACILITIES; AMENDING CHAPTER 5.50; AND DECLARING AN EMERGENCY

B. Approve a “Project Agreement” with the Oregon Parks and Recreation Department for Grant Funds for the Construction of Riverfront Park Phase II – Resolution

Mr. Rice provided the staff report in which the City Council was requested to adopt the Resolution authorizing the city manager to sign a Local Government Program Agreement between the Oregon Parks and Recreation Department and the City. He reviewed the conditions of the agreement.

It was moved by Councilor Miller and seconded by Councilor Churchill to adopt the Resolution authorizing the city manager to enter into a “Project Agreement” with the Oregon Parks and Recreation Department in order to receive grant funding for the construction of Riverfront Park Phase II. Motion passed with the following vote: Councilors Miller, Churchill, Hedges, and Gamba and Mayor Ferguson voting “aye.” [5:0]

RESOLUTION No. 36-2014:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AUTHORIZING THE CITY MANAGER TO ENTER INTO A "PROJECT AGREEMENT" WITH THE OREGON PARKS AND RECREATION DEPARTMENT IN ORDER TO RECEIVE GRANT FUNDING FOR THE CONSTRUCTION OF RIVERFRONT PARK PHASE II.

C. Approve an Intergovernmental Agreement for the Use of Trolley Trail Access to Milwaukie Riverfront Park – Resolution

Mr. Rice provided the staff report in which the City Council was requested to adopt the Resolution authorizing the city manager to sign an Agreement for Permit of Use between the NCPRD and the City for the use of certain parts of the Trolley Trail to access Riverfront Park.

It was moved by Councilor Gamba and seconded by Council President Hedges to adopt the Resolution authorizing the city manager to enter into an "Agreement for Permit of Use" with the North Clackamas Parks and Recreation District in order to receive permission of access to Riverfront Park across the Trolley Trail. Motion passed with the following vote: Councilors Miller, Churchill, Hedges, and Gamba and Mayor Ferguson voting "aye." [5:0]

RESOLUTION No. 37-2014:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AUTHORIZING THE CITY MANAGER TO ENTER INTO AN "AGREEMENT FOR PERMIT OF USE" WITH THE NORTH CLACKAMAS PARKS AND RECREATION DISTRICT IN ORDER TO RECEIVE PERMISSION OF ACCESS TO RIVERFRONT PARK ACROSS THE TROLLEY TRAIL.

D. Council Reports

Mayor Ferguson and Councilors reported on meetings they had attended and upcoming community events.

Mr. Monahan thanked Assistant to the City Manager Teri Bankhead for her work in the community and wished her the best of luck in her new position at the Town of Sahuarita, Arizona.

ADJOURNMENT

It was moved by Mayor Ferguson and seconded by Councilor Miller to adjourn the regular session. Motion passed with the following vote: Councilors Churchill, Hedges, Gamba, and Miller and Mayor Ferguson voting "aye." [5:0]

Mayor Ferguson adjourned the regular session at 10:14 p.m.

Respectfully submitted,

Pat DuVal, Recorder



Mayor Ferguson called the study session to order at 5:00 p.m.

Council Present: Council President Hedges and Councilors Scott Churchill, Mark Gamba, and Mike Miller

Staff Present: City Manager Bill Monahan, City Recorder Pat DuVal, Community Development Director Steve Butler, Finance Director Casey Camors, Police Chief Steve Bartol, Assistant Finance Director Bonnie Dennis, Officer Monte Sterling, Milwaukie Municipal Court Manager Carla Bantz, IST Director Karen Eichelberger, and Planning Director Denny Egner

Municipal Court Update

Municipal Court Judge Kimberly Graves had been with the City since February 2014 and was focused on updating outdated processes, documents, and programs. The process for handling fail to appear cases has been updated and formalized, and she had updated the Violations Bureau and the Deferred Sentencing Program. The Court Orders were updated to encompass a wider variety of issues, and she was working on making the Municipal Court website more robust.

Chief Bartol said putting the Court information on the uniform citations posed some problems since they were pre-printed by the state, but it was easier on the T-ticket machines and photo radar correspondence. The department had 5 handheld electronic ticket machines used by the motor officers and other officers who wrote the most tickets.

Judge Graves discussed the reliability of mailing photo radar citations and protecting the integrity of the system. She spoke to the courtroom dress code, seatbelt classes, and interest from Rowe Middle School to participate in the truancy court program.

The City Council concurred that if Rowe wanted its own truancy court session, an additional evening could be added. The group discussed the feasibility of a misdemeanor court and facilities concerns. The group agreed it would be worth looking at the feasibility of instituting a misdemeanor court. They discussed how to more effectively communicate the court rules to the public.

Garbage Rate Discussion

Ms. Camors discussed rate structure equity in the current the current system and how the current composite was built. She commented on County staff and consultant time available to build additional equity into the Milwaukie rate structure.

Rick Winterhalter, Sr. Sustainability Analyst at Clackamas County, discussed the Metro tipping fee, fuel, labor, vehicle replacement, and recycling revenue. He commented on parity of services provided, levels of service, and residential cart distribution by size. He would provide City Council with additional information on yard debris and recycling and noted that the big policy issues was contamination of recyclables and plastic bags and other materials. He explained that some customers put garbage in with the recycling in order to reduce the sizes of their carts.

Ms. Camors discussed the timing of the rate increase to coincide with the Metro tipping fee adjustment.

Councilor Miller said the last rate increase was October 2013, and he was concerned about two rate increases in the same year.

Mr. Winterhalter discussed the impacts of waiting until October.

Ms. Camors discussed the feasibility of adopting higher rates for larger carts.

Councilor Gamba understood yard debris and recycling were constants. He was still in favor of a steeper curve for larger carts. He would like to give people the option of saving money by going to a smaller container.

Mr. Winterhalter was not sure people would change their behaviors for a small monthly reduction in their bills.

Councilor Miller discussed the possibility of shedding the yard debris program.

Mr. Winterhalter said everyone had the option of monthly service or being on call and thereby foregoing the weekly yard debris pickup. He discussed gross revenue trends.

Hospital Facility Authority (HFA) Board Meeting

The group discussed scheduling an HFA Board meeting on April 28. **Mr. Monahan** suggested the administrative items be considered at 4 p.m. followed by a presentation of the project by Rose Villa at 5 p.m. The members felt it was important to have an expert review of the Rose Villa plan and that the Board be advised of any potential risks. **Councilor Churchill** asked that the materials be available to the HFA Board by April 24 so there was time to review them over the weekend.

Urban Growth Management Agreement (UGMA)

Mr. Egner provided the presentation outline and map of the proposed boundary. The UGMA was an agreement between the City and County designating what areas could be annexed in the future. He discussed the UGMA relative to the Comprehensive Plan, Council goals, and the project history.

Chief Bartol discussed Police Department staffing needs in the 3-Creeks area. There was little residential in that area, so minimum staffing may not be as big an issue as previously communicated to the City Council. 34.5 sworn officers were budgeted in police field services and should be sufficient when the Department was up to full staffing. As additional revenue came in, more officers could be hired if needs indicated. He outlined the variables that would impact deployable assets.

The group discussed the length of time it took to hire and train officers and the amount of time it would take to annex the area. **Chief Bartol** talked about attrition in the department over the next 5 years and state certification requirements.

Mr. Egner discussed the annexation process and what incentives there might be for property owners to annex. He pointed out the dual interest areas in the current UGMA and discussed the potential for additional dual interest areas in the new UGMA that set new triggers for annexation.

Mayor Ferguson asked if the target area was in an enterprise zone.

The group discussed the vacant properties that were generally agricultural with tax deferrals.

Mr. Egner suggested that if the property owners were interested in development at some time that they could be required to annex. The City of Happy Valley was done with its Agreement, so it was up to Milwaukie to complete its UGMA with the County.

Mr. Monahan had spoken with County staff and will plan to speak with the Community Planning Organizations (CPO) if so directed.

Mr. Egner encouraged the City Council to consider what kind of tools it wished to include in the new Agreement.

Mayor Ferguson suggested looking at an area that would bring Milwaukie's population to 50,000 so it would qualify for additional state revenues.

Chief Bartol discussed enhanced law enforcement staff in the unincorporated areas and informal conversations with Sheriff's Department command staff.

ACS (Photo Radar) Contract Extension

Chief Bartol discussed the history of the contract and provided photo radar statistics. He reviewed revenues and expenses. The City Council talked about the feasibility of expanding the enforcement zone and moving it further south.

Officer Sterling discussed certain restrictions that applied to the photo radar van when it was deployed in the neighborhoods. The City could consider using the van more on McLoughlin Boulevard and Hwy 224 and deploying the motor officers in more appropriate areas such as school zones.

Ms. Dennis noted the revenue and expenditure analysis also included City Prosecutor and Municipal Court Judge fees.

Councilor Churchill would be interested in knowing ACS's return on investment.

Chief Bartol reviewed the staff recommendations to the City Council. These were to extend the contract and continue the photo radar program, monitor the program for effectiveness and evaluate fiscal impacts, prepare findings related to traffic safety for new locations in the downtown core and Johnson Creek Boulevard, and evaluate a second year extension.

The group discussed the feasibility of photo red light to address pedestrian issues on McLoughlin Boulevard and what the infrastructure requirements might be.

The City Council concurred on a one-year extension to be approved on the May 6, 2014, consent agenda and to prepare findings identifying additional locations.

Proposed Water Environment Services (WES) Systems Development Charges (SDC)

Council President Hedges reported on a proposal at the recent RiverHealth Advisory Board meeting where System Development Charges (SDC) and Equivalent Dwelling Unit (EDU) fees were discussed. Happy Valley was opposed to the SDC, and Council President Hedges asked if the City Council supported his opposing the EDU methodology. The City Council supported his expressing the City's opposition to have it on the record.

Mayor Ferguson adjourned the Study Session at 8:19 p.m.

Respectfully submitted,

Pat DuVal, Recorder



CITY OF MILWAUKIE
"Dogwood City of the West"

Resolution No.

RS 3. B. 1.

5/6/14

A resolution of the City Council of the City of Milwaukie, Oregon reappointing Charles Bird to the Kellogg Good Neighbor Committee.

WHEREAS, the Kellogg Good Neighbor Committee was created February 5, 2013 by Resolution 06-2013 and was established to make recommendations to Council on funding priorities of the Good Neighbor Fund, established by the Intergovernmental Agreement between the City of Milwaukie and the Clackamas County Service District #1 (CCSD#1) to mitigate the impacts of the Kellogg Plant on the surrounding neighborhoods; and

WHEREAS, Charles Bird has served on the Kellogg Good Neighbor Committee since its creation in February, 2013 as a representative of the Island Station NDA; and

WHEREAS, the Island Station NDA has voted and recommends Gary Klein's appointment to the Kellogg Good Neighbor Committee to represent the NDA; and

Now, Therefore, be it Resolved that

SECTION 1: That Charles Bird is reappointed to the Milwaukie Kellogg Good Neighbor Committee as the Island Station NDA representative.

SECTION 2: That his term of appointment shall commence immediately and shall expire March 31, 2016.

Introduced and adopted by the City Council on **May 6, 2014**.

This resolution is effective on **May 6, 2014**.

Jeremy Ferguson, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney



CITY OF MILWAUKIE
"Dogwood City of the West"

RS 3. B. 2.

5/6/14

Resolution No.

A resolution of the City Council of the City of Milwaukie, Oregon reappointing Neil Hankerson to the Kellogg Good Neighbor Committee.

WHEREAS, the Kellogg Good Neighbor Committee was created February 5, 2013 by Resolution 06-2013 and was established to make recommendations to Council on funding priorities of the Good Neighbor Fund, established by the Intergovernmental Agreement between the City of Milwaukie and the Clackamas County Service District #1 (CCSD#1) to mitigate the impacts of the Kellogg Plant on the surrounding neighborhoods; and

WHEREAS, Neil Hankerson has served on the Kellogg Good Neighbor Committee since its creation in February, 2013 as a representative of someone who owns a business or property downtown; and

WHEREAS, Neil Hankerson has offered to continue serving on the Kellogg Good Neighbor Committee to represent the downtown; and

Now, Therefore, be it Resolved that

SECTION 1: That Neil Hankerson is reappointed to the Milwaukie Kellogg Good Neighbor Committee as the downtown business representative.

SECTION 2: That his term of appointment shall commence immediately and shall expire March 31, 2016.

Introduced and adopted by the City Council on **May 6, 2014**.

This resolution is effective on **May 6, 2014**.

Jeremy Ferguson, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney



CITY OF MILWAUKIE
"Dogwood City of the West"

RS 3. B. 3.

5/6/14

Resolution No.

A resolution of the City Council of the City of Milwaukie, Oregon reappointing Gary Klein to the Kellogg Good Neighbor Committee.

WHEREAS, the Kellogg Good Neighbor Committee was created February 5, 2013 by Resolution 06-2013 and was established to make recommendations to Council on funding priorities of the Good Neighbor Fund, established by the Intergovernmental Agreement between the City of Milwaukie and the Clackamas County Service District #1 (CCSD#1) to mitigate the impacts of the Kellogg Plant on the surrounding neighborhoods; and

WHEREAS, Gary Klein has served on the Kellogg Good Neighbor Committee since its creation in February, 2013 as a representative of the Historic Milwaukie NDA; and

WHEREAS, the Historic Milwaukie NDA has voted and recommends Gary Klein's appointment to the Kellogg Good Neighbor Committee to represent the NDA; and

Now, Therefore, be it Resolved that

SECTION 1: That Gary Klein is reappointed to the Milwaukie Kellogg Good Neighbor Committee as the Historic Milwaukie NDA representative.

SECTION 2: That his term of appointment shall commence immediately and shall expire March 31, 2016.

Introduced and adopted by the City Council on **May 6, 2014**.

This resolution is effective on **May 6, 2014**.

Jeremy Ferguson, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney



MILWAUKIE CITY COUNCIL
STAFF REPORT

To: Mayor and City Council
Through: Bill Monahan, City Manager

Subject: **Habitat Development Agreement, Extension of Wildlands'
Feasibility Period**

From: Steve Butler, Community Development Director

Date: April 29, 2014 for May 6, 2014 Regular Session

ACTION REQUESTED

Wildlands has requested that the City Council grant an extension to the feasibility period provided for in the Habitat Development Agreement between the City of Milwaukie and Wildlands Capital Partners, LLC. The issue before the Council is: Shall the City Council pass a resolution extending the feasibility period of Wildlands, provided for in the Habitat Development Agreement between the City of Milwaukie and Wildlands Capital Partners, LLC to December 31, 2014?

HISTORY OF PRIOR ACTIONS AND DISCUSSIONS

December 3, 2013 – City Council passed a resolution entering into the first amendment of the “Habitat Development Agreement and Initial Escrow Instructions,” which extended Wildlands’ feasibility period to May 30, 2014.

September 3, 2013 – City Council passed a resolution declaring that the owner had completed its due diligence

July 8, 2013 – execution of agreement with Wildlands

June 18, 2013 – City Council unanimously voted to adopt the Wildlands Habitat Development Agreement

BACKGROUND

The City and Wildlands entered into a Habitat Development Agreement for the development of a riparian and habitat restoration project on Kellogg Lake near the confluence of the Willamette River. The agreement was finalized on July 8, 2013 with the City Council completing its due diligence period on September 3, 2013.

Upon conclusion of the Owner’s feasibility period, Wildlands commenced its feasibility period on September 3, 2013. The period was set to expire at 5:00 p.m. Pacific Standard Time on the earlier of (1) one hundred and eighty (180) days after the Effective Date of the Agreement, or (2) December 31, 2013.

Wildlands submitted a letter on November 15 stating that coordination with ODOT, Union Pacific, and the Portland Harbor Trustee Council has been delayed so there are still some unresolved issues to address. As a result, Wildlands requested an extension of the feasibility period, which was granted by the Council at its December 3, 2013 Regular Session. Since that point in time, Wildlands has continued its due diligence work and maintained communication with City staff via bi-weekly conference calls, but has still encountered delay in reaching resolution on the unresolved issues. Wildlands staff provided an update on its work at the April 15, 2014 Work Session, at which the Council indicated a willingness to consider an extension until December 31, 2014, in order to give Wildlands adequate time to complete the feasibility period.

CONCURRENCE

Staff concurs that Wildlands has been unable to resolve issues necessary in order for it to complete its feasibility period. Wildlands has reached out to ODOT to schedule meetings needed in order to obtain data and coordinate efforts. An extension is needed in order for the feasibility period to be completed.

FISCAL IMPACTS

There are no new fiscal issues related to extending the feasibility period.

WORK LOAD IMPACTS

There will continue to be staff impacts during the feasibility period as staff routinely coordinates with Wildlands on the status of the project.

ALTERNATIVES

The City council could conclude that adequate time has been given to Wildlands to complete the feasibility period. However, as Wildlands expressed during its presentation on April 15, 2014, some of the delays have been caused by circumstances beyond its control.

ATTACHMENTS

1. Resolution
2. Resolution approving the first amendment extending the feasibility period of Wildlands
3. Original "Habitat Development Agreement and Initial Escrow Instructions" between City of Milwaukie and Wildlands



CITY OF MILWAUKIE
"Dogwood City of the West"

Resolution No.

A resolution of the City Council of the City of Milwaukie, Oregon, authorizing an amendment to the Habitat Development Agreement and Initial Escrow Instructions ("Second Amendment") between the City of Milwaukie and Wildlands Capital Partners, LLC

WHEREAS, The City of Milwaukie, an Oregon municipal corporation ("Owner"), and WILDLANDS CAPITAL PARTNERS, LLC, a Delaware limited liability company ("Wildlands"), collectively referred to as the "Parties," wish to enter into the second amendment of the Habitat Development Agreement and Initial Escrow Instructions ("Second Amendment"), dated for reference purposes as May 6, 2014.

Recitals

WHEREAS, Wildlands and Owner entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated as of July 8, 2013 (the "**Habitat Development Agreement**"), concerning the purchase and sale of the Habitat Development Rights associated with certain real property located in the City of Milwaukie, Oregon, and more particularly described as the "City Property" in the Habitat Development Agreement; and

WHEREAS, Wildlands and Owner entered into that First Amendment of the Habitat Development Agreement, dated December 3, 2013; and

WHEREAS, Wildlands has continued its due diligence work and has maintained consistent communication with City staff, but Wildlands needs additional time to reach resolution of issues that need to be resolved before Wildlands can complete its feasibility analysis.

WHEREAS, Pursuant to the provisions of the Second Amendment, Wildlands and Owner desire to amend the Habitat Development Agreement for the purpose of extending Wildlands' Feasibility Period; and

WHEREAS, in the Second Amendment, the Parties agree as follows:

Agreement

1. Definitions. Except as otherwise provided herein, all capitalized terms set forth in this First Amendment shall be defined as provided in the Habitat Development Agreement.

2. Extension of Wildlands' Feasibility Period. Wildlands' Feasibility Period is

hereby extended to 5:00 p.m. Pacific Standard Time on December 31, 2014.

3. Recitals. The Recitals herein are hereby incorporated by reference into this Second Amendment. The Parties warrant that the Recitals are true and correct.

4. Ratification. Wildlands and Owner hereby agree that, except as provided in the First Amendment and this Second Amendment, the Habitat Development Agreement is ratified, affirmed and remains in full force and effect and is incorporated herein by this reference.

5. Counterparts. This Second Amendment may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

6. Electronic Transmittals. The Parties agree that if this Second Amendment is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as original signatures and given the same legal effect as an original signature.

Now, Therefore, be it Resolved that:

1. The City Manager is authorized to sign the Second Amendment of the Habitat Development Agreement with Wildlands Capital Partners, LLC on behalf of the City of Milwaukie.
2. Wildlands' feasibility period is extended to 5:00 p.m. Pacific Standard Time on December 31, 2014.

Introduced and adopted by the City Council on _____.

This resolution is effective on _____.

Jeremy Ferguson, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney

Attachment 2



CITY OF MILWAUKIE
"Dogwood City of the West"

Resolution No. 85-2013

A resolution of the City Council of the City of Milwaukie, Oregon, authorizing an amendment to the Habitat Development Agreement and Initial Escrow Instructions ("First Amendment") between the City of Milwaukie and Wildlands Capital Partners, LLC

WHEREAS, The City of Milwaukie, an Oregon municipal corporation ("Owner"), and WILDLANDS CAPITAL PARTNERS, LLC, a Delaware limited liability company ("Wildlands"), collectively referred to as the "Parties," wish to enter into the first amendment of the Habitat Development Agreement and Initial Escrow Instructions, dated for reference purposes as December 3, 2013.

Recitals

WHEREAS, Wildlands and Owner entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated as of July 8, 2013 (the "Habitat Development Agreement"), concerning the purchase and sale of the Habitat Development Rights associated with certain real property located in the City of Milwaukie, Oregon, and more particularly described as the "City Property" in the Habitat Development Agreement; and

WHEREAS, Pursuant to the provisions of this First Amendment, Wildlands and Owner desire to amend the Habitat Development Agreement for the purpose of extending Wildlands' Feasibility Period; and

WHEREAS, in consideration of the foregoing recitals, and the mutual covenants contained herein, the Parties agree as follows:

Agreement

1. **Definitions**. Except as otherwise provided herein, all capitalized terms set forth in this First Amendment shall be defined as provided in the Habitat Development Agreement.

2. **Extension of Wildlands' Feasibility Period**. Wildlands' Feasibility Period is hereby extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.

3. **Recitals**. The Recitals herein are hereby incorporated by reference into this First Amendment. The Parties warrant that the Recitals are true and correct.

4. **Ratification**. Wildlands and Owner hereby agree that, except as provided in this First Amendment, the Habitat Development Agreement is ratified, affirmed and

remains in full force and effect and is incorporated herein by this reference.

5. Counterparts. This First Amendment may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

6. Electronic Transmittals. The Parties agree that if this First Amendment is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as original signatures and given the same legal effect as an original signature.

Now, Therefore, be it Resolved that:

1. The City Manager is authorized to sign the first amendment of the Habitat Development Agreement and initial escrow instructions with Wildlands Capital Partners, LLC on behalf of the City of Milwaukie.

2. Wildlands' feasibility period is extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.

Introduced and adopted by the City Council on 12/3/13.

This resolution is effective on 12/3/13.



Dave Hedges, Council President

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC



Pat DuVal, City Recorder



Justin V. Kean
City Attorney

**FIRST AMENDMENT TO HABITAT DEVELOPMENT AGREEMENT
AND INITIAL ESCROW INSTRUCTIONS
(City of Milwaukie – Kellogg Creek)**

This First Amendment to Habitat Development Agreement and Initial Escrow Instructions (“**First Amendment**”), dated for reference purposes as December 3, 2013, is entered into by and between the **CITY OF MILWAUKIE**, an Oregon municipal corporation (“**Owner**”), and **WILDLANDS CAPITAL PARTNERS, LLC**, a Delaware limited liability company (“**Wildlands**”). Owner and Wildlands are collectively referred to as the “**Parties**.”

Recitals

A. Wildlands and Owner entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated as of July 8, 2013 (the “**Habitat Development Agreement**”), concerning the purchase and sale of the Habitat Development Rights associated with certain real property located in the City of Milwaukie, Oregon, and more particularly described as the “City Property” in the Habitat Development Agreement.

B. Pursuant to the provisions of this First Amendment, Wildlands and Owner desire to amend the Habitat Development Agreement for the purpose of extending Wildlands’ Feasibility Period.

NOW, THEREFORE, in consideration of the foregoing recitals, and the mutual covenants contained herein, the Parties agree as follows:

Agreement


1. **Definitions**. Except as otherwise provided herein, all capitalized terms set forth in this First Amendment shall be defined as provided in the Habitat Development Agreement.
2. **Extension of Wildlands’ Feasibility Period**. Wildlands’ Feasibility Period is hereby extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.
3. **Recitals**. The Recitals herein are hereby incorporated by reference into this First Amendment. The Parties warrant that the Recitals are true and correct.
4. **Ratification**. Wildlands and Owner hereby agree that, except as provided in this First Amendment, the Habitat Development Agreement is ratified, affirmed and remains in full force and effect and is incorporated herein by this reference.
5. **Counterparts**. This First Amendment may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
6. **Electronic Transmittals**. The Parties agree that if this First Amendment is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as

original signatures and given the same legal effect as an original signature.

IN WITNESS WHEREOF, the Parties hereto have executed this First Amendment as of the dates set forth below.


WILDLANDS:

**WILDLANDS CAPITAL PARTNERS,
LLC, a Delaware limited liability company**

By: 
Its: Manager
Date: December 4, 2013

OWNER:

**CITY OF MILWAUKIE, an Oregon
municipal corporation**

By: 
Its: CITY MANAGER
Date: December 3, 2013

Attachment 3



CITY OF MILWAUKIE
"Dogwood City of the West"

Resolution No. 85-2013

A resolution of the City Council of the City of Milwaukie, Oregon, authorizing an amendment to the Habitat Development Agreement and Initial Escrow Instructions ("First Amendment") between the City of Milwaukie and Wildlands Capital Partners, LLC

WHEREAS, The City of Milwaukie, an Oregon municipal corporation ("Owner"), and WILDLANDS CAPITAL PARTNERS, LLC, a Delaware limited liability company ("Wildlands"), collectively referred to as the "Parties," wish to enter into the first amendment of the Habitat Development Agreement and Initial Escrow Instructions, dated for reference purposes as December 3, 2013.

Recitals

WHEREAS, Wildlands and Owner entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated as of July 8, 2013 (the "Habitat Development Agreement"), concerning the purchase and sale of the Habitat Development Rights associated with certain real property located in the City of Milwaukie, Oregon, and more particularly described as the "City Property" in the Habitat Development Agreement; and

WHEREAS, Pursuant to the provisions of this First Amendment, Wildlands and Owner desire to amend the Habitat Development Agreement for the purpose of extending Wildlands' Feasibility Period; and

WHEREAS, in consideration of the foregoing recitals, and the mutual covenants contained herein, the Parties agree as follows:

Agreement

1. **Definitions**. Except as otherwise provided herein, all capitalized terms set forth in this First Amendment shall be defined as provided in the Habitat Development Agreement.

2. **Extension of Wildlands' Feasibility Period**. Wildlands' Feasibility Period is hereby extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.

3. **Recitals**. The Recitals herein are hereby incorporated by reference into this First Amendment. The Parties warrant that the Recitals are true and correct.

4. **Ratification**. Wildlands and Owner hereby agree that, except as provided in this First Amendment, the Habitat Development Agreement is ratified, affirmed and

remains in full force and effect and is incorporated herein by this reference.

5. Counterparts. This First Amendment may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

6. Electronic Transmittals. The Parties agree that if this First Amendment is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as original signatures and given the same legal effect as an original signature.

Now, Therefore, be it Resolved that:

1. The City Manager is authorized to sign the first amendment of the Habitat Development Agreement and initial escrow instructions with Wildlands Capital Partners, LLC on behalf of the City of Milwaukie.

2. Wildlands' feasibility period is extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.

Introduced and adopted by the City Council on 12/3/13.

This resolution is effective on 12/3/13.



Dave Hedges, Council President

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC



Pat DuVal, City Recorder



Justin V. Kean
City Attorney

**FIRST AMENDMENT TO HABITAT DEVELOPMENT AGREEMENT
AND INITIAL ESCROW INSTRUCTIONS
(City of Milwaukie – Kellogg Creek)**

This First Amendment to Habitat Development Agreement and Initial Escrow Instructions (“**First Amendment**”), dated for reference purposes as December 3, 2013, is entered into by and between the **CITY OF MILWAUKIE**, an Oregon municipal corporation (“**Owner**”), and **WILDLANDS CAPITAL PARTNERS, LLC**, a Delaware limited liability company (“**Wildlands**”). Owner and Wildlands are collectively referred to as the “**Parties**.”

Recitals

A. Wildlands and Owner entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated as of July 8, 2013 (the “**Habitat Development Agreement**”), concerning the purchase and sale of the Habitat Development Rights associated with certain real property located in the City of Milwaukie, Oregon, and more particularly described as the “City Property” in the Habitat Development Agreement.

B. Pursuant to the provisions of this First Amendment, Wildlands and Owner desire to amend the Habitat Development Agreement for the purpose of extending Wildlands’ Feasibility Period.

NOW, THEREFORE, in consideration of the foregoing recitals, and the mutual covenants contained herein, the Parties agree as follows:

Agreement


1. **Definitions**. Except as otherwise provided herein, all capitalized terms set forth in this First Amendment shall be defined as provided in the Habitat Development Agreement.
2. **Extension of Wildlands’ Feasibility Period**. Wildlands’ Feasibility Period is hereby extended to 5:00 p.m. Pacific Standard Time on May 30, 2014.
3. **Recitals**. The Recitals herein are hereby incorporated by reference into this First Amendment. The Parties warrant that the Recitals are true and correct.
4. **Ratification**. Wildlands and Owner hereby agree that, except as provided in this First Amendment, the Habitat Development Agreement is ratified, affirmed and remains in full force and effect and is incorporated herein by this reference.
5. **Counterparts**. This First Amendment may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
6. **Electronic Transmittals**. The Parties agree that if this First Amendment is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as

original signatures and given the same legal effect as an original signature.

IN WITNESS WHEREOF, the Parties hereto have executed this First Amendment as of the dates set forth below.


WILDLANDS:

**WILDLANDS CAPITAL PARTNERS,
LLC, a Delaware limited liability company**

By: 
Its: Manager
Date: December 4, 2013

OWNER:

**CITY OF MILWAUKIE, an Oregon
municipal corporation**

By: 
Its: CITY MANAGER
Date: December 3, 2013

**HABITAT DEVELOPMENT AGREEMENT
AND INITIAL ESCROW INSTRUCTIONS
(City of Milwaukie – Kellogg Creek)**

This Habitat Development Agreement and Initial Escrow Instructions (“**Agreement**”), dated for reference purposes as ~~June~~ ^{July} 8, 2013, is entered into by and between the **CITY OF MILWAUKIE**, an Oregon municipal corporation (“**Owner**” or “**City**”), and **WILDLANDS CAPITAL PARTNERS, LLC**, a Delaware limited liability company (“**Wildlands**”)(Owner and Wildlands are collectively referred to as the “**Parties**”).

RECITALS

- A. Wildlands and its affiliates are currently in the process of developing wetland and salmonid restoration projects in the Willamette River watershed in the vicinity of Portland Harbor.
- B. Wildlands desires to undertake the development of a riparian and habitat Restoration Project on Kellogg Creek near its confluence with the Willamette River for the purpose of generating credits and Habitat Values.
- C. Owner is interested in supporting a Kellogg Lake/Kellogg Creek Restoration Project for the purpose of developing a project with environmental, recreational, cultural and multimodal transportation benefits.
- D. Wildlands intends to construct the Restoration Project on certain property located in the City of Milwaukie, Oregon, commonly known as Kellogg Lake and Kellogg Creek, the Restoration Project site. The general location of the Restoration Project site is shown on the Site Plan attached as Exhibit A and incorporated herein by this reference.
- E. Owner owns the City Property, which constitutes a majority of the Habitat Property. The location of the City Property and Habitat Property is shown on the Site Plan. The exact size and legal description of the City Property and Habitat Property shall be determined through the Survey (as hereinafter defined).
- F. Depending on the ultimate scope of the Restoration Project, there may be additional impacted lands owned or controlled by third parties, including but not limited to, the Oregon Department of Transportation (“**ODOT**”), TriMet, Clackamas County, and Union Pacific Railroad (“**UPRR**”), and private parties from whom Wildlands intends to seek permission to carry out the Restoration Project.
- G. The purpose of this Agreement is to set forth the terms and conditions upon which Wildlands may acquire, create, operate, maintain and sell the Habitat Development Rights with respect to the Habitat Property.

NOW, THEREFORE, in consideration of the foregoing recitals, and the mutual covenants contained herein, the Parties agree as follows:

AGREEMENT

ARTICLE I: DEFINED TERMS

As used in this Agreement, the following terms when capitalized shall have the following meanings.

Adjusted Net Sales Proceeds: means, as of any point in time, the difference between (a) the Sales Proceeds, and (b) the sum of (i) the Closing Costs as of such point in time, (ii) Wildlands' Costs incurred by Wildlands as of such point in time, (iii) Wildlands' Preferred Return as of such point in time, (iv) the Marketing Costs as of such point in time, and (v) the Endowment Amount paid by Wildlands as of such moment in time; provided, however, that if such difference is a negative number, the "Adjusted Net Sales Proceeds" shall be deemed to be "0."

Anticipated Costs: means an amount equal to any Wildlands' Costs not yet incurred, but which are expected to be incurred.

Anticipated Costs Deposit: means the amount of each deposit of Anticipated Costs into the Reserve Account.

Anticipated Costs Summary: means a written summary of the specific Anticipated Costs covered by the applicable Anticipated Costs Deposit and the approximate date on which the Anticipated Costs is expected to be incurred.

Approval of the Restoration Project Entitlement Applications: means the date on which the Regulatory Agencies have approved the Restoration Project Entitlement Applications on terms and conditions satisfactory to Wildlands and the Owner, and that all applicable appeal periods have expired without the filing of an appeal, or if an appeal has been filed, that the appeal has been resolved on terms satisfactory to Wildlands and the Owner.

Business Day: means any day other than a Saturday, Sunday, or bank holiday.

City Design Priorities: means the following improvements:

- (a) Development of Kronberg Park and Dogwood Park;
- (b) Perennial (year-round) flow of water in the section of Kellogg Creek running through the Habitat Property;
- (c) Public access to the City Property from the North (downtown) and South (Kronberg Park) (i.e., pedestrian access over trails);
- (d) An undercrossing of McLoughlin/99E between the Restoration Project site and the Willamette River/Riverfront Park; and
- (e) Removal of the Kellogg Dam.

City Property: means all of the Habitat Property owned by the Owner as identified in the Site Plan.

Close of Escrow: means the date on which the Land Use and Easement Agreement is recorded in the Official Records of Clackamas County.

Closing: *see* "Close of Escrow."

Closing Conditions: means the collective conditions in Section 19 of this Agreement.

Closing Costs: means any third-party costs incurred by Wildlands with respect to the actual sale of the Habitat Values, such as escrow fees, but expressly excluding the Marketing Costs. Third-party costs incurred by Wildlands in connection with its acquisition of the Habitat Values shall not constitute Closing Costs.

Confidentiality Agreements: means, collectively, that certain Confidentiality Agreement dated June 25, 2012, entered into by and between Owner and Heron Pacific, LLC. and that certain Confidentiality Agreement dated _____, 2013, entered into by and between Owner's counsel, Jordan Ramis PC. and Heron Pacific, LLC.

Deposit: means the initial payment in the amount of Five Thousand and No/100 Dollars (\$5,000.00) paid into Escrow by Wildlands within three (3) days following the Effective Date, and all interest that accrues on that payment during the time that it is held in Escrow.

DEQ: means the State of Oregon Department of Environmental Quality.

Documents and Materials: means any and all tests, surveys, maps, plans, records, permits, correspondence, environmental assessments, reports (including hazard disclosure reports), and other materials related to the City Property or Habitat Property.

DSAYs: means discounted service acre-years.

Effective Date: means the date on which the last Party executes this Agreement.

Endowment Amount: means the amount that the Regulatory Agencies require be set aside for the long-term endowment care of the Habitat Property.

Environmental Laws: means and includes, without limitation, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986; the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901 et seq.; the Federal Clean Air Act, 42 U.S.C. § 7401-7626; the Federal Water Pollution Control Act and Federal Clean Water Act of 1977, as amended, 33 U.S.C. § 1251 et seq.; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 et seq.; the Federal Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; the Federal Safe Drinking Water Act, 42 U.S.C. § 300(f) et seq.; the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001 et seq.; the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321; the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.; the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq.; the Oil Pollution Act of 1990, 33 U.S.C. 2701 et seq., the State of Oregon's Air Pollution Control Act, ORS 468A.005, et seq.; Noise Control Act, ORS 467.010, et seq.; Water Pollution Control Act, ORS 468B.005, et seq.; Oil or Hazardous Material Spillage Act, ORS 468B.300, et seq.; Community Information on Hazardous Substances Act, ORS 453.307, et seq.; Radiation Sources Act, ORS 453.605, et seq.; Transportation of Hazardous Substances and Radioactive Materials Act, ORS 453.825, et seq.; Cleanup of Toxic Contamination from Illegal Drug Manufacturing Act, ORS 453.855, et seq.; Solid Waste Management Act, ORS 459.005, et seq.; Reduction of

Use of Toxic Substances and Hazardous Waste Generation Act, ORS 465.003, et seq.; Removal or Remedial Action Act (“**Environmental Cleanup Law**”), ORS 465.200, et seq.; Storage, Treatment, and Disposal of Hazardous Waste and PCB Act (state’s companion to RCRA), ORS 466.005, et seq.; Notice of Environmental Hazards Act, ORS 466.360, et seq.; Use of PCB Act, ORS 466.505, et seq.; Spill Response and Cleanup of Hazardous Materials Act, ORS 466.605, et seq.; Oil Storage Tanks Act, ORS 466.706, et seq.; Pesticide Control Act, ORS 634.006, et seq.; Oregon Safe Employment Act, ORS 654.001, et seq., all as amended now or in the future, and all other federal, state, local and foreign statutes, regulations and ordinances concerning public health and safety, worker health and safety, and pollution or protection of the environment, including without limitation all those relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, or cleanup of any hazardous materials, substances or wastes (including petroleum products or byproducts), together with all applicable common law pertaining to actions for personal injury and property damage resulting from Hazardous Materials with respect to both on-site and off-site contamination.

EPA: means the United States Environmental Protection Agency.

Escrow: means the escrow entered into pursuant to this Agreement.

Escrow Holder: means Ticor Title Company, 111 SW Columbia, Suite 1000, Portland, Oregon 97201, Attention: Candice Weischedel, Escrow Officer.

Extended Coverage Title Policy: means the Title Company’s American Land Title Association Extended Coverage Policy of Title Insurance.

Feasibility Approval Notices: means Wildlands’ written notice to Owner of approval of the feasibility of developing the Habitat Values and/or a Restoration Project on the Habitat Property, and Owner’s written notice to Wildlands of approval of the results of Owner’s due diligence investigation into the capability of Wildlands.

Final Accounting: means an accounting with accompanying reasonable documentation of the Final Purchase Price.

Final Design Plans: means all construction drawings and specifications for all improvements to the Habitat Property, consistent with the Restoration Project Permits, Approvals, and Certifications.

Final Purchase Price: means the aggregate Purchase Price.

Future Costs Account: *see* “Reserve Account.”

Habitat Development Rights: means the exclusive right to permit, create, develop, maintain, operate, and sell the rights to use the City Property for the purpose of undertaking riparian and habitat restoration activities. Habitat Development Rights include, but are not limited to, the exclusive right to create and maintain the Restoration Project and the exclusive right to sell the Habitat Values to third parties. The Habitat Development Rights do not include fee title to the

City Property. The Habitat Development Rights include all of the following:

(a) Exclusive Rights to Habitat Values and use of City Property. All Habitat Values in the City Property, and an exclusive right to use the City Property for the purposes of developing and marketing Habitat Values, including, without limitation, the following with respect to the City Property: (i) the exclusive right to determine the natural resources to be restored; (ii) the exclusive right to determine the wetlands, streams, habitat and species sought to be protected, in the exercise of Wildlands' reasonable and professional judgment; (iii) the exclusive right to permit, create, develop, maintain, operate, use, encumber, trade and sell Habitat Values at prices and on terms determined by Wildlands in its sole discretion; (iv) the exclusive right to create, maintain, manage and monitor a Restoration Project; (v) the exclusive right to perform grading and construction activities on the Restoration Project in conjunction with the development of a Restoration Project; and (vi) the exclusive right to represent Owner and its successors-in-interest with respect to each of the foregoing.

(b) Access Rights. Nonexclusive easements (i) over the City Property to use the roads, paths, trails and other access-ways, as they may exist from time to time to maximize Habitat Values, for purposes of vehicular and pedestrian access to, from and through the City Property; and (ii) over the City Property to create such service roads within the Habitat Property, as may be reasonably necessary to construct, maintain, repair and reconstruct the Habitat Property. The Land Use and Easement Agreement shall more particularly describe such easements.

(c) Water Rights. Nonexclusive easements to any existing watercourses, existing ground water wells, and other water rights appurtenant to or otherwise granted to the City Property, as well as the right to extract and/or divert water from such sources and to transport and convey such water to and through the City Property for purposes of wetland, stream, or habitat restoration and maintenance within the City Property. The Land Use and Easement Agreement shall more particularly describe such easements.

(d) Right to Manage. The right to manage the City Property consistent with the Restoration Project Permits, Approvals and Certifications and in Wildlands' best professional judgment.

(e) Incidental Rights. Such incidental rights as may be reasonably necessary or appropriate in order to develop, maintain, operate and/or preserve the City Property in accordance with the requirements of the Regulatory Agencies, including, without limitation, the right of entry described in Section 3(c) below and the right to use the submerged and submersible lands abutting the City Property, to the extent they are not included in the City Property or Habitat Property and that are necessary in order to connect Wildlands' Restoration Project to the river and to obtain approval of the Restoration Project and to the extent that the Owner owns such incidental rights. The Land Use and Easement Agreement shall more particularly describe such incidental rights.

Habitat Development Work: means the construction of the Restoration Project, including without limitation, the construction of all improvements required by, and in accordance with, the terms of the Restoration Project Permits, Approvals, and Certifications.

Habitat Property: means all of the land impacted by the Restoration Project, as initially identified in the Site Plan, and further identified by Survey in accordance with Section 8 of this Agreement.

Habitat Values: means DSA Ys, mitigation credits, conservation credits, habitat values, and any other environmental credits and values that Wildlands deems appropriate, including, without limitation, those credits and values relating to water quality.

Hazardous Materials: means any chemical, element, compound, material, mixture, waste or substance that is now or hereafter defined or listed in, or otherwise classified pursuant to, any Environmental Laws as a "hazardous material," "hazardous substance," "hazardous waste," "extremely hazardous waste," "dangerous waste," "infectious waste," "toxic substance," "toxic pollutant," "pollutant," "regulated emission," or any other words of similar import intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, or toxicity, or as a nuisance, including without limitation polychlorinated biphenyls, dioxins and furans, lead paint, asbestos or asbestos-containing materials, urea formaldehyde, radioactive materials, mold, any petroleum or petroleum product, radon gas, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel (or mixtures of natural gas in such synthetic gas), ash, municipal solid waste steam, drilling fluids, or produced waters and other wastes associated with the exploration, development and production of crude oil, natural gas or geothermal resources.

Initial Project Design: means the design of the Restoration Project to be initially presented to the NRDA Trustees.

Land Use and Easement Agreement: means the "Land Use and Easement Agreement" attached hereto as Exhibit C and incorporated herein, the form of which is subject to modification pursuant to Section 19(a)(i) of this Agreement.

Marketing Costs: means all of the marketing and management costs (which Wildlands deems to be seven and one-half percent (7.5%) of the Sales Proceeds, regardless of the actual costs).

Memorandum: means the "Memorandum of Habitat Development Agreement" attached hereto as Exhibit B and incorporated herein by reference.

NRDA: means Natural Resource Damage Assessment.

NRDA Trustees: means the Portland Harbor Superfund Site Natural Resources Damage Assessment Trustee Council.

Outside Closing Date: means the tenth (10th) anniversary of the Effective Date of this Agreement.

Owner: means The City of Milwaukie, Oregon.

Owner's Feasibility Period: means the period of time commencing on the Effective Date and expiring at 5:00 p.m. Pacific Standard Time on the date that is sixty (60) days after the Effective Date of this Agreement.

Owner Parties: means Owner and its elected officials, employees, agents and affiliates, representatives, consultants, contractors and subcontractors, and their respective successors and assigns.

Owner's Agents: means Owner or Owner's agents, employees, representatives, consultants, contractors, and subcontractors.

Owner's Title Notice: means Owner's written notice to Wildlands of those disapproved title matters, if any, which Owner is unwilling or unable after reasonable and good faith efforts to have eliminated from title to the City Property by Close of Escrow.

Preliminary Title Report: means the Preliminary Title Report issued by the Title Company with respect to the City Property.

Purchase Price: means the price to be paid by Wildlands to Owner for the Habitat Development Rights, which shall be an amount equal to ten percent (10%) of the Adjusted Net Sales Proceeds.

Regulatory Agencies: means the United States Army Corps of Engineers, the United States Fish and Wildlife Service, the EPA, the United States National Marine Fisheries Service, the DEQ, the NRDA Trustees, the City of Milwaukie, the County of Clackamas and/or any other governmental or quasi-governmental federal, state, and local agency with jurisdiction over the Restoration Project.

Reserve Account: means an interest-bearing deposit account with a national banking association with offices in the State of Oregon.

Restoration Project: means a NRDA restoration project, a stream restoration project, a conservation bank, a mitigation bank, and/or a project to improve water quality to obtain credits or values on the Habitat Property (as determined by Wildlands in its sole and absolute discretion).

Restoration Project Entitlement Applications: means the applications for the Restoration Project Permits, Approvals and Certifications.

Restoration Project Permits, Approvals, and Certifications: means, collectively, any applications that are necessary in order for Wildlands (i) to obtain the necessary permits and approvals for its development of the Habitat Property for a Restoration Project, and (ii) to obtain approval and certification from the NRDA Trustees of the projected and conventionally estimated DSAYs that the Restoration Project will generate.

Sales Proceeds: means total gross revenue at any point in time derived by Wildlands from the Habitat Property from whatever source, including, but not limited to, sales of Habitat Values.

Site Plan: means the map attached hereto as Exhibit A and incorporated herein.

Standard Coverage Title Policy: means the Title Company's standard form American Land Title Association Owner's Policy of Title Insurance.

Third Party Agreements: means agreements between Wildlands and/or Owner and third-party owners of the Habitat Property, that authorize Wildlands to perform Habitat Development Work on those portions of the Habitat Property owned by such third-party owners, as is needed to complete the Restoration Project.

Title Documents: means documents setting forth in the legal description, and the exceptions to title, as disclosed by the following documents and instruments:

(a) the Preliminary Title Report;

(b) legible copies of all documents, whether recorded or unrecorded, referred to in such Preliminary Title Report; and

(c) a parcel map(s) of the Habitat Property on which Escrow Holder has plotted all exceptions to title disclosed by the Preliminary Title Report that are capable of being plotted.

Title Company: means the Escrow Holder's title insurer.

Title Policy: means the Standard Coverage Title Policy or the Extended Coverage Title Policy, as elected by Wildlands.

Wildlands' Agents: means Wildlands' employees, agents, representatives, consultants, contractors and subcontractors, collectively.

Wildlands' Costs: means all of the costs and expenses of the due diligence, design-build and construction costs of the Habitat Development Work, the initial and interim monitoring and maintenance costs, the Conservation Instrument costs, the financial assurances costs (which may include, by way of example and without limitation, costs associated with construction and performance bonds), legal, accounting, administration and any other costs that are incurred by Wildlands in carrying out the terms of this Agreement.

Wildlands' Feasibility Period: means the period of time commencing on the Effective Date and expiring at 5:00 p.m. Pacific Standard Time on the earlier of (1) one hundred and eighty (180) days after the Effective Date of this Agreement, or (2) December 31, 2013.

Wildlands' Preferred Return: means an amount such that Wildlands has received an eight percent (8%) internal rate of return on all Wildlands' Costs incurred, compounded quarterly.

Wildlands' Title Notice: means written notice to the Owner of Wildlands' approval or disapproval, which shall be made in Wildlands' sole and absolute discretion, of the legal description and every item or exception disclosed by the Title Documents.

ARTICLE 2: EFFECTIVE DATE AND DUE DILIGENCE

1. Escrow. Within three (3) Business Days after the Effective Date, Wildlands shall promptly deliver a copy of the fully-executed Agreement to Escrow Holder and secure the Acceptance by Escrow Holder in the form attached at the end of this Agreement.

2. Purchase and Sale of Habitat Development Rights. As long as this Agreement is in effect, Owner shall sell, and Wildlands shall buy the Habitat Development Rights on the terms and conditions set forth in this Agreement.

3. Wildlands' Feasibility Period. During Wildlands' Feasibility Period, Wildlands shall perform its due diligence review of the Habitat Property and determine, in Wildlands' sole and absolute discretion, whether or not the Habitat Property is suitable for Wildlands' proposed Restoration Project. Such due diligence investigation shall include, without limitation, the right (a) to review and approve the Documents and Materials, (b) to conduct any and all inspections, investigations, tests and studies (including, without limitation, investigations with regard to the environmental condition of the Habitat Property, the remediation/disposition of any Hazardous Materials located on the Habitat Property, ODOT bridge work, any improvements related to the existing UPRR bridge, zoning and other governmental regulations, engineering tests, economic feasibility studies, soils, seismic and geologic reports) with respect to the Habitat Property as Wildlands may elect to make or maintain, and (c) to evaluate the extent of any ODOT, UPRR and TriMet funding and cooperation for the Restoration Project.

a. Owner's Cooperation. Owner agrees to reasonably cooperate, at no expense to Owner (other than the approximately \$60,000.00 it previously contributed for sediment sampling of portions of the Habitat Property), (i) with Wildlands in conducting Wildlands' feasibility investigations, (ii) with Wildlands' efforts to investigate the environmental condition of the Habitat Property and the nature and extent of any remediation work that the DEQ, the EPA and/or any other governmental agency may require to be performed on the Habitat Property, and (iii) with Wildlands' efforts to obtain any prospective purchaser agreements, *de minimis* settlement consent decrees, no further action letters and/or such other environmental releases and clearances from the EPA, the DEQ and/or other governmental agencies that Wildlands requires, in its sole and absolute discretion, in order to become satisfied and comfortable with the environmental condition of the City Property and any clean-up obligations or liability with respect to the past or present environmental condition of the City Property. Owner shall authorize its consultants, legal counsel, contractors and subcontractors to provide Wildlands with any documents and/or other information that Wildlands may reasonably request concerning such matters and to discuss such matters with Wildlands in an effort to facilitate Wildlands' investigation of the feasibility of the City Property.

b. Documents and Materials. Within ten (10) days after the Effective Date, Owner shall deliver to Wildlands copies of the Documents and Materials that are within Owner's possession or control.

4. Preliminary Title Report: Permitted Exceptions. Wildlands shall have the right to approve any and all matters of and exceptions to title to the City Property, including the Title Documents, the preparation of which shall be commissioned by Wildlands. Owner shall cause Escrow Holder to deliver the Title Documents to Wildlands within ten (10) calendar days following the Effective Date. Wildlands shall have forty-five (45) calendar days following its receipt of the Title Documents or the Effective Date, whichever is later, to give Owner Wildlands' Title Notice. The failure of Wildlands to give Wildlands' Title Notice to Owner within the specified time period shall be deemed Wildlands' approval of the Title Documents. In the event that Wildlands disapproves of any matter of title shown in the Title Documents, Owner shall, within ten (10) calendar days after Wildlands' Title Notice is received by Owner, deliver Owner's Title Notice to Wildlands. Owner's failure to deliver Owner's Title Notice within such ten (10)-day period shall be deemed Owner's refusal to remove the disapproved title matters. In the event that Owner is unable or unwilling to remove, or is deemed to refuse to remove, all of the title matters objected to by Wildlands in Wildlands' Title Notice, Wildlands shall have until the expiration of Wildlands' Feasibility Period to notify Owner in writing that either (1) Wildlands is willing to purchase the Habitat Development Rights subject to such disapproved exceptions, or (2) Wildlands elects to cancel this transaction. Failure of Wildlands to take either one of the actions described in Subsection (1) or (2) above shall be deemed a cancellation of the transaction. In the event that Wildlands delivers the Feasibility Approval Notice, Wildlands shall be deemed to have elected to purchase the Habitat Development Rights subject to any disapproved exceptions. In the event this Agreement is canceled pursuant to this Section, the Parties shall have no further obligations under this Agreement save for those obligations which survive the termination of this Agreement, and the Deposit shall be promptly refunded to Wildlands. The title exceptions that Wildlands approves, pursuant to this Section, are referred to as the "Permitted Exceptions."

a. Covenant Not to Encumber. Once the Permitted Exceptions have been determined, Owner shall not cause the condition of title to the City Property to differ from that disclosed by the Title Documents without the prior written consent of Wildlands. The Parties understand and agree that the Restoration Project Permits, Approvals and Certifications may also place restrictions on the condition of title to the Habitat Property, and the Regulatory Agencies may have the right to approve changes in the condition of title.

b. Mineral Rights. Owner shall not perform, and shall not authorize or permit any tenant, successor-in-interest or any other party to perform, any surface or subsurface mining or other extraction activities on the City Property.

5. Owner's Due Diligence. During Owner's Feasibility Period, the Owner may conduct a due diligence investigation of Wildlands. This would include, but not be limited to, a financial stability analysis and an evaluation of Wildlands' experience and qualifications, in order to better ascertain Wildlands' capability to complete the Restoration Project.

a. Wildlands Cooperation: Confidentiality. Subject to the provisions of this subsection 5.a, Wildlands shall reasonably cooperate with Owner, at no cost or expense to Wildlands, in performing Owner's due diligence investigation, and shall provide Owner with references who can attest to Wildlands' expertise in developing and constructing Restoration Projects. Wildlands will also provide project descriptions for certain of the projects that Wildlands and/or its affiliates have completed, including the construction costs associated with

such projects. Wildlands shall determine, in its sole and absolute discretion, the specific projects that it will provide information on pursuant to the foregoing provision. To the extent that Wildlands, in its sole and absolute discretion, elects to provide Owner and/or Owner's legal counsel with any financial documents, Owner agrees to keep, and to cause its legal counsel to keep, all such information confidential in accordance with the terms and conditions of the Confidentiality Agreements.

6. Notice of Approval. If Wildlands, in its sole and absolute discretion, fails to provide the Owner with its Feasibility Approval Notice on or before the expiration of Wildlands' Feasibility Period, or if Owner, in its sole and absolute discretion, fails to provide Wildlands with its Feasibility Approval Notice on or before the expiration of Owner's Feasibility Period, this condition shall fail, this Agreement shall terminate, the Deposit shall be promptly refunded to Wildlands, and the Parties shall have no further obligations under this Agreement except for those obligations that survive the termination of this Agreement; unless excused by mutual written agreement.

7. First Payment to Owner. Upon delivery of both Feasibility Approval Notices, Wildlands shall, within ten (10) days, pay the Owner Ten Thousand dollars (\$10,000.00), as compensation for costs incurred by Owner up to that point including the preparation and negotiation of all agreements, including this Agreement and any agreement with the State of Oregon, and any costs associated with the design and evaluation of the Restoration Project. Except in the event of a material default by Owner before Closing, such payment is irrevocable and shall not be returned under any circumstances including termination of this Agreement.

8. Identification of City Property and Habitat Property. Prior to the mutual approval of the Initial Project Design to present to the NRDA Trustees, Wildlands and Owner shall work together with a licensed engineer or surveyor, reasonably acceptable to Wildlands and Owner, using global positioning systems to prepare a survey of the City Property and Habitat Property (the "Survey") including, without limitation, a legal description for the City Property and Habitat Property. While Wildlands and Owner anticipate that the City Property and Habitat Property will fall within the area shown as the "City Property" and "Habitat Property" on the Site Plan attached hereto as Exhibit A, the exact scope of the City Property and Habitat Property shall be mutually agreed to by Wildlands and Owner prior to the Close of Escrow. Wildlands shall be solely responsible for all costs associated with obtaining the Survey.

ARTICLE 3:

9. Project Design. Wildlands shall be responsible for development of the Initial Project Design in collaboration with Owner. Provided that Wildlands has conceptually agreed to the terms and conditions of all Third Party Agreements that the Parties determine are necessary pursuant to Section 22 below, Wildlands shall commence its development of the Initial Project Design promptly upon the expiration of Wildlands' Feasibility Period, or at such earlier time as Wildlands deems appropriate. Once the process of designing the Restoration Project has begun, Wildlands shall regularly consult with the Owner, and the Owner shall have direct input into the design of the City Design Priorities, including but not limited to holding a public process as anticipated under paragraph 11, below. Wildlands will determine, in its reasonable discretion,

whether it is economically and physically viable to incorporate Owner's designs for the City Design Priorities into the Initial Project Design. To the extent that integration is determined to be viable, Wildlands shall use its good faith, commercially reasonable efforts to integrate into the Initial Project Design to the greatest extent possible. Owner's designs for the City Design Priorities. In developing the Initial Project Design, Wildlands shall explore reasonable alternatives to tree removal for the purpose of avoiding the removal of as many trees as reasonably possible but in a manner that is consistent with Wildlands' Restoration Project.

10. Mutual Agreement. The Parties shall use their good faith, commercially reasonable efforts to agree upon the Initial Project Design. Wildlands shall not formally present or submit the Initial Project Design to the NRDA Trustees prior to Owner's approval of such Initial Project Design, but shall have the right to consult with and obtain feedback from the NRDA Trustees during its development of the Initial Project Design. Owner shall not unreasonably withhold its approval of the Initial Project Design, and shall have no right to approve or disapprove those components of the Initial Project Design that do not affect the City Design Priorities. This provision applies only to the City's role as Owner in this Agreement (its proprietary capacity), and does not bind it or predetermine any decision regulatory review or from the City. Impacts to the City Design Priorities are reasonable causes for the Owner to withhold approval. Upon completion of the collaborative design process described in paragraph 9, and not before completion of the public process described in paragraph 11, Owner will formally review the Initial Project Design. Owner shall have thirty (30) days in which to formally review and approve the Initial Project Design. Owner's failure to provide Wildlands with written notice of Owner's disapproval of the Initial Project Design within such thirty (30)-day period shall be deemed to constitute Owner's approval of the Initial Project Design. In the event that Owner reasonably disapproves of the Initial Project Design, Wildlands and Owner shall use their good faith, commercially reasonable efforts to promptly resolve the Parties' reasonable concerns. If the Parties are unable to resolve their reasonable concerns, then either Party may terminate this Agreement by providing written notice to the other Party, in which case the Deposit shall be immediately refunded to Wildlands, each Party shall bear the responsibility for its costs incurred prior to such termination, and the Parties shall thereafter have no further rights, duties or obligations under this Agreement save for those obligations that survive the termination of this Agreement. The Initial Project Design that is approved by the Parties pursuant to the provisions of this Section 10 is referred to herein as the ("**Approved Initial Project Design**").

11. Public Process. The Owner and Wildlands acknowledge that Kronberg Park and Dogwood Park are public amenities and assets to the City and citizens of Milwaukie and that redevelopment of Kronberg Park and Dogwood Park requires input from members of the public as a stakeholder in the future of the parks. As such, Wildlands and the Owner may bring the Initial Project Design to the appropriate City commission or commissions and City Council for review and approval or acceptance. This preliminary review by the City is in its proprietary capacity and is separate from requisite City regulatory review of the Restoration Project. The Milwaukie City Council must approve or accept the Initial Project Design prior to submittal of the Restoration Project Entitlement Applications to the City of Milwaukie for regulatory approval. This Agreement in no way guarantees any action or approval by the City's commissions or the City Council.

ARTICLE 4: PROJECT ENTITLEMENT

12. Wildlands' Obligation to Process Restoration Project Applications. Unless this Agreement has been previously terminated by either Party pursuant to its rights set forth in this Agreement, promptly following the expiration of Wildlands' Feasibility Period or at such earlier time as Wildlands deems appropriate, Wildlands shall prepare and diligently process the Restoration Project Permits, Approvals, and Certifications, with the Regulatory Agencies.

(a) Owner's Consent to Restoration Project Entitlement Applications. Prior to submittal to the Regulatory Agencies, Wildlands shall provide Owner with copies of the Restoration Project Entitlement Applications, which shall include, without limitation, any conceptual plans, development plans and legal and administrative documents (e.g., habitat restoration and protection documents, an operator assurances document, a bank enabling instrument and/or mitigation bank instrument) that are included in the Restoration Project Entitlement Applications. In the event that the Restoration Project Entitlement Applications are not materially consistent with the Approved Initial Project Design, then Owner shall have the right to approve or disapprove (in its proprietary capacity) those portions that are materially inconsistent with the Approved Initial Project Design, but only to the extent that such portions impact the City Design Priorities. Owner shall not unreasonably withhold such approval. Owner and Wildlands agree that material impact to the City Design Priorities is reasonable cause to withhold approval. Owner shall have no right to approve or disapprove those components of the Restoration Project Entitlement Applications that do not affect the City Design Priorities and/or that are materially consistent with the Approved Initial Project Design. Owner shall have thirty (30) days in which to review and approve the Restoration Project Entitlement Applications. Owner's failure to provide Wildlands with written notice of Owner's disapproval of the Restoration Project Entitlement Applications within such thirty (30)-day period shall be deemed to constitute Owner's approval (acting in Owner's proprietary capacity) of the Restoration Project Entitlement Applications. In the event that Owner disapproves of the Restoration Project Entitlement Applications, Owner and Wildlands shall use their good faith, commercially reasonable efforts to promptly resolve Owner's reasonable concerns. If Owner and Wildlands are unable to resolve Owner's reasonable concerns, then either Party may terminate this Agreement by providing written notice to the other Party, in which case the Deposit shall be immediately refunded to Wildlands, each Party shall bear the responsibility for its costs incurred prior to such termination, and the Parties shall thereafter have no further rights, duties or obligations under this Agreement save for those obligations which survive the termination of this Agreement.

(b) Authority to Process. Upon approval, in its proprietary capacity, of the Restoration Project Entitlement Applications pursuant to subsection (a) above, Owner shall provide Wildlands with written authorization, in a form that is reasonably acceptable to Wildlands and the applicable Regulatory Agencies, that Owner has consented to the processing of the Restoration Project Entitlement Applications prior to the Closing. To the extent required by any Regulatory Agencies, Owner shall execute the Restoration Project Entitlement Applications promptly upon request of Wildlands or the applicable Regulatory Agencies, and appoint Wildlands as Owner's agent for purposes of processing the Restoration Project Entitlement Applications. Wildlands will keep Owner periodically apprised of the status of the

Restoration Project Entitlement Applications, and will provide status updates at the request of Owner.

(c) Owner's Cooperation. Owner agrees to lend all reasonable assistance and cooperation reasonably required by Wildlands for the approval of the Restoration Project Entitlement Applications, including appearing and giving testimony before any Regulatory Agency. Owner also agrees to reasonably cooperate, in all reasonable respects and at no material expense to Owner, with Wildlands in its efforts to transfer, sell or otherwise convey the Habitat Values to third parties, and Owner agrees to execute and deliver to Wildlands, for the benefit of a third party, any documents reasonably required to convey the Habitat Values to such third party. Owner acknowledges and understands that its failure to cooperate with Wildlands in accordance with the foregoing provisions and/or its delay in providing such cooperation will cause Wildlands to suffer substantial damages.

(d) Fees and Costs. Wildlands shall be responsible for all fees and costs associated with (i) preparing and processing the Restoration Project Entitlement Applications; (ii) obtaining the Regulatory Agencies' issuance of the Restoration Project Permits, Approvals and Certifications, including, without limitation, all engineering and other consulting costs and all application fees including Owner's; (iii) satisfying all financial assurances required by the Regulatory Agencies; (iv) the acquisition of any rights-of-way or other property interests necessary to construct the Restoration Project (to the extent that Wildlands determines, in its sole and absolute discretion, that such acquisition is necessary and the terms of such acquisition are acceptable to Wildlands in its sole and absolute discretion); (v) constructing the Restoration Project; (vi) funding all endowment obligations; and (vii) maintaining and monitoring the Restoration Project during its operation. Wildlands shall have no obligation to pay for any costs or expenses incurred by Owner with respect to its review of the Restoration Project Entitlement Applications or otherwise, excepting the Owner's application fees and any other fees associated with Owner's review of the Restoration Project Entitlement Applications in Owner's capacity as a regulator.

(e) No Representation or Warranty. Wildlands makes no representation or warranty as to (i) whether the Regulatory Agencies will issue the Restoration Project Permits, Approvals and Certifications; (ii) the timing for such issuance; or (iii) the timing for the creation of the Restoration Project and the sale of Habitat Values. The Owner makes no representation or warranty as to any future decisions of the Milwaukie Planning Department staff, Planning Commission, or City Council with regard to any Restoration Project permits.

13. Owner's Right to Approve Conservation Instrument.

(a) Draft Conservation Instrument. In connection with the Regulatory Agencies' approval of the Restoration Project Permits, Approvals, and Certifications, the Regulatory Agencies will require that a Conservation Easement or a Restrictive Covenant (the "**Conservation Instrument**") be recorded against the Habitat Property. Wildlands shall provide Owner with a draft of the Conservation Instrument as soon as Wildlands has received sufficient input from the Regulatory Agencies and any holder of the Conservation Instrument to determine what terms and conditions should be contained in the Conservation Instrument. Wildlands understands and acknowledges that any provisions contained in the Conservation Instrument that materially impact the City Design Priorities may not be acceptable to Owner. Owner shall have

thirty (30) days after its receipt of the draft Conservation Instrument in which to review and approve the draft Conservation Instrument. Owner and Wildlands agree that material impact to the City Design Priorities is reasonable cause for City to disapprove of the Conservation Instrument. Owner's failure to provide Wildlands with written notice of Owner's disapproval of the draft Conservation Instrument within such thirty (30)-day period shall be deemed to constitute Owner's approval of the draft Conservation Instrument. Owner understands and acknowledges that the form of Conservation Instrument that is agreed upon by the Parties pursuant to the foregoing provisions may be modified by the Regulatory Agencies and any holder of the Conservation Instrument.

(b) Final Conservation Instrument. Owner shall have thirty (30) days after its receipt of the final Conservation Instrument in which to review and approve the final Conservation Instrument. Owner shall have the right to approve or disapprove (in its proprietary capacity) those portions of the final Conservation Instrument that are materially inconsistent with the approved draft Conservation Instrument, but only to the extent that such portions impact the City Design Priorities. Owner and Wildlands agree that material impact to the City Design Priorities is reasonable cause for City to disapprove of the Conservation Instrument. Owner's failure to provide Wildlands with written notice of Owner's disapproval of the final Conservation Instrument within such thirty (30)-day period shall be deemed to constitute Owner's approval of the final Conservation Instrument. Owner agrees to reasonably cooperate with Wildlands in making any revisions to the Conservation Instrument, and will not unreasonably withhold approval of the final version of the Conservation Instrument. In the event that Owner reasonably disapproves of the final version of the Conservation Instrument, Owner and Wildlands shall use their good faith, commercially reasonable efforts to resolve the Owner's concerns to the reasonable satisfaction of Owner, Wildlands, the Regulatory Agencies and any holder of the Conservation Instrument. In the event the Parties are thereafter unable to resolve the Owner's concerns and such concerns are in good faith and commercially reasonable and Owner is not otherwise in default under this Agreement, either Party shall have the right to terminate this Agreement, in which case each Party shall bear the responsibility for its costs incurred prior to such termination, and the Parties shall thereafter have no further rights, duties or obligations under this Agreement, except for those obligations that survive termination of this Agreement.

ARTICLE 5: DELIVERIES TO ESCROW HOLDER

14. Escrow. This Agreement constitutes escrow instructions to Escrow Holder. Owner and Wildlands may jointly or separately prepare additional escrow instructions. Escrow Holder may also provide general instructions. If there is any inconsistency between the provisions of any of these instructions and this Agreement, the provisions of this Agreement shall control.

15. Opening of Escrow.

(a) Within three (3) Business Days after the Effective Date, Wildlands shall open the Escrow by depositing with Escrow Holder a fully-executed photocopy of this Agreement for use as escrow instructions. Escrow Holder shall execute the Acceptance By Escrow Holder which appears at the end of this Agreement and deliver a fully-executed Acceptance By Escrow Holder to Owner and Wildlands.

(b) Owner and Wildlands hereby authorize Escrow Holder to take necessary steps for the Close of Escrow pursuant to the terms of this Agreement.

16. Memorandum. Concurrently with the execution of this Agreement, the Parties shall execute, acknowledge and deliver to Escrow Holder the Memorandum for the purpose of providing the Regulatory Agencies and third parties with constructive notice of the Habitat Development Rights that have been conveyed to Wildlands under this Agreement.

(a) The Memorandum shall be recorded with the Clackamas County Recorder immediately following Escrow Holder's receipt of both Parties' Feasibility Approval Notices.

(b) In the event that this Agreement terminates, Wildlands shall execute and deliver to Owner a quitclaim deed, in recordable form, for the purpose of removing the Memorandum from the public records within five (5) days after the termination of this Agreement, provided that the Deposit has been refunded to Wildlands (to the extent that the Deposit is required to be refunded to Wildlands pursuant to the terms and conditions of this Agreement). This Subsection shall survive the termination of this Agreement.

17. Close of Escrow. The Close of Escrow shall occur within thirty (30) days after Approval of the Restoration Project Entitlement Applications, but in no event later than the Outside Closing Date. Upon approval of each Restoration Project Entitlement Application, Wildlands shall immediately furnish a copy of the approval to the Owner. Wildlands shall not be deemed in default under this Agreement if it fails to immediately furnish such copy to Owner, provided that Wildlands does so within ten (10) days after Owner's written request for a copy of such approval. In the event that Wildlands does not obtain Approval of the Restoration Project Entitlement Applications by the Outside Closing Date, either Party shall have the right to terminate this Agreement, in which event Owner shall retain the Deposit and, except as otherwise provided herein, the Parties shall have no further obligations hereunder save for those obligations which survive the termination of this Agreement.

(a) Second Payment to Owner. At the Close of Escrow, Wildlands shall pay the Owner Ten Thousand dollars (\$10,000.00), as compensation for costs incurred after the expiration of Wildlands' Feasibility Period ("**Second Payment**"). Such payment is irrevocable and shall not be returned under any circumstances including termination of this Agreement.

18. Conditions to Close of Escrow.

(a) Conditions to Wildlands' Obligations. The Close of Escrow and Wildlands' obligations to consummate the transaction contemplated by this Agreement are subject to the satisfaction of the following conditions (or Wildlands' written waiver thereof) which are for Wildlands' sole benefit on or prior to the dates designated below for the satisfaction of such conditions, or the Close of Escrow in absence of a specified date:

(i) Title Insurance. At Closing, Title Company shall have issued or shall have irrevocably committed to issue the Title Policy to Wildlands.

(ii) Approval of Restoration Project Entitlement Applications. Wildlands shall have obtained Approval of the Restoration Project Entitlement Applications.

(iii) Owner's Representations. All representations and warranties made by Owner to Wildlands in this Agreement shall be true and correct in all material respects as of the Close of Escrow.

(iv) No Default by Owner. Owner shall have performed all of its obligations under this Agreement in all material respects.

(b) Conditions to Owner's Obligations. The Close of Escrow and Owner's obligations to consummate the transaction contemplated by this Agreement are subject to the satisfaction of the following conditions (or Owner's written waiver thereof) which are for Owner's sole benefit on or prior to the dates designated below for the satisfaction of such conditions, or the Close of Escrow in absence of a specified date:

(i) Wildlands' Representations. All representations and warranties made by Wildlands to Owner in this Agreement shall be true and correct in all material respects as of the Close of Escrow.

(ii) No Default by Wildlands. Wildlands shall have performed all of its obligations under this Agreement in all material respects.

(c) Failure of Condition. In the event any of the Closing Conditions are not timely satisfied or waived by the appropriate benefited party, for a reason other than the default of Wildlands or Owner, this Agreement shall terminate, the Deposit and all other funds deposited into Escrow by Wildlands shall be immediately returned to Wildlands and, except as otherwise provided herein, the Parties shall have no further obligations hereunder save for those obligations which survive the termination of this Agreement.

19. Closing Documents and Funds.

(a) Deposits by Owner. Prior to the Close of Escrow, Owner shall deposit with Escrow Holder:

(i) Land Use and Easement Agreement. The final Land Use and Easement Agreement duly executed and acknowledged by Owner. The Land Use and Easement Agreement that is attached hereto as Exhibit C is only a draft of the Land Use and Easement Agreement. Owner and Wildlands agree to further modify the form of the Land Use and Easement Agreement, if necessary, to address any additional restrictions imposed by the Regulatory Agencies, provided that such additional restrictions are consistent with the scope of the Habitat Development Rights. The final, fully-executed Land Use and Easement Agreement shall be recorded against the Habitat Property by Escrow Holder upon the Close of Escrow.

(ii) Miscellaneous. Such other documents and instructions as may be reasonably required by the Escrow Holder or Wildlands in order to close Escrow in accordance with the terms of this Agreement.

(b) Deposits by Wildlands. Prior to the Close of Escrow, Wildlands shall deposit with Escrow Holder:

(i) Land Use and Easement Agreement. The Land Use and Easement Agreement duly executed and acknowledged by Wildlands.

(ii) Costs and Expenses. All amounts necessary to pay the escrow, recording and title costs.

(iii) Second Payment. The amount of the Second Payment.

(iv) Miscellaneous. Such other documents and instructions as may be reasonably required by the Escrow Holder or Owner in order to close Escrow in accordance with the terms of this Agreement.

(v) Proof of Ownership. Documentation that Wildlands has entered into Third Party Agreements with all third party owners of Habitat Property pursuant to the provisions of Section 22 below.

20. Issuance of Title Insurance. At the Close of Escrow, the Title Company shall issue or shall have committed to issue to Wildlands its Standard Coverage Title Policy, insuring Wildlands' interest in the Habitat Property pursuant to the Land Use and Easement Agreement, subject only to the Permitted Exceptions and the printed exceptions and exclusions common to Standard Coverage Title Policies, with liability in an amount equal to the fair market value of the Conservation Instrument, as determined by Wildlands in its sole and absolute discretion. At Wildlands' election, the Title Company shall issue to Wildlands its Extended Coverage Title Policy instead of a Standard Coverage Title Policy.

21. Costs Related to Closing. Wildlands shall pay all Escrow, recording and title costs. Wildlands and Owner shall each pay all legal and professional fees and fees of other consultants incurred by Wildlands and Owner, respectively.

ARTICLE 6: PROJECT CONSTRUCTION

22. Control of Habitat Property: Third-Party Agreements. Prior to the expiration of Wildlands' Feasibility Period, Wildlands and Owner shall use their good faith, commercially reasonable efforts to determine whether any Third Party Agreements are necessary in order for Wildlands to develop the Restoration Project and, if so, the nature of such Third Party Agreements and whether Wildlands and/or Owner will be a party to such Third Party Agreements. In the event that the Parties determine that any Third Party Agreements are necessary, then the Parties shall jointly pursue the negotiation of such Third Party Agreement(s). Wildlands shall have no obligation to enter into any Third Party Agreement or to fund any of Owner's obligations under any Third Party Agreement unless the terms and conditions of such Third Party Agreement are acceptable to Wildlands in its sole and absolute discretion. Owner shall have no obligation to enter into any Third Party Agreement unless the terms and conditions of such Third Party Agreement are acceptable to Owner in its sole and absolute discretion. Owner shall have the right to approve any Third Party Agreement that is entered into by Wildlands, but only for the purpose of confirming that such Third Party Agreement adequately addresses the City Design Priorities. Wildlands shall have the right to redact the financial terms of any Third Party Agreement that is submitted to Owner for Owner's approval. Owner shall not unreasonably withhold, condition or delay its approval of such Third Party Agreements. If

Owner disapproves of any Third Party Agreement and the Parties are unable to resolve Owner's concerns, then either Party may terminate this Agreement by providing written notice to the other Party, in which case each Party shall bear the responsibility for its costs incurred prior to such termination, and the Parties shall thereafter have no further rights, duties or obligations under this Agreement save for those obligations which survive the termination of this Agreement.

23. Habitat Development Work; Construction Activities. Wildlands shall, at its sole cost and expense, directly or through contractors, perform all of the Habitat Development Work. Excepted from this obligation is any Habitat Development Work for which a third party owner of Habitat Property is responsible, pursuant to a Third Party Agreement.

(a) Final Design. Wildlands shall prepare the Final Design Plans. Wildlands shall use its good faith, commercially reasonable efforts to integrate into the Final Design Plans to the greatest extent possible, Owner's designs for City Design Priorities, provided that Wildlands determines, in its reasonable discretion, that it is economically and physically viable to do so. Wildlands shall submit the Final Design Plans to Owner for Owner's review and approval in its proprietary capacity, which approval shall not be unreasonably withheld. Owner's approval rights shall be limited to those aspects of the Final Design Plans that are materially inconsistent with the Approved Initial Project Design and that impact the City Design Priorities. Owner shall have forty-five (45) days in which to review and approve the Final Design Plans. Owner's failure to provide Wildlands with written notice of Owner's disapproval of the Final Design Plans within such forty-five (45)-day period shall be deemed to constitute Owner's approval of the Final Design Plans. Material impacts to the City Design Priorities constitute reasonable grounds for disapproval of the Final Design Plans. In the event that Owner disapproves of the Final Design Plans, Owner and Wildlands shall use their good faith, commercially reasonable efforts to promptly resolve Owner's reasonable concerns. If Owner and Wildlands are unable to resolve Owner's reasonable concerns, then either Party may terminate this Agreement by providing written notice to the other Party, in which case each Party shall bear the responsibility for its costs incurred prior to such termination, and the Parties shall thereafter have no further rights, duties or obligations under this Agreement save for those obligations which survive the termination of this Agreement.

(b) Performance Security. Prior to performing any construction activities on the City Property, Wildlands shall post a bond, letter of credit or other security in favor of Owner for the purpose of securing the performance of Wildlands' construction obligations under this Agreement, but only to the extent that such construction obligations have not already been fully secured by the financial assurances required by the Regulatory Agencies in connection with the Habitat Development Work. The form of such security and the amount of such security shall be addressed in the Construction Coordination Agreement (as hereinafter defined), which shall be agreed upon by the Parties pursuant to Section 23(e) below.

(c) Construction Standard. Wildlands shall construct the improvements, or shall cause the improvements to be constructed, in a manner deemed reasonable and customary as to such improvements and in accordance with the Final Design Plans that are approved by Wildlands and Owner pursuant to Subsection (a) above, and the Restoration Project Permits, Approvals and Certifications.

(d) Construction Schedule. Promptly upon obtaining the Regulatory Agencies' Approval of the Restoration Project Permits, Approvals and Certifications, the Parties shall use their good faith, commercially reasonable efforts to agree upon a schedule for construction of the Restoration Project, taking into account the market conditions at such time. Wildlands shall have no obligation to construct the Restoration Project if it determines, in its sole and absolute discretion, that the market is not sufficient to support such construction or if Wildlands otherwise determines that proceeding with construction is not economically viable. If Wildlands determines that the market does support proceeding with construction of the Restoration Project, the Parties shall negotiate and execute the Construction Coordination Agreement, pursuant to Section 23(e) of this Agreement, which shall include a construction schedule and a process for amending such schedule. The parties agree that the dates set forth on the approved construction schedule shall be subject to extension if a Force Majeure Event (as hereinafter defined) occurs. The term "**Force Majeure Event**" means an actual delay not occasioned by the conduct or financial condition of Wildlands, whether that delay is an act of God or a public enemy, whether the occurrence is caused by war, riot, unseasonable storms or inclement weather, earthquake or other natural forces, moratoriums, the failure of government agencies to issue any necessary permits, consents and/or approvals after timely submittal therefor, unavailability of material or labor, unforeseen conditions and/or by the reasonably unforeseeable acts of anyone other than Wildlands.

(e) Construction Coordination Agreement. Prior to Wildlands' commencement of any construction activities relating to the Restoration Project, Owner and Wildlands shall use their good faith, commercially reasonable efforts to enter into a written agreement (the "**Construction Coordination Agreement**") setting forth the details related to the construction of the Restoration Project, including, but not limited to:

(i) A construction schedule (which shall be subject to extensions due to Force Majeure Events), a process for the Parties to amend such schedule and remedies for Wildlands' failure to comply with such schedule or approved amendments.

(ii) The types and amounts of any insurance that must be provided by Wildlands (or any third party performing the construction of the Restoration Project) during the construction of the Restoration Project in addition to the insurance required under Section 32 of this Agreement. In no event will Wildlands perform any handling, hauling, removal, storage or disposal of Hazardous Materials without procuring pollution liability insurance in an amount reasonably acceptable to Owner.

(iii) The types and amounts of any bonds, letters of credit and/or other security that must be posted by Wildlands (or any third party performing the construction of the Restoration Project) in favor of Owner for the purpose of securing the performance of the construction obligations under this Agreement in addition to the financial assurances required by the Regulatory Agencies in connection with the Habitat Development Work.

(iv) Wildlands' obligation to provide Owner, prior to commencement of the construction of the Restoration Project, with evidence (which shall be in a form reasonably acceptable to Owner) of construction funding for the purpose of satisfying Owner that Wildlands has sufficient funds to complete the construction of the Restoration Project.

(v) Allocation of responsibility for elements of the construction between Wildlands and any third parties.

(vi) Final terms for mutual indemnification of the Parties during the construction of the Restoration Project.

In no event shall Wildlands commence the construction of the Restoration Project prior to the Parties' execution of the Construction Coordination Agreement. The terms of the Construction Coordination Agreement shall be commercially reasonable. In the event that the Parties, after using their good faith, commercially reasonable efforts, are unable to agree upon the terms and conditions of the Construction Coordination Agreement, such dispute shall be resolved in accordance with the provisions of Section 36 below.

(f) Construction Contracting. Because Wildlands will pay for, contract for, and carry on the construction of the Restoration Project, the City acknowledges that it is Wildlands' intent and expectation that Wildlands will not be subject to public contracting requirements, including prevailing wage under Oregon law, for work performed on City Property. Wildlands, if allowed by law, may either competitively bid all or portions of the work or sole source contracts to contractors it deems to be uniquely qualified to perform the work. Wildlands shall use reasonable efforts to solicit bids for the construction work from qualified contractors in the City of Milwaukie and Clackamas County, and shall use reasonable efforts to contract with minorities, women and emerging small businesses, but this Agreement does not require Wildlands to meet any participation levels.

The provisions of Article 6 will survive the termination of this Agreement and the Close of Escrow.

ARTICLE 7: PURCHASE TERMS

24. Purchase Price. The Purchase Price for the Habitat Development Rights shall be an amount equal to ten percent (10%) of the Adjusted Net Sales Proceeds. Wildlands shall have the sole discretion to establish the price and terms of any sale of Habitat Values to third parties.

25. Payment of Purchase Price. The Purchase Price shall be paid as follows:

(a) Deposit. Within three (3) Business Days following the Effective Date, Wildlands shall pay the Deposit to the Escrow Holder. Escrow Holder shall invest the Deposit with a financial institution acceptable to Wildlands, in a federally-insured interest-bearing demand account.

(i) Nonrefundability; Application of Deposit. Except in the event of a default by Owner or except as otherwise provided in this Agreement, the Deposit shall become nonrefundable upon Closing. The Deposit shall remain in Escrow until the Close of Escrow. The Deposit shall be credited to the Purchase Price at the Close of Escrow.

(b) Balance of Purchase Price. The balance of the Purchase Price payable to Owner by Wildlands shall be paid from the Sales Proceeds. Upon Wildlands' receipt of any Sales Proceeds, Wildlands shall apply such Sales Proceeds as follows:

(i) Closing Costs. First, to pay any Closing Costs incurred by Wildlands with respect to the actual sale of the Habitat Values.

(ii) Pre-Funded Endowment Costs. Second, to pay any portion of the Endowment Amount that the Restoration Project Permits, Approvals and Certifications and the Regulatory Agencies require Wildlands to, or Wildlands elects to (a) pre-fund in advance of the sale of Habitat Values, (b) pay at the time of the sale of Habitat Values, or (c) deposit into an account at the time of the sale of each acre of Habitat Value.

(iii) Wildlands' Costs. Third, to Wildlands as reimbursement of all of Wildlands' Costs previously incurred.

(iv) Wildlands' Internal Rate of Return. Fourth, to Wildlands until Wildlands has received an eight percent (8%) Internal Rate of Return on Wildlands' Costs.

(v) Marketing Costs. Fifth, to Wildlands to pay the then-applicable Marketing Costs.

(vi) Wildlands' Anticipated Costs. Sixth, an amount equal to Wildlands' Anticipated Costs shall be deposited into the Reserve Account, provided that, concurrently with each Anticipated Costs Deposit, Wildlands shall provide to Owner an Anticipated Costs Summary.

(vii) Payment of Purchase Price. Thereafter, Wildlands shall pay to Owner, by Wildlands' company check by the fifteenth (15th) day of each month immediately following the calendar quarter in which any Sales Proceeds are received by Wildlands, a portion of the Purchase Price until such time as Owner has received the entire Purchase Price. Without limiting the foregoing, in the event that the aggregate amounts set forth in Sections 27(b)(i)-(vi) of this Article exceed the Sales Proceeds as of such time, the Purchase Price as of such time shall be deemed to be "0". Any Sales Proceeds remaining following Owner's receipt of the Purchase Price shall be retained by Wildlands. Each Purchase Price payment shall be accompanied by an accounting of all Sales Proceeds received by Wildlands with respect to the Habitat Property for the preceding month, and all Closing Costs, Wildlands' Costs, Marketing Costs, Endowment Costs, and Anticipated Costs paid with such Sales Proceeds. Notwithstanding anything to the contrary contained herein, at such time as all of the Habitat Values have been sold and Wildlands has ceased to aggressively pursue the generation of additional income from the Habitat Property, Wildlands shall provide Owner with the Final Accounting. In the event that the aggregate payments made by Wildlands to Owner pursuant to this Section 27(b)(vii) (collectively, the "**Interim Payments**") are less than the Final Purchase Price, Wildlands shall promptly pay to Owner an amount equal to the difference between the Final Purchase Price and the Interim Payments. Except as otherwise provided in Section 27(c) below, any funds remaining in the Reserve Account after Owner has been paid the entire Purchase Price shall be disbursed to Wildlands. The obligations of Wildlands and Owner under this Section 27(b)(vii) shall survive the termination of this Agreement.

(c) Prior to the sale of any Habitat Values, Wildlands shall open the Reserve Account. The Reserve Account shall be in the name of Wildlands. Wildlands shall make each Anticipated Costs Deposit in accordance with Section 27(b)(vi). Wildlands shall have the right to

make withdrawals from the Reserve Account to reimburse itself for Anticipated Costs that it has incurred provided that (i) such Anticipated Costs are set forth on an Anticipated Cost Summary, and (ii) Wildlands has not previously been reimbursed for such Anticipated Costs. In the event that any funds are being held in the Reserve Account as of the date of any termination of this Agreement, such funds shall be allocated between Wildlands and Owner in accordance with the Final Accounting procedures set forth in Section 27(b)(vii). The provisions of this Section 27(c) shall survive any termination of this Agreement.

(d) Wildlands makes no representation or warranty concerning the amount of the Sales Proceeds that may be derived from the Habitat Property, the aggregate amount of the Purchase Price or the timing for such payment. Except as otherwise provided in this Agreement, in no event shall the Owner be obligated to contribute financially or otherwise pay any amount toward the Restoration Project or to Wildlands. Nothing contained in the foregoing provision shall be construed as a waiver by Wildlands of its right to recover damages from Owner in the event of a default by Owner.

ARTICLE 8: GENERAL TERMS

26. Wildlands Conduct. Although Wildlands will contract for and carry out the Restoration Project, it will be viewed by the citizens of Milwaukie as a public project. Wildlands understands this and agrees that all Wildlands' Agents, will conduct themselves in a manner that is courteous and civil to City staff and the citizens of Milwaukie.

27. Owner's Cooperation in Sale of Habitat Values. Owner agrees to execute and deliver to Wildlands, at no cost or expense to Owner, for the benefit of a third party, any documents reasonably required to convey the Habitat Values to such third party.

28. Right of Entry.

(a) During the term of this Agreement, Wildlands, Wildlands' Agents, and the Regulatory Agencies shall have the right to enter upon the City Property at reasonable times during ordinary business hours, or as otherwise agreed to by Owner or Owner's designated project representative, to make any and all inspections and tests as may be necessary or desirable in Wildlands' sole judgment and discretion. Wildlands shall indemnify, defend and hold Owner and Owner Parties harmless from any and all damages, claims, demands, liens, claims of liens, losses, fines, penalties, judgments, actions or liability of any kind, individually or collectively (including, without limitation, reasonable and actual attorneys' fees, expert witness fees and litigation or arbitration costs reasonably incurred), arising out of or as a result of the entry onto the Habitat Property by Wildlands and/or Wildlands' Agents, excepting those arising from or related to (i) the acts or omissions of Owner or Owner Parties, (ii) any diminution in the value of the Habitat Property arising from or related to matters discovered by Wildlands during its investigation of the Habitat Property, (iii) any latent defects in the Habitat Property discovered by Wildlands, (iv) liability resulting from Wildlands' performance of environmental testing consistent with ASTM standards, and (v) liability which arises from the results or findings of environmental testing procedures. In no event shall Wildlands be considered an owner or operator of the Habitat Property. The provisions of this Section shall survive the Close of Escrow and the termination of this Agreement.

(b) Wildlands Covenants Relating to Right of Entry. Wildlands shall (a) perform all investigations contemplated under this Section in a safe manner, in compliance with all applicable laws, orders, rules, regulations and ordinances; (b) if Wildlands decides not to issue its Feasibility Approval Notice, Wildlands shall promptly and adequately repair any damage to City Property caused by Wildlands by restoring the damaged area(s) to substantially its original condition; and (c) Wildlands shall not permit any liens or claims to stand against the City Property for labor or services furnished in connection with Wildlands' permitted activities. The provisions of this Subsection shall survive the termination of this Agreement.

(c) Insurance. Prior to any entry on the City Property by Wildlands or any of Wildlands' Agents, Wildlands shall furnish Owner with a certificate of Wildlands' liability insurance policy, which insurance shall be primary coverage regardless of whether Owner has other collectible insurance, and evidence of at least the coverage required by Section 32(d).

29. Owner's Representations and Warranties. As a material part of the consideration for Wildlands entering into this Agreement, Owner makes the representations and warranties set forth in this Section, each of which is material and is being relied upon by Wildlands (the continued truth and accuracy of which constitutes a condition precedent to Wildlands' obligations hereunder). The representations and warranties shall survive the Close of Escrow. The phrase "to Owner's knowledge" shall mean the current actual knowledge of Owner, excluding constructive notice and with no duty of any investigation or inquiry.

(a) Owner's Authority. Owner represents that it is a municipal corporation in good standing in the State of Oregon. Owner is the owner of the City Property. Owner has the right, power and authority to enter into this Agreement and to perform its obligations hereunder, and the person(s) executing this Agreement on behalf of Owner have the right, power and authority to do so. This Agreement constitutes the legal, valid and binding obligation of Owner enforceable against Owner in accordance with its terms subject to applicable bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting the rights of creditors generally and, as to enforceability, the general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law). This Agreement does not violate any provision of any other agreement or document to which Owner is a party or to which Owner is bound, which violation would materially impair the ability of Owner to perform its obligations under this Agreement. No further approval of any person or entity is required for Owner to perform its obligations hereunder.

(b) No Default. Owner is not in default under any contracts, leases, agreements, easements or any other documents or instruments relating to or affecting this Agreement or the Habitat Property.

(c) Pending Transactions, Suits or Proceedings. To Owner's knowledge, there are no transactions, suits, proceedings, litigation, including zoning or other land use regulation proceedings, condemnation, or investigations pending or threatened against or affecting Owner or the City Property that would prevent Owner from meeting any of its obligations under this Agreement or that would result in a material adverse change in the condition, operation, developability or marketability of the City Property for a Restoration Project from its condition as of the Effective Date.

(d) No Rights to Acquire Property. No person, firm or entity other than Wildlands has any rights in or right to acquire, lease or obtain any interest in the City Property or any part thereof, and as long as this Agreement remains in force, Owner will not, without Wildlands' prior written consent, lease, transfer, option, mortgage, pledge, or convey its interest in the City Property or any portion thereof nor any right therein, nor shall Owner enter into any agreement granting to any person or entity any option to purchase or rights superior to Wildlands with respect to the City Property or any part thereof.

(e) Hazardous Materials. To Owner's Knowledge, except as disclosed by the Documents and Materials delivered by Owner to Wildlands, Owner is in compliance with all Environmental Laws related to the City Property. Owner has not received any notice, report, or other information regarding any actual or alleged violation of Environmental Laws, or any liabilities or potential liabilities, including any investigatory, remedial, or corrective obligations, relating to any of the City Property under applicable Environmental Laws. To Owner's knowledge, except as specifically discussed in the Documents and Materials, no Hazardous Materials exist in, on, or under the City Property. Owner has not treated, stored, disposed of, handled, or released any Hazardous Materials at or on the City Property in a manner that has given or would give rise to liabilities to Wildlands, including any liability for response costs, corrective action costs, personal injury, property damage, natural resources damages, or attorney fees, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Solid Waste Disposal Act, as amended, or any other Environmental Law, nor has Owner, to Owner's knowledge, released, disposed of, arranged for, or permitted the disposal of, or transported any Hazardous Material on or to other properties owned or operated by third parties in a manner that has given or would give rise to liabilities to Wildlands, including any liability for response costs, corrective action costs, personal injury, property damage, natural resources damages or attorney fees, pursuant to any Environmental Law.

(f) No Violation of Law. Owner has received no notices from governmental authorities pertaining to violations of law or governmental regulations with respect to the City Property with which Owner has not fully complied or corrected, and Owner has no knowledge of any such violations which have not been the subject of any such governmental notices. To Owner's knowledge, Owner is not in default with respect to any of their obligations or liabilities pertaining to the City Property, nor to Owner's actual knowledge are there any facts, circumstances, conditions or events which, but for notice or lapse of time or both, would constitute or result in any such default.

(g) Information Provided to Wildlands. To Owner's knowledge, all Documents and Materials delivered to or inspected by Wildlands pursuant to the terms hereof are complete and true copies of such documents or original counterparts thereof and Owner is aware of no material inaccuracy in or material misrepresentation of the matters contained therein. The Documents and Materials delivered by Owner to Wildlands are true and correct copies and, to Owner's knowledge, there are no other documents or agreements which constitute Documents and Materials that have not been delivered by Owner.

(h) Material Change. From the execution date of this Agreement through the Closing, Owner shall promptly notify Wildlands of any material change with respect to the City Property and any information heretofore or hereafter furnished to Wildlands with respect to the City Property, including specifically, but without limitation, any changes to the Documents and

Materials or any change which would make any portion of this Agreement, including without limitation, the representations, warranties, covenants, and agreements contained herein untrue or materially misleading.

30. Wildlands' Representations and Warranties. As a material part of the consideration for Owner entering into this Agreement, Wildlands makes the representations and warranties set forth in this Section, each of which is material and is being relied upon by Owner (the continued truth and accuracy of which constitutes a condition precedent to Owner's obligations hereunder). The representations and warranties shall survive the Close of Escrow.

(a) Wildlands' Authority. Wildlands represents that it is a Delaware limited liability company in good standing in the States of Delaware and Oregon whose primary business is the development, maintenance and acquisition of land for the creation and sale of wildlife habitat mitigation credits and values. Wildlands has the right, power and authority to enter into this Agreement and to perform its obligations hereunder, and the person(s) executing this Agreement on behalf of Wildlands have the right, power and authority to do so.

(b) Wildlands' Financial Capacity. Wildlands represents that it has the financial capacity to fully construct, maintain and endow the Restoration Project.

(c) Wildlands' Expertise. Wildlands represents that it has experience and expertise in the design and development of habitat restoration projects similar to the Restoration Project, as well as the financing and execution of such habitat restoration projects.

31. Indemnity and Insurance.

(a) Indemnity by Owner. Subject to the Oregon Tort Claims Act and the Oregon Constitution, Owner shall indemnify, defend and hold harmless Wildlands, its successors and assigns, members, managers, partners, shareholders, officers, directors and/or employees (collectively, the "**Wildlands Indemnified Parties**"), and each of them, from, against, for and in respect of any and all demands, claims, actions, causes of actions, assessments, losses, diminutions in value, damages, liabilities, costs and expenses, including interest, penalties, costs of investigation and defense, amounts paid in settlement, and reasonable attorneys' and other professional fees and expenses asserted against, or paid, suffered or incurred (each, a "**Loss**" and collectively, "**Losses**") by any one or more of the Wildlands Indemnified Parties and resulting from, based upon or arising out of (i) any material breach by Owner of its obligations under this Agreement; (ii) the inaccuracy, untruth, incompleteness, misrepresentation or breach of any representation or warranty of Owner contained in or made pursuant to this Agreement; (iii) injury or harm caused to a third party or its property as a result of the acts or omissions of Owner or Owner Parties; and (iv) injury or harm caused to Wildlands and/or the Wildlands Indemnified Parties as a result of the gross negligence or willful misconduct of Owner or Owner Parties. Owner's indemnity and duty to defend and hold harmless does not extend to Losses resulting from the negligence or wrongful acts or omission of Wildlands or Wildlands Agents. The terms of this Section shall survive the Close of Escrow and termination of this Agreement.

(b) Indemnity by Wildlands. Wildlands shall indemnify, defend, and hold harmless Owner, its successors and assigns, members, managers, officers, directors, and/or employees (collectively, the "**Owner Indemnified Parties**"), and each of them, from, against, for, and in

respect of any and all Losses by any one or more of the Owner Indemnified Parties and resulting from, based upon or arising out of (i) any material breach by Wildlands of its obligations under this Agreement; (ii) the inaccuracy, untruth, incompleteness, misrepresentation or breach of any representation or warranty of Wildlands contained in or made pursuant to this Agreement; (iii) harm caused to a third party or its property as a result of the acts or omissions of Wildlands or Wildlands' Agents; (iv) injury or harm caused to Owner Indemnified Parties or its property as a result of the gross negligence or willful misconduct of Wildlands or Wildlands' Agents, and (v) any liens against the City Property relating to any work on or about the Habitat Property conducted by Wildlands or Wildlands' Agents or Losses resulting from a contest or forfeiture premised upon such liens. Wildlands will not be responsible for any Loss resulting from the negligence or wrongful acts or omission of Owner or Owner Parties. The terms of this Subsection shall survive the Close of Escrow and termination of this Agreement.

(c) Notice. Each of the Parties hereto further agrees, upon written notice from the indemnifying party, and at the sole cost and expense of the indemnifying party, to contest any demand, claim, suit, or action against which the indemnifying party has hereinabove agreed to indemnify and hold the other and all such other parties harmless, and to defend any action that may be brought in connection with any such claim with respect to which each party has hereinabove agreed to hold the other and all such other parties harmless and to bear all costs and expenses of such contest and defense. The terms of this Subsection shall survive the Close of Escrow and Termination of this Agreement.

(d) Insurance. Prior to any entry on the Habitat Property by Wildlands or any of Wildlands' Agents, Wildlands agrees to obtain and maintain, until the Land Use and Easement Agreement is terminated, at its own expense, and shall furnish Owner with a certificate evidencing Wildlands' Comprehensive General Liability insurance, including but not limited to Broad Form Property Damage, Personal Injury, Completed Operations, Contractual and XCU Coverage; Automobile Liability Insurance, including Owned Automobiles and Automobiles Under Long-Term Lease, Hired automobiles, and Non-Owned Automobiles; and Worker's Compensation and Employer's Liability Insurance for protection of Owner's employees as required by statute in the state in which the Habitat Development Work is to be performed. If Wildlands employs persons who are not covered by its worker's compensation insurance policy, Wildlands will also cause such persons to execute a declaration that each of such persons renders services as an independent contractor. Coverage limits and scope will be no less than minimum coverage requirements specified below or applicable statutory limits, whichever is greater. The following minimum coverage limits apply.

(i) Commercial General Insurance:

- a. Two Million Dollars (\$2,000,000.00) per occurrence;
- b. Three Million Dollars (\$3,000,000.00) general aggregate;
- c. Three Million Dollars (\$3,000,000.00) products/completed operations aggregate;
- d. Three Million Dollars (\$3,000,000.00) personal and advertising injury;

(ii) Employer's Liability Insurance:

- a. Two Million Dollars (\$2,000,000.00) per occurrence;
- b. Two Million Dollars (\$2,000,000.00) disease each employee;
- c. Two Million Dollars (\$2,000,000.00) disease – policy.

(iii) Comprehensive Automobile Liability Insurance including coverage for all owned, hired and non-owned vehicles:

- a. Two Million Dollars (\$2,000,000.00) per occurrence combined single limit;
- b. Three Million Dollars (\$3,000,000.00) aggregate bodily injury.
- c. Prior to commencing construction activities, as part of the Construction Coordination Agreement in Section 23(e), Owner and Wildlands will agree upon any additional types and amounts of insurance needed by Wildlands during construction of the Restoration Project.

(e) Such insurance shall be primary coverage regardless of whether Owner has other collectible insurance, with the exception of the worker's compensation policy shall contain an endorsement naming Owner as an additional insured, and shall be in form and substance reasonably satisfactory to Owner by an insurer reasonably satisfactory to Owner. Wildlands shall continue to maintain such insurance after the Close of Escrow until such time as the Land Use and Easement Agreement is terminated. This Section shall survive the close of Escrow.

32. Default by Wildlands; Liquidated Damages. WILDLANDS RECOGNIZES THAT THE CITY PROPERTY WILL BE REMOVED BY OWNER FROM THE MARKET DURING THE EXISTENCE OF THIS AGREEMENT, AND THAT IF THE CLOSE OF ESCROW DOES NOT OCCUR BECAUSE OF WILDLANDS' DEFAULT WHICH IS NOT CURED PURSUANT TO THE PROVISIONS OF SECTION 34 BELOW, IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE EXTENT OF THE DETRIMENT TO OWNER. THE PARTIES HAVE DETERMINED AND AGREED THAT THE ACTUAL AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY OWNER AS A RESULT OF ANY SUCH DEFAULT IS DIFFICULT OR IMPRACTICABLE TO DETERMINE AS OF THE DATE OF THIS AGREEMENT AND THAT THE AMOUNT OF THE DEPOSIT IS A REASONABLE ESTIMATE OF THE AMOUNT OF SUCH DAMAGES. FOR THESE REASONS, THE PARTIES AGREE THAT IF THE CLOSE OF ESCROW DOES NOT OCCUR BECAUSE OF WILDLANDS' DEFAULT IF NOT CURED AS PROVIDED IN SECTION 34 BELOW, THE DEPOSIT SHALL BE FORFEITED TO OWNER AS LIQUIDATED DAMAGES. UPON ANY SUCH BREACH OR DEFAULT BY WILDLANDS HEREUNDER, THIS AGREEMENT SHALL BE TERMINATED, AND NEITHER PARTY SHALL HAVE ANY FURTHER RIGHTS OR OBLIGATIONS HEREUNDER,

EACH TO THE OTHER, SAVE FOR THE TERMS THAT SURVIVE THE TERMINATION OF THIS AGREEMENT AND EXCEPT FOR THE RIGHT OF OWNER TO RETAIN SUCH LIQUIDATED DAMAGES; PROVIDED, HOWEVER, THAT NOTHING CONTAINED HEREIN SHALL IN ANY MANNER LIMIT THE AMOUNT OF DAMAGES OBTAINABLE PURSUANT TO AN ACTION UNDER ANY HOLD HARMLESS, DEFENSE AND INDEMNIFICATION PROVISION SET FORTH IN THIS AGREEMENT OR ATTORNEYS' FEES RECOVERABLE PURSUANT TO THIS AGREEMENT. DELIVERY TO AND RETENTION OF THE DEPOSIT AMOUNT SHALL BE OWNER'S SOLE AND EXCLUSIVE REMEDY AGAINST WILDLANDS IN THE EVENT OF A MATERIAL DEFAULT OR BREACH BY WILDLANDS RESULTING IN THE FAILURE OF CLOSING, AND OWNER WAIVES ANY AND ALL RIGHT TO SEEK OTHER RIGHTS OR REMEDIES AGAINST WILDLANDS, INCLUDING WITHOUT LIMITATION, SPECIFIC PERFORMANCE.

Owner 

Wildlands 

33. Termination Rights. The following provisions shall apply with respect to the termination of this Agreement.

(a) Owner's Termination Rights. Owner shall have the right to terminate this Agreement by written notice to Wildlands at any time after the date on which a material default by Wildlands has occurred under this Agreement or the Land Use and Easement Agreement, provided that Wildlands fails to cure such default within the following time periods: Wildlands shall have (a) ten (10) days after the delivery of written notice stating the nature of the default in which to cure any default that can be cured through the payment of money ("Monetary Cure Period"), and (b) thirty (30) days after the delivery of written notice from Owner stating the nature of the default ("Non-Monetary Cure Period), in which to cure a default which cannot be cured by the payment of money (a "Non-Monetary Default"); provided, however, if such Non-Monetary Default is reasonably capable of cure but is not reasonably capable of being cured (without taking into account financial capability) within the Non-Monetary Cure Period, such failure shall not constitute a default so long as Wildlands commences the cure of such Non-Monetary Default within such thirty (30)-day period and diligently prosecutes such cure to completion within one hundred twenty (120) days after such written notice from Owner. The term "Non-Monetary Cure Period" as used in this Agreement shall also mean the one hundred twenty (120)-day period to the extent applicable. In the event that this Agreement is terminated by Owner at any time prior to the Closing pursuant to the provisions of this subsection (a), Owner's remedies shall be limited pursuant to Section 33above. In the event that this Agreement is terminated by Owner at any time after Closing, Owner may pursue any remedies at law or in equity, including those remedies listed in this Agreement.

(b) Wildlands' Termination Rights. Wildlands shall have the right to terminate this Agreement at any time by providing written notice to Owner (i) if Owner is in material default under this Agreement or the Land Use and Easement Agreement, provided that Owner fails to cure such default within thirty (30) days after the delivery of written notice from Wildlands stating the nature of the default, or if such default cannot be cured within such thirty (30) day period, but is reasonably capable of cure, such failure shall not constitute default so long as Owner commences the cure within such thirty (30) day period and diligently prosecutes such cure to completion within one hundred twenty (120) days after such written notice to Owner; or

(ii) if at any time before undertaking construction Wildlands determines, in its sole and absolute discretion, that the proposed Restoration Project is not economically viable. Except to the extent that this Agreement is terminated pursuant to Subsection (i) above (i.e., a material default by Owner), Wildlands' payment obligations under Section 26 above shall survive the termination of this Agreement.

(c) Quitclaim. In the event that this Agreement is terminated pursuant to the provisions of Subsection (a) or (b) above or for any other reason, Wildlands shall quitclaim all of its right, title, and interest in and to the City Property back to Owner, and shall promptly execute any other documents that are necessary to terminate the Land Use and Easement Agreement. Notwithstanding the termination of such documents, the Conservation Instrument will continue to remain as an encumbrance against the Habitat Property if previously recorded, and Owner shall continue to comply with the terms of the Conservation Instrument. The terms of this Section 34 shall survive Closing and the termination of this Agreement.

34. Assignment. Provided that Wildlands complies with the terms of this Section 35 and subject to Owner's commercially reasonable approval, Wildlands shall have the right to assign this Agreement to a new entity to be owned by (a) Wildlands, (b) one or more of the principals of Wildlands, and/or (c) an entity in which one or more of the principals of Wildlands have an interest. In order for any permitted assignment to be valid, (a) any such assignment shall be in writing, (b) the assignee shall have agreed in such written assignment to assume all of the obligations of Wildlands hereunder, (c) any such assignment shall be an assignment of all of Wildlands' rights and obligations under this Agreement, (d) a copy of the written assignment shall be delivered to Owner immediately upon execution, and (e) the written assignment shall contain the name, address, telephone number, facsimile number and contact person for the assignee.

35. Confidentiality. Notwithstanding any other provision contained herein to the contrary, Wildlands, as a Representative (as such term is defined in the Management Agreement) of Heron Pacific, LLC, and Owner shall continue to be bound by the Confidentiality Agreement; provided, however, Wildlands and the Owner shall be permitted to disclose such Confidential Information (as such term is defined in the Confidentiality Agreement) as is reasonably necessary in order (a) to obtain the Regulatory Agencies' Approval of the Restoration Project Entitlement Applications, (b) to transfer, sell, assign or convey the Habitat Values, and (c) to otherwise perform under this Agreement.

36. Resolution of Disputes. Any dispute, controversy or claim arising out of or relating to this Agreement, including any dispute relating to interpretation of or performance under the Agreement ("**Dispute**"), shall be resolved in the manner set forth in this Section 36, which shall be in lieu of litigation in any court, and the Parties specifically waive any right to a jury trial of any Dispute between them.

(a) Mediation of Disputes. Either Party ("**Claimant**") desiring to arbitrate any Dispute shall first notify in writing the other Party hereto of the Claimant's intent to institute arbitration proceedings as provided hereinafter. Such notice ("**Claim**") shall state the nature of the Claim and the relief sought. Within thirty (30) days thereafter, the Claimant and the other Party shall mediate a resolution of the Dispute before a mediator employed by the Judicial Arbitration and Mediation Service, or such other mediation service which is mutually agreeable

to the Parties, the cost of which shall be shared equally between Wildlands and Owner. If the Parties have not reached a settlement of the Dispute within thirty (30) days following the mediation, the Claimant or the other Party may initiate formal arbitration proceedings pursuant to the procedures set forth below. Refusal of either Party to assent to the mediation shall entitle the initiating Party to obtain appropriate court relief to compel such mediation.

(b) **ARBITRATION OF DISPUTES.** In the event the Dispute is not resolved by mediation, the Dispute shall be resolved by binding arbitration before a retired judge of the Supreme Court, Appellate Court or Circuit Court of the State of Oregon (the "Arbitrator"), in accordance with the following provisions:

(i) The Parties stipulate and agree that any and all necessary parties may be joined in the arbitration, but the Parties agree to proceed with arbitration of all Disputes between themselves even if other parties refuse to participate. The Parties specifically waive any objection to arbitration based on the failure or refusal of any other party to be joined. If the nature of the Dispute is such that it cannot be finally resolved without the participation of other parties who refuse to participate in the arbitration, either Party may make a motion to the arbitrator to request a ruling that the Disputes cannot be finally resolved without the participation of the other parties and to transfer the Dispute to Clackamas County Circuit Court for resolution in accord with the Oregon Rules of Civil Procedure, without limitation.

(ii) The arbitration shall be initiated by written notice (the "Arbitration Notice") of a demand to arbitrate by registered or certified mail sent by one Party to the other Party or Parties. The Arbitration Notice shall include a plain statement of the Dispute and the relief requested. It shall attach the documents the Party demanding arbitration relies upon and a detailed statement of the expected testimony of witnesses, including expert witnesses. Within thirty (30) days of receipt of the demand for arbitration, each responding Party or Parties shall provide its own plain statement of the Dispute, together with documents such Party intends to rely upon and the expected testimony of witnesses, including expert witnesses. Owner and Wildlands shall each advance one-half of the Arbitrator's fee, as fixed and required by the Arbitrator in order to initiate the arbitration, although the Parties shall ultimately bear responsibility for such fee as determined by the Arbitrator.

(iii) The Parties shall attempt to agree on a retired judge to be the Arbitrator. If they are unable to agree, the Parties shall simultaneously exchange the names of three available retired judges and a judge appearing on both lists shall be selected. If there is no common available Arbitrator and the Parties still cannot agree on an Arbitrator, the Parties shall submit further lists until one is selected. If the Parties have not selected the Arbitrator within fifteen (15) days following the responding Party's statement of its position, the presiding judge of the Circuit Court of Oregon in and for the County of Clackamas shall appoint the Arbitrator. The Arbitrator so selected shall be notified immediately and a date for the arbitration shall be set. The Dispute shall be resolved by binding arbitration under the American Arbitration Association's ("AAA") Commercial Arbitration Rules then in effect, as supplemented by this Section 36.

(iv) The Arbitrator shall schedule a pre-hearing conference to resolve procedural matters, arrange for the exchange of information, obtain stipulations and narrow the issues.

(v) Except and only to the extent pre-empted by federal law, the substantive law of Oregon shall apply to the arbitration process and the Dispute. The law of Oregon shall be applied by the arbitrator to the Arbitration Issues and the Parties as it would be applied, in the judgment of the arbitrator, if the Parties were before a court of general jurisdiction in Oregon. However, this agreement controls over any Oregon or federal law that is not consistent with this agreement unless such law requires a different result.

(vi) The Arbitrator shall have the power to grant all legal and equitable remedies, including, but not limited to, injunction, specific performance, reformation, cancellation, accounting and compensatory damages, except only that punitive damages shall not be awarded.

(vii) Except as otherwise required by law, the arbitrator's final award shall be final, binding, and non-appealable; and no Party may seek any amendment to or reconsideration of the arbitrator's final award except for correction of non-substantive scrivener's or administrative errors. The arbitrator may issue such pre-final award rulings, instructions, and orders (including rulings in the nature of summary or partial summary judgment and orders compelling discovery) as the arbitrator deems necessary to fulfill the obligations of the arbitrator as set forth herein, that the Parties shall obey such rulings, instructions and orders, and that the arbitrator shall have the authority to enforce such rulings, instructions and orders by way of sanctions to include, but not to be limited to, monetary sanctions, the preclusion of evidence, and general or partial default awards, all of which (if any) shall be incorporated into the arbitrator's final award.

(viii) The Parties shall on their own initiative conduct such discovery as is reasonably necessary for them to prepare their cases, generally in accordance with ORS Ch. 36 and the Oregon Rules of Civil Procedure, but without unnecessary complexity or formality. The arbitrator may on motion of any Party or on the arbitrator's own motion order the Parties to adopt and follow such discovery procedures and methods as the arbitrator deems consistent with fairness, expedition, and economy and in so doing may depart from ORS Ch 36 or the Oregon Rules of Civil Procedure. The Parties shall conduct discovery expeditiously and cooperatively, and the arbitrator may, on request of either Party, require any Party to act with regard to discovery in the way most consistent with economy, expeditiousness, and fairness and without undue regard to technicalities.

(ix) The arbitrator is directed to, and the Parties agree that the arbitrator shall have the authority to, conduct the arbitration hearing and all pre-hearing matters, including discovery, in whatever fashion the arbitrator deems most consistent with fairness, expedition, and economy. The arbitrator shall be guided by, but may freely depart from, the rules of procedure and evidence that ordinarily apply in litigation.

(x) An arbitration hearing shall be held on dates agreed upon by the Parties in consultation with the arbitrator. If the Parties cannot agree on hearing dates by a date satisfactory to the arbitrator, the arbitrator shall select dates in the arbitrator's sole discretion, and the Parties may not contest those dates.

(xi) Each Party shall pay an equal share of the fees and costs charged by the arbitrator. Each Party agrees that its failure to timely pay its share of the fees and costs of

the arbitrator upon request by the arbitrator, including fees and costs requested by the arbitrator in advance, shall constitute both consent by the non-paying Party to entry of a default award against the non-paying Party and in favor of the paying Party and a waiver of any challenge to such a default.

(xii) The arbitrator shall issue a final and dispositive award on all substantive issues no later than 14 days after the last hearing day. A supplemental award may be issued, if appropriate, for fees and costs. The awards may be reduced to and enforced as judgments in accordance with applicable law.

(xiii) The arbitrator is encouraged to require the Parties to submit stipulated facts and to stipulate to exhibits in advance of the arbitration hearing and to impose other requirements that simplify and expedite the arbitration process and arbitration hearing consistent with fundamental fairness for the Parties.

(xiv) The arbitrator is encouraged to require the Parties to submit stipulated facts and to stipulate to exhibits in advance of the arbitration hearing and to impose other requirements that simplify and expedite the arbitration process and arbitration hearing consistent with fundamental fairness for the Parties.

(xv) In the event that an arbitrator selected by the Parties or appointed by a judge cannot or will not for any reason continue in that capacity, the Parties shall within seven business days agree on a new arbitrator, and if they fail to do so, a replacement arbitrator shall immediately be selected by the departing arbitrator in that arbitrator's sole discretion, but after consultation with the Parties. If the departing arbitrator is unable or unwilling to select a replacement arbitrator, the Parties shall ask the Presiding Judge of the Circuit Court of Clackamas County, Oregon to appoint a replacement arbitrator, and the Parties shall be bound by such appointment unless there is showing of actual bias or prejudice as to the arbitrator appointed, in which case they ask the presiding judge to appoint another arbitrator.

(xvi) If the Parties have a disagreement about the meaning or effect of this Section 36, such disagreement shall be submitted to the Arbitrator, who shall be the sole and final authority as to the meaning and effect of this section and the rights and obligations of the Parties thereunder. The Arbitrator shall include any determinations made as to the meaning and effect of this section in the final award. Unless otherwise required by law, no Party may seek relief or redress of any kind in any forum other than the arbitration hereunder as to any matter falling within the scope of this section or the dispute.

(xvii) The Arbitrator shall award reasonable attorneys' fees and costs, including the expert fees, to the "Prevailing Party." For purposes of this section, the "**Prevailing Party**" shall be the Party which obtains a net monetary recovery, exclusive of attorneys' fees and costs UNLESS the net monetary recovery is equal to or less than the amount of a written offer from the opposing Party made after the negotiations described in Section 36. The Arbitrator shall have exclusive and binding authority to determine entitlement to attorneys' fees and costs, including experts' fees, under this section, but the Arbitrator shall reduce any such award to any party who, in the Arbitrator's opinion, unnecessarily delayed or complicated the arbitration process. Such reduction shall be in an amount to be determined by the Arbitrator in the Arbitrator's sole discretion. Notwithstanding whether any party is otherwise entitled to fees, the

arbitrator may award fees and costs to any party upon a finding that another party unnecessarily delayed or complicated the Arbitration process.


(xviii) The arbitration shall be conducted in a place agreed upon by the Parties. If the Parties cannot agree on a location, the Arbitrator shall select a location in Clackamas County, Oregon. If the use of a space or other facilities for the arbitration hearing generates costs, the Parties shall pay the costs equally, unless the arbitrator finds that specified costs should be borne differently. Any party may be represented by counsel or other authorized Representative.

"NOTICE: BY INITIALLING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY OREGON LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALLING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE OREGON CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."



Owner's Initials



Wildlands' Initials

37. Miscellaneous Provisions.

(a) No Broker. Each of the Parties hereto represents to the other that it has dealt with no real estate salesperson, broker or finder in connection with this transaction, and insofar as they know, no salesperson, broker or other person is entitled to any commission, finder's fee or other compensation in connection with this transaction. If any claims for any brokers' or finders' fees for the consummation of this Agreement arise, then Wildlands hereby agrees to indemnify, hold harmless and defend Owner from and against such claims if they shall be based upon any statement, representation or agreement by Wildlands, and Owner hereby agrees to indemnify, hold harmless and defend Wildlands if such claims shall be based upon any statement, representation or agreement made by Owner.

(b) Notice. All notices, demands, consents, requests or other communications required to or permitted to be given pursuant to this Agreement shall be in writing, shall be given

only in accordance with the provisions of this Section 37, shall be addressed to the Parties in the manner set forth below, and shall be conclusively deemed to have been properly delivered: (i) upon receipt when hand delivered during normal business hours (provided that notices which are hand delivered shall not be effective unless the sending Party obtains a signature of a person at such address that the notice has been received); (ii) upon the day of delivery if the notice has been deposited in a authorized receptacle of the United States Postal Service as first-class, registered or certified mail, postage prepaid, with a return receipt requested (provided that the sender has in its possession the return receipt to prove actual delivery); or (iii) one (1) Business Day after the notice has been deposited with an overnight courier (provided that the sending Party receives a confirmation of actual delivery from the courier). The addresses of the Parties to receive notices are as follows:

TO WILDLANDS: Wildlands Capital Partners, LLC
3855 Atherton Road
Rocklin, California 95765
Attention: Sherrie R. Aland, Esquire
Telephone: (916) 435-3555
Facsimile: (916) 435-3556

TO OWNER: City of Milwaukie
Attention: City Manager
10722 SE Main St
Milwaukie, Oregon 97222 Telephone: (503) 786-7501
Facsimile: (503) 652-4433

With a copy to: Steve Shropshire
Jordan Ramis PC
Two Centerpointe Dr., 6th Fl.
Lake Oswego, Oregon 97035
Telephone: (503) 598-7070
Facsimile: (503) 598-7373

TO ESCROW HOLDER: Ticor Title Company
111 SW Columbia, Suite 1000
Portland, Oregon 97201
Attention: Candice Weischedel, Escrow Officer
Telephone: (503) 242-1210
Facsimile: (503) 242-0770

Any Party may change its address for purposes of this Section by giving the other Party written notice of the new address in the manner set forth above.

(c) Integration. This Agreement and the Exhibits related to and referred to within this Agreement and the Confidentiality Agreement contain the entire agreement of the Parties hereto; and this Agreement supersedes any and all prior written and oral agreements between them. There are no representations, agreements, arrangements or understandings, oral or written, relating to the subject matter which are not fully expressed herein.

(d) Additional Documents. From time to time prior to and after the Close of Escrow, each Party shall execute and deliver such instruments of transfer and other documents as may be reasonably requested by the other Party to carry out the purpose and intent of this Agreement, including, but not limited to, documents necessary for compliance, as required by law or the requirements of any Regulatory Agency.

(e) Calculation of Time Periods. If any date for performance herein falls on a day other than a Business Day, the time for such performance shall be extended to 5:00 p.m. Pacific Time on the next Business Day, and the next time period shall be calculated from and after the date of such actual date for performance.

(f) Attorneys' Fees. If a suit, action, appeal, mediation, arbitration or other proceeding of any nature whatsoever, including, without limitation, any proceeding under the U.S. Bankruptcy code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to this Agreement, the prevailing Party shall be entitled to recover from the losing Party its attorney fees, paralegal fees, accountant fees, and other expert fees, and all other fees, costs and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, appeal, mediation, arbitration or other proceeding, the amount of fees shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

(g) Dependency and Survival of Provisions. The respective warranties, representations, covenants, agreements, obligations and undertakings of each Party hereunder shall be construed as dependent upon and given in consideration of those of the other Party, and shall survive the Close of Escrow and delivery of the Land Use and Easement Agreement, and, the termination of this Agreement to the extent provided herein.

(h) No Third-Party Beneficiaries. This Agreement shall be for the sole and exclusive benefit of the Parties hereto and shall not confer any right upon any third party, unless expressly so stated herein.

(i) Condemnation.

(i) Before Close of Escrow. If, before the Close of Escrow, any portion of the Habitat Property is taken in condemnation or under the right of eminent domain, or in the event any portion of the Habitat Property is damaged or destroyed such that such portion cannot be restored by Wildlands pursuant to this Agreement, then such portion of the Habitat Property shall be excluded from the Habitat Property, and shall not be subject to the Land Use and Easement Agreement or any of the Restoration Project Permits, Approvals and Certifications or this Agreement. Notwithstanding the foregoing provision, if Wildlands, acting in good faith, reasonably determines, that the condemnation action or damage will have such an effect that the Restoration Project will no longer be economically viable, Wildlands shall have the right to terminate this Agreement, in which event, except as otherwise provided in this Agreement, the Parties shall have no further obligations under this Agreement save for those obligations which survive the termination of this Agreement. Owner (as applicable to City Property) shall be entitled to all condemnation awards, damages or insurance proceeds under this Subsection (i) with respect to the City Property.

(ii) After Close of Escrow. If, after the Close of Escrow, any portion of the Habitat Property shall be taken in condemnation or under the right of eminent domain, or in the event that any portion of the Habitat Property is damaged or destroyed after the Close of Escrow where such damage or destruction is not caused by any action or omission of Wildlands, and provided that Wildlands is not in default under this Agreement beyond applicable notice and cure periods, then Wildlands shall be entitled to that portion of the condemnation award or insurance proceeds (as applicable) allocable to the fair market value of the Habitat Rights only to the extent that any valuation includes value for the Habitat Values. Owner shall be entitled to the balance of the condemnation award or insurance proceeds (as applicable to City Property). The provisions of this Subsection shall survive the Close of Escrow.

(j) Counterparts. This Agreement may be executed in counterparts, and all counterparts together shall be construed as one document.

(k) Electronic Transmittals. The Parties agree that if this Agreement is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as original signatures and given the same legal effect as an original signature.

(l) Recitals/Exhibits. The Recitals set forth in this Agreement and the exhibits referenced herein are incorporated herein by this reference.

(m) Severability. If any portion of this Agreement shall be declared void, invalid, or illegal, the validity or legality of any other portion of this Agreement shall not be affected thereby.

(n) Choice of Law. The validity of this Agreement and the rights, obligations, and relations of the Parties hereunder shall be construed and determined under and in accordance with the substantive laws of the State of Oregon, without regard to its principles of conflicts of law.

(o) Pre-Suit Mediation. In the event any dispute arises out of or in connection with this Agreement, the Parties must submit such dispute to mediation prior to litigation. If the Parties cannot mutually and reasonably agree upon a mediator within fourteen (14) days following a Party's request therefore, any Party may apply to the presiding judge of the Clackamas Circuit Court to appoint a mediator. Mediation shall be non-binding upon the Parties unless a written agreement is signed by the Parties. The Parties shall share the mediator's fee equally. Each Party shall bear its own costs and attorneys' fees, if any, associated with the mediation. The mediation shall be conducted at a location in the greater Portland metropolitan area.

(p) Choice of Forum and Jurisdiction. Any action, suit, or proceeding arising from or relating to this Agreement shall not be commenced except in the appropriate court (state or federal) in the County of Clackamas, State of Oregon. Each of the Parties irrevocably submits to the exclusive jurisdiction of each such court in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the action, suit or proceeding shall be heard and determined only in such court and agrees not to bring any action, suit or proceeding arising out of or relating to this Agreement in any other court. The Parties agree that any Party may file a copy of this paragraph with any court as written

evidence of the knowing, voluntary and bargained agreement among the Parties irrevocably to waive any objections to venue or to convenience of forum.

(q) Inconsistencies. In the event of any conflict or ambiguity between the terms and conditions of this Agreement and any exhibits, attachments or prior agreements, the terms and conditions of this Agreement shall prevail.

(r) Amendment. This Agreement may be amended solely pursuant to a written agreement that refers to this Agreement by name, describes fully and completely all terms and conditions of such amendment and includes the signatures of both Parties.

(s) Relationship of the Parties. In the performance of this Agreement, Wildlands shall at all times be acting as an independent buyer, with the right to resell the Habitat Values. This Agreement shall not constitute or give rise to a joint venture, partnership, association or similar type relationship between the Parties, nor an employer-employee or principal-agent relationship between Parties.

(t) Successors and Assigns. This Agreement shall inure to the benefit of and be binding on the Parties to this Agreement and their respective successors and assigns unless otherwise stated in this Agreement.

(u) Representation by Counsel. Notwithstanding any rule or maxim of construction to the contrary, any ambiguity or uncertainty shall not be construed against either Wildlands or Owner based upon authorship of any of the provisions hereof. Wildlands and Owner each hereby warrant, represent and certify to the other as follows: (i) that the contents of this Agreement have been completely and carefully read by the representing Party and counsel for the representing Party; (ii) that the representing Party has been separately represented by counsel and the representing Party is satisfied with such representation; (iii) that the representing Party's counsel has advised the representing Party of, and the representing Party fully understands, the legal consequences of this Agreement; and (iv) that no other person (whether a party to this Agreement or not) has made any threats, promises or representations of any kind whatsoever to induce the execution hereof, other than the performance of the terms and provisions hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the dates set forth below.

[Signatures follow on next page]

WILDLANDS:

**WILDLANDS CAPITAL PARTNERS,
LLC, a Delaware limited liability company**

By: 

Its: Manager

Date: July 8, 2013

OWNER:

**CITY OF MILWAUKIE, an Oregon
municipal corporation**

By: 

Its: City Manager

Date: July 2, 2013

ACCEPTANCE BY ESCROW HOLDER

The undersigned Escrow Holder hereby acknowledges that on _____, 2013, the undersigned received a fully-executed duplicate original (with Section 33 initialed by both Parties) of the foregoing Habitat Development Agreement and Initial Escrow Instructions by and between the City of Milwaukie and Wildlands Capital Partners, LLC, a Delaware limited liability company. Subject to Escrow Holder's receipt of acceptable escrow instructions, Escrow Holder agrees to act as the Escrow Holder under this Agreement, and to comply with these instructions. Escrow Holder has assigned Escrow Number _____ to the Habitat Property for that purpose.

TICOR TITLE COMPANY

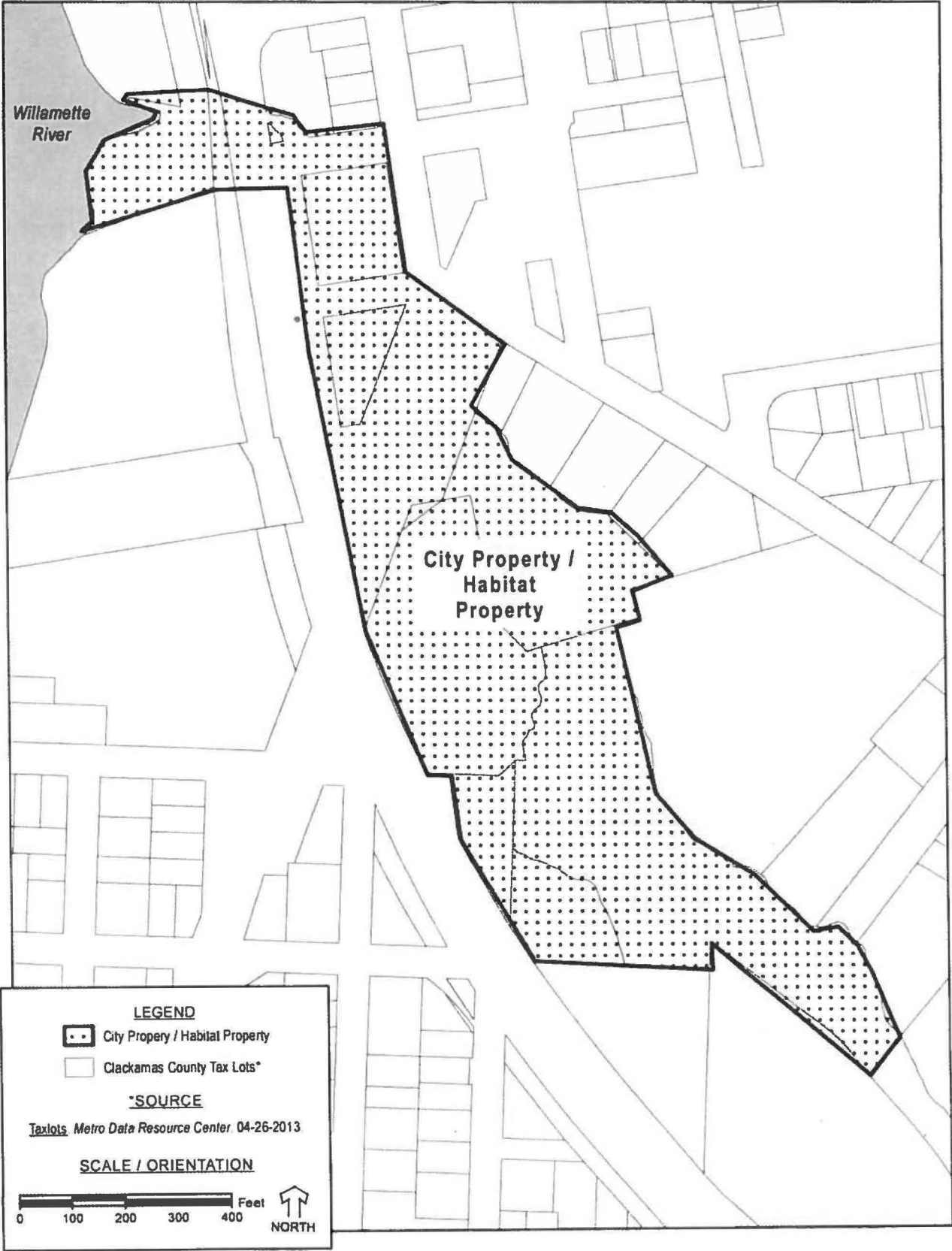
By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT A - SITE PLAN



**Exhibit B
Memorandum of Agreement**

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

Wildlands Capital Partners, LLC
3855 Atherton Road
Rocklin, California 95765
Attention: Sherrie Aland

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**MEMORANDUM OF HABITAT DEVELOPMENT AGREEMENT
(Kellogg Creek)**

This Memorandum of Habitat Development Agreement ("**Memorandum**") is executed in connection with that certain Habitat Development Agreement and Initial Escrow Instructions dated as of June __, 2013, as amended from time to time (the "**Agreement**"), entered into by and between the **CITY OF MILWAUKIE**, an Oregon municipal corporation ("**Owner**"), and **WILDLANDS CAPITAL PARTNERS, LLC**, a Delaware limited liability company ("**Wildlands**"), relating to certain real property located in the City of Milwaukie, County of Clackamas, State of Oregon, and more particularly described in the legal description attached hereto as Exhibit A and incorporated herein by this reference (the "**Overall Property**"). The Overall Property is shown generally on the map attached hereto as Exhibit B and incorporated herein by this reference. Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

Owner agrees to sell, and Wildlands agrees to purchase, the Habitat Development Rights with respect to a portion of the Overall Property, consisting of approximately ___ ± acres, which is generally shown on Exhibit B as the "**Habitat Property**," for a price and under the terms and conditions specifically set forth in the Agreement. Unless terminated earlier in accordance with the terms and conditions of the Agreement, the Close of Escrow for Wildlands' purchase of the Habitat Development Rights shall occur within thirty (30) days after the date on which Wildlands obtains Approval of the Restoration Project Entitlement Applications, but in no event later than insert date that is 10th anniversary of effective date of Agreement, in accordance with the provisions of the Agreement.

IN WITNESS WHEREOF, Owner and Wildlands have executed this Memorandum as of the dates set forth next to their signatures below.

CITY OF MILWAUKIE, an Oregon
municipal corporation

**WILDLANDS CAPITAL PARTNERS,
LLC**, a Delaware limited liability company

By: _____
Its: _____
Date: _____

By: _____
Its: _____
Date: _____

**Exhibit C
Land Use and Easement Agreement**

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

Wildlands Capital Partners, LLC
3855 Atherton Road
Rocklin, California 95765
Attention: Sherrie Aland

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**LAND USE AND EASEMENT AGREEMENT
(Kellogg Creek)**

This Land Use and Easement Agreement ("**Agreement**"), dated for reference purposes only as _____, _____, is entered into by and between **CITY OF MILWAUKIE**, an Oregon municipal corporation ("**Owner**"), and **WILDLANDS CAPITAL PARTNERS, LLC**, a Delaware limited liability company ("**Wildlands**"),.

Recitals

H. Owner is the owner of certain real property located in the City of Milwaukie, County of Clackamas, State of Oregon, and more particularly described in the legal description attached hereto as Exhibit A and incorporated herein by this reference (the "**City Property**"). The location of the City Property is shown on the site plan ("**Site Plan**") attached hereto as Exhibit B and incorporated herein by this reference.

I. Wildlands desires to undertake the development of a Natural Resource Damages Assessment ("**NRDA**") restoration project, a stream restoration project, a conservation bank, a mitigation bank, and/or a project to improve water quality to obtain credits or values (a "**Restoration Project**") on Kellogg Creek near its confluence with the Willamette River for the purpose of generating Habitat Values (as hereinafter defined).

J. Owner is interested in supporting a Kellogg Lake/Kellogg Creek Restoration Project for the purpose of developing a project with environmental, recreational, cultural and multimodal transportation benefits.

K. Wildlands intends to construct a majority of the Restoration Project on the City Property.

L. Owner and Wildlands entered into that certain Habitat Development Agreement and Initial Escrow Instructions dated June __, 2013, as amended from time to time (the "**Purchase Agreement**"), whereby Wildlands agreed to purchase, and Owner agreed to sell, the exclusive right to permit, create, develop, maintain, operate and sell the rights to use the City Property for the purpose of undertaking riparian and habitat restoration activities (the "**Habitat Development Rights**"). The Habitat Development Rights include, without limitation, the exclusive right to create and maintain the Restoration Project and the exclusive right to sell to third parties DSA's.

mitigation credits, conservation credits, habitat values, mitigation values and any other environmental credits and values that Wildlands deems appropriate, including, without limitation, those credits and values relating to water quality (collectively, the "Habitat Values"). The Habitat Development Rights are more fully described below.

M. Pursuant to the terms of the Purchase Agreement, Owner and Wildlands have agreed to record this Agreement against the City Property. Except as otherwise provided herein, all capitalized terms set forth in this Agreement shall be defined as provided in the Purchase Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the parties agree as follows:

Agreement

1. Grant of Use Rights. Owner hereby grants to Wildlands the following rights and interests, which shall constitute Habitat Development Rights:

(a) Exclusive Rights to Habitat Values and Use of City Property. All Habitat Values in the City Property, and an exclusive right to use the City Property for the purposes of developing and marketing Habitat Values, including, without limitation, the following with respect to the City Property: (i) the exclusive right to determine the natural resources to be restored; (ii) the exclusive right to determine the wetlands, streams, habitat and species sought to be protected, in the exercise of Wildlands' reasonable and professional judgment; (iii) the exclusive right to permit, create, develop, maintain, operate, use, encumber, trade and sell Habitat Values at prices and on terms determined by Wildlands in its sole discretion; (iv) the exclusive right to create, maintain, manage and monitor a Restoration Project; (v) the exclusive right to perform grading and construction activities on the Restoration Project in conjunction with the development of a Restoration Project; and (vi) the exclusive right to represent Owner and its successors-in-interest with respect to each of the foregoing.

(b) Access Rights. Nonexclusive easements (i) over the City Property to use the roads, paths, trails and other access-ways, as they may exist from time to time to maximize Habitat Values, for purposes of vehicular and pedestrian access to, from and through the City Property; and (ii) over the City Property to create such service roads within the Habitat Property, as may be reasonably necessary to construct, maintain, repair and reconstruct the Habitat Property. **[discuss what additional detail, if any, the City requires with respect to the location of these easements]**

(c) Water Rights. Nonexclusive easements to any existing watercourses, existing ground water wells, and other water rights appurtenant to or otherwise granted to the City Property, as well as the right to extract and/or divert water from such sources and to transport and convey such water to and through the City Property for purposes of wetland, stream, or habitat restoration and maintenance within the City Property. **[discuss what additional detail, if any, the City requires with respect to the location of these easements]**

(d) Right to Manage. The right to manage the City Property consistent with the Restoration Project Permits, Approvals and Certifications and in Wildlands' best professional

judgment.

(e) Incidental Rights. Such incidental rights as may be reasonably necessary or appropriate in order to develop, maintain, operate and/or preserve the City Property in accordance with the requirements of the United States Army Corps of Engineers, the United States Fish and Wildlife Service, the EPA, the United States National Marine Fisheries Service, the DEQ, the NRDA Trustees, the City of Milwaukie, the County of Clackamas and/or any other governmental or quasi-governmental federal, state, and local agency with jurisdiction over the Restoration Project (collectively, the "**Regulatory Agencies**"). including, without limitation, the right to use the submerged and submersible lands abutting the City Property, to the extent they are not included in the City Property, that are necessary in order to connect Wildlands' Restoration Project to the river and to obtain approval of the Restoration Project and to the extent that the Owner owns such incidental rights. **[discuss what additional detail, if any, the City requires with respect to the location of these easements]**

2. Development of Habitat Values. Wildlands shall have the right to process with the Regulatory Agencies any applications that are necessary in order for Wildlands (i) to obtain the necessary permits and approvals for its development of the City Property for a Restoration Project, and (ii) to obtain approval and certification from the NRDA Trustees of the projected and conventionally estimated DSAYs that the Restoration Project will generate (collectively, the "**Restoration Project Entitlement Applications**"), provided that Wildlands has received Owner's approval of such Restoration Project Entitlement Applications pursuant to the provisions set forth in the Purchase Agreement.

3. Owner's Cooperation. Owner agrees to lend all reasonable assistance and cooperation reasonably required by Wildlands for the approval of the Restoration Project Entitlement Applications, including appearing and giving testimony before any Regulatory Agency. Owner also agrees to reasonably cooperate, in all reasonable respects and at no material expense to Owner, with Wildlands in its efforts to transfer, sell or otherwise convey the Habitat Values to third parties, and Owner agrees to execute and deliver to Wildlands, for the benefit of a third party, any documents reasonably required to convey the Habitat Values to such third party. Owner acknowledges and understands that its failure to cooperate with Wildlands in accordance with the foregoing provisions and/or its delay in providing such cooperation will cause Wildlands to suffer substantial damages.

4. Construction of Restoration Project. Owner shall have the right to construct the Restoration Project on the City Property in accordance with the terms of the Restoration Project Permits, Approvals, and Certifications, provided that it complies with the provisions of the Purchase Agreement.

5. Conservation Instruction. Wildlands shall have the right to encumber the City Property with a Conservation Easement or a Restrictive Covenant (the "**Conservation Instrument**"). provided that Wildlands has received Owner's approval of such Conservation Instrument pursuant to the provisions set forth in the Purchase Agreement.

6. Covenant Not to Encumber. Owner shall not create or permit any new easements, licenses, use rights or encumbrances on the title to the City Property after the recordation of this Agreement without the prior written consent of Wildlands.

7. Mineral Rights. Owner shall not perform, and shall not authorize or permit any tenant, successor-in-interest or any other party to perform, any surface or subsurface mining or other extraction activities on the City Property.

8. Attorneys' Fees. If a suit, action, appeal, mediation, arbitration or other proceeding of any nature whatsoever, including, without limitation, any proceeding under the U.S. Bankruptcy code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to this Agreement, the prevailing Party shall be entitled to recover from the losing Party its attorney fees, paralegal fees, accountant fees, and other expert fees, and all other fees, costs and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, appeal, mediation, arbitration or other proceeding, the amount of fees shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

9. Purchase Agreement. Nothing contained in this Agreement shall limit or otherwise modify Owner's and Wildlands' respective rights, duties and obligations under the Purchase Agreement.

10. Entire Agreement. This Agreement, the Purchase Agreement and all Exhibits constitutes the entire agreement between the parties, integrate all of the terms and conditions mentioned herein or incidental hereto, and supersede all negotiations or previous agreements between the parties or their predecessors in interest with respect to all or any part of the subject matter hereof.

IN WITNESS WHEREOF, Owner and Wildlands have executed this Agreement as of the dates set forth next to their signatures below.

WILDLANDS:

OWNER:

**WILDLANDS CAPITAL PARTNERS,
LLC, a Delaware limited liability company**

**CITY OF MILWAUKIE, an Oregon
municipal corporation**

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____

5/6/2014



MILWAUKIE CITY COUNCIL
STAFF REPORT

To: Mayor and City Council

Through: Bill Monahan, City Manager

Subject: ACS – Photo Radar Contract Renewal

From: Chief Steven Bartol

Date: May 6th, 2014

ACTION REQUESTED

1. Authorization for the City Manager to sign a one year extension to the ACS / Xerox Photo Radar Contract which expires on May 17, 2014 for one year
2. Make findings that traffic safety is negatively impacted by speed in locations along Hwy 99E and Johnson Creek Blvd to support new locations where photo radar may be used.

HISTORY OF PRIOR ACTIONS AND DISCUSSIONS

The first photo radar contract was signed in May of 2008. At the end of that 3 year contract, we negotiated new terms and a second contract was signed on May 17, of 2014. This was a 3 year contract (expiring on May 17, 2014), with the option of two 1 year extensions. At the April 17, 2014 study session, Council was given an update on the program and requested staff to prepare a staff report with our recommendation for extending the contract for one year.

BACKGROUND

In 2007 the Milwaukie Police Traffic Division consisted of one motorcycle officer. In effort to be more responsive to communities' desires for a more robust program, then Chief Kanzler researched and proposed staffing increases to support this effort. It was proposed that the City authorize hiring of 2.5 additional FTE in the police department. The first FTE would operate the photo radar van. The remaining staff would create positions for one additional full time officer and one half time officer on motorcycles. Additionally, the court hired one full time FTE to assist with the anticipated influx of court activity as a result of having more traffic officers issuing citations. This proposal was accepted and the first 3 year contract with ACS was signed.

At the end of the first contract we negotiated with ACS to reduce the monthly service fee from \$2,500 to \$2,000 per month. Additionally they were to provide upgraded digital photography equipment to replace the older wet film technology. This would allow for clearer pictures of drivers and their vehicles, and would allow drivers to view their photos online before entering a plea on the citation. As a result of implementing the digital equipment we have seen a 26.42% increase in the ratio of citations issued (meaning less occurrences of not issuing citations due to bad pictures) and a 3% decrease in cases going to trial.

In 2013, the photo radar van was deployed an average of 50 hours per month. During that time we averaged approximately 689 citations per month. 81.78% of the violations recorded had citations issued. The remaining violations were not issued citations related to issues such as picture clarity, gender match (meaning the difference between the gender of the driver and the

gender of the registered owner), the driver not being the registered owner, and or issues associated with the delivery of the citation to the correct address. There were a total of 8,269 photo radar citations issued in 2013.

There were two things that Council requested when they authorized the second contract for ACS in 2008. The first was to create a video to educate the community about photo radar, and what to do if you receive a photo radar ticket. The second was to explore additional ways to educate the public and or public awareness related to speed. We accomplished both of these requests. The video was completed using assistance from the Milwaukie High School media department. These videos can be seen at <http://www.milwaukieoregon.gov/police/photo-radar> . To complete the second request we used a portion of the revenues generated by photo radar to purchase a total of 4 digital speed display signs from All Traffic Solutions. We have 19 locations within the 7 NDA's that we rotate these signs through. We have utilized the Public Safety Advisory Committee to identify locations within each of their respective neighborhoods where their members feel speeding vehicles are an issue. When we first identify a location we post the sign and collect data without turning on the display. This data can then be downloaded or managed remotely and used to make decisions related to enforcement priorities, and or educate the neighborhood about actual traffic volume and speeds. After the initial data is collected, the display is turned on. Once the display is turned on we have traditionally seen and marked decrease in recorded speeds. Our goal is to continue to purchase additional signs as funds allow in order to establish more permanent mounting, giving us the ability to take advantage of solar power options.

A review of accidents that occurred in 2013 revealed that Hwy 99E and Hwy 224 continue to be problematic. Statistics show that 21.5% of all injury and 15.8% of all non-injury accidents within the city occurred on Hwy 99E, while 20 % of injury accidents and 22.4% of non-injury accidents occur on Hwy 224. Combined, these two highways account for 38% of all the accidents in 2013. On Hwy 99E, the bulk of the accidents occur within the downtown core area between Harrison St and Washington St. On Hwy 224, the majority occur between Harrison St. and 37th Ave. We are also seeing a trend developing on Johnson Creek Blvd between 42nd Ave and Stanley Ave. This area accounts for 12.3 % of injury accidents and 5.8 % of non-injury accidents (see graphic – Attachment 1).

Previously, we have done photo radar enforcement on Hwy 99E near the Hwy 224 overpass for southbound traffic, and just north of the River Rd for northbound traffic. The idea being that we would attempt to slow traffic before it entered the downtown area. Considering the locations of the accidents occurring on Hwy 99E, we have researched and identified several new locations we feel may be beneficial to use photo radar which would put us closer to the accident locations.

These locations are:

1. Southbound in the 9000 block of Hwy 99E
2. Southbound in the 11500 block of Hwy 99E
3. Northbound in the 11100 block of Hwy 99E

Additionally we would like to amend a current location for southbound traffic on Hwy 99E at Millport to indicate the direction. This is a location which Council had previously made the required finding, however no specific direction was listed at this location. We believe identifying the actual direction would strengthen any challenges in court.

In order to address accidents related to speed on Johnson Creek Blvd, we would also like to establish a location for photo radar enforcement eastbound in the 5500 block of SE Johnson Creek Blvd. Again, Council had previously made findings for this location for westbound traffic, but we feel adding a location to enforce eastbound traffic at this same location would be beneficial.

FISCAL IMPACTS

The City of Milwaukie Finance Department reports that after expenses, including the wages / benefits of the photo radar operator, the half time motor officer, the court clerk position, and the digital speed signs, the revenues for photo radar citations was \$207,000 for FY2013. It is estimated we will see a net income of \$155,000 for FY2014 (see Revenue / Expense reports – Attachment 2).

WORK LOAD IMPACTS

No Changes.

ALTERNATIVES

Discontinue program resulting in the loss of a traffic safety/enforcement tool and revenues.

ATTACHMENTS

1. Traffic Accident Graphics (2 pages)
2. Revenue / Expense Report (3 pages)
3. Resolution – Findings for new locations along Hwy 99E and Johnson Creek Blvd

2013 Injury Crash Locations

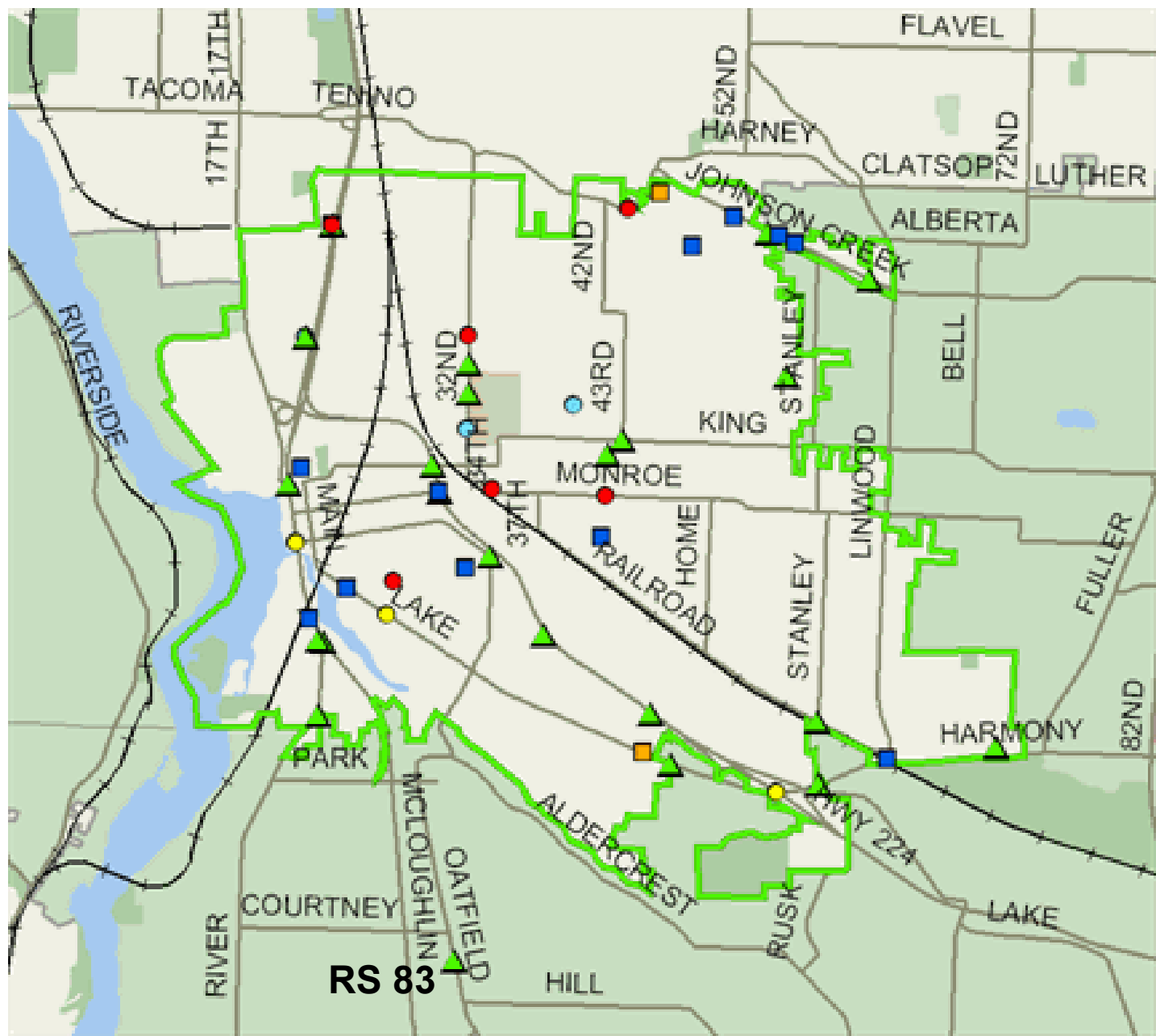
21.5% of all injury accidents occurred on Hwy 99E

20% occurred on Hwy 224

12.3% occurred on Johnson Creek Blvd

46.2% occurred in other locations

Source – CAMIN Query for injury accidents 01-01-13 to 12-31-13



2013 Non Injury Crash Locations

15.8 % of all non-injury crashes occurred on Hwy 99E

22.4% occurred on Hwy 224

5.8% occurred on JCB

56% occurred in other locations

38% of all accidents occurred on Hwy 99E and Hwy 224

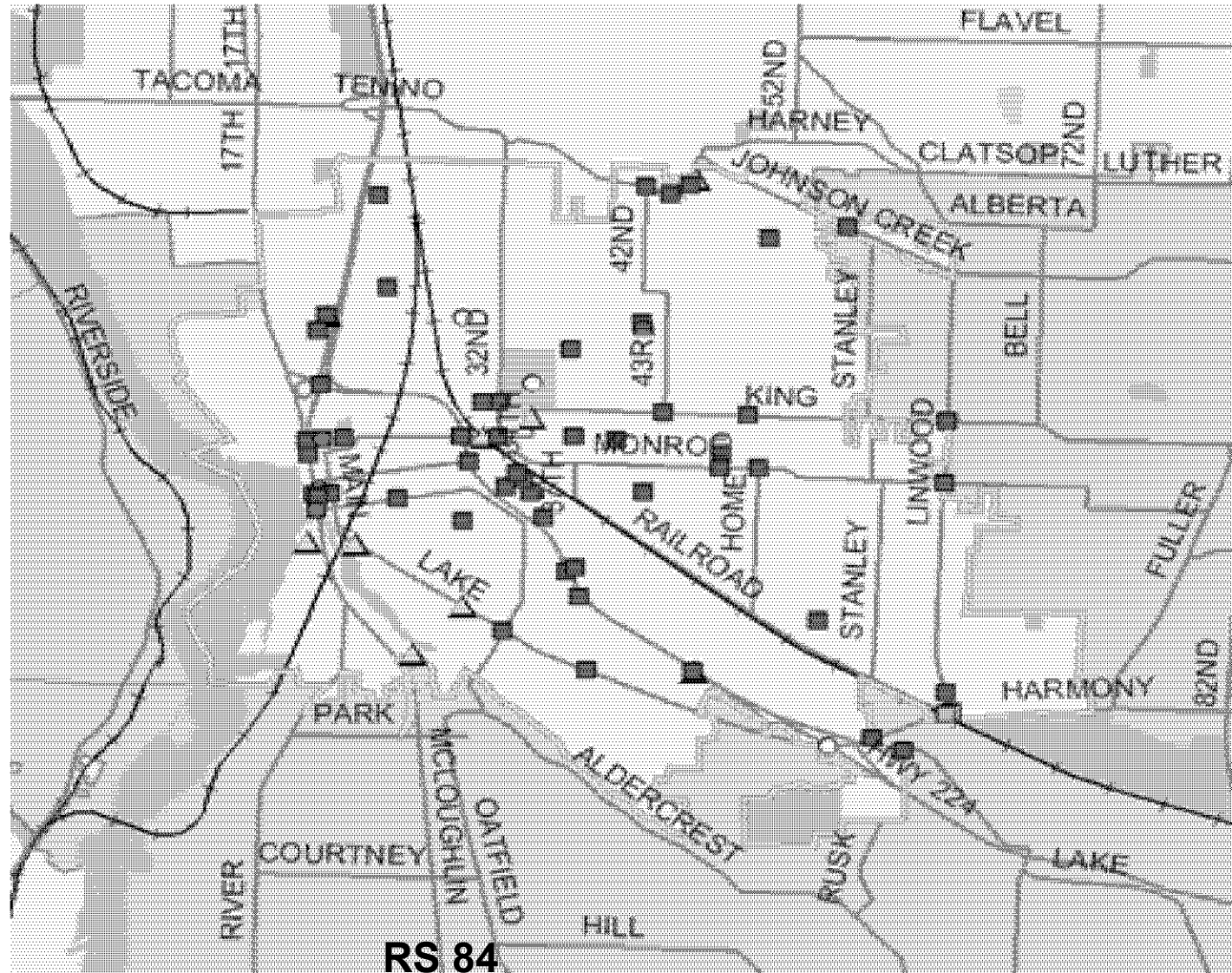


PHOTO RADAR - REVENUES & EXPENSES

(amounts in thousands)

	<i>Estimated</i>				
Revenue	FY11	FY12*	FY13	FY14	TOTAL
Photo Radar	\$ 459	\$ 368	\$ 702	\$ 635	\$ 2,164
Total Revenue	459	368	702	635	2,164
Expenses:					
Conviction Fee	109	87	167	151	514
Lease	29	24	24	24	101
Wages/Benefits	192	207	215	220	834
Other Fees**	80	79	89	85	333
Total Expense	410	397	495	480	1,782
Net Income/(Loss)	\$ 49	\$ (29)	\$ 207	\$ 155	\$ 382
Gross Margin	11%	-8%	29%	24%	18%

* FY12 had a lower level of tickets issued photo radar due to unusually low staffing levels from

** Other Fees Include: Legal, Prosecutor, Judge, Transaction Fees, and Digital Radar Signs.

PHOTO RADAR REVENUES & EXPENSES
(amounts in thousands)

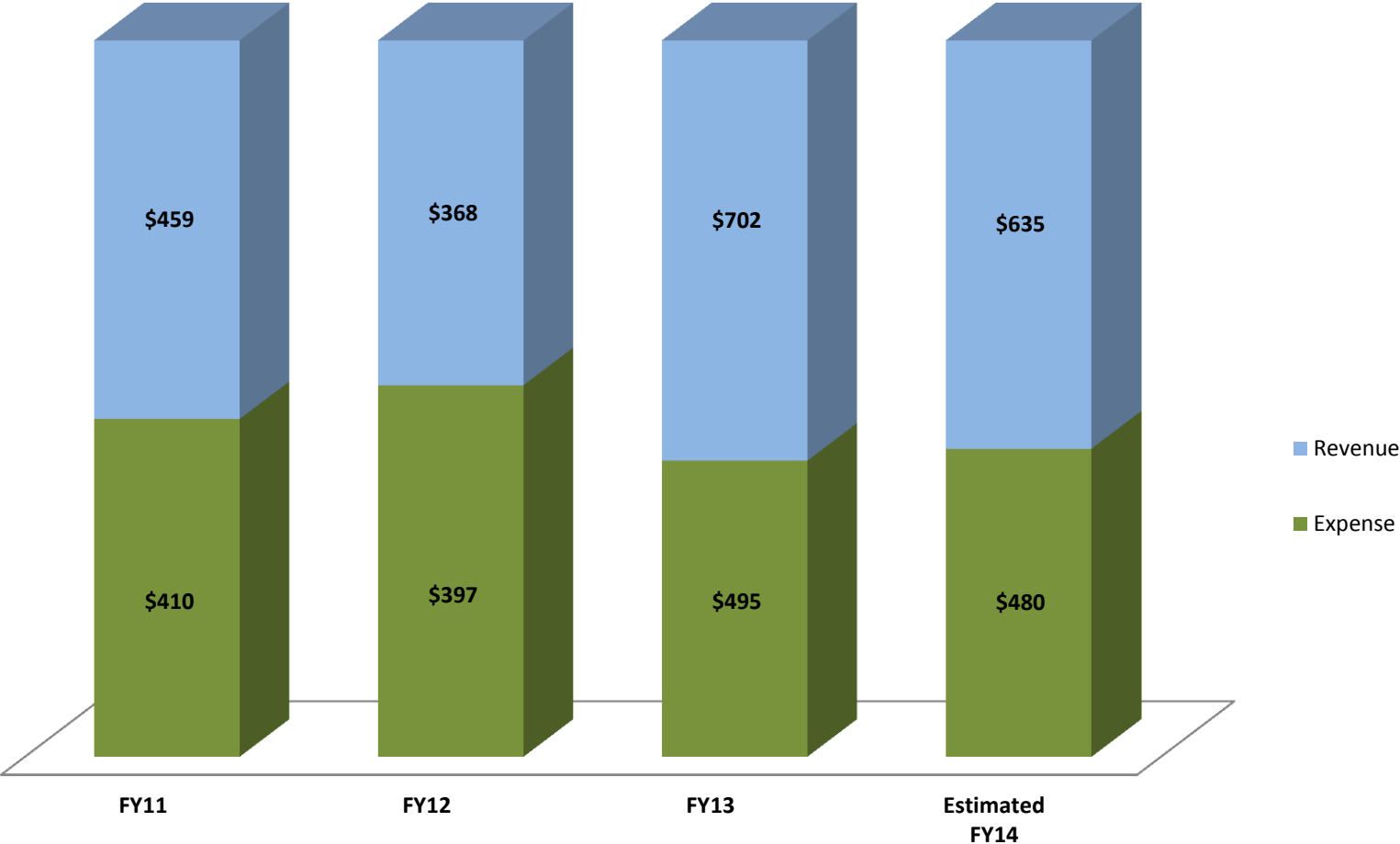
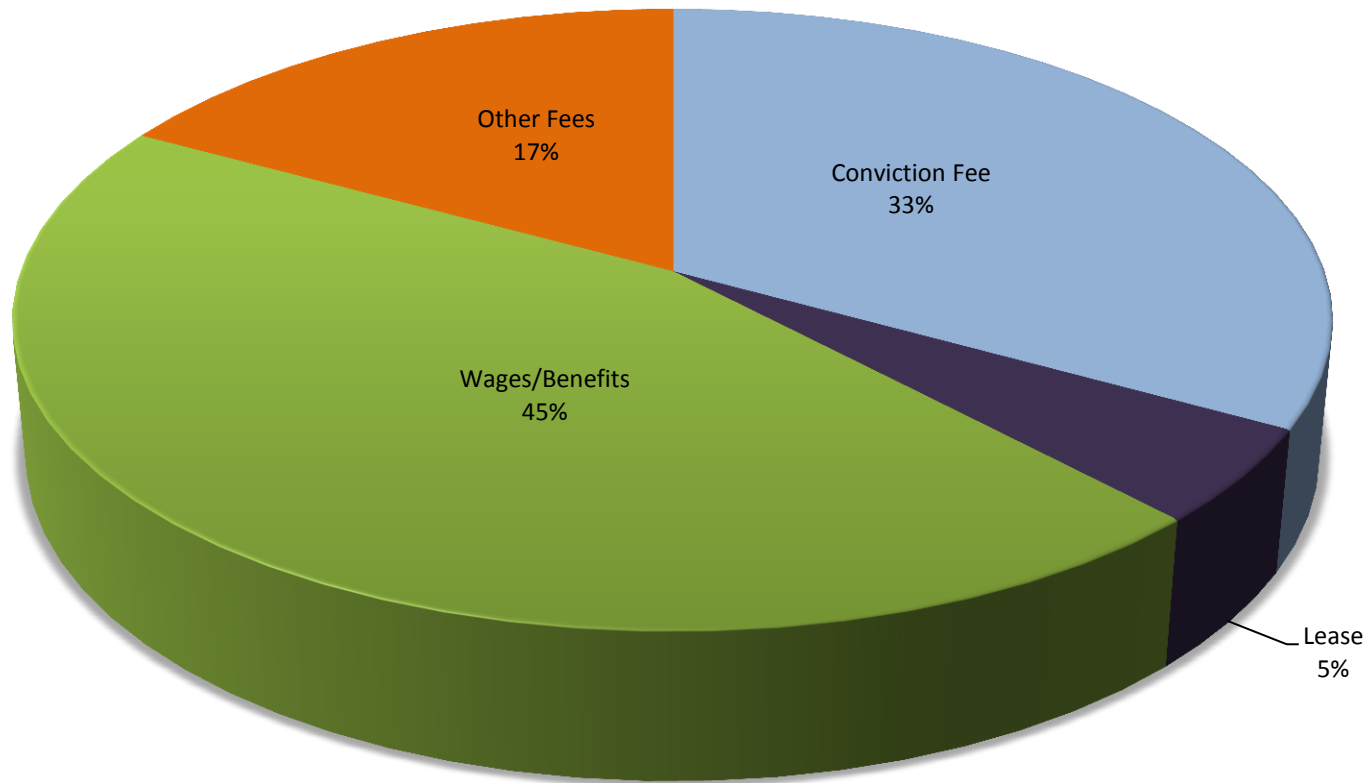


PHOTO RADAR EXPENSES



RS 87



CITY OF MILWAUKIE

"Dogwood City of the West"

Resolution No.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, EXTENDING THE CONTRACT FOR PHOTO RADAR SERVICES WITH AUTOMATIC COMPUTER SYSTEMS (ACS) INC. / XEROX, AND MAKING FINDINGS THAT TRAFFIC SAFETY IS NEGATIVELY IMPACTED BY SPEED AT LOCATIONS ON HWY 99E AND ON JOHNSON CREEK BLVD IN THE CITY OF MILWAUKIE.

WHEREAS, in January of 2008, Milwaukie Police Chief Larry Kanzler reported his photo radar work to the City Council, explaining the City's speed-related traffic problems, explaining legislative authority, and requesting resolution to contract with Automatic Computer Systems, Inc. (Now Xerox), to procure photo radar equipment; and

WHEREAS, at the study session on April 17th, 2014, Chief Steve Bartol updated Council on traffic crash statistics and sought Council's direction to renew the City's photo radar contract with its vendor ACS/Xerox; and

WHEREAS, Chief Bartol informed Council that there continues to be a serious problem with speeding on Hwy 224 and Hwy 99E, and it was on the basis of that information that Council indicated its desire to approve continued use of photo radar;

NOW, THEREFORE, The Milwaukie City Council finds as follows;

1. Since January 1st, 2008, traffic speed has had a negative impact on safety on streets in the City of Milwaukie with a history of injury crashes or an unusually high number of crashes; and
2. During calendar year 2013, 21.5% of all injury accidents and 15.8% of all non-injury accidents in the City of Milwaukie occurred on Hwy 99E; and
3. During calendar year 2013 12.3% of all injury accidents and 5. 8% of all non-injury accidents in the City have occurred on Johnson Creek Blvd; and
4. Since the following have been and continue to be areas where speeding has had a negative impact on traffic safety;
 - a. Southbound in the 9000 block of Hwy 99E
 - b. Southbound in the 11500 block of Hwy 99E
 - c. Southbound Hwy 99E at Milport Rd
 - d. Northbound in the 11100 block of Hwy 99E
 - e. Eastbound in the 5500 block of Hwy 99E

(Continued on Next Page)

NOW, THEREFORE, BASED UPON THE FOREGOING FINDINGS, IT IS HEREBY RESOLVED:

The Milwaukie Police shall continue the use of photo radar as previously directed to reduce the incidence of speeding and improve traffic safety; and

BE IT FURTHER RESOLVED, The City Manager is hereby authorized to execute a one year extension of the current contract between with ACS/Xerox to provide photo radar services.

Introduced and adopted by the City Council on May 6, 2014.

This resolution is effective on _____.

David Hedges, Council President

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney

Document1 (Last revised 09/18/07)



**Regular Session
Agenda Item No.**

6

Other Business

5/6/14



MILWAUKIE CITY COUNCIL
STAFF REPORT

To: Mayor and City Council

Through: Bill Monahan, City Manager

Subject: Riverfront Park -- Oregon Department of Fish and
Wildlife Grant Agreement

From: Jason Rice, Engineering Director

Date: May 6, 2014

ACTION REQUESTED

Authorize by Resolution the City Manager to sign a Grant Agreement between Oregon Department of Fish and Wildlife (ODFW) and the City for construction of specific elements tied to the Riverfront Park Phase II Project.

HISTORY OF PRIOR ACTIONS AND DISCUSSIONS

Sept. 17, 2013 – Council approved Resolution (73-2013) authorizing the City Manager to sign a Grant Agreement with the Oregon Marine Board for \$200,000.

April 2, 2013 -- Council approved Resolution (33-2013) authorizing staff to submit a grant to the Oregon Marine Board (and ODFW) for Riverfront Park improvements.

BACKGROUND

The Oregon Department of Fish and Wildlife currently receives federal dollars for the purposes of supporting local agency goals for restoring sport fishing facilities. The City, in partnership with the Oregon Marine Board recognized this opportunity and presented a funding package to advance the development of Riverfront Park. The package included matching funds from both agencies; \$200,000 from the OMB and \$1,000,000 from the City through the Kellogg Good Neighbor Fund.

Elements included within the application included construction of the following elements:

- Boat Ramp
- Boarding Dock
- The Small Restroom
- Access Roads
- Parking and Maneuvering Areas

Soon after submission of the application, Staff received notice that grant funds were to be allocated to the City. As Phase II is set to be under construction in June of 2014, formalization of a Grant Agreement is vital to the success of the project.

In summary, terms of the Agreement require the City to perform the following:

- Finish work by December 31, 2016
- Comply with certain Federal terms such the Davis Bacon Act
- Produce yearly progress reports through completion
- Place a sign at the project site acknowledging ODFW's grant program support
- Retain project records for a minimum of 6 years for ODFW audits

Staff is prepared to accommodate the following requirements within future work plans.

CONCURRENCE

The Riverfront Task Force supported the submittal of a grant to the ODFW for Riverfront improvements. The City's Attorney's Office has reviewed the agreement. Community Development and Finance Staff worked together to anticipate expenditures within the proposed FY14 and FY15 budget.

FISCAL IMPACTS

Authorizing signature of this Agreement commits the City to a \$1,159,160 match. \$200,000 of this match is coming from the Oregon Marine Board, while the remaining \$959,160 will be covered by the Kellogg Good Neighbor Fund. To accomplish the transfer of the Good Neighbor Funds to the project, the City will be obtaining a loan that will be backed by the guaranteed funds. Finance Staff has released a Request for Quotes (RFQ) for the loan and by the end of May, Staff will evaluate the quotes and select a financial institution for a targeted funding date of July 1, 2014.

This is a reimbursable grant for up to \$1,200,000 for the elements described above. City funds would be expended to pay for project costs and then be reimbursed by the grant program each month. Finance staff will work closely with the project manager to ensure that reimbursement occurs as swiftly as possible.

WORK LOAD IMPACTS

In addition to project management and inspection of the Riverfront Park Phase II project. This grant requires Progress Reports to be filed with ODFW yearly along with reimbursement requests for qualified expenditures monthly.

A solution for Inspection and Project Management is currently being explored with the North Clackamas Parks and Recreation District.

ALTERNATIVES

Not approve the attached resolution. However, by doing so the Riverfront Park Phase II project would not receive \$1,200,000 for construction of the boat ramp, boarding float, small restroom, access roads or the parking and maneuvering areas.

ATTACHMENTS

1. Proposed Grant Agreement
2. Resolution



**SUB-RECIPIENT
GRANT AGREEMENT**
between
OREGON DEPARTMENT OF FISH AND WILDLIFE
and
City of Milwaukie
for
Milwaukie Riverfront Park

RECIPIENT TYPE: City Government

This Grant Agreement ODFW Agreement #061-14, , is entered into by and between the State of Oregon acting by and through its **Department of Fish and Wildlife**, hereinafter referred to as "ODFW," and **City of Milwaukie**, hereinafter referred to as "Recipient," both herein referred to individually or collectively as "Party" or "Parties." By signing this Grant Agreement and accepting grant funds, the Recipient, or a duly authorized representative of the Recipient, makes the representations and agrees to the obligations and conditions set forth below.

I. PURPOSE AND AUTHORITY

- A. ODFW is the recipient of a grant from the **United States Department of the Interior, Fish and Wildlife Service (USFWS) Catalog of Federal Domestic Assistance (CFDA) #15.605 - Sport Fish Restoration, Federal Grant Number F14AF00310 "Willamette River - Milwaukie Riverfront Park"**.
- B. ODFW enters this sub-recipient Grant Agreement under this award to reimburse Recipient for expenses not to exceed **\$1,000,000** of implementing a project where sub-recipient is carrying out the purpose of the federal award, pursuant to its authority contained in Oregon Revised Statutes (ORS) 496.525 and 496.146(11).
- C. By the authority granted in ORS 190.110, state agencies may enter into agreements with other government entities for the performance of any or all functions and activities that a party to the agreement, its officers, or agents have the authority to perform.

II. TERM OF AGREEMENT

This Agreement takes effect on the date of last signature below and unless terminated or extended, this Grant Agreement expires twenty (20) years after project completion. Recipient's Period of Performance during which the project must be completed is **July 1, 2013 - December 31, 2016**. ODFW will make no payment for any service performed or expenses incurred before the beginning date or after the expiration date of the period of performance.

III. AGREEMENT DOCUMENTS

This Agreement consists of the following documents, which are listed in descending order of precedence: this Agreement less all exhibits, Exhibit A (Project Description and Budget), Exhibit B (Federal Compliance Terms), Exhibit C (Administrative Summary), and Exhibit D (Assurances - Construction Programs (Standard Form 424D), Enclosure 2 "US Army Corps of Engineers Permit Application #2009-00019/Oregon Department of State Lands Permit #41713-RF",

Enclosure 3 “US Army Corps of Engineer – Compliance Certification”, Enclosure 4 US Department of Commerce – National Oceanic Atmospheric Administration Biological Opinion – Milwaukie Riverfront Park “and Enclosure 5 US Army Corp of Engineers “Inadvertent Discovery Plan (IDP) attached hereto and by this reference made a part hereof. Recipient shall seek any prior approvals from ODFW and not USFWS.

IV. RECIPIENT OBLIGATIONS

A. Implement Project. The Recipient will

1. Implement the project during the Period of Performance of this agreement, as defined in Section II, and
2. request a formal amendment to the project if needed, as required by Section IV (J).

B. Maintain Project. The Recipient is responsible for the term of this agreement to maintain the public boating access facility that results from the implementation of the project (Facility). If Recipient fails to maintain the Facility, Recipient agrees to relinquish its interest in the Facility to ODFW via appropriate legal instrument.

C. Ensure the Public Boating Access Facility is used for its authorized purpose. The Recipient is responsible for the term of this agreement to ensure that the Facility is used as a public boating access facility. If Recipient fails to maintain this use, then Recipient agrees to relinquish its interest in the Facility to ODFW via appropriate legal instrument.

D. Match. Recipient must provide **\$1,159,160** of the total Project cost:

<u>Federal Funds from this Agreement:</u>	\$1,000,000
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Other Funds from:

City of Milwaukie	\$959,160
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Oregon State marine Board (OSMB)	\$200,000
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E. Recipient must document any cash and in-kind contributions Recipient makes to the project and retain such documentation. A summary of the match contributed for the period and the cumulative match amount must be included in Recipient’s reimbursement requests.

1. Match costs may include: (1) allowable costs incurred by ODFW, the Recipient, or cost-type contractors under this Agreement where the costs are funded by non-federal grants or by others’ cash donations from non-federal third parties and are not counted as match of another federal grant agreement or (2) third party in-kind contributions received during the Period of Performance of this Agreement.

2. **Special rules apply to valuing third party in-kind contributions.** Volunteer services should be valued at rates, including fringe benefits, consistent with those ordinarily paid for similar work within the Recipient’s organization, or at rates consistent with those ordinarily paid by other employers for similar work in the same labor market. Service of employees of third party organizations should be valued at the employee’s regular rate of pay exclusive of the employee’s fringe benefits and overhead costs.

F. Performance and Financial Reporting

1. Reports are due according to the following schedule:
 - a. Project Progress Reports:

Interim Performance Report	June 29, 2015
Interim Performance Report	June 29, 2016

- b. Final Project Report: **March 31, 2017**
2. Recipient shall compile and delivery to ODFW progress and final project reports that describe the work completed under this Agreement using ODFW approved reporting template. The ODFW project manager will provide the report format to the Recipient's project manager.
3. The Progress and Final Project Reports must include:
 - a. Status of Objectives (from Project Description Exhibit A) (a comparison of actual accomplishments to the objectives established for the period).
 - b. Description of work completed and methods used in completing the work.
 - c. Explanation of why objectives or portions of objectives were not completed. If the work could not be performed within the period specified, provide a statement of the problem, the actions to be taken to resolve the problem, and when it is anticipated that the objectives will be completed.
 - d. Summary of expenditures and match to date.
 - e. Explanation of why expenditures differ from original Project budget.
 - f. Any additional information that would be helpful in evaluating the strengths and weaknesses of the Project methods, materials or assumptions based on expectations of results.

G. Grant Reimbursement Requests

1. **Basis of Payment.** This is a reimbursable grant program. Recipient must complete or make progress on the Project before grant funds will be disbursed. Recipient must submit the final request for reimbursement to ODFW within thirty (30) calendar days of termination of the Period of Performance, and is due no later than **January 31, 2015**.
2. **Request for Reimbursement**
 - a. Recipient may request disbursement of the grant funds for up to a six (6) month period, but no more than once per month.
 - b. To request reimbursement, Recipient must submit a signed OSMB/ODFW Reimbursement Form showing current and cumulative costs by budget category (i.e., Salaries, Fringe Benefits [OPE], Travel, non-expendable equipment [greater than \$5,000 per item], Supplies [less than \$5,000 per item], Contract Services, Construction, and Indirect Costs, if contained in the budget depicted in Exhibit A) and the total of current and cumulative match. The OSMB/ODFW Reimbursement Form can be obtained at: <http://www.oregon.gov/osmb/boatfac/pages/index.aspx>.

H. Give credit and seek approval before publishing publicity, news releases, and reports.

Recipient shall give credit to the USFWS when implementing this project by:

- i. Displaying the logo on sport fish restoration facilities that are constructed, acquired, developed, or maintained using funds provided through this Agreement.
 - ii. Using the Sport Fish Restoration (SFR) logo on printed material or other visual representation that relate to project accomplishments or education/information. Recipient should refer to 50 CFR § 85.47 for logo colors; and
 - iii. Posting a sign during construction and/or after completion which states, "The Federal Aid in Sport Fish Restoration Program funded this facility thanks to your purchase of fishing equipment and motorboat fuel."
- I. Unauthorized use of grant funds.** Recipient will only be reimbursed for allowable costs of the Recipient necessary for implementing the project, including allowable costs in the form of payments to cost-type contractors, under the terms of this Agreement including all its Exhibits.
- J. Dual Payment.** The Recipient may not be compensated for or receive any other form of dual payment for the costs charged to ODFW for the project described in Exhibit A from any agency of the State of Oregon, the United States of America, or any other party.
- K. Obtain Written Amendment prior to making changes.** No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both ODFW and Recipient. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given.
1. **When Amendment Needed.** Recipient must request an amendment to this Agreement prior to any of the following changes:
 - a. If Recipient needs additional funding to complete the project (as identified in Exhibit A).
 - b. If the federal award received by ODFW is more than \$100,000, when the Recipient determines that the budgeted amount within any budget category is going to change by an amount that exceeds ten (10) percent of the total grant funds.
 - c. If Recipient revises the scope or objectives of the project (as identified in Exhibit A).
 - d. If Recipient needs additional time to complete the project beyond the Term of Agreement or Period of Performance identified in Section II of this Agreement.
 - e. If Recipient changes key persons in cases where specific persons are identified in Exhibit A of this Agreement.
 - f. If the Recipient wants to include costs that require prior approval in accordance with the applicable cost principles, and the costs are not identified in Exhibit A.
 - g. If the Recipient wants to subgrant or contract out services to a third party to perform activities which are central to the purposes of the work to be performed under this Agreement, where not already identified in Exhibit A.
 2. **Amendment Process.**
 - a. Any and all requests to ODFW for Amendment(s) to this Agreement must:
 - i. be in writing addressed to ODFW's Project Manager;

- ii. be made to ODFW as early as possible because these types of changes may require prior approval of USFWS before the change can be implemented;
 - iii. be made to ODFW at least sixty (60) days prior to the expiration of the Agreement; and
 - iv. state the reasons for the need to amend the Agreement.
 - b. Upon receipt of any request for amendment to this Agreement, ODFW will review the request and
 - i. If in agreement with the request, and if necessary, seek approval from USFWS promptly, and inform Recipient of USFWS's decision, including the date of USFWS approval, as soon as possible.
 - ii. If an amendment is approved, prepare a written amendment for signature by ODFW and Recipient.
 - iii. If an amendment is denied, submit a written notice to Recipient that the Amendment request is denied.
- L. Maintain Records.** Recipient shall create and maintain fiscal records in accordance with generally accepted accounting principles and in sufficient detail to permit ODFW, the Oregon Secretary of State's Office, the USFWS and their authorized representatives to verify how grant funds were used.
 - 1. Expenditures. All grant revenues and expenditures shall be documented in such a way as to readily identify and distinguish revenue and expenditures specific to this Agreement from other federal and non-federal funding sources.
 - 2. Funds Received. Recipient shall assume liability for all funds received pursuant to this Agreement and shall assume responsibility for repayment to ODFW of any expenditures not authorized by this Agreement.
 - 3. Recipient shall retain all records (whether in electronic or hard copy form) created or maintained pertinent to this Agreement (fiscal, program, and administrative) for a period of at least six (6) years from the date Recipient submits its project completion report.
 - 4. Records related to any real property or equipment purchased under this Agreement shall be maintained for a period of six (6) years starting from the date of disposition, replacement or transfer of the real property or equipment.
- M. Provide access to records.** Recipient will provide access to ODFW, USFWS, the Comptroller General of the United States, the Secretary of State's Office of the State of Oregon and their duly authorized representatives to the books, documents, papers and records (whether in electronic or hard copy form) of Recipient that are directly related to this Agreement, the project or the grant funds provided hereunder, for the purpose of monitoring compliance with this Agreement, making audits, examinations, excerpts, and transcripts.
- N. Audits.** Recipients that are non-federal entities are responsible to comply with requirements and standards under Office of Management and Budget (OMB) Circular A-133. In the event that Recipient is not an individual or for-profit entity, and expends \$500,000 or more per year in federal funds, an audit pursuant to this circular is required.
 - 1. **Qualify for OMB Circular A-133 Audit.** If Recipient qualifies for an OMB Circular A-133 audit, Recipient shall submit copies of their latest financial statements and A-133 audit, or a web link to this material, to ODFW Project Manager upon signing this

Agreement, and annually hereafter during the term of this Agreement. If Recipient does not meet the \$500,000 federal threshold requiring an A-133 audit, Recipient shall submit a signed statement certifying such.

2. **Inclusion in A-133 Audit.** Recipient shall report the grant funds received hereunder as pass-through funds on its Schedule of Expenditures of Federal Awards.
3. **Records Inspection.** Recipient shall assist in all compliance audits of Recipient's project conducted by ODFW, the Secretary of State Office of the State of Oregon, the USFWS, or their duly authorized representatives.
4. **Record Availability.** At any time during normal business hours, all records including landowner participant, program, and financial records pertaining to this Agreement, shall be available and accessible to ODFW or any of their duly authorized representatives for the purpose of audit, monitoring, or examination.
5. **Record Retention.** If there are unresolved audit questions at the end of the six (6) year period, Recipient shall retain the records until Recipient receives notice from ODFW that the audit questions have been resolved.
6. This clause (K) must be included in any sub-award of federal assistance to a non-federal entity.

V. ODFW'S OBLIGATIONS

Provide funds. ODFW agrees to pay Recipient the total sum not to exceed \$20,000 ("Grant Funds") to reimburse Recipient for implementing project as described in Exhibit A upon the following conditions:

1. ODFW has received sufficient funding, appropriations and expenditure authorization to allow ODFW, in the exercise of its reasonable administrative discretion, to make the disbursement.
2. Recipient has supplied sufficient match for the project as documented on the OSMB/ODFW Reimbursement Form.
3. ODFW will pay Recipient no later than forty-five (45) days following receipt and approval of Recipient's request for reimbursement.
4. ODFW will not pay for any project work performed before the beginning date or after the expiration date of the period of performance identified in Section II.
5. ODFW is not obligated to pay the Recipient if the Final Project Report and/or the Final Grant Reimbursement Request Form are delivered to ODFW more than forty-five (45) days after the Period of Performance.

VI. STANDARD CONDITIONS

- A. **Ownership.** Subject to the conditions contained in IV (B) and (C) of this Agreement, ODFW acknowledges and agrees that the project is the exclusive property of the Recipient. ODFW is neither responsible nor liable in any manner for the construction, operation, or maintenance of the Project.
- B. **Notice.** All notices required or allowed to be given by this Agreement shall be by first-class mail, facsimile, or email and addressed to the Administrative and Project Manager contact of each organization as listed in Exhibit C.

- C. Circumstances outside of Parties' Control.** Neither ODFW nor the Recipient will be held responsible for delay or failure to perform when such act or delay or failure is due to fire, flood, epidemic, strikes, acts of God or the public enemy, legal acts of public authorities, or delays or defaults caused by public carriers, which cannot be reasonably foreseen or provided against.
- D. Indemnity.** The Recipient of grant funds, pursuant to this Agreement with the State of Oregon, shall assume sole liability for recipient's breach of the conditions of the grant, and shall, upon recipient's breach of grant conditions that causes or requires the State of Oregon to return funds to the grantor, hold harmless and indemnify the State of Oregon for an amount equal to the funds which the State of Oregon is required to pay to grantor.
- E. State Tort Claims Act.** Recipient is responsible for the acts, omissions, or negligence of its own officers, employees, agents, or subcontractors. ODFW is responsible to the extent permitted by the Oregon Tort Claims Act (ORS 30.260 - 30.300) only for the acts, omissions, or negligence of its own officers, employees, or agents. Recipient and its officers, employees, agents, subcontractors, or volunteers are not considered "officers, employees, or agents" of the State of Oregon as those terms are used in ORS 30.265.
- F. Alternative Dispute Resolution.** ODFW and Recipient agree that in the event of a dispute regarding implementation of this Agreement, the Parties should attempt in good faith to resolve any dispute arising out of this Agreement. This may be done at any management level, including at a level higher than persons directly responsible for administration of the Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.

G. TERMINATION

1. FOR CONVENIENCE

- a. **Termination by Recipient.** The Recipient may terminate this agreement during the Period of Performance at any time upon thirty (30) days prior written notice to ODFW setting forth the reasons for such termination, and the effective date, delivered by certified mail or in person to ODFW's Project Manager contact as listed in Exhibit C.
 - b. **Termination by Mutual Consent.** ODFW may terminate this agreement with the consent of Recipient in which case ODFW and Recipient shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated.
 - c. **Termination by ODFW.** If the Federal Funding Agency's funding support for this project is terminated, suspended or discontinued, ODFW will immediately notify Recipient to stop all work and may terminate this agreement.
- 2. FOR CAUSE (REMEDIES FOR NON-COMPLIANCE BY RECIPIENT) - If Recipient materially fails to comply with any term of this Agreement, whether stated in a federal statute or regulation, in an application, or elsewhere, ODFW may take one or more of the following actions, as appropriate in the circumstances:**
- a. Temporarily withhold cash payments pending correction of the deficiency by the Recipient or more severe enforcement action by ODFW;

- b. Disallow (deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance;
 - c. Wholly or partly suspend or terminate this Agreement;
 - d. Withhold further grant awards for Recipient's project; or
 - e. Take other remedies that may be legally available.
3. **Recipient's Obligation upon submittal or receipt of note of termination.**
- i. Within thirty (30) days of submittal or receipt of a notice of termination of this Agreement, the Recipient must submit a final project report for work completed prior to termination.
 - ii. In the event that Recipient has materially failed to comply with this Agreement and such non-compliance has resulted in the USFWS terminating ODFW's grant or causes or required ODFW to return funds to the USFWS, Recipient will return to ODFW an amount equal to the funds which ODFW is not reimbursed for or is required to return to USFWS.
4. **ODFW's Obligation upon termination.** Upon termination of this Agreement and receipt of Recipient's final request for reimbursement, and subject to the limitations of this section, ODFW will reimburse Recipient for actual and allowable costs incurred under this Agreement prior to the termination date, including non-cancellable obligations.
- H. No Third Party Beneficiaries.** ODFW and Recipient are the only Parties to this Agreement and are the only Parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.
- I. Subgrants, Subcontracts and Assignment.**
1. Recipient may not enter into any subgrant or subcontract, not already identified in Exhibit A, or assign or transfer any of its interest in this Agreement without ODFW's prior written consent. Subawards and subcontracts with known parties identified in Exhibit A are deemed to be approved.
 2. Any subgrant entered into under this Agreement shall contain terms and conditions substantially similar to this Agreement, including the Federal terms and conditions listed in Exhibit B.
 3. Any subcontract entered into under this Agreement:
 - a. Shall be awarded in accordance with 43 Code of Federal Regulations (CFR) 12.76 "Procurement."
 - b. Shall contain the terms and conditions of Section V "Compliance with Applicable Federal Regulations and Statutes," of Exhibit B.
- J. Compliance with Applicable Law.** Recipient agrees to comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to this Agreement or to Recipient's obligations under this Agreement, as those laws, regulations and ordinances may be adopted or amended from time to time and as identified in Exhibit B.

K. Integration. This Agreement, including all Exhibits, constitutes the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. The failure of either party to enforce any provision of this Agreement shall not constitute a waiver by that party of that or any other provision.

L. Counterparts. This Agreement may be executed in several counterparts, all of which when taken together constitute one agreement binding on CONTRACTOR and ODFW, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Agreement so executed constitutes an original.

The Recipient, by signature of its authorized official, hereby acknowledges that he/she has read this Agreement, understands it, agrees to be bound by its terms and conditions (including all references to other documents) and is authorized by the authorized official to execute this Agreement on the authorized official's behalf. Failure to comply with this Agreement and with applicable State and Federal rules and guidelines may result in the withholding of reimbursement, the termination or suspension of the Agreement, denial of future grants, and damages to ODFW.

STATE OF OREGON, by and through its

RECIPIENT:

Department of Fish and Wildlife

City of Milwaukie

By _____
Debbie Colbert
Deputy Director for Administration

By _____
Bill Monahan
City Manager

Date _____

Date _____

Federal Tax ID # _____

Federal DUNS # _____

EXHIBIT A
PROJECT DESCRIPTION AND BUDGET
Willamette River - Milwaukie Riverfront Park

PROJECT: Willamette River - Milwaukie Riverfront Park
Milwaukie; Clackamas County
Ramp, Boarding Float, Flush Restroom, Parking and Maneuver Area
Replacement and Access Road
Latitude: 44.4425N Longitude: -122.6431W

3rd PARTY RECIPIENT: City of Milwaukie

NEED/PURPOSE: The existing concrete slab boat launch has become dilapidated and is extremely unsafe for boaters. The connections between the concrete slabs have loosened over time, creating large gaps in which vehicle and trailer tires get caught. This prompted the City to place barriers across most of the ramp to keep users from damaging boater trailers and tow vehicles. In addition there are drops offs on both sides of the ramp causing a further hazard for boaters trying to launch or retrieve. The current flush toilet and parking area are 30 years old and have out lived their life expectancy.

Over the past decade citizens of Milwaukie, Clackamas County and the Portland area have created a master plan for the park. To accommodate all proposed park uses and minimize vehicle and pedestrian conflict, the boat launch has been relocated south of the existing launch site. The regulatory permitting agencies have approved of the new location and all permits have been approved.

The purpose of this project is to relocate the boat ramp and add boarding floats to a protected area of the Willamette River for easier launching and retrieving and separate park uses which will reduce conflict. The single stall flush toilet provides convenient access to sanitation and the new parking area will improve traffic flow and safety.

OBJECTIVE: The objective is to relocate the current ramp and boarding floats, replace the vault toilet and parking area with a single lane concrete boat ramp, wood boarding floats, single stall flush toilet and asphalt parking to maintain recreational boating access in the city center.

The City of Milwaukie has incurred project expenses effective July 1, 2013. ODFW respectfully request that all project expenses incurred prior to the grant period, but after July 1, 2013, be approved as pre-award project expenses to be applied towards its match obligation.

EXPECTED RESULTS: Relocation of the current ramp, wooden boarding floats, replacement of the flush toilet and parking area with a concrete ramp, environmentally friendly boarding floats, unisex flush toilet and asphalt parking area will provide a safe facility for the boating public. This project has been designed for a useful life of 20 years. The method used to determine the length of useful life for this facility involved research of similar float construction materials, site application and anticipated use levels and maintenance.

COMPLETION DATE: December 30, 2016

APPROACH: JoAnn Herrigel, Parks & Sustainability Director, City of Milwaukie, will manage this project. The City of Milwaukie will advertise for bids, select the contractor and monitor construction.

ESTIMATED COST AND FUNDING PARTNERS:

SOURCE:	AMOUNT	%
Federal Sport Fish Restoration (ODFW)	\$ 1,000,000	46.3%
Oregon State Marine Board (OSMB)	\$ 200,000	9.3%
City of Milwaukie	\$ 959,160	44.4%
TOTAL	\$ 2,159,160	100%

**EXHIBIT B
FEDERAL COMPLIANCE TERMS**

Willamette River – Milwaukie Riverfront Park

I. Project Specific Compliance Requirements:

Cost accounting is required at the grant level.

Pre-Award costs from July 1, 2013 through March 2, 2014 are approved.

1. The time limit for completing the work authorized by the COE ends on October 31, 2020 but the actual grant period of performance expires December 31, 2016. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least two month before the above date is reached.

2. Permittee must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition No. 4 below. Should you decide to cease to maintain the authorized activity or should you decide to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions (**Enclosure 2**).

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

1. Permittee shall notify the Regulatory Branch with the date the activities authorized in waters of the United States are scheduled to begin. Notification shall be sent by email to cenwp.notify@usace.rumy.mil or mailed to the following address at least 30 days prior to beginning work below the ordinary high water mark:

U.S. Army Corps of Engineers
Permit Compliance, Clackamas County
Post Office Box 2946
Portland, Oregon 97208-2946

The subject line of the message shall contain the name of the county (Clackamas) in which the project is located followed by the U.S. Army Corps of Engineers permit number (NWP-2009-19).

2. Permittee shall submit a signed certification regarding the completed work and the required archeological monitoring. A "Compliance Certification" is provided **(Enclosure 3)**.

3. The following special condition is a part of all Department of the Army permits that provide authorization under Section 10 of the Rivers and Harbors Act, regardless whether the permit provides such authorization under Section 10 alone or in combination with authorization under other laws:

The permittee understands and agrees that if future operations by the United States require the removal, relocation, or other alteration of the structure or work herein authorized, or if in the opinion of the Secretary of the Army or their authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required upon due notice from the U.S Army Corps of Engineers to remove, relocate, or alter the structural work or obstructions caused thereby without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

4. The National Marine Fisheries Service (NMFS) issued biological opinion (BO) No. 2010/563 on May 10, 2013 since the project will adversely affect Lower Columbia River (LCR) Chinook salmon (*Oncorhynchus tshawytscha*), Upper Willamette River (UWR) Chinook salmon, LCR steelhead (*O. mykiss*), UWR steelhead, LCR coho (*O. kisutch*), and their designated critical habitats. To minimize adverse effects to listed species and their habitat, you shall fully implement the terms and conditions from the NMFS BO **(Enclosure 4)**. All terms and conditions of the BO are terms and conditions of this authorization.

5. To minimize impacts to listed salmon species, all work below the OHWM (elev. 18.4' NGVD 29) shall be conducted during the in-water work window from July 1 to October 31. Any deviation from this window requires prior written approval of the Corps, in consultation with ODFW and NMFS.

6. The permittee shall maintain unobstructed passage through Kellogg Creek for all life stages of fish and aquatic life (amphibians, reptiles, mammals) during the construction project.

7. The permittee shall follow these measures to avoid and minimize adverse effects during removal of the 79 derelict pilings:

A. A floating curtain shall be placed around the piling field prior to attempting piling removal.

B. Pilings shall be first removed with a barge-mounted vibratory hammer.

C. Pilings shall be gripped above the waterline.

D. Intentional twisting or bending of the piling is prohibited.

E. If a piling breaks during removal, a second attempt to remove the piling shall be

made.

F. If the piling is not retrievable, it shall be cut at the mudline.

G. The removed pilings shall be placed in a temporary containment area on the barge or in uplands to prevent the return of sediments and debris to the waterway.

H. The removed pilings, sunken debris, and floating debris shall be removed from the waterway and placed in a vehicle for disposal.

I. Removed debris and pilings disposal shall be taken to an appropriate upland landfill.

8. To prevent piscivorous bird perching, the permittee shall install conical piling caps on each piling.

9. The permittee shall incorporate light transmitting materials into boarding float and floating portion of the access ramp for at least 50 percent of its overwater surface area.

10. The permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the Oregon Office (503 -231 - 6179) of the U.S. Fish and Wildlife Service to determine if such "take" permits are required for a particular activity.

11. To minimize temporal loss and riparian effects, prior to grading the site and removing existing riparian vegetation, the permittee shall complete a tree preservation inventory below the OHWM of the park with the North Clackamas Parks and arborist to determine which existing native trees and snags may be safely left in place. The inventory shall be submitted to the Corps with the as-built report detailed in condition 16.

12. The permittee shall install vegetation below the OHWM in the following manner and method to maximize survival of individual plants that will develop into a properly functioning riparian zone:

A. At least 0.55 acres of woody shrubs and trees shall be planted below the OHWM. The 0.55 acre of plantings shall include at least 0.40 acre of emergent shrubs, 0.10 acre of ash/willow plantings, and 0.05 acre of fir/maple plantings. If monitoring, outlined in Condition 13 below, determines the failure to achieve these acreages after 10 years, additional plantings or other measures to achieve the expected environmental lift may be required. To accommodate beaver issues, the permittee may install additional vegetation (native willows or dogwoods) within the project limits by 10% (~0.05 acre) beyond the required 0.55 acre to ensure at least 0.55 acre of plantings survive to the end of the 10-year monitoring period.

B. Only native plants shall be used.

C. Only live plants shall be installed. Damaged, infected, or broken plants are prohibited.

Plants brought to site and not immediately installed shall be watered and placed in the shade until installed.

D. Species planted below the OHWM shall be tolerant of seasonal inundation.

E. Woody plants shall be installed in a higher density that will create a dense riparian zone after 10 years of growth.

F. Tree saplings shall be at least 2-gallon in size. Bare rootstock for trees is prohibited.

G. The soil around each installed tree sapling shall be amended.

H. A temporary watering plan and system for woody vegetation shall be developed and implemented for at least the first two growing seasons. The plan shall provide deep

watering at least every two weeks during the dry-weather, growing season from July through October. The water system may be used for three seasons as an adaptive management is required.

I. The temporary water system shall be removed in its entirety by the end of third growing season

13. The permittee shall submit an as-built "Year 0" report of the installed vegetation below the OHWM, detailing the following information:

A. Source(s) of installed plants.

B. Species installed.

C. Number and size of species installed.

D. Acres of installation for each community.

E. At least 5 photographs of installation activities for each planting community below the OHWM.

F. Location map of the planted communities with photographic monitoring sites.

G. Established at least 5 photographic monitoring sites.

H. Diagram of the watering system installed.

I. Written two-year watering plan.

J. Contingency plan to replace and protect lost plants during the 10-year monitoring period. The use of herbicides overwater or within 50 feet of the water's edge is prohibited, unless separately approved in writing by the Corps and NMFS.

K. The as-built vegetation plan shall be submitted within 60 days of completing installation of the vegetation and watering system

14. The permitted shall annually monitor during the growing season and adaptively manage the installed vegetation below the OHWM for 10 years. Status reports of the installed vegetation and annual monitoring shall be submitted by December 31 of years 1, 3, 5, 7, and 10. The succinct report shall briefly discuss the following long-term success criteria for each year monitored:

A. a minimum of 50% areal coverage of all vegetation by year 5 and 80% by year 10.

B. A maximum of 10% non-native vegetation in years 3, 5, 7, and 10.

C. A discussion of actions taken to meet the success criteria.

D. A discussion of plants lost, causes, and actions taken, with dates of actions, to replace lost plants.

E. A discussion of other factors that adversely or beneficially affecting achievement of the success criteria.

F. Photograph log of annual monitoring effort(s) and 5 photographic monitoring sites for each year.

15. The permitted shall remove and control all invasive or noxious plants below the OHWM in project limits for the 10-year monitoring period. Invasive and noxious plant species include, but are not limited to:

<http://www.oregon.gov/ODA/PLANT/index.shtml>

<http://www.portlandoregon.gov/bes/article/98648>

<http://www.oregon.gov/ODA/PLANT/WEEDS/Pages/lists.aspx>

16. The permitted shall submit an as-built report and final drawings of the redeveloped park by December 31 of the year in which in-water construction is completed. The as-built report shall detail the project's construction milestones and provide a photographic log of all work. The as built project report shall detail the quantities of removal and fill activities in waters of the U.S., the types and source location(s) of fill materials, areas of temporary and permanent aquatic impacts, and any deviations from the authorized project description.

17. The permitted shall have a Professional Archeologist monitor the initial excavation and grading of the new boat ramp area. The archeologist shall sign the compliance certificate form **(Enclosure 3)**.
18. Permitted shall immediately notify the Corps at the letterhead address if at any time during the authorized work, human remains and/or cultural resources are discovered within the permit area.
19. In the event cultural resources and/or historic properties are discovered during the any phase of the authorized work, the Permittee shall fully implement the recommendations outlined in the Inadvertent Discovery Plan **(Enclosure 4)**.
20. To minimize adverse environmental effects, no activity may use unsuitable fill materials (e.g., trash, debris, car bodies, asphalt, contaminated fill, etc.). Material used for construction or discharge must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).
21. Land-based equipment and heavy machinery is prohibited from working in the water. Heavy equipment working on mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance or compaction.
22. To protect water quality, the use of treated wood m over-water and in-water structures IS prohibited.
23. To protect water quality prior to, during, and immediately after construction, the permittee shall implement best management practices for erosion and sediment controls. You shall remove all temporary fill and isolation measures from waters of the U.S. within 30 days of completing in-water work. You shall utilize native, non-invasive plant species when re-vegetating disturbed areas.
24. To protect water quality during in-water work, turbidity controls and work area isolation measures shall be implemented. The use of sediment curtains shall follow the deployment and retrieval methods as detailed in the NMFS Biological Opinion.
25. The use of in-water explosives is prohibited.

II. Grant Recipient Compliance Requirements:

- A. Recipient is responsible to ensure compliance with the federal implementing regulations for the Dingell-Johnson Sport Fish Restoration Act, contained in 50 CFR Part 80.
- B. Recipient to comply with Assurances – Construction Programs (Standard Form 424D)
- C. Pursuant to 2 CFR Part 170, Recipient must complete and return the Federal Funding Accountability and Transparency Act (FFATA) form to ODFW prior to execution of this grant agreement.

III. Administrative Requirements

- A. Recipient acknowledges that as a sub-recipient of federal funds, Recipient is responsible to comply with the Federal Awarding Agency's administrative rules regarding Grants, as applicable. The applicable rules depend on the type of organization:
 - State, Local and Tribal Governments are responsible to comply with the Federal Awarding Agency's regulations implementing the Grants Common Rule (43 CFR 12).

Non-profit organizations, Universities and for profit organizations are responsible to comply with OMB Circular A-110, codified at 2 CFR Part 215 and Department of Interior regulations at 43 CFR Part 12 Subpart F.

- B. Federal Awarding Agency's codification of the Grants Common Rule and OMB A-110 can be found at http://www.whitehouse.gov/omb/grants_chart/

IV. Allowable Costs

- A. Cost-reimbursement expenses incurred under this Agreement can only be for: (1) The allowable costs of the Recipient, including allowable costs in the form of payments to fixed-price contractors; and (2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the Recipient.
- B. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs:

State, local or Indian tribal governments, use the principles in 2 CFR part 225 (OMB Circular A-87)

Private non-profit organizations (other than institutes of higher education, hospitals, or organizations listed as exempt from A-122), use the principles in 2 CFR Part 230 (OMB Circular A-122)

Educational institutions use the principles in 2 CFR part 220 (OMB circular A-21)

For Profit organizations use 48 CFR part 31.2

V. Compliance with applicable Federal Regulations and Statutes

A. Debarment and Suspension.

1. By acceptance of this grant, Recipient certifies to ODFW that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this transaction by any Federal department or agency. If requested by ODFW, the Recipient shall complete a Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion form certifying this information. Any such form completed by the Recipient for this transaction shall be incorporated into this Grant by reference.

2. By acceptance of this grant, Recipient accepts the responsibility to ensure that that it does not enter into either (a) a subgrant or (b) a contract with a value of \$25,000 or more, with an individual or entity which is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this Grant by any Federal department or agency. Recipient may satisfy this requirement by including this clause in any covered lower-tier transaction by obtaining a certificate certifying such from the subrecipient or contractor or by checking www.epls.gov. (Source: 2 CFR Part 180, as supplemented by 2 CFR 1400).

B. Anti-Lobbying

By acceptance of this Grant, Recipient certifies with respect to an award of \$100,000 or more, that Recipient will not and has not used Federal appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into

of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement, pursuant to 31 U.S.C. § 1352.

C. Officials Not to Benefit

No member of Congress or resident commissioner shall be admitted to any share or part of this grant or contract or derive any direct or indirect benefit that may arise there from, pursuant to 41 USC § 22.

D. Opposition to Legislation

No part of any Congressional appropriation shall be used directly or indirectly to pay for any personal service or the publication or distribution of literature intended or designed to promote the public support or opposition to any legislative proposal on which Congressional action is not complete other than to communicate to members of Congress as described in 18 U.S. C. 1913.

E. Buy American

1. Supplies.

- a. The Buy American Act (41 U.S.C.10) provides that the Government give preference to the purchase of domestic end products.
 - i. *Components*, as used in this clause, means those articles, materials, and supplies incorporated directly into the end products.
 - ii. *Domestic end product*, as used in this clause, means an unmanufactured end product mined or produced in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in paragraphs (b)(2) or (3) of this clause shall be treated as domestic.
 - iii. *End products*, as used in this clause, means those articles, materials, and supplies to be acquired for public use under this contract.
- b. Recipient shall ensure that for any supplies purchased, that the vendor or contractor shall deliver only domestic end products, except those—
 - i. For use outside the United States;
 - ii. That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
 - iii. For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that domestic preference would be inconsistent with the public interest; or
 - iv. For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the cost to be unreasonable (see § 12.715).

2. Construction Materials

- a. The Buy American Act (41 U.S.C. 10) provides that the Government give preference to the purchase of domestic construction material.
 - i. *Components*, used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

- ii. *Construction material*, as used in this clause, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.
 - iii. *Domestic construction material*, as used in this clause, means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to § 12.810(a)(3) of 43 CFR part 12, subpart E shall be treated as domestic.
- b. The Recipient agrees that only domestic construction material will be used by the contractor, subcontractors, materialmen, and suppliers in the performance of this agreement, except for foreign construction materials, if any, listed in this agreement.

F. Organizational Capacity

Recipient hereby certifies that it has the legal authority to receive Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-federal share of project cost) to ensure proper planning, management and completion of the project described in this Agreement.

G. Conflict of Interest

Recipient or Contractor shall ensure that it has and maintains established safeguards that prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

H. Federal Non-discrimination statutes

Recipient is responsible to comply with all federal statutes relating to non-discrimination, including but not limited to: Title VI of the Civil Rights Act of 1964 (PL 88-352) which prohibits discrimination on the basis of race, color or national origin; Title IX of the Education Amendments of 1972 (20 USC §§ 1681-1683; 1685-1686) which prohibits discrimination on the basis of gender; Section 504 of the Rehabilitation Act of 1973 (29 USC § 794) which prohibits discrimination on the basis of handicaps; Age Discrimination Act of 1975 (42 USC §§ 6101-6107) which prohibits discrimination on the basis of age; Drug Abuse Office and Treatment Act of 1972 (PL 92-255) which prohibits discrimination on the basis of drug abuse; the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (PL 91-616) regarding non-discrimination on basis of alcohol abuse or alcoholism; Sections 523 and 527 of the Public Health Services Act of 1912 as amended (42 USC §§ 290 dd-3 and 290 ee-3) regarding confidentiality of alcohol and drug abuse patient records; Title VIII of the Civil Rights Act of 1968 (42 USC §§ 3601 et seq.) regarding nondiscrimination in the sale, rental or financing of housing; any other nondiscrimination provisions of the specific statutes under which this Agreement is being made; and the requirements of any other

nondiscrimination statute(s) which apply to the federal financial assistance award received by ODFW.

I. Eligible Workers

Recipient shall ensure that all employees complete the I-9 form to certify that they are eligible for lawful employment under the Immigration and Nationality Act (8 USC 1324a). Recipient shall comply with regulations regarding certification and retention of the completed forms.

J. Environmental Laws

Recipient is responsible to comply with:

1. The Clean Air Act (42 U.S.C. §1857(h)) and Clean Water Act (33 U.S.C. §1368), and Executive Order 11738 (which requires that no facility to be used in the performance of the contract or grant is listed on the EPA List of Violating Facilities and that the work performed will not violate State clean air implementation plans).
2. Safe Drinking Water Act of 1974 (which requires the Recipient to protect underground sources of drinking water) (42 USC 300f et seq. [Pub. L. 93-523]).
3. National Environmental Policy Act; E.O. 11514 (which requires the Recipient to comply with environmental standards which may be prescribed pursuant to institution of environmental quality control measures under the National Environmental Policy Act of 1969 (42 USC Chapter 55, [Pub. L. 91-190]) and Executive Order 11514.
4. Executive Order 11990: Protection of Wetlands (which requires the Recipient to comply with environmental standards for the protection of wetlands)
5. Executive Order 11988: Floodplain Management; E.O. 11988 (which requires the Recipient to comply with environmental standards for the evaluation of flood hazards in floodplains)
6. Coastal Zone Management Act (which requires Recipient to ensure that the work performed will not violate State management programs developed under the Coastal Zone Management Act of 1972) (16 USC Chapter 33, Sections 1451 et seq.).
7. Wild and Scenic Rivers Act (which requires the Recipient to protect components or potential components of the national wild and scenic rivers system). (16 USC Chapter 28, Sections 1271 et seq.)
8. Historic Preservation Act, E.O. 11593 (which requires Recipient to assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 USC 470), E.O. 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 USC Sec. 469a-1 et seq.).
9. Endangered Species Act (which requires the Recipient to comply with environmental standards for the protection of endangered species) 16 USC Chapter 35, Sections 1531ff [Pub. L. 93-205].
10. Marine Mammal Protection Act (which requires permits and reports for research projects that will involve the taking or importation of protected marine mammals or marine mammal products) (16 USC Chapter 31, Subchapter I, Sections 1361ff).

K. Energy Efficiency

Recipient or Contractor is responsible to comply with mandatory standards and policies relating to energy efficiency that are contained in the Oregon Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

L. Text Messaging (E.O. 13513)

1. If funding for this Agreement originates from the U.S. Department of Interior, Recipient or Contractor is encouraged to adopt and enforce policies that ban text messaging while driving company-owned or -rented vehicles or Government-owned vehicles, or while driving personally-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.
2. Recipient or Contractor is also encouraged to considering new rules and programs, and reevaluating existing programs to prohibit text messaging while driving, and conducting education, awareness, and other outreach for employees about the safety risks associated with texting while driving. These initiatives should encourage voluntary compliance with the agency’s text messaging policy while off duty.

M. Patent Notification

Pursuant to Executive Order 12889, the Federal Awarding Agency is required to notify the owner of any valid patent covering technology whenever the Federal Awarding Agency or its financial assistance recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this award without a license or permission from the owner, the Recipient will be required to notify ODFW’s Administrative Contact, who will in turn be responsible to make notification to the Federal Awarding Agency’s Grants Officer. This notice does not necessarily mean that the government authorizes and consents to any copyright or patent infringement occurring under the financial assistance.

N. Recycled Products

If funding for this Agreement originates from the U.S. Department of Interior, as a result of RCRA, and EPA’s implementing regulations, Subrecipients that are local governments, institutions of higher education, hospitals, and non-profit organizations shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to EPA guidelines. For all purchase made with funds transferred through this award the Recipient shall seek to “Buy Green” environmentally friendly and recycled products when possible. When environmentally friendly products are not available, special attention shall be paid to ensure that the quantity procured does not exceed the amount required in order to minimize waste and disposal issues.

O. Seat-belt policies and program

If funding for this Agreement originates from the United States (US) Department of Interior, per 43 CFR § 12.2 (E)(3)(i), Sub-recipients of federal grants and cooperative agreements are encouraged to adopt and enforce on-the-job seat belt use policies and programs for their employees when operating company-owned, rented, or personally-owned vehicles. These measures include, but are not limited to, conducting education, awareness and other appropriate programs or their employees about the importance of wearing seat belts and the consequences of not wearing them.

P. The Trafficking Victims Protection Act of 2000

1. If Recipient is a private entity, recipient is responsible to comply with 22 U.S.C. § 7104(g), as amended, and the implementing regulations at 2 CFR part 175. This Act authorizes termination of financial assistance provided to a private entity, without penalty to the Federal Government, if the recipient engages in certain activities related to the trafficking of victims.
2. Recipient and its employees may not i. Engage in severe forms of trafficking in persons during the period of time that this agreement is in effect; ii. Procure a commercial sex act during the period of time that the award is in effect; or iii. Use forced labor in the performance of the award or subawards under the award.

Q. Hatch Act

Recipient understands it is responsible to comply with the Hatch Act (5 USC §§1501-1508 and 7324-7328) which limits the political activities of officers and employees of state and local agencies whose principal employment activities are funded in whole or in part with federal financial assistance.

R. Real Property Acquisition Relocation

Recipient will comply with Title II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

S. Lead-Based Paint

Recipient or Contractor will comply with the Lead-Based Paint Poisoning Prevention Act (42 USC §§4801 et seq.), which prohibits the use of lead-based paint in construction or rehabilitation of residential structures.

T. Copeland "Anti-Kickback" Act

Recipient and its Contractors shall comply with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. (18 U.S.C. 874 and 40 U.S.C. 276c).

U. Executive Order 13202 – Open competition and neutrality regarding labor relations

Recipient shall ensure that neither it nor a construction manager acting on its behalf, shall in its bid specifications, project agreements, or other controlling documents for construction contracts awarded:

1. Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or
2. Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

3. Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).

V. Davis-Bacon

If Recipient issues a contract under this Agreement for more than \$2000 under which mechanics or laborers are employed, Contractor shall comply with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, Contractor shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, Contractor shall be required to pay wages not less than once a week. If this Contract is in excess of \$2,000, this Contract is conditioned upon Contractor's acceptance of the current prevailing wage determination issued by the Department of Labor. (40 U.S.C. 276a to a-7).

W. Contract Work Hours and Safety Standards Act

If Recipient establishes a Contract under this Agreement which is in excess of \$2000 and is for construction, and/or in excess of \$2500 for the employment of mechanics or laborers, Recipient shall include the following clause in its Contract: Contractor shall comply with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, Contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1 ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence. (40 U.S.C. 327-333).

X. Equal Employment Opportunity

1. If Recipient establishes a Contract under this Agreement in excess of \$10,000 and for construction, Recipient shall include the following clause is inserted in the Contract: Contractor shall comply with Executive Order 11246, as amended by Executive Order 11375, and as supplemented by 41 CFR Part 60. All subcontracts entered into by Contractor shall contain a provision requiring the subcontractor to comply with Executive Order 11246, as amended by Executive Order 11375, and as supplemented by 41 CFR Part 60, to the extent such lower-tier agreements are allowed by ODFW.
2. Recipient shall include the following clause in its construction contracts which exceed \$10,000:

During¹ the performance of this contract, the Contractor agrees as follows:

¹ As required by 41 CFR 60-1.4 (b)

- a. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- b. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- c. The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- d. The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- e. The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- f. In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- g. The Contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

**EXHIBIT C
ADMINISTRATIVE SUMMARY**

Willamette River - Milwaukie Riverfront Park

City of Milwaukie

Project Leader	Jason Rice, Engineering Director
Address:	6101 SE Johnson Creek Blvd. Milwaukie, OR 97206
Phone/Cell Phone	503-786-7605 / 503-793-3906
E-mail	RiceJ@milwaukieoregon.gov
Administrative Contact	Blanca Marston
Address	6101 SE Johnson Creek Blvd. Milwaukie, OR 97206
Phone/Cell Phone	503-786-7600
E-mail	Marsonb@milwaukieoregon.gov

OREGON DEPARTMENT OF FISH AND WILDLIFE

ODFW Project Manager:	Karen Tofte
Address:	Oregon Department of Fish & Wildlife 4034 Fairview Industrial Drive SE Salem, OR 97302
Telephone:	503-947-6260
Fax:	503-947-6202
Email:	Karen.L.Tofte@state.or.us

ODFW Accounts Payable:	Kellie Jones
Address:	Oregon Department of Fish & Wildlife Administrative Services Division 4034 Fairview Industrial Drive SE Salem, OR 97302
Telephone:	503-947-6190
Fax:	503-947-6140
Email:	Kellie.S.Jones@state.or.us

ODFW Administrative Contact:	Jeff Svejcar
Address:	Oregon Department of Fish & Wildlife Administrative Services Division 4034 Fairview Industrial Drive SE Salem, OR 97302
Telephone:	503-947-6130
Fax:	503-947-6156
Email:	Jeff.Svejcar@state.or.us

ASSURANCES - CONSTRUCTION PROGRAMS

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0042), Washington, DC 20503.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the Awarding Agency. Further, certain Federal assistance awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the assistance; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure non-discrimination during the useful life of the project.
4. Will comply with the requirements of the assistance awarding agency with regard to the drafting, review and approval of construction plans and specifications.
5. Will provide and maintain competent and adequate engineering supervision at the construction site to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by the assistance awarding agency or State.
6. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
7. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
8. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
9. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.
10. Will comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681 1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

11. Will comply, or has already complied, with the requirements of Titles 11 and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal and federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
12. Will comply with the provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
13. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333) regarding labor standards for federally-assisted construction sub-agreements.
14. Will comply with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
15. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).
16. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
17. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).
18. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-1 33, "Audits of States, Local Governments, and Non-Profit Organizations."
19. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE	
APPLICANT ORGANIZATION		DATE SUBMITTED



Oregon

John A. Kitzhaber, MD, Governor

Department of Environmental Quality

Northwest Region Portland Office

2020 SW 4th Avenue, Suite 400

Portland, OR 97201-4987

(503) 229-5263

Fax: (503) 229-6945

TTY: 711

September 13, 2013

James Holm
U.S. Army Corps of Engineers
ATTN: CENWP-OP-GP
PO BOX 2946
Portland, OR 97208-2946

RE: 401 Water Quality Certification for City of Milwaukie

Dear Mr. Holm:

The Department of Environmental Quality (DEQ) has reviewed the U.S. Army Corps of Engineers Permit Application #2009-00019 (Department of State Lands Permit # 41713-RF), received by DEQ on December 15, 2009. DEQ's 401 Water Quality Certification public comment opportunity was circulated with the U.S. Army Corps of Engineers public notice, and DEQ received no public comments.

The applicant, the City of Milwaukie, proposes to impact waters of the state to develop a waterfront park and boat ramp. The project is located in waters of the Willamette River at river mile 18.5, in the city of Milwaukie, in Clackamas County, Oregon (Section 35, T1S/R1E).

Project Description: The City will redevelop the Milwaukie Riverfront Park along McLoughlin Boulevard between Kellogg Creek and Johnson Creek.

Proposed components of the project include working in water and during low water conditions, as follows:

- Removal of the existing deteriorated boat ramp and deleterious materials (concrete, rebar, fencing and debris) along riverbanks;
- Removal of up to 79 pilings near Kellogg Creek using a barge-mounted crane to vibrate out to prevent breakage;
- Construction of a new single lane boat ramp south of the existing ramp that will measure approximately 160 feet long by 20 feet wide and will be framed with riprap;
- Placement of up to 9 piles to secure the installation of a wood boarding float that will measure approximately 300 feet long by 8 feet wide;
- Installation of stone steps on the north side of the park that will extend into the ordinary high water line and measure approximately 35-40 feet wide
- Stabilization of riverbanks that will include; cribwalls, soft gabion soil lifts, large wood, coir mats, native vegetation and cobbles.

Additional project components that will complete the park development include:

- New parking facilities with stormwater treatment facilities;
- A pedestrian bridge over Kellogg Creek;
- Trails and scenic overlooks; and,
- A Public plaza and grass amphitheater for community access.



Status of Affected Waters of the State: The proposed impacts are in the Willamette River, which is classified as water quality limited under the federal Clean Water Act, and has an Environmental Protection Agency approved Total Maximum Daily Load (TMDL) that has been developed for the parameters of: Dioxin, Mercury, Temperature, and *E. coli*. The Willamette River is on the Section 303(d) List of impaired waterbodies for the parameters of: Aldrin, Dichlorodiphenyltrichloroethane (DDT), Dichlorodiphenyldichloroethylene (DDE), Dieldrin, Iron, polychlorinated biphenyl (PCB), and Dissolved Oxygen. Parameters listed with potential concern include: Chromium, Copper, Manganese, Nickel, Zinc, Alkalinity, and Phosphate.

Beneficial uses impaired by the above listed parameters in the Willamette River include: water contact recreation, salmonid fish spawning and rearing, anadromous fish passage, resident fish and aquatic life, fishing/fish consumption, and drinking water.

Based on the application materials and sediment characterization analysis, DEQ is reasonably assured that implementation of the Project will be consistent with applicable provisions of Sections 301, 302, 303, 306, and 307 of the federal Clean Water Act, state water quality standards set forth in OAR Chapter 340 Division 41, and other appropriate requirements of state law, provided the following conditions are incorporated into the USACE permit and strictly adhered to by the applicant.

401 CERTIFICATION CONDITIONS

- 1) **Duration of Certification:** This 401 WQC is valid until closure of the in-water timing window (see Condition 2) of the fifth year after issuance of the USACE permit. A new 401 WQC must be obtained prior to any substantial modification of the U.S. Army Corps of Engineers permit.
- 2) **Stormwater Management Plan:** A post-construction stormwater management plan has been developed and submitted on behalf of the applicant. The plan describes the Best Management Practices (BMPs) that will be implemented to prevent or treat pollution in stormwater generated by the proposed project in order to comply with state water quality standards, Total Maximum Daily Load (TMDL) Load Allocations (LAs), Groundwater Management Area concerns, or National Pollutant Discharge Elimination System (NPDES) permit requirements.

The system components include: stormwater will sheetflow into either: vegetated swales, infiltration planters; filter strips and an infiltration pond. The site will be designed to detain up to 100-year flow events and will infiltrate stormwater up to a 10-year design storm. The applicant, the City of Milwaukie, will provide long term operation and maintenance of the stormwater system components as outlined in the plan submitted on behalf of the applicant.

- 3) **Fish protection/Oregon Department of Fish and Wildlife timing:** In-water work is allowed only within the Oregon Department of Fish and Wildlife preferred time window as specified in Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources, June 2008, or most current version. Exceptions to the timing

window must be reviewed and approved in writing in advance by Oregon Department of Fish and Wildlife and the National Marine Fisheries Service.

- 4) **Aquatic life movements:** Any activity that may substantially disrupt the movement of those species of aquatic life indigenous to the water body, including those species that normally migrate through the area, is prohibited. Unobstructed fish passage must be provided at all times during any authorized activity. Exceptions must be reviewed and approved in writing in advance by Oregon Department of Fish and Wildlife and the National Marine Fisheries Service.
- 5) **Isolation of in-water work areas:** Isolation of in-water work areas from the active flowing stream must be accomplished to the maximum extent practicable. Methods of isolation include, but are not limited to: timing work at low water so as to effectively work in the dry; using silt curtains; cofferdams; inflatable bags; geo blocks; sandbags; sheet pilings; or similar materials. The applicant is referred to Appendix D of DEQ's *Oregon Sediment and Erosion Control Manual*, April 2005, for isolation techniques. <http://www.deq.state.or.us/wq/stormwater/docs/escmanual/appxd.pdf>
- 6) **Cessation of Work:** Cease project operations under high flow conditions that may result in inundation of the project area, except for efforts to avoid or minimize turbidity or other resource damage as a result of the exposed project area.
- 7) **Turbidity:** All practical Best Management Practices (BMPs) on disturbed banks and within the stream must be implemented to minimize turbidity during in-water work. Any activity that causes turbidity to exceed 10% above natural stream turbidities is prohibited except as specifically provided below.
 - a. **Monitoring:** Turbidity monitoring must be conducted and recorded as described below. Monitoring must occur each day during daylight hours when in-water work is being conducted. Visual gauging is acceptable, however, *turbidity that is visible over background is considered an exceedance of the standard.*
 - i. **Representative Background Point:** a sample or observation must be taken every two hours at a relatively undisturbed area approximately 100 feet upcurrent from in-water disturbance to establish background turbidity levels for each monitoring cycle. Background turbidity, location, date, and time must be recorded prior to monitoring downcurrent.
 - ii. **Compliance Point:** Monitoring must occur every two hours, approximately 100 feet downcurrent from the disturbance, at approximately mid-depth and within any visible plume, and be compared against the background measurement or observation. The turbidity, location, date, and time must be recorded for each sample or observation.
 - b. **Compliance:** Results from the compliance points must be compared to the background levels taken during each monitoring interval. Exceedances are allowed as follows:

MONITORING WITH A TURBIDIMETER		
ALLOWABLE EXCEEDANCE TURBIDITY LEVEL	ACTION REQUIRED AT 1 ST MONITORING INTERVAL	ACTION REQUIRED AT 2 ND MONITORING INTERVAL
0 to 5 NTU above background	Continue to monitor every 2 hours	Continue to monitor every 2 hours
5 to 29 NTU above background	Modify BMPs & continue to monitor every 2 hours	Stop work after 4 hours at 5-29 NTU above background
30 to 49 NTU above background	Modify BMPs & continue to monitor every 2 hours	Stop work after 2 confirmed hours at 30-49 NTU above background
50 NTU or more above background	Stop work	Stop work
VISUAL MONITORING		
No plume observed	Continue to monitor every 2 hours	Continue to monitor every 2 hours
Plume observed	Modify BMPs & continue to monitor every 4 hours	Stop work after 4 hours with an observed plume

If an exceedance over the background level occurs, the applicant must modify the activity and continue to monitor every two hours. **If an exceedance over the background level continues after the second monitoring interval, the activity must stop.** If, however, turbidity levels return to background at or after second monitoring level due to implementation of BMPs or natural attenuation, work may continue with appropriate monitoring as above.

If an exceedance occurs at: 50 NTU or more over background; 30 NTU over background for 2 hours; or 5-29 NTU over background for 8 hours, the activity must stop immediately for the remainder of that 24-hour period.

- c. **Reporting:** The applicant must make available copies of daily logs for turbidity monitoring to DEQ, USACE, NMFS, USFWS, and ODFW upon request. The log must include: calibration documentation (if using an instrument); background NTUs or observation; compliance point NTUs or observation; comparison of the points in NTUs or narrative; and location; date; time; and tidal stage (if applicable) for each reading. Additionally, a narrative must be prepared discussing all exceedances with subsequent monitoring, actions taken, and the effectiveness of the actions.
- d. **BMPs to Minimize In-stream Turbidity:**
 - i. Sequence/Phasing of work – The applicant must schedule work activities so as to minimize in-water disturbance and duration of in-water disturbances;
 - ii. Bucket control - All in-stream digging passes by excavation machinery and placement of fill in-stream using a bucket must be completed so as to minimize turbidity. All practicable techniques such as employing an experienced equipment operator, not dumping partial or full buckets of material back into the wetted stream, adjusting the volume, speed, or both of the load, or by using a closed-lipped environmental bucket must be implemented;
 - iii. Machinery may not be driven into the flowing channel;

- iv. Excavated material must be placed so that it is isolated from the water edge or wetlands and not placed where it could re-enter waters of the state uncontrolled; and,
 - v. Containment measures such as silt curtains, geotextile fabric, and silt fence must be implemented and properly maintained in order to minimize in-stream sediment suspension and resulting turbidity.
- 8) **Deleterious waste materials:** Biologically harmful materials and construction debris including, but not limited to: petroleum products, chemicals, cement cured less than 24 hours, welding slag and grindings, concrete saw cutting by-products, sandblasted materials, chipped paint, tires, wire, steel posts, asphalt and waste concrete may not be placed in or where they could enter waterways or wetlands.
- a. Concrete, cement, or grout must be cured for at least 24 hours prior to any contact with flowing waters;
 - b. Only clean fill, free of waste and polluted substances, may be used;
 - c. Best Management Practices must be employed to prevent discharges of spills of deleterious materials to surface or ground water;
 - d. An adequate supply of materials needed to contain deleterious materials during a weather event must be maintained at the project construction site and deployed as necessary; and
 - e. All foreign materials, refuse, and waste must be removed from the area.
- 9) **Spill Prevention:** Vehicles must be fueled, operated, maintained, and stored and construction materials must be stored in areas that minimize disturbance to habitat and prevent adverse effects from potential discharges. In addition, the following specific requirements apply:
- a. Vehicle staging, cleaning, maintenance, refueling, and fuel storage must take place in a vehicle staging area placed 150 feet or more from any waters of the state.
 - b. All vehicles operated within 150 feet of any waters of the state must be inspected daily for fluid leaks before leaving the vehicle staging area. Any leaks detected must be repaired before the vehicle resumes operation;
 - c. Before operations begin and as often as necessary during operation, equipment must be steam cleaned (or undergo an approved equivalent cleaning) until all visible external oil, grease, mud, and other visible contaminants are removed if the equipment will be used below the bank of the water body; and,
 - d. An adequate supply of materials (such as straw matting/bales, geotextiles, booms, diapers, and other absorbent materials) needed to contain spills must be maintained at the project construction site and deployed as necessary.
- 10) **Spill & Incident Reporting:**
- a. In the event that petroleum products, chemicals, or any other deleterious materials are discharged into state waters, or onto land with a potential to enter state waters, the discharge must be promptly reported to the Oregon Emergency

Response Service (OERS, 1-800-452-0311). Containment and cleanup must begin immediately and be completed as soon as possible.

- b. If the project operations cause a water quality problem that results in distressed or dying fish, the operator must immediately: cease operations; take appropriate corrective measures to prevent further environmental damage; collect fish specimens and water samples; and notify DEQ, Oregon Department of Fish and Wildlife and other appropriate regulatory agencies.

11) **Vegetation Protection and Restoration:**

- a. Riparian, wetland, and shoreline vegetation in the authorized project area must be protected from disturbance to the maximum extent practicable through one or more of the following:
 - i. Minimization of project and impact footprint;
 - ii. Designation of staging areas and access points in open, upland areas;
 - iii. Fencing and other barriers demarking construction areas; and,
 - iv. Use of alternative equipment (e.g., spider hoe or crane).
- b. If authorized work results in unavoidable vegetative disturbance and the disturbance has not been accounted for in planned mitigation actions, riparian, wetland and shoreline vegetation must be successfully reestablished to a degree that it functions (for water quality purposes) at least as well as it did before the disturbance. The vegetation must be reestablished by the completion of authorized work.

- 12) The applicant must notify DEQ of any change in ownership and obtain DEQ review and approval before undertaking any change to the project that might significantly affect water quality.
- 13) DEQ may modify or revoke this 401 WQC, in accordance with OAR 340-048-0050, in the event of project changes or new information indicating that the project activities are having a significant adverse impact on state water quality or beneficial uses.
- 14) A copy of this 401 WQC letter shall be kept on site and readily available for reference by the applicant and its contractors, U.S. Army Corps of Engineers, DEQ and other appropriate state and local government inspectors.
- 15) This 401 WQC is invalid if the project is operated in a manner not consistent with the project description contained in the permit application materials.
- 16) The applicant and its contractors must allow DEQ site access at reasonable times as necessary to monitor compliance with these 401 WQC conditions.

James Holm
Page 7

If the applicant is dissatisfied with the conditions contained in this certification, a contested case hearing may be requested in accordance with OAR 340-048-0045. Such request must be made in writing to the DEQ Office of Compliance and Enforcement at 811 SW 6th Avenue, Portland Oregon 97204 within 20 days of the mailing of this certification.

The DEQ hereby certifies this project in accordance with the Clean Water Act and state rules, with the above conditions. If you have any questions, please contact Corey Saxon at saxon.corey@deq.state.or.us, by phone at 503 229-5051 or at the address on this letterhead.

Sincerely,



Steve Mrazik
Water Quality Manager
Northwest Region

X: 2009-00019cert City Milwaukie.doc

cc: Applicant
Mischa Connine - NMFS
Anita Huffman, DSL

COMPLIANCE CERTIFICATION

U.S. Army Corps of Engineers, Portland District
CENWP-OD-G
P.O. Box 2946
Portland, Oregon 97208-2946

- 1. Permittee Name: City of Milwaukee
- 2. County: Clackamas County
- 3. Corps Permit No: NWP-2009-19
- 4. Corps Contact: Compliance Project Manager for Clackamas County
- 5. Type of Activity: **Individual Permit, Riverfront Park re-development**

Please sign and return form to the address above:

I hereby certify that the work authorized the above referenced permit has been completed in accordance with the terms and conditions of said permit and that required mitigation is completed in accordance with the permit conditions, except as described below.

Signature of Permittee

Date

.....
Professional Archaeologist Signature:

I hereby certify that the work authorized by the above referenced permit has been monitored for cultural resources and/or human remains during all ground disturbance activities in accordance with the terms and conditions of said permit. In the event cultural resources and/or human remains were discovered, all appropriate Federal, State, and local authorities have been notified.

Signature of Archaeologist

Date

Organization/Affiliation



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

Refer to NMFS No:
NWR-2010-563

May 10, 2013

Shawn H. Zinszer
Chief, Regulatory Branch
U.S. Army Corps of Engineers
P.O. Box 2946
Portland, Oregon 97208-2946

Re: Endangered Species Act Biological Opinion and Magnuson-Stevens Fishery
Conservation and Management Act Essential Fish Habitat Response for Milwaukie
Riverfront Park, Willamette River (HUCs 170900120104 and 170900120103),
Multnomah County, Oregon (Corps No.: NWP-2009-00019)

Dear Mr. Zinszer:

The enclosed document contains a biological opinion (opinion) prepared by the National Marine Fisheries Service (NMFS) pursuant to section 7(a)(2) of the Endangered Species Act (ESA) on the effects of the proposal by the U.S. Army Corps of Engineers (Corps) to authorize the City of Milwaukie's proposal for the Milwaukie Riverfront Park using the Corps' regulatory authority under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act.

In this opinion, NMFS concludes that the proposed action is not likely to jeopardize the continued existence of Lower Columbia River (LCR) Chinook salmon (*Oncorhynchus tshawytscha*), Upper Willamette River (UWR) spring-run Chinook salmon, LCR coho salmon (*O. kisutch*), LCR steelhead (*O. mykiss*), UWR steelhead, or result in the destruction or adverse modification of critical habitat designated or proposed for these species.

As required by section 7 of the ESA, NMFS is providing an incidental take statement with the opinion. The incidental take statement describes reasonable and prudent measures NMFS considers necessary or appropriate to minimize the impact of incidental take associated with this action. The take statement sets forth nondiscretionary terms and conditions, including reporting requirements, that the Federal action agency must comply with to carry out the reasonable and prudent measures. Incidental take from actions that meet these terms and conditions will be exempt from the ESA's prohibition against the take of listed species.

This document also includes the results of our analysis of the action's likely effects on essential fish habitat (EFH) pursuant to section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and includes two conservation recommendations to avoid, minimize, or otherwise offset potential adverse effects on EFH. One of these conservation recommendations is identical to the ESA take statement's terms and conditions. Section 305(b) (4) (B) of the MSA requires Federal agencies to provide a detailed written response to NMFS within 30 days after receiving these recommendations.

NWP-2009-19



RS 127

If the response is inconsistent with the EFH conservation recommendations, the Federal action agency must explain why the recommendations will not be followed, including the scientific justification for any disagreements over the effects of the action and the recommendations. In response to increased oversight of overall EFH program effectiveness by the Office of Management and Budget, NMFS established a quarterly reporting requirement to determine how many conservation recommendations are provided as part of each EFH consultation and how many are adopted by the action agency. Therefore, we request that in your statutory reply to the EFH portion of this consultation, you clearly identify the number of conservation recommendations accepted.

Please direct questions regarding this opinion to Mischa Connine, in the Oregon State Habitat Office, at 503.230.5401.

Sincerely,



William W. Stelle, Jr.
Regional Administrator

cc: JoAnn Herrigel, City of Milwaukie

**Endangered Species Act (ESA) Section 7(a)(2) Biological and
Conference Opinion
and
Magnuson-Stevens Fishery Conservation and Management Act
Essential Fish Habitat (EFH) Consultation**

Milwaukie Riverfront Park
Willamette River (HUCs 170900120104 and 170900120103)
Multnomah County, Oregon
(Corps No.: NWP-2009-00019)

NMFS Consultation Number: NWR-2010-563

Action Agency: U.S. Army Corps of Engineers

Affected Species and Determinations:

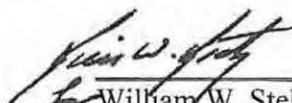
ESA-Listed Species	Status	Is Action Likely to Adversely Affect Species or Critical Habitat?	Is Action Likely To Jeopardize the Species?	Is Action Likely To Destroy or Adversely Modify Critical Habitat?
Lower Columbia River Chinook salmon (<i>Oncorhynchus tshawytscha</i>)	Threatened	No	No	No
Upper Willamette River Chinook salmon	Threatened	No	No	No
Lower Columbia River coho salmon (<i>O. kisutch</i>)	Threatened	No	No	No*
Lower Columbia River steelhead (<i>O. mykiss</i>)	Threatened	No	No	No
Upper Willamette River steelhead	Threatened	No	No	No

*Critical Habitat has been proposed for Lower Columbia River coho salmon

Fishery Management Plan That Describes EFH in the Project Area	Does Action Have an Adverse Effect on EFH?	Are EFH Conservation Recommendations Provided?
Pacific Coast Salmon	Yes	Yes

Consultation Conducted By: National Marine Fisheries Service, Northwest Region

Issued By:



William W. Stelle, Jr.
Regional Administrator

Date: May 10, 2013

TABLE OF CONTENTS

1. INTRODUCTION1
 1.1 Background.....1
 1.2 Consultation History1
 1.3 Proposed Action.....2
 1.4 Action Area.....13
2. ENDANGERED SPECIES ACT: BIOLOGICAL AND CONFERENCE OPINION AND
INCIDENTAL TAKE STATEMENT15
 2.1 Approach to the Analysis.....15
 2.2 Rangewide Status of the Species and Critical Habitat.....16
 2.2.1 Status of Listed Species16
 2.2.2 Status of Critical Habitat.....29
 2.3.1 Species within the Action Area.....37
 2.3.2 Critical Habitat within the Action Area41
 2.4 Effects of the Action on Species and Proposed and Designated Critical Habitat.....41
 2.5 Cumulative Effects.....52
 2.6 Integration and Synthesis.....53
 2.7 Conclusion55
 2.8 Incidental Take Statement.....55
 2.8.1 Amount or Extent of Take56
 2.8.2 Effect of the Take.....57
 2.8.3 Reasonable and Prudent Measures.....57
 2.8.4 Terms and Conditions57
 2.9 Conservation Recommendations62
 2.10 Reinitiation of Consultation62
3. MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT
ESSENTIAL FISH HABITAT CONSULTATION63
 3.1 Essential Fish Habitat Affected by the Project63
 3.2 Adverse Effects on Essential Fish Habitat.....63
 3.3 Essential Fish Habitat Conservation Recommendations63
 3.4 Statutory Response Requirement.....64
 3.5 Supplemental Consultation64
4. DATA QUALITY ACT DOCUMENTATION AND PRE-DISSEMINATION REVIEW64
5. REFERENCES66

LIST OF ACRONYMS

BA	Biological Assessment
BMP	Best Management Practice
CFR	Code of Federal Regulations
CHART	Critical Habitat Analytical Review Team
EFH	Essential Fish Habitat
ESA	Endangered Species Act
FR	Federal Register
HUC	Hydraulic Unit Code
LCR	Lower Columbia River
MSA	Magnuson Stevens Act
NMFS	National Marine Fisheries Service
OHW	Ordinary High Water
PCE	Primary constituent element
RM	River Mile
RMS	Root Mean Squared
RPM	Reasonable and prudent measure
TRT	Technical Review Team
U.S.C.	United States Code
UWR	Upper Willamette River
VSP	Viable Salmonid Population
WLC	Willamette/Lower Columbia

1. INTRODUCTION

This Introduction Section provides information relevant to the other sections of this document and is incorporated by reference into Sections 2 and 3 below.

1.1 Background

The National Marine Fisheries Service (NMFS) prepared the biological opinion (opinion) and incidental take statement portions of this document in accordance with section 7(b) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531, *et seq.*), and implementing regulations at 50 CFR 402.

We also completed an essential fish habitat (EFH) consultation on the proposed action, in accordance with section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801, *et seq.*) and implementing regulations at 50 CFR 600.

The opinion, incidental take statement, and EFH conservation recommendations are each in compliance with the Data Quality Act (44 U.S.C. 3504(d)(1) *et seq.*) and they underwent pre-dissemination review.

1.2 Consultation History

Early coordination and pre-consultation with NMFS, U.S. Fish and Wildlife Service, Corps, Oregon Department of Fish and Wildlife (ODFW), Oregon Department of State Lands (DSL), and Oregon Department of Environmental Quality (DEQ) was conducted during a series of site visits, meetings, and phone conversations. A pre-application meeting was held at the project site on July 16, 2008. A follow-up meeting was held with NMFS on April 14, 2010, to discuss the additional information requested from NMFS.

On February 28, 2010, NMFS received a request for ESA section 7 and MSA section 305(b) consultation from the U.S. Army Corps of Engineers (Corps) to authorize the City of Milwaukie's (City) Milwaukie Riverfront Park Project under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. NMFS sent a request to the Corps for additional information on March 19, 2010, and received the additional information on May 17, 2010. Several meetings took place with the Corps, ODFW, and the City to explore alternatives to the project that would minimize effects to ESA-listed fish and critical habitat. On October 11, 2012, NMFS sent a letter to the Corps, requesting the alternatives analysis within 30 days, and if we did not receive the information, we assumed the project was withdrawn. On January 14, 2013, NMFS received an alternatives analysis and final proposal from the Corps. NMFS requested additional information from the Corps and the City on January 18, 2013. NMFS received the additional information on January 24, 2013 and formal consultation was initiated.

In the request for consultation, the Corps concluded that the proposed action is "likely to adversely affect" Lower Columbia River (LCR) Chinook salmon (*Oncorhynchus tshawytscha*), Upper Willamette River (UWR) Chinook salmon, LCR coho salmon (*O. kisutch*), LCR steelhead (*O. mykiss*), and UWR steelhead, as well as designated critical habitat for LCR Chinook salmon,

UWR Chinook salmon, LCR steelhead, UWR steelhead, and LCR coho salmon (proposed). The Corps further concluded that the proposed action “would adversely affect” essential fish habitat (EFH) designated by NMFS under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801, *et seq.*).

This opinion is based on information provided in the December 2009 biological assessment, meeting discussions, field investigations, and the additional information provided by the Corps. A complete record of this consultation is on file at the Oregon State Habitat Office in Portland, Oregon.

1.3 Proposed Action

“Action” means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

The Corps proposes to authorize the redevelopment of Milwaukie Riverfront Park. The City plans to redevelop the park located along McLoughlin Boulevard between Kellogg Creek and Johnson Creek. The purpose of the proposed project is to improve recreational opportunities, increase structural and vegetative diversity along the waterway, create and enhance habitats that support native species while minimizing non-native species, protect and improve water quality in the Willamette River. Where needed, the project is also expected to provide stable riverbanks, protect existing and future urban development, infrastructure, significant natural resources, and public safety; provide safe, limited public access to the river in appropriate locations; and enhance the aesthetic qualities of the river’s edge.

The redeveloped park will include large grassy areas, a children’s play area, picnic facilities, restrooms, benches for viewing the river, natural vegetative areas with trails, stone steps leading to the river, a boat ramp with attached boat dock, and parking. (Figures 1 and 2). A description of each project element is described below.

Existing Boat Ramp Removal

A two-lane boat ramp is currently located in the middle of the park. The ramp has been undermined and is not safe to use during low water conditions. The existing ramp will be removed during the in-water work window at low water conditions to minimize the need for construction equipment to enter the river. The in-water work area for demolition of the old boat ramp will occupy about 2,700 square feet, of which about 2,000 square feet will be above the actual summer water level during construction. Demolition of this structure involves lifting out about ten large slabs of concrete using a trackhoe. The work will be performed during low tide during low-water season, and the inundated portion of the demolition work area will be isolated from the active flowing channel using a floating turbidity curtain as described below for new ramp construction. If any concrete is beyond reach of the trackhoe, a diver will attach chains to allow removal. The ramp will be isolated from the active flowing channel with a turbidity curtain or other engineer-approved measures to prevent debris and sediment from leaving the project

site. Construction equipment will be operated below OHW elevation but will not enter the water. The bank will be re-contoured to match upstream and downstream grades.

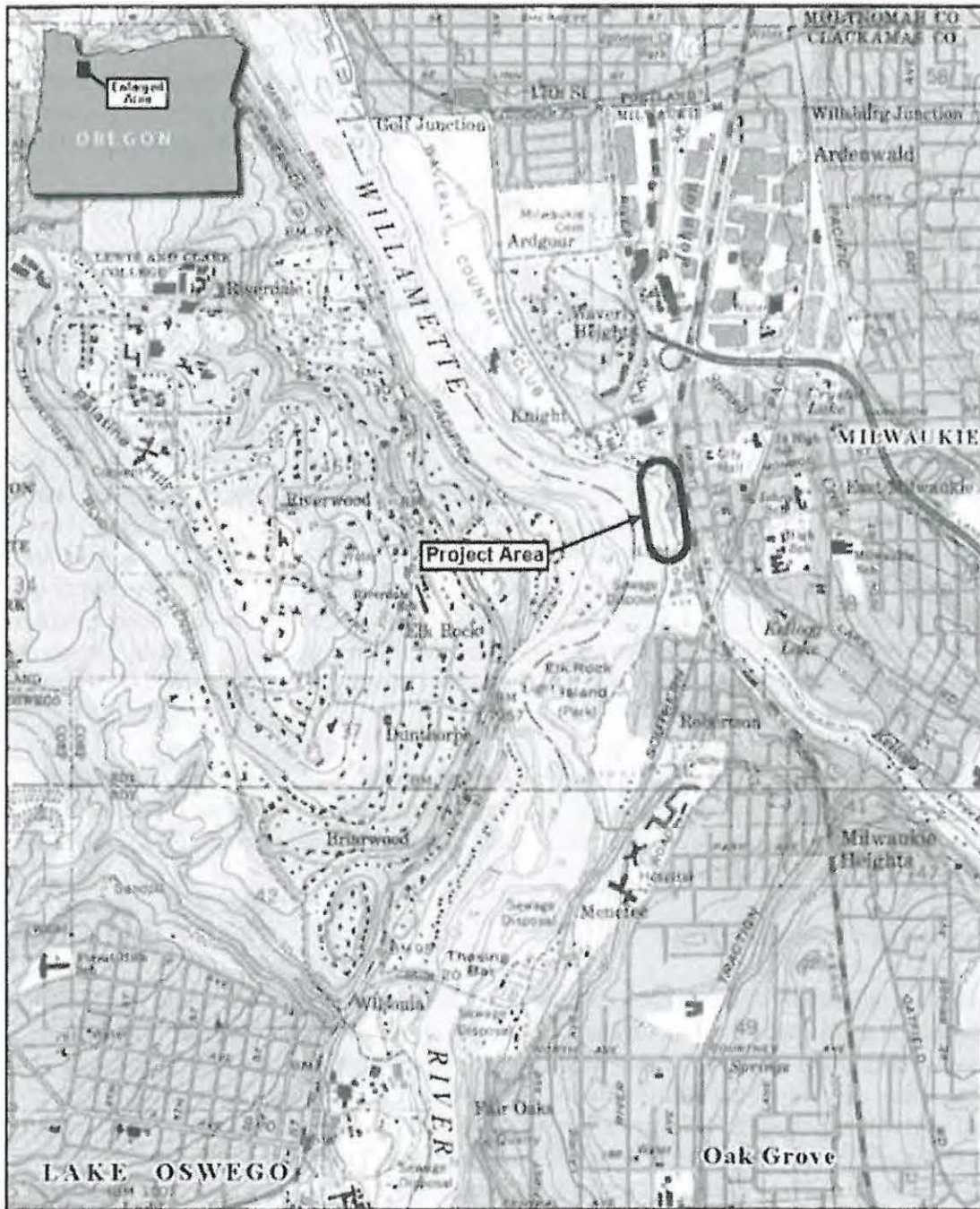


Figure 1. Location Map of the Milwaukie Riverfront Park Project

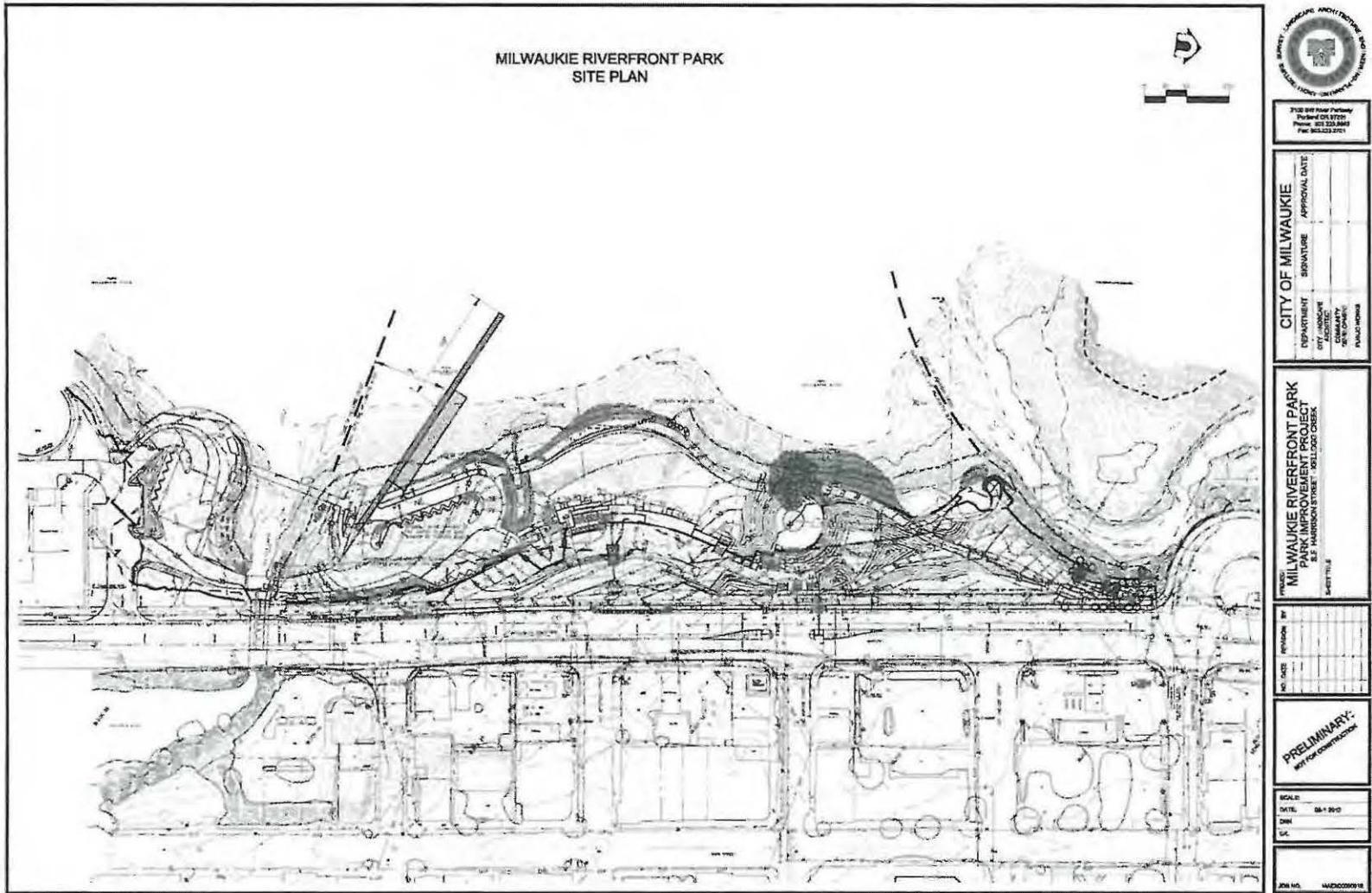


Figure 2. Plan view of the proposed Milwaukie Riverfront Park project.

New Boat Ramp and Boarding Float

The City proposes to construct a boat ramp south of the existing ramp (Figure 2, above). The boat ramp will be approximately 160 feet long by 20 feet wide and 8 inches thick. The boat ramp design is based on a single lane ramp and meets current Oregon State Marine Board standards. The section of the ramp below OHW elevation will be constructed with pre-cast concrete planks for the driving surface. The section of the ramp above OHW elevation will be poured-in-place concrete. Construction below OHW will include slope grading, with 1-1/2 inch gravel base and steel rails placed on grade to support planks. Grading will be limited to slope modifications necessary to establish a flush and level ramp. The pre-cast concrete planks will be placed on the rails and will interlock with each other. A perimeter of riprap will be placed around the ramp to prevent scour and undercutting of ramp surface. This rock will be approximately 4 feet wide and 4 feet deep and flush with the ramp surface.

Most of the construction will be accomplished using excavators and other shore-mounted equipment, but riprap will be placed using a barge mounted crane. The inundated portion of the boat ramp work area will be isolated using a floating turbidity curtain. The curtain will be pulled out from shore so as to exclude any fish that may be present at the time.

An 8-foot by 300-foot plastic 'wood' boarding float will be placed next to the ramp and secured with piling. The boarding float will be constructed of wood surrounding and encapsulating foam. The float will be secured with nine 16- to 18-inch steel piles driven into the ground. Each pile will have a conical pile cap to prevent birds from perching on top.

Stone Steps

The City proposes to construct stone steps to concentrate river access in one location which may help to protect the remainder of the bank and riparian vegetation. The stone steps will be located on the north side of the park in the upland and extend down below OHW elevation. The stone steps will be 35-40 feet wide. The steps will occupy 1,169 square feet and displace 65 cubic yards below OHW elevation. Large rock will be placed along the stone steps, where it is necessary to prevent undercutting and scouring.

Existing Pile and Deleterious Material Removal

A total of 79 pilings will be removed from the Willamette River including 75 at the mouth of Kellogg Creek and four downstream of Kellogg Creek. The old wooden pilings at the mouth of Kellogg Creek are tightly clustered together in several L-shaped rows. About half of them lie at an elevation that will be dry during the in-water work window, and half are likely to be inundated in water up to 6 feet deep. Of the four pilings that lie in the Willamette River, two will be inundated during the in-water work window. Containment for inundated pilings will consist of a floating boom placed around the inundated pilings before removal begins. The floating booms will encompass approximately 770 square feet at the Kellogg Creek location, and 500 square feet at the Willamette River location.

The pilings will be vibrated out using a barge-mounted crane, and the objective will be to vibrate out each entire piling without breakage. However, if a piling accidentally breaks, it will be cut off at the sediment mudline. The removed pilings will be stockpiled in a containment area to prevent discharge back into the River. The pilings will be discarded at the approved METRO facility off-site. Piling removal is expected to take about one week. After mobilization, it is estimated that extracting each piling would take about half an hour, and should a piling break, cutting it off at the mudline would take another half an hour.

Any debris will be pulled to shore when removing the boom after construction, and will be collected and disposed at the off-site approved METRO disposal facility along with the pilings. For pilings removed in areas below the OHW but above the actual water level, any debris will be collected and disposed of with the pilings.

Currently, concrete, rebar, chain link fencing, wood piles, and other debris are found along the banks of the Willamette River and Kellogg Creek. This material will be removed as part of this project. It is anticipated that approximately 35 cubic yards (611 cubic feet of material and 318 cubic feet of piles) will be removed below OHW.

Channel and Slope Stabilization

The shoreline is presently characterized by piles of concrete rubble waste overgrown with thickets of non-native blackberry, other non-native vegetation, and native overstory trees (black cottonwood, red alder, bigleaf maple, and red oak). Much of the immediate shoreline is relatively barren of vegetation. There would be a net increase in permanent fill volume but a net decrease in permanent fill area associated with the removal of the existing boat ramp and deleterious material and construction of the new boat ramp, boat dock and stone steps (Table 1). In most locations, the slope stabilization measures overlap the areas where material is being removed.

Table 1. Summary of fill volume within OHW associated with the Milwaukie Riverfront Park project.

Project Component	Area of Impact Below OHW
Removal of existing boat ramp	-8,990 ft ²
Construction of new boat ramp and dock	6,752 ft ²
Construction of new stone steps	1,169 ft ²
Recontouring bank	7,014 ft ²
Bio-engineered bank protection (cribwalls, soil lifts, large woody debris, cobble)	23,097 ft ²
Removal of deleterious material and existing piles	-18,771 ft ²
Total	10,271 ft²

Proposed bank stabilization measures will include cribwalls and soft gabion soil lifts planted with native shrubs, large wood, coir mats, shoreline cobbles, and large boulders at key scour edges at the new boat ramp and stone steps. Soil engineering will include installation of coir matting in concert with re-vegetation to protect the engineered soil from erosion while planting

becomes established and a matrix of roots binds the slope. The riverbank will then rely on the plantings for stability. To control further retreat of the bank, larger boulders will be placed behind the bioengineering and combined with the root-wads. This system will establish a limit of erosion if the bio-engineering experiences a major flow/flood event before root systems are firmly established.

The following provides a more detailed description of the proposed slope stabilization measures:

Cribwalls and Soft Gabion Soil Lifts. The City proposes crib walls that will be composed of anchored logs and rootwads, and “soft gabion walls” that will be composed of geotextile-wrapped soil lifts with native shrub plantings between levels. Below the OHW elevation, the crib walls will be topped with soft gabion soil lifts. Cribwalls and soft gabions are proposed upstream of the proposed boat ramp and in other locations where the shore is steep enough to require a stabilized terrace following removal of existing concrete rubble armoring.

Large Wood. All large wood below the OHW elevation will be incorporated into the log crib structures described above. The large wood will be approximately 24-inch diameter, 20 foot-long trunks attached to intact rootwads. The rootwads will face the river at about 10 feet on center spacing, in a stabilizing structure with sill logs below and abutment logs above. Several free-standing large wood structures are specified above OHW and are thus not described further here.

Coir Mats. Coir fabric will be used to stabilize the entire disturbed portion of the project shoreline. This includes the regraded area and the shoreline areas in which the only activity will be pulling out old concrete debris and clearing blackberry thickets. The total area to be protected with coir outside of soft gabion walls is 28,247 square feet.

Shoreline Cobbles. A layer of native material will be deposited throughout much of the shoreline below OHW and above the typical summer water elevation. This layer of material will occupy about 16,343 square feet below the OHW and displace 101 cubic yards. The proposed removal of 816 cubic yards of old concrete rubble and debris below OHW is expected to leave a rough, uneven surface that degrades the view from the park areas. The material will partially fill in the low spots and will provide a more uniform surface.

Trails and Scenic Overlook

The north end of the park adjacent to Johnson Creek will feature trails and scenic overlook connections to the Willamette River and to an informal amphitheater. Trail connections on the north end and south end of the park will allow access to regional recreational facilities by bikers and pedestrians. The trail will be located along the top of bank which is between 15-40 feet from OHW.

Pedestrian Bridge

A pedestrian bridge at the mouth of Kellogg Creek is proposed to connect parking on the north side of Kellogg Creek with Milwaukie Riverfront Park. The proposed pedestrian bridge will span

Kellogg Creek and will not be below OHW. The vertical profile will be slightly higher than the 100-year flood elevation to minimize flooding and to ensure a “no rise” in the 100-year floodplain (Figure 2, above). The bridge material will not be made of treated wood.¹

Park Entrance, Boat Trailer Parking, and Automobile Parking

The park’s main entry will be on the portion of the site south of Kellogg Creek. The two existing entryways will be removed. Access and parking will be provided adjacent to the boat ramp (Figure 2, above).

Upland Facilities

Upland facilities will include a Southern plaza, public plaza, amphitheater, and restroom.

The Southern plaza will be south of Kellogg Creek and will provide a gathering place to overlook the Willamette River. It will be at the top of a 30-foot high sheet pile wall formerly used as a log dump. Portions of the plaza will cantilever up to 10 feet over the river at the top of the sheet pile wall. A new parking area will be constructed adjacent to the plaza, where an informal parking area is currently.

The public plaza will include a water feature, children’s play area, and an outdoor theatre space.

The grass amphitheater will hold approximately 150 people for community events.

The restroom building in the large public (pedestrian) plaza will be constructed.

Illumination

Illumination is proposed for this project. All park and path lighting will be of a pedestrian scale and directed downward toward paths and will include hoods or shades to prevent light pollution on the river. Lighting associated with the dock float and walkway will be housed near, and obtusely directed at, the walking surface.

Utility Relocation

Portland General Electric power lines and a water line are currently in the northern half of the project area. The PGE poles and waterline would be moved closer to McLoughlin Blvd. behind the sidewalk. Both of these utility relocates are within existing developed park land and away from the top of bank. None of these utilities require work below OHW and would not result in the loss of riparian vegetation.

¹ Email to Mischa Connine, NMFS from JoAnn Herrigel, City of Milwaukie, stating that they will not use treated wood for the proposed pedestrian bridge, April 18, 2013.

Access/Staging

If possible, areas for non-workshift storage of equipment and vehicles, other than track-mounted vehicles and cranes, will be at least 150 feet away from the regulated work area. Areas for storing fuels and other potentially hazardous materials and areas for refueling and servicing construction equipment and vehicles will also be at least 150 feet from the regulated work area, if feasible. Due to the location of the Willamette River, Kellogg Creek and Johnson Creek, as well as the need to maintain access to sections of the park, sufficient space may not be available to establish a staging area for storing hazardous materials and non-work shift vehicles 150 feet away from OHW. If this is the case, full containment of potential contaminants will be provided to prevent soil and water contamination, as appropriate. Hazardous material containment booms and spill containment booms will be provided on site to facilitate the cleanup of hazardous material spills. After the project is completed, staging areas will be returned to pre-project grade and seeded, if the ground is disturbed.

Stormwater Collection and Treatment

The following provides a more detailed description of the stormwater treatment plan:

Water Quality Treatment. The majority of the existing impervious areas in the project area will be removed for the new layout of parking and sidewalks. The total pre-development site impervious area is approximately 103,960 square feet (2.4 acres). An impervious area of 95,756 square-feet (2.2 acres) will be removed. An impervious area of 8,204 square feet (0.2 acre) of sidewalk will remain.

Stormwater from the existing impervious surfaces presently flows down the river bank to the Willamette River. The existing stormwater system consists of two catch basins that collect part of the driveway stormwater runoff. These catch basins will be removed during construction since the driveway will be moved.

The City will add 122,821 square feet (2.8 acres) of impervious area to the existing 8,204 square-feet (0.2 acre) that will remain. The parking area near Kellogg Creek, which is approximately 56,292 square feet (1.3 acres), will be constructed using pervious pavement technology. Although this technology will allow some infiltration to occur, the water quality treatment facilities have been designed as if this area were impervious. Based on this approach, the total impervious area for the site post-development will be 131,025 square-feet (3.0 acres). The project will create a net increase of 27,065 square-feet (0.6 acre) of impervious area.

For discussion of stormwater, the site has been divided into three key areas. These areas are the north and south parking (intersected by Kellogg Creek connected by an existing vehicle bridge and the proposed pedestrian bridge) and the north pedestrian plaza.

The proposed water quality facilities meet the design standards of the current City of Portland, Stormwater Management Manual (SWMM)(City of Portland 2004). SWMM specifies that pollution reduction is required for all impervious areas created by development projects with the exception of roof areas. SWMM regulations require water quality facilities to treat stormwater

runoff generated by 0.83 inches of rainfall over a 24-hour period when using the Santa Barbara Urban Hydrograph hydrograph-based analysis method.

Stormwater runoff in the south parking area is collected, treated and detained from four basins in four separate facilities; one vegetated swale/planter, two infiltration planters, and one pond. The swale is connected to an adjacent planter. This planter collects and treats runoff through infiltration. The pond collects and treats runoff from the south parking area. All four facilities provide treatment for the water quality event and, furthermore, infiltrates the 10-year event without releasing any water. Larger storm events will release storm water to the Willamette River.

Stormwater runoff in the north parking area is treated and detained in three separate facilities: one flat planter and two sloped planters. All three facilities provide sufficient storage for the water quality storm event, and fully infiltrate runoff from the 10-year storm event.

The public plaza area, also referred to as the pedestrian plaza, includes the restrooms, water features, planters, and amphitheater. These areas also have two stormwater quality treatment features. A swale is proposed on the south side of the plaza and a filter strip is proposed on the far north side of the plaza. A large percentage of the plaza is graded to sheet flow stormwater runoff into adjacent planters or grassy areas. These areas were not modeled for water quality purposes.

Water Quantity Treatment. Since infiltration rates in this area are not high enough to infiltrate the 2-, 5-, 10-, and 25-year storm event, it is necessary to provide a detention system in order to meet the predevelopment discharge rate requirements. The proposed pond and planter facilities provide detention for both the north and south parking area runoff. These facilities are designed to provide detention during the 100-year storm event.

Stormwater Conveyance. All stormwater from vehicular impervious surfaces on the site will be collected and all storm water up to the 10-year event will be treated and infiltrated on the site. Overflow from larger storms, and runoff from some non-vehicular surfaces will be discharged at six pipe outfalls into the Willamette River.

Best Management Practices (BMPs)

The City proposes to minimize impacts to ESA-listed species by implementing an erosion control plan, suspended sediment control plan, and an in-water work isolation plan. The city proposes the following additional BMPs to avoid and minimize impacts to ESA-listed species and associated habitat:

Project Design Measures.

- Riparian shoreline native plantings.
- Removal of existing debris and pilings.
- The boat Ramp float will be placed 100 feet offshore to avoid shoreline smolt migration corridors.

- Float will incorporate light-transmitting materials.
- Stormwater-treatment design storm will be infiltrated to avoid pollutant discharges.
- Project will incorporate permeable pavement, reducing stormwater effects.

Erosion and Pollution Control Measures.

- The contractor will adhere to permit conditions of NPDES 1200-C permit for the discharge of stormwater from construction sites. This permit is issued by DEQ under the authority delegated by the U.S. Environmental Protection Agency.
- An erosion and sediment control plan (ESCP) will be developed and implemented, in accordance with the conditions of the NPDES 1200-C permit. The ESCP may include, but is not limited to, the use of turbidity curtains, silt fences, temporary and permanent ground covers, and siltation ponds to protect water quality, with particular attention to safeguarding adjacent waterways.
- Erosion and sediment control measures will be implemented prior to ground disturbing activities, and shall remain in place until the project area is stabilized.
- Turbidity curtains will be installed for removal of the existing boat ramp and construction of the new boat ramp.
- A floating surface boom will be installed during piling removal.
- A sediment fence will be installed for riprap removal and installation of bank treatment.
- Coir matting and bio filter bags will be installed along disturbed areas of the bank.
- Turbidity increases will be limited to 10% above background reading, as measured 100 feet downstream from the project.
- A pollution control plan will be developed and implemented, which includes limitations on chemical and fuel storage areas, as well as spill containment plans. Spill containment equipment must be stored on site, and the contractor must have the crew trained in its proper use. This plan shall satisfy all pertinent requirements of Federal, State, and Local laws and regulations.
- Construction equipment operating within 30 feet of any stream will contain appropriate spill containment measures, such as diapers.
- All construction equipment will be inspected and cleaned prior to operating within 150 feet of any stream. All construction equipment will be checked for fluid leaks and external oil, grease, dirt and caked mud will be removed. Untreated wash and rinse water will not be discharged into any stream. Temporary impoundments will be established to catch water from equipment cleansing, at least 150 feet from any stream and in a location that does not contribute untreated wastewater to any flowing stream.
- Non-work shift storage of equipment and vehicles, other than track-mounted vehicles and cranes, will occur at least 150 feet away from any stream, or within a fully contained area to prevent any contaminated runoff.
- If feasible, storage areas for fuels and other potentially hazardous materials and areas for refueling and servicing construction equipment and vehicles will be at least 150 feet from any stream. If staging areas are within 150 feet of any stream, full containment of potential contaminants will be provided to prevent soil and water contamination, as appropriate.
- Adequate containment measures will be implemented to prevent pollutants or construction and demolition materials from entering any stream.

- Hazardous material containment booms and spill containment booms will be maintained on site to facilitate the cleanup of hazardous material spills.
- If flooding of the work area is expected to occur within 24 hours, areas used for staging, access roads, or storage and remove materials, equipment, and fuel will be evacuated.

Habitat and Fish Impact Avoidance and Minimization Measures.

- For the purpose of this project, the OHW is defined as the area at or below the elevation of 18.4 feet.
- Construction below OHW will occur during the ODFW in-water work period, which extends from July 1 to October 31 in the Willamette River. The in-water work period for Kellogg Creek is July 1 to September 30. There is no in-water work proposed in Johnson Creek. An extension of the in-water work period requires approval by the engineer, ODFW, NMFS, DSL, and the Corps. Passage for adult and juvenile fish will be maintained for the duration of the project.
- Impacts will be minimized through the use of appropriate construction techniques including work area isolation, turbidity monitoring, and other environmental protection controls. Where feasible, work will be conducted from upland areas to limit temporary impacts to waterways.
- Isolation barriers or other engineer-approved containment method will be installed to isolate in-water work areas from the aquatic environment. Installation and removal will be restricted to the ODFW in-water work window.
- The engineer will be notified at least ten working days prior to completion of containment/isolation device construction. A qualified biologist will be provided access to the containment/isolation devices to remove fish trapped within the devices before beginning work within the containment/isolation devices. Entrapped fish will be removed in accordance with NMFS guidelines (NMFS 2011).
- Contaminated or sediment-laden water from the project or water contained within a containment/isolation device will not be discharged directly into any waterway until satisfactorily treated (*e.g.*, by bioswale, filter, settlement pond, pumping to a vegetated upland location, bio-bag or dirt-bag).
- Turbidity during construction will be monitored per DEQ section 401 permit requirements.
- Water pump intakes will be screened according to the NMFS Juvenile Fish Screen Criteria for Pump Intakes (NMFS 2008a).
- Alteration or disturbance of stream banks and existing riparian vegetation will be minimized. All areas temporarily disturbed by construction activities will be replanted.
- The following conservation measures where steel piles are driven (for construction of the boat ramp) within the wetted channel will be implemented:
 - o When using impact drivers to install a piling, use the smallest driver and the minimum force necessary. Use a drop hammer or hydraulic impact hammer when feasible and set the drop height to the minimum necessary to drive the piling.
 - o If currents are 1.7 miles per hour or less, surround the piling being driven with an unconfined bubble curtain for the full depth of the water column.

- o If currents are greater than 1.7 miles per hour, surround the piling being driven with a confined bubble curtain (*e.g.*, a bubble ring surrounded by a fabric or metal sleeve) for the full depth of the water column.
- o An additional bubble ring will be added for each 35 feet of water depth.
- The following conservation measures will be implemented when removing existing timber piles:
 - o All timber piles to be removed in inundated areas will first be surrounded by a floating surface boom to prevent discharge of debris.
 - o All pile removal equipment will be kept out of the water, and work will be performed during the July to October in-water work window.
 - o Existing piles will be extracted whenever possible, rather than broken or excavated.
 - o If a pile breaks during removal, cut it off flush with the river bottom.
 - o Removed piles will be placed in a containment basin on a barge to prevent discharge of debris or adhering sediment.
 - o All existing timber piles and adhering sediment will be disposed of at the approved METRO disposal facility.

Mitigation

The City states that the extensive shoreline treatment and planting is considered to be “self-mitigating” and will provide a significant net benefit of riparian and aquatic habitat by providing stabilization as well as shading, cover, and increased nutrient and insect prey input for smolts as well as resident fish. No additional mitigation is being proposed for this project. No wetland impacts are proposed. Aquatic habitat improvement has been incorporated into the project as part of the park redevelopment, and thus no separate compensatory mitigation plan has been proposed for waterway impacts.

1.4 Action Area

“Action area” means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02).

For this consultation, the action area includes a portion of Willamette River at river mile (RM) 18.4 known as Milwaukie Bay, and its banks between Johnson and Kellogg creeks, and a small parcel south of Kellogg Creek (Figures 1-2, above). The site consists of several parcels totaling approximately 6.5 acres that form the Milwaukie Riverfront Park owned by the City. The project site is in Milwaukie, Oregon (T01S, R01E, Sec 38, W.M.). The project is in the Lower Willamette River sub-basin and included the mouths of Johnson and Kelly creeks (HUCs 170900120104 and 17090012010) (Figures 1-2, above). The action area includes:

- The streambeds, streambanks, riparian areas, and associated wetlands and upland areas within the proposed project area.
- All such habitat 1,000 feet downstream from the project area (or to the limit of visible turbidity increases resulting from the construction activities).

The action area for this consultation also extends to areas where listed species may encounter impacts from pile driving (*i.e.*, sound pressure waves). Salmon and steelhead are relatively sensitive to sound generated by pile driving. NMFS defined the action area based on effects to salmon and steelhead from pile driving-generated sound. NMFS determined the extent of the action area, by using the NMFS Pile Driving Calculation spreadsheet. NMFS has calculated the distance of onset of injury within 338 feet for salmon and steelhead smolts and 368 feet for salmon and steelhead adults of pile driving activity. Behavioral effects, such as foraging disruption and delayed migration, could occur within 7,067 feet of the pile driving activity. However, the river bends at the project area, thus limiting sound transmission from reaching this distance and is likely closer to 2,970 feet upstream and 4,780 feet downstream from the proposed boat dock.

Thus, the total action area for all effects extends from 2,980 feet upstream and 4,780 feet downstream of the project area (Figure 3). The action area is occupied by LCR Chinook salmon, UWR spring-run Chinook salmon, LCR coho salmon, LCR steelhead, and UWR steelhead and is designated as critical habitat for these species. The action area is EFH for Chinook and coho salmon.

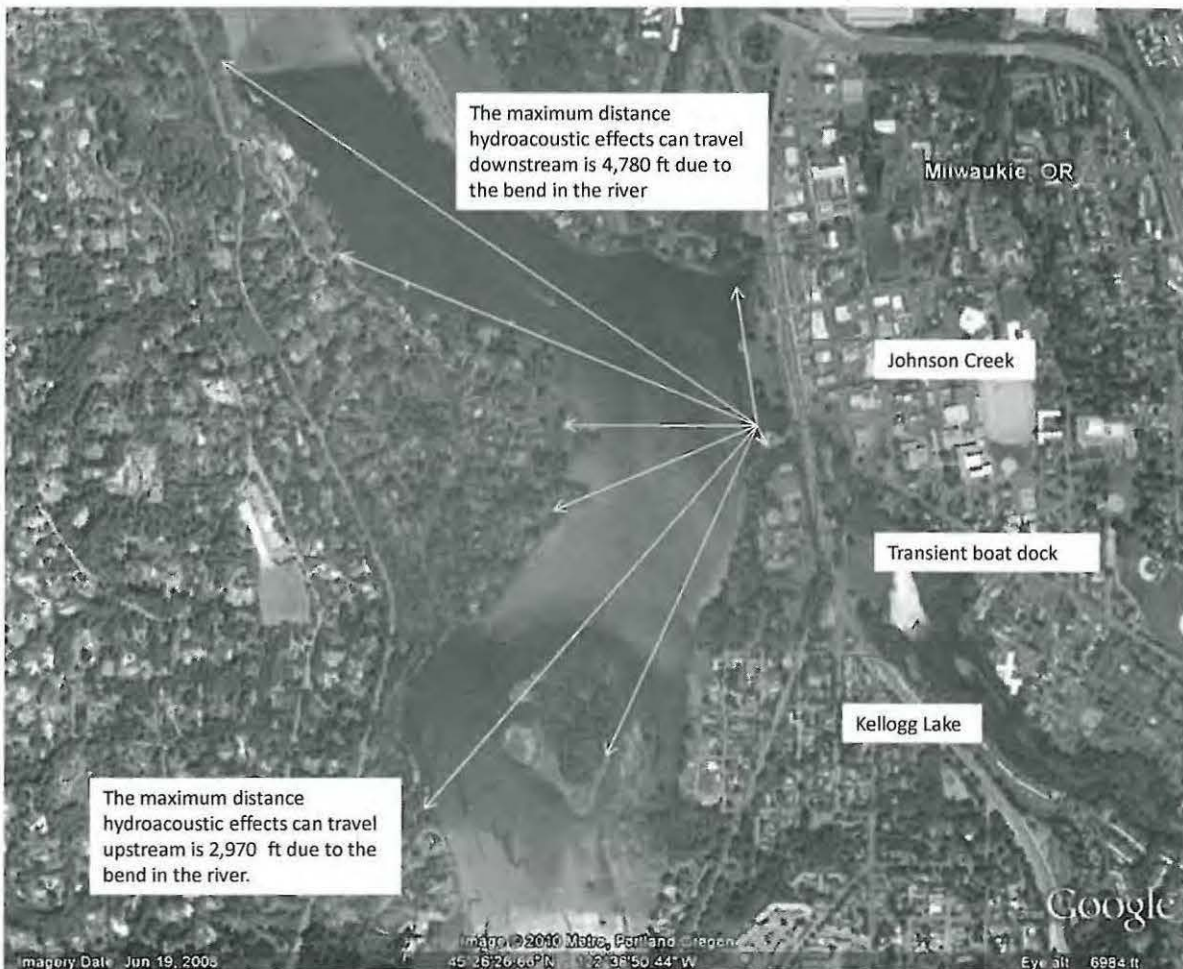


Figure 3. Action area of the Milwaukie Riverfront Park Project.

DEPARTMENT OF THE ARMY
Corps of Engineers, Portland District
Regulatory Branch

Inadvertent Discovery Plan (IDP)

Background

Traditionally, tribes have managed the lands in Oregon for thousands of years. Although these lands are now broken up into segments of various ownerships and managing agencies, Native Americans still retain a strong connection to their ancestral lands. For Oregon tribes, archaeological/burial sites are not simply artifacts of the tribe's cultural past, but are considered sacred and represent a continuing connection with their ancestors. Native American ancestral remains, funerary objects, sacred objects and objects of cultural patrimony associated with Oregon Tribes are protected under state and federal law. These laws recognize and codify the tribes' rights in the decision-making process regarding ancestral remains and associated objects. Therefore, both the discovered ancestral remains and/or archaeological objects should be treated in a sensitive and respectful manner by all parties involved.

It is the policy of the Corps Regulatory program to work effectively with Native American Tribes, landowners, resource agencies, historic preservation organizations, stakeholders, applicants and the public to comply with the National Historic Preservation Act and other applicable laws and regulations, Executive Orders, Presidential Memoranda, and policy guidance documents, and to efficiently process permit applications so that development projects can proceed for the good of the Nation's economic health and national security. Respectful and meaningful coordination and consultations between the Corps, Native American Tribes, and the State Historic Preservation Office are conducted as we strive to balance economic needs with historic preservation concerns.

This IDP ensures all parties involved, during inadvertent discovery of cultural materials, are contacted and fulfill their obligation under state and federal laws, including but not limited to:

National Historic Preservation Act (NHPA) – [16 USC 470] [36 CFR 60]
Native American Graves Protection and Repatriation Act – [25 USC 3001] [43 CFR 10]
Indian Graves and Protection Objects – ORS 97.740-S 97.760
Archaeological Objects and Sites – ORS 358.905 – 358.955
Procedures for the Protection of Historic Properties – [33 CFR 325 – Appendix C]
Consultation and Coordination with Indian Tribal Governments – [Executive Order – 13175]

Suspend Work

Cultural Resources and Human Burials: In the event evidence of human burials, human remains, cultural items, suspected cultural items, or historic properties, as identified by the National Historic Preservation Act, are discovered and/or may be affected during the course of the work authorized, the Permittee shall **Immediately Cease All Ground Disturbing Activities.**

Failure to stop work immediately and until such time as the Corps has coordinated with all appropriate agencies and complied with the provisions of 33 CFR 325, Appendix C, the National Historic Preservation Act and other pertinent regulations, could result in violation of state and federal laws. Violators are subject to civil and criminal penalties.

Notification Process for Permittee and/or Archaeological Monitor

The person(s) making the discovery shall immediately notify the permittee(s), the Corps of Engineers, and other appropriate agencies as necessary.

- Notification to the Portland District Regulatory Branch shall be made by fax (503-808-4375) as soon as possible following discovery but in no case later than 24 hours. The fax shall clearly specify the purpose is to report a cultural resource discovery, provide the Permittee's name, Corps Permit No., and the archaeological monitor's contact information for follow-up purposes.
- Follow up the fax notification with an email and phone call to the Corps of Engineers Project Manager identified in the permit letter.

Notification Process for Corps Project Manager

The Project Manager or person(s) designated to manage the inadvertent discovery shall immediately notify the following agencies:

- Oregon State Historic Preservation Office, Dennis Griffin, office phone (503) 986-0674.
- Washington Department of Archaeology and Historic Preservation, Greg Griffith, office phone (360) 586-3073.
- Oregon State Police [**if human remains are found**], Sgt. Chris Allori, office phone (503) 731-3020, cell (503) 708-6461.
- Commission on Indian Services (CIS) [provide the list of appropriate Native American Tribes], Karen Quigley, Director, office phone (503) 986-1067.

Tribes:

- Confederated Tribes of the Grand Ronde Community of Oregon, Eirik Thorsgard (503) 879-1630; Don Day (503) 879-2185.
- Confederated Tribes of the Warm Springs Reservation of Oregon, Sally Bird (541) 553-3555.
- Confederated Tribes of the Siletz Reservation, Oregon, Robert Kentta (541) 351-0148.
- Confederated Tribes of the Umatilla Reservation, Oregon, Carey Miller (541) 276-3629; Teara Farrow (541) 276-3629; Eric Quampts (541) 276-3447.
- Cow Creek Band of Umpqua Tribe of Indians, Jessie Plueard (541) 677-5575 ext. 5577.
- Coquille Tribe of Oregon, Nicole Norris (541) 756-0904.
- Klamath Tribes, Oregon, Lillian Watah (541) 783-2219 ext. 159; Perry Chocktoot (541) 783-2210 ext. 178.
- Confederated Tribes of Coos Lower Umpqua and Siuslaw Indians of Oregon, Agness Castronuevo (541) 888-7513.
- Fort Bidwell Indians Community of the Fort Bidwell Reservation of California, John Vass (530) 279-6310.
- Smith River Rancheria, California, Suntayea Steinruck (707) 487-9255 ext. 3180.
- Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon, Theresa Peck (541) 573-1375.
- Nez Perce Tribe of Idaho, Vera Sonneck (208) 843-7313.
- Yakama Indian Nation, Thalia Sachtleben, (509) 865-5121 ext. 6074.
- Cowlitz Indian Tribe, Washington, Dave Burlingame, (360) 577-6962.

The Corps will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Registry of Historic Places. In addition, the Corps will coordinate a Site Avoidance Plan (SAP) and/or a Scope of Work (SOW) with the SHPO/DAHP, the tribe(s) and the permittee to avoid or excavate the archaeological/burial site. In the event the Corps decides to delegate their cultural resource protection responsibilities to another federal or state agency, the Corps shall contact the interested parties and provide those parties with the appropriate new contact person(s).

Plan of Action (POA)

In the event human burials, human remains, cultural items, suspected cultural items, or historic properties, as identified by the National Historic Preservation Act, are discovered and/or may be affected during the course of the work authorized, the archaeological monitor, and/or designee, has the authority to temporarily stop all ground disturbance activities to further inspect the material(s). If an isolated artifact

(defined as fewer than 10 artifacts by the Oregon SHPO) is identified, the monitor shall determine whether sufficient quantities and/or evidence of artifacts warrant presence to define a site. If upon closer examination the materials discovered are not consistent with human burials, human remains, cultural items, suspected cultural items, or historic properties, as identified by the National Historic Preservation Act, the monitor will allow work to proceed but with caution and at a slower rate until the monitor is confident no sites are represented.

Upon positive identification of human burials, human remains, cultural items, suspected cultural items, or historic properties, as identified by the National Historic Preservation Act, the monitor will maintain the cease work order, make efforts to secure the discovery location, and immediately notify the permittee and/or designee of the positive discovery as defined in the notification process above.

Human Remains POA

If human burials and/or human remains are discovered, the monitor will treat the remains with sensitivity and respect, ensure all unauthorized personnel have vacated the site location in a safe manner, make reasonable efforts to secure the location, and stabilize the remains if necessary, e.g. they are endangered of falling out a trench wall. Every reasonable effort will be made by the monitor(s) to ensure the remains are not physically handled or examined by unauthorized personnel until the proper notifications have been made. Reference is made to the Tribal Position Paper on Human Remains found on SHPO's website at:

http://www.oregon.gov/OPRD/HCD/ARCH/docs/Tribal_position_paper_on_Human_Remains.pdf.

Treatment Plan (TP)

A treatment plan (TP) will be developed between the Corps, SHPO/DAHP, Tribe(s) and the Permittee during consultation to ensure the proper handling and curation of human remains and/or cultural items is clearly outlined and agreed upon. The TP will define the items found; develop a strategy for handling/moving human remains and/or cultural items; develop a strategy for determining whether additional human remains and/or cultural items are endangered; determine if additional testing is necessary to identify site boundaries; and, determine the disposition of the human remains and/or cultural items. The TP will be agreed upon by all parties involved before any future ground disturbance activities resume.

Construction related activities and/or ground disturbance activities shall not resume until authorization from the Corps has been given.

This plan was developed to ensure the safeguarding of our Nation's heritage through inadvertent discovery, and to ensure the Corps' Tribal-Trust responsibilities are met with Diligence, Responsiveness, Reliability, Accuracy, and Respect to our fellow government agencies.



CITY OF MILWAUKIE
"Dogwood City of the West"

Resolution No.

A resolution of the City Council of the City of Milwaukie, Oregon, HEREBY AUTHORIZING THE CITY MANAGER TO ENTER INTO A "GRANT AGREEMENT" WITH THE OREGON DEPARTMENT OF FISH AND WILDLIFE IN ORDER TO RECEIVE GRANT FUNDING FOR THE CONSTRUCTION OF RIVERFRONT PARK PHASE II.

WHEREAS, the Oregon Marine Board (OMB) teamed up with the City to apply for available grant funds from the Oregon Department of Fish and Wildlife (ODFW) for the completion of Riverfront Park Phase II; and

WHEREAS, via Resolution 33-2013 City Council approved Staff's submittal of an application for grant funds up to \$1.2 million to the OMB and ODFW; and

WHEREAS, ODFW have awarded the City a grant in the amount of \$1,000,000 for the construction of specific elements tied to the Riverfront Park Phase II Project; and

WHEREAS, to receive the grant funds, ODFW requires the City enter into a Grant Agreement; and

WHEREAS, signature of the Grant Agreement commits the City to a local match of \$959,160; and

WHEREAS, the City's matching funds will come from a loan that the City will acquire that will be backed by the Kellogg Good Neighbor Fund.

Now, Therefore, be it Resolved the City Manager has the authority to sign a Grant Agreement with the Oregon Department of Fish and Wildlife for the construction of specific elements tied to the Riverfront Park Phase II Project.

Introduced and adopted by the City Council on _____.

This resolution is effective on _____.

Jeremy Ferguson, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC

Pat DuVal, City Recorder

City Attorney

5/6/14



MILWAUKIE CITY COUNCIL
STAFF REPORT

To: Mayor and City Council
 Through: Bill Monahan, City Manager
 Subject: **Riverfront Park – Phase II Funding Discussion**
 From: Jason Rice, Engineering Director
 Date: May 6, 2014

ACTION REQUESTED

No formal action is being requested. However, Staff is interested in Council's opinion on how the project should proceed with regards to funding.

BACKGROUND

The Riverfront Park Phase II bid went through a competitive bidding process in accordance with Chapter 30 of the City's Public Contracting Rules. The City received 7 bids before the April 30, 2014, 11:00 AM bid opening. The following table is a summary of all bid amounts as well as the engineer's estimate.

<u>Contractor</u>	<u>Bid Amount</u>
1. Canby Excavation Inc.	\$2,697,946.00
2. Colf Construction Company	\$2,763,874.00
3. Wildish Standard Paving Co.	\$2,835,299.75
4. Brown Contracting Inc.	\$2,986,212.00
5. Elting Northwest Inc.	\$3,099,237.00
6. Tapani Inc.	\$3,182,313.00
7. PCR Inc.	\$3,308,055.50
David Evans and Associates Estimate	\$2,400,000.00

While the City's contract with David Evans and Associates (DEA) has concluded with the production of the construction drawings, Staff has started discussions with DEA in order to identify how its estimate was off by more than \$300,000. Items such as the pedestrian bridges, the pathway light bollards and earthwork contained a majority of the discrepancy.

Staff's selection of the contractor was based on the lowest responsive bid submitted in conformance with the Contract Documents. The lowest bid amount was submitted by Canby Excavation, however, after reviewing the error with the City's Legal Staff, it was recommended to reject their bid as non-responsive. The next lowest (responsive) bid was submitted by Colf Construction Company, a construction firm from Vancouver, WA.

Due to the sensitivity of the in-water work this project demands, Staff took further precaution and required bidders to submit a job history that included two projects of similar nature. Staff checked Colf's Construction Company's supplied work history and confirmed that they are capable to perform this project.

Currently, the project will receive funds from five separate sources.

Oregon Department of Fish and Wildlife	\$1,000,000
Kellogg Good Neighbor Fund	\$1,000,000

Oregon Marine Board	\$ 200,000
Oregon Parks and Recreation Department	\$ 221,000
<u>City Match (Grant Obligations)</u>	<u>\$ 147,500</u>
Total Project Budget (with Contingency)	\$2,568,000

Based on Colf's bid and other known expenditures the project will incur, there is an approximate budget shortfall of \$400,000.

Interested in how the bidding went, the Oregon Marine Board (OMB) contacted Staff. During that discussion OMB Staff mentioned there is potential for additional funding; however, their Staff will need to analyze the individual bid items in order to determine the total cost of boating elements. If the cost of the boating elements are more than \$1,200,000 OMB said that they had approximately \$115,000 and that the ODFW may have more as well. The downside to this analysis is that if it is determined that the items sum less than \$1,200,000 (ODFW and OMB combined funding), there is also a potential that City's funding gap could increase even further. OMB's determination is unknown at this time.

CONCURRENCE

Community Development Staff has discussed the issues with the City Manager's Office and both agree that Council's opinion needs to be heard prior to advancing the project into a contract.

STAFF RECOMMENDATION

Staff recommends moving forward with Colf Construction as the lowest responsive responsible bidder and to continue discussions with the Oregon Marine Board to acquire additional funding. In the event that not all the funding can be acquired, Staff recommends removal of the two pedestrian bridges (costing \$190,000) because they can easily be constructed in a future phase with minimal impact to Phase II work.

WORK LOAD IMPACTS

The extent of impact on Community Development Staff workload depends on which funding alternatives Council wishes to pursue. Despite the request, Staff is prepared to advance the project as Council sees fit.

ALTERNATIVES

1. Award the project on May 20th and direct Staff to reduce the project scope
2. Do not award the project (defer indefinitely)
 - If council wishes not to award the project and remove it from the CIP list.
2. Re-bid the project without amendments
 - If council approves of the project need and design but thinks the project should be re-bid for any reason. This option would result in construction of Phase II in summer of 2015.
3. Direct the staff to modify the project and re-bid
 - If council does not approve of the project design and/or thinks that rebidding could reduce cost. This option would result in construction of Phase II in summer of 2015.

ATTACHMENTS

None.