

**MEMORANDUM OF AGREEMENT (MOA)  
REGARDING THE  
SOUTHERN FLOW CORRIDOR - LANDOWNER PREFERRED ALTERNATIVE  
PROJECT**

This Memorandum of Agreement, hereinafter, AGREEMENT, is made and entered into by and between the Port of Tillamook Bay, by and through its Board of Commissioners, hereinafter **PORT**; Tillamook County, by and through its Board of Commissioners, hereinafter **COUNTY**; the Tillamook Estuaries Partnership, by and through its Executive Director, hereinafter **TEP**; and the Tillamook Bay Habitat and Estuary Improvement District, by and through its President, hereinafter **TBHEID**. **PORT**, **COUNTY**, **TEP**, and **TBHEID** collectively referred to as **PARTIES**.

**RECITALS**

**PURPOSE**

- A. The purpose of this AGREEMENT is to define **PARTIES'** responsibilities pursuant implementation of the project as defined in Recitals L, M, and N.

**BACKGROUND**

- B. In 2001, **COUNTY**, in cooperation with **TEP**, **TBHEID**, and numerous other partners, purchased 377 acres from private landowners for the purposes of flood control and habitat restoration. Thus, the 377 acres of **COUNTY**-owned property is currently subject to certain deed restrictions and conditions relative to the creation and protection of salt water wetland values, and is presently managed under an Intergovernmental Agreement (IGA)(refer to Recital O.) and the partner-developed *Tillamook Bay Wetlands: Management Plan for the Wilson, Fuhrman, and Farris Wetland Acquisition Properties (November 2001)* ("the Management Plan"), copies of which are attached hereto and by this reference incorporated herein.
- C. The Management Plan provides the overarching framework for development and management of the wetlands, floodways, flood control structures, and other resource uses throughout the 377 acres. The current parties to the Management Plan are **COUNTY**, **TEP**, **TBHEID**, Tillamook County Soil and Water Conservation District (SWCD), Oregon Department of Fish and Wildlife (ODFW), and City of Tillamook, who collectively participate in the management of the 377 acres and each of whom have participated either financially or with in-kind contributions to the operation and maintenance of the said lands and drainage structures thereon.
- D. **COUNTY** efforts to restore the 377 acres stalled when hydraulic analyses, modeled by the US Army Corps of Engineers, concluded that full restoration of the entire site would cause unacceptable increases in flood elevations within the City of Tillamook's Highway 101 business district. The study concluded partial restoration of the 377 acres was possible, but flood level reductions were nil.
- E. In 2006 and 2007, Tillamook County suffered large floods and extensive damages. After the 2006 flood, Governor Ted Kulongoski established a flood mitigation effort as an 'Oregon Solutions' (OS) project. The OS process provides a structure and process for public and private sectors to collaborate in addressing technically and politically challenging community needs. Subsequently, a 34-member Project Team (PT) of federal, state, and local government agencies, community groups,

business organizations, and individuals was assembled. In 2007, the PT prioritized projects and began implementation.

- F. Northwest Hydraulic Consultants (NHC), performed new hydraulic analyses to evaluate projects for flood mitigation benefits. The Southern Flow Corridor-Landowner Preferred Alternative project (“the Project”) was shown to be the most cost effective flood level reduction measure by creating a flow corridor from Highway 101 out to Tillamook Bay. The Project also provides substantial tidal wetland restoration and habitat benefits. On May 13, 2011, the Project was unanimously approved by the OS Design Team (DT), comprised of 15 federal, state, and local agencies and private parties, and subsequently the PT.
- G. PORT has available to it certain Federal Emergency Management Agency (FEMA) funds for a series of alternate projects currently being implemented under FEMA’s DR-1733-OR in lieu of restoring its damaged railroad facilities from the December 2007 storm event. The expenditure of these funds is governed by Infrastructure Contract 1733-DR-OR between PORT and the State of Oregon Office of Emergency Management. FEMA Disaster Assistance Policy (Alternate Projects) DAP9525.13(VI) authorizes an eligible applicant to perform hazard mitigation measures unrelated to the original facility so long as the applicant can demonstrate the project eligibility under the guidelines of DAP9525.13(VII). In April of 2010 PORT and COUNTY entered into an Intergovernmental Agreement (COUNTY IGA #4115) to outline the process for examining the Project’s eligibility as a FEMA Alternate Project. After a lengthy Alternate Project Request review process (initially determined ineligible) and the subsequent filing of two separate appeals in May 2011 and October 2012, on April 11, 2013 FEMA Headquarters overturned the Region’s denial of the First Appeal and approved the Project and PORT’s request to utilize \$4,300,000 of its available alternate project funds towards the Project. PORT’s 25% cost share (\$1,075,000) is being provided through a grant from the Oregon State Lottery Bonds (“Bonds”) program. A Project Worksheet (PW) is currently being developed by FEMA for obligation of these funds and implementation of the Project.
- H. Under ORS 777.120(2), PORT has authority to engage in the control and prevention of river and streambank erosion and the prevention of damage from floodwaters and sediment. COUNTY hereby grants a construction easement to PORT over existing COUNTY-owned Project lands, over the 128 acres currently being acquired by COUNTY, and over the 120 acres of flood and construction easements to be hereafter acquired by COUNTY within the Project area.
- I. On August 1, 2013 the National Oceanic and Atmospheric Administration (NOAA) approved COUNTY’s funding request for \$242,000 for fiscal year 2013 through NOAA’s Coastal and Marine Habitat Restoration Program. Up to \$2,458,000 is available in future years. Annual funding negotiations are partially dependent upon the availability and intent of funds provided by Congress.
- J. FEMA Environmental and Historic Preservation (EHP) staff has informed PARTIES that an Environmental Impact Statement (EIS) will be required under FEMA’s implementation of the National Environmental Policy Act (NEPA) for this Alternate Project. FEMA and NOAA are collaborating on this process. FEMA will issue the final EIS documentation.
- K. On December 13, 2013, the OS DT established a Project Management Team, comprised of PARTIES, to guide Project implementation.

## STATEMENT OF PROJECT

- L. The Project goal is to reconnect the floodplain, restore the ecological processes and economic values of the upper Tillamook Bay estuary and the Wilson and Trask river deltas in order to: 1) reduce flood hazards, 2) improve habitat for native fish and wildlife, 3) improve water quality and reduce sedimentation, and 4) enhance the overall ecological health of Tillamook Bay. The Project area is approximately 646 acres of public and private property. Implementation, which includes dike and levee removal and upgrades, road and structure removals, ditch filling, channel construction, and large wood placement, will provide an estimated 1.5-foot flood reduction and restore 521 acres to full tidal inundation.
- M. The proposed timeline for key Project elements are as follows:
1. Land and Easement Acquisition: September 2013 – October 2015
  2. Baseline Monitoring: October 2013 – March 2015
  3. Final Design: September 2013 – December 2014
  4. Permitting/EIS: October 2013 – June 2015
  5. Management Plan Revision: November 2014 – April 2015
  6. Construction: May – November 2016
  7. Post-Project Monitoring: October 2017 – October 2020
- N. Since the 377-acre purchase in 2001-2003, COUNTY has acquired an additional 15 acres in the Project area. Project implementation requires COUNTY to purchase an additional 128 acres of private land and 120 acres of private easements. Options are secured on 128 acres of the private land.

## EXISTING CONTRACTS

- O. IGA #3412 exists between COUNTY, ODFW, and SWCD for purposes of managing the original 377-acre COUNTY purchase. It is PARTIES' intent, upon completion of the Management Plan Revision as outlined in Recital M, to seek an update to this IGA to incorporate same therein.
- P. A sublease agreement exists between SWCD and George Allen & Sons for purposes of renting for agricultural use approximately 143 acres of the 377-acre COUNTY purchase. A 180-day notice of cancellation will be provided to the Lessee prior to construction of the project.
- Q. IGA #4115 exists between PORT and COUNTY for purpose of establishing the process to examine the Project's eligibility as a FEMA-funded Alternate Project. IGA #4115 will terminate upon execution of this agreement.
- R. A Professional Services Agreement (PSA) exists between COUNTY and NHC for the Project design and permitting activities, including cultural resources, geo-technical investigations, civil design, bidding, and monitoring plan development. For the purposes of establishing FEMA Alternate Project funding reimbursement approval, COUNTY and PORT will enter into a legally-acceptable Novation Agreement which thereby transfers the NHC PSA to PORT.
- S. A PSA exists between COUNTY and WILLIAM F. PAULUS ("Paulus") for due diligence associated with acquisition of the real property referenced in Recital N.

- T. A PSA exists between COUNTY and the Institute for Applied Ecology (“IAE”) for Project baseline monitoring activities.
- U. A PSA exists between COUNTY and the Confederated Tribes of Siletz Indians (“Tribes”) for Project baseline monitoring activities.

#### **SECURED CASH FUNDING CONTRACTS**

- V. PORT has secured \$3,225,000 through FEMA’s Disaster Assistance Policy for Alternative Projects, DAP9525.13(VI) and \$1,075,000 in Oregon State lottery bonds. Oregon Office of Emergency Management (OEM) Infrastructure Contract #FEMA-1733 DR OR exists between the State of Oregon, OEM, and PORT and governs use of the FEMA funds and Bonds.
- W. COUNTY has secured \$242,000 for the Project through the NOAA’s fiscal year 2013 Coastal and Marine Habitat Restoration Project Grants (#NA13NMF4630133).
- X. COUNTY has secured \$240,000 from Loren Parks for land acquisitions.

#### **PENDING CASH FUNDING**

- Y. Up to \$2,458,000 is available through COUNTY’s NOAA funding contract, dependent upon annual funding negotiations.
- Z. COUNTY has submitted a land acquisition proposal to the Oregon Watershed Enhancement Board (OWEB) for \$1,585,152 to purchase 128 acres. If awarded, the United States Fish and Wildlife Service (USFWS) Coastal Wetland Program will provide \$600,000 toward the Project implementation.
- AA. COUNTY has submitted an effectiveness monitoring proposal to OWEB for \$125,548 to support elements of the Project baseline monitoring.

#### **AGREEMENT**

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants, promises and undertakings hereinafter set forth, PARTIES agree as follows:

- 1. Rights, Duties, and Obligations of **PARTIES**. PARTIES shall:
  - 1.1 Cooperate to complete the Project as defined in Recitals L, M, and N.
  - 1.2 Cooperate on all project discussions and decision-making, including, but not limited to, land and easement acquisitions, engineering design, permitting, monitoring, construction, budgeting, and contracting.
  - 1.3 Review all contracts prior to execution.
  - 1.4 Collaborate on the Management Plan revision, which will include approximately 513 acres of publicly owned land.
  - 1.5 Continue OS PT and DT participation.
  - 1.6 Share data and information generated by the Project, such as reports, monitoring data, and contracts, on the Project website managed by COUNTY.

- 1.7 Collaborate when developing public outreach strategies and consistent Project related communication.
  - 1.8 Provide updates to PARTIES, agencies, and the public.
  - 1.9 Meet regularly, as determined by the project requirements.
2. Rights, Duties, and Obligations of **PORT**. On condition that PORT approves the written plan prepared by COUNTY to pay for completion of the Project as described in paragraph 3 below, PORT shall:
    - 2.1 Serve as the primary FEMA and Oregon Office of Emergency Management (OEM) liaison in PORT's administration of the PW for the Project's design and construction.
    - 2.2 On condition and to the extent FEMA approves funding for project design services, administer the NHC PSA.
    - 2.3 On condition and to the extent FEMA and Bonds provide funding, procure and administer contracts necessary to undertake work pursuant to the Project statement in this AGREEMENT.
    - 2.4 Approve or reject all COUNTY payment recommendations based on supporting documentation and the status of the services or work.
    - 2.5 Invoice COUNTY and any other applicable parties for their share of all COUNTY payment recommendations approved by PORT. On condition that COUNTY and all other applicable parties pay PORT or confirm available funding for invoices, PORT shall provide payment for all expenditures reimbursable by the Project PW. Provide confirmation of payment to PARTIES.
    - 2.6 On condition and to the extent FEMA and Bonds provide funding, acquire all permits and environmental consultations necessary to fully implement the Project.
3. Rights, Duties, and Obligations of **COUNTY**. COUNTY shall:
    - 3.1 Secure any reasonably available grants and any required matching funds for the Project.
    - 3.2 To the extent payment through PORT and other sources is less than the total cost for completion of the Project, pay for completion of the Project.
    - 3.3 Take reasonable steps to assure that COUNTY will have enough money to pay for completion of the Project, which includes but is not limited to creating a written plan that describes the steps COUNTY plans to take to secure funding, creating a separate account and depositing money into the account in accordance with a reasonable plan to adequately budget for the COUNTY's share of the cost for completion of the Project.
    - 3.4 Provide its written plan and reasonable supporting documentation to PORT and reasonably address or answer, as appropriate, any concerns or questions PORT may have regarding the written plan.
    - 3.5 Administer the existing NOAA funding contract and Loren Parks funds.
    - 3.6 Administer, if and when awarded, the OWEB and USFWS land acquisition, planning, and construction funding contracts.
    - 3.7 Administer the PSAs with Paulus, IAE, and Tribes.
    - 3.8 Provide support to PORT, as deemed necessary by PORT, for any PORT administered contracts.
    - 3.9 Following receipt of COUNTY's payment recommendation and PORT's and COUNTY's review and approval, provide payment for all expenditures reimbursable by the NOAA funding contract and Loren Parks and pending OWEB and USFWS funding contracts, upon their securance. Provide confirmation of payment to PARTIES.
    - 3.10 Reimburse TEP for permitting activities reimbursable through NOAA funding contract.
    - 3.11 Provide donated services approximating, at minimum, \$21,094 between August 2013 and December 2015. Apply these donated services as match toward the NOAA funding contract.

- 3.12 Seek to acquire approximately 128 acres of property, 35 acres of temporary construction easements, and 85 acres of permanent flood easements needed for the Project. The 128 acres of acquired property shall be incorporated into the revised Management Plan.
  - 3.13 Continue role as a co-convenor and project manager of the Tillamook County OS project.
  - 3.14 Maintain a Project website to allow public outreach.
4. Rights, Duties, and Obligations of TEP. TEP shall:
- 4.1 Seek and administer monitoring funding and procure and administer contracts necessary to implement the post-project monitoring pursuant to the Project monitoring plan.
  - 4.2 Provide grant and contract administrative support to PORT and COUNTY, as deemed necessary by PORT and COUNTY, for any PORT or COUNTY administered contracts.
  - 4.3 Continue OS PT and DT participation.
  - 4.4 Actively participate on the Monitoring Advisory Committee through all phases.
  - 4.5 Provide support to COUNTY through the permitting process, as needed.
5. Rights, Duties, and Obligations of TBHEID. TBHEID shall:
- 5.1 Ensure the Project meets the intent of reducing flood hazards.
6. TERMINATION. This AGREEMENT shall terminate:
- 6.1 Upon the request of any party, after giving the other parties 180 days advance notice.
7. INDEMNITY. Each party shall include appropriate indemnity clauses in any design or construction contracts issued for the Project. Such indemnity clauses shall require consultants, subconsultants, contractors, subcontractors, and suppliers to defend, indemnify and hold the PARTIES harmless from all claims, costs, damages, or expenses of any kind, including attorneys' fees and other costs and expenses of litigation, for personal injury or property damage to the extent such claims, costs, damages, or expenses arise out of that party's fault.
8. INSURANCE. Each party agrees to maintain insurance sufficient to meet sums specified by ORS 30.270.
9. GENERAL PROVISIONS.
- 9.1 MODIFICATION & WAIVER. The rights and duties under this AGREEMENT shall not be modified, delegated, transferred or assigned, except upon the written-signed consent of the parties. Failure to enforce any provision of this AGREEMENT shall not operate as a waiver of such provision or of any other provision.
  - 9.2 ATTORNEYS' FEES. Attorney fees, costs and disbursements necessary to enforce this agreement through mediation, arbitration and/or litigation, including appeals, shall be awarded to the prevailing party, unless otherwise specified herein or agreed.
  - 9.3 LEGAL REPRESENTATION. In entering into this AGREEMENT, each party has relied solely upon the advice of their own attorney. Each party has had the opportunity to consult with counsel.
  - 9.4 NOTICES. Any notice required or permitted under this AGREEMENT shall be in writing and deemed given when:
    - 9.4.1 actually delivered if not sent by mail as described below, or
    - 9.4.2 three days after deposit in United States certified mail, postage prepaid, addressed to the other party at their last known address.
  - 9.5 LANGUAGE. The headings of the contract paragraphs are intended for information only and shall not be used to interpret paragraph contents. All masculine, feminine and neuter genders

are interchangeable. All singular and plural nouns are interchangeable, unless the context requires otherwise.

- 9.7 SAVINGS. Should any clause or section of this AGREEMENT be declared by a court to be void or voidable, the remainder of this AGREEMENT shall remain in full force and effect.
- 9.8 JURISDICTION; LAW. This AGREEMENT is executed in the State of Oregon, and is subject to Tillamook County and Oregon law and jurisdiction. Venue shall be in Tillamook County, Oregon, unless otherwise agreed by the parties.
- 9.9 NO THIRD PARTY BENEFICIARIES. There are no intended third-party beneficiaries of this AGREEMENT.

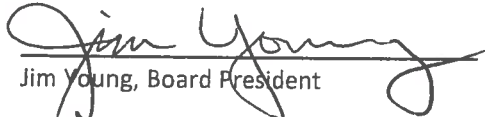
10. EFFECTIVE DATE. This AGREEMENT shall take effect on February 18, 2014.

11. IGA #4115 between PORT and COUNTY, as referenced in Recital Q, be and is hereby terminated.

**ACKNOWLEDGMENT:** EACH PARTY REPRESENTS TO THE OTHER BY THEIR SIGNATURES BELOW THAT EACH HAS READ, UNDERSTANDS, AND AGREES TO ALL COVENANTS, TERMS AND CONDITIONS OF THIS AGREEMENT. EACH PARTY REPRESENTS TO THE OTHER TO HAVE THE ACTUAL AND/OR APPARENT AUTHORITY TO BIND THEIR RESPECTIVE LEGAL PERSONS, CORPORATE OR OTHERWISE, IN CONTRACT.

PORT OF TILLAMOOK BAY

DATED THIS 18<sup>th</sup> DAY OF FEBRUARY, 2014

  
\_\_\_\_\_  
Jim Young, Board President

  
\_\_\_\_\_  
Jack Mulder, Board Secretary


TILLAMOOK ESTUARIES PARTNERSHIP

DATED THIS 18<sup>th</sup> DAY OF February, 2014

  
\_\_\_\_\_  
Lisa Phipps, Executive Director

TILLAMOOK BAY HABITAT AND ESTUARY  
IMPROVEMENT DISTRICT

DATED THIS 13 DAY OF Feb, 2014

  
\_\_\_\_\_  
Chad Allen, President

THE BOARD OF COMMISSIONERS  
FOR TILLAMOOK COUNTY, OREGON

DATED THIS 12<sup>th</sup> DAY OF February, 2014

Bill Baertlein

Bill Baertlein, Chair

Tim Josi

Tim Josi, Vice-Chair

Mark Labhart

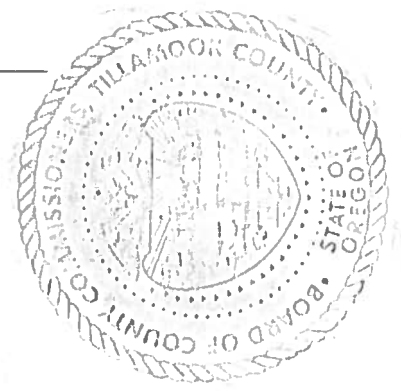
Mark Labhart, Commissioner

Aye      Nay      Abstain/Absent



ATTEST: Tassi O'Neil, County Clerk

APPROVED AS TO FORM:

By: Susan L. Beecraft  
Special Deputy

William K. Sargent  
William K. Sargent, County Counsel

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