

**INTERGOVERNMENTAL AGREEMENT
MS4 PERMIT**

This Intergovernmental Agreement (“this Agreement”) is by and between the City of Portland (“the City”), a municipal corporation of the state of Oregon, and the Port of Portland (“the Port”), a municipal corporation of the state of Oregon, and is authorized by ORS 190.010.

RECITALS

WHEREAS, the City and the Port are co-permittees for Municipal Separate Storm Sewer System (“MS4”) National Pollution Discharge Elimination System (“NPDES”) permit #101314 (“MS4 Permit”), issued by the Oregon Department of Environmental Quality (“DEQ”).

WHEREAS, DEQ renewed the MS4 Permit, effective October 1, 2021.

WHEREAS, the parties wish to continue allocating responsibility for satisfying various MS4 Permit requirements and related costs, and to replace and supersede the parties’ existing MS4 agreement, Port No. 2013-039, City No. 30003325.

AGREEMENT

1. General

1.1. Except as expressly provided otherwise by this Agreement or where the context requires otherwise, the terms used in this Agreement shall have meanings consistent with 40 CFR Part 122 and the MS4 Permit.

1.2. Except as expressly provided otherwise by this Agreement, each party shall be solely responsible for MS4 Permit compliance with respect to municipal separate storm sewers that it owns or operates.

1.3. Subject to the conditions and limitation of the Oregon Constitution, Article XI, Section 9, and the Oregon Tort Claims Act (ORS 30.260 to 30.300), the City agrees to defend, hold harmless, and indemnify the Port, its commissioners, directors, officers and employees from and against and to reimburse the Port for all claims, actions, damages, injuries, costs, loss or expenses incidental to the investigation and defense thereof, arising out of the acts or omissions of the City, its officers, employees, or agents in the performance of this Agreement. Subject to the conditions and limitations of the Oregon Constitution, Article XI, Section 9, and the Oregon Tort Claims Act (ORS 30.260 to 30.300), the Port agrees to defend, hold harmless, and indemnify the City, its commissioners, employees and agents from and against and to reimburse the City for all claims, actions, damages, injuries, costs, loss or expenses incidental to the investigation and defense thereof, arising out of the acts or omissions of the Port, its officers, employees, or agents in the performance of this Agreement.

1.4. Nothing in this Agreement shall be deemed to supersede or interfere with existing agreements governing the transfer of storm sewers, stormwater treatment facilities, or other utilities from one party to the other. Unless expressly provided otherwise by separate written agreement between the parties, the transfer of a storm sewer or a stormwater treatment facility to one party shall be deemed to transfer all responsibility to that party for MS4 Permit compliance for that sewer or facility.

1.5. The parties shall cooperate on implementation of the MS4 Permit conditions with appropriate actions, resources, and programs.

1.6. The parties shall cooperate generally in the administration of the MS4 Permit, including commitment and prioritization of resources and staffing necessary for permit administration, and shall negotiate amendments to this Agreement or separate agreements as necessary to ensure MS4 Permit compliance.

1.7. Exhibit 1 is incorporated by reference into this Agreement and will be updated by mutual agreement as needed, including concurrent with permit, and will be subject to the payment terms of Sections 4.1, 4.2, 4.3 and 4.4.

2. Discharges From One Part of the Municipal Separate Storm Sewer System ("MS4 System") to Another

2.1. The parties shall cooperate on a case-by-case basis as needed to investigate, monitor, and eliminate illicit discharges to each other's portions of the MS4 system.

3. City's Duties

3.1. Nothing in this Agreement shall be deemed to make the City the agent of the Port for any purpose. The City shall not represent to DEQ or the U.S. Environmental Protection Agency ("EPA") that the City is acting on behalf of the Port without the prior express written authority of the Port's Executive Director. Nothing in this Agreement shall give rise to any right or cause of action in any third party.

3.2. If there is a mutual agreement to coordinate jointly on a report required under the MS4 Permit, and the agreement includes the City taking the lead, the City shall coordinate the preparation and submittal of the relevant report with the Port. Coordination shall include receiving information from the Port and incorporating that information into such reports. The City shall make available to the Port materials related to relevant joint reports and other MS4 Permit implementation tasks that are coordinated between the City and the Port and for which the City has lead responsibility.

3.3. The City shall perform environmental monitoring, conduct analyses, and submit monitoring reports as required as part of the MS4 Permit monitoring program in accordance with the City's most current version of the MS4 Monitoring Plan. The monitoring data will be provided to the Port each year with the MS4 Permit annual report. The Port may also request the data more frequently than annually and the City will provide, or make available by current data-sharing technology, the requested data to the Port within 30 days from the time of the request.

3.4. The City's monitoring obligation shall include, without limitation, monitoring necessary to comply with the Total Maximum Daily Load ("TMDL") established by DEQ for the Columbia Slough.

3.5. The City shall update the MS4 Monitoring Plan as needed and provide any updates to DEQ and the Port. In the event the City makes an MS4 Permit-required request to DEQ to modify the MS4 Monitoring Plan, the City will promptly notify the Port of the request and of DEQ's response.

3.6. The City shall coordinate with the Port to review and comment on proposed modifications to the MS4 Monitoring Plan made in conjunction with the MS4 Permit renewal or made as allowed by terms of the MS4 Permit.

3.7. The City shall conduct inspections of stormwater management facilities ("SMFs") on tenant-occupied Port properties where the tenant is responsible for maintenance as identified by the City and agreed upon by the Port. Inspections shall be conducted in accordance with the City's established schedules.

4. Port's Duties

4.1. On an annual basis, the Port shall pay the City 12.7 percent of the costs actually incurred by the City for annual permit fees, any applicable permit modification fees and to conduct environmental monitoring required in the City's MS4 Monitoring Plan, subject to the Port Maximum Annual Payment for NPDES environmental monitoring ("the Maximum NPDES Payment") as specified in Tasks 1 through 3 of Exhibit 1 to this Agreement. If the Port's cost share for these fees exceeds the maximum amounts specified in Exhibit 1 by more than 10 percent, the City shall explain the reasons for the proposed increase and obtain Port approval of the increase prior to submitting the invoice to the Port. The Port will not unreasonably withhold approval. The Port's payment shall be due 30 days after the Port receives the City's invoice.

4.2. If the monitoring requirements of the City's MS4 Monitoring Plan and Exhibit 1 change, the Port's payment of 12.7 percent can be applied to different or additional MS4-required monitoring activities so long as the City provides the Port with ten days' written notice of its intent and the total monitoring costs do not exceed the Maximum NPDES Payment.

4.3. If there is a mutual agreement to coordinate jointly on a MS4-required report and how to share costs for that report, and the agreement includes the Port taking the lead, the Port shall coordinate the preparation and submittal of the relevant report with the City. Coordination shall include receiving information from the City and incorporating that information into such reports. The Port shall make available to the City materials related to relevant joint reports and other MS4 Permit implementation tasks that are coordinated between the Port and the City and for which the Port has lead responsibility.

5. Shared Consultant Services

5.1. In addition to shared services outlined in Sections 3 and 4 and Exhibit 1, the Port and City may agree through an amendment to this Agreement to coordinate required consultant services for MS4 Permit administration and implementation through either permittee as the lead.

5.2. In the event the Port retains the consultant for shared services, the following procedures apply:

5.2.1. For jointly funded shared services, the City and Port shall agree in writing to the scope of work and budget for the consultant. Changes to the scope of work and budget for the consultant will not constitute amendments to this Agreement.

5.2.2. The City agrees to reimburse the Port a mutually agreed upon amount or percentage of the actual costs incurred for the work. In the event the consultant performs tasks under the agreed scope of work for the City only, the City will reimburse the Port for 100 percent of the actual cost.

5.2.3. The Port will submit an invoice to the City, and the City will pay the Port for the City's share of the consultant services within 30 days of receiving the invoice from the Port.

5.2.4. The Port shall make available to the City reports and other written materials created by the consultant pursuant to this Section 5.2.

5.3. In the event the City retains the consultant for shared services, the following procedures apply:

5.3.1. For jointly funded shared services, the City and Port shall agree in writing to the scope of work and budget for the consultant. Changes to the scope of work and budget for the consultant will not constitute amendments to this Agreement.

5.3.2. The Port agrees to reimburse the City a mutually agreed upon amount or percentage of the actual costs incurred for the work. In the event the consultant performs tasks under the agreed scope of work for the Port only, the Port will reimburse the City for 100 percent of the actual cost.

5.3.3. The City will submit an invoice to the Port, and the Port will pay the City for the Port's share of the consultant services within 30 days of receiving the invoice from the City.

5.3.4. The City shall make available to the Port reports and other written materials created by the consultant pursuant to this Section 5.3.

6. Intergovernmental Cooperation

6.1. Nothing in this Agreement shall be deemed to preclude the parties from agreeing, by modification of this Agreement or by a separate intergovernmental agreement, to reallocate any of the duties arising under the NPDES municipal stormwater requirements.

6.2. The parties shall conduct meetings of their respective representatives from time to time to coordinate NPDES municipal stormwater activities.

7. Term

This Agreement shall be effective upon execution by both parties and its terms shall terminate at expiration or termination of the MS4 Permit by DEQ. If the MS4 Permit is extended or renewed, the term of this Agreement shall extend automatically to conform to the extended term of the MS4 Permit unless and until amended or replaced by a new Agreement.

8. Termination

Either party may terminate this Agreement upon 90 calendar days' written notice to the other party. Nothing in this Agreement shall be deemed to prevent a party from terminating this Agreement under Oregon law for a breach by the other party, or from exercising other contractual rights or remedies under Oregon law. In the event of termination under this section, the parties shall cooperate on completing any work then underway pursuant to Sections 3, 4, or 5. Any obligations arising before the date of termination survive the termination, including the parties' obligation to defend and indemnify each other described in Section 1.3. Compensation shall be made for any work performed, or costs incurred, up to the date on which notice of termination is given.

9. Dispute Resolution

If disputes arise under this Agreement or with respect to MS4 Permit issues, the parties agree to negotiate in good faith to resolve the disputes in a cost-effective manner. If the parties cannot resolve the dispute by negotiation, the parties agree to submit the dispute to mediation before a mediator agreed upon by the parties. If the parties cannot agree upon a mediator, either party may ask the Presiding Judge in Multnomah County Circuit Court to designate a neutral mediator. That designation shall be binding upon the parties. Regardless of the outcome of the mediation, the parties shall share the costs of the mediation equally. If the mediation fails to resolve the dispute, the parties may agree to submit the dispute to arbitration, or either party may initiate litigation in an appropriate court to resolve the dispute.

10. Amendments

This Agreement may be amended only by written amendments signed by an authorized representative of each party. The parties shall amend this Agreement as necessary to conform to any MS4 Permit modification or renewals.

11. Notices

Any notice or notices provided for by this Agreement must be sent in writing to:

1) The Port of Portland by email:

- a. To: Blake Hamalainen, Water Quality Manager
blake.hamalainen@portofportland.com
- b. With a copy to: Anzie St. Clair, Assistant General Counsel
anzie.stclair@portofportland.com

Or to an email address subsequently designated by the Port in writing.

2) The City of Portland by email:

- a. To: Barbara Adkins, Stormwater Regulatory Strategy Manager
barbara.adkins@portlandoregon.gov
- b. With a copy to: Eric Shaffner, Deputy City Attorney
eric.shaffner@portlandoregon.gov

Or to an email address subsequently designated by the City in writing.

12. Integration

This Agreement is the entire agreement of the parties regarding the same subject and, except for the agreements described in paragraph 1.4 of this Agreement, supersedes all prior and contemporaneous communications, agreements, or amendments regarding the same subject. By execution of this Agreement, it replaces and supersedes 2013 City of Portland/Port of Portland Intergovernmental Agreement Number 30003325/2013-039.

13. Severability

If any part of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable for any reason whatsoever, the remainder of this Agreement shall continue in full force and effect.

14. No Intended Third Party Benefit

This Agreement does not vest in any third party any rights, nor is it enforceable by any third party in any legal, equitable, or administrative proceeding whatsoever.

15. Counterparts and Electronic Signatures

This Agreement may be signed in counterparts, each of which shall be deemed an original, and together shall constitute one and the same instrument. This Agreement may be signed via DocuSign™ or similar electronic technology. Electronic signatures, together with copies of signatures transmitted by facsimile or e-mail in .pdf or similar format shall be deemed original signatures for all purposes and fully binding on the signatory.

16. Authority

The individuals signed below warrant that they have full authority to execute the Agreement on behalf of the party for whom they sign.

THE CITY OF PORTLAND

By: Dawn Uchiyama Digitally signed by Dawn Uchiyama Date: 2022.11.18 10:45:18 -08'00'
Name: _____
Title: _____
Date: _____

THE PORT OF PORTLAND

By: DocuSigned by: Curtis Robinhold
Name: Curtis Robinhold
Title: Executive Director
Date: 11/15/2022

APPROVED AS TO FORM
Approved as to form
by *Eric Shaffner*
By: _____
Deputy City Attorney


APPROVED AS TO LEGAL
SUFFICIENCY FOR THE PORT
By: 
Counsel for Port of Portland

EXHIBIT 1

CITY TASK	PORT MAXIMUM ANNUAL PAYMENT ^a
(1) Payment of Annual MS4 Permit Water Quality Compliance Determination Fee to DEQ	\$13,000
(2) Permit modification fee	\$1,500
(3) MS4 Permit and TMDL environmental monitoring	\$35,000

Notes:

^a "Port maximum annual payment" amounts were calculated at 12.7 percent of current costs incurred by the City, plus an additional amount that includes capacity for inflation of anticipated annual MS4 permit fee increases and City laboratory and field services increases during the MS4 permit term (executed in 2021). Maximum amounts will be evaluated with the next permit renewal and adjusted as appropriate.

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