

INTERGOVERNMENTAL AGREEMENT**Stormwater Retrofit Program Implementation**

This Master Intergovernmental Agreement (Agreement) is entered into by and between the City of Portland, acting by and through its Bureau of Environmental Services, hereafter referred to as "City," and the State of Oregon, acting by and through its Oregon Department of Transportation, hereafter referred to as "ODOT," individually and collectively referred to as the "Party" or "Parties."

RECITALS

1. By the authority granted in ORS 190.110, state agencies may enter into agreements with units of local government 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.
2. The State of Oregon's aging infrastructure, including ODOT's highway system and associated water quality treatment facilities, is in need of updating. Future regulatory requirements will very likely include a requirement to conduct a stormwater retrofit assessment of that infrastructure.
3. ODOT has initiated a Stormwater Retrofit Program and committed \$8.4 million towards stand-alone stormwater retrofit projects over the next four years (ODOT's fiscal years 2011 through 2014). These projects will be in urbanized areas within the Willamette Valley Watershed. A retrofit prioritization plan has been prepared for this program. Project screening and selection will focus on identifying projects that will have the greatest benefits to water quality and quantity relative to cost.

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

TERMS OF AGREEMENT

1. City and ODOT will collaborate to retrofit stormwater facilities of mutual interest and benefit for watershed health within City's jurisdictional areas. These actions will improve water quality, restore stormwater volume and rates of discharge from transportation related facilities to more natural flows, and improve conditions for Endangered Species Act (ESA) listed species and other biological communities.

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2. City and ODOT will provide mutual support to accomplish specific stormwater retrofit projects. That support may take the form of payment for elements of work; provision of planning, design, construction, establishment or maintenance services in connection with specific projects; exchanges of material goods or products; or allocation of staff time. This Agreement provides the vehicle for those exchanges; however, the specific projects and their scopes will be determined via Work Order Agreements entered into by mutual consent of both Parties as project details are developed over the term of this Agreement. ODOT expenditures under this Agreement shall not exceed \$4,000,000 in state funds.
3. Effective Date and Duration. This Agreement is effective beginning immediately upon complete execution by the Parties. Unless earlier terminated or extended by written mutual amendment, this Agreement will expire June 30, 2014, or upon completion of all projects paid for with funds committed for stormwater retrofits as described in this Agreement, whichever occurs first. The individual Work Order Agreements shall contain beginning and ending dates for the specific work.
4. Work Order Agreements. All work performed under this Agreement shall be determined by Work Order Agreements entered into by mutual consent of both Parties. The Work Order Agreement is attached hereto as Exhibit A and by this reference made a part hereof. Work Order Agreements shall include the project scope, delivery schedule, and budget for each project. Both Parties shall sign the Work Order Agreement before commencement of work. Each Work Order Agreement that is issued pursuant to this Agreement shall become a part of this Agreement. If the total cost of all Work Order Agreements under this Agreement exceeds \$150,000, the Oregon Department of Justice must approve each subsequent Work Order Agreement prior to performance of any work.
5. Project Representatives. Each Party has designated a project manager to be its formal representative for this project. All reports, notices, and other communications required under or relating to this Agreement shall be directed to the appropriate individual.

City

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City of Portland
1120 SW 5th Avenue Room 1000
Portland, OR 97204-1912
503-823-5708
Mike.Rosen@PortlandOregon.gov

ODOT

Frannie Brindle, Natural Resources Mgr.
ODOT Geo-Environmental Section
4040 Fairview Industrial Dr SE MS #6
Salem, OR 97302-1142
503-986-3370
Frances.Brindle@odot.state.or.us

6. Agreement Documents. This Agreement consists of the following documents, in descending order of precedence: This Agreement and attached Exhibit A "Work

Order Agreement." Each Work Order Agreement that is issued pursuant to this Agreement shall become a part of this Agreement.

7. The Work Order Agreement form shall be signed by the ODOT project manager and the City project manager or, in their absence, their designees. Each Party shall notify the other Party in writing of any contact information changes during the term of this Agreement.
8. Amendments. The terms of this Agreement shall not be waived, altered, modified, supplemented, or amended, in any manner whatsoever, except by written instrument signed by both Parties.
9. Termination.
 - A. The Parties may terminate this Agreement or any individual Work Order Agreement immediately or at a time certain upon mutual written consent.
 - B. Either Party may terminate this Agreement or any individual Work Order Agreement effective not less than thirty (30) days from delivery of written notice.
 - C. Either Party may terminate this Agreement or any individual Work Order Agreement effective not less than ten (10) days from written notice or at such other date as may be established by the terminating Party under any of the following conditions:
 - 1) If funding is not obtained and continued at levels sufficient to allow for purchase of the specified services. When possible, and when agreed upon, the Agreement or any individual Work Order Agreement may be modified to accommodate a reduction in funds.
 - 2) If federal or state regulations or guidelines are modified, changed or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Agreement or any individual Work Order Agreement, or are no longer eligible for the funding proposed for payments authorized by this Agreement.
 - D. Either Party may terminate this Agreement or any individual work order in the event of a breach by the other Party. Prior to such termination, however, the Party seeking termination shall give the other Party written notice of the Party's intent to terminate. If the Party has not cured the breach within ten (10) days or a longer period as granted in the cure notice, the Party seeking compliance may terminate this Agreement or any individual work order.

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- E. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination. Termination of this Agreement will also terminate all outstanding Work Order Agreements.
10. Funds Available and Authorized. The Parties will ensure that, at the time a Work Order Agreement is executed under the terms of this Agreement, sufficient funds will be available and authorized for expenditure to finance the costs of that Work Order Agreement. Payment for work performed after the last date of a budget period is dependent on the sufficiency of the paying Party's appropriations, limitations, or other expenditure authority.
11. If City performs work under this Agreement that will be reimbursed by ODOT, City shall present invoices for 100 percent of actual costs incurred to ODOT's Project Manager for review and approval. Such invoices shall be in a form identifying the work performed, the Agreement number and the Work Order Agreement number and shall itemize and explain all expenses for which reimbursement is claimed. Invoices shall be presented for periods of not less than one month in duration. Travel expenses shall not be reimbursed. ODOT shall pay City within forty-five (45) days of receipt of approved invoices.
12. Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions of this Agreement.
13. Choice of Law and Venue. Oregon law shall govern this Agreement and all rights, obligations and disputes arising out of the Agreement. Venue for all disputes and litigation shall be in Multnomah County, Oregon.
14. Severability/Survival. If any of the provisions contained in this Agreement are held unconstitutional or unenforceable, the enforceability of the remaining provisions shall not be impaired. All provisions concerning the limitation of liability, indemnity and conflicts of interest shall survive the termination of this Agreement for any cause.
15. Ownership of Work Product. The Parties shall mutually determine ownership of each stormwater facility constructed under this Agreement at the time of execution of the applicable Work Order Agreement. Each stormwater facility will become part of the owner's managed capital assets unless otherwise determined by separate and mutual agreement. After completion of construction, the stormwater facilities shall not be removed without notice and mutual written consent of both Parties.
16. Right of Access. ODOT and City shall grant to the other's staff or designees access to property and facilities to make observations or monitor stormwater facility performance. This right of access will continue for the duration of this

Agreement, but may be extended by separate written mutual agreement. City shall contact ODOT's representative via email or US Mail requesting consent for its contractors to enter onto state right-of-way for the work performed under this Agreement.

17. Operation and Maintenance of Stormwater Facilities. The owner of each facility, as determined under Paragraph 15 above, will be responsible for operation and maintenance of that facility, unless determined otherwise in the applicable Work Order Agreement or separate mutual written agreement.
18. Access to Records. Both Parties, the Secretary of State's Office of the State of Oregon, the federal government, and the duly authorized representatives of each shall have access to the books, documents, papers, and records of both Parties which are directly pertinent to a particular Work Order Agreement for the purpose of audits, examinations, excerpts, and transcripts for a period of six (6) years after final payment under that Work Order Agreement. Copies of applicable records shall be made available upon request. The requesting Party shall pay reasonable copying costs.
19. Compliance with Applicable Law. Both Parties shall comply with all federal, state, and local laws, regulations, executive orders, and ordinances applicable to the work under this Agreement.
20. Neither Party shall enter into any subcontracts for any of the work scheduled under this Agreement without obtaining prior written approval from the other Party.
21. City shall perform the work under this Agreement as an independent contractor and shall be exclusively responsible for all costs and expenses related to its employees' performance of the work under this Agreement including, but not limited to, retirement contributions, workers' compensation, unemployment taxes, and state and federal income tax withholdings.
22. Each Party shall ensure that each of its subcontractors under this Agreement complies with ORS 656.017 and provides workers' compensation coverage unless such subcontractors are exempt under ORS 656.126.
23. No Third Party Beneficiary. City and ODOT are the only Parties to this Agreement and, as such, are the only Parties entitled to enforce its terms. Nothing contained in this Agreement gives or shall be construed to give or provide any benefit, direct, indirect, or otherwise, to third parties unless such parties are expressly described in this Agreement as intended beneficiaries of the terms of this Agreement.

24. Indemnification.

- A. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or City with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
- B. With respect to a Third Party Claim for which the State is jointly liable with the City (or would be if joined in the Third Party Claim), the State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by the City in such proportion as is appropriate to reflect the relative fault of the State on the one hand and of the City on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of the State on the one hand and of the City on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. The State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if the State had sole liability in the proceeding.
- C. With respect to a Third Party Claim for which the City is jointly liable with the State (or would be if joined in the Third Party Claim), the City shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by the State in such proportion as is appropriate to reflect the relative fault of the City on the one hand and of the State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of the City on the one hand and of the State on the other hand shall be determined by

reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. The City's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.

- D. City shall require its contractor(s) and subcontractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon, Oregon Transportation Commission and its members, Department of Transportation and its officers, employees and agents from and against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys' fees, arising from a tort, as now or hereafter defined in ORS 30.260, caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of City's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the Parties that the State shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the State, be indemnified by the contractor and subcontractor from and against any and all Claims.
- E. Any such indemnification shall also provide that neither the City's contractor and subcontractor nor any attorney engaged by City's contractor and subcontractor shall defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that City's contractor is prohibited from defending the State of Oregon, or that City's contractor is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue claims it may have against City's contractor if the State of Oregon elects to assume its own defense.
25. The Parties shall attempt in good faith to resolve any dispute arising out of this 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.
26. Merger Clause. This Agreement, attached exhibits, and successive Work Order Agreements constitute the entire agreement between the Parties on the subject

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matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of ODOT to enforce any provision of this Agreement shall not constitute a waiver by ODOT of that or any other provision.

27. City certifies and represents that the individual or individuals signing this Agreement has or have been authorized to enter into and execute this Agreement on behalf of City, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind City.
28. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

The Oregon Transportation Commission on December 29, 2008, approved Delegation Order No. 2, which authorizes the Director to approve and execute agreements for day-to-day operations. Day-to-day operations include those activities required to implement the biennial budget approved by the Legislature, including activities to execute a project in the Statewide Transportation Improvement Program.

Signature Page to Follow

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On September 15, 2006, the Director of the Oregon Department of Transportation approved Subdelegation Order No. 2, Paragraph 1, in which authority is delegated to the Deputy Director, Highways; Deputy Director, Central Services; and the Chief of Staff, to approve and sign agreements over \$75,000 when the work is related to a project included in the Statewide Transportation Improvement Program or in other system plans approved by the Oregon Transportation Commission such as the Oregon Traffic Safety Performance Plan, or in a line item in the biennial budget approved by the Director.

CITY OF PORTLAND, by and through its
Bureau of Environmental Services

By _____

Date _____

By _____

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

By *Eric R. Hoffman*
Deputy City Attorney

Date 1/10/2011

City Contact:

Mike Rosen, Watershed Division Manager
City of Portland
1120 SW 5th Avenue Room 1000
Portland, OR 97204-1912
503-823-5708
Mike.Rosen@PortlandOregon.gov

STATE OF OREGON, by and through
its Department of Transportation

By _____
Technical Services Mgr./Chief Engineer

Date _____

APPROVAL RECOMMENDED

By _____
Geo-Environmental Section Manager

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

By _____
Assistant Attorney General

Date _____

ODOT Contact:

Frannie Brindle, Natural Resources Unit
Manager
Oregon Department of Transportation
4040 Fairview Industrial Drive SE MS#6
Salem, OR 97302-1142
503-986-3370
Frances.Brindle@odot.state.or.us

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EXHIBIT A

WORK ORDER AGREEMENT

Master Agreement No. 27145 Work Order Agreement No. _____

Under the terms of the Intergovernmental Agreement, Stormwater Retrofit Program Implementation (the "Master Agreement"), between ODOT and the City of Portland, dated _____, which is hereby incorporated by reference, the following project work is authorized:

Project Name: _____

Project Location: _____

Project Property Owner: _____

Project Description: _____

ODOT Project Manager: _____

City Project Manager: _____

Total Authorized Amount of this Work Order \$_____ Expenditure Acct. No. _____

Work Order Start Date: _____ Work Order End Date: _____

Effective Date: No Work shall occur until signed by all Parties.	Totals
Expenditure Account No.	No.
A. Amount authorized for this Work Order Agreement	\$
B. Amount authorized on prior Work Order Agreements	\$
C. Total Amount authorized for all Work Order Agreements(A+B=C)	\$
D. Agreement Not-to-Exceed amount	\$
E. Amount remaining on Agreement (D-C=E)	\$

Scope of Work

The project described above will be designed and constructed in accordance with this Work Order Agreement including the following assumptions, expectations, and responsibilities:

1. City shall:
 - a.

- b.
- c.
- d.

2. Oregon Department of Transportation (ODOT) shall:

- a.
- b.
- c.
- d.

Schedule and Budget

Tasks and Deliverables	Due Date	Hours	Budget
Pre-design			
Design			
Construction			

Standards of Acceptance of Work

If this project includes an engineered design, the design must meet the standards of ODOT and City and the drawings must be stamped by a certified engineer.

This Work Order Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Work Order Agreement so executed shall constitute an original.

ACCEPTANCE OF TERMS AND ACTION APPROVED BY ODOT: I acknowledge and certify that the work in this Work Order Agreement is within the scope of work of the Master Agreement.

Name/Title

Date

ACCEPTANCE OF TERMS BY CITY:

Name/Title

Date

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184384

APPROVED AS TO LEGAL SUFFICIENCY: If work order exceeds \$150,000 signature required

Assistant Attorney General

Date

cc: ODOT Project Manager
City Project Manager
OPO AGREEMENTS, Support Services Branch for General Files (*original*)

Listing of Potential ODOT Stormwater Retrofit Projects

#	Project Name	Watershed	Project Type/Purpose	Status	Estimated cost	Benefits
1	Barbur Transit Station	Tryon Creek	Stormwater facilities at a transit center	Ready for construction	\$600,000	Over 4.5 acres of impervious area and pollutants managed
2	Invasives Removal and Revegetation	Multiple Watersheds	Removal of invasives and replanting, as needed, on forested ODOT right of way areas	Seasonally limited projects, only dependent on availability of staff resources	\$647,000 (invasive removal only) or \$2,497,500 (invasives and planting)	185 acres of land treated
3	Tree Planting	Multiple Watersheds	Planting trees for stormwater detention and filtration	Seasonally limited projects, only dependent on availability of staff	\$900,000 to \$1,800,000	2,100 to 4,200 trees
4	I-5 and Barbur at SW 26th	Tryon Creek	Stormwater facilities on four transportation "remainder" properties	Predesign complete	\$1,932,000	Twenty acres of impervious area and pollutants managed
5	I-205 at Cascade Station	Columbia Slough	Stormwater facilities for runoff from I-205	Concept	In development	In development
6	Johnson Creek at I-205 (Outfall at 82 nd Ave.)	Johnson Creek	Stormwater detention and water quality management from I-205, flood plain reconnection, and stream restoration	Concept	\$1.5-2.0 million including land acquisition	The outfall serves 255 acres of I-205 right of way and 82 nd Ave.
7	Stephens Creek Central Canyon	Willamette River	Stormwater detention and water quality management from I-5	Concept	In development	Estimated 10-15 acres of I-5 near Terwilliger Curves
8	Sandy Blvd from I-205 to 122 nd Ave	Columbia Slough	Stormwater detention and water quality management from Sandy Blvd.	Concept	In development	Manage 1.3 miles of stormwater from Sandy Blvd.