

RESOLUTION NO. 36-2006

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, APPROVING AN INTERGOVERNMENTAL AGREEMENT FOR JOINT COUNSEL BETWEEN THE CITY OF MILWAUKIE AND OTHER LOCAL MS4 PERMITTEES

WHEREAS, the City has been issued a Phase I Municipal Separate Storm Sewer System Permit (MS4 Permit) by the Oregon Department of Environment Quality, which allows the City to operate that portion of its storm sewer system that discharges stormwater runoff to waters of the State of Oregon; and

WHEREAS, the purpose of the City's storm sewer system is to protect City residents and property from flooding and to protect water quality; and

WHEREAS, the other MS4 Permittees have been issued MS4 Permits similarly and for similar purposes; and

WHEREAS, the MS4 Permits have been subject to legal challenge by various petitioners, and the City and the MS4 Permittees anticipate future challenges to their respective MS4 Permits; and

WHEREAS, the City and the MS4 Permittees have a common interest in defending their respective MS4 Permits jointly and are prepared to retain the services of Cable Huston, a law firm, for such purpose; and

WHEREAS, the City acknowledges that it has the authority to enter into this Intergovernmental Agreement pursuant to ORS 190.010;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Milwaukie, Oregon, as follows:

- Section 1.** The City of Milwaukie hereby approves the Intergovernmental Agreement between the City of Milwaukie and the MS4 Permittees, attached as Exhibit B.
- Section 2.** The City of Milwaukie authorizes the City Manager and City Attorney to sign said agreement on behalf of the City.
- Section 3.** The City of Milwaukie authorizes the City Attorney to sign a retention agreement with Cable Huston, a law firm, on behalf of the City, attached as Exhibit C.

Introduced and adopted by the City Council on August 1, 2006.

This resolution is effective on August 1, 2006.


James Bernard, Mayor

ATTEST:


Pat DuVal, City Recorder

APPROVED AS TO FORM:
Ramis, Crew, & Corrigan, LLP


City Attorney

Document1 (Last revised 07/17/06)

INTERGOVERNMENTAL AGREEMENT

BETWEEN: The City of Portland, the Port of Portland, Clackamas County Service District No. 1, Clackamas County, Multnomah County, Oak Lodge Sanitary District, Surface Water Management Agency of Clackamas County, the City of Lake Oswego, the City of Gladstone, the City of Wilsonville, the City of Milwaukie, the City of Happy Valley, the City of Oregon City, and the City of West Linn (collectively, the "MS4 Permittees" or "Parties")

Effective Date: _____ (Date of last signature below).

This Intergovernmental Agreement ("IGA") is entered into by and between the CITY OF PORTLAND, a municipal corporation of the State of Oregon ("Portland"); the PORT OF PORTLAND, a port district of the State of Oregon (the "Port"); the CLACKAMAS COUNTY SERVICE DISTRICT NO. 1, a county service district organized under ORS Chapter 451 ("CCSD No. 1"); CLACKAMAS COUNTY; MULTNOMAH COUNTY; OAK LODGE SANITARY DISTRICT; SURFACE WATER MANAGEMENT AGENCY OF CLACKAMAS COUNTY ("SWMACC") the CITY OF LAKE OSWEGO, a municipal corporation of the State of Oregon ("Lake Oswego"); the CITY OF GLADSTONE, a municipal corporation of the State of Oregon ("Gladstone"); the CITY OF WILSONVILLE, a municipal corporation of the State of Oregon ("Wilsonville"); the CITY OF MILWAUKIE, a municipal corporation of the State of Oregon ("Milwaukie"); the CITY OF HAPPY VALLEY, a municipal corporation of the State of Oregon ("Happy Valley"); the CITY OF OREGON CITY, a municipal corporation of the State of Oregon ("Oregon City"); and the CITY OF WEST LINN, a municipal corporation of the State of Oregon ("West Linn").

RECITALS

- A. The Parties are permittees on Phase I municipal separate storm sewer system permits ("MS4 Permits") issued by the Oregon Department of Environmental Quality ("Department"), which have been subject to legal challenges by various petitioners. The Parties entered into a Joint Defense, Common Interest and Confidentiality Agreement (the "Joint Defense Agreement") to work cooperatively to defend the legal validity of the MS4 Permits.

- B. The Parties have been coordinating, and wish to continue coordinating, a defense to challenges made and challenges that may be made in the future concerning the MS4 Permits, including the Petition for Judicial Review filed in Multnomah Circuit Court. The Parties anticipate the potential for appeals and petitions before the Oregon Circuit Court, Oregon Court of Appeals, and Oregon Supreme Court (collectively, the "MS4 Permit Legal Challenges.")

- C. The Parties have a common interest in defending the MS4 Permit Legal Challenges, and have engaged Cable Huston as common counsel for the Parties in defending the MS4 Permit Legal Challenges. The Parties wish to share certain expenses that have been incurred and may be incurred in the defense of challenges made and challenges that may be made in the future concerning the MS4 Permits.
- D. The Parties may enter into this intergovernmental agreement under ORS 190.010.

AGREEMENT

1. Common Counsel Services – Cable Huston

- 1.1 The Parties have retained Cable Huston, a law firm, to provide legal representation to the Parties related to defense of the challenges made concerning the MS4 Permits. The legal services are being performed pursuant to the Joint Defense Agreement and June 28, 2006 Engagement Letter.
- 1.2 Cable Huston will provide a Statement for Payment to Portland and CCSD No. 1 on a monthly basis. Portland and CCSD No. 1 shall pay Cable Huston within 30 days after receipt, and forward the Statement for Payment onto the other Parties for reimbursement. Each Party shall within 30 days after receipt of the Statement for Payment reimburse Portland or CCSD No. 1 for that Party's share of the costs and expenses advanced in accordance with Section 3 below.

2. Authorized Expenditures and Reimbursement

- 2.1 The total amount of costs and expenses shared pursuant to this IGA shall not exceed \$125,000, unless the Parties agree to increase this amount by mutual written agreement signed by an authorized representative of each Party.
- 2.2 The Statement for Payment will be paid to Cable Huston based on the following percentages:

Party	Percentage
Portland	51%
CCSD No. 1	49%

- 2.3 Portland will provide a Statement for Payment to Port and Multnomah County. Port and Multnomah County will reimburse Portland and CCSD No. 1 within 30 days of receipt of the Statement for Payment based on the percentages in Attachment A. CCSD No. 1 will provide a Statement for Payment to Gladstone, Lake Oswego, Milwaukie, Oregon City, West Linn, Wilsonville, and Oak Lodge Sanitary District based on the following percentages in Attachment A.

3. Term

- 3.1 This IGA shall be effective upon execution and shall expire at such time as (a) each Party has reimbursed expenses incurred pursuant to this IGA, and (b) issuance of a final order or settlement resolving all legal challenges to the MS4 Permits. For purposes of this IGA, "final" means that any and all applicable periods for administrative or judicial rehearing, review or appeal of, or any similar proceeding relating to, the MS4 Permits have expired without any such proceeding having been commenced or, in the event such a proceeding is commenced, any such proceeding is terminated.

4. Termination and Withdrawal

- 4.1 The Parties may by mutual written agreement signed by an authorized representative from each Party terminate this IGA at any time during its term; provided however, notwithstanding any such termination, each Party shall remain obligated to reimburse costs and expenses incurred pursuant to this IGA for services performed or authorized prior to the effective date of such termination and any additional costs and expenses relating to authorized services resulting from such termination.

- 4.2 A Party may withdraw from this IGA with or without cause. Prior to withdrawal, the Party seeking to withdraw shall provide to the other Parties thirty days written notice of that Party's intent to withdraw. The withdrawal shall be effective thirty days after receipt of the Notice of Intent to Withdraw. The withdrawing Party shall remain obligated to reimburse costs and expenses incurred pursuant to this IGA for services completed prior to the effective date of withdrawal, and any costs and expenses for services authorized prior to the receipt of the Notice of Intent to Withdraw.

- 4.3 A withdrawing Party, or each Party upon termination of this IGA, shall have use of any work product resulting from this IGA as of the effective date of termination or withdrawal. The withdrawing Party shall also have use of any work product resulting from services authorized prior to the receipt of the Notice of Intent to Withdraw to the extent the withdrawing Party made payment for those services. Any additional costs related to obtaining use of the work product shall be at the cost of the requesting Party.

5. Amendment

- 5.1 This IGA may be amended by mutual written agreement signed by an authorized representative for each Party. However, nothing contained in this IGA shall be construed to prohibit or otherwise limit the right of any Party or Parties to enter separate agreements regarding the MS4 Permit Legal Challenges.

6. Dispute Resolution

- 6.1 If disputes arise under this IGA, 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 mediator equally. If the mediation fails to resolve the dispute, the Parties may agree to submit the dispute to arbitration, or any Party may initiate litigation in an appropriate court to resolve the dispute.
- 6.2 If a legal action other than mediation, including any dispute subject to arbitration under this IGA, is filed by any Party to enforce or interpret a provision of this IGA, or otherwise relating to the subject matter of this IGA, the prevailing Party shall be entitled, in addition to other rights and remedies it may have, to reimbursement of its expenses incurred with respect to that action, including court costs and reasonable attorneys' fees at trial, on appeal, and in connection with any petition for review.

7. Integration

- 7.1 This IGA, together with the Joint Defense Agreement described in Paragraph A of this IGA, is the entire agreement of the Parties regarding the subject of retaining common counsel for the MS4 Legal Challenges, except for the Joint Defense Agreement, and supersedes all prior and contemporaneous communications or agreements between the Parties regarding the same subject.

8. Severability

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

9. Waiver

- 9.1 The failure by a Party to require performance by the other of any provision of this IGA shall in no way affect the rights of that Party to enforce any provision of this IGA, nor shall any waiver of a breach of this IGA be construed as a waiver of other breaches of this IGA or a waiver of this non-waiver provision.

10. Counterparts

- 10.1 This IGA may be signed in two (2) or more counterparts, each of which shall be deemed an original, and which, when taken together, shall constitute one and the same agreement.

11. Applicable Law

11.1 This IGA shall be interpreted, construed, and enforced in accordance with the laws of the State of Oregon.

12. Survival of Covenants Provision

12.1 Any provision of this IGA which by its terms has or may have application after the expiration or earlier termination of this IGA, including all covenants, agreements, and warranties, shall be deemed to the extent of such application to survive expiration or termination of this IGA.

CITY OF PORTLAND

By: _____
Deputy City Attorney

By: _____

Title:

Dated: _____, 2006

PORT OF PORTLAND

By: _____
Counsel for the Port

By: _____

Title:

Dated: _____, 2006

CLACKAMAS COUNTY SERVICE DISTRICT NO. 1

By: _____
Counsel for CCSD No. 1

By: _____

Title:

Dated: _____, 2006

CLACKAMAS COUNTY

By: _____
Attorney for Clackamas County

By: _____

Title:

Dated: _____, 2006

MULTNOMAH COUNTY

By: _____
Attorney for Multnomah County

By: _____

Title:

Dated: _____, 2006

OAK LODGE SANITARY DISTRICT

By: _____
Attorney for Oak Lodge Sanitary District

By: _____

Title:

Dated: _____, 2006

**SURFACE WATER MANAGEMENT
AGENCY OF CLACKAMAS COUNTY**

By: _____
Attorney for SWMACC

By: _____

Title:

Dated: _____, 2006

CITY OF LAKE OSWEGO

By: _____
Attorney for City of Lake Oswego

By: _____

Title:

Dated: _____, 2006

CITY OF GLADSTONE

By: _____
Attorney for City of Gladstone

By: _____

Title:

Dated: _____, 2006

CITY OF WILSONVILLE

By: _____
Attorney for City of Wilsonville

By: _____

Title:

Dated: _____, 2006

CITY OF MILWAUKIE

By: Ray Frestuo
Attorney for City of Milwaukie

By: James W. B...
Mayor

Title:

Dated: August 2, 2006

CITY OF HAPPY VALLEY

By: _____
Attorney for City of Happy Valley

By: _____

Title:

Dated: _____, 2006

CITY OF OREGON CITY

By: _____
Attorney for City of Oregon City

By: _____

Title:

Dated: _____, 2006

CITY OF WEST LINN

By: _____
Attorney for the City of West Linn

By: _____

Title:

Dated: _____, 2006

Permit/Permittee	Permit Area (in acres)	Share by Permit Area	Percentage Share	Low	High
Portland Permit	49,300	51.00%	51.0%	\$38,250	\$63,750
City of Portland			43.86%	\$32,895	\$54,825
Port of Portland			6.12%	\$4,590	\$7,650
Multnomah Co.			1.02%	\$765	\$1,275
Clackamas Permit	47,360	49.00%	49.0%	\$36,750	\$61,250
CCSD No. 1/SWMAcc (incl. Happy Valley and Rivergrove)			27.00%	\$9,923	\$16,538
City of Gladstone			6.00%	\$2,205	\$3,675
City of Lake Oswego			17.00%	\$6,248	\$10,413
City of Milwaukie			9.00%	\$3,308	\$5,513
City of Oregon City			12.00%	\$4,410	\$7,350
City of West Linn			11.00%	\$4,043	\$6,738
City of Wilsonville			8.00%	\$2,940	\$4,900
Oak Lodge Sanitary District			10.00%	\$3,675	\$6,125
Totals	96,660		100%	\$75,000	\$125,000

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP

ATTORNEYS AT LAW
SUITE 2000
1001 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1136

TELEPHONE (503) 224-3092
FACSIMILE (503) 224-3176

RECEIVED

JUN 30 2006

RAMIS CREW
CORRIGAN & LLP
ATTORNEYS AT LAW

JAMES S. KINCAID
email address: jkincaid@chbh.com

June 29, 2006

Gary Firestone
City of Milwaukie
Ramis, Crew, Corrigan & Bachrach
1727 N.W. Hoyt Street
Portland, Oregon 97209

RE: MS4 Permit Litigation
Our File No. 27404.001

Dear Mr. Firestone:

Thank you for the opportunity to provide common counsel representation ("Common Counsel Group") for the City of Milwaukie regarding the defense of Municipal Separate Storm Sewer System (MS4) National Pollutant Discharge Elimination System Permit (NPDES) permit in *Tualatin Riverkeepers v. Oregon Department of Environmental Quality*, Case No. 0601-00752.

In order to avoid the potential for misunderstanding with our clients, our firm usually indicates our policies and sets forth our fees in writing. This letter will confirm the terms of Cable Huston Benedict Haagensen & Lloyd's representation of the Common Counsel Group in this matter.

Throughout our engagement, we will keep you informed of significant developments, and will explain the pertinent laws that relate to this matter. We will provide you with copies of all significant written materials sent or received that relate to this matter, and will undertake to respond promptly to all of your inquiries.

Our representation of the Common Counsel Group will be on an hourly fee basis. Statements for services rendered will be provided according to the terms agreed to by the Common Counsel Group in the attached Intergovernmental Agreement. In the event that any payments are not made as agreed, our firm reserves the right to immediately terminate our services and to withdraw from representation.

Mr. Gary Firestone
June 29, 2006
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Hourly rates for the attorneys and paralegals for this firm vary according to the experience and expertise of the individuals performing these services, the complexity of the matter undertaken, the risks associated with the representation, the time constraints under which we must work and other factors.

Below are the rates we charge for the various attorneys who are likely to work on this matter.

Tier	Hourly Rates	Attorneys
1	\$250	Kevin Kiely
2	\$225	Jim Kincaid, Clark Balfour, Don Haagensen, Jim Benedict
3	\$185	Carla Rhoden, Chad Stokes

Before involving any other attorneys in the firm on this matter, I will discuss this further with you and provide you with their hourly rate. We frequently use a paralegal for certain matters. Our paralegals' hourly rate is \$140 per hour. I will notify you in writing if our billing rates change.

In addition to the fees for legal services rendered, out-of-pocket expenses, such as photocopy charges, mileage, long distance charges, travel expenses, filing fees, computer-assisted legal research charges and similar expenses will also be charged to the extent they are incurred directly on your behalf. Out-of-pocket expenses are in addition to professional legal fees.

If you have any questions about our representation of you or about the fee arrangements, please let me know.

If the foregoing terms and conditions are acceptable, this letter will serve as our Agreement. We ask that you please sign at the bottom of this letter, above your printed name, and return it to our office.

Mr. Gary Firestone
June 29, 2006
Page 3

Please execute the enclosed Intergovernmental Agreement at your signature block and return it to us along with your signature on this letter. You will receive a copy of the Intergovernmental Agreement when it has been fully executed by all parties.

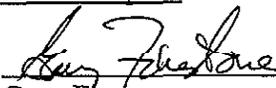
I look forward to working with you.

Very truly yours,


James S. Kincaid

JSK/nh
Enclosure

Agreed and Accepted:

By: 
Gary Firestone

Date: _____

RAMIS CREW CORRIGAN LLP

ATTORNEYS AT LAW

1727 NW HOYT STREET
PORTLAND, OREGON 97209
TELEPHONE (503) 222-4402
FAX (503) 243-2744
WWW.RCCLAWYERS.COM

Gary Firestone
garyf@rcclawyers.com

August 4, 2006

Barb Kwapich
City Records Office
10722 SE Main St.
Milwaukie, OR 97222

Re: Resolutions 36-2006 and Multi-agency fir Joint Council Re: MSA

Dear Barb:

Please find enclosed an executed copy of the above referenced Resolution and IGA. Please call if you have any questions.

Very truly yours,



Darlene R. Ferretti
Legal Assistant

/df
encls.

*Per Darlene she sent
on to Kingai O.*