

IMPLEMENTING AGREEMENT

by and between

CITY OF PORTLAND, OREGON, WATER BUREAU

and

NATIONAL MARINE FISHERIES SERVICE

TO ESTABLISH A MITIGATION PROGRAM FOR ENDANGERED AND THREATENED SPECIES AT THE CITY OF PORTLAND'S BULL RUN WATER SUPPLY FACILITIES, MULTNOMAH AND CLACKAMAS COUNTIES, OREGON

This Implementing Agreement (“Agreement”), made and entered into as of the 7th day of April, 2009, by and among the City of Portland, Oregon, Water Bureau (hereinafter Portland) and the National Marine Fisheries Service (NMFS), hereinafter collectively called the “Parties,” defines the Parties’ roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the City of Portland’s water supply operations in the Bull Run Watershed and the Sandy River Basin.

1.0 RECITALS AND PURPOSES

1.1 RECITALS: This Agreement is entered into with regard to the following facts:

WHEREAS, The Bull Run Watershed, including those portions that are owned by the City, has been determined to provide, or potentially provide, habitat for a variety of species of fish and wildlife that pursuant to the Endangered Species Act, are listed as threatened, or are candidates for such listing, or are otherwise considered species of concern. These species are identified in Table 3.1 of the Habitat Conservation Plan that is the subject of this agreement, attached hereto as Exhibit 1; and,

WHEREAS, Portland, with technical assistance from the Sandy River Basin Partners (which includes NMFS, the U.S. Fish and Wildlife Service, the United States Forest Service, and the Oregon Department of Fish and Wildlife), has developed a series of measures, described in the Habitat Conservation Plan, to minimize and mitigate the effects of the covered activities associated with the Bull Run water supply operations upon the subject listed and unlisted species and their associated habitats.

1.2 PURPOSES: The purposes of this Agreement are:

- 1.2.1 To ensure implementation of each of the terms of the HCP;
- 1.2.2 To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 1.2.3 To provide assurances to Portland that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.

2.0 DEFINITIONS: The following terms as used in this Agreement shall have the meanings set forth below:

- 2.1 “Permit” or ITP shall mean the incidental take permit issued by NMFS to Portland pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA).
- 2.2 “Conservation Plan” or “HCP” shall mean the Habitat Conservation Plan prepared for the Bull Run Watershed water supply operations.
- 2.3 “Covered lands” shall mean those lands listed as “covered lands” in the HCP, that is, including lands and facilities associated with and/or potentially affected by covered activities located within the hydrologic boundary of the Sandy River Basin in Clackamas and Multnomah Counties, Oregon, as depicted in Figure 2-1 of the HCP.
- 2.4 “Permittee” shall mean the City of Portland Water Bureau, hereinafter referred to either as Portland or the Permittee.
- 2.5 “Covered species” shall mean species adequately covered in the HCP and identified in Table 3.1 of the HCP and Exhibit 1 of this Agreement.
- 2.6 “Covered activities” shall mean those activities described as covered activities in the HCP, that is, City activities associated with covered lands and facilities to the extent they affect covered species, including operation, maintenance and repair of the water system; implementation of habitat conservation, research, and monitoring; and incidental land management related to the water system and HCP implementation.
- 2.7 “Covered facilities” shall mean those facilities listed as “covered facilities” in the HCP, that is, facilities owned, operated, and/or used by the City as part of the Bull Run water supply system within the hydrologic boundary of the Sandy River Basin to the extent these facilities are affected by the covered activities.

- 2.8 “Changed circumstances” means only those circumstances described in Chapter 10 of the HCP which fall into three general categories: climate change, change in status of habitat, and change in status of a species.
- 2.9 “Unforeseen circumstances” means any significant, unanticipated adverse change in the status of species addressed under the HCP or in their habitats; or any significant unanticipated adverse change in impacts of the project or in other factors upon which the HCP is based. The term “unforeseen circumstances” as defined in this Agreement is intended to have the same meaning as in the NMFS’s No Surprises policy.
- 2.10 “Force Majeure” means events that are beyond the reasonable control of, and that did not occur through the fault or negligence of, Portland or any entity controlled by Portland, including its contractors and subcontractors to the extent they are carrying out authorized activities, that wholly or partially prevent the City from performing obligations under the HCP and this Agreement. Force Majeure events include but are not limited to acts of God, sudden actions of the elements, or actions of local, state, or federal agencies or courts. Force Majeure does not include circumstances described as “changed circumstances” in the HCP.
- 2.11 Terms defined in Endangered Species Act. Terms used in this agreement that are specifically defined in the ESA, in regulations adopted by NMFS under the ESA, or the “no surprises policy,” shall have the same meaning as in the ESA, those implementing regulations, and that policy, unless this agreement expressly provides otherwise.

3.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other.

4.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow NMFS to issue the Permit, the HCP sets forth measures that are intended to ensure that any take associated with covered activities on covered lands or at covered facilities will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with changed circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the covered species in the wild. It also includes measures that have been suggested by NMFS as being necessary or appropriate for purposes of the HCP.

5.0 TERM

This Agreement shall become effective on the date that NMFS issues the Permit requested in the HCP and shall remain in full force and effect for a period of 50 years or until termination of the Permit, whichever occurs sooner.

6.0 FUNDING

Portland will provide such funds as may be necessary to carry out its obligations under the HCP. Portland should notify NMFS if the Permittee's funding resources have materially changed, including a discussion of the nature of the change, from the information provided in Chapter 11 of the HCP.

7.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE

7.1 PORTLAND'S RESPONSIBILITIES

- 7.1.1 The HCP will be properly functioning if the terms of the Agreement have been or are being fully implemented.
- 7.1.2 Portland shall undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including adaptive management procedures described in Chapter 9 of the HCP.
- 7.1.3 Portland shall submit an annual report, or a report at a frequency mutually agreeable to the parties, describing its activities during the relevant year, including implementation of HCP measures, documentation of progress toward meeting the HCP's measurable habitat objectives, cumulative effects and analysis of whether the terms of the HCP were met for the reporting period. The report shall rely upon and reference all reasonably available data regarding HCP-related activities and Portland shall make the underlying data available to NMFS upon request. Anticipated components include planning and implementation of measures, expenditures, compliance and effectiveness monitoring, fish population research as required by the HCP, and any plans or actions related to changed circumstances and/or adaptive management. The report shall also include the following certification from a responsible City official who supervised or directed the preparation of the report:

Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this

report, the information submitted is true, accurate, and complete.

7.2 RESPONSIBILITIES OF NMFS

7.2.1 NMFS shall cooperate and provide, to the extent funding is available, technical assistance to implement the Framework for Adaptive Response as detailed in Section 9.4.3 and Table 9-4 of the HCP. Nothing in this Agreement shall require NMFS to act in a manner contrary to the requirements of the Anti-Deficiency Act.

7.2.2 After issuance of the Permit, NMFS shall monitor the implementation thereof, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP and this Agreement.

8.0 DISPUTE RESOLUTION

Any Party to this agreement claiming a dispute shall notify the other Party of the dispute within 20 days of such Party's actual knowledge of the act, event, or omission that gives rise to the dispute. The Parties shall convene at least one meeting within 20 days after such notice, to attempt to resolve the dispute. If the dispute is not resolved within 15 days of the meeting, the Parties may agree to attempt to resolve the dispute using a neutral mediator unanimously selected by the Parties. The mediator shall mediate the dispute in accordance with the instructions and schedule provided to it by the Parties. Any of these time periods may be reasonably extended or shortened by agreement of the Parties, or as necessary to conform to the procedure of an agency or court with jurisdiction over the dispute. Unless otherwise agreed among the Parties, each Party shall bear its costs for its own participation in the dispute resolution. In all cases, the Parties shall proceed expeditiously to allow either Party to meet any regulatory, statutory or judicial deadlines regarding the subject matter of the dispute.

9.0 REMEDIES AND ENFORCEMENT

9.1 REMEDIES IN GENERAL

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, subject to the following:

9.1.1 NO MONETARY DAMAGES: No Party shall be liable in damages to the any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

9.1.1.1 Retain Liability: All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

9.1.1.2 Land Owner Liability: All Parties shall retain whatever liability they possess as an owner of interests in land.

9.1.1.3 Responsibility of the United States: Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

9.1.2 INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the covered species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

9.2 PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked only in conformance with the provisions of 50 CFR 13.27 through 13.29 (1994), as the same exists as of the date hereof.

9.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

9.3.1 NO SURPRISES POLICY

Subject to the availability of appropriated funds as provided in Paragraph 14.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the covered activities on covered lands or at covered facilities upon the covered species may be required from a Permittee who has otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional mitigation may not require additional land or water use restrictions or financial compensation from the Permittee without its written consent.

9.3.2 PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of Portland to the use or development of those lands, or interests in lands, constituting covered lands, to the use or development of covered facilities, or to the use or

development of water rights or claims to water rights held by the City; provided, that nothing in this Agreement shall absolve Portland from such other limitations as may apply to such lands, interests in lands, facilities, water rights, or claims to water rights under other laws of the United States and the State of Oregon. Nothing in this agreement shall be construed to give NMFS the authority to impose or seek to impose measures additional to those specified in the HCP or this agreement that would degrade drinking water quality, trigger a need for additional water treatment, or require commitment of additional water to purposes other than municipal water supply.

9.3.3 FORCE MAJEURE

9.3.3.1 Force Majeure procedures. In the event that Portland is wholly or partially prevented from performing obligations under this agreement because of a Force Majeure event, the City will be excused from whatever performance is affected by such Force Majeure event to the extent so affected, and such failure to perform will not be considered a material breach provided that nothing in this section will be deemed to authorize the City to violate the ESA or render the goals of the HCP unobtainable, and provided further that:

- (a) The suspension of performance is of no greater scope and no longer duration than is reasonably required by the Force Majeure;
- (b) The City notifies NMFS orally within a reasonable time (normally not to exceed 72 hours) after becoming aware of any event that the City contends constitutes a Force Majeure, and in writing within seven (7) calendar days after the event. Such notice will: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures;
- (c) The City uses its best efforts to avoid and mitigate the effects of any delay upon its ability to perform. A Force Majeure event may require use of the adaptive management provisions of this agreement and the HCP in remedying the effects of the Force Majeure event; and

- (d) When the City is able to resume performance of its obligations, it provides NMFS written notice to that effect.

9.3.3.2 Termination through Force Majeure. Any party may terminate the HCP if a Force Majeure event renders the goals of the HCP unobtainable.

10.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

11.0 MINOR MODIFICATIONS

11.1 The HCP, including its appendices, is a very lengthy and complex document, and the parties recognize that various minor and non-controversial corrections and adjustments may from time to time be required. Any party may propose minor modifications to the HCP or this agreement by providing written notice to all other parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the HCP and on covered species. The parties will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all other parties' written approval. If, for any reason, a receiving party objects to a proposed modification, it must be processed as an amendment of the permit in accordance with section 13 of this agreement. The NMFS will not propose or approve minor modifications to the HCP or this agreement if the NMFS determines that such modifications would result in operations under the HCP that are significantly different from those analyzed in connection with the original HCP, or would result in adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or additional take not analyzed in connection with the original HCP.

11.2 Minor modifications to the HCP and IA processed pursuant to this subsection may include but are not limited to the following:

11.2.1 Corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;

11.2.2 Corrections of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the permit or HCP;

11.2.3 Minor changes to survey, monitoring or reporting protocols;

11.2.4 Minor corrections and adjustments to the HCP, including changes in implementation schedules of up to two years.

11.3 Decisions on specific design details for facilities, studies, projects, or adaptive management strategies identified in the HCP are not modifications or amendments and may proceed without processing as amendments or modifications.

12.0 RELATIONSHIP TO FERC LICENSE, PROJECT NO. 2821

The City operates hydroelectric generators at its Bull Run Dams No. 1 and 2 under license from the Federal Energy Regulatory Commission. Generation of electricity at the dams is subordinate to water supply operations. The City's hydroelectric license is effective until March 1, 2029. If the City wishes to continue generation of electricity at the project after that date, it will seek a new license before license expiration. The parties agree that the HCP will be used as part of the required Exhibit E. Unless one of the changed circumstances described in the HCP has arisen, NMFS shall endorse the HCP as the appropriate fish and wildlife terms and conditions for covered species for a new license with a term coincident with the remaining term of the HCP. Should FERC impose, as part of a new license, conditions that are inconsistent with or make impossible the implementation of any provision of the HCP, the City may decline to accept the new license and cease production of electricity at the projects or the City may ask NMFS to enter into good-faith discussions. The purpose of those discussions will be to review the HCP, seeking ways to make the license and HCP consistent and to establish mechanisms to allow implementation of or change to HCP measures affected by license conditions. If the parties are not able to reach an agreement and the City accepts a FERC license that makes impossible the implementation of any provision of the HCP, the new license may be treated by any party as a Force Majeure event under the terms of this Implementing Agreement.

13.0 NEW LISTINGS

The ITP for federally listed species will be issued contemporaneously with the signing of this Agreement. In the future during the term of the Agreement, should any other covered species become listed, NMFS shall add to the ITP, within sixty (60) days of receipt by NMFS of a written request by the City, each such species at the level of take requested by the City and supported by the HCP without requiring additional mitigation, unless, within the specified sixty-day period, NMFS demonstrates that unforeseen circumstances exist. If such unforeseen circumstances are found to exist, NMFS may request or provide additional mitigation as provided in this agreement.

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

14.2 SUCCESSORS AND ASSIGNS

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

14.3 NOTICE

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

Assistant Regional Director
National Marine Fisheries Service
1201 NE Lloyd Blvd, Suite 1100
Portland, OR 97232

Administrator
Portland Water Bureau
1120 SW 5th Avenue
Portland, OR 97204

14.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between the Parties. It supersedes any and all other Agreements, either oral or in writing among the Parties with respect to the subject matter hereof and contains all of the covenants and Agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or Agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.5 ELECTED OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

14.6 AVAILABILITY OF FUNDS

Implementation of this Agreement and the HCP by NMFS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. treasury. The parties acknowledge that NMFS will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.7 DUPLICATE ORIGINALS

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

14.8 THIRD PARTY BENEFICIARIES

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of NMFS to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of NMFS as an agency of the Federal government.

14.10 REFERENCES TO REGULATIONS

Any reference in this Agreement, the HCP, or the Permit to any regulation or rule of NMFS shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

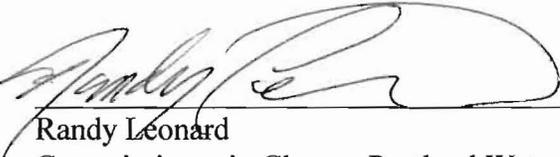
14.11 APPLICABLE LAWS

All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable State and Federal laws and regulations.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

BY 
Barry A. Thom
Acting Regional Administrator, Northwest Region
National Marine Fisheries Service
Seattle, Washington

Date April 7, 2009

BY 
Randy Leonard
Commissioner in Charge, Portland Water Bureau
Portland, Oregon

Date April 7, 2009