

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE CASCADE WATER ALLIANCE
FOR
OPERATIONS ON THE WHITE RIVER AT BUCKLEY, WASHINGTON

This AGREEMENT (hereinafter the "Agreement") is entered into this 2nd day of March, 2018, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Seattle District (hereinafter the "District Engineer"), and the Cascade Water Alliance, a Washington municipal corporation, (hereinafter "CWA"), represented by the Chief Executive Officer (hereinafter "CEO") (collectively, the "Parties").

WITNESSETH, THAT:

WHEREAS, CWA operates a water diversion headworks (the "Diversion Headworks") on the White River near Buckley, Washington, and this headworks consists of diversion flume, head gates, flow control gates, operating decks and roadways, sluiceway, ancillary buildings, and appurtenances and associated facilities;

WHEREAS, the Mud Mountain Dam was authorized for construction by Section 5 of the Flood Control Act of 1936, Public Law 74-738, and this authorization included the authority to construct and operate a Fish Passage Facility;

WHEREAS, the Government and CWA's predecessor in interest Puget Sound Power and Light ("Puget") entered into an Agreement for Construction of Fishway and Appurtenant Facilities for Mud Mountain Dam, Washington on February 2, 1948 regarding the construction, operation and maintenance of a fish trap facility on Puget-owned property;

WHEREAS, the Government will construct the Mud Mountain Dam Fish Passage Facility (hereinafter the "Fish Passage Facility" as defined in Paragraph 1.a. of this Agreement) adjacent to CWA's headworks and this Fish Passage Facility will include a barrier, levees, scour protection, water intakes, fish ladder entrances, fish ladder, holding pools, trap and haul, roadways, and appurtenances;

WHEREAS, concurrent with this Agreement, the CWA has granted a perpetual, exclusive easement and right-of-way to the Government for the location, construction, operation, maintenance, alteration, patrol and replacement of the Fish Passage Facility and the demolition of the existing barrier dam and fish trap facility, to be recorded in an easement deed (hereinafter "Easement") reserving all its remaining rights and privileges associated with the Easement property including its "Water Rights" as defined below;

WHEREAS, the Government will operate the Fish Passage Facility for the purpose of passing fish upstream around Mud Mountain Dam, and the Government will cooperate with

fishery managers to include the Muckleshoot Indian Tribe, the Puyallup Tribe of Indians and the State of Washington, to include providing access to the Mud Mountain Dam Fish Passage Facility under the terms of the Easement;

WHEREAS, pursuant to the Agreement Between the Department of the Army and Cascade Water Alliance for Additional Work in Connection with Construction of Mud Mountain Dam Fish Passage Project (the “Additional Work Agreement”) of even date herewith the Government will also undertake construction of a sluiceway and other modifications to CWA’s Diversion Headworks (the “Headworks Improvements”) in connection with construction of the Fish Passage Facility;

WHEREAS CWA and the Government want to establish certain operational requirements and protocols, as set forth herein, to be followed so that the Parties respective adjacent facilities will not adversely affect the facilities or operations of the other party and CWA can fully exercise its Water Rights in accordance with the Easement. ;

NOW, THEREFORE, the Government and CWA agree as follows:

1. Definitions.

a. The term “Fish Passage Facility” means a fish barrier and fish passage facility, as generally described in the FY 2015 Design and Execution Document, Mud Mountain Dam Upstream Fish Passage Project, Flood Control Act of June 22, 1936, Pierce County WA, dated April 24, 2015 and approved by the Director of Civil Works on May 11, 2015 (hereinafter the “Decision Document”).

b. An “Outage” is defined as an event where the Government lowers the pool behind the barrier structure below elevation 666.5 feet through operation of the Fish Passage Facility’s gates, unless such operation is at the request at the CWA.

c. The term “Water Rights” means CWA’s right to divert and of beneficial use of water from the White River as provided and at the location identified in State of Washington Water Right Permit No. S2-29920(A) - (B) (priority date June 20, 2000) and Certificate of Change of Water Right No. S2-CV1-2P168(B) (priority date April 17, 1895).

2. Facility Maintenance.

a. Upon completion of construction of the Government’s Fish Passage Facility and CWA’s Headworks Improvements, the southerly wall of the barrier foundation and abutments of the Fish Passage Facility constitutes the dividing line between the Government and CWA facilities, so that the Government’s facility is to the north of this dividing line and CWA’s facility is to the south as shown on the attached Exhibit A.

b. The Parties agree that they will own and maintain their facilities as their own assets.

c. Cascade will maintain and repair the surface of the southerly wall of the barrier foundation and abutments of the Fish Passage Facility.

d. The Government will maintain and repair the structure and foundation of the southerly wall of the barrier foundation and abutments of the Fish Passage Facility.

e. Within the Government's Fish Passage Facility, the Muckleshoot Indian Tribe will own, operate and maintain fixtures to supply water to the adjacent Muckleshoot Indian Tribe hatchery and to discharge effluent from this hatchery to the White River.

3. Communication and Coordination.

a. The Operations Points of Contact are:

For the Government:
Jonathan D. Norquist, Operations Project Manager
30525 SE Mud Mountain Road
Enumclaw, WA 98022
Jonathan.Norquist@usace.army.mil
206-764-3717

For CWA:
Michael Gagliardo, Director of Planning
520 112th Ave. NE Suite 400, Bellevue WA 98004
mgagliardo@cascadewater.org
(425) 453-1503

A party may change its Operations Point of Contact by giving written notice to the other party.

b. Upon completion of the Fish Passage Facility, the Government and CWA will adhere to the Communications and Coordination Protocol in Appendix 1. Appendix 1 may be modified at any time by mutual written agreement of the Operations Points of Contacts of both Parties.

4. Joint Operations.

a. The Government agrees to maintain a pool behind the barrier structure within a normal operating range sufficient to allow CWA to fully exercise its Water Rights. The Government intends to initially maintain a pool behind the barrier structure within a normal operating range between elevation 672.0 feet to elevation 673.5 feet for the purpose of diverting water for operation of the Fish Passage Facility fish way based on the contract specifications and drawings in Solicitation Number W912DW18R0001 issued by the Government on October 2, 2017. The Parties believe this range is capable of enabling CWA to fully exercise its Water Rights. The Government's need for managing the movement of sediment through the barrier structure will likely require operating the forebay pool for certain periods below this range, but above elevation 666.5 feet. Currently, the Parties do not know the frequency and duration of these sediment management operations.

b. Once the Fish Passage Facility is completed and placed in operation, the Government and CWA will cooperatively develop a mutually acceptable Joint Operations Protocol Manual to be completed no later than twelve (12) months following completion of CWA's Headworks Improvements. This Joint Operations Protocol Manual will contain the operational protocols related to required pool range, timing, duration and other related parameters necessary for coordination of Government and CWA operations, such as: fish trap operations, CWA diversion, and sediment sluicing. The Joint Operations Protocol Manual shall be reviewed at least annually, and updated if necessary, during one of the Quarterly Meeting provided for in the Communication/Coordination Protocol in Appendix 1.

c. The Parties agree to operate in accordance with the Joint Operations Protocol Manual.

d. If after the Fish Passage Facility is completed and placed in operation, the Parties are unable to satisfactorily meet the operational requirements of the Fish Passage Facility and CWA's diversion headworks while maintaining the normal operating range specified above, the Parties agree to work together in good faith to establish an alternative adaptive management regime which will meet the operational requirements of the Fish Passage Facility and CWA's diversion headworks to allow CWA to fully exercise its Water Rights.

5. Government Operations.

a. Except in an emergency, the Government shall provide CWA advance notice of when the pool will be outside the normal operating range established in Joint Operations Protocol Manual during the weekly meeting provided for in the Communication and Coordination Protocol described in Appendix 1.

b. The Government will not initiate an Outage (as defined in Paragraph 1.b. above) unless the Parties have a mutually agreed upon a work plan for such Outage.

c. During an Outage, the Government will conduct fish protection and recovery operations in CWA's diversion flume as required by the Endangered Species Act. CWA will provide the necessary real estate access rights for the Government to enter the flume to perform fish protection and recovery. The Government will protect and recover fish in CWA's diversion flume in accordance with Appendix 2. Appendix 2 may be modified at any time by mutual written agreement of the Operations Points of Contacts of both Parties.

6. Notice. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and either delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to CWA:

Cascade Water Alliance
Attention: Michael Gagliardo, Director of Planning
520 112th Ave NE
Suite 400
Bellevue, WA 98004

If to the Government:

U.S. Army Corps of Engineers Seattle District
Attention: Mud Mountain Dam Operations Project Manager
30525 SE Mud Mountain Road
Enumclaw, WA 98022

A party may change the recipient or address to which such communications are to be directed by giving written notice to the other party in the manner provided in this paragraph.

7. Dispute Resolution.

a. The Parties will resolve any disagreement on whether the Government's operation of the Fish Passage Facility is interfering or has interfered with CWA's ability to fully exercise its Water Rights in accordance with the Agreement Between the Department of the Army and the CWA for Dispute Resolution Procedures in Connection with the Mud Mountain Dam Fish Passage Project.

b. If the Parties disagree on any matter not subject to subparagraph 7.a., the issue will be elevated to the Operations Points of Contact described in subparagraph 3.a. above. If resolution cannot be reached at that level, the issue will be elevated to the District Engineer and CEO. The Parties will work to address the issues as expeditiously as possible under the circumstances. The Parties recognize that a disagreement that initially is not subject to subparagraph 7.a may evolve into one that is subject to subparagraph 7.a. In such event, either Party may then invoke subparagraph 7.a, by notice to the other, and the Parties will then proceed in accordance with the Agreement Between the Department of the Army and the CWA for Dispute Resolution Procedures in Connection with the Mud Mountain Dam Fish Passage Project.

c. As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the Parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the Parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the Parties from performance pursuant to this Agreement.

8. By and between Parties to this Agreement, execution of this Agreement terminates the Agreement for Construction of Fishway and Appurtenant Facilities for Mud Mountain Dam, Washington, dated February 2, 1948, effective upon mobilization of the Government's Fish Passage Facility construction contractor. The Parties agree to cooperate in seeking reasonable documentation of the confirmation and concurrence by the Washington State Department of Fish and Wildlife in such termination.

9. Execution of this Agreement terminates Cooperative Agreement W912DW1620001, dated January 23, 2016 effective upon mobilization of the Government's Fish Passage Facility construction contractor.

10. Upon completion of project construction, portions of the existing easement for the fish trap and certain improvements will no longer serve any useful purpose to the Government and will become excess to the needs of the project. The Government will dispose of this property to CWA in accordance with policy and regulation governing the disposal of real property and improvements, but without payment of additional consideration by CWA. A map showing the excess easement area is attached as Exhibit B and the improvements consist of a control house and the remaining structure/foundation of the existing fish trap not otherwise noted for re-use or demolition in the contract drawings and specifications in solicitation number W912DW18R0001 issued by the corps on October 2, 2017, as amended.

11. This Agreement does not document nor provide for the exchange of funds or manpower between the Parties nor does it make any commitment of funds or resources and nothing in this Agreement shall be interpreted to require obligations or payments by the Government in violation of the Anti-Deficiency Act, 31 U.S.C. §1341. Nothing in this Agreement may be considered as implying that the Congress will at a later date authorize and appropriate funds to meet deficiencies. This Agreement is neither a fiscal nor a funds obligation document. The provisions of this clause are without prejudice to any rights the Parties may have to make a claim or pursue remedies under applicable laws.

12. This Agreement may be modified by the written agreement of the Parties, duly signed by their authorized representatives or as provided herein.

13. This Agreement is not transferable except with the written consent of the Parties.

15. Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not a party to this Agreement.

16. Each Party reserves all of its rights and interests except as explicitly addressed by the terms of this Agreement.

17. This Agreement shall be binding on the Parties upon mutual execution by the parties and shall be effective upon mobilization of the Government's Fish Passage Facility construction

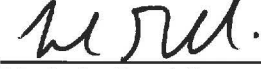
contractor. This Agreement shall continue in force so long the Government's Fish Passage Facility is authorized. This Agreement may be terminated by written agreement of the Parties.

IN WITNESS WHEREOF, the parties have executed this Agreement.

CASCADE WATER ALLIANCE

THE DEPARTMENT OF THE ARMY


Chuck Clarke
Chief Executive Officer


Mark A. Gerald
Colonel, Corps of Engineers
District Engineer

Date: 3/1/18

Date: 02 MAR 18

APPENDIX 1
Communications and Coordination Protocol

1-1. Quarterly Meetings. Both Parties will participate in a quarterly operational coordination meeting which will cover operational or maintenance activities of Mud Mountain Dam, the Fish Passage Facility, the CWA headworks flow control and sluiceway gates (hereinafter the “Cascade Gates”) and any other activities that the Parties anticipate will impact White River flows. This quarterly meeting will be held during the first week of January, April, July and October or as otherwise agreed to by the Parties.

1-2. Weekly Meetings. Both Parties will participate in a weekly face-to-face meeting to discuss anticipated gate operations or other operational or maintenance activities for Mud Mountain Dam, the Fish Passage Facility, and the Cascade Gates. CWA will provide a written report by email of the weekly face to face meeting and will include at a minimum:

a. Schedule and nature of activities, to include: description, start date and time, duration, and completion date and time.

b. Anticipated instream flow impacts at the Barrier Structure and the Buckley Gage described as the anticipated change in c.f.s.

c. Anticipated change in pool elevation at the Barrier Structure and the duration of this elevation change.

d. The ramping rates to be utilized at the Barrier Structure, Cascade Gates, Mud Mountain Dam, and the Buckley Gage.

1-3. Daily Calls. Both Parties will conduct daily telephone communication to confirm actual activity parameters and schedule, no later than 9:00 AM each day.

1-4. Changes. Both Parties will provide at least 24 hours advance notice of any changes to the activities and parameters which were discussed at the most recent weekly meeting.

1-5. Emergencies. Both Parties will provide notification of emergency actions as soon as practical under the circumstances, but no later than 12 hours after the action has been initiated.

1-6. Representatives. The following are the personnel anticipated to participate in the meetings and call, but either Party may substitute or add personnel.

Event	Government	CWA
Quarterly Meeting	<ul style="list-style-type: none"> • MMD Operations Supervisory Staff • Water Management 	<ul style="list-style-type: none"> • Operations Manager • Director of Planning • Contract Operator
Weekly Meeting	<ul style="list-style-type: none"> • MMD Operations Site Staff 	<ul style="list-style-type: none"> • Contract Operator
Daily Call	<ul style="list-style-type: none"> • MMD Operations Site Staff 	<ul style="list-style-type: none"> • Contract Operator

APPENDIX 2
Fish Protection and Recovery

2-1. In the event of an Outage (as defined in paragraph 1.b.), the Government shall be responsible for fish protection and recovery in the CWA flume.

2-2. In order to prepare for an Outage:

a. When the Government determines that there is a reasonable chance there will be an Outage, the Government will notify and consult with CWA in accordance with Appendix 1, Communications and Coordination Protocol. This notification and consultation will take place not less than fourteen (14) days prior to the anticipated date of the Outage. The Government and CWA will establish a communication schedule such that the Government will provide CWA with no less than three (3) days' notice of the actual date of the Outage.

b. The Government's advance notification to CWA will allow the Parties sufficient time to jointly develop and agree upon a work plan for the installation of a temporary weir in the flume that will create a backwater condition in the flume from the temporary weir upstream to CWA's intake.

c. The work plan will include: the location of the temporary weir, the time of placement of the weir, the maximum duration of the Outage, and planned fish rescue operations.

2-3. Fish Protection.

a. The Government will provide equipment and material to install a temporary weir in the flume to impound water for fish within the flume.

b. In accordance with the work plan developed with CWA, the Government will place, maintain, and remove the temporary weir.

2-4. Fish Recovery. In the event that the Outage exceeds the duration specified in the work plan, the Government will conduct fish recovery operations to remove fish from the water impounded in the CWA flume.

2-5. CWA will provide space on its property for the Government to store equipment and materials for the temporary weir.