

SCANNED 3-29-10  
(7)

WHATCOM COUNTY  
CONTRACT NO.  
201003023

2017

EXPIRES 6-30-11  
IA No. C1000209

**INTERAGENCY AGREEMENT  
BETWEEN  
THE STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY  
AND  
WHATCOM COUNTY FLOOD CONTROL ZONE DISTRICT**

WHEREAS the Washington State Legislature in ESHB 2687, passed in the 2009 Legislative Session, appropriated funds from the local toxics control account "solely to clean up naturally occurring asbestos from Swift Creek";

WHEREAS the Washington State Department of Ecology and Whatcom County staff, working on behalf of the Whatcom County Flood Control Zone District, have consulted on options for reducing the occurrence of flooding and associated deposition of asbestos-containing sediment in and around Swift Creek and agree on the general scope of work contained herein;

**THIS AGREEMENT** is made and entered into by and between the DEPARTMENT OF ECOLOGY hereinafter referred to as "**ECOLOGY**," and the WHATCOM COUNTY FLOOD CONTROL ZONE DISTRICT hereinafter referred to as the "**DISTRICT**."

**IT IS THE PURPOSE OF THIS AGREEMENT** to provide the **DISTRICT** with funds appropriated to **ECOLOGY** by the legislature to pass through to the **DISTRICT** to assist with the managing sediment deposited by Swift Creek. Swift Creek sediment contains naturally occurring asbestos.

**THEREFORE, IT IS MUTUALLY AGREED THAT:**

**STATEMENT OF WORK**

The **DISTRICT** shall furnish the necessary personnel, equipment, material and/or service(s) and otherwise do all things necessary for or incidental to the performance of the work set forth in Attachment "A". Furthermore, the **DISTRICT** agrees to budget \$450,000 for in-kind and other unspecified services related to the Swift Creek project.

**PERIOD OF PERFORMANCE**

Subject to its other provisions, the period of performance of this Agreement shall commence on January 26, 2010, and be completed on June 30, 2011, unless terminated sooner as provided herein, or extended by mutual written agreement by the **DISTRICT** and **ECOLOGY**.

**PAYMENT**

Compensation for the work provided in accordance with this Agreement has been established under the terms of RCW 39.34.130. The total project cost shall not exceed \$919,463. \*(By mutual agreement of the **DISTRICT** and **ECOLOGY**, \$80,537 of the legislative appropriation has been allocated for purchase and operation of a landslide monitoring video system to be implemented by

Western Washington University through a separate agreement). Payment for satisfactory performance of the work shall not exceed this amount unless the parties mutually agree to a higher amount and properly amend this Interagency Agreement. Compensation for service(s) shall be based on the budget in Attachment "A" which is attached hereto and incorporated herein.

#### **BILLING PROCEDURE**

The **DISTRICT** shall submit properly completed invoices on State Invoice Voucher form A19-1A and progress reports on a monthly basis to Katherine Scott. Copies of invoices and progress reports shall be submitted to Ecology's Project Representative, Mary O'Herron. Any work products shall be submitted quarterly to **ECOLOGY's** Project Representative.

Payment to the **DISTRICT** for approved and completed work will be made by warrant or account transfer by **ECOLOGY** within 30 days of receipt of the invoice. Upon expiration of the Agreement, any claim for payment not already made shall be submitted within 30 days after the expiration date or the end of the fiscal year, whichever is earlier.

#### **RECORDS MAINTENANCE**

The parties to this Agreement shall each maintain books, records, documents and other evidence that sufficiently and properly reflect all direct and indirect costs expended by either party in the performance of the service(s) described herein. These records shall be subject to inspection, review or audit by personnel of both parties, other personnel duly authorized by either party, the Office of the State Auditor, and federal officials so authorized by law. All books, records, documents, and other material relevant to this Agreement will be retained for six years after expiration and the Office of the State Auditor, federal auditors, and any persons duly authorized by the parties shall have full access and the right to examine any of these materials during this period.

Records and other documents, in any medium, furnished by one party to this agreement to the other party, will remain the property of the furnishing party, unless otherwise agreed. Except as provided below, the receiving party will not disclose or make available this material to any third parties without first giving notice to the furnishing party and giving it a reasonable opportunity to respond. Each party will utilize reasonable security procedures and protections to assure that records and documents provided by the other party are not erroneously disclosed to third parties.

Information that is a public record under Chapter 42.56 RCW, which does not meet any applicable exemptions to disclosure, can be disclosed to the public without prior permission of either party.

#### **SUBMITTING DATA TO ECOLOGY'S ENVIRONMENTAL INFORMATION MANAGEMENT SYSTEM (EIM)**

All sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with WAC 173-340-840(5) and Ecology Toxics Cleanup Program Policy 840: Data Submittal Requirements. Failure to properly submit sampling data will result in Ecology withholding payments.

Sampling data must be submitted in EIM system format. The EIM system is Ecology's main repository for electronic environmental monitoring data. It is intended to provide an accessible means by which to examine and evaluate environmental monitoring data. For EIM information: <http://www.ecy.wa.gov/eim/> or Kristin Carmack, TCP EIM Data Coordinator, (509) 454-4243.

### **HOLD HARMLESS**

To the extent permitted by the Constitution and laws of Washington, each party shall defend, protect, and hold harmless the other party from and against all claims, suits or actions arising from the negligent acts or omissions of its employees and/or authorized representatives while performing under the terms of this agreement.

### **RIGHTS IN DATA**

Unless otherwise provided, data which originates from this Agreement shall be "works for hire" as defined by the U.S. Copyright Act of 1976 and shall be owned by **ECOLOGY**. Data shall include, but not be limited to, reports, documents, pamphlets, advertisements, books magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions. Ownership includes the right to copyright, patent, register, and the ability to transfer these rights. All sampling data shall be submitted to **ECOLOGY** in both printed and electronic formats in accordance with WAC 173-340-840(5) and **ECOLOGY** Toxics Cleanup Program Policy 840: Data Submittal Requirements. Failure to properly submit sampling data will result in **ECOLOGY** withholding payment.

### **INDEPENDENT CAPACITY**

The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

### **AGREEMENT ALTERATIONS AND AMENDMENTS**

This Agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

### **TERMINATION**

Either party may terminate this Agreement upon 30 days' prior written notification to the other party. If this Agreement is so terminated, the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination.

### **TERMINATION FOR CAUSE**

If for any cause, either party does not fulfill in a timely and proper manner its obligations under this Agreement, or if either party violates any of these terms and conditions, the aggrieved party will give the other party written notice of such failure or violation. The responsible party will be given the opportunity to correct the violation or failure within 15 working days. If failure or violation is not corrected, this Agreement may be terminated immediately by written notice of the aggrieved party to the other.

### **DISPUTES**

In the event that a dispute arises under this Agreement, before any formal action is initiated, the parties shall make a good faith effort to informally resolve the dispute. If the dispute cannot be

resolved informally, it shall be resolved by a Dispute Board in the following manner: Each party to this Agreement shall appoint one member to the Dispute Board. The members so appointed shall jointly appoint an additional member to the Dispute Board. The Dispute Board shall review the facts, agreement terms and applicable statutes and rules and make a determination of the dispute. The determination of the Dispute Board shall be final and binding on the parties hereto. As an alternative to this process, either of the parties may request intervention by the Governor, as provided by RCW 43.17.330, in which event the Governor's process will control.

#### **GOVERNANCE**

This Agreement is entered into pursuant to and under the authority granted by the laws of the State of Washington and any applicable federal laws. The provisions of this Agreement shall be construed to conform to those laws.

In the event of an inconsistency in the terms of this Agreement, or between its terms and any applicable statute or rule, the inconsistency shall be resolved by giving precedence in the following order:

- a. Applicable state and federal statutes and rules;
- b. Statement of work; and
- c. Any other provisions of the agreement, including materials incorporated by reference.

#### **ASSIGNMENT**

The work to be provided under this Agreement, and any claim arising thereunder, is not assignable or delegable by either party in whole or in part, without the express prior written consent of the other party, which consent shall not be unreasonably withheld.

#### **WAIVER**

A failure by either party to exercise its rights under this Agreement shall not preclude that party from subsequent exercise of such rights and shall not constitute a waiver of any other rights under this Agreement unless stated to be such in a writing signed by an authorized representative of the party and attached to the original Agreement.

#### **SEVERABILITY**

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of this agreement, and to this end the provisions of this Agreement are declared to be severable.

#### **ALL WRITINGS CONTAINED HEREIN**

This Agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties hereto.

**AGREEMENT MANAGEMENT**

The agreement manager (Project Representative) for each of the parties shall be responsible for and shall be the contact person for all communications regarding the performance of this Agreement.

The Project Representative for **ECOLOGY** is:

Mary K. O'Herron  
WA Department of ECOLOGY  
1440 10th Street, Suite 102  
Bellingham, WA 98225

Phone: (360)715-5224  
Fax: (360)715-5225  
mohe461@ecy.wa.gov

The Project Manager for the **DISTRICT** is:

Jon Hutchings  
Public Works Assistant Director  
Whatcom County Public Works  
322 North Commercial Street  
Bellingham, WA 98225

Phone: 360-676-6876  
Fax: 360-738-2468  
jhutchings@co.whatcom.wa.us

**IN WITNESS WHEREOF**, the parties have executed this Agreement.

STATE OF WASHINGTON

Department of Ecology

WHATCOM COUNTY FLOOD CONTROL  
ZONE DISTRICT  
Whatcom County, Washington

Polly Zehm 3/3/10  
Signature Date

[Signature] 2-11-10  
Signature Date

Deputy Director  
Title

County Executive, on behalf of Whatcom  
Title County Flood Control Zone District.

APPROVED AS TO FORM:  
ATTORNEY GENERAL'S OFFICE

WHATCOM COUNTY PROSECUTOR

\_\_\_\_\_  
Assistant Attorney General

Daniel L. Gibson  
Prosecuting Attorney

**ATTACHMENT "A"**

**DESCRIPTION OF WORK**

The purpose of this work is to reduce the threat to human health and the environment caused by hydraulic distribution of Naturally Occurring Asbestos (NOA) by and from Swift Creek, while advancing the body of knowledge necessary to develop a long-term management option. This work is the first phase of a multi-year interim project aimed at minimizing distribution over the landscape of sediments transported from the Sumas Mountain slide by Swift Creek. The work consists of five elements: (1) design and construction of new deflector levees and/or retention facilities, (2) evaluation and improvement of existing levees, (3) acquisition of flood control easements and/or land, (4) geologic and geotechnical investigation of long-term sediment management strategies, and (5) advancement of Federal funding requests for future work.

Estimated costs for these elements are as follows:

| ITEM DESCRIPTION   | ITEM COST            |
|--|----------------------|
| Levee/Retention Facility Evaluation and Design                         | \$100,000.00         |
| Levee/Retention Facility Construction                                  | \$405,000.00         |
| Easement/Land Acquisition  | \$350,000.00         |
| Geotechnical Investigation   | \$64,463.00          |
| Project Management, Administration and Related Governmental Services** | \$450,000.00         |
| SUBTOTAL   | \$1,369,463.00       |
| Taxes  | Not applicable       |
| Administration/Contingency   | Not applicable       |
| TOTAL  | \$1,369,463.00       |
| <b>Amount to be Paid by ECOLOGY Through this Agreement</b>             | <b>\$919,463.00*</b> |
| Match to be Paid by DISTRICT**   | \$450,000.00         |

\*\$80,537 from the \$1,000,000 total will be paid by Ecology outside of this agreement to Western Washington University for landslide monitoring.

\*\*May be in kind or contracted services performed by the DISTRICT and/or Whatcom County, includes preparation of requests for additional funding.

### WORK PRODUCTS AND DECISION POINTS

Work products are expected to be delivered as described below. Scheduled delivery dates are approximated for planning purposes only and may change due to weather, contractor availability, changing environmental conditions, and/or other unforeseen events. All work will be completed and final work products delivered by June 30, 2011.

- (1) Deliver contractor Scope of Work for Alternatives Analysis and Design, and Geotechnical Analysis by January 27, 2010. Ecology will provide the District with comments by February 9, 2010.
- (2) Coordinate with Ecology to prepare a Congressional funding request to fund subsequent phases of the project by February 15, 2010.
- (3) Evaluate design options for (a) new deflector levees and/or retention facilities on the Swift Creek alluvial fan east of Goodwin Road and (b) improvement of existing levees between Goodwin Road and Oat-Coles road. Deliver a design alternatives report for review by Ecology no later than April 7, 2010. Ecology will provide the District with agency comments within 30 days after delivery.
- (4) Prepare bid ready design specifications for (a) selected alignment of new deflector levees and/or retention facilities and (b) improvement of existing levees. Deliver to Ecology 30 days before bidding construction.
- (5) Construct new levees and retention facilities, and complete improvements by November 1, 2011. Deliver final as-built plans and report documenting construction to Ecology by January 1, 2011
- (6) Conduct geotechnical investigation of long-term sediment management strategies. Deliver draft report by January 1, 2011.

