

GCB 3736
INTERLOCAL AGREEMENT BETWEEN
WSDOT / PORT OF TACOMA REGARDING MITIGATION BANK CREDITS

This INTERLOCAL AGREEMENT (Agreement) is entered into between the Washington State Department of Transportation (WSDOT) and the Port of Tacoma (PORT), each individually referred to as a "Party" and collectively referred to as the "Parties."

RECITALS

- A.** In 2015 the Legislature funded the construction of the Puget Sound Gateway Program (PROGRAM) through the Connecting Washington revenue package. The Legislature directed that \$130 million of the \$1.875 billion PROGRAM funding is to come through local funding sources.
- B.** The PORT has entered into a Local Funding and Phasing Memorandum of Understanding (MOU) with WSDOT (Exhibit A), commencing on July 1, 2018, acknowledging that the PORT is one of eighteen (18) Local Agency Partners committed to provide matching funds/contributions commensurate with the benefits accrued from the PROGRAM at a local level, estimated to total \$30 million.
- C.** The east segment of the State Route (SR) 167 Completion Project (PROJECT) is part of the PROGRAM, where WSDOT will construct a new highway from Interstate 5 to the existing terminus of SR 167 in Puyallup as shown and described in Exhibit B.
- D.** The PORT, in recognition of the PROJECT's benefits for freight mobility at the Port of Tacoma, will contribute a total of \$30 million in matching funds and in-kind equivalent contributions to the PROJECT's costs, consistent with Engrossed Senate Bill 5096 § 306(20)(b).
- E.** The PORT is the owner of the Upper Clear Creek Mitigation Bank (UCCMB), created and administered pursuant to the Mitigation Banking Instrument (MBI) signed by the Port as the Bank Sponsor and by the Washington State Department of Ecology, U.S. Army Corps of Engineers, and National Marine Fisheries Service, (collectively the "Regulatory Agencies", and the Co-Chairs of the Interagency Review Team (IRT) under the MBI), and certified June 24, 2020.
- F.** The UCCMB is established to operate in the State of Washington, within Universal (wetland) Credit and Fish Conservation Credit (DSAY) Service Areas (collectively, "Service Areas"), as defined by the MBI.
- G.** The purpose of the UCCMB is to provide off-site mitigation for unavoidable impacts to wetlands, fish habitat, and other critical areas associated with certain activity within the respective Service Areas.
- H.** The PORT is authorized to operate the UCCMB and to obtain, hold, sell, and transfer universal (wetland) bank credits ("Universal Credits") and fish conservation bank credits ("DSAY Credits"), said credits being units of trade representing the increase in ecological value of a site, as measured by acreage, functions, and/or values.

- I. WSDOT is planning certain activity within the Service Areas (the "Project"), which will require permits and/or approvals ("Permit(s)") from regulatory agencies and which activity may cause unavoidable impacts to wetlands, fish habitat, or other aquatic habitat, and may require mitigation.
- J. WSDOT wishes to receive from the PORT and has completed an Application To Purchase Bank Credits (Exhibit C), and the PORT wishes to provide to WSDOT, Universal Credits from the UCCMB for the Project as an in-kind contribution to the PROJECT's costs, on the terms and conditions contained in this Agreement.

NOW, THEREFORE, pursuant to Chapter 39.34 RCW, the above recitals that are incorporated herein as if fully set forth below, and in consideration of the terms, conditions, covenants, and mutual benefits and performances contained herein, and the attached Exhibits A, B, C and D incorporated and made a part hereof, the Parties mutually agree as follows:

1. General

- 1.1 This Agreement quantifies certain contributions of the PORT to be applied towards the PROJECT component of the PROGRAM as well as a credit towards the PORT's PROJECT contribution as described in this Agreement and defines the roles and responsibilities between the Parties with respect to such contributions.
- 1.2 As part of the east segment of the PROJECT from I-5 to the current terminus of SR 167 in Puyallup, known as the Stage 2 Project, WSDOT will build 4 miles of new highway to complete the unfinished segment of SR 167 in Pierce County. The Stage 2 Project will be the final stage of the SR 167 Completion Project Phase 1 Improvements by building a four-lane highway between SR 161 (North Meridian Avenue) and I-5, along with two new interchanges at Valley Avenue and I-5, improvements on several local streets such as Freeman Rd., N. Levee Rd., Valley Avenue, and 20th St., as well as the construction of riparian restoration sites in the Wapato Creek and Hylebos Creek basins in addition to other environmental mitigation and enhancements, as generally shown and described in Exhibit B hereto.
- 1.3 This Agreement is effective upon the last date of execution of both Parties and will terminate on the earlier to occur of Closing on the transfer of the Mitigation Bank credits under this Agreement or December 31, 2024, unless mutually extended by the Parties.

2. Payment; In-Kind Contribution of Mitigation Bank Credits

- 2.1 **In-Kind Contribution of Mitigation Bank Credits.** The PORT agrees to contribute to WSDOT up to two (2) Universal Credits from the UCCMB (the "Universal Bank Credits" or "Mitigation Bank Credits"), with the final amount of Mitigation Bank Credits to be transferred to be determined by WSDOT based on the Permits and regulatory agency requirements related to the Project, subject to the terms, covenants, and conditions set forth in this Agreement.

- 2.2 **Value.** The value of the Mitigation Bank Credits, which has been determined by a fair market value analysis pursuant to the PORT's Master Policy Directive (Resolution 2022-06-PT), is \$1,933,333 per Universal Bank Credit. The total aggregate value of the Mitigation Bank Credits contributed to the PROJECT by the PORT under this Agreement, shall be based on the final amount of Mitigation Bank Credits transferred under this Agreement. The PORT shall receive a credit for the total value of the Mitigation Bank Credits transferred under this Agreement, which shall be subtracted as an in-kind contribution from the PORT's \$30 million total obligation to the PROJECT under the MOU (Exhibit A). Any portion of the total PORT contribution of \$30 million remaining to be paid after completion of the PROJECT will be applied to SR 167 Completion Project Stage 2 Project, I-5 to SR 161.
- 2.3 **Project Information; Limitations on Transfer.** WSDOT shall be solely responsible for obtaining determinations from applicable agencies as to whether the Mitigation Bank Credits may be used for the PROJECT and the Permit(s). WSDOT acknowledges and agrees that the PORT is contributing the Mitigation Bank Credits specifically for the PROJECT and Permit(s) identified in Exhibit B (or other mutually approved WSDOT sponsored project) and that this Agreement and the Mitigation Bank Credits shall not be transferable by WSDOT to any other third-party applicant.
- 2.4. **Disclosure.** WSDOT acknowledges and agrees that the PORT may, as part of the process for transferring the Mitigation Bank Credits, disclose the information provided under Exhibit B and C above to the permitting agency(ies), the Pierce County Auditor, the Regulatory Agencies, and the IRT. The PORT and WSDOT are also subject to the State of Washington Public Records Act (RCW 42.56).
- 2.5. **Representations and Warranties.** The PORT represents and warrants to WSDOT that:
- 2.5.1 The PORT is authorized by the Regulatory Agencies to operate the UCCMB and to obtain, hold, sell, and transfer the Mitigation Bank Credits; and
 - 2.5.2 The PORT owns the Mitigation Bank Credits and is authorized to sell the Bank Credits to WSDOT.
 - 2.5.3 Any interest of the PORT in the Mitigation Bank Credits is free and clear of conditions or restrictions, except as otherwise provided in this Agreement, the Bill Of Sale, or the MBI.
 - 2.5.4 The PORT and its successors and assigns will maintain the UCCMB in accordance with the MBI.
 - 2.5.5 Except for the express representations and warranties in this Agreement, the PORT makes no representations or warranties regarding the Mitigation Bank Credits; the PORT hereby disclaims, and WSDOT hereby waives, any and all representations or warranties of any kind, express or implied, concerning the Mitigation Bank Credits, including but not limited to the suitability, utility, applicability, sufficiency, or otherwise, of the Mitigation Bank Credits to the PROJECT or Permits for which WSDOT intends to use the Bank Credits.

2.6. Closing

2.6.1 Closing and Closing Date. The Closing Date for transfer of the Mitigation Bank Credits shall be a date to be selected by WSDOT which shall be within thirty (30) days of WSDOT receiving both the necessary Permit(s) for the PROJECT and approval from all applicable governmental agencies to use the Mitigation Bank Credits for the PROJECT; provided, however, that in no event shall the Closing Date be sooner than twenty one (21) days after WSDOT's notice to the PORT of WSDOT's selection of the Closing Date ("WSDOT's Closing Notice"), or later than December 31, 2024, unless otherwise mutually agreed by the Parties. If WSDOT has not obtained the necessary Permit(s) or is not under contract with a general contractor for the PROJECT by December 31, 2024, then this Agreement shall automatically terminate, and PORT shall have no further obligation to contribute the Mitigation Bank Credits to WSDOT under this Agreement, unless otherwise mutually agreed by the Parties. Upon the PORT's receipt of WSDOT's Closing Notice as provided above, the PORT shall, on or before the Closing Date selected by WSDOT, deliver a Bill Of Sale to WSDOT transferring the Bank Credits to WSDOT. The "Closing" or "Closing Date," and the transfer of the Bank Credits, shall occur when the Bill Of Sale is delivered to WSDOT.

2.6.2 Limits on Closing Date. The Closing Date shall not be modified without the written approval of both Parties.

2.6.3 Conveyance; Notice of Transfer. At Closing, the PORT shall convey to WSDOT the Bank Credits, free of restrictions, rights, and conditions, except as expressly provided for in this Agreement. Conveyance shall be by a Bill Of Sale in substantially the form attached as Exhibit D hereto. In addition, the PORT will send a letter and updated bank credit ledger to WSDOT and Regulatory Agencies notifying them that the Mitigation Bank Credits have been transferred by the PORT to WSDOT for the Permits and PROJECT detailed in this Agreement. In addition, the PORT will record this Agreement or a notice of this transaction with the Pierce County Auditor, as required by the MBI.

2.6.4 Taxes; Recording Fees; Costs. WSDOT shall pay any sales tax or other tax due from the transfer of the Mitigation Bank Credits under this Agreement, and shall defend, indemnify, and hold harmless the PORT from any and all claims, costs, fees (including but not limited to attorney fees), and expenses related to such taxes; WSDOT's obligation under this section shall survive Closing. The PORT shall pay all recording fees related to the transfer of the Bank Credits under this Agreement. Except as provided above, each Party shall pay its own costs and attorney fees related to this Agreement and the transfer of Mitigation Bank Credits thereunder.

2.7. Assignment. WSDOT's rights under this Agreement, and any Mitigation Bank Credits to be received or received by WSDOT under this Agreement, shall not be assigned, sold, gifted, alienated, encumbered, apportioned, transferred, or otherwise disposed of (collectively "assign"), in whole or in part, either voluntarily or by operation of law, to any other person or entity, and any Mitigation Bank Credits to be received or received by WSDOT under this Agreement shall not be used for any

project or purpose other than as stated in this Agreement, without the prior written consent of the PORT, in its sole and absolute discretion. Any attempt to assign or otherwise transfer or use the Mitigation Bank Credits to any other person or entity shall be null and void. This provision shall survive Closing and shall not be merged into the Bill Of Sale. Subject to the foregoing limitation, this Agreement shall inure to the benefit of and be binding upon the Parties' respective successors and assigns.

3. Contract Administration

The Parties do not by this Agreement create any separate legal or administrative entity. The Secretary of Transportation or his designee, and PORT Executive Director or his designee, shall be responsible for working with each other to administer the terms of this Agreement. The Parties do not intend to jointly own any real or personal property as part of this undertaking. The Parties will cooperatively work together to further the intent and purpose of this Agreement.

4. Dispute Resolution

In the event that a dispute arises under this Agreement, it shall be resolved as follows: The Parties shall each appoint a member to a disputes board; these two members shall select a third board member not affiliated with either Party. The three-member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. An attempt at such dispute resolution in compliance with the aforesaid process shall be a prerequisite to the filing of any litigation concerning the dispute. The Parties shall equally share in the cost of the third disputes board member; however, each Party shall be responsible for their own costs and fees.

5. Indemnification

To the extent permitted by law, WSDOT and the PORT shall protect, defend, indemnify, and save harmless the other Party, their respective officers, officials, employees, and agents, while acting within the scope of their employment as such, from any and all costs, claims, judgment, and/or awards of damages, arising out of, or in any way resulting from, the indemnifying Party's negligent or other wrongful acts or omissions, or the negligent or other wrongful acts or omissions of its employees, agents, contractors, consultants, licensees, or invitees, while acting within the scope of their employment, contract, license, or invitation, related to this Agreement. Neither WSDOT nor the PORT will be required to indemnify, defend, or save harmless the other Party if the claim, suit, or action for injuries, death, or damages is caused by the sole negligence or other wrongful act or omission of the other Party. Where such claims, suits, or actions result from concurrent negligence or other wrongful acts or omissions of WSDOT and the PORT or their employees, agents, contractors, consultants, licensees, or invitees, while acting within the scope of their employment, contract, license, or invitation, the indemnity provisions provided herein shall be valid and enforceable only to the extent of WSDOT's or the PORT's own negligence or other wrongful act or omission, or the negligence or other wrongful act or omission of its employees, agents, contractors, consultants, licensees, or invitees, while acting within the scope of their employment, contract, license, or invitation, related to this Agreement. WSDOT and the PORT agree that their respective obligations under this subsection extend to any claim, demand, and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, WSDOT and the PORT, by mutual negotiation, hereby waive, with respect to the other Party only, any immunity that would otherwise be

available against such claims under the industrial insurance provisions of Title 51 RCW, and all other applicable Industrial Insurance / Worker's Compensation Acts or their equivalent in the applicable jurisdiction. Further, the indemnification obligations under this Agreement shall not be limited in any way by any limitations on the amount or type of damages, compensation, or benefits payable to or for any third party under Worker's Compensation Acts, Disability Benefit Acts, or other Employee Benefit Acts. In the event that WSDOT or the PORT incurs any judgment, award, and/or cost arising therefrom, including attorneys' fees, to enforce the provisions of this section, all such fees, expenses, and costs shall be recoverable by the prevailing Party. This indemnification shall survive the termination of this Agreement.

6. Venue

In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties hereto agree that any such action or proceedings shall be brought in Thurston County Superior Court.

7. Contacts and Notices

Contact between the Parties, including but not limited to agreement administration and notices will be directed to the below identified contacts as follows or his/her designee or such other addresses as either Party may, from time to time, designate in writing:

Port of Tacoma

Sean Eagan
Government Affairs Director
PO Box 1837
Tacoma, WA 98401
Phone (253) 428-8663
Email:
seagan@portoftacoma.com

WSDOT Project Manager shall be:

Steve Fuchs
PO Box 47440
Olympia, WA 98504
Phone (360) 701-9413
Email: fuchss@wsdot.wa.gov

8. Amendment

This Agreement may be amended or modified only by the mutual agreement of the Parties, in accordance with each Party's respective processes. Such amendments or modifications shall not be binding unless they are in writing and signed by persons authorized to bind each of the Parties.

9. Severability

Should any clause, phrase, sentence or paragraph of this Agreement or its application be declared invalid or void by a court of competent jurisdiction, the remaining provisions of this Agreement or its applications of those provisions not so declared shall remain in full force and effect.

10. No Third-Party Beneficiaries

This Agreement is executed for the sole and exclusive benefit of the signatory Parties. Nothing in this Agreement, whether expressed or implied, is intended to confer any right, remedy or other entitlement upon any person other than the Parties hereto, nor is anything

in this Agreement intended to relieve or discharge the obligation or liability of any third-party, nor shall any provision herein give any third-party any right of action against any party hereto.

11. Audits/Records:

All records for the PROJECT in support of all costs incurred shall be maintained by WSDOT for a period of six (6) years after the termination of this Agreement. The PORT shall have full access to and right to examine said records, during normal business hours and as often as it deems necessary. Should the PORT require copies of any records, it agrees to pay the costs thereof. The Parties agree that the work performed herein is subject to audit by either or both Parties and/or their designated representatives, and/or the federal/state government.

12. Signature Authority

The PORT Executive Director was authorized to execute this Agreement by The Port of Tacoma Commission on the _____ day of _____, 2022.

13. Recording

In accordance with RCW 39.34.040, prior to its entry into force, this Agreement shall be filed with the county auditor or, alternatively, listed by subject on each Party's website or other electronically retrievable public source.

14. Applicable Law

This Agreement does not relieve either Party of any obligation under applicable law.

In Witness Whereof, the Parties hereto have executed this Agreement as of the date last written below.

Port of Tacoma

Washington State
Department of Transportation

By 
Eric Johnson, Executive Director

By 
John White, Gateway
Program Administrator

Date: July 21, 2022

Date: August 22, 2022

Approved as to Form

Approved as to Form

By 
Heather Burgess, Port Legal Counsel

By 
Assistant Attorney General

Date: July 21, 2022

Date: August 11, 2022