

## **Memorandum of Agreement**

### **Between the State of Washington, Department of Ecology and The City of Seattle, Seattle City Light**

### **For the Release of Water to the Skagit River for Instream Flow Augmentation and Mitigation Purposes**

#### **Parties**

This Memorandum of Agreement (MOA) is entered into between the State of Washington, Department of Ecology (Ecology) and the City of Seattle, a Washington municipal corporation, acting through its City Light Department (City Light).

#### **Purpose, Objective and Scope**

This MOA outlines the mutual agreement between the Parties concerning City Light's provision of a continuous release of water to the Skagit River from the Gorge Reservoir for purposes of instream flow augmentation and mitigating the effects of permit-exempt domestic groundwater withdrawals on the instream flows of the Skagit River. Through this MOA, City Light is committing to the continuous release of 0.5 cubic feet per second (CFS) of water (representing approximately 362 acre-feet per year (AFY)) into the Skagit River for instream flow augmentation and mitigation purposes in exchange for Ecology's commitment to provide fair compensation to City Light.

#### **Background**

City Light owns and operates the Skagit River Hydroelectric Project (Skagit Project), which consists of three power generating facilities on the Skagit River known as the Ross, Diablo, and Gorge plants in Whatcom County, Washington. The three hydroelectric plants are hydraulically coordinated to act as a single project and supply approximately 20% of City Light's power obligations. City Light operates the Skagit Project under a license from the Federal Energy Regulatory Commission (FERC) which was issued in 1995 after settlement had been reached among City Light, federal and state natural resource, fish and wildlife agencies, and several Indian Tribes. Pursuant to the FERC license and settlement, the Skagit Project also provides instream flow conditions favorable to salmon and steelhead reproduction and rearing downstream of the Skagit Project.

In 2001, Ecology adopted WAC 173-503, an Instream Flow Rule for the Lower and Upper Skagit Water Resources Inventory Area (WRIAs 3 and 4) "to retain perennial rivers, streams, and lakes in the Lower and Upper Skagit water resources inventory area and Cultus [Mountain] Tributaries with instream flows and levels necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality." WAC 173-503-020. In 2006, Ecology amended its Instream Flow Rule to include specific reservations for limited future water uses in these watersheds. The 2006 amendment resulted in a legal challenge by the Swinomish Indian Tribal Community, and the subsequent invalidation of

the reservations for future uses by the Washington State Supreme Court through its decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

In response to the *Swinomish* decision, Ecology is committed to developing long-term and sustainable water supply solutions in the Lower and Upper Skagit Watersheds. This includes securing mitigation to offset withdrawals of water by existing (pre-2013) and new permit-exempt groundwater uses affected by the invalidation of the 2006 amendment, and to attain compliance with the Skagit River Basin Instream Flow Rule. The project for City Light's release of additional water being advanced through this MOA will provide mitigation for all of the existing and many of the new permit-exempt groundwater uses in the Skagit River Basin. Ecology's plan for use of the additional water to be released by City Light is described in the attached "Commitments and Restrictions on an acquisition of 0.5 CFS for an Exempt Well Mitigation Water Bank," which Ecology developed with its partner agencies and stakeholders.

#### **Authority to Enter Into Memorandum of Agreement**

Ecology has legal authority under RCW 90.03, RCW 39.34, and Section 3058 Enacted 2017-2019 Capital Budget (ESSB 5965), and City Light has legal authority under RCW 35.92.050, Seattle Municipal Code Chapter 3.08 and Section 21.49.130, that allow each party to enter into and undertake the actions agreed to in this MOA.

#### **Recitals**

Whereas City Light operates the Skagit Project and holds state-issued water rights authorizing the storage of water and the secondary use of water for hydroelectric purposes.

Whereas, in exchange for fair financial compensation, City Light is prepared to release additional water from storage at the Skagit Project for instream flow augmentation and mitigation purposes, provided that, in doing so, it is not selling, leasing, or otherwise transferring any of its water rights, or any portions of its water rights, to Ecology or any other entity, and provided that the use of the additional water released by City Light will be consistent with the attached Commitments and Restrictions.

Whereas Ecology is prepared to provide fair financial compensation to City Light for its continuous release of water from the Gorge Reservoir for instream flow augmentation and mitigation purposes, and Ecology understands that by receiving such financial compensation, City Light will not be selling, leasing, or otherwise transferring any of its water rights, or any portions of its water rights, to Ecology or any other entity.

Whereas City Light and Ecology acknowledge that, under RCW 90.03.370, a new secondary use permit must be issued by Ecology to authorize the use of the additional water to be released from the Gorge Reservoir to the Skagit River for instream flow augmentation and mitigation purposes.

Whereas City Light and Ecology acknowledge that Ecology will identify an appropriate entity (Permit Applicant) to apply for a secondary use permit. Ecology and City Light will mutually agree on the Permit Applicant in writing. Ecology will require the Permit Applicant to comply with the terms of the secondary use permit, and to transfer the secondary use water right into the State Trust Water Right Program after the water right is perfected.



Whereas, for the purpose of determining financial compensation for City Light in exchange for its continuous release of 0.5 CFS of water (approximately 362 AFY) into the Skagit River for instream flow augmentation and mitigation purposes, Ecology retained the firm WestWater Research LLC to provide a valuation analysis of the water to be released by City Light. Based on this valuation analysis, and the Parties' reasonable estimation of City Light's future operation and maintenance costs, the Parties have reached agreement on a fair and appropriate amount for financial compensation.

Whereas Ecology and City Light entered into an Interagency Agreement in April 2018 (Interagency Agreement), a copy of which is attached to this MOA, to provide reimbursement to City Light for its costs of assessing the feasibility of the water release project, designing necessary infrastructure for the release of additional water from the Gorge reservoir, installing the necessary infrastructure, and related tasks.

And,

Whereas the Legislature created the "State Building Construction Account" and provided funding for Skagit Mitigation, from which Ecology may expend funds to provide mitigation for existing and new water uses in the Skagit River Basin, including the mitigation provided through this MOA.

Now, therefore, the Parties acknowledge and agree to the following:

1. Permitting. Before the additional water to be released by City Light can be used for instream flow augmentation and mitigation purposes, certain permitting activities are expected to occur. Ecology will enter into a memorandum of understanding (or other form of agreement) with the Permit Applicant to (a) authorize the Permit Applicant to apply to Ecology for a secondary use water right authorizing the use of the additional water to be released from the Gorge Reservoir for instream flow augmentation and mitigation purposes as provided in Paragraph 5 below, (b) require the Permit Applicant to comply with the terms of the secondary use permit once issued, and (c) require the Permit Applicant to transfer the secondary use water right into the State Trust Water Right Program after the water right is perfected. As the holder of the water right for storage in the Gorge Reservoir, City Light will, at Ecology's request, provide written authorization to the Permit Applicant to apply for the secondary use water right. This MOA, together with City Light's written authorization, will provide the "documentary evidence" required in RCW 90.03.370 for the secondary use water right application. Ecology will process the application filed by the Permit Applicant for a secondary use water right consistent with applicable statutes, rules and policies.
2. Implementation Schedule. Before additional water can be released by City Light, certain construction activities must occur. City Light must design, permit and construct the infrastructure necessary for the release of water from the Gorge Reservoir power tunnel, reimbursement for which will be paid as provided in the Interagency Agreement. The infrastructure will be connected to an existing tap within an access tunnel located just up-gradient from the Gorge Powerhouse. The water from the tap will either be released directly to the Skagit River near the Gorge Powerhouse, or to Ladder Creek, which flows into the Skagit River in the same general vicinity. City Light anticipates commencing the release of the water by sometime in Fall 2019, subject to acquisition of appropriate permits and approvals, but this is a non-binding target. Prior



to construction, City Light will provide its final design plans to Ecology for review and approval to confirm that the plans satisfy the instantaneous and annual quantity requirements of this MOA.

3. Release of Water by City Light. City Light will release 0.5 CFS of additional water from Gorge Reservoir into the Skagit River for instream flow augmentation and mitigation purposes on a year-round and continuous basis (as defined below). This continuous release of water will be permanent (as defined below). This will result in the release of approximately 362 AFY on an annual basis into the Skagit River. This release will provide a net increase in flows of the Skagit River by 0.5 CFS compared to the flow levels associated with normal reservoir operations at the Skagit Project. City Light will operate and maintain the infrastructure for the water release and will provide information on the release to Ecology and/or the Permit Applicant as required under any reporting provisions of the secondary use permit. City Light's obligation to release the additional water is contingent upon (a) Ecology's issuance of the secondary use water right to the Permit Applicant, including the terms described in Paragraph 5 below, and, if an appeal of Ecology's decision to approve the application is filed, resolution of such appeal in a manner that upholds the validity of the water right, (b) City Light's written notification to Ecology that construction of the infrastructure required to release the agreed upon quantity of water is complete, and c) Ecology's satisfaction of its payment obligation as provided in Paragraph 4 below. City Light will begin releasing water within 60 days of conditions (a) and (b) being satisfied.
4. Compensation. Ecology will pay City Light a total of \$1,122,503 (one million, one hundred twenty-two thousand, five hundred and three dollars) in exchange for City Light's continuous release of 0.5 CFS of water into the Skagit River on a permanent basis. This payment will provide fair compensation to City Light both for the value of the water, and for City Light's operation and maintenance costs associated with the continuous discharge of water into the Skagit River. Ecology's obligation to make payment to City Light is contingent upon (a) Ecology's issuance of the secondary use water right to the Permit Applicant, including the terms described in Paragraph 5 below, and, if an appeal of Ecology's decision to approve the application is filed, resolution of such appeal in a manner that upholds the validity of the water right, (b) City Light's written notification to Ecology that construction of the infrastructure required to release the agreed upon quantity of water is complete, and (c) City Light's release of water as provided in Paragraph 3 above. Ecology will make payment to City Light within 60 days of conditions (a) and (b) being satisfied. Payment will be made according to written payment instructions to be provided by City Light.
5. Secondary Use Water Right Management. Ecology will manage the additional water released by City Light and permitted by the secondary use water right as part of a mitigation water program in a manner consistent with the attached "Commitments and Restrictions." The Commitments and Restrictions will be included as conditions in the secondary use water right, as will a more detailed mitigation plan. After the secondary use permit is perfected through the release of water into the Skagit River, Ecology will accept the Permit Applicant's transfer of the right into the State Trust Water Rights Program.
6. "Continuous" Water Release. City Light's commitment for its "continuous" release of the additional water does not include the requirement to release water during short-term shutdowns for operations and maintenance of infrastructure for the Skagit Project, or during emergency conditions (*force majeure*).

7. "Permanent" Water Release. City Light's commitment to release the additional water on a permanent basis continues only so long as City Light owns and is operating the Gorge Dam.

### **General Provisions**

- A. Binding Effect. This MOA binds and inures to the benefit of the Parties and their respective heirs, legal representatives, successors, and assigns.
- B. Headings. All headings, captions or subtitles used herein are intended solely for convenience of reference and in no way limit or broaden any of the provisions of this agreement.
- C. Cooperation. All Parties hereto agree to fully cooperate in all matters related to or arising out of this MOA.
- D. Entire Agreement. This MOA, and the associated Interagency Agreement entered into in April 2018, contains the entire agreement of the Parties and supersedes and replaces any and all prior or contemporaneous agreements or understandings, written or oral, express or implied, between the Parties concerning the subject matter of this agreement.
- E. Authority. Each person signing this MOA in a representative capacity warrants and represents that they have full authority to bind their principal to the provisions of this MOA.
- F. Scrutiny and Interpretation. This MOA has been submitted to the scrutiny of all Parties and their respective legal counsel and must be given a fair and reasonable interpretation in accordance with the words hereof without consideration or weight being given to its being drafted by or for one of the parties.
- G. Dispute Resolution. Upon alleged breach of this MOA, or other disputes arising hereunder, representatives of Ecology and City Light will meet and confer in good faith to resolve their differences. In the event of any such alleged breach, or any other dispute, or if any term is found or believed by the Parties to be void and unenforceable, the Parties will meet and seek to reach a mutually agreeable modification. The Parties may employ a mutually agreed upon mediator or other facilitator if they believe this may help resolve their dispute.
- H. Enforcement. This MOA is a contractual agreement binding on the Parties and enforceable as may be appropriate in a court of competent jurisdiction under the laws of the State of Washington. Only signatory Parties have a right to seek enforcement of this MOA. No third party is intended to have, or has, any rights under this MOA.
- I. This MOA may be executed in counterparts, and faxed signatures will be binding.
- J. This MOA will become binding on the Parties at the time every Party has executed this agreement.



### Amendment and Severability

The Parties enter into this MOA voluntarily and in good faith. This MOA will be effective upon the signatures of the officials listed below. This MOA may be amended or supplemented at any time by mutual consent of the parties; however, it may not be subject to modification except by written agreement signed by all of the Parties. This MOA is severable from any contracts or agreements that are entered into pursuant to this MOA.

### Duration and Termination of Memorandum of Agreement

This MOA is intended to have an indefinite term but shall terminate upon written consent by both parties hereto.

### **SIGNATURES**

City of Seattle, Seattle City Light

By Debra Smith

Debra Smith

General Manager and CEO

4/23/19

Date

State of Washington, Department of Ecology

By Polly Zehm

Polly Zehm, Deputy Director

4/30/19

Date

### Attachments:

“Commitments and Restrictions on an acquisition of 0.5 CFS for an Exempt Well Mitigation Water Bank”

Interagency Agreement (IAA) Between the State of Washington, Department of Ecology, and the City of Seattle, City Light Department (IAA No. C1800149)

**Commitments and Restrictions on an acquisition of 0.5 CFS for an Exempt Well Mitigation Water Bank  
- Agreement between Seattle City Light and Department of Ecology**

**1) 0.5 CFS Purchase:** This agreement is for 0.5 CFS (362 acre-feet) that would be purchased by the Department of Ecology (Ecology) from Seattle City Light (SCL). The terms of this agreement do not apply to any future purchases. Seattle City Light will maintain 0.5 CFS flow from storage into the Skagit River on a year-round and continuous basis.

**2) Existing homes:** Water will be used first to establish a legal water supply for the remainder of homes built between April 14, 2001 and October 3, 2013 ("Reservation Users") that currently do not have an uninterruptible supply. Ecology will debit a consumptive use amount higher than typical domestic use to account for these existing homes.

- a) This element of the agreement will debit 0.5 acre-feet per home. This will use approximately 210 acre-feet of the 362 acre-feet purchased. The water debited under this agreement for Reservation Users will stay in the Skagit River permanently.
- b) All new large-scale mitigation projects developed in the Skagit watershed tributaries by Ecology will provide additional flow enhancement to tributaries to offset the consumptive use of Reservation users in that tributary at a typical consumptive use rate. These Reservation users will be mitigated for before any new uses.

**3) New Uses:** Mitigation for new construction will only be available for wells near the Skagit River in the Green Zone of Figure 1. Water from this agreement will not be available for wells in areas mapped in red or grey in Figure 1. There will be approximately 152 acre-feet available for new construction in the Green Zone (the remainder of what is left after item 2 in this agreement).

- No new groundwater withdrawals outside the Green Zone will be mitigated based on the water in this agreement.
- Water from this acquisition will not mitigate for groundwater wells for new construction in the area downstream of the Skagit PUD Pipeline near Sedro Woolley. The Green Zone under this agreement will start at the PUD Pipeline and end at line perpendicular to the Skagit River originating at the confluence of Bacon Creek.
- Ecology will require new homes to install a remote-read metering system (e.g., radio-read or cellular-based telemetry) and report their water use. This data will be made available, in the aggregate, to any requesting party. Ecology or another public entity will collect and manage this metering data.
  - Ecology will provide requesting parties with a summary of aggregated monthly metering use, by tributary, for a one year period after this mitigation program is established. The frequency of reporting will change to quarterly after a one year period.
  - Ecology may modify the metering plan in consultation with area tribes (Sauc-Suiattle, Swinomish, and Upper Skagit), WDFW and Skagit County. Any change to the metering plan would be an appealable decision.

**4) Transferability of Mitigation.** Once issued, mitigation credits are appurtenant to a property and are non-transferable. This applies to mitigation provided to existing and new users.

**5) Compliance and Enforcement:** Ecology's compliance priority is to balance the water bank rather than to enforce at the individual level. If Ecology determines that a water user is willfully and significantly exceeding their allocated quantity, Ecology will pursue escalating levels of enforcement: (1) technical assistance, (2) warning letter, (3) compliance order / penalty.

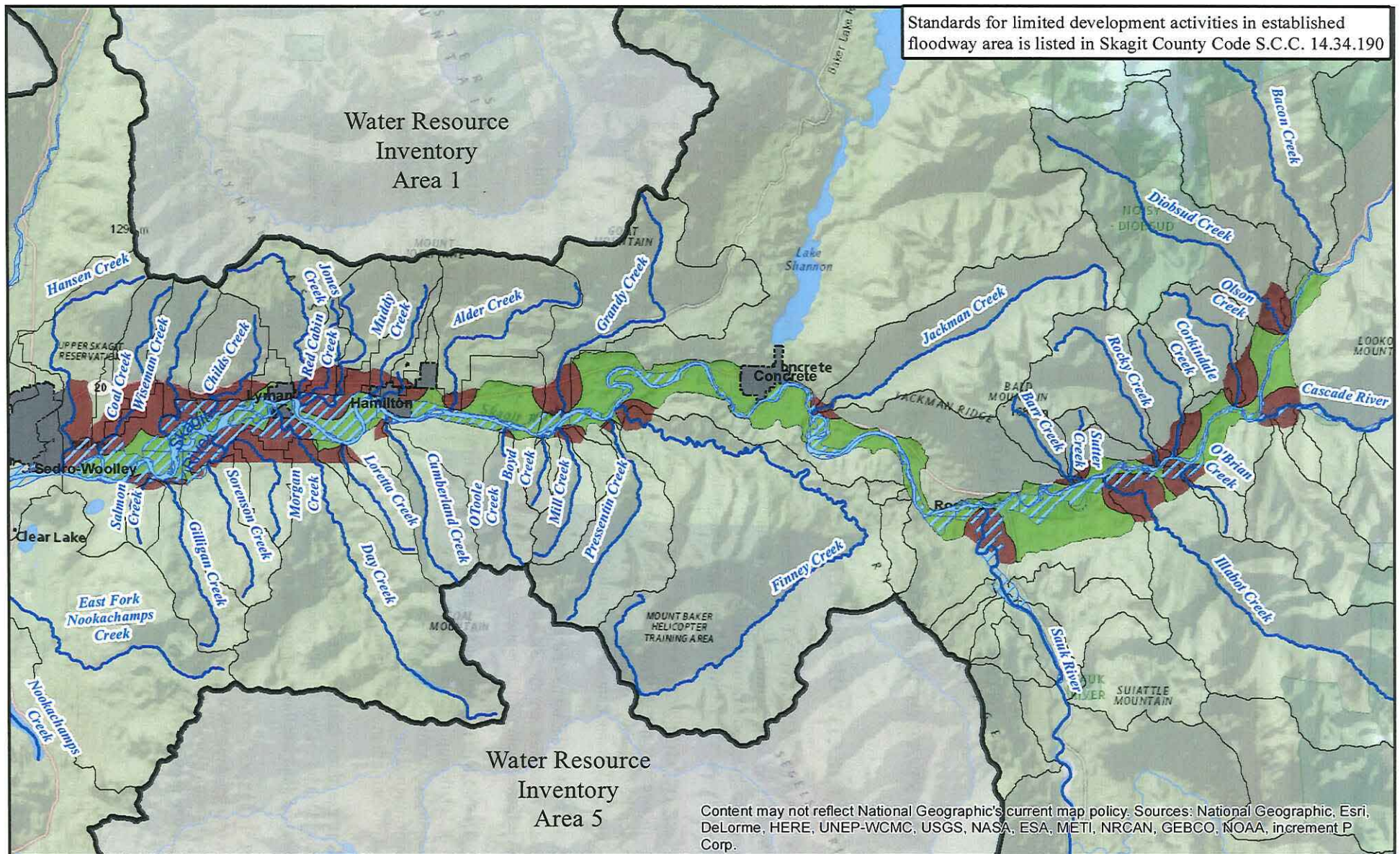
- If metering data shows water use in excess of three times the allocated per-connection quantity outlined in the mitigation plan, for a period of three consecutive months, Ecology will investigate use.

**6) Closing the Water Bank.** Ecology will track the water bank on its website and publish a quarterly summary of the water bank as required by RCW 90.42.170. Ecology will also provide notice when the mitigation bank is 75, 90, 95, and 100 percent allocated.

- If metering data shows that the bank has reached 95 percent allocation (i.e., if the reported metering data shows that 144.5 acre-feet/year have been used at any point in advance of full allocation), Ecology will cease issuing mitigation water and will effectively close the bank.
- Ecology will not use metering data to support an increased number of connections due to lower than expected water use.



Standards for limited development activities in established floodway area is listed in Skagit County Code S.C.C. 14.34.190



Content may not reflect National Geographic's current map policy. Sources: National Geographic, Esri, DeLorme, HERE, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, increment P Corp.

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Projection: NAD 83 HARN Washington State Plane South

- Proposed Mitigation Zone
- 0.55 mile Tributary Buffer for Designated Streams
- Skagit River
- Floodway
- Watershed Boundary
- Sub Basin Boundaries
- City Boundaries
- Designated Streams

## Proposed Middle Skagit Mitigation

Skagit River Watershed, Washington



Figure 1





**IAA No. C1800149**

**INTERAGENCY AGREEMENT (IAA)**

**BETWEEN**

**THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY**

**AND**

**THE CITY OF SEATTLE, CITY LIGHT DEPARTMENT**

**THIS INTERAGENCY AGREEMENT** ("Agreement" or "IAA") is made and entered into by and between the state of Washington, Department of Ecology, hereinafter referred to as "ECOLOGY," and the The City of Seattle, a Washington municipal corporation, acting through its City Light Department hereinafter referred to as "CITY LIGHT," pursuant to the authority granted by Chapter 39.34 RCW.

**THE PURPOSE OF THIS AGREEMENT** is for reimbursement of CITY LIGHT costs and expenses in connection with assessing the feasibility of planning, designing, and implementing facility and operational modifications for the continuous discharge of water to the Skagit River from City Light's Gorge Reservoir for purposes of instream flow augmentation and mitigation purposes.

**WHEREAS**, CITY LIGHT owns and operates the Skagit Hydroelectric Project which consists of three power generating facilities on the Skagit River known as the Ross, Diablo, and Gorge facilities, in Whatcom, Skagit and Snohomish Counties, Washington ("the Skagit Project"); and

**WHEREAS**, CITY LIGHT's original 50-year Skagit federal hydroelectric project license expired in 1977 and the City of Seattle applied to the Federal Energy Regulatory Commission (FERC) for a new operating license which FERC approved in 1995 after settlement had been reached to fully mitigate the Skagit Project's environmental impacts between City Light, federal and state natural resource, fish and wildlife agencies, and several Indian Tribes; and

**WHEREAS**, these three facilities are hydraulically coordinated to act as a single project and supply approximately 20% of City Light's power requirements, while providing instream flow conditions favorable to salmon and steelhead reproduction and rearing downstream of the Project; and

**WHEREAS**, ECOLOGY developed an Instream Flow Rule for the Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4) in 2001 "to retain perennial rivers, streams, and lakes in the Lower and Upper Skagit water resources inventory area and Cultus Mt. Tributaries with instream flows and levels necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic, and other



environmental values, and navigational values, as well as recreation and water quality” (WAC 173-503-020); and

**WHEREAS**, Ecology amended its Instream Flow Rule in 2006 to include specific reservations for limited future water uses in these watersheds, which resulted in a challenge by the Swinomish Indian Tribal Community and the subsequent invalidation of the reservations for future uses by the Washington State Supreme Court’s in *Swinomish Tribal Comm’y v. Dep’t Ecology*; and

**WHEREAS**, Ecology is committed to developing long-term and sustainable water supply solutions in the Lower and Upper Skagit Watersheds to mitigate for existing and new uses, and pursuant to this goal, supports CITY LIGHT, through this AGREEMENT, in conducting a feasibility study and follow-up design work related to developing a year-round and continuous discharge from the Skagit Project; and

**WHEREAS**, ECOLOGY has legal authority (RCW 90.03 and 39.34) and CITY LIGHT has legal authority (RCW 35.22.570; RCW 35.21.735; RCW 35.92.050; RCW 87.03.825; Charter of the City of Seattle, Art.III, Section 14, Eleventh; Seattle Municipal Code Title 3, Chapter 3.08) that allows each party to undertake the actions in this agreement qne

**WHEREAS**, ECOLOGY and CITY LIGHT experienced significant delays in executing this agreement, however, both parties have been working on this project at their own risk and in anticipation of a final agreement. ECOLOGY agrees to pay for work performed from January 1, 2018 to April 1, 2018 to develop water supply solutions for non-CIGY LIGHT customers in the Skagit watersheds as outlined in this IAA;

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

**1) SCOPE OF WORK**

City Light 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 Appendix A, Statement of Work and Budget, attached hereto and incorporated herein.

**2) PERIOD OF PERFORMANCE**

The period of performance of this IAA shall commence on **April 1, 2018**, and be completed by **December 31, 2021**, unless terminated sooner as provided herein. Amendments extending the period of performance, if any, shall be at the sole discretion of ECOLOGY.

**3) COMPENSATION**

Compensation for the work provided in accordance with this IAA has been established under the terms of RCW 39.34.130 and RCW 39.26.180(3). This is a performance-based agreement, in which payment is based on the successful completion of the work set forth in Appendix A.

The source of funds for this IAA is **State Building Construction Account (Skagit Provision)**.

The parties have estimated that the cost of accomplishing the work identified herein will not exceed \$315,000.00, including any indirect charges. ECOLOGY agrees to pay for work performed from January 1, 2018 to April 1, 2018 as outlined in this IAA, for cost incurred before the signing of this agreement. Payment for satisfactory performance of the work shall not exceed this amount unless the parties mutually agree via an amendment to a higher amount. Compensation for services shall be based on the terms and tasks set forth in Appendix A, Statement of Work and Budget. ECOLOGY will not make payment until it has reviewed and accepted the completed work pursuant to Section 4 of this Agreement.

#### **4) BILLING AND PAYMENT PROCEDURE**

Payment requests shall be submitted on state form, Invoice Voucher A19-1A. Invoices shall describe and document to ECOLOGY's satisfaction a description of the work performed, the progress of the work, and related costs. Each invoice voucher shall reference the Agreement (IAA) number and clearly identify those items that relate to performance under this Agreement. Payment will be made within thirty (30) days of submission of a properly completed invoice (form A19-1A) with supportive documentation. All expenses invoiced shall be supported with copies of invoices paid. Invoiced contractor (e.g, outside legal counsel) costs shall be included with supportive documentation.

Send invoices to:

State of Washington Department of Ecology Attn: Rose Bennett P.O. Box 47600 Olympia, WA 98504-7600
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Payment requests shall be submitted on a quarterly basis. Upon expiration of this Agreement, any claim for payment not already made shall be submitted to ECOLOGY within 30 days after the expiration date or the end of the fiscal year, whichever is earlier.

Payment will be issued through Washington State's Department of Enterprise Services Statewide Payee Desk. To receive payment you must be registered as a state-wide vendor. To register submit a state-wide vendor registration form and an IRS W-9 form at website, <http://www.des.wa.gov/services/ContractingPurchasing/Business/VendorPay/Pages/default.aspx>. If you have questions about the vendor registration process you can contact DES at the Payee Help Desk at (360) 407-8180 or email [payeehelpdesk@watech.wa.gov](mailto:payeehelpdesk@watech.wa.gov).

#### **5) 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.

#### **6) 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.

#### **7) ASSURANCES**

Parties to this Agreement agree that all activity pursuant to this agreement will be in accordance with all the applicable current federal, state, and local laws, rules, and regulations.

#### **8) CONFORMANCE**

If any provision of this Agreement violates any statute or rule of law of the state of Washington, it is considered modified to conform to that statute or rule of law.

#### **9) DISPUTES**

Parties to this Agreement shall employ every effort to resolve a dispute themselves without resorting to litigation. In the event that a dispute arises under this Agreement that cannot be resolved among the parties, it shall be determined 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 then make a determination of the dispute. The determination of the Dispute Board shall be final and binding on the parties hereto, unless restricted by law. The cost of resolution will be borne by each party paying its own cost. As an alternative to this process, if state agencies, 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. The parties may mutually agree to a different dispute resolution process.

#### **10) FUNDING AVAILABILITY**

ECOLOGY's ability to make payments is contingent on availability of funding. In the event funding from state, federal, or other sources is withdrawn, reduced, or limited in any way after the effective date and prior to completion or expiration date of this Agreement, ECOLOGY, at its sole discretion, may elect to terminate the Agreement, in whole or part, for convenience or to renegotiate the Agreement subject to new funding limitations and conditions. ECOLOGY may also elect to suspend performance of the Agreement until ECOLOGY determines the funding insufficiency is resolved. ECOLOGY may exercise any of these options with no notification restrictions, although ECOLOGY will make a reasonable attempt to provide notice.

In the event of termination or suspension, ECOLOGY will reimburse eligible costs incurred by the CITY LIGHT and its contractors through the effective date of termination or suspension. Reimbursed costs must be agreed to by ECOLOGY and CITY LIGHT. In no event shall ECOLOGY's reimbursement exceed ECOLOGY's total responsibility under the agreement and any amendments.

#### **11) GOVERNING LAW AND VENUE**

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. This Agreement shall be construed and interpreted in accordance with the laws of the state of Washington, and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

#### **12) 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.

#### **13) ORDER OF PRECEDENCE**

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 federal and state of Washington statutes, regulations, and rules.
- b. Mutually agreed upon written amendments to this Agreement.
- c. This Agreement, number C1800149.
- d. Appendix A, Statement of Work and Budget.
- e. Any other provisions or term of this Agreement, including materials incorporated by reference or otherwise incorporated.

#### **14) 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 of this Agreement 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. 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 subject to state public disclosure laws.

#### **15) RESPONSIBILITIES OF THE PARTIES**

Each party of this Agreement hereby assumes responsibility for claims and/or damages to persons and/or property resulting from any act or omissions on the part of itself, its employees, its officers, and its agents. Neither party will be considered the agent of the other party to this Agreement.

#### **16) RIGHTS IN DATA**

Unless otherwise provided, data which originates from this Agreement shall be "work made for hire" as defined by the United States Copyright Act, Title 17 U.S.C. section 101 and shall be owned by state of Washington, 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.

#### **17) 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.

#### **18) SUBCONTRACTORS**

CITY LIGHT agrees to take complete responsibility for all actions of any Subcontractor used under this Agreement for the performance. When federal funding is involved there will be additional subcontractor requirements and reporting.

Prior to performance, all subcontractor who will be performing services under this Agreement must be identified, including their name, the nature of services to be performed, address, telephone, WA State Department of Revenue Registration Tax number (UBI), federal tax identification number (TIN), and anticipated dollar value of each subcontract. Provide such information to ECOLOGY's agreement manager.

#### **19) 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 fifteen (15) business days. If failure or violation is not corrected, this Agreement may be terminated immediately by written notice of the aggrieved party to the other.

#### **20) TERMINATION FOR CONVENIENCE**



Either party may terminate this Agreement without cause upon thirty (30) calendar day 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.

## 21) 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 written amendment to this Agreement signed by an authorized representative of the parties.

## 22) AGREEMENT MANAGEMENT

The representative for each of the parties shall be responsible for and shall be the contact person for all communications, notifications, and billings questions regarding the performance of this Agreement. The parties agree that if there is a change in representatives that they will promptly notify the other party in writing of such change, such changes do not need an amendment.

The ECOLOGY Representative is:	The City Light Representative is:
Name: Ria Berns Address: 3190 160 <sup>th</sup> Ave SE Bellevue, WA 98008 Phone: (425) 649-7270 Email: ria.berns@ecy.wa.gov Fax: (425) 649-7098	Name: Tom Meyer Address: P.O. Box 34023 Seattle, WA 98124-4023 Phone: (206) 386-9168 Email: tom.meyer@seattle.gov Fax: (206) 386-4589

## 23) 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.

The signatories to this Agreement represent that they have the authority to bind their respective organizations to this Agreement.

IN WITNESS WHEREOF, the parties below, having read this Agreement in its entirety, including all attachments, do agree in each and every particular as indicated by their below signatures.

State of Washington  
Department of Ecology

City of Seattle  
(City Light Department)

By: Polly Zehm 4/18/18  
Signature Date

By: Lynn Best 4/10/18  
Signature Date

Print Name: Polly Zehm

Print Name: Lynn Best

Title: Deputy Director

Title: Chief Environmental Officer

Approved as to form only:  
Office of Attorney General

## **APPENDIX A STATEMENT OF WORK AND BUDGET**

### **Introduction**

Interagency Agreement C1800149 (the Agreement) is established to reimburse Seattle City Light (City Light) costs in connection with assessing feasibility of, planning, designing and implementing facility infrastructure and operational modifications to provide a year-round and continuous water discharge from its Gorge Reservoir to the Skagit River for purposes of an instream flow augmentation and mitigation project (hereinafter the water discharge).

### **Brief description of intended outcome/work**

The objectives of City Light's work under this Agreement include:

- Assess the feasibility of modifying Skagit River Hydroelectric Project (Project) infrastructure and City Light operations to provide a year round and continuous water discharge;
- Work with departments within the City of Seattle (e.g., City Law Department, City Council and Mayor's Office) as well as outside parties including, but not limited to, the Department of Ecology, the National Park Service, Skagit County, and area Tribes, to develop mutually agreeable terms and documentation required for the water discharge;
- Design and construct Project infrastructure modifications for the water discharge;
- Plan operational requirements for the water discharge; and
- Obtain required federal, state, and local permits or approvals.

### **Requirements and Tasks**

- The work is on-going for all the tasks below through the period of performance of the Agreement.

#### **Task 1: Assess Feasibility of the Water Discharge, and Develop, Negotiate and Execute Transactional Documents**

- 1-1. Assess the feasibility of modifying Project infrastructure and City Light operations to provide the water discharge.
- 1-2. Utilize services of contracted outside legal counsel to develop, negotiate, and execute transactional documents necessary for the water discharge.
- 1-3. Communicate and coordinate with local, state, federal and tribal governments pursuant to Subtasks #1-1 and #1-2, and as outlined in the "Framework" document.

Deliverables: 1) Skagit Mitigation Bank Framework

2) Water Release Agreement



**Task 2: Design and Planning**

- 2-1. Design and develop a cost estimate for the infrastructure modifications to provide the water discharge, including the preparation of necessary design documents.
- 2-2. Estimate operational activities and costs necessary to provide the water discharge.
- 2-3. Apply for and pay fees for state and local permits required for the water discharge.
- 2-4. Communicate and coordinate with local, state, federal and tribal government, as needed, pursuant to Subtasks #2-1, #2-2 and #2-3.

Deliverable: Final Design document.

**Task 3: Construction**

- 3-1. Purchase materials for and construct the infrastructure modifications developed in Task #2 and needed to provide the water discharge.
- 3-2. Communicate with local, state, federal and tribal government, as needed, pursuant to Subtask #3-1.

Deliverable: Photos of completed construction project.

**Budget:**

Item	Description	Amount
<b>1</b>	<b>Task 1</b>	
	Salaries & Benefits	\$15,500
	Overhead	\$9,500
	Contracted Services	\$25,000
	Equipment	\$0
	Supplies	\$0
	<b>TOTAL</b>	<b>\$50,000</b>
<b>2</b>	<b>Task 2</b>	
	Salaries & Benefits	\$76,000
	Overhead	\$39,000
	Contracted Services	\$0
	Equipment	\$0
	Supplies	\$0
	<b>TOTAL</b>	<b>\$115,000</b>
<b>3</b>	<b>Task 3</b>	
	Salaries & Benefits	\$52,000
	Overhead	\$27,500
	Contracted Services	\$0
	Equipment	\$0
	Supplies	\$70,500
	<b>TOTAL</b>	<b>\$150,000</b>
	<b>Total Project Cost</b>	<b>\$315,000</b>