CLACKAMAS
WATER ENVIRONMENT SERVICES

GREGORY L. GEIST | DIRECTOR

Water Quality Protection
Surface Water Management
Wastewater Collection & Treatment

March 2, 2023 BCC Agenda Date/Item: _____

Board of County Commissioners
Acting as the governing body of Water Environment Services
Clackamas County

Approval of an Intergovernmental Agreement with the City of Milwaukie for the Kellogg Good Neighbor Program. Agreement value is approximately $920,000 for 4.5 years. Funding through WES Sanitary Sewer Operating Funds. No County General Funds are involved.

Previous Board Action/Review	This item was presented at Issues on January 4, 2023, and a Policy Session on February 15, 2023.		
Performance Clackamas	This will forward the County's goal of building public trust through good government by partnering with other local governments to advance environmental restoration, economic development, and community improvement opportunities in the Kellogg neighborhood.		
Counsel Review	Yes	**Procurement Review**	No
Contact Person	Greg Geist, Director (WES)	**Contact Phone**	503-742-4560

EXECUTIVE SUMMARY: Since 1974, WES' Kellogg Creek Water Resource Recovery Facility located in the City of Milwaukie has provided wastewater treatment services for the city and surrounding area. In 2012, WES assisted the City of Milwaukie in establishing the Kellogg Good Neighbor Committee to minimize the impact of the facility on surrounding neighborhoods by prioritizing and spending a "good neighbor fund". WES desires for the Kellogg Creek facility to have a positive impact on multiple aspects of the host community beyond just resource recovery. In the spirit of governmental collaboration, the city is partnering with WES to advance environmental restoration, economic development, and community improvement opportunities in the Kellogg neighborhood area. The outcome of this partnership is to build greater community together through strategically agreed upon projects that support our economy, ecology, and the community with funding provided by WES ("Good Neighbor Program").

There are key areas that highlight the merits of the agreement.

1) WES needed to strengthen internal controls around the disbursement of funds. This is accomplished in the new agreement through the disbursement of all funds directly to the City, who is then responsible for disbursing funds to contractors they hire to perform eligible work.

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2) The new agreement will improve communication regarding the use of funds by requiring the City to provide a detailed annual report on projects completed or underway and on program expenses as well as unused balances.
3) The new agreement will be more administratively efficient and will require less WES staff time to support as the responsibility for tracking these funds shifts to the City.
4) By requiring a return of unused funds (after 3 years), the new agreement ensures the funding is being used in a timely manner for the betterment of the community.

This Good Neighbor Program is a benefit to the County in multiple ways. It facilitates collaboration and a joint mission by providing improved recreational opportunities, such as pathways, parks and trails, enhancing fish and wildlife habitat and riparian areas, creating opportunities for collaboration and leverage resources between Milwaukie and WES, and by enhancing public knowledge on wastewater treatment and surface water management by hosting educational opportunities and special projects educating the public on what they can do to help protect water quality.

RECOMMENDATION: Staff recommends the Board, acting as the governing body of Water Environment Services, approve the Intergovernmental Agreement between Water Environment Services and the City of Milwaukie for the Kellogg Good Neighbor Program.

Respectfully submitted,

Greg Geist
Director, WES

Attachment: IGA for Kellogg Good Neighbor Program

INTERGOVERNMENTAL AGREEMENT
BETWEEN WATER ENVIRONMENT SERVICES AND
THE CITY OF MILWAUKIE
FOR THE KELLOGG GOOD NEIGHBOR PROGRAM

THIS INTERGOVERNMENTAL AGREEMENT (this "Agreement") is entered into and between **Water Environment Services** ("WES"), an intergovernmental entity formed pursuant to ORS Chapter 190, and the **City of Milwaukie** ("City"), an Oregon municipality, collectively referred to as the "Parties" and each as "Party."

RECITALS

This Agreement is made pursuant to Oregon Revised Statutes Chapter 190.010, which confers authority upon local governments to enter into agreements for the performance of any and all functions and activities that a party to the agreement, its officers or agencies have authority to perform.

Since 1974, WES has provided wastewater treatment services for the city, and the Kellogg Creek Water Resource Recovery Facility ("Kellogg") is located in the city. WES desires for Kellogg to have a positive impact on multiple aspects of the host community beyond just resource recovery. In the spirit of governmental collaboration, the city is partnering with WES to advance environmental restoration, economic development, and community improvement opportunities in the Kellogg neighborhood area as defined on Exhibit A attached hereto (the "Good Neighbor Area"). The outcome of this partnership is to build greater community together through strategically agreed upon projects that support our economy, ecology, and the community with funding provided by WES ("Good Neighbor Program").

In consideration of the mutual promises set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

TERMS

1. **Term.** This Agreement shall be effective upon execution by both parties ("Effective Date") and shall expire on June 30, 2037. The Parties shall review this Agreement every five (5) years, with any changes incorporated into a signed writing executed by the Parties.

2. **Good Neighbor Fund.**

   A. Lump Sum Transfer. WES' Milwaukie Good Neighbor Fund ("Good Neighbor Fund"), established as a part of the agreement between the Parties in 2012, holds funds available for use by the city to advance environmental restoration, economic

development, and community improvement opportunities in the Good Neighbor Area. WES agrees to transfer the balance of the Good Neighbor Fund as of September 30, 2022, estimated to be approximately **Three Hundred Thousand Dollars** ($300,000), to the city within thirty days of execution of this Agreement. As a result of this transfer, WES will no longer be responsible for reimbursing the city for debt service payments related to the City of Milwaukie, Clackamas and Multnomah Counties, Oregon Full Faith and Credit Obligation Series 2014.

B. Annual Transfer. By July 15, 2023, and every July 15 thereafter, WES will transfer an amount equal to **$1 per equivalent dwelling unit ("EDU") per month** for connections served by WES in the city. Due to the lump sum transfer above, the first annual payment shall include amounts for EDUs served from October 1, 2022 through June 30, 2023. It is the intention of the Parties that the amount of the WES contribution to the Good Neighbor Fund shall adjust annually to reflect the growth in the number of connections served by WES in the city. The city shall continue to deliver a written report to WES stating the current number of connections to the city system and noting new connections and any permanent disconnections on March 1 and September 1 of each year.

C. Eligible Expenditures. Projects eligible to receive Good Neighbor Fund monies must have at least one of the following purposes ("Fund Approved Purpose"):

   i. Provide improved recreational opportunities, such as pathways, parks, and trails.

   ii. Enhance fish and wildlife habitat and riparian areas.

   iii. Create opportunities for collaboration and leverage resources between the City and WES relating to another purpose approved by the Parties.

   iv. Enhance public knowledge on wastewater treatment and surface water management and what they can do to protect water quality through education and special projects.

D. Debt Payments. The city may only use Good Neighbor Fund monies to make debt payments where the underlying debt was incurred for a Fund Approved Purpose.

3. **Obligations of the city.**

A. Coordination amongst the Cities. The city agrees to manage its own funds and project list in accordance with the terms of this Agreement.

B. Project Development; Public Involvement. The city agrees to establish a process for developing and prioritizing projects and/or efforts to be undertaken with the Good Neighbor Fund, and will ensure there is an opportunity for citizen involvement or feedback throughout the project development and/or prioritization process.

C. Establishment of Separate Program Account; Unused Funds. The city agrees to create a separate program account for deposit of Good Neighbor Fund monies and will ensure that projects align with terms outlined in this Agreement. The city agrees not to use Good Neighbor Fund monies for projects not authorized under this Agreement. The city will carry forward any funds not expended during a budget year to the following year; however, any Good Neighbor Fund monies, other than the lump sum transfer in Section 2A above, not spent within three years of their transfer to the city will be returned to WES, unless agreed to in advance for longer-term projects.

D. Annual Report. By April 1 of each year, the city will provide a written report to WES summarizing the work performed under the Good Neighbor Program for the year, including the revenues and expenditures of the Good Neighbor Fund monies and the balance carried forward, if any. The city agrees to use the report template provided by WES.

E. Promotion of Program. The city agrees to publish information about the program, including the goals, projects, annual reports, and relevant contact information on its website, and to include WES signage on projects supported by the Good Neighbor Fund. The city agrees to coordinate with WES on the development of a shared branding icon and appropriate signage for each project.

F. Records. The city agrees to maintain complete and accurate records related to the administration of the Good Neighbor Program consistent with the requirements of Oregon Public Records Law and all funds expended and carried forward, and will make these records available to WES for inspection, auditing and copying in compliance with Section 9(D) below.

4. **Representations and Warranties.**

A. City Representations and Warranties. The city represents and warrants to WES that it has the power and authority to enter into and perform under this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of the city enforceable in accordance with its terms.

B. WES Representations and Warranties. WES represents and warrants to the city that it has the power and authority to enter into and perform this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of WES enforceable in accordance with its terms.

C. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided.

5. **Termination.**

A. Either party may terminate their participation in this Agreement at any time upon (i) the mutual written consent of the Parties, or (ii) upon (12) months' notice to the other Party.

B. Either party may terminate this Agreement in the event of a breach of the Agreement by another Party. Prior to such termination however, the Party seeking the termination shall give the other Party written notice of the breach and of the Party's intent to terminate. If the breaching Party has not entirely cured the breach within fifteen (15) days of deemed or actual receipt of the notice, then the Party giving notice may terminate the Agreement at any time thereafter by giving written notice of termination stating the effective date of the termination. If the default is of such a nature that it cannot be completely remedied within such fifteen (15) day period, this provision shall be complied with if the breaching Party begins correction of the default within the fifteen (15) day period and thereafter proceeds with reasonable diligence and in good faith to cure the default as soon as practicable. The Party giving notice shall not be required to give more than one (1) notice for a similar default in any twelve (12) month period.

C. The Parties shall not be deemed to have waived any breach of this Agreement by the other Party except by an express waiver in writing. An express written waiver as to one breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach is of the same nature as that waived.

D. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination

6. **Indemnification**. The city agrees to indemnify, hold harmless and defend WES and Clackamas County, and their officers, elected officials, agents and employees from and against all claims and actions, and all expenses incidental to the investigation and defense thereof, arising out of or based upon damage or injuries to persons or property caused by the errors, omissions, fault or negligence of the city's employees, subcontractors, or agents. However, neither the city nor any attorney engaged by the city shall defend the claim in the name of WES or County or any department of County, nor purport to act as legal representative of WES or County, without first receiving written authority from the Clackamas County Counsel's Office to act as legal counsel for WES or County, nor shall the city settle any claim on behalf of WES or County without express written approval of the Clackamas County Counsel's Office. WES or County may, at its election and expense, assume its own defense and settlement.

7. **Insurance.** The Parties agree to maintain levels of insurance, or self-insurance, sufficient to satisfy their obligations under this Agreement and all requirements under applicable law.

8. **Notices; Contacts.** Legal notice provided under this Agreement shall be delivered personally, by email or by certified mail to the individuals identified below. Any communication or notice so addressed and mailed shall be deemed to be given upon receipt. Any communication or notice sent by electronic mail to an address indicated herein is deemed to be received 2 hours after the time sent (as recorded on the device from which the sender sent the email), unless the sender receives an automated message that the email has not been delivered. Any communication or notice by personal delivery shall be deemed to be given when actually delivered. Either Party may change the Party contact information, or the invoice or payment addresses by giving prior written notice thereof to the other Party at its then current notice address.

   WES Director, or their designee will act as liaison for the WES.

   Contact Information:

   150 Beavercreek Road, 4th Floor
   Oregon City, OR 97045

   Copy to:
   County Counsel
   2051 Kaen Rd
   Oregon City, OR 97045
   Attn: Amanda Keller

   Ann Ober, City Manager, or their designee will act as liaison for Milwaukie.

   Contact Information:

   10722 SE Main Street
   Milwaukie, OR 9722

9. **General Provisions**

   A. **Oregon Law and Forum.** This Agreement, and all rights, obligations, and disputes arising out of it will be governed by and construed in accordance with the laws of the State of Oregon and the ordinances of WES without giving effect to the conflict of law provisions thereof. Any claim between WES and the city that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Clackamas County for the State of Oregon; provided, however, if a claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by the WES of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the

Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. The city, by execution of this Agreement, hereby consents to the in personam jurisdiction of the courts referenced in this section.

B. **Compliance with Applicable Law**. Both Parties shall comply with all applicable local, state and federal ordinances, statutes, laws and regulations. All provisions of law required to be a part of this Agreement, whether listed or otherwise, are hereby integrated and adopted herein. Failure to comply with such obligations is a material breach of this Agreement.

C. **Non-Exclusive Rights and Remedies**. Except as otherwise expressly provided herein, the rights and remedies expressly afforded under the provisions of this Agreement shall not be deemed exclusive, and shall be in addition to and cumulative with any and all rights and remedies otherwise available at law or in equity. The exercise by a Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach, or for any other default or breach, by another Party.

D. **Access to Records**. The Parties shall retain, maintain, and keep accessible all records relevant to this Agreement ("Records") for a minimum of six (6) years, following Agreement termination or full performance or any longer period as may be required by applicable law, or until the conclusion of an audit, controversy or litigation arising out of or related to this Agreement, whichever is later. The Parties shall maintain all financial records in accordance with generally accepted accounting principles. All other Records shall be maintained to the extent necessary to clearly reflect actions taken. During this record retention period, the Parties shall permit each other access to the Records at reasonable times and places for purposes of examining and copying.

E. **Debt Limitation.** This Agreement is expressly subject to the limitations of the Oregon Constitution and Oregon Tort Claims Act, and is contingent upon appropriation of funds. Any provisions herein that conflict with the above referenced laws are deemed inoperative to that extent.

F. **Severability.** If any provision of this Agreement is found to be unconstitutional, illegal or unenforceable, this Agreement nevertheless shall remain in full force and effect and the offending provision shall be stricken. The Court or other authorized body finding such provision unconstitutional, illegal or unenforceable shall construe this Agreement without such provision to give effect to the maximum extent possible the intentions of the Parties.

G. **Integration, Amendment and Waiver.** Except as otherwise set forth herein, this Agreement constitutes the entire agreement between the Parties on the matter of the Project. There are no understandings, agreements, or representations, oral or

written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind any Party unless in writing and signed by the Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of any Party to enforce any provision of this Agreement shall not constitute a waiver by such Party of that or any other provision.

H. **Interpretation**. The titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

I. **Independent Contractor**. Each of the Parties hereto shall be deemed an independent contractor for purposes of this Agreement. No representative, agent, employee or contractor of one Party shall be deemed to be a representative, agent, employee or contractor of another Party for any purpose, except to the extent specifically provided herein. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.

J. **No Third-Party Beneficiary.** City and WES are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

K. **Subcontract and Assignment**. The Parties shall not assign or transfer any of their interests in this Agreement by operation of law or otherwise, without obtaining prior written approval from the other Party, which shall be granted or denied in the other Parties' sole and absolute discretion. Consent under this section shall not relieve the Parties of any of their duties or obligations under this Agreement.

L. **Counterparts**. This Agreement may be executed in several counterparts (electronic or otherwise), each of which shall be an original, all of which shall constitute the same instrument.

M. **Survival.** All provisions in sections 6, 8, and 9 shall survive the termination of this Agreement.

N. **Necessary Acts.** Each Party shall execute and deliver to the others all such further instruments and documents as may be reasonably necessary to carry out this Agreement.

O. **Successors in Interest.** The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective authorized successors and assigns.

P. **Force Majeure.** Neither the city nor WES shall be held responsible for delay or default caused by events outside of the City's or WES' reasonable control including, but not limited to, fire, terrorism, riot, acts of God, or war. However, the Parties shall make all reasonable efforts to remove or eliminate such a cause of delay or default and shall upon the cessation of the cause, diligently pursue performance of its obligations under this Agreement.

Q. **No Attorney Fees.** In the event any arbitration, action or proceeding, including any bankruptcy proceeding, is instituted to enforce any term of this Agreement, each party shall be responsible for its own attorneys' fees and expenses.

Signature Page Follows

IN WITNESS HEREOF, the Parties have executed this Agreement by the date set forth opposite their names below.

Water Environment Services

_____
Chair

_____
Date

City of Milwaukie

_____
Ann Ober, City Manager

12-7-22
Date

Approved as to Form:

_____ 1/3/23
County Counsel Date

Approved as to Form:

_____
City Attorney Date