

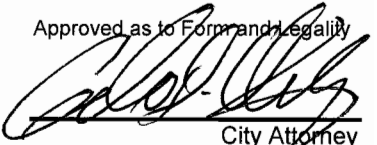
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OFFICE OF THE CITY CLERK
OAKLAND

2013 MAY 30 PM 4:09

OAKLAND CITY COUNCIL

RESOLUTION No. 84454 C.M.S.

Approved as to Form and Legality



City Attorney

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR OR HER DESIGNEE TO ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH EAST BAY SANITARY SEWER COLLECTION AGENCIES FOR COST SHARING OF REGIONAL CONSULTANT SERVICES IN AN ANNUAL AMOUNT NOT TO EXCEED FIFTY THOUSAND DOLLARS (\$50,000.00)

WHEREAS, the City of Oakland and neighboring East Bay communities and their respective sanitary sewer collection systems are subject to a Stipulated Order (SO) with the U.S. Environmental Protection Agency (USEPA) and the Regional and State Water Quality Control Boards relative to sanitary sewer overflows; and

WHEREAS, technical representatives from the cities of Oakland, Alameda, Albany, Berkeley, Emeryville, and Piedmont, and the Stege Sanitary District have formed a technical working group to respond and coordinate the regulatory requirement; and

WHEREAS, each of said agencies are implementing requirements of the SO and other regulatory requirements of the Regional and State Water Quality Control Boards; and

WHEREAS, there is a need to engage services of various consultants with respect to the SO and other regional requirements; and

WHEREAS, given that it is more cost effective to share the costs of these regional services, it is proposed that East Bay Agencies enter into a Memorandum of Understanding (MOU) amongst its members; and

WHEREAS, all costs associated with the MOU will be funded from the Sewer Fund (Fund 3100); now, therefore, be it

RESOLVED, that the City Administrator, or Here Designee, is hereby authorized to enter into the Memorandum of Understanding with East Bay Sewer Collection System Agencies Regarding cost-sharing of consultant services, in the form attached hereto as **Exhibit A**.

IN COUNCIL, OAKLAND, CALIFORNIA, JUN 18 2013, 2013

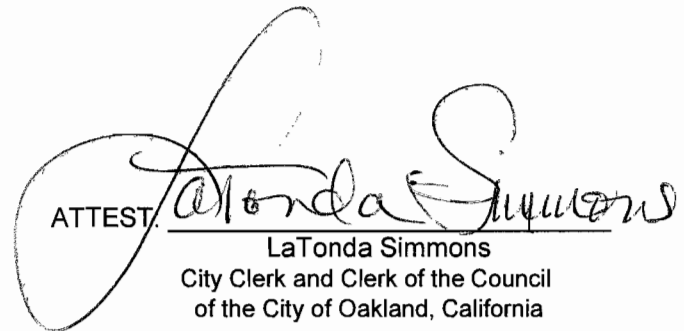
PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, GALLO, GIBSON MCELHANEY, KALB, KAPLAN, REID, SCHAAF and PRESIDENT KERNIGHAN - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

ATTEST 
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

**MEMORANDUM OF UNDERSTANDING AMONG EBCSAC AGENCIES
REGARDING SHARING COST OF CONSULTANT SERVICES**

This Memorandum of Understanding ("MOU") is dated this ___ day of _____ 2012, by the City of Alameda, the City of Albany, the City of Berkeley, the City of Emeryville, the City of Oakland, the City of Piedmont, and Stege Sanitary District, a public agency organized under the Sanitary District Act of 1923, collectively referred to as the "East Bay Collection System Advisory Committee" or "the EBCSAC Agencies" or "the Agencies."

RECITALS

A. Each of the EBCSAC Agencies discharges wastewater from its sanitary sewer collection system to the East Bay Municipal Utilities District ("EBMUD").

B. EBMUD was sued for violations of the Clean Water Act, and is currently under a cease and desist order to eliminate the use of its wet weather facilities. Subsequently, each of the EBCSAC Agencies received NPDES permits prohibiting their wastewater flow to cause or contribute to EBMUD's need to use the wet weather facilities.

C. On December 3, 2009, the EBCSAC Agencies were also sued individually and have since entered into a stipulated order. (*United States v. City of Alameda, et al.*, Case no. CV 09-5684 RS, hereinafter "Lawsuit".) The Agencies were also named as defendants in a complaint-in-intervention filed by San Francisco Baykeeper. As a result of those lawsuits, the agencies will be required either jointly or individually to defend the case, vigorously, or enter into a consent decree that will require each EBCSAC Agency to undertake substantial capital projects and operational improvements over a number of years. The EBCSAC Agencies may also receive future permits or orders that may require additional joint efforts to meet the additional conditions.

D. Representatives of the Agencies have already been coordinating with regard to their discharges to EBMUD and related collection system programs.

E. In addition, on May 19, 2010, the Agencies entered into a Joint Defense Agreement to coordinate their defense efforts related to the Lawsuit.

F. The EBCSAC Agencies have a mutual interest in engaging the services of various consultants with respect to their stipulated order, NPDES permits, testing, related legal work, and other related work.

G. By entering into this MOU, the EBCSAC Agencies do not intend to form a joint powers authority.

NOW, THEREFORE, the EBCSAC Agencies agree as follows:

Section 1. Purpose.

The EBCSAC Agencies wish to coordinate on engineering, consultant, and potentially legal services for the development, preparation, and implementation of studies, reports, and projects to address NPDES permit conditions and additional requirements stemming from jointly funded efforts agreed to by the EBCSAC Agencies (“the work”). The scope of the work will be determined annually as part of the annual budget.

Section 2. Decision Making Structure.

Decisions regarding this MOU, including decisions regarding which projects to pursue and fund, will be made by a committee made up of one designated representative from each EBCSAC Agency. This body of designated representatives shall be referred to as the Technical Advisory Committee (“TAC”). Each designated representative will have the authority to vote on behalf of that Agency, and one or more designated alternates will have the authority to vote on behalf of that Agency when the designated representative is absent or in the case of a conflict of interest. Each Agency shall have one vote on the TAC. Except for voting on the annual budget, separate projects, or outside projects, all other TAC decisions will require a minimum of four affirmative votes of the representatives.

(a) Fiscal Year.

This MOU and all decisions made herein shall operate on a fiscal year basis, where such fiscal year commences on July 1 and ends on June 30. All references to “annual” or “annually” in this MOU relate to the fiscal year.

(b) Annual Budget.

The TAC shall annually prepare and adopt a budget prior to the beginning of each fiscal year, and no later than June 30 of each year. As part of the budget, each Agency’s shared costs under this MOU shall not exceed \$50,000 per fiscal year. To adopt or modify the annual budget, or any separate projects, a minimum of five affirmative votes of the TAC members will be required. The budget shall include, but not be limited to, anticipated total annual expenditures, other contemplated expenditures, and any contingency reserve amount. The budget shall also contain sufficient detail to specify the anticipated projects and administrative costs for the fiscal year, a basis for the annual contribution of each Agency, and the total amount of administrative costs that will be reimbursed to the “Administrative Agency” (discussed in Section 3), or a procedure for effecting such reimbursement.

(c) Supermajority Required.

If fewer than seven Agencies remain parties to this MOU due to withdrawal or termination in subsequent years, then a supermajority of affirmative votes of the remaining Agencies is required in order to adopt or modify the annual budget or any separate projects. A supermajority is determined as follows: If six Agencies remain, then five votes are required; if five Agencies remain, then four votes are required; if four Agencies remain, then three votes are required.

(d) Separate Project Approval.

Separate projects are projects that (a) were either not included in the annual budget; or (b) pertain to projects that were included in the budget, but require supplemental authorization to carry out additional activities that were not contemplated in the budget. Both separate projects and projects that require supplemental authorization shall be approved by a minimum of five affirmative votes of the TAC members, or a supermajority of affirmative votes if fewer than seven Agencies remain parties to the MOU.

If the annual budget is not sufficient to fund the separate project, then within forty-five days of the separate project's approval, the Administrative Agency shall conduct an assessment of the Agencies' ability to pay the unfunded portion of separate project costs.

An Agency may choose to opt out of any separate project and will not be required to contribute funds toward the separate project. If one or more of the Agencies opt out of a separate project, then said project will be deemed an outside project.

(e) Outside Projects.

Outside projects are projects that were not included in the annual budget and that only some EBCSAC Agencies choose to pursue (an "outside project"). At least two Agencies must participate in an outside project. TAC members of Agencies wishing to participate in an outside project must unanimously approve the outside project. Participating agencies will allocate and assess costs separately from this MOU. Agencies that do not participate in the outside project will not be required to contribute funds toward the outside project. If requested and authorized by the participating Agencies, the Administrative Agency may also serve as Administrative Agency for the outside project, and shall account for all finances of the outside projects and projects undertaken pursuant to this MOU entirely separately.

Section 3. Role of Administrative Agency.

The Administrative Agency shall be responsible for administering the services on behalf of the EBCSAC Agencies provided by the engineers, consultants, or attorneys. The TAC may select the Administrative Agency with a minimum of four affirmative votes. Stege Sanitary District has agreed to initially assume the role of Administrative Agency to accomplish the purpose of this MOU.

The Administrative Agency may enter into contracts on behalf of the EBCSAC Agencies without TAC approval, provided that the contract is within budgetary authorization, and that the total aggregate annual value of each contract does not exceed \$15,000. Contracts that are not consistent with the approved annual budget or exceed a total aggregate annual value of \$15,000 shall require TAC approval and a minimum of five affirmative votes of the TAC members.

The Administrative Agency will be responsible for making or authorizing payments to engineers, consultants, or attorneys on behalf of the EBCSAC Agencies. The Administrative Agency shall provide regular financial reports to the TAC of all payments made and outstanding balances remaining on all projects. No payments shall be made in excess of the authorized project amount without unanimous approval of the TAC.

The term of the Administrative Agency shall be at least one full fiscal year. The Administrative Agency may resign its position as Administrative Agency upon written notice to all EBCSAC Agencies within 120 days prior to the end of the fiscal year. Unless otherwise agreed to by the Administrative Agency and a majority of TAC members, the last day of the fiscal year shall be the effective date of resignation. Upon resignation, the successor Administrative Agency shall direct the prior Administrative Agency to transfer or cause to have transferred to it all funds held on behalf of the Agencies, EBCSAC records, and financial statements that were in the prior Administrative Agency's possession. The prior Administrative Agency shall also take any further action as directed by a majority of TAC members.

The successor Administrative Agency shall be chosen by a majority vote of the TAC. If 30 days after the resignation effective date no successor Administrative Agency is designated or no alternative administrative protocol is adopted by a vote of the TAC, the MOU shall terminate and the Administrative Agency shall distribute all property held on behalf of the EBCSAC Agencies pursuant to Section 12.

Either the Administrative Agency or another public agency will be the financial agent of the EBCSAC Agencies, subject to TAC approval by majority vote. The financial agent will be the depositor, and will have custody of all money of the group, strictly accounting for all EBCSAC Agency funds held pursuant to this MOU in trust in a segregated, interest-bearing account. Any public agency that assumes the role of financial agent must keep sufficient records that would allow appropriate review by an outside auditor at any time, at the request of the Administrative Agency. The Administrative Agency's financial activities shall also be subject to an outside audit at any time, at the request of a majority of the TAC. For the initial term of this MOU, EBMUD has agreed to act as the financial agent.

Section 4. Distribution of Costs.

Except as provided herein with respect to the participation in and funding of outside projects, each of the EBCSAC Agencies agrees to contribute its annual share of the estimated project costs based upon the approved allocations adopted with the annual budget or as designated and approved subsequent to the adoption of the annual budget.

Upon approval of the annual budget or any approved mid-year project, each of the EBCSAC Agencies agrees to contribute its share of the costs in cash and/or creditable goods, materials, supplies or services as agreed to at the time of such approval. Creditable goods, materials, supplies or services are those goods, materials, supplies or services that are properly chargeable to the relevant project. None of the signatories to this MOU shall be entitled to a credit for goods, materials, supplies or services furnished unless the credit has been previously approved by the TAC. In allocating costs to the EBCSAC Agencies hereto, the Administrative Agency shall give credit for the furnishing of such creditable goods, materials, supplies or services. When creditable goods, materials, supplies and services are furnished by the EBCSAC Agencies, they shall be charged for and invoiced in accordance with the accounting practices of the particular Agency unless otherwise agreed to in advance by the TAC.

Section 5. Administrative Costs.

Administrative costs shall be proposed as a part of the annual budget and will be subject to TAC approval. The Administrative Agency shall be reimbursed for its direct and indirect administrative costs incurred for its work based upon invoices approved by the TAC. The Administrative Agency shall be reimbursed in the amount or in the manner as set forth in the annual budget.

Section 6. Revolving Fund.

In order to provide funds for all expenditures authorized by this MOU, including Administrative Agency administrative costs, and to facilitate the administration of this MOU, a revolving fund shall be established as provided herein. On or about July 1 of each year, after the TAC adopts the annual budget, the financial agent shall send an invoice to each Agency that sets forth the Agency's total annual allocated costs of the work ("budget payments"). On or before August 1 of each year, each Agency shall remit to the financial agent a minimum of half of the Agency's annual budget payments, which money the financial agent shall hold solely for payment to consultants for services rendered. Each Agency shall remit its other half of budget payments due to the financial agent on or before December 20 of each year.

Upon the financial agent's determination that monies submitted by the EBCSAC Agencies have been or will be exhausted, the financial agent shall notify each Agency of its pro rata share of the costs of the work, and each Agency shall promptly deposit same with the financial agent. No reimbursements shall be made to any Agency until said share is deposited with the financial agent. Agencies shall be responsible for submitting payment to the financial agent for any additional invoices no later than ten days before each payment is due.

If, in the financial agent's determination, there are sufficient funds in the revolving fund at the time the annual budget payments would be due, the financial agent will notify the Agencies that their annual budget payments need not be paid for that year, or that the payments may be reduced by any carry over balances from the preceding annual budget. The financial agent's notification that annual budget payments are not required or have been reduced shall not excuse the EBCSAC Agencies from their ongoing obligations to fund payment of work.

Section 7. Payments.

Pursuant to this MOU, all payments shall be by check, warrant, or electronic transfer. The Administrative Agency and/or the financial agent shall indicate the address where payments shall be sent and to whom payments shall be made payable.

Section 8. Notices.

Notices and invoices shall be delivered to the EBCSAC Agencies at the following addresses via US mail:

[]
City of Alameda

[]
City of Oakland

2263 Santa Clara Avenue
Alameda, CA 94501

1 Frank Ogawa Plaza
Oakland, CA 94612

[]
City of Albany
1000 San Pablo Avenue
Albany, CA 94706

[]
City of Piedmont
120 Vista Avenue
Piedmont, CA 94611

[]
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

[]
Stege Sanitary District
7500 Schmidt Lane
El Cerrito, CA 94530

[]
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Section 9. Default and Remedies.

If an Agency fails to make a payment or to provide assurances within ten (10) business days after receipt of notice given by the Administrative Agency of such non-payment, that Agency shall be in default of this MOU (“Defaulting Agency”) and the Administrative Agency may suspend the provision of services under this MOU for that Agency. A minimum of four affirmative votes of the TAC are required to suspend or terminate this MOU with respect to a Defaulting Agency. The TAC may also take such other action to remedy the default. The suspension or termination of this MOU will not terminate, waive, or otherwise discharge any ongoing liability for payment arising from this MOU until such obligations are satisfied in full. In the event a Defaulting Agency is terminated, this MOU will not automatically renew for the Defaulting Agency, and a minimum of four TAC members must vote to reinstate the Defaulting Agency. Following termination of any Defaulting Agency, the remaining EBCSAC Agencies shall cooperate and act in good faith to negotiate and agree upon the method of reallocating the costs of the consultants’ services.

Section 10. Withdrawal.

Any Agency may withdraw from this MOU by providing no less than ninety days written notice prior to the end of the fiscal year. Agencies that do not provide requisite notice to withdraw shall automatically remain active parties to this MOU. A withdrawing Agency shall still be financially responsible for its shared costs for any work done or continuing thereafter while it was a party to this MOU. The Administrative Agency shall calculate any amount owed by the withdrawing Agency for its share of costs of the annual budget, and the Agency’s withdrawal will be effective upon payment to the Administrative Agency of that amount. The withdrawn Agency shall have no right to receive any proportional share of any net surplus that may exist from the last year’s annual budget. However, the TAC has authority to direct any distribution to the withdrawn Agency that the TAC deems appropriate.

Section 11. Term.

The term of this MOU shall be two years from the date above. For EBCSAC Agencies that remain active parties to this MOU, the term shall automatically renew in two-year increments unless the MOU is terminated by mutual written agreement of the Agencies.

Section 12. Termination and Disposition of Funds Upon Termination.

This MOU shall terminate (a) by mutual written agreement of all EBCSAC Agencies that remain parties to the MOU; (b) if TAC members are unable to obtain five affirmative votes or a supermajority of votes to approve the next year's annual budget; (c) if a successor Administrative Agency is not timely designated; or (d) if all Agencies have withdrawn from the MOU. Upon termination of this MOU, and after payment of all engineering, consultant, and legal obligations, all assets remaining in the Revolving Fund, including any interest earned on deposits, shall be distributed to any remaining EBCSAC Agencies. Assets available for distribution shall be returned in a manner consistent with and proportion to each Agency's respective contribution.

Any liabilities in excess of the assets held by the Administrative Agency on behalf of the EBCSAC Agencies shall be assessed against the Agencies, and the Agencies shall be responsible for such liabilities.

Section 13. EBCSAC Agencies not Agents. Indemnification.

With the exception of the Administrative Agency when performing its duties as Administrative Agency, in the performance of this MOU, each Agency and its agents, employees, and contractors shall act in an independent capacity and not as officers, employees, or agents of any other Agency.

Costs and liabilities associated with paying the Administrative Agency, engineers, consultants, or attorneys, and the funding of joint projects, shall be allocated in accordance with Section 4.

In the case of non-contractual liabilities arising out of the activities of the Agencies under this MOU, the Agencies specifically repudiate the division of liability outlined in Government Code sections 895.2 *et seq.* and instead agree to share liability based on the relative fault of the Agencies.

Each Agency agrees that it is solely responsible for, and agrees to indemnify, defend, and hold harmless the other EBCSAC Agencies and their directors, council members, officers, agents and employees from and against any and all loss, liability, expense, claims, suits, and damages, including attorneys' fees, relating to or arising out of the design, construction, inspection, operation, or maintenance of its separate projects. Each Agency agrees that nothing in this MOU shall create, impose, or give rise to any liability, obligation, or duty of the Agency to the other Agencies or to any third party with respect to the manner in which the Agency designs, constructs, inspects, operates or maintains its separate projects. This provision will survive the expiration or termination of this MOU.

Section 14. Dispute Resolution

The Agencies shall resolve their disputes informally to the maximum extent possible. The disputing Agencies shall negotiate all matters of joint concern in good faith, with the intention of resolving issues between them in a mutually satisfactory manner. If the disputing Agencies cannot informally resolve the dispute, they shall first attempt to resolve such dispute through non-binding mediation for a period not to exceed ninety days. If the Agencies cannot mutually agree upon a mediator, then the presiding judge of the Alameda County Superior Court shall designate a mediator. Should mediation be unsuccessful, the dispute may be referred to private arbitration upon mutual written approval of the disputing Agencies. If the disputing Agencies do not mutually agree in writing to arbitration, a disputing Agency may commence an adversarial proceeding before any court of competent jurisdiction in the County of Alameda.

Section 15. Entire MOU.

This MOU, together with any exhibits hereto, constitutes the entire agreement among the EBCSAC Agencies with respect to the subject matter hereof, and supersedes all prior understandings or agreements whether written or verbal.

Section 16. Amendment.

This MOU may not be amended except in writing. Any such amendment must be approved and executed by all EBCSAC Agencies.

Section 17. Drafter.

Each Agency has participated in negotiating and drafting this MOU. If an ambiguity or a question of intent or interpretation arises, this MOU is to be construed as if the EBCSAC Agencies had drafted it jointly, as opposed to being construed against an Agency because it was responsible for drafting one or more provisions of this MOU.

Section 18. Severability.

The invalidity, illegality or unenforceability of any provision of this MOU shall not render the other provisions unenforceable, invalid or illegal.

Section 19. Governing Law and Venue.

This MOU shall be interpreted, governed by, and construed under the laws of the State of California.

Section 20. Separate Execution of Memorandum of Understanding by Agencies