

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ENDORSING) RESOLUTION NO. 15-4647
EXECUTION OF A MEMORANDUM OF)
AGREEMENT WITH THE US ARMY CORPS OF) Introduced by Chief Operating Officer Martha
ENGINEERS REGARDING MITIGATION OF) Bennett in concurrence with Council
ADVERSE IMPACTS DUE TO CLOSURE OF) President Tom Hughes
THE WILLAMETTE FALLS LOCKS

WHEREAS, On January 1, 1873, the Willamette Falls Locks opened to allow passage around the waterfall at Oregon City thereby providing access to a one river system; and

WHEREAS, in 1915, the United States Army Corps of Engineers (USACE) purchased the Locks from the private operator thereby ensuring free public passage through the Locks; and

WHEREAS, in 1974, the Willamette Falls Locks were listed on the National Register of Historic Places; and

WHEREAS, in November 2011, the USACE closed the Locks to maritime traffic, placing them in non-operational status for life safety reasons due to deterioration; and

WHEREAS, on September 23, 2013 the USACE acknowledged they have an obligation under Section 106 of the National Historic Preservation Act to address whether continued closure of the Locks is having an adverse impact on this federally owned facility listed on the national Register of Historic Places and to consult with interested stakeholders to identify appropriate mitigation measures; and

WHEREAS, on May 15, 2015 the USACE concluded that continued closure of the Locks is, in fact, having an adverse effect on the historic and cultural integrity of the facility; and

WHEREAS, the USACE has released a proposed Memorandum of Agreement defining actions to mitigate the adverse effects which includes a potential path toward the repair and reopening of the Locks; and


WHEREAS, Metro is a proposed concurring party to the Memorandum of Agreement; and

WHEREAS, on December 11, 2014 the Metro Council adopted Resolution No. 14-4576 urging the USACE to repair and reopen the Locks to all public maritime use; and

WHEREAS, on June 18, 2015 the Metro Council adopted Resolution No. 15-4621 amending the Metro budget to contribute toward the education and lobbying effort to pursue the repair and reopening of the Locks; now therefore,

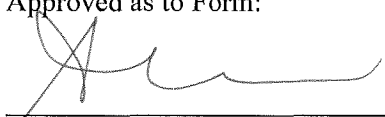
BE IT RESOLVED that the Metro Council endorses Metro's execution of the Memorandum of Agreement with the US Army Corps of Engineers, as a concurring party, regarding actions to mitigate the adverse effects of continued closure of the Willamette Falls Locks.

ADOPTED by the Metro Council this 17th day of September 2015.



Tom Hughes, Council President

Approved as to Form:



Alison R. Kean, Metro Attorney

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 15-4647, FOR THE PURPOSE OF ENDORING EXECUTION OF A MEMORANDUM OF AGREEMENT WITH THE US ARMY CORPS OF ENGINEERS REGARDING MITIGATION OF ADVERSE IMPACTS DUE TO CLOSURE OF THE WILLAMETTE FALLS LOCKS

Date: September 8, 2015

Prepared by: Andy Cotugno
ext. 1763

BACKGROUND

For the past 150 years, the Willamette Falls Locks have been an important feature in the economic, social and cultural development of the State of Oregon. However, for the past decade, due to declining commercial traffic through the Locks, they have continued to decline in condition due to deferred maintenance by the owner, the US Army Corps of Engineers (USACE). Throughout this period, Metro has participated in a large coalition of interested parties through the “One Willamette River Coalition” seeking to repair the Locks and provide for their reliable operation accessible to the public for commercial and recreational purposes. During this period, the Coalition has been successful at raising federal and local funding to support repairs, periodic operations and a variety of studies on the condition and benefits provided by the Locks.

The Locks are suffering from deterioration due to deferred maintenance because of the federal laws governing the USACE budget that mandate spending priority based upon freight tonnage movements and the resulting benefit to the US economy. In November, 2011 the level of deterioration reached a critical point and the USACE closed the Locks for life safety reasons.

However, at the urging of the National Trust for Historic Preservation (a private non-profit organization) and the Advisory Council on Historic Preservation (an independent federal agency), on September 23, 2013 the USACE issued a notice of intent to initiate a stakeholder consultation process as part of their obligation to comply with Section 106 of the National Historic Preservation Act. Under this section, federal agencies are obliged to assess the impact of their undertakings on any property listed on the National Register of Historic Places. The Willamette Falls Locks are owned by the USACE, having been purchased from the private operator in 1915, and were listed on the National Register in 1974. This acknowledgement by the USACE is significant because they closed the facility on a life/safety emergency basis which is exempt from these requirements. However, continued closure, continued deferred maintenance and continued deterioration is having an adverse effect and Section 106 requires that they address appropriate mitigation measures. On May 15, 2014 the USACE issued their finding of adverse effect and documented the character of the impact that needs to be mitigated. The USACE has now released their proposed Memorandum of Agreement (MOA) defining appropriate measures to mitigate the adverse effects (see Attachment 1 to the Staff Report).

Throughout the consultation process, the overwhelming interest of the stakeholders has been to repair and reopen the Locks to public use. However, the USACE has been very clear that repair and reopening will only occur through some form of alternate ownership, operation and/or financing arrangement. This could take the form of cost sharing of a USACE sponsored initiative or transfer to a non-Corps entity. Reaching a conclusion on the preferred approach requires a substantial amount of due diligence and

ultimately an agreement from an alternate financing or operating/ownership entity. Key issues that need to be addressed are:

- Geotechnical and structural condition of the facility;
- Cost of repair and continued rehabilitation of the facility;
- An economic assessment of the continued operation of the facility through either USACE ownership or through transfer to alternate ownership;
- A cost estimate and economic assessment of full closure and decommissioning;
- An assessment of permanent closure and repair/reopening options under the National Environmental Policy Act and the National Historic Preservation Act;
- Documentation and assessment of property title conditions and property boundary definition;
- An assessment of toxic/hazardous materials within the Locks and ship canal and necessary clean-up actions;
- Delineation of any continued regulatory oversight requirements of the USACE that may transfer to a new third party owner/operator.

The proposed Memorandum of Agreement describes these needed due diligence studies and establishes a commitment by the Corps to seek funding through the USACE budget process for either full federal funding or 50/50 cost share funding. While these appropriations are subject to inclusion in the President's budget and adoption by the US Congress, the MOA documents a federal interest in providing funding based upon compliance with historic preservation laws rather than compliance with USACE laws and regulations based upon economic significance of freight movement.

The formal signatories to the Memorandum of Agreement are limited to the US Army Corps of Engineers, the Oregon State Historic Preservation Officer and the (federal) Advisory Council on Historic Preservation. However, interested stakeholders (including Metro) are invited to sign the agreement as "concurring parties." While legal standing is vested to the signatories, signing on as a concurring party represents a statement of support of the proposal and provides access to participate in the due diligence process going forward. It is recommended that Metro endorse the proposal and sign on as a concurring party.

ANALYSIS/INFORMATION

1. **Known Opposition:** No known opposition.
2. **Legal Antecedents:** Execution of the Memorandum of Agreement constitutes completion of the consultation process required under Section 106 of the National Historic Preservation Act
3. **Anticipated Effects:** The Chief Operating Officer will sign the Memorandum of Agreement after approval of this Resolution.
4. **Budget Impacts:** There are no direct budget impacts from this Resolution although there are funds in the Metro budget to support a contribution toward contracted lobbyists and for staff participation in the process.

RECOMMENDED ACTION

Recommend adoption of the Resolution.

**MEMORANDUM OF AGREEMENT BETWEEN
THE U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT,
THE OREGON STATE HISTORIC PRESERVATION OFFICER, AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, REGARDING
THE CLOSURE TO VESSEL TRAFFIC OF THE WILLAMETTE FALLS LOCKS,
WEST LINN, OREGON**

WHEREAS the U.S. Army Corps of Engineers, Portland District (Corps), under its emergency operational authority, closed the Willamette Falls Locks (Locks) in December 2011 to vessel traffic (the “undertaking”) due to life safety concerns related to the potentially unsafe physical conditions of the gudgeon anchors on Gates 2, 3, and 4; and,

WHEREAS the Locks are a historic property that was listed in the National Register of Historic Places in 1974, and therefore, pursuant to 36 C.F.R. § 800.5(1), the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f), the Corps notified the Oregon State Historic Preservation Officer (SHPO) on May 15, 2014 that the undertaking posed an adverse effect to the features and qualities that made the Locks eligible for listing, (Appendix A) to which the SHPO agreed; and,

WHEREAS the Corps has defined the undertaking’s area of potential effects (APE) as the Locks, associated structures, and environs, to include the Lock Operator and Administration buildings, dock, and park easement along the west side of the Locks chambers (map of APE is attached as Appendix B); and,

WHEREAS the undertaking resulted in adverse effects to historical associations, specifically, visual associations with transportation and navigation history, and with tribal access to the Willamette Falls via the Locks to conduct traditional cultural practices; and,

WHEREAS, although no immediate effect to the physical engineering qualities of the Locks was realized by the undertaking, further examination of materials and operating components of lock walls and gudgeon anchors on Gates 2, 3, and 4 would be necessary to determine if, and to what degree, further decline may have occurred since closure; and,

WHEREAS the Corps acknowledges that since 2011 there has been continued impact on certain cultural, economic, and recreational goals of the proposed Willamette Falls National Heritage Area, the 2015-designated State Heritage Area, the 2012-designated National Water Trail, and the 1999-designated American Heritage River, to all of which the Locks is a significant and contributing resource; and,

WHEREAS the Corps acknowledges that the undertaking has eliminated the potential of commercial navigation through the Locks, resulting in a loss of economic opportunity for some sectors of the community; and,

WHEREAS the Corps considers the undertaking to be an essential and immediate response to an emergency condition threatening both life and property, the Corps has through this consultation notified SHPO, the Council, and the tribes within the time and resources available (36 C.F.R. § 800.12 (b)(2) so that comments and suggestions on how to appropriately mitigate for the subject undertaking could be provided. Stipulations provided in this agreement address adverse effects that resulted from the undertaking in 2011, although the last vessel permitted through the Locks occurred in July 2013. No data or information has been identified or presented to demonstrate that the mitigation needs have changed since the date of closure; and,

WHEREAS the Locks chambers and environs are no longer publicly accessible on a regular basis due to safety concerns and budgetary constraints, the Corps has provided supervised, infrequently scheduled opportunities for on-site viewing to requesting parties and has supported various events such as the Willamette Falls Heritage Foundation’s Lock Fest; and,

WHEREAS the Corps invited participation of the Confederated Tribes of Grand Ronde (CTGR), the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes of Siletz Indians who attach religious and cultural significance to lands within the Willamette Falls Locks and around the Willamette Falls; and,

WHEREAS the Corps has invited the West Linn Certified Local Government, National Trust for Historic Preservation (NTHP), Willamette Falls Heritage Foundation (WFHF), Clackamas County (CC), Clackamas County Historical Society, Willamette Falls Heritage Area Coalition (WFHAC), Metro, Oregon Marine Board, Oregon City, Portland General Electric, Wilsonville Concrete LLC, Marine Industrial Construction LLC, WCP INC, Pacific Northwest Waterways Association (PNWA), Restore Oregon, City of Wilsonville and other identified stakeholders to participate as concurring parties; and,

WHEREAS many of the consulting parties endorse the repair and reopening of the Locks in order to achieve potential cultural, economic, commercial and recreational goals of state and local stakeholders; and acknowledge since closure of the Locks, the Corps' annual requests for Congressionally appropriated funding for repairs have not been successful because the costs of rehabilitation outweigh the commercial navigation benefits to the nation and therefore, agree, although not part of the current undertaking or this Section 106 consultation, the most viable long term disposition of the Locks may be through a transfer of ownership to another agency or via alternative management of the facility through cost-sharing of repairs, leasing the facility, or other arrangement; and,

WHEREAS in accordance with 36 C.F.R. § 800.6(a)(1), the Corps has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effects determination with specified documentation, and the ACHP has chosen to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii);

NOW, THEREFORE, the Corps, SHPO, and the ACHP agree that the following Stipulations will be implemented in order to mitigate adverse effects to the Locks caused by the undertaking:

STIPULATIONS

1. Conduct regular informational meetings no less than twice a year with signatories and concurring parties to report on progress made toward accomplishing Stipulations 3-9.
2. Conduct a meeting with signatories, concurring parties, and other Federal and non-Federal stakeholders a minimum of every two months, or as required, to discuss possible options for the long term disposition of the Locks. Such a meeting would be with local interests that have organized under the leadership of the Clackamas County (identified as the Willamette Falls Locks Working Group) to study issues relating to repair, reopening and operation of the Locks. The goal of the process is to develop a report described in Stipulation 4. This meeting can be accomplished during one of the meetings described in Stipulation 1. Discussions may include but not limited to:
 - 2 a. Continue discussions on conducting a 100% Federally funded engineering investigation of the Locks' essential operating materials and components in order to identify repairs needed to meet standards established by the Corps that would support the deauthorization, decommissioning, and divestment of the Locks in a safe manner and provide the future owner and operator guidance in mid and long-term capital needs such as:
 - a forensic investigation of the operating components (gudgeon anchors, masonry, and wood materials of the lock walls) using minimally invasive techniques and technologies to probe non-visible conditions and substrates;
 - an updated geotechnical condition of the facility;
 - an updated economic analysis to identify the least cost alternative to decommission the facility;

- an environmental condition of the property to assess the presence, abundance and cleanup requirements resulting from hazardous and toxic materials exposed within the locks and ship canal.
- May include pertinent structural repairs to the locks so that the locks are returned to a safe and operable condition

2b. Continue discussions with the Willamette Falls Locks Working Group regarding a 50/50 cost share study to identify the necessary analysis and administrative steps necessary for alternate ownership or management of the Locks. The study, if pursued, may include the following:

- an updated geotechnical condition of the facility, including the need for dredging and proper disposal of dredge materials;
- consideration, including an economic assessment, of transfer of ownership and/or operations of the facility to an identified transferee;
- an economic evaluation of potential reauthorization of the facility to a different mission;
- an economic analysis of the status quo closure condition;
- evaluation, including economic assessment, of de-authorization, decommissioning and divestment of the facility;
- a current cost estimate to repair and return the Locks to safe operability;
- an economic opportunity analysis of reopening and continued operation;
- a full investigation of all environmental and regulatory requirements, including addressing NEPA and Section 106 requirements of both repair and final disposition options;
- an assessment of the real estate title and boundary issues, resulting in a detailed scope, schedule and budget to resolve any potential real estate issues;
- an environmental condition of the property to assess the presence, abundance and cleanup requirements resulting from hazardous and toxic materials exposed within the locks and ship canal; and,
- assessment of any continued Corps regulatory oversight requirements that may transfer to a new third-party operator.

Should a cost shared study be of mutual interest, the Corps shall execute a separate agreement with the appropriate non-Federal sponsor.

3. Continue current caretaker activities commensurate with obligations under Section 110 of the National Historic Preservation Act to preserve and protect significant character defining features of the property, defined herein as the inspection and monitoring of the Lock's status through scheduled operation of gates to identify mechanical changes in performance; surface observation and monitoring of condition and potential deterioration of gudgeon anchors and lock walls; removal of intrusive objects or plant material that may cause harm to operating components; the arrestment of any geophysical activities that may pose harm to the resource; and the prevention of public access that may result in vandalism or other deliberately imposed harm.

4. Continue support of public outreach endeavors, including, but not limited to:

- a) In cooperation with any volunteers, permit public tours of the Locks concurrent with Corps personnel on-site inspections and minimal maintenance activities, and continue to support local endeavors to heighten public awareness and appreciation of the Locks, as exemplified by the Willamette Falls Heritage Foundation's Lock Fest.
- b) Upon requests and invitations, the Corps shall provide public presentations of the Locks' Past, Present and Future to interested organizations.
- c) Corps shall conduct on-going conditions assessment of interpretive displays and shall inventory historical items, photographs, archives, and artifacts on display at the Lock

Operator's Building and Museum, and seek professional services within the USACE or other curation facilities to inventory and conserve artifacts, archives and photos, and upgrade interpretive exhibits, so long as the Locks is in caretaker status. SHPO shall be afforded 30 days to review and comment on revisions and/or layout and content when interpretive elements are modified or replaced. The Corps shall review requests and facilitate the temporary loan of historic artifacts and resources to qualified local museums for public education purposes.

- d) In consultation with signatories to this agreement, the Corps shall contract the development of a book, website, or video documentary to commemorate the history of the Willamette Falls Locks.
5. Corps shall coordinate with the appropriate National Park Service staff prior to preparing an updated, expanded, and complete Historic American Engineering Record (HAER Level I) recordation of the Willamette Falls Locks. HAER documentation will incorporate and build upon HAER documentation previously prepared for the Willamette Falls Locks Chamber No.1 (completed in 1980). SHPO shall be provided 30 days to comment on the draft documentation, and shall be provided a copy of the final documentation when produced. Corps shall complete documentation and submit to the Library of Congress/National Park Service within 4 years of the final signature of this document.
6. Within one of year of execution of this MOA, the Corps will further consult with consulting tribes to develop a mutually agreeable plan to enable means for conducting traditional cultural practices at Willamette Falls Locks.

III. ANTI-DEFICIENCY ACT

The Corps shall make reasonable and good faith efforts to secure the necessary funds to implement this MOA. The parties agree that any requirement for obligation of funds arising from the terms of this agreement shall be subject to inclusion in the President's Budget and the availability of congressionally appropriated funds for that purpose. This agreement shall not be interpreted to require the obligation or expenditure of funds in violation of the Anti-Deficiency Act.

If compliance with the Anti-Deficiency Act alters or impairs the Corps' ability to implement the stipulations of this MOA within the term of this agreement, the Corps shall conduct supplementary consultation with the Signatories and Concurring Parties in accordance with Stipulations VII and VIII below.

IV. DURATION

This MOA will expire upon completion of requirements in the above Stipulations, or if its terms are not carried out within ten years from the date of its execution. Prior to such time, the Corps may consult with the other signatories and concurring parties to reconsider the terms of the MOA and amend or renew it in accordance with Section VII. below.

V. MONITORING AND REPORTING

Each year following the execution of this MOA until it expires or is terminated, the Corps shall provide all parties to this MOA a summary report detailing work undertaken pursuant to its terms. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in the Corps' efforts to carry out the terms of this MOA. In addition to an annual report, per Stipulation 1 above, the Corps will conduct meetings as required with signatories, concurring parties and other stakeholders to report on progress made toward accomplishing the terms of this agreement.

VI. DISPUTE RESOLUTION

Should any signatory or concurring party to this MOA object at any time to any actions proposed or the manner in which the terms of this MOA are implemented, the Corps shall consult with such party to resolve the objection. If the Corps determines that such objection cannot be resolved, the Corps will:

- A. Forward all documentation relevant to the dispute, including the Corps' proposed resolution, to the ACHP. The ACHP shall provide the Corps with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, the Corps shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. The Corps will then proceed according to its final decision.
- B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, the Corps may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, the Corps shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the MOA, and provide them and the ACHP with a copy of such written response.
- C. The Corps shall carry out all other actions subject to the terms of this MOA that are not the subject of the dispute.

VII. AMENDMENTS

This MOA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

VIII. TERMINATION

- A. If any signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other signatories to attempt to develop an amendment per Section VII., above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate their interest in the MOA upon written notification to the other signatories.
- B. If the MOA is terminated, and prior to work continuing on the undertaking, the Corps must either (a) execute an MOA pursuant to 36 C.F.R. § 800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 C.F.R. § 800.7. The Corps shall notify the signatories as to the course of action it will pursue.
- C. Execution of this MOA by the Corps, SHPO and ACHP and implementation of its terms evidences that the Corps has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

SIGNATORIES:

U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT

Date: _____
Jose L. Aguilar, Colonel, Corps of Engineers, District Commander

OREGON STATE HISTORIC PRESERVATION OFFICER

_____ Date: _____
Ms. Christine Curran, Deputy

ADVISORY COUNCIL ON HISTORIC PRESERVATION

_____ Date: _____
Mr. John M. Fowler, Executive Director

CONCURRING PARTIES:

Signing as a concurring party is primarily a way to express agreement with the contents of the MOA and acceptance of the outcome of the process (36 CFR 800.6(c)(3)). Concurring parties do not have the rights of signatories; their approval is not needed to execute, amend or terminate the MOA.

CONFEDERATED TRIBES OF GRAND RONDE

_____ Date: _____
[insert name and title]

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

_____ Date: _____
[insert name and title]

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION

_____ Date: _____
[insert name and title]

NATIONAL TRUST FOR HISTORIC PRESERVATION

_____ Date: _____
[insert name and title]

CLACKAMAS COUNTY

[insert name and title]

Date: _____

METRO

Chief Operating Officer Martha Bennett

Date: _____

WEST LINN CERTIFIED LOCAL GOVERNMENT

[insert name and title]

Date: _____

ONE WILLAMETTE RIVER COALITION

[insert name and title]

Date: _____

WILLAMETTE FALLS HERITAGE FOUNDATION

[insert name and title]

Date: _____

WILLAMETTE FALLS HERITAGE AREA COALITION

[insert name and title]

Date: _____

RESTORE OREGON

[insert name and title]

Date: _____

PORTLAND GENERAL ELECTRIC

[insert name and title]

Date: _____

CITY OF WILSONVILLE

[insert name and title]

Date: _____

PACIFIC NORTHWEST WATERWAYS ASSOCIATION

[insert name and title]

Date: _____

CLACKAMAS COUNTY HISTORICAL SOCIETY

[insert name and title]

Date: _____

WILSONVILLE CONCRETE / MARINE INDUSTRIAL CONSTRUCTION LLC

[insert name and title]

Date: _____

WEST LINN PAPER

[insert name and title]

Date: _____

WILLAMETTE RIVER KEEPERS

[insert name and title]

Date: _____

eNRG KAYAKING

[insert name and title]

Date: _____