

## ORDINANCE No.

Authorize the Bureau of Environmental Services to enter into an Intergovernmental Agreement with the City of Lake Oswego to cooperate on a potential replacement of the Tryon Creek Wastewater Treatment Plant via a public-private partnership (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. The City of Portland currently owns and operates the Tryon Creek Wastewater Treatment Plant (the "TCWTP") in Lake Oswego, which provides wastewater treatment services to approximately 20,000 Portland residents and over 40,000 residents within Lake Oswego.
2. Costs and responsibilities relating to operation and maintenance of the TCTWP are governed under an existing Intergovernmental Agreement executed in 1984 between the City of Portland (via BES) and the City of Lake Oswego.
3. BES has been working cooperatively with the City of Lake Oswego on assessing options to upgrade or replace the TCWTP.
4. BES and the City of Lake Oswego have identified a potential option for a public-private partnership to design, build, finance, operate, and maintain ("DBFOM") a new treatment plant within Lake Oswego. Replacement of the TCWTP will be, at minimum, cost-neutral to BES ratepayers and may provide other cost efficiencies and environmental benefits.
5. Costs of the City of Portland's continued participation in the cooperative process, via participation of BES staff and City legal support, have been included in the FY2020-21 Adopted Budget.
6. BES has expressed interest in and support for a partnership with the City of Lake Oswego to proceed with a competitive proposal process for a potential DBFOM public-private partnership arrangement.

NOW, THEREFORE, the Council directs:

- a. That the BES Director is authorized to execute an intergovernmental agreement with the City of Lake Oswego in a form substantially similar to Exhibit A to this ordinance. The BES Director may execute amendments to the agreement provided they will not result in an increased financial obligation to the City of Portland.

Passed by the Council:  
Mayor Ted Wheeler

Prepared by: B. Jonas Biery  
Date prepared: August 13, 2020

**Mary Hull Caballero**  
Auditor of the City of Portland  
By

Deputy



Tryon Creek Wastewater Treatment Plant  
Interim Intergovernmental Agreement

This Interim Intergovernmental Agreement is by and between the City of Lake Oswego (“Lake Oswego”) and the City of Portland (“Portland”), is authorized by ORS 190.010, and is effective as of the last date of signature below (“the Effective Date”).

Recitals

This agreement is intended to:

- A. Establish roles and responsibilities for the procurement process to negotiate, award, and execute a Pre-Development Agreement (“the PDA”) between Lake Oswego and a private entity (“the P3”) for professional services to locate, design, permit, and plan the development of a new wastewater treatment plant (“the Future Plant”) to replace the Portland-owned Tryon Creek Wastewater Treatment Plant (“the Existing Plant”);
- B. Establish the criteria and process to be used for Lake Oswego and Portland to mutually agree to approve or reject a subsequent Project Agreement (“the PA”) between Lake Oswego and the P3 to decommission the Existing Plant, and to design, permit, build, operate, finance, and maintain the Future Plant;
- C. Identify and establish certain terms of an intergovernmental agreement (“the Future IGA”) between Lake Oswego and Portland, if the parties agree to proceed with the PA and Future Plant, to provide for ongoing treatment and disposal of wastewater and to transfer ownership of the Existing Plant’s real estate and improvements; and
- D. Establish certain terms for amendment or replacement (collectively, “the Replacement IGA”) of the existing 1984 Wholesale Sewage Treatment and Disposal Agreement (“the 1984 IGA”) if the parties decide not to proceed with the Future Plant.

Agreement

- 1. The P3 Procurement. Portland will support a request for proposals for a P3 selection (“the P3 RFP”) under the following conditions:
  - a. Lake Oswego, at its expense unless otherwise indicated in this sub-section 1.a, will carry out the P3 procurement process from the P3 RFP through completion of the PDA, including but not limited to the following process steps and deliverables:

- i. Lake Oswego and its consultants will prepare the P3 RFP.
  - ii. Portland, at its expense, will provide human resources, data, documents, and support to assist in P3 RFP development.
  - iii. Lake Oswego will issue the P3 RFP, respond to proposer questions, and receive proposals.
  - iv. A selection committee, including two members from Portland, will evaluate proposals and select the P3. The costs of each party's participation on the committee will be borne by that party.
  - v. Lake Oswego will negotiate and execute a PDA with the selected proposer following successful completion of negotiations and approval of the PDA by the Lake Oswego City Council.
  - vi. Lake Oswego will administer the PDA and direct the work of the P3.
  - vii. Lake Oswego will provide Portland with review copies of PDA deliverables.
  - viii. Portland, at its expense, will provide human resources, data, documents, and review of PDA deliverables to support to Lake Oswego and the P3.
  - ix. Lake Oswego will provide periodic updates to Portland throughout the process to confirm agreement within the terms and conditions identified in this term sheet.
- b. Portland and Lake Oswego will collaborate in a process to review the PA proposal to determine whether to proceed with the PA:
- i. Lake Oswego will provide estimates, to both parties' written satisfaction, of projected cost impacts to Portland and Lake Oswego, including but not limited to a cost-share structure and the cash flow expected to result from the PA, subject to terms and limitations described in this term sheet.
  - ii. Lake Oswego agrees to work in good faith with the Oregon Department of Environmental Quality ("DEQ") to obtain DEQ's confirmation that the Future Plant will meet all applicable DEQ requirements, and to confirm that DEQ will issue an outfall permit to Lake Oswego, effective when the P3 takes over operation of the Existing Plant. Lake Oswego agrees to submit all requested permit-related documentation to DEQ and will provide all permit-related information to Portland upon request. Portland

will provide Lake Oswego and DEQ with any required permit-related documents for the Existing Plant.

- iii. It is the intent of Portland and Lake Oswego to obtain a PA proposal that each city projects will result in treatment costs that do not exceed the costs each city estimates it would incur if Portland continues to operate and maintain the Existing Plant under the 1984 IGA.
- c. If Lake Oswego declines to proceed further with the P3 procurement process, declines to proceed with development of the PDA, terminates the PDA, or declines to proceed with development of a PA with the P3, the parties will proceed as follows (“the Exit Option”):
- i. Portland will retain ownership of the Existing Plant and will provide wastewater treatment and disposal services under the terms of the 1984 IGA, or any Replacement IGA agreed to by the parties; and
  - ii. Lake Oswego and Portland will each pay 50% of any payments due to the P3 under the PDA, plus Portland will pay or reimburse Lake Oswego for 50% of all costs Lake Oswego has incurred after the date of this interim IGA for the activities described in Section 1, including without limitation all reasonable consultant, design and outside legal costs. If this Exit Option applies under the terms of Subsection 1.d below, Portland will also pay or reimburse Lake Oswego for 50% of all costs Lake Oswego has incurred in the negotiation and development of a PA with the P3, also including all reasonable consultant, design and outside legal costs.
- d. If Lake Oswego decides to proceed with the PA and develop the Future Plant, Lake Oswego will request Portland’s written concurrence that the Future Plant is feasible.
- i. If Portland agrees that the Future Plant is feasible, Portland and Lake Oswego will negotiate the Future IGA as provided in Section 2 and Lake Oswego will negotiate the PA with the P3. The PA will provide that the P3 will decommission the existing plant, develop the Future Plant and provide wastewater treatment and disposal services for a period of at least 30 years. Lake Oswego will submit the Future IGA and the negotiated PA to the Lake Oswego City Council for approval.
    - 1) If the Lake Oswego City Council does not approve the Future IGA and the negotiated PA, the Exit Option, as defined in section 1.c above, will apply.

- 2) If the Lake Oswego City Council approves the Future IGA and the PA, both documents will be submitted to the Portland City Council for approval.
  - a) If the Portland City Council does not approve the Future IGA or does not approve the terms of the PA, the Exit Option, as defined in section 1.c above, will apply.
  - b) If the Portland City Council approves the Future IGA, and approves the terms of the PA:
    - i. Lake Oswego and Portland will execute the Future IGA;
    - ii. Lake Oswego will execute the PA with the P3; and
    - iii. Portland will continue to operate and maintain the Existing Plant under the executed Future IGA until the 1984 IGA Termination Date, as defined in section 2.i below.
  - ii. If Portland disagrees with Lake Oswego's determination of feasibility, Portland will notify Lake Oswego in writing, and the Exit Option, as defined in section 1.c above, will apply.
  - iii. If, after using their best efforts in good faith to do so, the parties fail to successfully negotiate the Future IGA, the Exit Option, as defined in section 1.c above, will apply.
  - iv. If Lake Oswego is unsuccessful in negotiating a PA with the P3, the Exit Option, as defined in section 1.c above, will apply.
- e. During the development and execution of the P3 RFP and the PDA and through execution of the PA:
  - i. Portland will continue to invest in capital improvements ("the Interim Projects") to maintain the minimum operational viability of the Existing Plant and to comply with its permit requirements;
  - ii. Portland will permit the P3 proposers and the selected P3 entity access to the Tryon Creek plant properties; and
  - iii. Portland and Lake Oswego will work together to identify the necessary permit transfers, easements and other implementation measures needed for

the access to, operation of, and decommissioning of the Existing Plant by the P3, for incorporation into the Future IGA.

2. The Future IGA. If both parties determine that the Future Plant is feasible under section 1.d above, the parties will negotiate the Future IGA, which will include, at a minimum, the following terms and conditions:
  - a. The PA will require the P3 to decommission the Existing Plant, and to design and construct the Future Plant to treat and dispose of the minimum quantity of wastewater per day from each of the parties that is stated in the RFP. The parties will agree to the minimum quantities before the RFP is issued.
  - b. The PA will require the P3 to permit, finance, operate, and maintain the Future Plant for at least 30 years from the date of execution of the PA.
  - c. The PA will also require the P3 to provide adequate risk protection against (A) increased costs related to the Existing Plant if the P3 defaults prior to the Future Plant being placed into operation and (B) increased costs of design, build, finance, operate and maintain programs for the Future Plant if the P3 defaults prior to expiration of the PA.
  - d. The terms of the Future IGA for wastewater treatment and disposal services will be the longer of 30 years or the duration of the PA, after which either party may terminate the Future IGA with 10 years' notice.
  - e. The new cost-share arrangement will be based on plant flow utilization (total annual volume of flow treated) between Lake Oswego and Portland for all costs allowable under the PA, including, but not limited to, decommissioning the Existing Plant, capital improvements, pipe connections, any relocation of the pump station, financing, operations, maintenance, administration, overhead, insurance and security packages, reserve accounts, and all other cost categories set forth in the PA, together with all costs Lake Oswego has incurred after the date of this Interim IGA for the activities described in Section 1 and for the negotiation and development of the PA with the P3, including, without limitation all consultant, design and outside legal costs.
  - f. Portland will provide Lake Oswego, for inclusion in the PA as P3 project costs, a description, including cost estimates, of any necessary relocation, to Portland's standards, of collection system pipelines, fiber optic communications infrastructure, and any necessary modifications to the Tryon Creek Pump Station that are required in order to accommodate development and operation of the Future Plant. Portland will be responsible for the costs of any relocations or modifications not so described and included in the PA.

- g. Lake Oswego will bill Portland quarterly for the cost of treating and disposing of the total volume of wastewater originating in Portland’s jurisdiction (“Portland’s Quarterly Costs”).
  - i. Portland’s Quarterly Costs will be established in the Future IGA based upon flow volumes, subject to a minimum quarterly amount that will be agreed to by the parties as part of the Future IGA terms. Portland’s Quarterly Costs may only include:
    - 1) The full costs of operations, maintenance, administration, and overhead;
    - 2) The depreciation of, and return on investment for, all assets of the Future Plant that are financed and owned by Lake Oswego; and
    - 3) The actual costs to Lake Oswego under the PA for the design, construction, and financing, of the Future Plant, and costs incurred by Lake Oswego for purchasing or leasing real estate, plus all costs described in section 2.e other than operations, maintenance, administration and overhead.
  - ii. Portland’s Quarterly Costs for the items in section 2.g.i.1) will be based upon actual flow volumes. Portland’s Quarterly Costs for the items in sections 2.g.i.2) and 2.g.i.3) will be based upon the flow volume projections determined by the parties at the time the Future IGA is negotiated.
  - iii. For the avoidance of doubt, and in addition to all other costs not listed in section 2.g.i, Portland’s Quarterly Costs may not include:
    - 1) Return on investment for the acquisition of real property or easements;
    - 2) Costs not contemplated by the PA or the Future IGA, unless agreed to by Portland in writing.
- h. The parties will jointly establish their obligations for additions to or replacement of facilities and will provide projections of future needs and expansion of treatment capacity, infiltration and inflow, industrial source control and pretreatment, and allocations of treatment plant capacity. The parties will jointly prepare an updated facilities plan approximately every 10 years, in accordance with the procedures set forth in the PA.



- i. Following a period of successful operation of the Future Plant to the written satisfaction of Portland, Lake Oswego, and DEQ, the Existing Plant will no longer be maintained or operated for wastewater treatment and the 1984 IGA will be terminated. Within 90 days of that date of termination (“the 1984 IGA Termination Date”):
  - i. Portland will present Lake Oswego with a final bill for service under the 1984 IGA. Lake Oswego will pay the bill in full or will enter into a separate payment agreement with Portland. The bill will include any balances due from Lake Oswego under the Existing IGA (based upon the undepreciated value of assets at the Existing Plant) on prior capital investments on the 1984 IGA Termination Date, except for the assets allocated for the percent share of treatment and disposal of biosolids generated at the Existing Plant (“the CBWTP Solids Assets”). The issue of whether and how any amount will be paid for the CBWTP Solids Assets will be addressed in the terms of the Future IGA.
  - ii. Lake Oswego will pay its share of costs (as calculated under the 1984 IGA) of all capital projects for the Existing Plant that are only partially completed as of the effective date of the Replacement IGA, including the Interim Projects, and that did not result in completed assets meeting Portland’s policy for capitalizing assets and therefore are not reflected in the Existing IGA’s cost allocation calculation (“the Partially-Completed Asset Costs”). The issue of whether Partially-Completed Asset Costs will include the CBWP Solids Assets will be addressed in the terms of the Future IGA.
  - iii. Portland will take actions to pay off all outstanding bonds that, upon transfer of the Existing Plant to Lake Oswego, will no longer finance Portland-owned assets. As of this writing, the estimated cost to pay off those outstanding bonds is \$6 million.
- j. Final Disposition of Existing Plant Real Estate and Improvements.
  - i. Portland will transfer all permits, easements and perform all other conveyances necessary to allow access to, operation of, and demolition of the Existing Plant by the P3.
  - ii. Portland will convey the real property on which the Existing Plant is located (“the Property”) to Lake Oswego via warranty deed for \$1.00 (one dollar). The Property is comprised of the following tax lots:
    - 21E02CB01300 (10.45 acres)
    - 21E02CB01400 (2.37 acres)

- 21E02CB00900 (0.71 acre)
  - 21E02CB02700 (0.15 acre)
  - 21E02CB02800 (0.20 acre)
- iii. Portland will convey to Lake Oswego, with no warranty, all assets and materials located at the Existing Plant or necessary for the operation of the Existing Plant, regardless of location. Portland will also convey copies of all relevant records.
  - iv. If Lake Oswego demolishes the Existing Plant, Lake Oswego will pay all costs related thereto, including all costs of environmental site cleanup.
  - v. Lake Oswego will grant perpetual easements to Portland on the Property for the operation, maintenance, and future replacement of Portland's collection system pipelines, fiber optic communications infrastructure, and the Tryon Creek Pump Station.
  - vi. Portland will transfer to Lake Oswego the Oregon Division of State Lands lease for the outfall to the Willamette River.
  - vii. Upon removal of current structures, any future use by Lake Oswego of properties previously owned by Portland will comply with then-current environmental regulations, including required setbacks from natural areas.
- k. The Future IGA may be amended by mutually acceptable written amendment for any reason.
  - l. The Future IGA will provide that, except to the extent caused by Portland's negligence or willful misconduct, Lake Oswego will indemnify, defend, and hold Portland harmless from and against all claims arising from or related to the negligent acts or omissions, or the willful misconduct, of Lake Oswego and its consultants, contractors, agents, and private partners in their ownership, operation, or maintenance of the Future Plant, as applicable, and any assets or materials associated therewith, and against all liability arising from sanitary sewer overflows caused by a failure of the Future Plant to satisfy the Minimum Treatment Quantity.
3. The Replacement IGA. If the parties agree that the Future Plant is not feasible, or if either city council does not approve the Future IGA or the PA, the parties will continue to operate under the terms of the 1984 IGA. The parties will negotiate in good faith toward a replacement IGA having a term beyond that of the 1984 IGA, with, at a minimum, the terms and conditions provided in this section, as applicable:

- a. The Replacement IGA may be modified by mutually acceptable written amendment for any reason.
  - b. The Replacement IGA will include the retention of ownership of the Existing Plant by Portland, with the following assumptions:
    - i. Portland will proceed with planning efforts and capital reinvestments at the Existing Plant.
    - ii. Lake Oswego will continue to work with Portland to adopt development standards for the existing plant to make the Existing Plant an allowed use under both current and future plant zoning under the Lake Oswego Development Code.
    - iii. Portland will provide periodic updates of the facilities plan with a target interval of 10 years. The update will include updating flow and load projections, permit requirements, etc.
4. Counterparts. This agreement may be executed in one or more counterparts, including by electronic means, and all such counterparts will comprise one and the same agreement.

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For the City of Lake Oswego:

For the City of Portland:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

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Name

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Name

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Date

APPROVAL AS TO FORM

APPROVAL AS TO FORM

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City Attorney

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City Attorney

## IMPACT STATEMENT

**Legislation title:** Authorize the Bureau of Environmental Services to enter into an Intergovernmental Agreement with the City of Lake Oswego to cooperate on a potential replacement of the Tryon Creek Wastewater Treatment Plant via a public-private partnership (Ordinance)

**Contact name:** Jonas Biery, BES Business Services Manager

**Contact phone:** 503-823-1855

**Presenter name:** Mike Jordan, BES Director & Jonas Biery, BES Business Services Manager

### **Purpose of proposed legislation and background information:**

The cities of Lake Oswego and Portland have maintained a decades-long relationship regarding a sewage treatment plant (the Tryon Creek Wastewater Treatment Plant, or "TCWTP") located within the City of Lake Oswego, and built, maintained, owned and operated by the City of Portland via the Bureau of Environmental Services ("BES"). TCWTP provides wastewater treatment services to approximately 20,000 City of Portland residents, and to over 40,000 residents of the City of Lake Oswego. Service and cost-sharing responsibilities are defined in an existing intergovernmental agreement established in 1984 (the "1984 Agreement"). The TCWTP is currently in need of major, significant maintenance and upgrades. Capital reinvestment needed at TCWTP is estimated to be in the range of \$150 million to \$200 million or more over next 30 years, with nearly \$100 million of that amount anticipated within the next 10 years.

Staff from the cities of Lake Oswego and the City of Portland have been in discussion for multiple years regarding potential upgrades to or replacement of the TCWTP to ensure adequate and efficient service to both cities over the long-term, and to continue to meet environmental regulatory requirements.

This Ordinance and the accompanying draft intergovernmental agreement will support the cities of Portland and Lake Oswego to proceed with the procurement process for a public-private partnership to design, build, finance, operate and maintain ("DBFOM") a replacement sewer treatment plant within the City of Lake Oswego. The procurement process is being led and managed by the City of Lake Oswego as they will become the long-term owner of the new treatment plant and will have the direct contractual relationship with the DBFOM provider. Portland will pay for Lake Oswego for wastewater collection and treatment services rendered under the new DBFOM arrangement. (This is the reverse of the current arrangement, where Portland owns/operates and Lake Oswego pays for services.) The City of Portland expects to have two representatives on the committee responsible for selection of the DBFOM provider.

If the City of Lake Oswego procurement is successful and DBFOM of a new Lake Oswego-owned treatment plant proceeds, future City Council action will be required to approve a new intergovernmental agreement to specifically address costs and responsibilities under that new arrangement.

If the procurement is not successful, the City of Portland will continue to own and operate TCWTP, and investment in major facility upgrades will commence under the terms of the 1984 Agreement.

### **Financial and budgetary impacts:**

There is no direct budgetary or fiscal impact of this proposed action. BES staff will continue to contribute staff time to participate in the procurement process and project feasibility review.

