



<b>Subject:</b> Public-Private Partnership (P3) Project to Build, Design, Finance, Operate, and Maintain a New Wastewater Treatment Plant in the Foothills Area.	
<b>Meeting Date:</b> April 13, 2021 Study Session	<b>Staff Member:</b> Anthony Hooper, Deputy City Manager/Public Works Director  <b>Department:</b> City Manager's Office
<b>Action Required</b> <input type="checkbox"/> Motion <input type="checkbox"/> Public Hearing <input type="checkbox"/> Ordinance <input type="checkbox"/> Resolution <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Council Direction <input type="checkbox"/> Consent Agenda	<b>Advisory Board/Commission Recommendation</b> <input type="checkbox"/> Approval <input type="checkbox"/> Denial <input type="checkbox"/> None Forwarded <input checked="" type="checkbox"/> Not Applicable  <b>Comments:</b>
<b>Staff Recommendation:</b> Direct staff to return to Council on May 4 with a Preliminary Service Agreement (PSA) with EPCOR to begin Phase 1 of the Project to design, build, finance, operate, and maintain a new wastewater treatment plant.	
<b>Recommended Language for Motion:</b> N/A	
<b>Project / Issue Relates To:</b> <input checked="" type="checkbox"/> Council Goals/Priorities <input type="checkbox"/> Adopted Master Plan(s) <input type="checkbox"/> Not Applicable	

#### ISSUE BEFORE COUNCIL

At the May 4 Council meeting, staff expects to recommend that the Council select EPCOR Foothill Water Partners (EPCOR) as the Project Company and approve a 14-month Preliminary Services Agreement (PSA) to provide a variety of preliminary services that would lead to the design, build, finance, operate, and maintenance of a wastewater treatment plant ("Project"), to replace the City of Portland's Tryon Creek Wastewater Plant.

This study session is designed to update, familiarize, and answer Council's questions about the Project, and particularly this PSA phase (Phase 1). Phase 1 is a significant step forward in this Project and involves a significant financial commitment.

If the results of testing, conceptual design, financial analysis and preliminary engineering in Phase 1 demonstrate that a new wastewater treatment plant would be the same impact to rates as upgrading the existing plant, meets DEQ requirements, and is technically viable, then the City

would proceed to Phase 2 of building, financing, operating and maintaining the new facility. With a decision to move forward, a new Intergovernmental Agreement with Portland would need to be developed and agreed upon by both city councils by July 2022.

## **INTRODUCTION**

The Preliminary Services Agreement (PSA) will provide that EPCOR, as the selected Project Company, complete 60% design plans, submit a permit application to the Department of Environmental Quality (DEQ), analyze the potential plant site, develop definitive pricing, and more, all to determine the feasibility of construction and operation of a wastewater plant at or below the projected costs of upgrading and operating the existing Portland facility.

There will be opportunities for the Lake Oswego and Portland Council to cancel the project from the Project until July 2022. Because EPCOR will be incurring expenses during this Phase 1, if the City elects to cancel the project, the City will need to reimburse EPCOR up to \$3,836,000, depending on the context of the break-up and how close the decision to cancel is made to July 2022. The City of Portland would be responsible for reimbursing EPCOR for the same amount.

City consultant costs are estimated to be about \$100,000 per month during the PSA period; however, Portland will pay 50% of these costs if the project is canceled; otherwise these costs they will be included in the Project Cost and Portland will share the cost according to their relative amount of sewage that is treated by the new plant.

If Lake Oswego or Portland “off-ramps,” wastewater would continue to be treated at the existing plant, and Portland would restart capital projects to upgrade that plant.

## **BACKGROUND**

This Project has gone to Council eight times, first in December 2018 and last in November 2020. The Council Reports for those meetings are available on the project page at: <https://www.ci.oswego.or.us/publicworks/tryon-creek-wastewater-treatment-plant-project>.

The City and Portland, through the Interim IGA (Attachment 1), have been exploring whether to build a new wastewater treatment plant in the Foothills area through a P3 or to continue with the existing arrangement, with the City of Portland investing in the 1965 wastewater treatment plant in order to meet necessary DEQ requirements and the costs being passed along to ratepayers.

In December 2018, the Council approved an alternative procurement method for a P3 design, build, finance, operate and maintenance of a new wastewater treatment plant. On November 17, 2020, the Council authorized an additional \$335,000 in consulting services to evaluate and select a P3 Project Company. During this period, we have spent \$288,000. To date, the City has spent \$1,021,000. Portland is responsible for reimbursing us for \$144,000 of this amount.

On February 10, 2021, the City received proposals from Foothills Water Partnerships and EPCOR. On March 2, the 5-person selection committee, including two members from the City of Portland, conducted 1 ½ hour interviews with each of the proposers. On mid-March, the selection committee, ranked EPCOR as the highest-ranked proposer. A notice of rankings was issued on March 12, with a 7-day protest period. No protest to the rankings was filed.

Again, on May 4, the Council will decide whether to undertake the first phase, selecting EPCOR as the Project Company and entering into a Preliminary Services Agreement (PSA) to complete the Phase 1 work. EPCOR and city staff are currently in discussions on the terms on the PSA and it is expected that staff will recommend approval of a form of PSA that is acceptable to EPCOR.

### **Key Project Facts**

In summary, the main decision is whether it makes more sense to build a new plant through EPCOR or upgrade the existing plant. Here is a recap of key facts of the Project:

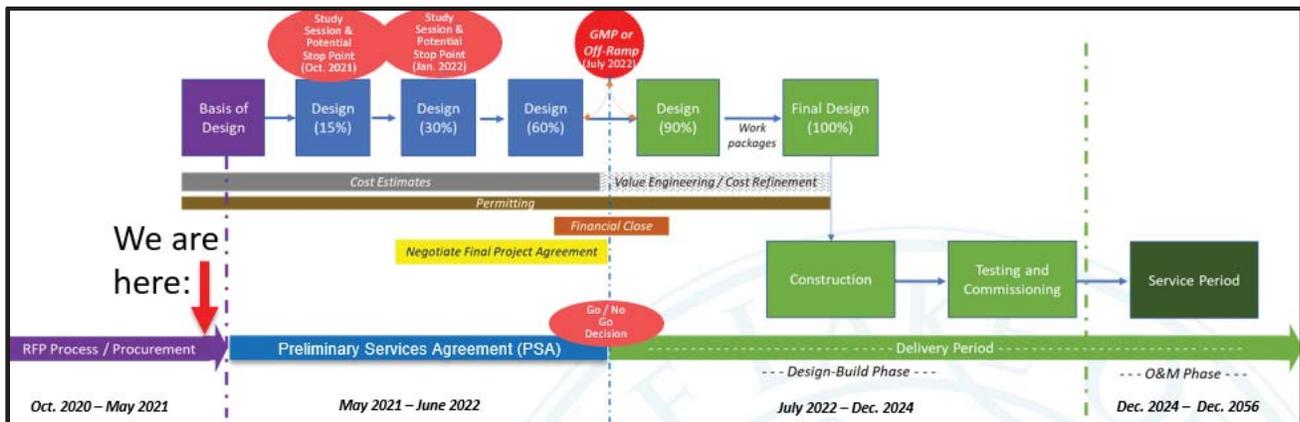
- **Upgrade Costs.** Portland must make upgrades to the existing Tryon Creek Wastewater Treatment Plant (TCWWTP) estimated at approximately \$130 million over the next 10-years to meet Department of Environmental Quality (DEQ) permitting requirements. Portland has an expired permit and needs these upgrades to be in compliance into the future. In addition, the existing plant needs further investment in 2030 - 2050.
- Portland owns, operates, and maintains the existing TCWWTP, adjacent to Foothills Park. Lake Oswego accounts for 65% to 70% of the flow to the TCWWTP. If Lake Oswego builds a new plant, then Lake Oswego would be the owner/operator of the new plant and Portland would be a customer of the new Lake Oswego plant. The Interim IGA sets forth the framework for a "Future IGA," under which Portland would be customer and pay its share of the costs through user rates.
- Future sewer rate increases are projected to be 3.9% per year for 15 years based on Portland's projections to upgrade the existing plant. There are other variables that effect sewer rates that are outside the scope of this project.
- Through the P3 contracting process, Lake Oswego would contract with EPCOR to design, build, finance, operate, and maintain the plant for a 32-year period of time (two years to build and 30 years to operate/maintain).
- Lake Oswego and Portland have an Interim Intergovernmental Agreement (IIGA) that provides for a 50/50 split of the PSA costs. The IIGA also states that the TCWWTP's 12.7 acres site will be sold to Lake Oswego for \$1; Lake Oswego is responsible for demolition of the old plant and remediation of the land.
- The current 1984 Agreement between the Portland and Lake Oswego is still in place. Per the IIGA, a Future IGA will need in July 2022 if Lake Oswego and Portland decide to approve Phase 2 and move into the construction phase. The 1984 agreement may lapse, upon 5-year written notice from Portland, in 2034.
- DEQ has stated that it will take two years from the time the DEQ permit application is submitted for them to review and, if all standards are met, approve a permit. A DEQ permit is required prior to starting construction.

- The current plant must remain operational while the new plant is being built. The new plant is expected to use the existing outfall. Therefore, the new plant needs to be near the existing plant in the Foothills area in order to connect to existing pipes and the outfall.
- The new plant will have the following benefits compared to upgrading the existing plant:
  - 6 acre footprint, compared to 14 acres with the expanded old plant.
  - Fully enclosed buildings that will blend into the neighborhood; the old plant does not.
  - Emission of odor will be reduced.
  - Cleaner effluent discharging into the Willamette River.
  - Lower life-cycle cost.

### Progressive Design-Build Process

The process that we are using for this project is a “Progressive Design-Build.” This process is similar to that of a Construction Manager/General Contractor (CM/GC) in that we select our P3 Project Company prior to doing design work. This process allows for Lake Oswego and EPCOR to work collaboratively in solving problems and design development. Figure 2 shows a diagram of the “Progressive Design-Build” process.

**Figure 1: Key Elements and Timeline for Progressive Design-Build Process**



The timeline will include significant public outreach, developed in tandem with EPCOR.

### Phase 1 Tasks and Timeline

There are four tasks that EPCOR will accomplish during the 14-month PSA phase:

**Task 1: Initial Development and Basis of Design Review (BODR):**

Includes geotechnical/environmental analysis of the preferred site, creating a Basis of Design document to be used for submitting for the DEQ Permit, creating a variety of plans (project management, financing, operations and maintenance, etc.), and more.

**Task 2: 30% Submittal Package:**

Includes bringing the design to 30% completion, which will allow for greater certainty on pricing and provide enough information to advance DEQ permitting.

**Task 3: 60% Submittal Package:**

Includes bringing the design to 60% completion, which will allow EPCOR to know with certainty whether they can meet the affordability cap.

**Task 4: Definitive Project Submittal**

Includes developing detailed information on pricing and financing.

**Figure 2: Schedule for Preliminary Services Agreement (PSA)**

Milestone Description	Date (Proposed)
Proposal Submission	February 10, 2021
Selection Announcement	March 12, 2021
Notice to Proceed	May 10, 2021
Task 1 Package Start	May 10, 2021
Project Kick-off Meeting	May 23, 2021
Conceptual O&M Review Meeting	May 28, 2021
Conceptual Design Review Meeting	June 8, 2021
Baseline Project Schedule	June 8, 2021
Permitting Plan Submission	June 23, 2021
Conceptual Financial Plan Review Meeting	June 28, 2021
Draft Basis of Design Submission	August 22, 2021
Task 1 Package Submission	September 13, 2021
Task 2 Package Start	<b>October 14, 2021</b>
Task 2 Package Submission	<b>December 19, 2021</b>
Task 3 Package Start	<b>January 19, 2022</b>
60% Technical Deliverable Material Submission	<b>April 3, 2022</b>
Task 3 Package Submission	<b>April 18, 2022</b>
Task 4 Package Start	<b>May 19, 2022</b>
Task 4 Package Submission	<b>June 7, 2022</b>

**Future Opportunities to Cancel the Project up until July 2022**

If the Council decides to move forward, EPCOR will be completing a variety of tasks under the PSA, such as testing, conceptual design, financial analysis and preliminary engineering. The costs of these activities are estimated at \$6,975,225. Lake Oswego and Portland have the right to cancel the project for convenience with a 14-day notice. If either city elects to cancel the project, EPCOR must be paid for any work completed to that point. If the project moves forward to completion, then these costs will be rolled up into the project total and financed by EPCOR. In turn, Lake Oswego will give them annual payments. Portland will also pay Lake Oswego as a customer, and these payments will pass through to EPCOR.

The longer the preliminary services period goes, the more costly it will be to cancel the project. Conversely, the longer the project goes on, the more information the Council will have to make decisions. If the City decides to off-ramp in July 2022, with all the work completed by EPCOR, then there will be a 10% premium, and the cost for preliminary services becomes \$7,672,000. In exchange, all the documents would become property of the City. Figure 3 shows the cost to cancel the project in October 2021, January 2022, and July 2022.

**Figure 3: Payment to Project Company to Cancel the Project at Various Stages**

Organization	October 2021	January 2022	July 2022
Lake Oswego	\$1,346,500	\$2,374,000	\$3,836,000
Portland	\$1,346,500	\$2,374,000	\$3,836,000
<b>Total</b>	<b>\$2,693,000</b>	<b>\$4,748,000</b>	<b>\$7,672,000</b>
<b>EPCOR Completes</b>	<b>Task #1</b>	<b>Task #2</b>	<b>Tasks #3 &amp; 4</b>

*October 2021:* EPCOR will have completed all the work under task #1. The Council will have the opportunity to off-ramp but it will cost Lake Oswego up to \$1.34 million to reimburse EPCOR for all of their work up to that point. Equally, the City of Portland will also be required to pay \$1.34 million since they are a 50/50 partner.

*January 2022:* EPCOR will have completed 30% designs and will have project cost information. If off-ramped here, Lake Oswego will reimburse EPCOR up to \$2.37 million, and similar for Portland.

*July 2022:* EPCOR will present new information, including 60% designs and a definitive price proposal, will be available. This meeting will be to decide whether to proceed with Phase 2. If the Council decides to off-ramp, then it will cost the City up to \$3.84 million, and similar for Portland.

The longer the project goes on, the more costly it will be to off-ramp.

### City Consultant Costs

The consultants are estimated to cost \$100,000 per month, with the majority of the cost going to toward engineering review services by an owner's representative firm. These consultant costs are split with Portland since October 26, 2020, the date the Interim Intergovernmental Agreement became effective. Since costs are now split, the cost to Lake Oswego for consultant services is estimated to be \$50,000 per month until July 2022 when Phase 2 would be initiated. Consultant oversight, particularly from an engineering firm with expertise with newer wastewater treatment technologies, will be critical in ensuring the success of the Project.

**Figure 4: Consultant Costs (Estimated)**

Organization	October 2021	January 2022	July 2022
Lake Oswego	\$1,177,000	\$1,327,000	\$1,627,000
Portland	\$444,000	\$594,000	\$894,000
<b>Total</b>	<b>\$1,621,000</b>	<b>\$1,921,000</b>	<b>\$2,521,000</b>
<b>EPCOR Completes</b>	<b>Task #1</b>	<b>Task #2</b>	<b>Tasks #3 &amp; 4</b>

## Aggregate Projected Project Company Payment and City Consultant Costs to Off-Ramp

Lastly, this table shows the combined totals of EPCOR’s reimbursable work and the consultant costs up to that point. Once again, if the City off-ramps in October 2021, the project cost to Lake Oswego will be about \$2.52 million. If the Council cancels the project in January, then the project cost will be about \$3.70 million. Lastly, if either Lake Oswego or Portland decides to pull the plug on the project in July 2022, then the final cost to the City will be about \$5.46 million. As Portland is a partner, it will cost the City of Portland about \$4.73 million. While the City has the fund balance necessary to cover the cost, the \$5.46 million will come at the expense of future capital projects or will require additional water rate increases.

**Figure 5: Aggregate Estimated Costs to Cancel the Project (Table 4 and 5 Combined)**

Organization	October 2021	January 2022	July 2022
Lake Oswego	\$2,523,500	\$3,701,000	\$5,463,000
Portland	\$1,790,500	\$2,968,000	\$4,730,000
<b>Total</b>	<b>\$4,314,000</b>	<b>\$6,669,000</b>	<b>\$10,193,000</b>
<b>EPCOR Completes</b>	<b>Task #1</b>	<b>Task #2</b>	<b>Tasks #3 &amp; 4</b>

If the Project continues to Phase 2, then EPCOR’s preliminary service costs of up to \$6,975,225 are rolled into the Project Cost, along with the construction, operating, and maintenance costs, and recovered by EPCOR as part of the annual capital charge component of the annual Service Fee.

### Breakage Fees

There are other situations that would cause the City to pay a lesser amount than in the scenario where the City decides to off-ramp.

*Termination for Convenience:* Lake Oswego and Portland would reimburse EPCOR for 100% of work to that point. With a 14-day notice, the City can terminate the agreement without cause. The City gets rights to all documents and work complete to that point.

*Termination for Cause* – Lake Oswego and Portland would reimburse EPCOR for 65% of work to that point, but the City would own all of the Project Company’s work and could pursue a cause of action for actual damages. This would come into play if EPCOR did not fulfill its agreement obligations in a timely and proper manner.

*Termination for Relief Events* – Lake Oswego and Portland would reimburse EPCOR for 100% of work to that point. This would apply if there were a “Relief Event” that caused the project to be infeasible or too expensive to develop, e.g., Change in Law; Force Majeure; unreasonable delays by a Governmental Body in issuing any required Governmental Approval; property access rights for the Project Company at the Project Site being denied; pre-existing Project Site conditions that the Project Company could not have reasonably been aware of based upon information in the “Virtual Data Room” established pursuant to the RFP, other publicly available information and the physical observations proposers were allowed to make pursuant to the RFP.

*City Off-Ramp Rights* – See *Future Opportunities to Off-Ramp up until July 2022*, discussion above.

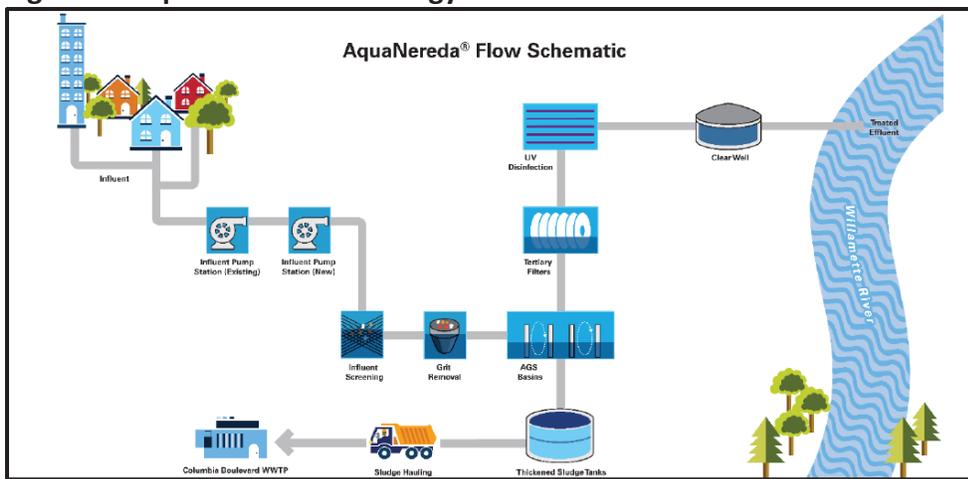
### Technology: Two Choices

As part of EPCOR’s proposal, they have offered two technology choices: AquaNereda or Membrane BioReactor (MBR) Technology. The City’s project team believes that both choices are viable. During the first month of the PSA, the project team and EPCOR will work together to select one of the two options.

#### AquaNereda

The first choice offered is AquaNereda. This choice has reduced upfront capital costs and lower long-term operational and maintenance costs than the MBR technology. This technology is also adaptable to highflows caused by rain infiltration into the wastewater system by being able to handle the peak flows through their treatment. A flow schematic of this technology is shown below:

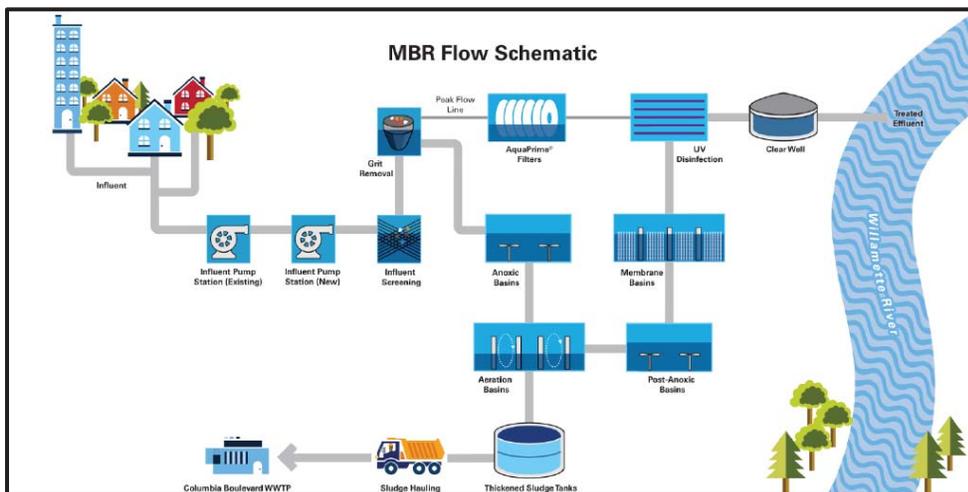
**Figure 6: AquaNereda Technology**



#### Membrane Bioreactor (MBR)

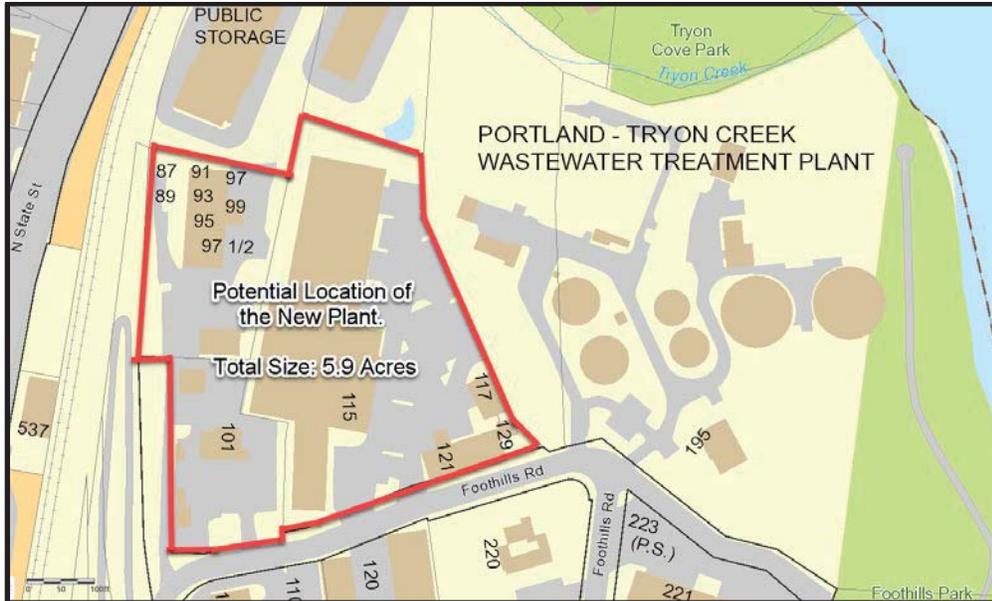
The MBR technology itself allows for high-quality wastewater and eliminates the need for additional filter treatment. A detailed flow schematic for MBR is shown in Figure 7.

**Figure 7: Membrane Bioreactor (MBR) Technology**



The Project Company will, per the PSA, conduct geotechnical and environmental studies on the potential location of the new plant. The preferred site is shown in red. If that site doesn't work, then an alternate location would be needed for the Project to continue.

**Figure 8: Preferred Site Location**



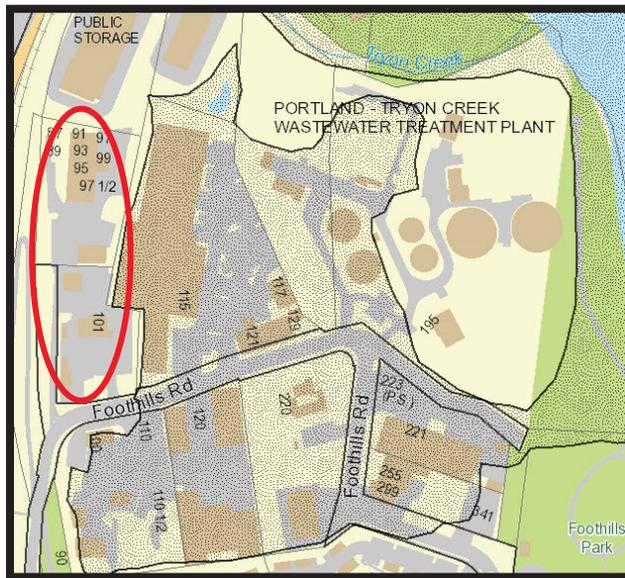
There are hazards to overcome as part of the project. A prominent one is that most of Foothills area is in a floodplain. In 1996, there was a flood from the Willamette River that was rated as nearly a 100-year flood event by FEMA and was one of the most significant floods in Oregon's history. Shown below, is Lake Auto Service, which is now known as Thor's Auto Service. This photo is taken during the 1996 flood event and is located a block away from the Tryon Creek Wastewater Treatment Plant.

**Figure 9: 1996 Flood in Foothills Area**



As shown, in Figure 10 below, the 1996 flood caused most of the existing Tryon Creek Plant to be underwater. The Project Company will be tasked with mitigating flood potential. Fortunately, part of the preferred site is located higher in elevation (circled in red), and was not underwater in the 1996 flood, and is the proposed location of the administrative and headworks buildings.

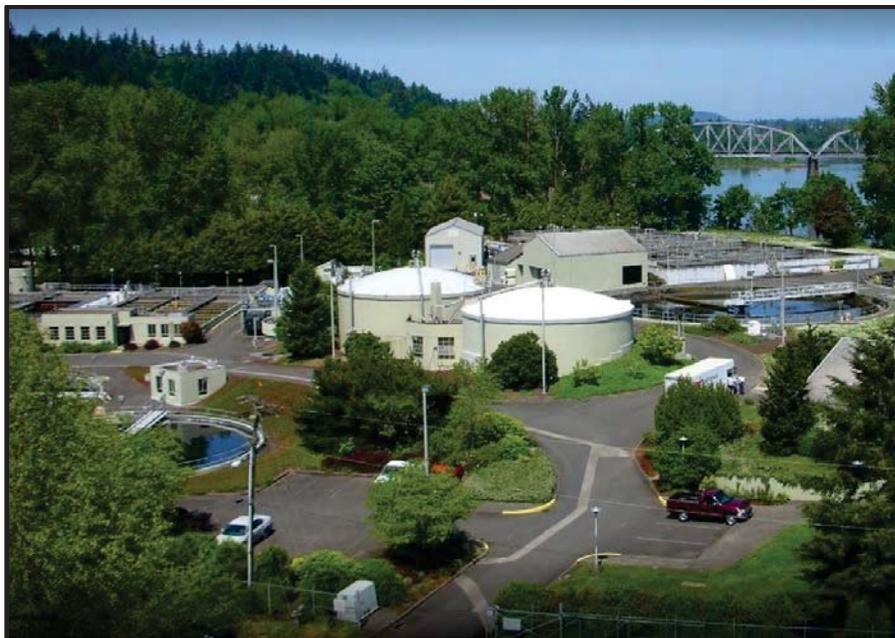
**Figure 10: 1996 Flood**



## SITE DESIGN

As mentioned earlier in the report, the current Wastewater Treatment Plant was built in 1965 and expanded in 1976, and is shown in Figure 11.

**Figure 11: Existing Tryon Creek Wastewater Treatment Plant**



As part of the proposal, EPCOR has presented some very early renderings of what the new Wastewater Treatment Plant could look like in Figure 12.

**Figure 12: Rendering of New Treatment Plant Site**



Figure 13 shows a concept close-up of the Wastewater Treatment building itself. The treatment processes are fully enclosed by a building. A passerby may not even realize it is a treatment facility.

**Figure 13: Rendering of Treatment Plant Facility**



Figure 14 shows a concept close-up of the administrative building on the left and the headworks building at the back center of the rendering. The headworks is used to screen out solids, grit, and other debris. Once again, this facility is fully enclosed by a building.

**Figure 14: Rendering of Administrative Building and Headworks**

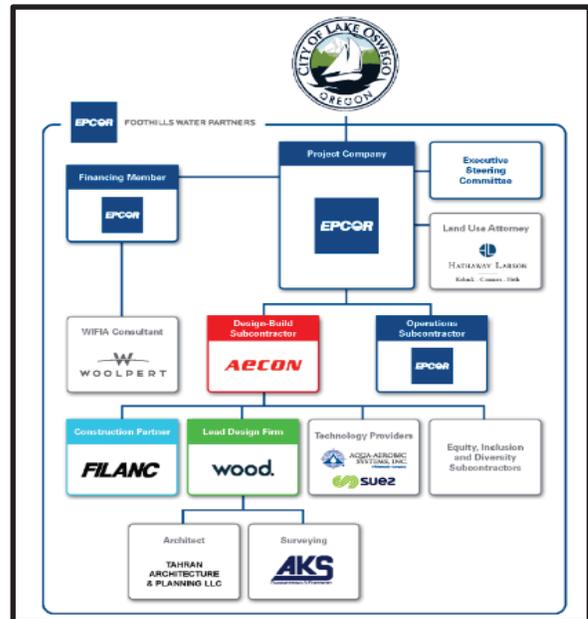


The City will have a lot of opportunity to provide feedback onto the design as EPCOR starts working from this concept towards having 30% designs.

**Figure 15: EPCOR Team Structure**

**EPCOR’s Brief Bio**

EPCOR is a leader in delivering wastewater treatment plants through the P3 process (designed, built, financed, operated and maintained). EPCOR USA is headquartered in Phoenix, Arizona. EPCOR USA provides water, wastewater, wholesale water and natural gas services to approximately 780,000 people across 42 communities and 18 counties in Arizona, New Mexico and Texas. Other key members of the EPCOR team for this project include Aecon Infra Development Inc., Wood Environment & Infrastructure Solutions and J.R. Filanc Construction Company Inc.



## FISCAL IMPACT

The following table outlines how much has been spent on this project since its inception.

**Figure 16: Consultant Invoices as of March 31, 2021**

Consultant	Function	Total Contract Amount	Total Invoiced Since Council's \$335,000 Authorization on 11-17-2020	Total Invoiced Since the Start of Project
Jones Lang LaSalle (Jill Jamieson). <i>The contract has been terminated.</i>	Primary Owner's Rep & Financing Advisor	\$100,000		\$88,000
Illuminati Infrastructure Advisors (Jill Jamieson)	Primary Owner's Rep & Financing Advisor	\$145,000* <i>Amendment in progress</i>	\$58,000	\$125,000
WCX ( <i>No longer in Business</i> )	Owner's Rep	\$10,000		\$4,000
Carollo Engineers	Technical Advisor	\$200,000	\$71,000	\$170,000
Hawkins, Delafield & Wood	Legal Advisor	\$594,000	\$159,000	\$476,000
Argent Management ( <i>Done</i> )	2018 Feasibility Study	\$150,000		\$150,000
FCS Consulting	Wastewater Rate Model	\$8,000		\$8,000
	<b>Total</b>	<b>\$1,207,000</b>	<b>\$288,000</b>	<b>\$1,021,000</b>

If the Council approves the Preliminary Services Agreement, the Project will need authorization for an additional \$1,400,000 in consultant services to cover the 14-month preliminary services period. Portland will be responsible for reimbursing us for half of that cost.

Figure 16 shows that the City of Lake Oswego has paid \$1,021,000 so far in the project. Of this amount, Portland is responsible for reimbursing LO for \$144,000 of this cost if the project is not completed. As discussed in detail in the report, the City is also responsible for reimbursing EPCOR for deliverables if the project is cancelled. The total cost that LO must reimburse EPCOR will range up to \$3,836,000 if the project is off-ramped in July 2022. Portland would be responsible for paying this same amount of money. With the consultant costs added in, the potential cost to Lake Oswego could be up to \$5,463,000 and the cost to Portland would be up to \$4,730,000. If the project was cancelled, these would be sunk costs.

## RECOMMENDATION

Direct staff to return to Council on May 4 with a Preliminary Service Agreement (PSA), at which the Council will select EPCOR as the Project Company, to begin Phase 1 of the Project to design, build, finance, operate, and maintain a new wastewater treatment plant.

## ATTACHMENTS

Attachment 1 – Interim Intergovernmental Agreement

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.

*The remainder of this page is intentionally blank.*

For the City of Lake Oswego:

  
Signature

Martha J. Bennett  
Name

City Manager  
Title

10/20/20  
Date

APPROVAL AS TO FORM

  
City Attorney

For the City of Portland:

Michael Jordan Digitally signed by Michael Jordan Date: 2020.10.26 17:42:10 -07'00'  
Signature

Michael Jordan  
Name

Director, BES  
Title

10/26/2020  
Date

APPROVAL AS TO FORM

APPROVED AS TO FORM  
  
CITY ATTORNEY  
City Attorney