

**STATE OF MINNESOTA
JOINT POWERS AGREEMENT
City of Duluth – Comparative Analysis of Mud Lake**

This agreement is between the State of Minnesota, acting through its commissioner of Natural Resources ("State") and the City of Duluth ("Governmental Unit").

Recitals

Under Minnesota Statute §§ 15.061 and 471.59, the State is empowered to engage such assistance as deemed necessary. The Governmental Unit and State are in need of a comparative analysis of alternatives for the causeway across Mud Lake ("Project") to develop, depict, and assess habitat and human service metrics. This project will enhance fish and wildlife habitat, improve water quality, and improve public recreation at Mud Lake in St. Louis County, MN.

Agreement

1 Term of Agreement

- 1.1 **Effective date:** **Upon execution**, or the date the State obtains all required signatures under Minnesota Statutes Section 16C.05, subdivision 2, whichever is later.
- 1.2 **Expiration date:** **October 10, 2019**, or until all obligations have been satisfactorily fulfilled, whichever occurs first.

2 Agreement between the Parties

- 2.1 Governmental Unit's responsibilities. The Governmental Unit shall:
 - a. Contract with a consultant to visually depict and describe alternatives to the Project as described in Attachment A, Scope of Work, which is attached to and incorporated into this agreement. The consultant shall also provide cost estimates for each of the alternatives.
 - b. Provide the State with 1 copy of the resulting tables, maps, etc. in electronic format.
- 2.2 State's responsibilities. The State shall:
 - a. Reimburse the Governmental Unit for up to \$5,000 for actual costs for this work.

3 Payment

The State will promptly pay the Governmental Unit after the Governmental Unit presents an itemized invoice for actual work performed on the project as outlined in Attachment A, and the State's Authorized Representative accepts the invoiced construction work. The State will pay for up to half of the actual costs of the work, not to exceed **\$5,000**.

Payments under this agreement will be made from state Outdoor Heritage Fund funds, as appropriated by the Minnesota State Legislature as Minnesota Session Laws 2017, Chapter 91, Article 1, Section 2, Subd. 5(f). The Governmental Unit is responsible for compliance with all requirements placed on these funds under this appropriation and M.S. 97a.056.

Partial payments are allowed. Payments for work completed through June 30 of each year must be submitted to the State's Authorized Representative no later than July 20 of that same year. Invoices must include copies of appropriate documentation to prove the work has been completed.

Final invoices for the project must be submitted within 30 days after the construction of the project is completed, but no later than July 20, 2019.

The total obligation of the State under this agreement will not exceed **\$5,000**.

4 Authorized Representatives

The State's Authorized Representative is Pat Collins, St. Louis River Restoration Consultant, 525 Lake Avenue South #415, Duluth, MN 55802, 218-302-3242, Pat.collins@state.mn.us, or his/her successor.

The Governmental Unit's Authorized Representative is Diane Desotelle, Natural Resources Coordinator, 411 W. 1st St., Duluth, MN 55802, 218-730-4329, ddesotelle@duluth.mn.gov.

5 Assignment, Amendments, Waiver, and Contract Complete

- 5.1 **Assignment.** The Governmental Unit may neither assign nor transfer any rights or obligations under this agreement without the prior consent of the State and a fully executed Assignment Agreement, executed and approved by the same parties who executed and approved this agreement, or their successors in office.
- 5.2 **Amendments.** Any amendment to this agreement must be in writing and will not be effective until it has been executed and approved by the same parties who executed and approved the original agreement, or their successors in office.
- 5.3 **Waiver.** If the State fails to enforce any provision of this agreement, that failure does not waive the provision or its right to enforce it.
- 5.4 **Contract Complete.** This agreement contains all negotiations and agreements between the State and the Governmental Unit. No other understanding regarding this agreement, whether written or oral, may be used to bind either party.

6 Indemnification

In the performance of this contract by the Governmental Unit, or Governmental Unit's agents or employees, the Governmental Unit must indemnify, save, and hold harmless the State, its agents, and employees, from any claims or causes of action, including attorney's fees incurred by the state, to the extent caused by Governmental Unit's:

- 1) Intentional, willful, or negligent acts or omissions; or
- 2) Actions that give rise to strict liability; or
- 3) Breach of contract or warranty.

The indemnification obligations of this section do not apply in the event the claim or cause of action is the result of the State's sole negligence. This clause will not be construed to bar any legal remedies the Governmental Unit may have for the State's failure to fulfill its obligation under this contract.

7 State Audits

Under Minnesota Statute § 16C.05, subdivision 5, the Governmental Unit's books, records, documents, and accounting procedures and practices relevant to this agreement are subject to examination by the State and/or the State Auditor or Legislative Auditor, as appropriate, for a minimum of six years from the end of this agreement.

8 Government Data Practices

The Governmental Unit and State must comply with the Minnesota Government Data Practices Act, Minnesota Statute Ch. 13, as it applies to all data provided by the State under this agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by the Governmental Unit under this agreement. The civil remedies of Minnesota Statute § 13.08 apply to the release of the data referred to in this clause by either the Governmental Unit or the State.

If the Governmental Unit receives a request to release the data referred to in this Clause, the Governmental Unit must immediately notify the State. The State will give the Governmental Unit instructions concerning the release of the data to the requesting party before the data is released.

9 Venue

Venue for all legal proceedings out of this agreement, or its breach, must be in the appropriate state or federal court with competent jurisdiction in Ramsey County, Minnesota.

10 Termination

10.1 **Termination.** The State or the Governmental Unit may terminate this agreement at any time, with or without cause, upon 30 days' written notice to the other party.

10.2 **Termination for Insufficient Funding.** The State may immediately terminate this agreement if it does not obtain

funding from the Minnesota Legislature, or other funding source; or if funding cannot be continued at a level sufficient to allow for the payment of the services covered here. Termination must be by written or fax notice to the Governmental Unit. The State is not obligated to pay for any services that are provided after notice and effective date of termination. However, the Governmental Unit will be entitled to payment, determined on a pro rata basis, for services satisfactorily performed to the extent that funds are available. The State will not be assessed any penalty if the agreement is terminated because of the decision of the Minnesota Legislature, or other funding source, not to appropriate funds. The State must provide the Governmental Unit notice of the lack of funding within a reasonable time of the State's receiving that notice.

11 E-Verify Certification (In accordance with Minn. Stat. §16C.075)

For services valued in excess of \$50,000, Contractor certifies that as of the date of services performed on behalf of the State, Contractor and all its subcontractors will have implemented or be in the process of implementing the federal E-Verify program for all newly hired employees in the United States who will perform work on behalf of the State. Contractor is responsible for collecting all subcontractor certifications and may do so utilizing the E-Verify Subcontractor Certification Form available at <http://www.mmd.admin.state.mn.us/doc/EVerifySubCertForm.doc>. All subcontractor certifications must be kept on file with Contractor and made available to the State upon request.

12. Intellectual Property Rights

(a) Rights. All rights, title, and interest in all of the intellectual property rights, including copyrights, patents, trade secrets, trademarks, and service marks in the works and documents shall be jointly owned by the Governmental Unit and the State. Works shall mean all inventions, improvements, discoveries (whether or not patentable), databases, computer programs, reports, notes, studies, photographs, negatives, designs, drawings, specifications, materials, tapes, and disks or other materials whether intangible or electronic forms, prepared by the Governmental Unit, its employees, and subcontractors, either individually or jointly with others in the performance of this Contract. Documents shall mean the originals of any databases, computer programs, reports, notes, studies, photographs, negatives, designs, drawings, specifications, materials, tapes, disks, or other materials, whether intangible or electronic forms, prepared by the Governmental Unit, its employees, or subcontractors, in the performance of this Contract. The ownership interests of the State and the Governmental Unit in the works and documents shall equal the ratio of each party's contributions to the total described in the budget of this Contract, except that the State's ownership interests in the works and documents shall be not be less than 50 percent (50%). The party's ownership interesting the works and documents shall not be reduced by any royalties or revenues received from the sale of the products or the licensing or other activities arising from the use of the works and documents. Each party hereto shall, at the request of the other, execute all papers and perform all other acts necessary to transfer or record the appropriate ownership interests in the works and documents.

(b) Obligations

1. *Notification.* Whenever any invention, improvement or discovery (whether or not patentable) is made or conceived for the first time or actually or constructively reduced to practice by the Governmental Unit, including its employees and contractors, in the performance of this Contract, the Governmental Unit shall immediately give the State's Authorized Representative written notice thereof, and shall promptly furnish the Authorized Representative with complete information and/or disclosure thereon. All decisions regarding the filing of patent, copyright, trademark or service mark applications and/or registrations shall be the joint decision of the Governmental Unit and the State, and the costs for such applications shall be divided as agreed by the parties at the time of the filing decisions. In the event the parties cannot agree on said filing decisions, the filing decision will be made by the State.
2. *Representation.* The Governmental Unit shall perform all acts, and take all steps necessary to ensure that all intellectual property rights in the works and documents are the sole property of the Governmental Unit and the State as agreed herein, , and that no Governmental Unit employee, agent, or contractor retains any interest in and to the works and documents. The Governmental Unit represents and warrants that the works and documents do not and shall not infringe upon any intellectual property rights of others. The Governmental Unit shall indemnify, defend, and hold harmless the State, at the Governmental Unit's expense, from any action or claim brought against the State to the extent that it is based on a claim that all or parts of the works and documents infringe upon the intellectual property rights of others. The Governmental Unit shall be responsible for payment of any and all such

claims, demands, obligations, liabilities, costs, and damages including, but not limited to, attorney fees. If such a claim or action arises, or in the Governmental Unit's or the State's opinion is likely to arise, the Governmental Unit shall, at the State's discretion, either procure for the State the right or license to use the intellectual property rights at issue or to replace or modify the allegedly infringing Works or Documents as necessary and appropriate to obviate the infringement claim. This remedy of the State shall be in addition to and not exclusive of other remedies provided by law.

- (c) **Uses of the works and documents.** The State and Governmental Unit shall joint have the right to make, have made, reproduce, modify, distribute, perform, and otherwise use the Works, including Documents produced under this Contract, for noncommercial research, scholarly work, government purposes, and other noncommercial purposes without payment or accounting to the other party. No commercial development, manufacture, marketing, reproduction, distribution, sales or licensing of the Works, including Documents shall be authorized without a future written contractual agreement between the parties.
- (d) **Possession of documents.** The Documents may remain in the possession of the Governmental Unit. The State may inspect any of the Documents at any reasonable time. The Governmental Unit shall provide a copy of the Documents to the State without cost upon the request of the State.
- (e) **Survivability.** The rights and duties of the State and the Governmental Unit provided for above shall survive the expiration or cancellation of this Contract.

1. STATE ENCUMBRANCE VERIFICATION

Individual certifies that funds have been encumbered as required by Minnesota Statute §§ 16A.15 and 16C.05.

Signed: Mary Lavelle
 Date: 9-27-18
 SWIFT Contract No. 148390

2. GOVERNMENTAL UNIT

By: _____
 Title: _____
 Date: _____

By: _____
 Title: _____
 Date: _____

3. STATE AGENCY

By: _____
 (with delegated authority)
 Title: _____
 Date: _____

4. COMMISSIONER OF ADMINISTRATION
As delegated to the Office of State Procurement

By: _____
 Date: _____

Distribution:
 Agency
 Governmental Unit
 State's Authorized Representative - Photo Copy

Scope of Work for a Comparative Analysis of Mud Lake

Summary

The City of Duluth is looking at the following alternatives for the causeway across Mud Lake with our agency partners to develop, depict, and assess habitat and human service metrics:

- **Alternative 1** – *Causeway retained in current state for rail use. Contaminant remediation, environmental restoration, and public access will be optimized within those bounds.*
- **Alternative 2a** – *Causeway retained for rail with a southern opening and a new northern opening to optimize water flow. (assumption will be rail bridges) Remediation, restoration, and access will be optimized within those bounds.*
- **Alternative 2b** – *Causeway retained for trail with a southern opening and a new northern opening to optimize water flow. (assumption will be bike/pedestrian bridge). Optimize remediation, restoration, and access within those bounds.*
- **Alternative 3** – *Causeway eliminated to maximize water flow, vestiges retained on ends for public fishing, trail on mainland. (This is the current City proposal). Optimize remediation, restoration, and access within those bounds.*

MNDNR and EPA-MED partners have offered to conduct and present this comparative analysis from a strictly scientific perspective, however, the City, as landowner retains the right to select the preferred option. To complete the assessment, the City will contract a consultant to visually, depict, describe, and provide cost estimates for the alternatives.

Process and Timeline

Step 1 – Mud Lake Restoration Alternatives Development – September – October

Using existing data, prepare similar looking maps and tables based on previously identified conceptual plans of the alternatives. The maps will show approximate bathymetry, remediated areas, habitat areas, intended land use classes, and recreational and accessibility amenities. The tables will provide estimated gains and/or losses for metrics associated with habitat types and human services, as well as approximate costs to construct, maintain and monitor the alternative in conjunction with sediment remediation and habitat restoration.

Deliverables:

- One meeting with lead staff
- Maps

Step 2 – Mud Lake Restoration Alternatives Refinement and Evaluation – October - January

MNDNR will prepare for and lead a discussion with a restoration site team (MNDNR, MPCA, EPA, USFWS, City, etc.) to clarify prioritization of habitat metrics and human use targets, refine concept plans for each alternative, identify needed map refinements, and determine which ecosystem services (e.g., waters suitable for boating) will be included in the comparative analysis. The city's contractor will draft the resulting concept plan maps and summaries for the restoration site team.

The restoration site team will then use the refined conceptual maps and summaries to assess habitat metrics and tabulate data necessary for calculating habitat and ecosystem services analyses. This will include completing the data tables so the agencies can prepare a habitat and an ecosystem services comparative analysis among alternatives.

MNDNR, USFWS and EPA will use the maps and data tables provided by the contractor to generally assess the various habitat and ecosystem service metrics. This may include having the restoration site team conduct a meeting(s) with community stakeholders as identified by the site team and City of Duluth to gather input regarding desired and preferred uses with respect to each alternative.

The contractor will prepare ballpark cost estimates for the construction features, maintenance, and monitoring costs for a 5 to 10 year period and include the information in a short summary of the findings (pros and cons of alternatives based on the metrics).

Deliverables:

- One to two restoration site team meetings
- Final maps
- Tables and summary discussing the analysis and findings for each alternative

Step 3 – Finalization and Presentation of Mud Lake Report and Western Waterfront Trail Mini Master Plan – February

The city will review the findings of the comparative analysis, make a decision about Mud Lake, and proceed with next steps.