

INTERGOVERNMENTAL AGREEMENT REGARDING
DESIGN, RIGHT OF WAY ACQUISITION, AND CONSTRUCTION
OF YALE-WABASH BRIDGE WATER QUALITY FEATURES
ARAPAHOE COUNTY PROJECT NO. C00-019

This INTERGOVERNMENTAL AGREEMENT REGARDING DESIGN, RIGHT OF WAY ACQUISITION, AND CONSTRUCTION FUNDING OF YALE-WABASH BRIDGE WATER QUALITY FEATURES (the "Agreement") is made and entered into as of this _____ day of _____, 2009 by and between the COUNTY OF ARAPAHOE, COLORADO, a body corporate and politic of the State of Colorado (the "County"), and SOUTHEAST METRO STORMWATER AUTHORITY, a quasi-municipal corporation and political subdivision of the State of Colorado ("SEMSWA"), collectively (the "Parties").

RECITALS

WHEREAS, the County is authorized to coordinate and participate in the provision of certain public infrastructure improvements within its boundaries in the State of Colorado, including, but not limited to, street improvements, storm drainage, landscaping, signalization, sidewalks and other improvements; and

WHEREAS, SEMSWA was formed to plan, construct, acquire, operate and maintain various drainage and flood control facilities and manage stormwater quality within its boundary in the County and the City of Centennial, Colorado, (City); and

WHEREAS, there are water quality needs that exist within SEMSWA's boundary and the County and SEMSWA are authorized to provide certain stormwater infrastructure improvements; and

WHEREAS, the County and SEMSWA wish to provide for the construction of water quality improvements adjacent to Cherry Creek, in the vicinity of Yale Avenue, as well as such other associated infrastructure improvements as are necessary to permit construction and use of the water quality improvements (the "Project"); and

WHEREAS, the County and SEMSWA, have discussed the nature, scope, and timing of the Project which represents a benefit to the area as a whole and to the region; and

WHEREAS, the Project will be located within SEMSWA's boundary, and within the County, and upon final acceptance after construction, will be maintained and operated by SEMSWA; and

WHEREAS, The County has authority to acquire and own necessary Easements as may be necessary to construct, operate and maintain the Project; and

WHEREAS, The County will permit SEMSWA to maintain and operate the improvements constructed as part of the Project; and

WHEREAS, the Parties desire to cooperate in the funding, and construction of the Project as set forth herein.

NOW, THEREFORE, in consideration of the covenants and mutual agreements herein contained, and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

COVENANTS AND AGREEMENTS

1. Purpose. The purpose of this Agreement is to identify certain public infrastructure improvements to be funded by the Parties and the allocation of the costs thereof between the Parties, to establish dates regarding the construction thereof, and to establish the process by which such public infrastructure improvements will be designed and constructed.

2. General Description of the Project funding. The Parties hereby agree to cooperate in the funding and construction of the Project, as described more fully in this Agreement. The Parties anticipate that construction of the Project will begin in the year 2009. Further description of, and a preliminary estimate of the costs for the Project are set forth below.

The total estimated costs for the Project (including design costs, easement acquisition costs, construction costs, and a 10% contingency) for each of the Parties is set forth below:

| | Each Party's Share of Cost of the Project | % of Total Costs |
|--------|--|---------------------|
| SEMSWA | \$140,000.00 | 50% |
| County | \$140,000.00 | 50% |
| Total | \$280,000.00 | 100% |

The County will pay for the design of the Project, and any easement acquisition costs. The total cost of these expenses is Twenty Thousand Dollars (\$20,000.00). The amount of the County's contribution to the project shall be reduced by \$20,000, which amount represents the amount paid by the County for these expenses to date. Therefore, the County's remaining contribution to the project is One-Hundred Forty Thousand dollars (\$140,000.00) less \$20,000.00, which totals One-Hundred Twenty Thousand dollars (\$120,000.00).

The project costs defined in this Agreement are estimates. Final costs will be based on the awarded bid and adjustments that may be necessary during construction.

3. Project, Design and Construction Details.

a) Scoping/Appropriations. The County and SEMSWA intend to budget and appropriate their respective shares of the funds for the Project, such that the funds are available for such purpose at time of execution of this agreement. The following provisions regarding design and construction, funding and contract administration and accounting shall apply to the design and construction of the Project.

b) County Responsible for Design. The County shall be responsible for the design of the Project. The County has engaged an engineer to design the Project and prepare an estimate of construction costs. The County has required the engineer to design of the Project so that the design is incorporated into the County's construction document format so that the Project can be put out for public bidding by the County, following the acquisition of any necessary Easements, utility clearances, environmental clearances, and other clearances as necessary.

c) Easement Acquisition. The County shall be responsible for pursuing acquisition of necessary easements for the project. The easements shall be dedicated to the County. The County shall hire a Right-of-Way agent/negotiator and appraiser acceptable to the Parties with the purpose of acquisition of those necessary easements. SEMSWA shall have the right to enter upon acquired easements for maintenance of the constructed facilities which right shall be in the form of a Right Of Entry acceptable to both the County and SEMSWA.

d) Funding and Contract Administration.

i) Prior to the award of the contract to construct the Project, SEMSWA will issue payment of its respective share of the Project costs as described in Paragraph 2 of this Agreement to the County for use on the Project (the "Project Fund"). No contract award or notice to proceed shall be given by the County to its contractor until the funding has occurred and the Funds for the Project have been received.

ii) After the County verifies that enough funds are available to cover the construction contract costs, the County will award the contract to the lowest responsible bidder. In the event that the lowest responsible bid is in excess of the construction costs budgeted, the Parties agree that the County is not authorized to award a contract for construction of the Project. In this event, the County shall notify SEMSWA and the Parties shall mutually determine whether to: (1) proceed with the project and deposit the additional moneys into the Project; or (2) proceed with the project and reduce the scope of the project; or (3) terminate this Agreement. In the event that the Parties are unable to mutually agree to either (1) or (2) the County will reject the bid and terminate the Agreement. Upon termination, SEMSWA will be refunded its share of funds deposited with the County less its share of costs incurred.

iii) Upon award of the contract, the County shall proceed to construct the Project in accordance with the plans and specifications and shall make periodic draws upon the deposited funds as necessary to process pay requests for the Project. All payments to contractors shall be subject to withholding for retention in accordance with law, and to the County's construction administrator's recommendation that such payments be made in accordance with work performed to the satisfaction of the County. Field orders not resulting in an increase in the contract price, or Contract time may be processed by the County without prior approval by, but with notice to SEMSWA. Except for County field order changes to handle emergency situations, the Parties must approve in writing any change orders which increase the contract

price or time. Such approval shall not be unreasonably withheld and SEMSWA shall promptly respond to any request from the County for a field order change. Concurrently with the approval of any change order which increases the project costs, each funding Party shall immediately fund its share of the cost increase, based on each Party's funding percentage share as set forth in Paragraph 2 by deposit into the Project Fund. Final payment shall be made in accordance with Colorado law.

e) Accounting. The County shall provide SEMSWA with a monthly report evidencing i) the Project Account balance and interest earnings thereon, ii) the total project costs as compared to the budget, and iii) copies of all invoices/pay requests. In the event that the County determines that the cost of the project is in excess of the approved budget, the County will notify SEMSWA to resolve the discrepancy between the actual costs and the amount which has been budgeted. The Parties will mutually determine how to resolve the increase in costs through the payment of additional money or a reduction in the scope of the project. Following completion of the Project and conditional acceptance thereof, the County shall provide SEMSWA with a final accounting of the total costs of the Project. In the event that SEMSWA disputes any of the costs, SEMSWA shall notify the County within thirty (30) days of its receipt of the County's final accounting. The County shall have thirty (30) days to review the records to verify the costs and provide SEMSWA with a final cost reconciliation. In the event that SEMSWA does not agree with the County's final reconciliation SEMSWA shall be entitled within sixty (60) days of receipt of the final accounting to have an independent Certified Public Accountant ("CPA"), mutually agreed to by the Parties, examine the financial records including all invoices, change orders, and bank statements to determine if each party has paid its allocable share of the costs. The independent accountant examination fee shall be paid by the County if the CPA determines that the final accounting was in error and by SEMSWA if the CPA determines that the final accounting was not in error. If no discrepancy is found, but SEMSWA continues to contest the allocation of the costs, the County shall be entitled to file an interpleader action in the District Court in and for Arapahoe County, Colorado and may deposit the remaining funds with the registry of said court. The Parties do hereby consent to such interpleader action by the County. Any funds remaining in the Project Fund after all costs for the Project have been paid shall be returned to each party on a pro-rata basis.

f) Unspent funds. Within one year of completion of the Project, if there are Project Funds remaining which are not committed, obligated, or disbursed, each party shall receive a share of such funds, which shares shall be computed as were the original shares.

g) The Project Shall be Operated and Maintained by SEMSWA. The Project shall be operated and maintained, subject to any applicable warranty periods with respect to contractors responsible for construction of the Project and appropriation of necessary funds by the SEMSWA Board of Directors, by SEMSWA after the project has received final acceptance.

i) Design changes during construction (Field/Change Orders) that affect Project maintenance shall be reviewed and approved by SEMSWA prior to issuing to

- contractor.
- ii) A representative from SEMSWA shall be present for the final inspection following construction, and inspections during the warranty period.
 - iii) The anticipated level of maintenance to be performed by SEMSWA shall be consistent with the Operations and Maintenance Manual for this facility.
 - iv) The Water Quality Pond shown in Exhibit A identifies the Project areas SEMSWA shall be responsible for maintaining following final acceptance.

4. Failure to Provide Funds/Termination. The funding obligation of the Parties is, in addition to the other limitations contained in this Agreement, expressly conditioned upon annual budget and appropriation by each party. In the event that one of the Parties fails to either appropriate funds, or fund its respective obligations hereunder by the date prescribed, or to exercise any other funding options as described in Paragraph 3 of this Agreement, the other Party shall be entitled to terminate this Agreement without liability or obligation to the other Party. Notwithstanding the foregoing, in the event any Notice to Proceed has been issued as provided in this Agreement with respect to the Project hereunder, then the obligation of the Parties to fund amounts required for the completion of the Project shall be enforceable in accordance with any legal remedies available at law or in equity.

5. Miscellaneous.

a) Governing Law. The Parties agree this Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.

b) Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors, assigns, and legal representatives.

c) Third Party Beneficiary. It is specifically agreed between the Parties executing this Agreement that it is not intended by any of the provisions of any part of this Agreement to create a third party beneficiary hereunder, or to authorize anyone not a party to this Agreement to maintain any claim under this Agreement. The duties, obligations and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed by law.

d) Entire Agreement; Amendments. This Agreement, including its exhibits, contains the entire understanding of the Parties with respect to this subject matter. This Agreement supersedes all prior agreements and understandings between the Parties with respect to its subject matter. This Agreement may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

e) Notice and Communications. Any notice pursuant to the terms and conditions of this Agreement shall be in writing and delivered personally, or sent by certified mail, return receipt requested, or sent by a recognized overnight mail or courier services, with delivery receipt requested, to the following addresses (or to such other address as may from

time to time be specified in writing by the Parties):

If to the County:

Chairman
Board of County Commissioners
County of Arapahoe
5334 South Prince Street
Littleton, Colorado 80126-0001

With a copy to:

Tom McNish, Esq.
Assistant Arapahoe County Attorney
Arapahoe County
5334 South Prince Street
Littleton, Colorado 80126-0001

David Schmit, Director
Department of Development Services
Arapahoe County
5334 South Prince Street
Littleton, Colorado 80126-0001

If to SEMSWA:

John A. McCarty, Executive Director
Southeast Metro Stormwater Authority
76 Inverness Drive East, Suite A
Centennial, Co 80112-5106

With a copy to:

Edward J. Krisor, Esq.
3900 South Wadsworth Blvd, Suite 320
Lakewood, Co 80235

Notices shall be effective when received by the party to whom addressed.

f) Binding Representative. In regard to change orders, the County designates The Director of Public Works or his/her designee as its representative with power to bind the County.

g) Acceptance of the Project. Upon construction contract final acceptance of the

Project and expiration of all applicable warranties, SEMSWA shall operate and maintain the the Water Quality Pond Project areas described in Exhibit A conditioned upon the annual budget and appropriation of necessary funds for such operation and maintenance by SEMSWA's Board of Directors..

h) Default/Remedies. In the event of a breach or default of this Agreement by any party, the non-defaulting party shall be entitled to exercise all remedies available at law or in equity, specifically including suits for specific performance and/or monetary damages. In the event of any litigation, arbitration or other proceeding to enforce the terms, covenants or conditions hereof, the prevailing party in such litigation, arbitration or other proceeding shall be entitled to obtain as part of its judgment or award its costs and reasonable attorneys' fees.

i) Force Majeure. Wherever there is provided in this Agreement a time limitation for performance by the Parties for any obligations related to construction, the time provided for shall be extended for as long as and to the extent that the delay in compliance with such limitation is due to an act of God, strikes, labor disputes, inability to obtain labor or materials or reasonable substitutes therefor, fire or other casualty and other causes beyond the control of the Parties.

j) Counterpart Execution. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

k) Governmental Immunity. Nothing herein shall be construed as a waiver of the rights and privileges of the County or SEMSWA pursuant to the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, C.R.S., as amended from time to time.

Made and entered into as of the date and year first above written.

SEMSWA

By: _____

ATTEST

By: _____

COUNTY OF ARAPAHOE, COLORADO

By: _____
David M. Schmit, PE, Director, Public Works &
Development Authorization Granted by
Resolution No. 09-0191

ATTEST

By: _____

