

## MEMORANDUM OF UNDERSTANDING

Between

Cherry Creek Basin Water Quality Authority and Southeast Metro Stormwater Authority

Regarding

Financial Participation of Cherry Creek Basin Water Quality Authority in the Construction of Cottonwood Creek, Easter to Briarwood Avenue, Stream Reclamation Improvements

This Memorandum of Understanding ("MOU") is entered into by and between Southeast Metro Stormwater Authority (SEMSWA) and Cherry Creek Basin Water Quality Authority (CCBWQA) regarding a contribution by the CCBWQA to the Funding of the construction of Phase I and II Cottonwood Creek, Easter to Briarwood Avenue, Stream Reclamation Improvements (Phase I & II Cottonwood @ Easter Improvements).

WHEREAS, Cottonwood Creek is tributary to the Cherry Creek Reservoir (the Reservoir); and

WHEREAS, the Reservoir has a water quality standard for Chlorophyll-a; a Phosphorous concentration goal; and a phased Total Maximum Annual Load; and

WHEREAS, the CCBWQA has a mission to "maintain beneficial uses in the Reservoir by preserving its water quality"; and

WHEREAS, Cottonwood Creek exhibits stream degradation associated with increased urban runoff, resulting in incised channels and exposed banks offering less vegetative filtering and infiltration, both necessary mechanisms for a healthy natural stream; and

WHEREAS, the CCBWQA has participated in construction and maintenance of the Cottonwood\Peoria Water Quality Pond, the Cottonwood Creek Wetlands Water Quality Pond, and Cottonwood Creek Stream Stabilization between these two water quality ponds, all which are Cottonwood Creek watershed pollution reduction facilities (PRF) constructed to control sediment reaching the Reservoir; and

WHEREAS, stream degradation tends to mobilize and transport significant quantities of sediment and nutrients that are bound to streambed and bank soils; and

WHEREAS, incised channels, deepened by erosion, convey stormwater at higher velocities, further increasing sediment transport downstream to the Water Quality Ponds and the Reservoir; and

WHEREAS, degrading channels can impact the quality of the Reservoir by becoming sources of sediment-bound nutrients through bed and bank erosion, by conveying more runoff and associated phosphorous loads downstream to the Reservoir, and by impairing the ability of healthy natural streams to immobilize nutrients via vegetative filtering and infiltration; and

WHEREAS, the Phase I & II Cottonwood @ Easter Improvements will stabilize the bed and banks of Cottonwood Creek through the project reach, producing wide, shallow flow conditions that typify a healthy, functional floodplain, lessening the nutrient load associated with sediment transport that reaches the Water Quality Ponds and the Reservoir; and

WHEREAS, the CCBWQA has identified the Phase I & II Cottonwood @ Easter Improvements as a desirable capital project to be completed in 2009 and has appropriated and budgeted funds in 2009 for its share of the project as set forth below; and

WHEREAS, SEMSWA desires to construct the Phase I & II Cottonwood @ Easter Improvements with construction anticipated to start on or about September 1, 2009; and

WHEREAS, a design for construction of Phase I & II Cottonwood @ Easter Improvements was completed by Moser Associates Engineering on or about December 2008; and

WHEREAS, the estimated cost of constructing the Phase I & II Cottonwood @ Easter Improvements is \$1,350,000; and

WHEREAS, Cottonwood Creek Basin fees have been collected for construction of stormwater drainage improvements; and

WHEREAS, Cottonwood Creek is located within land that has been dedicated to the public for drainage purposes; and

WHEREAS, SEMSWA has committed, appropriated, and budgeted funds from Cottonwood Creek Basin fees for the construction of the Phase I & II Cottonwood @ Easter Improvements; and

WHEREAS, the CCBWQA is willing to contribute \$338,000 towards the construction of the Phase I & II Cottonwood @ Easter Improvements.

NOW, THEREFORE, it is mutually understood and agreed by the Parties as follows:

1. The CCBWQA agrees to contribute \$338,000 towards the construction of the Phase I & II Cottonwood @ Easter Improvements.
2. SEMSWA has completed the design and intends to complete bidding for the Phase I & II Cottonwood @ Easter Improvements. Set forth below is a list of the items relating to the Phase I & II Cottonwood @ Easter Improvements that have been

completed and a proposed schedule for the items that remain to be completed. Every effort will be made to meet this schedule, but the Parties recognize circumstances may arise that may affect the schedule:

- |   |             |
|---|-------------|
| a. Finalize plans and specifications and cost estimates –                 | Completed   |
| b. Completed plans and specs including CCBWQA , County & SEMSWA reviews – | Completed   |
| c. 404 Permit –   | Obtained    |
| d. Advertised for project bids  | By 5/15/09  |
| e. Start construction   | By 7/01/09  |
| f. Complete construction (Six month construction period) –                | By 12/31/09 |
3. SEMSWA has involved the CCBWQA in the process of completion of design and agrees to involve CCBWQA in construction of the Phase I & II Cottonwood @ Easter Improvements and will obtain CCBWQA's approval to any change that materially modifies the project as initially designed.
4. SEMSWA agrees to establish an escrow account on terms and conditions acceptable to both Parties wherein all project monies will be deposited and which will be used solely for construction of the Phase I & II Cottonwood @ Easter Improvements. SEMSWA will provide to the CCBWQA a monthly accounting of project expenditures and will provide a final accounting of project expenditures following completion of the project.
5. Except as otherwise provided in this paragraph, CCBWQA agrees to provide the funds to SEMSWA once the bids have been opened and SEMSWA is ready to award a contract for construction of the project. The Parties understand and acknowledge that CCBWQA is subject to Article X, Section 20 of the Colorado Constitution ("TABOR"). CCBWQA represents to SEMSWA that it has budgeted and appropriated sufficient funding to meet CCBWQA's obligations provided in this Agreement for calendar year 2009. SEMSWA understands that if the lowest responsible bid for the Phase I & II Cottonwood @ Easter Improvements is greater than \$1,350,000, CCBWQA shall have no obligation to contribute its funds towards the project until it fully understands and approves of the way in which SEMSWA intends to redesign the project.
- For any amounts that may be paid in years subsequent to 2009, the Parties understand and agree that they do not intend by this Agreement to create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and therefore all payment obligations of CCBWQA are expressly dependant and contingent upon the continuing availability of funds beyond the term of CCBWQA's current fiscal year.
6. If the lowest responsible bidder that SEMSWA intends to use for the construction of the Phase I & II Cottonwood @ Easter Improvements bid is greater than \$1,350,000, SEMSWA shall either redesign or modify the design of the Phase I & II Cottonwood @ Easter Improvements to stay within the original estimated cost, or SEMSWA will take full responsibility for and pay any additional costs that are incurred in constructing the Phase I & II Cottonwood @ Easter Improvements. No additional monies will be requested from the CCBWQA.

One of the alternatives available to SEMSWA is to construct only Phase I. If this occurs, CCBWQA's contribution hereunder shall be reduced to \$169,000.

7. If only Phase I is constructed, SEMSWA agrees that it shall, as soon as funds are available, complete construction of Phase II Cottonwood @ Easter Improvements. At such time as SEMSWA authorizes construction of the Phase II Cottonwood @ Easter Improvements, CCBWQA will contribute on such terms and conditions as the Parties shall agree, \$169,000 to be applied to the Phase II Cottonwood @ Easter Improvements.
8. SEMSWA hereby covenants and agrees to indemnify, defend, save, and hold the CCBWQA harmless from any and all liability, loss, costs, charges, penalties, obligations, expenses, attorney's fees, litigation, judgments, damages, claims, and demands of any kind whatsoever in connection with, or arising out of, or by any reason of any violation of the terms of this MOU or of any law, ordinance, or regulation by SEMSWA, SEMSWA's agents, employees, servants, subcontractors, business invitees in regard to this MOU or as a result of the construction of the Phase I & II Cottonwood @ Easter Improvements; or by reason of any injury or damage however occurring to any person or persons whomever as a result of the construction of Phase I & II Cottonwood @ Easter Improvements. SEMSWA's obligations under this paragraph shall be limited to the extent that it is permitted by law to do so.
9. Once the Phase I & II Cottonwood @ Easter Improvements are completed said improvements will be operated, maintained and repaired by SEMSWA and CCBWQA shall have no continuing ownership interest therein, nor continuing maintenance obligations whatsoever. Further, it is understood and agreed that CCBWQA shall have no maintenance or other obligations with respect to either Phase I or Phase II of the Phase I & II Cottonwood @ Easter Improvements beyond making its contribution towards the cost thereof as outlined above.
10. Notices to be provided under this MOU shall be given in writing either by hand delivery, or deposited in the United States Mail, certified mail, return receipt requested, with sufficient postage to the following persons:

Cherry Creek Basin Water Quality Authority  
c/o R. S. Wells  
Attn: Chuck Reid  
8390 E. Crescent Parkway, Suite 500  
Greenwood Village, CO 80111

With a copy to:  
Timothy J. Flynn  
Collins Cockrel & Cole, PC  
390 Union Boulevard, Suite 400  
Denver, CO 80228-1556

Southeast Metro Stormwater Authority  
76 Inverness Drive East, Suite A

Englewood, CO 80112-5106

Any party may from time to time designate any other address for this purpose by giving written notice thereof to the other party.

11. This MOU, and any exhibits attached hereto, contain the entire agreement between the Parties and shall supersede all prior offers, negotiations and agreements.
12. No revision of this MOU shall be valid unless made in writing and signed by SEMSWA and CCBWQA or their authorized agent (s).
13. The laws of the State of Colorado shall govern this Agreement. Venue for any action for the enforcement of this Agreement shall be in the appropriate court for Arapahoe County, Colorado. Any judgment shall be limited to specific performance and/or injunctive relief and no Party shall have any claim or remedy for monetary damages arising from an alleged breach of this Agreement against another Party. This Agreement is not intended to modify or eliminate the standing the Parties may possess independent of this Agreement. The Parties agree that the rule that ambiguities in a contract are to be construed against the drafting party shall not apply to the interpretation of this Agreement.
14. A waiver by any Party to this Agreement or the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by a Party.
15. The Parties agree that this MOU, by its terms, shall be binding upon the successors, legal representatives, and assigns of the Parties; provided that this Section shall not authorize assignment.
16. Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party. Absolutely no third party beneficiaries are intended by this MOU. Any third-party receiving a benefit from this MOU is an incidental and unintended beneficiary only.

Cherry Creek Basin Water Quality Authority

By: 

Chair, Board of CCBWQA

Date: 5/21/09

ATTEST:

By: \_\_\_\_\_

SOUTHEAST METRO STORMWATER AUTHORITY

acting by and through SEMSWA Water Activity Enterprise

By: \_\_\_\_\_ Date: \_\_\_\_\_

Executive Director

Approved as to Form:

By: \_\_\_\_\_

Edward J. Krisor, SEMSWA Attorney