

Appendix 7D

**Example Contract for an Offsite Improvement to
Comply with Stormwater Ordinance**

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Setting

To be in compliance with the local stormwater ordinance, a major Developer is seeking an offsite opportunity to meet the stormwater management requirements associated with multiple redevelopment projects in a watershed. The Developer has determined that the redevelopment projects require at least 50,000 offsite quality gallons. Potential flow regime enhancement stormwater best management practice (BMP) projects have been evaluated and found acceptable through a preliminary screening process put forth by organizations within the Alliance of Rouge Communities (ARC). The project screening quantified BMP benefits in terms of Gallons and quality gallons. The screening included prioritizing projects which maximize the ecosystem improvement (that is, quality gallons) for a given cost.

The Developer selects a prescreened detention pond retrofit project to be located on private property and contacts the sponsoring local agency, the City of Farmington Hills. This was one of the projects originally identified by the ARC, a public agency established by the Watershed Alliance Act (Public Act 517) in 2004. The City has conducted a preliminary screening analysis that identifies the location, quality gallons available (estimated at 69,000), cost range, and private owner of the BMP (the “Landowner”).

An example contract is provided below outlining an agreement between the Developer and the Landowner to purchase quality gallons by funding a detention basin retrofit on the Landowner’s property. The example covers the following elements:

- Planning and design
- Construction
- Post-construction monitoring and maintenance
- Long-term maintenance
- Project assurances
- Agreement

Each element is detailed below.

Planning and Design

Project funding will be provided by the Developer to fully fund the project that provides 69,000 quality gallons even though only 50,000 quality gallons are required. The full funding is needed because constructing a partial project is not practical. The Developer can sell the extra quality gallons to others or bank the quality gallons for future use. The Developer and the Landowner will jointly select the design alternative. Once developed, plans and specifications will be reviewed by both parties, submitted to the City of Farmington Hills, and reviewed by

required regulatory agencies (Oakland County for erosion and sediment control requirements, or others as regulations require). To minimize risk to both parties, a licensed professional engineer will inspect the Facility prior to retrofit design to not only obtain important design information, but also to identify the pond existing condition.

Construction

Contracting for the project will go through the Developer, who will prepare the contract documents, advertise the project, and select the contractor for the job. Construction management will be done through an agreed-upon third party. The construction manager will be contracted and funded through the Developer. Appropriate performance bonds will be associated with the construction contract.

Post-construction Monitoring and Maintenance

To make sure the retrofit functions as intended, the Developer will hire a third party to provide 5 years of annual monitoring once construction is complete. The monitoring will assess the functioning of the pond and identify any corrective measures that need to be taken in order to meet the quality gallon requirement and associated ecosystem improvement. Monitoring reports will be provided to the Developer and the Landowner. Third party monitoring data will also be reported to the ARC and used to certify the quality gallons provided by the improvement.

If corrective measures and maintenance are needed within the first 5 years to achieve the ecosystem improvement and quality gallons anticipated, a contractor will be hired and funded by the Developer to conduct the maintenance activities. If the maintenance requirement is caused by the operation of an extraordinary natural force that reasonable care could not avoid (for example, tornadoes and severe floods), the Developer is not responsible for reinstalling the retrofit.

Long-Term Maintenance

Assuming the detention basin retrofit meets the quality gallons goals at the end of the 5-year maintenance program; the Developer will no longer conduct monitoring or be responsible for maintenance. Maintenance responsibilities will then once again be assumed by the Landowner where the Landowner will maintain the proposed ecosystem function values in perpetuity. For example, the Landowner will continue monitoring every 3 years and maintain the Facility as needed. Failure of the Landowner to maintain the Facility will allow the local community (Farmington Hills) to maintain the Facility and charge the Landowner for all associated maintenance costs.

Project Assurances

All phases of the project, from planning to post-construction monitoring, include assurances so that the desired flow restoration improvement provides the necessary quality gallons. The initial Facility inspection verifies that the site can be retrofitted to meet the project goals.

To ensure that funds are available to complete the project, appropriate performance bonds will be issued. To assess the function of the retrofit and provide necessary corrections, a third party will be contracted to provide monitoring and maintenance.

Example Agreement

This example presents the issues that should be covered in an agreement between two entities cooperating on an ecosystem improvement project. The document outlines the major points that would be agreed upon as part of an ecosystem improvement measured in quality gallons between a Developer and a private land owner. **Legal counsel should be consulted when developing legally binding agreements.**

Flow Restoration Agreement Between

Good Neighbor Landowner
2000 Water Quality Lane
Farmington Hills, MI 48331

Contact Person:
Mr. Facility Manager
2000 Water Quality Lane
Farmington Hills, MI 48331
Phone: 555-555-5555

And

XYZ Developer
120 Stormwater Drive
Farmington Hills, MI 48331

Contact Person:
Ms. Project Liaison
120 Stormwater Drive
Farmington Hills, MI 48331
Phone: 444-444-4444

This Agreement, entered into this 15th day of September, 2006, by and between the Good Neighbor Landowner hereinafter called the "Landowner." and XYZ Developer hereinafter called the "Developer." WITNESSETH, that WHEREAS, the Landowner is the owner of certain real property located at 2000 Water Quality Lane, Farmington Hills, MI 48331, more particularly described in the attached Exhibit A hereinafter called the "Property." WHEREAS, the Landowner currently maintains a Stormwater Detention Facility hereinafter called the "Facility" at this location

WHEREAS, the Landowner and the Developer entered into a Flow Restoration Agreement to produce 69,000 quality gallons with regard to the Property in September of 2005.

WHEREAS, the Landowner, its successors and assigns, and the Developer, its successors and assigns agree that the environmental quality of the Upper Rouge River Subwatershed hereinafter called the "Watershed" will be improved through a stormwater best management practice retrofit of the existing Facility, hereinafter called the "Retrofit."

WHEREAS, the City of Farmington Hills, Oakland County, hereinafter called the “City” has an easement over, on and in the Facility, which easement shall be for the purpose of access to the Retention and Discharge System for the maintenance, renovation, and repair thereof.

NOW, THEREFORE, in consideration of the foregoing promises, the mutual covenants contained herein, and the following terms and conditions, the parties hereto agree as follows:

1. The Developer shall fund the planning, design, and construction of the Retrofit to produce 69,000 quality gallons of which 50,000 quality gallons shall meet the quality gallon obligation for projects outlined in Attachment 1 (not provided).
2. The Landowner and the Developer shall jointly select the design of the Retrofit. The final design will be submitted to the City for comment and the local stormwater authority for compliance review.
3. Should the final design determine that providing at least 50,000 quality gallons, is not feasible, the Company will have 30 days to submit a withdrawal of this agreement in writing and a proposed plan for fully realizing 50,000 quality gallons through this and/or other projects. The Company retains ownership of quality gallons in excess of 50,000 and may donate, bank, or sell them as legally allowed once all Company commitments provided herein are met.
4. The Developer will prepare the contract documents, advertise the project, select the contractor for the job and award a contract to construct the Retrofit. A construction manager will be contracted through the Developer with approval from the Landowner.
5. The Developer will submit financial assurances of a type and amount reasonably acceptable to the Landowner to assure the complete and proper installation of the Retrofit. These funds shall be in the form of a performance bond or other agreed upon financial mechanism.
6. The Developer shall annually monitor and maintain, at its sole expense, the above referenced Facility in accordance with the plans previously submitted to and approved by the City and in compliance with all applicable state and local laws for a period of 5 years from the certification by the construction manager of completion of construction. Monitoring reports will be provided to both parties and to the ARC. Monitoring reports shall include an assessment of whether quality gallon goals will be met or not. If monitoring indicates fewer than 50,000 quality gallons will be met at the end of the 5-year maintenance period, the Developer shall notify the local stormwater authority within 30 days and continue maintenance for the 5-year period as provided herein. The Developer shall make up a deficit of quality gallons as specified in Attachment 1 (not provided).
7. The Developer will submit financial assurances equivalent to the estimated 5 years of maintenance costs. This assurance will be maintained in the form of a bond or other agreed upon financial mechanism by the City. If the Developer fails to maintain the Facility in accordance with the approved design standards and with the law and applicable administrative regulation, the City may conduct necessary maintenance and

the Developer is responsible for the cost of the work, both direct and indirect, as well as applicable penalties.

8. In the event of an emergency within five years of certification of completion of construction requiring work on the Retrofit as determined by the City in its sole discretion, the Developer shall be responsible for the cost of the work, both direct and indirect, as well as applicable penalties. Subsequently, in the event of an emergency as determined by the City in its sole discretion, the Landowner is responsible for the cost of such work and applicable penalties.
9. The Developer shall be responsible for the operation and maintenance of the Facility (or Retrofit) for 5 years as outlined in this Agreement. After 5 years, the Landowner shall be fully responsible for the operation and maintenance of the Facility (or Retrofit). The Developer shall be excused from operation and maintenance, or reconstruction of the Facility (or Retrofit), to the extent hindered or obstructed, or damage is caused by virtue of acts of God, war, riot, labor unrest, terrorism, natural disaster, failure of basic infrastructure, or other calamity where the Developer has exercised reasonable, good faith, care and due diligence in attempting to prevent or avoid the impacts of such events or forces. This agreement does not change the local unit of government's authority to maintain and charge the Landowner of the facility if appropriate maintenance does not occur as specified in other agreements and covenants.
10. The Developer shall indemnify, save harmless and defend the Landowner from and against any and all claims, demands, suits, liabilities, losses, damages and payments including attorney fees claimed or made by persons not parties to this agreement against the Landowner that are alleged or proved to result or arise from the Developer's construction, operation, or maintenance of the Retrofit and/or Facility.
11. Invalidation of any of these covenants and restrictions by judgment or court order shall in no way affect the validity of any other of its provisions, which shall remain in full force and effect.
12. The parties, whose signatures appear below, hereby represent and warrant that they have the authority and capacity to sign this agreement and bind the respective parties hereto.
13. This Agreement constitutes the full and final agreement of the parties. All prior agreements, obligations or understandings are, to the extent inconsistent with this Agreement, superseded, replaced and merged herein.
14. This Agreement is to be interpreted in accordance with the laws of the State of Michigan.

WITNESS the following signatures and seals:

By: _____

(Type Name)

(Type Name)

STATE OF _____

COUNTY OF _____

The foregoing Agreement was acknowledged before me this ____ day
of _____, 20____, by

_____.

NOTARY PUBLIC

My Commission Expires: _____

Rouge River Implementation Forum Participants' Feedback on the Example Contract

The draft “Example Contract for an Offsite Improvement to Comply with Stormwater Ordinance” was distributed to participants in advance of the forum, discussed as a group, and then privately evaluated by each of the stakeholders. The stakeholder discussion centered on long-term maintenance, especially for projects located on lands owned by third parties. Participants did not want to mandate who must take responsibility for which provisions of the contract, including the monitoring and maintenance provisions. Rather, they expressed the view that the contract needed to identify the conditions that must be met and allow the parties to the contract to negotiate the assignment of responsibilities.

Participants acknowledged that different types of projects could well require different specific provisions to evaluate performance and to assure that maintenance continued into perpetuity (or for the duration of the permit). For example, agreements covering the use of the land for the best management practice would need to convey with a sale of the property. Overall, participants agreed that the example contract included the necessary provisions, but they were not committed to how responsibilities were allocated in this example. The Rouge River Watershed stakeholders reacted negatively to use of the term “monitor,” as they did not want to create the perception that they were treating offsite best management practices differently than onsite activities, which are not monitored. Instead, they recommended using a legally binding agreement that assigns responsibility for performance and maintenance and that includes the necessary financial assurances. Consequently, for stormwater BMP construction for ecosystem improvement, a monitoring program beyond what would be required for similar stormwater BMPs associated with development is likely unnecessary.

The results from the survey of participants' opinions on aspects of the example contract were consistent with these discussion points. Table 1 lists the average responses of six participants. The same five-point scale was used for these questions as for the previous questions. Again a score of “1” meant strongly disagree; “2” disagree; “3” neutral; “4” agree; and “5” strongly agree. Respondents were neutral to slightly in favor of the method of assigning responsibility to various parties as per the specifics of the example contract. However, they agreed or strongly agreed that candidate offsite projects and the associated quality gallons should be prescreened to facilitate compliance with the requirements of the ordinance. Once selected, projects should then be reviewed for compliance.

TABLE 7D-1
Rouge River Forum Stakeholder Feedback on Sample Offsite Improvement Contract to Comply with Local Stormwater Ordinance

Contractual Elements	Avg. Response
Potential projects and associated Gallons and quality gallons should be prescreened and recorded to facilitate offsite compliance.	4.2
The contract agreement should be between the Developer and the Landowner.	2.3
If for an offsite project, the Developer finds that the available quality gallons are significantly less than what the Landowner indicated were available, the developer should be able to void the contract.	3.3
The offsite project or projects must be reviewed for compliance with all relevant regulations.	4.5
If the final design falls short of the necessary quality gallons, the Developer should be accountable for the difference.	3.8
For an offsite project, the Developer should be held accountable for providing financial assurances sufficient for covering the cost of project implementation and maintenance for the first five years.	3.7
For an offsite project, the developer should have responsibility for monitoring and maintaining the Project for the first five years.	3.2
A third party should have responsibility for certifying the quality gallons and for verifying the results of the monitoring reports provided by the Developer.	2.7