



Oregon

Bureau of Labor and Industries

Brad Avakian
Commissioner

March 12, 2013

Scott Bailey, Project Manager
Tillamook Estuaries Partnership
PO Box 493
Garibaldi, OR 97118

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Laws*
Project: Jackson Creek Restoration Project
Requested by: Tillamook Estuaries Partnership

Dear Mr. Bailey:

On February 19, 2013, you submitted a request on behalf of Tillamook Estuaries Partnership asking if the Prevailing Wage Rate laws would apply to the Jackson Creek Restoration Project (the "project"). Sufficient information to make a determination was received on March 12, 2013, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT:

1. Jackson Creek is an ocean tributary within Cape Lookout State Park, approximately 11 miles southwest of Tillamook. The property is owned by the State of Oregon, and is managed by Oregon Parks and Recreation Department ("OPRD").
2. In 1950, Jackson Creek was diverted into an excavated channel with the intent of improving salmon fishery in the bay. However, the diversion did not result in improved salmon fishery, and in fact, led to unintended adverse results. In 2011, OPRD contracted with Waterways Consulting, Inc. ("Waterways") to study the conditions of Jackson Creek and identify potential projects or management actions that would restore natural hydrologic, geomorphic, and aquatic habitat functions. From the options Waterways proposed, OPRD chose a restoration plan that will return historical flows to the original ocean-going channel of Jackson Creek, restore floodplain connectivity, and remove a fish passage barrier.

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3. Tillamook Estuaries Partnership (“TEP”), a private non-profit entity established in 1994, is dedicated to the conservation and restoration of the five Tillamook County estuaries and the watersheds that sustain them. As such, TEP is often involved to some degree in construction, reconstruction and major renovation projects that occur in the county’s estuaries and watersheds. For this project, OPRD requested that TEP apply for a grant from the Oregon Watershed Enhancement Board (“OWEB”) to help fund the project.¹ TEP did so in 2012, and received an OWEB grant in the amount of \$101,969. The grant funds will be used to support the necessary construction work to be done and for related administrative tasks. As part of the administration of the OWEB grant, TEP will contract with a contractor for the necessary construction work to be done on the project.
4. The total cost for this project, including project design and implementation, is estimated to be \$302,243. The work to be done includes the following:
 - a. Design and install an earthen plug in the diversion channel to block flows in the diversion channel and return full flows to the ocean-going channel.
 - b. Regrade areas affected by the diversion channel construction to restore historical elevations and connections with a two-acre beaver pond complex and other floodplain components.
 - c. Place 30 to 50 logs over 0.4 miles of stream to enhance stream complexity, rearing habitat, and gravel retention (also known as the “large wood placement phase” of the project).
 - d. Remove the fish passage barrier (a concrete ford) and existing pedestrian bridge; construct a new pedestrian bridge in the same location.
 - e. Install a new water intake structure and screen, and remove existing features of the system that are no longer needed (settling pond, etc.).
5. OPRD will contribute \$89,284 in funds of a public agency for this project, and will also provide staff labor to assist with oversight of the on-ground work, and to assist with fish salvage and other tasks. The funds of a public agency provided by OPRD will be broken down as follows:
 - a. \$42,000 toward the purchase and delivery of the new pedestrian bridge. OPRD will directly contract with a bridge manufacturer for the purchase and delivery of the bridge.
 - b. \$36,669 toward the construction of the bridge crossing, including excavation, abutments, placing the bridge, and the necessary asphalt concrete.
 - c. \$10,615 for the purchase of materials for re-vegetating the site and for large woody materials for upstream habitat improvement efforts.

¹ According to Mr. Bailey, OPRD could not apply for the OWEB grant.

In addition, as part of an unrelated project, OPRD will be removing trees from another part of the Cape Lookout State Park. If any of the trees are large enough, they may be used for the stream enhancement work known as the “large wood placement phase,” as noted in Finding of Fact 3.c above. The value of these logs, which would be considered funds of a public agency, is unknown at this time.

6. Oregon Department of Fish and Wildlife (“ODFW”) has provided \$8,707 in in-kind support for the project. ODFW staff have already installed the new water intake structure and screen, and removed the existing features of the water intake system that are no longer needed. In addition, ODFW will contribute staff time to design and lead the large wood placement phase of this project, although this phase of the project is on hold for now to give the restored Jackson Creek time to settle, and there is even some question if this phase of the project will be done.
7. The U.S. Fish and Wildlife Service will contribute \$72,170 in cash and in-kind staff support to pay for engineering designs and to provide staff to assist with the project.

CONCLUSIONS OF LAW:

1. ORS 279C.800(6)(a)(A) defines “public works” to include roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by a public agency to serve the public interest.

The Jackson Creek Restoration project will include the improvement of various structures through construction, reconstruction and major renovation, as defined in OAR 839-025-0004(5), (22), and (11), respectively.

No public agency will enter into a binding agreement for construction related to this project, and therefore the project will not be “contracted for” by a public agency. However, Oregon Parks and Recreation Department has had and will have substantial control over this project, and as such, the project will be “carried on” by a public agency. Elements of “carried on” include, but are not limited to, OPRD’s initiation of the Waterways study, its selection of the restoration plan and authority to request adjustments to the plan if needed, its ownership of the property and the improvements, etc. Therefore, the definition of “public works” under ORS 279C.800(6)(a)(A) will apply to this project.

2. The total project cost will exceed \$50,000, the project will use funds of a public agency, and the project is publicly owned. As a result, no exemptions from the law under ORS 279C.810(2) will apply to this project.

DETERMINATION:

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will apply to the Jackson Creek Restoration Project.

This determination is based on the agency's file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination.

REQUEST FOR RECONSIDERATION:

After the commissioner issues a determination, the requestor or any public agency served with a copy of the determination may request that the commissioner reconsider the determination. A request for reconsideration must be submitted in writing to the Prevailing Wage Rate Unit, must include the reason or reasons for the request and any documents in support of the request, and must be received within 15 calendar days of the date the determination was mailed. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

RIGHT TO A HEARING:

The requestor and any person adversely affected or aggrieved by this determination are entitled to a hearing as provided by the Administrative Procedures Act (ORS 183.413 to 183.470) and ORS 279C.817. If you want a hearing, the Bureau of Labor and Industries, Wage and Hour Division, must receive your written request for hearing within 21 days from the date this notice was mailed. Hearing requests should be addressed and delivered to:

Administrator
Wage and Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232

If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived.

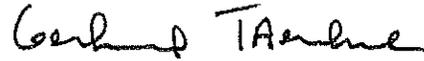
If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel or an authorized representative. If you request a hearing, you will receive information on Contested Case Rights and Procedures before

the hearing. After the hearing, an order confirming, modifying or reversing this determination will be issued. This determination shall remain in effect until the final order is issued.

If you request a hearing, but fail to appear at any scheduled hearing, you will have waived your right to hearing, and the commissioner may issue a final order by default. If the commissioner issues a final order by default, the agency file on this matter shall serve as the record for purposes of proving a prima facie case. You are not entitled to judicial review of this determination order unless you have made a timely request for a hearing.

Date: March 12, 2013

BRAD AVAKIAN, Commissioner
Bureau of Labor and Industries

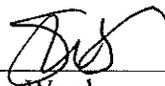


Gerhard Taeubel, Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On March 12, 2013, I mailed the Prevailing Wage Rate Determination for the Jackson Creek Restoration Project to the requestor, as follows:

Scott Bailey, Project Manager
Tillamook Estuaries Partnership
PO Box 493
Garibaldi, OR 97118



Susan Wooley
PWR Technical Assistance Coordinator
Wage and Hour Division
Bureau of Labor and Industries