



CHRISTINA E. STEPHENSON
Labor Commissioner

September 12, 2023

Thorp, Purdy, Jewett, Urness & Wilkinson, PC
Kristin Denmark
1011 Harlow Rd, Suite 300
Springfield, OR 97477

Re: Determination Whether Project is Subject to Prevailing Wage Rate Laws

Project: Riparian Restoration Work

Ref: **23-0042**

Requested by: Thorp, Purdy, Jewett, Urness & Wilkinson, PC on behalf of Metropolitan Wastewater Management Commission

Dear Ms. Denmark:

On December 28, 2022, the Bureau of Labor and Industries received the request you submitted on behalf of Metropolitan Wastewater Management Commission asking if the Prevailing Wage Rate laws would apply to riparian restoration work. Sufficient information to make a determination was received on September 12, 2023, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT

1. The Metropolitan Wastewater Management Commission (“MWMC”), a public agency under ORS 279C.800(5), is an intergovernmental entity that includes the City of Springfield, the City of Eugene, and Lane County, Oregon. According to MWMC, its purpose is to “provide management of wastewater treatment to the Eugene-Springfield community.”
2. MWMC has a water pollution control facility (the “Facility”) that discharges water into the Willamette River. The temperature of the discharged wastewater may be in excess of the temperature of the water in the Willamette River, referred to as “excess temperature discharge. MWMC has a National Pollution Discharge Elimination System permit (the “Permit”) for the Facility. Pursuant the Permit, MWMS may “reduce or offset the effects of excess temperature discharge by securing Thermal Credits generated within the MWMC’s eligible service area.” A Thermal Credit may be generated by the performance of riparian restoration work (the “Project”) within its eligible service area.
3. On April 2, 2019, MWMC entered into an Independent Consultant Agreement (the “Consultant Agreement”) with The Freshwater Trust (“TFT”), a non-profit entity, for the purchase of Thermal Credits from TFT. The Consultant Agreement was for Phase 1 of the credit services. On April 1, 2020, MWMC and TFT entered into Amendment 1 to the Consultant Agreement for implementation of two pilot projects. On September 1, 2021, MWMC and TFT entered into Amendment 2 to increase the scope of work for certain tasks. MWMC refers to the work up to this point as “Phase 1” work. It included developing a Water Quality Trading Plan and five small pilot projects to test the generation of Thermal Credits, and developing relationships with entities that will assist in generating Thermal



Credits. The contract value for the pilot project implementation was \$287,500. This work has been completed.

4. On June 20, 2022, MWMC and TFT entered into Amendment 3 to the Consultant Agreement to change the work number under the Riparian Shade Credit Program. This did not change the scope of work.
5. On November 3, 2022, MWMC and TFT entered into the Fourth Amendment to the Consultant Agreement (the “Fourth Amendment”). MWMC refers to this a “Phase 2” work. The scope of work in the Fourth Amendment is to “perform Credit Production Services in order to produce, sell, and maintain Thermal Credits for MWMC, as more particularly describe in Exhibit B-4....”
6. Exhibit B-4 of the Fourth Amendment includes the scope of work for thermal credit production. “TFT, its contractors, and subcontractors shall provide Credit Production Services for the purpose of generating Thermal Credits. Thermal Credits generated under this Agreement shall be calculated as provided in the [Water Quality Trading] Plan....”
7. Exhibit A-4 of the Fourth Amendment includes Defined Terms. ““Credit Production Services’ means all services required of Consultant to perform the Work hereunder, which includes but is not limited to, site modeling, Restoration Services, credit registration, long-term maintenance of the Thermal Credits Delivered, and reporting.”
8. ““Restoration Services’ means the site preparation, plantings and establishment work, including the monitoring and maintenance thereof, associated with environmental improvement projects implemented by the Credit Program Manager in order to generate and maintain Thermal Credits....”
9. Section 1.1 of the Water Quality Trading Plan for MWMC includes “credits may be produced from any combination of riparian shade restoration and instream restoration projects.”
10. MWMC indicated in its request for coverage determination that the riparian restoration work may include:
 - 1) “site-preparation work, which can include removal of debris as well as treating and eradicating invasive species;
 - 2) “planting and maintain native trees; and
 - 3) “if needed, constructing fencing to protect young trees from wildlife (*i.e.* beaver, elk or deer) and, in very limited circumstances, nearby livestock.”
11. TFT has an Overview of Approach to Restoration Services Using Fencing (the “Overview”). The Overview includes that “each riparian project is a site-specific undertaking.” “Generally, riparian restoration involves landowner recruitment, site preparation to remove invasive vegetation, placement of browse control, and ongoing monitoring and stewardship.” Initially, projects may use mesh tubes secured with a wooden stake and/or wire cages secured with a t-post. The mesh tubes and wire cages may be temporarily placed around new plantings to protect them from deer and beaver browse.
12. The Overview also includes that “fencing is expected on less than ten percent of restoration sites.” “Where grazing is seasonal or short-term, fencing may consist of movable electrical lines strung between temporary stakes.” “Where grazing is expected to be year-round or multi-year land use, fencing may involve building wooden corner braces... placing wooden posts at set intervals, with t posts in between the wood posts. “[F]encing is designed to be as minimal as possible.”

13. The TFT has a Temporary Electrical Fence Addendum to the Overview. It includes that “[t]emporary electric fencing is occasionally used to provide livestock exclusion from a restoration project site and is a valuable option given that it involves little material and is relatively easy to install and remove.” According to MWMC, “[w]hen new plantings on a site are no longer at risk of grazing animals, protective measures, such as temporary fencing, can be removed.”
14. TFT will enter into a series of lease agreements with the landowners where the restoration services will take place. Lease agreement for the work to be performed under the Fourth Amendment have not been entered into at this time. The work may continue through 2027.
15. The Sixth Amendment to the Consultant Agreement modifies the definition of “Restoration Services” to preclude from the definition, and from the work done under the Consultant Agreement, fence installation. The Sixth Amendment was executed on September 11, 2023.
16. Funds of a public agency to be used on the Project include up to \$9,548,000 in MWMC funds.
17. No public agency will occupy or use any of the square footage of the completed project.

CONCLUSIONS OF LAW

1. While the Project is being contracted for by a public agency to serve the public interest, the work will not include construction, reconstruction, major renovation, or painting. Therefore, the Project does not meet the definition of “public works” under ORS 279C.800(6)(a)(A).
2. The Project will use up to \$9,548,000 in “funds of a public agency.” While the Project will use \$750,000 or more in funds of a public agency, it does not include constructing, reconstructing, painting, or performing a major renovation on a road, highway, building, structure, or improvement of any type. Therefore, the Project does not meet the definition of “public works” under ORS 27C.800(6)(a)(B).
3. No other portion of the definition of “public works” under ORS 279C.800(6)(a) applies to the 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 not apply to the riparian restoration work as described in this determination.

This determination is based on the agency’s file as of the date of this determination. If any of the project information provided is incorrect or incomplete, this determination may no longer apply. If the project or project documents are modified or supplemented after the date of this determination, this determination may no longer apply. The commissioner may make a different determination if any of the project information is incomplete or incorrect, or if the project or project documents are modified or supplemented after the date of this determination. A new determination may be requested based on the modified or supplemented information or documentation.

REQUEST FOR A 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, Oregon 97232

If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived, this determination order will be final, and the agency file on this matter shall serve as the record for purposes of proving a prima facie case.

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 order 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.

Date: September 12, 2023

CHRISTINA E. STEPHENSON, Commissioner
Bureau of Labor and Industries



Laura van Enkevort
Wage and Hour Administrator

Certificate of Service

On September 12, 2023, I mailed the Prevailing Wage Rate Determination for the Riparian Restoration Work project to the requestor and interested parties, as follows:

Kristin Denmark
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Springfield, OR 97477

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The Freshwater Trust
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Matt Stouder and Todd Miller
Metropolitan Wastewater Management Commission
c/o City of Springfield, Public Works/Environmental Services
225 Fifth Street
Springfield, OR 97477



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