CAPITOL LAKE – DESCHUTES ESTUARY

MEMORANDUM OF UNDERSTANDING FOR GOVERNANCE AND FUNDING OF A RESTORED ESTUARY

Introduction

In 2018, the Washington State Department of Enterprise Services (DES) began a process to prepare an Environmental Impact Statement (EIS) to evaluate the potential impacts and benefits of long-term management alternatives for the Capitol Lake – Deschutes Estuary. This process included an effort to evaluate conceptual options for shared funding and governance of a future management plan, in accordance with Engrossed Substitute House Bill 2380. In 2022, DES identified the Estuary Alternative as the long-term management plan that would best meet project goals. This decision was made following careful consideration of a broad range of technical analyses conducted for the EIS, by soliciting feedback from key stakeholders, and after reviewing public comments.

Estuary restoration will complement other efforts among state, tribal, and local governments, public entities, and private organizations to restore the Deschutes River watershed.

To explore and develop long-term management options for the Capitol Lake – Deschutes Estuary, a Funding and Governance Work Group (FGWG) was created with the following members (FGWG Members):

State of Washington, Department of Enterprise Services
State of Washington, Department of Natural Resources
Squaxin Island Tribe
Thurston County
City of Olympia
City of Tumwater
LOTT Clean Water Alliance
Port of Olympia

The FGWG Members have reached preliminary consensus on a range of topics as outlined in this Memorandum of Understanding (MOU). This MOU is not a binding agreement among the FGWG Members. Instead, it is a description of the progress made to date toward a binding agreement, documenting areas of conceptual agreement, describing remaining issues, and indicating the shared commitment to building on areas of consensus and reaching agreement on the remaining issues. The FGWG Members intend to develop an Interlocal Agreement (ILA) that will govern long-term management of the restored estuary.

Background[1]

What is now known as Capitol Lake was originally the southern portion of the Deschutes Estuary, where freshwater from the Deschutes River mixed with saltwater from Budd Inlet over extensive tidal flats. Between 1949 and 1951, the State of Washington constructed a dam at 5th Avenue in Olympia. The 5th Avenue Dam blocked saltwater from Budd Inlet and transformed the area upstream of the dam into Capitol Lake, a 260-acre freshwater lake fed by the Deschutes River. Capitol campus planners intended Capitol Lake to be part of the Washington State Capitol Campus, and it was designated a resource of the Capitol Campus under RCW 43.34.090 and RCW 79.24.710. The waterbody, together with the parks and trails that surround it, remains an important visual and recreational resource for the community. Enterprise Services (to include predecessor agencies) has had the responsibility to manage Capitol Lake throughout the lake's existence.

The Deschutes River and Percival Creek deposit an estimated 35,000 cubic yards of sediment into the Capitol Lake basin each year. Before construction of the 5th Avenue Dam, much of this sediment was deposited in Budd Inlet; after construction of the dam, the vast majority of this sediment settled out in Capitol Lake. Over time, the sediment captured upstream of the 5th Avenue Dam has accumulated up to 13 feet deep in some places – shallowing the lake, visibly altering conditions, and impacting ecological functions.

Capitol Lake historically has violated water quality standards and is a focus of state and federal water quality improvement planning. Water quality monitoring began in the 1970s, and by 1985, the Thurston County Health Department permanently closed the historic swimming beach in Capitol Lake due to water quality impairments.

The presence and persistence of invasive species in Capitol Lake has also complicated its management. Since the 1980s, the State of Washington (State) has employed a variety of strategies to address invasive species, but today more than a dozen different plant and animal invasive species are present. In response to finding the New Zealand mudsnail in Capitol Lake in 2009, the State officially closed Capitol Lake to all active public use.

For more than 50 years, public and private entities have attempted to address environmental concerns regarding the Capitol Lake – Deschutes Estuary. For a wide variety of reasons, these efforts have been unsuccessful or stalled. All FGWG Members agree that action must be taken to better manage this resource and that an outcome of No Action is not acceptable.

DES released the Draft EIS in mid-2021 and identified the Estuary Alternative as the likely preferred alternative in early 2022. Shortly afterwards, FGWG Members began exploring

[1] This background is only intended to be a summary. A more complete discussion of project background, project elements, and the technical analyses that describe impacts and benefits of a long-term management plan can be found in the Final EIS and supporting materials, which can be accessed through the following links: Capitol Lake – Deschutes Estuary EIS - Home (capitollakedeschutesestuaryeis.org); https://des.wa.gov/about/projects-initiatives/capitol-lake/long-term-planning-capitol-lake-deschutes-estuary

ways to fund and govern the likely preferred alternative consistent with guiding principles established by the FGWG Members.

The areas of agreement outlined within this MOU are based on the guiding principles the FGWG Members identified in 2016 to support this process, which are as follows:

1. Dedicated and secure funding sources
2. Those who contribute to the problem should participate in funding or paying for the solution
3. Those who benefit from the solution should participate in funding or paying for the solution
4. Shared distribution of costs
5. State participation
6. Watershed-wide in scale
7. Manageable governance
8. Commitment to a long-term collaborative process
9. Adequately resourced administration
10. Support the goals and objectives of the long-term management plan and the future of the overall watershed

From these guiding principles, the FGWG Members agreed upon a two-part structure for implementing and funding the preferred alternative:[2]

- The State should be primarily responsible for funding the capital costs of design, permitting, and construction of a preferred alternative. This responsibility reflects the State's role in creating the current conditions.
- After construction is complete, FGWG Members will share in administering, funding, and maintaining the Estuary Alternative for the term of the ILA. This shared responsibility reflects FGWG Members' commitment to a long-term solution and recognition that the preferred alternative provides significant benefits to FGWG Members and the broader community.

FGWG Members recognize that after construction of the Estuary Alternative, continued governance of the project and funding of sediment management in West Bay, will contribute to the health of the Deschutes River watershed and will help maintain a working waterfront. Maintaining a working waterfront contributes to a dynamic, vibrant community and will produce and sustain public revenue in the forms of lease payments and tax receipts, support employment opportunities, and create public amenities that benefit all community members.

[2] The Managed Lake and Hybrid Alternatives identified in the Draft EIS lacked sufficient support among FGWG Members to warrant further development of governance and funding models. As a result, if either of these alternatives were selected, long-term administration, funding, and maintenance would be expected to remain State responsibilities.

Conceptual Agreement

The FGWG Members conceptually agree on the following issues:

1. Conceptual Overview

Construction and management of the Estuary Alternative will include the following elements and assumptions, which are described in more detail in sections that follow:

- The FGWG Members intend to execute an ILA governing implementation and long-term funding and governance of the Estuary Alternative.
- DES will submit a capital request to fund design and permitting of the Estuary Alternative to the State Legislature for the 2023 legislative session.
- The State will administer and fund initial estuary restoration. DES will pursue funding from the State Legislature and other sources and will construct the Estuary Alternative.
- DES will transfer specific physical assets and long-term management responsibilities of those assets to individual FGWG Members after construction.
- As a separate project, known sediment contamination in lower Budd Inlet will be remediated. This remediation is expected to be led by the Port of Olympia and will occur prior to removal of the 5th Avenue Dam.

2. Project Elements

a) Pre-Project Conditions

Prior to and separate from construction of the Estuary Alternative, known sediment contamination in lower Budd Inlet will be remediated to conditions satisfactory to the Washington State Department of Ecology. The Port of Olympia is expected to lead and manage this effort, with the State of Washington providing funding, in part. The Port of Olympia is currently targeting the late 2020s for remedial action throughout lower Budd Inlet. The 5th Avenue Dam will not be removed until this work is complete to help ensure that the Port of Olympia-led remediation and DES-led estuary construction do not interfere with each other and, to the extent feasible, complement each other.

b) Appropriations for Design, Permitting, and Construction

DES will submit a capital request to the State Legislature to fund the design and permitting of the Estuary Alternative in the 2023 biennial budget. If funding is secured, the estimated 3- to 5-year design and permitting process could begin in mid-2023. The State, acting through DES or a designee, will manage and have authority over design and permitting. During the design and permitting process, DES (or designee) will coordinate with the City of Olympia and City of Tumwater on design of the 5th Avenue Bridge and South Basin boardwalks, respectively, to ensure that these physical assets comply with applicable design standards and are acceptable to the receiving FGWG Member, and that the process used to approve design of the asset is acceptable to the receiving FGWG Member.

DES is currently developing a strategy for construction funding, which is likely to rely on funds from a variety of sources, including federal, state, and potentially philanthropic. If funding is secured without delay, construction of the Estuary Alternative could begin in the late 2020s. The State, acting through DES, the Washington State Department of Natural Resources, or a designee, will manage and have authority over construction, which is estimated to occur over a 7- to 8-year period.

c) Transfer of Assets

DES will convey or transfer certain physical assets to individual FGWG Members after construction is complete. Each transfer will be governed by a separate agreement between DES (or designee) and the receiving Member. Upon transfer of a physical asset, the receiving FGWG Member will have full ownership in perpetuity, to include all maintenance responsibility and risk of loss.

d) Transfer of Governance Responsibility

DES will transfer certain responsibilities to individual FGWG Members when the services are required in the course of long-term management for the Estuary Alternative. The receiving FGWG Member will bear costs associated with the responsibility (in addition to payment allocations) as a portion of its consideration for the ILA; this is considered to be an in-kind contribution similar to the contribution made by FGWG Members (TBD, discussion ongoing) receiving a constructed asset and providing full ownership and maintenance responsibilities. The transfer of governance responsibilities will be addressed within the ILA.

Table 1. Transfer of Physical Assets and Governance Responsibilities

Receiving Entity	Asset/Governance Responsibility	Time of Transfer
State of Washington	Maintenance of infrastructure for boating, fishing, recreation in estuary within Capitol Grounds, as needed. Staffing of decontamination stations. Maintenance of Middle Basin boardwalks. Participation in Contract Management for maintenance dredging (including bathymetric survey, design/permitting and construction) (TBD, discussion ongoing).	Upon construction completion
Squaxin Island Tribe	Participate in implementation of Habitat Enhancement Plan for constructed habitat in the 260-acre basin, formerly Capitol Lake.	Upon construction completion
Thurston County	Finance management of funds collected by FGWG Members for long-term sediment management.	ILA execution
City of Olympia	New 5th Avenue Bridge	Upon construction completion

Receiving Entity	Asset/Governance Responsibility	Time of Transfer
City of Tumwater	South Basin boardwalks	Upon construction completion
LOTT	None identified	N/A
Port of Olympia	Contract management for some portion of maintenance dredging (including bathymetric survey, design/permitting and construction) – (TBD, discussion ongoing)	Upon construction completion

e) Sediment Management

After the State constructs the estuary and transfers physical assets and specific management responsibilities to individual FGWG members, shared long-term responsibilities will focus on sediment management in the West Bay of Budd Inlet. Sediment management is part of the overall project for the benefit of all, as described above.

Sediment management is intended to remove additional sediment that deposit in West Bay under the Estuary Alternative at rates greater than existing conditions (also referred to as No Action or "baseline"). Sediment management includes annual bathymetric surveys to evaluate sediment accumulation along the eastern shoreline of West Bay, contract management (which includes design and permitting), and maintenance dredging (which includes disposal of dredged material). The FGWG Members will collectively fund maintenance dredging. Numerical modeling conducted for the EIS suggests that maintenance dredging to avoid significant impacts[3] to navigation from sediment accumulation could be needed in areas of West Bay on an average and approximated frequency of 6 years.

3. Term/Withdrawal

The ILA will become effective on the date of the last FGWG Member's signature. The ILA will expire on December 31, 2050, unless some or all FGWG Members agree to renew for an additional term. The FGWG Members will meet beginning in 2045 to determine whether to extend the ILA, and if so, on what terms and with which FGWG Members.

An FGWG Member may withdraw from the ILA at any time, provided that before withdrawing, (1) the withdrawing FGWG Member provides funds sufficient to satisfy all financial obligations of the withdrawing FGWG Member for the current term of the ILA, and (2) the withdrawing FGWG Member has satisfied all specific performance obligations under the ILA.

[3] Significant adverse impacts are defined as: Large vessels accessing the Federal Navigation Channel and Port of Olympia having to wait more than four (4) hours for channel access due to water depth and low tide conditions caused by sediment deposition on more than one consecutive occasion, or more than 10% of anticipated small craft vessels at any single marina unable to access leased moorage due to shallowed water depth caused by sediment deposition.

4. Renegotiation

If one or more of the following specific events occur, each FGWG Member will have the right to withdraw from or require renegotiation of the terms of the future ILA:

- Washington State Legislature fails to appropriate funding for construction of the Estuary Alternative.
- Remediation of contaminated sediment in lower Budd Inlet is postponed indefinitely or cannot occur before the removal of the 5th Avenue Dam.
- Projected sediment management costs during the term of the ILA increase above agreed-upon allocation amounts (Note: total estimated costs and the resulting individual allocations are stated in 2022 dollars and will include contingencies (to include inflation) calculated as a percent cost overage to be determined by FGWG Members).
- The private marinas, Port of Olympia, and/or U.S. Army Corps of Engineers (USACE) fail to provide sufficient funding commensurate with dredging needs under existing conditions (also called baseline or "No Action" dredging).

5. Financing for Sediment Management in West Bay

The FGWG Members have reached conceptual agreement regarding several aspects of funding and finance management for sediment management, as described below:

a) Finance Management

Thurston County will act as the finance manager for sediment management. On or before the date that the State of Washington formally appropriates full construction funding for estuary construction, Thurston County will have taken all actions necessary for it to receive, hold, and invest funds from FGWG Members to be used for sediment management in West Bay. Thurston County will invest such funds in its general investment fund and use funds (to include interest generated by funds deposited by FGWG Members) only for sediment management.

b) Total Estimated Sediment Management Costs and Payment Allocation

FGWG Members agree that costs for sediment management above those costs associated with dredging of the No Action alternative (baseline) will be allocated among FGWG Members on a percentage basis, as set forth in Attachment 1.

Working note to FGWG Members

c) FGWG Member Deposits and Annual Payments

Within 90 days of the date the State formally appropriates full construction funding for estuary construction, but no earlier than January 1, 2025, each FGWG Member will make an initial deposit with Thurston County. Each FGWG Member's initial deposit will be equal to the FGWG Member's annual payment, which is determined by dividing the FGWG Member's total allocated sediment management costs for the initial term of the ILA by the number of years (partial years count as a full year) remaining in the initial agreement term of the ILA at the time of the deposit. Following the initial deposit, each FGWG Member

agrees to make annual payments (determined as above) on or before December 31 of each year, through the end of the agreement term.

d) Annual Payment Adjustments

Calculations of total estimated sediment management costs conservatively assume that removal of the 5th Avenue Dam begins in 2033, which is the earliest that this could occur given the design and permitting process, and other construction activities that are required before dam removal; and this assumes that all funding is secured without delay. The total estimated sediment management costs also assume three dredging events, given the 18-year duration between 2033 and 2050 and the 6-year frequency of maintenance dredging that is estimated based on hydrodynamic and sediment transport numerical modeling conducted for the EIS. If removal of the 5th Avenue Dam is delayed such that fewer than three dredging events are anticipated to occur within the term of the ILA, FGWG Members will have the right to commensurately adjust total estimated sediment management costs and annual payments.

After the first maintenance dredging event, the Contract Manager will provide FGWG Members with final costs for the dredging event. FGWG Members will use this information to adjust the total projected sediment management costs, if needed, and commensurately adjust annual individual FGWG Member payments based on the percent allocation of total sediment management costs set forth in Attachment 1.

Adjustments to total sediment management costs and/or annual payments will trigger the renegotiation rights described in Section 4 only if adjustments cause projected costs to increase above agreed-upon allocations.

If, during the term of the ILA, sediment management costs are or are projected to be lower than estimates used for the ILA, the total sediment management costs and the resulting individual allocations will be adjusted. If excess funds remain upon the expiration or termination of the ILA and unless otherwise agreed to, each FGWG Member will be entitled to receive a refund of such excess funds based on a pro-rata calculation of the amounts paid.

e) Planning-Level Cost Estimates

FGWG Members have negotiated this MOU using planning-level cost estimates. Civil, environmental, and coastal engineers developed planning-level cost estimates using actual costs for similar work on recent projects, numerical modeling in the EIS that predicts sediment accumulation under the Estuary Alternative, and triggers to initiate dredging events (see footnote 3). Planning-level cost estimates also assume in-water disposal of the dredged sediment, based on current sediment data and a projection that invasive species will not persist in the material to be dredged.

Planning-level cost estimates are in 2022 dollars, are based on conceptual design, and have an accuracy variation of minus 25% to plus 35%, consistent with Class 4 estimates prepared using standards established by the Association for the Advancement of Cost Engineering. The cost estimates are to support planning efforts and include contingency allowances (to include inflation). The accuracy of these cost estimates will increase as design is further developed.

6. Enforcement

The FGWG Members agree and recognize that this multi-party MOU and the multi-party ILA to follow are the result of complex negotiations among individual entities each with individual interests and constituencies, and that the provisions of the MOU and ILA are interdependent and represent a balancing of those individual interests and constituencies. The FGWG Members further agree that the ILA and restoration of the Deschutes Estuary will provide each entity with public benefits, but to secure those public benefits, each obligation under the ILA must be fulfilled. Accordingly, the FGWG Members agree that each FGWG Member will have authority to enforce the obligations under the ILA of each other FGWG Member, to include requiring specific enforcement of such obligations.

7. Issue Remaining Under Discussion

The FGWG Members continue to discuss the following issue:

- Maximum allowable percentage increase to total sediment management costs (inflation and/or cost escalation), to be used as the basis for in cost allocations.
- Allocation, documentation, and parties involved in addressing baseline dredging and associated costs.
- PLACEHOLDER to be populated further by FGWG if open items remain.

8. Conclusion and Commitment

By signing below, the FGWG Members are not entering into a binding agreement, but are indicating areas of general or conceptual agreement.

The FGWG Members execute this MOU in good faith and commit themselves to continuing discussions for timely execution of the ILA.

Signature

FGWG Members – please let us know who will be signing the MOU.

City of Olympia – City Manager Jay Burney and City Attorney Mark Barber

City of Tumwater – Mayor Debbie Sullivan