

Subject: Resolution #650 – Authorizing Execution of an Inter-Agency Agreement with the Department Of Ecology for Funding the Ruston Tunnel Remediation

Proposed Council Action:

Approve Resolution #650.

Dept. Origin: Mayor’s Office
Prepared by: Jennifer Robertson, City Attorney’s Office
For Agenda of: March 7, 2017
Exhibits: Resolution #650 & IAA

	Initial & Date
Concurred by Mayor:	_____
Approved/form by City Atty:	<u>3-7-17/JSR</u>
Approved by _____ Director:	_____
Approved by Department Head:	_____

INFORMATION / BACKGROUND

The City has an easement for the Ruston Way Tunnel which is had utilized for a city street right-of-way since 1915, however, this street was closed to the public in 2012.

The United States Environmental Protection Agency’s (EPA’s) Record of Decision for the Asarco Tacoma Smelter Superfund Site requires that the Ruston Way Tunnel be abandoned and either removed or filled to the extent practicable with suitable materials (such as residential soils), and that the ground surface over the tunnel be capped. Point Ruston, LLC, is a potentially responsible party under EPA’s Record of Decision, and has already completed a portion of the filling but has stalled in completing the remainder of the work. Point Ruston has asserted contribution and cost recovery claims against the City for costs incurred and to be incurred for the Ruston Way Tunnel remediation.

In 2013, the Washington State Legislature appropriated \$400,000 to the Department of Ecology for the purpose of contracting for the cleanup and remediation of the former Ruston Way Tunnel.¹ This appropriation was renewed in 2015.²

The Department of Ecology and the City agree that the \$400,000 appropriation may be transferred from Ecology to the City, so that the City may, if it chooses to do so, remediate the Ruston Way Tunnel and areas related thereto. The Interagency Agreement (IAA) attached to Resolution No. 650 establishes procedures between Ecology and Ruston for obtaining these funds for the remediation of the tunnel and the surrounding area.

¹ ESSB 5035, 2013 Wash. 2d. Sp. Sess., Chap. 19 §3072.

² 2015 2EHB 1115.SL (page 94).

There are still a couple of blanks that Ecology will fill in, such as their internal agreement number and the contacts that the City will use in providing notice and sending invoices. These will be filled in by Ecology shortly.

FISCAL CONSIDERATION

If the City undertakes this remediation work, Ecology will reimburse the City for the costs up to \$400,000 provided that the work is done before the appropriation expires. The appropriation expires on June 30, 2017. Therefore, the City will need to work with the deadlines in order to ensure that the funding will not disappear prior to full cost recovery being made.

BOARD OR COMMITTEE RECOMMENDATION

None.

RECOMMENDATION / MOTION

Adopt Resolution #650.

MOTION: I move to adopt Resolution #650 authorizing the Mayor to execute an Inter-Agency Agreement with the Department of Ecology for funding remediation of the Ruston Way Tunnel and surrounding area.

RESOLUTION NO. 650

**A RESOLUTION OF THE CITY OF RUSTON,
WASHINGTON, AUTHORIZING THE MAYOR TO
EXECUTE AN INTER-AGENCY AGREEMENT WITH THE
DEPARTMENT OF ECOLOGY FOR FUNDING OF
REMEDICATION AND CLEANUP OF THE RUSTON WAY
TUNNEL.**

WHEREAS, in 2013, the Washington State Legislature appropriated \$400,000 to the Department of Ecology for the purpose of contracting for the cleanup and remediation of the former Ruston Way Tunnel. ESSB 5035, 2013 Wash. 2d. Sp. Sess., Chap. 19 §3072. This appropriation was renewed in 2015 under 2015 2EHB 1115.SL (page 94); and

WHEREAS, the City has an easement for the Ruston Way Tunnel which is had utilized for a city street right-of-way since 1915; and

WHEREAS, this street was closed to the public in 2012; and

WHEREAS, the United States Environmental Protection Agency's (EPA's) Record of Decision for the Asarco Tacoma Smelter Superfund Site requires that the Ruston Way Tunnel be abandoned and either removed or filled to the extent practicable with suitable materials (such as residential soils), and that the ground surface over the tunnel be capped; and

WHEREAS, Point Ruston, LLC, is a potentially responsible party under EPA's Record of Decision, and has already completed a portion of the filling; and

WHEREAS, Point Ruston has asserted contribution and cost recovery claims against the City for costs incurred and to be incurred for the Ruston Way Tunnel remediation; and

WHEREAS, the Department of Ecology and the City agree that the \$400,000 appropriation may be transferred from Ecology to the City, so that the City may remediate the Ruston Way Tunnel and areas related thereto; and

WHEREAS, the City Council finds it in the best interests of Ruston to enter into the Interagency Agreement as attached hereto as Exhibit “A” and to authorize the Mayor to execute the same; **NOW, THEREFORE,**

THE CITY COUNCIL OF THE CITY OF RUSTON HEREBY RESOLVES AS FOLLOWS:

Section 1. Agreement Authorized. The City Council hereby authorizes the Mayor to execute the Interagency Agreement with the Department of Ecology in substantially the form attached hereto as Exhibit “A”

Section 2. Posting on Website Required. Pursuant to RCW 39.34.040, once this Agreement has been executed by both Ruston and Ecology, the City Clerk is directed to post a copy of this Agreement on the City’s website.

RESOLVED this 7th day of March, 2017.

APPROVED:

Bruce Hopkins, Mayor

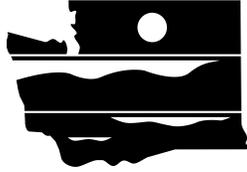
ATTEST/AUTHENTICATED:

Judy Grams, City Clerk

FILED WITH THE CITY CLERK: _____
PASSED BY THE CITY COUNCIL: _____
RESOLUTION NO.: 650

EXHIBIT "A"

**INTERAGENCY AGREEMENT
BETWEEN
CITY OF RUSTON
AND
THE WASHINGTON STATE DEPARTMENT OF ECOLOGY**



DEPARTMENT OF
ECOLOGY
State of Washington

IAA No. [REDACTED]

INTERAGENCY AGREEMENT (IAA)

BETWEEN

THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

AND

CITY OF RUSTON

THIS INTERAGENCY AGREEMENT is made and entered into by and between the STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, hereinafter referred to as "ECOLOGY," and the CITY OF RUSTON hereinafter referred to as the "CITY" and is issued pursuant to the authority granted by Chapter 39.34 RCW.

IT IS THE PURPOSE OF THIS AGREEMENT is to provide funding for the cleanup and remediation of the former Ruston Way Tunnel.

In 2013, the Washington State Legislature appropriated \$400,000 to ECOLOGY to contract for the cleanup and remediation of the former Ruston Way Tunnel. ESSB 5035, 2013 Wash. 2d. Sp. Sess., Chap. 19 §3072. This appropriation was renewed in 2015 under 2015 2EHB 1115.SL (page 94).

The CITY has an easement for the Ruston Way Tunnel which is had utilized for a city street right-of-way since 1915. This street was closed to the public in 2012.

The United States Environmental Protection Agency's (EPA's) Record of Decision for the Asarco Tacoma Smelter Superfund Site requires that the Ruston Way Tunnel be abandoned and either removed or filled to the extent practicable with suitable materials (such as residential soils), and that the ground surface over the tunnel be capped.

Point Ruston, LLC, ("Point Ruston") is a potentially responsible party under EPA's Record of Decision, and has already completed a portion of the filling.

Point Ruston has asserted contribution and cost recovery claims against the CITY for costs incurred and to be incurred for the Ruston Way Tunnel remediation.

ECOLOGY and the CITY agree that the \$400,000 appropriation may be transferred from ECOLOGY to the CITY, so that the CITY may remediate the Ruston Way Tunnel and areas related thereto .

THEREFORE, IT IS MUTUALLY AGREED THAT:

1) PAYMENT

ECOLOGY agrees to provide the CITY up to \$400,000 in funding for the CITY to perform remediation work on the Ruston Way Tunnel, consistent with the EPA approved work plan.

“Ruston Way Tunnel Remediation” means the work defined as the Remedial Action under paragraph 17(D)(i) of the Second Amendment to Consent Decree filed October 23, 2006 in *United States v. Asarco Incorporated and Point Ruston LLC*, No. C-91-552 8-B (W.D. Wash.) (“Second Amendment”), but only with respect to the work associated with abandoning, filling, and capping the Ruston Way Tunnel per section 2.2.1 DESIGN AND CONSTRUCTION of the Final Statement of Work for Remedial Design and Remedial Action Commencement Bay Nearshore/Tideflats Superfund Site Operable Unit 02 Asarco Tacoma Smelter Facility and Slag Peninsula and Operable Unit 06 — Marine Sediments and Groundwater, Ruston and Tacoma, Washington (“SOW”), as attached to the Second Amendment.

The CITY may utilize these resources to cover costs or expenses of remediation in the CITY related to the Ruston Way Tunnel Remediation project, including the City’s review, inspection, oversight and construction thereof.

When seeking payment from ECOLOGY, the CITY shall first verify, and provide documentation to Ecology demonstrating that the CITY has actually and reasonably expended the amount sought on Ruston Way Tunnel Remediation work, and that the work has received EPA’s approval as complete and consistent with the requirements of the Consent Decree.

2) PERIOD OF AGREEMENT

Subject to its other provisions, the period of this Agreement shall commence when fully executed, and be terminated as of the end of the biennium on June 30, 2017, unless funding is renewed or otherwise available to cover the expenses described herein, unless terminated sooner as provided herein.

3) BILLING PROCEDURE

The CITY shall submit invoices to ECOLOGY for payment. All invoices are to be delivered to the attention of at the following address: *Address to be provided here*

[NOTE: Identify how often invoices should be submitted and to whom]. Invoices may be submitted on a _____ basis or at the completion of the work.

Each invoice shall reference the Agreement (IAA) number and clearly identify the items related to performance under this agreement. All expenses invoiced shall be supported with copies of invoices paid. Upon expiration of the Agreement, any claim for payment not already made shall be submitted within 30 days after the expiration date or the end of the fiscal year, whichever is earlier. Payment will be within 30 days of receipt of properly completed invoice.

Payment for approved and completed work will be issued through Washington State's Department of Enterprise Services Statewide Payee Desk. To receive payment you must register as a state-wide vendor by submitting a state-wide vendor registration form and an IRS W-9 form at website, <http://www.des.wa.gov/services/ContractingPurchasing/Business/VendorPay/Pages/default.aspx>. If you have questions about the vendor registration process you can contact DES at the Payee Help Desk at (360) 407-8180 or email payeehelpdesk@des.wa.gov.

4) ALTERATIONS AND AMENDMENTS

This Agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

5) ASSIGNMENT

The work to be provided under this Agreement, and any claim arising thereunder, is not assignable or delegable by either party in whole or in part, without the express prior written consent of the other party, which consent shall not be unreasonably withheld.

6) DISPUTES

In the event that a dispute arises under this Agreement, it shall be determined by a Dispute Board in the following manner: Each party to this Agreement shall appoint one member to the Dispute Board. The members so appointed shall jointly appoint an additional member to the Dispute Board. The Dispute Board shall review the facts, agreement terms, and applicable statutes and rules, and make a determination of the dispute. The determination of the Dispute Board shall be final and binding on the parties hereto. The cost of resolution will be borne by each party paying its own cost. As an alternative to this process, either of the parties may request intervention by the Governor, as provided by RCW 43.17.330, in which event the Governor's process will control.

6) FUNDING

ECOLOGY's ability to make payments is contingent on availability of funding. In the event that the appropriation is withdrawn, reduced, or limited in any way after the effective date of this Agreement and prior to completion or expiration date of the work in this agreement, ECOLOGY, at its sole discretion, may elect to terminate the agreement, in whole or part, for convenience or to renegotiate the agreement subject to new funding limitations and conditions. ECOLOGY may also elect to suspend performance of the agreement until ECOLOGY determines the funding insufficiency is resolved. Ecology may exercise any of these options with no notification restrictions, however, ECOLOGY agrees to inform the CITY of any changes to funding as soon as practicable.

7) GOVERNING LAW AND VENUE

This Agreement is entered into pursuant to and under the authority granted by the laws of the state of Washington and any applicable federal laws. The provisions of this Agreement shall be construed to conform to those laws.

This Agreement shall be construed and interpreted in accordance with the laws of the state of Washington, and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

8) INDEPENDENT CAPACITY

The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

9) ORDER OF PRECEDENCE

In the event of an inconsistency in the terms of this Agreement, or between its terms and any applicable statute or rule, the inconsistency shall be resolved by giving precedence in the following order:

- a. Applicable federal and state of Washington statutes, regulations, and rules.
- b. Mutually agreed written amendments to this Agreement.
- c. Statement of Work and Budget.
- d. Any other provisions of the Agreement, including materials incorporated by reference.

10) RECORDS MAINTENANCE

The parties to this Agreement shall each maintain books, records, documents and other evidence that sufficiently and properly reflect all direct and indirect costs expended by either party in the performance of the service(s) described herein. These records shall be subject to inspection, review or audit by personnel of both parties, other personnel duly authorized by either party, the Office of the State Auditor, and federal officials so authorized by law. All books, records, documents, and other material relevant to this Agreement will be retained for six years after expiration and the Office of the State Auditor, federal auditors, and any persons duly authorized by the parties shall have full access and the right to examine any of these materials during this period.

Records and other documents, in any medium, furnished by one party to this agreement to the other party, will remain the property of the furnishing party, unless otherwise agreed. The receiving party will not disclose or make available this material to any third parties without first giving notice to the furnishing party and giving it a reasonable opportunity to respond. Each party will utilize reasonable security procedures and protections to assure that records and documents provided by the other party are not erroneously disclosed to third parties.

11) SEVERABILITY

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of this agreement, and to this end the provisions of this Agreement are declared to be severable.

12) TERMINATION FOR CAUSE

If for any cause, either party does not fulfill in a timely and proper manner its obligations under this Agreement, or if either party violates any of these terms and conditions, the aggrieved party will give the other party written notice of such failure or violation. The responsible party will be given the opportunity to correct the violation or failure within 15 working days. If failure or violation is not corrected, this Agreement may be terminated immediately by written notice of the aggrieved party to the other.

13) TERMINATION FOR CONVENIENCE

Either party may terminate this Agreement upon thirty (30) days' prior written notification to the other party. If this Agreement is so terminated, the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination.

14) WAIVER

A failure by either party to exercise its rights under this Agreement shall not preclude that party from subsequent exercise of such rights and shall not constitute a waiver of any other rights under this Agreement unless stated to be such in a writing signed by an authorized representative of the party and attached to the original Agreement.

15) AGREEMENT MANAGEMENT

The representative for each of the parties shall be responsible for and shall be the contact person for all communications and billings regarding the performance of this Agreement.

The ECOLOGY Representative is:	The CITY Representative is:
Name: Address: Phone: Email: Fax:	Name: Bruce Hopkins, Mayor Address: 5117 Winnifred Street Ruston WA 98407 Phone: (253) 759-3544 Email: bruceh@rustonwa.org townclerk@rustonwa.org Fax: (253) 752-3754

16) ALL WRITINGS CONTAINED HEREIN

This Agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties hereto.

The signatories to this Agreement represent that they have the authority to bind their respective organizations to this Agreement.

State of Washington, Department of Ecology
IAA No.

IN WITNESS WHEREOF, the parties have executed this Agreement.

State of Washington
Department of Ecology

City of Ruston

By: _____

By: _____

Title: _____

Title: Mayor, City of Ruston

Date: _____

Date: _____

APPROVED AS TO FORM ONLY:

APPROVED AS TO FORM ONLY:

ROBERT W. FERGUSON
Attorney General

By: _____
Assistant Attorney General

By: _____
Jennifer S. Robertson
City Attorney's Office