
Chapter 6

Watershed Flow Regime Restoration Evaluation Process

Ecosystem Improvement Transaction Example Contracts

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CH2MHILL

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Ecosystem Improvement Transaction Example Contracts

Introduction

This chapter provides example contracts for flow regime restoration implementation using stormwater management best management practices (BMPs). This chapter is one of a series of related documents¹ developed under a study to address Great Lakes flow regime-based ecosystem improvement projects. These chapters are presented individually because different applications are anticipated depending upon end users' goals. Chapters may be useful to users individually or collectively².

An example of flow regime restoration that results in ecosystem improvement is to retrofit existing impervious area without a stormwater BMP to include a BMP which offsets the affects of imperviousness by controlling peak flows, runoff volume, and infiltration. This study defines the BMP volume in Gallons and defines additional ecosystem function benefits, such as including habitat, water temperature moderation, and improving water quality in Quality Gallons (see Chapters 1 and 2).

This chapter outlines a process for implementing ecosystem improvement transactions. Various metrics can be used to conduct these transactions. The examples presented here are presented using the Quality Gallon Accounting System (QGAS) Protocol discussed in Chapter 4. Three case studies are examined. The first two case studies examine the contractual items which should be defined for the installation of two stormwater BMPs: a retrofit of an existing pond, and the installation of a bioretention facility. The final case outlines a process to implement a citywide rain garden program. Various drivers for ecosystem improvements are examined: Supplemental Environmental Projects (SEPs); existing regulatory programs; such as the Green Tier program developed by the Wisconsin Department of Natural Resources (WDNR); and performance zoning.

The example contracts provide a strong contractual model that addresses many of the issues two or more parties need to agree upon in order to come to a contractual agreement. Elements of some of the transaction processes will require additional details to be worked out, including:

¹ Executive Summary, Chapter 1: Watershed Flow Regime Restoration Evaluation Process, Chapter 2: Developing Stormwater BMP Quality Gallon Metric, Chapter 3: BMP Evaluation Process, Chapter 4: Quality Gallon Accounting System Protocol, Chapter 5: Facilitating and Funding Stormwater Management for Ecosystem Improvement, Chapter 6: Ecosystem Improvement Transaction Example Contracts, Chapter 7: Study Evaluation, Chapter 8: Study Communication Summary

² The project team members (CH2M HILL in association with The Conservation Fund, Cook and Franke, Public Sector Consultants, and Stormtech) acknowledge the generous support from the Great Lakes Protection Fund as part of their Growing Water suite of research projects.

Supplemental Environmental Projects (SEPs)

- Developing a list of SEP opportunities and having the project list available and acceptable to regulators.
- Educating regulators that the SEP list exists and that it is readily available during SEP negotiations with alleged violators.
- Processes to follow if a potential SEP project is not on an official list and a SEP opportunity becomes available.
- Level of design needed for the SEP project to be accepted as viable; including willingness of affected landowners, project cost estimates, and level of ecosystem improvement provided (in Quality Gallons or other ecosystem improvement metric).

Maintenance

On-going maintenance costs as well as how BMP maintenance is funded is an important issue identified by study stakeholders. Contracts that provide for clear maintenance responsibilities and funding are more acceptable. The example contracts provide examples of one method in which maintenance could be accomplished. Actual maintenance and funding will vary depending upon community specific requirements.

Example: Rouge River Upper Subwatershed

Detention Pond Retrofit

This hypothetical agreement illustrates the use of Supplemental Environmental Projects (SEPs) to facilitate flow regime restoration opportunities. A national industry (the “Company”) located in the Upper Rouge River watershed has been cited by the Michigan Department of Environmental Quality (MDEQ) for alleged violations of its National Pollutant Discharge Elimination System (NPDES) (or Air Quality permit) that subjects the Company to potential civil fines and penalties of up to \$10,000/day for each violation. The Company is interested in resolving the matter through a negotiated settlement and is generally aware that SEPs have been an element of previous settlements with other firms similarly cited for permit violations.

The Company asks MDEQ if they are aware of any SEP that might be appropriate for the Company to consider proposing as part of its resolution to the alleged violations. From its guidelines for potential SEP projects, the MDEQ identifies projects submitted by the Alliance of Rouge Communities (ARC), which is a public agency established by the Watershed Alliance Act (Public Act 517) in 2004. The ARC identified projects include stormwater best management practices (BMPs) for flow regime enhancement.

Flow regime enhancement projects considered for inclusion on the SEP list have completed the preliminary project eligibility sheet provided in Appendix 4B and received an acceptable risk rating from the ARC. Acceptable projects have been evaluated using the procedure described in Chapter 4 to quantify the Gallons and Quality Gallons associated with each project. Priority is given to projects which maximize the ecosystem improvement for a given cost. Projects are also selected to ensure a mix of urban and rural implementations.

Based upon prior experience, MDEQ has an expected range of ecosystem improvement expectation (measured in Quality Gallons) for a SEP negotiated settlement. The Company selects a detention pond retrofit project that provides enough Quality Gallons. The Quality Gallons would be obtained from a BMP located on private property and the Company contacts the sponsoring local agency, the City of Farmington Hills. The City has conducted a preliminary screening analysis that identifies the location and private owner of the BMP (the “Landowner”).

As part of its proposed resolution of the alleged violations, the Company submits the contract agreement with the support of a sponsoring local agency as a SEP. The MDEQ accepts the proposed SEP and other settlement terms. The permit issues are resolved and Quality Gallons are provided through a flow regime enhancement BMP constructed under the terms of an agreement between the local land owner and the Company, which is subsequently incorporated into a negotiated, enforceable civil settlement between the Company and the MDEQ.

An example contract is provided below outlining an agreement between the Company and the Landowner to obtain Quality Gallons through funding a detention basin retrofit on the Landowner’s property. Further information on the environmental goals of a similar detention basin retrofit is provided in Chapter 3 *BMP Evaluation Process*.

This example covers the following elements:

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

Each of these elements is detailed below.

Planning and Design

Project funding will be provided by the Company to obtain an ecosystem improvement of at least 69,000 Quality Gallons. The Company 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 (i.e. Oakland County for erosion and sediment control requirements, MDEQ for SEP compliance and expected Quality Gallon creation, 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 Company, 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 Company. Appropriate performance bonds will be associated with the construction contract.

Post-construction Monitoring and Maintenance

In order to make sure the retrofit functions (provides the expected Quality Gallons) as intended, the Company 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 ecosystem improvement values (number of Quality Gallons) outlined in the SEP application. Monitoring reports will be provided to the Company, the Landowner, and MDEQ for monitoring SEP compliance. 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 Company 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 Company is not responsible for reinstalling the retrofit.

Long-term Maintenance

Assuming the detention basin retrofit meets the intended ecosystem improvement (Quality Gallon) design standards at the end of the 5-year maintenance program; the Company 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 to ensure the desired flow restoration improvement is provided in Quality Gallons. The initial Facility inspection verifies that the site can be retrofitted to meet the project goals. To ensure that adequate 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 Company 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 Company
120 Stormwater Drive
Farmington Hills, MI 48331

Contact Person:
Ms. Project Liason
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 Company hereinafter called the "Company". 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 Company 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 Company, 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 (BMP) 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 Company shall fund the planning, design, and construction of the Retrofit to produce at least 69,000 Quality Gallons.

2. The Landowner and the Company shall jointly select the design of the Retrofit. The final design will be submitted to the City for comment and MDEQ for SEP compliance review.
3. Should the final design determine that providing at least 69,000 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 69,000 Quality Gallons through this and/or other projects. The Company retains ownership of Quality Gallons in excess of 69,000 and may donate, bank, or sell them once all Company commitments provided herein are met.
4. The Company 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 Company with approval from the Landowner.
5. The Company 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 Company 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 shall include an assessment of whether Quality Gallon goals will be met or not. Monitoring reports will be provided to both parties, to MDEQ, and to the Alliance of Rouge Communities (ARC). If monitoring indicates fewer than 69,000 Quality Gallons will be met at the end of the 5-year maintenance period, the Company shall notify MDEQ within 30 days and continue maintenance for the 5-year period as provided herein. The Company shall make up a deficit of Quality Gallons as specified through separate agreement with MDEQ.
7. The Company 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 Company 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 Company 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 Company 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 Company 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 Company 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 Company 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 Company 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 Company’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: _____

Example: Menomonee River Subwatershed

Bioretention Facility

This hypothetical example illustrates the use of an existing regulatory program, the Wisconsin Department of Natural Resources (WDNR) Green Tier program, which rewards superior environmental performance, as a driver for flow regime restoration.

A large industry within the Menomonee River watershed (the “Industry”) desires to be an industry leader in the environment. The Industry has several permits with the WDNR (including wastewater effluent and air discharge) and has agreed to commit to the Green Tier program. The Industry chooses to demonstrate superior environmental performance by providing ecosystem improvements (for example, improved habitat, water quality, or flow) which will provide a benefit equivalent to the effect of imperviousness on their property. The Industry quantifies this investment using the QGAS protocol (Chapter 4) to establish an appropriate target volume and agrees to fund sufficient projects over a five year period to provide the target level of Quality Gallons in the watersheds.

The Industry partners with a local trust fund organization (“Watershed Trust Fund”) to achieve this goal. The Watershed Trust Fund identifies projects using the pre-screening process outlined in Chapter 4 and prioritizes these projects using the QGAS protocol to measure the ecosystem improvement provided. The Industry then provides funding to the Watershed Trust Fund to construct a sufficient number of projects each year to meet its five year target. An attachment to an existing WDNR Green Tier application, outlining a similar arrangement developed for the Green Tier program, is included as Appendix 6A.

The contract below outlines an agreement between the Watershed Trust Fund and a second company, ABC Company (the “Company”) to construct a bioretention facility (“Facility”) in a parking lot on ABC Company’s property using funds provided by the Industry. The Watershed Trust Fund is responsible for certifying the project following construction and reporting actual Quality Gallon volumes to the Industry. Further information on the environmental goals of a similar bioretention project is provided in the Chapter *BMP Evaluation Process*.

This example covers the following elements:

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

Each of these elements is detailed below.

Planning and Design

The Watershed Trust Fund (Fund) will fund the planning and design components of the bioretention Facility. The number of Quality Gallons available from each alternative is determined during the design process. After selection of the final design by the Fund and

the Company, construction plans and specifications will be developed. The plans will also be submitted to the local unit of government and other agencies having regulatory authority over BMPs within the community (for example: erosion and sediment control during construction, long-term BMP maintenance, etc.). The project will be set up so that amenities not covered by the grant that the Company desires are bid separately.

Construction

Contracting for the project will go through the Company. The Company will prepare the contract documents, advertise the project, and select the contractor for the job. Construction management will be performed through an agreed-upon third party. The construction manager will be contracted through the Company.

Payment for flow regime improvement bid items will be made by the Fund to the Company as the invoices are sent from the contractor to the Company. Payment will be due within 30 days of invoice receipt. The Company and the Fund will establish a “not to exceed” cost for the bioretention project.

Postconstruction Monitoring and Maintenance

The Company agrees to report annually to the Fund on the bioretention Facility condition for 5 years once construction is complete. For purposes of Quality Gallon documentation, the Company also agrees to allow an independent certification to assess the project and to supply all requested documents and respond to questions from the Certifier.

If the bioretention Facility fails due to an extraordinary natural force that reasonable care would not avoid (for example, tornadoes and severe floods), neither the Company, nor the Fund is obligated to rebuild the Facility.

Long-Term Maintenance

The Company is responsible for maintenance in perpetuity and will monitor the facility at least once every 3 years. If the Company fails to maintain the BMP, the local unit of government will have authority to maintain the BMP and charge the Landowner of the facility as specified in other separate agreements and covenants.

Project Assurances

All phases of the project, from planning to long-term maintenance, include assurances that the desired flow restoration improvement and Quality Gallon goals as provided in the design standards will be met. Construction management is provided by a third party selected by the Company. The Company will also provide the Fund with an annual report on the Facility for 5 years. Finally, the Company agrees to maintain the Facility in perpetuity and submit a report to the local stormwater regulatory agency every 3 years. To further strengthen long-term performance, an easement could be recorded for the Facility. An example easement agreement between the property owner and a local land trust organization is included as Appendix 6B.

Example Agreement

This example presents the issues that should be covered in an agreement between two entities cooperating on providing Quality Gallon goals through an ecosystem improvement

project. The document outlines the major points that would be agreed upon as part of an ecosystem improvement between a Company and a Watershed Trust Fund. **Legal counsel should be consulted when developing legally binding agreements.**

MEMORANDUM OF AGREEMENT

ABC INDUSTRY BIORETENTION SITE 0 West Water Street Milwaukee, WI 53214

Tax Key 9999999999

This Memorandum of Agreement is made between ABC Company, hereinafter referred to as the “Company” and The Watershed Trust Fund, hereinafter referred to as the “Fund”, effective the last date of signature appearing below. The Fund agrees to provide financial resources and Company agrees to obtain engineering consultant expertise to achieve Quality Gallon goals through the construction of a bioretention facility, hereinafter referred to as the “Facility” on an existing parking lot on Company property in Milwaukee, Wisconsin. Such activities will be performed with the objective of implementing flow regime restoration and achieving Quality Gallon goals.

The Company shall be responsible for the following:

- The Company will prepare preliminary plans and specifications for the Facility.
- The Company will be responsible for paying for the amenity bid items while the flow restoration cost will be paid by the Fund.
- The Company will prepare the contract documents, advertise the project, select the contractor for the job and award a contract to construct the Facility. A construction manager will be contracted through the Company with approval from the Fund. The Company and the Fund will establish a “not to exceed” cost for the project.
- The Company agrees to allow a third-party to certify the number of Quality Gallons provided by the project at completion and to provide requested information for the certification process.
- The Company agrees to annual reporting to the Fund on the bioretention Facility condition for 5 years from third-party certification of completion of construction.
- The Company shall be responsible for the operation and maintenance of the Facility as outlined in this Agreement. The Company shall be excused from operation and maintenance, or reconstruction of the Facility, 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 Company has exercised reasonable, good faith, care and due diligence in attempting to prevent or avoid the impacts of such events or forces.
- The Company will provide a permanent easement to the County Land Trust granting access to ensure the operation and maintenance of the Facility and compliance with the terms of this Memorandum of Agreement.

The Fund shall be responsible for the following:

- The Fund will fund the planning and design components of the flow regime restoration up to the level of the “not to exceed” cost.
- The Fund will jointly fund construction management at a percentage equivalent to the ratio between the flow regime improvement bid items and the amenity items.
- Payment for flow regime improvement bid items will be made by the Fund to the Company as the invoices are sent from the contractor to the Company. Payment will be due within 30 days of invoice receipt.

Representative, ABC Company

Representative, Conservation Trust Fund

Example: Community Rain Gardens

This hypothetical agreement illustrates the use of performance zoning to facilitate environmental projects, including flow regime restoration for the purpose of generating Quality Gallons. An older community within the Menomonee River watershed is facing the Wisconsin Department of Natural Resources (WDNR) water quality mandates that will require significant capital expenditures to achieve compliance.

The community offers developers the opportunity to increase density by a third under the condition that the developer financially supports the stormwater retrofit needs of areas elsewhere in the community. The financial support is provided to the community through the purchase of Quality Gallon credits which are used to construct stormwater best management practices (BMPs). An overall Quality Gallon goal for the community is established using the QGAS protocol (Chapter 4). Individual projects are then built to work toward this goal with a priority placed on projects with high ecosystem improvement to project cost ratios as measured through Quality Gallons.

An example resolution illustrating this arrangement is included as Appendix 6C of this chapter. The actual text of the resolution allowing the density increase and accepting money for programs will vary depending on the zoning ordinances of the municipality. If the zoning applicable to the project allows for the granting of exceptions to density requirements, then the resolution accepting a payment for stormwater projects in exchange for an increase in density limits does not constitute an act of zoning, and will not require additional steps. For example, in Wisconsin, if the action constitutes an act of zoning, there must be a public hearing and recommendation from the Plan Commission. Moreover, if the action affects zoning (without actually being an act of zoning) Wisconsin law would require that the matter be referred to the Board of Zoning Appeals for its final decision. For this reason, the example resolution is written in the alternative, providing an exception where the zoning ordinance allows it or, in the alternative, a recommendation to the Board of Zoning Appeals for a variance or special exception. Actions that would constitute an act of zoning could not be handled through resolution, but would have to be approached through

the zoning legal process, for example, the public hearing and recommendation from the Plan Commission required in Wisconsin.

The community establishes a uniform cost for Quality Gallon units based upon current construction costs and allows for adjustment of this cost with changing market conditions on an annual basis. Contracts with developers are negotiated on a case by case basis and individualized to meet the goals of the developer and needs of the community. As part of the program, the community offers a condominium developer the opportunity to increase density by a third to 80 units under the condition that the developer purchases an appropriate number of Quality Gallons at the rate previously established by the community.

The transaction results in meeting stormwater quality requirements for the condominium development and for additional area within the community. The community uses the funding to install rain gardens on residential properties. Because the installation of BMPs on residential properties is a voluntary program, no contracts are developed between the homeowner and the community. A discussion of the following aspects of the program is provided below:

- Planning and design
- Construction
- Postconstruction monitoring and maintenance
- Long-term maintenance
- Project Assurances

Planning and Design

The city will develop an extensive public outreach program to encourage homeowners to participate in downspout disconnection and rain garden programs. A series of three mailings and door to door visits is planned to increase participation.

Residents will also be given the opportunity to have a rain garden constructed on their property. A qualified design consultant will visit the home of each interested homeowner to determine site-specific design constraints. The consultant will have a licensed professional engineer and landscape architect work with the homeowner to select an appropriate design for their site.

Construction

At sites identified for rain garden implementation, the community will retain a construction contractor to construct the rain gardens. The community will establish a “not to exceed” cost for each rain garden.

Construction management is provided by a third party contractor retained by the community.

Post-construction Monitoring and Maintenance

The construction contractor will provide 1 year of follow-up with the homeowners to ensure that the rain gardens are functioning as designed and met the needs of the individual homeowner. The construction contractor will also certify the project at completion. A final ecosystem improvement volume, measured in Quality gallons, will be reported to the

community and used to track progress toward the overall community goal, cost per Quality Gallon, and other program management metrics.

Every three years, the City visits rain gardens constructed in prior years to assess performance and to determine if it is still functioning properly. This information is then used to track long-term program success in keeping rain gardens functioning properly and achieving community Quality Gallon objectives.

Long-term Maintenance

Once installed, the rain garden is solely owned and operated by the homeowner. A deed restriction or easement for the BMP could be required by the local unit of government. To encourage the homeowner to maintain the rain garden, the design consultant provides care and maintenance instructions to the homeowner.

Not requiring a deed restriction on the property or that a maintenance covenant be signed by the homeowner could increase project participation. However, more restrictive arrangements have been developed in some communities. Appendix 6D is an example maintenance covenant used in Prince George's County, Maryland. The development of a maintenance agreement is recommended for larger projects, such as the installation of a green roof, bioretention facility in a commercial or industrial setting, or a large residential development where bioretention is the main stormwater control.

Project Assurances

Because this is a voluntary program without contracts for smaller projects, project assurances were structured differently. The ability of the completed rain gardens to meet flow restoration goals is dependent on the continued participation of the homeowner. To encourage homeowner participation, the community will focus upon developing a strong public education program and producing a quality finished project by having the design consultant actively engage the homeowner in the rain garden construction. The City will provide rain garden informational fliers during all home sale transactions.

To provide additional assurances, it is the City's goal to construct additional rain gardens above and beyond the flow regime restoration goals to provide redundancy and account for those rain gardens that may be removed or poorly maintained and do not provide adequate treatment to fully meet flow restoration goals.

Appendix 6A
Example Green Tier Contract

Attachment 3

American Transmission Company

Environmental performance report In support of its Green Tier application

American Transmission Company LLC and its corporate manager, American Transmission Company Management Inc, collectively referred to as American Transmission Company (ATC) started operation on January 1, 2001 as the first electric transmission company in the country. Its mission is to provide open access to the transmission system by owning, operating, maintaining and constructing electric transmission facilities. ATC owns nearly 9000 miles of transmission line and approximately 450 substations in Wisconsin, Michigan's Upper Peninsula and northern Illinois. It has 28 contributors, and a nine-member board of directors consisting of five directors from the founding participants and four directors employed outside the energy industry.

ATC's environmental strategy is one of leadership, expressed through its Environmental Commitment statement, attached to this document. This statement has become ATC's environmental policy statement and has been used for the past three years as a basis for annual as well as five year strategic planning for the Environmental Department. ATC uses an avoid-protect-restore/mitigate approach to environmental protection in the construction work we do. First, we avoid impacting environmental features through siting and design choices. If environmental features cannot practicably be avoided, environmental features will be protected. If protection cannot be practicably implemented, then restoration will be implemented.

ATC's Environmental Department, with assistance from other departments, has recently completed developing its environmental management system, internally called Fred. Fred provides an organized, systematic way of identifying ATC's environmental impacts as well as legal and other requirements, setting appropriate objectives and targets, and establishing environmental programs to achieve those objectives and targets. In doing so, we define structure and assign responsibilities, document and manage our procedures, work instructions, vital records and compliance requirements. Fred also provides a method for monitoring, measuring, reporting and improving our environmental performance. Fred was developed based on the Plan-Do-Act-Check cycle of continual improvement described by ISO standards,

incorporating continual improvement. As Fred was developed, we incorporated initial procedures and work instructions for waste disposal issues, building prevention of pollution into procedures and work practices. We continue to develop procedures and work instructions that will assist ATC in consistently performing its project work.

This report contains sections that describe baseline performance, current performance, future plans for enhancing performance. Supporting documentation is referenced in the text and is attached. Since the Green Tier application focuses on improving ATC's electric transmission line project implementation, the baseline performance section uses the Environmental Commitment Statement as a method of organization.

Baseline performance

Each ATC project has an impact on the environment. The degree and longevity of impact depends on the type and location of the project, construction methodology and resources present. Addressing these impacts was first accomplished through development and implementation of an environmental strategy, expressed in ATC's environmental commitment statement.

ATC's Environmental Commitment statement contains six actions through which it demonstrates its commitment to environmental excellence. These are:

- 1) Comply with all applicable laws, regulations and orders
- 2) Reduce environmental impacts of construction, operation and maintenance through the use of innovative practices, cost-effective technologies and, where appropriate, environmental mitigation and enhancement
- 3) Involve employees in environmental stewardship through job responsibilities and encouraging volunteerism
- 4) Provide employees the tools to participate in environmental stewardship through education and training
- 5) Address transmission-related environmental issues proactively with regulators and other stakeholders through partnerships and collaborative working relationships
- 6) Develop and implement an environmental appraisal process to ensure ATC continues to meet its environmental goals
- 7)

Since its inception, ATC has aggressively pursued a leadership strategy by implementing its environmental commitment. As a result, we've built an environmental ethic into our business activities, developed an attitude of environmental

protection within ATC and actively seek ways of improving environmental performance. To document baseline performance, the activities and accomplishments to date will be tied to the six actions listed above, and are documented in tabular form below. This table also identifies the Green Tier goals that are currently being met through ATC's actions. The three main Green Tier Program goals are to (1) move beyond compliance, (2) address unregulated environmental issues, and (3) natural resource protection and restoration.

Table of activities and connection to environmental commitment actions

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
Environmental Management system – Fred	X	X	X	X	X	X	1, 2, 3
Comply with permits and orders	X						1,3
Construction inspection	X	X				X	3
Approach to environmental stewardship – Avoid/protect, restore/mitigate, and enhance		X					3
Build environmental avoidance and protection into design		X	X				1, 2, 3
Complete analysis of	X	X					1,2,3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
environmental features of a project prior to completing the work. This includes literature search and field surveys as necessary to ensure proper protection is in place. ATC has a license agreement with the DNR's BER for use of the GIS formatted NHI database.							
ATC provided funding through the NRF to support completion of the DNR's BER NHI portal development.	X	X			X		1,2,3
Provide avoidance and protection during construction	X	X					3
<ul style="list-style-type: none"> Require environmentally or culturally sensitive areas be identified 	X	X		X			3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
for avoidance							
<ul style="list-style-type: none"> Develop construction access to avoid sensitive areas 		X					3
<ul style="list-style-type: none"> Employ construction techniques to protect those environmentally special areas that are not avoidable, including <ul style="list-style-type: none"> Winter construction – frozen conditions in wet areas and dormant vegetation Construction mats to protect wet and other sensitive areas Use of tracked or large tire vehicles to spread the weight of the 	X	X		X			1, 2, 3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
vehicle reducing ruts - For specially sensitive areas - walk-in access and helicopter access							
<ul style="list-style-type: none"> Move nests of osprey and eagle from transmission structures to nesting platforms installed near the original nest site. This is done in cooperation with the DNR and US Fish and Wildlife Service and is intended to protect both the birds as well as the reliability of the transmission line. 		X	X	X	X		1, 2, 3
Provide restoration where protection was not doable		X					3
Use of low		X	X	X	X		1, 2, 3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
maintenance, native vegetation at facilities owned by ATC (such as substations) and encourage landowners to plant compatible native vegetation along electric transmission line easements							
<ul style="list-style-type: none"> • ATC restores areas around owned facilities (such as substations) with native vegetation 		X	X	X			3
<ul style="list-style-type: none"> • Encourage landowners to plant low-growing native vegetation in transmission rights of way 		X	X	X	X		3
<ul style="list-style-type: none"> • Published and distribute a planting guideline that communicates ATC's right of way maintenance 		X	X	X	X		1, 2, 3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
policies and identifies low-growing native vegetation that landowners can plant near a transmission line							
<ul style="list-style-type: none"> Management of rights of way includes removal of invasive plant species and restoration with native vegetation with concurrence of landowner 		X	X	X	X		1, 2, 3
Earth Day celebration each year with special activities for employees and with organizations near each of our main office, Madison and De Pere. Initiated 'Earth Day is Everyday' in 2004, to help ensure that Earth Day is not just celebrated one day			X	X	X		3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
but infuses everything we do. Earth Day activities have included: Build nesting boxes which are donated to local nature centers Clean up Busse Woods in Pewaukee combined with speakers							
Proceeds from Earth Day t-shirt sales to be donated to the Natural Resources Foundation, dedicated to support the DNR's Bureau of Endangered Resources.			X		X		3
Work with local communities and environmental organizations to provide environmental stewardship including Izaak Walton League of Brown County Prairie restoration; support for the Einstein project;		X	X	X	X		2, 3

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
support for Green Bay's Flutter Day; contributed to the Mequon Nature Preserve; provide financial support for environmental organizations in Wisconsin including WWA, TNC, RAW, Sierra Club, Madison Audubon, Gathering Waters.							
Member of organizations being funded by ATC and board membership			X	X	X		3
Have developed and offered internal formal environmental training for employees and contractors including Karner Blue Butterfly, wetland, spill plans, Earth Day speakers	X	X	X	X	X		3
Informal training occurs on a daily basis as a result of interactions on		X	X	X			

Activity	Compliance	Reduce impacts	Environmental Stewardship	Education and training	Partnerships	Appraisal (EMS)	Green Tier Program Goal(s)
project teams							
ATC is a partner to the DNR's Karner Blue Butterfly protection partnership		X	X	X	X		1, 2, 3
ATC is a member of the National Wild Turkey Federation's Energy for Wildlife program		X		X	X		3
ATC is a member of the Wisconsin Bird Conservation Initiative		X	X	X	X		3
ATC works with the DNR to identify environmentally beneficial projects		X	X	X	X		1, 2, 3

Current Performance

Each of the six pieces of ATC's environmental commitment – compliance, environmental stewardship, employee involvement, education and training, partnerships and appraisal (EMS) – are applicable to construction projects. The table above represents the baseline as well as the current overall corporate performance by describing the activities in which ATC is involved and the facets of environmental commitment that the activity achieves. Many of the activities described in the table above have direct and indirect impacts on ATC's construction projects.

ATC, as a new company, is still developing necessary processes and related procedures. Fred currently provides a standardized and orderly framework for organizing and making decisions about the environmental work. However, the procedures that relate to construction projects are in development. Current performance regarding the covered activities is based on the experience and commitment of the environmental department staff

Future Plans for enhancing the environment

The interface between ATC's responsibilities and environmental impact occurs most often within its construction projects, and represents the greatest potential for environmental impact as well as the greatest opportunity for benefit. ATC also needs to ensure quick action on permit applications for projects to move forward in a timely manner. Construction delays are costly, and have the potential to increase impact if regulatory delay reduces or eliminates the opportunity to use optimal protection methods, such as winter construction.

Rather than stipulating specific construction methods or practices for a particular project, setting resource management and protection goals within a regulatory process provides improved protection opportunities as a project is implemented. This approach allows the company in partnership with its consultants and contractors to develop protection measures that meet the resource goals, are doable from a construction standpoint, and are integrated into the construction. This partnership approach supports the use of creative and innovative construction methods, allows for site-specific modifications as construction progresses, allows for modifications to improve protection effectiveness, builds support and buy-in from the partners, and improves assurance of effective protection.

Impacts of construction projects can be organized and classified by general types of ATC projects. This approach to evaluating impacts by ATC project type was used successfully in defining potential impacts on endangered resources in negotiating ATC's NHI license. Separating the types of impacts allows for the differentiation between permitted activities and those for which DNR permit is not required but for which all parties agree are appropriate for resource protection, and supports the need to document and report activities that go beyond regulatory requirements.

ATC's proposed area of focus is to develop methods of ensuring construction projects move forward quickly while also ensuring proper environmental avoidance, protection and mitigation measures are in place. ATC's proposal is also designed to meet the state's goals for Green Tier – move beyond compliance, address unregulated environmental issues

and natural resource protection and restoration. In order to accomplish these goals ATC proposes the following five actions:

- 1) Develop and implement construction standards. Standards help meet all three goals. In order to support this approach, the following should also occur:
 - a. ATC will develop and implement standardized construction procedures, practices and work instructions. These will apply to all construction and maintenance projects, will be incorporated into Fred and will include training and auditing.
 - b. These construction standards can then be used in the following ways in order to meet environmental goals set by the DNR and ATC on specific projects:
 - i. to define general permits for regulated activities for the projects with little or no impact
 - ii. to serve as a menu of standard methods and approaches to construction in environmentally sensitive areas for permit applications with environmental issues not covered by the standards to be addressed as exceptions
 - iii. to serve as a basis for training contractors and employees
 - iv. to serve as a basis for working with contractors and employees to improve protection implemented
 - v. to serve as a basis for measuring compliance
 - c. The construction standards will be used as standards for permit applications, allowing DNR to focus on exceptions not adequately covered by these standards, and procedures will provide a standardized method for resolving these exceptions.
 - d. Construction standards should also assist DNR with its alternatives analysis by allowing these analyses to focus on macro rather than micro issues. Standards ensure that micro issues are addressed and allow focus on larger route/site ecosystem impacts and alternatives. For this to be successful, DNR should
 - i. identify and segregate regulatory requirements from those actions/activities that support alternatives analysis or provide protection beyond regulatory requirements
 - ii. set project-specific environmental protection goals.
- 2) Environmental Stewardship. Stewardship has been an important feature of ATC's environmental program and our approach to projects. Stewardship projects are one facet of ATC's commitment to going beyond compliance, provide local as well as resource benefits, afford opportunities to integrate the company into the local community, and provide a starting point for long-term relationships and partnerships. Stewardship projects are also intended to meet mitigation requirements should these be required to ameliorate unavoidable impacts

of a project. The proposal formalizes our approach and helps meet two goals – restoration and going beyond compliance.

- a. *Proposal.* ATC proposes to fund environmental stewardship associated with its covered activities. This funding may be in two forms
 - i. Development and annual funding of an ATC Environmental Stewardship Fund, administered by Natural Resources Foundation (NRF)
 - ii. Continued support for special projects, funded through the Environmental Department (this represents a continuation of providing funds to special projects and environmental organizations.)
- b. *ATC Environmental Stewardship Fund*
 - i. Develop ATC Environmental Stewardship Fund with the Natural Resources Foundation (NRF). which will act as the third party administrator and make all grant decisions
 - ii. ATC will contribute a portion of its annual construction budget for projects that require a CA or CPCN order from the Public Service Commission of Wisconsin. The amount of the contribution is being determined.
 - iii. ATC and NRF to work out details of this program, with a special focus on supporting State Natural Areas..
 - iv. Annually,, ATC will recommend to the DNR and Environmental Advisory Group a distribution of the funds to be contributed to the ATC Stewardship Fund, based on where ATC completed construction over the past year and where impacts occurred. The DNR and Environmental Advisory Group review and provide comment on the distribution of funds
 - v. ATC makes donation to NRF with recommended targets for regions of Wisconsin
 - vi. NRF issues request for grants from DNR and other organizations, or if there is a specific need within the State Natural Areas (SNA) program in a region identified by ATC, NRF has the opportunity to designate funding to that SNA directly.
- c. **Continued support for stewardship projects**
 - i. ATC's Environmental Department Team will identify potential environmental stewardship projects as part of its annual planning.
 - ii. The Environmental Department budget will continue to reflect projects identified as ongoing and/or potential new stewardship and partnership projects.

- iii. All dollars in this budget are considered committed (If the projects that materialize do not use the entire funding, ATC would donate the remainder into the ATC Stewardship Fund for distribution by NRF)
- 3) Environmental Advisory group
 - a. ATC, with support and participation of DNR, will form an Environmental Advisory Group consisting of environmental stakeholder groups
 - b. The purpose of this group is to provide third party oversight of, review of and input into ATC's Green Tier implementation
 - c. The group members will meet periodically to review and provide input on ATC standards, participate in periodic review of implementation, provide feedback regarding environmental stewardship targeted projects, and participate in the continual improvement process
 - d. At least annually, ATC, DNR and the Environmental Advisory Group review environmental performance on projects to determine what has worked, not worked and where improvements should be made to procedures, work instructions and standards.
 - e. Participant funding. ATC will fund a grant program administered by the Natural Resources Foundation for the purpose of reimbursing Advisory group members' expenses associated with participating in the group.
- 4) Audits and reporting
 - a. ATC will complete a Readiness Assessment at the beginning of Green Tier participation.
 - b. ATC will complete scheduled self-audits and third party audits to support the Green Tier program
 - c. ATC will report annually on results of audits
- 5) Continual improvement
 - a. As ATC develops and implements project-related standards, it will also apply the continual improvement features of Fred

Attachments

- A Environmental Policy
- B Table of Project types

Appendix 6B
Example Bioretention Easement

BIORETENTION EASEMENT

DOCUMENT NO.

ABC COMPANY BIORETENTION SITE

0 West Water Street
Milwaukee, WI 53214

This GRANT OF EASEMENT and these COVENANTS are made by and between ABC Company hereinafter referred to as the "Grantor", and the County Land Trust, hereinafter referred to as "Grantee", as a holder of the easement.

WITNESS THAT:

WHEREAS, the Grantor is the owner in fee of certain real property located in Milwaukee County, in the State of Wisconsin, more particularly described on Exhibit A, said property hereinafter referred to as the "Bioretention Facility"; and

WHEREAS, the Grantor desires and intends that the natural elements and the ecological and aesthetic values of the Bioretention Facility be maintained and improved in accordance with the terms and conditions of this Easement and these Covenants;

WHEREAS, the Grantor and Grantee both desire, intend and have the common purpose of conserving and preserving in perpetuity the Bioretention Facility in a relatively natural condition by placing restrictions on the use of the Bioretention Facility and by transferring from the Grantor to the Grantee, by the creation of an easement on, over and across the Bioretention Facility, affirmative rights to ensure the preservation of the natural elements and values of the Bioretention Facility; and

WHEREAS, the Grantor has received valuable consideration for the granting of this Easement and the making of these Covenants.

NOW, THEREFORE, the Grantor, for valuable consideration received, hereby gives, grants, bargains and conveys to the Grantee, its successors and assigns, forever, an Easement in perpetuity over the Bioretention Facility consisting of the following:

THIS SPACE RESERVED FOR RECORDING DATA

NAME AND RETURN ADDRESS

Parcel Identification Number

Tax Key No. **9999999999**

I. PURPOSE OF THE EASEMENT

The purpose of this easement is to ensure that the Bioretention Facility will not be destroyed or substantially degraded by any subsequent owner of or holder of interest in the property on which the Bioretention Facility is located.

II. RIGHTS OF THE GRANTEE (County Land Trust):

1. The Grantee shall have the right to enforce by proceedings at law or in equity the Covenants hereinafter set forth. The Right shall include but not be limited to, the right to bring an action in any court of competent jurisdiction to enforce the terms of this Easement or these Covenants, to require the restoration of this property to a condition consistent with the Bioretention Facility as-built construction drawings, or to enjoin non-compliance by appropriate injunctive relief. The Grantee does not waive or forfeit the right to take action as may be necessary to ensure compliance with terms of this Easement and these Covenants by any prior failure to act. Nothing herein shall be construed to entitle the Grantee to institute any enforcement action against the Grantor for any changes to the Bioretention Facility or for any condition inconsistent with the Bioretention Facility as-built construction drawings arising from or due to causes beyond the Grantor's control and without the Grantor's fault or negligence (such as changes caused by fire, flood, storm, civil or military authorities undertaking emergency action, or unauthorized wrongful acts of third parties).
2. The Grantee, its contractors, agents and invitees, shall have the right to enter the Bioretention Facility, in a reasonable manner and at reasonable times, for the purpose of inspecting the Bioretention Facility to determine if the Grantor is complying with the Covenants and purposes of this grant, and further to observe, study, record and make scientific studies and educational observations.

III. COVENANTS OF THE GRANTOR (Owner):

1. **USES.** There shall be no commercial or industrial activity undertaken or allowed within the Bioretention Facility.
2. **BUILDINGS AND STRUCTURES.** There shall be no buildings, dwellings, barns, roads, advertising signs, billboards or other structures not related to education purposes, stormwater treatment or management, or wildlife habitat, built or placed in the Bioretention Facility.
3. **LAND DISTURBANCE.** There shall be no dredging, filling, excavating, mining, drilling or removal of any topsoil, sand, gravel, rock, minerals or other materials within the Bioretention Facility except in conjunction with authorized management activities.
4. **DUMPING/DISPOSAL.** There shall be no dumping of trash, plant materials or compost, ashes, garbage or other unsightly or offensive material, especially including any hazardous or toxic waste within the Bioretention Facility.

5. **AGRICULTURAL USES.** All agricultural uses are prohibited within the Bioretention Facility (for example, plowing, tilling, haying, cultivating, planting or other agricultural activities). This does not include native seed production activities, mowing, planting, or proper herbicide use conducted for the purposes of enhancing the ecological functions and values of the Bioretention Facility.
6. **NOXIOUS WEEDS.** The Grantor is responsible for compliance with all federal, state and local laws governing the control of noxious weeds within the Bioretention Facility.
7. **MOTORIZED VEHICLE USE.** There shall be no operation of motorized vehicles or equipment within the Bioretention Facility except in conjunction with activities in conformance with Secs. II and III.

IV. RESERVED RIGHTS

1. This easement does not authorize entry upon or use of the Bioretention Facility by the general public.
2. Nothing herein shall be construed as limiting the right of the Grantor to sell, give or otherwise convey the Bioretention Facility, or any portion or portions thereof, provided that the conveyance is subject to the terms of this Easement and these Covenants.

V. GENERAL PROVISIONS

1. This Easement and these Covenants shall run with and burden the Bioretention Facility in perpetuity and shall bind the Grantor and its heirs, successors and assigns. This Easement and these Covenants are fully valid and enforceable by any assignee of the Grantee, whether assigned in whole or in part. Prior to any assignment being effective, the Grantor must approve the assignment in writing.
2. The Grantor agrees to pay any and all real property taxes and assessments levied by competent authority on the Bioretention Facility, if the Grantor is subject to such taxes.
3. The Grantor agrees that the terms, conditions, covenants and restrictions set forth in this instrument will be inserted in any subsequent conveyance of any interest in said property. The Grantor agrees to notify the Grantee of any such conveyance in writing and by certified mail no later than 30 days before the conveyance.
4. The Grantee may assign or transfer this Easement and the rights and Covenants contained herein to any Federal or state agency or private conservation organization for management and enforcement.

The terms "Grantor" and "Grantee" as used herein shall be deemed to include, respectively, the Grantor and its heirs, successors, personal representatives, executors and assigns, and the Grantee and its successors and assigns.

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever.

IN WITNESS THEREOF Grantor and Grantee have set their hands on the day and year first above written.

GRANTOR:

ABC Company

(Date)

By: _____

(Signature)

(Print Name)

STATE OF _____)
) ss
COUNTY OF _____)

On the above date this instrument was acknowledged before me by the above-named person known to me and who acknowledged that the foregoing instrument was executed on behalf of _____ for the purpose aforesaid and by his/her authority as such officer.

Notary Public, State of

My Commission Expires: _____

ACCEPTED this ____ day of _____, 20__.

For the _____

By: _____

(Signature)

(Print Name)

STATE OF _____)
) ss
COUNTY OF _____)

On the above date this instrument was acknowledged before me by the above-named person known to me and who acknowledged that the foregoing instrument was executed on behalf of _____ for the purpose aforesaid and by his/her authority as such officer.

Notary Public, State of

My Commission Expires: _____

EXHIBIT "A"

LEGAL DESCRIPTION

Not included in this example.

Appendix 6C
Example Performance Zoning Resolution

Resolution No. 2540

WHEREAS, the City of ABC, Wisconsin, has deemed the construction of Stormwater Best Management Practice (BMP) retrofits to achieve Community-wide Quality Gallon goals an important element in its comprehensive stormwater management plan; and

AND WHEREAS, QRS Construction is the owner in fee of certain real property located in The City of ABC, with Tax Key **9999999999**, said property hereinafter referred to as the "Condominium Redevelopment"; and

AND WHEREAS, QRS Construction Company has agreed in writing to provide payment of \$100,000 ("Payment") (*example only*) to the City of ABC to purchase Quality Gallons and in turn support the stormwater retrofits needs of other areas of the City conditioned upon the issuance of a variance, special exception, or other exception to density requirements applicable to the Condominium Redevelopment .

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of ABC that QRS Construction Company hereby (requests from its Board of Zoning Appeals a Variance or Special Exception) (grants an exception) to increase zoning density in the Condominium Redevelopment to 80 units provided QRC Construction is able to conform to all other applicable state, local, and regulatory requirements the granting of which shall obligate the City of ABC to expend the Payment for the installation of rain gardens (or other stormwater management Facility) on private (or public) property.

ADOPTED:

Cynthia A. Citizen, President
ABC City Council

Attest:

City Attorney:
Reviewed

John A. Community, City Clerk

Appendix 6D

Example Rain Garden Maintenance Agreement

DECLARATION OF COVENANTS³

For Storm and Surface Water Facility, and Integrated Management System Maintenance

This DECLARATION OF COVENANTS, made this _____ day of _____, 20_____, by _____ hereinafter referred to as the "Covenantor(s)" to and for the benefit of [INSERT NAME OF REGULATORY AUTHORITY] and its successors and assigns hereinafter referred to as the [AUTHORITY].

WITNESSETH:

WHEREAS, the [AUTHORITY] is authorized and required to regulate the control of the storm and surface waters within the District set forth in [INSERT REFERENCE FOR REGULATION OR OTHER REFERENCE FOR AUTHORITY] and

WHEREAS, Covenantor(s) is (are) the owner(s) of a certain tract or parcel of land more particularly described as: _____ being all or part of the land which it acquired by deed dated _____ from _____ grantors, and recorded among the Land Records of (governing body), in _____ at _____ such property being hereinafter referred to as the "the property"; and

WHEREAS, the Covenantor(s) desires to construct certain improvements on its property which will alter the extent of storm and surface water flow conditions on both the property and adjacent lands; and

WHEREAS, in order to accommodate and regulate these anticipated changes in existing storm and surface water flow conditions, the Covenantor(s) desires to build and maintain at its expense, a storm and surface water management facility and system more particularly described and shown on plans (titled) (or attached hereto) _____

_____ and further identified under approval (permit) number _____; and

WHEREAS, the [AUTHORITY] has reviewed and approved these plans subject to the execution of this agreement.

NOW THEREFORE, in consideration of the benefits received by the Covenantor(s), as a result of the [AUTHORITY] approval of this plans, Covenantor(s), with full authority to execute deeds, mortgages, other covenants, and all rights, title and interest in the property described above do hereby covenant with the [AUTHORITY] as follows:

³ Modified from *The Bioretention Manual*, Appendix B—Sample Maintenance Covenant for Bioretention, Prince George's County, Maryland

1. Covenantor(s) shall construct and perpetually maintain, at its sole expense, the above referenced storm and surface water management facility and system in strict accordance with the plan approval granted by the [AUTHORITY].
2. Covenantor(s) shall, at its sole expense, make such changes or modifications to the storm drainage facility and system as may, in the [AUTHORITY]'s discretion, be determined necessary to ensure that the facility and system is properly maintained and continues to operate as designed and approved.
3. The [AUTHORITY], its agents, employees and contractors shall have the perpetual right of ingress and egress over the property of the Covenantor(s) and the right to inspect at reasonable times and in reasonable manner, the storm and surface water facility and system in order to ensure that the system is being properly maintained and is continuing to perform in an adequate manner.
4. The Covenantor(s) agrees that should it fail to correct any defects in the above described facility and system within ten (10) days from the issuance of written notice, or shall it fail to maintain the facility in accordance with the approved design standards and with the law or applicable executive regulation, or in the event of an emergency as determined by the [AUTHORITY] in its sole discretion, the [AUTHORITY] is authorized to enter the property to make all repairs, and to perform all maintenance, construction and reconstruction as [AUTHORITY] deems necessary. The [AUTHORITY] shall then assess the Covenantor(s) and/or all landowners served by the facility for the cost of the work, both direct and indirect, and applicable penalties. Said assessment shall be a lien against all properties served by the facility and may be placed on the property tax bills of said properties and collected as ordinary taxes by the [AUTHORITY].
5. Covenantor(s) shall indemnify, save harmless and defend the [AUTHORITY] 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 Declaration, against the [AUTHORITY] that are alleged or proven to result or arise from the Covenantor(s) construction, operation, or maintenance of the storm and surface water facility and system that is the subject of this Covenant.
6. The covenants contained herein shall run with the land and the Covenantor(s) further agrees that whenever the property shall be held, sold and/or conveyed, it shall be subject to the covenants, stipulations, agreements and provisions of this Declaration, which shall apply to, bind and be obligatory upon the Covenantor(s) hereto, its heirs successors and assigns and shall bind all present and subsequent owner's of the property served by the facility.
7. The Covenantor(s) shall promptly notify the [AUTHORITY] when the Covenantor(s) legally transfers any of the Covenantor(s) responsibilities for the facility. The Covenantor(s) shall supply the [AUTHORITY] with a copy of any document of transfer, executed by both parties.
8. The provisions of this Declaration shall be severable and if any phrase, clause, sentence or provisions is declared unconstitutional, or the applicability thereof to the Covenantor is held invalid, the remainder of this Covenant shall not be affected thereby.
9. The Declaration shall be recorded among the Land Records of (Governing Body) at the Covenantor(s) expense unless Authority authorizes the posting of the terms of this Declaration of Covenants on any database or geographical information system it deems suitable. In the event that the [AUTHORITY] shall determine at its sole discretion at future time that the facility is no longer required, then the [AUTHORITY] shall at the

request of the Covenantor(s) execute a release of this Declaration of Covenants which the Covenantor(s) shall record at its expenses.

IN WITNESS WHEREOF, the Covenantor(s) have executed this Declaration of Covenants as of this ____ day of _____, 20____.

ATTEST: FOR THE COVENANTOR(S)

(Signature)

(Signature)

(Printed Name)

(Printed Name and Title)

STATE OF _____:

COUNTY OF _____:

On this _____ day of _____, 20____, before me, the undersigned officer, a Notary Public in and for the State and County aforesaid, personally appeared _____, who acknowledged themselves to be _____, of _____, and as such authorized to do so, executed the foregoing instrument for the purposes therein contained by signing their name as _____ for said _____.

WITNESS my hand and Notary Seal

My commission expires: _____

Notary Public

Seen and approved: _____