

**MEMORANDUM OF UNDERSTANDING BETWEEN DUPAGE COUNTY
STORMWATER MANAGEMENT, THE FOREST PRESERVE DISTRICT OF
DUPAGE COUNTY, AND THE DUPAGE RIVER SALT CREEK WORKGROUP
FOR CONSTRUCTION AND PERPETUAL MAINTENANCE OF A FISH
PASSAGE SYSTEM AT FAWELL DAM IN THE McDOWELL GROVE FOREST
PRESERVE IN NAPERVILLE, ILLINOIS**

THIS Memorandum of Understanding (hereinafter the "Agreement") is entered into this 14th day of November, 2023, by and between: (1) the DuPage River Salt Creek Workgroup, (hereinafter the "DRSCW"); (2) DuPage County Stormwater Management, (hereinafter the "COUNTY"); and (3) the Forest Preserve District of DuPage County, a unit of local government organized and existing under Article VII, Section 8 of the 1970 Constitution of the State of Illinois (hereinafter "FPDDC"). The DRSCW, the COUNTY, and FPDDC are sometimes referred to herein individually as a "Party" and collectively as the "Parties".

WITNESSETH:

WHEREAS, the Illinois General Assembly has granted the COUNTY authority to develop watershed plans, undertake measures to control and protect against flooding, manage stormwater, and to enter into agreements for the purposes of stormwater management and flood control (Illinois Compiled Statutes, Chapter 55, paragraphs 5/5-1062.3 and 5/5-15001 et seq.); and

WHEREAS, pursuant to 65 ILCS 5/11-109-1, the COUNTY has the authority to maintain waterways and flood control structures under its ownership and jurisdiction; and

WHEREAS, the COUNTY owns and operates Fawell Dam for flood control and property protection purposes situated in the McDowell Forest Preserve in Naperville, Illinois, a preserve owned by the FPDDC; and

WHEREAS, the COUNTY is a regional stormwater authority and improving water quality within DuPage County Waterways is part of the COUNTY's mission; and

WHEREAS, aquatic life surveys of the West Branch DuPage River commissioned by the DRSCW have shown that species downstream of Fawell Dam are more abundant than those upstream of Fawell Dam; and

WHEREAS, the Parties have complimentary missions that include the preservation and enhancement of existing aquatic and riparian environments in DuPage County; and

WHEREAS, the Parties have identified a potential solution for improving aquatic life and are in agreement that fish passage through Fawell Dam can improve aquatic life upstream of Fawell Dam by placing a fish passage system (hereafter called “the Ladder”) in one of the dam’s culverts, plus related components (hereafter collectively called the “PROJECT”); and

WHEREAS, the DRSCW has negotiated a special condition into the National Pollutant Discharge Elimination System (NPDES) permits for its agency members that prescribes constructing the PROJECT by December 31, 2024, and

WHEREAS, the PROJECT may be completed more effectively and economically with the cooperation and joint efforts and resources of the COUNTY, FPDDC, and the DRSCW; and

WHEREAS, the Parties are committed to working jointly to problem solve and implement solutions to the placement and operation of the Ladder.

WHEREAS, on July 01, 2015, the DRSCW's Executive Board authorized the DRSCW to negotiate and enter into a Memorandum of Understanding with the COUNTY and FPDDC establishing roles for designing and implementing certain projects within DuPage County; and

WHEREAS, on November 21, 2023, the FPDDC's Board authorized the FPDDC to enter into a Memorandum of Understanding with the DRSCW and the COUNTY as to the PROJECT defined herein;

NOW THEREFORE, in consideration of the matters set forth above, the mutual covenants and agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties hereto, the COUNTY, FPDDC and DRSCW hereby agree as follows:

Article 1. Incorporation of Recitals.

The recitals set forth above are incorporated herein by reference and made a part hereof.

Article 2. Responsibility for Expenses

1. With the exception of Article 4.6 the DRSCW shall be responsible for all expenses incurred by the Parties for the design, purchase, delivery and construction of the Ladder, in accordance with Article 4.
2. The DRSCW shall also be responsible for all expenses incurred by the Parties for any repairs, modifications, temporary storage, temporary removal and re-installation, or permanent removal, of the PROJECT in accordance with Articles 6 and 7.
3. The DRSCW shall also be responsible for all expenses incurred by the Parties for the removal, re-installation and storage of the upstream section of the Ladder, including rental of equipment, for the winter season or emergency situations when the flood control gate would need to close entirely as prescribed in Article 5.6.
4. Expenses incurred in accordance with Article 5 shall be the responsibility of the Party identified as responsible for the action.
5. The Parties shall provide written requests for reimbursement to the DRSCW based upon actual costs incurred and the DRSCW shall reimburse each Party within 90 days of receipt.

Article 3. Transfer of Ownership

1. After 5 years from the date of substantial completion of the PROJECT, as defined and administered within the Construction Documents per Article 4, all ownership and maintenance responsibilities will be transferred from the DRSCW to the COUNTY, with the exception of activities covered in Article 2 Section 3.
2. Within 90 working days prior to the aforementioned transfer of ownership, the DRSCW shall cause a final, joint inspection of the PROJECT by the Parties to occur. The COUNTY and FPDDC shall provide the DRSCW with any requests for modifications in writing within 10 working days after said inspection. The DRSCW shall then cause said modifications to occur in accordance with Article 6 or provide a written disposition as to why said modifications cannot be reasonably made. The DRSCW shall be responsible for any costs incurred beyond the date of transfer that pertain solely to the final, joint inspection in accordance with the terms of this Agreement. Once said modifications are satisfactorily completed, or if none are

necessary, this Agreement shall then expire in accordance with Article 11.

Article 4. Construction of PROJECT

1. The PROJECT will consist of design, fabrication, and placement of the Ladder within the eastern culvert at Fawell Dam, the placement of upstream debris protection, and the regrading of the downstream riprap.
2. The DRSCW shall cause to be prepared construction drawings, specifications, and details for the PROJECT (hereinafter the "Construction Documents").
3. The DRSCW shall obtain all federal, state, and county permits required by law for the construction of the PROJECT, and shall assume any costs in procuring said permits.
4. The DRSCW shall provide the COUNTY and FPDDC with pre-final Construction Documents and the COUNTY and FPDDC will review and provide comments to the DRSCW in writing within twenty-eight (28) working days of receipt. The DRSCW shall then cause any modifications to the Construction Documents to be made, except those that it deems will impact its intended function, and provide a written disposition to said comments to the Parties.
5. The COUNTY shall be responsible for the procurement and administration of the construction contract for the PROJECT.
6. The COUNTY maintains the option to integrate repair of the dam's wingwall into the PROJECT. The COUNTY will provide plans, specifications, and scheduling for this repair work to the parties and incorporate them into the construction contract.
7. As this PROJECT pertains to the NPDES permits of the DRSCW's agency members, time is of the essence for its completion. The Parties will strive to complete the PROJECT by December 31, 2024, and if not then, then as soon as possible thereafter.
8. The COUNTY will provide the Parties with an electronic copy of the as-built for the PROJECT.

Article 5. Operations & Maintenance (O&M) of the Ladder

1. The Parties agree to work cooperatively to operate and maintain the Ladder and its intended function. The responsibilities as set forth herein shall take effect upon substantial completion of the PROJECT.
2. Each Party shall be responsible for obtaining any federal, state, and local permits necessary to perform their assigned maintenance.
3. The Parties may add, delete, or re-assign the maintenance responsibilities set forth herein based on the accumulated experience and mutual agreement of all Parties in accordance with Article 24.
4. The COUNTY agrees to accommodate the Ladder as an integral feature in the operation and maintenance of Fawell Dam.
5. The COUNTY shall be responsible for the removal of flow obstructions (i.e., trash, woody debris, vegetative material, etc.) that may inhibit fish passage or exert significant stress on the ladder during high flows. The COUNTY's responsibility will be limited to the removal of obstructions within the three trash racks (i.e., Upstream End, Splash Pad Lip Ladder, and Lip Ladder), as well as within the side baffles beneath the hinged, two-part top grate of the Splash Pad Lip Ladder. Ladder debris inspections and removal shall be scheduled to occur during the COUNTY's standard Fawell Dam inspection and maintenance schedule, and when it is safe to implement, judged by the COUNTY.
6. The County shall be responsible for the temporary removal and re-installation of the upstream section of the Ladder for the winter season or emergency situations when the flood control gate would need to close entirely.
7. The DRSCW shall be responsible for maintaining the structural integrity of the Ladder and its ancillary components. The DRSCW shall inspect all accessible structural components during the period between the temporary removal and re-installation of the upstream section of the Ladder. The DRSCW shall be responsible for developing and implementing a permit-required confined space program to conduct said inspection. The COUNTY may request additional inspections outside of said period based on its own inspection of the dam. Said request shall be in writing and upon receipt, the DRSCW shall have 15 working days to perform said inspection and provide a schedule for action within 5 working days of said inspection. The responsibility for inspections

and maintaining the structural integrity of the Ladder and its ancillary components shall transfer to the COUNTY with the Transfer of Ownership per Article 3.

8. The DRSCW will be responsible for the implementation of a program to monitor the effectiveness of fish passage through the Ladder. Prior to its implementation, the DRSCW shall submit a written plan to the COUNTY for its concurrence that said plan will not result in significant impacts to the COUNTY's operations. The COUNTY shall not be responsible to continue the monitoring program upon the Transfer of Ownership per Article 3, but the DRSCW reserves its right to continue with such at its sole discretion.
9. As part of the Ladder placement, the crest elevation of the riprap used for energy dissipation downstream of the dam shall be re-established. After substantial completion of the PROJECT, the COUNTY shall be responsible for maintaining the crest elevation within a reasonable tolerance. The COUNTY will inspect after high flow events, but inspections shall be no less than annually to ensure the riprap does not impede fish passage to the Ladder.

Article 6. Repairs and Modifications

1. In the event that a portion of the PROJECT is damaged due to factors outside of the Parties' control, the DRSCW will be responsible for providing plans and specifications for the maintenance repairs or improvements, obtaining permits (if required), and paying for the repairs. The COUNTY will provide for the procurement and administration of the contract for the repair. Any repair that alters the original design of the PROJECT shall be reviewed and approved by all Parties prior to procurement.
2. If modification of the Ladder to either improve fish passage or facilitate maintenance is agreed upon by all Parties, the DRSCW will be responsible for providing plans and specifications for the modification, obtaining permits (if required), and paying for the modification. The COUNTY will provide for the procurement and administration of a construction contract for the modification.
3. If repetitive maintenance and/or operational issues occur at Fawell Dam as a result of the PROJECT, the COUNTY shall provide written notice to the Parties documenting its concerns. The DRSCW shall then have 45 working days to develop and propose a modification for review by the Parties. If acceptable to all Parties, the COUNTY shall

then proceed with implementing the modification as set forth in this Agreement.

Article 7. Removal by the COUNTY

1. The COUNTY may temporarily remove the Ladder, or sections thereof, when performing repairs or routine maintenance of Fawell Dam that is unrelated to the PROJECT. The COUNTY shall be responsible for reinstalling the Ladder back at, or near to, its original condition.
2. In emergency situations, the COUNTY shall have the sole authority to remove the Ladder without prior approval or knowledge by the other Parties. In an effort to maximize the participation by the Parties prior to taking such significant action, emergency situations will generally be defined as either visible indications that the Ladder is detrimental to Fawell Dam's structural integrity or when the Ladder impedes the COUNTY's ability to operate the Fawell Dam as a flood control measure immediately preceding or during a high flow event. The COUNTY will salvage what is practical for later transport and storage by the DRSCW.
3. If modifications done in accordance with Section 6.3 fail to resolve the maintenance and/or operation issue identified in writing, then the COUNTY shall, at its sole discretion, procure and administer a contract for the PROJECT's permanent removal. The COUNTY will salvage what is practical for later transport and storage by the DRSCW.
4. If the DRSCW concludes that the ladder is not ameliorating fish passage and no remedy is available, it may recommend to the COUNTY and FPDDC that the ladder be removed. The COUNTY will cooperate with the DRSCW to facilitate this task.

Article 8. Termination by the COUNTY and FPDDC

Prior to commencement of construction on the PROJECT, the COUNTY or FPDDC may, at their option, and upon giving written notice to the DRSCW, terminate this Agreement as it pertains to the entire PROJECT. However, if the DRSCW has acquired materials and/or commenced construction for the PROJECT, the terminating Party shall reimburse the DRSCW for its costs relative to non-refundable material acquisition and construction invoices. Ownership of the material will be transferred to the reimbursing Party.

Article 9. Termination by the DRSCW

Prior to commencement of or during construction of the PROJECT, the DRSCW may, at its option, and upon giving written notice to the other Parties, terminate this Agreement as it pertains to the entire Project and reimburse the parties of any capital investment made toward the PROJECT by their agency.

Article 10. Effective Date

This Agreement becomes effective on the date of the Resolution as approved by DuPage County Board, which shall be the date inserted on the first page hereof.

Article 11. Duration of the Agreement

This Agreement shall remain in full force until the parties mutually agree in writing to its termination, unless terminated in accordance with Articles 8 and, or 9 above. If any PROJECT-related, operational, or maintenance issues relative to the PROJECT remain outstanding at the time of a mutually agreed termination under this Article, the Parties agree to cooperate towards the determination of terms, conditions, and responsibilities for a new agreement, which shall be executed by and between the Parties as to those outstanding issues contemporaneously with the termination of this Agreement.

Article 12. Non-Assignment

No Party may assign its rights or obligations hereunder without the written consent of the other Parties.

Article 13. Waiver of Personal Liability

No official, employee, or agent of any Party to this Agreement shall be charged personally by the other Parties with any liability or expenses of defense incurred as a result of the exercise of any rights, privileges, or authority granted herein, nor shall he or she be held personally liable under any term or provision of this Agreement, or because of a Party's execution or attempted execution of this Agreement, or because of any breach of this Agreement, unless said breach is proximately caused by a fraudulent and/or criminal act of the official, employee, and/or agent charged with the breach.

Article 14. Indemnification

1. The DRSCW shall, to the extent permitted by applicable law, indemnify, hold harmless and defend the COUNTY or any of its officials, officers, employees, and agents from and against all liability, claims, suits, demands, liens, proceedings and actions, including costs, fees and expense of defense, arising from, growing out of, or related to, any loss, damage, injury, death, or loss or damage to property resulting from, or connected with, the DRSCW's performance under this AGREEMENT to the fullest extent the DRSCW is so authorized under the law; provided, however, that the DRSCW shall not be obligated to indemnify, hold harmless and defend the COUNTY for any negligent or intentional wrongful misconduct or omissions by COUNTY officials, employees, agents, contractors or personnel.
2. The DRSCW shall, to the extent permitted by applicable law, require each consultant and contractor responsible for the design, construction, maintenance, or monitoring of the PROJECT to name the FPDDC and COUNTY as an additional insured party on said vendor's liability insurance policy. Further, the DRSCW shall require that its consultants and contractors indemnify, defend, and hold harmless the FPDDC and COUNTY, its officers, employees, and elected officials from and against any claims, liability or judgments resulting from, or caused by, the negligence or willful conduct of such consultant and, or contractor. To the extent permitted by applicable law.
3. The COUNTY shall, to the extent permitted by applicable law, indemnify , exonerate, and hold free and harmless FPDDC and the DRSCW, their Commissioners, officers, employees, servants, and agents ("Indemnified Parties") from all liabilities including losses, damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys' fees and disbursements), claims, demands, actions, suits, proceedings, judgments or settlements-any or all of which are asserted by any individual, private entity, or public entity against the Indemnified Parties and arise out of the negligent acts or omissions of the COUNTY, except to the extent of the negligence or fault of the party being indemnified.
4. FPDDC shall, to the extent permitted by applicable law, indemnify, exonerate, and hold free and harmless the COUNTY and the DRSCW, their Commissioners, officers, employees, servants, and agents ("Indemnified Parties") from all liabilities-including losses, damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys' fees and disbursements),

claims, demands, actions, suits, proceedings, judgments or settlements-any or all of which are asserted by any individual, private entity, or public entity against the Indemnified Parties and arise out of the negligent acts or omissions of the FPDDC, except to the extent of the negligence or fault of the party being indemnified.

5. Nothing contained herein shall be construed as prohibiting the COUNTY, its officials, directors, officers, agents, and employees, from defending through the selection and use of their own agents, attorneys and experts, any claims, suits, demands, liens, proceedings, and actions brought against them. Pursuant to Illinois law, any attorney representing the COUNTY, under this paragraph or paragraphs 4.1 through 4.4, is the State's Attorney, in accord with the applicable law. The COUNTY'S participation in its defense shall not remove DRSCW'S duty to indemnify, defend, and hold the COUNTY harmless, as set forth above. Moreover, indemnity as provided in this AGREEMENT shall not be limited by reason of any insurance coverage maintained by the DRSCW or its consultants, contractors, or agents. The DRSCW'S indemnification of the COUNTY shall survive the termination, or expiration, of this AGREEMENT.

Article 15. Representations of the COUNTY

The COUNTY covenants, represents, and warrants as follows:

1. The COUNTY has full authority to execute, deliver, and perform or cause to be performed this Agreement.
2. The individuals signing this Agreement and all other documents executed on behalf of the COUNTY are duly authorized to sign same on behalf of and to bind the COUNTY.
3. The execution and delivery of this Agreement, consummation of the transactions provided for herein, and the fulfillment of the terms hereof will not result in any breach of any of the terms or provisions of or constitute a default under any agreement of the COUNTY or any instrument to which the COUNTY is bound or any judgment, decree, or order of any court or governmental body or any applicable law, rule, or regulation.

Article 16. Representations of the FPDDC

FPDDC covenants, represents, and warrants as follows:

1. The FPDDC has full authority to execute, deliver, and perform or cause to be performed this Agreement.

2. The individuals signing this Agreement and all other documents executed on behalf of the FPDDC are duly authorized to sign same on behalf of and to bind the FPDDC.
3. The execution and delivery of this Agreement, consummation of the transactions provided for herein, and the fulfillment of the terms hereof will not result in any breach of any of the terms or provisions of or constitute a default under any agreement of the FPDDC or any instrument to which the FPDDC is bound or any judgment, decree, or order of any court or governmental body or any applicable law, rule, or regulation.

Article 17. Representations of the DRSCW

The DRSCW covenants, represents, and warrants as follows:

1. The DRSCW has full authority to execute, deliver, and perform or cause to be performed this Agreement.
2. The individuals signing this Agreement and all other documents executed on behalf of the DRSCW are duly authorized to sign same on behalf of and to bind the DRSCW.
3. The execution and delivery of this Agreement, consummation of the transactions provided for herein, and the fulfillment of the terms hereof will not result in any breach of any of the terms or provisions of or constitute a default under any agreement of the DRSCW or any instrument to which the DRSCW is bound or any judgment, decree, or order of any court or governmental body or any applicable law, rule, or regulation.

Article 18. Disclaimers

This Agreement is not intended, nor shall it be construed, to confer any rights, privileges, or authority not permitted by Illinois law. Nothing in this Agreement shall be construed to establish a contractual relationship between any party other than the DRSCW, the COUNTY, and the FPDDC.

Article 19. Waivers

Whenever a Party to this Agreement by proper authority waives another Party's performance in any respect or waives a requirement or condition to performance, the waiver so granted, whether expressed or implied, shall only apply to the particular instance and shall not be deemed a waiver for subsequent instances of the performance, requirement, or condition. No such waiver shall be construed as a modification of this Agreement regardless of the number of times the performance, requirement, or condition may have

been waived.

Article 20. Severability

If any provision of this Agreement is held to be invalid, illegal, or unenforceable, then such invalidity, illegality, or unenforceability will not affect any other provisions of this Agreement, and this Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. The remaining provisions will remain in full force and will not be affected by the invalid, illegal, or unenforceable provision or by its severance.

Article 21. Necessary Documents

Each Party agrees to execute and deliver all further documents and, or, agreements, and take all further action reasonably necessary to effectuate the purpose of this Agreement. Upon the substantial completion of the PROJECT, the COUNTY shall provide the DRSCW and FPDDC with "As-Built" drawings for the PROJECT that meets the requirements of the DuPage County Countywide Stormwater and Floodplain Ordinance and the DuPage County Building Code.

Article 22. Deemed Inclusion

Provisions required (as of the effective date) by law, ordinances, rules, regulations, or executive orders to be inserted in this Agreement are deemed inserted in this Agreement whether or not they appear in this Agreement or, upon application by any Party, this Agreement will be amended to make the insertions. However, in no event will the failure to insert such provisions before or after this Agreement is signed prevent its enforcement.

Article 23. Entire Agreement

This Agreement, and any exhibits or riders attached hereto, shall constitute the entire Agreement between the Parties. No other warranties, inducements, considerations, promises, or interpretations shall be implied or impressed upon this Agreement that are not expressly set forth herein.

Article 24. Amendments

This Agreement shall not be amended unless it is done so in writing and signed by the

authorized representatives of all the Parties.

Article 25. References to Documents

All references in this Agreement to any exhibit or document shall be deemed to include all supplements and/or authorized amendments to any such exhibits or documents to which all Parties hereto are privy.

Article 26. Notices

Unless otherwise stated in this Agreement, any and all notices given in connection with this Agreement shall be deemed adequately given only if in writing and addressed to the Party for whom such notices are intended at the address set forth below, unless otherwise specified and agreed to by the Parties. The title "Fawell Dam Fish Passage System Agreement" must be prominently featured in the heading of all notices sent hereunder.

Immediately upon execution of this Agreement, the following individuals will represent the Parties as a primary contact and with respect to the giving of notice in all matters under this Agreement.

For the DRSCW:
Director DuPage River Salt Creek Workgroup
The Conservation Foundation
10S404 Knoch Knolls Rd.
Naperville, IL 60565
Phone: 630-428-4500, x 118
Fax: 630-428-4599
Email: smccracken@theconservationfoundation.org

For the FPDDC:
Director of Natural Resources
Forest Preserve District of DuPage County
3S580 Naperville Road
Wheaton, IL 60189
Phone: 630-933-7227
Email: eneidy@dupageforest.org

For the COUNTY:
Director
DuPage County Stormwater Management
421 N. County Farm Rd.
Wheaton, IL 60187
Phone: 630-407-6676
Cell: 630-514-8867
sarah.hunn@dupagecounty.gov

Each Party agrees to promptly notify the other Parties of any change in its designated representative, which notice shall include the name, address, e-mail address, telephone number and fax number of the representative for such Party for the purpose hereof.

DuPage River Salt Creek Workgroup

IN WITNESS WHEREOF, the DuPage River Salt Creek Workgroup has caused this Agreement to be executed by its duly authorized officer, and duly attested.

DuPage River Salt Creek Workgroup

Stephen McCracken, Director

Date

Other

Date

Forest Preserve District of DuPage County

IN WITNESS WHEREOF, the Forest Preserve District of DuPage County has caused this Agreement to be executed by its duly authorized officer, duly attested, and its seal hereunto affixed.

Forest Preserve District of DuPage County

Erik Neidy, Director of Natural Resources

_____.

Date

Other

_____.

Date

DuPage County Stormwater Management Planning Committee

IN WITNESS WHEREOF, the DuPage County Stormwater Management Planning Committee has caused this Agreement to be executed by its duly authorized officer, duly attested, and its seal hereunto affixed.

DuPage County

Sarah Hunn, Director of Stormwater Management

Date

Other

Date

