

AGREEMENT

The City of Morgantown, West Virginia, a political subdivision and municipal corporation of the State of West Virginia (“Morgantown”); and the Morgantown Utility Board, a board established by Morgantown pursuant to West Virginia Code Chapter 8, Articles 16 and 20, for the purpose of operating a combined water, sewer, and stormwater system (“MUB”); and the Morgantown Board of Parks and Recreation Commissioners, a board established by Morgantown pursuant to West Virginia Code Chapter 8, Article 21, for the purpose of operating recreational facilities (“BOPARC”); enter into this Agreement (the “Agreement”) upon the terms and conditions contained herein.

1. Purpose: The purpose of this Agreement is to provide for the establishment, maintenance, and operation of public recreation facilities at the Flegal Reservoir and Dam property. Such facilities will be referred to herein as the “Recreation Facilities” as defined later in the Agreement.

2. Scope. The real estate subject of this Agreement (the “Property”) comprises the following parcels in Monongalia County, West Virginia:

- a. Parcel ID 05 6009300040000
- b. Parcel ID 05 6008900050000
- c. Parcel ID 05 6009400000000
- d. Parcel ID 05 6009500030000
- e. Parcel ID 05 6009500040000
- f. Parcel ID 05 6009600020000
- g. Parcel ID 05 6009600030000
- h. Parcel ID 05 6011800000000
- i. Parcel ID 05 6011900020000
- j. Parcel ID 05 6009300050000

3. Construction Conditions. The Agreement is subject to the following construction terms and conditions:

a. Morgantown and/or BOPARC and their designated contractor(s) shall be solely responsible for constructing, installing, operating and maintaining the Recreation Facilities in accordance with all applicable provisions of federal, state and local laws, and in accordance with the terms of this Agreement. Morgantown and/or BOPARC will perform all recommendations and requirements of the West Virginia Department of Environmental Protection and other governing regulatory agencies applicable to the Recreation Facilities.

b. Morgantown and/or BOPARC shall provide all plans and specifications for the construction of the Recreational Facilities to the West Virginia Department of Environmental Protection (Dam Safety) for its review and comment and, if required by law, its written approval prior to commencing any work. Morgantown and/or BOPARC also shall be responsible for any permitting necessary to construct, install, and maintain the Recreation Facilities.

c. Morgantown and/or BOPARC shall promptly repair any and all damage to the Property arising out of the construction, maintenance, and operation of the Recreation Facilities, including, but not limited to, destruction of or damage to vegetation, loss of topsoil due to grading, trenching or erosion resulting from any entry or work. Repairs shall be completed as directed by, and to the reasonable satisfaction of, MUB, in the exercise of its reasonable discretion. Intended work to construct the Recreation Facilities shall not constitute damage to the Property within the meaning of this paragraph.

d. As part of the work to construct the Recreational Facilities, Morgantown shall construct a restroom facility on the Property at a location to be approved by MUB. The restroom facility need not be a permanent structure but must be a stable structure that cannot be moved or emptied by the public users of the Property.

e. The Recreation Facilities and the Agreement shall be subject to all existing utility easements, if any, located within the Property, as well as any other easements, conditions, covenants or restrictions of record or capable of observation at the Property.

f. The Recreation Facilities shall be placed, operated, maintained and repaired in such a way as to avoid any adverse impact on continuing operation of the Flegal Reservoir and Dam for its intended purpose.

g. Morgantown and/or BOPARC shall be responsible for any and all other permitting, disposal, remediation, mitigation, penalties, damages and other measures required to address environmental contamination which arise either in the performance of the work or as a result of impacts of the work to construct the Recreation Facilities.

h. MUB and/or BOPARC may retain a third-party inspector at its cost to monitor the progress of the work and compliance with the terms of this Agreement.

i. Morgantown and/or BOPARC will provide signage in appropriate locations throughout the Property alerting users of the proper use of the Recreation Facilities. Said signage, including, without limitation, the location thereof, shall be reviewed and approved in advance by the parties, who shall not unreasonably withhold, condition, or delay approval.

4. Post-Construction Conditions. The Agreement is subject to the following post-construction terms and conditions. The parties understand and agree that this Agreement promotes public access to recreation facilities and balances that access with the maintenance of a safe drinking water supply at the Flegal Reservoir and Dam. To support those purposes, these conditions are imposed to ensure continued responsible recreational use of the Property while protecting the water supply from adverse impacts that could otherwise occur due to public use of the Property. Morgantown and/or BOPARC will not operate the Recreation Facilities in such a manner as to have a material adverse impact on the quality of the public water supply at the Flegal Reservoir and Dam, in the reasonable determination of the parties, and the parties agree that the following activities are likely to create such material adverse impact and are therefore restricted as stated in this section:

a. Fishing with live bait in the reservoir on the Property will be prohibited. Fishing from the spillway and dam crest is prohibited. Morgantown and/or BOPARC shall have the right, but not the duty, to stock the reservoir pool for fishing.

b. Motorized boating in the reservoir on the Property will be prohibited. To the extent that non-motorized boating is desired by Morgantown and/or BOPARC, Morgantown and/or BOPARC shall be responsible for the construction of a launch area, of a scope and with specifications determined in the reasonable discretion of MUB, Morgantown and BOPARC. Non-motorized boats must remain at least 100 feet from the intake tower. The parties will place appropriate signage notifying the public of the area(s) within 100 feet of the intake tower.

c. Swimming, ice skating, wind surfing and other body-contact recreation (human and pets) in the reservoir on the Property will be prohibited, within 100 feet of the intake tower and face of the dam. The parties recognize that body-contact recreation as described in this subsection may be further limited or prohibited by a state or federal agency with regulatory authority over the use of the reservoir, as may be provided by law. Morgantown and/or BOPARC shall be solely responsible for any management of the activities defined in this section and MUB shall not be liable for any claim, cause of action, demand, judgment, penalty, or other damages as a result of the activities defined in this section. Morgantown and BOPARC shall name MUB as an additional insured on the insurance policies required by Paragraph 12 hereof and shall provide signage warning that no lifeguards are on duty and that swimming is at the individual's own risk.

d. Public access to the crest of the dam on the Property will be prohibited.

e. Morgantown and/or BOPARC shall provide for timely removal of garbage throughout the Property.

f. Morgantown and/or BOPARC shall maintain and clean the restroom facility on a timely basis as conditions dictate.

g. Fires of any kind on the Premises, including, without limitation, cooking fires, are prohibited.

h. Except for events sponsored by Morgantown or BOPARC, public gatherings and social events on the Property are prohibited without the prior written consent of MUB, which consent will not be unreasonably withheld.

i. The use or lighting of fireworks on the Property will be prohibited.

j. The operation of motorized vehicles on the Property will be prohibited except in the approved parking area(s), as needed for ingress and egress to approved parking area(s), and when necessary to access the Property for maintenance, improvements, construction, or to provide emergency services.

- k. Hunting, trapping and similar activities will be prohibited on the Property.

5. Morgantown's Role. The parties agree that Morgantown will make improvements to the Property with funds from the Coronavirus State and Local Fiscal Recovery Funds of H.R. 1319 American Rescue Plan Act of 2021 (ARP/CSLFRF), and the improvements and the Property shall be subject to all obligations pursuant to ARP/CSLFRF, including applicable provisions of the Uniform Administrative Guidance (2 C.F.R. Part 200, including without limitation 2 CFR 200.311 through 2 CFR 200.316 detailing property standards related to the expenditure of ARP/CLSFRF funds). Morgantown and its officers, agents, and employees will have ingress, egress, and regress to and from the Property, including access across the Property to other parcels, for the purpose of design, construction, maintenance, operation, repair, replacement, expansion, and/or removal of recreational facilities including but not limited to trails, bridges, parking areas, water access (including without limitation boat launch or dock facilities), bathrooms, benches, trash receptacles, and other similar or supporting facilities (the "Recreation Facilities"). Morgantown represents and warrants to MUB and BOPARC that ARP/CLSFRF funds may be used for the construction and/or maintenance of the Recreational Facilities. The parties jointly agree to take any and all actions necessary, and execute such additional documents as may be necessary, to remain in compliance with the continuing obligations for use of such funds.

6. BOPARC's Role. The parties agree that BOPARC will operate, manage, and maintain the Recreation Facilities after construction. BOPARC and its officers, agents, and employees will have ingress, egress, and regress to and from the Property, including access across the Property to other parcels, for the purpose of performing its functions under this Agreement. BOPARC shall manage the Recreation Facilities consistent with good park and recreation facility management practices, as determined by the professional judgment of its staff and board members, and in accordance with the terms of this Agreement.

7. MUB's Role. The parties agree that MUB will operate the Flegal Reservoir and Dam, and appurtenant facilities of the waterworks system, at the Property. MUB and its officers, agents, and employees will have ingress, egress, and regress to and from the Property, including access across the Property to other parcels, for the purpose of performing its functions under this Agreement. MUB shall not be responsible for the cost, design, construction, repair, improvement replacement, condition, maintenance, nor use of the Recreation Facilities; provided, however, that MUB will identify the location(s) one hundred feet from the intake tower of the Flegal Reservoir and Dam as needed by Morgantown and BOPARC and MUB will cooperate with Morgantown and BOPARC as needed to provide for the construction, installation, maintenance, operation, repair, and replacement of the Recreation Facilities in a manner consistent with continued use of the Flegal Reservoir and Dam for its intended purpose. MUB shall have the right to construct or install at its cost such facilities as it deems necessary as part of the combined utility system for the protection of the drinking water supply and the safety of those who use the Recreation Facilities, while ensuring continued public access to the Recreation Facilities consistent with this Agreement, including, without limitation, fencing to restrict access to the dam, security cameras, bollards to prevent motorized boating, buoys around the intake tower and lighting; provided, MUB will share its plans for security measures with Morgantown and BOPARC in advance of the installation/construction for their review and

comment. MUB may also install electronic locking gates at the Property. Closure hours for the gates will be set by mutual agreement of the Parties. MUB will be able to remotely open the gates at all times to assist any person in need of entry or exit.

8. Public facilities. The parties understand and agree that the Recreation Facilities are being constructed for the benefit of the public and will remain accessible for use by the general public for recreational purposes, subject to reasonable rules and regulations necessary to ensure the continued public enjoyment of the Recreation Facilities, the safety of the public and drinking water supply.

9. Cost of Improvements. The parties understand and agree that no provision of this Agreement obligates the expenditure of funds by MUB or BOPARC, and that the intended source of funding for the design and initial construction of Recreation Facilities provided in this Agreement is ARP/CSLFRF. The parties agree to take such reasonable measures as are necessary and helpful to facilitate expenditure of the ARP/CSLFRF for the purposes stated in this Agreement.

10. Responsibility for Recreation Facilities. The parties understand and agree that Morgantown, its officers, agents, and employees will be solely responsible for designing, constructing, and installing the Recreation Facilities and that Morgantown and BOPARC and their officers, agents, and employees will be solely responsible for operating, managing, and maintaining the Recreation Facilities, which will include responsibility for complying with applicable laws and regulations applicable to the Recreation Facilities, including without limitation any permitting, remediation, mitigation, penalties, or damages arising out of the construction or operation of the Recreation Facilities. Morgantown will provide all plans and specifications for the Recreation Facilities to the West Virginia Department of Environmental Protection (Dam Safety) for its review comment and, if required by law, its approval prior to commencing construction and Morgantown shall be responsible for obtaining any other permits as may be required for the performance of its authorities and obligations under this Agreement, including the construction of the Recreation Facilities. Morgantown will also provide all plans and specifications for the Recreation Facilities to MUB and BOPARC for their review and comment prior to commencing construction. The Recreation Facilities will be constructed, operated, maintained, and repaired in such a manner as to avoid any material adverse impact on the continuing operation of the Flegal Reservoir and Dam for its intended purpose. The parties understand and agree that the following activities would create a material adverse impact on the continuing operation of the Flegal Reservoir and Dam for its intended purpose: (i) operation of motorized watercraft for recreation purposes; (ii) recreational use of the water within 100 feet of the Flegal Reservoir Dam intake tower and face of the Dam; and (iii) operation of motorized vehicles by the public outside of approved parking areas and roadways.

11. Default. In the event of a default of the terms of this Agreement by any party, the non-defaulting party/ies shall provide the defaulting party with written notice of the default and the defaulting party shall have ten (10) days to cure the default. In the event the default is not timely cured, the party noticing the default shall have the right to seek any and all available legal remedies to cure such default.

12. Insurance. Each party shall maintain at its sole cost and expense appropriate insurance coverage for the Property with respect to its relative interest in the Property that will insure against personal injury and property damage in a sum not less than Two Million Dollars (\$2,000,000.00) per occurrence and an aggregate coverage amount of not less than Five Million Dollars (\$5,000,000.00). Such insurance coverage shall be obtained from a reputable insurer who is licensed to conduct business in the State of West Virginia and shall name the other parties to this Agreement as an additional insured party and may not be cancelled without the consent of the named additional insureds pursuant to this Agreement. Each party shall provide proof of such coverage to any other party upon request. The parties agree that, with respect to any claim arising out of the construction or operation of the Recreation Facilities, the policy/ies of Morgantown and/or BOPARC shall provide the primary coverage. The parties agree that, with respect to any claims arising out of the construction or operation of the Flegal Reservoir and Dam, the policy/ies of MUB shall provide the primary coverage.

13. Indemnification. To the fullest extent permitted by law, Morgantown and BOPARC agree to indemnify, defend and hold harmless MUB, its officers, agents, servants, employees, and board members from and against any and all actions, causes of action, suits, losses, costs, penalties, fees, liabilities, damages and expenses, incurred by MUB as the result of, or arising out of, or relating to (a) their breach of any covenant, agreement, or obligation of this Agreement; or (b) any cause of action, suit, legal or administrative proceeding or claim brought or made against MUB by any third party arising out of the construction, installation, operation, existence, and maintenance of the Recreation Facilities as well as arising out of the recreational use of the Flegal Reservoir and Dam, including, without limitation, for injury or death to person or damage or destruction to property; or (c) the construction, installation, operation, existence and maintenance of the Recreation Facilities. To the fullest extent permitted by law, MUB agrees to indemnify, defend and hold harmless Morgantown and BOPARC, their officers, agents, servants, employees, and board members from and against any and all actions, causes of action, suits, losses, costs, penalties, fees, liabilities, damages, and expenses, incurred by Morgantown and/or BOPARC as the result of, or arising out of, or relating to (a) its breach of any covenant, agreement, or obligation of this Agreement; (b) any cause of action, suit, legal or administrative proceeding or claim brought or made against Morgantown and/or BOPARC by any third party arising out of the construction, installation, operation, existence, and maintenance of the Flegal Reservoir and Dam, including, without limitation, for injury or death to person or damage or destruction to property.

14. No Interest in Land. MUB, Morgantown, and BOPARC understand, acknowledge and agree that this Agreement does not create an interest or estate in the Property.

15. Notices. All notices required or permitted by this Agreement shall be in writing and shall be deemed to have been duly given or made when delivered personally or transmitted electronically by facsimile or email, receipt acknowledged, or in the case of documented overnight delivery service or registered or certified mail, return receipt requested, delivery charge or postage prepaid, on the date shown on the receipt therefor, in each case at the address set forth below:

To the City:

City of Morgantown
 Attn: City Manager
 389 Spruce Street
 Morgantown, WV 26505

To MUB:

Morgantown Utility Board
 Attn: General Manager
 278 Greenbag Road
 Morgantown, WV 26501

To BOPARC:

Morgantown Board of Parks and Recreation Commissioners
 Attention: Executive Director
 799 E. Brockway Avenue
 Morgantown, WV 26501

Any party may modify the notice address by delivery of notice pursuant to the provisions of this Section.

16. Miscellaneous Provisions:

a. Nothing contained in this Agreement shall be deemed or construed to operate for the benefit of any person or entity not a party to this Agreement.

b. This Agreement is executed in Morgantown, Monongalia County, West Virginia, and it shall be governed by the laws of the State of West Virginia without consideration of its conflict of law provisions.

c. This Agreement may be executed in any number of counterparts by the parties hereto, and all such counterparts taken together shall constitute a single instrument.

d. No party may assign its rights and obligations with respect to this Agreement without the prior written consent of all other parties, which consent may be granted or denied in the discretion of each party.

e. The parties agree that the respective obligations undertaken, and benefits received, by each of them pursuant to this Agreement constitute good and valuable consideration for this Agreement.

f. This Agreement constitutes the entire agreement between the parties hereto related to the subject matter hereof and there are no collateral agreements or understandings, oral or written, between the parties, except as specifically referenced herein. All additions, variations or modifications of this Agreement shall be void and ineffective unless they

are in writing and signed by all parties hereto. Section headings as used herein are for convenience only. Nothing in this Agreement shall be construed against or otherwise determined with respect to any party by reason of such party's preparation or drafting of this Agreement, in whole or in part.

g. Any term or provision of this Agreement may be waived in writing at any time by the party that is entitled to the benefits of it. Unless specifically waived in writing, the failure of either party at any time to require performance of any provision of this Agreement shall in no manner affect such party's right at a later time to enforce the same. No waiver by any party of a condition or the breach of any term, covenant, representation or warranty of this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of the breach of any other term, covenant, representation or warranty of this Agreement.

h. This Agreement, and all the provisions hereof, shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns.

[signatures on following page]

Executed this ___ day of _____, 2022 by

The City of Morgantown

Morgantown Utility Board

A. Kim Haws
City Manager

Michael W. McNulty
General Manager

Morgantown Board of Park and Recreation Commissioners

Melissa Wiles
Executive Director

STATE OF WEST VIRGINIA,
COUNTY OF MONOGALIA, to wit:

The foregoing instrument was acknowledged before me this ___ day of _____, 20___,
by _____, _____, and _____ for and on
behalf of the parties identified in the foregoing instrument.

My commission expires: _____.

Notary Public in and for the
State of West Virginia