

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE CITY OF WILSONVILLE, THE CITY OF HILLSBORO,
AND THE TUALATIN VALLEY WATER DISTRICT REGARDING
PLACEMENT OF WATER TRANSMISSION PIPELINE
IN KINSMAN ROAD DURING UPCOMING CONSTRUCTION**

This Memorandum of Understanding (“MOU”) is made and entered into by and between the **City of Wilsonville**, an Oregon municipal corporation (“Wilsonville”), the **City of Hillsboro**, an Oregon municipal corporation (“Hillsboro”), and **Tualatin Valley Water District**, a domestic water supply district of the State of Oregon (“TVWD”), referred to collectively as the “Parties.”

RECITALS:

A. WHEREAS, TVWD and Hillsboro (collectively “Users”) are planning to construct a water transmission pipeline (“Pipeline”), up to 72-inches in diameter, extending from Hillsboro to the Willamette River Water Treatment Plant (“WRWTP”) in Wilsonville. The Pipeline is intended to convey water to the Users by the year 2026; and

B. WHEREAS, Users have been communicating with Wilsonville about using rights-of-way owned by Wilsonville for routing the Pipeline Project and have developed a draft preferred route for the Pipeline Project, with alternatives, a copy of which is marked as **Exhibit A**, attached hereto, and incorporated by reference as if fully set forth herein, which route Wilsonville has not formally approved; and

C. WHEREAS, using federal funding through the Oregon Department of Transportation (“ODOT”), Wilsonville has already completed approximately ninety percent (90%) of the design work for the future construction of a new segment of Kinsman Road between Barber Street and Boeckman Road (“Kinsman Project”). Federal funding will also be used, along with Wilsonville funds, for the construction of the Kinsman Project. The construction contract for the Kinsman Project will be awarded by ODOT; and

D. WHEREAS, Users have requested that at the same time ODOT constructs the Kinsman Project, Users be allowed to locate a segment of the Pipeline within the Kinsman Project right-of-way (“Kinsman Right-of-Way”) as a part of the Pipeline Project, at Users’ sole risk, in order to save time and expense to Users and avoid a potential future demolition and reconstruction of the newly constructed Kinsman Project; and

E. WHEREAS, the alignment of the Kinsman Project is consistent with and part of the preferred route of the Pipeline Project and placement of a portion of the Pipeline within the Kinsman Right-of-Way, as depicted on **Exhibit B**, attached hereto and incorporated by reference as if fully set forth herein, and is supported by the Parties as set forth below; and

F. WHEREAS, in addition to design on the Kinsman Project already being approximately 90% complete, Wilsonville has also obtained certain environmental and wetland permits required for construction of the Kinsman Project but still needs permits for its sanitary sewer improvements; and

G. WHEREAS, to address and coordinate the timing of the necessary design, permitting, and contracting requirements for the combined improvements, the Parties have developed an anticipated schedule of tasks and events, marked as **Exhibit C**, attached hereto, and incorporated by reference as if fully set forth herein; and

H. WHEREAS, there are several unknowns at this time surrounding the possible addition of the Users' Pipeline to the Kinsman Project, including but not limited to additional cost that may be incurred by Wilsonville for staff time, re-design time, construction delays and other related construction costs that may be caused by amending contracts and/or permits already in place as well as costs during the construction phase, including but not limited to construction costs, management, oversight, inspection, and administration and engineering overhead; and

I. WHEREAS design and construction of the Kinsman Project is being done pursuant to a contract with ODOT ("ODOT Contract"), but agreement is yet to be reached between ODOT, Wilsonville, and Users concerning project construction costs, management, cost sharing, and payment terms, including but not limited to the cost allocation for excavation and related roadway work up to the subgrade for that portion of the road bed where Users' Pipeline will be located; and

J. WHEREAS, the final Pipeline location, feasibility, terms and fees related to Users' occupancy of Wilsonville's Kinsman Right-of-Way have not yet been established between Wilsonville and Users; and

K. WHEREAS, Users acknowledge that Wilsonville may impose terms, conditions, and fees for the use of Wilsonville's rights-of-way and property; and

L. WHEREAS, the Parties intend to negotiate in good faith the terms, conditions, and fees for the use of the rights-of-way and property in a future agreement;

NOW, THEREFORE, the Parties desire to enter this Memorandum of Understanding to begin to accomplish some resolution of the foregoing, and incorporating all of the above Recitals by reference, as follows:

1. Limited and Conditional Granting of Use. Wilsonville will grant Users a limited right of use of the Kinsman Right-of-Way depicted on **Exhibit B** to construct and locate a water transmission pipeline, up to 72 inches in diameter (the "Waterline"), within the Kinsman Right-of-Way, subject to the following:

1.1. The Parties and ODOT shall reach an agreement or agreements as to what Users and Wilsonville will each pay for the construction of the Kinsman Project with the Pipeline included. Any use of estimated amounts will be subject to true-up upon final completion. The Parties will work with ODOT to determine how the project management structure for this portion of the Kinsman Project will be allocated and how the Parties will pay their respective cost shares to ODOT. If the Parties and ODOT are unable to agree to an allocation, either Party may terminate this MOU, in its sole discretion. Provided, however, if activities attributable to the May 26, 2016 bid date set forth in **Exhibit C** for the design, permitting, or construction of the Waterline cause delays to the Kinsman Project that would not have occurred but for design, permitting, or construction of the Waterline, and the delays cause Wilsonville to incur additional costs, the Users shall reimburse Wilsonville for such

actual costs incurred, and the provisions of this MOU shall apply with respect to any dispute resolution concerning such reimbursement.

1.2. The Parties agree to make all reasonable efforts to comply with the schedule of events and deadlines described in **Exhibit C** of this Agreement. The Parties further agree that **Exhibit C** may be modified or amended from time to time, by mutual written consent of all Parties, without formal amendment to this MOU.

1.3. Users understand and accept the full risk of environmental permitting of the Pipeline Project, including but not limited to denial or conditions of the construction of the Waterline. It is Users' responsibility to promptly provide Wilsonville and the appropriate permitting agency or agencies with all requested documents required to advance the Waterline permitting process, as described in **Exhibit C**. Wilsonville retains the full risk of environmental permitting for its sanitary sewer improvements and any of its other improvements.

1.4. Users understand and agree that the Parties have not yet established the fee or other consideration Wilsonville will charge Users and that Users are obligated to pay for use of the Kinsman Right-of-Way and any other affected City rights-of-way and city properties. Users understand and agree that fees or other consideration will be imposed for use of the Kinsman Right-of-Way at a later date and through another agreement between the Parties. Nothing contained herein shall be construed as Wilsonville granting any consent or approval beyond that expressly set forth herein for the Kinsman Project.

1.5. Users understand that beginning construction of the Waterline before all other agreements between Wilsonville and Users with respect to the entire Pipeline Project within Wilsonville are completed is a significant risk and is being done at Users' sole risk. In the event the final alignment for the Pipeline Project excludes the Kinsman Right-of-Way, or the Parties are not able to reach agreement on the use of other right-of-way within Wilsonville, Wilsonville will provide 30 days' written notice to Users to enter into negotiations and Users and Wilsonville will enter into good faith negotiations to establish the ultimate disposition of the Waterline in Kinsman Road. If after 120 days from the date of the notice, or any mutually agreeable extension thereof, such an agreement is not reached, Users may be required by Wilsonville to remove or decommission the Pipeline Waterline and repair any damages to the Kinsman Right-of-Way resulting from the removal or decommissioning.

1.6. Users agree that a grant by Wilsonville to Users to construct the Waterline as part of the Kinsman Project does not constitute a waiver of any right by Wilsonville, including but not limited to the right to approve and permit the remainder of the Pipeline Project's route within the city, to establish fees or other reimbursement for use of rights-of-way, or other agreements that may be required pertaining to construction and disturbance within Wilsonville.

1.7. Users understand and agree that the use of any rights-of-way in Wilsonville, including the Kinsman Right-of-Way, are regulated by Wilsonville's ordinances, rules and regulations regarding construction and uses within its rights-of-way.

1.8. Assuming agreement between ODOT, Users, and Wilsonville as to cost allocation, the Parties and ODOT will create an Agreement or Agreements with ODOT for construction of the Kinsman Project and Users shall make all payments and deposits, provide all required bonding, and fulfill all other obligations as provided therein.

1.9. For any other payments not part of the ODOT agreement, Users agree to promptly pay Wilsonville for any and all costs incurred by Wilsonville in order to grant this request, including but not limited to those costs listed in **Recital H**, within thirty (30) days of billing. If Users dispute any invoiced cost, Users must pay the disputed cost(s) and, within 15 days of making payment, notify Wilsonville of the disputed cost(s) and the reasons therefor. Disputed charges are subject to the dispute resolution process described in **Section 6**. Any disputed payment amount(s) repaid to Users shall include interest equal to the amount repaid times the Local Government Investment Pool interest rate on the date of the original invoice.

1.10. Users agree to fully indemnify Wilsonville to the fullest extent allowed by law for claims or damages, including but not limited to attorney fees, arising out of Waterline construction or use of the Kinsman Right-of-Way attributable to Users. Users further agree that they must, prior to the May 26, 2016 bid date, provided Wilsonville with proof of adequate General Liability, Automobile Liability, Pollution Liability, and Workers Compensation insurance, in amounts acceptable to Wilsonville and with coverage by insurance carriers acceptable to Wilsonville.

1.11. Users understand and agree that any use of Wilsonville's Kinsman Right-of-Way that may be granted hereby is non-exclusive and other uses will also be permitted in the Kinsman Right-of-Way so long as they do not prevent Users' use of the Right-of-Way for the limited purposes as granted herein.

1.12. Users will provide design documents to the City's consulting engineer, OBEC, in sufficient time for OBEC to include the Waterline design in the Plan, Specifications, and Estimate (PS&E) submittal to ODOT, as set forth on **Exhibit C**. The Parties will otherwise make all reasonable efforts to comply with the schedule of events described in **Exhibit C**, including any deadlines for the submission of construction designs, permits, and property acquisition.

2. Indemnity. To the full extent permitted by law, each Party agrees to indemnify and hold harmless the other, its counsel, officers, employees, and agents from any and all claims, demands, damages, actions, attorney fees, or other harm caused by the sole negligence or intentional acts of that Party, including any attorney fees or other costs of defense. Further, independent of the indemnity obligation, Users must satisfy the insurance and bonding obligations set forth above prior to beginning any construction. This indemnification is in addition to, and not in lieu of, the indemnification requirements of the ODOT Contract.

3. Notices. Notices regarding operation, maintenance, repair, replacement, breach, termination, renewal, or other issues shall be deemed sufficient if deposited in the United States Mail, First Class, postage prepaid, addressed to the Parties as follows:

To Wilsonville: City of Wilsonville
Attn: City Manager
29799 SW Town Center Loop East
Wilsonville OR 97070

To Hillsboro: City of Hillsboro
Attn: Water Director
150 East Main Street
Hillsboro OR 97123

To TVWD: Tualatin Valley Water District
Attn: Chief Executive Officer
1850 SW 170th Avenue
Beaverton OR 97003

4. Termination. Any Party may terminate this MOU upon written notice to each of the other Parties, under any of the following conditions:

4.1. If federal or state laws, regulations, or guidelines are imposed, modified, or interpreted in such a way that the project contemplated under this MOU is prohibited.

4.2. If the conditions of **Section 1** are not met, and the City determines, in its sole discretion, that allowing the installation of the Waterline may cause a material delay in the Kinsman Project or materially jeopardize its costs or funding.

4.3. By mutual agreement to terminate for convenience.

Any termination of this MOU shall not prejudice any rights or obligations accrued to the Parties prior to termination.

5. Default. The failure of a Party to perform any duty imposed upon it by this MOU shall constitute a default.

5.1. **Notice of Default.** The non-defaulting Party shall have the right to give the defaulting Party a written notice of default, which shall describe the default in reasonable detail and state the date by which the default must be cured, which date shall be at least ten (10) days after receipt of the notice of default.

5.2. **Rights Upon Default.** Recognizing time is of the essence, a defaulting Party shall have ten (10) days to cure a default, following written notice thereof, unless cure within such ten (10) day period is not reasonably possible; in that case, the period to cure the default shall be extended to thirty (30) days, or such other time that the non-defaulting Party is willing to agree to, provided that the defaulting Party has diligently begun to work, in good faith, to cure the default within the original prescribed ten (10) day period. In addition, the non-defaulting Party may pursue any other remedy available at law or in equity against the defaulting Party, subject to the dispute resolution procedures set forth in **Section 6**.

6. Dispute Resolution. Any dispute arising out of the terms of this MOU or interpretation thereof shall be resolved by negotiation between the Parties, followed by mediation if the dispute remains unresolved. Except for disputes arising under the ODOT Contract, a dispute between the Parties regarding this MOU shall follow the dispute resolution provisions below:

6.1. **Written Notice.** A written notice regarding the dispute (Dispute Notice) shall be sent to the other Parties.

6.2. **Negotiations.** Within thirty (30) days following receipt of the Dispute Notice, the Parties to the dispute (“Disputing Parties”) shall each assign a representative to participate in good faith negotiations for a period not to exceed sixty (60) days after appointment of the representatives.

6.3. **Mediation.** If after the sixty (60) day period of negotiation (or a period not to exceed ninety (90) days following the receipt date of the Dispute Notice), the dispute(s) cannot be resolved, the Disputing Parties agree to submit the matter to non-binding mediation. The Disputing Parties shall attempt to agree on a mediator in a period not to exceed one hundred twenty (120) days following the receipt date of the Dispute Notice and proceed accordingly.

6.4. **Litigation.** If the Parties cannot agree on a mediator within the allocated time, or if the mediator cannot resolve the dispute(s) within one hundred eighty (180) days following the receipt date of the Dispute Notice, either of the Disputing Parties may avail itself of the remedies provided for herein. Moreover, each of the Disputing Parties shall bear its own costs, legal and expert witness fees at all stages of the dispute resolution process, except at trial or on any appeals. For any trials and appeals, the prevailing Party shall be entitled to recover attorney, paralegal, accountant, and other expert fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, but shall not include any such fees, costs, or expenses incurred under subsections 6.1, 6.2, or 6.3. In addition, nothing shall prevent the Disputing Parties from waiving any of the dispute resolution steps by mutual consent.

6.5. **ODOT Contract Dispute Resolution.** Notwithstanding the foregoing, however, if the dispute involves the work done under the ODOT Contract, the Parties may be required to follow the requirements for dispute resolution as set forth in the ODOT Contract. For disputes arising under the ODOT Contract, the dispute resolution provisions of the ODOT Contract shall control unless the Parties agree otherwise.

7. Miscellaneous Provisions.

7.1. **Effective Date.** This MOU is effective on the last date signed by the Parties below and remains in effect until terminated as provided herein.

7.2. **Integration.** This MOU, including all exhibits attached hereto, contains the entire and integrated agreement between the Parties and supersedes all prior written or oral

discussions, representations, or agreements. In case of conflict among these documents, the provisions of this MOU shall control.

7.3. **Succession.** This MOU shall be binding upon any successors to the respective Parties that, through merger, consolidation, or other means succeed to the rights of that Party. No transfer to a private, nonpublic entity is permissible without the consent of both Parties.

7.4. **Adherence to Law.** Users shall adhere to all applicable federal, state, and local laws, including but not limited to the Wilsonville Code, Wilsonville Public Works Standards, laws, rules, regulations, and policies concerning employer and employee relationships, workers compensation, and minimum and prevailing wage requirements. Any certificates, licenses, or permits that Users are required by law to obtain or maintain in order to perform any work described in this MOU shall be obtained and maintained throughout the term of this MOU.

7.5. **Governing Law.** This MOU is governed by the laws of the State of Oregon. Venue for any litigation shall be in Clackamas County, Oregon.

7.6. **Nonwaiver.** Failure by any Party at any time to require performance by any other Party of any of the provisions of this MOU shall in no way affect the Party's rights hereunder to enforce the same, nor shall any waiver by the Party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

7.7. **Severability.** In case any one or more of the provisions contained in this MOU shall be judicially deemed invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

7.8. **Amendment.** The terms of this MOU may be amended or supplemented by mutual agreement of the Parties. Any amendment or supplement shall be in writing, shall refer specifically to this MOU, and shall be executed by the Parties.

7.8.1. Notwithstanding the foregoing, the Parties agree that **Exhibit C** (tasks and schedule) may be amended with the written consent of all Parties without amending this MOU.

7.9. **Survival of Terms and Conditions.** The provisions of this MOU shall survive its termination to the full extent necessary for their enforcement and the protection of the Party in whose favor they run.

7.10. **Time of the Essence.** Time is expressly made of the essence in the performance of this MOU.

7.11. **Calculation of Time.** Except where the reference is to business days, all periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or

legal holiday observed by Wilsonville, the period shall be extended to include the next day which is not a Saturday, Sunday, or legal holiday. Where the reference is to business days, periods of time referred to herein shall exclude Saturdays, Sundays, and legal holidays observed by Wilsonville. Whenever a time period is set forth in days in this MOU, the first day from which the designated period of time begins to run shall not be included.

7.12. **Headings.** Any titles of the sections of this MOU are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

7.13. **Number, Gender and Captions.** In construing this MOU, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this MOU.

7.14. **Good Faith and Cooperation.** The Parties agree and represent to each other good faith, cooperation, and due diligence in the performance of all obligations of the Parties pursuant to this MOU.

7.15. **Access to Records.** Upon request of another Party, each Party shall provide copies of or access to such engineering, permitting or other records as may be reasonably necessary to effectuate the purposes of this MOU.

7.16. **Instruments of Further Assurance.** Upon request of another Party, each Party shall, without further consideration, execute and deliver such further instruments and shall take such further action as may be reasonably necessary to fully effectuate the purposes of this MOU.

7.17. **Interpretation.** As a further condition of this MOU, Wilsonville and Users acknowledge that this MOU shall be deemed and construed to have been prepared mutually by each Party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any Party. In the event that any Party shall take an action, whether judicial or otherwise, to enforce or interpret any of the terms of the contract, the prevailing Party shall be entitled to recover from the other Party all expenses which it may reasonably incur in taking such action, including attorney fees and costs, whether incurred in a court of law or otherwise.

7.18. **Counterparts.** This MOU may be signed in one or more counterparts, each of which shall be deemed an original and, when taken together, shall constitute one and the same agreement.

7.19. **Authority.** Each Party signing on behalf of Users and Wilsonville hereby warrants actual authority to bind their respective Party.

IN WITNESS WHEREOF, the Parties have, pursuant to official action of their respective governing bodies duly authorizing the same, caused their respective officers to execute this MOU on their behalf.

CITY OF WILSONVILLE
an Oregon municipal corporation

CITY OF HILLSBORO
an Oregon municipal corporation

City Manager
Dated: _____

Mayor
Dated: _____

ATTESTED TO:

ATTESTED TO:

City Recorder

City Recorder

APPROVED AS TO FORM:

APPROVED AS TO FORM:

City Attorney

City Attorney

TUALATIN VALLEY WATER DISTRICT
a domestic water supply district

Chief Executive Officer
Dated: _____

APPROVED AS TO FORM:

District Counsel

PROPOSED PIPELINE ROUTE

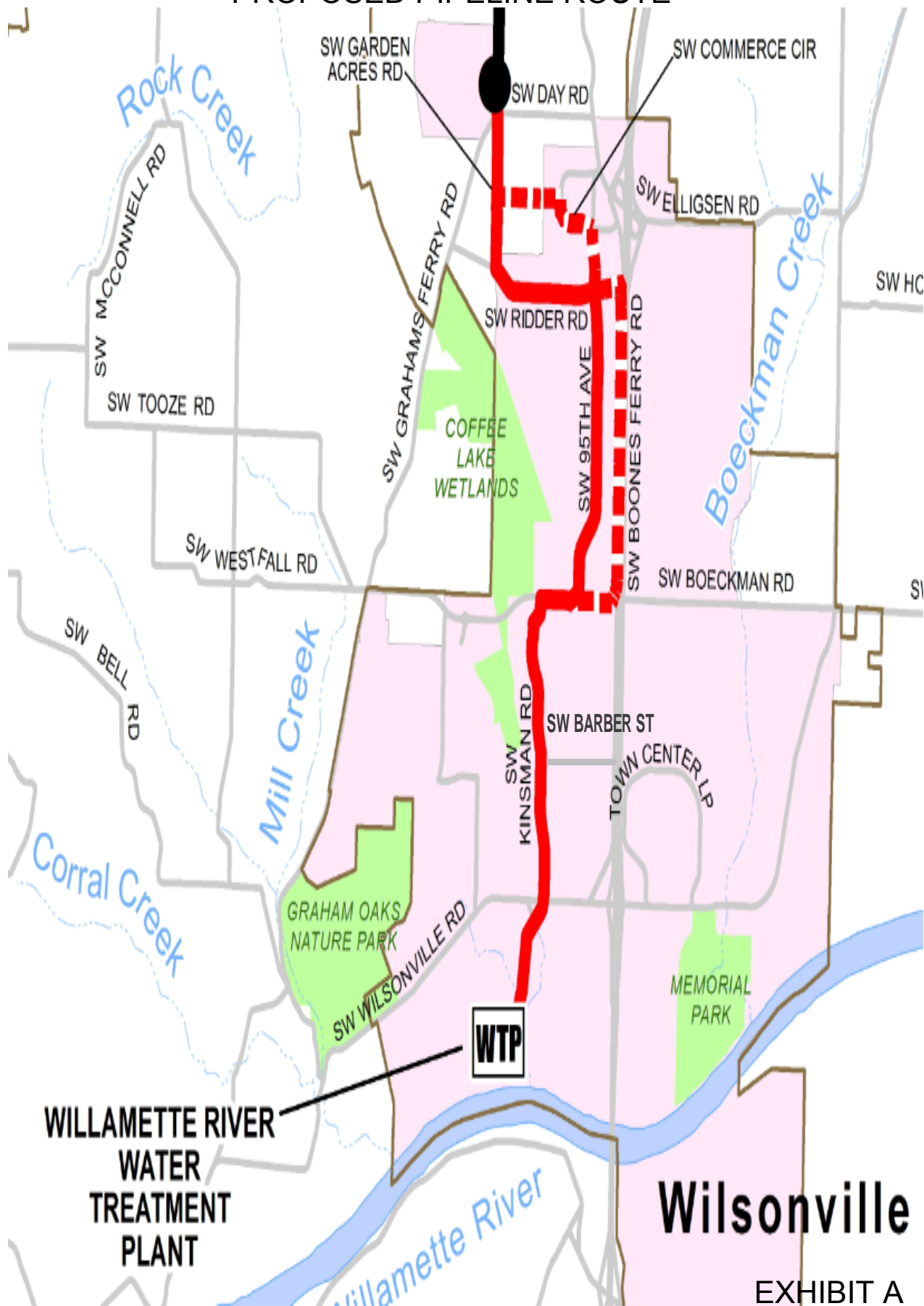
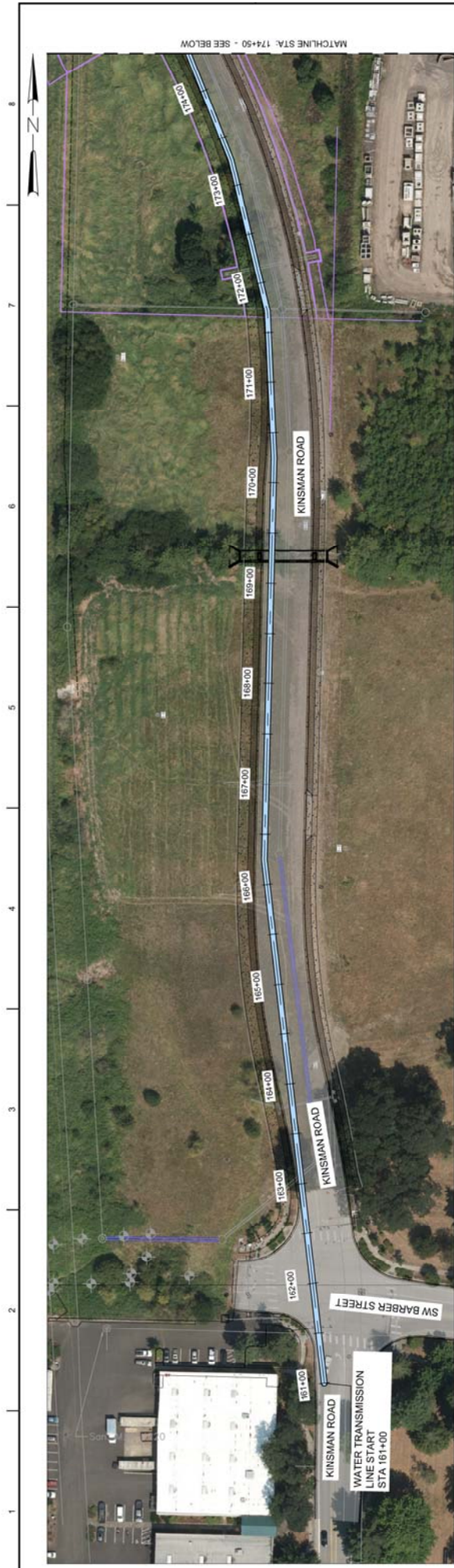


EXHIBIT A



MATCHLINE STA. 174+50 - SEE BELOW



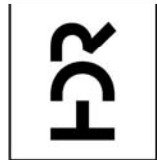
MATCHLINE STA. 174+50 - SEE ABOVE

PLAN
0 50 100 200

KNOW WHAT'S BELOW.
CALL BEFORE YOU DIG.
"LOOK UP AND LIVE"

PROJ. MANAGER	S. CHRISTENSEN
DESIGNED BY	M. DUFFY
DRAWN BY	S. WILMS
CHECKED BY	K. CALDERWOOD
PROJ. NUMBER	

ISSUE	DATE	DESCRIPTION



WILLAMETTE WATER SUPPLY PROGRAM

Kinsman Road Water Transmission Line
KINSMAN ROAD PROPOSED ALIGNMENT

FILE NAME: 0007 Figure
C:\projects\811\811\811.dwg

SCALE: 1" = 40'

PROJECT NUMBER: 811

SHEET # OF #:



29799 SW Town Center Loop E
 Wilsonville, Oregon 97070
 (503) 682-1011
 (503) 682-1015 Fax Administration
 (503) 682-7025 Fax Community Development

Kinsman Road Extension & Pipeline Project

Project Target Milestones
 6/23/2015

The following are target milestones for the Kinsman Road Extension Project and the WWSP Pipeline project to be bid and administered by ODOT as a federal aid project. Timelines assume ongoing design team, permit and property acquisition coordination between the agencies.

Project Milestone	Target Completion
Updated project quantities determined for permit updates for waterline (WWSP) and sewer line (Wilsonville).	July 15, 2015
Updated environmental permits submitted to agencies for review.	August 15, 2015
Revised environmental permits issued.	December 15, 2015
30% pipeline design complete	September 15, 2015
90% pipeline design complete	December 15, 2015
Updated Advanced Plans (90%) for road complete	December 15, 2015
Advanced plans (combined) submitted to ODOT	January 5, 2016
Property acquisition complete	January 30, 2016
100% pipeline design complete	February 26, 2016
Final roadway PS&E complete	February 26, 2016
Final plans (combined) submitted to ODOT	March 4, 2016
Advertise for Bid	April 15, 2016
Bid Open	May 26, 2015

