



## REQUEST FOR BOARD ACTION

ITEM NO. 19

**DATE OF MEETING:** September 20, 2010

**REQUESTED BY:** Michael G. Mack, Director, PCU

**SHORT TITLE:** Resolution by the Board of Commissioners to Approve an Interlocal Agreement between Pender County and Cape Fear Public Utility Authority for the US Highway 421 Wastewater Treatment Facility.

**BACKGROUND:** Pender County and Cape Fear Public Utility Authority (CFPUA) entered into a contract on September 9, 2009 to design and permit a 0.5 million gallon per day Wastewater Treatment Facility to serve the US 421 corridor. Both parties agree to the benefits of comprehensive master planning, and desiring to determine the best strategy to provide wastewater service to the US 421 Corridor and preserve the Authority's NPDES permit for discharge of 4 million gallons per day of treated wastewater effluent to the Cape Fear River. As a result of the contract, CFPUA authorized McKim & Creed to engineer, design, and permit a Sequential Batch Reactor Wastewater Treatment Facility.

Staff from both parties have been meeting monthly over the last year to discuss and review the design of the WWTP in addition to developing an Interlocal Agreement that both Boards will use to guide the planning and construction of the proposed facility. The Interlocal Agreement addresses the basic design, permitting, funding, construction, capacity allocation and operation and maintenance parameters to use for the furtherance of the project. The Interlocal Agreement was presented to the CFPUA Board of Directors at their September 8, 2010 meeting.

**SPECIFIC ACTION REQUESTED:** To consider a resolution approving an Interlocal Agreement with Cape Fear Public Utility Authority for a US Highway 421 Wastewater Treatment Facility.

**COUNTY MANAGER'S RECOMMENDATION**

Respectfully recommend approval.

MB  
Initial

**RESOLUTION**

**NOW, THEREFORE BE IT RESOLVED**, by the Pender County Board of Commissioners that

the attached Interlocal Agreement between Pender County and Cape Fear Public Utility Authority regarding planning for a US 421 Wastewater Treatment Plant is approved.

The Chairman/County Manager is authorized to execute any document necessary to implement this resolution.

**AMENDMENTS:**

MOVED \_\_\_\_\_ SECONDED \_\_\_\_\_

APPROVED \_\_\_\_\_ DENIED \_\_\_\_\_ UNANIMOUS

YEA VOTES: Tate \_\_\_ Brown \_\_\_ Blanchard \_\_\_ Rivenbark \_\_\_ Williams \_\_\_

\_\_\_\_\_  
Jimmy T. Tate, Chairman      09/20/10  
Date

\_\_\_\_\_  
ATTEST      09/20/10  
Date

**INTERLOCAL AGREEMENT BETWEEN PENDER COUNTY  
AND CAPE FEAR PUBLIC UTILITY AUTHORITY  
REGARDING PLANNING FOR THE US 421 WASTEWATER TREATMENT PLANT**

THIS INTERLOCAL AGREEMENT (ILA) made and entered into this the \_\_\_\_ day of \_\_\_\_\_, 2010, by and between PENDER COUNTY, a political subdivision of the State of North Carolina (hereinafter, "COUNTY"), and the CAPE FEAR PUBLIC UTILITY AUTHORITY, a body politic and corporate of the State of North Carolina (hereinafter, "Authority");

W I T N E S S E T H:

WHEREAS, the County and Authority are currently entered into a contract on September 09, 2009 to design and permit a 0.5 million gallon per day (MGD) Wastewater Treatment plant to serve the US 421 corridor; and

WHEREAS, the Authority (in accordance with said contract) has contracted with McKim and Creed Engineers for engineering, design, and permitting of a Sequential Batch Reactor Wastewater Treatment Plant; and

WHEREAS, the County has dedicated a portion of tract 2 (Refer to Map Book 50 Pages 125-127 in Pender County Register of Deeds. PIN # 2291-75-8677-0000) north of the New Hanover and Pender County boundary on US Highway 421; and

WHEREAS, the Authority has a National Pollutant Discharge Elimination System (NPDES) sewer discharge permit for 4.0 million gallons per day; and

WHEREAS, the parties recognize Pender County's land and the Authority's NPDES permit are considered of equivalent value for the purposes of this ILA; and

WHEREAS, the parties also recognize that it would be in their mutual best interests, as well as the furtherance of the public interest and advancement of the health, safety and welfare of the citizens of the Pender and New Hanover Counties, to cooperate with each other to coordinate and further the Design and Construction; and

WHEREAS, it is the intent of the parties to build a facility in phases until the permit capacity is exhausted. The initial plant will be 0.5 MGD with expansion in increments to 4 MGD; and

WHEREAS, the ultimate build-out of the site will be 11 MGD if permitted by DWQ; and

WHEREAS, upon completion of construction, it is the intention of the County and the Authority that each party shall be allocated treatment capacity in accordance with this agreement; and

WHEREAS, the parties hereto are authorized to enter into this Agreement pursuant to the provisions of N.C. Gen. Stat. § 160A-461.

NOW THEREFORE, for and in consideration of the premises and the other good and valuable consideration set forth herein, the County and the Authority hereby agree as follows:

1. Design of the Work; Permitting. The Authority shall continue to utilize McKim and Creed or other mutually acceptable engineering consultant for work to facilitate the completion of the Environmental Assessment (EA), final design, applications to the appropriate regulatory agencies for any required permits and any work to assemble Project costs or construction estimates. The County and CFPUA shall have the authority to approve all matters of design, to include all final design plans and specifications.

2. Design. The plant design will give consideration to its projected service life as agreed to by both parties. The basis of design shall include minimizing life cycle capital, operation, and maintenance costs and the principles of asset management.

3. Project Funding. In accordance with the existing contract, payment for the design and permitting will be shared by the County and the Authority. Prior to bidding, the Authority and County shall confirm that funding is available for the construction and inspection of the Project, (while anticipating changes to the cost of the Project), so as to facilitate the award of the contract and possible changes to the contract within reasonable limits suitable for the Authority and the County. Construction cost sharing will be determined by each entity and construction funding and payments will be defined by an amendment to this Agreement.

4. Project Contract. Upon completion and approval of the design work, using a set of construction drawing and specifications submitted by McKim and Creed Engineers, the County/Authority shall bid the Work in accordance with North Carolina law. The Authority/County shall have the right to review and approve the bids for the Work to ensure that the bids are within reasonable amounts budgeted by the Authority/County. The Authority's/County's approval of the Work shall not be unreasonably withheld or conditioned.

5. Construction and Inspection of the Work. Upon approval of the bids by the County and the Authority, the entity with the largest participation of project funding shall award and administer the construction contract for all of the Work unless otherwise agreed to by both parties. This entity shall be subsequently referred to as the Construction Administrator. During

the course of construction, the Construction Administrator shall be responsible for project management, shop drawing review, inspection and approval of the Work as approved on the plans. The County and Authority shall have the right to enter the project site and inspect all work at any time during construction. The County and Authority shall have the right to review and approve changes which may require significant field engineering during the course of construction. The Authority's/County's approval of the Work shall not be unreasonably withheld or conditioned. Upon completion of construction, the County and Authority shall each be provided a set of as-built drawings and O&M manuals of the work.

6. Capacity Allocation. Upon completion of construction, plant capacity will be allocated at a ratio equivalent to participation in project funding. In the event that one party does not participate in construction funding, one quarter (25%) of the plant capacity will be "reserved" for that party's later financial participation. Cost of capacity obtained during later financial participation will be based on the percentage of permitted plant capacity to be obtained multiplied by the total project cost plus total interest cost of the plant project. Additionally, a negotiated renewal and replacement cost component will be included in the cost of capacity obtained during later financial participation. (For the purposes of this agreement, total project cost is defined as cost of construction of the 0.5 MGD WWTF, including amount actually paid to contractor for construction of the project, plus the cost of the consultant's design, permitting, and construction oversight of the project, as well as legal, administrative and all other costs attributable to the project. For the purposes of this agreement, total interest cost is defined as interest plus issuance costs. When treatment flow reaches 50% of plant capacity the non-participating party will be notified by the participating party and the nonparticipating party will have 90 days to exercise a "right of first refusal" to purchase all or part of the reserved 25 % of plant capacity. Flow will be calculated using the previous 12 months running average daily flow (ADF) for both tributary and obligated flows in accordance with DENR/DWQ Flow Tracking/Acceptance for Sewer Extension Permit Applications (FTSE-10/07). Each party could contribute funding until the remaining capacity is exhausted, which occurs when the actual flow to the plant based on a twelve month running average plus obligated flow not yet tributary to the plant equals 80% of the permitted plant capacity. Initial capacity allocation shall be defined by amendment to this agreement. Examples illustrating the capacity allocation provisions of this agreement are shown on Exhibit A attached hereto and incorporated by reference.

7. Operation and Maintenance. A separate Operations and Maintenance agreement between the parties will be developed and approved prior to commencement of construction.

8. Facility Ownership. Real estate, buildings, and other site improvements will become assets and liabilities of the entities as determined by project funding participation percentage above and amendments to this agreement.

9. Term. This Agreement shall become effective upon the execution by the County and the Authority and shall remain in effect for 30 years unless otherwise amended.

10. Termination. This Agreement may only be terminated by mutual consent of the parties in writing or for cause if the breaching party fails to cure any material breach that destroys the value of the Agreement for the non-breaching party, and excuses the non-breaching party from the further performance of their own obligations under the Agreement within thirty (30) days after being notified by the objecting party in writing.

11. Notice. Notices to the parties to this Agreement shall be sent by first-class or certified mail as required to:

COUNTY:

Director  
Pender County Utilities  
Post Office Box 995  
605 E. Fremont Street  
Burgaw, North Carolina 28425

Pender County Manager  
Post Office Box 5  
805 S. Walker Street  
Burgaw, North Carolina 28425

AUTHORITY:

Chief Executive Officer  
Cape Fear Public Utility Authority  
235 Government Center Drive  
Wilmington, North Carolina 28403

Chairman of the Board  
Cape Fear Public Utility Authority  
235 Government Center Drive  
Wilmington, North Carolina 28403

Director of Engineering  
Cape fear Public Utility Authority  
235 Government Center Drive  
Wilmington, North Carolina 28403

Each party shall immediately notify the other of any change of address. Such notices shall be deemed to have been given when so sent.

12. Amendment. This Agreement may be amended or modified, including any extension, upon mutual agreement of the parties provided that any such amendment shall be reduced to writing and signed by the parties.

13. Construction. This Agreement shall be deemed to be made and performed in the State of North Carolina, and the parties hereto agree, notwithstanding the principles of conflicts of law, that the internal laws of the State of North Carolina shall govern and control the validity, interpretation, performance, and enforcement of this Agreement. Further, the parties hereto agree that any action relating to this Agreement shall be instituted and prosecuted only in the courts of the State of North Carolina, and each consents to the jurisdiction of said courts and waive any right or defense relating to such jurisdiction and venue. In the event of a conflict between the various terms and conditions contained herein, then the more particular shall prevail over the general and the more stringent or higher standard shall prevail over the less stringent or lower standard. This Agreement shall be considered to have been prepared equally by the parties hereto and shall not be construed more strictly against either party, regardless of which party was responsible for its preparation.

14. Assignment. This Agreement may not be assigned by any party without the prior written consent of the other party. This consent shall not be unreasonably withheld or conditioned.

15. Binding on Successors and Assigns. All covenants and agreements contained herein shall be binding upon and inure to the benefit of the successors and assigns of County and Authority.

16. Non-Waiver of Rights. Any party's failure to insist upon the strict performance of any provision of this Agreement or to exercise any right based upon a breach thereof, or the acceptance of any performance during such breach, shall not constitute a waiver of any rights under this Agreement.

17. Immunity Not Waived. This Agreement is governmental in nature and for the benefit of the public and is not intended to be for private profit or gain and the County and Authority do not intend to waive their sovereign immunity by reason of this Agreement.

18. Continuing Obligation. The parties will make and execute all further instruments and documents required to carry out the purposes and intent of this Agreement.

19. Reference. Use of the neuter includes feminine and masculine, singular includes plural; and captions and headings are inserted for convenience of reference and do not define, describe, extend or limit the scope or intent of this Agreement.

20. Entire Agreement. Except for the Contract dated September 9, 2009, and any other general agreement(s) entered into by the parties related to the water and sewer systems, all of which remain in full force and effect, this Agreement constitutes the entire understanding and agreement between the parties relating to the Work as described herein, this Agreement supersedes all prior discussions and written and oral agreements with respect thereto.

21. Savings Clause. If any section, subsection, paragraph, sentence, clause, phrase or portion of this Agreement is for any reason held invalid, unlawful, or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable and such holding shall not affect the validity of the remaining portions hereof.

22. Enforcement. It is recognized that the parties' remedies at law may not be adequate in the event of a breach of this Agreement. Accordingly, the parties agree that specific performance of this Agreement is a proper remedy in the event of a breach or default.

23. Multiple Counterparts. Multiple counterparts of this Agreement may be signed and delivered, each of which shall be considered an original and which together shall constitute but one Agreement.

IN WITNESS WHEREOF, the parties hereto, have caused the execution of this Agreement under seal and by authority duly given the day and year below written.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2010.

COUNTY OF PENDER

(SEAL)

By: \_\_\_\_\_  
Chairman

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
County Clerk

\_\_\_\_\_  
County Attorney

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act this the \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Pender County Finance Director

Project Number: (if applicable)  
Account Number:

STATE OF NORTH CAROLINA  
COUNTY OF PENDER

I, the undersigned Notary Public, do hereby certify

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Witness my hand and notarial seal, this the \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Notary Public

My Commission Expires

\_\_\_\_\_ (Seal)

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

CAPE FEAR PUBLIC UTILITY AUTHORITY

(SEAL)

By: \_\_\_\_\_  
Chairman

ATTEST:

\_\_\_\_\_  
Authority Secretary

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act this the \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Authority Finance Officer

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

I, \_\_\_\_\_, a Notary Public of the State and County aforesaid, certify that Burrows Smith personally appeared before me this day and acknowledged that he is Secretary to the Cape Fear Public Utility Authority, a North Carolina body politic and corporate, and that by authority duly given and as the act of the Authority, the foregoing instrument was signed in its name by its Chairman Gene Renzaglia, sealed with its corporate seal and attested by himself as its Secretary.

WITNESS my hand and notarial seal, this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_ (Seal)

**EXHIBIT A**

**INTERLOCAL AGREEMENT BETWEEN THE PENDER COUNTY AND CAPE FEAR  
PUBLIC UTILITY AUTHORITY  
REGARDING PLANNING FOR THE US 421 WASTEWATER TREATMENT PLANT**

**Capacity Allocation Example 1 – Participation Upon Completion of Construction**

In this example, Party A is the participating party and has just completed construction of the 0.5 MGD WWTF. Prior to this point in time, Party B has not financially participated in construction of the project. However, Party B now desires to obtain 25% of the plant capacity.

Situation details are summarized below:

1. Permitted Plant Capacity = 0.5 MGD
2. Total Project Cost = \$10,000,000 = "P"
3. Total Interest Cost = \$500,000 = "I"
4. Negotiated Renewal and Replacement Cost = \$0 = "R"
5. % Capacity to be Obtained = 25% = "C" (Note this equates to 0.125 MGD of capacity)

Cost of capacity which Party B would need to pay in order to obtain 25% capacity = "COST"

$$\text{COST} = [C (P+I)] + R$$

$$\text{COST} = [0.25 (\$10,000,000 + \$500,000)] + \$0 = \$2,625,000$$

Therefore, Party B would need to pay Party A \$2,625,000 in order to obtain 0.125 MGD of capacity in this example.

## Capacity Allocation Example 2 – Participation 5 Years Following Completion of Construction

In this example, Party A is the participating party and completed construction of the 0.5 MGD WWTF 5 years ago. Prior to this point in time, Party B has not financially participated in construction of the project. Party A has determined, based on 12 month running average, that actual plus obligated wastewater flows to the plant are 50% of permitted plant capacity and per agreement has provided party B with 90 days notice for “right of first refusal” of capacity. Party B wants to determine the cost of 0.1 MGD of capacity. Situation details are summarized below:

Situation details are summarized below:

6. Permitted Plant Capacity = 0.5 MGD
7. Total Project Cost = \$10,000,000 = “P”
8. Total Interest Cost = \$2,000,000 = “I”
9. Negotiated Renewal and Replacement Cost = \$1,000,000 = “R”
10. % Capacity to be Obtained = 20% = “C” (Note this equates to 0.1 MGD of capacity)

Cost of capacity which Party B would need to pay in order to obtain 0.1MGD = “COST”

$$\text{COST} = [C (P+I)] + R$$

$$\text{COST} = [0.20 (\$10,000,000 + \$2,000,000)] + \$1,000,000 = \$3,400,000$$

Therefore, Party B would need to pay Party A \$3,400,000 in order to obtain 0.1 MGD of capacity in this example.