

MEMORANDUM OF AGREEMENT
BETWEEN AND AMONG THE CITY OF LOS ANGELES, BY AND THROUGH
LOS ANGELES SANITATION ("LA SANITATION") AND
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES ("LADWP"),
AND
METABOLIC STUDIO LLC

REGARDING THE OPERATION AND MAINTENANCE OF THE
LOS ANGELES RIVER RUBBER DAM AND APPURTENANT STRUCTURES
CONSTRUCTED AS PART OF METABOLIC STUDIO'S "BENDING THE RIVER BACK
INTO THE CITY" PROJECT (HEREINAFTER REFERRED TO AS "PROJECT")

This Memorandum of Agreement ("AGREEMENT") is made and entered into as of the date of the last signature set forth below ("EFFECTIVE DATE") by the City of Los Angeles, by and through LA SANITATION and LADWP, and Metabolic Studio LLC, a Delaware limited liability company (hereinafter referred to as "METABOLIC STUDIO"), collectively referred to herein as the PARTIES or individually as PARTY, with respect to the following:

RECITALS

WHEREAS, artist Lauren Bon of METABOLIC STUDIO is designing the PROJECT; and

WHEREAS, METABOLIC STUDIO will fund the construction, operation, and maintenance of all components of the PROJECT; and

WHEREAS, pursuant to Water Right Permit 21342 ("BON PERMIT") issued by the State Water Resources Control Board on March 7, 2014, attached hereto as Exhibit A, Lauren Bon has the right to divert up to 0.22 cubic feet per second of water from the Los Angeles River to a maximum of 106 acre-feet per year to irrigate 42.5 acres of land in Section 22, Township 1S, Range 13W, Base and Meridian SB; and

WHEREAS, the BON PERMIT expressly states that Lauren Bon's right is "SUBJECT TO PRIOR RIGHTS;" and

WHEREAS, such prior rights include the City of Los Angeles' "prior and paramount pueblo right to the surface waters of the Los Angeles River," as set forth in the judgment entered in *City of Los Angeles v. City of San Fernando, et al.*, Superior Court of the State of California for the County of Los Angeles, Case No. 650079, and the City of Los Angeles' right to the reclaimed water it discharges to the Los Angeles River from its water treatment plants; and

WHEREAS, the PROJECT consists of a rubber dam across the Los Angeles River between the N. Broadway and N. Spring Street bridges, depicted on the Site Map, attached hereto as Exhibit B; an inlet screen, box and pipeline; a water wheel; a wheel house; a treatment system, a discharge pipeline, box, and screen; all within and adjacent to the Los Angeles River between the N. Broadway and N. Spring Street bridges, also depicted on Site Map, Exhibit B, and a water

distribution system to deliver, free of charge to the users, treated water to locations on both sides of the River; and

WHEREAS, the rubber dam will be approximately one hundred and ninety (190) feet across and eight (8) feet high and, when inflated, will cause water to pool for a distance of sixteen hundred (1,600) to eighteen hundred (1,800) feet upstream; and

WHEREAS, the rubber dam is intended to operate during periods of dry weather flow and to deflate in advance of any precipitation in the region so as not to impede the flood control function of the Los Angeles River channel; and

WHEREAS, METABOLIC STUDIO will finance the design and construction of the PROJECT and will pay all costs in connection with its operation and maintenance for a period of fifty (50) years; and

WHEREAS, METABOLIC STUDIO desires LA SANITATION to operate and maintain the rubber dam, inlet and outlet structures and appurtenances on METABOLIC STUDIO's behalf and at METABOLIC STUDIO's expense; and

WHEREAS, METABOLIC STUDIO has the option to authorize LA SANITATION to operate and maintain other PROJECT components besides the rubber dam, inlet and outlet structures and appurtenances; and

WHEREAS the City of Los Angeles Charter ("CITY CHARTER") grants the Board of Water and Power Commissioners possession, control, and management of the City of Los Angeles' rights-of-way, sites, facilities and property used for the capture, transportation, distribution and delivery of water for the benefit of the City, its inhabitants and its customers, and the right to supply and distribute reclaimed water to customers served by the City within the City's limits; and

WHEREAS, the PARTIES desire to enter into this AGREEMENT to establish the obligations of each PARTY.

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, the PARTIES do hereby agree as follows:

Section 1. Recitals. The recitals set forth above are fully incorporated as part of this AGREEMENT.

Section 2. Purpose. The purpose of this AGREEMENT is to establish the responsibilities of the PARTIES with respect to the operation and maintenance and financial obligations related to the PROJECT.

Section 3. Cooperation. The Parties shall fully cooperate with one another to attain the purposes of this AGREEMENT.

Section 4. Voluntary Nature. This AGREEMENT is entered into by the PARTIES voluntarily.

Section 5. Term. The term of this AGREEMENT shall be for fifty (50) years, as of the EFFECTIVE DATE of this AGREEMENT, subject to Section 12 of this AGREEMENT (Termination of Agreement), after which term the AGREEMENT shall terminate. The AGREEMENT may be extended, through a written amendment, for an additional term of up to fifty (50) years if agreed upon by the PARTIES.

Section 6. Role of METABOLIC STUDIO.

METABOLIC STUDIO agrees:

- a) To obtain all permits necessary for the construction and operation of the PROJECT.
- b) To design and construct the PROJECT.
- c) To permit the City of Los Angeles to review the PROJECT design specifications and manufacturer materials and warranties.
- d) To design and construct the PROJECT to permit LA SANITATION to have inflation and deflation capability over the PROJECT at all times, through direct access to the control panel at the premises and remotely.
- e) To allow LA SANITATION, or third party selected by LA SANITATION, to operate and perform maintenance of the rubber dam and the intake structure, as well as other components of the PROJECT that METABOLIC STUDIO chooses to include.
- f) To grant access of PREMISES to LA SANITATION for operation and maintenance for the duration of this AGREEMENT, subject to terms and conditions agreeable to METABOLIC STUDIO upon sufficient notice by LA SANITATION.
- g) To pay all actual costs incurred by LA SANITATION associated with the operation and maintenance of the PROJECT pursuant to this AGREEMENT, including but not limited to LA SANITATION's administrative costs and necessary repairs and replacement of the PROJECT and components as invoiced by LA SANITATION. All operations, maintenance and related administrative costs shall be tracked and documented by LA SANITATION and provided to METABOLIC STUDIO pursuant to Section 10 (Invoice and Payment).

- e) To pay LA SANITATION's cost to operate and maintain PROJECT in a manner substantially similar to the Scope of Services included as Exhibit C or at an appropriate level determined by the LA SANITATION and METABOLIC STUDIO based on actual needs.

Section 7. Role of LA SANITATION.

LA SANITATION agrees:

- a) To review the PROJECT design specifications and rubber dam manufacturer materials and warranties.
- b) To operate and maintain the PROJECT pursuant to the rubber dam manufacturer's recommendations and in a manner substantially similar to the Scope of Services included as Exhibit C or at an appropriate level determined by LA SANITATION based on actual needs.
- c) To operate and maintain any additional PROJECT components that METABOLIC STUDIO assigns at an appropriate level based on mutually established service needs.
- d) To document all costs and include documentation pursuant to Section 10 (Invoice and Payment).

Section 8. Role of LADWP.

LADWP agrees:

- a) To participate in this AGREEMENT pursuant to the CITY CHARTER.
- b) To the operation and maintenance of the rubber dam, inlet and outlet structures, appurtenances and other related PROJECT components pursuant to this AGREEMENT so long as such complies with the BON PERMIT and all applicable laws and regulations.

Section 9. Additional Provisions.

It is mutually understood and agreed:

If property of a PARTY is damaged by another PARTY, or any person entering PREMISES with the consent of that PARTY, either expressed or implied, that PARTY shall replace or repair the damaged property within a reasonable time to the satisfaction of the harmed PARTY or, at the harmed PARTY's sole discretion, compensate the harmed PARTY for the damage within ninety (90) days of billing.

It is understood that the operation of the PROJECT (outlined in Exhibit C) is subordinate to the flood control purposes of the Los Angeles River channel and activities covered in this AGREEMENT shall in no way conflict with these purposes. It is further understood and agreed that U.S. Army Corps of Engineers and the Los Angeles County Flood Control District may temporarily suspend the operation of the PROJECT for flood control purposes for any length of time necessary in order to allow the performance by these agencies, its officers, agents, invitees, and employees of activities necessary to protect life, property, or the PROJECT from damage at their sole discretion. Neither LA SANITATION nor LADWP shall be liable to METABOLIC STUDIO in the event the operation of the PROJECT is suspended.

Following construction of the PROJECT, METABOLIC STUDIO will update Exhibit C and the overall O&M plan to reflect the conditions of the completed PROJECT. After a year of operations and maintenance, METABOLIC STUDIO and LA SANITATION will cooperatively work to again refine Exhibit C and the O&M plan. Any substantial revisions to this AGREEMENT shall be subject to Section 13e (Amendment).

Section 10. Invoice and Payment. Pursuant to Sections 6 and 7 of this AGREEMENT (Role of METABOLIC STUDIO and Role of LA SANITATION), METABOLIC STUDIO shall pay LA SANITATION for the cost of operations and maintenance performed by LA SANITATION or its subcontractors. LA SANITATION shall prepare and submit to METABOLIC STUDIO a budget estimating its costs for the succeeding year. METABOLIC STUDIO shall pay those estimated costs within sixty (60) days of receipt. Within thirty (30) days of the conclusion of the budget year, any difference between METABOLIC STUDIO'S payment and actual costs incurred by LA SANITATION shall be reconciled, with overpayments credited toward the costs of the next budget year and underpayments paid to LA SANITATION. LA SANITATION will track the actual costs and provide quarterly statements to METABOLIC STUDIO documenting costs incurred by LA SANITATION over the previous quarter. Underpayment will be invoiced as part of the quarterly statement to be paid by METABOLIC STUDIO. METABOLIC STUDIO shall pay the submitted invoice within sixty (60) days of receipt. LA SANITATION will provide METABOLIC STUDIO with annual statements that specify the cost incurred by LA SANITATION. The first invoice will be sent to METABOLIC STUDIO for fiscal year 2017-18 in anticipation of PROJECT completion of December 2018. Subsequent invoices will be sent at the beginning of each fiscal year.

Section 11. Indemnification. To the fullest extent permitted by law, LA SANITATION and METABOLIC STUDIO agree to save, indemnify, defend, and hold one another harmless from any and all liability, claims, suits, actions, arbitration proceedings, administrative proceedings, and regulatory proceedings, losses, expenses, or any injury or damage of any kind whatsoever, whether actual, alleged or threatened, attorney fees, court costs, and any other costs of any nature without restriction incurred in relation to, as a consequence of, or arising out of, the performance of this AGREEMENT, and attributable to the negligence of such indemnifying PARTY. Following a determination of the percentage of fault and or liability by agreement between LA SANITATION and METABOLIC STUDIO or a court of competent jurisdiction, the PARTY responsible for liability to the other will indemnify the other PARTY to this AGREEMENT for the percentage of liability determined.

Notwithstanding any other provision of this agreement, METABOLIC STUDIO shall indemnify, defend, and hold harmless LA SANITATION and its respective officers and employees from and against any claims, demands, liability, damages, costs and expenses, including, without limitation, attorney fees and costs of litigation and claims involving bodily injury, death or personal injury of any person or property damage of any nature whatsoever, arising out of the operation and/or maintenance performed by LA SANITATION of the PROJECT. This indemnification shall apply except to the extent that the claims, demands, liability or damages arise from the negligence, recklessness or willful misconduct of LA SANITATION or its respective officers, employees, agents contractors or subcontractors.

Likewise, notwithstanding any other provision of this agreement, LA SANITATION shall indemnify, defend, and hold harmless METABOLIC STUDIO and its respective officers and employees from and against any claims, demands, liability, damages, costs and expenses, including, without limitation, attorney fees and costs of litigation and claims involving bodily injury, death or personal injury of any person or property damage of any nature whatsoever, arising out of the operation and maintenance by LA SANITATION of the PROJECT. This indemnification shall apply except to the extent that the claims, demands, liability or damages arise from the negligence, recklessness or willful misconduct of METABOLIC STUDIO or its respective officers, employees, agents contractors or subcontractors.

LADWP does not assume any financial, indemnity, or other obligations under this AGREEMENT.

Section 12. Termination of Agreement. Notwithstanding other provisions of this AGREEMENT, either METABOLIC STUDIO or LA SANITATION may terminate this AGREEMENT upon one hundred eighty (180) days prior written notice to the other PARTIES for any reason, including for breach of either of these PARTY's obligation(s) under the AGREEMENT. Failure to perform any provision, covenant or condition of this AGREEMENT shall not be deemed a breach if cured within thirty (30) days of written notice of breach. The PARTY claiming breach shall notify the other PARTIES in writing, identifying the breach, and provide thirty (30) days to cure the breach.

Section 13. General Provisions.

a) Notices. All notices herein that are to be given or that may be given by any PARTY shall be in writing and shall be deemed to have been given three (3) business days after deposit in the U.S. Mail addressed as follows:

To LA SANITATION:

Shahram Kharaghani, Program Manager
City of Los Angeles Sanitation
Watershed Protection Division
1149 South Broadway, 10th floor
Los Angeles, CA 90015
Attention: Wing Tam
Phone No.: (213) 485-3985
Fax: (213) 485-3939

To LADWP:

David Pettijohn, Director of Water Resources
Los Angeles Department of Water and Power
111 North Hope Street, Room 1460
Los Angeles, CA 90012
Phone No.: (213) 367-0899

To METABOLIC STUDIO:

Lauren Bon
METABOLIC STUDIO, LLC
1745 N. Spring Street, Unit 4
Los Angeles, CA 90012
Attention: John Yi
Phone No.: (917) 623-0524

b) Administration. For the purposes of this Agreement, the PARTIES hereby designate as their respective PARTY Representative, the person named in Section 13a of this AGREEMENT (Notices). The designated PARTY Representative, or his or her respective designee, shall administer the terms and conditions of this AGREEMENT on behalf of his or her respective PARTY. Each of the persons signing below on behalf of a PARTY represents and warrants that they are authorized to sign this AGREEMENT on behalf of such PARTY.

c) Relationship of Parties. The PARTIES are and shall remain at all times as to each other, wholly independent entities. No PARTY to this AGREEMENT shall have power to incur any debt, obligation, or liability on behalf of another PARTY unless expressly provided to the contrary by this AGREEMENT. No employee, agent, or officer of a PARTY shall be deemed for any purpose whatsoever to be an agent, employee, or officer of another PARTY.

d) Binding Effect. This AGREEMENT shall be binding upon and inure to the benefit of each PARTY to this AGREEMENT and their respective heirs, administrators, representatives, successors and assigns.

e) Amendment. Amendments, changes or modifications in the terms of this AGREEMENT may be made at any time by mutual written agreement between and among the PARTIES and shall be signed by the persons authorized to bind the PARTIES thereto.

f) Waiver. Waiver by any PARTY to this AGREEMENT of any term, condition, or covenant of this AGREEMENT shall not constitute a waiver of any other term, condition, or covenant. Waiver by any PARTY to any breach of the provisions of this AGREEMENT shall not constitute a waiver of any other provision, nor a waiver of any subsequent breach or violation of any provision of this AGREEMENT.

g) Law to Govern; Venue. This AGREEMENT shall be interpreted, construed, and governed according to the laws of the State of California. In the event of litigation between the PARTIES, venue in the state trial courts shall lie exclusively in the County of Los Angeles.

h) No Presumption in Drafting. The PARTIES to this AGREEMENT agree that the general rule that an agreement is to be interpreted against the party drafting it, or causing it to be prepared, shall not apply.

i) Attorneys' Fees and Costs. The PARTIES agree that in any action to enforce the terms of this AGREEMENT, each PARTY shall be responsible for its own attorneys' fees and costs.

j) Entire Agreement. This AGREEMENT constitutes the entire agreement of the PARTIES with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements, whether written or oral, with respect thereto.

k) Severability. If any term, provision, condition, or covenant of this AGREEMENT is declared or determined by any court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this AGREEMENT shall not be affected thereby and this AGREEMENT shall be read and constructed without the invalid, void, or unenforceable provision(s).

l) Counterparts. This AGREEMENT may be executed in any number of counterparts, each of which shall be an original, but all of which taken together shall constitute but one and the same instrument, provided, however, that such counterparts shall have been delivered to all PARTIES to this AGREEMENT.

m) Representation by Counsel. The PARTIES have been represented by counsel in the preparation and negotiation of this AGREEMENT. Accordingly, this AGREEMENT shall be construed according to its fair language.

IN WITNESS WHEREOF, each PARTY hereto has caused the AGREEMENT to be executed by its duly authorized representative.

LOS ANGELES SANITATION

Enrique C. Zaldivar Date
Director

APPROVED AS TO FORM:
Michael N. Feuer, City Attorney

Adena M. Hopenstand Date
Deputy City Attorney

ATTEST:
Holly L. Wolcott, City Clerk

Deputy City Clerk Date

IN WITNESS WHEREOF, each PARTY hereto has caused the AGREEMENT to be executed by its duly authorized representative.

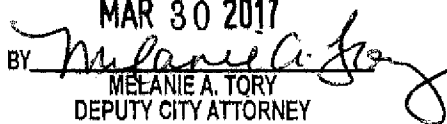
DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES BY
BOARD OF WATER AND POWER COMMISSIONERS

By: _____
DAVID H. WRIGHT
General Manager

Date: _____

And: _____
BARBARA E. MOSCHOS
Secretary

APPROVED AS TO FORM AND LEGALITY
MICHAEL N. FEUER, CITY ATTORNEY

MAR 30 2017
BY 
MELANIE A. TORY
DEPUTY CITY ATTORNEY

