

**AGREEMENT AMONG THE SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY,
THE SANTA CLARA VALLEY WATER DISTRICT,
THE SAN MATEO COUNTY FLOOD CONTROL DISTRICT,
THE CITY OF PALO ALTO, THE CITY OF MENLO PARK, AND THE CITY OF EAST PALO
ALTO
FOR FUNDING CONSTRUCTION OF
THE SAN FRANCISQUITO CREEK FLOOD REDUCTION,
ECOSYSTEM RESTORATION, AND RECREATION PROJECT
SAN FRANCISCO BAY TO HIGHWAY 101**

This Agreement ("Agreement") is made and entered into as of the date it is fully executed by and between the SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY ("Authority"), a California joint powers authority, the SANTA CLARA VALLEY WATER DISTRICT ("Water District"), a special district of the State of California, the San Mateo County Flood Control District, a special district of the State of California ("Flood District"), the CITY OF PALO ALTO ("Palo Alto"), the CITY OF EAST PALO ALTO ("East Palo Alto"), and the CITY OF MENLO PARK ("Menlo Park"), collectively referred to as "the Parties" or individually as "Party." The effective date of this Agreement will be the last date that this Agreement is executed by the Parties.

The purpose of this Agreement is to define the roles and responsibilities of the Parties for funding construction of the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, San Francisco Bay to Highway 101 ("Project").

R E C I T A L S

- A. San Francisquito Creek ("Creek") has a history of flooding the communities in and around East Palo Alto, Menlo Park and Palo Alto, most recently in December 2012, impacting residential properties adjacent to the Creek.
- B. Following the severe flood in February 1998, East Palo Alto, Menlo Park, and Palo Alto along with the Flood District and the Water District formed the Authority on May 18, 1999. These entities are all full members of the Authority. The Authority was authorized to represent its member agencies as the local sponsor for a U.S. Army Corps of Engineers' ("Corps") San Francisquito Creek flood control project on May 23, 2002.
- C. In March 2005 the Corps, working with the Authority, completed a reconnaissance study for the Creek. The reconnaissance study results indicated a Federal Interest in developing a flood control project for San Francisquito Creek. Therefore, the Corps has engaged in the feasibility study ("Study") phase of the San Francisquito Creek Flood Damage Reduction and Ecosystem Restoration Project ("FDRER") which requires a Feasibility Cost Share Agreement with a local sponsor.
- D. The Authority entered into a Feasibility Cost Share Agreement ("FCSA") with the San Francisco District of the Corps for the Study on the Creek. The Corps, pursuant to the FCSA, is developing a project to evaluate flood protection and ecosystem restoration opportunities within the San Francisquito Creek Watershed in Santa Clara and San

Mateo Counties. At the conclusion of the Study, the Corps will issue a Federally Preferred Plan, which will detail the pre-design actions to be taken to complete the FDRER.

- E. The Corps' ability to complete the Study has been impacted by unanticipated delays due to federal funding constraints and Corps' processes.
- F. Due to the Corp's delay in completing the Feasibility Study and the Member Agencies' desire to begin addressing the risk of flooding in their jurisdictions, the Authority and Member Agency staff conducted a process of evaluating alternatives for an initial capital project and recommended a preferred alternative with conceptual design drawings to the Authority Board of Directors for consideration.
- G. On July 23, 2009, the Authority's Board of Directors unanimously approved the staff's recommended Project and authorized its Executive Director to pursue funding opportunities and to contract with qualified consultants to perform 1) planning and design services and 2) environmental impact assessment and planning for the Project.
- H. The Authority, the Water District, and the Flood District entered into an agreement on November 3, 2009 to fund the design and environmental documentation of the Project.
- I. The Authority hired a design engineering firm and an environmental consulting firm to prepare design documents and an Environmental Impact Report ("EIR") for the Project.
- J. The final EIR was certified by the Authority on October 25, 2012. The Notice of Determination (NOD) was filed by the Authority with the County of Santa Clara, Office of the Clerk/Recorder and by the County of San Mateo Office of the Recorder, on July 30, 2013.
- K. East Palo Alto will contribute \$800,000 towards Project costs.
- L. In November 2012, the voters of Santa Clara County approved Measure B, the Water District's Safe, Clean Water initiative which will provide significant funding toward the Project costs. The District will contribute approximately \$28 million toward Project costs from its Safe, Clean Water program and other sources.
- M. On January 9, 2013, the Authority entered into an Agreement with the State of California, Department of Water Resources (DWR) for \$8 million in grant funding from DWR's Stormwater Flood Management Program to be applied towards Project costs.
- N. The Flood District will contribute \$800,000 toward Project costs. The Flood District's financial contribution will be in an amount equal to the financial contribution made by East Palo Alto.
- O. The City of Menlo Park and the City of Palo Alto are not financially contributing toward the Project costs, however, construction of the Project directly benefits the City of Menlo Park as its completion is necessary to accommodate future flood protection measures located in Menlo Park, upstream of the Project, which may be constructed in the future. In addition, Palo Alto is impacted by the Project because realignment of a portion of its

municipal golf course may be necessary to accommodate various flood protection construction elements of this Project.

- P. For the purpose of this Agreement, funding from East Palo Alto, the Flood District, the Authority, and any future funds from other sources, contributed toward Project costs, shall be referred to as "Non Water District Funds."
- Q. The Water District and the Authority intend to enter into a Construction Management Agreement designating the Water District as the entity responsible for managing construction of the Project.
- R. The Parties desire to enter into this Agreement to provide for reimbursement of Water District expenditures towards construction of the Project from funding that may become available through Non Water District Funds

NOW, THEREFORE, in consideration of the foregoing recitals, and the covenants and conditions in the sections contained herein below, the Parties agree as follows:

PROVISIONS

1. Project Purposes

The Project's purposes are to improve flood protection, restore the ecosystem, and provide recreational opportunities within the Project's reach, with the following specific objectives: 1) protect properties and infrastructure between Highway 101 and the San Francisco Bay from San Francisquito Creek flows resulting from 100 year flood events in conjunction with a 100-year tide, including projected Sea Level Rise; 2) accommodate future flood protection measures upstream of the Project that may be constructed; 3) enhance habitat along the Project reach, particularly habitat for threatened and endangered species; 4) enhance recreational uses; and 5) minimize operational and maintenance requirements.

2. Funding Amounts

Construction of the Project is currently estimated to cost approximately \$37.45 million. Based on this estimate, the Parties agree to contribute the following amounts toward these costs.

A. Non Water District Funds

1. The Authority will provide Project funding in the currently estimated amounts as stated below. The Authority will provide to the Water District documentation of all listed expenses incurred and paid for by the Authority.

- a) \$3,000,000 to the City of Palo Alto to mitigate for impacts to the City of Palo Alto Municipal Golf Course;
- b) \$50,000 for other mitigation activities;
- c) \$2,700,000 to Pacific Gas and Electric Company to relocate gas and electric transmission lines;

- d) \$400,000 to the East Palo Alto Sanitary District to relocate a sewer line;
- e) \$100,000 for property acquisition within East Palo Alto;
- f) \$150,000 DWR grant administration costs incurred by the Authority;
- g) \$1,450,000 remaining balance of DWR grant funds after the Authority pays for all costs listed in a) – f) above. The remaining balance will be remitted to the Water District as partial reimbursement of its construction costs.

2. East Palo Alto: \$800,000.

3. Flood District: \$800,000 (matching East Palo Alto's contribution of \$800,000 currently identified from Non Water District Funds).

B. Water District Funds

The Water District will expend an amount not to exceed \$28,000,000 for expenditures incurred in constructing the Project.

3. Method and Timing of Transactions

- A. Water District shall prepare and submit quarterly invoice packages to the Authority. Water District's Quarterly invoice packages will include Project progress reports and all other documentation required by DWR sufficient to enable the Authority to submit subsequent funding requests to DWR for grant funding reimbursement.
- B. Authority shall submit a request for grant fund reimbursement to DWR within 15 days of receipt of invoice packages from Water District, provided all DWR-related invoicing requirements are met. To the extent funds are available after the Authority pays for all costs itemized in paragraph #2. A. a) through f) above, the Authority will issue payment to the Water District for costs of construction managed by the Water District within thirty days of receipt of grant funds from DWR.
- C. Non Water District Funds contributed by East Palo Alto and the Flood District will be remitted to the Water District within one hundred and eighty days (180) after a construction contract is awarded by the Water District's Board of Directors.

4. Mutual Hold Harmless

Mutual Hold Harmless and Indemnification Obligations

- A. In lieu of and notwithstanding the pro rata risk allocation, which might otherwise be imposed between the Parties pursuant to Government Code Section 895.6, the Parties agree that all losses or liabilities incurred by a Party shall not be shared pro rata but, instead, the Member Agencies agree that, pursuant to Government Code Section 895.4, each of the Parties hereto shall fully indemnify and hold each of the other Parties, their officers, board members, employees, and agents, harmless from any claim, expense or cost, damage or liability imposed for injury (as defined in Government Code Section 810.8) occurring by reason of the negligent acts or omissions or willful misconduct of the indemnifying Party, its officers, employees, or agents, under or in connection with or arising out of any work, authority, or jurisdiction delegated to such party under

this Agreement. No Party, nor any officer, board member, or agent thereof shall be responsible for any damage or liability occurring by reason of the negligent acts or omissions or willful misconduct of the another party hereto, its officers, board members, employees, or agents, under or in connection with or arising out of any work, authority or jurisdiction delegated to such other Party under this Agreement. The obligations set forth in this paragraph will survive termination and expiration of this Agreement.

- B. In the event of concurrent intentional or unintentional misconduct, negligent acts or omissions by any one of the Parties (or each of their respective officers, directors and/or employees), then the liability for any and all claims for injuries or damages to persons and/or property which arise out of each and any of their performance of the terms and conditions of this Agreement shall be apportioned according to the California law of comparative negligence. The Parties hereto are not jointly and severally liable on any liability, claim, or lawsuit.
- C. The construction contract and bid documents will require the construction contractor to agree to appropriate indemnity provisions allowable by law to protect the Parties, and to secure and maintain in full force and effect all times during construction of the Project and until the Project is accepted by the Parties, general liability and property damage insurance, business automobile insurance and such other insurance as the Parties deem appropriate, in forms and limits of liability acceptable to the Parties, naming Water District, Authority and each of its Member Agencies and their respective directors, council members, officers, employees and agents as additional insureds from and against all damages and claims, losses, liabilities, costs or expenses arising out of or in any way connected to the construction of the Project.
- D. The duties and obligations of this Section will survive and continue in full force and effect after the termination or expiration this Agreement.

5. Retention of Records, Right to Monitor and Audit

Unless a longer period of time is required by law or federal or state grant funding agreements, the Parties shall maintain all financial records related to this Agreement and/or the Project for five (5) years after the Agreement expires or is terminated earlier pursuant to Section 7 of this Agreement. The records shall be subject to the examination and/or audit of either Party.

6. Agreement Term

This Agreement shall commence on the Effective Date and remain in place until the construction of the Project is completed and accepted by the Parties, or this Agreement is terminated earlier by the Parties in the manner authorized by Section 7. Termination.

7. Termination

- A. If any Party fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, any other Party may terminate this Agreement but only after giving written notice of the failure of performance to

the Party committing the failure with a copy of such notice given to all other Parties. Such notice shall explain the alleged failure of performance and provide a reasonable opportunity for the failure to be cured which in no case will be less than 30 days. If the failure of performance is not satisfactorily cured within the cure period, the Agreement may be terminated upon the delivery of a written notice of termination to all of the Parties.

- B. A final notice of termination may be given only after completion of the notice and cure process described in Section 7.A. and only with the approval of the governing body of the Party terminating the Agreement.
- C. In event of termination, each Party shall deliver to all of the other Parties, upon request, copies of reports, documents, and other work performed by any Party under this Agreement. The cost of work performed under this Agreement to the date of termination shall be due and payable in accordance with the provisions of this Construction Funding Agreement to be executed by the Parties prior to Water District's commencement of the bid process for award of a construction contract for the Project.
- D. Notwithstanding the foregoing, after the Water District awards a construction contract for the Project, this Agreement may only be terminated by the mutual written agreement of all of the Parties approved by the governing body of each Party.
- E. The Chief Executive Officer of the Water District and the Executive Director of Authority are empowered to terminate this Agreement on behalf of their respective agencies in accordance with the provisions of this Agreement.

8. Notices

Any notice or other communication required or permitted to be given hereunder shall not be effective unless it is given in writing and shall be delivered (a) in person, (b) by certified mail, postage prepaid, return receipt requested, or (c) by a commercial overnight courier that guarantees next day delivery and provides a receipt, and addressed to the parties at the addresses stated below, or at such other address as either party may hereafter notify the other parties in writing:

Authority: San Francisquito Creek Joint Powers Authority
615-B Menlo Avenue
Menlo Park, California 94025
Attention: Len Materman, Executive Director
len@sfcjpa.org

Water District: Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, California 95118
Attention: Beau Goldie, Chief Executive Officer
bgoldie@valleywater.org

Palo Alto	City of Palo Alto 250 Hamilton Avenue P.O. Box 10250 Palo Alto, CA 94303 Attention: James Keene, City Manager james.keene@cityofpaloalto.org
East Palo Alto	City of East Palo Alto 2415 University Avenue East Palo Alto, CA 94303 Attn: Magda Gonzalez, City Manager mgonzalez@cityofepa.org
Menlo Park	City of Menlo Park 701 Laurel Street Menlo Park, CA 94025 Attention: Alex McIntyre, City Manager admccintyre@menlopark.org
Flood Control District	Department of Public Works 555 County Center, 5th Floor Redwood City, CA 94063 Attention: James Porter, Director jporter@smcgov.org

Service of any such notice or other communications so made shall be deemed effective on the day of actual delivery (whether accepted or refused) as evidenced by:

a) confirmed in-person delivery by the addressee or other representative of the Party authorized to accept delivery on behalf of the addressee, b) as shown by the addressee's return receipt if by certified mail, or c) as confirmed by the courier service if by courier; provided, however, that if such actual delivery occurs after 5:00 p.m. (local time where received) or on a non-business day, then such notice or demand so made shall be deemed effective on the first business day immediately following the day of actual delivery. No communications via electronic mail shall be effective to give any notice, request, direction, demand, consent, waiver, approval or other communications hereunder.

9. Severability

In the event any portion of this Agreement is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, such portion shall be severed from this Agreement and the remaining parts hereof shall remain in full force and effect as fully as though such invalid, illegal or unenforceable portion had never been part of this Agreement.

10. Governing Law and Compliance with Laws

The parties agree that California law governs this Agreement. In the performance of this Agreement each Party will comply with all applicable laws, ordinances, codes and regulations of the federal, state, and applicable local government.

11. Venue

In the event that suit shall be brought by any party to this contract, the parties agree that venue shall be exclusively vested in the state courts of either the County of Santa Clara, or the County of San Mateo or where otherwise appropriate, exclusively in the United States District Court, Northern District of California.

12. Assignability and Subcontracting

Parties shall not assign this Agreement or any portion thereof to a third party or subcontract with a third party to provide services required under this Agreement without the prior written consent of the other parties. Any unauthorized attempt by any Party to so assign or transfer shall be void and of no effect. Notwithstanding the foregoing, a Party may hire a consultant to fulfill its obligations under Section 3 of this Agreement.

13. Ownership of Materials

All reports, documents, or other materials developed or discovered by any Party or any other person engaged directly or indirectly by any Party to perform the services required hereunder shall be and remain the mutual property of Authority and Water District without restriction or limitation upon their use.

14. Entire Agreement

This Agreement constitutes the entire Agreement between the Authority and the Water District with respect to the subject matter hereof and supersedes all prior offers and negotiations, oral and written. This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by authorized representatives of the Authority and Water District.

15. Further Actions

The Authority and Water District agree to execute all instruments and documents, and to take all actions, as may be reasonably required to consummate the transactions contemplated by this Agreement.

16. Counterparts

This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, taken together, shall be deemed to be one and the same instrument.

17. Non Waiver

A Party's waiver of any term, condition, or covenant, or breach of any term, condition or covenant will not be construed as a waiver of any other term, condition or covenant.

18. Third Parties

This Agreement is entered into only for the benefit of the Parties executing this Agreement and not for the benefit of any other individual, entity, or person.

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IN WITNESS WHEREOF, the San Francisquito Creek Joint Powers Authority has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

San Francisquito Creek Joint Powers Authority

By: _____
Greg Stepanicich
Title: SFCJPA General Counsel

By: _____
Len Materman
Title: Executive Director

Date: _____

Date: _____

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IN WITNESS WHEREOF, the Santa Clara Valley Water District has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

Santa Clara Valley Water District

By: _____
Leslie Orta
Title: Senior Assistant District Counsel
Office of the District Counsel

By: _____
Tony Estremera
Title: Chair/Board of Directors

Date: _____

Date: _____

ATTEST: MICHELE L. KING, CMC

Clerk/Board of Directors

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IN WITNESS WHEREOF, the City of Palo Alto has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

City of Palo Alto

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Print Name: _____

Title: _____

Date: _____

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IN WITNESS WHEREOF, the City of East Palo Alto has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

City of East Palo Alto

By: _____
John Nagel
Title: City Attorney

By: _____
Print Name: _____
Title: _____

Date: _____

Date: _____

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IN WITNESS WHEREOF, the City of Menlo Park has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

City of Menlo Park

By: _____
William L. McClure

By: _____
Print Name: _____

Title: City Attorney

Title: _____

Date: _____

Date: _____

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IN WITNESS WHEREOF, the San Mateo Flood Control District has executed this Funding Agreement as of the date and year stated below.

Each Party has executed a separate signature page.

APPROVED AS TO FORM:

San Mateo County Flood Control District

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Print Name: _____

Title: _____

Date: _____