

**FIRST AMENDED 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 First Amended Agreement ("Agreement") amends the terms and conditions of the original Agreement dated August 11, 2014, 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 and mitigation activities of the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, San Francisco Bay to Highway 101 ("Project").

RECITALS

- 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' ("USACE") San Francisquito Creek flood control project on May 23, 2002.
- C. In March 2005 the USACE, 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 USACE 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 USACE for the Study on the Creek. The USACE, 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 USACE will issue a Federally Preferred Plan, which will detail the pre-design actions to be taken to complete the FDRER.

- E. The USACE's ability to complete the Study has been impacted by unanticipated delays due to federal funding constraints and USACE's processes.
- F. Due to the USACE'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. On October 25, 2012, the final EIR was certified by the Authority. 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. In November 2012, the voters of Santa Clara County approved Measure B, the Water District's Safe, Clean Water special tax 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.
- L. On January 9, 2013, the Authority entered into an agreement with the State of California, Department of Water Resources (DWR) for \$8 million in Proposition 1E (Prop 1E) grant funding from DWR's Stormwater Flood Management Program to be applied towards Project costs. Of the amount awarded, \$7,875,000 is available for reimbursement of Project costs.
- M. On January 13, 2016, DWR awarded \$1,044,351 in Proposition 84 (Prop 84) funds to the Project as part of the Association of Bay Area Governments Shoreline Resiliency/Sea Level Rise Proposal to be administered by the State Coastal Conservancy. Of the amount awarded, \$953,351 is available for reimbursement of Project costs.
- N. The Flood District will contribute \$2,060,000 toward Project costs. The Flood District's financial contribution will be in an amount equal to the combined financial contributions made by East Palo Alto and Menlo Park.

- O. The City of East Palo Alto will contribute \$1,260,000 towards Project costs.
- P. The City of Menlo Park will contribute \$800,000 towards Project costs.
- Q. The City of Palo Alto will contribute \$400,000 towards Project costs.
- R. 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 is necessary to accommodate various flood protection construction elements of this Project.
- S. For the purpose of this Agreement, funding from Menlo Park, East Palo Alto, Palo Alto, the Flood District, the Authority, and any future funds from grants or other sources, contributed toward Project costs, shall be referred to as “Non Water District Funds.”
- T. On December 22, 2015, the Water District and the Authority entered into a Construction Management Agreement designating the Water District as the entity responsible for managing construction of the Project.
- U. 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 paragraphs 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. Identified Project Costs and Funding Amounts

Construction of the Project, including finalization of the design, is currently estimated to cost approximately \$41.32 million (Table 1), not including internal Project management costs incurred by the Water District or contingency costs for utility relocation expenses above the stated contract estimates.

TABLE 1. IDENTIFIED PROJECT COSTS		
Costs		Current
Palo Alto Golf Course mitigation		\$3,000,000
Other mitigation activities		\$300,000
Pacific Gas & Electric Company (without contingency)	Electric Relocation	\$1,267,000
	Gas Relocation	\$3,141,000
East Palo Alto Sanitary District (without contingency)	Sewer Relocation	\$848,000
East Palo Alto real estate acquisition		\$85,000
Construction Management (Hatch Mott MacDonald)		\$2,565,000
Construction Support Services (HDR)		\$853,000
Completed design services (HDR)		\$230,000
Construction contract with 10% contingency		\$29,026,800
Total Identified Project Costs		\$41,315,800

Based on the Total Identified Project Costs as stated in Table 1 above, the Parties agree to contribute the following amounts toward these costs (Table 2).

TABLE 2. FUNDING						
Funding Sources			Original Funding Agreement	Funds Shifted From Upstream Project	Newly Identified Funding	Total Contribution
Water District Funds			\$28,000,000	\$0	\$0	\$28,000,000
Non Water District Funds	Authority	Prop 1E Grant	\$7,875,000	\$0	\$0	\$7,875,000
		Prop 84 Grant	\$0	\$0	\$953,351	\$953,351
	Flood District		\$800,000	\$700,000	\$560,000	\$2,060,000
	East Palo Alto		\$800,000	\$200,000	\$260,000	\$1,260,000
	Menlo Park		\$0	\$500,000	\$300,000	\$800,000
	Palo Alto		\$0	\$0	\$400,000	\$400,000
Total Funding			\$37,475,000	\$1,400,000	\$2,473,351	\$41,348,351

3. Payment of Project Costs

- A. Through use of DWR Prop 1E and Prop 84 grant funds, along with agreements that provide additional funding to the Authority, including a cost sharing agreement whereby the Water District will fund the discrepancy between the available grant funding and anticipated expenses, the Authority agrees to pay the currently estimated Project costs as stated below. If the Authority receives additional grant or other funding for this project, such funds shall be applied first towards costs that are the responsibility of the Authority, itemized in paragraph #3. A. 1) through 7), with any remaining funds remitted to the Water District and applied toward Project Costs. The Authority will provide to the Water District documentation of all listed expenses incurred and paid for by the Authority.

- 1) \$3,000,000 to the City of Palo Alto to mitigate for impacts to the City of Palo Alto Municipal Golf Course;
 - 2) \$300,000 for other mitigation activities;
 - 3) \$4,408,000 to Pacific Gas and Electric Company to relocate gas and electric transmission lines;
 - 4) \$848,000 to the East Palo Alto Sanitary District to relocate a sewer line;
 - 5) \$85,000 for property acquisition within East Palo Alto;
 - 6) \$230,000 to HDR for completed design services; and
 - 7) \$853,000 to HDR for construction support services.
- B. Flood District agrees to fund \$2,060,000 of Project costs, payable to the Water District during three consecutive years. The payments will be made as follows: \$800,000 (Year 1); \$630,000 (Year 2); and \$630,000 (Year 3). The Year 1 payment will be remitted to the Water District within 180 days after a construction contract is awarded. The Year 2 and Year 3 payments will be remitted to the Water District within 180 days of the beginning of each respective fiscal year.
- C. East Palo Alto agrees to fund \$1,260,000 of Project costs, payable to the Water District during three consecutive years. The payments will be made as follows: \$420,000 (Year 1); \$420,000 (Year 2); and \$420,000 (Year 3). The Year 1 payment will be remitted to the Water District within 180 days after a construction contract is awarded. The Year 2 and Year 3 payments will be remitted within 180 days of the beginning of each respective fiscal year.
- D. Menlo Park agrees to fund \$800,000 of Project costs, payable to the Water District during three consecutive years. The payments will be made as follows: \$300,000 (Year 1); \$250,000 (Year 2); and \$250,000 (Year 3). The Year 1 payment will be remitted to the Water District within 180 days after a construction contract is awarded. The Year 2 and Year 3 payments will be remitted within 180 days of the beginning of each respective fiscal year.
- E. Palo Alto agrees to fund \$400,000 of Project costs, payable to the Water District during three consecutive years. The payments will be made as follows: \$133,334 (Year 1); \$133,333 (Year 2); and \$133,333 (Year 3). The Year 1 payment will be remitted to the Water District within 180 days after a construction contract is awarded. The Year 2 and Year 3 payments will be remitted within 180 days of the beginning of each respective fiscal year.
- F. Through Water District funds and funds remitted to the Water District by Palo Alto, Flood District, East Palo Alto and Menlo Park, the Water District agrees to pay the currently estimated Project costs as stated below.
- 1) \$2,565,000 for Construction Management Consultant; and

- 2) \$26,388,000 for construction contract and a separate encumbrance of 10% of the construction contract amount (\$2,638,800) for contingent expenses.

4. Unidentified Project Costs and/or Surplus Funds

- A. The Parties agree to apply any surplus funds toward unidentified Project costs which exceed the current estimated Identified Project Costs (Table 1). If there are no surplus funds, the Parties agree to determine an appropriate cost sharing allocation to pay for any unidentified Project costs or costs which exceed the current estimated Identified Project Costs.
- B. If there are any surplus funds after paying all identified or unidentified Project costs, the Water District shall retain those funds which shall be reallocated toward construction of the San Francisquito Creek local-state-funding-only project, upstream of Highway 101.

5. 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 and the State Coastal Conservancy 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 and the State Coastal Conservancy within 15 days of receipt of invoice packages from Water District, provided all DWR and the State Coastal Conservancy-related invoicing requirements are met. To the extent funds are available, the Authority will pay for all costs itemized in paragraph #3. A. 1) through 7).
- C. Non Water District Funds contributed by Flood District, East Palo Alto, Menlo Park, and Palo Alto will be remitted to the Water District as set forth in paragraph #3, Payment of Project Costs, subparagraphs B-E.

6. Indemnification

- 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 Water District's construction contract will require the construction contractor 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 paragraph #6, Indemnification, will survive and continue in full force and effect after the termination, completion, suspension, and expiration of this Agreement.

7. 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 paragraph #9, Termination, of this Agreement. The records shall be subject to the examination and/or audit of either Party.

8. 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 paragraph #9, Termination.

9. 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 paragraph #9.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 as approved by the governing body of each Party or pursuant to a delegation of such authority.

10. **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: Norma Camacho, Interim Chief Executive Officer
ncamacho@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 Attention: Carlos Martinez, City Manager cmartinez@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.

11. 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.

12. 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.

13. 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.

14. 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 as described above in paragraph #5, Method and Timing of Transactions.

15. 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.

16. Entire Agreement

This First Amended Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes all prior offers and negotiations, oral and written, including but not limited to the original Agreement dated August 11, 2014. This First Amended Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by authorized representatives of all Parties.

17. 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.

18. 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.

19. 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.

20. 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.

(Signatures follow on next pages)

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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
SFCJPA General Counsel

By: _____
Len Materman
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
Senior Assistant District Counsel
Office of the District Counsel

By: _____
Barbara Keegan
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: _____
Molly Stump
City Attorney

By: _____
James Keene
City Manager

Date: _____

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: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

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
City Attorney

By: _____
Alex D. McIntyre
City Manager

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: _____
John Beiers
County Counsel

By: _____
Warren Slocum
President, Board of Supervisors, San Mateo

Date: _____

Date: _____