

**FIRST AMENDED AGREEMENT FOR FUNDING A FEASIBILITY STUDY FOR
SAN FRANCISQUITO CREEK AMONG THE
SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY,
THE SAN MATEO COUNTY FLOOD CONTROL DISTRICT
AND THE SANTA CLARA VALLEY WATER DISTRICT**

This First Amended Agreement ("Agreement"), amending the terms and conditions of the original Agreement dated November 29, 2005, is made and entered into as of the date it is fully executed by and between the SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY, a California joint powers authority ("Authority"), the SAN MATEO COUNTY FLOOD CONTROL DISTRICT, a special district of the State of California ("Flood District"), and the SANTA CLARA VALLEY WATER DISTRICT, a special district of the State of California ("Water District"), collectively referred to as Parties, or individually as Party.

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 flood of 1998, the cities of East Palo Alto, Menlo Park and Palo Alto along with the San Mateo County Flood Control District and the Santa Clara Valley Water District formed the San Francisquito Creek Joint Powers Authority on May 18, 1999. These entities are full members of the Authority. The Authority was authorized to represent its member agencies as the local sponsor for a U.S. Corps of Engineers' ("USACE") 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 progressed to the feasibility study ("Study") phase of the San Francisquito Creek Flood Damage Reduction and Ecosystem Project ("FDRER"), which requires a cost sharing agreement with the 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 FCSA requires the Authority, as the local sponsor, to contribute to the USACE, in cash or in-kind services, fifty percent (50%) of the cost of the USACE' evaluation of flood control protection as the local share of the Study Costs as defined in the FCSA (the "Study Costs").

- F. Flood District and Water District, on behalf of themselves and the other members of the Authority within their respective jurisdictions, on July 23, 2001, agreed to provide up to \$1.5 million each as the local share to fund the Study Costs and the Authority Costs.
- G. In November 2005, the Parties executed this Agreement to fund the Study Costs and the Authority Costs. In the original Agreement, the Flood District and the Water District Agreed to contribute up to One Million Five Hundred Thousand Dollars (\$1,500,000.00) each to fund the Authority's contribution to the Study Costs. To date, the Flood District and Water District have each contributed \$930,847.83 toward Study Costs, leaving a remaining funding commitment for each agency of up to \$569,152.17.
- H. On January 25, 2007, the Authority entered into an Implementation Agreement with each of its member agencies that identified roles and responsibilities during the feasibility phase of the Project (the "Implementation Agreement").
- I. The USACE's ability to complete the Study has been impacted by unanticipated delays due to federal funding constraints and USACE's processes.
- J. 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, the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, San Francisco Bay to Highway 101 ("SF Bay to 101 Project"), and recommended a preferred alternative with conceptual design drawings to the Authority Board of Directors for consideration.
- K. On July 23, 2009, the Authority's Board of Directors unanimously approved the staff's recommended SF Bay to 101 Project; authorized its Executive Director to pursue funding opportunities and recommend to the Authority's Board of Directors contracts with qualified consultants to perform (1) planning and design services and (2) environmental impact assessment and planning for the SF Bay to 101 Project.
- L. 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 SF Bay to 101 Project.
- M. The Authority hired a design engineering firm and an environmental consulting firm to prepare design documents and an Environmental Impact Report ("EIR") for the SF Bay to 101 Project.
- N. On October 25, 2012, the final EIR for the SF Bay to 101 Project 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.
- O. In June 2014, the Parties, along with the Cities of East Palo Alto, Menlo Park and Palo Alto, entered into a construction funding agreement to fund the SF Bay to 101 Project.
- P. On February 23, 2016, the Water District Adopted the Plans and Specifications and Authorized Advertisement for Bids for Construction of the SF Bay to 101 Project.

- Q. On April 28, 2016, the Water District conducted a public bid opening and identified the apparent lowest bid.
- R. Based upon the apparent lowest bid and the other identified SF Bay to 101 Project construction and mitigation activities costs, a funding shortfall was identified. The Parties, along with the cities of Palo Alto, East Palo Alto and Menlo Park, intend to amend the SF Bay to 101 Project construction funding agreement in order to secure sufficient funding to allow the Water District to award the construction contract.
- S. Award of the construction contract by the Water District Board is currently scheduled for June 14, 2016.
- T. To fund the construction of the SF Bay to 101 Project, the Parties desire to amend this Agreement to reduce the Flood District's financial contribution to the Study and reallocate such funds toward construction funding for the SF Bay to 101 Project.

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

AGREEMENT

1. Funding Payment and Amount

- A. The Parties agree to limit the Flood District's contribution to the Study Costs to the amount that has already been expended to-date, which totals \$930,847.83, provided the Flood District agrees to reallocate its remaining commitment of \$569,152.17 towards its \$2,060,000 funding commitment for construction of the SF Bay to 101 Project.
- B. As a result of the Flood District's reduced funding obligation toward the Study Costs, the Water District agrees to increase its contribution commitment to the Study Costs up to \$2,069,152.17, of which \$930,847.83 has already been expended, leaving a remaining commitment of up to \$1,138,304.34, which includes its initial commitment amount and the amount the Flood District is reallocating to construction of the SF Bay to 101 Project.
- C. In connection with the remaining Study Costs, Water District shall deposit into an escrow account as described in Section 2. Escrow Account of this Agreement, the amount requested by Authority, within twenty (20) days of receiving Authority's request for payment.
- D. Authority will submit to Water District requests for payment in accordance with estimated costs provided by the USACE to meet the local sponsor's share of USACE's costs for the succeeding fiscal year.
- E. The amount, method and timing of any credit for any approved in-kind services provided by either Flood District or Water District shall be as provided for in the Implementation Agreement.

2. Escrow Account

- A. USACE has established an independent interest bearing escrow account to receive the cash contributions required for Study Costs. The escrow account is segregated from any Authority accounts. Escrow instructions for the escrow account have been approved by both Flood District and Water District.
- B. All prior escrow account fees or charges have been deducted equally from the cash contribution amount deposited by Flood District and Water District. The escrow account shall be overseen by the Authority subject to disbursement as herein provided.
- C. All interest that accrues from monies deposited in the escrow account, will be applied toward Study Costs.

3. Disbursement of Funds

- A. The Authority shall review all requests for payment from the USACE pursuant to the FCSA submitted by the USACE. Upon determining that a request for payment or portion of a request for payment is deemed appropriate and justified by Authority's Executive Director, Authority shall promptly issue escrow instructions to Water District to deposit funds into the escrow account for USACE to draw down for Study Costs. The Authority shall not disburse funds from the escrow account except in accordance with this Section.
- B. The Authority shall provide semi-annual reports to the Flood District and Water District of receipts and expenditures made to and from the escrow account.

4. Management of FCSA and Study

The Authority, in its sole discretion, shall be responsible for the performance of the Authority's obligations as described in the FCSA related to conducting and overseeing the Study. Flood District and Water District shall have no rights or obligations pursuant to the FCSA to conduct or oversee the Study, except as provided in this Agreement or as provided in the Implementation Agreement. Flood District and Water District are members of the Authority's project management team that will consult with and provide advice to the Executive Director on the implementation of the FCSA.

5. 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 Parties 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, suspension, completion, 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.

6. Retention of Records, Right to Monitor and Audit

- A. 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 8. Termination, of this Agreement. The records shall be subject to the examination and/or audit of each Party.
- B. Each year on January 2, or on a date mutually agreed to by the Parties and prior to termination and upon termination, the Authority shall submit to Flood District and Water District a statement of activities and balances for the escrow account to each Party. The Authority shall comply with all program and fiscal reporting requirements set forth in the FCSA and as required by this Agreement.

7. Agreement Term

This Agreement shall automatically terminate one hundred and eighty (180) days after the completion of the Study or termination of the FCSA.

8. Termination

- A. Termination for Cause
 - 1. 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.

2. A final notice of termination may be given only after completion of the notice and cure process described in Section 8.A. and only with the approval of the governing body of the Party terminating the Agreement.

B. Termination for Convenience

Any Party may terminate this Agreement by providing sixty (60) days written notice to all Parties. Authority will send Water District a final invoice within sixty (60) days of the effective date of termination of this Agreement for any Study Costs incurred prior to effective date of termination not paid for by existing monies on deposit in the escrow account and Water District will remit payment to Authority within thirty (30) days of receipt of such invoice.

9. Refund of Undisbursed Funds

Undisbursed funds and interest shall be returned to Flood District and Water District within sixty (60) days of the completion of the Study or the termination of the FCSA and payment of all financial obligations of the Authority to the USACE under the FCSA.

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

Flood District: Department of Public Works
555 County Center, 5th Floor
Redwood City, California 94063
Attention: James Porter, Director
jporter@smcgov.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

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 shall govern this Agreement. In the performance of this Agreement each party shall 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 Agreement, 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 Court, Northern District of California, in either Redwood City or San Jose, 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 perform services required pursuant to 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, Authority may contract with an accounting firm or an escrow company to fulfill its obligations described in Section 2. Escrow Account.

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 all Parties without restriction or limitation upon their use.

16. Entire Agreement

This Agreement constitutes the entire agreement between the Authority, Flood District and 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, Flood District, and the Water District.

17. Further Actions

The Authority, Flood District and Water District agree to execute all instruments and documents, and to take all actions, as may be reasonably required to consummate the transaction 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)

**First Amended Agreement for Funding a Feasibility Study for
San Francisquito Creek Among the
San Francisquito Creek Joint Powers Authority,
the San Mateo County Flood Control District
and the Santa Clara Valley Water District**

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: _____

**First Amended Agreement for Funding a Feasibility Study for
San Francisquito Creek Among the
San Francisquito Creek Joint Powers Authority,
the San Mateo County Flood Control District
and the Santa Clara Valley Water District**

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: _____
Norma J. Camacho
Interim Chief Executive Officer

Date: _____

Date: _____

**First Amended Agreement for Funding a Feasibility Study for
San Francisquito Creek Among the
San Francisquito Creek Joint Powers Authority,
the San Mateo County Flood Control District
and the Santa Clara Valley Water District**

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: _____