

**Agreement**  
**San Francisquito Creek Joint Powers Authority and its Member Agencies**  
**Roles and Responsibilities Regarding**  
**The Army Corps of Engineers' Feasibility Cost Share Agreement**

This Agreement (“Agreement”) is made and entered into as of \_\_\_\_\_, 2007, by and among 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 (“San Mateo”), the SANTA CLARA VALLEY WATER DISTRICT, a special district of the State of California (“Water District”), the CITY OF EAST PALO ALTO, a municipal corporation (“East Palo Alto”), the CITY OF MENLO PARK, a municipal corporation (“Menlo Park”), and the CITY OF PALO ALTO, a California charter city (“Palo Alto”), collectively referred to as Parties or individually as Party.

**R E C I T A L S**

- A. San Francisquito Creek has a history of flooding the communities in and around East Palo Alto, Menlo Park and Palo Alto. The latest and the most damaging flood occurred in 1998.
- B. Following the flood of 1998, East Palo Alto, Menlo Park, Palo Alto, San Mateo and 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. Army Corps of Engineers’ (“Corps”) flood damage reduction and ecosystem restoration project on May 23, 2002.
- C. The Corps, working with the Authority as the local sponsor, completed a reconnaissance study for San Francisquito Creek in 2005. The reconnaissance study indicated a Federal Interest in developing a flood damage reduction and ecosystem restoration project for San Francisquito Creek.
- D. Based on the reconnaissance study and extensive discussions between the Corps and the Authority, on November 17, 2005, a Feasibility Cost Share Agreement (“FCSA”) was entered into between the Corps and the Authority for a flood damage reduction and ecosystem restoration project feasibility study of San Francisquito Creek and adjacent tidal areas (“Study”). The Corps, pursuant to the FCSA, has agreed to initiate a project to evaluate flood protection and ecosystem restoration alternatives within the San Francisquito Creek Watershed and tidal areas as defined within, in Santa Clara and San Mateo Counties. The FCSA and its associated Project Management Plan is attached as Exhibit A.
- E. The FCSA requires the Authority, as the project local sponsor, to contribute to the Corps, in cash or in-kind services, fifty percent (50%) of the cost of the Study, as described in the FCSA, as the local share. The FCSA also requires the Authority to fund one hundred percent (100%) of the cost of other studies as may be required but not identified as funded by the Corps

in the FCSA, including but not limited to the environmental review that may be required by the California Environmental Quality Act (“CEQA”).

F. San Mateo and Water District agreed to provide up to \$1.5 million each (\$3 million total) to fund the local share of the Study pursuant to the 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 (“Funding Agreement”), which details the amount, method and timing of financial contributions from San Mateo and Water District to be applied towards the cost of conducting the fluvial portion of the Study, and is attached as Exhibit B.

G. East Palo Alto agreed by City Council action on November 15, 2005 to provide up to \$33,000 toward the local share of the Study for the particular purpose of including Tidal Option 1, as described in the FCSA, in the Study.

H. Menlo Park agreed by City Council action on November 8, 2005 to provide up to \$32,500 toward the local share of the Study for the particular purpose of including Tidal Option 1, as described in the FCSA, in the Study.

I. The FCSA allows the Authority to credit staff time as in-kind services up to \$592,800 toward the local share of the Study.

J. The Joint Powers Agreement between the Parties authorizes the Authority to enter into contracts with its member agencies to perform any of the duties and responsibilities of the Authority.

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

## **I. PROJECT DESCRIPTION AND MUTUAL OBJECTIVES**

### **A. Project Description**

The project is to conduct the Study as described in the Project Management Plan (“PMP”) of the FCSA for a Flood Damage Reduction and Ecosystem Restoration (“FDRER”) project for San Francisquito Creek and adjacent tidal areas. The Study will investigate the opportunities to reduce both fluvial (creek) and tidal flooding, which threaten public safety, and to restore ecosystem quality and function, where possible.

The geographical area of the Study includes the entire watershed of San Francisquito Creek and tidal areas extending from the northernmost bay-shore point in Menlo Park to the southernmost bay-shore point in Palo Alto. The proposed area of the Study is shown on the map, which is attached as Exhibit C. The Study will also consider potential impacts to, and without-project conditions of, adjacent areas of influence that may not be contained within the proposed area of the Study.

The Study is the second phase within the planning process of a Corps FDRER project. The Study will evaluate project alternatives in regard to cost, feasibility and environmental impacts. Significant elements of the Study include, but are not limited to, the following:

1. **Environmental Documents:** One element of the Study is the production of an Environmental Impact Statement (“EIS”) in accordance with the National Environmental Policy Act (“NEPA”). The corresponding Environmental Impact Report, (“EIR”), required by CEQA, will be developed by the Parties at their own expense. The EIR is expected to use much of the same supporting material as the EIS and may in fact be nearly the same document.

2. **Alternatives and Engineering Evaluation:** Various alternatives will be identified and scoped through suggestions and input from the Corps, the Authority and its member agencies, the public and other stakeholders. The Corps, with input from the staff of the Authority and its member agencies, will evaluate the feasibility of the alternatives with regards to engineering, costs, environmental impacts and other aspects important to the community.

3. **Public Participation:** The FDRER project is intended to result in flood damage reduction and ecosystem restoration within the San Francisquito Creek watershed, adjacent tidal and wetland areas, and their areas of influence. The Corps, the Authority and its member agencies have agreed that the community that lives within the watershed, tidal areas, and areas of influence must be involved in the development of the alternatives and the environmental documents, and that public outreach and participation is an important element of the Study.

## **B. Mutual Objectives**

The Parties mutually agree to the following objectives of the Study:

- Develop the Study to best incorporate and address the concerns of the Authority and its member and associate member agencies, the public, and other stakeholders.
- Develop a wide range of alternatives within the Study and strive to identify the alternative, or combination of alternatives, that provides the best flood reduction for the most people at the most reasonable cost.
- Preserve and restore the natural environment of the creek corridor and tidal area as a habitable resource for wildlife.
- Improve habitat for steelhead trout.
- Explore opportunities for one or more trails, compatible with the riparian and marshy natural setting that will accommodate a variety of trail users, with appropriate routing of paths, points, overlooks, vegetation and screening.
- Protect and restore riparian and aquatic habitat along the creek corridor.

## **II. SPECIFIC PROVISIONS**

### **A. Purpose**

The Funding Agreement provides for the members of the Authority to enter into an implementation agreement with the Authority defining the roles and responsibilities of the members during the Study. This Agreement is the implementation agreement required by the Funding Agreement. The provisions of this Agreement shall supercede and control over any conflicting provisions in the Funding Agreement.

### **B. Contributions**

Water District shall contribute \$74,100 toward the local share of the Study for the particular purpose of including Tidal Option 2, as described in the FCSA, in the Study. Upon written request for full or partial payment of the local share for the Tidal Option 2, as described in the FCSA, Water District shall deposit the requested amount of money in an escrow account managed by Authority. This contribution is in addition to Water District's contribution under the Funding Agreement. Water District shall not receive any credit or reimbursement for its financial contribution to the inclusion of Tidal Option 2 in the Study, nor shall East Palo Alto or Menlo Park receive any credit or reimbursement for their financial contributions to the inclusion of Tidal Option 1 in the Study, as described in Recitals G and H above.

### **C. Cooperation in FCSA Implementation**

Each Party shall cooperate with and assist the Authority in the implementation of the FCSA, including providing any reports, studies, data or other documents and information prepared or held by a Party that may be relevant to the completion of the Study. No credit, reimbursement or other entitlement shall be provided to a Party for this type of general assistance.

### **D. Management of FCSA and Study**

Except as specifically provided by this Agreement, the Authority, in its sole discretion, shall be responsible for the performance of the Authority's obligations under the FCSA related to conducting and overseeing the Study. The other Parties to this Agreement shall have no rights or obligations under the FCSA to conduct or oversee the Study, except as provided in this Agreement. San Mateo, Water District, East Palo Alto, Menlo Park and Palo Alto staffs are designated as members of Authority's project management team ("Management Team") that will consult with and provide advice to the Authority's Executive Director ("Director") on the implementation of the FCSA. The Parties shall provide appropriate representatives to the Management Team and participate in Management Team meetings and activities.

### **E. Consensus Approval of Work Products**

The Director shall strive to obtain consensus for acceptance or approval of documents developed by the Corps or its consultants or actions regarding the Study from the Management Team. The individual Management Team members shall support the Management Team and the Director by providing timely review of documents and issues, and by providing information and material that promotes Management Team's work

**F. Local Outreach Plan**

The Authority shall develop a local public outreach plan to supplement the Corps' outreach plan for the Study. Public meetings related to the local public outreach plan and the Corps' outreach plan shall be supported by the member representatives of the Management Team. Support shall be rendered in the form of materials, venue, attendance, and/or presentations. Funding for the costs associated with the local outreach plan shall be secured by the Authority, outside of this Agreement, either as part of its annual operating budget or through additional financial contributions from the Authority's member agencies.

**III. GENERAL PROVISIONS**

**A. Additional or Advance Funding or In-Kind Contributions**

Any funding for the Study in addition to what is stipulated within this Agreement or the Funding Agreement, or any funding advanced by any of the Parties for the purpose of conducting the Study at a pace greater than annual Congressional appropriations provide for, or any in-kind services or contributions rendered towards the Study on behalf of the Authority by any Party, shall be agreed to by an addendum or amendment to this Agreement as provided below. The source, timing, manner of transaction, and administration of contributions for future credit or reimbursement for any additional or advanced funding or in-kind contribution shall be described in the addendum or amendment.

An addendum to this Agreement may be proposed by any of the Parties. An addendum may be used only for additional or advance funding or in-kind contributions towards tasks that (1) are of a technical or planning nature and (2) have a cost estimate of less than or equal to \$100,000 per task identified in the PMP. An addendum shall be approved in the following manner:

1. The Party proposing the addendum shall first obtain the approval of the Management Team. An addendum may be proposed by more than one Party and may include multiple tasks. After such approval by the Management Team is obtained, the proposing Party shall prepare an addendum that describes the following:
  - a. The scope of work for additional funding or in-kind services to be provided, or the list of tasks identified in the PMP to be accelerated by advance funding.
  - b. The timetable for the additional services or in-kind contribution to be performed.
  - c. The amount of additional or advance funding that will be contributed or in-kind services that will be performed.
  - d. The method of credit or reimbursement to the proposing Party.

2. The proposed addendum shall not become effective until it is approved by the chief executive officer of each of the Parties, the Board of the Authority and the project manager of the Corps.

Any other additional or advance funding or in-kind contribution not meeting the limitations on addendums described above shall be approved only as an amendment to this Agreement that is approved by the governing body of each Party.

For additional or advance funding or in-kind contributions provided by San Mateo or Water District as part of an addendum or amendment, the actual costs up to the dollar amount specified in the addendum or amendment shall be credited by the Corps, upon the Corps' acceptance of the funded or provided work, against the next cost share invoice under the Funding Agreement.

For additional or advance funding or in-kind contributions provided by East Palo Alto, Menlo Park or Palo Alto, the credit or reimbursement shall be provided in the manner described in the approved addendum or amendment

**B. Mutual Hold Harmless**

1. Each Party shall defend, hold harmless and indemnify the other Parties, and their elected and appointed officials, officers, directors and employees from any and all claims for injuries or damages which arise out of the terms and conditions of this Agreement and which result from the intentional or unintentional misconduct, negligent acts or omissions of that Party, and its elected and appointed officials, officers, directors and employees.

2. In the event of concurrent intentional or unintentional misconduct, negligent acts or omissions by the Parties (or any of their respective elected and appointed officials, officers, directors and employees), then the liability for any and all claims for injuries or damages to persons and property which arise out of terms and conditions of this Agreement shall be apportioned according to the California law of comparative negligence.

3. The duties and obligations of each Party as set forth in this Section III.B shall survive and continue in full force and effect after the respective termination of the FCSA and this Agreement.

**C. Retention of Records, Right to Monitor and Audit**

The authority shall maintain all records for three (3) years after the Study is terminated or completed. The records shall be subject to the examination and/or audit of San Mateo, Water District, East Palo Alto, Menlo Park, and Palo Alto. The Authority shall comply with all program and fiscal reporting requirements set forth under the FCSA and as required by this Agreement.

**D. Termination of Agreement**

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

**E. 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, (c) by facsimile, or (d) by a commercial courier that provides a receipt, and addressed to the Parties at the addresses stated below, or at such other address as a Party may hereafter notify the other Parties in writing:

Authority: San Francisquito Creek Joint Powers Authority  
701 Laurel Street  
Menlo Park, California 94025  
Attention: Cynthia D'Agosta, Executive Director  
Facsimile No.: (650) 328-7935

San Mateo: San Mateo County Flood Control District  
555 County Center, 5<sup>th</sup> Floor  
Redwood City, CA 94063  
Attention: Director of Public Works  
Facsimile No.: (650) 361-8220

Water District: Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, California 95118-3614  
Attention: Stanley Williams, Chief Executive Officer  
Facsimile No.: (408) 445-1435

East Palo Alto: City of East Palo Alto  
2415 University Avenue  
East Palo Alto, CA 94303  
Attention: Alvin James, City Manager  
Facsimile No: (650) 853-3115

Menlo Park: City of Menlo Park  
701 Laurel Street  
Menlo Park, CA 94025  
Attention: David Boesch, City Manager  
Facsimile No: (650) 328-7935

Palo Alto: City of Palo Alto  
Department of Public Works  
250 Hamilton Avenue  
Palo Alto, CA 94301  
Attention: Glenn Roberts, Director of Public Works  
Facsimile No: (650) 329-2299

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

answerback if by facsimile (provided that if any notice or other communication to be delivered by facsimile is unable to be transmitted because of a problem affecting the receiving party's facsimile machine, the deadline for receiving such notice or other communication shall be extended through the next business day); b) as shown by the addressee's return receipt if by certified mail; and 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.

**F. 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.

**G. 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.

**H. Venue**

In the event that suit shall be brought by any Party, 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 when appropriate, in the United States Court, for the Northern District of California, in either the San Francisco or San Jose branch.

**I. Assignability and Subcontracting**

A Party 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 or except as approved by the Board of Directors of Authority.

**J. 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.

**K. Entire Agreement**

This Agreement constitutes the entire agreement between all the Parties with respect to this subject matter 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 all the Parties.

**L.     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.

*[This Remaining Space Intentionally Left Blank; Signatures Begin On The Next Page]*

IN WITNESS WHEREOF, the Authority, San Mateo, Water District, East Palo Alto, Menlo Park, and Palo Alto have duly executed this Agreement as of the date and year first above written.

Authority:

APPROVED AS TO FORM:

**SAN FRANCISQUITO CREEK JOINT POWERS  
AUTHORITY, a California joint powers authority**

\_\_\_\_\_  
General Counsel

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

**SAN MATEO COUNTY FLOOD  
CONTROL DISTRICT**

\_\_\_\_\_  
County Counsel

By: \_\_\_\_\_  
President, Board of Supervisors

Date: \_\_\_\_\_

APPROVED AS TO FORM:

**SANTA CLARA VALLEY WATER  
DISTRICT**

\_\_\_\_\_  
District Counsel

By: \_\_\_\_\_  
Stanley M. Williams  
Chief Executive Officer

Date: \_\_\_\_\_

APPROVED AS TO FORM:

**CITY OF EAST PALO ALTO**

\_\_\_\_\_  
City Attorney

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

Date: \_\_\_\_\_

APPROVED AS TO FORM:

**CITY OF MENLO PARK**

\_\_\_\_\_  
City Attorney

By: \_\_\_\_\_  
David Boesch  
City Manager

Date: \_\_\_\_\_

APPROVED AS TO FORM:

**CITY OF PALO ALTO**

\_\_\_\_\_  
Senior Assistant City Attorney

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

Frank Benest  
City Manager

Date: \_\_\_\_\_