

Agreement
Between the San Francisquito Creek Joint Powers Authority,
The San Mateo County Flood Control District, and
The Santa Clara Valley Water District
For Funding of the Planning and Design of the
Initial Capital Project on San Francisquito Creek
Between East Bayshore Road and San Francisco Bay

This Agreement ("Agreement") is made and entered into as of _____, 2009, by and among the SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY ("Authority"), a California joint powers authority, the SAN MATEO COUNTY FLOOD CONTROL DISTRICT ("Flood Control District"), a special district of the State of California, and the SANTA CLARA VALLEY WATER DISTRICT ("Water District"), a special district of the State of California, 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, 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 (Authority Member Agencies) formed the San Francisquito Creek Joint Powers 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. 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 San Francisquito 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 has entered into a Feasibility Cost Share Agreement (FCSA) with the San Francisco District of the Corps for the Study on San Francisquito 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 construction 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.

F. The Authority's staff conducted a process of evaluating alternatives for an Initial Capital Project (Project), and has recommended a preferred alternative with conceptual design drawings to the Authority's 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 conduct 1) planning and design services and 2) environmental impact assessment and planning for the 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:

PROVISIONS

1. Project Purpose and Work Products

The purpose of the Project is to provide the flood protection elements on San Francisquito Creek necessary to protect homes, businesses, and other facilities in the cities of Palo Alto and East Palo Alto downstream of East Bayshore Road near Highway 101. The intent of the Project is to provide conveyance of the one-percent (1%) design flood flow (9,400 cubic feet per second during mean high tide) through the area of consideration from the downstream face of East Bayshore Road to San Francisco Bay.

The final work products will be an Initial Study, Environmental Impact Report and Environmental Impact Statement, if necessary, and Plans, Specifications, and Cost Estimates to construct the project elements.

Authority will conduct a public process to contract with consultants to produce 1) Initial Study and Environmental Impact Report, and 2) Plans, Specification and Cost Estimates, for the Project.

2. Funding Amounts

- A. Water District will contribute one million dollars (\$1,000,000.00) to fund the planning and design of the Project and a portion of the Authority's additional costs as described in paragraph number 3.D below.
- B. The Flood Control District shall contribute four hundred thousand dollars (\$400,000.00) to fund the planning and design of the Project and a portion of the Authority's additional costs as described in paragraph number 3.D below.
- C. If the total Project costs (consultant plus allowed Authority additional costs) are less than \$1,400,000, the Flood Control District and Water District will contribute only their proportional amount up to the amount of the total Project costs.

3. Payments and invoices

- A. Authority shall invoice the Flood Control District and Water District monthly for payments to Project consultant based on the consultants' monthly invoices as approved by the Parties.
- B. Invoices from the Authority to the Flood Control District and Water District will include:
 - 1. Copies of the consultants' invoices to and as approved by the Authority;
 - 2. Detail of the work performed and products delivered during the invoice period;
 - 3. Itemized cost schedule and update of the current and total expenditures on each contract.
- C. Individual invoices to the Flood Control District and Water District will be the amount of the consultant invoices in proportion to the Flood Control District and Water District contributions to the total Project costs.

- D. Additional Authority costs directly related to the Project above normal operational costs, including legal, auditing and accounting expenses incurred to hire and manage the Consultant(s), expenses incurred for public outreach and meeting materials, venues, or other related items, will be chargeable to the contribution amounts of the Flood Control District and Water District. Authority will invoice the Flood Control District and Water District for these additional costs semi-annually in proportion to the total contribution amounts committed by the Flood Control District and Water District. Authority will itemize the charges on the invoices and provide back-up documentation and information to support the charges. All additional Authority costs under this Agreement that may be invoiced and charged to the Flood Control District and Water District will not exceed \$45,000.
- E. The Flood Control District and Water District will pay all invoices from Authority and approved by the Parties, within 30 calendar days of receipt to the Authority or its escrow account as determined by Authority. If Authority chooses to use an escrow account, it must be established by a state or federally chartered bank or savings & loan.
- F. Water District and Authority will negotiate and execute a letter of understanding to be referenced for administrative matters between them regarding their mutual roles and responsibilities relative to the planning and design of the Project. Said letter will have an effective date commensurate with the effective date of this Funding Agreement.
- G. Authority will request that the Corps, through Section 104 of the Water Resources Development Act of 1986, provide a credit for the local expenditures on the Project, to be realized through the future reduction of the local share of construction costs of the Federally Preferred Plan, and keep all the Parties apprised of progress towards these ends. The amount, method and timing of any credit against future federal expenditures for any approved in-kind services provided by either the Flood Control District or Water District shall be as provided for in the conditional Section 104 Credit Agreement to be obtained by the Authority with the Corps.

4. Payments to Consultants

Authority is responsible for review and payment of all consultant invoices.

5. Management of the Planning and Design of the Project

- A. Authority will administer the consultant selection and contracting process and is accountable for managing the contracts of consultant firms to perform the design and environmental work described in this Agreement.
- B. Authority will direct the consultants' work regarding the scope of the project, and the Water District will provide technical direction to the consultants regarding project deliverables.
- C. Technical approval of CEQA/NEPA documents, and certification of engineering plans and specifications and all related documents are subject to the review and approval of the Water District and the Flood Control District, or an agency or agencies designated by Water District and/or the Flood Control District prior to the completion of the Planning and Design of the Project, as appropriate to future ownership of Project elements.
- D. Authority is the CEQA/NEPA lead agency and its Board will be the appropriate Party to certify the CEQA/NEPA documents.

6. Mutual Hold Harmless

- A. Authority shall defend, hold harmless and indemnify the Flood Control District and Water District, their officers, directors, agents and employees from any and all claims for injuries or damages to persons and/or property which result from the intentional or unintentional misconduct, negligent acts or omissions of Authority, its officers, directors and/or employees in the performance of this Agreement.
- B. The Flood Control District shall defend, hold harmless, and indemnify Water District and the Authority, their officers, directors, agents and employees from any and all claims for injuries or damages to persons and/or property which result from the intentional or unintentional misconduct, negligent acts or omissions of Flood Control District, their officers, directors and/or employees in the performance of this Agreement.
- C. Water District shall defend, hold harmless, and indemnify the Flood Control District and the Authority, their officers, directors, agents and employees from any and all claims for injuries or damage to persons and/or property which result from the intentional or unintentional misconduct, negligent acts or omissions of Water District, their officers, directors and/or employees in the performance of this Agreement.
- D. In the event of concurrent intentional or unintentional misconduct, negligent acts or omissions by the Flood Control District, Water District, and Authority (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.
- E. The duties and obligations of this Section will survive and continue in full force and effect after the termination or expiration this Agreement.

7. Retention of Records, Right to Monitor and Audit

The Authority will maintain all records related to the transaction that is the subject of this Agreement and/or the Project for twenty (20) years after the Planning or Design Phase is terminated or completed. The records shall be subject to the examination and/or audit of all JPA Member Agencies and the Corps.

8. Agreement Term

- A. This Agreement shall automatically terminate one hundred and eighty (180) days after the completion of the Planning and Design of the Project. Completion of the Planning and Design of the Project is defined as approval by the Authority Board of Plans, Specifications, and Cost Estimates, and an Initial Study and Environmental Impact Report and Environmental Impact Statement, if necessary.
- B. 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 immediately upon written notice. This notice may be given only after a thirty (30) day corrective action communication has been provided and the Parties are unable to resolve the issue(s) giving rise to the proposed termination.
- C. Any Party may, upon 60 day written notice, terminate this Agreement.

- D. Termination of this Agreement by any of the Parties shall require the same approval process utilized by that Party to execute this Agreement.
- E. In the event of termination or expiration of this Agreement, each Party must deliver to all other Parties, upon request, copies of reports, documents, and other work performed by any Party or consultant to any Party under this Agreement. The cost of work performed under this Agreement to the date of termination or expiration will be due and payable in accordance with the provisions of this Agreement.

9. Refund of Undisbursed Funds

Undisbursed funds and interest shall be returned to the Flood Control District and Water District within ninety (90) days of the completion of the Planning and Design of the Project or termination or expiration of this Agreement.

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, (c) by facsimile, or (d) 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
1231 Hoover Street
Menlo Park, California 94025
Attention: Len Materman, Executive Director
Facsimile No.: 650-561-4580

Flood Control District: San Mateo County Flood Control District
555 County Center, 5th Floor
Redwood City, CA 94063
Attention: Jim Porter, 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: Beau Goldie, Chief Executive Officer
Facsimile No.: (408) 445-1435

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.

10. 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.

11. 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.

12. 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 Court, Northern District of California.

13. 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. Notwithstanding, Authority may contract with an accounting firm, financial institution, or escrow company to fulfill its obligations under Section 2 and 3.

14. 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 Authority Member Agencies without restriction or limitation upon their use.

15. Entire Agreement

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

16. Further Actions

The Authority, Flood Control 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.

17. 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.

18. NonWaiver

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.

19. 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.

IN WITNESS WHEREOF, the Authority, the Flood Control District, and Water District have executed this Agreement as of the date and year first above written.

Separate Signature pages were implemented individually for each Party as follows.

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Funding for the Planning and Design of the
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East Bayshore Road to San Francisco Bay

IN WITNESS WHEREOF, the Authority, the Flood Control District, and Water District have executed this Funding Agreement as of the date and year first above written.

Separate Signature pages were implemented individually for each Party.

APPROVED AS TO FORM:

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


Signature

By: 
Len Materman
Executive Director


Print Name
Authority Counsel

Date: 10/22/09

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APPROVED AS TO FORM:

SAN MATEO COUNTY FLOOD CONTROL DISTRICT

Signature

By: _____
Mark Church
President, Board of Supervisors

Print Name and Title
County Counsel

Date: _____

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APPROVED AS TO FORM:

SANTA CLARA VALLEY WATER DISTRICT

Signature

By: _____
Beau Goldie
Chief Executive Officer

Print Name and Title
District Counsel

Date: _____