

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
NAPA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT
FOR
CONSTRUCTION
OF INCREMENTS 2 AND 3 OF
THE NAPA RIVER//NAPA CREEK FLOOD PROTECTION PROJECT, CALIFORNIA

THIS AGREEMENT is entered into this ____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the Assistant Secretary of the Army (Civil Works) and the Napa County Flood Control and Water Conservation District (hereinafter the “Non-Federal Sponsor”), represented by the Chairperson of the Board of Directors.

WITNESSETH, THAT:

WHEREAS, construction of the Napa River/Napa Creek Flood Protection Project in Napa County, California (hereinafter the “Authorized Project”) was authorized by Section 204 of the Flood Control Act of 1965 (Pub. L. No. 89-298, 79 Stat. 1073, 1084 (October 27, 1965)) for the purposes of flood control and recreation substantially in accordance with the 1965 Chief of Engineers Report for the Napa River Basin (H. Doc. 89-222), and modified by Section 136 of the Water Resources Development Act of 1976 (Pub. L. No. 94-587, 90 Stat. 2917, 2929 (October 22, 1976));

WHEREAS, certain features of the Authorized Project were constructed pursuant to the Project Cooperation Agreement between the Government and the Non-Federal Sponsor entered into on February 1, 2000, as modified by Amendment Number 1 entered into on April 5, 2007, and Amendment Number 2 entered into on August 8, 2016;

WHEREAS, on the effective date of this Agreement, the Government and the Non-Federal Sponsor are also entering into Amendment Number 3 to the Project Cooperation Agreement to limit the terms thereof to those Authorized Project features already constructed as of the date of that Amendment;

WHEREAS, the Non-Federal Sponsor intends to construct Increments 2 and 3, the Lincoln Avenue Floodwalls separable element and the Imola Avenue to Hatt Street Floodwalls separable element of the Authorized Project, (hereinafter the “Project”, as defined in Article I.A. of this Agreement), pursuant to Section 204 of WRDA 1986, as amended (33 U.S.C. 2232) (hereinafter “Section 204”), with eligible reimbursement of the Federal share of the Project, or separable element thereof, provided by the Government in accordance with Section 204(d);

WHEREAS, the Government and the Non-Federal Sponsor entered into a Memorandum of Understanding (hereinafter the “MOU”) on April 19, 2023, setting out the procedures for the

Government's review of the Project's design, plans, and detailed implementation information that the Non-Federal Sponsor will provide for the Assistant Secretary of the Army (Civil Works) or his designee to approve;

WHEREAS, the Assistant Secretary of the Army (Civil Works) on [Month Day, Year] approved the *Napa River Increments 2 and 3 Implementation Plan* for the Project, attached hereto as Exhibit A (Implementation Plan), which specifies the procedures that must be followed by the Government and the Non-Federal Sponsor to support future consideration by the Assistant Secretary of the Army (Civil Works) or his designee that the Project, including any changes in design, is technically feasible, economically justified, and environmentally acceptable;

WHEREAS, construction by the Non-Federal Sponsor shall not commence until such time as the Assistant Secretary of the Army (Civil Works) or his designee approves the plans and detailed information for implementation of the Project, including any changes in design, and the notification in 33 U.S.C. 2232(e) is provided;

WHEREAS, the Non-Federal Sponsor shall not commence the construction of a separable element until the Government completes its environmental compliance for the increment to be constructed;

WHEREAS, on _____, the Assistant Secretary of the Army (Civil Works) granted a policy waiver for the Government to complete its environmental compliance for Increment 3 after execution of this Agreement;

WHEREAS, the Non-Federal Sponsor is acquiring all real property interests for construction of Increment 2 and Increment 3, but recognizes that the Government's induced flooding analysis for both Increments, which the Government is scheduled to prepare during design of Increment 3, may require further acquisition of real property interests by the Non-Federal Sponsor;

WHEREAS, Section 103 of WRDA 1986, as amended (33 U.S.C. 2213), specifies the cost-sharing requirements applicable to the Project;

WHEREAS, placement area improvements, as defined in Article I.I. of this Agreement, are limited to that required for the flood risk management features and provided by the Non-Federal Sponsor in accordance with 33 U.S.C. 2213;

WHEREAS, the total amount of Federal funds available for the Federal share of Project costs is \$48,300,000, and by letter dated December 9, 2022, the Non-Federal Sponsor stated its intent to cover all costs above \$48,300,000 for the Project; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement and acknowledge that Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b), provides that this Agreement shall be enforceable in the appropriate district court of the United States.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" shall mean construction of Increment 2, the West Bank/North of Oxbow - Lincoln Avenue Floodwalls separable element on the west bank of the Napa River north of the Oxbow and completing work on Oxbow Dry Bypass floodwalls, and Increment 3, the West Bank/South of Oxbow - Imola Avenue to Hatt Street Floodwalls separable element on the west bank of the Napa River, south of the Oxbow, of the Authorized Project, as generally described in the 13 December 2019 Federal Interest Determination, Supplemental General Design Memorandum, dated October 1998, and associated National Environmental Policy Act (NEPA) documentation, dated March 1999, approved by the Deputy Director of Civil Works on May 24, 1999; and as further described in future design recommendation documentation, its corresponding supplemental NEPA documentation, and the approved Implementation Plan approved by the Assistant Secretary of the Army (Civil Works) or his designee.

B. The term "discrete segment" means a physical portion of a separable element of the Project that the Non-Federal Sponsor can operate and maintain, independently and without creating a hazard, in advance of final completion of the separable element. The discrete segments associated with each separable element for the Project are further described in the approved Implementation Plan. For Increment 2, the Lincoln Avenue Floodwalls separable element on the west bank of the Napa River north of the Oxbow (the only increment with discrete segments), the discrete segments are:

1. Segment 1: North of Lincoln Avenue - 4,080 linear feet of floodwall and three closure structures will be constructed on the top of the west bank from the Lincoln Avenue bridge headed north through the RiverPointe development, Lake Park subdivision and River Glenn town homes and terminating into high ground just south of Elks Lodge. The three closure structures include three pedestrian access gates with one providing emergency vehicle and pedestrian water side trail access at the northern trail head at Lincoln Avenue and two in the Lake Park.

2. Segment 2: South of Lincoln Avenue - 2,377 linear feet of floodwall and three closure structures will be constructed starting from the Lincoln Avenue bridge headed around the Ace & Vine project area and extending south along the top of the west bank of the river terminating into high ground just north of the Napa Terrace Inn. Two closure structures will be constructed along Lincoln Avenue to provide access to the Ace & Vine project area and one closure structure will be provided just south of Wall Street providing emergency and pedestrian access to the waterside of the wall.

3. Segment 3: Northwest side of the Napa Oxbow Dry Bypass - 230 linear feet of floodwall to be constructed on 130 linear feet of floodwall west of Soscol Avenue bridge and 100 linear feet of floodwall east of Soscol Avenue bridge will be constructed in gaps intentionally left in the existing northwest floodwall of the Napa Oxbow Dry Bypass floodwall. Part of the 100 linear feet of floodwall east of Soscol Avenue will consist of a drainage outfall

structure allowing a 72-inch drain to discharge into bifurcated outlets (42-inch and 48-inch drains) and housing two sluice gates, one for each outlet respectively.

C. The term “timeframe for completion” means the scheduled completion date for Increment 2, the Lincoln Avenue Floodwall separable element on the west bank of the Napa River north of the Oxbow, which is presently estimated to be 31 December 2035. The timeframe for completion of Increment 3 is 31 December 2040. Completion of a separable element is assumed to occur when the Non-Federal Sponsor provides written notification to the Government of such completion in accordance with Article II.B.

D. The term “pre-Agreement design work” means the design work that the Non-Federal Sponsor initiated prior to the effective date of this Agreement that the Government determines was accomplished in a satisfactory manner, is integral to and necessary for design of the Project, was designed in accordance with applicable permits and approvals, and was accomplished in accordance with Government design standards.

E. The term “HTRW” means hazardous, toxic, and radioactive wastes, which includes any material listed as a “hazardous substance” (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”) (42 U.S.C. 9601-9675) and any other regulated material in accordance with applicable laws and regulations.

F. The term “project costs” means all costs incurred by the Government and the Non-Federal Sponsor in accordance with the terms of this Agreement that are directly related to design and construction of the Project and cost shared. The term includes the Government’s costs for review and approval of design work, appraisals, and reimbursement requests; developing Project performance metrics; environmental review and oversight; permit evaluations; agreement development and negotiation; construction monitoring and oversight; inspections; certifications; preparing periodic financial reports; conducting final accountings; and other costs incurred by the Government pursuant to the provisions of this Agreement. The term includes the Non-Federal Sponsor’s eligible costs for pre-Agreement design work, post Agreement design and construction work, including HTRW investigations pursuant to Article IV.A., permit work, and supervision and administration; and providing real property interests, relocations, and placement area improvements in accordance with Article V.B.1-3. The costs of historic preservation activities except for data recovery for historic properties, if any, are also included in this term. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement; HTRW cleanup and response; dispute resolution; participation by the Government and the Non-Federal Sponsor in the Project Coordination Team to discuss significant issues and actions; audits; betterments; or the Non-Federal Sponsor’s cost to negotiate this Agreement. The term also does not include any costs for technical assistance provided by the Government pursuant to Article II.L.

G. The term “real property interests” means lands, easements, and rights-of-way, including those required for relocations and borrow and dredged material placement areas. Acquisition of real property interests may require the performance of relocations.

H. The term “relocation” means the provision of a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad (excluding existing railroad bridges and approaches thereto for the flood risk management features), or public facility when such action is required by applicable legal principles of just compensation. Providing a functionally equivalent facility may include the alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

I. The term “placement area improvements” means the improvements required on real property interests to enable the ancillary placement of material that has been dredged or excavated during construction, operation, and maintenance of the Project, including, but not limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and dewatering pumps and pipes.

J. The term “total Federal funds amount” means the \$48,300,000 appropriations representing the total of the Government’s financial participation in design and construction in the remainder of the Authorized Project.

K. The term “betterment” means a difference in the design or construction of an element of the Project that results from applying standards that the Government determines exceed those that the Government would otherwise apply to design or construction of that element.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. The Non-Federal Sponsor shall design and construct the Project in accordance with all requirements of applicable Federal laws and implementing regulations, including but not limited to, if applicable, Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto, and the following:

1. The Non-Federal Sponsor is responsible for a minimum of 25 percent, but not to exceed 50 percent, of total Project costs allocated by the Government to flood risk management, and 50 percent of Project costs allocated by the Government to recreation. The Government will reimburse the Non-Federal Sponsor for the Federal share of the eligible project costs it incurs pursuant to Articles II.D., V., and VI.C.

2. In accordance with Article III, the Non-Federal Sponsor shall provide the real property interests, relocations, and placement area improvements required for construction and operation, maintenance, repair, rehabilitation, and replacement of the Project. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of performing inspections pursuant to Article II.B. and any other activities covered by this Agreement.

3. Prior to the Non-Federal Sponsor initiating construction under this Agreement, the design work for such construction, including relevant plans and specifications and arrangements for carrying out that work under a contract, must be reviewed and approved by the Assistant Secretary of the Army (Civil Works) or his designee as meeting the Government's current criteria, design standards, and review processes. Any proposed substantive changes to the approved design work must also be reviewed and approved by the Assistant Secretary of the Army (Civil Works) or his designee in advance of such construction. Upon completion of the design, the Non-Federal Sponsor shall furnish the Government with copies of the completed design. The Non-Federal Sponsor shall not award the first construction contract for a discrete segment or separable element until the Government completes its environmental compliance for the separable element proposed for construction.

4. The Non-Federal Sponsor shall comply with the same legal and technical requirements that would apply if the Project was carried out by the Government, including all mitigation required to offset environmental impacts of the Project as determined by the Government. The Non-Federal Sponsor shall obtain any permits or approvals required for the Project under Federal or state law, except that the Non-Federal Sponsor shall not be required to obtain any Federal permits or approvals that would not be required if the Government carried out the Project or separable element unless significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation.

B. The Government shall perform periodic inspections to verify the progress of construction and that work is being performed in a satisfactory manner. Upon completion of construction of each separable element, or discrete segment, the Non-Federal Sponsor shall provide written notification to the Government of such completion. For each separable element, the Non-Federal Sponsor shall provide as-built drawings for the completed work. Completed work is subject to onsite inspections and a determination by the Government that the work was accomplished in a satisfactory manner and in accordance with Government design and construction standards.

C. At the written request of the Non-Federal Sponsor, the Government shall provide to the Non-Federal Sponsor all relevant non-proprietary data and documentation under the control of the Government with respect to the Project, except for information that the Government may withhold under applicable law. The District Commander shall provide this non-proprietary data and documentation not later than 90 calendar days after the Non-Federal Sponsor requests the data and documentation.

D. Reimbursement of eligible project costs incurred by the Non-Federal Sponsor for pre-Agreement design work, post-Agreement design and construction work, and associated permit work after completion of a discrete segment or separable element will be provided in accordance with this paragraph.

1. After the effective date of this Agreement, and upon completion of construction for each discrete segment of Increment 2, the Lincoln Avenue Floodwalls separable element on the west bank of the Napa River north of the Oxbow and completion of each

separable element for which construction was initiated following Assistant Secretary of the Army (Civil Works) or his designee's approval of corresponding Design Recommendation Reports, the Non-Federal Sponsor shall submit an invoice to the Government that documents the costs that it incurred for such design and construction work and associated permit work, with such costs allocated by project purpose. In addition, for any pre-Agreement design work that the Government determines to be eligible for reimbursement, the costs for that design work shall be included in the initial invoice for that separable element.

2. The Government shall review each invoice provided by the Non-Federal Sponsor and, based on the procedures, requirements, and conditions provided in Article V, shall determine the costs, or portion thereof, allocated by project purpose that are eligible for inclusion in project costs and reimbursement of the Federal share. The Government shall provide a written explanation to the Non-Federal Sponsor for any costs it determines are not eligible for inclusion in project costs and reimbursement of the Federal share. To the maximum extent practicable, within 60 calendar days of receipt of each invoice for a completed discrete segment or separable element, the Government, after considering the estimated amount of credit that will be afforded to the Non-Federal Sponsor for real property interests, relocations, and placement area improvements for each separable element by project purpose and subject to the availability of Federal funds, shall reimburse the Non-Federal Sponsor for the Federal share of the eligible costs it incurred for pre-Agreement design work, design and construction work, and permit work. For each discrete segment identified in Article I.B., above, the Government shall estimate Government project costs and estimated costs for real property interests, relocations, and placement area improvements to be applied to project costs for the Lincoln Avenue Floodwalls by project purpose.

3. The Government will initially retain 5 percent of the total Federal funds amount to pay the Government's costs incurred for oversight, review, and other contingencies. The Government will use its best efforts to adhere to this percentage, but may increase the amount retained above this percentage if warranted by expenditures related to oversight, review, and other contingencies.

4. If the Non-Federal Sponsor fails to complete Increment 2 within its timeframe for completion as provided in Article I.C., the Non-Federal Sponsor shall remit to the Government any reimbursements it previously received under Article II.D. for completed discrete segments within Increment 2, the Lincoln Avenue Floodwalls separable element on the West Bank north of the Oxbow by delivering a check payable to "FAO, USAED, Sacramento (L2)" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government.

5. As a part of the final accounting for each separable element pursuant to Article VI.C., the Government will ensure that the Non-Federal Sponsor has met its cost-sharing requirements by project purpose consistent with 33 U.S.C. 2213.

E. The Government, as it determines necessary, to ensure compliance with the National Historic Preservation Act (NHPA) of 1966, as amended (54 U.S.C. 300101-307108), shall

undertake actions or direct the Non-Federal Sponsor to undertake actions associated with historic preservation, including, the identification and treatment of historic properties as those properties are defined in NHPA. All costs incurred by the Government and Non-Federal Sponsor for such work (including the mitigation of adverse effects other than data recovery) shall be included in project costs and shared in accordance with the provisions of this Agreement. If historic properties are discovered during construction and the effect(s) of construction are determined to be adverse, strategies shall be developed to avoid, minimize, or mitigate these adverse effects. In accordance with 54 U.S.C. 312507, up to 1 percent of the total amount authorized to be appropriated for the Project may be applied toward data recovery of historic properties and such costs shall be borne entirely by the Government. In the event that costs associated with data recovery of historic properties exceed 1 percent of the total amount authorized to be appropriated for the Project, in accordance with 54 U.S.C. 312508, the Government will seek a waiver from the 1 percent limitation under 54 U.S.C. 312507 and upon receiving the waiver, will proceed with data recovery at full Federal expense. Nothing in this Agreement shall limit or otherwise prevent the Non-Federal Sponsor from voluntarily contributing costs associated with data recovery that exceed 1 percent.

F. For each separable element, the Non-Federal Sponsor shall prepare an Operation, Maintenance, Repair, Rehabilitation and Replacement Manual (hereinafter the “OMRR&R Manual”) for approval by the Government. The Non-Federal Sponsor, at no cost to the Government, shall operate, maintain, repair, rehabilitate, and replace the Project in a manner compatible with the authorized purposes of the Project in accordance with applicable Federal laws and the OMRR&R Manual. For each separable element, the Non-Federal Sponsor shall provide an updated OMRR&R Manual for approval by the Government with updated as-built drawings, as necessary, based on the cost shared monitoring and adaptive management. If the Government determines that the Non-Federal Sponsor is failing to perform its responsibilities under this Agreement and the Non-Federal Sponsor does not correct such failures within a reasonable time after notification by the Government, the Government may undertake any operation, maintenance, repair, rehabilitation, or replacement of the Project. No operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of its responsibilities under this Agreement or preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

G. The Non-Federal Sponsor shall not use Federal program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share for such work.

H. In accordance with Section 402 of WRDA 1986, as amended (33 U.S.C. 701b-12), the Non-Federal Sponsor shall prepare a floodplain management plan for the Project within one year after the effective date of this Agreement and shall implement such plan no later than one year after completion of construction of the Project. The Non-Federal Sponsor may execute agreements with other non-Federal entities to ensure such preparation and implementation. The plan shall be designed to reduce the impacts of future flood events in the project area, including

but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood risk reduction provided by such work. The Non-Federal Sponsor shall provide an information copy of the plan to the Government.

I. The Non-Federal Sponsor shall ensure publication of floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in adopting regulations, or taking other actions, to prevent unwise future development and to ensure compatibility with the Project. The Non-Federal Sponsor may execute agreements with other non-Federal entities to ensure such publication and provision.

J. The Non-Federal Sponsor shall prevent obstructions or encroachments on the Project (including prescribing and enforcing regulations to prevent such obstructions or encroachments) that might reduce the level of flood risk reduction the Project affords, hinder operation and maintenance of the Project, or interfere with the Project's proper function.

K. In addition to the ongoing, regular discussions between the parties regarding Project delivery, the Government and the Non-Federal Sponsor may establish a Project Coordination Team to discuss significant issues or actions. The Government's costs for participation on the Project Coordination Team shall not be included in project costs that are cost shared but shall be included in calculating the Maximum Cost Limit. The Non-Federal Sponsor's costs for participation on the Project Coordination Team shall not be included in project costs that are cost shared and shall be paid solely by the Non-Federal Sponsor without reimbursement by the Government.

L. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall be responsible for all costs in excess of the total Federal funds amount.

M. The Non-Federal Sponsor shall keep the recreation features, access roads, parking areas, and other associated public use facilities, open and available to all on equal terms.

N. If the Non-Federal Sponsor elects to include betterments in the Project design or construction, the Non-Federal Sponsor shall notify the Government in writing and describe the betterments it intends to implement for Project design and construction. The Non-Federal Sponsor shall be solely responsible for all betterments costs, including costs associated with obtaining permits for such work, without reimbursement by the Government.

O. The Non-Federal Sponsor may request in writing that the Government perform technical assistance on the Non-Federal Sponsor's behalf. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article VI.D., must provide funds sufficient to cover the costs of such work in advance of the Government performing the work or the cost of such work can be deducted from any reimbursements provided pursuant to Article II.D. and such costs may not be reimbursed.

ARTICLE III - REAL PROPERTY INTERESTS AND RELOCATIONS

A. The Non-Federal Sponsor shall notify the Government of the real property interests required for construction, operation, and maintenance of the Project, and the Non-Federal Sponsor shall provide the Government with general written descriptions, including maps as appropriate, of such real property interests based on approved designs pursuant to Article II.A.3. The Government shall review the written descriptions, including estates, and maps provided by the Non-Federal Sponsor to ensure the real property interests are sufficient and provide to the Non-Federal Sponsor a written notice of any deficiency. If the Government determines that the real property interests are insufficient, the Non-Federal Sponsor shall acquire the real estate interests that the Government determines are necessary for construction, operation, and maintenance of the Project as described in the written notice. The Non-Federal Sponsor shall, in accordance with Article IV.A., investigate to ensure that HTRW does not exist in, on, or under the real property interests to be acquired. The Non-Federal Sponsor shall notify the Government in writing when such interests have been acquired and ensure that such real property interests are retained in public ownership.

B. The Non-Federal Sponsor shall notify the Government of the relocations and placement area improvements required for construction, operation, and maintenance of the Project, and the Non-Federal Sponsor shall provide the Government with general written descriptions, including maps and plans and specifications, and attorney opinions of compensability as appropriate, for such relocations and placement area improvements based on approved designs pursuant to Article II.A.3. The Government shall review the written descriptions, including maps and plans and specifications, provided by the Non-Federal Sponsor to ensure the relocations and placement area improvements are sufficient and provide to the Non-Federal Sponsor a written notice of any deficiency. If the Government determines that the relocations and placement area improvements are insufficient, the Non-Federal Sponsor shall perform the relocations and construct the placement area improvements that the Government determines are necessary for construction, operation, and maintenance of the Project as described in the written notice. The Non-Federal Sponsor shall notify the Government in writing when such work has been accomplished.

C. In acquiring the real property interests for the Project, the Non-Federal Sponsor assures the Government that it will comply with the following:

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under 42 U.S.C. 4622, 4623 and 4624;

(2) relocation assistance programs offering the services described in 42 U.S.C. 4625 shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with 42 U.S.C. 4625(c)(3);

(4) in acquiring real property, the Non-Federal Sponsor will be guided, to the greatest extent practicable under State law, by the land acquisition policies in 42 U.S.C. 4651 and the provisions of 42 U.S.C. 4652; and

(5) property owners will be paid or reimbursed for necessary expenses as specified in 42 U.S.C. 4653 and 4654.

ARTICLE IV - HTRW

A. The Non-Federal Sponsor shall be responsible for undertaking any investigations to identify the existence and extent of any HTRW regulated under applicable law, that may exist in, on, or under real property interests required for construction, operation, and maintenance of the Project.

B. In the event the Non-Federal Sponsor discovers that HTRW exists in, on, or under any of the real property interests needed for construction, operation, and maintenance of the Project, the Non-Federal Sponsor shall provide written notice to the Government within 15 calendar days of such discovery, in addition to providing any other notice required by applicable law. If HTRW is discovered prior to acquisition, the Non-Federal Sponsor shall not proceed with the acquisition of such real property interests until the parties agree that the Non-Federal Sponsor should proceed. If HTRW is discovered in, on, or under real property interests that the Non-Federal Sponsor currently owns or controls or after acquisition of the real property interests, no further Project activities within the contaminated area shall proceed until the parties agree on an appropriate course of action.

1. If the Non-Federal Sponsor initiates or continues construction, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the performance and costs of HTRW cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. The Non-Federal Sponsor shall pay such costs without reimbursement by the Government.

2. In the event the Non-Federal Sponsor fails to discharge its responsibilities under this Article, the Government may suspend or terminate future performance under this Agreement, including reimbursements pursuant to Article II.D.

C. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the owner and operator of the Project for purposes of CERCLA liability or other applicable law.

D. Any decision made pursuant to this Article shall not relieve any third party from any HTRW liability that may arise under applicable law.

ARTICLE V - DETERMINATION OF ELIGIBLE NON-FEDERAL SPONSOR COSTS

A. The Government and the Non-Federal Sponsor agree that the Non-Federal Sponsor's costs that are eligible for inclusion in project costs shall be determined in accordance with the following procedures, requirements, and conditions and subject to audit in accordance with Article X.B. to determine reasonableness, allocability, and allowability of costs.

1. The Non-Federal Sponsor's eligible costs for and value of real property interests, relocations, and placement area improvements will be included in project costs during the final accounting of each separable element for cost-sharing purposes. To the maximum extent practicable, no less frequently than on a semi-annual basis, the Non-Federal Sponsor should provide the Government with documentation sufficient for the Government to determine the amount of eligible costs for and value of real property interests, relocations, and placement area improvements in accordance with paragraphs B.1., B.2., B.3., and B.6. of this Article.

2. The Non-Federal Sponsor's eligible costs for pre-Agreement design work, post-Agreement design and construction work, and associated permit work will be reimbursed as the discrete segments or separable elements for such work are completed and invoiced by the Non-Federal Sponsor. Each invoice provided by the Non-Federal Sponsor pursuant to Article II.D. should include documentation sufficient for the Government to determine the amount of reimbursement to be provided in accordance with paragraphs B.4., B.5., and B.6. of this Article.

3. The amount eligible for reimbursement is further limited to the total Federal funds amount less the retained amount required by Article II.D.3..

B. The Non-Federal Sponsor's costs eligible for reimbursement will be determined as follows:

1. Real Property Interests.

a. General Procedure. For each real property interest, the Non-Federal Sponsor shall obtain an appraisal of the fair market value of such interest that is prepared by a qualified appraiser who is acceptable to the parties. Subject to valid jurisdictional exceptions, the appraisal shall conform to the Uniform Standards of Professional Appraisal Practice. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government.

(1) Date of Valuation. For any real property interests owned by the Non-Federal Sponsor on the effective date of this Agreement and required for the Project, the date the Non-Federal Sponsor initiates construction shall be used to determine the fair market value. The fair market value of real property interests acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

(2) Except for real property interests not eligible to be included in projects costs, the Non-Federal Sponsor shall obtain an appraisal for each real property interest required for the Project and provide the Government a copy of such appraisal in accordance with the schedule in Article V.A.1.

(3) After the Government reviews and approves the appraisals for reasonableness and compliance with applicable laws and regulations, the Government shall include the appraised amount in project costs during the final accounting of each separable element for cost-sharing purposes. If the Government determines that the amount paid by the Non-Federal Sponsor exceeds the approved appraised amount, the Government, at the Non-Federal Sponsor's request, shall consider all factors relevant to determining fair market value to be included in project costs and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing a greater amount to be included in project costs. If the Government determines that the amount paid by the Non-Federal Sponsor does not comply with applicable laws and regulations, the Government shall notify the Non-Federal Sponsor of the deficiency, and, within 30 calendar days of receipt of such notice, the Non-Federal Sponsor shall provide the Government with a plan to correct the deficiency.

b. Eminent Domain Procedure. For real property interests acquired by eminent domain proceedings instituted after the effective date of this Agreement, the fair market value to be included in project costs shall be either the amount of the court award for the real property interests taken or the amount of any stipulated settlement, with such value included in project costs during the final accounting of each separable element for cost-sharing purposes.

c. Waiver of Appraisal. Except as required by paragraph B.1.b. of this Article, the Government may waive the requirement for an appraisal pursuant to this paragraph if, in accordance with 49 C.F.R. Section 24.102(c)(2):

(1) the owner is donating the real property interest to the Non-Federal Sponsor and releases the Non-Federal Sponsor in writing from its obligation to appraise the real property interest, and the Non-Federal Sponsor submits to the Government a copy of the owner's written release; or

(2) the Non-Federal Sponsor determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the real property interest proposed for acquisition is estimated at \$15,000 or less, based on a review of available data. When the Non-Federal Sponsor determines that an appraisal is unnecessary, the Non-Federal Sponsor shall prepare the written waiver valuation required by 49 C.F.R. Section 24.102(c)(2) and submit a copy thereof to the Government for approval. The Government may approve exceeding the \$15,000 threshold, up to an amount of \$35,000, if the Non-Federal Sponsor offers the owner the option of having the Non-Federal Sponsor appraise the real property interest.

(3) if the Non-Federal Sponsor determines that the acquisition is uncomplicated, has a low fair market value, and the Non-Federal Sponsor offers the owner the option to have the property appraised, the Non-Federal Sponsor may request in writing approval to use a waiver valuation for properties with estimated values of more than \$35,000 and up to \$50,000. If use of a waiver valuation is approved by the Government, the Non-Federal Sponsor shall provide a report measuring the cost and time benefits, condemnation rate, settlement rate,

and other relevant metric to document the administrative savings, accuracy, and efficacy of the use of the waiver valuation.

d. Incidental Costs. The Government shall include in project costs the incidental costs the Non-Federal Sponsor incurred in acquiring any real property interests required pursuant to Article III for the Project within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, that are documented to the satisfaction of the Government, during the final accounting of each separable element for cost-sharing purposes. Such incidental costs shall include closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.C., and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest pursuant to Article III.

2. Relocations. The Government shall include in project costs the value of any relocations required for an applicable separable element during the final accounting of each separable element for cost-sharing purposes.

a. For a relocation other than a highway, eligible costs shall be only that portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

b. For a relocation of a highway, which is any highway, roadway, or street, including any bridge thereof, that is owned by a public entity, eligible costs shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of California would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

c. Relocation costs include actual costs of performing the relocation; engineering and design costs; and supervision and administration costs documented to the satisfaction of the Government. Relocation costs do not include any costs associated with betterments, as determined by the Government, nor any additional cost of using new material when suitable used material is available.

3. Placement Area Improvements. The Government shall include in project costs the value of placement area improvements required for an applicable separable element during the final accounting of each separable element for cost-sharing purposes. The value of the placement area improvements shall be equivalent to the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurred to provide such placement area improvements. Such costs include actual costs of constructing the improvements; engineering and design costs; and supervision and administration costs, but shall not include any costs associated with betterments, as determined by the Government.

4. Post-Agreement Design and Construction Work and pre-Agreement Design Work. The Government shall include in project costs the costs of design and construction work performed by the Non-Federal Sponsor after the effective date of this Agreement and the pre-Agreement design work performed by the Non-Federal Sponsor after the effective date of the MOU, that are eligible for reimbursement. Such costs may include engineering and design, including HTRW investigations pursuant to Article IV.A.; construction; and supervision and administration, but shall not include any costs associated with betterments, as determined by the Government. Eligible costs will be reimbursed to the Non-Federal Sponsor pursuant to Article II.D. as discrete segments or separable elements, as applicable, are completed.

a. The Non-Federal Sponsor shall provide documentation, satisfactory to the Government, for the Government to determine the amount of eligible costs. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Where the Non-Federal Sponsor's cost for completed pre-Agreement design work is expressed as fixed costs plus a percentage of project costs, the Non-Federal Sponsor shall calculate such costs based on actual costs.

b. The following costs are not eligible for inclusion in project costs: interest charges, or any adjustment to reflect changes in price levels after completion of the design or construction work; costs that exceed the Government's estimate of the cost for such post-Agreement design and construction work or pre-Agreement design work if such work had been accomplished by the Government; the costs of physical construction work under a contract awarded with notice to proceed prior to the effective date of this Agreement; and the costs of post-Agreement design and construction work or pre-Agreement design work obtained at no cost to the Non-Federal Sponsor.

5. Permit Work. The Government shall include in project costs the costs of permit work, which includes the Non-Federal Sponsor's costs for obtaining all required Federal and state permits, licenses, and approvals necessary for design, construction, and operation and maintenance of the Project, or separable elements thereof, after the effective date of this Agreement, that are eligible for reimbursement. Such costs will be reimbursed to the Non-Federal Sponsor pursuant to Article II.D. as discrete segments or separable elements, as applicable, are completed. Eligible costs shall be equivalent to the direct costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in obtaining all permits and licenses necessary for design, construction, and operation and maintenance of the Project. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees involved in obtaining such permits. Failure to comply with these permits and licenses may result in the Government denying, in whole or part, inclusion of the Non-Federal Sponsor's costs for effected design and construction work in project costs for cost-sharing purposes.

6. Compliance with Federal Labor Laws. In undertaking construction and relocations, the Non-Federal Sponsor shall comply with applicable Federal labor laws covering non-Federal construction and relocations, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act). The Non-Federal

Sponsor's failure to comply with these laws may result in the Government denying, in whole or part, inclusion of the Non-Federal Sponsor's costs for relocations and construction of the Project in project costs.

C. Notwithstanding any other provision of this Agreement, real property interests that were previously provided as an item of local cooperation for another Federal project shall not be included in project costs.

ARTICLE VI - ACCOUNTING

A. As of the effective date of this Agreement, total project costs based on 100 percent design of Increment 2 and updated design costs for Increment 3 are projected to be \$106,262,000, with the Government's share of such costs projected to be \$75,064,750 and the Non-Federal Sponsor's share of such costs projected to be \$31,197,250. Costs for technical assistance provided by the Government pursuant to Article II.L. are projected to be \$0. All costs shown in paragraph A. of this Article are estimates only that are subject to adjustment and are not to be construed as the total financial responsibilities of the Government and Non-Federal Sponsor. The total project cost will be updated upon finalization of design. Notwithstanding the foregoing, the Federal share of total project costs for all eligible reimbursements will be limited to the total Federal funds amount, less the retained amount required by Article II.D.3.

1. For Increment 2, the Lincoln Avenue Floodwalls separable element on the west bank of the Napa River north of the Oxbow the Lincoln Avenue Floodwalls separable element, the project costs are projected to be \$69,701,000, with the Government's share projected to be \$47,645,000 and the Non-Federal Sponsor's share projected to be \$22,057,000. Eligible pre-Agreement design work costs are projected to be \$8,198,000, eligible real property interest and relocation costs are projected to be \$10,021,000.

2. For Increment 3, the Imola Avenue to Hatt Street Floodwalls separable element on the west bank of the Napa River south of the Oxbow, the project costs are projected to be \$36,561,000, with the Government's share projected to be \$27,420,750 and the Non-Federal Sponsor's share projected to be \$9,140,250. Eligible pre-Agreement design work projected to be \$99,000, eligible real property interest, relocation, and placement area improvement costs projected to be \$6,877,000.

B. The Government shall provide the Non-Federal Sponsor with quarterly financial reports setting forth the estimated project costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government to date; costs incurred by the Non-Federal Sponsor to date; the total amount of reimbursements made to the Non-Federal Sponsor to date; estimated project costs for real property interests, relocations, and placement area improvements; and the balance of the Federal funds available for the Project.

C. Upon completion of construction of each separable element, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. During each final accounting, the Government shall consider the project costs that the Government incurred and all of the project costs the Non-Federal Sponsor incurred that

are eligible for reimbursement, to ensure that the Non-Federal Sponsor met its cost-sharing requirements for project purpose as follows: for structural flood risk management, a minimum of 25 percent, up to a maximum of 50 percent, of project costs, depending on the eligible value of the real property interests, relocations, and placement area improvements, plus a minimum amount equal to 5 percent of project costs allocated to structural flood risk management and any additional amount necessary to ensure the Non-Federal Sponsor's cost share is not less than 25 percent of project costs allocated to structural flood risk management; and for recreation 50 percent of project costs. The Government will determine the total reimbursable amount for each separable element by project purpose by totaling the Non-Federal Sponsor's contributions towards project costs and subtracting from it the required non-Federal cost share.

Reimbursements under this Agreement shall not exceed the total Federal funds amount as that term is defined in Article I.J., above, minus the retained amount required by Article II.D.3., except if any of the retained amount is unexpended upon completion of the Project, it shall be available for reimbursement purposes. If the Government determines that funds in excess of the total reimbursable amount have been reimbursed to the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of receipt of written notice from the Government, shall provide the Government with the full amount of such excess funds by delivering a check payable to "FAO, USAED, Sacramento (L2)", or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. Should the final accounting determine that the reimbursements provided to the Non-Federal Sponsor are less than the total reimbursable amount, then subject to the limitations in Article V.A.3 and the availability of Federal funds, the Government shall reimburse the Non-Federal Sponsor for the amount equal to such difference.

D. If the Government agrees to provide technical assistance on the Non-Federal Sponsor's behalf, the Government shall provide written notice to the Non-Federal Sponsor of the amount of funds required to cover such costs. No later than 60 calendar days of receipt of such written notice, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government through either payment method specified in Article VI.C. If at any time the Government determines that additional funds are required to cover such costs, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government. If the Government determines that funds provided by the Non-Federal Sponsor exceed the amount that was required for the Government to complete such work, the Government shall refund any remaining unobligated amount.

ARTICLE VII - TERMINATION OR SUSPENSION

If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate this Agreement. If the Government determines that the Federal funds available for the Project will be exhausted prior to completion of the Project, the Government shall notify the Non-Federal Sponsor and the Non-Federal Sponsor may continue with design and construction of the Project with future reimbursements subject to the availability of Federal funds.

ARTICLE VIII - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE IX - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDITS

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits shall not be included in project costs, but shall be included in calculation of the Maximum Cost Limit.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the Non-Federal Sponsor's request, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The Non-Federal Sponsor shall pay the costs of non-Federal audits without reimbursement by the Government.

ARTICLE XI - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE XII - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor:

Chairperson of the Board of Directors
Napa County Flood Control and Water Conservation District
804 First Street
Napa, California 94559

If to the Government:

District Commander
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, California 95814-2922

B. A party may change the recipient or address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

ARTICLE XIII - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XIV - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not a party to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works) or his designee.

DEPARTMENT OF THE ARMY

BY: _____

ADAM R. TELLE
Assistant Secretary of the
Army (Civil Works)

DATE: _____

NAPA COUNTY FLOOD CONTROL AND
WATER CONSERVATION DISTRICT

BY: _____

JOELLE GALLAGHER
Chairperson of the Board of Directors
of the Napa County Flood Control and Water
Conservation District

DATE: _____

APPROVED AS TO FORM
Napa County Counsel

By: _____

Date: _____

Doc Title: _____

PPA