

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE SANTA CLARA VALLEY WATER DISTRICT
TO ENSURE LONG TERM PROTECTION AND FINANCIAL ASSURANCE FOR
THE LAKE SILVEIRA COMPENSATORY MITIGATION PRESERVE FOR THE
UPPER LLAGAS CREEK FLOOD PROTECTION PROJECT

THIS MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into this ____ day of _____, 2019, by and between the Department of the Army, represented by the United States Army Engineer San Francisco District (“District Engineer”) and Santa Clara Valley Water District (“Valley Water”). The District Engineer and Valley Water are collectively referred to as the “Parties.” WITNESSETH, THAT:

WHEREAS, Valley Water is a flood protection and water district created by the Santa Clara Valley Water District Act – California Water Code Appendix Chapter 60 (“District Act”).

WHEREAS, Valley Water is responsible for providing comprehensive water management for all beneficial uses and protection from flooding within Santa Clara County.

WHEREAS, the purposes of Valley Water include the enhancement, protection, and restoration of streams, riparian corridors, and natural resources in connection with carrying out its other purposes in the District Act, and preserving open space in Santa Clara County and supporting the county park system in a manner that is consistent with carrying out the powers granted by the District Act.

WHEREAS, Valley Water’s Board Governance Policies provide that District goals and objectives include: the preservation of creek, bay and ecosystems through environmental stewardship and the improvement of watersheds, streams and natural resources.

WHEREAS, Valley Water is the owner of the 52.932-acre Lake Silveira property in Morgan Hill, California (“Property”).

WHEREAS, in or about June 2019, Valley Water will grant a conservation easement on the Property in favor of the Land Trust of Santa Clara Valley to provide mitigation for potential impacts from construction of the Upper Llagas Creek Flood Protection Project (“Project”).

WHEREAS, the aforementioned conservation easement also provides partial mitigation for impacts of Valley Water's Upper Llagas Creek Flood Protection Project to wetlands and other waters of the United States/State as specified in the NMFS' Biological Opinion No. WCR-2016-4163, dated February 9, 2018.

WHEREAS, the Department of the Army is one of the agencies requiring compensatory mitigation associated with this conservation easement.

WHEREAS, the compensatory mitigation associated with the referenced conservation easement was required to fully offset Valley Water's Upper Llagas Creek Flood Protection Project impacts authorized by Department of the Army permit number 2014-00086S, and these impacts were authorized and primarily incurred prior to issuance of the 2008 Mitigation Rule (33 CFR Parts 325 and 332).

WHEREAS, Valley Water is responsible for funding the perpetual management, maintenance and monitoring of the Property, and this funding responsibility is specified in and governed by the Santa Clara Valley Water District Lake Silveira Compensatory Mitigation Preserve Management Plan, dated February 2019 entered into between Valley Water and the Land Trust of Santa Clara Valley ("Management Plan").

NOW, THEREFORE, the District Engineer and Valley Water agree as follows:

1. The provisions of the Management Plan are incorporated by reference as if fully set forth herein.
2. Valley Water shall provide the District Engineer with its financial analysis conducted to calculate the annual management costs of the Management Plan ("Annual Management Costs") prior to recordation of the Lake Silveira property Conservation Easement and Management Plan.
3. Valley Water estimates the Annual Management Costs to be fourteen thousand three hundred dollars (\$14,300.00).
4. Valley Water shall revise the Annual Management Costs at least every five years to reflect the San Francisco-Oakland-San Jose Consumer Price Index (CPI) for the preceding five years to account for inflation and shall provide the District Engineer with written notice of any such revision.
5. Valley Water shall provide sufficient revenue annually to cover the entire Annual Management Costs.

6. Valley Water shall establish a standby fund in the amount of seventy-one thousand five hundred dollars (\$71,500) or 5 years of the Annual Management Costs (5 years x \$14,300/year) in the form of a Letter of Credit when USACE-Regulatory requires such financial assurance to be established (currently anticipated in Year 2031 or 10 years after construction completion of the Lake Silveira Compensatory Mitigation Preserve). This standby fund shall be utilized in any year when Valley Water's annual appropriations are insufficient to cover the Annual Management Costs. Prior to anticipated Year 2031, the Lake Silveira Compensatory Mitigation Preserve shall be managed in accordance with the 10-year mitigation and monitoring plan (MMP) prepared by Valley Water, approved by the Regulatory Agencies, to offset unavoidable adverse impacts to wetlands and streams authorized by Clean Water Act § 404 permit.
7. The Letter of Credit shall be issued on behalf of Valley Water by a financial institution that provides for payment of the Annual Management Costs to the Department of the Army or its designee in the event Valley Water is unwilling or unable to pay the Annual Management Costs in any year and has failed to remedy such default within 30 days of service of written notice of such default by the District Engineer. As of the effective date of this MOU, the Department of the Army's anticipated designee is the Land Trust of Santa Clara Valley.
8. The Letter of Credit shall have an initial term of five years and an auto-renewal provision for its annual extension beyond that initial term. Valley Water shall establish a replacement Letter of Credit, or such similar financial instrument as approved by the Department of the Army, if the financial institution issuing the Letter of Credit gives notice that it elects not to renew it. Valley Water shall establish the replacement Letter of Credit within 30 days of the financial institution's notice that they elect not to renew the original Letter of Credit. The Letter of Credit shall have terms requiring Valley Water to pay the financial institution issuing the Letter of Credit the full amount of any funds that have been drawn upon by the Letter of Credit and any fees and/or interest accrued therein. A decrease in the CPI would not require a change in the Letter of Credit.
9. The Department of the Army shall accept this MOU, Valley Water Board Resolution authorizing execution of this MOU, and the Letter of Credit referenced herein, as sufficient documentation of Valley Water's commitment towards the Management Plan and Property. With that exception, nothing in this MOU creates any duty, obligation, or responsibility for the Department of the Army.
10. Execution of this MOU shall not be interpreted as a federal assurance regarding later approval of any permit or project.
11. Valley Water acknowledges that for Section 404 permits required for its mitigation properties, it will be required to comply with the provisions of the 2008

Mitigation Rule set forth at 33 C.F.R. section 332.3 (General compensatory mitigation requirements), where active long-term management and maintenance are necessary to ensure long-term sustainability, with the provisions of 33 C.F.R. section 332.7 (d) (Long-term management), and with any other applicable legal guidance including relevant and legally enforceable Department of Army Headquarters guidance.

IN WITNESS WHEREOF, the Parties have executed this MOU, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

SANTA CLARA VALLEY WATER DISTRICT

By: _____
Travis J. Rayfield
Lieutenant Colonel
US Army Commander and
District Engineer

By: _____
Norma J. Camacho
Chief Executive Officer

Date: _____

Date: _____