

**COUNTY OF ALAMEDA
PUBLIC WORKS AGENCY**
399 Elmhurst Street • Hayward, CA 94544-1307
(510) 670-5480

April 10, 2009

The Honorable Board of Supervisors
County Administration Building
1221 Oak Street
Oakland, California 94612

Dear Board Members:

SUBJECT: EXECUTION OF AN AGREEMENT BETWEEN ALAMEDA COUNTY WATER DISTRICT AND ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT FOR REMOVING RUBBER DAM NO. 2 AND MODIFY ITS FOUNDATION IN THE ALAMEDA CREEK FLOOD CONTROL CHANNEL

RECOMMENDATION:

It is recommended that your Board approve and authorize the General Manager of the Alameda County Flood Control and Water Conservation District ("District") to execute an Agreement with the Alameda County Water District ("ACWD") for removing Rubber Dam No. 2 and modify its foundation in the Alameda Creek Flood Control Channel.

SUMMARY/DISCUSSION:

The Alameda Creek Flood Control Channel ("Federal Project") was constructed by the United States Army Corps of Engineers ("Corps") in 1972, and extends from San Francisco Bay approximately 12 miles inland to the vicinity of Niles Canyon. Upon construction by the Corps, the Federal Project was transferred to the District to be maintained in accordance with Corps maintenance and operation guidelines. Rubber Dam No. 2 was constructed by ACWD in 1974 pursuant to an encroachment permit (No. 485184) issued by the DISTRICT.

The ACWD has investigated the feasibility of removing Rubber Dam No. 2 as part of its and the DISTRICT's coordinated efforts to improve anadromous fish passage to and from the Alameda Creek Watershed. To that end, ACWD has prepared, circulated for public comment, and adopted in June 2006 a Mitigated Negative Declaration ("MND") for the removal of Rubber Dam No. 2. Consistent with the DISTRICT's preference, the preferred alternative in the MND envisions that the foundation of the dam will remain in the channel as a Grade Control Structure for the DISTRICT and that a notch and Larinier fishway be built into the foundation to facilitate fish passage during low creek flow conditions. This Agreement facilitates the dam removal, construction of the fishway, and transfer of the dam foundation to the District for use as a grade control structure.

In 1999 the Alameda Creek Fisheries Restoration Workgroup was formed consisting of 20 stakeholders of varying interests including the District and ACWD with the objective to develop a plan-of-action for the reestablishment of a viable steelhead run to the Alameda Creek Watershed.

FINANCING:

There is no impact to the General Fund, nor any cost to the District by execution of this Agreement.

Yours truly,



Daniél Woldesenbet, Ph.D., P.E.
Director of Public Works

DW/ED

c: County Administrator's Office
Auditor-Controller
Alameda Creek Fisheries Workgroup
County Counsel
Clerk of the Board
ACWD

AGREEMENT FOR REMOVAL OF RUBBER DAM

THIS AGREEMENT is made and entered into as of the _____ day of _____, 2009 by and between the Alameda County Flood Control and Water Conservation District (“DISTRICT”) and the Alameda County Water District (“ACWD”).

NATURE OF AND BACKGROUND TO THIS AGREEMENT

A. The Alameda Creek Flood Control Channel, constructed by the United States Army Corps of Engineers in 1972, extends from San Francisco Bay approximately 12 miles inland to the vicinity of Niles Canyon.

B. DISTRICT owns and maintains the constructed channel in accordance with the Corps of Engineers Maintenance Manual.

C. ACWD owns, operates and is responsible for maintaining three inflatable rubber dams, as well as other water diversion facilities located in the Alameda Creek Flood Control Channel. One of ACWD’s inflatable rubber dams (the “Lower Rubber Dam”) is located downstream of the DISTRICT’s drop structure, commonly referred to as the “BART Weir”. The Lower Rubber Dam was constructed by ACWD in 1974 pursuant to an encroachment permit (No. 485184) issued by DISTRICT.

D. The location of the facilities described in paragraph C are shown on the map attached as Exhibit One.

E. DISTRICT and ACWD (the “Parties”) are among the participants in the Alameda Creek Fisheries Restoration Workgroup, established in 1999 (“Workgroup”). The Workgroup commissioned Applied Marine Sciences, Inc. and Hagar Environmental Science to prepare a report assessing the potential for restoring a steelhead population in Alameda Creek. This

report, "An Assessment of the Potential for Restoring a Viable Steelhead Trout Population in the Alameda Creek Watershed", identified several barriers to steelhead migration into the Alameda Creek Watershed, including the BART Weir and ACWD's Lower Rubber Dam, when inflated.

F. ACWD has investigated the feasibility of removing the Lower Rubber Dam as part of its and the DISTRICT's coordinated efforts to improve anadromous fish passage to and from the Alameda Creek Watershed. To that end, ACWD has prepared, circulated for public comment, and adopted in June 2006 a Mitigated Negative Declaration ("MND") for the removal of the Lower Rubber Dam. Consistent with the DISTRICT's preference, the preferred alternative in the MND envisions that the foundation of the dam will remain in the channel as a Grade Control Structure for the DISTRICT and that a Notch will be built into the foundation to facilitate fish passage during low creek flow conditions.

G. Removal of the Lower Rubber Dam and modification of the foundation will require permits or other approvals from the United States Corps of Engineers and the California Department of Fish and Game. The work must also be consistent with the encroachment permit (No. 485184) issued by the DISTRICT and referred to in paragraph C.

H. Both parties share the goal of completing the removal of the Lower Rubber Dam and the modification of its foundation ("the Project") by October 2009.

I. The purpose of this Agreement is to provide (1) for cooperation between both parties in the permitting and construction work required for the Project and (2) for the ownership and maintenance of the foundation once the Project is completed.

THE PARTIES AGREE:

1. Design

ACWD previously has provided DISTRICT with engineering drawings for the Project, entitled "Rubber Dam 2 Decommissioning and Foundation Modification", prepared by CH2MHill, dated November, 2008 and consisting of 13 sheets ("the Drawings"). DISTRICT has approved the Drawings. ACWD will arrange for final drawings to be prepared, consistent in all material aspects with the approved Drawings, and will provide a set to DISTRICT before advertising for bids to construct the Project. DISTRICT will not unreasonably delay or withhold its approval of the final drawings. If DISTRICT does not object to the final drawings within 14 calendar days after receipt, it will be deemed to have approved them.

2. Permitting

ACWD will provide DISTRICT with a copy of all applications for permits and approvals for construction of the Project which it submits to regulatory agencies. DISTRICT will actively support ACWD's applications for these permits and approvals.

3. Construction

ACWD will carry out the Project at its sole cost and expense in accordance with the final drawings approved by DISTRICT, with the General Provisions and Special Provisions of Permit No. 485184 to the extent the same are applicable, and with all other permits and approvals from regulatory agencies.

This Agreement will constitute permission from DISTRICT for ACWD to carry out the Project and DISTRICT will not require either an amendment to encroachment Permit No. 485184 nor a separate permit.

4. Ownership

After completion of the Project, acceptance by ACWD and completion of the two year Demonstration Period, ACWD shall quitclaim to DISTRICT any interest in the dam foundation it may have (and shall relinquish any rights to the real property underlying the foundation granted by the easement from DISTRICT recorded on December 31, 1980, as Series No 80-230310, Alameda County Official Records) by delivery of a Quitclaim Deed substantially in the form shown on Exhibit Two. DISTRICT shall accept ownership of the foundation and the underlying real property by executing the Certificate of Acceptance included in Exhibit Two and shall record the Quitclaim Deed within 14 calendar days after receipt from ACWD. Concurrently with recording the Quitclaim Deed, DISTRICT shall rescind Permit No. 485184.

5. Repair and Maintenance of Grade Control Structure

At DISTRICT's request, the dam foundation will remain in place after removal of the Rubber Dam itself, in order to serve as a grade control structure. The foundation is hereafter referred to as the "Grade Control Structure". Upon recordation of the Quitclaim Deed, DISTRICT shall be responsible for performing all cleaning, maintenance, repairs and reconstruction of the Grade Control Structure, as well as of channel embankments and the channel bottom upstream and downstream of the Grade Control Structure, subject to the cost allocation provisions in Section 6D.

6. Cleaning of Grade Control Structure

A. Commencing with the acceptance of the Project by ACWD upon completion of construction, and for two years thereafter, ACWD shall be responsible, at its expense, for clearing sediment and removing small objects that may become lodged within the Larinier Notch in the Grade Control Structure and that, in the judgment of ACWD, are impeding

fish passage. Large objects that are beyond ACWD's ability to remove (such as appliances, automobile bodies, etc.) shall be removed by DISTRICT at its expense. This two-year period constitutes the "Demonstration Period".

B. The purpose of the Demonstration Period is to confirm the Parties' expectations that cleaning and removal of debris from the Grade Control Structure will not be greater than that required for other comparable grade control structures in Alameda Creek.

During the Demonstration Period, the Parties will keep accurate records of cleaning and debris removal performed at the Grade Control Structure and at the existing grade control structure located within the Alameda Creek Flood Control Channel immediately downstream of the Grade Control Structure (the "Benchmark Structure"). The records will include the dates on which work is performed, a description of the work performed, the number of employee hours expended, and equipment and materials used. Each party shall compile a report on work performed at the Grade Control Structure and (in the case of DISTRICT at the Benchmark Structure) during each month and shall send a copy of such reports for each three-month period within 21 calendar days after the end of each calendar quarter, (i.e., by January 15, April 15, July 15, and October 15) to the other party.

The Parties also agree to notify each other before work is performed (except in case of an emergency) so that the Parties will each have an opportunity to observe work performed by both parties at the Grade Control Structure and at the Benchmark Structure.

C. After the end of the Demonstration Period, the DISTRICT shall perform all cleaning and debris removal required at the Grade Control Structure in addition to the maintenance, repair and reconstruction, responsibility for which it will have assumed as described in Section 5. The responsibility for the cost of that cleaning and debris removal work shall be determined as provided in subsection D.

D. At the end of the Demonstration Period, the Parties shall compare the cost of cleaning/debris removal performed during the Demonstration Period by both parties at the Grade Control Structure and by the DISTRICT at the Benchmark Structure.

If the cost of cleaning and debris removal work performed at the Grade Control Structure does not exceed that of equivalent work performed at the Benchmark Structure, DISTRICT shall thereafter be responsible for the cost of cleaning and debris removal at the Grade Control Structure.

Conversely, if the cost of the cleaning and debris removal work performed at the Grade Control Structure does exceed that of equivalent work performed at the Benchmark Structure during the Demonstration Period, ACWD shall pay DISTRICT fifty percent (50%) of the difference between DISTRICT'S maintenance costs for the Benchmark Structure and DISTRICT'S cost to maintain Grade Control Structure. In consideration of the potential for future cleaning and debris removal that may be required at the Grade Control Structure subsequent to the end of the Demonstration Period, ACWD shall pay DISTRICT annually, one-half the amount it reimbursed DISTRICT immediately after the two year Demonstration Period, adjusted by the change in the Consumer Price Index, All Urban Consumers, for the San Francisco-Oakland-San Jose Metropolitan area, compiled by the U.S. Department of Labor, Bureau of Statistics ("Index"). The change in the Index to be used in calculating the initial payment will be the difference between the Index for the month and year that the Demonstration Period ended and the month and year 12 months thereafter. The change in the Index for subsequent years will be the difference between the Index last used and that 12 months thereafter.

ACWD and DISTRICT will continue to monitor the costs annually and if the future annual cost of maintaining the Grade Control Structure (for four subsequent years of

maintenance) is equal to or less than the Benchmark Structure, DISTRICT shall thereafter be responsible for the cost of cleaning and debris removal at the Grade Control Structure.

Conversely if the future cost of sediment and debris removal increases (for four subsequent years), ACWD will increase the annual payment to reimburse the DISTRICT for one-half the amount of the additional cost of sediment and debris removal.

E. At the end of the Demonstration Period, the DISTRICT and ACWD will meet and confer to jointly evaluate whether a permanent access road or walkway to the site is appropriate, based on the actual maintenance activities performed and documented at the Larinier Notch during the Demonstration Period. For example, if no maintenance was required during the Demonstration Period, construction of a permanent access road or walkway is not appropriate and will not be constructed. If minimal maintenance (i.e., personnel with hand tools) was required during the Demonstration Period, the DISTRICT may require a walkway to be constructed. If vehicles or heavy equipment was required during the Demonstration Period, the DISTRICT may require an access road to be constructed.

If, based on the above criteria, the DISTRICT requires a walkway or access road to be constructed, the DISTRICT will design, prepare CEQA documentation, obtain all required permits, perform any required hydraulic calculations, prepare bid documents, evaluate bids, award construction to a contractor, manage and inspect construction, accept completion of the project, and perform all other tasks required. The DISTRICT will allow ACWD to review and comment on all prepared documents before the documents are either submitted to a resource agency or issued for bid, as appropriate. The DISTRICT will also submit monthly cost reports to ACWD. Upon completion and final acceptance of construction, ACWD will pay the DISTRICT for all appropriate and documented costs (e.g., DISTRICT labor, outside services, materials) directly associated with the design and construction of the walkway or access road.

F. If the parties are unable to agree on the amount, if any, due to DISTRICT under subsection D or E, the dispute will be resolved by mandatory binding arbitration, using a single arbitrator, and following the rules of the California Arbitration Act (Code of Civil Procedure §1281 et seq).

Notice

7. During the design, permitting and construction of the Project, day-to-day communications will be exchanged between the project managers: DISTRICT: Moses Tsang, Supervising Civil Engineer or (in his absence or unavailability) Rohin Saleh, Supervising Civil Engineer; ACWD: Patricia Dustman, Engineering Supervisor or (in her absence or unavailability) Kalpana Gandhi, Project Engineer.

A. During the Demonstration Period, day-to-day communications will be exchanged between Laura Hidas, Water Supply Supervisor and Patricia Mattison, Field Maintenance Supervisor. It is anticipated that this communication will be short notice, by phone call.

B. Formal communications, including the quarterly reports referred to in Section 6.B, shall be sent by personal delivery or first class mail, or by facsimile transmission, as follows:

If to DISTRICT: General Manager Alameda County Flood Control and
Water Conservation District
399 Elmhurst Street
Hayward, CA 94544
Fax: 510-670-5541

If to ACWD: General Manager
 Alameda County Water District
 43885 South Grimmer Boulevard
 Fremont, CA 94538
 Fax: 510-770-1793

8. Indemnification

ACWD agrees to defend, indemnify and hold harmless DISTRICT, its Board of Supervisors, its predecessors, successors, assignees, agents, departments, officials, representatives, employees and all persons acting by, through, under or in concert with any of them, and each of them (collectively, "DISTRICT Indemnitees") from any and all claims, liabilities and losses arising out of ACWD's negligent acts in its performance of this Agreement.

The DISTRICT agrees to defend, indemnify and hold harmless ACWD, its Board of Directors, its predecessors, successors, assignees, agents, departments, officials, representatives, employees and all persons acting by, through, under or in concert with any of them, and each of them (collectively, "ACWD Indemnitees") from any and all claims, liabilities and losses arising out of DISTRICT's negligent acts in its performance of this Agreement.

9. Exhibits

Exhibits One, and Two, attached hereto, are incorporated herein as part of this Agreement by this reference.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written by their duly authorized officers.

ALAMEDA COUNTY WATER DISTRICT

ALAMEDA COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

By: _____
Name: _____
President, Board of Directors

By: _____
Name: Alice Lai-Bitker _____
President, Board of Supervisors

Attest: _____
District Secretary

Attest: _____
Clerk of the Board of Supervisors

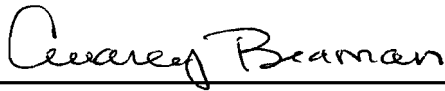
Date: _____

Date: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:
Richard Winnie, District Counsel

ACWD Legal Counsel



Name: _____
Title: _____

EXHIBIT ONE

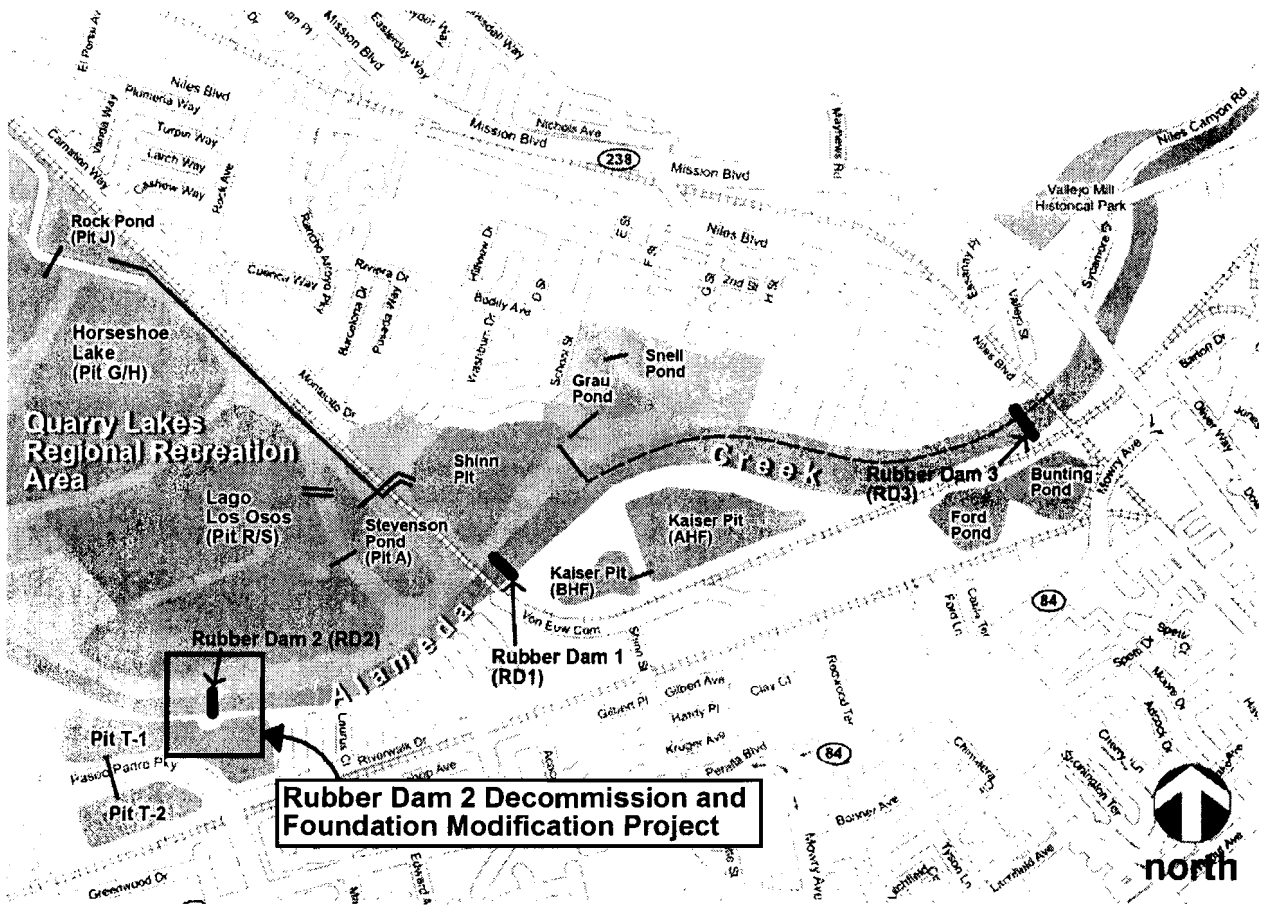


EXHIBIT TWO

Quit Claim example and Certificate of Acceptance to be added.