

**Indemnity Agreement
Regarding a Pajaro River Flood Risk Management Project
By and Among the City of Watsonville, the County of Monterey,
the County of Santa Cruz, the Monterey County Water Resources Agency,
and Zone 7 of Santa Cruz County Flood Control and Water Conservation District**

This Indemnity Agreement (“Agreement”) is made and entered into by and among the City of Watsonville (“Watsonville”), the County of Monterey (“Monterey”), the County of Santa Cruz (“Santa Cruz”), the Monterey County Water Resources Agency (“MCWRA”), and Zone 7 of Santa Cruz County Flood Control and Water Conservation District (“Zone 7”). A signatory to this Agreement is referred to herein as a Party, and collectively they are referred to as the Parties.

RECITALS

WHEREAS, there is a need to develop a regional water control plan (“Plan”) for coordinated and regional efforts to plan, design, finance, construct, operate, and maintain facilities and works necessary to enhance flood protection in areas of Santa Cruz and Monterey Counties within the Pajaro River watershed which are designated for residential, commercial, agricultural, or industrial uses.

WHEREAS, the Parties wish to form a joint powers agency to plan, design, finance, construct, operate, and maintain such a regional water control plan (hereinafter “Joint Powers Agency”).

WHEREAS, some of the Parties have existing contractual or other obligations regarding certain facilities of the current system of flood risk reduction (“Current System”) which could result in liability on the part of that Party in the event of flooding related to those certain facilities (“Existing Obligations”).

WHEREAS, Watsonville does not have these Existing Obligations as to facilities of the Current System and therefore should not have any liability in the event of flooding related to those facilities.

WHEREAS, after creation of the Joint Powers Agency, it is expected that the Joint Powers Agency will assume operation and maintenance of the Current System until new facilities can be planned, designed, and constructed.

WHEREAS, because the Joint Power Agency will operate and maintain certain facilities of the Current System, it is possible the Joint Powers Agency could be held responsible for damages for such operation and control.

WHEREAS, if the Joint Powers Agency is found liable for damages associated with the operation and maintenance of the Current System, it is also possible that a court could find liability on the part of its member agencies, including those who would not have otherwise been liable, even though the Parties understand the law to be otherwise.

WHEREAS, until such time as the Plan is implemented, the Parties do not intend to burden Watsonville with liability it would not otherwise have had absent its agreement to participate in the creation of the Joint Powers Agency for maintaining and operating the Current System's facilities and pursuing the Plan.

WHEREAS, the Parties desire to enter into this Agreement so that, from the creation of the Joint Powers Agency until the completion of each facility in the Plan, Watsonville is not exposed to liability by the creation of or its participation in the Joint Powers Agency or that agency's maintenance or operation of any existing facilities of the Current System.

AGREEMENT

In consideration of the mutual promises and covenants herein contained, the Parties hereto agree as follows:

1. **Incorporation of Recitals.** The above recitals are incorporated in this Agreement by reference.
2. **Condition Precedent.** This Agreement shall have no force and effect unless and until the Parties execute a Joint Exercise of Powers Agreement to create the Joint Powers Agency. This condition is for the benefit of all Parties.
3. **Term.** This Agreement shall be effective upon the effective date of a Joint Exercise of Powers Agreement as referenced in Section 2. This Agreement shall remain in effect so long as a Covered Claim, as defined below, exists.
4. **Indemnity, Defense, and Hold Harmless.**
 - (a) In addition to the definitions described in the Recitals, the following definitions apply to this agreement:
 - (1) "Covered Claim" means an occurrence as to which an injured third-party files a written claim or lawsuit against the Joint Powers Agency and/or Watsonville claiming damage from flooding caused by the design, construction, operation, or maintenance of a facility existing on the date of this Agreement that is part of the Current System for which the Joint Power Agency assumed operation or maintenance or some related role. A Covered Claim does not include claims related to any facility which the Joint Powers Agency constructs or improves.
 - (3) "Indemnifying Party" means a Party that has Existing Obligations as to a facility that gave rise to a Covered Claim.
 - (4) "Losses" means all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses Watsonville incurs of whatever kind, including reasonable attorney fees, expert and consulting fees, other fees, and the costs of enforcing any right to indemnification under this Agreement and the cost of pursuing any insurance providers.

(5) “Operation and Maintenance Milestone or O&M Milestone” includes the following:

- (i) As to a facility that is part of a Project Partnership Agreement with the USACE, when the USACE adopts a new, or changes to an existing, USACE O&M Manual reflecting work on the facility;
- (ii) As to a facility that is not part of a Project Partnership Agreement but for which the State of California has required an Operation, Maintenance, Repair, Replacement, and Rehabilitation (“OMRR&R”) Agreement, when the work has been completed on a facility such that the obligations to operate and maintain the facility are in effect under an OMRR&R Agreement; or
- (iii) As to any facility with no federal or state government funding, when the Parties agree by a separate agreement that an O&M Milestone has occurred as to that facility.

(b) Should a court of competent jurisdiction assign liability to Watsonville for a Covered Claim, then Watsonville shall be entitled to indemnification under this Agreement from all Indemnifying Parties.

(c) Consistent with Section 4(b), and subject to the terms and conditions of this Agreement, an Indemnifying Party shall indemnify, defend, and hold harmless Watsonville and its officers, employees, agents, successors, and permitted assigns against any and all Losses arising out of or relating to any Covered Claim of a third party to the extent such Losses are caused by or related to a facility or component of the Current System for which the Indemnifying Party has Existing Obligations.

(d) Notwithstanding anything to the contrary in this Agreement, an Indemnifying Party is not obligated to indemnify or defend Watsonville against:

- (1) Those portions of a Covered Claim (whether direct or indirect) or corresponding Losses arising out of or resulting from specific actions by Watsonville leading to a finding of liability by a court of competent jurisdiction; or
- (2) Any Covered Claim which arises from a Loss which occurred after an O&M Milestone with respect to the facility alleged to have caused that Loss.

5. **Notices.** Notice to be provided to any Party to this Agreement arising out of matters pertaining to this Agreement shall be addressed as follows:

For Santa Cruz County:

Carlos Palacios, County Administrative Officer
701 Ocean Street, Rm. 520
Santa Cruz, CA 95060
carlos.palacios@santacruzcounty.us

(831) 454-2100

For Monterey County:

Charles J. McKee, County Administrative Officer
168 West Alisal Street, Third Floor
Salinas, CA 93901
McKeeCJ@co.monterey.ca.us
(831) 755-5115

For Monterey County Water Resources Agency:

Brent Buche, General Manager
1441 Schilling Place, North Building
Salinas, CA 93901
bucheb@co.monterey.ca.us
(831) 755-8982

For City of Watsonville:

City Clerk's Office
275 Main St., Suite 400 (4th Floor)
Watsonville, CA 95076
cityclerk@cityofwatsonville.org
831-768-3040

For Santa Cruz County Flood Control and Water Conservation District Zone 7:

Matt Machado, District Engineer
701 Ocean Street, Rm. 410
Santa Cruz, CA 95060
matt.machado@santacruzcounty.us
(831) 454-2368

Any party may change the address to which subsequent notice and/or other communications can be sent by giving written notice designating a change of address to the other Parties, which shall be effective upon receipt.

6. **Modifications.** This Agreement contains the entire understanding of the Parties and no alteration, amendment, variation, or waiver of the terms of this Agreement shall be valid unless made in writing and signed by all Parties. Waiver by any Party of any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent, or any other right hereunder.

7. **Governing Laws and Jurisdiction.** This Agreement shall be deemed to have been executed and to be performed within the State of California and shall be construed and governed

by the internal laws of the State of California.

8. **Assignment; Binding on Successors.** The rights and duties of the Parties may not be assigned or delegated without the written consent of all other Parties. Any attempt to assign or delegate such rights or duties absent such consent shall be null and void. This Agreement shall be binding upon and shall inure to the benefit of the successors and permitted assigns of the Parties hereto. Any approved assignment or delegation shall be consistent with the terms of any contracts, resolutions, indemnities and other obligations of the Joint Powers Agency then in effect.

9. **Interpretation.** This Agreement shall be deemed to have been prepared equally by all of the Parties and shall not be construed or interpreted more favorably for one Party on the basis that another Party prepared it.

10. **Entire Agreement.** This Agreement constitutes the entire contract among the Parties regarding indemnity for operation and maintenance of flood risk reduction facilities providing protection for the parties and their residents on the date of this Agreement.

11. **Severability.** Should any part, term or provision of this Agreement be decided by any court of competent jurisdiction to be illegal or in conflict with any applicable law, or otherwise rendered unenforceable or ineffectual, the validity of the remaining portions or provisions shall not be affected thereby and, to that end, the Parties hereby declare the provisions of this Agreement to be severable.

12. **Duplicate Counterparts; Electronic Signatures.** This Agreement may be executed in duplicate counterparts each of which shall constitute the original agreement. Signatures may be given by emailed pdf or other electronic means with the same force as original, wet signatures.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed on the day and year indicated below.

COUNTY OF SANTA CRUZ

By: _____
CHAIRPERSON

Date: _____

ATTEST:

CLERK OF THE BOARD

APPROVED AS TO FORM:

COUNTY COUNSEL

SANTA CRUZ COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

By: _____
CHAIRPERSON

Date: _____

ATTEST:

CLERK OF THE BOARD

APPROVED AS TO FORM:

DISTRICT COUNSEL

COUNTY OF MONTEREY

By: _____
CHAIRPERSON

Date: _____

ATTEST:

CLERK OF THE BOARD

APPROVED AS TO FORM:

COUNTY COUNSEL

MONTEREY COUNTY WATER RESOURCES
AGENCY

By: _____
CHAIRPERSON

Date: _____

ATTEST:

CLERK OF THE BOARD

APPROVED AS TO FORM:

AGENCY COUNSEL

CITY OF WATSONVILLE

By: _____
Matthew D. Huffaker, City Manager

Date: _____

ATTEST:

Beatriz V. Flores, City Clerk

APPROVED AS TO FORM:

Alan J. Smith, City Attorney