

Attachment A

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THE PAJARO RIVER WATERSHED FLOOD PREVENTION AUTHORITY HEC-RAS HYDRAULIC AND SEDIMENT TRANSPORT MODEL USE AGREEMENT

THIS AGREEMENT is entered into on this 30th day of March, 2020, by and between PAJARO RIVER WATERSHED FLOOD PREVENTION AUTHORITY, (hereinafter referred to as "PRWFPA"),
Schaaf and Wheeler Consulting Civil Engineers

(hereinafter referred to as "CONSULTANT or USER"), and
Monterey County

(hereinafter referred to as "PUBLIC AGENCY or PROJECT SPONSOR").

WITNESSETH

WHEREAS, PRWFPA has developed a HEC-RAS Hydraulic and Sediment Transport Model (hereinafter referred to as "MODEL") in support of its Program to identify, evaluate, fund, and implement flood prevention and control strategies in the Pajaro River Watershed, on an intergovernmental basis. This Model, which consists of electronic model files with associated input and output data files, as well as other documentation; and

WHEREAS, PRWFPA established a Calibrated and Validation Data Set using channel cross section data from 1987 to 2000, and simulation of conditions from 1970 to present; and makes available the MODEL for the below-referenced project; and

WHEREAS, CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR wishes to use PRWFPA's MODEL for the
Miller Trust Commercial Project

(hereinafter referred to as "PROJECT"); and

WHEREAS, CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR represents that they are professionally qualified to use PRWFPA's MODEL.

NOW, THEREFORE, THE PARTIES HERETO DO MUTUALLY AGREE AS FOLLOWS:

1. TERM OF AGREEMENT

The term of this Agreement is for a period of 12 month(s) commencing March 30, 2020 and terminating March 30, 2021.

2. CONSIDERATION

PRWFPA's MODEL is being provided to CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR for use on the above-referenced PROJECT at no cost.

3. SCOPE OF PRWFPA SERVICES

- A. PRWFPA will provide CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR with a copy of PRWFPA's MODEL and technical documentation for use on the PROJECT.
- B. PRWFPA, ITS AFFILIATES, SUBCONTRACTORS AND REPRESENTATIVES MAKE NO WARRANTIES, EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIM ANY WARRANTIES INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE OF THE MODEL.

4. CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR AGREE AS FOLLOWS:

- A. To only install, operate and use the MODEL on a computer system owned, leased or otherwise controlled by USER in its own facilities.
- B. To use and execute all portions of the MODEL on such computer systems for the limited purpose of the identified PROJECT unless prior written approval of PRWFPA is obtained by CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR.
- C. To use the most current release of the PRWFPA MODEL and related data as determined by PRWFPA in its sole discretion at the time the MODEL is requested for PROJECT unless written approval by PRWFPA to use an earlier dataset is first obtained.
- D. To accept the sole responsibility for determining the suitability of the PRWFPA MODEL and related data for use on the above-referenced PROJECT. PRWFPA makes no warranty on the results, policies or decisions derived from these data for the PROJECT or any project, study or program not conducted by PRWFPA. PRWFPA accepts no liability for the results of the model applications.
- E. Any use, copying, distribution, adaptation or public display of the MODEL by USER not authorized by this Agreement shall automatically terminate USER's rights hereunder. Use of the MODEL on processors accessible through communications networks through terminals and devices not on premises owned or controlled by USER is prohibited unless otherwise agreed in writing by PRWFPA.

- F. USER agrees not to make modifications or additions to the MODEL without the prior written approval of PRWFPA. In the event USER makes modifications, additions or updates after receiving written approval from PRWFPA, USER shall promptly notify PRWFPA of and make available to PRWFPA all modifications, additions, or updates USER makes to the MODEL and shall grant PRWFPA a perpetual, royalty-free license to use, reproduce, sublicense, and to otherwise make available to third parties the MODEL as modified, and to modify such modifications, additions, or updates.
- G. Title to the MODEL, including all modifications, additions, deletions, input and output file additions and modifications, updates, copies and derivative works thereof by USER, shall be in and remain with PRWFPA. USER hereby assigns to PRWFPA ownership of all such modifications, additions, deletions, input and output file additions and modifications, updates, copies and derivative works.
- H. To provide PRWFPA access, upon request and/or upon completion, to electronic files and a copy of documentation, of the PROJECT. Failure to provide PRWFPA access to electronic files and a copy of the PROJECT documentation through administrative draft working stages and failure to provide PRWFPA the files themselves for draft and later PROJECT stages, as either requested by PRWFPA or upon PROJECT completion, shall immediately terminate the rights of CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR to use the PRWFPA MODEL and related data for this PROJECT and/or future projects.

Nothing herein is intended to require the administrative draft of any environmental document for the PROJECT or the CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR's internal deliberative processes to be provided or released for public review.

- I. Not to use, or claim to use, the PRWFPA MODEL without the prior written consent of PRWFPA. Prior to granting consent, PRWFPA shall have sole discretion to examine all of the input data and process(es) including any modifications or adjustments to the PRWFPA MODEL to determine if it is consistent with PRWFPA standards.
- J. **CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR AGREES THAT ITS SOLE REMEDY AGAINST PRWFPA, ITS AFFILIATES, SUBCONTRACTORS AND REPRESENTATIVES FOR LOSS OR DAMAGE CAUSED BY ANY DEFECT OR FAILURE OF THE MODEL, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, SHALL, TO THE EXTENT FEASIBLE (AS DETERMINED SOLELY BY PRWFPA) BE THE REPAIR OR REPLACEMENT OF THE MODEL. IN NO EVENT SHALL PRWFPA, ITS AFFILIATES, SUBCONTRACTORS OR REPRESENTATIVES BE LIABLE FOR**

INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, OR FOR LOST PROFITS, SAVINGS, OR REVENUES OF ANY KIND, OR FOR LOST DATA OR DOWNTIME, WHETHER OR NOT PRWFPA, ITS AFFILIATES, SUBCONTRACTORS OR REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

5. USE OF THE PROJECT MODEL

- A. CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR shall include the following statement in any document that makes use of these data, either in whole or in part:

“PRWFPA makes no warranty, express or implied, on the results or opinions derived from these data for any PROJECT study not conducted by PRWFPA.”

- B. If the data files are used without modification or adjustment, as verified by PRWFPA, the PROJECT study shall indicate use of the PRWFPA MODEL.
- C. If the data files are used with modification or adjustment, unless those modifications are made by PRWFPA, USER shall disclose in any document, plan, policy or program using the results of the modified MODEL, either in whole or in part, that those results are not the product of the PRWFPA MODEL, rather that they are a product of an adjusted PRWFPA MODEL. Those adjustments shall be disclosed to any user of the modeling results.

6. OWNERSHIP OF WORK PRODUCT

- A. Ownership of the PRWFPA MODEL and any computer codes, customized computer routines developed using proprietary or commercial software packages, and other spreadsheets, databases and routines developed for the purpose of generating existing and forecast volumes for the PRWFPA MODEL shall vest with PRWFPA. Ownership of study reports, data, studies, surveys, charts, maps, figures, photographs, negatives, memoranda, and any other documents which are developed, compiled, or produced as a result of this Agreement, whether or not completed, shall vest with PRWFPA and PUBLIC AGENCY.
- B. Methodology, materials, software, logic and systems developed under this Agreement are the property of PRWFPA, and may be used as PRWFPA sees fit, including the right to revise or publish the same without limitation. The PRWFPA will credit the USER if the USER makes modifications, and the PRWFPA uses it as a revision and/or publishes it including contributed USER modification.

7. INDEMNIFICATION

- A. The CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR agrees, to the fullest extent permitted by law, to indemnify and hold harmless the PRWFPA, its officers, directors and employees (collectively, PRWFPA) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs (collectively "Claims"), arising from use by CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR of the PRWFPA MODEL, or by its officers, employees, agents, consultants or sub-consultants or anyone for whom the CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR is legally liable, except to the extent such Claims are caused by the sole negligence or willful misconduct of PRWFPA, its officers, employees, contractors, consultants or anyone for whom PRWFPA is legally liable. Neither PRWFPA nor the CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence or for the negligence of others.

8. SUSPENSION/TERMINATION OF AGREEMENT

- A. The right is reserved by PRWFPA to terminate or suspend this Agreement with or without cause at any time by giving fifteen (15) days written notice to the other party(ies). In that event, all MODEL electronic files and associated documentation of revisions and adjustments related to the PROJECT shall be delivered to PRWFPA within ten days of notice of termination/suspension. The requisite form for transmittal of these electronic files is CD or DVD with the CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR, PROJECT name, USER and date of transmittal clearly labeled. Upon termination, or upon immediate request by PRWFPA, USER shall return all copies, and submit any modifications or derivative works and accompanying documentation of revisions to PRWFPA. Thereafter, the provisions of Sections 3.B., 4.E and 4.G shall continue to apply in accordance with their terms, notwithstanding the termination of this Agreement.

9. NO THIRD PARTY RIGHTS

- A. This Agreement is made solely for the benefit of the Parties to this Agreement and their respective permitted successors and assigns, and no other person or entity shall have or acquire any right by virtue of this Agreement unless otherwise agreed to by all parties hereto.

10. SEVERABILITY

In the event any provision of this Agreement is found to be invalid, voidable or unenforceable, the parties agree that unless it materially affects the entire intent and purpose of this Agreement, such

invalidity, voidability or unenforceability shall affect neither the validity of this Agreement nor the remaining provisions herein, and the provision in question shall be deemed to be replaced with a valid and enforceable provision most closely reflecting the intent and purpose of the original provisions.

11. ASSIGNMENT

- A. This Agreement may not be assigned or otherwise transferred by either party hereto without the prior written consent of the other party.

12. NOTICES

- A. Any notice to be given to the parties hereunder shall be addressed as follows (until notice of a different address is given to the parties):

PAJARO RIVER WATERSHED FLOOD PREVENTATION AUTHORITY:

Attn: Maura Twomey
PRWFPA Executive Coordinator
24580 Silver Cloud Court, Monterey, CA 93940
P.O. Box 2453
Seaside, CA 93955

CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR:

Monterey County RMA

1441 Schilling Place, 2nd Floor

Salinas, California 93901

- B. Any and all notices or other communications required or permitted relative to this Agreement shall be in writing and shall be deemed duly served and given when personally delivered to either of the parties, CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR or the PRWFPA, to whom it is directed; or in lieu of such personal service, when deposited in the United States mail, first class, postage prepaid, addressed to CONSULTANT/ USER/PUBLIC AGENCY/ PROJECT SPONSOR or to the PRWFPA at the addresses set forth above.
- C. Either party may change their address for the purpose of this paragraph by giving written notice of such change to the other party in the manner provided for in the preceding paragraph.

13. DISPUTE RESOLUTION

- A. The parties to this Agreement desire, if possible, to resolve disputes, controversies

and claims (hereinafter referred to as "DISPUTES") arising out of this Agreement without litigation. To that end, at the written request of a party, each party shall appoint a knowledgeable, responsible management representative to meet and negotiate in good faith to resolve any DISPUTES arising under this Agreement. The parties intend that these negotiations be conducted by non-lawyer, business representatives. The discussions shall be left to the discretion of the representatives. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as confidential information developed for purposes of settlement, shall be exempt from discovery and production, and shall not be admissible in any action or proceeding arising under or concerning this Agreement without the concurrence of all parties. Documents identified in or provided with such communications, which are not identified as being prepared for purposes of the negotiations are not so exempted and may, if otherwise admissible, be admitted in evidence in any such action or proceeding.

14. ATTORNEY'S FEES AND COURT VENUE

- A. Should either party to this Agreement bring legal action against the other, (formal judicial proceeding, mediation or arbitration), the party prevailing in such action shall be entitled to a reasonable attorney's fee which shall be fixed by the judge, mediator or arbitrator hearing the case and such fee shall be included in the judgment, together with all costs.

15. AGREEMENT CONTAINS ALL UNDERSTANDINGS: AMENDMENT

- A. This document represents the entire and integrated Agreement between the PRWFPA and CONSULTANT/USER/PUBLIC AGENCY/PROJECT SPONSOR, and supersedes all prior negotiations, representations and agreements, either written or oral.

16. GOVERNING LAW

- A. This Agreement shall be governed by the laws of the State of California.

USER ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT AND UNDERSTANDS IT, AND THAT BY ENTERING INTO THE AGREEMENT, INSTALLING AND EXECUTING THE MODEL, OR MAKING ANY OTHER USE OF IT, USER AGREES TO BE BOUND BY THE TERMS AND CONDITIONS HEREOF. THE PARTIES FURTHER AGREE THAT, EXCEPT FOR SEPARATE WRITTEN AGREEMENTS BETWEEN PRWFPA AND USER, THIS AGREEMENT IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE RIGHTS AND LIABILITIES OF THE PARTIES.

IN WITNESS WHEREOF, the parties, by those having the authority to bind their organization to the terms of this Agreement, have executed this PRWFPA MODEL Use Agreement for the following project on the date first hereinabove written.

PAJARO RIVER WATERSHED FLOOD PREVENTION AUTHORITY

By: _____

Title: _____

CONSULTANT/USER

By: Charles Anderson

Title: President

Firm: Schaaf and Wheeler Consulting Civil Engineers

PUBLIC AGENCY/SPONSOR

By: _____

Title: _____

Firm: Monterey County