

AGREEMENT FOR THE FORBEARANCE OF WATER
IN THE POGONIP CREEK AND REDWOOD CREEK SYSTEMS
FOR FISHERIES ENHANCEMENT IN THE SAN LORENZO RIVER LAGOON
SANTA CRUZ, CALIFORNIA

THIS AGREEMENT is made and entered into as of this ___ day of _____, 2022, by and between the Resource Conservation District of Santa Cruz County (“RCD”) and the City of Santa Cruz (“City”) for the forbearance of use of decreed water in the Pogonip Creek and Redwood Creek systems.

RECITALS

WHEREAS, the City’s Water Department (“Water Department”) was formed to provide clean, safe and reliable drinking water to the residents of the City of Santa Cruz, and the Water Department’s Watershed Section and its Water Resources Management workgroup’s responsibilities include environmental regulatory compliance and natural resource management; and

WHEREAS, the City of Santa Cruz has a long history of proactive natural resource stewardship, with watershed protection becoming an increasingly important part of the Water Department’s operations in the late 1990’s due to the 1996 amendments to the Safe Drinking Water Act and the Endangered Species Act listings of several local species such as steelhead, coho, tidewater goby and the California red-legged frog; and

WHEREAS, the Water Department’s Watershed Section oversees operations of the City’s nearly 4,000 acres of watershed lands and engages in natural resource management planning both within and beyond those limits to the extent that it supports the Department’s mission; and

WHEREAS, Pogonip Creek and Redwood Creek are karst derived streams which originate and flow through Pogonip Open Space Preserve. Pogonip is a City-owned park which operates under the jurisdiction of the City’s Parks & Recreation Department (“Parks Department”).

WHEREAS, the City proposed to dedicate a total of approximately 0.5 cfs of summer instream flows in the Pogonip Creek and Redwood Creek cold water tributaries to the San Lorenzo River as part of its grant proposal to the California Wildlife Conservation Board (“WCB”) for the grant proposal titled “Addressing Limiting Factors in the San Lorenzo River Lagoon: A Bottom Up Approach to Enhancing Stream Flow” (the “Grant”); and

WHEREAS, the WCB accepted the City’s Grant proposal on April 4, 2019, and executed a Grant Agreement with the City on or about September 11, 2019 (“Grant Agreement”) a copy of which is attached hereto and incorporated herein by this reference as Exhibit A; and

WHEREAS, Paragraph 2 of the Work Plan in the Grant Agreement states:

As in-kind match for this Agreement Grantee [the City] will dedicate a total of approximately 0.5 cfs of instream flows during the low flow season in two important cold-water tributaries in the lower watershed (Pogonip and Redwood Creeks) to benefit anadromous salmonid habitat. This dedication will involve the City of Santa Cruz' riparian water rights and will be formalized via a 20-year forbearance agreement between the City of Santa Cruz and the Resource Conservation District of Santa Cruz County, or other eligible entity; and

WHEREAS, Task 3.1 of the Grant Agreement:

Task 3.1 – Forbearance Agreement. Grantee [the City] will work with the Resource Conservation District of Santa Cruz County, or other eligible entity, to draft and enter into a forbearance agreement to voluntarily forbear diversion for a minimum of 20 years, a total of approximately 0.5 cfs of instream flows in Pogonip Creek and Redwood Creek during the low flow season (June – October); and

WHEREAS, task 3.2 of the Grant Agreement states:

Task 3.2. Monitoring of Instream Flows. Grantee [the City] will conduct all monitoring activities pertaining to the instream dedication, as outlined in the Project's Monitoring, Assessment and Reporting Plan, including adding gaging locations on Pogonip and Redwood creeks and adding temperature data loggers upstream of Redwood Creek and downstream of Pogonip Creek on the mainstem of San Lorenzo River. Grantee [the City] will include a summary of instream flow monitoring activities, data collected, analysis and results/findings in the Post-Project Monitoring and Operational Report (refer to Task 1); and

WHEREAS, the Grant Agreement requires that long-term maintenance and management of the various project components under the Grant will be conducted by the City Public Works Department, Water Department and/or the City Manager's Office; and

WHEREAS, the RCD is a special district organized under state law, with no enforcement or regulatory functions, that works closely with individuals, groups and agencies to conserve and restore the County's natural resources. The RCD has agreed to enter into this Forbearance Agreement to track the City's compliance with the terms and conditions of the Grant Agreement.

NOW, THEREFORE, in consideration of the terms and conditions herein, the parties agree as follows:

AGREEMENT

1. Definitions.
 - a. “Forbearance Requirement” means the City’s agreement pursuant to the Grant Agreement to voluntarily divert, for a minimum of 20 years, a total of approximately 0.5 cfs of instream flows in Pogonip Creek and Redwood Creek during the low flow season (June 1st– October 31st). The parties acknowledge that instream flows might be slightly higher or lower in any given year depending on natural hydrologic variability.
 - b. “Monitoring and Reporting Requirements” means the City’s agreement pursuant to the Grant Agreement to monitor and report instream flow monitoring activities, data collected, analysis and results/findings as required by the Grant Agreement.
2. Term. The term of this Agreement shall commence on the date first noted above and shall end on December 31, 2042 unless earlier terminated as provided herein or amended pursuant to this Agreement. This Agreement may be renewed or extended by the parties by a written agreement.
3. Budget Contingency Clause. This Agreement is contingent upon the availability of sufficient funding from the funding sources, including the WCB and City for the services covered by this Agreement and the Grant Agreement. Should such funding become unavailable or be reduced, this Agreement may become null and void at the request of either party with no liability occurring to either party, provided however, no such termination shall take place in the event termination would violate the terms and conditions of the Grant Agreement.
4. City’s Obligations. The City shall, at its sole cost and expense, comply with the Forbearance Requirement and the Monitoring and Reporting Requirements set forth in in the Grant Agreement. Compliance with the Grant Agreement remains the sole responsibility of the City. The RCD undertakes no responsibilities to the City or any third party, other than as expressly set forth in this Agreement.
5. Adaptive Management. The City acknowledges that Exhibit F to the Grant Agreement provides that if project objectives under the Grant Agreement are not being met, the City will take actions to adaptively manage the project in order to address obstacles or other barriers to success. In addition, the City will assume responsibility for locating additional funding sources, including potentially General Funds and Enterprise Funds, to complete the project and achieve project objectives as intended.
6. City Department Roles. The City’s Public Works Department shall have primary responsibility for facilitating implementation and completion of the Grant Agreement. The City’s Water

Department shall provide the monitoring and reporting requirements included in this Agreement, including reporting to the RCD and filing statements of use with the State Water Resources Control Board. The City's Parks Department shall provide reasonable access to diversion points and lands for the limited purpose of ensuring the City's compliance with this Agreement, including such access reasonably necessary for water monitoring and measurement activities.

7. RCD's Responsibility. The RCD's sole responsibility is to track the City's compliance with the Forbearance Requirement and the Monitoring and Reporting Requirements under the Grant Agreement by accepting the following information from the City: Annually, prior to July 1st during the term of the Grant, the City shall provide a Statement of Water Diversion and Use to the State Water Resources Control Board with a copy to the RCD and the Instream Flow Dedication Monitoring Report. Annually, prior to July 1, the City shall certify in writing to the RCD that it has complied with the Forbearance Requirement and the Monitoring and Reporting Requirements for the previous year.
8. Compensation: The City is not required to pay the RCD for its tracking responsibility set forth above. However, the City and RCD agree to negotiate in good faith on RCD compensation if the RCD's role expands over time beyond the RCD's tracking responsibility described herein.
9. Termination. Either party may terminate this Agreement in the event that the other party fails to abide by the material terms and conditions of this Agreement or the Grant Agreement without taking action required under the Grant Agreement (Exhibit F) to adaptively manage the Project to address obstacles or other barriers to success. Prior to terminating this Agreement, the terminating party will provide the other party with written notice. If the RCD is the terminating party, it will provide the City with the opportunity to propose an adaptive management plan as contemplated under Exhibit F to the Grant Agreement. Any adaptive management plan proposed by the City must be approved by the WCB.
10. City Water Rights. This Agreement does not result in any waiver, relinquishment, modification, or change in the City water rights, except as expressly provided in the Grant Agreement.
11. Notices. All notices, approvals, acceptances, demands, or requests authorized or required under this Agreement, to be effective shall be in writing and shall be delivered by personal delivery or U.S. mail (first class postage prepaid), or by commercial overnight delivery to the party to whom the notice is directed at the address of such party as follows:

RCD:

Resource Conservation District of Santa Cruz County
Attn: Lisa Lurie
Executive Director

820 Bay Ave #136
Capitola, CA 95010

CITY OF SANTA CRUZ

City of Santa Cruz Water Department
Attn: Chris Berry
Watershed Compliance Manager
123 Jewell St.
Santa Cruz, CA 95060

WITH A COPY TO:

City of Santa Cruz Parks & Recreation Department
Attn: Tony Elliott
Director
323 Church Street
Santa Cruz, CA 95060

12. Indemnification. To the fullest extent permitted by law, the City shall indemnify, protect, and hold harmless the RCD, and its Board, officers, agents, employees and representatives, from and against any and all claims, demands, damages, losses, costs, expenses, and liability of any nature (Claims) arising out of or incident to the Agreement or the Grant Agreement and/or the City's performance of, or failure to observe or perform, any obligations of this Agreement or the Grant Agreement.
13. Auditors. The auditors of the State of California have the right to examine the records of the RCD relating to this Agreement.
14. Successors and Assigns. The provisions of this Agreement shall apply to and bind the successors and assigns of the parties hereto. The City shall not make any assignment or transfer of this Agreement or any right or interest therein until approved in writing by the WCB and the RCD.
15. Amendment. This Agreement shall not be modified except in writing executed by the City and the RCD, with approval from the WCB.
16. Entire Agreement. This Agreement sets forth the entire agreement of the parties as to the transaction described herein.
17. Counterparts. The Parties may execute this Agreement in two or more counterparts, which shall, in the aggregate, be deemed an original but all of which, together, shall constitute one and the same instrument. A scanned, electronic, facsimile or other copy of a party's signature shall be accepted and valid as an original.

18. Warranty of Authority. The signatories to this Agreement warrant and represent that each is authorized to execute this Agreement and that their respective signatures serve to legally obligate their respective representatives, agents, successors and assigns to comply with the provisions of this Agreement.

IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the day and year first above written

Resource Conservation District of
Santa Cruz County

City of Santa Cruz

Jim McKenna, Board President

Matt Huffaker, City Manager

AGREEMENT APPROVED AS TO FORM:

City Attorney, City of Santa Cruz

EXHIBIT A

GRANT AGREEMENT ATTACHED