

## American River Flood Control District

### SAFCA Agreement for OMRR&R

#### Staff Report

##### **Discussion:**

The Sacramento Area Flood Control Agency (SAFCA) constructed a levee improvement project to increase the level of protection of the District's Arcade Creek Levees. The project, called the North Sacramento Streams (NSS) Levee Improvement Project, was cost-shared with the State of California (State). To define cost sharing details, the State requires a Local Project Partnering Agreement with a local project sponsor such as SAFCA to assign roles, responsibilities, and cost-sharing provisions for the work.

The State also requires an Operation, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R) Agreement between the State and the local sponsors. In recent years, the State also identifies the Local Maintaining Agency (LMA) as an entity that must be a party to the OMRR&R Agreement. In order for SAFCA to obtain cost-sharing funding to complete the NSS project, SAFCA staff requested that the District sign the OMRR&R Agreement.

In the past, the District provided assurances to the State that we would Operate and Maintain any levee facilities constructed and turned over to the District. It is not evident that the District has ever committed to Repair, Replace, or Rehabilitate(RR&R) any levee facilities.

Many LMAs in the Central Valley are struggling with the idea of RR&R and questioning their ability to pay for the enormous costs associated with RR&R. District Legal Counsel at Downey Brand worked with the Central Valley Flood Control Association to draft a white paper that describes the LMAs' understanding of what OMRR&R entails. This white paper is included as Attachment A.

##### **May 2018 Board Approval:**

In May 2018, the Board approved a motion to delegate authority to the President to sign the SAFCA OMRR&R Agreement. The Board directed staff to include a transmittal letter documenting the LMA understanding of the definition of OMRR&R. This Transmittal Letter is included as Attachment B.

##### **2019 State OMRR&R Agreement Revisions:**

In 2019, the State of California Department of Water Resources added language to address concerns that the Agreement's definition of OMRR&R was too vague:

*"OMRR&R:" Operation, maintenance, repair, replacement, and rehabilitation of the Project. In accordance with the Code of Federal Regulations, Title 33, Section 208.10 and federal Operations and Maintenance manuals. The term "repair, replacement, and rehabilitation" as described in ER 1110-2-401 does not include reconstruction of a*

*project or project segment that has reached the end of its design service life or is deficient due to a design or construction defect.*

In August 2019, SAFCA recirculated the updated Agreement for the District's approval. The revised Agreement is included as Attachment C.

**Consideration:**

Although the State added language to clarify the scope and intent of the OMRR&R Agreement, there may still be a concern that some of what is perceived as the State's obligations could be transferred to the District. It may be prudent to include a transmittal letter similar to the one drafted in 2018 with the Board's signature on the Agreement.

**Recommendation:**

The General Manager recommends that the Board of Trustees sign the OMRR&R Agreement and include a transmittal letter indicating the LMA understanding of OMRR&R.

## **Repair, Replacement, and Rehabilitation – The Three Rs (and now perhaps a fourth)**

### **Introduction and Issue**

The State of California provided assurances to the U.S. Army Corps of Engineers (USACE) for the Sacramento River Flood Control Project and the San Joaquin River Flood Control Project, and in providing those assurances, it agreed to perform operation and maintenance (O&M) on the project. For example, the State signed an MOU with USACE for the Sacramento River Flood Control Project in which it stated that it “fully recognizes and accepts its obligation to operate and maintain all completed project works....” SRFCP 1953 MOU. That MOU further provided that the State is obligated for “the operation and maintenance of all of the works, after completion, in accordance with the regulations prescribed by the Secretary of the Army.” This language set the standard for actions by the State. Subsidiary to its obligations to USACE, the State entered into multiple assurance agreements with local maintaining agencies (LMAs) whereby the LMAs agreed to operate and maintain certain portions of the system.<sup>1</sup>

As a result of Congressional directive in the 1986 Water Resources Development Act,<sup>2</sup> USACE changed its guidance and assurance agreements to go beyond merely requiring operation and maintenance of authorized facilities (the term “maintain” previously already included the use of the term “repair”)<sup>3</sup> by adding repair, replacement, and rehabilitation (OMRR&R). While the terms repair, replacement, and rehabilitation can very well be considered subsidiary to maintenance when applied to things like flap gates, gravel roads, and pumps (in other words, *routine* RR&R), many LMAs are concerned about the possible application of the repair, replacement, and rehabilitation obligation to improvements to federal project features that have traditionally been the domain of USACE Civil Works or other capital expenditure programs.

### **Summary of Conclusions**

The sources listed below coupled with past practices suggests that we actually have a fair amount of certainty as to what the RR&R obligation is and isn't, and what level of funding is required to satisfy the RR&R obligation:

---

<sup>1</sup> See also Water Code 8370 which, while it's questionable what effect it has, also uses the terms maintain and operate: “It is the responsibility, liability and duty of the reclamation districts, levee districts, protection districts, drainage districts, municipalities, and other public agencies within the Sacramento River Flood Control Project limits, to maintain and operate the works of the project within the boundaries or jurisdiction of such agencies, excepting only those works enumerated in Section 8361 and those for which provision for maintenance and operation is made by Federal law.”

<sup>2</sup> 33 USC 2213 “Any project to which this section applies (other than a project for hydroelectric power) shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operation, maintenance, and replacement and rehabilitation costs of the project, to pay the non-Federal share of the costs of construction required by this section, and to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors.”

<sup>3</sup> But note the limited context in which the term “repair” was used: “Maintenance. The Superintendent shall provide at all times such maintenance as may be required to insure serviceability of the structures in time of flood. Measures shall be taken to promote the growth of sod, exterminate burrowing animals, and to provide for routine mowing of the grass and weeds, removal of wild growth and drift deposits, and repair of damage caused by erosion or other forces....” 33 C.F.R. 208.10(b)(1).

- RR&R **is not** work undertaken to allow the facility to function better than the as-built condition (see ER 1110-2-401).
- RR&R **is not** work undertaken to address the major performance deficiencies caused by long-term degradation of a project that has exceeded its expected service life (see August 16, 2005 Guidance by MG Don Riley).
- RR&R **is not** work undertaken to address major, non-routine flood system damage caused by significant floods or other rare events (see application of Sacramento Bank Protection Program; PL 84-99; and other historic capital improvements).
- RR&R **is** work undertaken to achieve the requirements of the O&M manual which largely covers routine maintenance (see ER 1110-2-401).

As a result, an LMA's O&M budget (including RR&R) should be based on the level of funding required to achieve the requirements of the O&M manual with a reserve to fund repair, replacement, and rehabilitation of facilities that have a defined and predictable service life, such as a pump station, a gravity drain and removal of fallen trees and repair of roadways after a flood event. It should also be recognized that many LMAs have not had adequate revenue streams to address repair and replacement activities to date. This has created a backlog of deferred maintenance that will need to be addressed. The LMAs will need to work with the CVFPB and DWR to identify revenue sources to address this backlog.

### **Discussion**

Any consideration of the meaning of the terms repair, replacement, and rehabilitation must be considered in the context of how the terms have been defined by USACE. In 1994, USACE issued ER 1110-2-401 which provided definitions for each of the terms:

Repair is considered to entail those activities of a routine nature that maintain the project in a well kept condition. Replacement covers those activities taken when a worn-out element or portion thereof is replaced. Rehabilitation refers to a set of activities as necessary to bring a deteriorated project back to its original condition.

While these definitions are generally helpful, they are still subject to interpretation of whether one must rehabilitate a pump station (traditional routine O&M), or a dam or a levee (more commonly viewed as a capital improvement). However, the next line in that definition is helpful in creating a limitation:

RR&R actions are to conform to the project as-built plans and specifications unless other arrangements are made with the district commander.

Thus, a levee designed decades ago using less stringent engineering standards cannot be upgraded to the current engineering standards on the basis of RR&R. Similarly, RR&R cannot compel repair of damage from a flood event exceeding the original design flood. At the same time, typical earthen levee design assumes there will be some level of minor damage that requires maintenance or repair following the design event.

Another useful piece of guidance was issued on August 16, 2005 by MG Don Riley, the USACE Director of Civil Works. In that guidance document, Major General Riley notes:

Definition of Reconstruction. Cost shared reconstruction will be defined by elimination. Reconstruction excludes design or construction deficiencies. Further, ***reconstruction is limited to addressing impediments that prevent a project from performing as authorized after all maintenance, as required by the project operation and maintenance manual and the Code of Federal Regulations, has been accomplished and any deficiencies resulting from a lack of maintenance have been addressed. Reconstruction will consist of addressing the major performance deficiencies caused by a long-term degradation of the foundation, construction materials, and engineering systems that have exceeded their expected service lives and the resulting inability of the project to perform its authorized project functions.*** In addressing reconstruction needs, the latest design standards and efficiency improvements should be incorporated into the project.

This statement is helpful in that it makes clear that efforts to address major performance deficiencies that are caused by long-term degradation of the foundation, construction materials, and engineering systems exceeding their expected lives are not RR&R. To use an example, foundation piping as a result of poor rodent management could be a deficiency to be addressed by the non-Federal sponsor under RR&R, while foundation piping due to subsurface foundation conditions would not be a non-Federal sponsor obligation under RR&R. This suggests that one test to determine whether something should be addressed under RR&R or should be addressed under reconstruction (the fourth “R”), may be determined in part by whether consistent adherence to routine O&M could have prevented the problem.

Another helpful consideration is the way in which substantial damage to levees from extreme flood events have been handled historically. In these cases, USACE has typically repaired major damage using the P.L.84-99 or Civil Works authorities. When USACE did not undertake action to repair a damaged levee from a storm event, and the repair exceeded the LMA’s financial capacity, the State of California usually stepped in to repair the levee, often treating it as a capital project.



185 Commerce Circle  
Sacramento, CA 95815  
voice (916) 929-4006  
fax (916) 929-4160  
www.arfcd.org

**Board of Trustees**  
Brian F. Holloway  
Bettina C. Redway  
Cyril A. Shah  
William J. Pavão  
Steven T. Johns

Item 9  
Att B  
**General Manager**  
Timothy R. Kerr, P.E.

May 31, 2018

Mr. Jason Campbell  
Deputy Executive Director  
Sacramento Area Flood Control Agency  
1007 7<sup>th</sup> Street, 7<sup>th</sup> Floor  
Sacramento, California 95814

Dear Mr. Campbell:

At its meeting on May 11, 2018, the Board of Directors considered approval of the Operation, Maintenance, Repair, Replacement, and Rehabilitation Agreement for the Levee Accreditation Project North Sacramento Stream Levee Improvement Project (“OMRR&R Agreement”). The Board has been tracking the ongoing dialogue between the U.S. Army Corps of Engineers, the Department of Water Resources, the Central Valley Flood Protection Board, and fellow local maintaining agencies, regarding the specific obligations associated with the OMRR&R Agreement. The Board has found this dialogue essential in better understanding what a local maintaining agency is agreeing to when and if it executes an OMRR&R Agreement.

That dialogue has helped the Board understand these essential principles for the interpretation of those obligations:

- RR&R is **not** work undertaken to allow the facility to function better than the as-built condition (see USACE ER 1110-2-401).
- RR&R is **not** work undertaken to address the major performance deficiencies caused by long-term degradation of a project that has exceeded its expected service life (see August 16, 2005 Guidance by MG Don Riley).
- RR&R is **not** work undertaken to address major, non-routine flood system damage caused by significant floods or other rare events (see application of Sacramento Bank Protection Program; PL 84-99; and other historic capital improvements).
- RR&R is work undertaken to achieve the requirements of the O&M manual which largely covers routine maintenance (see USACE ER 1110-2-401).

With this understanding the Board authorized the President to execute the OMRR&R Agreement, which is attached for your consideration. If you believe that American River is not correctly interpreting its obligations under this OMRR&R Agreement, please contact me to discuss.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Tim Kerr  
General Manager

Enclosures:

Operation, Maintenance, Repair, Replacement, and Rehabilitation Agreement Between the Central Valley Flood Protection Board and American River Flood Control District and the Sacramento Area Flood Control Agency for the Levee Accreditation Project North Sacramento Streams Levee Improvement Project

Cc:

Leslie M. Gallagher, Executive Officer  
CA Central Valley Flood Protection Board

Board of Trustees  
American River Flood Control District

OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND  
REHABILITATION AGREEMENT BETWEEN  
The Central Valley Flood Protection Board  
AND  
American River Flood Control District and  
the Sacramento Area Flood Control Agency  
FOR  
The Levee Accreditation Project  
North Sacramento Streams Levee Improvement Project

This Operation, Maintenance, Repair, Replacement, and Rehabilitation Agreement (“OMRR&R Agreement”) is entered into by and between the State of California (“State”), acting by and through the Central Valley Flood Protection Board, or any successor thereto, (“Board”), American River Flood Control District (“Local Maintaining Agency”), and, for the limited purpose of Section I.A.3., hereof, the Sacramento Area Flood Control Agency (“Funding Recipient”) on this \_\_\_\_\_ day of \_\_\_\_\_, 2017 in view of the following circumstances:

1. The North Sacramento Streams Levee Improvement Project (the “Project”) is being undertaken under the Department of Water Resources’ (Department) Urban Flood Risk Reduction (“UFRR”) Program. The Project is a part of the Sacramento River Flood Control Project which was authorized by Congress by Section 101(a)(1) of the Water Resources Development Act (WRDA) of 1996 (Pub. L. No. 104-303, § 101(a)(1), 110 Stat. 3658, 3662-3663 (1996)), as amended. Amendments to this authority are as follows: 1) Section 366 of WRDA of 1999 (Pub. L. 106-53, § 366, 113 Stat. 269, 319-20 (1999)); 2) Section 129 of the Energy and Water Development Appropriations Act (EWDAA) of 2004 (Pub. L. No. 108-137, § 129, 117 Stat. 269, 1839 (2003)); 3) Section 130 of the Consolidated Appropriations Act (CAA) of 2008 (Pub. L. No. 110-161, § 130, 121 Stat. 1844, 1947 (2007)); and 4) Section 7002 of the Water Resources Reform and Development Act (WRRDA) of 2014 (Pub. L. No. 113-121, §7002, 128 Stat. 1193, 1366 (2014)).and the Water Infrastructure Improvements for the Nation Act (WINN) of 2016 (Pub. L. No 114-322, §1401) and is a part of the Sacramento River Flood Control Project which was authorized by Congress on March 1, 1917, and amended on May 16, 1928, August 26, 1937, August 18, 1941, August 17, 1954, and July 14, 1960.
2. State funding had become available for the Project:
  - The voters of California approved the California Disaster Preparedness and Flood Prevention Bond Act of 2006 (Proposition 1E) on November 7, 2006, making available proceeds from the sale of general obligation bonds for flood control work and other purposes.
  - The State, acting by and through the Department of Water Resources (“Department”), solicited applications for funding for its Urban Flood Risk Reduction (“UFRR”) Program.
  - The Funding Recipient applied for funding and the UFRR Funding Agreement was executed on February 23, 2015 (“Funding Agreement”). This Funding Agreement is between the Department and the Funding Recipient for the Project.
  - The Funding Agreement provides that the Funding Recipient will be responsible for construction, and operation, maintenance, repair, replacement, and rehabilitation (“OMRR&R”) of projects on land and rights-of-way that will ultimately be transferred to the Sacramento and San Joaquin Drainage District, acting by and through the Board.



- The Department has agreed to enter into the Funding Agreement on the condition that the Funding Recipient enters into this OMRR&R Agreement under which the Board will oversee OMRR&R for the Project for the State of California, as part of the State Plan of Flood Control.
  - Under the Funding Agreement, the Funding Recipient may agree to assume the responsibility of the Local Maintaining Agency as set out in this OMRR&R Agreement, or may agree with a Local Maintaining Agency that it shall assume responsibility for OMRR&R of the Project, provided that the Funding Recipient shall seek to assume responsibility for OMRR&R if for any reason the Local Maintaining Agency fails to perform under this OMRR&R Agreement.
  - The Funding Recipient has agreed with the Local Maintaining Agency that the Local Maintaining Agency shall assume responsibility for OMRR&R by entering into this OMRR&R Agreement.
  - The Department has agreed to enter into the Funding Agreement with the Funding Recipient on the condition that the Local Maintaining Agency enter into the OMRR&R Agreement and that the Funding Recipient shall seek to assume responsibility for OMRR&R if for any reason the Local Maintaining Agency fails to perform under this OMRR&R Agreement.
3. It is not expected that the Federal Government will provide funding for the Project at this time, but in anticipation that federal funds may become available eventually:
- The Funding Agreement requires the Funding Recipient to seek credit for the expenditures made under the Funding Agreement from the Federal Government, acting by and through the U.S. Army Corps of Engineers ("USACE"), and to enter into agreements necessary to obtain credit or reimbursement from the USACE.
  - The parties agree that this OMRR&R Agreement may be superseded by one or more agreements acceptable to the USACE, the Department, and the Board that gives satisfactory assurances to the Federal Government and the Board that the required local cooperation will be furnished in connection with the Project.
4. The Local Maintaining Agency agrees that it already has responsibility for existing portions of the Project (as hereinafter defined and as depicted on the plat attached here to as Figure 1) under California Water Code Section 12642 which states, and under which the State contends, that in all cases where the Federal Government does not maintain and operate projects, it is the responsibility and duty of the county, city, state agency, or public district affected to maintain and operate flood control and other works, constructed pursuant to the Water Code, after their completion, and hold and save the State and the Federal Government free from damages.
5. The Board has agreed to enter into this OMRR&R Agreement on the condition that the Local Maintaining Agency provides the Board with the assurances specified in this OMRR&R Agreement that Local Maintaining Agency or Funding Recipient will be responsible for OMRR&R of the Project upon its completion; and will, as described below, hold and save the Federal Government, State, their representatives, officers, directors, and employees, including their attorneys, free and harmless from any and all claims and damages arising from OMRR&R of the Project, and Funding Recipient will, as described below, hold and save the Federal Government, State, their representatives, officers, directors, and employees, including their attorneys, free and harmless from any and all claims and damages arising from construction of the Project.

6. The Board, Funding Recipient, and the Local Maintaining Agency have agreed that this OMRR&R Agreement will set forth not only their agreement with respect to OMRR&R for the Project, but also for work funded under prior and future funding agreements related to the Project, on land and rights-of-way that have been or will ultimately be transferred to the Sacramento and San Joaquin Drainage District, acting by and through the Board, and all of the federally and State authorized flood facilities related to the project that are within the Local Maintaining Agency's boundaries.

NOW, THEREFORE, IT IS HEREBY AGREED:

For purposes of this OMRR&R Agreement, the terms below are defined as indicated:

**“Board:”** The State of California Central Valley Flood Protection Board or any successor thereto.

**“Department:”** The State of California Department of Water Resources.

**“Funding Agreement:”** Agreement between the State of California Department of Water Resources and the Sacramento Area Flood Control Agency for The Levee Accreditation Project dated February 23, 2017, Agreement Number 4600011724, as amended.

**“Funding Recipient:”** The Sacramento Area Flood Control Agency (SAFCA), a public agency in the State of California, duly organized, existing, and acting pursuant to the laws thereof, which is the signatory to the Funding Agreement.

**“Federal Government:”** Department of the Army represented by the Assistant Secretary of the Army (Civil Works).

**“Local Maintaining Agency:”** The American River Flood Control District, a public agency in the State of California, duly organized, existing, and acting pursuant to the laws thereof, which has been designated by the Funding Recipient as the agency will assume responsibility for OMRR&R for any Functional Portion of the North Sacramento Streams Levee Improvement Project.

**“OMRR&R:”** Operation, maintenance, repair, replacement, and rehabilitation of the Project in accordance with the Code of Federal Regulations, Title 33, Section 208.10 and federal Operations and Maintenance manuals. The term “repair, replacement, and rehabilitation” as described in ER 1110-2-401 does not include reconstruction of a project or project segment that has reached the end of its design service life or is deficient due to a design or construction defect.

**“OMRR&R Agreement:”** This agreement between the Central Valley Flood Protection Board, the Funding Recipient and American River Flood Control District for OMRR&R of the Project.

**“Overall Work Plan:”** The plan described in the Funding Agreement, as amended, and Funding Agreement Exhibit A, as amended.

**“Post Construction Performance Reports:”** This report shall be prepared annually in compliance with Assembly Bill 156 (Stats. 2007, ch. 368) and comply with Section 9140 of the California Water Code.

**“Project:”** All of the federally and State authorized flood facilities to the extent to which they are within the Local Maintaining Agency's boundaries as shown in Figure 1.

**“Project Site:”** The location of the North Sacramento Streams Levee Improvement Project where permanent improvements are made to facilities of the State Plan of Flood Control.

**“North Sacramento Streams Levee Improvement Project:”** The flood risk reduction project features of such North Sacramento Streams Levee Improvement Project as described in the Overall Work Plan described in the relevant Funding Agreement, as amended.

**“Standard Operation and Maintenance Manual:”** A document prepared by the Funding Recipient and approved by the Local Maintaining Agency and submitted to the State for review, comment and approval that will govern the operation, maintenance, repair, replacement and rehabilitation of the Project. This manual will include all manuals related to the State Plan of Flood Control facilities covered by this OMRR&R agreement, including those prepared by the USACE and/or Board for flood, ecosystem, habitat, mitigation or other purposes and any other such manuals.

**“State:”** The State of California, acting by and through the Board.

**“State Plan of Flood Control:”** The state and federal flood control works, lands, programs, plans, conditions, and mode of maintenance and operations described in Cal. Pub. Res. Code § 5096.805(j).

**“USACE:”** The United States Army Corps of Engineers.

SECTION I: Obligations of the Local Maintaining Agency, and, in part, the Funding Recipient.

A. General Obligations. The Local Maintaining Agency, and, in part, as provided in Subsection 3 and 4, below, the Funding Recipient agree to the following:

1. To cause to perform OMRR&R for the Project, without limitation, in accordance with the Project design specifications, environmental permits, environmental impact reports, regulations, and directions prescribed by the State, all without any cost to the State. The duties of the Local Maintaining Agency to perform OMRR&R for all State Plan of Flood Control Project features shall be performed in a manner that does not diminish the flood protection afforded by or jeopardize the structural integrity of the Project and the flood control system of which the Project is part. The duties of the Local Maintaining Agency pursuant to this paragraph are described further in Section I-B below.
2. To defend, indemnify, hold and save the Federal Government and the State, to the extent allowed by law, their representatives, officers, directors, agents, and employees, including their attorneys free and harmless, to the extent permitted by law, from any and all liability for any claims and damages (including inverse condemnation) that may arise out of this OMRR&R Agreement, including but not limited to any claims or damages arising from the construction and performance of OMRR&R under this Agreement.
3. The Funding Recipient agrees to defend, indemnify, hold and save the Federal Government and the State, to the extent allowed by law, their representatives, officers, directors, agents, and employees, including their attorneys free and harmless, to the extent permitted by law, from any and all liability for any claims and damages (including inverse condemnation) that may arise out of construction of the Project, and to assume responsibility for OMRR&R if for any reason the Local Maintaining Agency fails to perform under this Agreement.
4. The Funding Recipient agrees to cause to perform OMRR&R of all mitigation features of the Project, without limitation, in accordance with environmental permits, environmental impact reports, and regulations.

B. Specific Obligations to Operate, Maintain, Repair, Replace, and Rehabilitate

1. The Local Maintaining Agency hereby accepts responsibility for OMRR&R of the Project. The Local Maintaining Agency agrees that it will be responsible for OMRR&R of the Project as further explained in: (1) the Standard Operation and Maintenance Manual for the Project and (2) any applicable Supplement to the Standard Operation and Maintenance Manual for the Project.
2. The Local Maintaining Agency agrees to cooperate in the Funding Recipient's development of a Standard Operation and Maintenance Manual for State Plan of Flood Control features of the Project as required by Board permits issued to The Funding Recipient for the Project. The Standard Operation and Maintenance Manual for the Project or Functional Portions of the Project may be a stand-alone document or an amendment to the Standard Operation and Maintenance Manual for the Project as directed by the Board. The Local Maintaining Agency and the Funding Recipient acknowledge that changes to the Standard Operation and Maintenance Manual of State Plan of Flood Control facilities may be made by the State and the USACE before the document becomes final. The State may make reasonable changes but shall consult with Local Maintaining Agency and Funding Recipient prior to making such changes. Local Maintaining Agency shall be required to update the Standard Operation and Maintenance Manual as may be necessary or as required by the Board and shall make a copy available to the State and Funding Recipient within three (3) days after the State or Funding Recipient so requests. Local Maintaining Agency shall be responsible for OMRR&R in accordance with any revised version of the Standard Operation and Maintenance Manual for the Project or any Supplement to the Standard Operation and Maintenance Manual.
3. The Local Maintaining Agency hereby gives the State and Funding Recipient the right to enter, at reasonable times and in a reasonable manner, upon the Project Site and land which it owns or controls for access to the Project Site for the purpose of: (i) conducting subsequent inspections to verify that the Local Maintaining Agency is complying with its obligations under this OMRR&R Agreement; and (ii) operating, maintaining, repairing, replacing, or rehabilitating any part of the Project located at or accessible by the Project Site in conjunction with any present or future flood control plan if in the reasonable judgment of State or Funding Recipient, the Local Maintaining Agency fails to comply with its obligations under this OMRR&R Agreement. In the event the State assumes title to any of the land to which the Local Maintaining Agency needs access to fulfill the obligations set forth in the paragraph, the State grants an irrevocable license to the Local Maintaining Agency and Funding Recipient to enter the land to fulfill its obligations under this OMRR&R Agreement.
4. If the Local Maintaining Agency has failed or refused to perform the obligations set forth in this OMRR&R Agreement or the requirements of the manuals mentioned above, and for any reason the Funding Recipient is not able to take appropriate actions under these provisions of law, then the Funding Recipient may take appropriate actions under this OMRR&R Agreement as follows: If the failure or refusal constitutes, in the sole discretion of the Funding Recipient, a threat to the continued ability of the Project or functional portion thereof to perform in a manner necessary to provide its designed level of flood protection, then the Funding Recipient may itself perform the necessary work or do so by contract. The Funding Recipient may in its sole discretion develop a work plan and present it to the Local Maintaining Agency with instructions that if the Local Maintaining Agency does not agree to carry out the work plan within the time specified in the work plan, the Funding Recipient will perform the necessary work or do so by contract. The Local Maintaining Agency will reimburse the Funding Recipient for the costs of performing such work in accordance with the procedures set forth in this OMRR&R Agreement. No completion, operation, maintenance, repair, replacement, or

rehabilitation by the Funding Receipt shall operate to relieve the Local Maintaining Agency of responsibility to meet the Local Maintaining Agency's obligations as set forth in this OMRR&R Agreement, or to preclude the Funding Recipient from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this OMRR&R Agreement.

5. If both the Local Maintaining Agency and the Funding Recipient have failed or refused to perform the obligations set forth in this OMRR&R Agreement or the requirements of the manuals mentioned above, the State may take appropriate actions including proceedings to establish a maintenance area under Water Code Section 12878 *et seq.*

If both Local Maintaining Agency and the Funding Recipient have failed or refused to perform the obligations set forth in this OMRR&R Agreement or the requirements of the manuals mentioned above, and for any reason the State is not able to take appropriate actions under these provisions of law, then the State may take appropriate actions under this OMRR&R Agreement as follows: If the failure or refusal constitutes, in the sole discretion of the State, a threat to the continued ability of the Project or functional portion thereof to perform in a manner necessary to provide its designed level of flood protection, then the State may itself perform the necessary work or do so by contract. The State may in its sole discretion develop a work plan and present it to the Local Maintaining Agency and Funding Recipient with instructions that if the Local Maintaining Agency and/or Funding Recipient does not agree to carry out the work plan within the time specified in the work plan, the State will perform the necessary work or do so by contract. The Local Maintaining Agency and/or Funding Recipient will reimburse the State for the costs of performing such work in accordance with the procedures set forth in this OMRR&R Agreement. No completion, operation, maintenance, repair, replacement, or rehabilitation by the State shall operate to relieve the Local Maintaining Agency and Funding Recipient of responsibility to meet their obligations as set forth in this OMRR&R Agreement, or to preclude the State from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this OMRR&R Agreement.

C. Additional Obligations:

1. The Funding Recipient and/or Local Maintaining Agency shall annually review and, if appropriate or requested by the State, update the safety plan for the Project prepared pursuant to the relevant Funding Agreements or required by Cal. Water Code § 9650. The Funding Recipient and/or Local Maintaining Agency agrees to use best efforts to ensure that the updated safety plan is integrated into any other local agency emergency plan and is coordinated with the State emergency plan.
2. No later than September 30 of each calendar year Local Maintaining Agency shall provide an annual Post Construction Performance Report to the Department, in accordance with Water Code Section 9140 that pertain to the Project.
  - (a) If the Local Maintaining Agency is not the same as the Funding Recipient, the Local Maintaining Agency represents that it has made arrangements with the Funding Recipient to obtain any information needed from the Funding Recipient in order to prepare this report.
  - (c) The Department in its sole determination may modify these reporting requirements as needed to ensure that it has adequate information with which to perform its responsibilities.
3. Upon request, the Funding Recipient will provide the State with copies of Project Completion Reports prepared pursuant to the Funding Agreement.

## SECTION II: Hazardous Substances

The Local Maintaining Agency and Funding Recipient acknowledge State may incur obligations with respect to hazardous substances regulated under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675; California Hazardous Substances Account Act, Calif. Health & Safety Code § 25310 *et seq.* or other statutes or regulations (collectively referred to as “state and federal Hazardous Substances Laws”) on lands necessary for Project construction and OMRR&R to the extent the Local Maintaining Agency fails to comply with its obligations under this OMRR&R Agreement. The Local Maintaining Agency agrees:

- A. That in the event that the Local Maintaining Agency discovers through an environmental investigation or other means that any lands, easements, or rights of way that have been acquired or provided for the Project contain reportable quantities of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws, the Local Maintaining Agency shall promptly notify the State and Funding Recipient of that discovery if it can be reasonably anticipated that the discovery of reportable quantities of hazardous substances will require Local Maintaining Agency to incur response costs in excess of \$10,000.

If the Funding Recipient is responsible for OMRR&R, that in the event that the Funding Recipient discovers through an environmental investigation or other means that any lands, easements, or rights of way that have been acquired or provided for the Project contain reportable quantities of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws, the Funding Recipient shall promptly notify the State and Local Maintaining Agency of that discovery if it can be reasonably anticipated that the discovery of reportable quantities of hazardous substances will require the Funding Receipt to incur response costs in excess of \$10,000.

- B. That in the event reportable quantities of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws have been found, the Local Maintaining Agency shall initiate and complete any and all necessary response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws, which shall include any studies and investigations necessary to determine the appropriate response to the contamination. Payment for the costs of such necessary response and cleanup activity as required under CERCLA and/or other state and federal Hazardous Substances Laws shall be made by the Local Maintaining Agency. In the event that the Local Maintaining Agency fails to provide the funds necessary for response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws or to otherwise discharge the Local Maintaining Agency’s responsibilities under this Paragraph B, then the State may perform the necessary response and cleanup activity, and the Local Maintaining Agency shall reimburse the State in accordance with the procedures set out in this OMRR&R Agreement. If the State performs the necessary response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws, the State shall consult with the Local Maintaining Agency concerning the selection of the person(s) to perform the work, the amount of money to be spent on the work, the scope of the work, and any other aspect of response and cleanup activity.

If the Funding Recipient is responsible for OMRR&R, that in the event reportable quantities of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws have been found, the Funding Recipient shall initiate and complete any and all necessary response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws, which shall include any studies and investigations necessary to determine the appropriate response to the contamination. Payment for the costs of such necessary response and cleanup activity as required under CERCLA and/or other state and federal Hazardous Substances Laws shall be made by the Funding Recipient. In the event that the Funding Recipient fails to provide the funds necessary for response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws or to otherwise discharge the Funding Recipient’s responsibilities under this Paragraph B, then the

State may perform the necessary response and cleanup activity, and the Funding Recipient shall reimburse the State in accordance with the procedures set out in this OMRR&R Agreement. If the State performs the necessary response and cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws, the State shall consult with the Funding Recipient concerning the selection of the person(s) to perform the work, the amount of money to be spent on the work, the scope of the work, and any other aspect of response and cleanup activity.

- C. That the Local Maintaining Agency shall consult with the State in order to ensure that responsible persons under CERCLA and/or other state and federal Hazardous Substances Laws ultimately bear all necessary response and cleanup costs as defined in CERCLA and/or other state and federal Hazardous Substances Laws.

If the Funding Recipient is responsible for OMRR&R, that the Funding Recipient shall consult with the State in order to ensure that responsible persons under CERCLA and/or other state and federal Hazardous Substances Laws ultimately bear all necessary response and cleanup costs as defined in CERCLA and/or other state and federal Hazardous Substances Laws.

- D. That the Local Maintaining Agency shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will control and minimize the release or threatened release of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws on lands necessary for Project construction, operation, maintenance, repair, replacement, or rehabilitation.

If the Funding Recipient is responsible for OMRR&R, that the Funding Recipient shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will control and minimize the release or threatened release of hazardous substances regulated under CERCLA and/or other state and federal Hazardous Substances Laws on lands necessary for Project construction, operation, maintenance, repair, replacement, or rehabilitation.

- E. That in the event that the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, are found to be liable under CERCLA and/or other state and federal Hazardous Substances Laws for the release or threatened release of hazardous substances arising out of the operation, maintenance, repair, replacement, or rehabilitation of the Project, then the Local Maintaining Agency shall indemnify and hold the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, harmless from any response or cleanup costs for which the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, may be found to be liable under CERCLA and/or other state and federal Hazardous Substances Laws.

If the Funding Recipient is responsible for OMRR&R, that in the event that the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, are found to be liable under CERCLA and/or other state and federal Hazardous Substances Laws for the release or threatened release of hazardous substances arising out of the operation, maintenance, repair, replacement, or rehabilitation of the Project, then the Funding Recipient shall indemnify and hold the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, harmless from any response or cleanup costs for which the State, their representatives, officers, directors, employees, including their attorneys, as well as their successors and assigns, may be found to be liable under CERCLA and/or other state and federal Hazardous Substances Laws.

- F. No decision made or action taken pursuant to any provision of this Section of the Project OMRR&R Agreement shall relieve any responsible person from any liability that may arise under CERCLA and/or other state and federal Hazardous Substances Laws, nor shall such decision or action be considered a waiver by the State, the Local Maintaining Agency or the Funding

Recipient of any right to seek from any responsible person as defined by CERCLA and/or other state and federal Hazardous Substances Laws the recovery, contribution of, or indemnification from costs incurred by the State, the Local Maintaining Agency or the Funding Recipient for response or cleanup activity required under CERCLA and/or other state and federal Hazardous Substances Laws, nor shall such decision or action be considered a waiver by the State of any other right or remedy provided by law.

### SECTION III: Authorization for Delegation or Subcontracting

The Local Maintaining Agency or the Funding Recipient may delegate or subcontract its responsibilities under this OMRR&R Agreement. The Local Maintaining Agency or the Funding Recipient shall be responsible for all work to be performed under the contract, including any delegated work. The State shall have the right to ask that any services for this OMRR&R Agreement provided by any subcontractor be terminated if its performance is unsatisfactory.

Payment for services rendered by subcontractors shall be made entirely by the Local Maintaining Agency or the Funding Recipient; the State shall not have any responsibility for making any payments to the subcontractors for any services they may render in connection with this OMRR&R Agreement.

### SECTION IV: Procedures for Reimbursing the State

If the Local Maintaining Agency fails to fulfill its obligations under this Agreement and if the failure or refusal constitutes, in the sole discretion of the State, a threat to the continued ability of the flood project to perform in a manner necessary to provide its designed level of flood protection, then the Funding Recipient, after notifying the Local Maintaining Agency and providing a sixty (60) day opportunity to cure period, may in its sole discretion develop a work plan and present it to the Local Maintaining Agency with instructions that if the Local Maintaining Agency does not agree to carry out, or is unable to carry out, the work plan within the time specified in the work plan, the Funding Recipient will perform the necessary work or do so by contract. The Local Maintaining Agency agrees, subject to compliance with applicable state law, to reimburse the Funding Recipient for the costs of performing such work in accordance with the procedures set forth in this Agreement. No completion, operation and maintenance, by the Funding Recipient shall operate to relieve the Local Maintaining Agency of responsibility to meet the Local Maintaining Agency's obligations as set forth in this Agreement, or to preclude the Funding Recipient from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

If the Local Maintaining Agency and Funding Recipient fails to fulfill its obligations under this Agreement and if the failure or refusal constitutes, in the sole discretion of the State, a threat to the continued ability of the flood project to perform in a manner necessary to provide its designed level of flood protection, then the State, after notifying the Local Maintaining Agency and the Funding Recipient and providing a sixty (60) day opportunity to cure period, may in its sole discretion develop a work plan and present it to the Local Maintaining Agency and the Funding Recipient with instructions that if the Local Maintaining Agency or the Funding Recipient does not agree to carry out, or is unable to carry out, the work plan within the time specified in the work plan, the State will perform the necessary work or do so by contract. The Local Maintaining Agency and the Funding Recipient agree, subject to compliance with applicable state law, to reimburse the State for the costs of performing such work in accordance with the procedures set forth in this Agreement. No completion, operation and maintenance, by the State shall operate to relieve the Local Maintaining Agency or the Funding Recipient of responsibility to meet the Local Maintaining Agency's and the Funding Recipient's obligations as set forth in this Agreement, or to preclude the State from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.



SECTION V: Disputes

Before any party to the OMRR&R Agreement may bring suit in any court concerning an issue relating to this OMRR&R Agreement, that party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to all parties.

SECTION VI: Obligation of Future Appropriations

The parties agree that nothing herein shall constitute, or be deemed to constitute, an obligation of future appropriations by the Legislature of the State of California, the Board of Directors of Funding Recipient, and the Board of Trustees of the Local Maintaining Agency.

SECTION VII: Term of Agreement; Amendment

The effective date of this OMRR&R Agreement is the date all parties sign it. The OMRR&R Agreement will continue in full force and effect unless terminated or amended upon written consent of all parties.

The parties acknowledge that in order to obtain federal credits or reimbursement for this Project, it may be necessary to amend this OMRR&R Agreement as required by the USACE. The parties agree that they will not unreasonably withhold consent for any amendments necessary to obtain federal credits or reimbursement.

SECTION VIII: Notices

All notices, requests, demands, and other communications required or permitted to be given under this OMRR&R Agreement shall be deemed to have been duly given if in writing and delivered personally or mailed by first class (postage pre-paid), registered, or certified mail, as follows:

If to the Local Maintaining Agency:  
American River Flood Control District  
ATTN: General Manager  
185 Commerce Circle  
Sacramento, CA 95815

If to the Board:  
Central Valley Flood Protection Board  
ATTN: Executive Officer  
3310 El Camino Avenue, Suite 170  
Sacramento, CA 95821

If to the Funding Recipient:  
Sacramento Area Flood Control Agency  
ATTN: Executive Director  
1007 7<sup>th</sup> Street, 7<sup>th</sup> Floor  
Sacramento, CA 95814

A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this section.

Any notice, request, demand, or other communication made pursuant to this section shall be deemed to have been received by the addressee at such time as it is personally delivered or seven (7) calendar days after it is mailed, as the case may be.

SECTION IX: Standard Conditions

This OMRR&R Agreement incorporates by reference the standard conditions that are included in Attachment A to this OMRR&R Agreement.

SECTION X: Authority

The Funding Recipient and the Local Maintaining Agency have each provided a copy of a resolution adopted by its governing body designating a representative to execute this OMRR&R Agreement. This resolution is substantially the same as the draft resolution provided in Attachment B to this OMRR&R Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this OMRR&R Agreement.

The Central Valley Flood Protection Board

American River Flood Control District

By \_\_\_\_\_  
Leslie M. Gallagher,  
Executive Officer

By \_\_\_\_\_  
Brian Holloway,  
Board of Trustees, President

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to Legal Form  
and Sufficiency:

Approved as to Legal Form  
and Sufficiency:

\_\_\_\_\_  
Kanwarjit Dua,  
Board Counsel

\_\_\_\_\_  
David Aladjem,  
District Legal Counsel

Sacramento Area Flood Control Agency

By \_\_\_\_\_  
Jason Campbell,  
Deputy Executive Director

Approved as to Legal Form  
And Sufficiency:

\_\_\_\_\_  
M. Holly Gilchrist,  
Agency Counsel

Attachment A

STANDARD CONDITIONS

1. **GOVERNING LAW:** This OMRR&R Agreement is governed by and shall be interpreted in accordance with the laws of the State of California.
2. **TIMELINESS:** Time is of the essence in this OMRR&R Agreement.
3. **AMENDMENT:** This OMRR&R Agreement may be amended at any time by mutual agreement of the Parties, except insofar as any proposed amendments are in any way contrary to applicable law. Requests by the Local Maintaining Agency for amendments must be in writing stating the amendment request and the reason for the request. State shall have no obligation to agree to an amendment.
4. **SUCCESSORS AND ASSIGNS:** This OMRR&R Agreement and all of its provisions shall apply to and bind the successors and assigns of the parties. No assignment or transfer of this OMRR&R Agreement or any part thereof, rights hereunder, or interest herein by the Local Maintaining Agency shall be valid unless and until it is approved by State and made subject to such reasonable terms and conditions as State may impose.
5. **INSPECTION OF BOOKS, RECORDS, AND REPORTS:** During regular office hours, each of the parties hereto and their duly authorized representatives shall have the right to inspect and to make copies of any books, records, or reports of either party pertaining to this OMRR&R Agreement or matters related hereto. Each of the parties hereto shall maintain and shall make available at all times for such inspection accurate records of all its costs, disbursements, and receipts with respect to its activities under this OMRR&R Agreement. Failure or refusal by Local Maintaining Agency to comply with this provision shall be considered a breach of this OMRR&R Agreement, and State may take any other action it deems necessary to protect its interests, after complying with paragraph V of the OMRR&R Agreement.
6. **PROHIBITION AGAINST DISPOSAL OF PROJECT WITHOUT STATE PERMISSION:** Local Maintaining Agency shall not sell, abandon, lease, transfer, exchange, mortgage, hypothecate, or encumber in any manner whatsoever all or any portion of any real or other property necessarily connected or used in conjunction with the Project, without prior permission of State. Local Maintaining Agency shall not take any action, including but not limited to actions relating to user fees, charges, and assessments that could adversely affect the ability of Local Maintaining Agency meet its obligations under this OMRR&R Agreement, without prior written permission of State. State may require that the proceeds from the disposition of any real or personal property acquired, reimbursed or credited with State funds be remitted to State.
7. **NO THIRD PARTY RIGHTS:** The parties to this OMRR&R Agreement do not intend to create rights in, or grant remedies to, any third party as a beneficiary of this OMRR&R Agreement, or of any duty, covenant, obligation or undertaking established herein.
8. **OPINIONS AND DETERMINATIONS:** Where the terms of this OMRR&R Agreement provide for action to be based upon, judgment, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious, or unreasonable.
9. **SUIT ON OMRR&R AGREEMENT:** Each of the parties hereto may sue and be sued with respect to this OMRR&R Agreement.
10. **REMEDIES NOT EXCLUSIVE:** The use by either party of any remedy specified herein for the enforcement of this OMRR&R Agreement is not exclusive and shall not deprive the party using such remedy of, or limit the application of, any other remedy provided by law.

11. SEVERABILITY: Should any portion of this OMRR&R Agreement be determined to be void or unenforceable, such shall be severed from the whole and the OMRR&R Agreement shall continue as modified.
12. WAIVER OF RIGHTS: None of the provisions of this OMRR&R Agreement shall be deemed waived unless expressly waived in writing. It is the intention of the parties hereto that from time to time either party may waive any of its rights under this OMRR&R Agreement unless contrary to law. Any waiver by either party of rights arising in connection with the OMRR&R Agreement shall not be deemed to be a waiver with respect to any other rights or matters, and such provisions shall continue in full force and effect.
13. TERMINATION FOR CAUSE: The State may terminate this OMRR&R Agreement should Local Maintaining Agency fail to perform the requirements of this OMRR&R Agreement at the time and in the manner herein provided or in the event of a default by the Funding Recipient under the relevant Funding Agreement.
14. INDEPENDENT CAPACITY: Local Maintaining Agency, and the agents and employees of Local Maintaining Agencies, in the performance of the OMRR&R Agreement, shall act in an independent capacity and not as officers, employees, or agents of the State.
15. CONFLICT OF INTEREST
  - a) Current State Employees: No State officer or employee shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or has a financial interest and which is sponsored or funded by any State agency, unless the employment, activity, or enterprise is required as a condition of regular State employment. No State officer or employee shall contract on his or her own behalf as an independent contractor with any State agency to provide goods or services.
  - b) Former State Employees: For the two-year period from the date he or she left State employment, no former State officer or employee may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any State agency. For the twelve-month period from the date he or she left State employment, no former State officer or employee may enter into a contract with any State agency if he or she was employed by that State agency in a policy-making position in the same general subject area as the proposed contract within the twelve-month period prior to his or her leaving State service.
  - c) Employees of the Local Maintaining Agency: Employees of the Local Maintaining Agency shall comply with all applicable provisions of law pertaining to conflicts of interest, including but not limited to any applicable conflict of interest provisions of the California Political Reform Act, Cal. Gov't Code § 87100 *et seq.*
  - d) Employees of and Consultants to the Local Maintaining Agency: Individuals working on behalf of a Local Maintaining Agency may be required by the Department to file a Statement of Economic Interests (Fair Political Practices Commission Form 700) if it is determined that an individual is a consultant for Political Reform Act purposes.
16. WORKERS' COMPENSATION: Local Maintaining Agency affirms that it is aware of the provisions of Labor Code Section 3700 *et seq.*, which requires every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and Local Maintaining Agency affirms that it will comply with such provisions before commencing the performance of the work under this OMRR&R Agreement and will make its contractors and subcontractors aware of this provision.

17. AMERICANS WITH DISABILITIES ACT: By signing this OMRR&R Agreement, Local Maintaining Agency assures State that it complies with the Americans with Disabilities Act (ADA) of 1990, (42 U.S.C., 12101 et seq.), which prohibits discrimination on the basis of disability, as well as all applicable regulations and guidelines issued pursuant to the ADA.
18. NONDISCRIMINATION CLAUSE: During the performance of this OMRR&R Agreement, Local Maintaining Agency and its subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age (over 40), marital status, and denial of family care leave. Local Maintaining Agency and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Local Maintaining Agency and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12990 (a-f) et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Agreement by reference and made a part hereof as if set forth in full. Local Maintaining Agency and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

Local Maintaining Agency shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the OMRR&R Agreement.

#### 19. DRUG-FREE WORKPLACE CERTIFICATION

Certification of Compliance: By signing this OMRR&R Agreement, Local Maintaining Agency, its contractors or subcontractors hereby certify, under penalty of perjury under the laws of State of California, compliance with the requirements of the Drug-Free Workplace Act of 1990 (Government Code 8350 et seq.) and, if such Act applies to Local Maintaining Agency, have or will provide a drug-free workplace by taking the following actions:

a) Publish a statement notifying employees, contractors, and subcontractors that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees, contractors, or subcontractors for violations, as required by Government Code Section 8355(a)(1).

b) Establish a Drug-Free Awareness Program, as required by Government Code Section 8355(a)(2) to inform employees, contractors, or subcontractors about all of the following:

1. The dangers of drug abuse in the workplace,
2. Local Maintaining Agency's policy of maintaining a drug-free workplace,
3. Any available counseling, rehabilitation, and employee assistance programs, and
4. Penalties that may be imposed upon employees, contractors, and subcontractors for drug abuse violations.

c) Provide as required by Government Code Sections 8355(a)(3), that every employee, contractor, and/or subcontractor who works under this OMRR&R Agreement:

1. Will receive a copy of Local Maintaining Agency's drug-free policy statement, and
2. Will agree to abide by terms of Local Maintaining Agency's condition of employment, contract or subcontract.

Suspension of Payments: This OMRR&R Agreement may be subject to suspension of payments or termination, or both, and Local Maintaining Agency may be subject to debarment if the State determines that:

- a) Local Maintaining Agency, its contractors, or subcontractors have made a false certification, or
- b) Local Maintaining Agency, its contractors, or subcontractors violates the certification by failing to carry out the requirements noted above.

20. UNION ORGANIZING: Local Maintaining Agency, by signing this OMRR&R Agreement, hereby acknowledges the applicability of Government Code 16645 through 16649 to this OMRR&R Agreement. Furthermore, Local Maintaining Agency, by signing this OMRR&R Agreement, hereby certifies that:

- a) No State funds disbursed by this OMRR&R Agreement will be used to assist, promote, or deter union organizing.
- b) Local Maintaining Agency shall account for State funds disbursed for a specific expenditure by this OMRR&R Agreement to show those funds were allocated to that expenditure.
- c) Local Maintaining Agency shall, where State funds are not designated as described in (b) above, allocate, on a pro rata basis, all disbursements that support the program.
- d) If Local Maintaining Agency makes expenditures to assist, promote, or deter union organizing, Local Maintaining Agency will maintain records sufficient to show that no State funds were used for those expenditures and that Local Maintaining Agency shall provide those records to the Attorney General upon request.

21. COMPUTER SOFTWARE: Local Maintaining Agency certifies that it has appropriate systems and controls in place to ensure that state funds will not be used in the performance of this OMRR&R Agreement for the acquisition, operation, or maintenance of computer software in violation of copyright laws.

22. DELIVERY OF INFORMATION, REPORTS, AND DATA: Local Maintaining Agency agrees to expeditiously provide, during work on the Urban Flood Risk Reduction Program and throughout the term of this OMRR&R Agreement, such reports, data, information, and certifications as may be reasonably required by State.

23. RIGHTS IN DATA: Local Maintaining Agency agrees that all data, plans, drawings, specifications, reports, computer programs, operating manuals, notes, and other written or graphic work produced in the performance of this OMRR&R Agreement shall be made available to the State and shall be in the public domain to the extent to which release of such materials is required under the California Public Records Act, Cal. Gov't Code §§ 6250 *et seq.* Local Maintaining Agency may disclose, disseminate and use in whole or in part, any final form data and information received, collected, and developed under this OMRR&R Agreement, subject to appropriate acknowledgement of credit to State for financial support. Local Maintaining Agency shall not utilize the materials for any profit-making venture or sell or grant rights to a third party who intends to do so. The State shall have the right to use any data described in this paragraph for any public purpose.

23. CHILD SUPPORT COMPLIANCE ACT: For any OMRR&R Agreement in excess of \$100,000, the Funding Recipient acknowledges in accordance with Public Contract Code 7110, that:

- a) The Funding Recipient recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings

assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code; and

b) The Funding Recipient, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

24. PRIORITY HIRING CONSIDERATIONS: If this OMRR&R Agreement includes services in excess of \$200,000, the Funding Recipient shall give priority consideration in filling vacancies in positions funded by the OMRR&R Agreement to qualified recipients of aid under Welfare and Institutions Code Section 11200 in accordance with Pub. Contract Code § 10353.

25. DOMESTIC PARTNERS: For contracts over \$100,000 executed or amended after January 1, 2007, the Funding Recipient certifies by signing this OMRR&R Agreement, under penalty of perjury under the laws of State of California that Funding Recipient is in compliance with Public Contract Code section 10295.3

26. LOCAL MAINTAINING AGENCY NAME CHANGE: Approval of the State is required to change the Local Maintaining Agency's name as listed on this OMRR&R Agreement. Upon receipt of legal documentation of the name change the State will process the amendment. Payment of invoices presented with a new name cannot be paid prior to approval of said amendment.

27. AIR OR WATER POLLUTION VIOLATION: Under State laws, the Local Maintaining Agency shall not be: (1) in violation of any order or resolution not subject to review promulgated by the State Air Resources Board or an air pollution control district; (2) subject to cease and desist order not subject to review issued pursuant to Section 13301 of the Water Code for violation of waste discharge requirements or discharge prohibitions; or (3) finally determined to be in violation of provisions of federal law relating to air or water pollution