

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT
AND RECORD OF ACTION**

March 28, 2023

FROM

BRENDON BIGGS, Chief Flood Control Engineer, Flood Control District

SUBJECT

Application and Agreement for Irrevocable Standby Letter of Credit with Wells Fargo Bank for the Elder Creek Channel Improvement Project in the City of Highland

RECOMMENDATION(S)

Acting as the governing body of the San Bernardino County Flood Control District:

1. Approve application for an Irrevocable Standby Letter of Credit with Wells Fargo Bank in favor of the California Department of Fish and Wildlife, in the amount of \$499,653, at an administrative cost not-to-exceed \$50,000, for the Elder Creek Channel Improvement Project in the City of Highland, for a term of May 1, 2023 through April 30, 2024.
2. Approve Standby Letter of Credit **Agreement No. 23-208**, including non-standard terms, with Wells Fargo Bank, in the amount of \$499,653, at an administrative cost not-to-exceed \$50,000, for the Elder Creek Channel Improvement Project in the City of Highland, for a term of May 1, 2023 through April 30, 2024.

(Presenter: Brendon Biggs, Chief Flood Control Engineer, 387-7906)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

Provide for the Safety, Health and Social Service Needs of County Residents.

Pursue County Goals and Objectives by Working with Other Agencies and Stakeholders.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The San Bernardino County Flood Control District (District) is funded by property tax revenue, fee revenue and other local, state, and federal funding. The proposed Irrevocable Standby Letter of Credit (Letter of Credit) will be funded by property tax revenue. The Letter of Credit, issued by Wells Fargo Bank (Wells Fargo), will be in the amount of \$499,653. The estimated administrative cost, including cost of issuance, for the Letter of Credit will not exceed \$50,000, which will be charged by Wells Fargo at 2% of the balance per year. Sufficient appropriation and revenue are included in the District's 2022-23 budget (1930002526 F01911) and will be included in future recommended budgets.

BACKGROUND INFORMATION

An application and Letter of Credit Agreement (Agreement) must be executed to enable Wells Fargo to prepare a Letter of Credit that satisfies specific permit conditions under two different State permits received by the District from the California Department of Fish and Wildlife (CDFW) for the Elder Creek Channel Improvement Project in the City of Highland (Project). Recommendation No. 1 will approve the application for the Letter of Credit, while

**Application and Agreement for Irrevocable Standby Letter of Credit with Wells Fargo Bank for the Elder Creek Channel Improvement Project in the City of Highland
March 28, 2023**

Recommendation No. 2 will approve the Agreement, which specifies the details of the Letter of Credit to be issued (e.g., interest rate, fees, etc.). Prior to construction, the Letter of Credit must be approved by CDFW.

The Project consists of the construction of approximately 2,100 linear feet of improvements to Elder Creek Channel between Greenspot Road and Plunge Creek in order to provide enhanced flood protection to residents.

Elder Creek is a stream that falls under the jurisdiction of CDFW. Construction within the stream requires a Streambed Alteration Agreement (SAA) from CDFW per State Fish and Game Code Chapter 6, Section 1602. On July 20, 2022, the District obtained a SAA for the Project.

In addition, the Project is located within an area adjacent to occupied habitat for the San Bernardino Kangaroo Rat, a State-listed species. Section 2080.1 of the California Fish and Game Code requires an Incidental Take Permit (ITP) from CDFW for any "take" of species as a result of the Project construction activity. "Take" is defined under the Federal Endangered Species Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species. The District applied for and received an ITP on December 29, 2022.

Both the SAA and ITP require the District to provide compensatory mitigation to offset the Project's environmental impacts. The District is providing compensatory mitigation through the establishment of 1.28 acres of wetland-riparian and Riversidean Alluvial Fan Sage Scrub habitat set-aside for wildlife functions and values. Both the SAA and ITP include conditions that require the District to manage its mitigation sites in perpetuity and provide financial assurances to CDFW that the District will meet its mitigation obligations. Following several rounds of negotiations, in December 2021, CDFW and the District determined that a Letter of Credit would be the appropriate vehicle to secure the District's mitigation and management obligations under the SAA and ITP.

Following approval of both the Letter of Credit and Agreement, Wells Fargo will draft the Letter of Credit using the CDFW standard template and the draft will be submitted to CDFW for review and approval. Following CDFW approval of the Letter of Credit, the final Letter of Credit will be presented to the Board of Supervisors (Board) at a future meeting for approval.

The Letter of Credit may be called upon by CDFW in the event that the District does not fulfill its obligations under the SAA and ITP associated with the creation and long-term management of compensatory mitigation sites for the Project.

The Agreement with Wells Fargo includes the following terms that differ from the standard District contract terms:

1. The Agreement does not require Wells Fargo to meet the District's insurance or indemnity standards as required by County Policy 11-07.
 - The District standard contract does not include indemnification or defense by the District of a contractor and requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: By agreeing to indemnify Wells Fargo, the District could be contractually waiving the protection of sovereign immunity. Claims that may

**Application and Agreement for Irrevocable Standby Letter of Credit with Wells Fargo Bank for the Elder Creek Channel Improvement Project in the City of Highland
March 28, 2023**

otherwise be barred as against the District, time limited, or expense limited could be brought against Wells Fargo without such limitations and the District would be responsible to defend and reimburse Wells Fargo for costs, expenses, and damages. In addition, the Agreement does not include District standard insurance requirements. This means that the District has no assurance that Wells Fargo will be financially responsible for claims that may arise from the Agreement, which could result in expenses to the District.

2. Wells Fargo limits its liability under the Agreement to the amount paid by the District under the Agreement and excludes any liability for punitive, exemplary, consequential, indirect or special damages.
 - The District standard contract does not limit a contractor's liability.
 - Potential Impact: Claims could exceed the liability cap, rendering the District financially liable for the excess. The District could also be responsible for punitive, exemplary, consequential, indirect or special damages resulting from the Agreement.
3. All disputes arising under the Agreement must be settled by binding arbitration, with the exception for claims falling under the jurisdiction of small claims court.
 - The District standard contract does not require arbitration.
 - Potential Impact: Arbitration decisions are not appealable.

The District recommends approval of this item, including the non-standard terms, as it allows the District to satisfy its mitigation and management obligations to CDFW under the SAA and ITP.

The proposed expenditures under the Agreement are aligned with the County and the Chief Executive Officer's goals and objectives of operating in a fiscally-responsible and business-like manner by complying with financial assurance requirements set forth in the State regulatory permits for the Project; providing for the health and safety needs of county residents by constructing flood control improvements; and working with other agencies to minimize and mitigate for environmental impacts through the establishment and long-term conservation of wildlife habitat.

PROCUREMENT

Not applicable.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Sophie A. Curtis, Deputy County Counsel, 387-5455) on March 6, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on March 9, 2023; Finance (Carl Lofton, Administrative Analyst, 387-5404) on March 10, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 13, 2023.

**Application and Agreement for Irrevocable Standby Letter of Credit with
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March 28, 2023**

Record of Action of the Board of Supervisors
San Bernardino County Flood Control District

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Curt Hagman
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 28, 2023



cc: SDD/SBCFCD- Pham w/agree w/app
Contractor- C/O SBCFCD w/agree w/app
File- w/agree w/app w/map
LA 03/29/2023