

Planning Memorandum of Understanding
by and between the San Bernardino County Flood Control District and
San Bernardino Valley Water Conservation District

RECITALS

WHEREAS, the San Bernardino County Flood Control District (FCD) was created by the San Bernardino County Flood Control Act of 1939, California Water Code Appendix section 43-1 *et seq.* (Flood Control Act). The Flood Control Act specifies that the FCD's primary purpose is to provide for the control of flood and storm waters and, secondarily, to conserve such flood and storm waters, and other waters, for beneficial uses in FCD's district area by spreading, storing, retaining, and through percolation.

WHEREAS, in 1910, the Water Conservation Association (WCA) was organized to conserve the water of the Santa Ana River by storing it in the groundwater basin for future use. In 1931, local citizens voted to create the **San Bernardino Valley Water Conservation District (SBVWCD)** as a public agency to protect against the excessive export of the local surface water by downstream agencies. WCA was dissolved in the early 1940s, and all land and water property were transferred to SBVWCD.

WHEREAS, SBVWCD is now constituted as a water conservation district, duly formed and existing under the authority of California Water Code sections 74000 *et. seq.* SBVWCD has as its primary purpose the capture, spread, and recharge of water, both native and imported, over groundwater recharge facilities it owns, operates, and leases, and the stewardship of lands for compatible water supply and quality, mineral production, and the preservation of sensitive habitats.

WHEREAS, FCD owns and operates a number of flood control facilities within SBVWCD's boundaries.

WHEREAS, SBVWCD has identified FCD's facilities into which storm water flows may be diverted for water recharge purposes, provided such use will not impair the primary purpose and function of FCD facilities, which is and is to remain to maintain adequate flood protection for the safety and protection of the public.

WHEREAS, the potential for such recharge use is at this time conceptual, and requires additional study, including the identification of eligible facilities, the amount and quality of storm water flows potentially available for recharge, the location and capacity of facilities to accommodate such flows, the secondary impacts such recharge might have on groundwater levels, migration of contaminant plumes, sand and gravel extraction or other land uses in the vicinity, subsidence protection, endangered and sensitive species habitat preservation, and related concerns.

WHEREAS, SBVWCD has preliminarily identified FCD facilities for future study of potential recharge, which facilities are more specifically depicted in Exhibit 1 hereto ("Initial Facilities").

WHEREAS, FCD and SBVWCD wish to enter into this Planning Memorandum of Understanding (MOU) to describe, in general terms, their interests in coordinating their efforts to plan and evaluate the practical, environmental, and financial feasibility of such combined use of FCD's facilities.

WHEREAS, as provided herein, this MOU is for undertaking investigations and feasibility studies in contemplation of possible future use of FCD facilities, and at this juncture does not commit either party to any project or future agreement. Any specific agreed-upon use of FCD facilities for recharge will be set forth in a separate water spreading agreement between the parties, for which the requisite California Environmental Quality Act (CEQA) analysis shall be conducted prior to entering into future agreements to approve or implement any specific project.

NOW, THEREFORE, it is mutually agreed as follows:

1. Recitals.

The recitals set forth above are true and correct and incorporated herein.

2. Term.

This MOU shall have a term of 10 years from the date on which the last party executes this MOU unless earlier terminated as set forth herein. This MOU may be extended by the parties for up to two (2) subsequent 10-year periods, pursuant to written amendment signed by both parties. Either party may terminate this MOU by providing the other party with ninety (90) written notice, provided, however, that termination of this MOU shall not terminate any water spreading agreements the Parties may have entered into as of the date this MOU itself is terminated, and any such water spreading agreements shall be governed by their own termination provisions, if any.

3. General Planning Efforts.

3.1 Preliminary Report. In order to evaluate the Initial Facilities (see Exhibit 1) for the use of storm water recharge, SBVWCD shall prepare and submit to FCD a preliminary report, in a form to mutually agreed upon by the parties, identifying the particular FCD facility, the anticipated amount of storm water to be captured and diverted to that facility, and any SBVWCD improvements anticipated to be required for use of the FCD facility for storm water diversion, storage, or recharge. Parties agree to hold one or more scoping meetings where FCD will provide information relating to its operational, engineering, and environmental constraints and SBVWCD will provide concepts to address those constraints while meeting the need and purposes each of the projects. FCD will provide access to the Initial Facilities to SBVWCD, without charge, to conduct field investigations and surveys necessary to finalize the concept designs. Such investigations and field studies by SBVWCD may include, but are not limited to, surveys, soil borings or tests, geologic sampling, plant or animal habitat counts or surveys, or water quality, quantity, or flow measurements or sampling, so long as such

investigations and field studies do not materially impact FCD's maintenance of use of the Initial Facilities. SBVWCD will prepare and submit the Preliminary Report for sites individually or as groups to address such constraints, impacts of the project(s) as an initial step in the permitting process.

3.2 Assessment of Preliminary Report and Planning. Once the preliminary report is submitted by SBVWCD for the specific use of a particular FCD facility, the parties shall allocate sufficient staff time and resources to evaluate the joint use/operation of that existing FCD facility for continued effective use for adequate flood control purposes, in conjunction with proposed storm water recharge. During this evaluation process, SBVWCD shall provide to FCD all of the details associated with the proposed use for each FCD facility including, but not limited to, concept-level construction plans and specifications for any proposed improvements or modifications to the FCD facility (including a statement as to which entity will own the improvements after a project specific agreement terminates), a permit plan identifying any permits or clearances required from any agency or regulatory authority other than FCD or SBVWCD, and a proposed operational plan for each FCD facility. To the extent access rights are indicated as necessary or appropriate for storm water recharge in a FCD facility, the parties shall meet and confer to delineate the scope and extent of such access rights. This information will also include the amount of estimated storm water recharge for each facility, and expected quality of such water.

3.3 Assessment of Secondary Effects of Recharge. SBVWCD's Preliminary Report shall also consider the potential secondary effects of storm water recharge to the environment, including, but not limited to, an evaluation of whether such activities will introduce water quality pollutants or mobilize existing groundwater contamination, or will cause land subsidence, liquefaction, or seepage to low lying lands in any basin to be impacted by the replenishment activities of SBVWCD. The parties acknowledge that SBVWCD will be the agency leading this evaluation as it has the appropriate expertise concerning storm water recharge and the water quality. FCD will independently review SBVWCD's evaluation.

3.4 Considering the statutory purposes of the FCD and the goals of SBVWCD, both parties agree that they will determine, on a case by case basis, which agency will be in charge of seeking permits for projects and which agency will be the "Lead Agency" for purposes of complying with CEQA. The responsibility for CEQA compliance and permits shall be specified in a water spreading agreement.

3.5 SBVWCD will work cooperatively with FCD towards SBVWCD's goal of maximizing the quantity of storm water recharge from the existing FCD's facilities, while maintaining or improving the protection of the public from the dangers of flooding.

4. Primacy of FCD Use.

4.1 The parties obligations set forth hereunder shall be subject to the primary purpose of FCD and FCD facilities pursuant to the Flood Control Act to protect property and the public from flood waters. The use of FCD facilities for flood control purposes shall be paramount.

4.2 In determining whether to enter into a water spreading agreement, for joint use of an FCD facility for water recharge, FCD shall have the sole discretionary authority to determine what constitutes "adequate flood protection" for the operation of its facilities and to determine whether a proposed recharge activity is consistent with and compatible with its uses of a facility.

4.3 FCD shall have the sole discretionary authority to determine which of its facilities are available for use in re-charge activities proposed by the SBVWCD. Any prospective use of any FCD facility shall be subject to the parties' approval of a water spreading agreement.

5. No Implied Covenants.

Based on the FCD priorities set forth in the Flood Control Act and FCD's discretion provided in this MOU, as well as the general planning nature of this MOU, FCD and SBVWCD acknowledge and agree that no implied covenants attach to this MOU, including, but not limited to, the implied covenant of good faith and fair dealing. Nothing set forth herein shall be deemed to bind FCD's Board of Supervisors to approve a water spreading agreement. Notwithstanding anything to the contrary herein, FCD and its Board of Supervisors retain the sole discretion to authorize the use of FCD facilities for storm water recharge.

6. Assignment.

This MOU may not be assigned by either party without the written consent of the other party.

7. Indemnification and Insurance.

7.1 FCD agrees to indemnify, defend (with counsel approved by SBVWCD) and hold harmless SBVWCD, its employees, officers, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability resulting from FCD's negligent acts or omissions which arise from FCD's performance of its obligations under this MOU.

7.2 SBVWCD agrees to indemnify, defend (with counsel approved by FCD) and hold harmless the FCD, its employees, officers, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability resulting from the SBVWCD's

negligent acts or omissions which arise from the SBVWCD's performance of its obligations under this MOU.

7.3 In the event FCD and/or SBVWCD is found to be comparatively at fault for any claim, action, loss or damage which results from their respective obligations under this MOU, FCD and/or SBVWCD shall indemnify the other to the extent of its comparative fault.

7.4 FCD and SBVWCD shall maintain throughout the term of this MOU such policies of insurance or legally sufficient self-insurance for Automobile Liability, Comprehensive General Liability, and Workers' Compensation that are adequate to protect against all liabilities and indemnification responsibilities arising out of the performance of the terms, conditions or obligations of this MOU.

8. **Jurisdiction.** This MOU shall be governed by the laws of the State of California. If a court of competent jurisdiction declares any portion of this MOU invalid, illegal, or otherwise unenforceable, the remaining provisions shall continue in full force and effect, unless the purposes of this MOU are frustrated. Any dispute or action to enforce any obligation under this MOU shall be filed and resolved in a Superior Court in San Bernardino County, California. In the event of litigation arising from this MOU, each party to the MOU shall bear its own costs, including attorneys' fees.

9. **Signatures.** This MOU may be signed in counterparts, each of which shall constitute an original, and such counterparts shall together constitute one and the same agreement. The parties shall be entitled to sign and transmit an electronic signature of this MOU (whether by facsimile, PDF or other email transmission), which signature shall be binding on the party whose name is contained therein. Each party providing an electronic signature agrees to promptly execute and deliver to the other party an original signed MOU upon request.

10. **Flood Control District Clause.**

All of the FCD's revenues as defined below, have been pledged to secure the payment of the principal and interest on certain bonds and refunding bonds ("Bonds") issued by the FCD in May 2007. The pledge constitutes a first lien on the revenues for the payment of the Bonds. Any payments under this MOU are subject to the prior pledge of revenues described above. FCD payments pursuant to this MOU will be made to the extent there are sufficient funds available after payment of the Bonds. For purposes of this paragraph, "revenues" shall mean all income and revenue received by the FCD from the operation or ownership of the flood and storm water control and conservation facilities ("Flood Control System") of the FCD (including but not limited to, all real and personal property, or any interest therein, and all additions, improvements, betterments and extensions thereto), determined in accordance with Generally Accepted Accounting Principles, including all ad valorem property taxes received by the FCD pursuant to Article XIII A of the Constitution of the State of California and Section 95 et seq. of the California Revenue and Taxation Code, all rents, royalties and license and permit fees and charges received by the FCD, investment income and all other money howsoever derived by the FCD from the operation or

ownership of the Flood Control System or arising from the Flood Control System, but excluding (a) ad valorem property taxes levied to pay any voter approved general obligation indebtedness of the FCD, (b) assessments levied pursuant to Section 43-7 or Section 43-26.9 of the San Bernardino County Flood Control Act (Cal. Water Code App. Sect. 43-1 et seq.), and (c) grants, advances or contributions in aid of construction, except to the extent such grants are unrestricted and available for any expenditure of the FCD.

11. **Amendments; Entire Agreement.** Any amendments to this MOU, including but not limited to, the addition of FCD facilities, shall be set forth in a writing signed by both parties. This MOU contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all other prior negotiations, understandings or contracts.

IN WITNESS WHEREOF, the parties have caused this MOU to be executed by their duly authorized officers or representatives as of the last day and year appearing below.

**SAN BERNARDINO VALLEY WATER
CONSERVATION DISTRICT**

By:  _____

President, Board of Directors

**SAN BERNARDINO COUNTY
FLOOD CONTROL DISTRICT**



Curt Hagman, Board Chairman

Dated:

SIGNED AND CERTIFIED THAT A
COPY OF THIS DOCUMENT HAS
BEEN DELIVERED TO THE
CHAIRMAN OF THE BOARD

Lynna Monell, Clerk of the Board

By: _____
Deputy

APPROVED AS TO LEGAL FORM:

Michelle D. Blakemore, County Counsel

By: _____
Sophie A. Akins
Deputy County Counsel