



MEMORANDUM

December 6, 2024

TO: MEMBERS, PORT COMMISSION
Hon. Kimberly Brandon, President
Hon. Gail Gilman, Vice President
Hon. Stephen Engblom
Hon. Willie Adams
Hon. Steven Lee

FROM: Elaine Forbes
Executive Director 

SUBJECT: Request authorization to enter a proposed Memorandum of Understanding with the United States Army Corps of Engineers enabling the Port of San Francisco to advance 1) design of coastal flood defenses described in the San Francisco Waterfront Coastal Flood Study including design of early implementation actions, and 2) construction of early implementation actions, subject to required environmental clearances, to earn potential future credit for these expenditures.

DIRECTOR'S RECOMMENDATION: Approve the Attached Resolution No. 24-62

EXECUTIVE SUMMARY

This report provides an overview of a proposed Memorandum of Understanding with the United States Army Corps of Engineers (USACE) enabling the Port of San Francisco (Port) to advance the design and construction of coastal flood defenses described in the San Francisco Waterfront Coastal Flood Study (Flood Study) subject to required environmental clearances, to earn potential future credit for these expenditures (USACE Design and Construction MOU or MOU).

Through the USACE Flood Study and working City department partners, USACE and the Waterfront Resilience Program team (the Project Delivery Team or PDT) have developed

THIS PRINT COVERS CALENDAR ITEM NO. 10B

a coastal flood risk mitigation plan consisting of coastal flood defenses, floodproofing and water management features to adapt the Port's 7.5-mile bayside waterfront to sea level rise over time, with subsequent adaptation actions to respond to higher future water levels (collectively, the USACE Draft Plan or Draft Plan).

The MOU described in this report does not commit the Port Commission (Commission) to undertake design and/or construction activities; rather, if the Commission decides to undertake these activities through approval of necessary contracts and subject to appropriations approved by the Commission and the Board of Supervisors, the MOU leaves open the possibility for the Port to earn potential future credit for such expenditures, subject to future USACE determinations. Any future construction work will be subject to compliance with all applicable federal, state, and local laws including compliance with the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the National Historic Preservation Act, and permitting requirements that govern construction in the 100' shoreline band and San Francisco Bay.

Resolution 24-62 authorizes the Executive Director to enter the USACE Design and Construction MOU, including any letters of intent, amendments, augmentations, or extensions thereof necessary to implement the transaction described in this report.

STRATEGIC OBJECTIVES

The Port's Waterfront Resilience Program supports the goals of the Port's Strategic Plan as follows:

Engagement:

By leading an inclusive stakeholder process to develop a shared vision, principles, and goals for the Waterfront Resilience Program and Flood Study.

Equity:

By developing a program-wide equity strategy that is integrated into the Port's Racial Equity Action Plan, focused on centering voices of marginalized communities through robust engagement, developing resilience projects to serve these communities, and ensuring equitable hiring and contracting to support the Program.

- Centering the voices of communities of color, low-income communities, and disadvantaged and historically underrepresented communities through robust, meaningful, and inclusive public outreach and engagement.
- Developing and investing in resilience projects that reduce flood and seismic risk in and around disadvantaged and historically underrepresented communities.
- Ensuring equitable hiring and contracting practices and supporting the development of a diverse workforce to design and deliver projects associated with the Waterfront Resilience Program.

Resiliency:

By leading the City's efforts to address threats from earthquakes and flood risk through research and infrastructure improvements to the entire Port shoreline and adjoining buildings and other infrastructure.

Evolution:

By developing adaptation options with a long time horizon as well as near-term actions, envisioning strategies to adapt the waterfront and its uses over time, and recognizing that decisions made today influence the options available to future generations who will be addressing different environmental and social conditions.

Sustainability:

By incorporating nature-based features into the USACE Draft Plan and early projects to reduce earthquake risk, enhance emergency response, and reduce early flood risk (Early Projects) to enhance the quality of the Bay water and habitat.

Productivity and Economic Recovery:

Through the investment of Proposition A Seawall Earthquake Safety Bond funding and other Port and public funding sources, and by developing strategies to defend or floodproof Port maritime and industrial facilities.

BACKGROUND

In 2018 the Port and USACE entered a Feasibility Cost Sharing Agreement (FCSA) to conduct a general investigation of coastal flood risk along the 7.5 miles of the City's Bay shoreline (the USACE Flood Study). Item 10A on this December 10, Port Commission agenda proposes an amendment to the FCSA to facilitate work needed to complete the Flood Study.

For a description of Waterfront Resilience Program development and accomplishments from 2017 to 2023, please see the December 12, 2023 staff report to the Port Commission¹. Item 12A on the November 25, 2024 Port Commission agenda² describes recent major milestones in the USACE Flood Study and staff's recommended contracting strategy to advance the Program over the next 5+ years.

Notable recent milestones include:

- On January 26, 2024, USACE in collaboration with the City and County of San Francisco, published the Draft Integrated Feasibility Report and Environmental

¹ December 12, 2023 Staff Report: https://sfport.com/files/2023-12/121223_12b_wrp_update_on_ch2m_program_management_contract_informational.pdf

Impact Statement (Draft IFR/EIS)³. The Draft IFR/EIS describes a draft plan consisting of coastal flood defenses, floodproofing and water management features to adapt the Port's 7.5-mile bayside waterfront to sea level rise over time, with subsequent adaptation actions to respond to higher future water levels (collectively, the Draft Plan). The proposed solutions are estimated to cost \$13.5 billion plus inflation, and, if approved by Congress, the Federal government may pay up to 65% of the construction cost. Cost estimates are preliminary, high-level, and subject to change.

- The Draft Plan along with the Draft IFR/EIS was released to the public on January 26, 2024, starting a 60-day formal public comment period under the National Environmental Policy Act (NEPA). During this period, USACE and the City conducted robust public outreach and engagement to get feedback on the Draft Plan. Numerous public comments on the Draft Plan were received; generally, public response was very positive.
- On June 28, 2024, USACE leadership endorsed the Draft Plan at the USACE Agency Decision Milestone Meeting (ADM). The Project Delivery Team (PDT) presented the Draft Plan, public comments, recommendations from USACE policy, technical, and legal review of the Draft Plan, and the PDT's workplan to address these comments and develop a revised Draft Plan for inclusion in the Final IFR/EIS. If the USACE Chief of Engineers recommends the Draft Plan to Congress in 2026, it will be the recommended plan (Recommended Plan).

RECOMMENDED NEXT STEPS

With USACE's endorsement of the Draft Plan at the Agency Decision Milestone, the Waterfront Resilience Program has reached an inflection point with a clear USACE leadership recommendation for investment in a resilient waterfront through the Flood Study.

After identifying the Draft Plan, the next step is to advance the project design. This phase in the USACE process is known as the Preconstruction, Engineering, and Design Phase (PED Phase).

³ February 6, 2023 Staff Report: https://www.sfport.com/sites/default/files/2024-02/020624_10a_usace_flood_study_draft_staff_report.pdf
https://www.sfport.com/sites/default/files/2024-02/020624_10a.1_exhibit_g_-_usace_flood_study_executive_summary.pdf

Congress has provided local sponsors with the option of advancing the design of coastal flood projects using local funding before Congressional authorization of projects. USACE has authority under Section 221 of the Flood Control Act of 1970, as amended, that allows a non-federal sponsor to proceed with the design and/or construction of local projects that may later be deemed integral to a USACE project, potentially resulting in credit for that work. Exhibit A provides a staff description of this authority and includes Exhibit A1 which includes a complete copy of the current USACE model agreement staff recommends entering.

By entering an in-kind MOU with USACE for design and construction, local sponsors can earn credit towards their future 35% local match requirement to obtain federal funding, subject to USACE determinations that the work is integral to the authorized USACE project and is in line with federal estimates for the cost of the work, as further detailed below.

USACE DESIGN AND CONSTRUCTION MOU TERMS

Table 1 below shows the major terms of the proposed USACE Design and Construction MOU:

| Table 2: USACE Design and Construction MOU Summary of Terms | | |
|--------------------------------------------------------------------|---------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section | Provision | Summary of Terms |
| | Introduction | Defines the parties: <ul style="list-style-type: none"> • <u>Government</u>: Department of the Army, represented by the District Commander • <u>Non-Federal Interest</u>: City and County of San Francisco (the “City”), acting by and through its Port Commission |
| Whereas Clause | Section 221 Authority | Section 221(a)(4) of the Flood Control Act of 1970, as amended, provides authority for providing credit to non-federal interest for the value of materials or services before execution of cost-sharing agreement if: <ul style="list-style-type: none"> • Parties enter into an In-Kind MOU • Only work carried out after execution of MOU is eligible for credit |
| Whereas Clause | Limitation of Credit | Credit will be afforded only toward the required non-federal contribution of funds (i.e., cash contribution) under the Project Partnership Agreement |
| Whereas Clause | Request by Non-Federal Interest | MOU developed based on request letter from non-federal interest stating intent to provide certain construction work, including any design associated with that construction work, prior to execution of the Project Partnership Agreement |

| Table 2: USACE Design and Construction MOU Summary of Terms | | |
|--------------------------------------------------------------------|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section | Provision | Summary of Terms |
| 1 | Description of Construction Work | A brief description of the construction work, including any necessary design activities, that the non-federal Interest plans to perform for the project, as generally described in the request letter from the non-federal interest |
| 2 | Documentation | <p><u>Required Documentation:</u></p> <ul style="list-style-type: none"> • Non-federal interest keeps books, records, documents, and other documentation of costs and expenses incurred for construction work • Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the non-federal interest's employees <p><u>Value:</u></p> <ul style="list-style-type: none"> • Value of the construction work equivalent to the costs that the non-federal interest incurred to provide the construction work, which may include: <ul style="list-style-type: none"> ○ Engineering and design ○ Real estate, economic, and environmental analyses and evaluation ○ Construction ○ Supervision and administration • Can not include any costs associated with betterments |
| 3 | Eligibility for Credit Subject to: | |
| 3a | Integral Determination | Determination by MSC Commander that construction work is integral to the project |
| 3b | Environmental Coordination | Completing or assuring completion of all necessary environmental coordination and obtaining all applicable federal, state, and local permits prior to initiating construction |
| 3c | Acquisition of Real Property Compliance: | |
| 3c(1) | Relocation Payments and Assistance | Provide fair and reasonable relocation payments and assistance to or for displaced persons as required by a federal agency under federal law |

| Table 2: USACE Design and Construction MOU Summary of Terms | | |
|--------------------------------------------------------------------|------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section | Provision | Summary of Terms |
| 3c(2) | Relocation Assistance Programs | Provide relocation assistance programs offering the services described in federal law to such displaced persons |
| 3c(3) | Comparable Replacement Dwellings | Make available within a reasonable period of time prior to displacement, comparable replacement dwellings to displaced persons in accordance with federal law |
| 3c(4) | Land Acquisition Policies | In acquiring real property, the non-federal interest will be guided, to the greatest extent practicable under State law, by the land acquisition policies under federal law |
| 3c(5) | Displaced Person Expenses | Displaced persons will be paid or reimbursed for necessary expenses as specified in federal law |
| 3d | Labor Laws | Compliance with applicable federal labor laws including, but not limited to: <ul style="list-style-type: none"> • Davis-Bacon Act • Contract Work Hours and Safety Standards Act • Copeland Anti-Kickback Act |
| 3e | Review and Verification | Review and verification that construction work was accomplished in a satisfactory manner and in accordance with applicable federal laws, regulations, and policies |
| 3f | Audit | Audit by government to determine the reasonableness, allocability, and allowability of costs |
| 4 | Further Understandings: | |
| 4a | No Interest Charges or Adjustments | No interest charges or adjustment applied to the costs incurred for the construction work to reflect changes in price levels |
| 4b | Use of Federal Program Funds | Federal program funds may not be used unless the federal agency providing the funds verifies in writing that the funds are authorized to be used for the project |
| 4c | Creditable Costs | Creditable costs limited to government's cost estimate if the construction work had been accomplished by the government |
| 4d | Limitation | No credit for: |

| Table 2: USACE Design and Construction MOU Summary of Terms | | |
|--------------------------------------------------------------------|------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section | Provision | Summary of Terms |
| | | <ul style="list-style-type: none"> • Construction work obtained at no cost to non-federal interest • Construction work performed prior to the effective date of MOU |
| 4e | HTRW Cleanup | <ul style="list-style-type: none"> • Any costs incurred for the clean-up of HTRW are the responsibility of the non-federal interest and no credit will be afforded for such clean-up costs. • To the maximum extent practicable, the non-federal interest will operate, maintain, repair, replace, and rehabilitate the construction work in a manner that will not cause liability to arise under CERCLA |
| 4f | Credit for Providing Real Property | <ul style="list-style-type: none"> • Crediting for costs associated with providing real property interests, placement area improvements, and relocations required for the construction work are not considered part of the creditable in-kind contributions under the MOU • Such costs may be creditable as part of the non-federal requirement to provide real property interests, placement area improvements, and relocations required for the construction work pursuant to the Project Partnership Agreement |
| 4g | Failure to Comply | Crediting may be withheld due to non-federal interest's failure to comply with terms of the MOU |
| 4h | Affording of Credit | Credit afforded only if Project Partnership Agreement is executed subsequently |
| 5 | Independent Capacity | Government and non-federal interest each act in independent capacity |
| 6 | No Assurance or Commitment | <p>Execution of MOU:</p> <ul style="list-style-type: none"> • Does not constitute, represent, or imply any federal assurance or commitment regarding approval of the project or execution of any future agreement that may include provisions for affording credit for construction work undertaken under the MOU • Does not prevent the government from modifying the project even if it results in the construction work provided by the non-federal interest no longer being an integral part of the project |

| Table 2: USACE Design and Construction MOU Summary of Terms | | |
|--------------------------------------------------------------------|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section | Provision | Summary of Terms |
| 7 | Assumed Risk | <ul style="list-style-type: none"> • MOU not a commitment to budget or appropriate funds for the project • Activities undertaken by non-federal interest for construction work solely at their own risk and responsibility |
| 8 | Notices | Notices delivered in writing to designated recipients deemed to have been duly delivered |
| 9 | Modifications | Modifications or amendments to MOU only by written mutual agreement |

The USACE Design and Construction MOU does not commit the Port to advancing design or construction activities; the major benefit the agreement provides is that it preserves the Port’s ability to obtain credit for advancing work, subject to the limitations described in the model in-kind design agreement in Exhibit A1.

DESIGN WORK THE PORT WISHES TO ADVANCE

Subject to necessary approvals from the Port Commission and appropriation authority from the Board of Supervisors, staff recommends advancing the following design efforts related to the USACE Draft Plan, as described in Item 12A on the November 25, 2024 Port Commission agenda⁴:

- **Preconstruction & Design of the USACE Draft Plan, Southern Waterfront and Northern Waterfront**, through stage gates to enable Port leadership to meter spending relative to available sources of funding:

Stage 1:

- **Adaptation design principles** that are foundational for advancing Southern Waterfront and Northern Waterfront adaptation work, building on the Waterfront Plan (access to Piers, preservation approaches, maritime/development and leasing, public access and views).
- **Program elements and requirements** for infrastructure systems (utilities, transportation, etc.)

⁴ November 25, 2024 Staff Report:

https://www.sfport.com/sites/default/files/2024-11/112524_12a_waterfront_resilience_program_next_steps_and_contracts.pdf

Stage 2:

- **Design Framework**, layering systems, and considering trade-offs with available space. The framework plan would include waterside and landside open spaces and shoreline areas. Other projects outside of the Recommended Plan (for example, future bridge adaptation or other transportation, utility, or open space projects in the area) could use the Design Framework plan as they move ahead with design development.
- **Implementation Plan**, including phasing of the project into sub-areas that can be built as funding becomes available, and construction sequencing, impacts, and mitigation. This deliverable will update the Implementation Strategy in the Final IFR/EIS through additional planning, engineering, and stakeholder engagement.

Stage 3:

- **Up to a 10% concept design and cost estimate** to inform the Draft Plan detailed design.
- **Preliminary and/or detailed design and cost estimate in targeted areas** to advance early resilience actions to implement the Draft Plan.
- **Detailed Design of the Downtown Coastal Resilience Project** to defend BART, MUNI, and the Ferry Building Area from coastal flooding, a planned early implementation action of the USACE Draft Plan.
- **Detailed Design of the South Beach Coastal Resilience Project** to defend the area from Pier 24.5 to Piers 38-40 from coastal flooding, a second early implementation action of the USACE Draft Plan.

CONSTRUCTION WORK THE PORT WISHES TO ADVANCE

Subject to necessary approvals from the Port Commission and appropriation authority from the Board of Supervisors, staff recommends advancing the following construction efforts related to the USACE Draft Plan, after completion of 100% design, and subject to compliance with all federal, state, and local laws including compliance with the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the National Historic Preservation Act and permitting requirements that govern construction in the 100' shoreline band and San Francisco Bay:

- The Downtown Coastal Resilience Project; and
- The South Beach Coastal Resilience Project.

These projects – initiated as Early Projects with Proposition A and now aligned with the USACE Draft Plan – are the most likely early implementation actions of the USACE Draft Plan in this area of the Port's waterfront. Other early implementation actions will be identified through the planning and design work described above.

Staff does not expect construction work on these projects to start until 2028 or 2029 due to design and permitting timelines. The USACE Design and Construction MOU can be updated in the future if Port leadership and the Port Commission later identify additional early implementation actions the Port wishes to pursue along with potential USACE credit towards local match requirements.

CONCLUSION

Staff seeks Port Commission feedback and guidance on the next steps described above as we seek agreements with USACE that will enable the Port to apply for credit for near-term resilience investments towards future 35% local match requirements for the design and construction of the USACE Draft Plan if it is recommended by the Chief of Engineers and authorized by Congress.

Resolution 24-62 authorizes the Executive Director to enter the USACE Design and Construction MOU, including any letters of intent, amendments, augmentations, or extensions thereof necessary to implement the transaction described in this report. Port staff recommends approval at today's meeting.

Prepared by: Brad Benson, Director
Waterfront Resilience Program

Attachments: Exhibit A - Section 221 Agreements for Design and Construction Work by the Port of San Francisco

Exhibit A1 - Model In-Kind Memorandum of Understanding (MOU) for Non-Federal Interest Design and Construction Work Performed Prior to Execution of a Design Agreement

**PORT COMMISSION
CITY AND COUNTY OF SAN FRANCISCO**

RESOLUTION NO. 24-62

- WHEREAS, The San Francisco Seawall was constructed more than a century ago and serves as the foundation for more than three miles of San Francisco waterfront, supporting historic piers, wharves, and buildings including the Ferry Building, and underpinning the Embarcadero Promenade which welcomes millions of people each year, serves as a critical emergency response and recovery area, and supports BART, Muni and ferry transportation and utility networks; and
- WHEREAS, The Port's Southern Waterfront includes Pier 48 and 50, areas surrounding Mission Creek, streets and parks in Mission Bay, the Union Iron Works Historic District at Pier 70, the Port's active maritime industrial piers, including Pier 80 and Piers 92-96, and land adjacent to Islais Creek, including 1399 Marin Street; and
- WHEREAS, Flood risk maps published by the Port, the City, and the Federal Emergency Management Agency all indicate current and future flood risk along significant portions of Port property associated with King Tides, 100-Year and 500-Year Floods, and sea level rise; and
- WHEREAS, On June 7, 2018, the United States Army Corps of Engineers (USACE) awarded the City and County of San Francisco a "new start" study appropriation to commence a General Investigation (GI) feasibility study to examine the Federal interest of possible improvements to reduce flood risk along the San Francisco waterfront (the San Francisco Coastal Flood Study, or Flood Study), as elaborated in the staff memorandum accompanying resolution 18-46 passed by the Port Commission on August 14, 2018; and
- WHEREAS, Pursuant to Resolution 18-46, the Port Commission authorized the Executive Director to enter into a Feasibility Cost Sharing Agreement with USACE for the Flood Study at a total cost of \$3 million over three years, under which the Port as Non-Federal sponsor committed to match federal funding for the Flood Study in equal proportion, resulting in a \$1.5 million Federal funding commitment and a \$1.5 million Non-Federal sponsor (Port) commitment (Original FCSA or FCSA); and
- WHEREAS, On May 26, 2020, pursuant to Resolution 20-24, the Port Commission authorized the Executive Director to enter into a first amendment to the FCSA with USACE (FCSA1), which increased the Flood Study funding from \$3 million to \$6 million and increased the Port's match to \$3 million in cash or in-kind contributions, as described in the staff report accompanying such resolution; and

WHEREAS, The Port Commission and USACE subsequently authorized amendments to the FCSA increasing the total Flood Study budget to \$16 million with a term of 7 years and 2 months; and

WHEREAS, At its December 10, 2024 meeting, the Port Commission will consider Resolution 24-61 authorizing the Executive Director to enter amendments to the FCSA, subject to the approval of the Assistant Secretary of the Army – Civil Works, that (1) allow the Port to elect to provide its cost match contribution earlier than federal appropriations to the Study, (2) increase the Flood Study budget by an additional \$3.2 million, increasing the Port’s 50% total local match to \$9.6 million (\$3 million for the original FCSA and FCSA1, \$5 million for FCSA2 and \$1.6 million for FCSA3) in Port funds or in-kind contributions to the Study, and (3) allows for an additional 12-months to complete the Study; and

WHEREAS, Through the FCSA, as amended, USACE staff and the Port’s Waterfront Resilience Program team have developed a draft plan consisting of coastal flood defenses, floodproofing and water management features to adapt the Port’s 7.5-mile bayside waterfront to sea level rise over time, with subsequent adaptation actions to respond to higher future water levels (collectively, the USACE Draft Plan or Draft Plan); and

WHEREAS, On June 28, 2024, senior leaders from USACE endorsed the Draft Plan; and

WHEREAS, If the Draft Plan is recommended by the USACE Chief of Engineers to Congress, it will become the Recommended Plan (or USACE Recommended Plan); and

WHEREAS, The Port wishes to preserve its ability to spend local, state, and other qualified funds to advance design of the USACE Draft Plan and design and possible construction of early implementation actions of the Draft Plan and potentially earn credit from USACE under agreements consistent with Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. § 1962d-5b(a)(4)) (Section 221) and subject to Congressional authorization of the Recommended Plan in the Water Resources Development Act; and

WHEREAS, The staff report attached to this resolution describes the terms of a USACE model Section 221 design and construction MOU (Section 221 Design and Construction MOU); and

WHEREAS, The proposed Section 221 Design and Construction MOU does not commit the Port to specific project designs or to undertake any construction activities; now, therefore be it

RESOLVED, That the Section 221 Design and Construction MOU does not commit the Port Commission to approval of any specific development concept or project proposal, nor does the Section 221 Design and Construction MOU foreclose

the possibility of alternative project concepts or mitigation measures; and be it further

RESOLVED, That entering into Section 221 Design and Construction MOU does not commit the Port Commission to approval of final project designs and that the Port Commission shall not take any discretionary actions committing it to the USACE Draft Plan or the USACE Recommended Plan until it has reviewed and considered environmental documentation prepared in compliance with the California Environmental Quality Act; and be it further

RESOLVED, That the Port Commission hereby authorizes the Executive Director to execute a Section 221 Design and Construction MOU as described in this resolution and accompanying staff memorandum, including any letters of intent, amendments, augmentations, or extensions thereof necessary to maintain future potential eligibility for local-match credit as described in the Section 221 Design and Construction MOU, this resolution, and the accompanying staff report, so long as the Executive Director determines in consultation with the City Attorney, such amendments, augmentations, or extensions, when taken as a whole, are in the best interests of the Port, and do not materially decrease the benefits or materially increase the obligations or liabilities of the Port, and are necessary or advisable; and be it further

RESOLVED, That the Executive Director, in consultation with the City Attorney, will determine if the final form of the Section 221 Design and Construction MOU ultimately negotiated between the Port and USACE requires Board of Supervisors approval, and will seek such approval if required.

I hereby certify that the foregoing resolution was adopted by the Port Commission at its meeting of December 10, 2024.

Secretary

EXHIBIT A

Staff Summary of Section 221 MOU for Design and Construction Work by the Port of San Francisco

Introduction

The Port of San Francisco (Port) and the U.S. Army Corps of Engineers (USACE) are completing the San Francisco Waterfront Coastal Flood Study. The USACE Recommended Plan includes structural and nonstructural coastal flood risk management features along the entire 7.5-mile waterfront. The Port is interested in proceeding with design of portions of the Recommended Plan and receiving credit for these activities. USACE has authority under Section 221 of the Flood Control Act of 1970, as amended, that allows a non-federal sponsor to proceed with design and/or construction of portions of a USACE project and to receive credit for that work. This exhibit provides an overview of the Section 221 authority and the USACE policies for implementing this authority.

Overview of Section 221 Authority

Section 221 of the Flood Control Act of 1970, as amended, is a comprehensive authority that addresses the affording of credit for the value of in-kind contributions provided by a non-Federal sponsor toward its required cost share if those in-kind contributions are determined to be integral to a study or project. Headquarters USACE (HQUSACE) issued Engineer Regulation (ER) ER 1165-2-208: *In-Kind Contributions Credit Provisions of Section 221(a)(4) of the Flood Control Act of 1970, as Amended*, on December 16, 2015, to provide guidance on implementation of Section 221. Some of the key provisions of Section 221, as outlined in ER 1165-2-208, are:

- Section 221 provides authority to USACE to provide credit for in-kind contributions made by a non-federal sponsor towards its required cost-share if those in-kind contributions are determined by USACE to be integral to the project.
- To be eligible for credit, the non-federal sponsor must comply with all applicable federal laws and implementing regulations.
- The Section 221 crediting provisions apply to the planning, design, and construction of water resources development projects.
- In those cases where there is not yet an executed Design Agreement or Project Partnership Agreement, the non-federal sponsor must execute an in-kind Memorandum of Understanding (MOU) with USACE prior to initiating the design or construction work to be considered for crediting.
- For projects that are or will be specifically authorized for construction, an in-kind MOU may be executed once there is HQUSACE approval of the Tentatively Selected Plan (TSP). The San Francisco Waterfront Coastal Flood Study was granted its HQUSACE approval of its TSP milestone on November 9, 2023.
- Any work undertaken by a non-federal sponsor pursuant to an in-kind MOU is at its own risk and responsibility. An in-kind MOU does not provide assurance that the non-federal sponsor's work will be determined to be integral to the federal project or that any construction undertaken by the non-federal sponsor will be included as part of the authorized project.
- Credit may only be afforded if USACE determines that the work is integral to the project. The approval of integral determinations has been delegated to the MSC

Commander (i.e., USACE Division Commander). The USACE District is required to prepare an Integral Determination Report to support decision-making by USACE.

- The creditable amount is the lesser of the costs incurred by the non-federal sponsor to obtain such materials or services; the market value of such materials or services; or the federal government's estimate of the cost of such work if it had been accomplished by the federal government.

Memorandum of Understanding

USACE has developed model In-Kind MOUs for design and construction work to be performed by non-federal sponsors. The MOU must be executed before the work to be credited as an in-kind contribution is performed. The In-Kind Design Work MOU is used for crediting design work that is accomplished by the non-federal sponsor prior to the execution of a Design Agreement while the In-Kind Construction Work MOU is used for crediting construction work (including design associated with that construction). The MSC Commander has delegated authority to approve the In-Kind MOU only if there are no substantive deviations from the approved model. If there are substantive deviations, the In-Kind MOU requires approval by the Director of Civil Works at HQUSACE. As part of the Mou package, the non-federal sponsor is required to submit a Certificate of Authority and Certification Regarding Lobbying.

The Model In-Kind Design Work MOU is included as Exhibit A1 and the Model In-Kind Construction Work MOU is included as Exhibit A2.

Integral Determinations

As described in ER 1165-2-208, Section 221 provides that credit may only be afforded if USACE determines that the material or service provided as an in-kind contribution by the non-federal sponsor is integral to the project. To be integral to the project, the material or service must be part of the work that the federal government would otherwise have undertaken for the design or construction of what is ultimately determined to be the federal project.

ER 1165-2-208 states that, in general, the integral determination for design work should be completed immediately prior to review and approval of the Design Agreement that provides for the affording of credit. The USACE District is required to prepare an Integral Determination Report (IDR) that includes the following:

- a description of the activities required to perform the design or construction, as applicable, of the Federal project or separable element in sufficient detail to allow a comparison with the description of the proposed in-kind contributions
- a detailed description of the work items proposed to be provided or performed as in-kind contributions
- a discussion of how each work item proposed to be provided or performed as an in-kind contribution is integral to the project
- an estimate of the costs of each work item proposed to be provided or performed as an in-kind contribution
- the estimated amount of credit to be afforded for each work item proposed to be provided or performed as an in-kind contribution

- a District Commander recommendation identifying which of the proposed in-kind contributions should be considered integral to the project

If the in-kind contributions were provided or performed prior to execution of the applicable cost sharing agreement, then also include in the IDR the results of the review or inspection, as applicable, and certification by the District Commander on whether the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies; and documentation of satisfactory environmental compliance for the construction portion of the in-kind contributions. The approval of integral determinations has been delegated to the MSC Commander.

ER 1165-2-208 lists the following examples of activities that are acceptable in-kind contributions:

- performance of design of all or a portion of the Federal project, including data collection related to design work
- demolition of buildings on lands required for the project
- performance of design or construction related studies for historic preservation activities except data recovery
- performance of cost shared monitoring and adaptive management
- construction of a portion of the project

ER 1165-2-208 lists the following as items that will not be accepted as in-kind contributions:

- The proposed in-kind contributions are not part of the Federal project.
- The proposed in-kind contributions consist of performance of activities that are inherently Governmental responsibilities (e.g., management of Government contracts; performance of District Quality Review, Agency Technical Review, Independent External Peer Review, or Policy Compliance Review; determining if Value Engineering evaluations are acceptable; determining the Lands, Easements, Rights-of-Way, Relocations, and Disposals (LERRD) required for the project or separable element of the project; determining the value of LERRD for crediting purposes; or making determinations as to compliance with applicable environmental laws and regulations).
- The proposed in-kind contributions are features or obligations that are a 100 percent non-Federal sponsor responsibility (e.g., purposes of land reclamation, local drainage, to protect against land or bank erosion, and/or the removal of hazardous, toxic, or radioactive wastes; local service facilities; betterments; acquisition and performance of LERRD, except for the provision of dredged or excavated material disposal facilities for commercial navigation projects; and performance of operation, maintenance, repair, rehabilitation, or replacement (OMRR&R);
- The proposed in-kind contributions have or will create a hazard to human life or property.
- The proposed in-kind contributions have been determined to be environmentally unacceptable.

- For proposed in-kind contributions performed prior to execution of the applicable cost-sharing agreement, after review or inspection, as applicable, the Government cannot certify the proposed in-kind contributions were accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies.
- For proposed in-kind contributions performed prior to execution of the applicable cost-sharing agreement, the non-Federal sponsor has not performed the necessary OMR&R, resulting in the work no longer functioning as needed for the project.

Tracking and Management of Credits

As stated in ER 1165-2-208, the amount of in-kind contributions that may be eligible for inclusion in shared costs for cost-sharing purposes is subject to an audit by USACE to determine the reasonableness, allocability, and allowability of such amount.

The creditable amount is the lesser of the costs incurred by the non-Federal sponsor to obtain such materials or services; the market value of such materials or services as of the date that the non-Federal sponsor provides such materials or services for use in the study or project; or the USACE's estimate of the cost for such work if it had been accomplished by USACE. This amount is not subject to interest charges or to adjustment to reflect changes in price levels between the time the in-kind contributions were completed and the time the amount is credited.

Any in-kind contributions performed or paid for by the non-Federal sponsor using funds provided by another Federal agency (as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant) are not eligible for credit unless the Federal agency providing the Federal portion of such funds verifies in writing that the funds are authorized to be used to carry out the study or project.

After execution of the applicable Design Agreement or Project Partnership Agreement, the non-Federal sponsor is required to submit credit requests to USACE not any less frequently than every 6 months for eligible in-kind contributions under that agreement. USACE requires that the credit requests contain the following: written certification by the non-Federal sponsor of the payments made to contractors, suppliers, or employees for in-kind contributions; copies of all relevant invoices and evidence of such payments; written identification of costs that have been paid with funds or grants provided by a Federal agency as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant; and a written request for credit of a specific amount not in excess of such specified payments.

EXHIBIT A1
Model In-Kind Memorandum of Understanding (MOU)
for Non-Federal Interest Construction Work Performed
Prior to Execution of a Project Partnership Agreement
May 30, 2008
(with updates as of September 17, 2024)

APPLICABILITY AND INSTRUCTIONS:

1. For a project for which a project partnership agreement will be executed, the attached model In-Kind MOU should be used if the non-Federal interest plans to perform construction (including design associated with that construction) pursuant to Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)(4)) prior to execution of the project partnership agreement. If the non-Federal interest plans to perform design work only prior to execution of a design agreement, or a project partnership agreement covering both design and construction (such as for CAP projects), use the applicable model In-Kind MOU developed for that purpose.
2. The MSC Commander has delegated authority to approve the In-Kind MOU only if there are no substantive deviations from the approved model. Before approval, division counsel is required to concur that the In-Kind MOU does not substantively deviate from the model and is appropriate to use for the particular project. If there are substantive deviations, the In-Kind MOU package, along with the MSC Division Commander's recommendations, must be transmitted to the appropriate HQUSACE RIT and the HQ Agreements Team (DLL-HQ-Agreements-Team@usace.army.mil) for review and requires the Director of Civil Works' approval. The District Commander is authorized to execute the In-Kind MOU after it is approval.
3. If there are multiple non-Federal interests, modify the In-Kind MOU to use the term "Non-Federal Interests" throughout and make the necessary modifications to change, as appropriate, verbs and pronouns from singular to plural.
4. Reminder: Make all required insertions; remove this cover page; remove the open and close brackets and any instructional text; and ensure the page numbers, spacing and page breaks throughout the In-Kind MOU are appropriate.
5. The Certificate of Authority and Certification Regarding Lobbying should be included as a part of the In-Kind MOU package. These certificates can be found on the Corps' "Model Agreements and Templates" website. Also, if a non-profit entity is serving as a Non-Federal Interest in accordance with ASA(CW) Memorandum, dated April 5, 2012, Subject: Implementation Guidance for Section 2003(b) of the Water Resources Development Act of 2007 - Definition of Non-Federal Interest, use the Certificate of Authority for a Non-Profit Entity as provided on the website mentioned above.

IN-KIND MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF THE ARMY
AND THE
[FULL NAME OF NON-FEDERAL INTEREST]
FOR CONSTRUCTION WORK PERFORMED
PRIOR TO EXECUTION OF
A
PROJECT PARTNERSHIP AGREEMENT
FOR THE
[FULL NAME OF PROJECT]

THIS IN-KIND MEMORANDUM OF UNDERSTANDING (hereinafter the “In-Kind MOU”) is entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for **[Insert Name of USACE District, e.g., New Orleans District]** (hereinafter the “District Commander”) and the **[Full Name of the Non-Federal Interest]** (hereinafter the “Non-Federal Interest”), represented by the **[Title]**.

WITNESSETH, THAT:

WHEREAS, Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)(4)), provides that a cost-sharing agreement may provide credit for the value of materials or services provided before the execution of such cost-sharing agreement if the Secretary and the non-Federal interest enter into an In-Kind MOU under which the non-Federal interest plans to carry out such work and only work carried out following the execution of such In-Kind MOU shall be eligible for credit;

WHEREAS, the Non-Federal Interest understands and acknowledges that any credit for eligible in-kind contributions will be afforded only toward the required non-Federal contribution of funds (i.e., cash contribution) under the Project Partnership Agreement for the project or separable element thereof **[INSERT THE FOLLOWING PHRASE IF THE PROJECT INCLUDES STRUCURAL FLOOD RISK MANAGEMENT FEATURES: “, except such credit will not be afforded toward the non-Federal requirement pursuant to the Project Partnership Agreement to pay a cash contribution equal to 5 percent of the construction costs allocated to structural flood risk management” OR IF THE PROJECT INCLUDES GENERAL NAVIGATION FEATURES: “, except such credit will not be afforded toward the non-Federal requirement pursuant to the Project Partnership Agreement to pay an additional 10 percent of construction costs over 30 years”];** and

WHEREAS, by letter dated **[Month Day, Year]**, the Non-Federal Interest stated its intent to provide certain construction work, including any design required for that construction work, (hereinafter the “Construction Work”, as defined in Paragraph 1 of this In-Kind MOU) prior to the execution of the Project Partnership Agreement for the **[Full**

Name of the Project] at [Specific Location of the Project, Including State, Commonwealth, or Territory].

NOW, THEREFORE, the parties agree as follows:

1. The Non-Federal Interest plans to perform the following Construction Work which must be undertaken in accordance with the terms and conditions of this In-Kind MOU and requirements of applicable Federal laws and implementing regulations. The Construction Work consists of **[describe the construction work the Non-Federal Interest plans to perform for the project, including any necessary engineering plans and specifications and other design activities that are required for that construction, even if the design activities are carried out prior to the execution of this In-Kind MOU]**, as generally described in the letter from the Non-Federal Interest.

2. The Non-Federal Interest shall keep books, records, documents, and other documentation of costs and expenses incurred for the Construction Work in accordance with this In-Kind MOU. The value of the Construction Work shall be equivalent to the costs, documented to the satisfaction of the Government, that the Non-Federal Interest incurred to provide the Construction Work, which may include engineering and design; real estate, economic, and environmental analyses and evaluation; construction; and supervision and administration, but shall not include any costs associated with betterments, as determined by the Government. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Interest's employees.

3. The Non-Federal Interest understands that eligibility for credit for the Construction Work is subject to:

a. A determination by the Division Commander for **[Name of USACE Division, e.g., Mississippi Valley Division]** that the Construction Work is integral to the project;

b. The Non-Federal Interest completing or assuring completion of all necessary environmental coordination and obtaining all applicable Federal, State, and local permits prior to initiating construction of the Construction Work;

c. In acquiring the real property interests for the Construction Work, the Non-Federal Interest assures the Government that it will comply with the following:

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under 42 U.S.C. 4622, 4623 and 4624;

(2) relocation assistance programs offering the services described in 42 U.S.C. 4625 shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with 42 U.S.C. 4625(c)(3);

(4) in acquiring real property, the Non-Federal Interest will be guided, to the greatest extent practicable under State or Commonwealth law, by the land acquisition policies in 42 U.S.C. 4651 and the provisions of 42 U.S.C. 4652; and

(5) displaced persons will be paid or reimbursed for necessary expenses as specified in 42 U.S.C. 4653 and 4654;

d. The Non-Federal Interest's compliance with applicable Federal labor laws covering non-Federal construction and relocations, including, but not limited to, 40 U.S.C. 3141–3148 and 40 U.S.C. 3701–3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act);

e. Review and verification, including on-site inspection, as applicable, by the Government that the Construction Work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies; and

f. An audit by the Government to determine the reasonableness, allocability, and allowability of such costs.

4. The Non-Federal Interest understands further that:

a. No interest charges or adjustment will be applied to the costs incurred for the Construction Work to reflect changes in price levels;

b. Federal program funds may not be used to meet any of its obligations under this In-Kind MOU unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor;

c. Only the costs of the Construction Work that do not exceed the Government's estimate of the cost of such work if the work had been accomplished by the Government are eligible for credit;

d. No credit will be provided for the value of Construction Work obtained at no cost to the Non-Federal Interest or for the cost of construction initiated prior to the effective date of this In-Kind MOU;

e. Any costs incurred for the clean-up of hazardous material regulated by the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"; 42 U.S.C. 9601–9675), that may exist in, on, or under any real property

interests required for the Construction Work are a Non-Federal Interest responsibility and no credit shall be afforded for such clean-up costs. In addition, the Non-Federal Interest understands that as between the Government and the Non-Federal Interest, the Non-Federal Interest shall be considered the owner and operator of the Construction Work for the purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Interest shall operate, maintain, repair, replace, and rehabilitate the Construction Work in a manner that will not cause liability to arise under CERCLA;

f. Crediting for the costs associated with providing real property interests, placement area improvements, and relocations required for the Construction Work are not considered part of the creditable in-kind contributions under this In-Kind MOU. However, such costs may be creditable as part of the non-Federal requirement to provide real property interests, placement area improvements (if applicable), and relocations for construction, operation, and maintenance of the Construction Work pursuant to the terms and conditions in a Project Partnership Agreement;

g. Crediting for the costs of the Construction Work may be withheld, in whole or in part, as a result of the Non-Federal Interest's failure to comply with the terms of this In-Kind MOU; and

h. Credit may be afforded only if a Project Partnership Agreement is executed subsequently by the Government and the Non-Federal Interest.

5. In the exercise of their respective rights and obligations under this In-Kind MOU, the Government and the Non-Federal Interest each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

6. Execution of this In-Kind MOU does not constitute, represent, or imply any Federal assurance or commitment regarding approval of the project or execution of any future agreement that may include provisions for affording credit for Construction Work undertaken under this In-Kind MOU. In addition, execution of this In-Kind MOU in no way prevents the Government from modifying the project even if it results in the Construction Work provided by the Non-Federal Interest no longer being an integral part of the project.

7. Nothing herein shall constitute, represent, or imply any commitment to budget or appropriate funds for the project in the future; and nothing herein shall represent, or give rise to, any duty, obligation, or responsibility for the United States. Any activity undertaken by the Non-Federal Interest for the Construction Work is solely at the Non-Federal Interest's own risk and responsibility.

8. Notices.

a. Any notice, request, demand, or other communication required or permitted to be given under this In-Kind MOU shall be deemed to have been duly given if in writing and delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Interest:
[Recipient's Title & Address]

If to the Government:
[Recipient's Title & Address]

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

9. This In-Kind MOU may be modified or amended only by written, mutual agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this In-Kind MOU, which shall become effective upon the date it is signed by the District Commander.

DEPARTMENT OF THE ARMY

[FULL NAME OF NON-FEDERAL INTEREST]

BY: _____
[TYPED NAME]
[Rank], U.S. Army
District Commander

BY: _____
[TYPED NAME]
[Full Title]

DATE: _____

DATE: _____

APPROVED AS TO FORM:
DAVID CHIU, City Attorney

By: _____
Name: _____
Deputy City Attorney