DRAFT

MEMORANDUM OF AGREEMENT
AMONG THE U.S. ARMY CORPS OF ENGINEERS,
THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER, AND
THE SAN FRANCISCO PUBLIC UTILITIES COMMISSION
REGARDING THE ISSUANCE OF A PERMIT(S) UNDER THE AUTHORITY OF SECTION 404 OF THE CLEAN WATER ACT FOR THE
SEISMIC UPGRADE OF BAY DIVISION PIPELINE NOS. 3 AND 4 AT HAYWARD FAULT PROJECT, FREMONT, ALAMEDA COUNTY, CALIFORNIA

WHEREAS, the U. S. Army Corps of Engineers, San Francisco District (Corps) (Lead Agency) will issue a permit (Undertaking), under File No. **COE090417A**, pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) to the San Francisco Public Utilities Commission (SFPUC) (Proponent), for the Seismic Upgrade of Bay Division Pipeline Nos. 3 and 4 at Hayward Fault Project (Project); and

WHEREAS, the Corps has consulted with the California State Historic Preservation Officer (SHPO) pursuant to 36 CFR Part 800, and

WHEREAS, the SHPO has concurred with the Corps regarding the Area of Potential Effects, Identification Efforts, and that pursuant to 36 CFR Part 800.5(d)(2) a finding of adverse effect was appropriate regarding archaeological site **CA-ALA-576, which has been found eligible for the National Register of Historic Places (NRHP) under criterion D by Section 106 consensus** (Attachment A)**,** and

WHEREAS, the Corps proposes to continue consultation with SHPO to resolve adverse affects to cultural resources through the development of this Memorandum of Agreement (MOA) and implementation of the attached Historic Properties Treatment Plan (HPTP) in Attachment B pursuant to 36 CFR Part 800.6, and

WHEREAS, This MOA, when executed, shall evidence the Corps' compliance with Section 106 and shall govern the program of resolution of adverse effect pursuant to 36 CFR Part 800.6.

WHEREAS, the Advisory Council on Historic Preservation (ACHP) has declined to participate in this consultation (Attachment D); and

WHEREAS, the Corps has determined that there are no federally-recognized Native American tribes associated with the project area; and

WHEREAS, the Corps has consulted with, and will continue to consult with, non-federally recognized tribes identified by the Native American Heritage Commission (NAHC), and they are invited signatories.

NOW, THEREFORE, the Corps, the SHPO, and the SFPUC shall ensure that the Undertaking is implemented in accordance with the following stipulations which take into account the effects of the Undertaking on site CA-ALA-576 and that these stipulations shall govern the Project and all of its parts until the terms of this MOA are fulfilled or the MOA is terminated in accordance with Stipulation E.

STIPULATIONS

The Corps shall incorporate the provisions of this MOA and implementation of measures described in the attached HPTP as conditions of the Corps Section 404 Permit for the Project, and will ensure that the following measures are carried out in full.

I. PROJECT DESCRIPTION, AREA OF POTENTIAL EFFECTS, AND RECORDED SITE

The SFPUC is proposing seismic upgrades (earthquake protection measures) to Bay Division Pipelines (BDPL) No. 3 and 4 where they cross three traces of the Hayward fault in the City of Fremont, County of Alameda, California. The Project is a component of the SFPUC's Water System Improvement Program (WSIP). BDPL Nos. 3 and 4 carry water from the Irvington Tunnel in Fremont to customers in the East Bay, South Bay, and Peninsula through turnouts along the pipelines. These pipelines cross the Hayward earthquake fault in Fremont. Without the proposed improvements, a large earthquake on the Hayward fault could rupture both pipelines at the Project location, causing substantial damage to surrounding features, localized flooding, as well as loss of water supply to the San Francisco Bay Area.

The Corps has established the APE for the Undertaking, in consultation with the SHPO. The established APE is depicted on maps contained in the HPTP (Attachment B). The APE includes the area, surface and subsurface, that could experience ground disturbance as a result of proposed Project activities including locations of pipeline installation as well as any ancillary areas to be used for construction materials and equipment staging. The horizontal archaeological APE includes the entire 80-foot-wide SFPUC right of way and staging areas. The vertical APE varies in depth from the ground surface, in areas where superficial activities including vehicle traffic and staging activities will occur, to a depth of 35 feet below surface level, in areas where ground disturbance anticipated in connection with pipeline installation and upgrades.

The Historic Context and Archaeological Survey Report (HCASR) completed for the Project revealed that a site within the APE was determined eligible to the National Register of Historic Places (NRHP), specifically, site **CA-ALA-576** (Attachment C). **CA-ALA-576** was determined eligible for listing on the National Register of Historic Places (NRHP) under Criterion D, its ability to yield information important in prehistory, by the SHPO on December 29, 1999. On April 28, 2009 (Attachment A) the SHPO concurred with the Corps that construction for this project would result in an adverse effect to site CA-ALA-576 because construction and upgrading of BDPLs 3 and 4 would impact the site (Attachment A).

II. TREATMENT OF ADVERSE EFFECTS

A. The Corps and the SFPUC have agreed to resolve adverse effects to **CA-ALA-576** by conducting archaeological data recovery detailed in the Historic Properties Treatment Plan (HPTP) that is included as attachment B to this MOA. The program detailed in the HPTP includes:

a. A detailed data recovery program, laboratory analysis, curation, and reporting requirements.
b. Requirements for monitoring during construction.
c. Continued coordination with Native American groups.
d. A plan for any unexpected discoveries during construction.
e. A process to treat unexpected and inadvertent discoveries of human remains.

B. The fieldwork portion of the data recovery measures in the HPTP shall be completed prior to construction (Attachment B).

III. REPORTING REQUIREMENTS

A. Reporting requirements as stated in the HPTP, Attachment B, shall be completed by the Corps within twenty-four (24) months of completion of proposed fieldwork. The Corps shall ensure that all reports comply with contemporary professional standards and follow the Secretary of the Interior's *Standards and Guidelines for Archaeological Documentation* (as amended and annotated).

B. Within the twenty-four month period, a draft technical report will be prepared by the Corps and distributed for review to signatory parties to this MOA. Signatory parties will have 30 days from receipt of draft technical report to submit written comments to the Corps. At the end of the 30 day comment period, the Corps will take into account comments received and issue the final technical report. Failure of reviewing signatory parties to submit written comments wihtin the established tiemframe will be construed as acceptance of the document.

IV. TREATMENT OF HUMAN REMAINS OF NATIVE AMERICAN ORIGIN

A. The parties to this MOA agree that any Native American burials or related items discovered during the implementation of the Project will be treated in accordance with the requirements of 7050.5 (b) of the California Health and Safety Code. If, pursuant to 7050.5 (c) of the California Health and Safety Code, the county coroner/medical examiner determines that the human remains are or may be of Native American origin, then the discovery shall be treated in accordance with the provisions of 5097.98 (a)-(d) of the California Public Resources Code. If human remains are discovered and determined to be Native American, the NAHC will be contacted for a determination of Most Likely Descendant (MLD). The Corps and SFPUC will work with the MLD to determine appropriate treatment and/or reburial measures. Treatment of human remains will be conducted according to the measures outlined in the attached HPTP.

V. DISCOVERIES AND UNANTICIPATED EFFECTS

A. If the Corps or SHPO determines that implementation of the Undertaking will affect a previously unidentified property that may be eligible for the NRHP, or affect a known historic property in an unanticipated manner, the Corps will address the discovery, or unanticipated effect, in accordance with the procedures outlined in 36 C.F.R. § 800.13. The Corps and SHPO at their discretion may hereunder assume any discovered property to be eligible for inclusion in the National Register, and that compliance with this stipulation shall satisfy the requirements of 36 CFR § 800.13(a)(2). Pursuant to 36 C.F.R. § 800.13, the Corps will notify SHPO and interested Native Americans within seventy-two (72) hours of the discovery. The notification shall describe the actions proposed by the Corps to resolve the adverse effects. The SHPO shall respond within seventy-two (72) hours of the notification. The signatories agree that only cultural resources determined or assumed to be eligible for the National Register will be subject to further consideration under terms of the MOA.

VI. ADMINISTRATIVE STIPULATIONS

A. STANDARDS

1. *Professional Qualifications*. All activities prescribed by Stipulations II, III, IV, and V of this MOA shall be carried out under the authority of the Corps by or under the direct supervision of a person or persons meeting at a minimum the Secretary of the Interior's *Professional Qualifications Standards* (PQS) (48 Fed Reg. 44,738-44,739) in the appropriate disciplines.

However, nothing in this stipulation may be interpreted to preclude the Corps or any agent or contractor thereof, from using the services of persons who do not meet the PQS who are supervised by persons who meet the PQS.

2. *Historic Preservation Standards*. All activities prescribed by Stipulations II, III, IV, and V of this MOA shall reasonably conform to applicable standards and guidelines established by the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation* (48 Fed Reg. 44,716-44,740) and SHPO guidelines.

3. *Curation and Curation Standards*. The Corps shall ensure that, to the extent permitted by applicable federal law, the materials and records resulting from the activities prescribed by Stipulations II, III, IV, and V of this MOA are curated in accordance with 36 CFR Part 79.

B. CONFIDENTIALITY

The parties to this MOA acknowledge that historic properties covered by this MOA are subject to the provisions of Section 304 of the National Historic Preservation Act of 1966 relating to the disclosure of archaeological site information and having so acknowledged, will ensure that all actions and documentation prescribed by this MOA are consistent with Section 304 of the National Historic Preservation Act of 1966.

C. RESOLVING OBJECTIONS

1. Should SHPO object to the manner in which the terms of this MOA are implemented, the Corps will consult with the SHPO to resolve the objection. If the Corps determines that the objection cannot be resolved, the Corps shall forward all documentation relevant to the dispute, including the Corps's proposed resolution to the ACHP for their assistance in resolving the dispute. In the event the ACHP provides timely advice or comments, the Corps, prior to reaching a final decision on the dispute, shall prepare a written response that takes into account the recommendation or comment provided by the ACHP pertaining to the subject of the dispute, and provide them a copy of this written response.

2. The Corps's responsibility to carry out all actions under this MOA that are not the subject of a dispute will remain unchanged.

3. The Corps may authorize any action subject to objection under this stipulation to proceed after the objection has been resolved in accordance with the terms of this stipulation.

4. At any time during implementation of the measures stipulated in this MOA, should an objection pertaining to such implementation be raised by a member of the public, the Corps shall notify the parties to the MOA in writing of the objection and take the objection into consideration. The Corps shall consult with the objecting party and, if the objecting party so requests shall also consult with SHPO, for no more than 15 days. Within ten (10) days following closure of this consultation period, the Corps will render a decision regarding the objection and notify all consulting parties of its decision in writing. In reaching its decision, the Corps will take into account any comments from the consulting parties regarding the objection, including the objecting party. The Corps decision regarding the resolution of the objection will be final.

D. AMENDMENTS

Any Signatory may propose that this MOA be amended, whereupon the Signatories will consult for no more than 30 days to consider such amendment. The amendment process shall comply with 36 CFR § 800.6(c) (l) and 800.6(c) (7). This MOA may be amended only upon the written agreement of the Signatories. If it is not amended, this MOA may be terminated by either Signatory in accordance with Stipulation VI(E).

E. TERMINATION

1. If this MOA is not amended as provided for in Stipulation VI(D), or if any Signatory proposes termination of this MOA for other reasons, the Signatory proposing termination shall, in writing, notify the other Signatories, explain the reasons for proposing termination, and consult with the other Signatories for at least 30 days to seek alternatives to termination. Such consultation shall not be required if the Corps proposes termination because the Undertaking no longer meets the definition set forth in 36 CFR § 800.16(y).

2. Should such consultation result in an agreement on an alternative to termination, then the Signatories shall proceed in accordance with the terms of that agreement.

3. Should such consultation fail, the Signatory proposing termination may terminate this MOA by promptly notifying the other Signatories in writing. Termination hereunder shall render this MOA without further force or effect.

4. If this MOA is terminated hereunder, and if the Corps determines that the Undertaking will nonetheless proceed, then the Corps shall either consult in accordance with 36 CFR § 800.6 to develop a new MOA or request the comments of the Council pursuant to 36 CFR Part 800.

F. DURATION OF THE MOA

1. Unless terminated pursuant to Stipulation VI(E), or unless it is superseded by an amended MOA, this MOA will be in effect following execution by the Signatories until the Corps, in consultation with SHPO, determines that all of its stipulations have been satisfactorily fulfilled. This MOA will terminate and have no further force or effect on the day that the Corps notifies SHPO in writing of its determination that all stipulations of this MOA have been satisfactorily fulfilled.

2. The terms of this MOA shall be satisfactorily fulfilled within five (5) years following the date of execution by SHPO. If the Corps determines that this requirement cannot be met, the parties to this MOA will consult to reconsider its terms. Reconsideration may include continuation of the MOA as originally executed, amendment or termination. In the event of termination, the Corps will comply with Stipulation VI(E)(4) if it determines that the Project will proceed notwithstanding termination of this MOA.

3. If the Project has not been implemented within five (5) years following execution of this MOA by SHPO, this MOA shall automatically terminate and have no further force or effect. In such event, the Corps shall notify SHPO in writing and, if it chooses to continue with the Project, shall reinitiate review of the Project in accordance with 36 CFR Part 800.

G. EFFECTIVE DATE

This MOA shall take effect on the date that it has been executed by the SHPO.

EXECUTION of this MOA by the Corps and SHPO, its subsequent transmittal by the Corps to the ACHP in accordance with 36 CFR § 800.6(b)(1)(iv), implementation of its terms, evidences that the Corps has afforded the ACHP an opportunity to comment on the Undertaking and its effect on historic properties and that the Corps has taken into account the effects of the Undertaking on historic properties.

SIGNATORIES:

U.S. ARMY CORPS OF ENGINEERS, SAN FRANCISCO DISTRICT

By: _____ Date: _____
Jane M. Hicks
Chief, Regulatory Division

CALIFORNIA STATE HISTORIC PRESERVATION OFFICER

By: _____ Date: _____
Milford Wayne Donaldson, FAIA
State Historic Preservation Officer

SAN FRANCISCO PUBLIC UTILITES COMMISSION

By: _____ Date: _____
Johanna Wong
Regional Project Manager, Bay Division

INVITED SIGNATORIES:

[Reviewers: This will include the list of Native American tribes that request to be signatories to the MOA.]

By: _____ Date: _____

By: _____ Date: _____

By: _____ Date: _____

Attachments:

A. Office of Historic Preservation (OHP), *Re: San Francisco Public Utilities Commission (SFPUC) Water System Improvement Program, BDPL Pipeline Nos. 3 and 4 at Hayward Fault Seismic Upgrade Project, Fremont, Alameda County, California*. Ref: COE090417A. Letter from Milford Wayne Donaldson, OHP, to Mitch Marken, PhD. ESA, April 28, 2009.
B. ESA+Orion, Seismic Upgrade of Bay Division Pipeline Nos. 3 and 4 at Hayward Fault, Archaeological Research Design and Treatment Plan/Historic Property Treatment Plan for Site CA-ALA-576. September, 2010.
C. ESA+Orion, *Historic Context and Archaeological Survey Report for the Seismic Upgrade of Bay Division Pipeline (BDPL) Nos. 3 and 4 at Hayward Fault Project.* Prepared for SFPUC and MEA, 2009.