

MEETING DATE: March 23, 2017

TITLE: Authorization to Enter into a Feasibility Cost Share Agreement with the Department of Army for the Painter Creek Section 206 Ecosystem Restoration Project

RESOLUTION NUMBER: 17-026

PREPARED BY: Tiffany Schaufler

E-MAIL: tschaufler@minnehahacreek.org

TELEPHONE: 952-641-4513

REVIEWED BY: Administrator Counsel Program Director:
 Board Committee Engineer Other

WORKSHOP ACTION:

<input type="checkbox"/> Advance to Board mtg. Consent Agenda.	<input type="checkbox"/> Advance to Board meeting for discussion prior to action.
<input type="checkbox"/> Refer to a future workshop (date):_____	<input type="checkbox"/> Refer to taskforce or committee (date):_____
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input checked="" type="checkbox"/> Other (specify): Not reviewed at Workshop. Seeking final action on March 23, 2017.	

PURPOSE or ACTION REQUESTED:

Authorization to enter into a Feasibility Cost Share Agreement with the Department of Army for the Painter Creek Section 206 Ecosystem Restoration Project and approval to expend \$39,000 for the District's contribution towards the Feasibility Cost Share Agreement.

PROJECT/PROGRAM LOCATION:

Painter Creek Subwatershed

PROJECT TIMELINE:

- 2017 – Update Feasibility Study
- 2018 – Negotiate Project Partnership Agreement, begin design
- 2019 – Continue design, permit acquisitions
- 2020 – Construction

PAST BOARD ACTIONS:

- February 19, 2009, RES 09-024: Resolution of Support for USACE Painter Creek Feasibility Study
- May 20, 2010: Discussed whether the District should work with the USACE to develop a collaborative project in the Painter Creek subwatershed.
- August 19, 2010: Discussed the real estate plan for the USACE Painter Creek partnership. At that time the real estate plan required the District to acquire land through fee title which was found infeasible for the District and resulted in the Board passing a resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the project.
- July 9, 2015, RES 15-061: Authorization to submit a Letter of Intent to the U.S. Army Corps of Engineers for Painter Creek Section 206 Funding

**DRAFT for discussion purposes only and subject to Board approval and the availability of funds.
Resolutions are not final until approved by the Board and signed by the Board Secretary.**

SUMMARY:

Painter Creek Subwatershed Background

Painter Creek is a 13.5 square mile (8,667 acre) subwatershed located along the northwestern boundary of the Minnehaha Creek Watershed District (MCWD or District) and includes portions of the cities of Medina, Orono, Maple Plain, Independence and Minnetrista (see attached map). The headwaters of the subwatershed is Katrina Lake (202 Acres), a shallow marsh system located within Three Rivers Park District's Baker Park Reserve, which drains via Painter Creek (County Ditch 10) through a series of large interconnected wetland systems into Jennings Bay on Lake Minnetonka.

The Painter Creek subwatershed is a wetland dominated systems with no lakes within the principal drainage area. The system delivers high phosphorus loads to Jennings Bay on Lake Minnetonka, which is listed as impaired for excess nutrients due to loading coming from Painter Creek and internal loading from within Jennings Bay. Based on MCWD monitoring data, it is estimated that Painter Creek contributes between 33% - 50% of the total annual phosphorus load to Jennings Bay on Lake Minnetonka, which is listed as an Impaired Water. While Painter Creek is not listed as an Impaired Water for nutrients, the stream exhibits significantly high total phosphorus concentrations, and exceeds state river eutrophication standards. Phosphorus loads increase from upstream to downstream, and dissolved oxygen can fall below state standards during low flows. Painter Creek also exceeds state standards for *E. coli* bacteria concentration.

In addition to water quality considerations, the subwatershed experiences some localized flooding due to the system's altered hydrology (hard cover and altered wetlands) and conveyance systems (culverts and ditches). Following 2014 flooding, the MCWD entered into a partnership with local landowners and communities to address localized flooding within the South Katrina Marsh system, in exchange for easements that would facilitate planned work under the USACE Section 206 Program.

Overall, the system enjoys moderate to high ecological integrity, with areas of high quality wetland and upland, including several regionally significant ecological areas. Management strategies within the Painter Creek will focus on restoring wetland and stream systems in ways that reduce nutrient loading downstream to Jennings Bay, while improving ecological integrity and corridor connectivity within the subwatershed.

United States Army Corps of Engineers – MCWD Background

In 2004, MCWD completed a Feasibility Study for the Painter Creek Subwatershed to assess the methods available to restore water quality to Jennings Bay and its tributary area. Following the completion of this work the District engaged in discussions with the United States Army Corps of Engineers (USACE), who expressed interest in partnering on an ecosystem restoration project for this geography. The USACE completed a DRAFT Painter Creek Feasibility Study in March 2010, under Section 206 of the Water Resources Development Act of 1996, and subsequently presented it to the Board of Managers at the May 20, 2010 Board Meeting. In order to approve the Section 206 Painter Creek Feasibility Study the USACE required a Letter of Intent (LOI) from the local project sponsor (MCWD). At the May 20, 2010 Board Meeting, the Board directed District counsel to develop additional details on a potential partnership with the USACE to implement projects in the Painter Creek Subwatershed. Discussion was continued at the August 19, 2010 Board Meeting, where staff outlined the real estate acquisition plan required for the USACE Painter Creek partnership, which would constitute MCWD's "local match" for Section 206 funds. At that time USACE rules governing the real estate plan required the District to acquire land through fee title, and prohibited acquisition through easement. This was evaluated and found to render the project infeasible by the District. Accordingly, the Board of Managers passed a resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the project.

In recent years, the Board has repeatedly identified the need to diversify its funding sources in order to fund a larger volume of capital project implementation at a larger scale. Following these discussions, District staff reinitiated contact with the USACE to explore ways to access Section 206 funding while managing risk to the District. As discussions progressed USACE staff indicated that interpretation of real estate acquisition language had changed, providing for the acquisition of land by the local sponsor through easement, rather than fee title.

At the April 16, 2015 Planning and Policy Committee (PPC), staff summarized planning efforts within the Painter Creek subwatershed, specifically in proximity to South Katrina Marsh and Painter Marsh. Both the South Katrina Marsh and Painter Marsh project areas represent areas of potential work pursuant to the USACE Painter Creek Feasibility Study. Staff then introduced a preliminary risk assessment and management framework (see attached framework), should the District Board of Managers wish to revisit its partnership posture with the USACE, to access ~\$2.3 million in Section 206 funding for wetland restoration within the Painter Creek corridor.

Following the April 16, 2015 PPC meeting, staff continued working with legal counsel and the USACE to discuss potential risk and exposure for the District under the Section 206 framework. District staff, Smith Partners staff and USACE staff had a joint meeting on June 9, 2015 to examine the risks and risk mitigation strategies associated with a USACE project partnership agreement.

District staff and counsel facilitated a discussion with the PPC at their June 25, 2015 meeting to discuss whether the risk was manageable to partner with the USACE to access Section 206 funding within the Painter Creek Subwatershed. The Committee determined that the MCWD had evolved since its initial partnerships with the USACE, and that risks were generally manageable, and passed a resolution recommending to the Board of Managers that a letter of intent be submitted to the USACE for the Painter Creek Feasibility Study. At the July 9, 2015 Board of Managers meeting, the Board approved Resolution 15-061 to submit a Letter of Intent to the USACE for the Painter Creek Feasibility Study, and the letter was sent on July 30, 2015.

In March 2016, following St. Paul District submittal of the Painter Creek Feasibility Study to USACE Division, USACE staff informed the MCWD that portions of the Painter Creek Feasibility Study would need to be updated before a congressional appropriation through Section 206 could be pursued. Specifically, the real estate plan, environmental compliance, and the cost engineering sections of the study would need updating. This update to the Painter Creek Feasibility Study would be done through a Feasibility Cost Share Agreement (FCSA) (see attached Agreement) between the USACE and District. The shared costs to update the Feasibility Study are projected to be \$78,000 of which the District would be responsible for half (\$39,000). The District's \$39,000 cost share would be due upon execution of the Feasibility Cost Share Agreement.

ATTACHMENTS:

- Map of Painter Creek Subwatershed
- Risk Management Framework: Painter Creek Partnership with USACE
- Feasibility Cost Share Agreement

RESOLUTION

RESOLUTION NUMBER: 17-026

TITLE: Authorization to Enter into a Feasibility Cost Share Agreement with the Department of Army for the Painter Creek Section 206 Ecosystem Restoration Project

WHEREAS, the Minnehaha Creek Watershed District has identified the Painter Creek subwatershed as a priority area for Capital Improvements in its 2007 Comprehensive Water Resources Management Plan; and

WHEREAS, the U.S. Army Corps of Engineers (USACE) completed a DRAFT Feasibility Study for the Painter Creek project area and reviewed the DRAFT Feasibility Study findings with the MCWD Board of Managers at their February 19, 2009 Board Meeting; and

WHEREAS, at the February 19, 2009 Board Meeting the Board passed Resolution 09-024 to provide a Resolution of Support for the USACE Painter Creek Feasibility Study; and

WHEREAS, in March 2010 the USACE finalized the Painter Creek Feasibility Study; and

WHEREAS, at the May 20, 2010 Board Meeting the Board discussed whether the District should work with the USACE to develop a collaborative project in the Painter Creek subwatershed; and

WHEREAS, at the August 19, 2010 Board Meeting the Board passed a Resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the Painter Creek project, due in part to the real estate plan requirement to obtain all project lands in fee; and

WHEREAS, since the August 19, 2010 Board Meeting the USACE has communicated that project lands may be acquired through easement rather than in fee; and

WHEREAS, in recent years the Board of Managers has identified the need to diversify its funding sources in order to fund larger capital projects; and

WHEREAS, in June 2015 District staff, legal counsel, and USACE staff jointly examined the risk and risk mitigation strategies associated with executing a USACE project partnership agreement; and

WHEREAS, at the June 25, 2015 Policy and Planning Committee staff and legal counsel facilitated a discussion on the risk and risk mitigation strategies associated with executing a project partnership agreement with the USACE to access Section 206 funding within the Painter Creek subwatershed; and

WHEREAS, at the June 25, 2015 Policy and Planning Committee it was moved by Manager Miller, seconded by Manager Shekleton and passed 3-0 that the Committee recommend issuing a letter of intent to the USACE at the July 9, 2015 Board of Managers Workshop; and

WHEREAS, at the July 9, 2015 Board Meeting the Board passed a Resolution to submit a non-binding letter of intent to the USACE for Painter Creek Section 206 funding; and

WHEREAS, at the March 9, 2017 Policy and Planning Committee staff provided a status update on the Painter Creek Section 206 Project and briefed the Committee on the need for a Feasibility Cost Share Agreement;

NOW, THEREFORE, BE IT RESOLVED that the MCWD Board of Managers hereby authorizes the Board President, on advice of counsel, to execute a Feasibility Cost Share Agreement with the Department of Army for the Painter Creek Section 206 Ecosystem Restoration Project; and

**DRAFT for discussion purposes only and subject to Board approval and the availability of funds.
Resolutions are not final until approved by the Board and signed by the Board Secretary.**

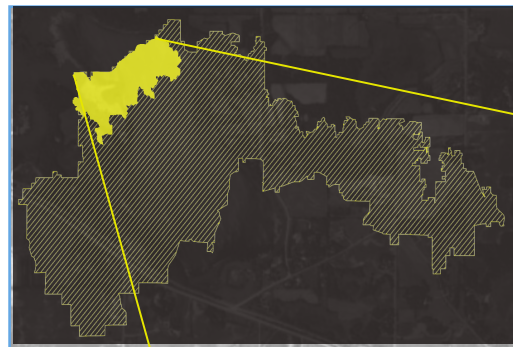
BE IT FURTHER RESOLVED that the MCWD Board of Managers approves an expenditure up to \$39,000 for the District's required cost share contribution for the Feasibility Cost Share Agreement and such other amounts as the District is obligated to contribute under the Agreement to meet its cost-share obligation.

BE IT FINALLY RESOLVED that the Board President and Administrator are authorized, on advice of counsel, to execute such other documents as are required to effect the Feasibility Cost Share Agreement.

Resolution Number 17-026 was moved by Manager _____, seconded by Manager _____.
Motion to adopt the resolution ___ ayes, ___ nays, ___ abstentions. Date: _____.

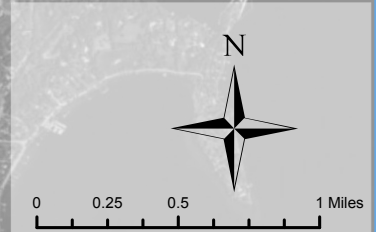
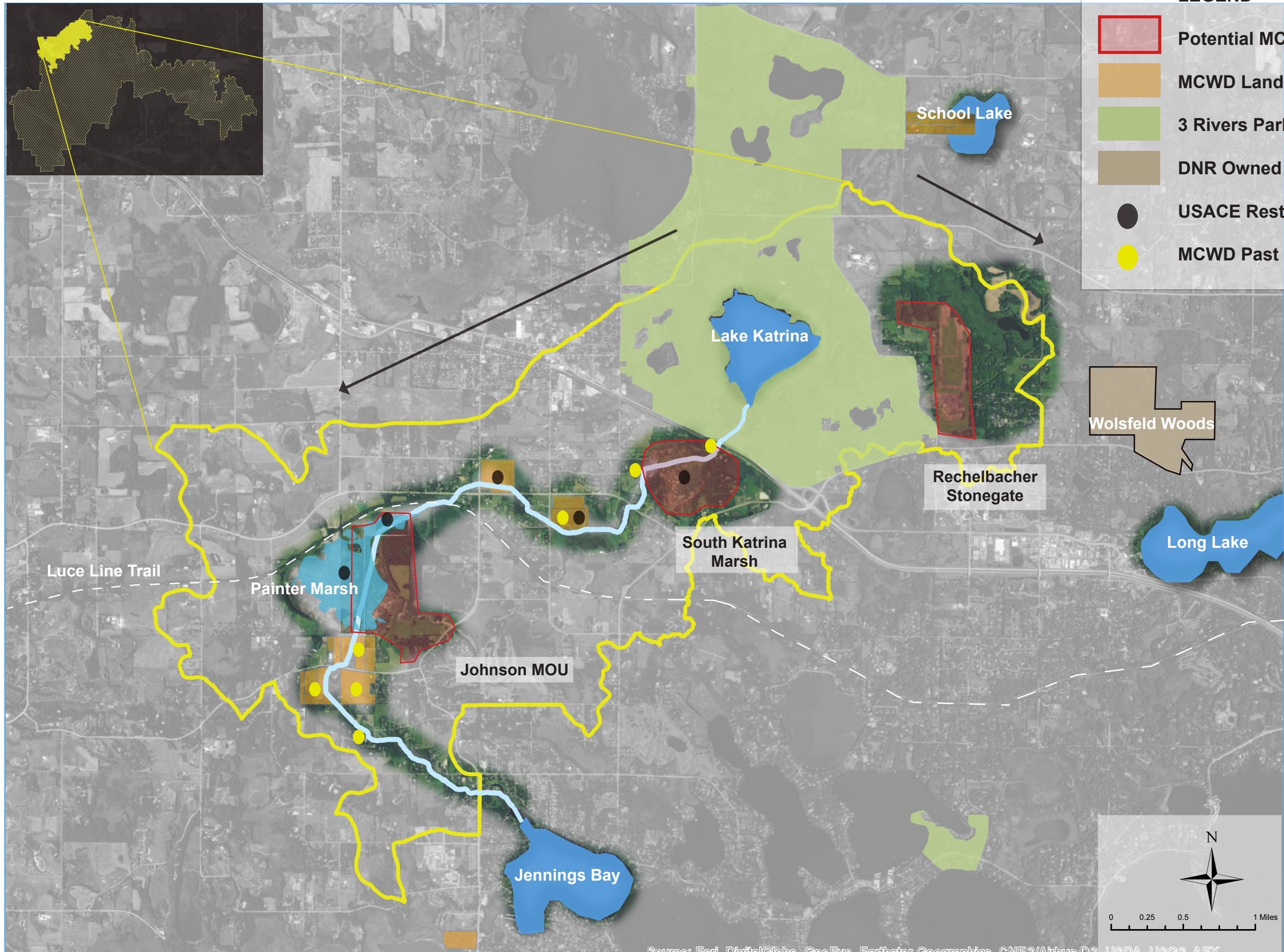
Secretary Date: _____

Painter Creek Corridor Planning



LEGEND

- Potential MCWD Conservation
- MCWD Land & Easements
- 3 Rivers Park District Owned
- DNR Owned
- USACE Restoration Planning
- MCWD Past Capital Projects



Risk Management Framework: Painter Creek Partnership with USACE

This document provides a framework which outlines the various stages of working with the U.S. Army Corps of Engineers (USACE), the associated risk with that work, the costs associated with the risk, and a plan to mitigate that risk. This document summarizes the following resources:

- May 12, 2010, Smith Partners Memo to MCWD Board of Managers
- April 9, 2015, meeting between District and USACE staff
- June 9, 2015, meeting between District, Smith Partner, and USACE staff

Background

Under Section 206 of the Water Resources Development Act of 1996, Public Law 104-303, as amended (33 U.S.C. 2330), the USACE, in coordination with the District, has prepared a feasibility study for ecosystem restoration projects within the Painter Creek subwatershed. Four wetlands have been selected and analyzed for potential improvements. The District would stand to gain ~\$2.3 million of USACE funding for the improvements. To move forward with the project, the USACE has asked the District to submit a letter of intent to move this project forward into the funding queue. If the project is approved the USACE and District would negotiate and execute a project partnership agreement (PPA) so that the USACE may proceed with project implementation under Section 206 authority. The PPA frames the roles and responsibilities of the USACE and the District, and is a binding agreement.

Painter Creek Section 206 Feasibility Study

The Feasibility Study was completed in March 2010, however, it has not been approved because a letter of intent had not been submitted by the local sponsor.

Step 1:

Letter of Intent; Timeline = Submitted in July 2015

In order to move this project forward and get into the funding queue, the USACE needs to have a letter of intent approved from the District. Once the District submits a letter of intent the USACE will take 30-60 days to process and review the project report/feasibility study. Once the project report/feasibility study is approved it will get sent to the Section 206 funding queue.

Risk Mitigation:

- No risk, as submitting a letter of intent does not commit the District to anything.

Financial Exposure:

- None

Step 2:

Feasibility Cost-Share Agreement (FCSA); Timeline = Execute in March/April 2017; USACE estimated to approve Feasibility Study by end of 2017

Due to the time elapsed since the finalization of the Feasibility Study in March 2010, the USACE is requiring certain elements of the Feasibility Study to be updated to reflect current conditions. Updating the Feasibility Study would be accomplished through entering into a FCSA with the USACE. MCWD's legal counsel has reviewed the FCSA language and found it to be straightforward.

Risk Mitigation:

- Develop a letter of intent with the USACE that outlines the process to establish a study scope for the feasibility study update to ensure it addresses all the necessary matters.

Financial Exposure:

- Total cost to update the Feasibility Study is ~\$78,000
 - District's share would be 50% of the cost, which is estimated to be \$39,000 (can be cash or in-kind contributions) and would be due upon signing the FCSA.

Step 3:**Project Partnership Agreement (PPA); Timeline = Tentatively January 2018**

Once the project report is approved, the USACE and District will negotiate the PPA and project management plan. The PPA frames the roles and responsibilities of the USACE and MCWD. Related project documents, including the feasibility study and project management plan (PMP), evidence the parties' intentions as to both design and process, but would not be incorporated into the PPA and would not legally bind the USACE. Though it is not favored, it is possible to revise the PPA. However, approval of a change would need to be reviewed/approved up the chain of command, depending on the nature of the proposed change, and the amount of time to do so would correspond. If the PPA is at odds with specific language in the PMP, that would be a good argument for a PPA revision (specifically, the PPA can be revised to state that easement acquisition is satisfactory).

Risk Mitigation:

- Phasing project by project—design, land rights acquisition and project construction. This can be sent forth in the PMP (and presumably can be explored as revision to PPA if MCWD wishes).

Financial Exposure:

- When the PPA moves into design, the District's retroactive cost-share obligation for the original (2010) feasibility study is triggered ~\$125,000

Step 4:**Design: Low Risk; Timeline = Tentatively July 2018**

Under the PPA framework, the USACE designs the project. MCWD legal counsel's review of the PPA is that the District has no formal right to disapprove (or require changes to) the design. The District can terminate its project participation at any time. An accounting would occur and the District would be responsible for 35% of the costs incurred to the point of termination. Thus, at critical points – e.g. environmental assessment, completion of design, contractor selection, and substantial completion of project elements, the District could terminate its participation or use the ability to do so as leverage to negotiate an acceptable outcome.

Risk Mitigation:

- District inform USACE that it would like to direct the USACE during design; USACE would then need to review and approve design

- Memorialize this through a Project Management Plan (PMP), which is tied to the PPA.
- Design/build one wetland restoration at a time. This would allow the District to investigate the partnership while only committing financially to one project.
- District can terminate at the end of design and proceed to construct on its own with completed design if it wishes.

Financial Exposure:

- District responsible for 35% of costs incurred to that point in design
 - 5% must be cash, other 30% can be in-kind design costs (in-house design work, land rights, etc.)
 - If District walked away from final design for all projects, estimated cost would be 15% of construction costs (~\$750,000); $(\$750,000 \times 35\%) = \$262,500$
- District responsible for buy back for feasibility study costs; ~\$125,000 (*noted above in PPA section)
- Estimated total maximum financial exposure during design; $\$262,500 + \$125,000 = \$387,500$

Environmental Review: Low Risk

Environmental review would fall under the design phase of the project. Under the PPA, the USACE would perform pre-project environmental assessment utilizing the standard Phase 1, Phase 2 processes and Phase 3 if needed. The District would be responsible to address any site contamination issues that are identified. If the District can unilaterally terminate the project (see above), it would be able to evaluate any issues and decide whether and how to proceed.

Risk Mitigation:

- District request Phase 2 to minimize risk found during construction
- If contamination is found, modify design to avoid area of contamination
- Insert language into PPA that addresses contamination
- Terminate contract if contamination is found that could not be dealt with in a timely/affordable method

Financial Exposure:

- District responsible to address any site contamination issue that are identified

Cultural Resource Review: Low Risk

A cultural resource review would fall under the design phase of the project Under the PPA, the USACE would manage pre-project cultural resource review under Section 106 of the National Historic Preservation Act. The District is responsible for all Phase 2 work at the direction of the State Historic Preservation Office (SHPO), following the USACE's initial Phase 1 assessment. The feasibility study notes the presence of cultural resources in the area, ranging from lithic artifacts to standing structures.

Risk Mitigation:

- If there are known sites the design process can take that into account to avoid those sites

Financial Exposure:

- USACE estimates they would be responsible for the first 50,000 of recovery costs (this is 1% of total project costs, so \$5M project would be \$50K. The larger the project the greater the Federal limit).
- Costs incurred would be project costs allocated according to cost-share terms
- District and USACE cost-share remaining costs above \$50,000

Land Acquisition: Low Risk

The “non-federal sponsor” (the District) is responsible to acquire all land rights needed for the project. The USACE already has removed language from the feasibility study stating that all acquisitions must be in fee. The draft real estate plan (a component of the feasibility study) indicates the USACE will allow some project land rights to be acquired as easements. Aside from the USACE project, the District has an interest in acquiring valuable wetland habitat areas and would benefit from acquisitions individually.

Risk Mitigation:

- USACE will ensure adequate documentation in PMP, Real Estate Plan and will create a “memorandum for record.”
- Phase the remaining acquisitions over time, prioritize area where the first project will be constructed. Phasing as a key element will be set forth in the PMP—this is not technically legally binding, but a change to the PPA could be explored if MCWD wishes.
- Utilize easement acquisition versus fee title
- District has interest in acquiring land rights over wetland properties regardless of USACE PPA

Financial Exposure:

- Calculating Land, Easements, Right-Of-Ways, Relocation, and Disposal Areas (LERRD) values:
 - Purchased in past 5 years = credit for purchase price
 - Purchase >5 years ago = credit for current land price/market value
 - If land was donated there is an opportunity for valuation of the property
- To date, the District has spent ~\$1.2 million on land acquisition for properties that align with the areas needed for the USACE work

Step 5:**Construction: Moderate-High Risk**

MCWD legal counsel has noted that in the PPA framework, the USACE selects the contractor, manages construction and certifies completion, therefore leaving the District with a consultative role. The District has no formal right to disapprove (or require changes to) the design, disapprove the contractor, or withhold concurrence in the certification of completion. USACE utilizes a competitive bid process and selects the low bid. The USACE would contribute ~\$2.3 million towards the project.

Risk Mitigation:

- If MCWD wishes the USACE can use a Best Value procurement process.
- Minimize risk on paper by memorializing the following in PMP (*this was not done for Minnehaha Glen project)

- District to supply a field observer to coordinate with USACE Contracting Officer to ensure real-time involvement and site compliance daily.
- District to work directly with Contracting Officer to modify fieldwork to achieve District objectives, i.e. placement of boulders for fish passage, etc.
- If MCWD is not satisfied with the work as completed, the USACE is committed to ensuring it is completed properly and in accordance with approved plans. USACE has access to a Section 1135 projects which provides funds to correct damage from prior federal work.

Financial Exposure:

- If District terminated project at substantial completion of project elements, the District would be responsible to cover 35% of the total costs incurred to the point of termination.

Step 6:

Maintenance of Improvements: Low Risk

Under the PPA, the USACE will prepare an operation and maintenance plan during the design phase. The District would then be obliged thereafter to “maintain, rehabilitate and replace” the improvements in accordance with the plan.

Risk Mitigation:

- District influence design so that the system functions as naturally as possible, resulting in minimal O&M requirements and investments
- District involved in developing the final O&M Plan, memorialize this in PMP
- Duration of maintenance obligation explicitly bounded
- Contingency budget to repair work after completion

Financial Exposure:

- Post construction costs to maintain project; the total estimated annual cost of operation and maintenance for the project is \$6,880

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE MINNEHAHA CREEK WATERSHED DISTRICT
FOR THE
PAINTER CREEK SECTION 206 ECOSYSTEM RESTORATION PROJECT
FEASIBILITY STUDY

THIS AGREEMENT is entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the U.S. Army Engineer, St. Paul District (hereinafter the “District Engineer”) and the Minnehaha Creek Watershed District (hereinafter the “Non-Federal Sponsor”), represented by the President of the Board of Managers.

WITNESSETH, THAT:

WHEREAS, Section 206 of the Water Resources Development Act of 1996, Public Law 104-303, as amended (22 U.S.C. 2330), authorizes a study for aquatic ecosystem restoration and protection;

WHEREAS, Section 105(a) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2215(a)), specifies the cost-sharing requirements;

WHEREAS, in 2005, the Government, financing both the Federal and Non-Federal share of costs, initiated this study, which was not completed by September 30, 2013;

WHEREAS, this study is subject to the Director of Civil Works Memorandum, dated August 27, 2013, which provides that feasibility phase costs incurred after September 30, 2013 will be cost shared pursuant to a feasibility cost sharing agreement, and the non-Federal share of costs, currently estimated at \$91,000, that were incurred before September 30, 2013 will be recovered under the project partnership agreement, once executed, for the project; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “Study” means the activities and tasks required to identify and evaluate alternatives and the preparation of a decision document that, as appropriate, recommends a coordinated and implementable solution for aquatic ecosystem restoration at Painter Creek, located in Hennepin County, Minnesota.

B. The term “shared study costs” means all costs incurred by the Government and Non-Federal Sponsor after the effective date of this Agreement that are directly related to performance of the Study and cost shared in accordance with the terms of this Agreement. The term includes, but is not necessarily limited to, the Government’s costs for preparing the PMP; for plan formulation and evaluation, including costs for economic, engineering, real estate, and environmental analyses; for preparation of a floodplain management plan if undertaken as part of the Study; for preparing and processing the decision document; for supervision and administration; for Agency Technical Review and other review processes required by the Government; and for response to any required Independent External Peer Review; and the Non-Federal Sponsor’s creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; for participation in the Study Coordination Team; for audits; for an Independent External Peer Review panel, if required; or for negotiating this Agreement.

C. The term “PMP” means the project management plan, and any modifications thereto, developed in consultation with the Non-Federal Sponsor, that specifies the scope, cost, and schedule for Study activities and tasks, including the Non-Federal Sponsor’s in-kind contributions, and that guides the performance of the Study.

D. The term “in-kind contributions” means those planning activities (including data collection and other services) that are integral to the Study and would otherwise have been undertaken by the Government for the Study and that are identified in the PMP and performed or provided by the Non-Federal Sponsor after the effective date of this Agreement and in accordance with the PMP.

E. The term “maximum Federal study cost” means the \$1,500,000 Federal cost limit for the Study, unless the Government has approved a higher amount, and includes the costs for the Federal share of the Study incurred by the Government prior to the effective date of this Agreement.

F. The term “fiscal year” means one year beginning on October 1st and ending on September 30th of the following year.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Study using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. The Non-Federal Sponsor shall perform or provide any in-kind contributions in accordance with applicable Federal laws, regulations, and policies.

B. The Non-Federal Sponsor shall contribute 50 percent of the shared study costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor for the remainder of the initial fiscal year of the Study. No later than 15 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government.

2. No later than August 1st prior to each subsequent fiscal year of the Study, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government.

C. The Government shall include in the shared study costs and credit towards the Non-Federal Sponsor's share of such costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in providing or performing in-kind contributions, including associated supervision and administration, after the effective date of this Agreement. Such costs shall be subject to audit in accordance with Article VI to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar day after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation, including invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Failure to provide such documentation in a timely manner may result in denial of credit. The amount of credit afforded for in-kind contributions shall not exceed the Non-Federal Sponsor's share of the shared study costs.

2. No credit shall be afforded for interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; for the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; for any items provided or performed prior to completion of the PMP; or for costs that exceed the Government's estimate of the cost for such item if it had been performed by the Government.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on solicitations for contracts prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of

contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

E. The Non-Federal Sponsor shall not use Federal Program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Study. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. Except as provided in paragraph C. of this Article, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

G. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Title VI of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

H. If Independent External Peer Review (IEPR) is required for the Study, the Government shall conduct such review in accordance with Federal laws, regulations, and policies. The Government's costs for an IEPR panel shall not be included in the shared study costs or the maximum Federal study cost.

I. In addition to the ongoing, regular discussions of the parties in the delivery of the Study, the Government and the Non-Federal Sponsor may establish a Study Coordination Team to discuss significant issues or actions. The Government's costs for participation on the Study Coordination Team shall not be included in the shared study costs, but shall be included in calculating the maximum Federal study cost. The Non-Federal Sponsor's costs for participation on the Study Coordination Team shall not be included in the shared study costs and shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

ARTICLE III - PAYMENT OF FUNDS

A. As of the effective date of this Agreement, the shared study costs are projected to be \$78,000, with the Government's share of such costs projected to be \$39,000 and the Non-Federal Sponsor's share of such costs projected to be \$39,000. These amounts are estimates only that are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Government shall provide the Non-Federal Sponsor with quarterly reports setting forth the estimated shared study costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Study.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, St. Paul District, (B6)" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of the shared study costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of the shared study costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon conclusion of the Study and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of shared study costs, including contract claims or any other liability that may become known after the final accounting.

ARTICLE IV - TERMINATION OR SUSPENSION

A. Upon 30 calendar days written notice to the other party, either party may elect at any time, without penalty, to suspend or terminate future performance of the Study. Furthermore, unless an extension is approved by the Assistant Secretary of the Army (Civil Works), the Study will be terminated if a Feasibility Report is not completed for the Study within 3 years after the effective date of this Agreement.

B. In the event of termination, the parties shall conclude their activities relating to the Study. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay the costs of termination, including any costs of resolution of contract claims, and resolution of contract modifications.

C. Any suspension or termination shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE V - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VI - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Study. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Study shall not be included in shared study costs, but shall be included in calculating the maximum Federal study cost.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the request of the Non-Federal Sponsor, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of non-Federal audits shall

be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

ARTICLE VII - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE VIII - NOTICES

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

If to the Non-Federal Sponsor:

President of the Board of Managers
Minnehaha Creek Watershed District
15320 Minnetonka Boulevard
Minnetonka, Minnesota 55345

If to the Government:

District Engineer
180 Fifth Street East Suite 700
Attention: CEMVP-PM
St. Paul, Minnesota 55101-1678

B. A party may change the recipient or address for such communications by giving written notice to the other party in the manner provided in this Article.

ARTICLE IX - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE X - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not a party to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

MINNEHAHA CREEK WATERSHED
DISTRICT

BY: _____

Samuel L. Calkins
Colonel, Corps of Engineers
District Engineer

BY: _____

Sherry Davis White
President of the Board of Managers
Minnehaha Creek Watershed District

DATE: _____

DATE: _____