

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
KING COUNTY, WASHINGTON
AND
STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES
FOR CONSTRUCTION OF THE
DUWAMISH SITE 1 ECOSYSTEM RESTORATION PROJECT

THIS AGREEMENT is entered into this ___ day of _____, 20 ___, by and between the Department of the Army (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works), and King County, Washington (hereinafter the "Non-Federal Sponsor"), represented by the Director of the Water and Land Resources Division of the King County Department of Natural Resources and Parks; and the State of Washington, Department of Natural Resources (hereinafter "State of Washington DNR"), represented by the Commissioner of Public Lands.

WITNESSETH, THAT:

WHEREAS, construction of the Duwamish/Green River Ecosystem Restoration Project (hereinafter the "Authorized Project") at King County, Washington was authorized by Section 101(b) (26) of the Water Resources Development Act of 2000, Public Law 106-541;

WHEREAS, the Government was authorized to perform *monitoring and adaptive management* (as defined in Article I.Q. and Article I.R. of this Agreement, respectively) as part of the Authorized Project;

WHEREAS, the Government, the Non-Federal Sponsor, and the State of Washington DNR desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for construction of the Duwamish/Site 1 ecosystem restoration project (a separable element of the Authorized Project and hereinafter the "*Project*" as defined in Article I.A. of this Agreement);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213), specifies the cost-sharing requirements applicable to the *Project*;

WHEREAS, Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. Section 2280), establishes the maximum amount of costs for the Authorized Project and sets forth procedures for adjusting such maximum amount;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 103(j) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(j)), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, where the State of Washington DNR is the holder of fee title and public trust interests on parts of the *Project*, the State of Washington DNR desires to make this State of Washington DNR parcel of land ("*Parcel*" or "*State of Washington DNR Parcel*"), as hereinafter described, available on the terms and conditions set forth herein; and

WHEREAS, the State of Washington DNR desires to limit its role in and responsibility for the *Project* to contributing the *Parcel*, as further detailed in Article III.A., Article III.D., and Article VIII.C. of this Agreement; and

WHEREAS, the Government, the Non-Federal Sponsor, and State of Washington DNR recognize that no construction can begin until all applicable environmental laws and regulations have been complied with; and

WHEREAS, the Government acknowledges that the *State of Washington DNR Parcel* is held as sovereign lands in trust for the people of Washington State, and that under the Constitution of the State of Washington and various State statutes the ability to convey that *Parcel* is restricted; and

WHEREAS, the State of Washington DNR acknowledges that the *Project* is an important public trust use of the *Parcel* and agrees that the *Parcel* may be used for the *Project* as generally described in Article I.B and I.C. of this Agreement; and

WHEREAS, from the date of execution of this Agreement and for so long as the *Project* remains authorized, the State of Washington DNR agrees to permit no other use of the *Parcel* inconsistent with those purposes; and

WHEREAS, the Non-Federal Sponsor agrees to cooperate with the State of Washington DNR and the Government as necessary to ensure that use of the *Parcel* is pursuant to the provisions of this Agreement, and to accomplish all its responsibilities in execution of the *Project* with respect to the *Parcel* as detailed throughout this Agreement;

WHEREAS, the parties agree that State of Washington DNR shall not be assigned any responsibilities for *Project* implementation or funding under this Agreement except as detailed in Article III.A., Article III.D, and Article VIII.C. of this Agreement;

WHEREAS, the Government, the Non-Federal Sponsor, and the State of Washington DNR have the full authority and capability to perform as hereinafter set forth

and intend to cooperate in cost-sharing and financing of the construction of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government, the Non-Federal Sponsor, and the State of Washington DNR, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government, the Non-Federal Sponsor, and the State of Washington DNR through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government, the Non-Federal Sponsor, and the State of Washington DNR, and facilitate the successful implementation of the *Project*;

NOW, THEREFORE, the Government, the Non-Federal Sponsor, and the State of Washington DNR agree as follows:

ARTICLE I -DEFINITIONS AND GENERAL PROVISIONS

A. The term "*Project*" shall mean the *ecosystem restoration features* and the *recreation features* at Duwamish/Site 1 (a separable element of the Authorized Project) as generally described in the final report of the Chief of Engineers dated December 29, 2000, and "Green/Duwamish River Basin Ecosystem Restoration Study, Final Feasibility Report," dated October 2000 and approved by the District Engineer, U.S. Army Corps of Engineers, Seattle District, on October 30, 2000.

B. The term "*ecosystem restoration features*" shall mean estuary/tidal habitat construction, stream and river rehabilitation, large woody debris placement, water quality enhancement, and drainage system upgrade/enhancement, as generally described in the final report of the Chief of Engineers dated December 29, 2000, and "Green/Duwamish River Basin Ecosystem Restoration Study, Final Feasibility Report," dated October 2000 and approved by the District Engineer, U.S. Army Corps of Engineers, Seattle District, on October 30, 2000:

C. The term "*recreational features*" shall mean trail, interpretive signage/displays, and hand-carried boat access, as generally described in the final report of the Chief of Engineers dated December 29, 2000, and "Green/Duwamish River Basin Ecosystem Restoration Study, Final Feasibility Report," dated October 2000 and approved by the District Engineer, U.S. Army Corps of Engineers, Seattle District, on October 30, 2000:

D. The term "*total project costs*" shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to construction of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: preconstruction engineering and design costs; the Government's engineering and design costs during construction; the Non-Federal Sponsor's and the Government's costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the

Government's costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.B.1. of this Agreement; the Government's costs of *monitoring* in accordance with Article II.J. and Article II.K. of this Agreement; the Government's costs of *adaptive management* in accordance with Article II.L. and Article II.M. of this Agreement; the Government's actual construction costs; the Government's supervision and administration costs; the Non-Federal Sponsor's and the Government's costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government's costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for which the Government affords credit in accordance with Article IV of this Agreement or for which reimbursement by the Government is required pursuant to Article II.C.3. or Article II.D.3. of this Agreement; and the Non-Federal Sponsor's and the Government's costs of audit in accordance with Article X.B. and Article X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, replacement, or rehabilitation of the *Project*; any costs of *betterments* under Article II.I.2. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; the Government's costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement; or the Non-Federal Sponsor's costs of negotiating this Agreement.

E. The term "*total ecosystem restoration costs*" shall mean that portion of the *total project costs* allocated to the *ecosystem restoration features*.

F. The term "*total recreation costs*" shall mean that portion of the *total project costs* allocated to *recreation features*.

G. The term "*period of construction*" shall mean the time from the date the Government issues the solicitation for the first construction contract for the *Project* or commences construction of the *Project* using the Government's own forces, whichever is earlier, to the date that construction, *monitoring*, and, if necessary, *adaptive management* of the *Project* are complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

H. The term "*financial obligations for construction*" shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total project costs* except for obligations pertaining to the provision of lands, easements, rights-of-way, the performance of *relocations*, and the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material.

I. The term "*non-Federal proportionate share*" shall mean the ratio of the Non-Federal Sponsor's total cash contribution required in accordance with Articles II.C.2., Article II.D.2., and Article II.D.4. of this Agreement to total *financial obligations for construction*, as projected by the Government.

J. The term "*highway*" shall mean any public highway, roadway, street, or way, including any bridge thereof.

K. The term "*relocation*" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, *highway*, railroad, or public facility when such action is authorized in accordance with applicable legal principles of just compensation; or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for the *Project* or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant removal of the affected facility or part thereof.

L. The term "*functional portion of the Project*" shall mean a portion of the *Project* for which construction has been completed and that can function independently, as determined by the U. S. Army Engineer, Seattle District (hereinafter the "District Engineer") in writing, although the remainder of the *Project* is not complete.

M. The term "*betterment*" shall mean a difference in the construction of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the construction of that element. The term does not include any construction for features not included in the *Project* as defined in paragraph A. of this Article.

N. The term "*Federal program funds*" shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

O. The term "*fiscal year*" shall mean one year beginning on October 1 and ending on September 20.

P. The term "*fiscal year of the Non-Federal Sponsor*" shall mean one year beginning on January 1 and ending on December 31.

Q. The term "*monitoring*" shall mean activities, including the collection and analysis of data, that are necessary to determine if predicted outputs of the *ecosystem restoration features* are being achieved and to determine if *adaptive management* is necessary.

R. The term "*adaptive management*" shall mean measures taken to adjust the *ecosystem restoration features* in response to the *monitoring* results so that the predicted outputs of the *ecosystem restoration features are achieved* following its construction. The term includes, but is not necessarily limited to, modifications or structures or adjustments to operation or management, of the *ecosystem restoration features*.

S. The term "State of Washington DNR Parcel" or "Parcel" shall mean that real property interest held by the State of Washington and administered by the State of Washington DNR that in coordination with the State of Washington DNR is to be made available to the *Project*. This has been identified by a legal description summary for Duwamish/Site 1, and has been previously provided to the State of Washington DNR by the Government, and by this reference is fully incorporated herein as fully set forth.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter, the "Congress") and using those funds and funds provided by the Non-Federal Sponsor, shall expeditiously construct the *Project*, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for construction of the *Project* or commence construction of the *Project* using the Government's own forces until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project*.

2. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Non-Federal Sponsor with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Government.

3. At the time the District Engineer furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract awarded by the Government for the *Project*, the District Engineer shall furnish a copy thereof to the Non-Federal Sponsor.

4. Notwithstanding paragraph A.2. of this Article, if the award of any contract for construction, *monitoring*, or *adaptive management* of the *Project*, or

continuation of construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces, would result in *total project costs* exceeding \$_____, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for construction, *monitoring*, or *adaptive management* of the *Project*, and continuation of construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces, but in no event shall the award of contracts or the continuation of construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces be deferred for more than three years.

Notwithstanding this general provision for deferral, in the event the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces.

5. As of the effective date of this Agreement, \$3,982,588_____ of Federal funds have been provided by Congress for the Authorized Project of which \$774,000_____ is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Authorized Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

B. The Government shall allocate *total project costs* between *total ecosystem restoration costs* and *total recreation costs*.

C. The Non-Federal Sponsor shall contribute 35 percent of *total ecosystem restoration costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *ecosystem restoration features*.

2. The Non-Federal Sponsor shall provide additional funds in accordance with Article VI.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's required share of 35 percent of *total ecosystem restoration costs* if the Government projects at any time that the collective value of the following contributions that

are determined by the Government to be attributable to the *ecosystem restoration features* will be less than such required share: (a) the value of the Non-Federal Sponsor's contributions under paragraph C.1. of this Article, as determined in accordance with Article IV of this Agreement; and (b) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

3. The Government, subject to the availability of funds, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 35 percent of *total ecosystem restoration costs* if the Government determines at any time that the collective value of the following contributions that are determined by the Government to be attributable to the *ecosystem restoration features* has exceeded 35 percent of *total ecosystem restoration costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph C.2. of this Article; (b) the value of the Non-Federal Sponsor's contributions under paragraph C.1. of this Article, as determined in accordance with Article IV of this Agreement; and (c) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *ecosystem restoration features*, perform any remaining *relocations* necessary for the *ecosystem restoration features*, or construct any remaining improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *ecosystem restoration features* on behalf of the Non-Federal Sponsor. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

D. The Non-Federal Sponsor shall contribute 50 percent of *total recreation costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *recreation features*.

2. The Non-Federal Sponsor shall provide additional funds in accordance with Article VI.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's required share of 50 percent of *total recreation costs* if the Government projects at any time that the collective value of the following contributions that are determined by the Government to be attributable to the *recreation features* will be less than such required share: (a) the value of the Non-Federal Sponsor's contributions under paragraph D.1. of this Article, as determined in accordance with Article IV of this Agreement; and (b) the value

of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

3. The Government, subject to the availability of funds and as limited by paragraph D.4. of this Article, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 50 percent of *total recreation costs* if the Government determines at any time that the collective value of the following contributions that are determined by the Government to be attributable to the *recreation features* has exceeded 50 percent of *total recreation costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph D.2. of this Article; (b) the value of the Non-Federal Sponsor's contributions under paragraph D.1. of this Article, as determined in accordance with Article IV of this Agreement; and (c) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *recreation features*, perform any remaining *relocations* necessary for the *recreation features*, or construct any remaining improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *recreation features* on behalf of the Non-Federal Sponsor. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

4. Notwithstanding any other provision of this paragraph, the Government's share of *total recreation costs* shall not exceed an amount equal to 10 percent of the Government's share of *total ecosystem restoration costs*. The Non-Federal Sponsor shall be responsible for all *total recreation costs* in excess of this amount and shall pay any such costs in accordance with Article VI.B. of this Agreement.

E. When the District Engineer determines that, except for *monitoring* and *adaptive management*, the entire *Project*, or a *functional portion of the Project*, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with a final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Project* or such completed portion. Upon such notification, the Government also shall furnish to the Non-Federal Sponsor a copy of all final as-built drawings for the entire *Project* or such completed portion if such drawings are available. Not later than 6 months after such notification by the Government that the entire *Project* is complete, the Government shall furnish the Non-Federal Sponsor with the final OMRR&R Manual and all final as-built drawings for the entire *Project*. In the event the final OMRR&R Manual or all final as-built drawings for the entire *Project* cannot be completed within the 6 month period, the Government shall provide written notice to the Non-Federal Sponsor, and the Government and the Non-Federal Sponsor shall negotiate an acceptable

completion date for furnishing such documents. Further, after completion of all contracts for the *Project*, copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided previously shall be provided to the Non-Federal Sponsor.

F. Upon notification from the District Engineer in accordance with paragraph E. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or the *functional portion of the Project* as the case may be, in accordance with Article VIII of this Agreement. Concurrent with the Non-Federal Sponsor's performance of operation, maintenance, repair, rehabilitation, and replacement for the completed *Project* or such completed portion, the Government shall perform *monitoring* and, if necessary, *adaptive management* in accordance with the provisions of this Agreement.

G. Upon the District Engineer's determination that, except for *monitoring* and *adaptive management*, the entire *Project* is complete, the Government shall conduct an interim accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor. Further, upon conclusion of the *period of construction* the Government shall amend the interim accounting to complete the final accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

H. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

I. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the "additional work") described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement.

1. Acquisition of lands, easements, and rights-of-way; performance of *relocations*; or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor,

for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

2. Inclusion of *betterments* in the construction of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *Project* features that include *betterments* between *total project costs* and the costs of the *betterments*.

J. Prior to initiation of construction of a *functional portion of the Project* related to the *ecosystem restoration features*, the Government, in consultation with the Non-Federal Sponsor and, as appropriate, other concerned agencies, shall finalize the plan for *monitoring* the *ecosystem restoration features*. The *monitoring* plan shall describe the specific parameters to be monitored; how these parameters relate to achieving the desired outcomes and to ascertaining whether *adaptive management* measures for the *ecosystem restoration features* will be necessary; methods for measuring those parameters; frequency and duration of *monitoring* of the *ecosystem restoration features*; criteria for measuring the success of the *ecosystem restoration features*; preparation and distribution of *monitoring* reports and other coordination requirements; and estimated *monitoring* costs. As of the effective date of this Agreement, the costs of *monitoring* of the *ecosystem restoration features* for the Authorized Project are estimated to be \$30,000 _____.

K. Upon providing notification to the Non-Federal Sponsor that the *ecosystem restoration features* are complete in accordance with paragraph E. of this Article, the Government shall perform *monitoring* of the *ecosystem restoration features* in accordance with the *monitoring* plan for years 2, 4 and 5 from the date of such notification. However, the *monitoring* of the *ecosystem restoration features* by the Government shall end prior to the expiration of such period upon the occurrence of either of the following events: (1) the award of the next contract for *monitoring* of the *ecosystem restoration features*, or continuation of *monitoring* of the *ecosystem restoration features* using the Government's own forces, would result in the costs incurred for *monitoring* of all the features for ecosystem restoration features in the Authorized Project exceeding 1 percent of the amount equal to total ecosystem restoration costs of the Project plus the costs for all other ecosystem restoration separable elements of the Authorized Project minus the costs for monitoring and adaptive management of all the features for ecosystem restoration in the Authorized Project; or (2) the District Engineer determines that continued *monitoring* of the *ecosystem restoration features* is not necessary.

L. Applying the criteria specified in the *monitoring* plan, the Government shall determine whether *adaptive management* of the *ecosystem restoration features* is necessary. The Government may make such a determination at any time during the *monitoring* period described in paragraph K. of this Article. Further, within 120 calendar days after the expiration or termination of such *monitoring* period, the Government shall make a final determination whether *adaptive management* of the *ecosystem restoration features* is necessary. In making such determinations, the Government shall consult with the Non-Federal Sponsor and, as appropriate, with other concerned agencies. Upon any

determination by the Government that *adaptive management* of the *ecosystem restoration features* is necessary, the Government shall notify the Non-Federal Sponsor in writing of its determination and expeditiously shall perform such *adaptive management* in accordance with paragraph M. of this Article. If, after the expiration or termination of the *monitoring* period, the Government determines that *adaptive management* of the *ecosystem restoration features* is not necessary, the Government shall notify the Non-Federal Sponsor in writing of its determination and shall conduct a final accounting in accordance with paragraph G. of this Article.

M. If the Government determines, pursuant to paragraph L. of this Article, that *adaptive management* of the *ecosystem restoration features* is necessary, the Government, in consultation with the Non-Federal Sponsor and, as appropriate, other concerned agencies, shall perform *adaptive management* of the *ecosystem restoration features* in accordance with the provisions of this paragraph and paragraph A. of this Article.

1. In no event shall the award of any contract for *adaptive management* of the *ecosystem restoration features*, or continuation of *adaptive management* of the *ecosystem restoration features* using the Government's own forces, result in the costs incurred for *adaptive management* of all the features for ecosystem restoration of the Authorized Project exceeding 3 percent of the amount equal to *total ecosystem restoration costs* of the *Project* plus the costs for all other ecosystem restoration separable elements of the Authorized Project minus the costs for *monitoring* and *adaptive management* of all the features for ecosystem restoration in the entire Authorized Project.

2. When the District Engineer determines that *adaptive management* of the *ecosystem restoration features* is complete, or that the costs therefor have or will exceed the 3 percent amount determined in accordance with sub-paragraph 1. of this paragraph, the District Engineer shall: a) notify the Non-Federal Sponsor in writing of such completion; b) furnish the Non-Federal Sponsor with an amended OMRR&R Manual that reflects any modifications to structures or adjustments to operation or management methods; c) furnish the Non-Federal Sponsor with a copy of any new or revised as-built drawings for the *ecosystem restoration features*; and d) within 30 calendar days after such notice and in consultation with the Non-Federal Sponsor, determine whether to continue *monitoring* of the *ecosystem restoration features*, subject to the limits in paragraph K. of this Article, or to conduct a final accounting in accordance with paragraph G. of this Article.

3. Upon notification from the District Engineer in accordance with sub-paragraph 2. of this paragraph, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project* in accordance with Article VIII of this Agreement.

N. The Non-Federal Sponsor shall prevent obstructions or encroachments on the *Project* (including prescribing and enforcing regulations to prevent such obstructions or encroachments) such as any new developments on *Project* lands, easements, and rights-of-way or the addition of facilities which might reduce the outputs produced by the *ecosystem*

restoration features, hinder operation and maintenance of the *Project*, or interfere with the *Project's* proper function.

O. The Non-Federal Sponsor shall not use the *ecosystem restoration features*, or lands, easements, and rights-of-way required pursuant to Article III of this Agreement for such features, as a wetlands bank or mitigation credit for any other project.

P. The Non-Federal Sponsor shall keep the *recreation features*, and access roads, parking areas, and other associated public use facilities, open and available to all on equal terms.

ARTICLE III - LANDS, RELOCATIONS, DISPOSAL AREAS, AND PUBLIC LAW 91-646 COMPLIANCE

A. The Government, after consultation with the Non-Federal Sponsor and the State of Washington DNR, shall determine the lands, easements, and rights-of-way required for the construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor and the State of Washington DNR with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor and the State of Washington DNR must provide, respectively, for the *ecosystem restoration features* and for the *recreation features*, in detail sufficient to enable the Non-Federal Sponsor and the State of Washington DNR to fulfill their obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that work, and the Non-Federal Sponsor and the State of Washington DNR shall provide the Government with authorization for entry onto all lands, easements, and rights-of-way the Government determines must be provided for that work thereto. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. Likewise, prior to the end of the *period of construction*, the State of Washington DNR shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines the State of Washington DNR must provide for the *Project*. The Non-Federal Sponsor and the State of Washington DNR shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the *Project* and that were provided by the Non-Federal Sponsor and the State of Washington DNR are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the *relocations* necessary for construction, operation, and maintenance of the *Project*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *relocations* that are necessary, respectively, for the *ecosystem restoration features* and for the *recreation features* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with such *relocations*. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Government determines to be necessary for that work. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the *Project*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such improvements that are required, respectively, for the *ecosystem restoration features* and for the *recreation features* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall provide all improvements set forth in such descriptions.

D. Except as detailed in this Article and in Article.VIII.C of this Agreement, the State of Washington DNR shall not be assigned any other responsibilities for the *Project* implementation or funding under this Agreement.

E. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations

contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for the construction, operation, and maintenance of the *Project*, including those necessary for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - CREDIT FOR VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS, AND DISPOSAL AREA IMPROVEMENTS

A. The Government shall include in *total project costs* and afford credit toward the Non-Federal Sponsor's share of *total ecosystem restoration costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor and the State of Washington DNR must provide pursuant to Article III.A. of this Agreement for the *ecosystem restoration features*; for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *ecosystem restoration features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Non-Federal Sponsor must provide pursuant to Article III.C. of this Agreement for the *ecosystem restoration features*. The Government also shall include in *total project costs* and afford credit toward the Non-Federal Sponsor's share of *total recreation costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III.A. of this Agreement for the *recreation features*; for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *recreation features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Non-Federal Sponsor must provide pursuant to Article III.C. of this Agreement for the *recreation features*. However, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of any lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that have been provided previously as an item of cooperation for another Federal project. In addition, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that were acquired or performed using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that affording credit for the value of such items is expressly authorized by Federal law.

B. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A., Article III.B., or Article III.C. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions for the purpose of including such value in *total*

project costs and for determining the amount of credit to be afforded or reimbursement to be provided in accordance with the provisions of this Agreement.

C. For the purposes of determining the value to be included in *total project costs* and the amount of credit to be afforded or reimbursement to be provided in accordance with this Agreement and except as otherwise provided in paragraph G. of this Article, the value of lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The date of valuation shall be calculated as follows:

a. Except as provided in paragraphs C.1.b and C.2.b. of this Article, the fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor or the State of Washington DNR provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

b. The Government and the Non-Federal Sponsor have stipulated that notwithstanding any of the other provisions of Article IV., the value of the lands, easements and rights of way owned by the Non-Federal Sponsor on the effective date of this Agreement and provided for the Project in accordance with Article III.A., Article III.B., or Article III.C., including those necessary for relocations, borrow materials, and dredged or excavated material disposal, shall be One Million Two Hundred Thirty-Nine Thousand and 00/100 Dollars (\$1,239,000.00). It is further agreed that such value may be increased to include the Non-Federal Sponsor's documented incidental costs in accordance with Article IV.C.4. of this Agreement.

c. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph C.1., paragraph C.3., or paragraph C.5. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with the provisions of this paragraph.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide the Government with the appraisal no later than 6 months after the Non-Federal Sponsor provides the Government with an authorization for entry for such real property interest.

The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor, prior to instituting such proceedings, shall submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 calendar days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60 day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an

appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with paragraph C.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are required for construction, operation, and maintenance of the *Project*, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. In the event the Government modifies its determination made pursuant to Article III.A. of this Agreement, the Government shall afford credit for the documented incidental costs associated with preparing to acquire the lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.D. of this Agreement, and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the Non-Federal Sponsor in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals pursuant to paragraph C.2. of this Article, as determined by the Government, and subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

5. Waiver of Appraisal. Except as required by paragraph C.3. of this Article, the Government may waive the requirement for an appraisal pursuant to this paragraph if it determines that an appraisal is unnecessary because the valuation is uncomplicated and that the estimated fair market value of the real property interest is \$10,000 or less based upon a review of available data. In such event, the Government and the Non-Federal Sponsor must agree in writing to the value of such real property interest in an amount not in excess of \$10,000.

D. After consultation with the Non-Federal Sponsor, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

1. For a *relocation* other than a *highway*, the value shall be only that portion of *relocation* costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the State of Washington would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. *Relocation* costs shall include, but not necessarily be limited to, actual costs of performing the *relocation*; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the *relocation*, as determined by the Government. *Relocation* costs shall not include any costs due to *betterments*, as determined by the Government, nor any additional cost of using new material when suitable used material is available. *Relocation* costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

E. The value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to *betterments*, as determined by the Government.

F. Any credit afforded or reimbursement provided under the terms of this Agreement for the value of *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material, performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Notwithstanding any other provision of this Agreement, credit or reimbursement may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

G. Where the Government, on behalf of the Non-Federal Sponsor pursuant to Article II.I.1. of this Agreement, acquires lands, easements, or rights-of-way, performs

relocations, or constructs improvements required on lands, easements, or rights-of-way to enable the disposal of dredged or excavated material, the value to be included in *total project costs* and the amount of credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall be the costs of such work performed or provided by the Government that are paid by the Non-Federal Sponsor in accordance with Article VI.D. of this Agreement. In addition, the value to be included in *total project costs* and the amount of such credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall include the documented costs incurred by the Non-Federal Sponsor in accordance with the terms and conditions agreed upon in writing pursuant to Article II.I.1. of this Agreement subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the *period of construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the *period of construction*, the Project Coordination Team shall generally oversee the *Project*, including issues related to: plans and specifications; scheduling; real property and *relocation* requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for *relocations* and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material; the investigations to identify the existences and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; historic preservation activities in accordance with Article XVII. of this Agreement; the Government's cost projections; final inspection of the entire *Project* or *functional portions of the Project* including issuance of permits; preparation of the proposed OMRR&R Manual; finalization of the *monitoring* plan; performance of *monitoring* and *adaptive management*; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation and replacement of the *Project* including

issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the *Project*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement. The State of Washington DNR shall be given the opportunity to serve on the Project Coordination Team, but shall not be required to do so. If the State of Washington DNR chooses to participate in the Project Coordination Team, its costs in doing so shall be borne separately by the State of Washington DNR.

ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records, and provide to the Non-Federal Sponsor current projections of, costs, financial obligations, contributions provided by the parties, and the value included in *total project costs* for the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$4,017,245 _____; *total ecosystem restoration costs* are projected to be \$4,007,245 _____; the Non-Federal Sponsor's contribution of funds required by Article II.C.2. of this Agreement is projected to be \$63,536 _____; *total recreation costs* are projected to be \$10,000 _____; the Non-Federal Sponsor's contribution of funds required by Article II.D.2. and Article II.D.4. of this Agreement is projected to be \$5,000 _____; the *non-Federal proportionate share* is projected to be 50 _____ percent; the Non-Federal Sponsor's contribution of funds required by Article XVII.B.3. of this Agreement is projected to be \$0 _____; the value included in *total project costs* for the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement is projected to be \$1,399,000 _____ for the *ecosystem restoration features* and \$0 _____ for the

recreation features; and the Government's total financial obligations for the additional work to be incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement are projected to be \$0 _____. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By _____ and by each quarterly anniversary thereof until the conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; *total ecosystem restoration costs*; the Non-Federal Sponsor's total contribution of funds required by Article II.C.2. of this Agreement; *total recreation costs*; the Non-Federal Sponsor's total contribution of funds required by Article II.D.2. and Article II.D.4. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's total contribution of funds required by Article XVII.D. of this Agreement; the total contribution of funds required from the Non-Federal Sponsor for the forthcoming *fiscal year*; the maximum amount determined in accordance with Article XIX of this Agreement; the value included in *total project costs* for the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement; and the Government's total financial obligations for additional work incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement.

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.C.2., Article II.D.2., Article II.D.4., and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for construction of the *Project* or commencement of construction of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the projected *non-Federal proportionate share of financial obligations for construction* through the first quarter; and (c) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred in the first quarter; or, if use of a continuing contract has been approved pursuant to Federal laws, regulations and policies, the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement through the first quarter. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Seattle District" to the District Engineer, or verifying

to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or by providing an Electronic Funds Transfer of the required funds in accordance with procedures established by the Government.

2. Thereafter, until the construction of the *Project* is complete, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each quarter in which the Government projects that it will make *financial obligations for construction* of the *Project* or financial obligations for data recovery activities pursuant to Article XVII.B.3. of this Agreement, of the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share* of *financial obligations for construction* to be incurred in that quarter; or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the projected *non-Federal proportionate share* of *financial obligations for construction* for that quarter and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred in that quarter; or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement for that quarter. No later than 30 calendar days prior to the beginning of that quarter, the Non-Federal Sponsor shall make the full amount of the required funds for that quarter available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the *non-Federal proportionate share* of *financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the *non-Federal proportionate share* of *financial obligations for construction* as *financial obligations for construction* are incurred; and (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations in the current quarter, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 60 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

C. Upon the District Engineer's determination that, except for *monitoring* and *adaptive management*, the entire *Project* is complete and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct an interim

accounting and furnish the results to the Non-Federal Sponsor. Further, upon conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall amend the interim accounting to complete the final accounting and furnish the results to the Non-Federal Sponsor. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall amend the previous interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such amended interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs*, *total ecosystem restoration costs*, *total recreation costs*, and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Non-Federal Sponsor's total required shares of *total ecosystem restoration costs*, *total recreation costs*, and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Seattle District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total ecosystem restoration costs*, *total recreation costs*, and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total required shares thereof, the Government, subject to the availability of funds and as limited by Article II.D.4. of this Agreement, shall refund or reimburse the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund or reimbursement and funds are not available to refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

D. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.I. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs

of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. At the time the Government conducts the interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of additional work from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work to complete the final accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the total obligations for additional work exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Seattle District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount

to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII - 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 both 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 VIII - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

A. Upon receipt of the notification from the District Engineer in accordance with Article II.E. of this Agreement and for so long as the *Project* remains authorized, the Non-Federal Sponsor, pursuant to Article II.F. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project* or *functional portion of the Project*, at no cost to the Government. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Project's* authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of such written notice by the Government, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. No completion, operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

C. The State of Washington DNR hereby gives the Government, the Non-Federal Sponsor, and any assignee of the Non-Federal Sponsor's responsibilities for operation, maintenance, repair, replacement and rehabilitation of the *Project*, a right to enter, at reasonable times and in a reasonable manner, upon state-owned aquatic lands that the State of Washington DNR owns or controls for access to the *Project* for the purpose of inspection, implementing, monitoring, maintaining and operating for so long as the *Project* remains authorized. If additional construction, completion, repairing, replacing or rehabilitation of the *Project* is required, the Government and the Non-Federal Sponsor (including any assignee of the Non-Federal Sponsor's operation, maintenance, repair, replacement and rehabilitation responsibilities) shall notify the State of Washington DNR. The State of Washington DNR shall provide authorization as described in Article III.A., above. Except in the case of an emergency, the State of Washington DNR shall be provided written notice of any construction or other significant activity on the *Parcel* at least thirty (30) days in advance. However, in cases of emergency, the State of Washington DNR will be notified of any construction or other significant activity no later than five (5) days after such activity commences. Significant activity means any activity that might interfere with any allowable uses not inconsistent with the project needs by the State of Washington DNR or public's use or enjoyment of the *Parcel* and surrounding state-owned aquatic lands or the waters. The right to enter to carry out construction or significant activity shall be exercised through a written authorization issued by the State of Washington DNR.

ARTICLE IX – HOLD AND SAVE

Subject to the provisions of Article XX of this Agreement, the Non-Federal Sponsor shall hold and save the Government and the State of Washington DNR free from all damages arising from the construction, *monitoring*, *adaptive management*, operation, maintenance, repair, replacement, and rehabilitation of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government, the State of Washington DNR, or their contractors.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and

regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government, the Non-Federal Sponsor, and the State of Washington DNR each act in an

independent capacity, and neither is to be considered the officer, agent, or employee of the others.

B. In the exercise of their rights and obligations under this Agreement, no party shall provide, without the consent of the other parties, any contractor with a release that waives or purports to waive any rights the other parties may have to seek relief or redress against that contractor either pursuant to any cause of action that the other parties may have or for violation of any law.

ARTICLE XIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the *Project* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Project*.

B. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, future performance under this Agreement shall be suspended. Such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIV.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-

Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIV.C. of this Agreement; 3) the Government continues work on the *Project*; or 4) the Government terminates this Agreement in accordance with the provisions of Article XIV.C. of this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.C.2., Article II.D.2., Article II.D.4., and Article XVII.B.3. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XIV.C. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor 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.

F. Upon termination in accordance with this Article or Article XV, the State of Washington DNR shall be released of any further obligations under this Agreement.

ARTICLE XIV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the *Project*, or, if already in construction, whether to continue with construction of the *Project*, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of *total project costs*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the *Project*.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the *Project* in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - 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 sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Director, Water and Land Resources Division
King County Department of Natural Resources and Parks
201 South Jackson Street
Seattle, WA 98104-3855

If to the State of Washington DNR:

Aquatic Land Manager,
Washington State Department of Natural Resources
South Puget Sound Region
950 Farman Ave. N.
Enumclaw, WA 99022-9282

If to the Government:

Chief, Planning Branch, PPMD
Seattle District, Corps of Engineers
P.O. Box 3755
Seattle, WA 98124-3755

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVI - 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 XVII - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the Project, shall perform any identification, survey, or evaluation of historic properties. Any costs incurred by the Government for such work shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. The Government, as it determines necessary for the *Project*, shall perform or ensure the performance of any mitigation activities or actions for historic properties or that are otherwise associated with historic preservation including data recovery activities.

1. Any costs incurred by the Government for such mitigation activities, except for data recovery activities associated with historic preservation, shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

2. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c (a)), the costs of data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in *total project costs*, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the *Project*.

3. The Government shall not incur costs for data recovery activities associated with historic preservation that exceed the statutory one percent limit specified in paragraph B.2. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit, and the Secretary of the Interior has concurred in the waiver, in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. 469c-2(3)).

a. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *ecosystem restoration features* shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government consistent with the cost sharing requirements for ecosystem restoration, as follows: 35 percent will be borne by the Non-Federal Sponsor and 65 percent will be borne by the Government.

b. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *recreation features* shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government consistent with the cost

sharing requirements for recreation, as follows: 50 percent will be borne by the Non-Federal Sponsor and 50 percent will be borne by the Government.

C. If, during its performance of *relocations* or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material in accordance with Article III of this Agreement, the Non-Federal Sponsor discovers historic properties or other cultural resources that have not been evaluated by the Government pursuant to this Article, the Non-Federal Sponsor shall not proceed with performance of the *relocation* or construction of the improvement that is related to such discovery until the Government provides written notice to the non-Federal Sponsor that it should proceed with such work.

ARTICLE XVIII - 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 party to this Agreement.

ARTICLE XIX - SECTION 902 MAXIMUM COST OF PROJECT

A. The Non-Federal Sponsor understands that Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280) establishes the maximum amount of total costs for the Authorized Project, of which the *Project* is a separable element. On the effective date of this Agreement, the maximum amount of total costs for the Authorized Project, which is the sum of *total project costs* for the *Project* and the costs for all other separable elements of the Authorized Project, is estimated to be \$ _____, as calculated in accordance with Engineer Regulation 1105-2-100, using October 1, 20__ price levels, and including allowances for projected future inflation. The Government shall adjust such maximum amount of total costs for the Authorized Project, in accordance with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), when necessary.

B. Notwithstanding any other provision of this Agreement, the Government shall not incur a new financial obligation or expenditure for the *Project*, or include in *total project costs* for the *Project* any additional contribution provided by the Non-Federal Sponsor, if such obligation, expenditure or additional contribution would cause the sum of cumulative project costs for the *Project* and the cumulative costs for all other separable elements of the Authorized Project to exceed such maximum total costs for the Authorized Project, unless otherwise authorized by law.

ARTICLE XX - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by King County of the State of Washington, where creating such an obligation would be inconsistent with Article IV of the King County Charter for King County, Washington, or the Constitution of the State of Washington.

B. The Non-Federal Sponsor intends to satisfy its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose, for each fiscal period, appropriations sufficient to cover the Non-Federal Sponsor's obligations under this Agreement for each biennium, and will use all reasonable and lawful means to secure the appropriations for that biennium sufficient to make the payments necessary to fulfill its obligations hereunder. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to discharge these obligations can and will lawfully be appropriated and made available for this purpose. In the event the budget or other means of appropriations does not provide funds in sufficient amounts to discharge these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to satisfy its obligations hereunder, the Government may exercise any legal rights it has to protect the Government's interests related 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 Assistant Secretary of the Army (Civil Works).

DEPARTMENT OF THE ARMY

KING COUNTY, WASHINGTON:

BY: _____
Assistant Secretary of the Army,
Civil Works

BY: _____
Pam Bissonnette, Director
King County Department of Natural
Resources and Parks

DATE: _____

DATE: _____

WASHINGTON STATE
DEPARTMENT OF NATURAL RESOURCES:

BY: _____
Doug Sutherland
Commissioner of Public Lands

DATE: _____

CERTIFICATE OF AUTHORITY

I, Joseph B. Rochelle, Senior Deputy Prosecuting Attorney, do hereby certify that I am an attorney representing King County, Washington, that King County, Washington is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the King County in connection with the Duwamish/Site 1 Ecosystem Restoration Project, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of King County have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
_____ day of _____ 20____.

Joseph B. Rochelle
Senior Deputy Prosecuting Attorney

CERTIFICATE OF AUTHORITY

I, Christa Thompson, do hereby certify that I am the Assistant Attorney General representing the State of Washington, Department of Natural Resources; that the Washington State Department of Natural Resources is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the King County in connection with the Duwamish/Site 1 Ecosystem Restoration Project, and to pay damages (consistent with State legislative appropriation) in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b); and that the persons who have executed this Agreement on behalf of the State of Washington Department of Natural Resources have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
_____ day of _____ 20__.

Christa L. Thompson
Assistant Attorney General

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

KING COUNTY, WASHINGTON

Pam Bissonette, Director
King County Department of Natural Resources and Parks

DATE: _____

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES

Doug Sutherland
Commissioner of Public Lands

DATE: _____

CERTIFICATE OF LEGAL REVIEW

The Draft Project Cooperation Agreement for Construction of the Duwamish/Site 1 Ecosystem Restoration Project at King County, Washington, part of the Duwamish/Green River Basin Ecosystem Restoration Project, was fully reviewed by the Office of Counsel, USAED, Seattle District, Seattle, Washington.

Date: _____

Assistant District Counsel