



# KING COUNTY

1200 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104

## Signature Report

June 23, 2009

### Ordinance 16563

**Proposed No.** 2009-0344.1

**Sponsors** Constantine and Phillips

1 AN ORDINANCE authorizing the county executive to  
2 enter into a Project Partnership Agreement with the United  
3 States Army Corps of Engineers and the Washington state  
4 Department of Natural Resources for the construction of  
5 the North Wind's Weir Intertidal Restoration Project.

6  
7 **STATEMENT OF FACTS:**

8 1. In 1994, King County and sixteen cities in the Duwamish/Green  
9 Watershed, also known as Water Resource Inventory Area 9 ("WRIA 9"),  
10 initiated cooperative work with the United States Army Corps of  
11 Engineers ("the corps") on the large-scale, multiphase Duwamish/Green  
12 Ecosystem Restoration Project ("D/G ERP"), to restore the ecosystem of  
13 the watershed through planning and construction of significant habitat  
14 restoration projects.

15 2. The D/G ERP Feasibility Report was completed in October 2000 and  
16 recommended forty-five sites in the watershed for habitat restoration,  
17 among them the North Wind's Weir Intertidal Restoration Project ("the

18 project"), officially referred to by the corps as the Duwamish/Site 1  
19 Ecosystem Restoration Project, the project's original name. The project is  
20 located on the Duwamish river at approximately river mile 6.3 in Tukwila  
21 and is intended to create over two acres of restored intertidal estuary,  
22 including a backwater slough and marsh areas, as off-channel habitat.  
23 Such habitat is critical to juvenile fish for growth and strength prior to  
24 their ocean migration.

25 3. Also in 2000, the seventeen WRIA 9 jurisdictions formalized their  
26 participation in the WRIA 9 Forum to jointly fund, plan, prioritize and  
27 conduct watershed planning and protection efforts, especially those aimed  
28 at protecting endangered Puget Sound Chinook salmon. Through the  
29 Forum's scientific work, the North Wind's Weir Project site was identified  
30 in the WRIA 9 Salmon Habitat Plan, completed in 2005, as one of the top  
31 priorities for acquisition and restoration due largely to its location in the  
32 Duwamish estuary transition zone, which is the critical area where  
33 juvenile salmon are preparing to make their migration out to sea via the  
34 river.

35 4. In 2001, the county acquired the 2.6 acres of the project site through an  
36 interjurisdictional effort that leveraged state and regional funding with  
37 moneys from the county, city of Seattle and city of Tukwila.

38 5. In 2004, in anticipation of the project construction, the county initiated  
39 necessary removal of hazardous materials present at the site. This cost is  
40 not eligible for federal cost-sharing.

41           6. In 2006, the county council authorized the executive to enter into a  
42           similar agreement for the project. The agreement could not be executed as  
43           authorized, as additional hazardous materials were identified on the site.  
44           This finding necessitated a major cleanup effort by King County. This  
45           effort, funded primarily by a Salmon Recovery Funding Board grant, was  
46           completed during 2007-2009, and the necessary Certificate of Cleanliness  
47           for the project site has been issued and accepted by the corps.

48           7. The corps and King County have prepared a Project Partnership  
49           Agreement for construction, post-construction monitoring, adaptive  
50           management, and long-term responsibility for the project. The proposed  
51           Project Partnership Agreement defines estimated total project costs and  
52           allocates costs shares at sixty-five percent for the corps and thirty-five  
53           percent for the county. Estimated project costs and cost shares are as  
54           shown on Attachment B to this ordinance.

55           BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

56           SECTION 1. The King County executive is hereby authorized to negotiate a final  
57           version of, and to enter into, a Project Partnership Agreement on behalf of King County  
58           with the United States Army Corps of Engineers and the Washington state Department of  
59

60 Natural Resources in substantially the same form as Attachment A to this ordinance, for  
61 the design and construction of North Wind's Weir Intertidal Restoration Project.

62

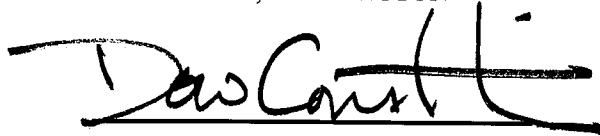
Ordinance 16563 was introduced on 5/26/2009 and passed by the Metropolitan King County Council on 6/22/2009, by the following vote:

Yes: 9 - Mr. Constantine, Mr. Ferguson, Ms. Hague, Ms. Lambert, Mr. von Reichbauer, Mr. Gossett, Mr. Phillips, Ms. Patterson and Mr. Dunn

No: 0

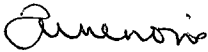
Excused: 0

KING COUNTY COUNCIL  
KING COUNTY, WASHINGTON



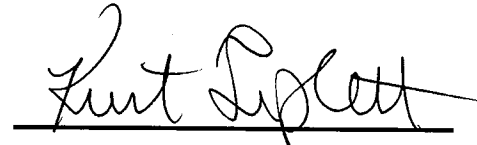
Dow Constantine, Chair

ATTEST:



Anne Noris, Clerk of the Council

APPROVED this 30<sup>th</sup> day of June, 2009.



Kurt Triplett, County Executive

**Attachments**

A. Project Partnership 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, B. North Wind's Weir Intertidal Restoration Project Costs and Cost Shares

RECEIVED  
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CLERK  
KING COUNTY COUNCIL

PROJECT PARTNERSHIP 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 "County"), 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 "DNR"), represented by the Commissioner of Public Lands (the County and DNR when referred to collectively are referred to as the "Non-Federal Sponsors").

WITNESSETH, THAT:

WHEREAS, construction of the Duwamish/Green River Basin Project for ecosystem restoration (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 in accordance with the plans, and subject to the conditions, recommended in a final report of the Chief of Engineers if a favorable report of the Chief is completed not later than December 31, 2000;

WHEREAS, a favorable final report of the Chief of Engineers was completed on December 29, 2000;

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

WHEREAS, the Government and the Non-Federal Sponsors desire to enter into a Project Partnership 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) wherein the responsibility of the DNR would be limited to providing certain lands, easements, and rights-of-way that are owned by the State of Washington that are administered by DNR;

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, the County carried out work on the *Project* on or before November 8, 2007, and before the effective date of this Agreement (hereinafter the "*pre-Agreement in-kind contributions*" as defined in Article I.N of this Agreement), for which the County may receive credit under the terms of this Agreement for the costs of such contributions toward the amount of its required contribution for the *Project* pursuant to Section 221(a)(4) of the Flood Control Act of 1970, Public Law 91-116, as amended (42 U.S.C. 1962d-5b(a)(4));

WHEREAS, the County desires to provide in-kind contributions after the effective date of this Agreement (hereinafter the "*post-Agreement in-kind contributions*" as defined in Article I.O. of this Agreement) for which the County may receive credit under the terms of this Agreement for the costs of such contributions toward the amount of its required contribution for the *Project* pursuant to Section 221(a)(4) of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b(a)(4));

WHEREAS, the Government and a non-Federal interest entered into an agreement, dated February 14, 2002, for engineering and design of the *Project* (hereinafter the "Design Agreement"), under the terms of which the non-Federal interest contributed a portion of the costs for engineering and design;

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 interest has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, the Government and the Non-Federal Sponsors 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 and the Non-Federal Sponsors, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsors 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 and the Non-Federal Sponsors, and facilitate the successful implementation of the *Project*;

NOW, THEREFORE, the Government and the Non-Federal Sponsors agree as follows:

#### ARTICLE I -DEFINITIONS AND GENERAL PROVISIONS

A. The term "*Project*" shall mean soil excavation to create off-channel emergent marsh and intertidal habitat, lowering bank elevations and cutting an inlet/outlet channel to the Duwamish River, creating benches and terraces within marsh areas, placing large woody debris within the marsh and adjacent areas, and planting vegetation, as generally described in the final report of the Chief of Engineers dated December 29, 2000, and in the "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. The term includes the *pre-Agreement in-kind contributions* described in paragraph N. of this Article and the *post-Agreement in-kind contributions* described in paragraph O. of this Article.

B. The term "*total project costs*" shall mean the sum of all costs incurred by the County 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: the Government's share of preconstruction engineering and design costs pursuant to the terms of the Design Agreement; the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; the Government's engineering and design costs during construction; the County'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.H. and Article II.I. of this Agreement; the Government's costs of *adaptive management* in accordance with Article II. J. and Article II.K. of this Agreement; the Government's actual construction costs; the costs of the *pre-Agreement in-kind contributions* and the costs of the *post-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement; the Government's supervision and administration costs; the County'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.B.3. of this Agreement; and the County'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.G.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; the County's costs of negotiating this Agreement; or any costs of the DNR.

C. 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.

D. The term "*financial obligations for construction*" shall mean the financial obligations of the Government and the costs for the *pre-Agreement in-kind contributions* and the costs for the *post-Agreement in-kind contributions*, as determined by 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.

E. The term "*non-Federal proportionate share*" shall mean the ratio of the sum of the costs included in *total project costs* for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions*, as determined by the Government, and the County's total cash contribution required in accordance with Article II.B.2. of this Agreement to total *financial obligations for construction*, as projected by the Government.

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

G. 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.

H. 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.

I. 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.

J. 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 therefore.

K. The term "*fiscal year*" shall mean one year beginning on October 1 and ending on September 30.

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



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

N. The term “*pre-Agreement in-kind contributions*” shall mean the supervision and administration and other activities associated with such work performed by the County prior to the effective date of this Agreement pursuant to the Integral Determination Letter Report and that the Government has determined is integral to the *Project*. The term does not include the design or construction of *betterments* or the provision of lands, easements, rights-of-way, *relocations*, or the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that are associated with the pre-Agreement in-kind contributions.

O. The term “*post-Agreement in-kind contributions*” shall mean the supervision and administration and other activities associated with such work performed by the County after the effective date of this Agreement and that the Government has determined is integral to the *Project*. The term does not include the design or construction of *betterments* or the provision of lands, easements, rights-of-way, *relocations*, or the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that are associated with the post-Agreement in-kind contributions.

P. The term “*DNR Parcel*” means approximately 1.37 acres of aquatic lands owned by the State of Washington and administered by the DNR that is located on or adjacent to Government Lot 10, Section 4, Township 23 North, Range 4 East, W.M. in King County, Washington, along the east side of the Duwamish River immediately north of the City of Seattle pipeline right of way.

## ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSORS

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 County, shall expeditiously construct the *Project*, except for the *post-Agreement in-kind contributions*, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies. The County expeditiously shall perform the *post-Agreement in-kind contributions* in accordance with applicable 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 County has confirmed in writing its willingness to proceed with the *Project*.

2. The Government shall afford the County 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 County 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 County 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 County 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 County, but the contents of solicitations, award of contracts, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project*, except for the *post-Agreement in-kind contributions*, 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 County.

4. The County shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *post-Agreement in-kind contributions*, including relevant plans and specifications, prior to the County's issuance of such solicitations. To the extent possible, the County shall afford the Government the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Government with notification of a contract modification is not possible prior to execution of the contract modification, the County shall provide such notification in writing at the earliest date possible. To the extent possible, the County also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The County shall consider in good faith the comments of the Government but, except as otherwise required in paragraph B.4. of this Article, the contents of solicitations, award of contracts or commencement of design or construction using the County's own forces, execution of contract

modifications, resolution of contract claims, and performance of all work on the *post-Agreement in-kind contributions* shall be exclusively within the control of the County.

5. At the time the County furnishes a contractor with a notice of acceptance of completed work for each contract awarded by the County for the *post-Agreement in-kind contributions*, the County shall furnish a copy thereof to the Government.

6. 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 \$4,000,000, the Government and the County 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 County 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 County, may award a contract or contracts, or continue with construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces.

7. As of the effective date of this Agreement, \$7,755,000 of Federal funds have been provided by Congress for the Authorized Project, of which \$2,234,404 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 County shall contribute 35 percent of *total project costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsors 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 *Project*.

2. The County shall provide a contribution of funds as determined below:

a. If the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions listed in the next sentence will be less than the Non-Federal Sponsor's required share of 35 percent of *total project costs*, the Government shall determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share without considering the credit the Government projects will be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* pursuant to paragraph B.5. of this Article. The Government shall determine the amount of funds that would be necessary by subtracting from the Non-Federal Sponsor's required share of 35 percent of *total project costs* the collective value of the following: (a) the value of the contributions provided by a non-Federal Sponsor pursuant to terms of the Design Agreement; (b) the value of the Non-Federal Sponsor's contributions under paragraph B.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.

b. The County shall provide funds in the amount determined by this paragraph in accordance with Article VI.B. of this Agreement. To determine the contribution of funds the County shall provide, the Government shall reduce the amount determined in accordance with paragraph B.2.a. of this Article by the amount of credit the Government projects will be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* pursuant to paragraph B.5. of this Article.

3. The Government, subject to the availability of funds, shall refund or reimburse to the County any contributions in excess of 35 percent of *total project costs* if the Government determines at any time that the collective value of the following contributions has exceeded 35 percent of *total project costs*: (a) the value of the County's contributions under paragraph B.2. of this Article; (b) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; (c) the value of the Non-Federal Sponsors' contributions under paragraph B.1. of this Article, as determined in accordance with Article IV of this Agreement; and (d) the value of the County's contributions under Article V, Article X, and Article XIV.A. of this Agreement; and (e) the amount of credit to be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* pursuant to paragraph B.5. of this Article. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *Project*, perform any remaining *relocations* necessary for the *Project*, 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 *Project* on behalf of the County. 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 County shall be responsible, as between the Government and the County, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

4. The Government shall determine and include in *total project costs* any costs incurred by the County for *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions*, subject to the conditions and limitations of this paragraph. The County in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the amount of costs to be included in *total project costs* for *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions*.

a. Acceptance by the Government of the *pre-Agreement in-kind contributions* shall be subject to a review and on-site inspection, as applicable, by the Government to verify that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies, and a determination by the Government that the work is integral to the *Project*.

b. The County shall not commence construction of the *post-Agreement in-kind contributions* until the designs, detailed plans and specifications, and arrangements for the prosecution of such work have been approved by the Government. Changes proposed by the County to approved designs and plans and specifications also must be approved by the Government in advance of the related construction. Upon completion of the *post-Agreement in-kind contributions*, the County shall furnish to the Government a copy of all final as-built drawings for the construction portion of such work.

c. Acceptance by the Government of the *post-Agreement in-kind contributions* shall be subject to an on-site inspection and certification by the Government that the work was accomplished in a satisfactory manner and in accordance with the provisions of this Agreement and a determination by the Government that the work is integral to the *Project*.

d. The County's costs for *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions* that may be eligible for inclusion in *total project costs* pursuant to this Agreement shall be subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

e. The County's costs for *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions* that may be eligible for inclusion in *total project costs* pursuant to this Agreement are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the *pre-Agreement in-kind contributions* were completed or the time the *post-Agreement in-kind contributions* are completed and the time the costs are included in *total project costs*.

f. The Government shall not include in *total project costs* any costs for *pre-Agreement in-kind contributions* or *post-Agreement in-kind contributions* paid by the County using *Federal program funds* 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.

g. The Government shall not include in *total project costs* any costs for *pre-Agreement in-kind contributions* or *post-Agreement in-kind contributions* in excess of the

Government's estimate of the costs of such work had the work been accomplished by the Government.

h. In the performance of the construction portion of the *pre-Agreement in-kind contributions* or the *post-Agreement in-kind contributions*, the County must comply 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)). Costs for the construction portion of *pre-Agreement in-kind contributions* or *post-Agreement in-kind contributions* may be excluded from *total project costs* by the Government, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

5. The Government, in accordance with this paragraph, shall afford credit toward the amount of funds determined in accordance with paragraph B.2.a. of this Article for the costs of the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* determined in accordance with paragraph B.4. of this Article. However, the maximum amount of credit that can be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* shall not exceed the lesser of the following amounts as determined by the Government: the amount of funds determined in accordance with paragraph B.2.a. of this Article or the combined costs of the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* determined in accordance with paragraph B.4. of this Article.

6. Notwithstanding any other provision of this Agreement, the County shall not be entitled to reimbursement of any costs for *pre-Agreement in-kind contributions* or *post-Agreement in-kind contributions* determined in accordance with paragraph B.4. of this Article and included in *total project costs* that exceed the amount of credit afforded for the *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions* determined in accordance with paragraph B.5. of this Article and the County shall be responsible for 100 percent of all costs for *pre-Agreement in-kind contributions* and *post-Agreement in-kind contributions* included in *total project costs* that exceed the amount of credit afforded.

C. 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 County in writing and furnish the County 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 County 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 County 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 County, and the Government and the County 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 County.

D. Upon notification from the District Engineer in accordance with paragraph C. of this Article, the County 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 County'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.

E. 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 County. 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 County.

F. The County 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.

G. The County may request the Government to perform or provide, on behalf of the County, 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 County 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 County 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 County shall be responsible, as between the Government and the County, 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*.

H. Prior to completion of construction of the *Project*, the Government, in consultation with the County and, as appropriate, other concerned agencies, shall finalize the plan for *monitoring* of the *Project*. 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 *Project* will be necessary; methods for measuring those parameters; frequency and duration of *monitoring* of the *Project*; criteria for measuring the success of the *Project*; preparation and distribution of *monitoring* reports and other coordination requirements; and estimated *monitoring* costs.

I. Upon providing notification to the County that the *Project* is complete in accordance with paragraph C. of this Article, the Government shall perform *monitoring* of the *Project* in accordance with the *monitoring* plan for a period of 4 years from the date of such notification. However, the *monitoring* of the *Project* 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 *Project*, or continuation of *monitoring* of the *Project* using the Government's own forces, would result in the costs incurred for *monitoring* and *adaptive management* of all the features for ecosystem restoration features in the Authorized Project exceeding 7 percent of the amount equal to *total project 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 *Project* is not necessary.

J. Applying the criteria specified in the *monitoring* plan, the Government shall determine whether *adaptive management* of the *Project* is necessary. The Government may make such a determination at any time during the *monitoring* period described in paragraph I. of this Article. 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 *Project* is necessary. In making such determinations, the Government shall consult with the County and, as appropriate, with other concerned agencies. Upon any determination by the Government that *adaptive management* of the *Project* is necessary, the Government shall notify the County in writing of its determination and expeditiously shall perform such *adaptive management* in accordance with paragraph K. of this Article. If, after the expiration or termination of the *monitoring* period, the Government determines that *adaptive management* of the *Project* is not necessary, the Government shall notify the County in writing of its determination and shall conduct a final accounting in accordance with paragraph E. of this Article.

K. If the Government determines, pursuant to paragraph J. of this Article, that *adaptive management* of the *Project* is necessary, the Government, in consultation with the County and, as appropriate, other concerned agencies, shall perform *adaptive management* of the *Project* 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 *Project*, or continuation of *adaptive management* of the *Project* using the Government's own forces, result in the costs incurred for *monitoring* and *adaptive management* of all the features for ecosystem restoration of the Authorized Project exceeding 7 percent of the amount equal to *total project 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. As of the effective date of this Agreement, the costs of *monitoring* and *adaptive management* of the entire Authorized Project are estimated to be \$844,000. As of the effective date of this Agreement, the costs of *monitoring* and *adaptive management* of this *Project* are estimated to be \$60,000.

2. When the District Engineer determines that *adaptive management* of the *Project* is complete, or that the costs for *monitoring* and *adaptive management* have or will exceed the 7 percent amount determined in accordance with sub-paragraph 1. of this paragraph, the District Engineer shall: a) notify the County in writing of such completion; b) furnish the County with an amended OMRR&R Manual that reflects any modifications to structures or adjustments to operation or management methods; c) furnish the County with a copy of any new or revised as-built drawings for the *Project*; and d) within 30 calendar days after such notice, conduct a final accounting in accordance with paragraph E. of this Article.

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

L. The Non-Federal Sponsors 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 *Project*, hinder operation and maintenance of the *Project*, or interfere with the *Project's* proper function.

M. The Non-Federal Sponsors shall not use the *Project*, 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.

N. The parties to this Agreement acknowledge and agree that the obligations and responsibilities of DNR under the provisions of this Agreement are limited to providing the *DNR Parcel* for the construction, operation, maintenance, repair, rehabilitation, and replacement of the *Project* in accordance with the provisions of this Agreement.

O. The parties to this Agreement acknowledge that the County, prior to the effective date of this Agreement, removed approximately 10,000 cubic yards of soil containing elevated levels of polyaromatic hydrocarbons (PAHs) from land owned by the County (referred to as Tax Parcels 0423049114 and 0423049118) that will be required, in whole or in part, for the construction, operation, and maintenance of the *Project*; and that supplemental soil remediation certified to the County on March 26, 2009 that appropriate corrective action in accordance with

the County's Cleanup Action Plan entitled Supplemental Remediation Report: North Winds Weir Intertidal Restoration Site and dated March 26, 2009 has been fully completed as of March 26, 2009. In the event that further hazardous substances, or other contaminants, not regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 – 9675; hereinafter "CERCLA") are discovered in, on, or under such land during the construction of the *Project*, and that, under applicable law or regulations, cleanup of such substances or contaminants is required, or, that, as determined by the Government, cleanup of such substances or contaminants is necessary to prevent significant adverse effects on the protection and propagation of terrestrial or aquatic ecological receptors, the County shall be responsible for all costs of cleanup and related activities, including the costs of 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 that hazardous substances regulated under CERCLA are found to exist in, on, or under such lands, the parties shall proceed in accordance with Article XIV of this Agreement.

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

A. The Government, after consultation with the Non-Federal Sponsors, 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 Sponsors with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsors must provide, in detail sufficient to enable the Non-Federal Sponsors to fulfill their obligations under this paragraph. The Government also shall provide the County with a written notice to proceed with acquisition of such lands, easements, and rights-of-way that the County must provide. 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 County shall acquire all lands, easements, and rights-of-way the Government determines the County must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *period of construction*, the County 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. Prior to the issuance of the solicitation for a 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, for which the Government determines that the *DNR Parcel* is required, the DNR shall provide the Government with an authorization for entry to the *DNR Parcel*. The County 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 County are retained in public ownership for uses compatible with the authorized purposes of the *Project*. The DNR shall ensure that the *DNR Parcel* that the

Government determines to be required for the *Project* and that was provided by the DNR is retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the County, 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 County with general written descriptions, including maps as appropriate, of such *relocations* that are necessary, in detail sufficient to enable the County to fulfill its obligations under this paragraph, and shall provide the County 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 County 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 County shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Government, after consultation with the County, 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 County with general written descriptions, including maps as appropriate, of such improvements that are required, in detail sufficient to enable the County to fulfill its obligations under this paragraph, and shall provide the County 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 County 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 County shall provide all improvements set forth in such descriptions.

D. The County 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 County's share of *total project costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsors must provide pursuant to Article III.A. of this Agreement; for the value of the *relocations* that the County must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement; 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 County must provide pursuant to Article III.C. of this Agreement. 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 County 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, the parties agree and stipulate that the fair market value of parcel numbers 0423049114 and 0423049118, collectively, is \$612,000, inclusive of all incidental costs of acquiring such interests and inclusive of all costs incurred by the County in reaching such stipulated value amount.

D. Except as provided in paragraph C. of this Article, 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 H. 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 fair market value of lands, easements, or rights of-way owned by the County on the effective date of this Agreement shall be the stipulated fair market

value contained in Article IV.C. The fair market value of lands, easements, or rights-of-way acquired by the County 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. The fair market value of the *DNR Parcel* provided by DNR shall be the fair market value of such parcel as of the date that DNR provides the Government with authorization for entry thereto.

2. General Valuation Procedure. Except as provided in paragraph D.3. or paragraph D.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 County shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the County and the Government. The County shall provide the Government with the appraisal no later than 6 months after the County 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 County's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the County's appraisal, the County may obtain a second appraisal, and the fair market value shall be the amount set forth in the County's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the County's second appraisal, the County chooses not to obtain a second appraisal, or the County 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 County. In the event the County does not approve the Government's appraisal, the Government, after consultation with the County, shall consider the Government's and the County'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 County for the real property interest exceeds the amount determined pursuant to paragraph D.2.a. of this Article, the Government, at the request of the County, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the County, may approve in writing an amount greater than the amount determined pursuant to paragraph D.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 County, but no less than the amount determined pursuant to paragraph D.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 County, 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 County 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 County 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 County agree as to an appropriate amount, then the County 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 County cannot agree as to an appropriate amount, then the County 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 D.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 County 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 County 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. Except as restricted in paragraph C.1 above, the value of the interests provided by the County in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals pursuant to paragraph D.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 D.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 County must agree in writing to the value of such real property interest in an amount not in excess of \$10,000.

E. After consultation with the County, 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.

F. 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.

G. 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 County's failure to comply with its obligations under these laws.

H. Where the Government, on behalf of the County pursuant to Article II.G. 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 County 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 County in accordance with the terms and conditions agreed upon in writing pursuant to Article II.G. 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 County 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 County shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the County'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; and the construction portion of the *post-Agreement in-kind contributions*; 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; determining costs of the *pre-Agreement in-kind contributions*; the performance of, scheduling for, and determining costs of the *post-Agreement in-kind contributions*; 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 County.

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* except for the *post-Agreement in-kind contributions*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations. On matters related to the *post-Agreement in-kind contributions* that the Project Coordination Team generally oversees, the Project Coordination Team may make recommendations to the County including suggestions to avoid potential sources of dispute. The County in good faith shall consider the recommendations of the Project Coordination Team. The County, having the legal authority and responsibility for construction of the *post-Agreement in-kind contributions*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal, State, or local laws or regulations.

E. The County'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.

F. At the election of DNR, representatives of the DNR may participate in the activities of the Project Coordination Team, but are not be required to do so. If DNR representatives participate in the activities of the Project Coordination Team, DNR's costs of participation shall not be included in *total project costs* and shall be borne solely by 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 County 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, the costs included in *total project costs* for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement, and the credit to be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$3,437,545; the County's contribution of funds required by Article II.B.2. of this Agreement

is projected to be \$1,203,141; the *non-Federal proportionate share* is projected to be 35 percent; the County'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 \$612,000; the costs included in *total project costs* for the *pre-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement are projected to be \$334,658; the credit to be afforded for the *pre-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement is projected to be \$334,658; the costs included in *total project costs* for the *post-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement are projected to be \$95,000; the credit to be afforded for the *post-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement is projected to be \$95,000; and the Government's total financial obligations for the additional work to be incurred and the County's contribution of funds for such costs required by Article II.G. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the County, and are not to be construed as the total financial responsibilities of the Government and the County.

2. By June 1, 2009 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 County with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; the County's total contribution of funds required by Article II.B.2. of this Agreement; the *non-Federal proportionate share*; the County's total contribution of funds required by Article XVII.B.3. of this Agreement; the costs included in *total project costs* for the *pre-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement; the credit to be afforded for the *pre-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement; the costs included in *total project costs* for the *post-Agreement in-kind contributions* determined in accordance with Article II.B.4. of this Agreement; the credit to be afforded for the *post-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement; the total contribution of funds required from the County 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 County's contribution of funds for such costs required by Article II.G. of this Agreement.

B. The County shall provide the contributions of funds required by Article II.B.2. 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 County in writing of such scheduled date and the funds the Government determines to be required from the County, after consideration of any cash contribution provided by a non-Federal interest pursuant

to the terms of the Design Agreement, 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 County'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 County'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 County 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 County has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the County, 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 County in writing of the funds the Government determines to be required from the County, and the County shall provide such funds in accordance with the provisions of this paragraph.

a. Where the Government will use a continuing contract approved pursuant to Federal laws, regulations, and policies to make *financial obligations for construction* of the *Project* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement, the Government shall notify the County in writing, no later than 60 calendar days prior to the beginning of each quarter in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the County, after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement, to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* for that quarter for such continuing contract and (b) the County'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 for such continuing contract. No later than 30 calendar days prior to the beginning of that quarter, the County shall make the full amount of such required funds for that quarter available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

b. For each contract for the *Project* where the Government will not use a continuing contract to make *financial obligations for construction* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement, the Government shall notify the County in writing, no later than 60 calendar days prior to the scheduled date for issuance of the solicitation for such contract, of the funds the Government determines to be required from the County, after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement, to meet: (a) the projected *non-Federal proportionate share of financial obligations for*

*construction* to be incurred for such contract and (b) the County'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 for such contract. No later than such scheduled date, the County shall make the full amount of such required funds available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

c. Where the Government projects that it will make *financial obligations for construction* of the *Project* using the Government's own forces or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement using the Government's own forces, the Government shall notify the County in writing, no later than 60 calendar days prior to the beginning of each quarter in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the County, after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement, to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* using the Government's own forces for that quarter and (b) the County's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement using the Government's own forces for that **quarter**. No later than 30 calendar days prior to the beginning of that quarter, the County shall make the full amount of such 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 County such sums as the Government deems necessary, after consideration of the credit the Government projects will be afforded for the *pre-Agreement in-kind contributions* and the *post-Agreement in-kind contributions* pursuant to Article II.B.5. of this Agreement, 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 County'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 County to cover the County's share of such financial obligations in the current quarter, the Government shall notify the County 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 County shall provide the Government with the full amount of such 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 all relevant claims and appeals and eminent domain proceedings have been resolved, the Government shall conduct an interim accounting and furnish the results to the County. 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 County. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an

interim accounting or amend the previous interim accounting, as applicable, and furnish the County with written notice of the results of such interim or amended interim accounting, as applicable. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall complete the final accounting and furnish the County with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project 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 County's total required shares of *total project costs* and the costs of any data recovery activities associated with historic preservation exceed the County's total contributions provided thereto, the County, 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 County for *total project costs* and the costs of any data recovery activities associated with historic preservation exceed the County's total required shares thereof, the Government, subject to the availability of funds, shall refund or reimburse the excess amount to the County within 90 calendar days of the date of completion of such accounting. In the event the County is due a refund or reimbursement and funds are not available to refund or reimburse the excess amount to the County, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

D. The County shall provide the contribution of funds required by Article II.G. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than 60 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the County in writing of such scheduled date and of the full amount of funds the Government determines to be required from the County 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 County 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 County 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 County must provide additional funds to pay for such additional work, the Government shall notify the County 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 County 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 County 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 County 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 County 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 County'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 County for such additional work, the County, 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 County 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 County within 90 calendar days of the date of completion of such accounting. In the event the County is due a refund and funds are not available to refund the excess amount to the County, 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 parties 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.C. of this Agreement and for so long as the *Project* remains authorized, the County, pursuant to Article II.D. 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 County 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 DNR hereby gives the County a right to enter, at reasonable times and in a reasonable manner, upon the *DNR Parcel* for the purposes of inspection, operation, maintenance, repair, rehabilitation, and replacement of the *Project*.

C. The County hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the County 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*. The DNR hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon the *DNR Parcel* 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 County 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 County and to the DNR. If, after 30 calendar days from receipt of such written notice by the Government, the County 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 County now or hereafter owns or controls, and upon the *DNR Parcel*, 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 County of responsibility to meet the County'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.

#### ARTICLE IX – HOLD AND SAVE

A. The County shall hold and save the Government free from all damages arising from the construction, *monitoring*, *adaptive management*, operation, maintenance, repair, rehabilitation, and replacement of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

B. The County shall hold and save DNR free from all damages arising from the construction, *monitoring*, *adaptive management*, operation, maintenance, repair, rehabilitation, and replacement of the *Project* and any *betterments*, except for damages due to the fault or negligence of DNR.

## 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 County 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 County 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 County 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 County 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 County and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the County and independent auditors any information necessary to enable an audit of the County'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 County 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 County 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 and the Non-Federal Sponsors each act in an independent capacity, and none 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 Sponsors fail to fulfill their 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 County 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 County 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 County elects to terminate this Agreement.

C. In the event that the Government and the County 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 County 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 County on whether to proceed or to terminate this Agreement, or the failure of the County to provide funds to pay for cleanup and response costs or to otherwise discharge the County's responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and County reach agreement on how to proceed or to terminate this Agreement; 2) the County 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 County in accordance with Article II.B.2. 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 County 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 XIV.C., 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 County shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the County 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 County with prior specific written direction, in which case the County shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the County 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 County and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the County shall not proceed with the acquisition of the real property interests until the parties agree that the County should proceed.

C. The Government and the County 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 County determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the County shall be responsible, as between the Government and the County, 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 County 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 County'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 County 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 County, the County shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the County

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 County:

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:

Commander,  
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 parties 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)). Any costs of data recovery activities associated with historic preservation that exceed the one percent limit shall not be included in *total project costs* but shall be shared between the County and the Government consistent with the cost sharing requirements for ecosystem restoration, as follows: 35 percent will be borne by the County and 65 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 County discovers historic properties or other cultural resources that have not been evaluated by the Government pursuant to this Article, the County 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 County that it should proceed with such work.

#### ARTICLE XVIII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

ATTACHMENT A

BY: \_\_\_\_\_  
Peter Goldmark, 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 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, as amended (42 U.S.C. Section 1962d-5b), and that the person(s) who have executed this Agreement on behalf of King County, Washington 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, \_\_\_\_\_, do hereby certify that I am the principal legal officer of the State of Washington Department of Natural Resources; that the State of Washington 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, King County, and the State of Washington Department of Natural Resources 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, as amended (42 U.S.C. Section 1962d-5b); and that the person(s) 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\_\_.

\_\_\_\_\_



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

\_\_\_\_\_, 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

\_\_\_\_\_  
Commissioner of Public Lands

DATE: \_\_\_\_\_

CERTIFICATE OF LEGAL REVIEW

The Draft Project Partnership 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

# 16563

Attachment B

## North Wind's Weir Intertidal Restoration Project Costs and Cost Shares

<b>Source of Contribution</b>	<b>Corps (\$)</b>	<b>King County (\$)</b>	<b>Total (\$)</b>
Cash	2,234,404	161,483	2,395,887
Pre-Agreement In-Kind Credit	0	334,658	334,658
Post-Agreement In-Kind Credit	0	95,000	95,000
Real Estate Credit	0	612,000	612,000
<b>Total</b>	<b>\$2,234,404</b>	<b>\$1,203,141</b>	<b>\$3,437,545</b>