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# Hamilton Wetlands Restoration Project



## Project Cooperation Agreement Signing

Monday, 22 April 2002

2:00 p.m.

Hangar #3, Hangar Avenue

Hamilton

Novato, California

PROJECT COOPERATION AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE STATE OF CALIFORNIA  
STATE COASTAL CONSERVANCY  
FOR THE  
HAMILTON WETLANDS RESTORATION PROJECT

THIS AGREEMENT is entered into this 22nd day of April, 2002 by and between the Department of the Army (hereinafter the "Government"), represented by Assistant Secretary of the Army (Civil Works), and the State of California, acting by and through the State Coastal Conservancy (hereinafter the "Non-Federal Sponsor"), represented by its Executive Officer.

WITNESSETH, THAT:

WHEREAS, Section 101(b)(3) of the Water Resources Development Act of 1999, Public Law 106-53, authorizes the Secretary of the Army to implement an ecosystem and wetland restoration project at the Hamilton Army Airfield and adjacent properties, City of Novato, Marin County, California;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for implementation, operation, and maintenance of the Hamilton Wetlands Restoration Project (hereinafter the "Project", as defined in Article I.A. of this Agreement);

WHEREAS, Section 101(b)(3) of the Water Resources Development Act of 1999, Public Law 106-53, and the Report of the Chief of Engineers dated August 13, 1999 specify the cost-sharing requirements applicable to this Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, and Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, provide that the Secretary of the Army shall not commence construction of any water resources project or separable element thereof until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, the Hamilton Wetland Restoration Plan Feasibility Report, dated December 1998, and the Report of the Chief of Engineers, dated August 13, 1999 (hereinafter the Chief's Report") state that the dredged material for placement and disposal at the Project site would originate from dredging projects within the San Francisco Bay area;

WHEREAS, the Non-Federal Sponsor is an agency of the State of California established pursuant to Division 21 of the California Public Resources Code (commencing with Section 31000) with responsibility for implementing a program of area restoration and resources enhancement in the coastal zone and the nine-county San Francisco Bay region of the State of California;

WHEREAS, acting pursuant to its authority under Chapter 6 of Division 21 of the California Public Resources Code, on April 22, 1999, the Non-Federal Sponsor certified the Project Environmental Impact Report/Environmental Impact Statement, adopted the Hamilton Wetlands Restoration Plan Feasibility Report, and declared its intent to serve as the non-Federal sponsor for the Project, providing for the restoration of tidal, subtidal and seasonal wetlands and upland habitats on the real property referred to herein as the Hamilton Wetlands Restoration Project site;

WHEREAS, on June 25, 2001, the Non-Federal Sponsor approved the disbursement of funds for implementation of the Project and authorized its Executive Officer to enter into a Project Cooperation Agreement on substantially the terms and conditions set forth herein;

WHEREAS, certain parcels of land required to implement the Project are the subject of ongoing and potential future environmental cleanup and remediation activities, including activities under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, pursuant to the Base Closure and Realignment Act of 1988, Public Law 100-526, as amended, and the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, as amended (hereinafter the "BRAC program") and the Formerly Used Defense Sites Program (hereinafter the "FUDS program"), and those cleanup and remediation activities, including the funding therefor, will not be provided for pursuant to this Agreement;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the implementation of the Project in accordance with the terms of this Agreement;

WHEREAS, the State of California has invested a large amount of public land and money in the planning and development of the Project and has a vital interest in the effectuation of the work contemplated by this Agreement;

WHEREAS, Section 902 of Public Law 99-662 establishes the maximum amount of costs for the Project and sets forth procedures for adjusting such maximum amount; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, intend to act reasonably and in good faith in the performance of their obligations under this Agreement, and desire to foster a "partnering" strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal

strategy of commitment and communication embodied herein, which creates an environment where trust and team work prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the completion of a successful project.

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

## ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean the restoration of approximately 990 acres of habitat, including over 570 acres of coastal salt marsh and seasonal wetlands, along with approximately 120 acres of tidal channels and intertidal habitats, through the construction of approximately 18,200 feet of perimeter levees around the landward boundary of the wetland; construction of approximately 2,200 feet of additional levees to protect and permit access to the Novato Sanitary District (hereinafter the "NSD") wastewater pipeline; removing existing buildings and structures; providing temporary drainage; constructing berms and internal peninsulas; placement and consolidation of up to the site capacity of approximately 10.6 million cubic yards (mcy) of suitable dredged or excavated material from projects in the San Francisco Bay area; placement of fill on approximately 6,000 feet of the wetland side of an existing levee to create a wildlife corridor; lowering the bayward levee; breaching portions of the bayward levee located on Project lands as provided in Article II.L. of this Agreement; cutting channels through the outboard marsh; and implementation of a 13-year monitoring and adaptive management plan, all as generally described in the Hamilton Wetland Restoration Plan Feasibility Report, dated December 1998, and the Environmental Impact Report/Environmental Impact Statement, dated December 1998, and approved by the Chief of Engineers on August 13, 1999.

B. The term "total project costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to implementation of the Project. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to preconstruction engineering and design costs; engineering and design costs during implementation; the costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XVI.A. of this Agreement; costs of removal or other corrective action, consistent with the applicable Remedial Action Plan developed by the BRAC program and the FUDS program as refined by further design, regarding contaminants other than hazardous substances regulated under CERCLA, such as pesticides and polynuclear aromatic hydrocarbons, that are located on lands, easements, or rights-of-way required for the Project; costs of historic preservation activities in accordance with Articles XIX.A. and XIX.C. of this Agreement; actual implementation costs; costs allocated to the Project in accordance with Article II.F. of this Agreement; monitoring and adaptive management costs in accordance with Article VIII of this Agreement; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with

Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, and suitable borrow areas for which the Government affords credit in accordance with Article IV of this Agreement; and costs of audit in accordance with Article XI of this Agreement. The term does not include the costs of implementation directly funded by other projects, including the Oakland Harbor Navigation Improvement (-50 Foot) Project; the costs of cleanup, removal, or remediation of contamination pursuant to Article XVI.C. of this Agreement; and the costs of historic preservation activities related to implementation of such programs, as further discussed in Article XIX.D. of this Agreement; nor does it include any costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; or any costs of dispute resolution under Article VII of this Agreement.

C. The term "financial obligation for implementation" shall mean a financial obligation of the Government, other than an obligation pertaining to the provision of lands, easements, rights-of-way, relocations, and borrow areas, that results or would result in a cost that is or would be included in total project costs.

D. The term "implementation" shall mean all actions required to carry out the Project including monitoring and adaptive management as defined in Article I.N. of this Agreement but excluding operation, maintenance, repair, replacement, and rehabilitation of the Project.

E. The term "non-Federal proportionate share" shall mean the ratio of the Non-Federal Sponsor's total cash contribution required in accordance with Article II.D.2. of this Agreement to total financial obligations for implementation as projected by the Government.

F. The term "period of implementation" shall mean the time from the effective date of this Agreement to the date that the U.S. Army Engineer, San Francisco District (hereinafter the "District Engineer") notifies the Non-Federal Sponsor in writing of the Government's determination that implementation of the Project is complete.

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

H. The term "relocation" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other public facility, or railroad when such action is authorized in accordance with applicable legal principles of just compensation. 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. The term includes relocating an NSD dechlorination plant to a suitable location outside the Project area and modifying the NSD outfall pipeline.

I. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

J. The term "functional portion of the Project" shall mean a portion of the Project that is suitable for tender to the Non-Federal Sponsor to operate and maintain in advance of completion of the entire Project. For a portion of the Project to be suitable for tender, the District Engineer must notify the Non-Federal Sponsor in writing of the Government's determination that, except for monitoring and adaptive management, the portion of the Project is complete and can function independently and for a useful purpose, although the balance of the Project is not complete.

K. The term "betterment" shall mean a change in the design and construction of an element of the Project resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design and construction of that element.

L. The term "monitoring" shall mean the acquisition, analysis, and distribution of data to evaluate the likely success of the Project in meeting its biological, hydrographic, topographic, bathymetric, and chemical conditions, or to comply with regulatory requirements, pursuant to a detailed written monitoring and adaptive management plan, developed in accordance with the process prescribed in Article VIII of this Agreement.

M. The term "adaptive management" shall mean project management actions taken to respond to data developed through the monitoring program, to be implemented if specific restoration standards are not met or if it appears that actual conditions will diverge from intended conditions to threaten the achievement of overall Project goals, pursuant to a detailed written monitoring and adaptive management plan developed in accordance with the process prescribed in Article VIII of this Agreement. Adaptive management may include adjustments for unforeseen circumstances and changes to structures or their operations or management techniques and shall be undertaken if the Government, after consultation with the Non-Federal Sponsor, determines adjustments are necessary to obtain the Project objectives.

N. The term "period of implementation of monitoring and adaptive management" shall mean a period of thirteen years beginning on the date of the District Engineer's notice to the Non-Federal Sponsor in accordance with Article II.C. of this Agreement that the entire Project or a functional portion of the Project is complete. If the District Engineer's notice addresses only a functional portion of the Project, the period of implementation of monitoring and adaptive management for that functional portion shall be a period of thirteen years beginning on the date of such notice.

O. The term "suitable dredged or excavated material" shall mean dredged or excavated materials that have chemical concentrations and sediment toxicity below levels that could harm wetland biota, and that are approved for use as wetland "cover" material under standards established and applied by the State of California Dredged Material Management Office and the San Francisco Bay Regional Water Quality Control Board.

P. The term "Federal program funds" shall mean funds or grants provided by a Federal

agency, other than the Department of the Army, and any non-Federal matching share required therefor.

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

A. The Government, subject to the availability of funds and using those funds and funds provided by the Non-Federal Sponsor, shall expeditiously implement the Project, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. The Government shall not issue the solicitation for the first contract for implementation until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the Project. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Non-Federal Sponsor with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, issuance of change orders, resolution of contract claims, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Government.

2. Throughout the period of implementation, the District Engineer shall furnish the Non-Federal Sponsor with a copy of the Government's Written Notice of Acceptance of Completed Work for each contract for the Project.

3. Notwithstanding paragraph A.1. of this Article, if, upon the award of any contract for implementation of the Project, cumulative total project costs would exceed \$61,393,622, the Government and the Non-Federal Sponsor agree to defer award of that contract and all subsequent contracts for implementation of the Project until such time as the Government and the Non-Federal Sponsor agree to proceed with further contract awards for the Project, but in no event shall the award of contracts be deferred for more than three years. Notwithstanding this general provision for deferral of contract awards, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts after the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts

must proceed in order to comply with law or to protect life or property from imminent and substantial harm.

B. The Non-Federal Sponsor may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

C. When the District Engineer determines that, except for monitoring and adaptive management, the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with an Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (hereinafter the "OMRR&R Manual") and with copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously. When the Government breaches a segment of the bayward levee in accordance with the provisions of this Agreement, the Government shall consider the portion of the Project corresponding to the breached segment of the bayward levee to be complete, except for monitoring and adaptive management. Upon such notification, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project in accordance with Article IX of this Agreement. Further, on the date of such notice, the period of implementation of monitoring and adaptive management shall begin for the entire Project, or functional portion of the Project, as applicable. The monitoring and adaptive management shall be performed concurrently with the Non-Federal Sponsor's responsibilities for operation, maintenance, repair, replacement, and rehabilitation in accordance with Article IX of this Agreement.

D. The Non-Federal Sponsor shall contribute 25 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 Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow areas that the Government determines the Non-Federal Sponsor must provide for the implementation, operation, and maintenance of the Project and shall perform or ensure performance of all relocations that the Government determines to be necessary for the implementation, operation, and maintenance of the Project.

2. If the Government projects that the value of the Non-Federal Sponsor's



contributions under paragraph D.1. of this Article and Articles V, XI, XVI.A., and XIX of this Agreement will be less than 25 percent of total project costs, the Non-Federal Sponsor shall provide an additional contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to 25 percent of total project costs.

3. If the Government determines that the value of the Non-Federal Sponsor's contributions provided under paragraphs D.1. and D.2. of this Article and Articles V, XI, XVI.A., and XIX of this Agreement has exceeded 25 percent of total project costs, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of 25 percent of total project costs. After such a determination, and reasonable consultation with the Non-Federal Sponsor, the Government, in its sole discretion, may provide any remaining Project lands, easements, rights-of-way, and suitable borrow areas and perform any remaining Project relocations on behalf of the Non-Federal Sponsor. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow areas or performance of relocations by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XVI.C. of this Agreement.

E. The Non-Federal Sponsor may request the Government to provide lands, easements, rights-of-way, and suitable borrow areas or perform relocations on behalf of the Non-Federal Sponsor. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow areas or performance of relocations by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Army Civil Works Program and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XVI.C. of this Agreement.

F. After consultation with the Non-Federal Sponsor, the Government shall allocate to total project costs that appropriate increment of costs of Federal projects within the San Francisco Bay area which provide dredged or excavated material for placement and disposal at the Project, which shall be no more than the amount by which the total costs of transportation and disposal of dredged material of any such project exceeds the least cost environmentally acceptable disposal plan, consistent with the Long Term Management Strategy Program Record of Decision. After consultation with the Non-Federal Sponsor, the Government may expend and allocate to total project costs a similar appropriate increment of costs of non-Federal projects within the San Francisco Bay area that provide dredged or excavated material for placement and disposal at the Project. No costs shall be allocated to the Project which are to be directly funded

by any other Federal project, including the Oakland Harbor Navigation Improvement (-50 Foot) Project pursuant to the Project Cooperation Agreement between the Government and the Port of Oakland, dated July 24, 2001.

G. The Government shall perform a final accounting in accordance with Article VI.D. of this Agreement to determine the contributions provided by the Non-Federal Sponsor in accordance with paragraphs B., D., and E. of this Article and Articles V, XI, XVI.A., and XIX of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs B., D., and E. of this Article.

H. The Non-Federal Sponsor shall not use Federal program funds to meet its share of total project costs under this Agreement unless the Federal agency providing the Federal program funds verifies in writing that such expenditure of funds is expressly authorized by statute

I. After consultation with the Non-Federal Sponsor, the Government shall develop and implement a plan to reserve a percentage of total Federal funds available for the Project, and an appropriately apportioned percentage of total funds contributed by the Non-Federal Sponsor in accordance with Article II.D. of this Agreement, as a contingency to fund the costs of termination of the Project in accordance with Article XV.D. of this Agreement and to satisfy the costs of compliance with applicable Federal and State laws and regulations associated with any such termination.

J. The Non-Federal Sponsor shall prevent future encroachments on the Project lands, easements, and rights-of-way which might interfere with proper functioning of the Project.

K. Notwithstanding any provision of this Agreement, no implementation shall be undertaken on a portion of the Project until all applicable environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341) relative to such portion.

L. The parties acknowledge that two segments of the bayward levee must be breached in order to reintroduce tidal action on the landward side of such levee. The Government, following consultation with the Non-Federal Sponsor, shall implement the Project in a manner so that each segment of the bayward levee is breached no later than 8 years after initiation of site preparation on the lands adjacent to such levee segment, regardless of the amount of suitable dredged or excavated material placed, consolidated, or available at such time, provided that the Government determines that each of the following is true in light of the state of completion of the construction features of the Project: (1) breach of the bayward levee does not cause undue risk of property damage to parcels of real property adjoining the Project site, (2) breach of the bayward levee does not cause undue risk of environmental harm to the Project site or the surrounding environment, and (3) breach of the bayward levee reflects sound engineering practice and judgment.

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

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for the implementation, operation, and maintenance of the Project, including those required for relocations and borrow materials. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph. The Government also shall provide a schedule to the Non-Federal Sponsor that specifies the projected dates when such lands, easements, or rights-of-way required for the Project must be provided together with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the end of the period of implementation, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each contract for implementation, the Non-Federal Sponsor shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that contract. For so long as the Project remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the Non-Federal Sponsor, with the exception of any parcel that may be acquired and retained by the Government pursuant to the request of the Non-Federal Sponsor in accordance with Article II.E. of this Agreement, are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the relocations necessary for the implementation, operation, and maintenance of the Project, including those necessary to enable the removal of borrow materials. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such relocations in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph. The Government also shall provide a schedule to the Non-Federal Sponsor that specifies the projected date when each such relocation will be required for the Project, together with a written notice to proceed with such relocations. Prior to the end of the period of implementation, the Non-Federal Sponsor shall perform or ensure the performance of all relocations as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government contract for implementation, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all relocations the Government determines to be necessary for that contract.

C. The Non-Federal Sponsor in a timely manner shall provide the Government with such

documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to paragraphs A. or B. of this Article. Upon receipt of such documents the Government, in accordance with Article IV of this Agreement and in a timely manner, shall determine the value of such contribution, include such value in total project costs, and afford credit for such value toward the Non-Federal Sponsor's share of total project costs.

D. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for the implementation, operation, and maintenance of the Project, including those necessary for relocations and borrow materials, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

#### ARTICLE IV - CREDIT FOR LANDS AND RELOCATIONS

A. The Non-Federal Sponsor shall receive credit toward its share of total project costs for the value of the lands, easements, rights-of-way, and suitable borrow areas that the Non-Federal Sponsor must provide pursuant to Article III of this Agreement, and for the value of the relocations that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III of this Agreement. However, the Non-Federal Sponsor shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow areas that have been provided previously as an item of cooperation for another Federal project. The Non-Federal Sponsor also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow areas to the extent that: a) such items are provided using Federal program funds unless the Federal agency providing the Federal program funds verifies in writing that such credit is expressly authorized by statute; or b) the title to such lands, easements, or rights-of-way was acquired by the Non-Federal Sponsor from the United States without consideration pursuant to the Base Realignment and Closure Act of 1990, as amended, or other Federal legislation.

B. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations and borrow materials, 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 Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph B.3. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with paragraph B.2.a. of this Article, unless thereafter a different amount is determined to represent fair market value in accordance with paragraph B.2.b. of this Article.

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

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

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor shall, prior to instituting such proceedings, 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 days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or

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

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60-day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with sub-paragraph B.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 the implementation, operation, and maintenance of the Project, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article XI.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, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with Article III.D. of this Agreement.

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

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

2. For a relocation of a highway, the value shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of California 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, but 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 XI.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

4. Crediting for relocations performed within the Project boundaries is subject to satisfactory compliance with applicable federal labor laws covering non-Federal construction, including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq), and the Copeland Anti-Kickback Act (40 USC 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

#### ARTICLE V - PROJECT COORDINATION TEAM

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

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of implementation 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. The responsibilities of the Government's Project Manager and the Non-Federal Sponsor's counterpart in this regard shall include, but not be limited to, informing the Project Coordination Team regarding the acceptance of dredged or excavated material from San Francisco Bay area projects, particularly the source of material, suitability of material for placement at the Project site, determinations of the applicable regulatory agencies and the State of California Dredged Material Management Office regarding material proposed for placement at the Project site, and the appropriate allocation of the costs of transportation and placement of the dredged or excavated material, site preparation costs, or any other applicable costs between the Project and the San Francisco Bay area project providing the dredged or excavated material.

C. Until the end of the period of implementation, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards

and modifications; contract costs; the application of and compliance with the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act for relocations; the Government's cost projections; the availability and placement of dredged or excavated material from San Francisco Bay area projects; the suitability of dredged or excavated material considered for placement at the Project site; final inspection of the entire Project or functional portions of the Project; preparation of the proposed OMRR&R Manual; development and implementation of the monitoring and adaptive management plan; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. The implementation of the Project, as overseen by the Project Coordination Team, shall be conducted in accordance with a detailed Project Management Plan, prepared by, and modified as necessary by, the Government, in consultation with the Non-Federal Sponsor. The Government shall consult in good faith with the Non-Federal Sponsor on the contents of the Project Management Plan and any modifications thereto, and any requests of the Non-Federal Sponsor for alternations to, additions to, or deletions from the Project Management Plan shall not be unreasonably denied.

D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters 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 implementation of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

E. The costs of participation in the Project Coordination Team by the Government and the Non-Federal Sponsor shall be included in total project costs and shared in accordance with the provisions of this Agreement.

#### ARTICLE VI - METHOD OF PAYMENT

A. The Government shall maintain current records of Project expenditures, contributions provided by the parties, current projections of total project costs, and costs due to betterments. By March 1<sup>st</sup> of each year and at least quarterly thereafter until the end of the period of implementation, the Government shall provide the Non-Federal Sponsor with a report setting forth all Project expenditures made to date, all contributions provided to date and the current projections of total project costs, of total costs due to betterments, of the components of total project costs, of each party's share of total project costs, of the Non-Federal Sponsor's total cash contributions required in accordance with Articles II.B., II.D., and II.E. of this Agreement, of the non-Federal proportionate share, and of the funds the Government projects to be required from the Non-Federal Sponsor for the upcoming fiscal year. On the effective date of this Agreement, total project costs are projected to be \$56,193,622, and the Non-Federal Sponsor's cash contribution required under Article II.D. of this Agreement is projected to be \$14,048,406. Such amounts are estimates subject to adjustment by the Government and are not to be construed as



the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Non-Federal Sponsor shall provide the cash contribution required under Article II.D.2. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than sixty (60) calendar days prior to the scheduled date for issuance of the solicitation for the first contract for implementation, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for implementation through the first fiscal year of implementation, including the non-Federal proportionate share of financial obligations for implementation incurred prior to the period of implementation. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or providing an Electronic Funds Transfer of the required funds in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of implementation, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government, determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for implementation for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the Non-Federal Sponsor shall make the full amount of the required funds for that fiscal year available to the Government through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for implementation incurred prior to the period of implementation; and (b) the non-Federal proportionate share of financial obligations for implementation as they are incurred during the period of implementation.

4. If at any time during the period of implementation the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the non-Federal proportionate share of projected financial obligations for implementation for the current fiscal year, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required, and the Non-Federal Sponsor, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

C. In advance of the Government incurring any financial obligation associated with additional work under Article II.B. or II.E. of this Agreement, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to pay for such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the Non-Federal Sponsor must provide additional funds to meet its cash contribution, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days thereafter, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

D. Upon completion of the Project or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the results of the final accounting. The final accounting shall determine total project costs, each party's contribution provided thereto, and each party's required share of total project costs. The final accounting also shall determine costs due to betterments and the Non-Federal Sponsor's cash contribution provided pursuant to Article II.B. of this Agreement. The Government may perform an interim accounting, if requested by the Non-Federal Sponsor.

1. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor is less than its required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the Non-Federal Sponsor shall, no later than 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet the Non-Federal Sponsor's required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor exceeds its required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

## ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay 50 percent 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 – MONITORING AND ADAPTIVE MANAGEMENT

A. In consultation with the Non-Federal Sponsor, the Government shall prepare a detailed monitoring and adaptive management plan in coordination with other concerned agencies, prior to breach of the bayward levee. The monitoring and adaptive management plan shall include, but not be limited to, the biological, topographic, hydrological, bathymetric, and chemical conditions to be monitored and discussion of how these parameters relate to achieving the desired project outcomes; methods for measuring those attributes; monitoring frequency and duration; preparation and distribution of monitoring reports; adaptive management techniques that would be used to adjust the project; estimated monitoring and adaptive management costs; and criteria for likely success of the Project with respect to both physical and biological functions. This detailed monitoring and adaptive management plan shall be developed in accordance with the process prescribed in Article V.C. of this Agreement.

B. As of the effective date of this Agreement, the costs of monitoring and adaptive management are projected to be \$1,672,235. Monitoring and adaptive management activities shall be performed during the period of implementation of monitoring and adaptive management, as defined in Article I.N. of this Agreement.

C. If, upon the award of any contract for monitoring or adaptive management, cumulative costs of monitoring and adaptive management would exceed \$2,006,682, the Government and the Non-Federal Sponsor shall defer award of that contract and all subsequent contracts for monitoring and adaptive management of the Project until such time as the Government and the Non-Federal Sponsor enter into a written amendment to this Agreement to modify the maximum cost established for monitoring and adaptive management.

D. Subsequent monitoring, following the period of implementation of monitoring and adaptive management, shall be the responsibility of the Non-Federal Sponsor, at no cost to the Government and shall be conducted in accordance with the detailed monitoring and adaptive management plan.

## ARTICLE IX - OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION (OMRR&R)

A. Upon notification in accordance with Article II.C. of this Agreement and for so long as the Project remains authorized, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XII of this Agreement and specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto. Nothing herein shall preclude the Non-Federal Sponsor from accomplishing the operation, maintenance, repair, replacement, and rehabilitation of the Project through the services of a willing agency, such as the U.S. Fish and Wildlife Service, following such notification. However, absent any modification to the Non-Federal Sponsor's responsibilities delineated in this Article through written amendment to this Agreement, the Non-Federal Sponsor shall remain primarily responsible, as between the Non-Federal Sponsor and the Government, for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project in accordance with the terms of this Agreement.

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

## ARTICLE X - INDEMNIFICATION

Subject to the provisions of Article XXI of this Agreement, the Non-Federal Sponsor shall hold and save the Government free from all damages arising from the implementation, operation, maintenance, repair, replacement and rehabilitation of the Project, and any Project related betterments, except for damages due to the fault or negligence of the Government or its contractors.

## ARTICLE XI - MAINTENANCE OF RECORDS AND AUDIT

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

B. Pursuant to 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 7501-7507, as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall permit the Non-Federal Sponsor to inspect all books, records, documents and other evidence pertaining to the Project, and the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the Project shall be included in total project costs and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act. 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 XII - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government agree to 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, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army". The Non-Federal Sponsor is also required to comply with all applicable federal labor standards requirements including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c).

### ARTICLE XIII - RELATIONSHIP OF PARTIES

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

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

### ARTICLE XIV - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

### ARTICLE XV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under Article II.B., II.D., II.E., VI, or XIX of 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. If appropriations are not available in amounts sufficient to meet the Government's share of Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. If on or before September 30, 2002 the United States does not transfer to the Non-

Federal Sponsor pursuant to the BRAC program lands required for the Project, either party may elect, upon 60 days written notice to the other party, without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations, until the designated parcels of the Project site are made available by the United States under the BRAC program, or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XVI of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.D. of this Agreement.

D. Prior to any termination of this Agreement, irrespective of the availability of dredged or excavated material or the amount thereof previously placed or consolidated, subject to the availability of funds, the Government shall take action to ensure that the portion of the bayward levee located on lands required for the Project is breached and that pilot channels are cut through the outboard marsh to restore tidal circulation to the area, provided that the Government determines that each of the following is true in light of the state of completion of the construction features of the Project: (1) breach of the bayward levee does not cause undue risk of property damage to parcels of real property adjoining the Project site, (2) breach of the bayward levee does not cause undue risk of environmental harm to the Project site or the surrounding environment, and (3) breach of the bayward levee reflects sound engineering practice and judgment. The Government shall plan and accomplish any breaching of the bayward levee following consultation with the Non-Federal Sponsor and substantially in accordance with the Project Management Plan developed in accordance with Article V.C. of this Agreement, in compliance with all applicable Federal and State laws and regulations, and utilizing, as appropriate and available, funds reserved in accordance with Article II.I. of this Agreement.

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

F. This Agreement shall be amended only upon consent of the Government and the Non-Federal Sponsor, and with the approval of the California Department of General Services.

G. This Agreement shall be approved by the California Department of General Services before being accepted and signed by the Government.

## ARTICLE XVI - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 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 the implementation, operation, and maintenance of the Project, except for: a) any such lands that the Government determines to be subject to the navigation servitude; and b) any such lands for which the United States has responsibility to conduct investigations to identify the existence and extent of hazardous substances regulated under CERCLA under the BRAC program or the FUDS program. For lands that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction. Except for costs incurred pursuant to the BRAC program or the FUDS program, all actual costs incurred by the Non-Federal Sponsor or 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, subject to an audit in accordance with Article XI.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

B. In the event it is determined 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, the Non-Federal Sponsor must provide for the implementation, operation, monitoring, adaptive management, and maintenance of the Project, the Non-Federal Sponsor and the Government shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until both parties agree that the Non-Federal Sponsor should proceed. In the event that, upon completion of cleanup and response activities performed on lands, easements, or rights-of-way required for the Project pursuant to the BRAC program or the FUDS program, either party determines that the parcels upon which such activities were performed are unsuitable for Project purposes due to contamination with hazardous substances regulated under CERCLA, that party shall provide prompt written notice to the other party, and the acquisition of the real property interests in such parcels shall not proceed until both parties agree that such acquisition should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate implementation of the Project, or, if already in implementation, whether to continue with work on the Project, continue with work on those portions of the Project not rendered unsuitable for



Project purposes due to such contamination, 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 the implementation, operation, and maintenance of the Project. Should the Government and the Non-Federal Sponsor determine to initiate or continue with implementation after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Army Civil Works Program and the Non-Federal Sponsor, for the costs of cleanup and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. However, notwithstanding the above, neither the Army Civil Works Program nor the Non-Federal Sponsor shall be responsible under the terms of this Agreement for performance of, or payment for, cleanup, response, or remediation activities, including any studies and investigations related thereto, in connection with hazardous substances regulated under CERCLA for which the United States has the responsibility pursuant to the provisions of the BRAC program or the FUDS program. Costs incurred pursuant to the requirements of this paragraph shall not be considered a part of total project costs. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for cleanup and response costs as required under this paragraph, or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA, including such costs associated with dredged or excavated material placed for purposes of ecosystem and wetland restoration. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Government shall be considered the operator of the Project for the purposes of CERCLA liability until such time as the Government makes notification in accordance with Article II.C. of this Agreement. Following notification in accordance with Article II.C. of this Agreement, as between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the Project or a functional portion of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the Project or a functional portion of the Project in a manner that will not cause liability to arise under CERCLA.

## ARTICLE XVII - 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 either delivered personally, or by telegram, or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Executive Officer  
State Coastal Conservancy  
1330 Broadway, Suite 1100  
Oakland, California 94612

If to the Government:

District Engineer  
San Francisco District  
U.S. Army Corps of Engineers  
333 Market Street  
San Francisco, California 94105

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

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

## ARTICLE XVIII - 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 XIX - HISTORIC PRESERVATION

A. The costs of identification, survey and evaluation of historic properties shall be included in total project costs and shared in accordance with the provisions of this Agreement.

B. Pursuant to Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and 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 the Government is authorized to expend for the Project.

C. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall be included in total project costs and shall be shared in accordance with the provisions of this Agreement.

D. The parties hereto agree that any historical preservation activities undertaken on lands, easements, or rights-of-way required for the Project that are performed pursuant to the BRAC program or the FUDS program are outside the scope of this Agreement and any costs therefor shall not be included as part of total project costs.

#### ARTICLE XX - SECTION 902 PROJECT COST LIMITS

The Non-Federal Sponsor has reviewed the provisions set forth in Section 902 of Public Law 99-662, as amended, and understands that Section 902 establishes the maximum amount of total project costs for the Hamilton Wetlands Restoration Project. Notwithstanding any other provision of this Agreement, the Government shall not make a new Project financial obligation, make a Project expenditure, or afford credit toward total project costs for the value of any contribution provided by the Non-Federal Sponsor, if such obligation, expenditure, or credit would result in total project costs exceeding this maximum amount, unless otherwise authorized by law. On the effective date of this Agreement, this maximum amount is estimated to be \$72,433,622, as calculated in accordance with ER 1105-2-100 using October 1, 2001 price levels and allowances for projected future inflation. The Government shall adjust this maximum amount in accordance with Section 902.

#### ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the legislature of the State of California, where creating such an obligation would be inconsistent with the Constitution of the State of California.

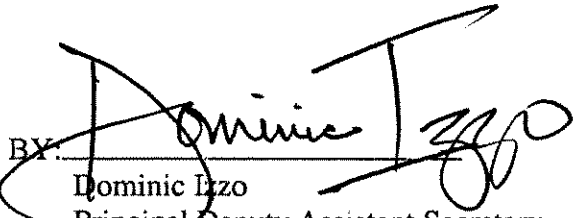
B. The Non-Federal Sponsor intends to satisfy its obligations under this Agreement. The State of California has appropriated funds in the amount projected to be the Non-Federal Sponsor's cash contribution required under Article II.D. of this Agreement in the Budget Act of 2000 (Item 3670-301-0001(4), Chapter 55, California Stats. of 2000), which funds have been encumbered through the execution of this Agreement in order to meet the Non-Federal Sponsor's financial obligations under this Agreement. To the extent, if any, that these funds are insufficient


to satisfy the Non-Federal Sponsor's financial obligations under this Agreement, the Non-Federal Sponsor shall include in its budget request through the California Resources Agency for each fiscal period appropriations sufficient to cover the Non-Federal Sponsor's obligations under this Agreement for each year, and will use all reasonable and lawful means to secure the appropriations for that year sufficient to make the payments necessary to fulfill its obligations hereunder. In the event the legislature of the State of California does not provide funds in sufficient amounts to discharge these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to satisfy its obligations hereunder, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

DEPARTMENT OF THE ARMY

STATE OF CALIFORNIA, acting by and through the CALIFORNIA STATE COASTAL CONSERVANCY

BY:   
Dominic Izzo  
Principal Deputy Assistant Secretary  
of the Army (Civil Works)

BY:   
Samuel Schuchat  
Executive Officer

DATE: April 22<sup>nd</sup> 2002

DATE: 4/22/02

CERTIFICATE OF AUTHORITY

I, Marcia Grimm, do hereby certify that I am the principal legal officer of the California State Coastal Conservancy, that the California State Coastal Conservancy is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the California State Coastal Conservancy in connection with the Hamilton Wetlands Restoration Project, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the California State Coastal Conservancy have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this

22nd day of April, 2002



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Marcia Grimm  
Senior Staff Counsel