

PROJECT PARTNERSHIP AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE STATE OF CALIFORNIA  
ACTING BY AND THROUGH ITS  
DEPARTMENT OF FISH AND GAME  
FOR  
DESIGN AND CONSTRUCTION  
OF THE  
NAPA RIVER SALT MARSH RESTORATION PROJECT

THIS AGREEMENT is entered into this 15<sup>TH</sup> day of JUNE, 2012, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, San Francisco District and the State of California acting by and through its Department of Fish and Game (hereinafter the "Non-Federal Sponsor"), represented by the Director.

WITNESSETH, THAT:

WHEREAS, construction of the Napa River Salt Marsh Restoration Project for ecosystem restoration and recreation (hereinafter the "Authorized Project") at the Napa River Unit of the Napa-Sonoma Marshes Wildlife Area on the northeast side of San Pablo Bay, immediately west of the Napa River and immediately east of Sonoma Creek, unincorporated portions of Napa, Sonoma, and Solano Counties, California was authorized by Water Resources Development Act of 2007, Public Law 110-114, Section 1001(12).

WHEREAS, the Government was authorized by Water Resources Development Act of 2007, Public Law 110-114, Section 1001(12) to perform *monitoring* and *adaptive management* (as defined in Article I.R. and Article I.S. of this Agreement, respectively) as part of the Authorized Project;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Partnership Agreement (hereinafter the "Agreement") for design and construction of the Napa River Salt Marsh Restoration (a separable element of the Authorized Project and hereinafter the "*Project*", as defined in Article I.A. of this Agreement);

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

WHEREAS, Section 221(a)(4) of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b(a)(4)), authorizes the Secretary of the Army, subject to certain limitations and conditions, to afford credit toward the non-Federal share of the cost of the *Project*

for the value of in-kind contributions that the Secretary of the Army determines are integral to the *Project*;

WHEREAS, the Non-Federal Sponsor desires to receive credit toward its required contribution of funds for the *Project* in accordance with the provisions of this Agreement for certain work (hereinafter the “*in kind contributions*” as defined in Article I.P. of this Agreement) that the Secretary of the Army determined to be integral to the *Project* on July 28, 2010;

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

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

WHEREAS, pursuant to the California Environmental Quality Act, California Public Resources Code Section 21000, *et seq.* (CEQA”), on April 30, 2004 the Department of Fish and Game (“DFG”) as lead agency certified the Napa River Salt Marsh Restoration Project Final Environmental Impact Report for the *Project* and on May 4, 2004 DFG filed a Notice of Determination with the State Clearinghouse;

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 *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, 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 teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

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

## ARTICLE I - DEFINITIONS

A. The term “*Project*” shall mean the design and construction of the *ecosystem restoration features* and the *recreation features* as generally described in the Napa River Salt Marsh Restoration Project Final Feasibility Report and Technical Appendices dated June 2004, and the Report of the Chief of Engineers dated December 22, 2004. The term “*Project*” includes the *in-kind contributions* described in paragraph P. of this Article.

B. The term “*ecosystem restoration features*” shall mean the ecosystem restoration of approximately 4,500 acres of former salt production ponds to managed habitat ponds and tidal marsh habitat in the Napa River Unit of the Napa-Sonoma Marshes Wildlife Area; include salinity reduction in Ponds 4, 5, 6, 6A, 7A and 8, via discharges to the Napa River, Napa Slough, and Devil’s Slough, and bittern removal/salinity reduction in Pond 7 via a discharge to Napa Slough; water control structures will connect Ponds 6 and 6A to Napa Slough and Devil’s Slough and Ponds 7A and 8 to Napa Slough; discharge from Ponds 4 and 5 will occur via a breach of the Pond 4 levee; and a combination of natural water sources to achieve pre-discharge dilution in the Upper and Lower Ponds, including seasonal rainfall and neighboring waters (Napa River, Napa Slough and Mud Slough), all as generally described in the Napa River Salt Marsh Restoration Project Final Feasibility Report and Technical Appendices dated June 2004, and the Report of the Chief of Engineers dated December 22, 2004.

C. The term “*recreation features*” shall mean minor upgrades to existing facilities to enhance educational activities, including interpretive signage, a comfort station, footpaths, and fishing platforms, all as generally described in the Napa River Salt Marsh Restoration Project Final Feasibility Report and Technical Appendices dated June 2004, and the Report of the Chief of Engineers dated December 22, 2004.

D. The term “*total project costs*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to design and construction of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s Preconstruction Engineering and Design costs; the Government’s costs of preparation of environmental compliance documentation in accordance with Article II.A.2. of this Agreement; the Government’s engineering and design costs during construction; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.B.1. of this Agreement; the Government’s costs of *monitoring* in accordance with Article II.J. and Article II.K. of this Agreement; the Government’s costs of *adaptive management* in accordance with Article II.L. and Article II.M. of this Agreement; the Government’s actual construction costs; the amount of credit the Government affords for *in-kind contributions* in accordance with Article II.C.5. and Article II.D.5. of this Agreement; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for which the Government affords credit in accordance with Article IV of this Agreement or for which reimbursement by the Government is required pursuant to Article II.C.3. or Article II.D.3. of this Agreement; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article X.B. and Article X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of *betterments* under Article II.I.2. of this Agreement; any costs of obtaining and providing water under Article II.Q. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; the Government’s costs for data recovery activities associated with historic

preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement; or the Non-Federal Sponsor's costs of negotiating this Agreement.

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

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

G. The term "*period of design and construction*" shall mean the time from the effective date of this Agreement to the date that construction, *monitoring*, and, if necessary, *adaptive management* of the *Project* are complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

H. The term "*financial obligations for design and construction*" shall mean the financial obligations of the Government and the costs for the *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, and rights-of-way, the performance of *relocations*, and the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material.

I. The term "*non-Federal proportionate share*" shall mean the ratio of (a) the sum of the costs included in *total project costs* for the *in-kind contributions*, as determined by the Government, and the Non-Federal Sponsor's total contribution of funds required by Article II.C.2., Article II.D.2., and Article II.D.7. of this Agreement to (b) *financial obligations for design and construction*, as projected by the Government.

J. The term "*highway*" shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

K. The term "*relocation*" shall mean providing a functionally equivalent facility to the owner of a 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 demolition of the affected facility or part thereof.

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

M. The term “*betterment*” shall mean a difference in the design or 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 design or construction of that element. The term does not include any design or construction for features not included in the *Project* as defined in paragraph A. of this Article.

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

O. The term “*fiscal year*” shall mean one year beginning on October 1 and ending on September 30.

P. The term “*in-kind contributions*” shall mean the design and permitting of salinity reduction and habitat restoration for Ponds 4 and 5; construction of salinity reduction and restoration features for Ponds 4 and 5; construction and post-construction monitoring for Ponds 4 and 5; design and cost estimate preparation for Ponds 6- 8; pre-permit monitoring and water quality analysis for Ponds 7, 7A, and 8; and project management, technical review, and administrative and project support carried out on or before November 8, 2007 and that the Assistant Secretary of the Army (Civil Works) determined to be integral to the *Project* on July 28, 2010.

Q. The term “*sufficient invoice*” shall mean documentation provided by the Non-Federal Sponsor containing the following: (1) a written certification to the Government by the Non-Federal Sponsor that it has made specified payments to contractors, suppliers, or employees for performance of work on the *Project* or a *functional portion of the Project* in accordance with this Agreement; (2) copies of all relevant invoices and evidence of such payments; (3) written identification of costs that have been paid with *Federal program funds*; and (4) a written request for credit of a sum certain amount not in excess of such specified payments.

R. The term “*monitoring*” shall mean activities, including the collection and analysis of data, that are necessary to determine if predicted outputs of the *ecosystem restoration features* set forth in the Napa River Salt Marsh Restoration Project Final Feasibility Report and Technical Appendices dated June 2004, and the Report of the Chief of Engineers dated December 22, 2004, are being achieved and to determine if *adaptive management* is necessary.

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

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

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the "Congress") and using those funds and funds provided by the Non-Federal Sponsor, expeditiously shall design and construct the *Project*, except for the *in-kind contributions*, applying those procedures usually applied to Federal projects, in accordance with applicable Federal, State, and local laws, regulations, and policies.

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

2. The Government has developed and coordinated as required, an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the *Project* in accordance with NEPA. The Government shall not issue the solicitation for the first construction contract for the *Project* or commence construction of the *Project* using the Government's own forces 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).

3. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, and the relevant plans and specifications, prior to the Government's issuance of such solicitations. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all proposed 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 to the Non-Federal Sponsor 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. In the event the Government performs all or some of the construction for the *Project* using its own forces, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the relevant plans and specifications prior to the commencement of such work using the Government's own forces. The Government shall consider in good faith and respond to the comments of the Non-Federal Sponsor, but the contents of solicitations, plans and specifications, award of contracts, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Government.

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

5. Notwithstanding paragraph A.3. of this Article, if the award of any contract for design or construction of the *Project*, *monitoring*, or *adaptive management* of the *Project*, or

continuation of design or construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces, would result in *total project costs* exceeding \$41,420,000, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for design or construction, *monitoring*, or *adaptive management* of the *Project*, and continuation of design or construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of design or 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 design or 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 design or construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with design, or construction, *monitoring*, or *adaptive management* of the *Project* using the Government's own forces.

6. As of the effective date of this Agreement, \$24,350,000 of Federal funds have been provided by Congress for the Authorized Project of which \$17,895,724 is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Authorized Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

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

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

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

2. The Non-Federal Sponsor shall provide 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 ecosystem restoration costs*, the Government shall

determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share prior to the Government affording credit for the *in-kind contributions* pursuant to paragraph C.5. of this Article. To determine such amount, the Government shall subtract from the Non-Federal Sponsor's required share of 35 percent of *total ecosystem restoration costs* the collective value of the following that are determined by the Government to be attributable to the *ecosystem restoration features*: (a) the value of the Non-Federal Sponsor's contributions under paragraph C.1. of this Article, as determined in accordance with Article IV of this Agreement; and (b) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

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

3. The Government, subject to the availability of funds and as limited by paragraph C.6. of this Article, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 35 percent of *total ecosystem restoration costs* if the Government determines at any time that the collective value of the following contributions that are determined by the Government to be attributable to the *ecosystem restoration features* has exceeded 35 percent of *total ecosystem restoration costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph C.1. of this Article as determined in accordance with Article IV of this Agreement; (b) the Non-Federal Sponsor's contribution of funds required by paragraph C.2.b. of this Article; (c) the amount of credit afforded for the *in-kind contributions* pursuant to paragraph C.5. of this Article; and (d) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *ecosystem restoration features*, perform any remaining *relocations* necessary for the *ecosystem restoration features*, or construct any remaining improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *ecosystem restoration features* on behalf of the Non-Federal Sponsor. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

4. The Government, in accordance with the conditions and limitations of this paragraph, shall determine the amount of the costs for *in-kind contributions* that are determined by the Government to be attributable to the *ecosystem restoration features* and that may be eligible for credit.

a. The Non-Federal Sponsor in a timely manner shall provide the Government with *sufficient invoices* and any other documents required by the Government to



enable the Government to determine the costs of *in-kind contributions* that may be eligible for credit.

b. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for credit 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.

c. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for credit 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 *in-kind contributions* were or are completed and the time the credit is afforded.

d. None of the costs for *in-kind contributions* paid by the Non-Federal Sponsor using *Federal program funds* are eligible for credit pursuant to 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.

e. Costs for *in-kind contributions* that are in excess of the Government's estimate of the costs for the Government to have performed or provided such work or materials are not eligible for credit pursuant to this Agreement.

f. Costs for *betterments*, 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 are not eligible for credit as *in-kind contributions*.

g. In the performance of the construction portion of the *in-kind contributions*, the Non-Federal Sponsor 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)). The Government may determine that costs for the construction portion of the *in-kind contributions*, in whole or in part, are not eligible for credit pursuant to this Agreement, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

h. Costs for *in-kind contributions* are not eligible for credit pursuant to this Agreement unless the Government determines through a review or on-site inspection, as applicable, performed by the Government that the work was accomplished in a satisfactory manner and in accordance with the applicable permits and the plans and specifications approved by the Government and the provisions of this Agreement.

i. No costs for *in-kind contributions* performed prior to compliance with all applicable environmental laws and regulations covering such work, including, but not limited

to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341) are eligible for credit pursuant to this Agreement.

5. The Government, in accordance with this paragraph, shall afford credit toward the amount of funds determined in accordance with paragraph C.2.a. of this Article for the costs of the *in-kind contributions* determined in accordance with paragraph C.4. of this Article and that are determined by the Government to be attributable to the *ecosystem restoration features*. However, the maximum amount of credit afforded shall not exceed the lesser of the following amounts as determined by the Government: (a) the amount of funds determined in accordance with paragraph C.2.a. of this Article; or (b) the costs of the *in-kind contributions* determined in accordance with paragraph C.4. of this Article.

6. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall not be entitled to reimbursement of any costs for *in-kind contributions* that exceed the amount of credit afforded pursuant to paragraph C.5. of this Article.

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

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

2. The Non-Federal Sponsor shall provide 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 50 percent of *total recreation costs*, the Government shall determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share prior to the Government affording credit for the *in-kind contributions* pursuant to paragraph D.5. of this Article. To determine such amount, the Government shall subtract from the Non-Federal Sponsor's required share of 50 percent of *total recreation costs* the collective value of the following that are determined by the Government to be attributable to the *recreation features*: (a) the value of the Non-Federal Sponsor's contributions under paragraph D.1. of this Article, as determined in accordance with Article IV of this Agreement; and (b) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

b. The Non-Federal Sponsor shall provide a contribution of funds in the amount determined by this paragraph in accordance with Article VI.B. of this Agreement. To determine such required contribution of funds, the Government shall reduce the amount determined in accordance with paragraph D.2.a. of this Article by the amount of credit the

Government projects will be afforded for the *in-kind contributions* pursuant to paragraph D.5. of this Article.

3. The Government, subject to the availability of funds and as limited by paragraph D.6. and paragraph D.7. of this Article, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 50 percent of *total recreation costs* if the Government determines at any time that the collective value of the following contributions that are determined by the Government to be attributable to the *recreation features* has exceeded 50 percent of *total recreation costs*: (a) the Non-Federal Sponsor's contribution of funds required by paragraph D.2.b. of this Article; (b) the value of the Non-Federal Sponsor's contributions under paragraph D.1. of this Article, as determined in accordance with Article IV of this Agreement; (c) the amount of credit afforded for the *in-kind contributions* pursuant to paragraph D.5. of this Article; and (d) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *recreation features*, perform any remaining *relocations* necessary for the *recreation features*, or construct any remaining improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *recreation features* on behalf of the Non-Federal Sponsor. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

4. The Government, in accordance with the conditions and limitations of this paragraph, shall determine the amount of the costs for *in-kind contributions* that are determined by the Government to be attributable to the *recreation features* and that may be eligible for credit.

a. The Non-Federal Sponsor in a timely manner shall provide the Government with *sufficient invoices* and any other documents required by the Government to enable the Government to determine the costs of *in-kind contributions* that may be eligible for credit.

b. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for credit 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.

c. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for credit 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 *in-kind contributions* were or are completed and the time the credit is afforded.

d. None of the costs for *in-kind contributions* paid by the Non-Federal Sponsor using *Federal program funds* are eligible for credit pursuant to 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.

e. Costs for *in-kind contributions* that are in excess of the Government's estimate of the costs for the Government to have performed or provided such work or materials are not eligible for credit pursuant to this Agreement.

f. Costs for *betterments*, 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 are not eligible for credit as *in-kind contributions*.

g. In the performance of the construction portion of the *in-kind contributions*, the Non-Federal Sponsor 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)). The Government may determine that costs for the construction portion of the *in-kind contributions*, in whole or in part, are not eligible for credit pursuant to this Agreement, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

h. Costs for *in-kind contributions* are not eligible for credit pursuant to this Agreement unless the Government determines through a review or on-site inspection, as applicable, performed by the Government that the work was accomplished in a satisfactory manner and in accordance with the applicable permits and the plans and specifications approved by the Government and the provisions of this Agreement.

i. No costs for *in-kind contributions* performed prior to compliance with all applicable environmental laws and regulations covering such work, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341) are eligible for credit pursuant to this Agreement.

5. The Government, in accordance with this paragraph, shall afford credit toward the amount of funds determined in accordance with paragraph D.2.a. of this Article for the costs of the *in-kind contributions* determined in accordance with paragraph D.4. of this Article and that are determined by the Government to be attributable to the *recreation features*. However, the maximum amount of credit afforded shall not exceed the lesser of the following amounts as determined by the Government: (a) the amount of funds determined in accordance with paragraph D.2.a. of this Article; or (b) the costs of the *in-kind contributions* determined in accordance with paragraph D.4. of this Article.

6. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall not be entitled to reimbursement of any costs for *in-kind contributions* that exceed the amount of credit afforded pursuant to paragraph D.5. of this Article.

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

E. When the District Engineer, after consultation with the Non-Federal Sponsor, determines that, except for *monitoring* and *adaptive management*, the entire *Project*, or a *functional portion of the Project*, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with a final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Project* or such completed portion. Upon such notification, the Government also shall furnish to the Non-Federal Sponsor a copy of all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, if such designs are available. Not later than 6 months after such notification by the Government that the entire *Project* is complete, the Government shall furnish the Non-Federal Sponsor with all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, and also shall furnish the Non-Federal Sponsor with the final OMRR&R Manual for the entire *Project*. In the event all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, or the final OMRR&R Manual for the entire *Project* cannot be completed within the 6 month period, the Government shall provide written notice to the Non-Federal Sponsor, and the Government and the Non-Federal Sponsor shall negotiate a mutually acceptable completion date for furnishing such documents. Further, after completion of all contracts for the *Project*, copies of all of the Government's and Non-Federal Sponsor's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided to the other party previously shall be provided to the Non-Federal Sponsor or the Government, as applicable.

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

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

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

I. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the “additional work”) described in sub-paragraphs 1 and 2 of this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement.

1. Acquisition of lands, easements, and rights-of-way; performance of *relocations*; or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

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

J. Prior to completion of construction of a *functional portion of the Project* related to the *ecosystem restoration features*, the Government, in consultation with the Non-Federal Sponsor and, as appropriate, other concerned agencies, shall finalize the plan for *monitoring* such *functional portion of the Project*. The *monitoring* plan for each *functional portion of the Project* related to the *ecosystem restoration features* shall describe the specific parameters to be monitored; how these parameters relate to achieving the desired outcomes and to ascertaining whether *adaptive management* measures of such *functional portion of the Project* will be necessary; methods for measuring those parameters; frequency and duration of *monitoring* for such *functional portion of the Project*; criteria for measuring the success of such *functional portion of the Project*; preparation and distribution of *monitoring* reports and other coordination requirements; and estimated *monitoring* costs. As of the effective date of this Agreement, the costs of *monitoring* for the Authorized Project are estimated to be \$1,297,509.

K. Upon providing notification to the Non-Federal Sponsor that a *functional portion of the Project* related to the *ecosystem restoration features* is complete in accordance with paragraph E. of this Article, the Government shall perform *monitoring* of such *functional portion of the Project*

in accordance with the applicable *monitoring* plan for a period of 5 consecutive years from the date of such notification for Ponds 6, 6A, 7A, and 8 and for a period of 10 consecutive years from the date of such notification for Ponds 4, 5, and 7. However, the *monitoring* of such *functional portion 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 any *functional portion of the Project* related to the *ecosystem restoration features*, or continuation of *monitoring* of any *functional portion of the Project* related to the *ecosystem restoration features* using the Government's own forces, would result in the costs incurred for *monitoring* of all features for ecosystem restoration in the Authorized Project exceeding 3.2 percent of the amount equal to *total ecosystem restoration costs* of the *Project* plus the costs for all other ecosystem restoration separable elements of the Authorized Project minus the costs for *monitoring* and *adaptive management* of all the features for ecosystem restoration in the Authorized Project; or (2) the District Engineer determines that continued *monitoring* of such *functional portion of the Project* is not necessary.

L. Applying the criteria specified in the *monitoring* plan, the Government shall determine, for each *functional portion of the Project* related to the *ecosystem restoration features*, whether *adaptive management* of such *functional portion of the Project* is necessary. The Government may make such a determination for a *functional portion of the Project* related to the *ecosystem restoration features* at any time during the *monitoring* period described in paragraph K. of this Article for such *functional portion of the Project*. Within 120 calendar days after the expiration or termination of such *monitoring* period for each *functional portion of the Project* related to the *ecosystem restoration features*, the Government shall make a final determination of whether *adaptive management* of such *functional portion of the Project* is necessary. In making such determinations, the Government shall consult with the Non-Federal Sponsor and, as appropriate, with other concerned agencies. Upon any determination by the Government that *adaptive management* of a *functional portion of the Project* related to the *ecosystem restoration features* is necessary, the Government shall notify the Non-Federal Sponsor in writing of its determination and expeditiously shall perform such *adaptive management* in accordance with paragraph M. of this Article. If, after the expiration or termination of such *monitoring* period for a *functional portion of the Project* related to the *ecosystem restoration features*, the Government determines that *adaptive management* of such *functional portion of the Project* is not necessary, the Government shall notify the Non-Federal Sponsor in writing of its determination and shall conduct an accounting in accordance with paragraph G. of this Article.

M. If the Government determines, pursuant to paragraph L. of this Article, that *adaptive management* of a *functional portion of the Project* related to the *ecosystem restoration features* is necessary, the Government, in consultation with the Non-Federal Sponsor and, as appropriate, other concerned agencies, shall perform *adaptive management* of such *functional portion of the Project* in accordance with the provisions of sub-paragraphs 1 – 3 of this paragraph and paragraph A. of this Article.

1. In no event shall the award of any contract for *adaptive management* of any *functional portion of the Project* related to the *ecosystem restoration features*, or continuation of *adaptive management* of any *functional portion of the Project* related to the *ecosystem restoration features* using the Government's own forces, result in the costs incurred for *adaptive*

*management* of all the features for ecosystem restoration in the Authorized Project exceeding 3.5 percent of the amount equal to *total ecosystem restoration costs* of the *Project* plus the costs for all other ecosystem restoration separable elements of the Authorized Project minus the costs for *monitoring* and *adaptive management* of all the features for ecosystem restoration in the entire Authorized Project. As of the effective date of this Agreement, the costs of *adaptive management* of the entire Authorized Project are estimated to be \$1,416,706.

2. When the District Engineer determines that *adaptive management* of a *functional portion of the Project* related to the *ecosystem restoration features* is complete, or that the costs therefore have or will exceed the 3.5 percent amount determined in accordance with sub-paragraph 1. of this paragraph, the District Engineer shall: a) notify the Non-Federal Sponsor in writing of such determination; b) furnish the Non-Federal Sponsor with an amended OMRR&R Manual that reflects any modifications to structures or adjustments to operation or management methods for such *functional portion of the Project*; c) furnish the Non-Federal Sponsor with a copy of any new or revised as-built drawings for such *functional portion of the Project*; and d) within 30 calendar days after such notice and in consultation with the Non-Federal Sponsor, determine whether to continue *monitoring* of such *functional portion of the Project*, subject to the limits in paragraph K. of this Article, or to conduct an accounting in accordance with paragraph G. of this Article.

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

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

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

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

Q. The Non-Federal Sponsor, at no cost to the Government, shall obtain and provide all water necessary to implement, operate, and maintain the *Project*.



ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY,  
RELOCATIONS, DISPOSAL AREA IMPROVEMENTS, AND  
COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

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

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

C. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the *Project*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs,

bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such improvements that are required, respectively, for the *ecosystem restoration features* and for the *recreation features* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for design and construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications. Furthermore, prior to the end of the *period of design and construction*, the Non-Federal Sponsor shall provide all improvements set forth in such descriptions.

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 (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 construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

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

A. The Government shall include in *total project costs* and afford credit toward the Non-Federal Sponsor's share of *total ecosystem restoration costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III.A. of this Agreement for the *ecosystem restoration features*; for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *ecosystem restoration features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Non-Federal Sponsor must provide pursuant to Article III.C. of this Agreement for the *ecosystem restoration features*. The Government also shall include in *total project costs* and afford credit toward the Non-Federal Sponsor's share of *total recreation costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III.A. of this Agreement for the *recreation features*; for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *recreation features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Non-Federal Sponsor must provide pursuant to Article III.C. of this Agreement for the *recreation features*. However, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of any lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal

of dredged or excavated material that have been provided previously as an item of cooperation for another Federal project. In addition, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that were acquired or performed using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that affording credit for the value of such items is expressly authorized by Federal law.

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

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

1. Date of Valuation.

a. 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. However, for lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement that the Government determines are required for the *in-kind contributions*, fair market value shall be the value of such real property interests as of the date the Non-Federal Sponsor awarded the first design or construction contract for the *in-kind contributions*, or, if the Non-Federal Sponsor performed the design or construction with its own forces, the date that the Non-Federal Sponsor began design or construction of the *in-kind contributions*.

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

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

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide the Government with the appraisal no later than 6 months after the Non-Federal Sponsor provides the Government with an authorization for entry for such real property interest. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

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

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

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

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement

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

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

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

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

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

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

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the State of 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*, as determined by the Government. *Relocation* costs shall not include any costs due to *betterments*, as determined by the Government or 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 such costs.

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

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

G. Where the Government, on behalf of the Non-Federal Sponsor pursuant to Article II.I.1. of this Agreement, acquires lands, easements, or rights-of-way, performs *relocations*, or constructs improvements required on lands, easements, or rights-of-way to enable the disposal of dredged or excavated material, the value to be included in *total project costs* and the amount of credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall be the costs of such work performed or provided by the Government that are paid by the Non-Federal Sponsor in accordance with Article VI.D. of this Agreement. In addition, the value to be included in *total project costs* and the amount of such credit to be afforded or the amount of

reimbursement provided in accordance with this Agreement shall include the documented costs incurred by the Non-Federal Sponsor in accordance with the terms and conditions agreed upon in writing pursuant to Article II.I.1. of this Agreement subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

#### ARTICLE V - PROJECT COORDINATION TEAM

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

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of design and 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 design and construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; 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; investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; determining eligibility of costs of *in-kind contributions* carried out prior to the effective date of this Agreement; historic preservation activities in accordance with Article XVII of this Agreement; the Government's cost projections; final inspection of the entire *Project* or *functional portions of the Project*; preparation of the proposed OMRR&R Manual; finalization of the *monitoring* plan; performance of *monitoring* and *adaptive management*; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for design and construction of the *Project*, except for the *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 *in-kind contributions* that the Project Coordination Team generally oversees, the Project Coordination Team may make recommendations to the Non-Federal Sponsor including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for design and construction of the *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 Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such 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.

#### ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, the value included in *total project costs* for 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 amount of credit to be afforded for *in-kind contributions* pursuant to Article II.C.5. and Article II.D.5. of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$41,420,000; *total ecosystem restoration costs* are projected to be \$40,269,000; the Non-Federal Sponsor's contribution of funds required by Article II.C.2.a. of this Agreement is projected to be \$5,382,500; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.C.5. of this Agreement is projected to be \$5,382,500; the Non-Federal Sponsor's contribution of funds required by Article II.C.2.b. of this Agreement is projected to be \$0; *total recreation costs* are projected to be \$1,151,000; the Non-Federal Sponsor's contribution of funds required by Article II.D.2.a. of this Agreement is projected to be \$531,500; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.D.5. of this Agreement is projected to be \$0; the Non-Federal Sponsor's contribution of funds required by Article II.D.2.b. and Article II.D.7. of this Agreement is projected to be \$531,500; the *non-Federal proportionate share* is projected to be 18 percent; the Non-Federal Sponsor's contribution of funds required by Article XVII.B.3. of this Agreement is projected to be \$0; the value included in *total project costs* for 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 \$7,413,000 for the *ecosystem restoration features* and \$13,500 for the *recreation features*; the value of the Non-Federal



Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement is projected to be \$1,298,650 for the *ecosystem restoration features* and \$30,500 for the *recreation features*; and the Government's total financial obligations for the additional work to be incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By January 1, 2013 and by each quarterly anniversary thereof until the conclusion of the *period of design and construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; *total ecosystem restoration costs*; the Non-Federal Sponsor's contribution of funds required by Article II.C.2.a. of this Agreement; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.C.5. of this Agreement; the Non-Federal Sponsor's contribution of funds required by Article II.C.2.b. of this Agreement; the *non-Federal proportionate share*; *total recreation costs*; the Non-Federal Sponsor's contribution of funds required by Article II.D.2.a. of this Agreement; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.D.5. of this Agreement; the Non-Federal Sponsor's contribution of funds required by Article II.D.2.b. and Article II.D.7. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's contribution of funds required by Article XVII.B.3. of this Agreement; the total contribution of funds required from the Non-Federal Sponsor for the upcoming *fiscal year*; the maximum amount determined in accordance with Article XX of this Agreement; the value included in *total project costs* for 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 value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement; and the Government's total financial obligations for additional work incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement.

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.C.2.b., Article II.D.2.b., Article II.D.7., and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 90 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for design of the *Project* or commencement of design of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the projected *non-Federal proportionate share of financial obligations for design and construction* to be incurred in the first *fiscal year*; or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the projected *non-Federal proportionate share of financial obligations for design and construction* through the first *fiscal year*; and (c) the Non-Federal Sponsor's share of the

projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred in the first *fiscal year*; or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement through the first *fiscal year*. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such 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 such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. Thereafter, until the construction of the *Project* is complete, the Government shall notify the Non-Federal Sponsor in writing of the funds the Government determines to be required from the Non-Federal Sponsor, and the Non-Federal Sponsor shall provide such funds in accordance with the provisions of subparagraphs a., b., and c. 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 design and 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 Non-Federal Sponsor in writing, no later than 120 calendar days prior to the beginning of each *fiscal year* in which the Government projects that it will make such financial obligations, of the funds the Government determines in accordance with this Agreement to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* for that *fiscal year* for such continuing contract and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement for that *fiscal year* for such continuing contract. No later than 30 calendar days prior to the beginning of that *fiscal year*, the Non-Federal Sponsor shall make the full amount of such required funds for that *fiscal year* 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 design and 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 Non-Federal Sponsor in writing, no later than 90 calendar days prior to the scheduled date for issuance of the solicitation for such contract, of the funds the Government determines in accordance with this Agreement to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* to be incurred for such contract and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred for such contract. No later than such scheduled date, the Non-Federal Sponsor 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 design and 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 Non-Federal Sponsor in writing, no later than 120 calendar days prior to the beginning of each *fiscal year* in which the Government projects that it will make such financial obligations, of the funds the Government determines in accordance with this Agreement to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* using the Government's own forces for that *fiscal year* and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement using the Government's own forces for that *fiscal year*. No later than 30 calendar days prior to the beginning of that *fiscal year*, the Non-Federal Sponsor shall make the full amount of such required funds for that *fiscal year* available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary, after consideration of the credit the Government projects will be afforded for the *in-kind contributions* pursuant to Article II.C.5. and Article II.D.5. of this Agreement, to cover: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the *non-Federal proportionate share of financial obligations for design and construction* as *financial obligations for design and construction* are incurred; and (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations in the current *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. Within 90 calendar days from receipt of such notice, the Non-Federal Sponsor 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 Non-Federal Sponsor. Further, upon conclusion of the *period of design and construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall amend the interim accounting to complete the final accounting and furnish the results to the Non-Federal Sponsor. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting or amend the previous interim accounting, as applicable, and furnish the Non-Federal Sponsor 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 Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs, total ecosystem restoration costs, total recreation costs*, and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs the interim or final accounting, as applicable, shall determine each party's required share thereof and each party's total contributions thereto as of the date of such accounting.

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

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total ecosystem restoration costs, total recreation costs*, and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total required shares thereof, the Government, subject to the availability of funds and as limited by Article II.C.6., Article II.D.6., and Article II.D.7. of this Agreement, shall refund or reimburse the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund or reimbursement and funds are not available to refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

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

1. Not less than 120 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds

required and provide an explanation of why additional funds are required. Within 90 calendar days from receipt of such notice, the Non-Federal Sponsor 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.

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

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

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

## ARTICLE VII - DISPUTE RESOLUTION

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

The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

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

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

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 90 calendar days from receipt of such written notice by the Government, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. No completion, operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

#### ARTICLE IX – HOLD AND SAVE

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 design, 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.

## ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

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

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

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

## ARTICLE XI - FEDERAL AND STATE LAWS

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

and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

## ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government 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 the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

## ARTICLE XIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, following receipt of written notice of such failure from the Government and a reasonable opportunity to cure, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless she determines that continuation of work on the *Project* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Project*.

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

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree



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

D. In the event that this Agreement is terminated pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.C.2.b., Article II.D.2.b., Article II.D.7., and Article XVII.B.3. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

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

#### ARTICLE XIV - HAZARDOUS SUBSTANCES

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

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

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

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

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

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

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Project* for the purpose of CERCLA liability. To the

maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the *Project* in a manner that will not cause liability to arise under CERCLA.

#### ARTICLE XV - NOTICES

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

If to the Non-Federal Sponsor:

State of California  
Department of Fish and Game  
Attn: Regional Manager, Bay Delta Region  
7329 Silverado Trail  
Napa, CA 94558

With a copy to:

State of California  
Department of Fish and Game  
Office of General Counsel  
Attn: General Counsel  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

If to the Government:

U.S. Army Corps of Engineers  
District Commander  
1455 Market Street, Rm. 1673  
San Francisco, CA 94103-1398

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

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

#### ARTICLE XVI - CONFIDENTIALITY

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

## ARTICLE XVII - HISTORIC PRESERVATION

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

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

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

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

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

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

b. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *recreation features* shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government consistent with the cost sharing requirements for recreation, as follows: 50 percent will be borne by the Non-Federal Sponsor and 50 percent will be borne by the Government.

C. If, during its performance of *relocations* or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material in accordance with Article III of this Agreement, the Non-Federal Sponsor discovers historic properties or other cultural resources that have not been evaluated by the Government pursuant to this Article, the Non-Federal Sponsor shall provide prompt written notice to the Government of

such discovery. The Non-Federal Sponsor shall not proceed with performance of the *relocation* or construction of the improvement that is related to such discovery until the Government provides written notice to the Non-Federal Sponsor that it should proceed with such work.

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

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

#### ARTICLE XIX - NON-LIABILITY OF OFFICERS AND EMPLOYEES

No officer, agent, consultant, or employee of the Non-Federal Sponsor, nor any officer, agent, consultant, or employee of the Government, may be charged personally, or held liable, under the terms or provisions of this Agreement because of any breach, attempted breach, or alleged breach thereof, except as provided in Section 912(b) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (42 U.S.C. 1962d-5b note), or other applicable law.

#### ARTICLE XX - SECTION 902 MAXIMUM COST OF PROJECT

A. The Non-Federal Sponsor understands that Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280) establishes the maximum amount of total costs for the Authorized Project, of which the *Project* is a separable element. On the effective date of this Agreement, the maximum amount of total costs for the Authorized Project, which is the sum of *total project costs* for the *Project* and the costs for all other separable elements of the Authorized Project, is estimated to be \$187,800,000, as calculated in accordance with Engineer Regulation 1105-2-100, using October 1, 2011 price levels and including allowances for projected future inflation. The Government shall adjust such maximum amount of total costs for the Authorized Project, in accordance with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), when necessary.

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

ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, or 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 Article XVI, sections 1 and 7 of the Constitution of the State of California.

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, 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 District Engineer.

DEPARTMENT OF THE ARMY

STATE OF CALIFORNIA

Acting by and through its

DEPARTMENT OF FISH AND GAME

BY: 

Torrey A. DiCiro  
Lieutenant Colonel, U.S. Army  
District Engineer

BY: 

Charlton H. Bonham  
Director  
California Department of Fish and Game


DATE: 6/15/12

DATE: 6/13/12

CERTIFICATE OF AUTHORITY

I, Thomas Gibson, do hereby certify that I am the principal legal officer of the Department of Fish and Game acting on behalf of the State of California, that the State of California acting by and through its Department of Fish and Game 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 State of California acting by and through its Department of Fish and Game in connection with the Napa River Salt Marsh Restoration Project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the State of California acting by and through its Department of Fish and Game have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 11<sup>th</sup> day of June, 2012.

  
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Thomas Gibson, General Counsel  
California Department of Fish and Game

## 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 31 U.S.C. 1352. 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.



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Charlton H. Bonham  
Director  
California Department of Fish and Game

DATE: 6/13/12