

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE STATE OF NORTH CAROLINA
FOR CONSTRUCTION OF THE
WILMINGTON HARBOR, NC - 96 ACT NAVIGATION PROJECT

THIS AGREEMENT is entered into this 26th day of March, 1999, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works), and the STATE OF NORTH CAROLINA (hereinafter the "State"), acting by and through the Chairman of the Environmental Management Commission and the Secretary of the North Carolina Department of Environment and Natural Resources.

WITNESSETH, THAT:

WHEREAS, the Wilmington Harbor - Northeast Cape Fear River, North Carolina Channel Widening project was authorized in Section 202(a) of the Water Resources Development Act of 1986 (Public Law 99-662);

WHEREAS, the Wilmington Harbor, Cape Fear River, North Carolina project was authorized in Section 101(a)(23) of the Water Resources Development Act of 1996 (Public Law 104-303);

WHEREAS, the Cape Fear - Northeast (Cape Fear) Rivers, North Carolina project was authorized in Section 101(a)(22) of the Water Resources Development Act of 1996 (Public Law 104-303);

WHEREAS, the Energy and Water Development Appropriations Act of 1998 (Public Law 105-62) directed the Secretary of the Army, acting through the Chief of Engineers, to combine the three authorized projects listed above "into a single project with one Project Cooperation Agreement based on cost sharing as a single project" (111 STAT 1323);

WHEREAS, the three projects related to Wilmington Harbor, having been combined as directed by Congress, are now known collectively as the Wilmington Harbor, North Carolina - 96 Act Navigation Project (hereinafter the "Project", as defined in Article I.A. of this Agreement);

WHEREAS, the Government and the State desire to enter into a Project Cooperation Agreement for construction of the Project;

WHEREAS, Section 101 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, and Section 101 of the Water Resources Development Act of 1986, Public Law 99-662 (codified as amended at 42 U.S.C. § 1962d-5b), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, construction, operation and maintenance of the Wilmington Harbor 38-foot navigation project, at Wilmington, North Carolina, was authorized by the River and Harbor and Flood Control Act of 1962;

WHEREAS, on July 28, 1997, the Government and the State entered into an agreement for the raising of dikes at Eagle Island, N.C. by virtue of the State advancing funds to the Government in the amount of \$3,850,000 (hereinafter referred to as "Eagle Island I");

WHEREAS, by the terms of the Eagle Island I Agreement, the Government agreed, subject to the availability of appropriations, to either reimburse the State or credit the State with the amount of the Federal share of costs incurred in implementation of the Eagle Island I Agreement;

WHEREAS, it is the intention of the parties to credit the State with the appropriate costs of the Federal share of the Eagle Island I Agreement, against its share of the costs incurred for the future construction of dredged or excavated material disposal facilities required during a subsequent period of construction;

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

WHEREAS, the Government and State 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 State, in connection with this Project Cooperation Agreement, desire to foster a "partnering" strategy and a working relationship between the Government and the State through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and team work prevent disputes, foster a cooperative bond between the Government and the State, and facilitate the completion of a successful project.

NOW, THEREFORE, the Government and the State agree as follows:

ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean the general navigation features and all lands, easements, rights-of-way, relocations, or removals that the Government, in accordance with Article III of this Agreement, determines to be necessary for the construction, operation, or maintenance of the general navigation features, but shall not include aids to navigation or the local service facilities .

B. The term "general navigation features" shall mean the plan of improvement consisting of deepening the ocean bar and entrance channels from the authorized depth of 40 feet to 44 feet; deepening the authorized 38-foot project from Southport to the Cape Fear Memorial Bridge to 42 feet up to and including the anchorage basin immediately upriver from the State Ports Authority dock, and extending the anchorage basin northward by 300 feet; widening the existing 400-foot wide channel to 600 feet over a total length of 6.2 miles including Lower and Upper Midnight and Lower Lilliput reaches; widening five turns and bends by 100 to 200 feet providing a total average channel width of 500 to 675 feet; widening the Fourth East Jetty Channel to 500 feet over a total length of 1.5 miles; deepening the 32-foot channel between the Cape Fear Memorial Bridge and the Hilton Railroad Bridge, the 32-foot turning basin just above the mouth of the Northeast Cape Fear River on the west side, and the 25-foot channel from the Hilton Railroad Bridge to 750 feet upstream all to a depth of 38 feet; and deepening the 25-foot channel from 750 feet upstream of the Hilton Railroad Bridge to the turning basin near the upstream limits of the project to 34 feet, along with widening of the channel from 200 to 250 feet; and widening the turning basin from 700 to 800 feet; mitigating for impacts by converting 30 acres of upland to new wetlands and nursery areas and acquiring about 650 acres of existing wetlands and nursery areas; and modifying two existing disposal facilities to accommodate material dredged during initial construction specified as the Eagle Island and Point Peter dredged or excavated material disposal facilities at Wilmington, NC; all as generally described in the Wilmington Harbor - Northeast Cape Fear River General Design Memorandum Supplement dated February 1994 approved by the Assistant Secretary of the Army (Civil Works) in September 1994; the Wilmington Harbor - Channel Widening Final Interim Feasibility Report and Environmental Impact Statement dated March 1994 approved by the Assistant Secretary of the Army (Civil Works) in August 1994, and Final Supplement I to the Final Environmental Impact Statement dated May 1996 approved by The South Atlantic Division Engineer in November 1996; and the Cape Fear - Northeast Cape Fear Rivers Final Feasibility Report and Environmental Impact Statement dated June 1996 and approved by the Chief of Engineers in September 1996, and the letter report titled "Decision Report Recommending Raises of the Dikes on Eagle Island for the Purpose of Confined Disposal of Wilmington Harbor, North Carolina, Maintenance Dredged

Material", dated May 5, 1997 and revised on June 10, 1998 and approved by the Deputy Director of Civil Works, Headquarters, U.S. Army Corps of Engineers on August 7, 1998.

C. The term "local service facilities" shall mean the facilities that are necessary to realize the benefits of the general navigation features, as generally described in, and required of the State by, the Water Resources Development Act of 1996, and described in decision documents for: the Wilmington Harbor - Northeast Cape Fear River project; the Wilmington Harbor - Channel Widening project; and the Cape Fear - Northeast Cape Fear Rivers project including, but not limited to, the disposal of dredged or excavated material and the incremental cost of construction, and maintenance thereof, of dredged or excavated material disposal facilities required to dispose of this material. The local service facilities are channel and docking improvements to the berthing areas for the North Carolina State Ports Authority, the PCS Nitrogen Company, the Amerada Hess Corporation, and the Apex Oil Company.

D. The term "total cost of construction of the general navigation features" shall mean all costs incurred by the State or the Government in accordance with the terms of this Agreement directly related to construction of the general navigation features. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: continuing planning and engineering costs incurred after October 1, 1985; advanced engineering and design costs; preconstruction engineering and design costs; engineering and design costs during construction; the costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XV.A.1. of this Agreement; costs of historic preservation activities in accordance with Articles XVIII.A. and XVIII.D.1. of this Agreement; actual construction costs, (including any costs incurred in the construction of dredged or excavated material disposal facilities during any subsequent period of construction), including the costs of alteration, lowering, raising, or replacement and attendant demolition of existing bridges over navigable waters of the United States; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; incidental costs of removals accomplished by the State before the end of the period of construction or during any subsequent period of construction in accordance with Article II.O. of this Agreement; direct and incidental costs of removals accomplished by the Government before the end of the period of construction or during any subsequent period of construction in accordance with Article II.N. of this Agreement; and costs of audit in accordance with Articles X.B. and X.C. of this Agreement. The term does not include the value of any lands, easements, rights-of-way, or relocations; any costs of removals accomplished by the State other than incidental costs; any financial obligations for operation or maintenance of the general navigation features, all costs assigned to an existing Federal navigation project in accordance with Article II.E. of this Agreement; any costs due to betterments; any costs of dispute resolution under Article VII of this Agreement; any costs of aids to navigation; or any costs of construction, operation or maintenance of the local service facilities.

E. The term "financial obligation for construction" shall mean a financial obligation of the Government that results or would result in a cost that is or would be included in the total cost of construction of the general navigation features.

F. The term "non-Federal proportionate share" shall mean the ratio of the State's total cash contribution required in accordance with Article II.F. of this Agreement to total financial obligations for construction, as projected by the Government.

G. The term "period of construction" shall mean the time from the date the Government first notifies the State in writing, in accordance with Article VI.B. of this Agreement, of the scheduled date for either issuance of the solicitation for the first contract for construction of the general navigation features or commencement of construction of the general navigation features using the Government's own forces, to the date that the U.S. Army Engineer for the Wilmington District (hereinafter the "District Engineer") notifies the State in writing of the Government's determination that construction of the general navigation features is complete, except for construction of any dredged or excavated material disposal facility identified in Article I.B. of this Agreement for which a construction contract has not been awarded at the time of the written notice.

H. The term "subsequent period of construction" shall mean a period of time after the period of construction beginning with the date that the Government first notifies the State in writing of the scheduled date for either issuance of the solicitation for the contract or commencement using the Government's own forces of construction of a dredged or excavated material disposal facility that is part of the general navigation features as defined in Article I.B. of the Agreement and ending with the date that the District Engineer notifies the State in writing of the Government's determination that construction is complete. There may be more than one subsequent period of construction.

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

J. The term "bridge over navigable waters of the United States" shall mean a lawful bridge over the navigable waters of the United States, including approaches, fenders, and appurtenances thereto, which is used and operated for the purpose of carrying railroad traffic, or both railroad and highway traffic, or if a State, county, municipality, or other political subdivision is the owner or joint owner thereof, which is used and operated for the purpose of carrying highway traffic.

K. The term "relocation" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway, railroad (including any bridge thereof), or public facility, excluding existing bridges over navigable waters of the United States, 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 "removal" shall mean eliminating an obstruction (other than a bridge over the navigable waters of the United States) where the Government determines, after consultation with the State, that : 1) elimination is necessary for the construction, operation, or maintenance of the general navigation features, including the borrowing of material or the disposal of dredged or excavated material associated therewith; 2) elimination must be accomplished before the end of the period of construction; or during a subsequent period of construction; and 3) the State of North Carolina, or the Government has the legal capability to accomplish elimination of the obstruction at the expense of the owner or operator thereof. The term also shall mean the elimination of an obstruction to the construction, operation, or maintenance of the general navigation features when such elimination is specifically provided for, and is identified as a removal, in the authorizing legislation for the Project or any report referenced therein.

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

N. The term "betterment" shall mean a change in the design and construction of an element of the general navigation features accomplished at the request of the State resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design and construction of that element.

O. The term "dredged or excavated material disposal facility" shall mean the improvements necessary on lands, easements, or rights-of-way to enable the disposal of dredged or excavated material associated with the construction, operation, or maintenance of the general navigation features. Such improvements may include but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, or de-watering pumps or pipes.

P. The term "over-depth" shall mean additional depth required to accomplish advanced maintenance, if any, and to compensate for dredging inaccuracies.

Q. The term "utility" shall mean that which the state of North Carolina, pursuant to generally applicable state law, defines as a public utility.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE STATE

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

State, shall expeditiously construct the general navigation features (including alteration, lowering, raising, or replacement and attendant removal of existing bridges over navigable waters of the United States), applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

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

2. Throughout the period of construction and during any subsequent period of construction, the District Engineer shall furnish the State with a copy of the Government's Written Notice of Acceptance of Completed Work for each contract for the general navigation features.

3. Notwithstanding paragraph A.1. of this Article, if the award of any contract for construction of the general navigation features would result in, cumulative financial obligations for construction that would exceed \$407,000,000, the Government and the State agree to defer award of that contract and all subsequent contracts for construction of the general navigation features until such time as the Government and the State agree to proceed with further contract awards for the general navigation features, but in no event shall the award of contracts be deferred for more than three years. Notwithstanding this general provision for deferral of contract awards, the Government, after consultation with the State, may award a contract or contracts after the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts must proceed in order to comply with law or to protect human life or property from imminent and substantial harm.

B. The State may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the State 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 State shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

C. In accordance with Article III of this Agreement, the State shall provide all lands, easements, and rights-of-way that the Government determines the State must provide for the construction, operation, or maintenance of the general navigation features, including the borrowing of material or the disposal of dredged or excavated material associated there with, and shall perform or ensure performance of all relocations that the Government determines to be necessary for the construction, operation, or maintenance of the general navigation features.

D. The State may request the Government to provide lands, easements, or rights-of-way, or to perform relocations, for the general navigation features on behalf of the State. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the State 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 State shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, or rights-of-way, or performance of relocations by the Government, the State shall be responsible, as between the Government and the State, for the costs of cleanup and response in accordance with Article XV.D. of this Agreement.

E. The Government shall assign all costs associated with the dredging of material from the dimensions, including over-depth, of any existing Federal navigation project to the costs of operation and maintenance of the existing Federal navigation project. The Government, in accordance with Federal laws, regulations, and policies, shall assign all costs included or to be included in the total cost of construction of the general navigation features to one or more of the following depth increments: dredging to a depth not in excess of 20 feet; dredging to a depth in excess of 20 feet but not in excess of 45 feet; and dredging to a depth in excess of 45 feet. The Government shall include any costs associated with over-depth dredging accomplished as part of the general navigation features in the costs assigned to the Project depth.

F. The State shall contribute a share of the total cost of construction of the general navigation features (including any costs incurred in the construction of dredged or excavated material disposal facilities during any subsequent period of construction) as follows: 10 percent of that portion of the total cost of construction of the general navigation features assigned to dredging to a depth not in excess of 20 feet; plus 25 percent of that portion of the total cost of construction of the general navigation features assigned to dredging to a depth in excess of 20

feet but not in excess of 45 feet; plus 50 percent of that portion of the total cost of construction of the general navigation features assigned to dredging to a depth in excess of 45 feet.

G. If the Government projects that the value of the State's contributions under paragraph O. of this Article and contributions under Articles V, X.B., X.C., and XV.A.1. of this Agreement, will be less than its share required by paragraph F. of this Article, the State shall provide a contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to meet its share required by paragraph F. of this Article

H. The Government shall perform a final accounting in accordance with Article VI.D. of this Agreement to determine the State's contributions provided in accordance with paragraphs B., D., G., and O. of this Article and the State's contributions provided in accordance with Articles V, X.B., X.C., and XV.A.1. of this Agreement and to determine whether the State has met its obligations under paragraphs B., D., and F. of this Article. The final accounting also shall determine an amount equal to 10 percent of the total cost of construction of the general navigation features (hereinafter the "10 percent amount"). In the event there is a subsequent period of construction the Government shall amend the final accounting in accordance with Article VI.E.5 of this Agreement.

I. Before furnishing the State with the results of the final accounting, the Government shall afford credit against the 10 percent amount for the value, as determined in accordance with Article IV of this Agreement, of lands, easements, rights-of-way, or relocations provided before the end of the period of construction; provided, however, that such credit shall not exceed the 10 percent amount. In accordance with Article VI.E. of this Agreement, the State shall, over a period not to exceed 30 years, pay an amount equal to the 10 percent amount reduced by such credit (hereinafter the "principal amount"), with interest. In accordance with Article VI.E.4. of this Agreement, the Government also shall afford credit against the principal amount for the value, as determined in accordance with Article IV of this Agreement, of the lands, easements, rights-of-way, or relocations, provided after the period of construction. In the event there is a subsequent period of construction and the Government amends the final accounting in accordance with Article VI.E.5 of this Agreement, the State, in accordance with Article VI.E.5 of this Agreement, shall pay any additional portion of the principal amount that is outstanding as a consequence of the amended final accounting.

J. Subject to applicable Federal laws and regulations, the State, at no cost to the Government and in a timely manner, shall construct or cause to be constructed the local service facilities, and shall be responsible for taking all actions to enable such construction. The Government shall have no responsibility under this Agreement for the construction of the local service facilities or the construction of any other facilities provided by the State or a third party.

K. In accordance with Article VIII.A. of this Agreement, the State, at no cost to the Government, shall operate and maintain or cause to be operated and maintained the local service

facilities. The Government shall have no responsibility under this Agreement for the operation or maintenance of the local service facilities or the operation or maintenance of any other facilities provided by the State or a third party. The State shall pay for the cost of disposal of dredged or excavated material related to the operation and maintenance of the local service facilities, including the incremental cost of construction, and maintenance thereof, of dredged or excavated material disposal facilities required to dispose of this material.

L. The Government shall operate and maintain the general navigation features in accordance with Article VIII.B. of this Agreement.

M. The State shall not use Federal funds to meet its obligations for the Project under this Agreement unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.

N. The Government shall accomplish all removals that the State of North Carolina does not have the legal capability to accomplish where the State of North Carolina makes a written request for the Government to accomplish such removal; and all removals that the Government is expressly required to accomplish in the authorizing legislation for the Project or any report referenced therein.

1. In the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such removal shall be reclassified as part of the State's responsibility to provide lands, easements, and rights-of-way, or to perform relocations, as appropriate, pursuant to Article II.C. of this Agreement.

2. All costs incurred by the Government in accomplishing removals shall be included in the total cost of construction of the general navigation features and shared in accordance with the provisions of this Agreement.

O. The State shall accomplish all removals, other than those removals specifically assigned to the Government by paragraph N. of this Article, in accordance with the provisions of this paragraph.

1. The Government in a timely manner shall provide the State with general written descriptions, including maps as appropriate, of such removals, in detail sufficient to enable the State to fulfill its obligations under this paragraph, and shall provide the State with a written notice to proceed with accomplishing such removals. Unless the Government agrees to a later date in writing, prior to the issuance of the solicitation for each Government contract for construction, operation, or maintenance of the general navigation features, or prior to the Government incurring any financial obligation for construction, operation, or maintenance of the general navigation features that it elects to perform with its own forces, the State shall

accomplish all removals set forth in such descriptions that the Government determines to be necessary for that work.

2. In the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such removal shall be reclassified as part of the State's responsibility to provide lands, easements, and rights-of-way, or to perform relocations, as appropriate, pursuant to Article II.C. of this Agreement.

3. The documented incidental costs incurred by the State in accomplishing removals, shall be included in the total cost of construction of the general navigation features, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs, and shared in accordance with the provisions of this Agreement. Incidental costs may include legal and administrative costs (such as owner or operator notification costs, public notice or hearing costs, attorney's fees, and litigation costs) incurred by the State in accomplishing removals, but shall not include any costs that the State of North Carolina has the legal capability to require of, assign to, or recover from the owner or operator of the obstruction.

P. The Government shall afford the State credit for the Federal share of the costs of the Eagle Island I Agreement, in accordance with the provisions of that agreement. Such credits shall be applied to the non-Federal share of the cost of construction of the general navigation features of the Project incurred during subsequent periods of construction but not be applied against the non-Federal share of the cost of construction of the general navigation features of the Project incurred during the period of construction. However, such credits may also be applied to the non-Federal share of the cost of construction of any future dredged or excavated material disposal facilities required for maintenance of the existing navigation project constructed during the period of construction. In lieu of applying such credits against construction during a subsequent period of construction the Government may, subject to the availability of funds appropriated for this purpose, provide reimbursement to the State.

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

A. The Government, after consultation with the State, shall determine the lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the general navigation features, including those lands, easements, or rights-of-way necessary for the borrowing of material, the disposal of dredged or excavated material, relocations, and including those lands, easements, or rights-of-way that the Government determines to be subject to the navigation servitude. The Government in a timely manner shall provide the State with general written descriptions, including maps as appropriate, of the lands, easements, or rights-of-way that the Government determines the State must provide, in detail sufficient to enable the State to fulfill its obligations under this paragraph, and shall provide the State with a written notice to proceed with acquisition of such lands, easements, or rights-of-way. Prior to the end of the

period of construction, or the subsequent period of construction, as applicable, the State shall acquire all lands, easements, or rights-of-way necessary for the construction of the general navigation features, as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government contract for construction, operation, or maintenance of the general navigation features or prior to the Government incurring any financial obligation for construction, operation, or maintenance it elects to perform with its own forces, the State shall acquire all lands, easements, or rights-of-way the Government determines the State must provide for that work and shall provide the Government with authorization for entry thereto.

B. The Government, after consultation with the State, shall determine the relocations necessary for the construction, operation, or maintenance of the general navigation features, 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 State with general written descriptions, including maps as appropriate, of such relocations in detail sufficient to enable the State to fulfill its obligations under this paragraph, and shall provide the State with a written notice to proceed with such relocations. Unless the Government agrees to a later date in writing, prior to issuance of the solicitation for each Government contract for construction, operation, or maintenance of the general navigation features or prior to the Government incurring any financial obligation for construction, operation, or maintenance it elects to perform by its own forces, the State 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.

C. Until the Government furnishes the State with the results of the final accounting pursuant to Article VI.D. of this Agreement, or the credit afforded in accordance with Article II.I. of this Agreement equals the 10 percent amount, whichever occurs later, the State 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 in accordance with paragraph A. or B. of this Article. Upon receipt of such documents the Government in a timely manner shall afford credit for the value of such contribution in accordance with Article II.I. of this Agreement.

D. The State shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the general navigation features, including those necessary for relocations, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - CREDIT FOR VALUE OF LANDS AND RELOCATIONS

A. The State shall receive credit in accordance with Article II.I. of this Agreement for the value of the lands, easements, or rights-of-way that the State must provide in accordance with Article III of this Agreement, and for the value of the relocations that the State must perform or for which it must ensure performance in accordance with Article III of this Agreement. However, the State shall not receive credit for the value of any lands, easements, rights-of-way, or relocations, that have been provided previously as an item of cooperation for another Federal project. The State also shall not receive credit for the value of lands, easements, rights-of-way, or relocations, to the extent that such items are provided or performed using Federal funds unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute.

B. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations, other than those the Government acquires on behalf of the State in accordance with Article II.D. of this Agreement, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the State on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the State provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the State after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph B.3. or B.4. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with paragraph B.2.a. of this Article, unless thereafter a different amount is determined to represent fair market value in accordance with paragraph B.2.b. of this Article.

a. The State shall obtain, for that real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the State and the Government. The State shall provide the Government with the appraisal no later than 6 months after the State provides the Government with an authorization for entry for such real property interest, or, in the event an authorization for entry is not required, no later than the end of the period of construction or the end of the subsequent period of construction, as applicable. 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 State's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the State's appraisal, the State may obtain a second appraisal, and the fair market value shall be the amount set forth in the State's second appraisal, if such appraisal is approved by the Government. In the

event the Government does not approve the State's second appraisal, the State chooses not to obtain a second appraisal, or the State 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 State. In the event the State does not approve the Government's appraisal, the Government, after consultation with the State, shall consider the Government's and the State'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 State for the real property interest exceeds the amount determined in accordance with paragraph B.2.a. of this Article, the Government, at the request of the State, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the State, may approve in writing an amount greater than the amount determined in accordance with paragraph B.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the State, but no less than the amount determined in accordance with paragraph B.2.a. of this Article.

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

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60-day period, the State 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 State 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 State agree as to an appropriate amount, then the State 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 State cannot agree as to an appropriate amount, then the State 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 B.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are necessary for the construction, operation, and maintenance of the general navigation features, 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 State within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. In the event the Government modifies its determination made in accordance with Article III.A. of this Agreement, the State shall receive credit for the documented incidental costs associated with preparing to acquire lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with Article III.D. of this Agreement.

C. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations, that the Government acquires on behalf of the State in accordance with Article II.D. of this Agreement, 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. The fair market value of such real property interests shall be the amount paid by the Government.

2. The value of the interest shall include the documented incidental costs of acquiring the interest. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits.

D. After consultation with the State, the Government shall determine the value of relocations in accordance with the provisions of this paragraph.

1. For a relocation other than a highway or a utility, 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 North Carolina would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. For a relocation of a utility, the value shall be only that portion of relocation costs borne by the State 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.

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

ARTICLE V - PROJECT COORDINATION TEAM

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

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

C. Until the end of the period of construction and during each subsequent period of construction, the Project Coordination Team shall generally oversee the Project, including but not necessarily limited to matters related to design; plans and specifications; scheduling; real property, relocation, and removal requirements; real property acquisition; contract awards or modifications; contract costs; the Government's cost projections; the amount of credit to be afforded the State under the Eagle Island I Agreement; final inspection of the entire Project or functional portions of the Project; preparation of the management plan for proposed dredged or

excavated material disposal; anticipated requirements for operation and maintenance of the general navigation features; and other Project-related matters. The Project Coordination Team also shall generally oversee the coordination of schedules for the Project and the local service facilities. Oversight of the Project shall be consistent with a project management plan developed by the Government after consultation with the State.

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

E. The costs of participation in the Project Coordination Team shall be included in the total cost of construction of the general navigation features and shared in accordance with the provisions of this Agreement.

ARTICLE VI - METHOD OF PAYMENT

A. Until the Government furnishes the State with the results of the final accounting, the Government shall maintain current records of contributions provided by the parties and current projections of the total cost of construction of the general navigation features and costs due to additional work under Article II.B. or Article II.D. of this Agreement. At least quarterly, the Government shall provide the State with a report setting forth all contributions provided to date and the current projections of the total cost of construction of the general navigation features, of total costs due to additional work under Article II.B. or Article II.D. of this Agreement, of the maximum amount determined in accordance with Article XX of this Agreement, of the State's total contributions required in accordance with Articles II.B., II.D., and II.G. of this Agreement, of the State's proportionate share, of the funds required from the State for the upcoming fiscal year, of the credit to be afforded in accordance with Article II.I. of this Agreement for the value of lands, easements, rights-of way, or relocations contributed before the end of the period of construction and during any subsequent period of construction, of the credit to be afforded in accordance with Article II.P. of this Agreement for the Federal share of the Eagle Island I Agreement, of the 10 percent amount, of the principal amount, and of the installments to be paid in accordance with paragraph E.2. of this Article. Thereafter, until the outstanding portion of the principal amount equals \$0, the Government, at least annually, shall provide the State with a report setting forth the outstanding portion of the principal amount and the current projection of the remaining installments to be paid in accordance with paragraph E.2. of this Article. On the effective date of this Agreement, the total cost of construction of the general navigation features is projected to be \$317,305,000, and the State's contribution required under Article II.F. of this Agreement is projected to be \$78,817,000. The total cost of construction of the dredged material

disposal facilities during subsequent periods of construction for maintenance purposes is projected to be \$45,404,000 and the State's contribution required under Article II.F. of this Agreement is projected to be \$11,351,000. These amounts are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the State.

B. The State shall provide the contribution required by Article II.G. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for either issuance of the solicitation for the first construction contract or commencement of construction using the Government's own forces, the Government shall notify the State in writing of such scheduled date and the funds the Government determines to be required from the State to meet the non-Federal proportionate share of projected financial obligations for construction through the first fiscal year of construction, including the non-Federal proportionate share of financial obligations for construction incurred prior to the commencement of the period of construction. Not later than such scheduled date, the State shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer, or verify to the satisfaction of the Government that the State has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the State, or present the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or provide an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of construction, the Government shall notify the State in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government determines to be required from the State to meet the non-Federal proportionate share of projected financial obligations for construction for that fiscal year (including the construction of dredged or excavated material disposal facilities during any subsequent period of construction). No later than 30 calendar days prior to the beginning of the fiscal year, the State shall make the full amount of the required funds for that fiscal year available to the Government through the funding mechanisms specified in paragraph B.1. of this Article.

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

4. If at any time during the period of construction, or any subsequent period of construction, the Government determines that additional funds will be needed from the State to

cover the non-Federal proportionate share of projected financial obligations for construction for the current fiscal year, the Government shall notify the State in writing of the additional funds required together with an explanation of why additional funds are required, and the State, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through the payment mechanisms specified in paragraph B.1. of this Article.

C. In advance of the Government incurring any financial obligation associated with additional work under Article II.B. or II.D. of this Agreement, the State shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer, or verify to the satisfaction of the Government that the State has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the State, or present the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or provide an Electronic Funds Transfer in accordance with procedures established by the Government. The Government shall draw from the funds provided by the State such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the State must provide additional funds to meet its contribution, the Government shall notify the State in writing of the additional funds required together with an explanation of why additional funds are required. Within 30 calendar days thereafter, the State shall provide the Government with the full amount of the additional required funds through the funding mechanisms specified above.

D. After completion of the construction of the general navigation features or termination of this Agreement, and upon resolution of all relevant proceedings, claims, and appeals, the Government shall conduct a final accounting and furnish the State with the results of the final accounting.

1. The final accounting shall determine the total cost of construction of the general navigation features, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine total costs due to additional work under Article II.B or II.D. of this Agreement and the State's contribution provided in accordance with Article II. B. or II.D. of this Agreement.

a. In the event the final accounting shows that the total contribution provided by the State is less than its required share of the total cost of construction of the general navigation features plus costs due to additional work under Article II.B. or II.D. of this Agreement, the State shall, no later than 90 calendar days after receipt of written notice, make a payment to the Government of whatever sum is required to meet the State's required share of the total cost of construction of the general navigation features plus costs due to additional work under Article II.B. or II.D. of this Agreement.

b. In the event the final accounting shows that the total contribution provided by the State exceeds its required share of the total cost of construction of the general navigation features plus costs due to additional work under Article II.B. or II.D. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the State no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the State, the Government shall seek such appropriations as are necessary to make the refund.

2. The final accounting also shall determine the 10 percent amount and the value of lands, easements, rights-of-way, and relocations, provided before the end of the period of construction.

E. The State shall pay the principal amount required by Article II.I. of this Agreement in accordance with the provisions of this paragraph.

1. Before furnishing the State with the results of the final accounting, the Government shall calculate the principal amount and the annual installments, which installments shall be substantially equal. At the time the Government furnishes the State with the results of the final accounting, the Government shall notify the State in writing of the principal amount and the annual installments. The Government shall recalculate the annual installments at five year intervals and shall notify the State in writing of the recalculated annual installments. In calculating or recalculating the annual installments, the Government shall amortize the principal amount over a period of 30 years (hereinafter the "payment period"), beginning on the date the Government notifies the State of the principal amount, using an interest rate determined by the Secretary of the Treasury. In the case of the initial calculation, the interest rate shall be determined by the Secretary of the Treasury taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the payment period during the month preceding the fiscal year in which the Government awards the first contract for construction of the general navigation features, plus a premium of one-eighth of one percentage point for transaction costs. In the case of recalculations, the interest rate shall be determined by the Secretary of the Treasury taking into consideration such average market yields during the month preceding the fiscal year in which the sixth installment is to be paid, and thereafter during the month preceding the fiscal year in which each fifth installment is to be paid, plus a premium of one-eighth of one percentage point for transaction costs.

2. The State shall pay the installments calculated or recalculated in accordance with paragraph E.1. of this Article each year on the anniversary of the date the Government notifies the State of the principal amount, over a period not to exceed the payment period, by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer or an electronic funds transfer in accordance with procedures established by the Government.

3. Notwithstanding paragraph E.2. of this Article, the State, in its sole discretion, may prepay the principal amount, in whole or in part, at any time. Notwithstanding paragraph E.1. of this Article, there shall be no charges for interest on any portion of the principal amount prepaid within 90 days after the Government notifies the State of the principal amount.

4. After the Government furnishes the State with the results of the final accounting, the Government shall afford credit against the principal amount for the value, as determined in accordance with Article IV of this Agreement, of lands, easements, rights-of-way, and relocations provided after the period of construction; provided, however, that the amount of credit afforded in accordance with this paragraph shall not exceed the principal amount. Credit shall be afforded against the portion of the principal amount that is outstanding at the time the credit is afforded. If the credit exceeds the portion of the principal amount outstanding at the time credit is afforded, the Government shall afford the excess credit against the portion of the principal amount that the State has paid at the time the credit is afforded, by refunding such portion to the State, subject to the availability of funds. In the event existing funds are not available to refund such portion to the State, the Government shall seek such appropriations as are necessary to make the refund.

5. In the event there is a subsequent period of construction, the Government, after completion of the construction of the applicable dredged or excavated material disposal facility or facilities, and upon resolution of all relevant proceedings, claims, and appeals, shall amend the final accounting (including recalculating the 10 percent amount), recalculate the principal amount and the principal amount outstanding, and, if the payment period has not elapsed, recalculate the annual installments by amortizing the principle amount outstanding over the remaining portion of the repayment period, and shall furnish the non-Federal Sponsor with the results of the amended final accounting and the aforesaid recalculations. Thereafter, if the payment period has not elapsed, the non-Federal Sponsor shall pay the aforesaid recalculated installments in lieu of the previously calculated installments. If the payment period has elapsed, the non-Federal Sponsor, not later than 90 days after being furnished the aforesaid results, shall pay to the Government the principal amount outstanding by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer or an Electronic Funds Transfer in accordance with procedures established by the Government.

ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay 50 percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VIII - OPERATION AND MAINTENANCE

A. Subject to applicable Federal laws and regulations and for so long as the Project remains authorized, and commensurate with the Government's operation and maintenance of the general navigation features, the State, at no cost to the Government, shall operate and maintain or cause to be operated and maintained the local service facilities in a manner compatible with the authorized purposes of the Project.

B. The Government, as it determines necessary, shall operate and maintain the general navigation features and shall be responsible for all financial obligations for operation and maintenance of the general navigation features.

C. The State hereby authorizes the Government to enter, at reasonable times and in a reasonable manner, upon property that the State now or hereafter owns or controls for the purpose of operating and maintaining the general navigation features. Nothing contained herein, however, shall convey to the Government any interest in real property owned or controlled by the State.

D. Further, to the extent not inconsistent with the interest in real property owned by the State, the State hereby authorizes the Government to perform all activities on the lands, easements, and rights-of-way provided by the State to enable the disposal of dredged or excavated material that, in the Government's sole discretion, are necessary for the operation, maintenance, or management of the dredged material disposal facilities including, but not limited to, construction, operation, or maintenance of the dredged material disposal facilities; disposal of dredged or excavated material associated with the construction, operation, or maintenance of the general navigation features; and removal and reuse of previously deposited dredged or excavated material without charge to the Government.

ARTICLE IX - HOLD AND SAVE

The State shall hold and save the Government free from all damages arising from the construction, operation, or maintenance of the Project, any betterments, and the local service facilities, 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 State 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 State 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 State shall each allow the other to inspect such books, documents, records, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the State is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 7501-7507, as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the State and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the State and independent auditors any information necessary to enable an audit of the State's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph before the Government furnishes the State with the results of the final accounting 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 the total cost of construction of the general navigation features and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the State is required to conduct under the Single Audit Act. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph before the Government furnishes the State with the results of the final accounting shall be included in the total cost of construction of the general navigation features 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 State and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), as implemented by Department of Defense Directive 5500.11 and Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the State 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 - OFFICIALS NOT TO BENEFIT

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

ARTICLE XIV - TERMINATION OR SUSPENSION

A. If at any time the State fails to fulfill its obligations under Article II.B., II.D., II.G., II.J., II.K., or VI of this Agreement, the Assistant Secretary of the Army (Civil Works) may terminate this agreement or suspend future performance under this Agreement unless he determines that continuation of work on the general navigation features 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. Notwithstanding the above, in order to resolve potential funding shortfalls of the State, the Assistant Secretary of the Army (Civil Works) agrees to defer termination of this Agreement until after a two year period has lapsed, unless both parties mutually agree to waive this two year period.

B. If the Government fails to receive annual appropriations in amounts sufficient to meet its share of scheduled expenditures for the general navigation features for the then-current or upcoming fiscal year, the Government shall so notify the State in writing, and 60 calendar days thereafter either party may elect without penalty to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement in accordance with this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the State elects to terminate this Agreement, whichever occurs first. Notwithstanding the above, in order to resolve potential funding shortfalls of the Government, both parties agree to defer termination of this Agreement until after a two year period has lapsed, unless both parties mutually agree to waive this two year period.

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

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV.D. of this Agreement shall not relieve

the parties of liability for any obligation previously incurred. Any delinquent payment from the State 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 XV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the State shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the State determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, or rights-of-way that the Government determines, in accordance with Article III of this Agreement, to be necessary for the construction, operation, or maintenance of the general navigation features. However, for lands, easements, or 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 State with prior specific written direction, in which case the State shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the State or the Government before the end of the period of construction or during any subsequent period of construction for such investigations for hazardous substances shall be included in the total cost of construction of the general navigation features and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the State after the period of construction, other than during a subsequent period of construction, for such investigations for hazardous substances shall be considered incidental costs under Article IV.B.4. and be credited in accordance with Article II.I. of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

3. All actual costs incurred by the Government after the period of construction, other than during a subsequent period of construction, for such investigations for hazardous substances shall be considered financial obligations for operation and maintenance of the general navigation features and shared in accordance with Article VIII.B. of this Agreement.

B. The State may perform, or cause to be performed, any investigations it determines to be necessary to identify the existence and extent of any hazardous substances regulated under

CERCLA that may exist in, on, or under lands, easements, or rights-of-way necessary solely for the construction, operation, or maintenance of the local service facilities. However, for any of those lands that the Government determines to be subject to the navigation servitude, the State must obtain prior written instructions from the District Engineer regarding the method of testing and must perform such investigations only in accordance with those instructions. The costs of any investigations performed under this paragraph shall be borne entirely by the State. The Government shall have no obligation under this Agreement for the costs of any investigations performed under this paragraph.

C. 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, in accordance with Article III of this Agreement, to be necessary for the construction, operation, or maintenance of the general navigation features, the State and the Government shall, in addition to providing any other notice required by applicable law, provide prompt written notice to each other, and the State shall not proceed with the acquisition of the real property interests until both parties agree that the State should proceed. In the event it is discovered through any means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the local service facilities, the State and the Government shall, in addition to providing any other notice required by applicable law, provide prompt written notice to each other.

D. The Government and the State shall determine whether to initiate construction, operation, or maintenance of the general navigation features, or, if already in construction, operation, or maintenance, whether to continue with construction, operation, or maintenance of the general navigation features, 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, in accordance with Article III of this Agreement, to be necessary for the construction, operation, or maintenance of the general navigation features. Should the Government and the State determine to initiate or continue with construction, operation, or maintenance after considering any liability that may arise under CERCLA, the State shall be responsible, as between the Government and the State, for the costs of clean-up and response, to include 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 the total cost of construction of the general navigation features. In the event the State fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the State's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the general navigation features. The Government shall have no obligation under this Agreement for the costs of any clean-up and response, to include the costs of any studies and investigations necessary to

determine an appropriate response to the contamination, on lands, easements, or rights-of-way necessary solely for the local service facilities.

E. The State 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 clean up and response costs as defined in CERCLA. Any decision made in accordance with paragraph D. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

F. To the maximum extent practicable, the Government and the State shall perform their responsibilities under this Agreement in a manner that will not cause liability to arise under CERCLA.

ARTICLE XVI - NOTICES

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

If to the State: Director, Division of Water Resources
North Carolina Department of Environment
and Natural Resources
Post Office Box 27687
Raleigh, North Carolina 27611

If to the Government: District Engineer
U.S. Army Engineer District, Wilmington
Post Office Box 1890
Wilmington, North Carolina 28402

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 in accordance with 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 XVII - 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 XVIII - HISTORIC PRESERVATION

A. The costs of identification, survey, and evaluation of historic properties incurred before the end of the period of construction, or during a subsequent period of construction, shall be included in the total cost of construction of the general navigation features and shared in accordance with Article II.F. and II.I of this Agreement.

B. The costs of identification, survey, and evaluation of historic properties incurred after the period of construction shall be considered financial obligations for operation and maintenance of the general navigation features and shared in accordance with Article VIII.B. of this Agreement.

C. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in the total cost of construction of the general navigation features, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the construction of the general navigation features.

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

1. Any costs of mitigation and data recovery that exceed the one percent limit and are incurred before the end of the period of construction or during a subsequent period of construction shall be included in the total cost of construction of the general navigation features and shall be shared in accordance with Article II.F. and II.I. of this Agreement.

2. Any costs of mitigation and data recovery that exceed the one percent limit and are incurred after the period of construction, other than during a subsequent period of construction, shall be considered financial obligations for operation and maintenance of the general navigation features and shared in accordance with Article VIII.B. of this Agreement.

ARTICLE XIX - 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 XX - SECTION 902 PROJECT COST LIMITS

The State has reviewed the provisions set forth in Section 902 of Public Law 99-662, as amended, and understands that Section 902 establishes the maximum cost of the Project and the local service facilities. Notwithstanding any other provision of this Agreement, the Government shall not make a new Project financial obligation, make a Project expenditure, or afford credit toward total cost of construction of the general navigation features for the value of any contribution provided by the State, if such obligation, expenditure, or credit would result in the total cost of construction of the general navigation features plus the value of any contribution provided by the State in accordance with Article III of this Agreement plus the costs of local service facilities exceeding this maximum amount, unless otherwise authorized by law. On the effective date of this Agreement, this maximum amount is estimated to be \$407,000,000, as calculated in accordance with ER 1105-2-100 using October 1, 1997 price levels and allowances for projected future inflation. The Government shall adjust this maximum amount in accordance with Section 902.

ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

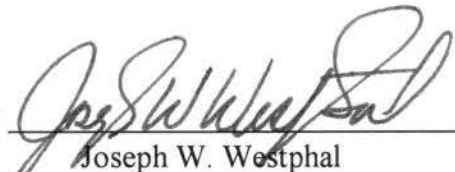
Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the General Assembly of the State of North Carolina.

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

THE DEPARTMENT OF THE ARMY

NORTH CAROLINA

BY:



Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

DATE:

March 26, 1999

BY:



David H. Moreau, Chairman
North Carolina Environmental
Management Commission

DATE:

Jan 13 1999

BY:



Wayne McDevitt
Secretary, State of North Carolina
Department of Environment and Natural Resources

DATE:

1/29/99

CERTIFICATE OF AUTHORITY

I, Dan Oakley, do hereby certify that I am a Senior Deputy Attorney General for the State of North Carolina, that the State of North Carolina 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 North Carolina, in connection with the Wilmington Harbor, NC - 96 Act Navigation Project, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the State of North Carolina have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
13th day of January 1999.

Dan Oakley
Senior Deputy Attorney General
State of North Carolina

CERTIFICATION REGARDING LOBBYING

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

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

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

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

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



Wayne McDevitt
Secretary, State of North Carolina
Department of Environment and Natural Resources

DATE: 1/29/99

CERTIFICATION REGARDING LOBBYING

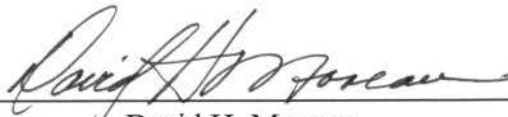
The undersigned certifies, to the best of his or her knowledge and belief that:

(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.

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David H. Moreau
Chairman, State of North Carolina
Environmental Management Commission

DATE: Jan 13 1999