

**Lee County Board Of County Commissioners  
Agenda Item Summary**

**Blue Sheet No. 20060468**

**1. ACTION REQUESTED/PURPOSE:** Review Project Cooperation Agreements (PCAs) with the Department of the Army (Corps of Engineers) for the restoration of beaches on Gasparilla Island and Estero Island. Approve and authorize Chairwoman to execute both agreements.

**2. WHAT ACTION ACCOMPLISHES:** Formalizes the project partnership between Lee County and the Army for implementation of the Shore Protection Project; defines responsibilities of each party including federal reimbursement of County expenses.

**3. MANAGEMENT RECOMMENDATION:** The Board of County Commission passed a motion to enter into the agreement with the Corps of Engineers at the April 11, 2006 meeting.

**4. Departmental Category:** 08 **A8A** **5. Meeting Date:** 04-25-2006

<b>6. Agenda:</b>	<input type="checkbox"/> Consent	<b>7. Requirement/Purpose: (specify)</b>	<input type="checkbox"/> Statute	<b>8. Request Initiated:</b>	
	<input checked="" type="checkbox"/> Administrative		<input type="checkbox"/> Ordinance		<input type="checkbox"/> Commissioner
	<input type="checkbox"/> Appeals		<input type="checkbox"/> Admin. Code		<input type="checkbox"/> Department
	<input type="checkbox"/> Public		<input checked="" type="checkbox"/> Other		<input type="checkbox"/> Division
	<input type="checkbox"/> Walk-On				<input type="checkbox"/> By: <u>Roland E. Ottolini, P.E.</u>

**9. Background:** In 1970, Congressional resolutions approved the construction of the Lee County Shore Protection Project. The project consisted of distinct segments: Captiva, Estero, and Gasparilla Islands. The Captiva Island segment was implemented by the Captiva Erosion Prevention District and is not part of this action.

In 1990, County Resolution 90-05-41 requested the Army Corps of Engineers to implement the Estero and Gasparilla Segments. Changes in federal policy made it difficult for the Corps to initiate the work, so the County opted to pursue the work as reimbursable projects. The conditions of reimbursement are defined in the PCA, and depend largely on the findings of a General Reevaluation Report (GRR) completed by the Corps in 2001. Based on the GRR, the Corps determined that the project was technically sound, environmentally acceptable and economically justified. As such, a PCA has been drafted for each project segment and offered to the County for approval.

Both project segments have been fully permitted. A taxing district has been established to fund the property owner share on Gasparilla Island. Sufficient construction easements are in place to build the Gasparilla segment. The Fort Myers Beach Town Council (Town) has indicated that they do not support construction of the Estero Island segment.

The Army has indicated that they desire to execute the PCAs at a formal ceremony in Boca Grande on April 26, 2006. Execution of the Gasparilla PCA would enable construction to begin immediately. Authorizing the Estero PCA would secure a cost sharing agreement with the Corps in the event the Town changed opinions.

The PCA will authorize reimbursement of construction cost to Lee County estimated at \$4.3 million for Gasparilla project and \$3.4 million for Estero. A budget amendment will be submitted under a separate bluesheet. County and Federal monies spent towards design and engineering, including preparation of the GRR, would also be eligible for cost sharing.

Attachments: Sample PCA Agreements – originals will be provided by the Army and executed in Boca Grande.

**10. Review for Scheduling:**

Department Director	Purchasing or Contracts	Human Resources	Other	County Attorney	Budget Services				County Manager/P.W. Director
					Analyst	Risk	Grants	Mgr.	
<i>[Signature]</i>	NA	NA	NA	<i>[Signature]</i> 4/13/06	<i>[Signature]</i>	<i>[Signature]</i> 4/13/06	<i>[Signature]</i> 4/13/06	<i>[Signature]</i> 4/13/06	<i>[Signature]</i>

**11. Commission Action:**

- Approved
- Deferred
- Denied
- Other

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COUNTY ADMIN:  
4-13-06 3:45  
COUNTY ADMIN  
FORWARDED TO:  
4/14/06  
4:30 pm

Rec. by CoAtty  
Date: 4/13/06  
Time: 3:35  
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PROJECT COOPERATION AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
LEE COUNTY, FLORIDA  
FOR CONSTRUCTION OF THE  
GASPARILLA ISLAND SEGMENT  
OF THE  
LEE COUNTY, FLORIDA  
BEACH EROSION CONTROL PROJECT

THIS AGREEMENT is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works), and LEE COUNTY, FLORIDA (hereinafter the "Non-Federal Sponsor"), represented by the Chairman of its Board of County Commissioners.

WITNESSETH, THAT:

WHEREAS, construction of initial fill and periodic nourishment for Lee County, Florida, Beach Erosion Control Project at Gasparilla Island, Florida (hereinafter the "Authorized Project") was authorized under Section 201 of the Flood Control Act of 1965 and approved by Senate Committee Resolution dated December 17, 1970 and House Committee Resolution dated December 15, 1970;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for initial construction of the Gasparilla Island Segment of the Lee County, Florida Beach Erosion Control Project (hereinafter the "Project"), as defined in Article I.A. of this Agreement;

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

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

WHEREAS, Section 309 of the Water Resources Development Act of 2000, Public Law 106-541, authorized the Secretary of the Army to enter into an agreement with the non-Federal interest to carry out the Project in accordance with Section 206 of the Water Resources Development Act of 1992, Public Law 102-580, if the Secretary determines that the Project is technically sound, environmentally acceptable, and economically justified;

WHEREAS, the Assistant Secretary of the Army (Civil Works) determined on March 31, 2004, that the Project is technically sound, environmentally acceptable, and economically justified;

WHEREAS, Section 206 of the Water Resources Development Act of 1992, authorized the Secretary of the Army to reimburse a non-Federal interest an amount equal to the estimate of the Federal share, without interest, of the cost of an authorized beach erosion control project;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, provides that credits and reimbursements afforded for all applicable general authorities and under specific project authority shall not exceed \$100,000,000 for all applicable programs and projects in each fiscal year; and

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

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

## ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean the initial restoration of 2.8 miles of shoreline through construction of a design template of a 20 foot berm with an elevation of +5 feet mean low water as generally described in the Lee County, Florida Shore Protection Project (Gasparilla and Estero Islands) General Reevaluation Report with Environmental Impact Statement, dated January 2000, revised July 2001 and Addendum thereto dated April 2002 (Revised November 2002) approved by the Assistant Secretary of the Army (Civil Works).

B. The term "total project costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to construction of the Project. 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. of this Agreement; costs of historic preservation activities in accordance with Article XVIII of this Agreement; actual construction costs; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas for which the Government affords credit in accordance with Article IV of this Agreement; and costs of audit in accordance with Article X.B. and X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; any costs for periodic nourishment; any costs for establishment of the erosion control line; or any costs of dispute resolution under Article VII of this Agreement.

C. The term “period of construction” shall mean the time from the date the Non-Federal Sponsor first notifies the Government in writing of the scheduled date for issuance of the solicitation for the first construction contract to the date that the Non-Federal Sponsor notifies the Government in writing of its determination that construction of the Project is complete.

D. The term “highway” shall mean any public highway, roadway, street, or way, including any bridge thereof.

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

F. 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.

G. The term “functional portion of the Project” shall mean a portion of the Project that is complete, can function independently and for a useful purpose, and is suitable for the Non-Federal Sponsor to operate and maintain in advance of completion of the entire Project.

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

I. The term “District Engineer” shall mean the U.S. Army Engineer for the Jacksonville District.

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

A. Using its funds, in accordance with Federal laws, regulations and policies, the Non-Federal Sponsor shall expeditiously construct the Project.

1. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. The Non-Federal Sponsor shall not issue the solicitation for any construction contract until the Government has confirmed in writing its acceptance of plans and specifications for the contract. Failure to obtain such confirmation shall permit, but not require, the Government to deny or reduce reimbursement. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Government with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof.

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

3. As of the effective date of this Agreement, \$1,250,000.00 of Federal funds is currently projected to be available for the Project. This amount is less than the Federal share of projected total project costs, and the Government makes no commitment to request the Congress to provide additional funds for the Project. Further, the Government's financial participation in the Project is limited to the amount of Federal funds the Government makes available to the Project.

B. When the Non-Federal Sponsor determines that the construction of the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the Non-Federal Sponsor shall so notify the District Engineer in writing. The Non-Federal Sponsor shall prepare and furnish the Government for review a proposed Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (hereinafter the "OMRR&R Manual"). The failure of the Non-Federal Sponsor to prepare an acceptable OMRR&R Manual shall not negate the Non-Federal Sponsor's responsibility to provide for the operation, maintenance, repair, replacement, and rehabilitation of the Project, or a functional portion thereof, in accordance with Article VIII of this Agreement. The Non-Federal Sponsor shall provide copies of all of the Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously.

C. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for construction, operation, and maintenance of the Project, and shall perform or ensure performance of all relocations that the Government determines to be necessary for construction, operation, and maintenance of the Project.

D. The Government, in accordance with Federal laws, regulations, and policies, shall assign all costs included or to be included in total project costs to one or more of the following project purposes: hurricane and storm damage reduction, recreation, or privately owned shores (where use of such shores is limited to private interests).

E. Throughout the period of construction, but not later than 180 days after the completion of the period of construction, the Non-Federal Sponsor shall provide the Government with such documents as are sufficient to enable the Government to conduct an accounting of the Project and determine the reimbursement. Upon receipt of such documents the Government shall conduct an accounting for the period of construction, including determination of costs eligible for reimbursement.

F. Subject to the limitations of Article VI of this Agreement, the Government shall reimburse the Non-Federal Sponsor in the amount necessary to make the Federal contribution for the period of construction of the Project equal to 65 percent of the total project costs assigned by the Government to hurricane and storm damage reduction plus 50 percent of the separable costs of total project costs assigned by the Government to recreation. The Government shall not reimburse the Non-Federal Sponsor for any portion of total project costs assigned by the Government to privately owned shores (where use of such shores is limited to private interests) or any costs due to construction of betterments. As of July 2001, the non-Federal share of the total project costs is estimated as 58.7 percent. This percentage is an estimate based on Project cost sharing and the amount of public and privately owned lands in the Project area and may be revised before construction commences.

G. The Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

H. In the event an uncompleted portion of the construction is damaged or destroyed by a storm or other natural forces, the Non-Federal Sponsor shall place suitable beach fill material within the area of uncompleted construction. The costs of such placement shall be included in total project costs and cost shared in accordance with Article II.F. of this Agreement. Nothing in this paragraph shall relieve the Non-Federal Sponsor of its obligations under Article VIII of this Agreement. Nothing in this paragraph shall preclude the Government from using Public Law

84-99 to accomplish any emergency repair and restoration work of the completed construction, or a functional portion of the construction.

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

J. The Non-Federal Sponsor agrees to participate in and comply with applicable Federal floodplain management and flood insurance programs in accordance with Section 402 of PL 99-662 as amended.

K. The Non-Federal Sponsor shall ensure continued conditions of public ownership and public use of the shores upon which the amount of Federal participation is based so long as the project remains authorized.

L. The Non-Federal Sponsor shall provide and maintain, at no cost to the Government, necessary access roads, parking areas and other public facilities, open and available to all on an equal basis.

M. The Non-Federal Sponsor shall adopt ordinances or other means to ensure preservation of the Project.

N. The Non-Federal Sponsor shall control water pollution to the extent necessary to safeguard the health of bathers.

O. As necessary to ensure compliance with applicable Federal, state and local laws, regulations, ordinances, and policies the Non-Federal Sponsor shall include appropriate provisions in its contracts for the construction of the project.

P. Neither the Government nor the Non-Federal Sponsor makes any commitment to participate in any future cost-shared nourishment of the Project subsequent to the nourishment to be performed under this Agreement.

Q. At least twice annually and after storm events, the Non-Federal Sponsor shall perform surveillance of the beach to determine losses of nourishment material from the project design section and provide the results of such surveillance to the Federal Government.

R. The Non-Federal Sponsor shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in preventing unwise future development in the floodplain and in adopting such regulations as may be necessary to prevent unwise future development and to ensure compatibility with protection levels provided by the Project.

S. The Non-Federal Sponsor shall prescribe and enforce regulations to prevent obstruction of or encroachment on the Project that would reduce the level of protection it affords or that would hinder future periodic nourishment and/or the operation or maintenance of the Project.

T. The Non-Federal Sponsor shall comply with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), which requires a non-Federal interest to prepare a floodplain management plan within one year after the date of signing this Agreement, and to implement such plan not later than one year after completion of construction of the *Project*. The plan shall be designed to reduce the impacts of future flood events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood protection provided by the *Project*. The Non-Federal Sponsor shall provide an information copy of the plan to the Government upon its preparation.

U. Not less than once each year the Non-Federal Sponsor shall inform affected interests of the extent of protection afforded by the Project.

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

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for construction, periodic nourishment, operation, and maintenance of the Project, including those required for relocations, borrow materials, and dredged or excavated material disposal. The Government in a timely manner shall provide the Non-Federal Sponsor with copies of general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines are required. Prior to the end of the period of construction, the Non-Federal Sponsor shall acquire such lands, easements, and rights-of-way required for construction, operation or maintenance of the Project set forth in such descriptions. For so long as the Project remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the proper disposal of dredged or excavated material associated with construction, operation, and maintenance of the Project. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions of such improvements. Prior to the end of the period of construction, the Non-Federal Sponsor shall provide all improvements required for construction,

operation, or maintenance of the Project set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each contract for construction, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the proper disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and timely provide such improvements in accordance with the approved plans and specifications.

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

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

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

#### ARTICLE IV - CREDIT FOR VALUE OF LANDS, RELOCATIONS, AND DISPOSAL AREAS

A. The Non-Federal Sponsor shall receive credit toward the Non-Federal share of total project costs for the value of the lands, easements, rights-of-way, and suitable borrow and

dredged or excavated material disposal areas that the Non-Federal Sponsor must provide for construction, operation, and maintenance of the Project pursuant to Article III of this Agreement and for the value of any relocations that the Non-Federal Sponsor must perform or for which it must ensure performance for construction, operation, and maintenance of the Project pursuant to Article III of this Agreement. However, the Non-Federal Sponsor shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that have been provided previously as an item of cooperation for another Federal project. The Non-Federal Sponsor also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas 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, borrow materials, and dredged or excavated material disposal, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor awards a contract requiring the use of such property, or, if the Non-Federal Sponsor performs the construction with its own labor, the date that the Non-Federal Sponsor begins construction of the Project. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

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

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

amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

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

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

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

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

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with sub-paragraph B.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent

the Government determined such interests are required for the construction, operation, and maintenance of the Project, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. 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.E. of this Agreement.

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

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

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

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

4. Crediting for relocations performed for the Project is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

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

## ARTICLE V - PROJECT COORDINATION TEAM

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

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

C. Until the end of the period of construction, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the Government's cost projections; final inspection of the construction or functional portions of the construction; the application of and compliance with applicable Federal and State laws including the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a project management plan developed by the Non-Federal Sponsor after consultation with the Government.

D. The Project Coordination Team may make recommendations that it deems warranted to the Non-Federal Sponsor on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations. Except as otherwise provided in this Agreement, the Non-Federal Sponsor may not reject or

modify the Project Coordination Team's recommendations when the purpose of such recommendations is to ensure that the Project complies with Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provision of this Agreement, subject to an audit in accordance with Article X.C of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government's costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provisions of this Agreement.

#### ARTICLE VI - LIMITATIONS ON REIMBURSEMENT

A. Reimbursement for the Federal share of work performed by the Non-Federal Sponsor during the period of construction is subject to the availability of appropriations for this Project and shall not take precedence over other pending projects of higher priority.

B. No reimbursement shall be made unless and until the Government has certified that the work subject to reimbursement has been performed in accordance with this Agreement.

C. No reimbursement shall be made for any work which does not, in the judgment of the Government, conform to the descriptions set forth in Article I.A. of this Agreement or does not conform to approved plans and specifications, contract modifications, or change orders.

D. The amount of reimbursement is not subject to interest charges, nor is it subject to adjustment to reflect changes in price levels between the time the period of construction is completed and the time that the reimbursement is afforded.

E. The amount of reimbursement shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

F. No reimbursement shall be made until the Government has certified that the work subject to reimbursement has been completed and performed in accordance with applicable permits and approved plans. At any time after completion of physical construction of the work or separable reach subject to reimbursement, the Non-Federal Sponsor can request that certification be made, even if there are outstanding claims. In such circumstances, the full costs of any outstanding claims at the time of certification become the responsibility of the Non-Federal Sponsor.

G. When considering reimbursement for a separable reach, the Government will prorate those costs (such as mobilization) which apply to more than one separable reach.

H. The amount of reimbursement that the Government may afford the Non-Federal Sponsor for work authorized under Section 206 of the Water Resources Development Act of 1992 shall be subject to the applicable limitation contained in Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103.

I. Crediting and/or reimbursement is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

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

A. Upon notification in accordance with Article II.B. of this Agreement the Non-Federal Sponsor shall, for so long as the Project remains authorized, operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto.

1. At least annually the Non-Federal Sponsor shall monitor the beach profile to determine losses of nourishment material from the Project design section and to determine the impact of project construction on sea turtle nesting. The Non-Federal Sponsor shall provide the results of such monitoring to the Government. The Non-Federal Sponsor will not be required to

monitor the beach profile during any period in which the Government notifies them in writing that the Government will be performing monitoring of the beach profile for that period.

2. The Non-Federal Sponsor shall grade and reshape the beach and dune profile using material within the Project area and maintain vegetation, public dune crossovers, and other Project features associated with the beach and dune.

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

#### ARTICLE IX - INDEMNIFICATION

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

#### ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

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

completion of the accounting for which such books, records, documents, and other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, documents, records, and other evidence.

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

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

#### ARTICLE XI - FEDERAL AND STATE LAWS

A. In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and 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", all applicable Federal labor standards requirements including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c).

B. In accordance with paragraph A. of this Article, the Non-Federal Sponsor shall procure all necessary permits and licenses necessary to accomplish the construction of the Project.

## ARTICLE XII - RELATIONSHIP OF PARTIES

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

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

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

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI of this Agreement. The Government may reserve a percentage of total Federal funds made available for the Project as a contingency to pay costs of termination. Notwithstanding such termination, the Non-Federal sponsor may continue with construction of the Project, at no cost to the Government.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV of this Agreement shall not relieve the parties of liability for any obligation previously incurred.

## ARTICLE XV - HAZARDOUS SUBSTANCES

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

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

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the Project, or, if already under construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the Project. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of 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 total project costs. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

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

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

#### ARTICLE XVI - NOTICES

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

If to the Non-Federal Sponsor:

Lee County Board of County Commissioners  
P.O. Box 398  
2115 2<sup>nd</sup> Street  
Ft. Myers, Florida 33902-0398

If to the Government:

District Engineer  
U. S. Army Corps of Engineers, Jacksonville District  
P. O. Box 4970  
Jacksonville, Florida 32232-0019

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

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

## ARTICLE 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 Government shall ensure compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) prior to initiation of construction by the Non-Federal Sponsor. At the Government's request, the Non-Federal Sponsor shall prepare information, analyses, and recommendations as required by 16 U.S.C. 470f and applicable regulations. Any costs incurred by the Non-Federal Sponsor relating to compliance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Any costs incurred by the Government relating to compliance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement.

B. The Non-Federal Sponsor shall perform any identification, survey, evaluation, or mitigation (except for archeological data recovery activities) of historic properties the Government determines necessary for the Project. The Non-Federal Sponsor shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who meet, at minimum, the Secretary of the Interior's Professional Qualifications Standards. The Non-Federal Sponsor shall submit study plans and reports to the Government for review and approval and shall be responsible for resolving any deficiencies. In the event the Government determines that preservation or mitigation (except for archeological data recovery activities) should be taken due to possible adverse effects to significant archeological or historical properties, the Non-Federal Sponsor shall formulate a plan in consultation with the Government and any other parties involved in the development of a Section 106 Memorandum of Agreement. The Non-Federal Sponsor shall be responsible for implementing preservation or mitigation (except for archeological data recovery activities) prior to the initiation of any construction activities affecting historic properties. Any costs of identification, survey, evaluation, and mitigation (except for archeological data recovery activities) of historical properties incurred by the Non-Federal Sponsor pursuant to this paragraph shall be included in total project costs and shared in accordance with the provisions of

this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

C. The Non-Federal Sponsor shall include provisions in all of its construction contracts for the protection of cultural resources discovered during construction. These provisions shall include, at a minimum, the requirement to cease all work in the immediate area of a discovered cultural resource until the situation is properly evaluated, and the requirement to immediately provide verbal and written notice to the Non-Federal Sponsor and Government in the event of such discovery. Upon receipt of notice that cultural resources have been discovered, the Government, pursuant to its responsibilities under the National Historic Preservation Act (hereinafter "NHPA"), must authorize further action or study before construction may continue. If the Government concludes that such discovery warrants consultation under the NHPA, the Non-Federal Sponsor shall be given the opportunity to participate as a consulting party. In such case, construction shall not continue until the Government sends written notification to the Non-Federal Sponsor. Where the Non-Federal Sponsor elects to perform the construction using its own forces, the same procedures shall be followed.

D. The Government, as it deems necessary for the Project, shall perform any archeological data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c (a)), the costs of archeological data recovery activities associated with historic preservation may be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of the total amount authorized to be appropriated for the Project.

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

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

LEE COUNTY, FLORIDA

BY: \_\_\_\_\_  
JOHN PAUL WOODLEY, Jr.  
Assistant Secretary of the Army  
(Civil Works)

BY: \_\_\_\_\_  
TAMMARA HALL  
Chairwoman  
Board of County Commissioners

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

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

CERTIFICATE OF AUTHORITY

I, David M. Owen do hereby certify that I am the principal legal officer of Lee County, Florida, 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 Lee County, Florida in connection with the Gasparilla Island Segment of the Lee County, Florida, Beach Erosion Control 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 person who has executed the Agreement on behalf of Lee County, Florida has acted within his statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification upon the date shown.

\_\_\_\_\_  
David M. Owen  
County Attorney  
Lee County, Florida

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

CERTIFICATION REGARDING LOBBYING

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

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

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

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

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

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Tammara Hall  
Chairwoman  
Board of County Commissioners  
Lee County, Florida

Date: \_\_\_\_\_

CERTIFICATION OF LEGAL REVIEW

The Draft Section 206 Project Cooperation Agreement for initial restoration construction of Gasparilla Island Segment of the Lee County, Florida Beach Erosion Control Project has been fully reviewed by Office of Counsel, USAED, Jacksonville, and is legally sufficient.

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Assistant District Counsel

PROJECT COOPERATION AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
LEE COUNTY, FLORIDA  
FOR CONSTRUCTION OF THE  
ESTERO ISLAND SEGEMENT  
OF THE  
LEE COUNTY, FLORIDA  
BEACH EROSION CONTROL PROJECT

THIS AGREEMENT is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works), and LEE COUNTY, FLORIDA (hereinafter the "Non-Federal Sponsor"), represented by the Chairman of its Board of County Commissioners.

WITNESSETH, THAT:

WHEREAS, construction of initial fill and periodic nourishment for Lee County, Florida, Beach Erosion Control Project at Estero Island, Florida (hereinafter the "Authorized Project") was authorized under Section 201 of the Flood Control Act of 1965 and approved by Senate Committee Resolution dated December 17, 1970 and House Committee Resolution dated December 15, 1970;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for initial construction of the Estero Island Segment of the Lee County, Florida Beach Erosion Control Project (hereinafter the "Project"), as defined in Article I.A. of this Agreement;

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

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

WHEREAS, Section 309 of the Water Resources Development Act of 2000, Public Law 106-541, authorized the Secretary of the Army to enter into an agreement with the non-Federal interest to carry out the Project in accordance with Section 206 of the Water Resources Development Act of 1992, Public Law 102-580, if the Secretary determines that the Project is technically sound, environmentally acceptable, and economically justified;

WHEREAS, the Assistant Secretary of the Army (Civil Works) determined on March 31, 2004, that the Project is technically sound, environmentally acceptable, and economically justified;

WHEREAS, Section 206 of the Water Resources Development Act of 1992, authorized the Secretary of the Army to reimburse a non-Federal interest an amount equal to the estimate of the Federal share, without interest, of the cost of an authorized beach erosion control project;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, provides that credits and reimbursements afforded for all applicable general authorities and under specific project authority shall not exceed \$100,000,000 for all applicable programs and projects in each fiscal year; and

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

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

#### ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean the initial restoration of 4.7 miles of shoreline through construction of a design template of a 40 foot berm with an elevation of +5 feet mean low water and construction of a 240 foot rubblemound groin at the northern end of the island as generally described in the Lee County, Florida Shore Protection Project (Gasparilla and Estero Islands) General Reevaluation Report with Environmental Impact Statement, dated January 2000, revised July 2001 and Addendum thereto dated April 2002 (Revised November 2002) approved by the Assistant Secretary of the Army (Civil Works).

B. The term "total project costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to construction of the Project. 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. of this Agreement; costs of historic preservation activities in accordance with Article XVIII of this Agreement; actual construction costs; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas for which the Government affords credit in accordance with Article IV of this Agreement; and costs of audit in accordance with Article X.B. and X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; any costs for periodic nourishment; any costs for establishment of the erosion control line; or any costs of dispute resolution under Article VII of this Agreement.

C. The term "period of construction" shall mean the time from the date the Non-Federal Sponsor first notifies the Government in writing of the scheduled date for issuance of the solicitation for the first

construction contract to the date that the Non-Federal Sponsor notifies the Government in writing of its determination that construction of the Project is complete.

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

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

F. 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.

G. The term "functional portion of the Project" shall mean a portion of the Project that is complete, can function independently and for a useful purpose, and is suitable for the Non-Federal Sponsor to operate and maintain in advance of completion of the entire Project.

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

I. The term "District Engineer" shall mean the U.S. Army Engineer for the Jacksonville District.

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

A. Using its funds, in accordance with Federal laws, regulations and policies, the Non-Federal Sponsor shall expeditiously construct the Project.

1. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. The Non-Federal Sponsor shall not issue the solicitation for any construction contract until the Government has confirmed in writing its acceptance of plans and specifications for the contract. Failure to obtain such confirmation shall permit, but not require, the Government to deny or reduce reimbursement. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Government with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof.

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

3. As of the effective date of this Agreement, \$250,000.00 of Federal funds is currently projected to be available for the Project. This amount is less than the Federal share of projected total project costs, and the Government makes no commitment to request the Congress to provide additional funds for the Project. Further, the Government's financial participation in the Project is limited to the amount of Federal funds the Government makes available to the Project.

B. When the Non-Federal Sponsor determines that the construction of the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the Non-Federal Sponsor shall so notify the District Engineer in writing. The Non-Federal Sponsor shall prepare and furnish the Government for review a proposed Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (hereinafter the "OMRR&R Manual"). The failure of the Non-Federal Sponsor to prepare an acceptable OMRR&R Manual shall not negate the Non-Federal Sponsor's responsibility to provide for the operation, maintenance, repair, replacement, and rehabilitation of the Project, or a functional portion thereof, in accordance with Article VIII of this Agreement. The Non-Federal Sponsor shall provide copies of all of the Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously.

C. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for construction, operation, and maintenance of the Project, and shall perform or ensure performance of all relocations that the Government determines to be necessary for construction, operation, and maintenance of the Project.

D. The Government, in accordance with Federal laws, regulations, and policies, shall assign all costs included or to be included in total project costs to one or more of the following project purposes: hurricane and storm damage reduction, recreation, or privately owned shores (where use of such shores is limited to private interests).

E. Throughout the period of construction, but not later than 180 days after the completion of the period of construction, the Non-Federal Sponsor shall provide the Government with such documents as are sufficient to enable the Government to conduct an accounting of the Project and determine the reimbursement. Upon receipt of such documents the Government shall conduct an accounting for the period of construction, including determination of costs eligible for reimbursement.

F. Subject to the limitations of Article VI of this Agreement, the Government shall reimburse the Non-Federal Sponsor in the amount necessary to make the Federal contribution for the period of construction of the Project equal to 65 percent of the total project costs assigned by the Government to hurricane and storm damage reduction plus 50 percent of the separable costs of total project costs assigned by the Government to recreation. The Government shall not reimburse the Non-Federal Sponsor for any portion of total project costs assigned by the Government to privately owned shores (where use of such shores is limited to private interests) or any costs due to construction of betterments. As of July 2001, the non-Federal share of the total project costs is estimated as 63.5 percent. This percentage is an estimate based on Project cost sharing and the amount of public and privately owned lands in the Project area and may be revised before construction commences.

G. The Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

H. In the event an uncompleted portion of the construction is damaged or destroyed by a storm or other natural forces, the Non-Federal Sponsor shall place suitable beach fill material within the area of uncompleted construction. The costs of such placement shall be included in total project costs and cost shared in accordance with Article II.F. of this Agreement. Nothing in this paragraph shall relieve the Non-Federal Sponsor of its obligations under Article VIII of this Agreement. Nothing in this paragraph shall preclude the Government from using Public Law 84-99 to accomplish any emergency repair and restoration work of the completed construction, or a functional portion of the construction.

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

J. The Non-Federal Sponsor agrees to participate in and comply with applicable Federal floodplain management and flood insurance programs in accordance with Section 402 of PL 99-662 as amended.

K. The Non-Federal Sponsor shall ensure continued conditions of public ownership and public use of the shores upon which the amount of Federal participation is based so long as the project remains authorized.

L. The Non-Federal Sponsor shall provide and maintain, at no cost to the Government, necessary access roads, parking areas and other public facilities, open and available to all on an equal basis.

M. The Non-Federal Sponsor shall adopt ordinances or other means to ensure preservation of the Project.

N. The Non-Federal Sponsor shall control water pollution to the extent necessary to safeguard the health of bathers.

O. As necessary to ensure compliance with applicable Federal, state and local laws, regulations, ordinances, and policies the Non-Federal Sponsor shall include appropriate provisions in its contracts for the construction of the project.

P. Neither the Government nor the Non-Federal Sponsor makes any commitment to participate in any future cost-shared nourishment of the Project subsequent to the nourishment to be performed under this Agreement.

Q. At least twice annually and after storm events, the Non-Federal Sponsor shall perform surveillance of the beach to determine losses of nourishment material from the project design section and provide the results of such surveillance to the Federal Government.

R. The Non-Federal Sponsor shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in preventing unwise future development in the floodplain and in adopting such regulations as may be necessary to prevent unwise future development and to ensure compatibility with protection levels provided by the Project.

S. The Non-Federal Sponsor shall prescribe and enforce regulations to prevent obstruction of or encroachment on the Project that would reduce the level of protection it affords or that would hinder future periodic nourishment and/or the operation or maintenance of the Project.

T. The Non-Federal Sponsor shall comply with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), which requires a non-Federal interest to prepare a floodplain management plan within one year after the date of signing this Agreement, and to implement such plan not later than one year after completion of construction of the *Project*. The plan shall be designed to reduce the impacts of future flood events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood protection provided by the *Project*. The Non-Federal Sponsor shall provide an information copy of the plan to the Government upon its preparation.

U. Not less than once each year the Non-Federal Sponsor shall inform affected interests of the extent of protection afforded by the Project.

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

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for construction, periodic nourishment, operation, and maintenance of the Project, including those required for relocations, borrow materials, and dredged or excavated material disposal. The Government in a timely manner shall provide the Non-Federal Sponsor with copies of general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines are required. Prior to the end of the period of construction, the Non-Federal Sponsor shall acquire such lands, easements, and rights-of-way required for construction, operation or maintenance of the Project set forth in such descriptions. For so long as the Project remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the proper disposal of dredged or excavated material associated with construction, operation, and maintenance of the Project. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions of such improvements. Prior to the end of the period of construction, the Non-Federal Sponsor shall provide all improvements required for construction, operation, or maintenance of the Project set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each contract for construction, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the proper disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and timely provide such improvements in accordance with the approved plans and specifications.

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

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

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

#### ARTICLE IV - CREDIT FOR VALUE OF LANDS, RELOCATIONS, AND DISPOSAL AREAS

A. The Non-Federal Sponsor shall receive credit toward the Non-Federal share of total project costs for the value of the lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Non-Federal Sponsor must provide for construction, operation, and maintenance of the Project pursuant to Article III of this Agreement and for the value of any relocations that the Non-Federal Sponsor must perform or for which it must ensure performance for construction, operation, and maintenance of the Project pursuant to Article III of this Agreement. However, the Non-Federal Sponsor shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that have been provided previously as an item of cooperation for another Federal project. The Non-Federal Sponsor also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas 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, borrow materials, and dredged or excavated material disposal, shall be the fair market value of the real property interests, plus certain

incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor awards a contract requiring the use of such property, or, if the Non-Federal Sponsor performs the construction with its own labor, the date that the Non-Federal Sponsor begins construction of the Project. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

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

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

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

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

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

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

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

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. 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.E. of this Agreement.

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

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

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

3. Relocation costs shall include, but not necessarily be limited to, actual costs of performing the relocation; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the relocation, but shall not include any costs due to betterments, as determined by the Government, nor any additional cost of using new material

when suitable used material is available. Relocation costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

4. Crediting for relocations performed for the Project is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

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

#### ARTICLE V - PROJECT COORDINATION TEAM

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

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

C. Until the end of the period of construction, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the Government's cost projections; final inspection of the construction or functional portions of the construction; the application of and compliance with applicable Federal and State laws including the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a project management plan developed by the Non-Federal Sponsor after consultation with the Government.

D. The Project Coordination Team may make recommendations that it deems warranted to the Non-Federal Sponsor on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal

authority and responsibility for construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations. Except as otherwise provided in this Agreement, the Non-Federal Sponsor may not reject or modify the Project Coordination Team's recommendations when the purpose of such recommendations is to ensure that the Project complies with Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provision of this Agreement, subject to an audit in accordance with Article X.C of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government's costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provisions of this Agreement.

#### ARTICLE VI - LIMITATIONS ON REIMBURSEMENT

A. Reimbursement for the Federal share of work performed by the Non-Federal Sponsor during the period of construction is subject to the availability of appropriations for this Project and shall not take precedence over other pending projects of higher priority.

B. No reimbursement shall be made unless and until the Government has certified that the work subject to reimbursement has been performed in accordance with this Agreement.

C. No reimbursement shall be made for any work which does not, in the judgment of the Government, conform to the descriptions set forth in Article I.A. of this Agreement or does not conform to approved plans and specifications, contract modifications, or change orders.

D. The amount of reimbursement is not subject to interest charges, nor is it subject to adjustment to reflect changes in price levels between the time the period of construction is completed and the time that the reimbursement is afforded.

E. The amount of reimbursement shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

F. No reimbursement shall be made until the Government has certified that the work subject to reimbursement has been completed and performed in accordance with applicable permits and approved plans. At any time after completion of physical construction of the work or separable reach subject to reimbursement, the Non-Federal Sponsor can request that certification be made, even if there are outstanding claims. In such circumstances, the full costs of any outstanding claims at the time of certification become the responsibility of the Non-Federal Sponsor.

G. When considering reimbursement for a separable reach, the Government will prorate those costs (such as mobilization) which apply to more than one separable reach.

H. The amount of reimbursement that the Government may afford the Non-Federal Sponsor for work authorized under Section 206 of the Water Resources Development Act of 1992 shall be subject to the applicable limitation contained in Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103.

I. Crediting and/or reimbursement is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

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

A. Upon notification in accordance with Article II.B. of this Agreement the Non-Federal Sponsor shall, for so long as the Project remains authorized, operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto.

1. At least annually the Non-Federal Sponsor shall monitor the beach profile to determine losses of nourishment material from the Project design section and to determine the impact of project construction on sea turtle nesting. The Non-Federal Sponsor shall provide the results of such monitoring to the Government. The Non-Federal Sponsor will not be required to monitor the beach profile during any period in which the Government notifies them in writing that the Government will be performing monitoring of the beach profile for that period.

2. The Non-Federal Sponsor shall grade and reshape the beach and dune profile using material within the Project area and maintain vegetation, public dune crossovers, and other Project features associated with the beach and dune.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of notice, the Non-Federal Sponsor continues to fail to perform, then

the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. No completion, operation, maintenance, repair, replacement, or rehabilitation by the Government shall operate to relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

#### ARTICLE IX - INDEMNIFICATION

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

#### ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

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

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

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

## ARTICLE XI - FEDERAL AND STATE LAWS

A. In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and 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", all applicable Federal labor standards requirements including but not limited to applicable Federal labor standards in 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.) and Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c).

B. In accordance with paragraph A. of this Article, the Non-Federal Sponsor shall procure all necessary permits and licenses necessary to accomplish the construction of the Project.

## ARTICLE XII - RELATIONSHIP OF PARTIES

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

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

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

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party

elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI of this Agreement. The Government may reserve a percentage of total Federal funds made available for the Project as a contingency to pay costs of termination. Notwithstanding such termination, the Non-Federal sponsor may continue with construction of the Project, at no cost to the Government.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV of this Agreement shall not relieve the parties of liability for any obligation previously incurred.

#### ARTICLE XV - HAZARDOUS SUBSTANCES

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

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

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the Project, or, if already under construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the Project. Should the

Government and the Non-Federal Sponsor determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of 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 total project costs. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

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

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

#### ARTICLE XVI - NOTICES

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

If to the Non-Federal Sponsor:

Lee County Board of County Commissioners  
P.O. Box 398  
2115 2<sup>nd</sup> Street  
Ft. Myers, Florida 33902-0398

If to the Government:

District Engineer  
U. S. Army Corps of Engineers, Jacksonville District  
P. O. Box 4970  
Jacksonville, Florida 32232-0019

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

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

## ARTICLE 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 Government shall ensure compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) prior to initiation of construction by the Non-Federal Sponsor. At the Government's request, the Non-Federal Sponsor shall prepare information, analyses, and recommendations as required by 16 U.S.C. 470f and applicable regulations. Any costs incurred by the Non-Federal Sponsor relating to compliance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Any costs incurred by the Government relating to compliance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement.

B. The Non-Federal Sponsor shall perform any identification, survey, evaluation, or mitigation (except for archeological data recovery activities) of historic properties the Government determines necessary for the Project. The Non-Federal Sponsor shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who meet, at minimum, the Secretary of the Interior's Professional Qualifications Standards. The Non-Federal Sponsor shall submit study plans and reports to the Government for review and approval and shall be responsible for resolving any deficiencies. In the event the Government determines that preservation or mitigation (except for archeological data recovery activities) should be taken due to possible adverse effects to significant archeological or historical properties, the Non-Federal Sponsor shall formulate a plan in consultation with the Government and any other parties involved in the development of a Section 106 Memorandum of Agreement. The Non-Federal Sponsor shall be responsible for implementing preservation or mitigation (except for archeological data recovery activities) prior to the initiation of any construction activities affecting historic properties. Any costs of identification, survey, evaluation, and mitigation (except for archeological data recovery activities) of historical properties incurred by the Non-Federal Sponsor pursuant to this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

C. The Non-Federal Sponsor shall include provisions in all of its construction contracts for the protection of cultural resources discovered during construction. These provisions shall include, at a minimum, the requirement to cease all work in the immediate area of a discovered cultural resource until the situation is properly evaluated, and the requirement to immediately provide verbal and written notice to the Non-Federal Sponsor and Government in the event of such discovery. Upon receipt of notice that cultural resources have been discovered, the Government, pursuant to its responsibilities under the National Historic Preservation Act (hereinafter "NHPA"), must authorize further action or study before construction may continue. If the Government concludes that such discovery warrants consultation under the NHPA, the Non-Federal Sponsor shall be given the opportunity to participate as a consulting party. In such case, construction shall not continue until the Government sends written notification to the Non-

Federal Sponsor. Where the Non-Federal Sponsor elects to perform the construction using its own forced, the same procedures shall be followed.

D. The Government, as it deems necessary for the Project, shall perform any archeological data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c (a)), the costs of archeological data recovery activities associated with historic preservation may be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of the total amount authorized to be appropriated for the Project.

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

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      LEE COUNTY, FLORIDA

BY: \_\_\_\_\_  
JOHN PAUL WOODLEY, Jr.  
Assistant Secretary of the Army  
(Civil Works)

BY: \_\_\_\_\_  
TAMMARA HALL  
Chairwoman  
Board of County Commissioners

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

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

CERTIFICATE OF AUTHORITY

I, David M. Owen, do hereby certify that I am the principal legal officer of Lee County, Florida, 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 Lee County, Florida in connection with the Estero Island Segment of the Lee County, Florida, Beach Erosion Control 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 person who has executed the Agreement on behalf of Lee County, Florida has acted within his statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification upon the date shown.

\_\_\_\_\_  
David M. Owen  
County Attorney  
Lee County, Florida

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

CERTIFICATION REGARDING LOBBYING

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

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

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

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

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

\_\_\_\_\_  
Tammara Hall  
Chairwoman  
Board of County Commissioners  
Lee County, Florida

Date: \_\_\_\_\_

CERTIFICATION OF LEGAL REVIEW

The Draft Section 206 Project Cooperation Agreement for initial restoration construction of Estero Island Segment of the Lee County, Florida Beach Erosion Control Project has been fully reviewed by Office of Counsel, USAED, Jacksonville, and is legally sufficient.

\_\_\_\_\_  
Assistant District Counsel