

**MODEL AGREEMENT
FOR
FEDERAL ASSUMPTION OF OPERATION AND MAINTENANCE OF
IMPROVEMENTS TO A FEDERAL NAVIGATION PROJECT
CARRIED OUT BY A NON-FEDERAL INTEREST
JANUARY 19, 2018**

APPLICABILITY AND INSTRUCTIONS:

1. The attached model agreement is for Federal assumption of operation and maintenance of improvements to a Federal navigation project carried out by a non-Federal interest pursuant to Section 204(f) of WRDA 1986, as amended.
2. The responsibility for review and approval of an Agreement that does not deviate from the approved model, or for an amendment to the January 19, 2018 model Agreement to include an approved option to the model, has been delegated to the MSC Commander. Division Counsel concurrence that the Agreement does not deviate from the subject model, and is appropriate for use for the particular project, is required prior to approval. In addition, the MSC Commander has been delegated authority to approve non-substantive deviations to the model Agreement. Division Counsel review of such deviations, with a recommendation to approve such deviations, is required prior to approval by the MSC Commander.
3. The following option, including language for the agreement, is addressed in the Attachment:
Option 1: Improvements with a Channel Depth in Excess of 50 feet (page A-1).
4. Reminder: Make all required insertions, including language associated with an option; remove this cover page; remove the open and close brackets and any instructional text; ensure the spacing and page breaks throughout the agreement are appropriate; and delete the Attachment.
5. The Certificate of Authority, Certification Regarding Lobbying, and the Non-Federal Sponsor's Self-Certification of Financial Capability should be included as a part of the agreement package. These certificates can found on the Corps' "Project Partnership Agreements" website under the "Forms" tab.

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF NON-FEDERAL SPONSOR]
FOR FEDERAL ASSUMPTION OF OPERATION AND MAINTENANCE OF
IMPROVEMENTS TO THE
[FULL NAME OF THE FEDERAL NAVIGATION PROJECT]

THIS AGREEMENT entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”) represented by the **[INSERT TITLE]**, and the **[FULL NAME OF THE NON-FEDERAL SPONSOR]** (hereinafter the “Non-Federal Sponsor”), represented by its **[INSERT TITLE]**.

WHEREAS, Section 204(f) of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2232(f)), authorizes the Secretary of the Army to assume responsibility for operation and maintenance of improvements to a Federally authorized harbor or inland harbor project, subject to certain conditions and cost-sharing consistent with Section 101(b) of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2211(b));

WHEREAS, the Non-Federal Sponsor proposes to carry out certain improvements to the **[FULL NAME OF THE FEDERAL NAVIGATION PROJECT]** (hereinafter the “improvements”, as described in paragraph 1 of this Agreement); and

WHEREAS, on **[Month Day, Year]**, the Assistant Secretary of the Army (Civil Works) determined that the proposed improvements are economically justified, environmentally acceptable, technically feasible, and consistent with the purposes of Title II of the Water Resources Development Act of 1986, as amended.

NOW THEREFORE, the parties agree as follows:

1. The Non-Federal Sponsor intends to carry out improvements consisting of **[DESCRIBE IMPROVEMENTS TO BE CONSTRUCTED BY THE NON-FEDERAL SPONSOR]**, as generally described in the **[FULL TITLE OF DECISION DOCUMENT(S) (e.g., which could be a Section 204(f) report, the Report of the Chief of Engineers, etc.)]** dated _____, _____, and approved by **[TITLE OF GOVERNMENT’S APPROVING OFFICIAL]** on **[Month Day, Year]**.
2. The Non-Federal Sponsor shall obtain all permits and licenses necessary for the design and construction of the improvements and shall comply with all applicable Federal laws, regulations, and policies.

3. The Non-Federal Sponsor shall not commence construction of the improvements until the Government has approved the designs, and detailed plans and specifications for such improvements. The Government may inspect the improvements as they are being constructed.

4. The Non-Federal Sponsor shall provide, at no cost to the Government, all lands, easements, and rights-of-way, relocations, and dredged material placement areas with sufficient capacity for at least 20 years of maintenance dredging, that the Government determines are necessary for operation and maintenance of the improvements.

5. As required by Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4630 and 4655), and Section 24.4 of the Uniform Regulations contained in 49 C.F.R. Part 24, the Non-Federal Sponsor assures that (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under Sections 4622, 4623 and 4624 of Title 42 of the U.S. Code; (2) relocation assistance programs offering the services described in Section 4625 of Title 42 of the U.S. Code shall be provided to such displaced persons; (3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with Section 4625(c)(3) of Title 42 of the U.S. Code; (4) in acquiring real property, the Non-Federal Sponsor will be guided, to the greatest extent practicable under State law, by the land acquisition policies in Section 4651 and the provision of Section 4652 of Title 42 of the U.S. Code; and (5) property owners will be paid or reimbursed for necessary expenses as specified in Sections 4653 and 4654 of Title 42 of the U.S. Code.

6. In constructing the improvements, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto; 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act); and the National Environmental Policy Act and other environmental laws.

7. Following written notification by the Non-Federal Sponsor to the District Commander that construction of the improvements is complete and certification by the District Commander that such improvements have been completed in accordance with applicable permits and the approved plans and specifications, the Government, as it determines necessary and subject to the availability of funds, shall operate and maintain the improvements, except for the dredged material placement areas which the Non Federal Sponsor shall operate and maintain at no cost to the Government.

a. The Non-Federal Sponsor hereby authorizes the Government to enter, at reasonable times and in a reasonable manner, upon lands, easements, and rights-of-way that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of operating and maintaining the improvements. In addition, the Non-Federal Sponsor shall provide the Government access to and use of the dredged material placement areas for at least 20 years, including the right to place, remove, use, or reuse the materials therein for any purpose without charge to the Government. However, nothing contained herein shall convey to the Government any lands, easements, and rights-of-way owned or controlled by the Non-Federal Sponsor.

b. Notwithstanding any other provision of this Agreement, if the Assistant Secretary of the Army (Civil Works) finds that the improvements are no longer economically justified or environmentally acceptable, the Government's responsibility for operation and maintenance ceases, except that the Assistant Secretary of the Army (Civil Works) may choose to maintain a lesser depth in lieu of completely discontinuing operation and maintenance activities.

8. The Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for all necessary cleanup and response costs of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"; 42 U.S.C. 9601-9675), that are located in, on, or under lands, easements, and rights of way necessary for construction or operation and maintenance of the improvements.

9. To the maximum extent practicable, the Government and the Non-Federal Sponsor shall perform their responsibilities in a manner that will not cause liability to arise under CERCLA.

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

11. The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design and construction or operation and maintenance of the improvements, except for damages due to the fault or negligence of the Government or its contractors in the operation and maintenance of the improvements.

12. 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. Neither party shall provide, without the consent of the other party, any contractor with a release that

waives or purports to waive any rights the other party may have to seek relief or redress against that contractor.

13. Notices.

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

If to the Non-Federal Sponsor:

[TITLE]
[ADDRESS]

If to the Government:

District Commander
_____ District
[ADDRESS]

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

14. This Agreement shall expire and become null and void if the improvements to be constructed by the Non-Federal Sponsor are not completed consistent with the permits issued by the Department of the Army to the Non-Federal Sponsor for such work, including any applicable extensions or amendments to such permits.

IN WITNESS WHEREOF, parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the **[INSERT TITLE OF THE GOVERNMENT REPRESENTATIVE]**.

DEPARTMENT OF THE ARMY

[FULL NAME OF NON-FEDERAL SPONSOR]

BY: _____

BY: _____

[TYPED NAME]
[FULL TITLE]

[TYPED NAME]
[FULL TITLE]

DATE: _____

DATE: _____

Attachment

Option 1: Improvements with a Channel Depth in Excess of 50 feet. For operation and maintenance of improvements with a channel depth in excess of 50 feet, make the following changes to the Agreement. Note any over-depth dredging and entrance channel wave allowances required for operation and maintenance of the improvements are not included when determining if the channel depth is in excess of 50 feet.

Replace paragraph 7 in its entirety with the following:

“7. Following written notification by the Non-Federal Sponsor to the District Commander that construction of the improvements is complete and certification by the District Commander that such improvements have been completed in accordance with applicable permits and the approved plans and specifications, the Government, as it determines necessary and subject to the availability of Federal funds and provision of Non-Federal Sponsor funds, shall operate and maintain the improvements, except for the dredged material placement areas which the Non-Federal Sponsor shall operate and maintain at no cost to the Government.

a. For improvements with a channel depth in excess of 50 feet, the Non-Federal Sponsor shall pay 50 percent of the excess costs for operation and maintenance of the improvements over the costs which the Government determines would have been incurred for operation and maintenance of the improvements if the channel had a depth of 50 feet. No later than August 1st prior to each fiscal year in which such operation and maintenance will be performed, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government by delivering a check payable to “FAO, USAED, [INSERT DISTRICT AND EROC CODE, e.g., New Orleans (B2)]” to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

b. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of operation and maintenance costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor’s required share of such operation and maintenance costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

Attachment

c. The Non-Federal Sponsor hereby authorizes the Government to enter, at reasonable times and in a reasonable manner, upon lands, easements, and rights-of-way that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of operating and maintaining the improvements. In addition, the Non-Federal Sponsor shall provide the Government access to and use of the dredged material placement areas for at least 20 years, including the right to place, remove, use, or reuse the materials therein for any purpose without charge to the Government. However, nothing contained herein shall convey to the Government any lands, easements, and rights-of-way owned or controlled by the Non-Federal Sponsor.

d. Notwithstanding any other provision of this Agreement, if the Assistant Secretary of the Army (Civil Works) finds that the improvements are no longer economically justified or environmentally acceptable, the Government's responsibility for operation and maintenance ceases, except that the Assistant Secretary of the Army (Civil Works) may choose to maintain a lesser depth in lieu of completely discontinuing operation and maintenance activities.”