

**WHATCOM COUNTY**  
Planning & Development Services  
5280 Northwest Drive  
Bellingham, WA 98226-9097  
360-778-5900, TTY 800-833-6384  
360-778-5901 Fax



**Mark Personius**  
Director

## Memorandum

DATE: December 17, 2021  
TO: Satpal Sidhu, County Executive  
FROM: Cliff Strong, Senior Planner  
THROUGH: Steve Roberge, Assistant Director  
RE: Contract for Critical Areas Off-Site Buffer Mitigation Program

---

### Background & Purpose

In the 2021 budget, Council funded, in the amount of \$100,000, a project to develop a feasibility study for a critical areas off-site buffer mitigation program. The Finance Department issued RFP #21-62 on October 6, 2021. Two proposals were received and after reviewing them the Planning and Development Services and Public Works team selected Herrera Environmental Consultants, Inc.

Unfortunately, time did not permit preparation of a contract for the full amount in time for Council's last meeting of the year on December 7<sup>th</sup>. Finance recommended preparing a contract for the first portion of the project in the amount of \$40,000. This allows the work to begin without undue delay. A supplemental budget request will follow in early 2022 for the remainder of the project tasks (\$60,000).

### Funding Amount & Source

Funding for this contract, in an amount not to exceed \$40,000 for this portion, is from 2500.6630 Professional Services. Total funding from Council is \$100,000.

Please contact Mark Personius (X5950) or Steve Roberge (x 5960) if you have any questions or concerns regarding the terms of this agreement.

### Attachments

- Contract Information Sheet
- Contract

**WHATCOM COUNTY CONTRACT  
INFORMATION SHEET**

Whatcom County Contract No.

**202112031**

Originating Department:	Planning & Development Services
Division/Program: (i.e. Dept. Division and Program)	Long Range Planning
Contract or Grant Administrator:	Cliff Strong
Contractor's / Agency Name:	Herrera Environmental Consultants, Inc.
Is this a New Contract? If not, is this an Amendment or Renewal to an Existing Contract? Yes <input type="radio"/> No <input checked="" type="radio"/> Yes <input checked="" type="radio"/> No <input type="radio"/> If Amendment or Renewal, (per WCC 3.08.100 (a)) Original Contract #: _____	
Does contract require Council Approval? Yes <input type="radio"/> No <input checked="" type="radio"/> If No, include WCC: <u>3.02.050</u> Already approved? Council Approved Date: _____ (Exclusions see: Whatcom County Codes 3.06.010, 3.08.090 and 3.08.100)	
Is this a grant agreement? Yes <input type="radio"/> No <input checked="" type="radio"/> If yes, grantor agency contract number(s): _____ CFDA#: _____	
Is this contract grant funded? Yes <input type="radio"/> No <input checked="" type="radio"/> If yes, Whatcom County grant contract number(s): _____	
Is this contract the result of a RFP or Bid process? Yes <input checked="" type="radio"/> No <input type="radio"/> If yes, RFP and Bid number(s): <u>RFP #21-62</u> Contract _____ Cost Center: <u>2500</u>	
Is this agreement excluded from E-Verify? No <input type="radio"/> Yes <input checked="" type="radio"/> If no, include Attachment D Contractor Declaration form.	
If YES, indicate exclusion(s) below: <input type="checkbox"/> Professional services agreement for certified/licensed professional. <input type="checkbox"/> Goods and services provided due to an emergency <input checked="" type="checkbox"/> Contract work is for less than \$100,000. <input type="checkbox"/> Contract for Commercial off the shelf items (COTS). <input type="checkbox"/> Contract work is for less than 120 days. <input type="checkbox"/> Work related subcontract less than \$25,000. <input type="checkbox"/> Interlocal Agreement (between Governments). <input type="checkbox"/> Public Works - Local Agency/Federally Funded FHWA.	
Contract Amount:(sum of original contract amount and any prior amendments): \$ <u>40,000</u> This Amendment Amount: \$ _____ Total Amended Amount: \$ _____	Council approval required for; all property leases, contracts or bid awards <b>exceeding \$40,000</b> , and professional service contract amendments that have an increase greater than \$10,000 or 10% of contract amount, whichever is greater, <b>except when:</b> 1. Exercising an option contained in a contract previously approved by the council. 2. Contract is for design, construction, r-o-w acquisition, prof. services, or other capital costs approved by council in a capital budget appropriation ordinance. 3. Bid or award is for supplies. 4. Equipment is included in Exhibit "B" of the Budget Ordinance. 5. Contract is for manufacturer's technical support and hardware maintenance of electronic systems and/or technical support and software maintenance from the developer of proprietary software currently used by Whatcom County.
Summary of Scope: <b>To develop the first two phases of the Feasibility Study for an Off-Site Critical Area Buffer Mitigation Program.</b>	
Term of Contract: <u>1/3/22</u>	Expiration Date: <u>6/30/22</u>

Contract Routing:	1. Prepared by: <u>Cliff Strong</u>	Date: <u>12/14/21</u>
	2. Attorney signoff: <u>Royce Buckingham</u>	Date: <u>12/17/21</u>
	3. AS Finance reviewed: <u>Brad Bennett</u>	Date: <u>12/16/21</u>
	4. IT reviewed (if IT related): <u>N/A</u>	Date: _____
	5. Contractor signed: <u>Theresa Wood, Herrera Inc.</u>	Date: <u>12/17/2021</u>
	6. Submitted to Exec.: <u>Tammy Axlund</u>	Date: <u>12/17/21</u>
	7. Council approved (if necessary): <u>N/A</u>	Date: _____
	8. Executive signed: _____	Date: <u>12/17/2021</u>
	9. Original to Council: _____	Date: _____

Whatcom County Contract No.  
20212031

**CONTRACT FOR SERVICES**  
**Between Whatcom County and Herrera Environmental Consultants, Inc.**

Herrera Environmental Consultants, Inc., hereinafter called **Contractor** and Whatcom County, hereinafter referred to as **County**, agree and contract as set forth in this Agreement, including:

- General Conditions, pp. 2 to 12,
- Exhibit A (Scope of Work), pp. 13 to 23,
- Exhibit B (Compensation), pp. 24 to 26,
- Exhibit C (Certificate of Insurance).

Copies of these items are attached hereto and incorporated herein by this reference as if fully set forth herein.

The term of this Agreement shall commence on the 3<sup>rd</sup> day of January, 2022, and shall, unless terminated or renewed as elsewhere provided in the Agreement, terminate on the 30<sup>th</sup> day of June, 2022.

The general purpose or objective of this Agreement is to develop the first two phases of the Feasibility Study for an Off-Site Critical Area Buffer Mitigation Program, as more fully and definitively described in Exhibit A hereto. The language of Exhibit A controls in case of any conflict between it and that provided here. Continued work on Phases 3-7 is to be initiated by a contract addendum.

Contractor acknowledges and by signing this contract agrees that the Indemnification provisions set forth in Paragraphs 11.1, 21.1, 30.1, 31.2, 32.1, 34.2, and 34.3, if included, are totally and fully part of this contract and have been mutually negotiated by the parties.

Each person signing this Contract represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Contract.

**IN WITNESS WHEREOF**, the parties have executed this Agreement this \_\_\_ day of 12/17/2021, 20 \_\_\_.

Each signatory below to this Contract warrants that s/he is the authorized agent of the respective party; and that s/he has the authority to enter into the contract and to bind the party thereto.

**CONTRACTOR:**

*Herrera Environmental Consultants, Inc.*

DocuSigned by:  
 12/17/2021

5EB9F50233AF420...  
*Theresa M. Wood, Vice President*

Email: twood@herrerainc.com

Address:  
2200 Sixth Ave., Suite 1100  
Seattle, WA 98121

Mailing Address:  
2200 Sixth Ave., Suite 1100  
Seattle, WA 98121

WHATCOM COUNTY:

Recommended for Approval:

Steve Roberge

Digitally signed by Steve Roberge  
DN: cn=Steve Roberge, o=Whatcom County,  
ou=Planning and Development Services,  
email=sroberge@whatcomcounty.us, c=US  
Date: 2021.12.17 12:27:38 -08'00'

Department Director \_\_\_\_\_ Date \_\_\_\_\_

DocuSigned by:  
Approved as to form:  
Royce Buckingham 12/17/2021  
1EE5DDBD9542404...

Prosecuting Attorney \_\_\_\_\_ Date \_\_\_\_\_

**Approved:**

Accepted for Whatcom County:

DocuSigned by:  
By: Satpal Sidhu 12/17/2021  
119267C18B664E3

Satpal Singh Sidhu, Whatcom County Executive

## GENERAL CONDITIONS

### ***Series 00-09: Provisions Related to Scope and Nature of Services***

#### 0.1 Scope of Services:

The Contractor agrees to provide to the County services and any materials as set forth in the project narrative identified as Exhibit "A", during the agreement period. No material, labor, or facilities will be furnished by the County, unless otherwise provided for in the Agreement.

### ***Series 10-19: Provisions Related to Term and Termination***

#### 10.1 Term:

Services provided by Contractor prior to or after the term of this contract shall be performed at the expense of Contractor and are not compensable under this contract unless both parties hereto agree to such provision in writing. The term of this Agreement may be extended by mutual agreement of the parties; provided, however, that the Agreement is in writing and signed by both parties.

#### 10.2 Extension:

The duration of this Agreement may be extended by mutual written consent of the parties, for a period of up to one year, and for a total of no longer than three years.

#### 11.1 Termination for Default:

If the Contractor defaults by failing to perform any of the obligations of the contract or becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency or makes an assignment for the benefit of creditors, the County may, by depositing written notice to the Contractor in the U.S. mail, first class postage prepaid, terminate the contract, and at the County's option, obtain performance of the work elsewhere. Termination shall be effective upon Contractor's receipt of the written notice, or within three (3) days of the mailing of the notice, whichever occurs first. If the contract is terminated for default, the Contractor shall not be entitled to receive any further payments under the contract until all work called for has been fully performed. Any extra cost or damage to the County resulting from such default(s) shall be deducted from any money due or coming due to the Contractor. The Contractor shall bear any extra expenses incurred by the County in completing the work, including all increased costs for completing the work, and all damage sustained, or which may be sustained by the County by reason of such default.

#### 11.2 Termination for Reduction in Funding:

In the event that funding from State, Federal or other sources is withdrawn, reduced, or limited in any way after the effective date of this Agreement, and prior to its normal completion, the County may summarily terminate this Agreement as to the funds withdrawn, reduced, or limited, notwithstanding any other termination provisions of this Agreement. If the level of funding withdrawn, reduced or limited is so great that the County deems that the continuation of the programs covered by this Agreement is no longer in the best interest of the County, the County may summarily terminate this Agreement in whole, notwithstanding any other termination provisions of this Agreement. Termination under this section shall be effective upon receipt of written notice as specified herein, or within three days of the mailing of the notice, whichever occurs first.

#### 11.3 Termination for Public Convenience:

The County may terminate the Agreement in whole or in part whenever the County determines, in its sole discretion, that such termination is in the interests of the County. Whenever the Agreement is terminated in accordance with this paragraph, the Contractor shall be entitled to payment for actual work performed at unit contract prices for completed items of work. An equitable adjustment in the contract price for partially completed items of work will be made, but such adjustment shall not include provision for loss of anticipated profit on deleted or uncompleted work. Termination of this Agreement by the County at any time during the term, whether for default or convenience, shall not constitute breach of contract by the County.

### ***Series 20-29: Provisions Related to Consideration and Payments***

#### 20.1 Accounting and Payment for Contractor Services:

Payment to the Contractor for services rendered under this Agreement shall be as set forth in Exhibit "B." Where Exhibit "B" requires payments by the County, payment shall be based upon written claims supported, unless otherwise provided in Exhibit "B," by documentation of units of work actually performed and amounts earned, including, where appropriate, the actual number of days worked each month, total number of hours for the month, and the total dollar payment requested, so as to comply with municipal auditing requirements.

Unless specifically stated in Exhibit "B" or approved in writing in advance by the official executing this Agreement for the County or his designee (hereinafter referred to as the "Administrative Officer") the County will not reimburse the Contractor for any costs or expenses incurred by the Contractor in the performance of this contract. Where required, the County shall, upon receipt of appropriate

documentation, compensate the Contractor, no more often than monthly, in accordance with the County's customary procedures, pursuant to the fee schedule set forth in Exhibit "B."

21.1 Taxes:

The Contractor understands and acknowledges that the County will not withhold Federal or State income taxes. Where required by State or Federal law, the Contractor authorizes the County to withhold for any taxes other than income taxes (i.e., Medicare). All compensation received by the Contractor will be reported to the Internal Revenue Service at the end of the calendar year in accordance with the applicable IRS regulations. It is the responsibility of the Contractor to make the necessary estimated tax payments throughout the year, if any, and the Contractor is solely liable for any tax obligation arising from the Contractor's performance of this Agreement. The Contractor hereby agrees to indemnify the County against any demand to pay taxes arising from the Contractor's failure to pay taxes on compensation earned pursuant to this Agreement.

The County will pay sales and use taxes imposed on goods or services acquired hereunder as required by law. The Contractor must pay all other taxes, including, but not limited to, Business and Occupation Tax, taxes based on the Contractor's gross or net income, or personal property to which the County does not hold title. The County is exempt from Federal Excise Tax.

22.1 Withholding Payment:

In the event the County's Administrative Officer determines that the Contractor has failed to perform any obligation under this Agreement within the times set forth in this Agreement, then the County may withhold from amounts otherwise due and payable to Contractor the amount determined by the County as necessary to cure the default, until the Administrative Officer determines that such failure to perform has been cured. Withholding under this clause shall not be deemed a breach entitling Contractor to termination or damages, provided that the County promptly gives notice in writing to the Contractor of the nature of the default or failure to perform, and in no case more than 10 days after it determines to withhold amounts otherwise due. A determination of the Administrative Officer set forth in a notice to the Contractor of the action required and/or the amount required to cure any alleged failure to perform shall be deemed conclusive, except to the extent that the Contractor acts within the times and in strict accord with the provisions of the Disputes clause of this Agreement. The County may act in accordance with any determination of the Administrative Officer which has become conclusive under this clause, without prejudice to any other remedy under the Agreement, to take all or any of the following actions: (1) cure any failure or default, (2) to pay any amount so required to be paid and to charge the same to the account of the Contractor, (3) to set off any amount so paid or incurred from amounts due or to become due the Contractor. In the event the Contractor obtains relief upon a claim under the Disputes clause, no penalty or damages shall accrue to Contractor by reason of good faith withholding by the County under this clause.

23.1 Labor Standards:

The Contractor agrees to comply with all applicable state and federal requirements, including but not limited to those pertaining to payment of wages and working conditions, in accordance with RCW 39.12.040, the Prevailing Wage Act; the Americans with Disabilities Act of 1990; the Davis-Bacon Act; and the Contract Work Hours and Safety Standards Act providing for weekly payment of prevailing wages, minimum overtime pay, and providing that no laborer or mechanic shall be required to work in surroundings or under conditions which are unsanitary, hazardous, or dangerous to health and safety as determined by regulations promulgated by the Federal Secretary of Labor and the State of Washington.

***Series 30-39: Provisions Related to Administration of Agreement***

30.1 Independent Contractor:

The Contractor's services shall be furnished by the Contractor as an independent contractor, and nothing herein contained shall be construed to create a relationship of employer-employee or master-servant, but all payments made hereunder and all services performed shall be made and performed pursuant to this Agreement by the Contractor as an independent contractor.

The Contractor acknowledges that the entire compensation for this Agreement is specified in Exhibit "B" and the Contractor is not entitled to any benefits including, but not limited to: vacation pay, holiday pay, sick leave pay, medical, dental, or other insurance benefits, or any other rights or privileges afforded to employees of the County. The Contractor represents that he/she/it maintains a separate place of business, serves clients other than the County, will report all income and expense accrued under this contract to the Internal Revenue Service, and has a tax account with the State of Washington Department of Revenue for payment of all sales and use and Business and Occupation taxes collected by the State of Washington.

Contractor will defend, indemnify and hold harmless the County, its officers, agents or employees from any loss or expense, including, but not limited to, settlements, judgments, setoffs, attorneys' fees or costs incurred by reason of claims or demands because of breach of the provisions of this paragraph

30.2 Assignment and Subcontracting:

The performance of all activities contemplated by this agreement shall be accomplished by the Contractor. No portion of this contract may be assigned or subcontracted to any other individual, firm or entity without the express and prior written approval of the County.

30.3 No Guarantee of Employment:

The performance of all or part of this contract by the Contractor shall not operate to vest any employment rights whatsoever and shall not be deemed to guarantee any employment of the Contractor or any employee of the Contractor or any subcontractor or any employee of any subcontractor by the County at the present time or in the future.

31.1 Ownership of Items Produced and Public Records Act:

All writings, programs, data, public records or other materials prepared by the Contractor and/or its consultants or subcontractors, in connection with performance of this Agreement, shall be the sole and absolute property of the County. If the Contractor creates any copyrightable materials or invents any patentable property, the Contractor may copyright or patent the same, but the County retains a royalty-free, nonexclusive and irrevocable license to reproduce, publish, recover, or otherwise use the materials or property and to authorize other governments to use the same for state or local governmental purposes. Contractor further agrees to make research, notes, and other work products produced in the performance of this Agreement available to the County upon request.

Ownership. Any and all data, writings, programs, public records, reports, analyses, documents, photographs, pamphlets, plans, specifications, surveys, films or any other materials created, prepared, produced, constructed, assembled, made, performed or otherwise produced by the Contractor or the Contractor's subcontractors or consultants for delivery to the County under this Contract shall be the sole and absolute property of the County. Such property shall constitute "work made for hire" as defined by the U.S. Copyright Act of 1976, 17 U.S.C. § 101, and the ownership of the copyright and any other intellectual property rights in such property shall vest in the County at the time of its creation. Ownership of the intellectual property includes the right to copyright, patent, and register, and the ability to transfer these rights. Material which the Contractor uses to perform this Contract but is not created, prepared, constructed, assembled, made, performed or otherwise produced for or paid for by the County is owned by the Contractor and is not "work made for hire" within the terms of this Agreement.

Public Records Act. This Contract and all records associated with this Contract shall be available for inspection and copying by the public where required by the Public Records Act, Chapter 42.56 RCW (the "Act"). To the extent that public records then in the custody of the Contractor are needed for the County to respond to a request under the Act, as determined by the County, the Contractor agrees to make them promptly available to the County at no cost to the County. If the Contractor considers any portion of any record provided to the County under this Agreement, whether in electronic or hard copy form, to be protected from disclosure under law, the Contractor shall clearly identify any specific information that it claims to be confidential or proprietary. If the County receives a request under the Act to inspect or copy the information so identified by the Contractor and the County determines that release of the information is required by the Act or otherwise appropriate, the County's sole obligations shall be to notify the Contractor (a) of the request and (b) of the date that such information will be released to the requester unless the Contractor obtains a court order to enjoin that disclosure pursuant to RCW 42.56.540. If the Contractor fails to timely obtain a court order enjoining disclosure, the County will release the requested information on the date specified.

The County has, and by this section assumes, no obligation on behalf of the Contractor to claim any exemption from disclosure under the Act. The County shall not be liable to the Contractor for releasing records not clearly identified by the Contractor as confidential or proprietary. The County shall not be liable to the Contractor for any records that the County releases in compliance with this section or in compliance with an order of a court of competent jurisdiction.

The Contractor shall be liable to the requester for any and all fees, costs, penalties or damages imposed or alleged as a result of the Contractor's failure to provide adequate or timely records.

This provision and the obligations it establishes shall remain in effect after the expiration of this contract.

31.2 Patent/Copyright Infringement:

Contractor will defend and indemnify the County from any claimed action, cause or demand brought against the County, to the extent such action is based on the claim that information supplied by the Contractor infringes any patent or copyright. The Contractor will pay those costs and damages attributable to any such claims that are finally awarded against the County in any action. Such defense and payments are conditioned upon the following:

- A. The Contractor shall be notified promptly in writing by the County of any notice of such claim.
- B. Contractor shall have the right, hereunder, at its option and expense, to obtain for the County the right to continue using the information, in the event such claim of infringement, is made, provided no reduction in performance or loss results to the County.

32.1 Confidentiality:

The Contractor, its employees, subcontractors, and their employees shall maintain the confidentiality of all information provided by the County or acquired by the Contractor in performance of this Agreement, except upon the prior written consent of the County or an order entered by a court after having acquired jurisdiction over the County. Contractor shall immediately give to the County notice of any judicial proceeding seeking disclosure of such information. Contractor shall indemnify and hold harmless the County, its officials, agents or employees from all loss or expense, including, but not limited to, settlements, judgments, setoffs, attorneys' fees and costs resulting from Contractor's breach of this provision.

**33.1 Right to Review:**

This contract is subject to review by any Federal, State or County auditor. The County or its designee shall have the right to review and monitor the financial and service components of this program by whatever means are deemed expedient by the Administrative Officer or by the County Auditor's Office. Such review may occur with or without notice and may include, but is not limited to, on-site inspection by County agents or employees, inspection of all records or other materials which the County deems pertinent to the Agreement and its performance, and any and all communications with or evaluations by service recipients under this Agreement. The Contractor shall preserve and maintain all financial records and records relating to the performance of work under this Agreement for three (3) years after contract termination, and shall make them available for such review, within Whatcom County, State of Washington, upon request. Contractor also agrees to notify the Administrative Officer in advance of any inspections, audits, or program review by any individual, agency, or governmental unit whose purpose is to review the services provided within the terms of this Agreement. If no advance notice is given to the Contractor, then the Contractor agrees to notify the Administrative Officer as soon as it is practical.

**34.1 Insurance:**

The Contractor shall, at its own expense, obtain and continuously maintain the following insurance coverage for the duration of this contract, which shall include insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, its agents, representatives, subcontractors or employees. All insurers providing such insurance shall have an A.M. Best Rating of not less than A- (or otherwise be acceptable to the County) and be licensed to do business in the State of Washington and admitted by the Washington State Insurance Commissioner. Coverage limits shall be the minimum limits identified in this Contract or the coverage limits provided or available under the policies maintained by the Contractor without regard to this Contract, whichever are greater.

**1. Commercial General Liability**

Property Damage	\$500,000.00, per occurrence
General Liability & bodily injury	\$1,000,000.00, per occurrence
Annual Aggregate	\$2,000,000.00

At least as broad as ISO form CG 00 01 or the equivalent, which coverage shall include personal injury, bodily injury and property damage for Premises Operations, Products and Completed Operations, Personal/Advertising Injury, Contractual Liability, Independent Contractor Liability, medical payments and Stop Gap/Employer's Liability. Coverage shall not exclude or contain sub-limits less than the minimum limits required, unless approved in writing by the County.

**2. Professional Liability**

Professional Liability - \$1,000,000 per occurrence

Obtain professional liability insurance covering the negligent acts, errors, or omissions of the professional in connection with the performance of services to the County. If any insurance policy or the professional liability insurance is written on a claims made form, its retroactive date, and that of all subsequent renewals, shall be no later than the effective date of this Contract. The policy shall state that coverage is claims made, and state the retroactive date. Claims-made form coverage shall be maintained by the Contractor for a minimum of 36 months following the Completion Date or earlier termination of this Contract, and the Contractor shall annually provide the Contracting Agency with proof of renewal. If renewal of the claims made form of coverage becomes unavailable, or economically prohibitive, the Contractor shall purchase an extended reporting period ("tail") or execute another form of guarantee acceptable to the Contracting Agency to assure financial responsibility for liability for services performed.

**3. Business Automobile Liability**

\$1,000,000.00	Minimum, per occurrence
\$2,000,000.00	Minimum, Annual Aggregate

Contractor shall provide auto liability coverage for owned, non-owned and hired autos using ISO Business Auto Coverage form CA 00 01 or the exact equivalent with a limit of no less than \$1,000,000 per accident. If Contractor owns no vehicles this requirement may be met through a non-owned auto Endorsement to the CGL policy.

**4. Additional Insurance Requirements and Provisions**

- a. All insurance policies shall provide coverage on an occurrence basis.
- b. Additional Insureds. Whatcom County, its departments, elected and appointed officials, employees, agents and volunteers shall be included as additional insureds on Contractor's and Contractor's subcontractors' insurance policies by way of endorsement for the full available limits of insurance required in this contract or maintained by the Contractor and subcontractor, whichever is greater.
- c. Primary and Non-contributory Insurance. Contractor shall provide primary insurance coverage and the County's insurance shall be non-contributory. Any insurance, self-insured retention, deductible, risk retention or insurance pooling maintained or participated in by the County shall be excess and non-contributory to Contractor's insurance.



- d. Waiver of Subrogation. The insurance policy shall provide a waiver of subrogation with respect to each insurance policy maintained under this Contract. When required by an insurer, or if a policy condition does not permit Contractor to enter into a pre-loss agreement to waive subrogation without an endorsement, then Contractor agrees to notify the insurer and obtain such endorsement. This requirement shall not apply to any policy which includes a condition expressly prohibiting waiver of subrogation by the insured or which voids coverage should the Contractor enter into such a waiver of subrogation on a pre-loss basis.
- e. Review of and Revision of Policy Provisions. Upon request, the Contractor shall provide a full and complete certified copy of all requested insurance policies to the County. The County reserves the right, but not the obligation, to revise any insurance requirement, including but not limited to limits, coverages and endorsements, or to reject any insurance policies which fail to meet the requirements of this Contract. Additionally, the County reserves the right, but not the obligation, to review and reject any proposed insurer providing coverage based upon the insurer's financial condition or licensing status in Washington.
- f. Verification of Coverage/Certificates and Endorsements. The Contractor shall furnish the County with a certificate of insurance and endorsements required by this contract. The certificates and endorsements for each policy shall be signed by a person authorized by the insurer to bind coverage on its behalf. The certificate and endorsements for each insurance policy are to be on forms approved by the County prior to commencement of activities associated with the contract. The certificate and endorsements, and renewals thereof, shall be attached hereto as Exhibit "C". If Exhibit C is not attached, the Contractor must submit the certificate and endorsements required in this contract to the County prior to the commencement of any work on the contracted project. A certificate alone is insufficient proof of the required insurance; endorsements must be included with the certificate. The certificate of insurance must reflect the insurance required in this contract, including appropriate limits, insurance coverage dates, per occurrence, and in the description of operations, include the County project, Whatcom County, its departments, officials, employees, agents and volunteers as additional insureds, primary, non-contributory, and waiver of subrogation.
- g. The County must be notified immediately in writing of any cancellation of the policy, exhaustion of aggregate limits, notice of intent not to renew insurance coverage, expiration of policy or change in insurer carrier. Contractor shall always provide the County with a current copy of the certificate and endorsements throughout the duration of the contract.
- h. No Limitation on Liability. The insurance maintained under this Contract shall not in any manner limit the liability or qualify the liabilities or obligations of the Contractor to the coverage provided by such insurance, or otherwise limit the County's recourse to any remedy available at law or equity.
- i. Payment Conditioned on Insurance and Failure to Maintain Insurance. Compensation and/or payments due to the Contractor under this Contract are expressly conditioned upon the Contractor's compliance with all insurance requirements. Failure on the part of the Contractor to maintain the insurance as required shall constitute a material breach of contract. Payment to the Contractor may be suspended in the event of non-compliance, upon which the County may, after giving five business days' notice to the Contractor to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the County on demand or offset against funds due the Contractor. Upon receipt of evidence of Contractor's compliance, payments not otherwise subject to withholding or set-off will be released to the Contractor.
- j. Workers' Compensation. The Contractor shall maintain Workers' Compensation coverage as required under the Washington State Industrial Insurance Act, RCW Title 51, for all Contractors' employees, agents and volunteers eligible for such coverage under the Industrial Insurance Act.
- k. Failure of the Contractor to take out and/or maintain required insurance shall not relieve the Contractor or subcontractors from any liability under the contract, nor shall the insurance requirements be construed to conflict with or otherwise limit the obligations concerning indemnification. The County does not waive any insurance requirements even in the event the certificate or endorsements provided by the Contractor were insufficient or inadequate proof of coverage but not objected to by the County. The County's failure to confirm adequate proof of insurance requirements does not constitute a waiver of the Contractor's insurance requirements under this Contract.
- l. Availability of Contractor Limits. If the Contractor maintains higher insurance limits than the minimums shown above, the County shall be insured for the full available limits, including Excess or Umbrella liability maintained by the Contractor,

irrespective of whether such limits maintained by the Contractor are greater than those required by this contract or whether any certificate furnished to the County evidences limits of liability lower than those maintained by the Contractor.

- m. Insurance for Subcontractors. If the Contractor subcontracts (if permitted in the contract) any portion of this Contract, the Contractor shall include all subcontractors as insureds under its policies or shall require separate certificates of insurance and policy endorsements from each subcontractor. Insurance coverages by subcontractors must comply with the insurance requirements of the Contractor in this contract and shall be subject to all of the requirements stated herein, including naming the County as additional insured.
- n. The Contractor agrees Contractor's insurance obligation shall survive the completion or termination of this Contract for a minimum period of three years.

34.3 Defense & Indemnity Agreement. To the fullest extent permitted by law, the Contractor agrees to indemnify, defend and hold the County and its departments, elected and appointed officials, employees, agents and volunteers, harmless from and against any and all claims, damages, losses and expenses, including but not limited to court costs, attorney's fees, and alternative dispute resolution costs, for any personal injury, for any bodily injury, sickness, disease, or death and for any damage to or destruction of any property (including the loss of use resulting therefrom) which: 1) are caused in whole or in part by any error, act or omission, negligent or otherwise, of the Contractor, its employees, agents or volunteers or Contractor's subcontractors and their employees, agents or volunteers; or 2) directly or indirectly arise out of or occur in connection with performance of this Contract or 3) are based upon the Contractor's or its subcontractors' use of, presence upon, or proximity to the property of the County. This indemnification obligation of the Contractor shall not apply in the limited circumstance where the claim, damage, loss, or expense is caused by the sole negligence of the County.

Should a court of competent jurisdiction determine that this contract is subject to RCW 4.24.115, then in the event of concurrent negligence of the Contractor, its subcontractors, employees or agents, and the County, its employees or agents, this indemnification obligation of the Contractor shall be valid and enforceable only to the extent of the negligence of the Contractor, its subcontractors, employees, and agents. This indemnification obligation of the Contractor shall not be limited in any way by the Washington State Industrial Insurance Act, RCW Title 51, or by application of any other workmen's compensation act, disability benefit act or other employee benefit act, and the Contractor hereby expressly waives any immunity afforded by such acts.

It is further provided that no liability shall attach to the County by reason of entering into this contract, except as expressly provided herein. The parties specifically agree that this Contract is for the benefit of the parties only and this Contract shall create no rights in any third party. The County reserves the right, but not the obligation, to participate in the defense of any claim, damages, losses, or expenses, and such participation shall not constitute a waiver of Contractor's indemnity obligations under this Agreement.

In the event the Contractor enters into subcontracts to the extent allowed under this Contract, the Contractor's subcontractors shall indemnify the County on a basis equal to or exceeding Contractor's indemnity obligations to the County. The Contractor shall pay all attorney's fees and expenses incurred by the County in establishing and enforcing the County's rights under this indemnification provision, whether or not suit was instituted.

The Contractor agrees all Contractor's indemnity obligations shall survive the completion, expiration or termination of this Agreement.

The foregoing indemnification obligations of the Contractor are a material inducement to County to enter into this Agreement and are reflected in the Contractor's compensation.

By signing this contract, the Contractor acknowledges that it has freely negotiated and agreed to the indemnification requirements to defend, indemnify and hold harmless the County from all claims and suits including those brought against the County by the Contractor's own employees, arising from this contract.

35.1 Non-Discrimination in Employment:

The County's policy is to provide equal opportunity in all terms, conditions and privileges of employment for all qualified applicants and employees without regard to race, color, creed, religion, national origin, sex, sexual orientation (including gender identity), age, marital status, disability, or veteran status. The Contractor shall comply with all laws prohibiting discrimination against any employee or applicant for employment on the grounds of race, color, creed, religion, national origin, sex, sexual orientation (including gender identity), age, marital status, disability, political affiliation, or veteran status, except where such constitutes a bona fide occupational qualification.

Furthermore, in those cases in which the Contractor is governed by such laws, the Contractor shall take affirmative action to insure that applicants are employed, and treated during employment, without regard to their race, color, creed, religion, national origin, sex, age,

marital status, sexual orientation (including gender identity), disability, or veteran status, except where such constitutes a bona fide occupational qualification. Such action shall include, but not be limited to: advertising, hiring, promotions, layoffs or terminations, rate of pay or other forms of compensation benefits, selection for training including apprenticeship, and participation in recreational and educational activities. In all solicitations or advertisements for employees placed by them or on their behalf, the Contractor shall state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

The foregoing provisions shall also be binding upon any subcontractor, provided that the foregoing provision shall not apply to contracts or subcontractors for standard commercial supplies or raw materials, or to sole proprietorships with no employees.

35.2 Non-Discrimination in Client Services:

The Contractor shall not discriminate on the grounds of race, color, creed, religion, national origin, sex, age, marital status, sexual orientation (including gender identity), disability, or veteran status; or deny an individual or business any service or benefits under this Agreement unless otherwise allowed by applicable law; or subject an individual or business to segregation or separate treatment in any manner related to his/her/its receipt any service or services or other benefits provided under this Agreement unless otherwise allowed by applicable law; or deny an individual or business an opportunity to participate in any program provided by this Agreement unless otherwise allowed by applicable law.

36.1 Waiver of Noncompetition:

Contractor irrevocably waives any existing rights which it may have, by contract or otherwise, to require another person or corporation to refrain from submitting a proposal to or performing work or providing supplies to the County, and contractor further promises that it will not in the future, directly or indirectly, induce or solicit any person or corporation to refrain from submitting a bid or proposal to or from performing work or providing supplies to the County.

36.2 Conflict of Interest:

If at any time prior to commencement of, or during the term of this Agreement, Contractor or any of its employees involved in the performance of this Agreement shall have or develop an interest in the subject matter of this Agreement that is potentially in conflict with the County's interest, then Contractor shall immediately notify the County of the same. The notification of the County shall be made with sufficient specificity to enable the County to make an informed judgment as to whether or not the County's interest may be compromised in any manner by the existence of the conflict, actual or potential. Thereafter, the County may require the Contractor to take reasonable steps to remove the conflict of interest. The County may also terminate this contract according to the provisions herein for termination.

37.1 Administration of Contract:

This Agreement shall be subject to all laws, rules, and regulations of the United States of America, the State of Washington, and political subdivisions of the State of Washington. The Contractor also agrees to comply with applicable federal, state, county or municipal standards for licensing, certification and operation of facilities and programs, and accreditation and licensing of individuals.

The County hereby appoints, and the Contractor hereby accepts, the Whatcom County Executive, and his or her designee, as the County's representative, hereinafter referred to as the Administrative Officer, for the purposes of administering the provisions of this Agreement, including the County's right to receive and act on all reports and documents, and any auditing performed by the County related to this Agreement. The Administrative Officer for purposes of this agreement is:

Whatcom County Planning and Development Services  
Attn.: Mark Personius, Director  
5280 Northwest Drive  
Bellingham, WA 98226  
360.778.5950  
mpersoni@co.whatcom.wa.us

37.2 Notice:

Any notices or communications required or permitted to be given by this Contract must be (i) given in writing and (ii) personally delivered or mailed, by prepaid, certified mail or overnight courier, or transmitted by electronic mail transmission (including PDF), to the party to whom such notice or communication is directed, to the mailing address or regularly-monitored electronic mail address of such party as follows:

Whatcom County Planning and Development Services  
Attn.: Cliff Strong, Senior Planner  
5280 Northwest Drive  
Bellingham, WA 98226  
360.778.5942  
cstrong@co.whatcom.wa.us

Herrera Environmental Consultants, Inc.  
2200 Sixth Ave., Suite 1100  
Seattle, WA 98121  
Attn.: Tina Mirabile  
360 398 5075  
Email: tmirabile@herrerainc.com

Any such notice or communication shall be deemed to have been given on (i) the day such notice or communication is personally delivered, (ii) three (3) days after such notice or communication is mailed by prepaid certified or registered mail, (iii) one (1)

working day after such notice or communication is sent by overnight courier, or (iv) the day such notice or communication is sent electronically, provided that the sender has received a confirmation of such electronic transmission. A party may, for purposes of this Agreement, change his, her or its address, email address or the person to whom a notice or other communication is marked to the attention of, by giving notice of such change to the other party pursuant to this Section.

37.3 If agreed by the parties, this Contract may be executed by Email transmission and PDF signature and Email transmission and PDF signature shall constitute an original for all purposes.

38.1 Certification of Public Works Contractor's Status under State Law:

If applicable, Contractor certifies that it has fully met the responsibility criteria required of public works contractors under RCW 39.04.350 (1), which include: (a) having a certificate of registration in compliance with RCW 18.27; (b) having a current state unified business identifier number; (c) if applicable, having industrial insurance coverage for its employees working in Washington as required in Title 51 RCW, an employment security department number as required in Title 50 RCW, and a state excise tax registration number as required in Title 82 RCW; and (d) not being disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065 (3).

38.2 Certification Regarding Federal Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions:

If applicable, the Contractor further certifies, by executing this contract, that neither it nor its principles is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or Agency.

The Contractor also agrees that it shall not knowingly enter into any lower tier covered transactions (a transaction between the Contractor and any other person) with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, and the Contractor agrees to include this clause titled "Certification Regarding Federal Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction" without modification, in all lower tier covered transactions and in all solicitations for lower tier transactions.

The "Excluded Parties List System in the System for Award Management (SAM) website is available to research this information at WWW.SAM.GOV. Contractor shall immediately notify Whatcom County if, during the term of this Contract, Contractor becomes debarred.

38.3 E-Verify:

The E-Verify contractor program for Whatcom County applies to contracts of \$100,000 or more and sub contracts for \$25,000 or more if the primary contract is for \$100,000 or more. If applicable, Contractor represents and warrants that it will, for at least the duration of this contract, register and participate in the status verification system for all newly hired employees. The term "employee" as used herein means any person that is hired to perform work for Whatcom County. As used herein, "status verification system" means the Illegal Immigration Reform and Immigration Responsibility Act of 1996 that is operated by the United States Department of Homeland Security, also known as the E-Verify Program, or any other successor electronic verification system replacing the E-Verify Program. Contractor/Seller agrees to maintain records of such compliance and, upon request of the County, to provide a copy of each such verification to the County. Contractor/Seller further represents and warrants that any person assigned to perform services hereunder meets the employment eligibility requirements of all immigration laws of the State of Washington. Contractor/Seller understands and agrees that any breach of these warranties may subject Contractor/Seller to the following: (a) termination of this Agreement and ineligibility for any Whatcom County contract for up to three (3) years, with notice of such cancellation/termination being made public. In the event of such termination/cancellation, Contractor/Seller would also be liable for any additional costs incurred by the County due to contract cancellation or loss of license or permit." Contractor will review and enroll in the E-Verify program through this website: [www.uscis.gov](http://www.uscis.gov)

**Series 40-49: Provisions Related to Interpretation of Agreement and Resolution of Disputes**

40.1 Modifications:

Either party may request changes in the Agreement. Any and all agreed modifications, to be valid and binding upon either party, shall be in writing and signed by both of the parties.

40.2 Contractor Commitments, Warranties and Representations:

Any written commitment received from the Contractor concerning this Agreement shall be binding upon the Contractor, unless otherwise specifically provided herein with reference to this paragraph. Failure of the Contractor to fulfill such a commitment shall render the Contractor liable for damages to the County. A commitment includes, but is not limited to, any representation made prior to execution of this Agreement, whether or not incorporated elsewhere herein by reference, as to performance of services or equipment, prices or options for future acquisition to remain in effect for a fixed period, or warranties.

41.1 Severability:

If any term or condition of this contract or the application thereof to any person(s) or circumstances is held invalid, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, condition or application. To this end, the terms and conditions of this contract are declared severable.

**Contract for Services**

*Feasibility Study for an Off-Site Critical Area Buffer Mitigation Program*

41.2 Waiver:

Waiver of any breach or condition of this contract shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this contract shall be held to be waived, modified or deleted except by an instrument, in writing, signed by the parties hereto. The failure of the County to insist upon strict performance of any of the covenants and agreements of this Agreement, or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of any such, or any other covenants or agreements, but the same shall be and remain in full force and effect.

42.1 Disputes:

a. General:

Differences between the Contractor and the County, arising under and by virtue of the Contract Documents, shall be brought to the attention of the County at the earliest possible time in order that such matters may be settled or other appropriate action promptly taken. Except for such objections as are made of record in the manner hereinafter specified and within the time limits stated, the records, orders, rulings, instructions, and decisions of the Administrative Officer shall be final and conclusive.

b. Notice of Potential Claims:

The Contractor shall not be entitled to additional compensation which otherwise may be payable, or to extension of time for (1) any act or failure to act by the Administrative Officer or the County, or (2) the happening of any event or occurrence, unless the Contractor has given the County a written Notice of Potential Claim within ten (10) days of the commencement of the act, failure, or event giving rise to the claim, and before final payment by the County. The written Notice of Potential Claim shall set forth the reasons for which the Contractor believes additional compensation or extension of time is due, the nature of the cost involved, and insofar as possible, the amount of the potential claim. Contractor shall keep full and complete daily records of the work performed, labor and material used, and all costs and additional time claimed to be additional.

c. Detailed Claim:

The Contractor shall not be entitled to claim any such additional compensation, or extension of time, unless within thirty (30) days of the accomplishment of the portion of the work from which the claim arose, and before final payment by the County, the Contractor has given the County a detailed written statement of each element of cost or other compensation requested and of all elements of additional time required, and copies of any supporting documents evidencing the amount or the extension of time claimed to be due.

d. Arbitration:

Other than claims for injunctive relief, temporary restraining order, or other provisional remedy to preserve the status quo or prevent irreparable harm, brought by a party hereto (which may be brought either in court or pursuant to this arbitration provision), and consistent with the provisions hereinabove, any claim, dispute or controversy between the parties under, arising out of, or related to this Contract or otherwise, including issues of specific performance, shall be determined by arbitration in Bellingham, Washington, under the applicable American Arbitration Association (AAA) rules in effect on the date hereof, as modified by this Agreement. There shall be one arbitrator selected by the parties within ten (10) days of the arbitration demand, or if not, by the AAA or any other group having similar credentials. Any issue about whether a claim is covered by this Contract shall be determined by the arbitrator. The arbitrator shall apply substantive law and may award injunctive relief, equitable relief (including specific performance), or any other remedy available from a judge but shall not have the power to award punitive damages. Each Party shall pay all their own costs, attorney fees and expenses of arbitration and the parties shall share equally in the Arbitrator's fees and costs. The decision of the arbitrator shall be final and binding and an order confirming the award or judgment upon the award may be entered in any court having jurisdiction. The parties agree that the decision of the arbitrator shall be the sole and exclusive remedy between them regarding any dispute presented or pled before the arbitrator. At the request of either party made not later than forty-five (45) days after the arbitration demand, the parties agree to submit the dispute to nonbinding mediation, which shall not delay the arbitration hearing date; provided, that either party may decline to mediate and proceed with arbitration.

Any arbitration proceeding commenced to enforce or interpret this Contract shall be brought within six years after the initial occurrence giving rise to the claim, dispute, or issue for which arbitration is commenced, regardless of the date of discovery or whether the claim, dispute, or issue was continuing in nature. Claims, disputes, or issues arising more than six years prior to a written request or demand for arbitration issued under this Contract are not subject to arbitration.

e. The parties may agree in writing signed by both parties that a claim or dispute may be brought in Whatcom County Superior Court rather than mediation or arbitration.

*Unless otherwise specified herein, this Contract shall be governed by the laws of Whatcom County and the State of Washington.*

43.1 Venue and Choice of Law:

In the event that any litigation should arise concerning the construction or interpretation of any of the terms of this Agreement, the venue of such action of litigation shall be in the courts of the State of Washington in and for the County of Whatcom. This Agreement shall be governed by the laws of the State of Washington.

44.1 Survival:

The provisions of paragraphs 11.1, 11.2, 11.3, 21.1, 22.1, 30.1, 31.1, 31.2, 32.1, 33.1, 34.2, 34.3, 36.1, 40.2, 41.2, 42.1, and 43.1, if utilized, shall survive, notwithstanding the termination or invalidity of this Agreement for any reason.

45.1 Entire Agreement:

This written Agreement, comprised of the writings signed or otherwise identified and attached hereto, represents the entire Agreement between the parties and supersedes any prior oral statements, discussions or understandings between the parties.

EXHIBIT "A"  
(SCOPE OF WORK)



## SCOPE OF WORK

# WHATCOM COUNTY OFF-SITE CRITICAL AREAS BUFFER MITIGATION FEASIBILITY STUDY

On November 3, 2021, Whatcom County Planning and Development Services (County) authorized Herrera Environmental Consultants (Herrera) and subconsultant Jacobs, jointly referred as the Consultant, to prepare a scope of work and cost estimate to assist in the preparation of a Feasibility Study for the development of an Off-Site Critical Areas Buffer Mitigation Program (Program) for Whatcom County. This scope of work includes a discussion of the activities, assumptions, deliverables, and a schedule associated with the first two phases of the project to be authorized in 2021 for implementation in the first half of 2022. Subsequent phases (three through six) will be described and authorized through an addendum scope of work in 2022.

Throughout all phases of the project, the Consultant will use an established system of quality assurance/quality control review to ensure high quality deliverables that comply with the requirements of the scope of work, as well as provide the most responsive and technically accurate work product. Work products will be reviewed by technical leads, technical editors, the project manager, and ultimately by the Client Satisfaction Reviewer

## PHASE 1.0 – PRELIMINARY PROGRAM RESEARCH

The initial phase of the project will be based on the Consultant conducting preliminary program research and gathering background information to determine appropriate parameters for developing the feasibility study. Based on the Consultant's understanding of mitigation program development, a list of topics for discussion to solicit feedback from the County team during a kickoff meeting, will be prepared. The list of topics will provide the framework for the Program's development. The agenda for the kickoff meeting will be provided to the County within 2 weeks of the contract's notice to proceed. The kickoff meeting will be scheduled 1 week after the agenda notice. The County will have three weeks to prepare responses to any requests for information or ideas for input identified during the kickoff meeting.

The kickoff meeting's discussion will focus on determining appropriate parameters for the feasibility study's development, including, but not exclusive of the following issues:

- The County's anticipated need for the Program and data sources used to support the analysis
- The County's anticipated timeframe for estimating demand (typically 8-10 years)



## SCOPE OF WORK

---

- Scope of the feasibility study's analysis – pursue all three Program options (A – Advance Mitigation, B – “in lieu fee” like approach, or C “ off the shelf”) or limit to a preferred option
- Geographic scope for the Program (County-wide, watershed based, target unserved watersheds (e.g., outside of Lummi Bank and proposed City of Bellingham service area watersheds)
- Existing and future monitoring of mitigation measures to determine “no net loss” of water quality, hydrology or habitat functions.
- The County's reference data and the latest or anticipated draft updates of compliance regulations, as well as other documentation appropriate for review and incorporation into the Program. The Consultant has preliminarily identified the following regulatory guidance and reference data and documents and will want confirmation from the County if additional or less documentation should be evaluated:
  - Whatcom County Code (WCC )Title 23 (Shoreline Master Program Restoration Plan) (as updated for anticipated adoption by the County in January 2022)
  - WCC Chapter 16.16 (Critical Areas including Section 16.16.710(D) Species of Local Importance)(as updated and anticipated adoption by the County in January 2022)
  - Whatcom County Wetland Inventory and Stream Inventory maps/data
  - Whatcom County's Comprehensive Plan and Policies
  - Whatcom County's Transportation and Capital Improvement Plans
  - Whatcom County Ecosystem Report
  - City of Ferndale GIS wetland inventory
  - WRIA 1 Nearshore and Estuarine Assessment and Restoration Project
  - WRIA 1 Limiting Factors Analysis and Salmon Recovery Plans
  - WRIA 1 - 4 Year Habitat Work Schedule
  - Puget Sound Watershed Characterization – mapping of WRIA 1
  - City of Bellingham, Umbrella Mitigation Bank Prospectus
  - Lummi Mitigation Bank Instrument and Appendices

The Consultant will provide meeting minutes within 1 week of County kickoff meeting. Based on the Program's directives, as refined during the kickoff meeting, the Consultant will work with the County to establish goals to be considered in framing the County's Off-Site

## SCOPE OF WORK

---

Critical Area Buffer Mitigation Program and help in selection of the type of program. The Consultant will then conduct research to inform the potential mitigation sites, potential credit demand, and Program users. Each jurisdiction within the County has projected growth demands that they are required to meet under state law. Local jurisdictions will be updating comprehensive plans and may revise zoning based on State Office of Financial Management (OFM) growth projections. The Consultant will estimate the potential credit demand over the identified time period based both on anticipated projects and growth projections within the County.

Preliminarily, the selection of potential mitigation sites will focus on complementing existing habitat restoration programs and policies, as well as to add to existing publicly or privately held sites that are managed for their habitat functions and values. The Consultant will also review relevant local and state policies, rules, and guidance with respect to mitigation site selection. The selection of mitigation sites will also be based on quantifying potential mitigation needs by contacting potential users and local planning resources. The Consultant will send its current list of over 80 contacts to County staff for review and refinement prior to the kickoff meeting.

The consultant will meet with the County to discuss the research methods and analysis prior to preparing a draft Technical Memorandum that will summarize the results of the Phase 1 Preliminary Research. The meeting will be held in an on-line format and its expected duration is two hours.

The results of the Consultant's analysis of the anticipated Program's impacts and mitigation demand will be provided in a Draft Technical Memorandum for County review. The memo will document the methods of research, the findings, and project a range of anticipated mitigation needs based on findings. Mitigation projections will be anticipated over a 10-year period – or an appropriate planning horizon based on reviewed plans and consultation with County staff. Maps illustrating proposed impact and potential mitigation sites will be provided. A Final Technical Memorandum incorporating the County's review comments will be prepared.

This research will inform goals and objectives for developing Whatcom County's Off-Site Buffer Mitigation Program, and may inform potential partnerships, if the county determines that to be of interest (e.g., having the County collaborate with the Whatcom Land Trust or other NGOs to manage and maintain Off-Site Critical Area Buffers under the County Program). This research will help inform the basis for site selection considerations formulated in Phase 2, regardless of the type of program selected.

## Deliverables

- Provide discussion materials via e-mail to County staff at least 1 week in advance of the kickoff meeting to include:

## SCOPE OF WORK

---

- Draft Agenda
- Preliminary Research Contact List
- List of documents intended to inform research (partially listed above)
- Minutes from the County kickoff meeting will be prepared in an electronic format within 1 week of the scheduled meeting for distribution to meeting attendees.
- The Consultant will coordinate and lead a preliminary research review meeting with the County to provide the format for the Consultant's preparation of a Draft Technical Memorandum summarizing the results of the Feasibility Program's Task 1 work project.
- Minutes from the Preliminary Research Review Meeting will be provided in an electronic format to the County within 1 week of the scheduled meeting.
- Draft Technical Memorandum summarizing findings from Phase 1 Preliminary Program Research in Microsoft Word and Adobe pdf formats.
- Final Technical Memorandum in Adobe PDF format.

## Assumptions

- The County will identify a Project Manager, who will be the primary point of contact for work conducted under this contract. Deliverables will be delivered to the County Project Manager via e-mail.
- The County kickoff meeting will be conducted for approximately 2 hours via an on-line meeting format.
- The County will provide Consultant with requested background documentation within 3 weeks of the kickoff meeting.
- A Preliminary Research Review meeting will be conducted for approximately 2 hours via an on-line meeting format.
- The County will provide one set of consolidated comments to the Consultant on the Draft Technical Memorandum within three weeks of receipt.
- The Consultant and the County will have a continued dialog during all phases of the Program development and responses to requests for information or comments will not exceed 3 weeks by either party.

## SCOPE OF WORK

---

### PHASE 2.0 – IMPLEMENTATION, OWNERSHIP & MANAGEMENT STRUCTURE

The meetings conducted with the County and the research and analysis conducted to prepare the Final Technical Memorandum in Phase 1 – Preliminary Program Research will be the basis to inform the Siting Criteria and Potential Candidate Mitigation Sites for the Program, to be developed under Phase 2. Phase 2 will focus on developing the following:

- Preferred organizational structure of the Program – including evaluating County-owned and managed, third-party owned and managed, or possibly a hybrid approach.
- County ownership of sites vs. County ownership of easements over public or private properties to be established as Off-Site Critical Area Buffer Mitigation Sites and
- Identify Site Selection Criteria

An important and related consideration in Program development is the identification of criteria for potential Candidate Mitigation Site Selection. In the best-case scenario, candidate mitigation sites will provide ecologically appropriate mitigation, expand regional restoration priorities, and be located in areas without other mitigation options. The sites must adequately replace impacted critical area buffer functions.

The results of the Consultant's analysis will be provided in a Draft Technical Memorandum for County review. The memo will document the methods of research, the findings, and include the following recommendations: proposed organizational structure of the Program, any changes to code based on review and analysis, and mitigation site ownership considerations. The County's review comments will be incorporated into a Final Technical Memorandum that will be submitted electronically to the County lead within 1 week after the County's 2-week comment review period.

#### Deliverables

- Draft Technical Memorandum summarizing findings from Phase 2 Preliminary Program Research in Microsoft Word and Adobe pdf formats.
- Final Technical Memorandum in Adobe PDF format.

#### Assumptions

- The County's review time from receipt of the Draft Technical Memorandum for incorporation into the Final Technical Memorandum is 3 weeks.

## SCOPE OF WORK

---

### PHASE 3.0 – PROJECT MANAGEMENT/ CONTRACT ADMINISTRATION

The objective of this work is to manage the scope, schedule and budget, and provide coordination with the County. The Consultant will coordinate with Whatcom County's project manager on a regular monthly basis regarding the project progress, project issues and schedule.

The Consultant will prepare monthly progress reports that describe the work items and percentage of work items that were accomplished that is independent of budget expended, as well as a forecast of work to be completed over the following month. Progress reports will include a status of budget spent and remaining for each individual task. The monthly progress reports will also identify any other issues or problems that may occur in any given month. The Consultant will submit these monthly progress reports to the County's Project Manager with the monthly invoices. The monthly invoices will bill by individual tasks. The Consultant Project Manager will notify the County's Project Manager, in writing (memo format), of any out of scope and/or budgetary issues that are inconsistent with this Scope of Services. The Consultant will also manage the subconsultant budgets and invoices, manage change, and prepare amendments, if/as necessary. Any expense or subconsultant charge will have supporting documents included with the invoices.

#### Deliverables

- Monthly project work progress and budget tracking reports and invoices for phase 1 and phase 2 of the project
- Project Schedule (up to one)

#### Assumptions

- Phase 3.0 Project Management will be initiated at contract acceptance and continue through project completion. This scope of work only includes project management time and expenses through the first 2 phases of the project. Phases 4 through 7 and additional project management will be scoped and funded via a separate contract in 2022.
- Duration of first two phases of the active project work will not exceed 6 months.
- Meetings among Consultant team members that do not involve County staff will be conducted under other tasks in the scope of work.
- Herrera will prepare one subcontract and track subcontractor's performance.

## **SCOPE OF WORK**

---

- Monthly coordination meetings and/or conference calls with key County/Consultant team members to cover project status.
- Subconsultant participation will be as described under the subconsultant work element.

## **SCOPE OF WORK**

---

### **PHASES 4 THROUGH 7**

The proposed phases 4 through 7 to complete delivery of the Feasibility Plan for the County's off-site buffer mitigation program will be authorized via an addendum scope of work and budget in 2022.

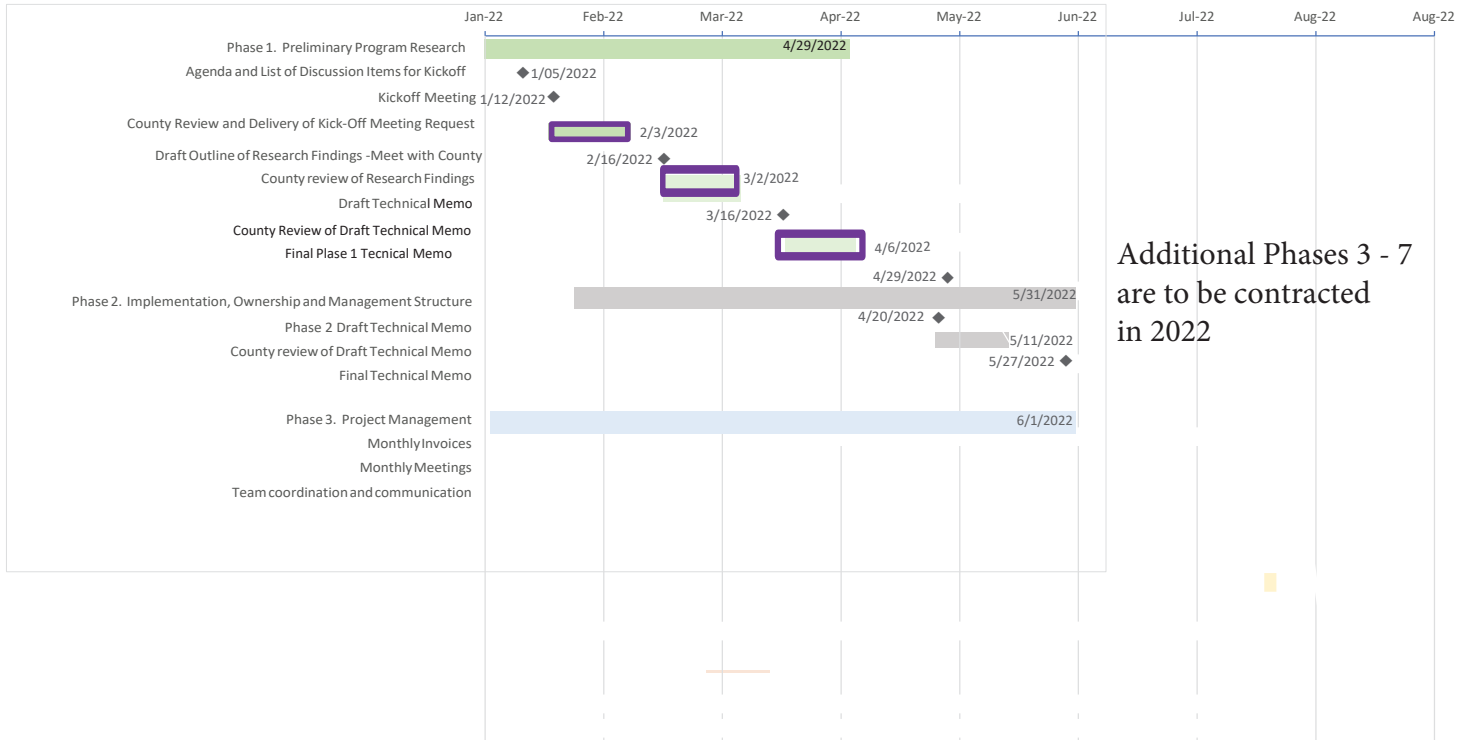
## **SCOPE OF WORK**

---

## **PROJECT SCHEDULE**



## Whatcom County Off-Site Buffer Mitigation Feasibility Scope Schedule - Phases 1, 2 and Project Management (3) Through June 1, 2022



Task	Start Date	End Date	Milestone
<b>Phase 1. Preliminary Program Research</b>	1/1/2022	4/30/2022	
Agenda and List of Discussion Items for Kickoff		1/05/2022	y
Kickoff Meeting		1/12/2022	y
County Review and Response to Kick-off Meeting Information Requests	1/12/2022	02/02/2022	
Draft Research Outline Meeting for Technical Memo		2/16/2022	y
County review of Research Outline	2/16/2022	3/2/2022	
Draft Technical Memo		3/16/2022	y
County Review of Draft Technical Memo	3/17/2022	4/6/2022	
Final Technical Memo		4/29/2022	y
<b>Phase 2. Implementation, Ownership and Management Structure</b>	01/12/2022	5/15/2022	
Draft Technical Memo		4/20/2022	y
County review of Draft Technical Memo	4/21/2022	5/11/2022	
Final Technical Memo		5/27/2022	y
<b>Phase 3. Project Management</b>	1/1/2022	6/1/2022	
Monthly Invoices			y
Monthly Meetings			y
Team coordination and communication	1/1/2022	6/1/2022	

**EXHIBIT "B"**  
(COMPENSATION)

As consideration for the services provided pursuant to Exhibit A (Scope of Work), the County agrees to compensate the Contractor according to the hourly rates provided in below. Other reasonable expenses incurred in the course of performing the duties herein shall be reimbursed. Mileage at IRS rate, lodging and per diem at a rate not to exceed the GSA rate for location services are provided. Other expenditures such as printing, postage and telephone charges shall be reimbursed at actual cost plus 2%.

The maximum consideration for the initial term of this agreement shall not exceed \$40,000.

Herrera Environmental Consultants

12/13/2021



Cost Estimate for **Whatcom County Off-Site Buffer Mitigation Feasibility Study**  
 Herrera Project No. **21-07734-000**

			Phase No.	1	2	3	Total
				Preliminary Program Research	Implementation, Ownership & Management Structure	Project Management	
Herrera Labor based on:	Burdened Labor Rates						
Schedule	Task Start Date			1/1/2022	1/1/2022	1/1/2022	
	Task End Date			5/1/2022	6/1/2022	6/1/2022	
Staff	Title	2021 Burdened Labor Rates					
Mirabile, Tina	Scientist IV	\$185.43	40	36	14	90	
Merten, Christina	Scientist V	\$210.18	5	7	0	12	
Schmidt, Jennifer	GIS Analyst V	\$193.25	7	2	0	9	
Rudnick, Tracy	Project Accountant IV	\$125.43	0	0	6	6	
Matsumoto-Hervol, Makie	GIS Analyst I	\$96.20	5	4	0	9	
Jackowich, Pam	Administrative Coordinator IV	\$123.03	5	5	0	10	
<b>Total Hours per Task</b>			62	54	20	136	
<b>Subtotal Herrera Labor</b>			<b>\$10,917</b>	<b>\$9,533</b>	<b>\$3,349</b>	<b>\$23,799</b>	
5%	<b>Escalation on Herrera Labor in 2022</b>		\$546	\$477	\$167	\$1,190	
<b>Escalated Subtotal Herrera Labor</b>			<b>\$11,463</b>	<b>\$10,010</b>	<b>\$3,516</b>	<b>\$24,989</b>	
<b>Subconsultants</b>							
Subconsultant							
Jacobs			\$9,000	\$6,000	\$0	\$15,000	
<b>Subtotal Subconsultant Cost</b>			<b>\$9,000</b>	<b>\$6,000</b>	<b>\$0</b>	<b>\$15,000</b>	
<b>Grand Subtotal</b>			<b>\$20,463</b>	<b>\$16,010</b>	<b>\$3,516</b>	<b>\$39,989</b>	
<b>Grand Total</b>						<b>\$39,989</b>	

**Cost Estimate for      Whatcom County Off-Site Buffer Mitigation Feasibility Study**  
**Herrera Project No.    21-07734-000**

			Phase No.			<b>Total</b>
			<b>1</b>	<b>2</b>	<b>3</b>	
			<b>Number of Hours</b>			
			<b>Preliminary Program Research</b>	<b>Implementation, Ownership &amp; Management Structure</b>	<b>Project Management</b>	
<b>Jacobs Labor based on:      Burdened Labor Rates for 2022</b>						
<b>Schedule</b>		<b>Task Start Date</b>	1/1/2022	1/1/2022	1/1/2022	
		<b>Task End Date</b>	4/1/2022	5/15/2022	6/1/2022	
<b>Staff</b>	<b>Title</b>	<b>2022 Burdened Labor Rates</b>				
Jennifer Thomas	Senior Ecologist	224.54	42	27		69
<b>Total:</b>			9,000	6,000		15,000

**EXHIBIT "C"**  
(CERTIFICATE OF INSURANCE)



33.1 Right to Review:

This contract is subject to review by any Federal, State or County auditor. The County or its designee shall have the right to review and monitor the financial and service components of this program by whatever means are deemed expedient by the Administrative Officer or by the County Auditor's Office. Such review may occur with or without notice and may include, but is not limited to, on-site inspection by County agents or employees, inspection of all records or other materials which the County deems pertinent to the Agreement and its performance, and any and all communications with or evaluations by service recipients under this Agreement. The Consultant shall preserve and maintain all financial records and records relating to the performance of work under this Agreement for three (3) years after contract termination, and shall make them available for such review, within Whatcom County, State of Washington, upon request. Consultant also agrees to notify the Administrative Officer in advance of any inspections, audits, or program review by any individual, agency, or governmental unit whose purpose is to review the services provided within the terms of this Agreement. If no advance notice is given to the Consultant, then the Consultant agrees to notify the Administrative Officer as soon as it is practical.

34.1 Insurance:

*(CHOOSE AND INDICATE OPTION): EX: COMMERCIAL GENERAL LIABILITY AND BUSINESS AUTO LIABILITY*

The Consultant shall, at its own expense, obtain and continuously maintain the following insurance coverage for the duration of this contract, which shall include insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, subconsultants or employees. All insurers providing such insurance shall have an A.M. Best Rating of not less than A- (or otherwise be acceptable to the County) and be licensed to do business in the State of Washington and admitted by the Washington State Insurance Commissioner. Coverage limits shall be the minimum limits identified in this Contract or the coverage limits provided or available under the policies maintained by the Consultant without regard to this Contract, whichever are greater.

**1. Commercial General Liability**

Property Damage	\$500,000.00, per occurrence
General Liability & bodily injury	\$1,000,000.00, per occurrence
Annual Aggregate	\$2,000,000.00

At least as broad as ISO form CG 00 01 or the equivalent, which coverage shall include personal injury, bodily injury and property damage for Premises Operations, Products and Completed Operations, Personal/Advertising Injury, Contractual Liability, Independent Consultant Liability, medical payments and Stop Gap/Employer's Liability. Coverage shall not exclude or contain sub-limits less than the minimum limits required, unless approved in writing by the County.

**2. Professional Liability**

Professional Liability - \$1,000,000 per occurrence

Obtain professional liability insurance covering the negligent acts, errors, or omissions of the professional in connection with the performance of services to the County. If any insurance policy or the professional liability insurance is written on a claims made form, its retroactive date, and that of all subsequent renewals, shall be no later than the effective date of this Contract. The policy shall state that coverage is claims made, and state the retroactive date. Claims-made form coverage shall be maintained by the Consultant for a minimum of 36 months following the Completion Date or earlier termination of this Contract, and the Consultant shall annually provide the Contracting Agency with proof of renewal. If renewal of the claims made form of coverage becomes unavailable, or economically prohibitive, the Consultant shall purchase an extended reporting period ("tail") or execute another form of guarantee acceptable to the Contracting Agency to assure financial responsibility for liability for services performed.

**3. Business Automobile Liability**

\$1,000,000.00 Minimum, per occurrence  
\$2,000,000.00 Minimum, Annual Aggregate

Consultant shall provide auto liability coverage for owned, non-owned and hired autos using ISO Business Auto Coverage form CA 00 01 or the exact equivalent with a limit of no less than \$1,000,000 per accident. If Consultant owns no vehicles this requirement may be met through a non-owned auto Endorsement to the CGL policy.

**4. Additional Insurance Requirements and Provisions**

- a. All insurance policies shall provide coverage on an occurrence basis.
- b. Additional Insureds. Whatcom County, its departments, elected and appointed officials, employees, agents and volunteers shall be included as additional insureds on Consultant's and Consultant's subconsultants' insurance policies by way of endorsement for the full available limits of insurance required in this contract or maintained by the Consultant and subconsultant, whichever is greater.

- c. Primary and Non-contributory Insurance. Consultant shall provide primary insurance coverage and the County's insurance shall be non-contributory. Any insurance, self-insured retention, deductible, risk retention or insurance pooling maintained or participated in by the County shall be excess and non-contributory to Consultant's insurance.
- d. Waiver of Subrogation. The insurance policy shall provide a waiver of subrogation with respect to each insurance policy maintained under this Contract. When required by an insurer, or if a policy condition does not permit Consultant to enter into a pre-loss agreement to waive subrogation without an endorsement, then Consultant agrees to notify the insurer and obtain such endorsement. This requirement shall not apply to any policy which includes a condition expressly prohibiting waiver of subrogation by the insured or which voids coverage should the Consultant enter into such a waiver of subrogation on a pre-loss basis.
- e. Review of and Revision of Policy Provisions. Upon request, the Consultant shall provide a full and complete certified copy of all requested insurance policies to the County. The County reserves the right, but not the obligation, to revise any insurance requirement, including but not limited to limits, coverages and endorsements, or to reject any insurance policies which fail to meet the requirements of this Contract. Additionally, the County reserves the right, but not the obligation, to review and reject any proposed insurer providing coverage based upon the insurer's financial condition or licensing status in Washington.
- f. Verification of Coverage/Certificates and Endorsements. The Consultant shall furnish the County with a certificate of insurance and endorsements required by this contract. The certificates and endorsements for each policy shall be signed by a person authorized by the insurer to bind coverage on its behalf. The certificate and endorsements for each insurance policy are to be on forms approved by the County prior to commencement of activities associated with the contract. The certificate and endorsements, and renewals thereof, shall be attached hereto as Exhibit "C". If Exhibit C is not attached, the Consultant must submit the certificate and endorsements required in this contract to the County prior to the commencement of any work on the contracted project. A certificate alone is insufficient proof of the required insurance; endorsements must be included with the certificate. The certificate of insurance must reflect the insurance required in this contract, including appropriate limits, insurance coverage dates, per occurrence, and in the description of operations, include the County project, Whatcom County, its departments, officials, employees, agents and volunteers as additional insureds, primary, non-contributory, and waiver of subrogation.
- g. The County must be notified immediately in writing of any cancellation of the policy, exhaustion of aggregate limits, notice of intent not to renew insurance coverage, expiration of policy or change in insurer carrier. Consultant shall always provide the County with a current copy of the certificate and endorsements throughout the duration of the contract.
- h. No Limitation on Liability. The insurance maintained under this Contract shall not in any manner limit the liability or qualify the liabilities or obligations of the Consultant to the coverage provided by such insurance, or otherwise limit the County's recourse to any remedy available at law or equity.
- i. Payment Conditioned on Insurance and Failure to Maintain Insurance. Compensation and/or payments due to the Consultant under this Contract are expressly conditioned upon the Consultant's compliance with all insurance requirements. Failure on the part of the Consultant to maintain the insurance as required shall constitute a material breach of contract. Payment to the Consultant may be suspended in the event of non-compliance, upon which the County may, after giving five business days' notice to the Consultant to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the County on demand or offset against funds due the Consultant. Upon receipt of evidence of Consultant's compliance, payments not otherwise subject to withholding or set-off will be released to the Consultant.
- j. Workers' Compensation. The Consultant shall maintain Workers' Compensation coverage as required under the Washington State Industrial Insurance Act, RCW Title 51, for all Consultants' employees, agents and volunteers eligible for such coverage under the Industrial Insurance Act.
- k. Failure of the Consultant to take out and/or maintain required insurance shall not relieve the Consultant or subconsultants from any liability under the contract, nor shall the insurance requirements be construed to conflict with or otherwise limit the obligations concerning indemnification. The County does not waive any insurance requirements even in the event the certificate or endorsements provided by the Consultant were insufficient or inadequate proof of coverage but not objected to by the County. The County's failure to confirm adequate proof of insurance requirements does not constitute a waiver of the Consultant's insurance requirements under this Contract.
- l. Availability of Consultant Limits. If the Consultant maintains higher insurance limits than the minimums shown above, the County shall be insured for the full available limits, including Excess or Umbrella liability maintained by the Consultant, irrespective of whether such limits maintained by the Consultant are greater than those required by this contract or whether any certificate furnished to the County evidences limits of liability lower than those maintained by the Consultant.
- m. Insurance for Subconsultants. If the Consultant subcontracts (if permitted in the contract) any portion of this Contract, the Consultant shall include all subconsultants as insureds under its policies or shall require separate certificates of insurance



and policy endorsements from each subconsultant. Insurance coverages by subconsultants must comply with the insurance requirements of the Consultant in this contract and shall be subject to all of the requirements stated herein, including naming the County as additional insured.

- n. The Consultant agrees Consultant's insurance obligation shall survive the completion or termination of this Contract for a minimum period of three years.

### 34.3 Defense & Indemnity Agreement.

To the fullest extent permitted by law, the Consultant agrees to indemnify, defend and hold the County and its departments, elected and appointed officials, employees, agents and volunteers, harmless from and against any and all claims, damages, losses, and expenses, including but not limited to court costs, attorney's fees, and alternative dispute resolution costs, for any personal injury, for any bodily injury, sickness, disease, or death and for any damage to or destruction of any property (including the loss of use resulting therefrom) which: 1) are caused in whole or in part by any error, act or omission, negligent or otherwise, of the Consultant, its employees, agents or volunteers or Consultant's subconsultants and their employees, agents or volunteers; or 2) directly or indirectly arise out of or occur in connection with performance of this Contract or 3) are based upon the Consultant's or its subconsultants' use of, presence upon, or proximity to the property of the County. This indemnification obligation of the Consultant shall not apply in the limited circumstance where the claim, damage, loss, or expense is caused by the sole negligence of the County.

Should a court of competent jurisdiction determine that this contract is subject to RCW 4.24.115, then in the event of concurrent negligence of the Consultant, its subconsultants, employees or agents, and the County, its employees or agents, this indemnification obligation of the Consultant shall be valid and enforceable only to the extent of the negligence of the Consultant, its subconsultants, employees, and agents. This indemnification obligation of the Consultant shall not be limited in any way by the Washington State Industrial Insurance Act, RCW Title 51, or by application of any other workmen's compensation act, disability benefit act or other employee benefit act, and the Consultant hereby expressly waives any immunity afforded by such acts.

It is further provided that no liability shall attach to the County by reason of entering into this contract, except as expressly provided herein. The parties specifically agree that this Contract is for the benefit of the parties only and this Contract shall create no rights in any third party. The County reserves the right, but not the obligation, to participate in the defense of any claim, damages, losses, or expenses, and such participation shall not constitute a waiver of Consultant's indemnity obligations under this Agreement.

In the event the Consultant enters into subcontracts to the extent allowed under this Contract, the Consultant's subconsultants shall indemnify the County on a basis equal to or exceeding Consultant's indemnity obligations to the County. The Consultant shall pay all attorney's fees and expenses incurred by the County in establishing and enforcing the County's rights under this indemnification provision, whether or not suit was instituted.

The Consultant agrees all Consultant's indemnity obligations shall survive the completion, expiration, or termination of this Agreement. The foregoing indemnification obligations of the Consultant are a material inducement to County to enter into this Agreement and are reflected in the Consultant's compensation.

By signing this contract, the Consultant acknowledges that it has freely negotiated and agreed to the indemnification requirements to defend, indemnify, and hold harmless the County from all claims and suits including those brought against the County by the Consultant's own employees, arising from this contract.

### 35.1 Non-Discrimination in Employment: *(Must be included in every contract as per Ord. 2021-016)*

The County's policy is to provide equal opportunity in all terms, conditions and privileges of employment for all qualified applicants and employees without regard to race, color, creed, religion, national origin, sex, sexual orientation (including gender identity), age, marital status, disability, or veteran status. The Consultant shall comply with all laws prohibiting discrimination against any employee or applicant for employment on the grounds of race, color, creed, religion, national origin, sex, sexual orientation (including gender identity), age, marital status, disability, political affiliation, or veteran status, except where such constitutes a bona fide occupational qualification.

Furthermore, in those cases in which the Consultant is governed by such laws, the Consultant shall take affirmative action to insure that applicants are employed, and treated during employment, without regard to their race, color, creed, religion, national origin, sex, age, marital status, sexual orientation (including gender identity), disability, or veteran status, except where such constitutes a bona fide occupational qualification. Such action shall include, but not be limited to: advertising, hiring, promotions, layoffs or terminations, rate of pay or other forms of compensation benefits, selection for training including apprenticeship, and participation in recreational and educational activities. In all solicitations or advertisements for employees placed by them or on their behalf, the Consultant shall state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

The foregoing provisions shall also be binding upon any subconsultant, provided that the foregoing provision shall not apply to contracts or subconsultants for standard commercial supplies or raw materials, or to sole proprietorships with no employees.

### 35.2 Non-Discrimination in Client Services: *(Must be included in every contract as per Ord. 2021-016)*

The Consultant shall not discriminate on the grounds of race, color, creed, religion, national origin, sex, age, marital status, sexual orientation (including gender identity), disability, or veteran status; or deny an individual or business any service or benefits under this

This page has been left blank intentionally.

**p. Nuclear Material**

Based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

**q. Owned Facilities**

Arising from or in connection with any **location** which is or was at any time owned, operated, rented, or occupied by you or by any entity that:

- (1) Wholly or partly owns, operates, manages, or otherwise controls you; or
- (2) Is wholly or partly owned, operated, managed, or otherwise controlled by you.

**r. Personal and Advertising Injury**

Arising out of **personal and advertising injury**.

**s. Previously Reported Claim**

Arising from the same, related or continuous **professional incident** that was the subject of a **claim** reported under any policy of which this policy is a renewal or replacement or which it may succeed in time, whether or not such prior policy affords coverage for such **claim**.

**t. Prior Professional Incident**

Arising from any **professional incident** known to a **responsible executive** prior to the effective date of the **policy period**, if such **responsible executive** knew or could have reasonably foreseen that such **professional incident** could give rise to damages, **claims** or **suits** under this policy.

This exclusion does not apply if we have been notified, in writing, of such **professional incident** giving rise to such damages, **claims**, or **suits** during the policy period of a policy previously issued by us.

**u. Your Product**

Based upon or arising out of **your product**.

**v. Warranties**

Based upon or arising out of express warranties or guarantees. This exclusion shall not apply if liability would have resulted in the absence of such express warranties or guarantees.

**w. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

**SECTION II – WHO IS AN INSURED**

**1. If you are designated in the Declarations as:**

- a.** An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b.** A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c.** A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **executive officers** and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Any subsidiary, associated, affiliated, allied or limited liability company or corporation, including subsidiaries thereof, of which you have more than 50% ownership interest at the effective date of the **policy period** qualify as a Named Insured.
  3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
    - a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the **policy period**, whichever is earlier;
    - b. Coverage under this policy does not apply to **bodily injury, property damage or environmental damage** that occurred before you acquired or formed the organization;
    - c. Coverage under this policy does not apply to **personal and advertising injury** arising out of an offense committed before you acquired or formed the organization; and
    - d. Coverage under this policy does not apply to damages arising out of any act, error or omission or **professional incident** that took place before you acquired or formed the organization.
  4. Each of the following is also an insured:
    - a. Your **volunteer workers** only while performing duties related to the conduct of your business, or your **employees**, other than either your **executive officers** (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these **employees** or **volunteer workers** are insureds for:
      - (1) **Bodily injury or personal and advertising injury:**
        - (a) To you, to your partners or members (if you are a partnership or joint venture) or to your members (if you are a limited liability company);
        - (b) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) above; or
        - (c) Arising out of the providing or failure to provide professional health care services except incidental health care services provided by any physician, dentist, nurse, emergency medical technician or paramedic who is employed by you to provide such services and provided you are not engaged in the business of providing such services.
      - (2) **Property damage or environmental damage** to property owned, occupied or used by, rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your **employees, volunteer workers**, any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
    - b. Any person (other than your **employee**), or any organization while acting as your real estate manager.
    - c. Any person or organization having proper temporary custody of your property if you die, but only with respect to liability arising out of the maintenance or use of that property and until your legal representative has been appointed.
    - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.
    - e. Any person or organization you agree to include as an insured in a written contract, written agreement or permit, but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of your operations, **your work**, equipment or premises leased or rented by you, or **your products** which are distributed or sold in the regular course of a vendor's business, however:

- (1) A vendor is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
    - (a) For which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement except that which the vendor would have in the absence of the contract or agreement;
    - (b) Arising out of any express warranty unauthorized by you;
    - (c) Arising out of any physical or chemical change in the product made intentionally by the vendor;
    - (d) Arising out of repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from you, and then repackaged in the original container;
    - (e) Arising out of any failure to make inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
    - (f) Arising out of demonstration, installation servicing or repair operations, except such operations performed at the vendor's location in connection with the sale of the product; or
    - (g) Arising out of products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
  - (2) A manager or lessor of premises, a lessor of leased equipment, or a mortgagee, assignee, or receiver is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
    - (a) Arising out of any **occurrence** that takes place after the equipment lease expires or you cease to be a tenant; or
    - (b) Arising out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor of premises, or mortgagee, assignee, or receiver.
- f. Any person or organization that has at least a 50% controlling interest in you but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of their financial control of you.

### SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. **Claims** made or **suits** brought;
  - c. Persons or organizations making **claims** or bringing **suits**;
  - d. **Pollution incidents**;
  - e. Acts, errors or omissions; or
  - f. Benefits included in your **employee benefit program**.
2. The General Aggregate Limit:
  - a. Is the most we will pay for the sum of:
    - (1) Damages and **emergency response expense** under **COVERAGE PART I**, except damages because of **bodily injury, property damage or environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**;
    - (2) Damages under **COVERAGE PART II**;
    - (3) Medical expense under **COVERAGE PART II**;

- (4) Damages, **clean-up costs, emergency response expense** and **legal and claims expense payments** under **COVERAGE PART III**; and
  - (5) Damages and **legal and claims expense payments** under **COVERAGE PART IV**.
- b. Shall apply separately as respects all damages caused by:
- (1) **Occurrences** covered under **COVERAGE PART I, Coverages A, B or D** arising out of operations at a **location** owned or occupied by you;
  - (2) **Occurrences** covered under **COVERAGE PART I, Coverage A or G** arising out of ongoing operations at a project where you are performing **your work**; or
  - (3) **Pollution incidents** covered under **COVERAGE PART III** arising out of operations at an **insured site**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay for damages because of **bodily injury, property damage** or **environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**.
4. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit – COVERAGE PART I: Coverage A, B, C inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage A: General Bodily Injury and Property Damage Liability**;
  - b. Damages under **COVERAGE PART I – Coverage B: Hostile Fire and Building Equipment Liability**; and
  - c. Damages under **COVERAGE PART I – Coverage C: Products Pollution and Exposure Liability**
- because of all **bodily injury, property damage** and **environmental damage** arising out of any one **occurrence**.
5. Subject to Paragraph 4. above, the Damage To Premises Rented To You Limit is the most we will pay under **COVERAGE PART I - Coverage A** for damages because of **property damage** to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
6. Subject to Paragraph 2. above, the Each Occurrence Limit – COVERAGE PART I: Coverage D, E, F inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability**;
  - b. Damages under **COVERAGE PART I – Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability**; and
  - c. Damages under **COVERAGE PART I – Coverage F: Pollution Liability during Transportation**
- because of all **bodily injury, property damage** and **environmental damage** arising out of any one **occurrence**.
7. Subject to Paragraph 2. above, the Each Occurrence Limit - Contractors Pollution Liability: Coverage G is the most we will pay for the sum of all damages under **COVERAGE PART I – Coverage G: Contractors Pollution Liability** because of **bodily injury, property damage** or **environmental damage** arising out of any one **occurrence**.
8. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay for the sum of all damages because of all **personal and advertising injury** sustained by any one person or organization.
9. Subject to Paragraph 2. above, the Employee Benefits Administration Liability Limit is the most we will pay for the sum of all damages sustained by any one **employee**, including damages sustained by such **employee's** dependents and beneficiaries. However, the amount paid shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the **employee benefit program**.
10. Subject to Paragraph 2. above, the Medical Expense Limit is the most we will pay under **COVERAGE PART II - Coverage C** for all medical expenses because of **bodily injury** sustained by any one person.
11. Subject to Paragraph 2. above, the Each Incident Limit – COVERAGE PART III: Site Pollution Legal Liability is the most we will pay for the sum of:
- a. Damages and **legal and claims expense payments** under **COVERAGE PART III – Coverage A: Bodily Injury and Property Damage**;

- b. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage B: First and Third Party On-Site Clean-Up Costs**; and
- c. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage C: Off-Site Clean-Up Costs**

because of all **bodily injury, property damage and environmental damage** arising out of the same, related or continuous **pollution incident**.

12. Subject to Paragraph 2. above, the Each Incident Limit – **COVERAGE PART IV: Professional Liability** is the most we will pay under **COVERAGE PART IV** for damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
13. The Limits of Insurance apply in excess of the Deductible amounts shown in the Declarations. The deductible amount applies as follows:
- a. As respects the Each Incident Limit: **(i)** to the sum of all damages, **clean-up costs, emergency response expense and legal and claims expense payments** because of **bodily injury, property damage or environmental damage** arising out of the same, related or continuous **pollution incident**; **(ii)** to the sum of all damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
  - b. As respects the Each Occurrence Limit, to the sum of all damages because of **bodily injury, property damage or environmental damage** as a result of one **occurrence** regardless of the number of persons or organizations who sustain damages because of that **occurrence**.

We may pay any part or the entire deductible amount to effect settlement of any **claim or suit** or to pay **clean-up costs** or **emergency response expense** which may be covered under this policy and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

Subject to **SECTION IV – Conditions**, Condition 16. **Multiple Coverage Sections**, if the same or related **occurrence, pollution incident or professional incident** results in coverage under more than one coverage part, only the highest deductible under all coverage parts will apply.

14. The Limits of Insurance apply to the entire **policy period**. If the **policy period** is extended after policy issuance for an additional period, the additional period will be deemed part of the last preceding period for the purposes of determining the Limits of Insurance.

#### **SECTION IV – CONDITIONS**

##### **1. Assignment**

This policy may not be assigned without our prior written consent. Assignment of interest under this policy shall not bind us until our consent is endorsed thereon.

##### **2. Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations.

##### **3. Cancellation**

- a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
- b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
  - (1)** 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - (2)** 90 days before the effective date of cancellation if we cancel for any other reason.
- c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
- d. Notice of cancellation will state the effective date of cancellation. The **policy period** will end on that date.
- e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund will be less than pro rata and will be subject to the minimum premium stated in the Declarations. The cancellation will be effective even if we have not made or offered a refund.

f. If notice is mailed, proof of mailing will be sufficient proof of notice.

#### 4. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

#### 5. Choice of Forum

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that any such litigation shall take place in the appropriate federal or state courts located in New York, New York and any arbitration or other form of dispute resolution shall take place in New York, New York.

#### 6. Choice of Law

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of the State of New York shall apply without giving effect to any conflicts or choice of law principles. The terms and conditions of this policy shall not be deemed to constitute a contract of adhesion and shall not be construed in favor of or against any party hereto by reason of authorship or otherwise.

#### 7. Currency

All reimbursement shall be made in United States currency at the rate of exchange prevailing on:

- a. The date of judgment if judgment is rendered;
- b. The date of settlement if settlement is agreed upon with our written consent;
- c. The date of payment of **clean-up costs** and **emergency response expense**; or
- d. The date **legal and claims expense payments** are paid.

Whichever is applicable.

#### 8. Duties In The Event Of Occurrence, Offense, Pollution Incident, Professional Incident, Act, Error or Omission, Claim Or Suit

a. Without limiting the requirements of any insuring agreement in this policy, you must see to it that we are notified as soon as practicable of an **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission which may result in a **claim**. To the extent possible, notice should include:

- (1) How, when and where the **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the **occurrence**, offense, **pollution incident**, **professional incident** or act error or omission.

b. If a **claim** is made or **suit** is brought against any insured, you must:

- (1) Immediately record the specifics of the **claim** or **suit** and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the **claim** or **suit** as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **claim** or **suit**;



- (2) Authorize us to obtain records and other information;
  - (3) Cooperate with us in the investigation or settlement of the **claim** or defense against the **suit**; and
  - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. In the event **emergency response expenses** are incurred, you must provide, in writing, all available information relating to such **emergency response expenses** and the **pollution incident** giving rise thereto to us within fourteen (14) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- e. In the event of a **time-element pollution incident**, you must provide, in writing, all available information relating to the **pollution incident** giving rise thereto to us within thirty (30) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- f. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid and **emergency response expense**, without our consent.
- g. When any insured becomes legally obligated to pay **clean-up costs** to which this insurance applies, the insured must:
- (1) Submit, for our approval, all proposed work plans prior to submittal to any regulatory agency.
  - (2) Submit, for our approval, all bids and contracts for **clean-up costs** prior to execution or issuance.
  - (3) Forward progress submittals regarding **clean-up costs** at reasonable intervals and always prior to submittal to any regulatory agency that is authorized to review and approve such submittals.
- We shall have the right, but not the duty, to assume direct control of such **clean-up costs**. Any **clean-up costs** incurred by us shall be applied against the applicable Limit of Insurance and deductible.
- h. If we are prohibited under applicable law from investigating, defending or settling any such **claim** or **suit**, the insured shall, under our supervision, arrange for such investigation and defense thereof as is reasonably necessary, and subject to our prior authorization, shall effect such settlement thereof.

#### 9. Economic and Trade Sanctions

In accordance with laws and regulation of the United States concerning economic and trade sanctions administered and enforced by The Office Of Foreign Assets Control (OFAC), this policy is void ab initio solely with respect to any term or condition of this policy that violates any laws or regulations of the United States concerning economic and trade sanctions.

#### 10. Enforceability

If any part of this policy is deemed invalid or unenforceable, it shall not affect the validity or enforceability of any other part of this policy, which shall be enforced to the full extent permitted by law.

#### 11. Extended Reporting Period

This condition applies only as respects **COVERAGE PART III - SITE POLLUTION INCIDENT LEGAL LIABILITY** and **COVERAGE PART IV – PROFESSIONAL LIABILITY**.

- a. This condition applies only if:
- (1) The policy is cancelled or non-renewed for any reason except non-payment of the premium; or
  - (2) We renew or replace this policy with **COVERAGE PART III - SITE POLLUTION LIABILITY** or **COVERAGE PART IV – PROFESSIONAL LIABILITY** that provides claims-made coverage for **bodily injury, property damage, environmental damage** or **professional incident** and that has a Retroactive Date later than the one shown in the Declarations or for an **insured site**; and
  - (3) You do not purchase coverage to replace the coverage described in Paragraph **a.(2)**.
- b. Automatic **Extended Reporting Period**

You shall automatically have a period of ninety (90) days following the effective date of such termination of coverage in which to provide written notice to us of **claims** first made and reported within the automatic extended reporting period.

A **claim** first made and reported within the automatic **extended reporting period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

No part of the automatic **extended reporting period** shall apply if the optional **extended reporting period** is purchased.

**c. Extended Reporting Period Option:**

(1) A **claim** first made and reported within forty eight (48) months after the end of the **policy period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

(2) The Extended Reporting Period Endorsement will not reinstate or increase the Limits of Insurance or extend the **policy period**.

**d. We will issue the Endorsement indicating the **Extended Reporting Period** Option has been accepted if the first Named Insured shown in the Declarations:**

(1) Makes a written request for it which we receive within 30 days after the end of the **policy period**; and

(2) Promptly pays the additional premium, which will not exceed 200% of the annual premium for the policy, when due.

The Extended Reporting Period Endorsement will not take effect unless the additional premium is paid when due. If that premium is paid when due, the Endorsement may not be cancelled. The additional premium will be fully earned when the Endorsement takes effect.

**d. The Extended Reporting Period Endorsement will also amend **SECTION IV – CONDITIONS**, Condition **17. Other Insurance** so the insurance provided will be excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis, whose policy period begins or continues after the Endorsement takes effect.**

**12. Headings**

The descriptions in the headings and sub-headings of this policy are inserted solely for convenience and do not constitute any part of the terms or conditions on this policy.

**13. Independent Counsel**

In the event the insured is entitled by law to select independent counsel to oversee our defense of a **claim** or **suit** at our expense, the attorney fees and all other litigation expenses we must pay to that counsel are limited to the rates we actually pay to counsel we retain in the ordinary course of business in the defense of similar **claims** or **suits** in the community where the **claim** or **suit** arose or is being defended.

Additionally, we may exercise the right to require that such counsel have certain minimum qualifications with respect to their competency including experience in defending **claims** or **suits** similar to the one pending against the insured and to require such counsel have errors and omissions insurance coverage. As respects any such counsel, the insured agrees that counsel will timely respond to our request for information regarding the **claims** or **suit**.

Furthermore, the insured may at any time, by the insured's written consent, freely and fully waive these rights to select independent counsel.

**14. Inspections and Surveys**

- a. We have the right to:
  - (1) Make inspections and surveys at any time;
  - (2) Give you reports on the conditions we find; and
  - (3) Recommend changes.
- b. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
  - (1) Are safe or healthful; or
  - (2) Comply with laws, regulations, codes or standards.

This applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

#### 15. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a **suit** asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

#### 16. Multiple Coverage Sections

No **claim** or **suit**, or part thereof, for which we have accepted coverage or coverage has been held to apply under one or more Coverages in this policy shall be covered under any other Coverages in this policy.

#### 17. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this policy, our obligations are limited as follows:

##### a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below. However, regardless of whether **b.** below applies, in the event that a written contract or agreement or permit requires this insurance to be primary for any person or organization you agreed to insure and such person or organization is an insured under this policy, we will not seek contributions from any such other insurance issued to such person or organization

##### b. Excess Insurance

- (1) This insurance is excess over:
  - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
    - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for **your work**;
    - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
    - (iii) That is insurance purchased by you to cover your liability as a tenant for **property damage** to premises rented to you or temporarily occupied by you with permission of the owner; or

This page has been left blank intentionally.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**BUSINESS AUTO COVERAGE ENHANCEMENT ENDORSEMENT**

This endorsement modifies insurance provided under the following:

**BUSINESS AUTO COVERAGE FORM**

With respect to coverage afforded by this endorsement, the provisions of the policy apply unless modified by the endorsement.

If the policy to which this endorsement is attached also contains a Business Auto Coverage Enhancement Endorsement with a specific state named in the title, this endorsement does not apply to vehicles garaged in that specified state.

**COVERAGE INDEX**

<u>SUBJECT</u>	<u>PROVISION NUMBER</u>
ACCIDENTAL AIRBAG DEPLOYMENT	13
ADDITIONAL INSURED BY CONTRACT, AGREEMENT OR PERMIT	4
AMENDED DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS	21
AMENDED FELLOW EMPLOYEE EXCLUSION	6
AUDIO, VISUAL AND DATA ELECTRONIC EQUIPMENT COVERAGE	15
BODILY INJURY REDEFINED	25
EMPLOYEES AS INSUREDS (Including Employee Hired Auto)	3
EXTRA EXPENSE - BROADENED COVERAGE	11
GLASS REPAIR - WAIVER OF DEDUCTIBLE	17
HIRED AUTO COVERAGE TERRITORY	23
HIRED AUTO PHYSICAL DAMAGE (Including Employee Hired Auto)	7
LOAN / LEASE GAP (Coverage Not Available In New York)	16
NEWLY FORMED OR ACQUIRED SUBSIDIARIES	2
PARKED AUTO COLLISION COVERAGE (WAIVER OF DEDUCTIBLE)	18
PERSONAL EFFECTS COVERAGE	12
PHYSICAL DAMAGE - ADDITIONAL TRANSPORTATION EXPENSE COVERAGE	9
PHYSICAL DAMAGE DEDUCTIBLE - VEHICLE TRACKING SYSTEM	14
PRIMARY AND NON-CONTRIBUTORY - WRITTEN CONTRACT OR WRITTEN AGREEMENT	24
RENTAL REIMBURSEMENT	10
SUPPLEMENTARY PAYMENTS	5
TOWING AND LABOR	8
TRAILERS - INCREASED LOAD CAPACITY	1
TWO OR MORE DEDUCTIBLES	19
UNINTENTIONAL FAILURE TO DISCLOSE HAZARDS	20
WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US	22

**SECTION I - COVERED AUTOS** is amended as follows:

**1. TRAILERS - INCREASED LOAD CAPACITY**

The following replaces Paragraph **C.1. Certain Trailers, Mobile Equipment And Temporary Substitute Autos** of **SECTION I - COVERED AUTOS**:

"Trailers" with a load capacity of 3,000 pounds or less designed primarily for travel on public roads.

**SECTION II - LIABILITY COVERAGE** is amended as follows:

**2. NEWLY FORMED OR ACQUIRED SUBSIDIARIES**

**SECTION II - LIABILITY COVERAGE**, Paragraph **A.1. - Who Is An Insured** is amended to include the following as an "insured":

d. Any legally incorporated subsidiary of which you own more than 50 percent interest during the policy period. Coverage is afforded only for 90 days from the date of acquisition or formation. However, "insured" does not include any organization that:

- (1) Is a partnership or joint venture; or
- (2) Is an "insured" under any other automobile policy except a policy written specifically to apply in excess of this policy; or
- (3) Has exhausted its Limit of Insurance or had its policy terminated under any other automobile policy.

Coverage under this provision d. does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization.

**3. EMPLOYEES AS INSURED**

**SECTION II - LIABILITY COVERAGE**, Paragraph **A.1. Who Is An Insured** is amended to include the following as an "insured":

- e. Any "employee" of yours while using a covered "auto" you do not own, hire or borrow but only for acts within the scope of their employment by you. Insurance provided by this endorsement is excess over any other insurance available to any "employee".
- f. Any "employee" of yours while operating an "auto" hired or borrowed under a written contract or agreement in that "employee's" name, with your permission, while performing duties related to the conduct of your business and within the scope of their employment. Insurance provided by this endorsement is excess over any other insurance available to the "employee".

**4. ADDITIONAL INSURED BY CONTRACT, AGREEMENT OR PERMIT**

**SECTION II - LIABILITY COVERAGE**, Paragraph **A.1. Who Is An Insured** is amended to include the following as an "insured":

g. Any person or organization with respect to the operation, maintenance or use of a covered "auto", provided that you and such person or organization have agreed in a written contract, written agreement, or permit issued to you by governmental or public authority, to add such person, or organization, or governmental or public authority to this policy as an "insured".

However, such person or organization is an "insured":

- (1) Only with respect to the operation, maintenance or use of a covered "auto";
- (2) Only for "bodily injury" or "property damage" caused by an "accident" which takes place after you executed the written contract or written agreement, or the permit has been issued to you; and
- (3) Only for the duration of that contract, agreement or permit.

The "insured" is required to submit a claim to any other insurer to which coverage could apply for defense and indemnity. Unless the "insured" has agreed in writing to primary noncontributory wording per enhancement number 24, this policy is excess over any other collectible insurance.

**5. SUPPLEMENTARY PAYMENTS**

**SECTION II - LIABILITY COVERAGE, Coverage Extensions, 2.a. Supplementary Payments**, Paragraphs (2) and (4) are replaced by the following:

- (2) Up to \$3,000 for cost of bail bonds (including bonds for related traffic violations ) required because of an "accident" we cover. We do not have to furnish these bonds.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$500 a day because of time off from work.

## 6. AMENDED FELLOW EMPLOYEE EXCLUSION

In those jurisdictions where, by law, fellow "employees" are not entitled to the protection afforded to the employer by the workers compensation exclusivity rule, or similar protection, the following provision is added:

**SECTION II - LIABILITY, Exclusion B.5. Fellow Employee** does not apply if the "bodily injury" results from the use of a covered "auto" you own or hire if you have workers compensation insurance in force for all of your "employees" at the time of "loss".

This coverage is excess over any other collectible insurance.

**SECTION III - PHYSICAL DAMAGE COVERAGE** is amended as follows:

## 7. HIRED AUTO PHYSICAL DAMAGE

Paragraph **A.4. Coverage Extensions of SECTION III - PHYSICAL DAMAGE COVERAGE**, is amended by adding the following:

If hired "autos" are covered "autos" for Liability Coverage, and if Comprehensive, Specified Causes of Loss or Collision coverage are provided under the Business Auto Coverage Form for any "auto" you own, then the Physical Damage coverages provided are extended to "autos":

- a. You hire, rent or borrow; or
- b. Your "employee" hires or rents under a written contract or agreement in that "employee's" name, but only if the damage occurs while the vehicle is being used in the conduct of your business, subject to the following limit and deductible:
  - a. The most we will pay for "loss" in any one "accident" or "loss" is the smallest of:
    - (1) \$50,000; or
    - (2) The actual cash value of the damaged or stolen property as of the time of the "loss"; or
    - (3) The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality, minus a deductible.
  - b. The deductible will be equal to the largest deductible applicable to any owned "auto" for that coverage.
  - c. Subject to the limit, deductible and excess provisions described in this provision, we will provide coverage equal to the broadest coverage applicable to any covered "auto" you own.
  - d. Subject to a maximum of \$1,000 per "accident", we will also cover the actual loss of use of the hired "auto" if it results from an "accident", you are legally liable and the lessor incurs an actual financial loss.
  - e. This coverage extension does not apply to:
    - (1) Any "auto" that is hired, rented or borrowed with a driver; or
    - (2) Any "auto" that is hired, rented or borrowed from your "employee" or any member of your "employee's" household.

Coverage provided under this extension is excess over any other collectible insurance available at the time of "loss".

## 8. TOWING AND LABOR

**SECTION III - PHYSICAL DAMAGE COVERAGE**, Paragraph **A.2. Towing**, is amended by the addition of the following:

We will pay towing and labor costs incurred, up to the limits shown below, each time a covered "auto" classified and rated as a private passenger type, "light truck" or "medium truck" is disabled:

- a. For private passenger type vehicles, we will pay up to \$75 per disablement.
- b. For "light trucks", we will pay up to \$75 per disablement. "Light trucks" are trucks that have a gross vehicle weight (GVW) of 10,000 pounds or less.
- c. For "medium trucks", we will pay up to \$150 per disablement. "Medium trucks" are trucks that have a gross vehicle weight (GVW) of 10,001 - 20,000 pounds.

However, the labor must be performed at the place of disablement.

**9. PHYSICAL DAMAGE - ADDITIONAL TRANSPORTATION EXPENSE COVERAGE**

Paragraph **A.4.a. Coverage Extensions, Transportation Expenses** of **SECTION III - PHYSICAL DAMAGE COVERAGE**, is amended to provide a limit of \$50 per day and a maximum limit of \$1,500.

**10. RENTAL REIMBURSEMENT**

**SECTION III - PHYSICAL DAMAGE COVERAGE, A. Coverage**, is amended by adding the following:

- a. We will pay up to \$75 per day for rental reimbursement expenses incurred by you for the rental of an "auto" because of "accident" or "loss", to an "auto" for which we also pay a "loss" under Comprehensive, Specified Causes of Loss or Collision Coverages. We will pay only for those expenses incurred after the first 24 hours following the "accident" or "loss" to the covered "auto."
- b. Rental Reimbursement requires the rental of a comparable or lessor vehicle, which in many cases may be substantially less than \$75 per day, and will only be allowed for the period of time it should take to repair or replace the vehicle with reasonable speed and similar quality, up to a maximum of 30 days.
- c. We will also pay up to \$500 for reasonable and necessary expenses incurred by you to remove and replace your tools and equipment from the covered "auto". This limit is excess over any other collectible insurance.
- d. This coverage does not apply unless you have a business necessity that other "autos" available for your use and operation cannot fill.
- e. If "loss" results from the total theft of a covered "auto" of the private passenger type, we will pay under this coverage only that amount of your rental reimbursement expenses which is not already provided under Paragraph **4. Coverage Extension**.
- f. No deductible applies to this coverage.
- g. The insurance provided under this extension is excess over any other collectible insurance.

If this policy also provides Rental Reimbursement Coverage you purchased, the coverage provided by this Enhancement Endorsement is in addition to the coverage you purchased.

For the purposes of this endorsement provision, materials and equipment do not include "personal effects" as defined in provision **12.B**.

**11. EXTRA EXPENSE - BROADENED COVERAGE**

Under **SECTION III - PHYSICAL DAMAGE COVERAGE, A. Coverage**, we will pay for the expense of returning a stolen covered "auto" to you. The maximum amount we will pay is \$1,000.

**12. PERSONAL EFFECTS COVERAGE**

**A. SECTION III - PHYSICAL DAMAGE COVERAGE, A. Coverage**, is amended by adding the following:

If you have purchased Comprehensive Coverage on this policy for an "auto" you own and that "auto" is stolen, we will pay, without application of a deductible, up to \$600 for "personal effects" stolen with the "auto."

The insurance provided under this provision is excess over any other collectible insurance.

**B. SECTION V - DEFINITIONS** is amended by adding the following:

For the purposes of this provision, "personal effects" mean tangible property that is worn or carried by an "insured." "Personal effects" does not include tools, equipment, jewelry, money or securities.

**13. ACCIDENTAL AIRBAG DEPLOYMENT**

**SECTION III - PHYSICAL DAMAGE COVERAGE, B. Exclusions** is amended by adding the following:

If you have purchased Comprehensive or Collision Coverage under this policy, the exclusion for "loss" relating to mechanical breakdown does not apply to the accidental discharge of an airbag.

Any insurance we provide shall be excess over any other collectible insurance or reimbursement by manufacturer's warranty. However, we agree to pay any deductible applicable to the other coverage or warranty.



**14. PHYSICAL DAMAGE DEDUCTIBLE - VEHICLE TRACKING SYSTEM**

**SECTION III - PHYSICAL DAMAGE COVERAGE, D. Deductible**, is amended by adding the following:

Any Comprehensive Deductible shown in the Declarations will be reduced by 50% for any "loss" caused by theft if the vehicle is equipped with a vehicle tracking device such as a radio tracking device or a global position device and that device was the method of recovery of the vehicle.

**15. AUDIO, VISUAL AND DATA ELECTRONIC EQUIPMENT COVERAGE**

**SECTION III - PHYSICAL DAMAGE COVERAGE, B. Exclusions**, Paragraph **a.** of the exception to exclusions **4.c.** and **4.d.** is deleted and replaced with the following:

Exclusions **4.c.** and **4.d.** do not apply to:

- a. Electronic equipment that receives or transmits audio, visual or data signals, whether or not designed solely for the reproduction of sound, if the equipment is:
  - (1) Permanently installed in the covered "auto" at the time of the "loss" or removable from a housing unit that is permanently installed in the covered "auto"; and
  - (2) Designed to be solely operated by use from the power from the "auto's" electrical system; and
  - (3) Physical damage coverages are provided for the covered "auto".

If the "loss" occurs solely to audio, visual or data electronic equipment or accessories used with this equipment, then our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by a \$100 deductible.

**16. LOAN / LEASE GAP COVERAGE (Not Applicable In New York)**

**A. Paragraph C. Limit Of Insurance of SECTION III - PHYSICAL DAMAGE COVERAGE** is amended by adding the following:

The most we will pay for a "total loss" to a covered "auto" owned by or leased to you in any one "accident" is the greater of the:

- 1. Balance due under the terms of the loan or lease to which the damaged covered "auto" is subject at the time of the "loss" less the amount of:
  - a. Overdue payments and financial penalties associated with those payments as of the date of the "loss";
  - b. Financial penalties imposed under a lease due to high mileage, excessive use or abnormal wear and tear;
  - c. Costs for extended warranties, Credit Life Insurance, Health, Accident or Disability Insurance purchased with the loan or lease;
  - d. Transfer or rollover balances from previous loans or leases;
  - e. Final payment due under a "Balloon Loan";
  - f. The dollar amount of any unrepaired damage which occurred prior to the "total loss" of a covered "auto";
  - g. Security deposits not refunded by a lessor;
  - h. All refunds payable or paid to you as a result of the early termination of a lease agreement or as a result of the early termination of any warranty or extended service agreement on a covered "auto";
  - i. Any amount representing taxes;
  - j. Loan or lease termination fees; or
- 2. The actual cash value of the damage or stolen property as of the time of the "loss".

An adjustment for depreciation and physical condition will be made in determining the actual cash value at the time of the "loss". This adjustment is not applicable in Texas.

**B. Additional Conditions**

This coverage applies only to the original loan for which the covered "auto" that incurred the "loss" serves as collateral, or lease written on the covered "auto" that incurred the "loss".

**C. SECTION V - DEFINITIONS** is changed by adding the following:

As used in this endorsement provision, the following definitions apply:

"Total loss" means a "loss" in which the cost of repairs plus the salvage value exceeds the actual cash value.

A "balloon loan" is one with periodic payments that are insufficient to repay the balance over the term of the loan, thereby requiring a large final payment.

**17. GLASS REPAIR - WAIVER OF DEDUCTIBLE**

Paragraph **D. Deductible** of **SECTION III - PHYSICAL DAMAGE COVERAGE** is amended by the addition of the following:

No deductible applies to glass damage if the glass is repaired rather than replaced.

**18. PARKED AUTO COLLISION COVERAGE (WAIVER OF DEDUCTIBLE)**

Paragraph **D. Deductible** of **SECTION III - PHYSICAL DAMAGE COVERAGE** is amended by the addition of the following:

The deductible does not apply to "loss" caused by collision to such covered "auto" of the private passenger type or light weight truck with a gross vehicle weight of 10,000 lbs. or less as defined by the manufacturer as maximum loaded weight the "auto" is designed to carry while it is:

- a. In the charge of an "insured";
- b. Legally parked; and
- c. Unoccupied.

The "loss" must be reported to the police authorities within 24 hours of known damage.

The total amount of the damage to the covered "auto" must exceed the deductible shown in the Declarations.

This provision does not apply to any "loss" if the covered "auto" is in the charge of any person or organization engaged in the automobile business.

**19. TWO OR MORE DEDUCTIBLES**

Under **SECTION III - PHYSICAL DAMAGE COVERAGE**, if two or more company policies or coverage forms apply to the same "accident", the following applies to Paragraph **D. Deductible**:

- a. If the applicable Business Auto deductible is the smaller (or smallest) deductible, it will be waived; or
- b. If the applicable Business Auto deductible is not the smaller (or smallest) deductible, it will be reduced by the amount of the smaller (or smallest) deductible; or
- c. If the "loss" involves two or more Business Auto coverage forms or policies, the smaller (or smallest) deductible will be waived.

For the purpose of this endorsement, company means any company that is part of the Liberty Mutual Group.

**SECTION IV - BUSINESS AUTO CONDITIONS** is amended as follows:

**20. UNINTENTIONAL FAILURE TO DISCLOSE HAZARDS**

**SECTION IV- BUSINESS AUTO CONDITIONS**, Paragraph **B.2.** is amended by adding the following:

If you unintentionally fail to disclose any hazards, exposures or material facts existing as of the inception date or renewal date of the Business Auto Coverage Form, the coverage afforded by this policy will not be prejudiced.

However, you must report the undisclosed hazard of exposure as soon as practicable after its discovery, and we have the right to collect additional premium for any such hazard or exposure.

**21. AMENDED DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT, OR LOSS**

**SECTION IV - BUSINESS AUTO CONDITIONS**, Paragraph **A.2.a.** is replaced in its entirety by the following:

- a. In the event of "accident", claim, "suit" or "loss", you must promptly notify us when it is known to:
- (1) You, if you are an individual;
  - (2) A partner, if you are a partnership;
  - (3) Member, if you are a limited liability company;
  - (4) An executive officer or the "employee" designated by the Named Insured to give such notice, if you are a corporation.

To the extent possible, notice to us should include:

- (a) How, when and where the "accident" or "loss" took place;
- (b) The "insureds" name and address; and
- (c) The names and addresses of any injured persons and witnesses.

**22. WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US**

**SECTION IV - BUSINESS AUTO CONDITIONS**, Paragraph **A.5. Transfer Of Rights Of Recovery Against Others To Us**, is amended by the addition of the following:

If the person or organization has in a written agreement waived those rights before an "accident" or "loss", our rights are waived also.

**23. HIRED AUTO COVERAGE TERRITORY**

**SECTION IV - BUSINESS AUTO CONDITIONS**, Paragraph **B.7. Policy Period, Coverage Territory**, is amended by the addition of the following:

- f. For "autos" hired 30 days or less, the coverage territory is anywhere in the world, provided that the "insured's" responsibility to pay for damages is determined in a "suit", on the merits, in the United States, the territories and possessions of the United States of America, Puerto Rico or Canada or in a settlement we agree to.

This extension of coverage does not apply to an "auto" hired, leased, rented or borrowed with a driver.

**24. PRIMARY AND NON-CONTRIBUTING IF REQUIRED BY WRITTEN CONTRACT OR WRITTEN AGREEMENT**

The following is added to **SECTION IV - BUSINESS AUTO CONDITIONS, General Conditions, B.5. Other Insurance** and supersedes any provision to the contrary:

This Coverage Form's Covered Autos Liability Coverage is primary to and will not seek contribution from any other insurance available to an "insured" under your policy provided that:

1. Such "insured" is a Named Insured under such other insurance; and
2. You have agreed in a written contract or written agreement that this insurance would be primary and would not seek contribution from any other insurance available to such "insured".

**SECTION V - DEFINITIONS** is amended as follows:

**25. BODILY INJURY REDEFINED**

Under **SECTION V - DEFINITIONS**, Definition **C.** is replaced by the following:

"Bodily injury" means physical injury, sickness or disease sustained by a person, including mental anguish, mental injury, shock, fright or death resulting from any of these at any time.

This page has been left blank intentionally.