

COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
WHATCOM COUNTY
FOR
REHABILITATION OF FLOOD CONTROL WORKS
TIMON LEVEE

THIS AGREEMENT is entered into this ____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for **U.S. Army Corps of Engineers Walla Walla District** (hereinafter the “District Commander”) and **Whatcom County** (hereinafter the “Public Sponsor”), represented by its **Executive Member from the Flood Control Zone District**.

WITNESSETH, THAT:

WHEREAS, the non-Federal flood risk management project commonly referred to as the **Whatcom County Timon Levee** (hereinafter the “project”), is located on the right-bank of the Nooksack River, near Timon Road in the City of Lynden, Washington;

WHEREAS, pursuant to Public Law 84-99, as amended (33 U.S.C. 701n), the Government is authorized to conduct repair or restoration of the project (hereinafter the “rehabilitation work” as defined in Article I.A. of this Agreement) if the Public Sponsor agrees to provide 20 percent of costs of the rehabilitation work;

WHEREAS, on **January 6, 2022**, the Public Sponsor requested in writing that the Government, undertake the rehabilitation work and agreed to provide its 20 percent share of the costs of such rehabilitation work; and

WHEREAS, the Government and the Public Sponsor have the full authority and capability to perform the rehabilitation work in accordance with the terms of this Agreement and acknowledge that Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b), provides that this Agreement shall be enforceable in the appropriate district court of the United States.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “rehabilitation work” means **repairing approximately 1,300 linear feet of levee with slopes, materials, and other aspects brought in-line with current engineering standards to restore performance and protection levels**, as generally described in **Project**

Information Report: Rehabilitation of Flood Control Works: NSK-03-22 dated August 2022 and approved by the **Northwest Division Commander** on **September 6, 2022**.

B. The term “HTRW” means hazardous, toxic, and radioactive wastes, which includes any material listed as a “hazardous substance” (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”) (42 U.S.C. 9601-9675) and any other regulated material in accordance with applicable laws and regulations.

C. The term “rehabilitation costs” means all costs incurred by the Government and the Public Sponsor that are directly related to the design and construction of the rehabilitation work and cost shared. The term includes the Government’s engineering, design, and construction costs; the Government’s supervision and administration costs; the Public Sponsor’s creditable cost for in-kind contributions; and the costs of historic preservation activities except for data recovery for historic properties. The term does not include costs for operation and maintenance; real property interests, placement area improvements, and relocations; HTRW investigations, cleanup, and response; betterments; audits; or increased costs to correct deficient, deferred, or inadequate maintenance, or for the Public Sponsor’s preferred alternatives.

D. The term “in-kind contributions” means those materials or services provided by the Public Sponsor that are identified as being integral to the rehabilitation work by the Division Commander for **Northwestern Division** (hereinafter the “Division Commander”). To be integral to the rehabilitation work, the material or service must be part of the work that the Government would otherwise have undertaken for design and construction of the rehabilitation work.

E. The term "betterment" shall mean the difference in construction of an element of the rehabilitation work that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to construction of that element.

F. The term “fiscal year” means one year beginning on October 1st and ending on September 30th of the following year.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. In accordance with applicable Federal laws, regulations, and policies, the Government shall undertake the rehabilitation work subject to receiving funds appropriated by the Congress and funds provided by the Public Sponsor. In carrying out its obligations under this Agreement, the Public Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including but not limited to, if applicable, Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

B. The Public Sponsor shall contribute 20 percent of the rehabilitation costs and provide the following, in accordance with the provisions of this paragraph:

1. As further specified in Article III, the Public Sponsor, at no cost to the Government, shall provide the real property interests, placement area improvements, and relocations required for the rehabilitation work.

2. In accordance with Article IV, the Public Sponsor, at no cost to the Government, shall be responsible for undertaking any HTRW investigations required by the Government for the rehabilitation work.

3. If providing in-kind contributions as a part of its cost share for the rehabilitation work, the Public Sponsor shall obtain all applicable licenses and permits necessary for such work. As functional portions of the work are completed, the Public Sponsor shall begin operation and maintenance of such work. Upon completion of the work, the Public Sponsor shall so notify the Government within 30 calendar days and provide the Government with a copy of as-built drawings for the work. The Government shall verify and credit the value of the in-kind contributions towards the Public Sponsor's share of the rehabilitation costs in accordance with the following procedures, requirements, and conditions and subject to audit in accordance with Article VIII.B. to determine reasonableness, allocability, and allowability of costs.

a. The value shall be equivalent to the costs, documented to the satisfaction of the Government, that the Public Sponsor incurred to provide the in-kind contributions, which may include engineering and design; construction; and supervision and administration, but shall not include any costs associated with betterments, as determined by the Government. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Public Sponsor's employees.

b. No credit shall be afforded for the following: interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; the value of in-kind contributions obtained at no cost to the Public Sponsor; any in-kind contributions performed prior to the effective date of this Agreement; or costs that exceed the Government's estimate of the cost for such in-kind contributions.

c. Any credit afforded for in-kind contributions under the terms of this Agreement is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act), and credit may be withheld, in whole or in part, as a result of the Public Sponsor's failure to comply with its obligations under these laws.

4. After considering the estimated amount of credit that will be afforded to the Public Sponsor pursuant to paragraph B.3., above, the Government shall determine the estimated amount of funds required from the Public Sponsor to meet its 20 percent cost share for the then-

current fiscal year. No later than 60 calendar days after receipt of notification from the Government, the Public Sponsor shall provide the full amount of such required funds to the Government in accordance with Article V.C.

5. No later than August 1st prior to each subsequent fiscal year, the Government shall provide the Public Sponsor with a written estimate of the full amount of funds required from the Public Sponsor during that fiscal year to meet its cost share. No later than September 1st prior to that fiscal year, the Public Sponsor shall provide the full amount of such required funds to the Government in accordance with Article V.C.

C. To the extent practicable and in accordance with Federal law, regulations, and policies, the Government shall afford the Public Sponsor the opportunity to review and comment on contract solicitations, including relevant plans and specifications, prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

D. Within 30 calendar days of the District Commander determining that the rehabilitation work is complete, the District Commander shall so notify the Public Sponsor in writing. The Government shall furnish the Public Sponsor with an Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") to reflect changed conditions resulting from rehabilitation work and copies of all as-built drawings for the completed work.

1. The Government undertaking the rehabilitation work has no effect on the Public Sponsor's responsibility for operation, maintenance, repair, rehabilitation, and replacement of the project, to include any additional responsibilities related to rehabilitation of the project, at no cost to the Government. The Public Sponsor shall continue to operate and maintain the project in accordance with applicable Federal laws and regulations and the Government's specific directions in the OMRR&R Manual. The Government and the Public Sponsor shall consult on any subsequent updates or amendments to the OMRR&R Manual.

2. The Government may enter, at reasonable times and in a reasonable manner, upon real property interests that the Public Sponsor now or hereafter owns or controls to inspect the project. If the Government determines that the Public Sponsor is failing to perform its obligations under this Agreement and the Public Sponsor does not correct such failures within a reasonable time after notification by the Government, the Government, at its sole discretion, may undertake any operation, maintenance, repair, rehabilitation, or replacement of the project, or deny further assistance under Public Law 84-99. No operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Public Sponsor of its obligations under this Agreement or preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance of this Agreement.

E. The Public Sponsor shall not use Federal program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the

funds are authorized to be used for the rehabilitation work. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. The Public Sponsor shall hold and save the Government free from all damages arising from the rehabilitation work, and for operation and maintenance of the project, except for damages due to the fault or negligence of the Government or the Government's contractors.

G. The Public Sponsor agrees to continue to participate in and comply with the policies and procedures of the U.S. Army Corps of Engineers Rehabilitation and Inspection Program, and of Title 33, Code of Federal Regulations, Part 208.10 (33 CRF 208.10).

H. The Public Sponsor may request in writing that the Government perform betterments on the Public Sponsor's behalf. Each request shall be subject to review and written approval by the Division Commander. If the Government agrees to such request, the Government shall provide written notice to the Public Sponsor of the amount of funds required to cover such costs in advance of the Government performing such betterments. The Public Sponsor shall provide such funds in accordance with Article V.F. In addition, the Public Sponsor is responsible for providing, at no cost to the Government, any additional real property interests, relocations, and placement area improvements determined by the Government to be required for such betterments.

ARTICLE III - REAL PROPERTY INTERESTS, PLACEMENT AREA IMPROVEMENTS, AND RELOCATIONS

A. The Government, after consultation with the Public Sponsor, shall determine the real property interests required for the rehabilitation work. The Government shall provide the Public Sponsor with general written descriptions, including maps as appropriate, of the real property interests that the Government determines the Public Sponsor must provide for the rehabilitation work. The real property interests required for the rehabilitation work may be provided incrementally for each construction contract. In accordance with Article IV, the Public Sponsor shall investigate to verify that HTRW does not exist in, on, or under any of the real property interests required for the rehabilitation work. For real property interests currently owned or controlled by the Public Sponsor, such HTRW investigations must be completed prior to the Government advertising a construction contract for that work. For any additional real property interests to be acquired by the Public Sponsor, such HTRW investigations must be completed by the Public Sponsor prior to the Government providing the Public Sponsor with a written notice to proceed with that acquisition. The Public Sponsor shall provide the Government with authorization for entry to such real property interests according to the Government's construction schedule for that work. The Public Sponsor shall ensure that real property interests they provide are retained in public ownership.

B. The Government, after consultation with the Public Sponsor, shall determine the placement area improvements required for the rehabilitation work, provide the Public Sponsor with general written descriptions, including maps as appropriate, of such improvements, and

provide the Public Sponsor with a written notice to proceed with such improvements. The Public Sponsor shall construct the improvements in accordance with the Government's construction schedule for that work.

C. The Government, after consultation with the Public Sponsor, shall determine the relocations required for the rehabilitation work, provide the Public Sponsor with general written descriptions, including maps as appropriate, of such relocations, and provide the Public Sponsor with a written notice to proceed with such relocations. The Public Sponsor shall perform or ensure the performance of these relocations in accordance with the Government's construction schedule for that work.

D. In acquiring the real property interests for the rehabilitation work, the Public Sponsor assures the Government that it will comply with the following:

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under 42 U.S.C. 4622, 4623 and 4624;

(2) relocation assistance programs offering the services described in 42 U.S.C. 4625 shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with 42 U.S.C. 4625(c)(3);

(4) in acquiring real property, the Public Sponsor will be guided, to the greatest extent practicable under State law, by the land acquisition policies in 42 U.S.C. 4651 and the provisions of 42 U.S.C. 4652; and

(5) property owners will be paid or reimbursed for necessary expenses as specified in 42 U.S.C. 4653 and 4654.

ARTICLE IV - HTRW

A. The Public Sponsor shall be responsible for undertaking any investigations to identify the existence and extent of any HTRW regulated under applicable law that may exist in, on, or under real property interests required for the rehabilitation work.

B. In the event it is discovered that HTRW exists in, on, or under any of the real property interests needed for the rehabilitation work, the Public Sponsor and the Government shall provide written notice to each other within 15 calendar days of such discovery, in addition to providing any other notice required by applicable law. If HTRW is discovered prior to acquisition, the Public Sponsor shall not proceed with the acquisition of such real property interests until the parties agree that the Public Sponsor should proceed. If HTRW is discovered

after acquisition of the real property interests, no further rehabilitation activities within the contaminated area shall proceed until the parties agree on an appropriate course of action.

C. If HTRW is found to exist in, on, or under any required real property interests, the parties shall consider any liability that might arise under applicable law and determine whether to initiate construction, or if already initiated, whether to continue, suspend, or terminate construction.

1. Should the parties initiate or continue construction, the Public Sponsor shall be solely responsible, as between the Government and the Public Sponsor, for the performance and costs of HTRW cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. The Public Sponsor shall pay such costs without reimbursement or credit by the Government. In no event will the Government proceed with that construction before the Public Sponsor has completed the required cleanup and response actions.

2. In the event the parties cannot reach agreement on how to proceed or the Public Sponsor fails to discharge its responsibilities under this Article upon direction by the Government, the Government may suspend or terminate construction. Additionally, the Government may undertake any actions it determines necessary to avoid a release of such HTRW with the Public Sponsor responsible for such costs without credit or reimbursement by the Government.

D. In the event of a HTRW discovery, the Public Sponsor and the Government shall initiate consultation with each other within 15 calendar days in an effort to ensure that responsible parties bear any necessary cleanup and response costs as required by applicable law. Any decision made pursuant to this Article shall not relieve any third party from any HTRW liability that may arise under applicable law.

E. To the maximum extent practicable, the Government and Public Sponsor shall perform their responsibilities under this Agreement in a manner that will not cause HTRW liability to arise under applicable law.

F. As between the Government and the Public Sponsor, the Public Sponsor shall be considered the owner and operator of the project, including the rehabilitation work, for purposes of CERCLA liability or other applicable law.

ARTICLE V - PROVISION OF NON-FEDERAL COST SHARE

A. As of the effective date of this Agreement, the rehabilitation costs are projected to be **\$2,025,984.08**, with the Government's share of such costs projected to be **\$1,620,787.26** and the Public Sponsor's share of such costs projected to be **\$405,196.82**, which includes creditable in-kind contributions project to be \$ 0, and the amount of funds required. Costs for betterments are projected to be \$ 0. These amounts are estimates only that are subject to adjustment by

the Government and are not to be construed as the total financial responsibilities of the Government and the Public Sponsor.

B. The Government shall provide the Public Sponsor with **quarterly** financial reports setting forth the estimated rehabilitation costs and the Government's and Public Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Public Sponsor funds, to date; the amount of funds provided by the Public Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated amount of funds required from the Public Sponsor during the upcoming fiscal year.

C. The Public Sponsor shall provide the funds required to meet its share of rehabilitation costs by delivering a check payable to "FAO, USAED, **Seattle G3**" to the District Commander, or verifying to the satisfaction of the Government that the Public Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Public Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Public Sponsor to cover the non-Federal share of rehabilitation costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Public Sponsor to cover the Public Sponsor's required share of such rehabilitation costs, the Government shall provide the Public Sponsor with written notice of the amount of additional funds required. Within 60 calendar days from receipt of such notice, the Public Sponsor shall provide the Government with the full amount of such additional required funds.

E. Upon completion of construction of the rehabilitation work, the Government shall conduct a final accounting and furnish the Public Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Public Sponsor, the Public Sponsor, within 60 calendar days of receipt of written notice from the Government, shall provide the Government with the full amount of such additional required funds by delivering a check payable to "FAO, USAED, **Seattle G3**" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. Such final accounting does not limit the Public Sponsor's responsibility to pay its share of rehabilitation costs, including contract claims or any other liability that may become known after the final accounting. If the final accounting determines that funds provided by the Public Sponsor exceed the amount of funds required to meet its share of rehabilitation costs, the Government shall refund such excess amount, subject to the availability of funds for the refund.

F. If the Government agrees to perform betterments on the Public Sponsor's behalf, the Government shall provide written notice to the Public Sponsor of the amount of funds required to cover such costs. No later than 60 calendar days after receipt of such written notice, the Public Sponsor shall make the full amount of such required funds available to the Government through either payment method specified in Article V.E. If at any time the Government determines that additional funds are required to cover such costs, the Public Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government.

If the Government determines that funds provided by the Public Sponsor exceed the amount that was required for the Government to complete such work, the Government shall refund any remaining unobligated amount.

ARTICLE VI - DISPUTE RESOLUTION

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

ARTICLE VII - TERMINATION OR SUSPENSION

A. If at any time the Public Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate construction unless the Assistant Secretary of the Army (Civil Works) determines that continuation of such work is in the interest of the United States or is necessary in order to satisfy agreements with other non-Federal interests.

B. If the Government determines at any time that the Federal funds made available for the rehabilitation work are not sufficient to complete such work, the Government shall so notify the Public Sponsor in writing within 30 calendar days, and upon exhaustion of such funds, the Government shall suspend construction until there are sufficient funds appropriated by Congress and funds provided by the Public Sponsor to allow construction to resume.

C. If HTRW is found to exist in, on, or under any required real property interests, the parties shall follow the procedures set forth in Article IV.

D. In the event of termination, the parties shall conclude their activities relating to the rehabilitation work. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay the costs of termination, including any costs of resolution of real property acquisition, resolution of contract claims, and resolution of contract modifications.

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

ARTICLE VIII - MAINTENANCE OF RECORDS AND AUDITS

A. The parties shall develop procedures for the maintenance by the Public Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Public Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the rehabilitation work. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits shall not be included in rehabilitations costs.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Public Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the Public Sponsor's request, provide to the Public Sponsor or independent auditors any such information necessary to enable an audit of the Public Sponsor's activities under this Agreement. The Public Sponsor shall pay the costs of non-Federal audits without reimbursement or credit by the Government.

ARTICLE IX - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Public Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE X - NOTICES

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

If to the Public Sponsor:

Whatcom County
Whatcom County Public Works – River & Flood Division
322 N. Commercial Street, Suite 120
Bellingham, WA 98225-4042

If to the Government:

**District Commander
U.S. Army Corps of Engineers, Walla Walla District
201 N. 3rd Avenue
Walla Walla, WA 99362-7816**

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

ARTICLE XI - CONFIDENTIALITY

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

ARTICLE XII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

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

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

DEPARTMENT OF THE ARMY

WHATCOM COUNTY

BY: _____
**ShaiLin KingSlack
Lieutenant Colonel, U.S. Army
District Commander**

BY: _____
**Satpal Singh Sidhu
Whatcom County Executive**

DATE: _____

DATE: _____