MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES
FOR MAINTENANCE DREDGING OF
SELECTED NORTH CAROLINA FEDERAL NAVIGATION PROJECTS

This MEMORANDUM OF AGREEMENT (hereinafter the “MOA”), is entered into this 14th day of November, 2013, by and between the DEPARTMENT OF THE ARMY (hereinafter the “Government”), represented by the U.S. Army Engineer, Wilmington District (hereinafter the “District Engineer”), and the NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (hereinafter the “Contributor”), represented by its Secretary.

WITNESSETH THAT:

WHEREAS, the following Federal navigation projects (hereinafter the “Projects”) were constructed pursuant to the specified authorizations:

Atlantic Intracoastal Waterway, North Carolina – River and Harbor Act of 1912 (Public Law 62-241), River and Harbor Act of 1927 (Public Law 69-560), River and Harbor Act of 1930 (Public Law 71-520), River and Harbor Act of 1937 (Public Law 75-392), and River and Harbor Act of 1948 (Public Law 80-858);

Manteo (Shallowbag) Bay, including Wanchese Harbor and Old House Channel, North Carolina – River and Harbor Act of 1910 (Public Law 61-264), River and Harbor Act of 1940 (Public Law 76-868), River and Harbor Act of 1950 (Public Law 81-516), Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), a Detailed Project Report approved May 11, 1962, and River and Harbor Act of 1970 (Public Law 91-611);

Stumpy Point Bay, North Carolina – Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved April 13, 1966;

Channel from Pamlico Sound to Rodanthe, North Carolina – River and Harbor Act of 1945 (Public Law 79-14);

Avon Harbor, including Channel from Pamlico Sound to Avon Harbor, North Carolina – River and Harbor Act of 1945 (Public Law 79-14), Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved May 5, 1965;
Rollinson Channel, including Channel from Hatteras Inlet to Hatteras, North Carolina – River and Harbor Act of 1935 (Public Law 74-409), River and Harbor Act of 1945 (Public Law 79-14), River and Harbor Act of 1954 (Public Law 83-780), and River and Harbor Act of 1962 (Public Law 87-874);


Silver Lake Harbor, North Carolina – River and Harbor Act of 1930 (Public Law 71-520), River and Harbor Act of 1940 (Public Law 76-868), Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and Detailed Project Reports approved July 9, 1965 and February 7, 1967;

Ocracoke Inlet, North Carolina – River and Harbor Act of 1960 (Public Law 86-645);


Channel from Back Sound to Lookout Bight, North Carolina - River and Harbor Act of 1937 (Public Law 75-392), and River and Harbor Act of 1945 (Public Law 79-14);

Beaufort Harbor, including Bulkhead Channel, Gallant's Channel, Taylor's Creek, Morgan Creek, and the Town Creek Harbor of Refuge, North Carolina – River and Harbor Act of 1881 (21 Stat. 468), River and Harbor Act of 1930 (Public Law 71-520), River and Harbor Act of 1945 (Public Law 79-14), River and Harbor Act of 1950 (Public Law 81-516), Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and Detailed Project Reports approved May 21, 1965 and August 12, 1983;

Atlantic Beach Channels, North Carolina – Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved June 15, 1965;

Peltier Creek, North Carolina – River and Harbor Act of 1954 (Public Law 83-780);
Bogue Inlet, North Carolina – Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and Detailed Project Reports approved November 29, 1963 and September 7, 1983;

Channels to Jacksonville, North Carolina – River and Harbor Act of 1935 (Public Law 74-409), and River and Harbor Act of 1948 (Public Law 80-858);

New River Inlet, North Carolina – River and Harbor Act of 1938 (Public Law 75-685);

New Topsail Inlet and Connecting Channels, North Carolina – Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved July 28, 1965;

Masonboro Inlet and Connecting Channels, North Carolina – River and Harbor Act of 1950 (Public Law 81-516);

Carolina Beach Inlet, North Carolina – Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved February 18, 1983;

Lockwoods Folly River and Inlet, North Carolina – River and Harbor Act of 1890 (26 Stat. 426), Section 107 of the River and Harbor Act of 1960 (Public Law 86-645), and a Detailed Project Report approved January 31, 1979; and

Shallotte River, North Carolina – River and Harbor Act of 1913 (Public Law 62-429), and River and Harbor Act of 1927 (Public Law 69-559);

WHEREAS, the Contributor considers it to be in the interest of the people of North Carolina to contribute funds voluntarily (hereinafter the "Contributed Funds") to be used by the Government for maintenance of the Projects (hereinafter "Maintenance Work"); and

WHEREAS, the Government is authorized, pursuant to 33 U.S.C. 701h, to accept Contributed Funds to be used for Maintenance Work.

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

1. The Contributor plans to provide to the Government up to $4,000,000 in Contributed Funds per fiscal year of the Government for costs associated with Maintenance Work, including the costs of environmental compliance, during the period beginning on the date of execution of this MOA, and ending September 30, 2017, for a total amount of up to $16,000,000 for the entire period. While the Government will endeavor to limit costs of Maintenance Work performed under this MOA to the Government estimates, the Contributor understands that the
actual costs of Maintenance Work may exceed the estimate due to claims or other unforeseen circumstances.

2. The Contributor shall provide the Contributed Funds in accordance with the provisions of this paragraph.

a. Upon execution of this MOA, the Government and Contributor shall develop expeditiously a Work Plan for Maintenance Work proposed to be performed during Government Fiscal Year 2014. The Work Plan shall identify the Project(s) to be dredged (hereinafter “Maintenance Work event(s)”; the schedules for completion of compliance with applicable environmental laws and regulations and initiation of dredging for each Maintenance Work event; and the Government’s estimate for each Maintenance Work event, including the costs of environmental compliance. Within fifteen (15) calendar days of receipt of the Government’s estimated cost of Maintenance Work to be performed during the first quarter of Government Fiscal Year 2014, Contributor shall pay such funds to the Government. No later than fifteen (15) calendar days before the beginning of each remaining quarter of Fiscal Year 2014, the Contributor shall provide to the Government Contributed Funds for all estimated costs, including the costs of environmental compliance, of Maintenance Work to be accomplished in that quarter, provided further that for Maintenance Work to be accomplished by contract, the Contributor shall provide to the Government all Contributed Funds estimated to be necessary for the contract no later than fifteen (15) calendar days prior to solicitation of that contract. The Government and Contributor shall review and update, as necessary, the Work Plan for Fiscal Year 2014.

b. No later than thirty (30) calendar days before the beginning of each full fiscal year of the Government covered by this MOA, the Government and Contributor shall develop a Work Plan for Maintenance Work proposed to be performed during the upcoming fiscal year. The Work Plan shall identify the amount of Contributed Funds the Contributor plans to provide; the Maintenance Work events; the schedules for completion of compliance with applicable environmental laws and regulations and initiation of dredging for each Maintenance Work event; the Government’s estimate for each Maintenance Work event, including the costs of environmental compliance; and the Government’s estimate of Contributed Funds required for each quarter. No later than fifteen (15) calendar days before the beginning of each quarter of the fiscal year, the Contributor shall provide to the Government Contributed Funds for all estimated costs, including the costs of environmental compliance, of Maintenance Work to be accomplished in that quarter, provided further that for Maintenance Work to be accomplished by contract, the Contributor shall provide to the Government all Contributed Funds estimated to be necessary for the contract no later than fifteen (15) calendar days prior to solicitation of that contract. The Government and Contributor shall review and update, as necessary, the Work Plan.

c. If the Government determines at any time that additional funds are needed to fund Maintenance Work in a Work Plan, including resolution of any
claims or appeals, the Government shall notify the Contributor in writing and adjust the Work Plan to use available and unobligated Contributed Funds received pursuant to this MOA to satisfy the balance owed. In the event there are no Contributed Funds available to satisfy the balance, the Government shall notify the Contributor in writing of the need for additional funds. The Contributor shall provide such additional funds within fifteen (15) calendar days of such notification. The Contributor shall provide such additional funds out of available appropriated funds or available funds that are not State funds as defined in Chapter 143C of the North Carolina General Statutes, and if such funds are not available, the Contributor will use its best efforts, in accordance with paragraph 13, to obtain and provide such funds as soon as possible. To the extent practicable, the Government shall notify the Contributor as soon as possible of any changed conditions that would require additional funds.

d. The Government may use Contributed Funds not obligated in the quarter received or remaining after completion of a Maintenance Work event, including resolution of any claims or appeals, for other Maintenance Work events under this MOA in the current or a future fiscal year unless notified in writing to the contrary in advance by the Contributor.

e. Termination: Either party may terminate this MOA by providing written notice to the other party as described in Paragraph 15 (Notices), below. In the event that either party elects to terminate this MOA, the Government shall conclude its activities relating to the Maintenance Work and conduct an accounting in accordance with Paragraph 7 of this MOA. The Contributor understands and agrees that it will be responsible for all costs associated with the conclusion of Maintenance Work activities, including but not limited to those costs associated with demobilization of Government plant, completion or termination of existing contracts, and cancellation of contract solicitations. Any termination of this MOA in accordance with this paragraph shall not relieve the parties of liability for any obligation previously incurred. Upon completion of the conclusion of the Maintenance Work activities, the Government shall perform an accounting in accordance with Paragraph 7, below, and shall return excess funds (if any) pursuant to the terms of that paragraph.

3. The Contributor shall provide Contributed Funds to the Government by delivering a check payable to “FAO, USAED, Wilmington” to the District Engineer; or verifying to the satisfaction of the Government that such funds have been deposited in an escrow or other account acceptable to the Government, with interest accruing to the Contributor; or presenting the Government with an irrevocable letter of credit acceptable to the Government for such funds; or providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government.

4. The Government shall not commence a Maintenance Work event for any Project until all applicable environmental laws and regulations have been complied with, including, but not limited to, the National Environmental Policy Act
of 1969 (42 U.S.C. 4321-4347) and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

5. The Government shall provide the Contributor with quarterly reports of obligations for the Maintenance Work, by Maintenance Work event. The first such report shall be provided within thirty (30) calendar days after the final day of the first full quarter of a fiscal year following initial receipt of Contributed Funds pursuant to this MOA, and subsequent reports shall be provided within thirty (30) calendar days after the final day of each succeeding quarter until the Government concludes all Maintenance Work under this MOA.

6. Upon conclusion of each Maintenance Work event and resolution of any claims and appeals, the Government shall conduct an interim accounting of the costs of such work and furnish the Contributor with written notice of the results of such interim accounting. Such interim accounting shall in no way limit the Contributor's responsibility to pay for all costs associated with such Maintenance Work event, including contract claims or any other liability that may become known after such interim accounting. Should the results of such interim accounting show that the costs of that Maintenance Work event exceed the amount of Contributed Funds provided by the Contributor, the Contributor shall provide the required additional funds to the Government within sixty (60) calendar days of written notice of the results of the interim accounting by delivering a check payable to "FAO, USAED, Wilmington" to the District Engineer or providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government.

7. Upon conclusion of the final Maintenance Work event and resolution of any claims and appeals, the Government shall complete a final accounting of the costs of the Maintenance Work under this MOA and furnish the Contributor with written notice of the results of such final accounting. Should the final accounting show that the costs of the Maintenance Work exceed the amount provided by the Contributor, the Contributor shall provide the required additional funds in accordance with paragraph 6 of this MOA within sixty (60) calendar days of written notice of the final accounting. Should the final accounting show that the costs of the Maintenance Work are less than the amount provided by the Contributor, the Government shall refund the excess amount to the Contributor within sixty (60) calendar days of the written notice of the final accounting.

8. No credit or repayment is authorized, nor shall be provided, for any Contributed Funds obligated by the Government.

9. Nothing herein shall constitute, represent, or imply any commitment to budget or appropriate funds for the Projects in the future; and nothing herein shall represent, or give rise to, obligations of the United States.

10. Before any party to this MOA may bring suit in any court concerning an issue relating to this MOA, such party must first seek in good faith to resolve
the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

11. The Contributor shall hold and save the Government free from all damages arising from the Maintenance Work, except for damages due to the fault or negligence of the Government or its contractors.

12. In the exercise of their respective rights and obligations under this MOA, the Contributor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."


a. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the General Assembly of the State of North Carolina where creating such an obligation would be inconsistent with Section 23 of Article II of the Constitution of the State of North Carolina.

b. The Contributor intends to fulfill its obligations under this Agreement. The Contributor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, and shall use all reasonable and lawful means to secure those appropriations. The Contributor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Contributor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Contributor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

14. In the exercise of their respective rights and obligations under this MOA, the Government and the Contributor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

15. Notices.

a. Any notice, request, demand, or other communication required or permitted to be given under this MOA shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:
If to the Contributor: Director
Division of Water Resources
North Carolina Department of Environment and Natural Resources
1611 Mall Service Center
Raleigh, NC 27699-1611

If to the Government: District Commander
U.S. Army Engineer District, Wilmington
69 Darlington Avenue
Wilmington, NC 28403

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 paragraph.

c. Any notice, request, demand, or other communication made pursuant to this paragraph shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven (7) calendar days after it is mailed.

16. 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. The Contributor is subject to a broad Public Records Act and may be subject to sanction for failure to produce public records upon request. If the Government intends to exchange records which it intends to remain confidential, it should be aware of the Contributor's limitations regarding confidentiality and consult with the Contributor before transmission of any potentially confidential records.

17. This MOA may be modified or amended only by written, mutual agreement of the parties.

IN WITNESS WHEREOF, the parties have executed this MOA as of the day, month, and year first above written.

THE DEPARTMENT OF THE ARMY

BY: Steven A. Baker
Colonel, U.S. Army
District Engineer

STATE OF NORTH CAROLINA

BY: John E. Skvarla III
Secretary, Department of Environment and Natural Resources
CERTIFICATE OF AUTHORITY

I, Roy Cooper, do hereby certify that I am the principal legal officer of the State of North Carolina, that the North Carolina Department of Environment and Natural Resources is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the North Carolina Department of Environment and Natural Resources, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the North Carolina Department of Environment and Natural Resources have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this ___day of December, 2013.

Roy Cooper
Attorney General
State of North Carolina
CERTIFICATION REGARDING LOBBYING

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

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

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

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

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

John E. Skvarla III
Secretary, Department of Environment and Natural Resources

DATE: Nov. 5, 2013