

APPENDIX B

MODEL SECTION 101 PROJECT COOPERATION AGREEMENT (DESIGN)

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
<Name of non-Federal Sponsor>
FOR DESIGN OF THE
<Name of Facility>
<Location of Facility>

THIS AGREEMENT is entered into this _____ day of _____, 199__, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), represented by the District Engineer of the Alaska District, Army Corps of Engineers, and <Name of Sponsor> (hereinafter the "Non-Federal Sponsor"), represented by its <Title of Representative>.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army was authorized to provide planning, design and construction assistance for environmental infrastructure projects pursuant to Section 101 of the Energy and Water Development Appropriations Act of 1998 (Public Law 105-62);

WHEREAS, the <Name of Facility> at <Location of Facility> has been identified as a project of the type authorized Section 101 of the Energy and Water Development Appropriations Act of 1998, Public Law 105-62;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement for the design of, the <Name of Facility> at <Location of Facility> (hereinafter the "Project," as defined in Article I.A. of this Agreement);

WHEREAS, Section 101 of the Energy and Water Development Appropriations Act of 1998, Public Law 105-62 specifies the cost-sharing requirements applicable to the Project;

WHEREAS, Section 101 of the Energy and Water Development Appropriations Act of 1998, Public Law 105-62 provides that the Secretary of the Army shall not provide assistance in the form of planning, design and construction for any water-related environmental infrastructure and resource protection and development projects, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

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

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

ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Project Cooperation Agreement:

A. The term "project design work" shall mean any work described in the Scope of Work attached hereto associated with the design phase of this project, to include concept design, report writing, detailed design, preparation of plans and specifications, design analysis and quantity/cost estimates for <Describe the project>.

B. The term "total cost of project design work" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to accomplishing the design work described in the Scope of Work attached hereto. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: advanced engineering and design costs; preconstruction engineering and design costs; costs of investigations to identify the existence of hazardous substances in accordance with Article XIII of this Agreement; costs of historic preservation activities in accordance with Article XVI of this Agreement; supervision and administration costs; costs of acquisition of rights-of-entry in accordance with Article III of this Agreement; costs of participation in the Project Coordination Team in accordance with Article IV of this Agreement; costs of contract dispute settlements or awards; and costs of audit in accordance with Article VIII of this Agreement. The term does not include any costs for dispute resolution under Article VI of this Agreement, nor any costs of design of betterments.

C. The term "financial obligation for Project design work" shall mean a financial obligation of the Government that results or would result in a cost that is or would be included in the total costs of design of the project.

D. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

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

F. The term "rights-of-entry" shall mean permission given by individual landowners, not constituting an interest in land, to allow the Government, its employees and contractors, entry to certain tracts of land for purposes of survey, test borings and other exploratory work for a specified period of time.

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

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter, the "Congress") and using those funds and funds provided by the Non-Federal Sponsor, shall expeditiously accomplish the project design work, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. The Government shall not issue the solicitation for the first design contract until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the Project. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Non-Federal Sponsor with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, issuance of change orders, resolution of contract claims, and performance of all project design work (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Government.

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

<Optional - To be added if requested by the non-Federal Sponsor>

3. Notwithstanding paragraph A.1. of this Article, if, upon the award of any contract for design of the Project, cumulative financial obligations for design would exceed \$_____, the Government and the Non-Federal Sponsor agree to defer award of that contract and all subsequent contracts for design of the Project until such time as the Government and the Non-Federal Sponsor agree to proceed with further contract awards for the Project, but in no event shall the award of contracts be deferred for more than three years. Notwithstanding this general provision for deferral of contract awards, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts after the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts

must proceed in order to comply with law or to protect life or property from imminent and substantial harm.

B. The Non-Federal Sponsor may request the Government to design betterments. Such requests shall be in writing and shall describe the betterments requested to be designed. If the Government in its sole discretion elects to design the requested betterments or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions. Such terms and conditions must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article V.A. of this Agreement.

C. When the District Engineer determines that the entire project design work is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with copies of all design work completed under this Agreement.

D. The Non-Federal Sponsor shall provide a cash contribution equal to 25 percent of total cost of project design work in accordance with the provisions of Article V.A. of this Agreement.

E. The Government shall perform a final accounting in accordance with Article V.B. of this Agreement to determine the contributions provided by the Non-Federal Sponsor in accordance with paragraphs B. and D. of this Article and Articles IV and VIII of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs B. and D. of this Article.

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

ARTICLE III - RIGHTS-OF-ENTRY

The Government, its employees and contractors shall determine the rights-of-entry, as defined in Article I.F, required for the design phase of this Project, including those necessary for soil and rock sampling. The Government and its employees shall acquire all rights-of-entry required for the design phase of this Project. The costs of such acquisition shall be a part of total cost of project design work, as defined in Article I.B.

ARTICLE IV - PROJECT COORDINATION TEAM

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

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

C. Until the end of the period of design, the Project Coordination Team shall generally oversee the project design work, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; contract awards and modifications; contract costs; the Government's cost projections; and other related matters. This oversight shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for design of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

E. The costs of participation in the Project Coordination Team shall be included in total cost of project design work, as defined in Article I.B. of this Agreement, and cost shared in accordance with the provisions of this Agreement.

ARTICLE V - METHOD OF PAYMENT

A. In advance of the Government incurring any financial obligation associated with the project design work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required under Article II.B. and II.D. of this Agreement to pay for the non-federal cost share of such design work by delivering a check payable to "FAO, USAED, Alaska District" to the District Engineer. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such design work as they are incurred. In the event the Government determines that the Non-Federal Sponsor must provide additional funds to meet its cash contribution, the Government shall notify the Non-Federal Sponsor in writing of the additional

funds required. Within thirty (30) calendar days thereafter, the Non-Federal Sponsor shall provide the Government with a check for the full amount of the additional required funds.

B. Upon completion of the project design work or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the results of the final accounting. The final accounting shall determine total cost of project design work under this Agreement, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine the Non-Federal Sponsor's cash contribution provided pursuant to Article II.B. and II.D of this Agreement.

1. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor is less than its required share of the total cost of project design work plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the Non-Federal Sponsor shall, no later than ninety (90) calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet the Non-Federal Sponsor's required share of the total cost of project design work plus costs due to any betterments provided in accordance with Article II.B. of this Agreement.

2. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor exceeds its required share of the total cost of project design plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than ninety (90) calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or shall apply the excess towards the Non-Federal Sponsor's cost share required as part of total project costs resulting from the execution of a Project Cooperation Agreement for the construction or implementation of the project that is subject to this Agreement.

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 both parties. The parties shall each pay fifty (50) percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VII - INDEMNIFICATION

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

ARTICLE VIII - MAINTENANCE OF RECORDS AND AUDIT

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

B. Pursuant to 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 7501-7507, as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the Project shall be included in total cost of project design work and cost shared in accordance with the provisions of this Agreement.

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

ARTICLE IX - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor 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 Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."

ARTICLE X - RELATIONSHIP OF PARTIES

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

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

ARTICLE XI - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XII - TERMINATION OR SUSPENSION

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

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and sixty (60) calendar days thereafter either party may elect

without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Non-Federal Sponsor elects to terminate this agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article V.B. of this Agreement.

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

ARTICLE XIII - HAZARDOUS SUBSTANCES

After execution of this Agreement, the Government shall perform, or cause to be performed, any investigations for hazardous substances that the Government determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, and that the Government determines to be required to complete the design of the Project. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in total cost of project design work and cost shared in accordance with the provisions of this Agreement.

ARTICLE XIV - 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 either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

<Name of non-Federal Sponsor>

<Address>

If to the Government:

District Engineer
Alaska District

U.S. Army Corps of Engineers
<Address>

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

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

ARTICLE XV - 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 XVI - HISTORIC PRESERVATION

The costs of identification, survey and evaluation of historic properties performed by the Government, as they relate to the design, shall be included in total cost of project design work and cost shared in accordance with the provisions of this Agreement.

ARTICLE XVII - FUTURE AGREEMENTS

Nothing in this Agreement is intended to obligate either party to enter into further agreements for construction or implementation of the project that is the subject of this Agreement. However, subject to the availability of appropriations, and subject to mutual agreement of the parties, further such activities may be undertaken, in accordance with policies of the Government in effect at the time.

ARTICLE XVIII - LIMITATION ON GOVERNMENT OBLIGATIONS

The Government's financial obligation for all activities undertaken under Section 101 of Public Law 105-62 is limited to \$5,000,000. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall be responsible for the total cost of project design work if Government funds for all Section 101 activities are exhausted. The Government shall provide a written notice to the Non-Federal Sponsor if it determines that this eventuality may occur. Should all Government funds appropriated pursuant to Section 101 be exhausted, in lieu of completing the project design work at its own expense, the Non-Federal Sponsor may, at its

option, elect to terminate the project design work in accordance with Article XII of 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 Engineer.

THE DEPARTMENT OF THE ARMY

<Name of non-Federal Sponsor>

BY: _____
 <Name>
 <Title>

BY: _____
 <Name>
 <Title>

DATE: _____

DATE: _____

CERTIFICATE OF AUTHORITY

I, <Name>, do hereby certify that I am the principal legal officer of the <Non-Federal Sponsor>, and that we are 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 <Non-Federal Sponsor> in connection with the <Name of Facility> at <Location of Facility>, and that the persons who have executed this Agreement on behalf of the <Non-Federal Sponsor> have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19__.

<Name>
Attorney at Law

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, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

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

<Name>, CHAIRMAN
<Non-Federal Sponsor>

CERTIFICATION OF LEGAL REVIEW

The Preliminary Draft Project Cooperation Agreement, for design of the <Name of Facility> at <Location of Facility> has been fully reviewed by the Office of Counsel, U.S. Army Engineer District, <Name of District>, and is legally sufficient.

<Name>
District Counsel