# MEMORANDUM OF AGREEMENT BETWEEN THE U.S. FISH AND WILDLIFE SERVICE AND THE U.S. ARMY CORPS OF ENGINEERS

## ARTICLE I - PURPOSE AND AUTHORITY

This two-way Memorandum of Agreement (MOA) is entered into by and between the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (Service) (collectively "parties") for the purpose of establishing a framework governing the respective responsibilities for the provision of goods and services as described in ARTICLE II below. This MOA is entered into pursuant to the Economy in Government Act (31 U.S.C. § 1535) and the Fish and Wildlife Act of 1956 (16 U.S.C. § 742 et seq.).

## ARTICLE II - SCOPE

a. Goods and services that the Corps may provide under this MOA include planning, design, construction, and also environmental restoration, hazardous or toxic materials removal, engineering or technical assistance, training, and such other related goods or services as may be agreed upon in the future.

b. Goods and services that the Service may provide under this MOA include environmental management, fish and wildlife resource management, training, and such other related goods or services as may be agreed upon in the future. These services may be ordered for both Civil Works projects and military installations for a variety of tasks such as those relating to operations and maintenance.

c. Nothing in this MOA shall be construed to require either party to use the other party or to require either party to provide any goods or services to the other party, except as may be set forth in Support Agreements (SA(s)).

## ARTICLE III - INTERAGENCY COMMUNICATIONS

To provide for consistent and effective communication between the Corps and the Service, each party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may also be appointed to serve as points of contact on SAs.

## ARTICLE IV - SUPPORT AGREEMENTS

a. In response to requests from one party (the "Ordering Agency") for the other party's (the "Servicing Agency") goods and services, the parties will develop mutually agreed upon written SAs that detail the specific tasks to be completed. Those SAs must be on either Engineer

Form 4914-R or a similar document containing the same information as Department of Defense Form 1144. SAs must include:

- a detailed scope of work statement;
- schedules;
- funding arrangements, including whether payment shall be in advance or by reimbursement;
- the amount of funds required and available to accomplish the scope of work;
- the Ordering Agency's fund citation and the date upon which the cited funds expire for obligation purposes;
- the names of individual project managers;
- the types of contracts to be used (if known);
- the types and frequencies of reports;
- identification of which party is to be responsible for government-furnished equipment; contract administration; records maintenance; rights to data, software, and intellectual property; and contract audits;
- procedures for amending or modifying the SA; and
- other information needed to describe clearly the obligations of the parties.

b. Goods or services shall be provided under this MOA only after an appropriate SA has been signed by a representative of each party authorized to execute that SA. After signature, a SA shall constitute a valid Economy in Government Act order. In the case of conflict between this MOA and a SA, this MOA shall control.

ARTICLE V - RESPONSIBILITIES OF THE PARTIES

a. Responsibilities of the Servicing Agency under each SA

(1) The Servicing Agency shall provide goods or services in accordance with the purpose, terms, and conditions of this MOA and with specific requirements set forth in SAs and implementing arrangements.

(2) The Servicing Agency shall ensure that only authorized Servicing Agency representatives sign SAs.

(3) The Servicing Agency shall use its best efforts to provide goods or services either by contract or in-house effort.

(4) The Servicing Agency shall provide detailed periodic progress, financial, and other reports as outlined in the SA. Financial reports shall include information on all funds received, obligated, and expended, and on forecast obligations and expenditures.

(5) The Servicing Agency shall inform the Ordering Agency of all contracts entered into under each SA.

b. Responsibilities of the Ordering Agency under each SA

(1) The Ordering Agency shall certify, prior to the execution of each SA under this MOA, that the SA complies with the requirements of the Economy in Government Act.

(2) The Ordering Agency shall pay all costs associated with the Servicing Agency's provision of goods or services under this MOA and shall certify, at the time of signature of a SA, the availability of funds necessary to accomplish that SA.

(3) The Ordering Agency shall ensure that only authorized Ordering Agency representatives sign SAs.

(4) The Ordering Agency shall develop draft SAs to include scope of work statements.

(5) The Ordering Agency shall obtain for the Servicing Agency all necessary real estate interests and access to all work sites and support facilities, and shall perform all coordination with and obtain any permits from State and local agencies, as necessary during the execution of each SA.

ARTICLE VI - FUNDING

a. The Ordering Agency shall pay all costs associated with the Servicing Agency's provision of goods or services under this MOA. For SAs estimated to cost more than $250,000 total in contracts and in-house services or $50,000 in contracts, the Servicing Agency shall bill the Ordering Agency in advance using the Intra-governmental Payments and Collection System (IPAC), and the Ordering Agency shall provide the necessary funds in advance using ENG Form 4914-R, Sep 97 or a similar form. For SAs valued at less than these amounts, the Ordering Agency may reimburse the Servicing Agency for the goods or services. For these lesser requirements, the Servicing Agency shall bill the Ordering Agency monthly for costs incurred using IPAC, and the Ordering Agency shall reimburse the Servicing Agency within 30 days of receipt of the IPAC transaction.

b. If the Servicing Agency forecasts its actual costs under a SA to exceed the amount of funds available under that SA, it shall promptly notify the Ordering Agency of the amount of additional funds necessary to complete the work under that SA. The Ordering Agency shall either provide the additional funds to the Servicing Agency, require that the scope of work be limited to that which can be paid for by the then-available funds, or direct termination of the work.

c. Within 90 days of completing the work under a SA, the Servicing Agency shall conduct an accounting to determine the actual costs of the work. Within 30 days of completion of this accounting, the Servicing Agency shall return to the Ordering Agency any funds advanced in excess of the actual costs as then known, or the Ordering Agency shall provide any

additional funds necessary to cover the actual costs as then known. Such an accounting shall in no way limit the Ordering Agency's duty in accordance with Article X to pay for any costs, such as contract claims or other liability, which may become known after the final accounting.

## ARTICLE VII - APPLICABLE LAWS

The applicable statutes, regulations, directives, and procedures of the United States shall govern this MOA and all documents and actions pursuant to it. Unless otherwise required by law, all contract work undertaken by the Corps shall be governed by Corps policies and procedures and all contract work undertaken by the Service shall be governed by Service policies and procedures.

## ARTICLE VIII - CONTRACT CLAIMS AND DISPUTES

a. Corps of Engineers Contracting

(1) All claims and disputes by contractors arising under or relating to contracts awarded by the Corps shall be resolved in accordance with Federal law and the terms of the individual contract. The Corps shall have dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. § 601-613). The Armed Services Board of Contract Appeals (ASBCA) is designated as the appropriate board of contract appeals. In lieu of appealing to the ASBCA or its successor, the contractor may bring an action directly to the United States Court of Federal Claims.

(2) The Corps shall be responsible for handling all litigation involving disputes and appeals, and for coordinating with the Department of Justice as appropriate. The Corps shall notify the Service of any such litigation and afford the Service an opportunity to review and comment on the litigation proceedings and any resulting settlement negotiations.

b. Fish and Wildlife Service Contracting

(1) All claims and disputes by contractors arising under or relating to contracts awarded by the Service shall be resolved in accordance with Federal law and the terms of the individual contract. The Service shall have dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. § 601-613).

(2) The Service shall be responsible for handling all litigation involving disputes and appeals, and for coordinating with the Department of Justice as appropriate. The Service shall notify the Corps of any such litigation and afford the Corps an opportunity to review and comment on the litigation proceedings and any resulting settlement negotiations.

ARTICLE IX - DISPUTE RESOLUTION

The parties agree that, in the event of a dispute between the parties, the Service and the Corps shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution. The parties agree that, in the event such measures fail to resolve the dispute, they shall refer it for resolution to the Office of Management and Budget.

ARTICLE X - RESPONSIBILITY FOR COSTS

a. If liability of any kind is imposed on the United States relating to the Servicing Agency's provision of goods or services under this MOA, the Servicing Agency will accept accountability for its actions, but the Ordering Agency shall remain responsible as the program proponent for providing such funds as are necessary to discharge the liability and all related costs. This obligation extends to all funds legally available to discharge this liability, including funds that may be made legally available through transfer, reprogramming, or other means. Should the Ordering Agency have insufficient funds legally available, including funds that may be made legally available through transfer, reprogramming or other means, it remains responsible for seeking additional funds from Congress for such purpose, although nothing in this MOA shall be construed to imply that Congress will appropriate funds sufficient to meet the liability.

b. Notwithstanding the above, this MOA does not confer any liability upon the Ordering Agency for claims payable by the Servicing Agency under the Federal Torts Claims Act. Nothing in this Agreement is intended or will be construed to create any rights or remedies for any third party, and no third party is intended to be a beneficiary of this Agreement.

ARTICLE XI - PUBLIC INFORMATION

a. Justification and explanation of the Service's programs before Congress and other agencies, departments, and offices of the Federal Executive Branch shall be the responsibility of the Service. The Corps may provide, upon request, any assistance necessary to support the Service's justification or explanations. In general, the Service is responsible for all public information. The Corps may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The Service or the Corps shall make its best efforts to give the other party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to SAs under this MOA.

b. Justification and explanation of the Corps programs before Congress and other agencies, departments, and offices of the Federal Executive Branch shall be the responsibility of the Corps. The Service may provide, upon request, any assistance necessary to support the Corps justification or explanations. In general, the Corps is responsible for all public

information. The Service may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The Corps or the Service shall make its best efforts to give the other party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to SAs under this MOA.

ARTICLE XII - MISCELLANEOUS

a. Other Relationships or Obligations

(1) This MOA shall not affect any pre-existing or independent relationships or obligations between the Service and the Corps.

b. Survival

(1) The provisions of this MOA that require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

c. Severability

(1) If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

ARTICLE XIII - AMENDMENT, MODIFICATION, AND TERMINATION

This MOA may be modified or amended only by written, mutual agreement of the parties. Either party may terminate this MOA by providing written notice to the other party. The termination shall be effective upon the sixtieth calendar day following notice, unless a later date is set forth. In the event of termination, in all circumstances the Ordering Agency shall continue to be responsible for all costs incurred by the Servicing Agency under this MOA, and for the costs of closing out or transferring any on-going contracts.

ARTICLE XIV - EFFECTIVE DATE

This MOA shall become effective when signed by both the Service and the Corps.

Steve Williams
Director
U.S. Fish and Wildlife Service

1/22/03
Date

Robert B. Flowers
Commander
U.S. Army Corps of Engineers

22 JAN 2003
Date