

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE CITY OF SACO, MAINE
FOR
SACO RIVER AND CAMP ELLIS BEACH
SECTION 111 SHORE DAMAGE MITIGATION PROJECT

THIS AGREEMENT is entered into this 30th day of January, 2024, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for New England District, and the City of Saco, Maine (hereinafter the “Non-Federal Sponsor”), represented by its City Administrator, each as duly authorized, hereinafter individually “Party” and collectively “Parties”.

WITNESSETH, THAT:

WHEREAS, Section 111 of the Flood Control Act of 1968, as amended (33 U.S.C. 426i) (hereinafter “Section 111”), authorizes the Secretary to investigate, study, plan, and implement structural and nonstructural measures for the prevention or mitigation of shore damages attributable to Federal navigation works;

WHEREAS, pursuant to the authority provided in Section 111, design and construction, including periodic nourishment, of the Saco River and Camp Ellis Beach Section 111 Shore Damage Mitigation Project to mitigate damage caused by a Federal navigation project (hereinafter the “Project”, as defined in Article I.A. of this Agreement) was approved by Division Commander for the North Atlantic Division (hereinafter the “Division Commander”) on August 15, 2023;

WHEREAS, the Section 8342 of the Water Resources Development Act of 2022, authorized the Government to undertake design and construction, including periodic nourishment, of the Project at Federal expense and increased the Federal Participation Limit on the Project to \$45,000,000;

WHEREAS, 33 U.S.C. 701h authorizes the Government to undertake, at the Non-Federal Sponsor’s full expense, additional work while the Government is carrying out the Project; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform 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 “Project” means the construction of a stone spur jetty approximately 750 feet long with reinforcement of adjacent section of the main north jetty, and placement of approximately 73,170 cubic yards of sand beach fill of over approximately 3,250 feet of beach northward from the main jetty, as generally described in the Section 111 Shore Damage Mitigation Project Decision Document & Environmental Assessment Including Finding of No Significant Impact and Section 404(b)(1) Evaluation: Saco River and Camp Ellis Beach, Saco, Maine, dated April 2019 with a 2022 addendum to the Decision Document dated December 2022 and approved by the Division Commander on December 23, 2022 and a 2023 update to the addended Decision Document dated August 2023 and approved by the Division Commander on August 15, 2023 (collectively, “Decision Document”).

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 “periodic nourishment” means the placement of suitable sand beach fill after the initial construction of the Project at appropriate intervals during the 50-year period of Federal participation that begins on the date of initiation of construction of the Project and as limited by the Federal Participation Limit, as generally described in the Decision Document.

D. The term “Federal first costs” means all costs incurred by the Government, in accordance with the terms of this Agreement that are directly related to design and initial construction of the Project. The term includes the Government’s pre- and post-Agreement engineering and design costs; the Government’s initial construction costs; the Government’s supervision and administration costs; the Government’s costs for providing real property interests, relocations, placement area improvements, and HTRW investigations; and the costs of historic preservation activities except for data recovery for historic properties. The term does not include any costs for the feasibility phase; operation, maintenance, repair, rehabilitation, or replacement, which includes monitoring and adaptive management, if required; periodic nourishment; HTRW cleanup and response; dispute resolution; participation by the Non-Federal Sponsor in the Project Coordination Team to discuss significant issues and actions; Non-Federal Sponsor’s audits; additional work; betterments; or the Non-Federal Sponsor’s cost to negotiate this Agreement.

E. The term “periodic nourishment costs” means all costs incurred by the Government, in accordance with the terms of this Agreement that are directly related to periodic nourishment of the Project. The term includes the Government’s engineering, design, and construction costs; the Government’s supervision and administration costs; the Government’s costs for providing any additional real property interests, relocations, placement area improvements, and HTRW investigations; and the costs of historic preservation activities except for data recovery for historic properties. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement; HTRW cleanup and response; dispute resolution; participation by the Non-Federal Sponsor in the Project Coordination Team to discuss significant issues and actions; Non-Federal Sponsor’s audits; additional work; and betterments.

F. The term “real property interests” means lands, easements, and rights-of-way, including those required for relocations and borrow and dredged material placement areas. Acquisition of real property interests may require the performance of relocations.

G. The term “relocation” means the provision of a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad, or public facility when such action is required by applicable legal principles of just compensation. Providing a functionally equivalent facility may include the alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

H. The term “placement area improvements” means the improvements required on real property interests to enable the ancillary placement of material that has been dredged or excavated during construction, operation, and maintenance of the Project, including, but not limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and dewatering pumps and pipes.

I. The term “functional portion thereof” means a portion of the Project that has been completed and that can function independently, as determined in writing by the District Commander for New England District (hereinafter the “District Commander”), although the remainder of the Project is not yet complete.

J. The term “betterment” means a difference in design or construction of an element of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to design or construction of that element.

K. The term “additional work” means items of work related to, but not a part of, the Project that the Government will undertake at the written request of the Non-Federal Sponsor and on the Non-Federal Sponsor’s behalf while the Government is carrying out the Project, with the Non-Federal Sponsor responsible for all costs and any liabilities associated with such work.

L. The term “Federal Participation Limit” means the \$45,000,000 statutory limitation in the Federal first cost and periodic nourishment costs for design and construction of the Project.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. In accordance with Federal laws, regulations, and policies, the Government, as limited by the Federal Participation Limit, shall undertake design and construction, including periodic nourishment, of the Project, including providing the required real property interests, relocations, and placement area improvements, at full Federal expense, except that any real property interests owned by the Non-Federal Sponsor shall be provided at no cost to the Government. As of the effective date of this Agreement, the Federal first costs are projected to be \$31,208,000. Also, it is currently projected that the cost for three cycles of periodic nourishment could be funded within the Federal Participation Limit. Any real property interests acquired by the Government for the Project shall be acquired in the Non-Federal Sponsor's name except, if acquired by eminent domain, the Government shall convey all of its right, title, and interest to the Non-Federal Sponsor by quitclaim deed or deeds. The Non-Federal Sponsor shall accept delivery of such deed or deeds and ensure that such real property interests are retained in public ownership for uses compatible with the authorized purposes of the Project. In addition, the Government will perform any HTRW investigations that may be required prior to its acquisition of the real property interests required for the Project. The Government's provision of real property interests, relocations, placement area improvements, or HTRW investigations does not alter the Non-Federal Sponsor's responsibility under Article III for the performance and costs of any HTRW cleanup and response related thereto, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination.

B. To the extent practicable and in accordance with Federal law, regulations, and policies, the Government shall afford the Non-Federal 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.

C. The Government, as it determines necessary, shall undertake actions associated with historic preservation, including the identification and treatment of historic properties as those properties are defined in the National Historic Preservation Act of 1966, as amended (54 U.S.C. 300101-307108). All costs incurred by the Government for such work (including the mitigation of adverse effects other than data recovery) shall be included in Federal first costs. If historic properties are discovered during construction and the effect(s) of such construction are determined to be adverse, strategies shall be developed to avoid, minimize, or mitigate these adverse effects. In accordance with 54 U.S.C. 312507, up to one percent (1%) of the total amount authorized to be appropriated for the Project may be applied toward data recovery of historic properties and such costs shall be borne entirely by the Government. In the event that costs associated with data recovery of historic properties exceed one percent (1%) of the total amount authorized to be appropriated for the Project, in accordance with 54 U.S.C. 312508, the Government will seek a waiver from the one percent (1%) limitation under 54 U.S.C. 312507 and upon receiving the waiver, will proceed with data recovery at full Federal expense. Nothing in this Agreement shall limit or otherwise prevent the Non-Federal Sponsor from voluntarily contributing costs associated with data recovery that exceed one percent (1%).

D. When the District Commander determines that initial construction of the Project, or a functional portion thereof, is complete, the District Commander shall so notify the Non-Federal Sponsor in writing within 30 calendar days of such determination, and the Non-Federal Sponsor, at no cost to the Government, shall operate, maintain, repair, rehabilitate, and replace the Project, or such functional portion thereof. Such activities of the Non-Federal Sponsor will generally consist of regular inspections, maintenance and repair of the stone jetty including the reinforcement of adjacent sections of the main north jetty, and monitoring of the beach and management consistent with the requirements for protecting listed shorebird species determined by the Non-Federal Sponsor in consultation with the U.S. Fish and Wildlife Service; the average annual costs for operation, maintenance, repair, replacement, and rehabilitation of the Project are projected to be \$87,000. The Government shall furnish the Non-Federal Sponsor with an Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual" and copies of all as-built drawings for the completed work, as applicable. The Government's undertaking of a cycle of periodic nourishment has no effect on the Non-Federal Sponsor's continuing responsibility for operation, maintenance, repair, rehabilitation, and replacement of the Project. If a cycle of periodic nourishment changes those responsibilities, the Non-Federal Sponsor, at no cost to the Government, shall commence any additional responsibilities upon notification from the Government.

1. The Non-Federal Sponsor, as applicable, shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner consistent with the Project's authorized purpose and in accordance with applicable Federal laws and regulations, and the Government's specific directions in the OMRR&R Manual. The Government and Non-Federal 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 Non-Federal Sponsor now or hereafter owns or controls to inspect the Project, and, if necessary, to undertake any work necessary to the functioning of the Project for its authorized purpose. If the Government determines that the Non-Federal Sponsor is failing to perform its obligations under this Agreement and the Non-Federal 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. No operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal 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 Non-Federal Sponsor shall prevent obstructions or encroachments on the Project (including prescribing and enforcing regulations to prevent such obstructions or encroachments) that might reduce the outputs produced, hinder operation and maintenance, or interfere with the proper function of the Project.

F. The Non-Federal 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 Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

G. In addition to the ongoing, regular discussions between the Parties regarding Project delivery, the Government and the Non-Federal Sponsor may establish a Project Coordination Team to discuss significant issues or actions. The Non-Federal Sponsor shall pay the costs it incurs for participation in the Project Coordination Team without reimbursement by the Government.

H. If, after completing the design portion of the Project, the Parties mutually agree in writing not to proceed with construction of the Project, the Parties shall conclude their activities relating to the Project.

I. The Non-Federal Sponsor may request in writing that the Government perform additional work or betterments on behalf of the Non-Federal Sponsor. 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 Non-Federal Sponsor of the amount of funds required to cover such costs in advance of the Government performing such work.

1. As of the effective date of this Agreement, the costs for additional work and betterments are projected to be \$0 and \$0, respectively. Such costs are not included as part of the Federal first costs of the Project.

2. No later than sixty (60) calendar days after receiving written notice from the Government of the costs of the additional work or betterments, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government by delivering a check payable to "FAO, USAED, New England (E6)" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. If at any time the Government determines that additional funds are required to cover such costs, the Non-Federal Sponsor shall provide those funds within thirty (30) calendar days from receipt of written notice from the Government.

3. In addition, the Non-Federal Sponsor is responsible for providing, at no cost to the Government, any additional real property interests, relocations, and placement area improvements, including any related HTRW investigations, determined by the Government to be required for construction, operation, and maintenance of such work.

4. Upon completion of the additional work and betterments, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal 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 through either payment method specified in Article II.I.2. If the Government determines that funds provided by the Non-Federal Sponsor exceed the amount that was required for the Government to complete such work, the Government shall refund any remaining unobligated amount.

J. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all 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.

K. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall be responsible for all costs in excess of the Federal Participation Limit.

ARTICLE III - HTRW

A. In the event it is discovered that HTRW exists in, on, or under any of the real property interests needed for construction, operation, and maintenance of the Project, the Non-Federal 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 Government shall not proceed with the acquisition of such real property interests until the Parties agree that the Government should proceed. If HTRW is discovered after acquisition of the real property interests, no further Project activities within the contaminated area shall proceed until the Parties agree on an appropriate course of action.

B. 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 Non-Federal Sponsor shall be solely responsible, as between the Government and the Non-Federal 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 Non-Federal Sponsor shall pay such costs without reimbursement by the Government. In no event will the Government proceed with that construction before the Non-Federal Sponsor has completed the required cleanup and response actions.

2. In the event the Parties cannot reach agreement on how to proceed or the Non-Federal 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 Non-Federal Sponsor responsible for such costs without reimbursement by the Government.

C. In the event of a HTRW discovery, the Non-Federal 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.

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

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the owner and operator of the Project for purposes of CERCLA liability or other applicable law.

ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate construction of the Project 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 construction, including periodic nourishment, of the Project, as limited by the Federal Participation Limit, are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing within 30 calendar days, and upon exhaustion of such funds, the Government shall suspend construction. Construction of the Project will be resumed if additional funds are made available.

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 III.

D. In the event of termination, the Parties shall conclude their activities relating to design and construction of the Project. 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 Non-Federal 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 V - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

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 - MAINTENANCE OF RECORDS AND AUDITS

A. The Parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal 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 Project. Government audits shall be conducted in accordance with applicable Government cost principles and regulations.

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

ARTICLE VIII - RELATIONSHIP OF PARTIES

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. 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 IX - 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 Non-Federal Sponsor:

City Administrator
City of Saco, Maine
300 Main Street
Saco, Maine 04072

If to the Government:

District Commander
U.S. Army Corps of Engineers, New England District
696 Virginia Road
Concord, Massachusetts 01742

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 X - 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.

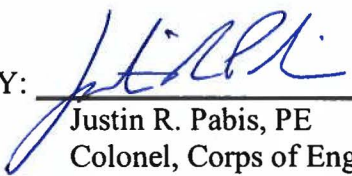
ARTICLE XII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

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 for New England District of the Department of the Army.

DEPARTMENT OF THE ARMY

CITY OF SACO, MAINE

BY: 
Justin R. Pabis, PE
Colonel, Corps of Engineers
District Commander

BY: 
John Bohenko
City Administrator

DATE: January 30th, 2024

DATE: January 30th, 2024