

City of Saco

Ron Michaud, Mayor

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July 22, 2010

U.S. Senator Susan Collins
413 Dirksen Senate Office Building
Building
Washington, D.C. 20510-1904

U.S. Senator Olympia Snowe
154 Russell Senate Office

Washington, D.C. 20510-1903

U.S. Representative Chellie Pingree
1037 Longworth HOB
Washington, D.C. 20510

RE: Saco River and Camp Ellis Beach Shore Damage Mitigation Project

To the Honorable U.S. Senators Collins and Snowe and U.S. Representative Pingree:

At the regular City Council meeting on July 19, 2010, the Council voted unanimously to “request U.S. Senators Collins and Snowe and U.S. Representative Pingree submit to the U.S. Army Corps of Engineers, the ‘Project Partnership Agreement between the Department of the Army and City of Saco, Maine for Design and Construction of the Saco River and Camp Ellis Jetty Section III Project’”, and therefore at this time graciously requests your continued support. A brief summary:

As you are aware, coastal storms have caused severe shoreline erosion along Camp Ellis Beach and the loss of over 30 homes. At the request of the City, the New England District of the Army Corps of Engineers (ACOE) conducted studies to find a remedy to the ongoing erosion.

These studies indicated an optimal federal plan consisting of a 750-foot long spur jetty and periodic beach fill as shown in Figure 3 (following page) of the Project Information Sheet dated January 19, 2010, published by the ACOE.

The design and construction of the Saco River and Camp Ellis Beach Section III Jetty Project will exceed the \$5 million statutory cap under Section 111 (of the River and Harbor Act of 1968) authority; however, Congress provided specific authority in the Water Resources Development Act of 2007 to exceed this limitation. The Secretary of the Army is authorized to allot from certain appropriations an amount not to exceed \$26,900,000 for the design and construction of

the Project as an aid to navigation, while simultaneously mitigating shoreline damage and erosion.

Such undertaking is dependent upon the City, following construction, acting as a partner. The City of Saco, in connection with this Agreement, desires to foster a partnering strategy and a working relationship between the ACOE and the City of Saco through a mutually developed formal strategy of commitment and communication, which creates an environment where trust and teamwork prevents disputes, fosters a cooperative bond between the ACOE and the City of Saco, and facilitates the successful implementation of the Project.

Additionally, the City desires to enter into a Project Partnership Agreement with the ACOE to clarify the role and responsibility of each Party from design, through construction, and for a period of 50 years post-construction. The ACOE has indicated they would like an Agreement reached this calendar year.

In negotiating the Agreement with the ACOE the City has several issues that are steadfast:

- Once the project is completed, the city cannot guarantee the ACOE project.
- In the past, the City has not been required to match funds through Section 111, or pay for project costs, and the city trusts that this process will continue into the future.
- Additionally, the City of Saco will need your support in dealing with deviations from ACOE requirements which are beyond our capabilities.

I would like to meet with you when you are in Maine and discuss this Project Partnership Agreement in more detail.

Sincerely,

Roland Michaud
Mayor

Cc: Bobby Reynolds
Peter Morin
Jackie Potter

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF SACO, MAINE
FOR
DESIGN AND CONSTRUCTION
OF THE
SACO RIVER AND CAMP ELLIS JETTY SECTION III PROJECT

THIS AGREEMENT is entered into this _____ day of _____, 2010, by and between the Department of the Army, represented by the **U.S. ARMY CORPS OF ENGINEERS, HEADQUARTERS DIVISION, 441 B Street, N.W., Washington, D.C. 20314 (“Army Corps” or “Government”)** and the **City of Saco, a Municipal Corporation, 300 Main Street, Saco, Maine (hereinafter “Saco” or “the City of Saco”)**.

WITNESSETH, THAT:

WHEREAS, the design and construction of the **SACO RIVER AND CAMP ELLIS BEACH SECTION III JETTY PROJECT** (the “Project”, as defined in Article I of this Agreement) at **Saco River /Camp Ellis Beach, City of Saco, County of York, Maine** was approved by Congress on _____, _____ pursuant to the authority contained in Section 111 of the River and Harbor Act of 1968, Public Law 90-483, as amended (hereinafter “Section 111”); and

WHEREAS, the Secretary of the Army is authorized to allot from certain appropriations an amount not to exceed \$26,900,000 for the design and construction of the Project as an aid to navigation, while simultaneously mitigating shoreline damage and erosion; and

WHEREAS, such undertaking is dependent upon the City acting as a partner; and

WHEREAS, the Government and the City of Saco desire to enter into a Project Partnership Agreement (hereinafter the “Agreement”) to clarify the role and responsibility of each Party from design, through construction, and for a period of 50 years post-construction; and

WHEREAS, the Government and the City of Saco have the full authority and capability to perform as hereinafter set forth and intend to cooperate in accordance with the terms of this Agreement; and

WHEREAS, the Government and the City of Saco, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the City of Saco through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevents disputes, fosters a cooperative bond between the Government and the City of Saco, and facilitates the successful implementation of the Project.

NOW, THEREFORE, the Government and the City of Saco agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" shall mean that design and construction generally described in the Final Draft Report, Saco River and Camp Ellis Beach Section III Project dated January, 2006.

B. The term "total project costs" shall mean the sum of all costs incurred by the Government to complete the design and construction of the Project, including the costs of beach re-nourishment for a period of time running the 50 years post construction.

C. The term "period of construction" shall mean the time from the date the Government issues the solicitation for the first construction contract for the Project or commences construction of the Project using the Government's own forces, whichever is earlier, to the date that construction of the Project is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII, whichever is earlier.

D. The term "financial obligations for construction" shall mean the total financial obligations of the Government including both total project costs, as well as the costs to secure any necessary lands, easements, and rights-of-way, the performance of relocations, and the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material.

E. The term "highway" shall mean any highway, roadway, street, or way, including any bridge which is a part thereof, which is owned by a public entity.

F. The term "relocation" shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad, or public facility when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, rising, or replacement and attendant demolition of the affected facility or part thereof.

G. The term "functional portion of the Project" shall mean a portion of the Project for which construction has been completed and that can function independently, as determined by the U.S. Army Engineer, Headquarters District (hereinafter the "District Engineer") in writing, although the remainder of the Project is not complete.

H. The term "Federal program funds" shall mean funds provided by a Federal agency, other than the Department of the Army.

I. The term "Section 111 Project Limit" shall mean the \$26,900,000 statutory limitation on the Government's financial participation in the planning, design, and construction of the Project as specified in Section 111 of the River and Harbor Act of 1968, Public Law 90-483, as amended.

J. The term “fiscal year” shall mean one year in time beginning on October 1 and ending on September 30.

K. The term “Design Coordination Team Activities” shall mean the oversight of matters related to design of the Project including: engineering and design, including scheduling of reports and work products; development of plans and specifications; real property and relocation requirements of the Project; contract awards and modifications; contract costs; the Government’s cost projections; anticipated requirements and needed capabilities for performance of operation and maintenance of the Project; and other matters related to design of the Project.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE CITY OF SACO

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) shall design and construct the Project, applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for design of the Project or commence design of the Project using the Government’s own forces until the City of Saco has confirmed in writing its willingness to proceed with the Project.

2. All contracts executed by the Government for the delivery or installation of rock, stone and/or sand to the Project/Project site shall require delivery within Saco of such materials, by any subcontractor or material man, to be by barge and not by road to protect local roads from excessive wear and damage due to material weight.

3. The Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the Project in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347; hereinafter “NEPA”). However, the Government shall not issue the solicitation for the first construction contract for the Project or commence construction of the Project using the Government’s own forces until all applicable State of Maine and Federal environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341), and all necessary and required State of Maine, City of Saco and Federal Permits have been secured.

4. The Government shall afford the City of Saco 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. To the extent possible, the Government shall afford the City of Saco the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the City of Saco with notification of a contract modification is not possible prior to execution of the contract modification, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the City of Saco 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 City of Saco, but the contents of solicitations, award of contracts or commencement of design or construction using the Government's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the Construction, Repair and Maintenance Project shall be exclusively within the control of the Government.

5. At the time the District Engineer furnishes any contractor with the Government's Written Notice of Acceptance of Completed Work for each contract awarded by the Government for the Project, the District Engineer shall furnish a copy thereof to the City of Saco.

6. The Government shall be responsible for securing any and all local, state and federal permits required for the Project, including permits for beach re-nourishment going forward after completion of construction,

7. Following completion of construction, the Army Corps shall each year thereafter conduct, or cause to be conducted, a survey of the beach profile landward of all improvements, for purposes of determining whether beach re-nourishment is necessary. Additional surveys may be requested by the City of Saco upon occasion of a significant storm event, meaning a storm that is a so-called "10 year storm" or greater. Re-nourishment shall be deemed necessary, and shall be undertaken by Army Corps, when surveys determine that 80,000 cubic yards of sand have eroded from the beach landward of the project. All re-nourishment by the Government conducted hereinafter shall be subject to the following terms and conditions:

a. The Government shall not commence beach re-nourishment work until the Army Corps has completed its construction of all improvements, and only upon sufficient subsequent erosion to warrant beach re-nourishment as noted herein above.

b. The Government shall not include in total project costs any costs for beach re-nourishment if the work had been accomplished by the Government alone, or the Government with cooperation of City of Saco forces and employees.

c. In the performance of all work, the Government shall comply with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.), and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

d. The Parties agree the City may, without further permission or consent, periodically deposit sand in the re-nourishment area at its own cost and expense to supplement re-nourishment by the Army Corps.

B. The City shall contribute **ZERO DOLLARS** of the total project costs. This commitment shall apply to design phase, construction phase, and for post-construction including the re-nourishment of the beach for the 50 years set forth herein. The City of Saco, however, shall grant

all easements, over land it owns, as may be necessary for the Government to undertake both construction and periodic beach re-nourishment.

C. Notwithstanding any other provision of this Agreement, Federal financial participation in the Project is limited by the following provisions of this paragraph.

1. In the event the Government projects that the amount of Federal funds the Government will make available to the Project through the then-current fiscal year, or the amount of Federal funds the Government will make available for the Project through the upcoming fiscal year, is not sufficient to meet the total project costs and the Federal share of costs for data recovery activities associated with historic preservation in accordance with this Agreement that the Government projects to be incurred through the then-current or upcoming fiscal year, as applicable, the Government shall notify the City of Saco in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the Project will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the Project, future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article XIII of this Agreement.

2. In accordance with Section 111 of the River and Harbor Act of 1968, Public Law 90-483, as amended, the Government's total financial obligations for planning, design, and construction of the Project shall not exceed the \$26,900,000.00.

3. As of the effective date of this Agreement, \$26,900,000.00 of Federal funds is currently projected to be available for the Project. The Government makes no commitment to request Congress provides additional Federal funds for the Project. Further, the Government's financial participation in the Project is limited to the Federal funds that the Government makes available to the Project.

D. When the District Engineer determines that the entire Project, or a functional portion of the Project, is complete, the District Engineer shall so notify the City of Saco in writing and furnish the City of Saco with a copy of the final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire Project or such completed portion. Upon such notification, the Government also shall furnish to the City of Saco a copy of all final as-built drawings for the entire Project or such completed portion if such drawings are available. Not later than 6 months after such notification by the Government that the entire Project is complete, the Government shall furnish the City of Saco with the final OMRR&R Manual and all final as-built drawings for the entire Project. In the event the final OMRR&R Manual or all final as-built drawings for the entire Project cannot be completed within the 6 month period, the Government shall provide written notice to the City of Saco, and the Government and the City of Saco shall negotiate an acceptable completion date for furnishing such documents. Further, after completion of all contracts for the Project, copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the Project that have not been provided previously shall be provided to the City of Saco.

E. Upon notification from the District Engineer in accordance with paragraph D. of this Article, the Army Corps shall maintain the beach area immediately landward of the Project, by and through beach re-nourishment for 50 years.

F. The Government shall perform and provide, on behalf of the City of Saco, all of the following services, at its cost, without contribution from the City of Saco:

1. Acquisition of lands, easements, and rights-of-way; performance of relocations; or construction of improvements required on submerged lands, and other easements, and rights-of-way to enable the construction of the Project.

2. Inclusion of betterments in the design or construction of the Project shall be the cost and responsibility of the Government unless expressly requested by the City of Saco. If the City does specifically request any betterment, it shall pay for such betterments pursuant to Section VI.

**ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY,
RELOCATIONS, DISPOSAL AREA IMPROVEMENTS, AND
COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED**

A. The Government, after consultation with the City of Saco, shall determine, and as needed shall secure, those lands, easements, and rights-of-way required for construction, operation, and maintenance of the Project, including those required for relocations, the borrowing of material, and the disposal of dredged or excavated material. Prior to the issuance of the solicitation for each Government contract for construction of the Project, or prior to the Government initiating construction of a portion of the Project using the Government's own forces, the Army Corps shall acquire all lands, easements, and rights-of-way the Government determines are necessary for completion of the Project. Furthermore, prior to the end of the period of design and construction the Government shall acquire all lands, easements, and rights-of-way required for construction, operation, and maintenance of the Project, as set forth in such descriptions, and shall provide the City of Saco with authorization for entry thereto. The Government shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the Project and that were secured herein are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the City of Saco, shall determine the relocations necessary for construction, operation, and maintenance of the Project, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government in a timely manner shall provide the City of Saco with general written descriptions, including maps as appropriate, of such relocations, and shall provide the City of Saco with a written notice of its intentions to proceed with such relocations. Prior to the issuance of the solicitation for each Government contract for construction of the Project, or prior to the Government initiating construction of a portion of the Project using the Government's own forces, the Government shall ensure the preparation of plans and specifications for, and perform or ensure the performance of, all relocations the Government determines to be necessary for that work. Furthermore, prior to the end

of the period of design and construction the Government shall perform or ensure performance of all relocations as set forth in such descriptions.

C. The Government, after consultation with the City of Saco, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the Project. Such improvements may include, but are not necessarily limited to, retaining dikes, waste weirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government, in a timely manner, shall provide the City of Saco with general written descriptions, including maps as appropriate, of such improvements; and, shall provide the City of Saco with a written notice of its intentions to proceed with construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the Project, or prior to the Government initiating construction of a portion of the Project using the Government's own forces, the Government shall prepare plans and specifications for all improvements it determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the City of Saco for its general review, but not for its approval. Furthermore, prior to the end of the period of design and construction, the Government shall provide all improvements set forth in such descriptions.

D. The Government shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for construction, operation, and maintenance of the Project, including those required for relocations, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV -VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS AND DISPOSAL AREA IMPROVEMENTS

A. All lands, easements, rights of way, relocations and disposal area improvements, as may be determined as necessary for the Project, shall be the responsibility of and secured by the Army Corps, and the Government shall bear the cost for all such acquisitions.

B. Reserved.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the City of Saco and the Government, not later than 30 calendar 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 and construction. The Government's

Project Manager and a counterpart named by the City of Saco shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the City of Saco's counterpart shall keep the Project Coordination Team informed of the progress of design and construction 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 and construction, the Project Coordination Team shall generally oversee the Project, including matters related to design; completion of all necessary environmental coordination and documentation; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.), and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for relocations, improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material, and the construction portion of the Section 111 work; the investigations to identify the existence and extent of hazardous substances in accordance with Article XIV of this Agreement; historic preservation activities in accordance with Article XVII of this Agreement; the Government's cost projections; the performance of and scheduling for the Section 111 work; final inspection of the entire Project or functional portions of the Project; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the Project including issuance of permits; and other matters related to the Project. This oversight of the Project shall be consistent with a project management plan developed by the Government after consultation with the City of Saco.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the Project 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 and construction of the Project, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

E. The City of Saco's costs of participation in the Project Coordination Team shall not be included in total project costs. The Government's costs of participation in the Project Coordination Team shall be included in total project costs.

ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the City of Saco current projections of costs, financial obligations, contributions provided by the parties, the value included in total project costs for lands, easements, rights-of-way, relocations, and improvements required on lands, easements, and rights-

of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement.

1. All these costs shall be borne by the Government up to the Project limit of \$26,900,000.00.

2. The cost of any betterment specifically requested by the City of Saco shall be paid for by the City as set forth herein below.

B. The City of Saco shall provide funds required of this Agreement within 365 days of the completion of construction by delivering a check payable to “FAO, USAED, [APPROPRIATE USACE DISTRICT & EROC]” to the District Engineer, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

ARTICLE VII - 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, the parties shall engage in non-binding alternative dispute resolution (ADR) such as mediation, of no less than a day’s length, with a qualified third party acceptable to both 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. Should non-binding ADR fail to resolve the matter, one or the other parties may file suit to enforce their rights herein unless the other opts, within 60 days of the conclusion of mediation, for binding arbitration in which case, the dispute shall be finally and conclusively resolved via binding arbitration, each side to bear half the costs of such binding arbitration, and to bear its own attorneys fees. Arbitration shall take place in Portland, Maine.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R); BEACH RE-NOURISHMENT

A. Upon receipt of the notification from the District Engineer in accordance with Article II of this Agreement and for a period of 50 years from date of completion, the Army Corps shall re-nourish that area of the Camp Ellis Beach landward of the Project, subject to the terms of Section II. The operation, maintenance, repair, rehabilitation and replacement of the Project itself shall be the responsibility of the Government subject to the Terms of Article II. The Government shall conduct the operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the Project’s authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The City of Saco hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the City of Saco now or hereafter owns or controls, for access to the Project and to the Camp Ellis Beach for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, inspecting, repairing, rehabilitating, or replacing the Project.

ARTICLE IX – LIABILITY/ HOLD AND SAVE HARMLESS

A. The Government warrants and represents that the City of Saco is not responsible or liable for the nature and extent of existing conditions at the Saco River or Camp Ellis Beach as of this date.

B. Upon completion of construction, the Government warrants and represents that it will not hold Saco liable, nor will it state, claim or assert in any manner or forum that the City of Saco is responsible, for any subsequent conditions that arise from or are in any way related to the installation and maintenance of the Project, including the shape, condition and size of the Camp Ellis Beach or the Saco River.

C. The Government shall hold and save the City of Saco free from any and all damages arising from the design and construction of the Project, except for damages due to the fault or negligence of the City or its contractors.

D. The Parties agree the City of Saco is not a guarantor in any shape, form or manner of the Project, or of the workmanship therein, nor does it warrant or guarantee the performance of the Project over its projected 50 year life.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the City of Saco shall develop procedures for keeping books, records, documents, or 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 City of Saco shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the City of Saco shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the City of Saco is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 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 City of Saco and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the City of Saco and independent

auditors any information necessary to enable an audit of the City of Saco's activities under this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the City of Saco is required to conduct under the Single Audit Act Amendments of 1996. 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 project costs.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the City of Saco and the Government shall 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; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq.), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq.), and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the City of Saco 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 the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE XIII - TERMINATION OR SUSPENSION

A. If the City of Saco fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) may, subject to the terms of Section VII, 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 nonfederal interests in connection with the Project.

B. In the event future performance under this Agreement is suspended pursuant to Article II of this Agreement, such suspension shall remain in effect until such time that the Government notifies the City of Saco in writing that sufficient Federal funds are available to

meet the Federal share of total project costs and the Federal share of costs for data recovery activities associated with historic preservation.

C. In the event that the Government and the City of Saco determine to suspend future performance under this Agreement in accordance with Article XIV of this Agreement, such suspension shall remain in effect until the Government and the City of Saco agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIV of this Agreement due to failure to reach agreement with the City of Saco on whether to proceed or to terminate this Agreement, or the failure of the City of Saco to otherwise discharge the City of Saco's responsibilities under Article XIV of this Agreement, such suspension shall remain in effect until: 1) the Government and City of Saco reach agreement on how to proceed or to terminate this Agreement; 2) the City of Saco provides funds necessary to otherwise discharge its responsibilities under Article XIV of this Agreement; 3) the Government continues work on the Project; or 4) the Government terminates this Agreement in accordance with the provisions of Article XIV of this Agreement.

D. If after completion of 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 and conduct an accounting in accordance with Article VI of this Agreement.

E. In the event that this Agreement is terminated pursuant to this Article or Article XIV of this Agreement, both parties shall conclude their activities relating to the Project and conduct an accounting in accordance with Article VI of this Agreement.

F. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II or Article XIV of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the City of Saco 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 XIV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Army Corps shall perform, or ensure performance of, 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 (42 U.S.C. 9601-9675; hereinafter "CERCLA"), that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the Project.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands,

easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the Project, the City of Saco and the Government, shall provide prompt written notice to each other, and no such real property interests shall be taken until a decision as to cost sharing and liability is made.

C. The Government and the City of Saco shall determine whether to initiate construction of the Project, or, if already in construction, whether to continue with construction of the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Parties, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the Project. Should the Government and the City of Saco determine to initiate or continue with construction of the Project after considering any liability that may arise under CERCLA, the Government shall be responsible for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall be considered a part of total project costs. In the event the Government does not reach agreement with the City of Saco on whether to proceed or to terminate this Agreement under this paragraph, the Government, in its sole discretion, may terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The City of Saco and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the City of Saco, the Government shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Government shall operate, maintain, repair, rehabilitate, and replace the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - 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 sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the City of Saco: City of Saco
Attn: City Administrator
300 Main Street
Saco, Maine 04072

If to the Government: Army Corps of Engineers
Headquarters
441 G Street, N.W.
Washington, D.C. 20314

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 XVI - 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. The Parties agree in advance, however, that this document itself shall be deemed and treated as a public record under Maine Law.

ARTICLE XVII - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the Project, shall perform any identification, survey, or evaluation of historic properties. Any costs incurred by the Government for such work shall be paid by the Army Corps.

B. The Government, as it determines necessary for the Project, shall perform or ensure the performance of any mitigation activities or actions for historic properties or that are otherwise associated with historic preservation including data recovery activities.

1. All costs incurred by the Government for such mitigation activities, shall be borne by Army Corps.

2. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c (a)), the costs of data recovery activities associated with historic preservation shall be borne entirely by the Government.

C. If, during its performance of any work hereafter, the City of Saco discovers historic properties or other cultural resources that have not been evaluated by the Government pursuant to this Article; the City of Saco shall provide prompt written notice to the Government of such discovery. The City of Saco shall not proceed with performance of any further work that could alter or affect such discovery until the Government provides written notice to the City of Saco that it should proceed with such work.

ARTICLE XVIII - 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 party to this Agreement.

ARTICLE XIX - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the City of Saco, or the Government, where creating such an obligation would be inconsistent with Laws of the State of Maine or the United States Government.

B. Both the Army Corps and the City of Saco intend to fulfill its obligations under this Agreement. The Army Corps and the City of Saco shall include in their budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations as they arise, and they shall use all reasonable and lawful means to secure those appropriations. Both Parties reasonably believe 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 City of Saco 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 City of Saco 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.

ARTICLE XX –SOVEREIGN IMMUNITY

The City of Saco waives any sovereign immunity that it may possess from suit by the United States related to the provisions, terms, and conditions contained in this Agreement, EXCEPT, it does not waive any immunity it may possess as to claims for damages. Accordingly, the City of Saco hereby waives any sovereign immunity that it may possess from suit by the United States to: (1) specifically enforce the terms and conditions of this Agreement; and (2) seek an injunctive relief subject to the conditions of Section VII.

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

DEPARTMENT OF THE ARMY:

CITY OF SACO:

BY: _____

BY: _____

Rick Michaud
City Administrator

Print name/title

BY: _____

Ron Michaud
Mayor

DATE: _____

DATE: _____