

AMENDMENT NUMBER 2
OF THE
LOCAL COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND THE
COMMONWEALTH OF PENNSYLVANIA
FOR THE SHORELINE PROTECTION PROJECT
AT PRESQUE ISLE PENINSULA
ERIE HARBOR, ERIE, PENNSYLVANIA

THIS AMENDMENT is entered into this 22 day of September, 1998 by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), acting by and through the Assistant Secretary of the Army (Civil Works) and the Commonwealth of Pennsylvania (hereinafter the "Local Sponsor"), acting by and through the Department of Conservation and Natural Resources.

WITNESSETH, THAT:

WHEREAS, Subsection 501(a) of the Water Resources Development Act (WRDA) of 1986 (Public Law 99-662) authorized the construction of the shore line protection project at Presque Isle Peninsula, Erie, Pennsylvania (hereinafter "the Project") in accordance with the Report of The Chief of Engineers, dated October 2, 1981; and

WHEREAS, on 22 June, 1989 the Government and the Local Sponsor entered into a Local Cooperation Agreement (hereinafter the "Agreement") for the construction of the Project, as defined in Article I.A. of the Agreement, as amended; and

WHEREAS, on 13 May, 1991 the Government and the Local Sponsor entered into an Amendment to the Agreement; and

WHEREAS, the Project provided for an authorized beach nourishment period of 50 years after completion of construction, the costs to be shared equally among the parties; and

WHEREAS, the Project was completed and turned over to the Local Sponsor on 14 July 1993; and

WHEREAS, the Government and the Local Sponsor have each made available their annual contribution for Presque Isle beach nourishment; and

WHEREAS, the Government expects to award or has awarded a contract for Presque Isle Beach Nourishment, Erie, Pennsylvania; and

WHEREAS, after funds were made available, late winter storms caused additional damages to the ice-free beaches of the Presque Isle Peninsula; and

WHEREAS, no more Federal Funds are available for the beach nourishment of the Presque Isle Peninsula; and

WHEREAS, the Local Sponsor wishes to add betterment language to the Agreement to allow the placement of additional sand to repair the damages and enhance the beaches on Presque Isle Peninsula and to this end is willing to contribute additional funds over and above its required share of the costs of beach nourishment under the Project; and

NOW, THEREFORE, the Government and the Local Sponsor agree to amend the Agreement, as amended, as follows:

1. ARTICLE I - DEFINITIONS

a. In paragraph 6., first line, and in paragraph 3., last line, replace the words "Contracting Officer" with the words "District Engineer".

b. In the last line of paragraph 6., delete the words ", or his designee".

c. Add a new paragraph 11. as follows:

"11. The term "betterment" shall mean a change in the design and construction 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 and construction of that element."

2. ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE Local Sponsor

a. Add a new paragraph i. as follows:

"i. The Local Sponsor may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the Local Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Local Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.e. of this Agreement."

b. Add a new paragraph j. as follows:

"j. The Government shall perform a final accounting in accordance with Article VI.f. of this Agreement to determine the contributions provided by the Local Sponsor in accordance with paragraph i. of this Article and Articles X, XI, and XIX of this Agreement and to determine whether the Local Sponsor has met its obligations under paragraph i. of this Article."

3. ARTICLE V - CONSTRUCTION PHASING AND MANAGEMENT

In paragraph b., last line, and in paragraph c., first and third lines, replace the words "Contracting Officer" with the word "Government".

4. ARTICLE VI - METHOD OF PAYMENT

Delete paragraphs VI e., and f. and replace with the following paragraphs.

"e. In advance of the Government incurring any financial obligation associated with additional work under Article II.i. of this Agreement, the Local Sponsor shall verify to the satisfaction of the Government that the Local Sponsor either has deposited the full amount of the funds required to pay for such additional work in an escrow or other account acceptable to the Government with interest accruing to the Local Sponsor, or by presenting to the Government an irrevocable letter of credit acceptable to the Government in an amount sufficient to meet the Local Sponsor's obligation. The Government shall draw from the funds provided by the Local Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the Local Sponsor must provide additional funds to meet its cash contribution, the Government shall notify the Local Sponsor in writing of the additional funds required. Within 60 calendar days thereafter, the Local Sponsor shall provide the Government with a check for the full amount of the additional required funds."

"f. Upon completion of the Project or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Local Sponsor with the results of the final accounting. The final accounting shall determine total project costs, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments and the Local Sponsor's cash contribution provided pursuant to Article II.i. of this Agreement.

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

2. In the event the final accounting shows that the total contribution provided by the Local Sponsor exceeds its required share of total project costs plus costs due to any betterments provided in accordance with Article II.i. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the Local Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Local Sponsor, the Government shall seek such appropriations as are necessary to make the refund."

5. NEW ARTICLE

ARTICLE XX - HAZARDOUS SUBSTANCES

"a. After execution of this Agreement and upon direction by the District Engineer, the Local Sponsor shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the Local Sponsor 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, 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 the construction, operation, and maintenance of the Project. However, for lands that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Local Sponsor with prior specific written direction, in which case the Local Sponsor shall perform such investigations in accordance with such written direction. All actual costs incurred by the Local Sponsor for such investigations for hazardous substances shall be included in total project costs and cost shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Articles X and XI of this Agreement to determine reasonableness, allocability, and allowability of costs.

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 the construction, operation, and maintenance of the Project, the Local Sponsor and the Government shall provide prompt written notice to each other, and the Local Sponsor shall not proceed with the acquisition of the real property interests until both parties agree that the Local Sponsor should proceed.

c. The Government and the Local Sponsor shall determine whether to initiate construction of the Project, or, if already in construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, 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 the construction, operation, and maintenance of the Project. Should the Government and the Local Sponsor determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the Local Sponsor shall be responsible, as between the Government and the Local Sponsor, for the costs of clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of total project costs. In the event the Local Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Local Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

d. The Local Sponsor and the Government shall consult with each other in an effort to ensure that responsible parties bear any necessary clean up 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 Local Sponsor, the Local Sponsor shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Local Sponsor shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA."

6. NEW ARTICLE

Add a new Article as follows:

"ARTICLE XXI - HISTORIC PRESERVATION

a. The costs of identification, survey and evaluation of historic properties shall be included in total project costs and cost shared in accordance with the provisions of this Agreement.

b. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of the total amount authorized to be appropriated for the Project.

c. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall not be included in total project costs but shall be cost shared between the Local Sponsor and the Government consistent with the cost sharing requirements for this Agreement.

7. All other terms and conditions of the Agreement, as amended remain unchanged.

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

THE DEPARTMENT OF THE ARMY

THE COMMONWEALTH OF PENNSYLVANIA

BY: Mark D. Feierstein
Mark D. Feierstein
Lieutenant Colonel, U.S. Army
Commanding

BY: Eugene J. Comoss, P.E.
Eugene J. Comoss, P.E.
Bureau of Facility Design and
Construction,
Commonwealth of Pennsylvania
Department of Conservation and
Natural Resources

DATE: 25 SEP 98

DATE: 9/23/98

Approved for Legality and Form:

Phillip W. Shupaly

Chief Counsel, DCNR

Approved for Legality and Form:

Donald Weiser

Deputy General Counsel, Office of
General Counsel

Approved for Legality and Form:

Attorney General

CERTIFICATE OF AUTHORITY

I, William W. Shakely, am Staff Attorney for the Commonwealth of Pennsylvania Department of Conservation and Natural Resources and do hereby certify that the Department of Conservation and Natural Resources, Bureau of Facility Design and Construction is a legally constituted public body with full authority and legal capability to perform the terms of the Amendment between the Department of the Army and the Commonwealth of Pennsylvania in connection with the Presque Isle Peninsula beach nourishment Project, and to pay damages in accordance with the terms of this Amendment, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the person who has executed this Amendment on behalf of the Commonwealth of Pennsylvania has acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 30th day of September, 1998.

William W. Shakely

Nancy J. Read

NOTARIAL SEAL
NANCY J. READ, Notary Public
Harrisburg, Dauphin County
My Commission Expires Nov. 29, 1999