

AGREEMENT BETWEEN
THE DEPARTMENT OF THE ARMY
AND
TOWN OF EVANS, NY

FOR LOCAL COOPERATION ON NAVIGATION PROJECT ON LAKE ERIE
AT STURGEON POINT MARINA

THIS AGREEMENT entered into this 26th day of October, 1987, between the DEPARTMENT OF THE ARMY (hereinafter called the "Government") acting by and through the District Commander, U.S. Army Engineer District, Buffalo and the Town of Evans, NY (hereinafter called the "Town"), acting by and through the Evans Town Board;

WITNESSETH THAT:

WHEREAS, the authority for construction of the navigation project on Lake Erie at Sturgeon Point Marina, Evans, New York, (hereinafter called the "Project") not specifically authorized by Congress is contained in Section 107 of the River and Harbor Act of 1960, (Public Law 86-845), as amended, and the Project was approved by the Chief of Engineers, U.S. Army Corps of Engineers, Washington, DC, on 21 October, 1987; and

WHEREAS, Section 107 of the River and Harbor Act of 1960, as amended by Section 915, Sub Section (d) of P.L. 99-662, limits the amount the Government can expend on a single project to \$4,000,000; and

WHEREAS, the Water Resources Development Act of 1986, Public Law 99-662, specifies the cost sharing requirements applicable to this project; and

WHEREAS, Public Law 99-500 addresses construction of this Project and specifically provides the sum of one million six hundred thousand dollars (\$1,600,000) for its purpose in the language of the Act; and

WHEREAS, the general plan and description of the Project is set out in the May, 1987, Detailed Project Report prepared by the Buffalo District, Corps of Engineers, copies of which have been furnished the Town; and

WHEREAS, the Town has the authority and legal capability to furnish the non-Federal cooperation hereinafter set forth and is willing to participate in project cost-sharing and financing in accordance with the terms of this Agreement;

WHEREAS, the Town and the Government mutually desire to enter into a cost-sharing agreement for construction of a navigation project on Lake Erie at Sturgeon Point, New York.

NOW THEREFORE, in consideration of the foregoing and the benefits which shall accrue to the parties by construction of the project, the parties agree as follows:

ARTICLE I. - DEFINITIONS

For purposes of this Agreement:

a. The term "project" shall mean the following general navigation features which have joint recreational and commercial navigation purposes: rehabilitation of the existing breakwater with a rubblemound facing, construction of a rubblemound west breakwater extension, construction of a rubblemound East Breakwater and dredging to minus eight feet Low Water Datum (-8 ft. LWD) in the entrance channel, and the mooring basin will be split equally with depths of minus six and minus four Low Water Datum (-6 ft. and -4 ft. LWD) in the mooring basin. Sediment by-passing is proposed as a

yearly maintenance feature in order to eliminate water-based dredging operations and to preserve the natural nourishment of littoral sediment. In addition to the annual by-passing, sand will be dredged from the mooring area and entrance channel as needed.

b. The term "total cost of the project allocated to commercial navigation" shall mean all costs incurred by the Town and the Government directly related to construction of the general navigation feature of the project allocated to commercial navigation. Such costs shall include, but not necessarily be limited to, allocated actual construction costs, allocated costs of applicable engineering and design, supervision and administration costs, and costs of contract dispute settlements or awards, but shall not include the allocated value of lands, easements, rights-of-way, and dredged material disposal areas, or relocations performed by or on behalf of the Town; or non-Federal dredging of public or private channels and berthing areas; or aids to navigation.

c. The term "total cost of the project allocated to recreational navigation" shall mean all costs incurred by the Town and the Government directly related to construction of the general navigation features of the project allocated recreation. Such costs shall include, but not necessarily be limited to, allocated actual construction costs, allocated costs of applicable engineering and design, and supervision and administration costs, the allocated value of lands, easements, rights-of-way, relocations, dredged material disposal areas, but shall not include non-Federal dredging of public or private channels and berthing areas; or aids to navigation.

d. The term "period of construction" shall mean the time from the advertisement of the first construction contract to the time of acceptance of the general navigation features of the Project by the Contracting Officer.

e. The "Contracting Officer" shall mean the Commander of the U.S. Army Engineer District, Buffalo, or his designee.

ARTICLE II. - OBLIGATIONS OF PARTIES

a. The Town shall provide, during the period of construction, fifty (50) percent of the total cost of the project allocated to recreation, and ten (10) percent of the total cost of the project allocated to commercial navigation. The value, as determined under Article IV hereof, of items or work allocated to recreation that are provided under paragraphs b. and c. of this Article shall be credited toward the Town's share of the total cost of the project allocated to recreation. Allocations of cost shall be based on the percentages of project benefits accruing to each purpose. Eighty-eight (88) percent of the project benefits are allocable to the recreation purpose, and twelve (12) percent of project benefits are allocable to the commercial navigation purpose.

b. As further specified in Article III hereof, the Town shall provide to the Government all lands, easements, and rights-of-way, including dredged material disposal areas, and perform all relocations or alterations of facilities other than utilities governed by paragraph c. below (except relocations or alterations of highway and railroad bridges), determined by the Government to be necessary for construction, operation, or maintenance of the project. However, to the extent that any lands, easements, and rights-of-way provided by the Town under this paragraph are already owned by the Town for use by the Sturgeon Point Marina and related facilities, the value of such items shall not be credited against the Town's local cooperation requirements.

c. As further specified in Article III hereof, the Town shall perform or assure performance of all utility relocations or alterations determined by the Government to be necessary for construction, operation, or maintenance of the project.

d. The Town shall provide and maintain, at its own expense, all project facilities, other than those for commercial navigation as specified in Article VIIIc, including dredged depths, commensurate with those in related general navigation features in berthing areas, local access channels serving the general navigation features, necessary mooring facilities, utilities, a public landing with suitable supply and essential sanitary facilities, launching ramps, parking areas, and access roads open to all on equal terms.

e. As further specified in Article VI hereof, the Town shall repay with interest, over a period not to exceed 30 years following completion on the project, an additional 0 to 10 percent of the total cost of construction of the project allocated to commercial navigation, depending on the value, as calculated under Article IV hereof, of items provided pursuant to paragraph b. of this Article which are allocable to the commercial navigation. If the credit allowed for such items is less than 10 percent of the total cost of construction of the project allocated to commercial navigation, the Town shall repay a percentage of said total cost equal to the difference between 10 percent of the allocated total cost and the percentage of the total cost represented by the value of such items. If the credit allowed is equal to or greater than 10 percent of said total cost, the Town shall not be required to repay any additional percentage of the total cost. No credit shall be given for items provided pursuant to paragraph c. of this Article.

f. As further specified in Article VIII a and c, the Town shall operate and maintain all portions of the Project, except for aids to navigation, and

the Government shall pay annually to the Town twelve percent (12%) of the total incurred operation and maintenance costs of the general navigation features.

g. In no instance shall the Government's share of the total project cost, including all preauthorized planning, exceed the total amount of four million dollars (\$4,000,000). The Town shall assume full responsibility for all costs in excess of the P.L. 99-662 § 915(d) cost limitation of four million dollars (\$4,000,000).

h. Upon completion of the project, the Government shall turn the project over to the Town, which shall be solely responsible for operating, maintaining, and rehabilitating the project in accordance with Article VIII hereof.

i. The Government, subject to and using funds provided by the Town and appropriated by the Congress, shall expeditiously construct the Project, applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The Town shall be afforded the opportunity to review and comment on all contracts, including relevant plans and specifications, prior to the issuance of invitations for bids. The Town also shall be afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the contractor of a Notice to Proceed. The Government will consider the view of the Town but awards of the contracts and performance of the work thereunder shall be exclusively within the control of the Government.

ARTICLE III. - LANDS, FACILITIES, AND RELOCATION ASSISTANCE

a. Prior to the advertisement or award of any construction contract, the Town shall furnish to the Government all lands, easements, and rights-of-way, including suitable borrow and dredged material disposal areas, as may be determined by the Government to be necessary for construction, operation, and maintenance of the project, and shall furnish to the Government evidence supporting the town's legal authority to grant rights-of-entry to such lands.

b. The Town shall provide or pay to the Government the full cost of providing all retaining dikes, wasteweirs, bulkheads, and embankments, including all monitoring features and stilling basins, determined by the Government to be necessary for construction, operation, or maintenance of the general navigation features.

c. Upon notification from the Government, the Town shall accomplish all necessary alterations and relocations of buildings, highways, railroads, storm drains, and other facilities, structures and improvements.

d. Upon notification from the Government, the Town shall perform or assure performance of all necessary alterations and relocations of pipelines, cables and other utilities.

e. The Town shall comply with the applicable provisions of the Uniform Relocations Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, approved January 2, 1971, in acquiring lands, easements, and rights-of-way for construction and subsequent operation and maintenance of the project, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV. - VALUE OF LANDS AND FACILITIES

a. The value of any lands, easements, and rights-of-way which are provided under the terms of this Agreement shall be determined in accordance with the following provisions:

(1) If the lands, easements and rights-of-way are owned by the Town as of the date this Agreement is signed, the credit shall be the fair market value of the interests at the time such interests are made available to the Government for construction of the project. The fair market value shall be determined by an appraisal to be obtained by the Town, which has been prepared by an independent and qualified appraiser who is acceptable to both the Town and the Government. The appraisal shall be reviewed and approved by the Government.

(2) If the lands, easements, or rights-of-way are to be acquired by the Town after the date this Agreement is signed, the credit shall be the fair market value of the interest at the time such interest is made available to the Government for construction of the project. The fair market value shall be determined in the same manner as specified in subparagraph 1 above. If the Town pays an amount in excess of the appraised fair market value, it may be entitled to a credit for the excess if the Town has secured prior written approval from the Government of its offer to purchase such interest.

(3) If the Town acquires more lands, easements, or rights-of-way than are necessary for project purposes, as determined by the Government, then only the value of such portions of those acquisitions as are necessary for project purposes shall be credited to the Town's share.

(4) Credit for lands, easements, and rights-of-way in the case of involuntary acquisitions made within one year preceding the date this Agreement is signed or any time after the date this Agreement is signed will be based on court awards or stipulated settlements, that have received prior Governmental approval.

(5) For lands, easements, or rights-of-way acquired by the Town within a five-year period preceding the date this Agreement is signed or any time after this Agreement is signed, credits provided under this Article will also include the actual incidental costs of acquiring the interest, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for any relocation assistance provided in accordance with obligations under this Agreement.

b. The allowable cost of construction, relocation, alteration, or modification of utilities or facilities shall be that portion of the actual costs incurred by the Town as set forth below:

(1) Highways: Only that portion of the cost as would be necessary to construct substitute highways to the design standard that the State of New York would use in constructing a new highway under similar conditions of geography and traffic loads.

(2) Facilities: Actual relocation costs, less depreciation, less salvage value, plus the cost of removal, less the cost of betterments. With respect to betterments, new materials shall not be used in any relocation or alteration if materials of value and usability equal to those in the existing

facility are available or can be obtained as salvage from the existing facility or otherwise, unless the provision of new material is more economical. If, despite the availability of used material, new material is used, where the cost of such new material represents an additional cost, such cost shall not be included in total project costs or credited to the Town's share.

ARTICLE V. - CONSTRUCTION PHASING AND MANAGEMENT

a. To provide for consistent and effective communication between the Town and the Government during the term of construction, the Town and the Government shall appoint representatives to coordinate on scheduling, plans specifications, modifications, contract costs, and other matters relating to construction of the project.

b. The representatives appointed above shall meet as necessary during the term of Project construction and shall make such recommendations as they deem warranted to the Contracting Officer.

c. The Contracting Officer shall consider the recommendations of the representatives in all matters relating to the project, but the Contracting Officer, having ultimate responsibility for construction of the project, has complete discretion to accept, reject, or modify the recommendations of the representatives.

ARTICLE VI. - METHOD OF PAYMENT

a. The Town shall provide, over the term of construction, the percentages of the total cost of construction of the general navigation features

specified in Article II a. hereof. Such total cost is presently estimated to be \$2,514,000. In order to meet its share, the Town must provide an initial cash contribution presently estimated to be \$1,276,000.

b. The Town shall provide its required cash contribution in proportion to the rate of Federal expenditures over the term of the construction period in accordance with the following provisions:

(1) For purposes of budget planning, the Government shall notify the Town by August 1 of each year of the estimated funds that will be required from the Town to meet its share of project costs for the corresponding Government fiscal year.

(2) Sixty (60) days prior to the award of the first construction contract, the Government shall notify the Town of its share of project costs, including costs attributable to the project incurred prior to the initiation of construction, for the first fiscal year of construction. Within thirty (30) days thereafter, the Town shall provide the requisite amount to the Government in cash by delivering a check payable to "FAO, USAED, Buffalo" to the Contracting Officer.

(3) For the second and subsequent fiscal years of project construction, the Government shall, 60 days prior to the beginning of the fiscal year, notify the Town of its share of project costs for that fiscal year. No later than 30 days prior to the beginning of the fiscal year, the Town shall make the necessary funds available to the Government through the funding mechanism specified above.

(4) If at any time during the period of construction the Government determines that additional funds will be needed from the Town to meet its initial share of project costs, the Government shall notify the Town and the Town, within 60 days from receipt of notice, shall make the necessary funds available through the funding mechanism specified above.

c. The Government will draw on the funds provided by the Town such sums as it deems necessary to cover contractual and in-house fiscal obligations attributable to the project as they are incurred, as well as project costs incurred by the Government prior to the initiation of construction.

d. Upon completion of all the project elements and resolution of all relevant contract claims and appeals, the Government shall compute the total cost of construction of the general navigation features and tender a final accounting to the Town of its share of project costs.

(1) In the event the total contribution by the Town for the commercial navigation element is less than its minimum required share of project costs allocated to commercial navigation, at the time of the final accounting, the Town shall within 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet its minimum required share of said project costs. In the event the Town has made excess cash contributions which result in the Towns having provided more than its initial required share pursuant to Article II a. of project costs, allocated to commercial navigation, the Government shall credit the excess to the additional amount the Town must repay pursuant to Article II e. of this Agreement.

(2) In the event the total contribution by the Town for the recreational navigation element is less than its minimum required share of project costs allocated to recreation at the time of the final accounting, the Town shall within 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet its minimum required share of said project costs. In the event the Town has made contribution in excess of 50 percent of total project costs allocated to recreation which result in the Town's having provided more than its required share of project costs allocated to recreation, the Government shall within 90 days of the final accounting, subject to availability of appropriations, return said excess to the Town.

e. The Town shall repay the additional amount required pursuant to Article II e. of this Agreement, reduced by any excess cash contribution made during the term of construction, in equal annual installments over a period of (not more than 30) years from the date the final accounting is tendered by the Government. Such repayment shall include interest at a rate determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the repayment period, during the month preceding the fiscal year in which costs for the construction of the project are first incurred (or, in the case of recalculation, the fiscal year in which the recalculation is made), plus a premium of one-eighth of one percentage point for transaction costs. The interest rate shall be recalculated by the Secretary of the Treasury at five-year intervals. Nothing herein shall preclude the Town from repaying this additional amount in full upon

receipt of the final accounting. Should this full repayment be made within 90 days from receipt of the final accounting, there shall be no charges for interest or transaction costs.

ARTICLE VII. - DISPUTES

Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or through other forms of alternative non-binding dispute resolution, mutually acceptable to the parties.

ARTICLE VIII. - OPERATION AND MAINTENANCE

a. The Town shall operate and maintain all portions of the project, except for aids to navigation, in accordance with regulations or directions prescribed by the Government.

b. The Town hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which it owns or controls for access to the Project for the purpose of inspection, and, if necessary, for the purpose of completing, operating, repairing, and maintaining the project. If an inspection shows that the Town for any reason is failing to fulfill its obligation under this Agreement without receiving prior written approval from the Government, the Government will send a written notice to the Town. If the Town persists in such failure for 30 calendar days after receipt of the notice, then the Government shall have a right to enter, at reasonable times and in a reasonable manner, upon lands the Town owns or controls for access to the Project for the purpose of completing, operating, repairing, or maintaining those portions of the project for which the local sponsor is responsible

under this Agreement at town expense. No completion, operation, repair, or maintenance by the Government shall operate to relieve the Town of responsibility to meet its obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

c. The Government annually shall pay the Town one hundred percent of the incurred operation and maintenance costs allocated to commercial navigation.

ARTICLE IX. - RELEASE OF CLAIMS

The Town shall hold and save the Government, free from all damages arising from the construction, operation, and maintenance of the project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X. - MAINTENANCE OF RECORDS

The Government and the Town shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement to the extent and in such detail as will properly reflect total Project costs. The Government and the Town shall maintain such books, records, documents, and other evidence for a minimum of three years after completion of construction of the project, and resolution of all claims arising therefrom, and shall make available at their offices at reasonable times, such books, records, documents, and other evidence for inspection and audit by authorized representatives of the parties to this Agreement.

ARTICLE XI. - FEDERAL AND STATE LAWS

In acting under its rights and obligations hereunder, the Town agrees to comply with all applicable Federal and State laws and regulations, including Section 601 of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and Department of Defense Directive 5500.II issued pursuant thereto and published in Part 300 of Title 32, Code of Federal Regulations, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."

ARTICLE XII. - RELATIONSHIP OF PARTIES

The parties to this Agreement act in an independent capacity in the performance of their respective functions under this Agreement, and neither party is to be considered the officer, agent, or employee of the other.

ARTICLE XIII. - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, or resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XIV. - COVENANT AGAINST CONTINGENT FEES

The Town warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Town for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this

Agreement without liability, or, in its discretion, to add to the Agreement or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XV. - TERMINATION OR SUSPENSION

a. If at any time the Town fails to make the payments required under this Agreement, the Secretary of the Army shall terminate or suspend work on the Project until the Town is no longer in arrears or unless the Secretary determines that continuation of work on the Project is in the interest of the United States. Any delinquent payments 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.

b. If the Government fails to receive annual appropriations in amounts sufficient to meet expenditures for the then-current fiscal year, the Government shall also notify the Town. After sixty (60) days either party may elect without penalty to terminate the Agreement or to suspend performance thereunder, and the parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.

ARTICLE XVI. - NOTICES

a. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly

given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage-prepaid), registered, or certified mail, as follows:

If to the Town:

Town of Evans
42 North Main Street
Angola, NY 14006

If to the Government:

District Commander
U.S. Army Engineer District, Buffalo
1776 Niagara Street
Buffalo, NY 14207

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

c. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at such time as it is personally delivered or on the third business day after it is mailed, as the case may be.

ARTICLE XVII. - CONFIDENTIALITY

To the extent permitted by the law governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

THE DEPARTMENT OF THE ARMY

TOWN OF EVANS, NY

BY: Daniel R. Clark
Daniel R. Clark
Colonel, U.S. Army
Contracting Officer

BY: Eugene J. Hart

DATE: 26 Oct 1987

DATE: 26 OCT 1987

CERTIFICATION OF AUTHORITY

I, ANTHONY M. MURPHY do hereby certify that I am the Attorney of the Town of Evans, NY, that the Town of Evans, NY is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the Town of Evans, NY in connection with the navigation project on Lake Erie at Sturgeon Point Marina, Evans, NY and to pay damages, if necessary in the event of the failure to perform, in accordance with Section 221 of Public Law 91-611 and that the person who has executed this Agreement on behalf of the Town of Evans has acted within his statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this

26th day of October 1987.

Anthony M. Murphy

ATTORNEY