

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE NATURE CONSERVANCY
FOR
DESIGN AND CONSTRUCTION
OF THE
HALF MOON REEF RESTORATION PROJECT,
PALACIOS/MATAGORDA COUNTIES, TEXAS

THIS AGREEMENT is entered into this 17th day of Sep, 2012, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Galveston District and The Nature Conservancy, a District of Columbia non-profit corporation (hereinafter the "Non-Federal Sponsor"), represented by Texas State Director,

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized to carry out estuary habitat restoration projects (hereinafter the "Estuary Habitat Restoration Program") pursuant to Section 104 of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2903);

WHEREAS, on December 3, 2002 the Estuary Habitat Restoration Council approved and published in the *Federal Register* the Estuary Habitat Restoration Strategy, as required by Section 106 of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2905), to ensure a comprehensive approach to maximize benefits derived from estuary habitat restoration projects and to foster the coordination of Federal and non-Federal activities related to restoration of estuary habitat;

WHEREAS, on March 17, 2008 the Half Moon Reef Restoration project in Matagorda Bay, Palacios and Matagorda County, Texas (hereinafter the "*Project*" as defined in Article I.A. of the Agreement) has been selected for implementation under the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2901), in accordance with the criteria in Section 104(c) of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2903(c));

WHEREAS, the Secretary, in consultation and coordination with appropriate State and local governmental agencies and Indian tribes, has allowed The Nature Conservancy, a *nongovernmental organization* (as defined in Article I.M. of this Agreement), to serve as the non-Federal sponsor for the *Project*;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the “Agreement”) for design and construction of the *Project*;

WHEREAS, Section 104(d) of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2903(d)), specifies the cost sharing requirements applicable to the *Project* and that the non-Federal share of the costs of an estuary habitat restoration project carried out under this authority may include services or any other form of in-kind contribution determined by the Secretary to be an appropriate contribution;

WHEREAS, the Non-Federal Sponsor desires to perform certain work (hereinafter the “*non-Federal design and construction work*” as defined in Article I.L. of this Agreement) which is a part of the *Project* and receive credit toward the non-Federal share of the *Project* for the costs of such work;

WHEREAS, performance of *monitoring* (as defined in Article I.J. of this Agreement) was approved as part of the *Project*;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 104(f) of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2903(f)), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I - DEFINITIONS

A. The term “*Project*” shall mean the Half Moon Reef Restoration Project located in Palacios/Matagorda County, Texas, consisting of the barging and placement of limestone or limestone marl or other suitable substrate material of varying sizes into water approximately 8 feet in depth to create multiple, segmented vertical structures of subtidal

reef suitable for oyster colonization interspersed within an area of approximately 12 acres on the floor of northern Matagorda Bay in the vicinity of the historic location of Half Moon Reef, all as generally described in the Estuary Habitat Restoration Program Project Letter Report for Half Moon Reef Restoration Project dated April 7, 2010, and approved by Director, Programs Directorate, Southwestern Division on May 11, 2010. The term includes the *non-Federal design and construction work* described in paragraph L. of this Article.

B. The term “*total project costs*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to design and construction of the *Project* and any planning costs incurred by the Government prior to the effective date of this Agreement. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s planning costs; the Government’s design costs; the Government’s costs of preparation of environmental compliance documentation in accordance with Article II.A.2. of this Agreement; the Government’s engineering and design costs during construction; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.C.1. of this Agreement; the Government’s actual construction costs; the costs of the *non-Federal design and construction work* determined in accordance with Article II.D.3. of this Agreement; the Government’s costs of *monitoring* in accordance with Article II.A.3. of this Agreement; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, and *relocations* for which the Government affords credit in accordance with Article IV of this Agreement; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article X.B. and Article X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of *betterments* under Article II.J.2. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; the Government’s costs for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. and Article XVII.C.4. of this Agreement; or the Non-Federal Sponsor’s costs of negotiating this Agreement.

C. The term “*period of design and construction*” shall mean the time from the effective date of this Agreement to the date that construction and *monitoring* of the *Project* are complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

D. The term “*financial obligations for design and construction*” shall mean the financial obligations of the Government and the costs for the *non-Federal design and construction work*, as determined by the Government, that result or would result in costs

that are or would be included in *total project costs* except for obligations pertaining to the provision of lands, easements, and rights-of-way, and the performance of *relocations*.

E. The term “*non-Federal proportionate share*” shall mean the ratio of the sum of the costs included in *total project costs* for the *non-Federal design and construction work*, as determined by the Government, and the Non-Federal Sponsor’s contribution of funds required by Article II.D.2. of this Agreement to *financial obligations for design and construction*, as projected by the Government.

F. The term “*highway*” shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

G. 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, raising, or replacement and attendant demolition of the affected facility or part thereof.

H. The term “*betterment*” shall mean a difference in the design or construction of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design or construction of that element. The term does not include any design or construction for features not included in the *Project* as defined in paragraph A. of this Article.

I. The term “*Federal program funds*” shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

J. The term “*monitoring*” shall mean activities that are necessary to determine if predicted outputs of the *Project*, or a completed portion thereof, are being achieved, that are performed in accordance with the standards and requirements for monitoring developed under Section 107 of the Estuary Restoration Act of 2000, Title I of Public Law 106-457, as amended (33 U.S.C. 2906), and that are conducted by the Non-Federal Sponsor after receipt of the written notification provided by the Government in accordance with Article II.E. of this Agreement.

K. The term “*fiscal year*” shall mean one year beginning on October 1 and ending on September 30.

L. The term “*non-Federal design and construction work*” shall mean design, construction, *monitoring*, supervision and administration, and other activities associated with design and construction of the *Project* to be performed by the Non-Federal Sponsor, or volunteers on the Non-Federal Sponsor’s behalf, after the effective date of this Agreement and after written approval of the District Engineer. The term does not include the design or construction of *betterments* or the provision of lands, easements, rights-of-

way, and *relocations* that are associated with the non-Federal design and construction work.

M. The term “*nongovernmental organization*” shall mean an organization that is incorporated under the applicable laws of the District of Columbia as a non-profit organization, exempt from paying Federal income taxes under Section 501 of the Internal Revenue Code (26 U.S.C. 501), and organized and operated primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Internal Revenue Code (26 U.S.C. 170(h)(4)(A)).

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) and using those funds and funds provided by the Non-Federal Sponsor, expeditiously shall design and construct the *Project*, except for the *non-Federal design and construction work*, applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies. The Non-Federal Sponsor expeditiously shall perform the *non-Federal design and construction work* in accordance with applicable 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 Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project*.

2. 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, neither the Government nor the Non-Federal Sponsor shall issue the solicitation for the first construction contract for the *Project* or commence construction of the *Project* using its own forces until all applicable 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).

3. Prior to completion of construction of the *Project*, the Government, in consultation with the Non-Federal Sponsor and, as appropriate, other concerned agencies, shall finalize the plan for *monitoring* of the *Project*. The *monitoring* plan shall describe the specific parameters to be monitored; methods for measuring those parameters; frequency and duration of *monitoring* of the *Project*; estimated *monitoring* costs; preparation and distribution of *monitoring* reports and other coordination requirements consistent with standards for *monitoring* and reporting the results of such *monitoring* developed under Section 107 of the Estuary Restoration Act of 2000, Title I of Public

Law 106-457, as amended (33 U.S.C. 2906). As of the effective date of this Agreement, the costs of *monitoring* for the *Project* are estimated to be \$369,000.00.

4. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all Government contracts for construction, including relevant plans and specifications, prior to the Government's issuance of such solicitations. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Non-Federal Sponsor 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 Non-Federal Sponsor 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 Non-Federal Sponsor, 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 *Project*, except for the *non-Federal design and construction work*, shall be exclusively within the control of the Government.

5. At the time the District Engineer furnishes the 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 Non-Federal Sponsor.

6. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *non-Federal design and construction work*, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Government with notification of a contract modification is not possible prior to execution of the contract modification, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The Non-Federal Sponsor shall consider in good faith the comments of the Government but, except as otherwise required in paragraph D.3. of this Article, the contents of solicitations, award of contracts or commencement of design or construction using the Non-Federal Sponsor's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *non-Federal design and construction work* shall be exclusively within the control of the Non-Federal Sponsor.

7. At the time the Non-Federal Sponsor furnishes a contractor with a notice of acceptance of completed work for each contract awarded by the Non-Federal

Sponsor for the *non-Federal design and construction work*, the Non-Federal Sponsor shall furnish a copy thereof to the Government.

8. Notwithstanding paragraph A.4. and paragraph A.6. of this Article, if the award of any contract for design, construction, or *monitoring* of the *Project*, or continuation of design, construction, or *monitoring* of the *Project* using the Government's or the Non-Federal Sponsor's own forces, would result in *total project costs* exceeding \$1,900,000.00, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for design, construction, or *monitoring* of the *Project*, and continuation of design, construction, or *monitoring* of the *Project* using the Government's or the Non-Federal Sponsor's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of design, construction, or *monitoring* of the *Project* using the Government's or the Non-Federal Sponsor's own forces, but in no event shall the award of contracts or the continuation of design, construction, or *monitoring* of the *Project* using the Government's or the Non-Federal Sponsor's own forces be deferred for more than three years. Notwithstanding this general provision for deferral, in the event the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of design, construction, or *monitoring* of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with design, construction, or *monitoring* of the *Project* using the Government's own forces.

B. As of the effective date of this Agreement, from within the Federal funds that have been provided by Congress for the Estuary Habitat Restoration Program, \$855,000.00 is currently projected to be available for the *Project*. The Government's maximum amount of financial participation in the *Project* shall not exceed the lesser of the following amounts as determined by the Government:

1. the Federal funds the Government makes available to the *Project*; or
2. sixty-five (65) percent of *total project costs* plus 100 percent of the costs incurred by the Government for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. of this Agreement plus 65 percent of the costs incurred by the Government for data recovery activities associated with historic preservation in accordance with Article XVII.C.4. of this Agreement.

C. The Non-Federal Sponsor shall be responsible for all *total project costs* and the costs for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. and Article XVII.C.4. of this Agreement that are in excess of the Government's financial participation determined in accordance with paragraph B. of this Article.

D. The Non-Federal Sponsor shall contribute its share of *total project costs* determined in accordance with paragraph C. of this Article in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, and shall perform or ensure performance of all *relocations* that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *Project*.

2. If the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions listed in the next sentence will be less than the Non-Federal Sponsor's share of *total project costs* determined in accordance with paragraph C. of this Article, the Government shall determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share. The Government shall determine the amount of funds that would be necessary by subtracting from the Non-Federal Sponsor's share of *total project costs* determined in accordance with paragraph C. of this Article the collective value of the following: (a) the value of the Non-Federal Sponsor's contributions under paragraph D.1. of this Article determined in accordance with Article IV of this Agreement; (b) the costs of the *non-Federal design and construction work* as determined in accordance with paragraph D.3. of this Article; and (c) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. In accordance with Article VI.B. of this Agreement, the Non-Federal Sponsor shall provide funds in the amount determined by the Government to be necessary to meet the Non-Federal Sponsor's share of *total project costs* determined in accordance with paragraph C. of this Article.

3. The Government shall determine and include in *total project costs* any costs incurred by the Non-Federal Sponsor for *non-Federal design and construction work*, subject to the conditions and limitations of this paragraph. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the amount of costs to be included in *total project costs* for *non-Federal design and construction work*.

a. The Non-Federal Sponsor shall not commence construction of the *non-Federal design and construction work* until the designs, detailed plans and specifications, and arrangements for the prosecution of such work have been approved by the Government. Changes proposed by the Non-Federal Sponsor to approved designs and plans and specifications also must be approved by the Government in advance of the related construction. Upon completion of the *non-Federal design and construction work*, the Non-Federal Sponsor shall furnish to the Government a copy of all final as-built drawings for the construction portion of such work.

b. *Non-Federal design and construction work* shall be subject to an on-site inspection and certification by the Government that the work was

accomplished in a satisfactory manner and in accordance with the provisions of this Agreement and is suitable for inclusion in the *Project*.

c. The Non-Federal Sponsor's costs for *non-Federal design and construction work* that may be eligible for inclusion in *total project costs* pursuant to this Agreement shall be subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

d. The Non-Federal Sponsor's costs for *non-Federal design and construction work* that may be eligible for inclusion in *total project costs* pursuant to this Agreement are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the *non-Federal design and construction work* is completed and the time the costs are included in *total project costs*.

e. The Non-Federal Sponsor's costs of *non-Federal design and construction work* may include the monetary equivalent of work performed by volunteers on behalf of the Non-Federal Sponsor subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

f. The Government shall not include in *total project costs* any costs for *non-Federal design and construction work* paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

g. The Government shall not include in *total project costs* any costs for *non-Federal design and construction work* in excess of the Government's estimate of the costs of the *non-Federal design and construction work* had the work been accomplished by the Government.

h. In the performance of the construction portion of the *non-Federal design and construction work*, the Non-Federal Sponsor must 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)). Costs for the construction portion of *non-Federal design and construction work* may be excluded from *total project costs* by the Government, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

4. The Government, in accordance with this paragraph, shall afford credit toward the Non-Federal Sponsor's share of *total project costs* determined in accordance with paragraph C. of this Article for the costs of the *non-Federal design and construction work* determined in accordance with paragraph D.3. of this Article.

E. When the District Engineer determines that, except for *monitoring*, the entire *Project*, or a portion thereof, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing. Upon such notification, the Government shall furnish the Non-Federal Sponsor a final OMRR&R Manual for the entire *Project* or such completed portion. The OMRR&R Manual will include performance standards for operation, maintenance, repair, rehabilitation, and replacement of the *Project*, or such completed portion, that were developed by the Government in consultation with the Non-Federal Sponsor. If the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Project* or such completed portion shall be provided. Upon such notification, the Government also shall furnish to the Non-Federal Sponsor a copy of all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, 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 Non-Federal Sponsor with all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, and also shall furnish the Non-Federal Sponsor with the final OMRR&R Manual for the entire *Project*. In the event all final as-built drawings for the portion of the *Project* for which the Government awarded a construction contract, or the Government constructed using its own forces, or the final OMRR&R Manual for the entire *Project* cannot be completed within the 6 month period, the Government shall provide written notice to the Non-Federal Sponsor, and the Government and the Non-Federal Sponsor 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 and Non-Federal Sponsor's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided to the other party previously shall be provided to the Non-Federal Sponsor and/or the Government, as appropriate.

F. Upon notification from the District Engineer in accordance with paragraph E. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or the completed portion thereof as the case may be, in accordance with Article VIII of this Agreement.

G. Upon receipt of the notification from the *District Engineer* in accordance with paragraph E. of this Article that the *Project* is complete, the Non-Federal Sponsor shall perform *monitoring* of the entire *Project*, or the completed portion thereof as the case may be, in accordance with specific directions prescribed in accordance with the *monitoring* plan and any subsequent amendments thereto and applicable Federal and State laws as provided in Article XI of this Agreement for a period of 5 consecutive years from the date of such notification. The Non-Federal Sponsor's performance of *monitoring* shall be concurrent with the Non-Federal Sponsor's performance of operation, maintenance, repair, rehabilitation, and replacement for the completed *Project* or the completed portion thereof as the case may be. The *monitoring* of the *Project* by the Non-Federal Sponsor shall end prior to the expiration of such 5 year period upon the

occurrence of either of the following events: (1) the award of the next contract for *monitoring* of the *Project*, or continuation of *monitoring* of the *Project* using the Non-Federal Sponsor's own forces, would result in *total project costs* exceeding the amount specified in paragraph II.A.8. of this Article or (2) the District Engineer determines that continued *monitoring* of the *Project* is not necessary. Any costs of *monitoring* incurred by the Non-Federal Sponsor pursuant to this paragraph shall be included in the costs for *non-Federal design and construction work* subject to an audit in accordance with Article X.C of this Agreement to determine reasonableness, allocability, and allowability of such costs.

H. Upon the District Engineer's determination that, except for *monitoring*, the entire *Project* is complete, the Government shall conduct an interim accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor. Further, upon conclusion of the *period of design and construction* the Government shall amend the interim accounting to complete the final accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

I. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

J. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the "additional work") described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the Non-Federal 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 Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement.

1. Acquisition of lands, easements, and rights-of-way or performance of *relocations* for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way or performance of *relocations* by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

2. Inclusion of *betterments* in the design or construction of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *Project* features that include *betterments* between *total project costs* and the costs of the *betterments*.

K. The Non-Federal Sponsor shall prevent obstructions or encroachments on the *Project* (including prescribing and enforcing regulations to prevent such obstructions or encroachments) such as any new developments on *Project* lands, easements, and rights-of-way or the addition of facilities which might reduce the outputs produced by the *Project*, hinder operation and maintenance of the *Project*, or interfere with the *Project's* proper function.

L. The Non-Federal Sponsor shall not use the *Project*, or the lands, easements, and rights-of-way required pursuant to Article III of this Agreement, as a wetlands bank or mitigation credit for any other project.

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

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the 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. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. 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 Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *period of design and construction*, the Non-Federal Sponsor 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 Government with authorization for entry thereto. The Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the *Project* and that were provided by the Non-Federal Sponsor are retained in the ownership of a *nongovernmental organization*, or in public ownership, for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the Non-Federal Sponsor, 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 Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *relocations* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice 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 Non-Federal Sponsor shall prepare or 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 Non-Federal Sponsor shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Non-Federal Sponsor 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 - CREDIT FOR VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, AND RELOCATIONS

For the purposes of affording credit toward the Non-Federal Sponsor's share of *total project costs* and inclusion in *total project costs*, the value of lands, easements, and rights-of-way, including those necessary for *relocations*, the borrowing of material, and the disposal for dredged or excavated material that the Government determines, in accordance with Article III of this Agreement, to be required for the *Project* and to be provided by the Non-Federal-Sponsor and the value of *relocations* necessary for the construction, operation, and maintenance of the *Project*, are hereby agreed and stipulated to be \$0 inclusive of any incidental costs of acquiring such interests or performing such *relocations*.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor 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 Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor'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* and the construction portion of the *non-Federal design and construction work*; the investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. 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 *non-Federal design and construction work*; final inspection of the entire *Project* or completed portions thereof; preparation of the proposed OMRR&R Manual; finalization of the *monitoring* plan; anticipated requirements and needed capabilities for performance of *monitoring* and 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 Non-Federal Sponsor.

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* except for the *non-Federal design and construction work*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations. On matters related to the *non-Federal design and construction work*, that the Project Coordination Team generally oversees, the Project Coordination Team may make recommendations to the Non-Federal Sponsor including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for design and construction of the *non-Federal design and construction work*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, the value included in *total project costs* for lands, easements, rights-of-way, and *relocations* determined in accordance with Article IV of this Agreement, the costs included in *total project costs* for the *non-Federal design and construction work* determined in accordance with Article II.D.3. of this Agreement, and the credit to be afforded for the *non-Federal design and construction work* pursuant to Article II.D.4. of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$1,680,000; the value included in *total project costs* for lands, easements, rights-of-way, and *relocations* determined in accordance with Article IV of this Agreement is projected to be \$0; the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement is projected to be \$25,000; the costs included in *total project costs* for the *non-Federal design and construction work* determined in accordance with Article II.D.3. of this Agreement are projected to be \$800,000; the credit to be afforded for the *non-Federal design and construction work* pursuant to Article II.D.4. of this Agreement is projected to be \$800,000; the Non-Federal Sponsor's contribution of funds required by Article II.D.2. of this Agreement is projected to be \$0; the *non-Federal proportionate share* is projected to be 48.34 percent; the Non-Federal Sponsor's contribution of funds required by Article XVII.C.4. of this Agreement is projected to be \$0; and the Government's financial obligations for the additional work to be incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.J. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By September 1, 2012 and by each quarterly anniversary thereof until the conclusion of the *period of design and construction* and resolution of all relevant claims and appeals, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; the value included in *total project costs* for lands, easements, rights-of-way, and *relocations* determined in accordance with Article IV of this Agreement; the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement; the costs included in *total project costs* for the *non-Federal design and construction work* determined in accordance with Article II.D.3. of this Agreement; the credit to be afforded for the *non-Federal design and construction work* pursuant to Article II.D.4. of this Agreement; the Non-Federal Sponsor's total contribution of funds required by Article II.D.2. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's total contribution of funds required by Article XVII.C.4. of this Agreement; and the Government's financial

obligations for additional work incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.J. of this Agreement.

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.D.2. and Article XVII.C.4. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for design of the *Project* or commencement of design of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet its projected share under Article II.D.2. and Article XVII.C.4. of this Agreement. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, Galveston District" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary, when considered with any credit the Government projects will be afforded for the *non-Federal design and construction work* pursuant to Article II.D.4. of this Agreement, to cover: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the *non-Federal proportionate share of financial obligations for design and construction as financial obligations for design and construction* are incurred; and (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

C. Upon the District Engineer's determination that, except for *monitoring*, the entire *Project* is complete and all relevant claims and appeals have been resolved, the Government shall conduct an interim accounting and furnish the results to the Non-Federal Sponsor. Further, upon conclusion of the *period of design and construction* and resolution of all relevant claims and appeals the Government shall amend the interim accounting to complete final accounting and furnish the Non-Federal Sponsor with written notice of the

results of such final accounting. If outstanding relevant claims and appeals prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting or amend the previous interim accounting, as applicable, and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting or amended interim accounting, as applicable. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs* and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Non-Federal Sponsor's shares of *total project costs* and the costs of any data recovery activities associated with historic preservation determined in accordance with Article II.C. of this Agreement exceed the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Galveston District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the final accounting show that the total contributions provided by the Non-Federal Sponsor for *total project costs* and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total shares thereof determined in accordance with Article II.C. of this Agreement, the Government, subject to the availability of funds, shall refund to the Non-Federal Sponsor any funds contributed by the Non-Federal Sponsor that have not been obligated by the Government on the *Project*, within 90 calendar days of the date of completion of such accounting.

D. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.J. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than 60 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. At the time the Government conducts the interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations incurred for additional work and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of such financial obligations for additional work from being conducted in a timely manner, the Government shall conduct an interim accounting of such financial obligations for additional work and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of such financial obligations for additional work to complete the final accounting of such financial obligations for additional work and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the Government's total financial obligations for additional work exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Galveston District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work exceeds the Government's total financial obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting.

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, they may agree to a mutually acceptable method of non-binding alternative dispute resolution 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.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT

A. Upon receipt of the notification from the District Engineer in accordance with Article II.E. of this Agreement, the Non-Federal Sponsor, pursuant to Article II.F. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project* or a completed portion thereof as the case may be, at no cost to the Government. The Non-Federal Sponsor shall conduct its 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 Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of such written notice by the Government, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. No completion, operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE IX – HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, *monitoring*, operation, maintenance, repair,

rehabilitation, and replacement of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

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 Non-Federal Sponsor 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 with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations, OMB Circular A-110. The Government and the Non-Federal Sponsor 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 Non-Federal Sponsor 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 Non-Federal Sponsor 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 Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-122 and A-133, and such costs as are allocated to the *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor 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-122 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* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor 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 Non-Federal Sponsor 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 at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall 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 non-Federal interests in connection with the *Project*.

B. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor 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.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor’s responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIV.C. 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.C. of this Agreement.

C. 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.C. of this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.D.2. and Article XVII.C.4. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XIV.C. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor 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 Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal 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 (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*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

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 Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor 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 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 construction, operation, and maintenance of the *Project*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, 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 not be considered a part of *total project costs*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the *Project*.

D. The Non-Federal Sponsor 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 Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor 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 Non-Federal Sponsor: The Nature Conservancy, Attn: Upper Gulf Coast Program Manager, 205 N. Carrizo St., Corpus Christi, Texas 78401, Tele. (361) 882-3584, Fax (361) 882-8561; with a copy to: TNC Legal Department, 200 E. Grayson St., Suite 202, San Antonio, Texas 78215, Tele. (210) 224-8774, Fax (210) 228-9805

If to the Government: Commander, US Army Engineer District, Galveston, 2000 Fort Point Road, Galveston TX 77550

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.

ARTICLE XVII - HISTORIC PRESERVATION

A. Except as provided in paragraph B. below, the Government shall perform any identification, survey, or evaluation of historic properties that it determines is necessary for the *Project*. Any costs incurred by the Government for such work shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event that the Government determines that any identification, survey, or evaluation of historic properties is required for construction of the *non-Federal design and construction work*, and if the Government and the Non-Federal Sponsor agree in writing that the Non-Federal Sponsor should perform such identification, survey, or evaluation of historic properties, the Non-Federal Sponsor shall perform such identification, survey, or evaluation in accordance with this paragraph and other written directions of the Government.

1. The Non-Federal Sponsor shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who meet, at a minimum, the Secretary of the Interior's Professional Qualifications Standards. The Non-Federal Sponsor shall submit study plans and reports

to the Government for review and approval and the Non-Federal Sponsor shall be responsible for resolving any deficiencies identified by the Government.

2. Any costs of identification, survey, or evaluation of historic properties incurred by the Non-Federal Sponsor pursuant to this paragraph shall be included in the costs for *non-Federal design and construction work* subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

C. Except as provided in paragraph C.2. below, 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. Any costs incurred by the Government for such mitigation activities, except for data recovery activities associated with historic preservation, shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

2. In the event that the Government determines that mitigation activities or actions other than data recovery activities associated with historic preservation are required for construction of the *non-Federal design and construction work*, and if the Government and the Non-Federal Sponsor agree in writing that the Non-Federal Sponsor should perform such activities or actions, the Non-Federal Sponsor shall perform such activities or actions in accordance with the written directions of the Government. The Non-Federal Sponsor shall perform the agreed upon activities or actions prior to construction of the *non-Federal design and construction work*. Any costs incurred by the Non-Federal Sponsor in accordance with the provisions of this paragraph shall be included in the costs for *non-Federal design and construction work* subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

3. 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 and shall not be included in *total project costs*, up to the statutory limit of one percent of the amount of Federal funds that the Government makes available for the *Project*.

4. The Government shall not incur costs for data recovery activities associated with historic preservation that exceed the statutory one percent limit specified in paragraph C.3. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit and the Secretary of the Interior has concurred in the waiver in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. 469c-2(3)). Any costs of data recovery activities associated with historic preservation that exceed the one percent limit shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government as follows: 35 percent will be borne by the Non-Federal Sponsor and 65 percent will be borne by the Government.

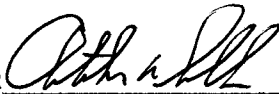
D. If, during its performance of *relocations* in accordance with Article III of this Agreement or performance of the *non-Federal design and construction work*, the Non-Federal Sponsor discovers historic properties or other cultural resources that have not been evaluated in accordance with this Article, the Non-Federal Sponsor shall provide prompt written notice to the Government of such discovery. The Non-Federal Sponsor shall not proceed with performance of the *relocation* or performance of the *non-Federal design and construction work* that is related to such discovery until the Government provides written notice to the Non-Federal Sponsor 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.

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

DEPARTMENT OF THE ARMY

BY: 
Christopher W. Sallese
Colonel, US Army
District Engineer

THE NATURE CONSERVANCY

BY: 
Laura Huffman
Texas State Director

DATE: 17 Sep 2012

DATE: 09/17/2012

CERTIFICATE OF AUTHORITY

I, Justin G. Rice do hereby certify that I am the Assistant Secretary of The Nature Conservancy, that The Nature Conservancy is a legally constituted *nongovernmental organization* with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and The Nature Conservancy in connection with the Half Moon Reef Restoration Project (PWI #152544), and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of The Nature Conservancy have acted within their corporate authority.

IN WITNESS WHEREOF, I have made and executed this certification this
6th day of Sept. 2012.



Justin G. Rice
Senior Attorney + Asst. Secy.

CERTIFICATION REGARDING LOBBYING

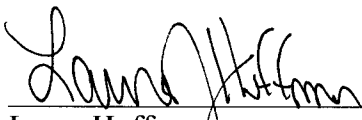
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



Laura Huffman
Texas State Director

DATE: 9/10/12

The State of Texas



Austin, Texas

SURFACE LEASE NO. SL20120020

STATE OF TEXAS

§

COUNTY OF MATAGORDA

§

§

KNOW ALL BY THESE PRESENTS:

This Surface Lease, SL20120020, ("Lease"), is granted by virtue of the authority granted in Section 51.121, et seq., TEX. NAT. RES. CODE ANN. (Vernon), 31 TEX. ADMIN. CODE, Chapter 13, Land Resources, et seq., and all other applicable statutes and rules, as the same may be amended from time to time, and is subject to all applicable regulations promulgated from time to time.

ARTICLE I. PARTIES

1.01. In consideration of the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the STATE OF TEXAS, acting by and through Jerry E. Patterson, Commissioner of the Texas General Land Office (GLO), on behalf of the Permanent School Fund of the State of Texas (the "State"), hereby grants to The Nature Conservancy, whose address is 205 North Carrizo Street, Corpus Christi, Texas, 78401 ("Lessee"), the right to use the surface estate of certain Permanent School Fund land (the "Leased Premises") for the purposes identified in Article V below.

ARTICLE II. LEASED PREMISES

2.01. The Leased Premises consists of approximately 86 acres of state submerged land, all being located in State Tracts 214, 215, 226, and 227, Matagorda Bay, Matagorda County, Texas, as depicted in Exhibits A, B, and C to this Lease, attached hereto and collectively incorporated by reference for all purposes. The approximately 86 acres constitutes the area ("Project Investigation Area") within which Lessee will investigate and identify specific sites suitable to conduct habitat creation, pursuant to the Lease. Prior to construction of any habitat, Lessee shall further delineate the boundaries to be used for the project and will submit maps to identify specific areas where habitat will be created ("Project Area") and submit the Project Area maps to the Texas General Land Office Corpus Christi Field Office (Field Office). Upon submission of the Project Area delineations to the GLO, the Parties agree that the Leased Premises herein described in Exhibits B and C will be replaced by the Project Area maps as additional exhibits, which will then define the new Leased Premises. Upon submission of the Project Area maps and addition of these maps as exhibits to the Lease, all areas not identified in the Project Area maps will be fully released and no longer included as part of the Leased Premises.

2.02. LESSEE HAS INSPECTED THE PHYSICAL AND TOPOGRAPHIC CONDITION OF THE LEASED PREMISES AND ACCEPTS SAME "AS IS" IN ITS EXISTING PHYSICAL AND TOPOGRAPHIC CONDITION. LESSEE IS NOT RELYING ON ANY REPRESENTATION OR WARRANTY OF THE STATE REGARDING ANY ASPECT OF THE LEASED PREMISES, BUT IS RELYING ON LESSEE'S OWN INSPECTION OF THE LEASED PREMISES. THE STATE DISCLAIMS ANY AND ALL WARRANTIES OF HABITABILITY, MERCHANTABILITY, SUITABILITY, FITNESS FOR ANY PURPOSE, AND ANY OTHER WARRANTY WHATSOEVER NOT EXPRESSLY SET FORTH IN THIS LEASE. THE STATE AND LESSEE HEREBY AGREE AND ACKNOWLEDGE THAT THE USE

OF THE TERMS "GRANT" AND/OR "CONVEY" IN NO WAY IMPLIES THAT THIS LEASE OR THE LEASED PREMISES ARE FREE OF LIENS, ENCUMBRANCES AND/OR PRIOR RIGHTS. LESSEE IS HEREBY PUT ON NOTICE THAT ANY PRIOR GRANT AND/OR ENCUMBRANCES MAY BE OF RECORD AND LESSEE IS ADVISED TO EXAMINE ALL RECORDS OF THE STATE AND COUNTY IN WHICH THE LEASED PREMISES ARE LOCATED. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS LEASE.

ARTICLE III. TERM

3.01. This Surface Lease No. SL20120020 is for a term of sixty (60) years, commencing on May 1, 2012 and terminating on April 30, 2072, unless earlier terminated as provided herein. Renewal of this agreement is at the sole discretion of the State, and no right to renew is implied or provided herein.

ARTICLE IV. CONSIDERATION

4.01. As consideration ("Consideration") for the granting of this Lease, Lessee agrees to pay the State (payable to the Commissioner of the General Land Office) at Austin, Texas, **Fifty dollars and NO/100 (\$50.00)**, payable in one payment upon execution of the Lease by Lessee.

ARTICLE V. USE OF THE LEASED PREMISES

5.01. The Leased Premises may be used by Lessee solely for the restoration and creation of oyster habitat, by the barging in of limestone, limestone marl or other suitable substrate material of varying sizes to create vertical structure of sub tidal reef on the floor of Matagorda Bay in an area of approximately 4-6 feet of water depth up to approximately 86 acres, all as generally described in the Estuary Habitat Restoration Program Project Letter Report and Project Management Plan dated April 7, 2010. During the term of the leasehold, the United States, its representative agents, contractors and assigns is granted the right of entry upon the leased premises in order to survey, stake out, appraise, make borings and conduct tests and other exploratory work necessary to the creation of the habitat as well as the execution of the 5 year monitoring plan that has been designed to evaluate both structural and functional success criteria for the project, in accordance with the monitoring requirements established by the Estuary Habitat Restoration Council monitoring standards. Lessee is specifically prohibited from modifying the Leased Premises in any manner not authorized herein.

5.02. Lessee shall not use, or permit the use of, the Leased Premises for any illegal purpose. Lessee will comply with, and will cause its officers, employees, agents, contractors, and invitees to comply with, all applicable federal, State and local laws, ordinances and rules concerning the use of the Leased Premises.

5.03. The State reserves the exclusive right to grant easements, rights-of way and/or other grants of interest authorizing use of the Leased Premises, provided such use does not unreasonably interfere with Lessee's use thereof.

5.04. Lessee shall not grant other rights in or to the Leased Premises to any other person or entity, excluding Lessee's contractors and governmental entities assisting in Lessee's performance of activities authorized by this Lease, and any attempt to do so shall be void and of no effect and shall constitute a default by Lessee hereunder, provided however, that the public may harvest oysters from the Premises as allowed under the Texas Parks and Wildlife code, and associated regulations adopted by the Texas Parks and Wildlife Commission.

5.05. The State reserves the right to enter upon the Leased Premises at any time with or without prior notice to Lessee to inspect the condition thereof and/or take action authorized by this Lease.

5.06. The Leased Premises are subject to prospecting, production and development of oil, gas and other minerals and other materials of commercial value by the State, its lessees, permittee, licensees or other agents, assigns or representatives. Lessee shall not interfere with such use of the Leased Premises and shall allow any lessee, permit holder, licensee or other agent, assignee or representative of the State and/or the School Land Board the right of ingress and egress over, across and through, and the use of, the Leased Premises for any and all purposes authorized by the State, provided however, that all such mineral exploration and related activities comply with all state and federal permitting requirements.

5.07. Lessee may not charge the State's authorized lessees, permit holders, licensees or other agents, assigns or representatives surface damages, or any other fee, for use of the Leased Premises; provided, however, the foregoing shall not limit the liability of any person or entity to Lessee for damages caused to property owned by Lessee.

5.08. Lessee's use of the Leased Premises is subject to and contingent upon compliance with the following covenants, obligations and conditions (the "Special Conditions"):

1. Lessee is responsible for securing all permits required to develop the Leased Premises at its expense. Lessee must submit any and all applications and required documentation related to any permits it seeks to the State for approval in advance of submission for review or approval by any regulating entity. Lessee must also submit a copy of any reports submitted to any federal, state, or local agency concerning operations on the Leased Premises to the State as such reports are prepared.
2. At the termination of the Lease, Lessee will not be required to remove pre-approved oyster reef material that has been placed according to the terms and conditions of the Lease.
3. Lessee shall not place any permanent structures or improvements on the Leased Premises unless previously approved in writing.
4. Lessee is required to conduct a pre- and post-construction oyster survey for the Project Investigation Area as shown on Exhibit B. Grantee shall provide the Field Office with two (2) weeks advance notice before beginning the pre-construction survey to enable State staff to participate if desired. Two (2) copies of the report containing findings of the pre-construction survey shall be submitted to the State, at the Field Office no more than ninety (90) days following completion of the survey.
5. Lessee shall provide the State, by providing the Field Office two (2) weeks advance notice before beginning the post-construction survey to enable State staff to participate if desired. The post-construction survey shall be performed within twelve (12) weeks of completion of the activity authorized herein. Two copies of the report summarizing results of the post-construction survey shall be submitted to the Field Office no more than ninety (90) days following completion of the survey.
6. The boundary of the created oyster reef shall be clearly marked using temporary navigation aids (posts, pilings, poles, buoys, flags, etc.) so that construction crews can properly delineate boundaries of the authorized work area and avoid impacts to state-owned land and resources adjacent to the project site. All materials used to mark the work area shall be removed by the Lessee and properly disposed of on private upland property within thirty (30) days following completion of construction.
7. Lessee shall not place any material that has not been pre-approved by the State on the Leased Premises without prior approval of the State. Pre-approved materials are reefing materials that meet national and state guidelines for durable, stable, and complex reef materials and are agreed to in advance by Lessee and the State. The initial agreed list of approved reefing materials includes crushed limestone, river rock, rock, recycled crushed concrete, and/or oyster shell. Materials can be added to the list of pre-approved materials by mutual written agreement between the Lessee and the State. No less than thirty (30) days prior to placement of any habitat-building structure material on the Leased Premises, Lessee shall provide the State with advance notification of the proposed materials to be placed if they are not listed as pre-approved materials. The State will review the proposed to determine whether there will be any unacceptable impacts to mineral or wind energy research, exploration, or development, other State resources and within thirty (30) days provide written comments or approval or denial of the proposed placement. The State will not approve the placement of material containing human remains.
8. Lessee is prohibited from selling, exchanging, or otherwise transferring credits for mitigation purposes related to its activities on the Leased Premises without the express consent and involvement of the State.

ARTICLE VI. ASSIGNMENTS

6.01. Lessee shall not assign the Leased Premises or the rights granted herein, in whole or part, to any third party for any purpose without the prior written consent of the State, which may be granted or denied in the State's sole discretion. Any unauthorized assignment shall be void and of no effect and such assignment shall not relieve Lessee of any liability for any obligation, covenant, or condition of this Lease. This provision, and the prohibition against assignment contained herein, shall survive expiration or earlier termination of this Lease. For purposes of this Lease, an assignment is any transfer, including by operation of law, to another of all or part of the property, interest or rights herein granted.

ARTICLE VII. PROTECTION OF NATURAL AND HISTORICAL RESOURCES

7.01. Lessee shall take no action on the Leased Premises which results in the discharge of any solid or liquid material. Lessee shall use the highest degree of care and all appropriate safeguards to: (i) prevent pollution of air, ground, and water in and around the Leased Premises, and (ii) protect and preserve natural resources and wildlife habitat. Lessee shall comply with all applicable rules and regulations of the Texas General Land Office and other governmental agencies responsible for the protection and preservation of public lands and waters. In the event of pollution or an incident that may result in pollution of the Leased Premises or adjacent property which is the result of Lessee's (or Lessee's employees, contractors, invitees and agents) acts or omissions, Lessee shall immediately notify the State, use all means reasonably available to recapture any pollutants which have escaped or may escape, and mitigate for any and all natural resources damages caused thereby.

7.02. LESSEE IS EXPRESSLY PLACED ON NOTICE OF THE NATIONAL HISTORICAL PRESERVATION ACT OF 1966, (PB-89-66, 80 STATUTE 915; §470) AND THE ANTIQUITIES CODE OF TEXAS, CHAPTER 191, TEX. NAT. RES. CODE ANN. (VERNON). IN THE EVENT THAT ANY SITE, OBJECT, LOCATION, ARTIFACT OR OTHER FEATURE OF ARCHEOLOGICAL, SCIENTIFIC, EDUCATIONAL, CULTURAL OR HISTORIC INTEREST IS ENCOUNTERED DURING ANY ACTIVITY ON THE LEASED PREMISES, LESSEE WILL IMMEDIATELY CEASE SUCH ACTIVITIES AND WILL IMMEDIATELY NOTIFY STATE AND THE TEXAS HISTORICAL COMMISSION, P.O. BOX 12276, AUSTIN, TEXAS 78711, SO THAT ADEQUATE MEASURES MAY BE UNDERTAKEN TO PROTECT OR RECOVER SUCH DISCOVERIES OR FINDINGS, AS APPROPRIATE.

ARTICLE VIII. INDEMNITY

8.01. EXCEPT FOR DAMAGES DIRECTLY OR PROXIMATELY CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE STATE, THE STATE'S OFFICERS, AGENTS, EMPLOYEES, OR INVITEES,, LESSEE SHALL INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS, THE GLO, AND THE OFFICERS, REPRESENTATIVES, AGENTS, AND EMPLOYEES OF THE STATE OF TEXAS AND THE GLO FROM ANY LOSSES, CLAIMS, SUITS, ACTIONS, DAMAGES, OR LIABILITY (INCLUDING ALL COSTS AND EXPENSES OF DEFENDING AGAINST ALL OF THE AFOREMENTIONED) ARISING IN CONNECTION WITH:

- LESSEE'S OBLIGATIONS AND REQUIREMENTS UNDER THIS LEASE;
- ANY NEGLIGENCE, ACT, OMISSION, OR MISCONDUCT IN THE LESSEE'S PERFORMANCE OF THE SERVICES REFERENCED HEREIN; OR
- INCLUDING ANY CLAIMS OR AMOUNTS ARISING OR RECOVERABLE INVOLVING THE ABOVE UNDER FEDERAL OR STATE WORKERS' COMPENSATION LAWS, THE TEXAS TORT CLAIMS ACT, OR ANY OTHER SUCH LAWS.

LESSEE SHALL BE RESPONSIBLE FOR THE SAFETY AND WELL BEING OF ITS EMPLOYEES, CUSTOMERS, AND INVITEES. THESE REQUIREMENTS SHALL SURVIVE THE TERM OF THIS LEASE UNTIL ALL CLAIMS HAVE BEEN SETTLED OR RESOLVED AND SUITABLE EVIDENCE TO THAT EFFECT HAS BEEN FURNISHED TO THE GLO. THE PROVISIONS OF THIS SECTION 8.01 SHALL SURVIVE TERMINATION OF THIS LEASE.

ARTICLE IX. DEFAULT, TERMINATION AND EXPIRATION

9.01. If, following thirty (30) days prior written notice from the State specifying a default or breach, Lessee is in breach of any term or condition of this Lease or any plan required pursuant to this Lease, the State shall have the right, at its option and its sole discretion, to terminate this Lease and all rights inuring to Lessee herein by sending written notice of such termination to Lessee in accordance with ARTICLE X of this Lease. Upon sending of such written notice, this Lease shall automatically terminate and all rights granted herein to Lessee shall revert to the State. Such termination shall not prejudice the rights of the State to seek recovery on any claim arising hereunder.

9.02. If Lessee fails to remove any personal property from the Leased Premises within the time specified in Section 9.01 above, then the State may, at its sole option, remove and dispose of such property (with no obligation to sell or otherwise maintain such property in accordance with the Uniform Commercial Code). **THE TERMS OF THIS SECTION SHALL SURVIVE EXPIRATION OR EARLIER TERMINATION OF THIS LEASE**

9.03. In addition to the above, Lessee shall pay and discharge any and all taxes, general and special assessments, and other charges which during the term of this Lease may be levied on or assessed against the Leased Premises or the Improvements constructed thereon, provided such taxes result from Lessee's use of this Lease. Lessee shall pay such taxes, charges, and assessments not less than five (5) days prior to the date of delinquency thereof directly to the authority or official charged with the collection thereof. Lessee shall have the right in good faith at its sole cost and expense to contest any such taxes, charges, and assessments, and shall be obligated to pay the contested amount only if and when finally determined to be owed.

9.04. **LESSEE AGREES TO AND SHALL PROTECT AND HOLD THE STATE HARMLESS FROM LIABILITY FOR ANY AND ALL SUCH TAXES, CHARGES, AND ASSESSMENTS, TOGETHER WITH ANY PENALTIES AND INTEREST THEREON, AND FROM ANY SALE OR OTHER PROCEEDING TO ENFORCE PAYMENT THEREOF.**

ARTICLE X. NOTICE

10.01. Any notice which may or shall be given under the terms of this Lease shall be in writing and shall be either delivered by hand, by facsimile, or sent by certified United States first class mail, adequate postage prepaid, if for the State to Deputy Commissioner, Professional Services, addressed to his attention, 1700 North Congress, Austin, Texas 78701-1495, FAX: (512) 463-5304, and if for Lessee, to The Nature Conservancy, whose address is 205 North Carrizo Street, Corpus Christi, Texas, 78401, FAX (361) 882-8561. Any party's address may be changed from time to time by such party by giving notice as provided above, except that the Leased Premises may not be used by Lessee as the sole notice address. No change of address of either party shall be binding on the other party until notice of such change of address is given as herein provided.

10.02. For purposes of the calculation of various time periods referred to in this Lease, notice delivered by hand shall be deemed received when delivered to the place for giving notice to a party referred to above. Notice mailed in the manner provided above shall be deemed completed upon the earlier to occur of (i) actual receipt as indicated on the signed return receipt, or (ii) three (3) days after posting as herein provided.

ARTICLE XI. INFORMATIONAL REQUIREMENTS

11.01. A. Lessee shall provide written notice to the State of any change in Lessee's name, address, corporate structure, legal status or any other information relevant to this Lease.

B. Lessee shall provide to the State any other information reasonably requested by the State in writing within fifteen (15) days following such request or such other time period approved by the State (such approval not to be unreasonably withheld).

ARTICLE XII. MISCELLANEOUS PROVISIONS

12.01. With respect to terminology in this Lease, each number (singular or plural) shall include all numbers, and each gender (male, female or neuter) shall include all genders. If any provision of this Lease shall ever be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provisions of the Lease, but such other provisions shall continue in full force and effect.

12.02. The titles of the Articles in this Lease shall have no effect and shall neither limit nor amplify the provisions of the Lease itself. This Lease shall be binding upon and shall accrue to the benefit of the State, its successors and assigns, Lessee, Lessee's successors and assigns (or heirs, executors, administrators and assigns, as the case may be); however, this clause does not constitute a consent by the State to any assignment by Lessee, but instead refers only to those instances in which an assignment is hereafter made in strict compliance with Article VI above, or in the case of a deceased natural person Lessee, refers to the instances previously referred to in this sentence and also circumstances in which title to Lessee's interest under this Lease passes, after the demise of Lessee, pursuant to Lessee's will or the laws of intestate succession. The words "hereof," "herein," "hereunder," "hereinafter" and the like refer to this entire instrument, not just to the specific article, section or paragraph in which such words appear.

12.03. Neither acceptance of Consideration (or any portion thereof) or any other sums payable by Lessee hereunder (or any portion thereof) to the State nor failure by the State to complain of any action, non-action or default of Lessee shall constitute a waiver as to any breach of any covenant or condition of Lessee contained herein nor a waiver of any of the State's rights hereunder. Waiver by the State of any right for any default of Lessee shall not constitute a waiver of any right for either a prior or subsequent default of the same obligation or for any prior or subsequent default of any other obligation. No right or remedy of the State hereunder or covenant, duty or obligation of Lessee hereunder shall be deemed waived by the State unless such waiver be in writing, signed by a duly authorized representative of the State.

12.04. No provision of this Lease shall be construed in such a way as to constitute the State and Lessee joint ventures or co-partners or to make Lessee the agent of the State or make the State liable for the debts of Lessee.

12.05. In all instances where Lessee is required hereunder to pay any sum or do any act at a particular indicated time or within an indicated period, it is understood that time is of the essence.

12.06. Under no circumstances whatsoever shall the State ever be liable hereunder for consequential damages or special damages. The terms of this Lease shall only be binding on the State during the period of its ownership of the Leased Premises, and in the event of the transfer of such ownership interest, the State shall thereupon be released and discharged from all covenants and obligations thereafter accruing, but such covenants and obligations shall be binding during the Lease term upon each new owner for the duration of such owner's ownership.

12.07. All monetary obligations of the State and Lessee (including, without limitation, any monetary obligation for damages for any breach of the respective covenants, duties or obligations of either party hereunder) are performable exclusively in Austin, Travis County, Texas.

12.08. The obligation of Lessee to pay all Consideration and other sums hereunder provided to be paid by Lessee and the obligation of Lessee to perform Lessee's other covenants and duties under this Lease constitute independent, unconditional obligations to be performed at all times provided for hereunder, save and except only when an abatement thereof or reduction therein is expressly provided for in this Lease and not otherwise. Lessee waives and relinquishes all rights which Lessee might have to claim any nature of lien against, or withhold or deduct from or offset against, any Consideration or other sums provided hereunder to be paid to the State by Lessee. Lessee waives and relinquishes any right to assert, either as a claim or as a defense, that the State is bound to perform or is liable for the nonperformance of any implied covenant or implied duty of the State not expressly set forth in this Lease.

12.09. In the event any provision of this Lease is more restrictive than any administrative rule promulgated by the Texas General Land Office and/or the School Land Board, this Lease shall control.

ARTICLE XIII. ENTIRE AGREEMENT

13.01. This Lease, including any exhibits to the same, constitutes the entire agreement between the State and Lessee; no prior written or prior oral contemporaneous oral promises or representations shall be binding. The submission of this Lease for examination by Lessee or the State and/or execution thereof by Lessee or the State does not constitute a reservation of or option for the Leased Premises and this Lease shall become effective only upon execution of all parties hereto and deliver of a fully executed counterpart thereof by the State to Lessee. This Lease shall not be amended, changed or extended except by written instrument signed by both parties thereto.

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IN TESTIMONY WHEREOF, witness my hand and the Seal of Office.

STATE:
THE STATE OF TEXAS

LESSEE:
THE NATURE CONSERVANCY

By: Jerry E. Patterson
JERRY E. PATTERSON
Commissioner, General Land Office

By: LAURA HUFFMAN
(Printed Name)

[Signature]
(Signature)

TEXAS STATE DIRECTOR
(Title)

Date: 8/30/12

Date: 07/16/12

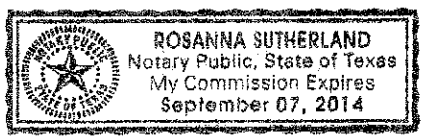
APPROVED:
Contents: [Signature]
Legal: [Signature]
Deputy: [Signature]
Executive: [Signature]

ACKNOWLEDGMENT

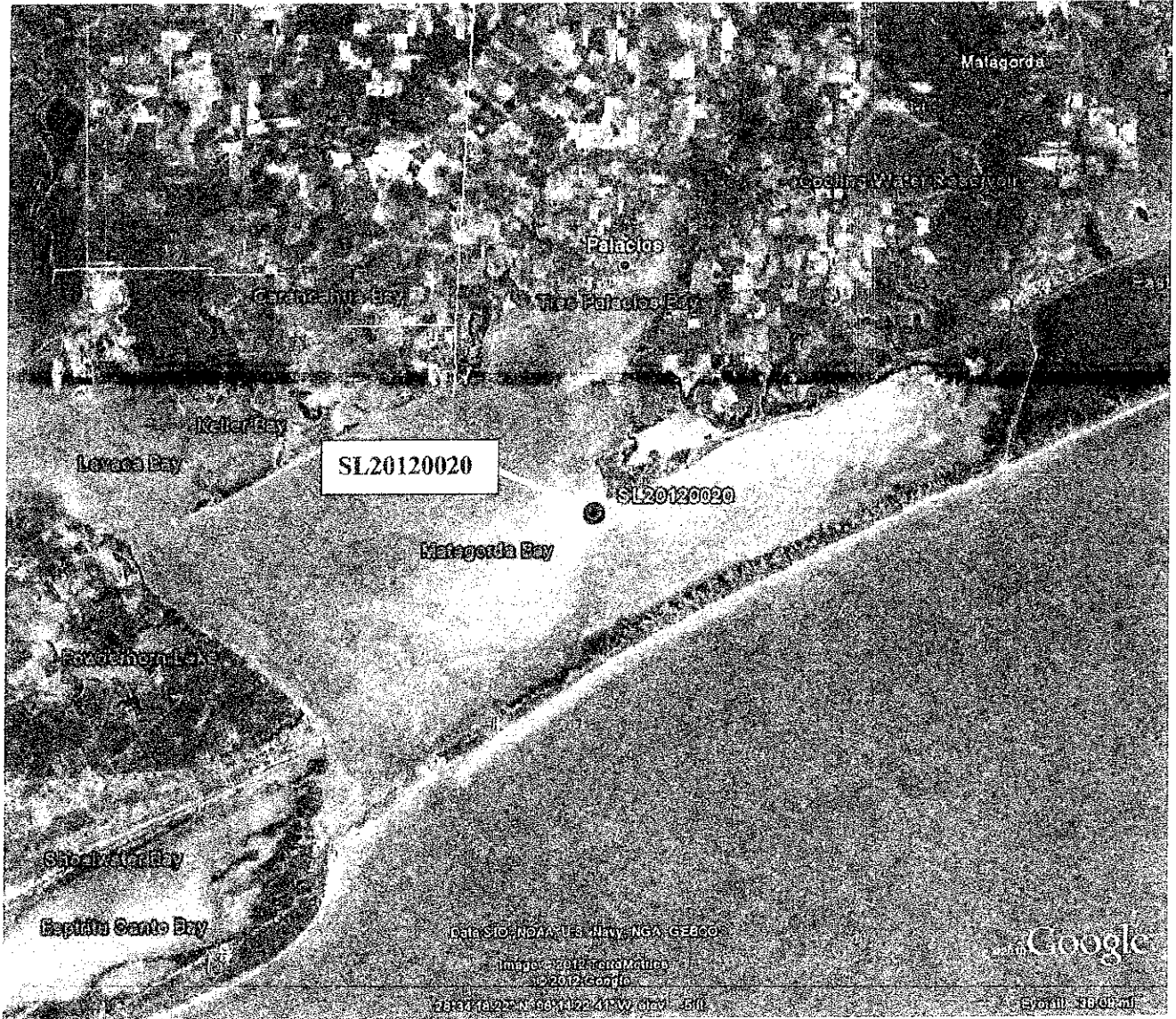
STATE OF TEXAS
COUNTY OF TRAVIS

This instrument was acknowledged before me on the 16th day of JULY, 2012,
by LAURA HUFFMAN.

[Signature]

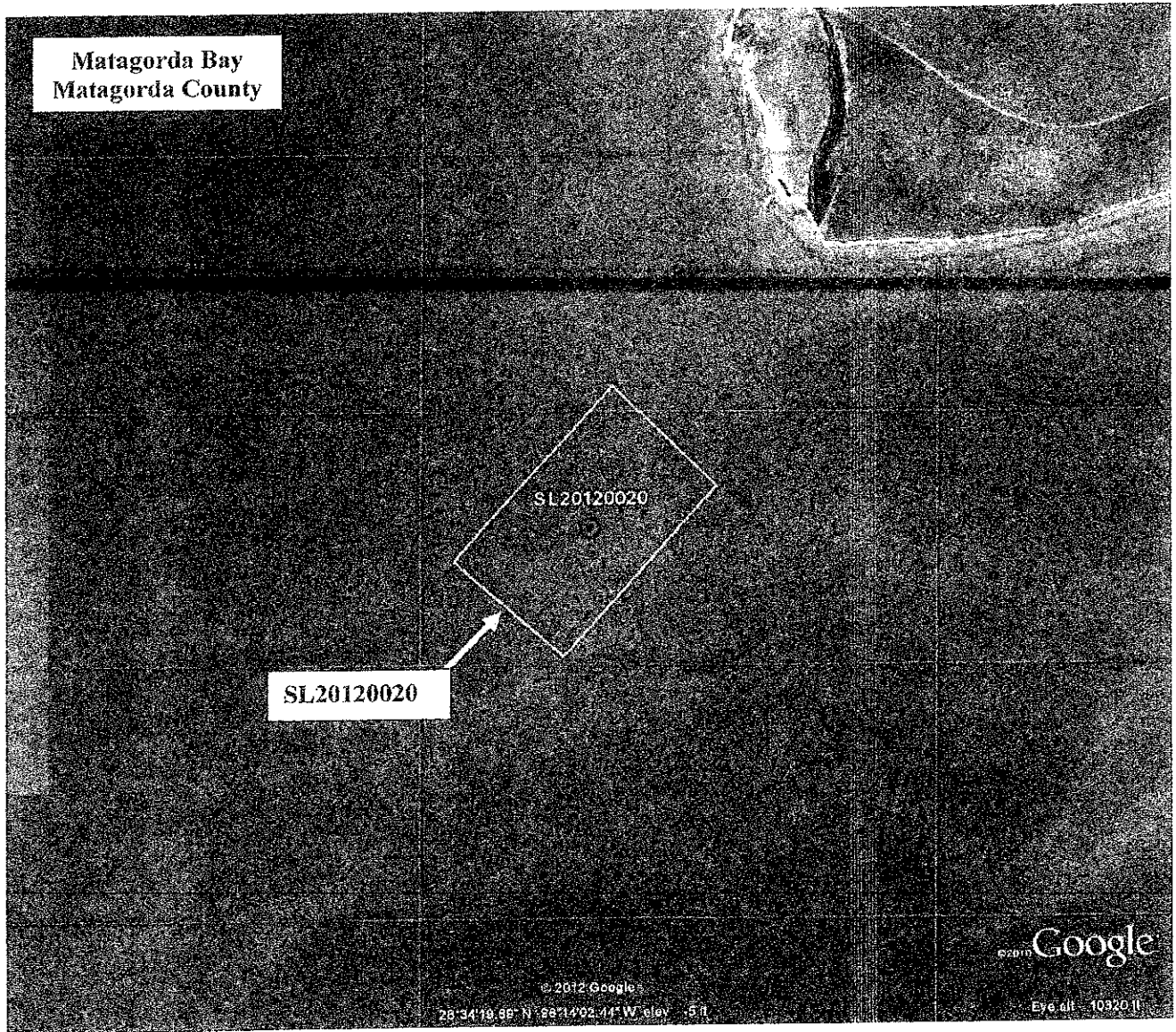


Notary Public, State of Texas
My commission expires: 09/07/2014

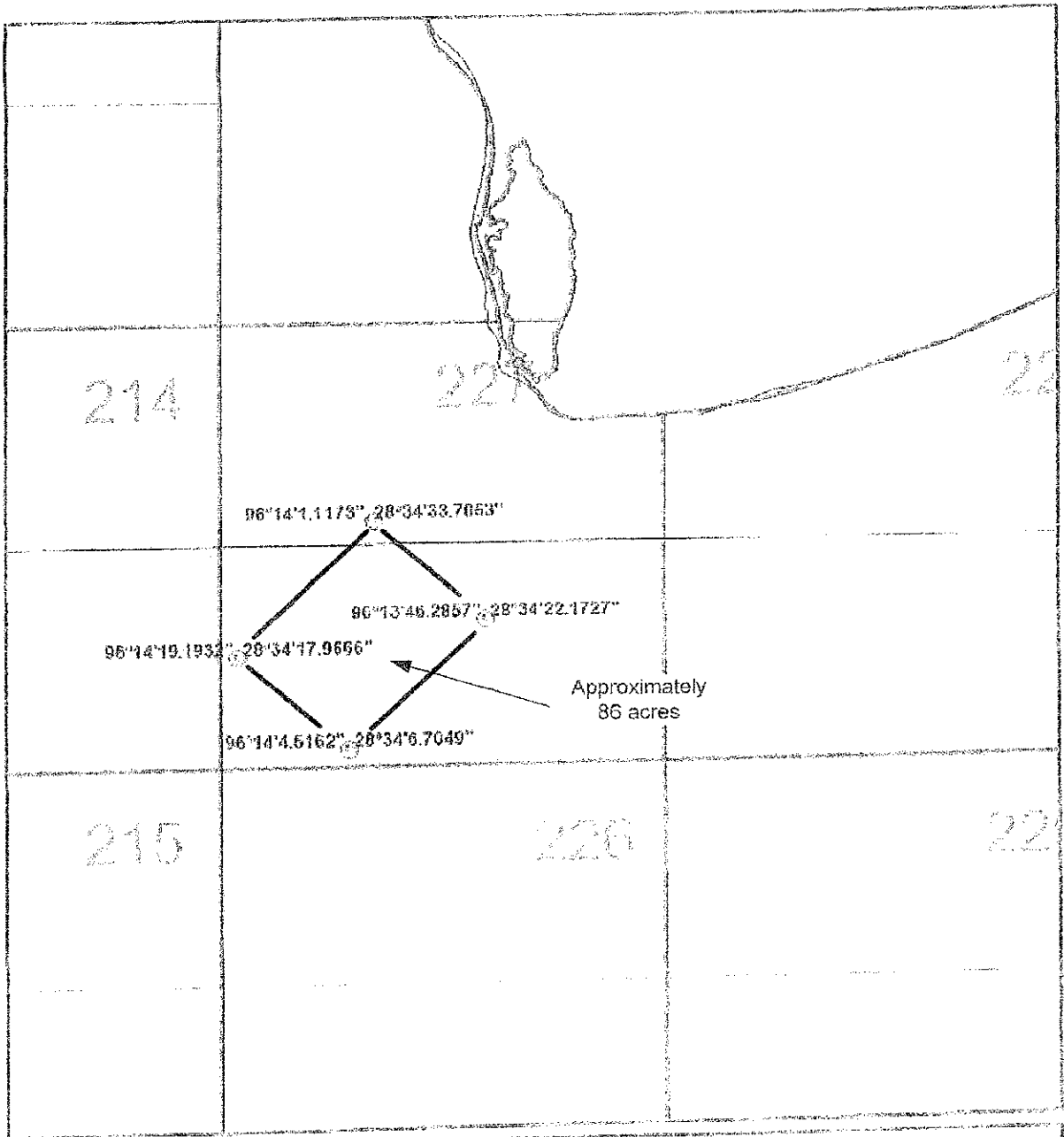


Title: The Nature Conservancy – Half Moon Reef / SL20120020	Date of Inspection: 3/20/2012
Company: General Land Office	Creator: Kathryn Tunnell
Scale: Not to Scale	Exhibit A

Matagorda Bay
Matagorda County



Title: The Nature Conservancy – Half Moon Reef / SL20120020	Date of Inspection: 3/20/2012
Company: General Land Office	Creator: Kathryn Tunnell
Scale: Not to Scale	Exhibit B



Texas General Land Office



HMR USACE 60 Yr Term

The Texas General Land Office makes no representations or warranties regarding the accuracy or completeness of the information depicted on this map or the data from which it was produced. This map is NOT suitable for navigational purposes and does not purport to depict or establish boundaries between private and public land.

Printed: Mar 23, 2012



TITLE: The Nature Conservancy – Half Moon Reef / SL20120020 INSPECTION DATE: 3/20/2012

COMPANY: Texas General Land Office

CREATOR: Kathryn Tunnell

EXHIBIT C

DRAWING SCALE: 1in : 10ft