

AGREEMENT BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE ALABAMA STATE DOCKS DEPARTMENT
FOR LOCAL COOPERATION ON MOBILE HARBOR
DEEPENING PROJECT, PHASE I, MOBILE, ALABAMA

THIS AGREEMENT entered into this 13th day of June, 1986, by and between the DEPARTMENT OF THE ARMY (hereinafter called the "Government"), represented by the Assistant Secretary of the Army (Civil Works), and the Alabama State Docks Department, an Agency of the State of Alabama (hereinafter called the "State Docks"), WITNESSETH THAT:

WHEREAS, construction of the Mobile Harbor Deepening Project, Mobile, Alabama, was authorized by the Supplemental Appropriations Act for the Fiscal Year Ending September 30, 1985 (Public Law 99-88, Ninety-Ninth Congress, First Session), which also authorizes the Secretary of the Army to initiate construction of the Project under terms and conditions acceptable to him as set out below, and

WHEREAS, Public Law 99-88 authorizes construction of the Project substantially in accordance with the Report of the Chief of Engineers dated 18 November 1981, said Report specifying that work on the Project may be accomplished in separable units or features and that the written agreement with non-Federal interest required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, may be obtained in compatible increments; and

WHEREAS, the State Docks hereby represents that it has the authority and capability to furnish the non-Federal cooperation for Phase I of the Project, as required by the Federal legislation authorizing the Project, and by other applicable law, as implemented below.

Phase I of the Project consists of constructing either:

1) A channel to the vicinity of the McDuffie Coal Terminal, in upper Mobile Bay, consisting of a 47 - by 600-foot channel for a distance of 8.1 miles across the Mobile Bar, then a 45- by 400-foot channel for a distance of 31.2 miles plus necessary bend widening (including a 40-foot deep turning basin 1,500 feet square opposite the McDuffie Coal terminal and a 40-foot deep anchorage area 4000 feet long and 600 feet wide adjacent to the southern part of the turning basin;

or, if the State Docks notifies the Government prior to September 30, 1987, that it has reached agreement with private parties and/or other state or local agencies to construct a transshipment facility in lower Mobile Bay,

2) A channel to a transshipment facility in lower Mobile Bay, consisting of a 57- by 600-foot channel for a distance of 7.8 miles across the Mobile Bar, then a 55- by 400-foot channel for a distance of 3.0 miles to the area of the transshipment facility (including a 40-foot deep turning basin 1,500 feet square opposite the McDuffie Coal Terminal), and

WHEREAS, the parties understand that it is the intention of the Secretary of the Army that initiation of construction of Phase I of the Project is contingent upon the enactment of legislation imposing a nationwide Federal port use charge, revenues from which will be applied to the Government's cost for harbor maintenance;

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITION

For purposes of this Agreement:

1. The term "total cost of construction of general navigation facilities assigned to commercial navigation" shall mean all costs incurred by the State Docks and the Government directly related to construction of the general navigation features of Phase I of the Project. Such costs shall include, but not necessarily be limited to, actual construction costs, costs of applicable engineering and design, continuing planning and engineering costs incurred after October 1, 1985, and supervision and administration costs, but shall not include the value of lands, easements, rights-of-way, relocations, dredged material disposal areas, non-federal dredging of public or private channels and berthing areas, and aids to navigation.

ARTICLE II - OBLIGATIONS OF PARTIES

a. The State Docks shall construct, operate, and maintain, at its own expense, all project facilities other than those for general navigation.

b. As further specified in Article III hereof, the State Docks shall, without cost to the Government, provide all necessary interests in property and perform all necessary utility and facility alterations and relocations.

c. As further specified in Article V hereof, the State Docks shall provide, during the period of construction, a cash contribution equal to the following percentages of the total cost of construction of the general navigation facilities assigned to commercial navigation based on the depths below mean water listed herein:

1. Deeper than 20 feet but no more than 45 feet: 25 percent; and
2. Deeper than 45 feet: 50 percent.

d. The State Docks shall pay 50 percent of the incremental costs of maintaining the Project depth below 45 feet below mean low water.

e. As further specified in Article V hereof, the State Docks shall repay with interest, over a period of 30 years following completion of Phase I of the Project, 10 percent of the total cost of construction of general navigation facilities assigned to commercial navigation.

f. If the State Docks notifies the Government prior to September 30, 1987, that it has reached agreement with private parties and/or other state or local agencies to construct a transshipment facility in lower Mobile Bay, the Government, using funds provided by the State Docks and appropriated by Congress, shall construct a channel to a transshipment facility in lower Mobile Bay, consisting of a 57- by 600-foot channel for a distance of 7.8 miles across the Mobile Bar, then a 55- by 400-foot channel for a distance of 3.0 miles to the area of the transshipment facility (including a 40-foot deep turning basin 1,500 feet square opposite the McDuffie Coal Terminal); otherwise, the Government shall construct a channel to the vicinity of the McDuffie Coal Terminal, in upper Mobile Bay, consisting of a 47- by 600-foot channel for a distance of 8.1 miles across the Mobile Bar, then a 45- by 400-foot channel for a distance of 31.2 miles plus necessary bend widening (including a 40-foot deep turning basin, 1,500 feet square opposite the McDuffie Coal Terminal and a 40-foot deep anchorage area 4000 feet long and 600 feet wide adjacent to the southern part of the turning basin. The Government shall apply those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. Award of Federal contracts and performance of the work thereunder shall be within the control of the Government.

g. The Government shall operate and maintain the general navigation features of Phase I of the Project.

h. Construction of Phase I, and all rights and responsibilities arising under this Agreement, shall be contingent upon the enactment of Federal legislation permitting written agreements for the construction of water resources projects between the Secretary of the Army and States, bodies politic of States which derive their powers from the State constitution, or governmental entities created by the State legislature, to reflect that nothing therein obligates future legislative appropriations when so doing would be inconsistent with State constitutional limitations.

ARTICLE III - LANDS, FACILITIES, AND RELOCATION ASSISTANCE

a. The State Docks shall provide without cost to the Government all lands, easements, and rights-of-way, including suitable dredged material disposal areas, as may be determined by the Chief of Engineers to be necessary for construction of Phase I of the Project. Prior to the award of any construction contract, the State Docks shall furnish to the Government rights-of-entry to all lands required for Phase I of the Project, together with evidence supporting the State Dock's legal authority to grant such rights-of-entry.

b. The State Docks shall accomplish without cost to the Government all alterations and relocations of buildings, streets, storm drains, utilities, and other structures and improvements made necessary by construction of Phase I of the Project.

c. The State Docks shall comply with the applicable provisions of the Uniform Relocations Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, approved January 2, 1971, in acquiring lands, easements, and rights-of-way for construction and subsequent operation and

maintenance of Phase I of the Project, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - PROJECT PHASING AND MANAGEMENT

a. To provide for consistent and effective communication between the State Docks and the Government as Phase I of the Project is implemented, the State Docks and the Government shall appoint representatives to coordinate on scheduling, plans, specifications, modifications, contract costs, and other matters relating to construction of Phase I of the Project.

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

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

ARTICLE V - METHOD OF PAYMENT

a. The State Docks shall provide, over the term of construction, the percentages of the total cost of construction of general navigation facilities assigned to commercial navigation specified in Article II.c. hereof. Such total cost is presently estimated to be \$89,100,000 if the 55 foot channel to the transshipment facility is to be constructed. In order to meet its share, the State Docks must provide over the term of construction a cash contribution presently estimated to be \$40,750,000.00. If the 45-foot channel to McDuffie is to be constructed, the total cost is presently estimated to be \$89,770,000. In this case, in order to meet its share, the

State Docks must provide over the term of construction a cash contribution presently estimated to be \$24,090,000.

b. Payments shall be made as follows:

1. Two months before the start of each fiscal year of the Government, the Government shall notify the State Docks of the estimated funds that will be required from the State Docks to meet its share of project costs for that Government fiscal year. The State Docks shall then make those funds available to the Government as expeditiously as possible through either cash payments or deposit of cash in an escrow account acceptable to the Government. The estimate of project costs for each Government fiscal year of construction will include the amortized portion of costs incurred by the Government prior to the date of this Agreement.

2. Thirty days prior to the advertisement of each construction contract, the Government shall notify the State Docks of its required share of contract costs, plus engineering, supervision, and administration costs, under paragraph a. of this Article. Within 30 calendar days thereafter, the State Docks shall verify to the satisfaction of the Government that sufficient funds are available to the Government in the funding institution or mechanism referred to in paragraph b.1. of this Article to meet its share of the contract costs. If the Government determines that sufficient sums are not available to it, it shall so notify the State Docks and the State Docks shall deposit said sums within 10 calendar days and provide verification of such deposit. If the contract is expected to extend into more than one Government fiscal year, the State Docks may make the deposit in installments, with each installment to be made to each Government fiscal year in the amount required for that year's work on the contract, plus engineering, supervision, and administration costs.

3. When bids are opened on any given contract and additional funds are needed from the State Docks to meet its required share of contract costs, the Government shall so notify the State Docks and the State Docks shall deposit the additional funds within 10 calendar days after demand is made by the Government.

d. The Government will draw on the funds, escrow account, or letter of credit provided by the State Docks such sums as it deems necessary to cover contractual obligations and in-house fiscal obligations, to include engineering and design and supervision and administration costs as they occur, and Government costs incurred prior to the date of this Agreement.

e. Upon completion of Phase I of the Project and resolution of all contract claims and appeals, the Government shall compute the total cost of construction of general navigation facilities assigned to commercial navigation and tender to the State Docks a final accounting of its share of Phase I project costs. In the event the total contribution by the State Docks is less than its initial required share of Phase I project costs at the time of the final accounting, the State Docks shall deposit within 90 calendar days after receipt of written notice whatever sum is required to meet its initial required share of Phase I project costs. In the event the State Docks has made excess cash contributions which result in the State Docks' having provided more than its initial required share of Phase I project costs, such excess will be refunded to the State Docks.

f. The State Docks shall repay the additional 10 percent of the total cost of construction of general navigation facilities assigned to commercial

navigation in equal annual installments over a period not to exceed thirty years from the date of project completion. Such repayment shall include interest at a rate determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the repayment period, during the month preceeding the fiscal year in which costs for the construction of Phase I of the Project are incurred, plus a premium of one-eighth of one percentage point for transaction costs. The interest shall be recalculated by the Secretary of the Treasury at five-year intervals.

ARTICLE VI - DISPUTES

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

ARTICLE VII - OPERATION AND MAINTENANCE

a. The State Docks shall operate and maintain all portions of Phase I of the Project, except for general navigation facilities, upon completion in accordance with regulations or directions prescribed by the Secretary of the Army.

b. The State Docks hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which it owns or controls for access to Phase I of the Project for the purpose of inspection, and, if necessary, for the purpose of completing, operating, repairing, and maintaining Phase I of the Project. If any inspection shows that the State Docks for any reason is failing to complete, operate, repair, and maintain Phase I of the Project in accordance with the assurances hereunder, the

Government will send a written notice to the State Docks. If the State Docks persists in such failure for 30 calendar days after receipt of the notice, then the Government shall have right to enter, at reasonable times and in a reasonable manner, upon lands the State Docks owns or controls for access to Phase I of the Project for the purpose of completing, operating, repairing, or maintaining Phase I of the Project. No completion, operation, repair, or maintenance by the Government shall operate to relieve the State Docks of responsibility to meet its obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

c. The Government shall operate and maintain the general navigation features of Phase I of the Project.

d. The State Docks shall pay the Government 50 percent of the incremental costs of maintaining the general navigation features of Phase I of the Project at depths below 45-foot mean low water. The incremental costs shall be determined at a future date by formula to be negotiated by the parties. The Government shall notify the State Docks of its share of maintenance costs 365 days before the award of the maintenance contract, and the local sponsor shall tender its share within 270 days thereafter.

ARTICLE VIII - RELEASE OF CLAIMS

The State Docks shall hold and save the Government free from all damages arising from the construction and operation of Phase I of the Project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE IX - MAINTENANCE OF RECORDS

The Government and the State Docks shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred

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

ARTICLE X - FEDERAL AND STATE LAWS

a. In acting under its rights and obligations hereunder, the State Docks agrees to comply with all applicable Federal and state laws and regulations.

b. The State Docks agrees to comply with Section 601 of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and Department of Defense Directive 5500.11 issued pursuant thereto and published in Part 300 of Title 32, Code of Federal Regulations, in connection with the construction, operation, and maintenance of Phase I of the Project.

ARTICLE XI - RELATIONSHIP OF PARTIES

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

ARTICLE XII - OFFICIALS NOT TO BENEFIT

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

ARTICLE XIII - COVENANT AGAINST CONTINGENT FEES

The State Docks warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the State Docks for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability, or, in its discretion, to add to the Agreement or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XIV - TERMINATION OF SUSPENSION

a. If at any time the State Docks fails to make the payments required under this Agreement, the Secretary of the Army shall terminate or suspend work on Phase I of the Project until the State Docks is no longer in arrears or unless the Secretary determines that continuation of work on Phase I of the Project is in the interest of the United States. Any delinquent payment shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 percentum 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 delinquency exceeds 3 months.

b. If the Government fails to receive annual appropriations in amounts sufficient to meet expenditures for the then-current fiscal year, the Government shall so notify the State Docks. After sixty days either party may elect without penalty to terminate the Agreement or to suspend performance thereunder, and the parties shall proceed to wind up their

activities relating to Phase I of the Project and proceed to a final accounting in accordance with Article V.e.

ARTICLE XV - STATEMENT OF INTENT

As required under Title I, Chapter IV of Public Law 99-88, the State Docks hereby affirms its willingness and capability to meet its cost-sharing obligations as set forth in this Agreement.

ARTICLE XVI - EFFECT OF SUBSEQUENT LEGISLATION

a. The parties hereto anticipate the passage of legislation during the current term of Congress regarding Federal and non-Federal cost sharing for Federal navigation projects

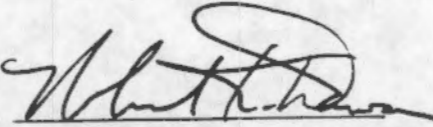
b. If the pending water resources authorization bill, H.R. 8, 99th Congress, 2nd session, as enacted into law, contains a provision of general effect that changes or results in changes to cost-sharing principles applicable to commercial harbor projects funded in Title I, Chapter IV of Public Law 99-88, the parties hereto shall renegotiate their respective rights, duties, and responsibilities under his Agreement so as to conform to such provision. In any event, any renegotiated agreement must be approved by the State Docks and the Secretary of the Army.

ARTICLE XVII - OBLIGATION OF FUTURE APPROPRIATIONS

Nothing herein shall constitute or shall be deemed to constitute, an obligation of future appropriations by the Legislature of the State of Alabama.

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

THE DEPARTMENT OF THE ARMY

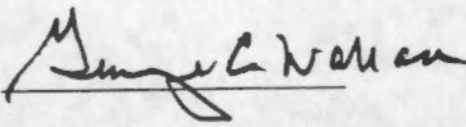
BY: 

Robert K. Dawson
Assistant Secretary of
the Army (Civil Works)

DATE: 13 June 1986

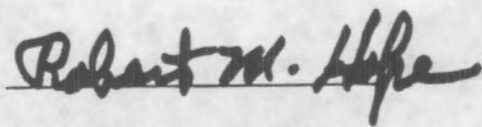
THE STATE OF ALABAMA,

acting by and through its
statutory agent, The Alabama State
Docks Department

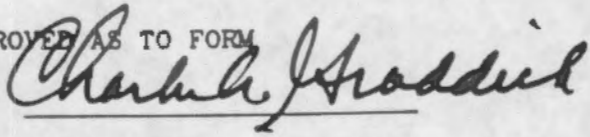
BY: 

George C. Wallace
Governor

DATE: _____

BY: 

Robert M. Hope
Director
Alabama State Docks Department

APPROVED AS TO FORM
BY: 

Charles A. Graddick
Attorney General

AS WITNESSED BY:

Tom Bevill

Tom Bevill
House of Representatives

H. L. Callahan

H. L. Callahan
House of Representatives

Patrick J. Kelly

Patrick J. Kelly
Brigadier General, USA
Deputy Director, Civil Works

C. E. Edgar, III

C. E. Edgar, III
Brigadier General, USA
Division Engineer

C. Hilton Dunn, Jr.

C. Hilton Dunn, Jr.
Colonel, Corps of Engineers
District Engineer