

CHEWACLA CREEK SAFE HARBOR AGREEMENT

1.0 INTRODUCTION

This Safe Harbor Agreement (“Agreement”), effective and binding on the date of last signature below, is between the State of Alabama Department of Conservation and Natural Resources, Bob and Fannie Harris, LLC, John W. Pace III, Phillips Family Partnership, Ltd., The Water Works Board of the City of Auburn, Alabama, Martin Marietta Materials, Inc. (hereinafter collectively referred to as “Landowners”); The City of Auburn, Alabama; and the U.S. Fish and Wildlife Service (“Service”). As described more fully below, The City of Auburn, Martin Marietta Materials, Inc., and The Water Works Board of the City of Auburn will also be considered “Cooperators” for certain enrolled properties. The Landowners, Cooperators, and Service are hereinafter collectively referred to as “the Parties.” Contact information for the Parties is as follows:

Landowners: Alabama Department of Conservation and Natural Resources (“ADCNR”): M. Barnett Lawley, Commissioner, 334/242-3486, 64 North Union Street, Room 474, Montgomery, Alabama, 36130

Bob and Fannie Harris, LLC (“Harris”): Dr. Charles Harris, 301/460-0285, 13908 Turnmore Road, Silver Spring, Maryland, 20906

John W. Pace III (“Pace”): Betty M. Pace, 251/344-8408, 4955 Carmel Drive, North Mobile, Alabama, 36608

Phillips Family Partnership, Ltd. (“Phillips”): Elaine P. Espy, 334/502-0310, 1458 South Donahue Drive, Auburn, Alabama, 36832

Water Works Board of the City of Auburn, Alabama (“Water Board”): Rex B. Griffin, Jr., Manager, 334/887-4911 ext. 224, 114 No. Donahue Drive, Auburn, Alabama, 36830

Martin Marietta Materials, Inc. (“Martin Marietta”): David Barkley, Martin Marietta Aggregates, Shorter Sand and Gravel Plant, 334/727-6662, P.O. Box 339, Shorter, Alabama, 36075

Cooperator: The City of Auburn, Alabama (“City”): Doug Watson, City Manager, 334/501-7260, 144 Tichenor Avenue, Auburn, Alabama, 36830

Service: Larry Goldman, Field Supervisor, Daphne Field Office, 1208-B Main Street, Daphne, Alabama, 36526, 334/441-5181

Reporting: Any notices and reports required by this Agreement shall be delivered to the persons listed above. Any change in any aspect of a Party's contact information above must be provided to all other Parties by certified mail, return receipt requested, or other method allowing for tracking and receipt confirmation, at least two weeks prior to the effective date of the change. Failure to comply with this notification requirement shall not be considered a material breach of the Agreement.

This Agreement shall be identified by Agreement and/or Tracking Number: TE-070113-0.

Definitions: Unless otherwise provided in this Agreement, terms used herein shall have the meaning given them under the relevant regulations promulgated by the Service as in effect on the effective date of this Agreement.

Covered Species: This Agreement covers the following species listed under the Endangered Species Act:

fine-lined pocketbook, *Lampsilis altilis*
southern clubshell, *Pleurobema decisum*
ovate clubshell, *Pleurobema perovatum*

These species are considered the "covered species" as defined in the Service's final Safe Harbor Policy (64 *Federal Register* 32717) and as that term is used in this Agreement.

This Agreement covers the following properties: The properties covered by this Agreement are located in Lee County, Alabama, within Township 18 North, Range 25 East, Sections 13 & 24; and Township 18 North, Range 26 East, Sections 16, 17, & 18.

Each enrolled property is depicted on the map attached as Attachment 1. The Water Board owns Lake Ogletree (hereinafter also referred to as "Lake") and the property surrounding the Lake, including both sides of Chewacla Creek (hereinafter also referred to as "Creek") downstream of the dam (hereinafter also referred to as "upstream Water Board enrolled property"). The Water Board's enrolled property also includes a parcel abutting Chewacla Creek on the south side near the Moore's Mill Creek confluence (hereinafter also referred to as "downstream Water Board enrolled property"). Chewacla State Park, which is owned by the State of Alabama and managed by ADCNR, lies to the north of Chewacla Creek. The Harris, Pace, and Phillips enrolled properties each abut Chewacla Creek to the south across the Creek from Chewacla State Park. Under long term leases, Martin Marietta operates a limestone quarry ("Quarry") on the Harris, Pace, and Phillips enrolled properties. With respect to the Harris, Pace, and Phillips enrolled properties and for the purpose of this Agreement and the associated permits only, Martin Marietta will be considered a "Landowner" by virtue of its leases.

Each of these properties is considered an "enrolled property" as defined in the Service's final Safe Harbor Policy and as that term is used in this Agreement. Included in each enrolled property, for the purposes of the baseline descriptions in section 3.3 below, is the bed and banks of Chewacla

Creek adjacent to that property. Nothing in this Agreement shall be construed to change or otherwise impact title to any lands.

Agreement Duration: This Agreement and the Permits issued thereunder will remain in effect for 30 years from the effective date of the Permits issued by the Service for this Agreement unless terminated or extended pursuant to the terms of this Agreement.

2.0 AUTHORITY AND PURPOSE

Sections 2, 7, and 10 of the Endangered Species Act (the “Act”) of 1973, as amended, allow the Service to enter into this Agreement. Section 2 of the Act states that encouraging interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs is a key to safeguarding the Nation’s heritage in fish, wildlife, and plants. Section 7 of the Act requires the Service to review programs that it administers and to utilize such programs in furtherance of the purposes of the Act. By entering into this Agreement, the Service is utilizing its Endangered Species and related programs to further the conservation of the Nation’s fish and wildlife resources. Lastly, section 10(a)(1) of the Act authorizes the Service’s issuance of enhancement of survival permits for listed species. This Agreement is entered into pursuant to the Service’s final Safe Harbor Policy (64 *Federal Register* 32717) and final regulations (64 *Federal Register* 32706), and implements the intent of the Parties to follow the procedural and substantive requirements of section 10(a)(1)(A) of the Act.

The purpose of this Agreement is for the Parties to collaborate by performing their individual obligations as specifically described herein in order to implement conservation measures for the fine-lined pocketbook, *Lampsilis altilis*, southern clubshell, *Pleurobema decisum*, and ovate clubshell, *Pleurobema perovatum*, by providing minimum flows and controlling subsidence features in sections of Chewacla Creek in order to enhance and expand the habitat available to the covered species. An enhancement of survival permit, in a form substantially similar to and with the Terms and Conditions contained in the permit attached hereto as Attachment 2, will be issued to each Landowner which will authorize the Landowner and applicable Cooperators to implement the conservation actions and other provisions of this Agreement and authorize the incidental take of the covered species and habitat that are above each Landowner’s baseline responsibilities, as defined in this Agreement. The terms and objectives of this Agreement are consistent with the Service’s Recovery Plan for the Mobile River Basin Aquatic Ecosystem (USFWS 2000) and further the recovery objectives contained therein for the covered species.

3.0 BACKGROUND

3.1 General Description of Chewacla Creek within the Enrolled Properties

Chewacla Creek's headwaters originate south of Opelika, Alabama. The Creek flows through pasture, commercial, and private developments before emptying into Lake Ogletree, the primary drinking water source for Auburn, Alabama residents. The upstream end of the enrolled properties is Lake Ogletree and the surrounding adjacent land owned by the Water Board. As it flows downstream from the Lake through the enrolled properties, Chewacla Creek flows over several geologic formations including the Manchester Schist, the Chewacla Marble, and the Hollis Quartzite. (Buss 2001, Figure 2). The enrolled properties lie within the Piedmont ecoregion, a transitional area between the Appalachian mountains to the northeast and the relatively flat coastal plain to the south and southeast (Webber and Blevins 2000).

Lake Ogletree was designed in the 1940s. The Water Board, an independent corporation organized under the laws of the State of Alabama to provide drinking water to the citizens of Auburn, operates the dam which creates Lake Ogletree. The elevation of the dam's concrete spillway is 481.5 feet above mean sea level ("msl"); however, the Water Board installed temporary boards on top of the spillway to augment its water retention capacity during the wet spring months. Since 1991, the additional boards have raised the spillway elevation to 486 feet msl. At 486 feet msl, Lake Ogletree is a 300-acre lake with a storage capacity of approximately 1.5 billion gallons (Buss 2001, Appendix E-4).

Historically, Lake Ogletree has not discharged a continuous flow to Chewacla Creek, as documented by data reported at Buss (2001) Appendix E-3, and lack of stream flow in Chewacla Creek within the enrolled properties has been well-documented (Webber and Blevins 2000) (Buss 2001).

Generally, a stream's dependability as a water source or aquatic habitat hinges on the stream's lowest flows. A stream's low flow characteristics can be expressed in terms of certain "7-day" averages. The lowest average flow for any consecutive 7-day period during the year is referred to as the "7-day low flow." The two primary measures of a stream's "7-day low flow" are "7Q2" and "7Q10." A stream's "7Q2" is the stream's median annual 7-day low flow that is expected to occur one of every two years. A stream's "7Q10" is the median annual 7-day low flow that is expected to occur one of every ten years. Thus, the "7Q10" is an estimate of a stream's low flow condition in very dry years, and the "7Q2" is an estimate of more frequent dry conditions.

Based on data reported by the Geologic Survey of Alabama ("GSA"), the historical low flow for Chewacla Creek above the Moore's Mill Creek confluence and below Lake Ogletree is a 7Q2 of 1.8 MGD and a 7Q10 of 0.5 MGD—meaning flows can be expected to recede to or below 1.8 MGD in one of every two years and to or below 0.5 MGD in one of every ten years. (GSA 1972). The base period for these low flow data was 1939-1962 (Chandler 2001), therefore spanning before and after the construction of Lake Ogletree Dam. Flow at a site just above the Moore's Mill confluence

was measured as low as 0.6 MGD by GSA on September 9, 1968, after the construction of Lake Ogletree. (GSA 1972). At this same station, the U.S. Geologic Survey has reported a 7Q2 of 1.74 MGD and a 7Q10 of 0.32 MGD (converted from 2.7 ft³/sec and 0.5 ft³/sec, as reported) (USGS 1994).

Immediately below Lake Ogletree Dam, present flow in Chewacla Creek can be characterized as generally low to extremely low, with higher flows following significant rainfall events. Webber and Blevins (2000) reported a discharge and velocity too low to read at a station approximately 600 meters downstream of Ogletree Dam during the fall of 1999. In April of 2000, Buss (2001) measured a flow of 2.55 MGD at approximately the same location, about two weeks after a 1.3-inch rain event, but encountered flow too low to measure a few weeks later in May at the same location.

From the base of Lake Ogletree downstream to the area locally known as “Pretty Hole,” Chewacla Creek is a “gaining stream”—meaning that over this reach of the Creek, flow is increased by groundwater recharge, surface run-off, and tributary inflow (Buss 2001) (For reference, gauging station site 2 on the attached map is located just above Pretty Hole.). Webber (2001) reported data for May 2001 demonstrating that when the flow just below the dam was 2.01 MGD, the flow just above the Pretty Hole was 4.87 MGD and, later that month, when the flow below the dam was only 0.57 MGD, the flow just above Pretty Hole was 1.39 MGD. Multiple tributaries (including an unnamed tributary which is bounded on both sides by the Harris enrolled property) enter Chewacla Creek upstream of Pretty Hole and provide a consistent contribution to the flow of Chewacla Creek above Pretty Hole.

Just downstream of Pretty Hole, flow in Chewacla Creek is affected by the presence of subsidence features. These subsidence features are concentrated in and around an area where Chewacla Creek flows over the Chewacla Marble and can be characterized as depressions, sinkholes, solution fractures, or other holes in the underlying substrate that allow surface water loss from the Creek. A map of these subsidence features and a full description, including latitudinal and longitudinal coordinates, can be found at Figure 1 and Table 1 of Buss (2001). From just below Pretty Hole downstream to outfall 2 of Martin Marietta’s NPDES-permitted discharge, Chewacla Creek does not maintain a year-round flow, and is more accurately characterized at the present time as an intermittent or ephemeral stream. For example, data recently reported by Webber (2001) demonstrated that on May 18, 2001, flow was 1.39 MGD just above Pretty Hole, but was diminished to 0.13 MGD just below Pretty Hole.

Consistent flow is restored to Chewacla Creek once the Creek reaches outfall 2 of Martin Marietta’s NPDES-permitted discharge. Martin Marietta discharges water from the Quarry pits into Chewacla Creek from two permitted discharge points. Outfall 2 discharges water pumped from the old (East) Quarry pit at a rate ranging from approximately 5.0 to 9.0 MGD. Outfall 1 discharges water pumped from the new (West) Quarry pit at a discharge rate of less than 1.0 MGD (generally around 0.23 MGD) (Martin Marietta 2000). The locations of both outfall 1 and outfall 2 are depicted on the map attached as Attachment 1. From outfall 2 downstream to its confluence with Moore’s Mill Creek, Chewacla Creek maintains a consistent flow which is, because of the Quarry’s discharges,

artificially elevated above the historical low flows in that reach of the Creek, as demonstrated by the GSA data based on periods before and after the construction of Lake Ogletree discussed previously.

At a point about 1,300 meters downstream of outfall 2, Moore's Mill Creek enters Chewacla Creek from the north. Moore's Mill Creek impacts the quality of Chewacla Creek within the downstream enrolled properties through the introduction of large amounts of sediment. Jones (2001) documented, through sediment sampling, that Moore's Mill Creek is the primary cause of sedimentation in Chewacla Creek downstream of their confluence. The Alabama Department of Environmental Management ("ADEM") has proposed to list Moore's Mill Creek from its mouth at Chewacla Creek to its source as impaired due to sedimentation (ADEM 2000).

3.2 Description of Covered Species

A complete description of the physical characteristics, ecology, life history, historic range, status, and major factors threatening the existence of the covered species can be found in the final rule listing the covered species (58 *Federal Register* 14330) and in the Service's Recovery Plan for the Mobile River Basin Aquatic Ecosystem (USFWS 2000).

3.3 Description of Baseline Conditions

Baseline conditions for this Agreement are described with reference to each enrolled property. Included in each enrolled property, for the purposes of the baseline descriptions in this section, is the bed and banks of Chewacla Creek adjacent to that property. Nothing in this Agreement shall be construed to change or otherwise impact title to any lands. The baseline is described in terms of locations and numbers of covered species. The aquatic habitat within the enrolled properties is described in Webber and Blevins (2000) and Richardson (2001).

Between the upstream Water Board enrolled property and the Harris enrolled property, Chewacla Creek flows adjacent to multiple properties, the landowners of which are not parties to this Agreement. Populations of fine-lined pocketbook in Chewacla Creek in this area are described in Gangloff (2001).

The following is the baseline description for each enrolled property in terms of locations and numbers of the covered species:

Water Board enrolled property

Gangloff *et al.* (2003) conducted a survey for freshwater mussels at the upstream Water Board enrolled property below Lake Ogletree Dam. Gangloff *et al.* located one (1) live fine-lined pocketbook individual, but located no southern clubshell or ovate clubshell individuals, in Chewacla Creek within the upstream Water Board enrolled property. Thus, the baseline for the

upstream Water Board enrolled property is one (1) for the fine-lined pocketbook and zero for the southern clubshell and ovate clubshell.

The downstream Water Board enrolled property is adjacent to Chewacla Creek near the Wright's Mill Road bridge. Gangloff (2001) reported none of the covered species or any other member of the Unionidae family at the Wrights Mill Road bridge. Richardson (2001) also reported none of the covered species at a site just upstream of the Wrights Mill Road bridge (site CH4). Thus, the baseline for all the covered species for the downstream Water Board enrolled property is zero.

Harris enrolled property

Garner (2002) conducted a survey for freshwater mussels at the Harris enrolled property. Garner located no live specimens of any of the covered species. Sampling performed by Richardson (2001) in Chewacla Creek adjacent to the Harris enrolled property (site CH1B) also revealed none of the covered species. Moreover, as noted by Garner (2002), much of Chewacla Creek adjacent to the Harris enrolled property (from Pretty Hole downstream to outfall 2) is of an ephemeral nature and so currently can not maintain a baseline population for any of the covered species. Thus, the baseline for the Harris enrolled property is zero for all covered species.

Pace enrolled property

Sampling performed in Chewacla Creek adjacent to the Pace enrolled property revealed none of the covered species. Gangloff (2001) reported none of the covered species or any other member of the Unionidae family at the Wrights Mill Road bridge (near the western boundary of the enrolled property). Richardson (2001) sampled for mussels in Chewacla Creek adjacent to the Pace enrolled property near its eastern boundary (site CH2) and just upstream of the Moore's Mill Creek confluence (site CH3) and reported none of the covered species. Weber and Blevins (2000) conducted sampling for invertebrates, including mussels, over a 100 meter stretch of Chewacla Creek adjacent to the Pace enrolled property (site CB6) and counted none of the covered species. Thus, the baseline for all the covered species for this enrolled property is zero.

Phillips enrolled property

Sampling performed in Chewacla Creek adjacent to the Phillips enrolled property revealed none of the covered species. Gangloff (2001) reported none of the covered species or any other member of the Unionidae family at the Wrights Mill Road bridge (near the eastern boundary of enrolled property). Richardson (2001) sampled for mussels in Chewacla Creek adjacent to the Phillips enrolled property near its eastern boundary (site CH4) and reported none of the covered species. Weber and Blevins (2000) conducted sampling for invertebrates, including mussels, over a 100 meter stretch of Chewacla Creek adjacent to the Phillips enrolled property (site CB7) and counted none of the covered species. Thus, the baseline for all the covered species for this enrolled property is zero.

ADNCR enrolled property

The ADCNR enrolled property is located on the north side of Chewacla Creek directly across from the Harris, Pace, downstream Water Board, and Phillips enrolled properties. Thus, the baseline for the ADCNR enrolled property is zero for all covered species, the same as the baseline for the Harris, Pace, downstream Water Board, and Phillips enrolled properties as described above.

4.0 AGREEMENT IMPLEMENTATION

4.1 Conservation Measures

4.1.1 *Maintaining the Baseline Conditions*

The conservation measures described below are expected to maintain the baseline populations of the enrolled properties by providing additional flow, and, therefore, new or improved habitat in Chewacla Creek. The Parties recognize that natural changes in mussel locations and population numbers will occur over the term of this Agreement. Nothing in this Agreement or the associated Permits shall be construed to hold any Party responsible or liable for such natural changes.

The baseline can be increased or decreased subject to the following conditions. Any Landowner(s), and Cooperator(s) if applicable, can request a decrease in the baseline conditions for its respective enrolled property if the reduction is the result of unforeseen catastrophic events, such as hurricanes, forest fires, insect/disease/parasite epidemics, and other such events, including but not limited to actions by persons not a party to this Agreement that are beyond the reasonable control of the Landowner and do not occur through the fault or negligence of the Landowner and/or Cooperator(s) if applicable. In such circumstances, the Landowner(s), the Service, and any Cooperator(s) for that enrolled property may agree to revise the Agreement's baseline conditions for that enrolled property to reflect the new circumstances, rather than terminate the Agreement. Requested decreases to the baseline are at the Service's discretion based on a thorough evaluation of the information available at the time of the request, such as whether or not the decrease is temporary or permanent. The Service is under no obligation to make such baseline decreases. Increases or decreases to the baseline for an enrolled property shall require the unanimous consent of the respective Landowner(s), the Service, and any applicable Cooperator(s).

4.1.2 *Overview of Conservation Measures*

Conservation measures that will provide a net conservation benefit to the covered species will be implemented on each enrolled property by Martin Marietta, the Water Board, and/or their successor in interest. Martin Marietta, as authorized by the applicable Landowner, has repaired certain subsidence features within the enrolled properties. These repairs are consistent with the

conservation measures called for in this Agreement, and demonstrate the commitment of the Landowners and Cooperators to conservation of the covered species.

The conservation measures on each enrolled property are coordinated to increase the quality and quantity of available habitat for the covered species. Water will be pumped from the Quarry pits operated by Martin Marietta on the Harris, Pace, and Phillips enrolled properties and conveyed through a pipeline to a discharge point into Lake Ogletree. With the availability of this additional water source, the Water Board will provide a 2.0 MGD minimum flow at the base of Lake Ogletree Dam. However, this minimum flow may be subject to staged reductions under certain water shortage circumstances as described below. Martin Marietta will monitor for, and repair if necessary, subsidence features in Chewacla Creek and within 10 feet of its bank within the ADCNR, Harris, Pace, Phillips, and downstream Water Board enrolled properties so that the minimum flow is not diminished within the downstream enrolled properties. Adaptive management by Martin Marietta and the Water Board, in the form of periodic monitoring and bioassessment, will be part of the implementation of these measures. The specific conservation measures that are authorized and will be implemented for each enrolled property are described below. Nothing in this Agreement shall be construed to alter the terms of any other agreement, such as a lease, between or among any of the Parties, or to impose any requirement or obligation to implement conservation or management measures on ADCNR, Harris, Pace, or Phillips.

4.1.3 *Specific Conservation Measures*

All conservation measures, monitoring, and bioassessment activities described in this Agreement shall be provided by Martin Marietta, the Water Board, and/or their successors in interest, as authorized by the necessary applicable Landowner. Neither ADCNR, Harris, Pace, or Phillips is expected to or shall be obligated to implement any affirmative conservation measure or provide funding thereof. The specific conservation measures that are authorized by each Party and that will be implemented for each enrolled property are described in section 4.1.4 below.

Subsidence Feature Control

Martin Marietta will monitor for and repair subsidence features, either new or existing, located in Chewacla Creek or within 10 feet of its banks within the ADCNR, Harris, Pace, Phillips, and downstream Water Board enrolled properties as necessary to maintain a minimum continuous stream flow in the portions of Chewacla Creek adjacent to the Quarry equal to 2.0 MGD as measured at gauging station 4. Locations of all gauging stations are depicted on the map attached as Attachment 1. In addition, even when stream flow in the portions of Chewacla Creek adjacent to the Quarry is equal to 2.0 MGD as measured at gauging station 4, Martin Marietta will repair subsidence features in the portions of Chewacla Creek adjacent to the Quarry if, in the opinion of GSA, there is an excessive diminution in stream flow between gauging station 2 and gauging station 4. These obligations will be carried out by Martin Marietta for so long as it is extracting reserves from the Quarry pit. Should the flow in Chewacla Creek at gauging station 2 be less than 2.0 MGD, then Martin Marietta is only required to repair subsidence features to the extent necessary to

maintain a quantity of flow at gauging station 4 equal to that measured at gauging station 2. It is anticipated that the Water Board will seek the water rights from each Landowner, respectively, associated with the Quarry after reserves are no longer extracted from the Quarry. Assuming the Water Board obtains water rights, it will assume Martin Marietta's repair obligation described above. Subsidence feature repair work under this paragraph will be performed as soon as reasonably practicable in the judgment of the party performing the work based on weather and stream flow conditions and subject to any applicable laws and regulations.

Supply of Quarry Water to Lake Ogletree

Martin Marietta currently holds permits to discharge water from the Quarry pits into Chewacla Creek at two outfalls. The locations of these outfalls are depicted on the map attached as Attachment 1. Outfall 1 is from the new (West) pit, and outfall 2 is from the old (East) pit. The old pit is located on the Harris and Pace enrolled properties. Outfall 2, which discharges from the old pit, is located on the Harris enrolled property. The new pit is located on the Phillips enrolled property. Outfall 1, which discharges from the new pit, is located on the Pace enrolled property.

Martin Marietta will request approval from the Alabama Department of Environmental Management ("ADEM") for a new discharge point into Lake Ogletree at a location to be determined by the Water Board, using the existing 16 inch ductile iron pipeline ("Old Pipeline") located underground on granted easements from Lake Ogletree to a certain point near the bank of Chewacla Creek adjacent to the Harris property. The discharge of the Quarry water into Lake Ogletree, as opposed to directly into Chewacla Creek as it is presently, will allow the settling of any sediment present in the discharge water and a moderation of pH levels. ADEM may request an alternative emergency discharge at the base of the dam (to be controlled by the Water Board). Martin Marietta agrees to pump the pit water from the old (East) pit to the existing outfall 2 to the extent required for mining operations. Martin Marietta reserves the right to continue to discharge to Chewacla Creek from outfalls 1 and 2 in periods of high flow, so that unnecessary pumping cost to Lake Ogletree will be avoided. Detailed pumping records will be kept by Martin Marietta and the Water Board and filed monthly with the Water Board to be maintained as a public record.

This new discharge point into Lake Ogletree will require the construction of approximately 1,400 feet of pipe (the "New Pipeline") from the existing outfall 2 to the Old Pipeline, and the purchase and installation of a booster pump for pumping the discharge approximately 1,400 feet from outfall 2 through the New Pipeline to the Old Pipeline and from that point approximately 7,000 feet to Lake Ogletree. The Water Board will purchase, install, operate, and maintain the New Pipeline in accordance with manufacturers' recommendations, if any, or otherwise in a commercially reasonable manner. Martin Marietta will purchase, install, operate, and maintain the booster pump in accordance with manufacturers' recommendations, if any, or otherwise in a commercially reasonable manner. Martin Marietta and the Water Board will be responsible for the cost of the electric power necessary to pump the discharge to Lake Ogletree in accordance with a separate cost sharing agreement between those two parties.

Minimum Flow from Lake Ogletree

The Water Board will guarantee a minimum flow of 2.0 MGD at the base of Lake Ogletree dam for as long as the Quarry is in operation, and thereafter provided the Water Board obtains the water rights as anticipated. Historically, the Quarry has produced approximately 5.0 to 9.0 MGD from the old pit and around 0.23 MGD from the new pit. (Martin Marietta 2000). In the unanticipated event that the Quarry fails to produce at least 3.5 MGD, the Water Board's minimum flow obligation will be reduced from 2.0 MGD in direct proportion. For example, if only 0.7 MGD is available from the Quarry, then the Water Board's minimum flow obligation will be reduced to 0.4 MGD. The GSA has estimated that 0.4 MGD is the natural "7Q10" for Chewacla Creek below Lake Ogletree (GSA 2002). Pumping records maintained by Martin Marietta for 2000, a severe drought year, demonstrate that the least amount of water produced daily by the old pit was 2.25 MGD, which would translate to a minimum flow at Lake Ogletree Dam of 1.28 MGD.

In addition, the 2.0 MGD minimum flow will be subject to staged reduction under certain water shortage circumstances as follows. In the event the City imposes mandatory water use restrictions on its water users, the minimum flow will be reduced over a three-day period to 0.4 MGD, which the GSA has estimated to be the natural "7Q10" for Chewacla Creek below Lake Ogletree. If the City has imposed mandatory water use restrictions and the Water Board determines, in consultation with the City, that it will unlikely be able to fulfill its obligation to meet the restricted demand for water, the minimum flow obligation will be reduced to zero. In such a situation, the Water Board will endeavor in good faith to provide flows to Chewacla Creek that do not interfere with its obligation to meet the demand for water. Historically, the City has never imposed mandatory water use restrictions. Thus, the staged reduction of flow provided for in this Agreement is expected to result in increased flows within the enrolled properties except in unanticipated circumstances. The Water Board will notify the Service in advance of any anticipated flow reductions in accordance with sections 4.2 and 4.6, and to the extent practical coordinate such reductions with Service recommendations.

The method of siphoning or pumping water from Lake Ogletree to the Creek will be determined by the Water Board in its discretion, subject to all applicable rules and regulations. Water will be pumped or siphoned from a depth sufficient to assure adequate dissolved oxygen downstream, as shown by the annual bioassessment.

Monitoring and Bioassessment

The Water Board and Martin Marietta commit to the continuous monitoring of stream flow at six points: (1) below Lake Ogletree dam, (2) just above Pretty Hole, (3) approximately 1500 feet downstream of Pretty Hole (in the area of Chewacla Creek above outfall 2 which presently receives intermittent or ephemeral flows), (4) approximately 1500 feet downstream of outfall 2 (just above Moore's Mill Creek), (5) at the Wright's Mill Road bridge, and (6) just below the confluence with Town Creek. The locations of these gauging stations are depicted on the map attached as

Attachment 1. The stream gauging equipment to be used is described in the Scope of Work prepared by the Auburn University Department of Fisheries and Allied Aquacultures attached as Attachment 3 (“Scope of Work”). The cost of the stream gauging equipment will be the joint and equal obligation of Martin Marietta (or any subsequent operator of the Quarry) and the Water Board, for as long as the Quarry is in operation, and thereafter the sole obligation of the Water Board. This stream gauging obligation will continue for Martin Marietta so long as it is extracting reserves from the Quarry pit and for the Water Board so long as either Lake Ogletree or the Quarry is serving as a water source for the City of Auburn. Martin Marietta will require any new operator of the Quarry to assume its monitoring and bioassessment obligation. All Parties, their agents, employees or designees, shall have access to the continuous stream gauging flow rate data and may verify the accuracy of the stream gauges.

In addition, the Water Board agrees at its sole expense to fund an annual bioassessment of Chewacla Creek at sites (1), (2), (3), (4), and (6). The locations of these bioassessment sites are depicted on the map attached as Attachment 1. The bioassessment will include an assessment of macroinvertebrate, mussel, and fish communities, with water chemistry analysis and a visual physical habitat assessment for a period of fifteen (15) years as fully described in the Scope of Work attached as Attachment 3. At the end of the fifteen (15) year bioassessment period, the bioassessment requirement herein will terminate provided the Service reasonably determines that the conservation measures have been properly implemented. Notwithstanding the foregoing, the monitoring and bioassessment obligations described in this section will only continue for Martin Marietta so long as it is extracting reserves from the Quarry pit and for the Water Board so long as either Lake Ogletree or the Quarry is serving as a water source for the City of Auburn. Martin Marietta will require any new operator of the Quarry to assume its monitoring and bioassessment obligation. Nothing herein shall prohibit the Water Board and Martin Marietta from entering into a separate cost sharing agreement for conservation measures contained in the Agreement.

4.1.4 *Applicability of Conservation Measures to each Enrolled Property*

Water Board enrolled property (City and Martin Marietta as Cooperators):

The Water Board authorizes the discharge of the Quarry water into Lake Ogletree in accordance with applicable permits. The Water Board, in consultation with the City, will provide the minimum flow from Lake Ogletree as described in section 4.1.3.

Martin Marietta’s subsidence feature control conservation measure applies to the downstream Water Board enrolled property. The Water Board will undertake, and authorizes and directs Martin Marietta, its employees, contractors, and agents to undertake, the conservation measures described in section 4.1.3 for the downstream Water Board enrolled property regarding subsidence feature control.

Gauging stations 1 and 5 and bioassessment sites 1 and 4 are located in Chewacla Creek adjacent to the Water Board enrolled property. The Water Board will conduct, and authorizes and directs

Martin Marietta, its employees, contractors, and agents to conduct, the monitoring and bioassessment activities described in section 4.1.3 for the Water Board enrolled property.

ADCNR enrolled property (Water Board and Martin Marietta as Cooperators):

Martin Marietta’s subsidence feature control conservation measure applies to the ADCNR enrolled property. ADCNR authorizes and directs Martin Marietta, the Water Board, their employees, contractors, and agents to undertake the conservation measures described in section 4.1.3 for the ADCNR enrolled property regarding subsidence feature control.

Gauging stations 2, 3, 4, 5, and 6 and bioassessment sites 2, 3, 4, and 6 are located in Chewacla Creek adjacent to the ADCNR enrolled property. ADCNR authorizes and directs the Water Board, Martin Marietta, their employees, contractors, and agents to conduct the monitoring and bioassessment activities described in section 4.1.3 for the ADCNR enrolled property.

Harris enrolled property (Water Board as Cooperator and Martin Marietta as additional Landowner):

Martin Marietta’s subsidence feature control conservation measure applies to the Harris enrolled property. A portion of the old pit and outfall 2 are located on the Harris enrolled property. The New Pipeline, booster pump, and Quarry pumps are also located on the Harris enrolled property. Harris, subject to Harris’s rights in the water, the property, and the terms or agreements between Harris, Martin Marietta, and the Water Board, authorizes and directs Martin Marietta, the Water Board, their employees, contractors, and agents to undertake the conservation measures described in section 4.1.3 for the Harris enrolled property regarding subsidence feature control and supply of Quarry water to Lake Ogletree.

Gauging stations 2 and 3 and bioassessment sites 2 and 3 are located in Chewacla Creek adjacent to the Harris enrolled property. Harris, subject to Harris’s rights in the water, the property, and the terms or agreements between Harris, Martin Marietta, and the Water Board, authorizes and directs the Water Board, Martin Marietta, their employees, contractors, and agents to conduct the monitoring and bioassessment activities described in section 4.1.3 for the Harris enrolled property.

Pace enrolled property (Water Board as Cooperator and Martin Marietta as additional Landowner):

Martin Marietta’s subsidence feature control conservation measure applies to the Pace enrolled property. A portion of the old pit and outfall 1 are located on the Pace enrolled property. Pace, subject to Pace’s rights in the water, the property, and the terms or agreements between Pace, Martin Marietta, and the Water Board, authorizes and directs Martin Marietta, the Water Board, their employees, contractors, and agents to undertake the conservation measures described in section 4.1.3 for the Pace enrolled property regarding subsidence feature control and supply of Quarry water to Lake Ogletree.

Gauging station 4 is located in Chewacla Creek adjacent to the Pace enrolled property. Pace, subject to Pace's rights in the water, the property, and the terms or agreements between Pace, Martin Marietta, and the Water Board, authorizes and directs the Water Board, Martin Marietta, their employees, contractors, and agents to conduct the monitoring and bioassessment activities described in section 4.1.3 for the Pace enrolled property.

Phillips enrolled property (Water Board as Cooperator and Martin Marietta as additional Landowner):

Martin Marietta's subsidence feature control conservation measure applies to the Phillips enrolled property. The new pit is located on the Phillips enrolled property. Phillips, subject to Phillips's rights in the water, the property, and the terms or agreements between Phillips, Martin Marietta, and the Water Board, authorizes and directs Martin Marietta, the Water Board, their employees, contractors, and agents to undertake the conservation measures described in section 4.1.3 for the Phillips enrolled property regarding subsidence feature control and supply of Quarry water to Lake Ogletree.

Gauging stations 5 and 6 and bioassessment site 6 are located in Chewacla Creek adjacent to the Phillips enrolled property. Phillips, subject to Phillips's rights in the water, the property, and the terms or agreements between Phillips, Martin Marietta, and the Water Board, authorizes and directs the Water Board, Martin Marietta, their employees, contractors, and agents to conduct the monitoring and bioassessment activities described in section 4.1.3 for the Phillips enrolled property.

4.1.5 *Providing a Net Conservation Benefit*

The Service has determined that the conservation measures, as described above, are reasonably likely to provide a net conservation benefit for the covered species. As described in more detail below, that net conservation benefit will likely occur as soon as the minimum flows provided for in section 4.1 are implemented in the enrolled portions of Chewacla Creek.

The conservation measures described above are expected to increase the quality and quantity of habitat available to the covered species. As documented above, lack of flow is a primary cause of habitat degradation within the enrolled properties. The provisions for minimum flows below Lake Ogletree Dam, the monitoring of habitat conditions, and the control of subsidence features are expected to ameliorate this situation. The Agreement will provide a stream flow that approximates the normal flows in all reaches of the Creek by adding a portion of the Quarry water to Lake Ogletree and requiring minimum flow below the dam.

For example, based on data from 1980 to the present, Lake Ogletree has not discharged a continuous flow to Chewacla Creek, as documented by data reported at Buss (2001) Appendix E-3. Since Chewacla Creek is a "gaining stream" in this section, a requirement for 2.0 MGD at the base of Lake Ogletree Dam will likely result in more than 2.0 MGD in-stream flow downstream near Pretty Hole during normal conditions. For example, Webber (2001) reported data for May 2001

demonstrating that when the flow just below the dam was 2.01 MGD, the flow just above Pretty Hole was 4.87 MGD; and, later that month, when the flow below the dam was only 0.57 MGD, the flow just above Pretty Hole was 1.39 MGD.

With the control of subsidence features provided for in the conservation measures, the 2.0 MGD requirement below Lake Ogletree should provide more natural flows in Chewacla Creek within the enrolled properties. Subsidence feature control, coupled with the minimum flow requirement at Lake Ogletree Dam, is expected to restore year-round flow to that section of Chewacla Creek between Pretty Hole and outfall 2 that has been dewatered. This section, because of its present intermittent nature, is not available habitat for the covered species. With implementation of the conservation measures, that section is expected to become fully available for repopulation by the covered species.

Moreover, year-round flow in that section is expected to increase the opportunity for host fish to access the covered species. The presence of likely host fish (largemouth bass) has been documented upstream of Pretty Hole (Richardson 2001), and the ability of fish to travel through the intermittent section has been documented (Folkerts 2001). Under the conservation measures, year-round fish migration and increased interaction between the covered species and host fish will be possible. Increased fish migration from downstream of the intermittent section will also make it more likely that southern clubshell, *Pleurobema decisum*, and ovate clubshell, *Pleurobema perovatum*, will repopulate these sections. Known populations of these two covered species occur in Chewacla Creek downstream of the enrolled properties (USFWS 2000). Mussel reproduction involves the development of larval forms known as glochidia from fertilized eggs (USFWS 2000). These glochidia attach to the gills of certain host fish as parasites, remaining there for a period ranging from a week to several months (USFWS 2000). After this parasitic period, the glochidia develop into juveniles and detach from the host fish (USFWS 2000). Thus, host fish provide a mechanism for transporting mussel juveniles over a wide range (USFWS 2000). Providing year-round flow to sections of the enrolled properties that have been dewatered will allow host fish to transport glochidia from the downstream existing populations of the covered species to the upstream areas of the enrolled properties now largely disconnected, thereby enabling those covered species to repopulate those areas of the enrolled properties. The overall expected result of the conservation measures is a more natural flow in all sections of Chewacla Creek and an overall increase in the habitat available to the covered species.

4.2 Incidental Take

Under this Agreement, the Landowners and Cooperators are authorized to make use of their respective enrolled property in any manner that does not reduce the baselines in section 3.3 or as amended. The Landowners and Cooperators may continue current land-use practices, undertake new ones, or make any other lawful use of the property and resources, even if such use results in take of the covered species, as long as the baseline is maintained and the activities identified in the Agreement as necessary to achieve a net conservation benefit for the covered species have been carried out by the Landowner or Cooperator making such use. Pursuant to the enhancement of

survival permit attached hereto as Attachment 2, the Landowners and Cooperators are authorized to take all covered species above the baseline population for each species. Such take is not anticipated, but may occur, for example, should the minimum flow from Lake Ogletree be diminished in accordance with section 4.1.3. No take of individuals, populations, or habitat of the covered species that are part of the baseline is permitted under the Agreement. Pursuant to 50 C.F.R. §§ 17.22(c)(3) and 17.32(c)(3), a Landowner shall notify the Service at least 30 days in advance, but preferably as far in advance as possible, of when it expects to incidentally take any covered species. Such notification will provide the Service with an opportunity to relocate affected individuals of the covered species, if possible and appropriate. The Parties agree to cooperate to the maximum extent practicable to effectuate such relocation, including providing necessary access, in order to promote the continued existence and recovery of the covered species.

Implementation of this Agreement may result in increases of the covered species' populations or habitat beyond the baseline. If such increases occur, at the end of the term of a permit issued hereunder, a Landowner or Cooperator may take those individuals, populations, or habitats of the covered species in excess of the baseline before the permit expires. If the respective Landowner and Cooperator choose not to take any above-baseline individuals, populations, or habitats and terminates the permit or allows the permit to expire, the Landowner(s) and Cooperator(s) for such permit acknowledge that they no longer have permit protection against take liability under the Act.

4.3 Reporting Provisions

The Water Board will make available, and provide upon request, to the Parties an annual report with the following information regarding implementation of the Agreement and fulfillment of its provisions:

- verification of maintenance of the baseline (through the annual bioassessment)
- implementation of the Agreement's conservation measures
- notification of any known take authorized by the Agreement and Permit
- monitoring data from stream gauges
- bioassessment results
- pumping records (to be provided to Water Board by Martin Marietta for inclusion in annual report)
- A certification from a responsible official who supervised or directed the preparation of the report: "Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete."

This information will be set out by month where available. Annual reports, covering each full calendar year during which the Agreement is effective, will be due on or before March 31 of the subsequent year. A copy of the report shall be sent by the Water Board to the Service at each of the two following addresses:

- Field Supervisor, Daphne Field Office, 1208-B Main Street, Daphne, Alabama, 36526
- Endangered and Threatened Species Permits, U.S. Fish and Wildlife Service (AES/TE/P), 1875 Century Boulevard, Suite 200, Atlanta, Georgia, 30345

Pursuant to 50 C.F.R. § 13.45, this reporting by the Water Board will fulfill any reporting obligation for all other Parties, and, other than Martin Marietta's stream flow monitoring obligation in section 4.1.3, no other Party shall be required at any time to conduct monitoring or provide any report under the Agreement or pursuant to any rule or regulation.

4.4 Funding Provisions

Within the limits contained herein and as specifically described and authorized above in section 4.1.4, the Water Board and Martin Marietta commit to expend the funds and resources necessary for monitoring, repair, reporting, and implementation of the conservation measures.

Implementation of this Agreement is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any funds from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized Agency official affirmatively acts to commit to such expenditures as evidenced in writing. Nothing herein shall be construed to require ADCNR, Harris, Pace, or Phillips to commit or expend any funds at any time.

4.5 Neighboring Landowners

This Agreement shall not confer any rights or remedies upon any person or entity other than the Landowners and Cooperators, their employees, contractors, and agents, and their respective successors and assigns, as provided for herein. The Service will use the maximum flexibility allowed under the Act to address neighboring properties under the Agreement and the associated Permits. The Service's potential actions include, but are not limited to, granting take authority to neighboring landowners where occupation by listed species is expected as a result of the Agreement and where the neighboring landowner makes application for a permit, allows a baseline determination, and agrees to access and notification requirements. However, the implications to neighboring landowners and the potential need to actively address these implications will be determined on a case-by-case basis. In general, the Service will endeavor to include neighboring landowners who may be affected by listed species as parties to this or a separate agreement and permit.

4.6 Emergency Situations

Performance by the Parties of their respective obligations under the Agreement shall be excused if and to the extent that such performance is prevented by events or circumstances beyond their

reasonable control including, without limiting the generality of the foregoing, Acts of God, earthquakes, floods, civil insurrection, riot, strikes or other labor difficulties, governmental decrees other than those issued by the Party seeking excuse, rules, regulations or embargoes, equipment failure (not the result of the failure of the Water Board to meet its operation and maintenance obligations in section 4.1.3), failure of sources of supply, terrorist acts and other contingencies whether similar or dissimilar to the foregoing. In the event a Party's performance is prevented by any such contingency, such Party in good faith shall endeavor to overcome the effects of the contingency as promptly as possible.

In these situations, the Parties acknowledge that it may be impossible to provide the 30-day notice required by the Agreement prior to initiation of activities that could foreseeably result in take of the covered species. However, the relevant Landowner or Cooperator will notify the Service within 10 days of discovering such a situation, but preferably as soon as possible, and will make reasonable accommodations to the Service to survey for and/or relocate affected individuals or populations of the covered species individuals prior to the action(s). The Parties acknowledge that survey and relocation may be precluded by certain urgent or emergency situations.

5.0 RESPONSIBILITIES OF THE PARTIES

5.1 Landowner and Cooperator Responsibilities

Within the limits contained herein, Martin Marietta and the Water Board agree to implement their management actions and other provisions of this Agreement and to provide sufficient funding and other resources necessary to implement their respective obligations under the Agreement. ADCNR, Harris, Pace, and Phillips authorize Martin Marietta and the Water Board to take these actions, but ADCNR, Harris, Pace, and Phillips shall not be responsible for nor required in any way to provide funding, monitoring, reporting, or management actions at any time. All Landowners and Cooperators agree to adhere to the Terms and Conditions of the Permit.

With reasonable advance notice, the Landowners shall allow Service personnel, or other properly permitted and qualified persons designated by the Service, to enter their respective enrolled property at reasonable hours and times for the general purposes specified at 50 C.F.R. § 13.21(e)(2).

5.2 Service Responsibilities

The Service agrees to provide technical assistance and funding, if available, to the Landowners and Cooperators to assist with implementation of the Agreement.

The Service shall ensure that the Landowners and Cooperators implement the Agreement properly.

The Service will ensure that the terms of the Agreement will not be in conflict with any ongoing conservation or recovery programs for the covered species.

5.3 Shared Responsibilities of the Parties

The Parties will ensure that the Agreement and the actions covered in the Agreement are consistent with applicable Federal, State, and local laws and regulations.

Nothing in this Agreement will be construed to limit or constrain any Party or any other entity from taking additional actions at its own expense to protect or conserve the covered species.

Nothing in this Agreement shall limit the ability of Federal and State conservation authorities to perform their lawful duties, and conduct investigations as authorized by statute and by court guidance and direction.

Each Party shall have all remedies otherwise available to enforce the terms of the Agreement and the Permit, except that no Party shall be liable in damages for: (i) any breach of this Agreement, (ii) any performance or failure to perform an obligation under this Agreement, (iii) termination of the Permit or this Agreement, or (iv) any other cause of action arising from this Agreement.

The Parties agree to work together in good faith to resolve any disputes, using dispute resolution procedures agreed upon by all Parties.

6.0 LANDOWNER AND COOPERATOR ASSURANCES

Through this Agreement, the Service provides and shall provide the Landowners and Cooperators assurances that if additional conservation measures are deemed necessary, the Service may request additional measures, but only if such measures are limited to modifications within the enrolled property, if any, for the covered species and these measures maintain the original terms of the Agreement to the maximum extent possible. Additional conservation measures are voluntary on the part of the Landowner and/or Cooperator and will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Agreement without the consent of the Landowner and/or Cooperator from whom such a commitment is sought or to whom such restrictions would be applicable. Failure of a Landowner or Cooperator to perform additional conservation measures requested by the Service will not constitute a breach of this Agreement or result in any liability under the Act.

These assurances allow the Landowners and Cooperators to alter or modify their respective enrolled property, even if such alteration or modification results in the incidental take of the covered species to such an extent that the take returns the covered species to the originally agreed upon or amended baseline conditions. These assurances depend on compliance with the obligations in this Agreement and in the respective permit by the Landowner or Cooperator whose actions result in such an incidental take. Further, the assurances apply only to this Agreement, only if the Agreement

is being properly implemented by such Landowner or Cooperator, and only with respect to the covered species.

7.0 AGREEMENT MANAGEMENT

7.1 Agreement Termination

Any Landowner or Cooperator can terminate its participation in this Agreement at any time by providing the Parties with 30 days written notice. However, each Landowner and Cooperator acknowledges that if it terminates its participation in the Agreement it will no longer be covered by the Permit and it will lose the regulatory assurances provided by the Permit for the covered species. The Landowners and Cooperators may return the covered species to baseline conditions, even if the expected net conservation benefits have not been realized, but only if done prior to the termination date, and in accordance with section 4.2 above. A Landowner's termination of its participation in this Agreement shall not affect the responsibilities, protections, and assurances of other participating Landowners.

7.2 Agreement Renewal

The Agreement can be renewed with or without modification with the approval of the Parties to be bound by the renewed Agreement.

7.3 Agreement Amendments

Amendments to this Agreement can be proposed by any Party to the Agreement and must be provided to the other Parties in writing. All Parties will have at least 60 days to evaluate proposed amendments, and all amendments must be approved in writing by each Party. Matters such as change of ownership by transfer or succession, change of Cooperator, termination by a Party, or change of term or duration shall be considered a minor change in the Agreement. Amendments for actions that would either 1) result in a different level or type of take than was analyzed in association with the Agreement, or 2) result in a substantial change to the cumulative conservation benefits to the covered species such that the net conservation standard might not be met, may likely be major amendments. Major amendments may require the Service to comply with certain procedural requirements of federal law, such as those contained in the National Environmental Policy Act.

7.4 Transfer of Agreement Benefits

To the extent practicable, each Landowner agrees to notify the Service and any relevant Cooperators in writing and at least 30 days in advance if that Landowner's ownership of all or a portion of the enrolled property is to be transferred to another. If a Landowner transfers its ownership in the enrolled property, the Service will regard the new landowner as having the same rights and

obligations as the Landowner under this Agreement, if such new landowner agrees to become a party to the Agreement. Actions taken by the new landowner that result in take of species covered by the Agreement would be authorized if the new landowner maintains the terms and conditions of the Agreement and the Permit. If the new landowner does not become a Party to the Agreement, the new landowner would neither incur responsibilities under the Agreement nor receive any assurances relative to the Act's section 9 prohibitions that might result from the new landowner's actions.

In the event of death, receivership, bankruptcy, or involuntary transfer by a Landowner, the successor to such Landowner's rights and title as described in 50 C.F.R. § 13.24 shall have the same protections and assurances of the Landowner, and if such successor desires to be covered by the Agreement and Permit, the successor shall use its best efforts to, within ninety (90) days of such succession, notify the Service and provide the Permit to the Service for endorsement. It is recognized that such successor may not have notice of the Agreement or Permit and the Service, upon discovery of the successor, shall make all efforts to notify the successor of the existence of the Agreement and Permit.

After any notification of change in ownership or event of succession in an enrolled property, the Service within thirty (30) days will contact the new or prospective landowner or successor to explain the Agreement and to determine whether the new landowner will become a Party to the Agreement or enter a different agreement. When a new landowner becomes a Party to the Agreement, the Service will honor the terms and conditions of the Agreement and Permit.

7.5 Miscellaneous

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same Agreement.

The Parties and their respective attorneys have participated jointly in the negotiation and drafting of this Agreement, and it shall be construed as if jointly drafted by these Parties. No presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

Authority Cited

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