

**MEMORANDUM OF UNDERSTANDING AND PUBLIC ASSISTANCE
AGREEMENT FOR CLEARING OF PUBLIC AND PRIVATE
WATERWAYS**

THIS MEMORANDUM OF UNDERSTANDING AND PUBLIC ASSISTANCE AGREEMENT (“MOU”) is made and entered into as of the date last signed by the parties below, between Monroe County Board of County Commissioners (hereinafter the “County”) and the State of Florida’s Department of Environmental Protection (the “State” or “DEP”), each one constituting a public agency as defined in Section 163.01(3)(b), Florida Statutes (2017).

WITNESSETH:

WHEREAS, on September 10, 2017, Hurricane Irma made landfall in the Florida Keys and the County as a Category 4 storm with maximum sustained winds of approximately 130 m.p.h.

WHEREAS, Hurricane Irma caused significant and widespread damage throughout Monroe County.

WHEREAS, the majority of County’s waterways are connected to, and part of the United States National Marine Sanctuary and must be preserved for future generations.

WHEREAS, because of the impact of Hurricane Irma, Monroe County has expended all its resources and revenues in preparation, mitigation, and cleanup actions.

WHEREAS, the County now has no resources available to clear non-hazardous and hazardous debris from private and public waterways (including canals and nearshore waterways below the mean high water line).

WHEREAS, debris, including, but not limited to vegetation, hazardous waste, construction and demolition debris, propane tanks, white goods, e-waste, docks, non-marine vehicles, seawalls, and houses or portions of houses pose a direct threat to the health, safety, and welfare of the residents of the County and the State of Florida.

WHEREAS, pursuant to Section 252.45, Florida Statutes the Governor of the State of Florida, when he deems it in the public interest, may “enter into a contract on behalf of the state for the lease or loan to any political subdivision of the state, on such terms and conditions as she or he may deem necessary to promote the public welfare and protect the interests of the state.” Furthermore, this loaning power is delegated by the Governor to DEP as it is one of the “principal administrative unit[s] within the executive branch of state government” under the definitions in Section 20.03, Florida Statutes.

WHEREAS, pursuant to Sections 125.01(1)(p), 252.40, and 403.061(21), Florida Statutes, and Section 9, Article IV of the Constitution of Florida, by and through this MOU, DEP agrees to assist the County with the clearing, removal, and disposal of debris from private and public waterways.

WHEREAS, the County has adopted Ordinance 023-2017 on October 18, 2017 (incorporated herein as Exhibit 1). This ordinance details that debris removal from public and private property (including waterways and canals) is necessary to protect the public health and safety in a declared emergency. Furthermore, that the County has the legal authority and repository to remove the debris, and that it is necessary for the public interest to eliminate an immediate threat to life, public health, and safety. Finally, federal and state governments are held harmless and indemnified for all claims or loss or damages resulting from the work.

WHEREAS, the Federal Emergency Management Agency (“FEMA”) in its Public Assistance Program and Policy Guide (2018) provides debris on private property may be removed and eligible under the doctrine of public assistance. Through this MOU, debris removal on private property must be in the public interest to qualify according to for Public Assistance Program and the criteria of Public Assistance Program and Policy Guide (2018). There also must be a written request to FEMA for this doctrine to go into use. Accordingly, the County has adopted Ordinance

023-2017 to comply with the Federal Emergency Management Agency's Public Assistance Program and Policy Guide (2018). This ordinance, upon verbal consent of FEMA's attorneys, should fulfill the requirement for a written request and authorization. On February 1, 2018, the County has submitted a request for approval of its marine debris removal program to FEMA through the State of Florida, Division of Emergency Management.

WHEREAS, as a result of the passage of Ordinance 023-2017, the County is empowered for cleaning up private and public waterways.

WHEREAS, the County is also permitted to ask for additional assistance under the auspices of Federal Emergency Management Agency's Public Assistance Program, specifically the "Mutual Aid" procedure. This procedure allows a government body, who does not have sufficient resources to respond to an incident to request "mutual aid" from another jurisdiction.

WHEREAS, in the present case, the State will provide aid and assistance to the County directly under the doctrine of "mutual aid."

NOW, THEREFORE, in consideration of the mutual covenants and obligations contained herein, the Parties agree to the following:

Section 1- Parties' Responsibilities: DEP will use its resources, funds, and contracts to remove non-hazardous and hazardous debris resulting from the 2017 Hurricane Irma from the private and public waterways, including nearshore waterways below the mean high water line, within the County's unincorporated boundaries. This MOU does not include the cleaning up of derelict vessel debris.

If the public or private waterway extends into a municipality, the State will cease work at the borderline of the unincorporated Monroe County and the municipality. Work by the State in the municipalities of Monroe County will be dealt with in subsequent and individual MOUs, as needed or wanted by each municipality. Private and public waterways, including nearshore

waterways below the mean high water line, for the purposes of DEP's portion of this MOU, are defined by and identified in Exhibit 1. For the purposes of this MOU, "mean high water" is defined in Section 177.27(14), Florida Statutes (2017) as "...the average height of the high waters over a 19-year period." Furthermore, Section 177.27(14), Florida Statutes (2017) goes on to say that "for shorter periods of observation, 'mean high water' means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value." Therefore, the mean high water line as defined in Section 177.27(15), Florida Statutes (2017) and for the purposes of this MOU is the intersection of the tidal plane of mean high water with the shore."

The documentation identifying public and private waterways, including nearshore waterways below the mean high water line, in unincorporated Monroe County, which are subject to this MOU are incorporated as Exhibit 2. Exhibit 2 may be modified by in writing by mutual agreement of the DEP and the County.

As part of its responsibilities, the County shall have the responsibility to locate and secure appropriate sites and/or transfer stations for debris, and shall secure all necessary permits, including disaster debris management site (DDMS) permits. The County shall provide any public lands that are available and appropriate as DDMS sites, and shall provide any other help to assist the State in locating and securing the necessary sites. Finally, the State does not guarantee a minimum or maximum of amount of aid under this MOU.

Section 2- Standards: The State and County will follow all applicable Federal Emergency Management Agency, federal, Florida, and local laws, rules, policies, and procedures to ensure work is done properly, efficiently, and to maximize reimbursement opportunity from Federal Emergency Management Agency. This MOU and all related documents will comply all federal procurement

requirements under 2 C.F.R. § 200.326 (2014), including Appendix II to Part 200, as incorporated by reference into this MOU as Exhibit 4.

This MOU prohibits Time-and-Material Contracts (T&M), which are discouraged by the Federal Emergency Management Agency. If DEP elects to use a T&M Contract, either for a contractor or subcontractor, there must be a prior written explanation provided to the County as to its use, justification, and why the other types of contracts do not work in the present situation.

It is understood and agreed that each party operates under its own legal authorities, policies, and administration, and each party's obligations under this MOU are thereby limited. It shall be the responsibility of each party to interpret its own authorities and policies and make decisions as required under law and policies applicable to each.

Section 3 – Scope of Work and County's Priority List: The State and County shall do, perform, and carry out the duties described in the Scope of Work, attached hereto as Exhibit 3. The waterways will be worked on in the order of the County's priority that is incorporated in Exhibit 5. These exhibits are incorporated into this MOU as any other term or provision of this MOU.

Section 4 – Repayment: Under the doctrine of "mutual aid" the County will be required to reimburse DEP for all costs, activities, fees, and expenditures associated with this MOU and its exhibits. The County is responsible for paying the entire local share in accordance with the Federal Emergency Management Agency's dollar amounts. These monies will be paid independently from the monies provided under this MOU.

The County will be responsible for repaying DEP fifty (50) percent of all the monies expended by DEP, no later than the last day of the nineteenth month following the date of execution of this MOU by both parties ("Date of Execution"). To determine the amount to be repaid, which repayment shall occur by no later than the last day of the eighteenth month following the Date of

Execution, DEP will issue to the County an accounting in writing, showing all monies expended up to the last day of the seventeenth (17) month following the Date of Execution, together with detailed backup. The backup shall be in a form that shall conform with requirements for submission to FEMA as part of all Project Worksheet (P.W.) requests for reimbursement. The remaining work will continue until the last day of the twenty-third (23) month the Date of Execution, DEP shall submit to the County a final accounting, showing all monies expended on the project covered by this MOU. Thereafter, the County will then be required to repay the Department the balance of the money outstanding by the last day of the twenty-fourth (24) from the Date of Execution. Finally, all monies repaid to DEP will be made in accordance with DEP's instructions and guidance.

On or before the third day of each month covered by this MOU, the County shall submit a snapshot report showing revenue and expenditures for the County for the previous month. This will be done in writing to the DEP's Deputy Secretary for Land and Recreation and in generally accepted accounting principles.

Section 5- Administration and Monitoring: The State (or its Contractors) shall exclusively administer and monitor its work within the County, but will consider counsel from County as needed. Specifically, the Florida Department of Environmental Protection will be responsible for the administration and monitoring of marine debris clearing, removal, and disposal. The County will be responsible for providing a list of priority of work the County is requesting the State to perform, in consultation with the State.

Section 6 – Local Governments: This MOU applies solely to the private and public waterways of unincorporated Monroe County, excluding those in the five (5) municipalities within Monroe County.

Section 7- Sovereign Immunity: Nothing herein shall be deemed a waiver, express or implied of any parties' sovereign immunity under Section 768.28, Florida Statutes (2017) or

considered a waiver of immunity or the limits of liability beyond any statutory limited waiver or limits of liability which may have been adopted by the Florida Legislature in Section 768.28, Florida Statutes (2017) or other state statutes. To the extent that a Court of competent jurisdiction should determine that anything contained in this MOU constitutes a waiver of sovereign immunity, such terms and conditions shall be interpreted to the fullest extent possible to effectuate the intent of the parties (and their contractors), but deleting any terms or conditions which would constitute a waiver of sovereign immunity.

Section 8- County's Cleanup Measures: The County may take its own measures to clear debris, so long as it does not interfere with or duplicate work performed by the State or its contractors. The County shall consult with the State for any waterway debris removal to be performed by the County to prevent overlapping projects and operations.

Section 9- Termination: This MOU shall commence when it is executed by all parties and shall continue until terminated as provided herein, amended, or replaced with a new MOU. The MOU can also be terminated via amendment or replacement. During the state's major disaster declaration period, that commenced on September 4, 2017, and has subsequently been extended, none of the parties may terminate the MOU until this state declaration expires or is lifted by the Governor of the State of Florida or his designee. Except as provided herein, this MOU may be terminated with or without cause by DEP and the County upon a thirty (30) day written notice to all other parties. If a terminated party desires to re-enter the MOU, it must be upon consent of the remaining parties and in writing in accordance instructions laid out in this MOU.

Section 10- Modification: No modification to this MOU is effective unless the parties agree, consent, and join in writing thereto, and any modification to this MOU must be executed by representatives of the undersigned parties duly authorized to bind the parties.

Section 11- Public Records: If any party to this MOU is a "contractor" as defined in Section

119.0701(1)(a), Florida Statutes (“Contractor”), the Contractor shall:

- (1) Keep and maintain public records required by DEP, the County and FEMA to perform the service.
- (2) Upon request, provide DEP with a copy of requested public records or allow the public records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law.
- (3) A Contractor who fails to provide the public records to DEP within a reasonable time may be subject to penalties under Section 119.10, Florida Statutes.
- (4) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Contract term and following completion of the Contract if the Contractor does not transfer the public records to DEP.
- (5) Upon completion of the Contract, transfer, at no cost, to DEP all public records in possession of the Contractor or keep and maintain public records required by the State to perform the service. If the Contractor transfers all public records to DEP upon completion of the MOU, the Contractor shall destroy any duplicate Public Records that are exempt or confidential and exempt from public records disclosure requirements. DEP will be responsible for the maintenance and retention of these records for FEMA reimbursement and other purposes in conformity with federal and state regulations, laws, and rules. If the Contractor keeps and maintains public records upon completion of the MOU, the Contractor shall meet all applicable requirements for retaining public records. All public records stored electronically must be provided to the State, upon request from the DEP’s custodian of public records, in a format specified by the State as compatible with the information technology systems of DEP. These formatting requirements are satisfied by using the data formats as authorized in the Contract or Microsoft Word, Outlook, Adobe, or Excel, and any software formats the Contractor is authorized to access.

(6) IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES AND ALL APPLICABLE FLORIDA DEPARTMENT OF STATE RULES TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THE CONTRACT, CONTACT DEP'S CUSTODIAN OF PUBLIC RECORDS AT:

Telephone: (850) 245-2118
Email: public.services@dep.state.fl.us
Mailing Address: Department of Environmental Protection
ATTN: Office of Ombudsman and Public Services
Public Records Request
3900 Commonwealth Boulevard, MS 49
Tallahassee, Florida 32399

Section 12- Parties, Notices, and Delegations: Notice and correspondences related to this MOU shall be directed to the attention of the public officials identified below.

Monroe County
Mayor David Rice, Monroe County Board of County Commissioners
1100 Simonton Street, Suite 205
Key West, Florida 33040

Florida Department of Environmental Protection
Deputy Secretary David A. Clark, Florida Department of Environmental Protection
3900 Commonwealth Boulevard, MS #44
Tallahassee, Florida 32399

Each party reserves the right to designate another official to be the point of contact without formal amendment to this MOU. This designation must be done ten (10) days before the desired date of substitution by email, facsimile, or U.S. Mail. Confirmation of this transfer and its receipt must be maintained, and if sent by U.S. Mail there must be a mail receipt. The designated official shall be responsible for all material actions, oversight, and coordination in the performance of this MOU.

All notices must be in writing and are only effective: (i) when deposited in the U.S. mail, certified mail, return receipt requests, and postage prepaid, or (ii) when sent via overnight delivery.

Notice will be deemed delivered on the date of the receipt (or on the receipt is refused) as shown on the certification of receipt or the records or manifest of the U.S. Postal Service or overnight delivery.

Section 13- Severability and Choice of Venue: If any provision of this MOU is adjudged by a court of competent jurisdiction to be void and unenforceable, that judgment shall not affect: (a) any other provision of this MOU; (b) the application of such provision in any other circumstances; and (c) the validity or enforceability of this MOU, subject to the law of severability under Florida law. Any action in connection herewith, in law or equity, shall be brought in Leon County, Florida, to the exclusion of all other lawful venues.

Section 14- Monetary Limitations: The signatories of this MOU acknowledge that DEP has a finite amount of resources for the clean-up of not only the above-referenced waterways but also for the state lands and possibly waterways within the five (5) municipalities in Monroe County. Therefore, DEP sets a limitation of six million dollars (\$6,000,000.00) for this MOU, state lands, and the other municipalities. Upon reaching this limitation, DEP's Deputy Secretary for Land and Recreation will evaluate current and future projects, as well as available funding resources to determine whether to continue with clean-up operations. This decision will be made in consideration of input from the County, but the County's input is in no way binding on Deputy Secretary for Land and Recreation's decision. This decision will be made and sent in writing to the County within ten (10) days of reaching the \$6,000,000.00 cap.

Section 15 - Non-Reliance by Third-Parties: No person(s) or entity(ies) shall be entitled to rely upon the terms of this MOU to enforce or attempt to enforce any third-party claim(s) or entitlement(s) to or benefit(s) from any service(s), term(s), project(s), program(s), or task(s) contemplated hereunder.

Section 16 - Non-discrimination: No person, on the grounds of race, creed, color, national

origin, age, sex, or disability, shall be excluded from participation in, be denied the proceeds or benefits of, or be otherwise subjected to discrimination in the performance of this MOU. All activities pursuant to this MOU shall be in compliance with the requirements of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. 2000d et seq.); Title V, Section 504 of the Rehabilitation Act of 1973 (87 Stat. 394; 29 U.S.C. 794); the Age Discrimination Act of 1975 (89 Stat. 728; 42 U.S.C. 6101 et seq.); and with all other State and Federal laws, regulations, and policies prohibiting discrimination.

Section 17 – Non-Assignment: This MOU may not be assigned in whole or in part without the written approval of all parties. Any such assignment or attempted assignment shall be null and void.

Section 18 – No Third-Party Rights: The parties hereto do not intend, nor shall this MOU be construed to grant any rights, privileges or interest to any person not a party to this MOU.

Section 19 – Jury Trial Waiver: As part of the consideration for this MOU, the parties hereby waive trial by jury in any action or proceeding brought by any party against any other party pertaining to any matter whatsoever arising out of or in any way connected with this MOU, or with the services provided under this MOU; including but not limited to any claim of quantum meruit.

Section 20 – Entire Agreement: This MOU with all incorporated attachments and exhibits represents the entire MOU between the parties.

IN WITNESS WHEREOF, Monroe County Board of County Commissioners and Florida Department of Environmental Protection have caused this Memorandum of Understanding to be effective when it is executed by all parties as indicated below for uses and purposes set forth herein.

BOARD OF COUNTY COMMISSIONERS
MONROE COUNTY, FLORIDA

 2-6-18
Chair/Mayor Date

ATTEST:

Deputy Clerk

APPROVED AS TO FORM AND LEGALITY



Assistant County Attorney

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Troy A. Fain 2/6/18
Deputy Secretary Date

ATTEST:
Latasha T. Pierce 2/6/18
Notary



APPROVED AS TO FORM AND LEGALITY

[Signature]
General Counsel

Attachments:

- Exhibit 1: Ordinance 023-2017, Monroe County Board of County Commissioners
- Exhibit 2: Documentation Identifying Public and Private Waterways in Monroe County
- Exhibit 3: Scope of Work and Responsibility of the State of Florida
- Exhibit 4: Contract Provisions Required by 2 CFR §200.326
- Exhibit 5: Monroe County's List of Priority Canals