



OFFICE OF MAYOR

# Town of Waynesville

AGENDA  
REGULAR MEETING  
BOARD OF ALDERMEN  
TOWN OF WAYNESVILLE  
TOWN HALL - 9 SOUTH MAIN STREET  
JULY 26, 2011  
TUESDAY - 7:00 P.M.

## Call to Order

1. Approval of Minutes of July 12, 2011
2. Public Hearing - Amendment to Land Development Plan/Map Amendment  
Rezone 50 Acres (43 Properties) S. Main Business District to  
Hyatt Creek Regional Center
3. Eric Yarrington  
Request Regarding Main Street Mile
4. Municipal Bridge Agreement Between Town of Waynesville and  
Department of Transportation
5. Fourth Quarter Surplus Property Report
6. Memorandum of Agreement Between the Department of the Army,  
the Southeastern Power Administration and the Sponsors,  
Including the Town of Waynesville
7. Adjournment

Additional information regarding this agenda is available at [www.townofwaynesville.org](http://www.townofwaynesville.org)

Draft

REGULAR MEETING  
TOWN OF WAYNESVILLE  
BOARD OF ALDERMEN  
TOWN HALL – 9 SOUTH MAIN STREET  
JULY 12, 2011  
TUESDAY – 7:00 P.M.

The Board of Aldermen of the Town of Waynesville held a regular meeting on Tuesday, July 12, 2011. Members present were Mayor Gavin Brown, Aldermen Gary Caldwell, J. Wells Greeley and LeRoy Roberson. Absent was Alderman Libba Feichter. Also present were Town Manager A. Lee Galloway, Assistant Town Manager Alison Melnikova, Town Clerk Phyllis McClure and Town Attorney Woodrow Griffin. Mayor Brown called the meeting to order at 7:00 p.m.

Approval of Minutes of June 28, 2011

Alderman Greeley moved, seconded by Alderman Caldwell, to approve the minutes of the June 28, 2011 meeting as presented. The motion carried unanimously.

Mutual Assistance Agreement Towns of Canton and Waynesville

The building inspector for the Town of Canton retired and a new employee was appointed to that post. The new employee lacked some of the required certifications, so an agreement was worked out with the retired employee to oversee the new employee. That agreement came to an end and was not renewed.

The Town of Canton has requested that the Town of Waynesville enter a Mutual Assistance Agreement so that Waynesville's building inspector may assist the Canton inspector while he is working toward his certifications. This would mean assistance on an as needed basis when the Canton inspector has questions or feels there might be a need for a review of a project by someone with more experience. Manager Galloway said the Canton inspector is close to having the required certifications in some areas but there may be others where he needs more time. When he has his certifications, it is quite possible that Waynesville may find a need to call on him when one or both of Waynesville's inspectors are not available due to vacation or illness or other reason.

Building construction is slow at present and Waynesville's two inspectors have the extra time to assist the Canton inspector. Chief Codes Administrator Jason Rogers is in favor of providing the assistance Canton has requested. Manager Galloway said the Town of Waynesville has had a very cooperative relationship with the other municipalities in the county and it is felt this is just an expansion of that good relationship. It is not anticipated that this will be time consuming work and this agreement could be reassessed by the Board at a later time to consider continuation.

Alderman Roberson moved, seconded by Alderman Greeley, to authorize Mayor Brown to enter into the Mutual Assistance Agreement with the Town of Canton as proposed. The motion carried unanimously. (Cont. No. 10-11)

#### Livable Communities Initiative

Assistant Town Manager Alison Melnikova recently attended a meeting hosted by the Land of Sky Regional Council of Governments on the Livable Communities Initiative. Information was distributed to the Board, including an explanation of what it is and why the initiative is being pursued. This is an effort of cooperation and communications within the region and an effort to assess what is already in place and how to coordinate rather than duplicate. The project is funded by the United States Department of Housing and Urban Development.

The work will go beyond local governments, with the effort to include businesses, non-profits and the general citizenry to be involved in this regional coordination on jobs, energy, housing, transportation, resources and other issues in which they are all connected.

A "Consortium Agreement" was also distributed to the Board that has been presented to each local government for consideration. The Agreement cites the goals of this effort which is projected to continue over a three year time frame. Those joining the Consortium now will be a part of recommending names for a 13 member steering committee which will oversee the effort as it proceeds over the three years. Assistant Town Manager Melnikova said a staff representative and someone from the community, possibly a business can be appointed by the board to serve. She added that a web site is available for the Livable Communities Initiative if board members wished to review it. It was noted that Waynesville is now part of the MSA, which is linked with Buncombe County.

Alderman Greeley moved, seconded by Alderman Roberson, to authorize Mayor Brown to enter into an agreement to join the Western North Carolina Livable Communities Consortium as proposed. The motion carried unanimously. (Cont. No. 11-11)

#### Update Regarding Municipal Building Renovations

Manager Galloway said renovations continue on the Municipal Building and progress is being made. The drive-thru window has been removed and brick will be salvaged from the back portion of the building to install in its place to match the existing brick. Before the brick can be removed, a large piece of metal will need to be replaced. A window will then be constructed to match the original window. The old paint is being removed from the windows and some painting has begun. No action was necessary.

#### Sales Tax Update

Manager Galloway said Finance Director Eddie Caldwell received the sales tax figures for April and reported an increase over last year. He added that the increase is not large, but seems to be headed in the right direction.

### Cost of Living Increase

Manager Galloway said comments have been received from several employees and they are very grateful that the Board was able to include a cost of living increase in this fiscal year's budget.

### Adjournment

With no further business, Alderman Caldwell moved, seconded by Alderman Greeley, to adjourn the meeting at 7:19 p.m. The motion carried unanimously.

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Phyllis R. McClure  
Town Clerk

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Gavin A. Brown  
Mayor

ITEM 2. PUBLIC HEARING  
AMENDMENT TO LAND DEVELOPMENT PLAN/MAP AMENDMENT  
REZONE 50 ACRES (43 PROPERTIES) IN THE SOUTH MAIN  
STREET BUSINESS DISTRICT TO THE HYATT CREEK  
REGIONAL CENTER

There have been changes in the South Main Street Corridor due to the redevelopment of the former Dayco Industrial site. The changes will be even more prevalent when the additional shopping area with Belks, Michael's and Pet Smart opens in the latter part of 2012. With these changes that have occurred and those to take place, the Planning Department has recommended that another look be given to the South Main Street Business District and the relationship with the Hyatt Creek Regional Center.

Rather than recount the situation, I would refer you to the following information from the Planning Department which includes the Staff Report on this matter and the maps included of the areas under consideration. I would also urge you to read the minutes of the Planning Board meeting of June 20, 2011, at which time this matter was discussed by that group. As you will see, after a period of discussion, the Planning Board voted unanimously to support the changes which have been recommended.

All property owners affected by the changes have been notified and the proper public notice has appeared in the legal ads for the news source. The public hearing on Tuesday will allow citizens to state their opinions on the matter.

## STAFF REPORT

**Agenda Item:** Land Development Plan / Map Amendment  
**Location:** South Main Street Area  
**Size:** 50 acres / 43 properties  
**Proposed Rezoning:** South Main Business District (SM-BD) to Hyatt Creek Regional Center (HC-RC)

### **Background**

The South Main Street Corridor has undergone significant change in the last 5 years primarily due to the redevelopment of the former Dayco industrial site into the Waynesville Commons retail shopping center. This development effectively shifted the function of the area from a long vacant industrial site and supporting community service businesses to a regional shopping center anchored by Walmart and Best Buy. Typically redevelopment of this type generates other similar redevelopment of neighboring properties. As a result of this change in use NCDOT has widened both Hyatt Creek Road and South Main Street to accommodate significantly increased vehicular traffic within the area.

The April 2011 revision to the Town's Land Development Standards (LDS) clarified and strengthened the intent and standards of the SM-BD as being a neighborhood/community business district, excluding more auto-intensive uses and vehicular use areas in front of buildings in keeping with a pedestrian-friendly, walkable streetscape. In making this change to the SM-BD standards the LDS Steering Committee recognized that a substantial amount of the SM-BD should be rezoned to recognize and facilitate the on-going growth and redevelopment of the area to a regional business center, while preserving an area of the less intense, more pedestrian friendly SM-BD as a transition to the predominantly residential development further north and east along Main Street.

The staff has proposed the following amendments to the 20/20 Land Development Plan and the Land Development Map to implement the Committee's recommendation.

### **2020 Land Development Plan**

The 2020 Land Neighborhood Plan, (Maps 12 and 15) indicates that the planned land use for most of the corridor is "Mixed Use, Low to Medium" with the Waynesville Commons site indicated as "Industrial". Both of these classifications have become out of step with reality on the ground since the conversion of the old Dayco industrial site to the Waynesville Commons shopping center.

In keeping with the LDS Committee's direction, the staff recommends that the 20/20 Land Development plan be amended to indicate "Mixed Use, Medium to High" – a regional commercial/mixed-use land-use classification – for the area of the Waynesville Commons shopping center and the area currently zoned SM-BD west of the Allens Creek Road / Brown Avenue intersection with South Main Street as shown on the attached map entitled: "Amendment to Maps 5 and 12 of the Town of Waynesville 2020 Land Development Plan".

### **Land Development Map**

Currently the commercial district served by South Main Street is split into two distinctly different zoning districts. Property west of the railroad bounded by the Smoky Mountain Expressway and Hyatt Creek Road (including most of the Waynesville Commons shopping center) is zoned Hyatt Creek Regional Center (HC-RC) - a regional commercial/mixed-use land-use classification. The remainder of the area east of the railroad extending to Belle Meade Drive is zoned South Main Street Business District (SM-BD) – a district that is designed for limited range of uses with an emphasis on walkability as explained above.

The staff proposes rezoning the area within the SM-BD west of the Allens Creek Road / Brown Avenue intersection with South Main Street to the Hyatt Creek Regional Center District (HC-RC). This change would basically convert the zoning west of this intersection to a regional business district, while leaving an area of the less intensive mixed-use district as a buffer between the regional business district and the predominately residential area north and east of Belle Meade Street.

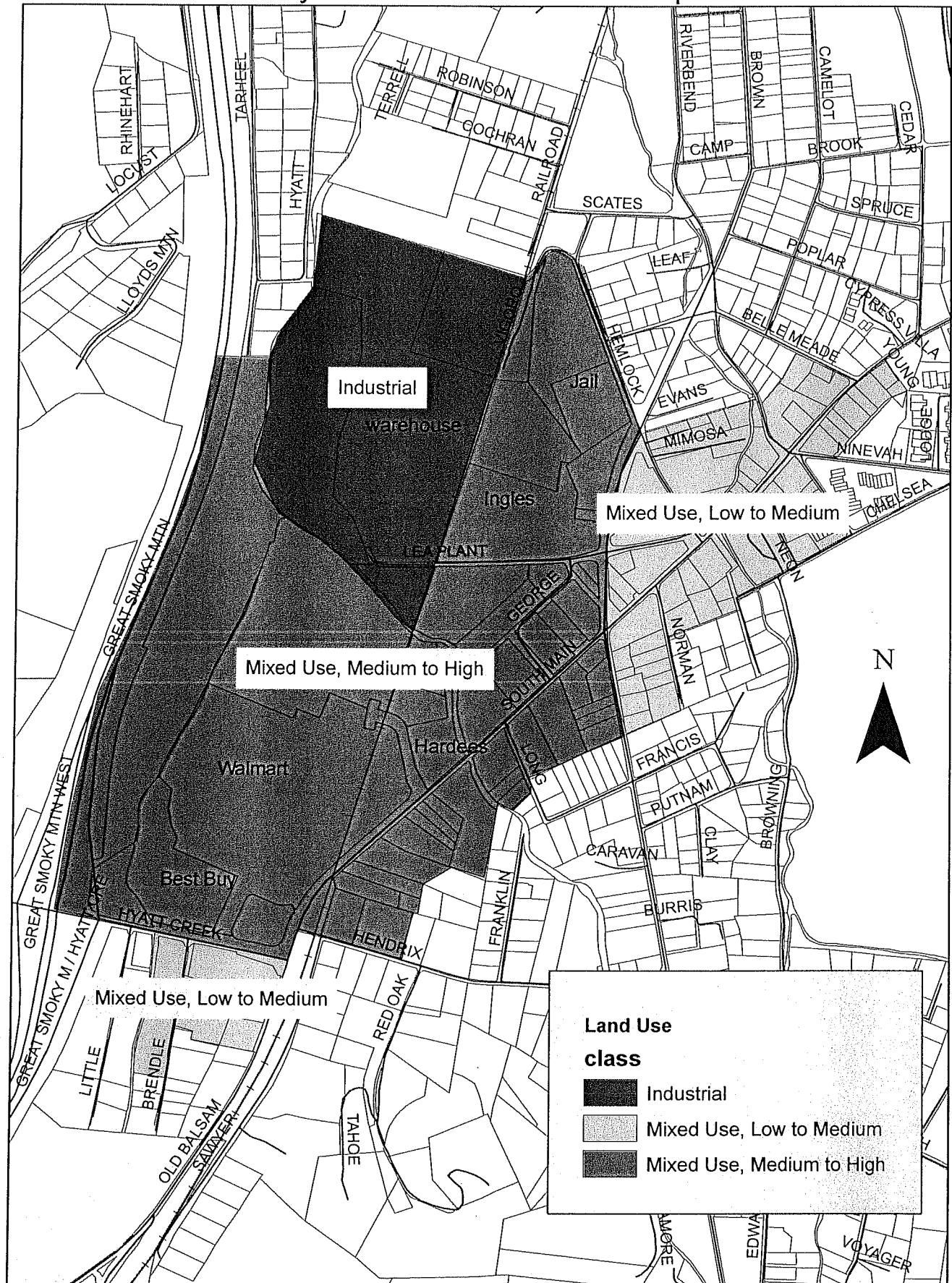
This proposed rezoning includes 43 properties and covers approximately 50 acres. It is roughly triangular in shape and bounded by Hemlock Street, Brown Avenue and Allens Creek Road to the east, the railroad to the west and Hedrix Street to the south as shown on the attached map entitled: "Proposed South Main Street Area Rezoning".

### **Recommend Planning Board Action:**

1. Amend the 20/20 Land Development Plan, Maps 5 and 12, to change planned land use in the subject area from "Industrial" and "Mixed Use, Medium to Low" to "Mixed Use, Medium to High".
2. Amend the Land Development Map to change zoning in the subject area from South Main Business District to Hyatt Creek Regional Center.

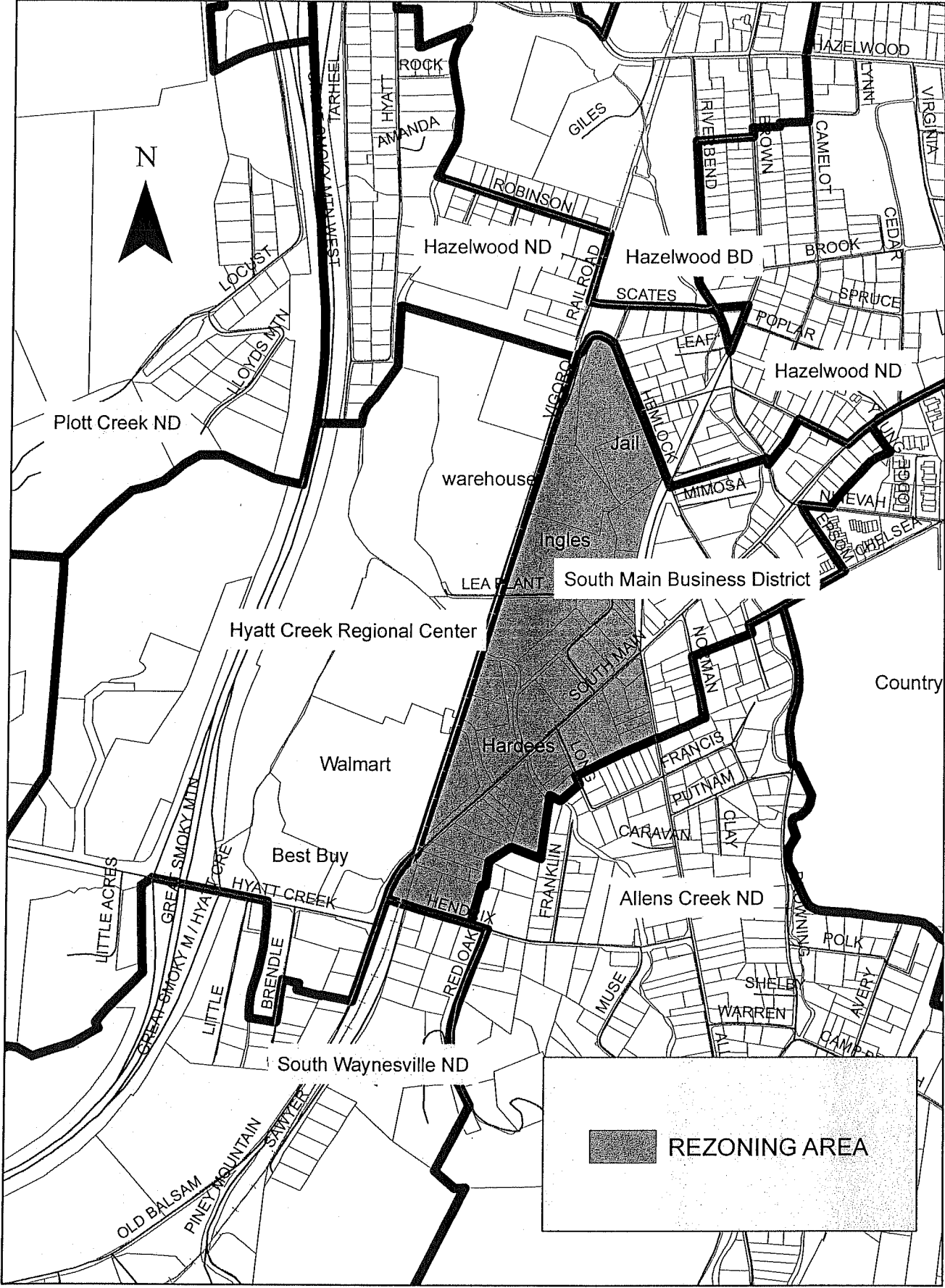
# Amendment to Maps 5 & 12

## Town of Waynesville 2020 Land Development Plan





# Proposed South Main Street Area Rezoning



REGULAR MEETING  
TOWN OF WAYNESVILLE  
PLANNING BOARD  
JUNE 20, 2011  
MONDAY - 5:30 PM  
TOWN HALL

The Planning Board held a regular meeting on Monday, June 20, 2011. Members present were Marty Prevost, Patrick McDowell, Gary Sorrells, Jim Francis, Jon Feichter, Ron Reid and Lee Bouknight. Also present were Planning Director Paul Benson, and Administrative Assistant Eddie Ward. Chairman Patrick McDowell called the meeting to order at 5:30 p.m.

Approval of Minutes of March 21, 2011

Lee Bouknight moved, seconded by Ron Reid to approve the minutes of March 21, 2011 as presented. The motion carried unanimously.

Land Development Plan and Map Amendment South Main Business District (SM – BD) to Hyatt Creek Regional Center (HC – RC)

Chairman McDowell asked Paul Benson, Planning Director, to present the staff report on the map and plan amendment proposed for the South Main Street area. Mr. Benson stated the recent text amendment to the Land Development Standards changed the nature of the South Main Business District (SM-BD) to a more limited range of uses, and to a central business type development pattern. In view of the regional commercial development currently taking place in the corridor and the planned widening of South Main Street in this area, the Land Development Standards Steering Committee recommended that a portion of the SM-BD be rezoned to the adjacent Hyatt Creek Regional Center District (HC-RD).

The South Main Street area is currently split-zoned with property west of the railroad, bounded by Smoky Mountain Expressway and Hyatt Creek Road zoned Hyatt Creek Regional Center (HC-RC), a regional mixed-use district. The remainder of the area east of the railroad extending to Belle Meade Drive is zoned South Main Street Business District (SM-BD). The proposed rezoning would change 43 properties totaling approximately 50 acres from SM-BD to HC-RC.

Mr. Benson explained that zoning is required by state law to follow a comprehensive land development plan. Waynesville's existing 2020 Land Development Plan classifies the area covered by the proposed rezoning as "Industrial" and "Mixed Use – Low to Medium". Given that this plan was based on the reuse of the former Dayco site for industrial use, which has not occurred, staff recommends that the 2020 Land Development Plan be amended to indicate the area with a planned land use of "Mixed Use - Medium to High" which is the designation that would be most appropriate for future regional commercial development of this area.

Marty Prevost asked about the height of permitted buildings in the rezoned area. Patrick McDowell stated Wal-Mart is a one story building by design but by our standards it is considered a three story building due to its height. Mr. Benson stated that the maximum building height permitted within the HC-RC district is 4-5 stories, while the existing SM-BD has a maximum building height of 3 stories.

Jon Feichter had a question about the rezoning area as shown on the maps in the agenda package. Mr. Benson explained the maps and stated that the rezoning area matches the section of South Main Street (from the railroad northeast to the Brown Avenue intersection) planned for future widening. The

remaining area of the South Main Business District east of this intersection would form a transitional "downtown style" mixed-use district between the regional commercial center to the west toward the bypass and the residential area to the east toward downtown.

Don Stephenson had questions about how much of the South Main Business District would be remaining. Mr. Benson said there would be four or five blocks left in that district east of the Brown Avenue intersection along South Main Street.

Mr. Feichter had a question about the traffic generated by a Regional Center district as opposed to a Business District and the impact of this change on street design. Mr. Benson explained that the Town had contracted with a traffic engineering consultant for a corridor study of South Main Street. He said the consultant would base traffic projections on existing and planned land use. In general a Regional Center district would be expected to have higher traffic generation than a business district.

When asked if the rezoning would require a hearing, Mr. Benson stated that letters would be mailed to all property owners in, and bordering the area and a public hearing will be held by the Board of Aldermen.

Jon Feichter made a motion to follow the staff recommendation to amend the 20/20 Land Development Plan, specifically Maps 5 and 12, to change planned use in the subject area from "Industrial" and "Mixed Use, Medium to Low", to "Mixed Use, Medium to High". The motion was seconded by Jim Francis and carried unanimously.

Lee Bouknight made a motion to follow the staff recommendation to amend the Land Development Map to change zoning in the subject area from South Main Business District (SM-BD) to Hyatt Creek Regional Center (HC-RC). The motion was seconded by Don Stephenson and carried unanimously.

#### Adjournment

With no further business, the meeting was adjourned at 6:10 p.m.

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Patrick McDowell  
Chairperson

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Eddie Ward  
Administrative Assistant

ITEM 3.     ERIC YARRINGTON  
REQUEST REGARDING MAIN STREET MILE

In 2010, Eric Yarrington was the primary organizer of the Waynesville Main Street Mile. This event involved a run of one mile on Main Street between Auburn Park Drive and the Haywood County Courthouse. The funds raised in this event were donated to the Shriner's Hospital in Greenville, South Carolina.

Mr. Yarrington plans to hold this event again in 2011 and in the spring, after consulting with Waynesville Police Chief Bill Hollingsed and Downtown Waynesville Director Buffy Phillips, he scheduled the date of Friday, August 12 for the run. For your information, the web site for the event is: [www.waynesvillemainstreetmile.com](http://www.waynesvillemainstreetmile.com) This provides you with information about the various runs planned and has pictures from the 2010 event.

Last year, the race was coordinated with the Police Department and there were no issues as things were very well planned and the event came off without a hitch. That is due in large part to the hard work of Mr. Yarrington.

He will come before the Board Tuesday evening to seek approval to stage the race for 2011.

#### ITEM 4. MUNICIPAL BRIDGE INSPECTION AGREEMENT BETWEEN TOWN AND DEPARTMENT OF TRANSPORTATION

In the late 1970s and early 1980s, there were several highly publicized bridge failures on heavily traveled highways in the nation. One of particular note was on Interstate 95 in Connecticut. As a result of these bridge failures, the federal government developed a program to encourage the safety of the motoring public through the inspection of all bridges on public roads in the country. The federal government provides 80% of the cost of the inspections of bridges and 80% of the actual repair or construction of bridges.

In North Carolina, the State Department of Transportation administers these funds on behalf of the federal government, and there are various options available to the local governments under this program. One option would be for the municipal government to inspect their own bridges with their own staff of bridge inspectors and determine the engineering load ratings. A second option would be for the municipality to hire a qualified private engineering firm to perform the inspections and load ratings. The third option would be for the municipality to request that the State Department of Transportation employ a private engineering firm to perform inspections and load ratings. The Town of Waynesville has traditionally used the third option, contracting with the State to have their contractor perform these inspections and load ratings.

Public Works Director Fred Baker has reviewed the formal agreement between the Town and the NCDOT authorizing the State to hire a private engineering firm to inspect and load rate the municipality's bridges. He recommends approval of the agreement. Upon completion of the work, the NCDOT will invoice the municipality for 20% of the cost of the inspections, and the Town is to make prompt reimbursement. The State will be paying the 80% portion from the Federal-aid Highway Funds.

In the past, these agreements were for two year periods and had to be renewed every other year. The new agreement has a term of ten years, so this matter will not likely reappear on the agenda until 2021. It is a relatively simple agreement and there is really no reason not to run it for ten years. If in the future, the Town should become dissatisfied with the arrangement, the agreement may be cancelled with a thirty day written notice to the other party.

We recommend approval of the agreement with the selection of Option C to have the NC DOT employ a private engineering firm to conduct inspections and load tests of the eleven bridges on the Town's Bridge Inventory List.



STATE OF NORTH CAROLINA  
DEPARTMENT OF TRANSPORTATION

BEVERLY EAVES PERDUE  
GOVERNOR

EUGENE A. CONTI, JR.  
SECRETARY

June 23, 2011

Dear Municipal Contact Person:

The Federal Surface Transportation Act requires that the Department of Transportation assure that municipal bridges are inspected and load rated every two years. The process for obtaining inspections in the 17<sup>th</sup> Cycle is being initiated with this letter.

This letter is our first step toward setting up this cycle's municipal bridge inspections. We are sending it to all municipalities so that all who have bridges that qualify this cycle have a chance to respond even though they may not have had any qualifying bridges last cycle.

Two items of information are required from each municipality at this time. These are:

- (1) The number of bridges in your municipality that will require inspection and their location within the municipality. The number of bridges should not include any bridges on NC, US, or SR routes. Bridges on these routes are state bridges maintained by the State.
- (2) The option your municipality desires to use in having the required bridge inspections completed.

These two items are discussed below:

In reference to item (1), we are requesting an answer from every municipality on this item to bring our records up to date. We need to know the number of bridges (even if the number is zero) that need to be inspected for every municipality. In order to help you determine if a structure qualifies as a bridge, the following definition is furnished:

A "bridge" is defined as a structure including supports erected over a depression or an obstruction, such as water, highway or railway, and having a passageway for carrying highway traffic and having an opening measured along the center line of the roadway more than twenty feet between under copings of abutments (clear opening, face to face of caps or abutments) or spring lines of arches or extreme ends of openings

MAILING ADDRESS:  
Bridge Management Unit  
1565 Mail Service Center  
Raleigh, NC 27669-1565

Telephone: 919-733-4362  
FAX: 919-733-2348

WEBSITE: <http://www.ncdot.org>

LOCATION  
4809 Beryl Road  
Raleigh, NC

for multiple boxes. It may also include multiple pipes, where the clear distance between openings is less than half of the smaller of contiguous (adjacent) openings. See the attached drawing.

In reference to item (2), the following options are available for municipal governments:

- OPTION A: Municipal governments may inspect their own bridges with their own staff of qualified bridge inspectors, determine the structural condition and perform all engineering load ratings of the existing bridges and prepare the necessary Structure Inventory and Appraisal Forms for submission to the Federal Highway Administration.
- OPTION B: Municipal governments may employ a qualified private engineering firm to perform the inspections and load ratings
- OPTION C: Municipal governments may request the North Carolina Department of Transportation employ a qualified private engineering firm to perform the inspections and load ratings.

If you select Option A, the North Carolina Department of Transportation will make provisions for 80 percent of the cost of the inspection and load rating to be paid for by Federal-aid Highway funds. This payment will be made upon completion of the inspections and load ratings, and the submission of an acceptable invoice. The remaining 20 percent of the cost must be borne by your municipal government. There are no State funds available for the inspection and load rating of municipally owned bridges.

If you select Option B a formal agreement between the North Carolina Department of Transportation and your governing body will be required before any work can be authorized. The North Carolina Department of Transportation will make provisions for 80 percent of the cost of the inspections and load ratings to be paid for by Federal-aid Highway funds. This payment will be made upon completion of the inspections and load ratings, and the submission of an acceptable invoice. The remaining 20 percent of the cost must be borne by your municipal government. There are no State funds available for the inspection and load rating of municipally owned bridges.

If you select Option C, a formal agreement between the North Carolina Department of Transportation and your governing body will be required before any work can be authorized. The North Carolina Department of Transportation will employ and pay a private engineering firm to inspect and load rate the municipality's bridges and will invoice the municipality for 20 percent of the cost upon completion of the work. The municipality will be expected to reimburse the Department immediately upon receipt of the invoice. The remaining 80 percent will be paid for from Federal-aid Highway funds.

To expedite contract execution, we are attaching option B and C contracts to this questionnaire. Based on your elected option, please print out and execute two copies the

appropriate agreement and return both original copies to the address below. The option C Agreements will have an effective term of ten years. At any time either party may cancel the Agreement with a thirty (30) day written notice to the opposite party. If you entered zero for the number of bridges needing inspections, this contract execution does not apply to you.

To estimate the cost of the inspections and load ratings to the municipality, we suggest you use 20% of \$2600 or \$520 per municipal bridge. The ultimate cost of the inspection will depend on fees negotiated with the private engineering firm or the cost of a qualified municipal staff to do the work.

I am requesting you to let me know as soon as possible the number of bridges you need to have inspected (even if the number is zero) and the option your municipality desires to use. Please furnish this information on the enclosed preprinted form and send it back to me.

Please forward your answers to:

Mr. Henry A. Black, Jr., P.E.  
Assistant State Bridge Management Engineer  
NCDOT - Bridge Management Unit  
1565 Mail Service Center  
Raleigh, North Carolina 27699-1565

Email: [hblack@ncdot.gov](mailto:hblack@ncdot.gov)

If you or your staff have any questions on this matter, please feel free to send an email to [hblack@ncdot.gov](mailto:hblack@ncdot.gov) or call me at (919) 733-4362.

Sincerely,

Henry A. Black, Jr., P.E.  
Assistant State Bridge Management  
Engineer/Inspections  
Bridge Management Unit

Enclosure

cc: Mr. Eugene A. Conti, Jr. P.E.  
Mr. Terry R. Gibson, P.E.  
Ms. Leslie B. Johnson  
Mr. Earl Dubin, P.E., FHWA



North Carolina

\_\_\_\_\_ County

North Carolina Department of Transportation and the City/Town of \_\_\_\_\_

Municipal Agreement

Inspection of Bridges on the Municipal Street System

F.A. Project BRZ-NBIS (17)

THIS AGREEMENT is made and entered into on the last date executed below, by and between the Department of Transportation, an agency of the State of North Carolina, hereinafter referred to as the Department, and the City/Town of \_\_\_\_\_, a municipal corporation hereinafter referred to as the Municipality;

Witnesseth:

WHEREAS, 23 U.S.C. 144, Sections 1101, 1114 and 1805 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A legacy for Users (SAFETEA – LU), which require that federal funds be available for certain specified Federal-Aid Highway Bridge Replacement and Rehabilitation program; and

WHEREAS, the Highway Bridge Replacement and Rehabilitation portion of the law requires that all structures defined as bridges located on public roads must be inspected on a cycle, not to exceed two years in accordance with National Bridge Inspection Standards (NBIS); and

WHEREAS, the Municipality has requested the Department or a Consultant retained by the Department to inspect and analyze all public bridges located on its Municipal Street System in compliance with the National Bridge Inspection Standards; and

WHEREAS, the Department and the Municipality are authorized to enter into an agreement for such work under the provisions of G.S. 136-18(12), G.S. 136-41.3, and G.S. 136-66.1; and,

WHEREAS, the Appropriate Official of the Municipality has approved the herein above referenced inspections and analysis and has agreed to participate in certain costs thereof in the manner and to the extent as hereinafter set out.

NOW, THEREFORE, the Department and the Municipality agree as follows:

1. The Department or a Consulting Engineering firm retained by the Department shall inspect, load rate, and prepare the necessary inspection reports for all bridges on the Municipal Street System in accordance with the National Bridge Inspection Standards.
2. All work shall be done in compliance with the following documents.
  - a. National Bridge Inspection Standards (23 CFR, Chapter 1 Part 650)
  - b. AASHTO Manual for Bridge Evaluation-2008 including all Interim Revisions.
  - c. Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges – December, 1988.
3. The Municipality shall furnish all data in the possession of the Municipality that can be released that will help the Department or its Consultant in the accomplishment of the work including but not limited to appropriate municipal maps showing the location of the bridges, plans for the bridges when available, and any prior inspection reports.
4. During the inspection process, some repairs may be discovered that require immediate attention or repair, or a regulatory sign may be missing, damaged, or incorrect. A Critical Finding Notice, Priority Maintenance Notice or Regulatory Sign Notice will be issued in these cases. It is required that the Municipality resolve or notify the

Department of their plans to resolve Priority Maintenance Notices and Regulatory Sign Notices within thirty (30) days of issuance. Critical Findings require a response within seven (7) days of notice.

5. The Municipality shall designate a responsible Municipal official with whom the Department or its Consultant will coordinate the work.
6. It is understood by the parties hereto that the Federal Highway Administration, through the Department, is to participate in the costs of the work to the extent of eighty (80) percent of actual costs, subject to compliance with all applicable federal policy and procedural rules and regulations. All costs not participated in by the Federal Highway Administration shall be borne by the Municipality.
7. Upon completion of the bridge inspection, and load rating work, the Department shall invoice the Municipality for accumulated project costs not participated in by the Federal Highway Administration. Upon FHWA final audit, the Department shall invoice/refund the Municipality any differences in the amount previously invoiced and the actual costs not participated in by the Federal Highway Administration. Reimbursement shall be made by the Municipality within sixty (60) days of the invoice date. After the due date, a late payment penalty and interest shall be charged on any unpaid balance due in accordance with G.S. 147-86.23 and G.S. 105-241.21 (I). It is anticipated that the cost to the municipality will be approximately \$520 per structure. The actual cost is based on the work being performed therefore, the final invoice amount will not be known until the work is complete.
8. In the event the Municipality fails for any reason to pay the Department in accordance with the provisions for payment hereinabove provided, the Municipality hereby authorizes the Department to withhold so much of the Municipality's share of funds allocated to said Municipality by the General Statutes of North Carolina, Section 136-41.1, until such a time as the Department has received payment in full.
9. It is the policy of the Department not to enter into any Agreement with another party that has been debarred by any government agency (Federal or State). The Municipality certifies, by signature of this Agreement, that neither it nor its agents or contractors are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by a Federal or State Department or Agency.
10. This Agreement shall have an effective term of ten (10) years beginning when executed by the State Highway Administrator and ending on the same date ten (10) years later, subject to the following termination conditions:
  - (A) At any time either party may cancel the Agreement with a thirty (30) day written notice to the opposite party. On behalf of the Municipality, this Agreement may be canceled by the City Manager and/or his designee.
  - (B) Upon the effective date of the cancellation, neither party shall owe any obligations under this Agreement, except that all obligations performed under this Agreement, including but not limited to invoicing, record retention, and payment for work performed prior to the effective date of cancellation, shall remain in effect.
11. By Executive Order 24, issued by Governor Perdue, and N.C. G.S. § 133-32, it is unlawful for any vendor or contractor ( i.e. architect, bidder, contractor, construction manager, design professional, engineer, landlord, offeror, seller, subcontractor, supplier, or vendor), to make gifts or to give favors to any State employee of the Governor's Cabinet Agencies (i.e., Administration, Commerce, Correction, Crime Control and Public Safety, Cultural Resources, Environment and Natural Resources, Health and Human Services, Juvenile Justice and Delinquency Prevention, Revenue, Transportation, and the Office of the Governor).





# Town of Waynesville

## Bridge Inventory

<u>Street</u>	<u>Stream</u>	<u>Distance</u>	<u>Spans</u>
<b>2</b> Vance St.	Richland Creek	0.5MI. S. Howell Mill Rd.	1x42' -9"
<b>4</b> Depot St.	Richland Creek	0.6 MI. JCT. Main St.	2x33'
<b>5</b> Smathers St.	Richland Creek	0.4 MI. W. Commerce St.	2x36'-7"
<b>6</b> Boyd Ave.	Richland Creek	0.06 MI. W. Killian St.	2x50'
<b>10</b> Hendricks St.	Allens Creek	0.05 MI. W. Allen Creek Rd.	1x41'
<del>Oakdale Rd.</del>	<del>Shelton Branch</del>	<del>0.01 MI. S. McCracken St.</del>	<del>1x20'-4"</del>
<b>11</b> Meadowbrook Cr.	Camp Branch	0.1MI. S JCT. Stoney Cr.	1x30'
<b>8</b> Brookside Crt.	Plott Creek	0.01 MI. N. JCT. Plott Cr.	1x25'-9"
<b>7</b> Brown Ave.	Browning Creek	0.3MI. N. JCT. US23BUS.	Triple 9'x5' BC
<b>9</b> Scates St.	Browning Creek	0.01MI. W. JCT Riverbend	Triple 7'-3"x3'-3"BC
<b>1</b> Walnut Trail	Richland Creek	North of town off U	3x40"
<b>3</b> Walnut St.	Shelton Branch	0.06MI. West of JCTBUS23/N. Main St.	Double 10'x8'BC

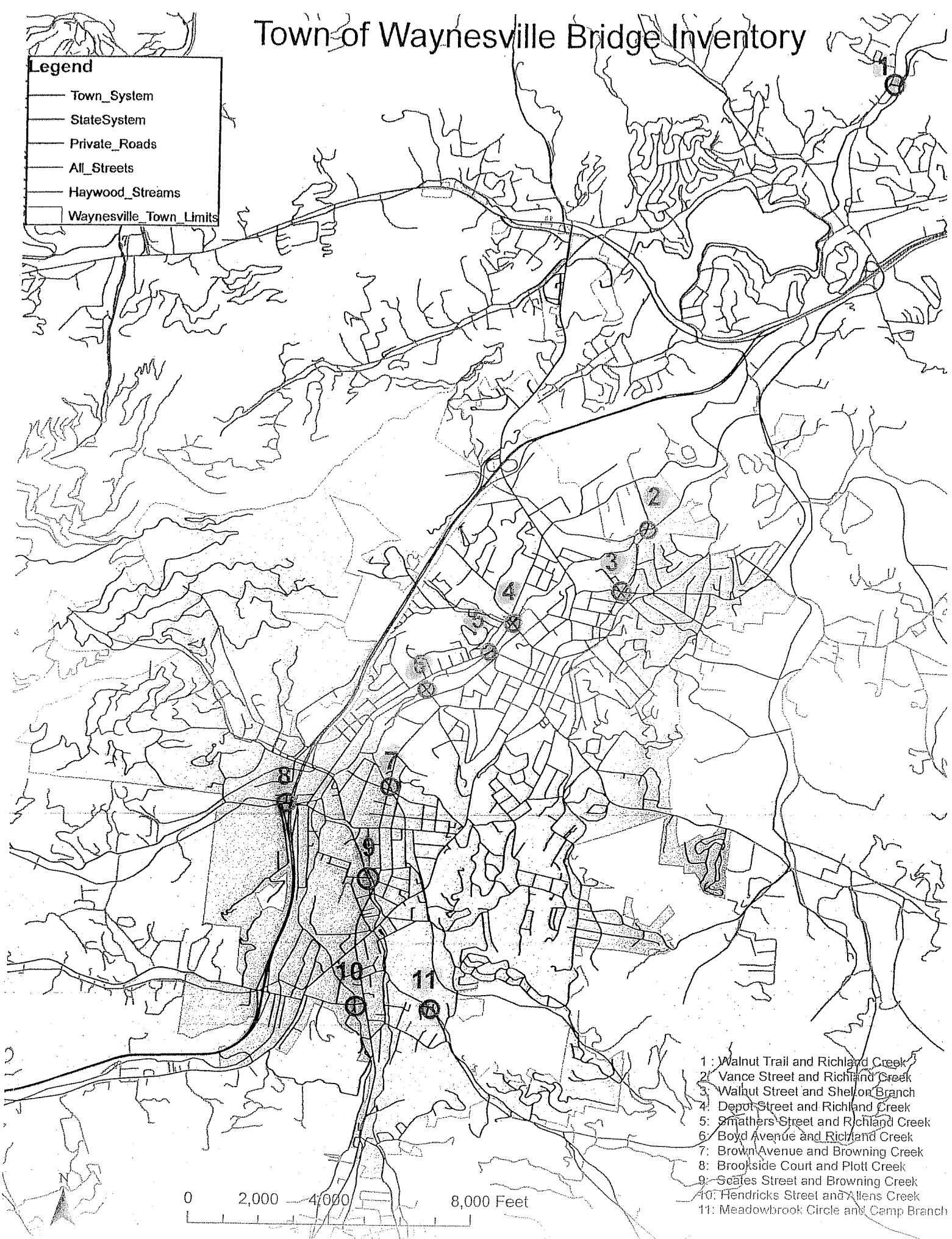
PC moved 11/23/10 too short

8/21/07

# Town of Waynesville Bridge Inventory

## Legend

- Town\_System
- StateSystem
- Private\_Roads
- All\_Streets
- Haywood\_Streams
- Waynesville\_Town Limits



- 1: Walnut Trail and Richland Creek
- 2: Vance Street and Richland Creek
- 3: Walnut Street and Shelton Branch
- 4: Depot Street and Richland Creek
- 5: Smathers Street and Richland Creek
- 6: Boyd Avenue and Richland Creek
- 7: Brown Avenue and Browning Creek
- 8: Brookside Court and Plott Creek
- 9: Scates Street and Browning Creek
- 10: Hendricks Street and Allens Creek
- 11: Meadowbrook Circle and Camp Branch

## ITEM 5. FOURTH QUARTER SURPLUS PROPERTY REPORT

As you will recall, under our Purchasing Policy, the Purchasing Supervisor is required to make a report to the Town Board each quarter on the assets of the Town which were sold. Purchasing Supervisor Julie Grasty has divided the report into two sections. One section is showing the assets which were sold on Gov-Deals, which is similar to an E-Bay Program for governments. The other section shows the assets which were sold not using the Gov-Deals Program.

Traditionally, the Town places more valuable pieces of equipment and vehicles on Gov-Deals for auction. In the case of the 1995 Sewer Jet Truck, the Lake Junaluska Assembly had expressed an interest in that unit to help them in the maintenance of their sewer lines. We have, at times, provided the personnel and equipment to assist the Assembly in addressing sewer line problems, so we felt it would be advantageous for both the Town and the Assembly for them to have this sewer cleaning truck in their possession. Ms. Grasty checked on the Gov-Deals site to find comparable prices for similarly aged trucks and equipment and felt that the \$15,000 was a fair and reasonable sales price.

No action is required by the Board but we will be more than happy to answer any questions that it might have regarding the sale of Town assets.

[illegible]

[illegible]



ITEM 6. MEMORANDUM OF AGREEMENT BETWEEN  
THE DEPARTMENT OF THE ARMY, THE SOUTHEASTERN  
POWER ADMINISTRATION AND THE SPONSORS, INCLUDING  
THE TOWN OF WAYNESVILLE

In 1950, the Southeastern Power Administration (SEPA) was created by the Secretary of the Interior to carry out the functions assigned to the Secretary by the Flood Control Act of 1944. In 1977, SEPA was transferred to the newly created United States Department of Energy. SEPA is headquartered in Elberton, Georgia, and is responsible for marketing electric power and energy generated at reservoirs operated by the United States Army Corps of Engineers. This power is marketed to more than 491 preference customers in the states of Georgia, Florida, Alabama, Mississippi, southern Illinois, Virginia, Tennessee, Kentucky, North Carolina, and South Carolina.

The Town of Waynesville is one of the preference customers and is provided some of this "cheap" power which is wheeled or transferred from the hydroelectric plants owned and operated by the Army Corp of Engineers, through the Tennessee Valley Authority and Progress Energy to the Town of Waynesville. For many years, the power supplied was in abundance and helped us hold down the cost of electricity to our customers. But in the past decade, the availability of the hydroelectric power has been greatly reduced. Part of the reason was the severe droughts that the southeast experienced during the period of 2002 to 2008, but a more significant reason was the failure of the Wolf Creek Dam on the Cumberland River in Kentucky in 2005. The dam creates Cumberland Lake, the largest lake in Kentucky covering 102.4 square miles. The Wolf Creek Dam is capable of generating 270 megawatts of power daily.

When seepage beneath the dam was discovered, the lake level was lowered and the volume of electricity produced was greatly reduced. As a result, Waynesville and other electric systems received lower volumes of cheap power from SEPA than in the past. Repairs on the dam are underway and should be completed in 2012 and will cost in excess of \$500 million dollars. Electric rates through SEPA are set to rise by 28% over a two year period, but even with the planned increase, the electric rates are still very attractive. In April, 2011, the Town received 569,823 kilowatts of power from SEPA at a cost of 2.3 cents per kilowatt. We pay in the six to seven cent range for power from Progress Energy.

We have been asked to join with other electric providers in signing a Memorandum of Agreement with the Department of the Army and SEPA to call for the maintenance, rehabilitation and modernization of the Cumberland River hydroelectric facilities owned by the Corp of Engineers. In doing so, the Town would be agreeing to the higher rates. In exchange, SEPA would allow the sponsors to continue to purchase the "cheap" power with the earliest termination date of October 1, 2029, such termination to become effective October 1, 2032.

Public Works Director Fred Baker has reviewed the agreement and we have both followed the discussions and negotiations on this Memorandum of Agreement for many months. We feel that it is in the Town of Waynesville's best interest to sign this agreement and place the Town in the position to continue to receive the power available through SEPA for an extended period of time.

# MEMORANDUM OF AGREEMENT

AMONG

THE UNITED STATES DEPARTMENT OF THE ARMY,  
SOUTHEASTERN POWER ADMINISTRATION,  
AND  
SPONSORS

FOR

CUMBERLAND RIVER HYDROPOWER PLANT EQUIPMENT PROJECTS

THIS MEMORANDUM OF AGREEMENT ("MOA") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2011, among the U. S. Department of the Army, acting through the U.S. Army Corps of Engineers Nashville District Engineer ("Corps"); Southeastern Power Administration ("SEPA"), acting through the Administrator of SEPA; and certain hydropower customers or representatives of customers of SEPA's Cumberland System (each a "Party" and collectively, "the Parties").

## **ARTICLE I. Purpose and Authority**

A. The purpose of this MOA is to establish a framework governing the respective responsibilities of the Parties regarding funding of certain non-routine maintenance, rehabilitation and modernization activities at Cumberland River hydroelectric facilities owned and operated by the Lakes and River Division of the Corps in SEPA's marketing region (hereinafter referred to as the "Facilities").

B. The Parties recognize the need for timely non-routine maintenance, rehabilitation and modernization of the Facilities as described in the Master Plan as appended hereto as Attachment II. Under the terms of this MOA, the Parties may from time to time—depending upon: (i) the sufficiency of appropriated rehabilitation funding, (ii) the timing of the ability of the Corps to implement identified Work Items in furtherance of the Master Plan, (iii) the potential impact on SEPA power rates, and (iv) the availability, terms, and conditions of customer funding under Section 212 of the Water Resources Development Act of 2000 (33 U.S.C. §2321a) (hereinafter "Section 212")—execute Sub-Agreements to provide customer funding (through customer credits in accordance with the terms of this MOA) for identified Work Items that are in furtherance of the Master Plan; provided, that the Parties acknowledge and agree that (a) neither this MOA, nor any other agreement, shall obligate any Party to enter into any particular proposed Sub-Agreement, and (b) no Sponsor shall ever be obligated under this MOA, or any Sub-Agreement hereunder, to provide funding to the Corps through a means other than the aforementioned customer credits against amounts otherwise owed by the Sponsor to SEPA under its power supply contract with SEPA.

C. This MOA is entered into pursuant to Section 5 of the Flood Control Act of 1944 (16 U.S.C. §825s), the Department of Energy Organization Act of 1977 (42 U.S.C. §7101 et seq.),

and Section 212 of the Water Resources Development Act of 2000 (33 U.S.C. §2321a), as well as relevant agency regulations and orders issued thereunder.

## **ARTICLE II. Definitions**

A. Funding Requirement: The amount of estimated costs, including applicable contingency amounts, specified in a Sub-Agreement for each Work Item to be funded by the Sponsors in accordance with such Sub-Agreement and the terms of this MOA, as more fully set forth in Section V.C of this MOA.

B. Master Plan: The comprehensive 20-year project plan and associated 5-year construction work plan for non-routine maintenance, rehabilitation or modernization of the Cumberland River hydropower system, as described in Article III of this MOA and as appended hereto in its initial form as Attachment II.

C. Previous MOA(s): Any one or more of the memoranda of agreement regarding the Facilities that were entered into among the Corps, SEPA, and Sponsors for Fiscal Year 2004, Fiscal Years 2005-06, and Fiscal Years 2008-09.

D. Program Coordination Committee or "PCC": The committee identified in Section VI.A of this MOA.

E. Project Review Committee or "PRC": The committee identified in Section VI.B of this MOA.

F. Pro Rata Share: Pro Rata Share is the estimate of a Sub-Agreement signatory's percentage share, to be listed in a table in each Sub-Agreement, of each Work Item Funding Requirement specified in that Sub-Agreement.

G. Qualified Reserve Fund Expenditures: Those amounts which the Corps may access from the Reserve Fund pursuant to this MOA as set forth in Section VII.B.2 of this MOA.

H. RECs: Means Renewable Energy Credits or Renewable Energy Certificates or such successor commodity in function, that represent proof that electricity was generated from an eligible renewable energy resource.

I. Reserve Fund: The separate, non-replenishing account, not to exceed \$20 million in cumulative total contributions provided from Section 212 Funds and such funds as available from Previous MOAs, to be established pursuant to the terms of this MOA for paying or reimbursing costs resulting from claims filed under the Contract Disputes Act of 1978, administrative proceedings or litigation before the Armed Services Board of Contract Appeals or U.S. Court of Federal Claims (or any successor tribunals thereto) and any resulting settlements or judgments pursuant to proceedings before any of the aforementioned tribunals incurred by the Corps under this MOA as more fully described in Section VII.B of this MOA.

J. Section 212 Allowance: As identified on a Sponsor's power bill from SEPA, Section 212 Allowance means the credit to be applied by SEPA toward partial or full satisfaction of amounts that are otherwise payable by the Sponsor to SEPA under its power supply contract with SEPA, for funds paid by the Sponsor to SEPA for transfer to the Corps to meet the Sponsor's Pro Rata Share of Work Item Funding Requirements or other obligations under this MOA, including transfers into the Reserve Fund.

K. Section 212 Funds: The amount of hydropower revenues or receipts, collected by SEPA from Sponsors, that is determined by SEPA to be available for transfer to the Corps to meet Funding Requirements under this MOA and associated Sub-Agreements.

L. Sponsors: Hydropower customers who receive a capacity allocation and associated energy from SEPA in accordance with Section 5 of the Flood Control Act of 1944, 58 Stat. 890, 16 U.S.C. §825s, and who are signatories to this MOA as set forth in Attachment I. For the purposes of this MOA, the Tennessee Valley Authority ("TVA") shall be eligible to be considered a Sponsor, if it provides funds to the Corps pursuant to this MOA on behalf of certain preference entities to whom TVA sells energy it receives from SEPA. For the purposes of this MOA, Tennessee Valley Public Power Association ("TVPPA") shall also be eligible to be considered a Sponsor, if TVA has provided funds to the Corps pursuant to this MOA and TVPPA is acting as agent for its members that are preference entities and have authorized TVPPA to act as their agent in accordance with Section 27 of the contract among SEPA, TVA, and TVPPA that is dated October 1, 1997.

M. Sub-Agreement: An agreement for one or more Work Items pursuant to this MOA or a Previous MOA, as more fully set forth in Section V.A.

N. Work Item: A project or scope of work identified in a Sub-Agreement for certain non-routine maintenance, rehabilitation or modernization work at the Facilities to be performed by the Corps pursuant to and in accordance with this MOA. A Work Item may include planning, engineering, design, material procurement, and construction activities, as well as the related supervisory and administrative activities, associated with non-routine maintenance, rehabilitation or modernization work at the Facilities.

### **ARTICLE III. Program Scope and Limitations**

#### **A. Master Plan**

The scope of programs and projects eligible to be performed and funded under this MOA shall be established by the Master Plan. Each Party acknowledges and agrees that it has reviewed the Master Plan and, subject to the limitations set forth in Sections IV.C.4, V.A, and VII.A, supports the completion and/or implementation thereof. The Master Plan sets forth key milestones designed to track progress by the Corps in completing the programs and projects set forth therein.

## **B. Amendments to the Master Plan**

The Master Plan may be amended from time to time only upon approval by the PCC in accordance with Article VI of this MOA. Amendments to the Master Plan shall not constitute formal amendments of this MOA requiring execution by all Parties. Amendments to the Master Plan shall be recommended by the PRC in accordance with Article VI of this MOA for approval by the PCC. The Corps shall promptly notify all Parties of each amendment to the Master Plan: (1) by sending an e-mail to each PCC member identifying the amendment, and (2) by posting notification of such on a shared website, or successor in function, accessible to all Parties and maintained by the Corps. The website shall provide documentation of all amendments to the Master Plan and a conformed copy at all times of the then-current amended version of the Master Plan.

## **C. Implementation through Sub-Agreements**

To implement the Master Plan and this MOA, the Parties may enter into Sub-Agreements in accordance with Section V.A and all other provisions of this MOA. No work shall be funded or performed under this MOA unless a Sub-Agreement providing for such work has been executed in accordance with the provisions of this MOA.

# **ARTICLE IV. General Responsibilities of the Parties**

## **A. Department of the Army**

1. The Department of the Army, through the Corps, shall meet with representatives of SEPA and of the Sponsors as members of the Program Coordination Committee and Project Review Committee to approve and prioritize Work Items to be funded by the Sponsors under this MOA and to oversee progress and performance in completing such Work Items, all in accordance with the features of the Master Plan.

2. The Army, through the Corps, shall perform and complete Work Items as set out in Sub-Agreements and in accordance with Article V of this MOA. The Corps shall administer all funds advanced in accordance with Sub-Agreements, and said funds shall be expended only on the Work Items as set out in accordance with Sub-Agreements and the terms of this MOA. Prior to the execution of any Sub-Agreement, the Corps shall provide SEPA with a Treasury account number into which the Corps may receive funds provided by the Sponsors to SEPA pursuant to this MOA. Prior to the execution of any Sub-Agreement, the Corps shall also provide SEPA with a Treasury account number into which the Corps may receive funds provided by the Sponsors to SEPA for deposit into the Reserve Fund pursuant to this MOA.

3. The Army, through the Corps, shall comply with all other obligations of the Corps as set forth in this MOA and Sub-Agreements.

4. The Army, through the Corps, shall cooperate with any advisors or consultants performing under contracts with SEPA under provisions of Section IV.B.7 in order to help assure that those advisors or consultants have access to the information from the Corps that is necessary for those advisors or consultants to provide effective assistance to the Sponsor representatives in carrying out their PCC responsibilities.

**B. Southeastern Power Administration**

1. SEPA, through its representatives on the Program Coordination Committee and the Project Review Committee, shall assist the Sponsors and the Corps in prioritizing the Work Items that the Corps will perform at the Facilities to be funded by the Sponsors under this MOA and overseeing the progress and performance of the Corps in completing said Work Items, all in accordance with the features of the Master Plan.

2. SEPA shall take appropriate action to provide credit to the Sponsors in the form of Section 212 Allowances for designated funds that the Sponsors provide through payments for SEPA power that are to be applied by SEPA toward Work Item Funding Requirements or Reserve Fund obligations. All credits provided by SEPA pursuant to this MOA shall be pursuant to SEPA authorities.

3. SEPA shall ensure that funds collected from billings as described in Section VII.A of this MOA are processed and deposited in a Federal Reserve Bank, or to other depositories, as determined by the U.S. Treasury.

4. At the end of each month, or other time mutually agreed upon by the Parties, on behalf of the Sponsors, SEPA shall cause to be transferred to the Corps using Standard Form (SF) 224 or its successor all funds collected pursuant to this MOA.

5. Upon requests from the Corps, SEPA shall provide the Corps with the current balance of all funds deposited on the Corps' behalf.

6. By not later than November 30 of each calendar year during the term of this MOA, the Administrator of SEPA shall provide the Sponsors with an accounting report specifying the amounts and timing of all funds provided to the Corps under this MOA during the preceding Federal governmental fiscal year.

7. At the request of a majority of the Sponsor representatives on the PCC, SEPA shall assign a SEPA employee and/or contract with appropriate, qualified advisors or consultants to provide assistance to the Sponsor representatives in carrying out their responsibilities, in accordance with a scope of work and amounts of annual funding as developed and specified by the Sponsor representatives on the PCC. SEPA shall fund these services under such contracts through existing authorities.

8. In the event of termination or cancellation of the contract among SEPA, TVA, and TVPPA dated October 1, 1997, SEPA will put forth every effort to secure alternative

arrangements for the services provided under the aforementioned contract by TVA which are necessary and required to facilitate delivery of Cumberland System power to the Sponsors. In the event SEPA is unable to establish such alternative arrangements, this MOA shall be subject to cancellation or renegotiation.

### **C. Sponsors**

1. The Sponsors, through the Program Coordination Committee and through their representatives on the Project Review Committee, shall assist the Corps and SEPA in identifying and prioritizing the Work Items that the Corps will perform at the Facilities to be funded by the Sponsors under this MOA and overseeing the progress and performance of the Corps in completing said Work Items, all in accordance with the features of the Master Plan.

2. Notwithstanding any provision of this MOA that might be interpreted to the contrary, none of the Sponsors shall be an agent of SEPA or the Corps.

3. Notwithstanding any provision of this MOA that might be interpreted to the contrary, nothing in this MOA shall require the Sponsors to provide funding in excess of (i) the total of all Funding Requirements established in Sub-Agreements entered into pursuant to this MOA, plus (ii) the \$20 million cumulative limit on funds to be deposited into the Reserve Fund in accordance with this MOA.

4. The amount of funding available under this MOA to execute work proposed in the Master Plan may be limited because of the recovery from Sponsors of costs associated with the Corps hydropower program in the Cumberland River Basin. In the event that the SEPA rates are projected to be non-competitive, the Sponsors may not commit the funds needed to execute work contemplated by the Master Plan. The Sponsors intend to commit funds under this MOA to accomplish the work proposed in the Master Plan; however, the Sponsors' ability to commit additional funds under this MOA is dependent upon the extent of their obligations for the hydropower program in the Cumberland River Basin.

5. Subject to the limitations of amounts established in applicable Funding Requirements and amounts available in the Reserve Fund, as applicable; and except for any damages and related costs occasioned by work performed under this MOA or Previous MOAs and related Sub-Agreements and due to the negligence and/or misconduct of the United States or its contractors; and only to the extent such funding is available through Section 212 Funds for which Section 212 Allowances have been credited to the Sponsors; the Sponsors shall be responsible for funding all costs incurred by the Corps pursuant to Sub-Agreements, including costs resulting from (1) Qualified Reserve Fund Expenditures, (2) the performance of Work Items, and (3) termination of Work Items in accordance with this MOA. In the event of termination of a Work Item, subject to limitation to the amount available in the applicable Funding Requirement to fund such Work Item, the Sponsors shall fund all costs incurred by the Corps for closing out the Work Item or transferring any associated ongoing contracts, provided that the Corps shall take reasonable steps to mitigate costs associated with Work Item



termination, including but not limited to considering the seeking of additional funds through appropriations and reporting such costs to SEPA.

## **ARTICLE V. Establishment and Performance of Work Items**

### **A. Sub-Agreements**

1. The Corps, SEPA and the Sponsors may enter into mutually agreed-upon individual and written Sub-Agreements regarding Work Items the Corps will perform. The Corps shall propose the details of the Work Items and Sub-Agreements for consideration by the PRC, and the PRC shall, as it determines to be appropriate, make recommendations for proposed Sub-Agreements to the PCC for consideration in accordance with Article VI of this MOA. To become effective, a Sub-Agreement must be approved by the PCC and signed by the Corps, SEPA, and Sponsors as identified on Attachment I. A valid Sub-Agreement may include entities that are not signatories to this MOA.

2. Consistent with the Master Plan, Sub-Agreements may include, but are not limited to, the following with respect to each Work Item:

- a scope of work statement, including (as appropriate) how the Work Item relates to or enables future work and the general scope, cost, and timing of that work;
- schedules for completion of work and disbursement of funds;
- the Funding Requirement necessary and available to accomplish the scope of work;
- a funding schedule detailing an estimated timetable for transferring funds to the Corps;
- each signatory's Pro Rata Share;
- procedures for obtaining additional funding, if necessary;
- designation of responsible employees;
- procedures for amending, modifying, or terminating the Sub-Agreement; and
- such other particulars as are deemed necessary or appropriate.

3. Each Sub-Agreement shall set forth each Sub-Agreement signatory's estimated share of the total Funding Requirements in the Sub-Agreement.

4. The Corps District Engineer for the Nashville District, the Administrator of SEPA, and the duly-authorized official or representative of each Sponsor are each an authorized signatory for Sub-Agreements providing for Sponsors' funding responsibility of \$25 million or less. The Corps Director of Civil Works, or successor in function, the Administrator of SEPA, and the duly-authorized official or representative of each Sponsor shall sign Sub-Agreements providing for greater than \$25 million in Sponsors' funding responsibility.

## **B. Conflict between MOA and Sub-Agreements**

The provisions of this MOA shall apply to all Sub-Agreements executed pursuant to this MOA. In case of a conflict between this MOA and a Sub-Agreement, this MOA shall control.

## **C. Work Item Funding Requirements**

A Funding Requirement for each Work Item shall be approved by the PCC and specified in a Sub-Agreement. The Funding Requirement shall include all estimated costs for the project scope described for the Work Item. The Funding Requirement may include costs related to, but not limited to, planning, engineering and design costs; construction costs; supervision and administration costs; overhead costs; and a contingency for unknown factors that could increase the total costs of the Work Item beyond the estimated amount. This contingency may be an amount determined by the Program Coordination Committee relative to the scope of the Work Item.

## **D. Performance of Work Items**

The Corps shall use best efforts to expeditiously perform and complete the Work Items, pursuant to applicable Federal laws, regulations, and policies, and in accordance with this MOA and the applicable Sub-Agreement(s). Award of any contracts and performance of the work thereunder shall be exclusively within the control of the Corps. Provided, however, that if the Parties fail to agree on a Sub-Agreement, the Sponsors shall not be obligated to provide funding, and the Corps shall not be obligated to perform any Work Item. Performance of a Work Item shall commence only after the Corps, SEPA and the Sponsors have signed a corresponding Sub-Agreement covering said Work Item, and its Funding Requirement has been fully met through transfers from SEPA to the Corps.

# **ARTICLE VI. Procedures for Reviewing and Selecting Work Items**

## **A. Program Coordination Committee (PCC)**

1. The Corps, the Sponsors, and SEPA shall form a Program Coordination Committee ("PCC") to administer and oversee the performance of this MOA. SEPA shall have two (2) members on the PCC, who shall be designated in a written notice by SEPA to the other Parties. Each Sponsor shall have one (1) member on the PCC, who shall be designated in a written notice by such Sponsor to the other Parties. The Corps shall appoint a Program Manager to be a member of the PCC and to be the Corps' authorized representative and point of contact for reporting work progress, expenditures, and variances in scope, schedule, or cost to perform the work under this MOA. The Corps may further appoint a second member to the PCC. Both members shall be designated in a written notice by the Corps to the other Parties.

2. A Party may change its designated PCC member(s) at any time upon written notice to the other Parties. By written notice to the other Parties, each Party shall designate an alternate

for its PCC member(s) to serve with full participation and voting rights when the regular PCC member is unable to attend a meeting. By unanimous agreement of the PCC members, the PCC may include additional members as appropriate.

3. The PCC shall prepare any proposed amendments to this MOA for consideration by the Parties. To become effective, any amendment to this MOA must be approved by the PCC and signed by all Parties.

4. The PCC shall be authorized to take such other actions as it deems necessary or appropriate for the administration of this MOA, including but not limited to review and approval of (a) recommendations from the PRC, (b) Work Items, (c) Sub-Agreements, and (d) amendments to the Master Plan; as well as preparation of proposed amendments to this MOA.

5. Operating Guidelines for conducting the PCC's responsibilities under this MOA and Sub-Agreements are set forth in Attachment III to this MOA. The Operating Guidelines may be modified from time to time upon approval by the PCC, and such modification shall be automatically made to, and incorporated within, Attachment III without a need for the MOA to be formally amended.

6. All actions taken by the PCC shall require unanimous agreement of all PCC members.

#### **B. Project Review Committee (PRC)**

1. The Corps, the Sponsors, and SEPA shall form a Project Review Committee ("PRC") to assist the PCC in matters including, but not limited to: (i) defining needs, priorities, and Work Items; (ii) tracking project and program progress and performance; (iii) overseeing governance of the program; and (iv) recommending changes to the Master Plan as necessary. The PRC shall evaluate needs of the Facilities and identify, prioritize, and recommend to the PCC Work Items for the Corps to perform under Sub-Agreements, all in a manner consistent with the Master Plan described in Article III. Consistent with the Master Plan described in Article III and sound engineering practice, the PRC shall prioritize Work Items to be performed at the Facilities on the basis of availability of units, the potential for outage, ease of maintenance, efficiency of contracting and work practices, previous maintenance, rehabilitation or modernization work at the facility, and such other factors as the PCC may deem relevant.

2. The PRC shall consider and recommend to the PCC the Funding Requirement for each Work Item to be included in a Sub-Agreement. All Sub-Agreements related materials including ballots for determining approvals must be reviewed and approved by the PRC prior to submission to the PCC.

3. The PRC shall prepare and recommend any proposed changes or revisions to this MOA, the Master Plan, Sub-Agreements, Work Items, or other related program items for consideration by the PCC.

4. All recommendations by the PRC to the PCC shall include dissenting and differing views, if any.

### **C. PRC Structure and Membership**

1. The PRC shall have no more than five (5) members and shall consist of one (1) member appointed by the Corps, one (1) member appointed by SEPA, and up to three (3) members appointed by the Sponsors. A majority vote of the members of the PRC is required for the PRC to take action. Any member of the PCC may attend meetings of the PRC in a non-voting capacity.

2. The Nashville District Engineer shall appoint the Corps' member of the PRC.

3. SEPA shall select its member of the PRC in accordance with its own guidelines.

4. The Sponsors' members on the PRC may include one (1) member appointed by the Tennessee Valley Authority.

5. The PRC members may be changed by their respective Party(ies) at any time upon written notice to the other Parties.

## **ARTICLE VII. Funding**

### **A. Funding of Work Items**

1. Solely to the extent available through Section 212 Funds for which Section 212 Allowances have been credited to each Sponsor providing such funds, and in accordance with the terms of this MOA and the applicable Sub-Agreement, the Sponsors shall provide funding to meet the Funding Requirements for approved Work Items. SEPA shall apply credits as promptly as legally feasible against each Sponsor's obligation to SEPA under its power supply contract for all amounts identified on SEPA's bill to the Sponsor as the Section 212 Allowance and paid by the Sponsor to SEPA. SEPA shall provide such Section 212 Funds to the Corps in accordance with the schedule for Funding Requirements as shown in the Sub-Agreement until the total Funding Requirement has been remitted. SEPA shall deposit and transfer these funds in accordance with Section IV.B of this MOA.

2. The Sponsors shall provide the Funding Requirement for a particular Work Item as reflected in the Sub-Agreement before the Corps starts any Work Item required under this MOA. The Corps shall assign a specific account to accumulate and account for all costs incurred for each Work Item under this MOA. The Corps shall coordinate with the Sponsors and SEPA in updating the Funding Requirement for specific Work Items as needed.

3. Nothing in this MOA shall preclude the PCC, in accordance with Section VII.C of this Article, from reallocating previously-authorized funds among Work Items in a way that could

result in some Work Items being funded above and other Work Items being funded below the amounts originally authorized in the applicable Funding Requirement for the Work Item(s) in question.

4. The Parties agree that, notwithstanding any provisions to the contrary in any Previous MOAs or associated Sub-Agreements regarding the Facilities between the Corps, SEPA, and Sponsors, any excess of the sum of all Funding Requirements for all Work Items under such Previous MOAs and their respective associated Sub-Agreements that remains after the Final Accounting is completed for all such Work Items shall, upon approval by the PCC and unanimous agreement of all of the signatories to the Previous MOA under which such excess remains, be made available to the Corps to fund an increase in the Funding Requirement(s) for one or more existing Work Items or to fund a new Work Item, the ultimate approval of any such proposed new Work Item to remain subject to the provisions of Article VI.

5. Notwithstanding any provision of this MOA or any Previous MOA or associated Sub-Agreements to the contrary, except for Funding Changes approved by the Sponsors in accordance with Section VII.C of this MOA and any provisions of Sub-Agreements executed pursuant to this MOA, the Sponsors' remaining funding liability for any Work Item under this MOA, or any Previous MOA and associated Sub-Agreements executed with regard to work on the Facilities, at any given time for any and all expenditures by the Corps shall never exceed the amount currently available in the applicable Funding Requirement for the Work Item in question (i.e., collected, but not yet spent).

6. Subsequent to completion of a Work Item, operations and maintenance ("O & M") costs associated with said Work Item shall be included in the Corps' normal hydropower O & M costs and shall not be funded pursuant to this MOA.

7. Nothing herein shall preclude the Corps, at its sole discretion, from funding work at the Facilities through appropriations.

## **B. Reserve Fund**

1. The Sponsors shall provide funding through Section 212 Funds for which Section 212 Allowances have been credited to each Sponsor in accordance with the terms of this MOA to establish a Reserve Fund to be administered by the Corps. The total amount of funding to be provided using Section 212 Funds to establish the Reserve Fund may be reduced by contributions of funds from Previous MOAs as set forth in Section VII.B.4.

2. Use of the Reserve Fund created pursuant to this MOA shall be limited to paying or reimbursing costs resulting from claims filed under the Contract Disputes Act of 1978, administrative proceedings or litigation before the Armed Services Board of Contract Appeals or U.S. Court of Federal Claims (or any successor tribunals in function) and any resulting settlements or judgments pursuant to proceedings before any of the aforementioned tribunals that are incurred by the Corps under this MOA and any associated Sub-Agreements and that the Corps is legally obligated to pay; provided, however, that the Sponsors shall not be responsible

for damages and related costs occasioned by work performed under this MOA and associated Sub-Agreements, or any Previous MOA and associated Sub-Agreements, that are due to the negligence and/or misconduct of the United States or its contractors, and the Sponsors shall have no liability or responsibility to otherwise fund such damages and related costs ("Qualified Reserve Fund Expenditures").

3. The Reserve Fund shall be a separate, non-replenishing account. Cumulative total contributions to the Reserve Fund from all sources shall not exceed twenty million dollars (\$20 million).

4. Following the execution of this MOA, the Corps shall identify any amounts in emergent work accounts under Previous MOAs. Subject to the terms of the Previous MOAs and by unanimous agreement of all of the signatories to the Previous MOA, the Corps may transfer uncommitted funds in emergent work accounts under Previous MOAs which are not required to pay contingent liabilities pursuant to those agreements to the Reserve Fund. Upon the transfer of available funds from the Previous MOAs, the Corps shall identify and report to SEPA and the Sponsors the remaining amount necessary to fully fund the Reserve Fund. SEPA shall allocate a portion of the Section 212 Funds during each of the first four (4) full twelve-month Federal governmental fiscal years to the Reserve Fund until the Reserve Fund is fully funded. Notwithstanding any provision of this MOA which might be interpreted to the contrary, SEPA shall not allocate any Section 212 Funds to the Reserve Fund in excess of the amounts needed to fund the Reserve Fund. Notwithstanding any provision of this MOA which might be interpreted to the contrary, the total cumulative payments and transfers into the Reserve Fund from any source and in any manner during the term of this MOA shall not exceed \$20 million, unless this MOA is amended in writing by agreement by all Parties to authorize additional amounts to be so paid or transferred into the Reserve Fund.

### **C. Funding Changes and Termination of Work Items**

1. At any time, the PCC may agree to transfer amounts of the Funding Requirement for one Work Item in a Sub-Agreement to increase the Funding Requirement for another Work Item in the same Sub-Agreement or other Sub-Agreement entered into pursuant to this MOA. If at any time, before or during performance of a Work Item, the Corps forecasts or becomes aware that the funding need for a Work Item under this MOA will exceed the amount of the Funding Requirement for that Work Item (set forth in a Sub-Agreement or as increased by reallocation), the Corps shall promptly notify SEPA and the Sponsors of the need for additional funds and shall provide a revised estimate for performing the Work Item, together with supporting reasons and documentation. In addition to this duty, if at any time the Corps has reason to believe that the costs that will accrue in the next succeeding ninety (90) calendar days, if added to all other payments and costs previously accrued, will exceed seventy-five (75) percent of the Funding Requirement for a Work Item, the Corps shall notify the Sponsors and provide a revised estimate for performing the Work Item, together with supporting reasons and documentation. All notices pursuant to this Section VII.C shall include the cause of the need for additional funds and any efforts the Corps proposes to make to mitigate the need for additional funds. No additional funds may be collected to pay costs occasioned by the negligence and/or misconduct of the United

States or its contractors. If additional funds are necessary to complete any Work Item, then one of the following options shall be selected within ninety (90) calendar days of the notice documenting the need for additional funds:

- a. all Sponsors may agree to contribute the additional funds necessary to complete the work, provided that such contributions must be made within ninety (90) calendar days of the notice; or
- b. the PCC may either:
  - (1) amend the scope of the Work Item(s) so that it may be completed without additional funds;
  - (2) delete appropriate scope from other Work Items or delete other Work Items from its Sub-Agreement in order to make the funds from those other Work Items available to the Corps for said Work Item;
  - (3) reallocate available excess funds from the Funding Requirement(s) for other Work Item(s) or Sub-Agreements to provide said additional funds where the Corps forecasts an under-run to perform the associated Work Item(s);
  - (4) defer work on other Work Items;
  - (5) direct the Corps to suspend all work and terminate the remaining work under that Work Item; or
  - (6) implement any other alternative allowable consistent with the provisions of this MOA as may be agreed to by the Corps.

2. Any revisions to Work Items shall be made in accordance with Section VII.C.1. Until such time as one of the options set forth in either Section VII.C.1 (a) or (b) above is selected, the Corps may, at its discretion, continue the work on said Work Item requiring additional funds. If the Sponsors fail to select one of the aforementioned options set forth in either Section VII.C.1 (a) or (b) within ninety (90) calendar days of a notification by the Corps to the Sponsors under Section VII.C.1 of a need for additional funds, work on that Work Item shall terminate. The PCC may extend the ninety (90) calendar day deadline.

3. Until such time as one of the aforementioned options set forth in either Section VII.C.1 (a) or (b) is selected, the Corps shall make all reasonable efforts to adjust and manage work on the Work Item for which notification of a need for additional funds was given in order to minimize the ultimate financial impact in the event that the Work Item is terminated.

4. Subject to the limits of the amounts available in the Funding Requirement for a Work Item and the Reserve Fund as applicable, in the event of termination of a Work Item, the Sponsors shall fund costs incurred by the Corps with respect to said terminated Work Item, including costs of Qualified Reserve Fund Expenditures, and the costs of closing out or transferring any ongoing contracts associated with said terminated Work Item, provided that the Corps shall take reasonable steps to mitigate costs associated with contract termination related to said Work Item, including but not limited to seeking additional funding through appropriations and allocating appropriate costs to SEPA rates. This MOA neither prohibits nor requires the Corps to use its appropriated funds to pay for the costs of termination.

#### **D. No Direct Payment Obligation**

1. Neither a Sponsor nor any entities it represents shall have any direct payment obligations or other liability to the Corps under this MOA.

2. Payments to the Corps resulting from (i) this MOA, (ii) any of the Previous MOAs, and (iii) any Sub-Agreements executed pursuant to this MOA or the Previous MOAs, shall, notwithstanding any provisions of any of those Previous MOAs or associated Sub-Agreements to the contrary, be made from the Treasury accounts established for the receipt of the funds provided pursuant to the aforementioned MOAs, and no payments shall be made directly from the Sponsors to the Corps.

#### **E. Use of Federal Appropriations**

If any part of a Work Item is to be funded using Federal appropriations, the applicable Sub-Agreement shall specify which components of the Work Item will be funded using Federal appropriations. Further, any Sub-Agreement that contains a scope of work to be funded in part using Federal appropriations must delineate the respective Parties' funding responsibilities for contingencies for cost overruns and Qualified Reserve Fund Expenditures. Use of Federal appropriations to fund Work Items shall not obligate the Sponsors to pay pursuant to this MOA for damages and related costs occasioned by work performed under this MOA and due to the negligence and/or misconduct of the United States or its contractors.

#### **F. Refunds**

Upon deposit in the Treasury account established for the receipt of funds provided pursuant to this MOA, the Sponsors shall have no recourse for refunds from the Corps or SEPA. Provided, further, that upon the deposit of funds in the Treasury account, SEPA shall exercise no authority to change or modify the credits provided as Section 212 Allowances to those Sponsors who have provided such funds to SEPA.

#### **G. Final Accounting**

1. Upon completion or termination of a Work Item and resolution of all contract claims and appeals and litigation not occasioned by the negligence or misconduct of the United States or its contractors, the Corps shall compute the total Work Item costs and tender to the Sponsors and SEPA a final accounting of the Work Item costs. The Corps is obligated to complete and report a final accounting for a Work Item not later than 365 calendar days after the date of that Work Item's completion or termination.

2. In the event the Sponsors have provided funds for a Work Item in excess of the actual cost of that Work Item, the Corps shall return the excess to SEPA's miscellaneous receipt account within the Federal Treasury within one hundred eighty (180) calendar days of the transmittal of the final accounting; provided, however, upon the completion or termination of a Work Item, that if the PCC approves, the Parties may amend the Sub-Agreement to add new



Work Item(s) and direct the Corps to use all or part of said excess cash contributions on the new or an existing Work Item, the estimated additional Funding Requirement of which shall not exceed the amount of the available excess funding. If the PCC agrees to add new Work Item(s) pursuant to this provision, the Corps shall reallocate and apply as much of said excess as feasible to meeting the Funding Requirements for the new Work Item(s), thereby relieving Sponsors of the obligation to transfer that same amount to the Corps with respect to said new Work Item(s).

#### **H. Incidental Capacity Increases**

No funds shall be provided or used under this MOA for the planned increase or planned uprate of generation capacity or for the planned capacity increase of associated Facilities unless approved by the PCC. Capacity increases incidental to the repair or replacement of equipment shall be permitted. Provided, however, that nothing herein shall preclude SEPA from selling any capacity or energy made available because of an incidental capacity increase.

### **ARTICLE VIII. Title**

The ownership of, the title to, and the operation and maintenance responsibility for any equipment furnished with funds provided by the Sponsors pursuant to this MOA and relevant Sub-Agreements shall be in the name of the Corps or its contractor.

### **ARTICLE IX. Coordination and Review**

#### **A. Progress Reports**

1. The Corps shall provide any information needed by the Sponsors or SEPA relating to work to be completed under this MOA. On a Federal fiscal year basis (October 1 through September 30), the Corps shall provide the Sponsors and SEPA Monthly Progress Reports and a Final Completion Report for each Work Item completed under a Sub-Agreement as described below. Monthly Progress Reports shall be issued no later than 15 calendar days after the end of every month.

2. One copy of each Report shall be submitted to each member of the PCC or otherwise made available electronically.

3. For each Work Item the Army, through the District Engineer of the Nashville District Office of the Corps, shall provide to the Sponsors a Monthly Progress Report of all activities related to the implementation of that Work Item. Each such progress report shall be presented (in a format as specified by the PCC) throughout the duration of the work, and shall include: (i) a description of work activities and work progress accomplished during the month; (ii) an accounting of all costs charged to the Work Item during the month; (iii) an explanation of significant variances between estimated and actual costs to date, including recovery plans where appropriate; (iv) schedule status, including any anticipated delays and/or revisions; (v) a

discussion of any forecasted cost impacts required by proposed schedule revisions or scope of work changes; (vi) an accounting of the funding authorizations for each Work Item; (vii) a short description of planned activities for the following month; and (viii) any other significant information pertaining to Work Item performance and progress or any item as required to comply with the intent of this MOA. Also, the Army, through the District Engineer of the Nashville District of the Corps, shall provide a Final Completion Report within 60 calendar days of completion of each Work Item in accordance with Section VII.G. of this MOA.

## **B. Attachments**

The Attachments to this MOA are incorporated herein. Any amendment to an attachment approved pursuant to the procedures in this MOA, or, if no procedures are specified, upon approval by the PCC, shall be deemed valid and binding upon the Parties without the need for formal amendment of this MOA.

## **ARTICLE X. Audit**

A. The Corps and SEPA shall maintain books and records, consistent with accounting methodology prescribed for each, respectively, by the Department of the Army, the Department of Energy and/or the Federal Energy Regulatory Commission, sufficient to reflect properly all costs the Corps incurs in the performance of work pursuant to this MOA and to reflect all treatment of such costs as they may affect or pertain to the development of SEPA's rates for electricity sales.

B. Authorized representatives of the Sponsors, including their internal and external auditors, shall have the right to examine the books and records supporting the costs incurred by the Corps and the records supporting the SEPA rates. This right of examination shall include inspection at reasonable times of all Corps and SEPA facilities involved in work performed pursuant to this MOA or in the development of SEPA rates, and at locations where books and records pertaining to this MOA and SEPA rates are maintained.

C. Prior to January 15 of each year until all work pursuant to this MOA is complete, the Corps shall provide to the Sponsors and SEPA an accounting report detailing the use during the previous Federal fiscal year of all funds provided to the Corps under this MOA, including (i) for the Work Items described in each Sub-Agreement executed under this MOA, (ii) for deposit into the Reserve Fund, (iii) for reimbursement of the Corps from the Reserve Fund, and (iv) for any other purpose. If requested by the Sponsors, the Corps shall provide documentation showing the payments made to each contractor, a description of the work performed by each contractor, and any balance to complete the work for each contractor. The Corps also shall give an accounting of funds expended for work done by the Corps, a description of the work performed by the Corps, and the balance to complete the work required to be performed by the Corps.

D. The Sponsors shall be afforded the opportunity to obtain information concerning SEPA rates and the performance of work under this MOA through reasonable requests

respectively to SEPA and the Corps. If the amount of information becomes excessive, as reasonably determined by the requested Party, the requested Party shall inform the requesting Sponsor(s) of the same, and shall make arrangements to provide the information requested at the sole expense of said Sponsor(s).

## **ARTICLE XI. Miscellaneous Provisions**

### **A. Applicable Laws**

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, Corps policies and procedures shall govern all contract work with third parties undertaken by the Corps.

### **B. Limitations**

1. This MOA shall not prevent the Corps from funding non-routine maintenance, maintenance, rehabilitation or modernization activities through appropriations. Funding of any program or project commenced or conducted by the Corps that is not funded by this MOA, shall remain the sole responsibility of the Corps.

2. Except as set forth in Section VII.D.2, this MOA shall not affect any pre-existing or independent relationships or obligations among the Parties, and is not intended to and does not confer upon any person other than the Parties to this MOA any rights or remedies hereunder.

3. This Agreement shall not be deemed to resolve any future allocation of RECs that may be available from the Federal facilities located in Cumberland River basin.

### **C. Protests, Claims and Disputes by Contractors**

1. All claims and disputes by contractors arising under or relating to contracts awarded by the Corps shall be resolved in accordance with Federal law and the terms of the individual contract. The Corps shall have final dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. §§601-613). The Armed Services Board of Contract Appeals ("ASBCA") is designated as the appropriate board of contract appeals. In lieu of appealing to the ASBCA, the contractor may bring an action directly to the United States Court of Federal Claims.

2. Any agency protests filed against the advertisement and award of contracts in accordance with this MOA shall be handled in accordance with Federal Acquisition Regulations ("FAR") Part 33 and the Engineer FAR Supplement ("EFAR") Part 33.

3. The Corps shall be responsible for litigating all disputes and appeals pertaining to Corps contractors, and for coordinating with the Department of Justice as appropriate. The Corps shall notify the Sponsors and SEPA of any such litigation, including an estimate of the potential amount of liability and shall afford the Sponsors an opportunity to comment to the Corps in the litigation and any resulting settlement negotiations.

4. This document shall not be construed to limit the Sponsors' right of intervention that may arise from third party litigation with the Corps.

#### **D. Dispute Resolution Among the Parties**

1. The Sponsors agree that, in the event of a dispute among the Parties, the Sponsors, SEPA, and the Corps shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties.

2. This provision shall not apply to the decision to terminate this MOA in accordance with its terms.

#### **E. Public Information**

Justification and explanation of this MOA before Congress and other agencies, departments, and offices of the Federal Executive Branch shall be the responsibility of the Corps and SEPA. The Sponsors and SEPA shall work with the Corps in providing such assistance as may be necessary and appropriate to support the Corps' justification or explanation of Work Items conducted under this MOA. The Corps may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The Parties shall make best efforts to provide each other Party seven calendar days advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to this MOA. SEPA will respond to its own Congressional inquiries and notify the other Parties.

#### **F. Term**

The terms and conditions of this MOA shall become effective when executed by all the Parties, and shall remain in effect until all agreed-upon Sub-Agreements are completed, or until terminated in accordance with the provisions of this MOA. Notwithstanding the foregoing, unless as otherwise expressly provided in this MOA or as otherwise agreed by the Parties, the term of this MOA shall expire on September 30, 2032.

#### **G. Amendment, Termination, and Modification**

1. This MOA may be modified or amended only by written, mutual agreement of the Parties, except that an eligible entity, as determined by SEPA, may become, subsequent to the effective date of this MOA, a Sponsor under this MOA if said eligible entity executes the then-

current version of this MOA and provides notice of such execution to all other Parties. In that event, Attachment I shall be updated to reflect the current list of Sponsors.

2. A Sponsor may terminate its participation in this MOA by providing written notice to the other Parties. Such termination of participation shall be effective upon written notice, unless an alternative effective date is agreed to in writing by all of the other Parties, and Attachment I shall be updated to reflect the current list of Sponsors. In the event of termination of participation, through credits from Section 212 Allowances applied as promptly as legally feasible against the amounts that are payable by the terminating Sponsor to SEPA under its power supply contract with SEPA, the terminating Sponsor shall continue to fund its Pro Rata Share of all costs under any Sub-Agreement approved by the terminating Sponsor, including Qualified Reserve Fund Expenditures.

3. In consideration of Sponsors' entering into this MOA with SEPA as a party hereto, SEPA agrees that it shall not, with respect to any Sponsor, exercise any right to terminate or provide notice of termination in accordance with any express termination provisions within any power supply contract between SEPA and the Sponsor during the term of this MOA where such notice would be provided prior to October 1, 2029, or such termination would become effective prior to September 30, 2032, unless: (i) the Sponsor has terminated its participation under this MOA in accordance with Section XI.G.2 of this MOA; (ii) the Sponsor has failed to pay amounts owing and due in accordance with the terms of the Sponsor's power supply contract with SEPA and has failed to cure its non-payment within a reasonable time; or (iii) this MOA terminates earlier than September 30, 2032, in which event the effective date of termination of the Sponsor's power supply contract may be no earlier than the termination date of this MOA; provided, that in no circumstance shall SEPA have the right to give notice of termination of any power supply contract with a Sponsor prior to June 30, 2014.

4. In the event a Sponsor terminates its participation pursuant to this Section XI.G, this MOA shall remain in full force and effect, and nothing shall bar the remaining Sponsors, the Corps, or SEPA from executing Sub-Agreements.

#### **H. Survival and Severability**

1. Except as set forth below in Section XI.H.3, the provisions of this MOA which require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

2. If any provision of this MOA is determined to be invalid or unenforceable, the obligations set forth herein and pursuant to any existing Sub-Agreements shall not survive except those set forth in Section VII.C.

3. A Sponsor shall have no obligation to provide any additional funds pursuant to this MOA or associated Sub-Agreements in the event that Congress repeals Section 212 of the Water Resources Development Act, SEPA terminates a valid power supply contract with that Sponsor, SEPA fails to execute a power supply agreement with that Sponsor with a termination date no

earlier than the expiration date of this MOA, or SEPA employs a different rate making methodology other than the rate making methodology in effect as of the date of this Agreement.

**I. No Favored Treatment**

The Parties recognize that some hydropower customers of SEPA that receive energy from the Cumberland System of Projects or the representatives of such customers may not participate in this MOA. SEPA and the Corps agree to afford no preferential treatment to any existing or future SEPA Cumberland System hydropower customer or its representative, regardless of whether it participated in this MOA or in a similar customer funding agreement that relies on Section 212 funding. Provided further, that no Sponsor under this MOA shall bear a greater share of funding responsibility for cost overruns associated with a Work Item than the share that the Sponsor's contribution of Section 212 Funds for that Work Item represents in relation to the total Section 212 funding contributed for that Work Item, regardless of whether contributed pursuant to this MOA or similar customer funding agreements.

**J. Notices**

Any written notification under this MOA shall be addressed to each Party as indicated in Attachment I; provided, that each Party may change said address at any time by providing written notification to the other Parties. Any written notification under this MOA shall be considered to have been given on the date that it is sent.

**K. Execution in Counterparts**

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

**IN WITNESS WHEREOF**, the Parties have caused this MOA to be executed. Each signatory represents that he or she has been appropriately authorized to execute this MOA on behalf of the Party for which he or she has signed.