



Software Maintenance Agreement No. 2012M317

This Software Maintenance Agreement ("Agreement") is between the **City of Durham ("Licensee")** and **Environmental Systems Research Institute, Inc. ("Esri")**.

DEFINITIONS

"Software" means all or any portion of Esri's proprietary software technology accessed or downloaded from an Esri-authorized website or delivered on any media in any format including backups, updates, service packs, patches, hot fixes, or permitted merged copies.

ARTICLE 1—TERM AND FEE

The initial term of this Agreement will begin on receipt of order (renewal date) and will continue for twelve (12) consecutive months at the fee(s) noted in the Esri Quotation No 25499001, dated 11/04/2011, attached and incorporated herein. The total amount of this Agreement shall not exceed \$93,450. Thereafter, Licensee may continue the service for annual maintenance and update at the then current fee. Should Licensee decide to extend this Agreement, Licensee must issue a purchase order in advance of the renewal date at the quoted price. Payment is due annually in advance. If Licensee wishes to reinstate lapsed maintenance, Licensee agrees to pay a reinstatement fee as well as the maintenance fee. Licensee agrees to pay Esri invoices within thirty (30) days of receipt. To reinstate lapsed maintenance, maintenance fees from the date maintenance lapsed, in addition to the current fees, must be paid. Maintenance fees are nonrefundable.

ARTICLE 2—SOFTWARE MAINTENANCE AND UPDATE SERVICE

As discussed further on the Esri website named below, Esri provides technical support in response to specific inquiries as well as software maintenance by way of patches, updates, and upgrades as applicable. Maintenance is composed of technical support, updates, and other benefits. Esri will support/maintain the Software for a period of twelve (12) months. Software maintenance will apply only to unmodified Software and commercially released updated versions of the Software. Software updates are provided only for standard hardware platforms and operating systems supported by Esri as described in the Software documentation. Licensee is responsible for making or arranging for

updates to interfaces for nonstandard devices or custom applications.

Esri maintenance will be provided in compliance with the Esri US Software Standard Maintenance Program on the Esri website at <http://www.esri.com/legal/pdfs/us-sw-maintenance.pdf>. Esri supports users with the installation and maintenance of Esri Software, assistance in solving problems arising from the use of the Software, hardware interfacing of peripheral devices, and logging of enhancement requests and problems or issues submitted by the user. Esri's Support website is found at <http://support.esri.com/en/support>.

Licensee may contact Technical Support at

E-mail: support@esri.com

Website Address: <http://support.esri.com/>

Phone: +1-909-793-3774

Toll-Free Phone: +1-888-377-4575, Extension 2

Support Web Form:

<http://support.esri.com/en/webform>

Chat: <http://support.esri.com/en/webform-chat>

Hours: 5:00 a.m. to 5:00 p.m. Pacific time (Monday through Friday, except Esri holidays)

Resultant order documents for maintenance must include the statement, "This order is subject to the terms and conditions of Software Maintenance Agreement G060. All other terms and conditions are void."

ARTICLE 3—TERMINATION

This Agreement may be terminated by either party giving the other party thirty (30) days' notice of intent to terminate prior to the end of the term identified in Article 1.

ARTICLE 4—LIMITATION OF LIABILITY AND REMEDIES

Esri will use commercially reasonable efforts to provide corrections or workaround solutions for any problem or issue reported and determined to be in the Software or the documentation at no cost to Licensee for the term of this Agreement. While it is Esri's goal to provide an acceptable resolution for incoming problems/issues and incidents, Esri cannot predict a resolution time and is unable to guarantee that all problems or issues can be resolved or addressed.

EXCEPT FOR THE ABOVE EXPRESS LIMITED WARRANTY, ESRI DISCLAIMS ALL OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINTERFERENCE, SYSTEM INTEGRATION, AND NONINFRINGEMENT. ESRI DOES NOT WARRANT THAT THE SOFTWARE OR DOCUMENTATION WILL MEET LICENSEE'S NEEDS, OR THAT LICENSEE'S OPERATION OF THE SAME WILL BE UNINTERRUPTED OR ERROR FREE, OR THAT ALL NONCONFORMITIES CAN OR WILL BE CORRECTED.

If Esri fails to fulfill its obligations under this Agreement, Licensee's sole and exclusive remedy is the right to terminate this Agreement immediately for the affected Software.

IN NO EVENT SHALL ESRI BE LIABLE TO LICENSEE FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOST PROFITS; LOST SALES OR BUSINESS EXPENDITURES; INVESTMENTS; OR COMMITMENTS IN CONNECTION WITH ANY BUSINESS, LOSS OF ANY GOODWILL, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR USE OF THE SOFTWARE OR DOCUMENTATION, HOWEVER CAUSED, ON ANY THEORY OF LIABILITY, AND WHETHER OR NOT ESRI HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

ARTICLE 5—LICENSE

Maintenance and support are provided subject to the terms and conditions of the City of Durham, NC Master License Agreement No. 2002M3442.

Licensee may not assign the rights granted hereunder, or any of them, without the prior written consent of Esri.

ARTICLE 6—APPLICABLE LAWS

(a) Choice of Law and Forum; Service of Process.

(i) This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice,

in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. (ii) If the Contractor is not a natural person (for instance, the Contractor is a corporation or limited liability company), this subsection (ii) applies. "Agent for Service of Process" means every person now or hereafter appointed by the Contractor to be served or to accept service of process in any State of the United States. Without excluding any other method of service authorized by law, the Contractor agrees that every Agent for Service of Process is designated as its non-exclusive agent for service of process, summons, and complaint. The Contractor will instruct each Agent for Service of Process that after such agent receives the process, summons, or complaint, such agent shall promptly send it to the Contractor. This subsection (ii) does not apply while the Contractor maintains a registered agent in North Carolina with the office of the N. C. Secretary of State and such registered agent can be found with due diligence at the registered office.

(b) Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) Performance of Government Functions. Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) Severability. If any provision of this contract shall be unenforceable, the remainder of this contract shall be enforceable to the extent permitted by law.

(f) Compliance with Law. In performing all of the Work, the Contractor shall comply with all applicable law.

(g) Notice of City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

(h) EEO Provisions. During the performance of this Contract the Contractor agrees as follows: (1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Contractor shall in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will

receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts. (5) Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing this contract and in every subcontract related to this contract so that these EEO provisions will be binding upon such subcontractors and vendors.

(i) SDBE. The Contractor shall comply with all applicable provisions of Article III of Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance), as amended from time to time. The failure of the Contractor to comply with that article shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that article, this contract, and State law. The Participation Plan submitted in accordance with that article is binding on the Contractor. Section 18-59(f) of that article provides, in part, "If the City Manager determines that the Contractor has failed to comply with the provisions of the Contract, the City Manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to the Contractor's alleged violations of its obligations under Article III of Chapter 18 and not to the Contractor's alleged violations of other obligations.

(j) No Third Party Rights Created. This contract is intended for the benefit of the City of Durham and the Contractor and not any other person.

(k) Principles of Interpretation and Definitions. (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) "Duties" includes obligations. (5) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (6) The word "shall" is mandatory. (7) The word "day" means calendar day. (8) A definition in this contract will not apply to the extent the context requires otherwise.

(l) Modifications. Entire Agreement. A modification of this contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City

unless it is signed by the City Manager, a deputy or assistant City Manager, or, in limited circumstances, a City department director. This contract contains the entire agreement between the parties pertaining to the subject matter of this contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this contract.

(m) City's Manager's Authority. To the extent, if any, the City has the power to suspend or terminate this contract or the Contractor's services under this contract, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

ARTICLE 7—Notice. (a) All notices and other communications required or permitted by this contract shall be in writing and shall be given either by personal delivery, fax, UPS, Federal Express, or certified United States mail, return receipt requested, addressed as follows. The parties are requested to send a copy by email.

To the City:

CIO/ Customer Service Manager
City of Durham
101 City Hall Plaza
Durham, NC 27701-3329
The fax number is (919) 560-4808
Email: Martha.Lester-Harris@durhamnc.gov

To the Contractor:

Robin Gosney
The fax number is 909-307-3083
Email: rgosney@esri.com

(b) Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this contract shall be deemed given and sent at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs

The parties have agreed to these terms and have executed this Agreement on the date last signed below.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and effective as of the last date written below.

THE CITY OF DURHAM, NORTH CAROLINA

(Licensee)

By: _____
Authorized Signature

Printed Name: _____

Title: _____

Date: _____

ENVIRONMENTAL SYSTEMS RESEARCH
INSTITUTE, INC.
(Esri)

By: _____
Authorized Signature Date

Printed Name: _____

Title: _____

Licensee Contact Information

Contact: Marcus Bryant _____

Installation Address: 101 City Hall Plaza, 4th Floor _____

City, State, ZIP: Durham, NC 27701 _____

Telephone: 919-560-4122 _____

Fax: 919-560-4808 _____

E-mail: _____