

GroundWork Subscription and Services Agreement

Agreement between GroundWork Open Source and Subscriber

Existing Subscribers with effective GroundWork Subscription and Services Agreements executed December 3, 2009 or later with term licenses only, will not be subject to the terms and conditions of this Agreement for additional GroundWork product purchased via the GroundWork on-line shopping cart.

This Subscription and Services Agreement is between GroundWork Open Source (GWOS) and the Subscriber who executes this Agreement. Except for Subscribers with existing GroundWork Subscription and Services Agreement as noted above, this Agreement shall govern Subscriber's initial purchase on the Effective Date as well as any future purchases made by the Subscriber with reference to this Agreement. The Agreement permits Subscriber to purchase Subscriptions, Extensions and Services from GWOS pursuant to GWOS Order Forms or Statements of Work (SOW) referencing this Agreement and sets forth the basic terms and conditions under which the GWOS Products are licensed. GWOS's Subscription and Services Agreement is conditioned on the Subscriber's acceptance without modification of the terms, conditions, and notices contained herein. Subscriber Permitted Use of GWOS Products constitutes Subscriber agreement to all such terms, conditions, and notices.

1. GroundWork Monitor Subscription

The Subscription provides GroundWork Proprietary software license, services and support under the following terms:

- (a) Subscriber must enable the Network Service when installing GWOS products.
- (b) If a monitored device limit applies to the product being purchased you may not exceed the monitored device limit granted to you under the Subscription purchased.
- (c) Under no circumstances may GWOS Product licenses granted under the Enterprise Quickstart program exceed 50 monitored Devices in total. Enterprise Quickstart licenses are valid on a one per company/department basis for a single Designated System only.
- (d) You are responsible for the security of your passwords and for any use of your account. You must immediately notify us of any unauthorized use of your GroundWork Monitor deployment by contacting us at: info@gwos.com
- (e) Since the Agreement is a term contract, the Subscription and Services Agreement is effective as of the date when the subscription purchase transaction is accepted by GWOS for on-line purchases, or the Effective Date when purchased using a GWOS Order Form.

2. Definitions

- (a) "Designated System" means a single server or virtual server upon which the GWOS Proprietary Software is solely licensed for use.
- (b) "Device" an autonomous computing device, including but not limited to, a server, virtual machine, workstation, desktop or laptop, storage device, network device or a standalone environmental sensor or security device that is monitored by GWOS Software. The number of devices to be monitored is not affected by the manner in which monitoring data is collected; e.g. directly interrogated by GWOS software, sent to GWOS software by the monitored device or via another monitoring system provided by GWOS or a third-party.

- (c) "Documentation" means any technical specification documentation generally made available by GWOS to a subscriber.
- (d) "Effective Date" means the date when the subscription purchase transaction is accepted by GWOS for on-line purchases, or the Effective Date as indicated on the GWOS Order Form.
- (e) "GWOS Products" – means the GroundWork Proprietary Software and the Open Source Software and the accompanying Documentation and Updates delivered to Subscriber under the terms of this Agreement.
- (f) "GWOS Proprietary Software" means all the proprietary software programs, configurations, scripts, reports, and graphs contained in the GWOS Products, but excluding the Open Source Software.
- (g) "Open Source Software" means any software made publicly available in source code or object code form, in each case subject to a separate license that accompanies such code. Any Open Source Software that is delivered to Subscriber as part of the GWOS Products includes the license agreement associated with such Open Source Software. The terms and conditions governing Subscriber's use of the Open Source Software are set forth in the respective license for such Open Source Software and not in this Agreement. A list of the Open Source Software components is provided at <http://www.groundworkopensource.com/products/pro-ipingredients.html>.
- (h) "Permitted Use" means use by Subscriber for internal business purposes only and not for hosted service resale.
- (i) "Subscription" means a license to Use GWOS Products for a specified term.
- (j) "Support Services" means technical assistance services for GWOS products.
- (k) "Professional Services" means the professional consulting services to be provided by GWOS to subscriber under a Statement of Work.
- (l) "Extensions" means Third Party or other software and services that enhance or extend GWOS Products. Extensions are included in the GWOS price list and are sold and Supported by GWOS.
- (m) "Third Party Software" means software which may be necessary for Use of GWOS Products that is not included in the Subscription purchased by Subscriber.
- (n) "Virtual Appliance" means a software product that integrates a pre-configured copy of GWOS software and third-party software into a composite package that is deployed in the context of a virtual machine. A Virtual Appliance is not modifiable to something other than its initial function.
- (o) "Updates" means (a) any major new releases, modifications or enhancements to the GWOS Products as designated by a change in the number to the left of the decimal in the version number and (b) any code corrections, patches, updates and minor version releases of the GWOS Products as designated by a change in the number to the right of the decimal in the version number, in each case which GWOS elects to generally commercially release to Subscriber during the applicable Subscription Term.

3. Payment

- (a) Subscriber agrees to pay GroundWork the total fees for the items ordered on-line or in each Order Form or SOW. Payment terms are net cash in US dollars and are due upon execution of the Agreement for on-line purchases or within thirty (30) days from the invoice date (the earlier of the date the Subscriber signs the Subscription and Services Agreement, or the Effective Date) as applicable. Fees for Services ordered by Subscriber, if any, are due as set forth in the respective SOW. All payments are non-refundable. Except for taxes based on the net income of GroundWork, Subscriber shall be responsible for all taxes, withholdings, duties and levies (including interest and penalties for late payment) arising from the order,

whether or not listed on GWOS's invoice. The Subscriber agrees to pay GWOS the total fees and any additional fees if the Subscriber exceeds the quantity of Devices procured. Additional fees will be effective at the then current list price. Any late payments shall be subject to a service charge equal to 1.5% per month of the amount due or the maximum amount allowed by law, whichever is less. GWOS will not compensate or credit Subscription Fees not used during a Subscription Term.

- (b) The Subscription can be canceled for any reason at the end of your current Subscription term. Once the Subscription term expires, the right to use GWOS Products and any Support Services or Extensions under this Agreement are terminated.
- (c) Subscriber will be required to renew Subscriptions on-line unless approved otherwise by GWOS.
- (d) The Subscriber must renew the Subscription through the payment of the Subscription fee to continue to use the GWOS Proprietary Software or Extensions and receive Support Services and Updates. Otherwise the Licensee must stop using the GWOS Proprietary Software and destroy all copies thereof. Subscription renewals, or fees for an increase in the number of Subscriptions, are based on the GWOS standard list price at the time of renewal or increase
- (e) The Subscriber may have required additional payment and Use terms outside of the Subscription and Services Agreement to cover Third Party Software and Extensions. The Subscription and Services Agreement terms are not superseded by any additional agreements.

4. License Grant

Subject to the terms of this Agreement, GWOS hereby grants Subscriber an annual, non-exclusive, non-transferable, non-assignable, non-sublicensable right to use the GWOS Proprietary Software for the Permitted Use on the Designated System (if applicable) for each GWOS Product. Subscriber shall not (and shall not allow any third party to): (a) distribute, sublicense, transfer, loan, rent, lease, or use the GWOS Proprietary Software (or any portion thereof) for time sharing, hosting, service provider or like purposes or (b) modify any part of the GWOS Proprietary Software, create a derivative work of any part of the GWOS Proprietary Software, or incorporate the GWOS Proprietary Software into or with other software, except to the extent expressly authorized in writing by GWOS. The included Network Service must be enabled at installation and remain installed and functional during the Subscription period.

5. Support Services

- (a) **Designated Contact.** Based on Subscriber's Subscription of GWOS Products, you must designate Support contacts who are permitted to access GWOS Support. GWOS's Support accessibility is governed by the Subscription terms purchased, including pre-requisite training completion if applicable. GWOS will verify compliance with the terms of this subscription agreement as a condition of providing Support. The definition of each support level is documented at <http://www.groundworkopensource.com/services/support.html>.
- (b) **Updates.** Subscriber is responsible for maintaining functional hardware, firmware or Third Party software necessary to implement or use the Updates. GWOS does not provide operating system(s) updates. At GWOS's option, GWOS will use commercially reasonable efforts to resolve incompatibilities between the GWOS Products and supported operating system(s).
- (c) **Support / Error Reporting / Corrections.** During the Subscription Term, GWOS will provide technical assistance for the GWOS Products using the support mechanisms defined for each support level. The Subscriber must provide information that will allow GWOS to reproduce the error. GWOS shall use commercially reasonable efforts to correct reproducible GWOS Product errors with a level of effort

commensurate with the severity of the error as set forth in the applicable service level agreement located at <http://www.gwos.com/services/support/index.html>.

- (d) **Limitations and Exclusions.** Support does not apply to problems resulting from: (i) errors not attributable to the GWOS Products (ii) GWOS Products being used with hardware or software not specified in the Documentation; (iii) any additions or modifications to GWOS Products made by Subscriber or any third party and not approved by GWOS; (iv) defects in the GWOS Products due to accident, abuse or improper use by Subscriber; (v) Virtual Appliances that have been changed or modified beyond their initial configuration or function or (vi) GWOS Products provided on a no charge or evaluation basis. GWOS only provides support to the current release and the prior two releases of the GWOS Products.

6. Professional Services

- (a) **Professional Services to be Performed.** GWOS shall provide the Professional Services purchased in an applicable Order Form and/or Statement of Work (SOW) that describes the work to be performed, fees, payment terms, and any applicable milestones, dependencies or other technical specifications. Each SOW must be signed by both parties before GWOS shall commence work under such SOW. Subscriber will reimburse GWOS for reasonable travel and lodging expenses as incurred.
- (b) **Warranty for Professional Services.** GWOS warrants that it will perform Professional Services in a manner consistent with industry standards reasonably applicable to the performance of such services. As Subscriber's sole and exclusive remedy, and GWOS's sole liability for any breach of this warranty, any substandard performance reported by Subscriber within thirty (30) days of performance shall be promptly re-performed by GWOS at no additional charge.
- (c) **Ownership of Services Deliverables.** Subscriber shall have a license right to use anything delivered as part of the Professional Services subject to the terms of its license to use the GWOS Products, but GWOS shall retain all right, title and interest in and to any such work product, code or GWOS Proprietary Software and any derivative, enhancement or modification thereof created by GWOS or its agents.

7. Intellectual Property Ownership and Requirements

- (a) **GWOS Proprietary Software.** Notwithstanding anything to the contrary contained in this Agreement, except for the limited license rights expressly provided herein, GWOS and its suppliers have and will retain all rights, title and interest in and to the GWOS Proprietary Software (including, without limitation, all patent, copyright, trademark, trade secret and other intellectual property rights) and all copies, modifications and derivative works of the GWOS Proprietary Software. Subscriber acknowledges that it is obtaining only a limited license right to the GWOS Proprietary Software and that no ownership rights are being conveyed to Subscriber under this Agreement or otherwise. Subscriber agrees not to register or attempt to register, directly or indirectly any intellectual property rights of GWOS (including URLs that utilize, or that are substantially similar to GWOS' registered trademarks).
- (b) **Confidentiality of GWOS Proprietary Software.** Neither Subscriber nor its employees or agents shall cause or allow the GWOS Proprietary Software or any information or data identified as GWOS confidential or proprietary information to be disclosed to third parties or duplicated or used except as expressly permitted in this Agreement. Subscriber will take all reasonable steps, both during and after the Term of this Agreement, to ensure that no unauthorized person will have access to GWOS Proprietary Software or Documentation and that no unauthorized copy, distribution or disclosure, in whole or in part, is made in any form.
- (c) **Copyright Notices.** All copies of the GWOS Products reproduced by Subscriber must include all proprietary marks, legends and copyright notices that appear on the original copies, including both size of location of marks, of the GWOS Products provided to Subscriber.

8. Limited Warranty

GWOS warrants that, for a period of thirty (30) days from the date of delivery (the “Warranty Period”), the GWOS Proprietary Products shall perform substantially in accordance with the Documentation. In the event of a breach of the warranty set forth in this Section 6 (Limited Warranty), GWOS’ entire liability and Subscriber’s exclusive remedy shall be (i) for GWOS to correct GWOS Proprietary Products bugs or errors that cause the breach of warranty, or (ii) if GWOS is unable to correct the GWOS Proprietary Products to operate as warranted, to provide Subscriber with a refund of the Subscription fees paid to GWOS during the then-applicable Subscription, upon removal of the GWOS Proprietary Products from the Designated System and Subscriber’s return of the GWOS Proprietary Products to GWOS. GWOS shall have no obligation with respect to any warranty claim unless notified of such claim within the Warranty Period. The above warranty shall not apply: (i) if the GWOS Proprietary Products are used with components not supported in the Documentation; (ii) if any additions or modifications to the GWOS Proprietary Products are made by Subscriber or any third party; (iii) to defects in the GWOS Proprietary Products due to accident, abuse or improper use by Subscriber; or (iv) to GWOS Proprietary Products provided on a no charge or evaluation basis.

9. Disclaimers

- (a) EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 8 (LIMITED WARRANTY); THE GWOS PRODUCTS IS PROVIDED TO SUBSCRIBER “AS IS.”
- (b) THE WARRANTIES SET FORTH IN SECTION 8 (LIMITED WARRANTY) ARE GIVEN IN LIEU OF, AND SUBSCRIBER HEREBY WAIVES, ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR ARISING FROM A COURSE OF DEALING OR USAGE OF TRADE. EXCEPT WITH RESPECT TO THE LIMITED WARRANTY SET FORTH IN 8 (LIMITED WARRANTY), SUBSCRIBER ASSUMES THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF THE GWOS PRODUCTS.

10. Indemnification

- (a) Subject to the limitation set forth in Section 11 (Limitation of Liability), GWOS shall, during the period of a paid Subscription, defend and indemnify, at its expense, any claim or suit brought by a third party against Subscriber alleging that GWOS Proprietary Software infringes a U.S. patent, U.S. copyright, or U.S. trademark and shall pay all costs and damages finally awarded. GWOS’ indemnification obligations under this Section 10 a) are conditioned on Subscriber giving GWOS: (i) prompt written notice of such claim or suit (but in any event notice in sufficient time for GWOS to respond without prejudice), (ii) Subscriber’s reasonable assistance and (iii) the exclusive right to control and direct the investigation, defense and settlement (if applicable) of such claim.
- (b) If Subscriber’s Permitted Use of GWOS Proprietary Software under the terms of this Agreement is, or in GWOS opinion is likely to be, enjoined due to infringement, then GWOS will, at its sole option and expense, (i) obtain the right to continue using GWOS Proprietary Software, (ii) replace or modify the GWOS Proprietary Software so that it becomes non-infringing, or (iii) if the remedies set forth in clauses (i) and (ii) are not available on a commercially reasonable basis, terminate the Agreement and refund to Subscriber a pro-rata portion of the Subscription fee paid by Subscriber in respect of the applicable Subscription Term, upon removal of the GWOS Proprietary Products from the Designated System and Subscriber’s return of the GWOS Proprietary Products to GWOS.
- (c) GWOS shall have no liability for actual or alleged infringement based upon the use of GWOS Proprietary Software outside the scope of the Permitted Use, in combination with other products, devices or software not furnished by GWOS, or arising out of modifications made to GWOS Proprietary Software by Subscriber

or any third party to the extent the claim or suit of infringement would not have occurred but for such combination or modification. GWOS disclaims all other liability for patent, trade secret and copyright and other intellectual property rights infringement, including any incidental, special or consequential damages.

- (d) WITH RESPECT TO ANY CLAIMS OR ACTIONS RELATING TO INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS WITH REGARD TO THE GWOS PRODUCTS OR THIS AGREEMENT, THE REMEDIES SET FORTH IN THIS SECTION 10 (INDEMNIFICATION) SHALL BE SUBSCRIBER'S SOLE AND EXCLUSIVE REMEDY AND GWOS'S SOLE OBLIGATION.

11. Limitation of Liability

IN NO EVENT WILL GWOS OR ITS SUPPLIERS BE LIABLE FOR ANY LOSS OF DATA, LOSS OF INCOME, LOSS OF OPPORTUNITY OR PROFITS, OR COST OF RECOVERY OR FOR ANY OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES ARISING FROM THE USE OF THE GWOS PRODUCTS, ACCOMPANYING DOCUMENTATION, EXTENSIONS, THIRD PARTY SOFTWARE RELATED TO THE GWOS PRODUCTS, SUPPORT SERVICES, OR PROFESSIONAL SERVICES HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY. THIS LIMITATION WILL APPLY EVEN IF GWOS OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. IN NO EVENT SHALL GWOS LIABILITY EXCEED THE AGGREGATE AMOUNT PAID BY SUBSCRIBER TO GWOS UNDER THIS AGREEMENT. SUBSCRIBER ACKNOWLEDGES AND AGREES THAT GWOS' FEES REFLECT THIS ALLOCATION OF RISK. THE PARTIES AGREE THAT THE LIMITATIONS SPECIFIED IN THIS SECTION 11 (LIMITATION OF LIABILITY) WILL SURVIVE AND APPLY EVEN IF ANY LIMITED REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED ITS ESSENTIAL PURPOSE.

12. Miscellaneous Provisions

- (a) **Export Compliance.** Subscriber acknowledges that the GWOS Proprietary Software is subject to export restrictions by the United States government and import restrictions by certain foreign governments. Subscriber shall not and shall not allow any third-party to remove or export from the United States or allow the export or re-export of any part of the GWOS Proprietary Software or any direct product thereof: (i) into (or to a national or resident of) any embargoed or terrorist-supporting country; (ii) to anyone on the U.S. Commerce Department's Table of Denial Orders or U.S. Treasury Department's list of Specially Designated Nationals; (iii) to any country to which such export or re-export is restricted or prohibited, or as to which the United States government or any agency thereof requires an export license or other governmental approval at the time of export or re-export without first obtaining such license or approval; or (iv) otherwise in violation of any export or import restrictions, laws or regulations of any United States or foreign agency or authority. Subscriber agrees to the foregoing and warrants that it is not located in, under the control of, or a national or resident of any such prohibited country or on any such prohibited party list. The GWOS Proprietary Software is further restricted from being used for the design or development of nuclear, chemical, or biological weapons or missile technology, or for terrorist activity, without the prior permission of the United States government.
- (b) **Governing Law; Jurisdiction and Venue.** This Agreement shall be governed by the laws of the State of California and the United States without regard to conflicts of laws provisions thereof, and without regard to the United Nations Convention on the International Sale of Goods. Unless waived by GWOS in its sole discretion, the jurisdiction and venue for actions arising out of and related to the subject matter hereof shall be the California state and United States federal courts located in San Mateo County, California, and both parties hereby submit to the personal jurisdiction of such courts.
- (c) **Customer Reference.** Subscriber agrees that GWOS can use Subscriber's company name and logo in connection with marketing and promotions for GWOS.

- (d) **Assignment.** This Agreement will bind and inure to the benefit of each party's permitted successors. GWOS may assign this Agreement to any affiliate or to any assignee of all or substantially all of GWOS assets (whether pursuant to a merger, change of control or otherwise). Subscriber may not assign or transfer this Agreement, in whole or in part, without GWOS' prior written consent. Any attempt to transfer or assign this Agreement in violation of this Section will be null and void.
- (e) **Severability.** If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited to the minimum extent necessary so that this Agreement shall otherwise remain in effect.
- (f) **Entire Agreement.** This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement.
- (g) **Term.** This Agreement is effective as of the Effective Date and expires on the day that the term of the last Subscription for any GWOS Proprietary Software licensed hereunder expires. Either party may terminate this Agreement (including all related Order Forms and SOWs) if the other party fails to cure any material breach of this Agreement within thirty (30) days after written notice of such breach. Termination is not an exclusive remedy, and the exercise by either party of any remedy under this Agreement will be without prejudice to any other remedies it may have under this Agreement, by law, or otherwise. Termination shall not relieve Subscriber's obligation to pay all fees that have accrued or are otherwise owed by Subscriber, including any late payment fees.
- (h) **Termination.** Upon any termination of this Agreement by GWOS pursuant to a material breach (Section 12(g)), Subscriber shall cease any and all use of any GWOS Proprietary Software and destroy all copies thereof and so certify to GWOS in writing.
- (i) **Survival.** Sections 2 (Definitions), 3 (Payment Terms), 4 (License Grant (but subject to Section 12(g) above), 7 (Intellectual Property Ownership and Requirements), 9 (Disclaimers), 11 (Limitation of Liability) and 12 (Miscellaneous Provisions) shall survive any expiration or termination of this Agreement.
- (j) **Miscellaneous.** Any notice or report hereunder shall be in writing to the notice address set forth above and shall be deemed given: (i) upon receipt if by personal delivery; (ii) upon receipt if sent by certified or registered U.S. mail (return receipt requested); or (iii) one day after it is sent if by next day delivery by a major commercial delivery service. The terms of this Agreement shall prevail over any conflicts with terms of a Subscriber purchase order.
- (k) **Amendments; Waivers.** No supplement, modification, or amendment of this Agreement shall be binding, unless executed in writing by a duly authorized representative of each party to this Agreement. No waiver will be implied from conduct or failure to enforce or exercise rights under this Agreement, nor will any waiver be effective unless in a writing signed by a duly authorized representative on behalf of the party claimed to have waived. No provision of any purchase order or other business form employed by Subscriber will supersede the terms and conditions of this Agreement, and any such document relating to this Agreement shall be for administrative purposes only and shall have no legal effect.

We reserve the right to change future agreement terms, conditions, and notices under which Subscription and Services agreement is offered, including but not limited to the future charges associated with the use of GroundWork Monitor. Such changes will become effective five business days after being posted on the GWOS website. When we change these subscription and services agreement terms, we will also modify the "Last modified" date above. We encourage you to review these terms of use periodically.

- (l) **Audit Rights.** With prior notice of at least 10 days, GWOS may audit the use of the GWOS Products in use by Subscriber, provided such audit is during regular business hours; Subscriber is responsible for such audit costs only in the event the audit reveals a discrepancy, of 5% or greater, on the part of Subscriber.
- (m) **Force Majeure.** Neither party shall be liable to the other for any delay or failure to perform any obligation under this Agreement (except for a failure to pay fees) if the delay or failure is due to unforeseen events which occur after the signing of this Agreement and which are beyond the reasonable control of such party, such as a strike, blockade, war, act of terrorism, riot, natural disaster or refusal of a license by a government agency.
- (n) **Government End-Users.** As defined in U.S. Federal Acquisition Regulations (FAR), the GWOS Proprietary Software and accompanying Documentation licensed in this Agreement are deemed to be “commercial items” and “commercial computer software” and “commercial computer software documentation.” Consistent with applicable FAR sections, any use, modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. government shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement. Further, Subscriber represents and warrants that it is not a governmental entity or agency nor a quasi-governmental entity or agency.
- (o) **Links.** The GWOS site may contain information, products, and services provided by third parties and links to the third party web sites. This information and these products, services, and links are provided only as a convenience. GWOS does not make any representations or warranties, express or implied, regarding this information or these products, services, or web sites. Inclusion of any of the foregoing in the Product does not constitute or imply an endorsement, authorization, sponsorship, or affiliation by GWOS.