

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE LAKE CHARLES HARBOR AND TERMINAL DISTRICT
FOR THE
EXPEDITED EVALUATION OF PERMIT APPLICATIONS

THIS MEMORANDUM OF AGREEMENT (MOA) is entered into this 2nd day of February, 2015 by and between the Department of the Army (the Government), represented by the U.S. Army Engineer, New Orleans District (the District Engineer); and the Lake Charles Harbor and Terminal District (hereinafter the "LCHTD"), represented by its Executive Director.

WITNESSETH, THAT:

WHEREAS, under the authority of Section 214 of the Water Resources Development Act of 2000, as enacted in Public Law No. 106-541, as amended (codified in 33 U.S.C. § 2201) (Section 214", the Secretary of the Army (the Secretary), after public notice, may accept and expend funds contributed by non-Federal public entities to expedite the evaluation of permit applications under the jurisdiction of the Department of the Army as per Section 404 of the Clean Water Act 33 U.S.C. §1344; Section 10 of the Rivers and Harbors Appropriation Act of 1899, as amended 33 U.S.C. § 403; ("Section 10"), and hereinafter collectively referred to as the "permit applications";

WHEREAS, in carrying out Section 214, the Secretary shall ensure that the use of funds accepted from non-Federal public entities does not impact impartial decision-making on any permit application, either substantively or procedurally;

WHEREAS, by letter dated December 11, 2013, LCHTD requested the Government to expedite its evaluation of current and forthcoming permit applications for the five to seven large scale LCHTD projects that involve upgrading of existing LCHTD port facilities and/or constructing new additional LCHTD port facilities over the next few years (collectively referred to as the Project);

WHEREAS, LCHTD understands that the Government does not have funds available to expedite the evaluation of such permit applications for the Project;

WHEREAS, LCHTD, on December 11, 2013, indicated its willingness to provide funds necessary to expedite the evaluation of its permit applications;

WHEREAS, the Government issued a Public Notice dated December 23, 2013, regarding its intent to accept and expend funds contributed by LCHTD to expedite the evaluation of permit applications for the Project;

WHEREAS, following review of the comments received in response to the Public Notice dated December 23, 2013, the District Engineer determined on November 10, 2014, that expenditure of funds received from LCHTD to expedite evaluation of permit applications for the project complies with Section 214 and applicable Section 214 guidance of the U.S. Army Corps of Engineers;

WHEREAS, as per Section 214 and applicable Corps of Engineers Section 214 guidance, the Government issued a second Public Notice, dated November 24, 2014, advising the public of the District Engineer's decision to accept and expend funds contributed by LCHTD to expedite evaluation of its permit applications;

WHEREAS, the Government and LCHTD desire to enter into this agreement for the purposes hereinafter stated;

WHEREAS, LCHTD acknowledges that the Government's evaluation of its permit applications must and therefore shall be completely impartial, according to applicable Federal laws and regulations; and

WHEREAS, the Government and LCHTD have the full authority, capacity, and capability to enter into and to perform the obligations of this agreement.

NOW, THEREFORE, the Government and LCHTD agree as follows:

ARTICLE I – PURPOSE AND AUTHORITY

Pursuant to Section 214, this MOA is entered into between Government and LCHTD, under the authority of Section 214, for the purpose of establishing the framework for LCHTD to contribute and for the Government to accept and expend funds contributed by LCHTD to expedite the evaluation of LCHTD's permit applications for the Project. Furthermore, LCHTD understands that providing such funds shall not impact the Government's impartial decision making with respect to such permit applications, either substantively or procedurally.

ARTICLE II – SCOPE OF WORK AND FUNDING

A. The LCHTD will determine the scope of work by identifying from time to time, in writing; those permit application requiring an expeditious evaluation by the Government. Annual funding as determined by Article II. C. below will be provided by LCHTD to address the expeditious evaluations. Funds shall be drawn from the account in accordance with Article IV. A. 2. As of the effective date of this MOA, the total costs for the Government to expedite the evaluation of Section 10 and/or 404 permit applications is currently estimated to be \$100,000 annually.

B. Funds provided by LCHTD will be expended by the Government primarily on direct

labor, overhead, and travel expenses for Government personnel associated with evaluating LCHTD 's permit applications, including all supporting documents and the analysis provided by LCHTD for its applications. For the Section 10 and/or 404 permit, Government activities may include, but are not limited to, application review, permit database entry, drawing corrections, jurisdictional determinations, jurisdictional delineation verifications, functional or conditional assessment verifications, public scoping meetings, Environmental Impact Statement consultant meetings, site visits, public notice preparation, preparation of correspondence; activities related to public interest review; preparation of draft permit decision documents; engineering, technical, legal, and policy analyses; real estate evaluation; risk analysis; clerical, administrative, and support tasks; meetings with LCHTD and other Federal, state, and local entities; permit compliance; mitigation monitoring; preparation of financial reports; technical writing; travel; coordination activities; contracting; and acquisition of GIS data, and any other permit evaluation-related responsibilities that may be mutually agreed upon. The funds provided under this MOA shall not, however, be used to cover the cost of administrative expenses related to real property transactions, including the drafting, negotiating, or issuing of necessary real estate instruments; the cost of enforcement activities; or, the costs of public hearings and of distribution of public notices.

C. Not later than 30 calendar days after execution of this MOA, prior to the Government incurring any financial obligations or performing any work under this MOA, LCHTD shall provide \$100,000 for the first year of the MOA (or portion thereof) to the Government to expedite evaluation of the permit applications for the identified projects by delivering to the District Engineer a check payable to "FAO, USAED, New Orleans (B2)," or by electronically transferring such funds in the manner to be prescribed by the Government. Not less than 60 calendar days prior to the beginning of each subsequent year period, the Government shall notify LCHTD of the funds it requires in the next period of time to be funded by LCHTD. Not more than 30 calendar days after such notification, LCHTD shall provide the Government with the full amount of such required funds, using either of the payment mechanisms prescribed above. If at any time the Government determines that LCHTD must provide additional funds to pay for such work, the Government shall so notify LCHTD of the additional amount required. Within 30 calendar days from receipt of such notice, LCHTD shall provide the Government with the full amount of such additional funds, again using either of the payment mechanisms prescribed above. If the requested funds are not provided, the Government's ability to expedite the review of the subject permit applications in accordance with this Agreement shall be suspended. Thereafter, the Government's review and analysis of the permit applications shall proceed in accordance with normal Federal policy and review processes and available Federal funding until such time as the requested funds are provided by LCHTD in accordance with the terms of this Agreement. If the funds provided by the LCHTD are more than needed to expedite LCHTD permit applications during that fiscal year, the excess shall be applied to the following fiscal year. Within 30 days of the new fiscal year, the LCHTD shall provide funds in an amount equal to the difference between the amount of excess funds applied from the previous year and \$100,000.

D. Within 90 calendar days of the date on which the Government has completed all work under this MOA, or within 90 days of the date that this MOA is terminated under Article IX, the Government shall conduct a final accounting to determine the actual costs of such work and

furnish LCHTD with the written results of the final accounting. Should the final accounting determine that additional funds are required from LCHTD, LCHTD, within 30 calendar days of receipt of written notice from the Government, shall provide the Government with the full amount of such additional required funds, using either payment mechanism prescribed above. If funding needs to expedite LCHTD permit applications exceed \$100,000. in a given fiscal year, USACE will tender a request for additional funds and if those funds are not provided within 30 days, then USACE efforts to expedite review of the permit application will cease until such funds are received. During that period of time, USACE will continue review of the permit application but the schedule for such efforts will be dependent on the availability of Federal funds to support USACE efforts therefore. Should the final accounting determine that LCHTD has provided funds in excess of the required amount, the Government shall refund the excess amount no later than 30 calendar days after to the Government provides the results of the report of final accounting to LCHTD. Such final accounting shall in no way limit LCHTD's obligation to promptly pay for any costs which may become known after the final accounting.

E. LCHTD shall not use funds provided by another Federal agency (or any non-Federal contribution made to match funds provided by another Federal agency) to meet any of its obligations under this MOA, unless the Federal agency providing the funds verifies in writing that the funds may lawfully be used for that purpose.

F. The funds provided under the terms of this Agreement shall not be utilized by the Government in support of its review of any permit application associated with this Project pursuant to Section 14 of the Rivers and Harbors Appropriation Act of 1899, as amended (33 U.S.C. § 408) ("Section 408"). The Government's decision regarding a Section 10/404 permit application under this Agreement shall be subject to the decision rendered by the Government in a related Section 408 permit application. Therefore, it is understood and agreed by the Government and LCHTD that the ability of the Government to expedite its Section 10/404 permit application decision, under this Agreement, may be impacted by the Section 408 permit application review and decision under the normal Federal Section 408 policy and review processes and availability of Federal funds.

ARTICLE III - COORDINATION

To provide for consistent and effective communication between the Government and LCHTD, each party, not more than 30 calendar days after the effective date of this MOA, shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may also be appointed to serve as technical points of contact for the expedited evaluation of the permit applications for the Project.

ARTICLE IV - RESPONSIBILITIES OF THE PARTIES

A. Responsibilities of the Government.

1. The Government shall expedite the evaluation of LCHTD's permit applications for the Project in accordance with the terms and conditions of this MOA, consistent with its obligations under law, regulations, and policies.

2. The Government shall establish an account to track receipt and expenditure of funds contributed by LCHTD. LCHTD provided funds will be drawn from the account by the Government as work progresses on the permit applications.

3. The Government shall provide detailed quarterly progress, financial, and other reports to LCHTD, in accordance with the reporting schedule agreed to by the Principal Representatives. Financial reports shall include information on all funds received and expended and a forecast of upcoming expenditures.

4. The Government shall adhere to the procedures, set forth below, that are designed to ensure independent, objective, and impartial decision-making on LCHTD's permit applications. The permit-issuing official for the Section 10 and Section 404 permits is the District Engineer. To ensure that the funds provided under this MOA by LCHTD will not affect impartial decision-making, the Government will follow these procedures:

a. No funds received under this MOA will be expended by or for the District Engineer to review or act on any LCHTD permit application, in regard to a Section 408 permit application review, or will any such funds be expended by or for the U.S. Army Engineer, Mississippi Valley Division (the Division Engineer) to review and make a recommendation to the Director. If the project proposed by LCHTD triggers a need for a 408 application review, then the 408 review will proceed upon the normal schedule that is possible within available Federal funding for that effort. LCHTD is aware that the typical 408 implementation schedule may not be capable of being expedited, and the USACE decision on the Section 10 and/or 404 permit application under this circumstance, is subject to the time necessary to obtain a Section 408 decision.

b. Draft and final technical documents or draft and final decision documents resulting from the use of funds provided under this MOA, including, but not limited to, jurisdictional determinations, and all reporting nationwide, general, and regional permit verifications, will be reviewed and signed by a reviewer who is not funded by funds provided under the MOA.

c. All final permit decisions on applications for which funds contributed by LCHTD were used will be published on the New Orleans District public web page: <http://www.mvn.usace.army.mil/Missions/Regulatory/Permits.aspx>

d. The acceptance of the funds pursuant to this agreement will advance the time that the action would have taken if the Government's action is solely dependent on the receipt of appropriated Federal funds. In utilizing the funds provided pursuant to this Agreement, the Government will follow all applicable permit-issuing laws, regulations, policies and guidance applicable to Section 10, and Section 404 permits. No prescribed procedures, analyses, decisions, or other activities will be eliminated, curtailed, or omitted for purposes of expediency.

e. The Government will comply with all applicable laws, regulations, policies, and guidance.

f. Funds provided by LCHTD under this MOA shall only be expended to evaluate LCHTD's permit applications for the Project, including compliance activities through the end of the construction period and monitoring of mitigation sites.

B. Responsibilities of LCHTD.

1. Upon execution of this MOA, LCHTD shall provide the funds stated in Article II and ensure participation of all essential personnel within the State of Louisiana during the evaluation of the permits.

2. LCHTD shall coordinate with the Government, through its Principal Representative, a schedule of required submittals and reviews.

3. LCHTD shall comply with 33 C.F.R. §§ 320-332 in preparing its Section 10 and/or Section 404 permit applications.

4. LCHTD shall timely submit, through its Principal Representative, all engineering, environmental, and other technical data or other material prescribed by the Government.

5. Between October 1st and October 10th of each year, LCHTD may provide a letter to the District Engineer detailing LCHTD's level of satisfaction with the Government's performance under this MOA.

ARTICLE V - APPLICABLE LAWS

The Government and LCHTD, in carrying out their respective obligations under this MOA, shall comply with all requirements of applicable Federal and state laws, and implementing regulations, policies and guidance.

ARTICLE VI - DISPUTE RESOLUTION

The parties agree that, in the event a dispute between them arises as to the performance of any function under this MOA, they will use their best efforts to resolve the dispute by informal means, including, without limitation, mutually agreeable, non-binding alternative dispute resolution processes; provided, however that a dispute relating to a final decision by the Government on a LCHTD permit application shall not be subject to resolution by such means. The existence of a dispute shall not excuse the parties from performing their obligations under this MOA.

ARTICLE VII - COMMUNICATIONS

A. Any request, demand, or other communication required or permitted to be given under this MOA shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to LCHTD:

Executive Director
Lake Charles Harbor and Terminal District
751 Bayou Pines East, Suite P
Lake Charles, LA 70601

If to the Government:

District Engineer
U.S. Army Corps of Engineers
New Orleans District
7400 Leake Avenue
New Orleans, LA 70118-3651

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or 7 calendar days after it is mailed.

ARTICLE VIII - MISCELLANEOUS

A. Other Relationships or Obligations. This MOA shall not affect any pre-existing or independent relationships or obligations between LCHTD and the Government.

B. Severability. If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and effect, to the fullest extent permitted by law.

ARTICLE IX - AMENDMENT, MODIFICATION, AND TERMINATION

A. This MOA shall be modified to conform to changes in Federal law, and it may be amended, by written agreement of the parties, to conform to changes in the guidance applicable

to Section 214 or for other reasons. Either party may terminate this MOA by providing written notice to the other party. Such termination shall be effective 60 calendar days following such notice, unless a later date is stated. Upon termination of this MOA, LCHTD shall remain responsible for all costs properly incurred by the Government under this MOA and for the costs of closing out or transferring any on-going contracts. If this MOA is terminated prior to the Government's issuance of any permits for the Project, the Government's remaining work on LCHTD's permit applications shall progress according to the availability of appropriated funds, subject to other constraints imposed by law, regulation, or Government policy.

B. Termination of this MOA shall not relieve LCHTD of liability for obligations previously incurred by the Government in connection with the review of permit applications for the Project.

IN WITNESS WHEREOF, the parties have executed this MOA, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

LAKE CHARLES HARBOR AND
TERMINAL DISTRICT

BY:



RICHARD L. HANSEN
Colonel, Corps of Engineers
District Engineer

BY:



WILLIAM J. RASE, III
Executive Director

DATE:

2 February 2015

DATE:

1/23/15

CERTIFICATE OF AUTHORITY

I, Michael Dees, do hereby certify that I am the principal legal officer of the Lake Charles Harbor and Terminal District, that the Lake Charles Harbor and Terminal District (LCHTD) is a legally constituted public body with full authority and legal capability to perform the terms of the Memorandum of Agreement between the Department of the Army and the Lake Charles Harbor and Terminal District in connection with the acceptance of Section 214 funds for the expedited evaluation of permit applications for five to seven large scale LCHTD projects, involving the upgrade of existing LCHTD port facilities and/or the construction of new additional LCHTD port facilities (collectively referred to as the Project), and that the persons who have executed this Agreement on behalf of the Lake Charles Harbor and Terminal District have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 23rd day of January 2014



MICHAEL DEES
General Counsel

Lake Charles Harbor and Terminal District

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



WILLIAM J. RASE, III
Executive Director
Lake Charles Harbor and Terminal District

DATE: 1/23/15