

COOPERATIVE AGREEMENT

AND

MEMORANDUM OF UNDERSTANDING

BETWEEN THE

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

UNITED STATES ARMY CORPS OF ENGINEERS, AND

FEDERAL HIGHWAY ADMINISTRATION,

RELATIVE TO

PRIORITY HIGHWAY CONSTRUCTION PROJECT REVIEWS

BY THE UNITED STATES ARMY CORPS OF ENGINEERS

IN

NORTH DAKOTA

JANUARY 2013

This Cooperative Agreement and Memorandum of Understanding (Agreement) is between the North Dakota Department of Transportation (NDDOT), United States Army Corps of Engineers (USACE), and Federal Highway Administration (FHWA), hereinafter referred to as the parties.

This Agreement sets forth the responsibilities of the parties relative to priority review of highway construction projects, with the goal of achieving timely design and implementation of adequate, safe, environmentally sound and economical highway improvements while also assuring such design and implementation are done in accordance with the Federal statutes that USACE administers.

WHEREAS, authority for this Agreement is pursuant to The Chiefs' Economy Act (10 U.S.C. 3036(d)) and Section 214 of the Water Resources Development Act of 2001 (P.L. 106541, subsequently extended by P.L. 108-137, P.L. 109-99, P.L. 109-209, P.L. 109-434, and P.L. 110-114); and

WHEREAS, Title 23 United States Code Section 139. Efficient Environmental Reviews for Project Decisionmaking, provides for a coordinated environmental review process and authorizes the use of Federal-aid highway funds to expedite transportation-related project delivery; and

WHEREAS, NDDOT has a substantial number of highway projects that USACE (Omaha District) has legal responsibility to review pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act; and

WHEREAS, the parties have determined that it would be mutually beneficial to supplement USACE staffing above existing levels; and

WHEREAS, the parties have determined that the supplemental staffing referenced above would provide priority review of those Federal-aid and State-aid NDDOT highway projects contemplated or under design by NDDOT and will reduce the customary time for reviews that fall within the legal responsibility of USACE; and

WHEREAS, the State-aid NDDOT highway projects reviewed under this Agreement are those projects that may receive Federal-aid funding or have another type of federal nexus; and

WHEREAS, NDDOT is willing to fund supplemental USACE support staff dedicated to work on NDDOT permit actions and issues; and

WHEREAS, FHWA agrees that NDDOT's apportioned Federal-aid highway funds may be used to support this Agreement and would be an eligible source for funding at applicable Federal-aid match rates; and

WHEREAS, NDDOT and USACE have certified that NDDOT has sufficient work associated with the processing of Department of the Army permits to fully employ one employee for the life of this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the signatory parties to this Agreement concur with the following responsibilities and terms,

I. Agency Responsibilities

A. NDDOT shall:

1. Program a Federal-aid project to track costs and provide advance State payment to USACE for the costs contemplated by this Agreement, as listed below. It is anticipated that total annual funds needed for these services will not exceed \$198,175 in Fiscal Year 2013. (See Attachment A.). Actual costs may be less than the estimated amount, depending on the amount of travel needed to provide the priority review contemplated by this Agreement.
  - a. Salary and benefits (including paid Federal holidays) for one (1) full-time employee (meeting the professional standards described in Attachment B), adjusted annually to cover appropriate cost of living and performance-based salary increases within the employee's pay grade under the General Schedule pay scale. Permanent Change of Station (PCS) expenses for the

employee, if needed, will be covered by NDDOT. PCS expenses will be limited to \$60,000. Additional positions and subsequent funding may be added under this Agreement if all parties to the agreement find that the workload warrants additional USACE (Omaha District) personnel.

- b. Actual burdened overhead rate for USACE, including:
    - i. Effective Rate
    - ii. Departmental Overhead Rate
    - iii. General Administrative Rate
    - iv. Other, as appropriate
  - c. Credit hours, compensatory and overtime labor compensation, training, travel, and per diem at Federal Government rates, as needed to support the priority review contemplated by the Agreement.
2. Upon receipt of a signed Agreement modification or task order, transmit an advance payment equal to either the annual total of funds needed to support the services contemplated by this Agreement or the additional funds needed to pay for any modification within 30 days. Subsequent start date for annual funding will be 1 October. Funds will be transmitted electronically.
  3. Beginning 1 January 2013, pay USACE (Omaha District) the annual amount for Federal Fiscal Year 2013, and all Federal fiscal years on 1 October thereafter, on an annual basis for all services set forth herein.
  4. If notified by USACE (Omaha District) that additional funds are needed (because actual costs exceed the amount of funds available), either provide the additional funds to USACE (Omaha District), require that the scope of work be limited to that which can be paid for by the then-available funds, or direct the termination of the Agreement pursuant to Section IV.
  5. Review quarterly USACE submittals of actual account of expenditures for salaries, benefits, travel, and indirect costs, as drawn against advance NDDOT payment in support of work contemplated by this Agreement, and review quarterly USACE reports of tasks completed.
  6. Request a meeting to clarify the account of expenditures within ten (10) working days if NDDOT disagrees with the USACE submittals. In the event of a disagreement over the account of expenditures, NDDOT pledges to negotiate

in good faith towards a reconciliation of the disputed amount.

7. Reconcile and adjust Federal-aid project funding and/or advance NDDOT payment to USACE at the time of Agreement extension, modification, or termination and, upon completion of this Agreement, make any adjustments needed in Federal share payable as consistent with 23 U.S.C. 120.
8. Hold meetings as necessary with USACE to establish priorities and evaluate work performed under the agreement.

B. USACE shall:

1. Supplement its existing staff, which currently processes NDDOT and other permits on a routine basis, by hiring one professional employee, as detailed in Attachment B, and use the funds provided under this Agreement to pay the costs of this individual's salary, associated benefits (including Permanent Change of Station, if needed), and actual burdened overhead rate; any needed training, as determined by USACE, and reimbursable travel expenses in accordance with the Federal Travel Regulations, 41 C.F.R. Chapter 301, that are hereby incorporated into this Agreement by reference.
2. Promptly notify the NDDOT of the amount of additional funds needed if USACE (Omaha District) forecasts its actual costs will exceed the amount of funds available as mentioned in paragraph I.A.4., the NDDOT shall then either provide the additional funds to USACE (Omaha District), require that the scope of work be limited to that which can be paid for by the then-available funds, or direct the termination of the Agreement pursuant to Section IV.
3. Include FHWA and NDDOT on the interview panel and fully consider their comments on the personnel selection for the position. Conditions for the personnel selection for the position will include the ability of the person to recommend sound permit decisions, jurisdictional determinations, and jurisdictional delineations.
4. Ensure that the work time of the supplemental staff funded by this Agreement is dedicated to work on the priority projects identified by the NDDOT in accordance with the coordination procedures defined in Section II (below).

5. Ensure that the employee identified in Attachment B keeps a bi-weekly time record identifying the number of hours spent working on tasks related to highway projects and any other work tasks such as those listed under Section II (below) relative to coordination. These records shall account for 100 percent of the time worked by said supplemental staff, including any time spent on non-NDDOT work. In addition, USACE shall keep accurate accounting records of all receipts and disbursements of all funds received pursuant to this Agreement and produce such records and reports for examination on a quarterly basis as required by NDDOT or FHWA and shall permit extracts and copies to be made by these other signatory agencies or their duly authorized representatives. USACE shall keep records substantiating hours and costs billed pursuant to this Agreement for a period of at least three (3) years after the final billing is submitted. These records shall be subject to audit in accordance with the Single Audit Act.
6. Hold quarterly meetings with NDDOT and FHWA to evaluate work performed under this Agreement during the previous quarter.
7. Upon receipt of initial advance NDDOT payment, fill the supplemental positions as expeditiously as possible to support work contemplated by this Agreement.
8. Subject to the availability of funds, return unused funds to NDDOT at the termination of this Agreement.
9. In the event of disagreement over statements of expenditure, negotiate in good faith towards reconciliation of the disputed amount. Continue the priority review of highway construction projects throughout negotiations as long as current advance State payment is sufficient to cover costs. USACE will credit NDDOT for any amount determined to be an overstatement of USACE expenses. Any funds advanced to USACE by NDDOT in excess of the actual costs incurred in a billing period shall apply toward USACE's expenses in the following billing period.
10. Develop internal procedures to implement this Agreement and modify as necessary.

C. FHWA shall:

1. Approve programming a Federal-aid project at the request of NDDOT to accomplish the work contemplated by this Agreement at the applicable Federal-aid reimbursement rate. Any requirement for the payment or obligation of funds by FHWA-North Dakota pursuant to this MOU will be subject to availability or appropriated funds. No provision herein shall be interpreted to require any obligation or payment of funds in violation of the Anti-Deficiency Act (31 U.S.C. §1341).
2. Under the authority of 23 U.S.C. 139, reimburse NDDOT the total amount of Federal share payable for any project programmed (including advance payments) to support this Agreement upon obtaining notification of its execution.
3. Make available to the USACE staff, database, and office information that would be used to determine impacts of highway construction projects.

II. Coordination

- A. On a monthly basis and as needed, NDDOT will establish a priority listing of projects for USACE which will guide the USACE supplemental staff efforts in the priority review process.
- B. On a quarterly basis, NDDOT will meet with the USACE to establish priority and evaluate work performed under this agreement.
- C. Both NDDOT and USACE agree that reasonable access will be provided to working level staff of the other agency in an effort to minimize the need for formal meetings.
- D. While the focus will be to review permit decisions for priority NDDOT projects, USACE supplemental staff may also be involved in other tasks which support agency coordination and which serve to expedite the implementation of NDDOT's highway construction program and compliance with the statutes and regulations for which USACE bears responsibility. Examples of other tasks which may be assigned include, but are not limited to:
  1. Attend pre-application meetings and preliminary engineering reviews (as travel

- budget and workload allow),
2. Participate in interagency scoping meetings and Section 404 merger meetings,
  3. Comment on project alternatives and mitigation plans, review and comment on biological assessments, and
  4. Develop and implement programs to increase efficiency of transportation project permit processing, such as wetland mitigation banks, in-lieu fee mitigation agreements, regulatory training of NDDOT personnel and consultants, and regional general permits.
- E. To the extent funding is available USACE may direct work assignments to other personnel and charge that work according to this agreement. This option would be utilized only if beneficial to both agencies and after consultation between agencies determines work priorities are necessary to be completed in event of the employee absence.
- F. To the extent NDDOT workload allows and USACE funding is available the employee may be directed by the USACE to work on assignments other than NDDOT projects and charge that work to the appropriate USACE account. This option would be utilized only if beneficial to both agencies and after consultation between agencies.

### III. Performance Objectives

- A. NDDOT, USACE, and FHWA will review existing interagency coordination processes and formulate recommendations to improve procedures and increase efficiency within three (3) months of the time that the individual in the position to be funded by the Agreement reports for duty.
- B. USACE agrees to meet the performance goals established as defined in Attachment C: and.
  1. Provide early coordination and prioritization of highway project permit applications.
  2. Supplement one full-time position dedicated to work on Federal-aid and State-aid highway construction projects contemplated or under design by NDDOT.
  3. Inform NDDOT if project evaluation may exceed standard processing times

due to, but not limited to, issues such as required (Federal) Endangered Species Act, coordination Section 106 of the National Historic Preservation Act, jurisdictional determinations that are elevated, Section 404(b) (1) Guidelines compliance, controversial public interest factors, litigation, etc.

C. NDDOT agrees to meet the following goals:

1. Prepare and submit to USACE a completed permit application together with drawings as currently required by USACE regulations set forth at 33 CFR 325, nationwide permits, and letters of permission (LOP), incorporated herein by reference.
2. Provide all information necessary for evaluation of permit applications.
3. Give full consideration to modifying the submitted permit application in accordance with the comments provided by USACE or other approving agencies in the course of permit review or terminate and withdraw the permit application.

IV. General Terms

A. Length of Agreement. This Agreement expires on 1 October 2016, unless extended or terminated as provided in paragraphs IV.B. or IV.C. below.

B. Modification and Extension. This Agreement may be modified, amended, or extended by the mutual agreement of the signatory parties.

C. Termination. This Agreement may be terminated by either NDDOT or USACE upon six (6) months' written notice to the POC of the other party if the party requesting termination has determined that the other party has not substantially fulfilled the responsibilities and terms of the Agreement after being provided with notice and ninety (90) days to remedy the situation. If either NDDOT or USACE wishes to terminate this agreement for any reason other than deficient performance, the party wishing to terminate shall provide written notice to the other party indicating the intent to terminate the agreement six (6) months from the date of receipt of the written notice, unless both parties agree to an alternate date.

D. Excess Funds (if Agreement is terminated). In the event of termination, all

unobligated funds shall be refunded to NDDOT within sixty (60) days after the effective date of termination. Neither party shall incur any new obligations after the effective date of termination and shall cancel as many obligations as possible. Full credit shall be allowed for each party's expenses and all non-cancelable obligations properly incurred up to the effective date of termination. In the event of termination of this Agreement, USACE (Omaha District) shall conduct a final accounting. If additional funds are necessary, USACE (Omaha District) shall be entitled to compensation for the work performed prior to receipt of notice of termination, less any funds previously paid by or on behalf of NDDOT. NDDOT shall not be liable for any further claims, and the claims submitted by USACE shall not exceed the total amount of consideration stated in this Agreement. Should USACE (Omaha District) be unable to complete the provision of this Agreement for any reason, all monies provided by NDDOT which prove to be cancelable obligations or unallowable shall be refunded to NDDOT.

- E. By signature below, NDDOT certifies that the individuals listed in this Agreement as representatives of NDDOT are authorized to act in their respective areas for matters related to this Agreement. All parties acknowledge that any person executing this Agreement in a representative capacity hereby represents that he/she has been duly authorized by his/her principal to execute this Agreement on such principal's behalf.

F. Points of Contact/Project Managers. The title of the point of contact and current office holder for each signatory agency is listed below.

1. NDDOT:

Name: Mark S. Gaydos  
Title: Director, Environment and Transportation  
Address: Services, North Dakota Department of  
Transportation  
608 East Boulevard Avenue  
Bismarck, North Dakota 58505-0700  
Tel: (701) 328-4417  
Fax: (701) 328-0310  
E-mail: [mgaydos@nd.gov](mailto:mgaydos@nd.gov)

2. USACE:

Name: Martha S. Chieply  
Title: Chief, Regulatory Branch  
Address: Omaha District, US Army Corps of Engineers  
ATTN: CENWO-OD-R  
1616 Capitol Avenue, Suite 9000  
Omaha, Nebraska 68102-9000  
Tel: (402) 995-2451  
Fax: (402) 995-2454  
E-mail: [Martha.S.Chieply@usace.army.mil](mailto:Martha.S.Chieply@usace.army.mil)

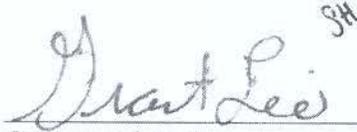
3. FHWA:

Name: Wendall L. Meyer  
Title: Division Administrator  
Address: Federal Highway Administration  
North Dakota Division  
1471 Interstate Loop  
Bismarck, North Dakota 58501-0567 (701) 250-  
4204  
Tel: (701) 250-4395  
Fax: (701) 250-4395  
E-mail: [Wendall.Meyer@fhwa.dot.gov](mailto:Wendall.Meyer@fhwa.dot.gov)

G. During the performance of this Agreement, the parties agree to abide by the terms of Executive Order 11246 on nondiscrimination and will not discriminate against any person because of age, race, color, religion, sex, or national origin. The participants will take affirmative action to ensure that applicants are employed without regard to their age, race, color, religion, sex, or national origin.

- H. No member of or delegate to Congress, or appointed transportation official or commissioners, shall be admitted to any share or part of the funds of this Agreement or any benefit that may arise therefrom; but this provision shall not be construed to extend to this Agreement if made with a corporation for its general benefit.
- I. All contracts to be developed and awarded pursuant to this Agreement, including all designs, plans, specifications, estimates, construction, utility relocation work, right-of-way acquisition procedures, acceptance of work and procedures in general, shall at all times conform to the applicable Federal and state laws, rules, regulations, orders and approvals, including procedures and requirements relating to labor standards, equal employment opportunity non-discrimination, compliance with the American with Disabilities Act, anti-solicitation, information, auditing and reporting requirements.
- J. Continuation of Existing Responsibilities
  - 1. The parties to this Agreement are acting in an independent capacity in the performance of their respective legally authorized functions under this Agreement, and none of the parties' employees are to be considered the officer, agent, or employee of another party, to include the supplemental staff to be hired by USACE to support priority review of NDDOT highway construction projects.
  - 2. This Agreement shall not abrogate any obligations or duties to comply with the regulations promulgated under the 1973 (Federal) Endangered Species Act, as amended; the 1958 (Federal) Fish and Wildlife Coordination Act, as amended; the National Environmental Policy Act of 1969; the (Federal) Clean Water Act of 1977, as amended; or any other Federal statute or implementing regulations.

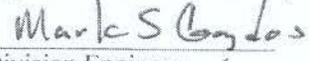
Signatory Participants

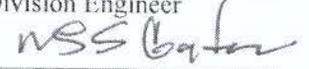
 <sup>SH</sup>

Grant Levi, P.E.  
Interim Director  
North Dakota Department of  
Transportation

Date 1/10/13

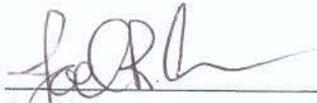
Approved as to substance by:

  
Division Engineer



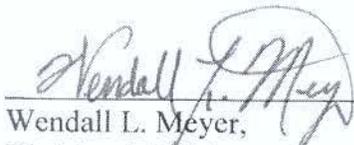
Signature

1/9/13  
Date



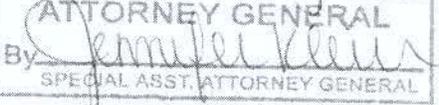
Joe R. Cross  
Colonel, Corps of Engineers  
District Commander

Date 1/23/13



Wendall L. Meyer,  
Division Administrator  
North Dakota Division  
Federal Highway Administration

Date 1/9/13

FORM JK.  
APPROVED as to execution this  
10<sup>th</sup> day of January 2013  
ATTORNEY GENERAL  
By   
SPECIAL ASST. ATTORNEY GENERAL

ATTACHMENT A

Cost Estimate

Labor (approx. \$77,983 (rounded up), assuming a former GS-12/5)

Fully burdened rate/salary (based on 2087 hours a year and a total labor multiplier of 2.39; includes holidays and paid benefits)	\$ 186,379.37
+ 0.5% est. cost of living adjustment for 2014 (effective in January 2014)	\$ 931.90
+ 1.0% award +/- (if applicable)	\$ 1,863.79
Overtime	\$ 2,000.00
Total Estimated Labor	\$ 191,175.06
Training (assuming one PROSPECT-type course per year)	\$ 2,000.00
Travel (for training and for visiting project sites*)	\$ 5,000.00
Computer/supplies/materials (to be paid by Corps)	\$ 0.00
ESTIMATED TOTAL COST TO SUPPORT ONE FTE**:	\$ 198,175.06 ***

\* USACE employee is permitted to travel in State-provided transportation when working on projects covered by this position.

\*\* FTE = Full-time equivalent position.

\*\*\* Total will be adjusted annually to account for cost of living adjustment.

## ATTACHMENT B

### Professional Standards for Supplemental Staff

One (1) specialist with experience and/or education in engineering, biology, natural resources, or other related environmental science. Working knowledge of Section 404 of the (Federal) Clean Water Act, Section 10 of the Rivers and Harbors Act of 1899, the National Environmental Policy Act, the (Federal) Endangered Species Act, the National Historic Preservation Act, and the Joint Federal Manual for the Identification and Delineation of Wetlands is essential. In addition, the ability to travel, occasionally overnight, is mandatory. This employee will be qualified to be paid under the General Schedule pay scale.

## ATTACHMENT C

### PERFORMANCE INDICATORS

### COOPERATIVE AGREEMENT

#### PRIORITY HIGHWAY CONSTRUCTION PROJECT REVIEWS

1. The USACE agrees to meet the goals established by the following Performance Indicators:
  - a. USACE will provide response to NDDOT solicitation of views and jurisdictional determinations requests within 21 days of submission 75% of the time.
  - b. USACE will provide a preliminary response to NDDOT on all applications within 10 days of submission 85% of the time. Preliminary response will include a status update on the expected level of complexity and the estimated future action that will be needed on the permit. The USACE will also include their forecasted delivery date for the action.
  - c. USACE will complete processing of 75% of the nationwide (General) permit applications within 30 days of receipt of a completed application from NDDOT, unless otherwise previously indicated or noted as an exception. Exceptions may include complex issues or delay because of CWA Section 401 certification, Section 106 of the National Historic Preservation Act (NHPA) and/or Section 7 of the Endangered Species Act (ESA) consultation. It is understood the Corps stated objective is 45 days 90% of the time.
  - d. USACE will complete processing of 50% of individual (Standard) permits applications within 90 days of receipt of a completed application from NDDOT, unless otherwise previously indicated or noted as an exception. The USACE will inform NDDOT if project evaluation may exceed standard processing times because of CWA Section 401 certification, Section 106 of the NHPA, Section 7 of the ESA, extended comment period for public notice, untimely submittal of information or comments, or other environmental review. It is understood the Corps stated objective is 120 days or less 50% of the time.
  - e. USACE will strive to perform compliance inspections on general permit as well as individual permit projects, and their compensatory mitigation. Nationwide goals are for the USACE to perform compliance inspections on at least 10 % of all individual permits in construction; and at least 5% of all general permit projects in construction. USACE shall perform compliance inspections of 5% of compensatory mitigation sites required by the USACE.

- f. USACE will attend meetings 75% of the time when given at least seven day notice. Meetings may include project development reviews, interagency scoping, and mitigation plans and site reviews, including office and field meetings.
  - g. USACE will provide monthly updates to NDDOT providing lists of work items performed/completed. The monthly updates will include the dates the work item was received, completion date, or the forecast completion date if the project may exceed agreed upon processing times. Any comments on additional information/items needed to complete work item will also be included in USACE monthly updates.
  - h. USACE will track the above-listed performance indicators and submit quarterly report of activities. Any performance indicators that are out of tolerance for two consecutive reporting periods will be reported at the Quarterly Agency Head Meeting.
  - i. USACE will provide to NDDOT a monthly work calendar/schedule of the supplemental staff. This will help facilitate work load prioritization.
2. USACE, NDDOT, and FHWA will work to improve process and quality of technical assistance through a joint annual review of qualitative performance indicators. Results will be reported at the Quarterly Agency Head Meeting. *All items will be rated on the following scale: 1 = dissatisfied, 2 = satisfied, 3 fully satisfied.*
- i. Requested technical assistance is beneficial
  - ii. Comments have a positive effect on the quality and completeness of NDDOT environmental documents and compliance with regulations.
  - iii. Comments have a positive effect on project designs (i.e. cost effective, accelerates delivery, reduces impacts with same function).
  - iv. Comments identify significant procedural or environmental issues, where they exist.
  - v. Generates ideas and suggest compromises and/or solutions to the issues raised by the agency or other parties.
  - vi. Facilitate approval of solutions to project issues.
  - vii. Resolve problems through open dialogue and at the lowest possible level.
  - viii. Contribution to interagency relationships.
3. These performance indicators may be revised by mutual agreement of all Parties without requiring formal amendment to this agreement.