

**MEMORANDUM OF AGREEMENT  
BETWEEN THE TENNESSEE DEPARTMENT OF TRANSPORTATION, AND  
UNITED STATES ARMY CORPS OF ENGINEERS, FOR THE  
INTERAGENCY FUNDING OF REVIEW POSITIONS**

**WHEREAS**, this Memorandum of Agreement (Agreement) is between the Tennessee Department of Transportation (TDOT), and the Nashville District of the United States Army Corps of Engineers (USACE) (hereinafter referred to as "the Parties"); and

**WHEREAS**, this Agreement sets forth the responsibilities of the Parties relative to priority review of projects covered under the Tennessee Environmental Streamlining Agreement (TESA) as executed in 2014, or as may be amended, with the goal of achieving timely review of adequate, safe, environmentally sound and economical highway improvements while also ensuring such improvements are made in accordance with the Federal statutes administered by the USACE; and

**WHEREAS**, Section 214 of the Water Resources Development Act (WRDA) of 2000, as amended (codified at 33 U.S.C. § 2352), provides that the Secretary of the Army (Secretary), after public notice, may accept and expend funds contributed by a non-Federal public entity to expedite the evaluation of a permit application of that entity related to a project or activity for a public purpose under the jurisdiction of the Department of the Army (DA); and

**WHEREAS**, TDOT has programmed a substantial number of transportation projects that will require authorizations from the USACE for impacts to "waters of the United States" pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act; and

**WHEREAS**, TDOT desires that the USACE provide an expedited review of TDOT DA permit applications, proposed mitigation banks and sites, and permitted projects (hereinafter, collectively, "TDOT Projects"); and

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

**WHEREAS**, the Nashville District Commander has determined that expenditure of funds received from TDOT will be in compliance with WRDA Section 214, as amended, and a public notice dated December 17, 2015, was issued regarding the District Engineer's intent to accept expend funds contributed by non-Federal public entities for the purposes described above; and

**WHEREAS**, TDOT has determined USACE involvement in the environmental analysis of proposed transportation projects undertaken by TDOT or its sub-recipients to be in the public interest; and

**WHEREAS**, the Parties have determined that supplemental USACE staff dedicated to the review of TDOT Projects will reduce the customary time for reviews required under the statutory responsibility of USACE; and

**WHEREAS**, TDOT agrees to fund supplemental USACE staff dedicated to work on TDOT Projects; and

**WHEREAS**, TDOT would request reimbursement from the Federal Highway Administration (FHWA) for federal-aid eligible activities related to the expedited review of federal-aid-eligible projects.

**NOW THEREFORE**, the signatories agree as follows:

## I. DEFINITIONS

A. "TDOT Projects" means TDOT Department of the Army permit applications and associated actions, proposed mitigation banks and sites, and permitted projects.

B. "Funded Employee" means an USACE employee whose employment is completely funded by TDOT (see Resources in paragraphs II.A.1. a-d below) and whose responsibilities are dedicated to the review of TDOT Projects.

## II. TDOT RESPONSIBILITIES

### A. RESOURCES

1. Program a Federal-aid project and provide payment to USACE for the costs to support staff dedicated to the review of TDOT Projects as contemplated by this Agreement. TDOT shall obtain funds to cover two (2) full-time employees. The cost of funding to USACE shall include all fully burdened salary-related costs assessed by USACE. The total funds needed for these services would not exceed \$550,000.00. Prior to each subsequent budget cycle, TDOT will review USACE cost proposals for future budget cycles. Annual budgets submitted by USACE will reflect the costs of appropriate salary step-increases, salary awards, and salary cost of living allowances within the employee's pay grade under the General Schedule (GS) pay scale, and administrative cost adjustments.

Allowable costs include but are not limited to the following:

- a. Salary and benefits (including paid Federal holidays) for two (2) permanent, full-time USACE Project Managers (Funded Employees) for the length of this Agreement;
- b. Actual burdened overhead rate carried by the Nashville District, including Effective Rate, Departmental Rate, General and Administrative Rate, Training and Travel and other items as appropriate;
- c. Credit hours and any necessary compensatory and overtime labor compensation;
- d. Cost of a leased USACE fleet vehicle;

### B. PAYMENTS

1. TDOT shall adhere to its obligations as set forth in the Agreement and will make payments to the USACE for expenses associated with Funded Employees. Payment will be made within 45 days of receiving an invoice from USACE.

2. Upon execution of this Agreement, transmit an advance payment equal to the whole amount of the approved FY2017 budget to support the services provided in this Agreement.

3. Upon receipt of future budget estimates, TDOT shall within 90 days transmit an advance payment to cover budgeted expenditures for one year's program support.

4. TDOT will review quarterly USACE submittals (see the Quarterly Project and Expenditures Report described in Section III.H) documenting actual account of expenditures for the items as listed above in support of work contemplated.

5. If TDOT disagrees with the USACE's Quarterly Project and Expenditures Report, TDOT will, within twenty (20) working days of receipt of the Report, request a meeting, confer, and collaborate to resolve the account of expenditures.

6. If USACE forecasts that its actual costs will exceed the amount of funds available, it shall promptly notify TDOT of the amount of additional funds necessary. TDOT shall either provide the additional funds to USACE, 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 this Agreement pursuant to paragraph V.C. of this Agreement. If TDOT elects to provide additional funds to USACE, USACE shall promptly send an invoice for the required amount to TDOT. TDOT shall make payments via electronic funds transfer within forty-five (45) days of receipt of such invoices.

### C. COORDINATION

1. TDOT shall request and hold meetings with USACE to discuss projects, establish priorities and evaluate work performed under the Agreement. These may include:

a. Pre-application meetings with the USACE for each Project, as deemed necessary, for application review and to benefit project delivery.

b. Quarterly project scheduling meetings, or more frequently if deemed necessary, with USACE to discuss project priorities, pending applications, and anticipated submittals.

c. Annual Leadership meetings, or more frequently if deemed necessary, to evaluate the timeliness of work performed under this Agreement during the previous period. USACE performance goals as defined in paragraph III.F of this Agreement will be reviewed and evaluated.

d. Other meetings, as necessary to provide information on TDOT projects, including corridor plans, location studies, transportation area wide studies, and other transportation planning studies in order to identify USACE concerns and comments, and improve project planning.

2. TDOT shall provide reasonable access to TDOT working-level staff in an effort to minimize the need for formal meetings.

3. TDOT acknowledges that full-time Funded Employees under this Agreement will be required to attend USACE staff meetings and to complete USACE mandated training, and that these and similar work-related items are provided for and reimbursable under this Agreement.

4. TDOT shall provide USACE with pertinent project information for timely application review, including mapping, National Environmental Policy Act (NEPA) documentation, mitigation plans, documentation satisfying Section 106 of the National Historic Preservation Act (Section 106), documentation satisfying Section 7 of the Endangered Species Act (Section 7), or other appropriate information, as necessary and required.

### D. TRAINING

TDOT shall identify internal training on transportation planning, transportation plan reading, transportation project development process, project scheduling, transportation engineering and other program support activities as may be beneficial to the Funded Employees in the execution of their work on TDOT permit applications. Opportunities to attend such training shall be communicated to USACE.

## E. PERFORMANCE

1. TDOT will track the review of permit applications to monitor the effectiveness of this Agreement. TDOT internal tracking data shall be compared with data provided in the USACE Quarterly Project and Expenditures Report (see Section III.H) to identify any discrepancies. The TDOT tracking data will be shared and discussed in the quarterly project coordination meetings.
2. Following guidance provided by USACE supplemental staff, prepare and submit complete permit applications for all types of permits.
3. Following guidance provided by USACE supplemental staff, modify or withdraw permit applications as may be best suited under the circumstances to meet the requirements of applicable law.

## III. USACE RESPONSIBILITIES

### A. RESOURCES

1. Employees will be hired using U.S. Government, Army, and USACE hiring and employment laws and rules, will supplement its Regulatory Division staff by hiring two employees, one at the GS-12 and one at the GS-13 level, with the knowledge, skills and abilities described in **Attachment A**. Employees will be dedicated to the review of TDOT Projects under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.
2. Ensure that the work time of Funded Employees is dedicated exclusively to TDOT Projects identified in accordance with the defined coordination procedures or other activities as outlined in paragraphs II.C. and III.F of this Agreement, as well as any permit compliance work associated with permitted TDOT Projects and any attendant required training and general personnel responsibilities.
3. The Funded Employees will be physically located in the Nashville District Office or a field office within the district, unless, by mutual agreement of all Parties, it is determined that delivery functions would be served more efficiently by other physical duty locations.

### B. DUTIES

1. Examples of tasks which all Parties agree are within the expected job duties of the Funded Employees include, but are not limited to:
  - a. Provide timely review on permit applications submitted by TDOT.
  - b. Support process improvements to increase the efficiency of review of TDOT permit applications and decision-making.
  - c. Provide comments on assessment of project alternatives necessary to satisfy Least Environmentally Damaging Practicable Alternative requirements.
  - d. Provide comments regarding project and mitigation alternatives and the screening of alternatives according to USACE regulations.
  - e. Participate in transportation project interagency scoping meetings.
2. The Funded Employees shall be responsible for addressing the requirements for the review of all on-going and future work associated with TDOT mitigation sites. Each of the positions shall have responsibilities regarding these activities. Newly proposed mitigation sites will be reviewed in a timely fashion and in accordance with USACE processes and procedures. Monitoring reports shall be reviewed in a timely manner to allow TDOT to make site changes or alterations, as deemed necessary. Where feasible in light of project priorities established during

coordination meetings, reviews shall be scheduled to identify any changes or alterations before the start of the next growing season.

#### C. ACCEPTANCE OF TDOT PROGRAMMATIC AGREEMENTS

TDOT and FHWA have several programmatic agreements that have been developed with other resource agencies as a means to reduce paperwork and improve program delivery while complying with all appropriate laws and regulations. USACE acknowledges that the following TDOT and FHWA programmatic agreements exist and are incorporated by reference into this Agreement. These agreements include:

1. Programmatic Categorical Exclusion Agreement with TDOT  
Establishes criteria for which FHWA is not required to approve Categorical Exclusions for projects identified in 23 CFR §771.117(d).
2. MOU with Tennessee Historical Commission (State Historic Preservation Office) for Federally Funded or Permitted Minor Transportation Projects
3. MOA with Tennessee Department of Environment and Conservation  
Streamline TDOT projects and activities which typically result in no adverse effects to state listed plant species in Tennessee.
4. MOA with US Fish and Wildlife Service  
Establishes activities which typically result in no adverse effects to threatened/endangered plant and animal species and/or their critical habitats in Tennessee
5. As appropriate, other programmatic agreements developed and entered into by TDOT and FHWA during the period this Agreement is in effect, provided the Parties to this Agreement agree in writing to their inclusion herein.

#### D. COORDINATION

1. Funded Employees will participate in meetings including, but not limited to:
  - a. Pre-application meetings.
  - b. Quarterly project scheduling meetings, or more frequently if deemed necessary.
2. USACE leadership shall attend annual leadership meetings with TDOT to evaluate work performed under this Agreement during the previous period.
3. Funded Employees shall alert TDOT staff to changes to statutes, regulations and guidance during the term of this Agreement that may affect Section 10 and Section 404 permit reviews and TDOT's transportation project delivery.
4. USACE shall provide reasonable access for project level staff to Funded Employees via telephone and email in an effort to minimize the need for formal meetings.

#### E. TRAINING

Funded Employees shall be provided an opportunity to attend required USACE training and TDOT recommended training as necessary to provide the transportation project review services described under this Agreement.

F. PERFORMANCE GOALS USACE performance goals are indicators of performance pertaining to achievement of the goals of this Agreement. Performance measure results can be used to determine the effectiveness of the Agreement, which will help all Parties to understand, manage, and allow for modification of the Agreement, as necessary. Detailed performance measures are described below.

#### 1. Individual Permits and Letter of Permission Actions

- a. Within 30 days of receipt of a submitted application, the USACE will complete the initial technical review of impacts to “waters of the U.S.,” provide written comments regarding deficiencies or concerns, and determine the potential method of application review.
- b. Within 30 days of notification of the additional information necessary to complete the application, TDOT will submit the requested information or the application will be withdrawn. Within 10 days of receipt of additional information, USACE shall determine whether the application is complete for processing or identify any additional information that may be required to supplement the information provided.
- c. If the application is being reviewed as an Individual Permit: The Public Notice (PN) will be prepared within 10 days of receipt of a complete the application and published immediately thereafter. Following the close of the Public Notice comment period, all comments received will be forwarded to TDOT within 5 days. Following receipt of any information from TDOT to address the issues identified during the PN comment period and any other information that may be necessary to complete the review of the application including alternatives analysis, and an appropriate mitigation plan, USACE will render a decision.
  - i. For a non-controversial application that does not require submittal of additional information by TDOT following the public comment period, it is the objective that the decision will be made within 60 days of publication of the PN or within 30 days following issuance of the 401 Water Quality Certification, whichever is later.
  - ii. For a non-controversial application that does require submittal of additional information by TDOT following the public comment period, it is the objective that the decision will be made within 80 days of USACE's receipt of that information from TDOT.
  - iii. No definitive timelines can be specified for controversial applications or disagreement. However, USACE will keep TDOT fully informed regarding the pending issues and requirements of the law including elevation procedures by the USFWS or the USEPA in accordance with the 1992 Memorandum of Agreement Part IV, Section 404(q) of the CWA, when the discharge will result in a substantial and unacceptable adverse effect to aquatic resources of national importance.

#### 2. Nationwide Permits

- a. Within 15 days of receipt of a submitted application, the USACE will complete the initial technical review of impacts to “waters of the U.S.,” and provide written comments regarding deficiencies or concerns or provide a written statement that the application is complete.
- b. Within 30 days of notification of the additional information necessary to complete the application, TDOT will submit the requested information or the application will be withdrawn.
- c. If the application requires notification to the agencies in accordance with Regional General Conditions or Agency Coordination as described in the Nationwide Permit

(NWP) General Conditions. The 10 day notification to the agencies will be sent within 10 days of receipt of the information necessary to complete the application in accordance with the NWP conditions. The agencies may request an additional 15 days. Following completion of the notification period and provided USACE is satisfied that all appropriate determinations and concurrences regarding Endangered Species and Historic Properties have been issued, USACE will render a decision within 30 days.

- d. If the application is for a non-reporting NWP, USACE will render a decision regarding NWP verification within 30 days of receipt of a complete application including satisfactory evidence of appropriate determinations and concurrences regarding Endangered Species and Historic Properties.

3. Results for performance goals, either positive or negative should be considered as opportunities to examine the processes that generated them, to capitalize on successes and identify way to implement this Agreement more effectively. Quantitative results for any particular measure are likely to require careful analysis before drawing firm conclusions, as they may be influenced by a complex mix of TDOT, USACE and other actions and circumstances.

**G. REPORTING**

1. USACE will prepare a Quarterly Project and Expenditures Report, deliverable by the 15th day of the month following the State of Tennessee’s Fiscal Year quarter that:

- a. Identifies the status of all pending TDOT permit applications as well as any final actions taken during the period;
- b. For each project identified, states the type of application submitted or permit issued, the date of application receipt, days elapsed since submittal of the application, the date the application was determined complete, the days elapsed since the application was determined to be complete;
- c. Describes other activities undertaken during the time period and a status update; and
- d. Submits an accounting of quarterly personnel costs and expenditures.

Performance will be described using the following table, which may be updated as needed to understand processing goals and performance:

	Metric	Number of Decisions Rendered	Average Number of Days to Render Decision
1	RAI or notice of completeness		
2	Render decisions on Individual Permits		
3	Render decisions on Permit Modifications (that do not require a Public Notice or consultation)		
4	Render decisions on General Permits		

Table Note: This does not include actions that require formal consultation pursuant to the Endangered Species Act, actions that require a Memorandum of Agreement or Programmatic Agreement resulting from consultation pursuant to the National Historic Preservation Act, or actions that require Tribal consultations.

From the Quarterly Project and Expenditure Reports, USACE will develop an annual report on the funding agreements for agency review. The template document in **Appendix B** will be used for preparing the annual report, which will include a list of all active funding agreements, an accounting of the total funds accepted and total funds expended, list of all permit decisions issued under the funding agreement, list of all employees that charged time to any agreement, and a qualitative and quantitative description of how the agreement expedited the review for the funding entity. Annual reports must be reviewed by the Major Subordinate Command (MSC) Regulatory Program Manager, and then be provided to the HQ Regulatory Section 214/Transportation Program Manager within 30 days of the conclusion of each fiscal year. HQUSACE will compile the reports received from all USACE Districts and provide a combined annual report to ASA(CW). The ASA(CW) will submit the combined annual report to the Congressional committees within 90 days of the conclusion of each fiscal year. HQUSACE will maintain copies of the combined annual reports on the HQUSACE website for the most recent 5 years.

#### IV. IMPARTIAL DECISIONMAKING

Impartial Decision-Making. It is understood and agreed that in order to ensure that the acceptance and expenditure of funds will not impact impartial decision making with respect to permit review and final permit decision, either substantially or procedurally, the Corps will comply with the following standards, as mandated by Headquarters, USACE.

- A. The review will comply with all applicable laws and regulations.
- B. Any procedures or decisions that would otherwise be required for a specific type of project or permit under consideration cannot be eliminated; however, process improvements that are developed can be shared in order for all members of the regulated public to benefit.
- C. In cases where funds provided to the USACE by TDOT are used, all final permit decisions and decision documents including reporting nationwide and general permit verifications, will be reviewed and approved in writing by at least one level above the decision maker, unless the decision maker is the District Commander. The one-level-above review must be a position that is not partially or fully funded by the same funding entity.
- D. All jurisdictional determinations (preliminary or approved) made on projects where funds are used will have documentation that a non-funded Regulator conducted a review of the determination.
- E. All final permit decisions, including all reporting nationwide and general permit verifications, made for projects where these funds are used will be made available and updated monthly on the HQUSACE ORM2 public portal.
- F. Funds will not be used for enforcement activities.

#### V. GENERAL TERMS

A. Length of Agreement. This Agreement expires on June 30, 2022, unless extended or terminated as provided in paragraphs V.B. or V.C. below.

B. Supplement, Modification and Extension. This Agreement may be modified, amended, or extended by the mutual agreement of the signatory Parties. This Agreement may be renewed on two-year cycles to update the budget and other provisions as appropriate.

C. Termination. This Agreement may be terminated by TDOT or USACE upon six (6) months written notice to the POCs 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 an alleged breach of this Agreement, if any. The TDOT or USACE may terminate this Agreement for any reason. 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. Severability. If any provision of this Agreement, or the application thereof to any person or circumstance, is found to be invalid or unenforceable, the remainder of the provisions in this Agreement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid or unenforceable, as the case may be, will remain valid and binding and will not be affected thereby.

E. Excess Funds. In the event of termination, all funds that have not yet been obligated by USACE as of the effective date of termination shall be refunded to TDOT within sixty (60) days after that date. USACE may offset the funds necessary for the actual costs of termination as described below against the excess funds. Neither party shall incur any new obligations for the terminated portion of the Agreement after the effective date 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 shall conduct a final accounting. USACE shall be paid for all actual expenses of employing, and reviewing TDOT's permit applications. If additional funds are necessary, USACE shall be entitled to compensation for work performed prior to receipt of notice of termination, less any funds previously paid by or on behalf of TDOT. TDOT shall not be liable for any further claims. Should USACE be unable to complete the provision of this Agreement for any reason, all monies provided by TDOT which prove to be cancelable obligations or unallowable shall be refunded to TDOT.

F. By signature below, TDOT certifies that the individuals listed in this Agreement as representatives of TDOT 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 or she has been duly authorized by his or her principal to execute this Agreement on such principal's behalf.

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

TDOT  
Susannah Kniazewycz  
Environmental Division Director  
505 Deaderick Street  
J.K. Polk Building, Suite 900  
Nashville, Tennessee 37243

USACE

Tammy R. Turley  
Chief, Regulatory Division  
U.S. Army Corps of Engineers  
Nashville District  
3701 Bell Road  
Nashville, Tennessee 37214

H. 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.

I. All contracts to be developed and awarded pursuant to this Agreement 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 Americans with Disabilities Act, anti-solicitation, information, auditing and reporting requirements.

J. This Agreement and any disputes or claims arising out of this Agreement shall be governed by the laws of the United States.

#### K. 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 Funded Employees to be hired by USACE to support priority review of TDOT 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.

**V. SIGNATURES**

**TENNESSEE DEPARTMENT OF TRANSPORTATION**

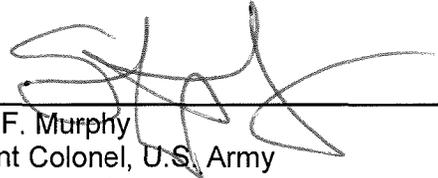


\_\_\_\_\_  
Commissioner, John C. Schroer  
Tennessee Department of Transportation

06.16.17 

\_\_\_\_\_  
Date

**U.S. ARMY CORPS OF ENGINEERS-Nashville District**



\_\_\_\_\_  
Stephen F. Murphy  
Lieutenant Colonel, U.S. Army  
District Commander

16-JUN-17

\_\_\_\_\_  
Date