

COOPERATIVE AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY,  
THE FEDERAL HIGHWAY ADMINISTRATION,  
AND  
THE STATE OF WEST VIRGINIA,  
DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS  
FOR THE  
INTERAGENCY FUNDING OF THE DEPARTMENT OF THE ARMY PERMIT  
PROCESSING FOR FEDERAL-AID HIGHWAY PROJECTS IN WEST VIRGINIA

This Agreement will become effective on 1st day of September, 2006 between the Department of the Army (hereinafter the "USACE"), represented by the Division Commander, Great Lakes and Ohio River, the Federal Highway Administration (hereinafter the "FHWA"), represented by the Division Administrator, and the State of West Virginia Department of Transportation, Division of Highways (hereinafter the "WVDOH"), represented by the Commissioner, all hereinafter referred to as "the parties".

WHEREAS, the WVDOH desires to have 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 is done in accordance with Section 404 of the Clean Water Act (33 U.S.C. 1344, et seq) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403, et seq); and

WHEREAS, this Agreement sets forth the responsibilities of the parties to ensure priority review of the State of West Virginia highway construction projects with the purpose of achieving timely review and disposition of State of West Virginia permit applications, and other activities which the Corps administers in accordance with Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403, et seq) and Section 404 of the Clean Water Act (33 U.S.C. 1344, et seq) and its implementing regulations; and

WHEREAS, authority for this Agreement is pursuant to the Intergovernmental Cooperation Act (31 U.S.C. 6505), Section 214 of the Water Resources Development Act of 2000 (Pub. L. 106-

541, subsequently extended by P.L. 108-137, P.L. 109-99 and P.L. 109-209), and §17-2A-8 (28) of the West Virginia State Code; and

WHEREAS, funding has been appropriated under the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (P.L. 109-59) to provide a coordinated environmental review process; and

WHEREAS, WVDOH has a substantial number of highway projects for which the USACE 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 location of these projects within West Virginia fall under the jurisdictional areas of two (2) different USACE districts (Huntington and Pittsburgh); and

WHEREAS, the Parties agree that establishing a USACE central point of contact to be located in the Huntington District for all highway projects in West Virginia would be more efficient and improve the environmental review process; and

WHEREAS, the parties have determined that it would be mutually beneficial to supplement USACE personnel to achieve the purpose set forth above; and

WHEREAS, WVDOH is willing to pay for dedicated personnel to evaluate and process WVDOH permit applications and issues in accordance with Federal laws and regulations; and

WHEREAS, the FHWA has indicated and agrees that WVDOH'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

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.

### **Section 1: Obligations of WVDOH**

1.1 WVDOH shall program a Federal-aid project to identify costs and provide payments to the USACE for the costs incurred pursuant to this Agreement. WVDOH agrees to encumber an annual amount to cover all services to be provided by the USACE, as set forth herein. The annual amount for State of West Virginia Fiscal Year 2007 is estimated to be One-Hundred, Seventy-Six Thousand Dollars (\$176,000) - One Hundred Forty Thousand Dollars (\$140,000) for salary and benefits, Fifteen Thousand Dollars (\$15,000) for travel/vehicle costs, and One Thousand Dollars (\$1000) for mobile communication/cell phone, and Twenty Thousand Dollars (\$20,000) for initial office set-up. The annual amount for State of West Virginia Fiscal Year 2008 is estimated to be One Hundred Fifty Six Thousand Dollars (\$156,000) – One Hundred Forty Thousand Dollars (\$140,000) for salary and benefits, Fifteen Thousand Dollars (\$15,000) for travel/vehicle costs, and One Thousand Dollars (\$1000) for mobile communication/cell phone. Annual amounts for future fiscal years shall be determined by the mutual consent of the

parties at least sixty (60) days prior to the start of the next fiscal year. The State of West Virginia's fiscal year begins July 1 and ends June 30 each year.

1.2 Within 30 days of the execution of this Agreement, WVDOH agrees to make its annual payment based on the remaining percentage of State of West Virginia Fiscal Year 2007 to USACE Huntington District by mutually acceptable method of payment. This payment shall cover expenses resulting from the hiring of a new employee and overhead costs.

1.3 Beginning July 1, 2007, WVDOH agrees to pay the USACE Huntington District the annual amount for State of West Virginia Fiscal Year 2008, and all state fiscal years thereafter, on a quarterly basis for all services set forth herein. Quarters shall begin on the 1<sup>st</sup> day of July, October, January, and April.

1.4 If the Huntington District forecasts its actual costs will exceed the amount of funds available, it shall promptly notify the WVDOH of the amount of additional funds necessary. The WVDOH shall either provide the additional funds to the Huntington 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 this Agreement pursuant to Section 7.

1.5 Quarterly payments may include the following expenses:

1. Salary and benefits for a full-time employee(s) which will be adjusted annually to cover appropriate step-increases and cost of living allowance (COLA) awarded to Federal government employees.
2. Actual burdened overhead rate carried by the USACE, including:

- Effective Rate
- Departmental Rate
- General Administrative Rate
- Other as appropriate
- Training and travel

1.6 WVDOH agrees to hold meetings with the USACE to establish priorities and evaluate work performed under this Agreement.

## **Section 2: Obligations of the USACE Huntington District**

2.1 USACE Huntington District may accept and expend the funds provided for herein by WVDOH to expeditiously evaluate permit applications under the jurisdiction of the Department of the Army for WVDOH highway construction projects.

2.2 Using the funds provided by WVDOH, the USACE Huntington District shall expeditiously supplement its existing staff, which currently processes WVDOH permit applications and other permits on a routine basis, by hiring an experienced senior regulatory project manager, and use the funds provided under this Agreement to pay the costs of salary, associated benefits, and actual burdened overhead rate. Additional positions and subsequent funding may be added under

this agreement, if all parties to the agreement find that the work load warrants additional USACE Huntington District personnel.

2.3 USACE Huntington District agrees to ensure that the supplemental staff funded by this Agreement shall be assigned to evaluate and process permit applications and other tasks which support this Agreement including agency coordination and compliance with the statutes and regulations for which the USACE is legally responsible and identified as priority projects by the WVDOH in accordance with the coordination procedures defined in Section 5 below.

2.4 The USACE shall keep accurate and separate accounting records of all receipts and disbursements of all funds received pursuant to this Agreement and produce such records and reports as required by Section 4 for examination as required by the WVDOH or the FHWA and shall permit extracts and copies to be made by these other signatory agencies or their duly authorized representatives. The 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.

2.5 USACE Huntington District agrees to hold a meeting every quarter for the first year with WVDOH and FHWA to assess the coordination procedures, and the timeliness of work performed under this Agreement. After the first year, annual meetings will be held with WVDOH and FHWA to assess the coordination procedures and the timeliness of work performed under this Agreement.

2.6 Upon receipt of the initial WVDOH payment, the position shall be filled as expeditiously as possible to support work contemplated by this Agreement.

2.7 USACE Huntington District agrees to fully consider comments by the WVDOH on the personnel selection for the position.

2.8 USACE Huntington District agrees that considerations for the personnel selection for the position will include: the ability and availability of the person to remain in the position for a year or more; the ability of the person to spend at least two days per week, on average, at the WVDOH Charleston offices or in the field; the ability of the person to recommend sound permit decisions, jurisdictional determinations, and jurisdictional delineations; and the ability of the person to assist the WVDOH Contractors with 404 construction compliance issues.

2.9 USACE Huntington District shall develop internal procedures to implement this Agreement and modify as necessary.

### **Section 3: Obligations of FHWA**

3.1 FHWA shall approve programming a Federal-aid project to accomplish the work contemplated by this Agreement at the applicable Federal-aid reimbursement rate in accordance with P.L. 109-59

3.2 Under the authority of 23 U.S.C. 132, the FHWA shall reimburse WVDOH within 30 days for the total amount of the Federal share payable for any project programmed (including any initial and quarterly payments) to support this Agreement upon obtaining notification of its execution.

#### **Section 4: Payment Provisions**

4.1 In accordance with paragraph 1.2, WVDOH agrees to make the annual payment for State of West Virginia Fiscal Year 2007 to USACE Huntington District by a mutually acceptable method of payment and shall, within ten (10) calendar days, notify the USACE Huntington District in writing that the payment has been sent to the appropriate account at the USACE Finance Center.

4.2 For State of West Virginia Fiscal Year 2008 advance payment, the USACE Huntington District shall provide an invoice of estimated costs to implement this Agreement for the upcoming year to WVDOH. Such estimate shall include supporting documentation based on the costs for the previous time period and shall be provided to WVDOH sixty (60) days prior to the July 1, 2007. In accordance with paragraph 1.3, WVDOH agrees to make the annual payment for State of West Virginia Fiscal Year 2008 to USACE Huntington District by a mutually acceptable method of payment and shall notify the USACE Huntington District in writing that the payment has been sent to the appropriate account at the USACE Finance Center. WVDOH shall pay the USACE Huntington District the annual lump sum amount as mutually determined by the parties. The USACE Huntington District shall ensure that said funds are assigned to an appropriate account from which the USACE Huntington District may withdraw the funding in support of activities identified in this Agreement.

4.3 For all subsequent quarterly advance payments, the USACE Huntington District shall provide an invoice of estimated costs to implement this Agreement for the upcoming quarter to WVDOH. Such estimate shall include supporting documentation based on the costs for the previous quarter and shall be provided to WVDOH sixty (60) days prior to the start of the next quarter. WVDOH shall pay the USACE Huntington District a quarterly lump sum amount as mutually determined by the parties. The USACE Huntington District shall ensure that said funds are assigned to an appropriate account from which the USACE Huntington District may withdraw the funding in support of activities identified in this Agreement.

4.4 WVDOH shall make prompt payment within thirty (30) calendar days of the receipt of the USACE Huntington District's estimate of costs for the next quarter.

4.5 USACE Huntington District shall provide to WVDOH a quarterly accounting of the actual expenditures for salaries, benefits, and overhead. WVDOH shall review the quarterly USACE accountings of such actual expenditures. If WVDOH determines that the documentation or allowance of such expenditures are inadequate or insufficient, or determines that further documentation or clarification is required, a meeting to clarify the account of expenditures will be requested by WVDOH within fifteen (15) working days of the receipt of the submittal from USACE Huntington District. In the event of a disagreement over the account of expenditures, the parties pledge to negotiate in good faith towards a reconciliation of the disputed amount; however, the burden of providing the required information or documentation is on the USACE

Huntington District. WVDOH shall notify USACE Huntington District in writing of the inadequacy or insufficiency and may provide any information necessary to correct the inadequacy or insufficiency.

4.6 In the event of disagreement over statements of expenditure, USACE Huntington District agrees to continue the priority review of highway construction projects throughout negotiations as long as the current balance is sufficient to cover costs. The USACE Huntington District will credit WVDOH for any amount determined to be an over-statement of USACE expenses. Any funds paid to the USACE by WVDOH in excess of the actual costs incurred in a billing period shall apply toward the USACE Huntington District's expenses in the following billing period.

4.7 WVDOH agrees to reconcile and adjust Federal-aid project funding and WVDOH payments to the USACE Huntington District at the time of any Agreement extension, modification, or termination. Upon completion of this Agreement, WVDOH shall make any adjustments needed in Federal and non-Federal shares payable in accordance with 23 U.S.C. Section 132. All records and payments associated with this agreement are subject to federal and state audits.

### **Section 5: Coordination**

5.1 On a monthly basis or as needed, WVDOH will establish a priority listing of projects with the USACE Huntington District which will guide the Huntington District staff efforts in the priority review process.

5.2 Both WVDOH and the USACE agree that ready and reasonable access will be provided to working level staff of each party in an effort to minimize the need for formal meetings.

5.3 While the focus will be to review permit applications for priority WVDOH projects, USACE Huntington District staff may also be involved in other tasks which support this Agreement including agency coordination and compliance with the statutes and regulations for which the USACE is legally responsible. Examples of other tasks which may be assigned include, but are not limited to:

1. Review and comment on pre-application submittals (i.e., project alternatives, ecological survey reports, environmental documents, mitigation plans, functional assessments, etc.).
2. Attend project meetings, including field or office meetings.
3. Participate in interagency scoping meetings.
4. Perform other tasks including jurisdictional determinations and wetland delineation verifications.
5. Develop and implement programs to increase efficiency of transportation project permit processing, such as merging NEPA and 404 process requirements to improve efficiencies of the project development process, implementing wetland mitigation banks and in-lieu fee mitigation agreements, developing programmatic agreements and general permits as necessary, review and comment on Nationwide Permit (NWP) changes as necessary, and developing interagency training programs

in cooperation with WVDOH and FHWA to sustain efforts contemplated by this agreement.

6. Work with FHWA to identify and implement procedures to improve efficiencies during the project development process that allow the USACE to adopt environmental documentation as a cooperating agency to comply with NEPA, and where appropriate, reference and adopt findings on projects to comply with other laws, regulations and Executive Orders. Examples include, but are not limited to, findings for National Historic Preservation Act, Endangered Species Act, and Environmental Justice.

### **Section 6: Goals and Objectives**

6.1 The WVDOH, USACE, and FHWA shall review all existing interagency coordination processes and formulate recommendations to improve procedures and increase efficiency, including but not limited to those items in Appendix A, within six (6) months of the individual in the position to be funded by the Agreement reports for duty. The recommendations shall be accompanied with a proposed schedule for implementation.

6.2 The USACE agrees to meet the following goals:

1. Early coordination and prioritization of WVDOH project permit applications and related activities (i.e., project alternative analysis, ecological survey reports, environmental documents, mitigation plans, functional assessments, etc.).
2. The USACE will promptly inform WVDOH if project evaluation may exceed agreed upon processing times.
3. The USACE will work proactively to improve upon all timelines set forth at 33 CFR 325 and 33 U.S.C. 1344 for Department of the Army actions unless otherwise previously indicated or noted as an exception.

6.3 WVDOH agrees to meet the goals established by the following performance indicators:

1. Prepare and submit to the USACE a complete permit application with drawings and necessary information as required by USACE regulations.
2. Provide all information necessary for evaluation of permit applications and related activities.
3. Give full consideration to modifying the submitted permit application in accordance with the comments provided by the USACE or other approving agency in the course of permit review or terminate and withdraw the permit application.

### **Section 7: Commencement, Expiration, and Termination**

7.1 The terms and conditions of this Agreement shall become effective when executed by all the parties.

7.2 The terms and conditions of this Agreement shall be reviewed at a meeting to be held by the parties every year, coinciding with the beginning of the State of West Virginia's fiscal year. At

the time of review, the parties shall discuss the estimated annual amount for the next fiscal year, quality of work performed, key accomplishments, work processes, procedures, priorities, and the goals and objectives of the Agreement. The parties shall determine whether the terms and conditions of this Agreement are still satisfactory to each party or whether modifications are required. If modifications are required, such changes shall be made by written amendment executed by all parties. Each party is free to request modifications to the terms and conditions of this Agreement at any time while this Agreement is in effect and such modifications may be made by written amendment upon the mutual agreement of all parties.

7.3 WVDOH has the legal authority to enter into this Agreement, and the institutional, managerial and financial capability (including funds sufficient to pay nonfederal share of project costs) to ensure proper planning, management, and completion of the Agreement. WVDOH acknowledges that the rights, duties, and obligations described in this Agreement cannot be binding until all statutory and regulatory requirements have been met, including Chapter 17 of the West Virginia State Code. In the case of invalidity due to Chapter 17 of the West Virginia State Code, USACE may exercise any legal rights it has to protect the Government's interests related to this Agreement.

7.4 This Agreement may be terminated by either the WVDOH or the USACE upon thirty (30) days written notice to the POC of the other agency if the party requesting termination has demonstrated that the other party has not substantially fulfilled the responsibilities and terms of the Agreement after being provided with notice and an additional thirty (30) days to remedy the situation. If either WVDOH 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 ninety (90) days from the date of the written notice, unless both parties agree to an alternate date.

7.5 In the event of termination, all excess funds shall be refunded within sixty (60) days after the effective period of the termination. 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, the USACE Huntington District shall conduct a final accounting. If additional funds are necessary, the USACE Huntington 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 WVDOH. WVDOH shall not be liable for any further claims, and the claims submitted by the USACE shall not exceed the total amount of consideration stated in this Agreement. Should the USACE Huntington District be unable to complete the provisions of this Agreement for any reason, all monies provided by WVDOH which prove to be cancelable obligations or unallowable shall be refunded to WVDOH.

## Section 8: General Provisions

8.1 The point of contact in each signatory agency is as listed below:

1. WVDOH: State Highway Engineer's Office  
West Virginia Department of Transportation  
1900 Kanawha Boulevard, East, Building 5, Room 164  
Charleston, West Virginia 25305-0430  
Tel: 304-558-2804; Fax: 304 -558-5781
  
2. USACE: Chief, Regulatory Branch  
USACE Huntington District  
502 8<sup>th</sup> Street; Huntington, West Virginia 25701  
Tel: 304-399-5389; Fax: 304-399-5085
  
3. FHWA: Environmental Program Manager  
Federal Highway Administration  
700 Washington St. E.,  
Charleston, West Virginia 25301  
Tel: 304-347-5928; Fax: 304-347-5103

8.2 During the performance of this Agreement, the parties agree to abide by the terms of Executive Order 11246 on non-discrimination 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.

8.3 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.

8.4 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 staff to be hired by the USACE to support priority review of WVDOH 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; National Historic Preservation Act of 1966, or any other Federal statute or implementing regulations.

8.5 This Agreement in no way restricts the USACE or WVDOH from participating in similar activities with other public or private agencies, organizations, and individuals.

8.6 This Agreement and any claims arising out of this Agreement shall be governed by the laws of the United States and the State of West Virginia.

8.7 The USACE shall provide its own workers compensation coverage throughout the duration of the Agreement and any extensions thereof.

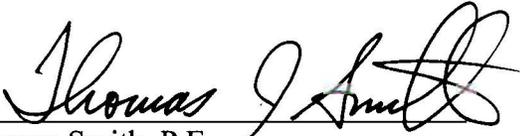
8.8 By signature below, WVDOH certifies that the individuals listed in this Agreement as representatives of WVDOH are authorized to act in their respective areas for matters related to this Agreement. All parties acknowledge that any person executing this Agreement in a representative capacity hereby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

**STATE OF WEST VIRGINIA**

  
Paul A. Mattox, Jr., P.E.  
Secretary West Virginia Department of Transportation/  
Commissioner Division of Highway

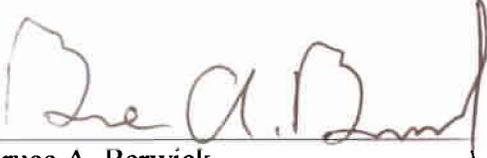
Date 7-21-06

**FEDERAL HIGHWAY ADMINISTRATION**

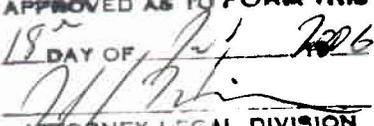
  
Thomas Smith, P.E.  
Division Administrator  
Federal Highway Administration

Date 7-31-06

**DEPARTMENT OF THE ARMY**

  
Bruce A. Berwick  
Brigadier General, U.S. Army  
Division Engineer

Date 28 Sep 2006

APPROVED AS TO FORM 1-05  
18<sup>th</sup> DAY OF July 2006  
  
ATTORNEY LEGAL DIVISION  
WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION  
DIVISION OF HIGHWAYS

## **APPENDIX A**

### Process Improvements

Nationwide Permits which require Pre-construction Notification

Current Processing Time – 6 weeks

Improved Processing Time (Goal – 2 weeks)

### Individual Permits

Time to Determine Completeness (Goal – 2 weeks)

Time to Publish Public Notice (Goal – 3 weeks)

Jurisdictional Determinations (Goal – 1 week)

Verification of Delineations (Goal – 1 week)

Permit Modifications (Goal – 2 weeks)

Training DOH Personnel, Consultants, and Contractors

Flood Recovery & Coordination

Regional Permits that could eliminate the need for some Individual Permits

Early involvement and coordination during planning that will result in a better understanding of potential 404 issues