

**MEMORANDUM OF AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE STATE OF LOUISIANA  
COASTAL PROTECTION AND RESTORATION AUTHORITY  
FOR THE  
EXPEDITED EVALUATION OF PERMIT APPLICATIONS  
FOR THE  
MID-BARATARIA SEDIMENT DIVERSION, LOUISIANA PROJECT**

THIS MEMORANDUM OF AGREEMENT (“Agreement”) is entered into this 19<sup>th</sup> day of April, 2016, by and between the Department of the Army (the “Government”), represented by the U.S. Army Engineer, New Orleans District (the “District Engineer” or “District Commander”); and the State of Louisiana, through the Coastal Protection and Restoration Authority (the “CPRA”), represented by its Executive Director.

WITNESSETH, THAT:

WHEREAS, under the authority of Section 214 of the Water Resources Development Act of 2000, (“Section 214”), as amended by Section 1006 of the Water Resources Reform and Development Act of 2014 and codified under 33 U.S.C. 2352, 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 permits and permissions of that entity related to a project or activity for a public purpose under the jurisdiction of the Department of the Army, including Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter “Section 404”), Section 10 of the Rivers and Harbors Appropriation Act of 1899, as amended (33 U.S.C. 403) (hereinafter “Section 10”) and, if applicable, Section 14 of the Rivers and Harbors Appropriation Act of 1899, as amended (33 U.S.C. 408) (hereinafter “Section 408”), and hereinafter collectively referred to as the “permit and permission applications”; and

WHEREAS, in doing so, the Secretary must ensure that the use of such funds will not impact impartial decision making with respect to permits, either substantively or procedurally; and

WHEREAS, the Secretary has delegated this responsibility to the Chief of Engineers and his authorized representatives, including District Commanders of the United States Army Corps of Engineers; and

WHEREAS, by letter dated January 8, 2014, the CPRA (a non-federal public entity) requested the United States Army Corps of Engineers (“USACE”), New Orleans District (“CEMVN”), to expedite its evaluation of permit and permission applications submitted by CPRA for the Mid-Barataria Sediment Diversion, Louisiana Project (the “Project”), and indicated its intent to provide the funds necessary to expedite the Project permit and permission evaluations; and

WHEREAS, the CEMVN has reviewed the funding request of CPRA and has determined that the proposed Project serves a public purpose; and

WHEREAS, CEMVN issued an initial Public Notice dated February 24, 2014, advising the public of its intent to accept and expend funds contributed by CPRA for the expedited review and processing of permit and permission applications for the Project; and

WHEREAS, on July 1, 2014, following the review of the comments received in response to the public notice, the CEMVN District Engineer determined that expenditure of funds received from CPRA for expedited Project permit and permission evaluations complies with Section 214 and applicable USACE guidance; and

WHEREAS, CEMVN issued a second Public Notice dated July 28, 2014, advising the public of the CEMVN District Engineer's decision to accept and expend funds contributed by CPRA for expedited Project permit and permission processing; and

WHEREAS, the Government and CPRA desire to enter into this Agreement for the purposes hereinafter stated; and

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

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

#### **ARTICLE I – PURPOSE AND AUTHORITY**

A. The foregoing recitals are incorporated herein by reference as if fully set forth herein and constitute material terms of this Agreement. Pursuant to Section 214, including compliance with all procedural requirements, the Government and CPRA (collectively the "parties"), enter into this Agreement for the purpose of establishing the framework for the acceptance and expenditure of funds provided by CPRA to expedite the CEMVN evaluation and processing of Department of Army permit and permission applications submitted by CPRA for the Project. CPRA represents and agrees that all permits and permissions requested pursuant to this Agreement will be submitted to USACE in the name of CPRA and that the proponent of any permit and permission requests for the Project is CPRA.

#### **ARTICLE II – SCOPE OF WORK AND FUNDING**

A. As of the effective date of this Agreement, the total costs for CEMVN to expedite the evaluation and processing of Section 10 and Section 404 permits and Section 408 permissions related to the Project, over the thirty-six (36) month term of this Agreement, are estimated to be One Million and Five Hundred Thousand Dollars (\$1,500,000) ("Estimated Total Costs"). **Attachment "A"** of this Agreement contains a USACE budget estimate to support the Estimated Total Costs, and includes the tasks, estimated hourly rates and personnel hours required, and direct and indirect labor costs of CEMVN on a time and materials basis. This estimate is subject to adjustment by the CEMVN, is not to be construed as the total financial responsibility of the CPRA, and the actual costs of CEMVN for the work performed pursuant to this Agreement will be billed as the costs are incurred. No adjustment in excess of the Estimated Total Costs shall be made by CEMVN without the written agreement of CPRA and thirty (30) calendar days prior

notice to CPRA.

B. It is understood and agreed by the parties that use of the funds accepted by USACE pursuant to this Agreement will not impact impartial Government decision-making with respect to permit and permission decisions, either substantively or procedurally.

C. Not later than thirty (30) calendar days after execution of this Agreement by the District Engineer, and prior to the CEMVN incurring any financial obligations or performing any work under this Agreement, CPRA shall provide One Hundred and Eighty-Seven Thousand and Five Hundred Dollars (\$187,500.00) in initial funds to cover the first six (6) month period of expedited permit and permission processing by CEMVN under the term of this Agreement, by delivering a check payable to "FAO, USAED, New Orleans (B2)" to the District Engineer or by electronically transferring such funds in the manner to be prescribed by the Government. The CEMVN shall draw from the funds provided by CPRA such sums as the CEMVN deems necessary to cover the costs of the expediting permit and permission processing as those costs are incurred by CEMVN. Whenever the balance of funds provided by CPRA reaches Thirty Thousand Dollars (\$30,000.00) and additional funds are required for CEMVN to continue its expedited permitting activities pursuant to this Agreement, CEMVN shall notify CPRA in writing of the amount of the additional funds required. Within thirty (30) calendar days from receipt of such notice, the additional funds will be remitted by CPRA to CEMVN before any further work can proceed. All fund transfers under this Agreement will be directly between CPRA and the CEMVN. Any delinquent payment shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 percent of the average bond equivalent rate of the 13-week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3-month period if the period of delinquency exceeds three (3) months. If the price of the work and all administrative and other costs are less than the estimated sum already provided, the difference will be remitted to CPRA following a USACE audit of the account.

D. In order to ensure the funds accepted from CPRA are expended for the intended purpose, the CEMVN shall establish separate accounts in the USACE Financial Management System to track the acceptance and expenditure of funds pursuant to this Agreement in accordance with the USACE current fiscal year budget execution guidance. CEMVN personnel accomplishing the technical and administrative tasks required to expedite the evaluation of the Section 10, Section 404, and Section 408 requests covered by this Agreement, shall charge their time against the specific applicable account when working on those requests.

E. Regulatory funds can only be used for a Section 10 and a Section 404 action, which may include those actions with an associated Section 408 request. Regulatory staff can use Regulatory funds to participate in joint meetings and internally coordinated portions of shared documents when a Section 408 request also requires a Section 10 and a Section 404 action. Regulatory funds cannot be used to develop or coordinate any components of the Section 408 request independent of a Section 10 and Section 404 action. Processing Department of the Army permit applications pursuant to Section 10 and Section 404 will be accomplished in accordance with current USACE regulations and guidance. If the Section 408 request requires Division or HQUSACE coordination and/or review, no Section 10 and Section 404 permit decision

documentation will be forwarded to Division or HQUSACE in order to preserve the independent decision-making authority of the CEMVN and Division Commanders. The CEMVN, however, shall ensure that the Section 408 documentation clearly articulates that the Section 10 and Section 404 authorization is required.

F. The decision on a Department of the Army permit application pursuant to Section 10 and Section 404 cannot be rendered prior to the decision on the Section 408 request. The granting or denial of permission pursuant to Section 408 is not a permit action handled by the USACE Regulatory Program. Special conditions may be included by USACE as part of any Section 408 permission. A decision on the Section 408 application for permission cannot be rendered by USACE until the endorsement of all non-federal sponsors is provided to CEMVN pursuant to Section 3 of the Flood Control Act of 1936, as amended (33 USC 701c), or Section 221 of the Flood Control Act of 1970, as amended (42 USC 1962d-5b).

G. The District Commander shall designate a Section 408 Coordinator responsible for ensuring the processes in USACE regulations are met and that the proper coordination occurs among all necessary CEMVN elements, including but not limited to, regulatory, real estate, counsel, planning, engineering, programs and project management, and/or operations. The Section 408 Coordinator will track CEMVN expenditures, including funding provided by CPRA for expediting the processing of Section 408 requests by federal fiscal year basis by funding source. The District Commander, or his authorized designee, shall designate a Regulatory Project Manager (“Regulatory Project Manager”) to oversee the Section 10 and Section 404 permits processed by CEMVN pursuant to this Agreement to ensure that USACE regulations are met and that proper coordination occurs among CEMVN elements. The Regulatory Project Manager will coordinate as necessary with the CEMVN Section 408 Coordinator, throughout their respective evaluations. The Section 408 Coordinator and the Regulatory Project Manager shall be responsible for schedule coordination of the Section 404, Section 10, and the Section 408 efforts, deliverables, milestones, and key decisions with CPRA and CPRA’s Project procurement process. Coordination of the Section 408 reviews shall be mutually agreed upon between the parties through a Section 408 Review Plan. CEMVN shall provide CPRA with detailed quarterly progress, financial, and other reports.

H. Funds provided by CPRA will be primarily expended on direct labor, salaries, and overhead for CEMVN personnel performing expedited permit and permission processing activities for the Project. Examples of activities that the funds may be expended on include, but are not limited to: application intake review, permit database entry, correction of drawings, jurisdictional determinations, jurisdictional delineation verifications, functional or conditional assessment verifications, public scoping meetings, site visits, preparation of public notices, drafting of correspondence, conducting the public interest review, meetings with the CPRA, preparation of draft permit decision documents, engineering, technical, legal and policy analyses, real estate evaluation, risk analysis, clerical/support tasks, technical writing, training, travel, field office set up costs, copying, coordination activities, additional personnel (including support/clerical staff), technical contracting, programmatic tool development and improvement, early coordination activities such as National Environmental Policy Act (“NEPA”)/404 synchronization procedures and any other permit evaluation related activities that are mutually agreed upon in writing by the parties. Funds provided pursuant to this Agreement shall not be used for the preparation of any environmental or NEPA documents by a third party contractor, including but not limited to Environmental Impact Statements or Environmental Assessments required for the Project.

All preliminary jurisdictional determinations and any approved jurisdictional determinations where funds are used must have documentation that a non-funded regulator conducted a review of the determination.

I. Funds may be expended for the administration and tracking of the contributed funds and work performed. Funds may be used for construction inspection activities for the Section 408 request. Funds may be used to contract discrete tasks to inform decisions or conduct administrative actions.

J. No funds will be used by the Division or District Commanders for their review, recommendation, or decision concerning a Section 408 request. The funds provided under this Agreement shall not be used to cover administrative expenses related to the issuance of real property instruments required if the Section 408 permission is granted. Those administrative costs for drafting, negotiating, or issuing any necessary real estate instruments, may be accepted under the provisions of 10 USC 2695.

K. Funds may not be used to continue activities for CPRA should a lapse in appropriations result in a shutdown furlough for the USACE Regulatory and/or Civil Works Programs.

L. Activities conducted in accordance with this Agreement must expedite the permit and permission review process and may include generally shorter review times as compared to typical review times, facilitation of a smoother review process through improved coordination and communication, and/or the development or use of programmatic agreements or standard operating procedures. The expedited review cannot result in an adverse effect on the timeframes for review of other applications within the CEMVN, when considered collectively.

M. Within ninety (90) calendar days of the date on which the Government has completed all work under this Agreement, or within ninety (90) calendar days of the date that this Agreement is terminated under Article IX, the Government shall conduct a final accounting. Should the final accounting determine that additional funds are required from CPRA, within thirty (30) calendar days of receipt of written notice from the Government, CPRA shall provide the Government with the full amount of such additional required funds. Should the final accounting determine that CPRA has provided funds in excess of the required amount, the Government shall refund the excess amount no later than thirty (30) calendar days after the Government provides the results of the report of the final accounting to CPRA. Upon receipt of a written request by CPRA, and to the extent permitted under applicable Federal laws and regulations, the Government shall provide CPRA with the final accounting which shall include a detail of the expenses incurred by CPRA pursuant to this Agreement. The final accounting by the Government shall in no way limit CPRA's obligation to promptly pay for any costs which may become known after the final accounting.

N. The CPRA 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 Agreement, unless CPRA forwards to CEMVN a written confirmation from the federal agency that the use of the funds to expedite the permit and permission review process is acceptable.

### ARTICLE III – IMPARTIAL DECISION-MAKING

A. CEMVN shall ensure that expediting the evaluation of Project permits and permissions does not adversely affect the timeline for evaluation by CEMVN of permits and permissions under the jurisdiction of the Department of the Army or other entities that have not contributed funds under Section 214.

B. All final permit and permission decision documents, including all reporting and state programmatic permit verifications, shall be reviewed and approved in writing by a responsible official, at least one level above the decision maker. For purposes of this Agreement, the decision maker is the person that has been delegated signature authority. The one-level-above review must be a position that is not partially or fully funded by the same funding entity. If the Section 408 approval authority is at the level of the USACE Director of Civil Works, the CEMVN through the Mississippi Valley Division (“Division”), shall provide sufficient information to assure the decision maker that the acceptance and expenditure of funds by the CEMVN under this Agreement has not affected the CEMVN’s or the Division’s evaluation of the Section 408 request, either substantially or procedurally. Draft technical documents or draft decision documents shall be reviewed and signed by unfunded reviewers prior to consideration by the Division or District Commander. No funds received pursuant to this Agreement shall be expended for the CEMVN District Commander’s consideration and recommendation to the Director of Civil Works regarding the CPRA Section 408 request. The CEMVN permit and Section 408 permission review shall utilize the same procedures for decisions that would otherwise be required for the evaluation of permits and permissions for similar projects or activities not carried out using funds authorized under Section 214.

C. The CEMVN shall expedite the evaluation of CPRA’s permit and permission applications for the Project in accordance with the terms and conditions of this Agreement. The CEMVN shall not eliminate any procedures or decisions that would otherwise be required for the type of project and permit and permission applications under consideration, and shall comply with all applicable laws, regulations, policies, and guidance. However, process improvements that are developed can be shared in order for all members of the regulated public to benefit. No prescribed procedures, analyses, decisions, or other activities will be eliminated, curtailed, or omitted for purposes of expediency.

D. All final permit decisions on permit and permission applications, including all general, and regional permit verifications for which funds contributed by CPRA are used, will be made available, updated monthly and published on the CEMVN public web page. A copy of this Agreement, together with other related documents such as decision documents and annual reports, will also be posted on the HQUSACE Regulatory web page.

E. Funds will only be expended to expedite the review and approval of the permit or permission application or authorization request. Funds will not be expended for review of the decision-maker's decision. If contracts are used to develop decision documents, such documents shall be drafts only and subject to review and adoption by the CEMVN before the decision is made.

**ARTICLE IV - APPLICABLE LAWS**

A. The CEMVN and CPRA, in carrying out their respective obligations under this Agreement, shall comply with all requirements of applicable Federal and state laws, and implementing USACE regulations, policies and guidance.

**ARTICLE V - DISPUTE RESOLUTION**

A. The parties agree that, in the event a dispute arises as to the performance of any function under this Agreement, 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 CPRA permit and/or permission application shall not be subject to resolution by such means. Once dispute resolution, if applicable, has been exhausted, the parties may avail themselves of any remedies available at law or equity. Neither party waives any claims or defenses with respect to work performed under this Agreement or any right that it might have to challenge or review of a final decision by the Government on a CPRA permit and/or permission application. The existence of a dispute shall not excuse the parties from performing their obligations under this Agreement.

**ARTICLE VI - COMMUNICATIONS**

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

B. Any request, demand, or other communication required or permitted to be given under this Agreement 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 the CPRA:            Executive Director  
Louisiana Coastal Protection and Restoration Authority  
P.O. Box 44027  
Baton Rouge, LA 70804-4027

If to the CEMVN:        District Engineer  
U.S. Army Corps of Engineers  
New Orleans District  
7400 Leake Avenue  
New Orleans, LA 70118

C. 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. 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 seven (7) calendar days after it is mailed.

## **ARTICLE VII - MISCELLANEOUS**

A. The term of this Agreement shall be a period of thirty-six (36) months commencing on the date that the CEMVN District Engineer has executed the Agreement. This Agreement may be executed in any number of counterparts, each of which shall constitute an original document which shall be binding upon any of the Parties executing same.

B. This Agreement shall not affect any pre-existing or independent relationships or obligations between the State of Louisiana, CPRA and the Government.

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

D. This Agreement constitutes the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind a party unless in writing and signed by each party and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of any party to enforce any provision of this Agreement shall not constitute a waiver by that party of that or any other provision.

## **ARTICLE VIII – AMENDMENT & MODIFICATION**

A. This Agreement may be amended or modified only by written agreement of the parties, executed by the CEMVN District Engineer and the CPRA Executive Director. This Agreement shall be modified to conform to changes in Federal law, and may be amended, by written agreement of the parties, to conform to changes in the guidance applicable to Section 214 or for other reasons.

## **ARTICLE IX – TERMINATION**

A. Either party may terminate this Agreement by providing written notice to the other party. Such termination shall be effective thirty (30) calendar days following such notice, unless a later date is stated.

B. This Agreement may be terminated by any party after providing thirty (30) calendar days written notice of termination to the other party, if the party giving notice of termination has demonstrated that the other party has not substantially fulfilled the responsibilities and/or complied with the terms of the Agreement, after being provided with written notice from the other party identifying the alleged failures, breaches, and/or non-compliance and given thirty (30) calendar days to remedy the situation(s) identified in the notice.

C. Upon termination of this Agreement, CPRA shall remain responsible for all costs properly incurred by the Government under this Agreement and for the costs of closing out or transferring any on-going contracts.

D. This Agreement shall remain in force until the Agreement is terminated pursuant to this Article, or the authority provided to the USACE to accept funds in accordance with 33 U.S.C. 2352 is terminated, or until the funds contributed by CPRA have been expended and not replenished following receipt of a sixty (60) calendar day notice from the CEMVN to the CPRA, whichever occurs first.

E. If this Agreement is terminated prior to the Government's issuance of any permits or permissions for the Project, the Government's remaining work on CPRA's permit or permission applications shall progress according to the availability of appropriated funds, subject to other constraints imposed by law, regulation, or Government policy.

F. Termination of this Agreement shall not relieve CPRA of liability for obligations previously incurred by the Government in connection with the review of permit and permission applications for the Project under the Agreement.

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

**DEPARTMENT OF THE ARMY**

**COASTAL PROTECTION AND RESTORATION AUTHORITY**

BY: *Richard L. Hansen*  
RICHARD L. HANSEN  
Colonel, U.S. Army  
District Engineer

BY: *MR Ellis*  
MICHAEL ELLIS  
Executive Director

DATE: *19 April 2016*

DATE: *4/18/16*