



## **MEMORANDUM OF AGREEMENT**

### **BETWEEN ILLINOIS DEPARTMENT OF TRANSPORTATION AND UNITED STATES ARMY CORPS OF ENGINEERS, FOR THE FUNDING OF A REVIEW POSITION**

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

WHEREAS, IDOT hereby enters into this Intergovernmental Agreement pursuant to the Intergovernmental Cooperation Act, 5 ILCS 220/1 et seq.;

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, the authority of the Secretary of the Army was delegated to the Assistant Secretary of the Army for Civil Works by memorandum dated January 8, 2018, re-delegated to the Chief of Engineers by memorandum dated January 19, 2018, and further re-delegated to District and Division Commanders by memorandum dated April 18, 2018, in effect to date;

WHEREAS, the Acting Assistant Secretary of the Army for Civil Works, by memorandum dated January 19, 2018, has provided implementation guidance for District and Division Commanders to accept and expend funds contributed by non-federal entities to expedite the evaluation of permit applications pursuant to Section 214 of the Water Resources Development Act of 2000, as amended, subject to the limitations described in the implementation guidance, including the District Engineer's approval of said agreements and additional standards with which the District must comply to ensure impartial decision making;

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

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

WHEREAS, the Chicago District Commander has determined that expenditure of funds received from IDOT will be in compliance with WRDA 2000 Section 214, as amended, and a public notice dated July 30, 2019, was issued soliciting comments regarding the District Engineer's intent to accept and expend funds contributed by non-Federal public entities for the purposes described above; and

WHEREAS, the Commander, USACE has determined USACE involvement in the environmental analysis of proposed transportation projects with a public purpose undertaken by IDOT to be in the public interest; and

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

WHEREAS, IDOT agrees to fund supplemental USACE staff dedicated to work on IDOT Projects;

NOW THEREFORE, the signatories agree as follows:

## I. DEFINITIONS

A. "IDOT Projects" means IDOT 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 partially funded by IDOT and whose responsibilities are dedicated to the review of IDOT Projects.

## II. IDOT RESPONSIBILITIES

### A. RESOURCES

1. Subject to the continued authority of USACE to accept such funds, IDOT shall be responsible for payment to USACE of an amount equal to 50% of USACE's costs (estimated \$100,000 in FY 20) to employ a USACE staff member as a USACE Project Manager dedicated to the review of IDOT Projects (Funded Employee), as contemplated by this Agreement. The employment costs of the Funded Employee shall include all fully burdened salary-related costs assessed by USACE, and, unless otherwise agreed to by IDOT. Prior to each subsequent budget cycle, IDOT 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.

2. This Agreement is contingent upon and subject to the availability of funds. IDOT, at its sole option, may terminate or suspend this Agreement, in whole or in part, without penalty or further payment being required, if (1) the Illinois General Assembly or the federal funding source fails to make an appropriation sufficient to pay such obligation, or if funds needed are insufficient for any reason, (2) the Governor decreases IDOT's funding by reserving some or all of the IDOT's appropriation(s) pursuant to power delegated to the Governor by the Illinois General Assembly; or (3) IDOT determines, in its sole discretion or as directed by the Office of the Governor, that a reduction is necessary or advisable based upon actual or projected budgetary considerations. USACE will be notified in writing of the failure of appropriation or of a reduction or decrease.

Allowable costs include but are not limited to the following:

- a. Salary and benefits (including paid Federal holidays) for one half of (1) permanent, full-time USACE Project Manager for the length of this Agreement;
- b. Actual burdened overhead rate carried by the Chicago 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, POV or rental car for field inspections.

## B. PAYMENTS

1. IDOT shall adhere to its obligations as set forth in the Agreement and will make an annual payment to the USACE for expenses associated with Funded Employee. Payment will be made in accordance with the State Prompt Payment Act, 30 ILCS 540, 74 Ill. Admin. Code 900. Payments delayed at the beginning of the State's fiscal years (July and August payments) because of the appropriation process shall not be considered a breach.

2. Upon execution of this Agreement, transmit an advance payment equal to the remaining amount of the Corps' approved FY2019 budget (October 1, 2018-September 30, 2019) to support the services provided in this Agreement.

3. Upon receipt of future budget estimates, IDOT shall, within the timelines as set forth in the State Prompt Payment Act, transmit an advance payment to cover budgeted expenditures for one year's program support.

4. IDOT will review quarterly USACE submittals documenting actual account of expenditures for the items as listed above in support of work contemplated by this agreement.

5. If IDOT disagrees with the USACE's Quarterly Project and Expenditures Report, IDOT will, within twenty (20) working days of receipt of the Report, request a meeting, confer, and collaborate with USACE 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 IDOT of the amount of additional funds necessary. IDOT 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 previously obligated funds, or direct the termination of this Agreement pursuant to paragraph VI.C. If IDOT elects to provide additional funds to USACE, USACE shall promptly send an invoice for the required amount to IDOT. IDOT shall process invoices to make payments via electronic funds transfer within forty-five (45) days of receipt of such invoices.

### III. USACE RESPONSIBILITIES

#### A. RESOURCES

1. Using U.S. Government, Army, and USACE hiring and employment laws and rules, USACE will supplement its Regulatory Branch staff by hiring, or identifying from current employees and backfilling, one employee, at the GS-12 level, with the knowledge, skills and abilities necessary to perform the job. The Funded Employee will be dedicated to the review of IDOT 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 the Funded Employee is dedicated exclusively to IDOT Projects identified in accordance with the defined coordination procedures or other activities as outlined in this Agreement, as well as any permit compliance work associated with permitted IDOT Projects and any attendant required training and general personnel responsibilities.

3. The Funded Employee will be physically located in the Chicago District Office, unless, by mutual agreement of all Parties, it is determined that delivery functions would be served more efficiently by other physical duty locations. It is anticipated the funded USACE employee will physically be at IDOT's offices in Schaumburg between one to two days per month. The Funded Employee shall be supervised solely by the Chicago District.

### IV. JOINT IDOT AND USACE RESPONSIBILITIES

#### A. DUTIES

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

- a. IDOT's Phase I activities include NEPA planning/plan review meetings to discuss project scope, potential High Quality Aquatic Resources (HQAR), the potential need for a Jurisdictional Determination (JD), and anticipated 404 permitting, as deemed necessary, and assessing USACE jurisdiction within project scope of work;
- b. IDOT's Phase II means a project's contract plans and preparation activities, and permitting; pre-application meetings with the USACE for each Project, as deemed necessary, for establishing 404 permitting, timeframes, the potential need for additional field work, and/or information, and application review to benefit project delivery;
- c. Quarterly project scheduling meetings, or more frequently if deemed necessary, with USACE to discuss project priorities, pending applications, and anticipated submittals;
- d. Annual Leadership meetings, or more frequently, and if deemed necessary, evaluate the timeliness of work performed under this Agreement during the previous period. USACE performance goals as defined in paragraph IV. (D) of this Agreement will be reviewed and evaluated; and
- e. Other meetings, as necessary, to discuss information on IDOT 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. The IDOT shall provide reasonable access to IDOT working-level staff and its consultants in an effort to minimize the need for formal meetings.

3. The IDOT acknowledges that a Funded Employee 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. The IDOT shall provide USACE with pertinent project information for timely application review, including complete applications, 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.

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

6. Examples of tasks which all Parties agree to within the expected job duties of the Funded Employee include, but are not limited to:

- a) Provide timely review and response on all formal correspondence including but not limited to; jurisdictional determinations, Letter of No Objection Requests and permit applications submitted by IDOT;
- b) Support process improvements to increase the efficiency of review of IDOT permit applications and decision-making;
- c) Participate in IDOT design standards and construction specification review so to provide comments on alternatives for updating IDOT standards and specifications 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, including Least Environmentally Damaging Practicable Alternative requirements;
- e) Participate in design milestone/plan review and preconstruction meetings;
- f) Perform compliance inspections during and after project construction;
- g) Participate in transportation project interagency scoping meetings;
- h) Assist in the development of programmatic agreements/consultation pursuant to the Clean Water Act to facilitate permit determinations;
- i) Representing the USACE at various transportation planning, design and construction forums in effort to educate the transportation industry on USACE protocols relating to the permitting process; and
- j) Perform other related tasks as defined and agreed to by IDOT and USACE.

7. Should the Funded Employee fail to meet the expectations of the IDOT, the IDOT shall be allowed to substitute the Funded Employee with equivalent experience within 90 days of the execution of the Memorandum of Agreement. Written notice from the IDOT requesting the substitution shall be provided to the USACE within the 90 days period.

## B. COORDINATION

1. Funded Employee will participate in meetings including, but not limited to:

- a. Design milestone/plan review meetings, Phase I and Phase II.
- b. Pre-application meetings;
- c. Pre-construction meetings;
- d. Quarterly project scheduling meetings, or more frequently if deemed necessary;
- e. Transportation industry forums, including but not limited to; American Council of Engineering Companies, American Society of Civil Engineers and Illinois Road and Transportation Builders Association; and

2. USACE leadership shall attend annual leadership meetings with IDOT to evaluate work performed under this Agreement during the previous period; and

3. The Funded Employee shall alert IDOT staff to changes to statutes, regulations and guidance during the term of this Agreement that may affect Section 10 and Section 404 permit reviews.

#### C. TRAINING

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

2. Funded Employee will provide training to IDOT staff and consultants on the USACE Permit Process.

#### D. 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, the IDOT 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 15 days of receipt of a complete application and published immediately thereafter. Following the close of the Public Notice comment period, all comments received will be forwarded to the IDOT within 5 days. Following receipt of any information from the IDOT 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 the IDOT 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 the IDOT 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 the IDOT.

iii. No definitive timelines can be specified for controversial applications or disagreement. However, USACE will keep the IDOT 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. General Permits (GP)

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, the IDOT will submit the requested information or the application will be withdrawn.

c. If the application requires notification to other agencies in accordance with General Conditions or Agency Coordination as described in the Regional Permit Program, the 10-day notification to the agencies and/or 30-day notification to State Historic Preservation office or Tribes will be sent within 10 days of receipt of the information necessary to complete the application in accordance with the GP 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.

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 ways 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 the IDOT, USACE and other actions and circumstances.

## V. 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 implemented by Headquarters, USACE.

A. The review must comply with all applicable laws and regulations. Any procedures or decisions that would otherwise be required for a specific type of project or review

under consideration cannot be eliminated. However, process improvements that are developed under a funding agreement are encouraged to be applied widely, when applicable, for all members of the regulated public to benefit;

B. In cases where funds from external entities are used, all final permit decisions (including individual permit decisions and all reporting general permit verifications, such, general, regional general, and state programmatic general permits) and associated decision documents must be reviewed and signed by a responsible official that is at least one level above the decision-maker. Permit required decisions must also be reviewed and signed by the one-level above reviewer. For the purposes of this guidance, the permit decision-maker is the person that has been delegated signature authority. For example, if the decision-maker is a Regulatory Section Chief, then the one-level-above reviewer may be the Regulatory Chief or Deputy Chief. Section chiefs and team leaders are appropriate one-level above reviewers provided that signature authority has been delegated to the project manager level. For example, if the funded project manager would otherwise have signature authority for a general permit for non-funded projects, then the section chief or team leader could be an appropriate one-level-above reviewer for general permits reviewed under a funding agreement by that project manager. Additionally, the one-level-above reviewer must meet the following requirements: must hold a position that is not partially or fully funded by the same funding entity, and; has not been partially or fully funded by the same funding entity for at least one year;

C. Instruments for mitigation banks or in-lieu-fee programs developed for an entity with a funding agreement must be signed by a Regulatory Branch/Division Chief, an equivalent, or a higher level position that is not funded by any funding agreement;

D. All preliminary jurisdictional determinations (JDs) and approved JDs where funds are used to complete the JD must have documentation that a non-funded regulator conducted a review of the determination. This review is intended to maintain impartiality in the decision and does not require a one-level-above reviewer. The JD review does not need to be a field review. For those approved JDs that require coordination with EPA, additional internal review is not required;

E. Funds from this Agreement cannot be used for enforcement activities. Funds from this Agreement may be used for compliance inspections (i.e. of issued permits and monitoring of compensatory mitigation banks, etc.), but cannot be used to resolve noncompliance issues. Enforcement activities must be charged to Regulatory's appropriated funds in accordance with the most recent budget execution guidance;

F. The USACE will establish a separate account to track the acceptance and expenditure of funds with the current fiscal year budget guidance.

## VI. GENERAL TERMS

A. Length of Agreement. This Agreement does not expire, unless modified, amended or terminated as provided in paragraphs VI (B). or VI(C).

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 IDOT 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 IDOT 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 IDOT 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 IDOT'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 IDOT. IDOT 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 IDOT which prove to be cancelable obligations or unallowable shall be refunded to IDOT.

F. By signature below, IDOT certifies that the individuals listed in this Agreement as representatives of IDOT 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.

IDOT  
John Baczek,  
Program Development Engineer  
Illinois Department of Transportation  
201 W. Center Court  
Schaumburg, Illinois 60196

USACE  
Keith L. Wozniak  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers Chicago District  
231 South LaSalle Street  
Chicago, Illinois 60604

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 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 and venue shall lie in the district courts of the Northern District of Illinois.

#### 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 Employee to be hired by USACE to support priority review of IDOT 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.

L. USACE shall maintain books and records relating to the performance of this Agreement necessary to support amounts charged to the IDOT. Books and records, including information stored in databases or other computer systems, shall be maintained by USACE for a period of five (5) years from the later of the date of final payment under this Agreement or completion of the work performed under this Agreement. To the extent permitted under applicable Federal laws and regulations, books and records, required to be maintained under this section shall be available for review or audit by representatives of the Auditor General, the Office of Executive Inspector General, the IDOT Bureau of Investigations and Compliance, State of Illinois internal auditors, or other governmental entities with monitoring authority, upon reasonable notice and during normal business hours. 30 ILCS 500/20-65.

M. USACE also recognizes that, pursuant to the State Officials and Employees Ethics Act (5 ILCS 430 et seq.; 2 IL ADC 1620 et al.), the Office of the Executive Inspector General (OEIG) of the IDOT has the authority to conduct investigations into certain matters including but not limited to allegations of fraud, waste and abuse, and to conduct reviews. USACE will fully cooperate in any OEIG investigation or review and shall not bill the IDOT for such time. Cooperation includes, to the extent permitted under applicable Federal laws and regulations, providing access to all information and documentation related to the performance of this Agreement, and disclosing and making available all personnel involved or connected with, or having knowledge of, the performance of this Agreement.

N. Nothing in this Agreement is intended to create a joint employer relationship among the IDOT, USACE, and the Funded Employee. USACE shall exclusively direct the work of the Funded Employee.

VII. SIGNATURES

STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION

By:   
JACK A. ELSTON, P.E.  
BUREAU CHIEF, DESIGN & ENVIRONMENT

Date: 9/16/2019

  
OMER OSMAN  
ACTING SECRETARY

Date: 9/20/19

By:   
PAUL A. LOETE, P.E.  
DIRECTOR, OFFICE OF HIGHWAY PROJECT  
IMPLEMENTATION, CHIEF ENGINEER

Date: 9/20/19

U.S. ARMY CORPS OF ENGINEERS – CHICAGO DISTRICT

By: REISINGER.AARON.WILLIAM.1161675209  
AARON W. REISINGER  
COL, EN Commanding

Digitally signed by  
REISINGER.AARON.WILLIAM.1161675209  
Date: 2019.10.07 14:14:58 -05'00'

Date: \_\_\_\_\_