



COOPERATIVE AGREEMENT

between

U.S. ARMY CORPS OF ENGINEERS

and

**MISSISSIPPI DEPARTMENT OF
MARINE RESOURCES**

For 2020 - 2022

Article I. **FUNDING RECIPIENT**

US Army USACE of Engineers
Mobile District
109 Saint Joseph Street
Mobile, Alabama 36602

Article II. **AUTHORITY**

This Agreement between the US Army Corps of Engineers, Mobile District ("USACE") and the Mississippi Department of Marine Resources ("MDMR") is hereby entered into under the authority of 33 U.S.C. § 2352 (Section 214 of the Water Resources Development Act of 2000, as amended). Collectively, these two agencies are referred to herein as the "Parties".

Article III. **PURPOSE AND OBJECTIVE**

The purpose of this Agreement is to set forth the responsibilities of the Parties relative to the establishment of a mutual framework governing the respective responsibilities of the Parties for the acceptance and expenditure of funds contributed by the Mississippi Department of Marine Resources to the USACE (Mobile District) to expedite the evaluation of permit applications submitted by MDMR (either singularly or in conjunction with another state agency co-applicant) that are under the jurisdiction of the USACE.

The objective of this Agreement is for the USACE (Mobile District) to commit one (1) full-time employee dedicated to the review of permit applications submitted by MDMR in its capacity as a permittee (or in conjunction with another state agency co-permittee). Applications submitted by MDMR may be subject to Section 10 of the Rivers and Harbor Act of 1899, Section 404 of the Clean Water Act, and/or Section 103 of the Marine Protection Research and Sanctuaries Act of 1972. Enforcement actions will be turned over to non-funded Regulatory Project Managers for resolution. It is also understood that the USACE employees who work on permit applications subject to this Agreement will also participate in general USACE employee activities.

Article IV. **BACKGROUND**

The MDMR has a coastal restoration and enhancement program. In order to optimize environmental coordination, it is important to develop procedures that enable Corps personnel to work directly with MDMR planners and provide recommendations at the earliest stages of project development.

The mission of the Mississippi Department of Marine Resources (MDMR) is to enhance, protect and conserve the state's marine interests. MDMR manages all marine life, public trust wetlands, adjacent uplands and waterfront areas to provide optimal commercial, recreational, educational and economic uses of these resources that are consistent with environmental concerns and social changes. To fulfill the agency's mission, MDMR plays an important role in coastal restoration and enhancement, ensuring that the coastal waters remain rich with natural resources. With the increase in funds available

for restoration and enhancement projects in coastal Mississippi, MDMR is at risk of losing these funds because permitted sites are unavailable when approval by USACE of MDMR's permit applications is delayed. Expediting the evaluation of MDMR's permit applications by USACE will reduce this risk. It is critical that the already established close working relationship between the USACE and the MDMR be maintained and expanded. Critical to the success of this Agreement is timely interagency communications, assurances of personnel availability for site visits and meetings, and maintenance of continuity by trained and informed personnel.

This Agreement is intended to provide the resources necessary to increase direct and early USACE involvement in the MDMR planning process. This increased focus will facilitate environmentally responsible development while at the same time improving the USACE's ability to review, evaluate and process appropriate permit applications for MDMR projects in a timely manner. This Agreement is predicated upon a relationship of trust between the Parties that will be maintained and strengthened as a result of this effort.

Article V. **SCOPE OF WORK**

For the period hereinafter set forth, the USACE will furnish the necessary personnel, materials, services and facilities needed to carry out the activities described below:

Specifically, the USACE will:

- A. Employ one Regulatory Project Manager to carry out work as detailed in Attachment A and other work contemplated by this Agreement. The USACE will use funds provided under this Agreement in accordance with Article XI herein.
- B. Maintain the mutually agreed-upon employee in the Mobile district, Biloxi field office, unless all Parties agree to a change in personnel or location. A change will not occur, unless all parties agree to such a change. Reason for such a change would have to be unforeseen circumstances, where such a change is the only reasonable resolution.
- C. Ensure that the Regulatory Project Manager maintains daily time and attendance records identifying the number of hours spent working on tasks related to MDMR permit applications, including those listed in Attachment A and Section VI Coordination.
- D. Maintain accurate accounting records necessary for substantiating hours and costs billed against this Agreement. A budget summary report will be run monthly and sent to MDMR for agency review and records. As required by federal regulations, records will be kept during and for a period of five (5) years thereafter the completion of work conducted under this Agreement. At any time requested by MDMR, these records will be subject to examination or audit by MDMR. If any audit, litigation or other action arising out of or related in any way to this Agreement is commenced before the

end of the five (5) year period, the records shall be retained for one (1) year after all issues arising out of the action are finally resolved or until the end of the five (5) year period, whichever is later.

E. Consistent with a letter of responsibility from MDMR, the USACE shall issue such permit or authorization as appropriate and impose such mitigation and permit responsibilities as appropriate to and between MDMR and its state agency co-permittees, which may include the imposition of all mitigation responsibilities on the state agency co-permittee on any permit or authorization issued pursuant to this Agreement consistent with 33 CFR Part 325 as appropriate.

Impartial Decision Making: It is understood and agreed that, to ensure the funds paid under this Agreement will not impact impartial decision making with respect to MDMR permit applications, the following procedures will apply to all cases using funds paid or to be paid by MDMR as a participating non-Federal public entity:

A. All final permit decisions (including individual permit decisions and all reporting general permit verifications, such as nationwide and regional 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. For example, if the decision-maker would be a Regulatory Section Chief, then the one-level-above reviewer would be the Branch Chief. In addition, the one-level-above review must not be a position partially or fully funded by MDMR within the last year. The one-level-above review must be completed in a timely manner. If the review process extends beyond 30 days, MDMR will be notified and the Parties will work together for a proposed resolution.

B. All final permit decisions for cases where these funds are used will be made available on the USACE Headquarters Regulatory ORM2 public web page.

C. The Mobile District will not eliminate any procedures or decision criteria that would otherwise be required for the type of project and permit application under consideration.

D. The Mobile District must comply with all applicable Federal laws and regulations.

E. Funds will only be expended to expedite the evaluation of a permit application according to the terms and conditions of this Agreement. Funds will not be expended for the review of the decision maker's decision. If any third parties are used to develop decision documents, such decision documents must be drafts only and be reviewed and adopted by the Mobile

District before the final permit decision is made and be maintained in the original file with all other documents pertaining to the decision.

F. Funds will not be used for enforcement activities. Funds may be used for compliance inspections, including monitoring of mitigation sites, but cannot be used to resolve non-compliance issues.

G. All preliminary jurisdictional determinations (JDs) and approved JDs where funds are used must be reviewed by a non-funded USACE regulatory employee. The review does not need to be a field review. For those approved JDs that require coordination with the U.S. Environmental Protection Agency, additional internal Mobile District review is not required.

Specifically, MDMR will:

A. Provide the funds to USACE on a reimbursement basis to accomplish the work contemplated by this agreement as set forth in Article IX, all of which in combination shall not exceed \$195,000 in any one 12-month period.

B. Since MDMR is prohibited by law from paying for goods or services in advance, USACE will bill MDMR monthly for allowable costs incurred in the preceding month. MDMR will review the monthly billings submitted by USACE and, if MDMR disagrees with a billing, a meeting to clarify same will be conducted, upon request, within 10 working days. MDMR and USACE will negotiate in good faith to reach resolution of any disputed amount(s).

C. Provide the USACE with a one-year projected project planning list that will be updated and submitted to the USACE at least quarterly. The list should provide the Project Title, Location, Type of Project, Status (funding, planning, design, permitting, etc.) and anticipated construction date.

Regarding all Parties:

A. The Parties to this Agreement act in an independent capacity in the performance of their respective functions under this Agreement; and neither Party shall be construed as the officer, agent or employee of the other. The Regulatory Project Manager furnished by USACE shall not be deemed in any way, directly or indirectly, expressly or by implication, to be an employee of the MDMR or the State of Mississippi. Further, the MDMR shall not provide any insurance coverage or other benefits, including Worker's Compensation, normally provided by the State for its employees to the USACE employee. Neither USACE nor its employees, shall, under any circumstances, be considered servants, agents, or employees of the MDMR, and the MDMR shall be at no time legally responsible for any negligence or other wrongdoing by USACE, its servants, agents, or employees.

B. This Agreement shall not be construed to require or authorize either

party to abrogate its respective obligation and duty to comply with the regulations promulgated under the Endangered Species Act of 1973 (as amended), the Fish and Wildlife Coordination Act of 1958 (as amended), the National Environmental Policy Act of 1969, the Clean Water Act of 1972 (as amended), the Rivers and Harbors Act of 1899 (as amended), or any other Federal statute or regulation. This Agreement shall not be construed to require or authorize MDMR to abrogate its obligation and duty to comply with Mississippi law or implementing regulations. Nor shall this Agreement be construed to imply that the USACE's impartial decision making will be compromised in any way.

C. The Parties will establish primary point of contacts for administration of this Agreement (the "Agreement Administrators") as identified in Article XIII. The Agreement Administrators will hold monthly meetings to establish priorities and evaluate work performed under the Agreement, and to discuss management level concerns related to staff performance, workload priorities and management initiatives.

D. The Agreement Officers listed in Article XII, or their designated representatives, will meet at least annually to facilitate communication, discuss interagency cooperation, and identify programmatic initiatives and strategic goals. Issues that the Agreement Administrators have identified and are unable to resolve at their level should be brought forward and resolved at this meeting.

Article VI. **COORDINATION**

A. MDMR and the USACE agree that ready and reasonable access will be provided to working level staff of the other agency in an effort to minimize the need for formal meetings. Both agencies are committed to frequent and productive interaction and the establishment of working-level interpersonal relationships that will allow for expedient scheduling of field visits, meetings, and all manner of open communications in a sustained effort to achieve the stated goals of this Agreement.

B. MDMR and the USACE agree to conduct early and frequent coordination on issues such as, but not limited to, comments on project alternatives; mitigation plans; review of and comments on Biological Assessments; implementation of permit streamlining processes; and interagency MDMR/USACE training.

Article VII. **PERFORMANCE OBJECTIVES**

A. As part of this Agreement, the USACE agrees to make every effort to adhere to the timeframes outlined in Attachment B. Adjustments to the timeframes may be made in writing when practical and agreed to by all Parties.

Article VIII. **PERIOD OF PERFORMANCE**

A. This Agreement shall be effective for a period of three (3) years from the start date of the funding period. Options for renewal of this Agreement will be determined at the end of the three-year period.

B. Either party may terminate this Agreement upon ninety (90) day written notification to the other Parties. At such time, all MDMR projects will be redistributed amongst existing USACE staff and all commitments made by the USACE under this Agreement shall cease.

Article IX. **AWARD AMOUNT**

- A. 1st Funding Period: Upon execution of this Agreement by both Parties - September 30, 2020
(Funding will be prorated for the 1st funding period based on the date of signing of this Agreement)
2nd Funding Period: October 1, 2020 - September 30, 2021
3rd Funding Period: October 1, 2021 - September 30, 2022
- B. Total Estimated Costs for 1st Funding Period: \$195,000
Total Estimated Costs for 2nd Funding Period: \$195,000
Total Estimated Costs for 3rd Funding Period: \$195,000
- C. TOTAL FUNDING FOR THIS AGREEMENT: \$585,000 (Will be pro-rated based on date of execution of this Agreement)

It is expressly understood and agreed that the obligation of the MDMR to proceed under this Agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the Agreement are, at any time, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the MDMR, the MDMR shall have the right upon thirty (30) calendar days' notice to USACE, to terminate this Agreement without damage, penalty, cost or expenses to the MDMR of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.

Article X. **PAYMENT PROVISIONS**

Since MDMR is prohibited by law from paying for goods or services in advance, USACE will bill MDMR monthly for allowable costs incurred in the preceding month. After execution of this Agreement by both parties, MDMR agrees to make payment in full of the Award Amount for each funding period as set forth in Article IX prior to the start date of the applicable funding period.

Article XI. **FUNDING**

- A. The estimated amount for the funding period is based on 100% of the direct labor per hour rate for one (1), GS-12 Regulatory Project Manager not to exceed \$195,000.

B. The funding amount may be adjusted, either increased or decreased, to adequately compensate for the employee's actual direct labor per hour rate. If a funding adjustment is required, the Parties will meet and agree to the appropriate amount in writing.

C. If the Parties agree or an audit reveals that any funds paid to USACE by MDMR were not used in conformance with this Agreement, USACE agrees to refund any such funds within thirty (30) days after written notification by MDMR to USACE.

Article XII. **AGREEMENT OFFICERS**

Mobile District, U.S. Army Corps of Engineers
Craig J. Litteken, PMP – Chief, Regulatory Division
109 Saint Joseph Street
Mobile, Alabama 36602

Mississippi Department of Marine Resources
Joe Spraggins – Executive Director
1141 Bayview Avenue
Biloxi, MS 39530

Article XIII. **AGREEMENT ADMINISTRATORS**

Mobile District, U.S. Army Corps of Engineers
Munther Sahawneh – Chief, Mississippi Branch
109 Saint Joseph Street
Mobile, Alabama 36602

Mississippi Department of Marine Resources
Jan Boyd – Director, Coastal Resources Management
1141 Bayview Avenue
Biloxi, MS 39530

Article XIV. **ADDITIONAL PROVISIONS**

- A. Severability.** Each provision of this Agreement must be interpreted in a way that is valid under applicable law. If any provision is held invalid, the rest of the Agreement remains in full effect.
- B. Entire Agreement.** This Agreement and its attachments are the entire understanding between the parties.
- C. Changes.** The parties can amend this Agreement only by a written document signed by both parties.
- D. Controlling Law.** The applicable statutes, regulations, policies, directives, and procedures of the United States govern this Agreement and all documents pursuant to any actions arising out of the Agreement. Unless otherwise required by law, all expediting of permit applications undertaken by USACE will be governed by USACE

regulations, policies and procedures.

- E. Dispute Resolution.** The Parties agree that, in the event of a dispute between the Parties, MDMR and USACE shall use their best efforts to resolve the dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties. The Parties agree that, in the event such measures fail to resolve the dispute, they shall refer the dispute for resolution to an appropriate forum in accordance with Federal law.
- F. Other Relationships or Obligations.** This Agreement will not affect any pre-existing or independent relationships or obligations between MDMR and USACE. USACE's participation in this Agreement does not imply endorsement of MDMR projects, nor does it diminish, modify, or otherwise affect MDMR statutory or regulatory authorities.
- G. Continuation of Existing Responsibilities.** 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, representative, agent, or employee of any another Party, to include the Regulatory Project Manager employed by USACE to support expedited review of MDMR permit applications under this Agreement.

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed by an authorized official on the date and year set forth below their signature.

U.S. Army Corps of Engineers

JOLY.SEBASTIEN.PIERRE.1132186762
RE.1132186762

Digitally signed by
JOLY.SEBASTIEN.PIERRE.1132186762
Date: 2020.05.22 13:51:39 -05'00'

Sebastien P. Joly
Colonel, U. S. Army
District Commander

Date

Mississippi Department of Marine Resources



Joe Spraggins
Executive Director

5-22-2020
Date

Attachment A

The USACE staff will accomplish the reviews and tasks appropriate to coordinate, expedite and review permit applications in a manner that meets MDMR's initiatives in compliance with applicable State and Federal statutes. The USACE staff reviews and work tasks may include, but are not limited to, the following:

- Review and processing of permits.
- Participate in agency coordination.
- Participate in site selection review and comment.
- Verify delineations of Waters of the US for proposed project sites.
- Participate in wildlife resource inventory and impact assessment.
- Provide preliminary environmental analysis, guidance and review.
- Provide preliminary and detailed alternatives analyses guidance and review.
- Represent the USACE at meetings, as appropriate.
- Participate in advising the MDMR and/or its state agency co-applicants or proposed state agency co-applicants on USACE regulations and guidance.
- Conduct document reviews and draft agency responses, which may include but are not limited to:
 - o Wetlands Identification and Delineation Reports
 - o Wetland Functional Assessment Reports
 - o Wildlife Resources and Related Technical Reports
 - o Alternatives Analyses
 - o Cultural Resource Assessments
 - o Endangered Species - Biological Assessments
 - o Floodplain Determination
 - o Hydraulics Report
 - o Habitat Evaluation Procedure Reports
 - o Purpose and Need Statements
 - o Preliminary Alternatives Reports
 - o Environmental Impact Statements
 - o Environmental Assessments
 - o Categorical Exclusion Evaluations
 - o FONSI Requests
 - o Environmental Evaluation Reports
 - o Mitigation Reports and Plans
 - o Department of the Army Permit Applications
 - o Policies and Procedures
- Coordinate and provide training on natural resource issues and permits, including various aspects of the Regulatory Program.
- Organize meetings and conference calls to clarify issues at the request of MDMR and/or its state agency co-applicants or proposed state agency co-applicants or the USACE.
- Perform other related tasks as defined by MDMR and agreed to by the USACE.

Attachment B

Under normal circumstances the USACE will make every effort to meet the following timeframes. Please be advised that these timeframes can be affected by regulation changes, Supreme Court decisions, National Guidance, National Policy, etc. and can only be met when complete and accurate information is provided.

1. With all requests for Nationwide Permit authorization (NWP) and Individual Permit (IP) applications, the USACE shall provide notification of any need for additional, required information/clarification within 15 days of the USACE's receipt of such applications.
2. Upon receipt of a completed application or the requested (required), additional information associated with an Individual Permit (IP) application, the USACE shall disseminate the 30-day Joint Public Notice within 15 days.
3. For IPs, within 15 days of the end of any Joint Public Notice the USACE shall provide to MDMR and any state agency co-applicant all comments received as a result of the notice, as well as those comments from the USACE.
4. With all of MDMR's or their state agency co-applicant's or proposed state agency co-applicant's requests for Jurisdictional Determinations (JDs), the USACE liaison shall provide notification of any need for additional, required information/clarification within 15 days of the USACE's receipt of such JD requests.
5. For IPs, upon resolution of comments/issues with the USACE, the resource and other regulatory agencies, and issuance of 401 Water Quality Certification or a Coastal Zone Consistency, the USACE shall render a permit decision within 30 days, in 95% of all instances.
6. Upon receipt of a completed and correct JD request, the USACE shall issue the JD within 30 days, provided coordination with EPA and USACE HQ is not required pursuant to current USACE Guidance. Completed and correct JD requests requiring coordination with EPA and or HQ, but not elevated, will generally be completed within 45 days. These timeframes are subject to the scheduling and timing of site visits and the availability of MDMR, its state agency co-applicant, if any, and/or the consultant for the project.