

**MEMORANDUM OF AGREEMENT
AMONG THE KENTUCKY TRANSPORTATION CABINET,
UNITED STATES ARMY CORPS OF ENGINEERS, AND FEDERAL HIGHWAY
ADMINISTRATION FOR THE
INTERAGENCY FUNDING OF REVIEW POSITIONS**

WHEREAS, this Memorandum of Agreement (Agreement) is among the Kentucky Transportation Cabinet (KYTC), the Great Lakes and Ohio River Division of the United States Army Corps of Engineers (USACE), and Federal Highway Administration (FHWA), hereinafter referred to as the parties;

WHEREAS, this Agreement sets forth the responsibilities of the parties relative to priority review of projects of the KYTC transportation program, with the goal of achieving timely review of adequate, safe, environmentally sound and economical highway improvements while also ensuring such improvements are made in accordance with the Federal statutes administered by the USACE;

WHEREAS, Section 214 of the Water Resources Development Act (WRDA) of 2000, as amended (now 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);

WHEREAS, KYTC 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;

WHEREAS, KYTC and the FHWA desire that the USACE provide an expedited review of KYTC DA permit applications, proposed mitigation banks and sites, and permitted projects (hereinafter, collectively, “KYTC Projects”);

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

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

WHEREAS, the parties have deemed to be efficient the centralization of USACE regulatory reviews of KYTC Projects located within the jurisdictions of the Louisville and Nashville Districts under the management of one USACE office at the Louisville District;

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

WHEREAS, KYTC and FHWA agree to fund supplemental USACE staff dedicated to work on KYTC Projects;

WHEREAS, FHWA agrees that KYTC'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,

WHEREAS, KYTC would request reimbursement from FHWA for federal-aid eligible activities related to the expedited review of federal-aid projects.

NOW THEREFORE, the signatories agree as follows:

I. DEFINITIONS

- A. "KYTC Projects" means KYTC Department of the Army permit applications, proposed mitigation banks and sites, and permitted projects.
- B. "Funded Employee" means a USACE employee whose employment is completely funded by KYTC (see Resources in para II.A.1.a-c below) and whose responsibilities are dedicated to the review of KYTC Projects.

II. KYTC RESPONSIBILITIES

A. RESOURCES

- 1. Program a Federal-aid project and provide payment to USACE for the costs to support staff dedicated to the review of KYTC Projects as contemplated by this Agreement. Biennial budget cycles shall run from July 1 of the first year through June 30 of the second year. Prior to each budget cycle, KYTC will review USACE cost proposals for future budget cycles. Annual budgets submitted by USACE will reflect the costs of appropriate salary step-increases, salary awards, and salary cost of living allowances within the employee's pay grade under the General Schedule (GS) pay scale, and administrative cost adjustments. Allowable costs include but are not limited to the following:
 - a. Salary and benefits (including paid Federal holidays) for three (3) permanent, full-time USACE Project Managers (Funded Employees) for the length of this Agreement;
 - b. Actual burdened overhead rate carried by the Louisville District, including Effective Rate, Departmental Rate, General and Administrative Rate, Training and Travel and other items as appropriate; and

- c. Credit hours and any necessary compensatory and overtime labor compensation.

B. PAYMENTS

1. KYTC shall adhere to its obligations as set forth in the Agreement and will make payments to the USACE for expenses associated with a Funded Employee.
2. Upon execution of this Agreement, transmit an advance payment equal to the whole amount of the approved budget to support the services provided in this Agreement.
3. Upon receipt of future budget estimates, KYTC shall within 90 days transmit an advance payment to cover budgeted expenditures for one year's program support.
4. KYTC will review quarterly USACE submittals (Quarterly Project and Expenditures Report; See section III.H) documenting actual account of expenditures for the items as listed above in support of work contemplated.
5. If the KYTC disagrees with the USACE's Quarterly Project and Expenditures Report, KYTC will, within twenty (20) working days of receipt of the Report, request a meeting, confer, and collaborate to resolve the account of expenditures.
6. If USACE forecasts that its actual costs will exceed the amount of funds available, it shall promptly notify KYTC of the amount of additional funds necessary. KYTC shall either provide the additional funds to USACE, require that the scope of work be limited to that which can be paid for by the then-available funds, or direct the termination of this Agreement pursuant to paragraph V.C. of this Agreement. If KYTC elects to provide additional funds to USACE, USACE shall promptly send an invoice for the required amount to KYTC. KYTC shall make payments via electronic funds transfer within thirty (30) days of receipt of such invoices.

C. COORDINATION

1. KYTC shall request and hold meetings with USACE and FHWA to discuss projects, establish priorities and evaluate work performed under the Agreement. These shall include:
 - a. Pre-application meetings with the USACE for each Project, as deemed necessary, for application review and to benefit project delivery.
 - b. Quarterly project scheduling meetings, or more frequently if deemed necessary, with USACE and FHWA to discuss project priorities, pending applications, and anticipated submittals.
 - c. Semi-annual Leadership meetings to evaluate the timeliness of work performed under this Agreement during the previous period. KYTC, FHWA and USACE performance measures as defined in paragraph III.G of this Agreement will be reviewed and evaluated.
 - d. Other meetings, as necessary to provide information on KYTC 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. KYTC shall provide reasonable access to KYTC working-level staff in an effort to minimize the need for formal meetings.
 3. KYTC acknowledges that Funded Employees under this Agreement will be required to attend USACE staff meetings and to complete USACE mandated training, and that these and similar work-related items are provided for and reimbursable under this Agreement.
 4. KYTC shall provide USACE with pertinent project information for timely application review, including mapping, National Environmental Policy Act (NEPA) documentation, mitigation plans, documentation satisfying Section 106 of the National Historic Preservation Act (Section 106), documentation satisfying Section 7 of the Endangered Species Act (Section 7) or other appropriate information, as necessary and required.

D. TRAINING

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

E. PERFORMANCE

KYTC will track the review of permit applications to monitor the effectiveness of this Agreement. KYTC internal tracking data shall be compared with data provided in the USACE Quarterly Project and Expenditures Report (See Section III.H) to identify any discrepancies. The KYTC tracking data will be shared and discussed in the quarterly project coordination meetings.

III. USACE RESPONSIBILITIES

A. RESOURCES

1. Hire, or identify from current employees and then backfill, three (3) Funded Employees to be dedicated to the review of KYTC Projects under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.
2. Ensure that the work time of Funded Employees is dedicated exclusively to KYTC Projects identified in accordance with the defined coordination procedures or other activities as outlined in paragraph II.C. and III.E. of this Agreement, as well as any permit compliance work associated with permitted KYTC Projects and any attendant required training and general personnel responsibilities.

3. The Funded Employees will be physically located in the Louisville District Office or a field office within the district, unless, by mutual agreement of all parties, it is determined that delivery functions would be served more efficiently by other physical duty locations.

B. DUTIES

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

C. ACCEPTANCE OF KYTC PROGRAMMATIC AGREEMENTS

KYTC and FHWA have several programmatic agreements that have been developed with other resource agencies as a means to reduce paperwork and improve program delivery while complying with all appropriate laws and regulations. USACE acknowledges that the following KYTC and FHWA programmatic agreements exist and that KYTC and FHWA intend those agreements to be binding upon the parties that signed such agreements. These shall include:

1. Programmatic Agreement Among the Federal Highway Administration, Kentucky Transportation Cabinet, Kentucky State Historic Preservation Office, and the Advisory Council on Historic Preservation Regarding Implementing Section 106 of the National Historic Preservation Act for Federally Funded Road Projects in the Commonwealth of Kentucky (2010);

2. Memorandum of Understanding Between the Federal Highway Administration and the Kentucky Transportation Cabinet, Determinations of No Effect Pursuant to Section 7 of the Endangered Species Act (2005);
3. Indiana Bat Conservation Memorandum of Agreement Among the U.S. Fish and Wildlife Service – Kentucky Division, Federal Highway Administration – Kentucky Division and the Kentucky Transportation Cabinet;
4. As appropriate, other programmatic agreements developed and entered into by KYTC and FHWA during the period this agreement is in effect, provided the parties to this agreement agree in writing to their inclusion herein.

D. RECORDKEEPING and RECONCILIATION OF BUDGET/EXPENDITURES

1. The Funded Employees shall keep daily time records, which identify the number of hours spent working on each KYTC project. Time will be tracked to the nearest half hour. KYTC and FHWA acknowledge that this will be an informal accounting measure and not part of the USACE federal payroll system. In addition, 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 for examination by KYTC or FHWA. The USACE shall keep records substantiating hours and costs billed pursuant to this Agreement for a period of at least five (5) years after the final billing is submitted.
2. Accounts due shall be reconciled at the time of any Agreement extension, supplement, or termination and, upon completion of this Agreement.

E. COORDINATION

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

F. TRAINING

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

G. PERFORMANCE MEASURES

The objective of all parties to this agreement is that all permit applications shall be reviewed in as expeditious a manner as feasibly possible and processed in accordance with applicable laws, regulations, and guidance.

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, KYTC will submit the requested information or the application will be withdrawn. Within 10 days of receipt of additional information, USACE shall determine whether the application is complete for processing or identify any additional information that may be required to supplement the information provided.
- c. If the application is being reviewed as an Individual Permit:
 - The Public Notice (PN) will be prepared within 10 days of receipt of the information necessary to complete the application and published immediately thereafter.
 - Following the close of the Public Notice comment period, all comments received will be forwarded to KYTC within 5 days.
 - Following receipt of any information from KYTC 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 KYTC following the public comment period, it is the objective that the decision will be made within 90 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 KYTC following the public comment period, it is the objective that the decision will be made within 60 days of USACE’s receipt of that information from KYTC.
 - iii. No definitive timelines can be specified for controversial applications. However, USACE will keep KYTC 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.

- d. If the application is being reviewed as a Letter of Permission (LOP)
 - In accordance with the Kentucky Transportation LOP (LRL-2006-259), the required 21 day coordination to the agencies to provide written or email comments will be sent within 5 days of receipt of the information necessary to complete the application as specified for the LOP process. The comment period may be extended for an additional 14 days, in accordance with the LOP process.
 - Following completion of the coordination period, the USACE will forward any comments received from the agencies to KYTC within 5 days.
 - Following receipt of information from KYTC to address the issues identified by the agencies' comments and provided USFWS or the USEPA has not retained their option to elevate consideration of the application in accordance with Section 404(q), a decision will be rendered within 45 days following receipt of information from KYTC.
2. Nationwide Permits
 - a. Within 10 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.
 - b. Within 30 days of notification of the additional information necessary to complete the application, KYTC will submit the requested information or the application will be withdrawn.
 - c. If the application requires notification to the agencies in accordance with Regional General Conditions or Agency Coordination as described in the Nationwide Permit (NWP) General Conditions
 - The 10 day notification to the agencies will be sent within 10 days of receipt of the information necessary to complete the application in accordance with the NWP conditions. The agencies may request an additional 15 days.
 - Following completion of the notification period and provided USACE is satisfied that all appropriate determinations and concurrences regarding Endangered Species and Historic Properties have been issued, USACE will render a decision within 30 days.
 - d. If the application is for a non-reporting NWP, USACE will render a decision regarding NWP verification within 30 days of receipt of a complete application including satisfactory evidence of appropriate determinations and concurrences regarding Endangered Species and Historic Properties.

3. The USACE will be available within two (2) weeks, or as soon as feasibly possible if extenuating circumstances arise and USACE cannot be available within two weeks, following notification of the need for either a site visit or meeting.
4. If the timelines specified above are not met, the delinquent party will document and provide to all parties the circumstances and issues that contribute to these measures not being met. Together, the parties will develop a plan of action to reduce additional delays. Costs incurred by funded employees to complete this document is an allowable cost under paragraph II.A.
5. Mitigation monitoring reports will be reviewed and comments regarding compliance, additional work requests or other items will be provided as expeditiously as possible. Mitigation credit releases shall be completed as quickly as possible following submittal of the required monitoring report(s).

H. REPORTING

1. A Quarterly Project and Expenditures Report, deliverable by the 15th day of the month following the State of Kentucky's Fiscal Year quarter, shall be provided that:
 - a. Identifies the status of all pending KYTC permit applications as well as any final actions taken during the period; and,
 - b. For each project identified, the report shall provide the type of application submitted or permit issued, the date of application receipt, days elapsed since submittal of the application, the date the application was determined complete, the days elapsed since the application was determined to be complete;
 - c. A description of other activities undertaken during the period and a status update.
 - d. An accounting of quarterly personnel costs and expenditures.
2. A Semi-Annual Report shall be prepared for discussion at the Semi-Annual Leadership Meeting, which documents, on a project or permit basis, whether the performance metrics set forth were satisfied. Should performance metrics not be met during the period, an explanation of the circumstances that caused unanticipated delays shall be provided along with a proposed corrective measure to improve likelihood of achieving the established objectives.

IV. FHWA RESPONSIBILITIES

- A. Approve programming for Federal aid to accomplish the work contemplated by this Agreement.
- B. Under the authority of 23 U.S.C. 139, and upon receipt of a request, reimburse KYTC for the cost of activities to support this Agreement.
- C. Support the state and local transportation program by involvement and participation in, but not limited to the following meetings, as time allows:

1. Pre-application meetings.
 2. Quarterly project coordination meetings, or more frequently as deemed necessary.
 3. Semi-Annual Leadership meetings.
- D. FHWA will provide the KYTC and the USACE reasonable access to working level staff in an effort to minimize the need for formal meetings.
- E. Collaborate to determine the initial range of project alternatives to be evaluated and the information needed to screen these alternatives.
- F. Comment on project alternatives and mitigation plans.

V. GENERAL TERMS

- A. Length of Agreement. This Agreement expires on June 30, 2018, unless extended or terminated as provided in paragraphs V.B. or V.C. below.
- B. Supplement, Modification and Extension. This Agreement may be modified, amended, or extended by the mutual agreement of the signatory parties. This agreement may be renewed on two-year cycles to update the budget and other provisions as appropriate.
- C. Termination. This Agreement may be terminated by KYTC, FHWA or USACE upon six (6) months written notice to the POCs of the other parties if the party requesting termination has determined that one, or both, of the other parties 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 KYTC 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. Excess Funds (if Agreement is terminated). 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 KYTC 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 KYTC'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 KYTC. KYTC 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 KYTC which prove to be cancelable obligations or unallowable shall be refunded to KYTC.

- E. By signature below, KYTC certifies that the individuals listed in this Agreement as representatives of KYTC 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.
- F. Points of Contact/Project Managers. The title of the current point of contact for each signatory agency is listed below.

KYTC

Title: Director, Division of Environmental Analysis
Address: 200 Mero Street, Frankfort, KY 40622

USACE

Title: Chief, Regulatory Branch, USACE – Louisville District
Address: P.O. Box 59, Louisville, KY 40201-0059

FHWA

Title: Team Leader – Planning Environment and Safety
Address: 330 West Broadway, Frankfort, KY 40601

- G. 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.
- H. All contracts to be developed and awarded pursuant to this Agreement shall at all times conform to the applicable Federal and state laws, rules, regulations, orders and approvals, including procedures and requirements relating to labor standards, equal employment

opportunity non-discrimination, compliance with the Americans with Disabilities Act, anti-solicitation, information, auditing and reporting requirements.

- I. This Agreement and any disputes or claims arising out of this Agreement shall be governed by the laws of the United States.
- J. Continuation of Existing Responsibilities
 1. The parties to this Agreement are acting in an independent capacity in the performance of their respective legally authorized functions under this Agreement, and none of the parties' employees are to be considered the officer, agent, or employee of another party, to include the Funded Employees to be hired by USACE to support priority review of KYTC 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.

KENTUCKY TRANSPORTATION CABINET

Approved as to form and legality:

Office of Legal Services

Date

Greg Thomas, Secretary

Date

FEDERAL HIGHWAY ADMINISTRATION

Thomas L. Nelson, Jr., Division Administrator

Date

**U.S. ARMY CORPS OF ENGINEERS-Great Lakes &
Ohio River Division**

Richard G. Kaiser
Brigadier General, U.S. Army
Division Commander

Date