

MEMORANDUM OF AGREEMENT
BETWEEN
UNITED STATES ARMY CORPS OF ENGINEERS (USACE),
NEW ENGLAND DISTRICT (NAE)
AND
MAINE DEPARTMENT OF TRANSPORTATION (MaineDOT)
FOR
EXPEDITING PERMIT APPLICATION EVALUATIONS UNDER
SECTION 214 OF THE WATER RESOURCES DEVELOPMENT ACT OF 2000,
AS AMENDED,
AND
SECTION 139(j) OF TITLE 23, UNITED STATES CODE, ASSISTANCE TO
AFFECTED STATE AND FEDERAL AGENCIES

PREAMBLE: This Memorandum of Agreement (Agreement) between the Maine Department of Transportation (MaineDOT) and the New England District of the U.S. Army Corps of Engineers (USACE) (collectively "the Parties") sets forth the responsibilities of the Parties relative to the expedited review and processing of permit applications for MaineDOT and local federal-aid transportation projects located in Maine. The purpose of this Agreement is to achieve timely decision-making for transportation improvements within the State of Maine while also assuring transportation project design and implementation is sensitive to the protection of federal aquatic resources, in accordance with the federal statutes. The Parties shall work proactively to enhance each agency's ability to realize its mission through open communication and teamwork.

1. WHEREAS, many of these projects include activities that fall within the jurisdiction of USACE under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403;
2. WHEREAS, timely review of permit applications for MaineDOT and local federal-aid transportation projects in Maine under these statutes is critical to MaineDOT's ability to advertise these projects to meet scheduled dates for obligating federal and non-federal funding;
3. WHEREAS, USACE is unable, within current staff resource constraints, to provide expedited evaluation of permit applications under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 for transportation projects within the State of Maine and MaineDOT-funded USACE dedicated staffing will assist MaineDOT in meeting its milestones for bid advertisement and will help avoid unanticipated costs and delays to MaineDOT and local federal-aid transportation projects in Maine;
4. WHEREAS, the Parties have determined that it will be mutually beneficial and serve to increase efficiencies within each agency to supplement USACE staffing above existing levels;
5. WHEREAS, the Parties have determined that the agreed upon staffing above existing levels will provide expedited review of transportation projects contemplated or under design for a public purpose by MaineDOT or local governmental entities receiving Federal Highway Administration financial assistance through MaineDOT ("sub-recipients");
6. WHEREAS, MaineDOT and USACE have determined that MaineDOT and its sub-recipients have sufficient work associated with the processing of USACE permit applications for MaineDOT and sub-recipient transportation projects to employ at least one full-time USACE employee for the life of this Agreement for the expedited review and processing of such permit applications ("dedicated USACE employee");
7. WHEREAS, MaineDOT is willing to contribute funds to USACE for the dedicated USACE employee to provide these functions;
8. WHEREAS, Section 214 of the Water Resources Development Act of 2000 (Section 214), as amended and codified at 33 U.S.C. § 2352, authorizes the Secretary of the Army, after public notice, to accept and expend funds contributed by a non-Federal public entity to expedite evaluation of permit applications from that entity related to projects or activities with a public purpose falling under the jurisdiction of the USACE Regulatory Program;
9. WHEREAS, MaineDOT receives funding from the Federal Highway Administration (FHWA) pursuant to 23 U.S.C. § 139(j) (Section 139(j)) which authorizes the Secretary

of the U.S. Department of Transportation (USDOT) to allow public entities that receive financial assistance from USDOT (when the financial assistance is provided under title 23 (“Highways”) or chapter 53 of title 49 (“Public Transportation”) of the United States Code) to provide funds to Federal agencies, state agencies, and Indian Tribes participating in the environmental review process for a project or program, but only when the funds will support activities that directly and meaningfully contribute to expediting and improving permitting and review processes;

10. 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;

11. WHEREAS, the Assistant Secretary of the Army for Civil Works (ASA-CW), by memorandum dated January 19, 2018, issued implementation guidance on the establishment, management, and oversight of Section 214 and Section 139(j) funding agreements that allow USACE to accept and expend funds to expedite the permit review process;

12. WHEREAS, Title 23 of the Maine Revised Statutes grants MaineDOT the authority to enter into agreements and cooperate with the government of the United States in the construction, improvement, enhancement, or maintenance of transportation in Maine and authorizes MaineDOT to comply with the laws and regulations of the United States for the expenditure of federal moneys;

13. WHEREAS, the Parties anticipate that this Agreement and the funding hereunder will result in demonstrated improvements in coordination amongst the Parties and in the permit decision-making process for MaineDOT and local federal-aid transportation projects, in accordance with the performance objectives outlined in this Agreement;

14. WHEREAS, the locations of these projects within the State of Maine fall under the area of responsibility of the New England District of the USACE;

15. WHEREAS, the Parties agree that funding a dedicated USACE employee position for MaineDOT and local federal-aid transportation projects in the state of Maine would create efficiency and expedite the permit application review process for such projects;

16. WHEREAS, USACE’s involvement in the planning and environmental analysis of proposed Federal-aid transportation projects undertaken by MaineDOT or its sub-recipients will better serve the public interest; and

17. WHEREAS, it is acknowledged and understood that USACE will ensure that acceptance and expenditure of funds under this Agreement will not impact its impartial decision-making responsibilities and that the USACE implementation of this agreement

and USACE review of MaineDOT and its sub-recipients' permit applications will be in accordance with all applicable federal laws and regulations and the ASA-CW's January 2018 implementation guidance (or subsequent guidance).

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Parties to this Agreement concur and agree as follows:

I. Agency Responsibilities

A. MaineDOT

1. MaineDOT shall fund at least one (1) full-time dedicated USACE employee position to review and process USACE permit applications expeditiously for MaineDOT and sub-recipient transportation projects in accordance with the Performance Measures set forth in Enclosure 1 hereto, which is incorporated into this Agreement by reference. The costs of funding the dedicated USACE employee shall include all salary-related costs assessed by USACE as provided in this Section I.A. It is expected that the total annual funds needed for these services will not exceed \$290,000.00. Actual costs may be less than this amount, depending upon the amount of travel needed to support the expedited review contemplated by this Agreement. If additional funds are necessary, additional payments may be negotiated by all Parties to this Agreement. Costs to be billed by USACE and paid by MaineDOT shall include:

(a) Salary and benefits (including paid Federal holidays) for at least one (1) full-time dedicated USACE employee, adjusted annually as needed to cover appropriate locality pay increases and performance-based salary increases within the employee's pay grade under the GSA General Schedule pay scale. In accordance with Section VI.H of this Agreement, additional positions and subsequent funding, subject to an encumbrance as required by Maine State law, may be added under this Agreement if all parties to the Agreement find that the workload warrants additional USACE personnel.

(b) Actual burdened overhead rate carried by USACE, including:

- i. Effective Rate,
- ii. Departmental Overhead Rate,
- iii. General Administrative Rate, and
- iv. Other Items, as appropriate.

(c) Compensatory time, overtime labor compensation, training, travel, and per-diem at Federal government rates, as needed to support the expedited review contemplated by this Agreement.

(d) Costs for the use of a government-owned vehicle or rental car.

2. Funding and payment under this Agreement shall be as follows. MaineDOT shall make quarterly payments from amounts due, in accordance with USACE procedures and subject to the provisions of this Agreement.

3. If this Agreement is modified to provide for additional services from USACE not identified by this Agreement, payment shall be made for the costs for those additional services within thirty (30) days of receiving an invoice from USACE, provided that such services and costs are identified in the invoice and such costs have been correctly calculated.

4. If USACE forecasts that its actual costs will exceed the amount of funds specified in Section I.A.1, it shall promptly notify MaineDOT of the amount of additional funds necessary. MaineDOT shall (i) provide the additional funds to the USACE, or (ii) require that the scope of work be limited to that which can be paid for by the then-available funds, or (iii) direct the termination of the Agreement pursuant to Section VI.J.

5. MaineDOT shall review quarterly USACE submittals of actual account of expenditures. MaineDOT shall request a meeting to clarify the account of expenditures within thirty (30) calendar days of receipt if MaineDOT disagrees with the USACE submittals. In the event of a disagreement over the account of expenditures, MaineDOT pledges to negotiate in good faith towards a reconciliation of the disputed amount, in accordance with Section VI.A. USACE and MaineDOT will each credit the other as appropriate for any amount determined to be an over-statement or under-statement of USACE expenses.

6. On a quarterly basis or as determined appropriate at the field level, MaineDOT shall establish a priority listing of projects and pending permits for USACE that will guide the dedicated USACE employee's efforts in the expedited permit review process. MaineDOT will provide updates to this priority listing to USACE as needed.

7. Within sixty (60) days following the last signature on this Agreement, MaineDOT shall provide the USACE with a one-year-out project planning list (Enclosure 2) that will be updated and submitted at least quarterly. The list shall provide project title, location, type of project, anticipated USACE permits required, status (funding, planning, design, permitting, etc.), and, if known, anticipated contract advertisement, award, and construction dates.

8. On a quarterly basis, MaineDOT will meet with the USACE to evaluate work performed under this Agreement.

9. When a USACE permit is needed, MaineDOT and its sub-recipients shall, with the guidance of the USACE staff, prepare and submit to USACE a completed permit application and drawings, as required by USACE regulations set forth at

33 C.F.R. Part 325, and New England District procedures. MaineDOT and/or its sub-recipients shall provide all information necessary for USACE evaluation of permit applications, delineations of aquatic resources, and jurisdictional determinations.

B. USACE, New England District, shall:

1. Designate a dedicated USACE employee as the central point of contact for all USACE permit application reviews for MaineDOT projects contemplated by this Agreement.

2. Hold quarterly meetings with MaineDOT to evaluate work performed under this Agreement.

3. Upon execution of this Agreement and the programming and obligation of the initial year's funding as provided in Section I.C.1 hereof, hire at least one full-time dedicated USACE employee with the qualifications to provide review of permit applications for transportation projects of the MaineDOT and its sub-recipients required under this Agreement, as determined by the USACE in consultation with MaineDOT during the hiring process. The dedicated USACE employee filling the position shall be employed by USACE at the Maine Project Office and supervised solely by the New England District.

4. As provided in Section I.A.2(c) of this Agreement, in the event of disagreement over statements or accounts of expenditures, USACE and MaineDOT shall negotiate in good faith towards reconciliation of the disputed amount. USACE will continue work under this Agreement throughout negotiations as long as current funding is sufficient to cover costs set forth in such statements or accounts.

5. Develop internal procedures to implement this Agreement and modify such procedures as necessary, including but not limited to, procedures for tracking receipts and expenditures of funds provided under this Agreement – particularly to identify the relevant statutory authority (that is, Section 214 and/or Section 139(j)); to review applications for Federal-aid transportation projects or state-aid projects proposed by MaineDOT under Section 214 and applications for projects of MaineDOT's Federal-aid sub-recipients under Section 139(j); and to comply with reporting requirements related to activities undertaken pursuant to this Agreement.

II. Coordination

A. MaineDOT will establish a list of priority projects to guide the USACE employee's efforts in prioritizing permit review process, per Section I.A.5 above. MaineDOT and USACE will collaborate on other priority work to be accomplished by the USACE employee hired pursuant to this Agreement, such as the development of programmatic improvements that aim to expedite the permit evaluation process.

B. Both MaineDOT and USACE agree that reasonable access will be provided to working level staff of the other agency to minimize the need for formal meetings.

C. While the primary focus will be to prioritize the review and processing of permit applications for MaineDOT projects, the dedicated USACE employee may also be involved in other related tasks which support agency coordination (e.g., programmatic efforts). These may include efforts towards compliance with the statutes and regulations for which USACE bears responsibility, including advising MaineDOT in the USACE environmental decision-making process and on pertinent environmental regulations to achieve timely permit application reviews for projects undertaken by MaineDOT and its sub-recipients. Examples of other tasks which USACE may assign to the dedicated USACE employee, include but are not limited to:

1. Attend pre-application meetings, site visits, interagency meetings, internal MaineDOT project coordination meetings, and public meetings for requested MaineDOT and local federal-aid transportation permit actions, as determined appropriate by the USACE.

2. Participate in interagency scoping meetings and NEPA-404 merger meetings.

3. Conduct outreach on USACE-related issues for stakeholders, as needed.

4. Review and comment on project alternatives, mitigation plans, and biological assessments.

5. Assist MaineDOT in developing programs to increase the efficiency of MaineDOT's environmental decision-making process, programmatic agreements, statewide wetland banking program, and transportation project permit application evaluation.

6. Assist MaineDOT in providing appropriate training of MaineDOT personnel in USACE Regulatory Program requirements and general permits.

7. Assist MaineDOT and its sub-recipients in identifying navigable waters of the United States and waters of the United States that may be impacted by MaineDOT and sub-recipient projects and require a USACE permit and potential wetland and stream mitigation sites and plans.

III. Performance Objectives

A. MaineDOT and USACE will review existing interagency coordination processes and, if appropriate, formulate recommendations to improve procedures and increase efficiency.

B. USACE agrees to use best efforts to meet the following goals:

1. Provide early coordination and priority review of transportation project permit applications for MaineDOT and its sub-recipients.

2. Inform MaineDOT if the processing of a permit application may exceed Performance Targets evaluation and processing times set forth in Enclosure 1 hereto due to, but not limited to, issues such as required (Federal) Endangered Species Act consultation, Section 106 of the National Historic Preservation Act consultation, Section 404(b)(1) Guideline compliance, controversial public interest factors, litigation, etc.

3. Meet all timelines established by regulations and USACE policy for individual permit decisions, unless otherwise previously indicated.

4. Provide relevant substantive comments (as necessary) during project reviews and construction.

5. Provide timely reviews and response for General Permit re-verifications and individual permit amendments.

6. Provide timely reviews and response for what MaineDOT considers urgency projects.

7. Include the dedicated USACE employee as a commenting member of MaineDOT's environmental review and evaluation team for USACE pre-applications, informal consultations under the Endangered Species Act, and USACE participating and cooperating agency roles under NEPA.

C. MaineDOT agrees to meet the following goals:

1. With the guidance of the dedicated USACE employee, provide all information necessary for evaluation of complete permit applications.

2. With the guidance and assistance of the dedicated USACE employee, give full consideration to modifying each submitted permit application and supporting documentation in accordance with the comments provided by USACE and other approving or commenting agencies in the course of permit review or terminating or withdrawing the permit application.

IV. Impartial Decision Making

It is understood and agreed that, to ensure the acceptance and expenditure of MaineDOT funds will not impact USACE's impartial decision-making with respect to eligible MaineDOT and sub-recipient permit applications, USACE will apply the following procedures to all cases where funds provided by MaineDOT as a participating non-Federal public entity are used by USACE for the work envisioned by this Agreement:

A. All final USACE permit decisions (including individual permit decisions, all reporting general permit verifications, such as nationwide and regional general permits, and no permit required decisions) and associated decision documents must be reviewed and signed by a responsible USACE official that is at least one level above the decision-maker. The decision-maker is the USACE official that has been delegated signature authority. For example, if the decision-maker would be a Regulatory Branch Chief, then the one-level-above reviewer would be the Regulatory Division Chief. In addition, the one-level-above review must not hold a position that is partially or fully funded by MaineDOT for at least one year.

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

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

D. The New England District will comply with all applicable Federal laws and regulations.

E. Funds accepted under this Agreement will only be expended to expedite and prioritize the evaluation and processing of eligible permit applications, 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 New England District before the final permit decision is made.

F. Funds accepted under this Agreement will not be used for enforcement activities. Funds may be used for compliance inspections, including monitoring of mitigation sites, but cannot be used to take formal non-compliance actions. Mitigation bank or in-lieu-fee program instruments sponsored by MaineDOT and evaluated by USACE using funds accepted under this Agreement must be signed by the Regulatory Division Chief or a higher-level position not funded by any funding agreement.

G. All preliminary jurisdictional determinations (JDs) and approved JDs where funds accepted under this Agreement are used to complete the JD must have a documented review by a USACE Regulatory employee that is not funded by this Agreement. 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 review is not required.

V. Public Information

Justification and explanation of MaineDOT programs or projects before other agencies, departments and offices will not be the responsibility of the New England District. The New England District may provide, upon request from MaineDOT, any assistance necessary to support justification or explanations of activities conducted under this Agreement. In general, the New England District is responsible only for public information regarding New England District regulatory activities. MaineDOT will give the New England District advance notice before making formal, official statements regarding New England District activities funded under this Agreement.

VI. General Terms:

A. **Dispute Resolution.** The Parties agree that, in the event of a dispute between the Parties, MaineDOT and the USACE New England District shall use their best efforts to resolve the dispute collaboratively 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.

B. **Other Relationships or Obligations.** This Agreement will not affect any pre-existing or independent relationships or obligations between MaineDOT and the USACE New England District. USACE's participation in this Agreement does not imply endorsement of MaineDOT projects or projects of its sub-recipients, nor does it diminish, modify, or otherwise affect USACE statutory or regulatory authorities.

C. **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 Staff hired by USACE to support priority review of MaineDOT and sub-recipient permit applications under this Agreement.

D. **Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, the remaining provisions will remain in force and unaffected to the fullest extent permitted by law and regulation.

E. **Effective Date.** This Agreement will become effective upon the date of execution by the last signatory (the "Effective Date").

F. **Controlling Law.** The applicable statutes, regulations, policies, directives, and procedures of the United States govern this Agreement and all documents pursuant to and 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.

G. Length of Agreement. This Agreement shall expire five (5) years following the Effective Date of execution, unless extended or terminated as provided below.

H. Modification and Extension. This Agreement may be modified, amended or extended by written agreement of the signatory Parties.

I. Merger. This Agreement, including any documents incorporated by reference or attachments thereto, constitutes the entire agreement between the Parties with respect to the subject matter hereof. All prior or contemporaneous agreements, understandings, representations and statements, oral or written, with respect to such subject matter are merged herein and shall be of no further force or effect.

J. Termination. This Agreement may be terminated by either MaineDOT or USACE upon sixty (60) days prior written notice given to the contact for the other party set forth in Section VI.K hereof, if the party requesting termination has demonstrated that the other party has not substantially fulfilled the responsibilities and terms of the Agreement after being provided with written notice and ninety (90) days to remedy the situation. If either MaineDOT or USACE wishes to terminate this Agreement for any reason other than deficient performance, the party wishing to terminate shall provide written notice to the other party, indicating the intent to terminate the Agreement, at least one hundred and eighty (180) days from the date of the written notice, unless both parties agree to an alternate date. In the event of termination, MaineDOT shall continue to be responsible for all costs incurred by USACE under this Agreement.

K. Agency Points of Contact. Any notice, request, 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 to the party's place of business during normal business hours, sent by fax, sent by email, or mailed by registered or certified mail, with return receipt. A Party may change the recipient or address to which such communications are to be directed by giving written notice to the other Parties in the manner provided in this Article. The points of contact are listed below:

1. MAINEDOT:

ADDRESS: Joyce Taylor, Chief Engineer
Maine Department of Transportation
24 Child Street
Augusta, ME 04330
PHONE: (207) 624-3000
FAX: (207) 624-3001
EMAIL: joyce.taylor@maine.gov

2. USACE:

ADDRESS: Frank J. Delguidice, Branch Chief
Regulatory Division
U.S. Army Corps of Engineers, New England District
696 Virginia Road
Concord, MA 01742

PHONE: (978) 318-8174

FAX: (978) 318-8832

EMAIL: frank.j.delgiudice@usace.army.mil

3. FHWA

ADDRESS: Todd D. Jorgensen, Division Administrator
Federal Highway Administration
40 Western Avenue, RM 614
Augusta, ME 04330

PHONE: (207) 622-8350

FAX: (207) 622-9133

EMAIL: Todd.jorgensen@dot.gov

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, which shall become effective upon the date it is last signed.

Joyce Noel Taylor 7-8-2022
Joyce Taylor Date
Chief Engineer
MaineDOT

TODD D
JORGENSEN
Digitally signed by TODD
D JORGENSEN
Date: 2022.07.06 16:14:34
-04'00'

Todd D. Jorgensen Date
Division Administrator
Federal Highway Administration
(Signing for the limited purpose of documenting FHWA's approval consistent with their authority pursuant to 23 U.S.C. § 139(j) (Section 139(j)))

John A. Atilano II Date
Colonel, Corps of Engineers
District Engineer

Encls

ENCLOSURE 1

	Performance Measures	Performance Targets
1.	Determination of completeness of USACE applications	Within 15 days of submission
2.	Individual permit decisions within 120 days after submittal of a complete application with the exception of those that are delayed due to: absence of CWA Section 401 certification; Section 7 of the Endangered Species Act (ESA) consultation(s); Section 106 of the National Historic Preservation Act consultation(s); untimely submittal of information or comments from MaineDOT; extended comment period for public notice; and/or environmental review processes with statutory time frames.	80% of submitted annually
3.	General permit decisions within 60 days after submittal of a complete application	90% of submitted annually

Definitions and Notes

1. **Determination of completeness of USACE applications.** This refers to applications formally deemed complete in accordance with 33 CPR Part 325.1.
2. **Individual Permits.** The national USACE goal for processing individual permits is 70% within 120 days of a complete application.
3. **General Permits.** The national USACE goal for processing other permit actions is 85% within 60 days of a complete application.

ENCLOSURE 2

Planned Priority Transportation Projects

Presque Isle Bypass Section 1 Phase II
Machias Dike Bridge
Offshore Wind Port Development
Transportation Resiliency Projects

Pending Permits List as of 5/18/22

Projects Sent:	DOT Staff	Sent to USFWS/EPA/NOAA	Date submitted
Saint John Plt 25409.00 slip line- Rick	Audie	email	3/7/2022
Lincolntown 27733.00 (R2 M&O)-Rick	Kevin	email	4/13/2022
Southwest Harbor 26320.00 (R4 M&O)	Audie	email	4/15/2022
Veazie 27819.00 (R4 M&O) pipe end reset	Audie	email	4/15/2022
Stonington-Deer Isle 22356.01	Andrea	email	4/19/2022
Litchfield-West Gardiner 23094.01	Andrea/Josh	email	4/19/2022
Individual Permit Waterville Winslow Ticonic 23138.00- Peter	Andrea	email	4/26/2022
East Machias 27815.00 M&O-Peter	Audie	email	5/3/2022
Batchelders Grant 18724.00	Andrea/Josh	email	5/12/2022

Note: Planned Priority Transportation Projects list and Pending Permits List are subject to updating and/or amending by the MaineDOT and will be conveyed to USACE regularly (quarterly at minimum).