

**MEMORANDUM OF AGREEMENT (MOA) BETWEEN THE NORFOLK DISTRICT CORPS OF
ENGINEERS (USACE) AND THE VIRGINIA DEPARTMENT OF TRANSPORTATION (VDOT) TO
DOCUMENT ACTIONS FOLLOWED ON VDOT COMPENSATORY MITIGATION SITES TO COMPLY
WITH LONG TERM MANAGEMENT REQUIREMENTS (33 CFR 332.7(d))**

INTRODUCTION:

In 2008, the Corps of Engineers/Environmental Protection Agency Compensatory Mitigation Rule (Federal Register Vol. 73, No. 70, pp. 19594 – 19705, hereinafter “Final Rule”) established new priorities and requirements for compensatory mitigation for impacts to waters of the United States authorized by Department of the Army Permits issued under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The Final Rule requires long-term management (LTM) of compensatory mitigation sites (33 CFR 332.7(d)) and requires compensatory mitigation plans to include provisions for funding of that LTM (33 CFR.7(d)(3)). This MOA documents the steps VDOT will take to comply with LTM on VDOT compensatory mitigation sites. “VDOT compensatory mitigation sites” are those sites where VDOT is the permittee (including sites where the permit has been transferred to VDOT) and are the only sites subject to this MOA.

WHEREAS: VDOT and USACE agree that adequately compensating for wetland and stream loss, as required by USACE regulation 33 CFR 332.3(a)(1), is critical for ecological reasons; and

WHEREAS: VDOT is committed to the successful long-term performance of its compensatory mitigation sites; and

WHEREAS: VDOT develops an annual management plan for VDOT compensatory mitigation sites, based on monitoring and maintenance requirements of USACE permits; and

WHEREAS: Based on the annual management plan, VDOT develops an annual mitigation budget to support the performance of VDOT compensatory mitigation sites; and

WHEREAS: The Commonwealth of Virginia currently includes a line item in its biennial budget that provides sufficient funds for permit-required performance monitoring and remediation and is expected to continue to include this line item; and

WHEREAS: VDOT recognizes that its current monitoring and remediation program must be enhanced to better provide for long term compensatory mitigation site management, when required by permit; and

WHEREAS: USACE, in accordance with 33 CFR 332.3(n), has determined that VDOT will not be required to provide financial assurances for construction and monitoring and maintenance of VDOT compensatory mitigation sites when VDOT is the-permittee;

NOW BE IT THEREFORE RESOLVED:

For VDOT-compensatory mitigation sites associated with a permit application received by USACE after execution of this MOA, and after these sites are determined by USACE to perform in accordance with standards established by permit requirements (typically after the ten year monitoring period), VDOT will do the following to meet regulatory requirements for permanent LTM, including an LTM funding plan:

Long-term management:

- VDOT will include a Long-Term Management Plan (LTMP) as part of its compensatory mitigation plan submitted with an application for a USACE permit.
- VDOT will develop an annualized cost for accomplishing the LTMP on a project-specific basis for permanent long-term management and use that cost in developing its annual mitigation budget.
- For compensatory mitigation sites associated with permits transferred to VDOT, including those that may have expired, VDOT will assume responsibility for long term management consistent with this agreement.
- In general, funding for long-term management should not be phased out over time, since those activities usually need to be conducted for substantial periods of time. There may be occasions where long-term management is no longer necessary because a compensatory mitigation project has developed to the point where long term management is no longer needed to fulfill the objectives of that project. In such cases, VDOT should contact the district engineer and request that the long-term management provisions be modified to release those obligations.
- After USACE determines that a site meets performance standards and the permittee is released by USACE from monitoring requirements associated with site establishment and, if VDOT is not the original permittee but agrees to assume LTM responsibilities, VDOT will then comply with the LTMP that is included as a permit condition, including inspections of the site every one to three years (as specified in the LTMP) to identify any maintenance action items necessary to assure the long-term performance of the site. VDOT will invite USACE to participate in these site inspections.
- VDOT will document each inspection and any maintenance action items by providing USACE a narrative monitoring report or summary, as specified in the permit condition for the LTMP). The detail of information provided will be commensurate with the size and/or complexity of the site and the actions which were necessary for that year.
- Maintenance action items may include fence repairs, trash removal, repair of water control structures (pipes, sluice gates, berms, etc.), and similar actions in accordance with the LTMP and any meetings with USACE (on-site or off-site).
- Should VDOT object to any necessary actions in any given year of LTM, their objections will be discussed with the USACE project manager, and if the objections cannot be resolved, then the objections will be elevated to the USACE Chief, Regulatory Branch, in accordance with standard practice.
- VDOT shall be responsible for the repair and remediation of any portion of a site except for repairs and remediation necessary due to those events considered to be Force Majeure, as determined by USACE and the Virginia Department of Environmental Quality after consultation with VDOT. Force majeure events are those that VDOT could not have anticipated or controlled and that have an irreparable material and detrimental impact on the project site.

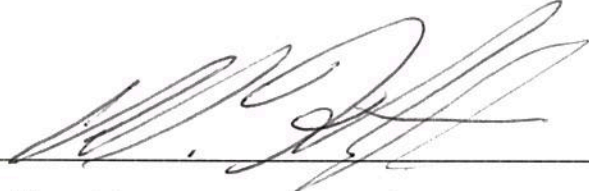
Long-term funding plan:

- In accordance with Section 7 of Article X of the Constitution of Virginia, nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the General Assembly of the Commonwealth of Virginia, where creating such an obligation would be inconsistent with the Constitution of Virginia.
- VDOT intends to fulfill the long-term requirements of its permits and LTMPs (including its compensatory mitigation site management budget), as described in this MOA. VDOT shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that biennium, and shall use all reasonable and lawful means to secure those appropriations. VDOT reasonably believes that funds in amounts sufficient to fulfill


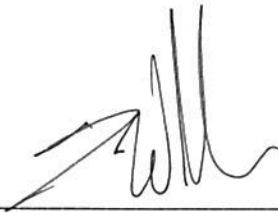
these obligations can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, VDOT shall use its best efforts to satisfy any requirements for payments or contributions of funds under this MOA from any other source of funds legally available for this purpose. Further, if VDOT is unable to fulfill these obligations, USACE may exercise any legal rights it has to protect the compensatory mitigation.

- VDOT's Environmental Division will continue to develop an annual compensatory mitigation site budget to support permit-required long-term management.
- VDOT's Environmental Division annual compensatory mitigation site budget will include funds to support LTM of mitigation sites.
- Should the Commonwealth discontinue, for even one year, its practice of including a line item in the biennial budget for VDOT mitigation management, VDOT must immediately notify USACE. VDOT must still meet all permit conditions regarding LTM and must submit to USACE an alternate LTM funding plan.
- In order to record the annual LTM obligations in future years, a spreadsheet will be maintained by VDOT. As each mitigation project is approved by USACE, the following will be added to the spreadsheet: the project name, USACE project number, the year that LTM begins, and the project's estimated annual long-term funding requirements. A copy of the complete spreadsheet will be emailed to the USACE project manager and the USACE Special Projects Section Chief.

SIGNATORIES:



Charles A. Kilpatrick, P.E., Commissioner of Highways, Virginia Department of Transportation Date 7/23/15

William T. Walker Chief, Regulatory Branch, U.S. Army Corps of Engineers, Norfolk District Date 8/3/15

