

MEMORANDUM OF AGREEMENT
BETWEEN
THE U.S. FISH AND WILDLIFE SERVICE
AND
THE U.S. ARMY CORPS OF ENGINEERS

SUBJECT: The transfer, acceptance, and expenditure of funds for fish mitigation services.

1. Purpose and Authority.

This Memorandum of Agreement ("MOA") is entered into by and between the U.S. Army Corps of Engineers ("USACE") and the U.S. Fish and Wildlife Service ("USFWS") (collectively "the Parties") for the purpose of establishing a mutual framework governing the respective responsibilities of the Parties related to the USACE's transfer of funds to USFWS, and USFWS's acceptance and expenditure of such funds, to mitigate for fisheries lost due to Corps of Engineers projects. This MOA is entered into consistent with authority and funding provided to the USACE under various statutes authorizing the operation and maintenance of such projects, to the USFWS under the Fish and Wildlife Coordination Act (16 U.S.C 661-667) and the Fish and Wildlife Act of 1956 (16 USC 742), and under fund transfer, acceptance, and expenditure authority provided to USACE and to USFWS in annual appropriations enactments dating back to 2012, including most recently, but not limited to, Section 103 of the Energy and Water Development and Related Agencies Appropriations Act, 2015, Public Law 113-235, as well as any future authority and funding which may be provided to the USACE and the USFWS.

2. Scope.

Goods and services which the USFWS may provide under this MOA include the performance of fish mitigation services, including but not limited to fish species production, stocking, and other activities to mitigate for fisheries lost due to authorized USACE dam and other civil works projects, and such other related goods or services as may be agreed upon in the future. Funding used to support production at USFWS hatcheries shall be limited to paying costs directly related to fish mitigation, egg production and fish health specifically for Corps dams, and shall not include major rehabilitation, major maintenance, or non-routine maintenance activities.

Nothing in this MOA shall be construed to require the USACE to transfer funds to the USFWS or to require the USFWS to accept and expend such funds for the provision of any goods or services, except as may be set forth in a Military Interdepartmental Procurement Request (MIPR).

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3. Interagency Communications.

To provide for consistent and effective communication between the USFWS and the USACE, each Party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may also be appointed to serve as points of contact on one or more individual MIPRs.

4. Requirements for Fund Transfers.

USACE shall determine that it has sufficient authority and available funding prior to initiating a transfer of funds to USFWS. Prior to accepting or expending any funds transferred by USACE, USFWS shall determine that it has sufficient authority and capability to perform, or obtain performance by contract, the fish mitigation services and other goods and services that are intended to be covered with funds transferred by USACE under this MOA.

Upon both parties reaching the above determinations, and in the event USACE proceeds with a transfer of funds to USFWS for use in providing goods and services under this MOA, the USACE shall execute each such transfer through issuing a written MIPR, in response to which the USFWS shall issue a written acceptance.

By issuing, and accepting a MIPR under this MOA, both Parties certify that the above determinations have been completed.

Upon signature, issuance, and acceptance by each Party's authorized representative, a MIPR shall constitute a valid transfer, order, and request for goods and services under this MOA. Each MIPR shall include:

- a. detailed scope of work statement, including firm, clear, specific, and complete description of the goods or services ordered;
- b. the amount of funds required and available to accomplish the scope of work as stated above;
- c. funding schedules, including periods of performance;
- d. funding arrangements, including whether payment shall be in advance or by reimbursement; and
- e. USACE's authority and fund citation and the date upon which the cited funds expire for obligation purposes, if any;

The following must be addressed in each MIPR, or in this MOA:

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- a. identification of individual project managers;
- b. identification of types of major contracts over \$100,000 to be used (if known) and summarized for all hatchery production when requested by the Corps
- c. types and frequencies of reports;
- d. identification of which Party is to be responsible for government-furnished equipment; contract administration; records maintenance; rights to data, software, and intellectual property; and contract audits;
- e. procedures for amending or modifying the MIPR; and
- f. such other particulars as are necessary to describe clearly the obligations of the Parties with respect to the requested goods and services.

In the event of a conflict between this MOA and any MIPR, contract, or other instrument stating responsibilities regarding the transfer of funds or performance of fish mitigation services under this MOA, this MOA shall control.

5. Responsibilities of the Parties.

a. Responsibilities of USFWS

(1) The USFWS shall use the funds transferred by USACE to perform goods or services in accordance with the purpose, terms, and conditions of this MOA and with specific requirements set forth in MIPRs and other implementing arrangements.

(2) The USFWS shall identify authorized USFWS representatives to accept MIPRs.

(3) The USFWS shall use its best efforts to provide goods or services either by contract or by in-house effort.

(4) The USFWS shall provide detailed periodic progress, financial and other reports to the USACE, including summarized data providing totals of fish produced and sub-totals of fish produced for particular hatcheries. Financial reports shall include information on all funds received, obligated, and expended, and on forecast obligations and expenditures.

(5) The USFWS shall inform the USACE of all contracts entered into under each MIPR.

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(6) No later than April 15 of each year, the USFWS shall provide the USACE with a cost estimate based upon USFWS expenditures from the preceding year for USACE consideration in development of the USACE's budget request for submittal to OMB.

(7) The USFWS shall afford the USACE the opportunity to participate in discussions, and provide summary documentation related to, the establishment of annual fish mitigation needs of Corps projects for which goods and services may be provided under this MOA.

b. Responsibilities of USACE

(1) The USACE shall certify, prior to the execution of each MIPR that it complies with all legal requirements applicable to the transfer of funds under this MOA.

(2) Funds transferred by USACE shall be used to pay all direct costs associated with the USFWS's provisions of goods or services under this MOA, up to and not to exceed the amount of funds transferred. USACE shall certify, at the time of signature of a MIPR, the availability of funds necessary to accomplish the activities covered by that MIPR. Funds transferred by USACE shall not be used to pay indirect costs, including but not limited to overhead and deferred maintenance projects.

(3) The USACE shall ensure that only authorized USACE contracting officers sign MIPRs.

(4) The USACE shall develop draft MIPRs to include scope of work statements.

(5) If requested by the USFWS, the USACE shall obtain for the USFWS any necessary real estate interests and access to all work sites and support facilities, and shall perform all coordination with and obtain any permits from state and local agencies, as necessary during the execution of each MIPR.

6. Funding.

This MOA does not document the obligation of funds between the Parties. Any obligation of funds in support of this MOA will be accomplished by executing a MIPR or equivalent form.

Funds transferred by USACE shall be used to pay all direct costs associated with the USFWS's provision of goods or services under this MOA, not to exceed the total amount of funds authorized and available for transfer.

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For funds transferred on a reimbursable basis, the USFWS shall bill the USACE monthly for costs incurred using Standard Form (SF) 1080, Voucher for Transfers Between Appropriations and/or Funds. The USACE will use the Intra-Governmental Payment and Collection System (IPAC) to automatically reimburse USFWS. Upon request by the USFWS, the USACE shall provide funds in advance of any obligation. Bills rendered will not be subject to audit in advance of payment.

If the USFWS forecasts its actual costs under a MIPR to exceed the amount of funds available under that MIPR, it shall promptly notify the USACE of the amount of additional funds necessary to complete the work under that MIPR. The USACE shall either provide the additional funds to the USFWS subject to sufficient available authority and funding, require that the scope of work be limited to that which can be paid for by the then-available funds, or direct termination of the work under that MIPR. Alternatively, if the USFWS has funding available to complete the work, the USFWS may use such funding to complete the project as originally planned.

Within 90 days of completing the work under a MIPR, the USFWS shall conduct an accounting to determine the actual costs of the work. Within 30 days of completion of this accounting, the USFWS shall return to the USACE any funds advanced in excess of the actual costs as then known, or the USACE shall provide any additional funds necessary to cover the actual costs as then known, subject to sufficient available authority and funding. Such an accounting shall in no way limit the Parties' duties in accordance with Article 10 to pay for any costs, such as contract claims or other liability, which may become known after the final accounting.

7. Applicable Laws.

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, all contract work undertaken by the USFWS shall be governed by USFWS policies and procedures.

8. Contract Claims and Disputes.

All claims and disputes by contractors arising under or relating to contracts awarded by the USFWS shall be resolved in accordance with Federal law and the terms of the individual contract. The USFWS shall have dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. § 7101).

The USFWS shall be responsible for handling all disputes arising under or relating to the contracts, including litigation involving disputes and appeals, and for coordinating with the Department of Justice as appropriate. The USFWS shall notify the USACE of

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all potential or actual claims immediately upon discovery, and afford the USACE an opportunity to review and comment on the proposed resolutions of such potential or actual claims, to include litigation proceedings and any resulting settlement negotiations.

9. Dispute Resolution.

The Parties agree that, in the event of a dispute between the Parties, the USACE and the USFWS shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties. In the event such measures fail to resolve the dispute, the parties shall elevate the issue through their respective chains of command and, if needed, the Parties shall refer the matter to the Office of Budget and Management for resolution.

10. Responsibility for Costs.

If liability of any kind is imposed on the United States relating to the USFWS's provision of goods or services under this MOA, the USACE's responsibility for discharging such liability is limited to the total amount of funds directed by Congress for transfer to the USFWS for these purposes. If USACE does not have sufficient funds available, the USACE and the USFWS shall seek the assistance of the Office of Management and Budget in order to seek additional funds from Congress for such purposes. Nothing in this MOA shall be construed to imply that Congress will, at a later date, appropriate funds sufficient to meet the deficiencies.

Notwithstanding the above, this MOA does not confer any liability upon the USACE for claims payable by the USFWS under the Federal Torts Claims Act. Provided further that nothing in this MOA is intended or will be construed to create any rights or remedies for any third party and no third party is intended to be a beneficiary of this MOA.

11. Public Information.

Justification and explanation of the USACE's programs before Congress and other agencies, departments, and offices of the Federal Executive Branch shall be the responsibility of the USACE. The USFWS shall provide, upon request, any assistance necessary to support the USACE's justification or explanations of the USACE's programs conducted under this MOA. The USFWS may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The USACE or the USFWS shall make its best efforts to give the other Party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to Support Agreements under this

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MOA. This agreement does not preclude the USFWS from responding to inquiries from Congress or associated staff, committees or subcommittees, Office of Management and Budget or other entity requesting information on the National Hatchery Program including work under this MOA.

12. Miscellaneous.

a. Other Relationships or Obligations: This MOA shall not affect any pre-existing or independent relationships or obligations between the USACE and the USFWS.

b. Survival: The provisions of this MOA which require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

c. Severability: If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

d. Transferability: This MOA is not transferable except with the written consent of the Parties.

13. Required Reviews.

The Parties will review this MOA annually on or around the anniversary of its effective date for financial impacts and triennially in its entirety.

14. Amendment, Modifications and Termination.

This MOA may be modified or amended only by written, mutual agreement of the Parties. Either Party may unilaterally terminate this MOA by providing at least 180 days written notice to the other Party. In the event of termination, the Parties shall continue to be responsible for all costs incurred by the USFWS under this MOA, as provided in Article 10, to include the costs of closing out or transferring any on-going contracts.

15. Effective Date.

This MOA takes effect beginning on the day after the last Party signs.

16. Expiration Date.

This MOA expires on June 1, 2024.

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Edward E. Belk, Jr. PE
Chief, Operations and Regulatory Division
Directorate of Civil Works
U.S. Army Corps of Engineers

9/27/16
(Date)



David Hoskins
Assistant Director, Fish and Aquatic Conservation
U.S. Fish and Wildlife Service

9/7/16
(Date)