

**MEMORANDUM OF AGREEMENT
BETWEEN
THE VERMONT AGENCY OF NATURAL RESOURCES
AND
THE VERMONT AGENCY OF TRANSPORTATION
REGARDING
CONSULTATION AND CERTIFICATION PROCEDURES
FOR
CULVERT AND DITCH PROJECTS IN SMALL WATERSHEDS**

THIS MEMORANDUM OF AGREEMENT (Agreement) is entered into this ___ day of _____, 2010 by and between the Vermont Agency of Natural Resources (ANR) and the Vermont Agency of Transportation (VTrans).

WHEREAS, in 1997, VTrans, in consultation with ANR, adopted Culvert & Ditch Maintenance Procedures to ensure that culvert and ditch maintenance projects (including culvert replacements) adequately drain roadways and at the same time protect natural resources;

WHEREAS, VTrans, in consultation with ANR, has periodically updated and amended VTrans' Culvert & Ditch Maintenance Procedures, which now apply to both new projects and maintenance projects and are now known as the Culvert & Ditch Procedures;

WHEREAS, under 19 V.S.A. § 10(12), VTrans must consult with ANR prior to engaging in road repairs or construction involving water resources;

WHEREAS, culvert and ditch projects that VTrans undertakes typically involve water resources and therefore require VTrans to consult with ANR pursuant to 19 V.S.A. § 10(12);

WHEREAS, ANR and VTrans have interpreted and applied 19 V.S.A. § 10(12) to require VTrans to consult with ANR prior to funding municipal road repairs or construction involving water resources;

WHEREAS, culvert and ditch projects often discharge into navigable waters or wetlands or modify navigable channels and therefore require a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, 33 U.S.C. § 1344 (prohibiting the unpermitted discharge of dredged or fill material into jurisdictional waters and wetlands), or section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (prohibiting the unpermitted modification of navigable channels);

WHEREAS, under section 401 of the Clean Water Act, 33 U.S.C. § 1341, any applicant for a federal license or permit that will result in a discharge into navigable waters of the United States must obtain a certification from the designated agency of the state that the discharge will comply with the state's water quality standards;

WHEREAS, pursuant to 10 V.S.A. § 1004, ANR is the agency in Vermont responsible for issuing certifications pursuant to section 401 of the Clean Water Act;

WHEREAS, on November 19, 2007, ANR issued a categorical certification pursuant to section 401 of the Clean Water Act for projects covered by category 1 (non-reporting projects) of the Corps' Vermont General Permit for projects implicating section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act, but ANR issued only conditional certification for projects covered by category 2 (reporting projects), and ANR continues to review category 3 projects (projects requiring an individual permit) on a project-specific basis;

WHEREAS, category 1 of the Corps' Vermont General Permit and the categorical certification that ANR has issued pursuant to section 401 of the Clean Water Act for projects covered by category 1 do not extend to many culvert and ditch projects in watersheds draining less than one square mile;

WHEREAS, compliance with the standards and specifications in VTrans' Culvert and Ditch Procedures will ensure that VTrans culvert and ditch projects in watersheds draining less than one square mile and VTrans-funded municipal culvert and ditch projects in watersheds draining less than one square mile will protect natural resources and comply with the Vermont Water Quality Standards;

WHEREAS, ANR and VTrans desire to reduce the administrative burden of consultations and certifications relating to VTrans culvert or ditch projects in watersheds draining less than one square mile and VTrans-funded municipal culvert and ditch projects in watersheds draining less than one square mile, while at the same time, maintaining and improving resource protection by establishing categorical consultations and certifications for these projects and thereby shifting some of ANR's responsibilities to VTrans resource staff, which may be more familiar with VTrans culvert and ditch projects and have greater capacity to address the resource issues relating to them on a project-specific basis;

WHEREAS, ANR and VTrans desire to fulfill the consultation requirements of 19 V.S.A. § 10(12) and the certification requirements of section 401 of the Clean Water Act, 33 U.S.C. § 1341, on a categorical basis for VTrans culvert or ditch projects in watersheds draining less than one square mile and VTrans-funded municipal culvert and ditch projects in watersheds draining less than one square mile;

WHEREAS, under 3 V.S.A. § 2822(f), ANR may simplify procedures for minor projects;

NOW THEREFORE, the ANR and VTrans agree as follows:

A. Compliance with Culvert & Ditch Procedures

1. For every culvert or ditch project that VTrans undertakes in a watershed draining less than one square mile, VTrans must comply with the standards and specifications set forth in its Culvert & Ditch Procedures, unless ANR agrees to different standards or specifications for any

particular project or unless these standards or specifications would conflict with state or federal permitting requirements.

2. For every culvert or ditch project that a municipality undertakes in a watershed draining less than one square mile and that VTrans funds in whole or in part through state or federal aid that VTrans manages or controls, VTrans must require the municipality, as a condition of receiving state or federal aid, to comply with the standards and specifications set forth in VTrans' Culvert & Ditch Procedures, unless ANR agrees to different standards or specifications for any particular project or unless these standards or specifications would conflict with state or federal permitting requirements.

3. Reference to the Culvert & Ditch Procedures in this agreement means the most recently updated or amended version that VTrans has adopted in consultation with ANR.

4. The responsibility of VTrans under this Agreement to comply with the standards and specifications set forth in its Culvert & Ditch Procedures or to ensure that a municipality complies with those standards and specifications means compliance with the version in effect at the commencement of work on a project.

5. ANR and VTrans agree to continue to update and amend VTrans' Culvert & Ditch Procedures as experience or changes in resource-protection standards may demand.

B. Consultations under 19 V.S.A. § 10(12)

1. The consultation requirements of 19 V.S.A. § 10(12) are fulfilled for VTrans culvert and ditch projects in watersheds draining less than one square mile and municipal culvert and ditch projects in these watersheds that VTrans funds in whole or in part with state or federal aid that VTrans manages or controls, provided these projects comply with the standards and specifications of VTrans' Culvert & Ditch Procedures.

2. Notwithstanding any other provisions of this Agreement, either ANR or VTrans, or both, may request consultation under 19 V.S.A. § 10(12) for any project or category of project covered by this Agreement, and neither ANR nor VTrans will deny any such request.

3. Nothing herein is intended nor shall be construed to relieve VTrans or any municipality from obtaining any permit or complying with any other legal requirement, except for project-specific consultations under 19 V.S.A. § 10(12) insofar as this Agreement fulfills the consultation requirement of section 10(12) categorically.

C. Certifications under Section 401 of the Clean Water Act

1. As soon as practicable following the execution of this Agreement, ANR must provide notice and an opportunity for public comment on a proposed categorical certification pursuant to section 401 of the Clean Water Act and 10 V.S.A. § 1004 of all VTrans culvert and ditch projects in watersheds draining less than one square mile and municipal culvert and ditch projects in these watersheds that VTrans funds in whole or in part with state or federal aid that

VTrans manages or controls that comply with the standards and specifications of VTrans' Culvert & Ditch Procedures; this proposed categorical certification must state that it remains in effect until the Corps modifies, suspends, revokes, or reissues its Vermont General Permit or until such time that ANR modifies or revokes the categorical certification on its own initiative, whichever occurs sooner.

2. Following the comment period, as may be appropriate in view of any comments received, ANR must issue a categorical certification for the projects subject to this Agreement pursuant to section 401 of the Clean Water Act in final form, with notice of an opportunity to appeal to Environmental Court as provided by 10 V.S.A. §§ 1004 and 8503(a)(1)(C).

3. As may be reasonable following the Corps' modification, suspension, revocation, or reissuance of its Vermont General Permit, ANR must promptly reissue its categorical certification of projects subject to this Agreement, with any modifications that may be reasonably appropriate in view of the Corp's permit, public comments, experience, or other relevant considerations.

D. Duration and Termination

1. This Agreement shall remain in effect for an indeterminate period.
2. Either party may terminate this Agreement upon ten (10) days notice to the other party.

AGENCY OF TRANSPORTATION

AGENCY OF NATURAL RESOURCES

David C. Dill
Secretary

Jonathan L. Wood
Secretary

APPROVED AS TO FORM:

Daniel D. Dutcher
Assistant Attorney General