



North Carolina Department of Environment and Natural Resources

Michael F. Easley, Governor

William G. Ross Jr., Secretary

November 14, 2008

Ms. Deborah M. Barbour, PE  
Division of Highways - Preconstruction  
North Carolina Department of Transportation  
1541 Mail Service Center  
Raleigh, NC 27699-1541

Subject: DENR-DOT MOA for the Ecosystem Enhancement Program (EEP)

Dear *Debbie* Ms. Barbour:

Enclosed please find a duplicate original of the Memorandum of Agreement between the Department of Environment and Natural Resources and the Department of Transportation, executed by Secretary Ross on November 14, 2008.

Thank you for your assistance in this matter.

Sincerely,

William G. Laxton  
Chief Deputy Secretary

BL:as

Enclosure

cc: Manly Wilder, Assistant Secretary for Natural Resources



## MEMORANDUM OF AGREEMENT

BETWEEN THE

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES

AND

THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

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This Memorandum of Agreement (MOA) is made and entered into on the date herein below last written by and between the **NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES** (hereinafter "NCDENR") and the **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION** (hereinafter "NCDOT"), collectively referred to hereinafter as the "Parties," to establish the procedures for providing compensatory mitigation through the NCDENR Ecosystem Enhancement Program (hereinafter, "DENR-EEP") to offset impacts to waters and wetlands due to activities authorized by Sections 401 and 404 of the Clean Water Act, 33 USC §§1341, 1344, and under Section 10 of the Rivers and Harbors Act, 33 USC §403 (hereinafter "federal permits"), and by certain certifications, authorizations or permits issued under the North Carolina water quality statutes, the North Carolina Coastal Area Management Act and the North Carolina Dredge and Fill Law and associated rules.

### **1.0 Purpose of MOA**

1.1 Implementation of "Tri-Party Agreement". This MOA is an extension of the concepts and agreements embodied in the Tri-Party Memorandum of Agreement (hereinafter the "Tri-Party Agreement") among NCDENR, NCDOT and the United States Army Corps of Engineers (hereinafter USACE), Wilmington District, executed on July 22, 2003 and as amended. The purpose of the Tri-Party Agreement was to establish the formation of the DENR-EEP and define its role and authority. The purpose of this MOA is to define the duties

and obligations of the Parties necessary to make effective the purpose and intent and agreements embodied in the Tri-Party Agreement to two NCDENR permitting agencies – the Division of Water Quality (DWQ) and the Division of Coastal Management (DCM). Specifically, NCDOT agrees to fund DENR-EEP operations, as they relate to specified NCDOT projects, pursuant to the terms and requirements of the Tri-Party Agreement. Accordingly, DENR-EEP agrees to provide, through its own program, offsite compensatory mitigation needs requested by the NCDOT generated by the transportation projects administered by the NCDOT within the State of North Carolina, which shall include transportation projects identified in the Transportation Improvement Program (TIP) and Division-level transportation projects, hereinafter collectively referred to as “NCDOT Transportation Projects.” The ultimate objective of this MOA is that requested compensatory mitigation in compliance of all permits, certifications, and authorizations will be provided in advance of transportation project impacts and will be planned and executed in a comprehensive manner, considering both the ecological needs and functional enhancement opportunities consistent with the terms and timeframes of the Tri-Party Agreement.

1.2 NCDOT and NCDENR Communication. It is further the purpose of this MOA to establish the mechanism for communication and sharing of relevant information between DENR-EEP and NCDOT, so as to optimize the coordination between the NCDOT and NCDENR, concerning compensatory mitigation requirements for the state permits. Compensatory mitigation is defined as the restoration, enhancement, creation, and/or preservation of wetlands, and other waters of the United States regulated by the State, or other activities that replace the ecological functions lost through permitted activities, which are needed to offset the unavoidable loss or degradation of waters of the United States due to activities authorized by the federal and state permits. Vegetative buffers are not included in this MOA. The terms restoration, enhancement, creation, and preservation as used in this MOA shall be defined in accordance with the Federal Guidance for the Establishment, Use

and Operation of Mitigation Banks, 60 Fed. Reg. 58605, and applicable NCDENR permitting rules or guidance.

1.3 In-Lieu-Fee Program. This MOA does not address an in-lieu-fee compensatory mitigation program for permittees other than NCDOT; those permittees will continue to be covered under the existing Memorandum of Understanding between the NCDENR Wetlands Restoration Program and USACE, dated November 8, 1998.

1.4 Agreements Superseded. This MOA supersedes the following agreements entered into between the Parties:

- a) Memorandum of Understanding, July 7, 1999, except that NCDOT will continue to implement efforts with NCDENR to achieve enhanced avoidance and minimization;
- b) Reimbursement Agreement, Work Order: 4.6000016, dated February 15, 1999;
- c) Reimbursement Agreement, Project R-4066, dated March 17, 2000;
- d) Amendment to Reimbursement Agreement, Work Order: 4.6000016 and TIP Specific Projects, dated July 24, 2000;
- e) Interim Reimbursement Agreement NCDOT Project Number 6.001014 dated April 30, 2003;
- f) Amendment to Reimbursement Agreement NCDOT Project Number 6.001014 dated July 18, 2003; and
- g) Amendment Number 2 to Reimbursement Agreement NCDOT Project Number 6.001014 dated October 14, 2003.
- h) Memorandum of Agreement between the NCDENR and the NCDOT, dated April 2004.

1.5 Functional Assessment of Impacts and Assets. The MOA is written in terms of measuring authorized impacts and compensatory mitigation in terms of acreage (wetlands) and linear feet (streams). It is the goal of the Parties to this MOA to develop or accept a

scientifically acceptable and practicable method of measuring authorized impacts to wetlands and streams on the basis of functions lost, and compensatory mitigation in terms of functions gained. When the Parties have agreed upon such a method of functional assessment, after notice and opportunity for comment on such functional assessment method, permit conditions will be written, and compensatory mitigation provided, in terms of functional replacement units, which will be reflected on the accounting reports prepared and provided by DENR-EEP. Research to be funded by NCDOT in support of this goal requires prior written approval by NCDOT. If approved by NCDOT, written approval will be provided to DENR-EEP by the Manager of NCDOT's Project Development and Environmental Analysis (PDEA) Branch within 30 days of receipt of the request.

1.6 Program Assessment and Consistency Group. DENR-EEP will convene the Program Assessment and Consistency Group, which will provide oversight and review of the DENR-EEP, pursuant to and consistent with Part VII of the Tri-Party Agreement. While USACE chairs these meetings, it is acknowledged that the Corps may find it unnecessary to participate in discussions affecting only the state permitting agencies and the state permits. The Program Assessment and Consistency Group has also assumed the duties of the Advisory Team identified in Section IV.J. of the November 4, 1998 Memorandum of Understanding between USACE, Wilmington District, and the NCDENR, Wetlands Restoration Program.

## **2.0 Authority**

2.1 Authority of NCDENR Permitting Agencies. NCDENR provides for the implementation and administration of the state's water pollution control program, NCGS 143-211 *et seq.*, and issues certifications, approvals and permits for the control of sources of water pollution and the protection of water quality standards under 15A NCAC 2B (Surface Water and Wetland Standards) and 15A NCAC 2H (Procedures for Permits; Approvals), including isolated wetland rules and buffer requirements unless the NCDOT has been delegated authority of any affected state program. NCDENR also provides for the implementation and

administration of the comprehensive plan for the protection, preservation, orderly development and management of the coastal area of the state, through the Coastal Area Management Act, NCGS 113A-100 et seq, and the Dredge and Fill Law, NCGS 113-229 and 113-230; and the implementing rules found at 15A NCAC Chapter 7. Collectively, these certifications, approvals, permits and authority actions are referred to herein as the “state permits.”

2.2 Authority of NCDOT. NCDOT is responsible for planning, design, right of way acquisition, construction, maintenance, and operation of an integrated statewide transportation system for the economic and safe transportation of people and goods. Major transportation functions include aeronautics, highways, mass transportation, motor vehicles, and transportation safety. NCDOT’s authority is derived primarily from NCGS, Chapter 136 (Roads and Highways), and Chapter 143B (State Departments, Institutions, and Commissions). NCDOT promulgates transportation related regulations in Title 19A of the North Carolina Administrative Code (NCAC). NCDOT is authorized under NCGS § 136-18 to enter into contracts and agreements and submit such schemes and programs as necessary to construct, improve and maintain the state transportation system in conformance with present or future acts of Congress.

2.3 Authority of DENR-EEP. The NCDENR Ecosystem Enhancement Program is the refocused and renamed non-regulatory program that includes the current organization executing the formerly named N.C. Wetlands Restoration Program (WRP) required by NCGS 143-214.8 through N.C.G.S. 143-214.13. The WRP has been administered to protect and improve water quality, flood prevention, fisheries, wildlife and plant habitats, and recreational opportunities through the restoration, enhancement and preservation of wetlands and riparian areas within North Carolina’s water basins, and will now be improved and administered by the DENR-EEP. The DENR-EEP will function consistently with the WRP laws and mandates, and will be fully integrated with the existing water quality and habitat plans of the NCDENR.

**3.0 DENR-EEP Responsibilities**

3.1 Purpose and Mission of DENR-EEP. The DENR-EEP operates an offsite compensatory mitigation program for the NCDOT. The purpose and mission of DENR-EEP is reflected within the Tri-Party agreement.

3.2 Watershed Restoration Plans and Watershed Needs Assessment. DENR-EEP will review and revise the watershed restoration plans for each of the 17 river basins in North Carolina, as agreed to and outlined in Part IV.A of the Tri-Party Agreement. The basis for priority for review and update of plans will be the results of the GIS-based forecasts of expected impacts and estimated losses. The DENR-EEP will use a GIS Needs Analysis Methodology, as agreed to and outlined in the Tri-Party Agreement, and will incorporate NCDOT projected wetland and stream impacts for specified NCDOT Transportation Projects into its analysis. DENR-EEP will acquire the mitigation site, develop the mitigation site and execute the project, as agreed to and outlined in the Tri-Party Agreement.

3.3 Mitigation Sites. Using funds provided by NCDOT for that purpose, DENR-EEP shall manage or perform all duties necessary to provide off-site compensatory mitigation for impacts to waters and wetlands anticipated to be authorized by federal and state permits for specific projects requested by the NCDOT in conformance with the requirements of the Tri-Party Agreement. Mitigation projects will be produced in conformance with applicable rules and guidance of DWQ and DCM for corresponding NCDOT permits. DENR-EEP will include in the quarterly invoice report, a project by project budget status along with a percentage complete by phase.

Mitigation projects will be developed and built based on NCDOT's mitigation needs derived from the anticipated NCDOT Impacts submitted to DENR-EEP pursuant to section 4.2 of this MOA. In the event that DENR-EEP has advertised for construction of Design/Bid/Build projects, or completed acquisition and approved the start of Task 3 (mitigation plan) for Full Delivery projects to provide mitigation according to NCDOT's mitigation needs, and mitigation needs decrease, DENR-EEP is authorized to complete those

mitigation projects. Exceptions to this policy may be sought on a case-by-case basis and submitted for approval to the PDEA Branch Manager and/or the DENR-EEP Director as appropriate.

3.4 Mitigation Site Reporting Requirements. DENR-EEP shall provide a copy of each site-specific mitigation plan, annual monitoring report, final report, and preservation report to NCDOT, and each member of the Program Assessment and Consistency Group (which includes the NCDENR permitting agencies), within 30 days of completion of the document. This requirement may be satisfied, at the discretion of DENR-EEP, and with the consent of the receiving member of the Assessment Group, by posting such report on an accessible website, with e-mail notification to each recipient that such report has been posted. DENR-EEP shall develop and maintain a website accessible to the general public and shall timely post all site-specific mitigation plans and preservation reports on the website.

3.5 Schedule of Performance for Providing NCDOT Compensatory Mitigation. DENR-EEP shall comply with all duties, performance schedules and timelines as stated in the Tri-Party Agreement. DENR-EEP shall acquire compensatory mitigation, pursuant to this MOA, for those impacts identified in the annual NCDOT Project Impact Report (Section 3.6.2).

3.6 Compensatory Mitigation Database. DENR-EEP shall administer a Compensatory Mitigation Database, which will include, at a minimum, the following information for each eight-digit cataloging unit (CU) in North Carolina:

3.6.1 Complete and Functioning Mitigation. For each N.C. eight-digit CU, DENR-EEP shall maintain an accounting of all complete and functioning wetland and stream mitigation. For wetland mitigation, said accounting will be in terms of acres of mitigation (i.e., restoration, creation, enhancement and preservation wetland) available and type of mitigation in terms of riparian, non-riparian and coastal marsh. For stream mitigation, said accounting will be in terms of linear feet of restoration, enhancement,



and preservation. Functionally equivalent mitigation may also be provided upon agreement by the Parties.

3.6.2 7-Year Annual Projected NCDOT Impacts. For each N.C. eight-digit CU, DENR-EEP shall maintain an accounting per Section 4.2 below, of NCDOT's impacts and associated mitigation needs anticipated and requested by NCDOT. This data will be referenced by TIP project number and/or NCDOT Division operations impacts, by year, CU and mitigation type.

3.6.3 Mitigation Site Accounting and Procurement Plan. For each N.C. eight-digit CU, DENR-EEP shall develop an annual mitigation procurement plan to provide the mitigation needed by NCDOT per section 4.2. DENR-EEP will maintain an accounting and schedule (if instituted) of all DENR-EEP mitigation sites anticipated by year. DENR-EEP shall maintain a list of TIP projects and/or NCDOT Division(s) mitigation needs within each CU for which projected mitigation credits will be debited. This annual projected mitigation accounting shall be hereinafter referred to as the "7-Year Mitigation Work Plan." A copy of the 7-Year Mitigation Work Plan and any updates made to the plan throughout the year will be provided to the NCDOT by DENR-EEP. Functionally equivalent anticipated compensatory mitigation may also be provided upon agreement by the Parties.

3.6.4 Compensatory Mitigation Database Report. DENR-EEP shall follow quarterly and annual reporting requirements as described in the Tri-Party Agreement. NCDENR-EEP will also provide NCDOT with Web-enabled access to reports generated by the EEP Information Management (data base) System.

3.7 Fiscal Accounting Responsibilities. DENR-EEP shall maintain all books, documents, papers, accounting records and such other evidence as may be appropriate, in accordance with state accounting procedures and regulations (and, where needed, Federal Highway Administration (FHWA) procedures and regulations [http://www.whitehouse.gov/omb/fedreg/2005/083105\\_a87.pdf](http://www.whitehouse.gov/omb/fedreg/2005/083105_a87.pdf)) to substantiate costs incurred

## **NCDENR-EEP/NCDOT MOA Continued**

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under this MOA. Further, DENR-EEP shall make such materials available at its office at all reasonable times during the MOA period, and for three (3) years from the date of final payment under this MOA, for inspection and audit by NCDOT and/or FHWA. The NCDOT and NCDENR Contract Administrators, as defined in Section 8.5 below, will participate in a quarterly review of the procedures, coordination, and services provided by DENR-EEP.

NCDOT and NCDENR will jointly develop the following:

- 1) Procedures for reconciling all payments made by NCDOT to the DENR-EEP program pursuant to this MOA and the Tri-Party Agreement;
- 2) Procedures for reconciling expenditures, with appropriate descriptions, made by DENR-EEP for NCDOT-related activities;
- 3) Procedures for invoicing and disbursement of funds; and
- 4) Procedures for DENR-EEP to certify that it has performed in conformance with relevant Federal laws and regulations.

3.7.1 The accounting system will incorporate any required NCDOT and FHWA financial data associated with federal reimbursement (e.g., cost analysis).

3.7.2 DENR-EEP shall provide NCDOT a biennial budget, as described below, based upon the projected annual cost of mitigation and administration for the next two state fiscal years and a gross estimate of the total annual budget for the first two years of the 7-Year Mitigation Work Plan, no later than April 1, for TIP budgeting purposes. The budget and workplan will be based upon the annual NCDOT Project Impact Report described in Section 4.2 of this MOA.

3.7.3 Budget Development and Approval. On or before February 1 of each year, NCDOT will submit the anticipated Project Impact Report to DENR-EEP. DENR-EEP will review the report within one week and send any comments and questions to NCDOT. Within 15 days of receipt of questions and comments, NCDOT will submit the final version of the anticipated Impact Report to DENR-EEP.

DENR-EEP will convert the anticipated impacts into NCDOT mitigation needs and evaluate the mitigation needs against inventory available. This data will be used to produce an annual 7-Year Mitigation Work Plan that identifies the amount, type and location of new mitigation needed. Based on new mitigation needed and mitigation that is currently in production, EEP will produce a biennial budget and submit it to the PDEA Branch Manager for review by April 1. The Biennial Budget will include line-item detail of the administrative budget, including number of positions funded through said budget.

The NCDOT PDEA Branch Manager will submit questions and comments to DENR-EEP by April 15. DENR-EEP will respond to comments and/or make adjustments to the draft budget by April 30. A copy of the finalized budget will be sent to the NCDOT PDEA Branch Manager. The DENR-EEP Director and NCDOT PDEA Branch Manager will send a copy of the final budget to the Contract Administrators of this MOA.

The NCDOT PDEA Branch Manager will facilitate placement of the biennial budget on the May N.C. Board of Transportation (BOT) Meeting agenda. The biennial budget will be presented to the BOT for approval at the June meeting. No modifications in the budgeted scope or budget levels of the MOA shall occur until the changes have been mutually agreed upon by both Parties to this MOA, and approved in writing by the Contract Administrators.

3.7.4 Quarterly Invoicing. Invoice submittal and approval will occur quarterly. DENR-EEP will submit an invoice to NCDOT within 30 business days of the last day of each quarter. DENR-EEP's invoice will include the previous quarter's actual expenditures and the estimated expenditures for the next quarter. Additional information provided to NCDOT will include a projection of anticipated expenditures over the next 4 quarters, along with a report showing the total amount that was paid to each contractor for that quarter for use by NCDOT to track DBE/MBE/WBE

usage. After appropriate invoice documentation has been provided to NCDOT, any questions have been addressed in writing by both parties, and any necessary changes have been incorporated, the NCDOT will approve the invoice for payment. Payment to DENR-EEP should occur approximately 15 business days from receipt of the appropriate invoice documentation. The NCDOT invoice payments made to DENR-EEP shall be deposited in an interest bearing fund that is housed in DENR and specific to NCDOT. The interest earned on the separately maintained NCDOT fund will be calculated monthly, and credited back to NCDOT on a monthly basis and included on the quarterly invoice.

3.7.5 DENR-EEP will provide the NCDOT with a final financial report of all mitigation asset values and expenditures made during the prior state fiscal year, prior to September 30.

3.7.6 All NCDOT mitigation assets will be kept on a separate debit ledger from other in-lieu-fee program assets managed by DENR-EEP and will be made available for review by NCDOT at any time.

3.8 Program Decisions. The Contract Administrators for this MOA will meet as needed to discuss and make executive level decisions regarding programmatic changes associated with NCDOT funded program components. These decisions may include but are not limited to: office space; staff reallocation, modification and addition of positions; salary adjustments; and policy or operational changes that will affect the expenditure of NCDOT funds. Decisions made regarding such items will be documented in writing and shared with appropriate DENR-EEP and NCDOT staffs.

3.9 Preserving Eligibility for FHWA Reimbursement. Since NCDOT may request reimbursement from FHWA for DENR-EEP budgetary expenditures, DENR-EEP and NCDOT shall develop and implement procedures to meet relevant federal laws, regulations and procedures, in order to preserve reimbursement eligibility.

3.10 Land Acquisition Procedures. DENR-EEP shall follow NCDOT-approved State Property Office (SPO) procedures established specifically for all DENR-EEP acquisitions of interest in land. Any subsequent changes or modifications to said SPO procedures shall be presented in writing to the NCDOT Right of Way Branch prior to being placed in effect. Consistent with Section 3.7 above, said approved land acquisition procedures are necessary for the NCDOT Right of Way Branch to certify to FHWA that their land acquisition rules and regulations are being followed in order for NCDOT to receive federal reimbursement for NCDOT expenditures.

#### **4.0 NCDOT Responsibilities**

4.1 Reliance on DENR-EEP Program. Pursuant to the terms of this MOA and except where surplus mitigation is available or where the DENR-EEP program is unable to deliver, NCDOT agrees to use the DENR-EEP program to satisfy NCDOT's offsite compensatory mitigation needs to meet the requirements for the federal and state permits. DENR-EEP will constitute the preferred mitigation source for meeting NCDOT project environmental impacts.

4.2 NCDOT Project Impact Accounting and Reporting. For each N.C. eight-digit CU, NCDOT shall provide DENR-EEP with its NCDOT Project Impact Report, which is a report of projected NCDOT impacts according to TIP project number and/or NCDOT Division operations, by year, for the most current 7-Year state TIP. The NCDOT Project Impact Report will be provided to DENR-EEP no later than February 1 of each year and a finalized version of the NCDOT anticipated Impact Report will be provided to DENR-EEP as required by timelines described in section 3.7.3 of this MOA. The final version will reflect any revisions made to the mitigation impact projections after DENR-EEP review of the February 1 submittal. The transmittal letter from NCDOT conveying the submittal of the final version of the anticipated Impact Report will acknowledge that mitigation requirements are typically twice the impact amounts and encourage DENR-EEP to pursue with the regulatory agencies

the application of NCDOT mitigation credits at a ratio of 1:1 (mitigation to impact). Upon receipt of the final version of the anticipated Impact Report on February 15, DENR-EEP will translate the NCDOT Impacts into NCDOT mitigation needs over time, by CU and mitigation type. For anticipated wetland mitigation, said accounting and report will be in terms of acres of riparian, non-riparian or coastal marsh mitigation. For anticipated stream mitigation, said accounting and report will be in terms of linear feet of anticipated mitigation. The NCDOT Project Impact Report shall be updated and provided to DENR-EEP's Strategic Planning Section as soon as it becomes available. DENR-EEP will make every effort to accommodate changes to NCDOT's mitigation needs. In the event that DENR-EEP has advertised for construction of Design/Bid/Build projects, or completed acquisition and approved the start of Task 3 (mitigation plan) for Full Delivery projects to provide mitigation according to NCDOT's mitigation needs, and mitigation needs decrease, DENR-EEP is authorized to complete those mitigation projects. Exceptions to this policy may be sought on a case-by-case basis and submitted for approval to the PDEA Branch Manager and/or the DENR-EEP Director as appropriate.

4.3 NCDOT Funding of DENR-EEP. Subject to available funds and Board of Transportation approval, NCDOT will fund the DENR-EEP program, as described herein and in the Tri-Party Agreement, by approving a biennial DENR-EEP budget, and, by making quarterly payments to DENR-EEP. NCDOT will provide the necessary funding to NCDENR for the delivery of all aspects of off-site compensatory mitigation as required by the Tri-Party Agreement. Except for project suspensions mutually agreed upon per section 3.3, NCDOT commits to the funding for contracts encumbered by DENR-EEP for NCDOT mitigation needs. NCDOT agrees to fund a biennial budget of DENR-EEP based upon anticipated DENR-EEP administrative and project costs associated with NCDOT off-site compensatory mitigation needs, which will be annually reviewed. NCDOT agrees to provide funding on a quarterly basis for the establishment, development and continued operations of DENR-EEP. DENR-EEP shall submit an invoice for funds to be provided each quarter based upon

anticipated DENR-EEP needs. Each subsequent request for funds should also include a detailed accounting of program expenditures incurred the prior quarter and the subsequent request should be adjusted by any balance of funds over or under expended from the previous quarters (as described in Section 3.7.4).

DENR-EEP will be responsible for project monitoring through contracting or utilization of in-house staff in compliance with the most recent State and Federal mitigation guidelines. Any monitoring above and beyond these requirements must be submitted to NCDOT for review and written approval prior to initiation of a contract. A response will be provided to DENR-EEP by the NCDOT PDEA Branch Manager within 30 days of receipt of the request.

NCDOT will fund watershed restoration plans and local watershed plans based on the following conditions: prior written approval from NCDOT before DENR-EEP begins the development of watershed restoration plans and local watershed plans that will utilize NCDOT funding (a response will be provided to DENR-EEP by the NCDOT-PDEA Branch Manager within 30 days of receipt of the request); DENR-EEP providing NCDOT with interim progress reports and notification of public meetings; DENR-EEP providing NCDOT the opportunity to review local watershed plans at major milestones; and DENR-EEP providing NCDOT a list of the mitigation sites that were generated from the watershed plan. NCDOT will make future funding decisions based on how well the plans meet final mitigation project goals.

## **5.0 Accountability and NCDOT Compensatory Mitigation Database Review**

### **5.1 Management of Assets and Projects Transferred from NCDOT to DENR-EEP.**

Many off-site compensatory mitigation projects initiated by NCDOT prior to the establishment of DENR-EEP were transferred to DENR-EEP for asset and project management. In the event that credits managed by DENR-EEP are needed as part of the interagency effort to reduce existing surplus mitigation, DENR-EEP will formally transfer

credits through written communication to NCDOT for use in that effort and remove those credits from DENR-EEP asset accounting. DENR-EEP will complete the management of transferred restoration projects through close-out with the regulatory agencies. Upon close-out, NCDOT will either direct DENR-EEP to transfer the projects to the NCDENR Stewardship Program for long-term protection, or NCDOT will maintain responsibility for providing long-term protection. For sites that NCDOT will maintain long-term management, EEP will provide NCDOT with a copy of the site “As Built Plans.”

5.2 Review of NCDOT Mitigation Needs versus EEP Assets. DENR-EEP will provide NCDOT with an annual detailed 7-Year mitigation work plan and updates as generated that describes programmatic inventory and a comparison of NCDOT compensatory mitigation needs and DENR-EEP compensatory mitigation assets and procurement schedule, on a CU basis. NCDOT compensatory mitigation needs will be based on the impact report prepared by NCDOT in accordance with Section 4.2 of this MOA.

5.3 Notice of Concern. In the event that either party has concerns regarding the mitigation request, or delivery of the mitigation, they shall provide a written “Notice of Concern” which shall be addressed in writing by the other party within 30 days of receipt of the notice.

5.4 Elevation of Notice of Concern. If either party continues to have concerns, they may elevate the issue to the contract administrators, or their designee, for resolution. The contracts administrators, or their designee, may consult, as appropriate, with USACE, Wilmington District.

## **6.0 Mitigation Requirements**

6.1 Compensatory Mitigation Determination. The appropriate permitting agency will make decisions concerning the amount and type of compensatory mitigation requirements for permits or authorizations issued to the NCDOT as part of its decision on the individual



permit or general permit authorization for each proposed project, in compliance with all applicable rules and statutes.

6.1.1 On-Site Mitigation. On-site mitigation is defined as mitigation that can be performed within or contiguous to the right-of-way acquired to construct the transportation project or that can be performed during activities directly related to the construction of the transportation project. NCDOT will determine if on-site mitigation opportunities are practicable and environmentally preferable to other mitigation options. NCDOT will coordinate with NCDENR permitting agencies and USACE to gain approval of the onsite mitigation opportunities, either through the Merger Process or field inspection meetings for Non-Merger projects. NCDOT shall notify EEP in writing of the TIP project, amount, type, and kind of on-site mitigation annually along with the NCDOT's impact report, as described above in Section 4.2: NCDOT Project Mitigation Accounting and Reporting. NCDOT will also provide updates regarding onsite mitigation throughout the year if there are any substantial changes to the annual report. If NCDENR permitting agencies determine that on-site mitigation opportunities are both practicable and environmentally preferable to existing mitigation available through the DENR-EEP program, the permit may be conditioned to require such on-site mitigation; however, NCDENR permitting agencies will not delay the issuance of a permit or certification for a NCDOT project due to such on-site mitigation requirements. NCDOT will determine the most appropriate strategy to implement the on-site compensatory mitigation requirements.

6.1.2 Off-Site Mitigation. If it is determined that on-site mitigation is either not practicable or not environmentally preferable, the appropriate NCDENR permitting agency will accept off-site mitigation as compensatory mitigation provided by DENR-EEP under the terms of the Tri-Party Agreement.

6.2 Annual Performance Criteria for Mitigation Sites. Prior to use as mitigation for state permits, issued by the NCDENR permitting agencies, the mitigation projects shall meet all required annual performance criteria.

6.3 Protection of Mitigation Sites. The DENR-EEP will ensure that all mitigation sites that are used to satisfy compensatory mitigation requirements will remain within the public domain in fee simple title in perpetuity or that appropriate conservation easements in perpetuity are placed on the sites and that sites will be managed in accordance with the long-term management plan included within the mitigation plan or report for the property. In all cases, DENR-EEP shall procure appropriate agreements to ensure that both public domain properties and other properties under conservation easements are maintained in perpetuity as viable compensatory mitigation sites serving the functions required by the permit.

## **7.0 NCDENR Permitting Agencies - Division of Water Quality and Division of Coastal Management**

7.1 Permit Decisions. The Parties to this MOA recognize that state permit decisions regarding the need for and appropriateness of compensatory mitigation are to be made by the NCDENR permitting agencies, within the state certification, authorization or permit process required for each proposed NCDOT project, in a manner similar to the manner in which permit decisions are made by USACE under Part VI.B. of the Tri-Party Agreement. The Parties agree that successful implementation of the DENR-EEP program will result in well-planned, high quality mitigation projects and that the NCDENR permit decisions on NCDOT Transportation Projects requiring compensatory mitigation will require utilization of DENR-EEP mitigation. The permitting agencies agree to manage the state permit processes in a manner supportive of the goals of the Tri-Party Agreement.

### **7.2 Alternate Mitigation Options**

A. If DENR-EEP is unable to identify adequate compensatory mitigation opportunities, with or without receiving comments from the Program Assessment and

Consistency Group, and the issuance of a state permit to NCDOT may jeopardize the letting schedule of a NCDOT project, NCDOT may propose to the appropriate NCDENR permitting agency to use alternate mitigation options, including, but not limited to, the existing NCDENR in-lieu-fee program or other mitigation providers, to satisfy the mitigation requirement; and the NCDENR permitting agencies will allow the alternate option, provided all applicable rules are met. When NCDOT is using the NCDENR in-lieu-fee program, payments to NCDENR will be based upon an initial invoice corresponding to the schedule of fees then in effect. NCDENR may, however, adjust the final payment invoice, which shall be paid by NCDOT, to reflect the actual cost of mitigation, because such use of the in-lieu-fee program will not have been anticipated by NCDENR.

B. If additional revenue or pressing transportation needs warrant the advancement of a project in the TIP schedule, the NCDOT will coordinate with DENR-EEP to determine a schedule, consistent with Section X of the Tri-Party Agreement, for the delivery of required mitigation (per Tri-Party Agreement March 2007 amended section VI B 6 ). NCDOT can then, at its discretion, set an appropriate advanced letting date based on the availability of mitigation. In the event that EEP cannot satisfy the compensatory mitigation requirements for the advanced NCDOT project, NCDOT may propose to use alternate mitigation options, including, but not limited, to, the existing NCDENR in-lieu-fee program or other mitigation providers, to satisfy the compensatory mitigation requirement.

7.3 Effect on Permitting. Nothing in this MOA shall abrogate or limit the regulatory decision authority of the appropriate NCDENR permitting agencies.

7.4 Comments on Mitigation Plans. The NCDENR permitting agencies will provide comment on mitigation plans through the review of the permits required to implement a mitigation project. Such comments will be only with regard to permitting and federal consistency requirements and not the use of any mitigation project as compensatory mitigation for a specific NCDOT project. The NCDENR permitting agencies will also participate in the Program Assessment and Consistency Group.

**8.0 Amendment, Termination and Dispute Resolution**

8.1 Amendments. Amendments to this MOA may be made with mutual agreement in writing by the signature agencies.

8.2 Termination. This MOA may be terminated by a signatory party by giving ninety (90) days written notice to the other party. Notwithstanding any termination of this MOA, DENR-EEP shall complete all restoration, creation, enhancement or preservation activities, including any required remediation, necessary to satisfy the compensatory mitigation requirements of the state permits for which DENR-EEP is responsible. The completion of such compensatory mitigation shall be accomplished in accordance with the project implementation schedule included within the relevant mitigation plan.

8.2.1 Termination Accounting. Within thirty (30) days of such written notice of termination by any party, DENR-EEP shall provide a final accounting report showing total payments received from NCDOT in satisfaction of compensatory mitigation requirements and funds disbursed for implementation of compensatory mitigation requirements. Said final report shall itemize the following accounting items: 1) NCDOT funded mitigation projects that are complete and functioning, or are otherwise available for use, by amount, type, and eight-digit CU with associated NCDOT TIP project(s) for which said mitigation was acquired; 2) Identification of NCDOT funded mitigation sites acquired by amount, type, and eight-digit CU and implementation status with associated NCDOT TIP project(s) for which said mitigation was acquired; 3) Total units of mitigation debited with identification of mitigation site debited by permit Action ID, amount, type, and eight-digit CU (whether mitigation is Complete and Functioning) and associated NCDOT TIP project(s) for which mitigation was debited; 4) Total remaining units of mitigation by amount, type, and eight-digit CU whether from Complete and Functioning mitigation sites/projects, and associated NCDOT TIP project(s) for which mitigation is intended; and (5) Total

NCDOT payments unspent and uncommitted to incomplete projects in progress.

NCDOT shall confirm the findings of the final accounting report.

8.2.2 Transfer of Assets. Upon the effective date of any notice of termination all mitigation assets paid for by NCDOT as determined by the final accounting report, shall immediately become the asset of NCDOT to be applied to NCDOT project impacts.

8.2.3 Transfer of Unused Funds. Upon the effective date of any notice of termination, DENR-EEP shall return all monies paid by NCDOT, which are unspent and uncommitted to incomplete projects in progress and administration.

8.3 Conflicts and Disputes. All conflicts and disputes arising from the implementation of the MOA, including possible termination, shall be resolved by the NCDENR and NCDOT Secretaries or by the Governor.


8.4 Conflict with Tri-Party Agreement. In any conflict between the language in this MOA and the language in the Tri-Party Agreement, the latter shall control.

8.5 Contract Administrators. The Chief Deputy Secretary for NCDENR and the Chief Operating Officer for NCDOT (or successor offices and designees) are designated as the contract administrators for their respective agencies.

**9.0 Effective Date**

The effective date of this Memorandum of Agreement is the date of the last signature below.

DATE: 11-14-08

  
\_\_\_\_\_  
William G. Ross, Jr.

Secretary  
NC DENR

DATE: 11-10-08

  
\_\_\_\_\_  
Lyndo Tippett

Secretary  
NC DOT