

MEMORANDUM OF AGREEMENT BETWEEN THE
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
AND THE
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

1. Introduction and Purpose

1.1. This Memorandum of Agreement (MOA) is made and entered into on the date herein below by and between the **NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY** (hereinafter “NCDEQ”) and the **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION** (hereinafter “NCDOT”), collectively referred to hereinafter as the “Parties,” to establish the procedures for the NCDEQ Division of Mitigation Services (hereinafter, “DMS”) to provide compensatory mitigation to offset NCDOT impacts to waters and wetlands resulting from 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 “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. This Agreement supersedes the 2008 MOA between NCDEQ and NCDOT. Any other agreements between NCDOT and NCDEQ remain in effect. Upon mutual agreement by the Secretaries, this MOA may be expanded to include other natural resource and environmental impacts.

2. Authority

- 2.1. 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. 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 to enter into contracts and agreements as necessary to construct, improve and maintain the state transportation system in conformance with present or future acts of Congress.
- 2.2. Authority of DMS. The DMS is authorized to implement third-party in-lieu-fee compensatory mitigation programs in the state of North Carolina for streams, wetlands, nutrients, and riparian buffers (NCGS 143-214 et seq). DMS’s “NCDOT Stream and

Wetland Program” and the “Statewide Stream and Wetland ILF Program” are authorized by the US Army Corps of Engineers pursuant to the Federal Mitigation Rule (33 CFR Parts 325 and 332, and 40 CFR part 230) and the Compensatory Mitigation Instrument (hereinafter, “DMS ILF Instrument”, which shall be construed so as to include any revisions or replacement instruments approved by the U.S. Army Corps of Engineers) between the U.S. Army Corps of Engineers and the Ecosystem Enhancement Program (now named the DMS).

3. NCDOT Responsibilities

- 3.1. Permit Applications. NCDOT is solely responsible for all activities required to apply for and secure construction permits for transportation projects, including permits and regulatory certifications for impacts to jurisdictional natural resources from transportation projects.
- 3.2. DMS Compensatory Mitigation Reliance. NCDOT, pursuant to the terms of this MOA, agrees to use the DMS program as the preferred mitigation source to satisfy NCDOT’s off-site compensatory mitigation needs anticipated as necessary to meet the requirements of federal and state permits.
- 3.3. Funding of DMS. NCDOT will provide the necessary funding to DMS to deliver the NCDOT Stream and Wetland Program as described in the DMS ILF Instrument. NCDOT agrees to fund the program via a biennial budget and shall provide funds quarterly to DMS. NCDOT agrees to fund the full and actual costs of implementing the NCDOT Program including the costs of credit delivery (property acquisition, design, construction, monitoring, long-term management, credit purchases, full-delivery projects, etc.), watershed planning and analysis, and administration.
- 3.4. Project Impacts / Mitigation Order. NCDOT will order mitigation from DMS annually on February 1 by producing an NCDOT Mitigation Order. The Mitigation Order will itemize those projects and associated impacts for which NCDOT requests DMS to provide mitigation. All impacts to wetlands and streams will be estimated for NCDOT transportation projects that are prioritized for funding and expected to be let over the next 7 years, including those impacts for which the NCDOT has identified other sources of mitigation. Impacts will be identified as cold, cool and warm stream, riparian wetland, nonriparian wetland, and coastal marsh wetland. Other project information such as NCDOT project number, let date, permit request date, service area (typically 8-digit cataloging unit), and any other agreed upon criteria necessary for the successful DMS fulfillment of the NCDOT Mitigation Order will be provided. When sources of mitigation other than DMS are to be utilized, NCDOT will provide information to DMS such as mitigation bank name, bank sponsor, credits to be acquired or optioned in the Mitigation Order. For Mitigation Order purposes, NCDOT requests that DMS secure sufficient credits to satisfy the Mitigation Order using a 2:1 mitigation credit ratio (two mitigation units for each unit of impact), unless otherwise agreed upon for specific transportation projects. The NCDOT may provide modifications to the mitigation order

throughout the fiscal year as updated information becomes available on transportation projects. DMS will seek to accommodate all such modification requests by adjusting procurement plans as practicable.

- 3.5. On-site and Off-site mitigation. On-site mitigation is defined as compensatory mitigation that is conducted on property parcels for which a claim (or partial claim) to such parcels is (1) deemed necessary to construct and maintain a transportation project or (2) determined to be acquired for rationale other than compensatory mitigation. NCDOT shall not acquire other real property interests solely for purposes of developing compensatory mitigation without approval from DMS. On-site mitigation will be identified with associated impacts in the NCDOT Mitigation Order submitted to DMS. When NCDOT identifies large on-site mitigation opportunities, NCDOT shall consult with DMS to determine which agency is best suited to manage implementation of the mitigation project. Off-site mitigation is defined as all compensatory mitigation conducted outside any parcels for which a claim (or partial claim) to such parcels is (1) deemed necessary to construct and maintain a transportation project or (2) determined to be acquired for rationale other than compensatory mitigation. NCDOT shall not perform off-site mitigation without prior consultation with and approval from DMS. NCDOT shall acquire any necessary off-site mitigation through DMS unless otherwise approved by DMS. Acquisition of private mitigation bank credits by NCDOT is an exception. NCDOT may purchase compensatory mitigation credits or credit options from private mitigation banks after consultation with DMS.

4. DMS Responsibilities

- 4.1. NCDOT Compensatory Mitigation. The DMS will manage and/or direct all of NCDOT ILF compensatory mitigation procurement needed to satisfy each NCDOT Mitigation Order excluding any bank credits or options agreements purchased by NCDOT. DMS will deliver credits according to the terms, processes and conditions described in the DMS ILF Instrument, and all relevant statutes, rules and regulatory guidelines.
- 4.2. Watershed Planning. The DMS is required by Federal Rule to apply a watershed approach to all compensatory mitigation performed under the DMS ILF Instrument. Under this agreement, DMS will implement watershed planning consistent with the terms and conditions of the Compensation Planning Framework as defined in the DMS ILF Instrument.
- 4.3. Asset Management. The DMS will manage the inventory and utilization of all existing mitigation credits held by DMS. Within 30 days of execution of this agreement, NCDOT shall share all existing NCDOT mitigation credits and ledgers with DMS. DMS is responsible for managing, debiting, and crediting all off-site compensatory mitigation ledgers, including credits from private mitigation banks purchased by NCDOT, in accordance with permit and program requirements. DMS shall, upon

NCDOT request and when practicable, reserve available and/or specific mitigation credits for specific NCDOT permits.

- 4.4. Mitigation Procurement. DMS shall oversee and direct the future acquisition of mitigation credits to the extent needed to satisfy the Mitigation Order. After the NCDOT Mitigation Order is received, DMS will review the NCDOT asset inventory to identify areas of credit surplus and credit needs. DMS will procure needed credits per the DMS ILF Instrument and applicable statutes.
- 4.5. Financial Accounting. DMS shall maintain all books, documents, papers, accounting records and such other evidence in accordance with state and federal accounting procedures and regulations. DMS 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 financial and/or FHWA staff. The accounting system will incorporate any required NCDOT and FHWA financial data associated with federal reimbursement.
- 4.6. Biennial Budget. DMS shall provide NCDOT a biennial budget as described below, based upon the projected annual costs of active mitigation projects and administration for the next two state fiscal years and a gross estimate of the annual budgets for the first two years of fulfilling the Mitigation Order. The biennial budget will be supported with information on new mitigation needed for DMS to fulfill the NCDOT Mitigation Order, including the amounts of mitigation needed by credit type and cataloging unit.
- 4.7. Budget Development and Approval. DMS will produce a biennial budget and submit it to the NCDOT Chief Financial Officer (CFO) and Technical Services Administrator for review by April 1 of each fiscal year. The Biennial Budget will include line-item accounting of the administrative and mitigation delivery budget. The NCDOT CFO will submit questions and comments to DMS by April 15. DMS 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 CFO and Technical Services Administrator. The DMS Director and NCDOT Technical Services Administrator will send a copy of the final budget to the Contract Administrators of this MOA. The NCDOT CFO 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 by DMS for approval at the June meeting. BOT approval of the biennial budget shall constitute authorization and approval for DMS to procure all new mitigation credit needs necessary to fulfill the Mitigation Order as described in Section 3.4 (above). No significant 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.
- 4.8. Quarterly Invoicing. Invoice submittal and payment will occur quarterly. DMS will submit invoices to NCDOT within 10 business days of the BD-701 certifications by the

NC Office of the State Controller each quarter. DMS'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 Payment to Vendors report for use by NCDOT to track DBE/MBE/WBE usage. NCDOT will approve the invoice for payment after appropriate invoice documentation has been provided, any questions have been addressed in writing by both parties, and any necessary changes have been incorporated. NCDOT will identify and notify DMS of any issues that may delay payment within 10 business days. Payment to DMS shall occur within 15 business days from receipt of the invoice approval and such approval shall not be unreasonably withheld. The NCDOT invoice payments made to DMS shall be deposited in an interest-bearing fund that is housed in DEQ and specific to the NCDOT program. All interest earned in the program account must remain in that account for use by the NCDOT program in accordance with CFR 332.8(i).

- 4.9. 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.
- 4.10. Reporting. No later than September 30 of each year (contingent upon the BD-701 certifications being completed by the NC Office of the State Controller), DMS will provide the NCDOT with a final financial report of all mitigation costs and expenditures made during the prior state fiscal year. DMS will provide an Annual Report along with a regulatory addendum in accordance with the DMS ILF Instrument timelines and specifications.

5. Amendment, Termination and Dispute Resolution

- 5.1. Amendments. Amendments to this MOA may be made with mutual agreement in writing by the Contract Administrators.
- 5.2. 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, DMS shall complete all restoration, creation, enhancement or preservation activities necessary to satisfy the compensatory mitigation requirements of the state permits for which DMS is responsible. The completion of such compensatory mitigation shall be accomplished in accordance with the project implementation schedule included within the individual mitigation plans.
- 5.3. Termination Accounting. Within sixty (60) days of such written notice of termination by any party, DMS shall provide an accounting report showing total payments received from NCDOT in satisfaction of compensatory mitigation requirements and funds disbursed for implementation of compensatory mitigation requirements. The final

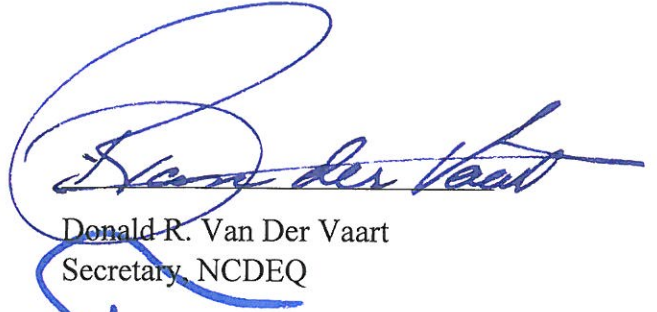
report shall itemize the following accounting items for the NCDOT Stream and Wetland Program: 1) List of mitigation projects and their credits; 2) the NCDOT ILF asset and requirement ledgers; 3) list of completed projects with no future expenditures and available mitigation credits; 4) list of all active contracts and projection of all future contracts and expenditures necessary to fulfill program requirements; 5) total cash, encumbered cash, and unencumbered cash balances in account.

- 5.4. NCDOT Termination Payment and Closure. In the event of termination, no additional NCDOT compensatory mitigation obligations will be accepted by DMS for projects not in any previous Mitigation Order. DMS will submit a final invoice to NCDOT within 90 days in the amount necessary to complete all obligations from previous Mitigation Orders. NCDOT shall complete payment in accordance with the project implementation schedule included within the individual mitigation plans or on an accelerated payment schedule mutually agreeable to both parties. DMS would continue to manage active mitigation projects until their full completion, final regulatory closeout and successful transfer to long-term management. Upon successful transfer to long-term management and upon receipt of all payments for each completed project, DMS will provide a receipt to NCDOT stating that the compensatory mitigation credit requirements assigned to DMS and fulfilled by each such project, have been satisfied.
- 5.5. Termination Transfer of Assets. Upon the effective date of termination, all closed mitigation credits completely paid for by NCDOT, shall within 60 days be transferred to NCDOT to become the mitigation assets of NCDOT. All legacy NCDOT properties and associated credits will be transferred to NCDOT. Active mitigation projects that are not closed at the time of termination shall be held by NCDEQ as necessary contingency in the event of unforeseen credits losses sustained during the project closure process after termination. After all mitigation projects have been fully completed and closed-out by the regulatory agencies, and after all permit obligations previously accepted by DMS have been fulfilled, any remaining mitigation credits will be transferred to NCDOT.
- 5.6. Conflicts and Disputes. All conflicts and disputes arising from the implementation of this MOA, including possible termination, shall be resolved by the NCDEQ and NCDOT Secretaries or by the Governor.
- 5.7. Contract Administrators. The Chief Deputy Secretary for NCDEQ and the Chief Deputy Secretary for NCDOT are designated as the Contract Administrators for their respective agencies and for matters that require escalation of disputes resulting from consultation between NCDOT and DMS.

6. **Effective Date**

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

DATE:



Donald R. Van Der Vaart
Secretary, NCDEQ

DATE:

6/14/16

Nicholas J. Tennyson
Secretary, NCDOT