



North Carolina Department of Environment and Natural Resources

Michael F. Easley, Governor

William G. Ross Jr., Secretary

April 12, 2004

Mr. Fred Lamar
Assistant Attorney General
Attorney General's Office
Transportation Section
1505 Mail Service Center
Raleigh, NC 27699-1505

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

Dear Fred:

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 Bill Ross on April 12, 2004. Please distribute as necessary.

Thank you for your assistance in this matter.

Sincerely,

Daniel C. Oakley
General Counsel

DO:np

Enclosure

cc: Secretary Bill Ross
Dempsey Benton
Bill Gilmore
Ron Ferrell
Chris Russo
Alan Klimek
Charles Jones

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NC ECOSYSTEM
ENHANCEMENT PROGRAM

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MEMORANDUM OF AGREEMENT

BETWEEN THE

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

AND

THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION



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 MOA" -- This MOA is an extension of the concepts and agreements embodied in the Tri-Party Memorandum of Agreement (hereinafter the "Tri-Party MOA") among NCDENR, NCDOT and the United States Army Corps of Engineers, Wilmington District, executed on July 22, 2003. The purpose of the Tri-Party MOA 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

NCDENR-EEP/NC DOT MOA Continued

and agreements embodied in the Tri-Party MOA 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 NCDOT needs, pursuant to the terms of this agreement, relating to identification, acquisition and implementation of compensatory mitigation necessary to offset impacts to waters and wetlands, including impacts to isolated wetlands and buffers, due to NCDOT activities authorized by the federal and state permits. Accordingly, DENR-EEP agrees to provide, through its own program or through other entities, all compensatory mitigation needs 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 said compensatory mitigation 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 within the relevant watershed and anticipated NCDOT impacts within that watershed.

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, other waters of the United States and vegetative buffer areas 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. The terms restoration, enhancement, creation, and preservation as used in this agreement 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 the US Army Corps of Engineers, dated November 8, 1998.

1.4 Agreements Superseded -- This MOA supercedes 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 DOT Project Number 6.001014 Dated April 30, 2003;
- f) Amendment to Reimbursement Agreement DOT Project 6.001014 Number Dated July 18, 2003; and
- g) Amendment Number 2 to Reimbursement Agreement DOT Project Number 6.001014 Dated October 14, 2003.

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.

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 MOA. While the United States Army Corps of Engineers 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.

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. 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, 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 North Carolina 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 riverine 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 purpose of the DENR-EEP is to provide a comprehensive, natural resource enhancement program that identifies ecosystem needs at the local watershed level and preserves, enhances, and restores ecological functions within the target watersheds while addressing impacts from anticipated NCDOT Transportation Projects. All ecological enhancement activities are to be undertaken by the DENR-EEP with participation by State and Federal agencies and will be eligible for funding through multiple sources, including, but not limited to, programmed transportation funding. The goal of the DENR-EEP is to provide effective protection of the natural resources of the State by assessing, prioritizing, restoring, enhancing and preserving ecosystem functions and providing compensatory mitigation for development impacts by addressing watershed or basin needs and developing enhancement projects where the most benefit would be experienced. An additional goal of the DENR-EEP is to advance environmental stewardship through the identification of unique enhancement

opportunities that, if implemented, would provide substantial benefit and protection to the natural resources of the State of North Carolina.

The DENR-EEP mission is to restore, enhance, preserve and protect the functions associated with wetlands, streams and riparian areas including but not limited to those necessary for the restoration, maintenance and protection of water quality and riparian habitats throughout North Carolina. The goals of the program are to:

- Execute the requirements placed on the NCDENR by the North Carolina Wetlands Restoration Program Act (NCGS 143-214.8, et seq.)
- Enhance the natural resources of North Carolina by addressing watershed needs.
- Fully satisfy compensatory mitigation requirements for authorized impacts on a programmatic, watershed-level basis.
- Provide in-ground, functioning compensatory mitigation for authorized impacts in advance of the actual impacts.
- Satisfy the compensatory wetland, stream and buffer mitigation needs of the NCDOT transportation program.
- Provide a means for organizing, steering, funding, and implementing ecosystem enhancement efforts in the State of North Carolina.

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 MOA. 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 Part IV.B of the Tri-Party Agreement, and will incorporate NCDOT projected wetland (including isolated wetlands), stream and buffer impacts from anticipated NCDOT Transportation Projects into its analysis. The DENR-EEP will acquire the mitigation site, develop the mitigation site and execute the project, as agreed to and outlined in Part IV. D-F of the Tri-Party MOA.

3.3 Mitigation Sites -- Using funds provided by NCDOT for that purpose, DENR-EEP shall manage or perform all planning, acquisition, construction, monitoring, remedial action, and preservation necessary to provide compensatory mitigation for impacts to waters and wetlands anticipated to be authorized by the federal and state permits. DENR-EEP shall complete such work within the time frames established in Exhibit 1 of this MOA. DENR-EEP will follow the compensatory mitigation requirements established in Part VI of the Tri-Party MOA; and, mitigation plans will be prepared in conformance with applicable rules and guidance of the Division of Water Quality and the Division of Coastal Management for corresponding NCDOT permits.

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 -- For each eight-digit CU, DENR-EEP is responsible for providing the compensatory mitigation, for impacts certified by NCDOT-PDEA in the NCDOT Project Impact Report (defined in Section 4.2, below), necessary to satisfy the requirements of the federal and state permits to offset the anticipated NCDOT impacts as specified in Exhibit 1 of this MOA. DENR-EEP shall only acquire compensatory mitigation, pursuant to this MOA, for those impacts identified in the NCDOT Project Impact Report.

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 NC eight-digit CU, DENR-EEP shall maintain an accounting, of all complete and functioning wetland, stream and buffer mitigation. For wetland mitigation and buffer, 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 riverine, non-riverine, coastal marsh or buffer. 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 NC eight-digit CU, DENR-EEP shall maintain an accounting per Section 4.2 below, of all anticipated NCDOT impacts which will be provided by NCDOT and referenced by TIP project number and/or NCDOT Division operations impacts, by year for at least seven (7) years into the future.

3.6.3 7-Year Annual Projected Mitigation Site Accounting Schedule -- For each NC eight-digit CU, DENR-EEP shall also maintain an accounting and schedule (if under implementation) of all DENR-EEP mitigation sites anticipated by year for seven (7) years into the future. DENR-EEP shall identify, for each CU, the mitigation site(s) or project(s) and TIP projects and/or NCDOT Division(s) projects within said CU for which projected mitigation credits will be debited. This 7-year annual projected mitigation accounting shall be hereinafter referred to as the "7-year Mitigation Work Plan." Functionally equivalent anticipated compensatory mitigation may also be provided upon agreement by the Parties.

3.6.4 Compensatory Mitigation Database Report --DENR-EEP shall update said NCDOT Compensatory Mitigation Database continuously and be capable of generating a

NCDOT-specific Compensatory Mitigation Database Report upon request by NCDOT, or, at a minimum, provide such report to NCDOT on a quarterly basis.

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) to substantiate costs incurred under this Agreement. Further, DENR-EEP shall make such materials available at its office at all reasonable times during the Agreement period, and for three (3) years from the date of final payment under this Agreement, for inspection and audit by NCDOT's Fiscal Branch and/or FHWA. The NCDOT and NCDENR Contract Administrators, as defined in Section 8.4 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 agreement and the Tri-Party MOA;
- 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 Federal Highway Administration 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 each of the subsequent years of the 7 Year Mitigation Work Plan (i.e., years 3 through 7), 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 The budget, including both administrative and project costs, for the state fiscal year will be developed and approved by the end of the 3rd quarter of the prior fiscal year. NCDENR will provide a biennial work plan and its associated budget to NCDOT each year. After concurrence with the work plan, NCDOT will agree to fully fund the work plan and its associated budget, subject to Board of Transportation approval and availability of funds. No modifications in the budgeted scope or budget levels of the agreement shall occur until the changes have been mutually agreed upon by both Parties to this agreement, and approved in writing by the Contract Administrators.

3.7.4 Provided appropriate documentation has been provided to NCDOT, the annual EEP Budget will be executed through quarterly payments by NCDOT. All NCDOT payments made to DENR-EEP shall be deposited in an interest bearing bank Fund (currently, this is the Wetlands Restoration Fund), which will include a NCDOT account which will be maintained separate from any other DENR-EEP or WRP accounts. The interest earned on the separately-maintained NCDOT account will be calculated monthly and shall be credited back to NCDOT on a monthly basis. The quarterly payments will be divided between payment for administrative costs and project costs and based upon quarterly invoice estimates presented by DENR-EEP. Payment for quarterly invoices will occur a minimum of 5 days prior to the beginning of that quarter. Each quarterly payment will be reconciled based on actual costs from previous quarters.

3.7.5 The 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.

3.8 DENR-EEP Positions -- Job descriptions for DENR-EEP positions shall be developed. The positions will work on transportation-related EEP activities, but may also be involved in activities which improve DENR-EEP's ability to address impacts from anticipated

NCDOT Transportation Projects, with the approval of the NCDENR/NCDOT contract administrators.

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 the DENR-EEP program is unable to deliver, NCDOT agrees to use the DENR-EEP program to satisfy all NCDOT's required compensatory mitigation requirements for the federal and state permits. The DENR-EEP will constitute the preferred mitigation source for meeting NCDOT project environmental impacts.

4.2 NCDOT Project Impact Accounting and Reporting -- For each NC eight-digit CU, NCDOT shall provide DENR-EEP with its NCDOT Project Impact Report, which is a report of all anticipated NCDOT impacts according to TIP project number and/or NCDOT Division operations impacts, by year, for seven (7) years into the future no later than February 1 of each year. For anticipated wetland impacts, said accounting and report will be in terms of acres of riverine, non-riverine or coastal marsh impacts. For anticipated buffer impacts, said accounting and report will be in terms of square feet of impacts. For anticipated stream impacts, said

accounting and report will be in terms of linear feet of anticipated impacts. The NCDOT Project Impact Report shall be continuously updated and provided to DENR-EEP's Planning Section on a quarterly basis. Functional equivalence of anticipated NCDOT impacts may also be provided upon agreement by the Parties.

4.3 NCDOT Funding of DENR-EEP -- NCDOT will fund the DENR-EEP program, as described herein, by approving a biennial DENR-EEP budget, and, by making quarterly payments to DENR-EEP. NCDOT will provide the necessary funding to NCDENR to contract for the planning, acquisition, construction, long-term monitoring and management, and any necessary remediation of mitigation projects identified during the development of the watershed needs assessment, watershed restoration plans and local watershed plans. NCDOT agrees to fund a biennial budget of DENR-EEP based upon anticipated DENR-EEP administrative and project costs, which will be annually reviewed. NCDOT agrees to advance 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 advanced each quarter based upon anticipated DENR-EEP needs. Each subsequent request for advanced funding 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.

4.4 Funding of Preservation Sites -- For preservation sites acquired by DENR-EEP to be used as Transition Period mitigation within identified Eco-regions, DENR-EEP must maintain a separate accounting of such acquisitions from other preservation sites. Acquisition of Eco-region preservation sites shall be in conformance with the Tri-Party MOA. If the expenditure for such sites is not budgeted for in the approved DENR-EEP Budget, DENR-EEP may invoice NCDOT monthly for costs associated with the acquisition of such high quality preservation sites to advance mitigation efforts for NCDOT once the State Property Office secures an option to purchase, and upon approval of the site and funding for the site by the Board of Transportation. The NCDOT will transfer funds to DENR-EEP upon receipt of an invoice with proper supporting documentation prior to ten days of the property closing. Each invoice shall properly

document WBS accounting number by Eco-region, and when appropriate cataloging unit. In the event that the actual acquisition costs are less than preservation funds advanced, unused funds will be credited toward the next funding request. Preservation sites purchased shall be acquired in conformance with the Right of Way Acquisition Policy contained in Title 23 of the Code of Federal Regulations, Part 170 and the Uniform Relocation Assistance and Real Property Acquisition Act, Title 49 code of Federal Regulations, Part 24.

5.0 Accountability and NCDOT Compensatory Mitigation Database Review

5.1 Initial Asset/Debit Ledger Review -- Upon execution of this MOA, NCDOT and DENR-EEP shall identify all existing mitigation currently maintained or implemented by NCDOT to establish which mitigation projects shall be assumed by DENR-EEP. The compensatory mitigation asset/debit ledger shall be established based upon this initial review, and thereafter the DENR-EEP will manage the ledger. NCDOT shall provide DENR-EEP with a list of active mitigation sites, whether debited or not, including status and projected needs to achieve final success criteria. Based upon said mitigation site review, DENR-EEP and NCDOT will determine which sites will be assumed by DENR-EEP and which sites will be continued by NCDOT, if necessary.

5.2 Quarterly Review of NCDOT Mitigation Needs versus EEP Assets -- NCDENR-EEP shall provide quarterly to NCDOT a comparison of NCDOT compensatory mitigation needs and DENR-EEP compensatory mitigation assets and procurement schedule. The NCDOT compensatory mitigation needs will be based on the impacts report prepared by NCDOT in accordance with Section 4.2 of this MOA. With the exception of new or accelerated projects, for any area of concern relating to inconsistency between projected DENR-EEP mitigation procurement schedules and projected NCDOT project impacts within any eight-digit CU, NCDOT shall provide DENR-EEP with a written "Notice of Concern." DENR-EEP shall address or respond to any such Notice of Concern raised by NCDOT concerning consistency of planned compensatory mitigation with anticipated impacts on or before the following quarterly

report. In the case of accelerated projects, where DENR-EEP mitigation is expected to be used, the NCDOT will notify DENR-EEP of their intentions to change the schedule at least six months prior to such changes. DENR-EEP will notify NCDOT of the program's capability and capacity to support the modified project schedule. If such a change is supportable, the DENR-EEP will as a matter of course provided the necessary mitigation.

5.3 Elevation of Notice of Concern -- If NCDOT continues to have concerns over consistency of planned compensatory mitigation with anticipated impacts after the subsequent quarterly report, NCDOT shall elevate its Notice of Concern to the Policy and Oversight Group for decisions. The Policy and Oversight Group consists of the Secretaries of NCDENR and NCDOT. The Policy and Oversight Group may consult, as appropriate, with the USACE, Wilmington District.

6.0 Mitigation Requirements

6.1 Compensatory Mitigation Determination -- The appropriate NCDENR 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. If the NCDENR permitting agencies and/or USACE determine that on-site mitigation opportunities are both practicable and environmentally preferable to existing mitigation available through the EEP program, the permit will 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. Based on the permit requirements,

DENR-EEP and NCDOT will determine the most appropriate strategy to implement the on-site compensatory mitigation requirements of the permit.

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

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 referred to in paragraphs 2-8 of Exhibit 1 of this MOA shall meet all required annual performance criteria for each year of monitoring required to be performed prior to permit issuance.

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 the United States Army Corps of Engineers under Part VI.B. of the Tri-Party MOA. 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 MOA.

7.2 Alternate Mitigation Options -- 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.

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, the 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.

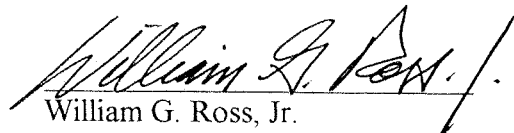
8.3 Conflicts and Disputes -- All conflicts and disputes arising from the implementation of the MOA, including possible termination, shall be resolved by the NCDENR and NCDOT Secretaries or by the Governor.

8.4 Contract Administrators -- The Chief Deputy Secretary for NCDENR and the Deputy Secretary for Environment, Planning and Local Government Affairs 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: 4/12/04



William G. Ross, Jr.
Secretary
NCDENR

DATE: 4/5/04



Lyndo Tippett
Secretary
NCDOT

EXHIBIT 1

EEP Schedule of Performance Requirements

1. **NCDOT Projects Permitted during Transition Period -- through 07/22/05**-- During the Transition Period, the DENR-EEP will provide, through multiple procurement, methods all compensatory mitigation required by state permits for the NCDOT projects identified in Exhibit 2 of the Tri-party Agreement "Transition Period Projects." For NCDOT Projects to be permitted through July 22, 2005, DENR-EEP must, at a minimum, have begun implementing the compensatory mitigation for said projects **on or before July 22, 2005**.

During the Transition Period permits and certifications can be issued when 100% preservation is used to meet impact requirements. Such preservation will be identified based on a specific list of criteria based on ecological merits and will be coordinated with the USACE. The 1:1 restoration requirement will be provided by the end of the transition period.

For Preservation sites, EEP will maintain the Assessment Report stating the cost benefit analysis for each proposed site in terms of the type of mitigation available for each of the 8 ecoregions. A per acre/linear foot valuation shall be established for each preservation site to be applied to specific NCDOT mitigation. For each 1 acre of determined impact there will be required either (A) 2 acres of restoration in the same hydrologic cataloging unit, or, (B) 1 acre of restoration and 5 acres of preservation in the same cataloging unit, or (C) 10 acres of preservation in the same ecoregion, with 1 acre of restoration due in accordance with the DOT/DENR/USACE MOA. At the time restoration is achieved in alternative (C), DENR will release 5 of the 10 acres of preservation for future mitigation requirements in the same ecoregion.

2. **NCDOT Projects Permitted during "Year 3" -- 7/23/05 through 7/22/06** -- For NCDOT Projects to be permitted in Year 3, between July 23, 2005 and July 22, 2006, DENR-EEP must, at a minimum, have completed the following tasks, **by July 22, 2006 (end of Year 3)**,

in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2005 and July 22, 2006: (1) permanently preserve the mitigation property (ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before than July 22, 2012.

3. **NCDOT Projects Permitted during “Year 4” -- 7/23/06 through 7/22/07** -- For NCDOT Projects to be permitted in Year 4, between July 23, 2006 and July 22, 2007, DENR-EEP must, at a minimum, have completed the following tasks, **by July 22, 2007 (end of Year 4)**, in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2006 and July 22, 2007: (1) permanently preserve the mitigation property (ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before July 22, 2013.

4. **NCDOT Projects Permitted during “Year 5” -- 7/23/07 through 7/22/08** -- For NCDOT Projects to be permitted in Year 5, between July 23, 2007 and July 22, 2008, DENR-EEP must, at a minimum, have completed the following tasks, **by July 22, 2008 (end of Year 5)**, in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2007 and July 22, 2008: (1) permanently preserve the mitigation property (ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and

implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before July 22, 2013.

5. NCDOT Projects Permitted during “Years 6, 7, and 8” -- 7/23/08 through 7/22/11 --

For NCDOT Projects to be permitted in Years 6, 7, and 8, between July 23, 2008 and July 22, 2011, DENR-EEP must, at a minimum, have completed the following tasks, **by July 22, 2008 (end of Year 5)**, in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2008 and July 22, 2011: (1) permanently preserve the mitigation property (ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before July 22, 2013.

6. NCDOT Projects to be Permitted during “Years 9, 10, and 11” -- 7/23/11 through

7/22/14 -- For NCDOT Projects to be permitted in Years 9, 10, and 11, between July 23, 2011 and July 22, 2014, DENR-EEP must have, at a minimum, completed the following tasks, **by July 22, 2009 (end of Year 6)**, in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2011 and July 22, 2014: (1) permanently preserve the mitigation property(ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before July 22, 2014.

7. NCDOT Projects to be Permitted during “Years 12, 13, and 14” -- and Future Years

-- For NCDOT Projects to be permitted in Years 12, 13, and 14, between July 23, 2014 and July

22, 2017, as well as all future years that this agreement is in force, DENR-EEP must have at a minimum, completed the following tasks, **by July 22, 2010 (end of Year 7)**, in order for the mitigation site(s) to be used as compensatory mitigation for NCDOT projects to be permitted between July 23, 2014 and July 22, 2017: (1) permanently preserve the mitigation property(ies), (2) complete the mitigation plan(s), and (3) begin construction of the mitigation site(s). Said construction of these mitigation sites must be completed within one year of permit issuance for which the project serves as compensatory mitigation. All planning and implementation will be conducted with the goal of achieving final success criteria (to include initial 5-year monitoring period) on or before July 22, 2015

8. NCDOT Projects to be Permitted Subsequent to “Year 12” -- after 7/23/15 -- For NCDOT Projects to be permitted in subsequent to Year 12, after July 23, 2015, DENR-EEP must have the appropriate restoration Complete and Functioning Mitigation available for said projects at the time of permitting. Complete and Functioning Mitigation shall mean that construction of the mitigation site has been completed, and the site has met all final success criteria described in the site-specific mitigation plan, and has been preserved in perpetuity.