

**AGREEMENT TO ESTABLISH THE * MITIGATION BANK
IN * RIVER BASIN WITHIN THE STATE OF NORTH CAROLINA**

USACE approval of this Instrument constitutes the regulatory approval required for the [INSERT NAME OF THE MITIGATION BANK OR IN-LIEU FEE PROGRAM] to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 C.F.R. 332.8(a)(1). This Instrument is not a contract between the Sponsor or Property Owner and USACE or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

This **Umbrella** Mitigation Banking Instrument (**UMBI**) is made and entered into on the day of _____, 20__, by _____, hereinafter Sponsor, and the U.S. Army Corps of Engineers (Corps), and each of the following agencies, upon its execution of this **UMBI**; the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the North Carolina Wildlife Resources Commission (NCWRC), the State Historic Preservation Office (SHPO) and the North Carolina Division of Water Resources (NCDWR). The Corps, together with the State and Federal agencies that execute this **UMBI**, are hereinafter collectively referred to as the Interagency Review Team (IRT).

WHEREAS the purpose of this agreement is to establish an **umbrella** mitigation bank (Bank) providing compensatory mitigation for unavoidable wetland and/or stream impacts separately authorized by Section 404 Clean Water Act permits and /or Section 10 of the Rivers and Harbors Act permits in appropriate circumstances;

WHEREAS the agencies comprising the IRT agree that the Bank site(s) is/are suitable mitigation bank site(s), and that implementation of the Mitigation Plan(s) is/are likely to result in net gains in wetland and/or stream functions at the Bank site(s), and have therefore approved the Mitigation Plan(s);

THEREFORE, it is mutually agreed among the parties to this agreement that the following provisions are adopted and will be implemented upon signature of this **UMBI**.

Section I: General Provisions

A. The Sponsor is responsible for assuring the success of the *restoration, *creation, *enhancement and *preservation activities at the Bank site(s), and for the overall operation and management of the Bank. The Sponsor assumes the legal responsibility for providing the compensatory mitigation once a permittee secures credits from the Sponsor and the District Engineer (DE) receives documentation that confirms the Sponsor has accepted responsibility for providing the required compensatory mitigation.

B. The goals of the **Umbrella** Bank site(s) is/are to **restore, enhance, create and preserve wetland and/or stream** systems and their functions to compensate in appropriate circumstances

for unavoidable **wetland and/or stream** impacts authorized by Section 404 of the Clean Water Act permits and or Section 10 of the Rivers and Harbors Act permits in circumstances deemed appropriate by the Corps after consultation, through the permit review process, with members of the IRT.

C. Use of credits from the Bank to offset **wetland and/or stream** impacts authorized by Clean Water Act permits must be in compliance with the Clean Water Act and implementing regulations, including but not limited to the 404(b)(1) Guidelines, the National Environmental Policy Act, and all other applicable Federal and State legislation, rules and regulations. This agreement has been drafted in accordance with the regulations for Compensatory Mitigation for Losses of Aquatic Resources effective June 9, 2008 (33 CFR Parts 325 and 332) (Mitigation Rule).

D. The IRT shall be chaired by the DE of the U.S. Army Corps of Engineers, Wilmington District (District). The IRT shall review documentation for the establishment of mitigation bank sites. The IRT will also advise the DE in assessing monitoring reports, recommending remedial measures, approving credit releases, and approving modifications to this instrument. The IRT's role and responsibilities are more fully set forth in Sections 332.8 of the Mitigation Rule. The IRT will work to reach consensus on its actions.

E. The DE, after consultation with the appropriate Federal and State review agencies through the permit review process, shall make final decisions concerning the amount and type of compensatory mitigation to be required for unavoidable, permitted wetland and/or stream impacts, and whether or not the use of credits from the Bank is appropriate to offset those impacts. In the case of permit applications and compensatory mitigation required solely under the Section 401 Water Quality Certification rules of North Carolina, the NCDWR will determine the amount of credits that can be withdrawn from the Bank. Any credits used to offset impacts solely authorized by Section 401 cannot be used for other impacts authorized under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

F. The parties to this agreement understand that a watershed approach to establish compensatory mitigation must be used to the extent appropriate and practicable. Where practicable, in-kind compensatory mitigation is preferred.

Section II: Geographic Service Area

The Geographic Service Area (GSA) is the designated area within which the **Umbrella** Bank is authorized to provide compensatory mitigation required by DA permits. The GSA for this Bank shall include the **{Name Watershed}** Hydrologic Unit **{8 digit HUC}** in North Carolina. Credits are to be used in the same HUC in which they were generated, and credits within each HUC should be tracked on separate ledgers.

Section III: Mitigation Plan

Any Mitigation Plan submitted pursuant to this agreement must contain the information listed in 332.4(c) (2) through (14) of the Compensatory Mitigation Rule.

A. The Sponsor will perform work described in **the/each site-specific** approved Mitigation Plan(s).

B. The Sponsor shall monitor the Bank Site(s) as described in the approved Mitigation Plan(s), until such time as the IRT determines that the performance standards described in the Mitigation Plan(s) have been met.

C. Mitigation Plans submitted for inclusion in this bank must meet the requirements of any District guidance that is current at the time the new site is submitted to the District, including any updates made to monitoring requirements, credit releases, long term management, or any other provisions that are required and/or specifically addressed in the Mitigation Plan. The addition of any site to this instrument shall be considered as a modification to this instrument, and processed in accordance with the procedures set forth in the Mitigation Rule.

D. The members of the IRT will be allowed reasonable access to the Property for the purposes of inspection of the Property and compliance monitoring of the Mitigation Plan.

Section IV: Reporting

A. The Sponsor shall submit to the DE, for distribution to each member of the IRT, an annual report describing the current condition of the Bank Site(s) and the condition of the Bank Site(s) in relation to the performance standards in the Mitigation Plan(s). The Sponsor shall provide to the DE any monitoring reports described in the Mitigation Plan(s).

B. As part of each annual monitoring report, the Sponsor shall also provide ledger reports documenting credit transactions as described in Section VIII of this **UMBI**.

C. Each time an approved credit transaction occurs, the Sponsor shall provide notification to the DE within 30 days of the transaction. This notification shall consist of a summary of the transaction and a full ledger report reflecting the changes from the transaction. Additionally, signed copies of the Compensatory Mitigation Transfer of Responsibility Form shall be submitted to the Corps Project Manager for the permit and the Corps Bank Manager for the bank site.

Section V: Remedial Action

A. The DE shall review the monitoring reports, as required in the Mitigation Plan(s), and may, at any time, after consultation with the Sponsor and the IRT, direct the Sponsor to take remedial action at the Bank site(s). Remedial action(s) required by the DE shall be designed to achieve the performance standards as specified in the Mitigation Plan(s). All remedial actions

required under this section shall include a work schedule and monitoring criteria that will take into account physical and climactic conditions.

B. The Sponsor shall implement any remedial measures required pursuant to the above.

C. In the event the Sponsor determines that remedial action may be necessary to achieve the required performance standards, it shall provide notice of such proposed remedial action to all members of the IRT. No remedial actions shall be taken without the concurrence of the DE, in consultation with the IRT.

Section VI: Use of Mitigation Credits

A. Description of credit classifications and provisions pertaining to the use of those credits shall be provided in the Mitigation Plan(s) **to be included in this bank**. Credit classifications (e.g., cold water stream, cool water stream, warm water stream, coastal wetlands, non-riparian wetlands, riparian non-riverine wetlands, and riparian riverine wetlands) will be in accordance with current District guidance at the time the Mitigation Plan is submitted to the District. In general, these classifications will be used to determine if a particular credit qualifies as “In-Kind” mitigation. Exceptions to the use of “In-Kind” mitigation may be allowed at the discretion of the permitting agencies on a case-by-case basis.

B. Wetland and stream compensation ratios are determined by the DE on a case-by-case basis based on considerations of functions of the wetlands and/or streams impacted, the severity of the wetland and/or stream impacts, the relative age of the mitigation site, whether the compensatory mitigation is in-kind, and the physical proximity of the wetland and/or stream impacts to the Bank Site.

C. Notwithstanding the above, all decisions concerning the appropriateness of using credits from the Bank to offset impacts to waters and wetlands, as well as all decisions concerning the amount and type of such credits to be used to offset wetland and stream impacts authorized by Department of the Army permits, shall be made by the DE, pursuant to Section 404 of the Clean Water Act and implementing regulations and guidance. These decisions may include notice to and consultation with the members of the IRT through the permit review process if the DE determines this to be appropriate given the scope and nature of the impact.

Section VII: Credit Release Schedule

A. All credit releases must be approved in writing by the DE, following consultation with the IRT, based on a determination that required performance standards have been achieved.

B. A credit release schedule shall be provided in **the/each site-specific** Mitigation Plan(s) **that are included in this bank**. The release schedule will list all of the proposed credit releases and any performance standards associated with those releases.

C. In general, the initial allocation of credits **from any site included as part of this bank** shall be available for sale only after the completion of all of the following:

1. Execution of this UMBI by the Sponsor, the DE, and other agencies eligible for membership in the IRT who choose to execute this agreement, to include the approval of any modifications to this agreement when new sites are added to it;
2. Approval of a final Mitigation Plan;
3. Confirmation that the mitigation bank site has been secured;
4. Delivery of executed financial assurances as specified in the site-specific Mitigation Plan;
5. Delivery of a copy of the recorded long-term protection mechanism as described in as specified in the site-specific Mitigation Plan, as well as a title opinion covering the property acceptable to the DE; and
6. Issuance of any DA permits necessary for construction of the mitigation site (if necessary).

The Sponsor must initiate implementation of the approved Mitigation Plan(s) no later than the first full growing season after the date of the first credit transaction (i.e., construction of the initial physical and biological improvements proposed in the approved Mitigation Plan(s) must be started by the end of the first full growing season following the initial sale of any credits from the Bank. This provision does not apply to preservation-only sites that do not include any physical or biological improvements. Subject to the Sponsor's continued satisfactory completion of all required performance standards and monitoring, additional restoration mitigation credits will be available for sale by the Sponsor as specified in the final Mitigation Plan.

Section VIII: Accounting Procedures

- A. The Sponsor shall develop accounting procedures acceptable to the DE for maintaining accurate records of debits made from the Bank. Such procedures shall include the generation of a ledger by the Sponsor showing credits used at the time they are debited from the Bank. All ledger reports shall identify credits debited and remaining by type of credit and shall include for each reported debit the Corps ORM ID number for the permit for which the credits were utilized and the permitted impacts for each resource type.
- B. When credits from the bank are sought by a permit applicant, the Sponsor shall prepare a reservation letter for the applicant to include with the Corps permit application, that documents the number and type of credits available to be debited from the bank, and the amount of time (if any) that those credits will be held for that applicant (with an expiration date for the letter of availability).
- C. Each time an approved credit transaction occurs, the Sponsor shall notify the DE within 30 days of the transaction with a summary of the transaction and a full ledger report showing the changes made. Signed copies of the Transfer of Mitigation Responsibility form shall also be submitted to the Corps permit Project Manager and the Corps Bank Manager for that bank.
- D. The Sponsor shall prepare an annual ledger report, on each anniversary of the date of execution of this agreement, showing all credits used, any changes in credit availability (e.g., additional credits released, credit sales, suspended credits, etc.), and the beginning and ending

balance of remaining credits. The Sponsor shall submit the annual report to the DE, for distribution to each member of the IRT, until such time as all of the credits have been utilized, or this agreement is otherwise terminated.

Section IX: Financial Assurances

A. Financial assurances for the Bank site(s) will be detailed in the **site-specific** Mitigation Plan(s). The Sponsor shall provide financial assurances in a form acceptable to the DE, sufficient to assure completion of all mitigation work, required reporting and monitoring, and any remedial work required pursuant to this UMBI. The financial assurance value should be based on the cost of doing the mitigation work, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring. For preservation only Bank Sites, no financial assurances will generally be required unless there are specific activities necessary to ensure the successful preservation of resources on the site, in which case appropriate financial assurances may still be required.

B. All financial assurances shall be made payable to a standby trust or to a third-party designee, acceptable to the Corps, who agrees to complete the project or provide alternative mitigation. Financial assurances structured to provide funds to the Corps in the event of default by the Bank Sponsor are not acceptable.

C. The form and amount of financial assurances must be stated in the **site-specific** Mitigation Plan(s) in order for the Mitigation Plan to be approved. This must include the name of the specific provider of those assurances and the method by which the financial assurances will be provided in the event that they must be utilized. Original copies of the financial assurance documents must be provided to the DE prior to the initial release of credits.

D. A financial assurance must be in the form that ensures that the DE receives notification at least 120 days in advance of any termination or revocation.

Section X: Site Protection

A. The Sponsor shall grant a Conservation Easement (CE) in form acceptable to the DE, sufficient to protect the Bank Site(s) in perpetuity. The CE shall be perpetual, preserve all natural areas, and prohibit all use of the property inconsistent with its use as mitigation property, including any activity that would materially alter the biological integrity or functional and educational value of wetlands or streams within the Bank Site, consistent with the Mitigation Plan. The purpose of the CE will be to assure that future use of the Bank Site will result in the restoration, protection, maintenance and enhancement of wetland and/or stream functions described in the Mitigation Plan. The name and contact information for the Corps approved easement holder and a draft copy of the CE will be provided in the **site-specific** Mitigation Plans(s).

B. The Sponsor shall deliver a title opinion acceptable to the DE covering the mitigation property. The property shall be free and clear of any encumbrances that would conflict with its use as mitigation, including, but not limited to, any liens that have priority over the recorded CE.

C. Subsequent to the recording of the CE, the Sponsor may convey the Bank Site property either in fee or by granting an easement to a qualified land trust, state agency, or other appropriate nonprofit organization approved by the Corps. The Sponsor is responsible for ensuring that the CE is re-recorded so that it remains within the chain of title. The terms and conditions of this conveyance shall not conflict with the intent and provisions of the CE nor shall such conveyance enlarge or modify the uses specified in the easement. The CE must contain a provision requiring 60 day advance notification to the DE before any action is taken to void or modify the CE, including transfer of title to, or establishment of any other legal claims over, the project site.

Section XI: Long-term Management

A. The Sponsor shall implement the long-term management plan as described in the **site-specific Mitigation Plan(s). {Provide the name and contact information for the party responsible for long-term management.}**

B. The long-term management plan will include a list of annual maintenance, monitoring, and/or repair activities for the **each** mitigation site, the associated annual cost for each activity, and the required total amount necessary to provide all future site management. The long-term management plan should explain how the funds will be managed and provided to the designated long-term manager (e.g., an endowment managed through a separate account holder). The long-term management plan should include a contingency section that addresses how the responsibility and funding for the long-term site management will be passed on to a new manager in the event that the selected long-term management entity is no longer able to provide for management of the site.

Section XII: Default and Closure

A. It is agreed to establish and maintain the Bank site(s) until (i) credits have been exhausted or banking activity is voluntarily terminated with written notice by the Sponsor provided to the DE and other members of the IRT; and (ii) it has been determined and agreed upon by the DE and IRT that the debited Bank site has satisfied all the conditions herein and in the Mitigation Plan. If the DE determines that the Bank site is not meeting performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.

B. Any delay or failure of Bank Sponsor shall not constitute a default hereunder if and to the extent that such delay or failure is primarily caused by any act, event or conditions beyond the Sponsor's reasonable control and significantly adversely affects its ability to perform its obligations hereunder including: (i) acts of God, lightning, earthquake, fire, landslide, or interference by third parties; (ii) condemnation or other taking by any governmental body; (iii) change in applicable law, regulation, rule, ordinance or permit condition, or the interpretation or enforcement thereof; (iv) any order, judgment, action or determination of any federal, state or local court, administrative agency or government body; or (v) the suspension or interruption of any permit, license, consent, authorization or approval. If the performance of the Bank Sponsor is affected by any such event, Bank Sponsor shall give written notice thereof to the IRT as soon

as is reasonably practicable. If such event occurs before the final availability of all credits for sale, the Sponsor shall take remedial action to restore the property to its condition prior to such event, in a manner sufficient to provide adequate mitigation to cover credits that were sold prior to such delay or failure to compensate for impacts to waters, including wetlands, authorized by Department of the Army permits. Such remedial action shall be taken by the Sponsor only to the extent necessary and appropriate, as determined by the IRT.

C. At the end of the monitoring period, upon satisfaction of the performance standards, the Sponsor may submit a request to the DE for site close out. The DE, in consultation with the IRT, shall use best efforts to review and comment on the request within 60 days of such submittal. If the DE determines the Sponsor has achieved the performance standards in accordance with the mitigation plan and all obligations under this MBI, the DE shall issue a close out letter to the Sponsor.

Section XIII: Miscellaneous

A. Modification of this UMBI shall be in accordance with the procedures set forth in 332.8 of the mitigation rule.

B. No third party shall be deemed a beneficiary hereof and no one except the signatories hereof, their successors and assigns, shall be entitled to seek enforcement hereof.

C. This UMBI constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.

D. In the event any one or more of the provisions contained in this UMBI are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this UMBI shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

E. This UMBI shall be governed by and construed in accordance with the laws of North Carolina and the United States as appropriate.

F. This UMBI may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute but one and the same instrument.

G. The terms and conditions of this UMBI shall be binding upon, and inure to the benefit of the parties hereto and their respective successors.

H. All notices and required reports shall be sent by regular mail to each of the parties at their respective addresses, provided below.

Sponsor:

*Name

*Title

*Address

Corps:

Mr./Ms. *

U.S. Army Corps of Engineers
Regulatory Division

*Address

USEPA:

Mr. Todd Bowers
Wetlands Section - Region IV
Water Management Division
U.S. Environmental Protection Agency
61 Forsyth Street, SW
Atlanta, Georgia 30303

USFWS:

Mr./Ms. *

U.S. Fish and Wildlife Service

*Address

NCWRC:

Mr./Ms. *

North Carolina Wildlife Resources Commission

*Address

NCDWR:

Mr. Mac Haupt
Division of Water Resources
North Carolina Department of Environmental Quality
Post Office Box 29535
Raleigh, NC 27626-0535

NCSHPO

State Historic Preservation Office
Ms. Renee Gledhill-Earley
4617 Mail Service Center
109 E. Jones Street
Raleigh, NC 27699-4617

NMFS:

Mr. Ken Riley
National Marine Fisheries, NOAA
Habitat Conservation Division
Pivers Island
Beaufort, North Carolina 28516

NCDCM:

Mr./Ms. *
North Carolina Division of Coastal Management
North Carolina Department of Environment and
Natural Resources
*Address

**IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled
“Agreement To Establish The * Mitigation Bank In * County, North Carolina”:**

Sponsor:

By: _____

Date: _____

U.S. Army Corps of Engineers:

By: _____

Date: _____

**IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled
“Agreement To Establish The * Mitigation Bank, * River Basin in the state of North
Carolina”:**

U.S. Environmental Protection Agency:

By: _____ Date: _____

U.S. Fish and Wildlife Service:

By: _____ Date: _____

N.C. Division of Water Resources:

By: _____ Date: _____

N.C. Wildlife Resources Commission:

By: _____ Date: _____

NC State Historic Preservation Office:

By: _____ Date: _____

National Marine Fisheries Service:

By: _____ Date: _____

N.C. Division of Coastal Management:

By: _____ Date: _____

List of Appendices

Appendix A: Geographic Service Area Map

Appendix B: Mitigation Plan (Each plan should include construction costs, maintenance and monitoring costs, draft copy of financial assurance documents, draft copy of site protection instrument, and a long term management plan as appendices to the plan.)