

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered as of the signature of the last Party to approve the Agreement (“Effective Date”), by and between Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina (“Plaintiffs”) and the North Carolina Department of Transportation (“NCDOT”) and NCDOT Secretary James H. Trogon III (NCDOT and Secretary Trogon are collectively referred to as the “State Defendants”).¹ Plaintiffs and State Defendants, as the parties to this Agreement, are collectively referred to herein as the “Parties” or individually as a “Party.”

WHEREAS, NCDOT proposed to extend the Triangle Expressway from the N.C. 55 Bypass in Apex to U.S. 64/U.S. 264 (I-87) in Knightdale, thereby completing the 540 Outer Loop around the greater Raleigh area, (“Project” or “Complete 540”²) and studied the environmental effects of the Project pursuant to the National Environmental Policy Act (“NEPA”); and

WHEREAS, on June 6, 2018, the Federal Highway Administration (“FHWA”) issued a Record of Decision (“ROD”) that approved a Selected Alternative for the Project; and

WHEREAS, Plaintiffs assert that federally-listed species in the Project area have an inherent right to live out their life cycles within their extant habitat, free from disturbance or removal; and

¹ The term “Defendants,” as used in this Agreement, refers collectively to the State Defendants and the Federal Defendants named in the Federal Lawsuit (as later defined in this Agreement): the Federal Highway Administration, Edward T. Parker, in his official capacity as Assistant Division Administrator of the Federal Highway Administration, the U.S. Fish and Wildlife Service, Greg Sheehan, in his official capacity as Acting Director for the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Christopher J. Oliver, in his official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service.

² The Project comprises State Transportation Improvement Program (“STIP”) numbers R-2721 (which consists of both R-2721A and R-2721B), R-2828, and R-2829.

WHEREAS, Plaintiffs recognize that the threat of extinction for the federally-listed species in the Project area has grown so extreme that emergency measures are required in order to secure a future for these species in the wild; and

WHEREAS, part of the study area for the Project is occupied by the dwarf wedgemussel (“DWM”), which has been federally listed as endangered under the Endangered Species Act (“ESA”); and

WHEREAS, part of the study area for the Project is occupied by the yellow lance, which has been federally listed as threatened under the ESA; and

WHEREAS, part of the study area for the Project contains designated critical habitat for the Atlantic sturgeon, which has been federally listed as endangered under the ESA; and

WHEREAS, part of the study area for the Project is occupied by the Atlantic pigtoe, which is proposed to be federally listed as threatened under the ESA; and

WHEREAS, part of the study area for the Project contains habitat proposed to be designated as critical habitat for the Atlantic pigtoe; and

WHEREAS, part of the study area for the Project is occupied by the Neuse River waterdog, which is proposed to be federally listed as threatened under the ESA; and

WHEREAS, part of the study area for the Project contains habitat proposed to be designated as critical habitat for the Neuse River waterdog; and

WHEREAS, part of the study area for Project is occupied by the Carolina madtom, which is proposed to be federally listed as endangered under the ESA; and

WHEREAS, on April 10, 2018, the United States Fish and Wildlife Service (“USFWS”) issued a Biological Opinion determining that the Project is not likely to jeopardize the continued existence of the DWM and yellow lance; and

WHEREAS, on May 21, 2018, the National Marine Fisheries Service (“NMFS”) concurred in NCDOT’s determination that the Project is not likely to adversely affect the Atlantic sturgeon or its designated critical habitat; and

WHEREAS, on May 23, 2018, Plaintiffs filed suit to challenge NCDOT and FHWA’s approvals in the United States District Court for the Eastern District of North Carolina in, as later amended, *Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina v. North Carolina Department of Transportation, James H. Trogon III, Secretary, North Carolina Department of Transportation, Federal Highway Administration, Edward T. Parker, Assistant Division Administrator, Federal Highway Administration, U.S. Fish and Wildlife Service, Greg Sheehan, Acting Director, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Christopher J. Oliver, Assistant Administrator for Fisheries, National Marine Fisheries Service*, Civil No. 4:18-CV-00097-D, alleging claims under NEPA, ESA, and the Administrative Procedure Act (“APA”) (“Federal Lawsuit”); and

WHEREAS, on February 15, 2019, the North Carolina Department of Environmental Quality - Division of Water Resources (“NCDWR”) issued 401 Water Quality Certification No. 4179 for the Project (“Certification”); and

WHEREAS, on February 22, 2019, Plaintiffs filed a Petition for a Contested Case Hearing in the North Carolina Office of Administrative Hearings, *Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina v. North Carolina Department of Environmental Quality – Division of Water Resources*, 19 EHR 01010, to challenge the issuance of the Certification (“OAH Matter” and, collectively with the Federal Lawsuit, the “Actions”); and

WHEREAS, NCDOT intervened in the OAH Matter on March 20, 2019; and

WHEREAS, pursuant to court order in the Federal Lawsuit, the matter is currently remanded to FHWA for re-initiation of ESA consultation with USFWS regarding the DWM, yellow lance, and species that are currently proposed to be federally listed under the ESA; and

WHEREAS, the Parties believe it is in the best interest of the public, the Parties, and judicial economy to compromise and settle these claims outside of the courtroom.

NOW, THEREFORE, in consideration of the promises and covenants contained in this Agreement, the Parties agree to settle all claims and causes of action arising in the Actions as follows:

A. NCDOT's Obligations and Covenants:

Land Acquisition

1. NCDOT commits to support Wake County's goal of thirty percent (30%) open space by matching twenty-five (25) cents per dollar that Wake County spends through its Open Space Program during calendar years 2020, 2021, 2022, and 2023. The NCDOT matching funds will be contributed to the Wake County Open Space Program and, to the extent practicable, be used to purchase high value properties using Wake County's model, with additional emphasis on purchasing properties in close proximity to the Complete 540 project and Swift Creek.
2. NCDOT will expend Five Million and 0/100 Dollars (\$5,000,000.00) for high-quality land acquisition to provide habitat benefits in perpetuity for some or all of the following species: DWM, yellow lance, Atlantic pigtoe, Neuse River waterdog, and Carolina madtom. These monies will be expended in the following priority:
 - a. First, NCDOT will use its best efforts, within reason, to expend these monies within the "Priority Aquatic Habitats" within the Neuse and Tar-Pamlico River watersheds, as identified via GIS data by the North Carolina Natural Heritage Program, and found at <http://center.maps.arcgis.com/apps/View/index.html?webmap=fd23709255e1464a89e8013e0565ef14>.
 - b. Second, NCDOT will use its best efforts, within reason, to expend these monies to acquire land within close proximity to the Project with significant habitat value to the DWM, yellow lance, Atlantic pigtoe, Neuse River waterdog, and Carolina madtom. NCDOT will coordinate with Plaintiffs' counsel, the Southern

Environmental Law Center (“SELC”), and, by extension, Plaintiffs, in these efforts.

- c. Third, NCDOT will use its best efforts, within reason, to expend these monies to acquire land within the watersheds affected by the Project. NCDOT will coordinate with SELC and, by extension, Plaintiffs, in these efforts.
 - d. None of the expenditures in Section A.2 will be used to satisfy mitigation or other environmental commitments and responsibilities for other projects or programs. As NCDOT makes progress in expending these funds, NCDOT will apprise SELC, and by extension, Plaintiffs, of how the funds have been spent, including specific information on the properties obtained, including precise location and watershed; acreage; imperiled³ species present; and the specific habitat benefits to specific aquatic species produced by these purchases. NCDOT will use its best efforts to expend these funds by December 31, 2022.
 - e. In order to ensure these lands’ preservation in perpetuity, NCDOT may:
 - i. transfer ownership of these properties to the North Carolina Wildlife Resources Commission for inclusion in its Wildlife Conservation Area system; or
 - ii. utilize other preservation methods as mutually agreed upon by NCDOT and SELC and, by extension, Plaintiffs.
3. Upon completion of projects R-2721A, R-2721B, and R-2828, NCDOT will commit to preserving in an undeveloped state fifty percent (50%) by acre of all remnant property acquired for these projects. NCDOT will coordinate with SELC in selecting the remnant properties to be preserved. NCDOT will preserve the property by transferring ownership to the North Carolina Wildlife Resources Commission for inclusion in its Wildlife Conservation Area system or by utilizing other preservation methods as mutually agreed upon by NCDOT and SELC, and, by extension, Plaintiffs. Within twelve (12) months after completion of projects R-2721A, R-2721B, and R-2828, NCDOT, in coordination with SELC, will begin to inventory and identify remnant property that is subject to this provision.

³ The term “imperiled” refers to species that are any of the following: (i) listed as endangered or threatened under the ESA; (ii) considered a “candidate” species for listing by USFWS under the ESA; and/or (iii) listed as threatened, endangered, or of special concern under the North Carolina state Endangered Species Act, 113 NCGS Subc. IV, Art. 25.

Stream Protection/Mitigation/Stormwater

4. For the Project, NCDOT will secure forty-seven thousand (47,000) linear feet of stream mitigation in addition to that required for the typical 2:1 ratio for stream impacts. The mitigation will be secured in two batches. The first batch would be in the amount of thirty-five thousand (35,000) linear feet and will be secured within twelve (12) months of the Effective Date of this Agreement. The remaining twelve thousand (12,000) linear feet will be secured concurrent with the construction permit process for R-2829. All stream and wetlands mitigation will be for multi-benefit projects.
5. Within eighteen (18) months of the Effective Date of this Agreement, NCDOT will provide funding to Johnston County for its stormwater management program in the amount of Five Hundred Thousand and 0/100 Dollars (\$500,000.00).
6. For R-2721 and R-2828, NCDOT will model the runoff discharge volume and peak flow for (i) pre-highway construction and (ii) expected conditions post-construction based on design plans to identify the difference, if any, between the total cumulative runoff discharge volume for the two projects for the pre and post-construction land cover conditions. NCDOT will also model differences to pollutant loadings, including copper (Cu), zinc (Zn), total nitrogen, total phosphorus, and total suspended solids.

For every percentage of difference between the total cumulative runoff discharge volume for the two projects between the post-construction and pre-construction land cover conditions, NCDOT will commit One Hundred Fifty Thousand and 0/100 Dollars (\$150,000.00) to work with municipal separate storm sewer systems (“MS4s”) and Wake County to install additional stormwater control measures (“SCMS”), with a maximum commitment of Three Million Five Hundred Thousand and 0/100 Dollars (\$3,500,000.00), or some lesser amount if the pre/post construction total runoff discharge volume percentage difference can be mitigated prior to reaching the maximum commitment of \$3,500,000.00. NCDOT will use its best efforts to expend these funds within three (3) years after the completion of R-2721 and R-2828.

To model the information referenced in the first paragraph of Section A.6, above, NCDOT and Plaintiffs will coordinate to select three (3) drainage areas within the boundaries of R-2721 and R-2828. For these three (3) drainage areas, NCDOT will model the runoff hydrograph for the pre-construction and post-construction land cover conditions using two (2) different hydrological modeling platforms to gain an awareness of the change in the pre- and post-construction runoff hydrograph as well as an awareness of the differences between the two modeling platforms. For these three (3) drainage areas, NCDOT will also model runoff volume and peak flow using two (2) different

rainfall-runoff calculation methods to gain an awareness as to the differences between the methods.

NCDOT shall make the model results available to the Plaintiffs, and will use the information gathered with regard to pollutant loadings to inform how to modify and adapt mitigation strategies to reduce those pollutants.

7. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Two Hundred Thousand and 0/100 Dollars (\$200,000.00) for research on the examination of peer states' use of Low Impact Development guidelines and how these guidelines could be used to enhance the NCDOT Best Management Practices (“BMP”) toolbox.
8. By June 2022, NCDOT will develop and implement a new policy regarding stormwater management and work with the United States Geological Survey (“USGS”) to establish a risk assessment matrix and categorize projects by type and sensitivity to more appropriately assign BMPs to all projects.
9. NCDOT will reserve Three Million and 0/100 Dollars (\$3,000,000.00) in Project funds to either (i) perform post-construction water quality monitoring on the Project and implementation of future BMPs to supplement existing BMPs and further enhance water quality regarding the Project or (ii) supplement the NCDOT National Pollutant Discharge Elimination System funds to specifically implement retrofit BMPs in the Project corridor's watersheds.

Air Quality / Climate Change

10. From the Effective Date of this Agreement, NCDOT commits to allowing toll-free use by public transit buses of all managed lanes (“HOT”) projects in the current 2018 – 2027 State Transportation Improvement Program (“STIP”), as last amended July 2019, and in future STIPs, in accordance with applicable North Carolina law.
11. NCDOT will support GoTriangle's use of NC 540 through funding partnerships for the calendar years 2020, 2021, and 2022. NCDOT will report annually to Clean Air Carolina (“CAC”) and SELC on those support efforts.
12. From the Effective Date of this Agreement, NCDOT will complete a quantitative analysis of greenhouse gas emissions for all projects where a Preferred Alternative has not been identified prior to January 1, 2021 and which require completion of an Environmental Impact Statement or Environmental Assessment under NEPA.

13. Within nine (9) months of the Effective Date of this Agreement, NCDOT commits to hire a firm to conduct a study to identify strategies specific to North Carolina to reduce vehicle miles travelled (“VMT”) in urban, rural, and regional areas of the state. The study should be completed no more than a year from the date of the firm’s hiring. After the study is complete:
 - a. NCDOT will make the findings of the study publicly available on its website and share the findings of the study with Metropolitan Planning Organizations (“MPOs”) and Regional Planning Organizations (“RPOs”) with the goal that these planning organizations will utilize the findings to develop plans that reduce VMT.
 - b. Within six months after the study is completed, NCDOT will create a toolkit for local governments and MPOs regarding VMT reduction strategies. This toolkit will include information regarding what actions are possible at what levels of government, what funding is available, and similar information.
 - c. NCDOT will establish a VMT reduction task force with members from the private sector, local governments, MPOs & RPOs, non-governmental organizations (“NGOs”), including CAC and SELC, and other interested parties, if any.
14. NCDOT will commit to working with SELC and CAC to develop and host a breakout session at each of the next three Transportation Summits (provided that the Transportation Summit series continues) on the study referenced in Section A.13 above, or other topics related to the intersection of transportation and the environment, as agreed upon by NCDOT, SELC, and CAC.
 - a. In the event the summit series does not continue, NCDOT will commit to working with SELC and CAC to develop and host a standalone event on the study referenced above or other topics related to the intersection of transportation and the environment, as agreed upon by NCDOT, SELC, and CAC.
15. Within three (3) months of the Effective Date of this Agreement, NCDOT will begin to collect and monitor data regarding the ratio of VMT per North Carolina licensed driver. The initial data will be collected prior to the start of the study referenced in Section A.13, above, produced concurrent with the start of the study, and data will be monitored and collected concurrent with the study. Once the results of the study have been distributed, NCDOT will set targets for a reduction in the ratio of VMT per North Carolina licensed driver.

16. NCDOT commits to develop and implement a contract specification for lower emission construction equipment that will require use of Tier⁴ 4 construction equipment and/or incentivize the use of Tier 4 construction equipment for all new contracts in the Triangle area (Wake, Durham, Orange, and Chatham Counties). This specification will apply only to Triangle area contracts for projects that, at the time of letting, are valued over Fifty Million and 0/100 Dollars (\$50,000,000.00) and, at time of letting, require at least One Million (1,000,000) cubic yards of earth moving. Specifically, NCDOT commits to:

- a. Work with stakeholders, including CAC and SELC, to develop and implement the Triangle area specification for all applicable contracts by January 1, 2020.
- b. Use the current I-77 specification⁵ for guidance in developing the new Triangle area specification. This specifically includes incorporating the reporting requirements from the I-77 specification into the Triangle area specification to ensure that the contractors are reporting all of their applicable construction equipment and detailing, among other things, the Tier level for each piece.
- c. Include in the Triangle area specification requirements and incentives for a certain percentage of the construction equipment used on applicable projects to be a certain Tier as follows:
 - i. For applicable contracts awarded in 2020 in the Triangle area, a minimum of twenty-five percent (25%) of the construction equipment used on an applicable project must meet Tier 4 requirements or a minimum of fifty percent (50%) of the construction equipment used on an applicable project must meet Tier 3, Tier 4 or Tier 4i requirements. These contracts will also have an incentive clause that pays Fifty Thousand and 0/100 Dollars (\$50,000.00) to the contractor if, at the conclusion of the project: (1) more than fifty-five percent (55%) of the total number of pieces of construction equipment used on the project meets Tier 4 Final requirements and (2) less than twenty-five percent (25%) of the total number of pieces of construction equipment used on the project is categorized as Tier 0 or 1.
 - ii. For applicable contracts awarded in 2021 in the Triangle area, a minimum of thirty-five percent (35%) of the construction equipment used on an applicable project must meet Tier 4 requirements or a

⁴ References to “Tiers” in this Agreement refer to the multiple tiers of emission standards adopted by the Environmental Protection Agency for regulating heavy equipment with compression-ignition (diesel) engines (“construction equipment”).

⁵ The current I-77 specification can be found at Section 2.8.4, Book 2, Technical Provisions of the Comprehensive Agreement dated June 26, 2014.

minimum of sixty percent (60%) of the construction equipment used on an applicable project must meet Tier 3, Tier 4 or Tier 4i requirements. These contracts will also have an incentive clause that pays Fifty Thousand and 0/100 Dollars (\$50,000.00) to the contractor if, at the conclusion of the project: (1) more than sixty-five percent (65%) of the total number of pieces of construction equipment used on the project meets Tier 4 Final requirements and (2) less than twenty-five percent (25%) of the total number of pieces of construction equipment used on the project is categorized as Tier 0 or 1.

- iii. For applicable contracts awarded in 2022 in the Triangle area, a minimum of fifty percent (50%) of the construction equipment used on an applicable project must meet Tier 4 or Tier 4i requirements. These contracts will also have an incentive clause that pays Fifty Thousand and 0/100 Dollars (\$50,000.00) to the contractor if, at the conclusion of the project: (1) more than seventy-five percent (75%) of the total number of pieces of construction equipment used on the project meets Tier 4 Final requirements and (2) less than twenty-five percent (25%) of the total number of pieces of construction equipment used on the project is categorized as Tier 0 or 1.
- d. For applicable contracts awarded in 2023 and later, NCDOT will evaluate the reporting data for 2020, 2021, and 2022 and set new goals by the end of 2023 based on that data. The goals will at least maintain the 2022 levels for specification requirements, as outlined in Section A.16.c.iii above. The incentive threshold and amounts will also be re-evaluated at that time.
- e. Concurrent with the goal setting timeframe noted in Section A.16.d above (end of 2023), NCDOT will draft goals for Tier 4 usage on all NCDOT contracts that, at the time of letting, are valued over Fifty Million and 0/100 Dollars (\$50,000,000.00) and, at the time of letting, require at least One Million (1,000,000) cubic yards of earth moving, once more data is available through the Triangle area projects.
- f. So as not to adversely affect Disadvantaged Business Enterprises (which includes Minority and Women's Business Enterprises for state-funded projects), the construction equipment operated by those firms on applicable projects may be excluded from (i) the reporting requirements contained in Section A.16.b, above, and (ii) the restrictions (but not the incentives) described in Section A.16.c above, provided that the construction equipment used by those firms meets Tier 1 or above requirements.

- g. Since diesel-operated cranes have a much longer service life than other equipment and they operate very intermittently (e.g. lifting girders), for applicable projects these cranes may be excluded from the calculations described above, as long as the crane meets Tier 1 or higher requirements.
- 17. By April 1, 2020, NCDOT will examine the specifications for each piece of construction equipment in its inventory and include the Tier level in the inventory going forward. NCDOT will update the inventory annually that reflects these Tier levels and provide this information to third-parties upon request. Once more data is available through the Triangle area projects and concurrent with the goal setting timeframe noted in Section A.16.d above (end of 2023), NCDOT will draft goals for implementing Tier 4 requirements for all NCDOT construction equipment in its inventory.
- 18. NCDOT will produce standardized documentation of construction equipment used on all applicable NCDOT Triangle area projects (at time of letting, valued over Fifty Million and 0/100 Dollars (\$50,000,000.00) and requiring at least One Million (1,000,000) cubic yards of earth moving) to be shared with CAC and SELC. NCDOT will produce a template of the standardized documentation within six (6) months of the Effective Date and will input data from the applicable projects as it becomes available.
- 19. By the end of 2020, NCDOT will design and implement anti-idling guidelines for NCDOT construction workers and contractors.
- 20. Within six months of the Effective Date of this Agreement, NCDOT will join the Transportation and Climate Initiative as an observer.

Species

- 21. Pursuant to (i) the Reimbursable Agreement entered into between NCDOT and Wake County on January 5, 2018 and (ii) the Interagency Agreement entered into between NCDOT and the North Carolina Wildlife Resources Commission on February 27, 2018, NCDOT has previously agreed to fund a maximum amount of Five Million and 0/100 Dollars (\$5,000,000.00) to (i) construct and/or renovate the Yates Mill Aquatic Conservation Center (“YMACC”) and (ii) fund the operations and maintenance of the North Carolina Non-Game Aquatic Species Program (“Program”) at the YMACC for up to five (5) years. NCDOT commits to fund the operations and maintenance of the Program for an additional five (5) years beyond the current commitment at a per annum rate of no more than Six Hundred Eight Thousand Two Hundred Twelve and 0/100 Dollars (\$608,212.00).
- 22. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Two Hundred Fifty Thousand and

0/100 Dollars (\$250,000.00) for propagation of the magnificent ramshorn (aquatic snail). This funding shall be provided in ten (10) equal installments of Twenty-Five Thousand and 0/100 Dollars (\$25,000.00) per year for ten (10) years, or as otherwise agreed to with the research partner and/or institution.

23. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of One Million and 0/100 Dollars (\$1,000,000.00) for research on and development of an in-vitro mussel propagation technique. This funding shall be provided in ten (10) equal installments of One Hundred Thousand and 0/100 Dollars (\$100,000.00) per year for ten (10) years, or as otherwise agreed to with the research partner and/or institution.
24. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Two Million and 0/100 Dollars (\$2,000,000.00) for a water quality testing program for re-introduction sites for DWM, yellow lance, Atlantic pigtoe, and Neuse River waterdog in the Neuse and Tar River watersheds. This funding shall be provided in ten (10) equal installments of Two Hundred Thousand and 0/100 Dollars (\$200,000.00) per year for ten (10) years, or as otherwise agreed to with the research partner and/or institution.
25. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Five Hundred Twenty-Five Thousand and 0/100 Dollars (\$525,000.00) for a genetic study of imperiled freshwater mussel species in the Project area to ensure effective reintroduction and/or augmentation efforts to best conserve and enhance genetic diversity among these freshwater mussel populations. This funding shall be provided in three (3) equal installments of One Hundred Seventy-Five Thousand and 0/100 Dollars (\$175,000.00) over the course of a three-year study, or as otherwise agreed to with the research partner and/or institution.
26. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Three Hundred Seventy-Five Thousand and 0/100 Dollars (\$375,000.00) for imperiled freshwater mussel fitness experiments for propagated versus wild individuals. These experiments will be done in tandem with the genetic study referenced in Section A.25, above. This funding shall be provided in three equal installments of One Hundred Twenty-Five Thousand and 0/100 Dollars (\$125,000.00) over the course of the three-year study, or as otherwise agreed to with the research partner and/or institution.
27. By the end of 2022, NCDOT commits to award a contract for research funding to a research partner and/or institution in the amount of Four Hundred Fifty Thousand and 0/100 Dollars (\$450,000.00) for a study whose purpose is to set quantitative conservation

(i.e. reintroduction and/or augmentation) targets for imperiled freshwater mussel populations based on demographic and genetic models. This study will be done in tandem with the study and experiments referenced in Sections A.25 and A.26, above. This funding shall be provided in three equal installments of One Hundred Fifty and 0/100 Dollars (\$150,000.00) over the course of the three-year study, or as otherwise agreed to with the research partner and/or institution.

28. NCDOT hereby recognizes that it is in the interests of sound environmental planning to implement site specific management plans pursuant to 15A NCAC 02B.0110 to assist in the conservation of federally listed species. NCDOT encourages the Environmental Management Commission to adopt any rules and regulations necessary to implement the provisions of 15A NCAC 02B.0110.

B. Plaintiff's Obligations and Covenants:

1. Within thirty (30) days of the Effective Date, Plaintiffs shall dismiss or file a motion to dismiss, with prejudice, all claims against all Defendants in the Federal Lawsuit.
2. Within thirty (30) days of the Effective Date, Plaintiffs shall dismiss or file a motion to dismiss, with prejudice, all claims against NCDWR and NCDOT in the OAH Action.
3. As of the Effective Date, Plaintiffs covenant not to sue Defendants, NCDWR, and/or any other State or Federal agency or department for any claims challenging the validity of the ROD, any Biological Assessment, including later amendments, any Biological Opinion, including later amendments, any concurrence letter, or any determination, approval, or other document necessary to complete the environmental review or approval of the Project's construction. Plaintiffs do not release, discharge, or covenant not to sue with regard to any future claims under NEPA, the ESA, the Clean Water Act, or any other state or federal law arising out of future agency actions related to the Project that present substantial changes or significant new circumstances or information, relevant to environmental concerns. *See* 40 C.F.R. § 1502.9(c)(1)(i)-(ii); 23 C.F.R. § 771.130.
4. As of the Effective Date, Plaintiffs covenant not to sue USFWS, NMFS, NCDWR, the United States Army Corps of Engineers ("USACE"), or any other State or Federal agency or department for any claim arising out of their cooperation, approval, and implementation of the Project, as consistent with and approved in the ROD, including, but not limited to, the agencies' issuance of special unit permits, issuance of a letter of consent, acceptance of mitigation plans and/or strategies, and issuance of the 404 and 401 permits and/or certifications under the Clean Water Act.
5. Plaintiffs hereby covenant not to waive any conflict of interest should its attorney, the Southern Environmental Law Center, be approached by any other client or prospective

client to pursue any of the claims listed in Sections B.3 and B.4, in keeping with N.C. Legal Ethics Rule 1.9.

6. Nothing in this release and covenant not to sue, or this Agreement, shall (i) release NCDOT from performing the terms, conditions, covenants and promises of this Agreement or (ii) affect whatever rights Plaintiffs may have, if any, to assert claims that construction activities for the Project are not being conducted in compliance with conditions listed in any certifications, permits, or other approvals or listed in any future modifications to any certifications, permits, or other approvals.
- C. This Agreement does not affect the exercise of any authority by NCDOT, FHWA, USFWS, NMFS, USACE, NCDWR, or any other State or Federal agency or department except as expressly set forth herein. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants or NCDWR take action in contravention of the ESA, APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to Defendants and NCDWR by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination. Additionally, nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Defendants or NCDWR take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, N.C. Gen. Stat. § 143C-6-8, or any other appropriations law.
- D. In the event of a dispute arising out of or relating to this Agreement, the Party raising the dispute shall provide the other Parties with written notice of the claim as provided in Section E. The written notice shall include a description of the dispute, documentation related to the dispute, and any proposals for resolving the dispute. The Parties agree that they will meet and confer (either telephonically or in person) in a good faith effort to resolve any disputes. The Parties agree to use good faith efforts to schedule an opportunity to meet and confer within thirty (30) days of receipt of the notice of dispute and to resolve the dispute within thirty (30) days thereafter. If the Parties fail to resolve the dispute within these time periods, or if a Party fails to cure any alleged breach in a timely manner, the sole remedy shall be limited to the filing of a new action. The Parties do not waive or limit any defense related to such litigation. Nothing in this paragraph is intended to preclude the Parties from engaging in informal communications to attempt to resolve potential disputes.
- E. To the extent any notices are required or authorized under this Agreement, they shall be made in writing by U.S. mail and addressed to the following:

a. Plaintiffs:

Kym Hunter
Ramona McGee
Maia Hutt
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, N.C. 27516

Matthew Starr
Heather Deck
Sound Rivers, Inc.
PO Box 1854
Washington, N. C. 27889

June Blotnick
Clean Air Carolina
PO Box 5311
Charlotte, NC 28299

Perrin de Jong
Center for Biological Diversity
P.O. Box 6414
Asheville, NC 28816

b. Defendants

North Carolina Department of Justice
Transportation Division
1505 Mail Service Center
Raleigh, N.C. 27699-1505

North Carolina Department of Transportation
General Counsel's Office
1501 Mail Service Center
Raleigh, N.C. 27699-1501

If there is any change in the name or address of the person responsible for receiving notice on behalf of a Party, that Party shall inform each of the other Parties to this Agreement in writing.

- F. This Agreement is for the benefit of Plaintiffs and NCDOT, with NCDWR and the United States, including but not limited to FHWA, USFWS, NMFS, and USACE, as intended third-party beneficiaries, and may not be used by any other person or entity in any other

proceeding. This Agreement is binding upon the Plaintiffs and their respective agents, successors, and assigns, and is binding upon NCDOT and its respective agents, officials, and employees.

- G. This Agreement resolves all claims related to or arising from the Actions which have been or could have been asserted except as expressly reserved.
- H. The Agreement is the result of compromise and settlement and sets forth the entire agreement among the Parties. Nothing in this Agreement shall be construed or offered as evidence in any proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement or any similar claims brought in the future by any other party. Except as expressly provided in this Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. This Agreement is executed for the purpose of settling the Actions, and nothing herein shall be construed as precedent having preclusive effect in any other context.
- I. The Agreement may not be modified, altered or changed except by written agreement of all Parties specifically referring to this Agreement.
- J. This Agreement shall be governed by the laws of the State of North Carolina, without regard to conflict of law principles.
- K. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid.
- L. Each Party represents that it has not relied on, and does not rely on, any representations or agreements other than those expressly stated in this Agreement, about any facts or about the nature or extent of any claims, demands, damages, or rights it may have against any other Party. Other than those expressly stated in this Agreement, no representations have been made to the Parties to induce them to enter into and execute this Agreement. Each Party expressly agrees it is assuming any and all risks that the facts and law may be or become different from the facts and law as known to, or believed to be, by the Party as of the date of this Agreement. This Agreement supersedes any prior agreements or understandings among the Parties in compromise of the Actions.
- M. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.
- N. The undersigned representatives of the Parties certify that they are fully authorized by the respective Parties whom they represent to enter into the terms and conditions of this Agreement and to legally bind such Parties to it.

SOUND RIVERS, INC.

By: _____
Name/Title

Dated:

CENTER FOR BIOLOGICAL DIVERSITY

By: _____
Name/Title

Dated:

CLEAN AIR CAROLINA

By: _____
Name/Title

Dated:

By: _____
Kimberley Hunter
Southern Environmental Law Center
Attorney for Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina

Dated:

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and JAMES H. TROGDON III, in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By: _____
James H. Trogdon III, Secretary
North Carolina Department of Transportation

Dated:

By: _____
Daniel H. Johnson, General Counsel
North Carolina Department of Transportation

Dated:

SOUND RIVERS, INC.

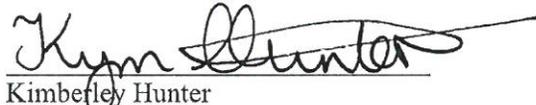
By:  Executive Director Dated: 8/19/19
Name/Title Heather Deek

CENTER FOR BIOLOGICAL DIVERSITY

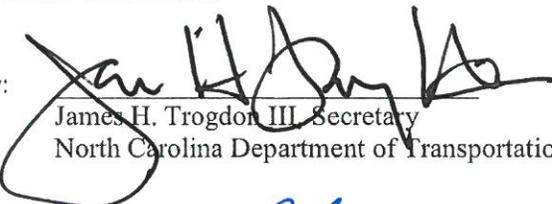
By: _____ Dated: _____
Name/Title

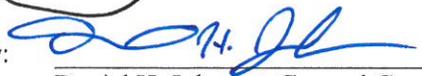
CLEAN AIR CAROLINA

By: _____ Dated: _____
Name/Title

By:  Dated: 8/21/19
Kimberley Hunter
Southern Environmental Law Center
Attorney for Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and JAMES H. TROGDON III, in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By:  Dated: 8/22/19
James H. Trogdon III, Secretary
North Carolina Department of Transportation

By:  Dated: 8/21/19
Daniel H. Johnson, General Counsel
North Carolina Department of Transportation

SOUND RIVERS, INC.

By: _____
Name/Title

Dated:

CENTER FOR BIOLOGICAL DIVERSITY

By: Perrin W. de Jong
Name/Title
Perrin W. de Jong
Staff Attorney
CLEAN AIR CAROLINA

Dated: August 19, 2019

By: _____
Name/Title

Dated:

By: _____
Kimberley Hunter
Southern Environmental Law Center
Attorney for Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina

Dated:

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and JAMES H. TROGDON III. in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By: _____
James H. Trogdon III, Secretary
North Carolina Department of Transportation

Dated:

By: _____
Daniel H. Johnson, General Counsel
North Carolina Department of Transportation

Dated:

SOUND RIVERS, INC.

By: _____
Name/Title

Dated:

CENTER FOR BIOLOGICAL DIVERSITY

By: _____
Name/Title

Dated:

CLEAN AIR CAROLINA

By: June Blotnick, Executive Director
Name/Title

Dated: 8/19/19

By: _____

Dated:

Kimberley Hunter
Southern Environmental Law Center
Attorney for Sound Rivers, Inc., Center for Biological Diversity, and Clean Air Carolina

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and JAMES H. TROGDON III, in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By: _____
James H. Trogon III, Secretary
North Carolina Department of Transportation

Dated:

By: _____
Daniel H. Johnson, General Counsel
North Carolina Department of Transportation

Dated: