

**REQUEST FOR BOARD ACTION**  
**HENDERSON COUNTY**  
**BOARD OF COMMISSIONERS**

**MEETING DATE:** November 20, 2019

**SUBJECT:** Edneyville Community Park – Stream Restoration Project

**PRESENTER:** Betsy Gerwig, Soil & Water

**ATTACHMENTS:** Yes  
1) Proposed Contract

**SUMMARY OF REQUEST:**

Lewis Creek sits at the back of the Edneyville Community Center Park located at 15 Ida Rogers Lane. During the high rains the County experienced in 2018 and 2019 the creek that borders the Park saw significant flooding and as a result a large amount of damage.

Parks and Recreation staff reached out to Soil and Water to evaluate the creek and look into options. Soil and Water has worked to produce an option to restore the creek with no cost to the County through the Army Corp of Engineers mitigation credits. The Army Corp of Engineers will be doing inspections of potential mitigation sites in January of 2020.

Should the Board wish to pursue this option for restoration, a draft proposal is attached that that would be included in the list of potential sites for review. If the Army Corp of Engineers approve the project, all restoration work would be paid through the mitigation bank. The attached proposed contract is to begin the pursuit of the mitigation bank. If acceptance into the bank is approved, this proposal will also serve as the design and construction contract to implement the required restoration.

**BOARD ACTION REQUESTED:**

The Board is requested to approve the attached contract allowing this project to become a mitigation site as reviewed and defined by the Army Corp of Engineers.

**Suggested Motion:**

*I move the Henderson County Board of Commissioners approve the attached contract allowing staff to pursue the mitigation and restoration of the site pending the Army Corp of Engineers approval.*

July 26, 2019

Henderson County  
Attn: Mr. John Mitchell  
Business and Community Development Director  
100 North King Street  
Hendersonville, NC 28792

**Subject: Stream Restoration Agreement  
Edneyville Park  
Lewis Creek Restoration Project, Edneyville, NC**

Dear Mr. Mitchell:

The purpose of this letter is to document the County's desire that their Property benefit from the "Lewis Creek Restoration Project" and to document restoration measures ClearWater Environmental Consultants and Jennings Environmental [Restoration Team] will provide as part of this project. The intent of this letter is to also establish authorization for the Restoration Team, its agents, assigns and contractors to survey, design, construct and monitor restoration activities along Lewis Creek.

The attached Figure shows conceptual stream layout, which may be adjusted in the future based on final design. We have shown desired access points for equipment to use during the construction phase. The Figure also shows proposed boundaries of conservation easement, which extends 30 feet from the top of both banks along the project reach. We ask for the County's assistance in acquiring permission from adjacent landowners Travis and Stacy Nix, Lila Moon, Christine Fletcher, Barry and Crystal Fletcher and Michael Pressley to relocated and restore the stream.

Labor and material costs to survey, design, permit, construct and monitor the project will be borne by the Restoration Team.

If the proposed project concept and terms and conditions outlined in the attached draft conservation easement are acceptable to you, this letter can serve as our agreement and can be executed in the spaces provided below.

***IT IS NOW, THEREFORE, AGREED AS FOLLOWS:***

1. **AGREEMENT PERIOD.** The Restoration Team will arrange and attend an on-site meeting with regulatory members of the Interagency Review Team (IRT) to present the mitigation bank project and matters related to approval. Upon regulatory approval and signing of the Mitigation Banking Instrument (MBI), the Restoration Team will manage the stream restoration including vegetation and hydrology monitoring and reporting to the MBRT.

The Restoration Team has 18 months from the date of this signed agreement to obtain approval from the MBRT. Upon approval as a mitigation site (bank or single project) The Restoration Team will have up to 2½ years to begin construction. If at this time, no construction activities have taken place, then the County may revoke this agreement. This Agreement shall remain in effect from the date this Agreement has been executed by County and the Restoration Team until the mitigation project is certified as complete by state and federal agencies (typically seven years after construction is complete).

2. **PURPOSE.** County shall convey to the Restoration Team the right to design, implement, construct, perform, install, monitor and maintain those stream improvements more particularly described in Figure , attached hereto and incorporated by reference herein, in accordance with plans and specifications developed or to be developed by the Restoration Team for that purpose.
3. **LEWIS CREEK RESTORATION PROJECT.** Upon execution of this Agreement, the Restoration Team shall, in its sole discretion, design, implement, construct, perform, install and, for a period of seven years, monitor and maintain those certain stream improvements which the Restoration Team deems reasonably necessary to perform the work shown on the attached Figure at its sole cost.
4. **RIGHT OF ENTRY AND INSPECTION.** The Restoration Team shall have the right to enter the Property at reasonable times for surveying, engineering, conducting environmental inspections and assessments, and other reasonable purposes related to this transaction.

In witness whereof, and intending to be legally bound hereby, the parties have caused this Agreement described above to be executed as of the day and year last written below.

**WITNESS:**

**Henderson County**

\_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**WITNESS:**

**The Restoration Team**

\_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Sincerely,  
The Restoration Team

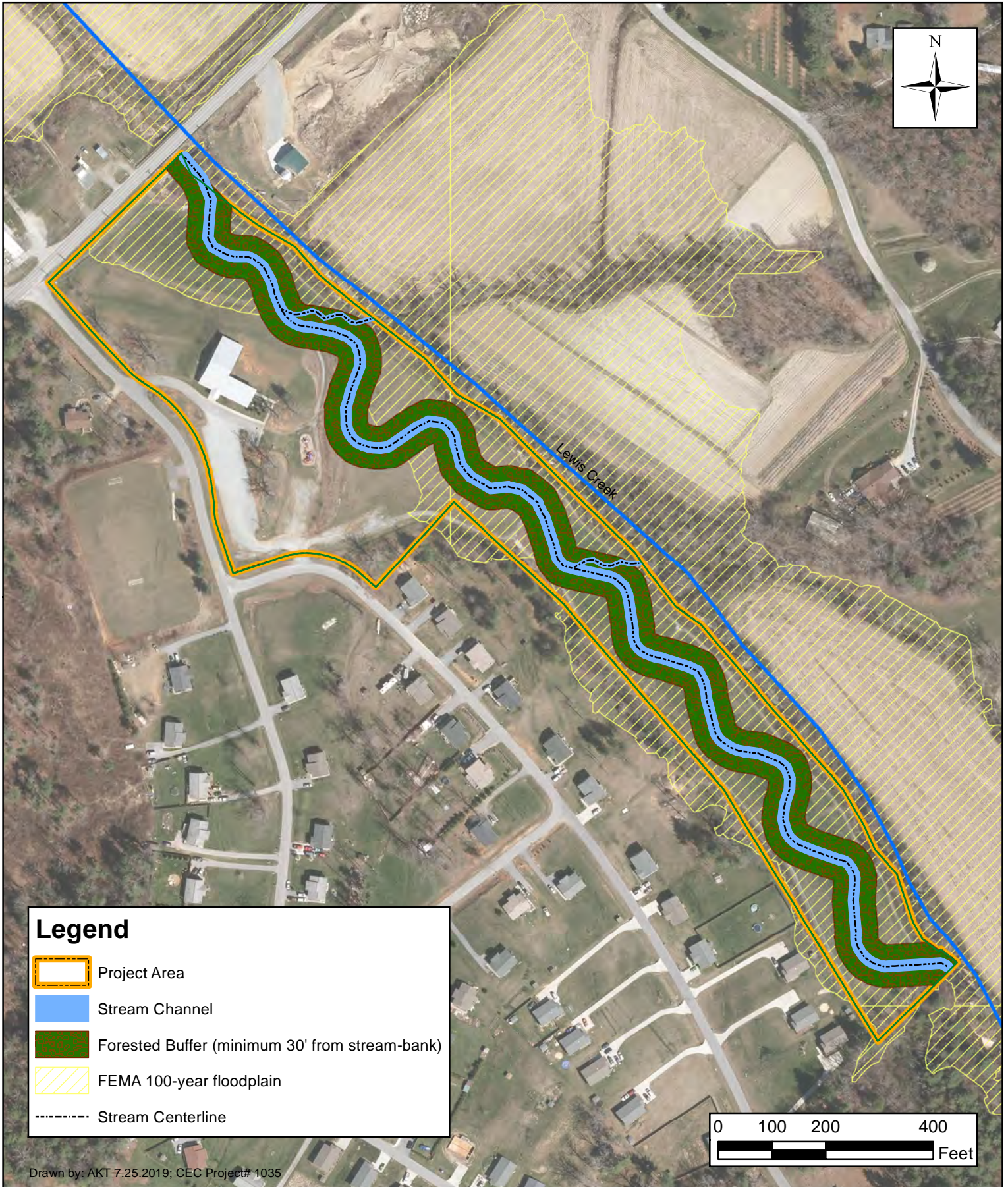
Greg Jennings, PE  
Jennings Environmental  
Principal

R. Clement Riddle, PWS  
ClearWater Environmental Consultants, Inc.  
Principal

Attachments: Figure  
Draft Conservation Easement



# Edneyville Community Park (+/- 13 AC)



Henderson County,  
North Carolina



32 Clayton Street  
Asheville, North Carolina 28801

Proposed Stream Restoration  
Lewis Creek



MODEL CONSERVATION EASEMENT

January 18, 2001  
Rev'd October 16, 2002  
Rev'd August, 2003

*Model Conservation Easement for use in preserving mitigation property. Language in italics is instructional, and should be deleted when site-specific Conservation Easement is prepared.*

PERMANENT CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT ("Conservation Easement") made this \_\_\_\_ day of \_\_\_\_\_, 200\_ by and between \_\_\_\_\_, ("Grantor") and \_\_\_\_\_ (Grantee).

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

RECITALS

WHEREAS, Grantor owns in fee simple certain real property situated, lying and being in \_\_\_\_\_ County, North Carolina, more particularly described in Exhibit A attached hereto and incorporated herein ("Property");

WHEREAS, Grantee is [either a public body of this state, an agency of the United States, or a nonprofit corporation or trust whose purpose is the conservation of property], and is qualified to be the Grantee of a conservation easement pursuant to N.C. Gen. Stat. § 121-35;

WHEREAS, Grantor and Grantee recognize the conservation, scenic, natural, or aesthetic value of the property in its natural state, which includes the following natural communities: [describe by wetland and/or stream type, as well as any associated buffers or upland communities]. The purpose of this Conservation Easement is to maintain wetland and/or riparian resources and other natural values of the Property, and prevent the use or development of the Property for any purpose or in any manner that would conflict with the maintenance of the Property in its natural condition.

[ For use when the mitigation is offered for impacts of a single individual or general permit use] WHEREAS, the preservation of the Property is a condition of Department of the Army permit Action ID \_\_\_\_\_ issued by the Wilmington District Corps of Engineers, required to mitigate for unavoidable stream and/or wetland impacts authorized by that permit. Grantor and Grantee agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Wilmington District

(Corps, to include any successor agencies), and that these rights are in addition to, and do not limit, the rights of enforcement under said permit.

*[Alternate paragraph for use when the conservation easement supports a mitigation bank]* WHEREAS, the preservation of the Property is required by a Mitigation Banking Instrument for the [Name of Bank], Department of the Army Action ID [Action ID number for the mitigation bank]. The Mitigation Bank is intended to be used to compensate for unavoidable stream and/or wetland impacts authorized by permits issued by the Department of the Army. Grantor and Grantee agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Wilmington District (Corps, to include any successor agencies), and that these rights are in addition to, and do not limit, the rights of the parties to the Mitigation Banking Instrument.

NOW, THEREFORE, for and in consideration of the covenants and representations contained herein and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, Grantor hereby unconditionally and irrevocably grants and conveys unto Grantee, its heirs, successors and assigns, forever and in perpetuity a Conservation Easement of the nature and character and to the extent hereinafter set forth, over the Property described on Exhibit A, together with the right to preserve and protect the conservation values thereof, as follows:

#### ARTICLE I. DURATION OF EASEMENT

This Conservation Easement shall be perpetual. This conservation Easement is an easement in gross, runs with the land and is enforceable by Grantee against Grantor, Grantor's personal representatives, heirs, successors and assigns, lessees, agents and licensees.

#### ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Property inconsistent with the purpose of this Conservation Easement is prohibited. The Property shall be preserved in its natural condition and restricted from any development that would impair or interfere with the conservation values of the Property.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited, restricted or reserved as indicated hereunder:

A. Disturbance of Natural Features. Any change disturbance, alteration or impairment of the natural features of the Property or any introduction of non-native plants and/or animal species is prohibited.

B. Construction. There shall be no constructing or placing of any building, mobile home, asphalt or concrete pavement, billboard or other advertising display,

antenna, utility pole, tower, conduit, line, pier, landing, dock or any other temporary or permanent structure or facility on or above the Property.

C. Industrial, Commercial and Residential Use. Industrial, residential and/or commercial activities, including any right of passage for such purposes are prohibited.

D. Agricultural, Grazing and Horticultural Use. Agricultural, grazing, animal husbandry, and horticultural use of the Property are prohibited.

E. Vegetation. There shall be no removal, burning, destruction, harming, cutting or mowing of trees, shrubs, or other vegetation on the Property.

F. Roads and Trails. There shall be no construction of roads, trails or walkways on the property; nor enlargement or modification to existing roads, trails or walkways.

G. Signage. No signs shall be permitted on or over the Property, except the posting of no trespassing signs, signs identifying the conservation values of the Property, signs giving directions or proscribing rules and regulations for the use of the Property and/or signs identifying the Grantor as owner of the property.

H. Dumping or Storage. Dumping or storage of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery or hazardous substances, or toxic or hazardous waste, or any placement of underground or aboveground storage tanks or other materials on the Property is prohibited.

I. Excavation, Dredging or Mineral Use. There shall be no grading, filling, excavation, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals or other materials, and no change in the topography of the land in any manner on the Property, except to restore natural topography or drainage patterns.

J. Water Quality and Drainage Pattern. There shall be no diking, draining, dredging, channeling, filling, leveling, pumping, impounding or related activities, or altering or tampering with water control structures or devices, or disruption or alteration of the restored, enhanced, or created drainage patterns. In addition, diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means, removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited.

K. Development Rights. No development rights that have been encumbered or extinguished by this Conservation Easement shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

L. Vehicles. The operation of mechanized vehicles, including, but not limited to, motorcycles, dirt bikes, all-terrain vehicles, cars and trucks is prohibited. *[The Corps will generally allow the use of vehicles on existing roads provided those roads are*



*identified by reference to a recorded map showing their location, configuration, and size.]*

M. Other Prohibitions. Any other use of, or activity on, the Property which is or may become inconsistent with the purposes of this grant, the preservation of the Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

### ARTICLE III GRANTOR'S RESEVERED RIGHTS

The Grantor expressly reserves for himself, his personal representatives, heirs, successors or assigns, the right to continue the use of the property for all purposes not inconsistent with this Conservation Easement, including, but not limited to, the right to quiet enjoyment of the Property, the rights of ingress and egress, the right to hunt, fish, and hike on the Property, the right to sell, transfer, gift or otherwise convey the Property, in whole or in part, provided such sale, transfer or gift conveyance is subject to the terms of, and shall specifically reference, this Conservation Easement.

*[For use when mitigation work (approved or required restoration, creation, or enhancement) is to be done on the property]* Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its successors and assigns, the right to construct wetland and stream mitigation on the Property, in accordance with the *[describe mitigation plan by title, date and permit action id if a single mitigation site; if a mitigation bank, include the language "detailed mitigation plan approved in accordance with the Mitigation Banking Instrument for the \_\_\_\_\_ Mitigation Bank.]*

### ARTICLE IV. GRANTEE'S RIGHTS

The Grantee or its authorized representatives, successors and assigns, and the Corps, shall have the right to enter the Property at all reasonable times for the purpose of inspecting said property to determine if the Grantor, or his personal representatives, heirs, successors, or assigns, is complying with the terms, conditions, restrictions, and purposes of this Conservation Easement. The Grantee shall also have the right to enter and go upon the Property for purposes of making scientific or educational observations and studies, and taking samples. The easement rights granted herein do not include public access rights.

### ARTICLE V ENFORCEMENT AND REMEDIES

A. To accomplish the purposes of this Easement, Grantee is allowed to prevent any activity on or use of the Property that is inconsistent with the purposes of this Easement and to require the restoration of such areas or features of the Property that may be damaged by such activity or use. Upon any breach of the terms of this Conservation

Easement by Grantor that comes to the attention of the Grantee, the Grantee shall notify the Grantor in writing of such breach. The Grantor shall have 30 days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after 30 days, the Grantee may enforce this Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of the term of this Conservation Easement is or would irreversibly or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to Grantee in connection with this Conservation Easement. The costs of a breach, correction or restoration, including the Grantee's expenses, court costs, and attorneys' fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. The Corps shall have the same right to enforce the terms and conditions of this easement as the Grantee.

B. No failure on the part of the Grantee to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to Grantee to enforce the same in the event of a subsequent breach or default.

C. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury or change in the Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, war, acts of God or third parties, except Grantor's lessees or invitees; or from any prudent action taken in good faith by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Property resulting from such causes.

## ARTICLE VI MISCELLANEOUS

A. Warranty. Grantor warrants, covenants and represents that it owns the Property in fee simple, and that Grantor either owns all interests in the Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Property which have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Grantee shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement, and that Grantor will warrant and defend title to the Property against the claims of all persons.

B. Subsequent Transfers. The Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument that transfers any interest in all or a portion of the Property. The Grantor agrees to provide written notice of such transfer at least thirty (30) days prior to the date of the transfer. The Grantor and Grantee agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interests in the Property or any portion thereof and shall not be amended, modified or terminated without the prior written consent and approval of the Corps.

C. Assignment. The parties recognize and agree that the benefits of this Conservation Easement are in gross and assignable provided, however that the Grantee hereby covenants and agrees, that in the event it transfers or assigns this Conservation Easement, the organization receiving the interest will be a qualified holder under N.C. Gen. Stat. § 121-34 et seq. and § 170(h) of the Internal Revenue Code, and the Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue in perpetuity the conservation purposes described in this document.

D. Entire Agreement and Severability. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Easement. If any provision is found to be void or unenforceable by a court of competent jurisdiction, the remainder shall continue in full force and effect.

E. Obligations of Ownership. Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Property. Grantor shall keep the Property free of any liens or other encumbrances for obligations incurred by Grantor. Grantee shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state or local laws, regulations and permits that may apply to the exercise of the Reserved Rights.

F. Extinguishment. In the event that changed conditions render impossible the continued use of the Property for the conservation purposes, this Conservation Easement may only be extinguished, in whole or in part, by judicial proceeding.

G. Eminent Domain. Whenever all or part of the Property is taken in the exercise of eminent domain so as to substantially abrogate the Restrictions imposed by this Conservation Easement, Grantor and Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.

H. Proceeds. This Conservation Easement constitutes a real property interest immediately vested in Grantee. In the event that all or a portion of this Property is sold, exchanged, or involuntarily converted following an extinguishment or the exercise of eminent domain, Grantee shall be entitled to the fair market value of this Conservation

Easement. The parties stipulate that the fair market value of this Conservation Easement shall be determined by multiplying the fair market value of the Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of this easement at the time of this grant to the value of the Property (without deduction for the value of this Conservation Easement) at the time of this grant. The values at the time of this grant shall be the values used, or which would have been used, to calculate a deduction for federal income tax purposes, pursuant to Section 170(h) of the Internal Revenue Code (whether eligible or ineligible for such a deduction). Grantee shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.

I. Notification. Any notice, request for approval, or other communication required under this Conservation Easement shall be sent by registered or certified mail, postage prepaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

**To Grantor:**

*[Name, address and fax number]*

**To Grantee:**

*[Name, address and fax number]*

**To the Corps:**

*[Name, address and fax number]*

J. Failure of Grantee. If at any time Grantee is unable or fails to enforce this Conservation Easement, or if Grantee ceases to be a qualified grantee, and if within a reasonable period of time after the occurrence of one of these events Grantee fails to make an assignment pursuant to this Conservation Easement, then the Grantee's interest shall become vested in another qualified grantee in accordance with an appropriate proceeding in a court of competent jurisdiction.

K. Amendment. This Conservation Easement may be amended, but only in a writing signed by all parties hereto, and provided such amendment does not affect the qualification of this Conservation Easement or the status of the Grantee under any applicable laws, and is consistent with the conservation purposes of this grant.

L. *[For use if there is a document describing the current condition of the property. The language provided is applicable if there is a mitigation plan that accurately describes the current condition and uses of the property. If there is not such a plan, another document we agree is accurate and can be identified and is in our files can be referenced.]* Present Condition of the Property. The wetlands, scenic, resource, environmental, and other natural characteristics of the Property, and its current use and state of improvement, are described in Section \_\_\_\_, Appendix B of the Mitigation Plan,

dated \_\_\_\_\_, prepared by Grantor and acknowledged by the Grantor and Grantee to be complete and accurate as of the date hereof. Both Grantor and Grantee have copies of this report. It will be used by the parties to assure that any future changes in the use of the Property will be consistent with the terms of this Conservation Easement. However, this report is not intended to preclude the use of other evidence to establish the present condition of the Property if there is a controversy over its use.

TO HAVE AND TO HOLD the said rights and easements perpetually unto Grantee for the aforesaid purposes.

IN TESTIMONY WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

*[Signatures of the Grantor and Grantee in appropriate form]*