

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Defenders of Wildlife and National Wildlife Refuge Association (collectively “Plaintiffs”); North Carolina Department of Transportation (“NCDOT”) and Anthony J. Tata in his official capacity as North Carolina Secretary of Transportation (collectively the “NCDOT Parties”); North Carolina Department of Environment and Natural Resources, Division of Coastal Management (“DCM”); Federal Highway Administration (“FHWA”) and John F. Sullivan, III, in his official capacity as Division Administrator, FHWA; and Cape Hatteras Electric Membership Corporation. The Plaintiffs, NCDOT Parties, FHWA and Cape Hatteras Electric Membership Corporation are collectively referred to as the Parties.

WHEREAS, the NCDOT proposed the “NC 12 Replacement of Herbert C. Bonner Bridge” (the “Project”), and on December 20, 2010, the FHWA issued a Record of Decision (“ROD”) that approved the Selected Alternative (as defined in the ROD) and approved construction of Phase I of the Project ;

WHEREAS, the Plaintiffs challenged the 2010 ROD and related documents in the U.S. District Court for the Eastern District of North Carolina in *Defenders of Wildlife and National Wildlife Refuge Association v. North Carolina Department of Transportation, Eugene A. Conti, Jr., Secretary, North Carolina Department of Transportation, Federal Highway Administration, and John F. Sullivan III, Division Administrator Federal Highway Administration*, Civil No. 2:11-CV-00035-FL (the “Federal Action”), alleging claims under the National Environmental Policy Act (“NEPA”) and Section 4(f) of the Department of Transportation Act (“Section 4(f)”). Cape Hatteras Electric Membership Corporation intervened in the Federal Action;

WHEREAS, the district court entered summary judgment in favor of defendants in the Federal Action, 971 F. Supp. 2d 510 (E.D.N.C. 2013), and Plaintiffs appealed from that decision to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in part, reversed in part and remanded to the district court, 762 F.3d 374 (4th Cir. 2014), but the mandate has not yet issued;

WHEREAS, Plaintiffs filed a Petition for Contested Case Hearing in the North Carolina Office of Administrative Hearings challenging the September 19, 2012 issuance by the DCM of Coastal Area Management Act (“CAMA”) permit 106-12 (the “CAMA permit”) in *Defenders of Wildlife and National Wildlife Refuge Association v. North Carolina Department of Environment and Natural Resources, Division of Coastal Management*, 13 EHR 16087 (the “State Action”), and NCDOT intervened in the State Action. The State Action is pending and discovery has been completed;

WHEREAS, all parties to the Federal Action and the State Action believe it is in the best interest of the public, the Parties, and judicial economy to compromise and settle the issues in the Federal Action and the State Action;

NOW, THEREFORE, in consideration of the promises and covenants contained in this Settlement Agreement (“Agreement”), the Parties agree to settle all claims and causes of action arising in or related to the Federal Action and the State Action as follows:

1. NCDOT, DCM and Plaintiffs’ Actions and Covenants Prior to Dismissals, and Dismissals:
 - a. NCDOT shall rescind the current Phase IIa contract and enter into a contract to provide for interim safe and reliable transportation through the present Phase IIa area (as shown in Exhibit A) while a long-term solution for that area is reevaluated and constructed. Providing for interim safe and reliable transportation through the present Phase IIa area will involve constructing a new temporary bridge located in the existing NCDOT easement, maintaining the present bridge height approximately 15

feet above mean high water, lengthening the bridge to no more than 3,000 feet, and using pile bents to support the temporary bridge.

In the event NCDOT determines there is an impairment or immediate threat to safe and reliable transportation through the present Phase IIa area, NCDOT may alter the existing temporary structure; install a detour around this structure; or take such other emergency or temporary measures that are necessary or prudent to assure provisions for interim safe and reliable transportation through the Phase IIa area while a long-term solution is reevaluated and constructed, but shall not include construction of the currently planned and permitted Phase IIa bridge, any other permanent structure, permanent shoreline hardening, or artificially filling in the inlet created by Hurricane Irene. All such interim infrastructure shall be located within the existing NCDOT easement and shall not extend outside the easement unless clearly necessary to provide safe and reliable transportation, and in such case, only to the extent necessary to provide safe and reliable transportation.

- b. To provide for interim safe and reliable transportation through the present Phase IIa area, as described in paragraph 1.a., above, NCDOT shall submit an application to further modify the Modifications to CAMA Permit Number 106-12 that are related to Phase IIa, which Modifications were issued April 26, 2013 and October 17, 2013, to authorize the interim measures under paragraph 1.a. while a long-term solution is reevaluated and constructed.
- c. NCDOT shall identify Phase IIb Bridge on New Location as its preferred alternative and seek Merger Team Concurrence Point 3 (the terms "Concurrence" and "Concurrence Point" are used throughout this Agreement as described in the Memorandum of Understanding dated May 16, 2012 and its appendices; the Memorandum of Understanding and Appendix B are attached hereto as Exhibit D) on Phase IIb Bridge on New Location Alternative area (as shown in Exhibit B). Nothing in this Agreement requires or should be interpreted to predetermine the choice of the Phase IIb Bridge on New Location as the Selected Alternative.
- d. DCM shall expeditiously process any application for CAMA permit modification as described in paragraph 1.b., subject to applicable laws and rules for permit processing, including public comment provisions. DCM shall consult with NCDOT to identify any proposed modifications as described in paragraph 1.b. for Phase IIa which would require permit denial based on the CAMA, the State Dredge and Fill Law or the Coastal Resources Commission's administrative rules. If DCM determines an application for CAMA permit modification as described in paragraph 1.b. for Phase IIa requires permit denial, DCM shall work with NCDOT to expeditiously proceed through the CAMA variance process, including supporting any request to expedite a variance petition if requested by NCDOT.
- e. As part of the Merger Team Concurrence Point 3 process, DCM shall provide a written statement of DCM's support and preference for Phase IIb Bridge on New

Location and by expressing this preference and otherwise shall use best efforts to help NCDOT attempt to secure Merger Team concurrence.

- f. NCDOT shall provide written assurance to Plaintiffs that Phase I as currently planned, designed and contracted does not preclude the addition of a later extension into the Pamlico Sound to the south.
- g. Plaintiffs shall refrain from seeking an injunction against or otherwise impeding the mobilization of work for Phase I while NCDOT is working on completion of the actions set forth in paragraphs 1.a., 1.b., 1.c. and 1.d. above.
- h. Upon rescinding the current Phase IIa contract as set forth in paragraph 1.a and completing the actions set forth in paragraphs 1.b., 1.c., 1.d., 1.e., and 1.f. above, the securing of the CAMA permit modification described in paragraphs 1.b. and 1.d., and the securing of Concurrence Point 3 described in paragraph 1.c., Plaintiffs shall dismiss with prejudice both the federal lawsuit challenging the Record of Decision issued December 20, 2010 and the contested case challenging issuance of the CAMA Permit 106-12 as issued September 19, 2012, and refrain from seeking an injunction against or otherwise impeding the mobilization and implementation of work on Phase I. Plaintiffs retain the right to challenge future actions and decisions of NCDOT, FHWA and DCM consistent with applicable law and Plaintiffs' covenants and obligations under this Agreement.
- i. Plaintiffs, NCDOT, and DCM will issue a joint press release announcing the settlement immediately following the execution of the Settlement Agreement.

2. Plaintiffs' covenants and obligations after dismissals:

- a. Plaintiffs covenant not to sue the State of North Carolina (the "State") or the United States including any agency, official or employee as to any claim based on, arising out of or regarding, in whole or in part, the NEPA and Section 4(f) documents issued for the Phase I or the interim Phase IIa work described in paragraphs 1.a. and 1.b., or any permit, approval or any other decision regarding the Phase I or the interim Phase IIa work described in paragraphs 1.a. or 1.b.
- b. If the Phase IIb Bridge on New Location Alternative is determined to be the least environmentally damaging practicable alternative ("LEDPA") and becomes the Selected Alternative, Plaintiffs covenant not to sue the State or the United States including any agency, official or employee as to any claim based on, arising out of or regarding, in whole or in part, the NEPA and Section 4(f) documents issued for the Phase IIb Bridge on New Location Alternative, or any permit, approval or any other decision regarding the Phase IIb Bridge on New Location Alternative.
- c. If the Phase II Extension Alternative (as shown in Exhibit C) is determined to be the LEDPA and becomes the Selected Alternative for Phase IIa, Plaintiffs covenant not to sue the State or the United States including any agency, official or employee as to any claim based on, arising out of or regarding, in whole or in part, the NEPA documents

issued for the Phase II Extension, or any permit, approval or any other decision regarding the Phase II Extension. Plaintiffs retain the right to challenge any future actions and decisions of the State and the United States related to any Section 4(f) document issued for the Phase II Extension Alternative that they believe fails to comply with federal law or the decision of the United States Court of Appeals for the Fourth Circuit issued in the Federal Action.

- d. If the Phase II Extension Alternative is determined to be the LEDPA and becomes the Selected Alternative, Plaintiffs will make best efforts to assist NCDOT in obtaining the funding described in paragraph 3.d.viii., below.

3. NCDOT and FHWA covenants and obligations after dismissals

- a. NCDOT and FHWA shall not design Phase IIa and Phase IIb of the Project so as to preclude the construction of subsequent phases within Pamlico Sound. NCDOT and FHWA acknowledge that the studies to be conducted as part of the NEPA and Section 4(f) processes pursuant to paragraphs 3.c. and 3.d.v. of this Settlement Agreement may conclude that the selected alternative for the studied phase should be located partially or wholly within the Pamlico Sound in order to minimize or avoid the use of Pea Island National Wildlife Refuge, and that such an alternative may be found to be the “least overall harm alternative” (23 C.F.R. § 774.3(c)(1)). NCDOT and FHWA further acknowledge that if a subsequent phase is proposed beyond those described in this Settlement Agreement (Phase IIa and Phase IIb), the environmental studies that are conducted as part of the NEPA and Section 4(f) processes for the subsequent phase(s) may conclude that the subsequent phase(s) should be located partially or wholly within the Pamlico Sound in order to minimize or avoid the use of Pea Island National Wildlife Refuge, and that such an alternative may be found to be the “least overall harm alternative” (23 C.F.R. § 774.3(c)(1)). NCDOT and FHWA acknowledge that all of their obligations must be undertaken in accordance with applicable law, including but not limited to 23 C.F.R. Part 774.
- b. The Parties agree that Phase I can be implemented immediately after execution of the Settlement Agreement, subject to permitting requirements and other applicable law.
- c. Phase IIb Bridge on New Location Alternative –
 - i. If the Merger Team concurs that the Phase IIb Bridge on New Location Alternative is the LEDPA for Phase IIb, then NCDOT and FHWA shall promptly revise the December 3, 2013 Section 4(f) evaluation for the B-2500B Project, accompanied by an associated environmental document prepared pursuant to NEPA.

The revised Section 4(f) and NEPA documents would, without limitation:

1. Identify the Phase IIb Bridge on New Location Alternative as the preferred alternative. Nothing in this Agreement requires or should be interpreted to predetermine NCDOT’s or FHWA’s

- choice of the Phase IIb Bridge on New Location as the Selected Alternative.
2. Evaluate the potential use of Section 4(f) properties by the Phase IIb Bridge on New Location Alternative.
 3. Propose to identify the Phase IIb Bridge on New Location Alternative as the “least overall harm” alternative (23 C.F.R. § 774.3(c)(1)), pending receipt of comments from agencies with jurisdiction over the Section 4(f) properties in the study area.
 4. Provide information about the current status of Phase I and Phase IIa activities.
 5. Shall not assert the joint planning exception for the Phase IIb Bridge on New Location Alternative in connection with the use of the Pea Island National Wildlife Refuge and shall apply Section 4(f) to the Refuge as both a refuge and an historic property.
 6. Be published on the NCDOT's website and mailed in accordance with NCDOT’s distribution guidelines and practices. A public hearing would be held and comments would be accepted as required by applicable regulations. All comments received would be considered by NCDOT and FHWA prior to a final decision.
- ii. NCDOT shall complete the NEPA, Section 4(f) and the Clean Water Act Section 404 permit processes in consultation with the appropriate State and federal agencies. Upon completion of the NEPA process, NCDOT shall seek a ROD from FHWA.
 - iii. If the Phase IIb Bridge on New Location Alternative is determined to be the LEDPA for Phase IIb, NCDOT shall provide written assurance that the Phase IIb Bridge on New Location Alternative will be planned, designed, and contracted so as not to preclude the addition of a later extension into the Pamlico Sound to the north.
- d. Phase II Extension Alternative – NCDOT and FHWA shall reevaluate the NEPA and Section 4(f) documentation for Phase IIa as outlined in the following steps.
 - i. NCDOT shall prepare a report on the Phase II Extension Alternative within one and one-half years of the dismissals referred to in paragraph 1.h. The report shall contain information and evaluation sufficient to support Concurrence Points 2 and 2A for the Phase II Extension, and shall inform the analysis necessary for Concurrence Point 3 and for the Section 4(f) evaluation. The report shall, without limitation:
 1. Describe the environmental features of the Phase II Extension study area, including performing new studies or updating existing

studies of the topography, coastal condition, wetland and open water habitat, protected species, essential fish habitat, historic properties, and utilities.

2. Identify preliminary corridors that address the Purpose and Need for the project and consider the environmental constraints within the study area, including preparing conceptual/functional designs with horizontal and vertical alignments, edge of pavements, slope stakes, and right of way limits on digital orthophotography, as needed.
 3. Include meeting summaries describing recommendations from members of the Merger Team, stating the rationale for retaining or dropping conceptual alternatives. Based on the input from the Merger Team, NCDOT shall identify the alternative(s) to be carried forward for more detailed design (preliminary level design).
 4. Describe the development of the preliminary designs and, after coordination with key federal and State agencies, identify environmental impacts and possible measures to minimize such impacts.
 5. Provide cost estimates and identify funding alternatives based on the preliminary design.
- ii. After completion of the report described in paragraph 3.d.i., NCDOT and FHWA shall consult on the NEPA and Clean Water Act Section 404 permit processes. As part of those processes, NCDOT and the FHWA shall propose that the Phase II Extension Alternative be a detailed study alternative, and shall seek Merger Team Concurrence Point 2 as to the Phase II Extension Alternative.
 - iii. NCDOT shall use best efforts to identify an alignment that, to the extent possible, avoids and then minimizes harm to submerged aquatic vegetation (“SAVs”), areas of environmental concern (“AECs”), Wildlife Refuge property, historic properties, and other environmental features, consistent with other statutory or regulatory requirements. NCDOT shall use best efforts to secure the Merger Team’s Concurrence Point 2A for the Phase II Extension Alternative.
 - iv. Based on the information gathered in the detailed study of Phase II Extension Alternative and other alternatives, and if: (1) NCDOT and FHWA determine the data support such a recommendation, and (2) such a recommendation is consistent with the requirements of Title 23 of the United States Code and other statutory and regulatory requirements; NCDOT and FHWA shall identify the Phase II Extension Alternative as their preferred alternative, recommend to the

Merger Team that it concur that the Phase II Extension Alternative is the LEDPA, and seek Concurrence Point 3 for the Phase II Extension Alternative.

- v. If the Merger Team concurs at Concurrence Point 3 for the Phase II Extension Alternative during the NEPA and Clean Water Act Section 404 permit processes, NCDOT, in consultation with FHWA shall finalize a NEPA document and Section 4(f) determination. The NEPA document and/or Section 4(f) determination would include without limitation:
 1. Identify the Phase II Extension Alternative as the preferred alternative. Nothing in this Agreement requires or should be interpreted to predetermine the choice of the Phase II Extension Alternative as the Selected Alternative.
 2. Evaluate the potential use of Section 4(f) properties by the Phase II Extension Alternative.
 3. Propose to identify the Phase II Extension Alternative as the “least overall harm” alternative (23 C.F.R. § 774.3(c)(1)), pending receipt of comments from agencies with jurisdiction over the Section 4(f) properties in the study area.
 4. Provide information about the current status of activities on Phases I and IIb.
 5. Shall not assert the joint planning exception for Phase IIa in connection with the use of the Pea Island National Wildlife Refuge and shall apply Section 4(f) to the Refuge as both a refuge and an historic property.
 6. Be published on the NCDOT's website and mailed in accordance with NCDOT's distribution guidelines and practice. A public hearing would be held, and comments would be accepted as required by applicable regulations. All comments received would be considered by NCDOT and FHWA prior to a final decision.
- vi. NCDOT shall complete the NEPA, Section 4(f) and the Clean Water Act Section 404 permit processes for Phase IIa in consultation with the appropriate State and federal agencies. Upon completion of the NEPA process, NCDOT shall seek a ROD from FHWA.
- vii. If the Phase II Extension Alternative is determined to be the LEDPA, NCDOT shall provide written assurance that the Phase II Extension Alternative will be planned, designed, and contracted so as not to preclude the addition of a later extension into the Pamlico Sound to the north.
- viii. If the Merger Team concurs at Concurrence Point 3 for the Phase II Extension Alternative, NCDOT shall make best efforts to obtain funding for it, including, but not limited to GARVEE bonds or other financing.

- e. If at any time during the Merger Team process it appears to NCDOT that there are major issues of concern from members of the Merger Team with regards to moving forward with the Merger Team concurrence process described in this Agreement, NCDOT agrees to allow Plaintiffs and other members of the public to submit information for consideration by the Merger Team that the commenter believes supports the need for and/or the selection of a particular alternative.
 - f. Upon written request and consistent with state law, NCDOT shall provide or make available to Plaintiffs copies of all public records related to any phase of the B-2500 project submitted by NCDOT to the Merger Team, to any of the agencies participating in the Merger Team, and to any other permitting agency.
4. DCM's covenants and obligations after dismissal:
- a. DCM shall facilitate and expedite the alternatives analysis of the Phase II Extension Alternative (if and as requested by NCDOT), including by providing expertise and technical assistance involving the delineation of coastal wetlands and SAV habitat.
 - b. As part of the Merger Team Concurrence Point 2 process, DCM shall provide a written statement of its support for the study of the Phase II Extension Alternative and use best efforts to help NCDOT secure Merger Team concurrence.
 - c. DCM shall continue to provide to Plaintiffs' counsel, timely notice of future-issued permits, future-issued modifications, and notice of new permit applications or modification requests for the B-2500 project.
 - d. DCM shall include a "note" in each subsequent CAMA permit or permit modification for the B-2500 project that states that "the specific development being permitted does not preclude the remainder of the B-2500 project being built in the Pamlico Sound provided that future development will be constructed in a way that avoids and minimizes impacts to AECs."
5. Plaintiffs agree that any judicial challenge to the procedures used or the conclusions drawn by NCDOT, FHWA or DCM for Phase IIa as described in paragraphs 3.d.i.-vi., 4.a.; or Phase IIb as described in paragraph 3.c., shall be brought only after the applicable process is complete and there is a final agency action. The Parties agree that any such challenge shall be brought in a newly filed complaint rather than as a continuation of the Federal Action or State Action.
6. The Parties shall work together to have the Fourth Circuit promptly issue the mandate. Within fourteen (14) days of the Fourth Circuit's entry of the mandate, the Parties will jointly request that the Federal Action and the State Action be stayed for one hundred twenty (120) days, subject to reopening for the dismissals required by paragraph 2.