

SETTLEMENT AGREEMENT

This Settlement Agreement is entered effective the 13th day of April, 2018, by and between the Sierra Club ("Plaintiff"), the North Carolina Department of Transportation ("NCDOT"), and NCDOT Secretary of Transportation James H. Trogon III, collectively referred to herein as the "State Defendants."¹ Plaintiff and State Defendants, as the parties to this agreement, are collectively referred to herein as the "Parties."

WHEREAS, NCDOT proposed the Havelock Bypass (the "Bypass" or the "Project") in Craven County, North Carolina, and studied the environmental effects of the Project pursuant to the National Environmental Policy Act ("NEPA"); and

WHEREAS, on December 16, 2016, the Federal Highway Administration ("FHWA") issued a Record of Decision ("ROD") that approved a Selected Alternative for the Project; and

WHEREAS, part of the study area for the Bypass area is occupied by the red-cockaded woodpecker, which has been federally listed as endangered under the Endangered Species Act ("ESA"); and

WHEREAS, on November 19, 2013, the United States Fish and Wildlife Service ("USFWS") concurred in NCDOT's determination that the Bypass is not likely to adversely affect the red-cockaded woodpecker ("RCW"); and

WHEREAS, on December 29, 2016, Plaintiff filed suit to challenge NCDOT and FHWA's approvals in the United States District Court for the Eastern District of North Carolina in *Sierra Club v. North Carolina Department of Transportation, James H. Trogon III, Secretary, North Carolina Department of Transportation, Federal Highway Administration,*

¹ The term "Defendants," as used in this agreement refers both to the State Defendants and the Federal Defendants named in the lawsuit: the Federal Highway Administration, John F. Sullivan, in his official capacity as Division Administrator of the Federal Highway Administration, the U.S. Fish and Wildlife Service, and Pete Benjamin, in his official capacity as Field Supervisor for the U.S. Fish and Wildlife Service.

John F. Sullivan, Division Administrator, Federal Highway Administration, Civil No. 4:16-CV-00300-F, alleging claims under NEPA and Section 4(f) of the Department of Transportation Act (“Section 4(f)”); and

WHEREAS, on March 20, 2017, Plaintiff amended the action to include USFWS and Pete Benjamin, USFWS Field Supervisor, as parties and add claims under the ESA (hereinafter “the Action”); 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 Settlement Agreement (“Agreement”), the Parties agree to settle all claims and causes of action arising in this Action as follows:

1. NCDOT’s Actions and Covenants Prior to Dismissal:

- a. Within thirty (30) days of the final execution of this Agreement, NCDOT shall transfer five million, three hundred thousand (5,300,000) dollars to the North Carolina Coastal Land Trust (“CLT”) to establish the Croatan Protection Fund. CLT commits to use the Croatan Protection Fund only for real property or conservation easement acquisition, subject to the provisions of and limitations set out in the Memorandum of Agreement attached as Attachment A. Within thirty (30) days of the final execution of this Agreement, NCDOT shall transfer two million dollars (2,000,000) to CLT to establish a Revolving Loan Fund as set out in Attachment A.
- b. NCDOT commits to place a conservation easement on Craven County PIN #6-216-001, an approximately 226-acre parcel of land currently owned by NCDOT, excluding the width of the NCDOT Right-of-Way that is proposed to pass through the

parcel. The conservation easement will protect the conservation values of said parcel in perpetuity, consistent with the terms of Attachment B to the extent agreeable with the holder of the conservation easement. The conservation easement on said parcel is intended to be held by the CLT, subject, however, to prior approval of the CLT Board of Directors and CLT staff approval of the specific terms, restrictions and reservations of the conservation easement, which terms may vary from the terms set forth in Attachment B. The purpose of Attachment B is to describe the property to be subject to the conservation easement. Attachment B is not intended to set out all conditions precedent for CLT to accept the conservation easement on the property described herein below or to incorporate all of the restrictions and provisions that may be required by CLT to hold the conservation easement interest in said property. In the event the CLT Board of Directors does not approve the contemplated conservation easement, NCDOT will pursue other methods to provide permanent protection to the property.

2. NCDOT's² obligations after dismissal:

- a. NCDOT commits that no NCDOT vehicle will enter utility corridors located on United States Forest Service ("USFS") property within Craven County (as well as parcel PIN #6-216-001), except within the intersection of the utility corridors and the NCDOT right-of-way. This provision does not prohibit access to the utility corridor by contractors engaged in utility work that requires access to facilities within the corridor outside of the NCDOT right-of-way. Authorized activities are outlined in,

² For purposes of this subsection of the Agreement, NCDOT means NCDOT and any contractors or subcontractors hired by NCDOT that are involved in the construction of the Bypass.

and limited by, the terms and restrictions in the easement between the utility company and USFS.

- b. NCDOT commits to clearly demarking its right-of-way in the project area.
- c. NCDOT commits not to store equipment or construction materials in areas outside of its right-of-way at its intersections with utility corridors without permission from USFS.
- d. NCDOT commits to provide controlled access at the intersections of its right-of-ways and utility corridors by constructing fences across the width of the corridor, with sufficient length beyond the corridor to prohibit access around the fence by motorized vehicles. NCDOT will install locking gates to provide access for utility and USFS personnel.
- e. NCDOT commits to limit its ground disturbing activity for controlled access within its right-of-way to preparing fencing and gating post holes, with the exception of areas within temporary construction easements ("TCEs") or activities not otherwise prohibited to facilitate current design.
- f. NCDOT commits as part of its regular maintenance activities to conducting inspections of its controlled access fencing and gating at the intersection of utility corridors no less than every three months to reasonably ensure that no unauthorized or illegal vehicle access is occurring into utility corridors through NCDOT right-of-way. If NCDOT discovers incidents of unauthorized access, it will promptly report them to local law enforcement, the utility company owner, and USFS, and at the same time provide a copy of the report to the Sierra Club designated representative.

- g. NCDOT commits that no USFS property adjacent to an NCDOT right-of-way shall be used for staging or stockpiling of project fill material, storage of equipment or vehicles, excavation for fill material, or any ground disturbing activities, except with the express prior written consent of USFS under a special use permit. NCDOT commits to providing the Sierra Club designated representative with a copy of any application for such a special use permit.
- h. NCDOT commits to conducting all land clearing activities in coordination with a staff endangered species biologist.
- i. NCDOT commits that, prior to tree clearing activities in RCW suitable habitat, NCDOT will perform a comprehensive preconstruction survey of the project area to identify active or inactive cavity trees, as well as any previously undocumented RCW cavity trees. Surveys will be conducted in areas inside and outside of right-of-way consistent with USFWS guidelines. If new cavity trees are identified, NCDOT will immediately report the matter to USFWS and comply with all applicable guidance, laws, and regulations, including the requirements set out in the RCW Recovery Plan. All references in this agreement to RCW habitat management areas and RCW foraging habitat shall be read to incorporate any new information gathered in the comprehensive preconstruction survey.
- j. NCDOT commits that prior to tree clearing and construction activities in RCW suitable habitat, NCDOT and contractor personnel will be notified, in the form of a briefing or other written communication, of any restrictions relevant to the RCW and, when necessary, incorporate that information into its project planning processes, including visual delineation on the ground and in project maps.

- k. NCDOT commits to minimizing tree and other vegetation clearing activity within the border areas of the right-of-way, to the extent that such commitment is not otherwise in violation of state or federal regulations or requirements, or where such commitment compromises other safety or design standards. NCDOT will limit the project right-of-way to 200 feet or less in the RCW foraging and habitat management areas between Stations 338+00 and 393+00.
- l. NCDOT commits to ensuring minimal encroachment on trees or other vegetation that border riparian areas consistent with North Carolina Department of Environmental Quality, Division of Water Resources regulations and restrictions.
- m. NCDOT commits to coordinate and cooperate with forest management efforts in compliance with RCW guidelines set out in the 2003 RCW Recovery Plan.
- n. NCDOT commits to tailoring its construction activities, at its discretion, so as to minimize disturbances associated with noise and lighting necessitated by nighttime work to known active RCW cavity trees located more than 200 feet and less than 500 feet from the right-of-way boundary consistent with USFWS regulations. This commitment envisions a flexible approach recognizing the lack of guidance or data pertinent to impact on RCW clusters at distances greater than 200 feet from construction activities occurring either during the day or at night and irrespective of the RCW nesting season.
- o. Within sixty (60) days after the end of each calendar year, NCDOT commits to compile a list of non-road construction equipment that was used for construction of the Bypass for greater than forty (40) hours during that calendar year. Such list shall

be compiled each year through completion of the Bypass. The list shall include the following information for each applicable piece of non-road construction equipment:

- i. equipment type and manufacturer;
- ii. engine manufacturer and model;
- iii. engine model number;
- iv. engine family name and model year;
- v. engine horsepower or kilowatts;
- vi. engine serial number; and
- vii. engine Environmental Protection Agency ("EPA") Tier number.

The list shall also include the Tier (1, 2, 3 or 4) Nonroad Exhaust Emission Standard that the equipment's engine satisfies in accordance with EPA current standards. The list shall be accompanied by a document that will include a description of how NCDOT shall meet a goal of increasing the number of nonroad construction equipment engines employed during each subsequent year that meet Tier 3 or higher by 5 to 10% in each subsequent year through completion of the Bypass. In the event that such goal is not attained, NCDOT shall provide in the document the reasons why the goal was not attained and NCDOT's approach to attaining the following year's goal.

- p. NCDOT commits to utilizing logging techniques to avoid disturbances or damage to forested areas, including groundcover surrounding the boundary of the right-of-way.
- q. NCDOT commits to a special contract provision, consistent with standard practices in the timber industry and in coordination with USFS, that trees cleared during construction of the right-of-way, where possible, are sold as a commodity and not

burned as waste. NCDOT envisions discussing this issue in its preconstruction meeting.

- r. NCDOT commits to seed collection activities and coordination with USFS to effect replanting with native plant species.
- s. NCDOT commits to replanting the disturbed right-of-way with native plant species.
- t. NCDOT agrees to cooperate with USFS in road closure requests, during construction of the Bypass and thereafter, to effect USFS Prescribed Burn Plans. NCDOT will close the Bypass whenever requested to by USFS in accordance with NCDOT's commitments specified in the letters exchanged between NCDOT and USFS on June 27, 2016 and July 25, 2016.

3. Plaintiff's Covenants and Obligations:

- a. Within thirty (30) days of the payment by NCDOT pursuant to Paragraph 1(a), above, Sierra Club shall dismiss all claims against all Defendants encompassed in the Action with prejudice.
- b. Upon payment by NCDOT, Sierra Club covenants not to sue Defendants for any claims challenging the validity of the ROD, the Biological Assessment concluding that the Havelock Bypass was "not likely to adversely affect" the RCW, USFWS's concurrence in the "not likely to adversely affect" determination, or any determination, approval, or other document necessary to complete the environmental review or approval of the Project's construction, as consistent with and approved in the ROD. Sierra Club does 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 Bypass 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.

- c. Upon payment by NCDOT, Sierra Club covenants not to sue USFS, the United States Army Corps of Engineers, and the North Carolina Department of Environmental Quality 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 the letter of consent, acceptance of the Croatan Wetland Mitigation Bank lands, and issuance of the 404 and 401 permits under the Clean Water Act.
 - d. Sierra Club hereby covenants not to waive any conflict of interest should its attorney, the Southern Environmental Law Center, be approached by any other client to pursue any of the claims listed in Paragraphs (a)-(c) of this subsection in keeping with N.C. Legal Ethics Rule 1.9.
 - e. 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 Sierra Club may have, if any, to assert claims that construction activities for the Bypass 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.
4. This Agreement does not affect the exercise of any authority by NCDOT, FHWA, or USFWS except as expressly set forth herein. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the Administrative Procedure Act ("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 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 take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

5. 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 Paragraph 6. 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.
6. 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. Plaintiff:

Geoffrey R. Gisler
Kym Hunter

Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, N.C. 27516

Cassie Gavin
North Carolina Chapter
Sierra Club
19 West Hargett Street, Suite 210
Raleigh, N.C. 27601

Aaron Isherwood
Coordinating Attorney
Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94612

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.

7. This Agreement is for the benefit of Sierra Club, NCDOT, and the United States as an intended third-party beneficiary and may not be used by any other person or entity in any other proceeding. This Agreement is binding upon the Plaintiff and its respective agents, successors, and assigns, and is binding upon NCDOT and its respective agents, officials, and employees.

8. This Agreement resolves all claims related to or arising from the Action which have been or could have been asserted except as expressly reserved.
9. 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 Plaintiff's Amended Complaint, and nothing herein shall be construed as precedent having preclusive effect in any other context.
10. The Agreement may not be modified, altered or changed except by written agreement of all Parties specifically referring to this Agreement.
11. This Agreement shall be governed by the laws of the United States.
12. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid.
13. 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 this Action.

14. 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.

15. 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.

16. The terms of the Agreement shall become effective upon the signature of the last Party to approve the Agreement ("Effective Date").

SIERRA CLUB

By: Molly Diggins
Molly Diggins, State Director, North Carolina Chapter
Sierra Club

Dated: 4/13/18

By: Kimberley Hunter
Kimberley Hunter
Southern Environmental Law Center
Attorney for Sierra Club

Dated: 4/13/18

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

Dated: 4/13/18

By: Charles D. Watts Jr.
Charles D. Watts Jr., General Counsel
North Carolina Department of Transportation

Dated: 4/13/18