

ESCROW AGREEMENT
South Carolina Department of Transportation
Lexington County S-28 Bridge Replacement Project
Compensatory Mitigation Credit Purchase Deposit

THIS ESCROW AGREEMENT (the “Escrow Agreement”) is made and entered into as of the ____ day of _____, 2012, by and among the **South Carolina Department of Transportation (“SCDOT”)**, the **United States Army Corps of Engineers, Charleston District (the “Corps”)**, and **Willoughby and Hoefler, PA (the “Escrow Holder”)**.

WITNESSETH:

WHEREAS, in order to obtain authorization from the Corps to commence construction of the Lexington County S-28 Bridge Replacement Project (the “Project”), SCDOT is required to offset the resulting unavoidable impacts to aquatic resources in accordance with the mitigation requirements of 33 C.F.R. Part 332;

WHEREAS, pursuant to 33 C.F.R. § 332.3(a)(1), SCDOT, as the permit applicant for the Project, is responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts;

WHEREAS, pursuant to 33 C.F.R. § 332.3(f)(1), the amount of required compensatory mitigation for the Project must be, to the extent practicable, sufficient to replace lost aquatic resource functions;

WHEREAS, the appropriate number and resource type of compensatory mitigation credits to offset the Project’s unavoidable impacts to aquatic resources are not currently available within the service area of a Corps approved mitigation bank;

WHEREAS, pursuant to 33 C.F.R. § 332.3(l)(3), SCDOT, as the permit applicant for the Project, retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a Corps approved mitigation bank and the Corps has received documentation that confirms that the approved mitigation bank has accepted the responsibility for providing the required compensatory mitigation;

WHEREAS, pursuant to 33 C.F.R. § 332.3(f)(2), the Corps must require a mitigation ratio greater than one-to-one where necessary to account for, *inter alia*, temporal losses of aquatic resource functions;

WHEREAS, pursuant to 33 C.F.R. § 332.3(m), the Corps must require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the advance or concurrent construction of the permitted activity (*i.e.*, the Project) prior to the purchase of the appropriate amount of compensatory mitigation credits;

WHEREAS, the Corps has determined that a mitigation ratio greater than one-to-one is required to compensate for temporal losses of aquatic resource functions as a result of the timing of the construction of the Project;

WHEREAS, SCDOT and the Corps have agreed that the funds required to purchase 611.7 credits of stream mitigation (including a minimum of 306 stream restoration credits) should be deposited into an escrow account and held therein in accordance with this Escrow Agreement; and

WHEREAS, SCDOT and the Corps have agreed to satisfy the requirement to purchase the 611.7 credits referenced above using a delayed compensatory mitigation plan, described in detail in the “Compensatory Stream Mitigation Plan (SAC-2009-01393-DJS), Lexington County S-28 Bridge Replacement Project” (the Compensatory Stream Mitigation Plan);”

WHEREAS, upon execution of this Escrow Agreement by both SCDOT and the Corps, approval of the Compensatory Stream Mitigation Plan by the Corps, and the establishment and funding of the escrow account by SCDOT (as described below), the Corps will issue a general permit letter, which will provide SCDOT with the necessary authorization to commence construction of the Project;

WHEREAS, SCDOT has agreed with the Corps to pay One Hundred Twenty-six Thousand and no/100 (\$126,000.00) Dollars (“the Deposit”) to fund the future purchase of 611.7 credits of stream mitigation as described in the Compensatory Stream Mitigation Plan, which shall be withheld and placed in escrow by the Escrow Holder, in its capacity as escrow agent hereunder, which Deposit shall then be held and disbursed from escrow as provided in this Escrow Agreement; and

WHEREAS, the Escrow Holder is willing to receive, hold and disburse the Deposit in accordance with the following additional terms and conditions.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions set forth herein, the receipt and sufficiency of which is hereby acknowledged, SCDOT, the Corps, and the Escrow Holder hereby agree as follows:

1. Establishment and Administration of Escrow Arrangement. SCDOT and the Corps hereby appoint the Escrow Holder, and the Escrow Holder hereby accepts such appointment, to serve as the Escrow Holder and escrow agent hereunder for the sole purpose of receiving, holding and disbursing the Deposit in accordance with this Escrow Agreement. Except for interpleader and/or tender of any portion of the Deposit into a court of competent jurisdiction in accordance with Section 11 of this Escrow Agreement, the Escrow Holder shall not release all or any portion of the Deposit except as provided in this Escrow Agreement. The Escrow Holder shall make no other disbursements of portions of the Deposit without the written direction of both SCDOT and the Corps.

2. Delivery. SCDOT shall deliver to the Escrow Holder funds in the amount of \$126,000.00 for the future purchase of 611.7 credits of stream mitigation from an approved

mitigation bank with a primary or secondary service area that includes the impacted watershed (HUC 03050109) associated with the Project.

3. Establishment. The Escrow Holder agrees to immediately deposit said funds in a non-interest bearing escrow account, and to hold and disburse said funds, only and specifically as hereinafter provided.

4. Confirmation. Upon receipt of the funds referred to herein, the Escrow Holder shall provide written confirmation to SCDOT of receipt of such funds. SCDOT shall forward copies of this confirmation to the Corps at the following address:

U.S. Army Corps of Engineers
Attn: Regulatory Division
69A Hagood Avenue
Charleston, South Carolina 29403

5. Requests. Any requests by SCDOT to the Escrow Holder to release the funds to an approved mitigation bank shall be in writing. The Escrow Holder shall forward a copy of any request for disbursement to the Corps for written approval.

6. Release. Upon receiving written approval from the Corps for the requested disbursement, the Escrow Holder shall release said funds to the approved mitigation bank within five (5) days of receiving said approval.

7. Remaining Funds Release. Upon receiving written approval from the Corps that compensatory mitigation requirements have been satisfied by escrow account funds, the Escrow Holder shall pay over any remaining balance of funds to SCDOT.

8. Escrow Holder Duty. Nothing contained in this Escrow Agreement shall be deemed to impose any duty upon the Escrow Holder to exercise discretion. SCDOT and the Corps intend that the Escrow Holder shall not be obligated to act except as specifically provided in this Escrow Agreement or as set forth in subsequent written instructions to the Escrow Holder executed by both SCDOT and the Corps. SCDOT agrees that in performing any of its duties under this Escrow Agreement that the Escrow Holder shall not be liable to SCDOT for any loss, costs or damage that may incur as a result of its service as Escrow Holder hereunder, except for any loss costs or damage arising out of its willful default or gross negligence. Accordingly, as between SCDOT and the Escrow Holder, the Escrow Holder shall not incur any liability with respect to (a) any action taken or admitted to be taken in good faith upon advice of its counsel given with respect to any questions relating to its duties and responsibilities, or (b) to any action taken or admitted to be taken in reliance upon any document, including any written notice of instruction provided for in this Escrow Agreement, not only as to its due execution and validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained therein, which Escrow Holder in good faith believes to be genuine, believes to have been signed or presented by a proper person or persons and, in good faith believes to conform with the provisions of this Escrow Agreement. All requests for disbursement requires written

approval by the Corps, so disbursements made without such approval are by definition willful or negligent and cannot provide exculpation to the Escrow Holder.

9. Reliance. The Escrow Holder shall at all times be protected in acting on any written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney, or other paper or document which the Escrow Holder in good faith believes to be genuine and what it purports to be. The Escrow Holder shall not be liable for anything which it may do or refrain from doing in connection herewith provided that it acts in good faith.

10. Advice of Counsel. The Escrow Holder may consult with legal counsel in the event of any dispute or questions as to its duties as the Escrow Holder under this Escrow Agreement, and it shall incur no liability and shall be fully protected in acting in good faith in accordance with the good faith opinion and instruction of its counsel.

11. Disputes/Interpleader. In an event of dispute between SCDOT and the Corps, the Escrow Holder shall comply with the Corps, and the SCDOT agrees to defer to the Corps. With regard to disputes not involving the Corps, where circumstances warrant, in the Escrow Holder's discretion, the Escrow Holder shall be entitled to interplead and/or tender unto the registry or custody of any court of competent jurisdiction all or any portion of money or Property held by it under the terms of this Escrow Agreement, together with such legal pleadings as it deems appropriate and immediately thereupon it should be discharged from all duties and responsibilities hereunder.

12. Fees. The fee to be paid to the Escrow Holder for the services provided hereunder shall be as the Escrow Holder and SCDOT may mutually agree. Any fee paid to the Escrow Holder shall be the sole responsibility of SCDOT. The Escrow Holder shall have no right to deduct funds from the Deposit to pay for its services. In the event SCDOT fails to make payment to the Escrow Holder for its services, all claims for such payment shall be directly against SCDOT. The Corps shall not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the escrow account.

13. Miscellaneous. No amendments, conditions, deletions, modifications or changes to or of this Escrow Agreement shall be of any force or affect whatsoever unless reduced to writing and signed by the duly authorized representatives of SCDOT, the Corps, and the Escrow Holder. This Escrow Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective successors, legal representatives and assigns.

14. Vesting Title. Nothing in this Escrow Agreement shall be considered as vesting title in the Escrow Holder to the funds deposited, except for the purposes set forth herein. Title to said funds shall not vest in the Corps at any time.

15. Originals. This Escrow Agreement may be executed in multiple counterpart originals, each of which shall constitute one and the same instrument, provided that each of the parties hereto signs at least on e of the counterpart originals.

IN WITNESS WHEREOF, this Escrow Agreement has been duly executed by the parties as of the date first written above.

South Carolina Department of Transportation

BY (SIGNATURE): _____

PRINT NAME: _____

ITS: _____
As SCDOT

DATE: _____

Willoughby and Hofer, PA

BY (SIGNATURE): _____

PRINT NAME: _____

ITS: _____
As the Escrow Holder

DATE: _____

U.S. Army Corps of Engineers, Charleston District

BY (SIGNATURE): _____

PRINT NAME: _____

ITS: _____
As the Corps

DATE: _____