

MEMORANDUM OF AGREEMENT
between the
TENNESSEE DEPARTMENT OF TRANSPORTATION
and the
TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION
CONCERNING A FUND TO PROVIDE FOR THE ASSESSMENT AND REPAIR
OF COMPENSATORY MITIGATION SITES

This MEMORANDUM establishes an agreement between the Tennessee Department of Transportation (hereinafter referred to as "TDOT") and the Tennessee Department of Environment & Conservation (hereinafter referred to as "TDEC") to create and administer a fund to assess the success of and take appropriate action regarding certain compensatory mitigation projects at TDOT project sites across the state.

I. Purpose:

TDEC and TDOT agree that avoiding and successfully mitigating environmental harm associated with construction activities is of the utmost importance to the future of this state and its people. With that in mind, TDEC and TDOT now agree to create and administer a fund disbursements from which will be used to create and administer a program to assess the success of compensatory mitigation projects associated with approximately 185 construction permits issued to TDOT from and including 1990 through 2006, and to take whatever action is reasonably necessary to achieve and maintain success at any such sites that are currently failing to meet the criteria for success detailed in their respective permits.

II. Permits Covered

The program described in this Agreement shall cover any and all permits issued by TDEC to TDOT from and including 1990 through 2006 when such permits require compensatory mitigation for loss of or impairment to streams, wetlands, or any other waters of the United States or the State of Tennessee, including any and all Clean Water Act §401 water quality certifications issued by TDEC for Clean Water Act §404 permits issued to TDOT by the United States Army Corps of Engineers.

III. Mitigation Fund:

I. Creation and Title:

TDEC shall create a fund to be referred to as the "TDOT Project Mitigation Assessment and Repair Fund" (hereinafter "the Fund"). The fund shall be a sub-

account of the Division of Water Pollution Control's Environmental Protection Fund.

2. Administration and Accounting

TDEC shall be responsible for administering the Fund according to the requirements of this Agreement. TDEC may account for the Fund in any reasonable manner.

3. Contributions

TDOT shall make contributions to the Fund as follows:

- Within SIXTY (60) DAYS of executing this Agreement: ONE MILLION ONE HUNDRED FORTY THOUSAND DOLLARS (\$1,140,000.00).
- On or before the same date each year for the next four (4) years: ONE MILLION ONE HUNDRED FORTY THOUSAND DOLLARS (\$1,140,000.00).
- TDOT's total contribution to the Fund under this Agreement shall not exceed FIVE MILLION SEVEN HUNDRED THOUSAND DOLLARS (\$5,700,000.00).

4. Disbursements

As Administrator of the Fund TDEC shall have the authority in its sole discretion to make such disbursements from the Fund as it deems necessary to complete the program of assessment and repair or replacement described herein. Except in the event that the total program cost at the end of five years is less than TDOT's total contribution to the Fund, TDEC shall not have the authority to make disbursements from the Fund for any other reason or to support any other activity.

IV. Program to Assess and Repair Identified Compensatory Mitigation Projects

TDEC and TDOT have previously identified 185 permits, issued to TDOT from and including 1990 through 2006, that required TDOT to perform compensatory mitigation projects. TDEC and TDOT agree that TDEC, using disbursements from the Fund, shall create and administer a program (hereinafter "the Program") to assess the success of those compensatory mitigation projects, and any other compensatory mitigation projects required by any other permit issued to TDOT from and including 1990 through 2006 as may hereafter be identified, as compared to the success criteria detailed in their respective permits. TDOT and TDEC agree that whenever any such projects are assessed as not meeting the requisite criteria for success, TDEC shall undertake or cause to be undertaken all

reasonably feasible and cost effective actions necessary to bring such projects in line with the applicable criteria for success, with the overall goal that no net loss to aquatic resources result from the work authorized by the permits subject to this program. Such actions may include physical repair of such projects, such as stream bed or bank stabilization, tree planting, or other work. If physical repair is for some reason not feasible or not cost effective, TDEC may use the Fund to carry-out alternative mitigation projects or purchase alternative mitigation from compensatory mitigation banks. TDEC shall also undertake or cause to be undertaken any actions necessary to maintain the projects subject to this program.

V. Agreement Concerning Calculation of Contributions

TDOT and TDEC agree that TDOT's contributions to the Fund were determined based on estimates of the cost to assess and repair projects associated with 21 of the 185 permits in question. Projects associated with those 21 permits were assessed as part of a pilot study which found a critical failure rate of 13% (5 sites), a general failure rate of 38% (8 sites), and a success rate of 38% (8 sites). The estimated cost to repair the five critically failing sites was \$335,000.00. In-lieu-fee cost for the same sites would range from \$400,000.00 to \$640,000.00. The estimated cost to repair the generally failing sites was \$65,000.00. Assuming that those rates of failure may approximate conditions in the entire group, but acknowledging that such projections are only estimates, TDEC and TDOT agree that the total program cost may approximate \$5,700,000.00.

TDOT and TDEC agree that the nature of the assumptions involved in calculating TDOT's contributions to the Fund result in a definite risk that those contributions may be too large or too small depending on the actual state of each of the projects subject to the Program.

In exchange for TDEC's agreement not to seek additional contributions from TDOT in the event that the total Program costs exceed TDOT's contributions to the Fund, TDOT agrees not to seek reimbursement of excess contributions in the event that the total Program costs are less than the sum of TDOT's contributions to the Fund.

Likewise, in exchange for TDOT's agreement not to seek reimbursement of excess contributions in the event that the total Program costs are less than the sum of TDOT's contributions to the Fund, TDEC agrees not to seek additional contributions from TDOT in the event that the total Program costs exceed TDOT's contributions to the Fund.

V. Discharge of Responsibility

TDEC and TDOT agree that as the recipient of all of the permits subject to the Program, TDOT was properly responsible for the success of any compensatory mitigation required by the terms of those permits.

TDEC and TDOT further agree that by making all of the contributions required by this agreement, TDOT will have discharged its entire responsibility regarding the compensatory mitigation requirements of the permits subject to the Program.

TDEC and TDOT further agree that upon TDOT's making the contributions as required by this agreement, TDEC shall assume the responsibility to correct any and all deficiencies in the compensatory mitigation required by any permit covered by this agreement.

IN WITNESS WHEREOF:

TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION

By: James H. Fyke / rth Date: 1-30-09
James H. Fyke, Commissioner

Approved as to Form:

By: E. Joseph Sanders Date: 1-30-09
E. Joseph Sanders, General Counsel

TENNESSEE DEPARTMENT OF TRANSPORTATION

By: Gerald F. Nicely Date: 2/23/09
Gerald F. Nicely, Commissioner

Approved as to Form:

By: John H. Reinbold Date: 2/23/09
John H. Reinbold, General Counsel