20140728

AGREEMENT TO ESTABLISH AN UMBRELLA MITIGATION BANKING INSTRUMENT IN THE RANDLEMAN LAKE WATERSHED WITHIN THE CAPE FEAR RIVER BASIN FOR RIPARIAN BUFFER MITIGATION CREDITS PURSUANT TO THE RANDLEMAN LAKE WATER SUPPLY WATERSHED NUTRIENT STRATEGY

I. PREAMBLE

This Umbrella Mitigation Banking Instrument ("Instrument") regarding the establishment, use, operation, and maintenance of mitigation bank parcels ("Bank Parcels") under an Umbrella Bank ("Bank") to provide Randleman Lake Riparian Buffer mitigation credit ("Riparian Buffer Credits") is made and entered into by and among Environmental Banc & Exchange, LLC ("EBX"), acting as the Bank Sponsor ("Sponsor"), and the North Carolina Department of Environment and Natural Resources – Division of Water Resources ("DWR"). This Instrument is in accordance with 15A NCAC 02B.0252 and Session Law 2009-337.

The purpose of the Bank is:

A. To improve water quality through the restoration of riparian buffer habitat.

B. To provide mitigation and sell any resulting Riparian Buffer Credits to third parties within the Randleman Lake Water Supply Watershed who have received either an Authorization Certificate or Variance pursuant to 15A NCAC 02B .0250 and are required to perform mitigation. Authorization Certificates and Variances are approved by either DWR or a local government with jurisdiction.

C. To provide mitigation and sell any resulting Riparian Buffer Credits to the Riparian Buffer Restoration Fund administered by the North Carolina Ecosystem Enhancement Program (NCEEP) in accordance with 15A NCAC 02B .0269.

II. GEOGRAPHIC SERVICE AREA

A. The Geographic Service Area ("GSA") is the designated area wherein a Bank can reasonably be expected to sell Riparian Buffer Credits. .

B. The GSA for this Instrument is limited to Bank Parcels located within the Randleman Lake Watershed of the Cape Fear River Basin in the State of North Carolina.

C. Sale or transfer of Riparian Buffer Credits shall be limited to within the Randleman Lake Water Supply Watershed.

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III. AUTHORITIES

A. The Bank will be used to provide Riparian Buffer Credit in accordance with the requirements in the DWR Authority document referenced herein as "Attachment A" and attached to this Instrument.

B. Projects eligible for utilization of the credits are those requiring authorization under the requirements of Attachment A.

C. All activities shall be consistent with approved North Carolina ("State") statutes and rules for the Randleman Lake Water Supply Watershed Nutrient Management Strategy.

IV. ESTABLISHMENT OF BANK PARCEL(S)

A. Each parcel proposed for inclusion within the Bank under this Instrument shall require a Bank Parcel Development Package ("BPDP") be submitted to, and approved by, the DWR prior to use of the parcel for mitigation purposes or sale or transfer of any associated credits.

B. Bank Parcel(s) may be added to the Bank at any time upon approval of a BPDP by the DWR.

V. BANK PARCEL DEVELOPMENT PACKAGE

A. Each BPDP shall include detailed information consistent with the sections below concerning: 1) site location; 2) existing conditions; 3) proposed buffer restoration/enhancement; 4) monitoring and maintenance plans; 5) financial assurances; 6) associated buffer mitigation credit calculations, which shall include credit generation, service area, and accounting as appropriate for each regulatory authority; and 7) stream buffer determination letter from DWR or local government with jurisdiction.

B. In addition to items 1-7 listed in "A" of this section, for each Bank Parcel, the Sponsor agrees to transfer or assign the conservation easement and its interests in perpetuity to a qualified holder under N.C. General Statute ("G.S.") 121-34 et seq. and 170(h) of the Internal Revenue Code. The holder shall be a land trust or stewardship program that will hold and enforce the conservation easement and the interests. The Sponsor shall choose a land trust or stewardship program that is accredited by the Land Trust Accreditation Commission and/or has been approved by DWR prior to the end of the fourth year monitoring period. A land trust must be certified under 501(c)(3) of the Internal Revenue Code and must have the qualifications outlined in G.S. 105-130.24 and G.S. 105-151.12.

Permitting

C. The Sponsor will obtain all applicable federal, state, and local documentation, permits, or authorizations needed to construct and maintain the Bank Parcel. This Instrument does not qualify as, or substitute for, such documentation, permit or authorization.

Construction

D. The Sponsor agrees to perform all necessary work, in accordance with the provisions of this Instrument, to establish, maintain, and monitor Randleman Lake Riparian Buffers until Item B (1) and (2) of Section IX have been satisfied.

E. As-Built Reports: The Sponsor will submit an as-built plan and report for each Bank Parcel within 30 calendar days after completing the establishment of the riparian buffer area. The as-built report will describe any deviation from the approved BPDP and will document the following:

1. Buffer restoration: planting details, invasive species control, monitoring device locations, vegetation plot locations, photo point locations, surface and groundwater elevations, as appropriate.

2. Boundary Survey of the conservation easement area including an enumeration of the final mitigation area for Riparian Buffer Credit in both square feet and acres.

Operation and Maintenance

F. The Sponsor agrees to perform all necessary work to operate and maintain the Bank Parcel(s) consistent with the operation and maintenance criteria established in each approved BPDP until Items B (1) and (2) of Section IX have been satisfied. At the time Items B (1) and (2) of Section IX have been satisfied, operation and maintenance of the Bank Parcel shall be deemed "Closed" and the Sponsor is relieved from all operation and maintenance responsibilities of the Bank Parcel.

G. Requests for deviation from the approved BPDP must be submitted to the DWR in writing. Written approval from the DWR must be received prior to implementing any deviation from the approved BPDP.

Monitoring

H. The Sponsor shall monitor each Bank Parcel as described in the BPDP until such time as DWR determines that the success criteria described below have been met. The monitoring period shall be a minimum of five years.

I. Trees should be planted at a density sufficient to provide 320 trees per acre at maturity. To achieve this density, approximately 436 (10x10 feet spacing) to 681 (8x8 feet spacing) trees per acre should be planted initially.

J. Vegetative Success Criteria: Reporting criteria of the riparian buffer restoration shall be based on the Carolina Vegetation Survey ("CVS") - EEP *Protocol for Recording Vegetation Level 1-2 Plot Sampling Only Version 4.0* or any updated versions of this protocol in place at the date of acceptance of the BPDP. "Character Trees" are defined as

planted or volunteer species identified from a survey of local vegetation on less degraded sections of the specified stream and from reference literature that details native species. A list of Character Tree species for each Bank Parcel will be detailed in the BPDP. Vegetative Success Criteria should be based upon guidelines set forth in the *Guidelines for Riparian Buffer Restoration* prepared by the North Carolina Ecosystem Enhancement Program (or subsequent updated versions of this Guidance in place at the date of acceptance of a BPDP). Success will be defined as the survival of an average density of 320 planted trees per acre after five years. If vegetative success criteria are not met, supplemental plantings may be required. Supplemental plantings will be utilized until the required densities have been achieved and maintained for five years.

K. **Monitoring Reports for Riparian Buffer Credit**: The Sponsor shall submit to the DWR an annual monitoring report no later than December 31 of each year for a minimum of five years after the first full growing season. This report will describe the conditions of each Bank Parcel, including an evaluation of the success criteria contained within the approved BPDP. Reports shall contain the following:

1. A U.S. Geological Survey map showing location of the Bank Parcel(s);

2. A detailed narrative summarizing the condition of the Bank Parcel(s) and all regular maintenance activities; and

3. Appropriate topographic survey showing location of sampling plots, permanent photo points, location of transects, etc.; and

4. Monitoring data, including specific vegetative counts and photographs; and

5. A copy of the most recent Bank credit/debit ledgers; and

6. Corresponding buffer authorizations, permits, or variances from local governments with jurisdiction or DWR; and

7. Corresponding Mitigation Transfer Certificates

Contingency Plans/Remedial Actions

L. In the event the Bank Parcel fails to achieve the success criteria described in this Instrument and the approved BPDP, the Bank Sponsor shall develop necessary contingency plans in coordination with the DWR and implement appropriate remedial actions for the Bank Parcel and the Bank. Depending on the degree of remedial actions required, the DWR may modify the monitoring period.

Financial Assurances

M. Following approval of the BPDP, the Sponsor shall provide a Performance Bond from a surety company that is rated no less than an "A-" as rated by A.M. Best. The

Performance Bond amount shall be 100% of the estimated cost for implementation of the buffer restoration and/or stormwater BMP project as described in the approved BPDP, but not less than $150,000.00.

N. Alternatively, in lieu of posting the Performance Bond, the Sponsor may elect to construct the project prior to the first credit release.

O. After completion of the restoration/construction, a separate Performance/Maintenance Bond will be secured for 100% of the estimated cost to implement the monitoring and maintenance plan but not less than $100,000.00. The Performance/Maintenance Bond shall be in effect for a minimum of five years, and until DWR has released all mitigation credits to the Bank Sponsor. Upon DWR approval, this may be lowered each year based on the adjusted cost to complete the monitoring

VI. CALCULATION OF MITIGATION CREDITS AND CREDIT RELEASE SCHEDULE

A. Riparian Buffer Credit may be achieved through restoration or enhancement of the DWR riparian buffer, as defined in 15A NCAC 02B .0250 and per 15A NCAC 02B .0252 and may be subject to mitigation ratios.

B. Riparian Buffer Credit is defined as one (1) buffer credit per one square foot or 43,560 buffer credits per one acre.

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C. Credit Release: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by DWR, it is agreed that the mitigation credits associated with the Bank Parcel will become available for sale to a third party in accordance with the following schedules:

Table I - Credit Release Schedule for Riparian Buffer Credits		
Task	**Project Milestone**	**% Credit Available for Sale**
1	BPDP Approved by DWR, Conservation Easement Recorded* and Financial Assurance Posted	20
2	Mitigation Site Earthwork, Planting and Installation of Monitoring Devices Completed	20
3	Monitoring Financial Assurance Posted and Approval of As-Built Report	10
4	Monitoring Report #1: Approved by the DWR**	10
5	Monitoring Report #2: Approved by the DWR**	10
6	Monitoring Report #3: Approved by the DWR**	10
7	Item B (1) of Section IX in this Instrument has been completed and approved by DWR.	5
No remaining credits will be released until Task 7 has been satisfied		
8	Monitoring Report #4: Approved by the DWR**	5
9	Monitoring Report #5: Approved by the DWR** and final site visit by DWR has been conducted	10
	Total	**100%**

* For specification, please see Section VIII in this Instrument

** DWR Approval provided upon a determination that the site is meeting success criteria contained within the approved BPDP

D. DWR may modify the credit release schedule based on the information submitted or the order in which required information is received. DWR will notify the Sponsor of any modification to the credit release schedule.

VII. PROCEDURE FOR DEBITING AND CREDITING

A. Available mitigation credits are credits that have been released by DWR but not sold by the Sponsor

B. The Bank Sponsor shall obtain verification of riparian buffer mitigation need from DWR or a local government with jurisdiction prior to debiting Riparian Buffer Credits from the Bank Parcel. Buffer authorizations and buffer variances are acceptable for verifying the buffer mitigation need.

C. The Bank Sponsor shall maintain one credit ledger for each individual Bank Parcel under this Instrument to account for buffer mitigation credits in square feet and acres.

D. The credit ledgers shall be submitted on an 8 ½ in X 11in spreadsheet with legible font style and font size. At a minimum and unless otherwise requested by DWR, credit ledgers shall contain the following information:

1. Bank Details listed in a header: (1) name of the approved banking instrument as it appears on the instrument document, (2) sponsor name, (3) bank parcel name as it appears on the BPDP, (4) DWR project number for the BPDP, (5) date the ledger was last updated, 6) total credits released to date.

2. Credit Details Table with the following for each credit sale: (1) date of credit sale, (2) purchaser name, (3) project name where buffer mitigation credits will be applied, (4) name of jurisdictional local government or State agency requiring riparian buffer mitigation, (5) buffer authorization or variance, (6) credits released by DWR to the Bank listed in square feet and acres for Riparian Buffer Credits, (7) credits debited/sold from bank listed in square feet and acres for Riparian Buffer Credits, (8) available credits listed in square feet and acres for Riparian Buffer Credits.

E. All credit and debit transactions for each Bank Parcel under this Instrument shall be accurately depicted in the credit ledger. DWR shall be notified of each credit sale or credit transfer within thirty (30) calendar days by electronically submitting an updated credit ledger to DWR. At a minimum, DWR shall receive a hard copy of updated credit ledgers along with the corresponding Mitigation Credit Transfer Certificates ("Certificate") and all corresponding buffer authorizations and variances from the jurisdictional local governments or DWR twice a year. Notification of all credit sales shall be provided to DWR until all credits that have been released have been sold.

F. All credit sales, expect for NCEEP, will include a Certificate that will include, at a minimum, all of the information provided in the credit ledger as identified above in (D).

G. Prior to providing Riparian Buffer Credits to NCEEP, as allowed in Item C of Section I, the Bank Sponsor shall provide a Credit Transfer Certificate, which shall be signed by the Bank Sponsor or a representative to the Bank Sponsor, NCEEP, and DWR.

H. If the DWR determines that the Bank is operating at a deficit (e.g. the Sponsor is closing on sales and/or transferring credit that is not available), or the Bank is selling credits out of compliance with statutes, rules or this Agreement, the sale/transfer of credits will immediately cease, and the DWR, in consultation with the Sponsor, will determine what remedial actions are necessary.

VIII. PROPERTY DISPOSITION AND LONG-TERM MANAGEMENT

A. Prior to the release of any credits, the Sponsor shall acquire a permanent conservation easement(s) and/or drainage and access easements for the Bank Parcel(s) at the County Register of Deed's office that is sufficient to ensure protection, operation and maintenance of restored riparian buffers for the duration specified in the approved BPDP.

B. The form of the conservation easement shall be consistent with the standards employed by the State of North Carolina in the protection of restored riparian buffers and shall be approved by the DWR prior to the release of any credits.

C. The Sponsor shall not grant additional easements, right of ways, or any other property interest in or to the project areas without prior approval from the DWR.

D. The Sponsor shall transfer or assign the Bank Parcel's conservation easement and all of its interests to a land trust or stewardship fund as described in Item B of Section V in this Instrument. The land trust or stewardship will hold and enforce the conservation easement in perpetuity.

E. In the event that the Sponsor is also the owner of the underlying fee interest in the property, the conveyance of the conservation easement to a land trust or stewardship fund must be arranged at the outset of the approved BPDP.

IX. BANK PARCEL CLOSURE

A. Bank Parcel Closure shall be identified as the event when the Sponsor is relieved of DWR oversight, as described in Item E of Section X, for the Bank Parcel.

B. Bank Parcel Closure shall commence only after all of the following events have occurred:

1. Transfer or assignment of the conservation easement and all of its interests, in perpetuity, to a land trust or stewardship program as described in Item B of Section V of this instrument.

2. All five years of monitoring completed and all monitoring reports submitted and approved by DWR.

3. All credits have been released and debited and updated ledgers showing a zero credit balance have been submitted and approved by DWR.

X. GENERAL PROVISIONS

A. Upon the presentation of proper credentials, and during normal business hours, the Sponsor and the landowner shall grant permission to the Director, an authorized representative of the Director, or DENR staff, to enter the property containing the Bank Parcel(s).

B. Amendments: This Banking Instrument may be amended or modified only with written approval of all signatory parties.

C. Any transfer of the Sponsor's rights or obligations outlined in this Instrument or any other agreement referenced in this Instrument to a third party must be approved by DWR prior to the transfer.

D. *Force Majeure*: After the sale of all available credits, the Sponsor will not be responsible for Bank failure that is attributed to natural catastrophes including but not limited to

flood, drought, disease, regional pest infestation, etc. that are beyond the control of the Sponsor.

However, if a *force majeure* event occurs before DWR has released all of the credits, the Sponsor shall take remedial action to restore the property to its condition prior to the event, in a manner sufficient to provide adequate mitigation to cover credits that were sold prior to the occurrence of the event. Such remedial action shall be taken by the Sponsor only to the extent necessary and appropriate, as determined by DWR and the Sponsor.

DWR must concur in writing that a *force majeure* event has occurred for this provision to apply.

E. Oversight: Actions taken by DWR may include, but are not limited to, the following:

1. Site visits.
2. BPDP review and approval of items listed in Items A and B of Section V of this instrument.
3. As-Built Report review and approval of items listed in Item E of Section V of this instrument.
4. Monitoring Report and/or O&M report review and approval of items listed in Item K of Section V of this instrument.
5. Credit Ledger review and approval of items listed in Item D of Section VII of this instrument.
6. Certificate and Credit Transfer Certificate review of items listed in Items E and G respectively of Section VII of this instrument and cross analysis to credit ledgers.
7. Information requests, file reviews and audits

Reports, ledgers, files and other information shall be made available to DWR upon request, unless otherwise specified in this or any other document.

F. Validity of the Banking Instrument: This Instrument will become valid on the date of the last party's signature.

G. Specific Language of Banking Instrument Shall Be Controlling: To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents that are incorporated into the Instrument by reference, and that are not legally binding, the specific language within the Instrument shall be controlling.

H. Any disputes over decisions regarding this Instrument, shall be referred to the Director of DWR for a decision. The Director's decision is subject to review as provided in Articles 3 and 4 of G.S. 150B.

I. This Agreement shall be binding upon the parties and is entered into knowingly, intelligently, and voluntarily.

J. Notices: All notices and other communications which may be or are required to be given or made by any party to the other shall be in writing and shall be deemed to have been properly given and received on the date delivered in person or deposited in the United States mail, registered or certified, return receipt requested, to the addresses set out below, or at such other addresses as specified by written notice delivered in accordance herewith.

If to EBX:	Environmental Banc & Exchange, LLC 909 Capability Drive, Suite 3100 Raleigh, NC 27606 Attn: Cara Conder
Copy to:	Environmental Banc & Exchange 1724 East Boulevard, Suite 202 Charlotte, NC 28203 Attn: Matt Fisher
If to DWR:	NC Division of Water Resources – 401& Buffer Permitting Unit Attn: Nutrient Offset & Buffer Banking Coordinator 1617 Mail Service Center Raleigh, NC 27699-1617

K. Applicable Law: This Agreement shall be construed under the laws of the State of North Carolina.

ENVIRONMENTAL BANC & EXCHANGE, LLC

By: Cara Conder (Print)

(Signature)

Title: Operations Manager

Date: 6/18/14

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

By: TOM REEDER (Print)

(Signature)

Title: DIV DIRECTOR

Date: 8/5/14

Attachment A

All Basins

General Statutes:
G.S. §143-214.1 Water; water quality standards and classifications; duties of Commission
G.S. §143-214.11 Ecosystem Enhancement Program
G.S. §143-214.26 Nutrient Offset Credits
G.S. §143-214.20-24 Riparian Buffer Protection Program
G.S. §143-214.7 Stormwater runoff rules and programs

G.S. §143-215.3(a)(1) General powers of Commission and Department; auxiliary powers
G.S. §143-215.6A Enforcement Procedures: Civil Penalties
G.S. §143-215.6B Enforcement Procedures: Criminal Penalties
G.S. §143-215.6C Enforcement Procedures: Injunctive Relief
G.S. §143-215.8B Basinwide Water Quality Management Plans
G.S. §143B-282 Environmental Management Commission – creation; powers and duties

Session Laws
S.L. 2012-200 (Amendment to G.S. §143-214.23 and G.S. §143-215.1)
S.L. 2011-343 (Amendment to G.S. §143-214.11)
S.L. 2009- 337 (Amendment to G.S. §143-214.11)

Administrative Rules:
15A NCAC 02B .0202 Definitions
15A NCAC 02B .0223 Nutrient Sensitive Waters
15A NCAC 02B .0237 Best Management Practice Cost-Effectiveness Rate
15A NCAC 02B .0240 Nutrient Offset Payments
15A NCAC 02B .0269 Riparian Buffer Mitigation Fees to the NC Ecosystem Enhancement Program
15A NCAC 02B .0274 Nutrient Offset Payment Rates for the NC Ecosystem Enhancement Program
15A NCAC 02B .0301 Stream Classifications

Neuse River Basin Buffer and Neuse Nutrient Strategy

Session Laws
S.L. 2011-394
S.L. 1998-221 (Part I)
S.L. 1995-572

Administrative Rules:
15A NCAC 02B .0232 Basin Nutrient Reduction Goal
15A NCAC 02B .0233 Protection and Maintenance of Existing Riparian Buffers
15A NCAC 02B .0234 NPDES Wastewater Discharge Requirements
15A NCAC 02B .0235 Basinwide Stormwater Requirements
15A NCAC 02B .0236 Agricultural Nitrogen Loading Reduction
15A NCAC 02B .0238 Agricultural Nitrogen Reduction Strategy
15A NCAC 02B .0239 Nutrient Management
15A NCAC 02B .0241 Delegation of Authority for the Protection and Maintenance of Existing Riparian Buffers
15A NCAC 02B .0242 Mitigation Program for Protection and Maintenance of Riparian Buffers

Neuse River Basin Buffer and Falls Lake Nutrient Strategy

General Statutes and Session Laws:
G.S. §143-214.5 Water Supply Watershed Protection
S.L. 2012-187
S.L. 2011-394
S.L. 2009-486
S.L. 1998-221 (Part I)

Administrative Rules:
15A NCAC 02B .0233 Protection and Maintenance of Existing Riparian Buffers
15A NCAC 02B .0241 Delegation of Authority for the Protection and Maintenance of Existing Riparian Buffers
15A NCAC 02B .0242 Mitigation Program for Protection and Maintenance of Riparian Buffers
15A NCAC 02B .0275 Purpose and Scope
15A NCAC 02B .0276 Definitions
15A NCAC 02B .0277 Stormwater Management for New Development
15A NCAC 02B .0278 Stormwater Management for Existing Development
15A NCAC 02B .0279 Wastewater Discharge Requirements
15A NCAC 02B .0280 Agriculture
15A NCAC 02B .0281 Stormwater Requirements for State and Federal Entities
15A NCAC 02B .0282 Options for Offsetting Nutrient Loads

Jordan Buffer and Jordan Water Supply Nutrient Strategy

General Statutes and Session Laws:
G.S. §143-214.5 Water Supply Watershed Protection)
S.L. 2012-201
S.L. 2012-187
S.L. 2009-216
S.L. 2009-484
S.L. 2006-259 (Section 31(a))
S.L. 2005-190
S.L. 1999-329 (part of G.S. 143B-282)

Administrative Rules:
15A NCAC 2B .0262 Purpose and Scope
15A NCAC 2B .0263 Definitions
15A NCAC 2B .0264 Agriculture
15A NCAC 2B .0265 Stormwater Management for New Development
15A NCAC 2B .0267 Jordan Water Supply Nutrient Strategy
15A NCAC 2B .0268 Mitigation for Riparian Buffers
15A NCAC 2B .0270 Wastewater Discharge Requirements
15A NCAC 2B .0271 Stormwater Requirements for State and Federal Entities
15A NCAC 2B .0272 Fertilizer Management
15A NCAC 2B .0273 Options for Offsetting Nutrient Loads

Tar-Pamlico River Basin Buffer and Tar-Pamlico Nutrient Strategy

Session Laws:
S.L. 2011-394
S.L. 1999-329 (part of G.S. 143B-282)

Administrative Rules:
15A NCAC 2B .0229 Nutrient Offset Payments for Non-Tar-Pamlico Basin Association Members
15A NCAC 2B .0255 Agricultural Nutrient Loading Goals
15A NCAC 2B .0256 Agricultural Nutrient Control Strategy
15A NCAC 2B .0257 Nutrient Management
15A NCAC 2B .0258 Basinwide Stormwater Requirements
15A NCAC 2B .0259 Protection and Maintenance of Existing Riparian Buffers
15A NCAC 2B .0260 Mitigation Program for Protection and Maintenance of Existing Riparian Buffers
15A NCAC 2B .0261 Delegation of Authority for the Protection and Maintenance of Existing Riparian Buffers