

**MITIGATION CREDIT PURCHASE AGREEMENT
AND OPTION AGREEMENT**

THIS MITIGATION CREDIT SALES AGREEMENT AND OPTION PURCHASE AGREEMENT (the "Agreement") is executed this _____ day of _____, 2012, by and between City of Durham ("City") and EBX-EM, LLC, a limited liability company organized and existing under the law of the State of Delaware ("Banker").

R E C I T A L S

WHEREAS, the City is extending Carver Street in Durham County, which activity will result in certain impacts to wetlands, streams and water quality ("Carver St. Project"). Accordingly, the City has obtained a Section 404 General Permit (SAW-2009-1175) ("404 Permit") from the U.S. Army Corps of Engineers (USACE) and a Section 401 Water Quality Certification (Proj. No. 20110916) ("401 Certification") from the N.C. Department of Environment and Natural Resources (NCDENR);

WHEREAS, the Banker is the Managing Member of the Bank Sponsors of Forrest Creek Stream Mitigation Bank referenced by the N.C. Dept. of Environment and Natural Resources as "DWQ Project #20080229," the Forrest Creek Riparian Buffer Mitigation Bank and other mitigation banks including the Cape Fear Riparian Buffer and Nutrient Mitigation Umbrella Banking Agreement, Upper Neuse Riparian Buffer and Nutrient Reduction Umbrella Mitigation Bank, the EBX Neuse Riparian Buffer Umbrella Mitigation Bank, and the Neu-Con Stream and Wetland Umbrella Mitigation Bank (collectively "Mitigation Banks").

WHEREAS, a condition of both the 404 Permit and 401 Certification, requires the City to purchase from the Banker 326 linear feet of stream credit (for 163 linear feet of stream impact) and 135,791 square feet of Neuse River buffer credit (for 135,791 square feet of impact) for the Project (collectively "Credits"). The 404 Permit and the 401 Certification require the Credits to be purchased from the Forrest Creek Riparian Buffer Mitigation Bank, which is owned and controlled by the Banker; and,

WHEREAS, the City desires to purchase and Banker desires to sell the Credits under the terms and conditions set forth herein.

T E R M S

1. RECITALS. The recitals set forth above are true and correct and are incorporated herein by reference.

2. AGREEMENT TO PURCHASE. Banker agrees to sell, and the City agrees to purchase 326 Stream Credits at a cost of \$335.00 per credit and 135,791 of Buffer Credits at a cost of \$0.90 per credit for a total payment of **\$231,421.90** ("Purchase Price") from Forrest Creek Mitigation Bank (DWQ Project #20080229), which service the area where the City's impacts are occurring.

2. DELIVERY BY BANKER AND TRANSFER OF CREDITS.

- a. Banker Warranty. Banker represents and warrants that the Credit to be sold to the City are currently available and have been approved for release by the applicable authorities, including, but not limited to, the North Carolina Department of the Environment and Natural Resources-Division of Water Quality or the United States Army Corps of Engineers.
- b. Delivery Date. Banker shall deliver the Credits to City no later than ten (10) days from the date of payment in full by the City (the “Delivery Date”).
- c. Transfer of Credits. The delivery of the Credits to the City shall be evidenced by the issuance of affidavits of credit sales and a copies of the applicable bank credit ledgers (together, the “Affidavit”) by the Banker within 10 days of payment. The credit ledgers are maintained by the Banker and periodically reviewed by the applicable resource agencies.

4. OPTION TO PURCHASE ADDITIONAL CREDITS: Banker further grants to the City the option to purchase additional Credits prior to the expiration Date of this Agreement (the “Option Provision”). The terms and provisions of the Option Provision shall be as follows:

- a. The City may acquire and the Banker may sell additional Credits as determined necessary by the City. The City is under no obligation to buy and the Banker is under no obligation to sell Credits and such sale shall occur only in the event the City has needs and the Banker has available Credits to sell.
- b. The term of this Option Provision commences on the date of execution of this Agreement and terminates one year after the date of execution. The City may, at its discretion and with the consent of the Banker, decide to renew this Option Provision for one (1) additional year. The City shall give the Banker written notice of the City’s intention to extend the Option Provision term not less than ten (10) days prior to the end of the Option Provision term then in effect.
- c. The Banker shall provide additional Credits based on availability. Neither party guarantees the purchase or delivery of such Credits until the City issues a Purchase Order to the Banker and the Banker confirms in writing the availability of the specific Credits (the “Statement of Availability”) to the City.
- d. In the event the City desires to exercise its option to acquire additional Credits, the Credit price shall be the following:
 - (i) Three Hundred and Thirty Fiver Dollars (**\$335**) per Stream Credit,
 - (ii) Ninety Cents (**\$0.90**) per Buffer Credit
 - (iii) Sixty Two Thousand Dollars (**\$62,000**) per Riparian Wetland Credit,
 - (iv) Forty Four Thousand (**\$44,000**) per Non-Riparian Wetland Credit,
 - (v) Eighteen Dollars and Fifty Cents (**\$18.50**) per Nitrogen Credit in the Neuse River Basin,
 - (vi) Forty Two Dollars and Fifty Cents (**\$42.50**) per Nitrogen Credit in the Cape

Fear River Basin, and
(vii) One Hundred and Twenty Seven and Fifty Cents (**\$127.50**) per Phosphorus
Credit in the Cape Fear River Basin

These prices are guaranteed for the term of this Agreement; including the one year period of extension should the City opt to extend under Section 3 above. Any City department may purchase Credits under this Agreement.

5. NOTICES: All notices from the City to the Banker shall be deemed dully served if mailed or faxed to Banker at the following Address:

Attention Thomas L. Rinker
Chief Operating Officer
Environmental Banc & Exchange, LLC
909 Capability Drive, Suite 3100
Raleigh, NC 27606
Phone Number 410-356-5159
Fax Number 410-375-6340

All Notices from the Banker to the City shall be deemed duly served if mailed or faxed to the City to:

Attention: _____

City of Durham
P.O. Box ____
Durham, NC _____
Phone Number: 919- _____ - _____
Fax Number: 919- _____ - _____

6. TERMINATION: Should the Banker be found to have failed to perform its services consistent with applicable law, as specified in this Agreement, the City may, after giving Banker written notice of such failure and a thirty day (30) period to correct such failure, terminate said Agreement immediately for cause and Banker shall reimburse the City for the cost (including the Purchase Price) for credits not delivered.; further the City may terminate this Agreement for convenience with a thirty (30) day written notice.

7. INSURANCE: The Banker shall provide insurance upon request and in accordance with City requirements including, but not limited to, General Liability Insurance, Business Auto Liability Insurance, and Workers Compensation if applicable. The Banker is not required to provide insurance so as long as the Banker does not enter onto City project property.

8. INDEMNIFICATION: The Banker shall indemnify and hold harmless the City, its officers, and employees from any and all liabilities, damages, losses and costs, including, but not limited to, reasonable attorneys' fees and paralegals' fees, to the extent caused by the negligence, recklessness, or intentional wrongful conduct of the Banker or anyone employed or utilized by

the Banker in the performance of this Agreement.

9. CONFLICT OF INTEREST: The Banker represents that it presently has no interest and shall acquire no interest, either direct or indirect, which would conflict in any manner with the performance of services required hereunder. Banker further represents that no persons having any such interest shall be employed to perform those services.

10. NONDISCRIMINATION AGREEMENT: In consideration of the signing of this contract, the parties hereto for themselves, their agents, officials, employees and servants agree not to discriminate in any manner on the basis of race, color, creed, national origin, sex, age, handicap, or sexual orientation with reference to the subject matter of this contract, no matter how remote. . This provision is hereby incorporated into this contract for the benefit of the City of Durham and its residents, and may be enforced by action for specific performance, injunctive relief, or other remedy as by law provided. This agreement shall be binding on the successors and assigns of the parties with reference to the subject matter of this contract.

11. CHOICE OF LAW AND VENUE: (i) This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. (ii) If the Contractor is not a natural person (for instance, the Contractor is a corporation or limited liability company), this subsection (ii) applies. “Agent for Service of Process” means every person now or hereafter appointed by the Contractor to be served or to accept service of process in any State of the United States. Without excluding any other method of service authorized by law, the Contractor agrees that every Agent for Service of Process is designated as its non-exclusive agent for service of process, summons, and complaint. The Contractor will instruct each Agent for Service of Process that after such agent receives the process, summons, or complaint, such agent shall promptly send it to the Contractor. This subsection (ii) does not apply while the Contractor maintains a registered agent in North Carolina with the office of the N. C. Secretary of State and such registered agent can be found with due diligence at the registered office.

12. MISCELLANEOUS.

d. The benefits and obligations of the covenants herein shall inure to the benefit of and bind the respective heirs, executors, administrators, successors and assigns of the parties hereto.

e. Neither this Agreement, nor any notice, memorandum nor notation thereof shall be recorded by any party hereto in the Public Records of Durham County, North Carolina or of any other county in the state of North Carolina. This Agreement shall impose no lien, charge or encumbrance upon any property.

f. The effective date of this Agreement shall be the day upon which the last of the parties hereto shall have executed this Agreement.

g. This Agreement shall be interpreted as drafted by both parties hereto equally, and no rule of strict construction shall be applied against any party.

h. The captions are included for convenience only and shall be given no legal effect whatsoever.

i. The Banker and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Agreement must be in writing.

j. Nothing herein contained shall create or be construed as creating a partnership between the City and the Banker or to constitute the Banker as an agent of the City.

k. If any portion of this Agreement is held to be void, invalid, or otherwise unenforceable, in whole or in part, the remaining portion of this Agreement shall remain in effect.

13. ADDITIONAL ITEMS/SERVICES: . A modification of this contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless it is signed by the City Manager, a deputy or assistant City Manager, or, in limited circumstances, a City department director. This contract contains the entire agreement between the parties pertaining to the subject matter of this contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this contract.

14. CITY MANAGER'S AUTHORITY. To the extent, if any, the City has the power to suspend or terminate this contract or the Contractor's services under this contract, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

IN WITNESS WHEREOF: the Banker and the City, have each, respectively, by an authorized person or agent, hereunder set their hands and seals on the date and year first above written.

ATTEST: CITY OF DURHAM

_____ By: _____

preaudit certificate, if applicable _____

BANKER:

EBX-EM, LLC

By: Thomas L. Rinker
Manager

I, a notary public in and for said county and state, certify that _____ personally (1) appeared before me this day, (2) stated that he or she is a manager of **EBX-EM, LLC**, a limited liability company organized and existing under the laws of the State of Delaware, (3) acknowledged that the foregoing contract or agreement with the City of Durham carries on the company's business in the usual way, and (4) acknowledged the due execution of the contract on behalf of the company. This the _____ day of _____, 20_____.

My commission expires:

Notary Public