



REQUEST FOR BOARD ACTION

ITEM NO. 13

DATE OF MEETING: November 7, 2011

REQUESTED BY: Melinda Knoerzer, Administrative Assistant

SHORT TITLE: Resolution Authorizing Release of Escrow Funds to Mill Creek Waterway Restoration, Inc.: \$71,409.69

BACKGROUND: Beginning in 2007, Mill Creek Waterway Restoration, Inc., (MCWR) with the aid and assistance of a NC DENR Water Resources Grant and in partnership with Pender County, was able to undertake the dredging of the Mill Creek waterways complex for the benefit of the community's homeowners, their guests, and other members of the boating public, including commercial fisherman.

The Water Resources Division of NC DENR provided grant funds in the amount of \$702,687.28 and MCWR matched this with \$79,872 of private contributions. The County provided NO funding for this project. MCWR obtained all permits, coordinated engineering and construction of the project, and submitted invoices to the County for reimbursement from the State. All state funds passed through Pender County and, in accordance with Paragraph 5 of the attached agreement with MCWR, the County withheld 10% of the state funding for 24 months in order to guarantee performance and to make sure no claims have been made against the project.

Pursuant to the signed certification from Martin J. Evans, President of MCWR, there are no outstanding issues relative to this project. As they have complied with all provisions of their contract with the County, staff recommends reimbursement of the retainage in the amount of \$71,409.69.

SPECIFIC ACTION REQUESTED: Consider a resolution to authorize release of escrow funds to Mill Creek Waterway Restoration, Inc.

COUNTY MANAGER'S RECOMMENDATION

Respectfully recommend approval.

RB
Initial

RESOLUTION

NOW, THEREFORE BE IT RESOLVED by the Pender County Board of Commissioners that: Retainage in the amount of \$71,409.69 be refunded to Mill Creek Waterway Restoration, Inc. to complete the Mill Creek Waterway Dredging Project

60-407464-6075

Capital Improvement Program/Mill Creek Dredging

The Chairman/County Manager is authorized to execute any document necessary to implement this resolution.

AMENDMENTS:

MOVED _____ SECONDED _____

APPROVED _____ DENIED _____ UNANIMOUS

YEA VOTES: Brown ___ Tate ___ Rivenbark ___ Ward ___ Williams ___

George R. Brown, Chairman 11/07/11
Date

ATTEST 11/07/11
Date

Mill Creek Waterway Restoration, Inc.

I, Martin J. Evans, Authorized Agent for the Mill Creek Waterway Restoration, Inc., do hereby certify that the following is true:

- 1) Mill Creek Waterway Restoration, Inc., completed the excavation and dredge project of Mill Creek Waterway on November 6, 2009.
- 2) Since that time, we have received no notices of violation or other notification that the project was improperly completed.
- 3) Mill Creek Waterway Restoration, Inc., holds Pender County harmless in the event of any future violations.
- 4) This certification is offered in support of the final release of escrow funds being held for this project.



Signature

10.25.11
Date

MARTIN J. EVANS
Printed Name

**MILL CREEK DREDGING, PHASE II
MILL CREEK WATERWAY RESTORATION, INC.**

AGREEMENT, made and entered this 19th day of June, 2006 by and between **PENDER COUNTY**, North Carolina, a political subdivision of the State Of North Carolina, hereinafter referred to as "County", and **MILL CREEK WATERWAY RESTORATION INC.**, a non-profit corporation organized under the laws of the State of North Carolina, having its principal office in Pender County , North Carolina, hereinafter referred to as "MCWR".

WITNESSETH:

WHEREAS, MCWR wishes to initiate dredging activities to restore small boat navigation at low tide to the Mill Creek waterways complex for the benefit of the community's homeowners, their guests, and other members of the boating public including commercial fishermen; and

WHEREAS, MCWR is desirous of obtaining reimbursement from the State of North Carolina for a portion of the cost of performing dredging; and

WHEREAS, the State of North Carolina requires that Pender County act as a Sponsor of the dredging project in order to provide reimbursement; and

WHEREAS, Pender County wishes to assist MCWR in preserving, maintaining, and improving the water quality of the waterways of the Mill Creek community, for the purpose of insuring the continued use of waterways for recreational and navigational purposes and of safeguarding and perpetuating their biological, economic, and aesthetic value, so long as County funds are not placed at risk for the cost of the dredging project; and

NOW, THEREFORE, in consideration of the mutual benefits inuring to the parties hereto, and based upon the mutual covenants contained herein and the considerations stated therein, which are stipulated to be of value, the parties do hereby covenant and agree as follows

1. MCWR agrees and stipulates that under no circumstances will Pender County provide reimbursement from County funds and that any funds it receives pursuant to this agreement will be funds provided by the State of North Carolina. If for any reason funds are not provided by the State of North Carolina, then Pender County shall have no obligation to provide any funds to MCWR.
2. MCWR agrees that it shall oversee the dredging project and ensure that the project is completed in accord with the project narrative (Exhibit A). MCWR assumes complete responsibility for ensuring that all requirements imposed by the State of North Carolina in connection with the award of the reimbursement grant are met, including but not limited to obtaining all necessary and proper permits, compliance with laws and regulations regarding the award of contracts, complying with the terms of all permits, ensuring that the construction is

performed properly and ensuring that the project is open for use by the public. MCWR bears sole responsibility for securing easements and rights of way and securing a location to deposit spoil. In addition to, and not in limitation of the following, MCWR agrees that it shall undertake all requirements imposed upon Pender County by the "Resolution for State Assistance" attached hereto as Exhibit B. MCWR shall bear responsibility for keeping and maintaining all records necessary for implementation of the project.

3. MCWR agrees that it shall hire consultants and contractors which are properly insured for both liability and workers compensation claims, with the liability policy being in the amount of at least One Million Dollars (\$1,000,000). MCWR shall submit any contracts to County for review prior to entering into the contract. MCWR stipulates and agrees that no liability shall arise on the part of County by virtue of this review and that MCWR assumes all risk related to any such contracts. Pender County shall, to the extent possible, be named as an additional insured on all policies of insurance. MCWR agrees to hire only contractors or consultants who are able to provide proof of insurance in a form satisfactory to Pender County and in amounts satisfactory to Pender County. Should a contractor's insurance policy lapse or be cancelled then MCWR shall be required to obtain a liability policy in the minimum amount of One Million Dollars (\$1,000,000).
4. MCWR shall notify County of the start date of the project and shall notify County when 25%, 50%, 75%, and 100% of the project is completed. County may, but is not obligated to, inspect the work at any time upon reasonable notice to MCWR, and MCWR shall identify a contact person whom the County may contact to arrange inspections of the project work or any and all documents or records relating to the project. MCWR agrees that County is not providing supervision nor approval of the methods, means or quality of the work on the project, and MCWR shall not rely upon County for inspection of the work performed.
5. MCWR understands that State funding is anticipated to be 80% of the project cost, and will provide funding for all amounts for which reimbursement is not provided by the State of North Carolina from sources other than Pender County. MCWR further understands that Pender County shall retain Ten Percent (10%) of the total funds provided by the State of North Carolina for 24 months after completion of the entire project. Those funds may be used by the County for any costs, damages, fines or expenses which are incurred as a result of or arising out of the project, this contract or the grant from the State, including but not limited to hiring consultants, professional services, staff time, fines, penalties, attorneys fees, repayment of funds to the State or any other monetary cost or expense. County may unilaterally deduct from the 10% without approval or consent of MCWR, but County may, at its option, provide notice prior to incurring expense.
6. County agrees that it will apply for reimbursement from the State of North Carolina so long as MCWR is in full compliance with the terms of this contract, and all requirements, terms and conditions imposed by the State of North Carolina. MCWR bears complete responsibility for providing the documentation necessary to permit reimbursement to be made. County shall not be required to apply or seek any such reimbursement if, in its **SOLE DISCRETION**, the

documentation provided is inadequate or there is any possibility that the County would be exposed to liability for damages, repayment of grant funds or any other cost County will remit the reimbursement received from the State, less retained amounts, as quickly as possible but in any case within thirty days of receipt of the same. MCWR understands and agrees that County has no control over the availability of State funds nor over the time it will take to process requests. County may, with or without cause, terminate this Agreement or suspend its performance under this Agreement upon thirty (30) days notice to MCWR.

7. MCWR agrees that it **SHALL INDEMNIFY AND HOLD HARMLESS** County from any and all damages, claims, costs or expenses, including legal fees, which may arise or result from this contract, the dredging project or the grant from the State. The indemnity is without regard as to whether County is at fault, in whole or in part. MCWR agrees that it shall assume total responsibility for performing all the obligations imposed on County in Exhibit B, including without limitation the obligation to hold the State of North Carolina harmless. The intent of this agreement is that under no circumstances should County incur cost or expense as a result of this agreement, and MCWR undertakes to bear any costs, damages or expense which otherwise accrue to County.

8. MCWR understands and agrees that, in entering into this Agreement and providing services, it is acting as an independent contractor. Neither MCWR, nor its employees, officers, shareholders, contractors, members or personnel shall deemed or construed to be employees of Pender County. MCWR shall remain in complete operational control of the project. County shall not be responsible for any on-the-job injuries to MCWR's agents, contractors, shareholders, volunteers, or employees. MCWR shall control the hours, manner and methods of fulfilling its obligation under this agreement by their volunteers, employees and all other persons acting in their behalf.

9. This Agreement, with exhibits, constitutes the entire understanding of the parties and contains all of the terms agreed upon with respect to the subject matter hereof. No modification or rescission of the Agreement shall be effective unless evidence by writing signed by both parties to this Agreement.

10. The parties stipulate that this Agreement may not be assigned without the written consent of the other party.

11. It is agreed that County's failure to insist upon the strict performance of any provision of this Agreement or to exercise any right based upon a breach thereof, or the acceptance of any performance during such breach, shall not constitute a waiver of any rights under this Agreement. Should any dispute arise under this Agreement it is specified that the sole venue for resolution of the dispute shall be in the Superior Court of North Carolina. This Agreement shall be interpreted under the laws of the State of North Carolina.

12. It is stipulated and agreed that this Agreement is the product of negotiation of the parties, that each party has had the opportunity to have the Agreement reviewed by council of their choosing, and that the fact that one party may have prepared portions of the document shall not be deemed to make that party

the author of the Agreement for purposes of interpretation by any Court, arbitrator or tribunal.

13. In connection with the performance of this Agreement, MCWR agrees not to discriminate against any employee, member or applicant for employment or membership because of race, religion, color, sex, age, disability or national origin.

IN WITNESS THEREOF, the parties have hereunto set their hands and seals, by authority duly given, on the date first above written.

MILL CREEK WATERWAY RESTORATION INC.

PENDER COUNTY

Stuart A. Mossman

Stuart A. Mossman, President

NCDA# S457515

J. Chel

Chairman

Board of Commissioners

(CORPORATE SEAL)



(APPROVED AS TO FORM)

Carl (Trey) Thurman

Carl (Trey) Thurman
County Attorney

This instrument has been pre-audited in the manner required by the local Government Budget and Fiscal Control Act.

David J. McCole

David McCole,
Pender County Finance Officer

NORTH CAROLINA)
PENDER COUNTY)

I, Melinda K. Knoeczer, a Notary Public of the State and County aforesaid, certify that Stephen C. Holland personally appeared before me this day and acknowledged that he is Chairman of the Board of Commissioners of Pender County, and that by authority duly given and as the act of the Board, executes and seals the foregoing instrument.



WITNESS my hand and official seal, this 14th day of June, 2006

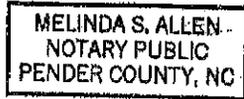
Melinda K. Knoeczer
NOTARY PUBLIC
My Commission expires 9-22-2007

MILL CREEK WATERWAY RESTORATION, INC.

NORTH CAROLINA)
PENDER COUNTY)

I, Melinda S. Allen, a Notary Public of the State and County aforesaid, certify that Stuart Mossman personally appeared before me this day and acknowledged that he is President of Mill Creek Waterway Restoration, Inc., a North Carolina corporation with its principal office in Pender County, and that by authority duly given and as the act of the Corporation, the foregoing instrument was signed in my presence.

WITNESS my hand and official seal, this 7 day of June, 2006



Melinda S. Allen
NOTARY PUBLIC
My Commission expires Nov 3, 2010

PROJECT NARRATIVE
For
STATE ASSISTANCE
FROM THE NORTH CAROLINA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
for
MILL CREEK DREDGING-PHASE 2

GENERAL

The Pender County Board of Commissioners is seeking State Aid to dredge the extremely important natural resource area known as Mill Creek located in Pender County, west of the AIWW, north of Futch Creek in New Hanover County and south of Nixon Creek in Pender County. This estuarine waterway complex comprises over 1 ½ miles of navigable channels consisting of three watershed creeks, four man-made canals and two boat ramps. Navigational access to and from the AIWW is via a dredged channel at the southern end of the mouth of the Creek.

The location and configuration of the Creek complex is shown on MAP "A" attached.

The Inlet Channel was dredged with State aid in Phase 1 -May/June 2006- to restore low-tide navigation (- 4' MLW) to and from the AIWW. The largest of the three canals (into Circle Drive) was also dredged in 2006. The other three canals were last dredged in 1995. With the exception of Deerfield Creek, the remainder of the Mill Creek complex, including the two watershed creeks Horn Creek and Deep Bottom Branch, was previously dredged over the period 1959 to 1970.(Deerfield Creek has never been dredged and is therefore not eligible for a CAMA permit at this time and is excluded from this Phase 2 scope). The current Phase 2 dredging plan is to restore low-tide navigation to those sections of Mill Creek which have become severely silted-up with watershed debris.

The Mill Creek community consists of four residential subdivisions- Long Point Estates, Washington Acres, Deerfield, and Water's Edge at Deerfield in Hampstead. The configuration is shown on the attached MAP "A" and in perspective in the attached aerial photographs #1 thru 4.

There are approximately 81 single-family home lots with docks along Mill Creek with another 24 lots with access to the water not yet developed. Nine of these lots in Water's Edge at Deerfield have recently completed docks. Furthermore, property owners within Washington Acres subdivision have rights to use the community boat launch ramp. An estimated 124 additional property owners, most boaters, have rights to use the ramp. Thus, 77% of the available home sites along Mill Creek are currently developed and another nine are being developed. Most of the homes on Mill Creek have boat docks. Several commercial fishermen use the inlet to access the Intracoastal Waterway and two commercial crabbers crab in the Creek. The Creek also contains oyster beds; however, harvesting is currently prohibited. The Creek is classified as a "secondary nursery area."

PREVIOUS DREDGING.

The Inlet Channel was dredged with State aid in Phase 1 -May/June 2006- to restore low- tide navigation to and from the AIWW. The largest of the three canals (into Circle Drive) was also dredged in 2006. The other three canals were last dredged in 1995. With the exception of Deerfield Creek, the remainder of the Mill Creek complex, including the two watershed creeks Horn Creek and Deep Bottom Branch, was previously dredged over the period 1959 to 1970. Affidavits from long term residents who witnessed this dredging at that time are on file.

PROPOSED DREDGING.

The current Phase 2 dredging plan is to restore low-tide navigation (- 4"MLW) to those sections of Mill Creek which have become severely silted up since they were last dredged. The planned dredging sites are shown on the attached MAP "B".

<u>Site</u>	<u>Location</u>	<u>Dredged Channel Dimensions- feet</u>	<u>Excavated Volume CY*</u>
#1.	Deep Bottom Branch	600 X 25 X - 4 MLW	1680
#2.	Waters Edge	850 X 30 X - 4 MLW	2280
#3A.	Horn Creek-Main	1500 X 30 X - 4 MLW	5300
#3B.	Horn Creek - side	268 X 15 X - 4 MLW	360
#4.	Horn Creek - extn.	617 X 20 X - 4 MLW	1590
#5.	Short Circle Dr. canal	450 X 30 X - 4 MLW	1140
#6.	Shoaling in Mill Creek (E2391250/N217500)	900 X 20 X - 4 MLW	1060
#7.	Long Point Estates Canal	1150 X 25 X - 4 MLW	1530
#8	Grady Scott Canal	360 X 25 X - 4 MLW	910
	Contingency	15%	<u>2380</u>

Total 18230

*Cubic yard volumes based on hydrographic surveys.(2006)

Note: Neither Deerfield Creek, nor the natural area between the two sections of Horn Creek have been previously dredged and are excluded from the scope of this Phase 2 dredging (and the CAMA Major Permit Application)

The proposed dredging will remove the run-off silt that has settled in the various sections. This material prevents the proper flushing of the Mill Creek basin and impedes

boat access to the Mill Creek community. Dredging should also assist to enhance the quality of the water and aquatic eco-systems through improved tidal flushing.

REGULATORY PERMITS.

The North Carolina Department of Environmental and Natural Resources (NCDENR)- Coastal Area Management Division has stipulated that the Mill Creek complex is not subject to the NC Environmental Protection Act, and both it, and the Division of Marine Fisheries, following site inspection and a review of documentation in several "pre-application" meetings, have agreed that the proposed dredging will be classified as "maintenance", thus paving the way for a CAMA Major Maintenance Dredging Permit application which is currently being finalized with the expectation that it will be successful.

SPOIL DISPOSAL.

There are no USACE spoil sites available for our use in the vicinity of Mill Creek, so the decision has been made to locate a site at the western end of Horn creek extension where spoil can be pumped ashore for dewatering via a pipeline using the culvert under Hughes Road. The location is a 110 acre area designated as Tract "C" in the Pender county records. Studies are underway to confirm the viability of this location and to obtain the necessary Soil Erosion and Sedimentary Control permit.

The disposal site will be designed to meet CAMA guidelines, and for the type and volume of spoil involved (in excess of 18000CY) will require a dike enclosure of approximately 5 acres. The dike walls will be approximately 7' high with room for 2 ½ feet of sediment, 2 feet of water and 2 feet of freeboard.

Permission to use the site is conditional on its meeting environmental requirements; however, choosing a viable 5 acre site from the available 110 acres is not considered a problem.

The spoil feed line into the spoil site and the drain line from it back to Horn Creek, will be routed and pulled across the intervening wet-lands in such a manner as to cause minimum disturbance to those wet-lands. The existing culvert under Hughes Road will be used to route the piping.

EXPECTED BENEFITS

- 1) Improved water quality in Mill Creek and adjacent canals due to increased tidal flow. After a heavy rain that muddies the creeks, larger flushing volumes should allow quicker dissipation of the silt run off from upstream.
- 2) Increased sea life activity (more dolphins, otters, schools of small-fin fish); and increased fish and shrimp populations.
- 3) More crabs for commercial and recreational users,
- 4) Safer passage by all users, local and regional, recreational and commercial.

PROJECT JUSTIFICATION

Mill Creek Waterway Restoration Inc. is a NC non-profit corporation, which, with the support of the Mill Creek Community and its various Home Owners Associations', as

well as Pender Watch and Conservancy, is committed to preserving, maintaining, and improving the water quality of the waterways within the Mill Creek estuary for the continued use of the creeks and canals for recreational, environmental, and economic purposes. Furthermore, it is safeguarding and perpetuating the biological, economic and aesthetic value. State assistance through a Water Resources Development Grant will be invaluable in helping it to accomplish its goals.

Its goals are also consistent with the objectives of the US Army Corps of Engineers proposed 206 Restoration Project for Mill Creek currently on hold due to lack of Federal funds. State funds for this Phase 2 dredging project will qualify towards the share of local (non Federal) funding prescribed in the Restoration Project should Federal funds become available in the future.

Attachments:

1. Map "A" – Mill Creek Location and Configuration.
2. Map "B" - Phase 2 dredging sites.
3. Aerial photos #1-4 of the Community.
4. MAP "C" – Spoil disposal location.
5. Aerial photo #5 – Proposed spoil site location.
6. Project Budget.