

# **OPERATING PROTOCOL FOR THE CHEOAH RIVER RESOURCE MANAGEMENT AND ENHANCEMENT FUND**

## **I. Introduction**

The Cheoah River Resource Management and Enhancement Fund (“Fund”) (also known as the North Carolina Resources Management and Enhancement Fund) was established through the Relicensing Settlement Agreement (April 2004) (“Settlement Agreement”) for the Tapoco Hydroelectric Project (the “Project”) (designated as Federal Energy Regulatory Commission Project No. 2169) and the license (“License”) for the Project (as amended), which is reported at 110 FERC ¶ 61,056 (25 Jan. 2005). Pursuant to the License, the Licensee is required to provide \$25,000 per year (in inflation-adjusted dollars) to the Fund for each of the forty years of the License, except that in the first year of the License the Licensee is required to provide \$100,000 and in the last three years of the license Licensee is not required to provide any funds. The Fund is to be managed by agreement by the North Carolina Wildlife Resources Commission (“WRC”), the North Carolina Department of Environment and Natural Resources (“DENR”), the USDA Forest Service (“FS”), the United States Fish and Wildlife Service (“FWS”), and the Eastern Band of the Cherokee Indians (“EBCI”), and is to be used to mitigate the continuing environmental and social impacts associated with the operation of the Project, in particular the Santeetlah and Cheoah developments, and the portion of the Calderwood development in North Carolina, on the Cheoah and Little Tennessee Rivers, as stated more specifically in the Settlement Agreement and the License.

## **II. The Fund Board**

### **A. Board Members and Representatives**

The Fund will be administered by a board (“Fund Board”) consisting of one representative each from the WRC, DENR, FWS, FS, and EBCI (collectively the “Board Members” and the “Representatives”). When a Board Member executes this Protocol, it shall identify (in the space provided) the individual who shall be its Representative. A Board Member may appoint a new Representative at any time by notifying the Licensee and other Board Members in writing of the change. All actions of Board Members discussed below shall be taken through such Representatives only.

### **B. Chair**

The Fund Board will be chaired by a member of the Fund Board (“Chair”) on an annual rotating basis. The order of rotation is: FS, DENR, FWS, WRC, and EBCI . The Chair for the first year will be established by majority vote at the initial Fund Board meeting. The rotation will begin with the Board Member selected as the first Chair. Duties of the chair will include chairing any meetings of the Fund Board and providing administrative support for the Board, including preparation of meeting minutes, preparation of the Annual Report (described below), and other related duties. A Representative of each Board Member will be required to serve as Chair for one year in each five-year period beginning in 2006 unless the Fund Board unanimously agrees to excuse such service or vary the rotation. The period of service will be from January 1 to

December 31 each year. In the first year of this agreement, the period of service will be from the initial Fund Board meeting until December 31 of the following year. Each Board Member shall bear the costs of the office of Chair when it is the Chair. The Board Members may make other arrangements to provide for such costs but shall not use Fund money to provide for such costs.

C. Committees

The Fund Board may establish any number of committees, which shall include no less than two Board Members, and shall include only Board Members. When establishing a Committee, the Fund Board shall identify the members of the Committee, the purpose of the Committee, the tasks the Committee is required to undertake, and the procedures by which the Committee must complete those tasks. The Fund Board shall not delegate to any Committee any decisionmaking authority regarding which projects to fund or whom to select as the Fiduciary Entity.

D. Delegation of Authority

The Board Members may delegate any authority of the Fund Board or the Chair to any individual Board Member or any committee by unanimous vote, which shall not be effective until it is reduced to writing; provided that, the Board Members shall not delegate decisions regarding which projects to fund or whom to select as the Fiduciary Entity. Any delegation may be withdrawn by a majority of the Board Members other than those to which the delegation was made.

E. Advisors to the Fund Board

Non-governmental organizations (“NGO”) that are signatories to the Settlement Agreement will serve as advisors to the Fund Board (“Advisors”). Advisors will be given the opportunity to review and provide comments to the Fund Board on funding proposals, to participate in any meetings held by the Fund Board, and to review and comment on the Annual Report (described below). Within three months of the selection of the first Chair, the Chair shall send a notice to all NGOs that were signatories to the Settlement Agreement asking them to indicate if they wish to receive future notices of Fund Board meetings. Only those entities making positive replies within sixty days shall be given future notices, provided that if an NGO that was a signatory to the Settlement Agreement at any time submits a written request for notice of future meetings, that entity shall be an Advisor and such notice shall thereafter be provided to that Advisor. Advisors will be given timely notice of all meetings of the Fund Board and the opportunity to review and provide individual comments to the Fund Board on project selection proposals, to participate in any meetings held by the Board regarding the use of the Fund, and to review and comment on the Annual Report (described below). No Advisors will have any decisionmaking authority with respect to any of the decisions of the Fund Board (or any committee) described herein or in related documents. In order to participate in any meeting of the Fund Board, an Advisor should notify the Chair at least one week in advance of the meeting. Unless otherwise approved by the Fund Board, only one representative from any Advisor may participate in a Fund Board meeting.

F. Meetings of the Fund Board

The Fund Board and a representative of the Licensee shall hold an annual planning meeting during the fourth quarter of each year (“Annual Meeting”) to discuss and decide on funding priorities for the subsequent year. At this Annual Meeting the Fund Board shall also review the implementation and status of activities previously approved for funding.

The Chair will be responsible for scheduling the Annual Meeting and will provide to the other Board Members, the Licensee, and Advisors an agenda and supporting materials, including all funding proposals received and upon which action is contemplated, at least two weeks prior to the scheduled meeting.

By executing this Protocol, the Board Members unanimously agree that any meeting may be held in whole or in part by telephone. Any Board Member or Advisor, or the Licensee, may participate fully in any meeting by telephone. Upon timely request, the Chair shall arrange for participation by telephone. Any Board Member may participate, including voting or being part of a consensus, by proxy, so long as the proxy relationship is disclosed to all other Board Members in advance of the meeting.

Any Board Member (including the Chair) may request that the Chair convene a meeting in addition to the Annual Meeting if the Board Member believes that a specific proposal should be discussed and decided upon prior to the Annual Meeting. Upon such request, the Chair shall notify all other Board Members by any appropriate means of the request. If any Board Member (including the Chair) other than the party requesting the meeting also informs the Chair that it agrees with the request for the additional meeting, then the Chair shall convene a meeting of the Fund Board and the Licensee to discuss and decide upon the specific proposal.

G. Decisionmaking

Unless otherwise specified, all decisions of the Fund Board and of any committee shall be by consensus only. Consensus is reached when: (1) the majority of the Board Members “like” the outcome or proposal being made; (2) all Board Members can “live with” the outcome or proposal being made; and (3) all Board Members will advocate the decision with others outside the Fund Board. A unanimous decision occurs only when all Board Members affirmatively vote in favor of the decision.

The Fund Board may make decisions only during meetings. A meeting occurs at the date, time and place identified by the Chair in advance of the meeting and only if all Board Members are present (even if only by telephone or proxy). If one or more Board Members are not present, the Fund Board may reach tentative decisions. These tentative decisions shall be communicated to non-present Board Members in writing by the Chair. If the non-present Board Member(s) fails to object to the tentative decisions within fourteen calendar days of the mailing of such notice, then the tentative decisions are final.

If any Board Member fails to attend two consecutive properly announced meetings, the Board Member shall be considered to consent to all subsequent decisions of the Board Fund (that is, all

decisions made in the third meeting and beyond), until such Board Member again attends a meeting (physically, by telephone, or by proxy), provided that such Board Member may still object to such decision in writing within the fourteen calendar days specified above.

H. Notices

All notices and information shall be delivered by first class mail unless the Licensee, Board Member, or Advisor agrees to receive notices by electronic means. All parties are encouraged to agree to accept notices by electronic means in order to reduce the costs and resources associated with distributing information.

I. Liability

A Board Member shall include in any contracts or other agreements provisions requiring the parties to the contract or other agreement (other than another Board Member) to indemnify and hold harmless the Board Members for any and all injury, loss, or damage, that any Board Member may suffer as a result of claims, demands, losses, or judgments incident to the contract or other agreement, to the extent allowed by law. In the case in which a Board Member enters into a contract or other agreement with a Federal, State or other governmental entity, indemnification may be limited to that as prescribed under Federal and State Tort Claims Acts or similar limiting law. The Board Members, individually and collectively, do not waive sovereign immunity by entering into this agreement (or by entering into any contract or memorandum of agreement pursuant to this agreement, except as so provided in such contract or memorandum of agreement) except as otherwise provided by law. A Board Member shall provide in any contracts or other agreements language indicating that none of the Board Members waives sovereign immunity or any other defenses available to them by entering into such contract or other agreement. In addition, all written requests for bids or proposals shall stipulate that all bids or proposals are accepted subject to the understanding that none of the Board Members waives sovereign immunity or any other defenses available to them by reviewing and deciding on an appropriate contractor or vendor of goods or services.

J. Nondiscrimination

The Fund Board shall comply with all Federal and State statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964, 40 U.S.C. § 2000, which prohibits discrimination on the basis of race, color, disability, or national origin; (b) Title IX of the Education amendments of 1972, as amended, 20 U.S.C. §§ 1681-1683, and 1685-1686, which prohibits discrimination on the basis of sex; and (c) Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 794, which prohibits discrimination on the basis of disabilities. The Board Member shall include in each contract or other agreement appropriate nondiscrimination statements.

K. Costs

Except as specifically provided in this Protocol, all costs, including costs of attending meetings, preparing documents, and arranging conference calls, shall be borne by the Board Members.

The Board Members may arrange to distribute these costs among the Board Members at their discretion.

L. Public Relations

The Fund Board may arrange to communicate to the public the benefits of the activities approved by the Fund Board.

**III. Revenue Source**

A. Tapoco Project Licensee Funding Commitment

The Fund shall be funded as prescribed in the Settlement Agreement and License, which are summarized as follows: The year the License becomes effective, which is 2005, the Licensee will make a contribution of \$100,000; and the Licensee will contribute \$25,000 annually thereafter, except for the final three years of the License. In these final three years, the Licensee will make no payments. Each payment will be made by January 31 of the year in which it is due. The funding commitment is stated as of the year 2003 and such sums will be escalated according to the Gross Domestic Product Implicit Price Deflator. The sum due for any year will be calculated as of January 1 of that year. All sums received are joint property of the Board Members and the Licensee shall have no further responsibility therefor. To the extent allowed by law, the Board Members shall indemnify the Licensee and save the Licensee harmless in any litigation, save litigation initiated by the Licensee, in which expenditures from the Fund are at issue.

B. Cost Share Supplementation

The Board Members and Licensee recognize that establishment of the fund creates a “seed source” of monies that can be combined with other contributions to expand the scope of possible accomplishments. Accordingly, the Fund will be structured and administered so as to allow cost share and other contributions to be incorporated into the fund.

C. Gifts

The Fund may accept monetary and in-kind donations, so long as the Fund Board retains full authority to dispose of such gifts, within the restrictions established by the Settlement Agreement, the License, and this Protocol. Any gifts shall be used for the purposes and through the procedures described in this Protocol and as though it were part of the principal received from the Licensee.

**IV. Fund Administration**

All monies received by the Fund, including amounts paid by the Licensee, cost share contributions, other contributions and gifts, and any interest or appreciation, will be managed by a fund administrator (“Fiduciary Entity”) selected by the Fund Board with the consent of the

Licensee. The Fiduciary Entity must be identified prior to transfer of any funds from the Licensee or any other source to the Fund.

The documents authorizing the Fiduciary Entity to manage the Fund (including receiving, holding, and disbursing money) must be signed by a representative of each Board Member who has the authority to authorize a third party to hold and manage its money. The Fund Board may select as the Fiduciary Entity one of the Board Members, but, in such case, the Board Member selected cannot participate in the selection decision. As indicated above, the Fund Board may not delegate the responsibility to select a Fiduciary Entity.

In any contract or agreement with a Fiduciary Entity, the Fund Board:

- (i) Shall require that the Fiduciary Entity shall not disburse money unless the disbursement is previously approved in writing by the Chair and one other member of the Fund Board.
- (ii) Shall require that the Fiduciary Entity shall submit annually by March 1 of each year to each Board Member and the Licensee a report (“Fund Report”) that shall include a detailed statement of:
  - (a) The balance of funds as of December 31 of the previous calendar year;
  - (b) Amounts received by and payments out of the Fund in the previous calendar year, including all cost share or other contributions to the Fund and all interest earned;
  - (c) All outstanding financial obligations and remaining commitments not yet invoiced as of the end of the previous calendar year;
  - (d) The expected balance of funds available for expenditure in the next calendar year, which shall include current cash balances, expected income from annual payments by the Licensee, other expected income, and amounts due under current contracts and other agreements.
- (iii) Shall provide that the Fiduciary Entity shall, at the Fund Board’s request, update the Financial Report to reflect the Fund’s finances as of September 30 in order to facilitate funding decisions at the Annual Meeting.
- (iv) May authorize the Fiduciary Entity to invest the Fund money only in guaranteed investments. Any interest shall be used for the purposes and through the procedures described in this Protocol and as though it were part of the principal received from the Licensee.
- (v) Shall authorize the Fiduciary Entity to retain a reasonable portion of the Fund for reasonable direct administrative, legal, and overhead costs associated with management of the Fund.

- (vi) Shall require that the Fiduciary Entity disburse money from the Fund only as directed by the Fund Board as provided in this Protocol.

## **V. Funding of Projects**

### **A. Solicitation of Funding Proposals**

The Fund Board or any individual Board Member may solicit proposals for funding by the Fund from any entity, including universities, non-profit organizations, state or federal agencies, federally recognized Tribes, individuals or corporations. The Fund Board may receive proposals at any time.

### **B. Funding Decisions**

As specified in the Settlement Agreement, the Fund Board may agree to fund the following activities:

- Monitoring of biotic and abiotic parameters.
- Addition of large woody debris and gravel and vegetation management in the Cheoah River below Santeetlah Dam.
- Other natural stewardship activities, including but not limited to, (a) threatened and endangered species recovery efforts, (b) control of exotic species and environmental outreach, and (c) education directly related to Cheoah River and Little Tennessee River resources directly affected by ongoing Project operations.

The Fund Board shall prefer proposals that contribute most to restoration of ecosystems directly affected by Project operations and to those activities necessary for effective management of resources associated with the Project. The Fund Board shall also prefer decisions that would support matching funds and funding enhancements. The Fund Board may fund activities not directly related to ongoing Project operations but only by unanimous consent of the Fund Board and the Licensee.

### **C. Funding Limitations**

The Fund Board shall not approve any proposal unless the proposal, or a defined and severable stage of the proposal, can be funded using the expected balance of funds. The Fund Board is not required to approve any minimum number of projects or to spend any minimum dollar amount in any year.

The Representative of a Board Member shall not administer funds awarded to the Board Member that the Representative represents.

The Chair shall not authorize the disbursement of funds unless all requisite permits, licenses, *etc.* for an approved project have been secured.

In the event that any dispute arises pursuant to this Fund Agreement, the Chair shall, upon the request of an aggrieved Board Member, promptly convene a meeting to discuss the dispute. The Board Members are also encouraged to discuss the dispute outside such meeting. In the event that resolution cannot be reached by the Fund Board within ninety days after the request for the meeting, the dispute may be referred to the Parties to the Relicensing Settlement Agreement and handled pursuant to the dispute resolution provisions contained therein.

**D. Funding Process**

The Fund Board shall fund projects through contracts, memoranda of understanding, or similar arrangements. Any proposals that are funded by the Fund and carried out by an entity that is not a Board Member shall be under contract between one or more Board Members and such entity (or by memorandum of agreement between the entity and one or more Board Members if the entity is a government agency and the Board Members deem a memorandum of agreement to be appropriate). The Fund Board shall select the Board Member(s) with which the contract (or memorandum of agreement) shall be made. The Board Member(s) shall follow laws and procedures applicable to such Board Member(s) when selecting an entity to carry out a proposal and executing and administering the contract. Any proposals that are funded by the Fund and carried out by a Board Member shall be under memorandum of agreement among all Board Members.

**VI. Annual Report**

The Chair shall prepare a report (“Annual Report”) that describes all specific activities for which money was disbursed from the Fund in the previous calendar year, and describes amount received into and disbursed from the Fund in the previous calendar year. The Chair shall distribute a draft report to the Board Members by March 31 each year, and each Board Member shall provide any comments to the Chair by May 1. The Fund Board shall deliver the Annual Report to the Licensee by June 15 of each year.

**VII. Audit**

The Fund Board may cause to be conducted an independent review of Fund activities at any time. The cost of such review shall be borne by the Fund. The Fund Board shall cooperate with any independent review conducted by the Licensee of Fund activities the purpose of which is to ensure that the Fund is being administered properly to achieve the purposes of the Settlement Agreement. The costs of a review by the Licensee shall not be borne by the Fund.

**VIII. Relationship to Settlement Agreement and License; Severability**

This Protocol shall be interpreted to the extent possible in a manner that is consistent with and carries out the purposes of the Settlement Agreement and the License. In the event of a conflict between this Protocol and either the Settlement Agreement or the License, the Protocol provisions shall be deemed amended consistent with the Settlement Agreement or the License.

The provisions of this Protocol are severable and to the extent any provision is deemed unenforceable it shall not affect the validity or enforceability of any other provision or of this Protocol as a whole.

**IX. Protocol Modifications**

Any Board Member may propose that this Protocol be amended at any time by providing written notice to the Chair with copies to the other Board Members. The notice shall state the substance and basis of the proposed amendment. The Chair shall promptly convene a meeting to discuss and decide upon the proposal. If the Board tentatively approves the proposal by consensus, the Chair shall distribute a draft amended Protocol and to all Board Members within thirty days of the meeting in which the proposed amendment was tentatively approved, and shall distribute a signature page to each Board Member (including the Chair). The Protocol shall be amended if all Board Members return a signed signature page. Upon receipt of the last signature, the Chair shall distribute the amended Protocol to the Board Members, the Licensee, and the Advisors.

**X. Signature and Effective Date**

This Protocol may be signed in separate parts. The Protocol is effective as soon as each Board Member signs a copy of the Protocol and any one Board Member is in possession of a signed copy from each Board Member. Signature pages follow.

-- ## --

Operating Protocol for the Cheoah River Resource  
Management and Enhancement Fund

June 19, 2006

**APPROVED FOR THE CHEOAH RIVER FUND BY:**

**NORTH CAROLINA WILDLIFE RESOURCES COMMISSION**

**BY:** Richard B. Hamilton

**NAME:** RICHARD B. HAMILTON

**TITLE:** Executive Director

**DATE:** 6/20/06

NC Wildlife Resources Commission Representative: Chris Goudreau,  
Hydropower Licensing Coordinator, Marion, 828-652-4360 ext 223

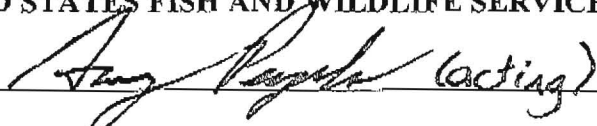
Operating Protocol for the Cheoah River Resource  
Management and Enhancement Fund

June 19, 2006

**APPROVED FOR THE CHEOAH RIVER FUND BY:**

**UNITED STATES FISH AND WILDLIFE SERVICE**

**BY:**

 (acting)

**NAME:**

BRIAN P. COLE

**TITLE:**

Field Office Supervisor

**DATE:**

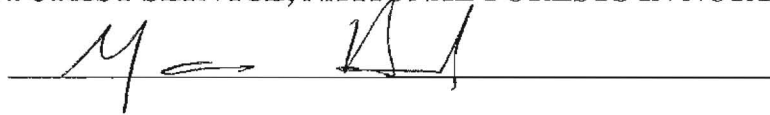
6. 22. 06

US Fish & Wildlife Service Representative: Mark Cantrell,  
Fish and Wildlife Biologist, Asheville, 828-258-3939 ext 227

**APPROVED FOR THE CHEOAH RIVER FUND BY:**

**USDA FOREST SERVICE, NATIONAL FORESTS IN NORTH CAROLINA**

**BY:**



**NAME:**

MARISUE HILLARD

**TITLE:**

Forest Supervisor

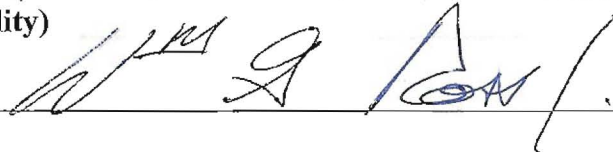
**DATE:**

6/29/06

Forest Service Representative: Jason Farmer, Fisheries Biologist,  
Cheoah Ranger District, 828-479-6431

**APPROVED FOR THE CHEOAH RIVER FUND BY:**

**NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES (Division of Water Resources, Division of Parks & Recreation and Division  
of Water Quality)**

**BY:**  \_\_\_\_\_

**NAME:** WILLIAM G. ROSS, JR.

**TITLE:** Secretary

**DATE:** 6/21/06

NC Dept of Environment and Natural Resources Representative; Steve Reed,  
Hydropower Licensing Coordinator, Raleigh, 919-715-5424

Operating Protocol for the Cheoah River Resource  
Management and Enhancement Fund

June 19, 2006

**APPROVED FOR THE CHEOAH RIVER FUND BY:**

**EASTERN BAND OF THE CHEROKEE INDIANS**

**BY:** Michael L. Bolt

**NAME:** Michael L. Bolt

**TITLE:** Water Quality Section Supervisor

**DATE:** June 20<sup>th</sup> 2006

Eastern Band of the Cherokee Indians Representative; Michael Bolt, Water Quality Section Supervisor, Cherokee, 828-497-6824