

HARPETH CONSERVANCY
OBED WATERSHED COMMUNITY ASSOCIATION
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
RICHLAND CREEK WATERSHED ALLIANCE
TENNESSEE CHAPTER OF THE SIERRA CLUB
TENNESSEE CLEAN WATER NETWORK
TENNESSEE CONSERVATION VOTERS
TENNESSEE ENVIRONMENTAL COUNCIL

January 10, 2019

BY EMAIL ONLY

water.permits@tn.gov

Tennessee Department of Environment and Conservation
Division of Water Resources
Natural Resources Unit
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 11th Floor
Nashville, TN 37243

Re: Comments on Draft Stream Mitigation Guidelines and Draft Mitigation Debit Tool

Dear Sir or Madam:

The undersigned commenters (“Commenters”) appreciate the opportunity to comment on the proposed / Draft Stream Mitigation Guidelines (the “Guidelines”) and Draft Mitigation Debit Tool (collectively, the “Guidance”). Although we appreciate the work that went into formulating the Guidance, it suffers from several fundamental defects and should be substantially revised.

First, the Guidance will not achieve its stated objectives – it will not create a workable system for mitigation or a market for mitigation credits, and in fact, creates substantial incentives to “game” or cheat the system it does create. Second, and closely related to our first concern, there is no method to verify either the condition of the streams affected, or the benefits supposedly fostered by the Guidelines. Third, the system created by the Guidelines will cause or contribute to violations of the federal Clean Water Act,¹ and the Tennessee Water Quality Control Act (“TNWQCA”).² Fourth, the

¹ 33 U.S.C. §1251 *et seq.*

² Tennessee Code Annotated (“TCA”) § 69-3-101 *et seq.*

Guidance does not contain any requirement or way to track cumulative impacts to streams. Fifth, the Guidance does not deal with the special problems associated with urban or headwaters streams. Sixth, the Guidance does not deal with many of the long-recognized issues associated with mitigation projects. Commenters will discuss each of these issues in turn.

As an initial matter, Commenters object to the issuance of the Guidance as “guidance” rather than using notice-and-comment rulemaking. The Guidance appears intended to bind third parties. As such, Commenters and the public generally are deprived of the ability to challenge the Guidance absent the use of the procedures under the UAPA for notice-and-comment rulemaking. If the Guidance is not intended to “bind” third parties, it must specify why and under what conditions TDEC considers it not to have such effect.

Additionally, please clarify how TDEC will be entitled to enforce violations of the Guidance against regulated entities alleged to be in violation of such non-binding documents. Please also clarify how violations of the provisions of various guidance documents, or failure to require that guidances or policies be followed in a particular instance, can support or a citizens’ suits under CWA Section 505. To the extent that the use of the Guidance is intended to undermine the ability to TDEC to enforce the law, or of citizens to avail themselves of the remedies under CWA Section 505, Commenters object thereto.

Similarly, please clarify how citizens may challenge the decisions of interagency review teams (IRTs) with respect to antidegradation decisions in particular, and their relationships to citizens’ rights under CWA Section 505.

1. The Guidance will not achieve its stated objectives – it will not create a workable system for mitigation or a market for mitigation credits, and in fact, creates substantial incentives to “game” or cheat the system it does create.

Commenters understand that Tennessee will continue to grow and welcome that growth. At the same time, that growth should attempt to preserve what is unique and special about Tennessee – the State’s natural heritage. That natural heritage is itself a significant driver of economic activity.³

Mitigation of the effects of growth therefore is an important method to facilitate that growth. Unfortunately, the Guidance (and the proposed revisions to Tennessee’s water quality standards, antidegradation policies, and aquatic resource alteration permits;⁴ collectively, the “Regulations,” which the Guidance is intended to implement), fail in their stated mission. The Guidance should,

³TN H2O Plan, Future of Our Water Resources -- Water-Based Recreation and Tourism (available at <https://www.tn.gov/content/dam/tn/environment/documents/TN%20H2O%20Recreation%20and%20Tourism%20Chapter.pdf>; accessed Jan. 5, 2019); Charles Sims, Ph.D. Jill Welch, Ph.D., *et al*, “The economic value of open space in the Cumberland Region,” May 7, 2018. (available at https://www.cumberlandregiontomorrow.org/about/resources/5818crt_open_space_report_final_update5-7-3.pdf; accessed Jan. 5, 2019) (note that small parcels can constitute valuable open space).

⁴ Included in the Board of Water Quality, Oil & Gas October 2018 Meeting Materials, available at <https://www.tn.gov/environment/about-tdec/boards-and-commissions/board-tennessee-board-of-water-quality--oil-and-gas.html> (accessed Jan. 6, 2019). Commenters incorporate by reference their comments dated on or about July 31, 2018 on the proposed Regulations.

but does not, attempt to foster mitigation in the areas where degradation is proposed / where resources are to be lost, and it does not insure that sufficient mitigation will occur or that it will be successful.

First, one of the more significant factors in the failure is the fact that the system created by the Regulations and the Guidance requires mitigation of “Existing Conditions” only.⁵ A substantial additional market for mitigation credits as well as to address cumulative impacts, would be to track, and require those who want to further degrade Tennessee’s streams to ameliorate, the current condition of the streams they seek to alter. The Louisville District Army Corps of Engineers operates an apparently successful mitigation system in Kentucky, Indiana, and Illinois that generally requires one-to-one mitigation per linear foot of stream, which implicitly assumes the stream is at its highest functioning level at the time of impact.⁶

Second, there are flaws in the options applicants are allowed to choose between to calculate functional loss in Section 4.1 of the Guidelines. The net effect of these flaws is that the Guidelines violate two (2) cardinal principles necessary to create a mitigation system of any kind, simplicity and certainty.

Option 1, in which applicants assess all existing conditions, and which presumably will be used for larger projects (and Option 2, to the extent applicants actually assess their chosen parameters), appears to create much needless complexity (and without regard to the requirements of law it is supposed to address, as discussed in section 3 of these comments). For these large projects, the Guidance supposedly requires the collection of a substantial amount of data.

If TDEC actually requires this data to be collected and to be analyzed, it could substantially slow the process of performing mitigation projects and/or the creation and sale of credits. Additionally, collection of all of the data is likely to substantially increase barriers to performing mitigation projects and/or entry into the business of mitigation banking, as well as increase costs for project proponents, both of which are quite likely to reduce mitigation and decrease the creation of mitigation credits. Alternatively, if the data is collected but not analyzed, that process will effectively be a “rubber stamp” of applicant-collected and generated data, which will simply decrease the credibility of the program and also not result in performance of necessary mitigation projects. Further, collection of all the data contemplated may also decrease the amount of credits created.

We note that other Southern states are apparently running considerably more simplified programs successfully. Georgia, for example, uses only three (3) tiers to categorize stream conditions.⁷

⁵ See the definition of “Existing Conditions” in the proposed Regulations, Tenn. Comp. R. & Regs 0400-40-07-.03(16).

⁶ U.S. Army Corps of Engineers, Louisville District’s 2008 Highlights & Frequently Asked Questions For Use in Evaluating, Documenting, and Compensating for Impacts to Waters of the US, p. 5 (available at <https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/LRLMitigationQAs.pdf>; accessed Jan. 9, 2019).

⁷ U.S. Army Corps of Engineers, Savannah District’s 2018 Standard Operating Procedure for Compensatory Mitigation, p. 9 (available

Commenters urge TDEC to study the performance of Louisville District's and Georgia's systems more closely and to adopt those elements that are best designed to implement the goals of the Clean Water Act and the TNWQCA.

Third, Option 3 gives applicants the ability to misstate the condition of a stream in order to obtain the ability to further degrade that water. By definition, a water not on the 303(d) list meets all water quality standards. Only in the case of demonstrated economic and social necessity are such waters to be degraded, and even so, any permitted degradation must result in the water still meeting applicable water quality standards.⁸ Option 3 does not recognize or give credit for a water that meets all applicable water quality standards but is not an ETW or ONRW, and instead of giving such waters a 1.0 score, gives them, without explanation or gradation, gives them a 0.8 score.⁹ Further, the Guidance does not explain how the results required by TDEC's own rules are to be obtained.

Option 2 combines the worst of both possibilities and allows an applicant to choose the method that will permit the most degradation.

The degradation permitted by Options 1 and 2 is further exacerbated by the failure of the Regulations and Guidance to provide for any system for audit or verification of stream conditions or of the results of mitigation obtained, as discussed further below.

Fourth, the system as presently proposed is very unlikely to achieve the stated goals and is, in fact, likely to exacerbate degradation of Tennessee's streams. The incentives created by the proposed system will be to consistently deflate and understate the condition of the stream in question, to portray the condition of the stream in question as more degraded than it actually is, so that fewer credits are required to offset the unavoidable loss of a linear foot of stream and so that additional ability to degrade will be created. The incentive will be always to find that the condition of the stream in question is at most a "0.4" (or even less), regardless of the actual condition, to "find" the ability to do additional projects and degrade the stream further.

Fifth, in section 4 of these comments we discuss issues related to the improper location of mitigation projects, which are likely to result in violations of state and federal law. Perhaps the best way to assure that mitigation occurs within the same stream segment as the proposed degrading activity (and classified use that must be maintained) is to provide adequate pricing for credits so that landowners in the vicinity of a project will be incentivized to dedicate their properties for

at <https://www.sas.usace.army.mil/Portals/61/docs/Regulatory/publicnotices/PN%20for%20SOP%20w%20Enclosure%20042718.pdf?ver=2018-04-27-173136-363>; accessed Jan. 4, 2019).

⁸ See, e.g., Tenn. Comp. R. & Regs. 0400-40-03.06(1)(a), (b)(2)iii., (3)(a). (proposed Regulations)

⁹ The Guidance further does not recognize that it is possible for a stream that is either a ETW or ONRW to have impaired segments, which by definition would have an existing condition lower than 1.0.

mitigation.¹⁰ To date, TDEC has not created such a system, either through the Guidance or otherwise.

Sixth, closely related to this is the issue of multipliers for out-of-system mitigation. Section 4.4 of the Guidelines provides for multipliers ranging from 1.25:1 for mitigation projects one HUC-8 away to 2:1 for projects three (3) HUC-8's away. Although the concept of increasing multipliers for further away projects has been recognized,¹¹ TDEC's does not provide any support for the multipliers chosen, including any support for the proposition that the proposed multipliers will have the desired effect. Indeed, the multipliers offered do not implement and actually contradict the principles proposed earlier in Section 4.4. Although that section speaks in terms of priorities for "projects providing an increase in resource values to degraded streams on-site or within the immediate impact area...", it offers no premium for such laudable goals. Instead, it offers multipliers only beginning with project one (1) HUC-8 away, to those for projects three (3) HUC-8's away.

The Guidance contains a number of related contradictory statements and principles, some of which, if properly implemented, could ameliorate degradation of Tennessee's streams. Unfortunately, the Guidance does not implement these principles. For example, Section 1 (page 7) of the Guidelines states that:

Stream compensatory mitigation projects provide functional lift to offset permitted impacts. These projects should be designed to improve the resource value and function in streams that are currently not supporting their designated uses, or otherwise demonstrated to be significantly degraded. Restoring a stream's ability to support its designated uses provides the maximum benefit and value to the citizens of Tennessee.

This appears to say that mitigation of an impaired stream would be given preference over a project that would try to compensate an impact on an unimpaired stream, by finding enhancement opportunities downstream of the impact area. However, nowhere in the Guidance is this principle implemented.

¹⁰ Commenters have long raised this point with TDEC. See, e.g., comments dated February 22, 2017 re File Number LRN-2016-00511, Public Notice 17-03 and February 10, 2016 re File Number LRN-2011-00206, Public Notice 15-46, which are attached.

¹¹ See, e.g., J. B. Ruhl And James Salzman, "The Effects of Wetland Mitigation Banking on People," NATIONAL WETLANDS NEWSLETTER, Volume 28, Number 2, March-April 2006, at p. 11-12 (available at <https://poseidon01.ssrn.com/delivery.php?ID=064009119124124120098087113071105126031031005037095033119001104125086120095005087077009121016122105097101111075001005012018113026076045089042088125002097126013108006021073074122094093102012067101116113119101121023104080122082006098121120098069069102&EXT=pdf>, accessed Jan. 3, 2019):

"To change how wetland mitigation banking influences ecosystem service distribution, we could change the incentive structure. For example, an incentive premium, such as an enhanced credit allotment, could be awarded to banks that locate closer to the urban areas losing wetland resources. Bankers would have an increased expected revenue stream to offset higher land costs, and the urban population would benefit from wetlands in closer proximity."

Commenters have previously noted that TDEC does not, but should, make better use of such national experts resident in Tennessee.

Seventh, the Guidance (or the Regulations) should specify that amounts collected through the application of multipliers are not available to pay the cost of the applicable compensatory mitigation project, but must go into a designated fund with an application process available to any MS4 or non-profit for restoration and enhancement projects on 303(d)-listed streams.

Finally, the Guidelines do not recognize the scale of many important watersheds / HUC-8's. For example, the Harpeth River watershed comprises six (6) counties and approximately 870 square miles. The Harpeth River is over 125 miles long and has 1,000 miles of tributaries. To say, as the proposed Regulations and Guidance do, that mitigation within the same HUC-8 offsets the loss of resource values of a particular project is nonsensical. A project in Ashland City, at the mouth of the Harpeth, cannot mitigate for an impact in Rutherford County, approximately 100 river miles away in the headwaters of the river (or vice versa). Such a mis-location of mitigation impermissibly takes from and deprives those who depend on the resource of its value.¹² Mitigation even further afield of the area impacted by a project violates common sense and logic, and is arbitrary, capricious and an abuse of discretion.

2. There is no method to verify either the condition of the streams affected, or the benefits supposedly fostered by the Guidelines.

The Guidance, as noted, requires the collection and/or generation of substantial amounts of data. Commenters have noted that this will either slow the process of mitigation to a “crawl” or result in a “rubber-stamping” of applicant-supplied data. Given TDEC funding and staffing levels, there is no way that all this data can be verified. Unless a third-party audit or verification system is employed,

¹² Id. at 8-9:

“On-site wetland mitigation is in principle neutral with respect to ecosystem services in the sense that it keeps wetland resources in generally the same location. In contrast, wetland mitigation banking facilitates moving wetland resources from one location, the development project, to a potentially distant location, the bank site. Even with the generous assumption that this movement provides a net ecological advantage, it cannot be the case that the same human population benefits from the ecosystem services once associated with the damaged wetlands. If the wetlands move, their ecosystem services go with them. Some people will inevitably lose and others will gain the economic benefit of wetland ecosystem services.” ...

“Indeed, there is good reason to believe that wetland mitigation banking will systematically move wetland resources from urban areas to rural areas within a bank’s service area. Entrepreneurial bankers are interested in profit, and thus are likely to seek the least costly land that will produce credits. Land developers are likely to seek the least costly land in the development market. It is highly unlikely, however, that bankers and developers will compete for land. Bankers need large tracts capable of sustaining wetlands, which, if they exist in a development market area, are likely to be too pricy for the banker. The whole point of wetland mitigation banking—what makes its economic incentives work—is that developers get to wipe out wetland patches in the higher-priced land markets and bankers get to establish wetland banks in the less-pricy land markets. It is not surprising, then, that development projects using wetland mitigation banking often are located in urban areas and the banks they use often are located in rural areas. Banking also is likely to redistribute local wetland services asymmetrically between those two areas.” [Citations omitted.]

this system is far more likely to result in substantial fees for consultants to project sponsors than it is to actually result in mitigation projects being performed.

The mis-incentivization in the Guidelines is made possible in part by the fact that there is no system in place either to monitor and track cumulative impacts, to audit the results of particular stream assessments, or to determine the results of mitigation. There exist, models, however, that with imagination could be adapted and utilized to provide assurance that the system is not “gamed” and abused.

TDEC should employ a system similar to the “Licensed Site Professional” or “LSP” system to ensure that stream conditions are accurately described. At least Connecticut,¹³ Massachusetts,¹⁴ and New Jersey¹⁵ employ “licensed site professionals.”

Tennessee employs a somewhat similar system for hydrological professionals who make wet weather conveyance determinations, and TDEC should modify or augment that program to better implement the Guidance.

At least one of the tasks that should be undertaken by TDEC or private third-party auditors is to conduct annual post-construction inspections for the first seven¹⁶ years of a project and every five years thereafter. The Guidelines (Section 4.2, page 30) provide that “[i]f the stream does not maintain or improve flow and classified uses at the end of the monitoring period, the site will not be considered successful. In this case, corrective action or additional compensatory mitigation may be required.” Without a system for audit and verification, such statements will be meaningless.

Further, we have previously commented that mitigation project costs must recognize life-cycle costs, i.e., that components of the project may require replacement, or may fail entirely, over time. (We note that Tennessee requires only up to seven (7) years of monitoring, but that regulations require projects be perpetual.)¹⁷ Projects must have adequate financial assurance on a life-cycle cost basis to ensure that if credit is given for mitigation, that mitigation will last as long as the degradation caused.)¹⁸

3. The system created by the Guidance will cause or contribute to violations of the federal Clean Water Act, and the Tennessee Water Quality Control Act.

The premise that underlies the Guidance is fundamentally flawed: The Regulations, which the Guidance is intended to implement, foster and incentivize out-of-system mitigation.¹⁹ However,

¹³ See <https://www.ct.gov/deep/cwp/view.asp?q=324978> (accessed Jan. 5, 2019).

¹⁴ See <https://www.mass.gov/how-to/hiring-a-licensed-site-professional> (accessed Jan. 5, 2019).

¹⁵ See <https://www.nj.gov/dep/srp/> (accessed Jan. 5, 2019).

¹⁶ Section 7 of the Guidelines provides monitoring of between 3 to 7 years.

¹⁷ See, e.g., <https://www.epa.gov/cwa-404/federal-guidance-establishment-use-and-operation-mitigation-banks>.

¹⁸ See also the similar issues raised in Section 5.2 (page 40)’s discussion of the components of compensatory mitigation, and 5.3.2 (5. – Determination of Credits) and (10. – Long-term management plan).

¹⁹ As noted in Commenters discussion of the proposed Regulations, significant changes in environmental policy are worked in the proposed Regulations by grammatical manipulations to define, for example, that “significant degradation,” which is otherwise “an appreciable permanent loss of resource values” does not occur “unless

mitigation that occurs outside of the HUC-12, and indeed outside of the applicable HUC-8, cannot protect “classified uses” as claimed on page 6 of the Guidance. Classified uses are specific to the impacted stream. Therefore, mitigation that does not occur within the particular impacted stream segment cannot maintain its classified uses.

The proposed Guidelines further violate the Clean Water Act and TCA § 69-3-108(g) to the extent that permitted activities further degrade a stream that already is impaired for the particular water quality standard in question, for example, for having unavailable parameters and thereby failing to meet water quality standards for siltation or habitat degradation. TDEC places heavy emphasis in its response to comments on the proposed revisions to the Regulations, that a permit cannot be issued that alone or in combination with others, causes or contributes to a condition of pollution.²⁰ Yet, this is precisely what the Guidelines do.²¹ If a proposed activity will cause additional habitat degradation or siltation in the particular stream segment affected by the activity and that segment is already on Tennessee’s 303(d) as failing to meet those water quality standards, issuing a permit that further degrades the stream would violate TCA § 69-3-108(g), notwithstanding any mitigation anywhere else in the state. Further, neither the proposed Regulations nor the Guidance explain or justify the principle (in Section 4.1.1 of the Guidance) that “any degraded stream will not be assessed as having an existing condition score of any less than 0.40,” or attempt to reconcile that scoring with the status of a stream on the 303(d) list: if a stream is on the 303(d) list, any further degradation of it will violate TCA § 69-3-108(g).

Similar issues plague mitigation on streams with available parameters. For example, Section 2.2 (page 10) of the Guidelines provides that:

For projects that propose an appreciable permanent loss of resource values to a stream with available parameters for habitat or ETWs, the applicant must either provide compensatory mitigation in-system to ensure no more than *de minimis* degradation or demonstrate economic or social necessity and a lack of practicable alternatives for the proposed project. For ETWs, if the proposed project (*i.e.*, the impact and any in-system compensatory mitigation) would result in more than *de minimis* degradation, then the Division must first make a determination of economic or social necessity, which may be challenged through a petition for declaratory order, before issuing a permit.

mitigation sufficient to ensure no overall net loss of resource values is provided.” Proposed Regulations, 0400-03--04(29). Commenters have incorporated by reference their comments dated on or about July 31, 2018 to the proposed Regulations.

²⁰ See, e.g., Responses to Comments Nos. 134, 168, 195, 214, https://www.tn.gov/content/dam/tn/environment/boards/documents/board-of-water-quality,-oil-and-gas/october/0400-40-03_and_0400-40-04%202018_Amendments_Redline_10-09-2018.pdf (accessed Jan. 3, 2019).

²¹ See, e.g., the following from page 10 of the Guidance:

For projects that propose an appreciable permanent loss of resource values to a stream with unavailable parameters for habitat, compensatory mitigation must result in no “significant degradation.” No “significant degradation” is the minimum requirement for all ARAPs for habitat alterations, and means that the permitted activity, including mitigation, must result in no overall net loss of resource values.

This paragraph is self-contradictory. Although it might be possible to combine a project with in-system mitigation to result in no significant degradation, the impacted reach will not be de minimis if compensatory mitigation is required. As soon as an applicant claims that there are “no practical alternatives,” it is, in fact, admitting to “significant degradation,” which may, definitionally become insignificant once out-of-system mitigation occurs.

4. The Guidance does not contain any requirement or way to track cumulative impacts to streams.

Although the proposed Regulations and the Guidelines mention cumulative impacts in passing, neither contains any system for tracking such impacts to streams, other than, perhaps, the status of the particular waterbody on the State’s 303(d) list. We have noted elsewhere in these comments how the Guidance will further cause or contribute to violations of water quality standards and thus state and federal law.²²

TDEC, if it does not already have one (and please clarify whether any such system exists), must implement an internal cumulative impacts tracking system that also tracks degradation from previous permits. In other words, it must be more than paperwork and must be linked to TDEC inspection reports. A stream that is degraded, but whose permit says “de minimis” because of mitigation on some distant site, MUST be tracked as degraded for purposes of future permits and calculating cumulative impacts.

Instead, the Guidelines appear to intentionally obfuscate the impacts and how the Guidance employs such concepts. For example, Section 3.1 (page 14) of the Guidelines states that:

For all other CPD activities, TDEC will assess cumulative impacts utilizing a Waterbody Unit scale. The Waterbody Catalog Unit, (also referred to as a Stream Segment) is the scale the Division utilizes in its biannual report to the EPA which evaluates overall use support of Tennessee’s water resources (“305(b) report”). Years of detailed data evaluation at this scale highlights these systems’ responsiveness to cumulative activities within the watershed, which are reflected in the overall condition of that Waterbody. This is also the scale at which TDEC reports the impairment status of water resources to the EPA (such as in the 303(d) list). Where unavoidable impacts from a CPD represent an appreciable permanent loss of water resource values in a given Waterbody, they will require compensatory mitigation. Locations and information about Waterbody IDs can be found on the Division’s data and map viewers available on the Division’s website.

However, Tennessee’s 303(d) list is based on the major HUC-8’s in the state. Within the 303(d) list, stream segments which are determined to be impaired are often identified at the HUC-10, -11, or -12 level. It is important to state at what level the impacts will be used to determine cumulative impacts. If the HUC-8 scale is used, most cumulative impacts will be very limited.

²² See Section 3 of these comments.

5. The Guidance does not deal with the special problems associated with urban or headwater streams.

The problems associated with the Guidelines' treatment of urban and headwaters streams appear in various sections of the Guidelines.

First, Section 4.1.1 (page 18) of the Guidelines provides a minimum existing condition score of 0.4. However, this scoring mechanism does not recognize that headwater and intermittent streams will show lower scores simply because of their size, unrelated to any impairment.

Second, Section 5.2 (page 36) states that "At the end of the project monitoring period, the above parameters should be fully functioning. Under rare circumstances, or in highly urban areas, this level of success may not be feasible." The Guidelines do not, but should, recognize that such success may not be achievable in headwaters or intermittent streams and provide alternatives should such results not be achievable.

Third, Section 5.2 (page 39) under the "Urban Projects" header provides for an additional credit of up to 15%. Although this may be laudatory, no support for the choice of 15% as the appropriate level is given. Additionally, it is not clear what relationship the proposed educational activities bear to the proposed 15% credit. Is the cost of such activities in addition to mitigation project costs, or to be credited against such costs? If credited against project costs, what is the rationale for including them, especially given the need for actual restoration of urban streams?

Fourth, we have previously noted the issues with the improper re-distribution of ecosystem services values away from impacted areas resulting from with far afield mitigation.²³

6. The Guidance does not deal with many of the long-recognized issues associated with mitigation projects.

First, Section 4.1.1 (page 19), does not address temporal factors. For example, a project may require the removal of vegetation in order to re-shape the bank or riparian zone. If that disturbed area is appropriately re-planted, is the removal of the vegetation ignored in scoring the project? If so, what level of monitoring is required to ensure that the vegetation is restored?

Second, Section 4.3 (page 30) only partially addresses the temporal loss issue. Even if the compensatory mitigation project is completed within a year (or even a year prior), it takes many years for vegetation to fully re-establish, for the in-stream habitat to both stabilize and become biologically active. If one accepts a five-year monitoring plan as a compromise (it may ensure

²³ See text and citations accompanying notes 11-12, above.

stability), then the temporal loss standard should be that only projects buying credits from projects more than five years old should be exempt from the temporal loss multiplier.

Third, comments such as those in Section 1 (page 7) that preservation may be included as a component of a mitigation project fail to recognize the well-established priority of avoidance-minimization-mitigation: why should preservation be included in a mitigation credit when the applicant's obligation is to avoid the impact in the first instance?

Similar issues affect statements such as those in Section 5.1 (page 39) (under the "Preservation Heading"). Despite the criteria enumerated in this section, the type of stream preservation that would earn credits is not clear. Previously, all compensatory mitigation projects were required to have permanent easements that included the stream and an appropriate riparian zone. Are we now to assume that credits will be given for a) expanding the riparian zone, or b) incorporating adjacent features (springs?) Would riparian wetlands preservation be able to earn stream mitigation credits? That is not currently allowed, but the concept of a stream/wetland complex is well recognized. These issues should be clarified.

In summary, we believe that Tennessee deserves a mitigation system that will actually facilitate growth and address the conditions of the State's waterways. Any such system should be based on sound science²⁴ and actually accomplish meaningful mitigation as close as possible to areas proposed for degradation, and be simple to administer and provide certainty for those actually doing and benefiting from the work. We stand ready to work with TDEC and other stakeholders to accomplish that result.

Sincerely yours,

HARPETH CONSERVANCY



By: _____
James M. Redwine, Esq.,
VP & COO

OBED WATERSHED COMMUNITY ASSOCIATION

By: ___/S/_____
Dennis Gregg,
Restoration Director

²⁴ See, e.g., Environmental Law Institute, et al., "Stream Mitigation: Science, Policy, and Practice," (Jan. 2017), available at <https://www.eli.org/research-report/stream-mitigation-science-policy-and-practice> (accessed Jan. 7, 2019).

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY

By: ___/s/_____
Barry Sulkin
Director, Tennessee Office

RICHLAND CREEK WATERSHED ALLIANCE

By: ___/s/_____
Monette Rebecca
Executive Director

TENNESSEE CHAPTER OF THE SIERRA CLUB

By: ___/S/_____
Axel Ringe,
Conservation Chair

TENNESSEE CLEAN WATER NETWORK

By: ___/s/_____
Kathy Hawes
Executive Director

TENNESSEE CONSERVATION VOTERS

By: ___/s/_____
Darlene Panvini
Board President

TENNESSEE ENVIRONMENTAL COUNCIL

By: ___/s/_____
Jeff Barrie,
Interim CEO

cc: Johnnie D. Purify, Jr., Acting Chief,
Water Quality Planning Branch; and
Gina Fonzi, P.E. TN WQS Coordinator,
USEPA Region 4



HARPETH RIVER WATERSHED ASSOCIATION

"Protecting the State Scenic Harpeth River and Clean Water in Tennessee Since 1999"

February 22, 2017

Nashville District, US Army Corps of Engineers
Regulatory Branch
3701 Bell Road
Nashville, Tennessee 37214
Attention: Joshua Frost

Re: File Number LRN-2016-00511, Public Notice 17-03

Dear Mr. Frost:

The undersigned groups submit the following comments in response to the Cumberland River Compact ("CRC") Stream Restoration In-lieu Fee ("ILF") Program Prospectus dated December 2016 (the "Prospectus").

We appreciate the need for additional mitigation projects and opportunities statewide and support the efforts to identify and perform such projects. We also support and applaud CRC in its efforts to fashion solutions for such projects. We believe, however, that the CRC program may be subject to many of the same challenges that have been identified with respect to other ILF programs sought to be implemented previously in Tennessee. We look forward to working with CRC and the US Army Corps of Engineers ("Corps") to address these challenges with mitigation programs in general with respect to this proposed CRC program as well as on mitigation projects and opportunities across the state.

Several of the signed organizations have detailed experience with restoration projects that have generated mitigation credits as well as working with various state and federal agencies and ILF programs such as TSMP.¹ We understand from talking to the Executive Director of CRC that the list of potential partners in the prospectus was not meant to be exhaustive or exclusive. The breadth of conservation organizations across the state with their various areas of expertise all have the common goal to restore and protect our natural resources and work with the various state and federal agencies on how mitigation programs best accomplishes this.

These comments are intended to address the continuing unresolved challenges facing similar mitigation programs, and how these might affect the CRC ILF proposed program. We incorporate

¹ For example, the Harpeth River Watershed Association was the project coordinator for the Harpeth River Lowhead Dam Removal and Restoration Project, a project that garnered state and federal awards and recognition for all the partners involved. See <http://www.harpethriver.org/resources/press-room/2016/06/22/harpeth-river-dam-removal-in-tennessee-receives-national-legacy-project-award.2070351>. This project is similar to those targeted on pps. 13-14 of the Prospectus. Other commenting organizations have relevant experience.

by reference our comments on those prior programs,² and highlight certain of those comments in this letter.

1. Significant Issues with Prior Mitigation Efforts in Tennessee Remain Unresolved; Mispricing of Credits.

The Prospectus correctly notes that all nine (9) of the mitigation banks developed by the Tennessee Stream Mitigation Program (“TSMP”) have limited or no availability to provide compensatory mitigation. The Prospectus does not, however, indicate how its program will differ from, or otherwise resolve the issues, facing those prior programs. In particular, we have previously noted issues with mis-pricing credits offered with respect to wetlands banks. We believe that very similar considerations are likely to be applicable here:

“After three and a half years of conducting this work, the ILF Program is likely familiar with the areas and watersheds with the most limiting factors and lacking adequate sites. We believe the ILF Program should explore other options.

- a. The ILF Program appears to be mispricing the amounts charged to establish and perform mitigation work. It appears a significant component of the current ILF Program’s inability to find appropriate sites in the same watershed on a timely basis is that it is not offering enough to landowners to participate in projects where credits can be created. Thus, the ILF Program sponsors should be charging project proponents enough to incentivize landowners to participate in its programs. Further, the ILF Program should examine increasing the cost of credits in these areas in order to allow the ILF Program to offer better purchase prices for land or conduct more complicated mitigation projects. Financial assurances are a component of the Corps requirements for compensatory mitigation success³ and the current credit costs are not providing this assurance. The significant loss of wetlands in specific geographic areas of the state – west Tennessee and urban areas - justify the higher cost of credits. These areas lack suitable land and are more costly in general for land acquisition and project development. Rather than distancing mitigation from the impact site, other options such as increasing the amounts charged to project proponents and raising credit prices should be explored to ensure ILF Program success.
- b. The ILF Program should also explore outreach efforts in order for interested landowners to participate. These efforts should target areas known to historically have wetlands and work with local land conservation groups. The ILF Program should also work with the state on public lands, specifically state parks in need of wetland restoration or creation.”⁴

² Incorporated by reference are the following: 1) Letter dated February 10, 2016 re File No. LRN-2011-00206, Public Notice 15-46; Letter dated August 31, 2009, from Obed Watershed Community Association to Roger Allen, Corps. Copies of these letters are attached for your convenience.

³ 40 C.F.R. § 230.93(n) *The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed.*

⁴ See letter dated February 10, 2016 re File No. LRN-2011-00206, Public Notice 15-46.

This mis-pricing appears to fail to take into account the dynamics of free, private markets. Such failure could adversely affect CRC's proposed ILF program as well if the pricing issues are not addressed.

Pricing of credits should also take into account the potential for two (2) additional issues: 1) that of long term (perpetual) oversight of the project site, and 2) of the necessity for adaptive management, i.e., the need for re-work of projects that do not initially achieve their objectives or subsequently fail or need additional restoration or enhancement to achieve project objectives. We believe that the Corps should use probabilistic cost estimating techniques such as those discussed in ASTM E 2137 – 06, "Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters"⁵ to account for and "price in" those possibilities.

2. The CRC Program, as Currently Proposed, Is Not Sufficiently Watershed-based.

The federal regulations clearly state "[t]he district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable."⁶ This is reiterated throughout the regulations: "In general, the required compensatory mitigation should be located within the same watershed as the impacted site..."⁷ While the proposed CRC program purports to provide two (2) service areas, these are very broad, and confined only by 6-digit HUC codes. Without justification or explanation, the Prospectus (p. 12) states that 6-digit areas are at "an appropriate scale." No rationale is offered why 8- or 12-digit areas are not appropriate.⁸ (This may be related to the mis-pricing issues noted above.) The scale proposed in the Prospectus is too great to meet the requirements of the regulations. As noted previously with respect to wetlands credits (which principles are applicable here):

"The size of the watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resource provided through compensation activities will effectively compensate for adverse environmental impacts resulting from the activities authorized by the DA permits. The district engineer should consider relevant environmental factors and appropriate locally-developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities."⁹

ILF [p]rograms are specifically required to consider the watershed scale. As described by the federal regulations an ILF [p]rogram devotes "significant resources to identifying and addressing high-priority resource needs on a watershed scale as reflected in their compensation planning framework."¹⁰

When considering options for successful mitigation it is incumbent upon the Corps to take into consideration whether the site is located within the same watershed as the proposed impacts. The Corps must consider "the likelihood of ecological success and sustainability,

⁵ <https://www.astm.org/Standards/E2137.htm>.

⁶ 40 C.F.R. § 230.93(c)(1).

⁷ 40 C.F.R. § 230.93(b)(1).

⁸ Note that the basis for proposed service area "must be documented in the instrument." 40 C.F.R. § 332.8 (d)(6)(A).

⁹ 40 C.F.R. § 230.93(c)(4).

¹⁰ 40 C.F.R § 230.93(b)(3).

the location of the compensation site relative to the impact site and their significance in the watershed"¹¹ (emphasis added).

Of note, watershed level mitigation is a priority for TDEC as they certify Section 404 Permits. It is one of TDEC's objectives to "achieve no overall net loss of wetlands acreage and functions in each USGS hydrologic unit."¹²¹³

Approving an ILF program with too great a scale may inhibit the Department from issuing Section 401 Certifications of Section 404 Permits utilizing the CRC ILF program for compensatory mitigation.

3. Projects Need to Ensure Permanent Improvements.

The Prospectus states that for some projects, best-management practices ("BMPs") will be incorporated.¹⁴ We assume that the reference here is to BMPs constituting particular restoration or stabilization techniques. Certain BMPs, such as those commonly utilized on 319 projects, do not require permanent easements (but most work is designed to make a permanent fix). Further, some BMPs for 319 projects can be temporary, in some cases lasting only as long as the contractor or consultant for them is actively working on the site with the landowner. Applicable regulations clearly state preferences (in order) for restoration, enhancements, and, finally, preservation.¹⁵ The need to preserve project sites in perpetuity through appropriate real estate arrangements is also recognized.¹⁶ In light of the function of ILF programs, i.e., to replace natural features lost to development, and the clear preference for restoration, temporary programs should not substitute for actual, permanent solutions to lost natural features, and we trust that the reference in the Prospectus is to permanent BMPs.

4. The Prospectus Needs to Assure Full Compliance with Applicable Law, Regulations, and Guidance

Regulations under the federal Clean Water Act contain a number of detailed provisions in furtherance of the "fundamental objective of compensatory mitigation ... to offset environmental losses resulting from unavoidable impacts to waters of the United States...."¹⁷ These regulations are amplified in applicable guidance (the "Guidance").¹⁸

¹¹ 40 C.F.R. § 230.93(a).

¹² Tennessee Department of Environment and Conservation. [Tennessee's Wetland Conservation Strategy](#), Chapter 3.

¹³ See letter dated February 10, 2016 re File No. LRN-2011-00206, Public Notice 15-46.

¹⁴ Prospectus, at p. 14-15. The Prospectus also cites CRC's experience with "Section 319" grants as qualifying experience. Prospectus, at pps. 8-10.

¹⁵ See, e.g., 40 C.F.R. § 230.93 (a)(2). Note also that credits on public lands "must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already in place." 40 C.F.R. § 230.93 (a)(3).

¹⁶ "Guidance" (as hereafter defined), at p. 7.

¹⁷ 40 C.F.R. § 230.93(a)(1).

¹⁸ "Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act," <https://www.fws.gov/habitatconservation/corps%20in-lieu-fee%20guidance.pdf>.

Among the requirements are: 1) that the project be protected in perpetuity,¹⁹ 2) when required, appropriate financial assurance be posted and maintained,²⁰ 3) provisions containing the ILF sponsor's agreement to assume responsibility for a permittee's compensatory mitigation,²¹ 4) that "[i]mplementation of the compensatory mitigation project, to the maximum extent practicable, shall be in advance of or concurrent with the activity causing the authorized impacts" and that additional mitigation is required to offset any temporal losses.²²

Although a number of these requirements are referenced in the Prospectus, it appears that many of them will be implemented upon the execution of the "ILF Instrument."²³ Accordingly, we look forward to the opportunity to review the proposed ILF Instrument and appropriate project-specific documents. We note that the Prospectus calls for completion of land protection and initial improvements by the end of the third full growing season,²⁴ which appears in conflict with the requirements of 40 C.F.R. § 230.93(m) and the Guidance.²⁵ We look forward to the resolution of this conflict.

We appreciate the opportunity to comment on the Prospectus. We believe that a meeting with the commenting organizations, CRC, and the Corps and others would be an effective way to address these issues; we are willing to facilitate such a meeting at your earliest convenience.

Sincerely,



James M. Redwine
Director, Water Quality Protection
And Sustainability
Harpeth River Watershed Association

Dana Wright
Water Policy Director
Tennessee Clean Water Network

Axel Ringe
Conservation Chair
Tennessee Chapter of the Sierra Club

John McFadden
Chief Executive Officer
Tennessee Environmental Council

Dennis Gregg
Executive Director
Obed Watershed Community Association

Barry Sulkin
Tennessee Director
Public Employees for Environmental Responsibility

cc: Mekayle Houghton, Cumberland River Compact

¹⁹ Guidance, at p. 7.

²⁰ 40 C.F.R. § 230.93 (k), (l)(2), n; Guidance, at p. 3.

²¹ 40 C.F.R. § 230.93(l)(2).

²² 40 C.F.R. § 230.93(m).

²³ See, e.g., Prospectus, at p. 11,13.

²⁴ Prospectus, at p. 3.

²⁵ Guidance, at p. 6-7; see also 33 C.F.R. § 332.8 (t)(2).

February 10, 2016

Mr. Marty Tyree
Nashville District, US Army Corps of Engineers
Regulatory Branch
3701 Bell Road
Nashville, Tennessee 37214

Mr. Randy Clark
Memphis District, US Army Corps of Engineers
167 North Main Street, Room B-202
Memphis, Tennessee 38103

Re: File Number LRN-2011-00206, Public Notice 15-46

Dear Mr. Tyree and Mr. Clark,

The Tennessee Clean Water Network submit the following comments on behalf of the Tennessee Environmental Council, the Obed Watershed Community Association, and the Southern Environmental Law Center. These comments are submitted in response to the US Army Corps of Engineers' proposed modification to the Tennessee Wildlife Federation Statewide Wetland In-Lieu Fee Program Instrument (ILF Program).

We appreciate Mr. Chris Roberts and Mr. Mike Butler taking the time to discuss the proposed changes and the reasoning behind the requested modifications. We understand the ILF Program is having difficulty obtaining adequate wetland mitigation sites within the existing services hence the modification request, but we cannot support these proposed changes for multiple reasons, most importantly because the planned changes negate the watershed approach established by federal regulations which ensures compensatory mitigation actually compensates for lost resources.

1. The watershed approach is firmly established within federal regulations.

The federal regulations clearly state "The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable."¹ This is reiterated throughout the regulations: "In general, the required compensatory mitigation should be located within the same watershed as the impacted site..."² While the proposed modifications to the ILF Program base the expanded service areas along watershed lines, the scale is too great to meet the requirements of the regulations.

The size of the watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resource provided through compensation activities will effectively compensate for adverse environmental impacts resulting from the activities authorized by the DA permits. The district engineer should consider relevant environmental factors and appropriate locally-developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.³

¹ 40 C.F.R. § 230.93(c)(1)

² 40 C.F.R. § 230.93(b)(1)

³ 40 C.F.R. § 230.93(c)(4)

ILF Programs are specifically required to consider the watershed scale. As described by the federal regulations an ILF Program devotes “significant resources to identifying and addressing high-priority resource needs on a watershed scale as reflected in their compensation planning framework.”⁴

When considering options for successful mitigation it is incumbent upon the Corps to take into consideration whether the site is located within the same watershed as the proposed impacts. The Corps must consider “the likelihood of ecological success and sustainability, *the location of the compensation site relative to the impact site and their significance in the watershed*”⁵ (emphasis added).

Of note, watershed level mitigation is a priority for TDEC as they certify Section 404 Permits. It is one of TDEC’s objectives to “achieve no overall net loss of wetlands acreage and functions in each USGS hydrologic unit.”⁶ Altering the ILF Program with expanded service areas may inhibit the Department from issuing Section 401 Certifications of Section 404 Permits utilizing the ILF Program for compensatory mitigation.

2. Compensatory mitigation must serve to offset the wetland functions lost through the permitted discharge of fill material.

Compensatory mitigation should be located as close to the impacted site as feasible and serve the same functions of the impacted wetland. The federal regulations note that the required compensatory mitigation “...should be located where it is most likely to successfully replace lost functions and services...”⁷ Mitigation must actually compensate for the resources and functions lost by the issuance of a Section 404 Permit:

...all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.⁸

As TDEC noted in the latest 305(b) Report:

Wetlands are some of Tennessee’s most valuable natural resources. Wetlands serve as buffer zones along rivers, help filter pollutants from surface runoff, store floodwaters during times of high flows, serve as spawning areas for fish, and provide habitat for specialized plant and wildlife species.⁹

Wetlands provide essential functions to water quality, ecological connections and habitat for wildlife. The habitat, flood control and runoff filtration benefits provided by wetlands at a specific site cannot be adequately compensated through the creation, restoration or preservation of a site as far away as the expanded service areas would allow.

3. Expanding the service areas is not the most appropriate solution to the ILF Program issue.

We appreciate the ILF Program management’s efforts to ensure appropriate sites with the likelihood of success are selected for mitigation and understand obtaining such sites is difficult. However, we do not condone the expansion of the service areas as a solution to this problem. After three and a half years of conducting this work, the ILF Program is likely familiar with the areas and watersheds with the most limiting factors and lacking adequate sites. We believe the ILF Program should explore other options.

⁴ 40 C.F.R. § 230.93(b)(3)

⁵ 40 C.F.R. § 230.93(a)

⁶ Tennessee Department of Environment and Conservation. *Tennessee’s Wetland Conservation Strategy*, Chapter 3.

⁷ 40 C.F.R. § 230.93(b)(1)

⁸ 33 C.F.R. § 320.4(r)(2)

⁹ Tennessee Department of Environment and Conservation. *2010 305(b) Report, The Status of Water Quality in Tennessee*.

- a. The ILF Program appears to be mispricing the amounts charged to establish and perform mitigation work. It appears a significant component of the current ILF Program's inability to find appropriate sites in the same watershed on a timely basis is that it is not offering enough to landowners to participate in projects where credits can be created. Thus, the ILF Program sponsors should be charging project proponents enough to incentivize landowners to participate in its programs. Further, the ILF Program should examine increasing the cost of credits in these areas in order to allow the ILF Program to offer better purchase prices for land or conduct more complicated mitigation projects. Financial assurances are a component of the Corps requirements for compensatory mitigation success¹⁰ and the current credit costs are not providing this assurance. The significant loss of wetlands in specific geographic areas of the state – west Tennessee and urban areas - justify the higher cost of credits. These areas lack suitable land and are more costly in general for land acquisition and project development. Rather than distancing mitigation from the impact site, other options such as increasing the amounts charged to project proponents and raising credit prices should be explored to ensure ILF Program success.
- b. The ILF Program should also explore outreach efforts in order for interested landowners to participate. These efforts should target areas known to historically have wetlands and work with local land conservation groups. The ILF Program should also work with the state on public lands, specifically state parks in need of wetland restoration or creation.

4. The Corps has the responsibility to ensure compensatory mitigation is sufficient.

Pursuant to Section 404 of the Clean Water Act, the Corps has purview over the content and authorization of applicable permits. The Corps has the authority to deny permits if mitigation is insufficient. It is the district engineer's responsibility determine if compensatory mitigation is adequate and can determine a "permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options."¹¹ Rather than modifying the ILF Program, the Corps can and should require permit applicants to use appropriate, watershed-level, function-replacing mitigation.

5. Public Notices for permits issued employing the ILF Program as mitigation are now insufficient.

The public notices for any permittee that paid into the ILF Program for compensatory mitigation are now inaccurate and misleading. Anyone reviewing a public notice in the past few years for a permit that utilized the ILF Program is now unaware mitigation may occur farther away. The set boundaries of service areas gave the public a specific understanding of where mitigation would occur. Public input may have been different or impacted land owners may have had more interest if the newly proposed service areas were in those public notices instead. These modifications deny the public the right to notice and input on the changes to previous issued permits.

6. The ILF Program should not pursue more advanced credits.

Advanced credits serve to initiate an ILF program, not to assist in financial shortcomings. As projects are put on the ground and produce credits, advanced credits are fulfilled and only then become available again. Additionally, given this program has now existed for three and a half years, the track record currently demonstrates that there is not sufficient need to increase the advanced credits available. The sponsor has

¹⁰ 40 C.F.R. § 230.93(n) *The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed.*

¹¹ 40 C.F.R. § 230.91(c)(3)

also shown that even with the current levels of advanced credits, it has encountered difficulty in getting projects implemented in the appropriate "third growing season" time frame."

As noted in the federal rules, for determining the appropriate number of advanced credits, the program sponsor must clearly demonstrate the economic need for an increase in advance credits, but more importantly, provide sufficient supporting documents that confirm prospective in-lieu fee project sites. If prospective sites have not been adequately identified and researched, then the requested increase in advance credits is inappropriate.¹²

We appreciate the opportunity to comment on the proposed modifications to the TWF ILF Program Instrument and hope the Corps will take into consideration the concerns expressed in this letter.

Sincerely,

Dana Wright
Water Policy Director
Tennessee Clean Water Network

Anne Davis
Managing Attorney
Southern Environmental Law Center

John McFadden
Chief Executive Officer
Tennessee Environmental Council

Axel Ringe
Conservation Chair
Tennessee Chapter of the Sierra Club

Dennis Gregg
Executive Director
Obed Watershed Community Association

Barry Sulkin
Tennessee Director
Public Employees for Environmental Responsibility

Cc: Mr. Mike Butler, Chief Executive Officer, Tennessee Wildlife Federation
Mr. Chris Roberts, Tennessee Mitigation Fund Director, Tennessee Wildlife Federation
Mr. Mike Lee, Division of Water Resources, TDEC

¹² 33 C.F.R. §332.8



August

*Dennis Gregg, Executive
Director
185 Hood Dr.
Crossville, TN 38555
931/484-9033*

Roger Allan
U.S. Army Corps of Engineers
167 North Main Street, Room
8-202

Memphis, Tennessee 38103-1894

Dear Mr. Allan,

Having had the opportunity to review both your Public Notice No: MVM-2009-249-RSA and TDEC's Prospectus for a State-wide In-Lieu Fee Program, there are a number of issues that cause me some concern. Let me begin by concurring with the thrust of the desire to come up with additional mitigation strategies. Most science-based research has raised significant questions about the effectiveness of existing mitigation programs, and the recent survey in Tennessee of mitigations that were promised by contractors uncovered an embarrassingly high rate of non-compliance and/or inadequately designed or implemented projects. Clearly there is a need to find new methods of ensuring that mitigation projects are designed, implemented, and monitored more effectively.

TDEC's proposal has a number of flaws. First, TDEC is understaffed and incapable of either developing the information necessary to develop the level of detail needed for watershed plans that would provide a complete listing of suitable mitigation sites, or to carry out and implement the mitigations in a cost-effective way. The Watershed Plans referenced in the Prospectus are at the HUC 8 level. The plans were developed primarily through the use of a few sampling sites in each watershed where both water quality and benthic assessments were made. TDEC has done no systematic stream assessments that map the problem areas that exist on all the tributary streams. Unfortunately, the same condition exists on 303(d) streams. They earn their designation based on sometimes as little as one monitoring point. The TMDL standards are not tied to particular sources or locations, with the exception of point sources. Analysis of aerial photography can show inadequate buffers but will not usually assist in identifying eroding stream banks, which on the Cumberland Plateau is the source of more than half of the sedimentation. The Prospectus allows mitigation funds to be used for doing such assessment work, but when contracted to private engineering firms or even newly-hired TDEC employees, this can eat up a lot of funds. The tendency will be and has been for TDEC to focus on large-scale, easy-to-identify projects, rather than to tie the mitigation to the actual watershed being impacted. The preference should be to HUC 12 level mitigation, starting on the same reach as the disturbance, and then moving to the next reach or the next trib looking for restoration and stabilization needs, before moving to the next stream in HUC 10 where the same process occurs. Only, and this will be extremely rare, if there are no mitigation needs in the immediate impact area, should projects be sought in the broader HUC 8 level. Just because it is easier to identify a few big projects in each HUC 8 watershed, and it is simpler to administer and monitor a few projects rather than many, does not mean that this is the appropriate level of administration.

Related to this first concern is the lack of support for local watershed groups and local watershed plans. In a number of parts of the state, local watershed groups have developed detailed watershed plans at the HUC 12 level. They have mapped and identified a variety of problem areas on the main streams and their tributaries. A number of these watershed organizations are actively involved in stream stabilization and restoration projects using 319 funds. They have assessed

streams that TDEC lists as “unassessed” on TDEC maps. They have creatively used donated materials and volunteers to come up with the 40% match required with 319 funds and have been able to effectively deliver projects at a much lower cost than either the TSMP program or those that TDEC has done directly. TDEC’s Prospectus mentions these groups in passing - as in they would receive suggestions for projects from them and might enter into an agreement with them for long-term monitoring, but ignores both the on-the-ground data that these groups possess as well as their capacity to do the projects cost-effectively as well as continue the monitoring that most of the groups already have in place. Given the important role that local watershed groups play and can play in this issue, the Prospectus needs to be revised to provide a mechanism for contracting with the watershed groups to provide the mitigation projects within their watershed, while allowing TDEC to administer the mitigation funds (for less than 15% on small projects) and provide oversight.

The third concern is scale. TDEC’s enforcement rules, particularly in terms of stormwater permits have not used numeric standards related to the TMDL’s on 303(d) streams. This, in effect, ignores the cumulative impacts of multiple source that can cause the TMDL to be exceeded. In terms of mitigation, the same principle holds. In fact, it may be argued that stabilizing ten one hundred foot sections of eroding stream bank will have a larger impact on the stream health than doing one thousand foot continuous stretch. There is typically less engineering involved and less heavy equipment with the smaller projects, which both reduces the cost and reduces the impact on the stream of the project itself. Given that the Corp has reiterated its commitment to avoid impacts to the greatest extent possible, most future in-lieu impacts should be relatively small. It is far preferable to have a one hundred foot impact result in a three hundred foot mitigation in a nearby reach or trib, than to “save-up” these funds to do a larger project somewhere down the line. While this will result in a much larger number of small projects, and TDEC has not historically done a good job in monitoring these projects, it is still the best way to get the appropriate results for the environment. TDEC simply needs a better way to do its oversight and monitoring. Where watershed groups don’t exist, TDEC should encourage their formation and contract with them to do the stream assessment needed to develop appropriate mitigation projects. There will still be areas in the state where TDEC-directed mitigations will be appropriate. The Prospectus discusses building the fund through in lieu fees. It would be more optimal to have each in-lieu fee project directly tied to the equivalent mitigation project.

The fourth issue is Watershed Plans. While I touched on it above in discussing the resources that watershed groups bring to the process, the question of watershed planning has increased in importance both do to water supply issues and habitat conservation issues that are being pioneered by the US Fish and Wildlife with two Habitat Conservation Plans being developed for the northern Cumberland Plateau. TDEC has funded a number of groups, including OWCA to develop watershed plans for watersheds below the HUC 8 level. It would strengthen the importance of these Watershed Management Plans that we have been developed if they are explicitly referenced here. Language needs to be inserted that gives priority to whatever Management Plan that exists at the finest level of detail. It would serve to force local governments to pay more attention to the work involved in developing these watershed plans and would encourage planning bodies to incorporate these plans in a way that would hopefully reduce impacts on streams and wetlands.

The final issue is one of transparency. Ronnie Bowers has been empowered to work with some engineers and contractors to develop and implement some mitigation projects. There is no question that this has resulted in some high quality work. It is our understanding that he has been given the responsibility and funds to address the 120 delinquent projects related to TDOT projects over the years. What is not clear is what the process will be to select and prioritize these projects and how he will manage all these projects at the same time that he will take on the new responsibility for the In-Lieu Fee program. Further, he has operated his current projects using some pre-selected

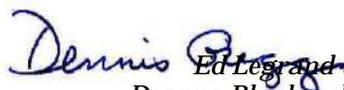
engineering and contracting companies. If this practice of contracting the work is going to continue, as implied in the Prospectus, how will projects be selected and how will contracts be advertised and awarded? What level of experience and/or positive accomplishments will be used to screen prospective contractors? What special provisions, if any, will be in place to allow non-profits to receive contracts? None of these issues are addressed in the Prospectus, which was prepared on contract by an engineering firm that has been involved in previous mitigation work. It is important that there be both transparency and accountability in the process. Related to the issue of transparency are two other issues. The Prospectus talks about a 15% administration fee and also allows mitigation funds to be used for research and scientific monitoring projects. It is not clear whether the research and scientific monitoring is part of the 15% or in addition. This needs to be clear. It is also not clear whether the research and scientific monitoring will also be contracted or will be performed by TDEC employees.

In summary, the Obed Watershed Community Association recognizes that mitigation of impacts caused by various projects' impacts on streams and wetlands has not had the results desired due to inadequate monitoring and oversight of promised mitigation projects. We recognize that an increased role for TDEC will be important to assure more effective mitigation going forward. We would prefer that TDEC act as the administrator and overseer of projects rather than taking the role of prime contractor in all cases, and that it develop the mechanism to build on the work of watershed organizations and to support their efforts to do mitigation projects, rather than to take funds away from the direct areas of project impact.

We look forward to future discussion with both TDEC and the Army Corp of Engineers on this important issue.

Sincerely,

Dennis Gregg, Executive Director



OWCA Board of Directors

*Ed Legrand (President), Rita DeFrees (Secretary), Fran Grant (Treasurer),
Deanna Blankenship, Jean Cheely, Sandra Goss, Pete Peterson, and June Zettlemeyer.*