February 19, 2016

Colonel Jason E. Kelly
District Commander
Norfolk District, U.S. Army Corps of Engineers
803 Front Street
Norfolk, VA 23510

RE: NAO-2006-5097—Tri-City Properties Joint Permit Application

Dear Colonel Kelly:

The Chesapeake Bay Foundation, Southern Environmental Law Center, Wetlands Watch, and North Carolina Coastal Federation have substantial concerns with the wetland impacts of the project application submitted by Tri-City Properties, LLC ("Tri-City") for its proposed Centerville Properties Development in Chesapeake, Virginia. This project would result in an unprecedented level of impacts to wetlands of very high quality. The Norfolk District previously denied a proposal by Tri-City to develop this site based on findings that granting a permit was not in the public interest and that the applicant failed to show that its proposal was the "least environmentally damaging practicable alternative" for this project.[1] We contend that Tri-City's current application again fails to meet both of these standards. We therefore request that the United States Army Corps of Engineers ("Corps" or "USACE") deny this permit and we provide further justification for our position below. We also request that a public hearing be held to gather community input on this important issue.

I. Tri-City's New Proposal is Not in the "Public Interest"

In considering Clean Water Act permit applications, the Corps' regulations require an evaluation of whether issuing a permit would be in the public interest based on a balancing of the benefits of the proposal against its reasonably foreseeable impacts (including indirect and cumulative impacts).[2] The Corps' denial of Tri-City's previous application to develop this site

[1] *See* letter from Dionysios Anninos, Corps of Engineers to Mike Gelardi, Tri-City Properties, LLC (Mar. 3, 2008) (hereinafter "Corps 2008 Permit Denial Letter").
[2] 33 C.F.R. § 320.4(a). This section further provides that factors to be considered in this analysis include "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs

was based in part on a finding that approval would not be in the "public interest." As the Corps stated in its 2008 denial letter:

> *"[T]he wetlands on site that are proposed to be impacted provide substantial conservation, water quality and habitat functions. These wetlands support and buffer a unique aquatic habitat and include rare plant and animal species that exist in the Gum Swamp/North Landing River System and the Intracoastal Waterway. The benefits to be derived from this project do not outweigh the substantial detrimental impacts and it is contrary to the public interest."* [3]

As discussed further below, Tri-City's new development proposal continues to implicate these same concerns, as well as a number of others, and we believe the benefits of this new proposal are similarly outweighed by its substantial detrimental impacts, making it clear that approving this permit application is not in the public interest.[4]

A. Wetland Status and Historic Trends in Virginia

Due to the sizeable wetland loss the proposed Tri-City development would cause, we urge the Corps—as well as the U.S. Environmental Protection Agency ("EPA") and, in its turn, the Virginia Department of Environmental Quality ("DEQ")—to take into consideration the status and trends of wetlands in the Commonwealth of Virginia in considering state and federal authorizations for this project. As a result of development activities, agriculture, and infrastructure construction, Virginia has suffered tremendous losses in wetland acreage and its associated functions and values since the late 1700s. Prior to 1780, wetlands covered approximately seven percent of the Commonwealth's land area.[5] Between 1780 and the mid-1980s, Virginia lost approximately 42 percent of its tidal and non-tidal wetland acreage or about 774,000 acres[6] resulting in a statewide wetland coverage decline to approximately four percent.[7] In the period between 1956 and 1977, Virginia lost approximately 57,000 acres of primarily non-tidal wetlands.[8]

Unfortunately, the trend of significant wetland losses continued during the 1980s despite the 1972 passage of the federal Clean Water Act. Between 1982 and 1990, Hampton Roads alone lost approximately 4,800 acres of wetlands.[9] The rate of loss continued through the late 1990s as

---

and welfare of the people "; *see also B&B Partnership v. U.S.*, 133 F.3d 913 (1997); *James City County* v. EPA, 12 F.3d 1330 (4th Cir. 1993).

[3] Corps 2008 Permit Denial Letter. The Corps also found that the project failed to avoid and minimize wetlands impacts to the maximum extent practicable, and that the applicant failed to rebut the regulatory presumption that a less environmentally damaging practicable alternative to the development exists.

[4] The Virginia State Water Control Board issued a 15-year wetlands permit for Tri-City's then-proposed development for this site in 2003. That permit was immediately challenged by CBF and others as failing to comply with the statutory mandate to avoid and minimize wetlands impacts to the maximum extent practical and to consider the least environmentally damaging alternatives, and other reasons. While the Board decision was ultimately upheld in court, the Corps should not consider the Virginia permit to be applicable to the present application as the project has changed dramatically. To the best of our knowledge, Tri-City has not yet filed an application with DEQ for a new permit as required by Virginia's Nontidal Wetlands Act.

[5] U.S. Environmental Protection Agency (EPA) Mid-Atlantic Wetland State Profiles. www.epa.gov/reg3esd1/wetlands/bystate.htm#va. Accessed 10/28/14.

[6] Virginia Department of Environmental Quality (DEQ). Virginia Water Quality Assessment 305(b)/303(d) Integrated Report. 2014.

[7] U.S. EPA Mid-Atlantic Wetland State Profiles. www.epa.gov/reg3esd1/wetlands/bystate.htm#va. Accessed 10/28/14.

[8] U.S. Fish and Wildlife Service Status and Trends of Wetlands in Five Mid-Atlantic States. 1986.

[9] U.S. Fish and Wildlife Service Status and Trends of Wetlands in the Chesapeake Watershed. 1994.

wetlands were routinely ditched and drained for development purposes.[10] The rate of loss did not begin to slow until changes were made to Virginia's Water Protection ("VWP") Permit Program regulations, following passage of the Virginia Nontidal Wetlands Act during the 2000 Virginia General Assembly session. Through this program, DEQ is charged with "avoidance and minimization of wetland impacts to the maximum extent practicable" and is responsible for ensuring "no net loss of existing wetland acreage and *functions*" and maintaining beneficial uses, such as fish and wildlife habitat.[11]

Recent trends have indicated that wetland impacts are still far too common, although the amount of compensatory mitigation has been substantial. Since the beginning of the VWP program on July 1, 2001 through June 30, 2013, DEQ authorized impacts to 2,460 acres of wetlands and open water, and approximately 322 miles of streams.[12] Authorization of these impacts required compensatory mitigation through a combination of creation, enhancement, restoration, and/or preservation totaling more than 10,000 acres of wetlands, and a combination of restoration, enhancement, and/or preservation of approximately 360 miles of streambed and 4,300 acres of riparian buffers.[13] Applications to fill substantial wetlands continue to be submitted, including the recent proposal to destroy 40 acres of wetlands to build a new Route 460 between Windsor and Suffolk—another proposal that raises serious concerns as noted in recent comment letters submitted by the Chesapeake Bay Foundation and Southern Environmental Law Center.[14] While stream and wetland mitigation can be a beneficial tool, loss of original wetland structure and function represents a risk to our aquatic resources, which is the reason why the Corps, EPA, and DEQ have established a clear preference for avoidance and minimization.[15] In addition, as discussed below, the continued loss of wetlands such as these will exacerbate the problems associated with sea-level rise in the Chesapeake area.

The wetland destruction resulting from this proposed development would significantly contribute to this long story of wetland loss in the Commonwealth. State and federal statutes designed to achieve "no net loss" recognize that wetland resources provide important ecosystem and economic benefits, including water quality improvements, flood control, and fish and wildlife habitats. To the best of our knowledge based on discussions with Norfolk District staff, this project, if approved, would bring about the largest loss of wetland acres ever permitted by

---

[10] Ibid.
[11] *See* Va. Code § 62.1-44.15:21 A, B.
[12] VA DEQ, Office of Wetlands and Stream Protection, Virginia Water Protection Permit Program Overview. 2013.
[13] Ibid.
[14] Similar to the Tri-City proposal, in our comment letters we contended that the permit application submitted for the new Route 460 project—also currently being reviewed by the Norfolk District—would not be in the public interest, and that the Virginia Department of Transportation has not adequately considered less damaging practicable alternatives such as upgrading the existing highway.
[15] *See* 33 C.F.R. § 332.1(c)(2); *see also* Corps of Engineers & U.S. EPA, "Compensatory Mitigation Rule: Questions and Answers" at Q11, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/comp_mitig_finalrule_qa.pdf (stating that"[p]roposed impacts must be avoided to the maximum extent practicable; remaining unavoidable impacts must then be minimized, and finally compensated for to the extent appropriate and practicable"); *see also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps Eng'rs*, 781 F.3d 1271 (11th Cir. 2015). See also Va. Code § 62.1-44.15:21 A.

Norfolk's USACE office,[16] with a single, non-pertinent exception arising from a judicial settlement involving Precon Development Corporation.[17]

Further, even factoring in the Precon project, the Tri-City permit would be unprecedented in terms of the magnitude of its impacts on very high quality wetlands, as well as the proportion of the site comprised of such wetlands. As noted below, nearly all of the 47.1 acres of wetlands proposed to be impacted by Tri-City's proposal are of "very high" or "outstanding" quality. In addition, the Precon project permit authorized impact of 75 acres of wetlands in association with a 658-acre development, corresponding to one acre of wetland impact for every 8.7 acres of development. In contrast, the entire Tri-City proposal is 53.8 acres, yet it would destroy 47.1 acres of wetlands—meaning it would impact one acre of wetlands for every 1.1 acres of development. Granting this permit would set a unique and troubling precedent, and would encourage future proposals in the Tidewater area for similar sites comprised almost entirely of sensitive wetlands.

B. <u>This Project Will Lead to a Net Loss of Wetland Quality</u>

In order to gain perspective on the relative value of the wetlands that would be impacted under this proposal, we analyzed proposed wetlands impacts using the Virginia Department of Conservation and Recreation ("DCR") Division of Natural Heritage's Virginia Wetlands Catalog (VWC).[18] The VWC is a geographic information systems ("GIS")-based tool for determining conservation and restoration priorities for the Commonwealth's wetland resources. The VWC uses a conservation index to illustrate the relative importance of wetlands throughout the state for conservation and restoration purposes, ranking wetlands on a scale from 0 to 5 (with 5 being wetlands of "outstanding" quality). Based on the conservation index values identified by DCR for the wetlands on this site, we estimated the total amount of wetlands falling into each category, as summarized in Table 1.

---

[16] According to USACE Staff, "it is not possible to compare a current project to all projects since the Clean Water Act was developed (in 1972) with regard to wetlands, since non-tidal wetlands were not clearly defined until 1987. Prior to that date, large areas of wetlands may or may not have been authorized without any clear record. Similarly, despite greater scrutiny of areas for the occurrence of wetlands since 1987, data keeping is not sufficient to support any broad statements about the proportion of projects that may or may not have impacted more than current proposals. However, comparative information based on the last 20 years or so using the Corps records as well as institutional knowledge supports these conclusions." Email from Alice Allen-Grimes, Norfolk District to Joseph Wood, Chesapeake Bay Foundation (Jan. 7, 2016)

[17] Precon Development Corporation was issued a permit in a judicial settlement that authorized a larger number of acres of wetlands impacts, but that permit was not granted in the normal course. It was, rather, an after-the-fact permit, part of an effort by the Corps and Precon to regularize the prior illegal actions of Precon's predecessor in interest, RGM Corporation, and get the project back on a lawful footing. *See* Proof Answering Brief of United States Army Corps of Engineers, *Precon Development Corps, Inc. v. U.S. Army Corps of Engineers*, Case No. 09-2239, dated March 5, 2010 (4th Cir. 2010), at 12-13.

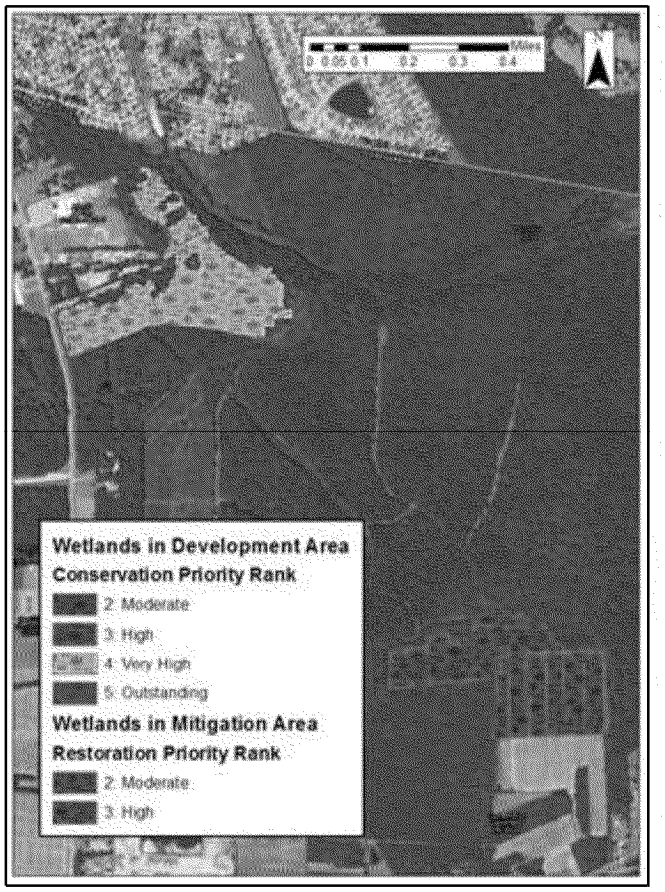
[18] Weber, J. T. and J. F. Bulluck. 2014. Virginia Wetlands Catalog: An Inventory of Wetlands and Potential Wetlands with Prioritization Summaries for Conservation and Restoration Purposes by Parcel, Subwatershed, and Wetland Boundaries. Natural Heritage Technical Report 14-4. Virginia Department of Conservation and Recreation, Division of Natural Heritage. Richmond, Virginia 49 pp.

Table 1. Wetland conservation priority rankings for proposed Tri-City wetlands impacts.

Wetland Rank (0-5)	Impacted Area (acres)	Percent Total Tri-City Wetland Impacts
Moderate (2)	0.9	2.0
High (3)	1.7	3.7
Very High (4)	40.8	86.5
Outstanding (5)	3.6	7.6
TOTAL	47.1	100.0

Nearly all of the wetland impacts (94.1 percent) under the proposed project will affect "Very High" (86.5 percent) or "Outstanding" (7.6 percent) conservation priority wetlands according to the VWC (Table 1). To put
Virginia's wetlands are ranked as "Very
High" or "Outstanding" by the VWC for
either conservation or restoration priorit
A loss of 44.4 acres of wetlands of this
caliber constitutes a significant loss for t
Commonwealth.

In contrast to the extremely
valuable wetland acres that would be
destroyed, this project proposes to mitig
a majority of those impacts on acres of
substantially lower wetland restoration
priority rank. "Moderate" and "High"
restoration priority wetlands would be
substituted, which account for
approximately 58 percent and 25 percen
Virginia's total wetland area, respectivel
(Figure 1). Even a wetland mitigation rat
that exceeds the customary 2:1 acres wil
not offset the proposed loss of pristine
Palustrine Forested wetlands ("PFOs").
also unlikely that the purchase of credits
from a mitigation bank would recover th
quality of wetlands impacted through thi
project, which are located within an aqu
system that EPA has previously classifie
as an Aquatic Resource of National
Importance ("ARNI"). [19]



[19] See 2005 EPA Comment letter recommending permit denial.

C. <u>These Impacts Would Occur Upstream of the North Landing River Which is Already Impaired Due to Low Levels of Dissolved Oxygen</u>

As pointed out in the EPA's comment letter on Tri-City's previous permit application dated April 4, 2005, the Stumpy Lake Nature Preserve and Natural Area are located at the head of Gum Swamp, which is a primary tributary of the North Landing River (which is connected to the Chesapeake Bay Watershed by the Albemarle-Chesapeake Canal) and its natural area preserve. While the 2010 DEQ Water Quality Assessment lacks sufficient data to characterize the status of Stumpy Lake, the immediate downstream reach of North Landing River up to the confluence with the Pocaty River is classified as level 4 to 5 for impairment, therefore requiring a Total Maximum Daily Load ("TMDL"). Permanent impacts to the forested wetlands that form the tributaries of Stumpy Lake will therefore constitute an increased discharge into an already impaired system.

In 2011 and 2014, DEQ developed two TMDLs for the North Landing River to address dissolved oxygen impairments (phosphorus loading) and bacterial impairments.[20] Under the nutrient TMDL scenario for the North Landing River, a 100 percent reduction in septic system/straight pipe loads and a 38.65 percent reduction from developed and agricultural sources is prescribed.[21] Developed surface within the North Landing River/Albemarle Canal TMDL coverage area accounted for 163 percent of allocated phosphorus loads in 2011. Given that this watershed already needs to reduce the waste load from development, this proposed development will further exacerbate challenges for restoring the North Landing River.

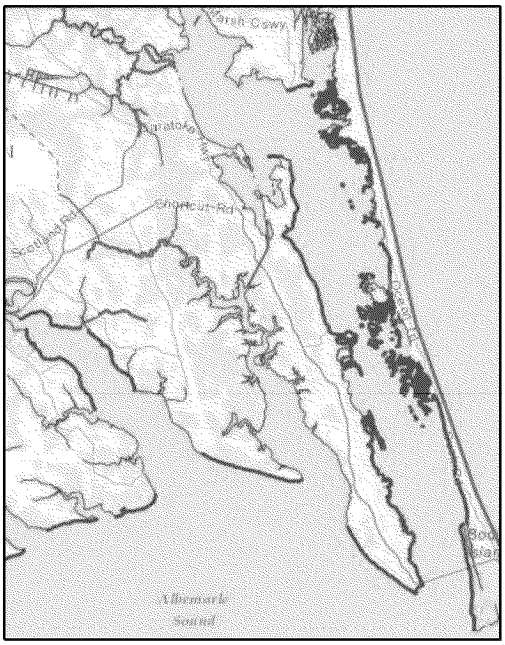


Figure 2. North Landing River, Currituck Sound, and northern Albemarle Sound water quality impairment data from NCDENR (2014). The North Landing River can be seen here flowing into the Currituck Sound to the west of the Marsh Causeway. Blue = 1 or 2 (attainment of water quality standards); green = 3 (insufficient data); red = 4 or 5 (non-attainment, requiring a TMDL).

Moreover, the impacts to impaired waters from this proposed development extend beyond the North Landing River and even the Virginia state border. The North Carolina Department of Environment and Natural Resources ("NCDENR") 2014 Water Quality Assessment Integrated Report indicates insufficient data to characterize water quality at the mouth of the North Landing River (Figure 2). However, the vast majority of the Currituck Sound south of the North Landing River, all the way to the Albemarle Sound, is classified as 4 or 5. Even with mitigation, the infilling of tributary wetlands will further impact the North Landing River as well as impaired reaches of Currituck and Albemarle Sounds.

[20] DEQ 2011, 2014 Integrated Report.
[21] EPA 2011. Decision Rationale total maximum daily load for Phosphorous due to dissolved oxygen impairments in Albemarle Canal and North Landing River Virginia Beach and Chesapeake, Virginia.

D. <u>The Proposed Level of Impacts is Inconsistent with USACE's Climate Change and Resiliency Adaptation Policy</u>

In addition to threatening downstream waters, this project will reduce coastal resiliency to flooding and sea level rise. The USACE's Climate Change Adaptation Policy (2014) states:

> *"It is the policy of USACE to integrate climate change preparedness and resilience planning and actions in all activities for the purpose of enhancing the resilience of our built and natural water-resource infrastructure and the effectiveness of our military support mission."*

While current stormwater regulations in Virginia are designed to minimize the volume and contamination of runoff, these guidelines are designed for typical storm events and can falter under extreme events such as hurricanes, which are expected to increase in frequency and intensity with climate change. Under the predicted future storm intensity scenario, preservation of high quality extant forests and wetlands at the development site will undoubtedly provide greater flooding mitigation services than the proposed development's stormwater system.

The USACE has been tasked with assisting the City of Virginia Beach with developing the Comprehensive City Response Plan to Sea Level Rise and Recurrent Flooding, a multi-million dollar, multi-year effort. Given the substantial threat posed by expected sea-level rise in this region, permitting the destruction of wetlands under the Tri-City proposal would not be consistent with USACE's Climate Change Adaptation Policy or with the leadership role the USACE has adopted for assisting coastal communities in planning for and combatting negative impacts due to climate change and recurrent flooding. The City of Virginia Beach is projected to spend $135 million over the next ten years in currently identified flood control projects,[22] and a map provided by the City of Chesapeake clearly illustrates the Tri-City proposed development site within an identified storm surge zone (Figure 3). Permitting this project

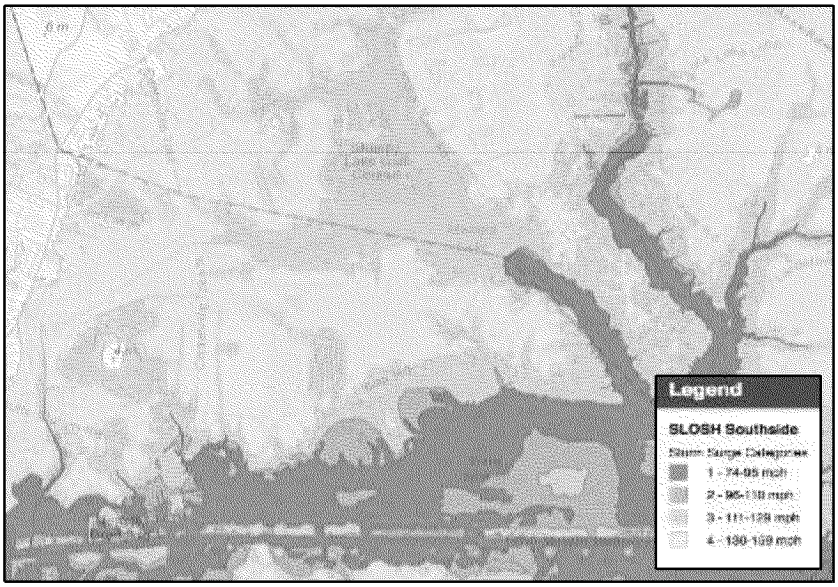


Figure 3. Storm surge risk map for City of Chesapeake, VA, generated by the National Weather Service's Sea, Lake, and Overland Surges from Hurricanes (SLOSH) model. Upland areas are shown in background while colors indicate flooding under storm surges are provided in the legend.

[22] Correspondence between James Spore (Virginia Beach City Manager) and City Council.

would not be consistent with USACE's Climate Change Adaptation Policy and would put this community, the local economy, and natural resources at increased risk.

E. This Proposal Indirectly Impacts a Larger Amount of Wetlands through Fragmentation and Potential Future Development

The proposed project will likely influence wetlands in addition to those identified as being directly impacted or conserved through mitigation. There is a large parcel of wetlands on the property which would not be placed under conservation easement or considered under direct impacts (Figure 4). We are concerned that the permitting of this project will leave the door open to further development of these wetlands in future phases. Even if these other wetlands are not subsequently developed, they will likely be subject to indirect effects from stormwater facilities and roads that could be detrimental. These include "run-off from impervious surfaces, downstream flooding, vehicle pollution, noise, increased sedimentation, and pollutant levels in surface and ground water" as have been described by EPA in previous comment letters on this proposal.

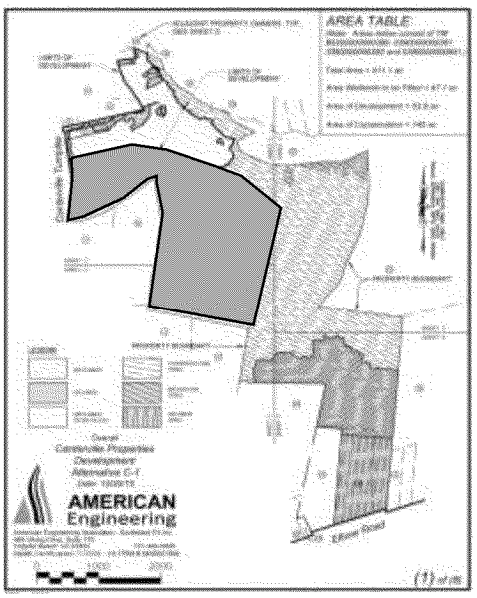


Figure 4. Wetlands unaccounted for in this mitigation plan highlighted in yellow (Drawing from NAO 2006-5097).

Furthermore this project would fractionate a large contiguous wetland system. Large parcels of wetlands are increasingly rare and have been shown to have synergistic environmental benefits whereas fragmented wetlands often exhibit reduced ecosystem services, increased exposure to invasive species, reduced biological diversity, and increased nitrogen export.[23]

Other studies have indicated a nonlinear decrease in wetland functioning with wetland area loss within watersheds, in part due to the decreased ability of fragmented wetland habitats to support a wide range of plant and animal species and to maintain continuous functions.[24] The fragmentation of a large, intact PFO wetland adjacent to Stumpy Lake and Gum Swamp would likely impinge on broader wetland functioning beyond the confines of the project site and thus we recommend the USACE request a plan for all wetlands as a part of this application process.

F. This Site is Located in a Key Conservation Area and Habitat Corridor

In the Corps' 2008 denial of Tri-City's previous permit application, it noted that "the public interest in preserving or conserving this site is substantial."[25] This was partly due to the Virginia DCR's finding that this property is located within the North Landing River—Gump

[23] Faulkner, Stephen. "Urbanization Impacts on the Structure and Function of Forested Wetlands." Urban Ecosystems 7, no. 2 (June 2004): 89–106.
[24] Tiner, R. 2005. Assessing cumulative loss of wetland functions in the Nanticoke river watershed using enhanced national wetlands Inventory data. *Wetlands*. Vol. 25, No. 2, pp. 405–419.
[25] Corps 2008 Permit Denial Letter at 4.

Swamp Conservation Site—and that the lands within this Conservation Site "are listed as the highest priority for protection."[26] The Corps further noted that the proposed development site is "part of a mostly forested corridor, much of it wetlands, linking the Dismal Swamp to the west and the Back Bay to the east and is important for the movement of wildlife."[27]

DCR continues to identify the area including the proposed development as a Natural Heritage Conservation Site,[28] and the project site continues to provide suitable habitat for a number of threatened and endangered species, including the canebrake rattlesnake, Dismal Swamp southeastern shrew, bald eagle, and northern long-eared bat. While the applicant tries to downplay the significance of this site by noting the substantial amount of development that has occurred nearby, in our view this instead highlights the critical importance of retaining the remaining forested wetlands within this important Conservation Site and habitat corridor, such as those located on this property adjacent to the Stumpy Lake Natural Area. This view is in line with numerous comments received from concerned citizens, localities, and resource agencies in connection with Tri-City's previous proposal, as noted in the Corps' 2008 letter.[29]

II. Tri-City's Alternatives Analysis Remains Inadequate

In addition to the "public interest" standard discussed above, under guidelines developed by EPA to implement Section 404(b)(1) of the Clean Water Act (which the Corps' regulations provide must be applied in its review of discharge permits[30]), the Corps may only grant a Section 404 discharge permit for the "least environmentally-damaging practicable alternative" ("LEDPA") for a project.[31] Further, the guidelines provide that if a project is not "water dependent" (as Tri-City acknowledges is the case here), then "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[32] As noted above, avoidance and minimization is a key tenet of wetland protection programs in Virginia and throughout the United States.

In its review of Tri-City's previous proposal to develop this site, the Corps found that Tri-City's analysis of alternatives failed to show that the proposal was the LEDPA for this project. This new application proposes to impact 47.1 acres of palustrine forested wetlands, and to mitigate these impacts through constructing wetlands on adjacent upland sites and developing a "conservation buffer," and the applicant claims—as it did for its prior proposal—that this represents the LEDPA. We disagree, and believe the applicant has again failed to provide adequate information to support such a finding by the Corps and overcome the presumption that a less harmful alternative exists for this non-water-dependent project.

---

[26] According to the Corps' letter, this finding was made in a February 2001 report by DCR's Division of Natural Heritage entitled "Conservation Plan for the Southern Watershed Area" (Natural Heritage Technical Report 00-12).
[27] Corps 2008 Permit Denial Letter at 3-4.
[28] *See* DCR, Natural Heritage Conservation Sites, http://www.dcr.virginia.gov/land-conservation/tools02c (last visited Feb. 18, 2016).
[29] *See* Corps 2008 Permit Denial Letter at 4.
[30] *See* 33 C.F.R. § 323.6(a) (providing that the Corps' district engineer "will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under the authority of section 404(b)(1) of the CWA").
[31] *See* 40 C.F.R. § 230.10(a); *see also B&B P'ship v. U.S.*, 133 F.3d 913 (4th Cir. 1997); *Precon Devel. Corp. v. U.S. Army Corps Eng'rs*, 658 F. Supp. 2d 752 (E.D. Va. 2009).
[32] 40 C.F.R. § 230.10(a)(3); *see also Precon Devel. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 658 F. Supp. 2d 752 (E.D. Va. 2009).

The application indicates that 90 acres of upland property are located on the parcel of land owned by the permittee; this area still appears to be a much more suitable site for development. In the current application, the permittee claims this area cannot be developed due to rezoning requirements and cost feasibility associated with road expansions. However, we see little in the information provided in this application[33] to illustrate that these obstacles are sufficient to warrant a permitted level of wetland impacts that is unprecedented for a residential development in the Commonwealth of Virginia. Furthermore, it has not been clearly shown that net mitigation costs would not exceed these financial obstacles. The impacts of expected increases in traffic on Elbow Road associated with the proposed development have also not been documented in this application.

Finally, the impacts from this proposed project cannot be fully mitigated. The concept that some projects' impacts cannot be fully mitigated is represented in the Memorandum of Agreement between the EPA and the USACE.[34] Permitting this level of impact to our natural wetland ecosystems will undoubtedly have a negative impact on the functional capacity of wetland resources. The National Research Council[35] and the scientific literature[36,37,38,39,40] have documented that mitigation projects often fail to achieve pre-impact levels of ecosystem services and benefits; and this justifies the Corps' and EPA's prioritization of avoidance and minimization over mitigation.[41]

In addition, we are concerned with the very limited amount of information that has been provided to the public concerning the updated alternatives analysis for this application. It appears that much of the information on this analysis has been redacted and, without further justification, withheld from disclosure under the Freedom of Information Act. For a development project that would have significant impacts on the public and has previously been found by the Corps and EPA to not be in the public interest, we urge the Corps to ensure that maximum information is provided to the public to enable a careful review of this proposal and its alternatives, both as part of this Section 404 permit review and as part of the National Environmental Policy Act ("NEPA") review discussed further below.

III. An Environmental Impact Statement Must be Prepared for This Application

Lastly, NEPA requires a federal agency to prepare an Environmental Impact Statement ("EIS") for any major federal action "significantly affecting the quality of the human

---

[33] The applicant supplied several letters suggesting road improvement must occur on Elbow Road before any rezoning will occur however road improvements are a standard consideration for any development and do not preclude this as a potential alternative given the substantial level of impacts proposed.

[34] Clean Water Act Section 404(q): Memorandum of Agreement, http://www.epa.gov/cwa-404/clean-water-act-section-404qmemorandum-agreement.

[35] National Research Council, 2001. Compensating for Wetland Loss under the Clean Water Act. Committee on Mitigating Wetland Losses, Board on Environmental Studies and Toxicology, Water Science and Technology Board, Division on Earth and Life Studies.

[36] Ardón, M., Morse, J. L., Doyle, M. W., & Bernhardt, E. S. (2010). The Water Quality Consequences of Restoring Wetland Hydrology to a Large Agricultural Watershed in the Southeastern Coastal Plain. Ecosystems, 13(7), 1060–1078.

[37] Bedford, B. L. (1999). Cumulative effects on wetland landscapes: Links to wetland restoration in the United States and southern Canada. Wetlands, 19(4), 775–788.

[38] Doyle, M. W., & Douglas Shields, F. (2012). Compensatory Mitigation for Streams Under the Clean Water Act: Reassessing Science and Redirecting Policy1. Journal of the American Water Resources Association, 48(3), 494–509.

[39] Zedler, J. B. (2000). Progress in wetland restoration ecology. Trends in Ecology & Evolution, 15(10), 402–407.

[40] Moreno-Mateos et al. 2012. Structural and Functional Loss in Restored Wetland Ecosystems. *PLoS Biology*. Vol. 10:1.

[41] 40 CFR Part 230, Final Rule 2008. Compensatory Mitigation for Losses of Aquatic Resources.

environment."[42] However, the public notice indicates that the Corps only intends to prepare a more concise Environmental Assessment ("EA") for this project, unless that assessment determines that an EIS is necessary. While NEPA allows for preparation of an EA when it is unclear whether a project's impacts will be "significant,"[43] this proposal meets that threshold and an EIS must be prepared if this project moves forward.

As discussed above, this proposal would impact 47.1 acres of wetlands—making it one of the most destructive projects the Corps would have permitted in Virginia if it were to be approved. Most of these wetlands are of "very high" or "outstanding" quality which have previously been designated as an Aquatic Resource of National Importance, and in an important location adjacent to Stumpy Lake and upstream of Gump Swamp and the North Landing River. In addition, this proposal would require the destruction and fragmentation of significant forested habitat for threatened and endangered species, such as the canebrake rattlesnake, Dismal Swamp southeastern shrew, bald eagle, and northern long-eared bat.

In our view, the impacts of this proposal would clearly be "significant," and the Corps must prepare a more comprehensive EIS if this proposal moves forward that includes a thorough review of the relative costs and benefits of this proposal, as well as its direct, indirect, and cumulative impacts, and provides the public with more complete information about the consideration of less harmful alternative options for this project.

IV. Conclusion

In summary, this project is not in the public interest nor has the appropriate level of analysis been performed to consider less impactful alternative developments. The drawbacks are substantial and include exacerbating current water quality challenges, reducing the area's resiliency to flooding, impacting rare wetland habitats, and fragmenting a large wetland parcel. These issues have important consequences for natural resources management in Virginia and also the local economy. The limited public benefits of this project pale in comparison to the negative impacts, and we are still not convinced that the public benefits that would occur with this project could not be achieved through less environmentally degrading alternatives on or near this parcel of land. We therefore urge you to deny this permit application.

---

[42] 42 U.S.C. 4332(C). ; *see also Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1972).

[43] *See, e.g.*, 40 C.F.R. § 1508.9. ; *see also U.S. Dep't Transp. v. Public Citizen*, 541 U.S. 752 (2004) (stating that "the [Council on Environmental Quality's] regulations allow an agency to prepare a more limited document, an Environmental Assessment ("EA"), if the agency's proposed action neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS").

Sincerely,

Rebecca LePrell
Virginia Executive Director
Chesapeake Bay Foundation

Trip Pollard
Director, Land and Community Program
Southern Environmental Law Center

Joseph Wood, Ph.D.
Virginia Staff Scientist
Chesapeake Bay Foundation

Travis Pietila
Staff Attorney
Southern Environmental Law Center

William A. Stiles, Jr.
Executive Director
Wetlands Watch

Todd Miller
Executive Director
North Carolina Coastal Federation

cc: Margaret Sanner, Virginia Assistant Director & Senior Attorney, Chesapeake Bay Foundation
Chris Moore, Virginia Senior Scientist, Chesapeake Bay Foundation
Jon Mueller, Vice President of Litigation, Chesapeake Bay Foundation
Carrie Traver, USEPA Region 3, Office of Environmental Programs
Melanie Davenport, Water Permitting Division Director
Dave Davis, Virginia DEQ, Office of Wetlands and Stream Protection
Bert Parolari, Virginia DEQ, Virginia Water Protection Permit Manager