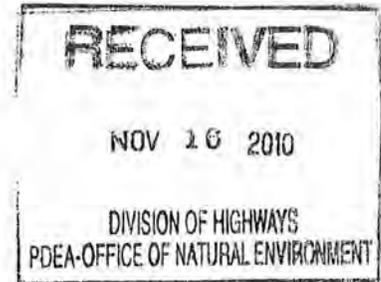




REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
69 DARLINGTON AVENUE
WILMINGTON, NORTH CAROLINA 28403-1343

November 9, 2010



CC: B. Ellis
L. Fitzpatrick
L. Pough

Regulatory Division

Gregory J. Thorpe, Ph.D.
Environmental Management Director, PDEA
N.C. Department of Transportation
1598 Mail Service Center
Raleigh, NC 27699-1598

Dear Dr. Thorpe:

As you are aware, we participated in a work shop on August 15-17, 2007 whose purpose was to address the issue of surplus mitigation assets that were acquired by NC DOT (and subsequently transferred to EEP), in order to provide compensatory mitigation for future transportation projects. As we understood at the time, the fundamental issue surrounding the use of these credits was due to their being located in different water sheds (8 digit HUCs) from where projected project impacts were to occur and thus their use within the EEP program was not allowed. During this workshop the participants identified three mechanisms by which the surplus credits could be utilized; development of an umbrella bank by NC DOT, short term use of credits on a case-by- case basis, and potential selling of unneeded sites on the open market (we addressed the potential sale of unneeded sites by letter to you dated December 4, 2006). Of those methods, the development of an umbrella mitigation bank by NC DOT appeared to offer a viable option whereby NC DOT staff could directly negotiate the use of these credits with the review agencies considering the impacts that were proposed by NC DOT and the specific mitigation that could be offered. We were under the impression that the case-by-case use of these sites was a short term method to utilize some of these credits for larger TIP projects (eg. Fayetteville Outer Loop), some of whom were identified during the workshop, until the Mitigation Banking Instrument (MBI) was signed and the number, type, and location of credits was fully understood by the resource and regulatory agencies. Even though the MBI was signed in September 2009, we are still receiving requests to use credits from mitigation sites that are being managed by EEP on a case-by-case basis. During development of the MBI, we had numerous discussions with both EEP and NC DOT staff about the potential for confusion regarding the tracking of credits between the EEP and NC DOT and for that reason the MBI specifically prohibits the transfer of credits back to EEP once they have been acquired by NC DOT. It is critical to the success of the mitigation programs in NC that there be no confusion regarding the number and type of credits that exist on any given mitigation site, who is managing these credits, who is ultimately responsible for mitigation site success, and who is ultimately responsible for meeting the terms and conditions of any DA permit that is issued obligating use of a particular site.

By way of background, we were under the impression that NC DOT transferred its mitigation sites to EEP around 2003, when those sites contained available mitigation credits and that EEP was subsequently responsible for accounting for their use (debiting), monitoring, remedial action, close out, and long term management with the review agencies. In accordance with the tri-party MOA, EEP was ultimately responsible for fulfilling the mitigation requirements found in the permit conditions. If a site was fully debited at the time the MOA was signed, it was our understanding that NC DOT would continue to monitor the site and coordinate its close-out with the review agencies and that NC DOT was solely responsible for ensuring the success of the site and for satisfying any permit conditions attached to that site.

On September 4, 2009 the NC DOT MBI was executed, and since then, two sites have been incorporated into the bank; Croatan and Privateer Farms. It is our understanding that your staff is preparing additional prospectuses to incorporate more sites although it is not entirely clear to us what sites will ultimately be incorporated into the bank. Although not specifically mentioned in the MBI, we believed that the development of the bank was to allow NC DOT to utilize surplus credits, and that those credits would only be used where the impact and mitigation sites were not located in the same 8 digit HUC. We believed then as we do now that EEP is fully capable of meeting your in-HUC mitigation requirements.

*UMBI should
not CU too*

Recently, we were asked to use the Clayhill Farms mitigation site before its inclusion into the bank under the case-by-case scenario; this is presenting significant issues for our PMs and potentially for the enforceability of our permit conditions. A basic requirement to incorporate a site into the bank is to coordinate with the field office in which it is located so that our PMs would be familiar with what the site is providing relative to community types, its relative maturity, and any issues relative to meeting its success criteria. Under the case by case use, NC DOT is responsible for debiting the site, meeting applicable permit requirements, including ensuring that the site is successful while these properties are still being managed by EEP, including monitoring. Aside from the confusion that may surround the transfer of credits between EEP and NC DOT, it is entirely unclear to us who is ultimately responsible for managing the site. We believe none of these issues will exist once the site is incorporated into the bank and a clear line of responsibility has been established as to who will be managing the site.

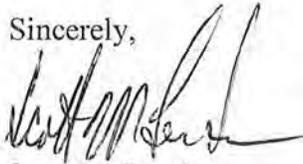
As the case by case use of NC DOT legacy mitigation sites is causing concern for us and may compromise our ability to maintain adequate oversight over available mitigation credits that exist in EEP and NC DOTs respective mitigation programs we are hereby informing you that until a mitigation site has been fully incorporated into the NC DOT bank, any credits must remain at EEP who will continue to be responsible for providing the required mitigation in accordance with the ILF instrument executed in July 2010.

stops case by case

We support the use of these legacy credits in accordance with all applicable regulations and policy, consistent with our goal to ensure that we offset permitted impacts with appropriate type and amount of compensatory mitigation. To that end, we believe it would be appropriate to convene meeting to discuss the situation as it currently exists, and perhaps develop a process by which NC DOT can access these credits that eliminates the concerns we have relative to the current practice. We believe that there may be an opportunity for EEP to manage NC DOTs credits on their sites for the purposes of maintaining debit ledgers, monitoring, and close out, but that NC DOT could propose use of these sites as the need arises.

If you have any questions or comments regarding this correspondence please do not hesitate to contact me at 910-251-4952.

Sincerely,



Scott McLendon
Assistant Chief,
Regulatory Division

Copies Furnished:

Mr. William D. Gilmore, P.E.
Director, Ecosystem Enhancement Program
1652 Mail Service Center
Raleigh, North Carolina 27699-1619

John Dorney
North Carolina Department of Environment
and Natural Resources
Division of Water Quality
1650 Mail Service Center
Raleigh, North Carolina 27699-1650



STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION

BEVERLY EAVES PERDUE
GOVERNOR

EUGENE A. CONTI, JR.
SECRETARY

16 November 2009

MEMORANDUM TO: Jim Stanfill, Strategic Planning Supervisor
NC Ecosystems Enhancement Program

FROM: Bruce O. Ellis, CLM, PWS, Assistant Unit Head
NCDOT, Natural Environment Unit

SUBJECT: Request to Transfer Wetland Mitigation Credits to NCDOT
for Case by Case Mitigation Negotiations.

Case by Case Mitigation Request, Bridge 43 over Deep
Creek on SR 1133, Carteret County, TIP No. B-4454, WBS
33707.1.1.

The purpose of this letter is to request that the Ecosystem Enhancement Program (EEP) transfer mitigation assets and credits in order for the NCDOT to complete case by case negotiation with the regulatory agencies to satisfy the mitigation requirements associated with the above referenced project. The proposed project is located in the White Oak River basin, CU 03020106. NCDOT requests that EEP transfer the following from the Clayhill Mitigation Site, located in White Oak River basin CU 03020106, to offset project related impacts.

Riparian Wetland 1.0 acres restoration

The NCDOT Natural Environment Unit is pursuing "case by case" wetland mitigation options for TIP B-4454 and will propose using mitigation credits generated by the Clayhill Mitigation Site in CU 03020106.

Concurrently, riparian wetland impacts associated with this TIP should be removed from the NCDOT's Impact Projection Database (mitigation order) dated February 2, 2009. The NCDOT acknowledges that EEP is no longer responsible for generating the mitigation assets and credits to offset these wetland impacts associated with this TIP project.

Please contact me at 919 431-6754 if you have any questions.

Cc: Bill Gilmore, P.E., Director, EEP
Phil Harris, P.E., Unit Head, NEU
Beth Harmon, DOT Coordinator, EEP
Linda Fitzpatrick, EEP Coordinator, NEU
Leilani Paugh, ICI and Onsite Mitigation Group Leader, NEU
Chris Manley, Environmental Specialist, NEU