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Maryland Department of the Environment

Mitigation and Technical Assistance Section

1800 Washington Boulevard, Suite 430

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SUBJECT: Lake Elkhorn Mitigation Bank, Application Number 2021-60426

Sent by email to john.j.dinne@usace.army.mil and kelly.neff@maryland.gov

January 7, 2022

Dear Mr. Dinne and Ms. Neff,

The Chesapeake Bay Foundation appreciates the opportunity to comment on the proposed project to establish the Lake Elkhorn compensatory mitigation bank ("Bank") under a statewide Davies Resource Group Maryland Umbrella Compensatory Mitigation Instrument (DRG MD UMBI) and generate mitigation credits to offset unavoidable impacts to waters of the United States authorized under Section 10 of the Rivers and Harbors Act (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344).

The Bank is proposed to generate various mitigation credits. It will generate credits to offset unavoidable impacts to waters of the State of Maryland authorized under Titles 5 and 16 of the Environment Article, Annotated Code of Maryland. It may also provide alternative types of mitigation for Total Maximum Daily Load (TMDL) and/or National Pollutant Discharge Elimination Systems Municipal Separate Storm Sewer System (MS4) nutrient and sediment credits. Finally, it may provide mitigation for Corps of Engineers civil works projects, or mitigation in connection with resolving Clean Water Act enforcement cases.

While the intent of the project is laudable, the project's prospectus fails to show that establishment of a Lake Elkhorn compensatory mitigation bank will fulfill the stated goals and objectives. Specifically, the proposal fails "to establish the

framework for restoring, enhancing, creating and/or preserving tidal and non-tidal wetlands, riparian systems, streams, and contiguous buffer corridors, as well as uplands and/or other aquatic resources. . ." from the Prospectus. The Lake Elkhorn proposal cannot meet these goals for several reasons, primarily because any restoration and preservation efforts in the stream corridor will likely be overwhelmed by pollution caused by extensive untreated impervious surface that channels polluted runoff toward the area intended for restoration.

The following elaborates on the concerns with this initiative:

- 1. The Lake Elkhorn proposal fails to show it will provide high function and value based on a watershed approach. In fact, the proposal ignores the root cause of erosion within the watershed.**

The prospectus states that the project will "provide high function and value [and] advanced compensatory mitigation based on a watershed approach. . ." Restoration and preservation efforts of the project will be undermined by the site location itself, particularly the extensive impervious surface upstream and surrounding the site. Upstream impervious surface limits the potential for water quality improvement because of the contaminated volume of runoff it generates, while the highly developed surroundings minimize opportunity to create high-value wildlife habitat in this location.

During a recent site visit, CBF staff observed firsthand that there is a lack of effective stormwater management throughout the Lake Elkhorn watershed. Stormwater management that does not properly slow and filter polluted runoff is the overarching cause of erosion and instability of the Lake Elkhorn stream system.

The Chesapeake Bay Foundation's Land Restoration Specialist walked along a trail which followed and crossed the stream system numerous times. There were many large culverts whose outfalls dump straight into the stream. These culverts deliver untreated stormwater from upslope parking lots, roadways and rooftops, putting stream water quality and wildlife habitat at risk. Eroding gullies throughout the area are evidence of extensive upland impervious surface that directs high volumes of runoff to the stream in the absence of adequate water quality and water quantity controls.

The stormwater runoff from the upstream segments, which will be aggravated by the increasing amount, frequency, and severity of rainfall from climate change, will potentially overwhelm restoration work by flooding the area. In the early days of the project this threat will be even greater because soils recently disturbed during site preparation and immature vegetation will leave the area vulnerable to erosion.

While the condition of the upland areas may not be within the Corps' purview, and while the applicant may claim these concerns to be beyond the scope of this project, the connection of this proposal to Lake Elkhorn's upstream hydrology is an essential

consideration. Without accounting for the stormwater volume and quality throughout the stream's watershed, the mitigation that occurs as a result of the proposal is likely to be ineffective at increasing the functionality of the existing stream.

Chesapeake Bay Foundation's Senior Scientist attended meetings held by the Columbia Association with residents. This project is an opportunity for the Columbia Association to take a comprehensive approach to stream mitigation that would incorporate upland stormwater management to help support the success of in-stream quality enhancements. The Columbia Association should consider the full impacts of impervious surface, stormwater volumes, and associated stream impacts and the Corps of Engineers and the Maryland Department of the Environment should not allow in-stream work until upland stormwater sources are addressed.

2. The applicant fails to show that this proposal will restore and preserve aquatic and semi-aquatic resources and fails to show relative probability of successfully achieving self-maintaining ecological uplift.

The prospectus states that the project will “[r]estore and preserve aquatic and semi-aquatic resources based on environmental priorities and relative probability of successfully achieving self-maintaining ecological uplift.” The suggestion that this project will result in restoration, preservation and ecological uplift can only be considered in the context of the destructive impacts associated with the mitigation work. A mitigation bank proposal should not include destructive impacts to existing wetlands, stream channels or floodplains.

Based on the site visit, Chesapeake Bay Foundation's Land Restoration Specialist found that the forest canopy cover throughout most of the floodplain is impressive with an understory of mostly spicebush. Construction impacts associated with the stream restoration are expected to result in forest fragmentation and loss of native species and habitat, as is not uncommon with stream restoration projects. There were some locations where the forest buffer could be widened, reducing the amount of mowed turfgrass and associated stormwater runoff.

Details on “enhancement” and “restoration” in the prospectus do not demonstrate that a water quality or fish and wildlife benefit will occur except to the extent that the project may prevent the property from being developed. Given the current restrictive easements on the Columbia Association property for recreation, even that benefit seems to have already been secured. Additional protection from development for this site, however, could be achieved through local zoning, and that process would spare the site from clearcutting.

3. The applicant fails to show how this project will create wildlife value or protect existing wildlife.

If the Lake Elkhorn project proceeds as currently designed, the site of the proposed bank has limited value for wildlife habitat based on the amount of surrounding development. In fact, it seems more likely that the proposal will negatively affect wildlife that may be currently present at the site. In particular, the Chesapeake Bay Foundation notes there may be threatened or endangered species onsite, including the Yellow Lance Freshwater Mussel.¹ Designation of critical habitat for yellow lance mussel is recent and includes areas near the project site. CBF requests on-site surveys be conducted for yellow lance mussel and other freshwater mussel species which might be sensitive to sedimentation caused by construction.

The U.S. Fish and Wildlife Service indicated that the effect of the project on the Northern Long-eared Bat must be considered since the project proposal consists of 15 acres or more of clearcutting.² The public notice states that a “preliminary review of this prospectus indicates that the proposal will have no effect on Federally-listed threatened or endangered species or their critical habitat, pursuant to Section 7 of the Endangered Species Act, as amended. As the evaluation of this application continues, additional information may become available which could modify this preliminary determination.” This finding is not an adequate basis for a final determination. A desktop review for threatened and endangered species is insufficient and must be supplemented with field verification and other scientific information.

4. This project has no clear water quality improvement purpose and will result in the community’s temporary loss of access to nature.

A stream restoration project should aim to improve water quality, and any pollution reduction or treatment benefits should be quantified relative to baseline nutrient and sediment loading and attenuation characteristics of the stream in its current condition. Those nutrient reduction benefits would also have to be quantified through the Chesapeake Bay Model incorporating loading factors based on the bank’s location relative to tidal waters of the Patuxent River to receive Chesapeake Bay TMDL restoration credit.

The stream restoration will also result in the temporary loss of significant recreation access for the community. A site visit confirmed that this trail system is of high value to area residents. The Chesapeake Bay Foundation’s Land Restoration Specialist observed a demographically diverse population using this trail, including all ages and backgrounds, school children, and sports teams. Loss of access to nature underscores the threat of this project. This loss, alongside uncertain water quality outcomes should factor into the Department of the Environment’s decision with respect to goals of equity, access to nature, and protection of natural resources.

¹ 50 CFR 17; 86 FR 18189 [Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Yellow Lance](#) (May 10, 2021).

² United States Department of the Interior, Fish and Wildlife Service, Chesapeake Bay Ecological Services Field Office, Letter dated May 20, 2021, part of prospectus record.

5. The proposed mitigation bank does not benefit all portions of the Patuxent or Patapsco watersheds.

Identifying a service area beyond the Patuxent River watershed within the Piedmont is inappropriate except possibly for nutrient reductions needed in the coastal plain portion of the Patuxent watershed downstream. There is no benefit to the Patapsco watershed from a mitigation bank in this location, so it should be removed as an alternative service area.

Based on the comments above, CBF does not support issuance of permits for this mitigation bank in its current form and shares the concerns of local residents who treasure the Lake Elkhorn watershed in its current condition, even if somewhat degraded. There are significant improvements that can be made to the system through better upland stormwater management and recreational facility management that would not authorize destruction of wetlands elsewhere in the identified service area.

Thank you for the opportunity to comment on this permit. If you would like to speak further about the concerns and suggestions shared, please be in touch: rclark@cbf.org; 443.995.8753.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Clark". The signature is stylized and cursive.

Robin J. Clark
Maryland Staff Attorney