

# Crowder/Shady Oaks Proposal Comment Form

Public Hearing  
October 16, 2007

Name Mrs Warren Vann  
Mailing Address 1557 White Elephant Rd Grant AL 35749

Comments We have children and grandchildren who  
look forward to coming to the lake, especially  
on holidays because they live out of the area.

The past two summers the amount of boats in  
the lake have increased two fold. They speed  
and drive very close to boat houses. This causes  
us great concern with our children and  
grandchildren's safety as they take jet ski &  
boat. Even floating on rafts close to our  
boat house.

More boats in this area would increase  
safety issues among other issues. Another  
issue is road traffic on White Elephant  
Road. It is already dangerous to walk  
because of auto speeders. Many times cars  
speed around the curves in the opposite  
lane causing us to move over into  
unimproved areas very close to the water &  
ditches. More autos will put an end to our  
early walks.

***JOE W. McCALEB and Associates***

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Joe W. McCaleb  
Emily H. Yao

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October 16, 2007

RE: Guntersville Reservoir – Jagger Branch Embayment, Marshall County

Public Comments Regarding Permit Application:

Corps-TVA Joint Public Notice No. 06-65 (Application No. 2006-01175,  
Shady Acres Subdivision) – DA permit issued January 19, 2007

(TVA Public Hearing, October 16, 2007, 5pm – 8pm, Marshall County  
Courthouse)

The following comments are submitted on behalf of the Honeycomb Community Association (“HCA”), an Alabama Non-Profit Corporation composed of riparian landowners on Jagger Branch and Honeycomb Creek, and other individuals who will be directly and indirectly impacted by proposed construction projects, including but not limited to the construction of community boat slips, dredging activities in Jagger Branch embayment, and clearing of the hillside east of White Elephant Road, as described in the U.S. Army Corps of Engineers (“Corps”) – Tennessee Valley Authority (“TVA”) Joint Public Notice No. 06-65 (Application No. 2006-01175, Shady Acres Subdivision) and amendments (DA permit issued January 19, 2007). Included with this letter are two documents previously submitted at a TVA Open House meeting, held May 8, 2007 in Guntersville, AL for Application No. 2006-02127, Jagger Branch Homeowners Association.<sup>1</sup> Because many of the issues that were discussed in these two documents pertain to the entire Jagger Branch embayment, and are not isolated to each individual permit application, we are resubmitting these comments for consideration, and so as to be addressed by applicants, Mr. Louis Crowder and Mr. Charles Gilliland.

As similar to the Jagger Branch Homeowner’s Association permit application, the locating of a community water-use facility in the narrow and shallow embayment of Jagger

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<sup>1</sup> (1) May 15 comments submitted by Joe W. McCaleb & Associates and (2) “Adverse Environmental Impacts Associated with Proposed Shady Oaks and Jagger Branch Developments” submitted by Mark A. Quarles of “Globally Green Consulting,” on behalf of HCA.

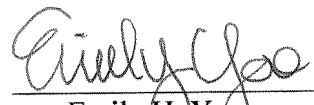
Branch will result in detrimental impacts to water quality, other natural resources, and the character and community of the Jagger Branch embayment. Furthermore, the applicants have failed to accurately consider and disclose the true extent of the impact of their proposed activities. TVA, as the responsible federal agency must assess these impacts, both direct and indirect, as well as cumulative impacts.

While HCA appreciates TVA's commitment of involving the public in permit decisions, and while HCA appreciates and looks forward to the separate Public Hearing that TVA intends to hold for the Jagger Branch Homeowner's Association application, HCA urges the agency to strongly consider the cumulative impact of permitting 2-3 community water-use facilities within a stone's throw of each other. Large community boatdocks and associated water-use facilities are better suited for larger areas with adequate flow and natural flushing abilities. This conclusion is supported by our May 15, 2007 comments, as well as the report submitted by Mark Quarles (Globally Green Consulting) on behalf of HCA. Moreover, this conclusion is currently being advanced in other TVA reservoirs, and is supported by expert opinion that boating capacity studies are necessary in order to determine boating safety and water quality, and furthermore, that improper siting of community water-use facilities will detrimentally impact water resources and other natural resources.

It is our hope that the issues raised in the (1) May 15, 2007 comments submitted by this office on behalf of HCA, and (2) the report submitted by Mark Quarles (Globally Green Consulting) on behalf of HCA, will highlight the many reasons why TVA should deny Mr. Crowder's and Mr. Gilliland's request for a Section 26a permit.

Thank you for the additional opportunity to submit comments, and on behalf of HCA I would like to request that you include Honeycomb Community Association as a "party of record," pursuant to 18 CFR § 1304 et seq.

Sincerely,

  
Emily H. Yao

- Encl: (1) May 15, 2007 letter/comments submitted by Joe W. McCaleb and Associates, on behalf of HCA
- (2) "Adverse Environmental Impacts Associated with Proposed Shady Oaks and Jagger Branch Developments: Jagger Branch Embayment, Guntersville Lake, Alabama," Prepared by Globally Green Consulting

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May 15, 2007

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RE: Guntersville Reservoir -- Jagger Branch Embayment, Marshall County

Public Comments Regarding Permit Applications:

Corps-TVA Joint Public Notice No. 06-115 (Application No. 2006-02127,  
Jagger Branch Homeowners Association)

Corps-TVA Joint Public Notice No. 06-65 (Application No. 2006-01175,  
Shady Acres Subdivision) – DA permit issued January 19, 2007

Gentlemen,

The following comments are submitted on behalf of the Honeycomb Community Association (“HCA”), an Alabama Non-Profit Corporation composed of riparian landowners on Jagger Branch and Honeycomb Creek, and other individuals who will be directly and indirectly impacted by proposed construction projects, including but not limited to the construction of community boat slips, dredging activities in Jagger Branch embayment, and clearing of the hillside east of White Elephant Road, as described in the U.S. Army Corps of Engineers (“Corps”) – Tennessee Valley Authority (“TVA”) Joint Public Notice No. 06-115 (Application No. 2006-02127, Jagger Branch Homeowners Association) and amendments, and Joint Public Notice No. 06-65 (Application No. 2006-01175, Shady Acres Subdivision) and amendments (DA permit issued January 19, 2007).

Both Applicants (hereinafter referred to as “Jagger Branch” and “Shady Oaks”) fail to address the probable harms that will result from the planned construction of community boathouses and the associated subdivisions. The National Environmental Policy Act (“NEPA”) requires that direct, indirect, and cumulative impacts be assessed prior to final agency decisions on activities likely to result in impacts significantly affecting the quality of the environment. (42 U.S.C. § 4332; 40 CFR § 1502). In fact, the applications submitted by Jagger Branch and Shady Oaks include inaccurate and incomplete information. Thus, any permit decision based solely on the information submitted in these applications would likewise be incomplete and unsupported.

This comment letter, along with the enclosed report prepared by Globally Green Consulting (“Adverse Environmental Impacts Associated with Proposed Shady Oaks and Jagger Branch Developments: Jagger Branch Embayment, Guntersville Lake, Alabama”) (hereinafter, “Globally Green report”), discusses the physical characteristics of Jagger Branch embayment, and its natural resources that will be significantly and detrimentally impacted if the proposed projects are permitted. In order to accurately assess the full impacts of the proposed projects, additional information must be evaluated, and the area of potential effect (“APE”) must be expanded to include the entire Jagger Branch embayment and hillside east of White Elephant Road.

Both the Jagger Branch proposal and the Shady Oaks proposal fail to comply with TVA regulations limiting the size and length of water-use facilities. The stated objective of the TVA regulations is to “restore, preserve, and enhance the quality of the environment.” (18 CFR § 1304.1) Furthermore, both proposals disregard the need to avoid locating such structures in reservoir areas replete with sensitive resources, and prone to water quality degradation. Because of the many shortcomings of these applications, actual cumulative impacts were not considered or were understated, and reasonable alternatives were not discussed. It is the opinion of this commenter that the proposed projects and plans constitute major federal actions significantly affecting the quality of the environment, and thus require an Environmental Impact Statement (“EIS”) under NEPA (42 U.S.C. § 4332; 40 CFR § 1502; *see also* 40 CFR § 1508.18 defining “Major Federal action” (“Major Federal action” includes actions with effects that may be major

and which are potentially subject to Federal control and responsibility.” . . . Federal actions include “[a]pproval of specific projects . . . include[ing] actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” )).

## I. CONTRARY TO LAW AND POLICY

### A. Excessive Structure Size Will Result in Significant Impacts

#### 1. The proposed Community Boathouses violate TVA limits on maximum structure dimensions

As stated above, compliance with TVA regulations found at 18 CFR Part 1304 is important for the protection of the environment. Regarding size of water-use facilities, TVA requires that structures “shall not exceed a total footprint area of greater than 1000 square feet” (not to include the area of the walkway). (18 § CFR 1304.204(a), (b)). The proposed boathouses for Jagger Branch and Shady Oaks will far exceed the maximum size allowance permitted by TVA. The boathouses proposed for Jagger Branch will have footprints of 9,504 square feet and 11,154 square feet<sup>1</sup>, while the proposed Shady Oaks boathouse will have a footprint of 8,970 square feet. TVA regulations do provide that “TVA may approve community facilities that are greater in size than 1000 square feet,”<sup>2</sup> (18 CFR § 1304.206(c)); however, the same section cautions that “in narrow coves or other situations where shoreline frontage is limited, shoreline development may be limited to one landing dock for temporary moorage of boats not to exceed the 1000-square-foot footprint requirement . . . .” (18 § CFR 1304.204(a)(3)). Elsewhere in the regulations, TVA also provides that “[w]here and if site constraints at the proposed construction location preclude a structure of the maximum size, TVA shall determine the size of facility that may be approved.” (18 CFR § 1304.204). Furthermore, deviation from the 1000 square foot limit must be approved by grant of a “variance” or “waiver” (18 CFR § 1304.408, 18 CFR § 1304.212); however, TVA regulations provide that such variances greater than the maximum 1000 square foot limit, must be approved according to procedures specified in 18 CFR § 1304.408, which include “consideration whether a proposed structure or other regulated activity would adversely impact navigation, flood control, public lands or reservations, power generation, the environment, or sensitive environmental resources, or would be incompatible with surrounding uses or inconsistent with an approved TVA reservoir land management plan.” Waivers of the standard limit, must take into account (amongst other factors), “prevailing permitted practices within the subdivision or immediate vicinity.” (18 CFR § 1304.212).

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<sup>1</sup> Because the Jagger Branch application proposes to construct two community boathouses, separated by only 50 feet (to allow access to boats of up to 30 feet in width), the actual total footprint or area of impact of the proposed Jagger Branch project is closer to between 26,208 square feet – 28,938 square feet.

<sup>2</sup> At the May 8, 2007 TVA Open House meeting held at the Guntersville Recreation Center, Guntersville, AL, TVA representative Mary MacBreyer informed this commenter that TVA allows one 1000 square foot footprint for each 100 feet of shoreline that a property owner owns, and that the resultant square footage can be added together to form the total square footage of one single water-use structure. (For example, if I own 500 feet of shoreline, then I can apply for a permit to construct a water-use facility with a footprint size up to 5,000 square feet). However, as discussed, TVA regulations clearly prohibit footprints greater than 1000 square feet, except in those rare cases that a variance or waiver may be granted (after consideration of site conditions), and there is no provision in the TVA regulations that allows for a 1000 square foot footprint for every 100 feet of shoreline owned.

To-date, there is no evidence that either Applicant has applied for a variance or waiver. However, any request for a variance or waiver must necessarily be denied. The Jagger Branch embayment is an isolated, and hence protected reach of the Guntersville Reservoir, by virtue of its restricted outflow area (which functions as the only entrance/exit from other parts of the reservoir). The water of the embayment is generally calm, and the embayment itself is quite narrow and very shallow. For instance, during high water levels, the depth around the Shady Oaks proposed site is at most 4 feet. The water depth surrounding the Jagger Branch propose project site is 1.5 – 2 feet during spring high water levels (*see* Globally Green report discussing water level fluctuation in Jagger Branch embayment) and only approximately 0.5 – 1 foot deep during the winter (as confirmed by David Baldrige, Corps). In the last 24 years, rapid and excessive sediment deposition of the embayment, has reduced the usable water acres from approximately 166 acres, to 63 acres (*see* Globally Green report discussing sediment deposition). When considered together with the narrowness of the embayment, and the proximity to significant wetlands and potential for federally listed threatened and endangered species, it is clear that “site conditions” would not warrant approval of any structure greater than 1000 square feet. In fact, site conditions require that TVA deny any permit application for construction of water-use facilities that are not “minor facilities.” (18 CFR § 1304.2(c)(1)). Furthermore almost every boathouse or dock currently located in the Jagger Branch embayment is either a single or double slip structure. Permitting community boathouses in this unique embayment would not only result in significant environmental impacts, but would also be wholly contrary to the “prevailing permitted practices” (18 CFR § 1304.212), and thus would destroy the character of the community.

In determining size and number of slips at community water-use facilities, and in order to ensure that proposed community water-use facilities are protective of the environment, TVA regulations specifically require consideration of “[w]ater depths fronting the community lot,” “[r]ecreational carrying capacity for water-based activities in the vicinity of the community lot,” and “[o]ther site specific conditions and considerations as determined by TVA.” (18 CFR § 1304.206(b)). The site conditions of Jagger Branch embayment would not support the proposed large community boathouses (representing a 62 % increase from the current number of slips present in Jagger Branch embayment (*see* Globally Green report)), and the sheer size and length of the proposed structures would present safety hazards and obstructions to navigation in this narrow and crowded embayment, as well as would require massive amounts of dredging (in wetlands) for useable boat channels in the shallow embayment. The proposed construction activity and subsequent use of the community boathouses would also result in substantial water quality degradation. As proposed, the Jagger Branch project and the Shady Oaks project should be denied.

## 2. The proposed Community Boathouses will impede navigation

As discussed above, if site conditions warrant, TVA may grant variances or waivers. However, TVA can only grant variances for size, not length of water-use facilities. TVA regulations restrict the total length of water-use structures (including walkways) to 150 feet from the shoreline: “Docks and walkway(s) shall not extend more than 150 feet from the shoreline, or more than one-third the distance to the opposite shoreline, whichever is less.” (emphasis added) (18 CFR § 1304.204(c)). There is no provision in the TVA regulations allowing the agency to

grant a variance beyond the 150 foot maximum.<sup>3</sup> The Corps has already granted a § 10 DA Permit (Permit No. 2006-01175) to Shady Oaks, for the construction of a community boathouse, extending 158 feet from the shoreline (extending lakeward from the normal summary pool Elevation 595.0). Based on TVA's own regulations, TVA cannot grant a permit to Shady Oaks for the project as proposed. Any and all water-use facilities must conform to the 150 foot length limitation stated in the TVA regulations. Thus, the Applicant for Shady Oaks must modify his proposal and plans in order for TVA to consider issuing a permit. Modification of plans, however, would constitute a change in the terms of the permit (approving the water-use structure) already issued by the Corps, and would be grounds for rescinding the DA permit 2006-01175.

Similarly, the proposed Jagger Branch community boathouses exceed the TVA limit on length of water-use facilities, as defined in 18 CFR § 1304.204(c). As proposed one community boathouse will extend 175 feet lakeward, and the other will extend 150 feet lakeward. TVA may only approve water-use facilities that extend 150 feet lakeward, or one-third the distance to the opposite shore, whichever is less. The northern portion of Jagger Branch embayment is the narrowest part of the embayment, which as already discussed, has drastically changed in just the last 24 years. In order to comply with TVA regulations, the applicant must submit more than just an approximate length for distance to the opposite shore, so that TVA can determine the maximum allowable dimensions of the proposed water-use facilities. Furthermore, and as will be further discussed below, the sensitive resources in the northern area of Jagger Branch embayment require that TVA only allow construction of minor facilities, smaller than the limits stated in 18 CFR § 1304.204.

Even though the Corps is not restricted by TVA regulations, the Corps likewise has sufficient grounds to reevaluate their Shady Oaks Permit Decision and to deny the Jagger Branch application (on the basis of "incomplete or inaccurate" information provided by the Applicants, and on the basis of "significant new information" which has surfaced). Both Applicants submitted outdated/inaccurate maps of the Jagger Branch embayment, which show a considerable greater amount of useable water area than is actually present (*see* Globally Green report for discussion on sediment deposition and loss of water acreage). Because of the considerable amount of dredging that will be required to create useable boat passageways to the proposed water-use facilities (i.e., dredging activity 158 feet from shore, 175 feet from shore, 150 feet from shore), it is likely that navigation will be impeded during the course of construction. Post-construction, the proposed water-use facilities will jut out into the lake further than the neighboring structures, and it is highly probable that the proposed Jagger Branch structures will obstruct access to the remainder of the northern part of Jagger Branch embayment (i.e., access to the wetlands by canoes, kayaks, etc.). Also, the Jagger Branch embayment currently experiences frequent "near misses" and accidents. Assuming that both west and east shorelines accommodate water-use facilities, little room is left for boats and other water crafts to navigate/turn around in this narrow embayment. Before any permits are issued, current site conditions should be accurately assessed.

## **B. Inappropriate Location for Siting of Community Boathouses**

<sup>3</sup> Note that although 18 CFR § 1304.206 allows TVA to approve footprint sizes for community facilities greater than 1000 square feet, there is no provision for granting of greater length.



1. The proposed Community Boathouses are contrary to TVA regulations and management policies

TVA regulations clearly provide that “site constraints” may require TVA to further restrict water-use facility dimensions over-and-above what is stated in the regulations. (18 CFR § 1304.204). In addition to the site constraints discussed above (i.e., shallowness of the embayment, narrowness of the embayment, actual usable water area, water quality issues, etc.), TVA has specifically addressed the need to avoid approving water use facilities near sensitive wetland resources: “Any activities along the shoreline, such as docks or boat ramps, associated with residential access (including Zone 7), are not likely to be approved in wetland areas without appropriate mitigation.” (Final Environmental Impact Statement and Land Management Plan, Guntersville Reservoir, p. 93 (August 2001)) (hereinafter referred to as “Guntersville FEIS”). Moreover, the Guntersville FEIS (Guntersville FEIS, 91) reaffirms TVA’s policy to avoid both direct and indirect impacts to wetlands, by stating the agency’s intent to comply with Executive Order No. 11990 (Protection of Wetlands, 42 F.R. 26961 (May 24, 1977)) (“EO 11990”).<sup>4</sup> EO 11990 provides that agencies “shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.” (emphasis added). Specifically, Section 5.7 of “TVA Procedures for Compliance with the National Environmental Policy Act,” April 28, 1983 (“TVA NEPA Compliance”) requires TVA to conduct a “wetlands evaluation” as part of the agency’s review of a proposed action that may directly or indirectly affect wetlands. More specifically, Section 5.7.2.2 provides that

If the action requires an EA or an EIS, the ensuing evaluation shall consider (1) the effect of the proposed action on natural and beneficial floodplain and wetland values and (2) alternatives that would eliminate or minimize such effects. . . .

If at any time prior to commencement of the action it is determined that there is a practicable alternative that will avoid affecting floodplains or wetlands, the proposed action shall not proceed.

(emphasis added).

Regardless of an agency’s determination of a wetland as “jurisdictional” or “non-jurisdictional,” all federal agencies are required to comply with the provisions of EO 11990, which does not make a distinction between jurisdictional and non-jurisdictional wetlands. Thus, impacts to wetlands must be avoided, unless there is “no practicable alternative” to the proposed action and proper mitigation is employed.

The Jagger Branch embayment contains wetlands that have been designated by TVA as a Sensitive Resource (Zone 3) in need of management. (Guntersville EIS). As discussed above,

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<sup>4</sup> This same commitment to avoid direct and indirect impacts to wetlands is stated in “TVA Procedures for Compliance with the National Environmental Policy Act,” April 28, 1983 (*see especially* Section 5.7 (requiring a “wetlands evaluation” according to TVA NEPA compliance procedures)).

applications submitted by Jagger Branch and Shady Oaks both provide an outdated map, that inaccurately depicts open-water, where there is none. This same map, dated 1983, was used by TVA in the 2001 Guntersville FEIS, to delineate the boundaries of the agency's zone allocations. Because the 2001 Guntersville FEIS was based on inaccurate site information, TVA should reevaluate its Zone allocation boundaries for the Jagger Branch embayment Sensitive Resource Management Zones (Zone 3). Based on current site conditions and data that was available in 2001, the northern portion of the Jagger Branch embayment which is designated a Sensitive Resource zone for scrub-shrub wetlands, should be extended more than 2,000 feet south of its current location. (See Globally Green report discussing the current extent of the wetlands). Thus, in actuality, the proposed Jagger Branch project will have both direct and indirect impacts on the wetlands, and at a minimum, the Shady Oaks project will have indirect and possibly direct impacts on the wetlands. Given current site conditions (and the extent of the sensitive wetlands resource), both Applicants must show that there is no "practicable alternative" to their proposed construction uses. As discussed below, neither applicant can meet that burden, and so TVA and the Corps should deny their requests for permits as contrary to EO 11990.

Furthermore, the Jagger Branch embayment is a poor location for community water-use facilities for many other reasons. As will be discussed below, the majority of the Jagger Branch embayment area has been designated by TVA as either "Sensitive Resource Management" (Zone 3) or "Natural Resource Conservation" (Zone 4). (Guntersville FEIS). The significance of these zone allocations is that TVA has recognized the importance of protecting the Jagger Branch embayment area. As will be discussed below (and as discussed in the Globally Green report), this embayment area contains sensitive wetlands resources, as well as habitat for federally listed threatened and endangered species (it is already known that the bald eagle frequents this embayment), and possible historic/archaeological resources. As will also be discussed below (and as discussed in the Globally Green report), this embayment area is hyper-sensitive to development impacts, and TVA and the Corps must further evaluate direct, indirect, and cumulative impacts that the proposed community water-use facilities will likely have on these various resources.

As much as the size/dimensions of the project area matters in assessing potential impacts, perhaps the more important factor that weighs in an agency's determination of whether or not to approve construction of water-use facilities is the proposed location of the water-use structures. The discussion in Section II ("Compliance with NEPA"), along with the Globally Green report shows that the Jagger Branch embayment area is unsuitable for "major facilities" (defined at 18 CFR § 1304.2(c)(2)) such as the proposed community boathouses.

## 2. Significant Resources Identified in TVA FEIS

The northern section of the Jagger Branch embayment was designated in 2001 as a Sensitive Resource Management zone (Zone 3), for the protection of wetlands resources: Parcels 11 (16.7 acres) and 12 (46.4 acres). (Guntersville FEIS, 129). Other areas of the Jagger Branch embayment are also designated as Sensitive Resource Management zones (Parcels 15 and 19), and five parcels are designated Natural Resource Conservation zones (Zone 4) (Parcels 10, 14, 16, 20, 282a) for the management of important wildlife habitat and shoreline vegetation. A table summarizing these Zone allocations is presented below:

Parcel	Acres	Proposed Zone	Description	Reason for Allocation	Access Rights (Y/N)
10	63.8	4	Natural Resource Conservation	To manage for important wildlife habitat and shoreline vegetation.	N
11	16.7	3	Sensitive Resource Management	To protect wetland resources.	N
12	46.4	3	Sensitive Resource Management	To protect wetland resources.	N
13	7.1	7	Residential Access	Parcel fronts individual homesites.	Y
14	14.2	4	Natural Resource Conservation	To manage for important wildlife habitat and shoreline vegetation.	N
15	18.4	3	Sensitive Resource Management	To provide a protective buffer area around Honeycomb School Cave.	N
16	28.2	4	Natural Resource Conservation	To manage for important wildlife habitat and shoreline vegetation.	N
17	9.3	7	Residential Access	Parcel fronts individual homesites.	Y
18	11.2	2	TVA Project Operation	Used by town of Grant for a water intake/pump station.	Y
19	49.6	3	Sensitive Resource Management	To protect wetland and cultural resources.	N
20	12	4	Natural Resource Conservation	To manage for important wildlife habitat and shoreline vegetation.	Y
20a	1.6	5	Industrial/Commercial Development	To accommodate anticipated commercial development.	Y
21	13.5	6	Developed Recreation	Used for recreation because it fronts the old Snug Harbor Marina site and because of deed access rights due transfer of land (XTGR-5) to the State of Alabama for public recreation purposes.	Y
282a	0.7	4	Natural Resource Conservation	To manage important wildlife habitat and shoreline vegetation.	N

(Guntersville FEIS, Appendix A-1). As evident by the zone allocation, TVA has identified significant resources in Jagger Branch embayment, and the need to manage and protect these resources. Furthermore, the Guntersville FEIS emphasizes the importance of protecting all remaining wetlands in the Guntersville reservoir, considering that in the past, an unknown acreage of extensive wetlands was destroyed. (Guntersville FEIS, 37). TVA's Shoreline Management Initiative ("TVA SMI") also highlights the importance of maintaining and protecting remaining wetlands along TVA reservoirs: "Wetlands along TVA reservoir shorelines are highly productive and biologically diverse ecosystems. In addition to habitat for fish and wildlife resources, wetlands also provide multiple functions and values, such as shoreline stabilization and erosion control, improved water quality, and recreational opportunities." (TVA Shoreline Management Initiative: An Assessment of Residential Shoreline Development Impacts in the Tennessee Valley, Public Summary of the Final Environmental Impact Statement, 7-8 (November 1998)).

Considering the important wetlands resource located in and around the proposed Jagger Branch and Shady Oaks water-use facilities, and considering the prevalence of nearby Natural Resource Management areas (for the "management of important wildlife habitat and shoreline vegetation"), both applications should be denied by TVA and the Corps. Not only will planned dredging activities directly impact and destroy wetlands that since 1983 have expanded over 2,000 feet (approximately 43 additional acres as estimated by the Globally Green report), but, as discussed in the enclosed Globally Green report, construction activities associated with the proposed water-use facilities, use of the facilities once constructed, and the clearing of the

hillside east of White Elephant Road that will only occur if the Jagger Branch and Shady Oaks permits are granted (*see* discussion below on consideration of cumulative effects) will result in significant runoff, pollution, and destruction of habitat that together will have a significant and grave impact on the wetlands and on the entire Jagger Branch embayment.

### 3. Corps Guidance prohibits

Corps guidance likewise directs against approving the construction of water-use facilities in-and-around wetlands, and other valuable resources. “Small boat basins should not be located in or immediately adjacent to wetlands. In addition, development of small boat basins should not disrupt unique areas such as mouths of streams, isolated aquatic plant beds, or small areas with valuable rock/rubble substrate.”<sup>5</sup> (“Environmental Engineering for Small Boat Basins” (hereinafter “1993 Corps Small Boat Basin guidance”), EM 1110-2-1206, p. 3-2, October 31, 1993). Noticeably, this directive is consistent with EO 11990 and applies to all wetlands, regardless of Corps jurisdictional determination.

In addition to direct and indirect impacts to wetlands, the 1993 Corps Small Boat Basin guidance also directs the agency to evaluate water quality issues, in assessing the soundness of approving water-use facilities.

Physical factors that must be considered in locating a small boat basin are circulation and current patterns, bottom conditions, wave action, tides, sedimentation and shoaling, and prevailing winds (Brockwell 1987). If conditions are not suitable, major environmental problems may result. Hazardous conditions for small craft operating out of the basin because of waves, currents, and shoaling may be created. Water quality may be degraded if tides and currents are not adequate to flush the basins. The potential for flushing of marina waters should be the prime consideration in selecting a site. Sites on open water or at the mouth of creeks and tributaries generally have higher flushing rates than those in coves and toward the head of creeks and tributaries that have lower flushing rates.

(emphasis added) (1993 Corps Small Boat Basin guidance, p. 3-2; *see especially* p. 3-10 – 3-11 (“Water Quality Impacts”), and Chapt. 4 (“Attendant Problems and Responsibilities”)). Most of these water quality concerns and problems are applicable to the Jagger Branch embayment, and are discussed in the enclosed Globally Green report.

The importance of assessing suitability of a location for siting of community water-use facilities is paramount for avoiding detrimental environmental impacts. Because of the low inflow to the Jagger Branch embayment, and the restricted outflow, compounded by the high sediment deposition rate, community boathouses are wholly inappropriate for the proposed

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<sup>5</sup> The 1993 Corps Small Boat Basin guidance document defines “small boat basin” as “a place to obtain essential supplies such as food, fuel, and drinking water. Small boat basins provide direct access to each boat, adequate depth of water, parking, toilet facilities, technical services, shops, and other amenities.” (1993 Corps Small Boat Basin guidance, 1-1). While the proposed community water use facilities may not provide all of the services/amenities as described in the 1993 Corps Small Boat Basin guidance, the points made in this document are highly relevant to the assessing the potential impacts of community use facilities, and to evaluate the soundness of approving such structures to be sited in a location such as Jagger Branch embayment.

Jagger Branch and Shady Oaks locations. By virtue of the Federal Water Pollution Control Act and Amendments (33 U.S.C. § 1251 et seq., “Clean Water Act” or “CWA”), NEPA, and other federal laws, the Corps is charged with the duty “to restore, preserve, and enhance the quality of the environment.” In order to meet this objective, the Corps is required to assess the potential impacts of proposed activities, even extending beyond the resources and boundaries over which the agency possesses oversight. (See Section II (“Compliance with NEPA”) for discussion on extent of a federal agency’s cumulative effects analysis). To that end, the Corps must evaluate the impact to the resources in question, and ensure that “the proposal is not anticipated to have a cumulative effect on the sustainability of environmental resources affected by the action.” (“Consideration of Cumulative Impacts in EPA Review of NEPA Documents,” USEPA 315-R-99-002, May 1999) (hereinafter “1999 EPA Guidance”). Approval of the Jagger Branch and Shady Oaks community boathouses will compromise the sustainability of water resources, and hence the sustainability of other natural resources such as the wetlands and the “important wildlife habitat” of Jagger Branch embayment. If water quality is permitted to degrade further, then certain “uses” of the embayment may likewise be compromised. (See Globally Green report discussing water quality issues of Jagger Branch embayment). In order to ensure the sustainability of environmental resources of Jagger Branch embayment, the Corps and TVA should only consider permit applications for “minor facilities” such as individual boat slips and/or boathouses conforming to TVA standards.

#### 4. Executive Order 11990: Protection of Wetlands

EO 11990 requires that federal agencies “shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities . . . .” More specifically, EO 11990 states that “in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative,” . . . federal agencies “shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use . . . .”

The bottom line is that a federal agency should not approve proposed actions that will detrimentally impact wetlands (regardless of whether or not the wetlands in question are considered “jurisdictional”), unless (1) there is “no practicable alternative,” and (2) “all practicable” minimization measures will be employed. In the case of the proposed Jagger Branch and Shady Oaks projects, neither Applicant has discussed alternatives to their proposed actions, and in fact, alternatives such as dry storage, a landing dock, a boat ramp, a smaller footprint, etc. exist. Furthermore, any permit issued by the Corps or TVA should require specific best management practices (“BMPs”) to minimize impacts to wetlands. BMPs for on-land use and use within the reservoir itself, should be specified and approved prior to the granting of any federal permit. Lastly, because the Jagger Branch application involves dredging activity in what arguably constitutes a wetland (or soon-to-be wetland, considering more narrow agency definitions of what constitutes a wetlands, and considering the rapid rate of sediment deposition

and growth of hydric vegetation), any permit issued by the Corps or TVA must require a wetlands mitigation plan, to ensure “no net loss” of wetland resources.

Because EO11990 does not distinguish between jurisdictional wetlands and non-jurisdictional wetlands, it seems that the only remaining question is: will the proposed Jagger Branch activities and the proposed Shady Oaks activities impact wetlands? The Globally Green report, together with the discussion provided below, support the contention that wetlands will be both directly and indirectly impacted. Because of the change in site conditions, the TVA-identified sensitive wetland resources actually extend to the Jagger Branch proposed project area. (See below for discussion of what constitutes a “wetland”). Proposed dredging activity will directly impact this valuable resource. Furthermore, the Globally Green report discusses the detrimental impact that further water quality degradation will have on the wetlands and other natural resources. These impacts would constitute both indirect impacts and cumulative impacts.

### **C. TVA Approval of Residential Community Water-Use Facilities Is Intended for Property Owners of Shoreline Frontage Lots Only**

Ownership of one small residential access lot (zone 7) or shoreline frontage property on a TVA flowage easement (zone 1) cannot be used as a conduit to allow an infinite number of subdivided upland or “backlot” property owners the right to apply for a boat slip (as part of a “community boathouse”) when those property owners otherwise would not qualify to apply for a water-use facility under 18 CFR § 1304.2 (requirement that applicant own sufficient property interest in “land immediately adjoining the TVA land”) and 18 CFR § 1304.200 (statement that “reasonable access to the water of the reservoir [be provided to] qualifying adjacent residents.”). (See also generally Guntersville FEIS; TVA SMI/SMP; TVA Land Policy (December 2006)). In the case of the Jagger Branch application and the Shady Oaks application, both Applicants have applied to TVA and the Corps for permission to construct community boathouses that will serve their respective planned subdivisions. The Jagger Branch application states that the proposed water-use facilities will serve the planned 182 lot subdivision that would be built on the eastern upland side of White Elephant Road, contingent upon TVA/Corps approval of permits. The Shady Oaks application likewise admits that the proposed water-use facilities will serve the planned subdivision that would be built on the eastern upland side of White Elephant Road, contingent upon TVA/Corps approval of permits.<sup>6</sup> Other than the small lots that the proposed water-use facilities will be attached to, no other property owners in the planned subdivisions will own shoreline frontage lots. As discussed above (and as discussed in the Globally Green report), the Jagger Branch embayment cannot support the impact from a 62% increase in boat slips (from just over 100 boat slip, to an additional 64 boat slips). If the Jagger Branch and Shady Oaks permit applications are granted, then the sustainability of the sensitive wetland resources, the important wildlife habitat, and other natural resources of the Jagger Branch embayment area would be highly questionable. (See TVA Shoreline Management Initiative/Shoreline Management Plan, emphasizing the need to protect sensitive and valuable natural resources in TVA reservoirs).

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<sup>6</sup> Note, because the Shady Oaks application was amended several times, it is unclear if a 200 lot subdivision is planned, a 105 lot subdivision, or a 54 lot subdivision.

TVA is charged with the responsibility to manage reservoir resources in the public interest. Because of the foreseeable detrimental environmental and socioeconomic impacts that would result from approval of the Jagger Branch and Shady Oaks applications, approval of these permits would amount to valuing the rights of two shoreline frontage property owners, at the expense of the public and the public interest (i.e., the public interest of maintaining the environmental health of the Jagger Branch embayment, and the current cohesive character of the Jagger Branch embayment community).<sup>7</sup> There is nothing different about Jagger Branch lot 15, or Shady Oaks lot 9 which would entitle either property to additional water-access rights over-and-above their neighbors, or at the expense of their neighbors. As discussed above, when considering permit applications for water-use facilities greater than 1000 square feet in size, TVA must consider the “prevailing permitted practices within the subdivision or immediate vicinity” (18 CFR § 1304.212), as well as whether the proposed activity “would be incompatible with surrounding uses” (18 CFR § 1304.408), amongst other factors. Currently the entire Jagger Branch embayment is composed of mostly single or double slip boathouses. Based on reports by long-time residents that the embayment is already over-crowded on “your average summer weekend,” and based on TVA’s own 10 acres per boat maximum density established by TVA in 2002 (see Globally Green report discussion of recreational boating density, and estimated density of 0.5 acres per boat density if the Jagger Branch and Shady Oaks water-use facilities are approved), approval of the Jagger Branch and Shady Oaks proposed community boathouses would render the Jagger Branch embayment virtually unusable from a boating safety standpoint.

Furthermore, based on TVA regulations, the proposed community boathouses should be denied. First of all, TVA regulations require that Applicants for facilities at jointly-owned community outlots be made on behalf of a “state-chartered homeowners association.” (18 CFR § 1304.206(b)(1)). Neither Jagger Branch nor Shady Oaks have provided any evidence of this. Secondly, TVA regulations direct TVA to consider the following factors when determining the size and number of slips at community water-use facilities lots:

- (i) Size of community outlet;
- (ii) Parking accommodations on the community outlet;
- (iii) Length of shoreline frontage associated with the community outlet;
- (iv) Number of property owners having the right to use the community outlet;
- (v) Water depths fronting the community lot;
- (vi) Commercial and private vessel navigation uses and restrictions in the vicinity of the community lot;
- (vii) Recreational carrying capacity for water-based activities in the vicinity of the community lot, and
- (viii) Other site specific conditions and considerations as determined by TVA.

(18 CFR § 1304.206(b)(2)). Taking these factors in order, it should be noted that:

- (i) Although it is unclear from the permit applications, the Jagger Branch community outlet (lot 15) and the Shady Oaks community outlet (lot 9) are likely no more than between 0.5 acres and 1.0 acres. These are very small outlots for

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<sup>7</sup> Note that the results of Freedom of Information Act requests to the Corps and TVA produced numerous public comments sent to the agencies, all opposed to the proposed Jagger Branch and Shady Oaks development projects.

service of 44 and 20 boat slips, respectively. Furthermore, an adjacent property owner has asserted that the Shady Oaks outlot (lot 9) is actually smaller than stated, and in fact, the submitted plat encroaches onto his property.<sup>8</sup> (7-26-06 letter from Roger Whitaker to Joe McMahan).

(ii) Both Applicants intend to construct parking accommodations, but no plans have been submitted for controlling (possibly polluted) runoff from the parking areas.

(iii) Again, it is unclear from the permit applications what is the total length of shoreline frontage for the Jagger Branch outlot and the Shady Oaks outlot; however, it is certainly not proportional to the requested number of boatslips at each location. Furthermore, the attempt by the Jagger Branch developers to “give up” water access rights for the remainder of their property north of lot 15, in order to “get” more access rights on lot 15, is not consistent with the TVA SMI/SMP allowance for water access rights “swaps.” In actuality, the Jagger Branch developers are only attempting to relocate any water access rights that they may have. These “rights” are themselves questionable, because nowhere in the TVA regulations is there a provision for “relocating” rights, especially when “site conditions” counsel against permitting “major facilities” in certain locations.

(iv) The more important question is “who” are the property owners who will have the right to use the community outlot, not “how many” property owners will have the right to use the community outlot. As discussed above, both the Jagger Branch and the Shady Oaks community outlots are directly tied to the service of the planned subdivisions on the upland hill east of White Elephant Road. The Applicants have admitted that the subdivisions will only be built if the water-use facility permits are granted. As discussed above, TVA regulations contemplate that only “qualifying adjacent residents” owning “land immediately adjoining the TVA land” will be considered for permits to construct water-use facilities. Thus, the number of property owners having the right to use the community outlot, should correspond to the number of “qualifying adjacent residents” that are members in the state-chartered homeowners association. In the case of both Jagger Branch and Shady Oaks, that number is one.

(v) As discussed above and in the enclosed Globally Green report, water depths fronting each of the community outlots is extremely shallow, and considerable dredging will be required to achieve a depth useable by boats and other watercrafts (especially considering the rapid rate of sediment deposition in the embayment).

(vi) As discussed above and in the enclosed Globally Green report, the northern reaches of Jagger Branch embayment (i.e., the area that both Applicants are proposing to construct their water-use facilities) is extremely shallow, and will need to be dredged to a deeper depth if watercraft are intended to access the boathouses.

(vii) *See* Globally Green report, discussing the limits on recreational carrying capacity for water-based activities in the vicinity of the community lot, and

(viii) *See* discussion herein and the Globally Green report, discussing other site

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<sup>8</sup> TVA regulations require that “[d]ocks proposed in subdivisions recorded after November 1, 1999, must be placed at least 50 feet from the neighbors’ docks.” (18 CFR § 1304.204(h)).



specific conditions that prohibit the locating of community boathouses in the Jagger Branch embayment.

Consideration of these eight factors support the conclusion that the proposed Jagger Branch and Shady Oaks water-use facilities are not suitable for the Jagger Branch embayment, and that both permit applications should be denied.

## II. COMPLIANCE WITH NEPA

NEPA requires the preparation of an Environmental Impact Statement (“EIS”) for all major Federal actions significantly affecting the quality of the environment. (42 U.S.C. § 4332; *see also* 40 CFR § 1502). Under NEPA, a “Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility” (40 C.F.R. § 1508.18). “Actions” include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies” (40 C.F.R. § 1508.18(a)). Furthermore, Section 5.4 of the “TVA Procedures for Compliance with the National Environmental Policy Act” (“TVA NEPA Compliance”), provides that “[a]ny major action, the environmental impact of which is expected to be highly controversial,” or “[a]ny other major action which will have a significant effect on the quality of the human environment,” normally will require an EIS.

There is no question that the proposed Jagger Branch and Shady Oaks water-use facilities and associated subdivision developments are highly controversial. In response to the Shady Oaks public notice, approximately 165 individuals signed a petition for denial of the permit application. The Jagger Branch public notice has likewise resulted in numerous public comments—all opposed to the permit application. As discussed in this comment letter and the Globally Green report, these permit applications are highly controversial because of the probable environmental and socioeconomic impacts that the proposed activities will have on the quality of the human environment in the Jagger Branch embayment community.

When preparation of an EIS is required, TVA procedures for compliance with NEPA specifically provides that an EIS should include “a description and an analysis of the proposed action; alternatives to the proposed action, including the no-action alternative; probable environmental impacts associated with the proposed action and measures (if any) to minimize impacts; and a list of the major preparers of the EIS.” (TVA NEPA Compliance, Section 5.4.1). Corps regulations incorporate many of these same considerations in the agency’s Public Interest Review evaluation. According to 33 CFR § 320.4(a)(1), the Corps must engage in a public interest review to determine whether or not to issue any permit.

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest . . . . All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are 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 and welfare of the people.

The following sections (in conjunction with the Globally Green report) discuss issues and potential impacts that need to be evaluated in greater depth before any permit decision can be made. The requirements of NEPA, and the TVA and Corps regulations implementing NEPA mandate that additional evaluation be conducted.

#### **A. Significant Environmental Impacts**

Both permit applications, as referenced above, fail to discuss and identify water quality concerns, sensitive wetlands, the presence of federally-listed threatened and endangered species, and other important natural resources. HCA is particularly concerned that the proposed projects will result in significant and irreparable damage to the environment of Jagger Branch embayment, including but not limited to degradation of water quality by the addition of sediment/siltation to Jagger Branch embayment and the dredging-up of (possibly contaminated) soils and addition of pollution associated with increased boating activity, the permanent destruction of important wetlands, destruction of habitat frequented by the federally-listed threatened bald eagle, destruction of habitat for other possible federally-listed threatened and endangered species, and damage to other natural resources that TVA has identified as in need of management. (*See especially* Section 4 of Globally Green report).

To-date, consideration of direct, indirect, and cumulative impacts to the environment has been inadequate (according to NEPA requirements, as well as TVA and Corps regulations implementing NEPA requirements). A partial explanation for this shortcoming can be attributed to the narrow scope and area of potential effect (“APE”) identified by the federal agencies as limited to the proposed construction disturbance area described in the Jagger Branch and the Shady Oaks permit applications. Federal rules and regulations are clear, however, in requiring that assessment of potential construction/project impacts be more expansive. Because of the particularities of the Jagger Branch embayment which makes the embayment and surrounding lands particularly sensitive to impacts from increased water use and certain construction activities, the APE should be expanded to include the entire embayment and surrounding land that will experience reasonably foreseeable impacts from the proposed activities. Reasonably foreseeable direct, indirect, and cumulative impacts will also be more-easily discernable, once additional (and accurate) information is obtained concerning water quality, boater carrying capacity, presence of federally-listed threatened and endangered species, and evaluation of wetlands resources.

##### **I. Water Quality**

Water quality data is currently available and has been available from the Alabama Department of Environmental Management (“ADEM”), and should have been evaluated to assess the appropriateness of approving the proposed Jagger Branch and Shady Oaks permit applications, before any permits are/were issued. (*See* Globally Green report for discussion of water quality data). Based on the results of Freedom Of Information Act requests to TVA and

the Corps (which should have included any relevant data), no such technical data was evaluated prior to the Corps approving the Shady Oaks DA permit, and no such technical data is present in either permit file maintained by the Corps or TVA.

In the Shady Oaks Environmental Assessment (“EA”) prepared by the Corps and TVA, and dated January 9, 2006,<sup>9</sup> the agencies state that “Cumulative environmental effects for this action are assessed in accordance with USEPA 315-R-99-002, dated May 1999.” (Shady Oaks EA, 7). However, the 1999 EPA Guidance (i.e., USEPA 315-R-99-002) requires that “[i]f adequate data and analytical procedures are available, specific threshold that indicate degradation of the resources of concern should be included in the NEPA analysis. . . . This change is then evaluated in terms of both the total threshold beyond which the resource degrades to unacceptable levels and the incremental contribution of the proposed action to reaching that threshold.” (USEPA 315-R-99-002, Section 4.5). Establishing a threshold is important for assessing the probable impacts of the proposed activities. And because ADEM data for water quality was already readily available, the Corps and TVA should have evaluated this data as part of their EA analysis. If this data had been analyzed, then the federal agencies would have concluded that significant impacts could be expected as a result of the direct, indirect, and cumulative effects of the proposed activities. (*See* Globally Green report for in-depth analysis of water quality issues). The Shady Oaks DA permit should be reevaluated to take into consideration the ADEM water quality data (which sheds light on the health and sensitivity of the Jagger Branch embayment), and the permit should ultimately be denied. TVA and the Corps should deny all other permits until this relevant data can be considered.

Because the Jagger Branch embayment experiences low flushing, pollutants will tend to concentrate in the embayment, resulting in water quality impairment and impacts to biological resources. (*See* Globally Green report for in-depth discussion). Low flushing rates in the Jagger Branch embayment are likely due to the low inflow rate, and the narrow outflow area for the embayment. As evidence of this stagnation and “bottleneck effect” at the U.S. Highway 432 causeway bridge, residents in-and-around the embayment often report visual observations of debris, a filmy layer, or other evidence of pollutants near the outflow point.

The water quality of Jagger Branch embayment will only worsen with the construction of the proposed community boathouses. Direct and associated impacts that will result from the construction of the community water-use facilities will include, but are not limited to: (1) further impediment of flow, due to the construction of sizeable boathouses in the embayment, and obstruction of the inflow source (*see* Globally Green report for discussion of flow impediments); (2) destruction of sensitive wetlands by direct impact (dredging) and indirect impacts (further impairment of water quality and disturbance of massive amounts of lake bottom sediment which may be contaminated and as well as which will result in elevated oxygen demands); (3) periodic and frequent maintenance dredging that will be required to maintain a boat channel and area around the boathouses of a depth of 4.5 feet; and (4) runoff from the planned developments (i.e., scouring the steep slopes) that will be served by the boathouses.

## 2. Wetlands

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<sup>9</sup> The EA is dated January 2006, but the DA permit for Shady Oaks was not issued until January 2007. The Corps and TVA should clarify what year the EA was prepared.

Impacts to wetlands designated by TVA as Sensitive Resources (Zone 3) will be much more significant than contemplated because of the actual site conditions, versus what was represented as the site conditions in the Jagger Branch and Shady Oaks applications. As already discussed, and as discussed in the Globally Green report, the applications submitted by both Applicants contained outdated maps, which would have rendered only indirect impacts to the wetlands. However, as discussed above, the sensitive wetlands have expanded in a southerly direction over 2,000 feet in the last 24 years, and has increased in acreage by approximately 43 acres. (See Globally Green report). With the addition of this area, the wetlands located in the northern part of Jagger Branch embayment now constitute over 100 acres of contiguous wetlands. TVA likewise based its 2001 boundary determinations for Parcels 11 and 12 (zoned 3 for protection of sensitive scrub-shrub wetlands) on an outdated 1983 map, and should reassess and redefine the true boundaries of the wetlands located in Jagger Branch embayment.

It has been suggested that impacts to these wetlands are somehow lessened by virtue of the fact that by Corps standards, the wetlands are not “jurisdictional wetlands” because they lack hydric vegetation in the actual Jagger Branch proposed construction area. However, as discussed above, EO 11990 makes no distinction between the need to protect jurisdictional and non-jurisdictional wetlands. Neither does TVA, nor does the U.S. Fish & Wildlife Service (USFWS).<sup>10</sup> In fact, TVA procedures for NEPA compliance defines wetlands to include “mud flats” —which suggests that the presence of hydric vegetation is inconsequential.

“Wetlands” are those areas inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances do or would support, a prevalence of vegetation or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, mud flats, and natural ponds . . . .

(TVA NEPA Compliance, Section 5.4.1). Also, considering the rapid rate of sediment deposition it would likely be just a matter of years before the entire reservoir area fronting the Jagger Branch proposed development would be covered with hydric vegetation. Corps regulations themselves also emphasize the importance of avoiding any adverse impact to any wetland resources:

Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an

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<sup>10</sup> USFWS’s definition of wetlands is quite expansive, to include:

lands that are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water and that have one or more of the following attributes:

1. At least periodically, the land supports predominantly hydrophytes;
2. The substrate is predominantly undrained hydric soil; and
3. The substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

(emphasis added) (Cowardin et al. 1979).

application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area.

(33 CFR § 320.4(b)(3)).<sup>11</sup>

Thus, impacts to wetlands, resulting from substantial dredging activity, will be significant. Moreover, the degree of impact on wetlands resulting from dredging activity will be much greater than has been stated in either the Jagger Branch permit application or the Shady Oaks permit application (and Corps-TVA EA/FONSI), because of the need to remove significant amounts of dredge materials—approximately double the amount estimated by the Jagger Branch Applicant (*see* Globally Green report for discussion on actual dredging activities required in order to achieve and maintain a boat channel depth of 4.5 feet). Also, even though the Shady Oaks proposed activities do not involve dredging activity, it is very likely (considering the actual depth of the embayment) that the Applicant will need to perform some dredging in order to allow boats to access the planned water-use facility.

As if the direct impact to sensitive wetlands were not enough, the proposed construction of community boathouses in Jagger Branch embayment will result in indirect impacts to the wetlands as well, caused by increased watercraft use and other associated boathouse activities, that will further degrade the water quality in the Jagger Branch embayment. As more completely discussed in the Globally Green report, impairment of water quality will result in detrimental affects to biological resources.

The loss of wetlands habitat may also detrimentally impact federally-listed threatened and endangered species, as well as other aquatic and terrestrial species. The wetlands of Jagger Branch embayment serve as important habitat and feeding grounds for many migratory birds, mammals, mussels, turtles, fish, etc. “In addition to supporting plant community diversity, Guntersville Reservoir wetlands provide habitat for a variety of waterfowl, wading bird, songbirds, amphibian, reptile and mammal species.” (Guntersville FEIS, 38; *see generally* Guntersville FEIS, 37-39 (discussing the importance of protecting remaining wetlands in the Guntersville reservoir)).

Finally, because wetlands serve as important natural filters, and flood control buffers, as well as a buffer against increased wave-action that routinely damages the property of riparian owners, the destruction of wetlands in Jagger Branch embayment will result in significant and cumulative impacts to the surrounding community. Loss of wetlands function will be as detrimental as loss of actual wetlands area.

. . . federal assessment and mitigation for the loss of wetlands often focus primarily on the acreage affected rather than the function of the wetland within the broader ecosystem. In such a case, the impact to the wetland might not be deemed significant if the wetland had no immediate wildlife values or other notable characteristics. However, by expanding the assessment to consider the full

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<sup>11</sup> *See also* TVA regulations stating that “[e]xcavation of individual boat channels shall be approved only when TVA determines there is no other practicable alternative to achieving sufficient navigable water depth and the action would not substantially impact sensitive resources. (emphasis added) (18 CFR § 1304.207(a)).

array of wetland functions and their importance with a broader context, cumulative impacts could be more fully assessed. For example, important functions to focus on could include the wetlands' role as a nursery for recreationally and/or commercially valuable aquatic species; its ability to minimize downstream flooding; and its ability to improve water quality.

(USEPA 315-R-99-002, Section 4.1). “[T]he unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest.” (33 CFR § 320.4(b)(1)).

### 3. Federally-listed Threatened and Endangered Species

HCA is very concerned about possible and probable impacts to federally-listed threatened and endangered species. (*See generally* Endangered Species Act, 16 U.S.C. § 1531 et seq.). Long time area residents report that the federally listed bald eagle is often sighted in Jagger Branch embayment. Keith Hudson of the Alabama Department of Conservation and Natural Resources confirmed that the entire shoreline area of the embayment is considered a “hot spot” for bald eagle habitat and roosting. (*See* Globally Green report, recounting conversation between Mark Quarles and Keith Hudson). Mr. Hudson also confirmed that bald eagles nests are known to occur just downriver of the Jagger Branch embayment. Further coordination with USFWS is needed to evaluate whether Jagger Branch embayment area—including the hillside east of White Elephant Road, which is planned for subdivision development in conjunction with the proposed water-use facilities—contains any bald eagle nests. Impairment of the natural resources in Jagger Branch embayment will detrimentally impact the bald eagle and other migratory birds that frequent the embayment; however, destruction of an eagles nest would constitute a “take” under the ESA, requiring additional evaluation and permits.

Long time area residents have also commented on the prevalence of caves in the Jagger Branch embayment area. USFWS records list both the federally-listed endangered Gray bat, and the federally-listed endangered Indiana bat as occurring in Marshall County. In evaluating cumulative impacts of the proposed Jagger Branch and Shady Oaks development plans, TVA and the Corps are required to consider the reasonably foreseeable impacts of the associated planned subdivision developments (that will be served by the water-use facilities, and that will only be developed if water-use facility permits are granted). Several caves that are possible bat habitats are known to exist on the hillside that will be completely cleared to accommodate development of the subdivisions. Prior to issuing any permits to the Applicants, TVA and the Corps must ensure that these endangered bats are not harmed. Further coordination with USFWS is needed to evaluate possible harms to the Gray and Indiana bat, and a bat survey is needed to determine the presence or absence of either endangered species.

Lastly, for Marshall County, five mussel species are listed as endangered, and one mussel species is listed as a “candidate species.” (*List available at* <http://www.fws.gov/daphne/es/specieslst.html#Marshall>). Furthermore, the threatened Snail darter, and the threatened Flattened musk turtle are also listed as occurring in Marshall County. Area residents also report the presence of mussels, turtles, and darters in the wetlands that will be directly and indirectly impacted by the proposed Jagger Branch and Shady Oaks construction activities. Further coordination with USFWS is needed to survey and evaluate whether the

mussels, turtles, and darters in the Jagger Branch embayment are listed as threatened or endangered.

The entire Jagger Branch embayment area contains value resources that need to be properly managed, conserved, and protected. The Guntersville FEIS confirms this fact, by zoning a considerable portion of the Jagger Branch embayment area as Sensitive Resource Zones and important wildlife Natural Resources Conservation Zones. It is wholly inappropriate, and contrary to the requirements of NEPA for permit decisions (with such accompanying potential significant impacts) to be based on an assessment of impacts limited to just the actual project disturbance area/site. An environmental document prepared under NEPA (i.e., an EA or EIS), must evaluate the potential impacts that the proposed activities will have on a reasonable area of potential effect.

### **B. Significant Social and Economic Impacts**

In addition to environmental impacts associated with the proposed activities, NEPA also requires federal agencies to consider the socioeconomic impacts of proposed activities. Relevant socioeconomic impacts of the proposed Jagger Branch and Shady Oaks community water-use facilities and associated subdivision developments include: overcrowding of the usable water area, and associated boating safety concerns; increased land traffic and safety issues; developments (massive subdivisions and large community water-use facilities) that detract from and alter the otherwise unified character of the community; aesthetic concerns; and property devaluation.

Many of these factors have been discussed above, and suggestions have been made as to additional studies and information that are needed (e.g., boating capacity study) before a reasonable and informed decision can be made on whether or not to issue permits.

### **C. Historic and Archaeological Resources**

Further coordination with the Alabama State Historic Preservation Officer ("SHPO") should be conducted to ensure that important historic and/or archaeological resources are not detrimentally impacted by proposed construction activities related to the permitting of water-use facilities by the Corps and TVA. Many residents have reported the existence of several caves in the Jagger Branch embayment area, including caves located on the hill planned for subdivision development by the Applicants. Area residents report that in the past, at least one of those caves was used as a site for a church prayer meeting. It is quite possible that those same caves have also been used by other past occupants of the Guntersville reservoir-Jagger Branch embayment area.

### **D. Cumulative Impacts**

NEPA and Corps and TVA regulations interpreting NEPA require that cumulative impacts of proposed actions must be evaluated along with the direct and indirect effects of each alternative, in assessing the total effects on a resource, ecosystem, and/or human community.

It has already been explained how the Jagger Branch and Shady Oaks applications grossly understate the potential for significant direct and indirect impacts to environmental, socioeconomic, and possible archaeological/historic resources in the Jagger Branch embayment area. From the lack of attention that has been devoted to discussion of these probable and significant impacts, it is apparent that appropriate scoping to determine the area of potential effect has not been conducted. Consequently, many cumulative impacts have escaped unevaluated, and hence, cumulative impacts have been understated.

In order to adequately assess cumulative impacts, the area of potential effect should not be limited to the actual construction disturbance area. Instead, the area of potential effect should be defined in terms of the boundary of the resource of concern:

EPA reviewers should determine whether the NEPA analysis has used geographic and time boundaries large enough to include all potentially significant effects on the resources of concern. The NEPA document should delineate appropriate geographic areas including natural ecological boundaries, whenever possible, and should evaluate the time period of the project's effects.

(USEPA 315-R-99-002, Section 4.2). In fact, EPA Guidance cautions against agencies limiting the scope of their impact analyses to "those areas over which they have direct authority or to the boundary of the relevant management area or project area." (*Id.*). Instead, agencies are directed to broaden their consideration of the "array of potential effects," to assess whether the proposed actions are "anticipated to have a cumulative effect on the sustainability of environmental resources affected by the action." (USEPA 315-R-99-002, Section 4.3).

Regarding the Jagger Branch and Shady Oaks permit applications, the area of potential effect should be broadened to include the entire Jagger branch embayment area, inclusive of the waters of the embayment, the shoreline/shoreland, and the upland areas immediately surrounding the Jagger Branch embayment. Also, the Corps and TVA should consider the combined strain on the same resources, caused by the similar proposals presented by Jagger Branch and Shady Oaks. In fact, the Corps-TVA EA and EPA guidance both recognize that a successful assessment of cumulative impacts will include consideration of

- 1) the proximity of the projects to each other either geographically or temporally;
- 2) the probability of actions affecting the same environmental system, especially systems that are susceptible to development pressures;
- 3) the likelihood that the project will lead to a wide range of effects or lead to a number of associated projects; and
- 4) whether the effects of other projects are similar to those of the project under review.
- 5) the likelihood that the project will occur -- final approval is the best indicator but long range planning of government agencies and private organizations and trends information should also be used;
- 6) temporal aspects, such as the project being imminent;

(USEPA 315-R-99-002, Section 4.3).



Furthermore, cumulative impacts analysis involves more than just an evaluation of the proposal's potential effect on present environmental conditions.

EPA reviewers should determine whether the NEPA document considered all past, present, and future actions that contribute to significant cumulative effects on the resources of concern. The analysis should include the use of trends information and interagency analyses on a regional basis to determine the combined effects of past, present, and future actions.

(USEPA 315-R-99-002, Section 4.3). In particular, “[f]uture actions should include any planned communities or commercial areas, induced growth and accompanying infrastructure, projected increase in population and traffic, and road expansion.” (USEPA 315-R-99-002, Section 4.3). Thus, in reviewing the Jagger Branch and Shady Oaks water-use facilities applications, the Corps and TVA are required to also consider the impacts from the subdivisions proposed by the Applicants.

In addition to expanding the boundaries of the area of potential/probable effect, and the scope of time (and impacts and activities therein) that will be discussed and evaluated in a NEPA environmental document (and/or during the Corps Public Interest Review process), the Corps and TVA need also expand the array of potential effects to include resource other than biological resources.

NEPA documents generally consider only a limited number of resources that may be potentially affected by cumulative impacts. In addition, assessments of impacts to biological resources generally have been limited to selected game species, federally or state listed threatened and endangered species, and wetlands habitats. These approaches are too limited and should be expanded to consider other valuable resources which could be affected, while also considering a broader array of potential effects.

(USEPA 315-R-99-002, Section 4.1). Examples of other resources that need to be considered in a cumulative impact evaluation include: “historic and archaeological sites, socioeconomic services and issues, and community structure and character.” (*Id.*).

#### **E. Consideration of Alternatives**

In compliance with NEPA, federal agencies are required to take a “hard look,” and consider all reasonable alternatives to the proposed actions. (40 C.F.R. § 1502.14). Federal regulations require a consideration of all “reasonable alternatives,” including the “no action” alternative. (40 C.F.R. § 1502.14).

To-date, alternatives to the proposed Jagger Branch and Shady Oaks community water-use facilities have not been seriously considered. Reasonable alternatives exist, however,

including but not limited to dry storage, a landing dock<sup>12</sup>, a boat ramp, a smaller footprint, etc. Considering the certain detrimental impact that the proposed community boathouses and accompanying subdivisions will have on significant environmental resources and socioeconomic considerations, a decision by either TVA or the Corps to approve the Jagger Branch and Shady Oaks applications must be accompanied by an explanation for (1) why the detrimental impacts are justified, and (2) why all other reasonable alternatives have been rejected. Such a level of analysis/explanation is required, considering EO 11990's mandate that agencies must avoid providing assistance or approval of permits for construction located in or affecting wetlands, unless the agency finds that there is "no practicable alternative to such construction."

#### F. Need

Additionally, not only should the Corps and TVA be required to show that there is "no practicable alternative to such construction" directly and/or indirectly affecting wetlands, but also that there is a need for the proposed construction activities. According to 33 CFR § 320.4(a)(2), the Corps should consider "[t]he relative extent of the public and private need for the proposed structure or work," when deciding whether to grant an application.

A showing of "need" should be required in order to justify such significant impacts to so many sensitive and natural resources.

In fact, available and vacant boat access and boat storage options in the vicinity of the proposed Jagger Branch and Shady Oaks water-use facilities suggest that there is no need for the proposed construction activities. There are two boat ramps within two miles of the proposed construction activities. Furthermore, dry storage is currently available for use by Jagger Branch embayment residents. Also, boat slips in community docks elsewhere on the Guntersville reservoir remain vacant. The proposed water-use facilities will not be constructed to meet an existing need, but instead, the construction of the proposed water-use facilities will only induced unsound concentrated growth in the Jagger Branch embayment community. Most notably, USFWS pointed out that in the past three years a significant number of water-use facilities have been proposed for construction on the Tennessee River within Alabama, and so USFWS strongly recommends that the Corps and TVA "[c]onsider the actual need for new boat dock facilities located in the vicinity of this and future, similar proposed actions." (November 17, 2006 letter from USFWS to David Baldrige).

### III. OTHER REQUIREMENTS

#### A. 404 Requirements

Based on the certainty that the extensive dredging activities will result in more than just an "incidental addition" or "redeposit" of dredged material into Jagger Branch embayment (33 CFR § 323.2d)(4)(i)), the Corps should require both Applicants to apply for and obtain a Section

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<sup>12</sup> TVA regulations specifically provide that "in narrow coves or other situations where shoreline frontage is limited, shoreline development may be limited to one landing dock for temporary moorage of boats not to exceed the 1000-square-foot footprint requirement . . ." (18 § CFR 1304.204(a)(3)).

404 permit under the Clean Water Act, and specifically in compliance with Section 404(b)(1) EPA Guidelines on disposal of dredged fill. (33 U.S.C. § 1344; 33 CFR §§ 323.1, 323.3; *see especially* 40 CFR § 230). Additionally, because the proposed activities will result in the degradation of water quality, ADEM should require the applicants to obtain Section 401 Water Quality Certifications, before any Section 10 or Section 404 permits can be issued.

### **B. Compliance with FEIS**

The Guntersville FEIS (“Final Environmental Impact Statement and Land Management Plan, Guntersville Reservoir”) was approved in 2001, and sets forth the management scheme for the entire Guntersville reservoir. Accordingly, federal approval of activities affecting the reservoir must conform to the requirements and mandates of the Guntersville FEIS.

### **IV. ADDITIONAL STUDIES**

Federal courts have consistently held that NEPA requires that the federal agencies “not act on incomplete information, only to regret its decision after it is too late to correct.” *Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)). Furthermore, “[i]f the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.” (40 CFR § 1502.22(a)).

To summarize, the following information and actions are needed so that the Corps and TVA are able to make final agency decisions based on complete and accurate information:

1. A depth study/profile of the embayment, to determine actual usable water acreage
2. A boating capacity study, to determine the embayment’s ability to accommodate significant increased water recreation uses
3. A boating safety study and/or consultation with the Alabama Marine Police, to determine the embayment’s ability to accommodate significant increased water recreation uses
4. Consultation with ADEM to determine the current water quality condition of the embayment, and to evaluate probable impacts to water quality if the permits are approved
5. Further coordination with USFWS to conduct surveys aimed at evaluating the presence of federally-listed threatened and endangered species and critical habitat.
6. Consultation with the Alabama Department of Conservation and Natural Resources, who has been conducting surveys of bald eagles since the early 1990s.
7. Further consultation with the Alabama SHPO, to determine whether any of the area caves contain important archaeological and/or historic resources.

### **V. CONCLUSIONS**

On behalf of HCA, I respectfully request that: (1) TVA and the Corps deny the Jagger Branch permit application as proposed; (2) that TVA deny the Shady Oaks permit application as proposed; and (3) that the Corps reevaluate the Shady Oaks DA permit issued January 19, 2007

(and accompanying EA/FONSI), in light of significant new information, and because of the previously submitted inaccurate and incomplete information.<sup>13</sup> If either project is to be further considered, then I respectfully request that: (1) TVA and the Corps engage in further consultation with USFWS, the Alabama SHPO, and relevant State agencies; (2) that additional water quality, depth analysis, boating capacity, and other studies be completed, as well as surveys for federally listed threatened and endangered species and critical habitat; (3) that all TVA and Corps regulations and policies regarding structure size and structure siting be complied with; and (4) that an EIS be prepared to fully assess the direct, indirect, and cumulative impacts of the proposed Boathouses and associated subdivisions.

As discussed above, the detrimental impacts of these two proposed projects are far greater than stated in Public Notice No. 06-65 and Public Notice No. 06-115. Members of HCA have submitted comments on both of the above-referenced applications, and have formally requested that “a public hearing be held to consider the material matters at issue in the permit application[s] . . .” (33 CFR § 327.4(b)). In order to afford the public an opportunity to present their “views, opinions, and information” on the many “material matters at issue in the permit application,” and in order to enable a complete and true Public Interest Review<sup>14</sup> as well as preparation of an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”), HCA again, formally requests that the Corps and TVA conduct public hearings on each of the permits identified above, in accordance with the requirements of 33 CFR § 327 and 18 CFR § 1304.5. 33 CFR § 327.4(b) specifically provides that requests for public hearings “shall be granted, unless the [Corps] district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.” (emphasis added) In that case, “[t]he district engineer will make such a determination in writing and communicate his reasons therefore to all requesting parties.” (emphasis added) (Id.). The public has expressed a clear and continued interest in the proposed project, and I ask that the Corps and TVA allow the public to participate in a full discussion of the proposed projects.

For reasons stated herein and as supported by the Globally Green report, HCA opposes the construction of community water-use facilities and associated construction activities, as well as the planned subdivisions that will be serviced by the community boathouses, and demand public hearings on all federal and state permit applications in accordance with state and federal public hearing rules and regulations. In addition, HCA demands that an EIS be prepared in full compliance with NEPA and existing federal court decisions. Please directly notify this office, at the address listed in the letterhead, of any public notices, any additional permit applications, and decisions to grant/deny any permits.

<sup>13</sup> “TVA may, at its sole discretion, deny any application to construct, operate, conduct, or maintain any obstruction, structure, facility, or activity that in TVA’s judgment would be contrary to the unified development and regulation of the Tennessee River system, would adversely affect navigation, flood control, public lands or reservations, the environment, or sensitive resources (including, without limitation, federally listed threatened or endangered species, high priority state-listed species, wetlands with high function and value, archaeological or historical sites of national significance, and other sites or locations identified in TVA Reservoir Land Management Plans as requiring protection of the environment), or would be inconsistent with TVA’s Shoreline Management Policy. . . .” (emphasis added) (18 CFR § 1304.8).

<sup>14</sup> 33 CFR § 320.4(a)(1), sets forth the requirement that all relevant factors and cumulative effects must be considered by the Corps in the Public Interest Review.