ZOE LOFGREN, CALIFORNIA
CHAIR

BEN CHANDLER, KENTUCKY
G. K. BUTTERFIELD, NORTH CAROLINA
KATHY CASTOR, FLORIDA
PETER WELCH, VERMONT

DANIEL J. TAYLOR,
COUNSEL TO THE CHAIR

R. BLAKE CHISAM,
CHIEF COUNSEL AND STAFF DIRECTOR

ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515–6328

JO BONNER, ALABAMA
RANKING REPUBLICAN MEMBER

K. MICHAEL CONAWAY, TEXAS
CHARLES W. DENT, PENNSYLVANIA
GREGG HARPER, MISSISSIPPI
MICHAEL T. McCAUL, TEXAS

TODD UNGERECHT
COUNSEL TO THE RANKING
REPUBLICAN MEMBER

SUITE HT–2, THE CAPITOL
(202) 225–7103

November 4, 2009

The Honorable Richard W. Moore
Inspector General
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902

Re: TVA Office of the Inspector General Inspection 2008-12003

Dear Inspector General Moore:

The Committee on Standards of Official Conduct (Committee) received your report, Inspection 2008-12003, on June 2, 2009. The Committee has reviewed the OIG report and the findings contained therein. According to your report, after a thorough investigation into several Maintain and Gain Program projects, including Blackberry Cove, a property owned by business interests of Representative Heath Shuler, the OIG concluded that it found no evidence that Representative Shuler violated any ethics rules. Additionally, you reported that the FBI reviewed the facts surrounding the application and also concluded that there was no evidence that criminal statutes were violated.

The Committee has also reviewed the matter and has determined that no House Rules were violated. Accordingly, after a careful review of the OIG report and findings, along with other information known to the Committee, the Committee is closing this matter without further action. If you have any questions about this matter please contact the Committee's Chief Counsel, R. Blake Chisam, at (202) 225-7103.

Sincerely,

Zoe Lofgren
Chair

Jo Bonner
Ranking Republican Member

Office of the Inspector General
Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

Richard W. Moore
Inspector General

May 22, 2009

The Honorable Zoe Lofgren, Chairwoman
Committee on Standards of Official Conduct
HT-2, The Capitol
Washington, DC 20515

Dear Chairwoman Lofgren:

The Office of the Inspector General (OIG) recently completed a review of the Tennessee Valley Authority (TVA) Maintain and Gain Program. We are providing you with a copy of our report because of the involvement of Congressman Heath Shuler in one of the lake access transactions. We have included the entire report although only the section on Blackberry Cove applies to Congressman Shuler.

Our referral of this matter should not be interpreted in any way to suggest that we have found any evidence to support an allegation that Congressman Shuler violated any ethics rule. We are forwarding this report only in recognition that the TVA OIG has no jurisdiction over a sitting United States Congressman and out of an abundance of caution. As you will see in our report, this matter was the subject of considerable coverage by the media.

While we found no attempt by Shuler to influence the TVA maintain and gain process, the facts as related in the report created an appearance of preferential treatment. These same facts were investigated by the FBI in conjunction with the TVA OIG to determine if any criminal statutes were violated. Both the FBI and our office have closed the criminal case because of insufficient evidence that a crime was committed.

Congressman Shuler cooperated with our staff and submitted himself to two separate interviews without the presence of legal counsel.

Our office has completed an inspection report on this matter that has been sent to Congress. After twenty days our report will become public. The inspection report does not include certain matters that have to do with the statements of Congressman Shuler that we believe are more properly included in this report to you. We have also completed an administrative report that addresses actions of TVA employees related to the Shuler matter. That report will not be made public.

If you have any questions or wish to discuss this report, you may contact me at (865) 633-7300.

Very truly yours,

Richard W. Moore

cc (Enclosure):
OIG File No. 2008-12003
OIG File No. A&I-5-1

Office of the Inspector General
Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

Richard W. Moore
Inspector General

May 22, 2009

The Honorable Jo Bonner, Ranking Member
Committee on Standards of Official Conduct
HT-2, The Capitol
Washington, DC 20515

Dear Representative Bonner:

The Office of the Inspector General (OIG) recently completed a review of the Tennessee Valley Authority (TVA) Maintain and Gain Program. We are providing you with a copy of our report because of the involvement of Congressman Heath Shuler in one of the lake access transactions. We have included the entire report although only the section on Blackberry Cove applies to Congressman Shuler.

Our referral of this matter should not be interpreted in any way to suggest that we have found any evidence to support an allegation that Congressman Shuler violated any ethics rule. We are forwarding this report only in recognition that the TVA OIG has no jurisdiction over a sitting United States Congressman and out of an abundance of caution. As you will see in our report, this matter was the subject of considerable coverage by the media.

While we found no attempt by Shuler to influence the TVA maintain and gain process, the facts as related in the report created an appearance of preferential treatment. These same facts were investigated by the FBI in conjunction with the TVA OIG to determine if any criminal statutes were violated. Both the FBI and our office have closed the criminal case because of insufficient evidence that a crime was committed.

Congressman Shuler cooperated with our staff and submitted himself to two separate interviews without the presence of legal counsel.

Our office has completed an inspection report on this matter that has been sent to Congress. After twenty days our report will become public. The inspection report does not include certain matters that have to do with the statements of Congressman Shuler that we believe are more properly included in this report to you. We have also completed an administrative report that addresses actions of TVA employees related to the Shuler matter. That report will not be made public.

If you have any questions or wish to discuss this report, you may contact me at (865) 633-7300.

Very truly yours,

Richard W. Moore

Enclosure
cc (Enclosure):
OIG File No. 2008-12003
OIG File No. A&I-5-1

Tennessee Valley Authority
Office of the Inspector General

MAINTAIN AND GAIN LAKESHORE MANAGEMENT PROGRAM

2008-12003
May 22, 2009

TABLE OF CONTENTS

APPENDICES

A. LETTER DATED AUGUST 30, 2005, FROM NANCY R. GREER TO DENNIS TUMLIN

B. MEMORANDUM DATED APRIL 26, 2006, FROM ROBERT F. WORTHINGTON, JR., TO BLACKBERRY COVE, LLC

C. E-MAIL DATED AUGUST 22, 2007, FROM MICHAEL J. DOBROGOSZ TO REBECCA CHUNN TOLENE AND PEYTON T. HAIRSTON, JR.

D. E-MAIL DATED AUGUST 23, 2007, FROM BRIDGETTE K. ELLIS TO [REDACTED]

E. LETTER DATED AUGUST 23, 2007, FROM JASON RUDD TO TOM KILGORE

F. E-MAIL DATED OCTOBER 16, 2007, FROM ROBERT A. MORRIS TO EMILY J. REYNOLDS AND PEYTON T. HAIRSTON, JR.

G. E-MAIL DATED OCTOBER 26, 2007, FROM BUFF L. CROSBY TO BRIDGETTE K. ELLIS AND ANDA ANDREWS RAY

H. E-MAIL DATED OCTOBER 29, 2007, FROM BUFF L. CROSBY TO ANDA ANDREWS RAY

I. LETTER DATED MARCH 10, 2004, FROM DON W. ALLSBROOKS TO CHARLES PERRY

J. ISSUE BRIEFING PAPER – JUSTIFICATION FOR SEQUENTIAL APPROVAL DATED MARCH 21, 2005

K. MEMORANDUM FROM TOM KILGORE TO ELLEN ROBINSON

L. RS GUIDELINES – 16.5.4.52 BOARD ACTION CHECKLIST

M. MEMORANDUM DATED APRIL 13, 2009, FROM TOM KILGORE TO RICHARD W. MOORE

INTRODUCTION

The Office of the Inspector General (OIG) conducted a review of Tennessee Valley Authority's (TVA) Maintain and Gain (hereinafter referred to as "Maintain and Gain") lakeshore management program. This program is one element under TVA's Shoreline Management Policy (SMP) that seeks to better protect shoreline and aquatic resources and allow reasonable access while maintaining the quality of life of the reservoir system. This policy restricts residential access rights to about 38 percent of available shoreline while protecting 62 percent. The Maintain and Gain program is designed to allow consideration of proposals to obtain lake access rights at the landowner's property by swapping access rights already available at other properties the landowner may possess. The policy, as written, requires that transactions would result in no net loss, or preferably, a net gain of public shoreline.

This review was initiated after numerous newspaper articles reported in August of 2008 on a TVA Maintain and Gain transaction involving an entity called The Cove at Blackberry Ridge, LLC (Blackberry). The articles focused on the fact that United States Congressman Heath Shuler of North Carolina was a primary investor in Blackberry while serving on the House Transportation Committee's Subcommittee on Water Resources and the Environment, one of two congressional panels that provide formal oversight of TVA. The articles also raised questions about whether Shuler used his position to influence TVA's decision to grant Blackberry's request for water access. These media articles included statements by TVA's spokesman, Congressman Shuler and Shuler's representatives that categorically denied that Shuler contacted TVA during TVA's deliberations or that he had made any attempts to influence the decision regarding the Maintain and Gain transaction. Because doubt was cast on the fairness of a TVA process, the OIG announced at the time the newspaper articles appeared that a review would be conducted.

Our original expectation that this review could be completed within a matter of weeks was based on the premise that the scope of the review would be confined to the Blackberry Cove transaction and that the OIG would be able to access internal TVA documents quickly. Our completion of this project was delayed primarily by our determination that a full review of all Maintain and Gain transactions was required in order to present a complete assessment of the program. This project was also delayed by certain TVA employees failing to fully disclose what they knew about what happened in the Blackberry Cove transaction. Fortunately, we received excellent cooperation from the majority of TVA personnel during this review.

This review was also delayed by our separate but companion reports that required substantial resources and investigation. One report has to do with personnel issues involving TVA employees connected to this case. That report is being submitted to TVA officials for their review. The second report contains matters that are being referred to

the House Ethics Committee. The TVA OIG has no jurisdiction over the conduct of a United States Congressman and we make no judgment as to whether Congressman Shuler's actions connected to the Blackberry Cove matter violate any existing ethical standard.

TVA management agreed with the report and plans to take action in regards to the recommendations. Additionally, the Audit, Governance, and Ethics Committee of the TVA Board is developing a protocol which is expected to be approved by the full TVA Board, which fully addresses the identification of conflicts of interest and the appearance of the exertion of undue influence over TVA matters. The TVA Board, and particularly the Audit, Governance, and Ethics Committee, has been fully supportive of this OIG review, and they have moved decisively to correct the problems we identify in this report.

METHODOLOGY

This review was conducted to determine whether: (1) TVA gave anyone preferential treatment in the review and approval of Maintain and Gain transactions; and (2) the policies and procedures related to the design and execution of the Maintain and Gain process were adequate. The OIG review primarily focused on the events surrounding the approval of the transaction for Blackberry. We also included a more limited review of additional transactions that had the potential for preferential treatment. Documentation related to all eight Maintain and Gain transactions completed was reviewed to evaluate whether TVA complied with the guidelines for processing Maintain and Gain requests.

While the impetus for the review was the media attention given the Blackberry Maintain and Gain application, it was quickly surmised that justice could not be done to this topic without expanding the review to include all the Maintain and Gain transactions approved by TVA since the inception of the program in 1999.

In conducting this review, the OIG completed 94 interviews of witnesses and examined hundreds of documents. This delayed the completion of this inspection report beyond the original estimate but has resulted in a much more definitive and comprehensive review.

During the course of the inspection, TVA employees at all levels of the agency were interviewed to gain an understanding of the process and the actions taken by TVA for specific transactions completed. Among the TVA employees interviewed were Tom Kilgore, President and Chief Executive Officer (CEO); Peyton Hairston, Senior Vice President, Corporate Responsibility and Diversity; Anda Ray, Senior Vice President, Office of the Environment and Research; Buff Crosby, Senior Advisor to the

Senior Vice President, Office of the Environment and Research; and Bridgette Ellis, former Vice President, Land and Water Stewardship. Managers and members of the following TVA Watershed Teams were interviewed, as necessary, --Hiwassee, Guntersville--Tims Ford, Holston--Cherokee--Douglas, Kentucky, Little Tennessee, Pickwick--Wheeler, and Watts Bar--Clinch. Also interviewed, as warranted, were selected Maintain and Gain applicants and other relevant individuals.

The OIG also interviewed United States Congressman Heath Shuler, Hayden Rogers (Shuler's chief of staff), Charles Perry, TVA Board Chairman Bill Sansom, and former TVA Chairman Bill Baxter.

Additionally, the following evaluation steps were performed:

- Reviewed relevant policies and procedures related to the Maintain and Gain program to gain an understanding of the overall program requirements.
- Visited the relevant watershed team locations to review the files for eight Maintain and Gain transactions completed since the inception of the program in 1999.
- Performed a Maintain and Gain file review using compliance checklists developed from the stated program requirements.
- Conducted follow-up interviews as needed to ensure a complete understanding on the actions taken by TVA.
- Made additional inquiries as needed to document justifications for instance when policies or procedures were not followed.
- Hired a real estate appraiser to provide an expert opinion as to the validity of TVA's Comparative Market Analysis for the Blackberry transaction.

Key Maintain and Gain process steps that we tested for compliance included whether there was evidence of:

- A completed Land Use Application.
- Payment of the required $5,000 fee.
- A completed worksheet documenting the Watershed Team's opinion of the transaction's public benefit.
- Coordination with U.S. Fish and Wildlife Service and state wildlife or natural resources agency.

- Management team review of the transaction to determine if the proposal is in the public's interest from a Valley-wide perspective.
- Public notification.
- Environmental review.
- An appraisal.

This review was conducted in accordance with the Quality Standards for Inspections.

BACKGROUND

MAINTAIN AND GAIN PROGRAM

On April 21, 1999, the TVA Board of Directors implemented an SMP which took effect on November 1, 1999. Through the SMP, TVA seeks to allow reasonable public access for residents along the shoreline while simultaneously maintaining the quality of life of the reservoir system.[1] As a part of this goal, TVA developed a strategy to "maintain and potentially gain" public reservoir shoreline property (i.e., at summer pool shoreline levels) while limiting the amount of residential access to the existing residential access rights (i.e., about 38 percent of the 11,000 miles of shoreline in the Valley). There are four methods whereby water access rights are acquired, and one of these methods is the execution of a Maintain and Gain transaction.[2] In Maintain and Gain transactions, water access rights on one piece of land are exchanged for water access rights on another piece of land.

Maintain and Gain transactions apply only to water access rights and not to the exchange of land or property. The Land Policy which was approved by the Board of Directors in 2006 restricts the exchange of land on TVA reservoirs and also allows for changing land use designations to implement the SMP.

Environmental Stewardship and Policy (ES&P) has issued guidance on Maintain and Gain transactions. ES&P Guideline 16.52.11.1, Reservoir Shoreline Maintain and Gain Information, states:

[1] The 1999 SMP was derived from a TVA Shoreline Management Initiative (SMI) which assessed TVA's existing reservoir residential shoreline permitting practices with an objective of establishing a policy that better protected shoreline and aquatic resources, allowed reasonable access to the water for adjacent residents, and improved management of public land along the shoreline.

[2] The other three methods whereby water access rights are acquired include: (1) the obtainment of flowage easement property where there are reservoir boundaries, but it is not TVA land; (2) the acquisition of land approved in the Land Management Plan as having water access; and (3) the acquisition of land that has deeded access rights which can be either (a) general rights to ingress and egress or (b) implied rights which only states there is water access.

- TVA may exchange access rights as long as it results in either (1) no net loss or (2) a gain of public shoreline.

- An individual(s) must first have an ownership of or a fee interest in currently undeveloped shoreline. They may then propose an exchange which addresses how the exchange will maintain or improve environmental and public values by assessing the resources for both properties. Resources to be considered include:

  - Wetlands.
  - Archeology.
  - Habitats for protected species.
  - Scenic qualities.
  - Shoreline characteristics.
  - Existing vegetation.
  - Water quality.

- TVA will consider the qualities of both properties and the benefits of the exchange. If TVA determines that the exchange will result in equal or greater public benefits, it may be approved.

Other key points of the Maintain and Gain guidelines include: (1) proposals must maintain or preferably gain public reservoir shoreline miles as calculated at the normal summer pool level; (2) TVA will not exchange property in which it has a fee interest; (3) exchanges must be on the same reservoir; and (4) proposals must be for TVA property that is narrow in width, maximum 100 feet from summer pool shoreline to backline.

ES&P Guideline 16.52.11.2, Instructions, along with 16.52.11.3, Maintain and Gain Worksheet, provides steps and a worksheet for the watershed representatives to complete when processing a Maintain and Gain transaction. Maintain and Gain transactions are tracked in the Information System Integration Project (ISIP) (the new Automated Land Information System) by ES&P.[3] The transactions are entered into the system after the application has been reviewed for completeness and feasibility by the Watershed Team and the initial fee has been received. Maintain and Gain inquiries and incomplete applications are not entered into the system nor is there a requirement to maintain documentation. According to ES&P personnel, the time to complete a Maintain and Gain transaction is more than a year. During this time, (1) the property is reviewed for the impacts listed above and a public notification is made and (2) management and Board/CEO approval is obtained.[4]

[3] ES&P has placed into service a new enhanced Automated Land Information System so data for Maintain and Gain transactions is housed in two different systems depending on the Maintain and Gain transaction timeframe.

[4] On May 18, 2006, the TVA Board of Directors delegated the authority to handle land transactions of five acres or less to the President and CEO.

THE NINE APPLICATIONS GRANTED

Nine Maintain and Gain transactions have been approved since the program began in 1999; however, one was withdrawn before finalization and the Blackberry transaction was approved but finalization had been suspended by the TVA Board pending the review by the OIG (See Figure 1).

Figure 1: Approved Maintain and Gain Transactions

Applicant	Reservoir	Completed Land Use Request Application Found in the Documentation	Purpose of Request	Date of Approval	Total Costs Billed by TVA
Stumac, Inc.	Chatuge	January-01	Development	June-02	$35,936.21
Riverbrook Shoreline Owners Association	Fort Loudoun	November-01	14 Private docks	November-02	$19,187.00
Scott Roberts; Harold Daniels; Ken Herrick	Chickamauga	Not in the documentation provided	2 Dock encroachments and a new dock for three subdivision lot owners	July-03	$37,765.00
Charles McLeroy	Watts Bar	8/10/2000	To remedy a dock violation	March-04	$22,500.00
William Sansom	Fort Loudoun	1/31/2006	New residential dock	March-04	$14,379.74
Charles Perry	Kentucky	6/24/2002 and a letter 02/03/03	To remedy a violation concerning a dock built in 2000	July-05	$27,711.77
Chris Stevens; John Rankin; Marsha and Norman Sheldon	Melton Hill	Not dated but prior to 8/25/05	3 Residential docks	August-06	$11,948.00
The Cove at Blackberry Ridge, LLC	Watts Bar	12/12/06 and revised 5/1/2007	Community dock by developer	2008	$29,854.72

SUMMARY CONCLUSIONS

Based upon an exhaustive review of the TVA Maintain and Gain program, the OIG has determined that the Maintain and Gain process is administered in an arbitrary and inconsistent manner that contributes, in some instances, to the appearance of preferential treatment. While TVA asserts that the Maintain and Gain process is only a guide and does not constitute any hard and fast rules, certain actions by TVA and by others in processing these transactions created the appearance of preferential treatment. Discussed below are summary conclusions that are found in more detail later in this report.

CONCLUSION 1

Certain actions by TVA employees and by others created the appearance of preferential treatment and thereby increased TVA's risk of reputational harm. TVA employees working on the Maintain and Gain transactions held the applicants to certain standards in an apparent good faith effort to not show partiality based on the status of the applicants. However, the inconsistent treatment of the applicants resulted in actions and decisions by TVA that give the appearance of preferential treatment.

The Blackberry Transaction

Certain TVA employees contributed to the appearance of preferential treatment by: (1) denying both to the media and initially to the OIG any contact by Shuler about Blackberry when, in fact, they knew or should have known that there had been contact; (2) bypassing the standard committee review which was intended to provide another layer of scrutiny; and (3) bringing in a high-level TVA executive as ombudsman to negotiate with Blackberry representatives creating the impression with lower-level employees that TVA executives wanted the Blackberry application granted.

Congressman Shuler contributed to the appearance of preferential treatment by continuing to pursue water access for Blackberry while a part owner of Blackberry and while sitting on a congressional committee with direct oversight of the agency from which Blackberry was seeking a permit for water access.

- The appearance of preferential treatment was exacerbated by: (1) Shuler calling TVA's CEO Tom Kilgore complaining about the lack of action on the permit; and (2) Shuler's representatives dropping Shuler's name with TVA employees.

The OIG found no evidence, however, that either Shuler or his representatives used Shuler's position as a United States Congressman to pressure TVA to grant Blackberry water access. We also note that TVA could have simply granted Blackberry water access and exempted Blackberry from the Maintain and Gain process as they did with others.

The Perry Transaction

TVA employees contributed to the appearance of preferential treatment by: (1) failing to give public notice of this transaction for fear of creating trouble for TVA; (2) approving a lot-by-lot transaction which is not generally allowed by the Maintain and Gain program within the Kentucky Reservoir system; (3) caving in to Perry after directing Perry to remove his illegal dock; (4) circumventing legitimate public benefit concerns raised by the Tennessee Wildlife Resources Agency (TWRA); and (5) preparing a document entitled "Board Questions" for TVA staff to brief the TVA Board which included a

statement that, “TVA probably would not have considered this action were it not for his [Perry’s] position as general manager of a TVA distributor.”

Perry contributed to the appearance of preferential treatment by: (1) building a dock in defiance of TVA and then successfully opposing TVA’s efforts to have him tear the dock down despite not complying with TVA rules, and (2) compounding the appearance problem by attempting to involve elected officials in his quest for water access.

Charles Perry also had an inherent conflict of interest because of his position. He was a manager of a TVA power distributor which potentially gave him undue influence over TVA employees who were being asked to bestow something of financial value (water access) on him.

Exceptions that Ate the Rule

In a separate class of cases, TVA created the appearance of preferential treatment by granting water access rights outside of the Maintain and Gain program. These exceptions essentially swallowed the TVA rule on how these cases were supposed to be handled. Specifically, these transactions obtained access rights because (1) TVA provided erroneous information to the landowner or (2) persistent appeals to the Board and/or TVA management. These cases may have been decided correctly based on their individual facts, but they were handled differently than similar cases. In two of these cases, access was approved after TVA acknowledged that erroneous information had been previously provided to the landowners.

CONCLUSION 2

TVA did not have a protocol in the Maintain and Gain process to ensure a transparent and independent review of applicants having known conflicts of interest. This problem was exacerbated by TVA failing to maintain the appropriate documentation of applicants to make a record of whom TVA was refusing and whom TVA was favoring. Although aware that both Shuler and Perry had inherent conflicts of interest, TVA proceeded blindly with a process that gave rise to the appearance of preferential treatment, resulting in reputational harm both to the applicants and to TVA.

CONCLUSION 3

The Maintain and Gain program has been administered in an arbitrary manner and requires substantial improvement if it is to be retained by TVA. The Maintain and Gain guidelines have been selectively and arbitrarily applied, with exceptions made for applicants that resulted in (1) waiving public notice, (2) bypassing management review committees, and (3) not coordinating with other agencies. In addition, no clear criterion exists for the term "public benefit" resulting in it being whatever TVA employees want it to be.

CONCLUSION 4

TVA's failure to retain records of who filed applications and why those applications were rejected damages the integrity of the Maintain and Gain program. Many of the applicants who were approved under this program appear to be wealthy, influential, or both, giving rise to speculation that the process is fairer for some than others.

CONCLUSION 5

The Maintain and Gain program may undermine the TVA Board's 2006 Land Policy and its apparent goal of restricting residential development on TVA shorelines. The Land Policy specifically incorporates the Maintain and Gain process to allow Maintain and Gain decisions to be made by management in carrying out the SMP. It is doubtful, however, that the TVA Board anticipated the administration of the Maintain and Gain program in a way that has permitted residential development that may not be consistent with the intent of the Land Policy.

FACTUAL OVERVIEW

As noted above, there have been nine approved Maintain and Gain transactions since the inception of the program in 1999. This review focuses primarily on the events involving the transaction with Blackberry since Congressman Heath Shuler has been a primary investor and since he also serves on the House Transportation Committee's Subcommittee on Water Resources and the Environment,[5] one of two panels that provide formal oversight of TVA. In addition, also included is a more limited review of two other Maintain and Gain transactions involving applicants whose status had the potential for preferential treatment by TVA. Those two applicants were Charles Perry, at that time a TVA power distributor manager, and William ("Bill") Sansom, currently the Chairman of the TVA Board of Directors. These transactions were reviewed both to

[5] Congressman Shuler advised the OIG in his interview on February 27, 2009, that he is no longer a member of this committee.

determine the effectiveness of the Maintain and Gain process as applied to them, as well as to determine whether any preferential treatment was shown to them.

The OIG review unearthed additional transactions that include three requests for water access that TVA approved because of (1) TVA providing erroneous information to the landowners or (2) persistent appeals to the Board and/or TVA management. These three transactions are: (1) [REDACTED]; (2) [REDACTED]; and (3) [REDACTED]. We discuss below the facts pertaining to each of the six transactions we have examined.

CHAPTER ONE

THE COVE AT BLACKBERRY RIDGE, LLC, TRANSACTION

TVA Gave Blackberry Cove Developers Erroneous Information

In early February 2005, Bowater, Inc. (Bowater), a paper company, placed a large tract of land for sale in Roane County, Tennessee. Bowater sold the land through the Hiwassee Land Company. Dennis Tumlin and Bradley Varner, partners in a realty venture called Tennessee Land Development, GP, learned the property was for sale. Tumlin and Varner were familiar with Bowater land sales and knew Bowater took the first offer for full price, making time of the essence. Tumlin, when interviewed, stated that he began gathering information about the property on February 8, 2005. Tumlin walked the tract before visiting the TVA Watershed office in Lenoir City, Tennessee, to inquire whether the parcel had water access rights. At the Watershed office, Tumlin received a map of TVA's 1998 Watts Bar Land Plan (WBLP) which indicated the Bowater parcel had water access rights. TVA employee Gary Chappelle, Land Use Technician, looked at the map and confirmed the existence of water access rights. However, Chappelle when interviewed pointed out there were federal mooring areas on either side of the property, and it was unlikely a dock would be approved. Chappelle suggested Tumlin submit a written request to TVA for a determination, but such a request was never submitted.

Satisfied with the research, Tumlin and Varner faxed an offer to the Hiwassee Land Company for the full price of $819,200. Tumlin and Varner were to pay $81,920 down with the sale conditioned on favorable soil tests and a sufficient municipal water supply. The offer was accepted.

According to Tumlin, on April 29, 2005, he and Varner signed a land sale contract with Bowater. They paid $81,920 as a deposit. The remainder of the purchase price was to be paid at closing.

Tumlin and Varner had no intention of developing the land themselves – only to sell it. After Tumlin contacted several developers, Heath Shuler agreed to look at the property. After looking at the property, Shuler proposed that Tumlin, Varner, and Danny Smith (Shuler's partner on other land developments) enter into partnership to develop the parcel. Tumlin and Varner agreed. Consequently, Blackberry Cove, LLC, was formed on May 12, 2005. Blackberry Cove later changed its name to The Cove at Blackberry Ridge. (Shuler became a partner in the project before his election to Congress in November of 2006.)

On June 26, 2006, Blackberry's appraiser called the TVA Watershed Team and asked for written confirmation of water access rights for the Blackberry property. The next day Tumlin also contacted the Watershed Team and stated that the lending institution needed a letter stating the exact nature of the land rights. The TVA staff said they would review the deed and prepare a letter. It was only when the TVA staff pulled the deeds that they realized that the property that Shuler and his partners were buying did not have water access rights.

The buyers were naturally upset. Tumlin and Varner had personally guaranteed money and faced the possibility that their bank would not award the loan. According to Tumlin, the bank, however, granted the loan because the land appraised at approximately $1.4 million without water access which exceeded the amount of the proposed loan. Blackberry closed on the property the next day, June 29, 2005.

TVA Acknowledged Providing Erroneous Information and Suggested Maintain and Gain Application

In a letter dated July 25, 2005, Tumlin wrote Nancy Greer, Manager, Watts Bar-Clinch Watershed Team, asserting Blackberry possessed water access rights under the TVA Board-approved 1988 WBLP. Tumlin noted the partners in Blackberry included himself, Varner, Heath "Schuler" [*sic*], and Danny Smith. Tumlin asked Greer for a prompt response to the letter.

On August 10, 2005, by e-mail to Buff Crosby, Greer proposed that in view of the fact that TVA provided erroneous information to Blackberry, the following course of action be followed:

> Here is how I propose to handle this. The attached letter has been revised to leave the door open should Mr. Tumlin wish to provide us with a copy of his purchase agreement for the land (for our attorneys to review and for us to reconsider our decision should we need to make good on the information we erroneously provided to the customer). If Mr. Tumlin believes he has a valid claim (and there are not, in fact, exit clauses in his contract such as the ability to back

> out of the deal without loss of earnest money if an appraisal report is not satisfactory…which those clauses are pretty standard), then we can offer to negotiate with him to build one community facility. This is similar to the approach Susan used awhile back when she had a staff member give a customer incorrect information regarding landrights and the customer invested the money based on what staff told him. (Referring to the [REDACTED] transaction which is reviewed later in this report.)

This plan of action was approved by Senior Vice President Bridgette Ellis. Tumlin gave Greer more than a month to answer his letter. Tumlin then wrote Tom Kilgore, Chief Operating Officer (later CEO), and Bill Baxter, Chairman, TVA Board of Directors, on August 29, 2005, asking for a response to his letter. Tumlin included a copy of his earlier letter to Greer and again asked for a response to his proposal for gaining water access rights on the Blackberry property.

Greer answered Tumlin's letter on August 30, 2005 (See Appendix A for Greer's response to Tumlin). Greer's discussion of the issues assumed Tumlin relied on the draft of a new WBLP and did not address Tumlin's assertion in his July 25, 2005, letter that Blackberry had access rights under the 1988 WBLP. She further stated it was her understanding Tumlin's appraiser advised him of the water access issue, that the deeds did not contain water access rights, mapping rights did not create access rights, and that the draft maps of the new plan were not intended as guidance in private land acquisition decisions. Greer ended the letter by stating that if Tumlin submitted further information, it would be reviewed to see if there are other options. She also suggested Tumlin consider submitting a Maintain and Gain application.[6]

On September 12, 2005, Tumlin and Varner met with Donna Norton, Manager, Watts Bar-Clinch Watershed Team, and Greer. According to a recap of events prepared by David Beverly, Blackberry's Project Engineer, Tumlin and Varner were led to believe getting a dock permit on Blackberry's parcel was not a problem. Discussions centered on transferring water access rights from one portion of the Blackberry property to another which was more suitable for building a dock.

Norton and Greer requested Blackberry provide a copy of their contract with Bowater to prove that the deposit of $81,920 was nonrefundable as the partners claimed. In a letter from Bowater to Tumlin dated September 22, 2005, Bowater stated the earnest money was nonrefundable should Blackberry not close on the property. Norton noted the letter was not the purchase contract and called Varner to tell him TVA still needed to see the contract. Neither Tumlin nor anyone else representing Blackberry provided TVA with a copy of the purchase contract.

[6] Letter from Nancy Greer to Dennis Tumlin, August 30, 2005.

Blackberry wrote Chairman Bill Baxter and CEO Tom Kilgore

Beverly submitted a 26a application for a dock permit on behalf of Blackberry on November 7, 2005. This application was rejected on November 16, 2005. Norton phoned Beverly to tell him Blackberry did not have the water access rights necessary to apply for a dock permit. Beverly received the rejected application in the mail the same day.

Two days later Beverly and Pat Becker (a consultant hired by Blackberry to help with the 26a process) met with Norton to discuss the rejected 26a application and to ask that it be accepted. Beverly noted that Norton again rejected the application due to lack of water access rights. Norton offered four possible solutions:

1. Blackberry could submit a Maintain and Gain application;

2. Blackberry could submit additional information which would cause TVA to reverse their decision;

3. TVA could open additional shoreline for development; or

4. TVA could pay a damage claim to Tumlin.

This exchange prompted Beverly to write a letter to Kilgore and Baxter. He argued that there was an inconsistency between the draft WBLP and how the Watts Bar-Clinch Watershed Team was implementing the plan. Beverly argued the shoreline of Blackberry's property was shown to have open water access on the draft plan and on the 1988 WBLP and yet the Watershed Team refused to approve their permit application. Speaking for Blackberry, he stated that "[w]e do not understand how the TVA staff can be non-responsive and arbitrary in its interpretation of the Plan." Finally, he asked for help in resolving the matter. TVA received the letter, but Beverly did not receive a response.

Blackberry Decided to Pursue Maintain and Gain

According to documents provided to TVA, Blackberry hired the law firm of Baker, Donelson, Bearman, Caldwell, and Berkowitz (Baker Donelson). Robert Worthington, attorney with Baker Donelson, presented Blackberry with three options for resolving the water access issue.[7]

The first option was to take the position that under TVA's SMP TVA would accept applications for docks if shoreline was designated in a current TVA Reservoir Land Management Plan as open for residential development. Arguably, the 1988 WBLP had

[7] This attorney client material was forwarded to TVA by Blackberry representatives and thereby lost any privilege or confidentiality ordinarily attached to it.

not been replaced by a subsequent land plan and was not in conflict with the SMP. Under this argument, the 1988 WBLP was still in effect making the shoreline abutting Blackberry's parcel open for development; thus, giving Blackberry the right to apply for a dock permit. Worthington did not believe this was a good option for Blackberry because even if the case was won in court, TVA could derail efforts to build a dock. He wrote that:

> [g]iven the nature and course of this dispute, and the subjective nature of the 26a application process, we are concerned that the Watts Bar-Clinch Watershed Team, if it felt that TVA senior management had directed it to accept a 26a application against its judgment and policy, might predetermine in an act of retaliation that it would not approve … plans to construct a water-access facility and then develop justification for that predetermined position based on various subjective assessments.
>
> (See Appendix B for complete memorandum.)

The second option presented was for Blackberry to apply for a Maintain and Gain permit. Worthington advised Blackberry that this was a costly and time-consuming strategy with no guarantees of success. Nevertheless, it could result in gaining the necessary rights to construct a dock. A 26a application could be processed concurrently with the Maintain and Gain application.

The final option was for Blackberry to lobby TVA for the adoption of the draft WBLP in its 2005 form. The 2005 draft map showed part of the shoreline abutting Blackberry's property as being planned for water access. If the plan were adopted in this form, Blackberry would have a right under federal regulation to apply for a dock. Worthington again cautioned that this option only gave Blackberry the right to apply for a dock and did not guarantee the dock itself would be approved.

Blackberry decided to pursue the Maintain and Gain. Tumlin related that as a land developer it was likely he would interact with TVA on future projects, and litigating the matter would hurt his relationship with TVA. In mid-April 2006, Erich Kennedy, an associate attorney at Baker Donelson, began coordinating with TVA in order to submit a Maintain and Gain application on behalf of Blackberry.

The composition of Blackberry changed in May 2006 when Shuler bought out Tumlin and Varner. The buyout agreement gave Blackberry the right to extinguish a water access easement on Tumlin and Varner's Rhea County development, known as *The Overlook*, as part of a Maintain and Gain. In July 2006, Blackberry began phase 1 of development construction.

TVA "Grandfathers In" Blackberry As To Dock Size

In September 2006, TVA and Blackberry began discussing TVA's rules which determined dock size. Blackberry representatives had been told in April 2006 the number of boat slips allowed was equal to 35 percent of the lots in the development. This was known as the "35 percent rule."

New guidelines, however, implemented the "10:1 rule" which required docks to have one linear foot of water access rights for every ten square feet of dock. Under this rule, Blackberry needed many more feet of shoreline with water access than they were requesting. In fact, the new rule required Blackberry to open access to 1,080 feet of shoreline to build the dock they were proposing under the new rule. TVA told Blackberry that if they wished to fall under the 35 percent rule, they needed to submit their 26a application before October 31, 2006. Although Blackberry had previously submitted a 26a application which was rejected, they did not resubmit another 26a permit application before the deadline. Since Blackberry submitted the initial 26a application prior to the rule change, TVA allowed the proposed dock size to be in accordance with the previous "35 percent rule." TVA effectively, "grandfathered in" Blackberry.

TVA Rejected Blackberry's First Maintain and Gain Application Submitted on December 27, 2006

On December 27, 2006, Blackberry submitted a Maintain and Gain application to open up 150 feet of shoreline access. This application was received by TVA on January 3, 2007. Blackberry also submitted a 26a application on that date. The Maintain and Gain application was reviewed by the "Maintain and Gain review committee" which found the proposal insufficient for several reasons. The Maintain and Gain review committee found the shoreline access to be opened had more linear feet than the access to be closed. The Maintain and Gain policy requires the amount opened be equal to or less than the amount of access extinguished.

TVA documents outlined the guidelines for granting a Maintain and Gain application and also set forth the reasons the application from Blackberry was rejected. That document notes that this information was conveyed to Blackberry's representative on February 7, 2007. The document states, in relevant part:

TVA received a land use application for a Maintain and Gain (M&G) proposal for Blackberry Cove, LLC (*Heath Shuler and partners*) on January 3, 2007. *(Emphasis added.*) TVA's M&G process allows TVA to consider proposals to "give up" access rights at one location to "acquire" these rights at another location when the action would result in no net loss, or preferably, a net gain of public shoreline. Upon conclusion of assessing the merits of the proposal, it was determined that the proposal did not meet the requirements necessary for further consideration by TVA's M&G review committee. Below is a listing of the minimum criteria by which the proposal was evaluated:

1. Does the proposal result in no net loss, or preferably, a net gain of public shoreline?

   No. The proposal requests 250 feet of shoreline to be opened for residential access. However, the applicant is only offering to extinguish access rights over 150 feet of shoreline (loss of 100 feet).

2. Does the proposal have clear public and resource benefits?

   No. The shoreline the applicant is offering to close is narrow and severely eroded. The proposal gives the appearance that the public is not gaining benefits.

3. Does the proposal provide TVA the same or greater property acreage so the result would maintain or gain the total amount of public land currently available for public use?

   No. Although the exact acreages affecting both tracts of property are not identified in the proposal, the property the applicant is asking TVA to open residential access consists of significantly more acreage than the property being offered to extinguish the rights over. The property where the access rights are being asked to extinguish is only owned to the 745-foot contour elevation (normal summer pool on Watts Bar Reservoir is the 741-foot contour elevation; therefore, the access exchange property is basically a 4-foot-high eroding bank.

4. Does the proposal meet current guidelines for community facilities?

   No. As of November 1, 2006, no community facilities can exceed 1,000 square feet in size for every 100 linear feet of shoreline at normal summer pool dedicated for community use (this proposal is for a 10,800-square-foot community facility), which will require a closure of 1,080 linear feet of shoreline.

TVA Required Communications from Blackberry to be with Ombudsman

Heath Shuler was elected as a representative to Congress from the 11th District of North Carolina in November of 2006 and subsequently sworn in as a member of Congress on January 4, 2007. Shuler was assigned to the Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment. CEO Tom Kilgore was scheduled to appear before this Committee on February 9, 2007. He was briefed by e-mail by his staff about Blackberry's Maintain and Gain application in anticipation of possible questions by then Congressman Shuler.[8] According to Kilgore, Shuler did not ask any questions about the matter. In interviews with the OIG, Congressman Shuler stressed that after his election to Congress he left the running of the Blackberry Cove project to Jason Rudd.

A few days after the Committee hearing before Congressman Shuler, Kilgore read a newspaper article dated February 19, 2007, which reported that Shuler had sold his real estate business. In interviews with OIG staff, Kilgore stated that he assumed the Blackberry development was part of the real estate sold by Shuler and that Shuler no longer had a personal interest in Blackberry.

After the rejection of Blackberry's Maintain and Gain application, on February 27, 2007, Donna Norton indicated in an internal TVA e-mail that Hayden Rogers, Shuler's chief of staff, called Penny Judd (nee Douglas), Valley Relations Manager, and left her a message to call him back. This information was discussed during a teleconference between TVA employees in which Penny Judd mentioned the call from Rogers in which he asked her to call him back. Both Judd and Norton assumed that Rogers was calling about Blackberry Cove because Judd had been forewarned that Rogers would be calling about Blackberry Cove. In interviews with OIG staff, Judd did not remember if she was told about why Hayden Rogers would be calling by Roger Carpenter who was the customer representative in the Southeast Valley for TVA or by Larry Kernea who was the general manager of Murphy Power.

[8] E-mail from Kathryn Jackson to Tom Kilgore, February 9, 2007.

The OIG interviewed Larry Kernea of Murphy Power who stated that Carpenter of TVA was a fishing buddy and that he had told Carpenter while fishing about the problem Congressman Shuler was having with TVA. Kernea said that he considers Shuler a "fond acquaintance," and he is also friends with Hayden Rogers.

In any event, Judd never returned Hayden Rogers' call because Tom Kilgore's office contacted her and told her that TVA decided not to respond to Rogers because of concerns such contact might not be proper. The OIG interviewed Hayden Rogers who said that he did not contact Penny Judd or any other TVA employee about Congressman Shuler's Maintain and Gain application. Rogers also denied asking anyone else to contact TVA about the matter.

The OIG review discovered an e-mail from Donna Norton dated February 27, 2007, to [REDACTED] and Michael Dobrogosz which states, in part:

> In Carol's [Eimers] report she will have Blackberry Cove Development listed as a hard spot. TVA has been contacted by Hayden Rogers, Congressman Shuler's Chief of Staff regarding the development and the status of the Maintain and Gain request. If you recall, the Maintain and Gain proposal did not meet TVA's minimum criteria needed for further consideration. As I understand now, Penny Douglas will ask Mr. Rogers if he wants to discuss further or meet with TVA regarding the project. *I have never me [sic] a Chief of Staff on a personal development and the appearance of this concerns me. We have not been asked to do anything unethical, but I got a call from Roger Carpenter (CSM) today and he wanted to know the status so he could brief the Murphy Power Board manager.* One of the things that is making this a "hard spot" is the number of TVA staff that is interacting with this proposal. Carol Eimers is trying to rein that in. (*Emphasis added*.)

The OIG interviewed Norton, Penny Judd, and others to determine if, in fact, Rogers talked to anyone at TVA about Blackberry. Judd said that she did not return Rogers' call as TVA officials decided to avoid direct contact with the Congressman or his chief of staff. TVA officials decided to keep the contact on this issue between the Watershed Team and Blackberry's corporate representative. We interviewed all relevant witnesses to determine if any contacts were made by Rogers other than the one reported here, and we found no additional contact. The OIG could not substantiate that Rogers, in fact, called about Blackberry although TVA employees had a reasonable basis to believe that his call to Judd was about Blackberry.

Shortly before March 20, 2007, Kilgore asked Peyton Hairston, Senior Vice President, Ombudsman and Corporate Responsibility, to call Jason Rudd, Blackberry's representative. Kilgore wanted Hairston to mediate issues between Blackberry and TVA. Hairston and Rudd met on March 20, 2007; April 9, 2007; and April 16, 2007. Beverly, Norton, and Mike Dobrogosz, Project Manager, were to attend these meetings. The first meeting focused on Blackberry's claim to water access and their reliance on the erroneous information initially provided by TVA. However, the parties realized this was not a viable approach, and the erroneous information issue was dropped in favor of trying to find the best way to move forward with the Maintain and Gain transaction.

TVA's discussions about how to handle communications with Blackberry Cove representatives or Congressman Shuler were not shared with Congressman Shuler or his congressional staff. The OIG review of this matter did not reveal any discussions by TVA with Congressman Shuler or his representatives expressing any concern by TVA about the apparent conflict of interest Shuler had with owning an interest in Blackberry Cove and being on a congressional committee with oversight responsibilities that included TVA. Congressman Shuler was not privy to the internal deliberations TVA had to limit communications between TVA staff and the Congressman and his congressional staff.

TVA Ombudsman Mediated with Blackberry's Representative and TVA Decided to Approve Blackberry's Modified Plan

Blackberry's representative Jason Rudd met with Peyton Hairston to find ways to remedy the problems identified in the four-prong test referenced above which resulted in the rejection of Blackberry's December 27, 2006, Maintain and Gain application.

Each of the criteria used to reject Blackberry's application was addressed. The issue of whether Blackberry was asking to open more access than they were extinguishing was resolved by Blackberry's proposal to open access along a different piece of shoreline at Blackberry Cove measuring only 145 feet. Obviously, this was less than the 150 feet of access to be closed and thus met the basic Maintain and Gain criterion that the amount of access opened be less than or equal to the amount of access closed.

The "public benefit" concerns were addressed by creating a 50-foot buffer zone on the land where access was to be extinguished and an agreement that Blackberry would pay $15,000 toward stabilizing the shoreline of Wading Bird Island. As indicated earlier, the Maintain and Gain review committee noted the shoreline where water access was to be extinguished was narrow and eroded. The 50-foot buffer created a wider swath of protected shoreline where the habitat for plants and animals would be unchanged and the natural view from the lake unaffected.

During one of the meetings held by Hairston, Rudd and Beverly suggested Blackberry stabilize the shoreline of the extinguished access rights to create more public benefit. This proposal was rejected because the shoreline was already a rock face with little stabilization to be done. As an alternative, either Dobrogosz or Norton suggested Blackberry stabilize a property other than the exchange property. TVA owns Wading Bird Island which needed stabilizing but had not been done due to lack of TVA funding. After Blackberry's representatives agreed to fund the Wading Bird Island project, Norton and Dobrogosz reviewed the proposal with Buff Crosby who concluded the Maintain and Gain now had sufficient "public benefit" to be processed.

The OIG contracted with Mike Campbell, Campbell & Associates Appraisal Service, for his expert opinion as to the reasonableness of the exchange of access rights, i.e., whether the access rights of the property that Blackberry was offering for exchange to TVA was of equal value with the Blackberry property. Mr. Campbell agreed with the conclusion of the Competitive Market Analysis (CMA) previously performed by TVA that indicated the Rhea County property being offered by Blackberry was at least as valuable as the Roane County property (Blackberry).

Blackberry Submits Second Maintain and Gain Application on May 1, 2007, and Management Review Committee is Bypassed

On May 1, 2007, Blackberry submitted their second Maintain and Gain application along with a 26a application for a dock permit which included a plan that both TVA and Blackberry agreed would be sufficient. Shortly thereafter, Buff Crosby, Senior Manager, Resource Stewardship, instructed Norton to suspend the Maintain and Gain review committee's consideration of the merits of Blackberry's Maintain and Gain proposal. Norton informed the Maintain and Gain review committee that "[d]ue to timing issues and complications with this project, management has decided to bypass a committee review and initiate the requisite environmental and programmatic review." In his interview with the OIG, Dobrogosz stated that the push to get this matter concluded stemmed from the need to conclude the project in a timely manner and because TVA "felt guilty" about having initially provided erroneous information. In his interview he opined that the Maintain and Gain review committee was less crucial for this application because they had already identified the issues associated with the Maintain and Gain application in rejecting the previous application. Furthermore, there were no mandatory rules about the composition of the Maintain and Gain review committee, and TVA management could become the committee if TVA thought that was advisable.

Norton informed the Maintain and Gain review committee, which had rejected Blackberry's December 27, 2006, application, of the most recently negotiated proposal that TVA was amenable to accepting. The new proposal included:

- Blackberry would close 150 feet of shoreline access in exchange for opening 145 feet of shoreline access.
- The acreage underlying the easement extinguishing the 150 feet of shoreline access equaled 0.25 acres while the acreage encumbered by the 145 feet of shoreline access to be opened equaled 0.22 acres.
- The access rights to be extinguished would include a 50-foot wide buffer zone for conservation which would be enforced through a deed restriction.
- Blackberry would contribute $15,000 to fund shoreline stabilization for Wading Bird Island on Watts Bar Lake.

Not long after the Maintain and Gain review committee was bypassed, Rudd asked Hairston for a letter from Kilgore confirming Kilgore would approve Blackberry's application if TVA staff approved it. TVA did not issue such a letter.

Despite the fact that Blackberry had been promised approval of their Maintain and Gain application in May of 2007, Blackberry was later told by TVA officials that they needed to do an archeological survey. In August 2007, they learned that an archeological survey was going to delay the process as TVA waited for lower lake levels. Lower lake levels would allow the survey team to assess land down to the lowest water level without hiring divers. This would have delayed the formal approval of the agreement reached with Blackberry by several months at least.

Congressman Shuler was interviewed by the OIG and stated that he became one of the owners of the Blackberry Cove development during the first half of 2005. In the fall of 2006, the Blackberry Cove owners hired Jason Rudd to manage the operations of Blackberry Cove. Congressman Shuler said that he had no involvement in the day-to-day operations of the business and received general reports on the status of operations from Rudd. In May 2007, Rudd reported to Congressman Shuler that the permit application with TVA was being processed and that Rudd was told by TVA that the process would be finished and approved in about six months.

In August 2007, Rudd reported a new delay to Congressman Shuler in completing the permitting process for the dock. TVA had advised that the delay involved not being able to do a required archeological review until December 2007 or January 2008 when the lake would be at low water. This was a new six-month delay that was clearly a setback for Blackberry Cove.

On August 22, 2007, at 5:33 p.m., Rudd sent an e-mail to Peyton Hairston and a TVA attorney in the Office of General Counsel. He copied Congressman Shuler and TVA staffer Michael Dobrogosz (See Appendix C). Dobrogosz responded to the Rudd

e-mail but only to Hairston and the TVA lawyer and not to Rudd (See Appendix C). Dobrogosz acknowledged that he did tell Rudd that there would be a six-month delay for an archeological review. Dobrogosz acknowledged the conflict between Blackberry Cove developers and TVA saying, "this is a good example of a customer just not liking our answer."

Congress Shuler telephoned Tom Kilgore about an unrelated matter and then told Kilgore of the continuing delays Blackberry was experiencing. According to Congressman Shuler, he told Kilgore he wanted no special treatment, and in discussing the subject with Kilgore he told Kilgore that he was "taking off his congressional hat." Congressman Shuler advised the OIG interviewers that he was aware of the House Congressional Ethics Rules and he believed that they allow a congressman to act as a normal citizen would in a personal matter such as the permit application Blackberry Cove.[9] Shuler said that he had told Kilgore that he couldn't understand why TVA had given him "the run around." Shuler expressed the view that "We have done everything to accommodate TVA, but we are still getting the run around."

Shuler stated to the OIG interviewers that he did not recall saying anything about filing a lawsuit against TVA. Congressman Shuler advised that he understood from Rudd that the permit would be issued once the environmental and other studies were completed. He said that he had been told that the process would take six months in May, but in August of 2007 he was being told it would take a year. Congressman Shuler told Kilgore that he did not know "who to turn to."

The OIG obtained an internal TVA e-mail from the watershed file dated August 23, 2007, from Bridgette Ellis to [REDACTED], which copied Anda Ray, Vice President, Office of Environment and Research, Dobrogosz and Norton (among others) stating that:

> Tom received a call from Shuler yesterday on BB Cove saying they felt they had done everything we asked of them but that we were "putting them off" to wait for low water for something. Shuler inferred a blistering letter with threat of lawsuit is coming. If we are delaying I want to know why. I want a project status with schedule completion dates by NOON. *(Emphasis in the original.)*
>
> (See Appendix D for Ellis' August 23, 2007, e-mail.)

[9] The OIG review of House Congressional Ethics Rules confirmed Congressman Shuler's interpretation that under these circumstances a Congressman is not precluded from pursuing a matter such as the instant one with TVA.

The "Tom" referred to in the Ellis e-mail was Tom Kilgore. Kilgore was interviewed by the OIG and recalled receiving a call from Shuler around that time. Kilgore's recollection of the conversation differs from both what Bridgette Ellis stated in her e-mail and what Congressman Shuler recalls about the conversation. Kilgore state he had a phone conversation with Shuler about another matter and, before getting off the phone, Shuler mentioned he needed a TVA contact about a matter he was interested in on Watts Bar Lake. Shuler made it clear he was not asking for a favor but a contact. Kilgore told the OIG interviewers that Congressman Shuler may have mentioned that "the developer" might be considering filing a lawsuit against TVA if the matter could not be resolved. He recalled Congressman Shuler saying that the process to obtain the permit was taking too long.

Kilgore stated that he did not know Shuler had a financial interest in Blackberry at the time because of the newspaper article[10] he read about Shuler selling his real estate business in Tennessee. Kilgore advised that it is his normal course of business to request a caller send a letter providing details of their concerns so that Kilgore could give it to the appropriate person to handle. He could not say for sure that he told Congressman Shuler to do that but that would have been his practice.

The letter referred to in the Ellis e-mail ("blistering letter with threat of lawsuit") was hand-delivered to TVA the same day as the e-mail from Ellis. The letter could not be fairly characterized as "blistering," and it did not threaten a lawsuit. It was signed by Rudd and detailed Blackberry's disappointment with TVA in initially providing erroneous information, refusing to recognize water access rights to which Blackberry believed they were entitled, and delaying the processing of the Maintain and Gain application. Rudd describes the process of dealing with TVA as "painful and disappointing." Rudd notes that while they were willing to continue to work with TVA "our patience is wearing thin." He closes the letter by stating: "Any assistance that you or Peyton can provide to expedite this matter will be greatly appreciated." (See Appendix E for Rudd's letter to Kilgore).

On August 24, 2007, Ellis e-mailed Kilgore a response to Rudd's letter. In summary, the e-mail made the following points:

- Although a mistake was made in initially telling Blackberry they had water access rights, TVA staff notified Blackberry before the property was purchased that the necessary land rights for a dock did not exist. Blackberry was also told prior to purchase that a Maintain and Gain was an option for obtaining access rights.

[10] Business Journal: News Brief, *Knoxville News Sentinel*, February 19, 2007.

- TVA informed Blackberry that it took six months on average to process a Maintain and Gain proposal.[11] In this case, the environmental review identified the need for an archeological survey which was generally conducted at winter lake levels. However, Rudd was informed an underwater survey could be conducted in order to continue progress. Blackberry opted to take that option.[12]

- Once the survey work was complete, it would be submitted to the State Historic Preservation Officer (SHPO) and appropriate American Indian tribes. The SHPO and tribes would have 30 days for review.

- The National Environmental Policy Act (NEPA) review would be completed in November and submitted to Kilgore for review.

- TVA worked with Blackberry to obtain waivers from dock guidelines. Blackberry proposed an 11,200 square-foot dock facility which would require water access rights along 1,120 linear feet of shoreline. The waiver allowed Blackberry to build their facility on access to 150 feet of linear shoreline.

- TVA would allow Blackberry to contribute $15,000 toward a stabilization project to stabilize a small island on Watts Bar Reservoir.

- TVA did not use its normal internal and external concurrence process for Blackberry's Maintain and Gain proposal which ordinarily would have included the internal committee review and the review of external natural resources agencies.

TVA staff prepared a draft letter to Rudd detailing how TVA had worked with Blackberry to process the Maintain and Gain and 26a applications. The letter contained most of the detail Ellis had provided to Kilgore. However, the letter was never sent to Rudd; instead, Hairston spoke with Rudd on the phone about TVA's efforts. Hairston followed up on his conversation with Rudd by sending a letter to confirm that the process for permitting the dock was "on track."

Kilgore Directs Anda Ray to Personally Meet with Congressman Shuler and Rudd

In August of 2007, CEO Tom Kilgore put Anda Ray in the position previously held by Bridgette Ellis as Vice President of Environmental Stewardship and Policy. Kilgore had become unhappy with how the 26a applications were being handled and wanted Anda Ray to make some changes. He directed her to personally meet with Congressman Shuler and Rudd to solicit their views as "stakeholders" to see how they thought the process could be improved.

[11] Although Ellis states that six months is the "average" time to process an M&G application, this seems dubious in light of the fact that it took approximately three years to have the Shuler application approved.

[12] Ellis fails to mention that to avoid even more delay by TVA, Blackberry agreed to foot the bill to pay divers to do the underwater survey adding to their already considerable costs.

Anda Ray was interviewed by the OIG and stated that from what Kilgore told her she understood that Congressman Shuler was an owner of Blackberry. Acting on Kilgore's direction, on October 16, 2007, she e-mailed TVA staff members advising them that she was going to set up a meeting with Congressman Shuler and Rudd. Staff members pointed out that since Shuler was an owner of Blackberry meeting with him was "a delicate issue."

Bob Morris, Vice President, Valley Relations, e-mailed TVA staff members on October 16, 2007, and reminded them that they had agreed to avoid meeting with Congressman Shuler personally agreeing instead to meet with the "developer." (See Appendix F for e-mail chain with Morris.) Emily Reynolds, TVA's Senior Vice President of Communications, told Anda Ray that she would contact Kilgore and talk with him about the issue. Reynolds told the OIG that she approached Kilgore and told him that she was concerned about contacting Shuler due to the "ethical issue" presented by Shuler's financial stake in Blackberry Cove. According to Reynolds, Kilgore agreed that the meeting with Shuler should not take place. Reynolds noted that Kilgore did not ask her any questions about the extent of Shuler's conflict of interest, but she felt that he understood that Shuler's personal financial interest created the ethical conflict. Ray never met with Congressman Shuler or Rudd. None of these internal discussions at TVA were shared with Congressman Shuler, his congressional staff, or representatives of Blackberry Cove.

Name Dropping

Jason Rudd used Congressman Shuler's name occasionally to prompt the TVA staff to action. For example, an e-mail from Buff Crosby dated October 26, 2007, to Bridgette Ellis and Anda Ray states that Rudd called Crosby wanting an update and telling Crosby that Rudd will be meeting with David Beverly and "Heath Shuler."

> From: Crosby, Buff L
>
> Sent: Friday, October 26, 2007 1:25 PM
>
> To: Ellis, Bridgette K; Ray, Anda Andrews *(sic)*
>
> Cc: Pickard, Karen J; Lawson, Helen; Shepard, Diane B; Dobrogosz, Michael J; Norton, Donna E; Ferry, Daniel H
>
> Subject: FW: Blackberry Cove
>
> Jason Rudd has called asking for an update on the Project. *He has a meeting with David Beverly and Heath Shuler* today at 2:00 pm EDT. He knows the 30 day SHPO review

> should be completed, therefore, wants an update. Attached are talking points that we plan to use in updating Jason today. They have been reviewed and concurred by OGC, Dan Ferry and Cultural Resources.
>
> Please let me know if you have any questions and we will let you know the outcome of the call with Jason Rudd. I will be calling Peyton Hairston to let him know the status as well, in case Jason calls him after Mike Dobrogosz's call.
>
> Thanks *(Emphasis added*.)
>
> (See Appendix G for Crosby October 26, 2007, e-mail.)

Again on October 29, 2007, Buff Crosby e-mailed Anda Ray about "pressure" from Rudd and about Rudd meeting with "Heath Shuler" to update him on the status.

> Anda,
>
> The attached letter to the SHPO is ready for your review and forwarding to Bridgette for her signature. When the letter gets to the SHPO, the 30 day period for the SHP to determine if they are going to contact the Advisory Council in Washington will start. Therefore, the letter is time sensitive. As I am sure you have seen by several emails from Friday, we were *under pressure to contact Jason Rudd. He had asked for an update before his meeting with Heath Shuler* on Friday. Mike did contact him to let him know the situation and the conversation went well. He does understand that if the project is delayed it will not be in TVA's hands. I also contacted Peyton on Friday to let him know, in case Jason decided to give him a call.
>
> Please let me know if we need to discuss or you have any questions.
>
> Thanks
> Buff *(Emphasis added.)*
>
> (See Appendix H for Crosby October 29, 2007, e-mail.)

The OIG found no evidence that Congressman Shuler or his congressional staff was aware that the Congressman's name was being used in this way.

TVA Resolved Archeological Survey

As indicated from the above discussion, one of the reviews TVA was required to conduct in issuing a 26a permit was a historical/cultural review. Such a review surveys the land to determine whether it is likely that artifacts or other items of historical significance are present. The physical area to be reviewed is termed the Area of Potential Effect (APE).

TVA determined the APE for the Blackberry applications was the area near the proposed dock. In a letter dated September 21, 2007, TVA notified the SHPO for Tennessee and 14 federally recognized American Indian tribes of TVA's APE determination for the Blackberry dock project and solicited comments.

On October 2, 2007, SHPO's Patrick McIntyre sent a letter to TVA stating he did not concur with TVA's determination of the APE and thought the APE actually encompassed the entire Blackberry development. This opinion was based on the SHPO's belief the subdivision was constructed as a result of TVA's willingness to allow the construction of water-use facilities.

Of the American Indian tribes consulted, only the Chickasaw Nation, Eastern Band of Cherokee, United Keetoway Band of Cherokee Indians in Oklahoma, Seminole Tribe of Florida, and Choctaw Nation of Oklahoma responded. All tribes indicated no historic properties to which they attach religious or cultural significance would be affected by the dock project.

TVA thanked the SHPO for his input in an October 29, 2007, letter but declined to change the APE. The SHPO responded to TVA in a November 7, 2007, letter suggesting TVA refer the matter to the Advisory Council on Historic Preservation (ACHP) in Washington, D.C. TVA sent the matter to the ACHP for comment in a December 4, 2007, letter. Tom Maher, Manager, TVA Cultural Resources, authored the letter and noted the following in support of TVA's position that allowing the construction of the dock did not result in the construction of the subdivision. He noted as follows:

- The groundbreaking for the Blackberry project was in July 2006, while the application for the dock facility was submitted on May 1, 2007. The first phase of construction was substantially complete when the application was received.

- The dock facility is an amenity for future subdivision residents, but it is not crucial to the establishment of the development. Several similar subdivisions in the area do not have docks. Additionally, without a boat dock, Blackberry residents could still enjoy other subdivision amenities such as a pool, tennis courts, and a club house. For residents who wanted boating facilities, there were two nearby public boat ramps.

- Blackberry had 155 lots over approximately 185 acres which would cost an estimated $8.6 million to develop. The boat dock, covering only about 0.25 acres comprised only a small fraction of the total development cost. The issuance of a federal permit for a dock, which is such a small part of the project, was not enough to extend federal control and responsibility over the entire development.

The ACHP responded to TVA on April 10, 2008, stating the ACHP would not challenge the TVA delineation of the APE because it appeared a reasonable argument could be made that the applicant did not originally plan direct water access facilities. The ACHP notified the SHPO they were not challenging TVA and that they believed TVA had complied with the process. On May 26, 2008, TVA concluded the archeological review.

TVA Approved Blackberry's Maintain and Gain Application

Blackberry's Maintain and Gain application was officially approved by CEO Tom Kilgore on June 3, 2008, consistent with TVA's decision made earlier in May 2007 to approve processing of the Blackberry application. At this point, the consummation of the deal required: (1) drafting the deeds to extinguish access on the Rhea County exchange property and to open access on the Blackberry Cove property; and (2) Blackberry to pay TVA $15,000 for the stabilization work on Wading Bird Island. The consummation of the process, however, was suspended after the OIG briefed TVA's Audit, Governance, and Ethics Committee on October 24, 2008, about this transaction.

Denials to the Media

On August 14, 2008, the *Knoxville News Sentinel* reported on the Maintain and Gain transaction between TVA and Blackberry Cove and pointed out that Congressman Heath Shuler was an investor in the project. Shuler's financial disclosure form filed as a Congressman showed his investment in Blackberry fell in a range between $5 million and $25 million. The article also noted that Congressman Shuler is a member of a congressional committee that exercises oversight of TVA.

The article indicated that the reporter asked Congressman Shuler's chief of staff, Hayden Rogers, whether or not Congressman Shuler ever discussed the Maintain and Gain application with TVA. Mr. Rogers reportedly said, "Not that I'm aware of." Jason Rudd was also asked by the newspaper about contacts by Shuler with TVA, and he was quoted as saying, "Shuler did not participate in any negotiations with TVA regarding the water access trade."

The following day, August 15, 2008, *The Asheville Citizen Times*, an Asheville, North Carolina, newspaper, reported on the story. This paper reported Congressman Shuler

as saying he had no contact with TVA about the project.[13] In this story Gil Francis, a TVA spokesman, is quoted as saying, "We had no contact with the congressman." Francis repeated that denial again on August 19, 2008, to the Citizen-Times.com.

On August 27, 2008, the *Roane County News* of Kingston, Tennessee, published an article on the Internet recounting the events of Shuler's subdivision, The Cove, at Blackberry Ridge. "Both Rudd and Francis contend Shuler's celebrity and spot on the Committee on Transportation and Infrastructure was a non-factor in the TVA dealings." "Our folks didn't know that, and it wouldn't have mattered anyway," according to Francis.

Again on August 29, 2008, the Citizen-Times.com quoted Francis stating, "We had no contact with the Congressman." Jason Rudd was also quoted as saying that Shuler had no contact with the agency. The article stated "Shuler said he never had any contact with TVA on the matter."

On September 24, 2008, John Fogle, a freelance writer who was writing a political column for the *Times-News* in Hendersonville, North Carolina, called TVA to ask, among other things, if Congressman Shuler's name had been mentioned in a part of the application. Fogle was told by TVA that, "the staff was not aware of any Shuler connection."

In early August, [REDACTED] was contacted both by [REDACTED], and Gil Francis and asked if Shuler had been in contact with TVA about the Maintain and Gain application. [REDACTED] responded that to [REDACTED] knowledge Shuler had not contacted TVA staff. [REDACTED] stated that at that time, [REDACTED] did not recall that Shuler was an owner nor did [REDACTED] recall the e-mail sent to [REDACTED] by Bridgette Ellis on August 23, 2007.

[REDACTED] was interviewed by the OIG twice regarding media contacts. In [REDACTED] first interview [REDACTED] did not mention the e-mail that Bridgette Ellis had sent to [REDACTED] saying that Shuler had called Tom Kilgore threatening a lawsuit. [REDACTED] did admit that after the OIG interviewers asked [REDACTED] about the e-mail in [REDACTED] first interview [REDACTED] called Bridgette Ellis and told [REDACTED] that the OIG knew about the e-mail sent to [REDACTED] by Bridgette Ellis on August 23, 2007. [REDACTED] also told the interviewers that [REDACTED] didn't recall that Shuler was an owner of Blackberry Cove. [REDACTED] later stated that [REDACTED] "must have been stupid" not to know that. [REDACTED] was shown various documents that [REDACTED] had previously seen during the course of the Maintain and Gain process which clearly showed Shuler's ownership.

[13] Congressman Shuler was asked when interviewed by the OIG if his statements to the media were reported correctly and he did not dispute the statement attributed to him by the press.

Gil Francis, spokesperson for TVA, was interviewed by the OIG, and he stated that his basis for denying contacts between TVA and Congressman Shuler was based solely on his conversation with [REDACTED].

CHAPTER TWO

THE CHARLES PERRY TRANSACTION

The Conflict of Interest Arises

Charles Perry was, during the course of the events presented here, the General Manager of Paris Board of Public Utilities, a distributor and customer of TVA. Perry owned property in Sandy Shores Subdivision on the Kentucky Reservoir at Big Sandy River mile 11.[14] On September 23, 1996, Perry visited the Kentucky Watershed Team office in Paris, Tennessee, to request a permit to construct a boat dock.[15] The TVA staff explained to Perry that he was not eligible to receive a permit because he did not own the necessary land rights. Between his property and the reservoir, TVA had retained a strip of land which was allocated for upland wildlife management in the 1985 Kentucky Reservoir and Management Plan (Plan). Perry was also told by staff that TVA was in the process of developing the SMI and that some of the proposals would allow additional structures where the TVA tracts were narrow and where residential development had already occurred.

The next day Perry wrote former Director Johnny Hayes requesting his assistance in obtaining a boat dock. On October 18, 1996, Director Hayes sent a letter to Perry, addressed to Perry's office at the Board of Public Utilities. The letter reiterated what Perry was told at the Watershed Team office, including that the current guidelines could change pending the outcome of the SMI. Director Hayes noted that three of the six proposals allowed additional residential shoreline development and that if additional development were to be allowed, the Sandy Shores area would likely be identified as an area suitable for additional development because the strip of TVA land was narrow, had been cleared and maintained, and the adjacent property was residentially developed.[16] In 1998, Perry contacted William Taylor, Senior Customer Service and Marketing Manager in Memphis, Tennessee, and asked for his assistance. Mr. Taylor discussed the situation with Ruben Hernandez, and Hernandez called Perry and restated once again TVA's previous position. The SMI had not been completed so there was still a possibility that Perry's situation could change. Hernandez promised Perry that TVA would follow up with him as soon as the final SMI was approved by the TVA Board.[17]

[14] Land Use Application Form submitted by Charles Perry, file stamped June 21, 2002.
[15] Memorandum to TVA Board (Directors Craven Crowell, Skila Harris, and Glenn McCullough, Jr.), June 26, 2000.
[16] Letter from Director Hayes to Charles Perry, October 18, 1996.
[17] Supra, memorandum to TVA Board, June 26, 2000.

TVA Told Perry No

In 1999, the SMI was adopted as policy by the TVA Board, and it did not allow for additional structures in Perry's situation. In December 1999, W. Greg McKibben, Kentucky Watershed Team Manager, met with Perry and informed him that the SMI had been approved, but there was no provision for approving additional facilities except for the "Maintain and Gain" policy. The Maintain and Gain program was explained to Perry.

Perry Built Boat Dock - TVA Says Tear It Down

During the spring of 2000, despite not having a permit, Perry had a boat dock built on his property on the Kentucky Reservoir. It was built in accordance with the plans submitted by Perry with his application for a boat dock permit. Later, Perry found a notice on his dock to tear it down, and on June 13, 2000, Perry went to the Kentucky Watershed Team office and asked who had posted his boat dock and why.[18] The staff was not aware Perry had built a dock and told him that someone else must have posted the dock. However, Perry was informed that TVA could not approve a dock at his location. Perry said he would come back later to discuss the situation when Greg McKibben was in the office.

Between June 13 and June 26, 2000, TVA received phone calls from a real estate agent and one of Perry's neighbors asking if TVA had changed its policy and was now approving docks in the Sandy Shores area. They were told the policy had not changed and TVA was not permitting any new facilities.

On June 26, 2000, Kathryn Jackson, Executive Vice President, River System Operations and Environment, wrote a memorandum to the TVA Board advising them of the unauthorized boat dock. She concluded her memorandum with the following recommendation:

> We believe that we need to meet with Mr. Perry and advise him that his dock will have to be removed. This is the only way to consistently administer our shoreline management policy.[19]

On September 15, 2000, Perry wrote to his fellow Sandy Shores lakefront lot owners, soliciting partners in a Maintain and Gain application for shared access to the lake.[20] In the letter, Perry explains his understanding of the Maintain and Gain policy:

[18] Id.
[19] Id.
[20] Letter from Charles Perry to Sandy Shores lakefront lot owners, September 15, 2000.

> I am owner of Lot 55 in Sandy Shores Subdivision on Kentucky Lake and have constructed a boat dock in front of it without a permit. I have been informed by TVA that I must remove the dock or purchase land or a land easement from a private owner that is between the 359 and 375-foot elevation and make a trade to TVA for rights in front of my lot. This would be under TVA's maintain and gain public shoreline policy.[21]

Perry Initiated Maintain and Gain Application to Prevent Dock Removal

On June 21, 2002, Perry paid the $5,000 fee for his Maintain and Gain application.[22] Three days later Perry signed and dated the application.[23] The application, which ultimately is for a boat dock that had already been built, backdated the time schedule for the project to January 6, 2000, to April 10, 2000.[24]

On August 28, 2002, in a letter to Ember Anderson, a Kentucky Watershed Team member, the TWRA explained the impact on the environment if the Perry Maintain and Gain swap was approved and suggested "that under the terms of this proposal there are not significant "gains" to justify this action."[25]

On January 13, 2003, Don Allsbrooks, Manager, Resource Stewardship, Watershed Operations, wrote a letter to Perry advising him that his Maintain and Gain proposal did not meet the minimum requirements.[26] Allsbrooks explained that the request for water access rights for both Lots 54 and 55 (234 feet of shoreline) in exchange for relinquishing access rights for property with 175 feet of shoreline resulted in a net loss of public shoreline and would not meet minimum Maintain and Gain requirements. However, Allsbrooks suggested:

> If you choose to modify your proposal to only include your lot (lot 55), this would result in a gain of 44 feet of shoreline and would allow TVA to continue processing your request.[27]

Allsbrooks also advised Perry of the additional shortcomings of his application:

> Our review also included preliminary coordination with the U.S. Fish and Wildlife Service and the Tennessee Wildlife

[21] Id.
[22] Maintain and Gain Application (Application Form Land Use), "Paid" stamp, page 1.
[23] Id., page 2.
[24] Id., page 1.
[25] Letter from Steve Seymour, Aquatic Habitat Biologist, TWRA, to Ember Anderson, August 28, 2002.
[26] Letter from Don Allsbrooks to Charles Perry, January 13, 2003.
[27] Id.

> Resources Agency. Responses from both agencies raised questions about the limited resource and public benefits associated with the proposal. In general, both agencies felt that the shoreline fronting the exchange property was already somewhat protected from shoreline development due to the presence of existing regulated wetlands and little public or resource value would be gained in the exchange.[28]

Allsbrooks closed by suggesting a modified application with more land and shoreline would improve his chance of gaining approval:

> If you submit a modified request that meets the minimum M&G requirements, TVA will continue processing your proposal. The next step in the process will involve public review. As we have communicated in the past, TVA cannot guarantee approval of your request. All proposals must show clear resource and public benefits. Comments received from the two outside agencies would suggest that your proposal might be more favorable to the general public if you could provide additional acreage and shoreline to your proposed exchange.[29]

Perry Modified Maintain and Gain Application to Resolve Issues

On February 3, 2003, Perry submitted a modified application in which he dropped Lot 54 of Sandy Shores as a recipient of water access rights.[30] Perry proposed to convey the fee simple interest in 0.55 acre, more or less, affecting Lot 86A (TVA Acquisition Tract No. GIR-3948) and extinguish existing access rights affecting TVA land fronting Lot 87, both in Harbor Town Subdivision, Benton County, Tennessee (TVA Tract No. XGIR-666). In exchange, TVA would convey a permanent recreational easement (TVA Sale Tract No. XGIR-943RE) that would affect acquisition Tract No. GIR-3657 located adjacent to Lot 55 of Sandy Shores Subdivision in Henry County, Tennessee.[31]

On February 24, 2003, Ember Anderson, Watershed Representative, Kentucky Watershed Team, sent the modified application to Robert Bay of the U.S. Fish and Wildlife Service inquiring whether the modified application changed their position on the value of the proposal to the environment.[32]

[28] Id.
[29] Id.
[30] Cover letter for Reservoir Shoreline Maintain and Gain Application, February 3, 2003.
[31] Title Report on properties within Perry application by Gregory Bates, Paralegal, March 15, 2005.
[32] E-mail from Ember Anderson to Robert Bay, March 6, 2003.

On February 26, 2003, Steve Seymour, TWRA, wrote to Ember Anderson stating:

> From an environmental concern I do not feel that the changes to the number of feet of shoreline associated with the "receive" property has any bearing. The position of the Tennessee Wildlife Resources Agency is that without this proposed "swap" the natural habitat will be benefited on both sides of the Big Sandy River.

On March 24, 2003, Robert Bay sent an e-mail to Ember Anderson stating:

> It remains our opinion that the exchange tracts are not suitable for shoreline development due to isolated location and the presence of wetlands. We do not believe there is any significant threat to the shoreline and habitat on this tract. Consequently, it would not be a suitable trade, in our mind, for the shoreline of the tract that Mr. Perry has already developed.[33]

TVA To Perry: Tear Down That Dock

On March 10, 2004, Allsbrooks told Perry in a letter that his revised Maintain and Gain proposal cannot be approved, and directed Perry to remove his boat dock.[34]

> In our November 14, 2003 letter, we stated that the only way to make this proposal acceptable was for you to acquire and extinguish all access rights between the proposed exchange lot and open water in order to provide effective resource protection of the shoreline. Your revised proposal failed to accomplish this and therefore cannot be accepted.
>
> … We regret that you were unable to provide us with an acceptable Maintain and Gain proposal that would allow your un-permitted facility to remain at its current location. In view of this, we must now ask that you remove this facility from the reservoir within 30 days of receipt of this letter.[35]
>
> (See Appendix I for complete letter.)

[33] E-mail from Robert Bay to Ember Anderson, March 24, 2003.
[34] Letter from Don Allsbrooks to Charles Perry, March 10, 2004.
[35] Id.

Perry Purchased Additional Property to Offer for Exchange

In order to make another more appealing offer to TVA, Perry acquired by option the lake access rights to Lot 87. This purchase option was dated April 12, 2004, and expired nine months later.[36]

On June 18, 2004, Kentucky Watershed Team Leader Ember Anderson approved of the exchange of water access rights offered in Perry's Maintain and Gain proposal stating for the file in a memorandum:

> … Mr. Perry purchased an option on the access rights to an adjoining lot and even though he has not purchase [*sic*] all access rights to open water, KWT feels the minimum requirements for a M&G proposal are met, the integrity of the wetlands would be protected, and we recommend TVA proceed with his request.[37]

On September 1, 2004, Brian Child, Corporate Finance and Risk Management, endorsed Perry's Maintain and Gain proposal, subject to meeting all other Maintain and Gain requirements and that Perry paid all of the administrative costs.[38]

TVA Recommends Approval and Suggests Forgoing Public Notice Due to "Sensitivity"

On March 21, 2005, Ember Anderson and Don Allsbrooks authored an Issue Briefing Paper justifying a sequential approval by the TVA Board of the Charles Perry Maintain and Gain proposal.[39] Of note are the following segments from the Issue Briefing Paper:[40]

> Issues: Mr. Perry is the General Manager of the Paris Board of Public Utilities, a distributor of TVA. His unauthorized dock was discovered in June of 2000 and posted for removal. He opposed removal and subsequent meetings were held and letters written to resolve the issue. Ultimately, the RS VP agreed to allow Mr. Perry to pursue a M&G proposal, even though M&G was not intended to be used on a lot-by-lot basis. This proposal was coordinated with both the Tennessee Wildlife Resources Agency and the U.S. Fish

[36] Letter from Gregory Bates, Paralegal, to Ember Anderson, March 15, 2005.
[37] Memorandum from Ember Anderson, Kentucky Watershed Team, June 18, 2004.
[38] E-mail from Brian Child to Ember Anderson, with copies to Allsbrooks, Robinson, and Terrell, September 1, 2004.
[39] Issue Briefing Paper prepared by Ember Anderson and Don Allsbrooks, Kentucky Watershed Team, March 21, 2005.
[40] Issue Briefing Paper prepared by Ember Anderson and Don Allsbrooks, Kentucky Watershed Team, March 21, 2005.

> and Wildlife Service. Comments from both agencies were neutral to negative and basically questioned the pubic [*sic*] and resource value to be gained by TVA's consideration of this action. *Due to the sensitivity of this action*, RS management recommended that this action forgo Public Notice and that it be handled sequentially." *(Emphasis added.)*
>
> Recommended Action: KWT recommends sequential Board Approval *to resolve a long standing 26a violation with the General Manager of one of TVA's distributors.*[41] *(Emphasis added*.)
>
> (See Appendix J for complete Issue Briefing Paper.)

On March 28, 2005, Don Allsbrooks extended an agreement to Perry whereby in return for a recommendation of approval of the proposed land rights exchange to the TVA Board of Directors, Perry would accept conveyance of the land rights exchange when tendered by TVA and thereupon would pay TVA the administrative costs, estimated at approximately $23,411. Upon receipt of the agreement signed by Perry, TVA would continue processing his request and present it to the Board for approval. Perry signed the agreement on March 29, 2005.[42]

Perry Requested Reduction of Administrative Costs

In June 2005, Perry wrote to Congressman John Tanner[43] and Senator Lamar Alexander[44] requesting assistance in reducing the amount of administrative costs from the anticipated $23,411 to the initial $5,000 estimate. Neither Tanner nor Alexander appear to have intervened on Perry's behalf except to inform TVA of Perry's appeal to them.

On June 22, 2005, TVA General Counsel Maureen Dunn forwarded to Hugh Standridge a draft recommendation memorandum and a prepared and initialed proposed Board resolution approving the Maintain and Gain proposal of, and granting an easement to, Charles Perry.

In August 2005, the Environment Site Assessment of Lot 86A-Unit 7 Extended, Kentucky Lake Heights Subdivision, Big Sandy, Benton County, Tennessee, was completed. This assessment evaluated whether there were any environmental or

[41] Id., emphasis added.
[42] Letter Contract No. RLR-124645 from Don Allsbrooks, March 28, 2005.
[43] Letter from Perry to Congressman John Tanner, June 7, 2005.
[44] Letter from Senator Lamar Alexander to Paul Phelan, Program Manager, Valley Relations, June 28, 2005.

historical liabilities attached to the piece of property that Perry was proposing to give to TVA as part of his Maintain and Gain application.[45]

On August 15, 2005, in response to a request from Perry for a breakdown of the administrative costs he was assessed, Allsbrooks sent a letter to Perry breaking down the final administration cost at $27,711.77, minus the initial processing fee of $5,000, for a balance of $22,711.77.[46]

In a document entitled "Board Questions," the TVA staff addressed Perry's attempt to have his administrative costs reduced by noting "TVA probably would not have considered this action were it not for his position as general manager of a TVA distributor."

On January 10, 2006, TVA granted Charles Perry a recreational easement across the TVA strip of land between Perry's Sandy Shores lot and Kentucky Lake.[47]

On January 17, 2006, a Management Committee meeting was held where the following notes were made of topics discussed:

> Cypress Creek Landowners Association has contacted Congressman Tanner's office about their displeasure with our land office granting a 26a permit to a non-resident of Cypress Creek. Valley Relations is coordinating a meeting with Tanner's office, Paris Land office, and Cypress Creek's Association for early February.[48] A dispute between the Paris Land office and Charles Perry has been resolved, and paperwork will be signed later this week. *Don mentioned how B [sic] "bending the rules" on our existing maintain and gain program to benefit property owners has opened up a* "*Pandora's Box." We can Eexpect [sic] other land owners who are well off to use this case as a precedent for achieving like goals.*[49] *(Emphasis added.)*

[45] Phase I Environmental Site Assessment of Lot 86A-Unit 7 Extended, by TVA River Systems Operation and Environment Resource Stewardship, Muscle Shoals, Alabama, August 2005.
[46] Letter from Don Allsbrooks to Charles Perry, August 15, 2005.
[47] Deed of Easement, from TVA to Perry, executed January 10, 2006, filed January 18, 2006.
[48] It is unclear if the Cypress Landowners' complaint is about Charles Perry or another individual. Perry actually did not receive his 26a boat dock permit until two months after this meeting. The topics discussed were run together in the notes.
[49] Management Committee Report, Regional Field Coordination Teams 04-03-06.doc, reference: January 17, 2006, meeting.

Don Allsbrooks was interviewed by the OIG and confirmed that he is the "Don" quoted above but doubted that he used the phrase, "bending the rules." He stated that while it was his belief that while TVA allowed Perry access in an "unpermittable area," Perry was nevertheless held to the same standards as anyone else. Allsbrooks knew that any dealing with a utility manager like Perry would be suspect, and he made a point of reminding those TVA employees working on the Perry Maintain and Gain that what they did would be scrutinized, and therefore they needed to be careful to avoid giving special consideration to Perry. He did feel like if Perry had not been a utility manager that the TVA personnel might not have raised the possibility of a Maintain and Gain application with Perry initially. Allsbrooks said that TVA kept the pressure on Perry to pay more than $22,000 in administrative expenses or risk TVA taking down Perry's dock.

The OIG interviewed Ember Anderson who was a pivotal player in the Perry transaction. She was employed by TVA during that time in various roles on the Kentucky Watershed Team. Anderson told the OIG that Perry's case was "out of the ordinary." Anderson said that she had feared that approving Perry's lot-by-lot transaction would set a precedent although she had been told by manager Don Allbrooks that TVA did not intend to grant lot-by-lot transactions in the future.

Anderson said that it was her opinion that her team felt pressure to grant Perry his permit because of pressure Perry had brought to bear on "politicians" who wanted an accommodation for Perry. She also stated her opinion that TVA was making a special arrangement for Perry because he was a manager of a utility and he had threatened to pull the Paris Board of Public Utilities out and contract with someone else other than TVA to supply their power. The OIG quizzed Anderson about the basis for her opinion, but she was unable to provide any firsthand evidence to support her opinion.

Former Board Chairman Bill Baxter was interviewed about the Perry transaction, and he recalled that Perry was "mad as a hornet" about how TVA was treating him. Baxter recalled his involvement in the Perry matter as "conflict resolution." He noted that the staff appeared "sensitive" to the fact that Perry was the manager of a utility TVA serviced, but Perry was required to meet the requirements for a Maintain and Gain permit just like anyone else. Ultimately, Baxter's role was trying to resolve the conflict between Perry and the TVA staff, and in the end TVA recommended granting the permit and Baxter gave written approval to do so.

The OIG interviewed Charles Perry on December 2, 2008. Among other things, Perry said that he thought that it would be "easier to get forgiveness than permission" when he built his dock. It cost him less than $10,000 to complete his dock his dock. When he was first told by TVA about the possibility of a Maintain and Gain, he was told that it would cost about $5,000. He paid that amount upfront. When Don Allsbrooks came to his office in March of 2005, Allsbrooks told him that his Maintain and Gain would be approved, but he would have to pay approximately $28,000 in additional fees. According to Perry, Allbrooks seemed ashamed to have to tell Perry that. Perry later

requested that TVA put everything in writing which resulted in TVA reducing the fee amount to more than $22,000.

Perry wrote letters to his congressmen on the Paris Board of Utilities' letterhead to gain some relief from what he thought was outrageous fees although he stated that his "pleas fell on deaf ears." Perry admitted hoping that his position as general manager of the utility that provided $25 million in revenue to TVA would influence TVA in his favor. He said using official letterhead was a "mistake," and he denied ever threatening TVA with leaving TVA and in fact he claimed that he had talked a Paris Board of Utilities board member out of trying to go with another source of power.

Perry believes that TVA actually used his position against him. He paid more than $31,000 to get his dock permitted and if he had known that it was going to be that expensive and difficult to do he would have never built the dock. He cited an example of TVA overcharging him as the survey costs TVA charged him in the amount of $8,983.95 for three lot surveys. Perry was a licensed engineer and a surveyor, and he knew this was an exorbitantly high amount for the work that was done.[50]

On March 13, 2006, TVA approved the permit to allow the boat dock to remain.

CHAPTER THREE

THE WILLIAM ("BILL") SANSOM TRANSACTION

Knox County Requested Change in Land Use Designation From Recreational to Residential Use Including a Plan for Sansom to Request a Maintain and Gain

As part of the approval, a plan was accepted to allow William Sansom, once he had ownership of the tract, to submit a request to extinguish rights for private water-use facilities on approximately 600 feet of privately owned shoreline in exchange for the rights to construct private water-use facilities at the transfer tract. It is to be noted that processing the Knox County request fulfilled all the requirements needed for Sansom's Maintain and Gain request including: (1) determination of public benefit, which encompasses historical and cultural reviews, and (2) environmental assessments. Therefore, no additional steps were taken when Sansom submitted his application.

The TVA Board approved this transaction at the March 16, 2004, Board meeting. However, the approved Board resolution required Sansom's Maintain and Gain to be submitted within one year of the Board resolution. The sale of the tracts took longer than a year and was not completed until October 2005. Therefore, sequential Board

[50] Former TVA Board Chairman Bill Baxter expressed similar sentiments when interviewed by the OIG. He thought that survey costs generally in the Maintain and Gain transactions were too high.

approval, obtained on February 23 and 24, 2006, was required to complete Sansom's Maintain and Gain transaction. Sansom submitted his Maintain and Gain application on February 3, 2006, which did not require any further Board actions. TVA completed the programmatic processing on April 28, 2006.

Mr. Sansom was nominated to the TVA Board on November 18, 2005, confirmed by the Senate on March 3, 2006, and sworn in on March 31, 2006.

CHAPTER FOUR

EXCEPTIONS THAT ATE THE RULE

We identified other instances where TVA granted water access rights for property that was not approved for access under the SMI. According to TVA policy, one of these transactions would normally require a Maintain and Gain proposal from the landowner to gain access rights. TVA granted lake access for these individuals due to TVA providing erroneous information to the landowner and on persistent appeals to the Board and/or management. Since TVA does not track which permits are granted without the required Maintain and Gain, management provided three transactions based on their recollection of events. We could not determine how many permits were granted that should have had a Maintain and Gain proposal. The following discussion provides details related to these three transactions.

Our review of these exceptions included interviewing relevant TVA staff and former Board Chairman Bill Baxter. Although Baxter did not recall the specific cases that we discuss below, he was able to discuss the process that was in place generally to handle these waterfront access issues.

Baxter stated that the Maintain and Gain process was like the rezoning process in city government. The Maintain and Gain gave the opportunity for changes to occur which allow for changes during the period between the major reviews of the land policy much like zoning variances do in the development of cities. Baxter pointed out that the process was not so much different than the land swap policy TVA employed in the past. The idea was to gain for TVA and the public while at the same time allowing for economic development and changing conditions.

Baxter and other Directors typically became involved in Maintain and Gain situations that were problems and which had been going on for a long time. He believed that the majority of transactions he became involved in were conflict resolution – trying to reach some agreement (either yes or no and why not). When a matter came to Baxter's attention he would normally call River System Operations and Environment, generally Buff Crosby, and ask what the situation was and what the alternatives were so that he

could understand it. He thought that Buff Crosby and Bridgette Ellis were relatively reasonable when he dealt with them. Below that level the staff wasn't usually helpful. Baxter always tried to reach an equitable arrangement for TVA and the other parties whenever possible.

As things proceeded in dealing with these situations, Baxter wanted to find out if there would be any negative environmental impact or if there would be any future problems because of precedent setting, but he also wanted to balance the equation with economic development. Baxter stated that he relied on the staff for information. Baxter commented that his bias was toward economic development. Baxter tried to balance TVA's economic development responsibilities with TVA's environmental stewardship responsibilities. Baxter also sought some sort of a decision or resolution of these issues whether it was a yes or no with regard to the matters that came to him. Baxter identified one of the problems he encountered in these situations as the "no answer" TVA often gave people who needed some sort of an answer.

With regard to the approval of Maintain and Gain requests and the like, Baxter followed the staff recommendation to approve. The staff performed their duties and that to the best of his knowledge he always voted in agreement with the staff recommendation. Baxter does not believe that any of the applicants received preferential treatment. He thought the Maintain and Gain program was a good program because it allowed people to be able to develop their land without having to wait for the Land Management Plan to be updated, which might be every 10-20 years.

One area he was bothered by connected to the Maintain and Gain and the 26a programs was the costs TVA charged the applicants for the services TVA provided. He thought the charges to customers made by TVA were outrageous. Baxter, as a businessman, thought the legal and surveying costs, as an example, were out of line.

TVA Gives Erroneous Information to [REDACTED]

[REDACTED] purchased property on Cherokee Lake in 1994. [REDACTED] property consists of one tract containing [REDACTED] on opposite sides of a cove. The parcels are separated by a private landowner on the landward side and TVA land on the lakeward side. TVA policies regarding shorelines open for private docks changed on June 16, 1994. After June 16, 1994, TVA only accepted applications for approval on marginal strip property with deeded rights of ingress and egress. [REDACTED] met with TVA in August 1994 prior to the purchase of [REDACTED]. He discussed the opportunity to apply for a dock to serve the residence he planned to build and was advised that TVA would accept his application for a structure.

The TVA staff did not check the deed for rights of ingress and egress. According to discussions with the Watershed Team and our review of correspondence between TVA and [REDACTED], it was not common for a Land Use Specialist to consult the property deed when advising landowners if they had water access rights on Cherokee Lake. We were specifically told that the common practice in 1994 was to consult a "D-Stage map" to determine if the property owner had water access rights. This practice was called a marginal strip policy. If the TVA owned land between the property owner and Lake Cherokee was determined to be a marginal strip of land, the property owner was granted water access rights by the Watershed Team. Therefore, since the TVA owned land between Cherokee Lake and [REDACTED] parcels of land, it was determined by the Watershed Team to be marginal. [REDACTED] was advised that he had water access rights to Cherokee Lake. The practice of verifying whether the property had deeded water access rights was not performed until 1999 when the SMP was initiated.

[REDACTED] Decided to Sell Property and Was Informed That TVA Made an Error and His Property Did Not Have Lake Access Rights

When [REDACTED] decided to sell his land in 2001, TVA consulted the property deed and determined that he did not have water access rights. When [REDACTED] was informed of TVA's position, he obtained legal representation and notified TVA of his desire to find a suitable solution. In a letter dated November 1, 2001, TVA stated that they would consider a request for a single, private water-use facility to meet the commitment made to [REDACTED] back in 1994. On November 9, 2001, [REDACTED] responded to TVA with a letter that stated that this arrangement falls short of meeting the commitment made in 1994. [REDACTED] stated that, "When TVA allows water use facilities for both tracts, sufficient to provide adequate dockage for the waterfront lots, they will have honored their commitment. [REDACTED] further stated:

> …I plan to appeal the proposal that was presented. You explained that in the absence of a formal appeals process, that my attorney, [REDACTED], and I are free to proceed in whatever direction we chose [*sic*], including requesting a meeting with TVA Board of Directors. It is our intent to pursue that meeting. I continue to hope that this issue can be resolved "in house" if at all possible. The resolution process has been going on for months now, and as far as I know, a meeting with the Board of Directors will pretty much exhaust my internal avenues.

According to an e-mail between the then Senior Manager of Watershed Operations and the Vice President of Resource Stewardship, it was stated, "Attached is the [issue briefing paper] for [REDACTED] and recommendation. There is a concern that [REDACTED] may contact the Board. If we need to discuss, please let me or [Team Manager, Cherokee Douglas Watershed Team] know." The aforementioned

[REDACTED], stated that, "We believe that in offering to review one water-use facility request we have met our commitment. Therefore, we do not recommend allowing additional water-use facilities on public property fronting his property." Additionally, in a previous [REDACTED], it was stated:

> If [permission for more than one water use facility] granted we could send a confusing message to stakeholders. There are areas near [REDACTED] property where individuals are not allowed to have facilities. Some of these areas are in sight of [REDACTED] property, and in particular, one individual is developing a maintain and gain proposal, in order to have a private dock. In addition, such an action by TVA may appear as if we are allowing additional residential development; unfairly contributing to the financial gain of an individual; and showing favoritism.

The [REDACTED] also detailed a case where another property owner inquired about a dock in front of his property in 1994. The following was explained:

> As in [REDACTED] case, we said yes since the property was sold to the 1075-foot contour. At that time we also did not look at the deed to see if access rights existed. [The other applicant] never applied for a dock. In November 1999, [the other applicant] called TVA and said he was going to auction his house and property and wanted to check again to see if a new owner could have a dock. We explained that he did not have deeded rights and that we would not permit a dock at this location. [The purchaser of the property] called before the auction inquiring about whether or not a dock would be allowed and we said no. The sale occurred as scheduled and [the purchaser of the property] did buy the property in December 1999.

The Executive Vice President, River System Operations and Environment, informed [REDACTED] by letter on April 26, 2002, that TVA would consider one community dock or community slip facility for [REDACTED] and one community dock or community slip facility for [REDACTED]. Those facilities would be allowed up to 50 boat slips for the former and up to 15 boat slips for the latter. Additionally, TVA informed [REDACTED] that they would not accept requests for private individual docks or any other water-use facility to service either the [REDACTED]. Furthermore, [REDACTED] was also informed that TVA would not agree to the construction of a road or a causeway on TVA land or to the granting of an easement or other land-use right on or across TVA land for the purpose of connecting the [REDACTED]. [REDACTED] agreed to this arrangement.

In an interview with the Cherokee Douglas Watershed Manager, she stated that there was a consensus among involved TVA personnel that TVA was wrong, made a mistake, and was at least half responsible for [REDACTED] situation.

In discussing the case of the individual who also was informed incorrectly that their land had water access rights, she stated that she believed the other individual was not offered any resolution from TVA because he never followed up with legal representation or political intervention. In respect to TVA's initial stance to not grant [REDACTED] request for more than one water-use facility, the interviewee stated that TVA changed its stance based on [REDACTED] persistence, documentation, and decreased property value.

TVA Acknowledged Mistake and Approved Access

The Cherokee Douglas Watershed Manager also stated that no one employee decided that TVA was wrong and should negotiate a settlement. She stated that those involved all believed TVA made a mistake, and a settlement with [REDACTED] was pursued so that both parties could claim victory and avoid legal proceedings. She also stated that there was no external political pressure/influence or internal managerial pressure/influence to negotiate the settlement with [REDACTED].

[REDACTED] Transaction

[REDACTED] Appealed to Elected Officials and Senior TVA Management for Permission to Build Boat Dock

On October 23, 1992, [REDACTED] neighbor, wrote to Congressman John J. Duncan, Jr.,[51] regarding the potential purchase of TVA property adjacent to [REDACTED]. In his letter, he noted that [REDACTED] owns a lot in the subdivision and would like to build a home there. [REDACTED] was told that TVA would not sell the property to them nor permit them to build boat docks. [REDACTED] stated that the property owners stated they were reluctant to construct an expensive dwelling in the area if they could not utilize the area for boating. [REDACTED] requested the Congressman's assistance in obtaining permission for the neighborhood to build boat docks for their personal use.

In response to [REDACTED] letter, Congressman Duncan wrote to William Willis, Senior Executive Officer and President, Board Advisory Group, TVA, on November 16, 1992, asking him to review [REDACTED] property situation and forwarding on his letter. On October 23, 1992, Congressman Duncan received a letter from [REDACTED] asking for permission to build boat docks for personal use.

[51] We found that Congressman Duncan and Senator Sasser were responding appropriately to constituents who contacted their offices. Specifically, there was nothing unusual or inappropriate about how Duncan's or Sasser's offices handled appeals for help from their constituents.

On November 16, 1992, John B. Waters, former TVA Board member, responded to Congressman Duncan regarding his letter on behalf of [REDACTED]. Mr. Waters advised Congressman Duncan that they had already explained to [REDACTED] that the land was managed by TVA for public recreation purposes and that construction of private facilities was not allowed. The letter stated, "We have agreed to meet with her on site and review the area in question first-hand and discuss the situation with her personally."

On September 18, 1993, [REDACTED] wrote to Senator Sasser asking for assistance in gaining permission to build a dock on TVA property. She also asked about possibly buying the land the dock would be placed on. On September 21, 1993, Senator Sasser wrote to TVA Chairmen Crowell asking him to review the matter.

On October 6, 1993, Congressman Duncan wrote to Dr. Charles Buffington, TVA Vice President of Land Management, discussing [REDACTED] recent request for assistance in the use of TVA land. Congressman Duncan enclosed a news clipping that [REDACTED] sent him as well as the letter she wrote about her desire to build a pier shared by three landowners in her neighborhood. The article was about a couple, [REDACTED], who were allowed to build a personal dock on other TVA property. Congressman Duncan asked Dr. Buffington to explain why the [REDACTED] request could be granted when [REDACTED] request could not.

On October 26, 1993, Craven Crowell responded to Senator Sasser regarding the [REDACTED] interest in buying or leasing TVA land on Fort Loudoun Reservoir in order to build a boat dock. Mr. Crowell noted that TVA wished to retain the land for future public use.

On October 27, 1993, Norman Zigrossi responded to Congressman Duncan's letter to Dr. Buffington. Mr. Zigrossi stated, "The public land requested by [REDACTED] is a portion of a 27-acre lakefront parcel in Blount County, Tennessee. [REDACTED] previously requested approval for a dock at that location, and we met with her at the site on December 1, 1992. We explained that this land is managed by TVA for public recreation and is retained for possible public development. This explanation was accepted by [REDACTED] at that time, and she sent a letter thanking us for the meeting." He went on to explain the land talked about in the news clipping is a commercial recreation development located on Watts Bar Reservoir, and it was TVA's intent that this narrow shoreline strip could be used for private water-use facilities in the future by the owners of the former TVA land. TVA had sold its land down to a contour very near the water, leaving only a narrow strip.

[REDACTED] Cited By TVA for Cutting Trees on TVA Property

On February 26, 1998, Todd R. Large, TVA Police, was called to investigate an anonymous report of tree cutting on TVA property, [REDACTED]. Officer Little and Officer Large responded to the request to investigate the tract at the address above owned by [REDACTED]. When they arrived they observed [REDACTED] clearing away tree cuttings on TVA property and found freshly cut trees on the property. They told [REDACTED] they had gotten a report that someone was cutting down trees on TVA property and asked if he had cut any down. [REDACTED] said he had cut down two trees that were located by the water because it was blocking his view from his house. The officers informed [REDACTED] that he was not allowed to cut down any trees on TVA's property without TVA's permission. TVA Police filed a Uniform Incident Report against [REDACTED] to report the vandalism on [REDACTED]. Karen Stewart, TVA Land Management, had previous discussions with the [REDACTED] about not altering any TVA property.

On March 25, 1998, TVA wrote a letter to [REDACTED] informing him how they would like to proceed on the matter of his unauthorized tree cutting on the TVA property adjoining his lot on Fort Loudoun Reservoir. TVA Police determined that two persimmons, two eastern red cedars, four black cherries, and three elms have been removed since 1995. TVA evaluated and valued the 11 trees at $2,200 according to the approved method by the Council of Tree and Landscape Appraisers. TVA stated they were willing to settle the matter and take no further action as long as [REDACTED] did not engage in further unauthorized tree cutting activities on TVA property and paid TVA the calculated $2,200 by May 1, 1998.

[REDACTED] Paid TVA $2,000 to Settle Tree-Cutting Incident

On May 11, 1998, TVA wrote [REDACTED] to inform him they received his settlement check for $2,000, a reduced amount, as agreed upon in a May 4, 1998, telephone conversation with [REDACTED]. To completely close the matter, TVA requested his signature agreeing to not engage in further unauthorized activities on TVA property. An adjudication report stated that on May 15, 1998, TVA agreed to dismiss the case against [REDACTED] if he agreed not to cut any more trees or grass on TVA land.

On August 23, 2001, Congressman Duncan wrote to Janet L. Duffy, TVA Land Use Representative, concerning the [REDACTED] recent request for assistance in obtaining the right to mow the property. On September 7, 2001, TVA responded to Congressman Duncan's letter regarding the [REDACTED] use of the land. TVA's letter stated that the land was for public use and that they were not authorized to mow or cut trees on the property.

A December 11, 2002, e-mail by a TVA Land Use Representative provided the following history:

- The [REDACTED] own a lot in a small subdivision behind a large tract of land. In 1992, they asked for permission from TVA to build a dock and perhaps even buy the land. TVA said no.

- Congressman Duncan and the TVA Board were contacted regarding this matter. Letters from both offices went to [REDACTED] explaining that the property was designated public recreation and that no private facilities would be approved.

- The following year the [REDACTED] sent letters to Senator Sasser and continued every year following to a TVA representative or elected official.

- With tips from neighbors, TVA was able to catch them in the act of clearing a large area on TVA property behind their home. Soon after this issue was resolved and a document was signed that they would not do any cutting or mowing on the property, they began to mow the area as it grew up.

On July 23, 2003, Ms. Duffey, TVA Land Use Representative, filed a Violations and Encroachments form for suspected mowing and clearing that was barred by previous litigation. On August 6, 2003, TVA Police (Officer Little) spoke with [REDACTED] concerning [REDACTED] adjacent to her property. Officer Little asked her to quit mowing the land belonging to TVA. She was told that she could have a prominent footpath to the water. [REDACTED] told the officer that she was not the only person in the area using that property, other people mowed and four-wheeled.

An e-mail from Robert G. Farrell, Watershed Team Manager, dated April 1, 2004, stated that he talked to [REDACTED] relating her call to Mr. Baxter's office discussing the Maintain and Gain process. [REDACTED] discussed the concept of a land swap if she bought property on another reservoir (Watts Bar). Mr. Farrell explained he would evaluate exchange proposals on a case-by-case basis and assess the potential benefits to TVA and the public. Mr. Farrell stated he planned to meet with [REDACTED] on-site to discuss the possible options for enhancing public recreational use. On April 22, 2004, Farrell wrote to [REDACTED] and informed her they had no objection to her request to place bird feeders on the TVA land. Mr. Farrell told [REDACTED] that if she had an interest in pursuing a shoreline "maintain and gain" or land exchange proposal, they could meet with TVA at her convenience to discuss it further.

[REDACTED] Appealed to Board Chairman Bill Baxter Regarding Land Use Proposal

On August 30, 2004, [REDACTED] wrote to Board Chairman Bill Baxter about her conversation with Robert Farrell to discuss partnering with TVA's Watershed Team and their neighborhood to achieve their goals of making the property a wildlife safe haven. She mentioned in the letter that they might qualify through a "grandfather" clause as the area was mowed before 1999. Another undated letter was written from [REDACTED] to Mr. Baxter asking him for help in approaching Mr. Farrell about the grandfather clause and their usage of the TVA property.

TVA Approved Plan That Included a Public Use Boat Dock

On September 8, 2004, Chairman Baxter handwrote an internal note asking TVA staff if [REDACTED] would qualify under the grandfather clause. On September 9, 2004, Mr. Farrell wrote to Mr. Baxter explaining that [REDACTED] property situation did not fit under the SMP grandfather clause for mowing and vegetation management. He explained that the land was designated for public recreation and was formerly leased to Blount County for that purpose. He said the grandfather clause did not apply to that property because it was not a "residential shoreline." Mr. Farrell indicated that [REDACTED] did not have deeded rights for ingress/egress for the construction of private water-use facilities. He mentioned she could consider a shoreline "maintain and gain" proposal if she wanted to obtain rights for a private dock.

On September 13, 2004, Mr. Baxter e-mailed Mr. Farrell and stated he was not aware that [REDACTED] wanted a private dock but that he would be okay with her request to maintain the property. Director Baxter also stated, "if that's all she wants, I have a hard time understanding why we can't let her do it. I'm not aware of any environmental reason to let it grow up, are you?" Mr. Farrell replied in an e-mail to other TVA employees dated September 15, 2004, that Director Baxter, "has been hearing from [REDACTED] for over a year and he wants us to work out a proposal, get a yes or no, and get it to a conclusion."

On September 29, 2004, TVA responded to [REDACTED] inquiry regarding establishing a vegetation management plan for the land. The response basically was that TVA would appreciate any effort to increase public use of the land. On November 1, 2004, [REDACTED] submitted a Land Use Application to TVA [REDACTED] for the use of public recreation.

On February 25, 2005, the Watershed Team approved a license agreement for occupancy and use of TVA land permitting implementation, management, and maintenance of native vegetation plots and wildflower meadows. The agreement also provided for shoreline stabilization areas as well as permission to construct and maintain a dock for public use. This transaction did not require Board approval.

[REDACTED]

TVA Approved 26a Permits After Determining Property Had Deeded Access Rights

[REDACTED] was approved for a 26a permit on July 18, 2005. Prior to the approval, [REDACTD] had inquired of TVA personnel at a public meeting pertaining to the update of the Watts Bar Land Management Plan as to whether the property was eligible for a dock. After TVA review of a map, and discussion of the deed which did provide ingress/egress rights, [REDACTED] was told that it was eligible. Shortly thereafter, [REDACTED] applied for and received the 26a permit with an approval date of July 18, 2005.

Later that year, [REDACTED] questioned TVA regarding a different property tract that was situated upstream of the first property. They intended to subdivide the property into lots. TVA informed them that they had access. Applications for three 26a permits, [REDACTED], were submitted and approved on December 21, 2005. An additional 26a application submitted by [REDACTED] was approved on January 4, 2006.

TVA Discovered Errors in Zoning Boundaries Which Would Restrict Lake Access

In a March 6, 2006, e-mail from a Land Use Specialist, she noted that there was a situation where the boundaries were incorrectly shown on the Draft Plan Maps. The effect of the error was to change the property from being eligible to not being eligible for water access. At this time, one of the docks had been constructed. The property where the dock had been constructed was where the 750-foot contour touches the tract. The deed provided for ingress/egress rights below the 750-foot contour for water-use facilities.

TVA Staff Evaluated Options to Resolve Error

An additional e-mail from Catherine Robinson, Process and Performance Management, Environmental Stewardship, stated that the Manager, Resource Stewardship, had requested options on how to handle the situation. The following options were proposed:

- “Revoke all permits.”

- “Leave all permits – Zone 7 for the areas where docks are currently permitted, and no more except where private property touches the 750…and the team needs to define where those areas are.”

- "Revoke the permits on the left, upstream bank and leave the one on the right, descending bank if the private property touches the 750 on the lakeside of the culvert."

The same e-mail stated that, "we hope the owners did not purchase the property based on being able to have docks."

A Land Use Representative prepared a summary of the issue which was dated April 12, 2006. The summary noted that there were four options. They were (1) revoke all permits, (2) leave all permits and change the areas where docks are currently permitted to Zone 7 and give no more permits except where private property touches the 750, (3) leave all permits and leave the allocation as a Zone 4 but do not revoke the five permits, and (4) notify the stakeholder involved that the only permits that would not be revoked would be ones that abut the 750-foot contour. Each of the options also included a short pros and cons list. Both options 1 and 4 indicate that there is a potential suit for damages if the permits were revoked.

In response to the summary dated April 13, 2006, Catherine Robinson stated, "How can we not ask for removal since we told the Blackberry people No." Additionally, she advocated revoking all the permits. She further stated that other dock requests have been made for the same tract, and "we need to be able to look them in the eye and tell them a mistake was made and we are trying to correct the error." Her second choice was option 4 which would be to revoke all permits that do not abut the 750-foot contour line. Additionally, a Land Use Representative also advocated option 1 or 4.

A teleconference was held on April 18, 2006, to further discuss the issue. It was attended by two Watershed Team members, two OGC attorneys, and three Watershed Team policy advisors. It was noted that OGC attorneys believed there was a concern that the permits could not be revoked as discussed and that if they did try to revoke the permits, "it would be a long, hard battle." It was also noted by Watershed Team policy advisors that TVA needed to revoke the permits where there are no land rights. The notes to the teleconference states that the permits issued to [REDACTED] would probably comply with the 750-foot contour. However, the permits issued to [REDACTED] would not meet the 750-foot contour requirement and would probably need to be revoked. The proposed action was to contact the applicants and notify them that they should stop construction plans until a decision was made.

An e-mail dated June 12, 2006, from a Land Use Representative stated that the team was:

> …asking that we consider honoring the approval of the existing permits, given the fact that these five owners are lake front property owners that [*sic*] live on [land] which has outstanding ingress/egress rights. With permit in hand, this could be a long, hard battle that we might not even win and to what benefit to TVA? We all agree that the interpretation is wrong, but our team would like to have this elevated internally by us instead of the land owners.

TVA Decided Not To Revoke 26a Permits

The proposal was elevated to the Manager, Resource Stewardship, along with a recommendation that a Problem Evaluation Report (PER) be initiated to keep the situation from occurring again. The proposal also noted that the issue was elevated because they did not have 100 percent consensus among the team. At least one person concurred with allowing the permits to remain in place for the land abutting the 750-foot contour.

A PER was initiated that stated the permits were issued incorrectly for at least three lots. It also noted the probable reason was "human error." TVA proposed defining guidelines around the process for determining land rights and documenting that determination back to the customer. They also suggested reviewing the general conditions of the permits specific to TVA's ability to revoke.

The permits, however, were not revoked for any of the five lots.

CONCLUSIONS

The OIG determined that the Maintain and Gain process is administered in an arbitrary and inconsistent manner that contributes, in some instances, to the appearance of preferential treatment. While TVA staff asserts that the Maintain and Gain process is only a guide and does not constitute hard and fast rules, certain actions by TVA in processing these transactions give the appearance of preferential treatment. As noted below, exceptions were made in processing these transactions in virtually every case. The exceptions that were made ranged from minor deviations in process steps to the granting of access without requiring any request for Maintain and Gain.

We noted these transactions have certain characteristics that substantially increase the reputational risks to TVA. For example, some of the applicants in these cases tended to be fairly affluent and influential individuals with the financial means to pursue a long and arduous process that requires persistence and substantial financial investment.

Additionally, the applicants frequently solicit support from other influential people including congressmen, senators, and TVA customers. We found instances where the applicants frequently bypassed staff and made direct appeals to the Board of Directors and other senior managers.

In conducting our review, we documented deliberations by TVA staff where they voiced their concerns about the appearance that TVA was "bending the rules." In the Perry case, the TVA Board package included a statement that Perry probably wouldn't have been considered for a Maintain and Gain transaction were it not for his position as a "general manager of a TVA distributor." The staff recognized that TVA could be criticized based on the inconsistent actions taken in these transactions. The OIG confirmed that TVA's resolution of these transactions was inconsistent giving rise to the appearance of preferential treatment which significantly increased TVA's reputational risk. Obviously, the transactions discussed in this report involving (1) a United States Congressman sitting on a TVA oversight committee, (2) a manager of a TVA power distributor, and (3) the Chairman of the TVA Board of Directors increase the risk level both for the applicant and for TVA. Any slight deviation in how high profile applications like these are handled raises the likelihood of a claim of preferential treatment.

As discussed above, two of the transactions that we examined were approved based on the recognition that erroneous information had been provided to the property owner by TVA. However, we found internal staff deliberations that indicated that in their opinion erroneous information provided to an applicant by TVA should not be the basis for granting water access rights. TVA staff recognized that the water access decisions were being applied in an inconsistent manner in this regard, particularly in the case of Blackberry representatives who were provided erroneous information but were still required to traverse the Maintain and Gain course.

CONCLUSION 1

CERTAIN ACTIONS BY TVA AND OTHERS CREATED AN APPEARANCE OF PREFERENTIAL TREATMENT THEREBY INCREASING TVA'S REPUTATIONAL RISK

Based upon an exhaustive review of the TVA Maintain and Gain program, we believe that certain actions by TVA employees in at least five transactions created the appearance of preferential treatment. TVA employees working on the Maintain and Gain transactions held the applicants to certain standards in an apparent good faith effort to not show partiality based on the status of the applicants. However, the inconsistent treatment of the applicants led to actions and decisions by TVA that could be considered preferential. Our conclusions related to each of the transactions included in this report are discussed below.

Blackberry Conclusions

The OIG scrutinized hundreds of documents and interviewed all relevant witnesses in an effort to find some evidence of preferential treatment by TVA for Congressman Shuler.

Despite the fact that there is no evidence that Shuler used his position as a United States Congressman to pressure TVA to give Blackberry water access on this lake front project, the unfortunate way that this was handled resulted in reputational harm both to Congressman Shuler and to TVA. It is unlikely that the casual observer will ever believe that a United States Congressman couldn't get a "sweetheart deal" from TVA. This review, however, shows that the TVA employees working on this project labored in good faith to hold Blackberry to the same standards as everyone else. In fact, it appears that Blackberry was forced to endure the Maintain and Gain gauntlet while others were simply told that they could have their waterfront access. This is despite the fact that a United States Congressman has considerable influence and that Shuler could have easily "thrown his weight around" had he chosen to do so.

Unfortunately, since there was no protocol to track how this was handled and since there was no contemporaneous and independent review of this transaction, the appearance created is the typical "good ole boy" politics. In the public domain, the facts are not likely to get in the way of a good story.

The most astonishing aspect of the Blackberry Cove transaction is how the parties have created a justified suspicion of their dealings with each other. Specifically, if all of this was above board, why did TVA and Shuler feel compelled to tell the media that there was no contact between the Congressman and TVA in relation to the Maintain and Gain application? There obviously was. The impression created is that both TVA and Shuler had something to hide and therefore admitting a conversation between them was somehow incriminating. The reality is that this particular transaction, although overly bureaucratic and lacking sufficient criteria, was nevertheless above board. The damage has been done, however, both to the Congressman and to TVA.

The evidence shows that TVA took steps to ensure that the Maintain and Gain process was generally followed including: (1) requiring Blackberry to file for a Maintain and Gain even though TVA had misled them initially by informing Blackberry investors that they had lake access; (2) the Watershed Team at TVA rejected Blackberry's application twice all the while knowing that Shuler was a partner and was a sitting United States Congressman; and (3) Blackberry's application was approved only after Blackberry made concessions that cost them time and money.

However, we conclude that the fact that Congressman Shuler is a part owner of Blackberry and sat in a position of authority over the very agency from which Blackberry was seeking a permit to build a boat dock created an inherent conflict of interest that

gave rise to the appearance of preferential treatment. Additionally, Shuler's chief of staff Hayden Rogers' call to TVA, despite the fact that he was unsuccessful in speaking to anyone, is nevertheless problematic. Rogers says that he did not call anyone at TVA about Blackberry and the OIG found no one at TVA who said that he did. TVA employees assumed that because Rogers had talked to his lifelong friend Larry Kernea, the general manager of Murphy Power Board, and Kernea was talking to a TVA employee about Shuler's problem around this same time about the Maintain and Gain application that Rogers' call to Judd was about Blackberry. This demonstrates how even mistaken impressions under these circumstances tend to subvert the normal process.

Donna Norton, the TVA Watershed staffer, writing to her co-workers about Rogers' attempt to contact TVA, rightly noted as reported earler that, "…[w]e have not been asked to do anything unethical…….but the appearance of this concerns me." This is the substance of what TVA was publicly saying was not happening, i.e., that TVA employees were not aware of Congressman Shuler's role in Blackberry and, therefore, his position didn't make any difference to them. (See Gil Francis' statement to the Citizen-Times.com on August 29, 2008. Again, Francis was reporting in good faith what he was being told by [REDACTED].) TVA employees did not appear to be influenced by Congressman Shuler's ownership or Rogers' attempt to contact them, but this process was wide open for mischief. In the absence of a protocol to document that no preferential treatment was given to Shuler, the circumstances cast doubt on this transaction.

Shuler's call to TVA's CEO to discuss the Blackberry Maintain and Gain application contributed to the appearance problem. While Congressman Shuler's effort to take off his "congressional hat" when talking to Kilgore may have been genuine, it was mostly illusionary. In the real world in which TVA employees operate, a congressman may leave his "congressional hat" at home, but it is doubtful that he leaves his power at home.

TVA employees contributed to the appearance of preferential treatment by: (1) denying any contact by Shuler about Blackberry when, in fact, they knew or should have known that there had been contact; (2) bypassing the standard committee review which was intended to provide another layer of scrutiny; and (3) bringing in a high-level TVA executive as ombudsman to negotiate with Blackberry representatives which created the impression with lower-level employees that TVA executives wanted the Blackberry application granted. TVA management apparently had the laudable intent of keeping communications on Blackberry between the developers (represented by Rudd) and one official in TVA. This was because TVA recognized the conflict of interest problem and sought to avoid conversations between Congressman Shuler or his chief of staff and the TVA employees working directly on the Maintain and Gain.

One distinction between the Blackberry Cove transaction and the Perry transaction is the difference in the perspectives of the employees on the Watershed Team who worked on the Blackberry Cove matter as opposed to the employees on the Watershed Team who worked on the Perry matter. As we explain in the Perry conclusion section to follow, at least some of the Watershed Team members on the Perry matter were left with the belief that TVA management had bent the rules in Perry's case for political reasons. That conclusion may not in fact be justified, but it nevertheless exists. On the other hand, the Watershed Team members in the Blackberry Cove matter believed that they did the right thing, and granting the permit in that case was based on nonpolitical considerations. The OIG was unable to find a single witness who said that they felt any political pressure to grant Shuler water access. How various Watershed Team members felt about these transactions is certainly not dispositive of the issue but does influence the effectiveness of the Maintain and Gain process.

Finally, we note that while it was known (or should have been known) by several TVA employees that the public statement made repeatedly by TVA that there had been no contact by Congressman Shuler with TVA was false, not one TVA employee took any action to correct these false statements. The OIG interviews of certain TVA employees revealed an unfortunate unwillingness to cooperate fully with our review. While it is understandable that TVA employees will not likely remember all the telephone calls they received during the course of a day, it is highly unlikely that a call from a United States Congressman threatening to sue TVA would not be remembered by at least one TVA employee. The substance of this conversation was sent by e-mail to several TVA employees because of its content. The existence of this e-mail would have never been known had the OIG relied solely on the statement of TVA employees. More to the point, not one TVA employee told us about the "Bridgette e-mail" that recounted the telephone call from Congressman Shuler to Tom Kilgore. This suggests a cultural problem at TVA that is beyond the purview of this report, but one that, nevertheless, should be addressed.

We also have concerns about TVA's process of responding to media inquiries. TVA's very public and very adamant position that there had been no contact with Shuler was apparently made on the basis of Gil Francis asking one person within TVA whether there had been any contact. While we have focused on the failure of TVA to admit to the conversation between Congressman Shuler and CEO Tom Kilgore, the truth was that there was extensive contact between TVA and Shuler's Blackberry representatives. Whether Congressman Shuler picked up the phone and called TVA or his representatives called TVA was immaterial. The TVA staff knew that they were dealing with Congressman Shuler in either case. Tom Kilgore's office appears to have a least partially recognized the conflict of interest problem by insisting that Blackberry's representatives deal with the ombudsman rather than Penny Judd or a member of the Watershed Team. Likewise, TVA staff nixed Kilgore's October 2007 directive to Anda Ray to meet with Congressman Shuler because they were trying in good faith to avoid the personal contacts between Congressman Shuler and certain TVA staff members.

This indicates that TVA staff (1) knew that Congressman Shuler was an owner, and (2) knew that this presented a conflict of interest issue. Therefore, to publicly state that Congressman Shuler did not have any contact with TVA was wrong on two counts. First, TVA staff knew that Congressman Shuler did, in fact, personally contact TVA. Secondly, TVA staff knew that Blackberry's representatives had been in constant contact with TVA negotiating the Maintain and Gain permit. TVA management chose to handle media questions about this subject by allowing [REDACTED] to deny contact between TVA and Congressman Shuler. [REDACTED] denials were not corrected by anyone in TVA despite widespread knowledge within TVA that what was being said publicly was not true. This is particularly unfortunate since there was nothing wrong with Congressman Shuler or his representatives contacting TVA about this matter and likewise nothing wrong with TVA employees talking to Congressman Shuler about this matter. Congressman Shuler was entitled (as is any other citizen) to pursue matters of personal financial benefit to him with TVA. The prohibition is a Congressman using his office to exert pressure on a government agency to obtain something of financial benefit to him. As we have noted, we found no evidence of that occurring in this case. The lack of a transparent protocol to handle this very awkward transaction, however, appears to have caused some reluctance to divulge the entire truth.

We conclude that given the lack of candor that the OIG found with TVA employees during this review, the process by which TVA determines what is factually accurate about a particular matter should be reviewed to ensure that the public can have some level of confidence in what TVA states publicly.

Perry Conclusions

As noted above, Charles Perry was the manager of a TVA power distributor which is a TVA customer. This case presented a known conflict of interest. Perry's position gave him the apparent power to harm TVA or to favor TVA. While in actuality Perry may not have been in a position to act independently of the utility he managed, that is a distinction that was apparently lost on the TVA staff handling Perry's transaction. His request for something of economic value (water access) from TVA created the conflict of interest. Some protocol established by TVA that would give the public assurance that Perry was not given water access simply because of his position was desperately needed. Instead, TVA elected to do this in the shadows apparently hoping that the transaction would never be exposed.

In fairness to the TVA Watershed Team handling Perry's transaction, they attempted in good faith to hold Perry to certain standards. For example, they required Perry to incur the cost of purchasing additional property to exchange for his water access. They also stood firm on requiring Perry to pay steep administrative costs of over $22,000. Finally, the TVA staff seemed to genuinely care about there being some public benefit achieved after the conclusion of this process.

Unfortunately, in the end, at least some of the TVA Watershed Team members were left with the impression that TVA management believed that "bending the rules" was necessary in this case to avoid adverse repercussions from Perry. We view this as serious collateral damage as the "tone at the top" was compromised and signaled to lower level TVA staff that preferential treatment would be shown if it suited to TVA management's purposes. No effort was made to explain to the Watershed Team the decision to grant Perry his permit that might have avoided this lingering doubt about TVA management's motives, although as we explain in this report there was at least some basis for granting Perry's application.

Unfortunately, the appearance of preferential treatment was created by: (1) failing to give the public notice of this transaction for fear of creating trouble for TVA, (2) approving a lot-by-lot transaction which is not generally allowed by the Maintain and Gain program, (3) caving in to Perry after directing Perry to remove his illegal dock, and (4) circumventing legitimate public benefit concerns raised by the TWRA.

We also note that TVA could have done for Perry what they did for others and simply bypassed the Maintain and Gain process altogether and given Perry water access. The risk to TVA in doing so would have been the absence of some semblance of a process with the accompanying documentation to suggest that Perry had been required to submit to the same process as everyone else. Unfortunately, the lapses in Perry's Maintain and Gain process listed above provide little comfort that fairness was a part of this transaction. The lack of transparency by TVA in handling this transaction contributes to the conclusion of TVA staffers found in the TVA Board package entitled "Board Questions" that TVA would not have considered a Maintain and Gain permit for Perry except for Perry's "position as a general manager of a TVA distributor." (See Board Questions in Appendix K.)

Taken as a whole, these facts support the conclusion that, at a minimum, TVA created the appearance of preferential treatment.

Sansom Conclusions

Since Sansom is the current TVA Board Chairman, we scrutinized the details of his Maintain and Gain transaction closely. In assessing this transaction, it is important to note that the initial request in 2000 from Knox County recognized that Sansom would also be pursuing a Maintain and Gain request. Mr. Sansom's Maintain and Gain request was approved in advance at the March 16, 2004, TVA Board meeting. Sansom did not become a Board member until 2006. We note that TVA completed all the required steps in processing the Knox County request which were required for Sansom's Maintain and Gain request before Sansom became a Board member. Therefore, Chairman Sansom did not have a conflict of interest with respect to the Maintain and Gain application, and there is no evidence that he was shown any preferential treatment by TVA. Likewise, we found no evidence that Chairman Sansom

attempted in any way to use his influence in this matter either before he became a Board member or after he became a Board member.

We note, however, that the fact that a TVA Board member has a personal matter before the agency that lingers on like this one creates the opportunity for criticism that could have been avoided. TVA should have recognized that even though the decision to grant the Chairman water access occurred before he became a Board member, the fact that some of the paperwork for Sansom's Maintain and Gain would not be completed until after Sansom came on the Board could create an appearance problem. Although before this OIG report there was no publicity about this matter and it was not likely to be discovered, the better approach might have been for TVA to issue a public statement outlining the facts and explaining what had been done. This is another example of where choosing transparency as a public federal agency would have served TVA's interests better.

Water Access Granted Without Maintain and Gain

In a separate class of cases, TVA created the appearance of preferential treatment by simply granting water access rights outside of the Maintain and Gain program. Specifically, after appeals to the then Board Chairman Bill Baxter and/or management, landowners were granted water access rights without being required to submit a Maintain and Gain proposal. These cases may have been decided correctly based on their individual facts, but they were handled differently than similar cases. In two of these cases, access was approved after TVA acknowledged that erroneous information had been previously provided to the landowners.

As we have stated, it may be that the decisions to grant water access rights were appropriate under the specific facts presented to Chairman Baxter and/or TVA management at that time. It is unlikely that anyone at TVA knew how all of these transactions were being handled resulting in an ad hoc approach with predictable results. For example, Chairman Baxter could not have guessed that TVA would change course after his departure and require landowners to submit to the Maintain and Gain process despite being misled by TVA about whether their property had water access or not. Even if TVA had studiously tracked each of these transactions and had made distinctions based on clear rules, the public would likely be suspicious when one landowner is granted water access and another landowner is denied water access. TVA is not required to attempt to extinguish every conceivable appearance of preferential treatment, but this process lends itself to criticism that could be avoided. This illustrates the importance of a transparent process that can withstand public scrutiny.

CONCLUSION 2

TVA DID NOT HAVE A CLEARLY DEFINED PROTOCOL TO ADDRESS THE KNOWN CONFLICTS OF INTEREST BY SHULER AND PERRY

Our review revealed that while TVA management clearly recognized that a conflict of interest existed in these transactions, no protocol existed to document that no preferential treatment was being shown. Trying to establish after the fact that someone like Congressman Shuler or Charles Perry did not receive preferential treatment is much harder than having a process that provides an independent contemporaneous review. These cases demand a level of transparency that may seem overly burdensome until the costs of handling them in the current manner are considered. Given what appears to be obvious conflicts of interest in these two cases, we pressed certain TVA employees about why no protocol was established to provide transparency and an independent review. The consensus seemed to be that there was the belief that despite the status of the applicants and despite the degree of the conflicts of interests, TVA employees could apply the same rules to everyone without partiality.

From TVA's perspective, the fact that an applicant for a Maintain and Gain permit has a conflict of interest in pressing TVA for the permit is not dispositive. Conflicts of interest abound in the world of business and politics, and the real question is how those conflicts of interest are managed. Obviously, if the conflict is never recognized, it is not likely to be managed appropriately. Only when a conflict of interest is properly identified is there hope that it can be properly handled. A whole body of law has risen up just to address the myriad conflicts of interest that confront, for example, employees of the federal government. TVA employees are expected to abide by strict rules of conduct designed to prevent them from using their position as a federal employee for personal gain. TVA employees, like all federal employees, are charged with the duty of addressing ethics issues to their agency's designated agency ethics official (the "DAEO"). For TVA, that person was Ralph Rodgers in the Office of General Counsel. Most TVA employees are required to take an online ethics training course each year that addresses, among other issues, conflicts of interest. TVA employees have been disciplined over the years for violating government ethics rules including for using their position with TVA to further their own personal gain. (See "General principles," 5 CFR 2635.101(b)(7), "Employees shall not use public office for private gain."; see also "Disqualifying financial interests," 5 CFR 2635.402; and "Use of public office for private gain," 5 CFR 2635.702.) Federal employees are well aware of the fundamental principle that they cannot use their position in government to advance their own financial interests. (See Office of Government Ethics "2007 Conflict of Interest Prosecution Survey," released November 6, 2008. See Case 12, where a TVA manager was convicted in federal court on a felony offense stemming from his interest.)

If it is reasonable to require federal employees to recognize their own conflicts of interest, then it is reasonable to require a federal agency to report suspected conflicts such as the ones that occurred in this case. The same logic that makes self-reporting for employees critical applies to federal agencies. In both situations, part of the rationale is to avoid the reputational harm that occurs when a transaction becomes suspect due to conflicts that give the appearance of impropriety. This imposes no unreasonable duty on a federal agency since in many cases the conflict of interest is obvious and well known. For example, the conflict of interest was readily apparent in both the Perry and the Shuler cases. Charles Perry's position as the manager of a utility that gave TVA approximately $25 million of revenue per year placed him in at least the apparent position to inflict economic harm on TVA if TVA did not grant his application for a Maintain and Gain permit for water access on his private property. Our review found that TVA employees were aware of Perry's position, and his position was perceived to be one that could influence his utility on matters like whether to continue to use TVA as a wholesale supplier of electricity or whether to "give notice" to TVA that the contract with TVA would not be renewed.

Similarly, Congressman Shuler's position as a member of Congress sitting on a committee with oversight responsibilities for TVA raised the specter of preferential treatment when he applied for his permit from TVA on a project with millions of his own personal money on the line. All of these facts were well known to TVA management without any real need for further investigation to determine if a conflict of interest existed. In fact, Congressman Shuler fully disclosed his interest in Blackberry in his federal financial disclosure form. That, however, did little to protect either him or TVA from the appearance of preferential treatment evidenced in this case.

Beyond the known and obvious conflicts of interest that pose a risk of reputational harm to a federal agency, there are the conflicts that a federal agency could discover with the exercise of due diligence. For example, due diligence would seem to require that when any elected official has personal business before a federal agency that a preliminary review be done to consider whether the elected official's position affords him or her the real or apparent ability to apply leverage to pressure the federal agency to rule favorably on his or her personal financial interest. Likewise, if anyone like a TVA distributor who is in a position to grant or withhold an economic benefit to TVA has a matter involving their own personal financial interests before TVA, then the prospect of a conflict of interest bears investigating. A more comprehensive index of possible conflicts that could present themselves can be developed with the goal of protecting the integrity of the federal agency, the agency's employees, and the conflicted party.

Given the high risk of reputational harm for a federal agency that fails to exercise due diligence in identifying conflicts of interest that if publicly revealed would suggest preferential treatment for the conflicted party and an appearance of impropriety for all involved, it is essential that the federal agency have an established protocol for identifying conflicts of interest.

The fact that TVA has never had such a protocol to either identify conflicts of interest or to manage those conflicts should be judged in context. Our rudimentary survey of other federal agencies did not reveal any federal agency that has a protocol to identify and to manage conflicts of interest. This appears to be a gap in both law and agency procedure. Our belief is that most federal agencies handle these conflicts like TVA has done. That method is to treat the problem as solely a conflict of interest for the other party (politician, major customer, or agency official) rather than a reputational risk issue for the agency. As with TVA, the belief is that the agency can treat the conflicted party equally without preferential treatment. As demonstrated in these cases, however, the appearance of impropriety is almost guaranteed once the conflicted party's financial interest is publicly revealed.

Our recommendations to address this problem appear at the conclusion of this report.

CONCLUSION 3

THE MAINTAIN AND GAIN PROGRAM HAS BEEN ADMINISTERED IN AN ARBITRARY MANNER AND NEEDS SUBSTANTIAL IMPROVEMENTS

TVA Employees Selectively Applied Maintain and Gain "Guidelines" Resulting in Frequent Exceptions

We identified ten key steps required for processing a Maintain and Gain transaction. We evaluated each transaction to determine whether any of the key elements were not followed. In summary, we found no exceptions were made in three of the following key requirements: (1) $5,000 application fee was paid; (2) exchanges were on the same reservoir; and (3) access rights given up were equal to or greater than the rights received.

However, we found that exceptions were made on various transactions in seven of the key requirements with the most frequent exceptions made for the watershed and management team reviews for public benefit. Specifically:

- Even though Blackberry was also provided erroneous information at the time of purchase, Blackberry was required to go through the Maintain and Gain process. However, in the Blackberry transaction, TVA senior management bypassed the management team assessments for public benefit on the second application.

- In the Charles Perry transaction, we found the following exceptions: (1) management made the decision to allow a lot-by-lot exchange when the program did not generally permit these types of transfers; (2) management decided to forgo a public notification due to the "sensitivity" of Charles Perry's position as a manager of a TVA power distributor (See Appendix L for RS Guidelines – 16.5.4.52 Board Action Checklist);

and (3) this transaction was approved despite concerns raised by both the U.S. Fish and Wildlife Service and other state wildlife or natural resources agencies. Both agencies stated "little public or resource value would be gained in the exchange." (See Appendix I for Allsbrooks letter to Perry). This was expressed in multiple denials of Mr. Perry's proposals and was also included in the package the Board ultimately approved (See Appendix J for Issue Briefing Paper – Justification for Sequential Approval).

On January 26, 2001, Bridgette Ellis, Vice President for Resource Stewardship, wrote a memorandum announcing the initiation of a Maintain and Gain review committee to improve TVA's response to Maintain and Gain applications.[52] She summarizes the need for improving the application process as follows:

> Since the initial implementation of Shoreline Management Initiative in November of 1999, the number of Maintain and Gain (M&G) proposals has increased substantially. Each of these proposals is unique. Several have been controversial; almost all are relatively complex with respect to the level of evaluation required, and the interpretation of the M&G policy. Because of their uniqueness, evaluations are costly to TVA and the customer in time and resources. In some cases, these proposals have been in process for six months or more before determination that they did not meet M&G criteria. And during this time, the customer has no assurance of how TVA will ultimately judge the proposal.[53]

Bridgette Ellis set out in her memorandum what should be included in a Maintain and Gain application and noted the following requirements:

- A complete land use request including a completed and signed application.

- A $5,000 fee, description of both properties (including acreage and linear feet of shoreline involved at summer pool elevation), [and so on] plans for development of the potential residential shoreline, and maps of both tracts. There should be information sufficient for the Watershed Team to prepare an Issue Briefing and for the Review Committee to determine if the proposal meets minimum Maintain and Gain criteria.[54]

[52] Memorandum by Bridgette Ellis, Maintain and Gain Review Committee, January 26, 2001.
[53] Id., page 1.
[54] Id., page 2.

Exceptions Granted

Figure 2: Compliance Test Results Pertaining to Key Maintain and Gain Process Steps

Key Element Reviewed	Exceptions Identified
Completed Land Use Application	• Chickamauga did not have documentation of Land Use Application.
$5,000 fee	No exceptions noted.
All access rights considered are on the same reservoir	No exceptions noted.
Applicants' access rights given up is greater than or equal to those received	No exceptions noted.
Worksheet Completed with the Watershed Team's opinion of the transaction's public benefit based on a variety of unpublished factors	• The Blackberry transaction had senior management approval to bypass this step. • The Chickamauga transaction had two management reviews as opposed to the Watershed Team review. • The McLeroy - Watts Bar transaction noted the review in the Issue Briefing Paper submitted with Board package only. • Riverbrook - Fort Loudoun had no documentation of the team review. • Guntersville - Team opinion was identified, but there was no worksheet completed.
Coordination with U.S. Fish and Wildlife Service (USFWS) and state wildlife or natural resources agency	• The Blackberry transaction had no documentation of a response or consultation. • The Guntersville transaction had no documentation of a response or consultation.
Management Team review of the transaction to determine if the proposal is in the public's interest from a Valley-wide perspective. However, no criteria is explicitly outlined in the process steps	• Melton Hill showed the Management Team Review was scheduled. • The Blackberry transaction had senior management approval to bypass this step. • The McLeroy - Watts Bar transaction noted the review in the Issue Briefing Paper only. • Riverbrook - Fort Loudoun and Perry - Kentucky had no documentation of the review.
Public Notification	• Chatuge appeared to have a public notice for the land transaction only that does not mention the Maintain and Gain transaction. • Management decision to forgo the Public Notice for Perry - Kentucky.
Environmental Review	• Chatuge did not conduct a separate EA from the land transaction. • Guntersville EA was mentioned as being completed, but no documentation was included.
Appraisal/CMA	• Chatuge did not appear to have conducted an up-to-date appraisal for the Maintain and Gain transaction.

Process Improvements Needed

Our review of the nine Maintain and Gain transactions and other related transactions identified improvement opportunities related to: (1) providing erroneous information to applicants and (2) a lack of criteria for evaluating public benefit.

TVA Provided Erroneous Information to Applicants

We noted in our review that in certain instances TVA provided erroneous information upon which the applicants relied. While it is certainly understandable that in an organization as large as TVA mistakes will be made, a representation that a landowner has water access on a TVA lake is difficult to take back. TVA employees who are likely to be asked about this should be trained to defer questions to those within TVA who have the authority to bind the agency and who have the requisite training to give the correct answer. These cases demonstrate the reputational harm done to TVA by ill advised statements from employees who were not the best sources of information.

TVA Has No Clear Criteria for Evaluating Public Benefit

One of the key steps in the Maintain and Gain process is an evaluation by the Watershed Team that the transaction constitutes a "public benefit." In evaluating the public benefit of a transaction, TVA considers ecological, cultural, recreational, scenic, and public benefits of the property proposed for the exchange with similar public and resource benefits of the TVA land over which access rights are requested. The criterion used in this determination is not generally known and results in additional costs to the applicant. For example, the initial Maintain and Gain proposal submitted by Blackberry was rejected, in part, due to a determination that the exchange property had no "public benefit" due to shoreline erosion. Blackberry agreed to pay TVA an additional $15,000 to resolve this issue. This may have been an acceptable arrangement, but it appears arbitrary and an option not likely initially contemplated by either TVA or Blackberry. It could appear to the casual observer that TVA merely leveraged $15,000 out of Blackberry because they could. If "public benefit" remains whatever TVA wants it to be, this will always be a source of suspicion.

In another instance, the Charles Perry application was rejected due to the determination by the U.S. Fish and Wildlife Service that no public benefit would be gained. These concerns were ignored by TVA, and the application was ultimately approved which undermined any suggestion that input from the U.S. Fish and Wildlife Service was part of the criteria or in any way meaningful.

CONCLUSION 4

TVA'S FAILURE TO RETAIN DOCUMENTATION FOR APPLICATIONS WHICH ARE WITHDRAWN OR REJECTED CREATES DOUBT ABOUT THE FAIRNESS OF THE MAINTAIN AND GAIN PROCESS

The current Maintain and Gain guidelines to process Maintain and Gain transactions do not specifically require any documentation be maintained either in hard copy files or in the Integrated Information System/ALIS (Automated Land Information System). Of the transactions reviewed, two had documentation maintained in the updated Integrated Information System/ALIS. The other transactions were located in the ALIS system used previously or in hard copy format.

This has the potential for great mischief as we have reported previously in this inspection. Accountability and transparency require some documentation of why TVA rejects some applications and accepts others. Given the substantial value access to TVA lakes bestows, there should not be room for speculation about this important process that presently has a checkered past.

CONCLUSION 5

THE MAINTAIN AND GAIN PROGRAM MAY UNDERMINE THE INTENT OF THE TVA BOARD'S 2006 LAND POLICY

On April 21, 1999, the TVA Board of Directors implemented a new SMP which took effect on November 1, 1999. The SMI assessed TVA's existing reservoir residential shoreline permitting practices to establish a policy that better protects shoreline and aquatic resources, allows reasonable access to the water for adjacent residents, and improves management of public land along the shoreline. According to the Executive Vice President and General Counsel, "When the Board was considering adopting its Land Policy in 2006, it reviewed the earlier Board-approved SMP (including its Maintain and Gain component). The Board, in effect, reinforced that policy by specifically providing in the TVA Land Policy that it adopted that "*TVA shall consider changing a land use designation outside of the normal planning process only . . . to implement TVA's Shoreline Management Policy"* (emphasis supplied)." The Maintain and Gain component of the SMP was deemed consistent with the 2006 Land Policy adopted by the Board.

While, "one element of the SMP is a strategy that will *maintain and potentially gain* public reservoir shoreline property (normal pool shoreline), while limiting the maximum amount of shoreline developed for residential access to the amount of shoreline where residential access rights currently exist," the Maintain and Gain transactions have the appearance of circumventing the Land Policy by permitting residential development on the lake that may otherwise be restricted. Specifically, the purpose of:

- The Blackberry transaction was a community dock.

- The Riverbrook Shoreline Owners Association transaction included 14 private docks.

- The Scott Roberts, Harold Daniels, Ken Herrick transaction was two dock encroachments and a new dock for subdivision lot owners.

- The Stumac, Inc., transaction was development.

- The Chris Stevens, John Rankin, Marsha and Norman Sheldon transaction involved three residential docks.

While the SMP allows TVA to consider proposals to "give up" access rights at one location to "get" these rights at another location when the action would result in no net loss, or preferably, a net gain of public shoreline, the entities had a developmental interest in the properties already owned. Therefore, the Maintain and Gain process provided an avenue for developmental actions that would have otherwise been restricted.

RECOMMENDATIONS

In consultation with the TVA Board of Directors, TVA management should consider:

- Eliminating the Maintain and Gain program and only consider changes to water access rights during the periodic update of the SMP.

- Alternatively, if the Maintain and Gain program is retained TVA should:

    - Evaluate the extent it may conflict with the Land Policy regarding residential development;

    - Strengthen procedural guidelines to reduce the inconsistency in how matters are resolved; and

    - Implement procedures to ensure adequate documentation of rejected and withdrawn applicants is maintained.

- Establishing a clearly defined protocol which creates a procedure for identifying inherent conflicts of interest by those applying for any TVA benefit. We recommend that the protocol include the following elements: (1) a definition of inherent conflicts of interest broad enough to capture the majority of cases that involve conflicted parties soliciting something of value from TVA; (2) a training program for TVA employees to enable them to recognize and report conflicts; (3) a process to refer

these cases to the Ethics and Compliance Officer, the Designated Agency Ethics Officer (DAEO) and to the OIG to track, review, and report on whether any preferential treatment occurred; and (4) a notice provision to any conflicted party applying for a TVA benefit advising them that their request or application will be the subject of a formal review and public report.

- Establishing a clearly defined protocol that requires verification from more than one source before releasing a statement to the media. We also recommend that documentation be maintained to verify that this process was followed and the media statement was approved by an appropriate TVA official.

Management's Response – The CEO provided comments on a draft of this report and agreed to implement our recommendations. Specifically, in response to our recommendations, management plans to (1) recommend to the TVA Board that Maintain and Gain program be terminated; (2) incorporate policy and process concerns addressed in the report in the design of any future water access rights programs that would be recommended to the Board, and if such a future program is needed, recommend any future Maintain and Gain activities be made public early and be subject to TVA Board approval to add public notice and transparency to the process; (3) develop, in coordination with the Audit, Governance, and Ethics Committee of the TVA Board, a policy that will provide a means to identify the potential of actual or apparent conflicts of interest or the appearance of exertion of undue influence on the part of persons applying for a TVA benefit; and (4) implement a protocol to require verification by more than one source for statements to the media and to immediately correct any incorrect or misleading information that is released. In addition, the Vice President of Land and Water Stewardship has been directed by the CEO to develop a process for review of information that is provided to the public so that greater accuracy will be assured or disclaimers will be noted.

(The complete text of the comments provided by the CEO is provided in Appendix M.

Auditor's Comments – We concur with TVA management's actions or planned actions.

Tennessee Valley Authority, 260 Interchange Park Drive, Lenoir City, Tennessee 37772

August 30, 2005

Mr. Dennis Tumlin
Blackberry Cove, LLC
160 Summit Drive
Dayton, Tennessee 37321

Dear Mr. Tumlin:

Thank you for your July 25 letter regarding your recent discussions with TVA about shoreline access for Tract No. XWBR-328. We have researched the points you have made in your letter and would like to provide the following information.

There are two parcels of TVA fee property that adjoin your proposed development: TVA Parcel No. 89 and TVA Parcel No. 90. TVA issued its Draft Watts Bar Reservoir Land Management Plan (Plan) externally on our website in September 2004. In the Plan, Parcel No. 89 is proposed for Natural Resource Management and Parcel No. 90 is proposed for Shoreline Access.

Staff had informal discussions with you regarding the allocations in the Plan. The day before your scheduled closing (June 28) you visited the watershed team office to request a letter of confirmation concerning the landrights on Tract No. XWBR-328, the sale tract which lies behind Parcel No. 90. It is our understanding that as part of your due diligence for acquisition of the private land your appraiser advised you about the access issue on Tract No. XWBR-328. TVA reviewed the deed for the property and discerned that deeded rights of access were not retained by the seller of Tract No. XWBR-328; therefore docks can not be considered on Parcel No. 90.

We apologize for any misunderstandings that may have occurred as a result of the mapping error and your conversations with staff prior to June 28. The maps produced for the Plan update are in draft form and are being checked against original deed information at this time. The error in mapping, regarding Parcel No. 90, will be corrected before the final maps are produced. TVA is proposing to divide Parcel No. 90 into two zones: Zone 2 for the navigation safety landing and Zone 4 for the downstream portion.

These draft maps are not intended for guidance in private land acquisition decisions. The mapping error does not provide "landrights" or justification for consideration of private water use facilities fronting Parcel No. 90. However, if you want to provide additional information regarding your contract or supporting information that leads to

your decision to enter into the contract, we will be glad to review to see if there are options moving forward. It is our understanding from conversations with you that you have other parcels on Watts Bar Reservoir that could be considered in a maintain and gain proposal. We would be happy to discuss any such proposals with you.

If you have any further questions, please contact me at (865) 632-1340.

Sincerely,

Nancy R. Greer

Nancy R. Greer, Manager
Watts Bar-Clinch Watershed Team
Resource Stewardship

LAW OFFICES
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
A PROFESSIONAL CORPORATION
2200 RIVERVIEW TOWER • 900 SOUTH GAY STREET
POST OFFICE BOX 1792
KNOXVILLE, TENNESSEE 37901

(865) 549-7000

Facsimile
(865) 525-8569

MEMORANDUM

TO: Blackberry Cove, LLC (the "Company")

FROM: Robert F. Worthington, Jr.

DATE: April 26, 2006

RE: Options in Resolution of Dispute with Tennessee Valley Authority ("TVA") regarding Access Rights to Watts Bar Reservoir ("Watts Bar")

This memorandum outlines the three primary options for consideration by the Company in resolution of the current dispute with TVA. First, the Company could continue to argue before TVA senior management (or the Company could make the argument in a lawsuit) that the 1988 Plan and SMP (both as defined below) permit the Company to file (and obligate TVA to accept and review) a "26a application." Second, the Company could initiate the maintain-and-gain process in an attempt to obtain access rights from its property over TVA-owned shoreland for the purpose of constructing a water-access facility. Finally, the Company might lobby TVA senior management and the TVA Board of Directors to approve the 2005 Plan (as defined below) as published and circulated among the public (i.e., without any changes or amendments).[1] The 2005 Plan, if adopted as is, would permit the Company to file a 26a application for access across that strip of TVA-owned shoreland abutting the Company's property and designated in the 2005 Plan as Water Access for the purpose of building a water-access facility. These options, and some of the potential risks and rewards of each option, are discussed in more detail below.

1. **Option 1 - 1988 Plan/SMP.**

The Company can continue to take the position with TVA senior management (or through a lawsuit) that the Company has a right to submit, and TVA has the obligation to accept and review, a 26a application requesting access across that portion of TVA-owned shoreland shown in the 1988 Watts Bar Reservoir Land Management Plan (the "1988 Plan") as marginal strip and abutting the Company's property.

Pursuant to the 1988 Plan, owners of property abutting "marginal strip land" are permitted access across the marginal strip land for the purpose of constructing residential, water-use facilities, provided that facilities are approved by TVA through the 26a application process.

[1] The Company might pursue the second and third options concurrently.

The 1988 Plan defines marginal strip land as "shoreline fronting former TVA reservoir land that was sold for private development purposes with deeded rights to construct private shoreline improvements, such as boat docks." While the maps accompanying the 1988 Plan have indicated that a portion of the TVA-owned shoreland abutting the Company's property is marginal strip land, that section of shoreland does not satisfy the definition of marginal strip land in the 1988 Plan because the Company's deeded rights do not include the right to construct private shoreline improvements.

TVA has taken the position that the 1988 Plan is modified to the extent inconsistent with the Shoreline Management Project ("SMP"), which was approved and implemented by the TVA Board of Directors in 1999. Portions of the SMP were codified in federal regulations in 2003. Those regulations provide that TVA will accept applications for access across TVA-owned shoreland for the purpose of building residential docks and water access facilities in the following circumstances:

(a) the adjacent residential landowner holds rights of ingress and egress to the water (except where a particular activity is specifically excluded by an applicable real estate document); or

(b) the shoreland is designated in "current TVA Reservoir Land Management Plans" as open for consideration of residential development.

We believe that the Company's best argument under the 1988 Plan and the SMP is that the 1988 Plan remains the "current TVA Reservoir Land Management Plan" for Watts Bar (at least until the 2005 Plan is adopted by the TVA Board of Directors, if at all). The maps accompanying the 1988 Plan show that a portion of the TVA-owned shoreland abutting the Company's property is marginal strip land. The Company's argument is that the 1988 Plan and accompanying maps, both adopted by the TVA Board of Directors, are determinative as to the classification of marginal strip land regardless of any written definition of marginal strip land in the 1988 Plan. Moreover, the Company must take the position that the 1988 Plan is not in conflict with the SMP as it relates to marginal strip land. Therefore, in accordance with its terms, the 1988 Plan permits the Company, as an abutting property owner to file a 26a application for access across that the marginal strip land for purposes of constructing non-commercial, water-access facilities.

Based on our review of the applicable authorities and relevant deeds, and or ongoing conversations with TVA, we believe that this strategy is unlikely to be successful, no matter to whom at TVA we appeal. A lawsuit based on this argument may have a better chance of success, but it is far from a certain winner (not to mention a costly and timely process). TVA has claimed (and we suspect that they will could continue to claim) that the 1988 Plan is inconsistent with the SMP as it applies to marginal strip land. In other words, when the SMP was adopted and codified by regulation, all marginal strip land in the 1988 Plan was thereafter reviewed based

solely on the underlying deeded rights.[2] Even if senior management at TVA were to acknowledge the Company's position and direct the Watts Bar-Clinch Watershed Team to accept the Company's 26a application, the Watts Bar-Clinch Watershed Team would still have broad discretion to determine whether, and to what extent, to approve construction of a water-access facility, based on a number of subjective determinations (e.g., environmental impact, impact on navigable waterways, etc.). Given the nature and course of this dispute, and the subjective nature of the 26a application process, we are concerned that the Watts Bar-Clinch Watershed Team, if it felt that TVA senior management had directed it to accept a 26a application against its judgment and policy, might predetermine in an act of retaliation that it would not approve the Company's plans to construct a water-access facility and then develop justification for that predetermined position based on various subjective assessments.

2. **Maintain and Gain.**

The Company can pursue a maintain-and-gain exchange of land-use rights with the Watts Bar-Clinch Watershed Team. This would be a costly (TVA charges the applicant for its services on a monthly basis) and timely strategy, and we do not believe that TVA will give any guarantees that the maintain-and-gain exchange would be approved (although we would certainly lobby TVA senior management to afford the Company the greatest cooperation and deference in the process). Although there is significant cost to the maintain-and-gain option (both administratively and in the loss of property values resulting from the exchange), and no certainty as to the outcome, it nevertheless provides a process that, if managed correctly, could ultimately provide the Company with the right to build a water-access facility.

The procedures that govern the maintain-and-gain process are not well-defined. The process begins with a proposal and preliminary review. As part of the proposal, the Company would need to deliver to the Watts Bar-Clinch Watershed Team (a) a map that shows the site to be utilized for development of a water-access facility (noting the length and width, at the summer pool elevation, of the shoreline necessary for development of the water-access facility), (b) a map showing the site where access rights will be terminated/exchanged, (c) multiple pictures of each site, (d) documentation demonstrating ownership or the option to purchase the exchange property, and (e) a description of the "comparable benefits" of the two sites. The Watts Bar-Clinch Watershed Team will review the proposal and make a preliminary evaluation as to whether the maintain-and-gain proposal is acceptable. If it is, then the Company would file a Land Use Application. According to Donna Norton, once the Land Use Application is filed, the process will:

> require internal coordination with TVA and external coordination with other federal/state agencies. These actions are also subject to the National Environmental Policy Act and will receive the appropriate level of environmental

[2] TVA's position is that the easement that the Company enjoys is not sufficient to grant access for the purpose of building a water access facility.

review. As a matter of policy, TVA also will issue a public notice on the proposal. Public comments will be taken into consideration during the review. The exchanges also require TVA Board approval. The review process takes approximately 6 months to complete (provided there is not a high level of public controversy and the environmental review can be completed at the lowest level of review).

In terms of timing, the Land Use Application and the 26a application can be filed with and reviewed by the Watts Bar-Clinch Watershed Team at the same time.

3. **2005 Plan.**

The 2005 Plan, as published, clearly provides under all three of its alternatives[3] that a portion of the TVA-owned shoreland abutting the Company's property is planned for Water Access, which would permit the Company to apply for a permit to access that TVA-owned shoreland to construct a water-access facility. If the TVA Board of Directors were to adopt the 2005 Plan as published, then we believe that the Company would have the right by federal regulation to file a 26a application.

Thus, the third alternative is to lobby TVA senior management and TVA's Board of Directors that the 2005 Plan, if and when it comes before the Board of Directors, should be identical to the 2005 Plan as published and circulated to the public for discussion. In other words, it would be improper to make any changes without further public review. Part of this strategy is to highlight that it may be damaging to TVA if TVA had to admit publicly that some portions of the 2005 Plan were inaccurate and unreliable. This strategy does not have a definitive timeline, as it is not certain if or when the Board of Directors will consider the 2005 Plan for approval. In addition, this strategy only gives the Company the right to file a 26a application. It does not guarantee that TVA would approve all or any portion of the water-access facility that the Company would like to construct. However, it would simplify the process for the Company by eliminating the necessity (and the related costs) of maintain and gain.

RFW:etk

cc: Erich T. Kennedy
Mary LeAnn Mynatt

[3] The 2005 Plan actually has three land management alternatives. One of the alternatives is to maintain the status quo under the 1988 Plan, in which case marginal strip land would be classified as "Water Access."

From: Dobrogosz, Michael J
Sent: Wednesday, August 22, 2007 6:37 PM
To: Tolene, Rebecca Chunn; Hairston, Peyton T Jr
Subject: FW: Status of The Cove at Blackberry Ridge

Hey -

I tried to clearly lay out the issues to Mr. Rudd and this is the result. I semi-agree with Mr. Rudd on one count, in that they should not be held hostage to the archaeological survey time for Wading Bird Island. They did not choose that course of action - we did. However, the archaeological requirements on the development land is another issue. We are meeting tomorrow to discuss APE and I will have a clear recommendation on the cultural needs at this site. Yes, we did tell Mr. Rudd app. 6 months, but we also said, quite clearly, that everything was "pending an environmental review." If an archaeological survey is required, it's often performed during draw down, depending on the site location. After tomorrow's meeting, I can provide a clear timeline and schedule, but this is a good example of a customer just not liking our answer. Maybe we can talk tomorrow.

Mike

From: Jason Rudd [mailto:jrudd@highlandsgroupllc.com]
Sent: Wednesday, August 22, 2007 5:33 PM
To: Tolene, Rebecca Chunn; Hairston, Peyton T Jr
Cc: Dobrogosz, Michael J; jhshuler@gmail.com
Subject: Status of The Cove at Blackberry Ridge

Based on a conversation with Donna Norton on Monday and review of a fairly detailed message from Mike today, I am still struggling to understand exactly where we stand. We have been working with TVA on this process for almost two years. During our discussions with TVA in the Spring, I felt like we got everything back on track and were finally moving in the right direction. At that time, we were told that the 26(a) review process would take approximately 6 months. We were also told that the process would be expedited as much as reasonably possible. We are now four months into the process and it appears that we may be at least six more months away, which is extremely disappointing to say the least.

Mike's message indicated that we are still awaiting an archeological review on the TVA property subject to the proposal, Wading Bird Island and on private land that could be possibly affected by the proposal (which I do not even understand). Most troubling in this statement is that Mike said that such review could not even be done until after winter draw down, which is typically in late Fall or early Winter. This would mean that we are still at least six months away from even having the various reviews completed that TVA is conducting in connection with our application. I have gone back and reviewed all of the information that was discussed during our various meetings, and there was never any discussion that would have indicated that we would have to wait until Winter 2008 to complete the review process.

With respect to our proposal that we would provide shoreline stabilization, we selected Wading Bird Island upon the recommendation of TVA. We are more than willing for our funds to be used at another location if it will expedite/eliminate the need for a delay for waiting for the lake to be drawn down to winter pool. In fact, we stated in our proposal that we would defer to TVA's judgment if there were another site where such stabilization would be beneficial.

We are still trying to understand exactly where we stand, and to get an idea of when this process will be completed. As we have stated previously, we will do whatever we can do on our end to expedite this matter, and we would respectfully request TVA to do the same. If possible, I would like to try to schedule a meeting similar to the ones we had in the Spring to try get a better understanding of the status of this application.

Thanks,

Jason Rudd
The Highlands Property Group, LLC
150 Elizabeth Lee Parkway
Loudon, Tennessee 37774

From: Ellis, Bridgette K

Sent: Thursday, August 23, 2007 8:19 AM

To:

Cc: Ray, Anda Andrews; Dobrogosz, Michael J; Pickard, Karen J; Lawson, Helen; Norton, Donna E; Ellis, Bridgette K

Subject: URGENT - Blackberry Cove

Tom received a call from Shuler yesterday on BB Cove saying they felt like they had done everything we asked of them but that we were "putting them off" to wait for low water for something. Shuler inferred a blistering letter with threat of lawsuit is coming. If we are delaying I want to know why.

I want a project status with schedule completion dates by NOON.

Bridgette

THE COVE AT BLACKBERRY RIDGE, LLC

150 ELIZABETH LEE PARKWAY
LOUDON, TENNESSEE 37774
TELEPHONE: 865.458.1955

*****REFERRAL ACTION ITEM*****
8/24/07 -- TLD
cc: Bridgette Ellis -- Please prepare reply for Peyton Hairston's signature. Coordinate with Maureen Dunn in OGC. E-mail draft response to Teresa Dillard for Tom Kilgore's review and approval. Due date: 8/2/07.
Peyton T. Hairston, Jr.
Wilson Taylor
EDMS

August 23, 2007

RECEIVED
KNOXVILLE
AUG 3 2 2007
President and
Chief Executive Officer

Via Hand Delivery

Mr. Tom Kilgore
President and Chief Operating Officer
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902

Re: The Cove at Blackberry Ridge, LLC

Dear Mr. Kilgore:

As you aware, we have been attempting to work with TVA for just over two years in an effort to obtain a dock permit on a parcel property located in Roane County on the Watts Bar Reservoir.

This property was purchased with the understanding that a significant portion of the property was eligible for consideration for water use facilities. This was confirmed by TVA prior to the purchase, and was only first challenged by TVA on the day before the scheduled closing to acquire the property. On June 28, 2005 (the day before closing). TVA informed us that there was a mistake on the map and that the property was not eligible for consideration for water use facilities. After further discussions with TVA in which we were assured that they would work with us to obtain a water use facilities, and after review of the various TVA maps, we moved forward with the purchase of the property rather than forfeiting our $81,920.00 earnest deposit.

Since acquiring the property, we have struggled now for twenty-four months to work with TVA to resolve this matter. Despite the representations by TVA to us and others that the property was eligible for consideration for water use facilities and despite that the maps published by TVA confirm that (a map dated August 3, 2007 which still designates the property as such is attached for your review), TVA refused to accept our request for a water use facility. Upon the recommendation of TVA and in an effort to avoid litigation, we attempted to pursue a maintain and gain proposal. This process required us to spend additional funds to acquire shoreline rights on a different piece of property and then attempt to trade those rights for shoreline rights on our property thereby enabling us to obtain a permit for a water-use facility.

After several months of unsuecessfully attempting to navigate the personnel, policies and procedures of TVA , we contacted your office to seek assistance in getting the maintain and gain process back on track. In March of this year, Peyton Hairston begin an effort to "mediate" the situation and was able to bring all of the various parties together and come up with what we felt like was a reasonable plan to move forward and continue with the maintain and gain process. As a result of this process, both us and TVA seemingly reached an agreement on what our proposal should be and how we would all proceed. We were told that the various reviews necessary to be completed would be coordinated and performed concurrently so that upon completion of the public review process we could proceed toward a rapid resolution. We were told on multiple occasions that the process for approval normally takes approximately six months, but we were all hopeful that the process would be able to be expedited.

It has now been almost four months since we filed our amended 26(a) application. The public comment expired on Friday, August 17. This week we were informed that there are still reviews to be completed by TVA and that the remaining reviews will not be commenced until the reservoir is at winter pool, which would mean that we will not even complete the review process for six more months and then we will once again after navigate through TVA to hopefully get our permit.

This process of dealing with TVA has been painful and disappointing. If not for TVA's alleged mistake on its own maps (which dates back as far as 1988 and continues through August 3, 2007), we would not have even entered into a contract to purchase this property. If not for TVA's assurances on the day before closing that they would make things right, we would have walked away from the earnest money. We have postponed our sales efforts waiting to resolve this matter with TVA which has cost us a significant amount of money in lost revenue. At this point, we have spent over $100,000.00 in actual out of pocket expenses attempting to navigate TVA's administrative waters in an effort to obtain rights that in documents published as recently as August 3, 2007 TVA indicates we already have.

We would like to maintain a good relationship with TVA. We have maintained since the very beginning that our request could be handled administratively, and we still believe that to be the case. However, in an effort to build a relationship with TVA we, at significant expense, pursued the maintain and gain option. We are still willing to work with TVA and we still want to build a good relationship with TVA, however, our patience is wearing thin.

Any assistance that you or Peyton can provide to expedite this matter will be greatly appreciated.

Regards,

Jason Rudd

Elmers, Carol E

From: Morris, Robert A
Sent: Tuesday, October 16, 2007 4:29 PM
To: Reynolds, Emily J; Hairston, Peyton T Jr
Cc: Elmers, Carol E
Subject: Congressman Shuler - Blackberry Cove

Emily/Peyton,

Carol and I appreciate Anda's assignment to take the pulse of the Blackberry Cove participants for opportunities to improve TVA's land process. We are concerned with the timing since we are still in the evaluation process and a TVA land decision has not been determined (the State of TN Historical Preservation Office has asked TVA to perform additional site surveys). Engaging Congressman Shuler could cause him ethical problems since it might appear that a meeting on this very issue influenced our final decision. Our previous efforts with the two of you has been to keep Cong Shuler out of the fray and deal with the developer. Would you like to weigh in on this with Anda/Tom to make sure we have thought through all the ramifications of surveying a "stakeholder"? If feedback from a stakeholder is the objective, let's select a project that has already completed the whole process. If feedback is not the objective, let's make sure we are not exposing TVA and Congressman Shuler to conflict of interest issues.

Your thoughts?

Bob

From: Ray, Anda Andrews
Sent: Tuesday, October 16, 2007 3:30 PM
To: Norton, Donna E; Hairston, Peyton T Jr
Cc: Armstrong, Susan G; Elmers, Carol E; Shepard, Diane B; Crosby, Buff L; Morris, Robert A; Reynolds, Emily J
Subject: FW: Need your assistance

Donna and Peyton,

I have been asked to personally meet with Jason Rudd and Heath Shuler (both involved in the blackberry cove issues). The request is that I ask them their impressions of the process and suggestions for improvement from a "stakeholder" perspective.

I am anxious to get the meeting scheduled, but want to ensure that I have the information I need to properly represent TVA with these individuals. Is there anything else you want me to know before I meet with them.

In the meantime, I assume that we can get Carol to go ahead and get the meetings scheduled?

Anda

From: Shepard, Diane B
Sent: Tuesday, October 16, 2007 3:13 PM
To: Ray, Anda Andrews
Subject: FW: Need your assistance

Anda,

Please see Carol Elmers' questions below.

From: Elmers, Carol E
Sent: Tuesday, October 16, 2007 3:03 PM
To: Shepard, Diane B

Subject: RE: Need your assistance

Diane: I'm happy to help. But before we schedule any meetings, can you tell me if Anda has spoken with Peyton Hairston about this issue? Has she spoken with Donna Norton in the watershed office? This has been a delicate issue given the fact that a Congressman is involved in a land deal. C.

Carol E. Elmers
Senior Manager, Valley Relations
TVA
400 W. Summit Hill Drive, WT 7
Knoxville, TN 37902
865-632-8328 (office)
865-632-9304 (fax)

From: Shepard, Diane B
Sent: Tuesday, October 16, 2007 2:29 PM
To: Elmers, Carol E
Subject: Need your assistance

Carol,

BJ said that you may be able to help me with this. Please let me know if I need to take a different route.

Anda Ray, per a request from Mr. Kilgore and as the new VP of ES&P, needs to meet with Jason Rudd of Blackberry Cove and Heath Shuler (separate meetings) to discuss (1) the 26a process and (2) what changes they feel need to be made regarding land and permitting. Can you help me with these meetings? Thanks.

Sender:	Dobrogosz, Michael J </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=MJDOBROG>
Subject:	FW: Blackberry Cove
Recipient:	Norton, Donna E </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=Denorton>
Sent Date:	2007/10/26 13:48:45
Priority:	Normal
Type:	Note

Donna - here are the talking points. Let's discuss before you call Beverly.

From: Crosby, Buff L

Sent: Friday, October 26, 2007 1:25 PM

To: Ellis, Bridgette K; Ray, Anda Andrews

Cc: Pickard, Karen J; Lawson, Helen; Shepard, Diane B; Dobrogosz, Michael J; Norton, Donna E; Ferry, Daniel H

Subject: FW: Blackberry Cove

Jason Rudd has called asking for an update on the Project. He has a meeting with David Beverly and Heath Shuler today at 2:00 pm EDT. He knows the 30 day SHPO review should be completed, therefore, wants an update. Attached are talking points that we plan to use in updating Jason today. They have been reviewed and concurred by OGC, Dan Ferry and Cultural Resources.

Please let me know if you have any questions and we will let you know the outcome of the call with Jason Rudd. I will be calling Peyton Hairston to let him know the status as well, in case Jason calls him after Mike Dobrogosz's call.

Thanks

Sender:	Crosby, Buff L </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=BLCROSBY>
Subject:	Action: SHPO/The Cove at Blackberry Ridge
Recipient:	Ray, Anda Andrews </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=AARAY>; Shepard, Diane B </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=DBSHEPARD>; Ferry, Daniel H </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=DHFERRY>; Lawson, Helen </O=TVA/OU=NAMERICA/CN=RECIPIENTS/CN=HLAWSON>
Sent Date:	2007/10/29 10:07:20
Priority:	Normal
Type:	Note

Anda,

The attached letter to the SHPO is ready for your review and forwarding to Bridgette for her signature. When the letter gets to the SHPO, the 30 day period for the SHPO to determine if they are going to contact the Advisory Council in Washington will start. Therefore, the letter is time sensitive. As I am sure you have seen by several emails from Friday, we were under pressure to contact Jason Rudd. He had asked for an update before his meeting with Heath Shuler on Friday. Mike did contact him to let him know the situation and the conversation went well. He does understand that if the project is delayed it will not be in TVA's hands. I also contacted Peyton on Friday to let him know, in case Jason decided to give him a call.

Please let me know if we need to discuss or you have any questions.

Thanks
Buff

From: Wallace, Sharon B
Sent: Monday, October 29, 2007 9:03 AM
To: Crosby, Buff L
Cc: Lawson, Helen
Subject: FW: The Cove at Blackberry Ridge

For you review and approval. Also attached some back-up information.

Microsoft Mail Internet Headers Version 2.0
Received: from TVACOCXVS2.main.tva.gov ([152.85.53.63]) by TVACOCXVS1.main.tva.gov with Microsoft SMTPSVC
(6.0.3790.1830);
Mon, 29 Oct 2007 10:07:20 -0400
X-MimeOLE: Produced By Microsoft Exchange V6.5
Content-class: urn:content-classes:message
MIME-Version: 1.0
Content-Type: application/ms-tnef;
name="winmail.dat"

March 10, 2004

Mr. Charles Perry
70 Davidson Drive
Paris, Tennessee 38242

Dear Mr. Perry:

This letter is to inform you that your revised Maintain and Gain (M&G) proposal submitted on February 13 cannot be approved. In our November 14, 2003 letter, we stated that the only way to make this proposal acceptable was for you to acquire and extinguish all access rights between the proposed exchange lot and open water in order to provide effective resource protection of the shoreline. Your revised proposal failed to accomplish this and therefore cannot be accepted.

We hope you would agree that TVA has exercised patience in resolving this issue which began in June of 2000, and that we provided help and assistance when requested throughout this process. We regret that you were unable to provide us with an acceptable M&G proposal that would allow your un-permitted facility to remain at its current location. In view of this, we must now ask that you remove this facility from the reservoir within 30 days of receipt of this letter.

If you have questions or if I can be of assistance please call me at 731-641-2003.

Sincerely,

Don W. Allsbrooks, Manager
Resource Stewardship
Kentucky Reservoir Team

DWA:ITG
cc: Kerry Brannon, UPB 2C-JKT
Buff Crosby, SP 3L-C
Bridgette Ellis, NRB 2A-N
Mark Hastings, ET 11A-K
Tim McKeehan, WT 11A-K
Teresa C. McDonough, NRB 2A-N
Paul E. Phelan, UPB 2C-JKT
Files, RS, LM 1A-PAT

Coordinated with Kerry Brannon (CS&M), Paul Phelan (VR), and Tim McKeehan.

ISSUE BRIEFING PAPER
JUSTIFICATION FOR SEQUENTIAL APPROVAL
XGIR-943RE, XGIR-666 S.1X, AND GIR-3948
CHARLES PERRY MAINTAIN AND GAIN

Filing Date: March 21, 2005

Author: Ember Anderson, Land Use Representative, 731-641-2001
Don Allsbrooks, Manager, 731-641-2003

Subject: Charles Perry Maintain and Gain Request to gain deeded access rights across TVA property fronting Lot 55 of Sandy Shores Subdivision.

Background: Charles Perry requested to exercise the M&G provision in SMI in order to gain access rights across TVA land so he could keep his unauthorized and unpermitable dock on Lot 55 of Sandy Shores Subdivision. In order to gain 125 LF of shoreline access fronting Lot 55, Mr. Perry will be extinguishing access rights on 251 LF of shoreline fronting Lots 86a and 87 in Harbor Town Subdivision as well as giving .55 acres in Lot 86a to TVA in fee.

Issues: Mr. Perry is the General Manager of the Paris Board of Public Utilities, a distributor of TVA. His unauthorized dock was discovered in June of 2000 and posted for removal. He opposed removal and subsequent meetings were held and letters written to resolve the issue. Ultimately, the RS VP agreed to allow Mr. Perry to pursue a M&G proposal, even though M&G was not intended to be used on a lot-by-lot basis. KWT staff assisted Mr. Perry in locating potential M&G properties, and also helped with the development of a proposal that would meet TVA's minimum M&G criteria by reviewing and making suggestions on several proposals that were submitted for preliminary review. RS exercised extreme patience, and following months of review and suggestions, a proposal was finally submitted in February 2003 that the RS M&G review team determined would meet the minimum criteria. This proposal was coordinated with both the Tennessee Wildlife Resources Agency and the U.S. Fish and Wildlife Service. Comments from both agencies were neutral to negative and basically questioned the pubic and resource value to be gained by TVA's consideration of this action. Due to the sensitivity of this action, RS management recommended that this action forgo Public Notice and that it be handled sequentially.

Recommended Action: KWT recommends sequential Board Approval to resolved a long standing 26a violation with the General Manager of one of TVA's distributors.

Key External

Participants:	Charles R. Perry, Applicant, (731) 642-5863 – home or (731) 642-1815 – work
Internal Issue Contacts:	Don Allsbrooks, Manager, Kentucky Watershed Team (731) 641-2003; Ember Anderson, Land Use Representative, Kentucky Watershed Team (731) 641-2001

Ellen Robinson, ET 12A-K (5)

REQUEST FOR BOARD APPROVAL - PROPOSED GRANT OF NONCOMMERCIAL, NONEXCLUSIVE PERMANENT EASEMENT TO CHARLES PERRY - TRACT NO. XGIR-943RE – PROPOSED LAND USE ALLOCATION CHANGE TO THE KENTUCKY RESERVOIR LAND MANAGEMENT PLAN – BENTON AND HENRY COUNTIES, TENNESSEE - KENTUCKY RESERVOIR

REQUESTED ACTION:

- That the Board approve, pursuant to 40 U.S.C. § 1314, the grant of noncommercial, nonexclusive permanent easement (Tract No. XGIR-943RE) affecting approximately 0.43 acre to Charles Perry, for construction and maintenance of recreational water-use facilities, in exchange for an approximate 0.55-acre tract (Tract No. GIR-3948) of private land and extinguishing access rights affecting an approximate 0.1-acre tract (Tract No. XGIR-666, S.1X) on Kentucky Reservoir in Benton and Henry Counties, Tennessee.
- That the Board approve a land use allocation change to the Kentucky Reservoir Land Management Plan (Plan) to reallocate the 0.43-acre tract from Wildlife Management to Shoreline Access; and allocate the 0.55-acre tract, and reallocate the shoreline fronting said tract and the 0.1-acre tract where access rights will be extinguished as Natural Resource Conservation.

CRITICAL SUCCESS FACTORS:

- Balance competing demands and optimize the river system.
- Achieve excellence in stakeholder relations and communications.
- Promote development through targeted, growth initiatives.

VALUE OF PROPOSED ITEM TO THE PEOPLE OF THE VALLEY:

- This action will support and contribute value to residential development and natural resource conservation in the Tennessee Valley resulting from the multiple opportunities provided by TVA's reservoir system.

KEY POINTS:

- Mr. Perry has requested TVA to grant a noncommercial, nonexclusive permanent easement (Tract No. XGIR-943RE) affecting approximately 0.43 acre with 125 feet of shoreline, fronting Mr. Perry's property in exchange for approximately 0.55 acre (Tract No. GIR-3948) of private property and extinguishing access rights on approximately 0.1 acre (Tract No. XGIR-666, S.1X) affecting a total of 251 feet of shoreline.
- Mr. Perry has also requested TVA to change the land use allocation of the approximate 0.43-acre tract from Wildlife Management to Shoreline Access.
- TVA would allocate the 0.55-acre tract conveyed to TVA, along with approximately 0.5 acre of shoreline fronting this tract and approximately 0.1 acre where access rights will be extinguished as Natural Resource Conservation in the Plan.
- In accordance with TVA's 1999 Shoreline Management Policy, because this action would open approximately 125 feet of additional shoreline to residential water-use facilities it should be offset by closing a comparable or greater amount of shoreline to such development. To accomplish this, in exchange for the permanent easement, Mr. Perry will convey to TVA approximately 0.55 acre of private land (Tract No. GIR-3948) and extinguish access rights on approximately 0.1 acre affecting a total of 251 feet of shoreline located on Kentucky Reservoir.

- The value of the easement rights requested have been appraised at $10,750 and the value of the private property and extinguished access rights to be provided in exchange have been appraised at $10,000.

JUSTIFICATION:
- Mr. Perry has agreed to pay TVA's administrative costs for the review of this proposal, which will be approximately $28,411.
- This proposal will not adversely impact TVA's operations and all required program, legal, and environmental coordinations, reviews, and approvals have been completed and obtained.

CONTACT:
- Donald W. Allsbrooks, Team Manager, Kentucky Watershed, 731-641-2003.

Tom Kilgore
President and Chief Operating Officer
ET 12A-K

HES
Attachments: Exhibit and Vicinity Maps
cc: W. Terry Boston, MR 3H-C
John Bradley, OCP 2A-NST
K. R. Breeden, OCP 1F-NST
Amy T. Burns, MR 2X-C
J. R. Bynum, LP 3K-C
M. H. Dunn, ET 11A-K
B. K. Ellis, WT 11B-K
Charlene Evans, ET 11A-K (w/ attachments)
EDMS, WT CA-K (w/ attachments)
Theresa A. Flaim, ET 12A-K
K. J. Jackson, WT 11A-K
J. E. Long, Jr., ET 12A-K
Anda A. Ray, SP 6D-C
Michael E. Rescoe, ET 12A-K
Karl W. Singer, LP 6A-C
D. LeAnne Stribley, ET 12A-K
Joel E. Williams, SP 3L-C

Disposal/xgir/943re.doc
003738195

Board Questions

1. What is the purpose of this Maintain and Gain request?

   The applicant constructed a dock fronting TVA property without the necessary land rights or 26a permit. This Maintain and Gain Proposal would allow him to keep the dock in its current location, as well offering additional protection for a wetland on the site he proposes to exchange.

2. Was a public notice issued for this request?

   No, we determined not to issue a public notice.

3. Why has this applicant been allowed to do a M&G on a lot-to-lot basis?

   In 2000, Mr. Perry's dock was discovered and posted as a violation. Following several meetings with Mr. Perry, and discussions with VR and CS&M staff, the RS VP in 2000 allowed Mr. Perry to do a lot-to-lot Maintain and Gain in an effort to resolve the violation.

4. Are there any future management issues associated with approval of this action?

   Adjoining lot owners in this subdivision have been waiting to see how TVA deals with Mr. Perry's violation. Approval of this action could establish a precedent and result in similar requests from adjoining lot owners. The precedent established by this action to allow a M&G for an individual lot could make it difficult for RS to deny such future requests.

5. I there any validity to Mr. Perry's recent letter questioning TVA's estimated administrative costs associated with this action in comparison to what he was originally quoted?

   Mr. Perry was informed of TVA's cost recovery process during initial discussion of this issue. During the course of this review TVA staff worked diligently with Mr. Perry to help him develop a M&G proposal that would meet TVA's minimum criteria for acceptance. He was advised of the estimated costs of this action including the additional costs associated with required surveys and descriptions of the property prior to TVA's authorization of the work. Mr. Perry concurred and asked TVA to proceed with the surveys and processing of his proposal. Prior to recommending this action to the Board of Directors, TVA staff hand delivered a commitment letter to Mr. Perry that provided an estimate of the administrative costs for completing this action. He asked for a few days to review and consider his options. A signed commitment letter was delivered to our Kentucky Watershed Team Office agreeing to pay all TVA administrative costs and the action was recommended for Board approval. Since that time Mr. Perry has contacted TVA's CS&M staff and congressional representatives asking for assistance in reducing TVA's administrative costs for this action. He is well aware of TVA's administrative cost recovery for land actions and that TVA probably would not have considered this action were it not for his position as general manager of a TVA distributor. TVA's VR and CS&M staff have been involved and aware of all RS actions to resolved this issues since it began in 2000.

Sheet1

RS Guidelines - 16.5.4.52 Board Action Checklist

SENSITIVE INFORMATION

	Board Meeting Items		Required
	Tract No. - XGIR-943RE, XGIR-666 S.1X, GIR-3948	Yes/No	Comments
1	Are all environmental clearances signed? If so, what level (CEC, EA, or EIS)? If not, when will it be completed?	Yes	CEC completed on this action.
2	Are there any potential attendees to the Board Meeting concerning this action? If so, person's name and related issues.	No	Proposed for Sequential Approval
3	Are you aware of any unresolved issues on the proposed action? If so, what are they?	No	N/A
4	Has the applicant been properly informed about reservoir level fluctuations? (year round water may not exist) If so, person which contacted?	Yes	Applicant has had an existing unpermitted dock at this location for several years and has seen water level first hand.
5	Was public review conducted for this action? If so, how and what were the comments (favorable/unfavorable)? If not, why?	No	The USFWS and TWRA reviewed the proposal and comments from both agencies were more unfavorable. Neither agency felt the public was gaining much by approval of this request. RS Mgmt determined that no public notices would be issued on this action due to its sensitivity.
6	Were local public officials, power distributor, and CS&ED informed of the action? If so, who and how? If not, why?	Yes	TWRA/ USFWS were informed and given the oppurtunity to comment. Kerry Brannon (CS&M) has been involved and kept abreast of this action through phone calls and e-mails since its beginning. The applicant is the GM of the Paris Board of Public Utilities.
7	Were the local Valley Relations Representatives informed of the action? If so who?	Yes	Paul Phelan
8	Would you suggest this item to remain on the next Board meeting agenda? If not, why?	No	This action is recommended for Sequential Approval.
9	What information are you aware of which would be nice to know, if you were presenting?	Yes	Mr. Perry is the Manager of the Paris Board of Public Utilities, a TVA distributor. This action will resolve a long standing V/E regarding his current unpermitted dock.
10	Is the applicant to pay fair market value, plus adm. costs? If so, has the applicant agreed verbally or by commitment letter? If verbal, did we confirm this with a letter?	No	The applicant has signed a commitment letter to pay all TVA administrative costs.
11	Please provide an electronic version of the vicinity and exhibit maps to Hugh Standridge.	X	Provided

Sheet1

12	**Has CFO staff reviewed and concurred with the proposed action? If not, what are the issues? If yes, please forward their concurrence with this sheet.**	Yes	**Provided**
13	**Please provide, with this form, the latest (electronic) version of any talking points or issue briefing paper for this action.**	X	**Provided**
14	**Please provide, with this form, 3 - 5 potential questions Bridgette may be asked and the answers for this action. Please send in a word document.**	X	**Provided**
15	**Please provide, with this form, the excel administrative cost tracking sheet for this action, along with an explanation of the administrative costs.**	X	**Provided**

April 13, 2009

Richard W. Moore, ET 4C-K

TVA COMMENTS ON DRAFT INSPECTION REPORT - 2008-12003 - REVIEW OF MAINTAIN AND GAIN TRANSACTIONS

This provides management's response to the subject draft inspection report dated March 20, 2009, issued by TVA's Office of Inspector General (OIG). The draft report makes numerous observations and contains three specific recommendations, which we agree with and plan to implement. I note that the report recognizes the good faith efforts of TVA staff to hold applicants to TVA's program standards, and recognizes staff's efforts not to show partiality based on the status of an applicant. However, we agree that improvements can and should be made to avoid the appearance of preferential treatment.

There are three recommendations in the draft report, summarized below in italics. TVA's comments follow each recommendation.

- *Eliminate the Maintain and Gain program and only consider changes to water access rights during the periodic update of the SMP.*

TVA has suspended the Maintain and Gain program, and based on the issues that have been identified in the implementation of this program, I plan to recommend to the Board that the program be terminated. As noted in your draft report, the Maintain and Gain program is based on staff findings regarding public benefits, including ecological, recreational, and environmental benefits. Since these are typically not quantitative benefits, the program, as it is currently designed, is difficult to administer and could raise questions of preferential treatment.

- *Alternatively, if the Maintain and Gain program is retained TVA should take specific actions to address policy and process concerns (described in detail on page 68).*

As stated above, TVA staff plans to recommend the termination of the Maintain and Gain program. If a future determination is made that a program is needed for water access rights, we will incorporate the suggestions in the report in the design of any such program that would be recommended to the Board. Also, if such a future program is needed, we will also recommend that any future Maintain and Gain activities be made public early in the application process and subject to Board approval to add public notice and transparency to the process.

- *Establish a clearly defined protocol which creates a procedure for identifying inherent conflicts of interest by those applying for any TVA benefit.*

We will develop, in coordination with the Audit, Governance, and Ethics Committee of the Board, a policy that will provide a means to identify the potential of actual or apparent conflicts of interest or the appearance of the exertion of undue influence on the part of persons applying for a TVA benefit. This policy would provide a process to determine that appropriate standards are applied and correct procedures are followed in the processing of such applications. This policy will also be coordinated with the OIG prior to implementation. We also plan to further emphasize identification and reporting of potential conflicts of interests in the annual ethics training that is taken by all TVA employees.

The draft report makes a number of additional observations that I would like to address. First, it points out a situation in which incorrect information was given and repeated to the media, and was never corrected. I understand that the final report will make a recommendation to address this. Specifically, you have informed us that you plan to recommend that a protocol be established that will require verification from more than one source before a statement is released to the media, and that some form of documentation be used to verify that this process was followed. I agree with this recommendation and plan to implement it. Although TVA makes substantial efforts to ensure that the information that it provides to the media and the public is accurate, we must do better. We do not have a process to correct erroneous information that was supplied by us or by others. We understand the importance of this issue to TVA's public reputation. I have directed that if it is determined that incorrect or misleading information is released by TVA, that error will be corrected as soon as it is discovered.

The draft report also notes that documentation regarding inquiries and incomplete 26a and other applications was not being maintained. To address this, a new Customer Interface Process was implemented in early 2008. This process applies to communications and transactions concerning land rights, permissions, commitments, land use requests, and 26a applications. The process requires TVA staff to document all inquiries into the system. I believe that this process should address the issues noted in the draft report.

The transactions discussed in the draft report deal with occasions where TVA staff provided erroneous information to potential applicants. The draft report notes that staff corrected the error regarding the Blackberry Cove property just prior to the potential applicant purchasing the property in question. On other occasions, TVA did not correct wrong information that was supplied. I agree with the report that TVA needs to develop a standard practice to address these types of situations. Therefore, I am directing the Vice President of Land and Water Stewardship to develop a process for review of the information that is provided to the public so that greater accuracy will be assured or disclaimers will be noted.

We appreciate the draft report's analysis of the issues surrounding the Maintain and Gain program, and its suggestions for improving TVA's processes.

Tom Kilgore

Tom Kilgore
President and Chief Executive Officer
WT 7B-K

cc: Director Robert M. Duncan
Director Thomas C. Gilliland
Director William B. Sansom
Director Howard A. Thrailkill
Maureen H. Dunn, WT 6A-K
Anda A. Ray, WT 11A-K