

Statement on FILO mitigation to the Interim Committee on Energy and Natural Resources

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Mr. Chairman and members of the Interim Committee, thank you for your interest in the subject of Compensatory Mitigation. My name is George Howard and I am Co-founder and CEO of Restoration Systems from Raleigh, North Carolina. Our firm has more than 100,000 acres of mitigation developed or “closed out” at more than ninety locations in nine states. Our industry is young, only 25 years old, and I have been involved since the beginning, when I discovered the new approach to the environment as a conservative staffer working in the US Senate in 1993.

If there is any lack of understanding of compensatory mitigation – you are not alone. Though the policies and tools to accomplish mitigation obligations are nearly 30 years old, they are not yet a commonly understood public policy tool. I hope our talks today are helpful to get everyone up to speed. Mitigation is as close to a “sacred” obligation as one will find in environmental policy and should be taken very seriously.

Mitigation is rooted in the Clean Water Act of 1972. Meeting the standards and timelines of mitigation are just as important as any other aspect of the CWA, including pollution limits on discharges and management of treatment plants. The law and regulations have required for 30 years that damaged resources be compensated foot for foot, acre for acre, with restored land and water to match the losses. Mitigation obligations were a result of a campaign pledge by former President George H. W. Bush to make “No NET Loss” of wetlands our national policy.

Significantly, and why I am here today, North Carolina operates a statewide FILO program just like Kentucky. The North Carolina Division of Mitigation Services – our FILO program – is a wild success. Since 1996 the program has received \$569 million in payments from developers and built more than 649 compensatory mitigation sites. Those sites resulted in four million feet of stream restored and 76,000 acres of land permanently protected. The program is widely praised and enjoys support from all stakeholders.

However, believe it or not, the NC FILO program was once extraordinarily controversial. Many news articles detailed the shortcomings of the program in the early 2000s. When the mitigation dollars crossed \$65 million in 2001, and only ten acres had been restored, our Governor at the time said to his agency heads...Easley story:

“Let me get this straight....we have all the money and too little mitigation, and these businesses have plenty of mitigation -- but no money. How about we buy from them? “

Governor Easley was dead right. And for the time being Kentucky’s FILO is in the same tough spot the NC FILO was 20 years ago. As with the NC program, staff has worked hard with the best intentions. However, more than 394,000 feet – or 74 miles! -- of stream restoration work remains outstanding, and 300,000 feet of that out of compliance with its governing document, which requires that the restored streams be “in the ground” within three years of the payment. 23 counties cannot use the program at all because of the backlog. This should be unacceptable in Kentucky.

But this situation is easily fixed. The solution that emerged in North Carolina is not complex and required no legislation. It was simply a change in the contracting and procurement approach. Over a period of five years North Carolina moved from “distributed contracting” for the all the various steps in mitigation -- identify the land, purchase the land, survey and map, design the restoration, build the site, monitor and care for the site -- to a more risk adverse system where mitigation providers with private employees guarantee the mitigation and perform the tasks I just listed for a flat price per foot. These contracts we require no change orders, are bonded and insured, and include a “payback” requirement for unfulfilled credit obligations.

It is important to note here: Rather than diminishing the our FILO program, our program grew dramatically over those years from seven to more fifty employees! We are here to make recommendations which will grow the KY FILO, just as we did in NC.

In advance of this meeting, I spoke with the KY FILO staff concerning procurement reform and the need for Full-Delivery contracting. The conversation was immensely encouraging for a near-term opportunity for our company to compete in an RFP to work and hire in Kentucky. Long term? Not as encouraging...

The program staff told me that of the \$165 million collected and unspent, only \$20 million was “unallocated” and available for Full Delivery. I recommend this committee carefully review the definition of “allocated” and see if you agree the money and jobs are likely to flow from the program at an acceptable pace. Allocated is not a business term. Allocated could mean the funds have been put into a line on a spreadsheet, not a paycheck for a track-hoe operator. I note, for instance, that more projects have been terminated, than constructed, in recent years. Terminated projects do not employ people, and the time and money spent on them has been wasted.

Specifically, as an employer wishing to hire in Kentucky, and with all due respect, I make the follow recommendations.

- Issue Full Delivery RFP’s in the areas with the greatest backlog.
- Empower and encourage the fee program employees, through statute, if necessary, to administer Full Delivery contracts.
- Add the necessary employees and adjust compensation and to attract and retain licensed professionals to administer a comprehensive purchasing program.
- Allow contractors to purchase the necessary land rights at free market prices – do not burden the land acquisitions with state procurement rules and appraised prices. This is a fantastic opportunity for rural landowners.
- Place the risk of compensatory mitigation credit delivery and all the unanticipated issues that arise at environmental restoration projects on the private sector -- and not on the FILO.
- Involve your DOT. No road work should ever be paused or reconsidered due to mitigation. You have a statewide FILO program and the Transportation Cabinet should utilize it.
- Petition the USACE to support KY cleaning up its balance of unfulfilled credits using Full Delivery.
- The committee should request a detailed accounting and definition of the “Allocated” dollars. What stage is the project or watershed in? How much money has been spent on “allocated” projects and on what? This information could be used to determine how much “allocated” funding is available for Full Delivery.

- Finally, after analysis of the data, and successful pilot RFPs, determine a point where “allocated” funds should be re-programmed to Full Delivery RFP’s. This should be at least half the unfulfilled balance of mitigation credits paid for by the public, or any project more than five years old, whichever is greater.