

MISSOURI COALITION FOR THE ENVIRONMENT

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April 11, 2007

VIA FACSIMILE: 660-438-6909

Mel B. Stanford
U.S. Army Corps of Engineers
Truman Regulatory Satellite Office
15837 Truman Road
Warsaw, Missouri 65355

Re: P. 2006-02749

Dear Mr. Stanford:

These comments are submitted on behalf of the Missouri Coalition for the Environment ("the Coalition"). By copy of this letter, the Coalition also submits these comments to the Missouri Department of Natural Resources for consideration in the applicant's water quality certification request.

Applicant Hickory Valley Group, LLC (the "Applicant") is seeking authority to fill another 1763 linear feet of a tributary to the Gasconade River after having illegally filled 4308 linear feet of tributary without a permit. The proposed activity involves completion of the last two sections of a larger subdivision. While the Corps and the state will be very tempted to issue this permit and the 401 certification without much ado, doing so without a proper showing that impacts are unavoidable and that unavoidable impacts are properly compensated for violates both federal law and federal and state guidance.

Rather than allowing Applicant to destroy over a mile of ephemeral stream, the Corps can take this opportunity to require the Applicant to actually protect what's left of the on-site segment.

Headwater Streams Should Be Protected

Both ephemeral and intermittent streams are vital components of the larger network of rivers within a watershed. Small streams such as those the Applicant proposes to destroy are the source of much of the nation's fresh waters. Each of our rivers, lakes and streams originates from much smaller streams. As such, the health of

these headwaters is critical to the health of the entire network. *Where Rivers Are Born.*¹ Small streams provide essential functions such as natural flood control, groundwater recharge, excess sediment and pollutant trapping, the recycling of nutrients, and the creation and maintenance of biological diversity. Headwaters help sustain the biological productivity of downstream rivers and lakes. *Id*

Land use changes, such as those proposed by the Applicant, impair the natural functions of headwaters and ultimately degrade downstream lakes and rivers. An altered stream channel is less effective at trapping sediment and recycling nutrients, leaving downstream lakes and rivers with poorer water quality, less reliable water flows and less diverse aquatic life. *Id.* Though these 1700 plus linear feet of ephemeral stream in the Gasconade River Watershed may seem insignificant to the Applicant, and even to the Army Corps of Engineers, they are part of a greater whole and should not be evaluated in isolation.

Applicant Must Be Required to Conduct a Rigorous Alternatives Analysis and To Avoid Adverse Impacts

Applicant did not bother to obtain a permit for previous work performed at this site. As such, we assume that an alternatives analysis has never been completed. Before the Hickory Valley Group can proceed, they must be required to conduct a proper alternatives analysis in accordance with the 404(b)(1) Guidelines. *40 CFR Subpart B, Section 230 et seq. (the "404(b)(1) Guidelines" or the "Guidelines").*

The 404(b)(1) Guidelines impose a mandatory duty upon permit applicants to take all appropriate and practicable steps to first avoid and then minimize adverse impacts to aquatic resources. Likewise, both the EPA and the Corps have issued a clear mandate regarding an applicant's duty to avoid adverse impacts to aquatic resources "to the maximum extent practicable." *Memorandum of Agreement between the EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines ("MOA").*² To be considered for permitting, a proposal must constitute the least environmentally-damaging practicable alternative. *404(b)(1) Guidelines.* Compensatory mitigation should be considered and authorized only for those adverse impacts shown to be unavoidable. The avoid-minimize-and-then-compensate model is thus a progressive one.

Contrary to common practice at the Corps, compensatory mitigation was never intended to be used as an offset to avoidable impacts. "To allow such mitigation proposals to determine the acceptability of a proposed discharge

¹ Meyer, Judy L., et al. (2003). "Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands." American Rivers and Sierra Club. [http://iowa.sierraclub.org/Steve-sierra%20web%20docs0526/WhereRivers Are Born.pdf](http://iowa.sierraclub.org/Steve-sierra%20web%20docs0526/WhereRivers%20Are%20Born.pdf).

² Memorandum of Agreement between the EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines." (February 6, 1990). [http://www.epa.gov/owow/wetlands/ regs/mitigate.html](http://www.epa.gov/owow/wetlands/regs/mitigate.html)

thwarts the objectives of the CWA.” *Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis*.³

The Corps is obligated to verify the accuracy of the alternatives analysis and to deny a permit when that analysis is insufficient. *See 40 CFR 1506.5(a) and (b); 33 CFR Part 325, App. B, 8(f)(2); Utahns v. United States, 305 F.3d 1152 (10th Cir. 2002) (rejecting agency finding of no practicable alternatives where applicant failed to meet its burden)*. “The burden of proof to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.” *404(b)(1) Guidelines, 61 Fed. Reg. 30,990, 30,998 (June 18, 1996) (citing 40 CFR 230.12(a)(3)(iv))*.

Again, Applicant must identify the least environmentally damaging practicable alternative, or that alternative that achieves the basic project purpose with the minimal adverse environmental impact. *Wetlands Protection Through Impact Avoidance*. Project purposes do *not* include a particular return on investment or a certain desired size requirement. *Wetlands Protection Through Impact Avoidance*. As such, a smaller return on investment does not render an alternative impracticable for the purposes of 404 permitting. *Id. at 5*. Similarly, the applicant’s financial standing is not applicable in determining whether the project purpose can be practicably achieved. *Id. at 13*.

For many years now, the Missouri Coalition for the Environment has been urging the Army Corps of Engineers and the Missouri Department of Natural Resources to put a stop to the piecemeal and unnecessary destruction of small streams. Denial of Applicant’s permit as proposed is an important step towards protecting these important aquatic resources. The alternatives analysis is more than a mere formality, but is instead a federally mandated duty imposed upon all applicants whose actions threaten to adversely impact our nation’s waters.

The Applicant should be required to reconfigure the layout of this development to avoid this tributary. Until the Corps starts treating headwaters as important, no developer is going to go out of his or her way to do so. We believe that requiring the Hickory Valley Group to conduct a proper alternatives analysis will demonstrate that the stream impacts can in fact be avoided.

Given the violations, this analysis should also be made available for public comment before a decision is issued. At a minimum, the resource agencies should be provided with an opportunity to review and comment on the alternatives analysis. If we don’t start following Clean Water Act regulations and require avoidance of unnecessary impacts now, we’ll never protect these dwindling resources.

³ Yocom, Thomas G., Leidy, Robert A., Morris, Clyde A. (1989). “Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis.” United States Environmental Protection Agency, Region IX, p. 4.

Compensatory Mitigation Plan Must Address Functional Replacement.

The primary goal of compensatory mitigation is to replace the functional values lost through permitted activities. *Memorandum of Agreement* (“MOA”);⁴ *ACE Guidance Letter*.⁵ Despite this clear directive from both the Corps and the EPA, Applicant proposes to compensate for the adverse impacts of this project with an array of methods that have little if any relationship to replacing lost stream functions. For instance, Applicant has proposed 51.63 acres of green space, a 2.71-acre detention pond, a .47-acre wetland, and in-lieu-fee mitigation for “any remaining project impacts.” Green space, detention ponds and a half-acre wetland are all inappropriate forms of compensation for the filling of 1763 linear feet of ephemeral stream and cannot possibly serve as authorized compensatory mitigation.

As noted above, ephemeral streams serve particular functions in river systems. If Applicant can show that any of the proposed impacts are truly unavoidable, it must then provide assurances that those unavoidable lost functions will be adequately compensated for.

Functional values must be measured in accordance with EPA and Corps guidance. Measures to accomplish an offset of unavoidable adverse impacts to existing aquatic resources “can be identified only through resource assessments tailored to the site performed by qualified professionals, because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field provided such assessments fully consider ecological functions included in the Guidelines.” *MOA*.

Applicant’s proposal to replace the existing 4 to 8 foot wide ephemeral segment with two man-made channels that are 25 and 65 to 85 feet wide respectively, is equally inappropriate and quite distressing. Applicant cannot simply create a wide linear ditch for storm water retention and call it stream mitigation. As eloquently put by the Corps itself: “Streams are complex ecosystems with morphological characteristics that are dependent on appropriate geomorphic dimensions, pattern, and profile as well as biological and chemical integrity. They are not simply storm water conveyances.” *Army Corps of Engineers Stream Mitigation Method* (emphasis added).⁶ If relocation is to be permitted, then Applicant must design the new reach “as close to a natural one as possible.” *State of Missouri Aquatic Resources Mitigation Guidelines*.

In-Lieu-Fee Arrangements Are Appropriate in Strictly Limited Situations

⁴ Memorandum of Agreement between the EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. (February 6, 1990). <http://www.epa.gov/owow/wetlands/regs/mitigate.html>.

⁵ Army Corps of Engineers Regulatory Guidance Letter, no. 02-2, December 24, 2002, p.2.

⁶ Department of Army, Corps of Engineers, State of Missouri Stream Mitigation Method (February 2007), p. 4.
<http://www.nwk.usace.army.mil/regulatory/compensatory%20mitigation/Missouri%20Stream%20Mitigation%20Method%20February%202007.pdf>

The public notice states that in-lieu-fee mitigation through the Missouri Conservation Heritage Foundation's Stream Steward Trust Fund is proposed for "any remaining project impacts." This statement is a puzzle as all project impacts should be set forth in the public notice in order to allow the public to prepare meaningful comments. 33 CFR 337.1 (a).

In lieu fee arrangements are also disfavored. Both the Corps of Engineers and the Environmental Protection Agency have made clear that on-site and in-kind compensatory mitigation should be required wherever practicable. *MOA; Guidance on In-Lieu-Fee Arrangements*.⁷ In-lieu-fee arrangements, while permissible, are the least preferable compensatory mitigation option given the uncertainty and temporal losses involved. Federal Guidance on the use of in-lieu-fee arrangements limits the use of in-lieu-fee arrangements to situations where the following conditions are met: 1) there is no practicable opportunity for on-site compensatory mitigation, 2) the in-lieu-fee arrangement is environmentally preferable to on-site compensation, 3) there is no mitigation bank serving the area of the permitted impacts, 4) the use of a mitigation bank serving an area outside of permitted impacts is not practicable or environmentally desirable and, 5) the in-lieu-fee arrangement provides in-kind restoration as mitigation. *Guidance on In Lieu-Fee Arrangements*, p 66915.

It is not clear from the public notice why the Applicant has proposed an in-lieu-fee arrangement. Before such a proposal can be considered, however, the Applicant (and, ultimately, the Corps) must demonstrate that the five conditions set forth above have been met. The Corps must also demonstrate that the in-lieu-fee arrangement will provide in-kind mitigation to replace the functional values lost through the filling of these ephemeral tributaries. Finally, before the Corps of Engineers can approve an in-lieu-fee mitigation arrangement, the Corps must ensure that any arrangement with the Stream Stewardship Trust Fund provides assurances of success and timely implementation. *Mitigation Banking Guidance*.⁸

The Corps Must Acknowledge and Consider These Public Comments

Despite having submitted public comments on 404 permit applications for years, the Coalition has never received an acknowledgment from the Corps, let alone a response to those comments. This failure violates the Corps' own regulations that require both acknowledgement and consideration of all comments received. 33 CFR 337.1(d) and (f). We look forward to your response.

⁷ Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers & Harbors Act, 65 Fed. Reg. 66914-66917.

⁸ Federal Guidance for Establishment, Use and Operation of Mitigation Banks. ⁸ Department of the Army, 60 Fed. Reg. 58606-58614 (November 28, 1995).

Thank you for your attention and this opportunity to comment.

Sincerely,



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