

# MISSOURI COALITION FOR THE ENVIRONMENT

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April 5, 2007

VIA FACSIMILE to 314-331-8741

Keith McMullen  
Assistant Chief/Supervisory Lead Project Manager  
U.S. Army Corps of Engineers  
1222 Spruce Street  
St. Louis, Missouri 63103-2033

Re: P-2615/Applicant: Bryan Benso

Dear Mr. McMullen:

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 Illinois Environmental Protection Agency for consideration in the agency’s water quality certification analysis.

Applicant Bryan Benso (the “Applicant”) is seeking authorization to destroy 1.24 acres of palustrine, forested wetlands for parking spaces and an additional apartment unit in a larger multi-unit apartment complex. Mr. Benso’s plans also involve a road crossing over Piles Fork Creek. The Coalition notes that the Applicant’s plans avoided a 1.14-acre wetland on the site. While we commend the protection of this important resource, rather than rewarding the developer for doing what is already required by the Clean Water Act, we think the 1.24 acres of forested wetlands can and must be avoided as well. The burden is on the Applicant and on the Corps of Engineers to show why the proposed impacts cannot be avoided.

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

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. *40 CFR Subpart B, Section 230 et seq. (the “404(b)(1) Guidelines” or the “Guidelines”).* 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*

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*Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines ("MOA").*<sup>1</sup> 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 thwarts the objectives of the CWA." *Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis.*<sup>2</sup>

The 404(b)(1) Guidelines impose an additional burden upon an applicant whose actions threaten to impact the nation's wetlands. According to the Guidelines, when a project is not water dependent,<sup>3</sup> there is a presumption in favor of an alternative site. The Guidelines presume first, that an alternative to the filling of wetlands is available, and second, that the alternative site will cause less harm to the aquatic environment. *MOA.* The Guidelines further discourage wetland destruction as contrary to the public interest. *Buttrey v. United States, 690 F. 2d 1170, 1180 (5<sup>th</sup> Cir. 1983) (citing 33 C.F.R. § 320.4(b)(1)).*

Because this project is clearly not water dependent, the Guidelines' presumption in favor of an alternative applies. While it may be easier for the Applicant to fill the wetlands as proposed, the Clean Water Act prohibits the destruction of wetlands for mere convenience. "It would hardly be putting the case too strongly to say that the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so." *Buttrey v. United States, 690 F. 2d at 1180 (citing 40 C.F.R. §230.1(c)).* The Corps must presume that an alternative is available until the Applicant can demonstrate (with evidence and careful analysis) otherwise. *40 CFR §230.10(a)(3); National Wildlife Federation v. Whistler, 27 F. 3d 1341,1344 (8<sup>th</sup> Cir. 1994).*

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 (10<sup>th</sup> 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

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<sup>1</sup> 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>

<sup>2</sup> 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.

<sup>3</sup> The 404(b)(1) Guidelines define water dependency as an activity requiring access or proximity to or siting within a special aquatic site to fulfill its basic project purpose. 40 CFR 230.10(a).

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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.

The geographic scope of the alternatives analysis should include all areas that would be reasonable to consider in the particular industry. *Id.* at 11. The developer may be required to consider other nearby communities within which housing could be built practicably without filling wetlands or other waters of the United States, or where such filling would have less adverse environmental impacts. *Id.* at 12.

For many years now, the Missouri Coalition for the Environment has been urging the Army Corps of Engineers to put a stop to the piecemeal and unnecessary destruction of small streams and wetlands. 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.

In this case, Applicant must show why he cannot alter his plan to avoid the 1.14-acre forested wetland. The importance of forested wetlands and the difficulty of replacing these wetlands when lost are well documented.<sup>4</sup>

The Applicant can certainly reconfigure the layout of this development, decrease the proposed number of units or parking spaces or even increase the density of the complex to avoid the wetland. Until the Corps starts treating wetlands as important, no developer is going to go out of his or her way to do so. We believe that requiring Mr.

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<sup>4</sup> USGS. Patuxent Wildlife Research Center. Perry, Jacobs, Pugh, and Osenton. “Evaluation of Forested Wetlands Constructed For Mitigation in Comparison to Natural Systems” <http://www.pwrc.usgs.gov/resshow/perry/forwetlands.htm>; United States Department of Agriculture. “Forested Wetlands” [http://www.na.fs.fed.us/spfo/pubs/n\\_resource/wetlands/index.htm](http://www.na.fs.fed.us/spfo/pubs/n_resource/wetlands/index.htm); Robb, James T. (2002). “Assessing Wetland Compensatory Mitigation Sites to Aid in Establishing Mitigation Ratios. *Wetlands* 22(2), pp. 435-440; Michigan Department of Environmental Quality (2001). “Wetland Mitigation and Permit Compliance Study”; Brown, Stephen C. and Veneman Peter L.M. (2001). “Effectiveness of Compensatory Wetland Mitigation in Massachusetts, USA.” *Wetlands* 21(4), p. 508-518.

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Benso to conduct a proper alternatives analysis will demonstrate that the wetland impacts can in fact be avoided.

Both the Army Corps of Engineers and the Illinois EPA have an opportunity to protect Illinois' wetlands by requiring the Applicant to conduct a thorough alternatives analysis, and by doing so, place the burden upon Bryan Benso to prove that his proposal is in fact the least environmentally-damaging practicable alternative. If we don't start following Clean Water Act regulations and require avoidance of unnecessary impacts now, we'll never protect this dwindling resource.

### **Army Corps of Engineers' Guidance Requires On-Site Mitigation Where Practicable**

Applicant has proposed to purchase credits from an unspecified mitigation bank. Both the federal guidance on mitigation banking and the Corps' guidance on compensatory mitigation favor on-site mitigation. *Federal Guidance for Mitigation Banks*, 60 Fed. Reg. 58605-58614 (November 28, 1995) ("*MB Guidelines*");<sup>5</sup> *United States Army Corps of Engineers Regulatory Guidance Letter 02-2* (December 24, 2002) ("*RGL 02-2*"). Off-site mitigation is permissible 1) when there is no practicable opportunity for on-site mitigation or 2) when off-site mitigation provides more watershed benefits than on-site mitigation. *RGL 02-2*. As discussed below, mitigation banking should not be utilized as compensation when credits are not available in advance of adverse impacts.

In evaluating compensatory mitigation options, the Corps must consider: 1) the likelihood for ecological success, 2) ecological sustainability, 3) practicability of monitoring and maintenance, and 4) proximity to the watershed where related impacts occur. *RGL 02-2*. In this case, the Corps must consider all of these factors and also make a finding that on-site mitigation is not practicable or that the proposed mitigation banking credits will provide more watershed benefits than any on-site or close-to-the-site mitigation.

We do not know why the name of the mitigation bank has not been specified and fear that this reflects a current lack of available credits. Perhaps it was simply an oversight in the preparation of the public notice. If, however, the failure to specify which mitigation bank will be utilized reflects a lack of currently available credits, then use of a mitigation bank in this case is inappropriate under the Mitigation Banking Guidelines. *MB Guidelines*.

Mitigation banking was envisioned as a means of reducing uncertainty in the 404 permit program. *MB Guidelines*. As such, mitigation banks should be constructed and be functioning in *advance* of project impacts. *Id.* (emphasis added). Permitted activities cannot commence unless there are mitigation credits currently available for sale to the

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<sup>5</sup> Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58605-58614 (November 28, 1995). <http://www.epa.gov/owow/wetlands/guidance/mitbankn.html>.

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permit recipient. Both the Corps and the EPA have stressed the importance of advance mitigation as a means of improving the efficacy of the program in replacing lost wetland functions within a watershed. *MB Guidelines*. Reducing uncertainty in the mitigation banking program is of particular importance given the questionable success of compensatory mitigation efforts as a whole.<sup>6</sup>

Finally, the Corps should determine if Piles Fork Creek and both on-site wetlands are sufficiently buffered. The issuance of this permit is an opportunity to obtain more protection for the Creek and the wetlands by requiring the Applicant to provide protective buffers.

Thank you for your attention and this opportunity to comment.

Sincerely,



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<sup>6</sup> National Academy of Sciences (2001). "Compensating for Losses Under the Clean Water Act." Executive Summary at <http://www.nap.edu/catalog/10134.html>; See also footnote 4 supra.