

MISSOURI COALITION FOR THE ENVIRONMENT

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April 19, 2007

VIA FACSIMILE: 816-389-2023

Brian Donahue
U.S. Army Corps of Engineers
Regulatory Branch
700 Federal Building
601 East 12th Street
Kansas City, Missouri 64106

Re: P. NWK-2007-268

Dear Mr. Donahue:

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.

South Lake Winnebago Partners, LLC (the “Applicant”) is seeking authority to relocate a dam on Lake Winnebago in Cass County, Missouri. By proposing to move the dam approximately one mile downstream from the existing dam, Applicant will be expanding the size of the lake from 244 acres to 416 acres and, in the process, filling nearly 16,000 linear feet of existing stream. The project would also destroy over 16 acres of existing wetlands. The scope of this project and its impacts go far beyond the typical 404 application to the Kansas City District. Both the Corps and DNR must surely agree that a project of this magnitude demands great scrutiny and meaningful public engagement. Unfortunately, the public notice as prepared provides insufficient time and information for meaningful public input. Only an environmental impact statement and a public hearing can ensure that project alternatives and impacts are adequately assessed. The public has a right to know all of the facts and to have a say in how our common resources are utilized.

The Corps Must Prepare an Environmental Impact Statement Before It Can Authorize a Project of This Magnitude

The National Environmental Policy Act (NEPA) requires that federal agencies prepare an environmental impact statement (EIS) prior to authorizing activities that significantly affect the environment. 42 U.S.C. § 4332(2)(C). The EIS must consider the direct, secondary and cumulative effects of the project. *Id.*

As proposed, Applicant's project threatens to significantly impact the environment. As discussed above, the dam relocation and lake expansion will impact an estimated 15,879 linear feet of perennial, intermittent and ephemeral streams. Though the public notice does not sufficiently explain precisely how these streams will be impacted, it is clear that most, if not all of them, will be inundated by the expanded lake. The Applicant is also proposing to destroy 15.28 acres of emergent wetlands and 1.29 of forested wetlands. The importance of each of these types of streams and wetlands is by now well established. *Where Rivers Are Born*,¹ as is the high failure rate at compensatory mitigation sites.²

Equally important, the adverse effects of this project will be felt beyond the linear feet and acreage set out in the public notice. For instance, it appears that the amount of outflow from the expanded lake will be significantly greater than the current flow. The impact of this greater flow rate on the downstream segment must be carefully examined. More flow can lead to increased erosion and sedimentation and the resulting destruction of in-stream habitat.

Similarly, the damming of streams poses numerous problems for aquatic species and wildlife both upstream and downstream of the dam. By blocking the free flow of water, the dam will remove the vital flushing function the as-yet-disturbed tributaries play. Instead of transporting and dispersing harmful sediment and nutrients downstream, the pollutants will accumulate upstream and behind the dam. Damming also causes changes in the temperature, dissolved oxygen levels, turbidity and salinity of the impounded and upstream waters. Because of these water quality impacts, when the impounded water is released from the detention basins, it will likely be lethal to many downstream fish and other aquatic organisms. Damming prevents the natural transport of organic matter that feeds the downstream aquatic community. It will also prevent fish and other species from traveling downstream of the structure. The Environmental Protection

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). See *Exhibit A on enclosed CD*.

² National Academy of Sciences (2001). "Compensating for Wetland Losses Under the Clean Water Act"; (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.

Agency ("EPA") has recommended avoiding dam construction whenever possible.³ By expanding this lake and damming more of the stream, we only exacerbate the above impacts.

Applicant's proposed project will also induce a number of secondary effects on the environment that must be considered. As noted in the public notice and by the Kansas City District office, the lake is being expanded in order to serve a 400-unit residential subdivision that has been proposed for an area around the expanded lake. The runoff from this area is likely to be dramatically higher than the current runoff and, again, threatens to exacerbate erosion, sedimentation, and habitat destruction. How will the waste from these homes be treated? Is a new waste water treatment plant under consideration? Will septic systems be installed? Neither the Corps nor the state can ignore these secondary effects or the implications they hold for water quality.

Finally, both NEPA and the Corps' own regulations require an analysis of cumulative impacts. *33 C.F.R. § 320.4(a)(1)*. For example, how will this project add to the negative effects of the historical loss of wetlands in this area and to the negative effects of the loss of stream functions, including the riparian habitat?

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

Before Applicant can proceed, it 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")*. According to the Kansas City office, no alternatives analysis has been submitted by the Applicant.

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")*.⁴ 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. Like so many applicants, however, South Lake Winnebago has jumped straight to compensatory mitigation without conducting the requisite alternatives analysis.

³ <http://www.epa.gov/OW/you/chap2.html>

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>

The Corps is obligated to verify the accuracy of the alternatives analysis once submitted, 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)).*

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 need for this project is highly questionable and we believe that a carefully conducted alternatives analysis will reveal that these impacts can and should be avoided.

The Proposed Project is Not in the Public Interest and Should Not Be Permitted

A Section 404 permit cannot be issued if it would be contrary to the public interest. A determination of the impact on the public interest "requires that the asserted benefits of the project be balanced against the "reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). Destroying invaluable public resources to enrich a few developers is hardly an equitable tradeoff. 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 streams and wetlands. Denial of Applicant's permit as proposed is an important step towards protecting these important aquatic resources.

Applicant Must Submit Compensatory Mitigation Plan & Address Functional Replacement

At this time, Applicant's mitigation plan is merely conceptual. As currently proposed, however, the mitigation measures are insufficient and contrary to Missouri's Aquatic Resources Mitigation Guidelines. For instance, while the guidelines call for a minimum mitigation ratio of 2:1 for wooded wetlands, Applicant has proposed a 1:1 ratio for the forested wetlands its project will destroy. Mitigation for emergent wetlands must utilize a minimum ratio of 1:1. It is not clear, however, where the Applicant is proposing to mitigate. Because on-site, in-watershed, and concurrent mitigation are preferred, the guidelines allow for an increase in mitigation ratios when these preferences are not met. If Applicant is proposing mitigation outside of the impacted watershed then the mitigation ratio for both forested and emergent wetlands should be increased accordingly.

Applicant's compensatory mitigation plan must also address functional replacement, including both stream and wetland functions. *Memorandum of Agreement* ("MOA");⁵ *ACE Guidance Letter*.⁶ The EPA and the Corps have provided clear and specific guidance regarding the measurement of functional values in an attempt to ensure more appropriate compensation. 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*. The Corps' Stream Mitigation Method for the State of Missouri also requires a functional assessment for purposes of stream mitigation. *DOA Stream Mitigation Method*.⁷

In addition to assessing on-site wetland and stream functions, Missouri's Aquatic Resources Mitigation Guidelines require the following additional elements be addressed in the mitigation plan:

1. Statement of the location and description of the baseline elevation and hydrology of the mitigation site;
2. Detailed construction plan with post-construction contour map, detailed location map and as built drawings;
3. Plans for establishment of vegetation including what, where and when if planting is proposed. Also, detailed drawings of planting plan and any proposed structures;
4. Description of a mitigation monitoring program;
5. Performance standards for site grading, hydrology and plant community establishment, composition and survival;
6. Contingency plan;
7. Guarantee that the work will be performed as planned; and
8. Provisions for long-term management and maintenance.

Should this project be permitted and compensatory mitigation be deemed appropriate, both the Corps and DNR should ensure that Applicant submit a detailed and comprehensive mitigation and monitoring plan before the permit is issued. Only through better planning, monitoring and enforcement will we see higher success rates at compensatory mitigation sites.

⁵ 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/reg/regs/mitigate.html>.

⁶ Army Corps of Engineers Regulatory Guidance Letter, no. 02-2, December 24, 2002

⁷ Department of Army, Corps of Engineers, State of Missouri Stream Mitigation Method. <http://www.nwk.usace.army.mil/regulatory/compensatory%20mitigation/Missouri%20Stream%20Mitigation%20Method%20February%202007.pdf>

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

The public notice states that Applicant has proposed in-lieu-fee mitigation through the Missouri Conservation Heritage Foundation's Stream Steward Trust Fund. In lieu fee arrangements should be the compensatory mitigation option of last resort.

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*.⁸ 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 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*.⁹

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)*. Again, the Coalition reiterates its request for a public hearing in this matter. We look forward to your response.

⁸ 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.

⁹ Federal Guidance for Establishment, Use and Operation of Mitigation Banks. ⁹ 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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VIA E-MAIL

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