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Justin Hughes
U.S. Army Corps of Engineers
Kansas City Regulatory Office
601 East 12th Street
Kansas City, Missouri, 6410

Via email: justin.w.hughes@usace.army.mil

Re: Permit Number: NWK-2015-316

Comments for PG Partners, LLC
Clean Water Act, Section 404 Permit Application

Dear Mr. Hughes:

Great Rivers Environmental Law Center (“Great Rivers”) and the Missouri Coalition for the Environment (“MCE”) (collectively referred to herein as the “Commenters”) are pleased to submit the following comments regarding Clean Water Act (“CWA”), Section 404 permit application and public notice, NWK-2015-316. The applicant, PG Partners, LLC, proposes to construct the Gateway Village Mixed Use Development in Grandview, Missouri. The project will result in the placement of fill into 3.3 acres of wetlands and approximately 2,550 linear feet of ephemeral stream. The project will also result in temporary impacts to 180 linear feet of ephemeral streams to construct sewer lines.¹ We request that the U.S. Army Corps of Engineers (“Corps”) and the Missouri Department of Natural Resources

¹ Public Notice, p. 1.

(“MDNR”) consider the following comments before deciding whether to grant the applicant a 404 Permit and Clean Water Act, Section 401 Water Quality Certification (“401 Certification”), respectively.

The Corps should reissue the Public Notice to conform with its regulations because it fails to provide any explanation of avoidance of adverse impacts and the discussion of minimization of adverse impacts only relates to the temporary impacts associated with the sewer lines. The Corps should not grant the 404 Permit because the proposed project does not comply with the 404(b)(1) Guidelines by failing to avoid and minimize adverse impacts to aquatic ecosystems and by violating water quality standards. Moreover, the project is not in the public interest.

I. Avoidance and Minimization Are Not Discussed in the Public Notice, Which Renders it Insufficient

The Public Notice does not provide any explanation for how adverse impacts have been avoided. Additionally, the only discussion related to minimization of impacts relates to the 180 linear feet of temporary impacts needed for construction of sewer/utility lines for the project, completely ignoring the larger quantity of permanent impacts that will be caused by the proposed project. According to federal regulation, “[f]or an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for.”² Moreover, the public notice must “provide enough information to enable the public to provide meaningful comment on the proposed mitigation.”³ The public notice must contain a statement explaining how the applicant addressed *all three* steps of mitigation required by the 404(b)(1) Guidelines: avoidance, minimization, and compensation. The Public Notice describes how the impacts are to be compensated for, but does not mention anything regarding avoidance or minimization of permanent impacts. Therefore, the public cannot provide meaningful comment on the proposed project and the public notice should be reissued to address these shortcomings and allow for meaningful public comment.

II. The Proposed Project Fails to Comply with the 404(b)(1) Guidelines

The proposed project does not comply with the 404(b)(1) Guidelines because it fails to avoid and minimize adverse impacts to aquatic ecosystems and violates water quality standards, and the permit should therefore be denied.

² 33 C.F.R. § 332.4(b)(1).

³ *Id.*

A. Avoidance and Minimization

The proposed project fails to comply with the 404(b)(1) guidelines' restrictions on discharge. The guidelines bar the discharge of dredged or fill material unless appropriate and practicable steps have been taken to avoid and minimize the potential adverse impacts of the discharge on the aquatic ecosystem.⁴ Additionally, the 404(b)(1) Guidelines contain a presumption that if a proposed project is not a water dependent activity, then practicable alternatives to the project exist. Water dependent activities are those that "require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose...."⁵ The twenty-nine (29) wetlands and ten (10) ephemeral streams identified on the project site are considered special aquatic sites according to 40 C.F.R. 230, Subpart E. Because the project does not require siting in a special aquatic site, it is not a water dependent activity. Therefore, it is presumed that practicable alternatives exist for the project that will not impact special aquatic sites.

The applicant must submit a thorough alternatives analysis to the Corps, proving no practicable alternatives exist, before any decision is made by the Corps to grant a 404 permit. This analysis must include alternatives for avoiding adverse impacts to wetlands and headwater ephemeral streams by locating the project on other practicable sites. The Corps "clearly violates the CWA regulations, and therefore its conduct is arbitrary and capricious, when it permits a developer to obtain a permit on its chosen site because that site is the 'most practicable' or 'most profitable,' if development of that site will result in greater environmental damage than would be realized at another site."⁶ Presumably, other land in the vicinity is available that would serve the purpose of the intended project that would not impact as many wetlands and headwater ephemeral streams. Unless this presumption is clearly rebutted, the Corps should deny the project on this ground alone.

Assuming that no other practicable site exists that would avoid more impacts to wetlands and headwater ephemeral streams, the proposed project fails to minimize adverse impacts to the aquatic ecosystem on the proposed project site. Of the 29 wetlands comprising 3.3 acres identified on the proposed project site, the project will permanently destroy all 29 wetlands and 3.3 acres. Of the 2,730 linear feet of ephemeral streams located on the project site, 2,550 linear feet will be permanently destroyed. These permanent impacts from the proposed project can hardly be described as minimizing adverse impacts to the aquatic ecosystem.

⁴ 40 CFR 230.12 (a)(3)(i), 40 C.F.R. § 230.10(d).

⁵ 40 C.F.R. § 230.10(a)(3).

⁶ *Sierra Club v Flowers*, 423 F. Supp. 2d 1273, 1351-52 (S.D. Fla. 2006).

If any practicable alternatives, either through avoidance or minimization, exist that would not completely and permanently destroy headwater ephemeral streams and wetlands, the permit application for the project, as proposed, should be denied.

B. Water Quality Standards

The permit as proposed would contravene the 404(b) Guidelines' prohibition against issuing permits that cause or contribute to a violation of state water quality standards or that cause or contribute to a significant degradation of waters of the United States.⁷ The Little Blue River is already listed as "impaired" by the State of Missouri under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d) and as a "Metropolitan No-Discharge" stream under 10 CSR 20-7.031(7) & (Table F), due to extensive losses of wetlands and riparian habitat in the past and continued urbanization pressures.⁸ Allowing additional degradation of wetlands and streams only worsens this impairment through increased runoff and discharges of pollutants such as bacteria, sediment, chlorides, nutrients, pesticides, herbicides, and heavy metals. The Corps' issuance of the permit as proposed will cause and contribute to a violation of the Missouri water quality standards, as well as a significant degradation of waters of the United States, in violation of the Section 404(b)(1) Guidelines.

III. The Proposed Project Is Not In The Public Interest

PG Partners, LLC should not be granted a permit under Section 404 of the Clean Water Act for its proposal to construct a commercial retail development in our nation's streams or wetlands because it is not in the public's interest. According to federal regulation, an application to the Department of the Army for a 404 Permit must be evaluated to determine if the impacts that would occur as a result of granting a permit for a project are contrary to the public interest. 33 C.F.R. 320.4(a)(1).

Impacts to 2,550 linear feet of headwater ephemeral streams and 3.3 acres of wetlands located on an impaired waterway are significant detriments to the public in the area. These natural features provide a significant public benefit and are difficult to replace. Wetlands provide the functions of reducing downstream flooding by capturing stormwater and slowly releasing it. This project will no doubt contribute to such stormwater runoff into an already impaired waterway. Wetlands also provide wildlife habitat and food supply for animal species, break down pollutants to improve water quality, and support biodiversity. If these wetland and stream resources were destroyed, it would violate Missouri's water quality standard

⁷ 40 C.F.R. § 230.10(b) and (c).

⁸ Although the lower reach of the Little Blue River below Longview Dam is listed, the water quality of the higher reach that will be impacted by this project no doubt affects the water quality of the lower reach.

that requires that “[w]aters shall be free from physical, chemical, or hydrologic changes that would impair the natural biological community....” 10 C.S.R. 20-7.031(3)(G). Removal of these natural features would exacerbate the effects of urbanization on the local watershed, resulting in harm to water quality as well as disruption of the biological community.

Allowing the applicant to eliminate resources in the project area’s watershed will not support the Clean Water Act’s goal of restoring and maintaining each watershed’s “chemical, physical, and biological integrity....” 33 U.S.C. 1251(a). A decrease in headwater streams and wetlands leads to an increase in runoff pollutants such as chlorides, nutrients, pesticides, herbicides, heavy metals and bacteria. If the detriment to important natural resources such as wetlands and streams is weighed against the benefit of having a commercial retail development built, it is clear that it is in the public’s interest not to destroy resources that are difficult to replace, especially given the already degraded condition of local waterways. Commercial retail developments can be built practically anywhere. Streams and wetlands cannot.

Conclusion

For the foregoing reasons, the Commenters suggest the Corps deny a 404 permit to applicant as contemplated in the Public Notice because the project is contrary to the 404(b)(1) Guidelines and is not in the public interest. Moreover, the public notice is insufficient to allow for meaningful comment on this project and should be reissued with greater detail.

Sincerely,



Bob Menees
Staff Attorney