

September 3, 2013

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Rock Island District  
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*Via postal mail*

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*Re: Permit Number: CEMVR-OD-P-2011-1447*

Founding President  
Lewis C. Green, 1924-2003

**Comments for the Hunt-Lima Drainage & Levee District's  
Clean Water Act, Section 404 Permit Application**

Dear Colonel Deschenes:

Great Rivers Environmental Law Center ("Great Rivers") is pleased to submit the following comments regarding the Hunt-Lima Drainage & Levee District's ("Levee District") application for a Clean Water Act, Section 404 Permit ("404 Permit") to perform levee improvements that would destroy 0.78 acres of forested wetland and 7.25 acres of emergent wetland. We request that the U.S. Army Corps of Engineers ("Corps") and the Illinois Environmental Protection Agency ("IEPA") consider the following comments before deciding whether to grant the Levee District a 404 Permit and Clean Water Act, Section 401 Water Quality Certification ("401 Certification"), respectively.

**I. It Is Not in the Public Interest to Grant the Levee District a 404  
Permit for its Project**

The Hunt-Lima Drainage & Levee District should not be granted a permit under Section 404 of the Clean Water Act for its proposal to dredge in our Nation's 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 applicant's project impacts are contrary to the public interest. 33 C.F.R. 320.4(a)(1).

According to the Public Notice, the Levee District's dredging operations would destroy 0.78 acres of forested wetland and 7.25 acres of emergent wetland. Public Notice, p. 2. Important riparian habitat would similarly be destroyed. An undisclosed quantity of wetland acreage will also be temporarily impacted. *Id.* These natural features provide



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significant public benefit and are difficult to replace. Wetlands provide the function of reducing downstream flooding by capturing stormwater and slowly releasing it. They also provide wildlife habitat and food supply for animal species, break down pollutants to improve water quality and support biodiversity. If these wetlands were destroyed, it would violate Illinois' antidegradation policy. Illinois regulation states, "[e]xamples of degradation of existing uses of the waters of the State include...an action that would result in the deterioration of the existing aquatic community..." 35 Ill. Adm. Code 302.105(a)(1). Removal of these natural features would exacerbate the effects of pollution downstream, resulting in harm to water quality as well as disruption of biological communities. A decrease in wetlands leads to an increase in pollutants in our waters including chlorides, nutrients, pesticides, herbicides, heavy metals and bacteria. Raising the height of levees also exacerbates downstream flooding. If the detriment to important natural resources such as wetlands is weighed against the Levee District obtaining dredged material from a more convenient location, 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 the Mississippi River. It is also in the public's interest not to intensify downstream flooding that could harm public safety and infrastructure. Flooding populated communities is much more dangerous than any impact that could occur to agricultural lands. The Hunt-Lima Drainage & Levee District's project is not in the public interest and, therefore, a 404 Permit should not be issued for the project as currently proposed.

## **II. The Applicant Must Avoid, Minimize and Compensate for Potential Impacts**

### **A. Avoidance**

The Hunt-Lima Drainage & Levee District should not be granted a 404 Permit for its currently proposed project if there are practicable alternatives that would avoid destroying wetlands. The applicant must submit an alternatives analysis for its project to be in compliance with 404(b)(1) Guidelines ("Guidelines"). According to a Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency, to achieve the Clean Water Act's objective of restoring and maintaining "the chemical, physical and biological integrity of the Nation's waters," 404 Permit applicants must avoid, minimize and, as a last resort, compensate for project impacts to aquatic ecosystems.<sup>1</sup> An alternatives analysis would provide the basis for determining whether any impacts to the Nation's waters could be avoided.

The Guidelines require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). In the Public Notice, the Levee District has discussed only one alternative to avoid wetland impacts, which is to obtain dredged material from the Corps of Engineers' navigation dredging activities. Public Notice, p. 2. Another practicable alternative to the Levee District's project would be to obtain dredged material from an area of the Mississippi River where no wetlands would be impacted and have that material

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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://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm#5>

transported to the levee sites. The Levee District could purchase this land, if needed. An alternative is practicable if:

...it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonable be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

40 C.F.R. 230.10(a)(2). An alternative cannot be considered impracticable if it results in an increase in cost or if the applicant is unwilling to pursue it. The burden is on the applicant to show no practicable alternatives exist. As the Guidelines state, “[t]he 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 C.F.R. 230.12(a)(3)(iv)).

There is a presumption that if a project activity is not a water dependent activity, then practicable alternatives to the project exist. Water dependent activities are those that do “not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose....” 40 C.F.R. 230.10(a)(3). The wetlands that would be impacted by the Levee District are considered special aquatic sites within the meaning of 40 C.F.R. 230, Subpart E. The Levee District’s sand dredging is not a water dependent activity that requires siting within a special aquatic site. Dredging can take place in locations that are not special aquatic sites. Therefore, it is presumed that practicable alternatives exist to go forward with the project in a manner that will not impact wetlands. The Levee District must submit a thorough alternatives analysis to the Corps, proving no practicable alternatives exist before any decision is made by the Corps to grant the Levee District a 404 Permit. If any practicable alternatives do exist that would not destroy wetlands, the permit application for the project, as proposed, should be denied.

#### B. Minimization

In the event no practicable alternatives exist to completely avoid destroying the wetlands at the project site, the Levee District must do everything it can to minimize these impacts through project modifications or the addition of permit conditions. According to 40 C.F.R. 230.10(d), “...no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” The Levee District could dredge different areas that would impact fewer acres of wetlands. The dredge discharge pipe could be constructed in a way that would avoid woodlands. The project could be scaled down to build a levee that is not as high as the one currently proposed, thus requiring less dredging. The Guidelines provide a host of other methods to minimize impacts to aquatic resources that the Levee District could utilize in its project plan. See 40 C.F.R. 230, Subpart H.

### C. Compensation

If the Levee District's destruction of wetlands is unavoidable and all measures to minimize impacts have been taken, then compensation for the destruction of the remaining resources must be adequate to fulfill the federal government's policy of maintaining "no net loss" of wetland acreage. The Memorandum of Agreement between EPA and the Corps states that "[a]ppropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required."<sup>2</sup> Furthermore, the Guidelines state:

Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.

40 C.F.R. 230.91(c)(3). The Levee District's mitigation plan will not conform to the 404(b)(1) Guidelines if the mitigation ratios that are being proposed to offset unavoidable aquatic resource impacts are insufficient. Federal regulation stipulates:

The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

40 C.F.R. 230.93(f)(2). The Levee District's proposed mitigation plan states that forested wetland will be replaced at a 3:1 ratio and that emergent wetland will be replaced at a 1:1 ratio. The acreage of forested wetland that will be impacted is 0.78. If this is to be replaced at a 3:1 ratio, 2.34 acres of forested wetland must be established. However, according to the mitigation plan, only 2.28 acres of forested wetland will be established. This is a net loss of wetland acreage and does not conform to EPA's Memorandum of Agreement with the Department of the Army. *See* footnote 1. Because the 404(b)(1) Guidelines have not been fulfilled, the mitigation plan is insufficient and the Levee District should not be issued a 404 Permit.

Furthermore, there is an undisclosed quantity of wetland acreage will be temporarily impacted. The Public Notice states:

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<sup>2</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://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm#5>

The wetlands will be restored to their original contours allowing existing dominants to re-establish. The original grade and contours will be established within 30 days and the area re-seeded within 7 days after grading occurs. If grading does not occur during the growing season, appropriate erosion control measures will be used. Re-seeding will be performed during the next optimal seeding period.

Public Notice, p. 2. Nothing in the mitigation plan proposes to mitigate for the temporal loss of resource function from these impacts, or for the difficulty of establishing the desired aquatic resource type and function caused by these impacts as required by 40 C.F.R. 230.93(f)(2). This must be corrected before the Levee District is issued a permit.

### **III. Other Considerations**

Finally, the following stipulations should be required of the applicant:

- If a 404 Permit is granted, it should be consistent with any final mitigation plan and/or 401 Certification granted by the State.
- Any mitigation that is undertaken for *unavoidable* wetland losses should be protected by a permanent conservation restriction for aquatic habitat, wetlands protection and wildlife purposes only. It should be filed and recorded as a deed restriction on the property in perpetuity.
- In addition to any Clean Water Act Section 404 or 401 requirements that must be fulfilled, the Levee District should apply for a Clean Water Act, Section 402 NPDES Permit if required by law.

### **IV. Conclusion**

Great Rivers appreciates the opportunity to comment on this Clean Water Act, Section 404 Permit application, and we respectfully request that the Corps and IEPA consider our input with respect to the impacts of the Hunt-Lima Drainage & Levee District's project before granting a 404 Permit or 401 Certification.

Sincerely,



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cc: Illinois Environmental Protection Agency, Bureau of Water, Watershed Management Section