

November 23, 2019

U.S Army Corps of Engineers, Louisville District
ATTN: Ms. Sarah Atherton, CELRL-RDS, Rm 752
P.O. Box 59
Louisville, KY 40201-0059

By email to: lrl.regulatorypubliccomment@usace.army.mil

RE: Public Notice ID No. LRL-2019-444-sea

Dear Ms. Atherton,

These comments are submitted in response to the request for a permit by Nucor Corporation to discharge dredged and fill material into 26.6 acres of jurisdictional wetlands and 10,386 linear feet of jurisdictional streams and to impact 35 acres of Ohio River riverbank in connection to the proposed construction a new steel plate mill and associated barge terminal. These comments are submitted in response the solicitation for public comments outlined in the public notice referenced in the subject line above and are based upon a review of the public notice and the “complete permit application,” which was requested and received from the Corps through a FOIA request. The Council appreciates the Corp extending the comment period from October 23, 2019 to November 23, 2019 in order to allow the public to obtain all relevant information applicable to this permit application. These comments are being submitted electronically on Sunday, November 24, 2019, and we respectfully request an additional extension if necessary, to allow acceptance of these comments.

After reviewing the permit application in light of the governing regulations under which the U.S. Army Corps of Engineers (Corps) reviews applications for placement of dredged and fill material in waters of the United States, it does not appear that the application satisfies the requirements of the Section 404(b)(1) guidelines nor the Corps of Engineers’ public interest review requirements. More specifically, the permit application fails to provide an adequate alternatives analysis and has not rebutted the presumption that a non-water dependent site exists for this project that would result in less environmental damage. In addition, the permit application does not provide enough information for the Corps to determine whether the proposed discharge will cause or contribute to significant degradation of waters of the United States. Finally, there does not appear to be enough information in the permit application for the Corps to conduct the required public interest analysis, including information necessary to assess direct, indirect, and cumulative impacts of the project on the public interest factors. For these reasons, the Kentucky Resources Council respectfully requests that this application be denied at this time, without prejudice, so that the applicant may resubmit its application with the level of detail and analysis that the Council believes necessary to allow the Corps to conduct the analyses required under the Clean Water Act and associated regulations.

I. BACKGROUND

The Kentucky Resources Council (“the Council”) is a non-profit, 501(c)(3) organization incorporated under the laws of the Commonwealth of Kentucky and dedicated to prudent use and conservation of our natural resources. The Council provides legal and technical assistance and advocacy and has worked for 35 years across the Commonwealth to protect Kentucky’s natural resources and ensure environmental justice for Kentucky’s most vulnerable people and communities. We work to ensure that individuals impacted by environmental decisions have a voice in the policy-making process through direct and indirect legal representation to individuals, community groups, and local governments, and advocacy in a wide variety of other forums. The Council has members throughout the Commonwealth of Kentucky, including in Meade County.

II. THE APPLICATION DOES NOT APPEAR TO SATISFY THE 404(B)(1) GUIDELINES.

A. The Applicant’s Alternatives Analysis Does Not Meet the Requirements of the 404(b)(1) Guidelines and Thus the Application Must be Rejected At This Time.

Under the Clean Water Act, the discharge of dredged or fill material into waters of the United States requires the applicant to obtain a permit/authorization from the Corps under Section 404 of the Clean Water Act. The Corps evaluates a permit application for the discharge of dredged or fill material into navigable waters, including wetlands, under the 404(b)(1) Guidelines (“Guidelines”), promulgated by the EPA in conjunction with the Corps. 40 CFR part 230; 33 CFR § 328.3(a)(3) (2014).

The 404(b)(1) Guidelines, which are in fact regulations with the force and effect of law, provide generally 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 CFR § 230.10(a). Thus, the Corps is required to analyze the alternatives to the proposed discharge and can only authorize the least environmentally damaging practicable alternative. The regulations contemplate a stepwise analysis with avoidance as the preferred alternative, followed by minimization, and mitigation.

“Practicable alternatives” include both activities that do not involve a discharge, and activities involving discharges of dredged or fill material at other locations. 40 CFR 230.10(a)(1). An alternative is considered practicable if it is available and capable of being done after taking into account cost, existing technology, and logistics in light of the overall project purposes. 40 CFR 230.10(2).

In order to analyze whether an alternative is “practicable,” the Corps must initially determine the “overall project purpose.” 40 CFR §230.10(a)(2). While the Corps has a duty to consider the applicant’s purpose and objectives in defining the overall project purpose, the applicant is not permitted to define the project purpose so narrowly “in order to preclude the

existence of any alternative sites and thus make what is practicable appear impracticable.” *La. Wildlife Federation, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985).

In analyzing “practicable alternatives,” the Corps must also determine whether or not a project is “water dependent.” Where the project “does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose,” it is not a “water dependent” project. 40 CFR § 230.10(a). If a project, such as that proposed in this instance, is not “water dependent,” a presumption is created that practicable alternatives that do not involve special aquatic sites are available and those sites are presumed to have less adverse impacts on the aquatic ecosystem. 40 CFR 230.10(3). The burden is on the applicant to overcome this presumption by clearly demonstrating otherwise. *Id.*

In this case, the applicant has proposed to fill approximately 26.6 acres of jurisdictional wetlands, which are defined as special aquatic sites under CFR Part 230, subpart E. The applicant’s stated purpose of the project is to “increase Nucor’s production capacity of steel plate products to help meet the demand for U.S.-made steel in the Midwest and across the U.S.” While a laudable project purpose, the construction and operation of a steel plate mill does not require access or proximity to or siting within the special aquatic district in question to fulfill its basic purpose of producing U.S.-made steel and thus the project is not “water dependent.” Thus, there arises by law a presumption that practicable alternatives are available that do not involve special aquatic sites, and those sites are presumed to have less adverse impacts to the aquatic ecosystem.

Under 33 CFR 325.1(e), the applicant is responsible for preparing an analysis so that the Corps has the necessary information to determine whether the Guidelines have been met. Here, the application appears to fall short of this requirement and the fails to overcome the presumption that no practicable alternatives are available that avoid discharging into special aquatic sites.

While the applicant states that it “completed a screening evaluation of potential sites within the region [presumably the Midwest] based on a number of factors” it does not provide a list of these sites or give the Corps any information that would allow it to determine if a thorough analysis of sites that avoid impacts to special aquatic sites and other waters of the United States has been conducted. There is also no indication of what factors or criteria the applicant used in this screening process or why the sites were rejected, which is relevant to determining whether the criteria were based solely on the practicability of the alternative based upon cost, logistics, and existing technology, or if the applicant used additional criteria based upon its own preferences. Given the presumption that a site that avoids impacts to wetlands exists and is practicable, the application has failed to demonstrate the lack of available practicable alternatives that would accomplish the project purpose without discharging into waters of the United States. This is especially true given that the location of the project could be placed anywhere in the Midwest, if not outside the region.

In addition, the applicant does not provide the Corps with enough information to determine if the proposed project is the least environmentally damaging practicable alternative. The applicant's first alternative is the Paducah Triple Rail Megaproject. While the applicant notes that the main parcel for this alternative is 99 percent free of wetlands, it rejects this alternative because the additional parcels needed to complete the project "likely contain significant acreage of wetlands, and the wooded portions of these parcels likely contain habitat for threatened and endangered species. Therefore, impacts to waters/wetlands and protected species would not be significantly different than anticipated impacts at the proposed Project site." (emphasis) The Application provides no data or rationale as to why it believes the adjacent parcels "likely" contain significant acreage of wetlands or likely contain habitat for threatened or endangered species and provides scant to no support for the contention that the impacts are likely similar. In addition, the application does not appear to analyze ways that the project could be designed to minimize any impacts to wetlands or habitats that happened to be on the site and rejects the alternative outright without any supporting data to back up its conclusions. Given the impacts proposed by this project and the legal presumption that a practicable alternative exists that avoids these impacts, the assessment of this alternative appears to fall well-short of the applicant's burden.

The only other site evaluated in the applicant's alternatives analysis besides the preferred location was an expansion of the applicant's Crawfordsville Sheet Mill Facility. However, the applicant rejected this alternative as impracticable given the logistical constraints associated with not having a third mode of transportation and unspecified costs needed to expand the existing facility.¹ Thus, the applicant has evaluated only one practicable alternative to its proposed project and has stated that this alternative would have similar impacts to the project as proposed. This appears to fall short of the level of analysis required for choosing and evaluating a reasonable range of alternatives to the proposed project.

In sum, because the essential project purpose, i.e. expansion of steel production capacity, is not a water dependent activity, there is a presumption that practicable alternatives exist that do not impact special aquatic sites and that these will be less damaging than the proposed impacts to 26.6 acres of wetlands. To rebut this presumption, the applicant must show by clear and convincing evidence that a practicable alternative that would not impact a special aquatic site does not exist. *Plantation Landing Permit Elevation Decision* (1989) 9, 12, 13-14; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980). The application has failed to propose or evaluate such a site or provide any reason why such a site is not available. Despite screening various sites, the applicant provides no evidence as to whether any of the sites screened did not impact special aquatic sites nor why they were rejected. Thus, the application has failed to rebut this presumption and the Corps may not issue a permit for this project until a proper alternatives analysis is conducted which chooses the least environmentally damaging practicable alternative.

¹ The proposed project is estimated in the applicant's permit application to cost \$1.35 billion, but it is unclear from the application in what respects and to what extent the Crawfordsville alternative would cost more than the proposed project.

B. The Application Fails to Provide Sufficient Information to Assess Whether the Proposed Discharge will Cause or Contribute to Significant Degradation of Waters of the United States.

The 404(b)(1) Guidelines, under which permit applications must be evaluated, also state that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of waters of the U.S. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations and tests” 40 CFR 230.10(c). These factual determinations must be made in accordance with 40 CFR 230.60 and, if necessary, the chemical and biological testing sequence in 40 CFR 230.61 must be used.

40 CFR 230.60(b) requires that the extraction site be examined in order to determine whether it is sufficiently removed from other sources of pollution so that it can be reasonably assured that the proposed discharge material is free from contaminants. The application and attachments do not appear to provide sufficient information or data needed to allow the Corps to make a factual determination on this issue. There does not appear to be any evidence of previous testing carried out on the site and there is no indication as to whether any petroleum or hazardous substances have been used or released on site. While the application states that there is a chemical facility located on the neighboring property and that groundwater contamination has occurred there, the permit application does not provide an assessment of the nature or extent of pollution or contamination. Overall, there does not appear to be any site-specific hydrologic or geologic information that would allow the Corps to determine potential pollutants in either natural deposits or otherwise introduced or the potential routes of contaminants or contaminated sediment to the extraction site. Thus, there is not enough information in the permit application to allow the Corps to determine whether the extraction site is sufficiently removed from sources of pollution and that the proposed discharge material is not contaminated.

Because there is not enough information in the permit application that would allow the Corps to make the required factual determination that the proposed discharges will not cause or contribute to significant degradation of U.S. waters, the permit application should be denied at this time pending development of such information.

III. The Permit Application Does Not Provide Documentation Sufficient to Demonstrate Compliance with the Corps Required Public Interest Review Requirements.

In addition to demonstrating that the proposed project is in compliance with the 404(b)(1) Guidelines, the applicant must also show that the proposed project complies with the standards set out in the Corps’ public interest review process. The public interest review requires that:

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process.

* * * * *

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economic, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and in general, the needs and welfare of the people.

33 CFR 320.4(a)(1).

The Corps' regulations prohibit the agency from issuing a permit unless the public interest review determines and concludes that the benefits of the proposal outweigh the detriments. While the applicant has provided what it believes are the economic benefits of the project, more information is needed to allow an adequate public interest review. For example, while the direct size of impacts to waters of the United States and potential direct impacts on endangered species and cultural resources has been noted, both are based on incomplete data and rely on studies that have not yet been completed. The Applicant must provide enough information to allow the Corps to weigh the public interest factors and to assess direct, indirect, and cumulative impacts. The application currently falls short of providing the information necessary to complete this analysis.

For example, there does not appear to be any detailed information in the permit application as to the processes that will be used by the proposed steel plate mill that would allow a determination of its potential environmental impacts. These impacts would include all releases to the environment, including air emissions, water discharges, hazardous and solid waste generation and disposal issues, among others. There is no information as to how the operation of the plant would affect aesthetics or the extent to which the plant could cause noise, dust, odors, or create nuisance conditions or how the applicant might mitigate or avoid these potential impacts. Given that steel plants typically use large amounts of energy, there should also be enough data in the permit application regarding the characteristics and sources of electricity and energy usage, to allow the Corps to determine the project's impact on climate

change. In sum, there is lacking in the permit sufficient information as to the projected environmental impacts of the project and of the plans to control, prevent, or minimize, and mitigate those impacts.

Given that the city of Brandenburg is less than 2 miles away and is home to over 2,800 residents, it is also important to assess whether the project might have any direct, indirect, or cumulative impacts on public health and safety, including worker health and safety. The application does not appear to provide any information that would allow the Corps to make this determination. Such information would necessarily include information about other nearby facilities to allow for a determination of cumulative impacts, as well.

Further, while the proposed project will impact 26.6 acres of wetlands, there does not appear to be any information in the application that would allow the Corps to assess the direct, indirect, or cumulative effects of filling these wetlands. "Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 CFR 320.4(b)(1). In order for the Corps to adequately evaluate the impacts of the proposed filling of wetlands on the public interest, it must have adequate information to determine to what extent the wetlands serve significant biological functions, to what extent their destruction would impact natural drainage and sedimentation patterns, habitats, the storage of storm and flood waters, and water purification functions. See 33 CFR 320.4(b)(2).

In addition, the alteration of wetlands, including numerous piecemeal changes, can result in major impairments to wetland resources. 33 CFR 320.4(b)(3). The Corps must have information about the complete and interrelated wetland areas within and hydrologically connected to the proposed site in order to adequately assess the potential cumulative impacts of the proposed impacts on the entirety of the wetland resources in the area. Without the ability to understand the direct, indirect, and cumulative environmental impacts of the proposed impacts to wetlands, the Corps cannot adequately evaluate whether the benefits of the proposed alteration outweigh the proposed destruction to the wetlands resource.

There is also no information provided in the permit application that would allow the Corps to weigh the potential impacts to flood hazards and floodplain values, including direct, indirect, and cumulative impacts. Like wetlands, floodplains possess significant natural values and carry out functions important to the public interest and the impacts of what appears to be even a minor alteration can cause cumulative impacts that results in significant degradation of floodplain values and functions. 33 CFR 230.4(l)(1)-(2). While the applicant states that it will in the future complete a detailed hydraulic analysis, without such an analysis or other information, the Corps cannot properly assess the impacts of the project on these factors.

While the applicant has proposed to avoid impacts to Flippins Run, there is does not appear to be any information in the application regarding any other potential direct impacts on Flippins Run, such as due to tree clearing or the potential for contamination. Potential indirect and cumulative impacts also do not appear to be discussed.

In addition, there does not appear to be any information that would allow the Corps to assess the potential impacts to recreation. The Buttermilk Falls Trail and River Front Park are located directly adjacent to the proposed site and impacts to recreational values must be assessed. In addition, the applicant has not provided any information on how its proposed barge facilities will impact recreational opportunities in the Ohio River or impact the right of access or use of the Ohio River by adjacent riparian landowners or the general public.

In conclusion, the application currently lacks data and information necessary for the Corps to complete the required public interest evaluation. The Corps must have adequate information to be able to appropriately weigh the potential benefits of the project against the direct, indirect, and cumulative impacts on the public interest. Because the application does not appear to provide all the necessary information, the review process cannot be undertaken, and the permit cannot be issued at this time.

IV. CONCLUSION

The Council appreciates the opportunity to review and comment on the requested 404 Authorization. For the reasons stated above, the Council recommends that the Corps deny the requested permit *without* prejudice, or to deem the application incomplete and to suspend review, in order to allow the applicant to resubmit an application containing the data and information that the applicable regulations contemplate as necessary for a full and complete evaluation of alternative, practicable sites for the proposed project and of the impacts on the environment and the other public interest factors. The application should also contain the data and information necessary for the Corps to evaluate whether the proposed discharges on the site chosen are the least environmentally damaging practicable alternative and will not cause or contribute to a substantial degradation of waters of the United States.

Sincerely,

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