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WORKING FOR JUSTICE IN ENVIRONMENTAL POLICY

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August 7, 2020

Shawn Hokanson
Floodplain Management Section
Division of Water
300 Sower Boulevard
Frankfort, Kentucky 40601

By email only:

Shawn.Hokanson@ky.gov
DOWFloodplain@ky.gov

Dear Mr. Hokanson:

I am writing on behalf of the Board and membership of the Kentucky Resources Council ("Council") to express my reservations concerning the issuance of a stream construction permit to Olde World Stone, LLC., Agency Interest Id. 160301, for construction of a road, parking area, and low-water crossing through Indian , proposed to support a limestone quarry operation to be located in Robertson County, Kentucky along the banks and partially in the floodplain of Indian Run. Specific comments follow:

1. The July 7, 2020 *Application For Permit To Construct Across Or Along Stream And/Or Water Quality Certification* appears to be administratively incomplete due to a lack of evidence of publication of the public notice required for this category of stream construction and floodplain development.

Item 14 on the *Application* requires that the applicant address public notice, and certify that "public notice has been given for this proposal by the following means" and lists two options – first, that "Public notice in newspaper having greatest circulation in area (provide newspaper clipping or affidavit)" and/or "Adjacent property owner(s) affidavits[.]"

To the extent that the Cabinet has posted the complete application submitted on July 7, 2020 on behalf of Olde (sic) World Stone, LLC, the application is deficient for want of either a newspaper clipping showing that public notice has been given, or an Affidavit attesting to same.

Instead, the application provides nothing more than the generic template for the public notice that the agency provides to applicants.

On information and belief, one public notice has been published in the *Maysville Ledger Independent*, on July 17, 2020. That public notice was published fully ten (10) days after submittal of the application for a Stream Construction Permit, thus effectively abridging the twenty-one (21) day public comment period by almost half.

The public notice indicated that the comment period on the application for the stream construction permit would end on August 7, 2020. In fact, the twenty-one day comment period begins to run after the **final** public notice, which, according to the regulation governing public notice of such permit applications, is on the third consecutive day if published in a daily newspaper, and at least twice in a newspaper published less than daily. It is my understanding that the *Ledger Independent* publishes three (3) days a week.

Unless there is evidence provided by the applicant that public notice was published at the frequency required by 401 KAR 4:060 Section 3(4)1b, the application should be deemed administratively incomplete pending proper public notice and submittal of notice copies or a publication affidavit, and pursuant to 401 KAR 4:060 Section 3(4)(b) and (c), proof of public notice should be required and another set of public notices should be required to be published.

With respect to the activities proposed in the regulatory floodplain for which approval is requested, the proposed activities include "a stream crossing" that the application acknowledges will result in "filling within the floodplain of Indian Run." As such, if it has not yet occurred, the application should be forwarded to the Water Quality Branch for processing of a Water Quality Certification. The application is wholly inadequate to support issuance of a water quality certification, since it lacks any information concerning potential impacts on the quality of the tributary or downstream waters from the streamside and in-stream disturbances.

A common theme runs through the proposed floodplain activities of a parking lot, haul road, and stream crossing – **none** of these activities is "water dependent" within the meaning of Section 404 of the Clean Water Act, and none of the activities need to be located in the floodplain of a tributary (Indian

Run) that runs into an Outstanding State Resource Water (Licking River) containing threatened and endangered species, including mussel species and mussel beds.

Inasmuch as the application indicates that fill material will be placed within the stream to support the “reconstruction” of a low-water crossing, the U.S. Army Corps of Engineers should be notified of the proposed activity, and the applicant informed that absent a Section 404 permit issued by that agency and a water quality certification issued by the Division of Water’s Water Quality Branch, no disturbance can occur within the regulatory floodplain.

Finally, given the likelihood that the applicant will fail to satisfy the presumption that there are practicable alternatives to the proposed activities that do not require placement of fill material in a water of the United States (since neither haul roads nor parking lots are water-dependent activities), any floodplain permit that is issued after proper public notice and a new comment period, should be conditioned on compliance with both Sections 401 and 404 of the Clean Water Act.

Thank you for your consideration of these comments. The Council looks forward to providing supplemental comments on the application once it is properly noticed and the comment period begins to run in earnest.

Cordially,

A handwritten signature in black ink, appearing to read 'Tom FitzGerald', with a stylized flourish at the end.

Tom FitzGerald
Director

Cc: Beth Harrod, Water Quality Branch
U.S. Army Corps of Engineers, Louisville District