

-----Original Message-----

From: Clarke, Louis E SWL [<mailto:Louis.E.Clarke@usace.army.mil>]  
Sent: Thursday, May 29, 2014 1:02 PM  
To: [MDMass@mycitycable.com](mailto:MDMass@mycitycable.com)  
Cc: Asa Wyatt  
Subject: Public comments received during notice, #SWL-2011-00260  
(UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Mr. Massingham,

The attached letter gives you the opportunity to comment on the comments received during the Public Notice on the Shelby Road extension project. Please provide your comments as soon as possible. The attached document is your official Little Rock COE Regulatory Division letter. If you need a hard copy or if you have any questions, please give me a call.

I hope you have a great day.

Louis Clarke  
Walnut Ridge Regulatory Field Office, Little Rock District PO Box 865 Walnut Ridge, AR 72476  
Phone: (870) 886-3610  
Email: [Louis.E.Clarke@usace.army.mil](mailto:Louis.E.Clarke@usace.army.mil)

For more information on the Regulatory Program, visit our web site at:  
<http://www.swl.usace.army.mil/regulatory/index.html>

Please let us know how we are doing by submitting your comments or suggestions on our Customer Service Survey:  
[http://corpsmapu.usace.army.mil/cm\\_apex/f?p=regulatory\\_survey](http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey)

Classification: UNCLASSIFIED  
Caveats: NONE



**DEPARTMENT OF THE ARMY**  
LITTLE ROCK DISTRICT, CORPS OF ENGINEERS  
Walnut Ridge Regulatory Field Office - P.O. BOX 865  
WALNUT RIDGE, ARKANSAS 72476-0865  
[www.swl.usace.army.mil/](http://www.swl.usace.army.mil/)

REPLY TO  
ATTENTION OF:

May 29, 2014

Regulatory Division

Mr. Mark Massingham  
City of Poplar Bluff  
101 Oak Street  
Poplar Bluff, Missouri 63901

Dear Mr. Massingham:

Please refer to your application for a Department of the Army permit, Action No. **SWL-2011-00260**, for the placement of dredged and fill material in waters of the United States associated with the expansion of Shelby Road. The proposed project is located in wetlands and Pike Creek, in sections 4, 5, and 9, T. 24 N., R. 6 E., Poplar Bluff, Butler County, Missouri.

The public notice regarding the request for the project was dated March 10, 2014, and closed May 10, 2014. In response to that notice, comments were received from the United States Environmental Protection Agency (EPA), the Missouri Department of Conservation (MDC), the Missouri Department of Natural Resources (MDNR), Missouri Coalition for the Environment, and Richard Johnson (copies enclosed). Their comments are as follows:

- a. EPA commented they were concerned about the type and amount of mitigation that had been offered by the applicant.
- b. MDC commented they were concerned about the type and amount of mitigation that was offered in the public notice.
- c. MDNR stated a number of issues and concerns and then 'denied without prejudice' the project until their concerns had been resolved.
- d. Missouri Coalition for the Environment commented that they were concerned about the type and amount of mitigation that had been offered in the public notice.
- e. Richard Johnson – stated that there was a potential for the area to contain cultural resources, floodplain issues, potential hazardous chemicals due to abandoned sewage lagoons, loss of wildlife habitat, disruption of landowners, and that an alternative route was not considered.

The concerns of the Corps of Engineers include, from a cultural resources perspective, is that the project has the potential to impact cultural resources and therefore a cultural resources survey of the final road alignment is required. The proposed project is located within the 100-year floodplain and the floodway of Pike Creek. Appropriate waivers and permits must be obtained prior to construction in these areas.

Pursuant to the Code of Federal Regulations (40 CFR 230) Section 404(b)(1) Guidelines, alternatives to placing fill in waters of the United States that will achieve the same basic purpose of the project, are presumed to be available unless clearly demonstrated otherwise. In order for the project to comply with the 404(b)(1) Guidelines, and before a permit could be issued, it must be demonstrated that there are no practicable alternatives to the project that are less environmentally damaging and that would achieve the same basic purpose of the project. This analysis should reflect other properties that you own and those that you do not own that could reasonably be obtained, utilized, expanded or managed in order to fulfill the project's basic purpose.

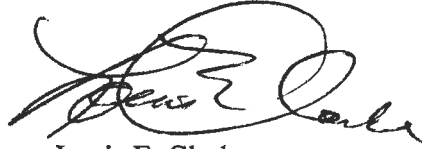
Accordingly, in order to properly address requirements of the 404(b)(1) Guidelines, additional information regarding practicable alternatives to the placement of the fill material in waters of the United States should be provided to this office. An alternative is considered practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. For example, modifying the road alignment so it runs west from the Business 67 and Highway 53 intersection to the approximate location of CR-485 and then run north, parallel to CR-465 to the south end of existing Shelby Road. Another alternative might be to stay on the east side of Pike Creek, running behind businesses on the high ground and then crossing Pike Creek in the vicinity of Roxie Road and then meeting the southern end of existing Shelby Road. It appears that both of these alternatives may reduce impacts to the floodplain and floodway, as well as impacts to waters of the United States.

What the City proposed as mitigation is not adequate. A rough approximation of the mitigation required would be 8 acres of restored mitigation where the restoration occurred in a farmed wetland area. To use preservation as a means of mitigation would require approximately 45 acres of existing wooded wetland. The mitigation rule allows the use of some preservation, but no more than 50% of the total required mitigation credits. The first leg of Shelby Road was part of a Transportation District and the mitigation for wetland impacts was accomplished through the purchase of credits from the Missouri Department of Transportation Bootheel Mitigation Bank. Is this also a possible source of mitigation credits this time as well?

You are hereby given the opportunity to review these letters and submit your views and rebuttals. We would appreciate receiving any response you may have to these comments within 30 days of the date of this letter. If we receive no response, we will proceed with a decision on your request/withdraw your application.

If you have any questions, please call me at (870) 886-3610.

Sincerely,

A handwritten signature in black ink, appearing to read "Louis E. Clarke". The signature is fluid and cursive, with the first name "Louis" and last name "Clarke" being the most legible parts.

Louis E. Clarke  
Project Manager

Enclosures

## Clarke, Louis E SWL

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**From:** Daniels, Jason [Daniels.Jason@epa.gov]  
**Sent:** Tuesday, March 18, 2014 1:41 PM  
**To:** Clarke, Louis E SWL; Bax, Stacia; Hansen, Rick MVS External Stakeholder; Leary, Alan  
**Subject:** [EXTERNAL] City of Poplar Bluff SWL-2011-00260

Louis,

I have a few comments on the Public Notice for the City of Poplar Bluff SWL-2011-00260.

Normally we recommend a higher than 1:1 ratio for forested wetland impacts due to the difficulty in restoring and the temporal loss of function that occurs while the forest is maturing. The wetland appears be mature forest so a 3:1 or 4:1 ratio would be more appropriate.

If preservation is used to offset impacts then we typically recommend a 10:1 ratio for preservation. The public notice shows a 3.91 acre preservation to offset 3.3 acres of forested wetland, which is ~1.18:1 ratio.

Considering this the proposed mitigation is lacking. In addition, any preservation needs to meet the mitigation rule's requirements for preservation:

(h) Preservation. (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed; (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available; (iii) Preservation is determined by the district engineer to be appropriate and practicable; (iv) The resources are under threat of destruction or adverse modifications; and (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust). (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.

In this document linked below it mentions 8.5 acres of wetlands and mitigating a mitigation site for Shelby Road. Maybe the additional acres and mitigation site have been avoided by a change in alignment?

[http://www.poplarbluff-mo.gov/vertical/sites/%7B686F1195-4578-4E6A-9031-5B02814D9503%7D/uploads/CC Regular Minutes 020612.pdf](http://www.poplarbluff-mo.gov/vertical/sites/%7B686F1195-4578-4E6A-9031-5B02814D9503%7D/uploads/CC%20Regular%20Minutes%20020612.pdf)

Thanks,

Jason M. Daniels

U.S. Environmental Protection Agency, Region 7

Water, Wetlands, and Pesticides Division

Watershed Support, Wetland and Stream Protection Section

11201 Renner Boulevard

Lenexa, KS 66219

913-551-7443

[daniels.jason@epa.gov](mailto:daniels.jason@epa.gov)

## Clarke, Louis E SWL

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**From:** Alan Leary [Alan.Leary@mdc.mo.gov]  
**Sent:** Monday, March 31, 2014 1:00 PM  
**To:** 'Daniels, Jason'; Clarke, Louis E SWL; Bax, Stacia; Hansen, Rick MVS External Stakeholder; 'bryan.simmons@fws.gov'  
**Cc:** Leary, Alan  
**Subject:** [EXTERNAL] RE: City of Poplar Bluff SWL-2011-00260

Louis,

I agree with Jason's comments below, it does not seem like the proposed mitigation is adequate to compensate for the expected impacts from the project. I believe the mitigation rule also states that preservation can not be used for 100% of the mitigation requirements. I think it only allows preservation to make up one half or one third, I can't recall which.

Please let me know if you have any questions,

Alan Leary, CWB

Policy Coordinator

Missouri Department of Conservation

573-522-4115 ext. 3346

**From:** Daniels, Jason [<mailto:Daniels.Jason@epa.gov>]  
**Sent:** Tuesday, March 18, 2014 1:41 PM  
**To:** Clarke, Louis E SWL; Bax, Stacia; Hansen, Rick; Alan Leary  
**Subject:** City of Poplar Bluff SWL-2011-00260

Louis,

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Normally we recommend a higher than 1:1 ratio for forested wetland impacts due to the difficulty in restoring and the temporal loss of function that occurs while the forest is maturing. The wetland appears be mature forest so a 3:1 or 4:1 ratio would be more appropriate.

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Thanks,

Jason M. Daniels

U.S. Environmental Protection Agency, Region 7

Water, Wetlands, and Pesticides Division

Watershed Support, Wetland and Stream Protection Section

11201 Renner Boulevard

Lenexa, KS 66219

913-551-7443

[daniels.jason@epa.gov](mailto:daniels.jason@epa.gov)

**From:** [WPSC Water Quality Certification](#)  
**To:** [Clarke, Louis E SWL](#)  
**Cc:** ["Bryan Simmons \(bryan\\_simmons@fws.gov\)"; USEPA Region 7; Thorne, David; Sternburg, Janet MVS External Stakeholder; Leary, Alan; "laura.ruman@mdc.mo.gov"; Campbell-Allison, Jennifer; Miller, Stuart; Hoke, John; Bax, Stacia; Wieberg, Chris; "cityofpb@pbutilities.com"](#)  
**Subject:** [EXTERNAL] City of Poplar Bluff, 2011-00260/CEL000925  
**Date:** Tuesday, April 01, 2014 9:13:57 AM

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The Missouri Department of Natural Resources' Water Protection Program has reviewed the Public Notice for No. 2011-00260 in which the city of Poplar Bluff is proposing the construction of Shelby Road Phase II. The project is not water dependent.

The combined wetland impacts from this proposed project are estimated to be 3.3 acres (1.0 acre northwest of a sewer lagoon which has been filled and 2.3 acres near Highway 67B). The city proposes to provide mitigation for impacts to 3.3 acres of wetlands at an off-site location. The method of mitigation proposed is preservation.

The proposed project is located in wetlands and Pike Creek in Sections 4, 5 and 9, Township 24 North, Range 6 East in Poplar Bluff, Butler County, Missouri.

We offer the following comments:

1. There is not adequate wetland mitigation as stated by other resource agencies during this public comment period. An impact of 3.3 acres of forested wetland should have significantly more compensatory mitigation than 3.91 acres of wetland preservation.
2. The project appears to impact several water ways, including an unnamed intermittent tributary to Pike Creek and Pike Creek, which are both classified waters of the state with corresponding narrative and numeric water quality criteria. Pike Creek, Water Body Identification Number 2815, is classified for 6.0 miles as a water that flows intermittently with the designated beneficial uses of protection of aquatic life and human health-fish consumption, livestock and wildlife watering, and whole body contact recreation-Category B. Unclassified waters are protected by narrative criteria. Twelve culverts appear to be constructed during this project. Please detail the impacts to the stream resources and explain why their impacts were not included with all the project impacts in the public notice.
3. According to the 2012 imagery, which is the most recent the Department has, the project appears to be more than half forested with a lesser amount of pasture. Forested areas may be of interest to the U.S. Fish and Wildlife Agency as habitat for candidate, threatened, or endangered bats.
4. Pike Creek is impaired by low levels of Dissolved Oxygen due to unknown sources violating the protection of aquatic life.
5. A stream, its channel configuration and its adjacent floodplain including wetlands and

riparian vegetation are interrelated portions of a dynamic ecosystem that constitute a valuable natural resource. Disruption of this system through filling, relocating, shortening, or changing the shape and vegetation of the stream channel will likely result in negative impacts on the stream's water quality and associated habitat value. Channel modifications may cause cumulative impacts to watersheds including bank instability, loss of aquatic habitat (pool and riffle complexes), bed degradation, loss of riparian areas, prevention of fish passage and migration, and channel incision is likely to occur downstream. Any impacts are to be avoided or minimized if possible and will require appropriate mitigation.

6. Wetlands were once significant components of Missouri's natural heritage accounting for almost 11 percent of surface area. Historical wetland losses in Missouri have been significant, approaching 90 percent. This Department and other federal and state agencies are directed to implement a policy of "no net loss of wetlands." Any impacts are to be avoided or minimized if possible and will require appropriate mitigation.

7. The proposed project should be constructed so that it does not cause future scouring or create an impediment to the passage of fish or other aquatic life during low-flow conditions in particular. Often stream crossings that employ the use of culverts can create, by virtue of their design, increased water velocity at high-flow conditions in the stream. This increase in water velocity can lead to scouring on the downstream side, which creates a barrier for fish and other aquatic organisms during low-flow conditions of the stream.

8. Culverts constructed or extended as part of this project should not exceed the base width of the stable roadbed. Impacts beyond the width of the culvert, including channel modifications, should not extend beyond 50 feet in length on either side of the culvert because of cumulative impacts to watersheds, including flooding, bank instability, loss of aquatic habitat (pool and riffle complexes), bed degradation, loss of stormwater retention and loss of riparian areas. Channel modifications are any activities that alter the width, depth, length and/or sinuosity of a waterway. This would include, but is not limited to, moving, shortening, cutting off, straightening, widening or modifying the cross section of or fills in the stream channel, whether natural or previously altered.

9. In-stream culverts should be sized and placed to maintain a depth of water at least as deep as the channel directly upstream of the crossing. Structures creating water velocities in excess of two feet per second during average annual discharge should be avoided. If preconstruction velocities exceed two feet per second, then structures should not increase existing velocities. There should be no drop between the downstream end of the culverts and the downstream water surface elevation.

10. Please provide an analysis of alternatives for the project. Include at least one other alternative to the proposed design of the project as well as a "No action" proposal, and explain why the proposed action is the most feasible.

11. To comply with antidegradation requirements, the Department will review any applicable alternatives analysis and/or compliance with Section 404(b)(1) guidelines to ensure the proposed discharges are unavoidable (i.e., necessary), that the least damaging practicable alternative is authorized, and mitigation is required for all impacts associated with the activity.

12. Antidegradation requirements require all appropriate and reasonable Best Management

Practices related to erosion and sediment control, project stabilization and prevention of water quality degradation (e.g., preserving vegetation, stream bank stability and basic drainage) are applied and maintained. Applicants will be responsible for ensuring that permit requirements and relevant Clean Water Act Section 401 Water Quality Certification (WQC) conditions are met, should one be issued.

13. Acquisition of a WQC should not be construed or interpreted to imply the requirements for other permits are replaced or superseded, including Clean Water Act Section 402 National Pollutant Discharge Elimination System Permits. Permits or any other requirements should remain in effect. Land disturbance activities disturbing one or more acres of total area for the entire project may require a stormwater permit. Instructions on how to apply for and receive the on-line land disturbance permit are located at <http://www.dnr.mo.gov/env/wpp/epermit/help.htm>. Questions may be directed to the Department's Southeast Regional Office at (573) 840-9750.

14. What is locally required for the protection of stream and riparian buffers? Often large metropolitan areas have ordinances that dictate preservation of riparian areas and development setback distances near waterways as well as stormwater control measures. Poplar Bluff is required to have a Municipal Separate Storm Sewer System Permit with measures to control and possibly treat stormwater.

15. Care should be taken to keep machinery out of the waterway as much as possible. Fuel, oil and other petroleum products, equipment, construction materials and any solid waste should not be stored below the ordinary high water mark at any time or in the adjacent floodway beyond normal working hours. All precautions should be taken to avoid the release of wastes or fuel to streams and other adjacent waters as a result of this operation.

16. Petroleum products spilled into any water or on the banks where the material may enter waters of the state should be immediately cleaned up and disposed of properly. Any such spills of petroleum should be reported as soon as possible, but no later than 24 hours after discovery to the Missouri Department of Natural Resources' Environmental Emergency Response number at (573) 634-2436.

17. Only clean, nonpolluting fill should be used.

18. Clearing of vegetation/trees should be the minimum necessary to accomplish the activity. A vegetated corridor should be maintained from the high bank on either side of the jurisdictional channel to protect water quality and to provide for long-term stability of the stream channel, unless physical barriers prevent such a corridor. Lack of ownership or control of any portion of this corridor may be considered a legitimate and discretionary cause to waive this requirement on that portion.

19. No project should accelerate bed or bank erosion.

20. An approved mitigation plan needs to be submitted before consideration for WQC. After avoidance and minimization for the project, unavoidable stream impacts should be mitigated appropriately. Mitigation for loss of aquatic resources should be in conformance with the April 10, 2008, joint regulation "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule" [U.S. Army Corps

of Engineers (USACE): 33 CFR Part 332 and U.S. Environmental Protection Agency: 40 CFR Part 230], and with guidance located on-line at <http://www.nwk.usace.army.mil/Missions/RegulatoryBranch/StateofMissouri.aspx>.

21. Please provide the adverse impact worksheet or calculation for both the stream and wetland impacts as well as the worksheet or calculation for the proposed mitigation. Proposed mitigation must be within the state of Missouri. If mitigation is being purchased from a mitigation bank or in lieu fee program, please name the provider and/or location.

22. Best Management Practices should be used during all phases of the project to limit the amount of discharge of water contaminants to waters of the state. The project should not involve more than normal stormwater or incidental loading of sediment caused by construction disturbances.

23. The Department encourages the permittee to consider environmentally-friendly design techniques such as Green Infrastructure into their plans. Green Infrastructure is a stormwater management strategy that maintains or restores the original site hydrology through infiltration, evaporation or reuse of stormwater. Designs might include creating vegetated swales, rain gardens and porous pavement. More information regarding Green Infrastructure can be found at these websites: <http://www.epa.gov/owow/NPS/lid/>, <http://water.epa.gov/infrastructure/greeninfrastructure>, or [www.lid-stormwater.net/lid\\_techniques.htm](http://www.lid-stormwater.net/lid_techniques.htm). A good source of information regarding green infrastructure is contained within the "Missouri Guide to Green Infrastructure: Integrating Water Quality into Municipal Stormwater Management" at <http://www.dnr.mo.gov/env/wpp/stormwater/mo-gi-guide.htm>.

24. Stream channels should not be relocated, straightened, cut-off, shortened, widened, or otherwise modified. A stream channel is defined as that area between the high banks of the creek where water is flowing, or in the case of a dry stream where water would flow after a rain event.

25. Conduct activity at low flows and water levels to limit the amount of sediment disturbance caused by the heavy equipment. Limit the duration and extent that the heavy equipment is required to be in-stream.

26. The riparian area, banks, etc., should be restored to a stable condition to protect water quality as soon as possible. Seeding, mulching and needed fertilization should be within three days of final contouring. On-site inspections of these areas should be conducted as necessary to ensure successful re-vegetation and stabilization, and to ensure that erosion and deposition of soil in waters of the state is not occurring from these projects.

27. All other commenting parties' comments and the applicant's response to those comments should be sent by e-mail at [wpsc401cert@dnr.mo.gov](mailto:wpsc401cert@dnr.mo.gov) or to the address below. Consideration for WQC cannot be made until all comments and responses have been received.

28. The request for WQC that is part of the public notice is denied without prejudice due to lack of complete application. Once the USACE is ready to issue the 404 Permit and the applicant, their consultant, or the USACE has provided to the Department a complete application per 10 CSR 20-6.060

and 20-7.031, which includes an alternative analysis and mitigation plan, a formal request for WQC should be made to the Department.

Thank you for the opportunity to comment on the proposed project. If you have any questions, please contact Stacia Bax by phone at (573) 526-4586, by e-mail at [stacia.bax@dnr.mo.gov](mailto:stacia.bax@dnr.mo.gov), or by mail at the Missouri Department of Natural Resources, Water Protection Program, Operating Permits Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

SB/pc

Thanks.

Pat Conger  
Missouri Department of Natural Resources  
Water Protection Program  
P.O. Box 176  
Jefferson City, MO 65102-0176  
Phone (573) 751-1300 Fax (573) 522-9920  
e-mail: [wpsc401cert@dnr.mo.gov](mailto:wpsc401cert@dnr.mo.gov) <<mailto:wpsc401cert@dnr.mo.gov>>  
web site: [www.dnr.mo.gov/env/wpp/401](http://www.dnr.mo.gov/env/wpp/401) <<http://www.dnr.mo.gov/env/wpp/401>>

Celebrating 40 years of taking care of Missouri's natural resources. To learn more about the Missouri Department of Natural Resources visit [dnr.mo.gov](http://www.dnr.mo.gov) <<http://www.dnr.mo.gov>> .

Civil Justice Clinic  
Interdisciplinary Environmental Clinic

March 31, 2014

Mr. Louis Clarke  
Little Rock District Corps of Engineers  
Walnut Ridge Regulatory Field Office  
PO Box 865  
Walnut Ridge, Arkansas 72476-0865  
VIA Email and U.S. Mail

Re: Comments on Proposal by the City of Poplar Bluff, Missouri  
Department of the Army Application No. SWL 2011-00260

Dear Mr. Clarke,

On behalf of the Missouri Coalition for the Environment (MCE), the Interdisciplinary Environmental Law Clinic at Washington University submits these comments on the work described in the Public Notice dated March 10, 2014 concerning Department of the Army Application No. SWL 2011-00260. The City of Poplar Bluff (Applicant) has requested authorization for the placement of dredged and fill material in waters of the United States associated with the construction of Shelby Road Phase II. The Applicant proposes to fill approximately 3.3 acres of wooded wetlands, including one acre northwest of a filled sewer lagoon and 2.3 acres near Highway 67B, to extend Shelby Road from Kanell Boulevard south to connect with Highway 53. To mitigate for the loss of wetlands that will result from this project, the Applicant proposes to preserve 3.91 acres of wetlands at an off-site location.

***There is No Documentation that the Proposed Mitigation Site Meets the Regulatory Criteria for Preservation***

The §404 regulatory program is directed by the nation's long-standing policy of achieving no overall net loss of wetland acreage and functions.<sup>1</sup> In the 2008 compensatory mitigation rule, the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) provided new standards for achieving this goal.<sup>2</sup> Regarding preservation as a mitigation method,

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<sup>1</sup> Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,604 (Apr. 10, 2008) (codified at 33 C.F.R. pts. 325, 332).

<sup>2</sup> 33 C.F.R. § 332.3(f).



the rule states that “the main purpose of preservation is to prevent a future loss of resources, not to provide a gain.”<sup>3</sup> Because preservation, if not done in conjunction with other forms of mitigation, results in a net loss of wetlands, it may only be used when specific criteria are met.<sup>4</sup> These include: 1) the resources to be preserved supply valuable physical, chemical, or biological functions for the watershed; 2) the resources to be preserved contribute significantly to the ecological sustainability of the watershed; 3) the district engineer determines that preservation is appropriate and practicable; 4) the resources face a threat of destruction or adverse modifications; and 5) the preserved site will be permanently protected through an appropriate real estate or other legal instrument.<sup>5</sup> Additionally, the Corps’ regulations require that where preservation is used as a mitigation method, it be done, to the extent appropriate and practicable, “in conjunction with aquatic resource restoration, establishment, and/or enhancement activities,”<sup>6</sup> although district engineers may waive this requirement “where preservation has been identified as a high priority using a watershed approach.”<sup>7</sup>

Typically, preservation is employed to protect unique, rare, or difficult-to-replace aquatic resources, such as bogs, fens and streams.<sup>8</sup> Nothing about the Applicant’s proposed mitigation site suggests that it is such a resource. It is bound on the west by four-lane Highway 67 and on the east by a large stormwater basin and is fed by a pair of culverted streams, one of which is damned just upstream of the site, suggesting that some level of degradation of the wetlands on the site has likely occurred (assuming there are any; the Applicant hasn’t provided a delineation report characterizing the proposed site). Furthermore, the Applicant hasn’t provided any documentation that the proposed mitigation site meets any of the five criteria for preservation, or that it is neither appropriate nor practicable to perform other mitigation activities in conjunction with preservation to offset the project’s impacts. MCE is not opposed to preservation of the proposed mitigation site. However, the Corps’ regulations clearly require the Applicant to do more. It must perform restoration, establishment, and/or enhancement activities in conjunction with preservation of the proposed site to offset the project’s impacts or, should the Corps waive this requirement, preserve significantly more wetland acreage than the 3.91 acres proposed.

***The Proposed Mitigation Ratio Is Inadequate if Preservation is the Sole Mitigation Method Used***

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<sup>3</sup> 33 C.F.R. § 332.5.

<sup>4</sup> U.S. EPA, *Wetlands Compensatory Mitigation* <http://www.epa.gov/owow/wetlands/pdf/CMitigation.pdf> (last visited March 22, 2014).

<sup>5</sup> 33 C.F.R. § 332.3(h).

<sup>6</sup> 33 C.F.R. § 332.3(h)(2).

<sup>7</sup> Id.

<sup>8</sup> Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,635 (Apr. 10, 2008) (to be codified at 33 C.F.R. pts. 325, 332).

The compensatory mitigation rule establishes a minimum one-to-one ratio for compensatory mitigation.<sup>9</sup> However, the rule requires district engineers to require higher ratios where necessary to account for the method of mitigation used, among other things. As noted above, district engineers may waive the requirement that preservation be done in conjunction with restoration, establishment, and/or enhancement activities “where preservation has been identified as a high priority using a watershed approach;” however, a higher compensation ratio is required when this requirement is waived. Furthermore, the State of Missouri Aquatic Resources Mitigation Guidelines state that only partial mitigation credit will generally be given for preservation of existing wetlands and that therefore “more acreage would be required as compared to other methods of compensation.”<sup>10</sup> By way of example, Department of the Army Permit No. P-2790, issued by the St. Louis District on February 7, 2012, authorized impacts to 10 acres of forested wetlands in conjunction with the development of youth practice football fields in Arnold, Missouri. In order to compensate for these impacts, the permit requires that the permittee preserve 50 acres of wetlands on and adjacent to the project site, a 5:1 ratio. More recently, EPA used a 10:1 ratio in determining mitigation credit for preservation of existing wetlands in its comments on public notice number P-2855.<sup>11</sup>

The Applicant's proposed mitigation relies solely upon the preservation of a 3.91 acre site, providing roughly a 1:1 ratio. This blatantly disregards the State of Missouri's and the compensatory mitigation rule's requirement for a higher ratio when preservation is the sole mitigation method used. Given that that is what the Applicant is proposing, a 1:1 ratio is inadequate. The Applicant must preserve significantly more wetland acreage than the 3.91 acres proposed if it is not going to perform other mitigation activities in conjunction with preservation. Furthermore, unless preservation has been identified by the Corps as a priority in the project area using a watershed approach, the Corps cannot waive the requirement that the Applicant perform restoration, establishment, and/or enhancement activities in conjunction with preservation. The public notice provides no indication that the Corps has identified preservation as a priority in the project area using a watershed approach. Therefore, the Applicant must perform restoration, establishment, and/or enhancement activities in conjunction with preservation of the proposed site to offset the project's impacts.

## Conclusion

The problems with the Applicant's proposed mitigation are significant and need to be resolved before the Corps can issue a permit. First, the compensatory mitigation rule states that

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<sup>9</sup> 33 C.F.R. § 332.3(f)(1).

<sup>10</sup> MDNR, *State of Missouri Aquatic Resources Mitigation Guidelines*  
[http://www.dnr.mo.gov/env/wpp/401/mitigation\\_guidelines.pdf](http://www.dnr.mo.gov/env/wpp/401/mitigation_guidelines.pdf) (last accessed Mar. 23, 2014).

<sup>11</sup> Comment Letter from Jason M. Daniels, U.S. Environmental Protection Agency, to Colonel Christopher G. Hall, District Engineer, U.S. Army Corps of Engineers (Feb. 10, 2014) (on file with the Washington University Interdisciplinary Environmental Clinic).

preservation should only be used where aquatic resources are identified as unique, rare, and difficult to replace; provide a significant contribution to the ecological sustainability of the watershed; and face a threat of destruction. The Applicant hasn't demonstrated that the proposed mitigation site satisfies any of these criteria. Second, even if this site is an appropriate candidate for preservation, it is not large enough to offset the project's impacts absent additional restoration, establishment, and/or enhancement activities. The proposed site would provide roughly a 1:1 mitigation ratio; however, the compensatory mitigation rule and the State of Missouri Aquatic Resources Mitigation Guidelines require a higher ratio when preservation is the sole mitigation method used. Therefore, the Corps must require the Applicant to perform restoration, establishment, and/or enhancement activities in conjunction with preservation to offset the project's impacts or, should the Corps waive this requirement, require the Applicant to preserve significantly more wetland acreage than the 3.91 acres proposed.

Thank you for the opportunity to comment on this proposal. If you have any questions about these comments, please contact Clinic Environmental Scientist Ken Miller at (314) 935-6368.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Hubertz', is positioned above the typed name.

Elizabeth J. Hubertz  
Clinic Attorney  
Interdisciplinary Environmental Clinic  
Washington University School of Law  
One Brookings Drive  
Campus Box 1120  
St. Louis, Mo 63130

Mr. Clark.

In response to the Joint Public Notice regarding Shelby Road Extension I am submitting the following concerns:

Cultural resources: The proposed route is in close proximity to many known Native American sites. Many are located on the property of Mr. Kelly Boyers. Previous construction in the Pike Creek drainage has unearthed sites on the north side of PP Highway adjacent to Pike Creek. Unfortunately the city planner for Poplar Bluff, Mo was present when a large area containing native artifacts and possible human remains were disturbed and did not intervene or contact appropriate authorities. This site was quickly covered with earth and construction proceeded.

I would hope that the Corps would put the appropriate boots on the ground and make a complete survey and assessment of potential Native American artifacts.

This area was occupied the Quapaw Indians of Oklahoma.

Flood Plain: The Pike Creek drainage has seen an accelerated rate of construction which has yielded increased frequency of flooding and higher water levels. A recent example is the filling of property on PP highway east of the bridge on Pike Creek. This site is very close to the creek and undoubtedly will have a negative effect on flooding. The filling of property north of PP highway and on the west side off Pike Creek further changed the natural spreading of flood waters. This has increased the frequency of the flooding of Roxie Road during periods of precipitation that previously would not have seen flood waters rise so quickly.

The large amount of construction on Oak Grove Road has further altered the landscape reducing the natural absorption of water that also flows into Pike Creek.

I have witnessed these flooding events for the last 55 years. Without proper planning and flood mitigation the building of Shelby Road Phase II will add an unknown to future flooding. In discussing Pike Creek flood plans with the city of Poplar Bluff I was informed the city has not planned for flood control. Smith Engineering of Poplar Bluff informed me on 3 April 2014 the road planning is based on a 25 year flood.

I would submit that narrowing of the natural spread of flood waters will result in an increased rate of flow that could potentially increase the loss of top soil and bank erosion. The construction of levees along Pike Creek and in close proximity have further altered the flow of flood waters and are within the Flood Way.

The flood water impact to the Paul Johnson farm has not been answered. How flood water will be evacuated has not been clearly delineated. This property will be cut off from the natural flow of water and those results will be detrimental to land usage.

I request that the flood model should be released to the public for debate and comment.

I urge that no permit be issued until a long range flood control plan is developed.

Environmental: The project will cross abandoned sewage lagoons. I raise the concern of disturbing areas without an Environmental Assessment to determine if there are pollutants in this area and a hazard mitigation plan is developed. I would suggest a survey be conducted to determine the location of any refuse landfills or disposal of hazardous waste along the route.

Natural Resources: This route will result in the loss of oak trees that have been determined to be older than 150 years. The project will result in habitat loss for deer, turkey, water fowl, and small game.

Needs of the land owners: Few if any of the impacted landowners indorse this project. Three families will forfeit their homes, business, and property. Some will see their lives interrupted, their quality of life diminished and their property irrevocably altered. While some will profit financially to the detriment of many.

During the construction hundreds of people will see their daily routine and route of travel significantly impacted. They will have to use access points on 67 that have no controlled access. Those needing emergency services will endure substantially longer response times. The response to inquiries regarding this imposition have been insensitive to the needs of the people.

Stated purpose of the project: The City of Poplar Bluff has not made any traffic studies that would support the purpose of reducing traffic available to the public. As the core of business for Poplar Bluff is on business 67 I am somewhat skeptical of this justification. I am more inclined to believe this project is providing a direct route to the 8 Points development at the northern end of Shelby road.

Alternate routes: This process addressed no options that did not involve crossing of the flood plain in two areas. There was no investigation of routes that would have been further to the west on high ground that would lessen the impact of encroaching on the flood plain on the northern end of the project. Many engineers I have consulted believe that a route directly west of highway 53 and then turning north as the road approached Pike Creek road would have been

more acceptable. This option would require significantly less fill and would lessen the impact to the flooding of Roxie Road.

I would request this option be given equal weight in the analysis by the Corps.

Public Hearing: I am formally requesting a public hearing that these concerns be addressed by a neutral party that has no agenda connected with this project, Corps of Engineers, and that the Corps facilitate the hearing. The residents that use Roxie Road as their primary route of travel to and from Poplar Bluff be informed in writing of these plans. The publication in the local newspaper is buried in the classified ads. This method is a hit and miss distribution of the information.

//signed//

RICHARD S. JOHNSON

Lt Col, USAF, retired