



## SCHOOL OF LAW

### Interdisciplinary Environmental Clinic

November 6, 2018

Cynthia Blansett  
U.S. Army Corps of Engineers  
Little Rock District Regulatory Division  
P.O. Box 867  
Little Rock, Arkansas 72203-0867  
Via Email to [Cynthia.W.Blansett@usace.army.mil](mailto:Cynthia.W.Blansett@usace.army.mil)

Re: Supplemental Comments on Proposal by The Doe Run Company  
Application No. 2014-00224-2

Dear Ms. Blansett:

On behalf of the Missouri Coalition for the Environment (“MCE”), the Interdisciplinary Environmental Clinic at Washington University School of Law submits these supplemental comments on the work described in the March 15, 2018 joint public notice for Application No. 2014-00224-2. The applicant, the Doe Run Company (“Doe Run”), has requested authorization to permanently redirect the flow of the West Fork of the Black River (“West Fork”) through a temporary diversion channel constructed at its West Fork Mine facility in Reynolds County, Missouri in July 2014.

The temporary diversion channel was originally constructed for the purpose of preventing significant loss of flow from the West Fork into Doe Run’s West Fork Mine through subsidence features associated with a major ground fall that occurred over a large portion of the site on or about June 12, 2014.<sup>1</sup> On June 27, 2014, the U.S. Army Corps of Engineers (“Corps”) determined that construction of the temporary diversion channel was authorized by Nationwide Permit No. 38, subject to several case-specific special conditions.

In its emergency request for a permit, Doe Run estimated that the temporary diversion channel would be utilized for approximately 16 months.<sup>2</sup> More than four years later, use of the diversion channel – construction of which resulted in approximately 2,642 linear feet of stream impacts (2,419 feet along the West Fork and 224 feet along Brown Branch, an intermittent tributary) and 0.176 acres of wetland impacts, for which Doe Run has provided no mitigation to date – continues. Doe Run now wants to make these impacts permanent, and further proposes

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<sup>1</sup> The June 12 ground fall was the result of “an apparent progressive ‘chain reaction’ failure of [pillars supporting the mine back]” and followed another large ground fall on April 2 resulting from a failure of pillars in an area of recent pillar extraction by Doe Run. U.S. Mine Safety and Health Administration, Investigation of Sinkhole Occurrences, Doe Run Company, West Fork Tailings Dam, Impoundment I.D. No. 23-00409-04, Fletcher Mine, Mine I.D. No. 23-00409, Reynolds County, Missouri (Sept. 29, 2014).

<sup>2</sup> U.S. Army Corps of Engineers, Nationwide Permit No. 2014-00224 (June 27, 2014).

adding approximately 65,000 cubic yards of fill to the abandoned West Fork channel and approximately 400 cubic yards of fill to the diversion channel to install four cross-vanes to improve stream habitat.

On April 15, 2018, MCE submitted comments on Doe Run's request for authorization for this project in response to the March 15 joint public notice in order to meet the deadline for comments.<sup>3</sup> However, these comments were submitted before MCE obtained several key documents from the Corps in response to a FOIA request it submitted on March 10, including Doe Run's current mitigation plan, which is significantly different from an earlier version provided to MCE in response to a previous FOIA request. MCE made a good-faith effort to obtain these documents before the comment period ended by requesting an extension of the comment period and amending its FOIA request on March 26 to request expedited processing in light of the pending deadline for comments.<sup>4</sup> The Corps extended the comment period by ten days but denied MCE's request for expedited processing. MCE subsequently requested production of mitigation-related documents prior to the close of the public comment period and production of all other responsive documents at a later date. The Corps ignored this request. On or around April 25, ten days after MCE submitted its comments, MCE received approximately 1,400 pages of documents regarding Doe Run's permit application in response to its FOIA request.

MCE's previous comments focused on the significant losses to recreational and aesthetic value that would be made permanent through the authorization of this permit, as well as on Doe Run's proposed mitigation insofar as MCE understood it based on the limited information provided in the public notice. These supplemental comments further discuss MCE's concerns regarding temporal losses and the location of the Crane Creek Wetland and Stream Mitigation Bank relative to the impact site and are based on the information acquired by MCE in response to its FOIA request after the close of the public comment period.

**I. A Compensation Ratio Higher Than 1:1 Should Be Used to Determine the Amount of Mitigation Required to Offset Stream Impacts to Account for Temporal Losses and the Location of the Crane Creek Mitigation Bank Relative to the Impact Site**

The purpose of compensatory mitigation is to make up for the environmental losses resulting from unavoidable impacts to waters of the United States.<sup>5</sup> As such, the Corps' regulations require compensatory mitigation capable of compensating for the aquatic resource functions lost as a result of the permitted project.<sup>6</sup> In the instant case, in order to ensure adequate compensation for all losses, a compensation ratio higher than 1:1 is necessary to account for temporal losses and the location of the Crane Creek mitigation bank relative to the impact site.

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<sup>3</sup> The public comment period for Application No. 2014-00224-2 originally ended on April 5, 2018 but was extended through close of business on April 15 in response to a request from MCE.

<sup>4</sup> MCE did not request expedited processing when it filed the request on March 10 because the public notice for Application No. 2014-00224-2 had not been issued yet, so there was no comment deadline at the time of filing.

<sup>5</sup> 33 C.F.R. § 332.3(a)(1).

<sup>6</sup> *Id.*

*A. A Higher Compensation Ratio is Necessary to Account for Temporal Losses Caused by the Project's Impacts*

Doe Run's current mitigation plan makes no reference to temporal losses caused by the project's impacts. This is a serious omission given that it has been over four years since Doe Run created these impacts. Furthermore, although the emergency permit authorizing the impacts required Doe Run to submit a compensatory mitigation plan within six months and to implement mitigation immediately following the Corps' approval, to MCE's knowledge Doe Run has not performed any mitigation to date to compensate for the aquatic resources it altered or destroyed in 2014. As a result, the project has already caused significant temporal losses of aquatic resource functions, and because it is unclear how much longer it will be until Doe Run is able to begin compensatory mitigation in the area, those losses are sure to grow before mitigation is finally implemented and grow even more before it is completed. According to the Corps' regulations, the district engineer *must* require a compensation ratio greater than 1:1 to account for, among other things, "temporal losses of aquatic resource functions."<sup>7</sup>

*B. A Higher Compensation Ratio is Necessary to Account for the Location of the Crane Creek Mitigation Bank Relative to the Impact Site*

Doe Run proposes to purchase approximately 1,831 stream credits from the Crane Creek Wetland and Stream Mitigation Bank ("Crane Creek") in southwest Missouri. The Corps' regulations allow the purchase of credits from an approved mitigation bank or in-lieu fee ("ILF") program to fulfill mitigation requirements, provided that the impact site is within the service area of said mitigation bank or ILF program.<sup>8</sup> However, in this case, the impact site is not within the service area of any authorized mitigation bank or ILF program, including Crane Creek.<sup>9</sup> According to the Corps' regulations, "[w]here permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option."<sup>10</sup> However, the Corps sometimes exercises discretion and allows the purchase of credits even though the permitted impacts are not within the service area of any bank or ILF program, and MCE generally favors the purchase of credits over permittee-responsible mitigation for many of the same reasons that the Corps does.<sup>11</sup> Therefore, MCE does not object to the use of mitigation bank credits in this instance. However, Doe Run proposes to purchase credits from Crane Creek, which is located more than 130 miles away from the impact site in a different, non-adjacent HUC-8 watershed.<sup>12</sup> According to the Corps' regulations, the district engineer *must* require a compensation ratio greater than 1:1 to account for, among other things, "the distance between the affected aquatic resource and the compensation site."<sup>13</sup>

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<sup>7</sup> 33 C.F.R. § 332.3(f)(2).

<sup>8</sup> 33 C.F.R. § 332.3(b)(2).

<sup>9</sup> U.S. Army Corps of Engineers, Regulatory In-lieu Fee and Bank Information Tracking System, available at <https://ribits.usace.army.mil> ("RIBITS").

<sup>10</sup> 33 C.F.R. § 332.3(b)(4).

<sup>11</sup> See e.g. 33 CFR 332.3(b)(2) and (3).

<sup>12</sup> RIBITS.

<sup>13</sup> 33 C.F.R. § 332.3(f)(2).

MCE strongly believes that a compensation ratio of at least 1.5:1 is necessary in this instance to account for both temporal losses and the considerable distance between the affected aquatic resources and Crane Creek, from which Doe Run proposes to purchase mitigation credits. While the Corps' regulations require a ratio greater than 1:1 to account for these factors, they do not specify a ratio, leaving it instead to the Corps' discretion. MCE notes that for permittee-responsible mitigation that takes place outside of the HUC-8 watershed within which stream impacts occur, the Missouri Stream Mitigation Method prescribes doubling the amount of compensatory mitigation required through the use of a location and kind factor of 0.5.<sup>14</sup> Similarly, Missouri's Aquatic Resources Mitigation Guidelines allow for an increase in compensation ratios when out-of-watershed mitigation is proposed, as well as when mitigation is not conducted before or concurrently with the authorized impacts – i.e., when temporal losses occur.<sup>15</sup> As such, a compensation ratio of 1.5:1 should be considered the minimum ratio required due to the extent of temporal losses that have occurred and the fact that Crane Creek is located over 130 miles away from the impact site. A 1.5:1 ratio would require Doe Run to provide 19,124 stream mitigation credits (see enclosed adverse impact factors worksheet), 6,375 more credits than Doe Run's current mitigation plan provides. These could be provided through additional permittee-responsible mitigation or, preferably, the increased use of mitigation bank or ILF program credits.

## **II. Doe Run Should Purchase Credits From the Mitigation Bank Nearest the Impact Site**

Given that Doe Run cannot avoid purchasing credits from a mitigation bank whose service area does not encompass the impact site, the Corps should require it to purchase credits from the closest mitigation bank with available credits in order to minimize the distance between the affected resources and the compensation site. Swallowtail LLC's Gasconade River Wetland and Stream Mitigation Bank ("Gasconade River") is located approximately 75 miles from the West Fork Mine site, a little more than half the distance to Crane Creek, and its service area comes much closer to encompassing the mine than Crane Creek's. At present, Gasconade River reports 5,677 available credits of the appropriate type available for purchase.<sup>16</sup> In addition, there are 17,204 stream credits available in the Missouri Conservation Heritage Association ("MCHF") ILF program's Ozark/Meramec service area, which comes even closer than that of Gasconade River to encompassing the mine site.<sup>17</sup> 3,807 of these credits were generated by a project on Spring Creek in neighboring Dent County, less than 30 miles from the impact site.<sup>18</sup> As such, MCE recommends that Doe Run be required to purchase credits from Gasconade River and/or MCHF, and that it only be allowed to purchase credits from Crane Creek if it needs more than Gasconade River and MCHF can provide. There is simply no sound basis for Doe Run purchasing credits from Crane Creek over these closer options.

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<sup>14</sup> U.S. Army Corps of Engineers, State of Missouri Stream Mitigation Method (April 2013) at 18.

<sup>15</sup> Missouri Department of Natural Resources, State of Missouri Aquatic Resources Mitigation Guidelines (May 1998) at 5.

<sup>16</sup> RIBITS.

<sup>17</sup> *Id.*

<sup>18</sup> SSTF0080, Dent County Road 2310 Bridge over Spring Creek. *Id.*

## CONCLUSION

For the reasons stated above, MCE urges the Corps to require more mitigation from Doe Run before granting this permit. The applicant has thus far failed to account for temporal losses caused by the project's impacts, as well as the distance between the affected aquatic resource and Crane Creek, one of the compensation sites Doe Run intends to use. The Corps' regulations require that temporal losses as well as location factors be accounted for in all mitigation plans. As it stands, Doe Run's mitigation plan fails to take these factors into consideration and therefore should not be approved in its current form.

Thank you for your attention to these supplemental comments. If you have any questions, please contact me at 314-935-8760, or Ken Miller at 314-935-6368.

Sincerely,



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Cc: Stacia Bax – Missouri Department of Natural Resources  
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**ADVERSE IMPACT FACTORS  
WORKSHEET**

Stream Type Impacted	Ephemeral 0.3			Intermittent 0.4			Perennial 0.8		
Priority Waters	Tertiary 0.1			Secondary 0.4			Primary 0.8		
Existing Condition	Functionally Impaired 0.1			Moderately Functional 0.8			Fully Functional 1.6		
Impact Duration	Temporary 0.05			Permanent 0.3					
Impact Activity	Clearing 0.05	Utility Crossing/Bridge Footing 0.15	Below Grade Culvert 0.3	Armor 0.5	Detention facility 0.75	Morpho -logic Change 1.5	Impound -ment 2.0	Pipe 2.2	Fill 2.5
Linear Impact Calculation	0.0002 multiplied by linear feet of stream impact recorded in each column below								

Factor	Impact 1 West Fork	Impact 2 Brown Branch	Impact 3	Impact 4	Impact 5
Stream Type Impacted	0.8	0.4			
Priority Waters	0.1	0.1			
Existing Condition	0.8	0.8			
Impact Duration	0.3	0.3			
Impact Activity	2.5	1.5			
Linear Impact Calculation	0.48	0.045			
Sum of Factors (M )	4.98	3.15			
Linear Feet of Stream Impact (LF)	2,419	223			
Credits (C) = M X LF	12,046.6	702.5			
*Compensation Ratio X (C)	1.5:1				

**Total Credits Required from all Columns= 19,123.65**

*\* Compensation Ratio - when the Corps determines that a third party mitigation source is acceptable to fulfill compensatory mitigation requirements the total credits determined on this worksheet shall be applied to mitigation banks or in-lieu fee programs at a 1:1 ratio when the impact area is within an approved service area. However, an increased compensation ratio may be used at the Corps discretion when an impact occurs beyond the geographic service area of an approved mitigation bank or in-lieu fee program.*