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May 9, 2017

Mr. Loren Wobig, P.E., CFM  
OWR Regulatory Projects Division Manager  
Division of Resource Management  
Illinois Department of Natural Resources  
1 Natural Resources Way  
Springfield, Illinois 62702-1271  
*Via overnight delivery and email to [loren.wobig@illinois.gov](mailto:loren.wobig@illinois.gov)*

**Re: Proposed Amendments to Illinois Administrative Code Title 17, Part 3700**

Dear Mr. Wobig:

I am writing regarding the proposed amendments to Illinois Administrative Code Title 17, Part 3700 under consideration by the Illinois Department of Natural Resources ("IDNR"). IDNR has long been a valued partner in protecting the safety and economic welfare of communities on both the Illinois and Missouri sides of the Mississippi River. However, the proposed amendments to Part 3700—which would significantly alter the standards applicable to levees along the Mississippi River—threaten to substantially increase the risk of severe flooding throughout Eastern Missouri. In particular, the proposed amendments could have the effect of ratifying or "grandfathering" previously overbuilt levees and floodwalls, and to exempt certain overbuilt structures from future regulatory oversight. Such regulatory changes would reward past misconduct, hamper efforts to bring overbuilt levees into compliance, and threaten Missouri and Illinois communities. For the reasons stated below, I strongly urge IDNR not to adopt the proposed amendments and to postpone any regulatory activity until—at the earliest—after the U.S. Army Corps of Engineers ("Corps") has completed its Upper Mississippi Regional Flood Risk Management Hydrologic Model ("UMR Hydrologic Model").

As you know, the Corps is currently preparing its UMR Hydrologic Model, which the Corps anticipates completing by September 2017. This study will provide critical information relevant to IDNR's proposed rulemaking and the effects that the proposed rules may have on relevant stakeholders. Only after the completion of the study will IDNR be able to make an informed decision regarding the need and advisability of any proposed rules. In addition, only after completion of the study will most relevant stakeholders be able to determine how the proposed rules will affect them, which in turn would allow those stakeholders to submit more detailed and informative regulatory comments. Awaiting the completion of the Corps study also

will not unreasonably delay the regulatory process. Thus, I strongly urge IDNR to postpone its proposed rulemaking until, at the earliest, the Corps has completed its UMR Hydrologic Model.

In addition, because the proposed rules inevitably will impact Illinois's neighboring States, I encourage IDNR to consult and coordinate with the appropriate agencies of those States before proceeding with the proposed rulemaking. This coordination is essential to ensuring effective and equitable water policies that protect the safety and economic security of all stakeholders.

At this preliminary stage—especially without the benefit of the UMR Hydrologic Survey—we cannot enumerate every aspect of the proposed rules that might pose risks to Missouri communities. However, I wish to identify two concerns in particular regarding the substance of the proposed rules.

*First*, it is essential that the proposed rules not ratify, retroactively authorize, or “grandfather” any levees or floodwalls that currently exceed their permitted profile. Overbuilt levees threaten communities on both sides of the Mississippi River, and those districts that have overbuilt their levees have done so in defiance of IDNR’s authority. Any regulatory change that would ratify or retroactively approve currently overbuilt structures would reward bad actors, incentivize future misbehavior, and obstruct efforts to bring overbuilt structures into compliance.

While several aspects of the proposed rules appear intended to address this concern, certain language within the proposed rules raises serious concerns about possible ratification of previous overbuilding. For example, proposed § 3700.30(b)(7) would entirely exempt from the permitting process all “[m]aintenance and repair, to preserve design capacity and function, of levees and floodwalls that existed on July 1, 1985 or have been authorized by a permit issued under this Part.” To be sure, that provision goes on to state that “[m]aintenance and repair does not include *raising* a levee or floodwall above its pre-July 1, 1985 or permitted profile.” (Emphasis added.) But under the plain terms of this provision, if a levee *already* exceeds its permitted profile, then (at least arguably) further profile increases would not raise the levee above the permitted profile. As a result, such further overbuilding might escape any review at all under the permitting process. IDNR could avoid this result by providing expressly that the exemption set forth in § 3700.30(b)(7) does not apply to any work that would increase the profile of a levee or floodwall that already exceeds its permitted profile. Similarly, it appears that IDNR intends proposed §§ 3700.75(c) and 3700.76(c) to preclude modifications of levees that currently exceed their authorized profile. However, the proposed rule should specify that an applicant must demonstrate *strict* and *complete* compliance with the existing permit and that “substantial compliance” does not suffice.

*Second*, the proposed rules would significantly alter the standard used in the worst-case analysis for the construction and modification of levees and floodwalls. Under the existing rules, the worst-case analysis for levees and floodwalls looks to “[t]he flood discharge that would just overtop [the] levee.” ILL. ADMIN. CODE Title 17, § 3700.75. In stark contrast, the worst-case analysis for a levee under the new rules would consider only a 100-year flood. Under this revision, once a levee’s profile reaches the level of a 100-year flood, there would be effectively no further regulatory barriers to additional increases to the levee’s profile. The permitting



process would not distinguish between a levee built to 100-year-flood levels and one built to 500-year-flood levels. This change could have devastating consequences for communities on both sides of the Mississippi River. I encourage IDNR to retain the existing worst-case analysis for levees and flood walls and to continue using the analysis set forth in the current version of § 3700.75.

I appreciate the opportunity to provide comments on IDNR's proposed rules. The Mississippi River has played a critical role in the economic and cultural life of both Illinois and Missouri. And for nearly 200 years, our States have successfully cooperated in the management and use of the River. I am hopeful that this successful cooperation will continue as IDNR considers amendments to Chapter 3700. For the reasons stated in this letter, I strongly urge IDNR not to adopt the proposed rules and to postpone any regulatory change until after completion of the Corps's UMR Hydrologic Model.

If I can provide any further assistance regarding this matter, please do not hesitate to contact my Office at 573-751-8145 or [michael.martinich-sauter@ago.mo.gov](mailto:michael.martinich-sauter@ago.mo.gov).

Sincerely,



Joshua D. Hawley  
Attorney General of Missouri