

# Midwest Environmental ADVOCATES

*pro bono publico*

## BOARD OF DIRECTORS

**Arlen Christenson**, President  
Emeritus Professor of Law  
and Environmental Studies  
University of Wisconsin Law School  
Madison

**Henry Hamilton III**  
U.S. Equal Employment  
Opportunity Commission  
Milwaukee

**James P. Goodman**  
Northwood Farm  
Woneoc

**Daniel Idzikowski**, Treasurer  
Assistant Dean for Public Service  
Marquette University Law School  
Milwaukee

**William H. Lynch**  
Law Office of William H. Lynch  
Milwaukee

**Sarah Skebba**  
Environmental Advocate  
Whitefish Bay

**Stephanie Tai**  
Assistant Professor of Law  
University of Wisconsin Law School  
Madison

**Larry Wawronowicz**  
Deputy Administrator of  
Natural Resources  
Lac du Flambeau Band of Lake  
Superior Chippewa Indians  
Arbor Vitae

*(Organizations listed for identification  
purposes only.)*

## STAFF

**Kimberlee Wright**  
Executive Director

**Melissa K. Scanlan**  
Founder & Senior Counsel

**Dennis Grzezinski**  
Senior Counsel

**Betsy Lawton**  
Staff Attorney

**James N. Saul**  
Staff Attorney

**Florence Edwards-Miller**  
Development Director

**Kendra J. Wochos**  
Litigation Paralegal

**Kelly Forman**  
Office Manager

**Jodi Habush Sinykin**  
Of Counsel

May 14, 2010

**Jason Berkner**  
Regulatory Branch  
United States Army Corps of Engineers  
St. Paul District  
15954 Rivers Edge Dr. Suite 240  
Hayward, WI 54843

**Re: 2010-00590-JRB - Superior Safety and Weigh Enforcement  
Facility (SWEF)**

Dear Mr. Berkner:

These comments supplement the April 15, 2010 preliminary comments submitted on behalf of Midwest Environmental Advocates regarding this permit application. MEA appreciates the decision of the United States Army Corps of Engineers to extend the public comment period.

MEA's previous comments, and those of the Wisconsin Wetlands Association (which MEA referenced and adopted), demonstrate that the proposed project's destruction of 18.2 acres of wetlands will cause significant adverse environmental impact. The proposed project footprint will destroy wetlands of high to exceptional quality, will impact at least one state species of special concern (Vasey's Rush), and is located in the headwaters of the St. Louis River, a watershed whose environmental significance is far better recognized today than it was in 2001-2004 when the applicant performed its wetland delineations, functional analyses, and environmental reviews.

Little or no consideration or analysis of the indirect impacts, cumulative impacts, or secondary impacts of this wetland destruction appears in the file for this permit application. Nor is there any analysis or assessment of the extent to which wetland functions can, as a practical matter, actually be restored to the area which is now the footprint of the existing SWEF facility. Nevertheless, the applicant's assessment of the net impacts to wetlands of the proposed project assumes, without analysis, that such restoration will be accomplished after the existing facility is abandoned

551 W. Main Street, Suite 200 • Madison, WI 53703  
Telephone 608.251.5047 • Fax 608.268.0205

1845 N. Farwell Avenue, Suite 100 • Milwaukee, WI 53202  
Telephone 414.688.4171

Email: [advocate@midwestadvocates.org](mailto:advocate@midwestadvocates.org) • Web: [www.midwestadvocates.org](http://www.midwestadvocates.org)

and demolished. Similarly, there has been no consideration of the impact of declining traffic volumes on the need for a facility of the size proposed, nor any analysis of the opportunity to reduce the footprint of the facility through the use of newer technologies, such as mobile equipment and facilities (virtual weigh stations, "Intelligent Transportation Systems," and the like), nor any evaluation of the ability to minimize wetland impacts by constructing a new facility at the location of the existing SWEF and to use newer technologies to provide needed services during the period of demolition and reconstruction.

In *Highway J Citizens Group v. United States Dept. of Transp.*, Case No. 05-C-0292 ( E.D. Wis. Sept 14, 2009) (decision and order on motions for summary judgment); and *Highway J Citizens Group v. United States Dept. of Transp.*, Case No. 05-C-0292 ( E.D. Wis. March 3, 2010 ) (order denying motion for reconsideration), a case in which the Corps was a party, the Court has ruled that similar approaches to conducting environmental reviews violate agencies' responsibilities under NEPA, the Federal Aid Highway Act, and the Clean Water Act. Similarly, the Court rejected DOT's conclusory rejections of alternatives to the proposed project, as well as its attempt to define a project's basic purpose in such a manner as to essentially exclude consideration of any alternatives. Unless there is a fundamental reconsideration of the environmental analysis and practicable alternatives evaluation performed on this project to date, MEA submits that approval of this permit application would amount to NEPA and Clean Water Act violations similar to those in the *Highway J* case.

MEA's previous comments, and those of the Wisconsin Wetlands Association, noted that the wetlands delineations, functional assessments, and practicable alternatives analysis for this project are out-dated. Under the Corps' own policies, delineations are to be redone if more than 5 years have passed. Approving this permit on the basis of such outdated information would be erroneous and arbitrary.

Applicants are required under 40 C.F.R. § 230.10(d) to take "appropriate and practicable" steps to minimize potential adverse impacts on the aquatic ecosystem. The Wisconsin Wetland Association's comments demonstrate that the applicant has failed to consider, and has failed to implement, a number of "appropriate and practicable" methods to reduce the adverse wetland impacts of this project:

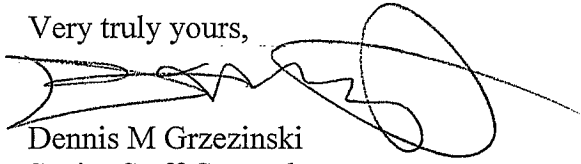
- Use of mobile or satellite weigh facilities
- Use of virtual weigh stations
- Ability to locate elements of the facility at other locations
- Ability to utilize the location of the existing facility

In *Senville v. Peters*, 327 F.Supp. 335 (D.C. Vt. 2004), 2004 U.S. Dist. LEXIS 8312, a highway project's 2003 Record of Decision adopted a 1986 Final Environmental Impact Statement. The Court found the 1986 FEIS inadequate for failure to discuss cumulative impacts and for its cursory examination of secondary impacts. An Environmental Assessment had been prepared to determine whether a Supplemental Environmental Impact Statement was necessary, without analyzing alternatives to the project. The

highway agency failed to consider alternative modes of transport which appeared to be available that were not available in 1986. Failure to consider this new information led the Court to rule that the environmental analysis was inadequate under NEPA. Similarly, under these circumstances, where the applicant agency has failed to consider new technologies for providing the weigh and safety functions which represent the purpose of the proposed project, approving this permit would be erroneous and arbitrary.

Midwest Environmental Advocates appreciates having the opportunity to supplement its previous comments with this additional submission. Wisconsin Wetlands Association is also submitting supplemental comments today, and MEA joins in and adopts those comments and objections as well.

Very truly yours,



Dennis M Grzezinski  
Senior Staff Counsel  
Midwest Environmental Advocates  
312 East Wisconsin Avenue, Suite 210  
Milwaukee, WI 53202  
414 289-9200  
414 289-0664 fax  
[dennisg@midwestadvocates.org](mailto:dennisg@midwestadvocates.org)