

Midwest Environmental ADVOCATES

pro bono publico

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April 15, 2010

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

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

Dear Mr. Berkner:

*(Organizations listed for identification
purposes only.)*

STAFF

Kimberlee Wright
Executive Director

The preliminary comments of Midwest Environmental Advocates, Inc. (MEA) on the above wetland permit application are set forth below. MEA is a nonprofit environmental law center with offices in Madison and Milwaukee, Wisconsin. MEA provides legal and technical support to grassroots groups that are working for environmental justice in the Western Great Lakes region, and has been involved in wetlands protection and other Clean Water Act issues since its founding over 10 years ago.

Melissa K. Scanlan
Founder & Senior Counsel

Dennis Grzezinski
Senior Counsel

Betsy Lawton
Staff Attorney

James N. Saul
Staff Attorney

As an initial matter, MEA requests a 30-day extension of the public comment regarding this application. It has been extremely difficult to obtain complete information regarding this project, and to date, MEA and others have been unable to obtain and review the information necessary to prepare and submit complete comments. We are informed that the United States EPA has already submitted a request for an extension.

Florence Edwards-Miller
Development Director

Kendra J. Wochos
Litigation Paralegal

Kelly Forman
Office Manager

Jodi Habush Sinykin
Of Counsel

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

MEA's preliminary comments and objections to the permit application relate to the inadequacy of the application – and its unreadiness for a permit decision at this time. This project is not ready for a permit decision for the following reasons:

Based on our review to date, it appears that the current permit application is based on information gathered between 2001 and 2004 for a previous application that was withdrawn. A new look at the information submitted in the earlier environmental assessment, alternatives analysis, and wetland delineations is required to deal with the current application.

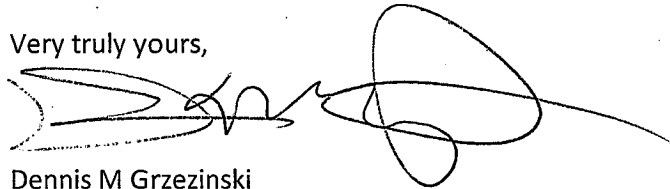
- a) The wetland delineations and assessments of the wetland impacts are outdated. ACOE's policy is to require new wetland delineations if an applicant submits delineations that are more than 5 years old. The application indicates that the wetland delineations at the proposed site were done in October 2001, with a further identification of wetlands within the 6-mile long study area done in 2004, and functional value assessments completed in May 2004. That makes the delineations about 8 1/2 years old, and the functional value assessments about 6 years old. Ergo, new wetland delineations are required.
- b) New environmental analyses are required, as WisDOT's environmental assessment is outdated, and subsequent significant information has not been considered or evaluated. The US Supreme Court, in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) addressed the issue of when a new or supplemental EIS is needed, and ruled that new "significant information" needs to be considered. CEQ regulations require supplemental statements when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 45 CFR Sec 1502(9)(c). Whether the newer information is considered through an EA, an EIS, or a reevaluation will depend upon the nature of the information, but a new hard look is required. See *Price Rd. Neighborhood Ass'n Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505 (9th Cir 1997).
- c) Here, the lengthy passage of time since the 2001 delineation and 2004 application warrants a new evaluation of the proposed project. This is particularly the case in light of 1) the dramatic decrease in highway travel nationwide, as well as in Wisconsin, over the last few years, contrary to DOT's projections of ever-increasing volumes; 2) the introduction of new technology for performing the weight and safety functions which the facility is proposed to provide, including mobile equipment and facilities, advances in computer and wireless technology, etc. which could reduce the required footprint of the facility, and could increase DOT's ability to reuse the footprint of the existing facility; and 3) the outdated wetland delineations and functional value assessments for the wetlands which DOT proposes to fill.

- d) The Purpose and Need for the project is based on seven year old traffic statistics and forecasts. And, contrary to WisDOT's projections of ever-increasing highway traffic volumes on which the size of the proposed facility was based, highway traffic volumes have been decreasing since 2006. See the Federal Highway Administration's monthly traffic volume reports for the nation, and for the North Central region of which Wisconsin is a part, showing that monthly vehicle miles traveled have decreased by 10% in the North Central region between January 2006 and January 2010, the latest month for which data is available at <http://www.fhwa.dot.gov/ohim/tvtw/tvtpage.cfm> That is a larger decrease than the 7% decrease for the nation as a whole.

The Wisconsin Wetlands Association has today submitted more extensive comments and objections relating to the need for an extension of the public comment period, to the need for public hearings regarding this permit application (which proposes very significant wetland impacts), and to the merits of the application. MEA joins in those comments and objections, but will not burden the Corps or the environment by repeating them in full here.

Please contact me at 414-289-9200 if you have any questions.

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