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March 16, 2018

VIA EMAIL to [bradleya.johnson@wi.gov](mailto:bradleya.johnson@wi.gov)

Bradley Johnson  
Wisconsin Department of Natural Resources  
5301 Rib Mountain Drive  
Wausau, WI 54401

**Re: OmniTRAX wetland fill application, Docket No. IP-WC-2016-27-00815**

Dear Mr. Johnson:

Thank you for the opportunity to comment on the Wisconsin Department of Natural Resources' ("DNR") proposal to issue a permit to OmniTRAX to construct a new industrial sand mining, processing, and rail loading facility that would destroy 4.02 acres of exceptional quality forested wetlands in Jackson County, Wisconsin. Midwest Environmental Advocates is a nonprofit environmental law center that works to ensure clean water, air, land, and government for this generation and the next. Midwest Environmental Advocates submits these comments on behalf of the Ho-Chunk Nation.

The Ho-Chunk Nation is one of the strongest indigenous Nations in the United States. The Nation's land extends throughout the Midwest, including significant tribal and trust lands in Wisconsin. There are many Ho-Chunk members throughout the state, and their history and culture is tied to Wisconsin. The southern half of what is now known as Wisconsin was and is their traditional homeland, which they have cared for and defended for thousands of years. Even after multiple forced removals, the Ho-Chunk people always returned on foot to take care of the land and the environment they were given.

The Nation's government is dedicated to protecting their people and lands for this and future generations, but DNR's failure to consult with the Ho-Chunk Nation limits its ability to protect its interests. The expansive and permanent destruction of the landscape, including wetlands, for industrial sand mines threatens the Nation's people, land, and cultural heritage. The Ho-Chunk Nation expressed its intent to protect its land and people from this landscape-scale destruction by passing a resolution in opposition to frac sand mining on December 4, 2012. Attachment 1.

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The OmniTRAX project in particular will have a disproportionate and negative impact on the Ho-Chunk Nation and its members. The project site is approximately 2-3 miles away from Ho-Chunk Nation allotments, and fee-simple and trust lands. Attachment 2 (map created by the Ho-Chunk Nation to show the location of its lands relative to the former Terracor site, OmniTRAX plans to develop as an industrial sand facility).

DNR has repeatedly failed to meaningfully consult or even notify the Ho-Chunk Nation about proposed industrial sand facilities that may impact the Ho-Chunk Nation's land and people. DNR's policy for consultation with Wisconsin tribes recognizes that such consultation is "necessary and respectful" for "activities that are anticipated to affect American Indian Tribes or their members."<sup>1</sup> Consistent with this policy, DNR should notify and meaningfully consult with the Ho-Chunk Nation on this and any future development proposals that "are anticipated to affect" the Ho-Chunk Nation or its members.

Further, for the reasons explained below, the DNR should not issue a wetland fill permit to OmniTRAX because it does not meet the legal standards for permit issuance. Specifically, the OmniTRAX proposed project will have significant direct, secondary, and cumulative impacts, is not the least environmentally damaging practicable alternative, and does not include an adequate compensatory mitigation plan.

**I. The OmniTRAX project would result in significant direct, secondary, and cumulative environmental impacts to an exceptional quality wetland in an environmentally important watershed.**

DNR may not issue a permit to fill wetlands if the project will "result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences."<sup>2</sup> To determine whether a proposed project meets legal standards, DNR must consider direct, secondary, and cumulative impacts as well as "[t]he net positive or negative environmental impact of the proposed project."<sup>3</sup> There are no environmental benefits associated with this project. As explained below, the OmniTRAX project will result in significant direct, secondary, and cumulative impacts to wetlands and the environment.

The OmniTRAX project will impact 4.02 acres of mostly forested and undisturbed wetlands. DNR's Wetland Rapid Assessment Methodology ("RAM") rates the floristic integrity as exceptional, with very low, less than 10%, cover of invasive species. The RAM also rates the wildlife habitat as exceptional, and provides that the large block of wetlands and adjacent habitat likely supports sensitive species in the area.

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<sup>1</sup> Department of Natural Resources, Policy Regarding Consultation with Wisconsin's Indian Tribes (June 28, 2005), available at <http://witribes.wi.gov/docview.asp?docid=6024&locid=57>.

<sup>2</sup> Wis. Stat. § 281.36(3n)(c)3.

<sup>3</sup> Wis. Stat. § 281.36(3n)(b).

In addition to direct wetland fill, this project would result in significant secondary impacts to surrounding wetlands, waters, and public lands. This permit would authorize OmniTRAX to construct a rail facility and sand conveyer adjacent to Halls Creek, which is a popular destination for fishing and paddling. In fact, DNR stated in the Black River Water Quality Management Plan that this section of Halls Creek, just a few miles north of Black River, was a priority for preservation.

Extension of the Black River State Forest boundary continuing up Halls Creek approximately three river miles would protect a very scenic landscape. This lower portion of Halls Creek contains mature trees, sandstone outcrops and 75 foot high canyon walls.<sup>4</sup>

Scenic beauty and the cold water fishery make Halls Creek and the Black River popular fishing and paddling destinations. Additionally, the OmniTRAX project is just 2 miles north of the Black River State Forest, and the Upper Black River State Natural Area.

OmniTRAX has not addressed in its application the secondary impacts of the industrial sand facility on surrounding wetlands, waters and public lands. The mining, processing, and transport of sand have significant environmental impacts including:

- Sediment, thermal, and metal pollution to surface water and groundwater;
- Noise, light, and vibration impacts to nearby wildlife and recreational users;
- Floristic impacts from tree clearing and introducing invasive species; and
- Impacts to threatened and endangered species<sup>5</sup>

The cumulative impacts of this project are also significant and unaccounted for. Neither DNR nor OmniTRAX indicate whether this area has historic or reasonably anticipated future threats from wetland fill. DNR's Industrial Sand Mining Strategic Analysis indicates that there are at least 16 industrial sand facilities already in Jackson County. Further, DNR recently authorized the fill of over 16 acres of high quality forested wetlands in southern Jackson County for another industrial sand facility.

**Comment:** The OmniTRAX project does not provide any environmental benefits and would result in significant direct, secondary, and cumulative environmental impacts. DNR must deny the OmniTRAX wetland permit application because it will "result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences."<sup>6</sup>

## **II. The OmniTRAX proposed project is not the least environmentally damaging practicable alternative.**

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<sup>4</sup> Koperksi, Cindy, Wisconsin Department of Natural Resources, Black River Water Quality Management Plan (draft 1999), available at <https://dnr.wi.gov/water/waterDetail.aspx?WBIC=1710600>.

<sup>5</sup> DNR, Industrial Sand Mining in Wisconsin, Strategic Analysis (June 2017), available at <https://dnr.wi.gov/topic/EIA/documents/ISMSA/ISMSA2017.06.12.pdf>.

<sup>6</sup> Wis. Stat. § 281.36(3n)(c)3.

The DNR may issue a wetland discharge permit only if “[t]he proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.”<sup>7</sup> Alternatives are considered practicable if they are “available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes.”<sup>8</sup> Wisconsin law provides that the DNR “shall impose a level of scrutiny and require an applicant to provide an amount of information that is commensurate with the severity of the environmental impact of the project.”<sup>9</sup> The OmniTRAX project would have severe and irreversible environmental impacts, and warrants a high level of scrutiny by the DNR. OmniTRAX has not established that its proposed project represents the least environmentally damaging practicable alternative, and thus is not entitled to a wetland discharge permit.

OmniTRAX analyzed off-site alternatives for sand mining and concluded that this was the only economically viable location for sand mining. However, it is the processing and rail loadout facility—not the mining operation—that will have significant wetland impacts and environmental consequences. OmniTRAX did not analyze alternative sites for its processing or rail loadout facility because OmniTRAX claims that it is impracticable to locate a transload facility more than three miles away from the mine site.

DNR has evidence that OmniTRAX’s argument to limit its alternatives analysis is false, and OmniTRAX has not supplied any evidence to support it. DNR recently issued a wetland fill permit to Meteor Timber LLC to construct an industrial transload facility that is **13.9 miles** away from the mining site. OmniTRAX has not explained why it must have a rail transload facility within three miles of its mining site when other sand companies are building new facilities with a much greater distance between mining and loading sites.

**Comment:** OmniTRAX has not submitted a complete analysis of practicable alternatives. Instead, it limited the alternatives analysis based on unsupported assertions that are directly contradicted by other projects that DNR has recently approved. DNR must deny the OmniTRAX wetland permit application because it is not the “least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.”<sup>10</sup>

### **III. DNR does not have enough information about compensatory mitigation**

DNR must require compensatory mitigation for any wetland fill it authorizes.<sup>11</sup> DNR is required to consider the impact of mitigation on wetland functional values before it issues a wetland fill

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<sup>7</sup> Wis. Stat. § 281.36(3n)(c)1.

<sup>8</sup> Wis. Admin. Code § NR 103.07(2).

<sup>9</sup> Wis. Stat. § 281.36(3n)(a)3.

<sup>10</sup> Wis. Stat. § 281.36(3n)(c)1.

<sup>11</sup> Wis. Stat. § 281.36(3n)(d)1.

permit.<sup>12</sup> There is not enough information in the OmniTRAX application to meaningfully analyze and comment on this aspect of the application.

OmniTRAX proposes to purchase an undetermined number of credits from an undetermined wetland mitigation bank. DNR's compensatory mitigation bank registry indicates that there are no bank credits available in the bank service area where OmniTRAX proposes to fill wetlands. Thus, OmniTRAX must buy credits at a higher ratio, at least 1.45:1 assuming OmniTRAX can purchase in-kind credits, pursuant to the Compensatory Mitigation Guidelines for Wisconsin.

**Comment:** OmniTRAX's application does not demonstrate that it will compensate for its proposed impacts to wetland functional values. Even if OmniTRAX purchases credits from a mitigation bank, that will not compensate for the direct, secondary, and cumulative impacts described above.

Thank you for your consideration of our comments. For the reasons provided above, DNR must deny OmniTRAX's application for a wetland fill permit because it does not meet legal standards.

Sincerely,

/s/

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cc: Sam Woboril, U.S. Army Corps of Engineers (via email)

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<sup>12</sup> Wis. Stat. § 281.36(3n)(b)4.