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July 13, 2016

Jeffrey M. Olson
Chief, Northeast Section
U.S. Army Corps of Engineers
St. Paul District – Regulatory
180 5th Street East, Suite 700
St. Paul, MN 55101

Re: Comments on Meteor Timber Application for Fill Permit, Ref. No. MVP-2015-03156-SJW

Dear Mr. Olson,

We appreciate the opportunity to submit comments to the US Army Corps of Engineers (“Corps”) regarding its evaluation of Meteor Timber, LLC (“Meteor Timber”)’s application to discharge fill wetlands. Midwest Environmental Advocates and the Ho-Chunk Nation submit these comments on Meteor Timber’s application.

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. Ho-Chunk members and lands are dispersed throughout the area of Wisconsin most heavily impacted by industrial sand mining. The Nation’s government is dedicated to protecting their people and their lands for this and future generations. The expansive and permanent destruction of the landscape, including wetlands, for industrial sand mines threatens the Nation’s people, land, and cultural heritage.

Midwest Environmental Advocates is a nonprofit environmental law firm working for clean air, land, water, and government for this generation and the next. MEA shares the Nation’s concern about the natural resource legacy in this state and advocates for the protection of our valuable water resources.

Meteor Timber plans to develop a transload site for nearby mined sand that would include a rail facility, a dry sand processing facility, and upgrades to existing access roads, permanently destroying 16.25 acres of wetlands in the process. This is the largest wetland fill proposed for a single industrial sand facility, and is over half the total number of acres filled in

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Wisconsin for other industrial sand mines since 2008.¹ Meteor Timber's application should be denied because it is not in the public interest and does not meet minimum regulatory requirements.

In its permit application, Meteor Timber provided a thorough description and maps of the project site and addressed the possibility of threatened and endangered species in the area as well as a cultural resources evaluation and state water quality certification plans. However, Meteor Timber's application omits several key pieces of information that both the Corps and the general public need to fully weigh this project. Among other deficiencies, the application does not include a complete mitigation plan, a statement of current demand for the industrial sand it seeks to supply, and a full alternatives analysis. In addition, the permit application does not state the full impact to wetlands from both a planned road expansion and the rail facility, discussing only the latter, and does not make public-interest considerations that it may fail to fulfill. Therefore, MEA requests that the Corps deny Meteor Timber's permit application for want of completeness and reopen a period for public comment and hearings when a complete application is submitted.

I. COMPENSATORY MITIGATION

1. Preservation

Restoration is the preferred method of wetland compensatory mitigation in Wisconsin.² Wisconsin's administrative rules governing wetland compensatory mitigation do not explicitly allow the use of preservation for mitigation purposes, instead only listing "restoration, enhancement or creation of wetlands" as means for mitigating wetlands impacts.³ The Guidelines for Wetland Compensatory Mitigation in Wisconsin purport to allow preservation as a method of mitigation in rare circumstances. Preservation is allowed, but only if five specific criteria are met.⁴ In order to use preservation for mitigation: 1) the resources to be preserved must provide important physical, chemical, or biological functions and services for the watershed; 2) the resources must contribute to the ecological sustainability of the watershed; 3) the preservation must be determined to be appropriate and reasonable; 4) the resources are under demonstrable threat of destruction or adverse modifications, and 5) the site must be protected in perpetuity.⁵ There is no demonstrable threat of destruction or adverse modifications to these wetlands other than, of course, the construction of the rail facility itself. Because all five criteria must be met for preservation to be allowed as a mitigation plan, and the planned preservation here does not meet the fourth criterion, this plan would not qualify for mitigation purposes. In its permit application, Meteor accounts for this possibility and states that, as a substitute, it would purchase credits from a mitigation bank or pay a fee to the Wisconsin Wetland Conservancy Trust's in-lieu fee program.⁶ For the reasons discussed below, more

¹ Wisconsin Department of Natural Resources, "Industrial Sand Mining in Wisconsin: Strategic Analysis for Public Review," at 2-64 (available online at <http://dnr.wi.gov/topic/EIA/documents/ISMSA/ISMSA.pdf>).

² Wis. Admin. Code § NR 350.05(1).

³ Id.

⁴ Guidelines for Compensatory Wetland Mitigation in Wisconsin, 19.

⁵ Id.

⁶ Meteor Timber, LLC Application for Section 404 Permit, Ref. No. MVP-2015-03156-SJW, at 3.

information is needed on these options before Meteor Timber's permit application can be considered complete. We request that the Corps offer a new opportunity for the public to comment and provide a hearing when Meteor Timber submits a complete application.

2. Conservation Banking

Meteor Timber's permit application lacks sufficient information regarding its backup compensatory mitigation plan as well. As stated in the Code of Federal Regulation, "[the] application must also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts."⁷ In its application to the Corps, Meteor Timber provided scant information about compensatory mitigation, indicating only that it intends to use credits from a wetland mitigation bank, and not including how many acres of compensatory mitigation it would complete or the type of mitigation it would complete.⁸

The Code of Federal Regulation provides that "[f]or individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review . . . For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used."⁹

Meteor Timber provided the name of an in-lieu fee program it would use if on-site mitigation would prove inadequate—which, as explained above, it does—it did not provide any of the information required in subsections (c)(5) or (c)(6) which is required for a compensatory mitigation plan. (c)(5) requires baseline information about "the ecological characteristics of the proposed compensatory mitigation site and . . . the impact site."¹⁰ Meteor Timber provided information only about the latter, and apart from a listing of species in each type of wetland that would be impacted, there is no other information on the impacted wetlands' aquatic resource functions or how the wetlands in the mitigation plan would replace or replicate these functions.

Meteor Timber also failed to provide the information required in subsection (c)(6), which requires "[a] description of the number of credits to be provided, including a brief explanation of the rationale for this determination . . . (ii) for permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined."¹¹

Compensatory mitigation "must be, to the extent practicable, sufficient to replace lost aquatic resource functions."¹² An applicant must provide adequate acres of compensatory mitigation to achieve this requirement, and the mitigation "should be located where it is most likely to successfully replace lost functions and services."¹³

⁷ 33 CFR § 325.1(d)(7).

⁸ Meteor Timber, LLC Application for Section 404 Permit, Ref. No. MVP-2015-03156-SJW, at 3.

⁹ 33 CFR § 332.4(c)(1)(i).

¹⁰ Id.

¹¹ 33 CFR § 332.

¹² 40 CFR § 290.93(f).

¹³ 40 CFR § 290.93(b)(1).

Meteor Timber is required to submit a fully formed mitigation plan before its permit can be approved. Publicly noticing the permit application without this information deprives the public of the opportunity to submit meaningful comments on this critical aspect of wetland permitting. A U.S. District Court in Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers explained that “[c]ompensatory mitigation is the single most important ‘material issue related to the justification’ of such a permit.”¹⁴ It is critical that the applicant provide adequate details about the compensatory mitigation plan so that the Corps can accurately judge the merits of the permit and the public can comment intelligently on the proposed activity. Again in Ohio Valley, the court stated that “[w]ithout any substantive information on mitigation, the notices failed to provide an accurate picture of the Corps’ reasoning and prevented useful criticism on the part of the plaintiffs and on the part of the public in general.”¹⁵ Thus, Meteor Timber’s failure to provide a complete compensatory mitigation plan not only makes its permit application legally deficient but also undermines the adequacy of public notice by not offering enough detail for the public to make informed comments on the plan.

COMMENT: The lack of an adequate compensatory mitigation plan should preclude Meteor Timber from receiving a permit at this time. A permit application must include an appropriately detailed compensatory mitigation plan in order to provide sufficient information to the public and to the Corps. Meteor’s failure to develop and submit a full plan makes its permit application incomplete. We request that the Corps require Meteor Timber to submit a more detailed compensatory mitigation plan. After such a plan is submitted to the Corps, we request that the Corps provide another opportunity for public comment and a public hearing at a time when the public has sufficient information to submit meaningful comments.

II. PROJECT PURPOSE AND NEED

Meteor Timber’s application includes a statement, as per state regulations, detailing the purpose of the project and the need for it. The main purpose cited is to carry sand to be used in the oil and gas industries to markets where demand for it is high. However, it does not address the considerable decline in demand for oil, and thus drilling equipment and sand, during the past year. In 2015, demand for industrial sand decreased by 14%.¹⁶ The applicant attempts to argue there is a need for additional frac sand along the Union Pacific rail line, but the applicant does not address whether other facilities along this line are producing or capable of producing sufficient sand to meet demand. If other facilities along this line have decreased or ceased production, there is no need to fill additional wetland acres to build another facility. A thorough project purpose and need statement would address whether there is a need for further infrastructure development at this time.

III. ALTERNATIVES ANALYSIS

¹⁴ 674 F. Supp. 2d 783, 804 (S.D.W.Va. 2009).

¹⁵ Id.

¹⁶ DNR, Industrial Sand Mining Strategic analysis at 1-1.

To ensure that a project impacts the minimum amount of wetlands possible, an alternatives analysis is required for all fill permit applications performed under § 404. While Meteor Timber considered a wide range of alternatives, they did not provide direct evidence to substantiate many of their claims about alternative sites and project layouts.

For some of the alternatives, stringent land use restrictions written into the land deeds were cited to explain why those sites could not be chosen. These include the Millston B and South Millston sites, said in the application to be otherwise suitable project locations rendered unusable by reversion clauses in their deeds which allow the land only to be used for public purposes. In addition, one alternative layout that would cause less impact to wetland on the chosen site was rejected in part due to a scenic easement over much of the non-wetland portion of the property. MEA requests that the Corps require Meteor Timber to provide actual documentation of these restrictions so as to better facilitate transparency and public understanding in the permitting process.

The alternatives analysis is also flawed in that several terms used therein are vague and undefined. A central factor in the choice of the proposed site over others is the need for an

“economically viable” project, which in turn requires “economical proximity” between the mine site and the rail facility.¹⁷ Neither of these terms are supported by any quantitative data that might give the Corps and the general public a more thorough understanding of what these terms mean, and thus, what reasoning led Meteor Timber to select the site that it selected.

Meteor Timber’s analysis also fails to justify the need for a track that would separate from the main UP line to run across the wetland in an arc to reach the loading facility.¹⁸ This would contribute to fragmentation of the wetland located between the two tracks. Meteor Timber’s alternatives analysis and wetlands preservation plans do not explain the need for this, nor do they explain how the hydrology of this wetland would be maintained.

Several alternatives, both for sites and for facility layout, that might have caused fewer impacts to wetland, were also disregarded on the basis that the Union Pacific Railroad rejected them for potential interference with its operations or for a failure to meet certain design requirements. No documentation was made available regarding either of these. MEA requests that the Corps require Meteor Timber to provide such documentation in the interest of transparency.

COMMENT: Meteor Timber’s Alternatives Analysis offers several potentially less harmful siting and layout options that are rejected on the basis of outside factors, often legal constraints. Meteor Timber has not, however, made available documentation of these issues from official sources. MEA requests that the Corps require Meteor Timber to provide this documentation.

IV. EFFECTS OF PROJECT AS A WHOLE

¹⁷ Meteor Timber, LLC, Wetland Permit Application SEH No. METTI 132928 4.00, “Narrative Alternatives Analysis,” at 4, 6 (available online at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-WC-2016-42-00902>).

¹⁸ Meteor Timber, LLC, “Alternatives Analysis: Alternative Rail Layouts,” at 1 (available online at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-WC-2016-42-00902>).

Meteor Timber's permit application states that upgrades will be made to existing roads in the Town of Knapp to facilitate heightened truck traffic and as part of a deal with the Town to receive approval for its proposed sand mines.¹⁹ Because the expansion of Fish Creek Road is identified as a part of the larger plan to mine and transport silica sand, Meteor Timber's permit application should take into account potential impacts to wetlands resulting from the road widening, not only those resulting from construction of the proposed rail facility. To do otherwise gives the false impression that only the wetlands adjoining the Union Pacific Railroad would be affected by this project.

As Meteor Timber has stated that the road's expansion is a necessary component of its plan, the application to destroy wetlands must include any wetlands to be filled or any other effects on wetlands resulting from its construction. In order to truly evaluate the significance of the impacts of the entire project on wetland functional values and water quality in the area, the Corps must consider the total amount of wetland acreage that would be destroyed.

Allowing explicitly interconnected components of an overarching single expansion of transportation infrastructure for Meteor Timber's planned sand mining enterprise to be reviewed, evaluated, and approved separately denies the public an opportunity for heightened scrutiny and oversight that this proposal package warrants. When viewed in fractured parts, the minimization and mitigation required of a larger project might be reduced. Because of this, Meteor Timber should be required to evaluate all of the effects of this project as a coherent whole.

COMMENT: Meteor Timber has not accounted for possible wetland impacts from the expansion of local roads as part of this mining project. Without considering these impacts, its application to discharge fill material into wetlands gives the public an incomplete picture of the effects that will take place. This impairs the public and permitting authority's ability to scrutinize the project. MEA requests that the Corps require Meteor Timber to submit additional information on wetlands impacts from local road expansion.

V. PUBLIC INTEREST CONSIDERATIONS

Before issuing a permit for a discharge to waters of the United States, the Corps must find that the proposed project is in the public interest. Within the public interest analysis, the Corps must weigh the benefits of the project against any detrimental impacts and consider many different factors, including "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, floodplain values . . . and, in general, the needs and welfare of the people."²⁰ Several of these factors are particularly relevant to Meteor Timber's proposed project, but were not evaluated in the permit application.

First, economic considerations related to the proposed project should include an evaluation of the market for industrial sand, as well as the crude oil and fracking industries overall. Low oil prices have had a significant impact on the fracking industry, and thus the

¹⁹ Meteor Timber, "Narrative Alternatives Analysis," at 4.

²⁰ 33 CFR § 320.4.

industrial sand industry, and are expected to drive down demand for industrial sand into the foreseeable future. This has caused many industrial sand mines in western Wisconsin to significantly cut back their production, temporarily cease production, and in some cases has caused some of the smaller operations to shut down production altogether.²¹

Therefore, serious consideration should be given to whether or not an industrial sand processing facility is necessary at this point in time, especially an operation such as this one, which will unavoidably impact such a large area of wetlands. Related to this, consideration must be given to the conservation goals of the county and state because such a large area of wetlands is being destroyed and, as of now, there is no plan to mitigate this region's loss of a valuable natural resource. The permit states that the project is necessary to meet the energy industry's "demand" for silica, but does not specify whether that demand is currently strong enough to warrant more mines.

Another factor warranting consideration is land use policy in Monroe and Jackson counties. As stated in Meteor Timber's permit application, construction of this rail facility would involve destruction of cranberry bogs in addition to the uncultivated wetlands that are the focus of the application. Cranberries are an important component of Wisconsin agriculture, and the state is responsible for more than 60% of the nation's cranberry production.²² While Meteor Timber's application states that its project is necessary to meet demand for mined sand, long-term demand for cranberries (as well as for fresh produce in rural areas such as this one) has not been considered. Furthermore, the project appears to be at odds with the goals of Monroe County's 2010 Land and Water Resources Management Plan (LWRMP). In addition to "maintain[ing] or increas[ing] wetland acreage and wetland quality," the plan lists as a goal that the county "assist landowners and local units of government with programs and policies that encourage preservation of farmland."²³ Meteor Timber's project would permanently destroy the cranberry bogs on its site, and it (and the Corps) must consider the local public interest implications in directly contravening county land use policy.

General environmental concerns are another issue presented here but not addressed by the Corps in an analysis. Such an analysis here should include the impact of increased industrial activity in this area on local residents' quality of life. This is particularly true because the planned upgrades to access roads almost certainly means an increase in truck traffic, and, more seriously, the nature of silica sand is that it is susceptible to blowing away in the wind anytime it is exposed. Silica sand was determined to be a carcinogen by the International Agency for Research on Cancer as early as 1997²⁴ and residents of western Wisconsin have already expressed concerns about the impact of sand mining on human health.²⁵ While the application asserts that the proposed project had

²¹ David Shaffer, "Frac Sand Industry Feels the Effects of Low Prices, Less Drilling," *Minneapolis Star Tribune*, April 7, 2015 (available online at <http://www.startribune.com/frac-sand-industry-feels-effects-of-low-oil-prices-less-drilling/298845431/>).

²² Wisconsin Cranberry Growers Association, "About Cranberries" (available online at <http://www.wiscran.org/cranberries/>).

²³ Monroe County Land and Water Resource Management Plan, October, 2010, available online at http://www.co.monroe.wi.us/wp-content/uploads/2012/01/20100827102317.L&Wplan_Monroe.pdf.

²⁴ Steenland, K. and Sanderson, W., "Lung Cancer among Industrial Sand Workers Exposed to Crystalline Silica," 153 *Am. J. Epidemiology* 7, at 695 (2000).

²⁵ Pearson, T., "Frac Sand Mining and the Disruption of Place, Landscape, and Community in Wisconsin," 75 *Human Organization* 1, at 47-58.

public support, Meteor Timber cites only the unanimous support of the town board, but does not indicate whether the rest of the community or Monroe County supports this facility. There are already numerous industrial sand facilities in the area, many of which are controversial. MEA requests that the Corps require a full permit application which takes these public interest factors into account, and we also request that opportunity for the public to comment and hold hearings be given once a completed application is submitted.

COMMENT: Permitting Meteor Timber's wetlands fill operation has implications for the public and the public interest that the Corps must consider. The picture presented in permit application materials of a mine and loading facility that are needed to meet demand for silica sand and promote job growth in the area is not a complete one. First of all, it is not clear that demand for silica sand is high enough to warrant construction of new mines and transport facilities, due to the steep decline in oil prices that has already impacted the sand industry and its labor force. In addition, the destruction of wetlands and cranberry bogs necessitated by this project puts it at odds with Monroe County's long-term land use goals, and this conflict has not been addressed in the permit materials. Finally, the interest of residents in protecting their health in the face of a relatively new industry, one with proven ramifications on the public's long-term health, must be addressed. MEA requests that the Corps give consideration to these and other public interest factors not mentioned in Meteor Timber's permit application.

Thank you for considering our comments. Please contact Sarah Geers if you have any questions. We also request notification of the Corps' decision on Meteor Timber's wetland fill application.

Sincerely,

/s/

Zachary Strom

Law Clerk

Sarah Geers

Staff Attorney

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