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May 8, 2017

VIA E-MAIL

jessica.l.kempke@usace.army.mil

U.S. Army Corps of Engineers
Attn: Jessica Kempke
211 North Broadway, Suite 221
Green Bay, WI 54303

Re: Friends of the Black River Forest Legal and Technical Comments and Request for
Public Hearing on § 404 Clean Water Act Permit Application and U.S. Army
Corps of Engineers Public Notice
Applicant: Kohler Company
Reference No.: 2015-01213-JLK

Dear Ms. Kempke:

This firm represents Friends of the Black River Forest ("FBRF"), a group of citizens concerned about the proposed Kohler Co. golf course in Sheboygan County, Wisconsin. The purpose of this letter is to submit FBRF's technical and legal comments regarding the above notice and application,¹ and are supplementary to comments FBRF has previously sent comments on its own behalf to the U.S. Army Corps of Engineers ("Army Corps"). The technical comments are supplied by Dr. Quentin Carpenter and are attached hereto. This letter also requests a public hearing.

Overall, the Application and Notice provide insufficient information to evaluate Kohler's proposal. To the extent they do, Kohler's application is not in the public

¹ The public notice states that comments would be received through May 6, 2017, but since that day falls on a weekend, FBRF confirmed with the Army Corps that it would accept comments submitted by the close of business on May 8, 2017.

interest and will not satisfy the 404(b)(1) guidelines for wetland fills. The project is a massive intrusion on an environmentally sensitive area, and the Army Corps should deny the permit.

Comments

- I. The Application is Incomplete and Public Notice Premature; the Corps Should Obtain Additional Information and Issue a New Notice.

The Army Corps' notice was preceded by a determination that Kohler's application for a wetland fill permit was complete, but that determination was premature and based on insufficient information. As such, the Army Corps has deprived the public of a meaningful opportunity to consider Kohler's proposal and provide appropriate comment. Lacking crucial information on project impacts, mitigation, practicable alternatives, and more, Kohler's wetlands permit application is, at best, an outline of a vast project with numerous adverse environmental implications.²

Courts have held that the Army Corps fails to meet its legal obligations under § 404 of the Clean Water Act and the National Environmental Policy Act when, as here, it solicits public notice and comment on an incomplete wetlands permit application. In *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783 (S.D.W. Va. 2009), the Army Corps granted wetlands permits to two mines despite the fact that the applications lacked specific information on compensatory mitigation and how it would account for any adverse environmental effects of the project. *Id.* at 794. Though the applicant later submitted a detailed mitigation plan to the Army Corps, it was not subjected to public comment. First noting that "[t]he overall purpose of the § 404 permit evaluation process and the attendant public notice is to determine whether a proposed project will result in significant, unacceptable adverse effects to the waters of the United States," *id.* at 789, the court explained that "[c]ompletion and public notice are inextricably linked," *id.* at 800. "The notice must ... include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment." *Id.* (citing 33 C.F.R. § 325.3(a)). Even though the Army Corps had subsequently received the mitigation plans, the Army Corps' permit approvals were remanded because the application had lacked the information at the time of public comment.

² The application in this case was fortunately posted by the WDNR on its website. Otherwise, it would have been extremely difficult for the public to access the application, based on the Army Corps' notice, which stated that application documents were available for review in St. Paul, Minnesota.

Other courts have similarly concluded that where an initial permit application lacks pivotal data and information, the public has not been afforded a meaningful opportunity to comment on the proposed project. *See, e.g., National Wildlife Federation v. Marsh*, 568 F.Supp. 985 (D.D.C. 1983) (approval of § 404 permit held deficient where an important staff evaluation had not been made available for public comment), *Friends of the Earth v. Hall*, 693 F.Supp. 904 (W.D.Wash. 1988) (approval of § 404 permit held deficient where a detailed monitoring plan had not been subjected to public comment); *Sierra Nevada Forest Protection Campaign v. Weingardt*, 376 F. Supp. 2d 984 (Forest Service approval of timber projects held deficient where public not allowed to comment on draft environmental assessment).

Here, Kohler's permit application indisputably lacks completeness, as evidenced by the DNR's April 7, 2017, four-page letter listing a multitude of missing data and information for its parallel wetland fill review, and on which the Army Corps was copied. Among many other deficiencies, the letter plainly states "The wetland mitigation plan submitted is conceptual only," and lists baseline data and other information that needs collecting, before specifically concluding that the application is incomplete. DNR's letter was issued one day after the ACE opened its 30-day public notice period on April 6, 2017. Kohler has not since produced the missing information.

FBRF agrees with the DNR that the wetland mitigation plan is incomplete and likely unfeasible, as suggested by DNR and the attached comments of Dr. Quentin Carpenter. That means Kohler will have to develop another plan, but the public will have no notice and opportunity to comment on this plan and its ability to satisfy legal requirements. The notice does not meet the legal standards identified above.

FBRF also agrees other aspects of the application are deficient and will require supplementation before the Army Corps can adequately conduct its public interest and § 404(1)(b) review. As written, the Army Corps' notice accepts too many of the applicant's unsupported statements and self-serving generalizations. These include:

- Proposed activities/project description. Many aspects of the project are described too incompletely (or not at all) to allow an understanding of their location and/or impacts related to construction and operation. These include utilities, septic, the "underground irrigation system," and other project or infrastructure components which will likely increase the project's impacts.
- Biologic and endangered resource information. Kohler's own consultants have recommended additional surveys for endangered and threatened resources and other rare plants and animals. These surveys have not yet been performed, and

the public therefore lacks complete information about endangered and threatened resources which could be affected by this project.

- Secondary wetland impacts. The notice states that “[p]otential secondary effects have been identified,” and generally lists these impacts, such as from nutrient loading and hydrologic alteration. However, despite the high susceptibility of the site’s ridge and swale wetlands to secondary impacts, there is no description of the extent of these impacts, their effect, and potential mitigation. As described below and in Dr. Carpenter’s attached comments, secondary impacts are likely to be extensive and severe, destroying those wetlands that are not filled.
- Other agency approvals. The application and notice omit mention of the approval process for a Land and Water Conservation Act (“LAWCON”) conversion for the four-acre easement Kohler would require in Kohler Andrae State Park. Additionally, Kohler has recently announced its intention to petition for annexation to the City of Sheboygan.³ Whether the property will be properly zoned, and what services will be available or utilized, are all uncertain and may increase project impacts.
- Project alternatives, especially as to off-site locations.

Due to the missing information, members of the public, including FBRF, have not had opportunity to view specific, detailed information relating to the application and, it follows, provide meaningful comment. The Army Corps should collect the necessary information from Kohler and issue a supplemental public notice, permitting the public to review the actual project as proposed and its impacts. 33 C.F.R. § 325.2(a)(2).

Additionally, the Army Corps should conduct a full Environmental Impact Statement due to the many complicated and sensitive features of Kohler’s proposed site, and to further study the many unknowns associated with this project. Further, while the WDNR has prepared a draft environmental impact statement under Wis. Stat. § 1.11, the Army Corps should not rely on this draft EIS because it was prepared without any permit applications and with even less information that the Army Corps has now. FBRF’s comments on the WDNR’s draft environmental impact statement are attached hereto. A full EIS is necessary to satisfy the Corps’ obligations under NEPA.

³ See Phillip Bock, *Kohler looks to annex golf course land into Sheboygan*, Sheboygan Press, Apr. 28, 2017, available at <http://www.sheboyganpress.com/story/news/local/2017/04/28/kohler-looks-annex-golf-course-land-into-sheboygan/101031360/>

II. The Application is Not in the Public Interest and Does Not Satisfy the 404(b)(1) Guidelines.

To the extent the application does describe the project, it is clear the major transformations to this special site are not in the public interest and will not satisfy the public interest or the 404(b)(1) guidelines. The wetland fill permit should not be granted. *See* 33 C.F.R. § 323.6(a).

A. The Permit is Not in the Public Interest

The Army Corps should not grant a permit for this project because the probable impacts, including cumulative impacts, exact too heavy a toll on the public interest, when weighed against the primarily private benefits Kohler hopes to obtain.

Wetlands. As the Army Corps recognizes, “[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.” 33 C.F.R. § 320.4(a). The project would impact both ridge and swale wetlands and interdunal wetlands, as well as wetlands adjacent to the Black River. The WNDR describes Great Lakes ridge and swale wetlands as imperiled in Wisconsin (state element ranking, S2) and globally vulnerable (global element rank G3). The WDNR also notes these wetlands host “exceptionally complex and diverse habitats for wetland, upland, and Great Lakes shoreline plants, and support rich assemblages of amphibians, reptiles, and breeding and migratory birds.”⁴ The WDNR describes interdunal wetlands as critically imperiled in Wisconsin (state element ranking, S1) and globally imperiled (global element rank G2), hosting critical habitat for many uncommon plant species and providing resting and feeding areas for migrating and resident water birds.⁵ These wetlands are thus important, “unique in nature or scarce in quantity to the region or local area” for purposes of 33 C.F.R. § 320.4(b)(2)(viii) and the Army Corps’ public interest review. Along with the impacted Black River wetlands, these wetlands also satisfy other criteria relevant to the Corps’ review. *See id.* § 320.4(b)(2)(i), (iii), (v)-(vii).

Kohler claims only a limited impact to wetlands associated with direct wetland fill, but it supplies only a cursory discussion of how these impacts were calculated during

⁴ *See*

<http://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=detail&Code=CCCOM102WI>

⁵ *See*

<http://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=detail&Code=CPHER068WI>

construction and operation. (Application Narrative at 25.) It also identifies general types of secondary impacts but does not quantify these amounts or explain the basis for conclusory statements, such as that it will have “adequate separation” between stormwater management areas, wetlands, and groundwater throughout the project. (*Id.* at 26.) As Dr. Carpenter explains in his attached comments, these impacts are likely to be severe. Kohler also claims no cumulative impacts, even though it partially impacts multiple wetlands. Under the Army Corps’ own guidelines, “[n]o permit will be granted which involves the alteration of wetlands identified as important” or where cumulative impacts will occur, and where the applicant cannot show the benefits outweigh these severe impacts. 33 C.F.R. § 320.4(b)(4). The permit should be denied.

Mitigation. As explained in Dr. Carpenter’s attached comments, direct and secondary impacts to the wetlands on the Kohler property are expected to be severe and totally transformational. Even if wetlands are not filled, changes to hydrology, runoff patterns, and other factors will result in a loss of the wetlands in their current state. Kohler has not demonstrated how it would minimize or avoid these secondary impacts. The loss of these wetlands cannot be adequately mitigated, since they cannot be replaced or created elsewhere. In other words, it is not “practicable,” “reasonable,” or “justified” to mitigate the losses of these unique wetlands, and the Corps should deny the permit. 33 C.F.R. § 320.4(r).

Wildlife and Endangered Resources. This project would also disrupt or destroy rare habitats, including intact forest along Lake Michigan and dune ecosystems along Lake Michigan. These habitats in turn provide valuable shelter to migratory birds, along with rare plants and animals such as Pitscher’s Thistle and the beach dune tiger beetle. The Wisconsin Society of Ornithology (“WSO”) has provided comments to the WDNR regarding impacts to migratory birds and other bird species, which are attached hereto, and which demonstrate the loss of intact forest along this shoreline would likely have significant adverse impacts to a variety of bird species, including forest interior songbirds and some potentially endangered or threatened bird species. The WSO emphasized the need for additional surveys, as have Kohler’s own consultants.⁶ Comments by Dr. Martin Bowles have noted that development on the Kohler property may negatively impact populations of rare plants like Pitcher’s Thistle on the adjoining Kohler Andrae State Park.⁷

⁶ *E.g.*, Stantec Consulting Services, Botanical Surveys, Kohler Golf Course Project, Town of Wilson, Sheboygan County, Wisconsin at 11 (Oct. 31, 2014) (“Based on the results of this botanical survey, additional rare plant surveys are strongly recommended for species in the [Endangered Resource Report], whose optimal period for identification occur in June.”).

Impacts to Private and Public Property, Water Supply, and Recreational Uses. Kohler primarily emphasizes the economic benefits of the golf course, but it will also have negative impacts to private landowners and public recreational uses. For example, the DNR's draft environmental impact statement estimated the golf course, once operational, could result in drawdowns to neighboring private wells of up to 23 feet.⁸ The Kohler entrance road proposal and large, 22,000 square foot maintenance building installed on Kohler-Andrae State Park property will also impact the Mueller family, which holds private land within the park.⁹ Needless to say, public recreational uses will be impacted by modifying the entrance road to the park, removing at least four acres of parkland from public use, and installation of new maintenance facilities serving Kohler.¹⁰ Kohler's own property is designated by Wisconsin law as a forest preserve, *see* Wis. Admin. Code § NR 15.01(16)(b), emphasizing the value of the land for wildlife and natural resources. Kohler's impacts to private and public interests support denial of the permit. 33 C.F.R. § 320.4(e), (g) (permit should not "authorize any injury to property or invasion of rights of others"), (m) (emphasizing water supply and conservation).

Other impacts. You have received comments directly from FBRF regarding other factors in the public interest review, including water quality, historic, cultural, scenic, and recreational values, as well as floodplain management. *See* 33 C.F.R. § 320.4(d), (e), (l). They have also commented on water supply, wildlife, and recreational areas. *See* 33 C.F.R. § 320.3(f). The comments additionally show that the permit is contrary to the public interest.

The "full public interest" does not support this project, given the many detrimental impacts identified above, as compared with the primarily private benefits to Kohler Co. The Corps should deny the permit.

⁷ *See* Attachment D; *see also* Exhibit 22 to Comments of FBRF, submitted April 20, 2017 (additional comments of Dr. Bowles).

⁸ *See* Draft EIS at 27, available at <http://dnr.wi.gov/topic/EIA/documents/Kohler/KohlerDraftEISPublic.pdf>

⁹ *See* Attachment E.

¹⁰ *See* Exhibit 23 to Comments of FBRF, submitted April 20, 2017 (comments of former KASP Superintendent Jim Buchholz).

B. The Application Does Not Satisfy the § 404(b)(1) Guidelines.

For many of the same reasons identified above, the application does not satisfy the 404(b)(1) guidelines in 40 C.F.R. pt. 230. These guidelines recognize the national policy that “the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by the[] Guidelines,” and the “guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” 40 C.F.R. § 230.1(d). The wetlands on the Kohler property are such “special aquatic sites.” See 40 C.F.R. § 230.41.

Under the guidelines, the “fundamental” precept is that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” 40 C.F.R. § 230.1(c). As discussed in the prior section, Kohler cannot make this showing. Kohler also cannot make the required showings under 40 C.F.R. § 230.11(c)(1)-(4), taking into consideration the required factual determinations under Subparts B through G, including those relating to cumulative and secondary effects, threatened and endangered species, aquatic organisms, and other wildlife, private water supplies, § 230.50(a), aesthetics, § 230.53,¹¹ and parks, § 230.54.

Furthermore, Kohler cannot show there is no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). Kohler’s project is not site-dependent or wetland-dependent. It could build a golf course at another location, and has built golf courses in other locations in Sheboygan County, including Whistling Straits and Blackwolf Run. There are ample other locations across Wisconsin for a golf course; Kohler’s own practical alternatives analysis identifies existing golf courses located across the state. (Practicable Alternatives Analysis, § 1, Question 1.)

Kohler has not discussed an off-site alternative; rather, its practicable alternatives analysis reads like a public-relation piece, and not a serious effort to discuss ways to avoid the inevitable environmental impacts of this project. It simply states that development of the proposed “golf course on this Property is not practicable without wetland impacts.” (Practicable Alternatives Analysis, § 1, Question 6.) It also fails to discuss the environmental benefits of locating the golf course elsewhere. (*Id.*, § 1,

¹¹ Not only does Kohler propose to convert the property from a natural to developed state, it proposes a “Lake Michigan observation tower” accessible to guests. (Practicable Alternatives Analysis, § 1, Question 1.) It does not discuss the height of the tower or visual impacts to those off-site.

Question 5.) The Army Corps' notice unfortunately perpetuates this problem by repeating Kohler's claims that there is no suitable alternative for a golf course "with comparable characteristics to meet the overall project purpose" – again, a golf course on this property. Because off-site alternatives are presumptively available, *see* 40 C.F.R. § 230.10(a)(3), Kohler's permit must be denied.

Finally, as noted above and in the comments of Dr. Carpenter, no appropriate and practicable steps are available which would "minimize the potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). Kohler asks the Corps to impermissibly "permit first-mitigate later," without any demonstration that its proposed mitigation is allowable or feasible.

Kohler cannot satisfy the 404(b)(1) guidelines, and its permit should be denied.

Request for Public Hearing

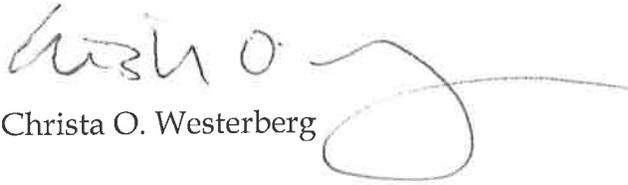
FBRF requests the Army Corps conduct a public hearing as to this application. This is a large project on an extremely environmentally sensitive property that has remained undeveloped for decades. The environmental impacts are significant and many, from impacts on rare wetlands to endangered resources to Lake Michigan waterfront to migratory birds to the Black River. It is near a heavily-used state park and would result in the loss of the public's use of the park and change park users' experiences from the very moment they turns onto the access road. It would also have a substantial human impact to the many residents in the area and those who use area roads and infrastructure. Finally, there are significant cultural resources on and around the site.

In other words, there is a heavy public interest in this project and this property. Additionally, the public input opportunities made available by the present public notice are not as robust as they should have been, due to Kohler's incomplete application materials and the Army Corps' premature completeness determination. Any public hearing should be held after the Army Corps obtains more information about his project and makes it available to the public.

Thank you for your consideration.

Sincerely,

PINES BACH LLP

A handwritten signature in black ink, appearing to read "Christa O. Westerberg", with a large, stylized flourish extending to the right.

Christa O. Westerberg

COW:hmm
Enclosures