

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

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In the matter of Wetland and Bridge  
Individual Permit No. IP-WC-2014-32-00454  
to Burlington Northern Santa Fe Railway  
care of John Stiley

Case No.: \_\_\_\_\_

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**PETITION FOR A CONTESTED CASE HEARING PURSUANT  
TO WIS. STAT. §§ 30.209, 227.42, AND 281.36(3q)**

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To the Department of Natural Resources:

In accordance with Wis. Stat. §§ 30.209, 227.42, and 281.36(3q), Maureen Freedland, Karen Ringstrom, Guy A. Wolf, Alan Stankevitz, Thomas Claflin, Ralph Knudson, Richard L. Pein, Marina Dvorak, and Carolyn Mahlum-Jenkins (“the Petitioners”) hereby request a contested case hearing pursuant to Wis. Stat. § 227.42 on the decision by the Department of Natural Resources (“DNR”) final decision to issue Wetland and Bridge Individual Permit No. IP-WC-2014-32-00454 (“the BNSF Permit”) to Burlington Northern Santa Fe Railway care of John Stiley (collectively “BNSF”).

BNSF plans to construct a second railroad track adjacent to its existing track that crosses the La Crosse River Marsh and the La Crosse River to the east of the City of La Crosse. The DNR issued the above-referenced BNSF Permit to authorize BNSF to fill 7.2 acres of wetlands in the La Crosse River Marsh and to build a bridge over the La Crosse River. According to the DNR’s recently revised regulations for compliance with the Wisconsin Environmental Policy Act (“WEPA”), the wetland and bridge permitting process is supposed to provide an equivalent environmental analysis to that required by WEPA. *See* Wis. Admin. Code § NR 150.20(2)(a)8. and 11. However, as is clear from this case, the environmental analysis conducted regarding the

BNSF permit was not sufficient to comply with NEPA as the DNR did not consider or disclose reasonably related cumulative and secondary impacts of the BNSF project.

For the reasons stated below, each of the Petitioners hereby requests that the DNR hold a contested case hearing pursuant to Wis. Stat. §§ 30.209, 227.42, and 281.36(3q).

In support of their petition, Petitioners state:

**I. AGENCY ACTION THAT IS THE BASIS FOR THE HEARING**

The DNR's final decision to issue Wetland and Bridge Individual Permit No. IP-WC-2014-32-00454 to BNSF to authorize 7.2 acres of wetland fill in the La Crosse River Marsh and the construction of a bridge across the La Crosse River to build a second railroad track to the east of the City of La Crosse. Specifically the DNR's decision to issue the BNSF Permit without an adequate environmental analysis in compliance with WEPA is the basis for the hearing.

**II. BASIS FOR FINDING THAT THERE IS NO EVIDENCE OF LEGISLATIVE INTENT THAT THE PETITIONERS' INTERESTS ARE NOT TO BE PROTECTED**

There is nothing in Wis. Stat. §§ 1.11, 30.209, 227.42, or 281.36(3q) that evinces a legislative intent that the Petitioners' interests are not to be protected. In fact, there is clear evidence of legislative intent to protect those interests. Regarding the DNR's obligations under chapter 281, the legislature indicated a clear intent to protect the public's interest in clean water and environmentally-sound decisions.

The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal

and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole.

Wis. Stat. § 281.11. Further, the plain language of Wis. Stat. §§ 30.209 and 281.36(3q) explicitly grants a right to a contested hearing to the public for the review of wetland and bridge individual permits such as the BNSF Permit.

The Wisconsin Environmental Policy Act also declares an intent to encourage the consideration of the environment in agency decision making, which is at the core of this Petition.

(1) The purposes of this act are to declare a policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the important ecological systems and natural resources.

...

(3) In order to carry out the policy set forth in this act, it is the continuing responsibility of this state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state may:

- (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (b) Assure safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (c) Attain the widest range of beneficial uses of the environment while attempting to minimize degradation, risk to health or safety, or other undesirable and unintended consequences;
- (f) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(4) The legislature recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

1971 Wis. Act. 274, Section 1. Thus, there is no evidence of a legislative intent that Wisconsin citizens' interest in clean air is not to be protected.

**III. PETITIONERS' SUBSTANTIAL INTERESTS INJURED OR THREATENED  
WITH INJURY BY THE AGENCY ACTION THAT ARE DISTINCT FROM THE  
INJURY TO THE GENERAL PUBLIC**

The Petitioners' actual and threatened injuries are different in kind or degree from the injury to the public caused by the agency action because:

- A. Many of the Petitioners live near the BNSF rail line that will be expanded to include a second track. Many Petitioners recreate in the La Crosse River Marsh and use the La Crosse and Mississippi Rivers, which will be affected by the BNSF project. The Petitioners are reasonably concerned that the DNR's inadequate environmental analysis fails to provide critical information for them, their community, and to protect their health, their interest in protecting the La Crosse River Marsh, and the La Crosse and Mississippi Rivers, and the environmental integrity of the community.

The Petitioners' substantial interests are injured or threatened with injury in the following ways:

- A. Petitioner Maureen Freedland is an adult resident of Wisconsin, residing at 2641 Schubert Place, La Crosse, Wisconsin. She lives approximately 200 feet from the railroad tracks owned by BNSF. Maureen hikes and bikes in the La Crosse River Marsh with her family. As an elected County Board Supervisor and participant in the neighborhood association whose members she represents, she is positioned to hear concerns from other area residents about BNSF's proposed rail expansion. She is reasonably concerned about the impact that BNSF's addition of a second track will have on her and her community. Maureen is reasonably concerned that the increase in railroad transport facilitated by BNSF's addition of a second track will lead to increased diesel particulates in the air, increased noise, a greater risk of safety hazards from more frequent trains passing through carrying hazardous materials, and the loss of recreational opportunities in the La Crosse River Marsh. Maureen and others

formed an organization called Citizens Acting for Rail Safety (“CARS”) in 2013 to address increasing concerns about the safety of rail transport of hazardous materials. She is reasonably concerned that the DNR did not conduct an adequate secondary and cumulative impacts analysis prior to issuing the BNSF Permit. Maureen is reasonably concerned that the DNR’s failure to adequately disclose and analyze these impacts will result in greater negative impacts on her community and others who cross the tracks to go to school, work or to partake in other activities.

B. Petitioner Alan Stankevitz is an adult resident of Minnesota, residing at 8824 County 21, La Crescent, Minnesota. Alan uses the La Crosse River Wetlands that will be impacted by the BNSF project for recreational purposes. He is a wildlife photographer and videographer and spends a lot of his time in the La Crosse River Wetlands. He is aware of many birds in the La Crosse River Wetlands that are listed as Wisconsin Species of Special Concern or Endangered Species. Alan is also aware that the La Crosse River Wetland is part of the Mississippi River Flyway and is used by waterfowl for rest during migration. Alan has taken many pictures of the wildlife in the La Crosse Wetlands that have appeared in books and periodicals. Alan is reasonably concerned that BNSF’s addition of a second rail line will allow for more trains to pass through the marsh more quickly, which will result in more disturbance to wildlife from noise, vibration, and air pollution. Alan is reasonably concerned that disturbances to wildlife in the La Crosse Wetlands will have a negative impact on wildlife and diminish his ability to use and enjoy those wetlands for his work and recreation. Alan is also reasonably concerned about the risk of a train derailment in the

La Crosse River Wetlands and the serious, irreversible harm that would have on wildlife and the marsh itself.

- C. Petitioner Thomas Claflin is an adult resident of Wisconsin, residing at 436 North 22<sup>nd</sup> Street, La Crosse, Wisconsin. He lives approximately three blocks away from the railroad tracks. Thomas regularly uses the La Crosse and Mississippi Rivers to fish, watch birds, and otherwise enjoy the riverine environment. Thomas uses the trails in the La Crosse River Marsh almost daily for at least nine months of the year. He was on faculty in the Department of Biology at the University of Wisconsin – La Crosse for 35 years and the founder and director of the River Studies Center at that institution. Thomas is reasonably concerned about the increase in the number of trains passing near his home and the disturbances to wildlife that may cause. He is also concerned with the absence of an environmental review into the impacts of increased rail traffic along the entire La Crosse River and Mississippi River corridors.
- D. Petitioner Richard Pein is an adult resident of Wisconsin, residing at 109 29th Street South, La Crosse, Wisconsin. He lives approximately 750 feet from the railroad right of way to the east of the tracks. Richard uses the La Crosse River Marsh occasionally for walking, riding bicycles, and to appreciate the scenic beauty. He is reasonably concerned about the potential safety hazard that trains stopped along the tracks would create. In the event of an emergency or accident that blocks the railroad tracks, there are limited escape routes from his neighborhood. Richard is also reasonably concerned about the increased noise and disturbance to his quality of life that additional train traffic would create. He is already regularly disturbed by the noise of train traffic,

especially in the summer when it becomes difficult to enjoy the outdoors because of train disturbances.

- E. Petitioner Ralph Knudson is an adult resident of Wisconsin, residing at 2550 Edgewood Place, La Crosse, Wisconsin. He lives about 400 yards from the railroad tracks. Ralph regularly walks, cycles, cross-country skis, and watches birds in the La Crosse River Marsh. He is a board member of Friends of the La Crosse River Marsh. He is not disturbed by train traffic, but he is reasonably concerned about the potential damage and safety issues from a train derailling in the area. Ralph has observed trains travelling along the tracks in what appeared to be an unstable manner and later learned that BNSF was repairing a dip in the tracks in that area. Based on his observations and his knowledge of train accidents involving trains carrying hazardous materials, Ralph is reasonably concerned about the impacts to the marsh and his community from a trail accident with more trains passing through on the second track.
- F. Petitioner Guy Wolf is an adult resident of Wisconsin, residing at N3421 Mohawk Valley Road, Stoddard, Wisconsin. He lives less than one mile from the BNSF rail line on which a train derailed in 2007, just south of La Crosse, which spilled materials from four rail cars into the Upper Mississippi River Refuge. Guy is a trapper and a trapper educator for the DNR. He has also assisted commercial fisherman on the La Crosse River for over 10 years. He also worked for the University of Wisconsin – La Crosse for almost 15 years, and was the program manager and founder of the Mississippi River Summer Adventure Program. Through that program, Guy planned and conducted summer science and math programs in the La Crosse River Marsh and Mississippi River. These programs included yearly water quality testing, reviews of

macro and micro invertebrates and surveys of waterfowl and wildlife. He is reasonably concerned that the BNSF project will result in negative impacts on the La Crosse River Marsh, the La Crosse River, and the Mississippi River. Guy participated in the public hearing and public comment opportunities on the BNSF Permit and was negatively impacted by the DNR's failure to consider cumulative and secondary impacts including safety concerns associated with the rail cars, the hazardous materials transported on the railroad, or remedial measures to address potential spills from train accidents. He is reasonably concerned that there would be significant adverse environmental impacts to the La Crosse River Marsh, La Crosse River, and the Mississippi River if a train carrying hazardous materials derailed in the area.

G. Petitioner Marina Dvorak is an adult resident of Wisconsin, residing at 923 Amy Drive, Holmen, Wisconsin. She is currently a student at the University of Wisconsin – La Crosse. Marina is studying Communication Studies and Philosophy, with a minor in Environmental Studies. She is a co-chair of the campus organization Students for Sustainability and the president of the Philosophy Club. She is reasonably concerned about the potential negative environmental impacts of the BNSF project because she uses the La Crosse River Marsh as an educational classroom, recreational resource, and route of transportation. Marina is reasonably concerned that the DNR's permitting process did not adequately consider the secondary and cumulative impacts of the BNSF project raised by students and community members such as herself.

H. Petitioner Karen Ringstrom is a Wisconsin resident, residing at 2545 Edgewood Place, La Crosse, Wisconsin. She lives approximately 500 feet from BNSF's railroad tracks, and approximately 750 feet from the La Crosse River Marsh. Karen is one of the

founding members of CARS, an organization of Wisconsin and Minnesota residents working for a rail transportation system that respects the health, safety, and quality of life of all citizens and the environment. Through her involvement with CARS, Karen worked with University of Wisconsin – La Crosse Extension to examine the potential impact of a railroad expansion on property values and tax revenue for the City of La Crosse and its residents. She is reasonably concerned that the BNSF railroad expansion will lead to an increase of the number and frequency of trains passing through La Crosse carrying hazardous materials. Karen is also reasonably concerned that more rail transport of hazardous materials in the area poses a threat to public health and the environment because of the unsafe train cars that are used for these materials and the risk of a train derailment. She is aware of recent instances of trains derailing on railroads and is reasonably concerned about the ability of the rail infrastructure to handle the weight, frequency and length of these trains. She is also reasonably concerned about the risk of increased flooding in La Crosse from the loss of over 7 acres of wetlands in the flood fringe of the La Crosse River. Karen is also reasonably concerned about increased pollution to water, soil and air from increased rail transport on the BNSF tracks. Karen is reasonably concerned that the DNR's failure to disclose these and other environmental impacts reasonably related to the BNSF project does not allow these impacts to be considered or addressed in an environmentally sound manner.

- I. Petitioner Carolyn Mahlum-Jenkins is an adult resident of Wisconsin, residing at 2642 Hackberry Lane, La Crosse, Wisconsin. She lives approximately 400 feet from the railroad tracks owned by BNSF. Carolyn gardens, hikes, bikes, and spends as much

time outdoors on her deck or in her garden as she can. Every day Carolyn and her husband walk their dog in the La Crosse River Marsh no matter what the weather is like. She knows intimately the plant life, animal behavior, bird migration, and flooding conditions of the paths through the marsh. She knows the daily status of flooding on the La Crosse River and the Mississippi River. Carolyn is aware of documented changes in the weather and increases in precipitation, which exacerbate her concerns about flooding impacts. She is reasonably concerned about the stability of the railroad tracks in the La Crosse River Marsh. Carolyn is also reasonably concerned that the DNR's environmental analysis did not include an accurate evaluation of potential impacts to endangered and special concern species and their nesting environments that may be impacted by the BNSF project. Generally, Carolyn is reasonably concerned about the impact of the rail expansion on flooding and the impact of that expansion on the marsh, the La Crosse River and the Mississippi River. She is also reasonably concerned that a number of significant impacts of this expansion have not been adequately assessed by the DNR.

#### **IV. FACTUAL BACKGROUND**

On February 24, 2014, BNSF applied to the DNR for a permit to fill 7.2 acres of wetlands in the La Crosse River Marsh and to construct bridges in the La Crosse River and its tributary. BNSF was required to obtain this permit to construct approximately four miles of railroad track and a one mile access road adjacent to the existing railroad track that goes through the City of La Crosse.

On November 21, 2014, the DNR provided notice to the public of BNSF's pending application, invited public comment, and indicated that the DNR would schedule a public

hearing to be held in January of 2015. The public notice did not provide the exact date of the hearing and the Petitioners did not have notice of the hearing until sometime in December. The notice indicated that public comments would be accepted until ten days after the public hearing was held. The public notice along with BNSF's permit application documents were posted on the DNR's public notice database, Sharepoint.

During this public comment period, BNSF submitted changes to its bridge construction plans, chose a different method of mitigation to compensate for the wetland acres it would destroy, and sent additional information to the DNR. The DNR continuously updated the Sharepoint database with these documents relevant to the BNSF Permit.

Shortly before the public hearing, the DNR also generated additional information about the project, including a Wetland Rapid Assessment Methodology worksheet, a WEPA compliance determination checklist, and an analysis of the cumulative impacts of the BNSF project. The DNR posted the WEPA compliance determination checklist and the Wetland Rapid Assessment Methodology worksheet on its Sharepoint database on December 30, 2014. The DNR provided the cumulative impact analysis on its Sharepoint database on January 14, 2015.

The DNR held a public hearing on January 7, 2015, from 2 to 5 pm in the City of La Crosse. Reflecting the significant public interest in this proposed project, 152 members of the public attended the hearing, and 42 provided testimony. Many individuals and government officials submitted written comments to the DNR before the deadline for public comments.

Public testimony and comments raised concerns about the impacts of the BNSF project on the La Crosse River Marsh, the La Crosse River, the Mississippi River, and the wildlife that rely on these natural resources. Individuals also raised concerns about adverse impacts to the City and its residents as a result of additional train traffic, noise, and vibrations, as well as

serious concerns about public safety hazards and environmental damage caused by a potential train derailment in the marsh or the river.

Commenters asked the DNR to prepare an EIS for the BNSF project. United States Senators Ron Kind and Tammy Baldwin asked the DNR to prepare an EIS “to examine the environmental consequences of a proposed project so that officials and the public can make informed decisions and help reduce any possible negative impacts.” State Representatives Jill Billings and Steve Doyle and State Senator Jennifer Shilling also asked the DNR to prepare an EIS based on “the strong public interest and broad environmental and public safety concerns” associated with the BNSF project.

The DNR issued the wetland and bridge permit to BNSF on February 6, 2015, without preparing an EIS.

## **V. LEGAL BACKGROUND**

### **A. The DNR’s Permitting Process for Bridge and Wetland Individual Permits.**

The DNR prohibits any person from constructing or maintaining a bridge in, on, or over navigable waters. Wis. Stat. § 30.123(2). Projects that are not exempt from this section’s requirements or subject to a general permit must obtain an individual permit pursuant to Wis. Stat. § 30.123(8). The DNR must issue an individual bridge permit if it finds that the bridge will not (1) materially obstruct navigation, (2) materially reduce the effective flood flow capacity of a stream, or (3) be detrimental to the public interest. Wis. Stat. § 30.123(8)(c).

No person may discharge dredged or fill material into a wetland unless the discharge is authorized by a wetland general or individual permit. Wis. Stat. § 281.36(3b).

The DNR must issue a wetland individual permit if it finds all of the following: (1) “The proposed project represents the least environmentally damaging practicable alternative taking

into consideration practicable alternatives that avoid wetland impacts”; (2) “All practicable measures to minimize the adverse impacts to wetland functional values will be taken”; (3) “The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.” Wis. Stat. § 281.36(3n)(c).

The DNR must consider the following factors when it analyzes the impacts of the proposed discharge to wetland functional values: (1) “The direct impacts of the proposed project to wetland functional values”; (2) “The cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project”; (3) “Potential secondary impacts of the proposed project to wetland functional values”; (4) “The impact on functional values resulting from the mitigation that is required under sub. (3r)”; (5) “The net positive or negative environmental impact of the proposed project.” Wis. Stat. § 281.36(3n)(b).

#### **B. The Wisconsin Environmental Policy Act.**

The DNR must comply with WEPA when issuing Chapter 30 and Chapter 281 permits. Wis. Stat. § 1.11. “WEPA requires that state agencies review the environmental consequences of decisions which may significantly affect the quality of the human environment.” *Wis. Envtl. Decade, Inc. v. Dep’t of Ind. Lab. and Human Relations*, 104 Wis. 2d 640, 645, 312 N.W.2d 749 (1981). The purpose of WEPA “is to insure that agencies consider environmental impacts during decision making.” *Clean Wis. v. Pub. Service Comm.*, 2005 WI 93, ¶ 188, 282 Wis. 2d 250, 700 N.W. 2d 768 (quoting *State ex rel. Boehm v. Dep’t of Natural Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993)). WEPA “imposes upon governmental agencies certain procedural obligations with respect to their decision-making processes to assure that the substantive policies

of the Act will be implemented (ch. 274, Laws of 1971, sec. 2, creating sec. 1.11, Stats.)” *Wis. Evt’l Decade v. Dep’t of Natural Res.*, 79 Wis. 2d 409, 415-16, 256 N.W.2d 149 (1977) (hereinafter *WED III*).

WEPA is patterned after its federal counterpart, the National Environmental Policy Act (“NEPA”), and requires compliance with the federal NEPA guidelines developed by the Council on Environmental Quality (“CEQ”). Wis. Stat. § 1.11(2)(c). Thus, federal cases interpreting NEPA are persuasive authority for interpreting WEPA. *Clean Wis.*, 282 Wis. 2d 250, ¶ 188 n.43.<sup>1</sup>

WEPA is not meant “to control agency discretion, but to require that agencies consider and evaluate the environmental consequences of alternatives available to them in the exercise of that discretion, and to require that they undertake that consideration in the framework sec. 1.11 provides.” *WED III*, 79 Wis. 2d at 416. To satisfy WEPA the DNR must have created a reviewable record demonstrating that (1) the agency took a “hard look” at the problem, as opposed to “bald conclusions, unaided by preliminary investigation,” (2) the agency identified the relevant area of environmental concern, and (3) the agency made a convincing case that the impact is insignificant. *Id.* at 420.

It is critical that the DNR create a record to demonstrate that it took the required “hard look” at environmental impacts. The DNR must provide a reviewable record of sufficient depth to demonstrate to a reviewing court that the DNR’s environmental analysis supports its

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<sup>1</sup> The language in *Clean Wisconsin* looking to NEPA case law for guidance follows from a long line of decisions that treat NEPA case law as persuasive authority in WEPA cases. *Wis. Evt’l Decade v. Pub. Serv. Comm’n*, 69 Wis. 2d 1, 19, 230 N.W.2d 243 (1975); *Wis. Evt’l Decade, Inc. v. Pub. Serv. Comm’n*, 79 Wis. 2d 161, 174, 255 N.W.2d 917 (1977); *Wis. Evt’l Decade, Inc. v. PSC*, 79 Wis. 2d 409, 141, 256 N.W.2d 149 (1977); *Wis. Evt’l Decade v. Pub. Serv. Comm’n*, 98 Wis. 2d 682, 693, 298 N.W.2d 205 (Ct. App. 1980); *Wis. Evt’l Decade, Inc. v. Dep’t of Natural Res.*, 115 Wis. 2d 381, 395, 340 N.W.2d 722 (1983). *See also Larsen v. Munz Corp.*, 167 Wis. 2d 583, 593, 482 NW 2d 332, 337 (1992).

conclusion that the action at issue will not have a significant adverse impact on the environment. *Town of Centerville v. Dep't of Natural Res.*, 142 Wis. 2d 240, 246-47, 417 N.W.2d 901 (Ct. App. 1987).

The scope of impacts to be reviewed is “extraordinarily broad, compelling consideration of any and all types of environmental impact of [agency] . . . action.” *WED III*, 79 Wis. 2d at 422. This includes the direct, secondary or indirect, and cumulative environmental impacts of a proposed action. *WED III*, 79 Wis. 2d at 428-30 n.16. “[A] proper cumulative impacts analysis will assess the proposed action in light of other activity that has affected or will affect the same environmental resources. The goal is to highlight any environmental degradation that might occur if the minor effects of multiple actions accumulate over time.” *Habitat Educ. Center v. U.S. Forest Serv.*, 603 F. Supp. 2d 1176, 1186 (E.D. Wis. 2009). Secondary or indirect effects are those “‘caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,’ [and] ‘include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.’” *Highway J Citizens Grp., U.A. v. U.S. Dep't of Transp.*, 656 F. Supp. 2d 868, 886 (E.D. Wis. 2009) (quoting 40 C.F.R. § 1508.8(b)) (discussing the adequacy of the agency’s analysis of the effect of a highway construction on growth within one mile of the highway).

Only major agency actions significantly affecting the quality of the human environment require the agency to prepare an Environmental Impact Statement (“EIS”). *Boehm*, 174 Wis. 2d at 665. An agency’s decision that an EIS is not required is defensible and in compliance with WEPA only if (1) the agency “developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a

reasonably informed preliminary judgment of the environmental consequences of the action proposed,” and (2) “the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow[s] from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations.” *Id.* at 666.

The DNR recently completed a major overhaul to its regulations guiding WEPA compliance. Effective April 1, 2014, the DNR eliminated the use of Environmental Assessments (“EA”), which were—and still are in the federal NEPA context—the environmental analysis document the DNR prepared to determine whether an agency action warranted an EIS. Exhibit 1; *see also Larsen v. Munz Corp.*, 167 Wis. 2d 583, 593-94, 482 N.W.2d 332 (1992) (discussing the role of EAs under WEPA as a means to develop a record and determine whether an EIS is warranted); *Highway J Citizens Group v. Mineta*, 349 F.3d 938 (7th Cir. 2003) (discussing the role of EAs in the NEPA context to determine whether an EIS is warranted).

The DNR now categorizes certain agency permitting decisions as “equivalent analysis actions” because, according to the DNR, “a detailed environmental analysis and public disclosure are conducted as part of the department programmatic procedure.” Wis. Admin. Code § NR 150.20(2)(a). In addition, section 150.20(2)(a) requires staff to prepare a WEPA compliance determination—regarding compliance with NR 150—for equivalent analysis actions. Wis. Admin. Code §§ NR 150.20(2)(a), 150.35(1). The permitting programs under which the BNSF Permit was issued are categorized as equivalent analysis actions. Wis. Admin. Code § NR 150.20(2)(a)8., 11.

For any action categorized as an equivalent analysis action, the DNR may elect to prepare an EIS “for projects of such magnitude and complexity that one or more of the following apply:

(1) “The project involves multiple department actions”; (2) “The project may be in conflict with local, state or federal environmental policies”; (3) “The project may set precedent for reducing or limiting environmental protection”; (4) “The project may result in deleterious effects over large geographic areas”; (5) “The project may result in long-term deleterious effects that are prohibitively difficult or expensive to reverse”; (6) “The project may result in deleterious effects on especially important, critical, or sensitive environmental resources”; (7) “The project involves broad public controversy”; (8) “The project may result in substantial risk to human life, health, or safety.” Wis. Admin. Code § NR 150.20(1), (4)(b).

Courts review an agency’s compliance with WEPA and its decision not to prepare an EIS under a reasonableness standard. *WED III*, 79 Wis. 2d at 421. The court will examine the record created by the agency and determine whether its decision not to prepare an EIS was reasonable under the circumstances. *Id.*

### **C. The Public Trust Doctrine.**

Wisconsin has a long history of preserving and protecting our valuable water resources. This history is rooted in the public trust doctrine established in our state’s constitution. Wis. Const., Art. IX, § 1; *Lake Beulah Mgmt. Dist. v. Dep’t of Natural Res.*, 2011 WI 54, ¶ 30, 335 Wis. 2d 47, 799 N.W.2d 73. The state has delegated some of its authority and obligation to protect our navigable waters to the DNR. *Lake Beulah*, 335 Wis. 2d 47, ¶ 33. Thus, in accordance with the public trust doctrine, the DNR has a duty to consider how its regulatory decisions will impact Wisconsin’s water resources. *Id.*, ¶ 34.

## **VI. ISSUES FOR REVIEW AND DISPUTES OF MATERIAL FACT**

The following are the specific issues on which the Petitioners request a contested case hearing on the legality of the BNSF Permit. The Petitioners have articulated the discrete disputes

of material fact that relate to each issue. They are entitled to a contested case hearing on all issues for the following reasons.

**A. Issue One: Whether the DNR complied with WEPA in issuing the BNSF Permit.**

The DNR's regulations acknowledge that WEPA requires an environmental analysis meeting statutory requirements for all DNR actions except those specifically exempted by statute. Wis. Admin. Code §§ NR 150.04(2)(e) (requiring the DNR to "[d]evelop appropriate environmental effects information and analysis along with a discussion of meaningful alternatives and make this available to the decision maker in a timely manner for all actions where such an evaluation is required by this chapter; and recognize that decisions subject to WEPA requirements cannot be made until the appropriate environmental review process is completed"), NR 150.20(1) ("This section establishes appropriate procedures for the environmental analysis that WEPA requires for all department actions except those specifically exempted by statute."). The breadth and depth of the environmental analysis required by WEPA is determined based on Wis. Stat. § 1.11, Wisconsin case law interpreting that provision, Wis. Admin. Code ch. NR 150, the CEQ guidelines, and NEPA case law. *See* Wis. Stat. § 1.11; Wis. Admin. Code § NR 150.01; *see also supra* at 14 n.1.

For DNR actions designated as equivalent analysis actions, such as the issuance of the BNSF Permit, the DNR must still provide an environmental analysis of potential impacts consistent with WEPA. *See* Wis. Admin. Code § NR 150.20(1), (2). The DNR's compliance determination checklist is intended to document the DNR's evaluation of potential environmental impacts and to demonstrate that the DNR's decision was made in accordance with WEPA and chapter NR 150.

In the DNR's WEPA compliance determination checklist, the DNR documented the environmental analysis that it conducted through the "equivalent analysis" process provided in Chapter 30 and Section 281.36 of the Wisconsin Statutes. The WEPA compliance determination checklist provides that it "should be utilized to identify and document the evaluation of potential environmental impacts from a proposed project and alternatives." Regarding the DNR's analysis of direct, secondary and cumulative environmental impacts, the DNR references its Wetland Rapid Assessment Methodology and BNSF's construction plans as providing that disclosure and analysis. The DNR also concludes in the BNSF Permit that it "has completed all procedural requirements of s. 1.11(2)(c), Wis. Stats., and NR 150, Wis. Adm. Code for this project." (*See* BNSF Permit, Finding of Fact 20.)

The DNR's unduly narrow and conclusory environmental analysis in its Wetland Rapid Assessment Methodology, cumulative impact analysis, and WEPA compliance determination checklist does not comply with WEPA. Specifically, the DNR did not adequately analyze the potential cumulative, historic, and secondary environmental impacts.

Among many potential environmental impacts discussed in public comments, citizens raised the following secondary and cumulative impacts in comments to the agency: (1) the risk of environmental harm and threat to public safety from a train derailment carrying hazardous materials such as crude oil; (2) disturbance to a documented bald eagle's nest within 600 feet of the railroad tracks; (3) the impact to nearby residents of increased noise, vibration, small incidental spills, and air pollution from more and more frequent trains passing through; (4) the incremental impact of another wetland fill in the La Crosse River Marsh that has already been reduced to half its size from previous developments; (5) impacts from construction and operation of the second track on the Mississippi River which is adjacent to and downstream from the La

Crosse River Marsh; (6) disturbance to wildlife that reside in or use the La Crosse River Marsh—including but not limited to endangered and special concern species such as the bald eagle and black tern, and migratory birds—from more and more frequent trains passing through; (7) impact on property values and tax revenue for the City of La Crosse; and (8) impact on flooding downstream of the project from the destruction of wetlands that provided flood storage. The DNR failed to address any of these impacts in its environmental analysis or record of documentation of WEPA compliance.

The DNR violated WEPA and issued a legally invalid permit to BNSF by failing to consider these secondary and cumulative environmental impacts. Wisconsin and federal case law, and CEQ guidelines provide that, in order to comply with WEPA and make a legally sound decision, an agency must consider secondary and cumulative impacts of a proposed project before making a decision. *WED III*, 79 Wis. 2d at 428-30. The DNR is required to comply with WEPA prior to issuing wetland and bridge permits. *See* Wis. Stat. § 1.11; Wis. Admin. Code §§ NR 150.04(2)(e), 150.20(1); *see also* *Wis. Env'tl. Decade, Inc. v. Dep't of Ind. Lab. and Human Relations*, 104 Wis. 2d at 645. Since the DNR's environmental analysis did not produce a reviewable record to demonstrate its compliance with WEPA, its finding that it complied with WEPA through the equivalent analysis process for the BNSF Permit is not based on substantial evidence in the record. Thus, the BNSF Permit must be set aside because the DNR failed to comply with WEPA when the DNR made its decision, and the DNR's findings in support of its decision are not based on substantial evidence in the record. *See* Wis. Stat. § 227.57(5), (6).

Compounding the importance of its WEPA obligations, the DNR's duty to consider and protect public trust resources also required it to analyze secondary impacts from the BNSF project on the La Crosse River Marsh, the La Crosse River, and the adjacent Mississippi River.

*Lake Beulah*, 335 Wis. 2d 47, ¶¶ 30-34. Commenters, many of whom are very knowledgeable about our waters and wildlife, submitted extensive information to the DNR about potential impacts to public trust resources as explained above, *see supra* at 19-20. The DNR either entirely failed to address those impacts or failed to adequately evaluate them in its environmental analysis for the BNSF project.

Finally, evidence in the record leads to the conclusion that an EIS was warranted for the BNSF project. The DNR erroneously exercised its discretion to fail to prepare an EIS because it did not address the factors which may trigger the preparation of an EIS, including that (1) the project involves multiple DNR actions; (2) the project may be in conflict with local policies; (3) the project may set precedent for reducing the wetland even further; (4) the project may result in deleterious effects downstream of the marsh in the sensitive Mississippi River; (5) secondary effects of the project may result in long-term harmful effects, from spills, explosions, or train derailments, that are prohibitively difficult and expensive to reverse; (6) the project may result in harmful effects on the especially important bird species, threatened, endangered and of special concern, as well as the adjacent Mississippi River; (7) the project involves significant public controversy; and (8) secondary effects of the project from oil crude train accidents could result in substantial risk to human health and safety.

In blind reliance on Chapter NR 150, the DNR concluded that the BNSF project was not a major action significantly affecting the quality of the human environment despite the lack of any information in the record to support that conclusion. (*See* BNSF Permit, Finding of Fact 6 (finding that the action was an equivalent analysis action and that it complied with WEPA, but failing to make a finding of no significant impact).) Because the DNR's environmental analysis did not comply with WEPA, its findings that the BNSF project would not have a significant

environmental impact and that an EIS was unnecessary are not based on substantial evidence in the record and are outside the range of discretion delegated to the agency by law. Wis. Stat. § 227.57(6), (8). Further, to the extent the DNR based its finding of no significant impact and refusal to prepare an EIS on the designation of wetland and bridge permits as equivalent analysis actions, that conclusion was erroneous and must be reversed because it is based on a legally invalid rule, Wis. Admin. Code § NR 150.20(2)(a)8., 11., as explained below. *See* Wis. Stat. § 227.57(5).

This issue raises the following disputes of material fact:

1. Whether, through the permitting process for the BNSF Permit, the DNR created a record of its environmental analysis that includes an environmental analysis equivalent to that required by WEPA;
2. Whether, through the permitting process for the BNSF Permit, the DNR created a record of its environmental analysis that adequately analyzed cumulative and secondary environmental impacts;
3. Whether, through the permitting process for the BNSF Permit, the DNR created a record of its environmental analysis that disclosed and analyzed: (1) the risk of environmental harm and threat to public safety from a train derailment carrying hazardous materials such as crude oil; (2) disturbance to a documented Bald Eagle's nest within 600 feet of the railroad tracks; (3) the impact to nearby residents of increased noise, vibration, small incidental spills, and air pollution from more and more frequent trains passing through; (4) the incremental impact of another wetland fill in the La Crosse River Marsh that has already been reduced to half its size from previous developments; (5) impacts from construction and operation of the second

track on the Mississippi River which is adjacent to and downstream from the La Crosse River Marsh; (6) disturbance to wildlife that reside in or use the La Crosse River Marsh—including but not limited to endangered and special concern species such as the bald eagle and black tern, and migratory birds—from more and more frequent trains passing through; (7) impact on property values and tax revenue for the City of La Crosse; and (8) impact on flooding downstream of the project from the destruction of wetlands that provided flood storage. The DNR failed to address any of these impacts in its environmental analysis or record of documentation of WEPA compliance;

4. Whether the DNR's finding that its environment analysis prepared in issuing the BNSF Permit complies with WEPA is supported by substantial evidence in the record; and
5. Whether the DNR's finding that the BNSF project would not have a significant impact on the human environment is supported by substantial evidence in the record.

**B. Issue Two: Whether Wis. Admin. Code 150.20(2)(a)8. and 11. is an invalid rule because it categorizes wetland and bridge permits as equivalent analysis actions.**

Wisconsin Admin. Code § NR 150.20(2)(a) subparts 8. and 11. presumes that the wetland and bridge permitting programs provide an equivalent analysis to that required by WEPA. However, the permitting program does not provide an environmental analysis that complies with WEPA because it does not provide for the disclosure and analysis of the full range of potential environmental impacts, including cumulative and secondary impacts of the proposed action. As a result, this portion of Wis. Admin. Code § NR 150.20(2)(a) subparts 8. and 11. is invalid because it exceeds the bounds of a permissible interpretation of Wis. Stat. § 1.11. *Sieder*, 236 Wis. 2d 211, ¶ 25; Wis. Stat. §§ 227.10(2), 227.11(2)(a), 227.40(4)(a).

Further, the DNR lacks an adequate factual basis to defend the validity of Wis. Admin. Code § NR 150.20(2)(a) subparts 8. and 11. The DNR did not develop an adequate factual record to support its determination that the wetland and bridge permitting programs provide an environmental analysis equivalent to that required by WEPA. Thus, the DNR did not meet its obligation to establish through a reviewable record that the rule bears a reasonable relationship to a legitimate government interest. *Liberty Homes, Inc.*, 136 Wis. 2d at 381. Thus, this rule is invalid because it violates constitutional due process protections. *Id.*; Wis. Stat. §§ 227.10(2), 227.40(4)(a).

This issue raises the following disputes of material fact:

1. Whether the DNR developed a rule making record that demonstrates a factual basis for this rule; and
2. Whether the environmental analysis provided in the wetland and bridge permitting process is equivalent to that required by WEPA.

**C. Issue Three: Whether a stay of the BNSF Permit is necessary to prevent significant adverse impacts or irreversible harm to the environment.**

The Petitioners are entitled to a stay of the BNSF Permit and project pending an administrative hearing because this Petition requests a stay and the Petitioners have demonstrated that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment. Wis. Stat. §§ 30.209(1m)(c), 281.36(3q)(d)1. This stay will be in effect until the DNR denies the Petitioners' request for an administrative hearing or the hearing examiner determines a stay is not necessary. Wis. Stat. §§ 30.209(1m)(d), 281.36(3q)(d)1.

A stay is warranted in this case because the DNR failed to analyze in its permitting process environmental impacts that would cause significant adverse impacts and irreversible

harm. Specifically, the Petitioners and other commenters raised following secondary and cumulative impacts that are reasonably related to the BNSF project:

- 1) the risk of environmental harm and threat to public safety from a train derailment carrying hazardous materials such as crude oil;
- 2) disturbance to a Bald Eagle's nest within 600 feet of the railroad tracks;
- 3) the impact to nearby residents from increased noise, vibration, small incidental spills, and air pollution from more and more frequent trains passing through;
- 4) the incremental impact of another wetland fill in the La Crosse River Marsh that has already been reduced to half its size from previous developments;
- 5) the impact of construction and operation of the second track on the Mississippi River which is adjacent to and downstream from the La Crosse River Marsh;
- 6) disturbance to wildlife, including but not limited to identified endangered and special concern species such as the bald eagle and black tern, and migratory birds from more and more frequent trains passing through;
- 7) the impact on property values and tax revenue for the City of La Crosse; and
- 8) the impact on flooding downstream of the project from the destruction of wetlands that provided flood storage.

Because the DNR failed to disclose and analyze the significance of these potential impacts, its decision did not take these impacts into account or appropriately address or mitigate these impacts. Further, the failure to analyze and disclose these impacts did not fulfill the function of WEPA to inform other agencies and the public, which might have led to other regulatory means to prevent such impacts.

Finally, if the BNSF permit is in effect, it will allow BNSF to begin construction of the second track, which would be hard to stop or undo once construction is underway. After BNSF fills more of the La Crosse River Marsh it will be difficult or impossible to restore. The same is true of impacts to the wetlands and La Crosse and Mississippi Rivers if they are negatively impacted from a train derailment and spill. If endangered or special concern species such as the bald eagle or black tern are disturbed and driven from their nests they may never return.

## **VII. REASONS THAT A HEARING IS WARRANTED**

A hearing is warranted on all of the above issues to resolve these disputes of fact in order to determine whether the DNR's decision to issue the BNSF Permit complied with the laws that are designed to protect air quality, public health and the environment.

Further, the Petitioners have sufficiently described their objection by the BNSF Permit by including in this Petition (1) “[a] description of the objection that is sufficiently specific to allow the department to determine which provisions of [section 281.36 and chapter 30] may be violated if the proposed discharge under the wetland individual permit is allowed to proceed,” (2) “[a] description of the facts supporting the petition that is sufficiently specific to determine how the petitioner[s] believe[] the discharge, as proposed, may result in a violation of the provisions of [section 281.36 and chapter 30],” and (3) “[a] commitment by the petitioner[s] to appear at the administrative hearing and present information supporting the petitioner[s’] objection.” Wis. Stat. §§ 281.36(3q)(c); 30.209(1m)(b).

## **VIII. RELIEF DESIRED**

The Petitioners respectfully request the following relief:

- A. Stay the effectiveness of the wetland and bridge permit issued to BNSF pending resolution of this review of the legality of the BNSF Permit, *see* Wis. Stat. § 227.54;

- B. Declare Wis. Admin. Code § NR 150.20(2)(a) subparts 8. and 11. an invalid rule because it conflicts with WEPA, Wis. Stat. § 1.11, and lacks an adequate factual basis in violation of constitutional due process protections, *see* Wis. Stat. § 227.40(4)(a);
- C. Set aside the BNSF Permit because it was issued without an environmental analysis that meets the requirements of WEPA, and thus was not issued in accordance with the law, *see* Wis. Stat. § 227.57(4)-(8);
- D. Set aside the DNR's finding that the equivalent analysis process for permits issued pursuant to Wis. Stat. §§ 30.123(8) and 281.36 meets the detailed environmental analysis required by WEPA because that finding was not based on substantial evidence in the record, *see* Wis. Stat. § 227.57(4)-(8);
- E. Set aside the DNR's finding that the BNSF Permit was not a major action significantly affecting the quality of the human environment and that no EIS was warranted because that finding was based on a legally invalid rule, Wis Admin. Code § NR 150.20(2)(a) subparts 8. and 11., and an inadequate environmental analysis, *see* Wis. Stat. § 227.57(4)-(8);
- F. Direct the DNR to conduct an environmental analysis that complies with WEPA prior to issuing a wetland and bridge permit to BNSF, and if warranted by such analysis, to prepare an EIS on this proposed action, *see* Wis. Stat. § 227.57(4), (5), (7), (8); and
- G. Remand this matter to the DNR with directions to issue a wetland and bridge permit to BNSF only after it completes an environmental analysis that meets the requirements of WEPA, *see* Wis. Stat. § 227.57(4), (5).

Dated at Madison, Wisconsin this 9<sup>th</sup> day of March, 2015.

MIDWEST ENVIRONMENTAL ADVOCATES INC.

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