

FREEDLAND ET AL.,

Petitioners,

Case No. 15-CV-117

Case Code:

v.

WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES,

Respondent.

---

**PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR STAY**

---

**INTRODUCTION**

Petitioners requested a stay of the wetland and waterway permit issued to Burlington Northern Santa Fe Railway (“BNSF”) to prevent further construction in the La Crosse River Marsh and the La Crosse River. To be clear, Petitioners are not asking this court to order BNSF to remove the fill that is already in place. Petitioners are asking this Court to halt further construction to prevent irreparable harm that is done every day that BNSF continues to construct.

Petitioners have been chasing after a moving target since the beginning in this case. During the public comment period, BNSF and the Wisconsin Department of Natural Resources (“DNR”) continued to add documents to the permit record right up to and even after the public hearing and public comment period. Pet. for Jud. Rev. ¶¶ 31-33. Petitioners had just 30 days after the BNSF Permit was issued to develop their challenge to the BNSF Permit and Wis. Admin. Code ch. NR 150. *See* Wis. Stat. §§ 227.40, 227.52. In the Petition for Judicial Review and Declaratory Judgment, Petitioners requested a stay pursuant to Wis. Stat. § 227.54. Because this

Court may use the injunction factors for guidance, which includes the likelihood of success on the merits, Petitioners had to wait to file a motion for a stay until the DNR responded to their requests for documents under the Open Records Law and for the DNR's production of the BNSF permit record, and then had to review several thousand pages of documents. To Petitioners' great surprise, shortly after BNSF obtained its permits, BNSF changed the game by getting a quick DNR amendment to its wetland and waterway permit. Amend. Pet. for Jud. Rev. ¶¶ 41-43. Petitioners had to search for information and make their voices heard when BNSF sought to get out of one of the wetland and waterway permit conditions that prohibited construction over the summer to protect nesting black terns. In the meantime, BNSF charged ahead with construction and fill in the La Crosse River Marsh and the La Crosse River.

But the fact that BNSF has been able to complete part of the wetland fill and part of the second rail line does not mean that Petitioners are not entitled to a stay. This Court has the authority to grant Petitioners' Motion for a Stay to preserve Petitioners' right to meaningful judicial review. *See* Wis. Stat. § 227.54. Even under the injunction factors, Petitioners establish a right to a stay. Petitioners have a high probability of success on the merits, more than that required for a stay. While some of the harm has been done, halting construction will prevent additional, irreparable harm. Below, Petitioners detail the specific, concrete irreparable harm to the environment and Petitioners' interests from ongoing construction. Additionally, because it is not clear that this Court would order BNSF to remove the fill and track even if Petitioners succeed on the merits, Petitioners also provide the specific, concrete, irreparable harm from the complete construction and operation of BNSF's second track. For these reasons, Petitioners respectfully request this Court grant their Motion for a Stay of the wetland and waterway permit issued to BNSF by the DNR.

## **ADDITIONAL FACTUAL BACKGROUND**

### **I. The Value of the La Crosse River Marsh, the La Crosse River, and the Mississippi River.**

It is difficult to overstate the unique values that the La Crosse River Marsh and adjacent waters provide to the ecosystem, the City of La Crosse, and its residents. The La Crosse River Marsh serves as a wildlife refuge, recreational area, and flood reservoir. Williams Aff., Exh. E at 6 (R. 646). The La Crosse River Marsh provides habitat for the spring migration of birds from Central and South America. In May 2013, over 100 species of birds were documented in the marsh. In the 1990s, a DNR land use survey indicated that the La Crosse River Marsh was the highest quality urban wetland in the state. Williams Aff., Exh. E at 17 (R. 664).

The La Crosse River Marsh and adjacent natural areas also provide opportunities for outdoor recreation, education, and tourism. BNSF's second track will cross through the La Crosse River Marsh and nearby natural resources like the Hixon Forest, which are used for recreation and education by local schools, the University of Wisconsin-La Crosse, and the Outdoor Recreation Alliance. Williams Aff., Exh. E at 16, 18 (R. 661, 665). Around 6,000 primary and secondary school student, and around 900 undergraduate and graduate students use the La Crosse River Marsh every year. Williams Aff., Exh. A at 69 (comments attached to email at R. 982).<sup>1</sup> Recreational trails through the marsh provide hiking and biking opportunities and connect the bluffs to the cities of La Crosse and Onalaska. Williams Aff., Exh. E at 18 (R. 665). BNSF's second track would further limit access to recreational trails in the nearby Hixon forest. Williams Aff., Exh. D at 9.

### **II. BNSF's Ongoing Construction and Actions Following Permit Issuance.**

---

<sup>1</sup> In exhibits to Williams' affidavit, Petitioners have reproduced some comments in the BNSF permit record, including comments by Citizens Acting for Rail Safety ("CARS") that do not include record page numbers. This is because the DNR included these comments in the record only as a link embedded within the PDF file of the BNSF permit record.

The DNR and BNSF make much of the fact that BNSF's construction of the second track is underway. Petitioners do not dispute BNSF's assertion that 55% of the civil engineering work in the wetland and waterway areas has been completed by BNSF. BNSF Br. at 8. BNSF and DNR conveniently ignore the fact that BNSF's project would not have been this far along if BNSF followed its original permit. The original BNSF wetland and waterway permit ("the BNSF Permit"), Williams Aff., Exh. A at 115-23 (R. 1054-62), prohibited any construction in wetlands and other waters from May 15 through July 31, a condition in place to protect black terns nesting in the marsh. Williams Aff., Exh. A at 119 (R. 1058) (permit condition 25).

Shortly after BNSF received its permit from the DNR, BNSF asked the DNR to relieve BNSF from this condition so that it could continue constructing through the summer. Williams Aff., Exh. E at 32 (R. 1719) (finding of fact 2 in BNSF Permit Amendment finding that BNSF applied for an incidental take permit on April 14, 2015). BNSF did so not by overtly seeking an amendment to its wetland permit—which flatly prohibited construction during this period—but by going through a separate process to obtain authorization from the DNR to take or kill black terns nesting during this period. Williams Aff., Exh. E at 32 (R. 1719). Recognizing the conflict with the blanket prohibition in the original BNSF Permit, the DNR issued an amended wetland and waterway permit to BNSF ("BNSF Permit Amendment"), Williams Aff., Exh. E at 30-33 (R. 1717-20), that allowed it to construct during black tern nesting if BNSF obtained the authorization to take black terns. Williams Aff., Exh. E at 31 (R. 1718) (amended permit condition 2). The DNR then issued a separate take authorization allowing BNSF to construct during black tern nesting with conditions to protect black tern nests. Williams Aff., Exh. E at 34-35 (R. 1787-88). All of this occurred in about one month, while for nearly a year leading up to

the issuance of the original BNSF Permit, everyone was operating with the understanding that BNSF would not be able to construct during black tern nesting.

This Court should consider this context when weighing what the DNR and BNSF assert is Petitioners' "delay" in seeking a stay. Petitioners were not sitting on their hands. Rather they were the victims of a bait and switch by BNSF. Petitioners filed this case with the understanding that BNSF could not construct in the wetland for most of the summer. Since BNSF received its permit from the Army Corps of Engineers on April 14, 2015, Williams Aff., Exh. D at 41-45, that would have left just one month for BNSF to begin construction under the original BNSF Permit. Petitioners were counting on that time to develop their motion for a stay while construction was on hold per the terms of the original BNSF permit.

**I. A Stay is Necessary to Preserve the Status Quo—Which is Now a Partially Filled Wetland—and to Prevent Irreparable Harm During Remaining Construction.**

Petitioners are entitled to a stay to preserve the status quo even where some of the damage has been done, as long as a stay will prevent further irreparable harm. Contrary to BNSF's and DNR's assertions, in terms of the legal standards for an injunction, it is largely irrelevant that some of the harm has been done and construction is underway. If the party seeking a stay or injunction can establish further irreparable harm will result absent a stay, then the Court should order a stay. Courts routinely grant injunctions even when construction has begun, as long as the party seeking the injunction can establish that halting construction would prevent further irreparable harm. Petitioners provide ample evidence of irreparable harm from remaining construction absent a stay.<sup>2</sup>

---

<sup>2</sup> Petitioners reply brief addresses the status of construction as of BNSF's initial brief in this matter and the hearing on June 22, 2015. Petitioners have dealt with a moving target from the start, and it would be unreasonable for Petitioners to anticipate the amount of work that will be done by the July 22 hearing.

**A. Legal Standard for Stay to Preserve Status Quo and Prevent Irreparable Harm.**

Petitioners and BNSF agree that the proper standard to use when seeking a stay of agency action comes from Wis. Stat. § 813.02, motion for temporary injunction. The temporary injunction factors, often called the *Grootemaat* factors require the movant to demonstrate: (1) the movant has a reasonable probability of success on the merits; (2) an injunction is necessary to prevent irreparable harm or preserve the status quo; and (3) the movant otherwise lacks an adequate remedy at law. *See Werner v. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

Petitioners established in their initial brief that they are likely to succeed on the merits. The DNR's arguments on the merits are off base and do not undermine Petitioners' arguments.<sup>3</sup> BNSF did not address the merits in its brief. The central dispute is whether a stay is required to prevent irreparable harm and preserve the status quo. BNSF and the DNR make much of the fact that construction is underway. But the law does not limit the right to a stay or injunction even if construction is underway as long as the party with the burden can establish irreparable harm absent court intervention.

In cases alleging a failure to prepare an environmental analysis in compliance with the National Environmental Policy Act ("NEPA"), courts presume irreparable environmental harm absent an injunction because "Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment." *Davis v. Mineta*, 302 F.3d 1104, 1114-5 (10th Cir. 2002) (relying on NEPA's stated purpose, which is the same as the stated

---

<sup>3</sup> Petitioners address the DNR's arguments on the merits in their initial brief on the merits, which will be submitted to this Court on Wednesday, July 8, 2015. For the sake of brevity and clarity, Petitioners do not address the merits further in this reply brief.

purpose of the Wisconsin Environmental Policy Act (“WEPA”));<sup>4</sup> *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (providing that harm NEPA meant to prevent is complete when agency makes decision without considering information NEPA seeks to place before decision-maker and public); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) (same).

Contrary to the DNR’s assertions that harm caused by a WEPA violation is merely “procedural,” the injury is actual, concrete harm to the environment resulting from an ill-informed agency decision. *Sierra Club*, 872 F.2d at 500-01. The *Sierra Club* court explained:

We did not (and would not) characterize the harm described as a “procedural” harm, as if it were a harm to *procedure* (as the district court apparently considered it). Rather, the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA’s object is to minimize that risk, the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project.

---

<sup>4</sup> WEPA contains the same statement of purpose provided in NEPA, except Wisconsin’s legislature went even further and issued the following powerful statement of purpose:

The legislature, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of this state, in cooperation with other governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations.

1971 Wis. Act 274, § 1(2).

*Id.* Environmental injury is considered particularly irreparable because “environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration.” *Amoco Production Co. v. Village of Gambell, AK*, 107 S.Ct. 1396, 1404 (1987).

Under similar circumstances, courts in many other jurisdictions have found that a stay during construction was appropriate to preserve the status quo even though some of the damage had been done, particularly when environmental harm is involved. *See e.g., Environmental Defense Fund Inc. v. Corps of Engineers of U. S. Army*, 324 F.Supp. 878, 880, (D.C. Cir. 1971) (granting a preliminary injunction even though construction of a canal was one-third complete; “further construction and related operations as now planned might irreparably damage marine and plant life and a primary source of drinking water for the State of Florida. For this there would be no adequate remedy at law.”); *Transcentury Properties, Inc. v. State of California*, 116 Cal. Rptr. 487, (492) (Cal. Ct. App. 1st Dist. Div. 4 1974) (preliminary injunction halting the construction of a harbor was granted because the loss of coastline would be irreparable; “once a project of the size and scope of Bodega Harbour is completed, the land cannot[sic] be restored to its natural state. Consequently, the relative hardships to the parties compel the conclusion that construction must be halted pending final judicial determination of the controversy.”); *National Wildlife Federation v. Harvey*, 440 F.Supp.2d 940, 959 (E.D. Ark., W Div. 2006) (granting a preliminary injunction to a partially halted construction until additional surveys are performed on the land) (emphasis added); *Sacred Family Investments, Inc. v. Doral Supermarket, Inc.*, 20 So.3d 412, 417 (Fla. 3rd DCA. 2009) (preserve status quo by enjoining a landlord from committing further construction).

Despite this authority to the contrary, BNSF boldly asserts that the fact that construction is underway “requires the denial of Petitioners’ Motion as a matter of law.” BNSF Br. at 3. The above authority demonstrates that this is simply false and mischaracterizes the law. BNSF also misrepresents the cases it cites in a feeble attempt to prove this assertion. There is no legal principle providing that a stay is not warranted where some of the harm is done and construction is underway. Without any Wisconsin case law to support its assertion, BNSF looked to other jurisdictions. But none of the cases BNSF cited establish that a stay is not warranted where the project is underway. BNSF misrepresents cases that actually support Petitioners right to a stay to halt construction that is underway. Many other cases are easily distinguished.

In *Ocoee River Council v. Tennessee Valley Authority*, the court denied the request for a preliminary injunction on the basis that the Ocoee River Council failed to meet its burden to show that the injunction factors favored an injunction, not because, as a matter of law, a court will not order an injunction where work is underway. 540 F.Supp. 788, 799 (E.D. Tenn. 1981). In *Village of Logan v. US Department of Interior*, the court denied the preliminary injunction because the Village of Logan failed to meet its burden that concrete and irreparable harm would occur absent an injunction. 577 F.App’x 760 (10th Cir. 2014). Similarly, in *NRDC v. Kempthorne*, NRDC simply did not convince the court that the irreparable harm claimed was sufficiently concrete. 525 F. Supp 2d 115 (D.D.C. 2007). In *Fund for Animals v. Frizzell*, the court concluded that Fund for Animals did not establish irreparable harm because the group did not allege sufficiently specific, concrete harm, and the court also noted that an injunction would be futile because the harm was already completely done. 530 F.2d 982, 987-88 (D.C. Cir. 1975). That is clearly distinguishable from the instance case in which some harm has been done, but Petitioners have alleged detailed, specific potential harm to their interests and the environment if

construction continues. In *United States v. Gimbel Brothers*, the alleged environmental harm was entirely economic harm, not environmental, and the court used balancing tests for economic interests that are inapplicable here, where most of the alleged harm is environmental. 202 F.Supp 779 (E.D. Wis. 1962). Similarly, in *Dalsis v. Hills*, the court refused to grant a motion to stay, but not because construction had already begun on the shopping mall at issue. 424 F.Supp 784 (W.D.N.Y. 1976). The court instead concluded that the plaintiff misrepresented his interest in the case and was motivated by alleged, unsubstantiated economic concerns, not the environmental harms alleged. *Id.* Finally, in *Public Interest Research Group of Michigan v. Brinegar*, the court ruled against the motion to stay because the project was necessary to ensure public safety, and that public safety concern outweighed the environmental concerns in that case. 517 F.2d 917 (6th Cir. 1975).

BNSF's legal arguments are unavailing. Their factual arguments fare no better, nor do the DNR's. BNSF and DNR hang their hats on the fact that some of the harm has been done, as some of the wetland has been filled and construction is underway. But they ignore the serious, ongoing harm to the environment during construction, and the significant harm to Petitioners interests and the environment once the second track is complete and operating.

**B. Irreparable Harm During Construction Unless This Court Grants a Stay to Preserve the Status Quo.**

The DNR and BNSF repeatedly misrepresent Petitioners' interests and the harm they seek to prevent. The DNR sometimes suggests that Petitioners are only interested in an unaltered wetland, DNR Br. at 21, and at other times dismiss Petitioners concerns as only about train traffic, DNR Br. at 22. The DNR's mischaracterization of the detailed, specific, and concrete harms alleged by Petitioners and other citizens in this case are emblematic of the DNR's approach to citizen concerns in the permitting process in this matter—minimize and dismiss.

BNSF focuses only on Petitioners' interest in not having the wetland filled until an adequate environmental analysis is complete. BNSF and the DNR try to cloud the issue, perhaps because they cannot dispute that Petitioners have established significant, concrete irreparable harm that may occur if construction continues.

Below, Petitioners highlight just some of the irreparable harm that may occur if construction continues. These concerns were raised in hundreds of pages of public comments, the Petition for Judicial Review and Declaratory Judgment, and Petitioners' initial brief in support of their Motion for a Stay. As established above, when a party alleges an agency did not comply with WEPA, a court can presume that irreparable harm to the environment will result if the project is allowed to proceed before an adequate environmental review. *Davis v. Mineta*, 302 F.3d at 1114-5. These are the specific harms to the environment that may occur absent a stay.

Continuing construction activities in the La Crosse River Marsh present a significant risk of harm to the La Crosse River Marsh downstream waters. As stated by the Army Corps of Engineers, dredging and fill placement results in "suspension of discharged material and re-suspension of bottom sediments [that] could . . . accumulate in downstream waters as sediment." Williams Aff., Exh. D at 25 (Army Corps Environmental Assessment). Sediment alone is a pollutant harmful to aquatic life, but there is an even greater potential for harm where sediment contains unsafe contaminants, which may be the case here. Due to "the use of herbicides by BNSF along the railroad corridor, toxic material transport[ed] on rail cars, and the proximity to lead contaminated sediment," it is likely that the marsh surrounding the existing BNSF track and the existing BNSF rail bed contain hazardous contaminants that may be transported downstream if disturbed. Williams Aff., Exh. A at 99 (R. 1007). Citizens have observed what appear to be oil leaks along BNSF's existing track, which ultimately leaches into the rail bed. Williams Aff.,

Exh. A at 83-84 (comments attached to email at R. 982). Frequent flood events and high water increase the risk that sediment and contaminants will pollute the surrounding marsh and downstream to the Mississippi River. Claflin Aff., ¶¶ 14-16. “Since 1965, La Crosse has experienced at least four (4) 50-year flood events,” and one 175-year flood event. *Id.*

A heavy rainfall or flood during construction is very likely to mobilize a significant amount of sediment and contaminants and allow it to discharge to other areas of the La Crosse River Marsh, La Crosse River, and the Mississippi River. BNSF recognized this fact in its brief. BNSF admits that the project in its current state creates “risk from exposure to the elements, such as large or extraordinary weather events or flooding.” BNSF Br. at 18. BNSF attempts to use this as a reason to allow it to continue construction on its schedule and argues this fact weighs against a stay. To the contrary, BNSF admits that there is a risk of ongoing harm to the environment from its construction project. BNSF also ignores the obvious fact that a stay does not necessarily mean BNSF will leave the site as is. There is no legal or logical reason that this Court could not order a stay of the BNSF Permit with directions for the DNR to oversee stabilization of the disturbed area pending resolution of this matter. Wis. Stat. § 227.54 (providing a reviewing court with the authority to “order a stay upon such terms as it deems proper”).

Because of the integration between the La Crosse River Marsh and downstream waters, disturbed sediment and contaminants from the construction site could easily be transported into the adjacent Mississippi River, a system of significant national interest. Claflin Aff., ¶ 7. BNSF did not provide any investigation of the marsh or the existing rail bed that would establish what contaminants are present in that material that will be disturbed as dredging and construction continues. Nor did BNSF provide any information on what types of contaminants will be used during construction. The DNR did not conduct any studies. And Petitioners do not have access to

the BNSF right of way. Thus, all we can know for certain is that sediment is being disturbed, it is likely being discharged to the surrounding marsh and downstream waters, and, given historic rail use and the use of contaminants in the construction process, it is likely that this sediment contains unknown contaminants. Claflin Aff., ¶¶ 8-17. “The[se] impacts to the environment are cumulative as work progresses,” and will only become greater in scale and severity as construction continues and more disturbed area is exposed to the elements. Claflin Aff., ¶¶ 8-9.

Citizens have documented conditions along the BNSF right of way that suggest there may have already been some discharge sediment and contaminants into the marsh, and that current conditions pose an ongoing risk to the environment. John Sullivan documented that BNSF began disturbing material along its rail right of way adjacent to the marsh before installing sediment controls such as silt fences or sand bags in the marsh. Sullivan Aff., ¶ 6. Mr. Sullivan recently returned to the site and found that a black silt fence or sand bags had been placed along the rail right of way. Sullivan Aff., ¶ 8. This is also consistent with the photographs that Carolyn Mahlum-Jenkins recently took along BNSF’s right of way. It appeared to Ms. Mahlum-Jenkins that the silt barrier was in place along most of the right of way, but that it had lapsed in some areas and was very near to being overtopped with water. Mahlum-Jenkins Aff., ¶¶ 6-8. From the observations of Mr. Sullivan and Ms. Mahlum-Jenkins, discharges of sediment and contaminants may have already occurred and are at risk of continuing in the event of a heavy rain or flood.

Continued construction and fill of the wetland will also do considerable harm to the people of La Crosse by further limiting the marsh’s valuable flood storage capacity. As stated above, the La Crosse River Marsh is subject to a considerably higher than average number of significant flood events, and these wetlands are a critically important natural resource for flood control. Claflin Aff., ¶¶ 14-16. According to the EPA, a “one-acre wetland can typically store

about three-acre feet of water, or one million gallons.” Williams Aff., Exh. E at 19 (R. 681). As such, even small amounts of fill can greatly reduce the flood storage capacity of an area of wetlands. Unfortunately, “BNSF’s analysis of flooding impacts . . . does not take into account the lost flood capacity from wetland acres destroyed,” and thus there is no plan in place to address this loss of flood control. *Id.* The flood storage of the marsh is of great importance to the people of La Crosse, as “a significant portion of the city was built below current flood stage standards,” and the marsh is able to routinely contain large flood events that would otherwise cause considerable property damage to surrounding homes. Williams Aff., Exh. E at 18 (R. 665). Several acres of flood storage has already been destroyed, and allowing construction to continue will significantly increase the damage done, and the risk of harm to the people of La Crosse.

Continued construction will also further fragment and limit the marsh habitat and cause increasingly severe impacts to endangered and threatened species in the area. According to the Army Corps of Engineers, placing fill material in the marsh will “displace or smother existing organisms, and permanently modify the existing habitat,” as well as impact adjacent wetland areas. Williams Aff., Exh. D at 25. The DNR has stated construction “will impact existing wildlife and fish habitat” and “result in direct, permanent loss of 7.2 acres of wetland.” Williams Aff., Exh. A at 10, 16 (R. 689, 695). The DNR has stated this “impact amount is substantial.” Williams Aff., Exh. A at 121 (R. 1060). A portion of this area has already been converted to upland, and continuing construction will only further alter remaining wetlands in and around the project area, doing considerable damage to threatened species in the marsh.

The La Crosse River Marsh is home to at least 16 different endangered species, 17 bird species of special concern, and a number of other threatened flora and fauna, all of which may be severely impacted by permanent changes to wetland habitat caused by ongoing construction.

Williams Aff., Exh. A at 1-6 (R. 596-601), Exh. E at 29 (R. 982). BNSF's wetland application indicates that plants such as sedges, cattails, duckweed, and willow saplings will be impacted during construction. Williams Aff., Exh. E at 18 (R. 665). "Willow saplings are the preferred nesting location for Bell's Vireo, a state threatened species and marsh resident." Williams Aff., Exh. E at 18 (R. 665). The Higgins' eye pearly mussel and the Sheepsnose mussel have historically inhabited the La Crosse River Marsh and adjacent Mississippi River, and local commercial fishermen have indicated that the fill area is "near a breeding ground for paddlefish, a species of concern, and a habitat for black tern, an endangered species." Williams Aff., Exh. E at 20 (R. 682).

DNR staff also noted that northern long-eared bats are "likely to occur in La Crosse County, but have no known hibernacula or reported occurrences in the project area. If this species is listed at the time of construction of this project, a survey could be conducted to determine if there would be any impacts to this species, particularly regarding tree removal." Williams Aff., Exh. E at 38 (R. 1757). Northern long-eared bats were officially listed as federally threatened in April of 2015,<sup>5</sup> but Petitioners are unaware of any further DNR or BNSF investigation of bat impacts. In April of 2015, the DNR raised concerns to BNSF about increased turtle deaths along rail corridors, and noted that the state special concern species, the Blanding's turtle, is present in the La Crosse River Marsh. Williams Aff., Exh. E at 39 (R. 1764). Ms. Kitchel suggested that BNSF might construct gravel ramps or clearing gravel between railroad ties to help turtles cross, which is a strategy used in other areas. Williams Aff., Exh. E at 39 (R. 1764). BNSF did not respond to that request. Williams Aff., Exh. E at 39 (R. 1764). This information directly contradicts DNR's assessment that "no rare species will be affected" by

---

<sup>5</sup> U.S. Fish & Wildlife Service, Northern Long-Eared Bat (*Myotis septentrionalis*), available at <http://www.fws.gov/midwest/endangered/mammals/nlba/>.

construction. Williams Aff., Exh. A at 16 (R. 695). On the contrary, considerable harm will be done to rare species in the area as long as construction continues.

**II. A Stay is Also Necessary to Prevent Irreparable Harm From the Operation of the Second Track Because BNSF and the DNR Do Not Concede Both That the Harm Could Be Undone and That This Court Has the Authority to Order the Track and Fill To Be Removed.**

On judicial review of an agency decision, this Court's review is limited to the scope of review provided in Wis. Stat. § 227.57. Petitioners challenged the BNSF Permit on the basis that the DNR failed to comply with the law, namely WEPA, in issuing the permit. While this Court likely has the authority to order the fill placed in a wetland and other state waters to be removed, Petitioners did not specifically request such relief. That fact does not affect this Court's ability to order such relief, but Petitioners anticipate that BNSF would argue that the Court lacks the authority to order the fill removed even though it is technically feasible to remove the fill. Since it is not entirely clear that this Court would order fill to be removed if Petitioners succeed on the merits, Petitioners address below irreparable harm that would result from the complete construction and operation of BNSF's second track.

**A. The Scope of This Court's Review and Its Authority to Grant Relief Pursuant to Wis. Stat. § 227.57.**

At the June 22, 2015, hearing on Petitioners' Motion for a Stay, this Court indicated that it was most interested in further briefing on facts showing irreparable harm that would occur *during the remaining construction work* on the second track. This Court suggested that those impacts, as opposed to *post-construction impacts from operation of the second track*, were most important to its analysis of Petitioners' Motion for a Stay. Petitioners understand that the Court makes this distinction because it could order the second track, underlying fill, and railroad bridges to be removed if Petitioners succeed in their case on the merits. It is Petitioners'

understanding that the Court based its conclusion, in part, on the DNR's assertion that it is feasible to remove wetland fill and restore a wetland. Olson Aff., ¶ 6.

While it is technically possible to remove wetland fill and restore the environment, it is not a foregone conclusion that this Court can or would order such a remedy if Petitioners succeed on the merits. Neither the DNR nor BNSF asserted or conceded that this Court could order removal of the second track and fill if Petitioners are successful. The DNR stated only that it was technically feasible to remove wetland fill. Olson Aff., ¶ 6.

In short, Petitioners sought the following relief in their Petition for Judicial Review and Declaratory Judgment: (1) a stay of the BNSF permit, (2) a declaration that certain sections of NR 150 are invalid, (3) to set aside the BNSF Permit, (4) to set aside the DNR's conclusions that its environmental analysis for the BNSF Permit complied with WEPA, and (5) a remand to the DNR to issue the BNSF Permit only if the DNR prepares an adequate environmental analysis. Pet. for Jud. Rev. at 23-24. It is true that on judicial review a court may order whatever relief is appropriate irrespective of the original form of the petition. *See* Wis. Stat. § 227.57(9). So even though Petitioners did not explicitly seek removal of any fill from the wetland if this court invalidates the BNSF Permit, there may be a legal basis for this Court to order such relief if it deems it appropriate.<sup>6</sup>

---

<sup>6</sup> To be clear, Petitioners' position is that there is a statutory basis for this Court to order removal of wetland fill authorized by a legally invalid permit. While this Court's review on judicial review of agency actions is governed by Wis. Stat. § 227.57, that section provides the Court with broad authority "whatever relief is appropriate irrespective of the original form of the petition." *See* Wis. Stat. § 227.57(9); *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. And while there is limited Wisconsin case law on point interpreting that provision, the 7th Circuit has interpreted Wisconsin courts' authority under Wis. Stat. § 227.57(9) broadly as authorizing the court to grant what it deems appropriate relief when an agency action was taken in violation of a statutory provision. *Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000).

However, unless the DNR and BNSF concede that this Court has the authority to order such relief in this case, or until this Court concludes that it has such authority, it is important to consider the potential harm during the operation of BNSF's second track, not just the potential harm during the construction process. Thus, Petitioners highlight below the potential impacts of the operation of BNSF's second track.

**B. Irreparable Harm During the Operation of BNSF's Second Track Unless This Court Grants a Stay to Preserve the Status Quo.**

- 1. Harm to public safety and the environment—plants, wildlife, and water quality in the La Crosse River Marsh, the La Crosse River, and the downstream Mississippi River—from a train derailment and hazardous material spill.*

Once the second track is complete, it will allow more trains to pass through the area, many of which will contain oil from the Bakken oil fields in North Dakota. Increased oil production in the United States has led to a dramatic increase in crude oil shipments by rail, including through La Crosse. Williams Aff., Exh. E at 4 (R. 606) (U.S. DOT crude oil transport advisory), 15 (R. 660). Crude oil trains generally are over a mile long, consist of over 100 train cars, and carry approximately 30,000 gallons of crude oil. Williams Aff., Exh. E at 4 (R. 606). Derailments of oil trains may involve the release of thousands of gallons of oil, can lead to the ignition of train cars carrying crude, can cause road closures, and present significant challenges in accessing the accident site. Williams Aff., Exh. E at 4 (R. 606).

Unfortunately, train derailments and oil spills have become relatively common in North America, given the volume of oil transported. Williams Aff., Exh. E at 13 (R. 657).<sup>7</sup> The sheer

---

<sup>7</sup> Petitioners provide just a few examples of some of the worst recent train accidents. In July 2013, an oil train derailed and exploded in downtown Lac Megantic, Quebec resulting in the loss of 47 lives and property damage. Williams Aff., Exh. E at 13 (R. 657). In November 2013, an oil train derailed and exploded in a wetland near Aliceville, AL, spilling 750,000 of Bakken oil into the wetland and surrounding environment. Williams Aff., Exh. E at 13 (R. 657). This oil spill has been difficult for crews to clean up and as of a March 15, 2014, article in the Huffington Post, oil

volume of oil shipped is certainly one factor that increases how often train accidents occur. BNSF transports approximately 430,000 barrels of oil through La Crosse by rail every day. Williams Aff., Exh. E at 37 (R. 907). That is nearly as much oil as is transported daily via Enbridge's Alberta Clipper oil pipeline. Williams Aff., Exh. E at 37 (R. 907).

The volatility of Bakken oil, and the safety concerns with the train cars used for shipping oil contribute to the problem. Bakken oil is particularly volatile and contains more combustible gases than other types of crude oil. Williams Aff., Exh. E at 13 (R. 657). The majority of the rail cars in use for shipping oil—referred to as DOT-111 cars—are being phased out because of safety concerns, but they are still widely used in the industry. Williams Aff., Exh. A at 42 (R. 900). BNSF's Permit requires BNSF to follow applicable Federal Railroad Administration guidelines, including Safety Advisory #2014-10, Williams Aff., Exh. A at 119 (R. 1058), which recommends that rail carriers use the newer, safer tank cars for the shipment of oil, but does not require BNSF to eliminate the use of the older and DOT-111 tank cars that have been involved in accidents and spills, Williams Aff., Exh. E at 2-3 (R. 266-67).<sup>8</sup> In April 2014, the outgoing chairwoman of the National Transportation Safety Board stated that the DOT-111 cars were not safe enough to carry hazardous liquids like crude oil. Williams Aff., Exh. A at 26 (R. 878).

Many of these oil train accidents have serious environmental consequences that are difficult to remedy, especially when they occur in sensitive environments like marshes and rivers. Williams Aff., Exh. A at 54 (R. 957), 75 (comments attached to email at R. 982);

---

remained in the rail bed and surrounding environment. Williams Aff., Exh. E at 21 (R. 870). In December 2014, two trains crashed and derailed, causing the oil train cars to explode. Williams Aff., Exh. E at 13 (R. 657). In April 2014, a train carrying Bakken oil derailed, and the train cars ruptured spilling oil into the adjacent river in Lynchburg, VA. Williams Aff., Exh. E at 13 (R. 657). This train was carrying the newer, safer tank cars for transporting crude oil.

<sup>8</sup> The DOT-111 rail cars have been used for many years to transport hazardous materials, and they have been involved in numerous tank failures and accidents. Williams Aff., Exh. E at 13-14 (R. 657-58).

Williams Aff., Exh. E at 14 (R. 659). The City of La Crosse's fire department raised concerns about its capacity and equipment to respond to an oil spill and fire in the La Crosse River Marsh. Williams Aff., Exh. A at 112 (R. 1042). An oil spill could quickly travel down to the adjacent La Crosse and Mississippi Rivers. Williams Aff., Exh. E at 14 (R. 659). Extrapolating from the oil train accident in Aliceville, AL, a 600,000-gallon oil spill could reach the Mississippi River in about 30-45 minutes. Williams Aff., Exh. A at 74 (comments attached to email at R. 982). Most importantly, as observed in the Lac Megantic accident in Quebec, at their worst, train derailments and explosions can result in the loss of life when they occur in populated areas. Williams Aff., Exh. E at 13 (R. 657).

2. *Harm to area residents and the environment from increased noise, vibration, small incidental spills and leaks, and air pollution from more and more frequent train traffic.*

A second track greatly increases the impacts of train traffic that already affect quality of life—noise, vibration, small spills, air pollution, and traffic delays. Residents are already experiencing the impacts of increased train traffic from increasing demand for rail transport, and a second track would only make those impacts even worse. Increasing demand for shipment by rail has increased train traffic through La Crosse from about 21 trains per day in 1995 to about 42 trains per day in 2012, to about 84 trains per day in 2014. Based on market predictions, train traffic could increase to 110 trains per day with the construction of the second track. Williams Aff., Exh. E at 7, 25 (R. 648, 882) (Karen Ringstrom and Karl Green of UW-Extension's report on economic impact of BNSF expansion). La Crosse residents reported an increase in vibrations in their homes due to the increasing rail traffic and weight of trains on the BNSF railway. Williams Aff., Exh. E at 8 (R. 650). Residents reported that increasing vibrations are affect

quality of life, increase cracks in homes, and may cause health impacts. Williams Aff., Exh. E at 8, 20 (R. 650, 682).

Increasing vibrations may destabilize adjacent sandstone bluffs and the river banks, and may impact wildlife in the La Crosse River Marsh. Williams Aff., Exh. E at 9, 20 (R. 651, 682). "This increase in rail traffic would result in more hazardous material transported through the wetlands and a higher risk for a spill into the wetlands. It would also cause more disturbances to the environment: more noise, more vibration, more fast-moving trains which causes wildlife to flee from the area every time a train moves through the wetlands." Williams Aff., Exh. A at 69 (comments attached to email at R. 982). Area residents have witnessed material falling from the bluff and are concerned about the threat rock and mudslides pose to public safety and property. Williams Aff., Exh. A at 103 (R. 1012). BNSF refused citizens and the City's request to limit speeds in La Crosse, to use alternative construction methods to limit noise and vibration, and to install noise barriers. Williams Aff., Exh. E at 24 (R. 881).

Area residents have observed oil leaks from trains on BNSF's track. Williams Aff., Exh. E at 9-12 (R. 651-54); Williams Aff., Exh. A at 28-29 (R. 886-87). Regarding the transport of coal, the Army Corps of Engineers has stated, "the presence of contaminants at high concentrations in some coal leachates and the demonstration of biological uptake of coal-derived contaminants in a small number of studies suggest that precipitation could wash potentially toxic amounts of potential chemical contaminants from loaded and unloaded coal cars. . . . [which could lead to] potentially serious water quality impacts." Williams Aff., Exh. A at 71 (comments attached to email at R. 982). Because citizens have observed leaks from oil trains, they anticipate similar impacts from oil train traffic.

Train derailments and oil spills present obvious public safety and environmental concerns, but train derailments and delays also present unique safety concerns in La Crosse, where many neighborhoods are isolated and residents can only get out via roads that cross BNSF's tracks. BNSF's tracks cross through and near many residential neighborhoods, three schools, and a university campus. Williams Aff., Exh. D at 7-8. Longer trains exceeding one mile may cut off residential neighborhoods from the only exit routes if there is a train delay or accident on the tracks. Williams Aff., Exh. E at 22 (R. 875). BNSF's second track will further limit access to natural resources like the La Crosse River Marsh and Hixon forest for recreation and education purposes, and may lead to losses in tourism revenue. Williams Aff., Exh. E at 16, 20 (R. 661, 682). Tourism in La Crosse generated \$214 million in revenue in 2013 and supported 4,000 full-time equivalent jobs. Williams Aff., Exh. E at 36 (R. 866).

3. *The incremental impact to the La Crosse River Marsh, the La Crosse River, and the Mississippi River from additional wetland fill in a wetland complex that has already been reduced to half its size.*

The La Crosse River Marsh has suffered the impacts of residential and industrial encroachment and has already been reduced to half its original size. Williams Aff., Exh. E at 15, 17 (R. 660, 664). This fill was done in five (5), ten (10), and (20) acre increments. Williams Aff., Exh. E at 17 (R. 664). Allowing additional wetland fill and this construction in the marsh is potentially inconsistent with past planning documents for the La Crosse River Valley that did not anticipate an additional 7.28 loss of wetlands. Williams Aff., Exh. E at 5 (R. 645) (Mayor Kabat comments to the Army Corps summarizing the City of La Crosse's concerns). Some of the goals of the La Crosse River Valley Land Use Management Plan include preservation of natural resources and aesthetics, and development of robust eco-tourism. Williams Aff., Exh. A at 23 (R.

868). It does not appear from the record that the DNR considered the La Crosse River Valley Land Use Management Plan.

This project also chips away even further at habitat for wildlife, including threatened and endangered species. Williams Aff., Exh. D at 7-8. The DNR's endangered resources review identified 16 threatened and endangered birds, and an additional 12 threatened or endangered animals in the area that may be impacted by the project. Williams Aff., Exh. A at 1-6 (R. 596-601).

*4. Harm to area property values and tax revenue for the City of La Crosse.*

Many residents are concerned about how the increasing impacts from the second BNSF track will affect residents' quality of life, property values, and the cost of flood insurance. BNSF's floodplain approval application addressed only potential impacts within the floodplain, based on bridge design. Williams Aff., Exh. E at 11 (R. 265) (DNR's approval of BNSF's floodplain analysis for compliance with Wis. Admin. Code ch. NR 116 technical requirements); *see also* Wis. Admin. Code § NR. 116.07 (providing the standards for hydraulic analyses and limited to studies of changes within the 100-year floodplain). BNSF's hydraulic analysis did not address the lost flood storage capacity from the wetland acres destroyed. Based on estimates by the US Environmental Protection Agency, the wetlands destroyed provided 7,280,000 gallons of flood storage. Losing that volume of flood storage may affect flooding, and that impact has not been analyzed. Williams Aff., Exh. A at 47 (R. 941). Residents have also noted increased flooding impacts from drift material building up behind BNSF's rail bridges. Williams Aff., Exh. A at 72 (comments attached to email at R. 982).

The quality of life impacts from more train traffic may also affect neighbors property values and the tax base of the City of La Crosse. R. 668. About 18% of La Crosse homes and

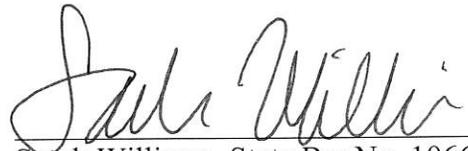
46% of La Crosse homes above the median value are in the area affected by BNSF's right of way and increased rail traffic, either because of noise, vibrations, or traffic delays due to train traffic. Williams Aff., Exh. E at 23-28 (R. 880-85) (Karen Ringstrom and Karl Green of UW-Extension's report on economic impact of BNSF expansion).

**CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Court stay the DNR's final decision to issue the BNSF Permit and the BNSF Permit Amendment pending judicial review of the validity of the DNR's decisions.

Respectfully submitted this 6<sup>th</sup> day of July, 2015.

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Sarah Williams, State Bar No. 1066948  
Tressie Kamp, State Bar No. 1082298  
Midwest Environmental Advocates, Inc.  
612 W. Main St., Suite 302  
Madison, WI 53703  
Tel: (608) 251-5047, ext. 5  
Fax: (608) 268-0205  
swilliams@midwestadvocates.org

Attorneys for Petitioners