STATE OF WISCONSIN LA CROSSE COUNTY CIRCUIT COURT
BRANCH 4

FREEDLAND ET AL.,

Petitioners,

Case No. 15-CV-117
Case Code:
30607 Administrative Agency Review
30701 Declaratory Judgment

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

Petitioners Maureen Freedland, Karen Ringstrom, Guy A. Wolf, Alan Stankevitz, Thomas Claflin, Ralph Knudson, Richard L. Pein, Marina Dvorak, and Carolyn Mahlum-Jenkins ("Petitioners") request that this Court reverse the decision of the Wisconsin Department of Natural Resources ("DNR") to issue Wetland and Bridge Individual Permit Nos. IP-WC-2014-32-00454 and IP-WC-2014-32-00455 ("the BNSF Permit") to Burlington Northern Santa Fe Railway care of John Stiley ("BNSF"). This Court should declare the BNSF Permit invalid because the DNR failed to comply with the Wisconsin Environmental Policy Act ("WEPA") when issuing the BNSF Permit. The DNR's error stems, in part, from the DNR's reliance on its rule interpreting its WEPA obligations, namely Wisconsin Administrative Code § NR 150.20(2)(a)8, 11, and (4) (collectively "the Rule"). Petitioners request that this Court declare the Rule invalid because it exceeds the DNR's authority under WEPA and lacks a factual basis. *See*

Wis. Stat. § 227.40(2)(e); *Wis. Hosp. Ass'n v. Dep't of Natural Res.*, 156 Wis. 2d 688, 704-05,457 N.W.2d 879 (Ct. App. 1990).

INTRODUCTION

From the beginning of this case, the DNR has minimized and dismissed citizen concerns about the BNSF project and the DNR's own obligations under WEPA. That continues in the DNR's brief in response to the Petitioners' Motion for a Stay in which the DNR addressed the merits of Petitioners' claims. The DNR repeatedly refers to Petitioners' concerns as merely procedural as opposed to substantive. DNR Br. at 2, 7, 10.[1] The DNR makes this distinction as if to say—what are Petitioners complaining about? The DNR dismisses Petitioners claims because, in its view, even if the DNR had disclosed and analyzed secondary impacts in an environmental analysis, it would not have affected the outcome of its permit decision. This argument demonstrates that the DNR either does not understand the purpose of WEPA, or at the very least thinks it provides little value.

The DNR also repeatedly mischaracterizes Petitioners' claims and arguments. The DNR asserts that Petitioners equate the "detailed statement" required by WEPA with an Environmental Impact Statement ("EIS") and that Petitioners' claim is based entirely on the fact that no EIS was prepared. DNR Br. at 2, 7-8. That is not accurate. Petitioners' argument on this issue is as follows: (1) the DNR was required to comply with WEPA in issuing the BNSF Permit, (2) WEPA requires an environmental analysis for all agency actions except those exempt from such review, (3) the *content of* the DNR's environmental analysis for the BNSF Permit did not comply with WEPA. The heart of Petitioners' argument is that, *whatever its form*, an environmental analysis must comply with WEPA and provide a sufficiently detailed analysis and disclosure of

[1] Hereinafter, where Petitioners cite to the DNR's brief, Petitioners refer to the DNR's Brief in Opposition to Petitioners' Motion for Stay.

direct, cumulative, and secondary impacts. Petitioners are not focused on the *form*, but rather the *substance* of the environmental analysis.

Perhaps the DNR's confusion stems from conflict within the agency regarding the proper interpretation and application of WEPA its new rule, NR 150. In the DNR's brief to this Court, the DNR repeatedly contradicts its own statements, documented in the record, regarding the proper interpretation of NR 150. To provide just one example, in its brief to this Court, the DNR asserts that the environmental analysis for an equivalent analysis action does not need to be the "detailed statement" required by WEPA. DNR Br. at 8 n.2. The DNR also asserts in its brief that the DNR has exercised its discretion in this case to "decline[] to treat the activity as a 'major action.'" DNR Br. at 9. This reflects that the DNR believes that it may make a discretionary determination that an equivalent analysis action is not a major action requiring a WEPA detailed statement. To the contrary, the DNR asserted in response to public comments on the new version of NR 150, that all actions not designated as "minor" in NR 150.20(1m) are major actions for which WEPA requires a "detailed statement." *See* Williams Aff., Exh. B at 35 (Rule R. 1056); *see also infra* at 19, 32-33 What is left to the DNR's discretion is the form and scope of this detailed statement, i.e., the level of detail, the depth of analysis of potential impacts, etc., so long as the DNR's exercise of discretion complies with WEPA.

Again, the focus of Petitioners' argument is not on the form that the environmental analysis must take—whether a more detailed and comprehensive environmental analysis with the permitting "equivalent analysis" process, or a formal EIS. To be clear, Petitioners do assert that the DNR did not create an adequate record to support its decision not to prepare a separate, formal EIS, and without factual support of its decision, the DNR's decision not to prepare an EIS is an abuse of its discretion. At a minimum, whether the DNR calls it an "equivalent"

environmental analysis or an EIS, the detailed statement provided for a DNR action must comply with WEPA.

BACKGROUND

Petitioners provide limited background information regarding the facts and procedural history in this matter, because the parties have briefed the merits of this case in their briefs on Petitioners' Motion for Stay.

I. PROPOSED BNSF PROJECT

A. BNSF's Project and the Impacted Environment

The BNSF Permit authorizes BNSF to build a second rail road track through the La Crosse River Marsh, and across the La Crosse River. Williams Aff., Exh. A at 117 (Permit R. 1056). BNSF's project will result in the destruction of 7.2 acres of wetlands in the La Crosse River Marsh. Williams Aff., Exh. A at 12 (Permit R. 691). BNSF's second track will allow more trains to pass through the marsh and the City of La Crosse, many of which will be transporting oil.

The La Crosse River Marsh, adjacent waters and natural resources provide significant value 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).[2] 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.

B. DNR Approvals Required & Received

BNSF submitted a wetland and waterway permit application on February 24, 2014. Pursuant to Wis. Stat. §§ 30.123 and 281.36, the DNR issued the BNSF Permit on February 6, 2015. Williams Aff., Exh. A at 117 (Permit R. 1056). To fulfill its WEPA obligations, the DNR conducted an environmental analysis within the wetland and waterway permit process, since those permits are categorized as equivalent analysis actions under the DNR's NR 150 rules for implementing WEPA. Williams Aff., Exh. A at 121 (Permit R. 1060).

The DNR's WEPA compliance determination checklist documented the environmental analysis that it conducted through the "equivalent analysis" process for wetland and waterway permits. Williams Aff., Exh. A at 17-20 (Permit R. 696-99). The record of the DNR's environmental analysis in this case includes the following documents: (1) its WEPA compliance determination, Williams Aff., Exh. A at 17-20 (Permit R. 696-99), (2) the DNR's Wetland Rapid

[2] 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.

Assessment Methodology, Williams Aff., Exh. A at 10-16 (Permit R. 689-95), and (3) BNSF's construction plans. 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." Williams Aff., Exh. A at 17 (Permit R. 696). The other two documents are incorporated by reference in the DNR's WEPA compliance determination. The final BNSF Permit is also part of the DNR's environmental analysis.

Based on the DNR's brief, the DNR also intended to include the "BNSF Railway construction project review," Williams Aff., Exh. A at 21-22 (Permit R. 704-05), which purports "to fully review environmental cumulative impacts" of the BNSF project. Additionally, the DNR meant to include BNSF's response to public comments on its federal permit application. DNR Br. at 15. Neither of these documents are referenced in the WEPA compliance determination. Nevertheless, Petitioners address these documents in their argument.

Shortly after BNSF received its original 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 (Permit Supp. R. 1719) BNSF applied for an authorization from the DNR to take or kill black terns nesting during this period. Williams Aff., Exh. E at 32 (Permit Supp. 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 (Permit Supp. 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 (Permit Supp. R. 1718). 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 (Permit Supp. R. 1787-88).

II. PROCEDURAL HISTORY

On March 9, 2015, Petitioners timely filed a petition for judicial review and declaratory judgment pursuant to Wis. Stat. §§ 227.40 and 227.52. The DNR also filed on March 27, 2015, a Statement of Position and Answer to Petitioners' request for judicial review. The DNR requested a stay of judicial review pending this Court's decision on the validity of the Rule. (Resp. Statement of Position and Answer.). The DNR asserted that Petitioners could only raise their rule challenge pursuant to Wis. Stat. § 227.40(1), which required bifurcation of issues pending resolution of the rule challenge. *Id*. This Court agreed that Petitioners could bring their rule challenge under Wis. Stat. § 227.40(2)(e), and also decided to bifurcate the issues raised on judicial review.

Petitioners filed a Motion for a Stay of the BNSF Permit on June 2, 2015, in order to protect the interests of Petitioners and the general public pending this Court's review of the legality of the BSNF Permit. On June 4, 2015, Petitioners also filed an amended petition for judicial review that encompassed all three (3) provisions of WEPA challenged by Petitioners and also challenged an amendment to BNSF's permit. In response to the motion for a stay, on June 19, 2015, BNSF filed an appearance and a brief in response to Petitioners' motion for a stay of the DNR's issuance of the BNSF Permit. On June 22, 2015, following a hearing on this matter, this Court set a new schedule to resolve Petitioners' motion for a stay as well as Petitioners' challenge to the Rule and to the validity of the BNSF Permit. In this brief, Petitioners address the merits of their rule challenge and the WEPA issue raised on judicial review.

ARGUMENT

WEPA was created in 1972, patterned after its federal counterpart the National Environmental Policy Act ("NEPA"). *See Clean Wis. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 188

n.43, 282 Wis. 2d 250, 700 N.W. 2d 768. An extensive body of case law exists interpreting and defining agencies' obligations under those laws. In evaluating the Rule and the DNR's compliance with WEPA on the BNSF Permit, it is critical to understand this well-developed body of law.

The Rule lacks an adequate factual basis, and conflicts with WEPA. Thus, this Court should declare the Rule invalid. The invalidity of the Rule is evident from how the Rule was applied to the wetland and waterway permit issued to BNSF, as the DNR relied on the Rule in preparing a deficient environmental analysis that does not with WEPA. This Court should declare the BNSF Permit invalid because the DNR issued it without complying with its WEPA obligation to prepare a detailed analysis and disclosure of environmental impacts.

I. THE WISCONSIN ENVIRONMENTAL POLICY ACT

WEPA requires the DNR to prepare an environmental analysis for *all* DNR actions, except those specifically exempted by statute. Wis. Admin. Code §§ NR 150.04(2)(e),[3] NR 150.20(1).[4] The breadth and depth of the environmental analysis required by WEPA is governed by Wis. Stat. § 1.11, Wisconsin case law interpreting that provision, Wis. Admin. Code chapter

[3] Wisconsin Admin. Code § NR 150.04(2)(e) requires 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."

[4] *See* Wis. Admin. Code § 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 DNR is required to comply with WEPA prior to issuing wetland and bridge permits, like the BNSF Permit, because those actions are not exempt. *See* Wis. Stat. § 1.11; Wis. Admin. Code §§ NR 150.04(2)(e), 150.20(1); *see also Wis. Envtl. Decade, Inc. v. Dep't of Indus., Labor, and Human Relations*, 104 Wis. 2d 640, 645, 312 N.W.2d 749 (1981).

NR 150, guidelines from the Council on Environmental Quality ("CEQ"), and NEPA case law.[5] *See* Wis. Stat. § 1.11; Wis. Admin. Code § NR 150.01.

To understand how WEPA operates, it is important to understand the difference between the action that triggers an agency to comply with WEPA and the underlying project authorized by that action, which is what is evaluated in the WEPA document. An agency "action"—its decision to issue a wetland and waterway permit in this case—triggers the agency to comply with WEPA. While the action is what requires the agency to prepare an environmental analysis, the environmental analysis evaluates the impacts of the projects authorized by that action. To state it another way, the action requires a WEPA analysis, and the substance of that analysis consists of the impacts of the project being authorized by agency action. *See, e.g, Cuddy Mountain v. U.S. Forest Serv.*, 137 F. 3d 1372, 1378-79 (9th Cir. 1998) (agency action at issue was allowance of a timber sale by the Forest Service, but environmental analysis focused on impacts of the trees being cut down after the sale rather than the sale itself). For example, in this case, the DNR's proposal to issue the BNSF permit was the "action" that triggered the DNR's obligations under WEPA. To comply with WEPA, the environmental analysis must examine the impacts of the construction and ultimately the operation of the second track.

The purpose of WEPA is to require agencies to disclose and consider environmental impacts beyond the scope of the immediate action that it is taking. *Clean Wis. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 188, 282 Wis. 2d 250, 700 N.W. 2d 768; *WED III*, 79 Wis. 2d at 415-16. WEPA ensures a robust and thoughtful decision-making process, but it does not necessarily

[5] NEPA case law is persuasive authority for interpreting WEPA because the provisions of WEPA are patterned after those of NEPA and because the legislature has directed agencies to follow the federal NEPA guidelines. *Clean Wis. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 188 n.43, 282 Wis. 2d 250, 700 N.W. 2d 768.

affect the substance or outcome of an agency's decision. 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." *Wis. Envtl. Decade v. Dep't of Natural Res.*, 79 Wis. 2d 409, 416, 256 N.W.2d 149 (1977) (hereinafter *WED III*).

Even though a WEPA analysis may not affect the action that triggered WEPA, it provides critical information to the agency and the public. WEPA's role is to "ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA, after which WEPA is patterned, is meant "to ensure 'that environmental information is available to public officials and citizens before decisions are made and before actions are taken.'" *Sierra Club v. Marita*, 46 F.3d 606, 616 (7th Cir. 1995) (quoting 40 C.F.R. § 1500.1(b)). 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.

Below, Petitioners explain WEPA's threshold requirements—what actions trigger WEPA and when an agency must prepare a detailed statement. Petitioners then detail an agency's obligations to evaluate cumulative and secondary impacts.

A. <u>WEPA threshold requirements</u>.

WEPA requires the DNR to prepare a "detailed statement" for all "major actions significantly affecting the quality of the human environment." Wis. Stat. § 1.11. The DNR has some discretion to use its technical expertise to determine when to prepare a "detailed statement," (i.e., what constitutes a major action significantly affecting the quality of the human

environment), what form that statement should take, and the breadth and depth of analysis required. But the DNR does not have unbridled discretion to determine when and how to carry out its WEPA obligations. The language of WEPA and the case law interpreting that provision dictate the limits on the DNR's discretion.

WEPA does not define what constitutes a "major action significantly affecting the quality of the human environment"—the trigger that requires it to prepare a "detailed statement." But WEPA and NEPA case law have defined this concept. The Wisconsin Supreme Court concluded that a major action:

> "significantly affecting the quality of the human environment" is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment. The phrase must be broadly construed to give effect to the purposes of NEPA. A ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, if the actual environmental impact is significant, it must be considered.

WED III, 79 Wis. 2d at 428 (quoting *Citizens Organized to Defend the Env't v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972)); *see also Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094, 1098 (D. Ariz. 1999) (quoting 40 C.F.R. §§ 1508.27(b)(3), (7), (9)). The 7th Circuit has explained that determining whether an action is "significant" is both a comparison and prediction to determine "whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides." *River Road Alliance v. Army Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985).

WEPA provides some minimum requirements regarding what an agency must include in a "detailed statement." Wis. Stat. § 1.11. A WEPA detailed statement must substantially follow the U.S. Council on Environmental Quality regulations, *see* 40 C.F.R. pts. 1500-08, and must

include, among other things, environmental impacts, alternatives, the relationship between short-term and long-term uses of the environment, any irreversible and irretrievable commitments of resources, and any beneficial aspects of the project. Wis. Stat. § 1.11. Though in the past a detailed statement has typically referred to an EIS, under the DNR's own interpretation of its new rules, a detailed statement can take other forms. Under the new NR 150, the DNR now includes equivalent analyses, prior compliance analyses, and EISs within the types of documents that the DNR may prepare to satisfy WEPA's detailed statement requirements. Williams Aff., Exh. B at 35 (Rule R. 941) (providing in the DNR's response to public comments on NR 150 that all actions other than those categorized as "minor" actions under the new rule require a WEPA detailed statement); *see also infra* at 19, 32-33.

B. <u>WEPA cumulative impact analysis.</u>

Cumulative impacts "are those that result from the 'incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Hoosier Envtl. Council, Inc. v. Army Corps of Engineers*, 105 F. Supp. 2d 953, 979 (S.D. Ind. 2000) (quoting 40 C.F.R. § 1508.7). A project's cumulative impacts can be significant and a critical element of a WEPA analysis. *WED III*, 79 Wis. 2d at 428 n.16 (quoting Sec. 1.5, Guidelines for the Implementation of WEPA).

Courts have invalidated agency actions that do not adequately address cumulative impacts in the environmental analysis. For example, in *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the court concluded that the agency did not comply with NEPA because it did not provide an adequate analysis of the cumulative impacts of a highway project. The agency described other past projects in the area, but "with generalities insufficient to permit adequate review of their cumulative impact." *Id.* The court concluded that

the EIS "fails both to catalogue adequately past projects in the area, and to provide any useful analysis of the cumulative impact of past, present and future projects and the Hatton Canyon freeway on the wetlands, Monterey pine and Hickman's onion." *Id.* The court highlighted the agency's failure to examine historic impacts, noting that the perfunctory analysis was particularly inadequate given evidence in the record that the area had experienced substantial growth and development over the past 30 years. *Id.* The court also found the minimal references to cumulative impacts inadequate because there was no "discussion of how these projects together with the proposed Hatton Canyon project will affect the wetlands" and sensitive plants in the area. *Id.*

Passing references to cumulative impacts without adequate detail or analysis does not meet an agency's obligation to take a hard look at those impacts. Courts have consistently held that "[s]ome quantified or detailed information is required" in a cumulative impact analysis. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 1997) (quoting *Neighbors of Cuddy Mountain*, 137 F.3d at 1380). The 9th Circuit stated in *Neighbors of Cuddy Mountain* that "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Cuddy Mountain*, 137 F. 3d at 1380. An agency cannot dispose of its WEPA obligations merely by checking a cumulative impacts box. A more detailed analysis is required.

> Neighbors note[] that three other timber sales are proposed for the Cuddy Mountain Roadless area . . . The Forest Service provided some information in regard to the cumulative effects of all proposed timber sales on old growth habitat, but the analysis provided was very general, and did not constitute the hard look that the Forest Service is obligated to provide under NEPA.

Id. at 1378-79.

C. <u>WEPA secondary impact analysis.</u>

A WEPA analysis must also explain and disclose secondary impacts, which the Wisconsin Supreme Court has described as follows:

> Even if the action itself has minimal or no direct environmental effects, if its nature is to stimulate or induce significant, secondary effects such as major new developments encouraged by new highways or sewer extensions the need for an impact statement is increased. Secondary effects may often be even more substantial than the primary effects of the original action.

WED III, 79 Wis. 2d at 430 n.16 (quoting Sec. 1.5, Guidelines for the Implementation of WEPA). Secondary effects include 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 Group, 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).

Courts will invalidate agency decisions based on environmental analyses that did not consider secondary impacts. For example, in a recent case, *Openlands v. U.S. Department of Transportation*, the court deemed insufficient an EIS prepared without addressing the secondary or indirect impacts. No. 13 C 4950, slip op. at 18 (N.D. Ill. filed June 16, 2015). The project in *Openlands* was the construction of a highway. *Id.*, at 2. The agency's EIS failed to take a number of cumulative and secondary impacts into account, such as the infrastructure necessary to serve development of the highway, improvements to nearby roads that would have to be made to accommodate for increased traffic caused by the highway, and potential conflicts between growth caused by the highway and regional land-use plans. *Id.* at 18-19. The court determined

the EIS in that case was invalid because it "d[id] not suggest measures for mitigating [secondary and cumulative] impacts or even acknowledge that they exist[ed]." *Id.* at 19.

When an agency is required to prepare a WEPA detailed statement, the agency must include reasonably foreseeable and related secondary impacts on the human environment. An agency is required to consider only those secondary impacts that have "a reasonably close causal relationship" to the project authorized by agency action. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). For example, in *Metropolitan Edison*, the court concluded that it was enough for the Nuclear Regulatory Commission to evaluate the risk to public health and safety from a nuclear accident, and the agency was not required to consider the psychological damage to residents because of the perceived risk of a nuclear accident. *Id.* at 779. When deciding whether an agency acted reasonably in refusing to consider a secondary impact, reviewing courts look to whether the agency was presented with information about the potential secondary impact.

> Without some specific document, report, or comment in the record to call the [Army Corps of Engineers'] attention to foreseeable secondary development, its decision not to consider such effects cannot be found arbitrary, capricious, or otherwise unreasonable.

Hoosier Envtl. Council, Inc., 105 F. Supp. 2d at 972-73.

II. THE RULE IS INVALID BECAUSE IT CONFLICTS WITH WEPA AND LACKS AN ADEQUATE FACTUAL BASIS.

This Court should declare the Rule invalid because it exceeds the DNR's authority under WEPA and lacks an adequate factual basis. Once this Court declares the Rule invalid, it follows that this Court would invalidate the BNSF Permit because the environmental analysis prepared was based on the Rule. Williams Aff., Exh. B at 1 (email from James Pardee, DNR, to Heidi Kennedy, DNR, explaining the effect of categorizing "permits listed in NR 150 as equivalent

analysis actions means that – by rule – the Department has determined those permits to be in compliance with WEPA").

A. Standard of Review

This Court must declare a rule invalid if the Court finds that it violates constitutional provisions or exceeds an agency's statutory authority. Wis. Stat. § 227.40(4)(a); *see also Wis. Hosp. Ass'n*, 156 Wis. 2d at 704-05. "[A] rule is not valid if it exceeds the bounds of correct interpretation." Wis. Stat. § 227.11(2)(a). Courts review de novo whether a rule exceeds an agency's statutory authority. *Debeck v. Dep't of Natural Res.*, 172 Wis. 2d 382, 386, 493 N.W.2d 234 (Ct. App. 1992).

Whether an agency established a sufficient factual basis to support its rule raises a constitutional due process challenge. *Liberty Homes, Inc. v. Dep't of Indus., Labor and Human Relations*, 136 Wis. 2d 368, 375, 401 N.W.2d 805, 807 (1987). To resolve this type of rule challenge, a court will analyze whether a rule bears a reasonable relation to a legitimate government interest. *Id.* (quoting *Josam Mfg. Co. v. State Bd. Of Health*, 26 Wis. 2d 587, 596-97, 602-04, 133 N.W.2d 301 (1965)). "The court must uphold the rule if there are any facts in the record which support the rule chosen by the agency to effectuate the governmental policy objective sought to be attained." *Liberty Homes*, 136 Wis. 2d at 381.

"To determine whether there is sufficient factual basis to support a rule, the reviewing court must decide whether there is a rational connection between the facts in the record and the rulemaking choice of the agency. In other words, based on the facts of record, could the agency reasonably have concluded that the rule would effectuate the legitimate governmental objective it is directed to implement." *Id.* at 385. "[T]he court must engage in a review process which allows it to determine whether, in light of the governmental objective, there is a rational connection

between the facts in the record and the rule adopted by the agency." *Id.* at 385-86. A reviewing court first determines the governmental objective that the agency rule is intended to advance, and may look to the enabling statute for guidance. *Id.* at 386. A reviewing court then engages in a "substantial inquiry" into the facts of record supporting the rule to determine whether the agency established a rational connection between the facts in the record and the rule adopted by the agency. *Id.* Finally, a reviewing court must "not presume conceivable facts to sustain agency rulemaking, [but] must look at the record to determine whether the rule is reasonably related to a legitimate governmental objective." *Id.* at 384. It is Petitioners' burden to establish that a rule is invalid on this basis. *Id.* at 384 n.13.

B. Wisconsin Administrative Code chapter NR 150 revised in 2014

Recently, the DNR overhauled its rules for implementing WEPA, Wis. Admin. Code ch. NR 150. The revised NR 150 went into effect on April 1, 2014. Williams Aff., Exh. G at 1 (Rule R. 571). The old version of NR 150, Wis. Admin. Code ch. NR 150 (2010), categorized permitting actions as Type I-IV with a corresponding *minimum level* of environmental analysis required for each type. *See* Wis. Admin. Code § NR 150.03 (2010) (providing that the DNR used the "action type list" to determine the minimum procedural requirements" mandated by ch. NR 150). Type I actions required an EIS, Type II actions required an environmental assessment ("EA"), and Type III and IV actions generally did not require an EA or EIS, but indicated that the DNR may need to prepare an environmental analysis for significant projects. Wis. Admin. Code § NR 150.20 (2010).

The revised NR 150 made sweeping changes to DNR procedures for complying with WEPA. It eliminated the environmental assessment ("EA") process, which the DNR historically used to determine whether an action had a significant impact, and which federal agencies

continue to use to ensure compliance with NEPA.[6] Under the old version of NR 150, an EA was defined as "an environmental analysis which is prepared to inform decision-makers of a proposed action's effect on the environment, and which develops, describes, and evaluates alternatives, and provides sufficient evidence to determine whether the proposed action is a major action." Wis. Admin. Code § NR 150.02(9) (2010). The DNR further explained that "[a]n EA serves as the primary document of the department's reviewable record of its factual investigation to identify relevant areas of environmental concern, and permit a reasonably informed prediction of a proposal's effect on the environment." Wis. Admin. Code § NR 150.02(9) note.

In lieu of the DNR's framework in the old NR 150, the DNR now lists and defines exempt, or "minor actions," and actions for which an environmental analysis in compliance with WEPA is prepared in a separate process, so called "equivalent analysis" and "prior compliance" actions. Wis. Admin. Code § NR 150.20(1m), (2), (3). Wetland and waterway permits like that issued to BNSF are listed as equivalent analysis actions. Wis. Admin. Code § NR 150.20(2)8., 11. Equivalent analysis is defined as "department programmatic procedures that include an environmental analysis and provide for public disclosure and comment." Wis. Admin. Code § NR 150.03(10).

[6] *See Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d at 1101-02 ("If . . . the significance of environmental impacts is unclear, the agency may prepare an EA, 'a concise public document . . . that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact.'") (quoting 40 C.F.R. § 1508.9(a)). Under federal law, the purpose of an EA is to (1) provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," (2) "[a]id an agency's compliance with the Act when no environmental impact statement is necessary," and (3) "[f]acilitate preparation of a statement when one is necessary." 40 C.F.R. § 1508.9.

Equivalent analysis actions are not exempt from WEPA compliance, rather the DNR has simply determined that the regulatory processes listed as equivalent analysis actions provide an environmental analysis and public involvement that complies with WEPA's detailed analysis requirements. Williams Aff., Exh. B at 35 (R. 941) (DNR response to public comments on NR 150) ("The proposed rule categorizes all actions as either minor – requiring no review – or as requiring a detailed analysis, as called for in s. 1.11(2)(c), Stats.") The DNR made clear at the Natural Resources Board ("NRB") hearing on the proposed new NR 150 that it would be tailoring the environmental analysis provided in permitting programs designated as equivalent analysis actions depending on the severity of potential impacts:

> This—this idea of the equivalent analysis [meaning] that we're not going to do environmental analysis, that we're going to rely on those permit processes, the dam permit process was an example that was used. I think there's a misread there of the code . . . . [The findings of fact that make up the environmental analysis] for a simple dam pipe project[], that finding of fact might be several paragraphs to analyze the full scope of environmental impact. *For others, we'll be working with the programs to make sure that there is a full analysis of the environmental impact and, perhaps, even a document that looks a lot like an environmental assessment, will be part of the project file—will be part of the findings that the decision was made on.*

R. 1139-40 (emphasis added).

The new version of NR 150 purports to require EISs for all other actions that are not listed as minor, prior compliance, or equivalent analysis actions. Wis. Admin. Code § NR 150.20(4). However, this is not the case when the rule is examined more closely. Subsection (2) provides that, on a case-by-case basis, the DNR may determine that a permitting process provides an equivalent analysis. Wis. Admin. Code § NR 150.20(2)(b). Thus, the new Rule does, by its terms, explicitly require the DNR to do an EIS for any action. In contrast to WEPA's mandate that an agency *shall* prepare a detailed statement for major actions significantly affecting the human environment, this Rule appears to provide the DNR with substantially more

discretion. In fact, nowhere in the Rule does the DNR mention WEPA's triggering language "major actions significantly affecting the quality of the human environment." Wis. Stat. § 1.11.

The public was assured that, by granting the DNR more discretion under NR 150, the DNR would be able to reduce duplicative environmental analyses and free up staff time to do more and better EISs. At the Natural Resources Board hearing on this new rule, several individuals raised concerns about the discretion granted to the DNR by this new rule. Rule R. 1124-37. In response to concerns about new provisions granting DNR discretion regarding whether to hold a public hearing on an EIS, the DNR explained that the DNR would "be doing EISs on some fairly minor projects and EISs on some larger projects." Williams Aff., Exh. G at 4 (Rule R. at 1138). The DNR also addressed citizen concerns that the new NR 150 would lead to less environmental review by assuring the public that the new rule would rely on the EIS process to a greater extent than the old version of NR 150. Williams Aff., Exh. B at 35 (Rule R. 941).

C. <u>The Rule violates due process protections because the DNR lacks an adequate factual basis in the record for the Rule.</u>

The Rule language presumes that the permitting programs designated as equivalent analysis actions, including the wetland and bridge permitting programs under which the BNSF Permit was issued, provide an environmental analysis that meets WEPA's requirements. *See* Wis. Admin. Code § NR 150.20(2)(a) (providing that equivalent analysis actions "do not require additional environmental analysis under [ch. NR 150] because a detailed environmental analysis and public disclosure are conducted as part of the department programmatic procedure"). Petitioners will show that the Rule was promulgated in violation of constitutional due process protections because the Rule record does not provide a factual basis for the DNR's conclusion that the wetland and waterway programs provide an adequate environmental analysis, and thus

the Rule does not bear a reasonable relationship to a legitimate government interest. *See Liberty Homes*, 136 Wis. 2d at 381.

The DNR did not provide evidence in the record to establish that the wetland and waterway programmatic procedures designated as equivalent analysis actions provide an environmental analysis that meets WEPA's detailed analysis requirements. The DNR did not carefully analyze the statutory and regulatory procedures to determine that they provided the DNR with the authority and obligation to consider the direct, secondary, and cumulative impacts of proposed projects. The documents provided by the DNR also did not indicate that the DNR evaluated the application of the wetland and waterway programmatic procedures to determine that, as applied, those procedures ensure compliance with WEPA for the projects authorized. Based on the records the DNR has provided, it appears that the DNR simply included wetland and waterway permits as equivalent analysis actions because they provide *some* environmental analysis and public involvement.

There is scant information in the record to support the DNR's conclusion that the wetland and waterway permit program provides an environmental analysis "equivalent" to a WEPA detailed statement. A DNR spreadsheet entitled "Revised NR 150 Guidance – Comparison of Previous Type List and New Procedures 03/10/2014," lists numerous regulatory programs, and identified the previous type categorization under the old rule and the categorization, if any, under the new version of NR 150. Williams Aff., Exh. B at 11-23 (Rule R. 618-658). The DNR justified its categorization of individual permits under Wis. Stat. § 281.36(3m) as equivalent analysis actions because "s. 281.36(3n)(b) and (c), Stats. require analysis of all related impacts, and s. 281(3p) (sic) provides for public disclosure." Williams Aff., Exh. B at 19 (Rule R. 627). The DNR explained that individual permits issued under Wis. Stat. § 30.123(8) should be

categorized as equivalent analysis actions because "Ch. 30.12(3m) (sic) requires that individual permits be in the 'public interest' a term equivalent to 'human environment' in s. 1.11. The permit process requires compliance with the public notification and hearings procedures in s. 30.208." Williams Aff., Exh. B at 19-20 (Rule R. 627-28).

That is all the information in the record regarding the DNR's analysis of specific permitting programs. Nothing in the record demonstrates that the DNR evaluated whether the wetland and waterway programmatic procedures provide a sufficiently broad and detailed environmental analysis to comply with WEPA. The DNR did not explain in any detail how the wetland permitting program's "analysis of all related impacts" provide an equivalent analysis to that required under WEPA. The DNR also failed to explain how the public interest analysis under chapter 30 provides an equivalent environmental analysis. Nor did the DNR provide support for its conclusion that "public interest" as it is used in chapter 30 is equivalent to "human environment" as it is used in WEPA. All the record contains are the DNR's conclusions.

It is not enough for the DNR to rely on deference to the agency or to assure this Court that its staff conducted a more thorough analysis than the record reflects. The DNR must provide actual facts in the record that demonstrate the DNR had a factual basis for the Rule. This Court may "not presume conceivable facts to sustain agency rulemaking, [but] must look at the record to determine whether the rule is reasonably related to a legitimate governmental objective." *Liberty Homes*, 136 Wis. 2d at 384.

The record not only lacks evidence of a factual basis for the rule, but also contains information that highlights the significance of the DNR's failure to more carefully analyze permitting programs to ensure that they truly provide a WEPA equivalent. For example, the DNR explained in notes from stakeholder meetings leading up to the new NR 150 that "making

sure that permit reviews are 'functionally equivalent' at meeting WEPA requirements will help ensure that only the necessary additional analysis required by a proposal will be completed." Williams Aff., Exh. G at 5 (Rule R. 664). In response to a question regarding how the new NR 150 would work with permit programs, the DNR responded, "We will need to evaluate each permit program and determine what changes are needed to their review process conform to requires (sic) to WEPA requirements." Williams Aff., Exh. G at 6 (Rule R. 665). But the record does not contain a detailed analysis of permitting programs to ensure the analysis conforms with WEPA.

The environmental analysis prepared for the BNSF Permit illustrates that, as the rule is applied, the wetland and waterway permitting program does not provide an environmental analysis equivalent to a WEPA detailed statement. Because the DNR's record does not establish an adequate factual basis for the Rule, it is invalid in violation of constitutional due process protections. *Liberty Homes*, 136 Wis. 2d at 381; Wis. Stat. §§ 227.10(2), 227.40(4)(a).

D. <u>The Rule exceeds the DNR's authority under WEPA.</u>

"[A] rule is not valid if it exceeds the bounds of correct interpretation." Wis. Stat. § 227.11(2)(a). WEPA requires all agencies to "[i]nclude in . . . major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States council on environmental quality." Wis. Stat. § 1.11(2)(c). Federal and state courts and agencies have all struggled to define precisely what constitutes an action that significantly affects the quality of the human environment; however, there is an extensive body of state and federal case law that roughly defines the bounds of this concept. It is well established that, at a minimum, an agency must produce a reviewable record to demonstrate that the agency took a "hard look" at potential impacts, complied with WEPA, and reached a

defensible conclusion that an action is not an action that significantly affects the quality of the human environment. *See WED III*, 79 Wis. 2d at 418-20.

The Rule provides that, for equivalent analysis actions, the programmatic procedures will provide an environmental analysis and public involvement that complies with the detailed analysis required by WEPA. Wis. Admin. Code § NR 150.20(2)(a). The Rule does not explicitly require the DNR to develop any environmental analysis other than that developed following the programmatic procedures for an equivalent analysis action. The Rule provides that, as a matter of law, the environmental analysis produced through regulatory programs listed as equivalent analysis actions will comply with WEPA in every case, no additional environmental analysis is required. Wis. Admin. Code § NR 150.20(2)(a); Williams Aff., Exh. B at 37, 42 (Rule R. 919, 924) (DNR response to comments on NR 150).

At the same time, the Rule does not exempt equivalent analysis actions from WEPA. Nor does the Rule eliminate the WEPA requirement to take a "hard look" at impacts and develop a reviewable record supporting the agency's decision not to prepare an EIS. *See WED III*, 79 Wis. 2d at 418-20. As explained above, the records provided by the DNR regarding its promulgation of the new version of NR 150 do not provide a factual basis for the Rule's conclusion that the wetland and waterway permitting programs will provide *in every case* an environmental analysis that complies with WEPA, including a reviewable record of its reasoning for not requiring any further analysis through a more detailed EIS.

Further, Petitioners will show, through the environmental analysis developed for the BNSF Permit, that the Rule exceeds the DNR's authority under WEPA because it allows the DNR to prepare an environmental analysis that does not meet WEPA's mandate. Petitioners do not dispute that the DNR followed the requirements in the programmatic procedures for the

wetland and waterway permit issued to BNSF. However, as the DNR acknowledges, the analysis required for wetland and waterway permits is narrower than that required by WEPA and allowed the DNR to exclude consideration of secondary and cumulative impacts that the DNR must analyze and disclose to comply with WEPA..

DNR staff familiar with the permitting programs designated as equivalent analysis actions have noted that these permitting programs do not explicitly require the disclosure and analysis of environmental impacts required by WEPA. A DNR attorney who reviewed the draft NR 150 revisions noted:

> As I've mentioned before, many of the permitting activities listed as equivalent review actions have information hearing requirements but only solicit and consider comments that deal with their permitting standards. Are the programs going to be willing to solicit and accepts comments that deal with environmental impacts that do not come into play at all in their permit decisions? Are they going to be willing to analyze these alleged environmental impacts that have no bearing at all on their program decisions? . . . Is that sufficient to constitute an environmental analysis and public disclosure and comment that is equivalent to the review required by NR 150?

Williams Aff., Exh. B at 28 (Rule R. 174) (email dated Nov. 12, 2012, from Edwina Kavanaugh, DNR, to James Pardee, DNR).[7]

It appears that even after the Rule went into effect, DNR staff remained confused about how regulatory programs designated as equivalent analysis actions would comply with WEPA when impacts that were required in a WEPA analysis were not part of the analysis leading up to a permitting decision. For example, a DNR Environmental Analysis & Review Specialist raised the following questions regarding an individual dredging permit under ch. 30:

[7] James Pardee responded to Edwina Kavanaugh's questions as follows: "Accepting, considering and responding to WEPA questions that are beyond the Department's authority has always been part of WEPA compliance. Yes, it's sufficient." Williams Aff., Exh. B at 28 (Rule R. 174). Mr. Pardee did not explain how the WEPA requirements Ms. Kavanaugh referenced would be incorporated into permitting programs designated as equivalent analysis actions.

> What if there are environmental impacts that we would discuss in an EA but would not get a review in the [individual permit ("IP")] process? An example is the air section of an EA where we may have a discussion even if there is no permit or jurisdiction. An example more applicable to this dredging project could be impacts to wildlife habitat (non-endangered/threatened) where we may have a discussion in an environmental document but may not be documented in an IP. Do they now have to address these impacts in their permit documents? My thoughts are that they do not have to document these impacts but I wanted to check with you.

Williams Aff., Exh. B at 30 (email from Eric Heggelund, DNR, to James Pardee, DNR). The documents included in response to Petitioners' open records request did not include a response to this email. This provides a glimpse into the more limited environmental review in ch. 30 and ch. 281 that does not provide the depth and breadth of environmental analysis required by WEPA. It is also another example of conflicting DNR interpretations of its WEPA obligations and what NR 150 requires.

The new NR 150 also exceeds the DNR's authority under WEPA because it purports to grant the DNR more discretion than it is allowed under WEPA regarding when to prepare a more detailed and formal EIS. To be clear, WEPA requires a detailed statement for certain major actions. The new version of NR 150 indicates that the DNR will provide such a detailed statement either through the equivalent analysis process or through an EIS. As is clear from this case, the DNR's interpretation and application of NR 150 thus far has not produced equivalent analyses that comply with WEPA's detailed statement requirement. Certain projects authorized by actions designated "equivalent analysis" may have such significant impacts that WEPA mandates a more thorough and detailed EIS, but the new NR 150 purports to give DNR unlimited discretion to use the EIS process.

To be clear, Petitioners do not assert that the Rule is invalid on the basis that the DNR *cannot* prepare an EIS when required by WEPA. *See* DNR Br. at 15 n.3. Petitioners assert that

the Rule is invalid because it purports to give the DNR *unlimited discretion* to decide when to prepare an EIS without referencing WEPA's legal mandate and without providing another environmental review process that meets WEPA's legal mandate.

Section NR 150.20 provides the DNR's WEPA environmental analysis procedures. It lists minor actions, equivalent analysis actions, prior compliance actions, and EIS actions. Section NR 150.20(4) provides that the DNR shall prepare an EIS for all actions not listed as minor compliance in (1m), equivalent analysis in (2), or prior compliance in (3). While on its face this would appear to impose a mandatory obligation on the DNR, in fact, subsections (1m), (2), and (3) provide the DNR with case-by-case discretion to determine that an action not listed under those subsections is actually minor, provides an equivalent analysis, or is prior compliance. Wis. Admin. Code § NR 150.20(1m)(b), (2)(b), (3)(b). The new NR 150 does not include any of the mandatory WEPA language that requires the DNR to prepare an EIS for certain projects.

Agencies must use their judgment and experience to determine when they are required to prepare an EIS in accordance with WEPA. But that does not mean agencies have unbridled discretion. As the Wisconsin Supreme Court has explained, in adopting a reasonableness standard of review and rejecting the more relaxed arbitrary and capricious standard,

> The arbitrary and capricious standard of review, on the other hand, gives too much room for the exercise of discretion by the agency. The obligation imposed by [WEPA], like that of sec. 102 of NEPA, is not inherently discretionary. It contemplates the exercise of judgment by the agency, but that judgment must be reasonably exercised within the limits imposed by the Act.

WED III, 79 Wis. 2d at 423-24 (footnotes omitted). Because NR 150 leaves unlimited discretion with the DNR to determine when to prepare an EIS, and creates an equivalent analysis process

that does not direct the DNR to prepare an environmental analysis equivalent to a WEPA detailed statement, the Rule exceeds the DNR's authority under WEPA.

III. THE DNR'S ISSUANCE OF THE BNSF PERMIT DID NOT COMPLY WITH WEPA.

A. Standard of Review

On judicial review of an agency decision, the scope of the court's review is limited to the scope of review in section 227.57, and is limited to the record on review, Wis. Stat. § 227.57(1). This Court must set aside the agency's action if it erroneously interpreted the law, if the agency's decision depends of any finding of fact not supported by substantial evidence in the record, if facts compel a particular action as a matter of law, or if the agency's exercise of discretion is outside of that delegated to the agency. Wis. Stat. § 227.57(5)-(8).

The scope and detail required for an environmental analysis is governed by a reasonableness standard.[8] *See Wis. Envtl. Decade, Inc. v. Dep't of Natural Res.*, 115 Wis. 2d 381, 391, 340 N.W.2d 722 (1983). The Court will analyze whether the DNR complied with WEPA in light of what is reasonable given the project at issue. 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. *WED III*, 79 Wis. 2d at 420.

The DNR's record must demonstrate that it took a "hard look" at secondary and cumulative impacts of a proposed project and must make a convincing case that these impacts

[8] Again, the DNR attempts to cloud the issue by mischaracterizing Petitioners' position as arguing that an EIS "as unlimited scope." DNR Br. at 20 n.11. Petitioners acknowledged that courts apply a reasonableness test when evaluating whether an agency environmental analysis complied with WEPA. Petrs.' Initial Br. in Supp. of Mot. for Stay at 16-17.

are insignificant. *Id.* at 420, 428-30. Where the agency decides not to prepare an EIS, its environmental analysis "must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d at 1102 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)).

In judicial review of agency actions, it is not a foregone conclusion that reviewing courts give deference to an agency interpretation. Reviewing courts may give agency interpretations great weight deference, due deference, or no deference depending on the agency interpretation at issue. *Racine Harley-Davidson, Inc. v. Div. of Hearings and Appeals*, 717 N.W.2d 184, 190 (Wis. 2006). An agency interpretation is not given any deference where (1) it's a case of first impression, (2) the agency has no expertise or experience in deciding the legal issue, and (3) the agency is so inconsistent as to provide no real guidance. *Id.* at 191-92.

Regarding the DNR's WEPA obligations under its new version of NR 150, the DNR's interpretation does not warrant any deference. The DNR argues that this Court should defer to its decision not to prepare an EIS in this case. DNR Br. at 8. But the DNR does not have experience interpreting the new NR 150 and fulfilling its WEPA obligations under that new rule. This is a case of first impression as the DNR first published its new version of NR 150 in April of 2014. For that reason, the DNR does not have much experience in fulfilling its WEPA obligations under the new NR 150. Finally, and most importantly, as documented throughout this brief, the DNR's current interpretation and application of NR 150 to fulfill its WEPA obligations is inconsistent with DNR statements in the record. Thus, this Court should not give the DNR's interpretation any deference.

B. <u>Summary of Applicable Law</u>

As explained above, the DNR must prepare a detailed statement—an environmental analysis that complies with WEPA—for all actions that are not exempt as categorically minor actions. This includes the wetland and waterway permit issued to BNSF.

The DNR relies heavily on the fact that, under old WEPA regime, wetland and waterway permits were characterized as a "Type IV" action that did not explicitly require an EA or EIS. DNR Br. at 12-13; *see also* Wis. Admin. Code § NR 150.03(8)(f)11,18 (2010). This argument is off base for several reasons. First, based on the DNR's past practice and implementation of WEPA under the old rule, this is incorrect. Second, and more importantly, the DNR's new rule regime in NR 150 mandates that the DNR prepare a detailed analysis in compliance with WEPA for these actions. Thus, no matter how wetland and waterway permits were categorized under the old rule, the DNR's current rule provides that wetland and waterway permits are major actions that require a detailed statement in compliance with WEPA.

The DNR has always recognized, even under the old rule, that WEPA may require a detailed analysis for certain projects authorized by wetland and waterway permits. The old version of NR 150 acknowledged that wetland and waterway permits were not categorically exempt from WEPA compliance. *See* Wis. Admin. Code § NR 150.03(8)(f)(11) (2010) ("Exceptional cases such as those involving filling of unusually valuable wetlands may require further analysis."). The DNR has always had to look more closely at the project being authorized to determine if WEPA required more analysis.

But whether an action was a Type I, Type II, etc., was not necessarily determinative of the level and detail of environmental analysis that WEPA required an agency to prepare. It was a *minimum* level of review. It is important to remember the distinction between the "action" that triggers WEPA—which the DNR used to categorize as Type I-IV—and the project being

authorized. Under the old NR 150, even if an action was categorized as Type II, the DNR was absolved from preparing an EIS for all projects that might be authorized by that Type II action. For example, in the past, the DNR has been subject to challenge on its decision to prepare only an EA, and not an EIS, for Type II actions. *See e.g.*, *State ex rel. Boehm v. Dep't of Natural Res.*, 147 Wis. 2d 657, 497 N.W.2d 445 (1993). In *Boehm*, the court ultimately concluded that the agency adequately defended its decision to prepare only an EA and not an EIS, but not on the basis that the action at issue was a Type II action. *Id.* (reviewing the DNR's decision to prepare only an EA and not an EIS for the DNR's approval of a landfill, which was categorized as either a Type II or III action pursuant to Wis. Admin. Code § NR 150.03(8)(e)(5), (6)). This case and others implicitly recognize the obvious—that the "type action list" was not the final word on WEPA compliance and did not substitute for a reasoned agency decision documented in a reviewable record. *See id.*, at 665-66.

This is consistent with the DNR's past practice of EAs and EISs for projects authorized by actions that did not mandate that minimum level of environmental analysis. For example, when the old NR 150 was in effect, the DNR prepared at least 15 EAs for projects that involved wetland and waterway permits. Williams Aff., Exh. F. As explained in Petitioners' Initial Brief in Support of their Motion for Stay, the DNR prepared EAs for (1) a project by Ashley Furniture with wetland impacts of a comparable size—in this case, 7.2 acres, and in the Ashley project, 14.58 wetland acres, and (2) a project by Enbridge Energy that was larger in scope, but involved similar secondary impacts—accidents and spills of hazardous materials that could harm sensitive waters and wetlands. Petrs.' Initial Br. Mot. for Stay at 38-39; *see also* Williams Aff., Exh. C at 1, 32. The DNR has also prepared an EA and then an EIS for a large dairy CAFO although none of the applicable permitting programs were categorized as Type I actions that mandated an EIS.

Williams Aff., Exh. F at 1-167 (DNR EIS for Rosendale Dairy Project explaining that after preparing an EA the DNR decided to prepare an EIS). The EAs and EISs described above provided a much more detailed analysis than the cursory environmental analysis prepared for the BNSF Permit that amounted to little more than checking boxes and providing conclusions in lieu of an analysis. *See* Petrs.' Initial Br. Mot for Stay at 38-39.

Oddly, the DNR dismisses as irrelevant its past practice regarding the types of projects for which the DNR prepared an EA or EIS. DNR Br. at 13-14. The DNR even suggests that, in the past, the DNR prepared EAs or EISs even though it was not legally obligated to do so. DNR Br. at 14. This assertion does not stand up to scrutiny considering the other players in this process. Surely a permittee would not agree to go through the time and expense of submitting the information necessary for an EA or EIS if the DNR simply thought it would be a good idea to prepare such a document even though it was not legally obligated to do so under WEPA.

Under the new and current NR 150, it is clear that the DNR requires a detailed statement in compliance with WEPA for wetland and waterway permits. The DNR explained in response to comments on its 2014 changes to NR 150 that the Department "categorizes all actions as either minor—requiring no review—or as requiring a detailed analysis, as called for in s. 1.11(2)(c), Stats." Williams Aff., Exh. B at 35 (Rule R. 941) (DNR response to comments on NR 150). There is no third category under the new NR 150—the DNR's options are preparing a detailed statement or categorizing an action as "minor" and exempt. By the plain language of the rule, equivalent analysis actions are not "minor actions," which is a separate category. *Compare* Wis. Admin. Code § NR 150.20(1m) (listing minor actions), *with* Wis. Admin. Code § NR 150.20(2) (listing equivalent analysis actions). The DNR explicitly stated that "equivalent

analysis actions listed in NR 150.20(2)(a) are not exempt from WEPA compliance." Williams Aff., Exh. B at 43 (Rule R. 925) (DNR response to comments on NR 150).

Wetland and waterway permits are categorized as equivalent analysis actions, and thus require a detailed statement. The DNR concluded that the regulatory review process for equivalent analysis actions would provide an environmental analysis and public involvement sufficient to comply with WEPA's detailed statement requirement. Williams Aff., Exh. B at 37, 39 (Rule R. 919, 921) (DNR response to comments on NR 150); Wis. Admin. Code § NR 150.20(2)(a).

The DNR seems to acknowledge that WEPA applies to wetland and waterway permits, but also seems to think that it can limit its environmental analysis to impacts relevant to the permit process. The DNR continues its pattern of conflicting positions when it asserts that some of the secondary impacts raised are irrelevant because they are outside the scope of its wetland and waterway permit review. DNR Br. at 17-20. The DNR's misunderstanding reflects its misinterpretation of how WEPA works and its purpose. Petitioners acknowledge that WEPA does not dictate the outcome of agency action. But it does inform that decision and inform the public. Petrs.' Initial Br. Supp. of Mot. for Stay. at 9-10. The legislature has determined that this information is critical. That is the central purpose of WEPA—to require agencies to consider environmental impacts beyond the scope of the immediate action its plans to take. Thus, WEPA requires an agency to consider the secondary and cumulative environmental impacts of a proposed action, no matter whether or not an agency has authority to address all of the impacts raised and analyzed.

DNR statements in the record repeatedly recognize this fact, though the DNR now espouses a different interpretation of WEPA. In response to a DNR staff question regarding how

the permitting programs will adapt to ensure WEPA compliance, a DNR staffer James Pardee stated, "Accepting, considering and responding to WEPA questions that are beyond the Department's authority has always been part of WEPA compliance." Williams Aff., Exh. B at 28. Apparently the DNR has forgotten that history in this case. At the NRB hearing on the new version of NR 150, David Siebert responded to an NRB member question regarding what the WEPA analysis added to the analysis already required for a water discharge permit issued to a large concentrated animal feeding operation ("CAFO"). Mr. Siebert responded:

> I think what WEPA and NR 150 require is that the agency takes a—as was pointed out by commenters, a broader look. . . . That permit's only about discharge . . . but there are other impacts of CAFOs, so we should look at those. Now, that analysis may not change the decision on the [CAFO] permit. . . . The analysis requires us to kind of go in eyes wide open, but it doesn't dictate what the decisions are on various permits.

Williams Aff., Exh. G at 7-8 (Rule R. 1145-46). Yet again, the DNR's statements in the record demonstrate that it is the DNR's current, limited interpretation of WEPA that is off point, not the claims raised by Petitioners.

C. <u>The record of the DNR's environmental analysis for the BNSF Permit does not comply with WEPA because it lacks a detailed analysis of secondary and cumulative impacts.</u>

The record of the DNR's environmental analysis[9] contains only conclusory references to the many secondary and cumulative impacts of the BNSF project. The DNR spends most of its briefing on the merits assuring the court that the record provides an adequate environmental analysis, but then hangs its hat on the fact that wetland and waterway permits used to be categorized as Type IV actions, which the DNR asserts never warranted an EA or EIS.[10] DNR

[9] *See supra* Background Section I.B. at 5-6 for an explanation of the documents that make up the DNR's record of its environmental analysis for the BNSF Permit.

[10] The DNR asserts that "[t]he record is lengthy and includes much technical analysis and back-and-forth, but even a sample of it reveals that DNR acted reasonably." DNR Br. at 15. The DNR

Br. at 12-15. Petitioners dispose of that red herring above. The DNR also references "analyses of possible alternatives to the proposed project," "technical review documents," "communications," and "documents expressing the agency's ultimate findings and conclusions." DNR Br. at 16-17. Like the DNR's inadequate environmental analysis in this case, the DNR's general references to documents in the record do not demonstrate its compliance with WEPA. The DNR does not point to specific and detailed analyses of the impacts raised by Petitioners and explain why the DNR's analyses complied with WEPA. The DNR cannot do so because that information is not in the record.

The record reflects that Petitioners' concerns regarding secondary and cumulative impacts were summarily minimized and dismissed. For example, the DNR's *only* explicit mention of secondary impacts are as follows: "Secondary impacts will be low due to the spatial integrity of the marsh complex, allowing for the wetland complex to continue to function and provide flood storage, hydrology, fish passage, and wildlife species relocation during construction. The construction methods and materials adequately stabilize the embankment for the safe transport of rail cars." Williams Aff., Exh. A at 121 (Permit R. 1060, FOF 12). Regarding cumulative impacts, the DNR's singular finding was that its "study of cumulative impacts resulted in a low significance due to the low amount of additional wetland losses and impacts (less than one acre for 13 projects statewide)." Williams Aff., Exh. A at 121 (Permit R. 1060, FOF 11). These brief findings ignore extensive public testimony that raised numerous, specific, and significant potential secondary and cumulative impacts.

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also asserts that its appendix "show[s] that DNR addressed the core environmental issues raised by the permit, and also alternatives, endangered resources, and cumulative and secondary impacts." DNR Br. at 15. The DNR points to "hundreds of pages of documents," and "months of review" in an attempt to convince the Court its environmental analysis was adequate. This does not substitute for actual evidence in the record that addresses the specific impacts raised by Petitioners.

D. The DNR unreasonably refused to analyze evidence presented regarding cumulative and secondary impacts.

Reviewing courts often take into account whether the agency was presented with evidence of potential impacts when evaluating whether the agency's environmental analysis was adequate even though it failed to analyze those impacts. *See e.g., Te-Moak Tribe of Western Shoshone of Nevada*, 608 F.3d at 605. In such cases, courts do not require the plaintiffs to prove that potential impacts will occur, but need only point to potential secondary and cumulative impacts that were presented to the agency that it failed to consider. *Id.* In this case, the DNR failed to acknowledge or include any meaningful analysis of numerous secondary and cumulative impacts raised in the public comment period. The potential impacts described below were raised in so many comments that Petitioners will provide only a small sample of comments presented to the DNR. Citizens and the Petitioners presented extensive and well-researched evidence regarding the following potential secondary and cumulative impacts. The DNR failed to acknowledge or include an adequate analysis of those impacts in its environmental analysis.

1. The risk of environmental harm and threat to public safety from a train derailment carrying hazardous materials such as crude oil.

The DNR also did not include a meaningful analysis and disclosure of the risk of a train accident and hazardous material spill in the marsh, or the difficulties presented to remediate a spill in a sensitive marsh and river environment. In the NEPA context, agencies regularly consider the potential for a spill when permitting an activity that involves the transport of hazardous materials. *Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 785-86 (9th Cir. 2001) (involving an offshore oil drilling project that required 404 permit from the Corps and concluding that the Corps analysis of indirect impacts from potential oil spills was adequate); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (involving an EIS

that analyzed the risk and impacts of a nuclear accident when authorizing a nuclear project and concluding that the risk of psychological harm due to fear of a nuclear accident was too attenuated); *see also* Petrs.' Initial Br. Mot. for Stay at 37-39 (discussing the DNR's EA for an pipeline project that evaluated the history of spills and the risk of spills).

The DNR was presented with overwhelming evidence that a significant secondary impact of the BNSF Permit is the risk of a train derailment or accident, and spill of hazardous materials such as oil. 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. Williams Aff., Exh. A at 51, 53, 59 (Permit R. 951, 953, 969). 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 (Permit R. 606) (U.S. DOT crude oil transport advisory), 15 (Permit 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 (Permit 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 (Permit 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 (Permit R. 657).[11] The

[11] 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 (Permit 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 (Permit 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 remained in the rail bed and surrounding environment. Williams Aff., Exh. E at 21 (Permit R. 870). In December 2014, two trains crashed and derailed, causing the oil train cars to explode. Williams Aff., Exh. E at 13 (Permit R. 657). In April 2014, a train carrying

sheer 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 (Permit 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 (Permit 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 (Permit 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 (Permit 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 (Permit 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 (Permit R. 266-67).[12] 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 (Permit 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 (Permit R. 957), 75 (comments attached to email at Permit R.

Bakken oil derailed, and the train cars ruptured spilling oil into the adjacent river in Lynchburg, VA. Williams Aff., Exh. E at 13 (Permit R. 657). This train was carrying the newer, safer tank cars for transporting crude oil.

[12] 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).

982); Williams Aff., Exh. E at 14 (Permit 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 (Permit R. 1042). An oil spill could quickly travel down to the adjacent La Crosse and Mississippi Rivers. Williams Aff., Exh. E at 14 (Permit 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 Permit R. 982). Dr. Greg Sandland with the University of Wisconsin-La Crosse Biology Department wrote, "Contamination of the Marsh via chemical leakage/spills/runoff could have irreparable impacts on countless marsh organisms." Williams Aff., Exh. A at 127 (Permit R. 1002). Guy Wolf included in his comments EPA statements that a frozen marsh or river presents extremely challenging working conditions for cleaning up spills following a train derailment. Williams Aff., Exh. A at 108 (Permit R. 1036). Tim Kabat, the City of La Crosse Mayor, also asked the DNR to evaluate the impact of a train derailment and spill on plants and wildlife in the marsh, and to surrounding property owners' land. Williams Aff., Exh. A at 113 (Permit R. 1048). 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 (Permit R. 657).

The DNR addressed safety issues only through the following permit condition: "Follow all applicable Federal Railroad Administration (FRA) guidelines, including Safety Advisory #2014-01 for the safe transport of petroleum crude oil by rail tank cars." Williams Aff., Exh. A at 119 (R. 1058, ¶ 28). As explained above, this does not come close to addressing citizen concerns. The DNR ignored the evidence that current federal regulations and standards for the trains that carry volatile crude oil have not been adequate to prevent serious rail accidents and

spills, and the DNR failed to provide any analysis of these impacts. Williams Aff., Exh. A at 54 (Permit R. 957).

2. Disturbance to a documented bald eagle's nest within 600 feet of the railroad tracks.

Despite numerous citizen comments regarding the presence of an eagle's nest within 600 feet of the tracks, *see, e.g.*, Williams Aff., Exh. A at 58, 99 (Permit R. 967, 1007) (comments noting resident bald eagles near the marsh, and comments of John Sullivan, former DNR employee), the DNR failed to analyze and disclose the potential impact to eagles, concluding that the eagles could relocate. The DNR completely ignored eagles in its Endangered Resources Review. Williams Aff., Exh. A at 1-6 (Permit R. 596-601). The DNR noted in correspondence to the US Fish & Wildlife Service that it failed to include bald eagles in its analysis in the Endangered Resources Review. Permit Supp. R. 1757.

In the DNR's environmental analysis, it notes that eagles "use trees for nesting," Williams Aff., Exh. A at 12 (Permit R. 691), but provides a blanket dismissal of impacts on rare species without explaining what measures are going to be taken to protect those species. Williams Aff., Exh. A at 16 (Permit R. 695). The DNR did not add anything to its environmental analysis nor did the DNR address the comments of citizens such as Alan Stankevitz, who included in his comments the exact location of an eagle's nest near the tracks, including pictures of the eagle's nest. Williams Aff., Exh. A at 62 (Permit R. 982) (including attached comment letter by Alan Stankevitz of behalf of Citizens Acting for Rail Safety).

The DNR's dismissal of any impacts to the bald eagle conflicts with the incidental take permit that the United States Army Corps of Engineers issued to BNSF after the DNR issued the BNSF Permit. Williams Aff., Exh. A at 124-25 (Permit R. 1193-94). The Corps' incidental take permit allows BNSF to take, disturb, or kill up to two bald eagles tending their nest per year.

Williams Aff., Exh. A at 124 (Permit R. 1193). The Corps' incidental take permit also places additional conditions on BNSF's construction in order to protect bald eagles, including buffer zones around the existing nest. Williams Aff., Exh. A at 124-25 (Permit R. 1193-94). The DNR's cursory dismissal of impacts to the bald eagle in its environmental analysis ignored information provided by citizens and conflicts with the Corps' incidental take permit. The DNR continues to minimize impacts to the bald eagle in its Brief in Opposition to Petitioners' Motion for Stay, but does not explain this inconsistency. DNR Br. at 20 n. 11.

3. The impact to nearby residents of increased noise, vibration, small incidental spills, and air pollution from more and more frequent trains passing through.

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 (Permit 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 (Permit 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 (Permit R. 650, 682). Commenters also raised concerns over air emissions from trains, including from train cars carrying hazardous chemicals. Williams Aff., Exh. A at 36 (Permit R. 894).

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 (Permit 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 Permit 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 (Permit 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 (Permit R. 881).

Area residents have observed oil leaks from trains on BNSF's track. Williams Aff., Exh. E at 9-12 (Permit R. 651-54); Williams Aff., Exh. A at 28-29 (Permit 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 Permit 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 (Permit 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 (Permit 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 (Permit R. 866). The DNR did not address these secondary impacts in its environmental analysis.

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.

The DNR's environmental analysis, including the cumulative analysis, does not document or disclose past projects in the La Crosse River Marsh and surrounding area, nor does the DNR analyze the cumulative impact that the BNSF project will have considering historical impacts to this environment. The DNR's only nod to historic impacts was to check a box in Section 3 of the Wetland Rapid Assessment, which acknowledged that there was historic fill in the area. Williams Aff., Exh. A at 14 (Permit R. 693). The environmental analysis failed to address historical wetlands impacts that commenters identified.

In the DNR's analysis of cumulative impacts, the "BNSF Railway construction project review," the DNR examined only the total number of acres of wetland fill from proposed BNSF projects between Iowa, Wisconsin, and Minnesota. Williams Aff., Exh. A at 21-22 (Permit R. 704-05). This fails in several respects. First, it ignores historical impacts even to the immediate environment affected. 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 (Permit R. 660, 664). This fill was done in five (5), ten (10), and (20) acre increments. Williams Aff., Exh. E at 17 (Permit R. 664). Second, the DNR unduly restricts the scope of potential future projects to those proposed by BNSF, when WEPA and NEPA do not limit the analysis based on whether the same company is involved. *See e.g.*, 40 C.F.R. § 1508.7 (defining cumulative impact to include "reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions). Third, the cumulative impact analysis focuses only on wetland acres affected, but does not analyze the cumulative impacts on wetland functional values, wildlife, flooding, and risks to public health and safety.

The DNR's refusal to evaluate cumulative impacts from historical fill in the La Crosse River Marsh also ignores numerous comments that the wetland fill was inconsistent with the La Crosse River Valley Land Use Management Plan. *See e.g.*, Williams Aff., Exh. A at 23, 113 (Permit R. 868, 1048); Williams Aff., Exh. E at 5 (Permit 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 (Permit R. 868). It does not appear from the record that the DNR considered the La Crosse River Valley Land Use Management Plan.

An agency must include in its cumulative impact analysis the impact of the project being authorized in light of historical impacts. In *City of Carmel-By-The-Sea*, 123 F.3d at 1160, the court concluded that the agency's cursory reference to past projects did not comply with WEPA because the EIS failed to "catalogue adequately past projects in the area, and to provide any useful analysis of the cumulative impact of past, present and future projects." The DNR failed to

address historical wetland impacts in its environmental analysis, despite numerous, detailed comments regarding the impact of another project in a wetland that has already been greatly reduced in size.

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.

In their request for an EIS, Representative Ron Kind and Senator Tammy Baldwin highlighted concerns about impacts to the Mississippi River system. "The preservation and protection of the La Crosse River Marsh and the Mississippi River are vital to sustaining a strong economy, a high quality of life for communities along the river, and maintenance of a watershed rich with biodiversity. It is critical that all potential environmental impacts of this project are fully understood before a decision is made." Williams Aff., Exh. A at 110 (Permit R. 1038). Commenters raised similar concerns regarding the impact of a spill on the adjacent Mississippi River. Williams Aff., Exh. A at 26 (Permit R. 878).

Construction and operation of the second track in the La Crosse River Marsh present a significant and immediate 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

(Permit 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 Permit 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. The DNR's environmental analysis failed to address these impacts.

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 frequent trains passing through.

Commenters, some of whom study ecology and manage natural resources, highlighted endangered and threatened species and other wildlife that may be impacted not only from the construction of the second track, but also from more frequent trains passing through. *See, e.g.*, Williams Aff., Exh. A at 58, 126, 99, 106, 130 (Permit R. 967, 1002, 1007, 1030, 1045). Commenters noted that the wildlife in the La Crosse River Marsh are the subject of ecological studies and environmental education programs. Williams Aff., Exh. A at 55 (Permit R. 962).

The BNSF project 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 (Permit R. 689, 695). The DNR has stated this "impact amount is substantial." Williams Aff., Exh. A at 121 (Permit 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 (Permit R. 596-601), Exh. E at 29 (Permit 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 (Permit 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 (Permit R. 665). The Higgins' eye pearly mussel and the Sheepnose 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 (Permit 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 (Permit R. 1757). Northern long-eared bats were officially listed as federally threatened in April of 2015,[13] 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 (Permit 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 (Permit R. 1764). BNSF did not respond to that request. Williams Aff., Exh. E at 39 (Permit R. 1764). This information directly contradicts DNR's assessment that "no rare species will be affected" by construction. Williams Aff., Exh. A at 16 (Permit R. 695). On the contrary, considerable harm will be done to rare species from this project.

7. Impact on property values and tax revenue for the City of La Crosse.

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

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 (Permit 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 (Permit 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 Permit 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. Permit 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 (Permit R. 880-85) (Karen Ringstron and Karl Green of UW-Extension report on economic impact of BNSF expansion). The DNR's environmental analysis did not address these secondary impacts.

8. Impact on flooding downstream of the project from the destruction of wetlands that provided flood storage.

Despite the critical flood risk in La Crosse, the DNR did not use its environmental analysis to examine or disclose residents' concerns regarding potential increased flooding from

the destruction of over seven (7) acres of wetlands. Residents raised reasonable and serious concerns about flooding based on the frequency of severe floods in La Crosse, the fact that half the marsh has already been filled, and the fact that the DNR did not analyze how lost wetland acres would impact the severity of floods downstream. *See, e.g.*, Williams Aff., Exh. A at 99, 107, 113 (Permit R. 1007, 1034, 1048). One of the Petitioners made the following comment: "In summary, regarding flooding, extreme rainfall events have increased, future weather patterns are not predictable, Marsh hydrology may be in flux, cumulative impacts must be evaluated including the high levels of siltation that the marsh is experiencing, and current and future population/transportation needs have to be considered." Williams Aff., Exh. A at 131 (Permit R. 1046).

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 (Permit 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 (Permit

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.

The floodplain analysis reviewed the impact of the bridge construction on the water levels at the 100 year flood, but failed to account for wetland destruction. Williams Aff., Exh. A at 8-9 (Permit R. 685-86). The DNR checked a box in the wetland rapid assessment recognizing that the wetland acres to be filled provided valuable flood storage in this flood-prone region. Williams Aff., Exh. A at 11, 15 (Permit R. 690, 694). The DNR's environmental analysis then dismissed the significance of this lost flood storage with scant analysis. The DNR determined the flood and stormwater storage functions were of moderate significance and said that the "[r]emaining wetland will capture and slow runoff and flood water." Williams Aff., Exh. A at 15 (Permit R. 694). A cursory reference to flooding impacts, especially given the significance to the city and its residents, is not adequate to comply with WEPA. *See, e.g.*, *WED III*, 79 Wis. 2d at 420 (DNR must take a "hard look" at the problem, as opposed to "bald conclusions, unaided by preliminary investigation.").

E. <u>The DNR erroneously exercised its discretion in refusing to prepare an EIS.</u>

The evidence in the BNSF Permit record indicates that the more detailed EIS was warranted for the BNSF project because, as demonstrated above, the DNR's "equivalent" environmental analysis did not equate to a WEPA detailed statement. The DNR's implicit finding that it complied with WEPA in issuing the BNSF Permit without first preparing a more detailed EIS is not based on substantial evidence in the record. *See* Wis. Stat. § 227.57(6) (requiring reversal and remand if agency findings are not based on substantial evidence in the record).

Many of the cumulative and secondary impacts identified above and raised by commenters are relevant to the factors that the DNR uses to determine whether to prepare an EIS for a project designated as an equivalent analysis action. Wis. Admin. Code § NR 150.20(4)(b).[14] The following factors indicate that the DNR erroneously exercised its discretion in refusing to prepare an EIS because the evidence in the record either does not adequately address of contains conflicting information regarding the following: (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.

[14] Wisconsin Admin. Code § NR 150.20(4)(b) provides, "While not required under this section, the department may follow the EIS procedures in s. NR 150.30 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."

The DNR's conclusion that the BNSF Permit does not warrant the more detailed EIS lacks an adequate factual basis in the record and is 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 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., and 150.20(4) as explained above. *See* Wis. Stat. § 227.57(5).

CONCLUSION

For the foregoing reasons, this Court should declare the BNSF Permit invalid and set it aside because the DNR failed to comply with WEPA, Wis. Stat. § 1.11. The Court should also require the DNR to conduct an environmental analysis that comports with the purpose and intent of WEPA, along with its substantive requirements, before re-issuing a permit to BNSF. Finally, Petitioners respectfully request that the Court declare Wisconsin Administrative Code § NR 150.20(2)(a)8, 11, and (4) invalid because this rule exceeds the DNR's authority under WEPA and lacks and adequate factual basis in the record.