



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott Walker, Governor
Cathy Stepp, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

May 22, 2015

BNSF Railroad
John Stillely
4515 Kansas Ave.
Kansas City, KS 66106

SUBJECT: BNSF Railway Project, City of LaCrosse, LaCrosse County, Wisconsin
Determination regarding impacts to Black Terns as a result of the railway project

Dear Mr. Stillely;

The Bureau of Natural Heritage Conservation has reviewed your request for an Incidental Take Permit (ITP) for the BNSF railroad project through the LaCrosse River Marsh in the City of LaCrosse, Wisconsin for the state endangered Black Tern (*Chlidonias niger*). The project consists of constructing approximately four miles of new railroad track adjacent to the existing railroad track on BNSF right-of-way, including two miles through the LaCrosse River Marsh, where Black Terns are known to occur.

We have reviewed the materials provided and evaluated options for protection of the Black Tern in the Marsh. An ITP was requested as a precautionary measure since it was uncertain when and where the Black Terns would nest in the Marsh and construction activities were scheduled to start before the nesting period. Black Terns are now present in the Marsh and nesting habitat has been established. Since that habitat is now identified it has been determined that an ITP is not needed because take can be avoided if the following conservation measures are implemented by BNSF. These conservation measures will avoid impacts and disturbance to the Black Tern and designated nesting habitat.

The Wetland and Waterway Permit issued 02/06/2015 (Permit numbers IP-WC-2014-32-00454 & IP-WC-2014-32-00455), as amended on 05/04/2015, requires avoidance of the nesting period for the Black Tern from May 25 to July 31 unless BNSF obtains from the Department's Bureau of Natural Heritage Conservation an ITP or other authorization that removes or revises the period during which construction is prohibited. This letter serves as authorization to revise the period during which construction is prohibited at designated 'avoidance zone' locations and removes the period during which construction is prohibited in the remaining project area.

On May 20, 2015 a NHC staff specialist identified occupied nesting habitat for the Black Tern in the LaCrosse River Marsh. A single linear area within the marsh was identified as occupied nesting habitat based on nesting activity of the Black Terns and designated as an 'avoidance zone'. Other areas of the Marsh were searched and no nesting activity was observed in those areas and accordingly those non-nesting areas were not included in the avoidance zone. The location of this avoidance zone was provided to appropriate BNSF staff to aid in the planning and implementation of the avoidance zone and conservation measures stipulated in this letter. Pursuant to Wis.Stat. s.23.27(3) this information is considered sensitive data and is not subject to Wisconsin's Open Records Law, and may only be shared with individuals who need the information in order to carry out specific roles in the implementation of the project. The location of the occupied nesting habitat may not be released or reproduced in any publicly disseminated documents, but may be shared with appropriate staff to ensure protection of the Black Tern avoidance zone.

This authorization applies the construction prohibition period from May 25 to July 31, unless noted otherwise in the conservation measures in this letter, to only those areas identified in the avoidance zone for the Black Tern. Specific activities prohibited or allowed in the avoidance zone during the construction prohibition period are specified in the conservation measures. If it is determined that Black Terns are no longer nesting or would no longer be impacted by construction activities the construction prohibition period may be shortened in consultation with NHC staff. This authorized revision removes the construction period restriction for construction activities outside the designated avoidance zone.

The following conservation measures are required in the avoidance zone during the construction prohibition period, except as noted otherwise:

- 1) No pile driving may occur at bridge structures in the avoidance zone;
- 2) Timber piles may not be driven before June 30, 2015 in the avoidance zone, but may be driven after June 30 or after the completion of egg incubation for the Black Terns as determined by NHC staff specialist;
- 3) Fill or other materials may be placed in the construction area within the railroad right-of-way in the avoidance zone;
- 4) Transportation of equipment and materials may occur in the avoidance zone;
- 5) Other construction activities may occur in the avoidance zone with prior consultation with NHC staff;
- 6) All other conditions of the Wetland and Waterway Permit shall be adhered to.

These conservation measures apply to the BNSF railroad, their employees, agents and contractors for activities conducted in the avoidance zone during the construction prohibition period.

The avoidance zone and/or construction prohibition period may be modified based on site conditions and evaluation of factors affecting the Black Terns, but may not extend after July 31, 2015 or beyond the bounds of the delineated occupied nesting habitat (avoidance zone) for the Black Tern.

Please contact me at 608-266-5248 or via email at Lisie.Kitchel@wisconsin.gov if you have any questions.

Sincerely,



Endangered Resources Review Program

cc: Doug Dorsey – Hanson Professional Services
Carrie Olson – WDNR Water Management Specialist, LaCrosse
Ed McCann – WDNR Conservation Warden
Chandra Harvey – WDNR Bureau of Legal Services
Edwina Kavanaugh – WDNR Bureau of Legal Services
Erin Crain – WDNR Natural Heritage Conservation Bureau
Rori Paloski – WDNR Natural Heritage Conservation Bureau