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' BRIEF IN SUPPORT OF MOTION FOR STAY

Petitioners, Maureen Freedland, Karen Ringstrom, Guy A. Wolf, Alan Stankevitz, Thomas Claflin, Ralph Knudson, Richard L. Pein, Marina Dvorak, and Carolyn Mahlum-Jenkins ("Petitioners") submit this brief to support Petitioners' motion for a stay of the Wisconsin Department of Natural Resources' ("DNR") issuance of Wetland and Bridge Individual Permit No. IP-WC-2014-32-00454 ("the BNSF Permit") to Burlington Northern Santa Fe Railway care of John Stiley ("BNSF"). Pursuant to Wis. Stat. § 227.54, this Court has broad discretion to grant a stay of the agency decision at issue in judicial review. The Petitioners respectfully request that this Court issue a stay in order to protect the Petitioners' interests pending resolution of the claims raised in judicial review.

INTRODUCTION

The DNR issued a wetland and waterway permit to BNSF in February 2015 to construct new and expanded rail infrastructure in the La Crosse River Marsh. R. 1056. Petitioners timely

opposed the BNSF Permit through this Petition for Judicial Review. The BNSF project, if permitted, would fill and destroy 7.2 acres of wetland in an ecosystem that is already disappearing due to rapidly expanding development such as that proposed by BNSF. R. 1056; Williams Aff., Exh. A at 117.[1] The DNR granted the BNSF Permit without analyzing secondary and cumulative impacts as required by the Wisconsin Environmental Policy Act ("WEPA"). Petitioners further allege that certain provisions of Chapter NR 150 are invalid to the extent the provisions presume that the wetland and waterway permitting programs, pursuant to which BNSF received a permit, afford for an analysis that is equivalent to that required by WEPA.

Petitioners respectfully request that this Court exercise its broad discretion according to Wis. Stat. § 227.54 to stay the effectiveness of the BNSF Permit while the legality of the BNSF Permit is under judicial review. BNSF's proposed project, should it proceed during the pendency of this Court's review, would irreparably harm the interests of the parties involved in this matter as well as interests of the general public. Because Petitioners' claims would effectively become moot absent a protective stay, it is incumbent upon this Court to grant Petitioners' accompanying motion for a stay consistent with the purpose of section 227.54.

BACKGROUND

I. PROPOSED BNSF PROJECT

A. Project Details

The BNSF Permit authorizes construction of new railroad track, a crossover/signal pad, and a service road, resulting in impact to 7.2 acres of wetland in the La Crosse River Marsh. BNSF also proposes to construct a 96-foot bridge across the La Crosse River and three (3)

[1] Because of the size of the record, Petitioners have included in Exhibit A of Williams Affidavit all cited pages of the DNR Record for the BNSF Permit. In citations, Petitioners provide the record citation as well as the corresponding page number in Williams Affidavit, Exhibit A.

additional bridges through the La Crosse River Marsh. (Pet. for Jud. Rev., ¶ 29); R. 1056; Williams Aff., Exh. A at 117. The wetland fill proposed by BNSF would occur in the La Crosse Marsh, which is already reduced to half its size due to previous developments. (Pet. for Jud. Rev., ¶ 48.) Endangered and special concern species such as the bald eagle, black tern and numerous migratory birds also reside in or use the La Crosse River march as essential habitat. *Id.* Petitioners and members of the general public who submitted comments in response to the draft BNSF Permit expressed concern that the BNSF project is part of rapidly expanding rail traffic along the Mississippi River Corridor, which is occurring without adequate consideration of the public health and safety implications of such expansion. *See, e.g., id.* at ¶¶ 1-8, 48.

B. DNR Approvals Required & Received

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

No person may discharge dredged or fill material into a wetland unless the discharge is authorized by a wetland general or individual permit. Wis. Stat. § 281.36(3b). The DNR must issue a wetland individual permit if it finds all of the following: (1) "The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts"; (2) "All practicable measures to minimize the adverse impacts to wetland functional values will be taken"; (3) "The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse

impact to water quality, or in other significant adverse environmental consequences." Wis. Stat. § 281.36(3n)(c).

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

BNSF submitted a bridge and wetlands fill permit application on February 24, 2014. Pursuant to Wis. Stat. §§ 30.123 and 281.36, the DNR issued Wetland and Bridge Individual Permit No. IP-WC-2014-32-00454 to BNSF on February 6, 2015. R. 1056; Williams Aff., Exh. A at 117. The DNR did not prepare an Environmental Impact Statement ("EIS") prior to issuing the BNSF Permit, relying instead upon the classification of wetland and waterway permits as equivalent analysis actions to conclude that the permitting process provided an adequate environmental analysis in compliance with WEPA. R. 1060; Williams Aff., Exh. A at 121. The DNR's WEPA compliance determination checklist documented the environmental analysis that it conducted through the "equivalent analysis" permitting process for wetland and waterway permits. R. 696-99; Williams Aff., Exh. A at 17-20. The DNR referenced its Wetland Rapid Assessment Methodology and BNSF's construction plans as providing allegedly sufficient disclosure and analysis of direct, secondary and cumulative environmental impacts. R. 697-98; Williams Aff., Exh. A at 18-19. Finally, the DNR concluded that it "[had] completed all

procedural requirements of s. 1.11(2)(c), Wis. Stats., and NR 150, Wis. Adm. Code for this project." R. 1061; Williams Aff., Exh. A at 122.

II. PETITIONERS' INTERESTS

All Petitioners are individuals with reasonable concerns regarding the impact of the BNSF project upon their professional interests, recreational activities, and personal safety (Pet. for Jud. Rev., ¶¶ 1-8.) Six (6) Petitioners are able to state in terms of feet, yards, or miles the distance from their residence to railroad tracks that are used by BNSF and slated for expansion if the BNSF project is approved. *Id.* Petitioners have particular interest in the BNSF project and its impacts on safety and the environment in their area, but are also generally concerned about the environmental and safety implications of increased rail traffic throughout the Mississippi River corridor. *Id.* All Petitioners assert that the DNR's inadequate environmental analysis of the BNSF project fails to provide critical information for them, their community, and to protect their health, their interest in protecting the La Crosse River Marsh, and the La Crosse and Mississippi Rivers, and the environmental integrity of the community.

III. 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. Petitioners alleged that the DNR issued the BNSF Permit without preparing an adequate environmental analysis or an EIS. (Pet. for Jud. Rev., ¶¶ 44-52.) Petitioners further alleged that the DNR's unduly narrow and conclusory analysis of potential cumulative, historic, and secondary environmental impacts analysis falls short of compliance with WEPA. (Pet. for Jud. Rev., ¶ 49.) Finally, Petitioners alleged that Wis. Admin. Code § NR 150.20(2)(a) subparts 8. and 11., which categorizes wetland and waterway

permits as equivalent analysis actions, is an invalid rule because it conflicts with WEPA and lacks an adequate factual basis. (Pet. for Jud. Rev., ¶¶ 54-55.)

The DNR also filed on March 27, 2015, a Statement of Position and a response to Petitioners' request for judicial review. (Resp. Statement of Position and Answer.) The DNR's response cited to Wis. Stat. § 227.40(3) and requested a stay of the issues raised on judicial review while this Court rules on the validity of Wis. Admin. Code § NR 150.20(2)(a) subparts 8. and 11. The Court bifurcated the issues raised on judicial review and the rule challenge, and set a briefing schedule to resolve the rule challenge. In order to preserve Petitioners' interests pending resolution of the rule challenge and judicial review, Petitioners move this Court to stay the effectiveness of the BNSF Permit while the legality of the Permit is on review.

ARGUMENT

This Court has broad authority to consider the interests of justice and grant Petitioners' motion to ensure that the BNSF project does not proceed and render moot Petitioners' claims during the pendency of judicial review of the legality of the BNSF Permit. It is also appropriate for this Court to grant Petitioners' request for a stay of the effectiveness of the BNSF Permit even considering the more restrictive temporary injunction standard. The petition for judicial review of the Permit demonstrates a reasonable probability of success on the merits of Petitioners' claims; because the requested stay is necessary to preserve the status quo and prevent irreparable injury to the environment, Petitioners' interests, and the interests of the general public; and because Petitioners have no other adequate remedy at law.

I. PETITIONERS ARE ENTITLED TO A STAY OF DNR'S DECISION.

A petition for judicial review pursuant to Wis. Stat. § 227.52 does not automatically result in a stay of the challenged agency action or decision. Rather, a "reviewing court may order

a stay upon such terms as it deems proper," with several exceptions that are not pertinent to the instant matter. *See* Wis. Stat. § 227.54. A circuit court has broad discretion to determine whether a stay is appropriate in a given case. *See, e.g., Weber v. White*, 2004 WI 63, ¶ 34, 272 Wis. 2d 121, 681 N.W.2d 137 ("[T]he circuit court has broad discretion to stay execution of a judgment and to condition a stay upon terms it deems appropriate."). Section 227.54 does not outline factors to guide a reviewing court's decision on a request to stay an agency decision.

This Court may find the temporary injunction factors useful in analyzing Petitioners' request for a stay of the BNSF Permit because a temporary injunction serves to provide similar relief in other contexts. This Court may analyze the appropriateness of a stay based upon the factors used when granting a temporary injunction, sometimes called the *Grootemaat* factors: (1) The movant has a reasonable probability of success on the merits; (2) An injunction is necessary to prevent irreparable harm or preserve the status quo; and (3) Movant otherwise lacks an adequate remedy at law. *See Werner v. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). *See also* Wis. Stat. § 813.02.

These factors provide useful guidance, but a court has discretion to look beyond these factors and impose a stay on terms that it deems proper based on the interests of justice.[2] The Wisconsin Supreme Court has directed circuit courts to use their broad discretion in response to a request for temporary injunctive relief.[3] *See, e.g., Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 171, 127 N.W.2d 29 (1964) ("It is an elementary rule of law that the granting or

[2] Because Petitioners are not requesting relief pending appeal pursuant to Wis. Stat. § 808.07, Petitioners are not required to post a bond. *See* Wis. Stat. § 808.07(2)(b). There is no such requirement listed in Wis. Stat. § 227.54 under which Petitioners seek a stay in this case.

[3] While Wisconsin courts have declined to find that equitable relief is a purpose of a temporary injunction pursuant to Wis. Stat. § 813.02, *see, e.g., School Dist. of Slinger v. WIAA*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997), equitable relief should guide this Court's decision because Petitioners are requesting a stay pursuant to the more flexible standards of Wis. Stat. § 227.54.

refusal of a temporary injunction is a matter lying within the discretion of the trial court, and its determination in regard thereto will not be upset on appeal unless an abuse of discretion is shown.").

As set forth in this section, Petitioners are entitled to a stay of the effectiveness of the BNSF Permit because it is in the interest of justice, soundly within the discretion of this Court, and because Petitioners satisfy all of the *Grootemaat* factors.

A. <u>Petitioners have a reasonable probability of success on the merits of their claims</u>.

This Court should exercise its discretion to grant a stay of the BNSF Permit because Petitioners can demonstrate a reasonable probability of succeeding on the merits of their claims. The discussion that follows first provides background on WEPA law, including relevant WEPA and National Environmental Policy Act ("NEPA") case law, that governs Petitioners' claims. Second, Petitioners describe the changes to Wis. Admin. Code ch. NR 150 that are at issue in this case, and explain that these NR 150 provisions are invalid because they conflict with WEPA and lack a reasonable factual basis. Finally, Petitioners describe the BNSF permitting process and demonstrate that the DNR's environmental analysis failed to comply with WEPA.

1. 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),[4] NR

[4] 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."

150.20(1).[5] 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 NR 150, guidelines from the Council on Environmental Quality ("CEQ"), and NEPA case law.[6] *See* Wis. Stat. § 1.11; Wis. Admin. Code § NR 150.01.

Agency "action" is the trigger that requires an agency to comply with WEPA and NEPA. While the action creates the agency obligation to prepare an environmental analysis, the agency evaluates the project that is being authorized pursuant to the agency action, rather than simply the discrete action the agency is taking. *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 timber sale if permitted rather than the issuance of the permit itself). For example, in this case, the DNR's proposal to issue a wetland and waterway permit to BNSF was the "action" that triggered the DNR's obligations under WEPA, but the environmental analysis required is concerned with the BNSF project to construct a second track of railway that is being authorized by DNR action.

WEPA ensures a robust and thoughtful decision-making process, but it does not necessarily 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

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[5] *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).

[6] 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 mandated compliance with 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.

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*). The purpose of WEPA "is to insure that agencies consider environmental impacts during decision making." *Clean Wis. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 188, 282 Wis. 2d 250, 700 N.W. 2d 768 (quoting *State ex rel. Boehm v. Dep't of Natural Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993)). WEPA "imposes upon governmental agencies certain procedural obligations with respect to their decision-making processes to assure that the substantive policies of the Act will be implemented (ch. 274, Laws of 1971, sec. 2, creating sec. 1.11, Stats.)." *WED III*, 79 Wis. 2d at 415-16. One such policy interest 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. An environmental analysis should consider cumulative impacts of other similar proposed projects. *See, e.g.*, *Cuddy Mountain*, 137 F. 3d at 1378-79 ("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.").

WEPA also requires the DNR to prepare an EIS for all major actions significantly affecting the quality of the human environment. Wis. Stat. § 1.11. The statutes do not define what constitutes a major action significantly affecting the quality of the human environment, but WEPA and NEPA case law have defined this concept to some extent. 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)). Federal courts interpreting NEPA use the following criteria to determine whether an EIS is warranted: "unique characteristics of the geographic area such as proximity to historic or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and the degree to which the action may adversely affect an endangered ... species." *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" and warrants an EIS 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. Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985).

a. WEPA cumulative impact analysis.

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). The Wisconsin Supreme Court recognizes that cumulative impacts may be significant in some cases. "Many state agencies' actions regarding a project or complex of projects can be individually limited but cumulatively considerable. When an action forms a precedent for future individual actions or represents a decision in principle about a future major course of action, the cumulative effects of future actions should be considered when determining if an impact statement is required." *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 include a cumulative impact analysis that complies with WEPA. For example, in *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the court concluded that the agency did not comply with WEPA because it did not provide an adequate analysis of cumulative impacts. 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 noted 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.*

Courts repeatedly hold 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). "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." *Id.*

b. WEPA secondary impact analysis.

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).

Federal courts evaluating compliance with NEPA note that agencies must include reasonably foreseeable and related secondary impacts on the human environment. For example, in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 779 (1983), the court concluded that it was adequate for the agency 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. An agency is required to consider only those secondary impacts that have "a reasonably close causal relationship" to the project authorized by agency action. *Id.* at 774. When deciding whether an agency acted reasonably in refusing to consider a secondary impact, reviewing courts have analyzed 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.

2. Standard of review for rule challenge and agency action compliance with WEPA.

a. Rule challenge standard of review.

The court must declare a rule invalid if the court finds that the rule violates constitutional provisions or exceeds the statutory authority of the agency. Wis. Stat. § 227.40(4)(a); *see also Wis. Hosp. Ass'n v. Dep't of Natural Res.*, 156 Wis. 2d 688, 704-05,457 N.W.2d 879 (Ct. App. 1990). "[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.* 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. WEPA issue on judicial review standard of review.

The Court's review of an agency action challenged under Wis. Stat. § 227.52 is limited to the scope of review provided in Wis. Stat. § 227.57. "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). A reviewing court shall also "set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record," and "shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility." Wis. Stat. § 227.57(6), (7). Judicial review is confined to the agency record on review. Wis. Stat. § 227.57(1). "The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8).

Regarding the specific WEPA claim at issue in this case, courts apply a reasonableness test to determine whether the agency complied with WEPA in preparing a record of its analysis and decision not to prepare an EIS. *Wis. Envtl. Decade, Inc. v. Dep't of Natural Res.*, 115 Wis. 2d 381, 391, 340 N.W.2d 722 (1983); *Clean Wis.*, 282 Wis. 2d 250, ¶ 191. A reviewing court conducts the following analysis:

> First, has the agency developed a reviewable record 15 reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

WED III, 79 Wis. 2d at 425.

"It is obvious that achievement of WEPA's goals will be significantly compromised if ill-advised determinations not to prepare an EIS are permitted by the courts to stand. Thus a consideration of the manner in which WEPA was intended to function dictates a liberal approach to the threshold decision of whether the impact statement should be prepared." *Wis. Envtl. Decade, Inc. v. Dep't of Natural Res.*, 115 Wis. 2d 381, 390, 340 N.W.2d 722, 727 (1983) (quoting *WED III*, 79 Wis. 2d at 419). 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.

Wisconsin and federal case law, and CEQ guidelines provide that, in order to comply with WEPA and make a legally sound decision, 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 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)).

3. Rule provisions—Wisconsin Administrative Code § NR 150.20(2)(a)8. and 11.—are invalid because they conflict with WEPA and lack an adequate factual basis.

A stay is warranted because Petitioners have a reasonable likelihood of success on their challenge to the validity of Wis. Admin. Code § NR 150.20(2)(a)8. and 11. (hereinafter "the Rule").[7] Once Petitioners establish that the Rule is invalid, Petitioners can easily demonstrate that the BNSF Permit is also unlawful, as 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 court must declare an administrative rule invalid under any of the following circumstances: (1) the rule violates constitutional provisions; (2) it exceeds the statutory authority of the agency; or (3) the agency adopted it without compliance with statutory rulemaking procedures. *Liberty Homes*, 136 Wis. 2d at 373. The Petitioners claim that the Rule is invalid because it violates the due process clause of the Wisconsin Constitution as it lacks an adequate factual basis and exceeds the DNR's authority under WEPA.

a. Wisconsin Administrative Code chapter NR 150 revised in 2014.

Recently, the DNR overhauled its rules for implementing WEPA, Wis. Admin. Code ch. NR 150. Following a years-long rule-making process, the revised NR 150 went into effect on April1, 2014. Williams Aff., Exh. B at 6 (permanent rule log sheet). The revised NR 150 made sweeping changes to the way in which the DNR would comply with WEPA. It eliminated the

[7] All following NR 150 citations are in reference to the August 2014 emergency rule.

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. *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 (FONSI).'") (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.

The revised NR 150 also created equivalent analysis actions as a new way to categorize regulatory processes or actions. 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). Equivalent analysis actions are not exempt from WEPA compliance, rather the DNR has simply determined that, by rule, the regulatory processes listed as equivalent analysis actions provide an environmental analysis and public involvement that complies with WEPA. Williams Aff., Exh. B at 35 (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. All actions that are not listed as minor would receive a detailed analysis under the proposed rule.") As the DNR explained in response to public comments,

> Equivalent analysis refers to those Department review processes that include environmental analysis and public involvement. Since some Department review

> processes are identified in the proposed rule as being equivalent, no further documentation or process would be required other than the WEPA compliance determination. We anticipate various program guidance updates to result from the proposed rule.

Williams Aff., Exh. B at 37 (DNR response to public comments on NR 150).

By May of 2014, the DNR had already drafted a scope statement to make emergency changes to these rules. Williams Aff., Exh. B at 6 (emergency rule log sheet). These additional changes, which the DNR called "housekeeping changes" added permitting programs to the equivalent analysis action list in section NR 150.20(2)(a). Williams Aff., Exh. B at 63, 69 (Emergency rule order OE-10-14(E)). The DNR also eliminated the requirement that the DNR prepare a WEPA compliance determination for all equivalent analysis actions. Williams Aff., Exh. B at 69 (Emergency rule order OE-10-14(E)). The emergency rule went into effect on August 31, 2014. Williams Aff., Exh. B at 6 (emergency rule log sheet).

b. <u>The Rule promulgation violated 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.

As counsel for the DNR indicated during the May 7, 2015, hearing in this matter, the DNR has not yet produced the record for this Court's review of the validity of the Rule. Through a request made pursuant to the Open Records Law, the Petitioners have obtained numerous DNR documents regarding the promulgation of the Rule. See Williams Aff., Exh. B at 7-8 (Petitioners' open records request to the DNR). At this time, the Petitioners rely on those records to support their claim that they will succeed on the merits of this argument.

In categorizing the wetland and waterway programmatic procedures as equivalent analysis actions, 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 action because they provide some environmental analysis and public involvement.

Most of the responsive documents were emails among DNR staff. Williams Aff. The DNR also provided a spreadsheet entitled "Revised NR 150 Guidance – Comparison of Previous Type List and New Procedures 03/10/2014," which listed 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. 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. 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.

Nothing in the records obtained from the DNR 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 create a record of any in depth examination of the specific provisions in the wetland permitting program's "analysis of all related impacts" to demonstrate that the analysis was equivalent to that required under WEPA. The DNR also failed to create a record of any in depth examination of the public interest analysis under chapter 30 to demonstrate that it 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.

As demonstrated below in regard to the BNSF Permit, the environmental analysis provided under the wetland and waterway programmatic procedures do not fulfill WEPA's requirements. The Petitioners will demonstrate that, 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).

c. <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. *See supra* Section I.A.1. 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 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 (DNR response to comments on NR 150).

At the same time, the Rule does not 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. Nor are equivalent analysis actions exempt from the WEPA requirement to prepare an EIS for major actions significantly affecting the human environment. 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 an 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 explained in more detail below, the analysis required by the programmatic procedures for the BNSF Permit 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 pursuant to WEPA. *See infra* Section I.A.3.

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 (email dated Nov. 12, 2012, from Edwina Kavanaugh, DNR, to James Pardee, DNR).[8]

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:

> 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 our 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.

Further, the new NR 150 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 an EIS. The new version of NR 150 does not explicitly require the DNR to prepare an EIS for any permitting process. Section NR 150.20 provides the "appropriate procedures for the

[8] 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. Mr. Pardee did not explain how the WEPA requirements Ms. Kavanaugh referenced would be incorporated into permitting programs designated as equivalent analysis actions.

environmental analysis that WEPA requires for all department actions except those specifically exempted by statute." 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 directory WEPA language that requires the DNR to prepare an EIS for major actions significantly affecting the quality of the human environment.

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, it exceeds the DNR's authority under WEPA.

4. The DNR's issuance of the BNSF Permit did not comply with WEPA.

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

As the DNR explained in response to comments on its 2014 changes to NR 150, it "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. All actions that are not listed as minor would receive a detailed analysis under the proposed rule." Williams Aff., Exh. B at 35 (DNR response to comments on NR 150). 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 (DNR response to comments on NR 150).

The programmatic procedures applicable to the BNSF Permit are categorized as equivalent analysis actions, which the DNR determined, by rule, "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." Wis. Admin. Code § NR 150.20(2)(a). 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. Williams Aff., Exh. B at 37, 39 (DNR response to comments on NR 150). The detailed environmental analysis required for equivalent analysis actions must be prepared in accordance with WEPA, which incorporates the requirements in the federal CEQ guidelines and NEPA case law. *See* Wis. Stat. § 1.11(2)(c); *Clean Wis.*, 282 Wis. 2d 250, ¶ 188 n.43.

The DNR's record of its environmental analysis for the BNSF Permit does not comply with WEPA because the DNR failed to evaluate and disclose numerous secondary and cumulative impacts. A review of the DNR's record of its environmental analysis indicates that the DNR made only passing reference to, included conflicting information about, or failed to acknowledge certain impacts. Petitioners and other citizens raised concerns in public comments regarding each of the cumulative and secondary impacts that Petitioners assert the DNR failed to address in its environmental analysis for the BNSF Permit. Not only does this unduly narrow environmental analysis conflict with WEPA, it is also inconsistent with the DNR's past practice in preparing EAs and EISs. Finally, evidence in the record demonstrates that the DNR abused its discretion by refusing to prepare an EIS prior to issuing the BNSF Permit.

a. <u>The record of the DNR's environmental analysis for the BNSF Permit lacks a detailed analysis of secondary and cumulative impacts.</u>

The BNSF Permit, R. 1054-62, Williams Aff., Exh. A at 115-23, finds that the DNR conducted an environmental analysis that complies with WEPA. *See* R. 1060-61, Findings of Fact ("FOF") 6, 20; Williams Aff., Exh. A at 121-22. The DNR's record of its environmental analysis is the WEPA compliance determination, R. 696-99, Williams Aff., Exh. A at 17-20, that the DNR prepared for the BNSF Permit, along with the other documents incorporated by reference into the WEPA compliance determination, including the DNR's Wetland Rapid Assessment Methodology, R. 689-95, Williams Aff., Exh. A at 10-16, and 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." R. 696; Williams Aff., Exh. A at 17. The Petitioners assume that the DNR also intended the "BNSF Railway construction project review," R. 704-05, Williams Aff., Exh. A at

21-22, which purports "to fully review environmental cumulative impacts" of the BNSF project, to be included in the DNR's environmental analysis record, though the "BNSF Railway construction project review" is not referenced in the WEPA compliance determination. Below, the Petitioners also address the DNR's cumulative impact analysis in the "BNSF Railway construction project review" document.

The record of the DNR's environmental analysis contains only conclusory references to the many secondary and cumulative impacts of the BNSF project. The DNR's findings in the BNSF Permit reflect that these concerns were summarily minimized and dismissed. For example, the DNR's *only* 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." R. 1060, FOF 12; Williams Aff., Exh. A at 121. 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)." R. 1060, FOF 11; Williams Aff., Exh. A at 121. These brief findings ignore extensive public testimony that raised numerous, specific, and significant potential secondary and cumulative impacts.

b. <u>The DNR unreasonably refused to analyze evidence presented regarding cumulative and secondary impacts.</u>

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 the agency 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.

i. 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. 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 infra* Section I.A.4.c (discussing the DNR's EA for an pipeline project that evaluated the history of spills and the risk of spills).

Commenters presented evidence of an increasing number of catastrophic train derailments with hazardous material spills and fires around the country. R. 962, 1017; Williams Aff., Exh. A at 55, 105. Commenters also noted that smaller-scale spills might occur regularly without much media coverage. R. 887; Williams Aff., Exh. A at 29. Some noted that they had observed small spills along BNSF's existing rail line. R. 988; Williams Aff., Exh. A at 93. The comments note that these spills are especially a concern in the area at issue in the BNSF Permit, which includes the La Crosse River, the La Crosse River Marsh, and is just upstream of the Mississippi River. 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." R. 1002; Williams Aff., Exh. A at 127. 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. R. 1036; Williams Aff., Exh. A at 108. 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. R. 1048; Williams Aff., Exh. A at 113. Commenters noted that the increased traffic of trains, many of which would likely carry volatile Bakken crude oil, along the second track would increase the risk of a major rail accident in the area. R. 951, 953, 969; Williams Aff., Exh. A at 51, 53, 59.

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." R. 1058, ¶ 28; Williams Aff., Exh. A at 119. The DNR did not address numerous citizen concerns 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. R. 957; Williams Aff., Exh. A at 54.

ii. 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.*, R. 967 (comments noting resident bald eagles near the marsh), 1007 (comments of John Sullivan, former DNR employee), Williams Aff., Exh. A at 58, 99, 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. R. 596-601; Williams Aff., Exh. A at 1-6. In the DNR's environmental analysis, it notes that eagles "use trees for nesting," R. 691, Williams Aff., Exh. A at 12, but provides a blanket dismissal of impacts on rare species without explaining what measures are going to be taken to protect those species. R. 695; Williams Aff., Exh. A at 16. 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. R. 982 (including attached comment letter by Alan Stankevitz of behalf of Citizens Acting for Rail Safety); Williams Aff., Exh. A at 62. The DNR's conclusion in its environmental analysis documents conflicts with the incidental take permit that the United States Army Corps of Engineers issued to BNSF after the BNSF permit was issued. R. 1193-94; Williams Aff., Exh. A at 124-25. The Corps' incidental take permit allows BNSF to take, disturb, or kill up to two bald eagles tending their nest per year. R. 1193; Williams Aff., Exh. A at 124. 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. R. 1193-94; Williams Aff.,

Exh. A at 124-25. 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.

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

Nearby residents already deal with the impact of trains travelling on BNSF's existing track, and several commenters raised concerns about increased noise, vibrations, and impacts to the nearby bluffs from more, heavier, and longer trains passing through a second BNSF track. *See, e.g.*, R. 1012 (comments of Joyce Arthur regarding fears about more severe shaking and cracking to her house and increased damage to the bluffs from vibrations when trains pass through); Williams Aff., Exh. A at 103. Commenters also raised concerns over air emissions from trains, including from train cars carrying hazardous chemicals. R. 894; Williams Aff., Exh. A at 36. The DNR did not address these secondary impacts in its environmental analysis.

iv. 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. R. 693; Williams Aff., Exh. A at 14. 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. R. 704-05; Williams Aff., Exh. A at 21-22. This fails in several respects. First, it ignores historical impacts even to the immediate environment affected. Commenters noted that the La Crosse River Marsh has already been reduced to half its size as a result of historical wetland fill. R. 974, 994, 1005, 1010, 1042; Williams Aff., Exh. A at 60, 95, 98, 102, 112. 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.*, R. 868, 1048; Williams Aff., Exh. A at 23, 113. Based on the comments, it seems that this Plan was developed to address the threat of continuing development on the La Crosse River Marsh and surrounding area, but the DNR never addressed the Land Use Management Plan in its environmental analysis.

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.

v. 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." R. 1038; Williams Aff., Exh. A at 110. Commenters raised similar concerns regarding the impact of a spill on the adjacent Mississippi River. R. 878; Williams Aff., Exh. A at 26. DNR's environmental analysis lacked any response to this concern from legislators.

vi. 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.*, R.

967, 1002, 1007, 1030, 1045; Williams Aff., Exh. A at 58, 126, 99, 106, 130. Commenters noted that the wildlife in the La Crosse River Marsh are the subject of ecological studies and environmental education programs. R. 962; Williams Aff., Exh. A at 55. Again, the environmental analysis from DNR made no mention of this potential secondary impact.

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

Commenters also raised concerns that increased noise and vibrations, the risk of spills and train derailments, along with impacts to wildlife in the marsh would impact neighbors' property values. *See, e.g.*, R. 977, 1005, 1044, 1045-46; Williams Aff., Exh. A at 61, 98, 129, 130-31. One of the Petitioners developed an analysis of the homes in the City of La Crosse that may be negatively affected by the BNSF project, and concluded that 18% of the homes in the city could be impacted, which could affect nine percent of the City's tax base or about 282 million dollars. R. 984; Williams Aff., Exh. A at 88. The DNR's environmental analysis did not address these secondary impacts.

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

According to an EPA estimate, one acre of wetlands typically provides approximately 8 million gallons of flood storage. R. 941; Williams Aff., Exh. A at 47. Unfortunately, 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.*, R. 1007, 1034, 1048; Williams Aff., Exh. A at 99, 107, 113. 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." R. 1046; Williams Aff., Exh. A at 131.

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. R. 685-86; Williams Aff., Exh. A at 8-9. 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. R. 690, 694; Williams Aff., Exh. A at 11, 15. 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." R. 694; Williams Aff., Exh. A at 15. 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.").

c. <u>The DNR prepared more detailed EAs and EISs for previous, similar projects and agency actions.</u>

One of the factors that the DNR uses to determine the appropriate level of environmental analysis for a project is the number and type of agency approvals required for the project. Wis. Admin. Code § NR 150.20(4)(b). This is consistent with the DNR's past practice, as explained below. The level of detail and the cumulative and secondary impacts that the DNR analyzed in

past EAs and EISs is instructive in comparison to the environmental analysis that the DNR prepared for the BNSF project. The BNSF project required floodplain zoning, runoff management, and wetland and waterway permits. R. 697; Williams Aff., Exh. A at 18. The BNSF project also required State Historical Preservation Office review and Natural Heritage Conservation review for the presence of threatened and endangered species. R. 697; Williams Aff., Exh. A at 18.

The DNR has a history of preparing EAs and EISs for projects requiring a wetland and waterway permit along with other DNR approvals or permits. The following are just two examples of EAs prepared for projects that required similar DNR approvals and also had either comparable wetland and waterway impacts (in the case of the Ashley Furniture project), or had similar potential secondary impacts regarding the transportation of hazardous materials (in the case of the Enbridge pipeline expansion project).

In 2005, the DNR prepared an EA for an Ashley Furniture Industries, Inc. expansion project ("Ashley project"). Williams Aff., Exh. C at 1. The DNR explained the action triggering the EA was Ashley's application "for approval from the [DNR] for waterway and wetland permits associated with a proposed facility expansion and construction of a compensatory wetland restoration site." Williams Aff., Exh. C at 1. The Ashley project would fill 14.58 wetland acres. *Id.* The project required a number of other permits from the DNR, including stormwater permits. Williams Aff., Exh. C at 3. The project was not expected to directly or indirectly impact threatened or endangered species. Williams Aff., Exh. C at 13. The DNR examined not only historical wetland impacts by the Ashley project, but also analyzed other wetlands within a five-mile radius of the Ashley project. Williams Aff., Exh. C at 16-17. The DNR noted that the proposed filling was a small area of wetland relative to existing wetlands

within a five-mile radius. Williams Aff., Exh. C at 16-17. The EA also analyzed the significance of any unknowns that create substantial uncertainty in predicting effects on the quality of the environment, and concluded that there were no significant unknowns. Williams Aff., Exh. C at 17.

In 2006, the DNR prepared an EA for the Enbridge Energy LP Southern Access Expansion Program Superior to Delevan Project ("Enbridge project"). Williams Aff., Exh. C at 24-143. The Enbridge project is certainly much larger in scope and in the acres of wetlands impacted than the BNSF project, but the two are similar in the types of DNR approvals required, Williams Aff., Exh. C at 32. The Enbridge project is also similar to the BNSF project in the types of potential secondary impacts to the environment, i.e., accidents and spills of hazardous materials that could harm surrounding waters and wetlands. In the EA, the DNR disclosed and analyzed the risk to groundwater and surface water from a malfunction or spill during pipeline operation, and assessed whether requiring additional valves along the pipeline would minimize potential impacts to sensitive environmental areas. Williams Aff., Exh. C at 72-73, 85-86.

These EAs, as well as others obtained by Petitioners, establish that the DNR's past practice for projects of similar scale and impacts that required similar DNR approvals as the BNSF project was to provide a much more in depth environmental analysis than that produced for the BNSF permit. The EAs produced for the Enbridge and Ashley projects may not have been perfect, but they certainly provide a picture of the type of environmental analysis the DNR has historically produced, which is in stark contrast to the environmental analysis produced for the BNSF permit.

d. <u>The DNR erred in refusing to prepare an EIS prior to issuing the BNSF Permit.</u>

The evidence in the BNSF Permit record indicates that an EIS was warranted for the BNSF project. The DNR's finding that it complied with WEPA in issuing the BNSF Permit without first preparing an 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).[9] 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

[9] 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."

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.

The DNR's conclusion that the BNSF Permit not a major action significantly affecting the quality of the human environment lacks an adequate factual basis in the record. R. 1060, FOF 6 (finding that the action was an equivalent analysis action and that it complied with WEPA, but failing to make a finding of no significant impact); Williams Aff., Exh. A at 117. Because the DNR's environmental analysis did not comply with WEPA, its findings that the BNSF project would not have a significant environmental impact and that an EIS was unnecessary are not based on substantial evidence in the record and are outside the range of discretion delegated to the agency by law. Wis. Stat. § 227.57(6), (8). Further, to the extent the DNR based its finding of no significant impact and refusal to prepare an EIS on the designation of wetland and bridge permits as equivalent analysis actions, that conclusion was erroneous and must be reversed because it is based on a legally invalid rule, Wis. Admin. Code § NR 150.20(2)(a)8., 11., as explained above. *See* Wis. Stat. § 227.57(5).

Since the DNR's environmental analysis did not produce a reviewable record to demonstrate its compliance with WEPA, its finding that it complied with WEPA through the equivalent analysis process for the BNSF Permit is not based on substantial evidence in the record. The Petitioners have a reasonable probability of success on the merits of their claim that the BNSF Permit must be set aside because the DNR failed to comply with WEPA when the DNR made its decision. *See* Wis. Stat. § 227.57(5), (6).

B. A stay is necessary to prevent irreparable injury and preserve the status quo.

1. *Petitioners satisfy this factor and are entitled to a stay because it is necessary to preserve the status quo.*

To the extent that this Court considers Petitioners' motion utilizing the *Grootemaat* factors, Petitioners need not prove irreparable injury, but must only show that a stay is necessary to maintain the status quo. *See Grootemaat*, 80 Wis. 2d at 520 ("[A]t the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile."). Any construction of the BNSF project that begins before conclusion of judicial review of the BNSF Permit would permanently alter the environmental "status quo." It will be scientifically and technically difficult, even unfeasible, to restore equivalent wetland quality and quantity once the BNSF project commences. *See, e.g., Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (wherein the court during a preliminary injunction analysis described environmental injuries generally as "difficult—if not impossible—to reverse.") (internal citations omitted). The Wisconsin Supreme Court has described environmental damage to the state's waters as permanent, stating that "[o]ur navigable waters are a previous natural heritage; once gone, they disappear forever." *See Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 632, 146 N.W.2d 577 (1966).

Because Wis. Stat. § 227.54 leaves this Court with significant discretion to consider the harm that a stay would prevent both for Petitioners and the public at large, the paragraphs below detail such harm.

2. *A stay of the BNSF Permit is necessary to prevent irreparable environmental impacts.*

It will be difficult or impossible to reverse environmental damage if the construction of the BNSF project begins during the pendency of judicial review.[10] The Wisconsin Supreme Court has favorably analyzed the imposition of a stay as a means of preventing such irreversible environmental damage. *See, e.g., Lake Beulah*, 335 Wis. 2d 47, ¶ 28 (Court ultimately agreed that "[a]fter-the-fact remedies would not be sufficient to protect public resources."); *Holtz & Krause, Inc., v. Dep't of Natural Res.*, 85 Wis. 2d 198, 206, 270 N.W.2d 409 (1978) ("The court's issuance of a stay provided protection for the petitioners during the judicial review process."). The Court has also defined irreparable injury as injury that is "not adequately compensable in damages." *Pure Milk Prod. Co-Op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W. 2d 691 (1979).

At the federal level, the Supreme Court has also analyzed environmental impacts as irreparable once damage occurs. *See, e.g., Michigan v. U.S. Army Corps of Engineers*, 667 F.3d at 788 (environmental injuries generally are "permanent or at least of long duration, i.e., irreparable") (quoting *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987)). In sum, irreversible and non-compensable damage to the environment will result if the BNSF project moves forward during judicial resolution of Petitioners' challenge to the BNSF Permit.

3. Irreparable harm will result to Petitioners' interest in DNR's compliance with WEPA.

[10] Petitioners' burden of establishing irreparable harm is lessened because BNSF is the only party that will be primarily impacted if the BNSF Permit remains ineffective as its legality is challenged. *See, e.g., Shearer v. Congdon*, 25 Wis. 2d 663, 668-69, 131 N.W.2d 377 (1964) ("[W]here one party is prohibited from acting only until the question of legal rights can be resolved, a showing of irreparable damage would not be as critical.").

Petitioners will also experience non-compensable harm to their interest in DNR's compliance with WEPA should the BNSF Permit become effective prior to conclusion of judicial review. The Wisconsin Supreme Court has found that a trial court's analysis of whether to grant an injunction should account for the "substantial . . . interest" that the public has in enforcement of environmental protection laws. *See Forest County, v. Goode*, 219 Wis. 2d 654, 684, 579 N.W. 2d 715 (1998) "In deciding whether to deny a request for an injunction based upon a shoreland zoning ordinance violation, the circuit court should . . . consider[] . . . the substantial interest of the citizens of Wisconsin in the vigilant protection of the state's shorelands . . . [and] the substantial public interest in enforcing its shoreland zoning ordinances."). Although *Forest County* involved a request for permanent injunctive relief, other decisions indicate the Court's willingness to grant stays to allow for more thorough analysis of the State's compliance with environmental statutes and regulations. *See generally, Lake Beulah*, 335 Wis. 2d 47, ¶ 28, *Holtz & Krause, Inc.*, 85 Wis. 2d 198 at 206.

The Court should take particular note of the public interest in the matter at hand because these applicable statutory provisions have an unambiguous intent to encourage public participation and protect the public interest in a healthy environment. The Wisconsin Environmental Policy Act declares a clear intent to encourage the consideration of the environment in agency decision-making, stating, for example, a state policy to "[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 1971 Wis. Act. 274, Section 1. Wisconsin Stat. § 281.11, as a final example, clarifies "the express policy of the state to . . . accomplish the greatest result for the people of the state as a whole."

Both Petitioners and the general public therefore have an interest in the compliance with environmental laws, including compliance with WEPA as the DNR exercises its permitting authority under Wis. Stat. chapters 30 and 281. The need for a stay in this matter is heightened due to the DNR's request that this Court resolve the question of the legality of the Rule before deciding whether the DNR properly issued the BNSF permit. The DNR's request, if granted, would result in an extended and bifurcated period of judicial review. Without a stay to the efficacy of the BNSF Permit, this longer timeframe for judicial review would increase the extent of irreversible environmental damage as well as damage to the Public and Petitioners' interests.

In addition, without a stay of the BNSF Permit, BNSF may be able to complete its project before this court determines whether the Permit is valid. Petitioners have an interest in obtaining a decision from this Court regarding the legality of the BNSF Permit and the DNR's compliance with WEPA before their claims become moot. This is especially true in cases such as this where damages are an ineffectual or unavailable remedy. *See, e.g., PRN Ass'n. v. State Dep't of Admin.*, 2009 WI 53, ¶ 48, 317 Wis. 2d 656, 766 N.W.2d 559 (providing that a temporary injunction might be necessary to "avoid rendering ineffective a possible judgment") (quoting *Aqua–Tech, Inc. v. Como Lake Protection & Rehabilitation Dist.*, 71 Wis. 2d 541, 552, 239 N.W.2d 25 (1976)).

C. Lack of Adequate Remedy at Law.

Petitioners are entitled to a stay of the BNSF Permit during judicial review because damages would not constitute an adequate remedy for the injury that Petitioners would suffer if this Court does not grant the requested stay. *See, e.g., Grootemaat*, 80 Wis. 2d at 524. *See also Amoco Prod. Co.*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages."); *Sierra Club v. Franklin County Power of Illinois,*

LLC, 546 F.3d 918, 936 (7th Cir. 2008) (wherein the court found that award of damages is not likely to compensate for "decrease in recreational and aesthetic enjoyment" of environmental resources).

Any future award of damages could not compensate for the aforementioned, irreversible environmental harm or for Petitioners' interest in the DNR's compliance with WEPA as it exercises its authority to issue wetland and bridge individual permits. At a minimum, in a case such as this involving environmental damage that is difficult to measure in monetary terms, this Court has discretion to grant injunctive relief. *See, e.g.*, *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 168, 98 N.W.2d 415 (1959) ("The remedy at law may be inadequate because of the difficulty o[r] impossibility of measuring the damages.").

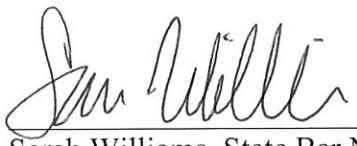
Finally, Petitioners were denied even a limited, administrative remedy at law when DNR denied Petitioners' request for a contested hearing pursuant to Wis. Stat. §§ 30.209(1m)(c), 281.36(3q)(d)1. This Court alone therefore has jurisdiction to stay the efficacy of the BNSF Permit during the pendency of judicial review and any administrative proceedings that follow based on orders of this Court.

CONCLUSION

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

Respectfully submitted this 2nd day of June, 2015.

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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