STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY
BRANCH 3

SAUK PRAIRIE CONSERVATION ALLIANCE,

Petitioner,

v.

Case No. 16-CV-0642
16-CV-0662
Administrative Agency Review: 30607

WISCONSIN NATURAL RESOURCES BOARD,

and

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR PARTIAL STAY AND, ALTERNATIVELY, MOTION FOR INJUNCTIVE RELIEF PENDING REVIEW

This Court should deny the Petitioner Sauk Prairie Conservation Alliance's (the Alliance) request for a partial stay of, and alternatively, a temporary injunction prohibiting—to use the Alliance's term—"high-impact" uses[1] allowed in the Department of Natural Resources' (DNR) Draft Master Plan and Final Environmental Impact Statement (Master Plan) for the Sauk Prairie State

[1] As discussed in Part V of this Brief, the Alliance has not clearly defined what a "high-impact" use is. This Brief uses the Alliance's term "high-impact" in order to be responsive and to address those uses that the Alliance appears to consider "high-impact" uses.

Recreation Area (SPSRA). This Court should deny the Alliance's request for a partial stay because the Alliance has not shown that it is likely to succeed on the merits of its Petitions for Judicial Review and the Alliance has not shown it will suffer irreparable harm without a partial stay. In contrast, a partial stay will harm the public and other interested parties.

INTRODUCTION

The Alliance's Petitions for Judicial Review challenge the Wisconsin Natural Resources Board's (NRB) approval of the Master Plan, a comprehensive, 15-year plan for the development and management of SPSRA, and DNR's determination that it complied with the Wisconsin Environmental Policy Act (WEPA determination) in developing the Master Plan. SPSRA is a recently designated state recreation area composed of lands that were formerly part of the Badger Army Ammunition Plant (BAAP), a chemical and munitions manufacturing facility operated by the Federal government until it was decommissioned in 1997. Master Plan at viii–x.

Over a five-year planning process, DNR considered a variety of recreational uses and land management options tailored to the former BAAP lands and conducted the most extensive public involvement effort in DNR's recent master planning history. *See id.* at 165–66. In response to significant public input—including strenuous opposition from the Alliance—DNR did not include a shooting range and all-terrain vehicle use in the Master Plan and placed limits on other recreation uses it did include in the Master Plan, including dual-sport motorcycling, Class 2 dog training, and model rocketry. The resulting Master Plan calls for restoring the former

BAAP lands to native oak woodland, savanna, and grasslands to create a natural ecological continuum from the Baraboo Hills to the Wisconsin River, and strikes a careful, deliberate balance between multiple recreation uses at the site with common-sense limits to ensure meaningful recreation experiences for the public.

Unsatisfied with DNR's decision to allow uses in the Master Plan that the Alliance objects to—but were specifically requested by other members of the public—the Alliance filed these Petitions for Judicial Review and now asks this Court for a partial stay of what it calls "high-impact" uses in the Master Plan.

This Court should deny the Alliance's request for a partial stay under Wis. Stat. § 227.54, and alternatively, a temporary injunction because the Alliance has failed to demonstrate that traditional equitable factors weigh in favor of a partial stay. Moreover, a temporary injunction is not an available remedy in a Wis. Stat. ch. 227 action.

The Alliance is unlikely to succeed on the merits of its Petitions because DNR has wide discretion to manage SPSRA, exercised that discretion reasonably, and complied with its master planning process and WEPA. DNR's Master Plan and WEPA determination are agency actions that rest squarely within DNR's expertise and are subject to great weight deference upon review by this Court.

Moreover, the Alliance has not demonstrated that it will suffer irreparable harm without a partial stay because the Alliance's members can continue to recreate at SPSRA with limited, if any, effects from the "high-impact" uses allowed in the Master Plan. If the Alliance's members want to recreate on property that only allows

"silent" recreation, they can recreate on over 30,000 acres of publicly accessible land that are largely open for only silent recreation in Sauk County—which is the most of any county in southern Wisconsin and includes immediately adjacent Devil's Lake State Park. *See id.* at 192.

In contrast, the public will suffer harm if this Court issues a partial stay. A partial stay will force the Wisconsin Army National Guard (WIARNG) to lose valuable training time flying farther to conduct helicopter training missions that ensure it is prepared to protect the public in case of emergency. A partial stay will also stop members of the public who explicitly requested that DNR allow their preferred recreation at SPSRA from engaging in that activity, the majority of which—unlike the Alliance's preferred silent recreation—are not allowed on nearby public lands. Because the equitable factors weigh heavily in favor of denying a stay, this Court should deny the Alliance's Motion for a Partial Stay under Wis. Stat. § 227.54.

ARGUMENT

This Court should deny the Alliance's request for a partial stay, and alternatively, a temporary injunction of so-called "high-impact" uses allowed under the Master Plan. First, the Alliance cannot obtain a temporary injunction because it conflicts with the explicit remedy included in Wis. Stat. ch. 227 to temporarily halt the effectiveness of an agency's decision. In ruling upon the Alliance's request for a partial stay under Wis. Stat. § 227.54, this Court should weigh traditional equitable factors, specifically: (1) the Alliance's likelihood of success on the merits of its Petitions, (2) whether the Alliance will suffer irreparable harm if a stay is not

granted, and (3) whether the public will be harmed if a stay is granted. The Alliance has not shown that these equitable factors weigh in favor of this Court granting a partial stay. Finally, the Alliance has not adequately defined "high-impact" uses so that this Court can issue a workable stay that DNR can implement.

I. A temporary injunction under Wis. Stat. § 813.02(1)(a) is not available in this judicial review action under Wis. Stat. ch. 227.

The Alliance cannot obtain a temporary injunction under Wis. Stat. § 813.02(1)(a) because a temporary injunction conflicts with the specific remedy authorized by the Legislature in Wis. Stat. ch. 227. The Alliance's Petitions for Judicial Review specifically challenge the Master Plan and WEPA determination under Wis. Stat. §§ 227.52 and 227.53. Dec. 20 Pet. 1; Dec. 7 Pet. 1.[2] The Alliance's Motion requests a partial stay under Wis. Stat. § 227.54, and alternatively, a temporary injunction under Wis. Stat. § 813.02(1)(a). Pet'r Mot. 2. Judicial review actions follow the procedures outlined in Wis. Stat. ch. 227. The civil procedure statutes can be used in a limited manner to augment those procedures but only when they do not conflict with Wis. Stat. ch. 227. *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 641, 511 N.W.2d 874 (1994) ("[C]h. 227 'contemplates the *limited* use of those civil procedure statutes which do not conflict with ch. 227'"(citation omitted)).

A temporary injunction conflicts with the procedures outlined in Wis. Stat. ch. 227 because Wis. Stat. ch. 227 contains a specific remedy if a petitioner seeks to limit

[2] The Alliance's December 7 Petition for Judicial Review and December 20 Petition for Judicial Review raise substantially the same claims. For brevity, this Brief will cite the Alliance's December 20 Petition throughout unless noted.

the effect of an administrative decision during judicial review. That exclusive remedy is a stay under Wis. Stat. § 227.54. The Court should therefore deny the Alliance's request for a temporary injunction and instead consider whether the Alliance has demonstrated that a stay under Wis. Stat. § 227.54 is warranted. For the reasons discussed below, it is not.

II. The Court should weigh traditional equitable factors, including the moving party's likelihood of success on the merits and harm to the parties and the public, before issuing a stay under Wis. Stat. § 227.54.

Wisconsin Stat. § 227.54 states this Court "may order a stay upon such terms as it deems proper." The Alliance's Brief accurately characterizes the lack of caselaw interpreting when a stay should be issued under Wis. Stat. § 227.54. Pet'r Br. 10–11. In the absence of specific direction from the Legislature or the courts, the State recommends this Court draw from standards that courts use to analyze requests for similar equitable remedies. Those remedies require the court to consider traditional equitable factors, including the moving party's likelihood of success on the merits and harm to the parties and the public.

A request for a stay under Wis. Stat. § 227.54 is most analogous to a request for a stay pending appeal under Wis. Stat. § 808.07. As counsel for the Alliance stated in his December 20, 2016 cover letter to the Court, "Appeals of administrative actions under Ch. 227 are just that: appeals. Effectively, the circuit court sits as an appellate court and reviews the administrative decision of the agency below." As such, the Alliance's request for a partial stay pending this Court's review is equivalent to a party requesting a stay of relief pending appeal under Wis. Stat. § 808.07. A court

may issue a stay of relief pending appeal when: (1) the moving party makes a strong showing that it is likely to succeed on the merits of the appeal; (2) unless a stay is granted, the moving party will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

A request for a stay under Wis. Stat. § 227.54 is also comparable to a temporary injunction under Wis. Stat. § 813.02(1)(a). A court may issue a temporary injunction under Wis. § 813.02(1)(a) when: (1) the moving party is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the moving party has no other adequate remedy at law; (3) the temporary injunction is needed in order to preserve the status quo; and (4) the moving party has a reasonable probability of success on the merits. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

The *Gudenschwager* and *Werner* factors both include an analysis of the moving party's likelihood of success on the merits and whether the moving party is likely to suffer irreparable harm. At a minimum, the State recommends the Court consider these factors before issuing a stay under Wis. Stat. § 227.54. Additionally, the State recommends the Court consider the impacts of a stay on other interested parties and the public—as the *Gudenschwager* factors do—because the Master Plan is an administrative decision that impacts any member of the general public who wants to visit SPSRA. Therefore, in ruling upon the Alliance's request for a stay under Wis. Stat. § 227.54, this Court could weigh all of the *Gudenschwager* and *Werner* factors,

but should pay particular attention to: (1) the Alliance's likelihood of success on the merits of its Petitions; (2) whether the Alliance will suffer irreparable harm without a stay; and (3) whether the public will be harmed if a stay is granted.

III. The Alliance has not satisfied its burden of demonstrating that a stay is equitably necessary under Wis. Stat. § 227.54.

State law presumes that an administrative agency's decision is *not* stayed during the pendency of judicial review. *See* Wis. Stat. § 227.54 ("The institution of the proceeding for review shall not stay enforcement of the agency decision."). As the party moving the Court for a stay, the Alliance bears the burden of demonstrating that, on balance, equitable factors weigh in favor of this Court issuing a partial stay. *See Gudenschwager*, 191 Wis. 2d at 440 (moving party bears the burden for a stay pending appeal); *Werner*, 80 Wis. 2d at 520 (moving party bears the burden for a temporary injunction). The Alliance has failed to meet this burden.

A. The Alliance has failed to show that it is likely to succeed on the merits of the Petitions for Judicial Review.

The Alliance has failed to show that it is likely to succeed on the merits of its Petitions for Judicial Review, which claim the NRB and DNR violated the master planning process in Wis. Admin. Code ch. NR 44, WEPA, the National Environmental Policy Act (NEPA), and other related requirements.

1. The NRB's approval of the Master Plan and DNR's WEPA determination are subject to great weight deference upon review.

The Alliance is challenging determinations that fall squarely within DNR's expertise to manage state lands for the benefit of the public and are determinations

which the Legislature has charged DNR with making. *See* Wis. Stat. §§ 1.11(2), 23.091(2); Wis. Admin. Code chs. NR 44, 150. Therefore, the determinations are subject to great weight deference on review by this Court. *See, e.g.*, *Clean Wis., Inc. v. Pub. Serv. Comm'n of Wis.*, 2005 WI 93, ¶¶ 39, 190, 282 Wis. 2d 250, 700 N.W.2d 768 (2005) (listing factors for great weight deference and holding the Public Service Commission's determination that an EIS was adequate received great weight deference). Under great weight deference, the Court should uphold DNR's interpretation of a statute so long as it is reasonable, even if a more reasonable interpretation exists, and should uphold DNR's interpretation and application of its own rules, including Wis. Admin. Code chs. NR 44 and 150, unless plainly erroneous or inconsistent. *See id.* ¶¶ 41, 45. The NRB's approval of the Master Plan and DNR's WEPA determination were reasonable, not plainly erroneous, and therefore should be upheld by this Court when it reaches the merits of the Petitions.

2. DNR developed the Master Plan in compliance with Wis. Admin. Code ch. NR 44.

DNR is responsible for providing a full range of outdoor recreation for the public across its portfolio of public lands. Master Plan at 177. The Master Plan is the culmination of a years-long, public, master planning process during which DNR considered regional and local ecological and recreational needs that could be best served at SPSRA in light of DNR's responsibility to provide a range of outdoor recreation experiences to the public. *See id*. at 5–6, 177.

DNR has broad authority and discretion under Wis. Stat. § 23.091(1) to "acquire, develop, operate, and maintain state recreation areas," and DNR used its

master planning process, which is outlined in Wis. Admin. Code ch. NR 44, to create the Master Plan, a specific, 15-year plan for the development and operation of SPSRA. The master planning process requires DNR to analyze land management, recreational use, and facility development alternatives at a property in light of the property's designation; the best available information regarding the purposes and benefits of the property; and an analysis of economic, ecological, and social conditions, opportunities, and constraints of the property on a local and regional scale. Wis. Admin. Code § NR 44.04(8)(c).

The NRB approved establishing SPSRA on former BAAP lands in 2002. Master Plan at 112. In 2004, DNR applied to the National Park Service (NPS)'s Federal Lands to Parks Program to receive part of the former BAAP and began receiving parcels from the NPS in 2011. *Id*. at 1.

In July 2012, DNR issued the Regional & Property Analysis for SPSRA (RPA), which analyzed existing resources and opportunities at SPSRA and in the broader Western Coulee and Ridges landscape region. Dec. 20 Pet. Ex. 5, at 3. The RPA concluded SPSRA offered a significant opportunity to manage and restore an ecological corridor from the Baraboo Hills to the Wisconsin River, including surrogate grassland and oak savanna, and an opportunity to diversify the range of recreational experiences available in the larger Baraboo Hills/Devil's Lake landscape. *Id*. at 49–50. The RPA recommended DNR consider motorized and nonmotorized trail networks and nontraditional outdoor recreation, including rocketry, a shooting range, dog parks, and other recreation activities not typically found on DNR land. *Id*. DNR

received public comments on the RPA that supported traditional recreation (bird watching, hiking, biking, and hunting) and comments that supported nontraditional recreation, including motorized trails for motorcycles or off-road vehicles, dog training and trialing, and a shooting range. DNR, Summary of Public Comments on RPA 1–2 (Sept. 2012) (Pohlman Aff. Ex. A).

In 2013, DNR released the Draft Vision, Goals, and Conceptual Alternatives for SPSRA (Draft Vision) which included three conceptual alternatives for SPSRA: a no action alternative, ecological restoration emphasis alternative, and outdoor recreation emphasis alternative. Dec. 20 Pet. Ex. 9, at 2–5. The outdoor recreation emphasis alternative included traditional recreation uses as well as motorized recreation for ATVs, motorcycles, and off-highway vehicles, and a shooting range. *Id*. at 4. Public comments on the Draft Vision focused primarily on recreation uses and typically either supported or opposed motorized uses and the shooting range. DNR, Summary of Public Comments on Draft Vision 3–4 (Nov. 2013) (Pohlman Aff. Ex. B).

In 2015, after taking into consideration the extensive public input, DNR released the 2015 Draft Master Plan and Environmental Impact Statement (2015 Draft Master Plan), which included traditional recreation uses, rocketry, limited dual-sport motorcycle use, and a Class 2 dog training area. Dec. 20 Pet. Ex. 17, at xi–xv. DNR excluded an ATV riding area and specific proposal for a shooting range due to public opposition in earlier comment opportunities. *Id*. The 2015 Draft Master Plan also proposed to manage and restore an ecological continuum of oak woodland to grassland across SPSRA and combat invasive species that have taken over large

portions of the site. *Id*. at xv. Public comments on the 2015 Draft Master Plan focused primarily on recreation uses, and in particular, on rocketry, dual-sport motorcycle use, and the Class 2 dog training area. DNR, Summary of Public Comments on 2015 Draft Master Plan 4 (Oct. 2015) (Pohlman Aff. Ex. D).

In November 2016, DNR issued the Master Plan, and the NRB approved the Master Plan on December 14, 2016. In response to public comments on rocketry, the NRB added an additional restriction to the Master Plan that prohibited high-powered rockets but continued to allow model rockets. The final Master Plan is the outcome of an extensive planning process that included significant public participation and modifications in response to public comments, was conducted in compliance with Wis. Admin. Code NR 44, and resulted in a reasonable balance of recreation uses at SPSRA.

3. DNR complied with WEPA and is not subject to NEPA.

DNR complied with all WEPA requirements in Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150 in developing the Master Plan and properly issued the WEPA determination. WEPA is designed to ensure state agencies make informed decisions and requires state agencies to consider environmental consequences of proposed actions as well as alternatives and their environmental consequences. Wis. Stat. § 1.11; *see Clean Wis., Inc.*, 2005 WI 93, ¶ 188.

DNR promulgated regulations in Wis. Admin. Code ch. NR 150 to carry out its WEPA obligations. Pursuant to Wis. Admin. Code § NR 150.20(2)(a)(1), DNR is not required to complete an environmental impact statement (EIS) for property master

plans because the master planning process already integrates the robust analysis and public input processes that are required in an EIS. However, due to the "timing and uniqueness" of the SPSRA master plan, DNR went beyond what is required by Wis. Admin. Code ch. NR 150 and voluntarily chose to complete an EIS. *See* Master Plan at viii.

Contrary to what the Alliance implies in its Petitions, WEPA "does not directly control agency discretion" but instead is "an important procedural step" that agencies must complete. *Clean Wis., Inc.*, 2005 WI 93, ¶ 188. If an agency's WEPA analysis shows potential adverse environmental effects of the agency's action, "WEPA does not prevent an agency from determining that other values outweigh the environmental costs." *Id*. ¶ 188; *see* Wis. Admin. Code § NR 150.30(1)(b) ("The EIS is an informational tool that does not compel a particular decision by the agency[.]"). Courts review an EIS "in light of the 'rule of reason,' which requires an EIS 'to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project . . . ." *Clean Wis., Inc.*, 2005 WI 93, ¶ 191.

In the Master Plan, which includes the final EIS, DNR analyzed: the history and features of the SPSRA property and surrounding region (Master Plan ch. III); environmental impacts of the ecological management, facilities development, and recreation uses in the Master Plan, including the "high-impact" uses (Master Plan ch. IV); alternatives for the ecological management, facilities development, and recreation uses at SPSRA (Master Plan ch. V); and DNR responded to public comments (Master Plan ch. VI). DNR analyzed reasonably foreseeable effects to the

environment from the Master Plan based on available information. *See, e.g.*, Master Plan at 139 (analyzing potential impacts of dual-sport motorcycles to terrestrial habitats and species). Among other alternatives, DNR specifically analyzed a "minimal management" alternative and a "limited recreational use" alternative, which included only those recreational uses that were uncontroversial. *Id.* at 169–70 (minimal management), 177–78 (limited recreation). DNR adequately analyzed the resources at SPSRA, the environmental impacts of the Master Plan, and the environmental impacts of alternatives to the Master Plan. DNR's combined Master Plan and EIS analysis therefore complies with all of the requirements of WEPA.

The Alliance appears to claim NEPA, the federal analogue to WEPA that applies to federal agencies, applies to DNR and the NRB's actions. Dec. 20 Pet. ¶¶ 56–60. However, NEPA does not apply to DNR or the NRB as they are State—not federal—agencies. *See* 42 U.S.C. § 4332 ("[A]ll agencies of the *Federal Government* shall— . . . (C) include in every recommendation or report on . . . *major Federal actions* significantly affecting the quality of the human environment, a detailed statement . . . ." (emphasis added)); 40 C.F.R. § 1508.18(a); *see also Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1101 (9th Cir. 2007).

4. The Alliance fundamentally misunderstands or mischaracterizes key documents to support its assertions that DNR and the NRB acted unlawfully.

The Alliance paints a compelling but misleading picture that the Master Plan and WEPA determination are unlawful by consistently misunderstanding or mischaracterizing key documents. To the extent the Alliance's likelihood of success

hinges on its interpretation of these documents, the following section demonstrates the Alliance's interpretations are unsupportable.

a. Badger Reuse Committee Final Report

In the December 20 Petition, the Alliance strongly implies the Badger Reuse Committee agreed that no "high-impact" uses would be allowed at SPSRA. The December 20 Petition states: "And nowhere in the Badger Reuse Committee's Reuse Plan - which constitutes its final recommendations - does the Badger Reuse Committee recommend using the property for a gun range, motorcycle races, dog training with guns, or helicopter training." Dec. 20 Pet. ¶ 18.

However, the Badger Reuse Committee—an advisory group that issued a nonbinding report on the reuse of BAAP—never "recommended" any particular recreation activities at BAAP. Instead, the Badger Reuse Committee reached consensus on only one criterion related to recreation, criterion 5.3, which states:

> Recreational activities should focus on Badger's natural and cultural features and values. Activities should be low-impact in nature and should be compatible with other uses and overall management goals. Efforts shall be made *to accommodate appropriate recreational activities, but these activities shall have no significant detrimental impacts on the cultural and natural features of the property*.

Dec. 20 Pet. Ex. 15, at 26 (emphasis added). The Badger Reuse Committee never reached consensus on a recommendation for specific recreation uses, but the Badger Reuse Committee did include Plan Element 5.3, which listed recreation uses it was considering at BAAP. These included "hiking, biking, wildlife viewing, tent camping, cross-country skiing, horseback riding, permit-based/managed hunting, and

snowmobiling and *all-terrain vehicle along the existing peripheral fence trail*." *See id.* (emphasis added).

Plan Element 5.3 demonstrates the Badger Reuse Committee was contemplating motorized recreation at BAAP even at this early stage, but did not reach consensus on specific uses at BAAP. This fact is not reflected in the Alliance's Petitions, but is consistent with DNR's experience in the subsequent master planning process that there are competing interests among user groups at BAAP.

b. Program of Utilization and Deed Restrictions

The Alliance characterizes the Program of Utilization as containing a final and exclusive list of recreation uses that DNR already determined would be allowed at SPSRA. In the December 20 Petition, the Alliance asserts:

> [T]he [Program of Utilization] - a plan which the WDNR itself prepared and submitted to the NPS as part of its [Federal Lands to Parks] application prior to the property being conveyed - includes only the following uses: "hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, ecological restoration, environmental education, and cultural/historic interpretation."

Dec. 20 Pet. ¶ 25. However, the Program of Utilization also explicitly states that DNR would go through the master planning process to determine recreation uses at SPSRA:

> Many groups with varying interests in Badger share a common goal with the WDNR to convert it to a recreational property with low impact recreation (hiking, picnicking, primitive camping) prairie, savanna and grassland restoration, environmental education and cultural/historical interpretation, with the potential for an educational center. *The specifics for how the property will be developed and managed will come from a master planning process the WDNR is required to prepare*. However, these are the types of uses we'd anticipate would come out of the planning process.

Dec. 20 Pet. Ex. 4, at 10 (emphasis added). If the Program of Utilization established an exclusive list of allowed recreation uses as the Alliance claims, then the master planning process, which DNR said it would complete in the Program of Utilization, would have been a futile, meaningless exercise because the recreational uses at SPSRA had already been predetermined. This is not a plausible interpretation of the Program of Utilization.

The Alliance similarly misunderstands or mischaracterizes the language in the deeds conveying BAAP lands to the State. In the December 20 Petition, the Alliance asserts:

> The high-impact uses are outside the scope of the purposes for which the GSA conveyed the property to the NPS, outside of the scope of the purposes for which the NPS conveyed the property to the WDNR and are contrary to the Area's deed restrictions.

Dec. 20 Pet. ¶ 63. The deeds do not so limit DNR's ability to manage SPSRA. The deeds' restrictions explicitly require DNR to comply with the Program of Utilization, and as described above, the Program of Utilization states DNR will complete the master planning process to determine specific recreational uses, which it did.

The deeds' restrictions also explicitly recognize DNR and NPS's ability to amend the original Program of Utilization and provide a process to do so:

> That the *property shall be used and maintained* exclusively for public park or public recreation purposes for which it was conveyed in perpetuity . . . and *as set forth in the program of utilization and plan contained in [the State's] application* submitted by the [State] dated June 7, 2004 and amended December 2, 2004, *which program and plan may be amended from time to time at the request of either the [NPS] or [State], with the written concurrence of the other party*, and such amendments shall be added to and become a part of the original application.

Dec. 20 Pet. Ex. 2, § 1.; Dec. 20 Pet. Ex. 3, § 1. (emphasis added). Therefore, even if the Master Plan was not consistent with the original Program of Utilization, the deeds' restrictions allow the Program of Utilization to be amended. DNR and NPS made such an amendment during the Master Plan approval process. In a December 8, 2016 letter to DNR, the NPS stated:

> Once [the Master Plan] has been approved by your Natural Resources Board, *we will consider the plan to be an amendment to the Program of Utilization (POU) contained in the state's application for the property and referenced in the deeds which transferred the property to the state* and will guide the development of the site going forward.

Potts Aff. Ex. 1 (emphasis added). To the extent the Alliance asserts the original Program of Utilization controls and limits recreation uses at SPSRA, the Program of Utilization has been amended to explicitly incorporate the Master Plan and the uses it allows.

In the December 20 Petition, the Alliance asserts: "The [Federal Lands to Parks] program also imposes use restrictions on deeded property, and if the WDNR does not comply with these use restrictions, federal law and the deeds conveying the property provide that ownership of the Area will revert back to the federal government." Dec. 20 Pet. ¶ 22. The Alliance supports this assertion with citations and incomplete parenthetical quotations from 40 U.S.C. § 550 (e)(4)(A) and the deed restrictions. *Id*.

The Alliance omits a few key words from its quotations to create the misimpression that the NPS's reversionary interest is automatic. It is not. The deed restrictions and 40 U.S.C. § 550(e)(4)(A) state (with the words omitted by the Alliance in italics): "In the event there is breach of any of the conditions and covenants herein

. . . all right, title and interest in and to the said premises shall revert to and become the property of the [NPS] *at its option* . . . ." 40 U.S.C. § 550(e)(4)(A); Dec. 20 Pet. Ex. 2, § 18.I.19; Dec. 20 Pet. Ex. 3, § 18.I.19 (emphasis added). The deed restrictions and 40 U.S.C. § 550(e)(4)(A) not only require that the use restrictions, or Program of Utilization, be violated, but that NPS exercise its option prior to the property reverting back to the federal government. Contrary to the impression left by the December 20 Petition, there is no automatic reversion if DNR does not comply with the Program of Utilization.

c. Wisconsin Legislative Council Memorandum

In the December 20 Petition, the Alliance asserts: "[T]he nonpartisan Wisconsin Legislative Council looked into [allowable recreational activities at SPSRA], and in December of 2012, agreed with the Petitioner's analysis that the property could only be used for low-impact recreational uses." Dec. 20 Pet. ¶ 31. This is simply incorrect.

The Wisconsin Legislative Council memorandum actually stated: "The program of utilization also provides that *the eventual allowed uses of the property will be identified in the DNR's master planning process for the property*. The language used in the relevant documents appears to provide some degree of flexibility to the DNR in defining how the property will be used." Dec. 20 Pet. Ex. 8, at 1 (emphasis added). The bipartisan Legislative Council did not agree with the Alliance that only "low-impact" uses would be allowed at SPSRA.

d. General Services Administration's 2003 EIS

Finally, in the December 20 Petition, the Alliance asserts: "In the end, the *2003 EIS and the [General Services Administration (GSA)] selected Scenario A as its preferred alternative*, which was titled 'Low Intensity Use' and 'draws upon the values, criteria, and plan elements established by the Badger Reuse Committee.'" Dec. 20 Pet. ¶ 19 (emphasis added). This is also incorrect.

The GSA did not select Scenario A as its preferred alternative because Scenario A was not a proposed alternative at all. The GSA's 2003 EIS only considered two alternatives: (1) the GSA's preferred alternative that the federal government dispose of BAAP to the State and others, or (2) the federal government retain ownership of BAAP. Dec. 20 Pet. Ex. 14, at E-10.

Under alternative one, which was to divest BAAP to the State and others, the GSA EIS assumed three "land use scenarios" might occur at BAAP so that GSA could evaluate indirect impacts from alternative one. *Id*. at E-10, 4-18. Scenario A was based on the Badger Reuse Committee Report, while Scenario B and Scenario C included varying amounts of commercial and industrial activity that was suited to BAAP. *Id.* at E-12–15, E-18. The GSA EIS determined that indirect impacts from any of the three scenarios would be negligible because all of the activities in all three scenarios, which included commercial and industrial activities, were "either consistent or comparable with the surrounding land uses, current zoning, and historical uses of Badger AAP." *Id*. at E-18.

Members of the Alliance who also submitted affidavits accompanying the Motion for a Partial Stay submitted comments specifically requesting that GSA make

Scenario A more consistent with the Badger Reuse Committee Report and adopt it as the preferred alternative. *Id.* at 4-1–4-4 (comments submitted by Donna Stehling and Mimi Wuest in support of Scenario A; Alliance members William Stehling and Frank Piraino also submitted comments). GSA responded that Scenario A would not be the preferred alternative:

> The Draft EIS evaluates only two alternatives, the Disposal Alternative (also known as the Proposed Action or Preferred Alternative) and the No Action Alternative. The scenarios presented under the Disposal Alternative were developed as a way of evaluating a range of possible land uses at Badger AAP under the Proposed Action, and were not meant to provide definitive land uses or vision for the future of the site.

Id. at 4-20, 4-26.

The Alliance's assertions in its Petitions for Judicial Review are largely based on misunderstandings or mischaracterizations of key documents that create the impression that DNR and the NRB acted unlawfully. A thorough and accurate review of these documents demonstrates DNR and the NRB complied with the master planning process and WEPA and that the Master Plan is consistent with the Program of Utilization and deeds' restrictions.

B. The Alliance has failed to show that it will suffer irreparable harm if a partial stay is not granted.

Neither the Alliance nor its members will suffer irreparable harm if this Court rejects the requested stay of so-called "high-impact" uses in the Master Plan. The Alliance contends the "high-impact" uses will greatly disturb the Alliance members' use of SPSRA, cause irreversible and irreparable environmental damage, and harm the Alliance's conservation efforts. Pet'r Br. 19–20. The Alliance supports its allegations by citing the Master Plan's discussion of potential impacts that particular

recreational uses could have at SPSRA. Pet'r Br. 19–21. However, the Alliance fails to present any independent evidence of concrete, significant, or likely irreparable harm that will occur if the "high-impact" uses are not stayed, and the Alliance's reliance on the Master Plan's discussion of potential impacts to show irreparable harm is misplaced because the Master Plan places specifically tailored restrictions on uses that address and mitigate potential impacts, including impacts to the environment. Even if the Alliance's members' recreational experiences at SPSRA are affected by the "high-impact" uses, they can recreate at numerous, nearby, publicly accessible lands that do not allow "high-impact" uses. A partial stay is not necessary because the Alliance will suffer little, if any, harm without a stay.

1. The Alliance's affidavits show WIARNG's helicopter training has not caused irreparable harm to its members in the past and will not do so in the future.

Based on the Alliance's affidavits supporting its Motion for a Partial Stay, WIARNG's ongoing helicopter training has not affected—let alone irreparably harmed—the Alliance's enjoyment of SPSRA. The Alliance's affidavits describe how the affiants have freely engaged in enjoyable recreational activities, such as birding and hiking, and completed prairie restoration for years and even decades. *See* Anthony Aff. ¶ 5 (four years prairie restoration); Meine Aff. ¶ 11 (20 years quiet recreation); Wuest Aff. ¶¶ 5, 12 (20 years conservation efforts and years of restoration).

WIARNG has performed helicopter training at BAAP to train military service members in tactical flight skills for decades and continued to conduct training during

the master planning process. Master Plan at 35, 131. In a typical week, WIARNG flies about eight flights per week at SPSRA (one to two helicopters on three to five days a week) and is present at SPSRA for a total of about five to ten hours per week. *Id*.

In their own words, the affiants recreated and completed restoration work at SPSRA over the same time period when WIARNG helicopter training was occurring. Accepting the affiants' testimony to be true, there has been no conflict between the affiants' activities and WIARNG's training that has stopped or infringed on the affiants' existing use of SPSRA and there is certainly no reason to believe there should be any conflict in the future. Allowing WIARNG helicopter training to continue as it has in the past will not cause any harm, let alone irreparable harm, to the Alliance and its members.

2. The Master Plan requires dogs to be on-leash on the vast majority of SPSRA and allows limited dog training that will not cause irreparable harm to the Alliance.

The Alliance will not suffer irreparable harm from dog use at SPSRA because the Master Plan places tailored limitations on dogs, including Class 2 dog training and dog trialing, that ensure enjoyable recreation experiences for all users, including the Alliance. In fact, before the NRB's approval of the Master Plan, dogs were allowed off-leash on the entire SPSRA property from August 1 through April 14 pursuant to applicable state law. Master Plan at 29, 143; *see* Wis. Admin. Code §§ NR 17.04(2)(a), 45.06.

In the Master Plan, DNR added more stringent dog restrictions to the majority of SPSRA to avoid conflicts between trail users in the areas of SPSRA that DNR expects will have higher visitation. Master Plan at 29–30. In the Master Plan, DNR stated it would pursue a rulemaking change to explicitly require dogs to be on-leash in all areas of SPSRA except for select parcels in the southernmost block of SPSRA, which is referred to as the Magazine Area. *Id*. at 29 n.20. The only exception to this on-leash requirement is dogs that are used for hunting during a legal hunting season. *Id*. at 30. This is more restrictive than applicable state law for dogs at other state recreation areas.

The Master Plan designates one portion of the Magazine Area, specifically parcels MA2 and MA4, as an unfenced dog park. *Id*. at 30, 82. In the unfenced dog park, dog owners can have their dogs off-leash from August 1 through April 14. *Id*. From April 15 to July 31, dogs must be on-leash to limit disturbances and impacts to nesting birds. *Id*. at 30, 143. In other words, the unfenced dog park allows dog use consistent with state law at other state recreation areas.

Additionally, DNR designated the southernmost portion of the Magazine Area, specifically parcel MA5, as a year-round Class 2 dog training area. *Id*. at 30, 82; *see* Wis. Admin. Code §§ NR 17.001(3) (defining dog training), 17.05(2) (defining Class 2 dog training grounds). The Alliance asserts the Class 2 dog training area will cause irreparable harm, but has not provided any specific evidence to demonstrate harm. *See* Pet'r Br. 21. The Class 2 dog training area includes only 72 acres of the 3,385 acres in SPSRA, or about two percent of the property. *See* Master Plan at 30. In the

Class 2 dog training area, the public can have dogs off-leash and discharge firearms to train dogs for hunting. *Id*. DNR has significant experience with dog training on state lands and has observed that "the use level at any given time at training grounds is low since people prefer to train their dogs with few distractions." *Id*. at 148. Environmental and noise impacts from dog training are similar to impacts from hunting, one of the most common and essential recreational uses of State lands. *Id*. at 143; *see* Wis. Admin. Code § NR 1.61(1) (except as prohibited by law, all DNR lands are open for "traditional recreational uses" including hunting). The Alliance will not be irreparably harmed by limited impacts from dog training, similar to those from hunting, on a small portion of the southernmost block of SPSRA.

The Master Plan also anticipates the public may want to hold dog trialing competitions, which are organized competitions designed to test dogs' hunting skills, at SPSRA, and requires an event organizer to apply for and receive a special event permit for a dog trialing event. Master Plan at 30; *see* Wis. Admin. Code §§ NR 17.001(5) (defining dog trialing), 17.09(1) (requiring application for dog trialing events). The special event permitting process will include an analysis of conditions appropriate to limit impacts to SPSRA, and DNR has authority to cancel any dog trialing events if, due to site conditions, they may cause damage to SPSRA or unduly conflict with other visitors. Master Plan at 30, 32–33; *see also* Wis. Admin. Code § NR 17.09(1). As a result, the Alliance will not be harmed by any potential dog trialing events at SPSRA.

The Master Plan holistically approaches dog use at SPSRA by first requiring dogs to be on-leash at all times in the vast majority of SPSRA and then by designating limited areas for off-leash dog use, including the Class 2 dog training area that will have limited impacts similar to those from hunting. The Alliance will not suffer irreparable harm from dog use at SPSRA, and in fact, is less likely to suffer harm due to the Master Plan's requirement—which is more stringent than applicable state law—that dogs be on-leash for the majority of SPSRA.

3. The Master Plan allows only limited use of dual-sport motorcycles on trails with restrictions that will prevent irreparable harm to the Alliance.

The Alliance will not suffer irreparable harm from dual-sport motorcycle use because the Master Plan allows only very limited use of dual-sport motorcycles on trails.[3] Specifically, the Master Plan allows dual-sport motorcycles to ride on up to fifty percent of the equestrian and biking trails for up to six days per year. Master Plan at 22–23. Dual-sport motorcycling on trails is only allowed with a special event permit. *Id*. Only two days of trail riding are allowed from April 15 to July 31 to minimize impacts to nesting birds, and only up to two consecutive days of trail riding will be permitted at any time throughout the year. *Id*. Participation in a special event is capped at 100 riders per day, and riders can only use trails from 9 a.m. to 4 p.m. *Id*.

[3] Because they are highway-licensed vehicles, dual-sport motorcycles may drive on the 15 miles of public roads in SPSRA whenever SPSRA is open to the public without a special event permit. Master Plan at 139.

Before using the trails for dual-sport motorcycling, clubs must apply to DNR to receive a special event permit and DNR reserves the ability to set specific parameters on an event to prevent impacts to SPSRA. *Id*. at 22–23. The club must work with DNR to select the up to fifty percent of equestrian and biking trails that will be used for riding, and selected trails will be closed to the public during the event to ensure visitor safety. *Id*. Events must be timed to ensure trails and roads are dry enough to support motorcycle use, other events and periods of high visitation are avoided, and impacts to sensitive resources are avoided. *Id*. DNR retains the ability to cancel events at any time if trail conditions cannot support motorcycle use, and all special event permits will require the club to repair any damage to the trails or roads at the club's expense. *Id*. DNR has not approved any special event permits for dual-sport motorcycling, and in fact, since the Master Plan was so recently approved, has not yet received an application for a special event permit for dual-sport motorcycling. Pohlman Aff. ¶¶ 9–10.

DNR currently has no funding to build trails at SPSRA, so the Master Plan designated roads used by the U.S. Army for motorized transportation as the equestrian and biking "trails." *See* Master Plan at 19, Map N. Practically, the Master Plan allows clubs to apply for a special event permit to ride on up to fifty percent of the former motorized roads at BAAP that are now designated for equestrian and bike use on six days per year, and if any of the "trails" are damaged, the club must repair them. *See id*. at 22. The Master Plan is intended to restore former BAAP lands after their use as an ammunitions and chemical manufacturing facility for over thirty

years. *See, e.g.*, Master Plan at ix–xi. If BAAP can be repaired and restored after decades of industrial use, its trails can be repaired and restored if a two-day dual-sport motorcycle event causes any damage. Therefore, the Alliance's assertion that limited use of dual-sport motorcycles at SPSRA will cause "irreversible" damage to SPSRA and irreparable harm to the Alliance's members is implausible. *See* Pet'r Br. 12.

4. The Alliance will not be irreparably harmed if the "high-impact" uses are not stayed because its members can recreate at nearby publicly accessible land on which "high-impact" uses are not allowed.

Not only will the Alliance's members continue to be able to recreate at SPSRA with very little, if any, disruption or harm, the Alliance's members can recreate at any of the numerous other publicly accessible lands in Sauk County that largely do not allow the "high-impact" uses. *See* Master Plan at 124, 133, 192. Sauk County has over 30,000 acres of publicly accessible land, which is more than any other county in Southern Wisconsin, and this land is largely available for only "silent" recreation. *Id.* at 192. For example, Devil's Lake State Park is directly adjacent to the north boundary of SPSRA, and Mirror Lake State Park and Natural Bridge State Park are both within 15 miles of SPSRA. *Id.* at 124 (listing other publicly-accessible lands within 15 miles of SPSRA). None of these parks allow the "high-impact" uses. The Alliance will not suffer irreparable harm without a stay because the Alliance's members can recreate on any one of the many other areas available for quiet recreation in Sauk County.

The Alliance has not demonstrated that it will suffer irreparable harm if this Court does not grant its request for a partial stay of the "high-impact" uses in the Master Plan. The Alliance asserts only vague, generalized allegations of harm based on the Master Plan's discussion of potential impacts from recreation uses at SPSRA. These alleged harms are directly addressed in the Master Plan, which includes specifically tailored, discrete restrictions on recreation uses to avoid, negate, or mitigate potential impacts to SPSRA and its visitors.

C. A partial stay of the "high-impact" uses will cause harm to other interested parties and the public.

Unlike the Alliance, which will suffer little, if any, harm, a partial stay of "high-impact" uses at SPSRA will cause substantial harm to WIARNG and the public, including other recreational users. The Alliance asserts a partial stay will not cause harm to the public because "high-impact" uses "have never been allowed" at SPSRA until the NRB approved the Master Plan and "people can ride their motorcycles and train their dogs elsewhere for the time being[.]" Pet'r Br. 3. Neither of these assertions is true. In fact, there are few other places on which some of the "high-impact" uses are allowed, and the limited availability and growing demand for these uses are precisely why DNR originally identified them as candidates for approval with tailored limits at SPSRA. *See, e.g.*, Master Plan at 21 (dual-sport motorcycling).

1. WIARNG will be substantially and irreparably harmed if it is unable to conduct helicopter training missions at SPSRA.

WIARNG will be substantially and irreparably harmed if this Court grants a partial stay preventing helicopter training at SPSRA. WIARNG has been conducting

helicopter training exercises at BAAP for decades, and if those exercises are stayed by this Court, WIARNG will be forced to conduct training exercises at Fort McCoy, the next closest suitable site to WIARNG's base in Madison. *Id*. at 35, 131. Training at Fort McCoy requires WIARNG service members to fly an additional 30 to 45 minutes each way to reach Fort McCoy on the three to five days per week that they typically perform helicopter training, and this significantly reduces the amount of time service members have to actually conduct tactical training once they reach Fort McCoy. *Id*. Flying to Fort McCoy materially reduces the amount of training WIARNG can perform, requires additional expense for fuel, and causes additional, unnecessary air emissions. *Id*. These constitute concrete, substantial, and irreparable harms to WIARNG and the environment.

WIARNG's training is for the express purpose of protecting the public. The helicopter missions train service members to fly at low-levels, at night, and to carry heavy loads. *Id*. at 35. The trainings simulate the skills that service members must perform to conduct supply drops and pick up and drop large quantities of water during wildfire suppression. *Id*. Denying service members the opportunity to perform helicopter training at SPSRA and forcing them to conduct reduced training at Fort McCoy is expressly harmful to the public interest and will cause concrete, substantial, irreparable harm to WIARNG and the public.

2. A partial stay of "high-impact" uses will harm members of the public who specifically requested and now wish to engage in those recreational pursuits at SPSRA.

Members of the public who plan to engage in "high-impact" recreation uses at SPSRA and who, just like the Alliance, participated in the master planning process, will be harmed if this Court grants a partial stay. The Alliance asserts that it requests the partial stay "to protect the public," but the Alliance does not represent the general public. *See* Pet'r Br. 19. In fact, other members of the public specifically requested and supported the "high-impact" uses that the Alliance opposes throughout the master planning process and will be harmed if this Court grants a stay.

When DNR issued the RPA for SPSRA in 2012, DNR received public comments supporting motorized recreation opportunities, motorcycle trails, and dog training at SPSRA: "Motorcycle trails, specifically single-track, were identified as a need in this part of the state. Opportunities for off-highway motorcycles and off-highway vehicles (jeep/truck type vehicles) also received support. Other non-trail related recreation comments referred to the need for dog training and trialing areas." Pohlman Aff. Ex. A, at 1.

When DNR issued the Draft Vision in 2013, DNR again received comments supporting motorized recreational opportunities at SPSRA: "Many people stated a desire to ride various motorized vehicles on the property. Many also expressed significant frustration about the lack of riding opportunities in the area." Pohlman Aff. Ex. B, at 4.

When DNR issued the 2015 Draft Master Plan, which included repurposing trails for dual-sport motorcycles, DNR received comments in support of repurposing:

> People in support of repurposing trails and roads for motorcycles commented that there is very high demand for off-road riding opportunities that is currently underserved. Some advocates for off-road motorcycling were disappointed that a dedicated trail for motorcycles open throughout the year was not included in the draft master plan.

Pohlman Aff. Ex. D, at 4. DNR also conducted a survey on the 2015 Draft Master Plan and of 392 people who anticipated visiting SPSRA, 18 percent stated they were likely to pursue dual-sport motorcycling. *Id.* at 5.

Members of the public who stated they wanted to pursue "high-impact" uses at SPSRA during DNR's master planning process will be concretely harmed if they are unable to pursue their preferred use at SPSRA. Unlike the Alliance whose members can access other areas near SPSRA for quiet recreation, there are few public lands available for the "high-impact" uses the Alliance opposes. *See* Pohlman Aff. Ex. E (only three areas within a 100-mile radius of SPSRA allow for motorized recreation).

Moreover, if this Court grants a partial stay of "high-impact" uses pending ultimate resolution of litigation, members of the public will be harmed for potentially years. In addition to this case, the Alliance has filed another petition for judicial review in Sauk County Circuit Court, case number 17-CV-20, seeking an administrative contested case hearing on the Master Plan and WEPA determination. After briefing on the merits in that case, if the Court grants the Alliance a contested case hearing, the hearing will take several additional months, if not a year or more, to complete, and then the hearing examiner's decision may be subject to judicial review. The Alliance has also filed a complaint against the U.S. Department of the Interior, NPS, GSA, and related federal defendants in the Western District of Wisconsin asserting NEPA claims and asking the court to order the federal

defendants to take control of SPSRA. The federal case may cause additional delays. This Court should deny the Alliance's request for a partial stay because it will harm WIARNG and members of the public who requested "high-impact" uses for potentially years to come.

IV. If this Court determines a temporary injunction is the appropriate remedy for the Alliance, the Alliance has not satisfied its burden of demonstrating that a temporary injunction is necessary under Wis. Stat. § 813.02(1)(a).

If this Court determines a temporary injunction is the appropriate remedy for the Alliance, the Alliance has not demonstrated that an analysis of the *Werner* factors weighs in favor of a temporary injunction. Two of the four *Werner* factors—the moving party's reasonable probability of success on the merits and whether the moving party is likely to suffer irreparable harm—are identical to the factors discussed above under the analysis for a stay under Wis. Stat. § 227.54. For economy, these arguments will not be reiterated here, but they apply equally and weigh strongly against issuance of a temporary injunction.

The remaining two *Werner* factors—the moving party has no other adequate remedy at law and a temporary injunction is needed in order to preserve the status quo—also weigh against issuance of a temporary injunction. Simply, the Alliance has another remedy at law: a stay under Wis. Stat. § 227.54.

With respect to the status quo, SPSRA has been indefinitely open to the public since April 2015 and was open in 2014 on a limited basis for hunting. Pohlman Aff. ¶ 6. Before the Master Plan, the public could operate any motorized vehicles on the open roads identified in the 2014 Fall Access Map, engage in traditional recreation

uses, and have dogs off-leash from August 1 through April 14. Pohlman Aff. ¶ 6, Ex. C; Master Plan at 29 (dog leash restrictions); *see also* Wis. Admin. Code §§ NR 17.04(2)(a), 45.06 (dog leash restrictions). With the Master Plan in place, the public can only drive motorized vehicles on roads that are permanently designated as motorized roads and operate dual-sport motorcycles via special event permit on trails. Master Plan at 20–23. Under the Master Plan, dogs are only allowed off-leash in the Magazine Area in the unfenced dog park area and Class 2 dog training area, as opposed to the entire site. *Id*. at 29. WIARNG helicopter training continues to occur as it has for decades. *Id*. at 35. The Master Plan places more restrictions on recreation uses than the status quo at SPSRA and places a framework on the property to ensure safe, enjoyable recreation experiences to all visitors.

The Alliance has not satisfied its burden of demonstrating that the *Werner* factors weigh in favor of a temporary injunction because the Alliance is unlikely to succeed on the merits of the Petitions, will not suffer irreparable harm, has another remedy available, and a temporary injunction is not necessary to preserve the status quo.

V. The Alliance has not sufficiently defined the scope of its requested stay or temporary injunction so that it can be implemented by DNR.

The Alliance has not defined its request for a partial stay or temporary injunction of "high-impact" uses in a manner that is capable of being implemented by DNR. The Alliance requests a stay of "high-impact" uses approved in the Master Plan, but this term is so vaguely defined in the Alliance's December 20 Petition, Notice of

Motion, Motion, and Brief, that the Court cannot issue a clear and workable stay or temporary injunction that DNR can implement.

The Alliance uses the term "high-impact" throughout its filings as if it were a term of art, but "high-impact" has no statutory or regulatory meaning in the context of recreation and it has not been used by DNR, NPS, or GSA during the land transfer and planning process for SPSRA. The only discernible meaning for "high-impact" uses comes from the Alliance's filings to date. In the Alliance's Notice of Motion, the Alliance states "high-impact" uses "includ[e], but [are] not limited to, Class II dog training, helicopter training, and dual-sport motorcycle riding." Pet'r Notice of Mot. 1. In the Alliance's Motion, it states "high-impact" uses "includ[e] use of a Class II dog training ground, rocket launching, and dual-sport motorcycle riding." Pet'r Mot. 2. The Alliance's Brief states "high-impact" uses include the Class II dog training area, helicopter training, dual-sport motorcycle riding "and any other high-impact uses allowed by the Plan." Pet'r Br. 19. In a footnote in both the Alliance's Brief and December 20 Petition, the Alliance states that "high-impact" uses includes "any as-yet-unidentified high-impact uses associated with special events at the Area." Pet'r Br. 19 n.5; Dec. 20 Pet. ¶ 43 n.7.

The Alliance itself does not consistently classify uses as "high-impact" because it has changed its position as to whether model rocketry was sufficiently impactful to qualify as a "high-impact" use. In paragraph 27 of the December 7 Petition the Alliance includes model rocketry as a "high-impact" use, while in paragraph 43 of the December 20 Petition, the Alliance excludes model rocketry as a "high-impact" use.

The Alliance explains in a footnote in the December 20 Petition that based on the testimony of high school students, it has "become convinced that non-high powered model rockets are not a high-impact use." Dec. 20 Pet. ¶ 1 n.1. This footnote is inconsistent, however, with the Alliance's Motion for a Partial Stay and the affidavits accompanying the Alliance's Brief, both of which continue to include objections to rocketry as too impactful at the site. Pet'r Mot. 2; Meine ¶¶ 9, 11; Piraino Aff. ¶ 9; B. Stehling Aff. ¶¶ 9–10; D. Stehling Aff. ¶¶ 9–10; Wuest Aff. ¶ 11.

"High-impact" uses appear to be whatever the Alliance believes is an objectionable recreational activity at SPSRA and has little to do with how impactful particular uses are compared to others. Snowmobiling, hunting, horseback riding, and mountain biking are also included in the Master Plan, but the Alliance has not challenged these as "high-impact" uses. *See* Master Plan at xi (summarizing allowed recreation uses). The Alliance's inconsistent assertions are not a clear, unequivocal standard by which DNR can measure and determine whether a use is "high-impact" such that it should be stayed. This is particularly problematic because the Master Plan allows the public to apply for special event permits for a wide-range of activities, such as marathons or triathlons, weddings, ice fishing jamborees, buckskinner rendezvous (historical reenactments), outdoor skill sessions, candlelight nights and educational programs. *Id.* at 33, 106. Filming for the movie *Public Enemies* was another recently authorized special event at Mirror Lake State Park. *Id.* at 33. It is not clear whether all, none, or some of these uses would be considered "high-impact" by the Alliance. Because the term "high-impact" does not have any independent

meaning in statute, rule, or usage and the Alliance has not provided a workable definition, this Court cannot grant an actionable stay or temporary injunction disallowing "high-impact" uses at SPSRA.

CONCLUSION

This Court should deny the Alliance's request for a partial stay under Wis. Stat. § 227.54, and alternatively, for a temporary injunction under Wis. Stat. § 813.02(1)(a). The Alliance has not met its burden to demonstrate that traditional equitable factors, including the Alliance's likelihood of success on the merits and harm to the parties and public, weigh in favor of a stay. The Alliance is unlikely to succeed on the merits of its Petitions because DNR has broad discretion to manage SPSRA, exercised that discretion in a reasoned manner, and is entitled to great weight deference on the NRB's approval of the Master Plan and DNR's WEPA determination. The Alliance's members will not suffer irreparable harm if the Master Plan is implemented as they will be able to continue to recreate at and enjoy SPSRA. In contrast, WIARNG will be concretely and substantially harmed and members of the public will be unable to pursue recreation uses that are not available on nearby public land. Moreover, the Alliance has not provided a workable definition of what activities are "high-impact" uses such that DNR could comply with any stay or temporary injunction issued by this Court. For these reasons, the Court should deny the Alliance's request for a partial stay, and alternatively, for a temporary injunction.

Dated this 27th day of January, 2017.

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