STATE OF WISCONSIN | CIRCUIT COURT BRANCH III | SAUK COUNTY

SAUK PRAIRIE CONSERVATION ALLIANCE. Petitioner, v. WISCONSIN DEPARTMENT OF NATURAL RESOURCES Respondent.	Case No. 2016-CV-000642 Case Code: 30607 Administrative Agency Review

PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL STAY AND, ALTERNATIVELY, MOTION FOR INJUNCTIVE RELIEF PENDING REVIEW

The Sauk Prairie Conservation Alliance (the "Alliance" or "Petitioner"), by its undersigned attorneys Perkins Coie LLP, respectfully submits this brief and accompanying Affidavits of Brian H. Potts, Charlie Luthin, Mimi Wuest, Paul Anthony, Donna Stehling, Bill Stehling, Ruth Ann Corrao, Frank Piraino and Curt Meine in support of Petitioner's Motion for Partial Stay and, Alternatively, Motion for Injunctive Relief Pending Review.[1]

INTRODUCTION

Between 1997 (when the U.S. Army decided to decommission the plant) and 2011 (when Governor Scott Walker's administration took office), numerous politicians on both sides of the aisle in various levels of government worked cooperatively with countless citizens of Sauk County to facilitate the transfer of the former Badger Army Ammunition Plant ("Badger") lands to the Ho-Chunk Nation, U.S.D.A. Dairy Forage Research Center and the Wisconsin Department of Natural Resources ("WDNR"). Republican Congressman Scott Klug, Republican Governor Tommy Thompson, Democratic Congresswoman Tammy Baldwin, Democratic President Bill

[1] Petitioner does not believe a bond is necessary or appropriate under Wis. Stat. § 813.06 in order for this Court to grant this motion. However, if the Court deems it necessary, the Petitioner will post a bond.

Clinton's General Services Administration ("GSA"), Republican President George W. Bush's GSA and National Park Service ("NPS"), the Sauk County Board, the Ho-Chunk Nation and countless other local municipalities, entities and citizens - of all political backgrounds - agreed that the property's best use was conservation, education, and low-impact recreation, such as hiking, biking, fishing and hunting.

Starting in early 2012, the newly instated WDNR leadership under Governor Scott Walker abandoned this long-term consensus agreement for how the Badger lands should be used. Defying its obligation to use the property for low-impact recreation, the WDNR began to prepare plans for a rifle range and an all-terrain vehicle ("ATV") track. After a massive public outcry, WDNR decided to shelve the gun range (at least temporarily) and ATV track, but instead proposed off-road (dual-sport) motorcycles, high power rocketry, helicopter training, and a Class II dog training and trialing area (which is training and showing dogs with the discharge of guns that shoot blanks).

Over the continued objection of the vast majority of those involved in the process and hundreds of citizens from the area (including a neighboring Badger landowner, the Ho-Chunk Nation), on December 14, 2016, the Wisconsin Natural Resources Board's ("NRB") approved the WDNR's Sauk Prairie State Recreation Area (the "Area") Master Plan and Final Environmental Impact Statement (the "Plan" and "FEIS") with these high-impact uses still included. In making this decision, the WDNR and NRB ignored decades of regional and local planning efforts and violated numerous federal property transfer laws and requirements under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11.

The issue before the Court now is whether the WDNR should be allowed to proceed with the development and implementation of these high-impact recreational uses, all of which the Plan has made immediately available, while all of Petitioner's appeals are pending. These high-impact uses will have significant and immediate adverse environmental effects, will create safety hazards and will be a nuisance for low-impact recreational users and neighboring landowners. Further, the high-impact uses are inconsistent with the ecological management of the Area and the purposes for which the GSA conveyed the property to the NPS, and the purposes for which NPS conveyed the property to the WDNR.

Not only is the Petitioner likely to succeed on the merits, the harm from allowing these uses at the property while this appeal is pending clearly outweighs any benefit of allowing these high-impact uses to go forward. Simply stated, people can ride their motorcycles and train their dogs elsewhere for the time being a lot easier than the WDNR can be ordered to fix any ecological damage caused by the high-impact uses. Moreover, high-impact uses have never been allowed at the property until now, and this planning process has been ongoing for almost two decades. So there is little, if any, harm to the public of delaying high-impact use of the property in the unlikely event that the WDNR prevails in this suit. Harm to the land, plants, animals and neighbors by the public's improper use of the property, on the other hand, would be much harder to remedy.

For these reasons and the reasons explained in more detail below, Petitioner respectfully requests that the Court allow all of the uses in the Plan to go forward except the high-impact uses challenged in the petitions and in the concurrently filed administrative appeals.[2] Alternatively,

[2] The Petitioner has also filed two administrative appeals of the Plan and FEIS under Wis. Stat. § 227.42. The WDNR has not yet determined whether to grant the Petitioner an administrative contested case hearing on any or all of the claims in these administrative appeals. Regardless of the WDNR's decision, however, Wis. Stat. § 227.54 gives this Court the ability to issue a stay pending both judicial and administrative review (if any).

Petitioner respectfully requests that the Court enjoin the NRB and the WDNR from allowing high-impact uses at the Area during the pendency of the appeals.

FACTUAL BACKGROUND

This case involves claims for NEPA and WEPA violations, described in Wis. Stat. § 1.11 and Wis. Admin. Code NR Ch. 150, and claims that the WDNR's and NRB's Plan and FEIS for the Sauk Prairie State Recreation Area are unlawful. The area at issue is located on the lands of the former Badger Army Ammunition Plant, which was decommissioned by the U.S. Department of Defense in 1997 and contains approximately 7,300 acres of land south of, and immediately adjacent to, Devils Lake State Park in Sauk County, Wisconsin. Petition for Judicial Review Exhibit 1 at viii, x, xi.

The local public involvement in the decision-making about the future of the Badger Lands began shortly after it was decommissioned when Congressman Scott Klug in 1998 formed a Citizen's Task Force. Petition for Judicial Review Exhibit 14 at E-9. In June of 1999, Congresswoman Tammy Baldwin began work in collaboration with the Citizen's Task Force and other local officials to create the Badger Reuse Committee ("BRC"), whose aim was to make recommendations on the future use of the Badger Lands. *Id.* The Badger Reuse Committee was comprised of twenty-one individuals representing diverse stakeholder groups, including federal, tribal, state, county, and municipal governments and agencies, non-profit organizations, local schools, agricultural interests and private landowners. *Id.* The Committee's primary directive was to develop a community consensus for the future uses of the Badger property.

The U.S. General Services Administration was the federal agency that was originally tasked with the disposition of the Badger Lands. In July of 2000, the U.S. House of Representatives acknowledged GSA's relationship with the Badger Reuse Committee, directing

GSA to "work with the Sauk County Badger Army Ammunition Plant Reuse Committee in the development of a mutually acceptable reuse plan for this property." *Id.*

The Badger Reuse Committee began working in July 2000 and met over the next nine months to develop its report and recommendations, which was memorialized in a document called the Final Report of the Badger Reuse Committee, commonly called the "Badger Reuse Plan." *Id.*; *see also* Petition for Judicial Review Exhibit 15. The Badger Reuse Plan was completed and signed by the representatives in March 2001, and was subsequently approved by the Sauk County Board of Supervisors. *See id.* According to the Reuse Plan, the intended management purposes and public use of the Badger Lands was to include cooperatively managing the property as a unified whole for ecological restoration, recreation, agriculture, education, and research purposes, and promoting the ecological and physical continuity of the landscape through the establishment of uninterrupted links between the Baraboo Range and the Wisconsin River Valley, some of Wisconsin's most significant regional ecosystems. *See id.*

Around the same time that the Badger Reuse Committee was finalizing the Reuse Plan, in 2001, former Governor Tommy Thompson sent a letter to the GSA formally expressing an interest in having the WDNR take over a portion of the property. Petition for Judicial Review Exhibit 16. In the letter, Governor Thompson said the following:

> The State of Wisconsin is hereby expressing interest in the lands of the Badger Army Ammunition Plant . . . .
>
> . . . .
>
> Wisconsin is interested in ownership and management of BAAP lands for the following purposes:
>
> - For the ecological restoration of a regionally significant block of endangered grassland and savanna habitat and associated wildlife species such as grassland birds;
>
> - To preserve and enhance the ecological transition between the hardwood forests of the Baraboo Hills and the grasslands and savannas of the adjoining Sauk

Prairie;

- To preserve and enhance the ecological corridor between the Baraboo Hills and the Wisconsin River; and
- To develop and maintain a recreational corridor between Devil's Lake State Park within the Baraboo Hills and the shorelands of Lake Wisconsin.

Id. at 1. The Thompson letter then goes on to state that "Wisconsin's interest is predicated on the following: . . . Wisconsin's ownership and management interests will be consistent with the BAAP Reuse Committee's final recommendations and/or other compatible uses." *Id.* at 1.

Nowhere in Governor Thompson's letter does he mention using the property for a gun range, off-road motorcycles, an ATV track, dog training with guns, or helicopter training. *See id.* And nowhere in the Reuse Plan - which constitutes its final recommendations - does the Badger Reuse Committee recommend using the property for such high-impact uses. *See* Petition for Judicial Review Exhibit 15. Rather, it recommended just the opposite. Criterion 5.3 of the Reuse Plan states: "[r]ecreational 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*." *See id.* at Criterion 5.3 (emphasis added).

In March of 2003, GSA completed a more than three hundred page, full environmental impact statement ("2003 EIS") analyzing the potential environmental impacts associated with the Federal government's disposal of the property. Petition for Judicial Review Exhibit 14. The 2003 EIS considered numerous uses of the entire 7,300 acre Badger property, including commercial and industrial uses. *Id.* In the end, the 2003 EIS and the 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." *See id.* at E-13. This

2003 EIS did not consider using any of the Badger Lands for high-impact recreational uses. *See id.* at § 2.4.3 ("Because Badger AAP is close to Devil's Lake State Park, low intensity recreation use would be most appropriate under this land use. Low intensity uses would include passive, non-invasive, and nature-based 'ecotourist' activities like hiking and camping. Biking, horseback riding, snowmobiling, interpretive trails, and nature programs would also be included . . .").

After completing the 2003 EIS and after the U.S. Army completed its clean-up of the property, the GSA transferred portions of the property[3] to the National Park Service ("NPS") who then, through its Federal Lands to Parks ("FLP") program, deeded more than 3,400 acres of the property to the WDNR in a series of transactions starting in 2011.[4] The FLP program imposes use restrictions on deeded property. Lands deeded through the FLP program must be used solely for public parks and recreation and must be used in accordance with the purposes for which the property was originally conveyed and according to the Program of Utilization ("POU") submitted as part of the WDNR's application to the NPS. *See* Petition for Judicial Review Exhibit 4 at 4 ("The [WDNR] shall forever use the property exclusively for public park and recreational use in accordance with its application for property, particularly the Program of Utilization . . . and approved amendments thereto . . . .").

As described above, the GSA originally conveyed the land for low-impact recreational uses. And the POU, a plan which the WDNR itself prepared and submitted, includes only the following uses: "hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, [ecological] restoration, environmental education and cultural/historic interpretation." Petition for Judicial Review Exhibit 4 at 9. Further, the POU adds that, "[m]any groups with varying

[3] Pursuant to the BRC's Reuse Plan and the 2003 EIS, portions of the property were also deeded (or are in the process of being deeded) to the Ho-Chunk Nation and U.S. Dairy Forage.
[4] Petition for Judicial Review Exhibit 1 at 1.

interests in [the Area] share a common goal with the WDNR to convert [the Area] to a recreational property with *low* impact recreation . . . ." *Id.* at 10 (emphasis added). Changes of uses and amendments to the POU are permitted by the FLP program, however not without NPS's concurrence and any such changes must be consistent with GSA's disposal of the property to NPS. *Id.* at 4.

After receiving the property and in accordance with state law, the WDNR began developing a master plan for the Area, which requires an assessment of the environmental impacts of all significant proposed actions. *See* Wis. Admin. Code NR Ch. 44; Wis. Admin. Code NR § 150.30. Notwithstanding the POU, the property deed, and state law, the WDNR began its master planning process by releasing a Regional & Property Analysis of the Sauk Prairie Recreation Area in July 2012 that, for the first time, included "non-traditional outdoor recreation uses . . . such [] as rocketeering, shooting ranges, geocaching, dog parks, paintball . . . and other recreation activities not typically found on Department lands." Petition for Judicial Review Exhibit 5 at 50. In response, Petitioner immediately provided the WDNR with detailed comment letters asserting that the WDNR must remove all references to high-impact uses as the existing POU and NPS approval did not allow for high-impact uses on the property. *See* Petition for Judicial Review Exhibit 6; Petition for Judicial Review Exhibit 7 at 1-2.

Soon after, at the request of Representative Fred Clark, the non-partisan Wisconsin Legislative Council launched an investigation, and in December of 2012, agreed with the Petitioner's analysis of the POU and the purposes of the original conveyance. *See* Petition for Judicial Review Exhibit 8.

Nonetheless, the WDNR then issued its Preliminary Vision and Goal Statements and Three Draft Conceptual Alternatives document in July 2013, which continued to include several

high-impact uses, such as a gun range and motorized recreation opportunities. *See* Petition for Judicial Review Exhibit 9. The Alliance provided the WDNR with another detailed comment letter on August 29, 2013, repeating its assertions that the existing POU and NPS approval did not allow for high-impact uses on the property. Petition for Judicial Review Exhibit 10. Petitioner added that such high-impact uses of the property would have a significant environmental impact, and their inclusion in the master plan would require the WDNR to complete a full environmental impact statement. *Id.* at 5-6. This letter also identified various deficiencies in the public comment process to date. *Id.* at 7.

The WDNR then released its draft master plan for the Area on August 11, 2015, which removed some of the proposed high-impact uses, but added other high-impact activities. Petition for Judicial Review Exhibit 17. The draft master plan included proposals for using the Area for dual-sport motorcycle access, a Class II Dog Training area involving the discharge of firearms, a rocketry launch site and unspecified "special uses" that could also include high-impact activities. *Id.* at xv. Again, on September 24, 2015, the Alliance sent comments to the WDNR repeating its assertion that the agency does not have the authority to include these high-impact uses in the master plan and that its environmental analysis of these uses was deficient. Petition for Judicial Review Exhibit 11. The Alliance also sent similar comments to the NPS on January 21, 2016. Petition for Judicial Review Exhibit 12. The NPS responded by providing comments to the WDNR on May 3, 2016 agreeing that the agency's proposed high-impact uses required an amendment to the POU, which the WDNR had not obtained, and would require significant additional environmental analysis, which the WDNR had not conducted. Petition for Judicial Review Exhibit 13.

In spite of these warnings from Petitioner and the federal government, the WDNR finalized the Plan and FEIS on November 8, 2016, without removing these high-impact uses, formally applying to the NPS for a POU amendment, conducting the required environmental analysis of these high-impact uses, or otherwise correcting the numerous deficiencies already identified in the WDNR's processes to date. Petition for Judicial Review Exhibit 1. Per the WDNR's final Plan, these high-impact uses are slated to be available "when the [] master plan is approved, or shortly thereafter." *Id.* at 108. Although the NPS previously and repeatedly cited issues with the Plan, it (inexplicably) issued a letter on December 8, 2016 accepting the plan as an amendment to the POU. Potts Aff., Exh. 1. The Natural Resources Board subsequently approved the Master Plan on December 14, 2016.

Petitioner appealed to this court on December 8 and December 20, 2016, and simultaneously filed administrative petitions for contested case hearings with the WDNR.

I. THE COURT SHOULD STAY EXECUTION OF THE HIGH-IMPACT RECREATIONAL USES IN THE PLAN AND FEIS PENDING RESOLUTION OF PLAINTIFF'S PETITIONS

Wis. Stat. § 227.54 allows the reviewing Court to stay enforcement of an agency decision "upon such terms as it deems proper." There is little law in Wisconsin regarding the standard that courts should use to determine whether to grant a stay pursuant to Wis. Stat. § 227.54. Wisconsin courts have only interpreted § 227.54 and its predecessor, Wis. Stat. § 227.17, in a handful of cases, all lacking any analysis regarding the proper standard by which courts should decide whether to grant a stay of an administrative action pending review. *See, e.g.*, *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 61, 335 Wis. 2d 47, 92 n.42, 799 N.W.2d 73, 85 n.42 (2011) (noting only that plaintiff "never requested a stay [pursuant to § 227.54] of the DNR's [underlying decision] at any point in the proceedings"); *Waste Mgmt. of Wis., Inc. v.*

State Dep't of Nat. Res., 149 Wis. 2d 817, 831, 440 N.W.2d 337, 344 (1989) (finding that plaintiff was not deprived of due process of law where § 227.54 "provides an adequate opportunity for review of agency actions without the risk of incurring substantial penalties"); *Holtz & Krause, Inc. v. State Dep't of Nat. Res.*, 85 Wis. 2d 198, 206, 270 N.W.2d 409, 414 (1978) (noting that § 227.17 "authorizes a reviewing court to issue [] a stay" of an agency order). Nonetheless, under the plain language of § 227.54, this Court has broad discretion to stay enforcement of the Plan or any portions of it "upon such terms as it deems proper."

This Court should stay enforcement of the high-impact uses in the Plan because no substantial harm will come to other interested parties by doing so. Since 2002, the WDNR has only engaged in the planning process for the Area. Petition for Judicial Review Exhibit 1 at 9. As acknowledged in the Plan, the development process for a WDNR property typically takes over fifteen years, and the WDNR is prohibited from any implementation of the Plan until it is approved by the NRB. *Id.* at 11. As such, until the WDNR and NRB adopted the final Plan a few weeks ago, no member of the public had any reasonable expectation of using the property for high-impact uses any time soon.

Additionally, both WEPA and NEPA require an agency to follow certain procedures before an agency can make a decision that would significantly affect the quality of the human environment. The NPS made clear in its May 3, 2016 letter that "the NPS must consider proposed changes that would require an amendment to the POU, and evaluate and disclose impacts from those uses, in light of [NEPA], and guidance and regulations from the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA …, as well as Department of the Interior policy and procedures." Petition for Judicial Review Exhibit 13 at 1. Additionally, federal law makes clear that "if the property ceases to be used or maintained for

[the purpose for which it was conveyed], all or any portion of the property shall . . . revert to the Government." *See* 40 U.S.C. § 550(e)(4)(A). This is also reinforced in multiple deeds for the property. *See* Petition For Judicial Review Exhibit 2 at 16; Petition for Judicial Review Exhibit 3 at 17 ("In the event there is a breach of any of the conditions and covenants herein . . . all right, title and interest in and to the [Area] shall revert to and become the property of the [NPS]"). Thus, the WDNR had ample notice that the implementation of its Plan could be thwarted without proper approval and without following the proper procedures (which the WDNR has not followed).

Additionally, granting a stay would do no harm to the public interest; rather petitioner seeks the stay to, among other things, *protect* the public interest. The people of Wisconsin stand to experience more harm if a stay is not granted. In 2001, when the State of Wisconsin first expressed an interest in the Badger Army Ammunition Plant, its primary purposes were ecological preservation, restoration, and development. Petition for Judicial Review Exhibit 16 at 1. Specifically, the State aimed "[f]or the ecological restoration of a regionally significant block of endangered grassland and savanna habitat and associated wildlife species," "[t]o preserve and enhance the ecological transition between the hardwood forests of the Baraboo Hills and the grasslands and savannas of the adjoining Sauk Prairie," "[t]o preserve and enhance the ecological corridor between the Baraboo Hills and the Wisconsin River," and "[t]o develop and maintain a recreational corridor between Devil's Lake State Park within the Baraboo Hills and the shorelands of Lake Wisconsin." *Id.* Allowing the Plan to move forward without high-impact uses will not hinder any of these original goals for the property. On the other hand, allowance of these high-impact uses rings counter-intuitive to the Area's founding mission, and the damage these high-impact uses cause could be irreversible.

Even today, public comment reflects an interest in prohibiting high-impact uses. Out of the over 270 public comments to its Plan, the WDNR received around 180 comments specifically in opposition to dual-sport motorcycle use and rocketry, which the Department itself categorized as "significant issues of public interest." NRB Hearing at 0:47:05 (2016), http://dnrmedia.wi.gov/main/Play/f1f71109966243779b6759ea059a5d1e1d?catalog=9da0bb43-2fd4-48a6-9d86-756192a62f17&playFrom=7438&autoStart=true. These comments reflected concerns regarding the noise, safety, environmental harm and damages to the trails. *Id.* at 0:49:25. Several individuals testified during the NRB hearing in support of the Plan without high impact uses, noting that the Plan in its current version "borders on an amusement park" and includes uses "that do not honor the land." *Id.* at 1:13:05, 1:15:39.

Given the Court's broad discretion to grant a partial stay and the lack of harm such a stay would cause, this Court should grant Petitioner's request for a partial stay of the Plan to halt the immediate implementation of high-impact uses pending all judicial and administrative review.

II. ALTERNATIVELY, THE COURT SHOULD ENJOIN DEFENDANTS FROM IMPLEMENTING THE HIGH-IMPACT USES

Wis. Stat. § 813.02(1)(a) provides the statutory authority for this Court to grant a temporary injunction. "When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." Wis. Stat. § 813.02(1)(a). The Wisconsin Supreme Court has determined that the courts must weigh the following four factors when making a decision on an injunction: (1) whether the movant can show a reasonable

probability of success on the merits; (2) whether the temporary injunction is needed to preserve the status quo; (3) whether the movant has an adequate remedy at law; and (4) whether the movant will suffer irreparable harm if the injunction is not granted. *See e.g., Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-14 (1977). No one factor is determinative; these factors should be weighed together. *Id.* at 520-21.

(1) The Petitioner Has More Than A Reasonable Probability Of Success On The Merits

With respect to the first factor, there is significant evidence that the Petitioner is likely to succeed on the merits. Under federal law, the WDNR can only use the property for the purposes for which it was originally conveyed. *See* 40 U.S.C. § 550(e)(4)(A) ("[I]f the property ceases to be used or maintained for [the purpose for which it was conveyed], all or any portion of the property shall . . . revert to the Government"); *see also* Petition for Judicial Review Exhibit 2 at 16; Petition for Judicial Review Exhibit 3 at 17 ("In the event there is a breach of any of the conditions and covenants herein . . . all right, title and interest in and to the [Area] shall revert to and become the property of the [NPS]").

The high-impact uses are outside the scope of the purposes for which the GSA conveyed the property to the NPS, outside the scope of the purposes for which the NPS conveyed the property to the WDNR, and are contrary to the Area's deed restrictions. Petition for Judicial Review Exhibit 2 at 13-17; Petition for Judicial Review Exhibit 3 at 15-18. The GSA conveyed the property to the NPS subject to its environmental analysis in 2003, which did not consider high-impact recreational uses, and NPS conveyed the Area subject to the POU submitted with the WDNR's FLP application, which included only low-impact uses. *See* Petition for Judicial Review Exhibit 4.

Moreover, even if the WDNR could ignore these requirements and include high-impact uses in the Plan, it would need to conduct a robust NEPA/WEPA analysis in the form of an EIS to do so. An EIS under NEPA must have a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Similarly, WEPA requires that an EIS evaluate "the probable positive and negative direct, secondary and cumulative effects of the proposed project, and alternatives to the proposed project, on the human environment." Wis. Admin. Code NR § 150.30(2)(g). Under both NEPA and WEPA, courts have long held that an agency must take a "hard look" at the environmental impacts of the agency's proposed actions. *See, e.g.*, *ForestWatch v. U.S. Bureau of Land Mgmt.*, No. CV-15-4378-MWF (JEMx), 2016 WL 5172009, at *10 (C.D. Cal. Sept. 6, 2016) (noting that "in reviewing the adequacy of an EIS [under NEPA], . . . review consists only of ensuring that the agency took a 'hard look'"); *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1102 (9th Cir. 2016) (noting that NEPA requires federal agencies to "take a 'hard look' at the human environmental consequences of their actions by preparing an EIS for each 'major Federal action significantly affecting the quality of the human environment") (internal citation omitted); *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 611, 482 N.W.2d 332, 344-45 (1992) (noting that WEPA requires an agency to take "a 'hard look' at the environmental consequences involved in [a] project") (citing *Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n*, 79 Wis. 2d 406, 420, 425, 256 N.W.2d 149, 155 (1977)). The WDNR's Plan and FEIS is woefully deficient in this regard and does not provide sufficient documentation for many of its conclusions.

The Plan and FEIS are rife with conclusory statements and analysis that wholly lack supporting documentation. Aside from an appendix listing the references that the WDNR staff supposedly used to "help inform" their assessment of environmental impacts, the Plan and FEIS

do not specifically cite any of these studies in support of their analysis. Petition for Judicial Review Exhibit 1 at 136, 209. Instead, the Plan and FEIS merely claim that "[f]or several of the proposed activities there either have been no or very few published studies conducted on their impacts to native plants and animals or other visitors to the property." *Id.* at 127. Ironically, the Plan and FEIS state that "[m]ost existing studies evaluating recreational impacts focus on parks, preserves, and wilderness sites that have substantially better ecological health and complexity . …" than the Area. *Id.* at 136. Of course, this cuts against the WDNR, as it indicates that impacts from recreational uses in the Area are even *more* likely, given its poorer ecological health. The WDNR, nonetheless, reached its many conclusions in the Plan and FEIS based apparently on "existing research, as incomplete as it is, and the knowledge and experience of department professionals." *Id.* at 127; *see, e.g.*, *id.* at 131 (stating that the potential impacts of dust from dual-sport motorcycle riding are "expected to be minor and localized" without citation to any references); *id.* at 140 (stating that impacts from motorized recreation on animal populations are expected to be "minor" because motorized use will be "limited" without citation to any peer-reviewed studies); *id.* at 142 (stating that impacts "from launching model [] rockets" are "expected to be minor" without citing detailed data from studies supposedly relied upon by the WDNR).

The Plan and FEIS also fail to provide an adequate analysis of alternatives to the proposed project. Both WEPA and NEPA require that an EIS discuss and analyze alternatives, the discussion of which encompasses "the heart" of the EIS. 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.14; Wis. Admin. Code NR § 150.30(2). An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives," and "[d]evote substantial treatment to each alternative

considered in detail including the proposed action so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14.

However, the Plan and FEIS do not include a detailed analysis of any reasonable alternatives. While the WDNR's analysis of its preferred alternative (i.e., the Plan including high-impact uses) is forty pages, the Plan devotes a mere twelve pages to discussing *all* other alternatives, including alternatives that are not reasonable. *See* Petition for Judicial Review Exhibit 1 at 127 at 169-81. For instance, the discussion of the alternative to a larger visitor and interpretive center merely states that it may attract more visitors and could lead to increased impacts to habitat and wildlife, without any further analysis. *Id.* at 175-76. The proposed alternative of converting land to row crops was explicitly prohibited in the deeds to the property. *Id.* at 181 (recognizing that "permanent cropland is not consistent with the intent or purpose of the SPSRA property" and "is also restricted by conditions of the transfer of land from the National Park Service"). And the no-action alternative, which the Plan describes as a minimal management approach, would result in the decline of roads, habitat, and recreation areas, and could lead to the NPS considering the property to be in noncompliance with the FLP requirements. *See* Petition for Judicial Review Exhibit 13 at 3 (where NPS warned that the minimal management approach is "not a reasonable alternative" because it "would potentially put the property in jeopardy of reversion to the Federal Government"). Nowhere does the Plan and FEIS even consider an alternative akin to the one put forward by the Badger Reuse Committee's Reuse Plan. *Id.*

In addition to the Plan and FEIS's shortcomings under NEPA, the Plan and FEIS also fail to comply with several additional WEPA regulations. For example, the Plan and FEIS fail to include a list of state, federal, tribal, and local approvals required for the proposed high-impact

uses. *See* Wis. Admin Code NR § 150.30(2)(c). The Plan and FEIS lack an explanation of the criteria used to discard alternatives from the study, *see id.* NR § 150.30(2)-(3), and, in particular, do not explain why the WDNR did not analyze an alternative that incorporated only the low-impact recreational uses consistent with the POU. The WDNR also failed to evaluate the consistency between the Plan and plans or policies of the NPS, the Ho-Chunk Nation, and other federal, state, local, or tribal governments. *See id.* NR § 150.30(2)(g)(3). Although the WDNR testified during its December 14, 2016 hearing before the NRB that its relationship with its partners has been "collaborative," the Plan is inconsistent with the plans of the Ho-Chunk Nation. Natural Resources Board Hearing at 2:57:39, (2016), http://dnrmedia.wi.gov/main/Play/f1f71109966243779b6759ea059a5d1e1d?catalog=9da0bb43-2fd4-48a6-9d86-756192a62f17&playFrom=7438&autoStart=true. Contrary to the Plan, the Nation opposes proposed dual sport motorcycle use and believes that "[f]uture land use and management of the property should focus on conservation with opportunities for low impact recreation." Potts Aff., Exh. 2 at 2. In the same vein, the WDNR did not adequately explain how it revised the Draft Master Plan and FEIS in response to public comments and concerns. *See id.* NR § 150.30(4)(b).

(2) An Injunction Is Needed To Preserve The Status Quo

As to the second factor in the temporary injunction test, it is also clear that without an order preventing Respondents from implementing the high-impact recreational uses, the Petitioner and its members (and the public) would be irreparably harmed unless the status quo is preserved. As proposed, the WDNR intends to make several of the high-impact uses detailed in the Plan immediately available to the public upon approval. Thus, unless an injunction is granted to preserve the status quo, these high-impact uses would pose an instant risk of harm to

the Petitioner, its members and the Area. Petition for Judicial Review Exhibit 1 at 108-109. Specifically, these uses include the Class 2 dog training area, helicopter training, dual sport motorcycle riding, and any other high-impact uses allowed by the Plan.[5] *Id.* But such uses would greatly disturb the Alliance and its members' uses of the property if permitted and could cause permanent and irreparable environmental damage.

(3) The Petitioner Does Not Have An Adequate Remedy At Law Unless An Injunction Is Issued

Regarding the third factor, the remedy available to Petitioner's claims is a declaration that the WDNR and NRB are required to amend the Plan to omit high-impact uses and undertake the necessary environmental review of the Plan pursuant to NEPA and WEPA. Given the immediate threat of implementing these high-impact recreational uses, some action from this Court is needed to preserve the viability of Petitioner's claims and to protect the Area from damage during the interim. As such, unless this Court issues the requested stay or injunction, the Petitioner will not have an adequate remedy at law.

(4) The Petitioner And Its Members (And The Public) Will Suffer Irreparable Injury If The WDNR's High-Impact Uses Are Permitted To Go Forward During The Appeals Process

Last, as shown in the attached affidavits, the Alliance and its members stand to suffer irreparable injury if the WDNR's high-impact uses are permitted during the pendency of the appeals. *See* Affidavit of Charlie Luthin; Affidavit of Mimi Wuest; Affidavit of Paul Anthony; Affidavit of Donna Stehling; Affidavit of Bill Stehling; Affidavit of Ruth Ann Corrao; Affidavit of Frank Piraino; and Affidavit of Curt Meine. It is clear that without a temporary injunction,

[5] The Plan and FEIS state that high-impact uses will be allowed for certain special events on a case-by-case basis. For example, page 102 of the Plan and FEIS notes that paintball will be allowed as a special event. *See* Petition for Judicial Review Exhibit 1 at 102. Any references herein to high-impact uses shall also include any as-yet-unidentified high-impact uses associated with special events at the Area.

ecological damage to the Area, and subsequently, irreparable injury to the Petitioner and its members, will be done. Petitioner's longstanding educational and prairie restoration efforts would be thwarted in many areas of the property due to significant adverse environmental effects from high-impact uses. For its entire history, the Alliance and its members have undertaken and promoted ecological restoration of various sites at the Badger property. Volunteer work parties and school groups led by Alliance staff and its members have helped control invasive species, collect seeds, plant prairie, and manage remnant prairie and savanna sites.

Allowance of high-impact uses would immediately and irreparably harm Petitioner's conservation efforts--especially since these uses have not been adequately evaluated. Even the WDNR in its Plan admits that these uses will cause negative environmental impacts. Why then allow them to proceed when we know that damage will occur and the Petitioner's relief sought is to not have any high-impact uses on the property?

Regarding dual-sport motorcycle usage, the Plan notes that "[e]xisting research indicates that trails open to motorized vehicle traffic year round, . . . can have a noticeable effect on the number and diversity of species in an area." Petition for Judicial Review Exhibit 1 at 139. Motorcycle exhaust could impact sensitive species and some animals could be struck by dual-sport motorcycles. *Id.* at 140. Motorcycle sounds "may cause displacement, nest desertion, breeding failure, and other impacts to some native species." *Id.* Further, this could result in animals being displaced for longer periods beyond the designated time for motorcycle use. *Id.*.

In addition, the Plan identifies the repurposing of trails for use by dual-sport motorcycles as one of the activities with "the most potential to adversely impact soils" due to compaction and erosion. *Id.* at 132. *Id.* The Ho-Chunk Nation has similar fears that the noise from motorcycle usage may affect its bison herd once established, in addition to creating "user conflicts with low

impact users, creat[ing] environmental concerns with soil erosion, spread[ing] [] invasive species, and potential[ly] impact[ing] [] previously remediated sites." Potts Aff., Exh. 2 at 2.

Although the Plan categorizes any impacts from the proposed 72-acre Class 2 dog training ground as likely "minimal, localized, and of short duration," there are still potential risks of concern. In addition to any disturbance caused by the presence of unleashed dogs, "wildlife may also flush or exhibit avoidance behaviors due to the occasional discharge of firearms used in training." Petition for Judicial Review Exhibit 1 at 143. Moreover, these events cover larger areas and could thus potentially affect more property. *Id.* At base, allowing any member of the public to come to the Area and discharge firearms, not just during hunting season, but at any time will have negative impacts to the environment, particularly to nesting birds and wildlife.

Even the vast majority of the original members of the Badger Reuse Committee are opposed to inclusion of high-impact uses in the Plan. On December 8, 2016, fifteen of the twenty-one original members of the Badger Reuse Committee sent comments to the NRB stating the following:

> We are, however, deeply concerned that the WDNR plan includes several recreational activities—off-road motorcycle use, model rocketry, year-round dog-training and dog-trialing, the potential for a long-range shooting range, and an exclusive 600-acre "Special Use" area—that run counter to the Badger Reuse Plan's clear consensus to emphasize and include only ***compatible, low-impact recreational opportunities***. Our concerns are based on the failure of the WDNR to acknowledge and communicate throughout its planning process the historic compromises worked out in the reuse process; the adverse impacts of these proposed activities on neighboring landowners (within and beyond the boundaries of the former Badger Plant); the failure of the WDNR to undertake adequate impact studies for proposed high-impact recreational activities; and the failure of the WDNR to acknowledge that public comments on its draft plans in September 2015 were overwhelmingly against high-impact recreation activities.

Petition for Judicial Review Exhibit 18 at 2 (emphasis in original).

Allowing high-impact uses also jeopardizes the WDNR's ownership of the Area, and subsequently, the Alliance's and its members almost two-decade investment in the property. The Alliance was created with the sole intention of promoting a community-based and conservation-oriented vision for the future of the Badger lands. Since 1997, when the federal government first decommissioned the Badger Army Ammunition Plant, the Alliance has organized to coordinate public presentations, discussion and meetings to foster awareness and consider options for the decommissioned Army facility. The deeds conveying the property from the NPS to the WDNR require that the Area only be used for public park or recreation purposes consistent with the POU and the purposes for which it was conveyed. Petition for Judicial Review Exhibit 2 at 4, 10; *see also* Petition for Judicial Review Exhibit 3 at 3. If the WDNR fails to comply with these conditions enumerated in the deeds, ownership of the Area could revert back to the NPS and GSA, and the Alliance's nearly two-decades of work would be rendered moot. *See* Petition for Judicial Review Exhibit 2 at 16; *see also* Petition for Judicial Review Exhibit 3 at 17.

In sum, to obtain an injunction, Petitioners only must show that the balance of the four factor test weighs in its favor. But here, all four factors weigh in Petitioner's favor. As such, this Court must issue a stay or an injunction stopping the high-impact uses in the Plan from moving forward pending the Plan's administrative and judicial appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant its motion for a partial stay of execution of the WDNR's and NRB's Plan and FEIS pending judicial and administrative review. Alternatively, Petitioner respectfully requests that the Court enjoin the WDNR and NRB from allowing high-impact uses on the property pending the Plan and FEIS's judicial and administrative review.

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