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STATE OF WISCONSIN CIRCUIT COURT IRON COUNTY

CLEAN WISCONSIN
634 W. Main Street, Suite 300
Madison, Wisconsin 53703,

SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612,

350 WISCONSIN
2921 Landmark Place, Suite 215
Madison, WI 53713,

Case No. _____

Case Code: 30607

LEAGUE OF WOMEN VOTERS OF WISCONSIN
612 W. Main Street, Suite 200
Madison, WI 53703,

Administrative Agency Review

Petitioners,

vs.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, Wisconsin 53707

Respondent.

**BRIEF IN SUPPORT OF MOTION FOR TEMPORARY STAY OF THE WISCONSIN
DEPARTMENT OF NATURAL RESOURCES' PERMITTING DECISION**

Clean Wisconsin, Sierra Club, 350 Wisconsin, and League of Women Voters of Wisconsin (“Petitioners”) file this brief in support of the Motion to Stay (“Motion”) the Department of Natural Resources’ (“DNR” or “the Department”) decision to issue a Wetland and Waterways Individual Permit No. IP-NO-2020-2-NOO471 (“the Permit”), the corresponding water quality certification (“WQC”), and the grant of coverage under Wisconsin Pollutant Discharge Elimination System (“WPDES”) General Permit No. WI-S067831-06 (“Stormwater GP”) (actions collectively, “Permit

Decisions”) to Enbridge Energy, LP (“Enbridge”) for construction of the Line 5 Wisconsin Segment Relocation Project (“the Reroute”). The Permit Decisions were subject to a contested case hearing pursuant to Wis. Stat. §§ 30.208, 227.42, and 281.36, (DHA Case No. DNR-25-0002; DNR Case Nos. 24-048 and 24-049), in which Petitioners took part. The contested case hearing concluded on February 13, 2026, with the issuance of the Division of Hearings and Appeals (“DHA”) decision in the matter (“DHA Decision”).

By law, the DHA decision at the conclusion of the contested case hearing *is* DNR’s final decision in the matter “[u]nless [DNR] petitions for judicial review as provided in s. 227.46(8), Stats.” Wis. Admin. Code NR § 2.155(1). As of this filing, DNR has not sought review of the DHA Decision. Thus, Petitioners seek review of the Permit Decisions as erroneously affirmed and modified by the DHA Decision.

Petitioners move the circuit court for a temporary stay *pendente lite*. For reasons explained below, the circuit court is authorized to grant this relief and it is appropriate here because an immediate stay is necessary to preserve the status quo and avoid irreversible environmental harm.

BACKGROUND

Construction of the Reroute would cause significant, irreversible harm to wetlands and waterways.¹ The proposed construction activities include clearing vegetation, stump removal, land grading, stripping topsoil, trenching, and blasting bedrock. These activities will permanently alter and degrade wetland hydrology, soils, and vegetation. High quality wetlands that are subject to this degree of human manipulation will simply not return to their natural condition. Waterways will similarly be permanently impacted by the construction methods Enbridge proposes to use to

¹ For a statement of facts discussing how Reroute construction would cause these impacts, *see* Petition for Judicial Review, ¶¶66-141. Factual allegations will be restated or discussed here as relevant to the standard for issuance of a stay of the Decision.

cross these waters.

The wetlands that would be impacted are environmentally valuable. DNR acknowledged in the Permit that many of the wetlands that would be permanently cleared provide high to exceptional wetland functional values.² Exh. A, Finding of Fact 32. These functional values include wildlife habitat, flood and stormwater storage, and groundwater processes. *Id.* DNR further acknowledge that “[t]here is an abundance of wetlands that are designated as wetlands in Areas of Special Natural Resource Interest in the Project area that will be impacted by construction.”³ Exh. A, Finding of Fact 40. The ALJ found that “significant portions of the Project’s route have been largely undisturbed by human impact in the last century Many wetlands within the Project route are high-quality and exhibit high functional values and high floristic integrity.” Exh. D at 6, Finding of Fact 10. It is also not disputed that these valuable wetlands are sensitive to disturbance. *Id.* (ALJ finding the wetlands to be impacted “are sensitive to disturbances of soils, hydrology, and vegetation.”).

DNR concluded that many wetland impacts would be merely temporary, on the premise that the proposed wetland restoration efforts would successfully return wetlands to pre-construction conditions. Exh. A, Finding of Fact 46. DNR acknowledges however, that restoration of high quality wetlands is “exceptionally” difficult” and “[i]mproper wetland restoration ... would result in long-term impacts” across all wetland functional values. *Id.*; Wis. Dep’t of Nat. Res., Final Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, at 474 (Sept. 2024) [hereafter, “EIS”]⁴. It is also uncontested that these purportedly “temporary” impacts will last decades, if not longer. Exh. A, Finding of Fact 39. The ALJ’s Decision does not address

² Wetland functional values are enumerated in Wis. Admin. Code § NR 103.03(1).

³ Wetlands in Areas of Special Natural Resource Interest (ASNRI) are enumerated in Wis. Admin. Code § NR 103.04.

⁴ Available at https://widnr.widen.net/s/tmh5xfcpzg/el5_final-eis.

whether DNR correctly designated these impacts as “temporary.”

Further, even in the best case scenario, in which the proposed restoration is successful on its own terms, DNR acknowledged that permanent conversion of forested to emergent wetlands along the pipeline corridor would result in permanent impacts to wildlife habitat and ecosystem hydrology and expand opportunities for invasive species to spread. Exh. A, Findings of Fact 59, 62(e). DNR also concluded that, even assuming successful restoration, the environmental impact of the Reroute “would be a net negative[.]” Exh. A, Finding of Fact 44(e).

In addition, construction and operation events including oil spills or leaks, aquifer breaches, or discharges of drilling mud during horizontal directional drilling (“HDD”) would also cause significant adverse impacts to wetland functional values (and other significant adverse environmental impacts) that would in many instances be irreversible.

The Reroute would also cause significant adverse impacts and irreversible harm to Wisconsin’s navigable waters. Blasting the bedrock in navigable waterways is irrevocable—that bedrock can never be put back together and the geological processes that formed it cannot be recreated. *See, e.g.*, EIS at 276 (“Blasting is a locally destructive process that permanently alters the rock in a local area.”). Altering the surface and subsurface in such a dramatic fashion not only changes the geology, but also the hydrology upon which impacted navigable waters rely to maintain baseflows, geomorphology and slope stability, water quality, fish and wildlife habitat, and more. *Id.* (“Blasted rock could have a higher capacity to convey water, increasing the possible rate of infiltration in unsaturated areas and increasing the rate of groundwater flow in saturated areas.”).

The impacts to hydrogeology from blasting at specific waterway crossings have not been adequately established, and those impacts to hydrogeology that have been identified can only be

minimized. *See* EIS at 69 (“Trench plugs would be used to limit water flow along the pipeline ...”), 276 (recognizing site-specific blasting plans are intended to minimize risk to above ground and underground structures but not water resources). Those impacts would not be prevented or remediated, and certainly not to the extent that these irreversible impacts would be insignificant.

Petitioners requested that a stay of the Decision remain in effect while the contested case hearing was pending. The ALJ found our arguments that construction of the Reroute would cause irreversible environmental harm “compelling,” and continued a stay of DNR’s decision pending resolution of the contested case hearing to “avoid the likelihood of significant adverse impacts to the environment” should construction proceed *pendente lite*. Exh. E. DNR did not contest Petitioners’ request for a stay.

While the ALJ ultimately affirmed DNR’s permitting decisions, the record establishes that the wetlands and waterways the Reroute will impact are environmentally valuable, sensitive to impacts, and that many impacts would be irreversible.

ARGUMENT

First, we establish the circuit court’s broad authority to order a stay of the Decision under Wis. Stat. Ch. 227 and why a stay is proper here. Second, Petitioners establish that if the standard for issuance of a temporary injunction is used as a guide for issuance of a temporary stay in this case, Petitioners meet that standard, as well.

I. The Circuit Court has the Authority to Stay the Decision and a Stay is Necessary to Avoid Irreversible Harm to Wetlands and Waterways.

The circuit court has the authority to order a stay of the Decision. Wis. Stat. Ch. 227 provides the procedure for judicial review of administrative agency decisions. *See* Wis. Stat. §§ 227.52-.57. The applicable provision states that “[t]he institution of the proceeding for review shall not stay enforcement of the agency decision. *The reviewing court may order a stay upon such*

terms as it deems proper[.]” Wis. Stat. § 227.54 (emphasis added); *Waste Management of Wisconsin, Inc. v. Department of Natural Resources*, 149 Wis. 2d 817, 831, 440 N.W.2d 337 (“a reviewing court may stay the proceedings if it determines that a stay would be appropriate.”). The circuit court therefore has significant discretion over whether and how to order a stay of the Decision.⁵

While Chapter 227 does not provide a statutory standard to be applied in determining whether to order a stay of the agency decision under judicial review, the underlying substantive statutes identify that staying a DNR wetland and waterway permit decision to avoid irreversible environmental harm is necessary and appropriate. *See* Wis. Stat. §§ 30.209(1m)(c)-(d), 281.36(3q)(g)2. As discussed above, the Reroute would cause irreversible environmental harm. *See supra*, 2-5. The basis for these irreversible harms has not changed since Petitioners filed their petition for contested case hearing. Enbridge’s clearing, grading, trenching, and blasting through wetlands and waterways would cause impacts that cannot be undone. Nothing in the ALJ’s Decision, including her modifications to the permits, alters that reality. Accordingly, the Decision should be stayed.

II. Petitioners’ Request Meets the Four-Factor Test Applied by Courts when Deciding Motions for a Temporary Injunction in Other Contexts.

The four-factor *Grootemaat* test for issuing a temporary injunction in other civil contexts

⁵ That discretion extends to the timing and duration of a stay and should be understood to confer authority to grant a stay that is at least as broad as judicial stay authority in other civil contexts. Notable here, Wis. Stat. §§ 813.02, 025(1)-(2) allows circuit courts to issue an immediate *ex parte* stay of, in relevant part, “any order of an administrative officer, board, department, commission or other state agency” to avoid “irreparable loss or damage[.]” The Decision is a state agency order. The circuit court is therefore authorized to issue an immediate *ex parte* stay once that irreparable loss showing has been made by the movant. For this reason, Petitioners believe the motion for *ex parte* stay requested by the Bad River Band of Lake Superior Chippewa in its Petition for Judicial Review challenging the same underlying agency decisions as Petitioners in that parallel proceeding is both authorized and appropriate here, and therefore support the Band’s request for an immediate *ex parte* stay. *Bad River Band of Lake Superior Chippewa Indians vs. Wisconsin Department of Natural Resources*, Iron County Circuit Court Case No. 2026CV000008.

may provide useful guidance in assessing the need for a stay.⁶ *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Petitioners meet each factor of the *Grootemaat* test.

A temporary injunction may be granted if: (1) the movant is likely to suffer irreparable harm if an injunction is not issued; (2) the movant has no other adequate remedy at law; (3) an injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.

Kennedy v. Wis. Elections Comm'n, 413 Wis. 2d 509, 512, 11 N.W.3d 786, 2024 WI 37.

Petitioners have already established they would suffer irreparable harm without a stay of the Decision.⁷ *See supra*, 2-5. “[A]t the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo *pendente lite*, the [ultimate relief] sought would be rendered futile.” *Wisconsin Asso. of Food Dealers v. Madison*, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980) (internal quotations omitted). Petitioners seek reversal of the Decision authorizing Enbridge’s construction of the Reroute, to avoid the irreversible environmental harms construction would cause. Obviously, if the Reroute is constructed while this judicial review action is pending, any relief Petitioners could subsequently secure invalidating

⁶ This standard for temporary injunctions under Wisconsin’s civil procedure is not binding on the circuit court in this request for a stay in a judicial review proceeding governed by Chapter 227. Chapter 227 is intended to provide “a single, uniform system of review[.]” *Wagner v. State Medical Examining Bd.*, 181 Wis. 2d 633, 640, 511 N.W.2d 874. Accordingly, “ch. 227 contemplates the limited use of those civil procedure statutes which do not conflict with ch. 227.” *Id.* at 641. When there is a conflict, the procedure in Chapter 227 controls. Chapter 227 is not silent as to the procedure for obtaining a stay of an agency decision during judicial review. Wis. Stat. § 227.54 provides that the circuit court may order a stay of the agency’s decision upon terms it deems proper. Imposing limits found in civil procedure statutes on a circuit court’s authority or discretion to order a stay of an agency’s decision in a judicial review proceeding would be inconsistent with the legislature’s choice to instead employ broad, discretionary language in Wis. Stat. § 227.54, and would therefore “render[.] [it] ineffective[.]” *State ex rel. Delavan v. Circuit Court for Walworth County*, 167 Wis. 2d 719, 723, 482 N.W.2d 899. Accordingly, to the extent the circuit court deems it necessary to address the applicability of stay provisions in Wisconsin’s civil procedure statutes, Wis. Stat. Chs. 801-807, in this judicial review action, those provisions should not be understood to limit the circuit court’s broad authority to issue a stay in this matter.

⁷ Petitioners take “irreversible” and “irreparable” to be roughly synonymous. For present purposes, the “irreversible environmental harm” noted above is plainly a type of “irreparable harm”.

permits authorizing that construction would be rendered futile. The irreparable injury factor is thus plainly met here.

Petitioners have no other adequate remedy at law. Remedies at law, i.e., monetary damages, are not adequate. *Vill. Food & Liquor Mart v. H & S Petroleum*, 254 Wis. 2d 478, 495, 647 N.W.2d 177, 2002 WI 92; *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶36, 324 Wis. 2d 703, 783 N.W.2d 294. Petitioners are not seeking monetary damages and *ex post* monetary damages would not remedy harms to Petitioners' interests, in any event. The only adequate remedy is a stay preventing the irreversible environmental harms the Decision would allow.

A stay is necessary to preserve the status quo. Courts have understood injunctive relief to preserve the status quo when movants are not asking to "change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *School Dist. v. Wisconsin Interscholastic Ath. Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (emphasis in original) (internal quotations omitted). Here, Petitioners do not ask the circuit court to compel any party to do any act whatsoever. Further, a stay merely *pauses* the effectiveness of the Decision; Petitioners' ultimate relief sought is *reversal* of the Decision. Consistent with the statutory emphasis on avoiding irreversible environmental harms, the status quo must be understood in terms of the present state of the environment to be affected by the Decision. The status quo is that the wetland and waterways along the proposed route remain in their "undisturbed," pre-construction state. A stay would preserve the environment in that state pending review. Accordingly, Petitioners' requested stay merely preserves the status quo.

Petitioners have a reasonable probability of success on the merits because the Decision rests on multiple, significant errors. The ALJ's Decision rests on erroneous interpretations of law, and the correct interpretations compel reversal of the Decision. *See* Wis. Stat. § 227.57(5). It is

also an “exercise of discretion [] outside the range of discretion delegated to the agency by law....” Wis. Stat. § 227.57(8). This Court will review these questions of law *de novo*, giving no deference to the Decision’s interpretation of law. *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. Petitioners will also demonstrate in merits briefing that the ALJ’s Decision erred by basing its decision on findings of facts not supported by substantial evidence. *See* Wis. Stat. § 227.57(6).

Wetland Individual Permit

Wisconsin’s wetland permitting scheme follows a straightforward avoid, minimize, and mitigate strategy to achieve no net loss of wetland functional values from permitted activities. *See* Wis. Stat. § 281.36(3n)(c). To issue a wetland individual permit, DNR must determine that *all* of the following apply:

1. The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.
2. All practicable measures to minimize the adverse impacts to wetland functional values will be taken.
3. The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.

Id.

Statute provides a set of factors DNR *must* consider when it assesses a project’s impacts to wetland functional values:⁸

1. The direct impacts of the proposed project to wetland functional values.

⁸ When the word “shall” appears in statute, it is presumed to be mandatory. *Karow v. Milwaukee Cty. Civil Serv. Comm’n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (citing *Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962)).

2. The cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project.
3. Potential secondary impacts of the proposed project to wetland functional values.
4. The impact on functional values resulting from the mitigation that is required under sub. (3r).
5. The net positive or negative environmental impact of the proposed project.

Wis. Stat. § 281.36(3n)(b). Case law makes clear that DNR must have sufficient information to consider the standards in sub. (3n)(b)-(c) at the time of permit issuance. *Meteor Timber v. DHA*, 2022 WI App 5, ¶¶63-64, 400 Wis. 2d 451, 969 N.W.2d 746.

Further, and except for exceptions not applicable here, DNR must require mitigation for wetland impacts not avoided or minimized. Wis. Stat. § 281.36(3n)(d). Importantly, however, this statutory provision requiring mitigation expressly states that it “does not entitle an applicant to a wetland individual permit or any other approval in exchange for conducting mitigation.” *Id.*

Petitioners are likely to prevail on their claim that DNR’s decision to issue a wetland individual permit, as affirmed by the DHA Decision, is erroneous. The Decision presents multiple distinct legal errors.

First, the Decision does not correctly interpret the standards for permit issuance. For instance, the Decision’s discussion of “missing” wetlands entirely misapplies the relevant law by treating Petitioners’ claim that DNR lacked sufficient information as an inquiry into whether Petitioners have proven a fact rather than whether the Department had information to support its own conclusions. Indeed, this discussion does not mention, much less engage with the case law establishing this threshold permitting requirement that DNR possess sufficient information to reach a permitting decision at the time of permit issuance. *Meteor Timber v. DHA*, 2022 WI App

5, ¶¶63-64, 400 Wis. 2d 451, 969 N.W.2d 746. Further, the Decision claims Petitioners must show proposed construction “will result in the significant adverse impact of increased methylmercury” whereas our expert purportedly only established that it “could” happen. Exh. D, 23 (emphasis in original). Setting aside the factual dispute as to whether Petitioners established it would, or merely could, happen, the statute plainly requires the Department to consider “potential” secondary impacts to wetland functional values. Wis. Stat. § 281.36(3n)(b)3. DNR failed entirely to consider increased concentrations of methylmercury due to hydrological impacts to wetlands, and the Decision misapplies the plain text of this required factor to excuse that omission.

Second, the Decision does not apply legally required factors for a decision or affirm the required findings for issuance of a wetland individual permit. The Decision’s discussion of the wetland individual permitting decision does not make affirmative findings as to direct, potential secondary, or cumulative impacts to wetland functional values, affirmatively find whether or to what extent mitigation will effect net impacts to wetland functional values, or determine whether the project will result in net negative or positive environmental impacts. The failure to apply the required factors is legal error. *Madison Gas & Electric Co. v. Public Service Com.*, 109 Wis. 2d 127, 137, 325 N.W.2d 339 (Ct. App. 1992) (holding that an agency order that did not consider applicable legal standards is outside of the discretionary authority conferred upon the agency); *see* Wis. Stat. § 227.57(8).

Related, the Decision does not adequately explain or cite to record evidence to provide parties or a reviewing court an explanation of the basis for decision. The discussion supporting the ALJ’s conclusion that the Reroute would not cause significant adverse impacts to wetland functional values is largely bereft of citation to the record beyond the face of the Permit itself, and then only to note that the Department “evaluated,” “noted,” and/or “addressed” concerns via permit

conditions, without elaboration of how permit conditions address substantive concerns. For instance, the ALJ Decision concludes the statutory standard is met because DNR “evaluated the impacts of concern raised by the Petitioners and conditions in the permit largely address them.” Exh. D, 22. The Decision does not cite record evidence beyond the Permit itself in this portion of the discussion or explain how the conditions “largely” address Petitioners’ concerns. Similarly, Petitioners raised a direct objection to DNR’s treatment of wetland impacts lasting decades as mere “temporary” impacts. The Decision does not engage with this necessary issue at all. These failures to explain the basis for decision are errors of law because they place the Decision “outside of the discretionary authority conferred upon the [agency.]” *Madison Gas & Electric Co.*, 109 Wis. 2d at 135-137; *see* Wis. Stat. § 227.57(8).

Third, as Petitioners argued during the hearing, the ALJ’s authority to modify permits challenged in a contested case hearing does not extend to the modifications requested by Enbridge or made by the ALJ in this instance. Pet. for Judicial Review, ¶¶75-82. Given that the Decision relies on modifications to find wetland permitting standards have been met, these *ultra vires* modifications present reversible legal error.

Further, what factual conclusions the Decision *does* reach are also erroneous because they are not supported by substantial evidence in the record. For instance, the Decision’s conclusion that Petitioners did not meet their burden to establish that the Department lacked sufficient information to determine permitting standards were met is based on a handful of citations to the record, largely concerning irrelevant or tangential evidence, or else conclusory statements that the Department thought it had enough information. *See, e.g.*, Exh. D at 19 (“Department staff made site visits to Project locations.... They included permit conditions to address specific concerns.... Department staff ... requested additional information ... until they were satisfied the permitting

standards were met.”). As Petitioners will establish in merits briefing, the Decision’s factual conclusions are not supported by substantial evidence in the record.

Waterways

Petitioners are likely to prevail on their claim that the Permit Decision violates Wis. Stat. §§ 30.12 and 30.20 because Enbridge is not a riparian owner as required by statute and because DNR lacked sufficient information to determine that the removal of materials from the beds of navigable waters is consistent with the public interest in those navigable waters.

Wis. Stat. § 30.12 prohibits the placement of structures and materials in navigable waters “[u]nless an individual or a general permit has been issued under this section or authorization has been granted by the legislature.” Wis. Stat. § 30.12(1). To obtain an individual permit to place structures in navigable waters, only “a riparian owner may apply to the department” Wis. Stat. 30.12(3m)(a). In addition, the placement of structures by a riparian owner must be “for the owner’s use.” *Id.* To issue an individual permit under Wis. Stat. § 30.12, DNR must find, among other things, that the structure or deposit “will not be detrimental to the public interest.” Wis. Stat. § 30.12(3m)(c)2. Importantly, applicants for Wis. Stat. ch. 30 permits cannot become or remain “riparian owners” through easements or other similar conveyances. *See, e.g., Abka P’Ship v. DNR*, 2002 WI 106, 225 Wis. 2d 486, 648 N.W.2d 854; *Berkos v. Shipwreck Bay Condo. Ass’n*, 2008 WI App 122, 313 Wis. 2d 609, 758 N.W.2d 215. *See also* Wis. Stat. § 30.133(1) (prohibiting the conveyance of riparian rights through easements, including “the right to place any structure or material.”).

Undisputed record evidence presented at hearing demonstrates that Enbridge is not the owner of the vast majority of riparian properties along the Reroute because Enbridge had only obtained temporary and permanent easements in those properties. DNR made no finding in the

Permit on the property interests Enbridge has in riparian properties along the proposed Reroute nor any finding that Enbridge has the necessary property interests to deposit material and place structures on the beds of navigable waters under Wis. Stat. § 30.12(3m)(a). *See generally* Exh. A. Indeed, the Permit indirectly acknowledges that Enbridge has only obtained easements in riparian properties. *See, e.g.*, Exh. A, Condition 29.

Following the contested case hearing below, DHA disregarded Petitioners' argument that the plain language of Wis. Stat. § 30.12(1)'s prohibition on the placement of structure and materials in navigable waters applies to "any" structure or material, including temporary structures and permanent structures other than shore stabilization structures. Exh. D at 26. Rather, DHA erroneously pointed to DNR administrative regulations to interpret Wis. Stat. § 30.20 as authorizing the placement of these structures and overcoming plain statutory language. *Id.* at 26. Administrative regulations cannot overcome clear statutory language prohibiting the placement of "any" structure without a permit or legislative authorization. Wis. Stat. § 30.12(1). *See also, e.g.*, Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law."). Since a permit under Wis. Stat. § 30.12 is required, and since only riparian owners are eligible to even apply for such permits, issuance of a permit to a non-riparian inappropriately subordinates public rights in navigable waters to that non-riparian, which is detrimental to the public interest. *See* Wis. Stat. 30.12(3m)(c)2. DHA has committed reversible legal error in affirming DNR's decision with respect to temporary structures and permanent structures other than shore stabilization structures.

DHA agreed with Petitioners that a permit under Wis. Stat. § 30.12 is required for permanent shore stabilization structures. However, DHA committed reversible legal error when it modified the Permit with the condition that Enbridge, along with the actual riparian owners as co-permittees, obtain separate permits for those shore stabilization structures. Exh. D at 27-29. Shore

stabilization structures necessary to obtain coverage under the Stormwater GP and WQC from DNR for Enbridge's Reroute are decidedly not "for the owner's use", and DHA's interpretation of that requirement in Wis. Stat. § 30.12(3m)(a) is erroneous. *See* Exh. D at 29. Petitioners have a high likelihood of success on its claim that Enbridge lacks the necessary property interests for permit eligibility under Wis. Stat. § 30.12.

Wis. Stat. § 30.20 prohibits the removal of material from the beds of navigable waters unless a person can obtain, *inter alia*, an individual permit from DNR. Wis. Stat. § 30.20(1). To issue a permit under Wis. Stat. § 30.20(1), DNR must find "that the issuance of the permit will be consistent with the public interest in the lake or stream." Wis. Stat. § 30.20(2)(c). Dredging is defined in DNR regulations to include "any part of the process of the removal or disturbance of material from the bed of navigable waterways" Wis. Admin. Code NR § 345.03(5). Dredging therefore includes blasting in the beds of navigable waterways. *See id.*

The DHA Decision committed reversible legal error by affirming DNR's finding that issuance of a permit under Wis. Stat. § 30.20 "will be consistent with the public interest in the lake or stream." Exh. D at 32. Neither DNR nor Enbridge know all the locations where blasting in navigable waters will occur. As a result, DNR necessarily cannot make site-specific findings about impacts to the public interest in those waters. Without the ability to make that determination with respect to each waterbody crossing where blasting will occur, a permit cannot be issued. *See* Wis. Stat. § 30.20(2)(c). Petitioners have a high likelihood of success on its claim that DNR's public interest determination under Wis. Stat. § 30.20 was erroneous.

Water Quality Certification

Petitioners are likely to prevail on their claim that DNR's water quality certification violates Wis. Admin. Code § 299.04(1)(b) because the Reroute fails to comply with wetland and

surface water quality standards.

Enbridge may not proceed with construction of the Reroute unless or until it receives a valid WQC from DNR. *See* 33 U.S.C. § 1341(a)(1) (Section 401 of the Clean Water Act requires WQC for proposed discharges into waters of the United States). When DNR receives a request for WQC such as here, it must determine whether it has reasonable assurance that the proposed activity will comply with state water quality standards. Wis. Admin. Code NR § 299.04(1)(b) (including applicable public interest and public rights standards as well as wetlands water quality standards).

Petitioners have established that the Reroute would cause significant adverse impacts to wetland functional values in violation of wetland water quality standards set forth in Wis. Admin. Code NR 103.03. *See* Pet. for Judicial Review, ¶¶143-147; *supra* 2-5. Petitioners have further demonstrated that the Reroute would infringe water quality standards related to public interest and public rights. *See* Pet. for Judicial Review, ¶¶150-155; *supra* 2-5. DNR's certification that the Reroute will comply with Wisconsin's water quality standards, as affirmed by the DHA Decision, is based on erroneous determinations that DNR has reasonable assurance the Reroute will comply with applicable wetland and surface water quality standards. The DHA Decision is thus based on a misinterpretation of law and not supported by substantial evidence in the record. Wis. Stat. § 227.57(5)-(6).

General Stormwater Permit Coverage

Petitioners are likely to prevail on their claim that DNR's grant of coverage under the Stormwater GP violates Wis. Stat. §§ 283.33, 283.35, and Wis. Admin. Code § NR Ch. 216 because the Reroute fails to comply with wetland and surface water quality standards.

Applicants are eligible for coverage under the Stormwater GP if, *inter alia*, the proposed stormwater discharges comply with wetland and surface water quality standards. WPDES Permit

No. WI-S067831-6 §§ 1.2.2, 1.2.5. Applicants seeking coverage under the Stormwater GP are required to develop and implement site-specific erosion control and stormwater management plans. *See* Wis. Admin. Code NR §§ 216.44, 216.46; *see also* WPDES Permit No. WI-S067831-6 § 3.

As described above, DNR lacked adequate assurance that the Reroute would comply with applicable wetland and surface water quality standards. *See supra* 15-16; *see also* Pet. for Judicial Review, ¶¶156-157. Additionally, Enbridge's required erosion control plan for the Reroute, upon which DNR's decision to grant coverage was at least in part predicated, includes shore stabilization structures designed to prevent sedimentation. *See* Exh. A, Finding of Fact 72. However, DHA found that Enbridge lacks authority to install those structures with the Permit as issued. Exh. D at 28 (Enbridge needs to obtain a separate permit under Wis. Stat. § 30.12 for the permanent bank stabilization structures). For the foregoing reasons, the Reroute is ineligible for coverage under the Stormwater GP. Given this, DNR's grant of coverage under the Stormwater GP, as affirmed by the DHA Decision, is outside the range of discretion delegated to DNR, based on a misinterpretation of law, and not supported by substantial evidence in the record. Wis. Stat. §§ 227.57(5)-(6),(8).

Wisconsin Environmental Policy Act

Petitioners are likely to prevail on their claim that DNR's WEPA compliance determination, as affirmed by the DHA Decision, violates Wis. Stat. § 1.11 and Wis. Admin. Code NR ch. 150. The Final Environmental Impact Statement does not adequately describe the human environment that will likely be affected, does not evaluate the direct, secondary, and cumulative impacts of the Reroute on the human environment, and fails to identify and describe the relevance of incomplete and unavailable information. Wis. Admin. Code NR § 150.30(2)(f)-(h). These

environmental review deficiencies are inextricable linked to the Permit Decisions, which are based on the erroneous interpretations of law and unsupported factual findings discussed above. Wis. Stat. §§ 227.57(5)-(6).

CONCLUSION

Petitioners respectfully move the circuit court to issue a temporary stay *pendente lite*.

Dated this 23rd day of February, 2026

Electronically signed by Robert D. Lee
MIDWEST ENVIRONMENTAL ADVOCATES
Robert D. Lee (State Bar No. 1116468)
Anya T. Janssen (State Bar No. 1132419)
Skylar U. Harris (State Bar No. 1141131)
634 W. Main St., Ste. 201
Madison, WI 53703
Tel: (608) 251-5047
rlee@midwestadvocates.org
ajanssen@midwestadvocates.org
sharris@midwestadvocates.org

*Attorneys for SIERRA CLUB, 350 WISCONSIN,
and LEAGUE OF WOMEN VOTERS OF
WISCONSIN*

Electronically signed by Evan Feinauer
CLEAN WISCONSIN
Evan Feinauer (State Bar No. 1106524)
Brett Korte (State Bar No. 1126374)
634 W. Main St. #300
Madison, WI 53703
Tel: 608-251-7020 x321
efeinauer@cleanwisconsin.org
bkorte@cleanwisconsin.org

Attorneys for Clean Wisconsin