

**BEFORE THE  
STATE OF WISCONSIN  
NATURAL RESOURCES BOARD**

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**IN THE MATTER OF THE SAUK PRAIRIE STATE RECREATION AREA  
MASTER PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT  
APPROVED ON DECEMBER 14, 2016**

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**POST-HEARING BRIEF**

To the Wisconsin Natural Resources Board:

101 S. Webster Street  
Madison, Wisconsin, 53707

**INTRODUCTION**

Over two years ago, on December 14, 2016, the Wisconsin Natural Resources Board (“NRB” or “Board”) approved a new master plan for the Sauk Prairie State Recreation Area (“SPSRA” or “SPRA”)—a recently acquired 3,385-acre Wisconsin Department of Natural Resources (“DNR”) property directly abutting, and sandwiched between, Devil’s Lake State Park and the Wisconsin River. This new master plan included provisions allowing the public to participate in numerous high-impact uses on the property, including dual-sport motorcycle use, dog training and trialing with guns, helicopter training by the Wisconsin Army National Guard (“WIARNG”), and unspecified “special events” that could include paintballing.

Shortly after the master plan’s approval, the Sauk Prairie Conservation Alliance (“Alliance”) petitioned both the Board and the DNR for an administrative contested case hearing to challenge the inclusion of the high-impact uses in the master plan. In short letter responses, the Board and DNR summarily denied the Alliance’s petitions and refused to hold a hearing.

So, the Alliance went to court. And the court overruled the Board's and DNR's decisions and ordered the DNR to hold a contested case hearing. This brief is the culmination of that nearly year-long contested case hearing process, which included hundreds of pages of pre-filed written testimony by twenty-one witnesses and a four-day in-person technical hearing.

In other words, after over two years, the decision to include the high-impact uses is now back on the Board's agenda. But this time the Board has a lot more information to rely upon when making its decisions. This additional information in the record shows both that the DNR's master planning process was fatally flawed and that the Board and the DNR should not have included the high-impact uses in the master plan in the first place.

This brief is, unfortunately, not very brief. One of the reasons for this brief's length is the Alliance wanted to provide the Board with a full summary of the enormous record that is before the Board in this case. Another, however, is that the DNR's master planning process was riddled with both procedural and substantive errors. These errors require this Board to order the DNR to redo the master planning process in its entirety. Or this Board can remove the high-impact uses from the master plan, and thereby resolve all of the Alliance's issues with it.

In fact, as outlined in Section I below, this Board is not even the correct entity that should be deciding this case now: the DNR Secretary and/or the administrative law judge should be deciding it. Nothing in the Wisconsin statutes or DNR's rules allow this Board to resolve contested case hearing disputes. Yet, the DNR has sent the contested case hearing to this Board anyway.

Assuming the Board nonetheless decides to rule on the record before it, the Board should find that the master planning process was unlawful for the following reasons:

- The challenged high-impact uses will have significant adverse environmental impacts and are not compatible with the ecological capability of the SPRA in

violation of Wis. Admin. Code § NR 44.06(8)(b). This was unequivocally established during the contested case hearing by the Alliance’s expert witnesses—including one of the DNR’s prior grassland bird experts (Michael Mossman), a current University of Wisconsin-Madison professor who specializes in avian ecology (Dr. Pidgeon), a thirty-year veteran avian ecologist who used to be the Director of the Field Ecology Department at the International Crane Foundation (Jeb Barzen), and three additional scientists (one with a PhD, Dr. Meine, and two with master’s degrees, Mr. Luthin and Mr. Senner). All of the Alliance’s witnesses testified in this contested case for no compensation.

- Wis. Stat. § 23.091 requires that prior to designating a property as a State Recreation Area, the DNR must have completed the master planning process. The Board designated the Badger property as a State Recreation Area in 2002. It is undisputed in the record, however, that the challenged master plan was a “new” master plan, and this new master plan was not approved by this Board until December of 2016. As such, either the Board’s original designation in 2002 was unlawful, or this master planning process should have been conducted as a modification to a prior plan (the Badger Reuse Plan), not as a new master planning process.
- The high-impact uses are incompatible with the land’s ability to support and sustain the intended management, development and recreational uses in violation of Wis. Admin. Code § NR 1.60(4)(a).

- DNR did not follow its own master planning rules, and its purported environmental impact statement in this case was woefully deficient and violated numerous provisions in Wis. Stat. § 1.11 and Wis. Admin. Code § NR 150.
- DNR did not consult with the State Nonmotorized Recreation and Transportation Trails Council while drafting the master plan in violation of Wis. Stat. § 23.177(2)(a).
- DNR was also required by statute to “consult with and obtain the comments of any agency which has jurisdiction or special expertise with respect to any environmental impact involved,” Wis. Stat. § 1.11(2)(d), but again DNR did not do so.
- DNR did not adequately “consult with federal, state, county, town, and local units of government, local agencies and Indian tribes” during the master plan development and adoption process, as required by Wis. Admin. Code NR § 44.04(7)(b).
- And last, but certainly not least, DNR failed to adequately consider and avoid the effects of the high-impact uses on adjacent management areas, such as Devil’s Lake State Park, in violation of Wis. Admin. Code § NR 1.60.

## **BACKGROUND**

### **A. History and Condition of the Property**

The relevant history of the Sauk Prairie State Recreation Area goes back decades. SPRA is located on portions of the 7,354-acre property of the former Badger Army Ammunition Plant (“Badger Plant”) in Sauk County. The Badger Plant ceased operations in 1975 and was decommissioned by the Army in 1997. Master Plan at 1. Except for certain areas that are closed to

the public, the Army has remediated the property. Master Plan at 5. Nearly all of the buildings and infrastructure from the Army's operation have been removed. Master Plan at ix; Meine Direct Test. at 4:7–8.

Despite the property's industrial history, the Badger Plant property "includes important habitat areas, including native prairie remnants, forestlands in the Baraboo Hills, oak savannas, and wetlands." Meine Direct Test. at 4:2–5. For decades, volunteers from the Alliance, a small non-profit in the area, have been involved in restoring native prairie at the property. Luthin Direct Test. at 3:2–22, 9:5–7; Luthin Ex. 4. Today the property is home to a "significant number of rare grassland, shrubland, and savanna birds." Mossman Direct Test. at 6:14–7:8. SPRA "is especially significant as a critical landscape for many species of rare and declining grassland birds including bobolink, eastern meadowlark, upland sandpiper, Bell's vireo, willow flycatcher, peregrine falcon, grasshopper sparrow, and Henslow's sparrow." Meine Direct Test. at 4:8–11.

The WDNR's 2011 Rapid Ecological Assessment of the SPRA concluded:

The Sauk Prairie Recreation Area (SPRA) supports numerous rare species. Thirty-three rare animal species are known from the SPRA, including four State Threatened and 29 Special Concern species. Seven rare plant species are known from the SPRA, including two State Endangered (one is also Federally Threatened) and five State Threatened species. . . .

Biologists and birders are concerned about population declines of many grassland bird species. Since the North American Breeding Bird Survey (BBS) began in 1966, grassland birds have declined more steeply than any other group of birds in North America and the Midwest. The SPRA provides extensive surrogate grassland, shrubland, and savanna habitat for 97 confirmed or probable breeding bird species. This is an impressive list for an area the size of the SPRA, especially the number and diversity of grassland and shrubland birds (21 species).

AR 4461. In addition, a 1999 report concluded that the Badger Plant property:

has one of the most significant grassland bird populations in the state, due to the size, quality, diversity and connectivity of its grassland; that it has greater potential if managed collaboratively across the local landscape to create an extensive mosaic of prairie, shrub, savanna, oak woodland, and suitable agriculture; that Badger presents rare opportunities for collaborative, much-needed research and monitoring

studies that could inform private lands management and help return grassland birds to the rural landscape; and that intensive industrial, commercial, and recreational use should be avoided, or relegated to the western edge of the property.

Mossman Direct Test. at 4:17–5:2; *see* AR 1781–1871. A follow-up report in 2003 concluded that the list of birds identified at the Badger Plant property:

is impressive for an area of this size, especially the numbers and diversity of grassland and shrubland birds such as Eastern and Western Meadowlarks, Bobolink, Upland Sandpiper, Orchard Oriole, Bell’s Vireo and several sparrow species. Grassland/shrubland species are in more need of management than any other group of birds in Wisconsin, and include most of the critical species found [at Badger].

AR 1766. The Badger Plant property was also nominated for, and unanimously accepted as, an Important Bird Area by the Wisconsin Bird Conservation Initiative. Mossman Direct Test. at 5:9–15; AR 3464–85.

#### **B. The Badger Reuse Plan**

Public involvement in planning for the future of the Badger Plant property began soon after the Army decommissioned the plant. AR 163. Congressman Scott Klug organized a Citizen’s Task Force on the Badger Lands in 1998. *Id.* The following year, the U.S. General Services Administration, which was overseeing the federal government’s disposition of the Badger Plant property, agreed to a request by the Wisconsin congressional delegation to delay its property disposal efforts while the local community could develop consensus recommendations on its future use. *Id.*

In June 1999, Congresswoman Tammy Baldwin worked with local officials to create the Sauk County Badger Army Ammunition Plant Reuse Committee (“Badger Reuse Committee”). *Id.* The U.S. House of Representatives Appropriations Committee directed the General Services Administration “to work with the [Badger Reuse Committee] in the development of a mutually

acceptable reuse plan” for the Badger Plant property. *Id.* The Badger Reuse Committee had 21 members representing a diverse cross-section of community interests and stakeholder groups, including federal, state, local, and tribal governments; local business representatives; local landowners; and members concerned with the history, culture, education, environment, conservation, and clean-up of the Badger Plant property. AR 731. The State was represented by three of the 21 members (on behalf of the Wisconsin Department of Natural Resources (“DNR” or “WDNR”), the Department of Administration, and the Governor’s Office). *Id.* The Badger Reuse Committee met over nine months to develop its report and recommendations based on substantial public involvement. AR 8891.

In January 2001, while the Badger Reuse Committee was working on the Badger Reuse Plan, Governor Tommy Thompson sent a letter to the General Services Administration formally expressing the State’s interest in having DNR receive a portion of the Badger Plant property *consistent with the Badger Reuse Committee’s eventual recommendations.* The letter stated:

Wisconsin is interested in ownership and management of [Badger Plant] 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.

Wisconsin’s ownership is predicated on the following: . . . Wisconsin’s ownership and management interests *will be consistent with the [Badger] Reuse Committee’s final recommendations and/or other compatible uses.*

AR 4530–31 (emphasis added).

The Badger Reuse Committee process culminated in the Final Report of the Badger Reuse Committee (“Badger Reuse Plan”) in March 2001, which was overwhelmingly adopted, with just one abstention. *See* AR 727–801. The Badger Reuse Plan contained nine overarching values and

34 criteria to guide future use of the property. AR 740–743. Notably, Criterion 5.3 of the Badger Reuse Plan stated:

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.

AR 742 (emphasis added).

Four of the 21 members of the Badger Reuse Committee testified at the contested case hearing about their experience on the Committee and the meaning and intent of the Badger Reuse Plan. These four witnesses explained the exhaustive process that the Badger Reuse Committee went through to develop a community-based consensus on the future use of the Badger Plant property; how the Badger Reuse Committee expressly considered and rejected motorized recreational activities; and how dual-sport motorcycle riding, dog training and trialing, and National Guard helicopter training is inconsistent with the Badger Reuse Plan. *See* Dalhoff Direct Test.; Dalhoff & Gilbert Joint Rebuttal Test.; Dalhoff Hr’g Test.; Gilbert Direct Test.; Gilbert Hr’g Test.; Meine Direct Test. at 8:1–14:16; Meine Rebuttal Test. at 2:5–8:14; Meine Hr’g Test., Tr. at 34:13–55:14; Mossman Direct Test. at 10:6–11:12. DNR provided no witnesses during the hearing from the Badger Reuse Committee to refute any of this testimony.

### **C. Federal Property Disposal**

Soon after the Badger Reuse Committee finished its work, the General Services Administration then prepared an environmental impact statement to study the anticipated disposal of the Badger Plant property. AR 151–594. The environmental impact statement studied three scenarios for future land use at the Badger Plant property. One such scenario—Scenario A—drew upon “the values, criteria, and plan elements” in the Badger Reuse Plan. AR 166. The environmental impact statement stated that “low intensity recreation use would be most

appropriate” for recreational uses in Scenario A. AR 166. In its official comments on the draft environmental impact statement, DNR stated that it supported a variant of Scenario A, based on the values in the Badger Reuse Plan, as the preferred alternative. AR 2065–66. DNR noted that it supported Scenario A “because the Reuse Committee effort (as sponsored by U.S. Representative Tammy Baldwin and federally funded) represents public participation to this point.” AR 2066.

In 2004, DNR submitted applications to the National Park Service to acquire portions of the Badger Plant property through the Federal Lands to Parks Program (“FLP”). AR 112–40. As part of the application, DNR included a Program of Utilization (“POU”) that described its proposed management of the property. AR 123–26. In particular, the Program of Utilization included the following uses: “hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education and cultural/historical interpretation.” AR 123. The POU additionally stated: “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.” AR 124. DNR agreed to forever use all property that it received from the National Park Service “exclusively for public park and recreational use in accordance with its application for property, particularly the Program of Utilization . . . and approved amendments thereto.” AR 115. DNR additionally agreed that “the Program of Utilization . . . may be amended only for the continued use of the property for public park or recreational purposes,” and amendments must “be consistent with the purposes for which the property was originally transferred.” *Id.*

The National Park Service approved DNR’s application to receive portions of the Badger Plant property in 2005. AR 3766–71. In a letter to the General Services Administration, the

National Park Service stated that “DNR will develop and use the property as described in the Program of Utilization.” AR 3766. As part of its approval, the National Park Service prepared a Report and Recommendation, which stated: “DNR will convert the site for use primarily as conservation and recreation uses. These uses will include hiking, picnicking, primitive camping, Lake Wisconsin access viewing, prairie, savanna and grassland restoration, environmental education and cultural/historical interpretation. Other recreational uses will include interpretation of the Badger Army Ammunition Plant’s history.” AR 3769.

Between 2009 and 2016, the National Park Service deeded 3,385 acres to DNR, which properties now comprise SPRA. AR 5323–57, 005378–5583. Other portions of the Badger Plant property have been deeded to the U.S. Department of Agriculture’s Dairy Forage Research Center (DFRC), the Ho-Chunk Nation, and the Bluffview Sanitary District. Master Plan at 7–8.

As conditions to transferring the land for free to DNR, the National Park Service included the following provisions in the deeds:

- That the Property shall be used and maintained exclusively for public park or public recreation purposes for which it was conveyed in perpetuity in accordance with 41 CFR 102-75.680 and as set forth in the program of utilization and plan contained in [DNR’s] application submitted by [DNR] 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 Grantor or Grantee with the written concurrence of the other party, and such amendments shall be added to and become a part of the original application.
- In the event there is a breach of any of the conditions and covenants herein contained by the Grantee . . . all right, title and interest in and to the [Property] shall revert to and become the property of the Grantor at its option.

*See* AR 5323–57, 5378–5583.

#### **D. DNR’s Master Planning Process**

Meanwhile, soon after the Badger Reuse Committee finished its work and released the Badger Reuse Plan, the Natural Resources Board approved establishing the new Sauk Prairie State

Recreation Area at its December 2002 meeting. AR 4455. The DNR's "green sheet" for the meeting recognized that role of the Badger Reuse Plan in DNR's future management of SPRA: "The [Badger Reuse Plan] articulates values and criteria to be applied to the future disposition, ownership and management of the Badger lands. Focus was on developing a realistic, community-based, consensus vision." AR 4448.

Beginning in July 2012, DNR's master planning process began to deviate from the Badger Reuse Plan's consensus recommendation to provide opportunities for low-impact recreational activities and other compatible uses. That month, and prior to collecting any public comments in the master planning process, DNR released a Regional and Property Analysis that, for the first time, proposed "non-traditional outdoor recreation uses" such as "rocketeering, shooting ranges, geocaching, dog parks, paintball, community gardens and other recreation activities not typically found on Department lands." AR 5638; *see generally* AR 5584–650. Later that month, DNR held an open house and accepted public comments. Brusoe Hr'g Test., Tr. at 19:18–20:5. According to DNR's summary of public comments at this time,

Support for the key values identified in the 'Badger Reuse Plan' was the most often received comment" on land resource opportunities at SPRA. Comments reflected a common theme of restoration, conservation and low-impact recreation, and respect for the efforts and process used to develop the reuse plan. They reflect a desire for the master plan to be consistent with the Badger Reuse Plan.

AR 5798.

At this time, there was also no internal consensus among DNR staff for allowing high-impact activities on SPRA. Indeed, the SPRA land management sub-team prepared a 25-page Suggested Habitat Management Plan, which proposed the following goal for managing the SPRA:

To manage the natural and cultural resources of the former BAAP with an emphasis on grassland and savanna communities, and provide interpretive and low-intensity recreational opportunities, consistent with the three existing goal-setting documents (DNR green sheet [for the December 2002 Natural Resources Board meeting], NPS

application and Badger Reuse Plan) and satisfying the purpose of State Recreation Area designation.

AR 4430.

DNR then issued a Preliminary Vision and Goals Statement and Three Draft Conceptual Alternatives document in July 2013, which continued to include several high-impact uses, such as a shooting range and motorized recreation opportunities. AR 5799–804. Alternative 1 (“No Action”) involved taking no new action, expending no funds, and substantially restricting public access due to public safety concerns. AR 5800. Alternative 2 (“Ecological Restoration Emphasis”) focused on grassland and savanna restoration, with no development and limited recreational opportunities. AR 5801. Alternative 3 (“Outdoor Recreation Emphasis”) involved developing a trail network and providing various recreational opportunities including motorized uses and a shooting range. AR 5802.

There was substantial opposition to the Three Conceptual Alternatives. The Badger Oversight and Management Committee—which had been established following the Badger Reuse Committee and initially included DNR, the Ho-Chunk Nation, and the Dairy Forage Research Center, *see* AR 1771–80—prepared and endorsed its own alternative (“Alternative 4”) that aligned with the Badger Reuse Plan. *Meine* Direct Test. at 14:4–16; *see* *Meine* Ex. 6; *Gilbert* Ex. 2. Alternative 4 was endorsed by several members of the Badger Reuse Committee, the State Nonmotorized Recreation and Transportation Trails Council, local governments, and many concerned members of the public. *Meine* Direct Test. at 14:9–16; *Gilbert* Direct Test. at 4:19–5:4; *Meine* Ex. 7; AR 5300, 5805–24. In summarizing public comments, DNR stated that “About three times as many people voiced opposition to motorized use as advocated for motorized use at the Sauk Prairie Recreation Area,” and “[a]ll of the resolutions passed by local units of government opposed the incorporation of motorized uses on the property.” AR 6660; *see generally* 006657–

62. Hundreds of people called on DNR to conserve the land for “wildlife habitat and low-impact recreation such as hiking, hunting and biking.” AR 6389–6438; *see also* 6439–6445 (noting that the Citizens for Safe Water Around Badger supported Alternative 4 and the Badger Reuse Plan); AR 6447–55 (urging DNR “to secure the highest degree of environmental cleanup to assure the conservation of the former Badger lands for ecological restoration, education, sustainable agriculture, and low-impact recreation”).

DNR published a Draft Master Plan and Environmental Impact Statement on August 11, 2015. AR 6667–843. The Draft Master Plan included proposals for dual-sport motorcycle events, dog training and trialing involving the discharge of firearms, helicopter training exercises by the Wisconsin Army National Guard, and unspecified special events that could include high-impact activities such as paintball. *See* AR 6667–843. Again, there was substantial public opposition to allowing high-impact activities at SPRA. According to DNR: “Many people expressed concern about the impacts that dual-sport motorcycles would have on wildlife” and that “the noise from dual-sport motorcycles would adversely impact other visitors and their enjoyment of the property. Some people stated that even the temporary use of motorcycles on the biking and equestrian trails would cause significant damage to the trails leaving them unusable for their primary uses.” AR 7675–81. Moreover, according to DNR, some people raised concerns “that shooting firearms as part of [dog] training exercises . . . would have a significant adverse impact on other visitors to the property, wildlife (particularly birds), and neighboring landowners.” AR 7675–81.

After reviewing the Draft Master Plan, the National Park Service notified DNR that the proposed high-impact uses would require an amendment to the Program of Utilization and would require significant additional analysis of environmental impacts. AR 5237–46. The National Park Service also informed DNR that “the use of the area by the National Guard for training with

helicopters or any other purpose (except training exercises which assist the DNR with cleanup or development of the site) is not a recreational use and is not allowable under the requirements of the [Federal Lands to Parks] program.” AR 5244.

Nevertheless, DNR released a revised Draft Master Plan and Final Environmental Impact Statement (“Master Plan”) on November 8, 2016. That same day, DNR also published its determination that it had complied with the Wisconsin Environmental Policy Act. AR 9325–26.

The final Master Plan authorized dual-sport motorcycles, dog training and trialing, helicopter training by the Wisconsin Army National Guard, and unspecified special events that could include paintballing. Again, there was substantial opposition to the high-impact activities in the Master Plan. Fourteen of the original 21 members of the Badger Reuse Committee (including Darrell Bazzell, former DNR Secretary and DNR’s representative on the Badger Reuse Committee) submitted a letter to DNR and the Natural Resources Board expressing their concern that off-road motorcycle use, dog training and trialing, and an area for special events “run counter to the Badger Reuse Plan’s clear consensus to emphasize and include only *compatible, low-impact recreational opportunities*.” AR 8646–50. The Ho-Chunk Nation also submitted a letter opposing dual-sport motorcycle use at SPRA because it “is inconsistent with the values and criteria found in the [Badger Reuse Plan],” “conflicts with the missions of the surrounding landowners,” “would generate more noise than that resulting from low impact recreation activities such as hiking and biking,” would “affect the Nation’s use of the property” and its planned bison herd, and “would also result in user conflicts with low impact uses and create environmental concerns with soil erosion, spread of invasive species and potential impacts to previously remediated sites.” AR 5289–90. According to DNR’s tally of the 258 written comments received on the Master Plan, 175 were opposed to motorcycles, dog training, hunting, or rocketry, and many supported only the

conservation and low-impact recreation activities that were set forth in the Badger Reuse Plan. AR 8375–9202. Together these two categories represent 75 percent of written comments received on the Master Plan. *Id.* Only 23 comments (9 percent) supported allowing dual-sport motorcycles. *Id.*

There were numerous procedural improprieties with DNR’s master planning process up to this point. DNR did not consult with the State Nonmotorized Recreation and Transportation Trails Council. Hauda Direct Test.; Hauda Rebuttal Test.; Hauda Hr’g Test. Nor did DNR consult with Bluffview Sanitary District, which owns the southwest portion of the Badger Plant property adjacent to SPRA. Meier Direct Test. at 4:7–20; Warner Hr’g Test., Tr. at 4:15–19. And DNR made decisions about what recreational activities to allow without consulting with its scientific experts to determine whether and how to limit recreational activities based on their environmental impacts. *See* Sample Hr’g Test., Tr. at 21:23–22:12. Rather, as DNR’s own grassland bird expert on the team put it, “[t]here was very little communication, by design, between the recreation and land sub-teams,” and “management seemed more interested in high-intensity uses than in important natural resources issues related to grassland birds, cultural interpretation, or neotenic salamanders at SPRA.” Mossman Direct Test. at 8:8–17.

Nevertheless, on December 14, 2016, the Natural Resources Board approved the Master Plan, with one amendment to remove high-powered rocketry. AR 9210–19.

#### **E. The Contested Case Hearing and Record**

The Alliance petitioned both DNR and the Board to hold a contested case hearing on the Master Plan, which they denied. The Alliance, however, successfully challenged these denials in court; on December 11, 2017, the Sauk County Circuit Court ordered the DNR to hold a contested case hearing on the Master Plan. *Sauk Prairie Conservation All. v. Wis. Nat. Res. Bd. & Wis. Dep’t of Nat. Res.*, No. 2016-CE-000642 (Cir. Ct. Branch 3, Dec. 11, 2017) (order granting request for contested case hearing). On January 31, 2018, DNR requested that the Wisconsin Division of

Hearings and Appeals hold a contested case hearing on the Master Plan. The issues for the hearing were:

- (1) whether the identified high-impact uses in the Master Plan will have significant adverse environmental impacts;
- (2) whether the identified high-impact uses are compatible with the ecological capability of the SPRA;
- (3) whether the identified high-impact uses are compatible with the SPRA's ability to support and sustain the intended management, development, and recreational uses;
- (4) whether the DNR complied with its master planning rules and state statutes, including the Wisconsin Environmental Policy Act ("WEPA");
- (5) whether the DNR consulted with the State Nonmotorized Recreation and Transportation Trials Council while drafting the Master Plan;
- (6) whether the DNR consulted with agencies with jurisdiction or special expertise with respect to the environmental impacts of the identified high-impact uses;
- (7) whether the DNR evaluated the consistency of the Master Plan with plans or policies of federal, state, local, and tribal governments; and
- (8) whether the DNR adequately considered the effects of the identified high-impact uses on adjacent management areas, such as Devil's Lake State Park.

A contested case hearing on the Master Plan for SPRA was held before Judge Mark Kaiser of the Division of Hearings and Appeals on January 14–17, 2019. No member of the Wisconsin Natural Resources Board (NRB) was present.

Before the hearing, the ALJ struck portions of testimony from an Alliance witness, Professor Mark Squillace, as improper legal opinion. Squillace, a National Environmental Policy

Act (“NEPA”) and Wisconsin Environmental Protection Act (“WEPA”) expert, submitted testimony that the DNR did not comply with those statutes’ requirements and rebutted contrary testimony from a DNR witness, James Pardee, who testified that the DNR did comply with WEPA. *See Squillace Direct Test. at 3:10-5:22; Squillace Rebuttal Test.*

In all, twelve witnesses for the Alliance and nine witnesses for DNR testified at the hearing. Following the hearing, the Division of Hearings and Appeals transmitted to DNR 24 folders which, in addition to this brief, contain the full record in this case. To summarize, the record in this case consists of the following:

- The Administrative Record for the 2016 Master Plan, which includes 9,471 numbered pages<sup>1</sup> (Folder 24, p. 92) as well as additional documents incorporated by reference (*see* Folder 24, p. 93).
- The pre-filed direct and rebuttal testimony and exhibits admitted at the contested case hearing.<sup>2</sup> (Folders 1–22.)
- The audio recording of testimony taken at the contested case hearing.<sup>3</sup> (Folder 23.)
- The Division of Hearings and Appeals file for the contested case hearing. (Folder 24.)
- This brief.

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<sup>1</sup> Cited herein as AR \_\_\_\_.

<sup>2</sup> Cited herein as [Name] [Direct Test. / Rebuttal Test. / Ex. #] at [page]:[line].

<sup>3</sup> To facilitate review of and citation to testimony provided at the contested case hearing, the Alliance has prepared an unofficial transcript of the audio recording of the hearing, which it has provided to DNR concurrently with this brief. The Alliance believes that its unofficial transcript substantially reflects what was said at the hearing. However, only the audio recording is part of the record. Citations to testimony provided at the hearing are cited herein as [Name] Hr’g Test., Tr. [page]:[line].

## ARGUMENT

Given the size of the record in this case and the number of issues, the Alliance has organized its brief by issue. However, the first section deals with two threshold procedural issues: whether this Board is the correct decisionmaker in this case (it is not) and whether the administrative law judge (“ALJ”) overseeing the contested case hearing should have stricken testimony by the Alliance’s NEPA and WEPA expert (he should not have). The remaining portions of the brief are arranged in numerical order based on the eight issues above (see page 16).

### **I. THE NATURAL RESOURCES BOARD IS NOT THE CORRECT ARBITER OF THIS CASE**

At the outset, the Alliance recognizes the oddity of arguing to this Board that this Board should not be the entity deciding this case. To be clear, the Alliance is not doing so with any bad intent towards the Board. The DNR’s regulations, however, say what they say. And nothing in the DNR’s regulations give this Board the authority to decide this case. Instead, the DNR’s regulations provide that the administrative law judge (“ALJ”) and/or the DNR Secretary should decide this case.

#### **A. DNR Did Not Timely Designate the Wisconsin Natural Resources Board to Decide this Case Before the Hearing, as Regulations Require.**

Someone other than the ALJ may decide a contested case, but only if certain requirements are met. Wisconsin regulations provide that, after “each contested case heard,” an Administrative Law Judge *must* prepare “findings of fact, conclusions of law, and [a] decision.” Wis. Admin. Code NR § 2.155(1). The DNR Secretary may designate himself or someone else to decide the case, but only if he does so “by rule or in a particular case [ ] by order,” Wis. Stat. § 227.46(3)(b), and only “*prior to [the] hearing.*” Wis. Admin. Code NR § 2.155(2)(a) (emphasis added). The Secretary may also—again, “prior to [the] hearing”—direct the ALJ to draft a “proposed decision”

to circulate and give the adversely affected party an opportunity to object and argue before the “officials who are to participate in the decision.” *See* Wis. Admin. Code NR § 2.155(2)(b) (citing Wis. Stat. § 227.46(2)).

Here, the DNR did not “designate” the Wisconsin Natural Resources Board to decide this case prior to the hearing. *See* Wis. Stat. § 227.46(3)(b); Wis. Admin. Code NR § 2.155(2)(a). The DNR Secretary sent a letter to the ALJ on January 30, 2018, asserting that the “requested hearing” is a “Class 1 proceeding” and “direct[ing] that the record of the contested case hearing be certified to the Department for further action.” *See* Folder 24 at 769 (Letter from Daniel L. Meyer, DNR Secretary, to Administrator Brian Hayes (dated January 30, 2018)). The letter did not designate the NRB as the decision maker. At no point between January 30, 2018, and the hearing on January 14–17, 2019, did the DNR Secretary designate the NRB as the decision maker for this contested case by order.<sup>4</sup>

**B. The ALJ Must At Least Prepare a “Proposed Decision” Because This Case Is a Class 3 Proceeding.**

Even if the DNR Secretary timely designated the NRB as the decision-maker, the ALJ must still prepare a “proposed decision” with findings of fact and conclusions of law. More specifically, the ALJ must prepare the proposed decision if the contested case is a “class 2 or class 3 proceeding” and “a majority of the officials of the agency who are to render the final decision are not present at the hearing.” Wis. Stat. § 227.46(2). A “class 1 proceeding is a proceeding in which an agency acts under certain standards conferring substantial discretionary authority upon it,” such as “rate making, price setting, . . . and the granting or denial of a license.” *Id.* § 227.01(3)(a). A class 2

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<sup>4</sup> The DNR argues that the letter designated the Board as the decision-maker because it referenced Wis. Admin. Code § NR 44.04(8). But that regulation is inapplicable. Section 44.04(8) outlines what the Department should do in order to “prepare a proposed master plan” “for review and decision by the board.” Wis. Admin. Code § NR 44.04(8)(f). It has nothing to do with contested-case hearings on a “final” master plan that has already been approved, at issue here. The letter is also not a DNR order.

proceeding is where “an agency determines whether to impose a sanction or penalty against a party,” such as the “suspension or revocation of . . . a license because of an alleged violation of the law.” *Id.* § 227.01(3)(b). A class 3 proceeding is “any contested case not included in class 1 or class 2.” *Id.* § 227.01(3)(c).

Here, assuming for argument’s sake that the DNR Secretary properly designated the NRB prior to the hearing (which did not occur), the ALJ would still need to prepare a “proposed decision” because this contested case is a class 3 proceeding and no one from the NRB, let alone a “majority,” was “present at the hearing.” *See* Wis. Stat. § 227.46(2). The contested case hearing is not a class 1 proceeding because the DNR did not “act under standards conferring substantial discretionary authority upon it,” such as “the granting or denial of a license.” Wis. Stat. § 227.01(3)(a). At least four of the eight issues covered at the hearing involve DNR’s compliance with *mandatory* statutes and regulations. For example, issue #4 is whether the “DNR compl[ie]d with its master planning rules and state statutes . . . in developing and approving” the Master Plan and environmental impact statement. Issue #5 is whether the DNR consulted with the “State Nonmotorized Recreation and Transportation Trails Council,” as required by law, “while drafting the Master Plan.” Issues #6 and #7 ask whether the DNR complied with other statutes and regulations by “consult[ing] with agencies with jurisdiction or special expertise with respect to environmental impacts” and “evaluat[ing] the consistency of the Master Plan with plans or policies of federal, state, local, and trial governments.” Thus, issues at the contested-case hearing do not implicate DNR’s discretion, let alone “substantial discretion.” *See* Wis. Stat. § 227.46(3)(a). Nor does the contested-case hearing seek to “impose a sanction or penalty against a party,” as in a class 2 proceeding. Wis. Stat. § 227.01(3)(b). Thus, it is a class 3 proceeding. *Id.* § 227.01(3)(c).

The DNR argues that this is a class 1 proceeding because the DNR has “substantial discretionary authority” in preparing a Master Plan for department-managed lands. But the DNR does not have any “discretion[ ],” let alone “*substantial* discretion,” to deviate from the statutes and regulations which mandate that the DNR take certain procedural steps. As mentioned above, at least four of the eight issues in the contested-case hearing involve mandates, not discretion.

**C. The ALJ’s Decision to Strike Professor Squillace’s Testimony Was Improper.**

An agency or hearing examiner is not “bound by common law or statutory rules of evidence.” Wis. Stat. § 227.45(1). Rather, the examiner must admit all “reasonabl[y] probative” evidence in a contested case hearing unless it is “immaterial, irrelevant or unduly repetitious.” *See* Wis. Stat. § 227.45(1); *see also* Wis. Admin. Code § 2.14(1) (“Rules of evidence in contested case hearings are governed by Wis. Stat. § 227.45.”). Under this “relaxed evidentiary standard,” for example, hearsay is admissible. *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 50, 278 Wis. 2d 111, 692 N.W.2d 572. In addition, “[e]very party shall be afforded adequate opportunity to rebut or offer countervailing evidence.” *Id.* § 227.45(2); *see also* Wis. Stat. § 227.44(3). All evidence about compliance with WEPA must be taken at the contested case hearing. Wis. Admin. Code NR § 2.085(1) (“all evidence regarding compliance with [WEPA] shall be taken at th[e] [contested case] hearing”); *see also* *Sauk Prairie Cons. Alliance v. Wis. Natural Resource Bd. & Wis. Dep’t of Natural Resources*, Nos. 16-cv-642; 16-cv-662; 16-cv-20; 16-cv-52, Memorandum Decision 3 (Wis. Cir. Ct. Nov. 30, 2017) (“all evidence regarding compliance with WEPA shall be taken at the contested case hearing”).

Here, Professor Squillace’s testimony was “reasonably probative” and not “immaterial, irrelevant or unduly repetitious.” *See* Wis. Stat. § 227.45(1); *see also* Wis. Admin. Code § 2.14(1). Squillace, a University of Colorado Professor who is well versed in NEPA and WEPA, testified that the DNR did not comply with NEPA’s and WEPA’s requirements. *See generally* Squillace

Direct Test.; *see also* Squillace Ex. 1 (detailing Squillace’s qualifications as relate to NEPA and WEPA). WEPA and NEPA require an environmental impact statement to consider “alternatives to the proposed action,” including the impact of the alternatives on the environment, and make the alternatives analysis “the heart of the environmental impact statement.” Squillace Direct Test. at 3:15–18 (citing 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14; Wis. Stat. § 1.11(2)(c)(3)). Squillace reviewed the DNR’s environmental impact statement and determined that it did not comply with WEPA because it lacked “any credible alternatives analysis.” Squillace Direct Test. at 3:10–5:22. The Master Plan itself acknowledged that DNR evaluated the environmental impact only of the proposal, and although the plan mentioned a “no action” alternative, the plan did not describe what that alternative looked like nor analyze its environmental impact. Squillace Direct Test. at 4:4–5:22.

In addition, Squillace’s testimony directly “rebut[ted] . . . countervailing evidence” from James Pardee, a DNR witness, and thus should have been admitted. Wis. Stat. § 227.45(2); *see also* Wis. Stat. § 227.44(3). Pardee, a non-lawyer environmental review specialist, testified that the DNR complied with WEPA because the Master Plan and environmental impact statement discuss “impact differences between the proposed plan and other plans, including the no-action alternative.” Pardee Direct Test. at 4:11–5:10; 8:14–9:5. Pardee also testified that he did not agree with Squillace’s assertion that WEPA incorporated by reference some federal guidelines. Pardee Direct Test. at 5:19–7:10. Squillace rebutted that testimony by pointing to the language of the WEPA statute and citing Wisconsin cases that rely on federal cases interpreting NEPA as persuasive authority. Squillace Rebuttal Test. at 2:9-4:7.

The ALJ erroneously excluded a portion of Squillace’s direct testimony and the entirety of his rebuttal testimony. The ALJ excluded that testimony because it was “improper” legal opinion,

but the rule of evidence excluding legal opinion does not apply to administrative hearings such as this one. Compare Wis. Stat. § 227.45(1), with *Bilda v. Milwaukee Cty.*, 2006 WI App. 159, 295 Wis.2d 673 (evidence struck by Milwaukee County Circuit Court); *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Corp.*, 2001 WI App. 148, 246 Wis. 2d 933 (consideration of affidavit by Dodge County Circuit Court); *RLJCS Enters., Inc. v. Prof'l Ben. Tr. Multiple Emp'r Benefit Plan & Tr.*, 487 F.3d 494 (7th Cir. 2007). The ALJ must admit all “reasonabl[y] probative” evidence in a contested case hearing unless it is “immaterial, irrelevant or unduly repetitious.” See Wis. Stat. § 227.45(1). There is no allegation that Squillace’s testimony is “immaterial, irrelevant or unduly repetitious.” Moreover, it should have been admitted because it concerned compliance with WEPA, Wis. Admin. Code NR § 2.085(1); see also *Sauk Prairie Cons. Alliance*, Memorandum Decision 3, and offered countervailing evidence to Pardee’s testimony, see Wis. Stat. § 227.45(2); see also Wis. Stat. § 227.44(3).

## **II. ISSUES 1 AND 2: THE IDENTIFIED HIGH-IMPACT USES WILL CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS AND ARE INCOMPATIBLE WITH THE ECOLOGICAL CAPABILITY OF THE SPRA**

Issues 1 and 2 are interrelated: (1) whether the identified high-impact uses in the Master Plan will have significant adverse environmental impacts; and (2) whether the identified high-impact uses are compatible with the ecological capability of the SPRA.

Wis. Admin. Code § NR 44.06(8)(b) provides that “[a] master plan may authorize any management activity or technique that is consistent with the management objective specified in the master plan for the area, *and is compatible with the site's ecological capability.*” (emphasis added). As was demonstrated through extensive testimony by numerous Alliance experts (many of whom have master’s degrees and/or PhDs), the challenged high-impact uses will have

significant adverse environmental impacts and are not compatible with the ecological capability of the SPRA.

**A. Dog Training and Trialing Will Cause Significant Adverse Environmental Impacts and Is Not Compatible with the Ecological Capability of the SPRA**

The Master Plan proposes to allow dog training and trials in SPRA's Magazine Area, a high-priority grassland bird parcel. Master Plan at 29–30. Dog training refers to “any teaching or exercising activity involving hunting dogs in which the primary purpose is to enhance their performance in the field.” *Id.* This involves various drills, with firearms, to train a dog to track, flush, and retrieve live or dummy game animals. Lobner Direct Test. at 3:6–14. Dog trials are competitions where hunting dogs are evaluated for their hunting skills. *Id.* at 5:14–20. Competitions usually involve two owners, each with a dog, and a judge and marshal on horseback walking through a field that is planted with birds. *Id.* There are typically eight competitions in a day, lasting 30 minutes each with four in the morning and afternoon for a total of 16 owners and their dogs. *Id.* at 6:1–16.

Dog training will primarily occur from March to September. Master Plan at 126. Dog trials will primarily be held in April, May, September, and early October. *Id.* at 30. Dogs can be off-leash from August 1 to April 14 in the Magazine Area. *Id.*

The DNR states that it is not aware of any research on the impacts of dog training on plant and animal populations at other dog training sites throughout the state. *Id.* at 143. Likewise, the DNR relies on its experience with dog-trialing events to conclude that impacts to plants and animals at SPRA will be minimal. *Id.* The Master Plan also states that, with dog training, the impacts should be low because only a few people will use the training area at a time. *Id.* at 148. According to DNR, impacts from dog trialing will also be minimized because these events are shorter in duration and more spread out. *Id.* at 143.

The DNR is incorrect in concluding that dog training and trialing will have minimal environmental impacts. The Master Plan itself acknowledges the potential environmental damage that these activities may cause:

Dog trialing events can typically involve dozens of dogs, their owners and trainers, along with judges, marshals and spectators. There can be high levels of activity associated with dog trials.

*Id.* at 149.

However, it is likely that the wildlife composition of these sites is reduced to some degree during the more intensively used periods. In addition to the disturbance that dogs may cause, wildlife may also flush or exhibit avoidance behaviors due to the occasional discharge of firearms used in training, similar to the impacts that occur from hunting.

*Id.* at 143.

Research indicates that in some instances, dogs that frequent an area can cause displacement of birds leading to a reduction in the number and diversity of species present.

*Id.* at 142.

Despite these admissions, the Master Plan fails to analyze these potential impacts further or appropriately limit dog training and trialing to reduce impacts.

The record contains numerous studies establishing that dog activity can significantly impact wildlife. *See e.g.*, R. H. W. Langston et al., *What Effects do Walkers and Dogs Have on the Distribution and Productivity of Breeding European Nightjar *Caprimulgus Europaeus*?*, in *Journal Compilation, British Ornithologists' Union*, 149 (Suppl. 1) 27–36 (2007) (Master Plan App'x 5); Scott G. Miller et al., *Wildlife Responses to Pedestrians and Dogs*, 29 WILDLIFE SOC'Y BULLETIN 124 (2001) (Master Plan App'x 5); Arielle Waldstein Parsons et al., *The Ecological Impact of Humans and Dogs on Wildlife in Protected Areas in Eastern North America*, 203 BIO. CONSERVATION 75 (2016) (Master Plan App'x 5). The presence of dogs, even on leashes, can lead to the disturbance and displacement of local bird fauna. Peter B. Banks & Jessica V. Bryant, *Four-*

*Legged Friend or Foe? Dog Walking Displaces Native Birds from Natural Areas*, 3 BIOL. LETT. 611 (2007) (Master Plan App'x 5). Dogs can alter the habitat utilization of wildlife. Benjamin E. Lenth & Richard L. Knight, *The Effects of Dogs on Wildlife Communities*, 28 NAT. AREAS J. 218 (2008) (Master Plan App'x 5).

Witnesses for the contested case hearing also testified to the impacts on wildlife, particularly grassland birds. “Species like gray catbirds, common yellowthroats, field sparrows, and song sparrows that nest on the ground or in low shrubs are vulnerable to predation by dogs while training and trialing.” Anna Pidgeon Direct Test. at 5:19–20. Charles Luthin explains that:

Off-leash dogs and leashed dogs with their handlers walking or running through grassland habitat may result in nests with eggs or young being stepped on or disturbed, and any human or dog activity in proximity to a nest can disrupt normal nesting behavior.

Charles Luthin Direct Test. at 13:12–20. Dog training and trialing could be particularly impactful during the summer breeding season for grassland birds as disruption during this time can result in state-wide and population-level impacts. Meine Direct Test. at 5:19–21. “During the nesting season, even if dogs are required to be on eight-foot-long leashes, a dog could still encounter and disturb grassland birds or their nests. Dogs in training are inexperienced, unpredictable, and unaccustomed to hearing gun shots.” Mossman Rebuttal Test. at 4:12–14. The impacts of firearm use for dog training and trialing, as compared to hunting, “is a more intense use, has different acoustic impacts, involves higher concentrations of people, and takes place during a different time of year.” *Id.* at 5:21–23, 6:1.

In addition, the ecological capability of the SPRA without this or the other high-impact uses is unquestionably strong. Meine Ex. 6 (referring to two reports that (1) “recognized BAAP as having high conservation significance” and (2) “which recognized [BAAP] as a priority landscape because of its surrogate grasslands and oak savanna...[and it’s] well-documented significance for

conservation, worthy of mention because of SPRA’s inclusion of a small part of the [Baraboo] Hills, and its continuity with them.”). High-impact uses like dog trialing with guns—particularly during the nesting season—are clearly not compatible with that ecological capability. Meine Direct Test. at 7:9–22; Pidgeon Direct Test. at 3:5–6:4 These uses, and their commensurate significant environmental impacts, are detrimental to the ecological capability of the SPRA, not compatible with it.

**B. Military Helicopter Training Activities Will Also Have Significant Adverse Environmental Impacts and Are Not Compatible with the Ecological Capability of the SPRA**

The Master Plan authorizes helicopter training flights for the Wisconsin Army National Guard occurring three to five days per week. Master Plan at 35–36. This typically results in eight flights per week using one or two helicopters. *Id.* at 35. Helicopter training exercises are conducted “during the week, often in the evenings or at night.” *Id.* Training activities include night vision flight training and tactical flight training which require helicopters to fly at low levels. *Id.* Helicopter operators practice “picking up heavy loads (typically a concrete-filled barrel on a sling)” and “flying a designated loop around the site.” *Id.*

Helicopter landing and take-off is limited to one small parcel at the SPRA. *Id.* However, helicopters are authorized to fly as low as 25 feet off the ground in numerous parts of the SPRA, including the high-priority grassland bird areas. Henderson and Sivertson Ex. 1 at 5, Map A. Moreover, the Army representative that testified during the contested case hearing testified that the Army was never asked to limit its helicopter training exercises to times of year or places on the property that would minimize environmental impacts. Henderson Hr’g Test., Tr. at 6:17–22, 15:12–14.

Helicopter exercises will have significant noise impacts. The Master Plan states that the type of military helicopter similar to the model used by WIARNG generates noise levels of 80

decibels at 500 feet above ground and 94 decibels at 80 feet above ground, which would be anticipated for 5 to 10 hours per week. Master Plan at 134. Helicopters generally produce more sound than an airplane. *Id.* at 144. The high-decibel levels of training flights are disruptive to wildlife behavior, and to the quiet nature of the site. Meine Direct Test. at 6. This unexpected noise “can be expected to cause a startle effect in horses.” *Id.* However, the Master Plan does not adequately analyze the effects of the high-decibel noise levels.

Helicopters will also create dust and air pollution. Master Plan at 131. As a part of operations, trainees operate helicopters low to the ground, particularly at the landing site adjacent to the main landfill (Parcel VI). Master Plan at 131. The Master Plan acknowledges that helicopters “generate considerable wind and dust” when they are close to the ground. *Id.*; Pohlman Direct Test. at 10.

The Master Plan did not discuss the potential significant impact helicopter use will have on public safety. As a witness at the Contested Case hearing explained:

the pilots are presumably ‘trainees’ and not experienced pilots, there is a greater risk of an accident compared to those piloted by a more experienced pilot flying the same patterns. The overall land management goal of SPRA by DNR and much of the adjoining lands by neighboring landowners (Ho-Chunk Nation and Dairy Forage Research Center) is to create up to 5,000 acres of open prairie grasslands that mimic the original Sauk Prairie. Native prairie is a fire-prone and fire-maintained ecosystem, and prescribed fire is routinely used as a management tool. Whereas fire is an essential element on the prairie landscape, an unplanned fire due to a helicopter accident could have devastating human and landscape-scale consequences. I am surprised the State is willing to take that enormous risk at a public land dominated by grassland.

Luthin Direct. Test at 14–15; *See* Luthin Ex. 4.

Continued helicopter use at SPRA will significantly impact wildlife, chiefly grassland birds. *See* Mossman Direct Test. at 7. The Master Plan discloses studies that have shown that “daytime helicopter overflights can have a negative impact on geese” and “nesting bald eagles can be disturbed by helicopters.” Master Plan at 144. While the Master Plan generally acknowledges

helicopter use impacts bald eagles, it fails to specifically address the bald eagles that nest on Parcel VI, the same parcel where training landings and take-offs take place. *See* Luthin Direct Test. at 14; Mossman Direct Test. at 7:9; Pohlman Direct Test. at 11. “An eagle nest, due to its location high in tall trees, is particularly vulnerable to disturbance by low-flying helicopters.” Luthin Direct Test. at 14.

Witnesses at the contested case hearing explained that noise levels associated with high-impact activities, including helicopter training, will impact birds by: “disturb[ing] nesting grassland birds by causing energy expenditures on stress, flight, and defensive behaviors, lowering nesting success, compromising energy budgets, increasing the risk of predation, and sometimes causing nest abandonment.” Casper Direct Test. at 3:20–4:1; Pidgeon Direct Test. at 3:5–4:4. The noise and level of helicopter training flights, specifically, “are likely to scare breeding birds, compromising nesting success. At the very least, this activity should be restricted to months other than June.” Casper Direct Test at 5:18–20; *see* Barzen Direct Test. at 9:14–23. But, “it only takes one disturbance to cause nest abandonment, so simply reducing—rather than eliminating—disturbance during the bird nesting season may be inadequate to support the Master Plan’s stated goal of supporting grassland nesting birds.” Barzen Direct Test. at 4:15–18.

Numerous studies also show that loud human-generated noises “can mask the acoustic communication of certain birds and cause them to abandon a noisy area.” Casper Direct Test. at 3:20–4:5; *see* Clinton D. Francis et al., *Noise Pollution Filters Bird Communities Based on Vocal Frequency*, 6 PLoS ONE e27052 (2011) (Casper Ex. 3); Gonçalo C. Cardoso, *Nesting and Acoustic Ecology, but Not Phylogeny, Influence Passerine Urban Tolerance*, 20 GLOB. CHANGE BIOLOGY 803 (2014) (Casper Ex. 2); Courtney L. Larson et al., *Effects of Recreation on Animals Revealed as Widespread through a Global Systematic Review*, 11 PLoS ONE e0167259 (2016)

(Casper Ex. 4); Bill Thompson, *Recreational Trails Reduce the Density of Ground-Dwelling Birds in Protected Areas*, 55 J. OF ENVTL. MGMT. 1181 (2015) (Pidgeon Ex. 2); Jesse R. Barber, et. al., *Anthropogenic Noise Exposure in Protected Natural Areas: Estimating the Scale of Ecological Consequences*, 26 LANDSCAPE ECOLOGY 1281 (2011) (Master Plan App'x 5).

The Master Plan states that the distribution and abundance of birds does not appear to be correlated to helicopter flight paths. Master Plan at 144. This is an insufficient indicator of impacts, however, because:

Most assessments relied on in the Master Plan used only the presence of species (or individuals) as a metric to determine impact from human disturbance, rather than the reproductive success of species in that habitat or other meaningful population parameters. Population parameters (rather than the presence of species or individuals) are better metrics to use when evaluating the impact that various types of disturbance may have on a population . . . It is possible, for example, to have a bird species occupy an area with high disturbance levels but not breed successfully because of that disturbance.

Barzen Direct Test. 4:21–5:6; see Richard G. Johnson & Stanley A. Temple, *Nest Predation and Brood Parasitism of Tallgrass Prairie Birds*, 54 J. OF WILDLIFE MGMT., 1 (1990) (Casper Ex. 6; Brazen Ex. 3); Christine A. Ribic, et. al., *Perspectives in Ornithology: Area Sensitivity in North American Grassland Birds: Patterns and Process*, 126 THE AUK: AN INT'L J. OF ORNITHOLOGY 126 (2009).

The DNR used bird census data over several breeding seasons and concluded that impacts from helicopter training “on bird distribution and abundance appear to be secondary to the effects of habitat abundance and quality.” Master Plan at 144. However, the Master Plan did not adequately analyze how helicopter use affects such terrestrial habits and assumes the helicopter activities will be required to stop. *Id.*; cf. Johnson & Temple, 54 J. OF WILDLIFE MGMT. 1 (1990) (Casper Ex. 6; Brazen Ex. 3); Richard W. Knapton, *Optimal Size of Territory in the Clay-Colored Sparrow, *Spizella pallida**, University of Manitoba R3T 3M2, (1978); Jennifer A. Gill, et. al., *Why*

*Behavioral Responses May Not Reflect the Population Consequences of Human Disturbance*, 97 Biological Conservation 265 (2001) (Master Plan App'x 5).

Helicopter training will also have significant visual impacts on both visitors, horses, and birds. *See* Master Plan at 149–150; Casper Direct Test. at 6:4–8. Low-flying military helicopters training on a daily basis will “negatively impact the experiences of visitors who come to SPRA for low-impact recreational activities such as birdwatching and hiking.” Luthin Direct Test. at 14:11–13. Helicopters typically appear suddenly, in a group, which could startle visitors and horses. *See* Meine Direct Test. at 6:13–15. The Master Plan notes that some visitors may be bothered or freighted by the appearance of the helicopters but does not further discuss its effect on low impact recreational uses, like bird watching or horseback riding. Master Plan at 149–150. While the immediate vicinity where take-offs and landings take place will be closed off to visitors, the Master Plan does not discuss measures to address the nesting bald eagles on the site or the affect of overhead flights on visitors and horses. *See* Pohlman Direct Test. at 11:5–21; Luthin Direct Test. at 14:6–15:6; Mossman Direct Test. at 7:3–8.

In sum, the contested case hearing record unequivocally establishes that the helicopter training exercises at SPRA will cause significant environmental impacts (particular to nesting birds) and that those training exercises are not compatible with the ecological capability of the SPRA.

**C. Dual-Sport Motorcycles Will Have Significant Adverse Environmental Impacts and Are Inconsistent with the Ecological Capability of SPRA**

The Master Plan allows special events with dual-sport motorcycles up to six days per year between January 1 and mid-October. Master Plan at 22. The Master Plan permits dual-sport motorcycle riding during the critical bird nesting season. Master Plan at 22. Up to 100 dual-sport motorcycles may participate in any given event. Master Plan at 22. Riding may occur between

9:00 a.m. and 4:00 p.m. Master Plan at 22. Dual-sport motorcycles would be allowed to use up to half the biking and equestrian trails at SPRA. Master Plan at 22. The Master Plan proposes to construct up to 15 miles of recreational biking trails, up to 10 miles of mountain biking trails, and up to 12 miles of equestrian trails; thus, dual-sport motorcycles would be allowed to use up to 18.5 miles of trails. Master Plan at 25. The conceptual plan and proposed trail infrastructure indicates that proposed biking and equestrian trails will cover the entire property, including the central grasslands area and the areas that DNR has designated “High Priority Grassland Bird Parcels” and “High Priority Shrubland Bird Parcels.” See Master Plan at xiv, Master Plan Map G; Rapid Ecological Assessment at 32.

Dual-sport motorcycles will have significant noise impacts. The Master Plan discloses that each dual-sport motorcycle must not exceed 96 decibels on the A-weighted scale. For comparison, 96 decibels is louder than the noise generated by a snowmobile 50 feet away (88 decibels) or a military helicopter 80 feet above ground (94 decibels). Master Plan at 134. While 96 decibels is significant in itself, the Master Plan did not analyze the *cumulative* noise impact from 100 motorcycles, which would be even greater than 96 decibels.

Dual-sport motorcycles will have detrimental impacts on wildlife, particularly grassland birds at both an individual scale and a population-wide level. The Master Plan acknowledges that motorized recreational uses “can have a noticeable effect on the number and diversity of species in an area.” Master Plan at 139. Motorcycles “may cause displacement, nest desertion, breeding failure, and other impacts to some native species. The sounds and movement of motorcycles may also result in animals being displaced for longer periods than just the days that the motorcycles are using the repurposed trails.” Master Plan at 140. Dual-sport motorcycles may cause animals to “experience stress and stress responses (e.g., increased time and energy spent or vigilance and

avoidance movements that results in weight loss, reduced breeding success, and susceptibility to disease).” Master Plan at 140. Slow-moving animals such as snakes could be hit by motorcycles riding on trails. Exhaust from motorcycles could also impact sensitive species. Master Plan at 140.

The harmful impacts resulting from vehicles riding on trails is well documented in the record. Motorcycles are also likely to create dust and air pollution and cause soil erosion. Master Plan at 131–32; Mossman Direct Test. at 8:22–23. A review of studies on the effects of off-road vehicles concluded that “biologists and land-use managers should exhibit stringent precautions and restrictions in selection of areas for [off-road vehicles] use and in managing that use. Data gathered to date indicate that most wildlife species and habitats are highly sensitive to light, moderate, and heavy vehicle use and that major deleterious impacts can occur to ecosystems.” Kristin H. Berry, *A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates*, in U.S. Forest Service, *Management of Western Forests and Grasslands for Nongame Birds: Workshop Proceedings*, General Technical Report INT-86, 451–67, 461 (1980); Pohlman Ex. 22. Disturbances from off-road vehicles can also negatively impact the reproductive success of snakes or other reptiles. Joanna Burger et al., *Effects of Off-Road Vehicles on Reproductive Success of Pine snakes (Pituophis melanoleucus) in the New Jersey Pinelands*, 10 URBAN ECOSYSTEM 275 (2007) (Master Plan App’x 5). The overwhelming weight of existing research has concluded that off-road motorized vehicles are likely to have negative impacts on wildlife. Courtney L. Larson et al., *Effects of Recreation on Animals Revealed as Widespread through a Global Systematic Review*, 11 PLoS ONE e0167259 (2016) (Casper Ex. 4).

Other evidence in the record further describes how off-road motorized vehicles will negatively impact wildlife. *See, e.g.*, Ralf Buckley, *Environmental Impacts of Motorized Off-Highway Vehicles*, in *Environmental Impacts of Ecotourism* 83–97 (Ralf Buckley ed., 2004)

(Master Plan App'x 5); Douglas S. Ouren et al., *Environmental Effects of Off-Highway Vehicles on Bureau of Land Management Lands: A Literature Synthesis, Annotated Bibliographies, Extensive Bibliographies, and Internet Resources*, U.S. GEOLOGICAL SURVEY OPEN-FILE REPORT 2007-1353 (2007) (Master Plan App'x 5); Patricia A. Stokowski & Christopher LaPointe, *Environmental and Social Effects of ATVs and ORVs: An Annotated Bibliography and Research Assessment*, UNIV. OF VT. SCH. OF NAT'L RES. (2000) (Master Plan App'x 5); William L. Gaines et al., *Assessing the cumulative Effects of Linear Recreation Routes on Wildlife Habitats on the Okanogan and Wenatchee National Forests*, U.S. FOREST SERVICE GENERAL TECHNICAL REPORT PNW-GTR-586 (2003) (Pohlman Ex. 22); Richard B. Taylor, *The Effects of Off-Road Vehicles on Ecosystems*, Texas Parks and Wildlife (Pohlman Ex. 22).

The impacts on birds at SPRA are particularly acute during the breeding season. One scientific study concluded that motorized recreational uses on trails was associated with nest desertion and abandonment and recommended limiting motorized recreational trail development in breeding areas of rare or endangered birds. Daniel C. Barton & Aaron L. Holmes, *Off-Highway Vehicle Trail Impacts on Breeding Songbirds in Northeastern California*, 71 J. OF WILDLIFE MGMT. 1617 (2007) (Master Plan App'x 5). A literature review concluded that off-road motorized recreational vehicles “can have profound and highly significant negative impacts [on birds] by reducing abundance, variety, and biomass.” Kristin H. Berry, *A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates*, in U.S. FOREST SERV., MGMT. OF WEST. FORESTS AND GRASSLANDS FOR NONGAME BIRDS: WORKSHOP PROCEEDINGS, GEN. TECH. REPORT INT-86, 451–67, 461 (1980) (Pohlman Ex. 22); see also Clinton D. Francis et al., *Noise Pollution Filters Bird Communities Based on Vocal Frequency*, 6 PLoS ONE e27052 (2011) (Casper Ex. 3); Bill

Thompson, *Recreational Trails Reduce the Density of Ground-Dwelling Birds in Protected Areas*, 55 J. OF ENVTL. MGMT. 1181 (2015) (Pidgeon Ex. 2).

Witnesses at the contested case hearing elaborated on these impacts to birds. Mike Mossman, one of the Alliance's grassland bird experts (and a former DNR employee), explained: "Loud motorized vehicles cutting through grassland and savanna habitat areas can be expected to disturb breeding and migrating birds. The impacts will probably be most severe during the summer breeding season when birds maintain breeding territories." Mossman Direct Test. at 8:20–22. Anna Pidgeon, a UW Madison professor and avian specialist, explained the following example of impacts during the breeding season:

[T]he loud noises and physical presence of many motorcycles can cause birds to leave their nests. If this occurs during the period when eggs are being incubated or soon after the eggs hatch, and if it is a cool and/or rainy day, the eggs or young may die from being chilled. During the incubation period, parent birds maintain egg temperature at approximately 90–100°F, and temperature fluctuation once this period begins is essential to their successful development into healthy birds. And once the eggs hatch, most species are unable to thermoregulate. In slightly later stages of the young birds' lives, if motorcycles are present, this may scare adult birds who are highly reluctant to bring food to their young in the nest when something disturbs the area of the nest. And in yet a slightly later stage, motorcycling may cause a family that includes young who have just left the nest to scatter. Normally, young are closely attended and fed by their adult parents for at least the first two weeks after leaving the nest, and in the first three days are very weak flyers. Scattering of the family at this time is likely to result in death of one or more young. The limitation or outright removal of these recreational uses can curb the severity of impacts upon various endangered and non-endangered wildlife species. . . .

[T]he noise from off-road motorcycles for a sustained period of several hours is likely to have an adverse impact on nesting birds within the motorcycle trail corridors, especially during nesting season (May through July). Loud noises of this nature could cause negative impacts on birds including nest desertion, where birds leave helpless young in the nest, which are then susceptible to delayed development, predation, or mortality. Further, even birds with young that are not helpless at hatching, like turkeys and peasanets whose young are more self-sufficient, may desert their nest during critical incubation periods for their young due to the sudden, heightened noise. Restricting all motorcycle use during nesting season would minimize disturbances to birds during this critical time of year.

Pidgeon Direct Test. at 3:12–4:4, 4:18–5:4.

At a minimum, the harms to grassland birds could be reduced by prohibiting dual-sport motorcycle riding during the breeding season (roughly April through August) and prohibiting dual-sport motorcycle riding in the central grassland portion of SPRA. *See, e.g.*, Barzen Direct Test. at 9:19–23; Barzen Hr’g Test., Tr. at 4:1–10; Casper Direct Test. At 5:19–20; Mossman Direct Test. at 8:22–23; Pidgeon Direct Test. at 5:2–4; Pidgeon Rebuttal Test. at 7:14–18. DNR’s own grassland bird expert corroborated this point. Sample Hr’g Test., Tr. at 33:3–5, 33:12–22, 35:17–22.

**D. DNR Failed to Analyze the Cumulative Impacts of High-Impact Uses, Which Cumulatively Will Cause Additional Significant Adverse Environmental Impacts.**

While the Master Plan acknowledges that high-impact uses could have a cumulative adverse impact on natural resources, it fails to analyze or quantify the extent of this potential impact. Master Plan at 161. Instead, the DNR relies on its experience managing other recreation areas to assure that it can balance the different high-impact uses that will occur at SPRA. *Id.* The Master Plan also suggests that, because SPRA was previously an industrial plant that is now degraded, that “the cumulative improvements to habitat quality from the proposed management actions over time are expected to have greater positive impacts on the populations of these species at SPSRA than the cumulative impacts that may result from the use of the property.” *Id.* at 162.

This claim is without substance because the Master Plan did not actually study the cumulative impacts from the high-impact uses. For instance, while the Master Plan might require each motorcycle to not exceed 96 decibels, it did not evaluate cumulative noise levels of up to 100 motorcycles riding for a seven-hour period. Luthin Direct Test. at 12:4–8. Likewise, “whereas dog training may represent a small number of hunters and dogs at one time being on the property, over

many days of consecutive hunter and dog traffic, there could be cumulative negative impacts to nesting birds.” *Id.* at 13:15–18. Cumulative impacts from motorcycle racing, special events, helicopter training, and dog training and trialing can “collectively reduce the productivity of grassland birds even when the reduction in grassland bird productivity for any one use alone may not be as severe.” Barzen Rebuttal Test. at 2:13–14. But these cumulative impacts were never evaluated by the DNR.

**III. ISSUE 3: THE IDENTIFIED HIGH-IMPACT USES ARE INCOMPATIBLE WITH THE SAUK PRAIRIE RECREATION AREA’S ABILITY TO SUPPORT AND SUSTAIN THE INTENDED MANAGEMENT, DEVELOPMENT, AND RECREATIONAL USES**

Wisconsin Administrative Code NR § 1.60(4)(a) provides that “management activities shall be compatible with the land’s ability to support and sustain the intended management, development or recreational use.” According to the plain text of this regulation, DNR must ensure that management activities on the property are compatible with the *intended* management, development, and recreational uses of the property.

The master-planning process violated Wisconsin Administrative Code NR § 1.60(4)(a) because the high-impact activities at the SPRA—dual-sport motorcycle use, military helicopter training, dog training and trialing, and unspecified, high-impact special uses—are both incompatible with the originally intended uses of the property and with the other intended low-impact management, development, and recreational uses of the SPRA contained in the Master Plan.

Of all of the documents in the record, none better reflects the original “intended management, development, and recreational uses” of the SPRA than the Badger Reuse Plan. It is undisputed in the record that the multi-year local planning process conducted by the Badger Reuse Committee, which included a DNR representative and two State of Wisconsin representatives, did

not envision high-impact uses on the SPRA. Meine Hr’g Test., Tr. at 34:19–20, 44:12–45:20, 46:10–47:7, 51:22–52:1; Pohlman Ex. 15 (noting that John Pohlman knew “that the [Badger] Reuse Committee reached consensus on the property providing low-impact recreational use”). In contemplating what management, development, and recreational uses would be compatible with the capability of the SPRA, the Badger Reuse Committee approved Criterion 5.3, which provided the means by which future uses would be evaluated:

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.

Meine Ex. 2 at 26 (emphasis added). It is no coincidence that the language of Badger Reuse Plan Criterion 5.3, and its focus on compatible uses and management goals, tracks the language of Wisconsin Administrative Code NR § 1.60(4)(a). Indeed, the three qualities of appropriate recreational activities identified in Criterion 5.3—(1) low-impact in nature, (2) compatible with other management goals, and (3) not causing significant detrimental impacts on the cultural and natural features of the property—align not only with Wisconsin Administrative Code NR § 1.60(4)(a) but with the property conveyance documents transferring the property from the National Park Service to DNR under the Federal Lands to Parks program.

What’s more, the high-impact uses also interfere with the other intended management, development and recreational uses contained in the Master Plan itself. The Master Plan recognizes that the SPRA provides an unparalleled opportunity for habitat management and recreation. SPRA is home to numerous rare species, including species listed as threatened or endangered by WNRD and/or the U.S. Fish and Wildlife Service. It is crucial that management activities on the SPRA support and sustain the management and development of these critical species.

The proposed high-impact uses neither protect nor enhance the ecological and habitat restoration of the SPRA, which are critical management objectives in the Master Plan. Dalhoff and Gilbert Joint Rebuttal Test. at 3:9–12; Meine Ex. 2 at 14. Numerous studies indicate that recreational activities less impactful than those that DNR proposed for the SPRA in the Master Plan can have detrimental effects on the presence, behavior, and management of wildlife and habitat. *Id.* at 5:7–8; *see, e.g.*, Pidgeon Ex. 2; Pidgeon Ex. 3; Senner Ex. 2. However, “there either have been no or very few published studies conducted on [the impacts of the proposed high-impact uses] to native plants and animals or other visitors to a property.” Master Plan at 127. And yet, despite DNR’s admitted lack of information on the potential consequences of high-impact uses on ecological and habitat management and other recreational users, DNR recklessly pushed forward high-impact activities on “this regionally significant block of endangered grassland and savanna habitat.” AR 126.

Simply because DNR does not know the impacts of dual-sport motorcycles, dog training and trialing, helicopter training, and high-impact special events does not zero out the detrimental impacts of these activities on the successful management, development, and recreational use of the property for low-impact uses. Indeed, multiple SPCA witnesses, many of whom worked for DNR and/or have extensive ecological experience, have testified that these high-impact activities will compete with low-impact recreation and development resources and undermine efforts to manage the SPRA on a landscape scale. Luthin Direct Test. at 10:16–12:2; Meine Direct Test. at 6:21–22; Mossman Direct Test. at 10:1–3; Senner Direct Test. at 7:1–8:3.

**A. Dual-Sport Motorcycle Use Is Incompatible with the Intended Management, Development, and Recreational Uses of the SPRA**

The Master Plan proposes to re-purpose up to half of the biking and equestrian trails that weave through the prairie for use in dual-sport motorcycle riding events up to six days each year.

Master Plan at 21. DNR states that dual-sport motorcycle events will be permitted between January 1 and mid-October, with a maximum of two dual-sport motorcycle events during the critical bird nesting season (April 15 to July 31); however, dual-sport motorcycle events are one of the two types of recreational uses that the Master Plan “pre-identifies” as being allowed through the special permit system—a permitting process, discussed further below, which allows special events, such as dual-sport motorcycle riding, every month of the year and in which the only temporal limit is that “[s]pecial events would be limited to no more than four consecutive days” and no more than five weekends between Memorial Day and Labor Day. Master Plan at 21, 33–34; *see also id.* at 12. Trails that are re-purposed for these events would be closed to all other users during these days. *Id.* at 22. The Master Plan does not impose a speed limit for dual-sport motorcycles; the Master Plan does not limit the number of times dual-sport motorcycles can pass over the same trail over the course of a single day; the Master Plan does not address the intersection of dual-sport motorcycle routes with other equestrian, biking, and hiking trails frequented by other recreational users.

Notably, DNR takes no responsibility for testing the noise output of these motorcycles or repairing damage from them. The individuals hosting these events, *not* DNR, are responsible for testing the noise output of dual-sport motorcycles. *Id.* (noting that dual-sport motorcycle noise must not exceed 96 decibels). DNR does not provide “anything specific to [repairing] trails [as] one of [their] standard conditions” of the permits for dual-sport motorcycle events. Brown Hr’g Test., Tr. at 10:10–17. Additionally, individuals sponsoring these events, *not* DNR, are responsible for “satisfactorily repair[ing] damage to the trails or roads caused by these events.” Master Plan at 21, 132. The Master Plan does not clarify what constitutes satisfactory repair—“satisfactory repair” could mean restoring the trails to their pre-event state, mending damage done to the extent

feasible, or any number of things. Moreover, DNR admits that the individuals who are responsible for repairing biking and equestrian trails damaged by dual-sport motorcycles are not required to have experience repairing trails. *Id.*

In light of the non-existent regulations for dual-sport motorcycle events and the hollow trail repair requirements provided in the Master Plan, the Master Plan nevertheless asserts that “[a]lthough these direct and indirect impacts may be substantial from some visitor’s perspective and may reduce the quality of their visit on the six days that dual-sport motorcycles are allowed on some of the biking and equestrian trails, these potential impacts are not expected to substantially affect the overall recreational value of the property.” Master Plan at 147. Based on the evidence in the record, it is unclear how exactly DNR came to the conclusion that dual-sport motorcycle events would not “substantially affect” the recreational capacity of the property.

Dual-sport motorcycle events on trails normally used for low-impact recreation will likely cause soil erosion, degrade SPRA trails, create substantial dust impacts, and cause user conflicts. Luthin Direct Test. at 11:12; Meine Direct Test. at 5:25–16. Noise and dust from dual-sport motorcycle events will travel beyond the immediate trail corridor—which could dissect the entire SPRA—and will disrupt other visitors’ experiences in other parts of the SPRA. Luthin Direct Test. at 12: 18–21. Noise and dust will also disrupt wildlife, which will negatively impact the enjoyment of visitors who travel to SPRA for birdwatching, hiking, equestrian use, and other low-impact recreational activities. *Id.*

Public comments relating to dual-sport motorcycle use throughout the SPRA neatly summarize the impact of dual-sport motorcycles on the habitat and recreational uses of SPRA:

Many people expressed concern about the impacts that dual-sport motorcycles would have on wildlife. The most common concern was that the vehicles would disturb or displace animals, particularly birds, at the property. Many people were also concerned that the noise from dual-sport motorcycles would adversely impact

other visitors and their enjoyment of the property. Some people stated that even the temporary use of motorcycles on the biking and equestrian trails would cause significant damage to the trails leaving them unusable for their primary uses.

AR 7678.

Indeed, even DNR's own bird expert, Dave Sample, would have requested that DNR "keep some of the motorcycle trails a little more to the perimeter." Sample Hr'g Test., Tr. at 36:11–12. If even a single dual-sport motorcycle goes off-road, the damage to soil and habitat escalates. *See e.g.*, Luthin Direct Test. at 10:15–19; Luthin Ex. 5. These impacts are not far-fetched and, indeed, logically flow from the scant restrictions the master plan placed on dual-sport motorcycle events.

In the end, dual-sport motorcycle events will have significant detrimental impacts on the ecology of SPRA, wildlife, and other recreational users. Meine Direct Test. at 11:9–12. Dual-sport motorcycle use is not a low-impact recreational activity, and the very nature of the activity prevents the use from being compatible with the envisioned development, management, and recreational use of the property. *Id.* The Master Plan's inclusion of dual-sport motorcycle use on the property is antithetical to Wisconsin Administrative Code NR § 1.60(4)(a) and should be rejected.

**B. Helicopter Training Is Incompatible with the Intended Management, Development, and Recreational Uses of the SPRA.**

DNR permits the Wisconsin Air National Guard (WIARNG) to conduct an unlimited number of helicopter training exercises "throughout the entire [SPRA] property," Monday through Friday, from 10:00AM to 11:00PM, with the option for training exercises on other dates and times. Pohlman Hr'g Test., Tr. at 49:18–19; Hendersen Ex. 1.

Training exercises occur at variable heights throughout the property. Henderson Ex. 1 at 5. In the Magazine Area—which provides hiking and biking trails, a special event staging area, picnic tables, grills, a Class 2 dog training ground, 72-acres for dog trialing events (which may include judges and marshals on horseback), areas where dogs may be off leash, and high-priority grassland

bird habitat—the minimum required height for a helicopter training activity is twenty-five feet above the ground. Master Plan at 24–25, 27, 29–30; Henderson Hr’g Test., Tr. at 10:17-21. Outside of the Magazine Area, the minimum required height for helicopter training activity is eighty feet. Henderson Hr’g Test., Tr. at 11:1–4; Henderson Ex. 1 at Map A) (noting that there are two no-fly areas on the SPRA where the minimum required height is 500 feet or more).

The purpose of the agreement between the Wisconsin Army National Guard and the DNR is to allow the WIARNG to conduct helicopter training activities such as “[t]raining for take-off and landings and exterior load flights” on and above the SPRA property, Henderson Ex. 1, not “to restore this regionally significant block of endangered grassland and savanna habitat” and “provide many recreational opportunities,” AR 126. Clearly the purpose of military helicopter training activities on the SPRA is not to support and sustain the management and development of the property. Indeed, the benefits that accrue from this agreement flow directly to the WIARNG at the expense of the ecological and recreational management of the property and its users. Henderson Hr’g Test., Tr. at 7:12–13, 8:1–3 (“[O]ne of the reasons that we value our use of Sauk Prairie State Recreation is the proximity of the training area to Madison....[and] training at Sauk Prairie State Recreation Area, regardless of venue, is certainly economically advantageous to us as well.”).

Nevertheless, for years, DNR has permitted the WIARNG to conduct training activities on the SPRA, even though the conveyance deeds clearly prohibit such non-recreational activities on the property. AR 5244 (“The use of the area by the National Guard for training with helicopters or any other purpose (except training exercises which assist the DNR with cleanup or development of the site) is not a recreational use and is not allowable under the requirements of the [Federal Lands to Parks] program”). The SPRA is not the only property where WIARNG can conduct training activities and the WIARNG has stated as much. Henderson Hr’g Test., Tr. at 7:12–8:8

(stating that “we could...look at training elsewhere, specifically at Fort McCoy for a convenience time windows if that were significant”).

Admittedly, “military [helicopter] training on department lands is not a normal or typical activity, but it does occur.” Henderson and Siverston Rebuttal Test. at 2:20–21. The inclusion of military helicopter training at the SPRA in the past does not obligate DNR to continue to inappropriately permit WIARNG to conduct military helicopter training on the SPRA property, especially given the incompatibility of military helicopter training with the intended and envisioned management and development of SPRA. Luthin Rebuttal Test. at 4:14–19.

What’s particularly striking is that DNR, through multiple years of negotiating an annual agreement with a party that is willing to “adapt our training as needed,” has never discussed limiting WIARNG training activity to the months outside the bird nesting season. Henderson Hr’g Test., Tr. at 10:3–6; Pohlman Hr’g Test., Tr. at 46:6–9. In light of DNR’s original intent to manage and develop the “endangered grassland and savanna habitat [to the] benefit [of] numerous endangered species,” it is disturbing that DNR never even made a good-faith effort to negotiate with WIARNG to protect the critical nesting birds. AR 124; *see* Luthin Direct Test. at 14:13–18; *see also* Luthin Rebuttal Test. at 5:19–6:4 (“It may only take one [helicopter] flyover to disrupt the [eagle’s] nest, potentially causing abandonment.”).

Nowhere in the administrative record or Master Plan did DNR articulate how helicopter training exercises are consistent with, support, or sustain the public-park and recreation purposes for which the property was intended. The Master Plan provides that the “primary purpose of recreation areas” is to “provide multiple high quality outdoor recreation areas, provide regional or urban recreation opportunities, or for [the] preservation of important resources.” Master Plan at 5. There is no dispute that the Wisconsin Army National Guard’s helicopter training exercises are

not a recreational use. *See, e.g.*, Master Plan at 35 (noting that helicopter use is “[n]ot recreation”). Indeed, DNR unabashedly states that while “it appears that conditions related to the transfer of the property to the department restrict the [Wisconsin Air National Guard’s] ability to continue conducting training exercises” on the SPRA, the DNR nevertheless, “fully supports this use.” Master Plan at viii, 35 (“[T]he National Park Service transfers lands through the Federal Lands to Parks program for recreational use. Activities that are not recreation-related, such as the training exercises by the WIARNG, *are not allowed* on lands transferred through the FLP program.”) (emphasis added).

Military helicopter will directly impinge on the solitude and quiet at SPRA, which are among the most important values of the property for current and future recreationalists. *Id.* at 6:8–9. Unexpected high-decibel noises from low-elevation helicopter training activities can be expected to startle horses on equestrian trails. *Id.* at 6:13–14. Low-altitude military helicopters will significantly interfere with and displace recreationalists who partake in low-impact activities such as birdwatching, hiking, and biking on the SPRA. Luthin Direct Test. at 14:11–13. Indeed, low-elevation helicopter training even conflicts with the other contested high-impact uses DNR proposed, such as dog trialing. It is unimaginable that dog trialing, dual-sport motorcycle, and special permit events could occur successfully, and without significant risk, while military helicopters are hovering or flying twenty-five feet above the ground. *See* Meine Direct Test. at 6:13–14.

Because military helicopter training is not a recreational activity, is inconsistent with and contrary to permissible low-impact recreational uses of the deed-restricted property, and is adverse to the SPRA’s ability to support and sustain the intended management, development, and

recreational use of the SPRA, the Master Plan does not comply with Wisconsin Administrative Code NR § 1.60(4)(a).

**C. Off-Leash Dog Use, Dog Training, and Dog Trialing Are Incompatible with the Intended Management, Development, and Recreational Uses of the SPRA.**

DNR also proposes to allow off-leash dogs on the SPRA property. *See* Master Plan at 29. And off-leash dogs will also interfere with the intended management, development, and recreational uses of the SPRA property.

In the Magazine Area, three miles of hiking trails will be constructed “for people walking their dogs.” Master Plan at 30. Dogs are allowed off-leash in parcels MA2, MA4, and MA5, which include the high-priority grassland bird area, from August 1 to April 14, which is “the same time period on most other department properties (except State Parks and State Natural Areas), where dogs are generally required to be on-leash all the time.” Master Plan at 30, 152; *see also* Master Plan at 18, fig. 6.

DNR admits that recreational users allow their dogs off-leash during times of the year when leashes are required and offers no management solution to this known impact. Pohlman Hr’g Test., Tr. at 37:22–38:1, 38:14–22. Off-leash dogs pose a threat to wildlife, “particularly during the summer breeding season for grassland birds, when disruptions to birds during this time can result in site-wide and population-level impacts.” Meine Direct Test. at 5:18–30. These impacts destabilize and hinder the intended management of nesting animals, particularly grassland birds, and “could result in significant long-term impacts on grassland and shrubland bird populations in the Magazine Area during the nesting season.” Master Plan at 29; Luthin Direct Test. 13: 3–14:5; *see also* Pidgeon Rebuttal Test. at 6:19–22.

The Master Plan proposes a Class 2 dog training area immediately south of parcels MA2, MA4, and MA5. Master Plan at 30. The Class 2 dog training ground will be open year-round. *Id.*

The goal of dog training is to “improve the dog’s ability to find and retrieve game animals,” and the ultimate goal “is a sequence where the dog flushes or points the bird, the owner flushes/shoots the bird, and the dog retrieves it to the owner.” Lobner Direct Test. at 3:6–14. Firearms are used in dog training and DNR does not prohibit or limit such use on SPRA. Lobner Hr’g Test., Tr. at 12: 18–20.

Dog trialing events “cover larger areas and thus have the potential to affect more lands.” Master Plan at 30. These events can involve “dozens of dogs, their owners and trainers, judges and marshals [on horseback], and spectators.” Master Plan at 149. DNR “anticipates that most dog trials at SPSRA would be held in April, May, September, and early October.” Master Plan at 30, 128 (noting that dog trialing events can occur from April to September); Luthin Direct Test. at 13:5–7 (“It is odd that this state-managed property with important grassland bird populations would be open to dog training and trialing events at all during bird nesting season.”). Firearms may be used in dog trialing events and DNR does not prohibit or limit such use on SPRA. Lobner Hr’g Test., Tr. at 12:18–20. Due to the high levels of activity associated with dog trialing, the Magazine Area “can be closed to other visitors during trialing events...[and] some visitors may be temporarily displaced from this portion of the property.” Master Plan at 149.

The presence of a Class 2 dog training area and dog training in this high priority grassland bird parcel will, of course, interfere with the intended management and development of grassland bird species. Pidgeon Hr’g Test., Tr. at 10:1–7; *compare* Brusoe Ex. 2 at 32, *with* AR 6834. DNR proposes to restore much of the high-priority grassland bird parcel to native grassland habitat, AR 6839, and, as DNR successfully develops and manages that parcel, the quality of the grassland will increase, making the land more attractive for grassland birds, Pidgeon Hr’g Test., Tr. at 11:14–22. Dog training and trialing on this high priority grassland bird parcel will “have the effect of turning

SPRA into an ‘ecological trap.’” Senner Direct Test. at 3:21–4:1. If it becomes an ecological trap, birds will be attracted to the area, but the dog training and trialing events “would lead to unsuccessful breeding and could lead to a net decrease in the overall grassland bird population in the area.” Senner Direct Test. at 4:2–6; Senner Ex. 2. Thus, DNR’s management and development activities on the SPRA “will be creating habitat that appears attractive to grassland birds...but also through [the addition of] high-impact recreational activities will be adding disturbance...creating the conditions for an ecological trap,” eroding the ecological and wildlife management and development activities on SPRA. Senner Hr’g Test. Tr. at 6:14–19.

The Master Plan does not indicate that DNR contemplated physically and temporally spacing either dog training or dog trialing in order to have the least, or even to minimize, impacts on birds and, more specifically, nesting birds. Luthin Direct Test. at 7:21–8:1. This lack of a comprehensive and contemplative management strategy is incompatible and antithetical to supporting and sustaining grassland bird management. *Id.* at 8:1–2.

In addition, dog training and trialing will have significant detrimental impacts on other recreational users. Meine Direct Test. at 11:9–10. Neither dog training nor dog trialing is a low-impact recreational activity and both are incompatible with other recreational uses of the property. Meine Direct Test. at 11:10–12. As noted above, during a dog-trialing event, all other recreational users can be barred from entering the Magazine Area. That one single use (dog trialing) can prevent all other recreational users from entering the 607-acre Magazine Area is a stark example of the utter incompatibility of dog trialing with all other recreational uses. Master Plan at 81.

**D. High-Impact Special Event Permit Activities Are Incompatible with the Intended Management, Development, and Recreational Uses of the SPRA.**

DNR’s special-event permit system would allow for high-impact activities anywhere on Sauk Prairie with minimal temporal limitations. The SPRA Master Plan “pre-identifies” two

recreational uses that will be allowed through the special event permit system: “dual-sport motorcycle use and rocket launching.” *Id.* at 32. DNR does not provide any other examples of or meaningful limitations on “special event” uses. At this point, DNR does not “have knowledge” of what types of special events may occur on the SPRA. Pohlman Hr’g Test., Tr. at 78:10–13; *id.* at 29:20–21. Although the DNR states that it will allow special events on department-managed lands “as long as such events are consistent with the general use and attributes of the property,” it acknowledges that “[b]y their very nature, special events are outside a property’s normal use patterns.” Master Plan at 32–33.

Apart from this vague and somewhat contradictory guidance, the Master Plan does not provide insight into the number or types of activities that DNR is willing to permit on SPRA. Absent concrete guidance, the limit does not exist. Moreover, special events may occur “in all of the Magazine Area;” indeed, a “special event can happen anywhere on Sauk Prairie.” Master Plan at 34; Pohlman Hr’g Test., Tr. at 21:17–19. The only temporal limitation in the Master Plan permits special events to span up to four consecutive days. Master Plan at 33. However, the Master Plan does not exclude any dates in the Special Use Area of the property, despite the area containing high priority grassland bird land and diverse nesting grassland birds between April and August. Luthin Rebuttal Test. at 8:4–6. Certain types of events may require that portions of the property “be closed to other visitors.” Master Plan at 32.

Indeed, “[t]here are no precise rules dictating what events are acceptable and when a special event permit is or isn’t needed.” Master Plan at 33. Rather, DNR provides obscure guideposts for two elements shared among special events: 1) the “event will be noticeable to *most* visitors” and 2) “there is a reasonable probability that it may affect *many* visitors’ use of the property.” *Id.* (emphasis added). Thus, it is foreseeable that special events will, at a minimum, draw the attention

of a majority of other recreational users and impact the use and enjoyment of a large portion of recreational users.

DNR's elusive standards for special events open the gates of the SPRA to innumerable high-impact activities. The Master Plan does not attempt to analyze the potential impacts of these yet-to-be-determined activities on the development, management, and recreational use of the property, likely because DNR has "a hard time kind of explaining what [special events] are likely to be and what the impacts are likely to be." Pohlman Hr'g Test., Tr. at 29:20–21. Without an understanding of what special events entail and how many special event activities are permitted on the SPRA, it is impossible to conclude that the special event permit activities are compatible with the SPRA's ability to support and sustain the intended management, development, and recreational use of the SPRA.

**E. The Cumulative Effects of the Contested High-Impact Activities Are Incompatible with the SPRA's Ability to Support and Sustain the Intended Management, Development, and Recreational Uses.**

As discussed above, each contested high-impact use of the SPRA, alone, is incompatible with the SPRA's ability to support and sustain the intended management, development, and recreational uses of the property. However, the contested high-impact uses will not occur in a vacuum. Rather, the individual impacts of each contested high-impact activity, when assessed alongside the impacts of every other contested high-impact activity, will result in cumulative effects that further deteriorate the ecological health and recreational opportunities of the SPRA and hinder successful management of the property as a whole.

DNR admits that high-impact activities such as dual-sport motorcycle events, dog training and trialing, helicopter training, and as-yet-unspecified high-impact special events could have "negative cumulative impacts on wildlife and visitors." Master Plan at 161. Rather than study these potential impacts, however, DNR merely notes that it is "not aware of any research related to

[cumulative] impacts.” *Id.* DNR “expects that [high-impact] activities could impact habitat quality and use of the property by some sensitive species... [and] it is expected that some potential visitors will not come to SPSRA due to a desire not to have to interact or experience others engaged” in high-impact uses. *Id.* at 161–62. DNR’s complete failure to analyze the cumulative effects of the contested high-impact activities on the management, development, and recreational use of the property makes prohibiting such high-impact uses even more important.

#### **IV. ISSUE 4: DNR DID NOT COMPLY WITH ITS MASTER PLANNING RULES AND STATE STATUTES, INCLUDING WEPA, IN DEVELOPING AND APPROVING THE MASTER PLAN AND ENVIRONMENTAL IMPACT STATEMENT**

##### **A. DNR Did Not Comply with Wis. Stat. § 23.091 or Its Own Master-Planning Rules**

The DNR “may acquire, develop, operate and maintain state recreation areas,” subject to certain procedural restrictions. Wis. Stat. § 23.091. One of those procedural restrictions could not be clearer: the DNR “may designate a recreational area only *after a master plan for use and management of the area is prepared*, public hearings on the plan are held in the county . . . , the procedures in s. 1.11 are complied with, and the plan is approved by the natural resources board.” Wis. Stat. § 23.091(2) (emphasis added).

Here, the Natural Resources Board designated the Badger property as the new Sauk Prairie State Recreation Area at its December 2002 meeting. AR 4455. The only “master plan” in existence at the time of the designation was the Badger Reuse Plan.

The “prepar[ation]” and “approv[al]” of the DNR’s recent “Master Plan” occurred long after the Board’s designation of the SPRA as a “recreational area” in 2002. *See* Wis. Stat. § 23.091(2) (approval of a master plan must come before designation as a recreation area). In fact, the Master Plan itself states that “[t]he Sauk Prairie State Recreation Area is designated as a state recreation area” based on a “December 2002” designation, citing Chapter 23. Master Plan at 11,

14 & n.5 (Table 2). This is not a minor issue. It is a huge procedural flaw. Either the Badger Reuse Plan was the operative master plan in 2002, or the WDNR's designation of the property as a State Recreation Area violated Wis. Stat. § 23.091.

What's more, if the Badger Reuse Plan was the operative master plan in 2002, that means the DNR should have started with the Badger Reuse Plan in 2012, not ignored the Badger Reuse Plan and issued a brand-new master plan instead. According to the DNR's own rules, the Board can change a master plan only in particular ways. A "master plan shall remain in effect until the board takes action to modify it." Wis. Admin. Code NR § 44.04(12). Allowable modifications fall into four categories: revisions, amendments, variances, and minor amendments. Wis. Admin. Code NR § 44.04(1)-(2); *see also id.* § 44.04(5). A revision "change[s] the goal or objectives for a property." *Id.* § 44.04(1)(b). An amendment "change[s] [ ] a management classification or subclassification of a property" but does not change the "goal and objectives for the property." *Id.* § 44.04(1)(c). A variance is a "change in management activity or use" that "is consistent with the area's land management classification" and "does not constitute a change in an objective for management or public use of the area as specified in the plan." *Id.* § 44.04(1)(d). Finally, a minor amendment is a "change . . . through a minor expansion of the property boundary" where the "added parcel" will be used and developed "consistent[ly]" with an adjacent area. *Id.* § 44.04(1)(e). Any "person" or the "department" may propose "a plan amendment or revision" "at any time," and an "amendment or revision request shall be filed in writing with the secretary of the department." *Id.* § 44.04(6). "The secretary shall inform the board of [such] requests . . . ." *Id.*

DNR's witnesses at the hearing admitted that the Master Plan was a "new master plan," not a modification to the Badger Reuse Plan. Pohlman Hr'g Test. at 15:12-14; Brusoe Hr'g Test. at 19:3-9. The process DNR followed was for adopting a new master plan, not an amendment.

Pohlman Hr’g Test. at 15:12–19; Brusoe Hr’g Test. at 19:3–9; *cf.* Admin. Code § 44.04. As such, the DNR’s process was flawed from the beginning. And numerous DNR witnesses admitted that the property’s designation in 2002 as a State Recreation Area impacted the uses they considered when drafting the new Master Plan. Brusoe Hr’g Test. at 11:6–14:9; Pohlman Hr’g Test. at 28:21–23. So, this was a significant procedural flaw that impacted what was ultimately included in the final Master Plan.

**B. DNR Also Did Not Comply with the Wisconsin Environmental Policy Act**

The Wisconsin Environmental Policy Act (“WEPA”) requires all state agencies to prepare an environmental impact statement (“EIS”) for all “major actions significantly affecting the quality of the human environment. Wis. Stat. § 1.11(2)(c). An EIS must provide “a detailed statement” about “(1) The environmental impact of the proposed action; (2) Any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) Alternatives to the proposed action; (4) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; (5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and (6) Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.” Wis. Stat. § 1.11(2)(c).

WEPA is modeled after its federal counterpart, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and they share many requirements. “NEPA and WEPA use nearly identical statutory language to require federal and state agencies, respectively, to prepare environmental impact statements for major actions significantly affecting the quality of the human environment. *Compare* 42 U.S.C. § 4332(2)(C), *with* Wis. Stat. § 1.11(2)(c).” Squillace Direct Test. at 2:16–20. Indeed, WEPA incorporates by reference the federal NEPA regulations, which

are codified at 40 C.F.R. §§ 1500–08. In particular, WEPA requires that an EIS must “substantially follow[ ] the guidelines issued by the United States council on environmental quality under P.L. 91–190, 42 USC 4331.” Wis. Stat. § 1.11(2)(c). And Wisconsin courts consider NEPA case law to be persuasive when interpreting WEPA. *See, e.g., Clean Wis., Inc. v. Pub. Serv. Comm’n of Wis.*, 2005 WI 93, ¶ 188 n.43 (“Because WEPA was patterned on the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1970), federal law construing NEPA is persuasive authority.”).

The purposes of WEPA are “twofold.” *Wisconsin’s Env’tl. Decade, Inc. v. State Dep’t of Nat. Res.*, 94 Wis. 2d 263, 271, 288 N.W.2d 168 (Ct. App. 1979). First, the Act “is designed to ensure adequate consideration of environmental factors in the decision-making processes of state agencies before resources are irreversibly and irretrievably committed.” *Id.* Second, “the Act is designed to get information on proposed actions before the public and other state agencies.” *Id.* WEPA and NEPA are “environmental full disclosure law[s].” *See id.*

Although officially titled the “Master Plan and Final Environmental Impact Statement,” the Master Plan is an EIS in name only. The Master Plan falls woefully short of meeting the standards that WEPA requires for an EIS.

### **1. The Master Plan Does Not Adequately Evaluate Environmental Impacts**

An EIS must include, among other topics, “[a]n evaluation of 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). In an oft-repeated phrase, WEPA requires that an agency take “a ‘hard look’ at the environmental consequences” of a project. *Wisconsin’s Env’tl. Decade, Inc. v. Public Serv. Comm’n*, 79 Wis. 2d 409, 420, 256 N.W.2d 149 (1977). “[V]ague and conclusory statements, without any supporting

data, do not constitute a ‘hard look’ at the environmental consequences of [an] action as required by NEPA.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006).<sup>5</sup>

The Master Plan does not adequately “evaluat[e],” Wis. Admin. Code NR § 150.30(2)(g), environmental impacts because it does not provide sufficient “data” for many of its conclusions. *See Hankins*, 456 F.3d at 973. The Master Plan is rife with conclusory statements and analysis that wholly lacks supporting documentation. *See id.* The Master Plan admits 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 a property,” and the DNR took no steps to rectify that. Master Plan at 127; *see Wisconsin’s Env’tl. Decade*, 79 Wis. 2d at 420 (“hard look”). And although DNR included an appendix with a list of references that DNR staff apparently used to “help inform” their assessment of environmental impacts, the Master Plan does not specifically cite any of these studies in support of its analysis. Master Plan at 136–37, 209–14. This lack of transparency completely undermines the public-information principles underlying WEPA. *See Wisconsin’s Env’tl. Decade*, 94 Wis. 2d at 271. In addition, much of the Master Plan’s attempted “evaluation” (beyond mere conclusory statements) lacks adequate detail or relies on flawed reasoning.

Indeed, the conclusory statements in the Master Plan downplay or wholly ignore the significance of the individual and cumulative environmental impacts resulting from dual-sport motorcycles, dog training and trialing, National Guard helicopter training, and special events that could be permitted at SPRA. As discussed in detail in Sections II and III of this brief, and as exhaustively documented in contested case hearing testimony and elsewhere in the record, these

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<sup>5</sup> As discussed above, Wisconsin courts routinely rely on NEPA caselaw when evaluating the adequacy of a state agency’s actions under WEPA.

activities will have significant environmental impacts. Because the Master Plan fails to adequately disclose, discuss, and analyze these impacts, it cannot pass muster under WEPA.

**a. Noise Impacts**

The Master Plan's conclusions about noise impacts lacked support and were contradictory. The Master Plan concludes that the noise impacts from dual-sport motorcycles "is expected to be minor" because of the distance that most neighbors are from SPRA and because "on average 11,000 cars and trucks a day travel the adjacent stretch of [U.S. Highway] 12." Master Plan at 146. But the Master Plan does not quantify the distance of neighbors from the areas that will be used for motorcycle riding, nor does the Master Plan quantify the sound levels of U.S. Highway 12 and compare them to the sound levels of motorcycles. And the Master Plan's own comparison directly contradicts its conclusion. The Master Plan stated that "[d]epending on the speed of the motorcycles and the number that are traveling together, it is possible, and potentially *likely*, that the sound level along the travel route during these six days may be *considerably higher* than the sound level along the roads during their typical use throughout the year." Master Plan at 140 (emphases added). Indeed, the Master Plan fails to quantify the cumulative noise impacts from up to 100 motorcycles of 96 decibels each riding on days when events are permitted. It is inexplicable how the Master Plan could conclude that impacts would be "minor" when compared with the noise levels of nearby roads if the noise levels from motorcycles will "likely" be "considerably higher" than typical noise levels along those roads.

**b. Air-Quality Impacts**

The Master Plan's analysis of air-quality impacts lacks the evidentiary support and relies on flawed comparisons. The Master Plan attempts to support its conclusion that air-quality impacts from motorcycles will be minimal by drawing a false comparison between motorcycle emissions and automobile emissions. The Master Plan estimates that on days when trails are open to

motorcycles, motorcycle events will result in emissions associated with using 100 gallons of gas each day. Master Plan at 131. “To put these emissions in perspective,” the Master Plan notes that vehicles driving on the roadways surrounding SPRA will generate emissions from burning 1,660 gallons of gas per day. *Id.* This comparison is flawed because it assumes, without substantiation, that the emissions from a motorcycle and an automobile both using one gallon of gas are equivalent. Moreover, the Master Plan glosses over the fact that motorcycle usage will be concentrated within a few hours, rather than spread throughout a 24-hour period. The Master Plan fails to explain what pollutants are emitted by dual-sport motorcycles, which makes it impossible for the agency and the public to fully understand the associated air-quality impacts. *See Wisconsin’s Env’tl. Decade*, 94 Wis. 2d at 271. Furthermore, this comparative analysis of air-quality impacts is flawed because the Master Plan should have analyzed the impacts relative to a baseline of no motorcycle use, rather than compared to highway traffic outside SPRA.

The Master Plan’s conclusions regarding dust pollution are also unsupported. The Master Plan contains a single sentence to analyze dust impacts from dual-sport motorcycles riding on trails: “Dust is likely to be created during the dual-sport motorcycle events, although the magnitude is expected to be minor and localized.” Master Plan at 131. The Master Plan cites no studies, reports, or other evidence to support its conclusion that dust impacts from motorcycle events would be “minor.” The Master Plan did not quantify how much dust would be created by motorcycle events, nor did it consider how that dust would impact wildlife or other visitors.

### **c. Impacts on Wildlife**

The Master Plan’s analysis of impacts on wildlife is fundamentally flawed. The Master Plan does not consider population-level habitat needs for various bird species at SPRA, which undermines any conclusions regarding population-level impacts. Barzen Direct Test. at 5:17–9:13. Moreover, the Master Plan lacks evidentiary support for its conclusions that impacts to animal

populations will be minor. As an example, the Master Plan states that any impacts of dual-sport motorcycles on animal populations “are expected to be minor” because motorized use will be “limited,” without citation to any peer-reviewed studies for support—and despite acknowledging that motorcycles riding on trails could cause nest displacement, nest desertion, breeding failure, trampling, and other impacts. Master Plan at 140. Indeed, “high-priority grassland birds have a very short window for breeding,” and “even the smallest or shortest disturbance in that timeframe can be significantly detrimental to the breeding success of these birds.” Senner Direct Test. at 3:15–20. If breeding failure occurs in a given year or in multiple years, populations will decline. Casper Hr’g Test., Tr. at 12:5–16. The record is replete with credible evidence that dual-sport motorcycle events, dog training and trialing, and helicopter flights will have significant adverse impacts on animal populations, contrary to the Master Plan’s unsupported conclusions. *See supra* Section II; Section III.

#### **d. Cumulative Impacts**

The Master Plan gave scant consideration to cumulative impacts, and a discussion of cumulative impacts is critical to understand the impacts of the various permissible activities in the Master Plan. This is because the impacts of various high-impact activities “taken together have a more adverse, cumulative effect” than any one activity. Senner Direct Test. at 5:23. “The Master Plan only examined the individual impacts of discrete uses and did not analyze the collective impacts of these uses on grassland birds through the whole area under consideration. It only takes one disturbance to cause nest abandonment, so simply reducing—rather than eliminating—disturbance during the bird nesting season may be inadequate to support the Master Plan’s stated goal of supporting grassland nesting birds.” Barzen Direct Test. at 4:13–19. This deficiency in the Master Plan “may significantly underestimate the actual impacts on grassland birds.” Barzen Direct Test. at 4:8–9.

## 2. The Master Plan Did Not Adequately Analyze Alternatives

An EIS must also include a “list of reasonable alternatives to the proposed project, particularly those that might avoid all or some of the adverse environmental effects of the project, including a description of proposed preventive and mitigating measures and an explanation of the criteria used to discard certain alternatives from additional study,” Wis. Admin. Code NR § 150.30(2)(e), and an “evaluation of the probable positive and negative direct, secondary and cumulative effects of . . . alternatives to the proposed project,” *id.* § 150.30(2)(g). An agency cannot avoid discussing significant detrimental environmental impacts of particular activities by pointing to the net “beneficial” effect of the project. *See* 40 C.F.R. § 1508.27(b)(1) (“A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.”). The alternatives analysis is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The alternatives analysis “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.* More specifically, the agency must:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.

- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

*Id.* For actions such as updating a land management plan, “alternatives would include management plans of both greater and lesser intensity.” *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). “To construct an alternative that is based on no management at all would be a useless academic exercise.” *Id.*

The Master Plan does not include a detailed analysis of any reasonable alternatives. *See* Wis. Admin. Code NR § 150.30(2)(e); *id.* § 150.30(2)(g); 40 C.F.R. § 1502.14. The discussion of alternatives in Chapter V of the Master Plan is far too short and superficial to satisfy the requirements of WEPA. *See* Wis. Admin. Code NR § 150.30(2)(g). The Master Plan does not “rigorously explore” and “devote substantial treatment to” any alternatives. *See* 40 C.F.R. § 1502.14. While the analysis of the DNR’s preferred alternative is 40 pages (and is inadequate in its own right, as discussed above), the Master Plan devotes a mere 12 pages to discussing *all other* alternatives, including *unreasonable* alternatives. Several alternatives discussed in the Master Plan are not reasonable because they are neither practical nor feasible. These alternatives would violate federal law and the deed covenants on the property, and would thus jeopardize DNR’s ownership of the property at SPRA. For example, the alternative of converting land to grow crops was explicitly prohibited in the deeds to the property. Master Plan at 181. Similarly, the no-action alternative—which the Master Plan incorrectly described as a “minimal management approach”—

would result in the decline of roads, habitat, and recreation areas, and was considered “unacceptable” by DNR because it would put the property in jeopardy of reversion to the federal government. Master Plan at 169–70. Indeed, the National Park Service notified DNR that its characterization of a no-action alternative was inappropriate:

In the SPRA scenario, [the no-action alternative] would mean continuing the Program of Utilization in the original application by which the property was granted with no changes in the current recreational uses (i.e. primarily passive recreation, trails, habitat management, and prairie restoration). However, the Master Plan and Environmental Impact Statement did not present this scenario as one of the alternatives. . . .

While the draft Master Plan and Environmental Impact Statement includes a “no action” alternative, it is described essentially as a hands-off, no management alternative, resulting over time to decline of roads, habitat, and recreational access, i.e. reduced recreational usefulness of the site. As noted above, this is not the “no action” alternative and, in fact, is not a reasonable alternative because if the State were to follow this approach with the decline as described, the NPS would likely consider the property to be in neglect and noncompliance with the justification for obtaining the property and the commitments made in the Program of Utilization, which would potentially put the property in jeopardy of reversion to the Federal government.

AR 5237–46. Indeed, “[t]o construct an alternative that is based on no management at all would be a useless academic exercise.” *See Forty Most Asked Questions*, 46 Fed. Reg. at 18,027. Moreover, the discussion of alternatives is largely focused on policy and social concerns, with barely any discussion of the relative environmental impacts associated with each alternative, *see* Wis. Admin. Code NR § 150.30(2)(e).

While the so-called “land management classifications” noted on page 172 might have offered a basis for describing several other reasonable alternatives, the Master Plan made no effort whatsoever to develop or describe these different classifications or assess the environmental impacts associated with them. It merely stated:

SPSRA could be classified entirely as a recreation management area, entirely as a habitat management area, or could have more or less native community management area. Or, a different combination of recreation management area,

habitat management area, special management area, and native community management area could be implemented than what is proposed. Alternatively, other land management classifications (forest production area, scenic resources management area, wild resources management area) could be assigned, although these classifications do not appear to be appropriate fits for the property.

Master Plan at 172. Any or all of these alternatives might have been studied as reasonable alternatives, but none are described in sufficient “detail,” 40 C.F.R. § 1502.14; *see* Wis. Admin. Code NR § 150.30(2)(g), for the reader to even know what they would mean for the management area, and no effort is made to discuss how these classifications might impose fewer or greater environmental impacts. Such opacity undermines the public transparency goals of WEPA and NEPA. *See Wisconsin’s Env’tl. Decade*, 94 Wis. 2d at 271; *see also* Squillace Direct Test. at 6:1–12.

### **3. The Master Plan Did Not Adequately Discuss Mitigation Measures**

An EIS must describe “proposed preventive and mitigating measures.” Wis. Admin. Code NR § 150.30(2)(e).

The Master Plan does not provide an adequate discussion of mitigation measures to satisfy these requirements. In the few instances where the Master Plan does mention mitigation and preventive measures, its discussion is conclusory and lacks detail. For example, while the Master Plan recognizes that dual-sport motorcycles and other trail uses could result in soil compaction and erosion, it concludes that the environmental impact will be minor because “the property manager has the authority to close all or sections of trails as needed until the problems can be fixed,” and “[c]lubs hosting dual-sport motorcycle riding events on biking and equestrian trail will be required to repair damage to trails caused by the event.” Master Plan at 132. The Master Plan lacks any detail regarding how the trails may be rehabilitated, how repair will be enforced, and any associated environmental impacts. Simply stating that an impact will be mitigated without

providing any explanation or performance standard is not a sufficiently detailed discussion of mitigation measures.

**4. The Master Plan Did Not Describe Consistency with Plans or Policies of Local, State, Federal, or Tribal Governments**

An EIS must describe the master plan’s “consistency with plans or policies of local, state, federal, or tribal governments.” Wis. Admin. Code NR § 150.30(2)(g)(3).

The Master Plan does not describe its consistency with plans or policies of local, state, federal, or tribal governments. Perhaps that is because the Master Plan is *not* consistent with the plans or policies of local, state, federal, and tribal governments. Indeed, the Master Plan is inconsistent with the Badger Reuse Plan, which represented the plans and policies of neighboring communities, local, state, and federal governments, and the Ho-Chunk Nation. AR 9396–97; *compare* AR 9405, with *supra* Sections II and III. In addition, the Master Plan is inconsistent with Alternative 4, which was supported by several members of the Badger Reuse Committee, the State Nonmotorized Recreation and Transportation Trails Council, local governments, and many concerned members of the public, the Ho-Chunk Nation Land Management Plan, the Bluffview Sanitary District’s plans and policies, the Program of Utilization with the federal government, and the policies of the State Nonmotorized Recreation and Transportation Trails Council. Meine Direct Test. at 13:14–14:16 (Alternative 4); AR 3414, 5290 (Ho-Chunk Nation Land Management Plan); Meier Direct Test. at 3:2–17 (Bluffview); *see* AR 115, 123–26, 3766–69 (federal government); Hauda Ex. 1 at 3 (Trails Council).

**V. ISSUE 5: DNR DID NOT CONSULT WITH THE STATE NONMOTORIZED RECREATION AND TRANSPORTATION TRAILS COUNCIL WHILE DRAFTING THE MASTER PLAN**

Wisconsin Statute Section 23.177(2)(a) provides: “The department of natural resources . . . shall seek the advice of, and consult with, the [nonmotorized recreation and transportation trails]

council regarding the planning, acquisition, development, maintenance, and *management* of nonmotorized recreation and transportation trails.” *Id.* (emphasis added). This requirement exists in addition to the general public-involvement process for Department master planning, *see* Wis. Admin. Code NR § 44.04(7). *See Hutson v. State of Wis. Pers. Comm’n*, 263 Wis. 2d 612, 641, 665 N.W.2d 212 (court should construe statutes to avoid surplusage).

Here, DNR neither sought the Council’s advice nor consulted with the Council during its preparation and development of the Master Plan for the nonmotorized recreation and transportation trails within the Sauk Prairie Recreation Area. The record is replete with examples of DNR treating the Council as if it were a member of the general public, rather than a body of which it was statutorily required to “seek . . . advice.” *See* Wis. Stat. § 23.177(2)(a).

The DNR testified that it never sought the advice of nor consulted with the Council. When asked at the contested case hearing whether she “directly as[ked] the council for their advice about proposed uses of the non-motorized trails at Sauk Prairie,” Recreation Management Section Chief Brigit Brown replied, “No.” Brown Direct Test. at 2:20–22; Brown Hr’g Test. She stated that the Council had provided its opinion regarding the proposed uses “[a]lmost coincident with the public kick-off of the Planning process” and that she did not believe that the Department “would receive different information from what [the Council] had already expressed.” Brown Hr’g Test., Tr. at 3:1–3:7. Brown’s prepared written testimony reveals even less of an effort to satisfy its consultation duty. For instance, DNR was proud to point out that it provided the Council with an internet link to DNR’s master planning process “so that they could follow that process,” and only after Council members initiated discussion of the planning process. Brown Direct Test. at 3:18–4:5; 6:9–13; 7:18–20; 14:3–10; 15:6–7. On several occasions, Brown also informed Council members how they “could subscribe to receive regular updates about the planning process” in the

same way that members of the public could subscribe and receive updates. Brown Direct Test. at 7:2–5; 10:16–17; 15:14–16; Brown Direct Test. at 12:4–5 (“ . . . I encouraged [Council members] to take action to stay informed regarding the issues that matter to them.”). Similarly, Brown at one point “noted [to a Council member] that the Council has the same opportunity to comment as other partners.” Brown Direct Test. at 8:15–16, 14:11–14 (“On November 22, 2016, I emailed the Council the DNR’s announcement that the Master Plan would be considered at the December 14 NRB meeting which explained that people can register to testify or submit written comments for the NRB’s consideration by 11 am on December 9.”); *cf.* Hauda Direct Test. at 3:4–7 (“[T]he Council was not even made aware of the DNR’s master planning process until the Master Plan was published for public review and comment. When asked why, DNR staff told us they did not want to ‘give us an advantage’ over the public.”); Hauda Hr’g Test., Tr. at 22:1–7. Finally, when given an opportunity at a Council meeting to actively seek input from the Council, Brown declined to do so. Brown Direct Test. at 5:8–12 (“At its sixth meeting, in January 2014, I provided the Council with a report on the Sauk Prairie master planning process. . . . I provided an internet link to a summary of the comments and reported that the DNR was now working on a draft plan.”).

William Hauda, a member of the Council, summarized at the hearing the grossly limited extent and nature of DNR’s engagement with the Council. Hauda stated that the DNR never reached out to the Council “to ask for its advice on motorized use on the Sauk Prairie recreational area.” Hauda Hr’g Test., Tr. at 32:1–3. Rather, the DNR “put the impetus [to consult with DNR] on the nonmotorized council[ ],” contrary to the statute’s mandate. Hauda Hr’g Test., Tr. at 32:17–18.

In sum, DNR violated its statutory duty to “seek the advice of, and consult with” the Council. *See* Wis. Stat. § 23.177(2)(1). Providing a link to a website designed to engage the public

does not approach the threshold of seeking advice from or consulting with the Council. Similarly, providing updates regarding the planning process during Council meetings does not qualify as seeking advice from or consulting with the Council. DNR's view that all it was required to do was provide the Council with the same opportunity to comment as the general public would render the mandate in Wis. Stat. § 23.177(2)(1) superfluous, a reading that "should be avoided wherever possible." *Hutson*, 263 Wis. 2d at 641 (quoting *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981)) (internal quotation marks omitted).

The Council should not have been treated like any other member of the public; at a minimum, a representative from the council should have been included on the internal DNR master planning team. Treating the Council no differently than the public violated Wis. Stat. § 23.177(3)(1).

**VI. ISSUE 6: DNR DID NOT CONSULT WITH AGENCIES WITH JURISDICTION OR SPECIAL EXPERTISE WITH RESPECT TO ENVIRONMENTAL IMPACTS OF THE IDENTIFIED HIGH-IMPACT USES**

DNR is also required by statute to "consult with and obtain the comments of any agency which has jurisdiction or special expertise with respect to any environmental impact involved" before finalizing an EIS. Wis. Stat. § 1.11(2)(d). Then, it must make those comments "available to the governor, the department of natural resources and to the public." *Id.*

The final EIS and Master Plan does not reflect the requisite consultation with agencies having jurisdiction or special expertise with respect to environmental impacts of the identified high-impact uses or the requisite publication of those comments to the governor or the public. Chapter IV of the EIS and master plan "describes the department's assessment of the anticipated impacts of the proposed management and public use of SPSRA." Master Plan at 127. The DNR simply reviewed existing research publications and data to identify and assess environmental impacts of high-impact uses. *See, e.g.*, Master Plan at 138–39 (motorized vehicle impacts), 144

(helicopter impacts). In fact, when faced with a lack of “research on the impacts from dual-sport motorcycles or other types of motorized recreation occurring at the low levels proposed at SPSRA,” DNR simply stopped and acknowledged that “it is difficult to directly apply the results of existing published research to estimate the level of impact that may occur at SPSRA.” Master Plan at 139. The Master Plan states that the “assessment of impacts is based on both existing research, as incomplete as it is, and the knowledge and experience of [DNR] professionals.” Master Plan at 127. A mere review of available but incomplete studies published by third parties and total reliance on internal “experience” does not satisfy this consultation requirement.

In fact, during the hearing, DNR admitted that it only consulted with the National Park Service and no other state or federal agencies. *See* Brusoe Direct Test. at 9:21–10:10; Pohlman Direct Test. at 31:15–33:5; *see generally* Pohlman Hr’g Test. at 25:10–20. Certainly, however, there are other state and federal agencies that might have been able to provide DNR with additional, relevant information regarding the impacts of the proposed uses to the property. For example, the U.S. Fish & Wildlife Service and the federal Environmental Protection Agency could have been consulted about species and other environmental impacts, the state and federal departments of transportation could have been consulted about motorcycle noise and impacts, and the U.S. Army and WIARNG could have been consulted about helicopter impacts. Instead, the DNR gave short shrift to its obligation to consult with other agencies during the master planning process.

## **VII. ISSUE 7: DNR DID NOT EVALUATE THE CONSISTENCY OF THE MASTER PLAN WITH PLANS OR POLICIES OF FEDERAL, STATE, LOCAL, AND TRIBAL GOVERNMENTS**

DNR “shall consult with federal, state, county, town, and local units of government, local agencies and Indian tribes” during the master-plan development and adoption process. Wis. Admin. Code NR § 44.04(7)(b). This requirement exists in addition to the “general public

involvement process.” *Id.* As discussed *supra* Section IV.A.4, an EIS must also describe the master plan’s “consistency with plans or policies of local, state, federal, or tribal governments.” Wis. Admin. Code NR § 150.30(2)(g)(3). Regulations further require that, during the master planning process for department land, “[m]anagement decisions *shall* be based on local and regional perspectives.” Wis. Admin. Code NR § 1.60(2) (emphasis added).

The DNR did not “consult” with state, town, and local units of government, local agencies or tribes during the Master-Plan development and adoption process beyond its outreach to the general public. *See* Wis. Admin. Code NR. § 44.04(7)(b). DNR mentions only that it solicited “public comment,” “discuss[ed]” planning documents with “Sauk County officials,” and “us[ed]” “input and recommendations from the National Park Service received in May 2016” to develop the plan. Master Plan at 6. The Plan is vague about DNR’s consultation with Ho-Chunk Nation. *See* Master Plan at 129 (the “department has engaged in ongoing discussions regarding the proposed management and use of SPSRA with the . . . Ho-Chunk Nation”); *see also* Master Plan at 17 (stating that “interpretive opportunities *will require* a close working relationship with the Badger History Group, the Ho-Chunk Nation, the local farm community, and others” (emphasis added)); Master Plan at 89 (DNR “will work with Ho-Chunk Nation” “[f]ollowing the approval of the master plan”). The Plan makes no mention of local and town governments other than claiming that it “has also discussed the property . . . at various meetings and presentations with local officials[ ] . . . and the general public for many years.” Master Plan at 129. Compare this consultation with the Badger Reuse Plan’s, which included the towns of Sumpter and Merrimac, the village of Merrimac, Ho-Chunk Nation, and representatives from the Baraboo, Sauk Prairie, and surrounding areas on the planning committee. AR 9396–97 (allocating seats on the committee to each of those governments). It is no surprise that the Master Plan is inconsistent with the plans

and policies of local, state, and tribal governments and fails to describe that inconsistency. *See supra* Section IV.A.4; *see also* Section V; *see generally* Section VI.

In addition, the Master Plan is not “based on local and regional perspectives.” Wis. Admin. Code NR § 1.60(2). The Badger Reuse Plan is “based on local and regional perspectives,” and the two plans are inconsistent. The Badger Reuse Committee included seven representatives from local government, two representatives from local business, and two local landowners, and the Badger Reuse Plan reflected their input and consensus agreement. *See* *Meine Direct Test.* at 8:1–9:15. The Master Plan is materially different from the Badger Reuse Plan because it allows for non-recreational use—*e.g.*, military helicopter training exercises—and high-impact recreational uses that will adversely affect the environment and the other low-impact recreational uses. In addition, public comment on the Master Plan overwhelmingly supported uses consistent with the Badger Reuse Plan, not the Master Plan. Once DNR began to introduce in 2012 “non-traditional outdoor recreation uses” such as “rocketeering, shooting ranges, geocaching, dog parks, paintball, community gardens and other recreation activities not typically found on Department lands,” AR 5584–650, the public expressed “a desire for the master plan to be consistent with the Badger Reuse Plan[’s]” “theme of restoration, conservation, and low-impact recreation,” AR 5798. “About three times as many people voiced opposition to motorized use as advocated for motorized use at the Sauk Prairie Recreation Area,” and “[a]ll of the resolutions passed by local units of government opposed the incorporation of motorized uses on the property.” AR 6657–62. Neighboring landowners and those who created the Badger Reuse Plan were left out of the planning process and treated like the general public. The DNR provided copies of the plan only after it was completed. Thus, the Master Plan effectively ignores local and regional perspectives.

DNR points out that it obtained input from some “neighbors” of the SPRA and considered the comments that federal, local, and tribal governments submitted, but that is insufficient to comply with Wisconsin master-planning statutes and regulations.

**VIII. ISSUE 8: DNR FAILED TO ADEQUATELY CONSIDER AND AVOID THE EFFECTS OF THE IDENTIFIED HIGH-IMPACT USES ON ADJACENT MANAGEMENT AREAS, SUCH AS DEVIL’S LAKE STATE PARK**

Wisconsin Administrative Code NR § 1.60 provides: “In planning efforts, the effects of management activities on adjacent management areas are to be considered and, where adverse, are to be avoided whenever practicable.” Adjacent management areas include management areas “lying near or close to, but not necessarily touching” the property at issue. *Adjacent*, Black’s Law Dictionary (10th ed. 2014).

The SPRA has many adjacent management areas and adjacent landowners. It is “immediately adjacent” to Devil’s Lake State Park, which is one of the important natural areas within Baraboo Hills, “one of the largest national natural landmarks in the [United States],” along with Parfrey’s Glen, Baxter Hollow, Pine Hollow, and Natural Bridge. AR 123; Gilbert Hr’g Test., Tr. at 5:3–16. In addition, the SPRA property shares borders with several landowners. Master Plan at Map A. The Ho-Chunk Nation owns land situated to the north and west of SPRA parcels. The Ho-Chunk Nation property “has very important historic and cultural significance to the Ho-Chunk people as it lies within the Ho-Chunk’s aboriginal territory and includes a number of historic and pre-historic sites of significance to Native people.” Master Plan at 7. The DFRC property, which encircles the Magazine Area of the SPRA, includes cropland with a rotation of corn, alfalfa, soybeans, winter wheat, and red clover, small research plots, and pastures. Master Plan at 8. Bluffview, located to the west of the Magazine Area, hosts the Bluffview Sanitary District wastewater treatment facilities. *Id.*

**A. DNR Did Not Consider the Effects of Management Activities on Adjacent Management Areas in Creating the Master Plan**

Despite the fact that the property's size and proximity to Devil's Lake State Park "provide[d] a unique opportunity to restore and maintain a large 'transitional' landscape—from the deep forests of Devil's Lake State Park to the open grasslands at SPSRA and adjacent HCN land," Master Plan at 42, the DNR refused to consider management of the entire property as a single entity. Landscape-scale approaches to conserving ecosystem diversity and function is a bedrock principle of conservation biology. *Meine Direct Test.* at 4:12–14. SPRA is adjacent to Devil's Lake State Park and sustainably-managed property owned by the Ho-Chunk Nation and DFRC—this proximity provides an invaluable opportunity and model for landscape-scale conservation in Wisconsin. *Id.* at 4:14–19; *Mossman Direct Test.* at 4:7–5:2; *Dalhoff and Gilbert Joint Rebuttal Test.* at 3:17–19.

Indeed, the Badger property has "one of the most significant grassland bird populations in the state, due to the size, quality, diversity and connectivity of its grasslands." *Mossman Direct Test.* at 4:16–19. Such large blocks of grassland bird habitat are rare in Wisconsin and are particularly valuable for grassland bird species. *Pidgeon Rebuttal Test.* at 7:7–10. Collaborative management of the Badger property increases the potential "to create an extensive mosaic of prairie, shrub, savanna, oak woodland, and suitable agriculture" for declining grassland bird species. *Id.*; *Mossman Direct Test.* at 4:16–5:2. Instead, DNR directed planning teams to exclude consideration of the "[m]anagement of the BAAP property (including HCN and DFRC lands) as a single entity," *Pohlman Ex. 18* at 7, and focused on filling "out the Baraboo Hill/Devil's Lake recreation landscape with potential uses such as [ ]rocketry, shooting ranges, geocaching, dog parks, paintball, community gardens and other recreation activities *not typically found on department lands.*" Master Plan at 112 (emphasis added); *id.* at 111 ("[M]otor . . . trail

opportunities are lacking within the Baraboo Hills/Devil’s Lake recreation that may be met [in SPRA].”). This master-planning approach ignored the unique opportunity for the SPRA and adjacent areas to model landscape-scale conservation in Wisconsin. *See* Gilbert Hr’g Test., Tr. at 5:3–16 (noting that Tom Gilbert, who served on the Badger Reuse Committee as the representative of the National Park Service and the Secretary of the Interior, does “not believe that...those high-impact activities [on SPRA] would be compatible with the protection of [ ] national-level interests”).

In stark contrast, the Badger Reuse Plan *did* consider the effects of “management activities” on “adjacent management areas.” Wisconsin Administrative Code NR § 1.60. Prior to DNR acquiring the SPRA, the common goal of the property owners of the former Badger property was “to convert [the Badger area] to a recreational property with low impact recreation (hiking, picnicking, primitive camping) [and] prairie, savanna and grassland restoration.” AR 124. DNR, adjacent property owners, including the Ho-Chunk Nation and DFRC, and other stakeholders reached a consensus agreement in line with this common goal for the future use of the Badger property. *Meine Ex. 2* at 4. At this point in time, DNR recognized the value of developing the Badger property with compatible uses that enhance the ability of the land to support and sustain ecological management and other recreational uses:

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 education center. . . . The master plan would be developed *for the entire 7,354 acres, in cooperation* with the Ho-Chunk Nation and USDA Dairy Forage. This plan would build upon work done on this project by the Badger Reuse Committee.

AR 124 (emphasis added).

**B. DNR Made No Effort to Avoid the Adverse Effects of Management Activities on Adjacent Management Areas and Landowners**

Multiple adjacent landowners and local units of government objected to the high-impact uses of the SPRA, concerned that the impacts would spill over onto their properties, but the DNR still included them in the Master Plan. *See, e.g.*, Pohlman Hr’g Test., Tr. at 31:3–4 (“BP: And did the [Ho-Chunk] oppose [ ] dual sport motorcycle use? JP: Yes.”); *id.* at 28:14–29:15 (“[DFRC] expressed concern about dogs - off leash dogs.”); *id.* at 29:16–21 (“[DFRC] expressed concern about special events.”); AR 6659 (“All of the resolutions passed by local units of government opposed the incorporation of motorized use on the property.”); Dalhoff and Gilbert Joint Rebuttal Test. at 3:20–4:1. For example, the Ho-Chunk Nation notified DNR of their opposition to dual-sport motorcycle use because of the adverse environmental impacts, including noise, soil erosion, and user conflicts. Pohlman Hr’g Test., Tr. at 31:3–4; AR 5289–90. DFRC opposed dual-sport motorcycle use throughout the SPRA, in part due to safety concerns for DFRC personnel. Pohlman Hr’g Test., Tr. at 30:3–6. Bluffview informed DNR of its opposition to dual-sport motorcycle use of Badger property roads because the use would limit the size of the field where Bluffview can spread its septage. Meier Direct Test. at 3: 11–17; Meier Hr’g Test., Tr. at 3:19–21. In addition, local and tribal governments and other stakeholders strongly opposed motorized use on SPRA trails, and “[e]very local government body to adopt a resolution on the Master Plan opposed motorized use at SPRA.” AR 2594. Nevertheless, DNR included dual-sport motorcycle use in the Master Plan. Master Plan at 21–23.

In sum, the DNR ignored the adverse effects of high-impact uses on adjacent management areas and adjacent landowners. The adverse effects from the Master Plan’s high-impact uses threaten to fragment the SPRA in such a way that it destroys the ecology of the vital grassland habitat corridor connecting Devil’s Lake State Park to the Wisconsin River, endangering the very

habitat that is so integral to the successful conservation of grassland birds. Meine Direct Test. at 4:12–19; Mossman Direct Test. at 4: 16–5:2; Pidgeon Hr’g Test., Tr. at 34:9–16. In addition, DNR ignored the objections of adjacent property owners and proposed a suite of high-impact uses that would adversely impact these management areas and property owners, flouting Wisconsin Administrative Code NR § 1.60’s requirements.

### CONCLUSION

For the reasons outlined herein, the Board should transfer this case to the correct arbiter. In the alternative, the Board should remove the contested high-impact uses from the Master Plan and abide by the originally intended management uses of the property, as set forth in the Badger Reuse Plan.

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