

SAUK PRAIRIE CONSERVATION
ALLIANCE.

P.O. Box 403
Baraboo, WI 53913,

Petitioner,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES

101 S. Webster Street
Madison, WI 53707,

Respondent.

Case No.

Case Code: 30607

Administrative Agency Review

PETITION FOR JUDICIAL REVIEW

The Sauk Prairie Conservation Alliance (the "Alliance" or "Petitioner"), by its undersigned attorneys Perkins Coie LLP, hereby petitions this court pursuant to Wis. Stat. §§ 227.52 and 227.53 for judicial review of the Wisconsin Department of Natural Resources' (the "WDNR") final decision issuing the Sauk Prairie State Recreation Area Draft Master Plan and Final Environmental Impact Statement (the "Plan" and "FEIS").

Petitioner further states as follows:

CHALLENGED DECISION

1. On November 8, 2016, the WDNR publicly released its Plan and FEIS,¹ which is attached as Exhibit 1. The Plan and FEIS are the challenged decision.

¹ The WDNR is scheduled to present the Plan to the Natural Resources Board for its approval on December 14, 2016.

PARTIES

2. Petitioner is a small non-profit corporation located in Sauk County that promotes education and cooperative conservation on the former Badger Army Ammunition Plant lands and in the surrounding Sauk Prairie area. Its address is P.O. Box 403, Baraboo WI 53913 (location address being 125 15th Avenue, Baraboo WI 53913).

3. The Wisconsin Department of Natural Resources is an “agency” of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1) and used throughout Wis. Stat. Ch. 227. The WDNR’s principal office is located at 101 S. Webster Street, Madison, Wisconsin 53707-7921.

JURISDICTION AND VENUE

4. Petitioner’s principal place of business is in Sauk County and Petitioner is therefore a “resident” of Sauk County.

5. Sauk County Circuit Court is the proper venue for this action as specified in Wis. Stat. § 227.53(1)(a)(3).

6. The Plan and FEIS is a final agency action subject to judicial review under Wis. Stat. §§ 227.52 and 227.53.

7. This petition is timely filed.

BACKGROUND

8. This Petition concerns the Sauk Prairie State Recreation Area (the “Area”), which is located on the lands of the former Badger Army Ammunition Plant (the “Badger Lands”). The U.S. Department of Defense decommissioned the Badger Army Ammunition Plant in 1997.² The Area contains 3,100 acres south of and immediately adjacent to Devils Lake State Park and other associated natural areas in Sauk County, Wisconsin.

² Plan at 1.

9. After many years of planning and cooperation involving numerous local, state and regional partners, in 2011 the WDNR obtained approximately 3,051 acres of the Badger property for the establishment of the Area.

10. The National Park Service (“NPS”) deeded this property to the WDNR through the Federal Lands to Parks (“FLP”) program in a series of transactions starting in 2011.³

11. The FLP program imposes use restrictions on the deeded property, and if the WDNR does not comply with these use restrictions, federal law and the deeds conveying the property provide that ownership of the Area will revert back to the federal government. *See* 40 U.S.C. § 550(e)(4)(A) (“[I]f the property ceases to be used or maintained for [the purpose for which it was conveyed], all or any portion of the property shall . . . revert to the Government”); *see also* Exhibit 2 at 16; Exhibit 3 at 17 (“In the event there is a breach of any of the conditions and covenants herein . . . all right, title and interest in and to the [Area] shall revert to and become the property of the [NPS]”).

12. Lands deeded through the FLP program must be used solely for public parks and recreation and must be used according to the Program of Utilization (“POU”) submitted as part of the WDNR’s application to NPS.

13. More specifically, the deeds for the property provide that “the property shall be used and maintained exclusively for public park or [the] public recreation purposes for which it was conveyed . . . and as set forth in the program of utilization and plan contained in [WDNR’s] application” Exhibit 2 at 4; Exhibit 3 at 3.

14. The Program of Utilization, a plan which the WDNR itself prepared and submitted to the NPS as part of its FLP application, includes only the following uses: “hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, [ecological] restoration, environmental education, and cultural/historic interpretation.” Exhibit 4 at 9. Further, the POU explains that, “[m]any groups with varying interests in [the Area] share a common goal with the

³ Plan at 1.

WDNR to convert [the Area] to a recreational property with low impact recreation . . .” Exhibit 4 at 10.

15. The FLP program allows changes of uses and amendments to the POU, but only with the concurrence of the NPS.

16. After receiving the property, state law required the WDNR to develop a master plan for the Area.⁴

17. State law, including Wis. Stat. § 1.11 and Wis. Admin. Code NR Ch. 150, also require WDNR to assess the environmental impacts of all significant proposed actions, including the issuance of a master plan.⁵

18. Notwithstanding the POU, the property deed, and state law, the WDNR began its master planning process by releasing a Regional & Property Analysis of the Sauk Prairie Recreation Area in July 2012 that, for the first time, included “non-traditional outdoor recreation uses...such [] as rocketeering, shooting ranges, geocaching, dog parks, paintball...and other recreation activities not typically found on Department lands.” Exhibit 5 at 55.

19. On July 2, 2012, the Petitioner provided the WDNR with a detailed comment letter regarding the Regional & Property Analysis. Exhibit 6. Petitioner also provided supplemental comments on August 17, 2012 to the WDNR explaining that the WDNR must remove all references to high-impact uses in its Regional & Property Analysis because the existing POU and NPS approval does not allow for high-impact uses on the property. Exhibit 7 at 1-2.

20. Soon after, at the request of Representative Fred Clark, the Wisconsin Legislative Council looked into the issue, and in December of 2012, agreed with the Petitioner’s analysis. *See* Exhibit 8.

21. The WDNR then issued its Preliminary Vision and Goal Statements and Three Draft Conceptual Alternatives document on July 12, 2013, which continued to include numerous

⁴ *See, e.g.*, Wis. Admin. Code NR Ch. 44.

⁵ Wis. Admin. Code NR § 150.30.

high-impact uses, such as a gun range and motorized recreation opportunities. *See* Exhibit 9. Additionally, the WDNR publicly stated an intention to use large parts of the area for an all-terrain vehicle (“ATV”) track.

22. On August 29, 2013, the Petitioner provided the WDNR with a detailed comment letter explaining again that the existing POU and NPS approval do not allow for high-impact uses on the property. *See* Exhibit 10. The Petitioner also reminded the WDNR that such high-impact uses of the property would have a significant environmental impact, and including them in the master plan would require the WDNR to complete a full environmental impact statement. *Id.* at p. 5-6. This letter also identified various deficiencies in the public comment process to date. *Id.* at p. 7.

23. On August 11, 2015, the WDNR released its draft master plan for the Area. This draft master plan removed some, but not all, of the proposed high-impact uses. The draft master plan still included proposals for using the Area for dual-sport motorcycle access, a Class II Dog Training Area (which involves training dogs with guns), and a rocketry launch site.

24. Again, on September 24, 2015 the Petitioner sent comments to the WDNR reminding the agency that it does not have the authority to include these high-impact uses in the master plan and that its environmental analysis of these uses was deficient. Exhibit 11. The Petitioner also then sent similar comments to the NPS on January 21, 2016. Exhibit 12.

25. On May 3, 2016, the NPS also provided comments to the WDNR on its draft master plan for the Area. NPS agreed that WDNR’s proposed high-impact uses required an amendment to the POU, which WDNR had not obtained, and would require significant additional environmental analysis, which WDNR had not conducted. *See* Exhibit 13.

26. Ignoring these warnings from Petitioner and the federal government, the WDNR finalized the Plan and FEIS on November 8, 2016, without removing these high-impact uses, applying to the NPS for a POU amendment, conducting the required environmental analysis of these high-impact uses, or otherwise correcting the numerous deficiencies already identified in WDNR’s processes to date.

27. The Plan and FEIS allow for several high-impact uses, including a 72-acre Class II Dog Training Area, access to a rocketry site ten days per year, access to the Wisconsin Army National Guard for helicopter training exercises, dual-sport motorcycle access to trails in the Area, and various as-yet-unspecific high-impact special events.⁶

28. These high-impact uses will harm important native plant and animal species, create a nuisance to neighbors, detrimentally impact other owners of the former Badger Army Ammunition Plant property and property owners near the Sauk Prairie State Recreation Area, and create conflicts for users of the Area.

29. The high-impact uses are not within the scope of the POU and have not been approved by NPS. Furthermore, the WDNR has failed to provide an adequate analysis of the environmental impacts associated with these high-impact uses.

INTEREST OF THE PETITIONER

30. Petitioner is not normally a litigious group; in fact, this is the first time in its nineteen years of existence that it has felt the need to resort to litigation.

31. The Petitioner and its individual citizen members have been involved in the process of determining the future use of the former Badger lands for almost two decades. The organization has hosted dozens of public education programs and forums about and at Badger, including tours inside the property boundaries. For fifteen years, the Petitioner has coordinated volunteer involvement in native prairie restoration at what is called the Hillside Prairie at Badger, now located on state-managed property.

32. The Petitioner has demonstrated a long-term commitment, significant engagement, and a deep understanding of the issues related to the Area. Petitioner's priorities have been consistent for many years: to provide for the restoration of the native prairie and savanna in the Area; to support compatible, low-impact recreational opportunities at the Area

⁶ The Plan and FEIS state that high-impact uses will be allowed for certain special events on a case-by-case basis. For example, on page 102 of the Plan and FEIS, the WDNR notes that paintball will be allowed as a special event. Any references in this petition to high-impact uses shall also include any as-yet-unidentified high-impact uses associated with special events at the Area.

that allow visitors to enjoy and learn from the natural and cultural features of the land; and to ensure that the former Badger lands are cooperatively and collaboratively managed by the landowners.

33. The Petitioner has led numerous school groups on to the property to teach about prairie restoration practices and to give local students lessons on environmental stewardship.

34. Petitioner and its members are substantially aggrieved by the Plan's inclusion of high-impact uses and the inadequate environmental analysis in the FEIS. The Petitioner has many members that live near the Area and have and will continue to recreate in the Area.

35. For example, Curt Meine (Sauk City), Bill & Donna Stehling (Sauk City), Mari Larson (Sauk City), Mimi Wuest (Reedsburg), Charlie Luthin (Lodi), and Frank Piraino (Madison) are all members that live near and/or recreate in the Area on a regular basis.

36. Petitioner and its members' uses of the property would be disturbed if high-impact uses are allowed on the property. Petitioner's longstanding educational and prairie restoration efforts would be thwarted in many areas of the property. For example, the trails it uses are likely to be damaged by high-impact uses; and fires from rocketry could damage the property and/or create a dangerous situation.

37. Petitioner's and its members' substantial interests are injured in fact, threatened with injury, and are adversely and irreparably affected by the WDNR's issuance of the Plan and FEIS. Both federal and Wisconsin law require WDNR to develop the Area for the low-impact uses described in the Program of Utilization that was approved by NPS, to follow the procedural requirements of the National Environmental Policy Act ("NEPA") and the Wisconsin Environmental Policy Act ("WEPA"), and to meaningfully consider and respond to public comment.

GROUND FOR REVERSAL

38. Wis. Stat. § 1.11 and Wis. Admin. Code NR Ch. 150 describe the NEPA and WEPA requirements applicable to the WDNR in this case.

39. NEPA, 42 U.S.C. §§ 4321 et seq., is a procedural law that requires federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. *See* 42 C.F.R. § 137.287 (describing NEPA). WEPA is its state counterpart. *See* Wis. Stat. § 1.11.

40. Because NPS is involved with the Area, both NEPA and WEPA apply to the master planning process for the Area.

41. Under both NEPA and WEPA, an action must (1) be categorically excluded from environmental review; (2) require a more limited environmental assessment; or (3) require an environmental impact statement (“EIS”).

42. In this case, both the NPS and the WDNR have admitted that they must conduct an EIS in order to include high-impact uses at the property.

43. The WDNR’s Plan and FEIS, however, does not comply with NEPA or WEPA and is patently unlawful. The FEIS portion of the document is—to put it mildly—an environmental impact statement in name only. Among other deficiencies, it doesn’t sufficiently identify or evaluate alternatives, it fails to fully and adequately analyze the high-impact uses’ many likely environmental harms to the property and the community, and it gives short shrift to the public input process and the public comments received. In fact, on page 161 (and elsewhere) in the Plan and FEIS, the WDNR admits that the high-impact uses could have “negative cumulative impacts on wildlife and visitors seeking quite experiences.” Rather than study these potential impacts, however, the WDNR merely notes that it “is not aware of any research” related to such impacts. This is not the type of rigorous environmental analysis that is required by WEPA and NEPA.

44. As the WDNR is well aware, a true and complete environmental impact statement takes years to create and is usually three to five hundred or more pages in length (not including appendices). This “FEIS” pales in comparison. In fact, the the draft EIS included only about sixteen pages of “environmental analysis” and 10 pages of analysis of alternatives.

45. In any event, and as outlined above, WDNR does not even have the legal authority to allow these high-impact uses in the Area. *See* 40 U.S.C. § 550(e)(4)(A) (“if the property ceases to be used or maintained for [the purpose for which it was conveyed], all or any portion of the property shall . . . revert to the Government”); *see also* Exhibit 2 at 16; Exhibit 3 at 17 (“In the event there is a breach of any of the conditions and covenants herein . . . all right, title and interest in and to the [Area] shall revert to and become the property of the [NPS]”).

46. The high-impact uses are outside the scope of the purposes for which the NPS conveyed the property and are contrary to the Area’s deed restrictions. Exhibit 2 at 13-17; Exhibit 3 at 15-18. NPS conveyed the Area subject to the WDNR’s submitted Program of Utilization, which included only low-impact uses. *See* Exhibit 4. As the WDNR has been reminded numerous times (including by the NPS), in order to alter the Program of Utilization and include these high-impact uses, the WDNR would have to (1) apply to NPS for a formal amendment to the Program of Utilization; (2) provide NPS and the public with the required environmental impact information and analyses; and (3) secure the approval of NPS before moving forward. The WDNR has taken none of these actions.

47. The WDNR’s inclusion of high-impact uses in the Plan is arbitrary, capricious, an abuse of discretion and otherwise unlawful, especially given that this decision allows NPS to take the property back from the WDNR for failure to comply with the approved Program of Utilization.

48. The Plan and FEIS are also unlawful for many other reasons, including the following.

49. The WDNR failed to abide by its master planning rules and state law regarding master planning for state properties, like the Area. *See* Wis. Admin. Code NR § 44.04(2).

50. The WDNR’s inclusion of high-impact uses in the Plan is arbitrary and capricious and fails to comply with Wis. Admin. Code NR § 44.06(8)(b) because those uses are incompatible with the site’s ecological capability.

51. The WDNR's failure to classify all, or at least most, of the Area as a Habitat Management Area and/or Native Community Management Area, rather than a Recreation Management Area and Special Management Area pursuant to Wis. Admin. Code NR § 44.06 was arbitrary, capricious, an abuse of discretion and otherwise unlawful.

52. The WDNR's failure to consult with the Nonmotorized Recreation and Transportation Trails Council while drafting the Plan and FEIS was unlawful. *See* Wis. Stat. § 23.177.

53. The WDNR's designation of the Area as Type 3 and Type 4 property was arbitrary, capricious, an abuse of discretion and otherwise unlawful pursuant to Wis. Stat. § 23.091(3), Wis. Admin. Code NR §§ 44.06 and 44.07, and the Program of Utilization.

54. The WDNR's draft EIS and FEIS are unlawful and woefully deficient under Wis. Stat. § 1.11 and Wis. Admin. Code NR Ch. 150. Among other things, the FEIS failed to adequately consider environmental justice and socioeconomic impacts or impacts to rare, endangered and protected species. The FEIS was also inappropriately limited to only examining fifteen years of Plan implementation. Moreover, numerous times throughout the FEIS, the WDNR simply states that it is not aware of any studies that address certain impacts, and then moves on without further analysis (*see, e.g.,* page 161). This is not a sufficient "hard look" under NEPA or WEPA.

55. The WDNR did not follow the proper procedures when issuing the draft and the final EIS. For example, the WDNR did not adequately summarize changes between the draft EIS and FEIS and did not adequately respond to comments.

56. In violation of state law, the WDNR (1) failed to adequately report the environmental impacts of high-impact uses in the Area, the adverse environmental effects which cannot be avoided if the Plan is implemented (including, among other things, air pollution, fire

and noise impacts); and (2) failed to analyze reasonable alternatives, or the relationship between local short-term uses of the Area and the maintenance and enhancement of long-term productive uses. *See* Wis. Stat. § 1.11(2)(c)(1-4).

57. In violation of state law, the WDNR failed to consult with agencies with jurisdiction or special expertise with respect to environmental impacts of the proposed high-impact uses of the Area. *See* Wis. Stat. § 1.11(2)(d).

58. In violation of state law, the Plan and FEIS inadequately analyze reasonable alternatives, including but not limited to low-impact uses described in the NPS-approved Program of Utilization and other more complete uses of the property. *See* Wis. Stat. § 1.11(2)(e).

59. Because the procedures in Wis. Stat. § 1.11 have not been complied with, the WDNR does not have the authority pursuant to Wis. Stat. § 23.091(2) to designate the property as a recreation area. To the extent the Plan and FEIS attempt to do so, that effort is unlawful.

60. In violation of WEPA regulations, the Plan and FEIS fail to adequately provide a list of state, federal, tribal, and local approvals required for the proposed high-impact uses. *See* Wis. Admin. Code NR § 150.30(2)(c).

61. In violation of WEPA regulations, the Plan and FEIS fail to provide a list of reasonable alternatives to the proposed high-impact uses, fail to describe potential preventative and mitigating measures, and fail to explain why a management alternative that incorporated only the low-impact uses approved in the Program of Utilization was not analyzed. *See* Wis. Admin. Code NR § 150.30(2)(e).

62. In violation of WEPA regulations, the WDNR failed to evaluate the consistency of the Plan and FEIS with plans or policies of the National Park Service, the Ho-Chunk Nation,

and other federal, state, local, or tribal governments. *See* Wis. Admin. Code NR § 150.30(2)(g)(3).

63. In violation of WEPA regulations, the WDNR failed to include the draft EIS in the Plan and FEIS. WDNR also failed to adequately explain how it revised the draft EIS or its plans for the Area in response to public comments and concerns. *See* Wisc. Admin. Code NR § 150.30(4)(b).

64. In violation of Wis. Admin. Code NR § 1.60(2), the WDNR failed to adequately base its management decisions on local and regional perspectives.

65. In violation of Wis. Admin. Code NR § 1.60(4)(a), the high impact uses in the Plan and FEIS are not compatible with the land's ability to support and sustain the intended management, development or recreational use.

66. In violation of Wis. Admin. Code NR § 1.60(4)(b), the WDNR failed in its planning efforts to adequately consider the effects of the proposed high-impact uses on adjacent management areas, such as Devil's Lake State Park, and did not issue its Plan and FEIS in a manner that ensures such impacts will be avoided wherever practicable.

RELIEF REQUESTED

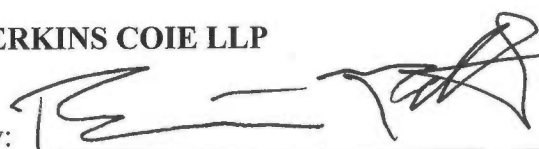
WHEREFORE, Petitioner requests judgment in its favor as follows:

1. Setting aside the WDNR Plan and FEIS as unlawful;
2. Declaring that the WDNR is required to undertake the necessary environmental review of the Plan pursuant to NEPA and WEPA;
3. Declaring that the WDNR is required to amend the Plan to omit high-impact uses in order to be consistent with the NPS-approved POU;

4. Declaring that the WDNR is required to reissue the Plan to designate all or at least more of the Area as a Habitat Management Area and/or Native Community Management Area;
5. Declaring that the WDNR is required to provide lawful public input opportunities on the Plan, as well as on the draft and final EIS, and to respond to any and all comments fully, but that WDNR failed to do so;
6. Declaring that the WDNR is required to consult with the Nonmotorized Recreation and Transportation Trails Council prior to issuing the Plan and FEIS;
7. Declaring that the WDNR is required to amend the Plan to only allow for Type 2 uses on the property pursuant to Wis. Admin. Code NR § 44.07;
8. Ordering the WDNR to re-conduct the planning process for the Area to follow all of the required procedures in Wis. Admin. Code NR Ch. 44 and NR § 1.60;
9. Remanding the Plan and the FEIS to the WDNR and directing the WDNR to amend the Plan, conduct further analysis, and perform additional consultation as necessary;
10. Ordering such interlocutory or final relief as is necessary to preserve the interests of Petitioner and other members of the public; and
11. Other relief as the court may deem just and equitable.

DATED: December 7, 2016

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