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SURFACE TRANSPORTATION BOARD

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC
PETITION FOR DECLARATORY ORDER

REPLY OF THE STATE OF WISCONSIN

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INTRODUCTION

The State of Wisconsin (the State) submits this Reply in response to Soo Line Railroad Company a/k/a CPKC's (Petitioner) Petition for Declaratory Order (Petition), submitted on October 30, 2023.

In short, this case involves a railroad that, faced with an eroded bridge abutment, chose to deposit materials and discharge pollutants—essentially cement mattresses—into a river instead of working with the State's Department of Natural Resources (DNR) to quickly obtain authorization for the immediately necessary repairs. This violated long-standing State law and resulted in concretizing part of the riverbed that people have spent considerable effort and money to restore. DNR subsequently evaluated the work and found that the cementitious grout mattresses (what Petitioner calls "grout mats") that it deposited in the Menomonee River substantially increased water velocities and the river's flooding potential and impeded fish passage. After months of Petitioner refusing to repair its damage to the riverbed, DNR suspended consideration of the railroad's post-construction permit application and referred the matter to the State's Department of Justice (DOJ) for civil enforcement.

Petitioner now hopes the Surface Transportation Board (Board) will throw it a lifeline from having to remediate by deeming that the State's permit (a Chapter 30 permit) and federal Clean Water Act (CWA) Water Quality Certification are preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA).

The Board should decline the invitation. If nothing else, the Petition is premature and not presently worth the Board's time. No civil action has begun, and the parties have just started settlement negotiations. Even if the State files suit, there are numerous disputed issues that a state court can ably resolve, thus ensuring a more informed decision on preemption.

If the Board institutes proceedings, it should deny the Petition as to both the Chapter 30 permit and CWA Water Quality Certification and any parallel enforcement efforts.

The State's post-construction or "after-the-fact" Chapter 30 permit is not categorically or as-applied preempted. The Chapter 30 permit is not the type of pre-clearance that the Board typically deems categorically preempted by the ICCTA. It does not directly conflict with the Board's exclusive federal regulation of railroads, as it is not a prerequisite for integral parts of railroad operations; it regulates activities completely tangential to railroad transportation; and the regulation necessarily varies with the facts of the case and the specific parcel of property. Put simply, the State was well within its authority to regulate Petitioner's depositing of cement mattresses into the Wisconsin river.

Petitioner also has failed to meet its burden of demonstrating that the Chapter 30 permit and enforcement case are as-applied preempted because they prevent or unreasonably burden railroad operations. DNR acted promptly and reasonably by attempting to accommodate Petitioner's repairs; Petitioner continues to use the bridge; and the chief reasons why it cannot yet secure a permit are its own

damage to the riverbed and failure to consider reasonable alternatives. Nor has Petitioner shown that the potential civil enforcement case would disrupt operations.

Petitioner fares no better in showing that the required CWA Water Quality Certification and related potential State enforcement case are preempted. Petitioner's arguments reflect a fundamental misunderstanding of the CWA. The State's Chapter 30 public interest criteria, which one must meet to obtain a federal Water Quality Certification, implement federal law. As such, they are preempted only if they unduly restrict the railroad from conducting operations or unreasonably burden interstate commerce. As with the Chapter 30 permitting, Petitioner has not made this showing. And Petitioner has not demonstrated that the State discriminately, pretextually, or otherwise unfairly applied the criteria or has used its potential enforcement case to frustrate Petitioner's operations or transportation.

The State respectfully requests that the Board deny the Petition.

RELEVANT LEGAL AND FACTUAL BACKGROUND

I. The Public Trust Doctrine and Chapter 30

The State is considering filing civil enforcement cases against the Petitioner for depositing cementitious grout mattresses on the riverbed of the Menomonee. The State proscribes such activities under two legal regimes that comprehensively protect the State's valuable water resources.

First, this river, like all navigable waterways in Wisconsin, is held by the State in trust and protected for the public under Article IX, § 1, of the State's Constitution, which provides that waterways "shall be common highways and forever free, as well to the inhabitants of the [S]tate as to the citizens of the United States"

This language comes from the Northwest Ordinance of 1787, predating the State's entrance into the Union. *Muench v. PSC*, 261 Wis. 492, 499–500, 53 N.W.2d 514 (Wis. 1952). As the Wisconsin Supreme Court said in 1901, “[t]he United States never had title[] in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes; and its trust . . . was transferred to the [S]tate, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth.” *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N.W. 855 (Wis. 1901).

Under this fundamental tenet of state Constitutional and property law, called the “public trust doctrine,” a riparian’s title to property to the center of a stream or river is “subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in it in trust for their use.” *Franzini v. Layland*, 120 Wis. 72, 81, 97 N.W. 499 (Wis. 1903).

The doctrine has evolved from protecting “more than just commercial navigability rights . . . to purely recreational purposes” *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶ 72, 350 Wis. 2d 45, 833 N.W.2d 800 (internal quotation marks and citation omitted).

The state legislature, in furtherance of the trust, enacted Wis. Stat. ch. 30 (Chapter 30), which delegates to DNR the broad authority to regulate under the doctrine. *ABKA Ltd. P’ship v. DNR*, 2002 WI 106, ¶ 12, 255 Wis. 2d 486, 648 N.W.2d 854. Subject to exceptions not applicable in this case, Wis. Stat. § 30.12(1)(a) states that “[u]nless an individual or a general permit has been issued . . . or authorization

. . . granted by the legislature, no person may . . . [d]eposit any material or place any structure upon the bed of any navigable water”

DNR must issue a Chapter 30 permit if the DNR finds that the structure or deposit of material “1. will not materially obstruct navigation[;] 2. . . . will not be detrimental to the public interest[; and] 3. . . . will not materially reduce the flood flow capacity of a stream.” Wis. Stat § 30.12(3m)(c).

II. Federal Clean Water Act Water Quality Certifications

The federal CWA is the other environmental regime in this case. The CWA prohibits anyone from discharging pollutants, including dredged or fill material, into navigable waters of the United States. 33 U.S.C. §§ 1311(a), 1362(6). The U.S. Army Corps of Engineers (USACOE) may authorize such discharges, but only pursuant to a general or individual permit under CWA § 404. *Id.* § 1344.

CWA § 401, 33 U.S.C. § 1341, preserves states’ ability to weigh in on, and thus implement § 404 permits, as the “prime bulwark in the effort to abate water pollution.” *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir.1983)). An applicant must obtain a § 401 Water Quality Certification from the state in which the discharge originates before the § 404 permit can be issued. *Id.* § 1341(a). Any limitations or requirements in the Water Quality Certification become a condition of the § 404 permit. *See id.* § 1341(d). Such limitations or requirements are based on monitoring or performance standards under the CWA, or “any other appropriate requirement of State law” *Id.* As the U.S. Supreme Court has indicated, Congress’s preservation of the states’ power to

enforce “any other appropriate requirement of State law,” is “essential in the scheme . . . to address [a] broad range of pollution.” *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 386 (2006).

The State has promulgated regulations in Wis. Admin. Code ch. NR 299 “establish[ing] procedures and criteria for the application, processing and review of [S]tate [W]ater [Q]uality Certifications” required by CWA § 401. Wis. Admin. Code § NR 299.01(1). Wisconsin Admin. Code § NR 299.04(1)(b)6. states that upon receipt of a complete Water Quality Certification application, DNR shall evaluate whether it has reasonable assurance the proposed activity will result in a discharge and comply with water quality standards, including the “[p]ublic interest and public rights standards, related to water quality, set forth in . . . [Chapter 30 provisions, among others] . . . and made applicable by [CWA § 401(d)].” This provision was promulgated pursuant Wis. Stat. ch. 281, which the legislature passed to protect, maintain, and improve the quality and management of the waters of the state, consistent with all the requirements of the CWA. Wis. Admin. Code § NR 299.01(1); Wis. Stat. § 281.11(1).

USACOE’s general CWA § 404 permit in this case is GP-002-WI (2016). It authorized certain discharges of dredge and fill materials into waters in Wisconsin for maintenance activities. (Verified Statement¹ of Sadie Derouin (Deroin V.S.) ¶ 4,

¹ The State’s submission of Verified Statements should not be read as concurrence with the use of Board’s Modified Procedures. *See* 49 C.F.R § 1112.1. The State thus did not submit Rebuttal Verification Statements pursuant to 49 C.F.R §§ 1112.2 and 1112.6. Should the Board institute proceedings, the State would respectfully request an opportunity to submit Rebuttal Verification Statements and some discovery and cross examination.

Ex. 8.) The permit divided activities into “Reporting” and “Non-reporting” categories. (*Id.*, Ex. 8, at 7–10.) The former required an individual permit from USACOE. (*Id.*, Ex. 8, at 7.) The latter did not. (*Id.* Ex. 8, at 9.) Relevant here, maintenance activities were Non-reporting activities, but the filling of more than 400 square feet of waterways required an individual permit. (*Id.*, Ex. 8, at 7, 8.) Wisconsin had not issued a Water Quality Certification for GP-002-WI, so prospective permittees had to obtain individual Water Quality Certifications from DNR. (*Id.*, Ex. 8, at 14.)²

II. Petitioner’s Depositing of Its Grout Mats in the Menomonee River

On October 30, 2017, Petitioner sent a letter notifying DNR that in the next week it would begin an emergency repair of an abutment on its bridge, Watertown Bridge, B.R. 88.74 (Bridge B.R. 88.74). (*Id.*, Ex. 1, at 1–2; Verified Statement of Michelle Hase (Hase V.S.) ¶ 4, Ex. 1, at 1–2). The letter stated that Petitioner planned to repair the erosion, or “scour[],” around the abutment by pumping an unknown amount of grout underneath its footing. (Derouin V.S. ¶ 4, Ex. 1, at 1.) “Additionally, . . . to prevent further erosion of the river bed,” Petitioner would place 1,900 square feet of “grout mats”—which are akin to mattresses filled with cementitious grout—on the riverbed.³ (*Id.*, Ex. 1, at 1.)

² The State has provided the June 19, 2017 version of GP-002-WI (2016), which has some parts that USACOE revoked or modified. No changes are relevant to this case. As indicated in the 2017 notice, Water Quality Certifications were not categorically issued for any portion of RGP-002-WI and not applicable to the revision. (Deroin V.S. Ex. 8, at 2.)

³ As described in a declaration accompanying the Petition, “grout mats” are a fabric casing with pockets that are filled with cementitious grout. Verified Statement of Karl Rittmeyer (Rittmeyer V.S.) ¶ 8.)

Drawings that Petitioner submitted with its October 30, 2017 letter showed that it would deposit three cement mattresses in the Menomonee River. One was a 15-by-55-foot mat placed immediately adjacent to the eroded abutment. (*Id.*, Ex. 1, at 3.) Another was a 15-by-55-foot mat that would run from roughly the middle of the riverbed to lie next to Pier No. 2. (*Id.*) These two mats would cover the entire riverbed. (*Id.*) The third mattress was a 10-by-25-foot mat, placed in front of Pier No. 2. (*Id.*) The letter claimed that the channel modifications would be “limited.” (*Id.*, Ex. 1, at 1.) The letter did not indicate how the second and third mattresses would prevent further scour on the undermined abutment. (*Id.*)

Petitioner’s letter requested “a [DNR] [W]ater [Q]uality [C]ertification under [CWA] Section 401 . . . ,” as required under Condition 26 of GP-002-WI. (*Id.*; *see also* Deroin V.S. ¶ 4, Ex. 8, at 17.) Petitioner also indicated that it was “serv[ing] . . . notice that [it was] choosing to forgo the State of Wisconsin and City of Milwaukee permitting process,” asserting that they would be categorically preempted by the ICCTA. (*Id.*, Ex. 1, at 1–2.)

DNR staff were quite concerned by the project. (*See* Verified Statement of Erin Cox (Cox V.S. ¶ 6.) The State had designated this segment of the Menomonee River as “impaired,” under the CWA, meaning it did not meet water quality standards. (Cox V.S. ¶ 8.) Two of the riverway’s significant problems are barriers to fish passage and flooding. (*Id.*) Structures block segments of the river, fragmenting habitats and impeding fish and other aquatic life from accessing higher quality habitats. (*Id.*) Such impediments impair recreation and decrease fishing

opportunities. (*Id.*) Further, segments of the waterway are lined with concrete, contributing to dangerous water conditions, erosion, and flooding. (*Id.*)

Notwithstanding, progress has been made to restore the Menomonee in recent years. (*Id.*, ¶ 9.) Several manmade structures and miles of concrete channel had been removed. (*Id.*) For example, in 2017, 1,000 feet of the concrete channel downstream from a Petitioner's bridge were removed, costing approximately \$5.7 million. This involved constructing 13 pools to assist fish passage. (*Id.*)

More work is needed to remove smaller fish passage barriers and improve habitat, however, and Petitioner's depositing of grout mats was a step backwards. (*Id.*, ¶ 10.)

Within three days on November 2, DNR responded to Petitioner's notice. (Hase V.S. ¶ 4, Ex. 1, at 1–2.) DNR informed Petitioner that a Chapter 30 permit would be required. (*Id.*, Ex. 1, at 1.) DNR recommended the use of traditional rock (known as rip-rap) as opposed to the grout mats because of the harm to fish, altered flood elevations, and increased downstream erosion. (*Id.*) Given the risk the grout mats might present to infrastructure and fish passage, DNR asked Petitioner to consider alternatives. (*Id.* Ex. 1, at 2.)

In response, Petitioner sent an email the next day, again indicating that it would be forgoing a Chapter 30 permit and claiming the “minimal” adverse impacts from its work. (Hase V.S. ¶ 5, Ex. 2, at 1–2.) The email indicated that Petitioner had ruled out using rip-rap in part because of the size needed and because it could not excavate in front of the eroded abutment. (*Id.*, Ex. 2, at 2.) The letter provided no

indication why there was a need for permanent grout mats and why rip-rap (with or without excavation) could not be placed away from the abutment. (*Id.*, Ex. 2, at 2–3.)

Within the hour, the Petitioner and DNR representatives discussed the matter on the phone, and DNR sent an email asking for more information about the emergency nature of the work. (Hase V.S. ¶ 6, Ex. 3, at 1–2.)

DNR determined that it could allow some of Petitioner’s work because fixing the abutment would not likely cause water pollution issues and thus disrupt potential public use of the river. (*See* Cox V.S. ¶ 6; Hase V.S. ¶ 8.) The following Wednesday, November 8, DNR sent an email to Petitioner reiterating its authority to approve the work under Chapter 30 but stating that “if this work does in fact meet the federal non-reporting general permit with [USACOE], the [S]tate can work with [Petitioner] to issue a [W]ater [Q]uality [C]ertification for only the immediate repairs that may be needed to the bridge pilings (the grout injection and bag footer at the toe of the piling).” (Hase V.S. ¶ 7, Ex. 4, at 1–2.) The email asked for more information, including about “the emergency/safety aspects of the repair.” (*Id.*, Ex. 4, at 2.)

On November 10, Petitioner sent an email describing the emergency nature of the repair. (Hase V.S. ¶ 9, Ex. 5, at 1–2.) Petitioner focused on the need to repair the abutment, and it separately described the grout mats as needed “to prevent further channel degradation.” (*Id.*, Ex. 5, at 2.) Petitioner said that it had rescheduled work to begin on a later date, November 13, and that it would be completed by November 24. (*Id.*) Petitioner expressed appreciation for DNR’s work on the water

quality certification, indicating it “looked forward to hearing back from you at your earliest convenience.” (*Id.*)

Petitioner did not wait, however. Sometime after November 10, Petitioner began the work and completed it by November 17, a week earlier than it told DNR. (Hase V.S. ¶ 10; Rittmeyer V.S. ¶ 12.)

After a DNR site visit revealed that Petitioner deposited grout mats that resulted in concentrated water flows, increased river velocity, and a narrowed stream channel (Derouin V.S. ¶ 4, Ex. 2, at 2–3), DNR issued a Notice of Violation and requested an enforcement conference. (Derouin V.S. ¶ 4, Ex. 3, at 1–3.) At the enforcement conference, Petitioner indicated its willingness to work with DNR (Derouin V.S. ¶ 4, Ex. 4, at 2), so the agency sent Petitioner a list of concerns, which included increased streambed elevations and stream velocities and the obstruction to navigation, harm to scenic beauty, and exposed wires. (Derouin V.S. ¶ 4, Ex. 5 at 1.)

Petitioner sent a letter to DNR on May 25, 2018 (Rittmeyer V.S. Ex. 10), and, on July 31, 2018, it submitted cross-sectional drawing of the riverbed from before and after its laying of the grout mats, as DNR had requested. (Derouin V.S. ¶ 4, Ex. 6 at 1–3; Hase V.S. ¶ 11.)

Petitioner provided no further correspondences or information to DNR. (Derouin V.S. ¶ 6.) And, on September 27, 2018, DNR requested that Petitioner submit a Chapter 30 permit application within 30 days, or it would consider referring the matter to the DOJ for enforcement, along with additional cross-sectional drawings. (Derouin V.S. ¶ 5, Ex. 10 at 1; Hase V.S. ¶ 10.)

On October 30, Defendants submitted a Chapter 30 permit application, but it sought approval only for the work it had already done and proposed no alterations to the grout mats. (Derouin V.S. ¶¶ 7–8, Ex. 11 at 1–2.)

DNR considered the permit application deficient, and, in February 2019, it walked through the application with Petitioner. (*Id.* ¶¶ 9–10.) Petitioner expressed interest in discussing the issues with the permit at the site, and this meeting was scheduled for July 2019. (*Id.* ¶ 10.) DNR outlined the main issues with Petitioner’s representatives at that site visit on July 30, 2019. (*Id.* ¶ 11; Cox V.S. ¶¶ 11–12; Hase V.S. ¶¶ 13–14.) Among other concerns, new scour had formed at the downstream end of the grout mats. (Cox V.S. ¶ 11.) The grout mats also did not just involve a six-inch increase in stream bed, as Petitioner had claimed. Petitioner’s newly submitted cross-sectional drawings showed a one-to-two-foot grade-change compared to before it deposited the mats. (Hase V.S. ¶ 13.) The mats had changed the velocity and flow of the waterway, created a potential barrier to fish passage, affected the floodplain, and created safety issues for recreators. (Cox V.S. ¶ 11; Hase V.S. ¶ 14.)

In terms of alternatives to grout mats, Petitioner rejected any option that would involve completely removing or lowering the grout mats, contending that excavation would undermine bridge stability. (Cox V.S. ¶ 12.) Petitioner did say, however, that it might be possible to remove parts of the grout mats, but it indicated that it would not consider alternatives that involved significant costs. (*Id.*)

On February 14, 2020, DNR sent Petitioner a letter indicating that its Chapter 30 permit application continued to be on hold because the project was likely causing

environmental damage and due to floodplain concerns. (Derouin V.S. ¶ 12, Ex. 12.)

Since that time, DNR has continued to monitor and evaluate the deleterious effects of Petitioner's grout mats. On May 4, 2021, the company Stantec performed a study for the Milwaukee Metropolitan Sewerage District that concluded that grout mattresses increased 100-year-flood-water-surface levels by approximately 0.06 feet starting from the bridge to about 2,400 feet upstream. (Hase V.S. ¶ 15, Ex. 6 at 4–5.)

As a result of its ongoing investigations, DNR has determined that the grout mats have posed and continue to pose serious harm to the riverbed of the Menomonee River. (Cox V.S. ¶ 13, Ex. 1 at 1–7; Hase V.S. ¶ 16.) Petitioner has never proposed any actions to remediate these harms. (Deroin V.S. ¶ 13.)

III. The State's Potential Enforcement Actions Against Petitioner for Chapter 30 and CWA Water Quality Certification Violations

On July 8, 2021, DNR referred this matter for civil prosecution to the DOJ. (*Id.* ¶ 14.) The DOJ sent Petitioner a letter indicating that it accepted the referral, along with two draft complaints that it would file if the parties could not reach a settlement. (*Id.* ¶ 15; Rittmeyer V.S. Exs. 17–18, at 1–2.) One complaint alleged Petitioner's depositing of grout mats violated Chapter 30, and the other alleged that it had violated DNR Water Quality Certification regulations.⁴ (Deroin V.S. ¶ 15; Rittmeyer V.S. Ex. 17, ¶¶ 50–59; Rittmeyer V.S. Ex. 18, ¶¶ 59–69.) Each sought forfeitures and an order that Petitioner abate the nuisance and restore the portion of the river and riverbed to their condition prior to its depositing of grout mats. (Deroin V.S. ¶ 15;

⁴ Two complaints are necessary for the enforcement actions because the civil prosecution for the Chapter 30 violation follows the procedures of Wis. Stat. § 23.50.

Rittmeyer V.S. Ex. 17, at 14, ¶ 1; Rittmeyer V.S. Ex. 18, at 16, ¶ 1.)

Since this time, the parties have met a few times to discuss the matter. (Deroin V.S. ¶ 16.) On August 30, 2023, the parties had a settlement conference, and Petitioner agreed to put together an analysis of potential options for remediation. (*Id.*) In September and October of 2023, counsel for the parties exchanged several emails attempting to narrow what remediation might be mutually acceptable. (*Id.*) As of the filing of Petitioner’s October 30, 2023 Petition, it had yet to present any such analysis to the State. (*Id.*)

IV. ICCTA Preemption

Under the Supremacy Clause, the U.S. Constitution and federal laws are “the supreme Law of the Land . . . [.]” and preempt “state laws that interfere with, or are contrary to, federal law.” *Union Pac. R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 678 (7th Cir. 2011) (internal quotation marks and citations omitted).

Congress enacted the ICCTA to broadly provide the Board with jurisdiction of over “transportation by rail carrier” 49 U.S.C. § 10501(a)(1). The ICCTA has an express preemption provision in 49 U.S.C. § 10501(b), which states that the Board’s jurisdiction over the following rail carrier activities is exclusive:

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State[.]

“Except as otherwise provided in this part, the remedies provided under this part

with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” § 10501(b).

“[N]ot all state and local regulations . . . affect[ing] rail carriers are preempted by § 10501(b).” *Soo Line R.R. Co.—Pet. Declaratory Order (Soo Line)*, Docket No. FD 35850, 2014 WL 7330097, at *4 (served Dec. 23, 2014). “[S]tate and local regulation is appropriate [if it does] not interfere with rail operations, and localities retain their reserved powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce.” *Id.* (citing *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005)).

The Board has indicated that there are two ways state laws can be preempted by the ICCTA, either through (1) “categorical,” or *per se* preemption, or (2) “as applied” preemption.⁵ *Union Pac. R.R. Co.*, 647 F.3d at 679 (citing *CSX Transp., Inc.—Pet. Declaratory Order (2005 CSX Declaratory Order)*, Docket No. FD 34662, 2005 WL 1024490, at *2–3 (served May 3, 2005)). A state or local law, and any action thereunder, is categorically preempted only if the law or its provided remedy “directly conflict with exclusive federal regulation of railroads.” *2005 CSX Declaratory Order*, 2005 WL 1024490, at *3. “Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale.” *Union Pac. R.R. Co.*, 647 F.3d at 679.

If not categorically preempted, a state law or action “may be preempted ‘as

⁵ Federal courts have recognized that the “categorical preemption” is essentially the same as “express preemption,” and “as applied preemption” is essentially “implied preemption.” See, e.g., *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 409–14 (5th Cir. 2010) (*en banc*).

applied’ based on the degree of interference that the particular action has on railroad transportation” *Id.* This is “a fact-intensive inquiry.” *Belt Ry. Co. of Chicago v. Weglarz Hotel III, L.L.C.*, No. 18-cv-7361, 2020 WL 6894664, at *9 (N.D. Ill. Nov. 24, 2020); *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1144 (8th Cir. 2015) (“The Board’s unreasonable-burden-or-interference test is fact intensive.”); *Franks Inv. Co. LLC, v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010) (*en banc*) (stating the Board’s as-applied preemption test is “fact-based test”). And “the railroad, as the proponent of preemption, bears the burden of proof.” *MD Mall Associates, LLC, v. CSX Transp., Inc.*, 288 F.Supp.3d 565, 596 (E.D. Pa. 2017).

V. Federal Clean Water Act Harmonization

The Board has recognized that categorical preemption does not apply to state standards that are incorporated into and serve to implement federal law, including the CWA. The Board has repeatedly said that nothing in the ICCTA’s express preemption provision is “intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as . . . the [CWA] . . . , unless the regulation is being applied . . . to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” *Joint Pet. Declaratory Order—Boston & Me. Corp. & Town of Ayer, MA (Town of Ayer)*, Docket No. FD 33971, 2001 WL 1174385, at *2 (served Oct. 5, 2001) (underscore omitted), *aff’d Boston & Me. Corp. v. Town of Ayer*, 191 F.Supp.2d 257, 259 (D. Mass. 2002). Thus, where the ICCTA and “a Federal environmental statute are both involved, the Federal statutes need to be harmonized.” *Id.*

ARGUMENT

I. The Board Should Deny the Petition or Hold It in Abeyance Because It Is Premature.

The Petition is premature and not presently worth the Board's time to review. The Board should not institute proceeding and should either deny the Petition or hold it in abeyance.

The Board will decline to institute proceedings “where it would promote efficiency and not be fundamentally unfair to any party.” *Baylands Devo., Inc.—Pet. Declaratory Order (Baylands)*, Docket No. FD 36660, 2023 WL 6121079, at *3 (served Sept. 18, 2023).

Here, holding the Petition in abeyance or denying it would accomplish both objectives. First, in terms of efficiency, there is no reason for the Board to review the preemption issue when the entire case may settle. As detailed above, this matter is in its infancy. No complaint has been filed, and the parties are in settlement discussions. (Deroin V.S. ¶ 16.) While Petitioner suggests that the parties are at an impasse (Pet. Declaratory Order 12), this comes as a surprise to the State, since the news was only delivered via the Petition and at a time when Petitioner was ostensibly preparing an analysis of remediation options for discussion. (*Id.*) Even if the State filed its complaints, further settlement discussions would likely continue.

Given this case's infancy, it is most efficient to allow the parties to continue negotiations to attempt to resolve the dispute without litigation, thus obviating the need for the Board's resolution. *Cf. Fletcher Granite Co., LLC—Pet. Declaratory*

Order, Docket No. FD 34020, 2001 WL 729418, at *2 (served June 29, 2021) (denying a petition as premature because litigation of the preemption issue was not inevitable).

Second, even if there is no settlement, it would be inefficient for the Board to wade into the morass of unresolved factual and legal issues in the case. Based just on the Petition, for example, some of the contested issues include whether Petitioner's grout mats were integral to repairing the abutment, the extent of the grout mats' damage, whether any remediation measures would burden transportation and not unreasonably encroach upon navigable waters, and whether DNR was unreasonable in its request for Petitioner to evaluate alternatives to the grout mats.

The Board typically denies a petition or holds it in abeyance when there are such substantial contested factual and legal issues. *See, e.g., Grafton and Upton R.R. Co.—Pet. Declaratory Order (Grafton)*, Docket No. FD 36518, 2021 WL 5122255, at *2 (served Nov. 3, 2021) (holding in abeyance a case so the state court could decide the issues of property law); *City of Milwaukie—Pet. Declaratory Order*, Docket No. FD 35625, 2013 WL 1221975, at *2 (served Mar. 25, 2021) (stating that “before [the Board] can reach the preemption issue . . . , it is appropriate for a state or municipal court to resolve the parties’ property law dispute . . . ”); *Baylands*, 2023 WL 6121079, at *3 (holding a petition in abeyance where state court proceedings would resolve factual issues).

This is especially true when a court's resolution of the disputed factual issues would better inform the Board's preemption analysis. *See, e.g., Grafton*, 2021 WL 5122255, at *2. In *CSX Transp., Inc.—Pet. Declaratory Order (CSX)*, for example, the

Board denied a Petition for Declaratory Order where the railroad argued that the ICCTA categorically preempted a county's regulations and claims. Docket No. FD 35832, 2016 WL 787578, at *1–2 (served Feb. 29, 2016). Just like in this case, there were outstanding issues as to whether the state actions directly affected railroad transportation. *Id.* at *2. In its denial of a motion for reconsideration, the Board reiterated that it was more appropriate for such factual disputes to be resolved by the state court. *Id.* at *4. An “examination of the facts and circumstances . . .[.]” the Board explained, may be “necessary in certain cases where we are determining whether categorical preemption applies[,] such as those where state or local actions . . . may have the effect of managing or governing rail transportation.” *Id.*

Here, the Board likewise should conclude that “the state court is an appropriate forum to engage in such fact-finding. Once the facts have been developed, the state court . . . should be well-equipped to determine whether the claims here . . . are subject to categorical preemption or as applied preemption.” *Id.*

In terms of prejudice, the Petitioner would not suffer were the Board to decline to institute proceedings. State courts are just as capable of evaluating the preemption issue by applying existing Board precedent. *See id.* (citing *14500 Ltd.—Pet. Declaratory Order*, Docket No. FD 35788, 2014 WL 2608812, at *1 (served June 5, 2014)). And, as discussed below, no rail operations on Bridge B.R. 88.74 have ever been affected by this dispute, and the bridge is still operational to this day.

There is simply no reason to institute proceedings in such a premature case.

II. The ICCTA Does Not Preempt Either State Chapter 30 Permitting or the Potential Enforcement Case Against Petitioner for Depositing Its Grout Mats in the Menomonee River.

Should the Board decide to take up this matter, it should conclude that the ICCTA does not preempt either State Chapter 30 permitting or the potential enforcement case against Petitioner.

A. A Chapter 30 Permit Is Not a Preclearance Requirement Categorically Preempted by the ICCTA.

The State's Chapter 30 permit falls outside the category of state regulations the Board and courts find categorically preempted.

This case in part involves a permitting regime. But Petitioner is wrong to suggest that this alone should render the State's Chapter 30 permitting and potential enforcement case categorically preempted. The Petitioner leans on the Board's *2005 CSX Declaratory Order*, which established two broad types of categorically preempted state actions, including the one that Petitioner invokes here: "any form of state or local permitting or preclearance that, by its nature could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized." 2005 WL 1024490, at *2.

There are three gaping holes in Petitioner's argument that Chapter 30 permits fall into the bucket of categorically preempted preclearances "*directly* conflict[ing] with [the ICCTA's] exclusive federal regulation of railroads." *Id.* at *3 (emphasis added).

First, Chapter 30 permits are not a preclearance on "integral part[s]" of railroad operations or transportation. This is language that the Board and courts

have used to set the limits of categorically preempted state regulations. *See Norfolk S. Rwy. Co., Pan Am Rwys., Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern, LLC in NY, NH, VT, MA and CT (Norfolk S. Rwy)*, Docket No. FD 3514, 2009 WL 289607, at *3 (served Jan. 30, 2009); *Soo Line R.R. Co.—Pet. Declaratory Order, (Soo Line)*, Docket No. FD 35850, 2014 WL 7330097, at *4 (served Dec. 23, 2014) (citing *Green Mountain R.R.*, 404 F.3d at 643).

Rather, Chapter 30 permits are typically a prerequisite for, and *only ever* regulate, manage, or govern the depositing of materials and placing of structures in navigable waters. Placing cement mattresses in Wisconsin's waterways is not integral to bridge maintenance or repairs. That Chapter 30 permits are only prerequisites for such non-integral activities puts them outside of the categorical preemption category.

This makes Chapter 30 permits far different from those categorically preempted laws where the state or locality sought to govern particular railroad activities, such as the law requiring trains to obtain permits for carrying hazardous commodities near the U.S. Capitol in *2005 CSX Declaratory Order*, 2005 WL 1024490, at *1. It also makes them different from categorically preempted preclearances for the construction, maintenance, or improvement of integral rail facilities themselves, such as in the Board's foundational pre-*2005 CSX Declaratory Order* decisions. *See, e.g., Cities of Auburn and Kent, WA—Pet. Declaratory Order—Burlington N. R.R. Co.- Stampede Pass Line (Cities of Auburn and Kent)*, Docket No. FD F33200, 1997 WL 362017, at *1, 5 (served July 2, 1997) (finding localities' land use and

environmental permitting of railroad line upgrades categorically preempted), *aff'd City of Auburn v. United States*, 154 F.3d 1027 (9th Cir. 1998).

In such cases, “permitting or preclearance requirements could give a local body the ability to deny the carrier the right to construct, develop, and maintain facilities or conduct operations.” *Norfolk S. Rwy Co.*, 2009 WL 289607, at *3 (citing *City of Auburn*, 154 F.3d 1029–31).

In contrast to those types of cases, when state or local regulatory actions do not serve as a preclearance for integral railroad activities and facilities, they are “reasonably within the local authorities’ jurisdiction under the Constitution.” *Cities of Auburn and Kent*, 1997 WL 362017, at *6 (stating that that a state or locality can go so far as to *prohibit* (i.e., not even allow through a permit) a “railroad from dumping excavated earth into local waterways [as] . . . a reasonable exercise of local police power” (emphasis added)); *Iowa, Chicago & Eastern R.R. Corp.*, 2003 WL 23807751, at *6 (S.D. Iowa 2003) (stating that in *Cities of Auburn and Kent*, the Board “concluded . . . a State could require a railroad to comply with laws prohibiting dumping of waste, [which is] not *integral* to the operation of a railroad” (emphasis added), *aff'd on other grounds*, 384 F.3d 557, 562 (8th Cir. 2004)).

Accordingly, when evaluating state regulations on activities that are not integral to railroad operations and facilities, the Board and courts employ an as-applied approach. This is true even where state and local regulations might have some effect on railroad operations, construction, maintenance, or improvement. *See Borough of Riverdale Pet. Declaratory Order the N.Y. Susquehanna and W. Rwy.*

Corp., Docket No. FD 33466, 1999 WL 715272, at *6 (served Sept. 10, 1999) (stating that state and local entities can enforce non-discriminatory electrical and building codes, or fire and plumbing regulations, “so long as they do not . . . requir[e] the obtaining of permits as a prerequisite *to the construction or improvement of railroad facilities*” (emphasis added)).⁶

And, in fact, an as-applied approach is more warranted for Chapter 30 permits because they have a unique feature that prevents them from being used “to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.” *2005 CSX Order*, 2005 WL 1024490, at *2. Like the permit at issue in this case, DNR is authorized to issue after-the-fact Chapter 30 permits even after the project is completed. *See Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 13, 234 Wis. 2d 335, 610 N.W.2d 129 (Wis. Ct. App. 2000); Wis. Stat. § 30.28(2m)(b); Wis. Admin Code § NR 300.20. While obviously not ideal for prophylactically protecting the State’s waterways, this feature means there is less potential for abuse.⁷

⁶ The Chapter 30 permitting requirement is also a generally applicable regulation, as it bars “any” person from encroaching upon public trust waterways without a permit. This further supports an as-applied approach, as “much of the Board’s logic in finding that standard building, fire, and electrical codes are not preempted is that, while the costs of compliance may be high in some sense, they are ‘incidental’ when they are subordinate outlays that all firms build into the cost of doing business.” N.Y. *Susquehanna and W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3rd Cir. 2007). Petitioner has not objected to getting such permits in the past, even when doing so requires the pre-permit submission of drawings. *See* Code of Ordinances, Franklin Park, Ill. § 2-13-12, located at https://library.municode.com/il/franklin_park/codes/code_of_ordinances?nodeId=15377. (*See* Verified Statement of Lisa K. Rossman ¶¶ 3–4, Ex. 1 (copy of a building permit that Petitioner obtained for a roof removal of a building at its facility in Franklin Park, Illinois).

⁷ With an after-the fact permit, the ICCTA also not categorically preempt the State from pursuing forfeitures. *See Cities of Auburn and Kent*, 1997 WL 362017, at *6 (stating that

Each of the decisions Petitioner cites for support is distinguishable from the present case because each involved a pre-clearance on integral parts of a railroad's operations or on the construction, maintenance, or improvements of the railroad facilities themselves. *See Town of Ayer*, 2001 WL 458685, at *1,7 (pertaining to a permit for the construction of an automobile unloading facility); *Green Mountain R.R. Corp.*, 404 F.3d at 640 (pertaining to an environmental land use statute that required preconstruction permits for an integral transloading facilities); *Soo Line*, 2014 WL 7330097, at *2 (pertaining to a number of preapprovals in a State law and City's zoning code, in combination, that operated as a preclearance "on the construction project" of the railroad). Given this key distinction, none of these decisions supports categorical preemption of the State's regulation in the present case.

Another hole in Petitioner's argument is that the remedies of the Chapter 30 permit and related enforcement case—i.e., materials not deposited and structures not placed that would otherwise disrupt the public's rights to use and enjoy waterways—are wholly unrelated to those remedies over which the ICCTA provides the Board exclusive authority "with respect to regulation of rail transportation" under § 10501(b).⁸

locality or state would not be categorically preempted for fining or penalizing a railroad that violated an ordinance involving the dumping of waste).

⁸ This is true regardless of whether the Board concludes that Chapter 30 permitting is the type of preclearance the Board treats as categorically preempted. *See Union Pac. R.R. Co. v. Louisiana Public Serv. Comm'n*, 722 F.Supp.2d 699, 705 (M.D. La. 2010) (finding even a state preapproval of the closing or removing a private railroad crossing was not categorically preempted because as it did not directly relate to "transportation").

When granting or conditionally granting a Chapter 30 permit, DNR evaluates three criteria that have little to nothing to do with rail transportation: whether the structure or material to be placed or deposited in navigable waters (1) will materially obstruct navigation; (2) will be “detrimental to the public interest;” and (3) will “reduce the flood flow capacity of a stream.” Wis. Stat. § 30.12(3m)(c)1.–3. This second factor has been further defined by statutory and case law to include the public’s right to use all the incidents of navigable waters, such as sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes, the right to unpolluted water, and the consideration of wetlands and near shore lands, wildlife habitat, and preservation of scenic beauty.⁹ *Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 66 (collecting cases).

Such remedies fall completely outside or are tangential to the Board’s exclusive regulatory authority over railroad “transportation” under ICCTA § 10501(b), which the act defines as the “movement of passengers or property, or both, by rail, . . .” 49 U.S.C. § 10102(9)(A), or “services related to such movement . . .” *Id.* § 10102(9)(B).

The courts and Board have repeatedly stated that state regulations that have

⁹ The legislature’s broad delegation to DNR reflects the importance of protecting waterways, but DNR’s authority is not wholly discretionary or open-ended. (*Contra* Pet. Declaratory Order 17.) DNR must make specific findings of fact, which “assures the parties concerned and affected that the legislatively required consideration of water pollution as a major factor in the decision-reaching process has been complied with.” *Reuter v. DNR, Div. of Res. Dev.*, 43 Wis. 2d 272, 278, 168 N.W.2d 860 (Wis. 1969). These specific findings are subject to a review through a contested case or petition for judicial review, both which must be filed within 30 days after the decision. Wis. Stat. § 227.53(1)(a)2. The State’s statement of position must be filed within 20 days and an administrative record must be filed within 30 days after service. *Id.* § 227.53(2), Wis. Stat. § 227.55(1).

only a limited or remote effect on “transportation” are not categorically preempted under the ICCTA.¹⁰ *See, e.g., CSX*, 2016 WL 787578, at *4 (advising that if a railroad maintenance program involved “discard[ing] debris into a drainage ditch,” it possibly would not be preempted, either categorically or as-applied) (citing *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007)); *In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 552 (Tex. App.-Hous. (14 Dist.) 2018) (finding a suit seeking restoration was not categorically preempted because the accumulated debris below a railroad bridge did not fall within the ICCTA’s definition of “transportation”); *Fla. E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (stating that ICCTA “permit[s] the continued application of laws having a more remote or incidental effect on rail transportation”); *Seymore v. Union Pac. R.R. Co.*, No. 10-cv-239-BSM, 2011 WL 3896703, at *1,4 (E.D. Ark. Sept. 6, 2011) (finding that negligence claims for railroad’s installation of embankments that resulted in flooding was not categorically preempted).¹¹

The decision in *Gordon v. New England Cent. R.R., Inc.*, is on all fours. No. 2:17-cv-00154, 2017 WL 6327105 (D. Vt. Dec. 8, 2017) There, the plaintiff sought a preliminary injunction to remove rip-rap that a railroad had deposited on its

¹⁰ It matters little that “railroads” are defined as “bridges” under 49 U.S.C. § 10102(6)(A) (*See* Pet. Declaratory Order 17.) Bridges are treated no differently for preemption purposes than any other “transportation,” as defined by 49 U.S.C. § 10102(9)(A)–(B).

¹¹ *See also, Benson v. Union Pac. R.R. Co.*, No. 2:08-cv-331-GEB-EFB, 2008 WL 2946331, at *4 (E.D. Cal. July 23, 2008) (refusing to dismiss as categorically preempted those state claims against a railroad for allegedly allowing lead-laden dust to blow onto the plaintiffs’ property); *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493, 501 (S.D. Miss. 2001) (refusing to dismiss as categorically preempted state claims against the railroad for its design and construction of an earthen berm).

property when repairing its embankment. *Id.* at *1. The railroad made precisely the same argument that Petitioner makes here with its grout mats, contending that removing the rip-rap would destabilize the embankment and result in the suspension of rail operations. *Id.* at *3, 7. The court found that such a claim was not categorically preempted. *Id.* at *8. Even if removing the rip-rap might burden the railroad, such impacts were incidental and would not “*necessarily* burden ‘the movement of passengers or property by rail[.]’” *Id.* (quoting 49 U.S.C. § 10102(9)(A)).

Likewise, in this case, since a Chapter 30 permit and the State’s potential enforcement case seeking to remove the grout-mats from the Menomonee River will not necessarily burden rail transportation, the actions are not categorically preempted by the ICCTA.

A third hole in Petitioner’s argument is that a Chapter 30 permit is akin to other state property law actions that courts, particularly those in the Seventh Circuit, have determined are governed by an as-applied analysis because they “necessarily var[y] with the facts of the case and the specific property.” *Union Pac. R.R. Co.*, 647 F.3d at 679–80 (concluding an as-applied analysis was warranted for condemnation actions) (citing *Norfolk S. Rwy Co. and the Alabama Great S. R.R. Co.*—*Pet. Declaratory Order*, Docket No. FD 35196, 2010 WL 691256 (served Mar. 1, 2010); accord *CSX Transp., Inc.*, 2016 WL 787578, at *3 (stating that state condemnation actions are not categorically preempted). See also *Partners v. Belt Rwy Co. of Chicago*, No. 16-cv-3583, 2016 WL 3907053, at *3 (N.D. Ill. July 19, 2016) (concluding an as-applied preemption analysis was warranted for trespass and

ejectment claims to remove railroad tracks from the owners' property). Like disputes about rail crossings, such claims cannot be subject to a "blanket rule" when they often involve regulation of "routine, non-conflicting uses" on railroad property. *Franks Inv. Co. LLC*, 593 F.3d at 412.

A Chapter 30 enforcement claim is akin to a condemnation or trespass suit. *See Rock-Koshkonong Lake Dist*, 350 Wis. 2d 45, ¶ 84 (stating that "the public trust doctrine implicates state ownership or virtual state ownership—by virtue of its trust responsibility—of land under navigable waters" (emphasis omitted)). The State must ascertain whether the particular property encroaches on the navigable waterway in a way that undermines that the public's particular use and enjoyment of such uses. It can then deny permits or issue them with conditions to conform to Wis. Stat. § 30.12(3m)(c)1.–3. Such an evaluation is "specifically limited in scope to the ownership or use of one particular piece of property," making an "as-applied" analysis far more appropriate. *See Union Pac. R.R. Co.*, 647 F.3d at 679.

The Board need only look at the Petition itself as proof. Petitioner's main complaints are that DNR inappropriately applied Chapter 30 to demand that Petitioner employ the State's "preferred repair method" and that DNR delayed in granting it a permit. (Pet. Declaratory Order 17–18.) These have much less to do with Chapter 30 permitting than with its application. It is telling that the Petition was filed in 2023, despite that Chapter 30 is not new and Petitioner has done business in the State for many decades. Indeed, Chapter 30's permit requirement and the supposedly "open-ended criteria" which Petitioner now protests have existed for more

than 72 years. *See* 1951 Act 712, § 1; *Hixon v. PSC*, 32 Wis. 2d 608, 617, 146 N.W.2d 577 (Wis. 1966). And yet only now does Petitioner bemoan this regulation's threat to the interstate rail network. (*See* Pet. Declaratory Order 21–22.)

In truth, the Petition is driven more by Petitioner's belief that the State's Chapter 30 permitting has been unfairly applied to its work on B.R. 88.74. This makes it an inappropriate case for categorical preemption. *Cf. Union Pac. R.R. Co.*, 647 F.3d at 679; *Franks Inv. Co. LLC*, 593 F.3d at 411 (concluding that state property law claims are not categorically preempted when they only “at times . . . may have an incidental effect on railroad transportation”).

In short, Petitioner's argument holds no water. The State's Chapter 30 permitting and related enforcement cases are not categorically preempted because they do not directly conflict with ICCTA's exclusive federal regulation of railroads.

B. The Required Chapter 30 Permit and the State's Potential Enforcement Case Are Not As-Applied Preempted by the ICCTA.

Petitioner has not met its burden of demonstrating that the requested Chapter 30 permit and State's possible enforcement action are preempted under the ICCTA because they have the effect of “preventing or unreasonably interfering with railroad transportation.” *Union Pac. R.R. Co.*, 647 F.3d at 679.

Indeed, Petitioner cannot even meet its burden of demonstrating that such state actions prevented or unreasonably interfered with Petitioner's own transportation. Petitioner has failed to meet this burden, thrice over. First, the evidence shows that DNR acted promptly and reasonably attempted to accommodate

Petitioner when first notified about the need to repair Bridge B.R. 88.74. Second, it shows that any hardship imposed upon Petitioner after it placed grout mats in the Menomonee River was self-inflicted from its own refusal to submit an after-the-fact Chapter 30 permit application, the significant environmental harms from its cement mattresses, and its failure to consider less damaging alternatives. Third, Petitioner has offered only scant and conclusory evidence supporting its contention that the State’s potential enforcement case would burden its railroad operations.

First, contrary to Petitioner’s arguments that DNR “indefinitely” delayed its permitting (Pet. Declaratory Order 18), DNR swiftly responded when Petitioner first informed the agency that it needed to fix the bridge. (Hase V.S. ¶ 4, Ex. 1, at 1.) Within days (and several days before the railroad indicated it would begin work on the bridge), DNR asked for more information so that it could process a Chapter 30 permit application. (*Id.*) And then, when pressed by Petitioner about the emergency nature of the work, DNR immediately requested more information on the “emergency/safety aspects of the repair” (*Id.* ¶ 6, Ex. 3, at 1.)

When the company failed to respond, DNR followed up within days to say that it could work with the Petitioner to the issue it a Water Quality Certification for the immediate repairs, such as the grout injection and grout bag. (*Id.* ¶ 7, Ex. 4, at 1–2.)

Even though Petitioner ignored DNR’s offer and rushed to deposit the grout mats in the river¹² (*Id.* ¶ 10; Rittmeyer V.S. ¶ 12), this hardly means that DNR did

¹² Notably, Petitioner never even followed the Board’s instructions for those cases that are categorically preempted by the ICCTA, including “meet[ing] periodically with . . . local government entities to seek mutually acceptable ways to address local concerns[] and . . .

not reasonably attempt to accommodate Petitioner because of the exigency of the situation. When Petitioner first contacted DNR, it indicated that there were two problems that needed to be addressed. (Derouin V.S. ¶ 4, Ex. 1, at 2.) The first was the more immediate work of filling the scour-formed void beneath the abutment to stabilize it. (*Id.*) DNR determined that it could quickly approve this work with a Water Quality Certification because it would not likely cause water pollution and disrupt public use of the river. (Hase V.S. ¶ 7, Ex. 4 at 1.)

DNR asked Petitioner to submit Chapter 30 permit application only for the long-term work of “armor[ing] the restored bridge against *future* scour.” (See Rittmeyer V.S. at ¶ 7 (emphasis added); Hase V.S. ¶ 7, Ex. 4 at 2.) The State never proposed that Petitioner leave the abutment unarmored, as Petitioner now suggests (see Rittmeyer V.S. at ¶ 7), since Petitioner indicated that it would use a “grout bag placed and filled to *armor the toe of the existing sheet piling*”—work that did not need a Chapter 30 permit. (Hase V.S. ¶ 9, Ex. 5, at 2 (emphasis added).) Nor did DNR suggest that Petitioner should “halt the repairs and force the railroad to implement its specified repair method” (see Pet. Declaratory Order 21), or demand that Petitioner not proceed with emergency work without a permit.¹³ (See Hase V.S. ¶¶ 4, 6, 7, Exs. 1, 3–4).

submit[ting] environmental monitoring . . . information to local government entities for an appropriate period of time after operations begin.” *Soo Line*, 2014 WL 7330097, at *4.

¹³ Petitioner thus has not and could not allege that DNR’s request for a Chapter 30 permit was somehow “pretext to carry out a policy of delay or interference” with the railroad operations. See *N.Y. Susquehanna and W. Ry. Corp.*, 500 F.3d at 255; *contra Cities of Auburn and Kent*, 1997 WL 362017, at *6.

Given the speed with which DNR reacted and its reasonable attempts to accommodate Petitioner prior to its repairs, it hardly can be said that DNR “indefinitely delay[ed]” Petitioner’s permitting. (*See* Pet. Declaratory Order 18.)

Second, it was Petitioner that caused the delay and ultimate suspension of its permit application after its work, due to the harm the mattresses caused and its refusal to consider alternatives.¹⁴ After it received a Notice of Violation, Petitioner submitted only deficient cross-sectional drawings, and it refused to submit an after-the-fact Chapter 30 permit application for six months. (*Hase* V.S. ¶ 11; *Derouin* V.S. ¶¶ 5–7.) When it did, it did not propose a single modification to its grout mats, despite DNR’s determination that they had serious impacts on the environment. *See supra* p. 11. (*Derouin* V.S. ¶¶ 4, 8, Exs. 5, 11.)

When DNR attempted to discuss these issues and how Petitioner’s grout mats had increased the elevation of the riverbed channel by one-to-two feet at a July 30, 2019 site visit,¹⁵ Petitioner indicated that it would not consider any alternatives that would involve completely removing or lowering the grout mats. (*Cox* V.S. ¶ 12.) And even if possible, Petitioner would not do so if it was too costly.¹⁶ (*Id.*)

¹⁴ The emergency at the bridge also appears at least in part to be a product of the railroad’s own derelict. One must wonder how the company managed to allow *ten feet* of scour on the abutment, despite its claims that it annually inspected the bridge. (*Hase* V.S. ¶ 5, Ex. 2, at 2; *Rittmeyer* V.S. ¶ 5.)

¹⁵ The delay between Petitioner’s scheduling of the Chapter 30 application and the site visit was due to scheduling difficulties. (*Derouin* V.S. ¶ 10.)

¹⁶ Notwithstanding its professions elsewhere that it chose the best alternative for the environment, Petitioner’s disregard for the impacts of grout mats is further demonstrated by its engineer’s determination (proven to be incorrect) that grout mats would not impact the riverbed, which he editorializes as “highly industrialized.” (*Rittmeyer* V.S. ¶ 10.)

Its refusal to consider alternatives was wholly unreasonable considering the two purposes Petitioner gave for depositing the grout mats: (1) ensuring that pressure grouting would be “contain[ed] within the abutment footprint” during the repair; and (2) preventing further channel degradation when placed at the bottom of the channel beneath Span No. 1 and upstream of Pier No. 2. (Hase V.S. ¶ 5, Ex. 2 at 2.)

Petitioner has never explained why it had to permanently install the grout mats to achieve the first purpose. (*See id.*) And, regardless, it has never explained why it could not excavate the channel to use rip-rap or to lower the elevation of grout mats to meet the second. (*See id.*; Cox V.S. ¶ 12.) While it has said that excavation would “endanger[] the already exposed abutment . . .” (Rittmeyer V.S. ¶ 8), Petitioner has never explained why excavation was impossible away from the damaged abutment, since one of the mats was placed in the middle of the riverbed and the other was placed in front of Pier No. 2.¹⁷ Nor has it ever explained why it would be infeasible to remove part of the grout mats, an option Petitioner had previously indicated was possible.

Thus, contrary to Petitioner’s claim that DNR improperly “second guess[ed] decisions about maintenance and repair of railroad tracks and bridges” to “impose its own, unique permitting standard” (Pet. Declaratory Order 18, 20), it was Petitioner’s own refusal to consider less damaging alternatives that caused and is still causing the railroad to be permitless. This does not amount to preventing or unreasonably

¹⁷ It only conclusorily indicates in its Petition that excavation “would *potentially* have harmed [P]ier No. 2.” (Rittmeyer V.S. ¶ 8 (emphasis added).)

interfering with railroad operations, especially given that the Petitioner has continued its activities on the bridge, unabated.

At an apparent dead end, DNR now has referred this matter to the DOJ to obtain both forfeitures and injunctive relief requiring Petitioner to remove the cement mattresses from the State's public trust waterway.

Petitioner has offered only scant and conclusory evidence supporting its contentions that the potential enforcement case burdens railroad transportation. Petitioner indicates that it has performed a new analysis that shows that removal of the grout mats now would require "invasive, expensive, and environmentally hazardous action . . . at minimum cost[ing] \$1M and \$2M It would require specialized, non-standard design to protect the abutment during the excavation . . . and disrupt the river bed." (Rittmeyer V.S. ¶ 22.) Petitioner indicates that if it was forced to remove the grout mat and install rip-rap, it would require "multiple daily track blocks of four plus hours, disrupting freight and passenger traffic." (*Id.* ¶ 23.)

But this is the first that the State has learned of this assessment, and Petitioner provides no additional details. Some of the obvious questions left unanswered are: How did Petitioner derive the costs? What sort of environmental damage would be inflicted? Could it be mitigated? Would the damage be short-term? And how does this compare to the long-term damage from the grout mats?¹⁸ Why

¹⁸ It similarly fails to explain what it means when it contends that removing the rip-rap will "ironically be more disruptive of the river" (Pet. Declaratory Order 21), since it begs the question: more disruptive or hazardous compared to what? Insofar as it means that it will cause more damage than leaving its mattresses in place, it ignores that the proper baseline for remediation is the state of the riverbed prior to Petitioner's illegal placement of grout mats.

would the costs be at least “\$1 and \$2 million,” or was this a range for the total costs? Why did the Petitioner only evaluate removing the grout mats completely and replacing them with rip-rap, when the State has indicated it would consider options involving partial removal and re-laying the grout mats at a lower elevation after excavation, and how much would any of these alternatives cost? What sort of disruptions would multiple daily track blocks cause? Could the repairs be timed or spread out to avoid or minimize such impacts?

Petitioner’s conclusory statements based on a secret analysis invite far too many questions to meet its burden. *Cf. MD Mall Associates, LLC*, 288 F.Supp.3d at 596 (finding railroad has not met burden where “there is no evidence as to how such construction would be carried out or how disruptive it would be to [the railroad’s] operations” and no reliable evidence of cost); *Gordon*, 2017 WL 6327105, at *8 (concluding vague and inconsistent witness statements were insufficient to meet the railroad’s burden of proof).

Nor are Petitioner’s assertions about the high costs of remediation sufficient, even if presumed to be accurate. To the extent that some of these projected costs, such as for removing the grout mats, could have been avoided if Petitioner had not deposited them in the first place, these are burdens untethered to the Chapter 30 permitting. *Cf. United States v. St. Mary’s Ry. W., LLC*, 989 F.Supp.2d 1357, 1366 (S.D. Ga. 2013) (refusing to consider the burdens to railroad transportation those that “arose only from the alleged non-compliance with the CWA”) *See also N.Y. Susquehanna & W. Ry. Corp.*, 500 F.3d at 255 (rejecting potential fines of up to

\$50,000 per day, per violation (far more than the State could obtain with its enforcement actions (*see* Rittmeyer V.S., Ex. 17, ¶ 61; Ex. 18, ¶ 71)) as excessive, since “nothing prevents a state from imposing a significant fine for months of noncompliance with valid regulations . . .”).

Having not demonstrated that the State’s Chapter 30 permitting and potential enforcement action prevents or unreasonably interferes with Petitioner’s activities, Petitioner is left with its dramatic claims that somehow “DNR’s actions . . . threaten the very purpose of the ICCTA.” (Pet. Declaratory Order 21.)

But again, it fails to apprehend that the State’s Chapter 30 permitting authority is limited to protecting and regulating the use of public trust waterways. And just like with its categorical preemption argument, Petitioner points only to easily distinguishable cases involving state actions that directly regulate railroad activities. *See Griffioen v. Cedar Rapids and Iowa City Rwy Co.*, 914 N.W.2d 273, 286–87 (Iowa 2018) (concluding a suit alleging a railroad “failed to build, maintain, inspect, and keep in good repair” its four bridges was preempted as it sought to govern “where and when railroads placed their railcars on their transportation lines or how they constructed those lines”); *Thomas Tubbs, Tr. of the Thomas Tubbs Revocable Tr. and Individually*, and *Dana Lynn Tubbs, Tr. of the Dana Lynn Tubbs Revocable Tr. and Individually* Pet. Declaratory Order, Docket No. FD 35792, 2014 WL 5508153 (served Oct. 31, 2014), at *4 (finding claims preempted when they targeted harms “stemming *directly* from the actions of a rail carrier, . . . in designing, constructing,

and maintaining an active rail line . . .” (emphasis added), *aff’d*, *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1143 (8th Cir. 2015)).

In sum, Petitioner has utterly failed to meet its burden of demonstrating that the requested Chapter 30 permit and the State’s potential enforcement action prevent or unreasonably burden Petitioner’s railroad transportation on the bridge or rail transportation, more generally (which continue to this day). DNR’s actions were prompt and reasonable, Petitioner’s hardships were brought upon itself, and it offers little evidence that it faces unreasonably burdens due to the State’s potential enforcement case.

III. The ICCTA Does Not Preempt Either State Clean Water Certifications or the State’s Potential Enforcement Case Against Petitioner for Depositing its Grout Mats in the Menomonee River.

Petitioner’s arguments that the ICCTA preempts the State’s issuance of Water Quality Certifications or potential related enforcement cases fare no better. State regulations require compliance with the State’s Chapter 30 public interest criteria to receive a federal Water Quality Certification. These incorporated criteria serve to implement the federal CWA, making them federal law for preemption purposes. Petitioner fails to demonstrate that these generally applicable criteria cannot live in harmony with the ICCTA. Like with Chapter 30 permits, Petitioner does not show that the criteria were applied to restrict the railroad from conducting operations or to unreasonably burden interstate commerce. And it does not show the State has discriminately, pretextually, or otherwise unfairly applied the criteria.

A. The State Chapter 30 Public Interest Criteria Incorporated into State Water Quality Certifications Implement the Federal Clean Water Act.

Petitioner fundamentally misunderstands the nature of CWA § 401 when it argues that the State’s Chapter 30 public interest criteria, which are incorporated as a precondition for receiving a CWA Water Quality Certification, should be construed as state law for preemption purposes. (*See* Pet. Declaratory Order 23–24.)

As discussed above, § 401 is a critical provision of the CWA, ensuring state water quality standards are incorporated into federally enforceable permits by requiring that prospective federal permittees first receive a state Water Quality Certification. 33 U.S.C. § 1341(a)(1). CWA § 401 preserves states’ powers to condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of State law. *Id.* § 1341(d).

DNR’s regulations at Wis. Admin. Code § NR 299.01(2) implement this part of the CWA. To receive a Water Quality Certification, § NR 299.01(2) requires that prospective federal permittees adhere to those Wisconsin water quality standards outlined in Wis. Admin. Code § NR 299.04, including the public interest criteria of Chapter 30 related to water quality. Wis. Admin. Code § NR 299.04(1)(b)6. These regulations were promulgated pursuant to Wis. Stat. ch. 281’s mandate to create a comprehensive action program, Wis. Stat. § 281.11, and in “all cases where the potential uses of water are in conflict,” interpret “water quality standards . . . to protect the general public interest.” Wis. Stat. § 281.15.

By making the Chapter 30 public interest criteria, which are aimed at protecting public uses of navigable waterways, a precondition for obtaining federal Water Quality Certifications, the State ensures that federal permittees cannot disrupt such waterways by depositing materials that are pollutants. *See Reuter v. DNR, Div. of Res. Dev.*, 43 Wis. 2d 272, 277, 168 N.W.2d 860 (Wis. 1969) (stating that “polluted waters do become less useful for most, if not all” of the public purposes protected by Chapter 30); 69 Op. Att’y. Gen. 128, 1980 WL 119472, at *4 (May 21, 1980) (concluding that Wis. Stat. § 30.12 “may be properly characterized as a water pollution control statute” (internal quotation marks omitted)).

Petitioner cannot challenge this long-standing approach. *Cf. PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 711, 715 (1994) (concluding that state standards containing stream water flow rates to protect fisheries were an “appropriate requirement of State law” under CWA § 401(d)). So instead, it collaterally attacks the incorporated Chapter 30 public interest criteria, claiming they are not “imbued with federal authority” and do not implement federal law for preemption purposes. (Pet. Declaratory Order 23.)

The problem for Petitioner is that a nearly identical theory was rejected nearly thirty years ago in *State, Dept. of Ecology v. Public Utility Dist. No. 1 of Jefferson Cty.*, 121 Wash. 2d 179 (Wash. 1993) (*en banc*), a Washington State Supreme Court decision that the U.S. Supreme Court left standing in its own review.

There, a city and a utility claimed that minimum stream flow requirements that were indirectly related to water quality and set forth as CWA § 401 state water

quality standards were preempted by the Federal Power Act. *Public Utility Dist. No. 1 of Jefferson Cty.*, 121 Wash. 2d at 192. The court disagreed, concluding that such standards implemented federal law. *Id.* at 193–95. Four interrelated bases supported this conclusion. First, the § 401 Water Quality Certification was a federal permit under the CWA, and the state was required to set certain limitations in issuing the federal certification. *Id.* at 193. Second, the stream flow limitations were integrated into CWA as “appropriate requirement[s] of State law” under CWA § 401(d). *Id.* Third, the U.S. Environmental Protection Agency’s (EPA) involvement in the development of state water quality standards was extensive, given they are promulgated under the federal CWA, must adhere to EPA regulations, and required EPA approval. *Id.* at 193–94. Finally, the conditions imposed in a CWA § 401 certificate become the terms and condition of the federal license. *Id.* at 194. “These factors collectively demonstrate such a significant and pervasive federal involvement” that the “state is . . . fulfill[ing] its federally mandated role in the comprehensive federal scheme embodied in the [CWA].” *Id.*

There is little daylight between this longstanding decision’s holding about the water quality standards in that case and the Chapter 30’s public interest criteria here. Put simply, a Water Quality Certification that incorporates Chapter 30’s public interest criteria is a federal CWA permit whose state limitations become the terms and conditions of a federal license.

The Petitioner fixates on EPA’s lack of approval of the Chapter 30 public

interest criteria, claiming that “under the prevailing test,”¹⁹ those criteria have not been sufficiently “imbued with federal authority” for preemption purposes. (Pet. Declaratory Order 23.) But this misunderstands that a separate section of the CWA, § 301, only requires states to submit water quality standards for EPA approval when they consist of “the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.”²⁰ 33 U.S.C. § 1313(c)(2)(A). The statute does not require EPA to approve other state limitations adopted under § 401(d), such as those that are “other appropriate requirement[s] of State law” and designed to ensure compliance with the EPA-approved state water quality standards under CWA § 303.

Notwithstanding, even non-EPA approved standards are incorporated into Water Quality Certifications and become the terms and conditions of the federal licenses under § 401(d) of CWA, putting them on par with every other term and condition in the certification implementing the CWA. Indeed, federal agencies must implement these conditions and may not disapprove of them. *See Roosevelt Campobello Intern. Park Comm’n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

This key characteristic of the CWA makes it different from those laws in the cases that Petitioner cites. *See Ass’n of American R.R.s v. S. Coast Air Quality Mgmt.*

¹⁹ Petitioner appears to create this “prevailing test” out of whole cloth, as it points to no decision articulating this test.

²⁰ The EPA has approved of the State’s water quality criteria and designated uses, (*see* 42 Fed. Reg. 56,786, 56,792 (Oct. 28, 1977), the latter which forms the backbone of any DNR decision that a proposal unreasonably interferes with the public’s use and enjoyment of navigable waterways.

Dist. 622 F.3d 1094, 1096 (9th Cir 2010) (pertaining to Clean Air Act State Implementation Plans, which only have the force and effect of law after EPA approval); *BNSF Rwy Co. v. Clark Cty., Washington*, 11 F.4th 961, 967–98 (9th Cir. 2021) (pertaining to the Gorge Act, which had no provision to transform the local ordinance into a regulation with the force and effect of federal law).

The Petitioner is also off-base in arguing that the State must be exercising delegated authority for state standards to implement federal law for preemption purposes. (See Pet. Declaratory Order 23). The Petitioner cites no authority for this. The *Ass’n of Am. R.R.s—Petition for Declaratory Order* (the *Train Car Discharge Guidance*) decision does not discuss delegation as relevant. Docket No. FD 362020, 2020 WL 7778233 (served Dec. 30, 2020). Nor does the *Town of Ayer* decision.²¹

At bottom, Petitioner cannot overcome the clear weight of authority indicating that state standards such as the Chapter 30 public interest criteria, when incorporated into Water Quality Certifications, implement the federal CWA and are thus sufficiently “imbued with federal law” for preemption purposes.

B. The State Chapter 30 Public Interest Criteria Can Be Harmonized with the ICCTA.

As a state legal requirement that serves to implement federal law, the question is not one of *per se* preemption, but whether the two federal statutes can be

²¹ In *Town of Ayer*, the Board essentially found that the locality had used its claimed authority under the CWA as pretext to burden interstate commerce. 2001 WL 1174385, at *2. Obviously, pretext cannot be asserted here, as the State has long included complying with the Chapter 30 public interest criteria as a condition of receiving Water Quality Certifications.

harmonized because the non-ICCTA regulation is not being “applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” *Town of Ayer*, 2001 WL 1174385, at *2 (underscore omitted). “This is a case- . . . and fact-specific determination,” that involves evaluating the severity of the likely environmental impacts and the burden on transportation. *Id.*

For many of the reasons described above, the Petitioner has not met its burden and demonstrated that requiring Petitioner to obtain a Water Quality Certification adhering to the Chapter 30 public interest criteria and the related enforcement action unduly restricted the railroad from conducting its operations or burdened interstate commerce. DNR acted quickly and reasonably to request that the Petitioner obtain a Water Quality Certification so that Petitioner could at least perform the short-term repair of the abutment quickly, as it did not seem to impair the public trust resources. (See Cox V.S. ¶ 6.) This is even though DNR indicated that it typically processed Water Quality Certifications as part of a Chapter 30 permit application. (*Id.*) After Petitioner refused to obtain the certification, the State was not unreasonable to pursue an enforcement case, not only for the abutment repairs but also for depositing of grout mats, given the extensive damage caused by the cement mattresses. Petitioner has never shown that transportation has ever been burdened by the need to obtain a Water Quality Certification, and its explanation on why remediation would burden transportation invites far too many questions to demonstrate that the State’s enforcement action is preempted.

The *St. Mary's Ry. West, LLC*, decision is instructive. 989 F.Supp.2d at 1359. There, like here, the railroad allegedly discharged pollutants into waterway as part of construction activities (there, tributaries in wetlands when building a spur and side-tracks). *Id.* Like in the present case, Petitioner failed to obtain a CWA § 404 permit. *Id.* The federal district court emphasized there was “voluminous authority supporting a harmonious reading of the Board’s exclusive jurisdiction and the ability of entities—including state and local governments—to enforce the CWA” *Id.* at 1363. “The CWA’s prohibition against pollutant discharges does not discriminate against those operating in the rail transportation industry, but instead applies generally to ‘any person,’” *id.* at 1362 (citing 33 U.S.C. § 1311(a)), and it serves “merely to ‘protect[] the quality of our Nation’s waters for esthetic, health, recreational, and environmental uses.’” *Id.* (quoting *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 175 (2001)). As such, this regulatory regime does not “conflict with the ICCTA’s separate purpose in simplifying the regulatory regime over the railroad industry.” *Id.* The court observed that this was how the “overwhelming majority of other courts and the Board have treated the issue.” *Id.* (citing cases).

The court held that the railroad did not show how the particular enforcement action unreasonably burdened transportation.²² *Id.* at 1365–66. It was not enough for the railroad to generally contend that a CWA § 404 license amounted to a preconstruction permit preventing the construction of an integral feature of railroad

²² This was notwithstanding that EPA was the enforcement agency. 989 F.Supp.2d at 1365.

operations or that there were burdens on the railroad. *See id.* Nothing suggested that the regulator was “enforcing the CWA in a discriminatory manner or as a pretext to frustrate Defendants’ operations, or that the railroad industry face[d] additional burdens that [we]re not incurred equally by others seeking to discharge pollutants” *Id.* at 1366.

Likewise, the State’s requirement that the Petitioner obtain a Water Quality Certification before depositing materials into a navigable waterway and the resulting potential enforcement action are not disharmonious with the ICCTA, and Petitioner’s general and conclusory assertions of the resulting burdens on transportation are insufficient to find preemption. (*See* Pet. Declaratory Order 26–27.)

Petitioner’s counterargument heavily leans on the Board’s *Train Car Discharge Guidance*, contending that the Board in that matter could not harmonize CWA National Pollutant Discharge Elimination System (NPDES) permits with the ICCTA. (*Id.* at 27 (citing 2020 WL 7778233, at *13).) But the Board’s guidance in that case actually *undermines* a preemption determination here. There—as Petitioner neglects to mention—the chief reason for finding preemption was that the NPDES permits attached to the rail cars *while in transit*:

The Board does not suggest that every requirement under the CWA that may differ from state to state would be preempted as applied to railroads. However, rail cars in transit are inherently instrumentalities of interstate commerce; as such, subjecting them to differing regulatory requirements as they pass from one state to the next is likely to be incompatible with the free flow of interstate commerce that Congress envisioned when enacting [the ICCTA] § 10501(b).

2020 WL 7778233 at *13.

“[O]ther applications of the CWA,” in contrast, “such as non-discriminatory application to discharges from certain types of stationary facilities owned or operated by railroads . . .” *id.*, would not warrant such treatment because “although they may differ from state to state, they do not typically conflict with § 10501(b)’s goal of preventing differing regulations from interfering with the free flow of interstate commerce.” *Id.*

State clean water standards, such as the State’s Chapter 30 public interest criteria incorporated into Water Quality Certifications, do not attach to railroad cars in transit but instead to the waterways in and around stationary railroad facilities such as bridges. They simply do not pose the same burden on transportation that standards on railroad cars traversing between states would.

C. The State’s Requirement That Petitioner Obtain a Clean Water Certification Was Not Unfair

Finally, DNR did not act unfairly or pretextually or otherwise discriminate against Petitioner or rail transportation by requiring it to obtain a Water Quality Certification. (*See* Pet. Declaratory Order 29–31.) As demonstrated above in relation to Chapter 30 permit, the State simply requested that railroad obey the same permitting requirements that every other any person would have to in depositing materials in a navigable water. *See supra* p. 21 and note 6.

Petitioner’s argument that because Chapter 30 is not applicable to some activities its permitting must be *ipso facto* discriminatory to railroads mischaracterizes or misunderstands Wisconsin law. Petitioner impugns Chapter 30’s exceptions, pointing to Wis. Stat. § 30.10’s exception for highways, bridges, and

culverts and Wis. Stat. § 30.12's exception for structures and deposits for new manufacturing facilities in certain zoned areas. The former, which has language similar to a provision dating back to 1853, exempted *municipality-constructed* roads, bridges, and culverts, ostensibly aiming to ensure that such entities maintained their pre-existing legislatively granted authority, notwithstanding the State's codification of its constitutional authority over navigable waters.²³ See 1853 Wis. Act ch. 72. It hardly can be construed as a provision discriminating against railroads given their nascency and lack of competitors in the State at that time.²⁴

In terms of Wis. Stat. § 30.12(1g)(m)'s exception for structures and deposits for new manufacturing facilities in electronic manufacturing zoned areas, Petitioner fails to mention that this is one of at least 15 exceptions to Wis. Stat. § 30.12. Railroads are no more discriminated for not being excepted from this provision, than a person seeking to build a pier or wharf greater than six-feet wide who also would not qualify, to name just one example. See Wis. Stat. § 30.12(1g)(f)1.(a).

These exceptions stem from the fact that under the State Constitution's public trust doctrine, "[t]he primary authority to administer this trust for the protection of

²³ Petitioner is also quite incorrect in saying State Department of Transportation (DOT) "regulations explicitly allow[] grout mats for scour repairs in Wisconsin rivers." (Pet. Declaratory Order 10). It cites the DOT's Facilities Design Manual's technical specifications, but these only apply if such grout mats are permitted. See <https://wisconsindot.gov/pages/doing-bus/eng-consultants/cnslt-rsrcs/rdwy/fdm.aspx>. Other sections of the manual cover permitting. See <https://wisconsindot.gov/rdwy/fdm/fd-20-50.pdf#fd20-50-5.1>. Just because the DOT contemplates allowing grout mats in some situations (like DNR might) does not mean that it would be permitted for every project.

²⁴ See Wisconsin Historical Society, Cultural Resource Management Plan, Vol. 2., Transportation 1-1 available at <https://www.wisconsinhistory.org/pdfs/cms/WI%20SHPO%20CRMP%20Volume%202%20Transportation.pdf>.

the public's rights rests with the legislature." *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (Wis. 1983). The general permitting authority that the legislature has delegated to DNR, along with the perhaps oddly specific exceptions to this permitting scheme, reflect that the State may "authorize limited encroachments upon the beds of such waters where the public interest will be served." *Id.* "In all of these legislative authorizations of fill or structures on the beds of navigable waters, it was the function of the legislature to weigh all the relevant policy factors including the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners." *Hixon*, 32 Wis. 2d at 620.

That Petitioner might not like how the legislature has made such determinations does not mean that it has been discriminated against. It certainly does not mean that the State put its interests ahead of the free movement of interstate commerce. (See Pet. Declaratory Order 30.) After all, a fundamental touchstone of the State's authorization of encroachments on public trust waterways is that they cannot impair the navigability of the waterways, precisely to preserve interstate commerce. See Wis. Const. art. IX, § 1; see also, e.g., *Sweeney v. Chicago, M. & St. P.R. Co.*, 18 N.W. 756, 758–60 (Wis. 1884) (stating, in a Pre-ICCTA, pre-Chapter 30, pre-CWA case, that the State Constitution requires the legislature to consider whether the bridge is "constructed and maintained as not to materially or unnecessarily obstruct such navigation" and interstate commerce when requiring railroads to maintain their bridges).

The simple fact that the legislature has not given the railroad an exception from complying with Chapter 30's public interest criteria is thus not enough to demonstrate that it has somehow been discriminated against.

Finally, DNR's issuance of a Clean Water Certification for USACOE's 2018 Regional General Permit (the 2018 RGP), 2018 RGP-002-WI, is of no import. (*Contra* Pet. Declaratory Order 31.) Petitioner argues that it was unfair for DNR to demand a Water Quality Certification when three months later it issued a Water Quality Certification for the 2018 RGP, which would have obviated its need to secure an individual Water Quality Certification. (*Id.*) But, unlike Chapter 30, CWA § 401(d) does not allow after-the-fact Water Quality Certifications. So, it does not matter what a subsequent permitting regime required; Petitioner was required to obtain a § 401 Water Quality Certification prior to commencing its work under the operative USACOE general permit, and it failed to do so. Further, while DNR was more than willing to issue a limited Water Quality Certification for some of the Petitioner's more short-term work, it was the Petitioner who sought to charge forward with its entire project, despite USACOE's July 11, 2017 notice that it was modifying the regional permit. (*Deroin V.S.* ¶ 4, Ex. 9 at 1.) It is not unfair for Petitioner to live with the consequences of its decision.

In any event, it is doubtful that the 2018 RGP general permit would have made much of a difference, even if Petitioner decided to commence much of the work after it was issued. Petitioner's laying of grout mats likely would not have been subject to the 2018 RGP and would still have required an individual permit, albeit from the

USACOE.²⁵ In accordance with the Wisconsin law, the 2018 RGP authorizes only “*temporary* structures fills and work, including the use of temporary mats” (Rittmeyer V.S. Ex. 13 at 2 (emphasis added)), and only when all tributary channel losses “are limited to the minimum necessary to construct or protect the linear transportation project.” (*Id.* at 3.) As indicated, this does not match Petitioner’s project. It is thus likely that Petitioner’s project would have not complied with the 2018 RGP, and it would have been subject to federal enforcement for failing to obtain an individual § 404 Permit. It is no more unfair to Petitioner that it is now being charged with state violations.²⁶

CONCLUSION

Efficiency in this case is best promoted by not instituting proceedings, so parties can continue settlement negotiations or a state court can decide the myriad of factual and legal issues. Alternatively, the Board should deny the Petition because the State’s Chapter 30 permitting, issuance of Water Quality Certifications, and possible enforcement cases are not preempted by the ICCTA.

²⁵ Petitioner’s reliance on DNR’s general permit for Municipalities to Construct, Reconstruct or Maintain Public Highways and Structures (WDNR-GP2-2022), available at https://widnr.widen.net/s/brqdqmtctg/wdnr-gp2-2022_final, is similarly misplaced. (*See* Pet. Declaratory Order 29 & n.7). Far from an “exemption” for municipalities, it is a general permit, that still requires municipalities to apply for coverage. WDNR-GP2-2022 at 1. And it would not allow the depositing of grout mats when done in a manner such as in this case which results in a “substantial permanent change to the course of a navigable waterway, or removal of material from the bed of any waterway, except for what is necessary to place the structure.” *Id.* § 1.3.d.

²⁶ Likewise, under the most recent RGP, Petitioner would be required to obtain an individual permit because it involves the permanent deposition of material below the ordinary high water mark and interferes with wildlife, recreation, and fish and aquatic life standards under Wis. Admin, ch. NR 102. *See* https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RGP/WI_DNR_401.pdf?ver=5hkqn4yeUSK0gAVItVfh7A%3d%3d.

Dated this 10th day of January, 2024.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Zachary B. Corrigan

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2024, a copy of the foregoing was served via e-mail upon the following:

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC

Verified Statement of Sadie Derouin

1. My name is Sadie Derouin, and I presently serve as an Enforcement Specialist with the Wisconsin Department of Natural Resources (DNR).

2. In this position I work closely with environmental regulatory staff, program supervisors, attorneys, and the State Department of Justice (DOJ), to ensure that environmental enforcement services are provided in a timely, effective, and efficient manner.

3. I first got involved in the present case when it was assigned to me and I accepted this assignment on March 9, 2018.

4. Part of my responsibilities involve gathering and organizing DNR records related to this matter. The following are true and accurate copies of agency records:

- Attached as Exhibit 1 is a true and accurate copy of the letter and attachments that Petitioner Soo Line Railroad Company a/k/a CPKC (Petitioner) sent indicating it would begin emergency work to repair an abutment on one of its bridges, Watertown Bridge, B.R. 88.74.
- Attached as Exhibit 2 is a true and accurate copy of a site inspection report from a November 30, 2017 DNR site visit to the bridge filed by Water Management Specialist Elaine Johnson.

- Attached as Exhibit 3 is a true and accurate copy of the Notice of Violation and request for an enforcement conference that I sent Petitioner.
- Attached as Exhibit 4 is a true and accurate copy of the summary of the Enforcement Conference held with the Petitioner on Thursday, April 12, 2018.
- Attached as Exhibit 5 is a true and accurate copy of the list of concerns that DNR sent to Petitioner after the enforcement conference.
- Attached as Exhibit 6 are the true and accurate copies of the cross-sectional drawing of the riverbed before and after Petitioner deposited the grout mats on the riverbed, which Petitioner submitted to DNR on July 31, 2018, at DNR's request.
- Attached as Exhibit 7 are the true and accurate copies of the cross-sectional drawing of the riverbed before and after Petitioner deposited the grout mats on the riverbed, which Petitioner submitted to DNR on October 30, 2018, at DNR's request.
- Attached as Exhibit 8 is a true and accurate copy of U.S. Army Corps of Engineers (USACOE) General Permit GP-002-WI (2016), a true and accurate copy of USACOE's notice of the modification and revocation of portions of GP-002-WI on June 19, 2017.
- Attached as Exhibit 9 is a true and accurate copy of the July 11, 2017 notice that USACOE provided the public proposing to modify GP-002-WI (2016).

5. On September 27, 2018, DNR requested that Defendants submit a Chapter 30 permit application within 30 days. The letter indicated it might refer the matter to the State Department of Justice for enforcement. Attached as Exhibit 10 is a true and accurate copy of this letter.

6. After Petitioner submitted the cross-sectional drawings on July 31, 2018, Petitioner provided no further correspondences or information to DNR until it submitted a Chapter 30 permit application on October 30, 2018.

7. Petitioner submitted a Chapter 30 permit application on October 30, 2018.

8. The Chapter 30 permit application that Petitioner submitted on October 30, 2018, sought approval only for the work it had already done and proposed no alterations to the grout mats. Attached as Exhibit 11 is a true and accurate copy of the Plans and Specifications (dated October 29) that petitioner submitted with its application.

9. DNR considered the permit application deficient when submitted.

10. DNR had a conference call with Petitioner's representatives on February 25, 2019, to walk through the permit application. During the call, the Petitioner expressed interest in discussing the issues with the permit at the site. After the conference call, DNR and Petitioner made numerous attempts to schedule a site visit, and finally agreed that we could do it in July 2019.

11. DNR outlined the main issues at the site with Petitioner's representatives in a meeting on July 30, 2019.

12. Given the harm to the riverbed posed by the Petitioner's depositing of grout mats and Petitioner's refusal to consider alternatives, DNR issued Petitioner a letter on February 14, 2020, indicating that its Chapter 30 Permit application continued to be on hold because the project was likely causing environmental damage and due to floodplain concerns. Attached as Exhibit 12 is a true and accurate copy of that letter sent on February 14, 2020.

13. Petitioner has never since proposed taking any actions to remediate these harms.

14. On July 8, 2021, DNR referred this matter for civil prosecution to the DOJ.

15. On June 30, 2023, the DOJ sent Petitioner a letter indicating that it accepted the referral, along with two draft complaints that it would file if the parties could not reach a settlement. True and accurate copies of the letter and complaints were supplied to the Surface Transportation Board by the Petitioner as Exhibit 17 for the Verified Statement of Karl Rittmer.

16. Since sending the letter, the parties have met twice by video conference to discuss the matter. On August 30, 2023, the parties had a settlement conference; the result of which was that Petitioner had agreed to put together an analysis of potential options for remediation. In September and October, counsel for the parties exchanged several emails attempting to narrow what remediation might be mutually acceptable. As of the filing of Petitioner's October 30, 2023 Petition, Petitioner had yet to present any such analysis to the State.

I, Sadie Derouin, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement .

Executed on the 20th day of December, 2023



Sadie Derouin

EXHIBIT

1



Karl Rittmeyer
Senior Bridge Engineer
East Region

11306 Franklin Ave.
Franklin Park, IL
60131
USA

Cell 224-500-4641
Karl_Rittmeyer@cpr.ca

October 30, 2017

Elaine Johnson
Water Management Specialist
WI DNR
141 NW Barstow, Room 180
Waukesha, WI 53188

RE: Canadian Pacific – Watertown BR 88.74 (B-18), Emergency Scour Repair

On behalf of Canadian Pacific (CP), I am writing to request WIDNR water quality certification under Section 401 of the Clean Water Act from the WI DNR. This is required under General Condition 26 of the USACE Regional (non-reporting) General Permit GP-002-WI. CP must repair a scoured condition under Abutment 1 of Watertown BR 88.74 (B-18).

Please find included with this submittal:

- Exhibit drawing containing the proposed project layout and elevation view showing the scour mitigation measures planned.
- Photo log of the existing conditions.

We believe this work qualifies as a non-reporting project under Regional General Permit GP-002-WI and does not require an individual Section 404 permit application for the following reasons:

- The project will repair an existing, previously authorized, currently serviceable structure, which will maintain the same use of carrying railroad traffic as when it was authorized. The existing structure is considered previously authorized as it was in place prior to December 18, 1968 (see 33 CFR 330.3).
- The structure is being restored to its original condition by pumping grout underneath the existing footing.
- Stream channel modifications, which are immediately adjacent to the structure and on CPR Right-of-Way, are limited to the minimum necessary and are intended to hold the channel elevation and prevent further undermining of the abutment.

Therefore, a copy of the enclosed information for this work is being sent to the US Army Corps of Engineers and the City of Milwaukee Floodplain Administrator for their information purposes only.

Watertown BR 88.74 is located in Miller Valley, WI crossing over the Menomonee River at these coordinates (43.042426, -87.972293). As shown in the attached drawing, CP plans to pump grout beneath the footing of Abutment 1 to fill any voids that exist; the total volume of grout is unknown. Additionally, in order to prevent further erosion of the river bed within Span 1, 1900 square feet of grout mats will be placed on the river bed.

As recently confirmed by the Surface Transportation Board, state and local permitting or preclearance requirements (including, but not limited to, building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted for the construction of rail facilities by the ICC Termination

Act of 1995 (ICCTA). *See Soo Line Railroad Company-Pet. For Declaratory Order*, FD 35850 at 4 (STB Dec. 22, 2014). Accordingly, this letter shall serve as notice that we are choosing to forgo the State of Wisconsin and City of Milwaukee permitting process. This letter and application is additionally being shared with the WI DNR for the purpose of meeting General Condition 26 of the USACE Regional General Permit GP-002-WI.

It is CP's intent to begin the emergency work the week of November 6th with the Contractor using State of Wisconsin Best Management Practices to protect the waterway during low flows. Material excavated and not reused in the project will be removed and disposed of off site. Native grasses will be planted on disturbed areas when work is complete.

Should you have any questions please feel free to contact HDR Project Manager Michael Keller at 406-532-2233 or myself at 224-500-4641.

Sincerely,



Karl Rittmeyer

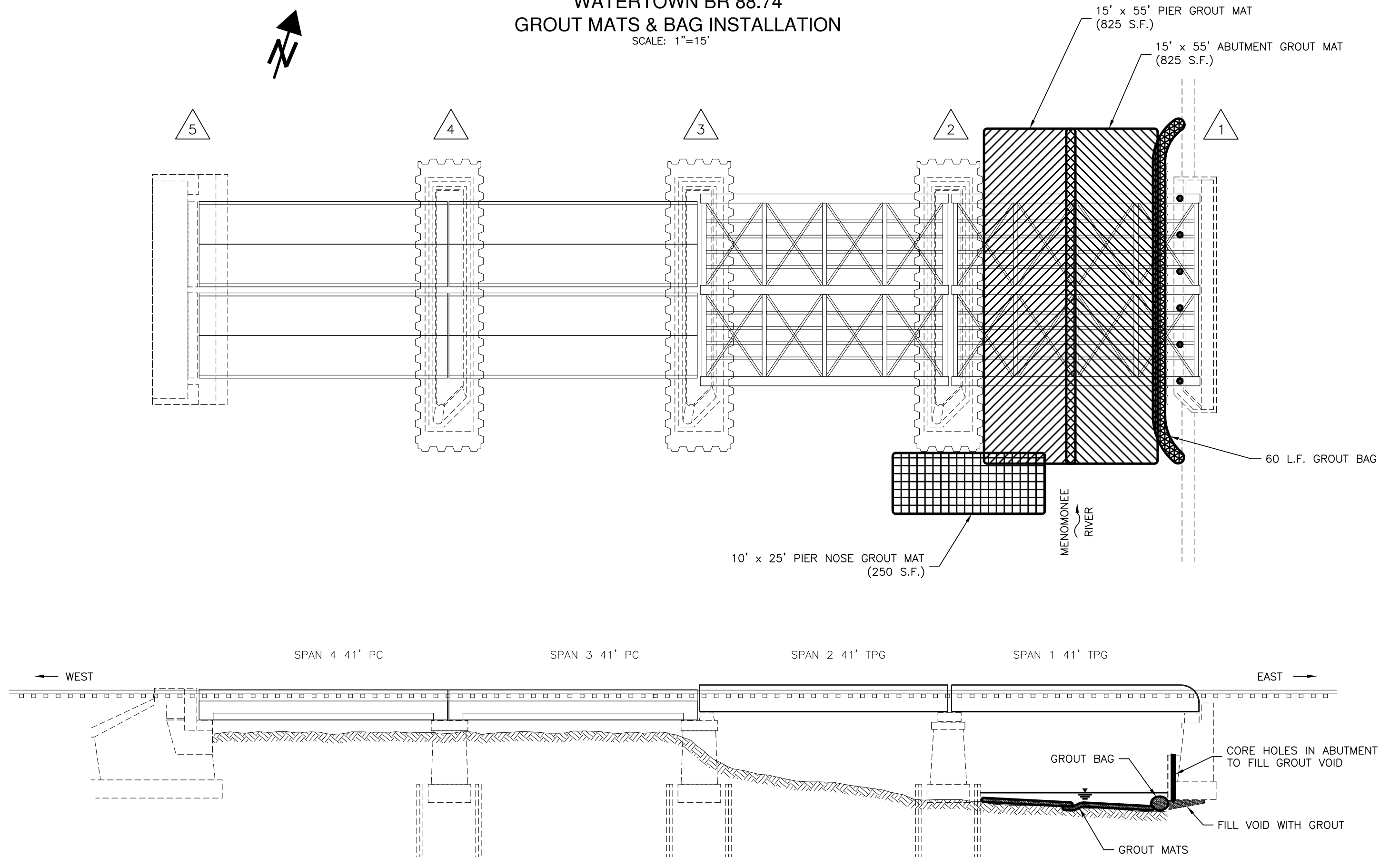
Senior Bridge Engineer – East Region

Cc: US Army Corps of Engineers, St. Paul District – Regulatory, 180 5th Street
East, Suite 700, St. Paul, MN 55101
Chris Rute, Floodplain Administrator – City of Milwaukee, 809 N Broadway,
Milwaukee, WI 53202
Wisconsin DNR Service Center, 141 NW Barstow, Room 180, Waukesha, WI
53188

encl

WATERTOWN BR 88.74 GROUT MATS & BAG INSTALLATION

SCALE: 1"=15'



CPR Watertown BR 88.74 (B-18) – Photo Log



Photo 1 – Looking southeast at Abutment 1 of BR 88.74.



Photo 2 – Looking southeast at Abutment 1 of BR 88.74.

CPR Watertown BR 88.74 (B-18) – Photo Log



Photo 3 – Tape measure extended 5' beneath footing of Abutment 1.



Photo 4 – Looking below the bottom of the sheet piling and into the void beneath the footing of Abutment 1.

CPR Watertown BR 88.74 (B-18) – Photo Log



Photo 5 – Full extension of 13' long tape measure under the Abutment 1 footing.



CASE ACTIVITY REPORT FOR REGULATORS

State of Wisconsin
Department of Natural Resources

Case ID	Case Title Canadian Pacific Railroad Watertown BR 88.74	
Activity Site Inspection		Date of Activity 11/30/17

On 11/30/17 at 8:30am I, Water Management Specialist Elaine Johnson, visited the Canadian Pacific Railroad Watertown BR 88.74 bridge with DNR Streams Biologist Craig Helker and DNR Fisheries Biologist Tom Burzynski. The purpose of the visit was to view activities completed by the railroad, as confirmed by Mr. Helker on 11-17-17, without DNR approval so that the resource managers could assess possible concerns with the work that was performed.

7 photos were taken during the inspection and are available for review. A photocard showing the site condition was prepared.

At approximately 8:45am, we exited the site.

Regulator Reporting	Date of Report	Exhibit Reference
---------------------	----------------	-------------------



1

- Photo of the installed grout mat concrete blanket, facing south.
- The grout mat did not appear to be properly keyed (anchored) into the substrate. The photo shows flows concentrated flows, increasing velocity and narrowing of the stream channel, which DNR resource managers have indicated concerns with native fish passage.



2

- Photo of northern end of the mat, facing west.



3

- Photo of the east bridge abutment on the north side of the bridge with new grout bag.





March 13, 2018

Certified Mail/Return Receipt Requested
Milwaukee County

SOO Line Railroad Company
C/O Real Estate
501 Marquette Ave, STE 1525
Minneapolis, MN 55402

Karl Rittmeyer
11306 Franklin Ave.
Franklin Park, IL 60131

Subject: **NOTICE OF VIOLATION AND ENFORCEMENT CONFERENCE REQUEST – April 5, 2018**

Dear Mr. Karl Rittmeyer,

The Department of Natural Resources (department) has reason to believe that SOO Line Railroad Company (SOO), a subsidiary of Canadian Pacific Railway, is in violation of state navigable waterway laws at Watertown BR 88.74 (B-18) bridge crossing, City of Milwaukee, Milwaukee County, Wisconsin (the site). These violations are based upon a site inspection and records review.

The department alleges the following violations:

1. **Section 30.12(1)a Wisconsin Statutes (Wis. Stats) states:** Permits required. Unless an individual or a general permit has been issued under this section or authorization has been granted by the legislature, no person may do any of the following: Deposit any material or place any structure upon the bed of any navigable water where no bulkhead line has been established.
2. **Section 299.03(1) Wisconsin Administrative Code (Wis. Code):** No person may conduct any activity which may result in any discharge into the waters of the state unless the person has received a certification or waiver under this chapter.
 - On October 30, 2017, SOO contacted the department requesting a 401 Water Quality Certification for a non-reporting activity under their current RGP-002 (general permit) from the U.S. Army Corps of Engineers.
 - On November 2, 2017, the department informed SOO that a Chapter 30 permit would be required and recommended modification of the proposed project due to concerns the project may affect fish passage, alter flood elevations and cause downstream erosion.
 - On November 17, 2017, the department confirmed during a site visit that SOO installed a grout mat on the bed of the Menomonee River at Watertown BR 88.74 (B-18) bridge crossing without a Chapter 30 permit.
 - The general permit from the U.S. Army Corps of Engineers states that "All GP-002-WI authorizations are provisional, and require individual Section 401 Clean Water Act Water Quality Certification or waiver from the Wisconsin Department of Natural Resources" and "GP-002-WI authorizations are provisional and require that the WDNR provide confirmation that the activity complies with state water quality certification".

We have scheduled the following Enforcement Conference to discuss this matter in more detail:

Conference Date: Thursday, April 5, 2018
Conference Time: 10:00am
Location: DNR Service Center – Waukesha
Conference Room 163
141 NW Barstow St # 180, Waukesha, WI 53188

Please come to the meeting prepared to discuss a restoration plan and permit requirements.

We request you attend the Enforcement Conference as it is an important opportunity to discuss the circumstances surrounding the alleged violations and to learn your perspective on this matter. Please note that in an effort to encourage a candid and productive conversation, attendance is limited to you, your legal counsel and others with the technical expertise necessary to understand, evaluate and correct the violation.

The department's enforcement decision will be based upon available information if you do not attend the Enforcement Conference.

Please be advised, the department is authorized to seek injunctive or other appropriate relief for violations of navigable waterway laws, including forfeitures of up to \$5,000 per day. Each day of continued violation is a separate offense. In addition to the penalties, the court may order the defendant to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the public interest in navigable waters. The court may order abatement of a nuisance, restoration of a natural resource or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant.

Pursuant to s. 30.292, Wis. Stats, Parties to a violation: Whoever is concerned in the commission of a violation of this chapter for which a forfeiture is imposed is a principal and may be charged with and convicted of the violation although he or she did not directly commit it and although the person who directly committed it has not been convicted of the violation.

If you have questions or need to reschedule the conference, please contact me at 608-622-8247 or through email at sadie.derouin@wi.gov.

Sincerely,



Sadie Derouin
Environmental Enforcement Specialist

Encl: Environmental Enforcement Conference Information Sheet

cc: E. Johnson, DNR – Waukesha
M. Scott, DNR – Waukesha
M. Kowalkowski, DNR – LS/8
April Marcangeli, U.S. Army Corps of Engineers
Jeff Johnson, HDR Inc.
Micheal Keller, HDR Inc.



Environmental Enforcement Conference

An Enforcement Conference (EC) is a meeting between Department of Natural Resources staff and representatives of a person or business that the Department believes has violated an environmental law. The Department issues a Notice of Violation (NOV) when it has reason to believe that a violation of a permit condition, administrative rule or statutory requirement has occurred. The NOV either offers or schedules an EC.

Why Should I Attend?

The EC is an important opportunity to discuss the Department's basis for the alleged violation(s) and learn more about what happened, why it may have happened, and any factors you believe the Department should consider, such as steps that have been or will be taken to stop the violation, correct any effects of the violation, and prevent violations from occurring in the future. It is also your opportunity to explain why you might disagree with the factual and legal conclusions underlying the NOV.

Historic data shows that most violations are resolved at the EC level, without the need for court ordered compliance and/or penalties. In situations where the significance of the violation warrants further enforcement action, your cooperative efforts to resolve the violation and prevent future violations will help minimize your legal and financial liability.

Who Should Attend the EC?

Department staff involved in the EC typically consists of an Environmental Enforcement Specialist and regulatory staff that are familiar with the issues identified in the NOV.

While not required, you may seek representation by legal counsel or the assistance of an environmental consultant to prepare for and/or attend the EC. The EC is most productive when all involved are well-prepared to discuss the allegations and any corrective actions that may be necessary.

To ensure a productive candid discussion, participation in the EC is limited to the person or business involved and others with the legal or technical expertise necessary to understand, evaluate, mitigate and correct the violation. The EC is not an open meeting under state law and the Department will limit participation to those directly involved in the resolution of the matter.

What Happens if I don't Attend the EC?

If a party is unable to attend the EC, they should immediately contact the Environmental Enforcement Specialist at the phone number in the NOV to reschedule. When a party refuses to attend the EC and provides no further information to the Department, the Department's enforcement decision will be based upon available information.

What Happens Following the EC?

The EC is part of the Department's stepped enforcement process. At the EC, Department staff will explain the process and options available to address the alleged violation. Generally, the options range from closing the matter with no further action to referral to the Wisconsin Department of Justice (DOJ) or to U.S. EPA, for further enforcement action. In limited circumstances, the Department can issue citations, which are handled in local court similar to traffic offenses. If a case is referred to DOJ, the DOJ may initiate an action in court on behalf of the State. The State typically asks the Court to impose financial penalties and order completion of any necessary corrective actions. In most of the Department's cases, a cooperative return to compliance with any necessary restoration results in close out of the case. At close out, the Department will send a letter advising of no further enforcement action.





4/27/2018

Certified Mail/Return Receipt Requested
Milwaukee County

SOO Line Railroad Company
C/O Real Estate
501 Marquette Ave, STE 1525
Minneapolis, MN 55402

Karl Rittmeyer
11306 Franklin Ave.
Franklin Park, IL 60131

SUBJECT: Enforcement Conference Summary Letter 4/12/2018

Dear Mr. Rittmeyer:

Thank you for attending the meeting with the Wisconsin Department of Natural Resources (department) to discuss the alleged violations of state navigable waterway laws at Watertown BR 88.74 (B-18) bridge crossing, City of Milwaukee, Milwaukee County, Wisconsin (the site).

Conference Date:	Thursday, April 12, 2018
Conference Time:	1:00pm
Location:	DNR Service Center- Fitchburg Bluff/Drumlin Room 3911 Fish Hatchery Rd, Fitchburg, WI 53711

Attendance list is attached

Discussion

Representatives of the Canadian Pacific Railway (CP) explained to department staff that the railway at the site is used as a freight and commuter rail. This railway is required by the Federal Railroad Administration (FRA) to have annual inspections to ensure safe load capacity. During an October 2017 inspection by CP staff showed a significant void under the bridge, which was not recorded under previous inspections. Addressing structural concerns at the site was deemed to be an urgent priority by CP, due to concerns that settling could cause potholing on the tracks and potential train derailment.

CP indicated several alternatives to correct the issue were reviewed; 1) installation of rock riprap, 2) installation of a grout mat with grout injection, and 3) installation of new bridge piers. Options 1 and 3 were rejected by CP due to costs, timing, and belief that installation of riprap could be impactful to water flow and the floodplain. Option 2 was chosen by CP.



CP indicated the work was conducted by J.F. Brennan Company, Inc. Approximately 8 cubic yards of concrete was pumped into the bridge pier abutment. CP and HDR staff explained that these types of grout mats are designed to be unstable, break apart, and are not typically "keyed-in" to the substrate. CP stated they did not believe the 50-60 foot long grout mat would be an impediment to fish passage. They explained the mats span the entire width of the channel so as not to increase flow velocity and to protect the other bridge piers. CP provided a 1937 aerial photo showing the river in relation to the bridge piers.

Department staff explained that a Chapter 30 individual permit is required for the placement of a structure such as a grout mat on the bed of a navigable waterway. The U.S. Army Corps of Engineers GP-002 approval is not valid unless water quality certification is received from the department. This water quality certification is typically issued in the form of the Chapter 30 permit.

As part of the Chapter 30 application process, the department is instructed to review the project to determine that the structure or deposit will not materially obstruct navigation, will not reduce the flood flow capacity of the stream, and will not be detrimental to the public interest (i.e. navigation, fish and wildlife habitat, natural scenic beauty, water quality/quantity, recreation). Department staff explained the public trust concerns with the structure as installed at the site (see attached Department Project Comments list).

Agreements

CP maintains that state authorization is not required on this project, but is willing to work in good faith with the department to address concerns. CP informed the department that the Milwaukee Metropolitan Sewerage District (MMSD) has plans to perform stream habitat activities in the location of the bridge and want to be sure all parties are coordinating on these efforts. The department has agreed to provide CP with a list of concerns by 4/27/2018 and provide CP with 30 days to investigate options to mitigate those concerns (5/27/2018). It is understood by the department that some of these options may require additional time to investigate and requests that CP and/or their consultants check back with the department by the close of the 30 days with an update. The department requests that the final project be authorized under a Chapter 30 individual permit application.

Please note, as outlined in the Notice of Violation, the department may pursue escalated enforcement actions for the alleged violations. The department may seek forfeitures or other appropriate relief, such as a restoration order, through a referral to the Department of Justice.

If you have any technical questions, please call me at (262) 574-2136 or email Elaine.Johnson@wisconsin.gov.

Sincerely,



Elaine Johnson
Water Management Specialist

Encl: Attendance List
Department Project Comments

cc: S. Derouin, DNR- Fitchburg
M. Scott, DNR- Waukesha
M. Hase, DNR- Waukesha
C. Helker, DNR- Sturtevant
M. Kowalkowski, DNR- LS/8
April Marcangeli, U.S. Army Corps of Engineers
Bill Tuttle, CP
Scott J. Paradise, CP
Jeff Johnson, HDR, Inc.
Michael Keller, HDR, Inc.



Department Project Comments:

1. Chapter 30 individual permit application submittal:
<https://dnr.wi.gov/topic/waterways/documents/PermitDocs/IPs/IndividualPermitAll.pdf>.
 - a. The department intends to include conditions in the permit for site maintenance should any of the grout mats become dislodged, moved, or cantilevered, etc..
2. Provide a PE signed/stamped narrative outlining what work was performed and why. This statement should include information on the alternatives reviewed and why each of those alternatives were rejected as not feasible (i.e. information on why the grout mat cannot be cut away and the channel stabilized using rip rap or alternate method). The statement should also include information on how these types of grout mats are designed to function and are installed to resist uplift and drag forces.
3. As-built channel survey elevations up, under, and downstream of the bridge will be necessary.
4. The channel is isolated to one side of the waterway, this area now has higher, concentrated velocities, which is an impediment to fish passage. The channels roughness has been changed to a smoother surface, and the construction of the grout mats as opposed to rip rap eliminates the resting/pool-type areas that would normally be present to facilitate fish passage.
5. There may be an impact to navigation- both by concentrating flows and the area of exposed grout mats can be an obstruction.
6. The grout mats impact natural scenic beauty as they are an man-made construction mats as opposed to a naturalized rock/cobble stream bottom
7. The grout mats have exposed tie-in wires. These can be a safety hazard and over time will rust and degrade and can become hazardous.





William M Tuttle
General Counsel - US

Suite 800
120 South 6th Street
Minneapolis, MN 55402

T 612 904 5967
F 612 851 5647
E bill_tuttle@cpr.ca

July 31, 2018

By E-mail Only

Elaine Johnson
Water Management Specialist
Department of Natural Resources
State of Wisconsin
141 NW Barstow, Room 180
Waukesha, WI 53188

Re: Enforcement Conference Summary

Dear Ms. Johnson:

I am writing to follow up on my letter of May 25, 2018. Attached please find two exhibits, depicting the stream bed contour of the Menomonee River at Watertown BR 88.74. The first shows the contour in 2015, prior to CP's bridge work. The second shows the contour as of July 19, 2018. CP believes these exhibits further demonstrate that stream topography was not significantly altered as a result of CP's work.

Sincerely,

William M. Tuttle
General Counsel U.S.

cc: Karl Rittmeyer
Scott Paradise
M. Kowalkowski, DNR
Michelle Scott, DNR
Michelle Hace, DNR
Craig Helker, DNR
Sadie Derouin, DNR
April Marcangeli, U.S. Army Corps of Engineers
Jeff Johnson, HDR Inc.
Michael Keller, HDR Inc.

Exhibit 1

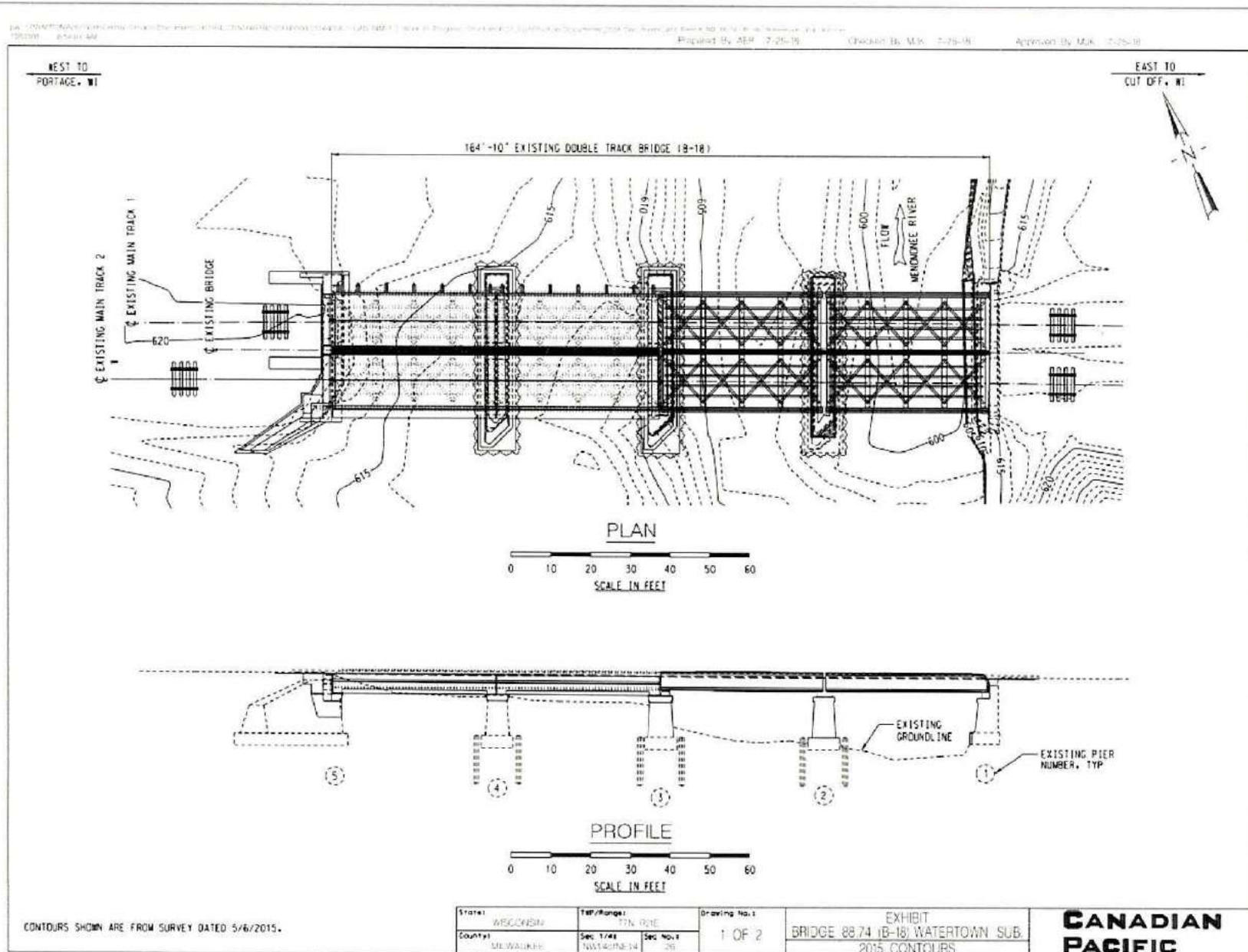
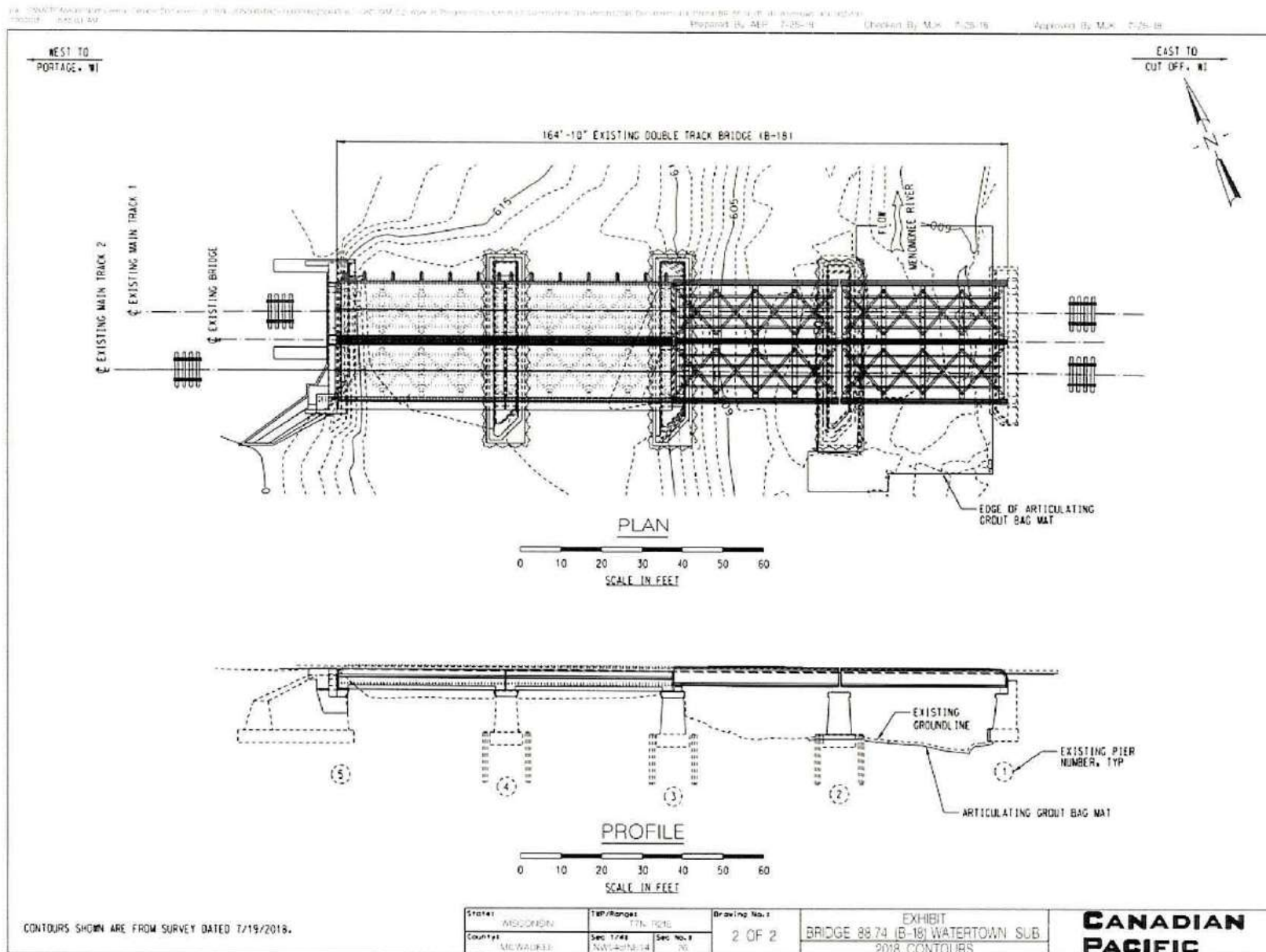


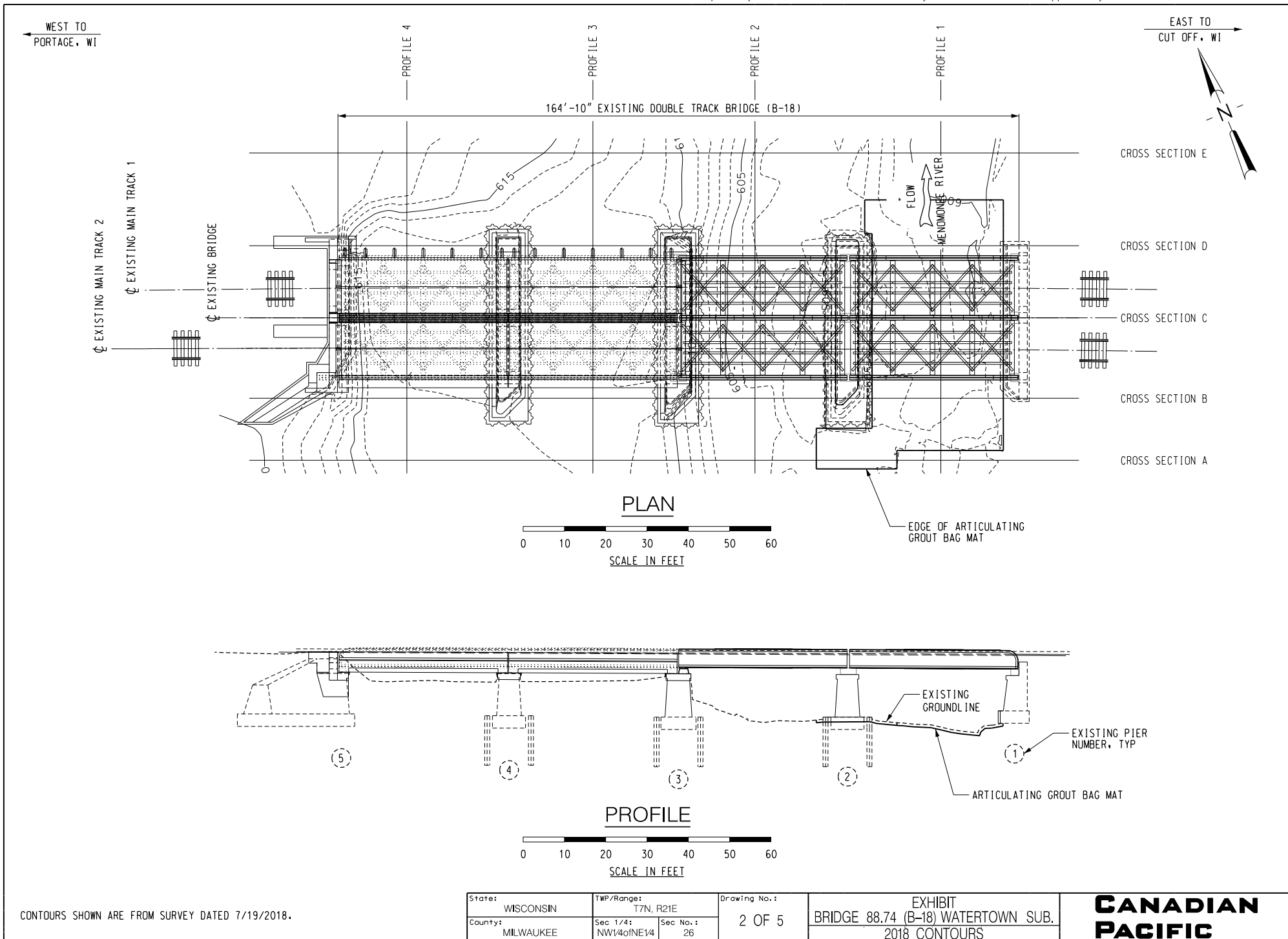
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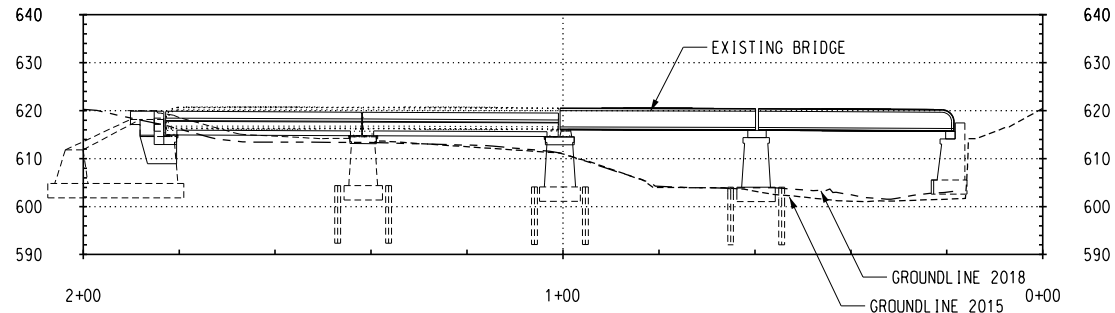




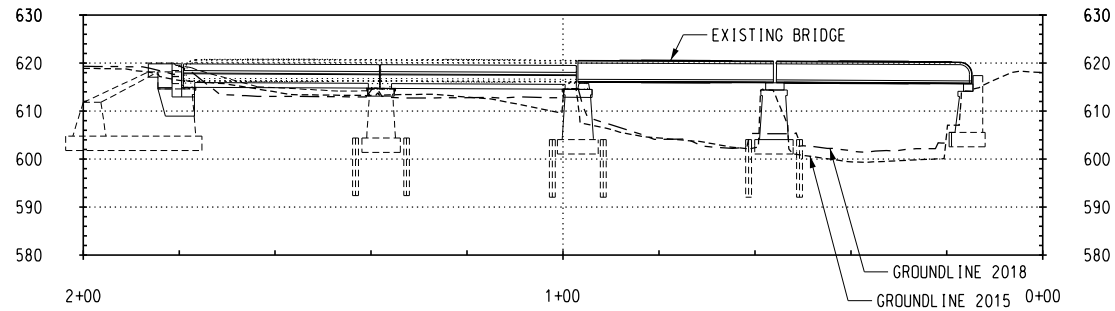


Derouin V.S. Ex. 7 at 001

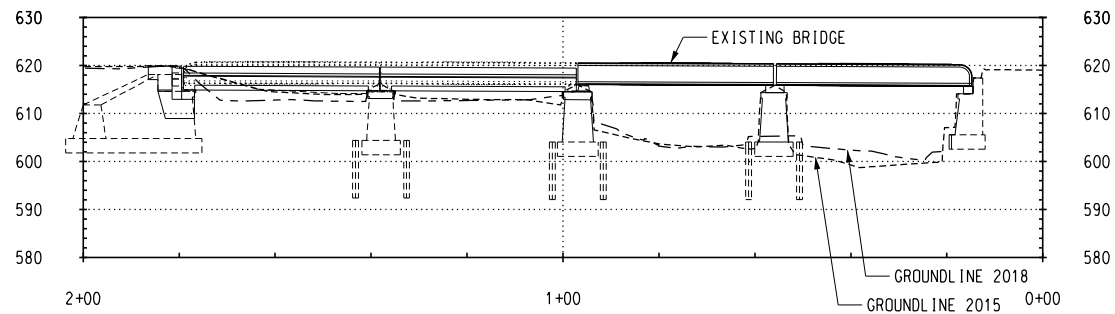




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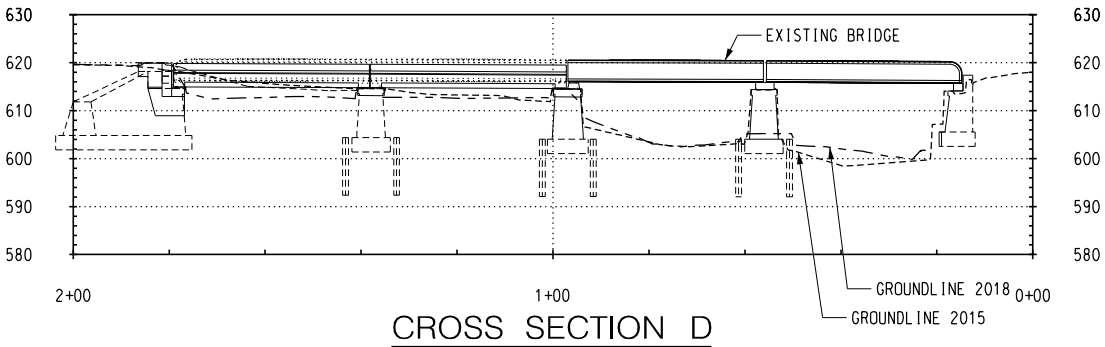


CROSS SECTION B

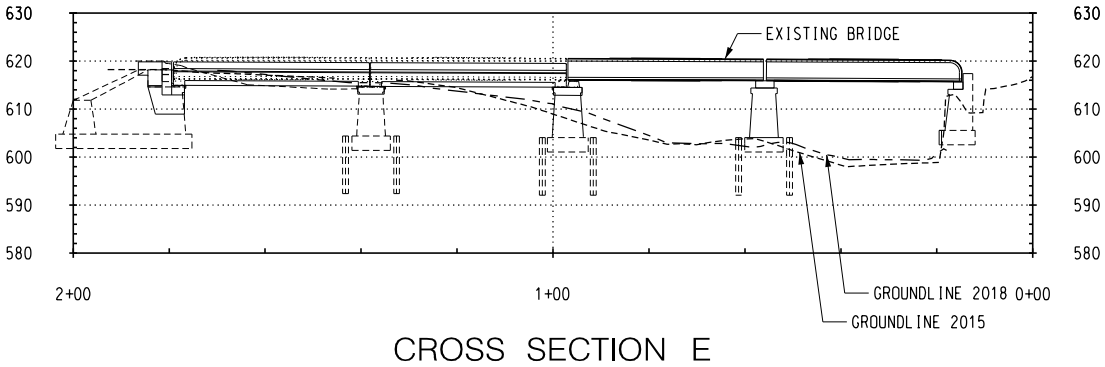


CROSS SECTION C

State:	WISCONSIN	TWP/Range:	T7N, R21E	Drawing No.:	3 OF 5	EXHIBIT BRIDGE 88.74 (B-18) WATERTOWN SUB. CROSS SECTIONS	CANADIAN PACIFIC
County:	MILWAUKEE	Sec 1/4:	NW1/4 of NE1/4	Sec No.:	26		

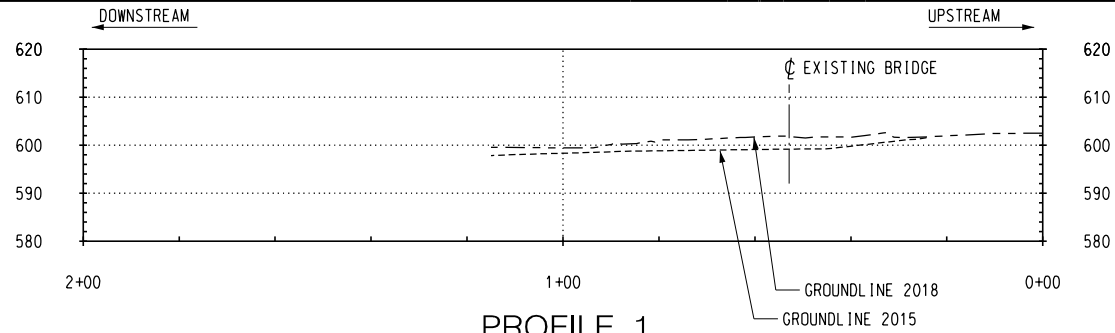


CROSS SECTION D

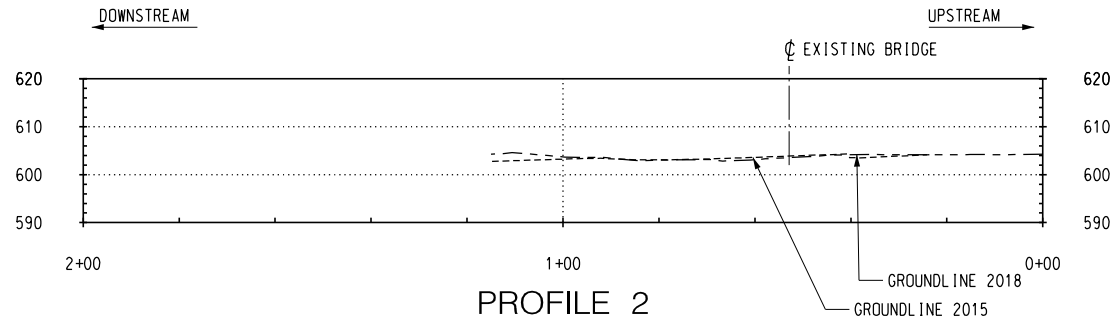


CROSS SECTION E

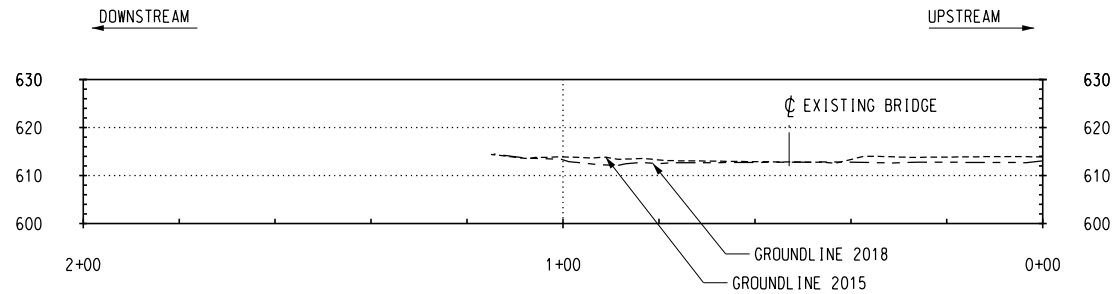
State:	WISCONSIN	TWP/Range:	T7N, R21E	Drawing No.:	4 OF 5	EXHIBIT BRIDGE 88.74 (B-18) WATERTOWN SUB. CROSS SECTIONS	CANADIAN PACIFIC
County:	MILWAUKEE	Sec 1/4:	NW1/4 of NE1/4	Sec No.:	26		



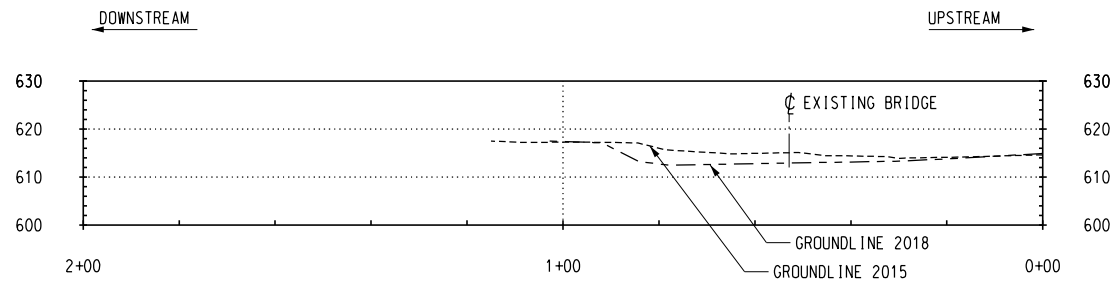
PROFILE 1



PROFILE 2



PROFILE 3



PROFILE 4

State: WISCONSIN	TWP/Range: T7N, R21E	Drawing No.: 5 OF 5	EXHIBIT BRIDGE 88.74 (B-18) WATERTOWN SUB. RIVER PROFILES	CANADIAN PACIFIC
County: MILWAUKEE	Sec 1/4: NW1/4 of NE1/4	Sec No.: 26		

EXHIBIT

8



US Army Corps
of Engineers
St Paul District

Public Notice

ISSUED: June 19, 2017

REFER TO: RGP-002-WI (2016-00163-RMG)

SECTIONS: 404 Clean Water Act and
10 Rivers and Harbors Act

MODIFICATION AND REVOCATION OF PORTIONS OF REGIONAL GENERAL PERMIT RGP-002-WI IN WISCONSIN

1. **PURPOSE OF THIS PUBLIC NOTICE.** By this notice, the St. Paul District Corps of Engineers (Corps) announces the revocation of twenty-one of the activity categories of RGP-002-WI and modification of two of the four retained activity categories of RGP-002-WI. Please refer to the attached Table 1 for a complete list of categories revoked and retained, and retained with modification. The final version of RGP-002-WI incorporating these changes is attached.
2. **BACKGROUND.** RGP-002-WI is a general permit issued by the Corps that provides Federal authorization under Section 404 of the Clean Water Act (Section 404) to discharge dredged and fill material associated with certain activities in waters of the United States in Wisconsin. Under a separate notice, the Corps issued forty-two Nationwide Permits (NWP), another type of general permit, under Section 404 as well as Section 10 of the Rivers and Harbors Act (Section 10) for use in Wisconsin. The existing RGP-002-WI has been re-evaluated to limit duplication with the NWPs and retain coverage for activities not addressed in the NWPs. On April 25, 2017, the Corps issued a public notice announcing the suspension and proposed revocation of twenty-one categories of RGP-002-WI, and the proposed modification of two categories of RGP-002-WI.
3. **CATEGORY REVOCATION.** The twenty-one suspended categories of RGP-002-WI are revoked effective the date of this notice. All pending and future requests for Section 404 permits that would have previously been evaluated under the terms and conditions of the revoked RGP-002-WI categories will be processed under the NWPs or another applicable general permit, or an individual permit as appropriate.
4. **CATEGORY RETENTION AND MODIFICATION.** Two activity categories, 1.a.13 for Minor Fills and 2.a.11 for Wildlife Ponds, are retained as originally published on July 15, 2016. The following two RGP-002-WI categories are modified as follows:
 - a. Non-Reporting category 1.a.1 – Maintenance Activities. Applicability is restricted to only those activities associated with linear utility and linear transportation projects. The category is further modified to authorize projects under both Section 404 and Section 10 rather than only Section 404. Other maintenance activities may be considered under NWP 3 (Maintenance).
 - b. Reporting category 2.a.9 – Utility Line Discharges. We have modified this category to authorize projects pursuant to both Section 404 and Section 10 rather than only Section 404.

The modifications to these two categories are effective upon publication of this notice. The final version of RGP-002-WI incorporating these changes is attached.

5. **JURISDICTION AND REGULATORY AUTHORITY.** All work currently authorized under RGP-002-WI occurs in waters of the U.S., which include navigable waters of the U.S., wetlands, and other waters subject to the regulatory jurisdiction of the Corps under Section 404. Effective upon issuance of this public notice, regulatory authority for categories 1.a.1 and 2.a.9 also incorporate authority pursuant to Section 10.

Modification and Revocation of portions of RGP-002-WI

6. FEDERALLY-LISTED THREATENED OR ENDANGERED SPECIES OR THEIR CRITICAL HABITAT. The revocation and modification of portions of RGP-002-WI will not affect Federally-listed endangered or threatened species or their critical habitat. Implementation of this proposal will not affect the Corps' responsibility to ensure that all Section 10 and Section 404 authorizations comply with Section 7 of the Endangered Species Act.
7. HISTORICAL/ARCHAEOLOGICAL. The revocation and modification of portions of RGP-002-WI will not affect known or unknown archaeological, scientific, or historical resources. Implementation of this proposal will not affect the Corps' responsibility to ensure that all Section 10 and Section 404 authorizations comply with Section 106 of the National Historic Preservation Act.
8. WATER QUALITY CERTIFICATION. Water quality certification was not categorically issued for any portion of RGP-002-WI. Water quality certification is not required for the revocation or modification of portions of RGP-002-WI.
9. PUBLIC INTEREST REVIEW. The decisions to modify and revoke portions of RGP-002-WI are based on an evaluation of the probable impact of the actions on the public interest as described in 33 Code of Federal Regulations 325.7(a). Those considerations include changes in circumstance since RGP-002-WI permit issuance, the current adequacy of or need for the existing permit, the extent to which modification or other action (in this case, partial revocation) would adversely affect plans, investments and actions the regulated community has reasonably made or taken in reliance on the RGP-002-WI. The administrative record for this permit is available for review in the Corps District Office.
10. FINAL ACTION. The twenty-one suspended categories of RGP-002-WI are revoked effective the date of this notice. Two of the four retained categories remain as originally published, and two categories are hereby modified. The final version of RGP-002-WI incorporating these changes is attached.

FOR THE DISTRICT ENGINEER:

Chad Konickson
Chief, Regulatory Branch

Table 1: Modified, Retained, and Revoked RGP-002-WI Activity Categories

RGP-002-WI Category	RGP-002-WI Category Name	Revoked or Modified	Comparable Nationwide permit (NWP)
Non-Reporting 1.a.1	Maintenance Activities	Modified	NWP 3
Non-Reporting 1.a.2	Fish & Wildlife Harvesting, Enhancement & Attraction Devices & Activities	Revoked	NWP 4
Non-Reporting 1.a.3	Scientific Measurement Devices	Revoked	NWP 5
Non-Reporting 1.a.4	Survey Activities	Revoked	NWP 6
Non-Reporting 1.a.5	Oil Spill/Hazardous Substances Containment/Cleanup	Revoked	NWP 20
Non-Reporting 1.a.6	Removal of Vessels	Revoked	NWP 22
Non-Reporting 1.a.7	Stream & Wetland Restoration Activities	Revoked	NWP 27
Non-Reporting 1.a.8	Moist Soil Management for Wildlife Maintenance Activities	Revoked	NWP 30
Non-Reporting 1.a.9	Emergency Watershed Protection - Rehabilitation	Revoked	NWP 37
Non-Reporting 1.a.10	Outfall Structures	Revoked	NWP 7
Non-Reporting 1.a.11	Bank Stabilization	Revoked	NWP 13
Non-Reporting 1.a.12	Boat Ramps	Revoked	NWP 36
Non-Reporting 1.a.13	Minor Fills	Retained	NWP 18
Reporting 2.a.1	Activities Excluded from authorization by the non-reporting GP because they are in a Coastal Wetland area described in 1.b.3.c	Revoked	None
Reporting 2.a.2	United States Coast Guard (USCG) Approved State or Federally Funded Bridges	Revoked	NWP 15
Reporting 2.a.3	Return Water from Upland Contained Disposal Areas	Revoked	NWP 16
Reporting 2.a.4	Hydropower Projects	Revoked	NWP 17
Reporting 2.a.5	Cleanup of Hazardous & Toxic Waste	Revoked	NWP 38
Reporting 2.a.6	Completed Enforcement Actions	Revoked	NWP 32
Reporting 2.a.7	Temporary Construction, Access and Dewatering	Revoked	NWP 33
Reporting 2.a.8	Structural Discharges	Revoked	NWP 25
Reporting 2.a.9	Utility Line Discharges	Modified	NWP 12
Reporting 2.a.10	Commercial, Residential, Industrial, Agricultural, Recreational, & Public Development	Revoked	NWP's 29, 39, 40, or 42
Reporting 2.a.11	Wildlife Ponds	Retained	None
Reporting 2.a.12	Aquatic Habitat Restoration, Establishment & Enhancement Activities	Revoked	NWP 27

DEPARTMENT OF THE ARMY PERMIT

Permittee: The General Public in Wisconsin
Permit No. GP-002-WI
Issuing Office: St. Paul District, United States Army Corps of Engineers
Issuance Date: July 15, 2016
Modification Date: June 19, 2017
Expiration Date: July 14, 2021

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the St. Paul District of the Corps of Engineers or the appropriate official of that office acting under the authority of the commanding officer.

GENERAL PERMIT AUTHORIZATIONS: The general public in the state of Wisconsin is authorized to perform work in accordance with the terms and conditions of the general permits (GPs) specified below, after satisfying all applicable permit terms and conditions.

IMPORTANT: GP-002-WI authorizations are subject to all applicable terms and conditions specified in this permit. In addition, reporting GP authorizations may be subject to project-specific special conditions that will be listed in the St. Paul District's verification letter. Refer to the appropriate sections of this permit for a description of GP eligible activities, conditions, exclusions and application instructions.

PROJECT DESCRIPTION AND LOCATION: GP-002-WI applies to certain discharges of dredged and/or fill material into waters of the United States, including wetlands, as described herein, in the state of Wisconsin except within the exterior boundaries of Indian Reservations.

Department of the Army General Conditions (applicable to all GP-002-WI authorizations):

1. GP-002-WI expires on July 14, 2021. Unless activities authorized under the GP-002-WI issued on July 15, 2016, have commenced construction or are under contract to commence construction by July 14, 2021, the time limit for completing work ends upon the expiration date of GP-002-WI. Activities authorized under GP-002-WI which have commenced construction or are under contract to commence construction by July 14, 2021, will have until July 13, 2022, to complete their activities under the terms and conditions of GP-002-WI. If you find that you require additional time to complete authorized activities, submit your time extension request to this office for consideration at least three months before the expiration date is reached.
2. You must maintain the activity authorized by GP-002-WI in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity. Should you wish to cease to maintain an activity authorized by the reporting GP, or abandon it without a good faith transfer; you must obtain a modification of the Corps authorization, which may require restoration of the area. If you wish to transfer responsibility for project completion or maintenance, please contact this office so we may provide you with the necessary documentation to transfer the authorization.
3. If you discover any previously unknown historic or archaeological remains while accomplishing any activity authorized by GP-002-WI, you must immediately stop work and notify the Corps. The St. Paul

District will initiate the federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. You must allow representatives from this office to inspect the proposed project site and the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of GP-002-WI.
5. If a conditioned water quality certification has been issued for your project by the Wisconsin Department of Natural Resources (WDNR), you must comply with the conditions specified in the certification as special conditions to this permit.
6. You must also comply with the other GP-002-WI terms and conditions specified below as well as any project specific conditions imposed by the St. Paul District.

Further Information:

1. Congressional Authorities: Authorization to undertake the activities described above is pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344). Categories 1.a.1 and 2.a.9 below may additionally be authorized pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Work authorized by categories 1.a.13 and 2.a.11 that also requires authorization under Section 10 of the Rivers and Harbors Act must be authorized separately through other GPs or individual permits.
2. Limits of this Authorization:
 - a. GP-002-WI does not obviate the need to obtain other federal, state, or local authorizations required by law.
 - b. GP-002-WI does not grant any property rights or exclusive privileges.
 - c. GP-002-WI does not authorize any injury to the property or rights of others.
 - d. GP-002-WI does not authorize interference with any existing or proposed federal project.
3. Limits of Federal Liability. In authorizing work, the Federal Government does not assume any liability, including for the following:
 - a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
 - b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
 - c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
 - d. Design or construction deficiencies associated with the permitted work.
 - e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data. The determination by this office that an activity is not contrary to the public interest will be made in reliance on the information provided by the applicant.

5. Reevaluation of Decision. This office may reevaluate its decision on an authorization at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

- a. The applicant fails to comply with the terms and conditions of this general permit.
- b. The information provided by the applicant in support of the permit application proves to have been false, incomplete, or inaccurate (see 4 above).
- c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

A reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring the permittee to comply with the terms and conditions of the permit and for the initiation of legal action where appropriate.

6. This office may also reevaluate its decision to issue GP-002-WI at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following: significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7.

This GP-002-WI becomes effective when the federal official, designated to act for the Secretary of the Army, has signed below.

Chad Konickson
Chief, Regulatory Branch

Date

GP-002-WI ACTIVITIES, PROVISIONS, AND CONDITIONS

This describes the Section 404 Clean Water Act (Section 404) and Section 10 Rivers and Harbors Act (Section 10) general permit authorization procedures implemented by the St. Paul District Corps of Engineers (Corps) in GP-002-WI.

Persons proposing to do work should note that, in ALL cases, GP-002-WI requires that adverse impacts on water and wetland resources be avoided and minimized to the maximum extent practicable. Also, activities that would adversely affect federal endangered plant or animal species or certain cultural or archaeological resources, or that would impair reserved Native American tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights, are not eligible for authorization under GP-002-WI.

1. NON-REPORTING GENERAL PERMIT

The following activities, for a single and complete project, that comply with all applicable terms and conditions of GP-002-WI are authorized by this GP. **No application or notification to the Corps is required under this GP. Project proponents may proceed with the described discharges after very carefully making sure that the work will meet all applicable terms and conditions of GP-002-WI.** Project proponents with non-reporting activities should consult the Wisconsin Department of Natural Resources (WDNR) and local governments concerning state and local permit requirements.

Note that certain areas and activities are EXCLUDED from this non-reporting GP in section 1.b., below.

a. ACTIVITIES ELIGIBLE FOR AUTHORIZATION BY THE NON-REPORTING GP:

1. Maintenance Activities for Linear Utilities and Linear Transportation Projects.

Regulated work in Section 10 waters, and discharges of dredged or fill material into waters of the U.S. for the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that they affect not more than ½ acre of waters of the United States, including wetlands. The temporary placement of mats in herbaceous wetland communities to minimize soil disturbance during maintenance activities may be authorized by this category, but does not contribute to the ½ acre threshold above. The structure or fill is not to be put to uses differing from those specified in the original authorization or most recently authorized modification. Minor deviations are allowed where necessary to conform to modern construction practices, materials, construction codes, or safety standards. This GP may be used for, but is not limited to, the replacement of bridge abutments and culverts, side-slope flattening, reconditioning of roadbeds. This GP may not be used for the addition of new lanes on roadways. This GP authorizes the minimal impact repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

2. Reserved.

3. Reserved.

4. Reserved.

5. Reserved.

6. Reserved.

7. Reserved.
8. Reserved.
9. Reserved.
10. Reserved.
11. Reserved.
12. Reserved.

13. Minor Fills.

Discharges of dredged and/or fill material for a single and complete project that would result in filling, draining (including full or partial diversion of flows), excavating or inundating not more than 400 square feet of waters of the United States, including wetlands. This authorization may not be used more than once by a permittee or landowner in a manner that would cumulatively impact more than 400 square feet of waters of the United States for a single and complete project (see definition of a “single and complete project” at 3.a.5., below).

b. AREAS/ACTIVITIES EXCLUDED FROM THE NON-REPORTING GP:

1. Diversions of water. This permit may not be used to authorize all or any portion of a project that would divert more than 10,000 gallons/day of surface water or groundwater into or out of the Great Lakes Basin.
2. In the Pleasant Prairie, Wisconsin, area identified in Corps permit 198700323, only discharges for bank stabilization, limited to one cubic yard per running foot, are eligible for authorization under this part of GP-002-WI.
3. The non-reporting GP does not authorize any activity in:
 - A. Federal and state Wild and/or Scenic Rivers. All regulated activities in these rivers, including stream and wetland restoration activities by a government agency, require evaluation under a Corps reporting general permit, letter of permission, or standard individual permit procedure.
 - B. Calcareous fens as identified by WDNR, and wetlands within 300 feet of such fens. All regulated activities in these areas require evaluation under Corps standard individual permit procedures (except oil - hazardous material spill confinement and cleanup described at 1.a.5. above).
 - C. Coastal wetlands in ridge and swale complexes as identified on WDNR maps, and wetlands adjacent to the Mink River in Door County or the Bad River in Ashland County.

NOTE: Unless otherwise noted, activities excluded above may be eligible for authorization under a reporting GP, a letter of permission, or a standard individual permit.

c. APPLICATION/EVALUATION PROCEDURES UNDER THE NON-REPORTING GP:

An activity authorized by the non-reporting portion of this GP may commence when project proponents have carefully confirmed that the activity will be conducted in compliance with all terms and conditions of GP-002-WI. No application to the Corps is required; however, if requested, the Corps will confirm whether or not proposed work is authorized by the non-reporting GP. Persons proposing to do work should note that

conditions of the GP require that adverse impacts on water and wetland resources be avoided and minimized to the maximum extent practicable. Activities that would adversely affect federal endangered plant or animal species or certain cultural/archaeological resources are not authorized by this non-reporting general permit. Information about federal and state endangered species may be obtained by contacting the USFWS at (952) 252-0092 (information on state species may be found by contacting the WDNR at (608) 261-6449). The Corps website (<http://www.mvp.usace.army.mil/Missions/Regulatory.aspx>) also contains a link to the USFWS list of federal and state endangered species for each Wisconsin county. Information concerning cultural resources may be obtained by contacting the State Historic Preservation Office at (608) 264-6400. Project proponents are encouraged to contact these agencies early in project planning to help avoid violations of federal law and potentially lengthy project delays.

2. REPORTING GENERAL PERMIT

The following activities, for a single and complete project, that comply with all terms and conditions of GP-002-WI are eligible for authorization under the reporting GP. **Persons proposing to do work should note that conditions of GP-002-WI require that adverse impacts on water and wetland resources be avoided and minimized to the maximum extent practicable.**

Note that certain areas and activities are EXCLUDED from this reporting GP as described in section 2.b., below.

Applicants for all activities should consult with the WDNR and local governments concerning state and local permit requirements.

a. ACTIVITIES ELIGIBLE FOR AUTHORIZATION BY THE REPORTING GP:

1. Reserved.
2. Reserved.
3. Reserved.
4. Reserved.
5. Reserved.
6. Reserved.
7. Reserved.
8. Reserved.

9. Utility Line Projects.

Activities regulated by Section 404 and Section 10 required for the construction, expansion, maintenance and repair of utility lines (for this GP, a “utility line” is defined below) and associated facilities in waters of the United States as follows:

- (a) Utility lines: The construction, expansion, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. Material resulting from trench excavation may be temporarily side-cast (up to two weeks during the growing season) into waters of the United States, provided that the material is not placed in such a manner that

it is dispersed by currents or other forces. In wetlands, the top 6" to 12" of the trench shall be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(b) Utility line substations: The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in waters of the United States.

(c) Foundations for overhead utility line towers, poles, and anchors: The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Loss of waters of the United States associated with activities (a) through (c) above may not exceed 10,000 square feet (see exclusion at 2.b.4 below). The area of waters of the United States filled, excavated, or flooded must be limited to the minimum necessary. Excess fill material must be removed to upland areas immediately upon completion of activities authorized. Temporary placement of construction matting (e.g., timber, steel, geotextile) may also be authorized. Placement of temporary construction matting shall not result in loss of waters, and does not contribute to the 10,000 square foot threshold above. When matting is proposed to be in place for more than two weeks, the duration should be specified by the applicant and verified in writing by the Corps (refer to Standard Condition 3.a.9). Mechanized land clearing may also be authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. If using directional-drilling method of utility line installation, the applicant must provide the Corps a detailed narrative describing water supply intake(s) and recapture and disposal methods for used drilling fluids. This plan must describe the correctional steps to be taken in the event of a leak, either through the substrate into the waterbody or waterway, or onto the upland area with possible return to the waterbody or waterway.

Where certain functions and services of waters of the United States are permanently adversely affected by new or expanded construction of utility lines, substations, or foundations, such as the conversion of a forested wetland to an herbaceous wetland, compensatory mitigation may be required to reduce the adverse effects of the project to the minimal level.

A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, internet, telephone, and digital messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, or french drains; however, it does apply to pipes conveying drainage from another area.

10. Reserved.

11. Wildlife Ponds.

Discharges of dredged or fill material for the construction of wildlife ponds that impact (see 3.a.1., below) not more than 1 acre of waters of the United States. The wildlife ponds shall be constructed with irregular shorelines, shallow sideslopes (e.g., 8-foot H to 1-foot V), and shall not exceed 5-feet of water depth. Excess fill material not needed for construction of the pond must be removed to an upland location. The primary

purpose of this activity must be wildlife habitat improvement. This GP does not authorize the discharge of fill material for the construction of wildlife ponds in forested wetlands, sedge meadows or calcareous fens.

12. Reserved.

b. AREAS/ACTIVITIES EXCLUDED FROM THE REPORTING GP:

1. Diversions of Water. This GP may not be used to authorize all or any portion of a project that would divert more than 10,000 gallons of surface or groundwater into, or out of, the Great Lakes Basin daily.
2. Activities in the City of Superior, Wisconsin, eligible for authorization under a "Superior SAMP" permit are not eligible for authorization under the reporting GP (Corps permits 199606788 through 199606792).
3. The reporting GP does not authorize any activity in calcareous fens as identified by the WDNR, and waters of the United States within 300 feet of such fens. All regulated activities in these areas require evaluation under Corps individual permit procedures.
4. Listed impaired waters. For activities 2.9.b. (utility line substations) and 2.9.c. (foundations for utility towers), this GP may not be used to authorize projects that involve filling, draining, or inundating more than 0.1 acre of wetland/water in waterbodies, and adjacent wetlands, that are listed on the EPA-approved list of Wisconsin impaired waters pursuant to Section 303(d) of the Clean Water Act. This exclusion applies only to those impaired waters that are listed for one or more of the following reasons: nutrients, dissolved oxygen (DO), ammonia, suspended solids, turbidity, sediment, streambank erosion, flow habitat, hydrological modification, wetland loss, siltation and organic enrichment. Such projects in these areas may be eligible for evaluation under a letter of permission or standard individual permit procedure.

c. APPLICATION/EVALUATION PROCEDURES UNDER THE REPORTING GP:

Applicants must submit a complete application to the Corps. The Corps accepts the WDNR WRAPP form available from the Corps and WDNR offices and on the websites of both agencies. Upon receipt of a permit application, the Corps will commence to review the proposed activity to determine eligibility for the reporting GP. In some cases, the Corps may require a wetland delineation prepared in accordance with the 1987 Corps of Engineers Wetland Delineation Manual (including applicable Regional Supplement) before an authorization decision can be made. The Corps will complete its review as noted below and send the applicant a letter advising of the outcome. If the Corps decision is to issue a reporting GP, the Corps will provide a reporting GP verification letter to the applicant, and send a copy of the letter to the WDNR.

ENDANGERED SPECIES AND CULTURAL RESOURCES REVIEW

The Corps review will include a determination concerning compliance of the project with Section 7 of the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA). Projects found not to comply with either or both of these Acts will not be authorized under the GP or any other Corps authorization until actions are taken so that compliance with both acts is assured.

The Corps federal endangered species review will consist of Corps staff consulting appropriate reference materials including endangered species information published by the USFWS in informational brochures and on Internet web pages and any other available data, information or specific guidance provided by USFWS. Corps staff will be aware of locations where endangered species are known or likely to be present and of the

types of activities that may affect those species. Corps staff will directly consult with USFWS staff concerning proposals which appear to have potential to affect listed species. The review will include Corps and/or USFWS site inspections of specific project sites, and/or formal Section 7 interagency consultation where necessary.

The Corps federal cultural resources review will be conducted in a manner similar to the endangered species review. The National Register of Historic Places (NRHP) will be used to determine the presence or absence of known cultural resources. Corps regulatory staff will be aware of areas that have a high probability to contain important cultural resources and will consult Corps cultural resource staff concerning questionable projects. Corps regulatory or cultural resource staff will consult with the State Historic Preservation Office (SHPO) and Tribal Historic Preservation Office (THPO) as appropriate. Cultural resource surveys and/or formal consultation with Tribal governments or the President's Advisory Council on Historic Preservation will be conducted as necessary.

COMPENSATORY MITIGATION

Complete applications for activities involving a discharge of dredged or fill material into waters of the United States must minimally include a statement regarding compensatory mitigation (33 CFR Part 325.1). This statement must describe how impacts to waters of the United States are to be compensated for, or a statement explaining why compensatory mitigation should not be required for the proposed impacts.

Corps reporting verification letters may require compensatory mitigation in accordance with 33 CFR Part 332 for any impacts authorized if a determination is made that the functions lost or impaired by the proposed project warrant replacement. These determinations are made on a case-by-case basis, however, projects that adversely affect 10,000 square feet or more of waters of the United States routinely require compensation. Applicants whose project requires compensatory mitigation should include a mitigation plan prepared in accordance with 33 CFR Part 332, and may utilize the *Guidelines for Wetland Compensatory Mitigation in Wisconsin*. The plan prepared should describe the measures proposed to ensure that the activity complies with the Section 404(b)(1) guidelines (40 CFR 230). Compensatory mitigation that is proposed to satisfy state or local requirements may, but will not necessarily, satisfy the federal requirement.

Work is authorized under the reporting GP when the project proponent receives both a reporting GP verification letter from the Corps AND confirmation from the WDNR that state water quality certification has been granted or waived for the project.

3. GP-002-WI PROVISIONS

a. GP-002-WI DEFINITIONS:

1. Calculation of Aquatic Impact Thresholds: For GP categories with threshold limits not otherwise specified, impacts shall be determined by calculating area of waters of the United States permanently and temporarily filled plus the impacts to waters of the United States that are excavated, inundated, or drained as a result of the regulated discharge.
2. Fill Material: Fill material, as defined in 33 CFR 323.2, means material placed in waters of the United States where the material has the effect of:
 - (i) Replacing any portion of a water of the United States with dry land; or
 - (ii) Changing the bottom elevation of any portion of a water of the United States.

Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. The term fill material does not include trash or garbage.

3. Loss of Waters: This term refers to aquatic resources filled or otherwise permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change its use. The loss of streambed includes the linear feet of streambed that is filled, excavated, or flooded. Waters of the United States temporarily filled, flooded, excavated, or drained but restored to preconstruction contours and elevations after construction are not typically included in the measurement of loss of waters of the United States. However, temporary fill in waters of the United States is regulated by Section 404.

4. Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.

5. Single and Complete Project: For purposes of GP-002-WI, the term "single and complete project" means the total project proposed by the project proponent. For example, if construction of a residential development or linear project such as a road or utility line affects several different areas of waters of the United States, the cumulative total of all filled areas is the basis for deciding the project's total wetland/water impact. For "phased" developments, each phase may constitute a single and complete project if it has independent utility and would accomplish its intended purpose whether or not other phases were constructed.

6. Wetland Creation: The construction of a wetland in an area that was not wetland in the past.

7. Wetland Restoration: Re-introduction of wetland vegetation AND wetland hydrology to an upland area where these vegetative and hydrologic qualities previously existed (re-establishment of hydric soil may rarely be required). This alteration results in the restoration of previously existing wetland.

8. Wetland Conversion: Alterations to an existing wetland that result in a change in wetland classification (i.e. the conversion of a wet meadow to a shallow marsh, or a forested wetland to wet meadow).

9. Wetland Enhancement: Alterations made to existing wetlands that result in a net increase in wetland function (i.e. vegetation management techniques or changes to the hydrologic regime). Wetland enhancement generally does not include wetland conversion, unless the purpose of the conversion is to return the wetland to known pre-disturbance conditions AND represents a net increase in wetland function.

10. Stream Restoration and/or Enhancement: Alterations to an existing or previously existing stream corridor that result in naturalization of the stream, including activities that mimic natural features or return the stream corridor to pre-disturbance conditions. This may include installation of vortex weirs, current deflectors, small habitat structures, riffle and pool stream structure, and modification of the stream bed or banks to restore meanders, selective removal of non-native vegetation, and the backfilling of artificial channels. Stream enhancement and restoration does not generally include significant artificial changes to the stream corridor such as widespread bank armoring with non-biodegradable materials (i.e. riprap) or conversion of adjacent wetlands which do not meet the definition of wetland enhancement (see 3.a.9., above).

b. GP-002-WI STANDARD CONDITIONS:

1. Discretionary Authority.

The Corps retains discretionary authority to require a standard individual permit review of any activity eligible for authorization under GP-002-WI based on concern for the aquatic environment.

2. Federal Trust Responsibility to Indian Tribes.

Projects the Corps finds to have potential to affect tribal interests will be coordinated with the appropriate Indian Tribal governments. The Tribe's views and the federal trust responsibility will be considered in the Corps evaluation. Based on treaty rights, no activity or its operation may impair reserved treaty rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

3. Form and Verification of Authorization.

Every GP-002-WI authorization that requires submission of an application will be verified in writing by the Corps. Any verification issued may include required special conditions.

4. Case-by-Case Conditions.

The authorized activity must comply with any special conditions that may have been added by the Corps or by a state, tribe, or the United States Environmental Protection Agency in its Section 401 Water Quality Certification or consistency determination under the Coastal Zone Management Act. Such conditions will be specifically identified in any Corps authorization.

5. Avoidance and Minimization.

Discharges of dredged or fill material into waters of the United States must be avoided and minimized to the maximum extent practicable (please see 3.a.4., above for the definition of practicable).

6. State Water Quality Certification and Coastal Zone Management (CZM) Consistency Determination.

GP-002-WI authorizations are provisional and require that the WDNR provide confirmation that the activity complies with state water quality certification. A CZM consistency determination may also be required from, or waived by the Wisconsin Coastal Management Program. If such a condition applies, it will be noted in the Corps authorization letter for the project.

7. Proper Maintenance.

Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

8. Erosion and Siltation Controls.

Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark must be permanently stabilized at the earliest practicable date. Work should be done in accordance with state-approved published practices. Upon completion of earthwork operations, all exposed slopes, fills, and disturbed areas must be given sufficient protection by appropriate means such as landscaping, or planting and maintaining vegetative cover, to prevent subsequent erosion. Cofferdams shall be constructed and maintained so as to prevent erosion into the water. If earthen material is used for cofferdam construction, sheet piling, riprap or a synthetic cover must be used to prevent dam erosion. All non-biodegradable erosion controls must be removed within two weeks of site stabilization unless otherwise conditioned in the Corps project confirmation letter.

9. Removal of Temporary Fills.

Any temporary fills, including construction mats, must be removed in their entirety and the affected areas returned to their preexisting elevation. The timeframe for completing this removal shall be:

- (a) Not later than the timeframe stipulated in the activity description (unless extended in writing by our office);
- (b) Not later than the timeframe stipulated in our office's verification letter; or
- (c) Not longer than two weeks from the date the temporary fill was placed in waters of the United States (condition (c) applies only if a timeframe is not otherwise established by applying (a) or (b) above).

10. Federal Threatened and Endangered Species.

GP-002-WI does not affect the Corps responsibility to insure that all Section 404 authorizations comply with Section 7 of the Federal Endangered Species Act (ESA).

- (a) No activity is authorized which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the ESA or which is likely to destroy or adversely modify the critical habitat of such species. Permittees shall notify the Corps if any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work on the activity until notified by the Corps that the requirements of the ESA have been satisfied and that the activity is authorized.
- (b) Authorization of an activity under GP-002-WI does not authorize the take of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with incidental take provisions, etc.) from the United States Fish and Wildlife Service (FWS), both lethal and non-lethal takes of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS, WDNR or their internet pages.

11. Historic Properties, Cultural Resources.

GP-002-WI does not affect the Corps responsibility to insure that all Section 404 authorizations comply with Section 106 of the National Historic Preservation Act (NHPA). No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places (NRHP) is authorized, until the Corps has complied with the provisions of 33 CFR Part 325, Appendix C. Project sponsors must disclose in the Corps permit application if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the NRHP, and shall not begin the activity until notified by the Corps that the requirements of the NHPA have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office (SHPO) and the NRHP. If cultural, archaeological, or historical resources are unearthed during activities authorized by this permit, work must be stopped immediately and the SHPO must be contacted for further instruction.

12. Spawning Areas.

Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

13. Obstruction of High Flows.

To the maximum extent practicable, discharges must not permanently restrict or impede passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose is to impound waters).

14. Adverse Effects from Impoundments.

If the discharge creates an impoundment of water, adverse effects on the aquatic system due to the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

15. Waterfowl Breeding Areas.

Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

16. Navigation.

No activity may cause more than a minimal adverse effect on navigation.

17. Aquatic Life Movements.

No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

18. Equipment.

Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance. Where temporary construction mats are used, they must be placed in a manner that minimizes the matted area to the minimum necessary to allow safe access to work areas and operation of equipment. To prevent the introduction of invasive species, all construction mats used shall be cleaned and free of debris (excess soil and plant material) prior to delivery at the project site.

19. Water Quality Standards.

All work or discharges to a watercourse resulting from permitted construction activities, particularly hydraulic dredging, must meet applicable federal, state, and local water quality and effluent standards on a continuing basis.

20. Preventive Measures.

Measures must be adopted to prevent potential pollutants from entering the watercourse. Construction materials and debris, including fuels, oil, and other liquid substances, will not be stored in the construction area in a way that allows them to enter the watercourse as a result of spillage, natural runoff, or flooding.

21. Disposal Sites.

If dredged or excavated material is placed on an upland disposal site (above the ordinary high-water mark), the site must be securely diked or contained by an acceptable method that prevents the return of potentially polluting materials to the watercourse by surface runoff or by leaching. Construction of containment areas, whether bulkhead or upland disposal site, must be complete prior to the placement of any dredged material.

22. Suitable Fill Material.

All fill (including riprap), if authorized under this permit, must consist of suitable material (e.g. no trash, debris, car bodies, asphalt, etc.) free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act). In addition, rock or fill material used for activities dependent upon this permit and obtained by excavation must either be obtained from existing quarries or, if a new borrow site is opened up to obtain fill material, the State Historic Preservation Office (SHPO) must be notified prior to the use of the new site. Evidence of this consultation with the SHPO will be forwarded to the Corps.

23. Water Intakes/Activities.

An investigation must be made to identify water intakes or other activities that may be affected by suspended

solids and turbidity increases caused by work in the watercourse. Sufficient notice must be given to the owners of property where the activities would take place to allow them to prepare for any changes in water quality.

24. Spill Contingency Plan.

A contingency plan must be formulated that would be effective in the event of a spill. This requirement is particularly applicable in operations involving the handling of petroleum products. If a spill of any potential pollutant should occur, it is the responsibility of the permittee to remove such material, to minimize any contamination resulting from this spill, and to immediately notify the state Emergency Management Duty Officer at 1-800-943-0003 and the National Response Center at telephone number 1-800-424-8802.

25. Other Permit Requirements.

No GP-002-WI authorization eliminates the need for other local, state or Federal authorizations, including but not limited to National Pollutant Discharge Elimination System or State Disposal System permits.

26. State Section 401 Certification Conditions and Limitations.

All GP-002-WI authorizations are provisional, and require individual Section 401 Clean Water Act Water Quality Certification or waiver from the Wisconsin Department of Natural Resources.

27. Wisconsin Coastal Management Program (WCMP) Conditions.

The WCPM's Federal consistency determination for GP-002-WI provides that no GP-002-WI authorization for an activity taking place in coastal wetlands identified as ridge and swale complexes and/or wetlands adjacent to the Mink River (Door County), and the Kakagon and Bad Rivers (Ashland County) will be valid unless and until a Federal consistency determination is granted or waived by the WCMP. This requirement therefore is incorporated as a permit condition of GP-002-WI. Project proponents will be notified of this condition in the Corps' GP-002-WI verification letter for projects in these areas.

28. Navigation.

The following conditions are part of all Corps of Engineers permits that provide authorization under Section 10 of the Rivers and Harbors Act:

- (a) No activity may cause more than a minimal adverse effect on navigation and there shall be no unreasonable interference with navigation by use of the activity authorized herein.
- (b) Any safety lights and signals prescribed by the United States Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.
- (c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.





US Army Corps
of Engineers®
St. Paul District

PUBLIC NOTICE

Date: July 11, 2017

ANNOUNCEMENT OF INTENT TO DEVELOP NEW REGIONAL GENERAL PERMITS

SUMMARY: This public notice is to inform the public of the St. Paul District's (District) intent to develop regional general permits for work in waters of the U.S. associated with utility line, linear transportation and minor activities not already authorized by nationwide permits. The regional general permits are proposed to be developed for use in Minnesota and Wisconsin, including Federally-recognized American Indian reservations. The regional general permits would be used to authorize work in waters of the U.S. that would result in no more than minimal adverse effects, individually and cumulatively.

BACKGROUND: On April 24, 2017, the District issued 42 nationwide general permits for use in Minnesota and Wisconsin. The District decided at that time not to utilize the nationwide permits to authorize work in waters of the U.S. associated with linear utility and linear transportation activities. Those projects are currently evaluated through existing regional general permits or via an individual permit process. New regional general permits will be developed to authorize work in waters of the U.S. associated with utility, transportation and various minor activities. The District's goals for this effort is threefold: 1) increase the utility of the regional general permits for the work in waters of the U.S. described above, 2) develop permit terms and conditions that are protective of the aquatic environment and public interest factors, and 3) have new regional general permits in place prior to the expiration of existing regional general permits in 2017 and 2018.

DRAFT PROPOSAL: Details on the content of the proposed regional general permits will be published as a draft in fall 2017 with a 30-day public comment period. The District is proposing to start using the permits in January 2018, provided all necessary agency, tribal, and public consultation and coordination has been completed. All activities authorized by the regional general permits under Section 404 of the Clean Water Act will require 401 Water Quality Certification (WQC) from the applicable state agency, tribe or the United States Environmental Protection Agency (EPA). For each regional general permit, the applicable agency or tribe may issue the WQC with no conditions, issue the WQC with conditions, deny the WQC, or waive the WQC.

FUTURE UPDATES AND OPPORTUNITIES FOR COMMENT: If you are interested in future updates on the development these regional general permits, please send an email to colleen.a.whaley@usace.army.mil with the subject line of "RGP emails." You may also call Colleen Whaley at 651-290-5361 to be added to the email list serve. At the most, two emails a month will be sent to interested parties and email addresses will only be used for this expressed purpose.

All other questions concerning development of the regional general permits should be directed to the following main contacts.

Work in waters of the U.S. associated with:

Utility Line Activities: Rebecca Graser 651-290-5728 rebecca.m.graser@usace.army.mil

Linear Transportation Activities: Jill Bathke 651-290-5697 jill.c.bathke@usace.army.mil

Minor Activities not covered by Nationwide Permits: Kyle Zibung 651-290-5877 kyle.d.zibung@usace.army.mil

To sign up for other public notices, including on specific project or mitigation proposals, please go to:
http://mvp-extstp.mvp.usace.army.mil/list_server.

EXHIBIT

10



September 27, 2018

Milwaukee County

Canadian Pacific
William M Tuttle
120 South 6th Street, Suite 800
Minneapolis, MN 55402

Subject: Response Requested

Dear Mr. Bill Tuttle,

In the May 25, 2018 Response Letter from SOO Line Railroad Company dba Canadian Pacific (CP), CP outlined responses to the department related to the March 13, 2018 Notice of Violation and April 12, 2018 Enforcement Conference. CP agreed to submit additional information on the channel elevations and grout mat to document as-built conditions within 60 days of the May 25, 2018 letter. Additionally, the department agreed to issue a 401 water quality certification for the project through the Chapter 30 permitting process. To-date, the department has not received a Chapter 30 permit application from CP.

Please submit the Chapter 30 permit application no later than October 30, 2018. Along with the permit application, please submit the survey data for the stream channel including several cross sections starting upstream of the bridge to downstream and one profile under each bridge section with elevations of pre-project and post-project. If you have technical questions regarding the permit application, please contact Elaine Johnson at 414-263-8628.

Please note, as outlined in the Notice of Violation, the department may pursue escalated enforcement actions for the alleged violations. The department may seek forfeitures or other appropriate relief through a referral to the Department of Justice.

If you have questions regarding this letter, please contact me at 608-622-8247 or through email at sadie.derouin@wi.gov.

Sincerely,

Sadie Derouin
Environmental Enforcement Specialist

cc: E. Johnson, DNR – Waukesha
M. Scott, DNR – Waukesha
M. Kowalkowski, DNR – LS/8
April Marcangeli, U.S. Army Corps of Engineers

Karl Rittmeyer, Canadian Pacific
Jeff Johnson, HDR Inc.
Michael Keller, HDR Inc.

EXHIBIT

11

Memo

Date: Monday, October 29, 2018

Project: CPR Watertown Bridge 88.74 – Emergency Scour Mitigation

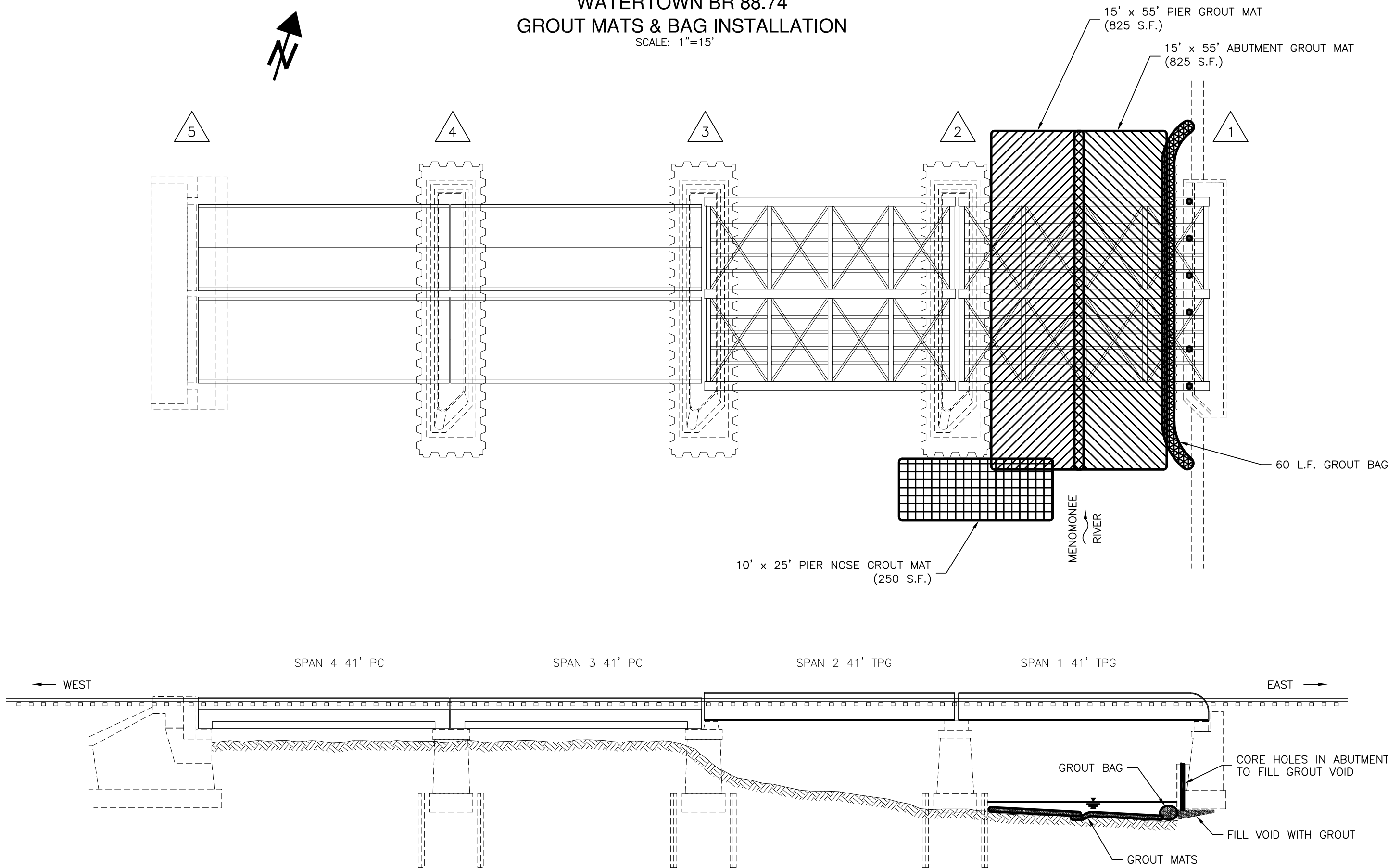
Subject: WI DNR 401 Water Quality Certification – Plans and Specifications

Project Plans were previously sent to the WI DNR on 10/30/2017; the Project Plans are included again in this file.

Project Specifications were previously sent to the WI DNR in the initial submittal on 10/30/2017 and through subsequent requests for information; the Project Specifications were as follows:

- The Contractor used State of Wisconsin Best Management Practices to protect the waterway during low flows.
- Material excavated and not reused in the project will be removed and disposed of offsite.
- Native grasses will be planted on disturbed areas when work is complete.
- The Contractor will stage materials and equipment at an upland location adjacent the East abutment.
- Grout mats will be 8" thick and the grout bags will be up to 36" in diameter. Grout will be pumped via a concrete line pump into the fabric forms for the mats and bags. Once cured, the fabric grout bag will act as a watertight form/barrier to pump grout into the voided abutment footing.
- There will be no mechanical excavation in the riverbed, all mats and bags will be placed over the existing contours.

WATERTOWN BR 88.74
GROUT MATS & BAG INSTALLATION
SCALE: 1"=15'



EXHIBIT

12



February 14, 2020

Milwaukee County

Canadian Pacific
William M Tuttle
120 South 6th Street, Suite 800
Minneapolis, MN 55402

Subject: **Response Requested**

Dear Mr. Bill Tuttle,

The department met with you and representatives from CP on July 30, 2019 to review and discuss the grout mat placement project that occurred in the fall of 2017. The department shared concerns regarding environmental impacts including impacts to fish passage, recreational use, floodplain elevations, and erosion. Further review with the City of Milwaukee indicates ongoing floodplain concerns related to CP's project.

CP's submitted survey shows an increase to the elevation of the bed of the waterway from the grout mat placement. The City of Milwaukee's floodplain ordinance requires that projects within the mapped floodplain do not obstruct flows or cause increases to the floodplain elevation, unless easements and a Conditional Letter of Map Revision (CLOMR) are obtained. The department provides technical assistance to local communities to ensure compliance with their floodplain ordinance.

Due to the ongoing concerns, the Chapter 30 application submitted by CP remains on hold. Please note, pursuant to Wis. Adm. Code s. NR 301.40, the department shall not process after-the-fact permit applications prior to completing enforcement actions if the project is causing or is likely to cause environmental damage. Additionally, please note that the Chapter 30 permit issued by the department serves as the Water Quality Certification for Army Corps of Engineers permitting.

Please provide an update regarding CP's status in correcting the deficiencies outlined in the March 13, 2018 Notice of Violation, April 27, 2018 summary letter, and July 30, 2019 on site meeting. Please provide this update via email to Sadie Derouin at sadie.derouin@wi.gov no later than March 1, 2020.

If you have questions regarding this letter, please contact me at 608-622-8247.

Sincerely,

Sadie Derouin
Environmental Enforcement Specialist

cc: Erin Cox, DNR – Milwaukee
Michelle Hase, DNR – Waukesha

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC

Verified Statement of Michelle Hase

1. My name is Michelle Hase, and I am a Water Management Engineer for the Wisconsin Department of Natural Resources (DNR). I am classified as an Advanced Water Regulation and Zoning Engineer.

2. I have had this position since January 2011. I have worked as an engineer for DNR since 2001. I obtained a B.S. in Civil Engineering from the University of Wisconsin-Madison and received my Professional Engineering Certification in Spring 2008.

3. In my current role, I am the Primary Water Management Engineer for Waukesha, Milwaukee, Winnebago, Fond du Lac, Calumet, and Manitowoc Counties. My primary responsibility is implementing the Dam Safety and Floodplain Management program. The position provides technical engineering analysis and support to the Water Management program. In addition, I provide engineering expertise to communities, regional staff, other governmental agencies, consultants, and the public and provide engineering analysis of dams and other physical alterations of surface waters within the assigned area. The floodplain functions of my

position include developing, reviewing, adopting, and administering floodplain projects and providing training for local zoning programs.

4. I first became involved in the present matter on November 2, 2017, when Water Management Specialist Elaine Johnson cc:d me on an email to Canadian Pacific (Petitioner). Attached as Exhibit 1 is a true and accurate copy of that email.

5. On November 3, 2017, Petitioner sent an email in response, which I was also cc:d on. Attached at Exhibit 2 is a true and accurate copy of Petitioner's November 3, 2017 email.

6. On November 3, 2017, DNR sent an email in response, which I was also cc:d on. Attached at Exhibit 3 is a true and accurate copy of DNR's November 3, 2017 email.

7. The following Wednesday, November 8, 2017, DNR sent an email to Petitioner, which I was cc:d on. Attached at Exhibit 4 is a true and accurate copy of the email.

8. My reaction to Petitioner's requests to DNR was that the type of work that Petitioner was proposing not something we have seen permitted before. It was unusual in that it was proposing the permanent use of grout mats instead of rip-rap. From my prior work with DNR, it was my thought that this would not meet the public interest criteria under Wis. Stat. ch. 30 (Chapter 30).

9. On November 10, 2017, Petitioner sent an email to DNR. Attached at Exhibit 5 is a true and accurate copy of the email.

10. I was informed on November 17, 2017, that Petitioner completed the work it had proposed.

11. On July 31, 2018, I was cc'd on an email from Petitioner with cross-sectional drawings of the grout mats. These drawings were insufficient to determine the floodplain and stream impacts, so DNR requested that Petitioner submit additional drawings.

12. On Tuesday, November 13, 2018, I received notice that Petitioner had submitted a Chapter 30 permit application and additional cross-sectional drawings. At some point thereafter, I reviewed the drawings.

13. I also examined the site at a visit and meeting with the Petitioner on July 30, 2019. Based on my review of drawings and the site visit, I believe that Petitioner's depositing of grout mats did not result in a 6-inch rise or that the riverbed still matched the natural grade of the channel, as the Petitioner has claimed. I witnessed a mid-channel drop in the elevation of the river, and the cross-sectional drawings show an increase in elevation of the riverbed of between one and two feet compared to before Petitioner deposited the mats.

14. As a result of Petitioner's depositing of grout mats, the flow is further channelized, and water velocities increased. They have created a barrier potentially preventing fish from passing because of these impacts to the waterway, and there is a potential increased risk of flooding.

15. My analysis was confirmed by a May 4, 2021 study that the company Stantec performed for the Milwaukee Metropolitan Sewerage District. The study

concluded that that grout mats have increased 100-year-flood-water-surface levels by approximately 0.06 feet starting from the bridge to about 2,400 feet upstream. Attached at Exhibit 6 is a true and accurate copy of this study.

16. As a result of my review of the documents and my examination of the site, it is my belief that the grouts mats have posed and continue to pose a serious detriment to the public interest, including by increasing the floodplain of the Menomonee River.

I Michelle Hase, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on the 18th day of December 2023

A handwritten signature in black ink, appearing to read "Michelle Hase", with a long horizontal flourish extending to the right.

Michelle Hase, P.E.

EXHIBIT

1

pieces of equipment within the stream bed that can take place with such short notice minimizing the impacts.

The current conditions necessitate immediate remediation and CP plans to move forward with the work scheduled to start the week of November 6th, 2017. We appreciate your timely response and all comments/suggestions/modifications that will minimize impacts to the extent practicable.

Thanks for your help thus far,

Jeff Johnson, PE
Railroad Bridge Engineer

HDR
700 SW Higgins Avenue, Suite 200
Missoula, MT 59803-1489
D 406.532.2230
jeff.k.johnson@hdrinc.com

hdrinc.com/follow-us

From: "Johnson, Elaine M - DNR" <Elaine.Johnson@wisconsin.gov>
Date: November 2, 2017 at 13:46:50 MDT
To: "Keller, Michael" <Michael.Keller@hdrinc.com>
Cc: "Rute, Chris" <Chris.Rute@milwaukee.gov>, "Karl Rittmeyer" (Karl_Rittmeyer@cpr.ca)" <Karl_Rittmeyer@cpr.ca>, "Helker, Craig D - DNR" <Craig.Helker@wisconsin.gov>, "Scott, Michelle M - DNR" <Michelle.Scott@wisconsin.gov>, "Hase, Michelle M - DNR" <Michelle.Hase@wisconsin.gov>, "Marcangeli, April N MVP" (April.N.Marcangeli@usace.army.mil)" <April.N.Marcangeli@usace.army.mil>
Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Good afternoon Michael,

Thank you for contacting me regarding this activity.

I know the narrative indicates the coordinates of the repair project, but could you provide a location map for the project area?

In terms of approvals, the DNR regulates work activities and structures placed on navigable waterways under Chapter 30. As such, the work would require a Chapter 30 permit from the DNR (if the work does not meet any exemption standards).

Prior to conducting work activities, it is important to note that placement of grout mats is not a practice that would be approvable in this waterway for the reasons outlined below. If stabilization is needed, traditional rock should be used. Additionally, final elevation, bed elevation surveys up and downstream, and information on prep work that is needed should be provided.

Bed erosion may be occurring through this stretch, but an emergency fix on a localized area without bed elevation surveys up and downstream may:

- Result in fish passage impediments
- Alter flood elevations
- Increase downstream erosion

There have been several projects that have occurred and are occurring on the Menomonee River in order to restore it to a more naturalized state. A grout mat, if installed without taking into account fluvial processes, may present risk to infrastructure and fish passage. As such, it's recommended that the plan be revised to an alternative method. Please feel free to forward additional information to me for review prior to applying for a Chapter 30 permit.

Information on the DNR Waterways and Wetlands Program can be found online at: <http://dnr.wi.gov/topic/Waterways/>

Thank you,
Elaine

We are committed to service excellence.

Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Elaine Johnson

Water Management Specialist covering northern Milwaukee, Kenosha, and Walworth Counties –
WT/WD

Wisconsin Department of Natural Resources

141 NW Barstow St., Room 180, Waukesha, WI 53188

Phone: 262-574-2136

elaine.johnson@wi.gov

dnr.wi.gov



For information on our program, visit: <http://dnr.wi.gov/topic/Waterways/>

From: Keller, Michael [<mailto:Michael.Keller@hdrinc.com>]

Sent: Monday, October 30, 2017 4:00 PM

To: Johnson, Elaine M - DNR <Elaine.Johnson@wisconsin.gov>

Cc: Rute, Chris <Chris.Rute@milwaukee.gov>; Karl Rittmeyer (Karl_Rittmeyer@cpr.ca)
<Karl_Rittmeyer@cpr.ca>

Subject: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Elaine –



April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Peterson, Cami L - DNR <Cami.Peterson@wisconsin.gov>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Hi Jeff,

Thank you for providing the below information and taking time to speak with me this afternoon regarding this project.

As discussed, I have been in touch with our state attorneys, who have indicated this work would need to obtain Chapter 30 authorization from the WDNR. We have set-up an internal call on Monday to discuss this further and will be in touch with you Monday or Tuesday next week.

Based on our call, you indicated:

- The USACOE St. Paul District was sent the same correspondence WDNR received this week and has not provided comment yet. However, the railroad believes the work meets the Corps GP.
- The nature of the emergency repairs was not known to you (you said you were not the best contact for this). You believe the railroad bridge may still be operational, with staff monitoring it. If you are able to between here and early next week, please let us know more about the emergency/safety aspects of the repair, whether the bridge is now closed, what repairs are immediately needed, etc.

Staff will be in touch with you early next week, Monday or Tuesday.

Thank you,
Elaine

We are committed to service excellence.

Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Elaine Johnson

Water Management Specialist covering northern Milwaukee, Kenosha, and Walworth Counties – WT/WD

Wisconsin Department of Natural Resources

141 NW Barstow St., Room 180, Waukesha, WI 53188

Phone: 262-574-2136

elaine.johnson@wi.gov

dnr.wi.gov



For information on our program, visit: <http://dnr.wi.gov/topic/Waterways/>

From: Johnson, Jeff K [<mailto:Jeff.K.Johnson@hdrinc.com>]

Sent: Friday, November 03, 2017 3:30 PM

To: Johnson, Elaine M - DNR <Elaine.Johnson@wisconsin.gov>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>; April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Keller, Michael <Michael.Keller@hdrinc.com>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Importance: High

Elaine –

Mike asked me to contact you, as he was unavailable, and traveling yesterday and today. I've left you a second voice mail to discuss the following items as they relate to your previous email.

Thanks for your timely response. Please find attached a vicinity map for the project area.

As described in the application letter CP has chosen to forgo the State of Wisconsin permitting process (including a Chapter 30 permit) and is only requesting 401 Water Quality Certification approval at this time for compliance with General Condition 26 of the USACE Regional (non-reporting) General Permit GP-0020WI.

CP believes that the currently proposed work constitutes the minimal adverse impacts to the extent practicable for the following reasons:

- The existing channel has scoured out more than 10 feet of material at the abutment (slightly less at the pier) since its construction. The scour has reached the base of the existing substructure and is reducing the structure stability, therefore requiring immediate action.
- The existing substructure is a spread footing type foundation and is already significantly undermined; as such, excavation of any sort in front of the foundation or in the existing stream bed would further undermine the footing and cause further stability issues and is not feasible.
- The use of riprap was deemed not feasible for the following additional reasons:
 - The anticipated water velocities coupled with the existing scoured condition would require a relatively large diameter riprap (~D50 = 2.0 ft) to safely protect the bridge. The placement of this riprap in a stable configuration to protect the bridge from further scour would require a mat approximately 5.0 feet in depth. Because the stream has eroded to the base of the footing, excavation of the existing channel 5.0 feet for its placement is not feasible. Placing the riprap on top of the existing stream bed to partially restore the original ground conditions was also deemed to be too impactful in regards to obstruction of high flows, aquatic life moments, etc. (many of the concerns you noted below but to a much greater extent).
 - Correcting the loss of material under the existing substructure will require pressure grouting. The use of porous riprap will not contain the grout to within the abutment footprint, thereby reducing the pressure applied to the grout below the abutment, making it not as effective in restoring the structure's stability.
 - The use of riprap would require the use of heavy machinery to transport and place the material within the existing channel.

After consideration of the above, CP chose to use a 8 inch thick articulated grout mat as the minimally invasive alternative. The mat will stabilize the existing stream bed without excavation allowing for the least impacts to high flows and aquatic life than other alternatives. The grout mat will abut the existing abutment allowing grout to be pressure injected at a reasonable pressure to increase the foundation's stability. The inherent nature of the mat allows for a shorter construction period with smaller, fewer

pieces of equipment within the stream bed that can take place with such short notice minimizing the impacts.

The current conditions necessitate immediate remediation and CP plans to move forward with the work scheduled to start the week of November 6th, 2017. We appreciate your timely response and all comments/suggestions/modifications that will minimize impacts to the extent practicable.

Thanks for your help thus far,

Jeff Johnson, PE
Railroad Bridge Engineer

HDR
700 SW Higgins Avenue, Suite 200
Missoula, MT 59803-1489
D 406.532.2230
jeff.k.johnson@hdrinc.com

hdrinc.com/follow-us

From: "Johnson, Elaine M - DNR" <Elaine.Johnson@wisconsin.gov>
Date: November 2, 2017 at 13:46:50 MDT
To: "Keller, Michael" <Michael.Keller@hdrinc.com>
Cc: "Rute, Chris" <Chris.Rute@milwaukee.gov>, "Karl Rittmeyer" (Karl_Rittmeyer@cpr.ca)" <Karl_Rittmeyer@cpr.ca>, "Helker, Craig D - DNR" <Craig.Helker@wisconsin.gov>, "Scott, Michelle M - DNR" <Michelle.Scott@wisconsin.gov>, "Hase, Michelle M - DNR" <Michelle.Hase@wisconsin.gov>, "Marcangeli, April N MVP" (April.N.Marcangeli@usace.army.mil)" <April.N.Marcangeli@usace.army.mil>
Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Good afternoon Michael,

Thank you for contacting me regarding this activity.

I know the narrative indicates the coordinates of the repair project, but could you provide a location map for the project area?

In terms of approvals, the DNR regulates work activities and structures placed on navigable waterways under Chapter 30. As such, the work would require a Chapter 30 permit from the DNR (if the work does not meet any exemption standards).

Prior to conducting work activities, it is important to note that placement of grout mats is not a practice that would be approvable in this waterway for the reasons outlined below. If stabilization is needed, traditional rock should be used. Additionally, final elevation, bed elevation surveys up and downstream, and information on prep work that is needed should be provided.



As a follow-up to my email below, WDNR staff has met internally to discuss the request. The WDNR would have regulatory authority over the work under Chapter 30 of the Wisconsin Statutes. However, if this work does in fact meet the federal non-reporting general permit with the Corps, the state can work with CP to issue a water quality certification for only the immediate repairs that may be needed to the bridge pilings (the grout injection and bag footer at the toe of the piling). In order to evaluate the request, we would need a little more information on:

- Please let us know more about the emergency/safety aspects of the repair, whether the bridge is now closed, what repairs are immediately needed, etc.
- Construction means and methods, narrative indicating how the work will be done, staging areas, grout bag size, how the material will be pumped into the bridge pilings, what type of best management practices will be used to prevent any materials from entering the stream during work activities, etc.

However, approval of the installation of a grout mat would not be supported for the reasons outlined in my below email dated 11/2/2017. Installation of rock or other stabilization methods in the river would typically be regulated under Chapter 30 of the Wisconsin Statutes.

Please let me know if you would like to set-up a time for a call to discuss this further. It would be beneficial to have the local Army Corps project manager, April Marcangeli (copied on this email), present to discuss federal permitting of the project.

Thank you,
Elaine

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Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Elaine Johnson

Water Management Specialist covering northern Milwaukee, Kenosha, and Walworth Counties – WT/WD

Wisconsin Department of Natural Resources

141 NW Barstow St., Room 180, Waukesha, WI 53188

Phone: 262-574-2136

elaine.johnson@wi.gov

dnr.wi.gov



For information on our program, visit: <http://dnr.wi.gov/topic/Waterways/>

From: Johnson, Elaine M - DNR

Sent: Friday, November 03, 2017 4:25 PM

To: Johnson, Jeff K <Jeff.K.Johnson@hdrinc.com>; Keller, Michael <Michael.Keller@hdrinc.com>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>;

April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Peterson, Cami L - DNR <Cami.Peterson@wisconsin.gov>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Hi Jeff,

Thank you for providing the below information and taking time to speak with me this afternoon regarding this project.

As discussed, I have been in touch with our state attorneys, who have indicated this work would need to obtain Chapter 30 authorization from the WDNR. We have set-up an internal call on Monday to discuss this further and will be in touch with you Monday or Tuesday next week.

Based on our call, you indicated:

- The USACOE St. Paul District was sent the same correspondence WDNR received this week and has not provided comment yet. However, the railroad believes the work meets the Corps GP.
- The nature of the emergency repairs was not known to you (you said you were not the best contact for this). You believe the railroad bridge may still be operational, with staff monitoring it. If you are able to between here and early next week, please let us know more about the emergency/safety aspects of the repair, whether the bridge is now closed, what repairs are immediately needed, etc.

Staff will be in touch with you early next week, Monday or Tuesday.

Thank you,
Elaine

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Elaine Johnson

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Phone: 262-574-2136

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From: Johnson, Jeff K [<mailto:Jeff.K.Johnson@hdrinc.com>]

Sent: Friday, November 03, 2017 3:30 PM



Thank you for the update and response. Responses to your bulleted items are as follows:

- As indicated in the prior submittal documents, the proposed repairs are all considered to be emergency work. The existing spread footing supporting Abutment 1 has been severely undermined by a shifting river channel, which has drastically lowered and shifted to flow primarily under Spans 1 and 2 (vs. Spans 2 and 3 when originally constructed). Grout will be pumped under the footing of Abutment 1, a grout bag placed and filled to armor the toe of the existing sheet piling, and an 8" thick grout mat will be placed on the bottom of the channel beneath Span 1 and upstream of Pier 2 to prevent further channel degradation. The bridge is not currently closed, but it is being closely monitored until the repairs are completed. It is imperative that these critical repairs are completed to ensure the bridge can continue to safely carry interstate train traffic.
- The proposed repairs will begin the week of November 13th with an anticipated completion date of November 24th. The Contractor will stage materials and equipment at an upland location adjacent the East abutment. Grout mats will be 8" thick and the grout bags will be up to 36" in diameter. Grout will be pumped via a concrete line pump into the fabric forms for the mats and bags. Once cured, the fabric grout bag will act as a watertight form/barrier to pump grout into the voided abutment footing. There will be no mechanical excavation in the riverbed, all mats and bags will be placed over the existing contours.

For the same reasons Jeff outlined to you last Friday, use of another river stabilization means, such as riprap, is not considered to be feasible based on the required excavation requirements to install a suitable size riprap blanket. For the reasons already explained, excavation in Span 1 is not feasible without risking failure to the bridge. It is also not feasible to place riprap without completing excavation, as a 5' thick riprap blanket laid on the existing river bed would block the low flow channel, thereby causing a greater concern for fish passage during low flows and likely causing changes to the water levels during a flood event. You mentioned previously that projects are underway to return the river to a more natural state; in this regard, CP would be interested in the DNR returning the river to flow between Spans 2 and 3, elevating the thalweg to its original elevation through the bridge when it was originally built, and armoring the channel and banks with riprap at that time.

We appreciate your ability to work with CP regarding the water quality certification and look forward to hearing back from you at your earliest convenience. Please let us know if you need further information in order to provide a 401 water quality certification for this work. Thank you for your help.

Michael Keller, P.E.

D 406.532.2233 M 406.546.8712

hdrinc.com/follow-us

From: Johnson, Elaine M - DNR [<mailto:Elaine.Johnson@wisconsin.gov>]

Sent: Wednesday, November 8, 2017 7:07 AM

To: Johnson, Jeff K <Jeff.K.Johnson@hdrinc.com>; Keller, Michael <Michael.Keller@hdrinc.com>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>; April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Peterson, Cami L - DNR <Cami.Peterson@wisconsin.gov>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Good morning Jeff & Michael:

As a follow-up to my email below, WDNR staff has met internally to discuss the request. The WDNR would have regulatory authority over the work under Chapter 30 of the Wisconsin Statutes. However, if this work does in fact meet the federal non-reporting general permit with the Corps, the state can work with CP to issue a water quality certification for only the immediate repairs that may be needed to the bridge pilings (the grout injection and bag footer at the toe of the piling). In order to evaluate the request, we would need a little more information on:

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However, approval of the installation of a grout mat would not be supported for the reasons outlined in my below email dated 11/2/2017. Installation of rock or other stabilization methods in the river would typically be regulated under Chapter 30 of the Wisconsin Statutes.

Please let me know if you would like to set-up a time for a call to discuss this further. It would be beneficial to have the local Army Corps project manager, April Marcangeli (copied on this email), present to discuss federal permitting of the project.

Thank you,
Elaine

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Elaine Johnson

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From: Johnson, Elaine M - DNR

Sent: Friday, November 03, 2017 4:25 PM

To: Johnson, Jeff K <Jeff.K.Johnson@hdrinc.com>; Keller, Michael <Michael.Keller@hdrinc.com>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>;



From: [Johnson, Elaine M - DNR](#)
To: [Keller, Michael](#); [Johnson, Jeff K](#)
Cc: [Helker, Craig D - DNR](#); [Scott, Michelle M - DNR](#); [Hase, Michelle M - DNR](#); April.N.Marcangeli@usace.army.mil; [Karl Rittmeyer](#); [Peterson, Cami L - DNR](#); [Daniel Miller](#); [Corey Rohrbeck](#); [Jeff Owen](#); [Sprangers, Kurt](#)
Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval
Date: Friday, November 17, 2017 4:00:00 PM
Attachments: [image001.gif](#)
[image002.gif](#)
[image003.gif](#)
[image004.gif](#)
[image005.gif](#)
[image006.gif](#)

Good afternoon Mike,

I just wanted to touch base regarding this project. It's the department's understanding that the work has been completed. We are evaluating the work that was performed and will be in contact with you.

Thank you,
Elaine

We are committed to service excellence.

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Elaine Johnson

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For information on our program, visit: <http://dnr.wi.gov/topic/Waterways/>

From: Keller, Michael [mailto:Michael.Keller@hdrinc.com]

Sent: Friday, November 10, 2017 12:38 PM

To: Johnson, Elaine M - DNR <Elaine.Johnson@wisconsin.gov>; Johnson, Jeff K <Jeff.K.Johnson@hdrinc.com>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>; April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Peterson, Cami L - DNR <Cami.Peterson@wisconsin.gov>; Daniel Miller <Daniel_Miller@cpr.ca>; Corey Rohrbeck <Corey_Rohrbeck@cpr.ca>; Jeff Owen <Jeff_Owen@cpr.ca>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Elaine -

Thank you for the update and response. Responses to your bulleted items are as follows:

- As indicated in the prior submittal documents, the proposed repairs are all considered to be emergency work. The existing spread footing supporting Abutment 1 has been severely undermined by a shifting river channel, which has drastically lowered and shifted to flow primarily under Spans 1 and 2 (vs. Spans 2 and 3 when originally constructed). Grout will be pumped under the footing of Abutment 1, a grout bag placed and filled to armor the toe of the existing sheet piling, and an 8" thick grout mat will be placed on the bottom of the channel beneath Span 1 and upstream of Pier 2 to prevent further channel degradation. The bridge is not currently closed, but it is being closely monitored until the repairs are completed. It is imperative that these critical repairs are completed to ensure the bridge can continue to safely carry interstate train traffic.
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Michael Keller, P.E.

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From: Johnson, Elaine M - DNR [<mailto:Elaine.Johnson@wisconsin.gov>]

Sent: Wednesday, November 8, 2017 7:07 AM

To: Johnson, Jeff K <Jeff.K.Johnson@hdrinc.com>; Keller, Michael <Michael.Keller@hdrinc.com>

Cc: Chris.Rute@milwaukee.gov; Helker, Craig D - DNR <Craig.Helker@wisconsin.gov>; Scott, Michelle M - DNR <Michelle.Scott@wisconsin.gov>; Hase, Michelle M - DNR <Michelle.Hase@wisconsin.gov>; April.N.Marcangeli@usace.army.mil; Karl Rittmeyer <Karl_Rittmeyer@cpr.ca>; Peterson, Cami L - DNR <Cami.Peterson@wisconsin.gov>

Subject: RE: CP Watertown BR 88.74 - Emergency Scour Repair - Request for 401 Approval

Good morning Jeff & Michael:



To:	Mark Mittag, MMSD	From:	Mike Schwar, Stony Point Hydrology Aaron Volkening, Stantec
File:	MMSD Contract W20028D01 Western Milwaukee Flood Mgmt Phase 2 Project Stantec #193804026	Cc:	Rich Klein, Stantec
		Date:	May 4, 2021

Evaluation of Freeboard Impacts from Articulated Mat Placement and other Modifications at the Canadian Pacific Bridge

The Menomonee River hydraulic modeling for the Western Milwaukee project is based on the HEC-RAS model developed by SEWRPC for the 2016 CLOMR submittal, which was reviewed by WDNR and FEMA before it was ultimately accepted. The Western Milwaukee Project is primarily located along the left (north) bank of the river between 63rd Street in Wauwatosa and the CP Rail Bridge in Milwaukee. Exceptions include a small amount of work within the current river channel and concurrent bank work on the right (south) bank approximately 1400 feet upstream of the CP Rail Bridge. In the project reach the SEWRPC model was modified only to reflect changes due to the project and existing model cross sections; conditions within the channel were not revised except at the location noted above.

Stantec was made aware that articulated concrete mattresses had been placed in the river beneath the CP Rail Bridge. Figure 1 shows the upstream bridge pier before and after mattress placement.

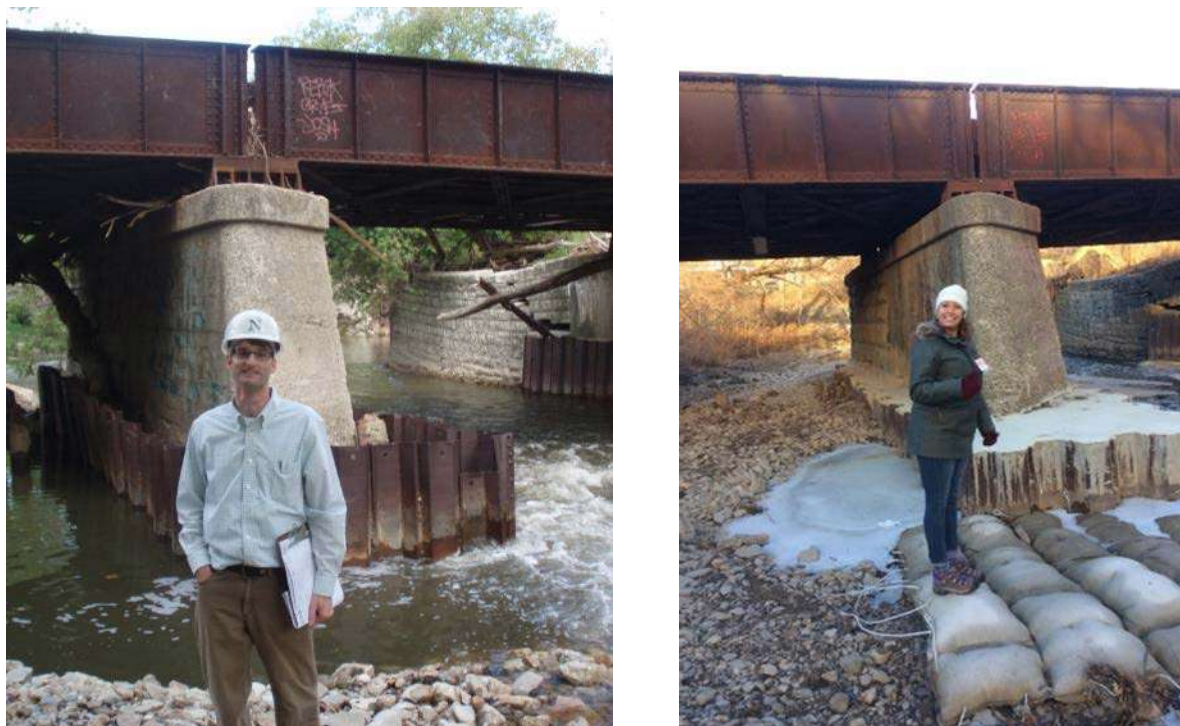


Figure 1. CP Rail Bridge in 2008 (left) and in December 2017 (right)

May 4, 2021

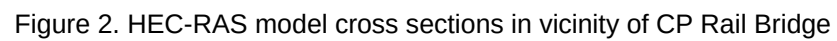
Evaluation of Freeboard Impacts from Articulated Mat Placement and other Modifications at the Canadian Pacific Bridge

Page 2 of 4

The bridge is located between cross sections 4.582 and 4.576 in the HEC-RAS model (Figure 2). The MMSD provided Stantec with survey information at the bridge for the post-mattress condition and Stantec inserted them into the “with-project” HEC-RAS model by changing cross sections 4.582 and 4.579 (Figure 3). The survey reflects both changes in the channel bottom and some possible channel filling on the left bank associated with bridge modifications (no record of CLOMR or LOMR obtained for this work).

Table 1 shows the impacts of these changes at the bridge on river 100-year water surface profile and the available freeboard within the HEC-RAS model submitted with the July 2020 CLOMR application. These changes (concrete mattresses and left bank fill) increase water levels upstream as far as Hawley Road. Along the constructed Western Milwaukee Phase 1 levee, the increase from these CP bridge modifications is a consistent 0.06 feet for the 100-year event. The impacts of this increase on freeboard requirements are shown in Table 1. There are several locations where the top of the existing levee crest is from 0.01 feet to 0.04 feet below the required crest elevation, because of these bridge modifications and their incorporation into the hydraulic model.

Freeboard requirements at each location were determined in the *Hart Park and Western Milwaukee Levee System Accreditation Master Plan*, March 2021, prepared by Stantec.



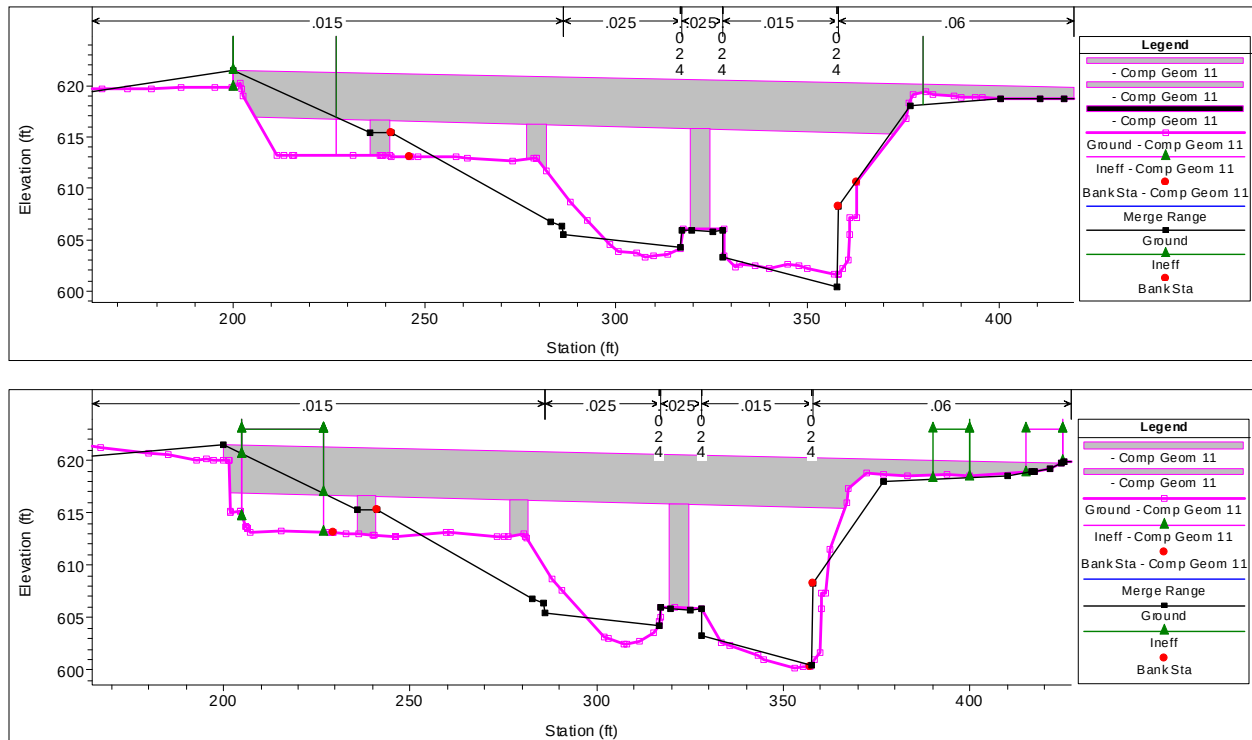


Figure 3. HEC-RAS representation of CP Rail Bridge upstream (top) and downstream (bottom) comparing "with mattress" condition (pink) to SEWRPC model cross sections (black).

Attachment:

Table 1

TABLE 1
FLOOD ELEVATIONS, CREST ELEVATIONS AND FREEBOARD REQUIREMENTS
5/4/2021

HEC-RAS river mile section	Master plan levee alignment station	100-year Water surface elevations (WSE)		100-yr WSEL increase, with CP bridge modifications added (ft)	Required freeboard (ft)	Minimum required levee crest elevation (WSE + req'd freeboard)	Levee crest elevation (from survey or survey interpolation)	Levee crest elevation minus required freeboard elevation	Freeboard deficiency due to CP bridge modifications?
		July 2020 CLOMR model	CLOMR model plus CP bridge modifications						
Downstream end of Phase 1 levee									
4.699	101+19	624.28	624.34	0.06	3.009	627.35	627.90	0.55	no
	101+50	624.36	624.42	0.06	3.011	627.44	627.99	0.55	no
4.72	102+00	624.50	624.56	0.06	3.015	627.57	627.94	0.37	no
	102+50	624.64	624.70	0.06	3.019	627.72	628.00	0.28	no
4.738	102+79	624.72	624.78	0.06	3.021	627.80	627.94	0.14	no
	103+00	624.72	624.78	0.06	3.022	627.80	627.90	0.10	no
4.754	103+50	624.72	624.78	0.06	3.026	627.81	627.87	0.07	no
	103+80	624.72	624.78	0.06	3.028	627.81	628.14	0.33	no
	103+89	624.72	624.78	0.06	3.029	627.81	628.05	0.24	no
	104+21	624.72	624.78	0.06	3.031	627.81	627.99	0.18	no
	104+24	624.72	624.78	0.06	3.031	627.81	627.96	0.15	no
	104+43	624.72	624.78	0.06	3.033	627.81	627.86	0.05	no
4.771	104+52	624.72	624.78	0.06	3.034	627.81	628.03	0.21	no
	104+65	624.72	624.78	0.06	3.035	627.81	627.92	0.10	no
	104+84	624.72	624.78	0.06	3.036	627.82	628.00	0.19	no
	104+86	624.72	624.78	0.06	3.036	627.82	628.03	0.21	no
	105+09	624.72	624.78	0.06	3.038	627.82	627.88	0.06	no
	105+19	624.72	624.78	0.06	3.039	627.82	627.88	0.06	no
	105+30	624.72	624.78	0.06	3.039	627.82	627.81	-0.01	yes
	105+49	624.72	624.78	0.06	3.041	627.82	627.87	0.05	no
	105+51	624.72	624.78	0.06	3.041	627.82	627.89	0.07	no
	105+72	624.72	624.78	0.06	3.043	627.82	627.80	-0.02	yes
	105+81	624.72	624.78	0.06	3.043	627.82	627.94	0.12	no
4.796	105+94	624.72	624.78	0.06	3.044	627.82	628.06	0.23	no
	106+10	624.72	624.78	0.06	3.045	627.83	628.08	0.25	no
	106+16	624.72	624.78	0.06	3.046	627.83	627.99	0.17	no
	106+40	624.72	624.78	0.06	3.048	627.83	628.08	0.25	no
	106+49	624.72	624.78	0.06	3.048	627.83	627.92	0.09	no
	106+61	624.72	624.78	0.06	3.049	627.83	627.87	0.04	no
	106+82	624.72	624.78	0.06	3.051	627.83	627.80	-0.03	yes
4.816	107+13	624.72	624.78	0.06	3.053	627.83	627.81	-0.03	yes
	107+77	624.72	624.78	0.06	3.058	627.84	627.80	-0.04	yes
Upstream end of Phase 1 levee / connection to floodwall									

Flood elevation increase compared to CLOMR submittal

Locations where levee freeboard requirement no longer met

Note: 100-year WSELs at 101+50 and 102+50 are linearly interpolated from adjacent river cross sections.
100-year model elevations smoothed to remove decreases in flood elevations going in upstream direction



FIGURE 1

December 2017 photo by Mark Mittag/MMSD



FIGURE 2

August 2009 photo courtesy of Mike Schwar/Stony Point Hydrology

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC

Verified Statement of Erin Cox

1. My name is Erin Cox and I am a Water Management Specialist for the Wisconsin Department of Natural Resources (DNR). I have had this position from September 2018 to the present. This position requires that I work with other issue experts at the agency to evaluate whether individuals and companies are violating the state environmental laws and permits and how to resolve such violations. My work also involves implementing the Waterway permit program. This requires advising the public on the need for water or wetland regulatory permits, granting or denying such permits, and conducting field investigations for project proposals to determine jurisdiction and permit applicability. The bulk of my work focuses on the Public Trust Doctrine, Wis. Stat. Chs. 30 and 31 permits, and federal Clean Water Act Water Quality Certifications.

2. Prior to this position, I served as a Water Resources Management Specialist from May 2017 to September 2018.

3. My training involved working with more experienced resource managers and Water Management specialists as well as document and case review.

4. I got involved in the present matter sometime in mid-May, 2019. I was assigned to the case after the original Water Management Specialist assigned to the case, Elaine Johnson, took a different position.

5. To get up to speed on the matter, I spoke to several DNR staff that were involved from the beginning. I reviewed all of the emails sent between Petitioner Soo Line Railroad Company a/k/a CPKC (Petitioner) and reviewed site photos.

6. While I was not originally involved in the discussions involving how to proceed when the Petitioner proposed its work, I have spent considerable time talking to DNR staff about it since the matter was assigned to me. I know people were quite concerned about the project, as it was a big violation. While typically Chapter 30 permitting is done at the same time as Water Quality Certifications are issued, DNR decided it could process a Water Quality Certification for the Petitioner's injection of grout underneath the abutment because it would likely not have water quality issues and would not disrupt the public use and enjoyment of the riverbed and therefore would qualify for a Chapter 30 permit too. The grout mats did cause such an impact and would need a Chapter 30 permit.

7. I am familiar with the Menomonee River. It has had some water quality problems. It is listed as "impaired," under the Clean Water Act (CWA). This means that means that it is not meeting water quality standards.

8. As detailed in the 2021 Updated Menomonee River Watershed Plan, by the Southeastern Wisconsin Watershed Trust (Plan) (located at https://cdnsm5-hosted.civiclive.com/UserFiles/Servers/Server_16227954/File/Departments/PPD/Lan

[dResources/Plans/WatershedPlans/MenomoneeRiverWatershedUpdated9EPlan-01-31-2022-All.pdf](#)), two significant problems that DNR and regional water quality management organizations have identified are barriers for fish passage and flooding. Structures in the rivers fragment habitats and impede fish and other aquatic life from accessing higher quality habitats in the upstream portions of the watershed. Such impediments can impair recreation and decrease fishing opportunities, according to the Plan. Further, segments of the waterway are lined with concrete, which contribute to dangerous water conditions, erosion, and flooding.

9. Notwithstanding, progress has been made in restoring the Menomonee in recent years, according to the Plan. Several manmade structures and several miles of concrete channel have been removed. For example, in 2013, 1,000 feet of the concrete channel downstream of a bridge owned by Petitioner were removed. Thirteen pools were constructed to assist with fish passage. This project was completed in 2017 at a cost of approximately \$5.7 million. More work is needed to remove smaller fish passage barriers and improve habitat, however.

10. Given my knowledge of this waterway, I believe that the Petitioner's depositing of grout mats was a step backwards to restoring the river.

11. I attended a site visit with Petitioner on July 30, 2019, at the site. I observed the grout mats and observed several issues that were concerning to Craig Helker, DNR's water quality biologist, myself, and other DNR staff. Among other concerns, new scour had formed at the downstream end of the grout mats. Other problems included increased water velocities, which could impede fish passage. This

velocity barrier for fish was exacerbated by the lack of roughness in the grout mats. The smooth nature of the grout mats also affords no resting locations for fish seeking to transition. DNR was also concerned because there were free hanging metal attachment wires that stuck out from the grout mats and posed a danger to recreators. DNR was also concerned because the grout mats were not toed into the stream substrate, which may put it at risk of being lifted off the bottom and further blocking stream flows.

12. At the July 30, 2019 meeting, Petitioner's representatives and DNR discussed alternatives to Petitioner's depositing of the grout mats. Petitioner rejected any option that would involve completely removing or lowering the grout mats. It contended that excavation would undermine bridge stability. Petitioner did say that it might be possible to remove parts of the grout mats. It indicated that it would not employ any alternatives that involved significant costs.

13. I have made two site visits since July 30, 2019, using drones to evaluate the situation at the site. On August 15, 2022, I visited the site via drone and observed the continued presence of grout mats on the bottom of the Menomonee River. I documented my observations about many of the problems with the grout mats that persist in a September 2, 2022 memo. A true and accurate copy of this memo is attached as Exhibit 1.

14. As a result of my site visits, it is my belief that the grouts mats have posed and continue to pose serious harm to the riverbed of the Menomonee River.

I, Erin Cox, verify under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this Verified Statement .

Executed on the 20th day of December, 2023

A handwritten signature in blue ink, appearing to read "Erin Cox", is written on the page.

EXHIBIT

1

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
141 NW Barstow St.
Waukesha, WI, 53188

Tony Evers, Governor
Preston D. Cole, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711



----- CORRESPONDENCE/MEMORANDUM TO FILE -----

DATE: September 2 2022

FILE REF: 2018-SEEE-SOO Line Railroad Company

TO: Sadie Derouin
DNR Environmental Enforcement Specialist

FROM: Erin Cox,
DNR Water Management Specialist

RE: SOO Railroad, Menomonee River Ch. 30 Violation, Analysis of photos taken August 15, 2022

Introduction

The violation is located in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 26, T7N, Range 21 East in the City of Milwaukee, Milwaukee County at approximately Lat 43.042423, Long -87.972424. As documented in Warden Smith's Case Activity report (dated 8/15/2022) and my photolog (dated 8/17/2022), photos were taken August 15, 2022 via drone showing the continued presence of grout mats on the bottom of the Menomonee River (Water Body Identification Code WBIC). This memo is written to provide my comments and observations from that day.

Image DJI 0677 (unedited):



Analysis of DJI_0677:

In the background of the photo, Warden Smith captures an area of the Menomonee River that is upstream of the grout mat work done by the responsible party. In this photo, it appears that the area upstream of the work fills most of the stream channel and appears to have relatively consistent water depths along an imaginary cross section of the stream. Realizing that historical work has been done in this area (as evidenced by the seawall on the left side of the photo) this, in my opinion, appears to represent the “natural” stream channel in this location well, showing more of what the unaltered stream in the vicinity of the bridge would have looked like pre-violation. To the best of my knowledge, this area represents “pre-disturbance conditions” for this case. This area shown below with a red circle.



To the left of the frame, we see the area that the responsible party reported was failing and attempted to repair, currently covered by a long grout bag (as indicated with red arrows).



When comparing the flow of water from the “natural” area and the flow of water once it interacts with the grout mats, it appears that the water is 1) being “pushed” over to the left side of the stream channel, when facing upstream, thus focusing more of the flow near the area that needed repair and 2) is sequestering the flow into a much tighter stream channel. The flow of water no longer takes up most of the stream channel, where it interacts with the grout mats, as it does upstream – it’s forced to flow in a channel that is considerably less in width (red lines) compared to the “natural” stream area (blue lines).



Readily visible in the above image is the change in elevation from the natural stream bed, versus the elevation of the grout mat as installed.

Image DJI_0682 (unedited):



Analysis of DJI_0682:

In this image, the drone is facing downstream. Again, we see the flow of water being constricted to the right side, in this image, of the frame (represented with thin blue lines, below).



However, when we observe the stream in the background downstream, where there are no more grout mats placed, we see that the stream once again fills more of the natural channel (represented below with red lines), mimicking the conditions that were noted earlier in this memo, upstream of where the grout mats are placed, in the “pre-disturbed conditions” images.



This further supports the assertion that the presence of the unnatural grout mats has changed the characteristics of how the stream flows through this channel, that water is being forced through a constricted area, and that water is being pushed to one side of the river channel (in the image immediately above, water is being pushed to the right side of the frame).

Image DJI_0678 (unedited):



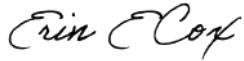
Analysis of DJI_0678:

In this image, we can clearly see some metal ties coming off the grout mats and into the stream. Some of these ties are indicated below with red arrows.



During the July 2019 site visit, these cables were raised as a concern by department staff. Staff identified the clipping of these cables to be one of the most cost-effective, “do-able” asks that DNR could put forth that would mitigate potential hazards to recreational users of this waterbody. The cables are metal, wrapped in fabric, and are reasonably expected to degrade/corrode over time. During the July 2019 site visit, railroad representatives stated that it would be possible to cut these cables and install some sort of blunted end, to keep the cables from retracting. Despite DNR raising the issue and railroad staff stating that this immediate “fix” would be possible, the hazard is still in place over 3 years later.

Respectfully,

A handwritten signature in cursive script, reading "Erin Cox". The signature is written in black ink and is positioned below the word "Respectfully,".

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC

Verified Statement of Lisa K. Rossman

1. My name is Lisa Rossman, and I am currently employed as a paralegal for the State of Wisconsin Department of Justice.

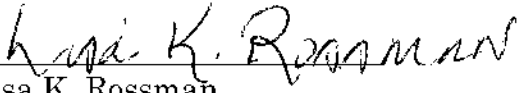
2. On November 21, 2023, I submitted a State Freedom of Information Act (FOIA) seeking “[a]ny and all permits and/or permit applications for carpentry, concrete, plumbing, fencing, roofing, masonry, signage, electrical, fire safety and HVAC related to 10800 Franklin Ave, Franklin Park, Illinois.”

3. It is my understanding that this is an intermodal terminal that is owned and operated by the Petitioner in this case.

4. On November 28, 2023, the FOIA request was granted. Attached as Exhibit 1 is a true and accurate copy of the Building Permit I received in response to that request.

I, Lisa K. Rossman, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on the 4th day of January, 2024


Lisa K. Rossman

EXHIBIT

1

BUILDING PERMIT



Village of Franklin Park
DEPARTMENT OF INSPECTIONAL SERVICES

847.671.8245

www.vofp.com



PERMIT NUMBER: 21-BP-0962

Job Address 10800 FRANKLIN AVE, FRANKLIN PARK, IL 60131
Parcel No: 12203010350000
Owner: NO NAME
Address: 10800 FRANKLIN AVE

Status: Issued
Applied: 8/13/2021
Issued: 8/13/2021
Expires: 2/9/2022

DESCRIPTION OF WORK: ROOF TEAR OFF / GUTTERS (VILLAGE PUMP STATION)

Valuation: \$4,190.00

Total Permit Fee: \$0.00

Keith E. Rooney
Building Official

**THIS PERMIT MUST BE POSTED ON JOB SITE AT ALL TIMES IN LOCATION VISIBLE FROM THE STREET.
START NO WORK UNTIL PREVIOUS WORK IS APPROVED BY VILLAGE INSPECTOR.**

**ALL CONSTRUCTION DEBRIS REQUIRED TO BE REMOVED FROM PROPERTY BY OWNER CALL 24
HOURS IN ADVANCE TO SCHEDULE ALL INSPECTIONS**