

OFFICE OF THE COMMISSIONER OF RAILROADS**STATE OF WISCONSIN**

Petition of the Wisconsin Department of Transportation for a
Determination of the Adequacy of Warning Devices, the Alteration and
Exemption of the Public Crossing of the Wisconsin & Southern
Railroad, L.L.C. tracks with CTH TT in the Town of Waukesha,
Waukesha County

9170-RX-326

FINAL DECISION

This is the Final Decision in the proceeding conducted as a Class 1 proceeding by the Office of the Commissioner of Railroads (Office) on the October 7, 2016, petition of the Wisconsin Department of Transportation (WisDOT)¹ under Wis. Stat. §§ 195.28, 195.285 and 195.29.² The WisDOT seeks alteration of the at-grade crossing of the Wisconsin and Southern Railroad, L.L.C. (WSOR) tracks with CTH TT in the city of Waukesha (Crossing No. 391530S / MP 22.68)³ as part of the WisDOT's city of Waukesha Bypass Project.⁴

With some updates, the Commissioner ADOPTS the proposed decision as final. The Commissioner DENIES the Petition for alteration of the crossing at-grade and ORDERS instead that the proposed bypass crossing BE GRADE-SEPARATED;

Further, the Commissioner deems MOOT the WisDOT's request as to adequacy of signals at the proposed crossing, EXCEPT as applied to the shared-use paths, subject to conditions.

¹ [PSC REF#: 292790.](#)

² All subsequent references to the Wisconsin statutes are to the 2015-16 version unless otherwise indicated.

³ The WisDOT also seeks a determination of the appropriate warning devices for the reconstructed crossing.

⁴ The original Petition included a request under Wis. Stat. § 195.285 that the new crossing be declared exempt from the stopping requirements of Wis. Stat. § 346.45, in part, because the proposed roadway did not include auxiliary pull out lanes. However, because a revised design now includes the pull out lanes, the WisDOT withdrew its request for an exemption.

Introduction

The WisDOT will be rerouting a portion of USH 18 to bypass the city of Waukesha through the city and town of Waukesha.⁵ CTH TT will be used as a portion of this bypass including a proposed reconstructed at-grade crossing of the WSOR's tracks. The project was first proposed in 1951. As development occurred over the years, right-of-way has been dedicated and set aside for the bypass. In April 2009, the WisDOT, Waukesha County, and city and town of Waukesha signed a memorandum of understanding to assign responsibilities allowing the West Waukesha Bypass to proceed with engineering and the environmental study phase and ultimately to construction. The project letting date for the WisDOT segment was November 14, 2017 with construction in 2018 and 2019.

Pursuant to due notice,⁶ the Office held a public hearing in Madison and Waukesha on May 9, 2017, before Administrative Law Judge (ALJ) David Albino. A list of parties is found at Appendix A.

The ALJ issued a proposed decision on August 14, 2017.⁷ The Office received comments in favor of a grade-separation from the WSOR,⁸ the Wisconsin Chapter of Operation Lifesaver,⁹ the Waukesha County Environmental Action League,¹⁰ and RRX Consulting LLC.¹¹ The city of Waukesha¹² and the Waukesha County Board of Supervisors,¹³ County Executive¹⁴

⁵ The bypass is a transitional-speed multilane arterial. [PSC REF#: 298258](#).

⁶ [PSC REF#: 301409](#).

⁷ [PSC REF#: 329651](#).

⁸ [PSC REF#: 330885](#).

⁹ [PSC REF#: 330689](#).

¹⁰ [PSC REF#: 330763](#).

¹¹ [PSC REF#: 330805](#).

¹² [PSC REF#: 330671](#).

¹³ [PSC REF#: 330807](#).

¹⁴ [PSC REF#: 330907](#).

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and County Department of Public Works (DPW),¹⁵ Waukesha County Business Alliance¹⁶ (Business Alliance) and the WisDOT¹⁷ all opposed grade separating the crossing.¹⁸

After receiving the comments, the Commissioner formulated a series of data requests of the WisDOT and WSOR in lieu of oral argument under Wis. Stat. § 227.46(2) and Wis. Admin. Code § RR 1.11(2).¹⁹ The Commissioner received responses and incorporated those herein.

Discussion of the Comments

The Waukesha bypass project's design year is 2037. The design year is an estimate of the future traffic demand and volume expected on the roadway. The WisDOT estimates vehicular volume for 2037 at 19,200 ADT. The WSOR 2037 estimate for rail traffic through the two track crossing is six to eight mainline trains per day and up to six switch trains per week at the siding.

The WisDOT comments argue that while it is foreseeable that a grade-separated crossing may become necessary, grade separation is not warranted today. The WisDOT is committed to a phased approach and proposes to program a grade-separated crossing project for 15 to 20 years in the future, *to be built as conditions warrant*.²⁰ (italics added) The municipalities assert that the Commissioner consider the adjacent communities' present needs rather than avoiding a potentially unsafe situation some 15-20 years in the future.

The adjacent communities' present needs are not in evidence. Moreover, the argument to wait 15-20 years before constructing a grade-separation simply ignores one-half of the exposure

¹⁵ [PSC REF#: 330801](#).

¹⁶ [PSC REF#: 330800](#).

¹⁷ [PSC REF#: 330909](#).

¹⁸ The DPW's and the WisDOT's filings contain both comment and new evidence. Because the evidence in this docket is closed, Wis. Admin. Code § RR 1.10(1) and (2), the Commissioner will not address new evidence.

¹⁹ See data requests to the WisDOT ([PSC REF#: 331432](#)) and the WSOR ([PSC REF#: 331433](#)).

²⁰ [PSC REF#: 330909](#) at 1.

factor that the WisDOT itself uses to consider grade-separation. The Commissioner fails to understand how the bypass can be designed for projected 2037 vehicular traffic but not consider, or down play, projected 2037 rail traffic.

The municipalities and the Business Alliance state that a grade separation would result in increased costs to Wisconsin taxpayers. To be clear, the municipalities are on record as having stated that no increase in taxes was necessary to pay for the bypass project.²¹ And, funding for the bridge was originally included in the overall project cost. The Commissioner's decision today would add back the funding amount. Other added design, delay and inflation costs are now unavoidable.

As reported in the Draft Environmental Impact Statement (DEIS), the original project cost was \$60 to \$62 million in 2016 year-of-expenditure dollars including the bridge.^{22,23} The Final EIS (no bridge) had costs of \$54.2 million in 2016 dollars, including real estate acquisition, design costs, construction, and a contingency.²⁴ By abandoning plans for the bridge without providing countervailing argument to that provided originally, the WisDOT realized project savings of up to \$7.8M. The WisDOT now estimates \$12.2M for the bridge. With savings of \$5.027M for the at-grade construction, including the culvert and necessary roadwork, the incremental cost for a bridge hovers around \$7.173M.

²¹ U.S. Dep't of Transportation, Federal Highway Administration (FHWA) FINAL ENVIRONMENTAL IMPACT STATEMENT: WEST WAUKESHA BYPASS III-X (2014) at 325. Available at http://www.waukeshabypass.org/docs/FinalEIS/Final_Environmental_Impact_Statement_Sections_3_to_10.pdf.

²² FHWA DRAFT ENVIRONMENTAL IMPACT STATEMENT: WEST WAUKESHA BYPASS, approved October 19, 2012, at 2-22. Available at http://www.waukeshabypass.org/docs/Draft_EIS_Front_Cover_To_Section_2.pdf.

²³ FHWA DRAFT ENVIRONMENTAL IMPACT STATEMENT: WEST WAUKESHA BYPASS III & IV, approved October 19, 2012, at 2-22. Available at http://www.waukeshabypass.org/docs/Draft_EIS_Section_3_And_4.pdf.

²⁴ FHWA FINAL ENVIRONMENTAL IMPACT STATEMENT: WEST WAUKESHA BYPASS I & II (2014) at 67. Available at http://www.waukeshabypass.org/docs/FinalEIS/Final_Environmental_Impact_Statement_Section_1_and_2.pdf.

The municipalities and the Business Alliance assert that delays in the project pose a greater risk to public safety based on the crash history of the roadways. While improving the intersections along the roadway may improve traffic flow and may reduce congestion and associated accidents, the Commissioner is not convinced that delaying the railroad crossing portion of the project would pose a *greater* safety risk than what currently exists or is projected.

Finally, the municipalities and the Business Alliance allege that delays in the project would create an unnecessary, but unexplained hardship for individual land owners.²⁵

Statutory Authority

Wisconsin Stat. §195.29(1) grants the Office authority to determine the type of highway-railway crossing that public safety demands. *Kurz v. Chicago, M., St. P. & P. R. Co.*, 53 Wis. 2d 12, 21, 192 N.W.2d 97, 102 (1971). The statute should be construed as to all crossings the Office must order construction of so as to promote public safety. *Green Bay & W. R. Co. v. Pub. Serv. Comm'n*, 269 Wis. 178, 183, 68 N.W.2d 828, 830–31 (1955).

In enacting Wis. Stat. § 195.29(1), the Legislature did not establish any standard to apply in determining when a new crossing at-grade is to be permitted, or if advisable, whether the new crossing must be by overhead structure or underpass. *Id.* The statute purposely grants the Office wide discretion to determine the methods that should be required at the crossing to promote the public safety. *Id.* It may be conceded that a crossing by means of an overhead structure or underpass is safer than a crossing at grade protected by automatic signals. *Id.* at 187, N.W.2d at 832. The statute, however, reasonably construed to accomplish its objective, does not require the

²⁵ The Commissioner notes that the public testimony and comments leading up to the Draft EIS opposed the project by about a 6:1 ratio. FEIS, *supra* note 24, at 76.

Office to order the type of crossing protection that is safest, but only such as is reasonably necessary to promote public safety. *Id.*

Findings of Fact

1. The WSOR operates two to four daytime freight trains per day, seven days per week at a maximum timetable speed of 25 mph but typical speeds of 10 mph.
2. The WSOR plans to rebuild its tracks to allow for 40 mph train speeds.
3. The Waukesha Subdivision handles approximately 28,000 carloads annually between Janesville and Horicon and is one of WSOR's heaviest traveled lines system-wide.
4. The existing crossing at CTH TT is 32 feet wide with two tracks-a mainline to the north and a side track to the south-protected by lights and gates covering both tracks.
5. The existing crossing has an asphalt and rubber seal surface in poor condition.
6. The WisDOT proposes to remove the existing crossing and replace it with a 224 foot crossing at 49-degrees, left-hand forward skew, 130 feet to the east.
7. CTH TT has two lanes of traffic 24 feet wide with the total roadway width of 30 feet.
8. CTH TT has a posted speed of 45 mph and an average daily traffic (ADT) of 14,100 in 2017.
9. USH 18 bypass will cross the railroad on a new alignment, while the existing CTH TT will be dead ended in cul-de-sacs on either side of the new crossing.
10. A grade-separated crossing is reasonably necessary to adequately protect and promote public safety.

11. It is reasonable that the WSOR fund five percent of the theoretical highway profile which would have been constructed if there were no railroad present, for the number of lanes on the existing highway and in accordance with the current design standards of the WisDOT.

12. It is reasonable that the WSOR remove the current at-grade crossing and install and maintain at-grade crossings for both multi-use pathways crossing the tracks.

Conclusions of Law

1. The WSOR is a railroad as defined in Wis. Stat. § 195.02(1).
2. The Office has authority under Wis. Stat. §§ 86.12 and 86.13, Wis. Stat. § 189.02, Wis. Stat. §§ 195.03, 195.04, 195.06, 195.28, 195.285, 195.29, and 195.30, Wis. Stat. § 227.47, and Wis. Admin. Code §§ RR 1.15, to issue this Final Decision.

Opinion

The city of Waukesha bypass is a five-mile expansion project with portions of the corridor on a new alignment located on the west side of the city. North of Madison Street, the existing roadway will be expanded on the same alignment to an urban four lane divided section for approximately 2.5 miles. South of Madison Street, the roadway will be on new alignment with a rural four lane divided section for approximately 2.5 miles. The WSOR crosses CTH TT 2,000 feet north of Sunset Drive. The West Waukesha Bypass project is a federally funded transportation project.

In its petition, the WisDOT proposes the Waukesha Bypass to cross the WSOR tracks at-grade at an angle of 49-degrees, left-hand forward skew, approximately 130 feet east of the

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existing at-grade crossing, which, is proposed to be removed. The existing CTH TT will have new cul-de-sacs placed just north and south of the WSOR tracks.²⁶

The new crossing surface is proposed to consist of two 224-foot long, concrete panel crossing surfaces, one for each track. The WisDOT proposes to install cantilever-mounted flashing-light gated signals on the outside shoulders of the new crossing and mast-mounted flashing-light gated signals in the median.

The new cross section at the proposed crossing would consist of a 17-foot median from back of curb to back of curb flanked by a 2.5-foot curb and gutter (with a six-inch curb head and a two-foot gutter pan), a four-foot offset, two twelve-foot lanes, an eight-foot paved shoulder, a two-foot aggregate shoulder, and pull out lanes. A ten-foot multi-use path with two-foot aggregate shoulders will follow USH 18 on the east side of the road and cross the tracks at a ninety-degree angle. A similar multi-use path will connect the dead-ended roadway (existing CTH TT) south of the tracks with the Glacial Drumlin Trail north of the tracks and will cross the tracks at an 86-degree angle with a left-hand forward skew.

The WSOR operates and maintains a 3,115 foot long passing track that parallels its mainline at the proposed crossing.²⁷ The WSOR uses this passing track two or three times per week based on customer demand. The WSOR stages cars at the track until such time as the customer can handle them. The WSOR states that its total usable capacity is approximately 2,775 feet, with storage capacity approximately 2,239 feet.

²⁶ [PSC REF#: 298251](#).

²⁷ [PSC REF#: 300884](#) at 3.

Grade Separation Alternative

The WisDOT states that one of its early alternatives was a grade separated crossing of the WSOR tracks. However, due to the close proximity of the Glacial Drumlin Trail and Pebble Creek to the north of the railroad tracks, the proposed grade separated crossing would have to span all three features. At a five percent grade, this would require a structure approximately 780 feet long with retaining walls at a cost of approximately \$12,200,000.²⁸

Due to the low number of train crossings, the WisDOT did not believe that a grade separated crossing was justified [based on the exposure factor criteria found in the WisDOT Facilities Development Manual (FDM)].²⁹ The exposure factor is the potential conflicts each day at a crossing considering the number of trains per day and the roadway volumes. Exposure factors are an indication of the expected frequency of grade crossing accidents. The WisDOT FDM criteria to consider a grade separated crossing is an exposure factor greater than 75,000 for rural roadways with speeds greater than 50 mph and 100,000 for urban roadways.³⁰

The WisDOT projects an ADT of 19,200 at the crossing in design year 2037.³¹ The WisDOT also projects an average three trains per day in 2037, resulting in an exposure factor of 57,600 – a number well below the criteria listed in the FDM to consider a grade separated

²⁸ The costs for the grade separation was estimated at \$9M in direct testimony ([PSC REF#: 298247](#) at 5), then in later testimony, at \$12.2M. ([PSC REF#: 303215](#) at 4-5).

²⁹ [PSC REF#: 301217](#) at 6.

³⁰ [PSC REF#: 298255](#). The WisDOT FDM is available at <http://wisconsin.gov/rdwy/fdm/fd-17-00toc.pdf>.

³¹ The WisDOT Southeast Region forecasts traffic counts by using the Traffic Analysis Forecasting Information System, but it contracts with the Southeast Wisconsin Regional Planning Commission (SEWRPC) to forecast traffic counts by using a travel demand model. The Southeast Region must approve all forecasts determined by SEWRPC. State Highway Program, Legislative Audit Bureau, Report 17-2 (January 2017) at 54. Available at <https://legis.wisconsin.gov/lab/media/2591/17-2full.pdf>.

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crossing.³² The WSOR states that in design year 2037, it is expected to operate six to eight mainline trains per day and up to six switches per week at its siding.³³

The WSOR's present day operations data³⁴ show only two daily trains (Monday thru Saturday), one in each direction, and four switch trains weekly.³⁵ Train cars plus locomotives averaged 92 in 2017, with train lengths on average exceeding 6500 feet in February, March, and April 2017 (100+ cars and locomotives). In 2016, train lengths averaged over 6500 feet in March and August (100+ cars and locomotives). August was the only month in 2015 where average train lengths exceeded 6500 feet (101 cars and locomotives).³⁶

Based on available growth rate data and WSOR's representation of four daily trains, the number of mainline trains per day could reach six by 2037.^{37,38} With projected trains per day of six and ADT of 19,200, an exposure factor of 115,200 would exceed the requirements of the FDM by the design year. However, the WSOR data presently shows just two daily trains. Applying the same growth rate, the number of daily trains would reach three by 2037. But, because each train travels from Janesville to Horicon and back to Janesville, adding a third train

³² [PSC REF#: 301217](#) at 5-6.

³³ [PSC REF#: 300884](#) at 4. The WSOR states that freight rail traffic is expected to double over the next 20-25 years and that future traffic on the Waukesha Subdivision is no exception. However, the U.S. Dep't of Transportation's 2015 DRAFT National Freight Strategic Plan states that rail freight as measured in tonnage would increase from 1.9 billion tons in 2013 to 2.8 billion tons by 2040, an increase of only 49 percent. See https://www.transportation.gov/sites/dot.gov/files/docs/DRAFT_NFSP_for_Public_Comment_508_10%2015%2015%20v1.pdf. The deadline for comments on the Draft plan was April 25, 2016, but no final plan has been released.

³⁴ [PSC REF#: 300889](#). See also, [PSC REF#: 331908](#) for monthly train totals for 2015, 2016 and 2017.

³⁵ The WisDOT's field observation, however, conducted May 2, 2017, through May 16, 2017, using a traffic camera, showed no switching trains for the time period. [PSC REF#: 303663](#) at 6.

³⁶ [PSC REF#: 331908](#).

³⁷ The WSOR transports a variety of commodities for its customer base including forest products, fertilizers, grain (corn, soy beans, and wheat), plastics, consumer foods, paper, aggregates, chemicals, frac sand, ethanol, and liquid petroleum.³⁷ Overall, U.S. shipments of cereal grains (+0.8 percent), fertilizers (+1.5 percent), plastic/rubber (+2.9 percent), and other foodstuffs (+2.1 percent) have increased since 2007 and are expected to continue increasing for the period 2015-2045 at an average annual growth rate of 1.825 percent. See FHWA 2016 Freight Quick Facts Report, table 14, available at <https://ops.fhwa.dot.gov/publications/fhwahop16083/ch1.htm#ch1.8>. This growth rate is in line with the 2015 Draft Nat'l Strategic Freight Plan.

³⁸ See also, [PSC REF#: 331907](#) for monthly breakdown of WSOR's shipments for 2015 and 2016.

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requires adding a fourth train, maybe empty, making a return trip. Thus, it is reasonable to forecast four daily through trains by 2037.

The WSOR states that there are also four weekly switch trains using the crossing.³⁹ The math here is more complicated, however, by the fact that the WSOR does not have a separate or dedicated local train that services the passing track.⁴⁰ Rather, it is the eastbound T003 (Janesville-Horicon) or westbound T004 (Horicon-Janesville) trains that either pull or shove cars in/out of the passing track. In order for the T003 train to shove or pull cars into the passing track, it must also cross the CTH TT crossing before coming to a complete stop. Thus, when shoving or pulling cars, the WSOR is making multiple moves over the CTH TT crossing. This means that merely saying four weekly switch trains use the crossing does not capture the actual number or length of time the crossing is blocked.

If the WSOR is staging cars two to three days per week, and this rate grew at the same rate as thru trains, then three to five switching operations per week would be taking place in 2037. When added to four thru trains, the total exposure factor could reach 134,400 by 2037, at least on those days the railroad is also performing switching movements because any train occupying a crossing risks an accident.

The Commissioner is mindful that the projected train and vehicular traffic for the bypass is just that -- a future projection. Those numbers could be lower or higher. However, based on a June, 2017, Wisconsin Legislative Audit Bureau audit of the state highway program,⁴¹ there is a

³⁹ Over the past 24 months, the WSOR has staged cars at the passing track between 225 and 280 days (an average of two - three days/week). During those staging days, the WSOR is forced to decouple its trains in order to clear the existing CTH TT crossing. [PSC REF#: 331896](#) at 1.

⁴⁰ [PSC REF#: 331896](#) at 1.

⁴¹ LAB Report, *supra*, note 31 at 51-55. The report found that the averages of the actual traffic counts on 48 of the 65 highway segments for projects completed between August 2013 and March 2016, or 73.8 percent, were higher than WisDOT's forecasted traffic counts by varying amounts up to 100 percent higher.

higher than 70 percent probability that actual traffic counts will exceed the projected ADT of 19,200. With this in mind, if train traffic reached just four daily thru trains by 2037 and one daily switch train, an underestimation of vehicular traffic of just four percent would yield an exposure factor of 100,000. This figure does not account for higher ADT due to increased local traffic flowing to the bypass as a more convenient way to get around once capacity is increased.

The exposure factor, however, is one of five general criteria included in the FDM for considering a grade separation project.⁴² Others include whether the existing terrain is economically suitable for separating the railroad and highway grades; whether construction of a crossing at grade is deemed uneconomical, excessively hazardous and would not serve the public interests; and, whether the construction/maintenance benefit-cost analysis indicates a separation structure is cost competitive with an at-grade crossing.

The environmental impact statements (discussed below) that were prepared for the entire bypass project discuss the terrain and the hazards and other drawbacks that militate in favor of grade separation. The existing terrain, because it is undeveloped open space for the most part, is economically suitable for separating the railroad and highway grades at this time. The cost-benefit analysis follows the discussion of the EISs.

Discussion of Waukesha Bypass Environmental Impact Statements

The National Environmental Policy Act of 1969⁴³ requires federal agencies to prepare EISs for major federal actions that significantly affect the quality of the human environment. An EIS is a full disclosure document that details the process through which a transportation project

⁴² One criteria, stating that grade separation structures are to be provided on all freeways and are highly desirable on expressways, is not applicable here because the USH-18 bypass or arterial is not an expressway or freeway as defined by Wis. Stat. §§ 990.01(7a) and (9a).

⁴³ 42 U.S.C. § 4321, *et seq.*

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was developed. An EIS includes consideration of a range of reasonable alternatives, analyzes the potential impacts resulting from the alternatives, and demonstrates compliance with other applicable environmental laws and executive orders.

The FHWA and the WisDOT prepared Draft (October 19, 2012)⁴⁴ and Final (September 11, 2014)⁴⁵ EISs for its Waukesha Bypass Project. Those EISs were not included in this docket as referencing documents. However, under Wis. Stat. § 227.45, the administrative law judge took official notice of the EISs and of the ensuing FHWA's Record of Decision (ROD).⁴⁶

The Draft EIS stated that the WisDOT would build a bridge to carry the new roadway over Pebble Creek, existing CTH TT, and the Glacial Drumlin State Trail and WSOR tracks (about 750 feet apart).⁴⁷ No piers would be placed in Pebble Creek. The existing bridge over Pebble Creek would remain in place.⁴⁸ CTH TT would remain as a frontage road with cul-de-sacs provided on both sides of the rail crossing, eliminating an at-grade conflict point. "This would allow more efficient and safer train operations along this line."⁴⁹ The new bridge "... would eliminate bicycle, pedestrian, and train conflicts with vehicles on CTH TT".⁵⁰ Nothing in the Draft EIS described the existing terrain as economically unsuitable for grade separation of the tracks and roadway. Quite the opposite in fact.

In its Draft EIS, the WisDOT also states that because the WSOR needs to wait for permission to cross the Canadian National (CN) rail line about three miles east of CTH TT,

⁴⁴ Draft EIS, *supra*, notes 22(Part I) and 23 (Part II).

⁴⁵ Final EIS, *supra*, notes 24 (Part I) and 21 (Part II) .

⁴⁶ Record of Decision, West Waukesha Bypass, County TT, I-94 to WIS 59, FHWA (January 2015). Available at [http://www.waukeshabypass.org/docs/FinalEIS/12-09-14 ROD v2 rmb.pdf](http://www.waukeshabypass.org/docs/FinalEIS/12-09-14_ROD_v2_rmb.pdf).

⁴⁷ Draft EIS Part I, *supra*, note 22 at 2-25.

⁴⁸ Draft EIS Part II, *supra*, note 23 at 3-68.

⁴⁹ Id. at 3-25.

⁵⁰ Id. at 3-28.

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WSOR train crews occasionally have to decouple the train so it does not block CTH TT.⁵¹ A grade-separation would eliminate the need for the WSOR to decouple the train at the crossing and allow more efficient and safer railroad operations.

In its Final EIS, however, the proposed bridge was dropped in favor of an at-grade crossing.⁵² The proposed bridge was eliminated because the results of the WisDOT's 2012 benefit-cost analysis (two daily trains at 10 mph) did not view construction of the bridge as a prudent investment.⁵³ The WisDOT did note that information from the WSOR in February 2017 stated that it operated two to four trains per day in a typical week with train speeds at 25 mph.⁵⁴

With the bridge no longer being considered, the state trail is now proposed to cross under the bypass in a 200-foot long, lighted box culvert.

Glacial Drumlin State Trail Box Culvert Underpass

The FHWA approved an EIS re-evaluation (No. 1) on July 22, 2016.⁵⁵ The re-evaluation described changes in environmental impacts from design changes and responded to comments received during the April 6, 2016, Public Involvement Meeting and subsequent comment period.⁵⁶ Several people stated the bypass should be grade separated over the WSOR and Glacial Drumlin State Trail.⁵⁷ Others “noted that the Glacial Drumlin State Trail box culvert will likely flood”.⁵⁸ The WisDOT acknowledged that the trail underpass will “occasionally

⁵¹ Id. at 3-24. The WSOR failed to mention decoupling at all during the hearing

⁵² Final EIS, *supra* note 24.

⁵³ [PSC REF#: 301217](#) at 6.

⁵⁴ Id.

⁵⁵ An EIS re-evaluation (No. 2) approved on April 28, 2017, did not discuss the WSOR crossing.

⁵⁶ http://www.waukeshabypass.org/docs/WB_ReEvaluation_Form_FINAL.pdf. (EIS Reevaluation No. 1)

⁵⁷ Id. at F-5.

⁵⁸ It's important to note that during questions following the PowerPoint presentation at the April 2016 public meeting, that Mr. Charlie Webb, project manager from CH2M, and Mr. Gary Evans, Waukesha County project manager, in response to a question whether the Office will require grade separation, answered that the Office "... will not require [the] WisDOT to construct a bridge over the railroad tracks". EIS Reevaluation No. 1, *supra* note

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flood” due to the adjacent low area.⁵⁹ The EIS, however, is devoid of any discussion of the extent of flooding of the underpass, of any measures to control flooding through mechanical means. An underpass that could “occasionally flood” may have limited functionality. The WisDOT stated that if water in the underpass prevents its use, however, that trail users will be able to cross the bypass at-grade within a marked crosswalk.⁶⁰

The WisDOT believes that the flooding concern is overstated because WisDOT design documents show otherwise.⁶¹ However, design documents for the box culvert are not in evidence. The DPW states that the PD inaccurately represents flooding of the proposed pedestrian underpass. The PD’s use of “occasionally flood”, however, is taken directly from the 2016 EIS Re-evaluation section -- Questions/Comments about the Glacial Drumlin State Trail and Railroad Area.

The Road Safety Audit for the “2-lane on alignment” and likely the “No Build.Improve Alternative”⁶² found that “during heavy periods of traffic, sufficient crossing gaps [of CTH TT] at the Glacial Drumlin Trail from both directions of travel are rare. Long delays could increase the chance of unsafe crossing behavior. Also, if a driver stops to allow a trail user to cross, there could be in an increased risk of rear-end crashes.”⁶³ Thus, the PD concluded that there was no reason to believe that these hazards would not also exist for trail users crossing a new four-lane divided roadway three times wider than CTH TT.

24, at F-11. The response is somewhat misleading because at the time, the Office had not received an application to consider an alteration of the crossing and, the Office is the state agency tasked with making such decisions.

⁵⁹ EIS Reevaluation No. 1, *supra* note 56, at A-2.

⁶⁰ *Id.*

⁶¹ [PSC REF#: 330909](#) at 5.

⁶² For a description of these alternatives, see Final EIS, *supra* note 24, at 47 and 44, respectively.

⁶³ Final EIS, *supra* note 24, at 51.

In its comments, the DPW interprets the PD's language as stating that a four-lane crossing is no less safe than a two-lane crossing.⁶⁴ The PD, however, states that the hazards of a two-lane crossing -- sufficient crossing gaps and increased risk of rear-end crashes due to unsafe crossing behavior -- *may* also exist at four-lane divided crossings.

The point at which the marked crosswalk would cross the bypass would be a six-lane divided roadway. Traffic in the inner lanes would be moving at 45 mph while traffic in the outer lane closest to the pedestrian or bicyclist could be stopped, slowing down or speeding up, depending on stopping requirements under Wis. Stat. § 346.45(1). Here, pedestrians and bicyclists would be subjected to a wide range of dynamic behavior due to diverse vehicle types and movements, including design year truck volumes of 1,830 per day,⁶⁵ leading to an even wider and unpredictable set of conflict points.⁶⁶

Benefit-Cost Analysis

The WisDOT benefit-cost analyses (BCA) are part of the WisDOT's standard procedures for evaluating the benefits and costs of warning device improvements at rail-highway crossings. A revised analysis ran three scenario periods for 10, 20 and 40 years, using both railroad provided data and observed train speeds over the two week period from May 2-16, 2017.⁶⁷ All other assumptions were held constant.

When using railroad provided data, the analysis showed benefit-cost ratios well above 1.00, indicating that the benefits of a grade-separated crossing outweighed the costs for all three

⁶⁴ [PSC REF#: 330801](#) at 2.

⁶⁵ Final EIS, *supra* note 24, at 11.

⁶⁶ The county states that there is a similar crossing on the east side of the West Waukesha bypass (STH 59) that is working well. [PSC REF#: 330801](#) at 2. The crossing is unidentified and no evidence supports the statement.

⁶⁷ [PSC REF#: 303667](#).

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time periods.⁶⁸ When observed train speeds were used, the benefit-cost ratios were below 1.00 for all time periods with negative net present benefits. This indicates that the BCA is very sensitive to variances in typical train speeds, especially slower eastbound trains that would block the crossing for longer time periods.⁶⁹

Using WSOR-provided minimum eastbound train speeds of 4 mph, the benefit cost ratios are 1.27, 1.93 and 2.92 at the 10, 20 and 40-year periods.⁷⁰ However, when that minimum speed is increased to 11 mph, the cost ratios drop to 0.31, 0.45 and 0.67 for the same periods.

The WSOR states that its eastbound T003 (Janesville-Horicon), at approximately 6,000 feet long, holds east of the existing CTH TT crossing while awaiting authorization from the CN to proceed north to Slinger, WI.⁷¹ Daily, the T003 pulls east of the existing crossing and stops just short of Grandview Blvd where it does not block any public or private crossing. The WSOR states that the design and right-of-way required for the proposed bypass will not allow the T003 to fit between the proposed crossing and Grandview Blvd.⁷² Thus, the T003 would have to hold west of the proposed crossing and once moving, would take about 22.76 minutes to accelerate and clear the proposed crossing.⁷³

During the WisDOT's two-week field observation, most of the eastbound trains were accelerating through, and occupying the crossing for between one and six minutes. One 7,215

⁶⁸ A benefit-cost ratio over 1.00 means that more than \$1.00 benefit is received by the public for each dollar expended. The total net present benefit calculates the value of the costs and benefits over the life of the project in present dollars. A positive number indicates that the benefits exceed the costs while a negative number indicates that the costs exceed the benefits.

⁶⁹ [PSC REF#: 303215](#) at 5.

⁷⁰ [PSC REF#: 303667](#).

⁷¹ [PSC REF#: 300884](#) at 6.

⁷² But, see Draft EIS where the WisDOT recognizes that because the WSOR needs to wait to cross the CN rail line about three miles east of CTH TT, WSOR train crews occasionally have to decouple the train so it does not block CTH TT. Draft EIS, *supra* note 23, at 3-24.

⁷³ [PSC REF#: 300884](#) at 6.

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feet long eastbound train activated the signals for a total of six minutes and 59 seconds.⁷⁴ The average speed of the T003 moving east was 16 mph during the WisDOT observation period.

The same train traveling westbound at observed 11 mph blocks the crossing for 9.49 minutes. Adding one daily switch trains at 3 mph (6.66 minutes gate down time), the crossing today could be blocked for about 23 minutes a day.⁷⁵

At train lengths over 7200 feet and four trains per day by design year 2037, the crossing could be blocked for up to 32 minutes a day (not including switching trains), based on WisDOT observed speeds and gate activation times. Or, up to 50 minutes a day based on WSOR data. With 75 percent of the 2037 projected 19,200 ADT (or 14,400 ADT) occurring between 6 AM and 6 PM, an average distribution of traffic is 1,200 per hour or 20 per minute. With gates down for seven minutes, it's conceivable that traffic could backup by 35 vehicles per lane if equally distributed (or a total of 140 vehicles).

Traffic congestion results in higher social costs due to longer travel times and lost productivity; increased air pollution and noise; reduced road capacity; less efficient roadway operations; and, rear-end collisions. The social costs from congestion go even higher if measuring the number of people that are delayed, not just the number of vehicles.

Part of the reason for the bypass is to accommodate growing traffic volumes along the corridor and reduce congestion, with some delays as long as five minutes at the four-way stop sign on Madison Street. The Commissioner, however, fails to see how a five minute delay at a

⁷⁴ [PSC REF#: 303663](#) at 7.

⁷⁵ These delays are not insignificant. The FHWA has assigned dollar costs to personal and business travel time for passenger cars, truck travel and inventory delay time, vehicle depreciation and operating costs, emissions and crash costs

four-way stop sign is unreasonable but a seven minute delay at the railroad crossing is reasonable.

Current and Future Bridge Costs

As stated above, today's incremental construction cost for the bridge would be around \$7.173M. That incremental cost would be lost if the bridge is delayed 20 years. The price tag for a future bridge would start at \$12.2M⁷⁶ and increase to approximately \$18M using a straight two percent consumer price inflation factor. Using the National Highway Construction Cost Index, normally higher than the consumer price inflation, would inflate 2037 construction costs to \$20M.

The portion of the bypass crossing the railroad will be funded out of WisDOT's State Highway Rehabilitation (SHR) program. The WisDOT states that the future bridge funding mechanism would still be the SHR program at today's apportionment of 80 percent federal, 15 percent state, and 5 percent railroad.⁷⁷ However, a future grade separation project has a different calculus and more appropriately falls under the Highway Safety Improvement Program (HSIP), Railway-Highway Crossings: Elimination of Hazards. While the WisDOT has the flexibility to allocate funds between subprograms, there are caps associated with the HSIP. It's likely, then, that half of the \$18M-\$20M future price tag of grade separating the crossing would fall on the municipality (or the state if the bypass is designated a state highway).

⁷⁶ For grade-separation, the WisDOT states that an additional \$3.785M is required for redesign and delay. [PSC REF#: 331897](#) at 7-8. For simplicity, I will only look at the construction costs for the bridge.

⁷⁷ [PSC REF#: 331897](#) at 4.

Operational Impacts

Each year, the WSOR moves 4.6 million tons of cargo over 802 miles of branch and mainline track across 21 counties in Wisconsin and Illinois, making it Wisconsin's second largest railroad.⁷⁸ Moving raw materials and finished goods by rail is energy efficient and cost effective, and that helps Wisconsin businesses compete in the global marketplace.⁷⁹ The Waukesha Subdivision is one of the WSOR's heaviest traveled rail lines,⁸⁰ handling almost half of the 60,000 annual system-wide carloads.

An at-grade crossing of the size proposed would increase the cost of the WSOR's Waukesha operations by making switching more hazardous; increasing the exposure to crews manning high-rail maintenance vehicles; and, imposing significant ongoing capital and maintenance costs on the railroad. These increased costs ultimately get passed on in the price of everything that gets moved on the WSOR's rails, with repercussions to economic development felt throughout the state.⁸¹

Safety

The proposed bypass would shift the highway right-of-way 130 feet to the east and substantially widen it. The WSOR states that such a design would cut its passing track in half and render it useless from an operating standpoint because the WSOR could no longer stage cars at the location efficiently and safely.

⁷⁸ See <https://www.watcocompanies.com/services/rail/wsor/>.

⁷⁹ Statement by former WisDOT Secretary Mark Gottlieb during the October 2016 Wisconsin Freight Rail Week.

⁸⁰ PSC REF#: 300884 at 2.

⁸¹ Adjusted for inflation, average U.S. freight rail rates (based on revenue per ton-mile) were 45 percent lower in 2016 than in 1981. This means that the average rail customer today can ship close to twice as much freight for about the same price it paid 35 years ago. Improvements in the cost effectiveness of freight rail over the years are due largely to rail productivity gains that have been passed through to shippers in the form of lower rates. *The Cost Effectiveness of America's Freight Railroads*, Association of American Railroads (April 2017). Available at <https://www.aar.org/BackgroundPapers/Cost%20Effectiveness%20of%20Freight%20Railroads.pdf>

A longer, at-grade crossing here and now would make the WSOR's operations less safe. A crossing of 49-degrees, left-hand forward skew, restricts vision, particularly for buses and trucks.⁸² A left-hand forward skew and longer crossing increases the hazard for the WSOR's slow-moving high-rail maintenance vehicles when conducting track inspections because they do not activate the railroad crossing signals.⁸³ At the proposed crossing, the maintenance vehicle would have to traverse a 224-foot skewed crossing with six lanes of traffic moving at different speeds and no active devices to warn motorists. Such conditions are hazardous for both motorists and rail personnel alike.

The WSOR states that it is working with the WisDOT and the Wisconsin River Rail Transit Commission to upgrade the Waukesha Subdivision to a FRA Class 3, or up to 40 mph train speeds, with no time frame provided.⁸⁴ Thru trains (either continuing east to WSOR Northern Division, or trains returning towards the west) can be traveling up to 40 mph at some point prior to 2037. Studies cited by state and federal regulatory bodies have shown that train speeds in excess of 40 mph strongly correlate with increased severe injuries and fatalities.

Capital and Maintenance Costs to the WSOR

The WSOR argues that after initial construction, the future capital and maintenance costs associated with maintaining the crossing will average approximately \$96,000 per year over a 50-year timeframe.⁸⁵ The railroad's calculations include original capital costs paid by the project. Backing out these capital costs, extending the crossing renewals to every 15 years verses every 10 years, changing the timeframe for crossing maintenance, and reducing the vegetation

⁸² WisDOT FDM at § 17-60-1.2.

⁸³ [PSC REF#: 303046](#) at 1.

⁸⁴ [PSC REF#: 300884](#) at 4.

⁸⁵ [PSC REF#: 300888](#), [PSC REF#: 300884](#) at 4-5.

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clearance to once yearly verses twice yearly, yields average annual maintenance costs over the 50-year timeframe of \$49,681 for which the railroad would still be responsible. In response to a data request, the WSOR has adjusted the annualized maintenance for the proposed crossing to \$80,230.⁸⁶ Such high maintenance costs are an unreasonable burden to place on the railroad.

Impacts to Emergency Services

If the proposed crossing is blocked by down gates, a disabled train, or an accident involving a high-rail maintenance vehicle, response times for emergency services may be increased. The nearest public crossing of the WSOR tracks is the at-grade crossing at Grandview Boulevard, 6600 feet (along the tracks) to the east or about four miles to reach the other side of the crossing along McArthur Road and West Sunset Drive. An immobile 7200-foot train has the potential of blocking both the USH-18 bypass and the Grandview crossings simultaneously.

The city, however, states that there Fire Stations No. 3 (near USH 18 and CTH TT) and No. 5 (STH 59 and CTH X) are able to access both sides of the rail corridor in the event of a blocked crossing.⁸⁷

Comparison with Other Crossings

A review of the Office's database indicates that there are 18, four-lane, two-track (main and spur) crossings in the state. Of those, two have severe skews. CTH G (Beloit Avenue) in the city of Janesville intersects the UP tracks at about 38 degrees, left hand forward skew (Crossing No. 177987A). The UP operates six thru and six switching trains at maximum timetable speeds of 10 mph. The ADT is 11,900 at a posted speed limit of 35 mph. The crossing has been equipped with lights and gates since 1983. There were six accidents at the crossing

⁸⁶ [PSC REF#: 331909](#).

⁸⁷ [PSC REF#: 330671](#) at 2.

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prior to installation of lights and gates; only one of those accidents involved an injury. The exposure factor here of 142,800 would normally initiate discussion of grade separation.

However, both rail and vehicular traffic are slow, and geometric configuration of the intersecting roadways north and south would make separation difficult.

The other is the crossing of the WSOR tracks with Delavan Drive also in the city of Janesville (Crossing No. 392408D). This crossing has seen 16 accidents with three injuries, the latest accident occurred in 2006. The crossing is protected with lights and crossbucks. There are four thru trains at maximum timetable speeds of 10 mph. With ADT at 6400, the exposure factor is only 25,600.

Both the WisDOT⁸⁸ and the WSOR⁸⁹ have attempted to draw comparisons of the proposed crossing to other four-lane crossings in the state. However, the comparisons fall short as those crossings are one track, conduct no switching operations, are shorter than the proposed crossing, and lack a pedestrian crossing of the roadway in close proximity to the tracks.

Sight Distances

A driver traveling at 45 mph needs to see the crossing warning devices at least 454 feet in advance of the 49-degree skewed crossing to stop safely. The desirable sight distance allows a driver to see an approaching train at a distance that allows the vehicle to stop well in advance of the crossing if signals, or gates and signals, are not present. The expected stopping sight distance along the bypass would exceed the required 454 feet.

⁸⁸ Four-lane, one-track crossing of the Union Pacific's (UP) tracks with STH 164 (Crossing No. 178794E) in the village Sussex. [PSC REF#: 303675](#) at 3.

⁸⁹ Four-lane, one-track, gated, at-grade crossing of the WSOR tracks with USH 151 in Beaver Dam (Crossing No. 387059K). [PSC REF#: 300884](#) at 10-11.

From the safe stopping distance of 454 feet, a driver traveling at 45 mph needs to see a train traveling at 25 mph when the train is at least 306 feet from the crossing. The same driver needs to see a train traveling at 40 mph when the train is at least 479 feet from the crossing in order to stop safely. The quadrant sight distance may be restricted in the southeast quadrant of the proposed crossing for trains at either 25 or 40 mph.

The driver of a vehicle stopped at a crossing with signal lights but no gates needs to be able to see far enough down the tracks from the stop bar to be able to cross the tracks before a train, approaching at maximum allowable speed, reaches the crossing. The clearing sight distance at the proposed crossing would be restricted in the southeast quadrant.

Clearing sight distance is treated differently, however, when the crossing involves two-tracks:

At multiple track highway-rail grade crossings of two or more in-service railroad tracks through the roadway, and where two or more trains can operate simultaneously over or in close proximity to the crossing, the presence of a train on one track can restrict or obscure a driver's view of a second train approaching on an adjacent track. Such crossings must be treated the same as any other crossing having insufficient clearing sight distance.⁹⁰

Since this is a new crossing, the exact distances cannot be determined at this time. All brush and other obstacles within the right of way will be removed to improve the sight lines.

Warning Devices

The WisDOT proposes that the new crossing include new crossbucks, cantilevered flashing light signals, gates, sidelights, stop bars, railroad advance warning signs and pavement

⁹⁰ GUIDANCE ON TRAFFIC CONTROL DEVICES AT HIGHWAY-RAIL GRADE CROSSINGS. Highway/Rail Grade Crossing Technical Working Group, Washington DC: FHWA, November 2002, at 5. Available at http://safety.fhwa.dot.gov/intersection/other_topics/fhwasa09027/resources/Guidance%20On%20Traffic%20Control%20at%20Highway%20Rail%20Grade.pdf.

markings for each direction of travel. The WisDOT recommends crossbucks and YIELD signs at the shared-use paths, as well as backlights facing the paths.⁹¹

Cost Share

On federal-aid projects, federal regulations preempt states from requiring railroads to pay any costs for bridges, except under limited circumstances. However, when a bridge replaces an at-grade crossing that has automatic flashing lights the railroad share of the project shall be five percent. 23 C.F.R. § 646.210(b)(3) The railroad's share of the cost is based on the costs for preliminary engineering, right-of-way and construction of the structure and approaches required to transition to a theoretical highway profile which would have been constructed if there were no railroad present, for the number of lanes on the existing highway and in accordance with the current design standards of the WisDOT.

Conclusion

Having reviewed the testimony and evidence in this docket, a grade-separated crossing is needed to adequately protect and promote public safety. A grade-separation may double the cost of an at-grade crossing in the short term and delay construction well into 2019. Delaying this much needed highway project, however, is an unfortunate circumstance that could not be avoided. It is better to make a sound long-term safety decision now, even if it causes delay, than to go ahead with an at-grade crossing and later find that it does not serve public safety.

The evidence clearly establishes that now is the time to build the grade separation. Doing so now would be cost effective. The WisDOT can and should proceed on a fast track pace to complete the project

⁹¹ [PSC REF#: 302984](#) at 2.

The bypass is to “accommodate traffic demand generated by existing and planned development within and outside the study corridor.”⁹² Such development in this area could make it more difficult to construct a bridge in the future. However, the WisDOT posits that environmental corridors, wetlands, the geometry of nearby road crossings, and jurisdictional boundaries may limit significant development near the crossing.

Noise from clanging bells and longer wait times from down gates at an at-grade crossing may actually hamper plans for development as people would avoid the noise and long wait times at the crossing.

An at-grade crossing will also impair WSOR operations and pose an increased risk to public safety. Public safety is also at risk by a 200-foot underpass that, if impassable due to water levels, would force pedestrians and bicyclists to cross six lanes of traffic.

It may be reasonable to not set a specific deadline but to allow the WisDOT to plan and acquire the funding to accommodate the new separation. However, an order with open-ended deadline would serve little purpose.

Order

1. The **WisDOT** shall file plans with the Office and the WSOR to construct a grade-separated crossing of the Waukesha Bypass with the WSOR tracks in the city of Waukesha, by **December 1, 2018**.

2. The **WisDOT** shall file plans with the Office to remove the current CTH TT crossing and install two new at-grade multi-use crossings for the shared-paths, to include proposed warning devices, by **December 1, 2018**.

⁹² FEIS, *supra* note 24, at II.

3. The **WisDOT** shall provide the Office with the status of the project at four month intervals starting on the effective date of the Final Decision.

4. The **WSOR** shall review and provide comments for submitted bridge plans within four (4) weeks of submission by the **WisDOT**.

5. The **WSOR** shall bear five percent of the 'theoretical' costs for the bypass grade-separated crossing as provided herein.

6. Notwithstanding any other cost apportionment in this order, the WSOR shall bear any cost assessed to it pursuant to Wis. Stat. § 195.60 for the investigation of this matter by the Office. The WSOR shall not pass on those assessment costs either directly or indirectly.

7. The Office retains jurisdiction.

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17/2017 01:06:07 pm

Yash P. Wadhwa, P.E.
Commissioner of Railroads

DA:jg:DL: 01567896

OFFICE OF THE COMMISSIONER OF RAILROADS
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**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES
ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE
NAMED AS RESPONDENT**

The following notice is served on you as part of the Commissioner's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Office of the Commissioner of Railroads (Office) for rehearing within 20 days of the date of service of this decision, as provided in Wis. Stat. § 227.49. The date of service is shown on the first page. The petition for rehearing must be filed with the Office and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Office within 30 days of the date of service of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of the date of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Office serves its original decision.¹ The Office must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: April 16, 2016

¹ See *Currier v. Wisconsin Dep't of Revenue*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

Appearances

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