1. **Introduction.** This is a Department of the Army (DA) permit Combined Decision Document. This document addresses the requirements contained in the National Environmental Policy Act (NEPA) of 1969 and the Section 404(b)(1) Guidelines (Guidelines) published at 40 CFR Part 230.

   1.1. Authorities. This decision is issued under Section 404 of the Clean Water Act (33 USC 1344). This review was conducted in accordance with the procedures described at 33 CFR Part 320-332, including Appendices B and C.

   1.2. NEPA Compliance. A thorough environmental assessment has been completed for this project with the U.S. Environmental Protection Agency (USEPA) participating as a cooperating agency. The *Environmental Assessment* can be found in Appendix A to this document.

   1.3. Permit Decision. I have reviewed and evaluated the subject DA permit application, in light of the overall public interest, the environmental, social, engineering, and economic considerations, and in accordance with the laws, regulations and policy cited above. I have decided to issue DA permit authorization for the project subject to special conditions described below.

2. **Project Information.**

   2.1. Applicant: BNSF Railway Company

   2.2. Application No.: NWK-2006-1014

   2.3. Project Location: The project is located between the cities of Gardner and Edgerton, in Johnson County, Kansas, on approximately 492-acres approximately one mile north of Interstate 35 (I-35). The proposed site is bounded on the west by Four Corners Road, on the south by 191st Street, and on the east by Waverly Road. The site is in Sections 26, 27, 33, and 34, Township 14 South, Range 22 East; Sections 5, 6, and 7, Township 15 South, Range 22 East, Johnson County, Kansas.

   2.4. Existing Conditions: The existing site is primarily agricultural. More information on the existing baseline conditions can be found in the *Environmental Assessment*.

   2.5. Project Description: The Applicant proposes to develop an intermodal facility (IMF), associated lead tracks, and relocate approximately 5.5 miles of the existing mainline track that travels through Mildale Park. The IMF is a shipment center where freight in containers and trailers is transferred using rail cars and trucks. The Proposed Action is located southwest of Gardner, Kansas and would encompass approximately 492 acres, inclusive of a 418–acre site for the IMF. An unnamed tributary of Big Bull Creek traverses the site from northeast to southwest. Development of the IMF will require relocation of approximately 9,100 feet of this stream. The project will impact a total of 17,302 linear feet of streams, 16.65 acres of open water, and 4.61 acres of wetlands. In addition, construction of the IMF will result in local road closures and elimination of

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seven public at-grade crossings. It is anticipated that not all of the facility features will be initially constructed; however, all impacts to waters of the U.S. will be completed in the initial phase. Development of the entire IMF will occur as market conditions warrant.

2.6. Jurisdiction: The jurisdictional determination (JD) for this project followed the procedures set forth in the guidance issued on 5 June 2007, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States". A draft JD was completed according to the guidance and submitted to the USEPA for review and concurrence. The USEPA, following the guidance, elevated the proposed JD to USEPA and Corps headquarters. The USEPA has final authority on Clean Water Act jurisdiction. A final JD was completed as a "special case" by the USEPA (Enclosure 9.1).

2.7. Project Purpose

2.7.1. Basic Project Purpose: The basic project purpose of this project is to provide competitive capacity to accommodate the growing demand for intermodal shipment of freight to and from the Kansas City region and to maintain throughput (volume of freight carried) on the Applicant's southern transcontinental mainline.

2.7.2. Overall Project Purpose: The overall project purpose is to construct a modern BNSF intermodal facility that can be expanded to meet existing and projected demand for intermodal freight in Kansas City. The IMF must be west of the Argentine Yard, adjacent to the Applicant's southern transcontinental mainline, with at least 8,000 feet long intermodal lead tracks within the IMF and 8,000 feet long lead tracks on both ends of the IMF. The IMF must have ready access to interstate/regional highways and adequate acreage to accommodate container storage, truck through-lanes, run-around tracks, storage tracks, parking and ancillary features. The property must not have restrictions that would limit vertical clearance for cranes and lighting and the IMF must be within approximately 30 miles from the Argentine Yard. See the *Environmental Assessment* for additional information.

2.7.3. Project Need: The need for the Proposed Action is for an expanded and modern intermodal facility in the Kansas City region that will meet existing and projected demand for intermodal freight as well as alleviate congestion and operational inefficiencies in the system. The need for the Proposed Action is driven by existing and projected demand for intermodal freight and current congestion and operational inefficiencies.

3. Public Notification

3.1. Public Participation:

3.1.1. The initial Public Notice was issued on 13 August 2007, and expired on 12 September 2007 (Enclosure 9.2). The initial public notice included notification

of a public scoping meeting.

3.1.2. A Public Meeting was held on 26 September 2007 from 4-9 pm at Milldale Farm, 35250 W 199th Street, Edgerton, KS 66021. Comments were received at the meeting verbally and in writing and the public had the opportunity to submit comments after the meeting.

3.1.3. A Public Notice was issued on 10 July 2009 (Enclosure 9.3), that announced the availability of the *Draft Environmental Assessment* and preliminary Section 404 (b)(1) Analysis. The initial expiration date of the Public Notice was 31 July 2009; however, the comment period was extended twice and expired on 16 August 2009.

3.2. Respondents:

3.2.1. The following is a list of respondents to the initial public notice dated 13 August 2007 and public meeting held on 26 September 2007. All comments are bundled as Enclosure 9.4.

Federal Agencies
Federal Aviation Administration
Federal Highway Administration (FHWA)
U.S. Fish and Wildlife Service (USFWS)
State Agencies & Local Government
City of Edgerton
Fire District # 1 of Johnson County
Gardner-City Administration
Johnson County Manager Office
Kansas Department of Health and Environment (KDHE)
Kansas Department of Wildlife and Parks (KDWP)
Kansas State Historic Preservation Office
Mid America Regional Council (MARC)
Other Organizations & Individuals
Damon Frizzell
David Bohen*
Debbie Gardner
Dennis Henricks*

Elaine Giessel
Eric Kirkendall
Gardner Area Chamber of Commerce
India Holtgraver*
James Wiseman
Jim and Betty Wiseman
Judy White
Lee Quaintance*
Linda S. Meisinger
Maria O'Neill
Mary Freund
Mary Peters
Mayrene Norris*
Robert Rescot*
Tom Rhomberg*

*comment included in public meeting transcript

Comments received during the initial comment period and public meeting were used to scope potential project concerns and helped the Corps formulate the *Draft Environmental Assessment*. Many project adaptations were made by the Applicant as a result of the initial public comments. The initial public comments generally focused on issues which were studied and addressed in the *Draft Environmental Assessment*. The following is a list of issues identified during scoping that were analyzed further in the Corps Permit Evaluation and *Draft Environmental Assessment*: Air Quality, Aquatic Resources, Community Resources, Cultural Resources, Floodplains, Geology & Soils, Hazardous Materials, Land Use, Light/Aesthetics, Mitigation, NEPA Compliance, Noise, Public Health, Request for Information and Additional Studies, Siting/Alternatives, Socioeconomics, General Support, Stream Relocation, T&E Species, Traffic, Utilities, Water Quality, Wetlands, Wildlife.

3.2.2. The following is a list of respondents to the public notice that announced the availability of the *Draft Environmental Assessment* and preliminary Section 404 (b)(1) Analysis dated 10 July 2009. All comments are bundled as Enclosure 9.5.

Federal Agencies	
Mike LeValley	Field Supervisor, US Fish and Wildlife Service
J. Michael Bowen	Division Administrator US Department of Transportation Federal Highway Administration
State Agencies & Local Government	
Amanda Graor	Senior Qir Quality Planner Mid America Regional Council
David C. Drovetta	Mayor, City of Gardner
Dean Palos	Director of Planning, Development, and Codes of Johnson County
Donald Roberts	Mayor, City of Edgerton KS
Hannes Sacharias	Deputy County Manager, Johnson County
John H. Sheperd	President, Gardner City Council
Marge Vogt	Olathe City Council Member, Mid America Regional Council, Total Transportation Policy Committee, Kansas Co Chair
Mary Peters	Gardner City Council Member
Stewart Fairburn	City Administrator, City of Gardner
Other Organizations / Groups / Companies	
Andrea M. Hricko	Assoc Prof Prev Med Keck School of Med & Director, Community Outreach and Education Southern CA Env Health Sciences Ctr
Ann Suellentrop	Physicians for Social Responsibility
Barb Brewer	Kansas Sierra Club
Bob Sommer	Political Chair Sierra Club
C. Elaine Giessel	Kanza Group of the Kansas Chapter of the Sierra Club
Carol Lehman	Interim President, Gardner Area of Commerce
Chris F. Gutierrez	President KC Smart Port
Chuck Caisley	Sr. Director Public Affairs KCP&L
Connie D. Wright	CEO, National Association for Health Professionals
Craig A. Lubow	Conservation Chair, Sierra Club Kansas Chapter & Kanza Chapter
Craig S. Volland	Air Quality Committee of the Kansas Chapter, Sierra Club
David Hinchman	SIOR, First Vice President CB Richards Ellis Industrial Properties
Douglas S. Kinsinger	President/CEO Greater Topeka Area of Commerce
Ed Elder	President, Grubb & Ellis
Gale Salzman	Director, Hillsdale Water Quality Project, Inc

Jane M. Scaro	President, Hillsdale Environmental Loss Protection
Jeff Shoemaker	Miles Excavating
Mark V Dugan	Attorney for Hillsdale Environmental Loss Protection
Melissa Lin Perrella and Andrew E. Wetzler	Natural Resources Defense Council
Michael S Almon	Secretary, Sustainability Action Network Inc.
Patrick J. Ruelle	Vice President, McAninch Corp
Robert Marcusse	President and CEO Kansas City Area Development Council
Robert Wagner	Board Member, International Dark Sky Association
Roy A. Jensen, M.D.	Director The University of Kansas Cancer Center Kansas Masonic Cancer Research Institute
Sara R Ritter	Executive Director DeSoto Economic Development Council
Tim McKee	Executive Vice President- Economic Development Olathe Chamber of Commerce
Tom Rienderer	President, Southwest Johnson County Economic Development
Tom Weigand	President /CEO Ottawa Area Chamber of Commerce
Whitney E. Kerr, Jr.	Colliers Turley Martin Trucking
Individuals	
Aaron Hooper	
Allen K. Williams, P.E.	
Amy Cunningham	
Andrea Fay	
Angela O'Kane	
Anita Witt	
Anne and Richard Rowe	
Axel and Lou Ann Thomsen	
Barbara	
Beverly and Jim Roy	
Beverly Pendleton	
Bill Blessing	
Bob and Maria O'Neill	
Bob and Phyllis Thomen	
Bob Futsch	
Brian T. Andrew	
Bryan Demars	
Carol A. Determan	
Carol Lawrence	

Carolyn Sharp
Carol Wagner
Chad Wilson
Christy L. Davis
Clara Marie White
Claud and Michele Hobby
Clem Egger
Cliff and Colleen Cole
Clyde Sullivan
Constance K. Murphy
Cory Gordon
Craig Morea
Dan Meisinger
Dana Copp
Daniel Carey-Whalen
Daniel E. Wahl
Danny L. Meisinger Jr.
Darin Benson
David B. Crupper
Dawn Hawkins
Dawn Stecklein
Deborah K. Drury
Dennis Goodyear
Denny Grabin
Diana Seim Meisinger
Diane C. Zoch
Diane K. Diehn
Dillon Corr
Donald J. Scaro
Donald Phipps
Dorothy Kuhlin
Doug Long
Doug Stecklein
Dr. Ed and Mrs. Del Lovitt
Ed Moore III
Emily Romo
Eric A. Carlson
Eric Kirkendall

Erica Eldred
Eve Wolf
Frances Locke
Frank Saunders
Franklin W. Neff
Gary and Lisa Allen
Gary Adams
Gary Higgins
Gary Maisch
Gene Billick
George Hendricks
Gerald Ohmes
Gretchen Meisinger
Heidi Jackson
Herta M. Folsm
Hilda Enoch
Jacki Alsup
James and Lucy Wilson
Janice DeVires
Jason D. Wilson
Jasper Meisinger
Jeff Groh
Jeff Roos
Jenny Hoefing
Jeremy Manness
Jerry Keeney
Jim and Debbie Andrea
Joe and JoAnn Farb
Joe Ball
Joel Riggs, P.E.
John and Eulene Phillips
John and Lauran Shearer
John Fish
John Flavin
John J. and Madonna L. Ronan
John Krehbiel
John M. Racunas
John T. Trausch

Judy Ann Kennedy
Judith Rogers
Judy Carman
Judy White
Julie A. Voss
Karen Nilson
Karen Stephenson
Kathleen M. Goodyear
Kathleen Outlaw
Kathleen Roos
Kelly Frampton
Kelly O'Brien
Kelly Pinet
Ken Lassman
Ken Morrison
Kim Bellemere
Krista Wilson
Larry and Donna Pearce
Laura Thomsen
Lee C. Peters
Lewis A. Heaven Jr.
Linda K. Wolf
Linda Meisinger
Lisa Meisinger
Louellyn Stangle
Magdeu Bull
Margaret Ohmes
Margaret Riley
Mark G. Manley
Mark Peters
Marshall and Judy Wolfe
Marshall Wolfe
Martha Hodges
Mary and Ron Freund
Mary Bushnell
Mary Cunningham
Mary Helen and George Korbelik
Mary Newton

Melanie Smith
Mic and Donna Haynes
Michael and Johnetta Hume
Michele Frantz
Mike Riley
Nancy A. Falkner
Nancy Hanahan
Nicole Northcraft
Owen de Long
Pamela and Mark Sanders
Patricia M. Houghton
Patricia Rankin
Peggy and Craig Avdeychik
P.J. Quell
Rami McDermott
Rich Wenzel
Richard D. Kessler
River Jordan Seim Meisinger
Ross and Amy Schweer
Sandy Wilson
Sara Beane
Sarah J. Schlider
Scott Bull
Sharon and Marion Kramer
Sharon Kramer
Shelley Brodie
Shelley Jordan
Shellie Krabbe-Hendricks
Sherri Hughes
Shirley DeRigne
Stephen Branch
Stephen D. Falkner
Steve and Patty Kohn
Steve Mabe
Steve Wasko
Susan Pavlakis
Susan Pearce-Glover
Timothy S. Parton

Thomas and Margo Young
Tom and Michelle Kreiser
Tom McBride
Travis Wilson
Tricia Crowe
Vicki Douglas
Vicki Kunkel
Vicky Joyce
Walter R. Rist
154 identical form letter comments submitted by Jane Scaro on behalf of other individuals. (One example included in Enclosure 9.5)

3.3. Comments and Resolution: Comments submitted in response to the *Draft Environmental Assessment* public notice were grouped when appropriate. The Corps thoroughly evaluated each comment received. The summary comment and Corps responses can be found in Appendix B of this document. In addition, the Applicant responded to comments in a letter to the Corps dated 25 September 2009 (Enclosure 9.6). The *Draft Environmental Assessment* was modified as necessary to address comments, correct errors, and to clarify issues.

3.4. Public Hearing Determination (33CFR Part 327):

Regulation 33 C.F.R. Part 327.3(a) defines a public hearing as, "... a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects." Regulation 33 C.F.R. Part 327.4(a) states that, "A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project." Regulation 33 C.F.R. Part 327.4(b) further states that, "Requests for a public hearing ... shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is no valid interest to be served by a hearing."

Corps Headquarters Regulatory Program Standard Operating Procedures (SOP) dated 1 July 2009 states, "Public hearings are held at the discretion of the district engineer when a hearing would provide additional information that is necessary for a thorough evaluation of pertinent issues but is not otherwise available." The SOP further states, "When evaluating the need for a public hearing the Districts should consider: (1) the extent to which the issues identified in conjunction with a request for a public hearing are consistent with the Corps need to make its 404(b)(1) Guidelines and public interest determinations (i.e., the extent to which the issues are within the Corps scope of

analysis); (2) the extent to which the issues identified in conjunction with a request for a public hearing represents information not otherwise available to the Corps; and (3) whether the issues identified are already addressed by comments submitted in response to the public notice."

The Corps received 14 requests to hold a public hearing (included in Enclosures 9.4 and 9.5). The primary basis for the public hearing requests were for increased public participation.

The public hearing requests are denied for the following reasons:

1) The Corps provided many opportunities for public involvement with this project including the Public Meeting held on 26 September 2007, the initial public comment period from 13 August 2007 through 12 September 2007, and the public comment period for the *Draft Environmental Assessment* from 10 July 10 2009 through 16 August 2009.

2) Holding a public hearing would not serve the purposes identified in Corps regulations or the SOP. A public hearing would not provide additional project related information that is not already available. In addition, there would be no valid interest to be served by holding a hearing that was not already obtained through the multiple public comment periods and the public meeting.

3) Attempts were made to informally resolve the public hearing requests. Because the public hearing requests primarily focused on increased public participation, the Corps extended the comment period twice for a total of a 37-day comment period on the *Draft Environmental Assessment*. These extensions allowed for additional public participation.

4) The Regulatory Program's SOP encourages Districts to consider public meetings or workshops in lieu of public hearings. As discussed above, a public meeting held for this project.

All public hearing requesters will be notified by mail that the public hearing request was denied.

4. Compliance with Other Laws.

4.1. Section 7 of the Endangered Species Act: The proposed activity will have no impact on Federally listed Threatened/Endangered species. For additional information on this determination, see Section 3.12 of the *Environmental Assessment.*

4.2. Section 106 of the National Historic Preservation Act: The proposed activity will have no direct effects on cultural resources. For additional information on this determination, see Section 3.13 of the *Environmental Assessment.*

4.3. Section 401 Water Quality Certification: The Kansas Department of Health and Environment certified in accordance with Section 401 of the Clean Water Act (33 USC 1341), that the work would not violate applicable water quality standards (Enclosure 9.7). The 23 March 2009 certification letter contains several conditions which address water quality concerns. The Applicant will be informed by the proposed permit transmittal letter that the conditions presented in this certification are incorporated into the special conditions of the Department of the Army permit by reference, as stated in General Condition "5" of the permit document.

4.4. Executive Orders:

4.4.1. Order 11990 Protection of Wetlands: The decision described in this document is consistent with this executive order.

4.4.2. Order 11988 Flood Plain Management: The decision described in this document is consistent with this executive order.

4.4.3. Order 11898 Environmental Justice: The decision described in this document is consistent with this executive order.

5. Mitigation

5.1. Applicant Proposal: The Applicant proposes to mitigate all impacts to waters of the U.S. through onsite creation/enhancement/restoration of a conservation corridor with the relocated tributary to Big Bull Creek. Additional details of the mitigation plan can be found in Appendix H of the *Environmental Assessment.* The mitigation plan was developed in accordance with Regulatory Guidance Letter (RGL) No. 02-2 for Compensatory Mitigation, the *Missouri Stream Mitigation Method*, and RGL No. 06-3 for Minimum Monitoring Requirements for Compensatory Mitigation. The 10 April 2008 Compensatory Mitigation for Losses of Aquatic Resources Rule is not applicable to this project because processing of this application began prior to the rule taking effect on 9 June 2008. The Applicant's proposed mitigation, however, does comply with the primary intent of the Compensatory Mitigation for Losses of Aquatic Resources Rule.

5.2. Mitigation Rationale: The mitigation is proposed to completely offset all negative impacts to waters of the U.S. The *Missouri Stream Mitigation Method* was utilized to determine the extent of debits necessary to offset impacts. The Missouri method was used for this project because the *Kansas Stream Mitigation Method Guidance* was not applicable at the time the Corps began processing this application. Use of the Missouri method is appropriate for this project given the similarities of western Missouri and the IMF site in addition to the Missouri method being the only available stream assessment method in the Kansas City District at the time the application was submitted. The project related impacts require at least 76,284 credits for stream impacts and the proposed mitigation completely offsets impacts by generating 82,291 stream mitigation credits. In addition, the proposed project will impact approximately 4.61 acres of wetlands and approximately 7.18 acres of wetland mitigation is proposed.

5.3. Mitigation Function: The proposed mitigation should offset all functions of waters of the U.S. lost as a result of the proposed project. Functions of the proposed mitigation include, but are not limited to, increased wildlife habitat, water quality enhancements, increased riparian corridor connectivity, flood water attenuation and improved habitat diversity.

5.4. Mitigation Acceptance: The proposed mitigation should completely offset all negative impacts to waters of the U. S. The mitigation proposed in Appendix H of the *Environmental Assessment* is acceptable and is a requirement of this permit as Special Condition A.

6. Special Conditions

a. You must mitigate for impacts to Waters of the U.S. according to Appendix H of the *Environmental Assessment.* In addition, the commitments made in the 10 August 2009 memo from Lewis A. Heaven, Jr. to Joshua A. Marx must be met (See Exhibit A). All initial mitigation construction grading and plantings must be completed no later than 18 months after work begins in Waters of the U.S. You must notify the Kansas City District Regulatory Branch prior to beginning work in Waters of the U.S.

This condition is necessary to insure timely completion and successful mitigation. The mitigation plan in Appendix H of the *Environmental Assessment* includes construction, timing, and monitoring requirements.

b. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor; and, you must give a copy of this entire permit to the contractor.

This condition is necessary to insure compliance with the terms and conditions of the subject permit. Past experience has shown that full compliance with the permit is more likely when all parties conducting the authorized work are familiar with the permit.

c. You must use clean, uncontaminated materials for fill in order to minimize excessive turbidity by leaching of fines, as well as to preclude the entrance of deleterious and/or toxic materials into the waters of the United States by natural runoff or by leaching.

This condition is a practicable measure that is necessary to ensure that adverse impacts of authorized fill on water quality are minimized.

d. You must dispose of excess concrete and wash water from concrete trucks and other concrete mixing equipment in a non-wetland area above the ordinary high water

mark and at a location where the concrete and wash water cannot enter the water body or an adjacent wetland area.

This condition is a practicable measure that is necessary to ensure that adverse impacts of authorized fill on water quality are minimized.

e. You must excavate, dredge and/or fill in the watercourse in a manner that will minimize increases in suspended solids and turbidity which may degrade water quality and damage aquatic life outside the immediate area of operation.

This condition is a practicable measure that is necessary to ensure that adverse impacts of authorized fill on water quality are minimized.

f. You must immediately remove and properly dispose of all debris during every phase of the project in order to prevent the accumulation of unsightly, deleterious and/or toxic materials in or near the water body.

This condition is a practicable measure that is necessary to ensure that adverse impacts of authorized fill on water quality, public safety and aesthetics are minimized.

g. You must not dispose of any construction debris or waste materials below the ordinary high water mark of any water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

This condition is a practicable measure that is necessary to ensure that impacts to aquatic habitats are confined to the authorized area.

h. You must store all construction materials, equipment, and/or petroleum products, when not in use, above anticipated high water levels.

This condition is a practicable measure that is necessary to ensure that adverse impacts of authorized fill on water quality are minimized.

7. Determinations.

7.1. Findings of No Significant Impact: After evaluating the anticipated economic, social, and environmental effects of the Proposed Action and accompanying mitigation in the *Environmental Assessment*, it is my determination that the granting of a Department of the Army permit will not have a significant adverse effect on the quality of the human environment; therefore, the filing of an environmental impact statement is not required.

7.2. Section 404(b)(1) Guidelines Compliance: As required by Section 404(b)(1) of the Clean Water Act (33 USC 1344), the subject activity has been evaluated in accordance

with guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army, and published at 40 CFR 230. The attached 404(b)(1) evaluation (Appendix C) has resulted in a conclusion that use of the discharge site is not prohibited by 40 CFR 230. There are no less environmentally damaging practicable alternatives. The activity does not appear to (1) violate applicable state water quality standards or effluent standards prohibited under Section 307 of CWA; (2) jeopardize the existence of Federally listed endangered or threatened species or their habitat; (3) violate requirements of any Federally designated marine sanctuary. The activity will not cause or contribute to significant degradation of waters of the United States including adverse effects on human health, life stages of organisms dependent on the aquatic ecosystem, ecosystem diversity, productivity and stability, and recreational, esthetic, and economic values; and (4) appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

7.3. Clean Air Act Conformity: Section 176(c) of the Clean Air Act. The project has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. The 1-hour NAAQS for ozone was revoked by EPA on June 15, 2005. Prior to that date, Kansas City was a maintenance area for the 1-hour ozone standard. Upon revocation, as explained in 40 Code of Federal Regulations, Section 51.905(e)(3), conformity pursuant to section 176(c) of the CAA no longer applies to areas, like Kansas City, which are designated attainment for criteria pollutants.

7.4. Public Hearing Determination**:** I find that there is no valid reason to hold a public hearing and that a public hearing would not provide substantial project related information that is not already available. The public hearing request is denied.

7.5. Public Interest Review: I find that issuance of a Department of the Army permit to BNSF Railway Company as prescribed by regulations published in 33 CFR 320-332, is based on a thorough analysis and evaluation of the various factors enumerated above; that there are no reasonable alternatives available to the Applicant that will achieve the purposes for which the work is being constructed; that the work is in accordance with the overall desires of the public as reflected in the comments of state and local agencies and the general public; that the work is deemed to comply with established state and local laws, regulations, and codes; that there have been no identified, significant, adverse environmental effects related to the work; that the issuance of this permit is consonant with national policy, statutes, and administrative directives; and that on balance the total public interest should best be served by the issuance of a Department of the Army permit.

8. Signatures/Approvals.

Prepared by: Joshua Marx	Title: Regulatory Project Manager
Reviewed by: David Hibbs	Title: Kansas City Program Manager
Reviewed by: Mark Frazier	Title: Chief, Regulatory Branch

Reviewed by: Matt Jeppson Title: Attorney, Office of Counsel

12/18/2009
Date

ROGER A. WILSON, JR.
Colonel, EN
Commanding

9. Enclosures Index.

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9.4. Initial Public Notice Comments
9.5. Draft EA and Draft 404(b)(1) Analysis Public Comments
9.6. Applicant's Response to Comments Letter
9.7. Water Quality Certification
Appendix A. *Environmental Assessment*
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Appendix C. *Section 404(b)(1) Guidelines Evaluation*