UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE Plaintiffs, v. RURAL UTILITIES SERVICE, CHRISTOPHER MCLEAN, Acting Administrator, Rural Utilities Service, UNITED STATES FISH AND WILDLIFE SERVICE, CHARLES WOOLEY, Midwest Regional Director, and SABRINA CHANDLER, Manager, Upper Mississippi River National Wildlife and Fish Refuge, UNITED STATES ARMY CORPS OF ENGINEERS, LIEUTENANT GENERAL SCOTT A. SPELLMON, Chief of Engineers and Commanding General, U.S. Army Corps of Engineers, COLONEL STEVEN SATTINGER, Commander and District Engineer, Rock Island District, U.S. Army Corps of Engineers, and COLONEL KARL JANSEN, Commander and District Engineer, St. Paul District, U.S. Army Corps of Engineers, Defendants, and AMERICAN TRANSMISSION COMPANY, LLC, DAIRYLAND POWER COOPERATIVE, & ITC MIDWEST LLC, Intervenor-Defendants.	)	Nos. 21-cv-00096-wmc & 21-cv-00306-wmc, Consolidated.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

Federal Agency Decisions

Federal Statutes

Federal Regulations

Federal Rules of Civil Procedure

Federal Register

State Regulations

Other Authorities

INTRODUCTION

Plaintiffs seek a preliminary injunction under Fed. R. Civ. P. 65 to temporarily stop construction of the controversial Cardinal-Hickory Creek high-voltage transmission line and preserve the status quo while this Court reviews and decides the Plaintiffs' pending federal claims on the merits.

All parties are currently briefing the merits issues on cross-motions for summary judgment. Initial briefs were submitted on September 3, 2021, response briefs are due on October 18, 2021, and replies will be due on November 1, 2021. On September 24, 2021, however, in the middle of the briefing schedule, Intervenor-Defendants American Transmission Company, ITC Midwest LLC, and Dairyland Power Cooperative ("Transmission Companies") notified the parties and this Court that they intend to begin construction in earnest through southwest Wisconsin's scenic Driftless Area landscape as soon as October 25, 2021, before merits briefing is completed.[1] Dkt. 96, 96-1.

That means the Transmission Companies will soon bulldoze through conservation lands, family farms, wetlands and waterways, and rural communities, and will soon clear-cut trees, prairies, and plants. That would cause irreparable environmental damage before this Court will have an opportunity to determine Plaintiffs' case on the merits even though the Transmission Companies and the federal Defendants have been changing their legal positions and shifting the

[1] Unfortunately, this will require that merits arguments be repeated in both the summary judgment and preliminary injunction briefing, because reasonable likelihood of success on the merits is a prerequisite for a preliminary injunction. Plaintiffs had hoped that this litigation could be resolved in this Court through the orderly summary judgment briefing process this Court set up, but Intervenor-Defendant Transmission Companies intend to change the facts on the ground by commencing construction before this Court can even begin to consider the merits, and that has forced Plaintiffs' hand. On each merits issue, Plaintiffs will focus on the core arguments in this Memorandum, but cross-reference their opening summary judgment brief ("Plaintiffs' Summary Judgment Brief"), where the merits issues are addressed in greater detail.

permit decisions over the past two months. The Transmission Companies' new notice of construction prompted the Plaintiffs to file this motion now for preliminary injunctive relief.

All of this environmental and community damage will happen even though the Transmission Companies themselves moved to rescind the Wisconsin Public Service Commission's approval of the Certificate of Public Convenience and Necessity ("CPCN") for their proposed transmission line. SPF at ¶ 213. American Transmission Co. and ITC Midwest admitted that their agents and executives had engaged in secret encrypted text messaging using the "Signal" app with former Commissioner Michael Huebsch while the contested case was pending and he was leading the Commission's deliberations and adjudication on the CPCN. SPF at ¶ 214.

The massive Cardinal-Hickory Creek ("CHC") transmission line with 17-story high towers would run between the Hickory Creek substation in Dubuque County, Iowa, through the protected Upper Mississippi National Wildlife and Fish Refuge, and then through the Wisconsin Driftless Area's scenic landscapes, family farms, protected conservation areas, rural communities, and vital natural resources, ending at the Cardinal substation in Middleton, Wisconsin. Statement of Proposed Facts ("SPF") at ¶ 1.

At the federal level,[2] the CHC transmission line requires: (1) permission from Defendant U.S. Fish and Wildlife Service ("USFWS") to run through the protected Upper Mississippi River

[2] This is not the only open proceeding challenging illegal authorizations for the CHC project that the Transmission Companies now intend to short-circuit. Indeed, at the state level, the Transmission Companies applied for and received a Certificate of Public Convenience and Necessity ("CPCN") from the Public Service Commission of Wisconsin ("PSCW") on September 26, 2019. Plaintiffs, and many others, appealed that decision to the Dane County Circuit Court, on the merits and on state constitutional grounds because of improper *ex parte* communications between PSCW members and parties supporting the CHC project while the PSCW docket was pending, and because of undisclosed conflicts of interest. The bias portion of that case is on hold while the Wisconsin Supreme Court decides whether to uphold the trial subpoena issued to former PSCW Commissioner Huebsch. That issue will be briefed in November 2021. Oral arguments on the other issues in that case will be scheduled soon. The bias and conflict-of-interest issues are also before this Court on plaintiffs' procedural due process complaint against the involved Commissioners. This Court denied defendants' motion to dismiss on

National Wildlife and Fish Refuge under the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee; (2) permits from the Defendant U.S. Army Corps of Engineers ("Corps") under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, to do work in navigable waters; and (3) permits from the Defendant Corps under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to allow dredged and fill material into federally protected rivers, streams, and wetlands. Those federal decisions were preceded, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. and agency environmental review rules, by a final environmental impact statement ("EIS"). Defendant Rural Utilities Service ("RUS") was the lead agency on the EIS, and Defendants USFWS and the Corps were cooperating agencies.[3]

The Defendants issued a Record of Decision ("ROD") in which they concluded that the EIS met all of NEPA's requirements, that the USFWS would be issuing a "Compatibility Determination" and new right-of-way permit and easement to allow the massive transmission line to run through the protected Upper Mississippi River National Wildlife and Fish Refuge, and that the Corps would be using so-called "general permits"—namely Nationwide Permit 12 for the Iowa side, and the Corps St. Paul District's "Utility Regional General Permit" for the Wisconsin side—to allow the CHC transmission line to run through wetlands and waterways.

Plaintiffs contend that: (1) running this massive transmission line through the Refuge, which is designated as a Wetland of International Important (Ramsar) and a Globally Important Bird Area, SPF at ¶ 122, is flatly prohibited by the National Wildlife Refuge System

---

sovereign immunity grounds, and that issue is now before the U.S. Court of Appeals for the Seventh Circuit, with oral argument held on February 17, 2021. The Court of Appeals imposed a stay, but when that stay is lifted, Plaintiffs anticipate filing a motion for a preliminary injunction in that case as well, if it is necessary.

[3] RUS became involved because Intervenor-Defendant Dairyland Power Cooperative, with a 9% interest in the project, expressed interest in securing a project loan from RUS. Dairyland has never actually applied for an RUS loan, but its expression of interest made RUS, instead of USFWS, the "lead agency" for purposes of environmental review.

Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee; (2) the environmental review failed to "rigorously explore[] and objectively evaluate[] all reasonable alternatives," or adequately assess cumulative impacts and climate impacts as NEPA requires (40 C.F.R. §§ 1508.7, 1502.14[4]); and (3) the Corps' general permits violate the requirements of the Clean Water Act, and are invalid because they were not preceded by an EIS or by programmatic consultation with USFWS under Section 7 of the Endangered Species Act.

Plaintiffs National Wildlife Refuge Association, Defenders of Wildlife, Driftless Area Land Conservancy, and Wisconsin Wildlife Federation sued in this Court under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, to vacate: (1) the Defendants' findings in the Record of Decision that the EIS was valid; (2) the USFWS's permissions that it is somehow compatible for this huge high-voltage transmission line with up to 20-story high towers to run through the protected Refuge; and (3) the Corps' general permits and its verifications that its general permits applied.[5] The administrative record for those claims has been certified, and the parties are now briefing cross-motions for summary judgment. Initial briefs were filed on September 3, 2021, with responses due October 18, 2021, and replies due on November 1, 2021.

Before this Court could decide any of these issues on the merits, however, the Intervenor-Defendant Transmission Companies announced that they intend to bulldoze the right-of-way for the CHC transmission line along its entire route starting on October 25, 2021, with clearing

[4] Unless otherwise noted, all references to 40 C.F.R. parts 1500 to 1508 (the CEQ regulations implementing NEPA) are to the 2019 version of the regulations, which were controlling at the time the environmental review for the CHC line was completed.

[5] The complaint against the USFWS and RUS defendants was filed on February 5, 2021. The complaint against the Corps was filed on May 5, 2021, and those two cases were consolidated on July 2, 2021. The claims against the Corps are also based on the APA, but also include allegations under the Clean Water Act, 33 U.S.C. § 1344(e), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

completed this winter.[6] The exception is the Refuge crossing, for which the Transmission Companies say they intend to clear and begin construction as soon as October 2022. Simply put, the Transmission Companies want to build the huge transmission line up to the east and west borders of the protected Upper Mississippi River National Wildlife and Fish Refuge even if it is determined to be *not* "compatible" to run through the protected Refuge. This "hostage-taking" should be rejected.

Plaintiffs therefore request that this Court maintain the status quo by putting a temporary hold on construction to allow the Court to decide their legitimate claims on the merits *before* the Transmission Companies clear the right-of-way for the CHC transmission line and begin construction. Clearing the right-of-way, erecting the 17-story towers and digging deep foundations, and stringing the high-voltage wires, will cause Plaintiffs and their members, and the general public, irreparable harms and create environmental damage that is unnecessary, wasteful, and cannot later be easily remedied.

Plaintiffs in this case can clearly make the showing necessary for a preliminary injunction preserving the status quo until this Court can decide the federal claims on the merits. Plaintiffs will demonstrate: "(1) that [they] will suffer irreparable harm absent preliminary injunctive relief during the pendency of [their] action; (2) inadequate remedies at law exist; and (3) [they have] a reasonable likelihood of success on the merits." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017).

Plaintiffs are likely to succeed on the merits of their claims, and certainly have a reasonable chance for success, but they will be unnecessarily limited in securing full relief if the right-of-way is already cleared, and if a significant part of the transmission line and towers are

[6] The right-of-way for the shorter Iowa segment has already been cleared, except for the portion within the Refuge's boundaries.

already constructed. That is a waste of money, which the Transmission Companies would charge to ratepayers, wasteful environmental destruction, and wasteful disruption of peoples' property, lives, homes, farmland, conservation lands, waterways, and rural communities. This Court should reject the Transmission Companies' "construction first, verdict later" approach.

The CHC transmission line was first proposed over a decade ago, and a temporary delay of a few months to maintain the status quo until the Court can decide the merits of this case will not cause the federal agency Defendants or the Transmission Companies any significant harm. The transmission line cannot be operational in any event until there is a means of crossing the Mississippi River between the Iowa and Wisconsin segments. There are no realistic threats of brownouts or blackouts due to an electricity shortage in Wisconsin. There is an oversupply of electricity in Wisconsin as supply exceeds demand. Especially with many new solar energy project installations underway in Wisconsin, a delay in construction will benefit the ratepaying public. For those reasons, the balance of harms favors the Plaintiffs, and, therefore, Plaintiffs' motion for a preliminary injunction should be granted.

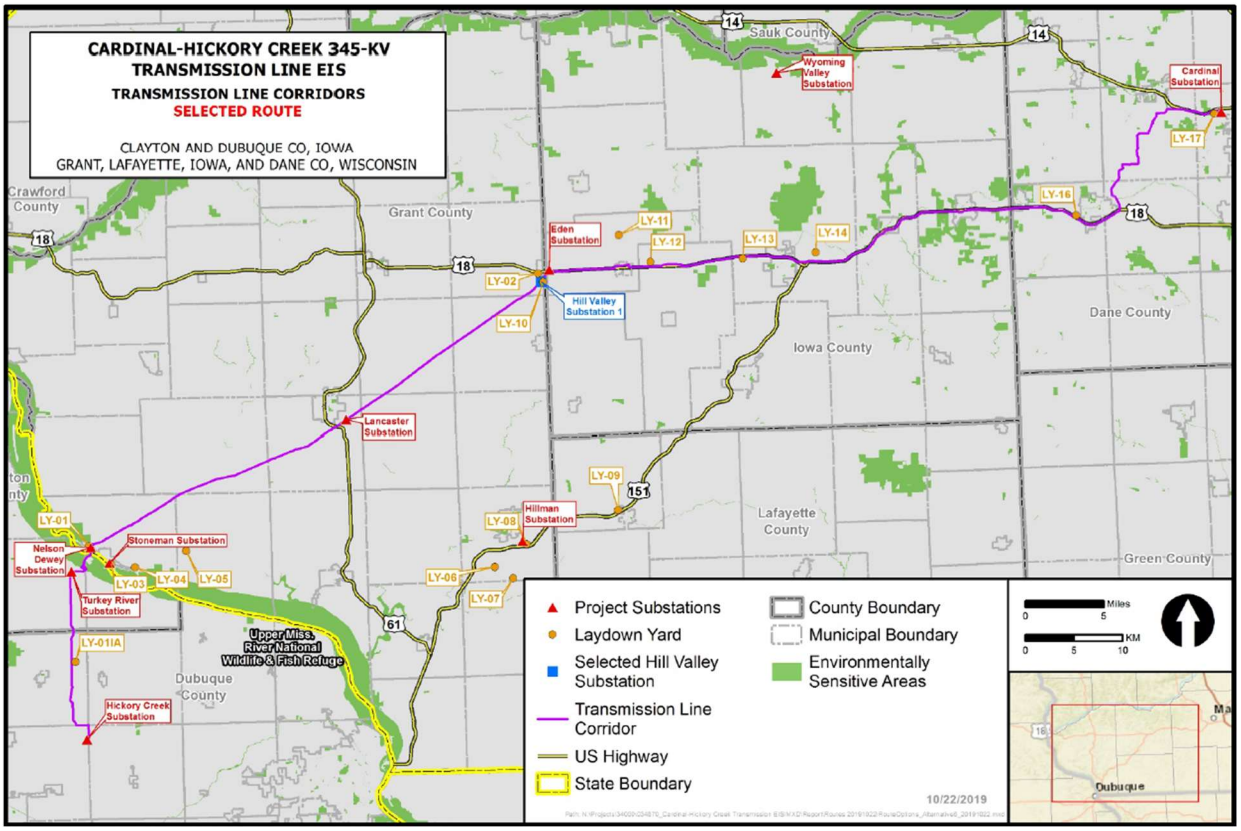
STATEMENT OF FACTS

With this motion, Plaintiffs are including an updated Statement of Proposed Facts as required by this Court's procedures for injunctive relief.[7] The following Statement summarizes the facts presented in greater detail in the Statement of Proposed Facts ("SPF").

I. Description and Current Status of the Proposed Cardinal-Hickory Creek High-Voltage Transmission Line

The proposed Cardinal-Hickory Creek high-voltage transmission line is planned to run for about 101 miles between Dubuque County, Iowa, and Middleton, Wisconsin. SPF at ¶ 1.

[7] Plaintiffs' opening summary judgment brief also includes a Statement of Proposed Facts. There is considerable overlap, but the two SPFs are not the same and the paragraph numbers are not the same.



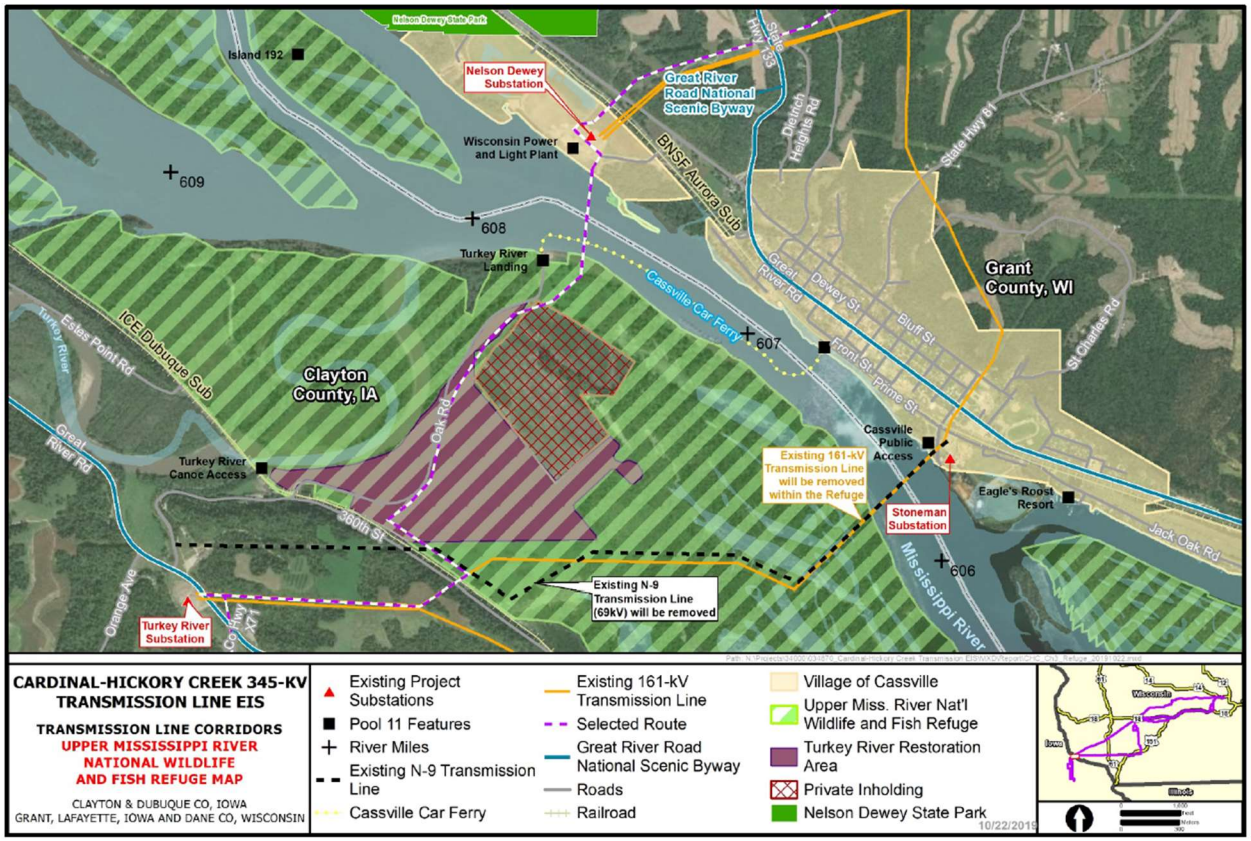
Map from the Record of Decision on the NEPA Review, ROD007625

The CHC transmission line towers will be about 195 feet high (*i.e.*, 20 stories high) on either side of the Mississippi River crossing, and 150 to 175 feet high (*i.e.*, 17+ stories) along most of the route. SPF at ¶¶ 1, 136. The towers will be built with two types of foundations: one would require holes 3 to 6 feet in diameter and 20 to 30 feet deep, and the other would require holes 5 to 12 feet in diameter and 20 to 60 feet deep. SPF at ¶ 163.

The proposed CHC transmission line will have a 150-foot-wide clear-cut right-of-way along most of its route, and a 260-foot-wide clear-cut right-of-way through the Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶¶ 2, 139. The right-of-way will be cleared of trees and plants to the ground before construction, and the trees and plants will be kept

down through cutting and herbicides for the entire life of the transmission line. SPF at ¶¶ 159-161.

In Iowa, the proposed transmission line would begin at the Hickory Creek substation and run for a short segment through Iowa before cutting a wide swath through the Upper Mississippi River National Wildlife and Fish Refuge and crossing the Mississippi River to reach Cassville, Wisconsin. SPF at ¶ 119.



Map from the Record of Decision on the NEPA Review, ROD007626

The Upper Mississippi River National Wildlife and Fish Refuge covers over 240,000 acres and extends 261 river miles from its north end at the confluence of the Chippewa River in Wisconsin to its south end near Rock Island, Illinois. SPF at ¶ 120. The northern and southern

boundaries of this protected National Wildlife Refuge roughly correspond to the northern and southern boundaries of the four-state Driftless Area. SPF at ¶121.

The Upper Mississippi River National Wildlife and Fish Refuge is designated as a Wetland of International Importance (Ramsar) and a Globally Important Bird Area. SPF at ¶ 122. The Refuge is a main route and stopping point on the Mississippi Flyway, a major north-south bird migration route used by up to 40% of North America's waterfowl. SPF at ¶ 123. The proposed east-west CHC transmission line would run perpendicular to the Flyway, creating a hazard to and killing the migratory birds. SPF at ¶ 189. The Refuge's wooded islands, marshes, and backwaters provide a home and important habitat for many types of unique fish, wildlife, and plants. SPF at ¶ 124. The right-of-way through the Refuge includes diverse non-forested and forested wetlands. SPF at ¶ 137.

The Transmission Companies propose to build the massive CHC transmission line on a new right-of-way through the National Wildlife and Fish Refuge. SPF at ¶ 134. The Transmission Companies have agreed to remove an older 69 kV transmission line that crosses the Refuge through a narrow right-of-way, and to relocate a 161 kV line in that right-of-way to the proposed new, larger 260-foot-wide CHC transmission line right-of-way. SPF at ¶¶ 132-133. The proposed route for the CHC transmission line would follow a different path than the existing lines by crossing the Mississippi River over a mile north of the existing River crossing. SPF at ¶ 134. The CHC transmission line would then cut a 150-foot-wide swath through the scenic Driftless Area landscape and communities in southwest Wisconsin on the way to ending at the Cardinal substation in Middleton, Wisconsin. SPF at ¶¶ 1, 151.

The Driftless Area, unlike much of the Midwest's landscape, was not flattened by glaciers, and its scenic landscape contains rolling hills and deep river valleys. SPF at ¶ 152. It is

a "truly unique landscape, rich in natural resources and well-known and appreciated for its natural scenic beauty." SPF at ¶ 153. It contains many rare and unique woodland, prairie, and riparian habitats. SPF at ¶ 152. The Driftless Area is home to numerous endangered and threatened species, includes many cold-water trout streams and high-quality wetlands, and contains several designated Important Bird Areas. SPF at ¶ 153. The proposed route for the CHC transmission line would run along and through the Military Ridge Prairie Heritage Area, which is identified as a high priority for landscape-scale grassland protection and management according to the Wisconsin Department of Natural Resources. SPF at ¶ 157. It would also pass near and through numerous other natural and recreation areas, including the Black Earth Creek Wildlife Area and the Southwest Wisconsin Grasslands and Stream Conservation Area. SPF at ¶ 158. With a "largely rural character," the Driftless Area "has emerged as an incubator for innovative agricultural enterprises, a home to thriving local and organic food economies, and a destination for visitors who appreciate the area's scenic beauty, recreational opportunities, and attractive communities." SPF at ¶ 155. The Driftless Area has a robust tourism economy based on the region's natural and outdoor recreation resources. SPF at ¶ 154.

The Transmission Companies have already begun building the CHC transmission line in the shorter Iowa segment where they have cut down trees, bulldozed most of the right-of-way, and begun construction. SPF at ¶ 167. With respect to Wisconsin, the Transmission Companies have now officially notified the parties and this Court that they plan to begin construction on October 25, 2021. SPF at ¶ 168. The Transmission Companies state that they plan to begin construction of their massive high-voltage transmission line through the Upper Mississippi River National Wildlife and Fish Refuge, with 195 foot high towers at the river crossing, in October

2022, SPF at ¶¶ 136, 169, after completing construction to the extent practicable up to the edge of the Refuge's borders on both sides.

II. Adverse Environmental Impacts of the Proposed CHC Transmission Line and High Towers

Preconstruction and construction work will cause significant damage to the environment, resulting in injury to Plaintiffs' members' use and enjoyment of the environment and causing direct harm to Plaintiffs' organizational interests, as further explained in Argument Section III, below.

Preconstruction activities include clearing the full right-of-way of all trees, grasslands, and plants, SPF ¶ at 159, which would cause immediate habitat destruction and disruption to wildlife, SPF at ¶ 187, raise the water temperature in cold water trout streams, SPF at ¶ 184, and cause immediate aesthetic harms, SPF at ¶¶ 185, 186. In addition to tree clearing, construction will involve filling wetlands, SPF at ¶ 172, regrading sloped sites, SPF at ¶ 164, and constructing access roads, temporary staging areas, and "laydown" yards SPF at ¶¶ 162, 165.

All of these destructive actions will have significant long-term adverse impacts on the 1,935 acres of right-of-way, 163 acres of access roads, and 213 acres of laydown yards, SPF at ¶¶ 170, 166, including increased erosion and sedimentation, SPF at ¶ 174, 175, 176, 177, creating new pathways for invasive species to spread, SPF at ¶¶ 179, 180, 182; *see* SPF at ¶ 30, compacting soils, including in sensitive agricultural fields, SPF at ¶ 188, and increasing the risk that birds, especially migratory birds using the north-south Mississippi Flyway, will fly into the line and be killed, SPF at ¶ 189. The project will also directly affect the 114 protected wetlands along the route, and the erosion, sedimentation, soil compaction, and invasive species spread from clearing of the right-of-way uphill from those wetlands will also put them at considerable risk. SPF at ¶ 171.

The Defendants acknowledge in their EIS that construction of the transmission line will cause "anticipated potential irreversible" impacts including "destruction of wetlands and floodplains," "destruction of terrestrial and aquatic vegetation and wildlife habitat, including forested areas and bluffs," and "alteration to the viewshed by clearing land, cutting and filling, and constructing transmission line structures." SPF at ¶ 190–191.

III. Impacts on Plaintiff Conservation Organizations and Their Members

Preconstruction and construction activities will harm Plaintiffs because Plaintiffs are nonprofit environmental organizations dedicated to protecting the natural and scenic resources of Wisconsin and the Driftless Area, including conservation and recreation areas. SPF at ¶ 10, 39. Damage to the numerous sensitive ecological areas through and near which the CHC transmission line would run, including the Military Ridge Prairie Heritage Area, Black Earth Creek Wildlife Area and Black Earth Creek watershed, Southwest Wisconsin Grasslands and Stream Conservation Area, designated Important Bird Areas, and many cold-water trout streams and high-quality wetlands, would therefore impair Plaintiffs' abilities to pursue their missions. SPF at ¶ 153, 157, 158.

In addition, Plaintiffs' members use and enjoy private lands and waterways, the Upper Mississippi River National Wildlife and Fish Refuge, and other public lands, including conservation areas and recreation areas that would be imminently and irreparably harmed.

For example, Dena Kurt, who is a member of both the Driftless Area Land Conservancy ("DALC") and Wisconsin Wildlife Federation ("WWF"), is an avid outdoor sports enthusiast who regularly enjoys canoeing and cross-country skiing in the area of the Upper Mississippi River National Wildlife and Fish Refuge through which the Transmission Companies would build the CHC transmission line. SPF at ¶ 12. Preconstruction and construction activities would impair her experience of being in a natural setting and would irreparably harm the ecosystems

and species which Ms. Kurt enjoys experiencing and viewing, because of the destruction and fragmentation of habitat, erosion, and sedimentation. SPF at ¶ 14. In particular, Ms. Kurt is concerned that clearing and maintenance of the wide right-of-way will cause increased run-off of soil and pollutants into the Mississippi River, with resulting sedimentation and algal blooms. SPF at ¶ 15. Clean and clear water is important to Ms. Kurt's enjoyment of paddling, because it allows her to view aquatic life, such as fish and mussels, and have a more enjoyable recreational experience. SPF at ¶ 16. Ms. Kurt is especially interested in mussels, including the federally endangered Higgins' eye pearlymussel, which lives in the Mississippi River at Cassville. SPF at ¶ 16. Sedimentation of mussel beds is considered a significant threat to the Higgins' eye pearlymussel. SPF at ¶ 17.

Dan Ashe is a member of the Board of Directors of the National Wildlife Refuge Association ("NWRA"). SPF at ¶ 58. Mr. Ashe served as the Director of the USFWS from June 2011 to January 2017, in addition to previously working in other roles at USFWS. SPF at ¶ 58. Mr. Ashe is concerned that allowing the massive transmission line and high towers through the Upper Mississippi River National Wildlife and Fish Refuge would set an unfortunate precedent for allowing additional transmission lines and rights-of-way through the protected Refuges. SPF at ¶ 59. In Mr. Ashe's professional opinion, allowing this new right-of-way through the Refuge would be precedent-setting because he is not aware of any similarly large new rights-of-way that have been allowed through the National Wildlife Refuges since the USFWS's compatibility regulations were adopted in 2000. SPF at ¶ 60.

Kerry Beheler, a member of WWF, worked as a Wildlife Health Specialist with the Wisconsin Department of Natural Resources from 1991 to 2004. SPF at ¶ 41. Her personal interests and hobbies include hiking, bird watching, upland game bird hunting, gardening, habitat

restoration, environmental education, and wildlife advocacy. SPF at ¶ 41. She uses and enjoys the area near the Upper Mississippi River National Wildlife Refuge, including the area near Cassville, Wisconsin where the proposed transmission line would cross, and she cares deeply about the wildlife that lives there. SPF at ¶ 42. Vegetation clearing will destroy and fragment habitat, introduce barriers to movement, and disturb wildlife. SPF at ¶ 43. Dredging and filling in the Refuge wetlands will impair their ecological value, and will likely result in increased turbidity and sedimentation in the Mississippi River, including in the essential habitat area for the federally endangered Higgins' eye pearlymussel. SPF at ¶ 44. The proposed construction of the CHC transmission line through the protected National Wildlife and Fish Refuge, including the dredging and filling in wetlands, would significantly detract from Ms. Beheler's enjoyment of the area. SPF at ¶¶ 44, 45.

DALC board member Mark Mittelstadt is a professional forester who provides ecologically-based woodland management. SPF at ¶ 25. As a volunteer, he maintains a native prairie at the Deer Valley Golf Course, just outside of Barneveld, Wisconsin, which provides habitat for species including the federally-listed regal fritillary butterfly and state-listed bird and plant species. SPF at ¶ 26. The CHC transmission line would run about a quarter mile from the prairie along the north edge of the Deer Valley Golf Course. SPF at ¶ 27.

Mr. Mittelstadt has actively managed this native prairie for 20 years, and he spends about 200 hours each year on the prairie. SPF at ¶ 26. Equipment used to clear and maintain the transmission line right-of-way, however, may introduce invasive plant species, which can then rapidly spread throughout the prairie. SPF at ¶ 28. Invasive plants are difficult to combat and, in some cases, such as poison parsnip, can even be harmful to humans. SPF at ¶ 28. Mr. Mittelstadt is also concerned about invasive species spreading to the prairie at the Thomas Historic Stone

Barn property, a protected conservation area, which is directly adjacent to the golf course, and on which DALC holds a conservation easement. SPF at ¶ 30.

Mr. Mittelstadt is also concerned that preconstruction and construction activity may disturb a pair of bald eagles that nests along Highway 18 / US 151. SPF at ¶ 31. Mr. Mittelstadt drives past the eagle nest regularly and often observes the nest and the eagles. SPF at ¶ 31. In addition, Mr. Mittelstadt's use of the Cassville ferry service would be less enjoyable if the CHC transmission line is constructed over the ferry's route between Cassville, Wisconsin and the landing in the Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶ 32.

Brian Durtschi, another DALC member, owns over 80 acres on the east side of Mount Horeb—a property with great scenic and recreational value with farmland, woods, Schlapbach Creek, and wetlands. SPF at ¶ 18-19. Wildlife including deer, turkey, other birds, and small mammals use Schlapbach Creek and the surrounding wetlands and wooded areas. SPF at ¶ 20. Mr. Durtschi enjoys seeing wildlife on his property, and also allows friends to use his property for hunting. SPF at ¶ 20. The planned CHC transmission line route would cut across his property through cropland, wooded areas, across Schlapbach Creek and its wetlands, and then continue over the Military Ridge State (Recreational) Trail. SPF at ¶ 21. Construction activities on Mr. Durtschi's property will include clearcutting a large swath of wooded area, destroying wildlife habitat and clearing plants around Schlapbach Creek and its wetlands. SPF at ¶ 22. Ground-clearing and bulldozing activities will likely cause significant erosion and sedimentation of the creek and its wetlands, especially due to the steep topography found on the property. SPF at ¶ 23. Moving heavy machinery through agricultural fields may cause irreversible soil compaction. SPF at ¶ 22.

Debora Morton is a DALC member who regularly visits, uses, and enjoys several recreational areas that would be damaged or affected by the CHC transmission line, including the Upper Mississippi River National Wildlife and Fish Refuge, Nelson Dewey State Park, Wyalusing State Park, and Pikes Peak State Park. SPF at ¶ 46. Ms. Morton camps, hikes, birdwatches, and enjoys the Mississippi River views in these protected public conservation and recreational areas. SPF at ¶ 46. Her use and enjoyment of these areas would be diminished if the CHC transmission line is constructed. SPF at ¶ 47.

Jean Luecke is a member of Defenders of Wildlife who enjoys recreational activities along the Mississippi River and in the area of the National Wildlife and Fish Refuge, including boating and going on river cruises. SPF at ¶ 48. Her use and enjoyment of the area would be diminished if the massive CHC transmission line and high towers are built, detracting from the scenic beauty of the area and negatively impacting wildlife. SPF at ¶ 49.

Todd Paddock is an NWRA member who lives two months out of the year in Winona, Minnesota. SPF at ¶ 50. When he is in Winona, he spends a great deal of time in the Upper Mississippi River National Wildlife and Fish Refuge, where he fishes, boats, walks, birdwatches, picnics, swims, and cycles, among other activities. SPF at ¶ 51. He also enjoys observing wildlife while fishing, hunting, or walking with friends. SPF at ¶ 52. Mr. Paddock has volunteered for the Refuge's Winona District Friends group, has introduced many others to the Refuge, and has sought to advocate for the Upper Mississippi River National Wildlife and Fish Refuge and the National Wildlife Refuge System more generally. SPF at ¶ 53. Mr. Paddock's enjoyment of the Refuge will be diminished if the CHC transmission line is built, as it would negatively impact wildlife populations and detracts from the scenic aesthetics of the area. SPF at ¶ 54.

Mary Kritz is a DALC member who enjoys visiting the Mississippi River in the area of the Refuge and Nelson Dewey State Park. SPF at ¶ 55. She also enjoys visiting and learning about Native American burial mounds in the area. SPF at ¶ 56. If built, the CHC transmission line would diminish her enjoyment of the natural areas near the Mississippi River and of burial mounds. SPF at ¶ 57.

IV. Impacts on Transmission Companies and the Public

While the destruction from clearing trees, grasslands, and plants in the right-of-way will cause immediate and irreparable harms to Plaintiffs and their members, those harms will of course likewise affect all of the other citizens who use and enjoy these vital natural resources. Moreover, from a monetary perspective, a construction delay will benefit the general public. The Public Service Commission of Wisconsin's staff's analysis and expert witness testimony concluded that, even under the Transmission Companies' cost-benefit models, postponing this expensive transmission line—which would cost ratepayers approximately $2.2 billion over the life of the project, SPF at ¶ 210—will save ratepayers money. SPF at ¶ 206. Demand for electricity in Wisconsin is flat or declining, not ever-increasing as the CHC transmission line proponents once assumed. SPF at ¶ 208.There is no shortage of electricity in Wisconsin, and, even since the beginning of this litigation, Wisconsin continues to add substantial local solar power generation projects, that further reduce any perceived "need" to import electricity from other states. SPF at ¶ 209.

The Transmission Companies may allege that delay will increase construction costs, but this project was first proposed over a decade ago and any short-term financial cost increases from a temporary construction halt to maintain the status quo will not be significant relative to the overall transmission line costs proposed on ratepayers. Moreover, the Transmission

Companies are fully insulated from the risk of project delay or cancellation. Special incentives granted by the Federal Energy Regulatory Commission ("FERC") not only allow these companies to recover 100% of the cost of construction from ratepayers, but also 100% of any additional costs or expenses should the project be delayed or cancelled for reasons beyond their control.[8] The Transmission Companies will suffer no adverse impact, but commencement of construction will cause irreparable harm to the environment, to the Plaintiffs, and to members of the general public.

V. Procedural History

The proposed CHC transmission line has required a number of state and federal permits and approvals.

On the federal side, which is the subject of this litigation, the proposed CHC transmission line has required:

(1) Permits from the Defendant Corps to do work in navigable waters, including the Mississippi River under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403;

(2) Permits from the Defendant Corps under Section 404(e) of the Clean Water Act, 33 U.S.C. § 1344(e), to discharge dredged and fill materials into "waters of the United States," including the 114 protected wetlands along the route;

(3) Permission from Defendant USFWS to cross the protected Upper Mississippi River National Wildlife and Fish Refuge, which requires a formal determination by the

[8] See Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 76; 18 C.F.R. § 35.35(d); Order Granting Abandoned Plant Incentive, 166 FERC P 61025 (F.E.R.C.), 2019 WL 256477 (Jan. 17, 2019) (American Transmission Company, LLC); Order Granting Abandoned Plant Incentive, 166 FERC P 61024 (F.E.R.C.), 2019 WL 256471 (ITC Midwest, LLC); Order on Transmission Rate Incentives, 161 FERC P 61301 (F.E.R.C.), 2017 WL 6673236 (Dairyland Power Cooperative).

Refuge manager that the project would be "compatible" with and "contribute to" the Refuge's wildlife protection and preservation purposes (a "Compatibility Determination") under the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd.[9]

(4) The Defendant USFWS must also approve conveying a right-of-way for this huge proposed transmission line to run through the protected National Wildlife and Fish Refuge.

(5) Because federal permits are required and one of the Transmission Companies intends to seek a federal loan for the project, an environmental impact statement ("EIS") is required under NEPA, 42 U.S.C. §§ 4321 *et seq.* NEPA requires that major federal actions, including granting permits or financial assistance to projects that might have a significant impact on the environment, must be preceded by an EIS that "rigorously explores and objectively evaluates all reasonable alternatives," among other NEPA requirements. 40 C.F.R. § 1502.14.

A. Environmental Review

Defendant RUS, part of the U.S. Department of Agriculture, instead of one of the environmental agencies, took the lead responsibility for preparing the EIS, apparently because one of the Transmission Companies had expressed interest in an RUS loan.[10] SPF at ¶¶ 5–6. Defendants USFWS and the Corps, along with the U.S. Environmental Protection Agency ("U.S. EPA"), participated as cooperating agencies. SPF at ¶¶ 8, 9.

[9] Defendant USFWS now asserts that if the agency conveys fee title to the right-of-way as part of a land exchange, instead of granting an easement and special use permit, with land donated to partially offset damages, the change in form will eliminate the statute's "compatible use" requirement. As Plaintiffs will explain in section II.B of the Argument below, the federal statute is not so easily brushed aside, and Defendants' reading of the law is clearly in error.

[10] Dairyland states that it intends to seek funding from the Rural Utilities Service in 2022 or 2023. SPF at ¶ 7.

RUS invited public comments on the proper scope of the EIS in 2017 and then issued a draft EIS on December 7, 2018. SPF at ¶¶ 73, 75. Plaintiffs Driftless Area Land Conservancy and Wisconsin Wildlife Federation submitted extensive written comments on the proper scope of the EIS and then submitted extensive written comments on the draft EIS. SPF at ¶¶ 76, 77. They urged RUS and the cooperating agencies to both: (1) fully and fairly rigorously explore and objectively evaluate reasonable "non-wires" alternatives—including distributed solar energy generation plus energy storage, energy efficiency, demand response and local transmission line upgrades and improvements, and other "alternative transmission solutions" in southwest Wisconsin—that could create transmission system benefits at a lower cost and with less adverse environmental impacts; and (2) fully and fairly rigorously explore and objectively evaluate reasonable alternative routes that would avoid cutting a wide swath through the protected Upper Mississippi River National Wildlife and Fish Refuge and the scenic Driftless Area landscape, family farms, rural communities, and vital natural resources. SPF at ¶ 78.

During the scoping process, the U.S. EPA also raised concerns about the proposed route running through the protected Upper Mississippi River National Wildlife and Fish Refuge. The U.S. EPA recommended that alternative routes avoiding the Refuge be fully considered. SPF at ¶ 74.

DALC and WWF also specifically raised concerns by explaining that the "purpose and need" statement in the EIS was written so impermissibly narrowly that it precluded full and fair consideration of reasonable alternatives other than the Transmission Companies' proposed huge high-voltage transmission line running on essentially the Transmission Companies' proposed route between the Hickory substation near Dubuque, Iowa, through the Upper Mississippi River National Wildlife and Fish Refuge, and then through the scenic Driftless Area landscape and

vital natural resources to the Cardinal substation in Middleton, Wisconsin. SPF at ¶ 79. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) ("If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.") DALC and WWF also explained that the EIS must analyze the cumulative impacts of the CHC transmission line, along with all "past, present, and reasonably foreseeable" future high-voltage transmission lines projects and other electricity infrastructure in the relevant geographic area. SPF at ¶ 80.

Defendant RUS did not make significant changes in response to the Plaintiffs' and others' comments, in publishing the final EIS on October 23, 2019. SPF at ¶ 81. On January 16, 2020, Defendants RUS, USFWS, and the Corps issued a Record of Decision approving the final EIS. SPF at ¶¶ 82–83.

B. Defendant USFWS's Approval of a Right-of-Way Cutting Across and Through the Federally Protected Upper Mississippi River National Wildlife and Fish Refuge

The proposed CHC transmission line is massive: a 345-kV high-voltage transmission line with 20-story high towers on either side of the Mississippi River, and much wider H-style towers through the forested parts of the Refuge. SPF at ¶ 136. To accommodate the wider H-style transmission towers, the proposed right-of-way would be 260 feet wide through the Refuge, that is 110 feet wider than the right-of-way for the rest of the transmission line. SPF at ¶ 139.

From the beginning of the process, the managers of the USFWS's Upper Mississippi River National Wildlife and Fish Refuge advised the Transmission Companies to find non-Refuge river crossing alternatives because a new huge high-voltage transmission line and high towers could not meet the Refuge Act's prohibition against uses that were not "compatible with" the Refuge's wildlife conservation purposes. As noted above, the U.S. EPA also urged

alternative routes that would avoid running through the protected Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶ 74.

In 2012, Tim Yager, Assistant Refuge Manager, wrote in an email that he had discussions with ATC, one of the Transmission Companies, that "focused on the use of existing rights-of-way and or avoidance of the Refuge as the only compatible alternatives for crossing the Refuge." SPF at ¶ 125. The "Cooperating Agency Kickoff Meeting Notes" from the Defendant federal agencies' September 21, 2016, meeting focused on the EIS for the proposed CHC transmission line, state: "The USFWS would prefer the transmission line not to cross the Refuge; therefore, it is important to identify the River Crossing Analysis as such since it involves alternatives not crossing the Refuge (i.e., City of Dubuque)." SPF at ¶ 126.

On December 19, 2019, however, Defendant Sabrina Chandler, the Manager of the Upper Mississippi River National Wildlife and Fish Refuge, issued a document called a "Compatibility Determination." SPF at ¶ 127. This document did *not* find that the CHC transmission line, towers, and 260-foot clear-cut right-of-way are compatible with the Refuge's wildlife purpose, but instead concluded that the massive transmission line could be grandfathered in as "a *minor* realignment of an existing right-of-way to meet safety standards" (emphasis added) because the Transmission Companies had agreed to take down two older, smaller, low-voltage transmission lines that crossed the Refuge and the Mississippi River about a mile downstream and to revegetate their narrower right-of-way. SPF at ¶¶ 128-130, 133. The USFWS Regional Director concurred with the determination the day after it was issued. SPF at ¶ 127. On or about September 8, 2020, Defendant USFWS granted a right-of-way authorization and special use permit, based on the "Compatibility Determination," for the CHC transmission line to cross the Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶ 131. Only after the

Plaintiffs filed their lawsuit and just a week before these cross-motions for summary judgments and accompanying briefs were due to be filed, the Defendants then notified Plaintiffs and this Court that the USFWS's authorization and permit were changing, however, as explained in Section D below.

C. Defendant U.S. Army Corps of Engineers' Use of Only "General" Permits

The Transmission Companies did not seek, and therefore the Corps did not conduct, the analysis required to issue an "individual" permit for the CHC transmission line under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Instead, the Corps' District Engineers in Rock Island and St. Paul "verified" that the project came within their definition of a "utility line," and relied only on so-called "general" permits: "Nationwide Permit 12" in Iowa for the Rock Island District and the St. Paul District's "Utility Regional General Permit" in Wisconsin. SPF at ¶ 84. The Corps had most recently reauthorized Nationwide Permit 12 in 2017, and the St. Paul's Utility Regional General Permit had been readopted in 2018. SPF at ¶¶ 196–197. Neither general permit was preceded by an EIS or a programmatic consultation with USFWS under Section 7 of the Endangered Species Act. SPF at ¶¶ 198–202.

D. New Developments Following Plaintiffs' Filing of This Lawsuit

Plaintiffs filed their Complaint challenging the Defendants' flawed "Compatibility Determination" and NEPA review on February 10, 2021. Case No. 21-cv-00096, Dkt. 1. Plaintiffs filed a separate Complaint on May 5, 2021 challenging the Corps' permitting decisions, and the two cases were consolidated. Case No. 21-cv-00306, Dkt. 1, 22; Case No. 21-cv-00096, Dkt. 48. After Plaintiffs filed their Complaints in these consolidated cases, the Transmission Companies first submitted a modified application to Defendant USFWS seeking approval for the CHC transmission line, towers, and 260-foot right-of-way to enter the protected

National Wildlife and Fish Refuge at a slightly different location, apparently to avoid burial mounds. SPF at ¶ 144.

In June 2021, Defendant RUS issued a draft Environmental Assessment ("EA") examining the impacts of the Transmission Companies' requested route modifications. SPF at ¶ 145. The EA concluded that the route modifications do not result in significant changed circumstances or new impacts, meaning that RUS does not intend to prepare a full EIS. SPF at ¶ 146. The EA states that USFWS may, "[i]f determined appropriate," issue an "amended" Compatibility Determination for the modified route through the Refuge, but the USFWS has not committed to doing so. SPF at ¶ 147. The EA also states that Defendant USFWS "would need to issue an amended [right-of-way] permit" and that the "Special Use Permit may need to be amended." SPF at ¶ 147.

In July 2021, the Transmission Companies proposed to USFWS that their right-of-way across the Upper Mississippi River National Wildlife and Fish Refuge be converted from an easement grant to a land exchange, which they claimed would somehow not be subject to the Refuge Act's compatibility requirements. SPF at ¶ 148. On August 27, 2021, shortly before the cross-motions for summary judgment and briefs were due to be filed on September 3, 2021, the Defendant USFWS informed the Plaintiffs and this Court that it was withdrawing its previous "Compatibility Determination" and right-of-way permit in order to pursue the land exchange. SPF at ¶ 150. USFWS stated that it had discovered a flaw in its review of the existing transmission line easement documents during its issuance of the "Compatibility Determination," and that the proposed land exchange could obviate those problems as well. SPF at ¶ 150. To date, no land exchange has been formally approved or completed, but Defendant USFWS and the Transmission Companies have indicated their intent that the land exchange will keep the same

right-of-way in place. SPF at ¶ 149. In other words, the proposed massive transmission line would run through the same place in what is currently the protected Upper Mississippi National Wildlife and Fish Refuge.

ARGUMENT

I. INTRODUCTION

In the Seventh Circuit, a party seeking a preliminary injunction must show: "(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits." *Whitaker.*, 858 F.3d at 1044. Once a plaintiff makes that threshold showing, the Court then conducts "a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.* at 1044. Courts in this circuit employ "a sliding scale approach" to this balancing in which "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc*., 549 F.3d 1079, 1086 (7th Cir. 2008) (*quoting Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)); *see also Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

Plaintiffs in this case can clearly make the showing necessary for a preliminary injunction that will preserve the status quo until this Court can decide the merits of the Plaintiffs' federal environmental claims. *First*, Plaintiffs are likely to succeed on the merits of their claims that the federal Defendants have violated NEPA's requirement that major federal actions be preceded by a legally sufficient environmental impact statement. The final EIS, however, unduly constricts the "purpose and need" statement to predetermine the result of choosing the Transmission

Companies' proposed huge CHC transmission line. The EIS does not rigorously explore and objectively evaluate all reasonable alternatives that are practical and less environmentally damaging, including non-wires and alternative transmission solutions and routes that would avoid running through the Refuge. Moreover, the EIS does not adequately assess cumulative impacts, and it all but ignores potential climate change impacts. *Second*, Plaintiffs are likely to succeed on the merits of their claims that the Defendant USFWS has violated or is about to violate the National Wildlife Refuge System Improvement Act's prohibition against uses of National Wildlife Refuges that are incompatible with a Refuge's purposes. *Third*, Plaintiffs are likely to succeed on the merits of their claims that the General Permits, which Defendant Corps has used and intend to use for the CHC transmission line are invalid and violate the requirements for general permits in Clean Water Act section 404(e), 33 U.S.C. § 1344(e), the requirement in NEPA that "major federal actions" be preceded by an environmental impact statement, and the requirement in Section 7 of the Endangered Species Act ("ESA") that federal policies posing a threat to protected species be preceded by programmatic consultation with the USFWS.

In the absence of a preliminary injunction, Plaintiffs are likely to suffer imminent irreparable harm. Land clearing, tree and plant removal, habitat destruction, and other construction activities that have already begun in Iowa, and are set to commence as soon as October 25, 2021 in Wisconsin, will cause sedimentation, runoff, habitat destruction, propagation of invasive species, and aesthetic harms for many of Plaintiffs' members. SPF at ¶ 10-11, 18-31, 34-35. Plaintiffs also have significant interest in protecting the Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶ 12-17, 40-45. While construction through the Refuge itself has been pushed back to fall of 2022, if the Iowa and Wisconsin segments comprising the rest of the 100-mile transmission line are built up to the borders of the Refuge,

the Transmission Companies and the Defendant federal agencies will likely argue that this locks them into running through the Refuge at the proposed location and thereby preclude meaningful consideration of all reasonable alternatives. That momentum is, in and of itself, irreparable injury. *Colorado Wild, Inc. v. United States Forest Serv.*, 523 F.Supp.2d 1213, 1221 (D. Colo. 2007).

There is no adequate remedy at law for these irreparable harms because monetary damages are not available; it would be challenging to restore the environment once it is damaged; and monetary damages, even if available, could not compensate for the lack of meaningful consideration of alternatives after most of the transmission line with 17- to 20-story high towers is built. The balance of the equities favors an injunction because the imminent, irreparable environmental harms Plaintiffs face and the public's interest in environmental preservation and in ensuring that federal agencies fully comply with their duties under federal law outweigh the negligible costs the federal Defendants and the Intervenor-Defendants might face if construction of this private project is halted temporarily and the status quo is maintained until this Court can rule on the merits of this case. The ratepaying public will benefit if this transmission line is delayed. There is no need for additional electricity "to keep the lights on," as the continued development of solar energy generation in Wisconsin reduces any perceived need to import more electricity from out-of-state. And any additional construction costs the Transmission Companies might incur are fully recoverable under the FERC incentives available to them. Therefore, this Court should grant Plaintiffs' requested preliminary injunction.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

In order to meet the likelihood of success requirement for a preliminary injunction in the Seventh Circuit, the moving party "need not show that it definitely will win the case," but must

"include[] a demonstration of how the applicant proposes to prove the key elements of its case." *Illinois Republican Party v. Pritzker,* 973 F.3d 760, 763 (7th Cir. 2020). Plaintiffs easily meet that test in this case:

1. Plaintiffs clearly have both direct standing and organizational standing based on members' interests.
2. The Defendants' Environmental Impact Statement prepared for this project violates NEPA and the Council on Environmental Quality's ("CEQ") environmental review rules. First, the EIS improperly adopts the Transmission Companies' artificially narrow Purpose and Need Statement and, as a result, does not seriously consider less environmentally damaging "non-wires" alternatives, and does not consider alternative routes that do not run through the protected National Wildlife and Fish Refuge at all. Second, the EIS makes no attempt to assess the cumulative impacts of the CHC transmission line together with the previous CapX2020 and Badger-Coulee high-voltage transmission lines built in this region, nor the proposed SOO Green high-voltage transmission line running from Mason City, Iowa to Chicago, and it imposes arbitrarily narrow restrictions on its analysis of present and future projects. Third, the EIS makes no attempt to estimate the upstream or downstream greenhouse gas emission impacts of the fossil fuel generated electricity that the CHC transmission line will carry.
3. Allowing the massive CHC transmission line to run through the Upper Mississippi River National Wildlife and Fish Refuge is flatly contrary to the National Wildlife Refuge System Improvement Act of 1997 because it is, as Defendants concede, not "compatible" with the Refuge's wildlife protection purposes. Defendants' attempt to "grandfather in"

the CHC transmission line or to use a "land exchange" to get around the "compatible use" rules cannot be reconciled with the law's requirements.

4. The Defendant Corps' General Permits: (a) violate the Clean Water Act because they allow more than "minimal" impacts on the environment; (b) violate NEPA because they were promulgated without an EIS; and (c) violate the Endangered Species Act because they were promulgated without the programmatic consultation required by Section 7.

A. Plaintiffs Have Standing.[11]

In order to establish Article III standing, Plaintiffs must establish: (1) an injury in-fact, (2) that is fairly traceable to the challenged conduct, and (3) seek a remedy that is likely to prevent or redress the injury. *Uzuegbunam v. Preczewski,* 141 S.Ct. 792, 797 (2021). An organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).[12]

Plaintiffs' members have standing to sue in their own right. These members include people who own property that would be taken to build the transmission line and very high towers, and their use and enjoyment of their property and their property's economic value will be impacted by the transmission line's construction. SPF at ¶¶ 18–24. Plaintiffs also have members who use and enjoy the Upper Mississippi River National Wildlife and Fish Refuge and natural

[11] *See* Plaintiffs' Summary Judgment Brief, at 27-32.

[12] Defendants do not dispute that the interests Plaintiff organizations are seeking to protect are germane to their organizational purposes, nor do they contend that there is any need for the participation of individual members in this lawsuit. Therefore, the only standing question is whether Plaintiffs' members would have standing to sue in their own right.

areas in Southwestern Wisconsin along the transmission line's route, and their enjoyment of those areas would be diminished by clearing and maintenance of the CHC project's right-of-way, as well as by construction of the transmission line and its 17-story towers. SPF at ¶¶ 11-17, 25-32, 34-35, 40-45, 67, 71. Plaintiffs' members also enjoy viewing native animal, tree, and plant species that would be harmed by construction of the line. SPF at ¶ 13-16, 20-22, 26-31, 41-45; *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."). Because the Transmission Companies have already cleared most of the shorter Iowa segment of the CHC project's right-of-way, and advised that they intend to commence construction of the transmission line in Wisconsin on October 25, 2021, these concrete and particularized harms are not speculative, but are actual and imminent and constitute injuries in fact. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 181–84 (2000); *American Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 658 (7th Cir. 2011).

The fact that many of Plaintiffs' members live, work, or play near the proposed CHC transmission line right-of-way, and will suffer diminished enjoyment of the land and the amenities likely affected by the project, is enough to establish standing. The U.S. Supreme Court has squarely held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw,* 528 U.S. at 183 (*quoting Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)); *see e.g. Indiana Forest All., Inc. v. U.S. Forest Serv.,* 325 F.3d 851, 855 n.4 (7th Cir. 2003) (use of a National Forest for "hiking, camping, and birding" enough to establish standing for a NEPA and National Forest Management Act lawsuit).

These imminent injuries in fact are fairly traceable to the Defendants' conduct. The Defendants attempt to minimize the federal role, but the central fact remains that the CHC project as currently proposed cannot be built without the federal permits and approvals. The CHC transmission line can only be built with a valid finding that the project is "compatible" with the Refuge's wildlife purposes, with valid Clean Water permits for all parts of the project that would result in dredged or fill materials being discharged into protected waterways and wetlands, and with an adequate EIS preceding all federal decisions.

That is why a favorable decision from this Court would redress Plaintiffs' members' injuries by vacating the Defendant USFWS's decision granting a right-of-way through the Refuge. Similarly, if the Plaintiffs prevail on their claims against the Defendant Corps, then the agency would have to issue new, valid Clean Water Act permits—after adequate consideration of environmental impacts, alternatives, and the public interest—before the transmission line could be built. And, similarly, if the Defendants' Record of Decision is vacated and remanded, the federal agencies would have to redo the EIS process to comply with NEPA, and no necessary federal permits or approvals could go forward until that process was completed, which could result in better, and more environmentally-protective alternatives.

The Defendants apparently deny that Plaintiffs have standing, at least on the NEPA claims. They argue that, since it was the possibility of Defendant RUS's funding that triggered the EIS requirement, then Plaintiffs have to show that the funding, by itself, caused or is causing Plaintiffs' injuries. Dkt. 93 at 43–44. Caselaw is clear, however, that remanding for an agency to redo a NEPA analysis in compliance with the law provides redress for injuries stemming from a project's environmental harms because, even though there is no guarantee the agency would come to a different decision on the merits, an agency *could* decide differently after a proper

NEPA analysis. *Lujan*, 504 U.S. at 573 n.7; *American Rivers v. Federal. Energy Reg. Comm'n*, 895 F.3d 32, 42 (D.C. Cir. 2018) (finding the redressability prong of standing met because "[r]equiring the Commission to prepare an Environmental Impact Statement might cause the Commission to gather more information that could improve the conditions in the license and the conditions of the Coosa River.").

In this case, a new EIS that fully evaluates (1) non-wires alternatives, (2) alternative routes that would avoid running through the protected National Wildlife and Fish Refuge, (3) the cumulative impacts of the past, present, and future accumulation of high-voltage transmission lines and other development projects in this region, and (4) potential climate impacts could well provide any of the federal Defendants, including USFWS and the Corps, a strong basis to reconsider their decisions. A revised EIS would also give members of the public the information they need to decide on whether the project should go forward as proposed, or they should take additional efforts to get it stopped or modified. Those informational or procedural injuries, plus the environmental harm caused by the CHC transmission line and towers, are enough to confer standing on Plaintiffs' members. As Justice Scalia recognized in *Lujan:*

> There is this much truth to the assertion that "procedural rights" are special. The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

504 U.S. at 572 n.7. Here, Plaintiffs' members live, work or play "adjacent to the site for proposed construction," *and* they have Defendants' own words that construction is imminent. Even under *Lujan,* that is more than enough for standing to make NEPA claims, or a claim based the consultation requirement in the ESA, whether the claims be project-specific or programmatic.

Sierra Club v. Marita, 46 F.3d 606, 611-12 (7th Cir. 1995) (plaintiffs who used and enjoyed national forest had standing to challenge programmatic forest plan); *Barnes v. Shalala,* 865 F. Supp. 550 (W.D. Wis. 1994) (milk product consumers had standing to challenge FDA decision allowing use of bovine growth hormone).

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Environmental Impact Statement for the CHC Project Did Not Meet the Requirements of the National Environmental Policy Act (NEPA).[13]

The Defendants' final Environmental Impact Statement violates NEPA's requirements in four critical ways: (1) the EIS's unduly constricted purpose and need statement improperly limited the range of alternatives the agencies fully considered, and (2) the EIS violated the requirement to "rigorously explore and objectively evaluate all reasonable alternatives," including non-wires alternatives and alternative transmission solutions,[14] as well as alternative routes that would avoid running through the Refuge and the southwest Wisconsin Driftless Area. 40 CFR § 1502.14; (3) the EIS failed to assess the cumulative environmental impacts of the proposed CHC transmission line—"the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"—together with all other transmission lines and development projects, 40 C.F.R. § 1508.7; and (4) the EIS failed to adequately analyze climate change impacts. Because of these failures, the Defendants' Record of Decision finding that the EIS complied with NEPA was "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[13] *See* Plaintiffs' Summary Judgment Brief at 32–53.
[14] *See* Plaintiffs' Summary Judgment Brief at 38–40.

1. The Defendants' Purpose and Need Statement Was Unduly Narrow and Precluded Full and Fair Consideration of Alternatives as NEPA Requires and the Seventh Circuit Held in *Simmons*.

First, Defendants erred as a matter of law from the outset by accepting the impermissibly and unduly constricting and narrow "purpose and need statement" urged by the Transmission Companies for what should be an independent NEPA environmental analysis. SPF at ¶ 86. The purpose and need statement frames the problem that must be solved and therefore defines the range of reasonable possible alternatives that must be "rigorously explore[d] and objectively evaluate[d]." 40 C.F.R. § 1502.14. An unreasonably narrow purpose and need statement constricts the range of alternatives analyzed, and undermines the federal agencies' ability to conduct an EIS that meets NEPA's requirements.

As the Seventh Circuit has explained:

> When a federal agency prepares an Environmental Impact Statement (EIS), it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195–96 (D.C.Cir.1991). The broader the purpose, the wider the range of alternatives; and vice versa. The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

Simmons, 120 F.3d at 666; *see also Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) ("[T]he evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.") (emphasis in original); *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1072 (9th

Cir. 2010) (an agency may not "adopt[] private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives"); *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 978 (S.D. Cal. 2015)*, modified on reconsideration sub nom. Backcountry Against Dumps v. United States Dep't of Energy*, No. 3:12-CV-03062-L-JLB, 2017 WL 2988273 (S.D. Cal. Jan. 30, 2017) (rejecting EIS for transmission line because "the purpose and need statement [was] too narrowly drawn and focused almost exclusively on private interests," which was then used to foreclose the consideration of an alternative of building distributed generation—solar panels in urban areas— instead of the new transmission line.)

Here, Defendants likewise adopted the Transmission Companies' desired, self-limiting purpose and need, SPF at ¶ 86, and thereby unduly constricted the range of reasonable alternatives NEPA requires they must independently consider. The Transmission Companies insisted that any alternative had to "increase the transfer capacity of the electrical system between Iowa and Wisconsin," SPF at ¶ 76, a purpose which could only be met by their proposed high-voltage transmission line.

"Increas[ing] the transfer capability of the electrical system between Iowa and Wisconsin" is a "means" rather than an "end," and is simply a description of the "means" the Transmission Companies want to build. Some of the other elements of the purpose and need statement, to the extent they are true needs,[15] can be equally and better addressed with non-wires alternatives and other alternative transmission solutions, which the Defendants' EIS failed to fully and fairly consider contrary to NEPA's requirements.

[15] Plaintiffs do not concede that they are.

2. The Defendants' EIS Failed to Rigorously Explore and Objectively Evaluate All Reasonable Alternatives as NEPA Requires.

The agency conducting an EIS must take a "hard look" at alternatives. That is "'the heart of the environmental impact statement.' 40 C.F.R. § 1502.14." *Simmons*, 120 F.3d at 666. In this case, there are many other alternative energy solutions and technologies that can offer the same benefits to the transmission system as building a massive new transmission line (and can do it with less environmental damage, and likely cheaper and faster). SPF at ¶ 91. These include employing high tech power management, deploying distributed solar energy and other renewable energy generation nearer to where it's needed and being used, upgrading existing lines, and using well-known and ubiquitous energy efficiency and demand response approaches, if needed, to hold down peak demand that can stress the grid. SPF at ¶ 91.

Defendants, however, rejected those alternatives—energy storage, energy efficiency, and demand response—summarily because they would not increase Iowa-Wisconsin electricity transfer capacity. SPF at ¶ 88. For the same reason, Defendants also did not consider the option of building a new transmission line on a route that avoids cutting through the Refuge and the Driftless Area (such as the route for the proposed SOO Green Line transmission line[16]). SPF at ¶ 95, 96, 97.

Defendants describe their purpose and need statement as an outgrowth of a regional planning process under the auspices of the Midcontinent Independent System Operator ("MISO"), a regional transmission organization. Dkt. 93 at 57–60. The implication is that MISO

[16] Plaintiffs DALC and WWF specifically commented on the Draft EIS that the agencies should consider other route options, such as those proposed for the SOO Green Renewable Rail project, an underground transmission line primarily utilizing existing railroad rights-of-way, which would run from Mason City, Iowa to just outside of Chicago. Plaintiffs noted that even if the specific SOO Green project was not built, this and similar proposals show that there are alternative corridors and routes for moving power from west to east that would avoid significant adverse environmental impacts on the special scenic Driftless Area landscape and unique natural resources. SPF at ¶ 97.

concluded that there was a need to "increase transfer capacity" between eastern Iowa and south-central Wisconsin and that only a large high-voltage transmission line could meet that need. That is simply not what MISO did. MISO did a study in the late 2000's, more than a decade ago, which recommended a regional buildout of additional transmission capacity, but it never assessed the needs or costs of any particular transmission line project. SPF at ¶ 211. Moreover, the MISO report assumed ever-increasing demand each year for electricity in Wisconsin and did not consider non-wires alternatives to maximize the capacity of the existing grid, such as battery storage, distributed renewable energy generation, and energy efficiency. SPF at ¶ 212.

The assumption of ever-increasing electricity demand has proven false over the past decade, SPF at ¶ 208, and efficient and cost-effective alternative technologies are readily available. For example, Public Service Commission of Wisconsin staff found that if the CHC transmission line was modeled in a world with 450 MW of new solar generation in Wisconsin, then the benefits of the line collapse to near zero. SPF at ¶ 207. Developers are now moving forward with more than 2,000 MW of Wisconsin-based solar energy generation, and more is on the way. SPF at ¶ 209. There is no basis for the Defendants' argument that somehow the MISO process from a decade ago requires the addition of this high-voltage transmission line between the Cardinal and Hickory Creek substations.

To the extent RUS considered non-wires alternatives and alternative transmission solutions at all, Defendants compounded their error by considering only individual measures in isolation, rather than considering realistic "packages" of these solutions, such as solar energy generation with battery storage. SPF at ¶ 90.

Of course, non-wires options work best in combination. As solar and energy storage expert Kerinia Cusick explained at the PSCW hearing: "The Applicants failed to evaluate

proven, non-wires-based solutions such as power electronics, energy storage, solar, and load control, and energy efficiency, and demand response approaches in effective combinations to augment the performance of the existing transmission infrastructure, thereby potentially meeting the transmission need more effectively and efficiently." SPF at ¶ 92.

In *Sierra Club, Illinois Chapter v. U.S. Department of Transportation*, 962 F. Supp. 1037 (N.D. Ill. 1997), the district court reversed the federal agency in an analogous situation involving a skewed and unduly limited consideration of alternatives to building a proposed large new tollroad in Chicago's exurbs:

> Plaintiffs' argument is persuasive. … In particular, the final impact statement contains a socioeconomic forecast that assumes the construction of a highway such as the tollroad and then applies that forecast to both the build and no-build alternatives. The result is a forecast of future needs that only the proposed tollroad can satisfy. As a result, the final impact statement creates a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible.

Id. at 1043. Because the impact statement did not provide information on how and to what extent the new tollroad would reduce travel times, it "d[id] not provide a basis for analyzing alternatives as to these current needs." *Id*. at 1044. The court concluded that "the final impact statement does not provide enough information to make a reasoned decision as to possible alternatives." *Id*. at 1045.

In *Environmental Law & Policy Center v. U.S. Nuclear Regulatory Commission*, 470 F.3d 676 (7th Cir. 2006), the Seventh Circuit held that the Nuclear Regulatory Commission had not violated NEPA when it failed to consider energy efficiency alternatives in its EIS for its grant of an "early site permit" for a new nuclear power plant in Illinois. *Id.* at 684. An early site permit allows an applicant to hold a site for possible future construction of a nuclear power plant, but the company would have to apply for a second permit in order to actually authorize construction. The Seventh Circuit held that the NRC did not have to consider energy efficiency in the EIS for

the early site permit because energy efficiency would be considered as an alternative during a later "need for power" analysis that would occur at the construction permitting stage. *Id.* at 684. That situation is clearly unlike this one, in which the NEPA review for the CHC transmission line occurs in one stage and is completed.

Likewise, as explained above and in more detail in Plaintiffs' Summary Judgment Brief at 40–41 the Defendants' EIS fails to fully and fairly consider alternative routes that would avoid running through the Refuge and the southwest Wisconsin Driftless Area. 40 C.F.R. § 1502.14.

3. The Defendants' EIS Failed to Fully and Fairly Consider the Cumulative Impacts of the Proposed CHC Transmission Line in Combination with All Past, Present, and Reasonably Foreseeable Future Projects as NEPA Requires.

Defendants also violated NEPA by failing to adequately consider the cumulative impacts of this line in combination with other transmission lines as well as other large infrastructure projects such as highways that put additive pressures on the same ecosystems, watersheds, and species. 40 C.F.R. §§ 1508.25(a)(2), (c)(3). CEQ's regulations explain that:

> *Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (emphasis in original); *see generally, Delaware Riverkeeper Network v. FERC,* 753 F.3d 1304, 1319 (D.C. Cir. 2014).

NEPA's "hard look" requirement extends to cumulative impacts, and analyses fall short of that requirement if they include so little "detail and quantification . . . such that an objective reviewer cannot be confident that the agency took the hard look at environmental consequences that NEPA requires." *Habitat Educ. Ctr., Inc. v. Bosworth (Habitat II),* 363 F.Supp.2d 1090, 1101 (E.D. Wis. 2005); *see also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d

1372, 1379 (9th Cir. 1998) ("To 'consider' cumulative effects, some quantified or detailed information is required.").

Defendants' EIS does not analyze cumulative effects from the CHC transmission line in combination with *past* actions and already-built projects in the region at all. The EIS ducks this analysis altogether by arguing that:

> The cumulative effects of past actions are accounted for in the description of the affected environment presented for each resource in Chapter 3; therefore, no past projects are included in the cumulative action scenario.

SPF at ¶ 98.

But federal agencies may not completely dispense with consideration of past actions when assessing cumulative impacts, merely by reciting magic words that a description of current conditions includes the current aggregative effects of past actions. They simply cannot lawfully ignore specific past projects of the same kind in the same geographic area, with no attempt to assess how those projects together might affect the region's aesthetics, wildlife habitat, resiliency, and recreational uses. *See, e.g. City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (rejecting EIS for "describ[ing] past projects in the area with generalities insufficient to permit adequate review of their cumulative impact); *Indigenous Env't Network v. United States Dep't of State*, 347 F.Supp.3d 561 (D. Mont. 2018) (requiring EIS for KeystoneXL pipeline to include analysis of cumulative impacts with earlier Alberta Clipper pipeline project).

In fact, even in its "description of the affected environment," the Defendants' EIS fails to *even acknowledge* several other major high-voltage transmission line projects in the same area. SPF at ¶ 99. The Badger-Coulee high-voltage transmission line also cuts through the Driftless Area and connects to the same Cardinal substation in Middleton, Wisconsin. SPF at ¶ 100. In the "affected environment" discussion, the EIS only references the Badger-Coulee transmission line

when providing photographs of it as an example of what the CHC transmission line would look like. SPF at ¶ 99. Likewise, the EIS just ignores the CapX2020 Hampton-Rochester-La Crosse line, which passes through Minnesota, crosses the Mississippi River and then proceeds to a substation in La Crosse County, Wisconsin.[17]

These huge transmission lines include west-to-east segments running perpendicular to the south-to-north ecologically-vital Mississippi Flyway for migratory birds, thereby creating a collision risk. SPF at ¶ 123. The EIS nowhere considers how the combination of these huge transmission line projects and other large development projects in the same geographical area would affect wildlife, including migratory birds that would have to now avoid multiple high-voltage transmission lines and towers. SPF at ¶ 98-99. Nor does the EIS consider how tourism in the region, or in the Upper Mississippi River National Wildlife and Fish Refuge specifically, would be affected by these large transmission lines in combination. SPF at ¶ 98-99.

The EIS's cumulative impacts analysis for "current" and "future" projects is also insufficient. First, the geographic scope of the analysis is drawn too narrowly.

The Defendants' EIS in the present case sets out a "cumulative impact spatial boundary" for each "affected resource," with the northern boundary for wildlife set where the Turkey and Wisconsin Rivers join the Mississippi River. SPF at ¶¶ 102, 103. That grossly and unlawfully restricts the impact, especially on migratory birds. SPF at ¶ 104. CEQ's guidance on cumulative impacts[18] provides that for "[m]igratory wildlife," "[p]ossible [g]eographic [a]reas for [a]nalysis" would include "[b]reeding grounds, migration route, wintering areas, or total range of affected population units." The Defendants' EIS addresses cumulative wildlife impacts only in about one

[17] Rural Utilities Service, *Dairyland Power Cooperative: CapX 2020 Hampton-Rochester-La Crosse Transmission Line Project*, 77 Fed. Reg. 41,369 (July 13, 2012).
[18] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997), https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.

page. SPF at ¶ 107. The EIS does not even acknowledge the special issue of cumulative impacts on migratory species. SPF at ¶ 107.

The northern boundary for wildlife cumulative impacts on the Wisconsin side—"where the … Wisconsin Rivers join the Mississippi River"—fares no better. SPF at ¶ 103. That boundary does not even include the entire CHC transmission line route, and again it minimizes the scope of cumulative impact on wildlife, trees, plants, and wetlands. SPF at ¶ 105.

"[T]he choice of analysis scale [for the cumulative impacts analysis] must represent a reasoned decision and cannot be arbitrary." *Habitat II*, 363 F. Supp. 2d at 1097 (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse,* 305 F.3d 957, 973 (9th Cir. 2002)). An agency must therefore "provide support for its choice of analysis area." *Id.* (quoting *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 902 (9th Cir. 2002)). An agency should consider whether an affected species also uses habitat outside of the project area. *Id.*

The circumstances in the three *Habitat Education Center* cases are analogous to the present CHC transmission line case when it comes to the defendant federal agency's failure to fully and fairly consider cumulative impacts. *Habitat Educ. Center, Inc. v. Bosworth (Habitat I),* 363 F. Supp. 2d 1070, 1078–83 (E.D. Wis. 2005); *Habitat II*, 363 F.Supp.2d 1090*; Habitat Educ. Ctr., Inc. v. Bosworth (Habitat III)*, 381 F.Supp.2d 842 (E.D. Wis. 2005). In each of these three cases, the U.S. Forest Service approved timber sales allowing thousands of acres of logging in the same geographical area of the Chequamegon-Nicolet National Forest in Northern Wisconsin. Each of the federal agency's separate environmental impact statements, however, looked only at that one timber sale's impacts on threatened red-shouldered hawks, northern goshawks and pine marten in isolation and failed to look at the cumulative impacts of the three

"past, present, and reasonably foreseeable future actions" in combination in destroying the wildlife's habitat necessary to survive.

The district court (Judge Adelman) accordingly ruled in favor of the plaintiffs and reversed the Forest Service's timber sale approvals in all three of these cases because of the lack of "sufficiency of the cumulative impacts analysis," and "REMANDED to the Forest Service for proceedings consistent with this opinion." In addition, the district court "ENJOINED" each of the three separate timber sale projects "until such time as the EIS complies with NEPA." *E.g., Habitat I*, 363 F. Supp. 2d at 1089.

Even for the projects and actions that the Defendants' EIS in this case *does* address in its cumulative impacts discussion, the EIS essentially just lists other projects and actions and then states that there would be cumulative impacts, *without engaging in any meaningful analysis* of what those cumulative impacts would be. For example, the cumulative impacts analysis for wildlife does little more than list other infrastructure projects in the area and acknowledge that the projects will cumulatively destroy, degrade, and fragment habitat. SPF at ¶ 107. This mere cataloging of projects is not sufficient.

In *Habitat II*, 363 F. Supp. 2d at 1100–02, the federal agency considered cumulative impacts on specific species, but even that discussion "provide[d] too little detail to demonstrate that the Forest Service took a hard look at the cumulative effects of past, present, and reasonably foreseeable future logging projects on red-shouldered hawk and goshawk." The EIS did not elaborate on how much habitat for these species exists or "make clear how the [proposed] project and other activities will affect such habitat." *Id.* at 1101. The EIS acknowledged "that logging, road construction, road improvement, and other human activities will impact goshawk and red-

shouldered hawk and their habitat, [but] the analysis provides no specific information concerning such impacts." *Id.*

The analysis in the Defendants' EIS in this case is even less detailed than the Forest Service's too-limited analysis that was reversed by the district court in *Habitat II*. The EIS here devotes only about one page to all wildlife cumulative impacts, and does not even mention any specific species. It makes general statements like the following:

> Any projects that remove, degrade, or fragment habitat—such as transportation improvement projects, new energy development, and new or rebuilt transmission lines—would contribute to the cumulative adverse impacts that may occur by converting undeveloped areas to developed areas, changing forested and shrubland land cover types to grassland, and loss of area to structure and ancillary facilities.

SPF at ¶ 108. This "analysis" is much too general to provide any meaningful information. *See Neighbors of Cuddy Mountain*, 137 F.3d at 1378–79 (finding that cumulative impacts analysis was inadequate when it provided "some information in regard to the cumulative effects of all proposed timber sales on old growth habitat, but the analysis provided was very general"). *Sierra Club, Illinois Chapter v. U.S. Dept of Transp.*, 962 F. Supp. at 1045 (concluding that "the final impact statement does not include sufficient information to justify the purposes and needs it identifies. Thus, this court lacks sufficient information to determine whether the alternatives were in fact unreasonable and deserved such a cursory dismissal").

The Defendants' "analysis" of cumulative adverse impacts of this massive CHC transmission line in combination with other huge transmission lines and other "past, present, and reasonably foreseeable future actions" in the relevant geographical area is so thin and insufficient as to be arbitrary and capricious, an abuse of discretion, and contrary to law. *See Habitat I*, 363 F. Supp. 2d at 1078–83; *Habitat II*, 363 F.Supp.2d at 1098; *Habitat III*, 381 F.Supp.2d 842.

4. The Defendants' EIS Failed to Adequately Analyze Potential Greenhouse Gas Emissions Contrary to Law.

Finally, the EIS's analysis of potential greenhouse gas emissions is wholly inadequate. Instead of making a reasonable analysis or estimate of how much electricity from fossil-fuel (coal and gas) generating plants the proposed line would carry, Defendants provided carbon emission estimates *if* the transmission line carried 100% coal-fired power—12.3 million metric tons of carbon dioxide per year—or 100% wind power—0.272 million metric tons of carbon dioxide per year—and told policymakers and the public that it would be somewhere in between. SPF at ¶ 111. That does not meet NEPA's requirements. Federal agencies may not simply throw up their hands, and say there is no accepted way of making these estimates. Even when information is incomplete or unavailable, the rules require agencies to explain how significant the impact might be, what evidence is available, and how others have been making those estimates. 40 C.F.R. § 1502.21(c); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). That is exactly the grounds on which the district court in *Sierra Club, Illinois Chapter v. U.S. Department of Transportation* reversed the defendant federal agency's EIS: "[T]he final impact statement does not provide enough information to make a reasoned decision as to possible alternatives. Accordingly, defendants must either conduct additional studies or explain why the studies are not possible." 962 F. Supp. at 1045.

At the hearings before the Public Service Commission of Wisconsin, Citizens Utility Board expert Mary Neal confirmed by use of her power system modeling that the Transmission Companies "greatly overstated" the "highly speculative" wind generation-related benefits, and explained that the CHC transmission line would actually increase coal-generated electricity. SPF at ¶ 112. Yet nowhere in the EIS is there an estimate or even a reasonable range of estimates

about what the climate impact would actually be. Consequently, the EIS does not "provide the information necessary for the public and agency decisionmakers to understand the degree to which the [federal action] at issue would contribute to [climate change] impacts." *WildEarth Guardians v. Zinke,* 368 F.Supp.3d 41, 51 (D.D.C. 2019).

That gap in the analysis is compounded by Defendants' refusal to use the social cost of carbon to monetize climate impacts.[19] Defendants argue that they are not required to monetize impacts to any resource, SPF at ¶ 113, but the EIS does monetize such claimed benefits such as "positive effects to employment and income" or alleged energy costs savings. SPF at ¶ 114. Federal courts have found agency analyses supporting regulations to be inadequate when they monetize benefits of an action but not costs. *Center for Biological Diversity v. National Hwy. Traffic Safety Admin.,* 538 F.3d 1172, 1199–1203 (9th Cir. 2008). Another federal court concluded that NEPA required "a 'hard look' at whether this tool [the social cost of carbon], however imprecise it might be, would contribute to a more informed assessment of the impacts than if it were simply ignored." *High Country Conservation Advocates v. United States Forest Serv.,* 52 F.Supp.3d 1174, 1193 (D. Colo. 2014). Most recently, the D.C. Circuit remanded an EIS from the Federal Energy Regulatory Commission that refused to use the social cost of carbon to assess the monetary impact of a set of natural gas pipelines and terminals. *Vecinos,* 6 F.4th at 1329. Defendants should have included an estimate of the social cost of the additional carbon emissions that will result from the CHC transmission line, or provided a reasoned explanation for why it could not be done. *WildEarth Guardians,* 368 F.Supp. 3d at 74–75 & n. 30.

[19] *See* Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide—Interim Estimates under Executive Order 13990* (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf?source=email.

***

As the district court eloquently stated in *Sierra Club, Illinois Chapter v. U.S. Department of Transportation*:

> Environmental laws are not arbitrary hoops through which government agencies must jump. The environmental regulations at issue in this case are designed to ensure that the public and government agencies are well-informed about the environmental consequences of proposed actions. The environmental impact statements in this case fail in several significant respects to serve this critical purpose.

962 F. Supp. at 1046.

For the reasons explained above, the Defendants' EIS in this case fell far short of NEPA's requirements, and the Defendants' findings in their Record of Decision approving the EIS are therefore arbitrary and capricious, an abuse of discretion and contrary to law under the Administrative Procedure Act. None of the federal agency actions at issue in this litigation were adequately informed by the legally flawed and factually insufficient EIS. Nor did members of the public get the analysis they needed to make their own informed judgment. Plaintiffs have certainly demonstrated a reasonable likelihood of success on their NEPA claims.

C. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that Conveying a 260-foot-wide Right-of-Way for the CHC Transmission Line through the Upper Mississippi River National Wildlife and Fish Refuge Violates the National Wildlife Refuge System Improvement Act of 1997.[20]

The National Wildlife Refuge System, which includes the Upper Mississippi River National Wildlife and Fish Refuge, is governed by the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee (the "Refuge Act").[21] The Refuge Act

[20] *See* Plaintiffs' Summary Judgment Brief at 53-69.

[21] For a review of the Refuge Act and its rationale, *see generally* Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 Fordham Envt. L. J. 41 (2000). As noted in the Committee Report for the Refuge Act, the National Wildlife Refuge System is a "system of Federal lands acquired and managed for the conservation of fish, wildlife, plants, and their habitat." H.R. Rep. 105-106, 1 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-5.

prohibits uses of Refuges that are not "compatible" with the wildlife purposes of the individual Refuge and the Refuge System's overall mission. *Id.* § 668dd(d)(3)(A)(i). The statute also defines "compatible" narrowly, with consideration of non-biological factors expressly prohibited. *Id*. § 668ee(1)–(3). Contrary to the Transmission Companies' argument, the National Wildlife Refuge System does not serve "multiple" purposes, like the National Forest system or federal lands under the jurisdiction of the Bureau of Land Management (BLM). National Wildlife Refuges are dedicated to one purpose—wildlife—and consideration of non-wildlife purposes is specifically prohibited.

Contrary to what Defendants suggest, Defendant USFWS has never determined that the construction of the CHC transmission line is "compatible" with the Upper Mississippi River National Wildlife and Fish Refuge's wildlife purposes. Indeed, Defendants USFWS has long recognized that "right-of-way projects" like the massive CHC transmission line are not "compatible" with wildlife purposes. The USFWS Manual states that "[i]t is the policy of the Service to discourage the type of uses embodied in right-of-way requests. On areas in the National Wildlife Refuge System (System), if a right-of-way cannot be certified as compatible with the purposes for which a unit was established, it cannot be granted without authorization by Congress." 340 FW § 3.3. The Manual goes on to emphasize that, in right-of-way cases, "[a] determination of compatibility with the purposes for which a unit of the System was established must mean consideration only of wildlife values or project values, not of any broader social or economic concerns." *Id.* § 3.6(A)(3).

When the Defendant USFWS previously rejected a similar high-voltage transmission line proposal to cross the Upper Mississippi River National Wildlife and Fish Refuge, the Refuge

managers explained why projects like this cannot be "compatible" with the Refuge system's wildlife purposes. Massive high-voltage transmission projects like this:

- increase the risk of negative interactions between invasive plants and adjacent forested/grassland habitats;
- greatly increase the risk of bird strikes, especially for migrant species which may be unfamiliar with the presence of power lines;
- impact wildlife-dependent recreational opportunities due to reduced habitat quality which directly impacts wildlife species upon which recreation is based;
- compromise the scenic qualities of the [Refuge area] because of the presence of a much larger right-of-way; and
- impair the quality of the visitor experience and likely reduce the public's opportunity to experience wildlife.

SPF at ¶ 116. The Defendant USFWS also stated concerns about the precedent that allowing the use would create, recognizing that permitting this transmission line use would likely lead to recurring requests for similar activities that will be difficult to manage in the future. SPF at ¶ 118.[22]

The concerns that led USFWS to reject that transmission line crossing apply with like force to the proposed CHC high-voltage transmission line here as well, and are reflected in the final EIS. SPF at ¶ 118. To its credit, Defendant USFWS has never backed off from its stated position that projects like the proposed CHC high-voltage transmission line do not meet the Refuge Act's compatibility requirement.

[22] The Upper Mississippi Refuge managers did issue a favorable "compatibility determination" to allow a transmission line to be built on an existing right-of-way near an operational coal-fired power plant near Alma, Wisconsin. It is highly questionable whether that decision complied with the Refuge Act, but it appears no one sought judicial review.

Instead, Defendants argue that the CHC transmission line somehow falls outside the Refuge Act's compatibility requirement: (1) because it can be "grandfathered in" as "maintenance" of an existing transmission line right-of-way; and most recently; and (2) because the right-of-way conveyance can be restructured as a land exchange rather than an easement grant, and that would supposedly avoid all of the Refuge Act's specific prohibitions.

Neither of Defendants' arguments has any merit. The new massive CHC high-voltage 345-kV transmission line and 20-story high towers on a new right-of-way cutting a wide swath through the protected National Wildlife and Fish Refuge is plainly *not* "maintenance," nor can it reasonably be characterized as a "minor expansion" or "realignment" for safety purposes.[23] The right-of-way for the CHC transmission line is brand new, it follows a new route, it is nearly twice as wide as the existing transmission line right-of-way, it will carry twice the voltage, and the transmission towers will be much larger and taller. SPF at ¶ ¶ 132, 133, 134, 135, 137, 139. The USFWS Manual says "[e]xamples of minor expansion or realignment include: expand the width of a road shoulder to reduce the angle of the slope, expand the area for viewing on-coming traffic at an intersection, and realign a curved section of a road to reduce the amount of curve in the road." 603 FW § 2.11(D). The proposed new massive high-voltage CHC project, with its 195-foot towers and its 260-foot-wide right of way up to 6,000 feet away from the existing right-of-way, SPF ¶¶ 136, 139, is not even remotely like expanding the width of a road shoulder. The Transmission Companies' offer to provide land and restoration work to compensate for the extensive damage caused by the CHC transmission line construction and operation is legally and practically insufficient and does not make any legal difference. Defendant USFWS's rule

[23] The federal agency Defendants are apparently not defending the "maintenance" theory anymore, and are instead relying entirely on the notion that changing the form of the transaction into a "land exchange" renders these claims moot.

expressly prohibits a practice that had become common in the pre-1997 period[24]—applicants offering "compensatory mitigation" in order to obtain a "compatibility" finding that might not otherwise be available.

The USFWS rules adopted in 2000 flatly forbid using "compensatory mitigation to make a proposed use compatible." 50 C.F.R. § 26.41(b), (c), 603 FW §§ 2.11 (C), (D). The result of allowing these arrangements before 1997 had been a continuing proliferation of non-compatible uses throughout the National Wildlife Refuge System, precisely what the 1997 Refuge Act and Defendant USFWS's own 2000 rules were intended to reverse.

Nor can repackaging this direct violation of the Refuge Act's statutory requirements into a contrived land exchange, in which presumably the Transmission Companies would get fee simple title to exactly the same right-of-way, be legally permissible. This is precisely the kind of dealing that the 1997 Refuge Act was designed to prohibit.

Defendants contend that, by withdrawing their previous "Compatibility Determination" and special use permit in favor of a land exchange, they have rendered the Refuge Act issues moot. The theory is that, after a land exchange, the massive new transmission line's right-of-way, and all the environmental and wildlife impacts that come with it, would no longer be "in" the Refuge, and therefore no longer be subject to the statutory prohibition against uses of Refuge land that are incompatible with the Refuge's wildlife purposes. Case No. 21-cv-00096, Dkt. 50 at 2, 10 (Transmission Companies' Memorandum in Support of Expedited Motion to Stay).

Contrary to what Defendants suggest, it is not nearly that easy to circumvent the Refuge Act's requirements, nor should it be through such legerdemain. The Refuge Act allows USFWS to use land exchanges to deed away federal lands if and only if those lands are "suitable for

[24] *See generally,* Robert Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 Ecology L.Q. 457 (2002).

disposition." 16 U.S.C. § 668dd(b)(3)(A). There is no such showing here, nor could such a showing reasonably be made.

"Suitable for disposition" of course must be defined in light of the Refuge Act's mission, text, and structure as a whole. The very purpose of the Refuge Act was to foreclose and limit private economic uses within the boundaries of protected National Wildlife Refuges, unless found to contribute to wildlife conservation purposes. Land exchanges that, for example, eliminate private inholdings and incompatible uses might be consistent with the Act's purposes.[25] Land exchanges like the one being proposed by the Transmission Companies, however, that add incompatible uses—here in a very big way—and are designed to get around the Refuge Act's specific substantive and procedural requirements, are unlawful and inconsistent with USFWS policy. Indeed, in "plan[ning] and direct[ing] the continued growth of the System" the USFWS must do so "in a manner that is designed to *accomplish the mission of the System*…." 16 U.S.C. § 668dd(a)(4)(C) (emphasis added).

Before the Refuge Act was adopted in 1997, it was not uncommon for Refuge managers to occasionally allow incompatible uses such as roads, pipelines, and powerlines to cross Refuges in exchange for land donations.[26] The rule *against* using such compensatory mitigation to make proposed uses artificially compatible, 50 C.F.R. § 26.41(b), was adopted precisely to stop that practice. The Transmission Companies' proposal would mark the return of the types of questionable practices that prompted Congress to enact the Refuge Act in the first place. If allowed, this would signal to private development interests who wish to dig copper mines, drill

[25] The Upper Mississippi Refuge's Comprehensive Conservation Plan (CCP), for example, contemplates exchanging Refuge lands that are intermingled with state wildlife management areas to "provide consistent management and regulations and reduce confusion by visitors." SPF at ¶ 143. Contrary to the Transmission Companies' suggestion, the CCP does not embrace the use of land exchanges whenever it would "benefit" the Refuge.

[26] *See generally,* Robert Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 Ecology L.Q. 457 (2002).

fracking wells, run tar sands pipelines, or construct high-voltage transmission lines through protected National Wildlife Refuges that they can engage in those activities by making an offer of land (or money to acquire land) that a Refuge manager is willing to accept, and all the substantive and procedural impediments in the law would drop away.

The U.S. District Court in Alaska recently rejected the idea that general land exchange authority can allow developers and USFWS to avoid the specific requirements of public lands statutes. In *Friends of Alaska National Wildlife Refuges v. Bernhardt,* 463 F.Supp.3d 1011 (D. Alaska 2020), the USFWS had agreed to exchange land in the Izembek National Wildlife Refuge in order to allow a road to be built through the Refuge between King Cove and Cold Bay, Alaska.[27]

The Izembek Refuge is governed by the Alaska National Interest Lands Conservation Act ("ANILCA"), which, like the Refuge Act, has a provision on land exchanges. ANILCA § 1302(h), 16 U.S.C. § 3192(h). At the same time, however, Title XI of ANILCA has specific substantive and procedural requirements for transportation and utility right-of-way projects across "conservation system units." ANILCA, subchap. IV, 16 U.S.C. §§ 3161–3173. One of those requirements is that transportation or utility projects must be "compatible with the purposes for which the unit was established," and there must not be an "economically feasible and prudent alternative route." 16 U.S.C. § 3165.

As in this case, Defendant USFWS made no attempt to argue that the proposed road was "compatible with" the Izembek Refuge's purposes. Nor did USFWS follow the procedures outlined in Title XI. USFWS argued, however, that it did not need to follow Title XI because,

[27] The *Friends* decision was appealed to the Ninth Circuit. The Secretary of the Interior is reconsidering the Izembek land exchange, however, and may well return to the Department's previous position against the land exchange from the Obama Administration. That would likely moot the appeal.

once the proposed land exchange was completed, the lands would no longer be federal conservation lands and therefore would no longer be covered by Title XI or ANILCA.

Upon judicial review, the district court agreed with the plaintiff conservation groups that USFWS could not "nullify the protections Congress established when adopting Title XI by enabling land exchanges to circumvent its procedures." *Friends of Alaska National Wildlife Refuges*, 463 F.Supp.3d at 1025. Using the "well established canon of statutory interpretation," the court found that "the more specific procedural mandates of Title XI govern over the general authority provided in [the land exchange section]" because that "avoids the superfluity of the specific provision from being swallowed by the general one, giving effect to every clause of the statute." *Id.* (*quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–46 (2012)) (internal quotation marks and alterations omitted) (specific controls the general, and "commonplace statutory construction" applies when two provisions are both parts of the same statutory scheme).

As the United States Supreme Court has long recognized, allowing a specific provision to be swallowed by a more general one "violat[es] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *RadLAX*, 566 U.S. at 645 (*quoting D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Similarly here, using the general land exchange provision to somehow trump the National Wildlife Refuge System Improvement Act of 1997's substantive "compatibility" requirements, and its procedural requirements for "compatibility determinations," cannot be reconciled with these fundamental rules of statutory interpretation. That approach is impermissible as a matter of law and violates Defendant USFWS's statutory obligations.

It remains "well settled," of course, that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Laidlaw*, 528 U.S. at 189 (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Voluntary cessation of a challenged practice rarely moots a federal case, and does so only when it is "absolutely clear that the allegedly wrongful behavior could not be reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189.

The party urging mootness bears the "heavy burden" of showing that it will not "revert to" its prior policy. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 n. 1 (2017). Here, not only can the government revert to its previous illegal act—allowing the CHC transmission line to run through the protected National Wildlife and Fish Refuge—but it has already announced its intention to do exactly that. SPF at ¶ 149. *See generally Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (amendment of challenged ordinance does not moot case because new ordinance "disadvantage[d] [plaintiffs] in the same fundamental way"); *Indigenous Env't Network v. Trump*, __F.Supp.3d__, 2021 WL 2187286, at *4 (D. Mont. May 28, 2021) (Biden revocation of Keystone XL pipeline permit did not moot challenge because subsequent President could re-issue it); *Natural Res. Def. Council v. U.S. Dep't of Energy*, 362 F.Supp.3d 126, 142 (S.D.N.Y. 2019) (Department of Energy's adoption of "more tailored approach" to achieve the same result did not moot case).

Defendants' alternative argument that the proposed land exchange is not ripe for review, urging this Court to put off consideration of its legality for a year or more, is also unavailing. The issue is "purely legal, and will not be clarified by further factual development." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 167 (2014) (*quoting Thomas v. Union Carbide*

Agricultural Prods., 473 U.S. 568, 581 (1985)). Moreover, delaying adjudication for a year may well allow construction of the two segments of the proposed CHC transmission line to continue right up to the Upper Mississippi River National Wildlife and Fish Refuge boundaries, which will work a hardship on Plaintiffs because of the irreparable environmental harm that will be caused by any route crossing the Refuge and the southwest Wisconsin Driftless Area. That outcome would also put untoward and unfair pressure on this Court to tolerate an unlawful outcome because a private project builder has sunk substantial costs into other parts of the project, and to practically limit this Court's ability to fashion an effective remedy.

Plaintiffs therefore certainly have a reasonable likelihood of success on the Refuge Act claims as well. The prohibition on uses that are not "compatible" with the sole purpose of National Wildlife Refuges—wildlife and wildlife-dependent recreation—is near absolute, and no one can seriously argue that massive right-of-way projects like the CHC high-voltage transmission line are "compatible." The past effort to characterize this project as mere "maintenance" and the current effort to argue that structuring this as a "land exchange" erases the compatibility requirement of the Refuge Act are equally contrary to law and common sense.

D. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the General Permits Used by the U.S. Army Corps of Engineers to Authorize the Discharge of Pollutants into Protected Waters and Wetlands Necessary to Build the CHC Project Violate the Clean Water Act, NEPA, and the Endangered Species Act.[28]

The massive CHC transmission line involves hundreds of crossings of rivers, streams, and wetlands protected by the Clean Water Act. SPF at ¶ 192. This transmission line cannot be built on its proposed route without federal permits to discharge dredged and fill material into waters of the United States under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, from Defendant U.S. Army Corps of Engineers. The Corps, however, decided not to do a project-

[28] *See* Plaintiffs' Summary Judgment Brief at 69-83.

specific analysis of whether the CHC transmission line or the "discharges" along its route met the Clean Water Act's requirements through its "individual" permit process, but instead used so-called "general" permits that the Corps says apply to all "utility lines," no matter their size or scope. SPF at ¶ 84.

Plaintiffs contend that this approach and the general permits themselves violate three separate federal laws: (1) the Clean Water Act, because transmission lines like the CHC project involve discharges that have more than "minimal" separate and cumulative adverse environmental effects; (2) NEPA, because these general permits are major federal actions with significant potential environmental impacts but were not preceded by an environmental impact statement; and (3) the Endangered Species Act, because those permits may affect listed species and critical habitat, but were not preceded by "programmatic" consultation with the Defendant U.S. Fish and Wildlife Service.

First, the general permits as applied to projects like this violate the Clean Water Act. The Corps' Section 404 permitting program is governed by rules adopted by the U.S. EPA. The U.S. EPA's "404(b)(1) Guidelines" place very serious limits and restrictions on the Corps' permitting authority. The Guidelines prohibit the issuance of any dredge or fill permit "unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c). The Guidelines also prohibit the grant of Section 404 permits if there are less environmentally damaging "practicable alternatives" to the proposed discharges, and they require compensatory mitigation for unavoidable adverse effects. 40 C.F.R. § 230.10(a).

Those rules also apply to the Corps' so-called general permits. General permits are "off-the-shelf," "one-size-fits-all" permits that apply to broad categories of activities. Their purpose is to avoid subjecting each new application to the more extensive, project-specific "individual" permitting process. Typically, unlike the case with "individual" permits, the Defendant Corps' general permits do not involve public notice or opportunity for comment on a project; often, they do not require any delineation of jurisdictional waters; in many cases, they do not even require that the Corps be notified. SPF at ¶ 193.

Congress authorized the Corps to use general permits in the 1977 amendments to the Clean Water Act, but only under very limited circumstances. Under what is now Section 404(e) of the CWA, the activities in any general permit category must be "similar in nature," they must "cause only minimal adverse environmental effects when performed separately," and they must "have only minimal *cumulative* adverse effect on the environment." 33 U.S.C. § 1344(e)(1) (emphasis added). Consistent with those restrictions, many of the Corps' general permits involve the kind of minor discharges one would expect—smaller-scale piers and docks, beach creation and maintenance, and wildlife ponds. SPF at ¶ 194. But, by their terms, some of the Corps' general permits today cover projects that can be massive in scale.

The Corps' "utility line" general permits are such an example. Nationwide Permit 12 ("NWP 12"), which the Corps' Rock Island district used in this case, and the Utility Regional General Permit ("Utility RGP") the St. Paul District used, authorize discharges associated with the construction, maintenance, repair, and removal of utility lines and associated facilities, including oil and gas pipelines, electric transmission and collection lines, telephone, cable TV and internet cables, and so on, if they do not cause the loss of more than one-half acre of waters

of the United States per waterway crossing.[29] SPF at ¶ 195. The Corps gets around its own one-half acre ceiling by treating each individual waterway or wetland crossing as a separate project.

The Defendant Corps' apparent position is that the utility line projects that would be covered by NWP 12 and the Utility RGP have no more than "minimal" adverse environmental impacts in virtually all cases, either individually or cumulatively, and so the general permits comply with Section 404(e) of the CWA.

It of course defies common sense to conclude that the potential adverse environmental impacts of the massive CHC high-voltage transmission line will be no more than "minimal," or that the cumulative negative impact of all utility lines will be "minimal." Yet the Defendant Corps still takes the "minimal impact" position, has refused to do individual permitting for the project, and argues that this "factual finding" is entitled to deference.

How does the Defendant Corps justify this counterintuitive conclusion when the proposed CHC transmission line will impact at least 114 wetlands and many waterways, including the Mississippi River? There are three basic Corps arguments. First, the Corps defines "project" narrowly to minimize the agency's jurisdiction and responsibility. Second, the Corps claims it can defer review of potential environmental impacts and possible conditions to the project stage and still use general permits. And third, the Corps argues that "compensatory mitigation" can and will always bring adverse environmental impacts below the "minimal" threshold. None of those arguments have merit.

[29] Earlier this year, the Corps divided NWP 12 into three separate nationwide permits: NWP 12 for oil and gas pipelines, NWP 57 for electric utility lines, and NWP 58 for water lines and other similar substances. U.S. Army Corps of Engineers, *Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 2,744 (Jan. 13, 2021). Even if the Corps were to shift the CHC project over to NWP 57, however, the CWA, NEPA, and Endangered Species Act issues will remain exactly the same. The 2021 proposals still extend to projects with more than minimal adverse environmental impacts, and they were still not preceded by environmental impact statements or programmatic consultation with USFWS.

The Defendant Corps' first argument is that large projects like the CHC transmission line are not single projects at all, but rather a series of discrete projects at each individual river, stream, or wetland crossing. According to the Corps, "each crossing of a water body at a separate and distant location" is a "single and complete project." SPF at ¶ 202, 203. This is the same contention, of course, that allows the Corps to get around its own "half-acre" requirement—that, if a project will result in more than a half-acre of protected waters or wetlands being converted, then a more extensive individual permit is required. SPF at ¶ 195.

Under the Corps' interpretation, then, there is no limit to the number of times its "utility line" general permits can be applied to an individual project like the CHC transmission line, nor is there any limit to the number of acres of protected waterbodies and wetlands a project like the CHC transmission line can damage before triggering an individual permit requirement. That result flies in the face of the very real limits Congress imposed on the Corps' general permitting authority in Section 404(e), 33 U.S.C. § 1344(e).

In particular, the requirement that a category of actions covered by a general permit have no more than minimal *cumulative* adverse environmental impacts gets read right out of the statute. General permits like NWP 12 and St. Paul's Utility RGP cover thousands of discharges, SPF at ¶ 193 (Corps estimate at time of 2017 NWP issuance that the permits would authorize over 60,000 activities per year), and the cumulative impact of those discharges cannot fairly be characterized as only "minimal." Even under the Corps' definition, then, the statutory requirements of minimal impacts simply cannot be met.

The Corps' response is that, despite its clear language, Section 404(e) does *not* require the agency to assess whether impacts will be "minimal" before it issues general permits. Instead, the Corps argues, it can defer consideration of cumulative impacts to the project stage, and, if it

concludes that a particular project's cumulative impacts will be minimal, then verifying that an applicant can use a general permit for that project is lawful under Section 404(e).

In *Ohio Valley Environmental. Coalition v. Bulen,* 410 F.Supp. 2d 450 (S.D. W.Va. 2004), *aff'd in part, vacated in part,* 429 F.3d 493 (4th Cir. 2005), however, the court concluded that Section 404(e) unambiguously required the Corps to determine minimal impacts *before*, not after, issuance of a general permit. As the court reasoned, "[i]f the Corps cannot define a category of activities that will have minimal effects, absent individual review of each activity, the activities are inappropriate for general permitting." 410 F.Supp. 2d at 465.

> The issuance of a [general] permit . . . functions as a guarantee *ab initio* that every instance of the permitted activity will meet the minimal impact standard. Congress intended for a potential discharger whose project fits into one of those categories to begin discharging with no further involvement from the Corps, no uncertainty, and no red tape.

410 F.Supp. 2d at 465–66 (citing colloquy between Sens. Muskie and Nunn in legislative history); *see also Sierra Club v. U.S. Army Corps of Eng'rs,* 399 F.Supp.2d 1335, 1345–47 (M.D. Fla. 2005), *vacated in part,* 464 F.Supp.2d 1171 (M.D. Fla. 2006).

Other courts have disagreed, including the Fourth Circuit in the *Ohio Valley* case, which deferred to the Corps' proffered interpretation under *Chevron.* In large part, the Fourth Circuit's explanation for finding the interpretation reasonable was that it would be difficult for the Corps to predict the environmental impact of activities not yet identified. 429 F.3d at 501–02. The problem with that reasoning, however, is that if the Corps cannot confidently predict that a category of activities will *not* have more than a minimal impact in different circumstances at the time it is considering a general permit, it should conclude that a general permit is *not* appropriate. Under Section 404(e), it is a *precondition* for a general permit that the category of activities will indeed not have more than minimal impacts. If the Corps cannot draw conclusions about impacts

until the individual project stage, then those projects should go through individual permitting.[30] The Corps cannot evade the requirement that it assess whether general permits will have no more than a minimal adverse environmental impact by just deferring any analysis of environmental impacts to the individual project stage.

The Corps' third principal argument for why it can conclude that projects like the CHC transmission line will have no more than "minimal" adverse environmental impacts is that there is always some way to provide "compensatory mitigation" to make up for any environmental damage and adverse impacts. In other words, if it turns out that discharges of dredged or fill material from a project like the massive CHC transmission line *do* have significant adverse environmental impacts, then the Corps can always ask the applicant to purchase wetland banking credits or take some other kind of mitigation measure to offset that impact. That "compensatory mitigation" will, in the Corps' view, bring the impact back under the "no more than minimal" threshold. SPF at ¶ 199.

That argument would swallow the "minimal impact" rule whole, however, because it assumes without knowing or requiring documentation that compensatory mitigation will always be possible and successful. That is not a legitimate assumption. As the Sixth Circuit recognized:

> Under the CWA, the issuance of a nationwide permit hinges on the reviewing agency's finding that a proposal has only a "minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1); *see also* 40 C.F.R. § 230.7(a)(3). In making this finding, the relevant CWA regulations require an agency to (i) "set forth in writing an evaluation of the potential . . . cumulative impacts of the category of activities to be regulated" by the proposal, 40 C.F.R. § 230.7(b) and (ii) provide "*documented information* supporting each factual determination [required by § 230.11]," *id.* § 230.7(b)(1) (emphasis added), including a determination of cumulative impacts, *d.* § 230.11(g).

[30] To our knowledge, the Seventh Circuit has not confronted this question. Tenth Circuit and D.C. Circuit panels have upheld the Corps position. *Sierra Club v. Bostick,* 787 F.3d 1043, 1061 (10th Cir. 2015); *Sierra Club v. U.S. Army Corps of Eng'rs,* 803 F.3d 31, 39 (D.C. Cir. 2015).

Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 412 (6th Cir. 2013). The Court acknowledged that post-issuance mitigation or other conditions could potentially support a minimal cumulative impact finding, but made it clear that such a finding required more than conclusory statements or lists of potential mitigation methods. *Id.; see also Ohio Valley Env't Coalition v. Hurst,* 604 F.Supp.2d 860, 867 (S.D.W.Va. 2009) (deeming "conclusory" the Corps' "unsupported belief in the success of mitigation measures" and explaining that the Corps' "'mere listing' of mitigation measures and processes, without any analysis, cannot support a minimal cumulative impacts determination").

The same reasoning applies here. NWP 12 and the St. Paul District's Utility RGP cover a wide variety of "linear" projects, that might cross a wide variety of different geographies with very different potential risks to water quality. The facts here are that the huge 101-mile CHC transmission line that crosses through 114 wetlands and the Mississippi River *does* create very significant risks and damaging impacts to water quality.

This huge transmission line would run through the unique topology of Wisconsin's Driftless Area, with its karst geology—a region with many cracks and crevices in the bedrock, and intricate ground and surface water connections—which allows pollutants to quickly and easily spread through groundwater. SPF at ¶ 156. If this huge transmission line and tall towers impair a particularly fragile wetland complex, it is not at all clear what conditions or mitigation measures might be available, might be effective, or might be enforceable. Large projects like this simply are not "similar in nature" to smaller "linear" projects with a limited geographic reach, for which effective mitigation measures might be easy to select and to implement. Using the mere theoretical possibility that every problem that might arise will have a mitigation solution as

justification for a finding of "minimal cumulative impact" is simply not supportable. The Corps' "one size fits all approach" does not fit well for the massive CHC transmission line.

The same arguments that the Corps uses to contend that its "utility line" general permits have no more than a minimal environmental impact under Section 404(e) of the Clean Water Act are the ones it uses to justify why it has never prepared an environmental impact statement or engaged in a programmatic consultation with the USFWS before issuing or renewing those general permits: Each river, stream, or wetland crossing should be treated as a separate "project," all analysis of impacts can be and should be deferred to the individual project stage, and, if all else fails, compensatory mitigation will always be available to reduce environmental impacts below any of the statutory thresholds.

None of these arguments have merit under NEPA or the Endangered Species Act ("ESA"), as the District Court recently held in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, 454 F.Supp.3d 985 (D. Mont. 2020), *amended* 460 F.Supp.3d 1030 (D. Mont. 2020), *appeal dismissed as moot* No. 20-35412 (9th Cir., Aug. 11, 2021), which is explained in greater detail below. NEPA provides that federal agencies must prepare environmental impact statements on all "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). General permits that set the requirements for all crossing by transmission lines of waterways or wetlands of whatever size or location throughout the nation or throughout a region certainly meet the statutory test of "major federal actions significantly affecting the quality of the human environment," *id.,* as well as the Council on Environmental Quality definitions. 40 C.F.R. §§ 1508.18, 1508.27. A "programmatic EIS" should be prepared when actions are "connected," "cumulative," or sufficiently "similar" such that a broader review becomes "the best way to assess adequately the

combined impacts of similar actions or reasonable alternatives to such actions." 40 C.F.R. § 1508.25(a); *see generally Kleppe v. Sierra Club,* 427 U.S. 390, 409 (1976) (discussing when a programmatic EIS may be necessary).

The Endangered Species Act requires review of broad agency decisions that may affect listed species or critical habitat. Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), requires each federal agency to ensure "that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by [USFWS] … to be critical." The agency must review its actions "at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Then, if the agency finds its action "may affect" a listed species or critical habitat, it must initiate formal consultation with USFWS unless the agency has made a finding, with USFWS concurrence, that the action's effects are not likely to be adverse. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. A "programmatic" consultation is appropriate when an agency's proposed action "provid[es] a framework for future proposed actions." 50 C.F.R. § 402.02. That is precisely what a general permit is—a "framework for future proposed actions."

The Defendant Corps' "general" permits are therefore not valid unless the agency complies with its obligation under the Endangered Species Act to consult on the proposed permits' potential impacts on listed species and their critical habitat. U.S. Fish and Wildlife Service, *Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements*, 80 Fed. Reg. 26,832, 26,835 (May 11, 2015) (expressly listing the Corps' Nationwide Permit Program as an example of a program that would require programmatic consultation). The Corps renewed and readopted both NWP 12 and the Utility RGP in 2017 and

2018, respectively, without consulting with USFWS as required by Section 7 of the ESA. SPF at ¶¶ 201–202.

On April 15, 2020, the United States District Court for the District of Montana concluded that the Corps' failure to initiate formal programmatic consultation with USFWS under Section 7(a)(2) of the Endangered Species Act before renewing NWP 12 in 2017 was arbitrary and capricious. *Northern Plains Resource Council,* 454 F.Supp.3d 985. In the decision document adopting NWP 12, the Corps itself acknowledged that the construction of utility lines "will fragment terrestrial and aquatic ecosystems," and that dredged and fill material can have temporary or permanent impacts, including losses of aquatic resource functions and services. SPF at ¶ 204. For those reasons, the district court found "resounding evidence" that the adoption of NWP 12 easily met the "may affect" threshold and required consultation. 454 F. Supp. 3d at 990–91.

The district court had little patience for the Corps' argument that programmatic consultation was not required, because each project that might involve listed species would get its own project-specific consultation. The district court reasoned:

> Programmatic consultation considers the effect of an agency's proposed activity as a whole. A biological opinion analyzes whether an agency action likely would jeopardize a listed species or adversely modify designated critical habitat. This type of analysis allows for a broad-scale examination of a nationwide program's potential impacts on listed species and critical habitat. A biological opinion may rely on qualitative analysis to determine whether a nationwide program and the program's set of measures intended to minimize impacts or conserve listed species adequately protect listed species and critical habitat. Programmatic-level biological opinions examine how the overall parameters of a nationwide program align with the survival and recovery of listed species. An agency should analyze those types of potential impacts in the context of the overall framework of a programmatic action. A broad examination may not be conducted as readily at a later date when the subsequent activity would occur.

454 F.Supp.3d at 990 (internal citations omitted). *See also Western Watersheds Project v. Kraayenbrink,* 632 F.3d 472 (9th Cir. 2011) (overturning Bureau of Land Management's

nationwide grazing regulations for inadequate environmental review and lack of programmatic consultation with USFWS under the ESA). The same reasoning of the court in *Northern Plains*, a case about NWP 12 as applied to a pipeline, holds true in this case for NWP 12 as well as for the similar Utility RGP.

The Corps, of course, tries to have it both ways. It avoids considering whether the individual and cumulative impacts of its general permits will be significant by deferring the assessment of impacts to the project stage, and then avoids considering impacts at the project stage by referring back to the general permits. The circular result is that serious consideration of alternatives—greater use of individual permit processes, caps (size, number of crossings) on availability of general permits, mitigation development, assessment, monitoring and enforcement—does not occur, even though that consideration of alternatives is precisely what the CWA and NEPA.

III. PLAINTIFFS WILL BE IRREPARABLY HARMED IF AN INJUNCTION IS NOT GRANTED TO PRESERVE THE STATUS QUO.

"[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Whitaker*, 858 F.3d at 1044-45 (*citing Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 787 (7th Cir. 2011)); *see also Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008). This showing "requires more than a mere possibility of harm," but does not require "that the harm actually occur before injunctive relief is warranted…[n]or does it require that the harm be certain to occur before a court may grant relief on the merits." *Whitaker*, 858 F.3d at 1045. Harm is considered irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1089. The U.S. Supreme Court has recognized that "[e]nvironmental injury, by its nature, … is often permanent

or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987).

Plaintiffs would suffer irreparable harm of several different types if the Court does not grant a preliminary injunction. The preconstruction and construction activities for the CHC transmission line and 17- to 20-story high towers with deeply excavated foundations will destroy natural resources and will irreparably harm the Plaintiffs because Plaintiffs have organizational interests in protecting these natural resources and their members will lose the opportunity to use and enjoy these natural resources in their undisturbed state. The Plaintiffs have also suffered and continue to suffer the irreparable procedural injury of the Defendants' violations of NEPA and the ESA. And, even though the Transmission Companies assert that they do not intend to build the Refuge portion of the CHC transmission line until October 2022, the construction of the rest of the line up to the Refuge's borders on both sides puts the Refuge at risk now. The continuing construction of the transmission line creates bureaucratic momentum and undermines the ability of the agencies to go back and "rigorously explore and objectively evaluate all reasonable alternatives." This is an injury in and of itself.

A. Plaintiffs Will Be Irreparably Harmed by the Environmental Damage Caused by the Transmission Companies' Preconstruction and Construction Activities.

In the short Iowa segment, the Transmission Companies have already cleared most of the right-of-way and begun construction. SPF at ¶ 167. In the much longer Wisconsin section, the Transmission Companies have notified the parties and this Court that they intend to begin construction as soon as October 25, 2021. SPF at ¶ 168. This case will not be fully briefed on the merits or decided before these activities irreparably harm Plaintiffs and their members. *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 663

(W.D. Wis. 2013) (noting that relevant harms for preliminary injunction analysis are those expected to occur during pendency of litigation).

Preconstruction and construction work will cause significant damage to the environment and harms to Plaintiffs' interests. As described in the EIS, preconstruction activities include clearing the full right-of-way of all trees and vegetation. SPF ¶ at 159. Vegetation in the right-of-way would be cleared with mowers, by hand, or by "sky trims, processors, or harvesters." SPF ¶ at 160. The CHC transmission line's right-of-way comprises 1,935 acres, including 352 acres of grassland, 250 acres of forest, 17 acres of shrubland, and 76 acres of wetland. SPF at ¶ 170. The selected route would cross approximately 114 different wetlands. SPF at ¶ 171. Impacts to wetlands "would include fill activities from transmission line structure construction, tree clearing within the ROW, and construction of access roads and staging areas." SPF at ¶ 172. These "wetland fill activities . . . are considered permanent impacts resulting in wetland loss." SPF at ¶ 172. Access roads of 14 to 20 feet wide and work platforms would also be built. SPF at ¶ 162. In areas with a steeper than 10% slope, the developers would regrade structure sites and work areas to be level. SPF at ¶ 164. The Transmission Companies would also construct temporary staging areas, helicopter landing pads, offsite "laydown yards," and "conductor pulling/handling" sites. SPF at ¶ 165. The preferred route includes 163 acres of access roads and 213 acres of laydown yards. SPF at ¶ 166.

All of these activities will have significant long-term impacts on the environment. Clearing the right-of-way would destroy and fragment habitat and expose soil to wind and water erosion, which can lead to sedimentation of nearby waterways. SPF at ¶ 174. Silty and farmland soils in the Driftless Area are particularly prone to erosion. SPF at ¶ 175. "The most common contaminant from construction activity is the movement of sediment by stormwater into nearby

surface waters, due to ground disturbance." SPF at ¶ 176. The EIS concludes that "[p]roject construction would affect both biological resources and vegetation communities, such as wetlands, forests, and bluffs, through land clearing, grading, erosion and sedimentation." SPF at ¶ 177. Further, "[c]onstruction of the project would affect water resources (e.g., rivers, floodplains) through land clearing, grading, [and] filling . . . Water bodies and floodplains would lose some productivity in the short term from construction-related pollutants, sedimentation, and erosion." SPF at ¶ 177. The EIS alleges that best management practices will minimize runoff and sedimentation, but does not include any proof of the efficacy of these management practices. SPF at ¶ 178.

DALC member and professional forester Mark Mittelstadt reviewed photographs of the cleared right-of-way in Iowa and states in his declaration that the clearing will cause considerable erosion. He notes that the steep roads within the right-of-way and the piling of wood chips on steep slopes do not appear to be consistent with the best management practices for water quality adopted by the Wisconsin Department of Natural Resources Forestry Division. SPF at ¶ 33.

Clearing the right-of-way would also create a new avenue for the spread of invasive plants and would "directly affect noxious weeds through soil and native vegetation disturbance." SPF at ¶ 179. Noxious and invasive vegetation can be spread through construction and maintenance activities and "can relative quickly invade disturbed or fragmented areas" and "lead to changes in the vegetation communities." SPF at ¶ 179; *see* SPF at ¶ 30.

Removing vegetation near cold water trout streams will raise the temperatures of the streams because the water will no longer be shaded by the plants. SPF at ¶ 184. Clearing the right-of-way would also impact scenic landscapes and aesthetics. "Potential impacts to visual

quality and aesthetics in the analysis area would result from . . . the establishment of new or expanded ROW through forested areas." SPF at ¶ 185. Clearing the right-of-way will have immediate, irreversible aesthetic impacts in the vicinity of the protected Upper Mississippi River National Wildlife and Fish Refuge, Nelson Dewey State Park, and the Military Ridge State Trail in Wisconsin. SPF at ¶ 186. The presence of, and noise caused by, humans and equipment during preconstruction activities are also likely to disrupt wildlife, including bald eagles. SPF at ¶ 187.

And once the massive transmission line and high towers are built, there will be even more negative impacts. One major impact will be the risk that birds, especially migratory birds using the Mississippi Flyway, will fly into the high-voltage line and be killed. SPF at ¶ 189.

The Defendants' EIS acknowledges that these impacts are "irreversible," which "is a term that describes the loss of future options. It applies primarily to the impacts of use of nonrenewable resources, such as minerals or cultural resources, or to those factors, such as soil productivity, that are renewable only over long periods of time." SPF at ¶ 190. The EIS lists "anticipated potential irreversible" impacts including "destruction of wetlands and floodplains," "destruction of terrestrial and aquatic vegetation and wildlife habitat, including forested areas and bluffs," and "alteration to the viewshed by clearing land, cutting and filling, and constructing transmission line structures." SPF at ¶ 191.

Federal courts have also held that these types of activities—filling wetlands, clearing trees, and irreversibly altering water quality and aesthetics—constitute irreparable injury. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (concluding that the filling of wetlands constituted irreparable harm); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (affirming a finding of irreparable injury based on the permanent destruction of wildlife habitat, water quality, natural beauty, and other environmental

and aesthetic values and interests); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (finding irreparable harm from logging mature trees and holding that "[n]either the planting of new seedlings nor the paying of money damages can normally remedy" such harm, finding moving jobs and revenue into a future year because of a preliminary injunction is minimal); *Habitat I,* 363 F.Supp.2d at 1089 (finding loss of red-shouldered hawk and goshawk habitat to be irreparable, "sufficient to tip the balance in favor of injunctive relief"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (rejecting argument that ability of plaintiffs to visit other natural areas means no irreparable harm).

These activities would irreparably harm the direct interests of at least one of the Plaintiff organizations. DALC owns a conservation easement on the historic Thomas Stone Barn property located on Highway 18 / US 151 west of Barneveld, Wisconsin. SPF at ¶ 34. The Cardinal-Hickory Creek transmission line would be built along the highway, and the easement includes property on both the north and south sides of the highway. SPF at ¶ 34. Construction of the transmission line would interfere with DALC's easement, and irreparably impair its ecological, aesthetic, and cultural value. SPF at ¶ 35. Even if the line is re-routed to be in the adjacent highway right-of-way, the line will negatively affect the conservation easement. SPF at ¶ 35.

Preconstruction and construction activities would also harm Plaintiffs because Plaintiffs' members use and enjoy areas that would be irreparably harmed during the pendency of this litigation, absent an injunction. For example, Dena Kurt is a member of both DALC and WWF who regularly uses and enjoys the area of the Upper Mississippi River National Wildlife and Fish Refuge through which the CHC transmission line would be built for activities like canoeing and cross-country skiing. SPF at ¶ 12. If the Transmission Companies go forward in building both the Iowa and the Wisconsin segments up to the borders of the Refuge, and then begin pre-

construction activities in the Refuge, this will significantly harm Ms. Kurt's use and enjoyment of the area by impairing the experience of being in a natural setting harming the ecosystems and species that Ms. Kurt enjoys experiencing and viewing due to impacts like destruction and fragmentation of habitat, erosion, and sedimentation. SPF at ¶ 14. In particular, Ms. Kurt is concerned that clearing and maintenance of the right-of-way will lead to increased run-off and sedimentation into the Mississippi River. SPF at ¶ 15. Sedimentation would negatively affect Ms. Kurt's ability to view aquatic life through clear water while paddling, and would harm the mussels Ms. Kurt enjoys viewing. SPF at ¶ 16, 17.

Kerry Beheler is a member of WWF who uses and enjoys natural areas in the Driftless Area, including the Refuge. SPF at ¶ 41, 42. Her use and enjoyment of the Refuge would be significantly harmed by preconstruction and construction activities that will destroy and fragment habitat, introduce barriers to movement, and disturb and drive away wildlife. SPF at ¶ 43. Dredge and fill in the Refuge wetlands will impair the value of those wetlands, and will lead to increased turbidity and sedimentation in the Mississippi River, including in the essential habitat area for the federally endangered Higgins eye pearlymussel, and would significantly detract from Ms. Beheler's enjoyment of the area. SPF at ¶¶ 44, 45.

DALC member and board member Mark Mittelstadt volunteers to maintain a native prairie at the Deer Valley Golf Course, which provides habitat for species including the federally-listed regal fritillary butterfly and state-listed bird and plant species. SPF at ¶¶ 25, 26. The Cardinal-Hickory Creek transmission line would run along the north edge of the Deer Valley Golf Course, about a quarter mile from the prairie. SPF at ¶ 27. Mr. Mittelstadt's use and enjoyment of this area will likely be negatively impacted by pre-construction and construction activities for the CHC transmission line which can introduce invasive plant species that can then

rapidly spread throughout the prairie and be difficult to combat. SPF at ¶ 27. Mr. Mittelstadt is also concerned about invasive species spreading to the prairie at the Thomas Historic Stone Barn property, which is adjacent to the golf course and on which DALC holds a conservation easement. SPF at ¶ 30. Moreover, Mr. Mittelstadt is concerned about impacts on other areas and natural resources. For example, he believes preconstruction and construction activity may disturb a pair of bald eagles that nests along Highway 18 / US 151, which he regularly observes. SPF at ¶ 31. In addition, Mr. Mittelstadt's use of the Cassville ferry service would be less enjoyable if the CHC transmission line is constructed over the ferry's route between Cassville, Wisconsin and the landing in the Upper Mississippi River National Wildlife and Fish Refuge. SPF at ¶ 32.

Brian Durtschi (DALC member) owns over 80 acres on the east side of Mount Horeb—a property with great scenic and recreational value with farmland, woods, Schlapbach Creek, and wetlands. SPF at ¶ 18-19. Mr. Durtschi enjoys seeing wildlife like deer and turkey on his property, and also allows friends to use his property for hunting. SPF at ¶ 20. The planned route for the CHC transmission line would cut through Mr. Durtschi's property across cropland, wooded areas, Schlapbach Creek and its wetlands, and then continue over the Military Ridge State (Recreational) Trail. SPF at ¶ 21. On Mr. Durtschi's property the Transmission Companies plan to clear a large swath of wooded area, destroy wildlife habitat, and clear vegetation around Schlapbach Creek and its wetlands, likely causing significant sedimentation of the creek and irreversible soil compaction in agricultural fields. SPF at ¶¶ 22, 23.

These are exactly the type of irreparable harms that warrant the issuance of a preliminary injunction. For example, in *Alliance for the Wild Rockies*, 632 F.3d at 1135, the plaintiff sought an injunction to halt logging in a National Forest. The plaintiff group showed irreparable harm because its members use the National Forest, including the areas that would be logged, for work

and recreation. If the area was logged, this would "harm [the] members' ability to 'view, experience, and utilize' the areas in their undisturbed state." *Id.* In *Habitat II*, 363 F. Supp. 2d at 1113, the court recognized that "logging such as would occur as the result of the Northwest Howell timber sale can have long-term environmental consequences and thus satisfy the irreparable injury criterion." Similarly, Ms. Kurt and Ms. Beheler use the Upper Mississippi River National Wildlife and Fish Refuge, including the area where the transmission line would be built. SPF at ¶¶ 12, 28. The clearing of the right-of-way and other preconstruction activity would harm their ability to view, experience, and utilize this area in an undisturbed state. SPF at ¶ 12, 15, 31. Similarly, the construction of the transmission line would ruin the aesthetics of Mr. Durtschi's property and may lead to less wildlife using the property.

In *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d at 995, the court found that "any injury to the environment in these cases will necessarily harm the plaintiffs' environmental interests" because plaintiffs' members used and enjoyed the area impacted by construction work. Activities that "would threaten" an endangered mussel also constituted irreparable harm to the plaintiff when plaintiff group's member stated that he "has a 'very important' interest in protecting all endangered species, including the mussel, and mussel specimens have been found on his property." *Id.* at 996. Similarly, both Ms. Kurt and Ms. Beheler have stated their significant interest in the protection of the Higgins eye pearlymussel, which lives in the Mississippi River right where the transmission line would be built, an area which both Ms. Kurt and Ms. Beheler visit. SPF at ¶ 12, 14-15, 28-30. Similarly, Mr. Mittelstadt has a significant interest in the prairie that he manages, and construction and maintenance activities associated with the transmission line threaten to spread invasive plants.

In *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d at 788, the plaintiffs sought a preliminary injunction to prevent invasive carp from entering the Great Lakes. On the issue of the likelihood of harm, the court acknowledged that "[a] presently existing actual threat must be shown." *Id.* (*citing* 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2948.1, at 154–55 (2d ed.1995)). The court found this standard was met even though "no one knows whether th[e] irreparable harm [of invasive carp spreading into the Great Lakes] will come to pass" and there was an "intense factual dispute" over how quickly the invasive carp were spreading, which made "evaluating its likelihood even more tricky." *Id.* Further, the court had "very little trouble concluding that the environmental and economic harm that the states have shown might come to pass would be genuinely irreparable if it did occur." *Id.* at 788.

Similarly, Plaintiffs do not need to conclusively prove that injuries to their members will certainly occur. Mr. Mittelstadt is concerned about the spread of invasive plant species into the native prairie that he manages and the neighboring property on which DALC has a conservation easement. The likelihood of new invasive species being introduced is high enough to support a preliminary injunction. The Defendants' EIS acknowledges that:

> The C-HC Project would directly affect noxious weeds through soil and native vegetation disturbance. Noxious weeds typically are able to effectively compete with native plants and can relatively quickly invade disturbed or fragmented areas. Therefore, disturbance of vegetative cover could facilitate the introduction, spread and proliferation of invasive species, which in turn could alter plant community composition, reduce native plant species cover and biodiversity, alter soils and hydrology, and produce monocultures.

SPF at ¶ 179. The EIS lists four "primary direct and indirect impacts to vegetation during construction and operation and maintenance of the proposed Project," which includes "increased non-native, invasive plants." SPF at ¶ 181.

The EIS reveals that many invasive species already exist in the area of the proposed line, and therefore could easily be spread through construction and maintenance activities. SPF at ¶

182. In 2017, there was fieldwork done for wetland delineations and vegetation mapping. Although the fieldwork "*did not* include targeted surveys to identify all invasive species," there were still over two dozen invasive plant species recorded. SPF at ¶ 182 (emphasis added). Twenty-four of the species are categorized as "restricted" under Wis. Adm. Code § NR 40.02(46), which means each species "causes or has the potential to cause economic or environmental harm or harm to human health." SPF at ¶ 182. One species is categorized as "prohibited," EIS at 164, which means it also has the potential to "caus[e] economic or environmental harm or harm to human health." SPF at ¶ 182.

Notably, the harmful impacts from the Cardinal-Hickory Creek transmission line are of an entirely different nature than the impacts that this court found to be insufficient to support a preliminary injunction in *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, No. 17-CV-35-JDP, 2017 WL 2773718, at *2 (W.D. Wis. June 26, 2017). In *Sauk Prairie,* the plaintiffs challenged an agency's decision to allow a few limited, specific uses of a state recreation area (previously the site of a munitions plant) that might disrupt the wildlife. It was *not* about large-scale changes to the landscape itself. For example, one use that concerned the plaintiffs in *Sauk Prairie* was dog training in a limited section of the recreation area near a highway, because it would involve "occasional" discharge of firearms, which would have impacts similar to the hunting that was already permitted. *Sauk Prairie Conservation All. v. U.S. Dep't of Interior*, 320 F. Supp. 3d 1013, 1031 (W.D. Wis. 2018), *aff'd sub nom. Sauk Prairie Conservation All. v. United States Dep't of the Interior*, 944 F.3d 664 (7th Cir. 2019). Another use was off-road motorcycle riding, which was limited to six days per year and to 100 riders. *Id.* at 1029. The impacts from building a massive high-voltage transmission line through the protected National

Wildlife and Fish Refuge, rural communities, family farms, and the scenic Driftless Area landscape and vital natural resources is entirely different in nature, scope, and permanence.

B. Plaintiffs Have Suffered and Continue to Suffer Irreparable Procedural and Informational Injury from the Inadequacy of the EIS.

The Plaintiffs have also suffered and continue to suffer procedural injury[31] because of the Defendants' violations of NEPA. Courts have recognized that "the failure to comply with NEPA's requirements causes harm itself." *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d at 995; *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030, 1037 (8th Cir. 2016). *See also United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 31 (1st Cir. 2011) ("It follows inexorably that 'when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.'") (*citing Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir. 1983)).

Plaintiffs' "procedural interest in a proper NEPA analysis is likely to be irreparably harmed if [a developer] were permitted to go forward with the very actions that threaten the harm NEPA is intended to prevent, including uninformed decisionmaking." *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1241–42 (D. Colo. 2009). *See also, Save Strawberry Canyon v. Dep't of Energy*, 613 F.Supp.2d 1177, 1187 (N.D. Cal. 2009) ("There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project."). In *Richland/Wilkin*, the court found that plaintiffs' members "face procedural harm because, as

[31] While some courts have described this as a "procedural" injury, others have instead acknowledged the same injury, but characterized it differently: "[T]he harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989).

noted by the district court, there would be added difficulty" in stopping the larger project once construction had begun on a specific component of that project. *Richland/Wilkin*, 826 F.3d at 1039.

Likewise, in *Milwaukee Inner-City Congregations*, 944 F. Supp. 2d at 663, this Court found that the plaintiffs would be irreparably harmed even though they were "not concerned about the imminent destruction of environmental resources," but were rather "worried about the long-term effects of the *completed* project on the environment . . . [that] will not begin to materialize until . . . well after a final decision on the merits." (emphasis in original). The court explained:

> [I]n the absence of an injunction, by the time the agencies revise the EIS and make a new decision, they may have made so many commitments to the preset version of the project that they will have no choice but to select that version once again, even if the corrected EIS reveals that a different version of the project would be preferable. If that happens, NEPA's action-forcing purpose will have been defeated.

Id. at 664.

Similarly, Plaintiffs and their members face procedural harm because the further the Transmission Companies get in preconstruction and construction activities, the harder it will be for Plaintiffs to stop the destruction and harder to enable the full and fair consideration of alternatives which is the "heart" of the NEPA process. If the Plaintiffs here ultimately prevail on their various claims, but the entire right-of-way has already been cleared, it would be much harder for the agencies to fully and fairly consider and "rigorously explore and objectively evaluate all reasonable alternatives" as well as undo the environmental damage.

This procedural harm only grows over time, as the "bureaucratic momentum" created by continued development increases the further along a project gets. *Colorado Wild,* 523 F.Supp.2d at 1221. Even if Plaintiffs then prevail on the merits, there is the significant risk that this

momentum "will skew the analysis and decision-making" of the agency "toward its original, non-NEPA compliant" decisions. *Id.* Accordingly, "the 'difficulty of stopping a bureaucratic steam roller, once started' [is] a proper factor for the district court to take into account" when considering a preliminary injunction. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d at 995 (citing *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)).

IV. TRADITIONAL LEGAL REMEDIES ARE UNAVAILABLE AND, IN ANY EVENT, WOULD BE INADEQUATE.

In order to show that legal remedies are inadequate, a plaintiff need not "demonstrate that the remedy be wholly ineffectual," but must "demonstrate that any award would be 'seriously deficient as compared to the harm suffered.'" *Whitaker*, 858 F.3d at 1046 (*quoting Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003)). Monetary damages are not even available under NEPA or the APA. In *Milwaukee Inner-City Congregations,* the court concluded that "[b]ecause only equitable remedies are available in NEPA cases… traditional legal remedies would be inadequate." 944 F. Supp. 2d at 664. Even if monetary damages were available, they certainly could not compensate for the irreversible environmental harms that construction of the transmission line would cause, including introduction of invasive species, harms to endangered species, and damage to wetlands.

The Supreme Court has recognized that environmental injuries "can seldom be adequately remedied by money damages." *Amoco Prod. Co.*, 480 U.S. at 545. And the Seventh Circuit has recognized that "[a]n economic award would not sufficiently compensate for" the injury of "a decrease in recreational and aesthetic enjoyment" of a natural area. *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d 918, 936 (7th Cir. 2008).

V. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION.

When deciding whether to grant a preliminary injunction, "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 542. A court must also consider the public interest, or "the consequences of granting or denying the injunction to non-parties." *Abbott Labs. v. Mead Johnson & Co*., 971 F.2d 6, 11 (7th Cir. 1992). The Supreme Court has stated that "[i]f [environmental] injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545.

The balance of harms and the public interest weigh in favor of granting an injunction. First, harm to the Defendants would be minimal. The federal agency Defendants provided various approvals for the transmission line project, but they do not have a significant interest in the transmission line being built at all, let alone quickly. Accordingly, there would be minimal, if any, harm to the Defendants from a preliminary injunction. The Intervenor-Defendant Transmission Companies will no doubt allege increasing construction costs, which ratepayers would presumably pay, but this project has been on the drawing board for more than a decade, and a temporary construction halt will not cause them substantial harm either. Any minor harm to Defendants from an injunction is vastly outweighed by the irreparable harms that Plaintiffs and their members will suffer in the absence of an injunction, as explained above, as well as by the strong public interest in preserving the environment and in ensuring the adequacy of the Defendant federal agencies' NEPA reviews.

There is a strong public interest in avoiding irreversible environmental degradation, and in preserving natural areas and wildlife habitats for future generations of Americans to enjoy.

Anglers of the Au Sable v. U.S. Forest Serv., 402 F. Supp. 2d 826, 839 (E.D. Mich. 2005) ("[T]here is a strong public interest in preserving national forests in their natural states and ensuring that the dictates of NEPA are complied with.") (citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002)). *Habitat I,* 363 F.Supp. 2d at 1089 (harm to hawk habitat irreparable "especially when coupled with the added risk to the environment that takes place when governmental decision makers make up their minds without having before them [a NEPA compliant] analysis"). When considering injunctive relief, the public interest "always tip[s] in favor of the protected species." *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015); *see also Red Wolf Coal. v. United States Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 806 (E.D.N.C. 2016) ("the public interest tips heavily in favor of protected species").

In addition, an "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest. There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). *See also W. Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1260 (D. Or. 2019) ("When the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff.").

There are many other individuals, in addition to members of the Plaintiff organizations, who own and use land along the transmission line route who will soon be irreparably harmed. In evaluating the public interest, this Court should consider the purpose of the federal statutes that Plaintiffs allege Defendants violated, which reveals "what Congress … declared to be in the public interest." *League of Women Voters*, 838 F.3d at 13. *Accord Abbott Labs.*, 971 F.2d at 19.

For example, the Seventh Circuit granted an injunction delaying construction of a facility until it obtained a permit complying with the Clean Air Act, noting that such an injunction would serve the public interest because "requiring the Company to obtain a valid [Prevention of Significant Deterioration] permit would likely result in decreased emissions and improved public health, which would further a stated goal of the Clean Air Act." *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d at 936–37. Granting a preliminary injunction here would further the purposes of NEPA, the National Wildlife Refuge System Improvement Act, and the Clean Water Act. "Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008).

The court should also consider the public interest in a fair and thorough evaluation of alternatives and environmental impacts *from this transmission line specifically*. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d at 997. "[J]ust as important as the public interest in potential economic gains is 'the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications.'" *Id.*

Thousands of individuals, organizations, local legislators, and Wisconsin counties, villages, townships, and other municipalities filed thousands of written public comments and provided oral testimony to federal and state agencies, stating their opposition to the CHC transmission line and urging the full and fair consideration of alternatives. For example, 379 comments were submitted just during the scoping period for the federal EIS process. SPF at ¶ 73. Additional comments were submitted on the federal draft EIS and on the federal final EIS. More than 1,000 comments were submitted in the Public Service Commissions of Wisconsin's proceedings and more than 1,000 people attended the three public hearings. Dozens of

municipalities, groups, and individuals intervened in the Wisconsin Public Service Commission's proceeding on the transmission line, and they overwhelmingly opposed this controversial transmission line. SPF at ¶ 205.

The court can certainly consider the interests raised by these public commenters and intervenors in weighing the public interest. For example, in *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1242, the court noted that "the thousands of comments from the public opposing the drilling demonstrates that the public interest favors the injunction." Similarly, in *Colorado Wild* ., 523 F. Supp. 2d at 1223, the court explained that, "[t]he thousands of public comments submitted on the draft EIS, the majority of which reportedly opposed [the developer]'s access request and development plans, also demonstrate the public interest in maintaining the status quo by not allowing the Forest Service and [the developer] to begin implementation of the ROD until this challenge to the Forest Service's decision is fully resolved." Likewise, this Court can and should consider the many public comments opposing the controversial CHC transmission line and urging the agencies to consider alternatives.

While the public certainly has an interest in a safe, reliable electric grid, that interest does not weigh against a preliminary injunction in this case. This transmission line is not needed for reliability or to prevent blackouts. In the proceeding before the Public Service Commission of Wisconsin in which the Commission considered the need for the project, no one submitted any evidence that not building the line would lead to blackouts or brownouts. Nor would delay cause any economic harm to ratepayers. The Commission's staff provided expert witness testimony that it would be economically beneficial to *delay* this proposed transmission line until at least 2025. SPF at ¶ 206.

In *Highland Co-op. v. City of Lansing*, 492 F. Supp. 1372, 1382 (W.D. Mich. 1980), the court enjoined the construction of a roadway project, noting that the project had been on the City's Master Plan for many years and explaining: "The residents of Lansing have been able to exist for years without an Edgewood Boulevard, and it would seem they could manage until a more thorough analysis of plaintiffs' substantial environmental issues could be obtained." The court also held that "[w]hile the delay in a construction project will almost invariably result in an increase in the eventual costs, those costs cannot be said to be a substantial harm," and also ordered that no bond would be required. *Id.* at 1382-83. Like the residents of Lansing, the residents of southwest Wisconsin will not be harmed by a delay in the Cardinal-Hickory Creek transmission line.

Because this is an administrative review case, without discovery or a trial, the duration of the preliminary injunction to preserve the status quo will be relatively short, especially as cross-motions for summary judgment have already been submitted, and the case is currently scheduled to be fully briefed by November 1, 2021. *Richland/Wilkin* explained that while delay in construction of a large project might lead to higher construction costs and other risks, these were outweighed by the risk of irreparable harm to the plaintiff, especially considering "that the injunction would likely be short in duration." *Richland/Wilkin*, 826 F.3d at 1039. A similar balance exists here—while there may be some costs to the developers, these would be outweighed by the risk of irreparable harm to the Plaintiffs and the public at large, especially considering that the time between entering the preliminary injunction and a final decision on the merits would likely be fairly short.

In addition, this Court has recognized that if the large cost of delaying construction projects were always allowed to tip the balance against injunctions in NEPA case, then agencies

"could routinely fail to comply with NEPA without fear of a court's interfering with their plans," which "could render NEPA toothless." *Milwaukee Inner-City Congregations*, 944 F. Supp. 2d 656 at 675. Where "[t]he 'environmental dangers at stake . . . are serious,'. . . the public interests that might be injured by a preliminary injunction, such as temporary loss of jobs or delays in increasing energy output in the region, 'do not outweigh the public interests that will be served.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d at 997–98 (quoting *All. for the Wild Rockies*, 632 F.3d at 1138). *See also Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 855 (9th Cir. 1982) ("[I]ncreased cost from delay is alone not sufficient to establish prejudice. In enacting NEPA Congress contemplated that some delay would necessarily occur in the process of identifying potential environmental harm.").

In fact, other factors have already pushed back the proposed in-service date for this transmission line by several years. The Cardinal-Hickory Creek transmission line was first proposed as part of a portfolio of projects created by the Midcontinent Independent System Operator ("MISO"). It was referred to as the "Dubuque to Spring Green to Cardinal 345 kV Line" in MISO's 2012 report on their portfolio, with a projected in-service date of 2020, which has already been postponed to 2023. SPF at ¶¶ 3-4. An additional short delay during litigation of this case would not unduly harm the developers, and will save money for the ratepayers who ultimately pay the bills while maintaining the status quo. *See League of Wilderness Defs.*, 752 F.3d at 765–66 (finding that the harm of moving jobs and revenue into a future year because of a preliminary injunction is minimal).

VI. ANY INJUNCTION BOND SHOULD BE SET AT A LOW AMOUNT TO REFLECT THE FINANCIAL CAPACITY OF THE PLAINTIFFS.

The federal agency Defendants have requested that this Court take further briefing on the scope of the remedy if the Court finds that a preliminary injunction is warranted. Plaintiffs'

request is simple: Plaintiffs seek a temporary halt in construction of the CHC project to preserve the status quo until this Court can decide their federal environmental law claims on the merits. Presumably, Defendants will advise on what spatial or temporal limits they believe should be placed on an injunction, and Plaintiffs will be provided an opportunity to respond. Plaintiffs will caution the Court against any effort to divide the CHC project into separate parts for purposes of an injunction—for example, to enjoin only the Refuge crossing, or to enjoin only tower construction and to allow clearcutting to proceed. No segment of this transmission line project from the Refuge and through the Southwest Wisconsin Driftless Area can stand on its own, and this Court should reject the idea of a partial injunction that does not truly preserve the status quo.

Any injunction bond in this case should be set at zero or a minimal amount. First, as explained above, the federal Defendants will suffer no harm from a temporary halt in construction, and any additional costs the Transmission Companies were to incur will be fully recoverable from ratepayers. There is no need for a substantial bond to protect their interests.

Second, the federal courts have consistently either waived the bond requirement or set nominal bond amounts in environmental cases brought by nonprofits like the Plaintiffs. *See generally Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300, 302 (E.D. Wis. 1979) (setting bond amount at zero); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322 (9th Cir. 1975) (reducing bond in NEPA case from $4.5 million to $1,000); *Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971) (referencing Congressional intent that "private environmental organizations should assist in enforcing NEPA," reviewing similar cases in which only nominal bonds have been required, and setting a bond of $100).

In *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972), a NEPA case in which plaintiffs sought to enjoin a highway project, the Seventh Circuit found that since "the amount of the

security rests within the discretion of the district judge, the matter of requiring a security in the first instance . . . also rest[s] within the discretion of the district judge." *Accord Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (bond exemption not automatic, but within discretion of district court).

In *Milwaukee Inner-City Congregations*, 944 F. Supp. 2d at 677-678, this Court held that a bond exemption can be appropriate if (1) the defendants would not be harmed by the preliminary injunction, (2) the plaintiffs are "virtually certain to prevail on the merits," or (3) the plaintiff "could not afford to post a bond in an amount that would be adequate to compensate the defendants for any delay-related harm they may suffer." *Id.* In this last circumstance, the court explained that it "might allow the plaintiffs to post a smaller bond or, perhaps, no bond at all." *Id. See also California ex rel. Van de Kamp v. Tahoe Reg'l Plan. Agency*, 766 F.2d 1319, 1325–26, *amended*, 775 F.2d 998 (9th Cir. 1985) (upholding a preliminary injunction in a NEPA case without a bond when the nonprofit group "indicate[d] that it is unable to post a substantial bond," and the likelihood of success on the merits "tips in favor of a minimal bond or no bond at all."); *Colorado Wild*, 523 F. Supp. 2d at 1230 (no bond); *Bragg v. Robertson*, 54 F. Supp. 2d 635, 653 (S.D. W. Va. 1999) (setting bond amount at $5000; bond should not "effectively deny Plaintiffs' right of judicial review); *Earth Island Inst. v. U.S. Forest Serv.*, No. 2:05-CV-1608-MCE-GGH, 2006 WL 3359192, at *2 (E.D. Cal. Nov. 20, 2006) ($1000 bond); *Red Wolf Coal. v. United States Fish & Wildlife Serv.*, No. 2:20-CV-75-BO, 2021 WL 230202, at *7 (E.D.N.C. Jan. 22, 2021) (setting bond at $100 in ESA case).

As the attached declarations establish, each of the four Plaintiffs is a nonprofit organization with limited or no capacity to secure a large injunction bond. SPF at ¶¶ 36, 38, 61, 63, 65, 68, 72. A significant portion of the budgets for each of the Plaintiff organizations

comprises restricted funds which can only be used for specific purposes established by grantors or the government. SPF at ¶ 37, 62, 69, 72.

As already discussed above, the cost to Plaintiffs of going without an injunction—the irreparable harms to the environment and to members' environmental, aesthetic, and recreational interests—outweighs the possible harms to Defendants of not having a bond high enough to cover the full risk of harm from granting an injunction. Additionally, Plaintiffs' high likelihood of success on the merits means that there is a low likelihood that Defendants would suffer harms from an improperly-issued injunction, a factor that weighs in favor of setting a low bond amount. *See e.g. Earth Island Inst.*, 2006 WL 3359182 at *4; *Van de Kamp,* 766 F.2d at 1326.

For these reasons, the Plaintiffs request that the court set any injunction bond at zero or a nominal amount.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for a preliminary injunction and temporarily stay construction of the CHC high voltage transmission line.

Respectfully submitted this 8th day of October, 2021.

/s/ Howard A. Learner
Howard A. Learner
Scott Strand
Rachel L. Granneman
Ann Jaworski
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
T: (312) 673-6500
F: (312) 795-3730
HLearner@elpc.org
SStrand@elpc.org
RGranneman@elpc.org
AJaworski@elpc.org

Counsel for Plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife

/s/ Lindsay Paige Dubin
Lindsay Paige Dubin
Admitted Pro Hac Vice
Defenders of Wildlife
1130 17th Street NW
Washington, D.C. 20036
T: (202) 772-3234
ldubin@defenders.org

Counsel for Plaintiff Defenders of Wildlife

/s/ Robert M. Morgan
Robert M. Morgan
Admitted Pro Hac Vice
National Wildlife Refuge Association
415 E. Cape Shores Dr.
Lewes, DE 19958-3109
T: (301) 466-8915
RMorgan@RefugeAssocation.org

Counsel for Plaintiff National Wildlife Refuge Association