

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WISCONSIN**

NATIONAL WILDLIFE REFUGE ASSOCIATION,  
et al,

Plaintiffs,

v.

RURAL UTILITIES SERVICE, et al.

Federal Defendants,

AMERICAN TRANSMISSION COMPANY, LLC, et  
al.

Intervenor-Defendants.

No. 3:21-cv-00096-wmc

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NATIONAL WILDLIFE REFUGE ASSOCIATION,  
et al,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et  
al.,

Federal Defendants.

AMERICAN TRANSMISSION COMPANY, LLC, et  
al.

Intervenor-Defendants.

No. 3:21-cv-000306-wmc

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**INTERVENOR DEFENDANTS' MEMORANDUM IN SUPPORT OF EXPEDITED  
MOTION FOR STAY**

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**INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 6(b), Intervenor-Defendants move for a stay of the proceedings in the above-captioned cases.<sup>1</sup> Since 2012, the Co-owners have been working

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<sup>1</sup> The Intervenor-Defendants are American Transmission Company LLC and ATC Management Inc. ("ATC"), ITC Midwest LLC ("ITC Midwest") and Dairyland Power Cooperative ("Dairyland") (collectively, the "Co-owners").

with the Rural Utilities Service (“RUS”), U.S. Fish & Wildlife Service (“USFWS”), and U.S. Army Corps of Engineers (“USACE” or “the Corps”) to conduct an environmental review and obtain approvals for the construction of the Cardinal-Hickory Creek 345-kilovolt (“kV”) Transmission Line Project (“Project”), part of which will cross the Upper Mississippi River National Wildlife and Fish Refuge (“Refuge”) between Iowa and Wisconsin. In 2019 and 2020, the federal agencies issued various permits and authorizations for aspects of the Project, several of which the Plaintiffs challenge in this case. Plaintiffs allege that (1) RUS and the Corps failed to prepare an environmental impact statement (“EIS”) for the Project that complies with the National Environmental Policy Act (“NEPA”); (2) USFWS violated the National Wildlife Refuge System Improvement Act (“Refuge Act”) by issuing a compatibility determination and right-of-way (“ROW”) permit for the Project to cross through the Refuge; and (3) USACE violated NEPA, the Endangered Species Act (“ESA”), and the Clean Water Act (“CWA”) when it issued general permits and general permit verifications for the Project under the CWA.

Recent developments regarding the Project warrant this Court exercising its discretion to stay these proceedings in their entirety or, alternatively, with respect to CWA claims in Iowa and the Refuge Act claims. As discussed in greater detail below, at the end of July 2021, the Co-owners requested that USFWS authorize the Project’s crossing of the Refuge through a land exchange, *see* 16 U.S.C. § 668dd(b)(3), and on August 3, 2021, USFWS committed to working with the Co-owners toward a timely review of the proposed land exchange. A land exchange would obviate the need for the Compatibility Determination and ROW permit USFWS issued for the Project (and that Plaintiffs currently challenge) in December 2019 and September 2020, respectively. USFWS has stated that the land exchange process would take up to nine months to complete. In the meantime, the Co-owners do not intend to commence work on the Project within the Refuge until

October 2022. The Co-owners have not used or relied (nor will they) on the general permit USACE issued to construct the Project in Iowa, including in the Refuge. Rather, the Co-owners will need to apply for a new verification or individual permit under the CWA before commencing construction in the Refuge in October 2022. The Co-owners have also committed to provide Plaintiffs with 30 days advance notice prior to the commencement of construction in Wisconsin.

In light of the foregoing, it is appropriate for the Court to stay this litigation unless and until USFWS acts on the Co-owners' request for a land exchange and USACE issues a new permit or general permit verification for any regulated activities that will occur in Iowa. A stay will not unduly prejudice the Plaintiffs. The land exchange process is expected to take up to nine months and construction will not start within the Refuge until October 2022. Therefore, Plaintiffs will be able to pursue—and the Court will have time to resolve—their Refuge-related claims (whether under the Refuge Act or the CWA) if and when USFWS authorizes the land exchange and USACE issues new permits or verifications for Project-related work within the Refuge. A stay will also simplify the issues, promote judicial economy, and ease the burdens of litigation on both the Court and the parties. If USFWS authorizes a land exchange, then the Co-owners will not need to rely on the extant Compatibility Determination and ROW permit. The Co-owners will also need to apply for new CWA verifications or individual permits from USACE to conduct work within Iowa, including the Refuge. Therefore, it makes little sense for the parties and the Court to spend time and resources litigating over agency actions that are not likely to form the operative basis for Project-related work within the Refuge and are likely to be superseded in the near future. For these reasons, and as discussed in greater detail below, the Co-owners respectfully request that this Court stay the current proceedings in their entirety.

## BACKGROUND

### I. Factual Background on the Project

The Cardinal-Hickory Creek Project includes a 101-mile, 345-kilovolt transmission line from the Cardinal Substation in Dane County, Wisconsin through the new Hill Valley Substation near Montfort, Wisconsin, and terminating at the existing Hickory Creek Substation in Dubuque County, Iowa. *See* ECF No. 21: Apr. 7, 2021 Declaration of Thomas Dagenais (“Dagenais Decl.”) ¶ 5. The Cardinal-Hickory Creek Project will provide extensive benefits to local consumers of energy. If built, the new transmission line will lead to lower interstate energy costs by reducing congestion on the system, enhancing system reliability, and improving access to at least 42 renewable generators of low-cost wind and solar generation in development in Wisconsin, Iowa, Missouri, North Dakota, South Dakota, and Minnesota. Dagenais Decl. ¶¶ 20, 23. The Midcontinent Independent System Operator, Inc. (“MISO”), a not-for-profit entity created under federal law that is responsible for planning and operating the transmission system and energy markets across fifteen states, determined in 2011 that this was one of the top priority regional transmission lines (also known as Multi-Value Projects (“MVPs”)) that are particularly critical to meeting local energy and reliability needs. *See Ill. Commerce Comm’n v. FERC*, 721 F.3d 764, 770–72 (7th Cir. 2013) (describing the MVP portfolio); *see also* Dagenais Decl. ¶¶ 8, 9.

The federal government does not have general electric transmission siting or construction authority. MISO is not a federal agency. The Cardinal-Hickory Creek Project is not a federal initiative or project. The Co-owners are not government agencies. The great majority of the Project is entirely on private land, relies on private investment, requires no federal approval, and is governed by state utility regulatory jurisdiction. But certain limited aspects of the Project did, or might in the future, involve decisions by three federal agencies.

In anticipation of a loan application from Co-owner Dairyland and an application for a right-of-way to cross the Refuge, the government prepared an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, which requires federal agencies to identify, evaluate and solicit public comment on the potential environmental impacts of their actions. RUS, an operating unit of the U.S. Department of Agriculture (“USDA”), served as the lead federal agency for developing an EIS to analyze the Project proposal under NEPA. USFWS and the USACE participated in the EIS as “cooperating” agencies. This EIS formed the foundation for certain decisions by USFWS, USACE, and RUS on those aspects of the Project that implicate or may implicate specific federal responsibilities. The three federal agencies’ decisions are referenced in a single, comprehensive Record of Decision (“ROD”) that they issued in January 2020, *see* ECF No. 19, Ex. A, and are discussed in greater detail below.

## **II. Relevant Agency Decisions**

### **A. Rural Utilities Service**

The RUS is authorized by the Rural Electrification Act of 1936, 7 U.S.C. § 901 *et seq.*, to make loans and loan guarantees to finance construction of electric distribution, transmission, and generation facilities. Dairyland’s present intention is to seek financial assistance from the RUS in 2022 or 2023. *See* ECF No. 23: Apr. 7, 2021 Declaration of Jesse Beckendorf (“Beckendorf Decl.”) ¶ 10. The potential financial assistance from RUS would support Dairyland’s participation in the Project. However, before RUS can grant financial assistance (and assuming that Dairyland does ultimately apply for it), RUS must assess the technical and financial characteristics of the Project for which federal financial assistance is sought. ROD, at 46. Because a loan from RUS would likely constitute a major federal action, RUS led preparation of the EIS to carry out its obligations under NEPA. RUS determined that the Project meets RUS’s *environmental* requirements for providing financing assistance to Dairyland. ROD, at 4. Dairyland has not applied for financial

assistance and does not intend to apply for financial assistance until 2022 at the earliest. Beckendorf Decl. ¶ 10.

**B. U.S. Fish & Wildlife Service**

The Refuge Act requires USFWS to decide whether a proposed use of land owned and managed by the USFWS is “compatible” with the purposes for which the wildlife refuge was established. The Cardinal-Hickory Creek Project crosses the Upper Mississippi National Wildlife and Fish Refuge, which extends for 261 river miles along the Mississippi River in Minnesota, Wisconsin, Iowa, and Illinois. Since April 2012, the Co-owners have been meeting with USFWS to analyze the Project’s alternatives for crossing over the Mississippi river, including crossings through the Refuge. ROD, at 11. In December 2019, USFWS issued a Compatibility Determination affirming that the Project’s use of roughly a mile of the Refuge—subject to numerous environmental conditions, including removal of existing transmission lines located nearby in the Refuge—is compatible with the Refuge purposes. *See generally* 0096 Compl. Ex. B (ECF No. 1-8). USFWS signed the ROD on January 8, 2020, selecting the preferred alternative for crossing the Refuge. *Id.*, at Ex. A (ECF No. 1-7). The ROD and Compatibility Determination allowed the USFWS to issue a ROW permit for the Project to cross the Refuge in September 2020. *See id.*, Ex. A (ECF No. 1-7).

In July 2020, during consultation pursuant to the National Historic Preservation Act, the Ho-Chunk Nation and the Iowa State Historic Preservation Office (“IASHPO”) recommended that a new route segment be adopted to avoid a Native American burial mound site near the Refuge.<sup>2</sup> *See* Aug. 11, 2021 Declaration of David R. Zoppo (“Zoppo Decl.”) ¶ 3, Exhibit A. Accordingly,

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<sup>2</sup> On December 22, 2018—almost 18 months earlier—RUS made reports of the Project’s potential impacts on this mound site available to both the Ho-Chunk Nation and IASHPO. However, at that time, neither entity responded to the reports requesting avoidance of those burial mounds.

in March 2021, the Co-owners applied to USFWS for an amended ROW permit for the Project that would avoid impacts to this resource, further reduce the number of transmission structures within the Refuge by four towers, and reduce the total Project ROW in the Refuge by approximately ten acres (from 39.98 to 29.06 acres). *Id.* at 3–4. In this application, the Co-owners stated that, to maintain their then-current construction schedule, they would need to know within six months whether USFWS would approve the new ROW. *Id.* at 5. In their May 14, 2021 Joint Preliminary Pretrial Conference Statement, the Co-owners stated that they extended their planned schedule for construction in the Refuge by one year. *See* ECF No. 40, at 7 n.6. On July 29, 2021 the Co-owners requested that the USFWS consider a land exchange in lieu of their March 1, 2021 application for an amended ROW permit. Zoppo Decl. ¶ 4, Exhibit B. USFWS has agreed that the Co-owners’ proposed land exchange “is a potentially favorable alternative to the right-of-way permit” and expects that the process to consummate the exchange “will take up to nine months.” *Id.*, ¶ 5, Exhibit C.

### **C. U.S. Army Corps of Engineers**

Certain locations along the Project route cross Corps’ owned/managed lands or are subject to easements held by the Corps for Mississippi River Project navigation purposes.<sup>3</sup> In addition, the Corps was required to ensure that the Project complies with Section 404 of the CWA, which establishes a permit program for the discharge of dredged or fill material into waters subject to the jurisdiction of the United States (“jurisdictional waters”), including wetlands. 33 U.S.C. § 1344. The Corps has issued general permits on a national, regional, or statewide basis that allow the dredge and fill of wetlands for an entire category of activities, provided that the activities are similar in nature and will cause only minimal adverse environmental effects, both separately and

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<sup>3</sup> The Mississippi River Project is a system of public works within the upper Mississippi Valley designed to manage flood risk and navigation and serves other public purposes within the channel.

cumulatively. *See* 33 U.S.C. § 1344(e)(1). Nationwide permits (“NWP”) are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts. *See* 33 C.F.R. § 330.1(b). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899. *See* 33 C.F.R. § 322.2(f). To comply with NEPA, the permits are analyzed as a category in a national scale cumulative impact assessment. *See* 33 C.F.R. §§ 330.1(b), 330.5. Individual activities are then verified to confirm that they meet the parameters of the general permits. 33 C.F.R. §§ 330.1(e)(2)–(3), 330.6(a)(2), (3)(i), (d).

In this case, the USACE determined that the Project’s ROW within the Refuge is consistent with all applicable laws and guidance. ROD, at 6. The appropriate Corps district offices also verified that Project-related activities in jurisdictional waters were authorized under either NWP 12 or the Utility Regional General Permit (“URGP”) for portions of the Project in Iowa and Wisconsin, respectively. On November 20, 2019, the USACE’s Rock Island District issued permits under the Rivers and Harbors Act for the Project’s crossing of the Mississippi River and issued a Nationwide Permit 12 (“NWP 12”) verification for the Iowa portion of the Project and for the Mississippi River crossing. 00306 Compl., Ex. A, at 104–125 (No. 21-cv-00306, ECF No. 1).<sup>4</sup> One month later, the USACE’s St. Paul District issued a URGV verification for the Wisconsin portion of the Project. *Id.* at 126–167. USACE also signed the ROD for the Project with RUS on January 16, 2020. ROD, at 48, 50.

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<sup>4</sup> On July 2, 2021, this Court granted the parties’ joint motion to consolidate Case Nos. 21-cv-00096 and 21-cv-00306. The latter case included Plaintiffs’ claims against the USACE under NEPA, the CWA, and the ESA, whereas the former included Plaintiffs’ claims against RUS and USFWS under NEPA and the Refuge Act. Co-owners cite to Plaintiffs’ complaint against RUS and USFWS as the “00096 Complaint” and to Plaintiffs’ complaint against USACE as the “00306 Complaint.”

In this consolidated action, the Plaintiffs challenge various aspects of the federal agencies' decisions for the Project. The Plaintiffs raise several challenges to the adequacy of the EIS under NEPA. *See* 00096 Compl. ¶¶ 75–145; 00306 Compl. ¶¶ 111–182. They also allege that the Compatibility Determination and ROW permit USFWS issued for the Project are unlawful under the Refuge Act. *See* 00096 Compl. ¶¶ 146–198. Finally, Plaintiffs allege that NWP 12 and the UGRP violate NEPA, the CWA, and the ESA, and that the general permit verifications for the Project also violate the CWA. *See* 00306 Compl. ¶¶ 86–110, 183–207.<sup>5</sup>

### III. Relevant Factual Developments

On July 29, 2021, the Co-owners requested that USFWS approve a land exchange that would enable the Project to cross of the Refuge. *See* Zoppo Decl. ¶ 5, Exhibit C. The Refuge's existing Comprehensive Conservation Plan identifies land exchanges as a desirable tool to adjust land ownership in and adjacent to the Refuge for the benefit of the Refuge. *Id.* at 2. Under the proposed land exchange, the Co-owners would surrender their existing, approximately 28.1-acre transmission ROWs within the Refuge and transfer an additional, approximately 30-acre parcel of land adjacent to the Refuge (the “Wagner parcel”) to USFWS in exchange for an approximately 19-acre segment of USFWS-owned land within the Refuge for the Project. *Id.* Surrender of the Co-owners' existing ROWs in exchange for a smaller parcel of land, with habitat that is already fragmented by a public road, would reduce habitat fragmentation within the Refuge. 0096 Compl. Ex. B, at 14. Moreover, the Wagner parcel contains high quality habitat that USFWS has identified as a priority for acquisition. Zoppo Decl. ¶ 4, Exhibit B, at 2. From this perspective, the Co-owners' proposal would secure significant benefits for the Refuge: they would transfer almost 60-acres of

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<sup>5</sup> As the Co-owners understand it, Counts One through Three of the 00306 Complaint raise facial challenges to the USACE's NWP 12 and UGRP, and Count Five of that complaint raises a challenge to the permit verifications that USACE issued for the Project.

high-quality habitat to USFWS (approximately three times the acreage of the Project's proposed ROW through the Refuge), while re-locating their existing transmission ROW along an existing road and railroad line, which will lead to a net reduction in habitat fragmentation within the Refuge over the next 30 to 50 years. 0096 Compl., Ex. B, at 12, 14–15.

In addition to creating net benefits for the Refuge, the Co-owners' land exchange proposal would allow them to place the Project into service in a timely manner. To date, USFWS has not identified a timeline for completing its decision-making related to the Co-owners' March 1, 2021 request for an amended ROW. However, the proposed land exchange could obviate the need for USFWS to issue an amended compatibility determination and ROW permit or otherwise act on the Co-Owners' March 1, 2021 request for an amended ROW. *See* Zoppo Decl. ¶ 5, Exhibit C. Rather, USFWS has broad discretion to acquire property through an exchange of Refuge-owned lands that are "suitable for disposition," so long as the value of the properties exchanged is approximately equal. 16 U.S.C. § 668dd(b)(3). USFWS has agreed that the Co-owners' proposed land exchange "is a potentially favorable alternative to the right-of-way permit" and expects that the process to consummate the exchange "will take up to nine months." *Id.*

Although the Co-owners commenced construction on the Iowa-side of the Project in mid-April 2021, *see* Aug. 10, 2021 Declaration of Mark Rothfork ("Rothfork Decl.") ¶ 7, no construction work on the Project has occurred or will occur within the Refuge while the Co-owners' request for a land exchange is pending. The Co-owners have committed to refrain using the ROW permit that USFWS issued in September 2020 for the Project while the land exchange efforts are underway and, in any event, will not start construction within the Refuge until October 2022. *See* Zoppo Decl. ¶ 5, Ex. C, at 2–3; Rothfork Decl. ¶ 8. Moreover, on January 13, 2021, the USACE published a final rule reissuing and modifying 12 existing NWP's under the CWA,

including NWP 12, which went into effect on March 15, 2021. *See Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 2744 (Jan. 13, 2021); Rothfork Decl. ¶ 6. Given that none of the work conducted in Iowa to date has relied on the NWP 12 verification, upon reissuance and modification of the 12 existing NWPs under the CWA (including NWP 12) on March 15, 2021, the existing verification likely expired on its own terms. Rothfork Decl. ¶¶ 5, 7. Regardless, in light of the USACE’s new general permits and the Co-owners’ updated timeline for construction within the Refuge, the Co-owners will need to apply for a new verification or individual permit from USACE before commencing work in jurisdictional waters within the Refuge in October of 2022.

### ARGUMENT

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The issuance of a stay is within the court’s discretion, *Virginia Ry. Co. v. United States*, 272 U.S. 658, 672 (1926), and the movant bears the burden of justifying an exercise of that discretion. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). The Court considers several factors when deciding a motion to stay, including whether (1) the litigation is at an early stage; (2) a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) a stay will simplify the issues in questions and streamline the trial; and (4) a stay will reduce the burden of litigation on the parties and on the court. *Grice Eng’g, Inc. v. JG Innovations, Inc.*, 691 F. Supp.2d 915, 920 (W.D. Wis. 2010). Here, each of these factors weighs in favor of a stay.

*First*, this litigation is still in its early stages. Plaintiffs filed their complaint against RUS and USFWS in February and against USACE in May. *See generally* 00096 Compl.; 00306 Compl. The Court consolidated those actions, *see* ECF No. 46, and has established a procedural schedule

on the Plaintiffs' claims against RUS and USFWS: the Defendants must file the record with the Court by August 20 and the parties must submit summary judgment motions by September 3. *See* ECF No. 42. The Co-owners' understanding is that the Court intends for the same procedural schedule to apply to summary judgment motions regarding Plaintiffs' claims against the USACE.<sup>6</sup> The fact that these consolidated actions have been pending for six months and substantive briefing has not yet commenced on any of Plaintiffs' claims weighs in favor of the Court issuing a stay. *See Woodman's Food Market, Inc. v. Clorox Co.*, No. 14-cv-734, 2015 WL 4858396, at \*3 (W.D. Wis. Aug. 13, 2015) (granting stay pending interlocutory appeal where case had been pending for nine months and Court had not yet resolved defendants' motions to dismiss).

*Second*, a stay will not unduly prejudice or tactically disadvantage the Plaintiffs. As noted earlier, the Co-owners requested and USFWS is considering a land exchange that would enable the Project's crossing of the Refuge. USFWS has indicated that the land exchange process is expected to take up to nine months, *see* Zoppo Decl. ¶ 5, Exhibit C, meaning it would be complete by (roughly) April 2022. The Co-owners will not commence Project construction in the Refuge until October 2022, and therefore, will not conduct any work within the Refuge while their request for a land exchange is pending. Rothfork Decl. ¶ 8. The Co-owners will also need to apply for one or more new authorizations from USACE before they can begin activities affecting jurisdictional waters within the Refuge. The Plaintiffs will be able to challenge those agency actions—and this Court will be able to resolve those challenges, if and when they occur—well before the start of construction within the Refuge. In other words, the Co-owners are not taking any immediate action

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<sup>6</sup> As explained, on May 19, 2021, the Court established a procedural schedule for the filing of the administrative record and summary judgment briefing on Plaintiffs' claims against RUS and USFWS in Case No. 21-cv-00096. *See* ECF No. 42. Approximately six weeks later, the Court consolidated that action with the Plaintiffs' action in Case No. 21-cv-00306 against USACE. *See* ECF No. 46. Although the Court's consolidation order did not indicate whether the existing procedural schedule would apply to Plaintiffs' claims against USACE, the parties are operating under the assumption that it does.

within the Refuge that will prejudice the Plaintiffs' ability to prosecute their claims. Accordingly, the second *Grice* factor also weighs in favor of a stay.

*Third*, a stay will both simplify the issues and reduce the burden of litigation on the parties and the Court. The Plaintiffs are challenging several federal agency actions that, in all likelihood, *will not* be the operative decisions authorizing construction of the Project through the Refuge. Specifically, the Plaintiffs allege that USFWS's Compatibility Determination and ROW permit for the Project's crossing of the Refuge is unlawful under the Refuge Act. 00096 Compl. ¶¶ 146–198. But USFWS is now considering the Co-owners' request to authorize a land exchange that would render both the Compatibility Determination and ROW unnecessary. *See generally* Zoppo Decl. ¶¶ 4–5, Exhibits B, C. The agency has acknowledged that, if approved, this land exchange would “obviate the need for the 2020 right-of-way permit” and would render unnecessary any further action on the Co-owners' March 1, 2021 amended ROW permit application. *See* Zoppo Decl. ¶ 5, Exhibit C. Moreover, the legal standards for land exchanges within the Refuge system, *see* 16 U.S.C. § 668dd(b)(3), are completely different from those that apply to authorizations for easements or ROWs within that system, *see id.* § 668dd(d)(1)(B). The USFWS need not determine that such a land exchange is “compatible with the purposes for which [the Refuge is] established.” *Id.* Rather, USFWS has broad discretion to acquire property through an exchange Refuge-owned lands that are “suitable for disposition,” so long as the value of the properties exchanged is approximately equal. *Id.* § 668dd(b)(3).

The Plaintiffs have also challenged USACE's issuance of NWP 12 and its verification that Project-related construction activities affecting jurisdictional waters within the Refuge fall under NWP 12. 00306 Compl. ¶¶ 86–110, 183–207. But for several reasons, these challenges are likely moot. The existing verification either expires on March 22, 2022 or, given that none of the work

conducted in Iowa to date has relied on that verification, expired on its own terms with the reissuance and modification of the new suite of NWP's on March 15, 2021. Rothfork Decl. ¶¶ 5, 7. The Co-owners will seek and obtain new verifications or individual permits under the CWA before they undertake any activities in jurisdictional waters in Iowa, including the Refuge—which will not occur until October 2022. Rothfork Decl. ¶¶ 5, 8–10. The new verification and/or permit may differ from the existing one, depending on the route the Project takes through the Refuge under the land exchange process. Moreover, the existing verification relies on an outdated version of NWP 12, which is no longer the operative general permit for utility lines under the CWA in the wake of USACE's January 2021 rulemaking. *See* 86 Fed. Reg. 2744. In light of this, Plaintiffs' facial challenge to the version of NWP 12 on which the verification is based, *see* 00306 Compl. ¶¶ 93–110, is clearly moot. The Plaintiffs may withdraw or raise additional challenges to the new general permit and any verification(s) that USACE issues for the Project, depending on their updated terms.

It makes little sense for the parties and the Court to spend time and resources litigating agency actions, many of which will, in all likelihood, have no bearing on the Project. The USFWS' decision to consider the Co-owners' request for a land exchange will likely moot the Plaintiffs' existing claims under the Refuge Act. An RUS decision on granting financial assistance for Dairyland would be based on a NEPA analysis and an application that Dairyland does not intend to submit until 2022 or 2023. And USACE's recent final rule issuing a new general permit for utility lines—along with the Co-owners' need to apply for and obtain a verification pursuant to that permit—have mooted the Plaintiffs' facial challenge to the NWP 12 permit and challenge to the Project-specific NWP 12 verification.

These future federal agency actions will implicate different facts, different administrative records, and different legal issues and arguments than those that are presently before the Court. Should the Plaintiffs choose to challenge these agency actions, the parties can brief—and the Court can resolve—the issues that are raised at that time. But it would be a waste of the parties’ and the Court’s time and resources to continue litigating agency decisions that are likely to be superseded, and that will involve factual and legal issues distinct from those that are currently before the Court. Accordingly, the third and fourth *Grice* factors also weigh in favor of a stay.

Certainly, a stay cannot be of an immoderate duration, *Landis*, 299 U.S. at 257, and the Co-owners are not suggesting that these proceedings be stayed indefinitely. The Court can lift the stay if and when USFWS completes the land exchange process (expected no later than April 2022) and USACE issues a verification for Project related activities affecting jurisdictional waters within the Refuge. In the interim, the Co-owners propose that the Court order status updates every 60 days from the date a stay is issued so the Court may be apprised of the progress with respect to these future actions.

### **CONCLUSION**

For the reasons stated above, the Co-owners respectfully request that this Court stay the current proceeding in its entirety or, alternatively, with respect to the claims involving NWP 12 and the Refuge Act claims, until USFWS completes its decision-making on the Co-owners’ request for a land exchange for the Project under 16 U.S.C. § 668dd(b)(3) and USACE issues a new verification for Project activities affecting jurisdictional waters within the Refuge for the Project under section 404 of the CWA.

DATED: August 11, 2021

Respectfully submitted,

*s/ Thomas C. Jensen*

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 11, 2021, I electronically filed the forgoing document with the Clerk of Court using the Court's ECF system, which will serve the document on all counsel of record registered for electronic filing in the above-captioned proceeding.

Dated: August 11, 2021

/s/ Thomas C. Jensen  
Thomas C. Jensen