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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs submit this Reply Brief in support of their motion for summary judgment, Dkt. 70, to respond to arguments raised in the Federal Defendants' Response Brief, Dkt. 115, and the Transmission Companies' Response Brief, Dkt. 112.

Defendants and the Transmission Companies continually seek to evade the merits of Plaintiffs' claims that they have violated the statutory requirements of the National Environmental Policy Act, the National Wildlife Refuge System Improvement Act, the Clean Water Act, and the Administrative Procedure Act. The Defendants and Transmission Companies raise multiple justiciability dodges to avoid the merits, argue that this Court owes deference to every agency decision made, and argue that the environmental impacts of this 100-mile-long massive Cardinal-Hickory Creek (CHC) transmission line with 17-story high towers are somehow miniscule. Deference cannot save agency decision-making that patently violates numerous environmental statutes. This Court should not be swayed by the disingenuous attempts to downplay the damaging environmental impacts of: (1) running high-voltage transmission wires with 20-story high towers through the protected Upper Mississippi River National Wildlife and Fish Refuge and across the Mississippi River through the migratory bird flyway, (2) sinking concrete foundations into wetlands, and (3) clearcutting miles of right-of-way through southwest Wisconsin's Driftless Area, including through the Black Earth Creek Watershed Area and Military Ridge Prairie Heritage Area, among other vital conservation lands, waterways, and communities.

The Defendants' and Transmission Companies mischaracterize Plaintiffs' claims of environmental destruction as ignoring a thorough environmental review process. That process, however, was fundamentally flawed and did not comply with the governing statutory requirements. Plaintiffs are hardly alone in raising issues with the Defendant agencies' failure to

"rigorously explore and objectively evaluate all reasonable alternatives" and failure to fully and fairly consider routes that would avoid the protected National Wildlife Refuge.

Numerous agencies, public officials, civic and environmental organizations, and hundreds of people filed comments in the federal environmental impact statement ("EIS") process raising these concerns, advocating for alternatives, and otherwise directly opposing the CHC Transmission Line. The U.S. EPA Environmental Protection Agency urged consideration of alternative transmission line routes that would run outside the protected Upper Mississippi River National Wildlife and Fish Refuge. ROD002226. The National Park Service raised concerns about harmful impacts on the Ice Age National Scenic Trail. ROD001975. Many others submitted critical comments on the EIS, including, but not limited to:

- U.S. Congresspersons:
    - Senator Tammy Baldwin (ROD004917)
    - Representative Mark Pocan (ROD009109)
    - Representative Betty McCollum (ROD009116)
- Local Governments
    - Town of Cross Plains (ROD003809)
    - Inter-Municipal Energy Planning Committee (ROD003692, ROD004268)
    - Village of Mount Horeb (ROD003688, ROD002266, ROD004823)
    - City of Platteville (ROD003782)
    - Town of Springdale (ROD002249, ROD004836)
    - Town of Vermont (ROD007856, ROD002240)
    - Town of Wyoming (ROD007804)
- Non-Governmental Organizations
    - Wisconsin's Green Fire – Voices for Conservation (ROD003966, ROD007178)
    - National Audubon Society (ROD012756)
    - The Nature Conservancy, Wisconsin Chapter (ROD002264)
    - The Prairie Enthusiasts (ROD002324)
    - Friends of Military Ridge Bike Trail (ROD004828)
    - Save Our Unique Lands (SOUL) of Wisconsin (ROD004508)
    - Trout Unlimited (ROD002012)

United States Senator Tammy Duckworth,[1] Representative Ron Kind,[2] and Representative Mike Quigley[3] each sent letters directly to the Federal Defendants urging that alternatives be fully and fairly evaluated.

Many municipalities challenged the proposed CHC transmission line in the state Public Service Commission proceeding. Dane County,[4] Iowa County,[5] Village of Montfort,[6] Town of Wyoming,[7] and the Citizens Utility Board[8] all intervened in the Public Service Commission proceeding as parties to oppose the CHC transmission line, and the Wisconsin Farmers' Union,[9] Black Earth Creek Watershed Association,[10] and 31 local governmental entities, ROD044970–71, submitted comments in opposition. All of the Wisconsin state legislators in the area of the CHC transmission line—State Senators Jonathan Erpenbach, Howard Marklein and Jennifer Shilling, and State Representatives Dave Considine, Diane Hesselbein and Sondy Pope submitted comments calling for alternatives, ROD044971, as did Representatives Todd Novak and Travis Tranel.[11] *Thousands* of local citizens submitted written comments to the Public

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[1] Decl. of Jaworski, Ex. A.
[2] Decl. of Jaworski, Ex. B, C.
[3] Decl. of Jaworski, Ex. D.
[4] Dane County's Initial Brief, PSC Docket 05-CE-146, PSC REF # 372100 (July 12, 2019), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=372100. A federal court may properly take judicial notice of filings in administrative agency dockets. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper.") (*citing Papasan v. Allain*, 478 U.S. 265, 268 n. 1 (1986)); *Opoka v. I.N.S.*, 94 F.3d 392, 394 (7th Cir. 1996).
[5] ROD012685.
[6] Initial Brief of the Village of Montfort, PSC Docket 05-CE-146, PSC REF # 372139 (July 12, 2019), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=372139.
[7] ROD012690.
[8] Initial Brief of the Citizens Utility Board, PSC Docket 05-CE-146, PSC REF # 372105 (July 12, 2019), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=372105.
[9] Public Comment by Wisconsin Farmers Union, Kara O'Connor, PSC Docket 05-CE-146, PSC REF # 371714 (July 5, 2019), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=371714.
[10] Black Earth Creek Watershed Association opposes proposed ATC Cardinal- Hickory Creek transmission line, Docket 05-CE-146, PSC REF # 354771 (Dec. 6, 2018), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=354771.
[11] Letter from State Senator Marklein, State Representative Tranel, and State Represenative Novak, Docket 05-CE-146, PSC REF # 372320 (July 16, 2019), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=372320.

Service Commission opposing the proposed CHC transmission line, and more than a thousand local citizens attended the three public hearings held in Dodgeville, Lancaster and Madison and testified in opposition.

Dane County, Iowa County, Town of Wyoming, and Village of Montfort are petitioners in the state lawsuit challenging the Public Service Commission of Wisconsin's approval of the CHC transmission line. They all supported DALC and WWF's motion for a temporary injunction in that case.[12]

The proposed CHC transmission line is a massive project with hugely consequential environmental impacts. The Defendants United States Fish and Wildlife Service ("USFWS"), United States Army Corps of Engineers ("the Corps"), and Rural Utilities Service ("RUS") have been involved in decisionmaking on this transmission line for years, and this Court should reject their belated attempt now to downplay federal agency involvement or to mischaracterize the impacts of this massive transmission line with 17- to 20-story-high towers as inconsequential.

ARGUMENT

I. ALL PLAINTIFFS HAVE STANDING.

Plaintiffs have established that they meet the requirements for Article III standing for all of their claims. The Transmission Companies' arguments that Plaintiffs' member declarations fail to establish injury in fact are without merit. Similarly, the Federal Defendants' and the Transmission Companies' arguments that causation and redressability are lacking for the Plaintiff's claims under the National Environmental Policy Act ("NEPA") fail as well.

[12] Dane County Letter, Dane County Circuit Court Case No. 2019-cv-003418, Dkt. 1085 (Oct. 11, 2021); Memorandum of Support From Iowa County, the Village of Montfort, and the Town of Wyoming For Emergency Motion For Temporary Injunction, Dane County Circuit Court Case No. 2019-cv-003418, Dkt. 1093 (Oct. 14, 2021).

A. The Plaintiffs' Member Declarations Do Establish Injury in Fact.

The Transmission Companies allege that deficiencies in the declarations supposedly mean that Plaintiffs have failed to show that any members will suffer any injury in fact from the construction of the transmission line. None of these arguments have merit because the declarations describe precisely the kind of aesthetic and recreational harms that courts regularly find sufficient to support associational standing in cases involving environmental destruction. Notably, the Federal Defendants do not contest injury in fact, and do not address standing in their Response Brief.

The Transmission Companies argue that declarations describing use of the Upper Mississippi River National Wildlife and Fish Refuge ("the Refuge") or Driftless Area does not establish that Plaintiffs' members' use and enjoyment of natural areas will be specifically impacted by a transmission line running through only parts of the protected National Wildlife Refuge and Driftless Area. Dkt. 112 at 5–6. It is true that the Supreme Court has required a certain level of detail in affidavits to establish standing. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). Plaintiffs' declarations, however, are much more specific and not as general as the Transmission Companies portray them to be. And in *Summers*, the Supreme Court held that "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." *Id.* at 494. The Supreme Court has also said 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." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000).

The declarations contain details showing that Plaintiffs' members' use and enjoyment of specific areas will be adversely affected by this massive high-voltage transmission line. For

example, Debora Morton explains that she uses and enjoys Nelson Dewey State Park, and specifically enjoys the scenic view of the Mississippi River that would be impacted by the proposed CHC transmission line. Dkt. 75 at ¶¶ 5–6. Nelson Dewey State Park is immediately north of the retired Nelson Dewey substation, where the transmission line will enter Wisconsin after crossing over the Mississippi River. ROD007626. If the transmission line is built, Ms. Morton would spend less time at Nelson Dewey State Park and would, instead, visit other parks. *Id.* at ¶ 8.

Mary Kritz also enjoys visiting Nelson Dewey State Park and the Refuge, and would avoid visiting the area of the Refuge near Cassville if the line were built. Dkt. 84 at ¶¶ 4–5, 10. Kerry Beheler specifically plans to visit the Refuge area near Cassville where the transmission line would be constructed, in the future and her visit and the birding experience would not be as enjoyable if the massive transmission line is constructed. Dkt. 79 at ¶ 13.

Mark Mittelstadt maintains and restores a native prairie as a voluntary activity, and is concerned that the huge transmission line's route near that prairie will negatively impact the prairie's aesthetics and will increase the spread of invasive species into the prairie. Dkt. 83 at ¶¶ 21–25. Dena Kurt is a serious paddler, who uses the area around the Turkey River weekly during training, and uses the area around Cassville during the winter for cross-country skiing and snow-shoeing. Dkt. 94 at ¶ 7. The transmission line route crosses the Mississippi River at Cassville, Wisconsin. ROD007605; ROD007620; ROD007624. She is concerned that construction of the line will increase sedimentation, which will reduce her ability to enjoy viewing sensitive species like mussels through clear water, and her enjoyment of the experience of being in nature will be diminished if a wide right-of-way is cleared through the Refuge and a large transmission line is

constructed. Dkt. 94 at ¶¶ 24–25, 27. A wide, clearcut right-of-way would also alter wind patterns, negative affecting her paddling experience in the area. Dkt. 94 at ¶ 26.

Courts have found similar level of detail in member affidavits more than sufficient to support standing. *Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (finding standing where plaintiff members "possess interests in observing the landscape from surrounding areas … or in enjoying [the landscape] while on public roads"); *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d 918, 925 (7th Cir. 2008) (finding standing when organization member averred "she will cease her biennial recreational trips because the pollutants emitted based on the permit will harm her and diminish her aesthetic enjoyment of Rend Lake"); *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1221 (D. Idaho 2018) (quoting relevant portions of member affidavits). *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 170 F. Supp. 3d 6, 12 (D.D.C. 2016) (finding standing when plaintiff member asserted she kayaked, sailed, and swam in the Savannah River basin and that the unsightly appearance of bulkheads in the area would lessen her enjoyment).

Courts have also found standing to challenge transmission lines or pipelines based on similar alleged injuries. *City of Bos. Delegation v. Fed. Energy Regul. Comm'n*, 897 F.3d 241, 250 (D.C. Cir. 2018) (finding standing for a non-profit to challenge a natural gas pipeline based on "injury to its property interests and the aesthetic interests of its members caused by the project"); *Oregon-California Trails Ass'n v. Walsh*, 467 F. Supp. 3d 1007, 1019 (D. Colo. 2020) (finding standing to challenge power line for an organization "devoted to, among other things, preventing the destruction or degradation of the Oregon and California Trails" and for other petitioners asserting injury to "wildlife-watching interests"); *Border Power Plant Working Grp.*

v. Dep't of Energy, 260 F. Supp. 2d 997, 1010–11 (S.D. Cal. 2003) (finding standing because plaintiff members live "near the transmission lines and power plants at issue").

The Transmission Companies assert that Plaintiff member Todd Paddock cannot have standing because he lives part time in Winona, Minnesota, and they incorrectly presume that when he says he spends time in the Refuge, he does so only in the most northern portions of the Refuge. Mr. Paddock's declaration states that while he spends most of his time on the stretch of the Refuge from the lower end of Pool 5 to the bottom of Pool 8—an area north of the proposed transmission line crossing—he also visits the Refuge "as far south as Dubuque, Iowa," Dkt. 86 at ¶ 6, an area south of the transmission line crossing. He also states that he has passed many times through the area where the transmission line would be built on trips to Dubuque, and that he does not want to see the visual intrusion of the huge transmission line crossing the Mississippi River on his future trips. Dkt. 86 at ¶ 18.

The Transmission Companies rely on *Pollack v. U.S. Dep't Of Justice*, 577 F.3d 736 (7th Cir. 2009), a case in which the Seventh Circuit used the standards set out in *Summers* to deny standing to plaintiffs seeking to challenge a government-owned gun range's practice of allowing lead bullets to land in Lake Michigan. The court rejected arguments that drinking water from Lake Michigan or eating freshwater fish gave rise to standing, because it was not clear that the lead affected waters outside the immediate area in which the bullets landed, and the declarant did not claim to drink water or eat fish taken from that specific area. *Id.* at 741–42. The court found that the fact that the declarant enjoyed birdwatching in the "Great Lakes watershed" and visiting parks "along the Illinois portion of Lake Michigan" could not support standing because he claimed "he visits parks and watches birds within a vast territory" and "never claimed to have a specific interest in the actual area affected by pollution." *Id.* at 743–44.

The generalized claims of the declarant in *Pollack* are obviously distinguishable from the detailed declarations from Plaintiffs' members in this case. Plaintiffs' detailed declarations here are more like those which the Seventh Circuit found to support standing in *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d at 925 and *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 657 (7th Cir. 2011). In *American Bottom Conservancy*, the Seventh Circuit held that plaintiffs had standing to challenge the destruction of 18.4 acres of wetland based on affidavits that their members enjoyed watching birds and butterflies at a state park half a mile away. *Id.* at 657. The court also noted that "it is enough to confer standing that their pleasure is diminished even if not to the point that they abandon the site." *Id.* at 658.

The Transmission Companies also assert that because Brian Durtschi, who owns private property crossed by the transmission line route, has accepted an easement offer, his standing is negated. Owners of private property along the transmission line route are faced with a choice between accepting an easement offer or being subject to an eminent domain proceeding—either way, the landowners cannot prevent the transmission line from being constructed across their property. That some landowners who oppose the transmission line running across their property may have reasons to choose to accept an easement offer instead of going through the hassle of an eminent domain proceeding says nothing about whether they reasonably believe that the negative impacts of the transmission line on their use and enjoyment of their land will outweigh the monetary compensation they may receive for the easement.

Mr. Durtschi's declaration specifically states: "I did not agree to the offer because I wanted to sell the easement, but because I felt that I did not have a choice." Dkt. 73 at ¶ 5. At the time Mr. Durtschi signed his declaration, his land was also subject to additional eminent domain or negotiations to obtain other easements for the transmission line. *Id.* at 5. In any event, this is

not a case about whether Mr. Durtschi received just compensation for the easement. Mr. Durtschi is concerned that clearcutting the woods on his property would destroy its scenic nature and disturb the habitat used by the wildlife he enjoys seeing on the property. Dkt. 73 at ¶ 7. Clearcutting forested areas that an individual property owner enjoys clearly counts as an injury in fact because "the aesthetic and recreational values of the area will be lessened" for that individual. *Friends of the Earth,* 528 U.S. at 183.

The Transmission Companies also allege that the facts in the declarations do not establish an aesthetic injury because a new huge high-voltage transmission line with 17- to 20-story-high towers cannot create additional aesthetic injury and visual impacts if it is located along a highway right-of-way abutting the scenic and conservation easement held by Plaintiff DALC on the historic Thomas Stone Barn property. While the Transmission Companies may think that the *additional* visual intrusion of this massive transmission line is minimal, Plaintiffs and their members clearly disagree. DALC was granted the conservation easement while the highway already existed; the prior existence of the highway does not mean that DALC cannot still seek to protect the land on which it holds a conservation easement from any further visual impacts of *additional* infrastructure.

Photo simulation of proposed CHC transmission line in background of the Thomas Stone Barn submitted with Driftless Area Land Conservancy's Draft EIS comments. ROD004723.

The Transmission Companies also argue that Defenders of Wildlife lacks standing because its member Jean Luecke's declaration[13] asserts that she visited the Refuge once, but does not clearly state plans to visit the Refuge in the future. Dkt. 112 at 3–4. This argument ignores the fact that standing "is to be assessed under the facts existing when the complaint is filed." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n. 4 (1992); *see also Friends of the Earth*, 528 U.S. at 184–86 (evaluating standing at the time the complaint was filed). Ms. Luecke's declaration, which was signed in January, 2021, *does* state future plans to visit the Refuge in summer 2021. Dkt. 77 at ¶ 7. The fact that summer 2021 is *now* in the past does not affect whether Ms. Luecke's declaration establishes standing for Defenders of Wildlife as of February 10, 2021 and May 5, 2021, the dates the complaints in these consolidated cases were filed.

The Transmission Companies at least imply they believe it is only speculation that any of these harms will occur. These are, however, precisely the types of harms the EIS itself warns that

[13] Defenders also submitted the declaration of its employee, Senior Policy Analyst Mariel Combs, to establish the organizational mission to meet the germaneness prong of the test for associational standing laid out in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 33 (1977). Dkt. 81.

the CHC transmission line will indeed cause, and therefore the fears about environmental harms that Plaintiffs' members have stated in their declarations are much more than speculation, and are more than enough to establish Article III standing.

B. There is Causation and Redressability for the NEPA Claims.

The Defendants briefly allude to the arguments they made in their opening briefs that Plaintiffs lack standing to challenge the adequacy of the agencies' NEPA review because of a lack of causation and redressability. Of course, there is no question of causation and redressability with respect to the Plaintiffs' informational or procedural injuries. Those injuries can only be remedied by sending the EIS back to the agencies to consider combinations of non-wires alternatives, to consider routes north or south of the Refuge and the Driftless Area, to fairly consider cumulative impacts in an appropriate geographic scope, and to do a legitimate estimate of likely climate impacts. If this Court orders such a remand, further agency action must not occur until that process is completed, since they must be "preceded" by an adequate EIS. Likewise, there is no question that the usual causation and reliability requirements are "relaxed" in informational or procedural injury cases. *WildEarth Guardians v. U.S. Dep't of Ag.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (*quoting Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011)).

The Defendants' principal argument is that, even if the EIS is inadequate under NEPA, the Corps has always been free to issue verifications under the general permits anyway.[14] The position of Defendant Corps is that, because the Corps' "regulatory jurisdiction" is so limited, its verifications under the general permits are "not subject to" NEPA, and therefore the EIS conducted for the CHC transmission line itself essentially has nothing to do with them. Even if

[14] Plaintiffs will not repeat their arguments related to the RUS financing from their Response Brief. Dkt. 110 at 7–14.

this Court finds the EIS to be inadequate under NEPA, the Corps argues, that should have no effect on the Corps' permits.

That position is contrary to how NEPA works, and is beyond the limits of the Corps' discretionary authority under the Clean Water Act and the applicable regulations.

First, at no point in the entire NEPA process for the CHC transmission line did the Corps take the position that the EIS was unnecessary or did not apply to it. Indeed, the Corps participated fully as a cooperating agency in the NEPA review and signed the Record of Decision finding the EIS met NEPA's requirements. The Corps should not be permitted to argue now that it really did not need to do an EIS, that the EIS it did participate in really did not need to comply with NEPA, or that its decisions really did not and do not have to wait until an adequate EIS is in place. Defendants have certainly cited no authority for the proposition that an agency can relitigate whether an EIS was mandatory in the first place when the EIS has already been completed with the agency's full participation and sign-off, as a way to later excuse their having violated NEPA's "adequacy" standard.

Second, even if this Court does allow the Corps to argue at this late date that the NEPA process was irrelevant to its decisions on the CHC transmission line, the Corps' own rules governing the scope of environmental reviews show this is not the kind of project for which the Corps could have legitimately restricted its analysis to the direct effects of particular discharge points on jurisdictional waters and not considered the broader implications of the larger project for the aquatic environment. The Corps rules make clear that, even when the Corps' direct authority is limited to particular discharge points, there "are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. pt 325—Appendix B, § 7.b.(2). While Appendix B does contemplate narrower reviews when

"the regulated activity comprises 'merely a link' in a corridor type project," *id.* § 7.b.(2)(i), it also requires consideration of "[w]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity," *id.* § 7.b.(2)(ii), and "[t]he extent of cumulative Federal control and responsibility." *Id.* § 7.b.(2)(iv). In this case, unlike other cases in which courts have upheld narrow Corps environmental reviews, there is a significant federal public lands component—the proposed Refuge crossing—which is the factor more than any other that drives the proposed route across the Driftless Area. There are also *114 wetlands* that would be impacted. ROD005163. That means the "cumulative Federal control and responsibility" is much greater here than in the Corps' so-called "small handle" cases.[15]

The Corps' attempt to minimize its role or potential role is contrary to the statutory requirements and expectations. No one disputes that the CHC transmission line cannot go forward on its currently planned route without the Corps permits. The Corps may not, for example, always directly regulate the clearing of rights-of-way,[16] but its permitting decisions directly or indirectly determine whether and where right-of-way clearing is going to take place.

Moreover, the Corps' attempt to claim that it lacks regulatory authority to consider the kind of information and analysis that a proper EIS would include is not consistent with the rules either. The Corps' regulatory discretion extends much further than that.

Suppose the Defendants had actually prepared the EIS that NEPA requires. That EIS might well have found that a combination of non-wires alternatives and upgrades to existing

[15] This is not a case where, for example, there is a single river crossing in a 50-mile transmission line, in which the Corps might justifiably limit the scope of its environmental review to the crossing. This is a case in which the cumulative federal control—the Corps permits, plus the Refuge crossing approval, certainly bear upon "the origin and destination as well as the route of the project outside the Corps regulatory boundaries." *Id.* § 7.b(3).

[16] The Corps does regulate clearing that "involves mechanized, pushing, dragging, or other similar activities that redeposit excavated soil material." 33 C.F.R. § 323.2(d)(2)(ii). That is a "discharge of dredged material" that requires a permit. *Id.*

transmission lines could meet the general purpose and need for the project. In other words, the same or better result could be obtained without the need to impair jurisdictional waters at all, without any adverse cumulative impacts on the region, and without potential climate impacts Or, perhaps the EIS would have concluded that an alternative route, avoiding the National Wildlife Refuge and southwest Wisconsin's scenic Driftless Area, could meet the perceived need just as well with less adverse impact on the environment, lesser cumulative impact on the region, and perhaps, if built as a direct current line that fossil fuel (coal and natural gas) power plants could not access, with little or no potential climate impact. Could the Corps then have denied the Transmission Companies' permit applications?

The answer is yes. District Engineers at the Corps always have the discretion to require applicants to go through an individual permitting process, even when the category of activities is covered by a general permit. "The Corps retains discretionary authority to require an individual permit for any activity eligible for authorization by an RGP [Regional General Permit] based on concern for the aquatic environment or for any other factor of the public interest." USACE009059. Individual permit review then requires a project-specific evaluation of whether the proposed discharges, separately or cumulatively, are the least environmentally damaging practicable alternative, 40 C.F.R. § 230.10(a), will not "cause or contribute to significant degradation of waters of the United States," 40 C.F.R. § 230.10(c), and are in the public interest, 33 C.F.R. § 320.4, the same factors that an adequate EIS would address. A decision to forego that kind of analysis prior to having adequate environmental review is exactly the scenario that NEPA is intended to forestall.

Consequently, what the Corps actually did—wait until after what it believed and ultimately found to be an adequate EIS was completed, and only then issue its "verifications"

and permits—is what the Corps was required to do. If the Court finds that the EIS was not adequate, then the Corps permits must be vacated as well until NEPA's requirements are met. If the Transmission Companies are permitted to build their huge high-voltage transmission line and high towers right up to the boundaries of the delineated wetlands under direct Corps jurisdiction, then the risk must be on them (and unfortunately the ratepayers) if the Corps permits are then found unlawful, and this transmission line cannot be completed.

II. THE DEFENDANTS' ENVIRONMENTAL IMPACT STATEMENT FOR THE CHC TRANSMISSION LINE DID NOT COMPLY WITH NEPA'S REQUIREMENTS.

The Defendant's EIS failed to comply with NEPA's requirements for five reasons: (1) the purpose and need statement was too narrow, defining reasonable alternatives out of consideration; (2) the EIS failed to rigorously explore and objectively evaluate all reasonable alternatives, including non-wires alternatives and other alternative transmission solutions; (3) the EIS failed to rigorously explore and objectively evaluate alternative routes that would have avoided running through the Upper Mississippi River National Wildlife and Fish Refuge and southwest Wisconsin's scenic Driftless Area landscape and vital natural resources; (4) the EIS did not fully and fairly evaluate the cumulative impacts of all past, present and reasonably foreseeable federal and non-federal development projects; and (5) the EIS did not adequately consider and describe climate impacts. None of the Defendants' and Transmission Companies' repeated invocations of judicial deference to agency expertise can rescue this flawed EIS that completely failed to comply with NEPA's statutory requirements and the Council on Environmental Quality's implementing regulations.[17]

[17] All references to 40 C.F.R. parts 1500 to 1508, the CEQ regulations implementing NEPA, are to the 2019 version of the regulations, Dkt. 115-1, which were controlling at the time the environmental review for the CHC transmission line was completed.

A. The Defendants' EIS Violated NEPA Because Its Purpose and Need Statement Was Improperly Narrow, Thereby Skewing the Analysis to Predetermine the Outcome.

The EIS's purpose and need statement was improperly narrow because the requirement to "[i]ncrease the transfer capability of the electrical system between Iowa and Wisconsin," ROD004984, limited the alternatives the Federal Defendants considered and improperly skewed the analysis in favor of only the particular proposed CHC high-voltage transmission line.

The Federal Defendants argue that this element of the purpose and need statement was not improperly narrow because it could be met in various ways and did not limit the project to a high-voltage transmission line. Dkt. 115 at 12. But during the NEPA review, the Federal Defendants took as a given that only a transmission line could fulfill this purpose and need. The EIS states that a non-wires alternative "by definition, would not include a transmission connection between Iowa and Wisconsin." ROD016064. The Alternatives Evaluation Study, a document prepared by the Transmission Companies that the EIS relies on, states that: "Put simply, only transmission can provide a permanent increase in transfer capability between Iowa and Wisconsin." ROD0014743. The element of purpose and need requiring increased Iowa-Wisconsin transfer capacity, coupled with the Federal Defendants' understanding and assertions throughout the EIS process that *only* a transmission line could meet that element, improperly limited the range of alternatives by pre-ordaining that only a high voltage transmission line—in this case, only the proposed CHC transmission line—would be selected.

The Federal Defendants also seek to distinguish *Simmons v. U.S. Army Corps of Engineers,* 120 F.3d 664, 666 (7th Cir. 1997), on the grounds that the purpose and need statement that the court in *Simmons* found to be too narrow contained only one element, while the EIS in this case contained six elements of purpose and need. Dkt. 115 at 12–13. That is a distinction without a difference. The purpose and need statement taken as a whole—regardless of

how many bullet points it contains—must comply with the requirements of NEPA. If any element of the purpose and need is so narrow as to "define competing 'reasonable alternatives' out of consideration," *Simmons*, 120 F.3d at 666, then the statement violates NEPA. *See National Parks Conserv. Ass'n v. Bureau of Land Mgmt.,* 606 F.3d 1058, 1071 (9th Cir. 2010) (multiple goals in purpose and need statement does not preclude finding that the purpose and need statement "unreasonably constrain[ed] the possible range of alternatives.")

The Federal Defendants argue that they did not improperly adopt the purpose and need out of deference to the Transmission Companies' goals, but that the goals of RUS, pursuant to its statutory mission, and of the applicants were "aligned." Dkt. 115 at 14. There are two problems with that argument. First, RUS's broad statutory mission is to encourage needed rural electric infrastructure, not to make sure that a particular massive high-voltage transmission line gets built between Iowa and Wisconsin. Nothing in RUS's statute or rules shows an intent to prefer particular kinds of projects or particular locations. And second, the whole point of NEPA is to essentially add environmental considerations, especially alternatives, to every federal agency's mission. The Federal Highway Administration's mission may be to build highways, but that mission is tempered by NEPA's requirements that the agency rigorously explore and objectively evaluate alternatives. Likewise, RUS may be about building rural electricity infrastructure, but again NEPA obligates the agency to take environmental considerations into account, and to understand them through the environmental review process before making any final decision. As Plaintiffs explain in their Response Brief, Dkt. 110 at 19, Defendants' argument ignores the fact that NEPA applies regardless of an agency's substantive statutory mission. And, of course, the Defendants' argument simply ignores the statutory missions of the cooperating agencies, USFWS and the Corps.

This Court must keep in mind the Seventh Circuit's guidance in *Simmons*:

> 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.

Simmons, 120 F.3d at 666. In *Simmons*, the Corps was focused on one source of water that met its improperly narrow purpose and need statement, but the Seventh Circuit held that the Corps must rigorously explore and objectively evaluate other reasonable alternatives. After the Corps did so following the *Simmons* decision, the Corps then chose an alternative pipeline to supply water to the City of Marion instead of the dam on Sugar Creek, which remains free-flowing today. Applying NEPA's alternatives requirement as should and must be done can make a real-world practical difference.

The Transmission Companies' other arguments are equally unavailing. Again, as Plaintiffs explained in their Response Brief, Dkt. 110 at 19–20, Defendants cannot lay their chosen purpose and need statement on the doorstep of the Midcontinent Independent System Operator ("MISO"). MISO's planning process encourages the build-out of transmission in the region, but it does not exclude alternative technologies nor does it exclude alternative routes. To the extent MISO did consider non-wires alternatives to big high voltage transmission lines back in the late 2000s, the world has simply changed. Since 2010, for example, solar energy has become much more competitive, energy storage is moving forward, solar buildouts in Wisconsin have been accelerating, and electricity demand has been flat or declining as opposed to MISO's assumptions a decade ago that electricity demand would increase by 1.0% each year. ROD031368–69.

Nor can Defendants escape considering combinations of non-wires alternatives (or "alternative transmission solutions") or alternate routes by claiming Plaintiffs did not provide

enough detail about those alternatives. Plaintiffs suggested routes avoiding the protected National Refuge and the Southwest Wisconsin Driftless Area, including routes like the one currently being considered for the SOO Green Line high-voltage direct current line from Iowa to Illinois.[18] That is more than enough to put that idea on Defendants' radar. Similarly, Defendants themselves are obviously quite aware of various "non-wires" alternatives because they listed them in the EIS. What Defendants did not do was consider appropriate *combination* of those alternatives, *e.g.* solar plus storage plus existing line upgrades. *See* Dkt. 71 at 41–42; Dkt. 110 at 20–21. Again, Defendants had plenty of notice to understand that those were the kinds of alternatives they ought to consider.

B. The Defendants' EIS Violated NEPA by Failing to Rigorously Explore and Objectively Evaluate All Reasonable Alternatives, Including Non-Wires Alternatives and Alternative Transmission Solutions in Reasonable Combination.

The EIS violated NEPA because it failed to "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. In particular, the EIS did not consider any reasonable combination of the non-wires and non-transmission alternatives which had each been rejected as *individually* unable to meet the project's purpose and need.

The Federal Defendants argue, Dkt. 115 at 16–17, that the question of whether to consider alternatives individually or as a package is within the agency's discretion and also argue that this case is like *Waukesha Cnty. Env't Action League v. U.S. DOT,* 348 F. Supp. 3d 869, 882–83 (E.D. Wis. 2018), in which a court found that a combination of the alternatives rejected in the EIS as stand-alone alternatives would not meet the project's purpose and need and

[18] The Transmission Companies attempt to dismiss such a route on the grounds that it does not travel between the Cardinal and Hickory Creek substations. Dkt. 112 at 14–15. But that just misses the point. The point is that the EIS should have seriously considered alternative west-to-east routes that would increase reliability, decrease congestion, increase renewable interconnection possibilities, but *not* run only between the Cardinal and Hickory Creek substations.

therefore did not need to be evaluated by the agency. That holding was specific to the facts of the case. The court in *Waukesha* distinguished the facts in the case before it from the facts in cases in which courts *did* hold that the failure to examine a combination of alternatives violated NEPA, *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) and *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152 (10th Cir. 2002). The court noted that in those cases, the defendant agency had failed to consider combinations of transportation alternatives that individually "could significantly contribute to traffic management," *Waukesha*, 348 F.Supp.3d at 882 (*quoting Davis*, 302 F.3d at 1122), or could meet twelve percent of the projected increased transportation demand, *id.* (*citing Utahns*, 305 F.3d at 1170). The court contrasted those cases, in which alternatives were found to be partially effective at meeting the project's purpose and need with the facts in the record before it, which the court interpreted to "show[] that the plaintiffs' proposed alternatives would be *ineffective* in fulfilling the projects' purpose and need." *Id.* at 882–83 (emphasis in original).

Here the record *does* show that the rejected alternatives would be at least partially effective at meeting the project purpose and need. The EIS acknowledges that "[e]nergy storage, such as the use of batteries, could increase electricity transfer capability." ROD005034. "[S]olar power has the benefit of providing peak electrical generation during hot summer days, which coincides with part of the period of peak demand." ROD005033. Demand response "could provide some congestion relief." ROD005035. One of the primary reasons a number of alternatives were rejected was not that they could not meet even a portion of the purpose and need, but that they each individually could not meet the *entire* need. ROD005033 ("regional and local renewable energy generation is not currently available at a scale to serve as a viable alternative"); ROD005034 ("Battery storage is not a technically feasible alternative at this time

due to the large amount of storage capacity that would be required to match the beneficial impacts of the C-HC Project"); ROD005034 (energy efficiency "does not address reliability issues on the regional bulk transmission system at a scale commensurate with transmission"); ROD005035 (demand response "does not address reliability issues on the regional bulk transmission system at a scale commensurate with transmission").The record further notes that several of the alternatives work better in combination with each other. ROD005033 ("without sufficient power storage capacity, residential photovoltaic solar systems have limited usefulness in resolving the identified grid reliability deficiencies").

Therefore, this is not a case like *Waukesha* in which the court found no "grounds in the record for concluding that some combination of alternatives might be effective." *Id.* at 883. Because the individually-rejected alternatives were each able to *partially* fulfill the purpose and need, and were expected to work better in combination, a combination of those alternatives constitutes a reasonable alternative that should have been evaluated to see if it could *fully* fulfill the purpose and need. This straightforward principle negates the Transmission Companies' argument that the EIS properly rejected each alternative for failing to individually meet multiple elements of the purpose and need statement, not just the interstate transfer element. Dkt. 112 at 16.

The Transmission Companies also fault Plaintiffs for supposedly conflating "non-wires alternatives" with "non-transmission alternatives." Dkt. 112 at 19 n.9. They state that some, but not all, electricity system infrastructure that lacks wires counts as "transmission" under Federal Energy Regulatory Commission ("FERC") definitions. Plaintiffs have consistently argued that the EIS should have considered a range and combination of non-wires and non-transmission alternatives, and do not dispute that some energy infrastructure other than transmission lines is

classified as "transmission" for the purposes of FERC regulation. The Transmission Companies misleadingly imply, based on legalistic definitions and terminology, that somehow only those alternatives that count as "transmission," and which ATC and ITC would therefore legally be allowed to construct, could validly be considered in the EIS.

First of all, FERC Order 1000 requires full consideration of alternative transmission solutions:

> These reforms work together to ensure that public utility transmission providers in every transmission planning region, in consultation with stakeholders, evaluate proposed alternative solutions at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers.

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC P 61051, ¶ 68 (F.E.R.C.), 2011 WL 2956837. The FERC order also notes "that identifying a set of transmission needs and projects for inclusion in a transmission planning study does not ensure that any particular transmission project will be in the regional transmission plan. Alternative solutions to the identified needs may prove better from cost, siting, or other perspectives." *Id.* at ¶ 217.

Second, the reasonable alternatives that an EIS must examine are not limited to only those a private project proponent can build. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (March 23, 1981, as amended, 1986) ("In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative."). *See also National Parks Conserv. Ass'n v. Bureau of Land Mgmt.,* 606 F.3d at 1072 (holding EIS did not comply with NEPA when four-element purpose and need statement included "three private objectives as defining characteristics of the proposed project… and unreasonably constrains the possible range of alternatives"). The

needs identified in the purpose and need statement are needs of the *public* related to electricity infrastructure; nowhere does the EIS identify (nor could it lawfully) any need for ATC and ITC to be the ones to solve the identified problems. Further, a court may only uphold agency action on the grounds that the agency invoked at the time it made its decision, *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943), and nowhere does the EIS identify the ability of ATC and ITC to construct alternatives as a relevant consideration.

C. The Defendants' EIS Violated NEPA by Failing to Rigorously Explore and Objectively Evaluate All Reasonable Alternatives Including Routes that Would Avoid the Transmission Line Running thought the Protected National Wildlife Refuge.

The Federal Defendants cannot escape from the reality that their EIS failed to rigorously explore and objectively evaluate alternative routes that would avoid running through the protected Upper Mississippi River National Wildlife and Fish Refuge and the scenic Southwest Wisconsin Driftless Area landscape and vital natural resources. They simply did not do it even though the U.S. Environmental Protection Agency urged the RUS and other agencies to fully consider alternative transmission line routes that would run outside the protected National Wildlife and Fish Refuge. ROD002226. The Federal Defendants followed the Transmission Companies' demand that only a high-voltage transmission line running between the Cardinal and the Hickory Creek substations be considered. Dkt. 112 at 14–15. That violates NEPA's requirements, which makes the rigorous exploration and objective evaluation of alternatives "the heart of the environmental impact statement." 40 C.F.R. § 1502.14.

D. The Defendants' EIS Violated NEPA by Failing to Adequately Evaluate Cumulative Impacts of All Past, Present, and Reasonably Foreseeable Development Projects.

The EIS's analysis of cumulative impacts was flawed because the geographic scope of analysis excluded portions of the transmission line, and because the Defendants' decision to

include existing projects as part of the baseline without providing the analysis required by NEPA was arbitrary and capricious. Regardless of any deference that federal agencies may receive, this analysis did not fulfill the requirement to analyze "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." 40 C.F.R. § 1508.7. *See also* 40 C.F.R. §§ 1508.25(a)(2), (c)(3).

The Federal Defendants argue that they should receive deference on the geographic scope of analysis for cumulative impacts, but that deference extends only so far as the agency makes a reasonable decision that complies with NEPA's requirements. "[T]he choice of analysis scale [for the cumulative impacts analysis] must represent a reasoned decision and cannot be arbitrary." *Habitat Educ. Ctr., Inc. v. Bosworth (Habitat II)*, 363 F.Supp.2d 1090, 1097 (E.D. Wis. 2005) (*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)). The Federal Defendants do not even acknowledge that the geographic scope they defined for cumulative impacts excludes portions of the transmission line itself, and in other places extends no further than the edge of the right-of-way. The analysis of cumulative wildlife and vegetation impacts is "bounded to the north by where the Turkey and Wisconsin Rivers join the Mississippi River." ROD005485, ROD005498, ROD005499. In other words, the *northern* boundary for this analysis is *south* of the Cardinal substation in Middleton, so the cumulative impacts analysis area excludes part of the project itself. ROD005199. The Turkey River joins the Mississippi River in Iowa approximately a half-mile west of where the transmission line would cross the Mississippi River, so the northern boundary for cumulative effects analysis in Iowa is essentially the transmission line itself. ROD007585.

The Federal Defendants also argue that the Plaintiffs have not shown that the EIS missed any cumulative impacts that were required by NEPA to be discussed. Dkt. 115 at 19. But the fact that the EIS did not consider cumulative impacts along the full length of the transmission line's right-of-way necessarily means that some cumulative impacts—the cumulative impacts of any other past, present, or future project in combination with that section of the transmission line—were necessarily omitted, making the Defendants' choice of geographic scope arbitrary and capricious.

The Federal Defendants also argue that they had discretion to determine which impacts to migratory birds needed to be considered and that mitigation measures "are reason to believe there will not be such impacts." Dkt 115 at 20–21. A court will not defer to an agency's "bald assertions that mitigation will be successful." *Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1252 (D. Wyo. 2005); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) ("A 'perfunctory description'… or "'mere listing" of mitigation measures, without supporting analytical data' is insufficient to support a finding of no significant impact.") (*quoting Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 115 (9th Cir. 1998).

The Federal Defendants also argue that NEPA does not require an EIS to list out all past projects along with present and future ones that are considered as part of cumulative impacts, and that incorporating past projects into the "baseline" of analysis is enough. Dkt. 115 at 18–19. The Sixth Circuit recognized the validity of the CEQ *Guidance*[19] that allows agencies to avoid listing all past projects by wrapping existing projects into a "baseline," but the court also held that merely *including* the projects in the baseline is not enough. *Kentucky Riverkeeper, Inc. v.*

[19] CEQ, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis* (June 24, 2005), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/Guidance_on_CE.pdf.

Rowlette, 714 F.3d 402, 410 (6th Cir. 2013). The court in *Kentucky Riverkeeper* emphasized that the CEQ *Guidance* also requires agencies to provide "a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects." *Id.* (quoting *Guidance* at 1). The EIS in this case was missing that required analysis of the *effects* of past actions—merely wrapping existing projects into a baseline, or even listing existing projects, cannot substitute for that analysis.

The Transmission Companies also argue that the EIS's cumulative impacts analysis was sufficient because the EIS: (1) analyzed thirty other projects, (2) did consider the Badger-Coulee transmission line that Plaintiffs argued should have been included, and (3) properly did not consider the CapX2020 transmission line because it fell outside of the geographic boundary for cumulative impacts analysis. Dkt. 112 at 22–24. The pages of the EIS the Transmission Companies point to for the discussion of the thirty other present and reasonably foreseeable future projects, ROD005486–5496, amount to the type of mere listing or inclusion that courts have found insufficient to comply with NEPA. *Kentucky Riverkeeper*, 714 F.3d at 410. The EIS's inclusion of photos of the Badger-Coulee line as examples of the visual impact of a high-voltage transmission line and brief mentions of "existing" transmission lines in several places does not constitute the type of *analysis* of cumulative impacts that NEPA requires. *See City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997); *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 604 (9th Cir. 2010); CEQ *Guidance* at 3. As to whether it was proper to select a geographic scope of analysis that excluded the CapX2020 transmission line, courts only give deference to an agency's decision on the scope of

cumulative impacts analysis so far as that analysis is reasonable. *Habitat II*, 363 F.Supp.2d at 1097.

E. The Defendants' EIS Violated NEPA by Failing to Adequately Evaluate Climate Change Impacts.

The Federal Defendants' examination of climate impacts was inadequate because the EIS failed to even attempt to quantify the amount of fossil fuel-generated electricity that this CHC transmission line would carry in order to give a reasonable estimate of greenhouse gas emissions and because the EIS monetized various supposed benefits of the transmission line but did not provide a reasoned explanation for failing to use the social cost of carbon to monetize the climate change harms of the transmission line. These flaws are fundamental, not mere "flyspecking," as they go to the heart of some of the transmission line's most important impacts and supposed benefits. *See* Dkt. 71 at 50–53; Dkt. 110 at 27.

The Transmission Companies argue that the federal agencies were not required to be more specific in their NEPA analysis because "it is impossible to know with certainty how quickly carbon-free generation will displace existing fossil-fuel generation, and how much of the electricity transmitted on the CHC line will be generated by renewable sources at any given time." Dkt. 112 at 25. The Federal Defendants also argue that NEPA only requires an agency to quantify impacts where they are reasonably estimable, and they fault the Plaintiffs for failing to suggest any method by which the Defendants could have determined the project's climate impacts with greater specificity. The EIS explained that "[d]ue to the connectivity of the electric grid and the changing national generation mix, it is not possible to identify which electricity generations sources would be served by the [CHC] Project for the life of the project." ROD005501. But the Transmission Companies also, contradictorily, argue that the CHC transmission line "will bring renewable wind

power from Iowa" to Wisconsin, so it is "ironic" for Plaintiffs to complain about the climate impacts of a transmission line that will increase renewable generation. Dkt. 112 at 26.

It cannot be the case *both* that it was impossible to provide an estimate of the amount of renewable electricity the line would carry with greater precision than "somewhere between 0% and 100%" *and* that the transmission line will demonstrably increase the amount of renewable electricity being carried into Wisconsin. The Transmission Companies also attempt to distinguish the cases Plaintiffs cited in which courts have required more detailed estimates of climate change impacts, stating that those cases all involved projects for which emissions could be more accurately estimated because 100% of the projects' output was fossil fuel-related.

The D.C. Circuit rejected the argument that an agency need not estimate greenhouse gas emission when the "number depends on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region," stating that "agencies may sometimes need to make educated assumptions about an uncertain future." *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). The D.C. Circuit went on to state that quantification of emissions would only be excused if the agency had presented a "satisfactory explanation" for why such quantification is not "feasible." *Id.* at 1374.

The Federal Defendants argue that providing emissions numbers for scenarios in which the transmission line carries 100% wind or 100% coal is sufficient because, based on those numbers, anyone can extrapolate the emissions for any given mix of wind and coal electricity. Dkt. 115 at 25–26. The District Court for the District of Columbia rejected similar arguments made by the Bureau of Land Management (BLM), saying that it may be true that interested citizens could have drawn conclusions from the data provided in the challenged EIS, "but [that] did not relieve BLM of its burden to consolidate the available data as part of its 'informed decisionmaking.'" *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019). In response to BLM's argument that the exact emissions were uncertain, the district court stated: "BLM could have expressed the forecasts as

ranges, and it could have explained the uncertainties underlying the forecasts, but it was not entitled to simply throw up its hands and ascribe any effort at quantification to 'a crystal ball inquiry.'" *Id.* at 69–70.

The Transmission Companies and Federal Defendants also argue that NEPA does not require monetization of impacts and that the caselaw does not require the use of the social cost of carbon, only a reasonable explanation for why an agency chose not to use it, which they argue the Defendants provided in their EIS. The Federal Defendants stated that the information included in the EIS concerning carbon emissions, "presented in metric tons and compared to the United States total greenhouse gas emissions for 2017, is adequate to inform the decision-makers and the public about potential impacts from the [CHC] Project." ROD005822. The EIS does, on the other hand, monetize the transmission line's "positive effects to employment and income" and alleged energy costs savings. ROD004961, ROD004989. 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). And a statement that presenting two bookend estimates of emissions in tons "is adequate" does not fulfill the requirement to take a hard look at whether use of the social cost of carbon would contribute to a more informed assessment of impacts. *High Country Conservation Advocates v. United States Forest Serv.*, 52 F.Supp.3d 1174, 1193 (D. Colo. 2014).

III. THIS COURT CAN AND SHOULD ADJUDICATE PLAINTIFFS' CLAIMS UNDER THE NATIONAL WILDLIFE REFUGE SYSTEM IMPROVEMENT ACT OF 1997 NOW AND REJECT THE DEFENDANTS' ATTEMPTS TO EVADE THE REQUIREMENTS OF THE ACT.

The National Wildlife Refuge System Improvement Act of 1997 ("Refuge Act"), 16 U.S.C. §§668dd–668ee, prohibits Defendant USFWS from approving new, extended, or expanded uses of National Wildlife Refuges unless they are "compatible" with the Refuge's

wildlife purposes and the Refuge System's mission to support wildlife and wildlife-dependent recreation. And, in this case, the Plaintiffs and Defendant USFWS agree[20]—a new large high-voltage transmission line with towers up to 200 feet tall and a cleared-out right-of-way up to 260 feet wide through the Upper Mississippi River National Wildlife and Fish Refuge is not "compatible" with those purposes. Officials with the Refuge themselves explained why high-voltage transmission lines like the CHC transmission line do not contribute to and indeed materially detract from those purposes—the reduction in wildlife habitat quality, the encouragement of invasive species, the aesthetic harm, the increased risk of bird strikes, and the impairment of the visitor experience. FWS00533–35.

Nevertheless, Defendant USFWS did indeed approve this project crossing the Refuge, and it has expressed no inclination to change its mind. The Defendants believe they have found at least two loopholes in the Refuge Act: (1) declaring that this new project is really just "maintenance" or "minor realignment" of an existing transmission line that can be "grandfathered in"; and (2) replacing the easement previously granted with transfer of fee title through a land exchange. Yet, rather than submit the question whether either or both of those sleight-of-hand maneuvers violate the Act to this Court, the Defendants have chosen a strategy of keep away—dropping the maintenance theory at least for now, claiming the issue is moot, and holding off on the land exchange until some future date when most of the transmission line is constructed, but still claiming the legal issue is not ripe for decision now. If the Transmission Companies build the transmission line right up to the protected National Wildlife Refuge

[20] The Intervenor-Defendant Transmission Companies apparently disagree, and argue that Defendant USFWS could have found the CHC transmission line "compatible." Reviewing courts of course may only consider the rationale the agency actually relied on, *Chenery*, 318 U.S. at 94, and so this new rationale is out-of-bounds. In any event, as explained in Section III.C, *infra,* the Companies' argument that the Refuge Act delegated broad, near-unreviewable discretion to Refuge managers on compatibility matters is simply wrong.

borders, then, even if approval of the crossing is illegal, it will be harder for this Court or any other court to do anything about it, increasing the possibility that the unlawful crossing will go forward. That should be and can be avoided by the sensible jurisprudence of not letting the current problem become worse.

Contrary to Defendants' argument, the Plaintiffs' claim under the Refuge Act is neither moot nor unripe. Under these unique circumstances, voluntary cessation of the unlawful activity—approving the crossing of the Refuge—cannot moot this case, since the Defendants have already indicated their intent to grant the approval eventually. At the same time, the decision to pursue a land exchange is reviewable now as a final agency action. There is no further development of the facts that will make any difference to the purely legal issue presented, and the hardship to Plaintiffs if review is delayed and construction goes forward will obviously be substantial.

A. Defendant USFWS's Temporary Withdrawal of Approval for the Unlawful National Wildlife Refuge Crossing Has Not Rendered Plaintiffs' Claims Moot.

As all parties appear to acknowledge, in actions for prospective relief, voluntary cessation of an unlawful activity does not render the litigation moot, unless it is absolutely clear that the alleged wrongful behavior will not recur after the court dismisses the case. Here, it is clear that the alleged wrongful behavior *will* recur— the Defendant USFWS is moving toward allowing the CHC transmission line to follow the Transmission Companies' preferred route, bisecting the protected National Wildlife Refuge. If government defendants enjoy a rebuttable presumption that their unlawful conduct will not recur, the statements of the Federal Defendants themselves in this case have effectively rebutted any such claim.

For purposes of the Refuge Act, there are no substantive differences between the original easement grant and the proposed land exchange. In each case, the transmission line follows

essentially the same route, takes over the same right-of-way through the Refuge, Dkt. 87-1 at 21, fig.9, and the Refuge gets the same land parcel—the so-called "Wagner parcel"—in return, Dkt. 53-2 at 3; Dkt. 89 at 36. The result is the same with regard to the environmental damages and the violations of the National Wildlife Refuge System Improvement Act of 1997.

The Federal Defendants' attempts to inflate the significance of this change are unpersuasive. The Defendants' contention that the land exchange contemplates a different route than the easement, and that makes a significant difference, Dkt. 115 at 8, is just not true. The minor route modification due to the discovery of Native American burial mounds came *before* the land exchange idea surfaced, and the Transmission Companies' request, Dkt. 53-1, was to modify the easement and the right-of-way approval to accommodate that change. The land exchange idea came *later,* Dkt. 53-2, after the proposed route and easement modification had already gone through a limited environmental review and comment process. In other words, whether through an easement modification or a land exchange, the modified right-of-way will be exactly the same. The land exchange has nothing to do with the route modification. The route would be the same either way.

Defendant USFWS also contends that the reason for withdrawing the original easement and compatibility determination was that it "did not review the correct easement documents." Fed. Resp. Br., Dkt. 115 at 6. Plaintiffs of course find it hard to believe that the potential opportunity to moot or delay part of this litigation had nothing to do with that decision.[21] But even if the problems with "easement documents" could not be corrected ministerially, and actually required rescission of the easement, that again had nothing to do with the land exchange

[21] As Chief Justice Roberts reminded in *Department of Commerce v. New York,* 139 S.Ct. 2551 (2019), when reviewing federal agency action, courts are "not required to exhibit a naivete from which ordinary citizens are free." *Id.* at 2575 (*quoting United States v. Stanchich,* 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

concept, and has nothing to do with ascertaining whether the agency intends to repeat its unlawful conduct. If the review for the easement process had considered the incorrect legal descriptions, the normal remedy would be to *re-review and reissue the easement,*[22] not to require that the approval could only be done with a land exchange.

Contrary to the Defendants' assertion, then, this is precisely the situation in which an agency repackages its unlawful conduct into a formally "new" action, which "disadvantages [the plaintiffs] in the same fundamental way" such that "the challenged conduct continues" and the challenge is not mooted. *See generally Northeastern Fla. Chap. of Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. 656, 662 (1993).

B. Defendant USFWS's Stated Intent to Re-Approve the Unlawful Refuge Crossing Through a Land Exchange is a "Final Agency Action" That Is Ripe for Review Now.

The other side of the Defendants' delay strategy is to contend that Plaintiffs have to wait until all of the details of the proposed land exchange are finalized, and construction of the CHC transmission line is largely completed, before they can seek judicial review. Dkt. 112 at 8–10; Dkt. 115 at 9–11.

Contrary to Defendant USFWS's argument, the agency's decision to go forward with the land exchange alternative is a reviewable "final agency action" under the APA, 5 U.S.C. § 704. The test is as follows: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.,* 578 U.S. 590,

[22] Of course, a withdrawal of an easement with a statement of intent to reissue it with corrections would not moot an underlying dispute over whether the easement was contrary to law in the first place.

597 (2016) (*quoting Bennett v. Spear,* 520 U.S. 154, 177–78 (1997)). Defendant USFWS's decision to do a land exchange meets that test.

First there is nothing tentative or interlocutory about Defendant USFWS's legal determination. USFWS's position is that, if a proposed use of a National Wildlife Refuge cannot meet the "compatibility" requirements of the Refuge Act, the USFWS may still allow it by using a land exchange to take the affected land out of federal ownership. Fed. Resp. Br., Dkt. 115 at 7–8. There is no indication in any statements made by USFWS, or in its briefs, to suggest that this is a position USFWS is merely floating, or on which it wants to generate comments, or which it is prepared to abandon. USFWS's position is not the kind of qualification-laden, guideline-offering, advice-giving, recommendation-giving statement that courts can be reluctant to designate as "final."

There is no requirement that the appraisals and title work necessary to complete the land exchange be completed before the court reviews USFWS's legal interpretation of the Refuge Act. "The APA does not require that the challenged agency action be the agency's final word on the matter for it to be 'final' for purposes of judicial review." *Salazar v. King,* 822 F.3d 61, 83–84 (2d Cir. 2016). "[I]f an agency has issued a 'definitive statement of its position, determining the rights and obligations of the parties,' the agency's action is final notwithstanding 'the possibility of further proceedings in the agency' on related issues, so long as 'judicial review at the time would not disrupt the administrative process.'" *Sharkey v. Quarantillo,* 541 F.3d 75, 88–89 (2d Cir. 2008) (*quoting Bell v. New Jersey,* 461 U.S. 773, 779–80 (1983)). Deciding the legal question presented now would do nothing to disrupt the administrative process, but it would resolve the rights and obligations of the parties.

Second, Defendant USFWS's legal conclusion "gives rise to 'direct and appreciable legal consequences.'" *Hawkes,* 578 U.S. at 598; *Bennett,* 520 U.S. at 178. This is analogous to the "jurisdictional determinations" in *Hawkes,* in which the Corps decides whether particular acreage comes within the definition of "waters of the United States." The Corps protested that these jurisdictional determinations were not "final" and that judicial review needed to wait until later permitting or enforcement proceedings were concluded. But the Court rejected that argument, because it recognized that threshold jurisdictional determinations typically determined whether parties faced Clean Water Act obligations or not and that it would be unfair to ask parties to risk ever-increasing risks of fines or other consequences to wait until the other proceedings were completed. *Hawkes,* 578 U.S. at 598–600. Here, delay forces Plaintiffs to wait while construction continues, making the unlawful crossing of the Refuge more difficult to unwind, even though the threshold legal determination can be reviewed now.

This case is also analogous to the series of cases in which plaintiffs have challenged federal agency "guidance," *i.e.,* agency legal interpretations that have not gone through rulemaking or adjudication or involve any particular set of facts. *E.g. Natural Resources Defense Council v. U.S. Dep't of Interior,* 397 F.Supp. 3d 430, 447–50 (S.D.N.Y. 2019) (memo from DOI solicitor's office concluding that Migratory Bird Treaty Act did not prohibit incidental "takes" of protected species); *Scenic America, Inc. v. U.S. Dep't of Transp.,* 836 F.3d 42, 56 (D.C. Cir. 2016) (Federal Highway Administration guidance memorandum regarding billboard lighting); *Natural Resources Defense Council v. EPA,* 643 F.3d 311, 320 (D.C. Cir. 2011) (Environmental Protection Agency guidance regarding air quality standards). In every one of those cases, the courts rejected the federal agencies' argument that the guidance memoranda

were not "final agency actions" and that judicial review needed to wait until the agencies actually implemented the guidance in a particular case.

It would make little sense to conclude that a USFWS guidance memo opining that land exchanges to allow noncompatible uses in National Wildlife Refuges meet the "suitable for disposition" criterion would be reviewable "final agency action" under the APA, but an actual decision in an actual case involving real-world consequences would not be. "The finality requirement is designed to allow an agency the opportunity to correct its own mistakes, to avoid judicial disruption of the agency's processes, and to prevent piecemeal judicial review which may become moot when the agency completes its procedures." *Natural Resources Defense Council v. U.S. Dep't of the Interior,* 397 F.Supp.3d at 450. There is no indication from either the agency's actions or the briefs submitted that this proposed land exchange is not going to be approved, or that USFWS is still completely undecided about whether to allow the CHC transmission line to cross what at least today is the Upper Mississippi River National Wildlife and Fish Refuge. No matter what details about exact route, appraised values, or titles may emerge, the fundamental decision whether a land exchange may be approved without considering the Refuge Act's compatibility requirements is certainly "final" and ready for this Court to review.

The Transmission Companies point to *Ash Creek Min. Co. v. Lujan,* 934 F.2d 240 (10th Cir. 1991), but there the situation was completely different. Although consideration of a possible land exchange was part of the dispute, the challenge was to an agency decision to withhold mineral rights to a tract of land. The court found the issue to be unripe because, if the suit continued, "extensive and expensive discovery would be undertaken, motions would be filed and hearings held" while "the land exchange may never occur." *Id.* at 244. None of that is involved

in this case, and there is no reason to think that consideration of the fundamental legal issue will interfere with appraisals, title work, or any other tasks necessary to fully implement the land exchange. This Court can decide now that National Wildlife Refuge land cannot be "suitable for disposition" under the land exchange provisions of the Act if the result is to allow a new, inholding, noncompatible use like a high-voltage transmission line bisecting the Refuge. Contrary to Defendants' argument, the land exchange section of the statute does not stand isolated. It must be construed consistently with the rest of the statute. *Friends of Alaska Natl. Wildlife Refuges v. Bernhardt,* 463 F.Supp.3d 1011 (D. Alaska 2020).[23] Dkt. 71 at 64–69.

Consideration of the ripeness doctrines does not lead to a different result. The question posed here is purely legal, and there is no need for further factual development. *Whitman v. American Trucking Ass'n,* 531 U.S. 457, 479 (2001) ("The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" (*quoting Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998))). Delay of judicial review will cause considerable hardship to Plaintiffs. If construction of the CHC transmission line continues right up to the border of the protected National Wildlife Refuge before this Court reviews whether the proposed Refuge crossing is lawful, the prospects of an effective remedy are reduced.

The Transmission Companies also contend that any challenge to the land exchange is barred because it was first raised in Plaintiffs' brief supporting their motion for summary judgment. They cite a Montana district court decision, *Native Ecosystem Council v. Marten*, No. CV 17-153-M-DWM, 2018 WL 10498569 (D. Mont. May 22, 2018), in which the plaintiffs had not promptly raised an issue and the court found undue prejudicial delay. There was no delay in

[23] *Compare Town of Superior v. U.S. Fish & Wildlife Serv.,* 913 F.Supp.2d 1087 (D. Colo. 2012) (land transfer out of new National Wildlife Refuge specifically required by act creating Refuge).

this case. Plaintiffs first learned of the Transmission Companies' land exchange proposal on July 29, 2021, Dkt. 53-2, and of the USFWS Defendants' positive response on August 3, 2021. Dkt. 53-3. A week later, on August 11, 2021, the Federal Defendants and the Transmission Companies moved to stay briefing on this case while the land exchange progressed. Dkt. 50, 54. Plaintiffs opposed that motion, arguing in their August 23, 2021 response that restructuring the right-of-way approval as a land exchange did not moot Plaintiffs' existing Refuge Act claims or change the legal analysis. Dkt. 60 at 14–16. Defendant USFWS then revoked the compatibility determination and easement it had previously issued on August 26, 2021, Dkt. 69, 69-1. One week later, on September 3, 2021, Plaintiffs addressed the land exchange issue and these new developments in their memorandum in support of their motion for summary judgment. Plaintiffs did not delay anything, and the Defendants have not been prejudiced because Plaintiffs' expressed their opposition to the proposed land exchange idea as soon as it was practicable to do so.

C. The Transmission Companies' Effort to Substitute a New Rationale for the Decisions by Defendant USFWS Should be Rejected.

The Federal Defendants, to their credit, have never attempted to argue that the CHC transmission line would be "compatible" with the Refuge's wildlife purposes. Their original "Compatibility Determination" was based on the theory that the CHC transmission line could be characterized as "maintenance" because it is a "minor realignment" of an existing transmission line (lower voltage, smaller towers, narrower right-of-way) and could somehow thereby be "grandfathered in." ROD007583–84.

But now the Transmission Companies contend that the USFWS Defendants *could have* found the CHC transmission line to be a "compatible use" and approved the crossing on that basis. There are two principal reasons why this Court should reject that argument.

First, under the rule of *Chenery,* 318 U.S. at 87, it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA,* 576 U.S. 743, 758 (2015); *Department of Homeland Security v. Regents of the Univ. of Calif.,* 140 S.Ct. 1891, 1907 (2020). Defendant USFWS did not decide to issue the easement on the basis of a finding that the CHC transmission line was "compatible" with the Refuge's wildlife purposes, and therefore this Court cannot uphold the agency's action on the Transmission Companies' proffered theoretical alternative rationales.

Second, the Transmission Companies' arguments about the Refuge Act are simply off base. The purpose of the Refuge Act was to *reduce,* not to expand the scope of USFWS Refuge Managers' discretion to allow noncompatible uses. The Refuge Act was a direct response to the proliferation of noncompatible uses throughout the system, H.R. Rep. 105-106 at 3 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 1798-5, some justified by economic and social factors, some justified by donations of land in exchange. The Refuge Act, for the first time, clarified that the *sole* mission of the National Wildlife Refuge System is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2).

The Refuge Act made clear that the National Wildlife Refuges were *not* multiple-use lands like National Forests. The "sound professional judgment" standard was not a broad delegation of discretion to Refuge managers, but rather a requirement that non-biological factors no longer be part of compatibility determinations. 16 U.S.C. § 668ee(3) (compatibility determinations must be based on "sound fish and wildlife management and administration,

available science and resources, and adherence to [legal] requirements").[24] The rule against compensatory mitigation was precisely to prevent the practice of accepting land donations or other considerations in exchange for positive "compatibility" findings.

Right-of-way projects were very much a part of the discussion in Congress. The electric power sector was very concerned that their existing rights-of-way across Refuges would be compromised or eliminated, so they were able to add the language providing that existing right-of-way easements could continue, and review of existing rights-of-way would be limited to the terms of the easements, not to the "compatibility" standard. But the new Refuge Act was very clear that new or expanded rights-of-way *would* be subject to the "compatibility" standard, and therefore not likely to be approved. The mention of "powerlines" in 16 U.S.C. § 668dd(d)(1)(B) as the kinds of projects that would have to undergo a compatibility determination is not at all an indication of Congress's intent that those projects be approved.[25]

There is likewise no basis to the Transmission Companies' argument that the Upper Mississippi River National Wildlife and Fish Refuge is really the responsibility of the Corps and not of USFWS. As the Comprehensive Conservation Plan (CCP) for this National Wildlife Refuge explains, USFWS and the Corps have a "cooperative agreement" which "grants to the Service the rights to manage fish and wildlife and its habitat on those lands acquired by the Corps of Engineers. These lands [owned by the Corps] are managed by the Service as part of the Refuge and the National Wildlife Refuge System. The Corps of Engineers retained the right to

[24] The Transmission Companies' brief does not include the statutory definition of "sound professional judgment," to suggest Congress intended a level of deference that in fact the Refuge Act intended to restrain.
[25] The quotes from various individual members of Congress, Trans. Co. Resp. Br., Dkt. 112 at 33 n. 27, are immaterial. Perhaps Idaho Sen. Kempthorne hoped for oil and gas leases on national wildlife refuges, but the language of the bill that passed is inconsistent with his view.

manage as needed for the navigation project." ROD028209–10.[26] This decision—whether to approve the CHC transmission line across the Refuge—belongs to USFWS.

The cases the Transmission Companies cite do not support their argument. *Cascade Forest Conservancy v. Heppler,* No. 19-cv-00424-HZ, 2021 WL 641614 (D. Ore. Feb. 15, 2021) is about hardrock mineral prospecting permits in the Gifford Pinchot National Forest. Because the decision involved land acquired for the purpose of outdoor recreation under the Land and Water Conservation Fund Act, the U.S. Forest Service had to make a finding that the proposed temporary use would not interfere with outdoor recreation. The Forest Service found that the exploratory drilling would be "transient or negligible," and therefore would not interfere with recreational purposes. *Id.* at *6. Different statute—LWCFA does not exclude all uses that are not recreational, like the Refuge Act does for non-wildlife purposes. And, of course, different facts. The CHC transmission line can hardly be characterized as "transient or negligible."

Audubon Society of Portland v. Zinke, No. 17-cv-00069-CL, 2019 WL 8371180 (D. Ore. Nov. 18, 2019) did involve a comprehensive conservation plan under the Refuge Act, but for lands also covered by the Kuchel Act, which required management of the land for "optimum agricultural use." The magistrate judge found that the Refuge managers' attempt to harmonize the two statutes in the CCP was reasonable enough to satisfy the *Chevron* standard. This case does not involve a planning document, and it does not involve two conflicting statutes.

The Transmission Companies also attempt to defend the "maintenance" theory that Defendant USFWS now says it has abandoned, arguing that this Court must defer to the Refuge manager's assessment of what "minor expansion" means. But of course, the case on which the

[26] The Cooperative Agreement itself is located in Appendix F of the environmental impact statement (EIS) prepared for the CCP, https://www.fws.gov/midwest/planning/uppermiss/feis/AppendixF.pdf.

Transmission Companies rely, *Kisor v. Wilkie,* 139 S.Ct. 2400, 2417 (2019),[27] makes it clear that agencies are owed deference only when they are applying technical substantive expertise. Any determination that a new high-voltage transmission line, with a 260-foot-wide right-of-way and towers almost 200 feet high, can be characterized as a "minor" expansion of an old, smaller low-voltage line on a 150-foot right-of-way with 75-foot towers is not the application of technical expertise.

The Transmission Companies assert that, because the Refuge contains 240,000 acres, the construction of this new high-voltage transmission line is appropriately considered merely "maintenance of an existing right-of-way" because it is a "minor realignment to meet safety standards, 50 C.F.R. §§ 25.21(h), 26.41(c), 603 F.W. 2.11(H)(3). Dkt. 112 at 37. That is just a *non sequitur*. There is no "percentage of acreage" threshold that would make a realignment "minor." This project would not be "maintenance" no matter the size of the overall Refuge. The Companies also complain that their project is not fairly characterized as an "economic use," which, under USFWS rules, must "contribute to" the wildlife purposes of the Refuge to be "compatible." 50 C.F.R. § 29.1. The Companies find a distinction between private economic uses that extract natural resources from Refuge land and private economic uses that use Refuge land for other purposes, but do not offer any kind of reasonable textual basis for such a distinction. A much more reasonable interpretation is that the purpose of 50 C.F.R. § 29.1 is not to discriminate among private purposes, but rather to draw a distinction between private projects like this one, and government-sponsored projects, which might be entitled to more solicitude.

[27] In *Kisor,* a 5-4 Court declined to overrule *Auer v. Robbins,* 519 U.S. 452 (1997), which contemplates a level of deference to administrative agency interpretations of their own regulations. That decision was not because of agreement with *Auer*'s rationale, but rather simply *stare decisis*. Much of Justice Kagan's opinion for the Court is devoted to reinforcing the limits of *Auer* deference, including the requirement that agency interpretations be based on some unique substantive expertise outside the general competence of the courts. 139 S.Ct. at 2417.

There is no basis for applying a more relaxed standard to a private project like this. And, of course, as the Refuge managers themselves acknowledge, high-voltage transmission lines like this not only do not "contribute to" Refuge purposes, but they do "materially interfere with" them for all the reasons listed in their letter regarding another proposed transmission line right-of-way through the Refuge. FWS00533–35.

IV. DEFENDANT CORPS' RELIANCE ON ITS UTILITY LINE GENERAL PERMITS FOR THE CHC TRANSMISSION LINE PROJECT VIOLATES THE CLEAN WATER ACT, THE ENDANGERED SPECIES ACT, AND NEPA.

Plaintiffs' challenge to the Corps permits for the CHC transmission line has two components. First, the permits are invalid under NEPA because the project-specific EIS for the CHC transmission line did not meet NEPA's requirements. The Corps participated in the preparation of the EIS from the beginning, the Corps said that it relied on the EIS when considering the Transmission Companies' permit applications, and the Corps signed off on the Record of Decision finding the EIS adequate under NEPA. ROD007654. But that EIS did not fully consider reasonable alternatives, including both combinations of non-wires and non-transmission alternatives and possible alternative routes that do not run through the protected Upper Mississippi River National Wildlife and Fish Refuge and the southwest Wisconsin Driftless Area. Nor did the EIS adequately evaluate cumulative impacts from past, present, and reasonably foreseeable future projects, both federal and non-federal, in the region, nor did it provide any kind of useful estimate of how much this proposed "open access" transmission line will contribute to greenhouse gas emissions and climate impacts. Elimination of those gaps would allow the Corps to make a more informed decision, and the availability of reasonable alternatives that would be less environmentally damaging might well prompt the Corps to rethink its permitting decisions.

The second component of Plaintiffs' challenge to the Corps' actions is based on the Corps' reliance on its general permits for utility lines for this project—NWP 12 (now renumbered as NWP 57) for the Iowa segment, and the St. Paul District's Utility Regional General Permit for the Wisconsin segment. Under Section 404(e) of the Clean Water Act, 33 U.S.C. § 1344(e), the Corps' use of general permits is severely restricted. General permits may only be used for categories of actions that are "similar in nature" and which pose no more than "minimal" adverse environmental effects, both individually and cumulatively. *Id.*

The Corps' and Transmission Companies' position today is apparently that virtually no "discharges of dredged or fill material" into "waters of the United States" pose anything more than a minimal threat to the environment. More than 97% of the Corps' regulatory workload is now processed in the form of general permits.[28] That includes nearly all "utility lines," defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose such as an oil or natural gas pipeline, any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. NWP005262, USACE009045–46. The utility line general permits apply no matter the size of the overall project, no matter how many water or wetland crossings may be involved, no matter the quality or function of the waters or wetlands affected, no matter where the project is located, and no matter what the surrounding environmental circumstances may be.[29]

[28] Congressional Research Service, 97-223, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments*, (Jan. 12, 2017), https://www.everycrsreport.com/files/20170112_97-223_271c5b98b058e7b84bab465be90e05777cf735ea.pdf ("CRS Report").

[29] In its June 2016 Decision Document, the Corps estimates that it would use NWP 12 approximately 14,000 times per year on a national basis, resulting in impacts to approximately 1,750 acres of waters of the United States. NWP000122. *See* CRS Report, *supra* note 28, at 8–9.

The general permits are limited to projects that disturb no more than a half-acre of waters of the United States, NWP005262, USACE009045–46, but that limitation is mostly meaningless because the Corps treats each individual water or wetland crossing as a "single and complete" project. NWP005264, USACE009058. Major transmission lines or pipelines can therefore include hundreds, even thousands, of separate "projects," all of which are then governed by a single verification under the general permit.[30] Plaintiffs contend that using these general permits for projects like the CHC transmission line—a massive project, affecting 114 wetlands, ROD005163, including some in a protected National Wildlife Refuge, all in the geographically unique and fragile Driftless Area—violates the Clean Water Act. And, since the Corps' assumption that the category of utility line discharges has no more than a minimal adverse environmental impact across the nation was not informed by either a programmatic consultation with USFWS, as required by Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), or by an EIS, as required by NEPA, the utility line general permits are invalid under those statutes as well.[31]

Defendant Corps offers several reasons why its utility line general permits and their application to projects like the CHC transmission line complies with the law, or why this Court should not reach the issue. Each of these will be discussed in turn.

[30] Plaintiffs' Response Brief explains why the Corps' segmentation approach violates both the Corps' own rules, 33 C.F.R. § 330.6(d), and the analogous anti-segmentation doctrine under NEPA. 40 C.F.R. §§ 1502.4(a); 1508.25(a). Plaintiff's Resp. Br., Dkt. 110 at 40–42, and cases cited.

[31] Plaintiffs' argument is presented in much greater detail in Plaintiffs' Brief in Support of Motion for Summary Judgment, Dkt. 71 at 69–83; Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, Dkt. 98 at 56–67; and Plaintiffs' Brief in Opposition to Defendants' and Intervenors' Motions for Summary Judgment, Dkt. 110 at 36–39.

A. Plaintiffs Have Not Waived Their Right to Challenge the General Permits or the Corps' Reliance on Them in This Case.

First, the Federal Defendants argue that Plaintiffs waived their claim that the Corps should have done the analysis of alternatives, adverse environmental effects, and the public interest required by the individual permitting process because they did not include a separate section on Count V of their Complaint in their opening summary judgment brief. That of course has been the remedy sought by Plaintiffs for all of the Corps' violations of law—that, after an adequate EIS is prepared for the CHC transmission line project, the Corps must proceed to use its individual permitting authority to consider the factors required by the U.S. EPA's "404(b)(1) Guidelines" and the Corps' own rules governing Corps permits. 40 C.F.R. § 230.10. There is no waiver in the way Plaintiffs organized their brief, and no surprise about the relief Plaintiffs seek.

Second, Defendants contend that Plaintiffs waived their right to challenge the general permits because only ELPC, counsel for the Plaintiffs, submitted comments on NWP 12 when it was reauthorized, and no party filed comments on the St. Paul District's Utility RGP. But as Plaintiffs explained in their Response Brief, Dkt. 110 at 39 n.31, the absence of a comment does not preclude a party from raising an argument if the agency had independent knowledge of the issue, or other participants had raised it. *See, e.g., 'Ilio'ulaokalani Coalition v. Rumsfeld,* 464 F.3d 1083, 1092 (9th Cir 2006). The concept is sometimes called "issue exhaustion." In any event, these argument against the Corps' overuse of general permits for massive projects like this transmission line has been a source of controversy for years, and the Corps has hardly been denied notice of this category of concerns.[32] Defendants argue that there may be a different exhaustion standard between NEPA and the Clean Water Act, and they contend that the

[32] *See* CRS Report, *supra* note 28, *passim. See also* NWP043761–NWP043887 (Sierra Club et al., *Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12,* Docket No. COE-2015-0017 (Aug. 1, 2016)).

comments involving compensatory mitigation did not precisely match the compensatory mitigation arguments made in this case. But the general rule is that any exhaustion requirement "should be interpreted broadly." *National Parks Conserv. Ass'n v. Bureau of Land Mgmt.* 606 F.3d at 1065. So long as the comments "provide[] sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged," there is no issue. *Id.* (*quoting Native Ecosystems,* 304 F.3d at 899). Again, these issues have been brought to the Corps' attention time and time again. There is no waiver or violation of an "issue exhaustion" requirement here.

B. Defendant Corps' Focus on "Acreage" to the Exclusion of All Other Factors in Assessing Whether Discharges Lead to More Than Minimal Adverse Environmental Effects Is Misplaced.

Throughout their briefs, Defendants focus on arguing that the number of acres of jurisdictional waters that will be permanently occupied by transmission towers and foundations when the CHC transmission line is completed will be small, and therefore the adverse environmental impacts of the discharges involved will necessarily be "minimal." Their argument is that, because the Corps' "regulatory jurisdiction" only extends to "waters of the United States," the adverse environmental effects of the activities on the geography surrounding the delineated "jurisdictional waters" are wholly irrelevant.

That is just not the case as a matter of applicable law and common sense. Section 404(e) of the Clean Water Act does not say general permits are allowed so long as "the permanent adverse impacts on jurisdictional waters" are no more than minimal. It says general permits are allowed only when "the *activities* in [the] category … will cause only minimal adverse *environmental* effects when performed separately, and will have only minimal cumulative adverse effect *on the environment*." 33 U.S.C. § 1344(e) (emphasis added). The statute says

"activities," not "permanent losses," and it says "the environment," not just "jurisdictional waters."

The impact or effect of any activity on the environment, of course, depends on its location and the surrounding environmental context. Our nation's environmental laws reflect that understanding. Under Section 402 of the Clean Water Act, 33 U.S.C. § 1342, for example, which governs all discharges of pollutants into waters of the United States other than "dredged or fill material," the amount of pollution a permit will allow is not fixed, but depends on the quality of the receiving water. If downstream waters already suffer from considerable pollution–*i.e.* are already "impaired"—effluent limits at upstream facilities will be stricter. Likewise, if downstream waters are drinking water sources, or "outstanding resource value waters," that will also affect the amount or concentration of effluent a Section 402 permit will allow.[33]

The same logic applies to activities requiring Section 404 permits. The adverse environmental effects of wetland losses depend not just on "acreage," but on the degree of wetland loss that has already occurred in surrounding watersheds, on the value of particular wetlands for flood control, groundwater recharge, wildlife habitat, or water filtration, and on the unique characteristics of the surrounding geography. Location matters. Activities like utility lines involving multiple discharges along a particular route can have greater adverse environmental effects in ecologically important areas like National Wildlife Refuges and Wisconsin's Driftless Area, when compared to other geographical areas.

Any "alternatives" analysis that does not include alternative locations is necessarily incomplete. As the Section 404(b)(1) Guidelines declare, "practicable alternatives" *must* include,

[33] The Clean Air Act works in a similar way. Emission limits are not fixed, but depend on the quality of the ambient air in the area, including whether an area is or is not in "attainment" with respect to national ambient air quality standards.

but are not limited to, activities which avoid discharge of dredged or fill material into the waters of the United States, 40 C.F.R. § 230.10(a)(1)(i), like non-wires or non-transmission alternatives, and, if discharges cannot be avoided, "[d]ischarges of dredged or fill material *at other locations* in waters of the United States." *Id.,* § 230.10(a)(1)(ii) (emphasis added). If the CHC transmission line can be replaced by non-wires alternatives that will have zero impacts on wetlands, or by a route on which adverse environmental effects related to discharges will be lessened, even though the "acreage" of tower foundations remains the same, it is the obligation of the Corps to insist on the less environmentally damaging practicable alternative. NEPA requires the consideration of potentially less damaging alternatives; the rules governing Corps permits require that the alternative selected *actually be* the least environmentally damaging "practicable alternative." 40 C.F.R. § 230.10(a).

Relying on "acreage" alone to measure adverse environmental effects cannot be squared with the plain language of either the Clean Water Act itself or the rules. Consequently, Defendants' attempt to minimize the adverse environmental effects of its permits by focusing entirely on how many square feet of transmission tower foundation will be inside delineated jurisdictional waters simply misses the critical factors that must be evaluated to make any kind of reasonable assessment.

C. The Defendant Corps' Argument That Project-Specific Evaluations Can Always Correct, When Necessary, the Utility Line General Permits' Assumption That Adverse Environmental Effects Will Be Minimal Is Also Contrary to the Law.

The Corps acknowledges, Dkt. 115 at 35–38, that, at the time it issues or reissues its general permits, it may not be able to predict whether reliance on those permits will lead to more than minimal adverse environmental effects, either separately or cumulatively, even though Section 404(e) explicitly requires that as a precondition to any general permit. 33 U.S.C. §

1344(e).[34] But the Corps says that does not matter. It does not matter, the Corps argues, because any mistaken or erroneous prediction made at the time a general permit issues can always be fixed at the project stage. At that stage, the Corps argues, if a District Engineer finds that there may well be more than minimal adverse environmental effects, he or she always has the option to order an individual permit review, impose additional conditions, or take some other action.

That argument cannot reasonably be squared with the plain language of Section 404(e), which requires an accurate assessment that potential adverse environmental effects will be "minimal" before a general permit is issued. That is a *precondition*, not something that can be kicked down the road to the project phase. Otherwise, there is no reason to include the "minimal" effects requirement in Section 404(e). Under the Corps' theory, it can just assume "minimal" effects at the general permit stage because later actions will always be adequate to assure that the Corps' assumption comes true.

Of course, Plaintiffs recognize that there is uncertainty in making these kinds of assessments, and that the District Engineer "safety valve" is important no matter which general permit is being considered. For example, it may be reasonable for the Corps to predict that installing ordinary recreational docks will normally have little environmental impact, and that a general permit would be appropriate, subject to the District Engineer requiring special treatment when conditions warrant. It is not reasonable for the Corps to predict that massive utility line projects—or, as the Corps would have it, the dozens, hundreds, or thousands of "single and

[34] Plaintiffs, of course, challenge the Corps' "prediction" that the discharges involved in large projects like the CHC transmission line will have only "minimal" adverse environmental effects. The Corps simply asserts that "best management practices" at a discharge site, perhaps with compensatory mitigation, will assure no significant impacts will occur, and then just extrapolates that conclusion to the hundreds or thousands of discharges along a particular route in a particular geography that are involved in projects like this. The Decision Documents for the Utility RGP and for the 2017 reissuance of NWP 12 acknowledge that impacts depend on the surrounding geography, NWP005303, NWP005305, USACE009005, USACE009008, but then just assert that, in any geographical setting, the impacts of utility line discharges will always be minor.

complete" projects involved in massive utility line projects—will have few adverse environmental effects, no matter how large, how many, or where they are located, and put the burden on District Engineers to somehow heroically save the day when that "prediction" does not come true.

The Corps did not even identify the circumstances—*e.g.,* protected federal land, unique geographies, cracked limestone topography as in Wisconsin's Driftless Area, presence of endangered or threatened species—in which the potential for adverse environmental effects is greater, and require that District Engineers go through individual permitting in those situations. The limits in Section 404(e) are designed to ensure that the Corps only resorts to general permits when categories of action are truly "similar in nature" and the Corps can predict with some degree of certainty that the separate and cumulative adverse environmental effects will truly be minimal in most, if not all, situations. That has not been, and could not reasonably be, done with the utility general permits—certainly not without full consultation with the USFWS and a thorough environmental impact statement.

The cases on which Defendants rely simply downplay the significance of the assessment of potential environmental effects that is required before general permits issue, and magnify what happens at the project phase.[35] As discussed above, the Corps' project-specific assessment of environmental effects in this case has essentially been limited to counting the acres of jurisdictional waters that will be permanently lost to transmission tower foundations. The consequence is that there has not been a serious evaluation of potential adverse environmental effects, either at the general permit stage or now at the project phase. That is not consistent with

[35] The principal case is *Ohio Valley Envt. Coal v. Bulen,* 429 F.3d 493 (4th Cir. 2005). Other courts have followed. *Sierra Club v. U.S. Army Corps of Eng'rs,* 803 F.3d 31 (D.C. Cir. 2015); *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015).

the requirements of Section 404(e), and the error is compounded by the Defendant Corps' failure to do the required programmatic consultation with USFWS or a full environmental impact statement.[36]

D. The Defendant Corps' Reliance on the Effectiveness of "Compensatory Mitigation" to Reduce Adverse Environmental Effects Enough to Justify Their Utility Line General Permits Is Equally Misplaced.

Contrary to what Defendants suggest, Dkt. 115 at 38–43, Plaintiffs do not contend that "compensatory mitigation" cannot play a significant role in reducing adverse environmental effects. Nor do Plaintiffs contend that findings of no more than minimal separate or cumulative adverse environmental effects to justify general permits may not consider the potential ameliorative effects of compensatory mitigation.[37] What Plaintiffs do challenge is the Corps' failure to provide "explanation or documentation to support th[e] presumption" that compensatory mitigation will ensure minimal cumulative adverse effects for the utility line category of activities. *Kentucky Riverkeeper,* 714 F.3d at 413 (*citing* 40 C.F.R. §§ 230.7(b); 230.11(g)). The Corps asks Plaintiffs to rely on its say-so, and that is not enough to satisfy the requirements of the rules. That is legal error, as the Sixth Circuit held in *Kentucky Riverkeeper,* 714 F.3d at 413 (invalidating NWP 21 on these grounds).

The burden to explain and document how compensatory mitigation will sufficiently reduce adverse environmental effects is, of course, greater in situations where different projects in widely varying circumstances are involved, as they are in the utility line context. In some situations, placing mats around construction areas or setting up temporary dams to reduce

[36] Plaintiffs' first two briefs go into more detail on these NEPA and ESA arguments. Dkt. 71 at 79–83; Dkt. 110 at 43–53. What a full EIS and a full consultation under the ESA may well conclude is that the current general permits—the "framework" the Corps uses for its decisionmaking—do not meet the requirements of the CWA. All three theories are therefore interrelated.

[37] Nor do Plaintiffs argue that the Corps improperly uses compensatory mitigation to get below the half-acre threshold.

sedimentation flow might be enough. In other situations, however, it may be necessary to take special precautions to protect endangered or threatened species—*e.g.* to provide alternative corridors for animals to move through, or in steeper terrain, to take more aggressive steps to prevent deterioration of downstream water quality. In other situations, there may be no known or practicable mitigation measure that will reduce adverse impacts sufficiently.

Environmental impact statements and programmatic consultations with USFWS are designed in large part to consider alternatives and mitigation measures. Simply assuming that mitigation measures will always turn out to be available, and will always be effective, is not enough to justify an assumption that individual and cumulative adverse effects will always be minimal. By failing to perform and to document the analysis of which kinds of mitigation measures will be needed, and what kinds of mitigation measures will be effective, under the many different circumstances in which utility lines are constructed, *before* issuing its general permits, the Defendant Corps failed to meet the requirements of its own rules and thereby acted contrary to law.

CONCLUSION

For the reasons stated above, and in its previous briefs to this Court, Plaintiffs respectfully request that their summary judgment motion be granted, with an injunction taking effect.

Respectfully submitted this 1st day of November, 2021.

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