No. 21-3123

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Driftless Area Land Conservancy, et al.,
Plaintiff-Appellees,

v.

American Transmission Company LLC, et al., *Intervenor-Defendant-Appellants.*

On Appeal from the United States District Court for the Western District of Wisconsin, Case Nos. 21-cv-0096 and 21-0306
The Honorable William M. Conley, Judge

INITIAL BRIEF OF INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE

Thomas Jensen
Edward Boling
Stacey Bosshardt
Meredith Weinberg

Perkins Coie LLP
700 13th Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
(206) 359-8000

DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and Seventh Cir. Rule 26.1, American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative provide the following corporate disclosure statement:

American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative are co-owners of the Cardinal-Hickory Creek transmission project (Co-owners). American Transmission Company LLC and ITC Midwest LLC will each own 45.5% of the Project, and Dairyland Power Cooperative will own the remaining 9%. Perkins Coie LLP represents the Co-owners collectively.

ATC Holding LLC, which is a wholly owned subsidiary of WEC Energy Group Inc. (NYSTE: WEC), owns an approximately 60% ownership stake in American Transmission Company LLC. MGE Transco Investment, LLC, which is a wholly owned subsidiary of MGE Energy, Inc. (NASDAQ: MGEE), holds an approximately 3.6% ownership interest in American Transmission Company LLC. AE Transco Investments, LLC, which is a subsidiary of Alliant Energy Corporation (NASDAQ: LNT), holds an approximately 16% ownership interest in American Transmission Company LLC. As owners of American Transmission Company LLC, the foregoing entities have a financial interest in the outcome of this case.

ITC Midwest LLC, a Michigan limited liability company, discloses that it is owned by ITC Holdings Corp., its sole member. ITC Holdings Corp.'s sole shareholder is ITC Investment Holdings Inc. FortisUS Inc. owns 80.1% of ITC Investment Holdings Inc. FortisUS Holdings Nova Scotia Limited wholly owns FortisUS Inc. Fortis Inc. (Fortis) wholly owns FortisUS Holdings Nova Scotia Limited. Fortis has no parent company, and no publicly-held company has a 10% or greater ownership interest in Fortis. Eiffel Investment Pte. Ltd. (Eiffel), which is wholly-owned by GIC (Ventures) Pte. Ltd. (GIC Ventures), indirectly owns 19.9% of ITC Investment Holdings Inc. GIC Ventures is affiliated with GIC Private Limited (GIC), an investment company that manages the Government of Singapore's foreign reserves, and GIC Special Investments Pte. Ltd., the private equity and infrastructure arm of GIC. GIC and GIC Ventures are each wholly-owned by the Government of Singapore through the Ministry for Finance, a statutory corporation set up by the Government of Singapore to own and administer government assets. The Ministry for Finance has no parent company, and no publicly-held company has a 10% or greater ownership interest in the Ministry for Finance.

Dairyland Power Cooperative has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

GLOSSARY

Acronym	Definition
APA	Administrative Procedure Act
App'x	Appellants' Appendix
ATC	American Transmission Company LLC and ATC Management Inc.
CHC	Cardinal-Hickory Creek
Co-owners	Collectively, Appellants American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
Dairyland	Dairyland Power Cooperative
DALC	Collectively, Plaintiffs Driftless Area Land Conservancy, National Wildlife Refuge Association, Wisconsin Wildlife Federation and Defenders of Wildlife
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FAST Act	Fixing America's Surface Transportation Act of 2015
FWS	U.S. Fish and Wildlife Service
ITC	ITC Midwest LLC
MISO	Midcontinent Independent System Operator, Inc.
NEPA	National Environmental Policy Act
NWP-12	CWA Nationwide Permit 12
Project or CHC Project	Cardinal-Hickory Creek 345-kilovolt Transmission Line Project

PSCW or Commission	Wisconsin Public Service Commission
Refuge	Upper Mississippi National Wildlife and Fish Refuge
Refuge Act	National Wildlife Refuge System Administration Act, amended by the National Wildlife Refuge System Improvement Act of 1997
Regional Permit or URGP	Utility Regional General Permit
ROW	Right-of-Way
Service	Rural Utilities Service

JURISDICTIONAL STATEMENT

I. The District Court's Jurisdiction

In these two consolidated cases, DALC[1] seeks declaratory and injunctive relief under the Administrative Procedure Act (APA), *see* 5 U.S.C. §§ 701–706, for alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*; the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd–668ee, amended by the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1253 (Refuge Act); Clean Water Act (CWA) Section 404, 33 U.S.C. § 1344; and Endangered Species Act (ESA) Section 7, 16 U.S.C. § 1536(a)(2), arising out of the Federal Defendants' environmental review of and authorizations for the proposed Cardinal-Hickory Creek (CHC) 345-kilovolt Transmission Line Project (Project).

The district court asserted jurisdiction over the cases under 28 U.S.C. § 1331 because DALC's claims raise federal questions under the APA, NEPA, CWA, and ESA. However, the Federal Defendants and Co-owners[2] have asserted that the district court lacks subject matter jurisdiction over DALC's NEPA claim against Defendant Rural Utilities Service (RUS or Service). DALC

[1] Plaintiff-Appellees Driftless Area Land Conservancy, National Wildlife Refuge Association, Wisconsin Wildlife Federation (WWF) and Defenders of Wildlife are collectively referred to as "DALC."

[2] Intervenor-Defendant Appellants, American Transmission Company LLC and ATC Management Inc. (ATC), ITC Midwest LLC (ITC) and Dairyland Power Cooperative (Dairyland) are collectively referred to as the "Co-owners" or "Utilities."

does not have standing to assert that claim because the Service's possible future decision regarding funding for the Project will not cause DALC's alleged injuries. The district court lacks jurisdiction also over certain of DALC's claims arising under the CWA Nationwide Permit 12 (NWP-12) against Defendant U.S. Army Corps of Engineers (Corps) because those claims are moot. The Federal Defendants also argued that the district court lacks subject matter over DALC's Refuge Act claim against Defendant U.S. Fish and Wildlife Service (FWS) because it is moot.

II. The Court of Appeals' Jurisdiction

Co-owners seek review of the district court's November 1, 2021 Opinion and Order, ECF No. 160 (Appellant Appendix (App'x) 1–21) (Order), and November 3, 2021 Preliminary Injunction Order, ECF No. 164 (App'x 22), which enjoined Co-owners from engaging in "any activities requiring permission under the [USACE St. Paul District's] Utility Regional General Permit" that impact jurisdictional waters of the United States, as defined under 33 C.F.R. § 328.3. App'x 21. Co-owners filed a Notice of Appeal from these orders on November 12, 2021, concurrently with the filing of a docketing statement within the 60-day deadline. *See* Fed. R. App. P. 4(a)(1)(B).

On September 3, 2021, the parties filed cross-motions for summary judgment on DALC's claims against the Federal Defendants and completed briefing

on those motions on November 1, 2021. The district court has yet to rule. Although these claims and parties remain pending in the district court, the Seventh Circuit has jurisdiction over this appeal because it is an appeal from an "[i]nterlocutory order[] of [a] district court[] of the United States … granting … [an] injunction." *See* 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the district court erred in concluding that DALC demonstrated "at least some likelihood of success" on DALC's:

- CWA challenges to the Corps' issuance of specific project verifications under its Utility Regional General Permit when DALC waived those claims by failing to brief them;
- CWA challenges to the Utility Regional General Permit verifications based on its misunderstanding of key terms in the Permit; the types of cumulative impacts the Corps must evaluate; and when and how the Corps must evaluate those impacts;
- NEPA claims against the Corps based on the Service's NEPA document, upon which the Corps did not rely, rather than reviewing the NEPA analysis the Corps prepared for the Utility Regional General Permit; and
- NEPA claims that the Environmental Impact Statement violates NEPA because its purpose and need statement is unduly narrow and its cumulative impacts analysis is flawed;

II. Whether the district court erred in finding that DALC would experience "irreparable harm" absent an injunction by presuming that any environmental impacts would constitute "irreparable harm" and despite DALC's failure to

demonstrate that the challenged agency actions would cause their asserted harms; and

III. Whether the district court erred by failing to consider the "public interest" (*e.g.*, improving of grid reliability, lowering electricity costs to consumers, and helping transition the region to renewable energy) as required before issuing an injunction, and by failing to consider factors that the Fixing America's Surface Transportation (FAST) Act of 2015 requires the court to consider before enjoining the project. 42 U.S.C. §§ 4370m-2–4370m-6.

STATEMENT OF THE CASE

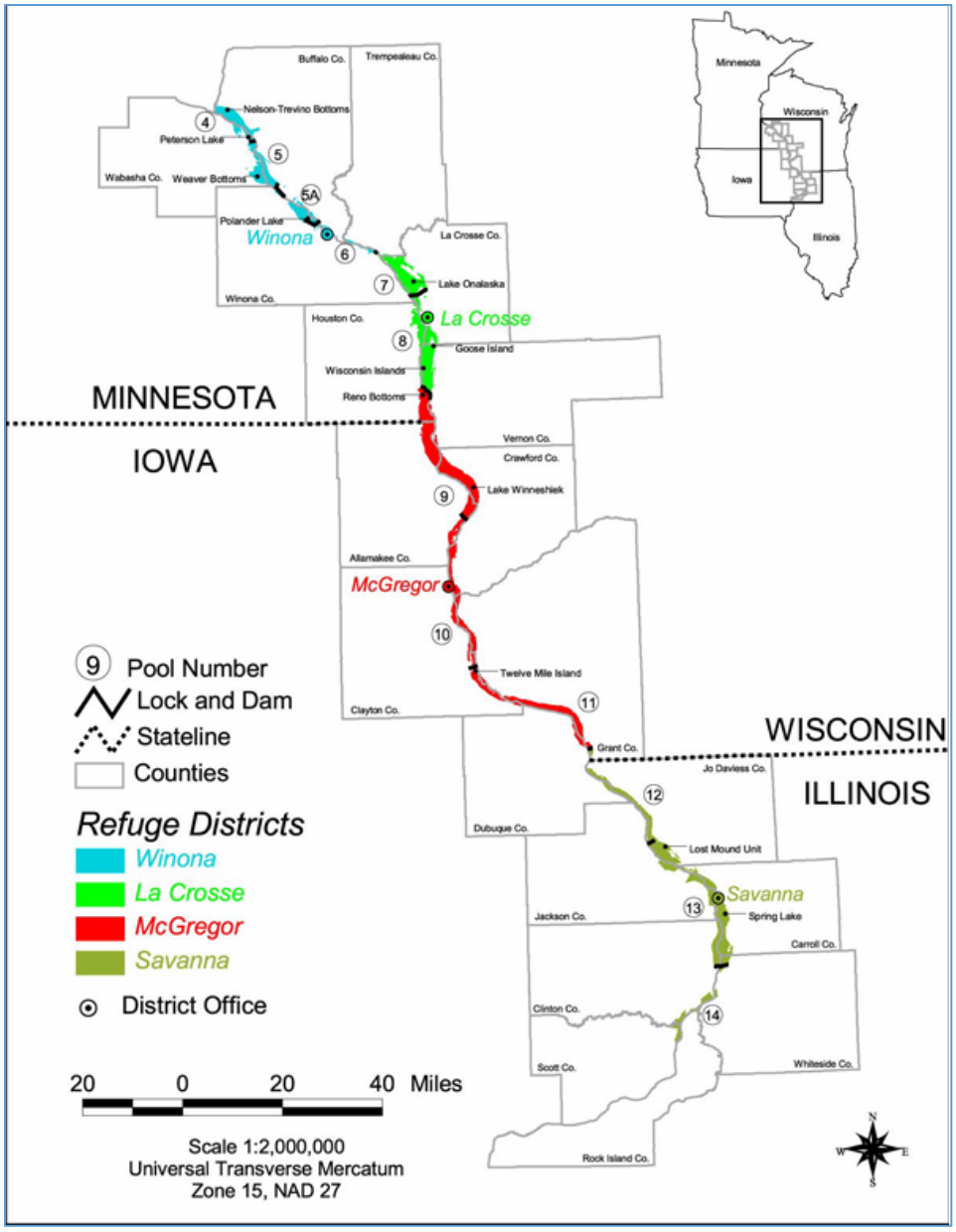
I. History of CHC Project

A. The Project

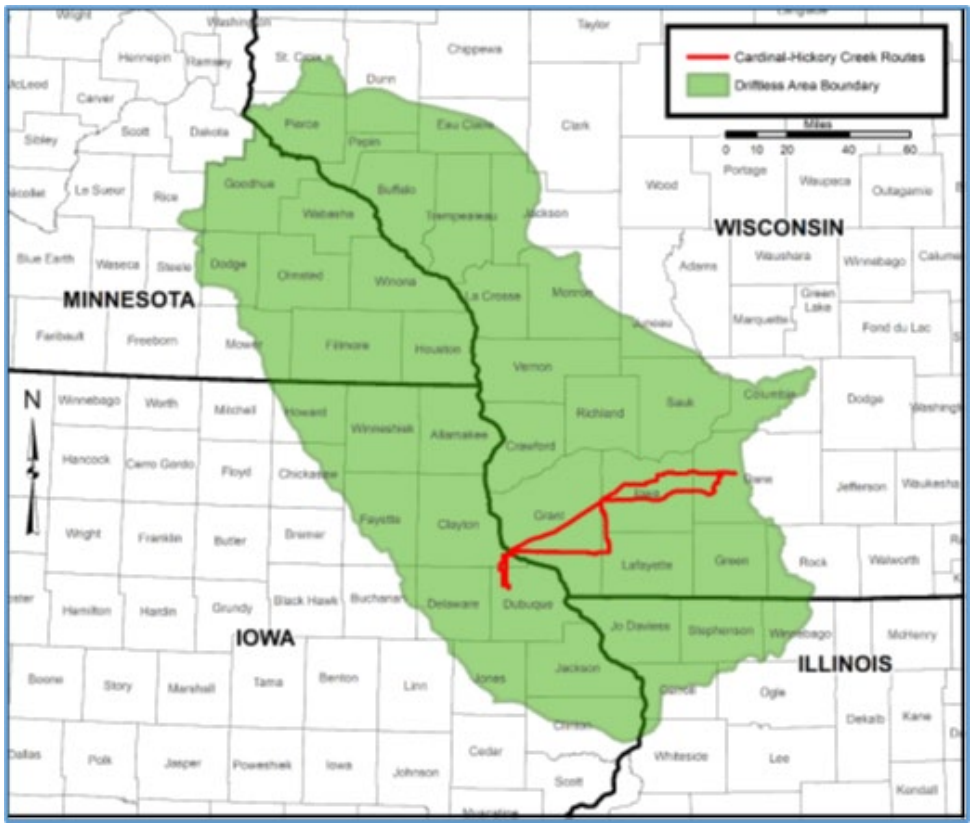
The Project is a 101-mile, 345-kilovolt transmission line conceived, studied and prioritized by the Midwest regional transmission planning authority to bring renewable energy from west of the Mississippi River to population centers east of the Mississippi. App'x 156; 1923–25; 1941–43. By design, it is collocated with other rights-of-way (ROW) for almost all its length. App'x 1231 (Environmental Impact Statement (EIS)); 1942 (Record of Decision, stating that 97 of line's 101 miles collocated with existing ROWs for "transmission lines, railroads, and roadways"); 1766–67 (Corps Memorandum for Record analyzing proposed work in jurisdictional waters). The line would pass over agricultural and some forested lands in the Driftless Area, a four-state region that

includes Wisconsin and Iowa characterized by unique geography that is the result of glaciation patterns, and where much of the original vegetation "has been converted to agricultural uses," including "cropland and pasture." App'x 1250. Under the Record of Decision DALC challenges, a 1.3-mile section of the line would also cross the Upper Mississippi River National Wildlife and Fish Refuge (Refuge) on United States-owned lands in Iowa that are cooperatively managed by the FWS and the Corps. The Co-owners applied for and received a ROW permit from FWS to cross FWS-managed land, and a ROW from the Corps to cross Corps-managed land inside the Refuge boundaries.[3]

[3] The FWS issued a "compatibility determination," as it is required to do under the Refuge Act, confirming that the proposed use of the Refuge would not materially interfere with the mission of the Refuge System or the purposes for which the Refuge was established. App'x 1914; 16 U.S.C. § 668dd(d)(3)(A)(i). The FWS later withdrew that document, *see infra* at 15; ECF 91 Ex. F.



Map of Refuge, App'x 145.



Map of Cardinal-Hickory Creek Routes and Driftless Area, App'x 647.

The Project will cost nearly $500 million, and the Co-owners have already spent $159 million building it. App'x 72 ¶ 8. After the line is built, Dairyland intends to apply for funding from the Service, a federal agency established to "promot[e] investment in rural electric infrastructure to facilitate the delivery of safe, affordable and reliable power to rural America." App'x 138 ¶ 5; *see also* 7 U.S.C. § 904. Dairyland plans to apply for assistance in 2023. App'x 41 ¶¶ 7, 9–10.

In anticipation of Dairyland's potential future application for financial assistance related to its 9% share of the Project, the Service conducted, as lead federal agency, an environmental review of the proposed Project, studying its

likely impacts and reasonable alternatives in an EIS. The Corps and FWS, both of which manage land within the Refuge that the Project will cross, participated in preparing the EIS as "cooperating agencies." App'x 1175. As a nationally significant infrastructure project that meets certain criteria, the Project is a "covered project" under the FAST Act, a statute that prescribes NEPA procedures and timetables, and enumerates factors a court must consider before enjoining such projects. App'x 532; 42 U.S.C. § 4370m(6)(A), (B).

In Wisconsin, the Project will permanently impact (by causing the loss of) 0.02 acres—855 square feet—of jurisdictional wetlands, and temporarily impact 13.6 acres. The Corps issued verifications affirming that impacts from this work would fall within the Corps' Utility Regional General Permit (Regional Permit) and were authorized under and subject to the restrictions set by that permit. App'x 1779–1844; 1845–895. Potential wetland impacts from work on the Iowa side of the line were authorized by the Corps pursuant to a verification based on a nationwide (not regional) permit (former NWP-12), App'x 1730–32, but that permit was superseded[4] and the verification expired. App'x 25 ¶¶ 5, 6.

[4] On January 13, 2021, the Corps issued its final rule reissuing and modifying 12 existing NWPs, including NWP-12, and issuing four new NWPs. *See Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 2744 (Jan. 13, 2021). NWP-12 went into effect on March 15, 2021.

B. Regional and state planning for Project

The Project was conceived more than a decade ago. In 2011, the Midcontinent Independent System Operator, Inc. (MISO), the not-for-profit entity responsible for planning and operating the transmission system and energy markets across fifteen states, designated the project (then known as "Multi-Value Project 5") as one of 17 top priority regional transmission lines (known as the Multi-Value Projects portfolio) needed to help states meet their renewable energy goals and improve the efficiency and reliability of the grid. *See Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 770–72 (7th Cir. 2013) (describing the Multi-Value Project portfolio); App'x 271–287 (Alternatives Evaluation Study describing MISO's comprehensive review of transmission and non-transmission alternatives as part of the Multi-Value Project process); App'x 1967 (explaining MISO's role under Energy Policy Act of 2005).

MISO's planning effort followed a 2008 request from five midwestern governors that MISO identify grid improvements that would enable utilities to comply with the states' renewable portfolio standards. App'x 150; 217; 282; 313; *see also Ill. Com. Comm'n*, 721 F.3d at 771 ("most of the [MISO] states expect or require utilities to obtain between 10 and 25 percent of their electricity needs from renewable sources by 2025—and by then there may be federal renewable energy requirements as well"). After three years of detailed study, MISO identified the scope of and need for the Project with a high degree of

specificity. App'x 156; 1213–14 (describing MISO's rationale for endpoints, including need to connect the Dubuque County, Iowa and Cardinal substations to take advantage of renewable energy; reach load centers in Madison and Milwaukee; and route power around the Quad Cities). MISO determined that the Multi-Value Project portfolio, including the Project, would generate economic benefits that exceed its costs and improve the reliability of the transmission system. It confirmed these benefits in reviews in 2014 (App'x 157–209) and 2017 (App'x 1680–1729).

The need for the Project was also carefully vetted for more than a year by the Wisconsin Public Service Commission (Commission) after the Co-owners applied for a Certificate of Public Convenience and Necessity for the Wisconsin portion of the Project. Two of the Plaintiff-Appellees (DALC and WWF), were parties to the Commission proceeding. *See Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 516–17 (7th Cir. 2021). In September 2019, the Commission issued a unanimous, bipartisan decision approving the Project. App'x 1061–1172. It found that the Project "addresses the need to improve electric system reliability locally and regionally, deliver economic savings for Wisconsin utilities and electric consumers, and provide infrastructure to support the public policy of greater access to renewable-based electric generation." App'x 1070. The Commission stated that "[c]onstruction is expected to begin in October 2020 with completion by December 2023." App'x 1140.

The Iowa Utilities Board also granted ITC and Dairyland a franchise to construct, operate and maintain the Iowa portion of the Project. Order, *In re ITC Midwest LLC and Dairyland Power Cooperative*, Docket No E-22386 (Iowa Utilities Bd., May 27, 2020).

C. Environmental analysis of the Project

The Refuge extends along 261 river miles of the Mississippi River, App'x 144. Recognizing that the Project would need to cross the river, and that land within the Refuge could be affected, the Utilities contacted FWS in 2012 and began the process of evaluating alternative crossings. App'x 1219. Before applying for a ROW for the 1.3-mile portion passing through the Refuge, the Utilities considered non-Refuge alternatives in a 408-page "Alternative Crossings Analysis" that examined seven different Mississippi River crossings, including four outside the Refuge. App'x 1213–14; 210–234. They also prepared a 110-page "Alternatives Evaluation Study" that examined several alternatives in detail including non-transmission options such as energy storage, distributed energy generation, and energy efficiency (App'x 1213–14; 278–282), and a 318-page "Macro-Corridor Study" that analyzed 187 different potential corridors for the Project (App'x 291–411; 1214). FWS ultimately ruled out the non-Refuge alternatives as not economically or technically feasible and as having greater overall environmental and other impacts, compared to the proposed route. App'x 1678.

On October 18, 2016, the Service initiated the formal 30-day public comment period concerning the scope of NEPA analysis of the proposed Project and alternatives. App'x 1207. The Service analyzed the comments contained within the 379 comment letters and public comments received, organized by concern, issue, or resource topic. App'x 1185; 1209–210. It published a draft EIS for public comment on December 17, 2018 and conducted six public meetings on the draft in 2018. App'x 1210. The Service received 2,039 comments on the draft EIS, which are analyzed in the final EIS. App'x 1211; 1318; 1290–1656 (Appendix F). The Service also made revisions in the EIS to address and respond to comments, where appropriate. App'x 1963. It then published the 1,241-page EIS for a 30-day public review period on October 25, 2019. App'x 1677–79. A draft compatibility determination prepared by FWS was included as an appendix to the EIS. App'x 1657–1676. On January 16, 2020, the Service, FWS, and the Corps' Rock Island District signed the Record of Decision. App'x 1918–974.

D. Post-decisional developments[5]

Although construction work on the Project has been proceeding in the Driftless Area on the Iowa side of the Refuge "without objection by plaintiffs" (App'x

[5] The events described in this section occurred after the decisions challenged in DALC's complaint and relate only to the Iowa side of the Project, but are provided for this Court's context.

3) since April 2021,[6] several changes have affected the Iowa portions of the Project. Responding to Native American tribal concerns regarding the Project's potential impacts on cultural resources in an area adjacent to but outside of the Refuge, the Co-owners agreed to change the Project route. The route change outside the Refuge also requires a change inside the Refuge. On March 1, 2021 the Co-owners applied for an amended ROW in the Refuge that would eliminate the need for four transmission structures and reduce the Project's length within the Refuge to 1.1 miles. App'x 33–38. Pending review of that application, Co-owner ITC decided to delay work within the Refuge until October 2022. ECF No. 40, at 7 n.6. ITC was able to complete its other Iowa work without needing a CWA permit.[7] App'x 25 ¶ 7.

On July 29, 2021, the Co-owners applied for a land exchange in lieu of the ROW, explaining that a "land exchange with the Service on the terms described in this letter could be completed more promptly than the current right-of-way proceedings, while securing equal or greater benefits for the Service and Refuge." App'x 45 ¶ 6, 49–51. FWS agreed to consider it, and the application is pending with FWS. App'x 45 ¶ 6, 52–54.

---

[6] Vegetation clearing, which is deemed "pre-construction" work under the EIS (App'x 1197), has been ongoing since January, 2021.

[7] DALC's Corps complaint asserts challenges to the then-effective NWP-12 and a verification issued to ITC which applied to the Iowa portion of the Project. Because ITC's verification for work in Iowa expired, *see* App'x 25 ¶¶ 5, 6, both DALC's challenge to that verification and its facial challenges to NWP-12 are moot. *See generally* ECF Nos. 89, 51, 54.

On August 27, 2021, citing an error that it made "when identifying the existing rights-of-way proposed for realignment," FWS revoked the ROW through the Refuge and the Compatibility Determination. *Id*. On September 24, 2021, the Co-owners appealed the revocation decision to the Director of the FWS. ECF No. 162, at n.2.

II. Utility regional general permit

A. Permit promulgation

Totally unrelated to the Project, in 2017, after public notice and comment and based on an environmental assessment, the Corps' St. Paul District issued a Regional Permit under the CWA. App'x 537–39. Regional permits are a type of general permits, which cover the discharge of certain material into waters over which the federal government has jurisdiction ("waters of the United States," or "jurisdictional waters"). 33 U.S.C. § 1344(e). To be covered by a general permit, activities must be similar in nature and have only a minimal adverse effect on the environment when considered separately and when considered cumulatively.[8] 33 C.F.R. § 323.2(h). Congress created the CWA's general permit program (consisting of both nationwide and regional general permits, which are analyzed under the same set of regulations that govern nationwide

[8] By contrast, an individual permit allows discharges associated with a specific project that will have more than a minimal adverse impact and can be issued only after the Corps' case-by-case evaluation of that specific project. 33 C.F.R. § 323.2(g).

permits) to "streamline the [permitting] process, reduce redundancy, and conserve agency resources," thus "enabl[ing] the Corps to quickly reach determinations regarding activities that will have minimal environmental impacts, such as those involving the discharge of less than a half an acre of fill." *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1163 (9th Cir. 2012).

Here, the Regional Permit authorizes discharges of dredged or fill material into jurisdictional waters within the Corps' St. Paul District (which has authority to grant permits for such activities within the states of Wisconsin and Minnesota) associated with the construction, maintenance, or repair of utility lines. App'x 540. For a transmission line, the Regional Permit can be used for any portion of the project crossing a jurisdictional water at a specific location, but only if the discharges associated with that portion of the project causes the "loss" of less than 0.5 acres of jurisdictional waters. App'x 540-41, 547.[9] This "loss" of acreage is how the Corps measures impacts to jurisdictional waters. *See generally* ECF No. 93, at 44–45, 99 (describing "loss" is measured in the

[9] The portion of a project that the Regional Permit can be used for is called a "single and complete project." For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a "single and complete project" for purposes of a general permit. App'x 552–53. Thus, one large utility project can have many "single and complete projects" within it.

context of NWP-12); App'x 422 (employing expertise in the context of NWP-12 to conclude that 0.5 acres "is an appropriate limit").

The St. Paul District published several draft regional general permits, including this one, for comment on October 13, 2017. App'x 425–431. None of the Plaintiffs in this lawsuit, nor their attorneys, submitted comments. *See* App'x 604–635. In December 2017, the St. Paul District promulgated the Regional Permit in its final form, which became effective February 21, 2018. App'x 537–540.

Prior to issuing the Regional Permit, the Corps prepared an environmental assessment for the Regional Permit, which analyzed the affected environment in Minnesota and Wisconsin, including details (drawing on relevant studies) about the nature and type of wetlands in Minnesota and Wisconsin, their quantity and quality, and trends in wetland losses, including from climate change. App'x 564–577. The Environmental Assessment analyzed all reasonably foreseeable impacts of the Regional Permit. *Id*. Recognizing that "projects eligible for [regional permit] authorization may be constructed in a wide variety of environmental settings," the Environmental Assessment nonetheless analyzed the impacts "likely to be associated with each activity authorized by" the Regional Permit. App'x 564.

Certain types of projects eligible for Regional Permit coverage require that the applicant first seek authorization by submitting a pre-construction notification to the St. Paul District. App'x 543–44. The District "verifies" whether the specific project qualifies for Regional Permit coverage by evaluating whether the proposed discharge activities will have no more than a minimal cumulative environmental impact and the proposed discharge is not contrary to the public interest. App'x 543, 546. This "verification"—confirmation that the proposed activity is authorized under the Regional Permit—may also impose additional conditions on discharges that the District determines are needed to further protect the aquatic environment. 33 C.F.R. §§ 330.1(e)(2)–(3), 330.6(a)(3)(i).

B. Verifications

In late 2019, ATC and ITC provided pre-construction notices to the St. Paul District. App'x 712; 648. On December 20, 2019, the St. Paul District issued verifications to ATC and ITC, respectively confirming that their proposed activities on the Project in Wisconsin were authorized under the Regional Permit. App'x 1779–1844; 1845–895. The ITC verification authorizes the permanent fill of 0.01 acres of wetland and temporary impacts to 5.8 acres of wetland. The ATC verification authorizes permanent fill of 0.01 acres of wetland and temporary impacts to 7.8 acres of wetland. The verifications each included a waiver of the "duration of temporary impacts needed for timber matting" limitation

contained in the Regional Permit. App'x 1766; 1733. The Corps also documented, in a "Memorandum for Record," that for each category of activities covered by the verification, "[t]he activity will result in no more than minimal individual and cumulative adverse effects on the aquatic environment and will not be contrary to the public interest." App'x 1771; 1778.

III. Procedural history

Although the Corps issued the CWA permit verifications challenged here at the end of 2019, App'x 1779; 1845; 1752–58; 423; 540, and the Service's final Record of Decision was effective in January 2020, App'x 1918—974, DALC filed its complaints in 2021, more than a year later. DALC's first complaint, filed in February 2021, challenges the January 2020 Record of Decision and FWS Compatibility Determination under NEPA and the Refuge Act. ECF No. 1, No. 21-cv-96 (RUS Complaint). DALC's second complaint, filed in May 2021 against the Corps, asserts facial challenges to NWP-12 and the Regional Permit under NEPA, the ESA, and the CWA; a challenge to the Project EIS; and a challenge to the verifications issued for Project-related work. ECF No. 1, No. 21-cv-306 (Corps Complaint).

On September 24, 2021, the Co-owners confirmed their longstanding construction schedule with a 30-day notice of their intent to begin construction in Wisconsin. ECF No. 96. Fourteen days later, DALC moved for a preliminary

injunction. ECF No. 97. Because summary judgment briefing was almost complete, Federal Defendants moved under Rule 65(a)(2) to consolidate the summary judgment and preliminary injunction briefing. ECF No. 105; *see also* ECF Nos. 106, 107 (Co-owners' joinder and DALC's opposition). The court held a hearing on October 22, 2021 for both the preliminary injunction motion and motion to consolidate, ECF No. 108, but never ruled on the latter. Federal Defendants and the Co-owners filed briefs and declarations opposing DALC's preliminary injunction motion. ECF Nos. 119–137, 139.[10]

On November 1, 2021, the district court issued its order preliminarily enjoining activities on "land on or near federal jurisdictional waters" for the "ninety-mile stretch" of the line in Wisconsin that required authorization under the Regional Permit. App'x 2. The court's order specifically exempted activities authorized under 33 C.F.R. § 323.2(d)(2), which permits non-jurisdictional activities, including the clearing of vegetation, in jurisdictional waters.

The Co-owners appealed to this Court on November 12, 2021. ECF No. 167.

SUMMARY OF ARGUMENT

The Project is needed to achieve the purposes for which it was devised by MISO more than a decade ago and that the Iowa Utilities Board, the Wisconsin

[10] The Co-owners also sought a bond to cover damages ($2 to 6 million) that were calculated based on the injunction of all Project construction in Wisconsin that DALC sought. ECF No. 121, at 60.

Commission, and the Service emphasized when analyzing it: to help alleviate transmission congestion, lower electricity costs to consumers, improve grid reliability, and enable Wisconsin and other states to transition from reliance on fossil fuels to use of renewable energy. Indeed, MISO has on multiple occasions affirmed the need for the Project. *See* App'x 64 ¶ 17 ("Given the importance of the CHC Project to the reliable and efficient operation of the regional transmission system, it is important that the CHC Project be placed into service and that the Project's in-service date not be delayed."). The Service, created to ensure affordable and reliable electric service to rural America, recognized the Project's need as part of a comprehensive NEPA process that generated a 1,241-page EIS and a Biological Opinion:

> The Project is expected to reduce and prevent regional transmission congestion, improve system reliability from outages, lower transmission costs, increase the transfer capability of the electrical system between Iowa and Wisconsin, meet renewable energy policies set by states, move renewable power from where it is generated to where it is needed, and address system needs due to coal and biomass powerplant closures.

App'x 138 ¶ 7; *see also* 1924–25 (Record of Decision, describing the purpose and need). Solar and wind generators, clean power advocacy groups, and Wisconsin utilities also affirmed the continued and increasingly pressing need for the Project, which will enable them to serve customers, operate new job-creating businesses, and prepare for potentially life-threatening shocks to the grid that occur with greater frequency because of climate change. As stated by an official

at the American Clean Power Association, "[m]any renewable resources that would support Wisconsin's clean energy goals are dependent on the development of the Cardinal-Hickory Creek 345-kilovolt transmission line to successfully interconnect to the grid." App'x 98 ¶ 10.

Despite the urgency to implement this long-planned and often studied project, DALC brought an eleventh hour preliminary injunction motion to block Project construction in Wisconsin. DALC asserts an "urgent" need to stop construction of the Project to prevent alleged impacts to its members based primarily on vegetation clearing, even though the Project will be co-located with existing utility or transportation ROWs for 97 of its 101 miles and even though the sole federal nexus on the Wisconsin side of the line is the 13.6 acres of temporary and 0.02 acres of permanent impacts authorized under the Regional Permit.

The *de minimis* work approved in the Corps verifications for Wisconsin were premised on NEPA and CWA review the District conducted in 2017 when it promulgated the Regional Permit. DALC did not participate in that process. Although DALC's complaint challenges the promulgation of that permit and the later Project-specific verifications, DALC's summary judgment and preliminary injunction briefs addressed only the Regional Permit, thus waiving any challenges to the verifications.

Regardless, the Corps appropriately analyzed the work planned in jurisdictional waters before verifying it, satisfying all CWA requirements and specifically addressing the proposed activity's cumulative impacts to aquatic resources. Experts at the Corps properly computed the "loss" of jurisdictional waters to exclude any temporary impacts from construction matting used *to protect* vegetation during construction, and to exclude wetlands converted from one type to another. The court erred by not deferring to the agency's expert interpretation of its own permit.

Nor is there any basis for the district court's conclusion that the Corps must evaluate the Regional Permit's cumulative impacts anew each time it considers whether to verify activity under that permit. To the contrary, Congress created the Corps' general permit program for the express purpose of allowing activities that have minimal impacts on jurisdictional waters (like the work in Wisconsin authorized here) to proceed expeditiously. Requiring case-by-case, time intensive environmental review at the verification stage would defeat the purpose of the statutory scheme.

DALC also pressed the district court to review the "purpose and need" and alternatives analyses in the Project's EIS —even though DALC's challenge concerns the Corps' Regional Permit, for which the Corps conducted its own NEPA

review when that permit was promulgated, in 2017. The court had no jurisdiction or basis to review the Project EIS for the purpose of evaluating the Regional Permit, and it erred in reaching these claims.

Even if the court were correct in reviewing the EIS, however, its findings were wrong. The agencies properly determined a purpose and need that reflected the need determinations of MISO, two state utility commissions, and the Utilities, and which was fully congruent with the Service's purpose of delivering "safe, affordable and reliable power to rural America." App'x 138 ¶ 5. The agencies considered an appropriate range of alternatives, adequately explaining why alternatives other than a high-voltage transmission line did not satisfy the purpose and need. The EIS also appropriately analyzed cumulative impacts for twelve categories of resources, including by tailoring the analysis area for each resource based on the agency's scientific expertise. NEPA—the goal of which is "foster excellent and environmentally conscious action, not prevent it"—requires no more. *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 533 (7th Cir. 2012).

The district court did not apply the APA's deferential standards for judicial review of federal agency action, instead disregarding the agencies' careful and well-supported determinations. Also contrary to Supreme Court law, the district court presumed irreparable harm from environmental impacts, despite

evidence before it that most Project impacts are temporary and reparable. App'x 16.

Finally, the court wholly ignored Supreme Court direction to consider the "public interest" before issuing a preliminary injunction. The court entirely overlooked the Project's expected benefits including improving grid reliability to make the MISO footprint more resilient to severe weather disruptions, *see* App'x 76 ¶ 23, lowering consumer costs for electricity, and providing long-term environmental benefits by shifting the region's energy generation away from fossil fuels toward renewable sources. The injunction disregards these important public benefits; patently disserving the public interest in reliable, low-cost, clean energy. *See* App'x 58 ¶ 12. The court also disregarded its obligations under the FAST Act, which spells out the factors a court must consider before enjoining vital infrastructure projects.

The court's failure to apply the correct standard for a preliminary injunction prevented any meaningful reckoning with these facts. The decision should be reversed and remanded with instructions that the district court vacate the injunction.

ARGUMENT

I. Standard of review

A. Administrative Procedure Act

The APA prescribes the standard of review for DALC's challenges under NEPA and the CWA. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 n.23 (1989). The APA imposes a narrow and highly deferential standard of review, limiting courts to determining whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Courts presume that the agency has acted in accordance with the law. *Id.* at 415.

Plaintiffs bear the burden of establishing that the agency's decision was unreasonable, *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995), and the standard of review is a narrow one. *Ind. Forest All. v. U.S. Forest Serv.*, 325 F.3d 851, 859 (7th Cir. 2003). "[I]n applying the arbitrary and capricious standard, this Court's only role is to ensure that the agency has taken a hard look at environmental consequences." *Env't Law & Policy Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 682 (7th Cir. 2006).

B. Scope of appellate review

A preliminary injunction is an "extraordinary remedy" that is only appropriate where the party seeking it has made a clear showing that: (1) they are

likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). If a plaintiff fails to meet any one of the prerequisites for a preliminary injunction, the injunction must be denied. *Cox v. City of Chicago*, 868 F.2d 217, 223 (7th Cir. 1989).

In reviewing the grant of a preliminary injunction on appeal, legal conclusions are reviewed *de novo*, findings of fact for clear error, and the balancing of harms for abuse of discretion. *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018); *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016). If a court applies an erroneous view of the law, "by definition," it abuses its discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). "[A] factual or legal error may alone be sufficient to establish that the court 'abused its discretion' in making its final determination." *Lawson Prod. Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986). Applying an "incorrect preliminary injunction standard" is also an abuse of discretion that warrants reversal. *Id.*

II. Statutory background

A. The National Environmental Policy Act

NEPA requires federal agencies to prepare a detailed EIS for all proposed "major Federal actions significantly affecting the quality of the human envi-

ronment." 42 U.S.C. § 4332(2)(C). NEPA requires analysis of significant environmental effects but does not require any particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350; *see also Marsh*, 490 U.S. at 371 ("NEPA does not work by mandating that agencies achieve particular substantive environmental results.").

B. The Clean Water Act

Congress has prohibited the discharge of dredged and fill material into "navigable waters" (also known as "waters of the United States" or "jurisdictional waters") without a "Section 404 permit." 33 U.S.C. § 1344(a); 33 C.F.R. § 328.3(a). Regulations implementing the CWA define terms associated with its permitting requirements:

- The CWA and its accompanying regulations define and classify "wetlands" (some of which are jurisdictional waters) by their different hydrology, vegetation, and soil content. 33 C.F.R. § 328.3(c)(16).
- "Fill material" is any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Id.* § 323.2(e).
- The "discharge of fill material" is the physical act of adding fill material into jurisdictional waters. *Id.* § 323.2(f).

Under the Act, the Corps may issue general and individual permits, as described above. *See supra* at 15–16 & n.8; 33 U.S.C. § 1344(e). Some general

permits apply nationwide, and some are available for use only in certain states or regions (like the Regional Permit here). Before issuing nationwide or regional general permits, the Corps must conduct an environmental review of the proposed general permit—including a NEPA analysis, and an examination of the relevant factors under the CWA Section 404(b)(1). 33 C.F.R. § 330.5(b)(3); 40 C.F.R. § 230.7(b). This general permit-level environmental analysis also includes a "public interest review" of approximately twenty factors, such as how the permit's use might affect conservation, wetlands, and energy needs. 33 C.F.R. §§ 320.1(a)(1), (c), 320.4(a)(1). When individual projects are later verified under a general permit, "district engineers do not need to do comprehensive cumulative effects analyses," because this analysis has already occurred. *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860, 1862 (Jan. 6, 2017); *compare* 40 C.F.R. § 230.7(b)(3) (describing the required evaluation before issuing nationwide permit) *with* 82 Fed. Reg. at 1862 (describing less comprehensive evaluation for verifications).

III. The district court erred in finding that DALC has demonstrated that it is likely to prevail on the merits of its claims.

To obtain the "extraordinary remedy" of an injunction a plaintiff must show that it is "likely to succeed" on the merits of its claims. *Winter*, 551 U.S. at 21–22.The court found that DALC had shown "at least some" likelihood of success on its claims that the Corps did not sufficiently address cumulative impacts

under the CWA; that the Service's EIS used an improperly narrow "purpose and need" statement; and that the EIS's analysis of cumulative impacts violates NEPA.[11] App'x 10, 14, 15. Because each of the analyses the court deemed insufficient is well supported by the administrative record before the agency, and none is "arbitrary and capricious," these conclusions are incorrect. DALC failed to make that showing on any of the three theories upon which the district court found "some likelihood" of success, and the court erred in granting the injunction.

A. The district court erred as a matter of law by reviewing claims to the verifications, which DALC waived by briefing only its facial challenges.

The Order is flawed because it focuses almost entirely on an issue that DALC waived and was not properly before the court—the validity of the verifications that the Corps issued. *See* App'x 8 (finding no evidence that Corps analyzed Project's cumulative impacts in the "project specific verifications under the [Regional Permit]"); *id.* at 8–9 ("there are also questions about the extent to which the CHC project itself qualifies for the [Regional Permit] at all"); *id.* at 10 (district court "is struggling to understand how the Corps-St. Paul's

[11] The Seventh Circuit has interpreted *Winter* to require more than a possibility of success or a better than negligible chance in evaluating whether the movant is "likely to succeed" on the merits. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). Some Seventh Circuit cases have used a different formulation of the standard, asking whether a plaintiff has shown "some likelihood of success." *See, e.g., Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020). The claims that the district court reached fail under either formulation.

project verification worked"); *id.* at 12 (focusing on "the Corps' project-specific decision" and "the Corps' specific project approval").

Although DALC's Corps Complaint asserted that both the Regional Permit and the verifications the Corps issued under them violated the CWA, DALC never briefed any argument concerning its claim challenging the verifications (Count V) either in its preliminary injunction motion or its summary judgment briefs. In finding that DALC had demonstrated some likelihood of success on this issue, the district court erroneously relied on arguments DALC did not raise, despite DALC's stipulation that arguments not raised in the briefs would be waived. *See* ECF No. 40, at 13 ("The parties agree that any claims or defenses not raised during summary judgment briefing will be deemed to have been waived."); ECF No. 110, at 47–48, 56; *id.* at 48 n.28 (affirmatively disclaiming any response to one of the Corps' arguments on Count V). A party's failure to raise an argument in its opening brief waives that argument. *United States v. Magana*, 118 F.3d 1173, 1198 n.15 (7th Cir. 1997). Because DALC waived its challenges to the Project-specific verifications, the court should not have considered them. The court compounded that mistake by erring on the merits, as explained below.

1. The district court's conclusions regarding the Project's verifications under the Regional Permit were clearly erroneous because the Corps' interpretation of the permit to exclude temporary impacts and conversions from the definition of "loss" was not arbitrary and capricious.

There are no valid "questions" about whether the Project qualifies for verifications under the Regional Permit—it plainly does, as demonstrated in the record—and the Corps' finding to that effect was not arbitrary and capricious. The Corps properly found that the Regional Permit covered the Project's activities in jurisdictional wetlands, thus warranting verification, and the district court's finding to the contrary was erroneous. It simply did not understand the terms of the Regional Permit.

The Regional Permit applies to activities in jurisdictional waters for projects that do not cause the loss of more than 0.5 acres of jurisdictional waters. App'x 541. Loss of jurisdictional waters includes only the *permanent* adverse effects to those waters, such as permanent fill that changes an aquatic area to dry land. App'x 542. Temporary impacts do not count towards the 0.5-acre loss permanent threshold. *Id.* Activities that "convert" one type of wetland (*e.g.*, dominated by tall woody vegetation) into another type of wetland (*e.g.*, dominated by grasslike plants) do not result in a "loss" of jurisdictional waters. *See Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 45–46 (D.D.C. 2013);

Optimus Steel, LLC v. U.S. Army Corps of Eng'rs, 492 F. Supp. 3d 701, 720–21 (E.D. Tex. 2020).

The only permanent destruction of jurisdictional waters currently authorized in connection with this Project will be caused by the placement of nine poles in wetlands. Installation of those poles will result in the permanent loss of only 0.02 acres (855 square feet) of wetlands in Wisconsin, squarely within the ambit of the Regional Permit. App'x 651, 652, 1766 (describing five poles to be installed in 0.011 acres of wetlands); App'x 728 (describing four poles to be installed in 0.009 acres of wetlands).

Other Project activities, such as the temporary placement of matting in wetlands to accommodate construction traffic, are authorized by the Regional Permit but under the terms of the permit do not constitute "loss" of jurisdictional waters to be counted against the 0.5-acre cap. In fact, the Corps *required* the use of temporary matting, which will be removed—and the wetland area completely restored—after construction. App'x 1766–67; *see generally Sierra Club v. U.S. Army Corps of Eng'rs*, No. 2:20-CV-00396, 2020 WL 7389744, at *5 (D. Me. Dec. 16, 2020), *aff'd*, 997 F.3d 395 (1st Cir. 2021) (contrasting the "temporary fill of wetlands with construction pads that enable equipment to transit certain wetlands with less intensive resulting impact" with the "permanent fill of wetlands to install 98 support poles (of a total of roughly 1,450 poles) and to expand or build electrical stations along the Corridor"). Thus, the placement of

temporary matting does not count towards the Regional Permit's 0.5-acre cap on loss of jurisdictional waters.

The district court also questioned whether the Project was eligible for verification under the Regional Permit given that it would result in the "conversion" of 2.64 acres of wetlands from one type of wetland to another. App'x 9. Again, the permit answers this question, indicating that a change in wetland type is not a "loss" counted towards the 0.5-acre cap. Here, the clearing of vegetation will convert 2.64 acres of forested wetlands to "emergent" or "herbaceous" wetlands, but they will not be filled or otherwise permanently lost. App'x 306; 728–29. This interpretation of "loss" is well supported in the case law. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 699 n.3 (5th Cir. 2018) (acres converted from forested wetlands to scrub-shrub wetlands would not be "irretrievably lost"). As the verifications explain, the temporary impacts—not the permanent impacts or loss—include the conversion acreage. App'x 1768 (analyzing impacts of ATC verification); 1775 (analyzing impacts of ITC verification). The district court misunderstood the Regional Permit's terms and apparently relied on that misunderstanding to conclude that DALC had some likelihood of prevailing on its challenges to the verifications. The Order should be reversed and remanded.

2. The district court's finding that the Corps violated the CWA by failing to consider the Project's cumulative effects was clearly erroneous because the Corps appropriately considered those effects before it verified the Project.

The district court erred when it concluded that, in issuing the verifications under the Regional Permit, the Corps failed to consider the Project's cumulative effects as required by the CWA. App'x 8. The memoranda for record prepared for the two verifications both include findings that the authorized activities "will result in no more than minimal individual and cumulative adverse effects on the aquatic environment." App'x 1771; 1778. A section in each memorandum also explains why the relevant cumulative impacts do not rise to a level that would require compensatory mitigation. App'x 1768; 1775. The Order (App'x 9) cites these sections but omits introductory language asking whether mitigation can "reduce the individual and cumulative adverse environmental effects to a minimal level." Given that the total permanent impacts to jurisdictional waters in each case were in the hundredths of an acre, this analysis—the purpose of which is simply to confirm the CWA analysis of cumulative impacts performed when the Regional Permit was promulgated—was more than sufficient.

Under regulations not challenged here, the CWA requires an analysis of an activity's cumulative effects on "an aquatic ecosystem." The Corps was thus only required to examine the cumulative effects of discharges verified under

the Regional Permit only on *the relevant aquatic ecosystem*. That is exactly what the Corps did before issuing the verifications, which is why this Court should reject the district court's assertion that there was "no evidence of even cursory analysis of the cumulative impact of the [Project] in the Corps-St. Paul's … verifications." App'x 8.[12]

Specifically, the Corps appropriately analyzed the anticipated cumulative effects for the Project's discharges, which totaled just 0.02 acres of permanent loss associated with nine transmission structures and 13.6 acres of temporary impacts associated with construction matting. The record the Corps reviewed and relied on consists of the more than 400 pages of information about the proposed discharges, and another 50 pages of maps, that Co-owners submitted with their pre-construction notices. App'x 712–1060; 648–660; 661–711. This information described and illustrated the various impacts that the project might have on the aquatic ecosystem in question and gave the Corps more than

[12] The CWA also requires the Corps to examine cumulative impacts before issuing the Regional Permit. 40 C.F.R. § 230.7(b)(3). The Corps also did that here, although the court ignored its analysis. The Corps estimated how many times the Regional Permit might be invoked to discharge dredged or fill material into aquatic features located in the St. Paul district, either with pre-construction notices (597 times, impacting 1,436 acres of jurisdictional waters), or without (799 times, impacting 47 acres of jurisdictional waters), and what the anticipated impacts may be on those aquatic features (over 90% of impacts being temporary in nature). App'x 587–88; 533–36. This analysis was reasonable, and DALC failed to comment on the analysis despite a public notice and comment period. *See* App'x 604–635. To the extent that the district court's finding was based on the Corps' failure to examine the cumulative effects of the Regional Permit (as opposed to the verifications), it must be reversed.

enough information on which to base its decision that the activities would "result in no more than minimal individual and cumulative adverse effects on the aquatic environment and will not be contrary to the public interest." App'x 1771; 1778.

The district court properly recognized that for a general permit verification, the Corps "need not engage in the same strenuous review necessary for an individual permit; indeed, the central tenet of general permits is that projects proceeding under them will not cause more than minimal harm, either individually or cumulatively." App'x 8. However, the district court ignored the information in the record that the Corps reviewed and relied on to find no more than minimal cumulative effects at the Project-specific level. *See Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1060–61 (10th Cir. 2015) (upholding Corps' decision where the underlying record reflected the Corps' analysis of the relevant information on cumulative impacts and the record supported the verification). The verifications here do not examine cumulative effects in the same depth that would be required for an individual permit, but the CWA does not require that depth of analysis for a verification. 82 Fed. Reg. at 1862 (under the CWA, "district engineers do not need to do comprehensive cumulative effects analyses for each [general permit] verification"). The district court thus improperly rejected the Corps' cumulative effects evaluation, to which it should have accorded deference. *Marsh*, 490 U.S. at 377.

3. The district court erred as a matter of law when it concluded that the CWA requires the Corps to reconsider the impacts of the Regional Permit each time it issues a new verification.

The district court exacerbated its error with respect to the Corps' obligation to examine cumulative effects when it found that the Corps—as a matter of law—should have evaluated the Regional Permit's cumulative impacts on the environment every time a party submits a pre-construction notice and/or each and every time the Corps issues a new verification within the five-year lifespan of the Regional Permit. App'x 9. As just described, the CWA requires the Corps to conduct only a limited cumulative impacts analysis when it considers whether to issue a verification under a general permit. Nothing in the CWA requires the Corps to expand that cumulative impacts analysis to include the impacts from all verifications previously issued under a general permit. Moreover, it would defeat the very purpose for which Congress created the general permit program: to avoid unnecessary delay and administrative burdens on the public and the Corps when permitting "routine activities." *See* 33 U.S.C. § 1344(e)(1); *see also* H.R. Rep. No. 95-830, at 98, 100 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424; *Snoqualmie Valley*, 683 F.3d at 1163 ("Requiring an elaborate analysis of the applicable regulations and the facts would defeat [Congress'] purpose.").

Because the court misunderstood how the CWA's general permitting regime works, DALC is unlikely to prevail on the merits of this claim.

B. The district court erred as a matter of law when it found that it could review the Service's 2019 EIS to determine whether the Corps complied with NEPA because, consistent with the CWA, the Corps completed its NEPA review of the Regional Permit in 2017 when that permit was issued.

Even in the one instance where the district court addressed the arguments that DALC actually raised, attacking the validity of the Regional Permit itself (as opposed to the verifications or the Regional Permit's use for the Project, about which DALC waived its arguments), the court still erred. The district court found that it could review the Service's EIS on the overall Project to determine the Regional Permit's validity.[13] App'x 12. But that EIS has no bearing on the Regional Permit, regardless of whether the Corps looked at or even relied on it. The CWA does not require the Corps to conduct or rely on any project-specific NEPA document or analysis when issuing a general permit. Instead, it mandates only that the Corps perform NEPA review of the Regional Permit when the permit is promulgated—well before any specific project seeking cov-

[13] The district court appears to have relied on the Service's EIS to assess the verifications' validity, not just the validity of the Regional Permit itself. That would be reversible error for similar reasons described here—no EIS-level NEPA review is required for verifications, and in any event, the Corps did not rely on the Service's EIS to issue the verifications.

erage under the permit would even be proposed. 33 C.F.R. § 330.5(b)(3) (directing Chief of Engineers to "prepare appropriate NEPA documents" and "section 404(b)(1) Guidelines compliance analyses for proposed [general permits]").

The court improperly disregarded analysis in the environmental assessment the Corps completed for the Regional Permit (which Federal Defendants presented in the administrative record for that permit) and instead reviewed a later EIS prepared by the Service that the Corps says was *not* the basis for its finding that the verifications satisfied NEPA. *See* App'x 10–12. The APA does not allow that. *Cf. Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003), *vacated sub nom. Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005) ("Judges are not historians charged with isolating the 'true' basis for an agency's decision … Hence the presumption that the agency properly designated the administrative record." (citations omitted)). Consistent with the contemporaneous evidence in the administrative record, Federal Defendants have consistently disclaimed that the Corps relied on the Service's EIS to approve the verifications. *See, e.g.*, App'x 10; ECF No. 161, at 13–14; ECF No. 93, at 59 n.22.

The court attempts to support its reasoning with citations to the memoranda for record the Corps prepared for the verifications. But those memoranda confirm that the Corps *did not* rely on the Service's EIS. The court cited three references in the memoranda to what it described as the "actions RUS

took under the EIS." App'x 11–12. One of these is a purely descriptive statement about the EIS, and the other two (under the heading "compliance with other laws") acknowledge the Corps is relying on the Project's Biological Opinion and Programmatic Agreement to satisfy its obligations under the ESA and National Historic Preservation Act. The latter two statements are not surprising because a general permit (and later verification, if applicable) satisfies the agency's obligations under NEPA and the CWA, not under other statutes. However, the Corps' treatment of these documents contrasts with its treatment of the EIS; the Corps' verifications expressly state that it is relying on the Biological Opinion and Programmatic Agreement to satisfy its obligations under the relevant statutes, and make no similar statement about the EIS.[14]

Significantly, the Service's 2019 EIS is not relevant to the validity of the Regional Permit that became effective in 2018. The only NEPA analysis that matters for purposes of the Regional Permit's validity is the NEPA analysis prepared in 2017 to inform the Corps' decisionmaking regarding the Regional Permit. *Compare* App'x 425–430 (draft Regional Permit published for public notice and comment in October 2017) and 556–603 (Decision Document, in-

[14] Nor does the timing of the verifications, which occurred shortly before the Record of Decision for the Project was signed, somehow estop the Corps from relying on the NEPA analysis completed for the Regional Permit in accordance with the CWA.

cluding environmental assessment, for Regional Permit, reflecting original signature date of December 2017) *with* 1173 (Project EIS published in October 2019). Thus, the Corps' St. Paul District participation in the Project-specific EIS process is irrelevant to the Regional Permit's merits. *Cf. Sierra Club*, 2020 WL 7389744, at *5, 12–13 (declining to treat NEPA analysis beyond what was required as a concession about the scope of required NEPA merely because the Corps went the proverbial "extra distance").

In short, even if there were deficiencies in the Service's EIS (there were not), they would not provide a basis for concluding that DALC had a likelihood of success on the merits in its challenge to the Regional Permit because that document was not the basis for any of the challenged decisions by the Corps.

C. The district court erred as a matter of law in concluding that it had jurisdiction to review the Service's EIS for the Project because the Corps' permitting decisions before the court did not rely on the Service's EIS..

The court erred in finding that it could reach the merits of DALC's challenges to the Service's EIS. The Service prepared an EIS because Dairyland intends to apply for a loan to finance its 9% interest in the Project, which it does not plan to do before 2023. App'x 41 ¶¶ 7, 9–10. Because Dairyland has not yet even applied for a loan and the Service had not acted on an application, DALC lacks standing to challenge the EIS. *See Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1014 (9th Cir. 2018). The Corps did

rely on the Service's EIS to issue an easement authorizing the crossing of Corps-managed lands, but DALC has not challenged that easement and it is not relevant to Wisconsin-side construction. FWS also relied on the EIS only to support its ROW, but that has been withdrawn and is not part of the Wisconsin-side construction. The court acknowledged as much. App'x 5–6 ("Any other construction activity is unavailable due to lapsed permits, is outside the jurisdiction of this court, or is not the subject of challenge in this lawsuit.").

D. Even if the Project-specific EIS were reviewable for purposes of DALC's challenge to the Regional Permit, the district court erred as a matter of law in issuing a preliminary injunction because the EIS satisfies NEPA.

1. The EIS's purpose and need statement satisfies NEPA.

Under NEPA, an EIS must "briefly specify the underlying purpose and need for the proposed action." 40 C.F.R. § 1502.13. To prevail on its challenge to the purpose and need adopted by the agencies, DALC must establish that the purpose and need adopted by the agencies was so narrow that it was "arbitrary and capricious." The district court found that DALC had shown "some likelihood of success" on its claim that the purpose and need defined by the agencies was too narrow because it adopted the Co-owners' purpose and need. This finding was unsupported by the administrative record, and incorrect as a matter of law because nothing in NEPA prohibits agencies from adopting a private party's purpose and need statement.

a. The district court erred as a matter of law in finding that an agency violates NEPA when its purpose and need statement takes into account an applicant's goals.

The Seventh Circuit has approved of the common-sense proposition that "a reviewing agency can take an applicant's goals for a project into account." *Env't L. & Pol'y Ctr.*, 470 F.3d at 683 (collecting cases)*; see also Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 764 (7th Cir. 2021) ("the agencies must take the objectives they are given and consider alternatives means of achieving those objectives, not alternative objectives.") (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (Thomas, J.)). In *Protect Our Parks*, the Seventh Circuit agreed that two federal agencies did not need to consider alternative locations for a Presidential Center proposed by the City of Chicago and a non-profit foundation that would occupy 20 acres in a City Park; "[t]he City's objective was to build the Center in Jackson Park, so from the Park Service's perspective, building elsewhere was not an alternative, feasible or otherwise." *Id*. Similarly here, the agencies did not need to reformulate the purpose and need to allow greater consideration of alternatives that did not increase transfer capability of the transmission system, or that did not connect the endpoints (Dubuque and Madison) MISO specified. Any such alternatives would have been beyond the capabilities of the Co-owners to build, and beyond the authority of the federal agencies to require. *Env't L. & Pol'y Ctr.*, 470 F.3d

at 684 ("[I]t was reasonable for the Board to conclude that NEPA did not require consideration of energy efficiency alternatives when [applicant for license] was in no position to implement such measures.").

This Court's holding in *Environmental Law and Policy Center* that "where a federal agency is not the sponsor of a project, the 'consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project'" disposes of DALC's claim. *Id.* (citation omitted). The district court found that DALC had shown at least some likelihood of success on the merits of its claim that one of the six parts of the purpose and need for the Project (increasing transfer capability between Iowa and Wisconsin) was unduly narrow under *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997), because it "wholly adopted a purpose proposed by intervenor-defendants." App'x 13. This case is thus a far cry from *Simmons*, in which the agency formulated a purpose so narrow that even a reasonable, "concrete" alternative proposed by the plaintiffs was not considered. *Simmons*, 120 F.3d at 669. In contrast, the purpose and need articulated in the Service's EIS resulted in the robust consideration of a wide range of alternatives, with the agency dismissing from in-depth study only those alternatives that failed to satisfy more than one of the six purpose and need criteria. App'x 1221–230; 1223 (identifying the specific goals that each rejected alternative failed to meet). Significantly, there was no alternative

that failed only the increased transfer capacity criterion. App'x 1223. The purpose and need statement appropriately considered the Co-owners' purpose and regional and state planning needs, and it allowed consideration of a sufficient range of alternatives. It was not arbitrary and capricious.

b. The district court's finding of some likelihood that the purpose and need statement violates NEPA is clearly erroneous.

The district court's finding is factually incorrect for three reasons. *First*, the administrative record demonstrates that, far from being based solely on the Co-owners' interests, the agencies' purpose and need statement was based on years of planning by the regional grid planning entity, MISO, and two state regulatory commissions. App'x 249–255; 1072; 1205. The expert grid operator and state agencies determined, in proceedings conducted publicly and with participation from multiple stakeholders, that the Project is needed in order to bring wind energy generated in Iowa and other states to population centers in Wisconsin. App'x 250; 260.

MISO began the regional planning exercise that identified the Multi-Value Projects portfolio to address the needs identified by states seeking grid improvements that would enable utilities to comply with renewable portfolio standards. App'x 150; 217; 282; 313. *See also Ill. Com. Comm'n*, 721 F.3d at 771–72. In doing so, it brought to bear considerable expertise. *Ill. Com. Comm'n*, 721 F.3d at 776 (acknowledging "the highly technical character of the

data and analysis required to match costs and benefits of transmission projects"). The Commission then carefully vetted the need for the Project for a year—a proceeding in which DALC actively participated. This Court recently recognized the expertise involved in Wisconsin's permitting process, under which "[t]he Commission must consider a multitude of factors such as the reliability of the power supply, alternative sources of supply, economic factors, engineering obstacles, safety, and environmental impact." *Driftless Area Land Conservancy*, 16 F.4th at 516. It was reasonable for the Service to take into account the Commission's final determination on whether this Project is needed. *Protect Our Cmtys. Found. v. U.S. Dep't of Agric.,* 845 F. Supp. 2d 1102, 1110 (S.D. Cal.), *aff'd*, 473 F. App'x 790 (9th Cir. 2012). NEPA does not require the Service to "reinvent the wheel." *Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013).

Second, the district court's finding also ignores Service's statutory mission to ensure delivery of "affordable and reliable power to rural America," which complements the Co-owners' interests. App'x 138–140 ¶¶ 5, 10. The court's premise that it was improper for the Service to adopt the Co-owners' interests erroneously presumes that their interests must be opposed and cannot be aligned.

Third, the district court's finding that the purpose and need was too narrow to permit consideration of reasonable alternatives is belied by the administrative record, which shows that the agencies considered both system (*i.e.*, transmission or non-transmission) and routing alternatives and explained, consistent with NEPA's requirements, why these alternatives were not carried forward for in-depth analysis.[15] App'x 1932.

The purpose and need complied fully with NEPA, and reasonably incorporated years of work done by entities (MISO and the Commission) that are charged with determining the need for transmission projects. They determined not only that the CHC line was needed, but also where and when it was needed. The overlap between their findings of need and that of the Service, whose mission is to ensure delivery of "affordable and reliable electricity to rural America," confirms that building the line is good policy regardless of whether it is viewed from the perspective of Wisconsin and Iowa acting on behalf of their citizens, the regional grid planner, or the federal government. The purpose and need identified in the EIS was not arbitrary and capricious.

[15] The district court also said that DALC had shown some likelihood of success on its "argument that the EIS failed to weigh fully reasonable alternatives to the proposed powerline project," App'x 14, although its discussion is limited to the propriety of the purpose and need. *Id*. 12–14. Here, however, the purpose and need statement allowed consideration of a full panoply of routing and systems alternatives. App'x 1213–215.

2. The district court's finding that DALC has some likelihood of succeeding on its claim that the agencies' consideration of cumulative impacts violates NEPA was clearly erroneous.

As a threshold matter, DALC waived the cumulative effects argument adopted by the court (App'x 8) by failing to raise it before the agencies during the notice and comment process. Project opponents challenging an agency's compliance with NEPA must "'structure their participation so that it … alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). And under the FAST Act, a court's review of a claim "shall be barred unless … any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue." 42 U.S.C. § 4370m-6(a)(1)(B)(ii). DALC did not the raise the boundary of cumulative impacts to wildlife and vegetation analysis in its comments on the final EIS, much less suggest what the boundary should be; instead, DALC commented only on the boundaries of several other cumulative impact analysis areas. App'x 1763–65 (alleging that the two-mile cumulative aesthetics analysis area, the 300-foot public health and safety cumulative impacts analysis area, and the Pool 11 impact analysis area were too limited); *see also* RUS

Compl. ¶¶ 112–13. DALC failed to provide the agencies with notice of this claim and therefore waived it.

More important, the EIS's discussion of cumulative impacts to wildlife and vegetation was thorough and commensurate with the scope of the Project. NEPA gives agencies discretion to consider "when and how" to consider cumulative impacts. *Highway J Citizens Grp. v. U.S. Dep't of Transp.*, 891 F.3d 697, 700 (7th Cir. 2018). "'[T]he determination of the extent and effect of [cumulative impact] factors … is a task assigned to the special competency of the appropriate agencies.'" *Habitat Educ. Ctr.*, 673 F.3d at 528 (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 414 (1976)). Here, the agencies' carefully tailored consideration of the Project's unique cumulative impacts on each of multiple resources merits deference.

The cumulative impacts discussion in the EIS addressed both the impacts of past projects, which were captured appropriately and consistent with Council on Environmental Quality guidance in the chapters describing the affected environment,[16] and the impacts of 30 "present or reasonably foreseeable" future actions. The present and reasonably foreseeable projects considered in-

[16] *See also* App'x 1262 ("The cumulative effects of past actions are accounted for in the description of the affected environment presented for each resource in Chapter 3.").

clude other transmission lines, energy generation facilities, urban development and transportation projects, pipelines, and recreation projects, which are catalogued by name, project size, and description. App'x 1262–272. The EIS includes a comprehensive cumulative impacts analysis of more than a dozen resource categories including soils, vegetation, wildlife, aesthetics, land use and recreation, and wetlands, each of which was assigned an analysis area based on scientific considerations unique to that resource. App'x 1260–288. In the discussion of each affected resource, the EIS describes the nature of impacts likely to result from particular types of projects. *See, e.g.,* App'x 1274 (discussing the potential contribution of surface disturbing activities to "vegetation removal, disturbance, and conversion of vegetation and plant communities, and the potential introduction of invasive species"); 1275 ("[T]ransmission line projects would pose a similar risk for avian collision as the … Project.").

Ignoring this comprehensive analysis, the district court instead seized upon one sentence that incorrectly describes the geographic area studied for cumulative impacts affecting two categories of resources. The Order cites language defining the cumulative wildlife and vegetation impact analysis areas as the "Savanna and Coulee Sections of the Driftless Area Ecoregion bounded to the north by where the Turkey and Wisconsin Rivers join the Mississippi River." App'x 14; 1261. The Turkey and Wisconsin Rivers do not join the Mississippi River in the same place, and the likely intent of this description was that the

area is bounded to the north by the Wisconsin River on the Wisconsin side of the Mississippi River and the Turkey River on the Iowa side.[17] Indeed, that is how DALC understood the sentence, based on its preliminary injunction motion. ECF No. 98, at 50 ("The northern boundary for wildlife cumulative impacts on the Wisconsin side—'where the … Wisconsin Rivers join the Mississippi River'—fares no better."). As the district court notes in its Order (App'x 15), the very next sentence in the EIS states that "[t]he direct and indirect impacts to vegetation would occur within and immediately adjacent to the proposed C-HC Project ROW." *Id.* Yet the district court apparently credited only the language in the first sentence when concluding that the EIS failed to consider cumulative impacts to wildlife and vegetation along the entire CHC transmission line route in Wisconsin. App'x 15.

The court's conclusion is also contrary to the EIS's discussion of cumulative impacts to wildlife and vegetation, which analyzes the full length of the CHC transmission line route. The sections of the EIS that directly address the cumulative wildlife and vegetation impacts of present and reasonably foreseeable

[17] In the draft EIS, cumulative impacts on vegetation were analyzed for projects in certain counties in Wisconsin and Iowa. App'x 638. The boundary for cumulative impacts to wildlife in the draft EIS included "projects that occur within Wisconsin and Iowa." *Id*. In its comments on the draft EIS, DALC complained that these boundaries "ignore[d] the fact that water resources traverse county boundaries." App'x 1481. In response, the agencies revised the cumulative impact boundaries to describe the relevant boundaries using natural rather than political boundaries, as DALC requested. *Id*. The Wisconsin counties (Dane, Grant, Iowa and Lafayette) are bounded to the north by the Wisconsin River.

future actions explicitly discuss the impacts of projects located north of the confluence of the Mississippi and Wisconsin rivers. These sections state that the agencies considered the cumulative impacts of approximately 305,181 acres of present and reasonably foreseeable projects and approximately 12,690 acres of restoration projects. App'x 1274–276 (EIS, §§ 4.4.2, 4.4.3:). These areas explicitly include projects north of where the Wisconsin River joins the Mississippi River. App'x 1263–271 (including 2,000 acres of expanded bike paths, trails, and parks in Madison; road work on WIS 78 between Mazomanie and Middleton; and road work on U.S. 61 between Cross Plains and Middleton). Thus, contrary to what one incomplete sentence in the 1,241-page EIS may suggest, the EIS considered cumulative impacts to vegetation and wildlife north of where the Wisconsin meets the Mississippi.

Moreover, in Chapter 3 of the EIS, the analysis area for direct and indirect impacts on vegetation and wildlife is defined by a 300-foot area surrounding each proposed ROW for the entire Project. App'x 1244, 1248; 1249. It would defy reason to find, based on one apparently mistaken characterization, that the agencies considered the entire length of the ROW for purposes of direct impacts but arbitrarily excluded part of the ROW when they analyzed cumulative impacts.

The district court's exclusive reliance on an inartfully phrased summary sentence and disregard of more substantive parts of the EIS showing substantive analysis to the contrary is flyspecking that is inconsistent with the APA's deferential standard of review. *Habitat Educ. Ctr.*, 673 F.3d at 528 (distinguishing between "claimed deficiencies in an EIS that are 'merely flyspecks' and those that are 'significant enough to defeat the goals of informed decision-making and informed public comment'") (citation omitted). A balanced reading of the EIS—rather than one that focuses myopically on an apparent editorial error—shows that the agencies' discussion of cumulative impacts was reasonable and considered the cumulative impacts to wildlife and vegetation along the entire CHC transmission line route in Wisconsin. The EIS's thorough discussion of cumulative effects was not arbitrary and capricious, and the court erred in finding that DALC had shown some likelihood of success on this claim.

IV. The district court erred as a matter of law in presuming that DALC would be harmed absent an injunction.

A showing of irreparable harm is a prerequisite for the issuance of a preliminary injunction. The district court erred by presuming that any of the Project's impacts constituted irreparable harm sufficient to justify an injunction. The harms DALC asserts based on generic passages of the EIS are not likely, not traceable to any federally authorized action, not imminent (to the extent DALC relies on harms within the Refuge), and not irreparable.

The Driftless Area spans 24,000 square miles in four states, Minnesota, Wisconsin, Illinois, and Iowa. App'x 1253–54. In contrast, the proposed acreage of permanent fill in Wisconsin is vanishingly small: only 0.02 acres—855 square feet. App'x 1766–772; 773–78. DALC fails to establish that this small loss will cause them any harm, let alone irreparable harm.

First, the district court erred as a matter of law when it found "a strong presumption in favor of an injunction where environmental harm is likely." App'x 18. To the contrary, "[n]o such thumb on the scales is warranted." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 544–45 (1987) ("[T]he environment can be fully protected without this presumption."). Moreover, the mere potential for environmental impact, without more, does not equate to a showing of irreparable harm. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (declining to adopt a rule that any potential environmental injury automatically merits an injunction).

Second, the district court's finding of irreparable harm is erroneous because DALC failed to show that "the alleged harm will directly result from the action which the movant seeks to enjoin." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam), *aff'd,* 770 F.2d 1144 (D.C. Cir. 1985); *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs*, No. CV-20-3817, 2021

WL 430054, at *17 (D.D.C. Feb. 7, 2021) (denying injunctive relief where plaintiffs failed to "tie their harm allegations to the specific wetlands that are to be permanently filled"). Environmental impacts that are unconnected to any federally authorized activities cannot justify injunctive relief. *Cf. Protect Our Parks*, 10 F.4th at 764 ("Environmental harm that federal agencies do not cause is irrelevant."). DALC did not submit any evidence, nor does the Order cite any, that would tie any of the harms they fear to the permanently affected wetlands.

The district court's discussion of DALC's irreparable harm largely relies on generic passages from the EIS. Those passages describe the impacts of vegetation clearing along the entire 101-mile Project, most of which does not require a Corps permit because no wetlands subject to federal jurisdiction are present. App'x 15–16 (discussing alleged harms by DALC from "clearing and maintenance of the ROW," "ground-clearing and ground-moving activities," "clearing of vegetation," and "disturbance of vegetation cover").

Yet, the great majority of these activities are not federally regulated and are not the result of federal action. They can proceed and are, in fact, proceeding now, consistent with the terms of the Order. *See* 33 C.F.R. § 323.2; App'x 1256; 1332 ("Tree clearing within forested wetlands would generally not be considered a wetland fill activity"). The district court did not—and by its own admission could not—enjoin construction of the Project, and therefore enjoined

the Co-owners only from engaging in "any activities requiring permission under the Utility Regional General Permit." App'x 21. Yet the court's presumption of harm to DALC fails to recognize the miniscule size of impacts subject to federal authority, particularly as contrasted with the scale of the Project and the activities not subject to the injunction or court jurisdiction. *See* ECF No. 121, at 44; App'x 1766–772; 1773–78.

Third, the harms DALC alleges, even if they were likely and traceable to federal action, are not "certain and great," *Wis. Gas Co.*, 758 F.2d at 674 (the irreparable injury "must be certain and great [and] must be actual"), nor are they irreparable "as the preliminary injunction standard requires," *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013). The court reasoned that monetary damages "are unlikely to outweigh the permanent damage threatened," App'x 20, presumably referring to vegetation clearing. But almost all impacts (approximately 13.6 acres) are temporary and are required to be restored after construction is completed.[18] App'x 725; 306. The EIS stated "[a]fter construction, natural recovery and restoration would take place"; that areas would be "restored as a mitigation measure or through natural recovery, to similar pre-project conditions"; that permanent displacement of wildlife species is not anticipated because in forested areas, "forest habitat

[18] Wetlands temporarily affected by the use of construction matting must be restored as soon as the activities requiring the matting are finished. App'x 1768; 1775.

would be available" in "near or adjacent" areas; and that, in previously forested areas, "disturbed areas would be revegetated consistent with non-invasive herbaceous vegetation that occurs in the area." App'x 1287; 1238; 1251; 1194; 88–91 ¶¶ 31, 40. The impacts cited in the Order are not certain, not traceable to the federally authorized activity, and not irreparable.

V. The district court committed reversible error by failing to consider the public's interest in grid reliability, lowering energy costs, and transforming the grid from fossil fuels to renewable energy, which heavily favor allowing construction to proceed.

Remarkably, the district court entirely failed to consider—or even mention—the public interest in granting or denying the preliminary injunction. The law is clear. To obtain an injunction, a plaintiff must demonstrate "that an injunction is in the public interest." *Winter*, 555 U.S.at 20; *Monsanto*, 561 U.S. at 156–57 (same); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 383, 388 (7th Cir. 1984) (same). Even if a movant demonstrates success on the first three *Winter* factors, a preliminary injunction must be denied if it is not in the public interest. *Winter*, 555 U.S. at 26; *id.* at 23 (finding that even if plaintiffs demonstrated irreparable injury, that injury was outweighed by a "proper consideration" of the public interest, which "alone requires denial of the requested injunctive relief."); *Pritzker*, 973 F.3d at 762 (same). "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'"

Winter, 555 U.S. at 24 (quoting *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982)).

Here, the district court committed a significant legal error and violated *Winter* by failing to consider, or even mention, the public interest. The court patently failed to apply the proper test for issuing a preliminary injunction. *See, e.g., Winter*, 555 U.S. at 26–27 (reversing decision upholding district court's grant of a preliminary injunction that addressed the public interest in "only a cursory fashion" and "did not give serious consideration to the public interest"); *see also Lawson Prod.*, 782 F.2d at 1437 (applying an "incorrect preliminary injunction standard" is an abuse of discretion). The district court's error is more than a simple recitation of the incorrect standard. The failure to consider one of the four factors for injunctive relief is a clear legal error and is sufficient to vacate the preliminary injunction. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Grantham,* 785 Fed. Appx. 467, 469 (9th Cir. 2019) (finding that district court abused its discretion by preliminarily enjoining logging project based on only "serious questions" as to the merits and irreparable harm findings, without considering public interest or balance of harms).

VI. The district court failed to consider the statutory criteria for preliminarily enjoining a covered project under the FAST Act.

Compounding its error of failing to determine whether the injunction was in the public's interest, the district court ignored threshold criteria that must

be satisfied under the FAST Act before a preliminary injunction may issue: the negative effects of its injunction on public health, safety, the environment, or job-creation. Congress enacted the FAST Act to streamline the NEPA review process for large-scale, nationally significant infrastructure projects, including transmission projects. *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304, 43,311 (July 16, 2020). It establishes an overarching framework that is intended to improve the efficiency of the environmental review process through interagency coordination, specific deadlines, increased transparency, and limits on litigation. The FAST Act establishes a two-year statute of limitations on lawsuits challenging federal approvals of these projects and specifies additional factors that courts must consider before granting injunctive relief.

To ensure that these much-needed projects are not casually derailed by litigation, the FAST Act supplements the traditional test for a preliminary injunction articulated in *Winter* by requiring courts to specifically consider the costs of delaying these projects, and that they not presume that those costs are "reparable." The FAST Act requires that:

> In addition to considering any other applicable equitable factors, in any action seeking a temporary restraining order or preliminary injunction against an agency or a project sponsor in connection with review or authorization of a covered project, the court *shall*—

> (1) consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction; and
>
> (2) not presume that the harms described in paragraph (1) are reparable.

42 U.S.C. § 4370m-6(b) (emphasis added).

Other statutes that seek to streamline frequently litigated categories of government action contain similar requirements intended to heighten the burden for plaintiffs to obtain injunctive relief of projects that Congress has deemed beneficial as a policy matter. *See, e.g.,* Healthy Forests Restoration Act, 16 U.S.C. § 6516(c)(3) (requiring courts to consider short and long-term effects of both action and inaction).

The CHC Project is a covered project within the meaning of the FAST Act. App'x 532; 42 U.S.C. § 4370m(6)(A). The district court was thus required to consider the injunction's potential effects on public health, safety, and the environment, and its potential for significant negative effects on jobs, in addition to the more traditional *Winter* factors. 42 U.S.C. § 4370m-6(b)(1). But the court made no findings regarding the "potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs" resulting from the injunction. 42 U.S.C. § 4370m-6(b). *See generally* App'x 1–21.

The statute's reference to the *environmental* impacts of the injunction also compels a court to consider something the district court here avoided—whether

the benefits of a project outweigh its costs. As discussed *supra* at Section V, the district court's order thwarts the public interest because enjoining construction has the potential to delay or preclude realization of the Project's significant benefits to public health, safety, the environment, and the economy. To the extent it results in delaying the Project's benefits,[19] the injunction has the potential to postpone or preclude significant economic benefits in terms of lower costs to consumers, *see, e.g.,* App'x 114–115 ¶ 36; 126 ¶ 70; compromise the reliability of the regional transmission system, *id.* ¶¶ 43–51, 71; and negatively impact the development of renewable energy in the upper Midwest and regional efforts to reduce greenhouse gas emissions and mitigate climate change. App'x 98–99 ¶¶ 9–12.

The district court failed to consider the negative effects of its injunction in violation of the FAST Act. Even if this were the only error made by the court below, it would be grounds enough for this Court to reverse the judgment and dissolve the preliminary injunction.

[19] Although the Court has represented that it intends to rule on the motion in "30 to 60 days," App'x 20, the injunction by its terms is indefinite. *See id.* 19 ("60 days"); *id*. 18 ("a few months").

CONCLUSION

For the reasons stated above, this Court should reverse the preliminary injunction order and remand to the district court with instructions to deny DALC's motion.

Respectfully submitted this 27th day of December 2021.

PERKINS COIE, LLP

s/ Thomas C. Jensen
Thomas C. Jensen
Edward Boling
Stacey Bosshardt
700 13th Street NW, Suite 800
Washington DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
Email: TJensen@perkinscoie.com
TedBoling@perkinscoie.com
SBosshardt@perkinscoie.com

Meredith Weinberg
1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
Telephone: (206) 359-8000
Facsimile: (206) 356-9000
Email: MWeinberg@perkinscoie.com

Counsel of Record for Intervenor-Defendant-Appellants American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative

RULE 32 CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32(c) because this brief contains 13,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-point Century Schoolbook font.

Dated this 27th day of December 2021.

PERKINS COIE, LLP

s/ Thomas C. Jensen
Thomas C. Jensen
700 13th Street NW, Suite 800
Washington DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
Email: TJensen@perkinscoie.com

Counsel of Record for Intervenor-Defendant-Appellants American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 27th day of December 2021.

PERKINS COIE, LLP

s/ Thomas C. Jensen
Thomas C. Jensen
700 13th Street NW, Suite 800
Washington DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
Email: TJensen@perkinscoie.com

Counsel of Record for Intervenor-Defendant-Appellants American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative

No. 21-3123

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Driftless Area Land Conservancy, et al.,
Plaintiff-Appellees,

v.

American Transmission Company LLC, et al.,
Intervenor-Defendant-Appellants.

On Appeal from the United States District Court for the Western District of Wisconsin, Case Nos. 21-cv-0096 and 21-0306 The Honorable William M. Conley, Judge

REQUIRED SHORT APPENDIX OF INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE

Thomas C. Jensen
Edward Boling
Stacey Bosshardt
Meredith Weinberg

Perkins Coie LLP
700 13th Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
(206) 359-8000

RULE 30 CERTIFICATE OF COMPLIANCE

I hereby certify that all of the materials required by 7th Cir. R. 30(a) and 30(b) are included in the Required Short Appendix bound with the Brief of Intervenor-Defendant-Appellants American Transmission Company LLC, Dairyland Power Cooperative, and ITC Midwest LLC and the Intervenor-Defendant-Appellants' Appendix.

Dated this 27th day of December 2021.

s/Thomas C. Jensen

Thomas C. Jensen
PERKINS COIE LLP
700 13th Street NW, Suite 800
Washington DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
TJensen@perkinscoie.com

Counsel of Record for Intervenor-Defendant-Appellants American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative

INDEX TO APPELLANTS' APPENDIX

IN THE 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 UTITLITIES 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.

OPINION AND ORDER

21-cv-096-wmc & 21-cv-306,

Plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife seek a preliminary injunction prohibiting Intervenor-Defendants American Transmission Company, LLC ("ATC"), Dairyland Power Cooperative ("Dairyland") and ITC Midwest LLC ("ITC") from

beginning construction on the ninety-mile stretch of their proposed, preferred route for the Cardinal-Hickory Creek ("CHC") Transmission Line Project running from far Southwest Wisconsin near Cassville and the Mississippi River to Middleton in the center of Southern Wisconsin through what is known as the Driftless Area.[1] Given the balance of harms implicated by the parties and the plaintiffs' likelihood of success on the merits, a narrowly tailored motion for preliminary injunction will be granted with respect to land on or near federal jurisdictional waters until issuance of this court's decision on the parties' cross-motions for summary judgment, which will be fully briefed within a day of the issuance of this order.

BACKGROUND[2]

A. Project Permits

Since 2012, ATC, ITC, and Dairyland ("co-owners") have been working on approvals for and construction of the CHC project. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 3-5.) This project involves a 345-kilovolt, 101-mile transmission line that will carry electricity from Iowa to Wisconsin. (*Id.* at ¶ 1.) Among other things, defendants have proposed that the CHC Transmission Line cross a section of the Upper Mississippi River National Wildlife and Fish Refuge ("Refuge"). (*Id.*) Dairyland has also indicated its intent

[1] The Driftless area is a region in Iowa, Wisconsin, and Minnesota. This region was not flattened by glaciers like many other areas of the Upper Midwest, leading to a unique geographic region with hills, bluffs, and valleys. Many species of plant and animal call this region home, such as the Timber Rattlesnake, the Northern Monkshood, and the Brook Trout. Defining the Driftless, October 28, 2021, https://driftlesswisconsin.com/defining-the-driftless/

[2] As cited below, the following facts are largely undisputed and taken from the parties' responses to each side's proposed findings of fact ("Resp. to PFF") or the administrative record, except where otherwise noted.

to pursue financial assistance from the Rural Utilities Service ("RUS") in the future. (*Id*. at ¶ 5). To that end, the RUS prepared an environmental impact statement ("EIS") regarding the project under the National Environmental Policy Act ("NEPA"), on which both the United States Fish and Wildlife Service ("Service") and the the U.S. Army Corps of Engineers ("Corps") expressly relied. (*Id*. at ¶ 6.) The Service determined that the project is compatible with the purposes of the Refuge, resulting in its issuance of a "right-of-way" permit for the line's construction through the Refuge. (*Id*. at ¶ 128.) Finally, the Corps is responsible for regulating the project to the extent that it impacts jurisdictional waters of the United States. (*Id*. at ¶ 192.) Since the proposed line covers territory under the district authority of two of the Corps branches, both the Rock Valley and St. Paul district branches have permitted sections of the proposed CHC transmission line. (*Id*. at ¶ 196-198.)

Specifically, the Corps-Rock Valley district issued Nationwide Permit 12 ("NWP 12"), under which intervenor-defendants had already started to clear cut the relatively smaller portion (approximately 15 miles) of the proposed CHC line running through Northeastern Iowa without objection by plaintiffs. (*Id*. at ¶ 197-198.) Because the Corps-St. Paul branch revoked NWP 12 within its district, no work had begun in the Upper Mississippi Refuge and the remainder of the proposed line through Wisconsin, although the St. Paul district did issue a more narrow Utility Regional General Permit ("URGP") some time ago (USACE000680).[3]

[3] Whether nationwide or regional, when a general permit is created, the issuing agency does an environmental review, but little, additional review is needed for each *specific* project subsequently. authorized, except for "Pre-Construction Notices" for certain larger projects having more than "minimal effects" on the environment. . (*Id*. at 193-196.)

B. Defendants' and Intervenor-Defendants' New Approach for Obtaining a CHC Line Permit Within the Refuge

On July 29, 2021, intervenor-defendants also requested a "land exchange" with the Service in lieu of obtaining renewed right-of-way permits through the Refuge. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 137.) Under this requested land exchange, the proposed co-owners, ITC, ATC and Dairyland, would transfer to the Service another parcel adjacent to the Refuge of around 30 acres. In exchange, the Service would grant the co-owners 19 acres of land within the refuge. (dkt. #53-2.) The Service is considering this proposal and expects its review to take up to nine months. (Def.'s Mot. (dkt #50) 10.)

In the meantime, the Service has withdrawn the CHC Project's application for Compatibility Determination and Right of Way Permits through the Refuge, ostensibly because the Service "did not review the correct easement documents when evaluating the existing use." (dkt. #69.) Additionally, the Corps modified and reissued several, other nationwide permits under the Clean Water Act on January 13, 2021, which it noted rendered the NWP 12 permit invalid. (*Id.*)

C. Plaintiffs' Claims

In this lawsuit, plaintiffs have asserted three, basic challenges to the federal approvals of the proposed preferred route of the CHC Transmission Line. First, plaintiffs' claim that the EIS prepared for the CHC project does not comply with the National Environmental Policy Act ("NEPA"). (Def.'s Mot. (dkt #50) 2.) Second, they claim that the right-of-way permit and compatibility determination by the Service violated the National Wildlife Refuge System Improvement Act, as the project is not compatible with the purposes of the Refuge. (*Id.*) Third, they claim that the Corps violated NEPA, the

Endangered Species Act, and the Clean Water Act by issuing general permits for the proposed project. (*Id.*)

On September 24, 2021, intervenor-defendants notified plaintiffs and this court of their intention to start construction in Wisconsin by clear cutting the proposed route within 30 days, a minimum notice period agreed upon by the parties early in this lawsuit. (dkt. #96.) In response, plaintiffs moved for a preliminary injunction, arguing that (1) clearcutting and subsequent construction of the powerline itself would permanently harm the environment and (2) a temporary pause of clearcutting and construction while the court decides the merits of this case at summary judgment is warranted. (Pl.'s Mot. (dkt. #98).) Subsequently, in response to inquiry by this court, intervenor-defendants agreed to hold off all activities within federal jurisdictional waters until November 29, 2021. (Dkt. #152.)

D. Jurisdictional Limits

Given that NWP 12 through Wisconsin and the Service's previous grant of a right of way through the Refuge are no longer valid, intervenor-defendants are unable to begin construction in the Refuge, including clearcutting. Additionally, Dairyland has not yet asked for funding from RUS, making that EIS relevant only to the extent it impacts the validity of other, current permits issued or actions taken by the Corps and the Service. Because the Wisconsin section is currently the subject of clearcutting and possible construction is authorized under the URGP alone, that is the only place where irreparable harm is likely to occur for the purposes of the preliminary injunction. As such, at most, the court can enjoin construction activities requiring permitting under that URGP. Any

other construction activity is unavailable due to lapsed permits, is outside the jurisdiction of this court, or is not the subject of challenge in this lawsuit.

OPINION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). A party seeking preliminary injunctive relief must demonstrate as a threshold matter that it: (1) has a reasonable likelihood of success on the merits; (2) lacks an adequate remedy at law; and (3) will suffer irreparable harm if relief is not granted. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If these elements are met, the court must then balance, on a sliding scale, the irreparable harm to the moving party with the harm an injunction would cause to the opposing party. *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cty. of Marion*, Indiana, 889 F.3d 432 (7th Cir. 2018). In particular, when assessing whether a claim challenging the issuance of a government permit has a likelihood of success on the merits, the court must follow the Administrative Procedure Act ("APA"), only asking "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952–53 (7th Cir. 2003) (citation omitted).

As with their briefing on cross-motions for summary judgment to date, the parties' equally lengthy submissions on plaintiffs' motion for preliminary injunction are like large ships passing in the night, largely failing to engage on the crucial legal issues, and for the most part, not even agreeing on what those issues are. Fortunately, by distillation of the material facts and legal issues during last week's nearly three hours of oral argument with

counsel, both the basic facts set forth above and key legal issues addressed below have emerged. Accordingly, that argument frames this opinion on plaintiffs' recently-filed motion.[4] In particular, the court's analysis begins by addressing those legal claims on which plaintiff is most likely to prevail, then moves on to the other factors that must be considered before issuance of a preliminary injunction.

I. Likelihood of Success on the Merits

A. Utility Regional General Permit

Given that the URGP is the only permit whose validity is currently contested in this case *and* on which intervenor-defendants could proceed with construction in Wisconsin, at least as to federally protected jurisdictional waters, plaintiffs must show that they have some likelihood of success on the merits of their claim that the URGP is invalid. General approval documents for the URGP state that the Corps-St. Paul branch will analyze the cumulative impact of all projects authorized under that permit to make sure that it does not exceed minimal impacts. Specifically, the approval documents contemplate that "[i]n reviewing the [pre-construction notice] for the proposed activity . . . [t]he Corps will also consider the cumulative adverse environmental effects caused by activities authorized by

[4] Like most matters in this case, the parties disagree about who is responsible for the sudden motion and need for a decision on an only recently filed motion for preliminary injunction in a case that has been pending for the better part of a year: intervenor-defendants for providing only 30-days notice of its intent to adhere to its long set schedule to begin work in Wisconsin, despite having no currently valid permit to do so within the Refuge itself; or plaintiffs for not realizing that the intervenor-defendants would proceed as originally planned with just the minimum notice agreed upon, even if it inevitably meant the court having to make a preliminary assessment of the merits just before turning to the parties' cross-motions on summary judgment. In the end, wherever the blame is most appropriately placed, this court's obligation to assessing the substance of plaintiffs' motion does not change.

the RGP and whether those cumulative adverse environmental effects are no more than minimal." (USACE 009060.) However, at least on the basis of the record cited by both sides to date, there is *no* evidence of even cursory analysis of the cumulative impact of the CHC Transmission Line in the Corps-St. Paul's project specific verifications under the RGP. (USACE 000679; USACE000686.)

Certainly, as both defendants and intervening-defendants take pains to point out repeatedly in their briefing and at oral argument, general permits need not engage in the same strenuous review necessary for an individual permit; indeed, the central tenet of general permits is that projects proceeding under them will not cause more than minimal harm, either individually or cumulatively. (USACE009046.) Even assuming that the Corps' limited review of the specific proposal for the CHC Line were adequate, without *any* apparent analysis of the projects proceeding under the general RGP, the Corps appears to have no basis on which it could have found harms are no more than minimal.

At this point, it remains to be seen whether there are in fact sufficient projects to raise such concerns, but the URGP is authorized for a period of five years and can be applied to any number of projects during that time, so it is only reasonable that the Corps comport with the text of its permit and take at least some look at the cumulative impacts over time with each subsequent project approved under that URGP.[5]

Moreover, there are also questions about the extent to which the CHC project itself

[5] The URGP defines a single and complete project as "that portion of the overall linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the US (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of this general permit authorization." (USACE 009058.)

qualifies for the URGP at all, which is limited to projects that do not "cause the loss of greater than 0.5 acre of waters of the US." USACE009046. In its project-specific verification, for example, the Corps-St. Paul branch acknowledges around 2.64 acres of permanent loss of wooded wetlands, but provides little explanation as to why that loss does not preclude the CHC project's operating under the URGP. USACE 000680 ("Indirect effects also include a permanent conversion of 1.50 acre of wooded wetland that will be cleared and maintained for the utility corridor."); USACE000686 ("Indirect effects also include a permanent conversion of 1.14 acre of wooded wetland that will be cleared and maintained for the utility corridor."),)[6]

The Corps' short memorandum on the specific project verification also states that,

> While the overall 5.81 acres of temporary impacts from timber matting include 1.14 acre of wooded wetland conversion, the matting is considered a best management practice to protect and minimize ground disturbance during construction. Because all wooded wetland conversion areas are a result of the matting, the Corps will not require compensatory mitigation."

(USACE000688.) However, operations under a general permit does not provide for a "best practices" exemption for mitigation. "The measurements of loss and temporary impact to waters of the US are for determining whether a project may qualify for the RGP, and are not reduced by compensatory mitigation." (USACE009048.) Even if this loss is divided between separate areas of the transmission line under the Corp's definition of "project,"

[6] ATC and ITC, two of the intervenor-defendants, applied separately for use of the URGP on their respective portions of the line. Because of this, there are two project verifications authorizing use of the URGP for the proposed CHC transmission line. (USACE000680; USACE000687.) Even taken separately, however, as noted above, these verifications still acknowledge 1.5 and 1.14 acres of permanent conversion of wooded wetlands, respectively. (*Id.*)

there is still no indication that the Corps considered this in either URGP project verification. (USACE000680; USACE000687.) Indeed, that this court, even with the benefit of the full administrative record, is struggling to understand how the Corps-St. Paul's project verification worked[7] further supports a finding that plaintiffs have established at least some likelihood of success on the merits as to the intervening-defendants right to proceed with clear cutting, much less building the CHC Line on permanent wetlands under the URGP alone.

B. Environmental Impact Statement

1. Corp's Reliance on the EIS

Defendants first argue that the EIS prepared for this project is wholly irrelevant to the court's analysis of plaintiffs' likelihood of success on the merits, as it was only created and relied upon for possible funding by one of the intervening-defendants' construction costs by the RUS. More specifically, since Dairyland has not even asked RUS for funding yet, defendants maintain any potential problems with the EIS are beyond this court's review. Defendants further maintain that because the Corps' verification of the project under the URGP permit occurred a few weeks before issuance of the final findings, it has no bearing on the Corps' issuance of that permit.

Even if either of these arguments were credited, the previous analysis under the URGP would still show some likelihood of success on the merits supporting an injunction and would at least be relevant to consideration of possible harms were this project to be

[7] On this second point about 3 acres, the Corps may be taking advantage of 33 USCA 1344(f)(1)(e), but if that is what they are relying on for the "best practices" point, there appears to be *no* mention of this in the administrative record.

allowed to proceed fully in Wisconsin. However, the court also does not credit either of defendants' arguments. Indeed, defendants' suggestion that the EIS is irrelevant to the URGP because the RUS financing has yet to be approved is just silly on its face. And while defendants' argument that the EIS should be ignored because the project-specific verification for the URGP was given before its final publication has some superficial appeal, it requires acceptance of a fiction that simply does not make sense and is contradicted by the record.

Certainly, the final EIS *was* published after the URGP verification, but the URGP verification and publication of the formal EIS occurred within *one* month of each other, making it unlikely that one occurred independently of each other at least factually, if not legally. (USACE000680; USACE000687; USACE00001.) Even more striking is the fact that Corps-St. Paul branch, which issued the URGP, had been a part of planning and development meetings for and preparation of the EIS nearly three *years* before the URGP project verification, dating back to at least to May of 2016. (USACE14753.) In that time, the Corps-St. Paul branch office was included in numerous meetings and calls about the NEPA analysis of the project, intervenor-defendants' plans for the line, *and* the drafting of the EIS. (USACE001238; USACE003685.)

Even more persuasive, the Corps' project verifications themselves cite heavily to actions RUS took under the EIS. (USACE000680 ("Other federal agencies involved include SERVICE, USEPA, and Corps Rock Island District. The Rural Utilities Service, USDA, is the lead federal agency and they published the Notice of Availability in the Federal Register for the Final EIS on October 23, 2019"); USACE000681 ("The action area was defined by the lead federal agency, the USDA Rural Utility Service (RUS), as the

entire project area"); USACE000682 ("RUS submitted a biological assessment (BA) to the Service on November 2, 2018 for all species identified throughout the entire Cardinal Hickory Creek project area . . . RUS made a 'no effect determination' for the whooping crane . . . The Corps has reviewed the documentation provided by the agency and determined it is sufficient to confirm Section 7 ESA compliance for this permit authorization."); USACE000683 ("RUS used the NEPA process, which covers the entire Cardinal Hickory Creek project area from Dubuque County, Iowa to Dane County, Wisconsin, to satisfy the public involvement process for Section 106 of the NHPA . . . the identification and evaluation process would be provided for in a Programmatic Agreement (PA) . . . RUS developed a PA that was fully executed on October 21, 2019 . . . The Corps has reviewed the PA provided by RUS and determined it is sufficient to confirm Section 106 compliance for this permit authorization.").) Accordingly, the court will not just ignore: nearly 3 years of collaboration, frequent citations to RUS findings made during the EIS process; and a temporal gap of less than a month before final publication of the EIS and issuance of the URGP verification. Thus, to the extent the EIS undergirded the Corps' project-specific decision, any material errors in approval of that statement may impact the validity of the URGP, as well as the Corps' specific project approval.

2. Narrow Purpose

Plaintiffs' main argument as to the EIS's defect goes to its purpose and need statement, which defines the scope of alternative analysis. (Pl.'s Mot. (dkt. #70) 34.) Specifically, plaintiffs object to EIS's adoption of the intervenor-defendants' proposed statement as to the purpose of the project: "increase[ing] transfer capability between Iowa

and Wisconsin enabling additional generation." FEIS Vol. I, 1.4.1. This purpose arguably allows little else but a large, wired transmission line between the two states. For instance, as even defendants concede, alternatives such as reliance on solar energy, battery storage, upgrading existing transmission lines, or changing the grid management system could reduce the *need* for increased transfer capability, but would not *increase* transfer capability between the two states. (Pl.'s Mot. (dkt. #70) 39.)

The Seventh Circuit has observed that "[o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). In *Simmons*, an EIS was prepared for a plan to supply two districts with water by creating a lake. *Id*. at 667. However, the Seventh Circuit found error in defining the purpose of the project as "supplying two users (Marion and the Water District) from a single source," because it effectively ruled out the consideration of any alternative that did not provide water from a single source, greatly reducing the scope of the EIS. *Id*. Similarly, plaintiffs argue here that RUS's adoption of a purpose narrowed to increasing transfer capacity unnecessarily constrained consideration of viable alternatives in the EIS. (Pl.'s Mot. (dkt. #70) 34.)

In response, defendants contend that "an EIS does not run afoul of [purpose] guidelines simply because its definition of a project's purpose precludes a particular interest group's preferred alternative." (Def.'s Mot. (dkt. #92) 56.) However, the stated purpose accepted in the EIS did not simply leave out plaintiffs' *preferred* option; it wholly adopted a purpose proposed by intervenor-defendants, which left little room for anything but the large CHC transmission line that intervenor-defendants had been planning all along.

"If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Simmons*, 120 F.3d at 670. Perhaps defendants can ultimately demonstrate the adopted purpose is not *too* narrow, but in emphasizing the limiting options that the EIS allows by adoption of a very narrow purpose, plaintiffs have at least demonstrated *some* likelihood of success on the merits of their argument that the EIS failed to weigh fully reasonable alternatives to the proposed powerline project, and thereby failing the purpose of NEPA.

3. Cumulative Impacts Analysis

The EIS also defines the area in which it considers cumulative impacts for different categories is required to be considered, including cumulative impacts on vegetation. As for wetlands in particular, the EIS states that:

> The spatial boundary is the Savanna and Coulee Sections of the Driftless Area Ecoregion bounded to the north by where the Turkey and Wisconsin Rivers join the Mississippi River. **Rationale:** The direct and indirect impacts to vegetation would occur within and immediately adjacent to the proposed C-HC Project ROW. These moderate (short- and long-term) impacts could contribute to adverse cumulative vegetation and wetland impacts within these ecoregions.

FEIS Vol. III, Table 4.2-1. The same boundary and definition were used for the wildlife impacts section. *Id*. Even construed generously, therefore, the definition limits the vegetation and wildlife cumulative impacts analysis to the area south of where the Wisconsin River meets the Mississippi River.

Unfortunately, plaintiffs assert, and defendants do not dispute that, a fair portion of the proposed CHC route is north of that area. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 102-103.) While defendants argue that the agencies creating the EIS have discretion in

drawing such boundaries as long as a rationale is given, the stated rationale contradicts the chosen boundary. (Def.'s Opp. (dkt. #115) 20-21.) In particular, the given rationale is that "direct and indirect impacts to vegetation would occur within and immediately adjacent to the proposed [CHC] Project ROW," but the adopted boundary cuts out a swath of the CHC line's right of way. (FEIS Vol. III, Table 4.2-1.) Moreover, there is also no indication that vegetation or wildlife would *not* be impacted in the right of way north of the chosen boundary.

Regardless, "NEPA requires that an agency explain in the EIS how it chose the geographic area in which it conducted the cumulative impacts analysis and . . . demonstrate that in making such choice it considered the relevant factors." *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1097 (E.D. Wis. 2005). Because the EIS fails to do so, plaintiffs' claim that the EIS violates NEPA also has some likelihood of success on the merits.

II. Likelihood of Irreparable Harm

The court next looks at whether the activities proposed, if not enjoined, will likely cause irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). Plaintiffs have offered statements from several of their members that outline how the construction could impact their ability to live, work, and play in the Driftless Area. For instance, Dena Kurt "is concerned that clearing and maintenance of the ROW will lead to increased run-off of soil, nutrients, and pollutants into the Mississippi River, which resulting sedimentation and algal blooms that would harm the aquatic ecosystem and her enjoyment of the Mississippi River and its species." (Pl.'s PFOF (dkt. #119) ¶ 15.)

Additionally, Brian Durtschi, who owns property that will be crossed by the transmission line, is concerned that, "[g]round-clearing and ground-moving activities will likely cause significant erosion and sedimentation of the creek and its wetlands, especially due to the steep topography found on the property." (Id. at ¶ 23.)

While defendants assure the court that best construction practices and mitigation will be used, that does not change the fact that some harm will come to the environment. (Id. at ¶ 24.) Specifically, even the first stage of construction will involve ground clearing, which in and of itself causes harms that are acknowledged in the Environmental Impact Statement, which the Corps signed. (USACE000001.) Even before actual construction starts, "[c]learing of vegetation as well as grading would disturb topsoil, which would result in newly exposed, disturbed soils that could be subject to accelerated soil erosion by wind and water." (FEIS Vol. II, Pg. 145.) Additionally, "disturbance of vegetative cover could facilitate the introduction, spread and proliferation of invasive species, which in turn could alter plant community composition . . . several species of invasive plants were documented in the C-HC Project." (*Id*. at 170-171.) And regarding animal species which live in the right of way, "[l]ong-term moderate impacts associated with clearing the ROW would include habitat loss, fragmentation, and degradation along with changes to species movement." (*Id*. at 201.)

All of the above represent real and irreparable impacts that will occur from clearing alone; actual groundbreaking will lead to even more severe consequences. Given that the Corps signed the Record of Decision, which adopts the findings of the Environmental Impact Statement (USACE000001), defendants must acknowledge that soil, habitats, and vegetation would all be truly and concretely impacted by the intervenor-defendants

beginning work.

III. Adequate Legal Remedy

Finally, the court looks to whether there exists an adequate legal remedy that would rectify such harms should they occur, such as "money damages and/or an injunction ordered at final judgment." *Abbott Lab'ys v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). According to the Seventh Circuit, "[a] harm is 'irreparable' if it 'cannot be prevented or fully rectified by the final judgment after trial.'" *Girl Scouts*, 549 F.3d at 1089 (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984).)

Here, the potential harm relates to the destruction of ecosystems, wetlands, and habitats, and simply awarding damages cannot repair fragile ecosystems that are harmed. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545, (1987) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") Accordingly, an injunction on the final merits is not likely to be sufficient to repair this kind of environmental damage once it occurs, as money cannot reverse soil erosion or reintegrate fragmented habitats. *Id*. Indeed, "[i]f [environmental] injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.* 480 U.S. 545. Courts have even found irreparable harm in less concrete situations; for instance, "courts have recognized that NEPA plaintiffs are likely to suffer irreparable harm when an agency is allowed to commit itself to a project before it has fully complied with NEPA," even if no actual construction would take place. *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656 (E.D. Wis. 2013).

All of this suggests a strong presumption in favor of an injunction where environmental harm is likely. As before, defendants signed off on the Environmental Impact Statement, which explicitly outlines the environmental harms that will occur from clearing activities. (USACE000001.) Given the presumption in favor of injunctions and the fact that defendants' own documents show a likelihood of environmental harm, this prong of the test is also satisfied.

IV. Balancing Test

While there are several compelling interests at play in this case, the court agrees with plaintiffs that the balance of equities favors a preliminary injunction as well for at least two reasons: (1) plaintiffs will be prejudiced without an injunction; (2) intervenor-defendants have voluntarily put the court in the position of having to decide this motion prematurely by not simply delaying plans to disturb federal jurisdictional waters a few months until the court can consider and decide the parties almost fully briefed, cross-motions on summary judgment; and (3) intervenor-defendants demonstrated only minimal damages, if any, from the imposition of a short, preliminary injunction to disturbing jurisdictional waters.

First, plaintiffs have suggested that defendants may use this construction to tilt the scales at summary judgment. (Pl.'s Mot. (dkt. #70) 68.) Intervenor-defendants have been building the Iowa side of the transmission line since April of 2021, and allowing additional construction on the Wisconsin side would no doubt help the transmission companies build momentum, if not create an air of inevitability to completion of the line, even through the Upper Mississippi River National Fish and Wildlife Refuge. (Def.'s Mot. (dkt #50) 10.)

Indeed, the Upper Mississippi River Refuge sits in the middle of the Iowa and Wisconsin branches that the intervenor-defendants are proceeding to clear cut and eventually construct towers and power lines despite a lack of permit for this crucial, environmentally sensitive section. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 1.) Moreover, plaintiffs' claims challenging construction within the Refuge remain, by far, their strongest in terms of likelihood of prevailing.

Thus, by permitting construction up to the edge of the Refuge on the Wisconsin side, just as they have already been doing on the Iowa side, the Refuge would represent only a relatively small strip of land, albeit likely the most environmentally sensitive, to complete the line. Psychologically, if not legally, this would likely make it much harder for state or federal regulatory authorities *or* the courts to deny a right of way through the Refuge.

Second, this proposed preliminary injunction is a problem of intervenor-defendants' own making. Early in the lawsuit, intervenor-defendants vowed to give plaintiffs at least a 30-day notice before beginning construction. (Def.'s Mot. (dkt #50) 9.) To their credit, this minimal notice was given, but by sticking to the very minimum notice necessary, defendants and intervenor-defendants surely were aware of what little time both plaintiffs and the court would have to take up this motion. (Dkt. #96.) Even more concerning is the fact that the proposed construction start date fell only 1 week before cross briefing on the parties' cross-motions for summary judgment would be completed. Intervenor-defendants have offered little, in any, reason why they cannot wait 60 days to receive a final judgment on the merits, given that they decided to withhold notifying the court of their commitment to stick to original construction plans until the last possible moment.

This, combined with plaintiffs' likelihood of irreparable harm and success on the merits, warrants the issuance of a preliminary injunction against any steps toward construction at least on federal jurisdictional waters, including clearance activities.

Finally, while intervenor-defendants have represented that they will suffer monetary damages due to an injunction, these limited damages are unlikely to outweigh the permanent damage threatened. Notably, intervenor-defendants have voluntarily decided to refrain from any work in jurisdictional waters until November 29, 2021 as "a showing of cooperation and good faith." (Status Rep. (dkt. #152) 1.) Intervenor-defendants represent that even this limited voluntary cessation will cost $140,000 in extra construction costs. (*Id.* at 5.) Moreover, if construction were halted along the entire Wisconsin right of way, rather than just jurisdictional waters, intervenor-defendants purportedly expect that a 30-day injunction would cause $3.1 million in damages, and a 60-day injunction would cause $12.72 million in damages. (Justus Dec. (dkt. # 157) 6-7.)

While actual damages would likely be much less -- given that this court has no jurisdiction to enjoin construction outside of land on or near jurisdictional waters -- briefing on the parties cross-motions for summary judgment will be completed within one day of this opinion's issuance, and the court does not anticipate taking more than 30 to 60 days to issue a final judgment on the administrative record already before it.[8] With these facts, the damages that intervenor-defendants will incur are not so extreme that it outweighs

[8] Since intervenor-defendants have yet to provide any calculation of this far narrower injunction for this short period of time, the court will not require plaintiffs to post any monetary bond at this time without prejudice to intervenor-defendants supplementing the record as to that much smaller sum and renewing their request for a monetary bond.

their likelihood of success on the merits and irreparable harm, which plaintiffs have raised. Thus, the balance of equities here weighs in favor of the plaintiffs.

ORDER

IT IS ORDERED that intervenor-defendants American Transmission Company, LLC, Dairyland Power Cooperative and ITC Midwest LLC are enjoined from any activities requiring permission under the Utility Regional General Permit until the issuance of an opinion and order on summary judgment. This includes any work impacting jurisdictional waters of the United States as defined under 33 C.F.R. § 328.3. Activities that fall under 33 C.F.R § 323.2(d)(2) are not restricted under the URGP and may proceed.

Entered this 1st day of November, 2021.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE 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 UTITLITIES 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.

PRELIMINARY INJUNCTION ORDER

21-cv-096-wmc & 21-cv-306,

As required by the Seventh Circuit, the court issues this preliminary injunction order to set forth its prior orders in this separate document.

IT IS ORDERED that intervenor-defendants American Transmission Company, LLC, Dairyland Power Cooperative and ITC Midwest LLC are PRELIMINARILY

ENJOINED from any activities requiring permission under the Utility Regional General Permit until the issuance of an opinion and order on summary judgment. This includes any work impacting jurisdictional waters of the United States as defined under 33 C.F.R. § 328.3. Activities that fall under 33 C.F.R § 323.2(d)(2) are not restricted under the URGP and may proceed.

Entered this 3rd day of November, 2021.

BY THE COURT:

WILLIAM M. CONLEY
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 27th day of December 2021.

s/Thomas C. Jensen

Thomas C. Jensen
PERKINS COIE LLP
700 13th Street NW, Suite 800
Washington DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
TJensen@perkinscoie.com

Counsel of Record for Intervenor-Defendant-Appellants American Transmission Company LLC, by its corporate manager ATC Management Inc.; ITC Midwest LLC; and Dairyland Power Cooperative