Case: 22-1347 Document: 18 Filed: 04/13/2022 Pages: 132

No. 22-1347

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Wildlife Refuge Association, 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

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DISCLOSURE STATEMENTS

American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative are the Co-owners of the Cardinal-Hickory Creek 345-kilovolt Transmission Line Project. ATC and ITC will each own 45.5 percent of the Project, and Dairyland will own the remaining nine percent. 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 percent 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 percent 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 percent 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, 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 percent 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 percent 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 percent 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 percent or greater ownership interest in the Ministry for Finance.

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

TABLE OF CONTENTS

Page

DISCLOSURE STATEMENTS i
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES vi
GLOSSARY xiii
JURISDICTIONAL STATEMENT 1
- I. The District Court's Jurisdiction 1
- II. The Court of Appeals' Jurisdiction 2

STATEMENT OF THE ISSUES 3
STATEMENT OF THE CASE 5
- I. Statutory Background 5
  - A. Rural Electrification Act and Federal Power Act 5
  - B. National Environmental Policy Act 7
  - C. Refuge Act 8
- II. Project Background 9
  - A. Project Description 9
  - B. Regional and State Planning for Project 11
  - C. Federal Involvement in the Project 13
    - 1. FWS 14
    - 2. RUS 20
    - 3. The Corps 21
  - D. Post-Decisional Developments 21
- III. Procedural History 22

SUMMARY OF ARGUMENT 25
ARGUMENT 27
- I. Standard of review 27

TABLE OF CONTENTS
(continued)

Page

II. The district court lacked jurisdiction to review the proposed land exchange because it is a non-final agency action that is both unreviewable under the APA and constitutionally unripe. 28

A. FWS has not approved or rejected the proposed land exchange, so there is no "final agency action" that can be subject to judicial review under the APA. 28

B. The proposed land exchange is not ripe for judicial review under Article III 31

III. Even if the district court had jurisdiction to review the proposed land exchange, its analysis of the Refuge Act was wrong as a matter of law. 33

A. The district court erred in concluding that the proposed land exchange must be supported by a compatibility determination. 33

B. The district court erroneously held that the Project is *per se* incompatible with the Refuge. 36

IV. The district court erred in exercising jurisdiction over DALC's challenge to the revoked CD and ROW permit, which is moot. 38

V. DALC lacks standing to challenge RUS's funding decision because judgment in their favor would not redress their harms. 41

VI. The EIS that the Federal Defendants prepared for the Project complies with NEPA. 45

A. The district court erred in finding that the purpose and need statement in the EIS was unduly narrow and violated NEPA. 48

B. The EIS considered an appropriate range of alternatives. 53

1. "Non-Transmission" Alternatives 54

2. Routing Alternatives 58

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 62
RULE 32 CERTIFICATE OF COMPLIANCE 64
CERTIFICATE OF SERVICE 65

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 30, 31

Alaska v. U.S. Dep't of Agric.,
17 F.4th 1224 (D.C. Cir. 2021) 39, 40

All Indian Pueblo Council v. United States,
975 F.2d 1437 (10th Cir. 1992) 53

Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n,
461 U.S. 375 (1983) 50

Bennett v. Spear,
520 U.S. 154 (1997) 28

Chessie Logistics Co. v. Krinos Holdings, Inc.,
867 F.3d 852 (7th Cir. 2017) 2

Chihuahuan Grasslands All. v. Kempthorne,
545 F.3d 884 (10th Cir. 2008) 40

Church of Scientology of Cal. v. United States,
506 U.S. 9 (1992) 38

Citizens Against Burlington, Inc. v. Busey,
938 F.2d 190 (D.C. Cir. 1991) 49, 51

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 27

City News & Novelty, Inc. v. City of Waukesha,
531 U.S. 278 (2001) 40

City of Stillwell v. Ozarks Rural Elec. Coop.,
79 F.3d 1038 (10th Cir. 1996) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Columbia Broadcasting Sys., Inc. v. United States,
316 U.S. 407 (1942) 30

Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.,
894 F.3d 1005 (9th Cir. 2018) 43, 44

Dep't of Transp. v. Public Citizen,
541 U.S. 752 (2004) 48, 49

Dhakal v. Sessions,
895 F.3d 532 (7th Cir. 2018) 29

DJL Farm LLC v. U.S. Env't Prot. Agency,
813 F.3d 1048 (7th Cir. 2016) 39

Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n,
470 F.3d 676 (7th Cir. 2006) 28, 49, 52, 57

Fed'n of Advertising Industry Representatives, Inc. v. City of Chicago,
326 F.3d 924 (7th Cir. 2003) 41

Franklin v. Massachusetts,
505 U.S. 788 (1992) 29, 30

Friends of Alaska Nat'l Wildlife Refuge v. Haaland,
No. 20-35721, 2022 WL 793023 (9th Cir. Mar. 16, 2022) 31, 35, 36

Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt,
463 F. Supp. 3d 1011 (D. Alaska 2020) 34, 35

Friends of Se.'s Future v. Morrison,
153 F.3d 1059 (9th Cir. 1998) 46

Highway J. Citizens Grp. v. Mineta,
349 F.3d 938 (7th Cir. 2003) 27, 47

Hoosier Env't Council v. U.S. Army Corps of Eng'rs,
722 F.3d 1053 (7th Cir. 2013) 52, 53

TABLE OF AUTHORITIES
(continued)

Page(s)

Ill. Commerce Comm'n v. FERC,
721 F.3d 764 (7th Cir. 2013)....6, 12, 50

In re ITC Midwest LLC and Dairyland Power Coop.,
No. E-22386, 2020 WL 2949408 (I.U.B. May 26, 2020)....13, 48

Ind. Forest All. v. U.S. Forest Serv.,
325 F.3d 851 (7th Cir. 2003)....27

ITC Midwest, LLC v. American Transmission Company, LLC,
142 FERC ¶ 61,096 (Feb. 7, 2013), Docket. No. EL13-13-000....46

Jersey Cent. Power & Light Co. v. Fed. Power Comm'n,
319 U.S. 61 (1943)....5

Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.,
928 F.3d 759 (8th Cir. 2019)....28

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)....43, 44, 45

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989)....7, 27, 46

Menominee Indian Tribe of Wis. v. Env't Prot. Agency,
947 F.3d 1065 (7th Cir. 2020)....29

Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.,
606 F.3d 1058 (9th Cir. 2010)....49

New York v. FERC,
535 U.S. 1 (2002)....5

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998)....30, 31, 32

Or. Nat. Res. Council, Inc. v. Grossarth,
979 F.2d 1377 (9th Cir. 1992)....40

TABLE OF AUTHORITIES
(continued)

Page(s)

Ortiz v. John O. Butler Co.,
94 F.3d 1121 (7th Cir. 1996)....................28

Ozinga v. Price,
855 F.3d 730 (7th Cir. 2017)....................39, 41

Protect Our Cmtys. Found. v. Jewell,
825 F.3d 571 (9th Cir. 2016)....................57

Protect Our Cmtys. Found. v. U.S. Dep't of Agric.,
845 F. Supp. 2d 1102 (S.D. Cal.), *aff'd*, 473 F. App'x 790 (9th Cir. 2012)....................52, 55

Protect our Communities Found. v. Jewell,
No. 13CV575, 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014), *aff'd*, 825 F.3d 571 (9th Cir. 2016)....................49

Protect Our Parks, Inc. v. Buttigieg,
10 F.4th 758 (7th Cir. 2021)....................46, 51

River Road All., Inc. v. Corp of Eng'rs of U.S. Army,
764 F.2d 445 (7th Cir. 1985)....................56

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989)....................7

S. E. Lake View Neighbors v. Dep't of Hous. & Urb. Dev.,
685 F.2d 1027 (7th Cir. 1982)....................43

S.C. Pub. Serv. Auth. v. FERC,
762 F.3d 41 (D.C. Cir. 2014)....................6

Sauk Prairie Conservation All. v. U.S. Dep't of the Interior,
944 F.3d 664 (7th Cir. 2019)....................49

Sierra Club v. Marita,
46 F.3d 606 (7th Cir. 1995)....................27

Simmons v. U.S. Army Corps of Eng'rs,
120 F.3d 664 (7th Cir. 1997)....................23, 53, 54

TABLE OF AUTHORITIES
(continued)

Page(s)

St. John's United Church of Christ v. FAA,
550 F.3d 1168 (D.C. Cir. 2008) 43

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 42

Town of Superior v. U.S. Fish & Wildlife Serv.,
913 F. Supp. 2d 1087 (D. Colo. 2012), *aff'd sub nom. WildEarth Guardians*, 784 F.3d 677 (10th Cir. 2015) 9, 34

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978) 56

Vill. of Bensenville v. FAA,
457 F.3d 52 (D.C. Cir. 2006) 45

Wabash Valley Power Ass'n v. Rural Elec. Admin.,
988 F.2d 1480 (7th Cir. 1993) 5

STATUTES

5 U.S.C. §§ 701–706 1

5 U.S.C. § 704 28

5 U.S.C. § 706(2)(A) 27

7 U.S.C. § 902 5

7 U.S.C. § 904 5

16 U.S.C. § 668dd(b)(3) 8, 33, 34, 35

16 U.S.C. § 668dd(d)(1) 8, 33, 34

16 U.S.C. § 668ee(1) 9, 33

16 U.S.C. § 723 37

16 U.S.C. § 724(b)(1) 37

TABLE OF AUTHORITIES
(continued)

Page(s)

16 U.S.C. § 824(b)(1) 5, 6, 50

16 U.S.C. § 3162(4)(A) 36

16 U.S.C. § 3164(a) 35

16 U.S.C. § 3192 35

28 U.S.C. § 1291 2

42 U.S.C. § 4332(2)(C) 7, 53

Iowa Code § 478.4 50

Wis. Stat. § 196.491(3) 50

RULES

Fed. R. App. P. 4(a)(1)(B) 2

REGULATIONS

7 C.F.R. § 1970.4(d) 7

7 C.F.R. § 1970.5(b)(3)(iii) 59

7 C.F.R. § 1970.8(b) 7, 20

7 C.F.R. § 1970.11(c) 7

7 C.F.R. § 1970.156 7

7 C.F.R. Subpart D 8

40 C.F.R. § 1502.13 46

40 C.F.R. § 1502.14(a) 53

40 C.F.R. § 1506.5(b) 59

50 C.F.R. § 29.21-1 37

TABLE OF AUTHORITIES
(continued)

Page(s)

50 C.F.R. § 29.21-8 37

50 C.F.R. § 29.21.1–8 33

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Order No. 888, FERC Stats. & Regs. 31,036 (1996) 6

Regional Transmission Organizations, Order No. 2000, 89 FERC ¶ 61,285 (1999), *codified at* 18 C.F.R. § 35.34(k)(7) 6, 50

OTHER AUTHORITIES

RUS Staff Instructions, Part 1970-O, Environmental-Miscellaneous Resources (April 1, 2016), https://www.rd.usda.gov/files/1970o.pdf 7, 59

U.S. Fish & Wildlife Service, 342 FW 5, Non-Purchase Acquisition (Jun. 21, 1994) (as amended Apr. 14, 2008), https://www.fws.gov/policy/342fw5.html 8

GLOSSARY

Acronym	Definition
ACA	Alternative Crossings Analysis
AES	Alternatives Evaluation Study
ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
App'x	Appellants' Appendix
ATC	American Transmission Company LLC and ATC Management Inc.
CD	Compatibility Determination
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, Plaintiff-Appellees Driftless Area Land Conservancy, National Wildlife Refuge Association, Wisconsin Wildlife Federation, and Defenders of Wildlife
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FMCSA	Federal Motor Carrier Safety Administration

FPA	Federal Power Act of 1935
FWS	U.S. Fish and Wildlife Service
ITC	ITC Midwest LLC
kV	kilovolt
MCS	Macro-Corridor Study
MISO	Midcontinent Independent System Operator, Inc.
MVP	Multi-Value Project
NEPA	National Environmental Policy Act
Order	January 14, 2022, Opinion and Order of the District Court, No. 21-cv-0096
Project	Cardinal-Hickory Creek 345-kV Transmission Line Project
PSCW	Wisconsin Public Service Commission
REAct	Rural Electrification Act
Refuge	Upper Mississippi National Wildlife and Fish Refuge
ROD	Record of Decision
Refuge Act	National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997
RGOS	Regional Generation Outlet Study
ROW	Right-of-Way
RTO	Regional Transmission Organization
RUS	Rural Utilities Service

The Secretary	The Secretary of the United States Department of the Interior
UMTDI	Upper Midwest Transmission Development Initiative

JURISDICTIONAL STATEMENT

I. The District Court's Jurisdiction

DALC[1] brought two, now consolidated, cases seeking 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. §§ 4321–4347; the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd–668ee, as amended by the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1253 (Refuge Act); Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344; and Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), related to the Federal Defendants' environmental review of and certain authorizations for the proposed Cardinal-Hickory Creek 345-kilovolt (kV) Transmission Line Project (Project).

The district court exercised jurisdiction over the cases under 28 U.S.C. § 1331 because DALC's claims raise federal questions under the APA, NEPA, CWA, Refuge Act, and ESA. The Federal Defendants and Co-owners[2] believe the district court lacked subject matter jurisdiction over DALC's NEPA claim

[1] Plaintiff-Appellees Driftless Area Land Conservancy, National Wildlife Refuge Association, Wisconsin Wildlife Federation, 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."

against the Rural Utilities Service (RUS) because DALC does not have standing to bring that claim. The district court also lacked subject matter jurisdiction over DALC's claims against the U.S. Fish and Wildlife Service (FWS) under the Refuge Act because those claims are moot or unripe.

II. The Court of Appeals' Jurisdiction

The Co-owners seek review of the March 1, 2022 final judgment, App'x[3] 46–47, and January 14, 2022 Opinion and Order, App'x 1–45 (Order) holding that (1) the Project cannot cross the Upper Mississippi National Wildlife and Fish Refuge (Refuge) through the (revoked) right-of-way (ROW) permit or a (potential) land exchange, *id.* at 23–35, and (2) the purpose and need statement in the environmental impact statement (EIS) was too narrow to comply with NEPA. *Id.* at 35–41. The district court upheld the U.S. Army Corps of Engineers (Corps) permits that DALC challenged, which are not at issue here. The Co-owners filed a Notice of Appeal and docketing statement on March 3, 2022, within the 60-day deadline. *See* Fed. R. App. P. 4(a)(1)(B). The final judgment disposed of all DALC's claims. This Court has jurisdiction over the Co-owners' appeal. *See* 28 U.S.C. § 1291; *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 856 (7th Cir. 2017).

[3] Documents from the district court and administrative record cited herein are provided in Appellants' concurrently filed Appendix.

STATEMENT OF THE ISSUES

I. Whether the district court erred in holding that a proposed land exchange involving certain acreage currently within the Refuge was a "final agency action" under the APA and ripe for review under the Constitution, where FWS has neither authorized nor acted on the exchange;

II. Whether the district court erred in holding that the proposed land exchange, made pursuant to 16 U.S.C. § 668dd(b)(3), must be supported by a determination that the Project is compatible with the purposes of the Refuge, when that statutory provision requires only that the Secretary of the Interior (Secretary) determine the land to be transferred out of the Refuge is "suitable for disposition" and "approximately equal" in value (or equalized by cash payment) to the land acquired for the Refuge;

III. Whether the district court erred in holding that the Project was *per se* incompatible with the purposes of the Refuge, where the Co-owners have two existing transmission lines within the Refuge, propose to transfer their existing ROWs in the Refuge and other lands outside the Refuge to FWS in fee, reducing transmission structures and habitat fragmentation within the Refuge and adding nearly twice as much land to the Refuge as would be used for the new ROW;

IV. Whether the district court erred in holding that DALC's challenge to FWS's compatibility determination (CD) and ROW permit was not moot, where the agency previously revoked those authorizations;

V. Whether the district court erred in holding that DALC has standing to challenge the EIS and Record of Decision (ROD), where DALC failed to show that vacatur of the EIS and ROD would redress its alleged harms by stopping Project construction; and

VI. Whether the district court erred in holding that the purpose and need statement in the EIS for the Project violated NEPA, where RUS relied substantially on the transmission project planning criteria, analyses, and processes developed pursuant to the Federal Power Act of 1935 (FPA), 16 U.S.C. §§ 791–825r, by the regional grid operator, state utility regulators, and the Co-owners.

STATEMENT OF THE CASE

I. Statutory Background

A. Rural Electrification Act and Federal Power Act

Congress enacted the Rural Electrification Act (REAct), 7 U.S.C. §§ 901–950aa-1, in 1936 to bring electricity to rural America. *See City of Stillwell v. Ozarks Rural Elec. Coop.*, 79 F.3d 1038, 1044 (10th Cir. 1996). The REAct authorizes RUS, an agency within the Department of Agriculture, to provide low-interest loans and loan guarantees. 7 U.S.C. §§ 902, 904. The REAct does not confer federal energy regulatory powers upon RUS. *City of Stillwell*, 79 F.3d at 1044; *see also Wabash Valley Power Ass'n v. Rural Elec. Admin.*, 988 F.2d 1480, 1490 (7th Cir. 1993) (RUS is "a lending agency administering a federal credit program rather than a regulatory agency."). RUS has no authority to set energy policy or manage transmission.

The Federal Power Act of 1935 gave the Federal Energy Regulatory Commission (FERC), previously the Federal Power Commission, exclusive federal authority to regulate interstate electricity transmission. *See* 16 U.S.C. § 824(b)(1). The primary purpose of the FPA was to give FERC power to regulate the sale of electric energy across state lines. *Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 67 (1943) (citation omitted). The FPA exemplifies the concept of cooperative federalism, reserving to the states significant control over siting of transmission lines and power plants. *New York*

v. FERC, 535 U.S. 1, 24 (2002), *citing with approval* FERC Order No. 888, FERC Stats. & Regs. 31,036, at 31,782, n.543 (1996) ("Among other things, Congress left to the States authority to regulate generation and transmission siting."); *see also* 16 U.S.C. § 824(b)(1) (states retain jurisdiction over facilities used for generation, local distribution, and intrastate transmission).

FERC oversees planning of the interstate transmission system. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55–59 (D.C. Cir. 2014). FERC authorized establishment of regional transmission organizations (RTOs), which are independent, non-profit organizations responsible for operating, maintaining the reliability of, and planning expansions to the transmission grid within certain regions of the United States.[4] *See Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (1999), *codified at* 18 C.F.R. § 35.34(k)(7); *see also Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 769–70 (7th Cir. 2013). The Midcontinent Independent System Operator, Inc. (MISO) is the RTO responsible for the grid serving Iowa, Wisconsin, and most of the Midwest region. *See Ill. Comm. Comm'n*, 721 F.3d at 771.

[4] The Co-owners respectfully suggest that the Court consider inviting the Federal Energy Regulatory Commission to appear in this proceeding. The Commission is not otherwise a party, has a direct interest in regional transmission planning and FPA jurisdiction, and expertise that should be relevant and valuable to the Court's consideration of this appeal.

B. National Environmental Policy Act

NEPA requires federal agencies to prepare an EIS for proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency must analyze significant environmental effects, but the statute does not compel any particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results.").

RUS uses NEPA to assess potential environmental effects of proposed funding decisions. *See* 7 C.F.R. § 1970.8(b). RUS's standard NEPA practice requires preparation an Alternative Evaluation Study (AES) and a Macro-Corridor Study (MCS) as foundational elements of its environmental review of a loan for transmission facilities.[5] The AES evaluates reasonable alternatives to meet the applicant's purpose and need, while the MCS identifies potential corridors within which the proposed transmission line project could be sited. App'x 384–85; App'x 445–46. RUS documents completion of its environmental review related to project financing in a ROD. *See* 7 C.F.R. §§ 1970.4(d),

[5] RUS Staff Instructions, Part 1970-O, Environmental—Miscellaneous Resources, Exhs. A, D (April 1, 2016) (guidance for preparing an alternative evaluation study and macro corridor study), https://www.rd.usda.gov/files/1970o.pdf.

1970.11(c), 1970.156. Following completion of its environmental review, RUS then reviews studies on the project's technical and economic features and the borrower's creditworthiness. 7 C.F.R. Subpart D. These studies, analogous to a commercial lender's due diligence, precede RUS's decision-making on a loan application.

C. Refuge Act

The Refuge Act authorizes the Secretary, acting through FWS, to "[a]cquire land . . . by exchange . . . for acquired lands or public lands . . . under his jurisdiction which he finds to be suitable for disposition." 16 U.S.C. § 668dd(b)(3). Thus, the Secretary can acquire land *outside* the refuge system in exchange for land *within* the refuge system, provided she determines that the latter is "suitable for disposition." FWS must follow a detailed process before exchanging land, including appraisal, environmental review, title review, and (depending on the value of the exchange) Congressional review.[6]

A separate provision of the Refuge Act authorizes the Secretary to "permit the *use* of any area within the [National Wildlife Refuge System] *for any purpose* . . . whenever [s]he determines that such uses are compatible with the major purposes for which such areas were established." 16 U.S.C. §

[6] *See* U.S. Fish & Wildlife Service, 342 FW 5, Non-Purchase Acquisition (Jun. 21, 1994) (as amended Apr. 14, 2008), https://www.fws.gov/policy/342fw5.html.

668dd(d)(1)(A) (emphasis added). A "compatible use" is a "wildlife-dependent use *or any other use* of a refuge that, in the *sound professional judgment* of the [Director of FWS or his designee], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1) (emphasis added). While Refuge Act requires FWS to find that a *proposed use* of a refuge is compatible with the refuge's purposes, the statute contains no similar requirement for land exchanges. *See Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1111 (D. Colo. 2012*)* ("The plain language of the Refuge Act supports the conclusion that a compatibility determination is not required for the acquisition of land."), *aff'd sub nom. WildEarth Guardians*, 784 F.3d 677 (10th Cir. 2015).

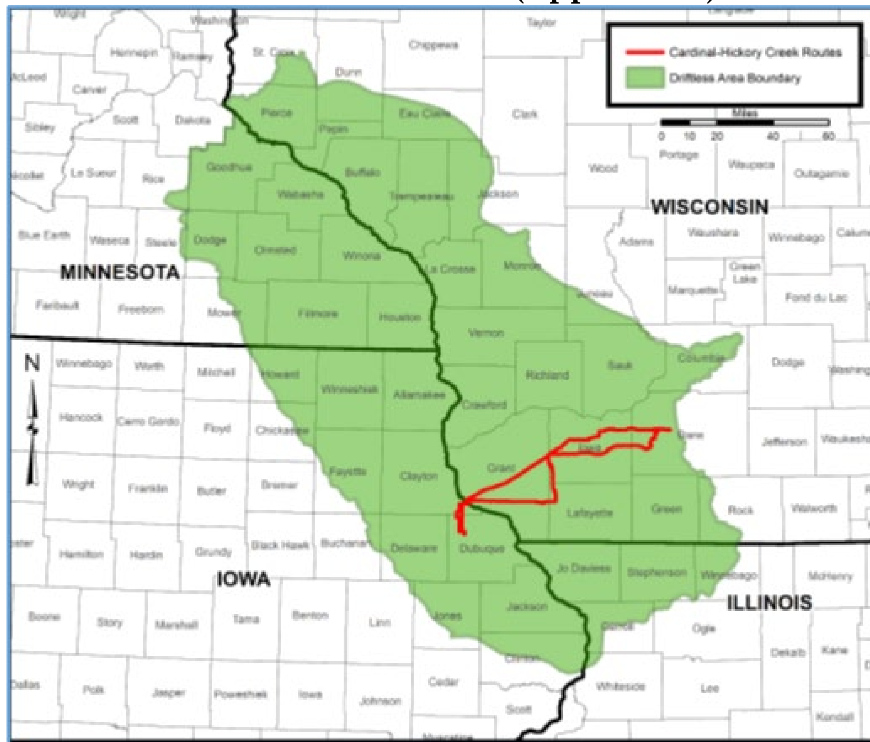
II. Project Background

A. Project Description

The Cardinal-Hickory Creek Project is an approximately 101-mile, 345-kv transmission line that will run from the Hickory Creek Substation in Dubuque County Iowa, across the Mississippi River through southwest Wisconsin to the Cardinal Substation in Middleton, Wisconsin. App'x 138; App'x 1176–78, 1194–97. The Project crosses mostly private and non-federal land, except for a roughly one-mile segment crossing the Refuge. App'x 877, 903. The Project is collocated with existing transportation, utility, or railroad ROW for almost all its length. App'x 895; App'x 1195. The Project will pass

over agricultural and some forested lands in the Driftless Area, a four-state region characterized by unique geography, where much of the original vegetation has been converted to cropland and pasture. App'x 914. The Project will cost nearly $500 million, and the Co-owners have already spent $159 million building it. ECF 132 ¶ 8. The Project will be placed into service in December 2023. ECF 129 ¶ 17.

Figure 1: Map of Alternative Project Routes within Driftless Area (App'x 1256)[7]



[7] The red lines on the map depict alternative routes that were under consideration at the time Figure 1 was prepared. The upper red line represents the selected alternative.

B. Regional and State Planning for Project

A high-voltage transmission link between the Madison, Wisconsin area and Iowa has been planned for well over a decade. In 2008, the governors of Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin formed the Upper Midwest Transmission Development Initiative (UMTDI), which worked with MISO to identify transmission corridors to move wind energy from the Great Plains to eastern population centers. App'x 1240, 1245. The UMTDI identified a transmission line between Dubuque, Iowa and Madison, Wisconsin as one of five "no regrets" or "first mover" projects that would meet transmission needs under a variety of future circumstances. App'x 1244–48.

Concurrently, MISO convened the Regional Generation Outlet Study (RGOS), a collaborative, multi-year effort involving state utility regulators and stakeholders. *See* App'x 89; App'x 640–41. This effort was intended to identify cost-effective transmission facilities to meet state renewable energy requirements. *Id.* The RGOS identified the Project as one of several MISO-region transmission projects that would "provide for the continuation and extension of the west to east transmission path to provide more areas with greater access to the high-wind areas." App'x 93.

Between 2010 and 2011, MISO intensively studied the RGOS portfolio using a FERC-approved transmission planning process. App'x 1194; App'x 641–42. MISO solicited input from public consumer advocates, environmental

organizations, state regulatory authorities, transmission owners, and others. App'x 633–36. MISO invested approximately 35,000 staff hours and held over 200 public meetings. App'x 641. The MISO stakeholder process recommended to the MISO Board of Directors that 17 transmission projects—including the Cardinal-Hickory Creek Project—be included in the Multi-Value Project (MVP) portfolio.[8] App'x 96–97.

The MISO Board approved the MVP portfolio in 2011, finding that it would produce benefits exceeding its costs by improving transmission reliability, reducing transmission congestion and wholesale energy costs, increasing access to low-cost wind energy being developed west of the Mississippi River, and supporting state renewable energy policies. *See* App'x 639; App'x 96–129; *see also Ill. Com. Comm'n*, 721 F.3d at 770–72.

The Public Service Commission of Wisconsin (PSCW) approved construction of the Project in Wisconsin, finding that it "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 682. DALC argued in the PSCW proceedings (as it does again here) that the Co-owners and regulators should have studied other

[8] At that time, the Project was also known as "MVP 5," or the "Dubuque Co.-Spring Green-Cardinal" line. App'x 97.

non-transmission alternatives in more detail. The PSCW rejected DALC's favored alternatives, finding them to be not "sufficiently credible." App'x 705–07. The Iowa Utilities Board also granted a franchise for construction of the Project in Iowa, finding that it is "necessary to meet current and future transmission needs" by supporting the interconnection of renewable energy in Iowa and improving the reliability of the transmission system. *See* Order, *In re ITC Midwest LLC and Dairyland Power Coop.*, No. E-22386, 2020 WL 2949408, at **9–15 (I.U.B. May 26, 2020).

C. Federal Involvement in the Project

The federal role in the Project is small. The Project is not a federal project and involves no federal property except where it crosses a short segment of land that the Corps and FWS administer on the Iowa bank of the Mississippi River. The Project did, however, require certain discrete approvals and permits from FWS, RUS, and the Corps. The three agencies, led by RUS, prepared an EIS to inform their respective decisions, and documented their decisions in the ROD. The federal agencies accounted for and accorded appropriate deference to MISO and the states' FPA-based decision-making and demonstrated their awareness that DALC had failed to win grid regulators' support for its preferred policies. App'x 706–07.

1. FWS

Wind power from Iowa and points west must cross the Mississippi River to reach consumers in Wisconsin and points east. App'x 223. MISO determined that new connections were needed between substations in Iowa and Wisconsin to carry the wind power eastward. The Refuge extends for 261 miles along the Mississippi River (roughly from Buffalo County, Wisconsin to Davenport, Iowa). App'x 862–67; App'x 223–25. As one of their first steps following MISO's approval of the MVP portfolio, the Co-owners began consultations with FWS in 2012 to identify potential river crossings, including land within the boundaries of the Refuge. App'x 229.

FWS would not consider allowing the Project to cross the Refuge on a new ROW unless the Co-owners could demonstrate that non-Refuge crossings were infeasible. *Id*. Over roughly three years, the Co-owners prepared the Alternative Crossings Analysis (ACA), a detailed 408-page examination of seven potential crossings along an approximately 30-mile stretch of the Mississippi River. App'x 862–63 (map of crossings); App'x 217–241 (summary of ACA). Four of the studied crossings—one at a lock and dam managed by the Corps, two along bridges leading into Dubuque, and a fourth along an existing 161-kV line leading into Dubuque—were located outside the Refuge. App'x 303–340. Three of the studied crossings were located within the Refuge: one along another lock and dam managed by the Corps, and the other two at or

near the Co-owners' existing 69-kV and 161-kV transmission lines within the Refuge, just across the river from Cassville, Wisconsin. *Id*. The Corps rejected crossings at the locks and dams, Dubuque would not permit the Project within city limits, and Iowa would not permit the bridge crossings. App'x 237–374.

Figure 2: Map of the Refuge (App'x 279)

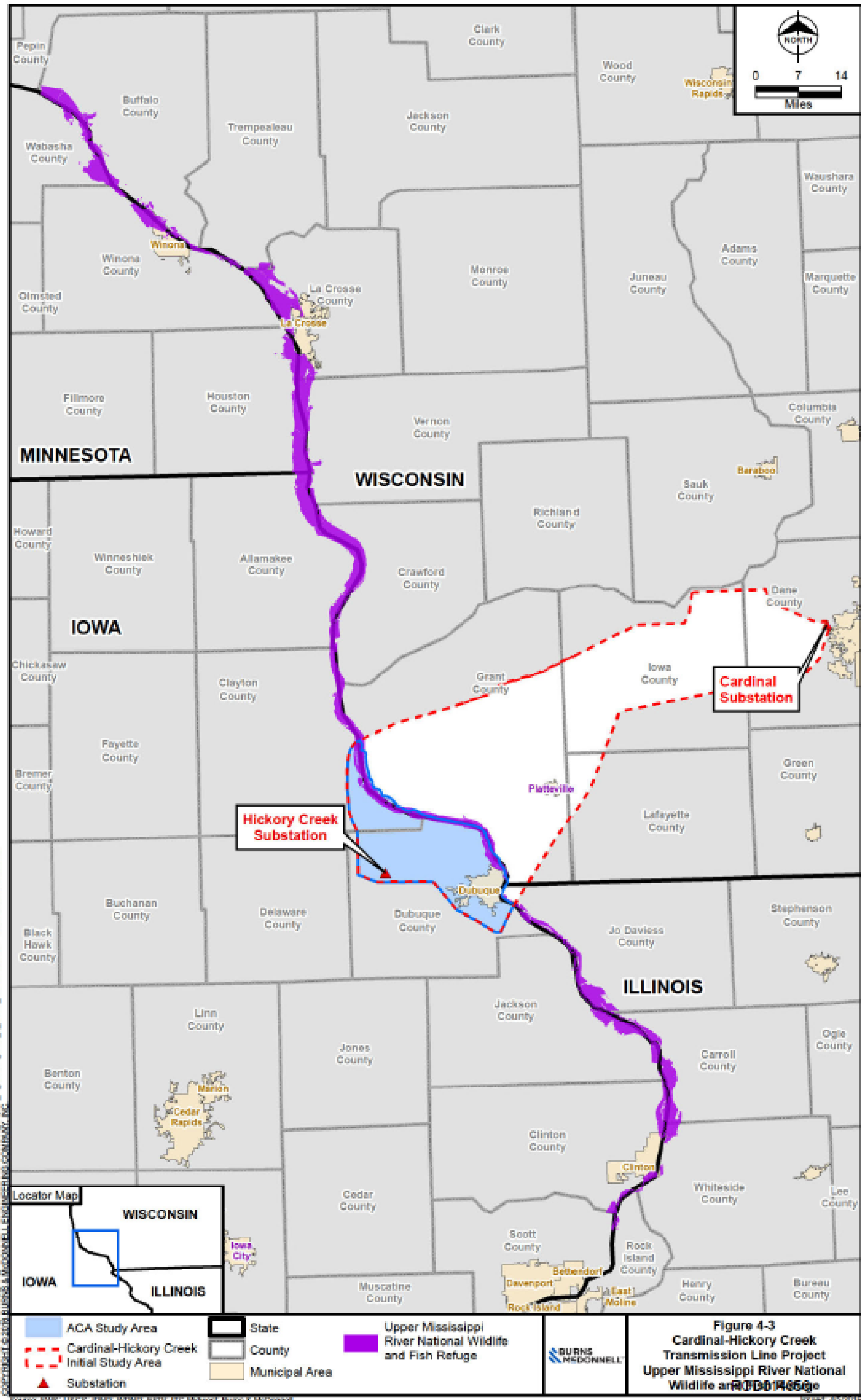
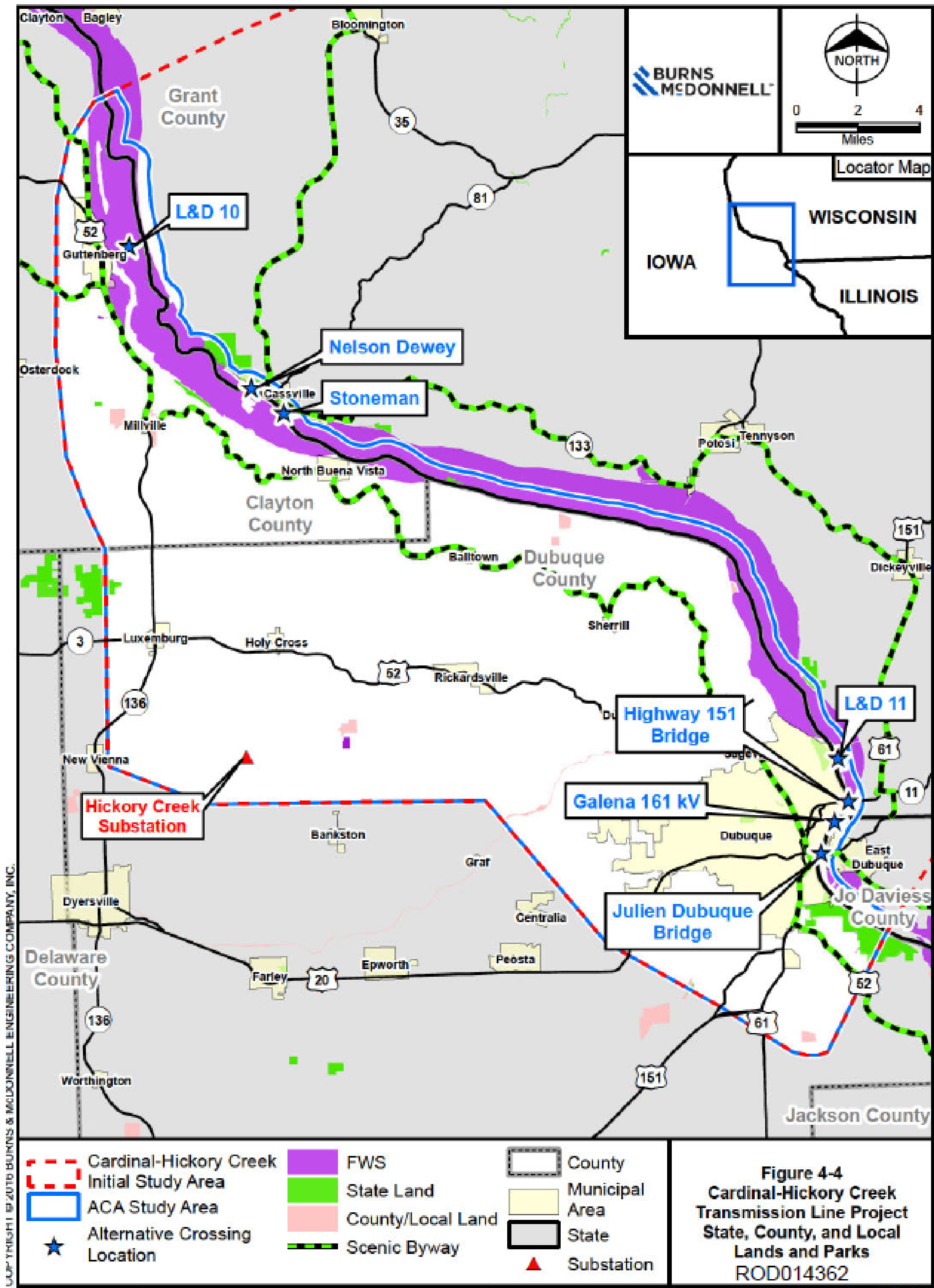


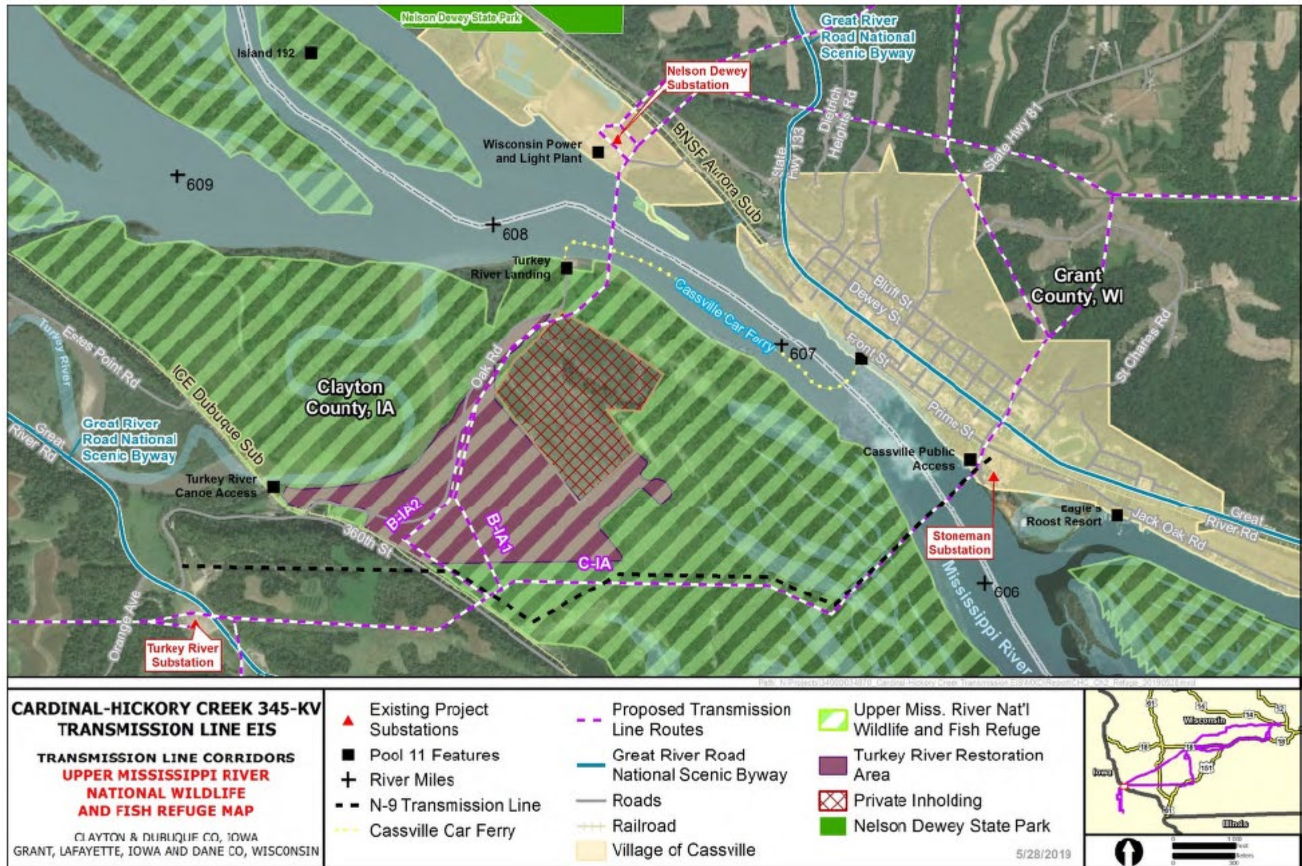
Figure 3: Map of Studied Refuge Crossings (App'x 285)



Thus, the only remaining feasible river crossings were within the Refuge, at or near the Co-owners' existing transmission lines. App'x 238–241. One of these crossings—known as the "Stoneman" crossing—would co-locate (or "double-circuit") the Project with the Co-owners' existing 161-kV transmission line that runs through the Refuge and across the Mississippi River into Cassville. App'x 234–35; App'x 351–361. The other crossing—known as the "Nelson Dewey" crossing—would cross FWS and Corps land in the Refuge along a new transmission ROW, adjacent to an existing road and railway, and enter Wisconsin at the site of the former Nelson Dewey coal power plant. App'x 235–36; App'x 362–370. Under this alternative, the Co-owners would remove and retire their existing 69-kV line, remove the existing 161-kV line from its current location, and double-circuit it with the Project, allowing for full restoration and revegetation of the existing transmission corridor within the Refuge.[9] *Id.*

[9] The Stoneman crossing would also involve removal of the Co-owners' existing 69-kV transmission line from the Refuge. App'x 239.

Figure 4: Nelson Dewey (B-IA2) and Stoneman (C-IA) Crossings (App'x 918)



The Co-owners applied to FWS in September 2019 for a ROW permit for the Project to cross the Refuge along the Nelson Dewey crossing. App'x 655–672. FWS issued a CD for the Nelson Dewey crossing, finding that none of the non-Refuge crossings were feasible and would have "greater overall environmental and human impacts compared to the two feasible Refuge crossing locations." App'x 799. FWS found that, by routing the Project along an existing road and railway, the "habitat fragmentation [created by the Project] would have minor additional impacts." App'x 1162. FWS also found that revegetation of the Co-owners' existing transmission ROW "would result in

reduced habitat fragmentation and restoration of larger contiguous blocks of habitat." App'x 1164. FWS cited the Co-owners' commitment to transfer an approximately 30-acre parcel (the "Wagner parcel") to FWS, adding valuable habitat to the Refuge. App'x 1160. FWS noted that the Nelson Dewey crossing would "significantly reduce safety concerns in the Town of Cassville." App'x 1167. FWS issued a ROW permit for the Project's crossing of the Refuge in September 2020. App'x 1228–238.

2. RUS

Dairyland intends to seek RUS financing for its nine percent Project stake in late 2023, a point at which the Project is expected to be nearly complete. ECF 90 ¶ 10. RUS conducts environmental reviews under NEPA and requires engineering and financial analyses before providing financing. *See* 7 C.F.R. § 1970.8(b). In October 2019, RUS published a 1,241-page final EIS for the Project. App'x 952–54.

On January 16, 2020, RUS, FWS, and the Corps' Rock Island District signed the ROD, App'x 1171–1227, selecting "Alternative 6"—the route the PSCW authorized for the Project—as the "preferred alternative" for the Project. App'x 901. The ROD *does not* authorize RUS to provide financing to Dairyland—it simply reflects the completion of RUS's analysis of environmental impacts associated with the potential loan to Dairyland. App'x 1221.

3. The Corps

The Corps was involved in two permitting actions, neither of which is at issue in this appeal. The Corps issued a ROW authorization (basically an easement) for the Project's crossing of approximately nine acres of Corps-administered land within the Refuge. App'x 847. The Corps relied on the EIS that RUS prepared when issuing this easement, *see* App'x 556–57, which DALC has not challenged. The Corps also authorized the Project's permanent impacts to less than 0.1 acres of wetlands in Wisconsin and Iowa. App'x 1032–097; App'x 1098–1148; App'x 1005–026. These authorizations relied on prior NEPA reviews of the Corps' permitting programs, not the RUS-led EIS. *See* App'x 560–570; App'x 575–622.

D. Post-Decisional Developments[10]

In March 2021, responding to concerns from a Native American Tribe, the Co-owners applied to FWS to amend the ROW through the Refuge so that the line would avoid burial mounds outside the Refuge. App'x 51–57. The proposed route change would also significantly reduce the Project's use of Refuge land. App'x 54.

On July 29, 2021, the Co-owners proposed a land exchange in lieu of the amended ROW, explaining that a "land exchange with [FWS] on the terms

[10] The events described in this section occurred after the Federal Defendants issued the decisions that DALC challenges in the complaint.

described in this letter could be completed more promptly than the current right-of-way proceedings, while securing equal or greater benefits for [FWS] and Refuge." App'x 59–60. Under the proposal, the Project would follow generally the same route that FWS authorized in the CD and ROW permit, with certain modifications to reduce the amount of Project ROW within the Refuge. App'x 59–61; ECF 67 ¶ 12. Specifically, the Co-owners would convey in fee to FWS and revegetate, restore, and/or improve approximately twice the amount of land (about 60 acres) that FWS and the Corps would convey to the Co-owners (about 29 acres). App'x 59–61; App'x 1159–160.

On August 3, 2021, FWS noted, in a one-paragraph letter, that a land exchange could be a "potentially favorable alternative to the right-of-way permit" and stated that it expected to act on the Co-owners' application by May 2022. App'x 63. On August 27, 2021, FWS revoked the CD and ROW permit after concluding that its original analysis had used incorrect easement documents. App'x 68–69. FWS has not taken final action on the Co-owners' application for a land exchange and (to the Co-owners' knowledge) has not determined what interim steps it may take given the district court's ruling.

III. Procedural History

DALC filed two complaints—one against RUS and FWS (in February 2021), challenging the ROD and the (now-revoked) CD and ROW permit (Case No. 21-cv-96), and another against the Corps (in May 2021), against the

wetland verification permits the Corps issued for the Project (Case No. 21-cv-306). The district court consolidated the cases on July 2, 2021. *See* ECF 46.

On November 1, 2021, the district court preliminarily enjoined the Co-owners from "any activities requiring permission under the Utility Regional General Permit until the issuance of an opinion and order on summary judgment." ECF 160 at 21; ECF 164 at 2. The Co-owners appealed the preliminary injunction but voluntarily dismissed it after the district court granted relief in favor of the Federal Defendants and Co-owners on DALC's claims against the Corps. ECF 167; ECF 202.

On January 14, 2022, the district court issued the Order. App'x 1–45. The district court held that, regardless of whether the Project crosses the Refuge through a ROW permit or land exchange, FWS must, as a matter of law, find that the Project is compatible with the purposes for which the Refuge was established. The district court held that FWS acted arbitrarily and capriciously in determining that the Project is compatible with the purposes of the Refuge and the Project may not cross the Refuge through a ROW permit or land exchange. The district court, relying primarily on *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), also held that the purpose and need statement in the EIS was too narrow and the agencies did not consider an appropriate range of Project alternatives. App'x 35.

The district court issued a final judgment on March 1, 2022. App'x 46–47. The final judgment vacates and remands the ROD and EIS to the Federal Defendants, and "declares that the compatibility determination precludes [the Project] as currently proposed from crossing the [R]efuge by right of way or land transfer." *Id.* The district court also temporarily stayed the final judgment until April 4, 2022. ECF 201. The Co-owners appealed the final judgment to this Court on March 3, 2022. The Co-owners moved to stay the district court Order on March 21, 2022. Dkt. 9. Briefing on the motion was completed on April 1, 2022. Dkt. 14.

SUMMARY OF ARGUMENT

This Court should reverse the district court's decision. The court's Order is not supported by the law or the administrative record, which it largely ignores. The district court did not accord the deference required under the APA to the expert federal and state decision-makers who are responsible for the nation's complex and vitally important interstate electric transmission system. The district court's Order disregards and threatens the system of cooperative federalism the FPA establishes for grid governance and misconstrues NEPA to require RUS and, by extension, all federal agencies making decisions involving transmission projects in some manner to perform *de novo* energy policy and transmission planning.

The court also lacked jurisdiction to review a proposed land exchange between FWS and the Co-owners. The proposal is not "final agency action" and the APA does not authorize review of DALC's claims challenging it. The proposal is unripe for judicial review under Article III of the Constitution, which forbids review of unripe decisions to protect the agencies from judicial interference until an administrative decision has been formalized.

Even if the court had authority to review the proposed land exchange, it erred by ruling that the Refuge Act's standards governing "uses" of the Refuge also control land exchanges, which are authorized under a different provision

of the law. The Refuge Act, FWS regulations, and relevant caselaw all demonstrate that a CD is not required for a land exchange.

DALC lacks standing to challenge the EIS and ROD because the only relevance of those documents to DALC's remaining claims concern RUS's potential future decision on financing Dairyland's nine percent stake in the Project. RUS's lending decision will occur "only after the completion of construction of the Project," ECF 90 ¶ 10, so the harms DALC alleges, all tied to construction, would not be redressed by an order that could affect only a small portion of the line's funding. DALC never challenged the Corps' easements covered by the ROD, and FWS withdrew the CD and ROW permit well before the district court issued its judgment.

Even if it was proper for the district court to reach the merits of DALC's NEPA claims, the court should have denied its motion for summary judgment because the analysis in the EIS meets and exceeds NEPA's requirements. The EIS identified a purpose and need that is consistent with the agency's limited role under the REAct as a rural project financier—not a transmission planner—and considered a reasonable range of alternatives. The EIS logically explains why impractical or infeasible non-transmission and routing alternatives, including all those considered and rejected by state regulators, were not carried forward for in-depth analysis. The EIS fully informed the public and federal decision-makers about the Project's potential impacts and

provided context for understanding those impacts in relation to potential alternatives. NEPA requires no more.

The district court exceeded limits on its own jurisdiction and disregarded the APA's deferential standard of review. The Order and final judgment should be reversed and remanded with instructions to dismiss DALC's claims with prejudice.

ARGUMENT

I. Standard of review

The APA prescribes the standard of review. *See Marsh*, 490 U.S. at 377 n.23. This Court presumes that the agency actions being challenged are valid, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and DALC bears the burden of showing otherwise. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

The APA standard of review is narrow. *Ind. Forest All. v. U.S. Forest Serv.*, 325 F.3d 851, 859 (7th Cir. 2003). A court is limited 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); *Volpe*, 401 U.S. at 416. The court should not "substitut[e] its judgment for that of the agency" as to the environmental consequences of its actions. *Highway J. Citizens Grp. v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003). The court's "*only* role is to ensure that the agency has taken a hard look at

environmental consequences." *Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 682 (7th Cir. 2006) (emphasis added).

The district court resolved DALC's claims on cross motions for summary judgment. This Court reviews the district court's grant of summary judgment *de novo*. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996).

II. The district court lacked jurisdiction to review the proposed land exchange because it is a non-final agency action that is both unreviewable under the APA and constitutionally unripe.

A. FWS has not approved or rejected the proposed land exchange, so there is no "final agency action" that can be subject to judicial review under the APA.

The district court exceeded its jurisdiction by issuing a declaratory judgment concerning an agency action that is not final—the proposed land exchange. The district court had APA jurisdiction only to review "final" agency action—that is, action that "mark[s] the 'consummation' of the agency's decisionmaking process" and is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted); 5 U.S.C. § 704. Neither condition is satisfied here. FWS has not made any decision regarding the land exchange. No "legal consequences" flow from a decision that has not happened. The district court improperly issued an advisory opinion. *See, e.g., Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 761 (8th Cir.

2019) (affirming dismissal of complaint against Federal Transit Administration where agency had not yet issued ROD).

The district court relied heavily on FWS's statement—from a one-paragraph letter—that the Co-owners' proposed exchange could be a "potentially favorable alternative to a right-of-way-permit." *See* App'x 15. The district court speculated that this "all but guarantee[s]" the agency's approval, rendering it final-enough for review. *Id*.

This was clear error. The letter reflects, *at most*, an advisory, preliminary assessment that the land exchange *could be* a "potentially favorable alternative" to the (now revoked) CD and ROW permit. Courts regularly decline to review these types of preliminary assessments, which are simply "informational in nature." *See Menominee Indian Tribe of Wis. v. Env't Prot. Agency*, 947 F.3d 1065, 1070 (7th Cir. 2020) ("A letter 'purely informational in nature' is not a final agency action because it 'impose[s] no obligations and denie[s] no relief.'") (citations omitted).

"'[A]gency action is not final if it is only . . . "tentative." The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" *Dhakal v. Sessions,* 895 F.3d 532, 539 (7th Cir. 2018) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)). Here, FWS's decision-making is far from complete. There are a variety of procedures that apply to land exchanges, including an

appraisal, environmental review, title review, and (depending on the value of the exchange) Congressional review.[11] FWS has not completed this process, let alone decided whether to consummate the land exchange. FWS's one-paragraph letter was not "final agency action" under the APA.

The district court's reliance on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and the line of cases cited therein, App'x 14–16, was flawed. In those cases, regulated entities sought pre-enforcement review of regulations they feared would be aimed at them. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 727, 734 (1998) (contrasting unripe challenges before it with the regulations at issue in *Abbott* and *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417–19 (1942), which "force[d] immediate compliance through fear of future sanctions."). The regulations at issue in *Abbott* and *Columbia Broadcasting* are a far cry from the letter here: FWS merely indicated its commitment to *review* the proposed land exchange. *See* App'x 62–63. FWS has made *no decision*. Nothing is being enforced. *See Franklin*, 505 U.S. at 797 ("The core question is whether the agency has completed its decisionmaking process, *and whether the result of that process is one that will directly affect the parties*.") (emphasis added).

[11] *See supra* n.6.

The district court faulted FWS for failing to offer "any evidence to suggest that the land is indeed suitable for disposition [under 16 U.S.C. § 668dd(b)(3)]," App'x 35. The court's criticism ironically demonstrates the court's error: FWS could not offer that evidence because it had not reached a decision on the proposed land exchange. *Cf. Friends of Alaska Nat'l Wildlife Refuge v. Haaland*, No. 20-35721, 2022 WL 793023, at **5–9 (9th Cir. Mar. 16, 2022) (conducting detailed review of administrative record to determine whether Secretary's proposed land exchange was arbitrary and capricious under the APA). The district court erred by addressing the merits of the proposed land exchange without an administrative record or a final agency action.

B. The proposed land exchange is not ripe for judicial review under Article III.

The ripeness doctrine is designed to prevent courts from "entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized . . . ." *Ohio Forestry*, 523 U.S. at 732–33 (quoting *Abbott*, 387 U.S. at 148–49). To decide whether an agency action is ripe for review, the Court must consider (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit

from further factual development of the issues presented. *Id*. at 733. Applied here, these factors show that the proposed land exchange is unripe for judicial review.

First, DALC will not suffer any hardship absent judicial review now because the Co-owners cannot construct the Project on the land proposed for exchange. If FWS authorizes the land exchange, DALC can challenge the decision then. *Cf. id.* at 733–34.

The other two ripeness factors also cut against judicial review now. The district court's ruling effectively prohibits the Co-owners and FWS from consummating the land exchange, which is a paradigmatic example of relief that "inappropriately interfere[s] with further administrative action." *Id.* at 733. The court would also benefit from "further factual development of the issues presented." *Id.* FWS has not decided on the land exchange, so there is no administrative record from which a court can evaluate the reasonableness or lawfulness of the agency's decision. *See supra* Argument Section II(A). Adjudicating DALC's challenge with no administrative record or *actual decision* wastes judicial resources and guarantees an inadequately informed opinion. This is the situation that the ripeness doctrine seeks to avoid. *Ohio Forestry*, 523 U.S. at 736–37.

III. Even if the district court had jurisdiction to review the proposed land exchange, its analysis of the Refuge Act was wrong as a matter of law.

A. The district court erred in concluding that the proposed land exchange must be supported by a compatibility determination.

Uses of refuge land and exchanges of refuge land are treated differently under the Refuge Act. FWS is not required to issue a CD before exchanging refuge land. The district court erred as a matter of law in concluding otherwise. Though the Refuge Act provides that proposed *uses* of "any area *within* the [Refuge] System" must be "compatible" with the Refuge's purposes, *see* 16 U.S.C. § 668dd(d)(1)(B) (emphasis added), there is no similar requirement for lands *transferred out of* the Refuge System via a land exchange. *Id.* § 668dd(b)(3).

The Refuge Act allows the Secretary to authorize private uses within a wildlife refuge—including "for purposes such as . . . powerlines . . . ."—so long as she determines in her "sound professional judgment" that such uses "are compatible with the major purposes for which such areas were established." 16 U.S.C. §§ 668ee(1), 668dd(d)(1)(A); 50 C.F.R. § 29.21.1–8. This standard governed the (now revoked) CD and ROW permit. However, the Secretary can also "[a]cquire lands or interests therein by exchange for acquired lands or public lands . . . under [her] jurisdiction which [she] finds to be suitable for disposition," provided the lands being exchanged are "approximately equal" in

value or equalized by cash payment. *Id.* § 668dd(b)(3). This standard governs the proposed land exchange.

The district court erred by conflating the requirements that apply to proposed *uses within* the Refuge with those that apply when FWS seeks to transfer lands *out of* the Refuge in exchange for non-Refuge lands to add to the Refuge. App'x 32–33. While FWS must determine that a proposed *use* of the Refuge (i.e., a right-of-way) is compatible "with the major purposes for which such areas were established," *see* 16 U.S.C. § 668dd(d)(1)(A), there is no similar requirement for land exchanges. *Id.* § 668dd(b)(3). Rather, the Refuge Act only requires FWS to determine that the Refuge land is (1) "suitable for disposition" and (2) "approximately equal" in value (or equalized by cash payment) to the land for which it is being exchanged. *Id. See Town of Superior*, 913 F. Supp. 2d at 1111 ("The plain language of the Refuge Act supports the conclusion that a compatibility determination is not required for the acquisition of land.").

The district court reached the opposite conclusion primarily by relying on *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, a case in which the Alaska district court vacated a land exchange that could eventually allow the construction of a one-lane gravel road through the Izembek National Wildlife Refuge in Alaska. 463 F. Supp. 3d 1011, 1015–17 (D. Alaska 2020). *See* App'x 33–34. The Ninth Circuit recently reversed and remanded the lower court's order, removing whatever persuasive support it might have provided to the

district court's rationale here. *See Haaland*, 2022 WL 793023, at *9. And while that case involves a different statute (the Alaska National Interest Land Conservation Act (ANILCA), *see* 16 U.S.C. § 3192) than the one at issue here (the Refuge Act), the Ninth Circuit's reasoning supports the Co-owners' position that the Secretary need not issue a CD before entering into a land exchange under 16 U.S.C. § 668dd(b)(3).

In *Haaland*, the Ninth Circuit considered whether the land exchange at issue was subject to special procedures in ANILCA, which apply to the approval of "transportation or utility systems" within the Izembek refuge. *Haaland*, 2022 WL 793023, at **8–9; *see also* 16 U.S.C. § 3164(a). The lower court concluded that those procedures (which the Secretary had not followed) *did* apply to the land exchange, *Bernhardt*, 463 F. Supp. 3d at 1024–26, but the Ninth Circuit reversed. *Haaland*, 2022 WL 793023, at **8–9.

The appellate court reasoned the statute under which the Secretary authorized the land exchange (16 U.S.C. § 3192(h)) was not an "applicable law" subject to ANILCA's special procedures because it only authorized the Secretary to exchange lands—not to authorize a "transportation or utility system" within the Izembek refuge. *Id.* The Ninth Circuit noted that ANILCA's special procedures apply to agency authorizations for a "transportation or utility system," which includes only those systems for which a "'portion of the route of the system will be *within* any conservation system unit, national

recreation area, or national conservation area.'" *Id.* (quoting 16 U.S.C. § 3162(4)(A)) (emphasis added). The court reasoned that "[l]and transferred out of a conservation system unit in a land exchange is, by definition, no longer '*within* any conservation system unit,'" rendering ANILCA's special procedural requirements inapplicable. *Id.* (emphasis added).

The Ninth Circuit's reasoning applies here. Requiring a CD for proposed uses *within a refuge* is consistent with the statute and common sense, since the land subject to the use will still be *within* the Refuge after the use is authorized. But imputing a similar requirement onto land exchanges makes no sense because the land being exchanged will not be "within the [National Wildlife Refuge System]" under 16 U.S.C. § 668dd(d)(1)(A).

B. The district court erroneously held that the Project is *per se* incompatible with the Refuge.

Even assuming the district court had jurisdiction to adjudicate the proposed land exchange (it didn't) and that proposal must be supported by a CD (it doesn't), the district court unlawfully substituted its own judgment for that of FWS when it determined that the Project is incompatible with the purposes for which the Refuge was established. App'x 25–32, 35. There is ample evidence to support a finding that the Project is compatible with the Refuge's purposes.

Here, the relevant laws and agreements establishing the Refuge contemplate that the Project can be compatible with the Refuge's purposes. In 1924, Congress established the Refuge as "a refuge and breeding place" for birds, fish, animals, and plants "to such extent as the Secretary [] may by regulations prescribe." 16 U.S.C. § 723. Those regulations, in turn, explicitly allow "electric power transmission line rights-of-way" within the Refuge, subject to certain conditions. *See* 50 C.F.R. §§ 29.21-1, 29.21-8. Moreover, in 1999, FWS expanded the Refuge through an agreement to purchase the land on which the Co-owners' existing transmission lines are located. App'x 78; App'x 75, 77. In purchasing that land, the Secretary necessarily determined that the Co-owners' existing transmission infrastructure does not materially interfere with the Refuge's purposes. *See* 16 U.S.C. § 724(b)(1). Thus, the Refuge Act, the organic law establishing the Refuge, and the Secretary's decision to add to the Refuge land that was *already burdened by* the Co-owners' existing transmission lines shows that FWS, in its "sound professional judgment," could find the Project to be a compatible use within the Refuge.

Under their proposed land exchange, the Co-owners would convey to FWS and revegetate, restore, and/or improve almost twice the amount of land (about 60 acres) that FWS and the Corps would convey to the Co-owners, whether in fee or through an easement (about 29 acres total). *See supra* Statement of the Case Section II(D). The Project would generate a *net benefit*

to the Refuge by *increasing* its overall size and *reducing* long-term habitat fragmentation. There is ample evidence upon which FWS could rely to issue a CD for the land exchange—if the statute required one. The district court erred in concluding that, as a matter of law, the Project is incompatible with the Refuge's purposes.

IV. The district court erred in exercising jurisdiction over DALC's challenge to the revoked CD and ROW permit, which is moot.

In summer 2021, FWS revoked the CD and ROW permit it previously issued for the Project's crossing of the Refuge but agreed to consider the Co-owners' proposed land exchange. App'x 62–63, 68–69. The district court speculated that the Federal Defendants were working "hand-in-glove with [the Co-owners]" to "conveniently moot[] any pending challenges to a Refuge crossing, just a week before opening briefs on summary judgment were due in this case." App'x 8, 12. It concluded that, under the "voluntary cessation" exception to mootness, DALC's challenge to the revoked CD and ROW permit was *not* moot. App'x 8–9. This was clear error: the district court should not have adjudicated the merits of the withdrawn CD and ROW permit, which are clearly moot.

A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v.*

United States, 506 U.S. 9, 12 (1992) (quotation marks and citation omitted). Thus, "[w]hen a plaintiff's complaint is focused on a particular statute, regulation, or rule and seeks only prospective relief, the case becomes moot when the government repeals, revises, or replaces the challenged law and thereby removes the complained-of defect." *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017).

The voluntary cessation doctrine is one exception to mootness: a federal court is not deprived of jurisdiction where a party voluntarily halts a challenged practice unless it is clear that the allegedly wrongful behavior could not reasonably be expected to recur. *DJL Farm LLC v. U.S. Env't Prot. Agency*, 813 F.3d 1048, 1050 (7th Cir. 2016) (per curiam). In cases where a government defendant voluntarily repeals or revokes a challenged law or policy, courts presume that the government acted in good faith. *Ozinga*, 855 F.3d at 734. Indeed, the voluntary cessation doctrine simply does not apply when the agency did not revoke the challenged action to avoid litigation. *See Alaska v. U.S. Dep't of Agric.*, 17 F.4th 1224, 1229–30 & n.5 (D.C. Cir. 2021).

Here, FWS's revocation of the CD and ROW permit mooted DALC's claims against those actions. The CD and ROW permit are no longer operative and any relief directed at them is meaningless. *See, e.g.*, *DJL Farm*, 813 F.3d at 1051 (dismissing challenge to expired permits because "the challenged permits are no longer in effect and cannot be reissued absent new regulatory

proceedings, [so] there is no relief that we can grant to petitioners"); *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 891–94 (10th Cir. 2008) (dismissing as moot appeal involving Bureau of Reclamation sale of oil and gas leases because all leases in dispute were either never acquired or terminated). And DALC can challenge the land exchange if FWS approves it, based on the administrative record in place at that time. *See, e.g.*, *Or. Nat. Res. Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992) (dismissing challenge to cancelled timber sale, despite agency's preparation of new EIS for sale in same area, because "any future sale would be based on a different administrative record").

The voluntary cessation doctrine does not apply. The purpose of this doctrine is to prevent a party from evading judicial review by temporarily altering illegal conduct long enough to render a lawsuit moot. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); *see also Alaska*, 17 F.4th at 1227. This concern is not present here because, as noted, FWS is not required to prepare a CD for the proposed land exchange: since the agency necessarily *cannot* return to its allegedly "illegal conduct" (i.e., issuance of a CD for the Project), the voluntary cessation doctrine does not apply.

There is also *no evidence* to support the district court's finding that FWS revoked the CD and ROW permit to avoid litigation. *See* App'x 12–13. FWS revoked these authorizations because it realized they were issued based on the

wrong easement documents. *See* ECF 69. Without any evidence of wrong-doing, the district court appears to have imputed bad faith to FWS's decision. *See Fed'n of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) ("presuming that the City has acted in bad faith . . . [is] something we ordinarily do not presume").

The CD and ROW authorizations are no longer operative, any relief against them would be ineffective, and there was no basis for the court to presume bad faith behind their revocation. *Ozinga*, 855 F.3d at 735. DALC's claims against FWS are moot and should have been dismissed.

V. DALC lacks standing to challenge RUS's funding decision because judgment in their favor would not redress their harms.

The district court erred as a matter of law in finding that DALC had standing to challenge RUS's NEPA compliance. DALC did not show that its harms were redressable, nor could it; the environmental impacts of construction on which DALC bases its standing will occur long before RUS makes a funding decision and do not depend on RUS's potential action. DALC not only failed to establish redressability—they actually refute it: DALC acknowledged below that "[i]t is not clear whether federal financing will be provided, or what a denial of federal financing might mean to the CHC transmission line." ECF 110 at 17 n.10. This admission is fatal to DALC's

ability to demonstrate standing, which required a showing that RUS's decision to deny funding would stop the Project.

Indeed, DALC never disputed that it lacked standing to challenge the EIS with respect to RUS's future funding decision, instead arguing below that it had standing to challenge decisions of other agencies that relied on the EIS. The district court erred in accepting this argument. FWS revoked its Project-related approvals, *see supra* Section IV, and DALC never challenged the only Corps decision that relied on the EIS: the Rock Island District's decision to grant easements over Corps-owned land within the Refuge. App'x 556–57. Thus, the only otherwise proper basis for the district court to review the EIS was its connection with RUS's potential funding of the Project. But DALC never showed that a denial of funding would redress its harms by halting construction of the Project. DALC therefore lacked standing to challenge the EIS, and the district court erred in concluding otherwise.

To establish Article III standing, a plaintiff must show that: (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) that it is likely, as opposed to merely speculative, that a favorable decision will prevent or redress its injury. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009). "[W]hen the plaintiff is not himself the object of the government action or inaction he

challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" because the plaintiff's harms depend on choices made by third parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citations omitted).

In NEPA cases involving federal funding for private projects, a plaintiff cannot establish redressability (and thus, lacks standing) when it is unable to show that the project would be abandoned without the funding that triggered the environmental analysis. *See, e.g.*, *Lujan*, 504 U.S. at 571 ("Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction [of federal agency funding] is eliminated."); *see also Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1014 (9th Cir. 2018) ("[T]he fact that both Projects were already underway by the time funding from the Ex-Im Bank was authorized—nearly halfway complete in the case of [one] Project—suggests that the Projects did not rely on Ex-Im Bank financing."); *St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1170 (D.C. Cir. 2008) (petitioners had "not shown the requisite 'substantial probability'" that Chicago would scrap the O'Hare airport expansion project if the court vacated challenged grant); *cf. S. E. Lake View Neighbors v. Dep't of Hous. & Urb. Dev.,* 685 F.2d 1027, 1036 (7th Cir. 1982) (no redressability where housing

development would continue to exist even if federal financial assistance were enjoined).

These courts have followed the plurality in the Supreme Court's seminal decision explaining standing in the context of environmental challenges. In *Lujan,* the plaintiffs challenged an Interior Department regulation interpreting the consultation requirements under the ESA to exclude funding for certain international programs. The Supreme Court held that plaintiffs lacked standing because they had not shown the requisite injury-in-fact. 504 U.S. at 562–67. The plurality reasoned that the groups had failed to show redressability because (among other reasons) the funding agencies "generally supply only a fraction of the funding for a foreign project." *Id.* at 571.

While the district court evaluated DALC's standing on summary judgment, App'x 17–23, it failed to consider how the contingent nature of RUS's potential future funding to Dairyland precluded DALC from establishing redressability. Simply put, DALC failed to show that its alleged harms from Project construction and operation would be redressed by vacatur of the ROD and EIS that would, *at most*, foreclose RUS's potential future funding. It was DALC's burden to make this showing. *Ctr. for Biological Diversity,* 894 F.3d at 1013 ("[A] plaintiff must establish that the hoped-for substantive action on the part of the government could alter the third party's conduct in a way that redresses the injury in fact.").

A plaintiff must show that the relief sought would prevent the applicant from building the project without the federal funding. *Lujan*, 504 U.S. at 571; *see also id.* (where agency provided "less than 10% of the funding" for challenged project, "Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated"); *Vill. of Bensenville v. FAA,* 457 F.3d 52, 70 (D.C. Cir. 2006) (petitioner lacked standing because the challenged federal funding represented "only . . . a tenth of the funding" of the allegedly injurious airport expansion). Dairyland will not apply for RUS funding before the second half of 2023, by which time most or all construction will be completed. ECF 90 ¶¶ 9–10. DALC failed to demonstrate that their concerns stemming from Project construction would be redressed by vacatur of the ROD and thus lacked standing to challenge the EIS.

VI. The EIS that the Federal Defendants prepared for the Project complies with NEPA.

The district court found that the EIS's purpose and need statement was flawed because it echoed the grid planning criteria developed by MISO. The court mischaracterized MISO as a "utility" and a "self-serving . . . beneficiary" of the Project (it is neither),[12] apparently to imply that MISO's planning

[12] MISO is neither a utility nor a beneficiary of the Project. FERC upheld MISO's judgment as to the purpose and need for the Project and affirmed that ATC and ITC

criteria were somehow suspect. App'x 40–41. The district court believed that, by adopting a purpose and need statement with six distinct subparts reflecting MISO's transmission planning objectives, RUS created "incredibly specific" criteria, "resulting in most reasonable alternatives being defined out of the EIS" and "mak[ing] the CHC project a foregone conclusion." *Id.* at 37, 39. In effect, the court decided that RUS violated NEPA by relying substantially on MISO's planning criteria, because when MISO applied those criteria to determine how to improve the regional grid, MISO approved the MVP portfolio of projects, including the Cardinal-Hickory Creek project, instead of measures that DALC prefers.

This Court should reverse the district court's holding on the validity of the EIS. NEPA requires an agency to "briefly specify the underlying purpose and need for the proposed action." 40 C.F.R. § 1502.13. An agency has "considerable discretion to define the purpose and need of a project," *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066–67 (9th Cir. 1998), and its determinations are entitled to deference. *Marsh*, 490 U.S. at 378; *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 765 (7th Cir. 2021). RUS lends money—it is not responsible for planning the regional transmission grid. RUS quite

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are responsible for construction and ownership of this Project. *See* 142 FERC ¶ 61,096 (Feb. 7, 2013), Docket. No. EL13-13-000. ATC and ITC subsequently invited Dairyland to join as a co-owner of the project.

properly framed its analysis of the potential environmental impacts of the Project in a way that took advantage of MISO's transmission planning expertise and process and showed respect for the exclusive decision-making roles that Congress, through the FPA, assigned to FERC, regional transmission organizations (e.g., MISO), and the states.

This Court has repeatedly stated that the APA does not allow a court to substitute its own judgment for that of the agency, *Highway J. Citizens Grp.*, 349 F.3d at 953. But here, the district court apparently concluded that it is better equipped than transmission planning and siting experts to assess the need for the Project and the route it would follow and found the experts' approach to transmission planning unsatisfactory and, indeed, unlawful. The district court apparently did not agree with the MISO-based criteria RUS used and rationalized that the results achieved from applying those criteria demonstrate that RUS did not fulfill NEPA's analytical requirements because the results were unsatisfactory to DALC and the court.

But NEPA prescribes only processes, not substantive outcomes. It does not implicitly reallocate to RUS the authority Congress granted FERC and the states regarding transmission planning and siting. The district court's reasoning incorrectly applies NEPA, lacks factual support, and flouts the APA's deferential standard of review.

A. The district court erred in finding that the purpose and need statement in the EIS was unduly narrow and violated NEPA.

The purpose and need statement in the EIS identifies six needs that the Project is intended to address: improving transmission reliability; alleviating transmission congestion; expanding access to low-cost renewable energy; increasing transfer capability between Iowa and Wisconsin; reducing line losses and improving transmission system efficiency; and supporting public policy objectives aimed at enhancing the transmission system and supporting a changing mix of generation resources. App'x 838.

The Co-owners identified these needs in the AES they submitted to RUS, *see* App'x 391–412, because they were working to implement decisions MISO made in its role as regional transmission planner under its FERC-approved process. The PSCW and the Iowa Utilities Board, after extensive contested administrative hearings, reaffirmed MISO's analysis. *See In re ITC Midwest LLC and Dairyland Power Coop.*, 2020 WL 2949408, at **9–15; App'x 673–784. The district court nonetheless faulted RUS for relying on MISO's and the Co-owners' extensive planning analyses supporting the need for the Project. App'x 40–41. This was clear error for at least two reasons.

First, the required scope of an agency's analysis under NEPA depends on the scope of its own statutory authority. In *Department of Transportation v. Public Citizen,* 541 U.S. 752 (2004), the Supreme Court held that NEPA did

not require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, even though FMCSA's promulgation of certain truck safety regulations was necessary for such cross-border operations to occur. *Id.* at 756. FMCSA, the court observed, lacked the discretion to prevent such cross-border operations, which were authorized by the President. *Id.* at 770; *see also Sauk Prairie Conservation All. v. U.S. Dep't of the Interior,* 944 F.3d 664, 680 (7th Cir. 2019) ("Because the National Park Service had no authority to end the helicopter training, there is no causal connection between its decision to approve the provision [that permitted training] and any environmental effects continued training might have.").

Courts have applied similar reasoning to claims challenging an agency's purpose and need statement. An agency's statutory authorities inform the purpose and need for the agency's decision. *See Env't L. & Pol'y Ctr.*, 470 F.3d at 683–84; *see also Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) ("'[A]n agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.'" (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)); *see also Protect our Communities Found.*

v. Jewell, No. 13CV575, 2014 WL 1364453, at *4 (S.D. Cal. Mar. 25, 2014), *aff'd*, 825 F.3d 571 (9th Cir. 2016).

Here, RUS's statutory authority defines the scope of its NEPA analysis. RUS is a lending agency, not a regulatory body. *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 386 (1983). RUS's statutory authority does not extend to regional transmission planning or transmission siting, which are matters the FPA exclusively reserves to FERC (or its delegees, like MISO) and the states, respectively. *See supra* Statement of Case Section I(A); *see also* App'x 833 ("Responsibility for electrical system planning, reliability, and transmission operational oversight within much of the United States" committed in the main to "large regional transmission organizations."); App'x 851 (noting that the PSCW "decides whether a transmission line should be built, how it should be designed, and where it would be located"). RUS does not use its loan program to identify the regional transmission needs within the MISO footprint. MISO has that responsibility, 18 C.F.R. § 35.34(k)(7), and state utility commissions like the PSCW and the Iowa Utilities Board are responsible for transmission siting. *See* 16 U.S.C. § 824(b)(1); Wis. Stat. § 196.491(3); Iowa Code § 478.4; *Ill. Com. Comm'n*, 721 F.3d at 773 ("[U]nlike the regulation of natural gas, a field in which FERC has jurisdiction both over pricing and over the siting of interstate lines . . . the states retain authority over the location and construction of electrical transmission lines."). Nothing

requires RUS to engage in *de novo* regional transmission planning in formulating the purpose and need statement for an EIS used to inform RUS about potential environmental impacts associated with potential financing for Dairyland's nine percent share of the Project, FWS's decision on a right-of-way permit involving about one percent of the Project route, and a Corps decision on an easement grant.

Rather, agencies "must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives." *Protect Our Parks*, 10 F.4th at 764 (citing *Citizens Against Burlington*, 938 F.2d at 199 (Thomas, J.)). In *Protect Our Parks*, this Court held 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. *Id.* ("The 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."). Applying the same logic here, neither NEPA nor other law obligated RUS to reformulate the purpose and need statement for the EIS (used to inform the three quite limited agency decisions related to the Project) to consider objectives MISO did not use for its regional planning analysis or alternatives that would not provide a connection between the two substations that MISO's planning process identified for new interconnection. App'x 922. Any such

alternatives would have been beyond the ability of the Co-owners to build (because they were not approved by FERC, MISO, or the states) and beyond the authority of RUS 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."). RUS's decision-making authority under the REAct includes no mandate or authority to redo MISO's regional transmission planning in formulating the purpose and need statement for a funding decision. NEPA does not give RUS that authority or require the agency to engage in planning that pretends to apply energy policy and transmission planning authority the agency does not have. The district court erred as a matter of law in concluding otherwise.

Second, the purpose and need statement is consistent with the weight of relevant authority, which holds 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.'" *See id.* at 683 (citing cases).[13] Here, RUS developed the purpose and

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[13] *See also Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) (finding that "if another agency has conducted a responsible analysis the Corps can rely on it in making its own decision"); *Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1110 (S.D. Cal.) (upholding purpose and need statement where "the EIS relies on CAISO's and CPUC's conclusions that a need existed for Sunrise Powerlink [117-mile transmission line]"), *aff'd*, 473 F. App'x 790 (9th Cir. 2012).

need statement based on planning studies and analyses conducted by MISO and the Co-owners, and siting decisions made by the states. It was wholly reasonable and appropriate for RUS to rely on work conducted by the federal and state agencies with authority and expertise related to transmission planning and siting when defining the purpose and need for the Project. *Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) (an agency "isn't required to reinvent the wheel" under NEPA).

B. The EIS considered an appropriate range of alternatives.

In addition to faulting RUS for relying on MISO's grid planning objectives, the district court also concluded that the purpose and need statement was so narrow that it "'define[d] competing 'reasonable alternatives' out of consideration.'" App'x 37 (quoting *Simmons*, 120 F.3d at 666). As the EIS and ROD demonstrate, the district court was wrong; the purpose and need statement was neither improper under NEPA nor so prescriptive that it ruled out consideration of any reasonable alternative.

An EIS must include detailed discussion of *reasonable* alternatives to the proposed action and a brief discussion of the reasons for eliminating other alternatives. *See* 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14(a) (emphasis added). An agency is not required to analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *All Indian Pueblo Council v. United States*,

975 F.2d 1437, 1444 (10th Cir. 1992) (citations and quotation marks omitted); *see also Simmons*, 120 F.3d at 669 ("[A]n agency should focus its energies only on the potentially feasible, not the unworkable.").

Here, the EIS initially considered a variety of alternatives to the Project, but declined to carry forward for additional, detailed analysis the alternatives that were not reasonable or feasible. The record shows that "non-wires" alternatives like energy conservation or battery storage were too speculative or unreasonable to warrant further, detailed analysis. The EIS's analysis of alternative routing options for the Project's crossing of the Mississippi River included a robust Alternatives Crossing Analysis that demonstrated the infeasibility of crossing the Mississippi River at any location other than near Cassville, Wisconsin, which requires crossing land in the Refuge.

1. "Non-Transmission" Alternatives

Building on previous analyses from MISO, the Co-owners, and state agencies, RUS reasonably concluded that, whatever their specific merits, non-transmission alternatives—including local renewable generation, energy storage, energy efficiency, and demand response—are not reasonable alternatives to the Project and declined to carry those alternatives forward for more detailed analysis in the EIS. App'x 867–872. DALC had first pressed these proposals before the PSCW and failed:

> The Commission did not find testimony regarding the viability of a battery or no-wires alternative to be sufficiently credible. Intervenors failed to demonstrate that such alternatives would be as effective at interconnecting new low-cost renewable generation, as the project is expected by the applicants to facilitate an additional 8.4 GW of new low-cost renewable energy resources in Wisconsin and in states to the west of Wisconsin. There was no credible evidence that a battery solution would be approved by MISO to interconnect the renewable generation projects currently conditioned on construction of the project at their full capacity. While non-transmission alternatives such as battery storage might be able to replicate aspects of the benefits of the project, these alternatives do not have the same breadth of benefits as the project, and there is no credible evidence that such a limited solution would be eligible for cost-sharing by MISO states like the project.

App'x 706–07.

Undeterred, DALC resurrected their preferred energy policies before the district court, arguing that RUS failed to evaluate "reasonable packages of non-wires options and alternatives combining non-wires options with local system upgrades." ECF 71, at 53. At no point did DALC offer PSCW or RUS any viable unexamined alternative that would meet MISO's planning criteria, nor did they present one as they relitigated their preferences before the district court. The district court erred when it agreed with DALC.

NEPA claims are not a vehicle for project opponents to advance their preferred policy agenda. *Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1117 (S.D. Cal.) ("These arguments concerning alternatives to Sunrise Powerlink [transmission line], however, amount to a policy fight

that specialized agencies charged to protect the public interest are best suited to resolve."), *aff'd*, 473 F. App'x 790 (9th Cir. 2012).

Nor are NEPA claims viable where a plaintiff argues that an agency failed to consider reasonable alternatives but declines to specify those alternatives in reasonable detail. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551–52 (1978), the petitioners challenged a license the Atomic Energy Commission issued to a nuclear power plant based on the agency's failure to consider an alternative that would respond to the need for power with "energy conservation." The Supreme Court rejected their argument, finding that the groups were required to do more than assert that the agency should have considered "energy conservation"—a term that embraced a "large variety of alternatives." *Id*. at 552. The Court exhorted that "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered." *Id*. at 553–54.

Following *Vermont Yankee*, federal courts have declined to entertain NEPA claims based on alternatives that were not shared during the administrative process. *See, e.g.*, *River Road All., Inc. v. Corp of Eng'rs of U.S. Army*, 764 F.2d 445, 452–53 (7th Cir. 1985) (agency "was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that [the permit applicant] had overlooked

some plausible alternative site—and they were not"). For these reasons, DALC needed to do more than simply invoke an unspecified "package of non-transmission alternatives" if it wanted RUS to consider a specific alternative to the Project.

In any event, there was no basis for DALC or the district court to second-guess RUS's analysis regarding the viability of these non-transmission alternatives. The administrative record shows that RUS properly relied upon MISO's transmission planning experts, the Co-owners, and state officials, all of whom rigorously studied potential non-transmission alternatives and properly rejected them as infeasible. *See* App'x 415–421; App'x 1245–46; App'x 90–91; App'x 652–53. The EIS explains in detail why the non-transmission alternatives DALC preferred would fail to satisfy the Project's purpose and need. App'x 870–71.

Other courts have also rejected distributed generation or energy conservation alternatives as too speculative or infeasible to merit in-depth consideration in an EIS. *See, e.g., Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 581 (9th Cir. 2016) (upholding agency's determination that "implementation of [the distributive generation] alternative to be 'speculative' given the current status of solar technology and the regulatory and commercial landscape"); *Env't L. & Pol'y Ctr.*, 470 F.3d at 684 (NEPA satisfied despite agency's failure to consider energy efficiency alternatives when project

proponent "was in no position to implement such measures"). RUS's consideration of non-transmission alternatives was reasonable and no less than that required under NEPA.

2. Routing Alternatives

The district court faulted the Federal Defendants for failing to analyze purported alternatives in which the Project crossed the Mississippi River outside of the Refuge. App'x 9–10, 40. It also criticized the agencies for relying on the Co-owners' analysis of potential Mississippi River crossings, accusing RUS of failing to perform even "a cursory analysis of non-Refuge crossing beyond the [Co-owners'] self-funded research." *Id.*

The district court's reasoning has no basis in fact or law. Beginning in 2012, the Co-owners and Federal Defendants together rigorously analyzed potential non-Refuge alternatives. *See* App'x 225. RUS found that these alternatives "were not economically or technically feasible and would have *greater overall environmental and human impacts*, compared with Refuge crossing locations." App'x 1186 (emphasis added). The record supports this finding, which was not arbitrary and capricious.

RUS did not violate NEPA by relying on the Co-owners' analysis of potential Mississippi River crossings. The agencies required the Co-owners to submit the analyses. RUS regulations required the Co-owners to submit an

evaluation of potential transmission corridors for the Project. *See* 7.C.F.R. § 1970.5(b)(3)(iii); 40 C.F.R. § 1506.5(b).[14]

The Co-owners submitted two studies (totaling more than 700 pages) of routing alternatives for the Project—one study (the MCS) that explored siting alternatives for the entire Project, *see* App'x 435–555, and another study (the ACA) that identified seven potential river crossings (four of which were outside the Refuge). App'x 217–241. Viable river crossings were limited by MISO's requirement that the Project connect the Cardinal Substation in Dane County, Wisconsin to the Hickory Creek Substation in Dubuque County, Iowa, and the Refuge's 261-mile course from Buffalo County, Wisconsin to just north of Davenport, Iowa. App'x 859–861. MISO's prescribed end-points for the Project, and the nearly perpendicular orientation of the Refuge eliminated many non-Refuge alternatives because they would have required lengthy detours around the Refuge, with additional environmental and social impacts and costs. App'x 251–52. Regardless, given the Refuge's extent and location, any non-Refuge alternative would necessarily have crossed the river near the Refuge and would run through the Driftless Area. *See supra* Statement of the Case Section II, Figs. 1–3.

[14] *See also* RUS Staff Instructions, Part 1970-O, Environmental—Miscellaneous Resources, Exh. D (guidance for preparing an alternative evaluation study) at 1 (April 1, 2016), https://www.rd.usda.gov/files/1970o.pdf.

The district court's belief that RUS violated NEPA by relying on these analyses is incorrect, and the court cited no legal basis for this finding. App'x 10. Nor is there any factual basis to the district court's suggestion that the Federal Defendants uncritically accepted these analyses. The EIS thoroughly discussed these studies as part of its alternatives analysis and reflects RUS's appreciation of the transmission planning process that formed the foundation for the Co-owners' studies. App'x 860; App'x 920–951. The record also shows that the federal agencies actively supervised the companies' analyses beginning as early as 2012, hosting multiple meetings with the Co-owners, at least one of which was also attended by the Corps, the Wisconsin Department of Natural Resources, the Commission, and City of Dubuque officials with jurisdiction over the non-Refuge alternatives. App'x 1257–59; App'x 151–53; App'x 154–163.

The Federal Defendants reasonably concluded that the only feasible river crossings for the Project—and *least environmentally damaging* crossings compared to other alternatives—would cross the Refuge, either on or near the ROW for the Co-owners' two existing transmission lines in the Refuge. *See* App'x 1185–86, 1191–93. Two crossings along Corps-managed locks and dams (one within and one outside the Refuge) were eliminated because there were no existing transmission lines at those locations, the Project created technical and safety concerns associated with dam operation, and/or the crossing would

increase the overall length of the line, creating additional environmental and social impacts. App'x 864; App'x 307–319; App'x 340–351. Three other crossings through Dubuque posed engineering and safety concerns, additional impacts to residential properties, and were not viable because the State of Iowa and City of Dubuque would not issue permits for them. App'x 864–65; App'x 318–340. The Federal Defendants determined that the "non-Refuge alternatives were not economically or technically feasible and would have *greater overall environmental and human impacts*, compared with Refuge crossing locations." App'x 1186 (emphasis added). Notably, DALC never identified any route for the Project that they found acceptable.

DALC never identified a feasible non-transmission alternative, or any specific "package" of alternatives, that could generate benefits comparable to those the Project will provide or connect the grid as specified by MISO. As the PSCW found, DALC's favored alternatives were not credible. App'x 705–07. The district court should have rejected DALC's challenge to the EIS on that basis alone. RUS reasonably relied on analyses from MISO, the Co-owners, and state officials in declining to perform a *de novo* grid planning exercise or conduct detailed studies of non-transmission alternatives that were not reasonable or feasible.

The Federal Defendants adequately considered a variety of potential locations for the Project's crossing of the Mississippi River. Their analysis

supported the agencies' conclusion that the only feasible and least environmentally damaging crossing location was through the Refuge, in the vicinity of the Co-owners' existing transmission infrastructure. Their analysis was not arbitrary and capricious. This court should reverse and remand the district court's finding that the EIS fails to comply with NEPA.

CONCLUSION

This Court should reverse and vacate the Order and final judgment and remand with instructions for the district court to dismiss all DALC's claims with prejudice.

Respectfully submitted this 13th day of April 2022.

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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 13,850 words, including the glossary and figures and 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 13th day of April 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, 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 13th day of April 2022.

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No. 22-1347

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Wildlife Refuge Association, 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

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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 13th day of April 2022.

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INDEX TO APPELLANTS' APPENDIX

Description of Document	District Court ECF Docket No.	App'x Page
District Court Opinion and Order on summary judgment motion, issued Nov. 1, 2021, Nos. 21-cv-0096 & 21-cv-0306	175	1
District Court Final Judgment on summary judgment motion, issued Mar. 1, 2022, Nos. 21-cv-0096 & 21-cv-0306	195	46

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,

OPINION AND ORDER

v.

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

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.

In this lawsuit, plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife challenge the actions of various federal agencies permitting the Cardinal-Hickory Creek ("CHC") Transmission Line Project, which would run from the Hickory Creek substation west of

Dubuque, Iowa, through far Southwest Wisconsin near Cassville and the Mississippi River to Middleton in the center of Southern Wisconsin, all through what is known as "the Driftless Area."[1] The utility companies charged with building and operating the CHC -- American Transmission Company, LLC ("ATC"), Dairyland Power Cooperative ("Dairyland") and ITC Midwest LLC ("ITC") (the "Utilities") -- later joined the suit as intervenor-defendants. Now at the merits stage, the court finds that defendants fail to meet legal requirements for the Environmental Impact Statement, Compatibility Determination, and Land Transfer.

BACKGROUND[2]

As proposed, the CHC project would create a 345-kilovolt electricity transmission line between 100 and 125 miles long. (ROD004933-34.) As part of the project, a new electricity substation would also be constructed in Montfort, Wisconsin. (*Id.*) Intervenor-defendants Dairyland, ATC, and ITC intend to construct, own and operate the CHC line jointly. (ROD004940.) Several areas of the proposed CHC project cover existing rights-

[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," https://driftlesswisconsin.com/defining-the-driftless/ (last visited December 30, 2021).

[2] Intervenor-defendants moved to strike plaintiffs' proposed findings of fact (dkt. #113) from consideration, as the parties agreed in their preliminary pretrial conference report that proposed findings would be unnecessary. (Report (dkt. #40) 13.) Because the court did not rely on any parties' proposed findings of fact for summary judgment, but instead relied directly on the administrative record, that motion will be denied as moot, along with plaintiffs' related motion for leave to reply (dkt. #165).

of-way owned by the Utilities and would also involve replacing or upgrading existing facilities. (*Id*.)

Midcontinent Independent System Operator, Inc. ("MISO"), an independent not-for-profit group which manages the power grid in 15 states, worked with various state regulators and utility industry stakeholders from 2008 to 2011 to identify projects that would increase energy transmission and usage of renewable energy. (ROD004981.) One identified project was to connect Dubuque, Iowa, to southwest Wisconsin, which would provide cheaper wind power to Milwaukee and Chicago, as well as reduce overloaded power lines. (ROD031340-41.) This in turn developed into the proposed CHC transmission line project. (ROD004981.)

Because Dairyland expressed an intent to request funding for its 9% stake in the CHC project from the U.S. Department of Agriculture Rural Utilities Service ("RUS"), that government entity led the effort to prepare an Environmental Impact Statement ("EIS") in cooperation with U.S. Fish and Wildlife Service ("Fish and Wildlife"), the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA"). (ROD004941.) The Utilities also asked (1) Fish and Wildlife for a right of way easement and special use permit to cross the Upper Mississippi River National Wildlife and Fish Refuge ("the Refuge"), and (2) the Corps for permits to build in navigable waters of the United States. (ROD004942.)

Before granting a right of way through the Refuge, Fish and Wildlife must confirm that the proposed project comports with the purposes of the Refuge under 16 U.S.C.A. § 668dd. Fish and Wildlife originally finalized its "Compatibility Determination for the

CHC" on December 20, 2019. (ROD007584.) Because the Utilities already had a prior right of way through the Refuge, where a 161 and 69kv transmission line had been previously installed (ROD17047) *and* the Utilities had agreed to transfer back that right of way (ROD007574), Fish and Wildlife found the proposed CHC line was compatible with the purposes of the Refuge as "a minor realignment of an existing right-of-way" and granted a permit to the Utilities. (ROD007574.)

On March 1, 2021, however, the Utilities contacted Fish and Wildlife and asked for a slightly amended right of way through the Refuge, ostensibly to avoid Ho-Chunk burial grounds. (Zoppo Decl., Ex. A (dkt. #53-1) 2-3.) Then, before Fish and Wildlife could issue a decision on the proposed amendment, the Utilities again contacted Fish and Wildlife on July 29, 2021, this time asking for an expedited land exchange instead of an amended right of way, ostensibly because approval for a new right of way would take too long. (Zoppo Decl. (dkt. #53-2) 1.) Specifically, in exchange for a land exchange in the Refuge, the Utilities were now proposing to transfer a 30-acre parcel to Fish and Wildlife. (*Id*.) On August 3, 2021, Fish and Wildlife confirmed receipt of the Utilities' latest proposal, indicating that its response to such a land exchange "may" be "favorable." (Zoppo Decl. (dkt. #53-3) 1.)

Then, on August 27, 2021, less than a month after Fish and Wildlife responded favorably to a proposed land transfer, and less than a week before summary judgment motions were due in this case, Fish and Wildlife "withdrew" its entire original Compatibility Determination, stating it "learned that an error had previously been made regarding the 2019 Compatibility Determination when identifying the existing rights-of-

way proposed for re-alignment." (Not. by Def. (dkt. #69-1) 1.) As a result, any approved right of way through the Refuge was rescinded, along with the compatibility determination. (*Id.*) However, in its letter of withdrawal to the Utilities, Fish and Wildlife did note that the agency "is committed to working with you toward timely review of the land exchange you have proposed in lieu of your March 2021 application for an amended right-of-way permit . . . [and] concurs that a land exchange is a potentially favorable alternative to a right-of-way permit." (*Id.*)

As for the Corps' involvement, both its Rock Island and Saint Paul district offices issued permits, as each office covers a different area of the CHC line. (USACE000094; USACE000679.) Specifically, the Corps' Rock Island office is responsible for those sections of the CHC project running through Iowa and authorized the project under Nationwide Permit 12 ("NWP 12"). Generally, such nationwide permits ("NWPs") are used as a means to expedite permissions to build without needing to go through the more demanding, individual permitting process. (USACE001200.) Instead, proposed projects permitted by an NWP only require that the Corps do a project-specific "verification" to ensure that it meets the requirements of the nationwide permit. (USACE001199.) The CHC was verified in November of 2019. (USACE001199.) However, NWP 12 was later revoked by the Corps in part, and now only covers oil and gas pipelines, meaning that companies building utility lines like the CHC project will need to be permitted under NWP 57. To date, the Utilities have not yet reapplied for an NWP 57 permit. *See* "Regulatory Program & Permits," U.S. Army Corps of Engineers,

https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/ (last visited Jan. 14, 2022).

In contrast, the Saint Paul district Corps never relied on NWP 12; instead, it issued a separate permit. (USACE013001.) Specifically, the Saint Paul office issued a Regional Utility General Permit ("RUGP"), which mirrors NWP 12 for the most part, while applying to operations in the Saint Paul District that includes the relevant portions of Southwest Wisconsin. (USACE000730.) The Corps verified the proposed CHC project under the RUGP in December of 2019 (USACE000679), which is active. (USACE000679.) Various other state permits have been issued for the CHC project as well, although none of those are challenged in this case. (USACE000012.)

OPINION

I. Mootness

The Administrative Procedure Act ("APA") grants judicial review of agency action to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. More specifically, APA § 704 provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Finally, APA § 706 grants courts the power to set aside agency actions that are "arbitrary, capricious, or otherwise not in accordance with law," 5 U.S.C.§706(2)(A), while affording appropriate deference to administrative decisions.

Both governmental and intervenor-defendants argue that many of the challenged actions here are now moot. Specifically, defendants point to the fact that the Fish and Wildlife's original Compatibility Determination and issuance of a right of way through the Refuge have been revoked, while the proposed land transfers have not yet been finalized. Yet none of these arguments hold up to scrutiny, as the specific facts of this case compel the court to rule on the challenged permits, as they are certain to have to be revisited by this court in similar form, except under even more pressing and difficult circumstances.

While this court's jurisdiction "is limited by Article III to live cases and controversies," the doctrine of mootness generally weighs against relinquishing jurisdiction. *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017). This is particularly true when a party voluntarily ceases the disputed conduct, rather than face a lawsuit forcing the conduct to stop. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Thus, the Supreme Court has adopted a "strict" standard in cases of voluntary cessation, as "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc.* 528 U.S. at 189 (*citing City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). In such cases, the court may only find mootness if "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citing *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). This burden shifts slightly if: (1) the party voluntarily ceasing an action is the government; *and* (2) "a government actor sincerely self-corrects the practice at issue." *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1051 (7th Cir.

2018). In that case, "a court will give this effort weight in its mootness determination," although a case may still be "live" if it "cannot give definitive weight to the [government's] statements." *Id*.

Under the circumstances here, the court cannot help but conclude that any mootness determination would require a finding of absolute clarity that a return to a request for a right of way could not reasonably be expected, especially because the Utilities offer only 30 days' notice from its reissuance to begin building through the heart of the Refuge. Even assuming a slightly lower standard applied because Fish and Wildlife is a governmental body -- albeit one seemingly working hand-in-glove with the Utilities up to and including suddenly withdrawing the right of way through the Refuge just weeks before plaintiffs' challenge was to become ripe for summary judgment consideration by this court -- the only other alternative is a nearly identical crossing through land transfers approved by Fish and Wildlife, which will be subject to the same or very similar challenges. Indeed, there remains no reasonable doubt on this record that both the Utilities and Fish and Wildlife remain committed to a path through the Refuge (whether by land transfer or a reissued right of way). Nevertheless, the court will address mootness and standing issues as to plaintiffs' principal claims in more detail before turning to the merits of those claims.

A. Compatibility Determination

Plaintiffs' strongest claim is their challenge to the Fish and Wildlife's original Compatibility Determination, which granted the Utilities the original right of way through the Refuge. However, defendants argue that the withdrawal of the right of way by Fish and Wildlife renders that claim moot, especially since the Utilities are now planning to

seek land transfers with Fish and Wildlife to run through the Refuge instead. (Defs.' Mot. (dkt. #93) 45; Not. by Def. (dkt. #69-1) 1.)

As previously explained, the history of the Compatibility Determination and issuance of the original right of way is a convoluted one, with the Utilities later requesting an amended right of way and now a land transfer, then Fish and Wildlife withdrawing its determination altogether, and with it, the existing right of way. Suspiciously, *all* of these actions took place in the months *after* this case was filed. Moreover, in weighing the likelihood of reoccurrence against Fish and Wildlife's voluntary cessation, the court finds that a very similar compatibility determination is not only likely but nearly certain to reoccur.

In response, defendants contend that the *original* right of way permit issued in 2020 will never be reissued given the Utilities request for a planned land transfer instead of a permit. (Defs.' Mot. (dkt. #93) 46.) That response is thin porridge indeed. While the Utilities have waffled between seeking another right of way or land transfers, *at no point* has Fish and Wildlife *or* the Utilities suggested that the CHC would *not* cross the Refuge, which mean the Utilities' request for another Compatibility Determination is a near certainty and its outcome is at least "potentially favorable" for the Utilities. Indeed, the government's Final EIS itself acknowledges as much: "[a]ll action alternatives would cross the Refuge," and the EIS did not even *consider* any routes not crossing the Refuge. (ROD004950.) Instead, the government relied on "the Utilities' investigation and assessment of potential Mississippi River crossing locations for the proposed C-HC Project"

and accepted the Utilities' own analysis that the CHC must cross the Refuge. (ROD005006.)

Without even a cursory analysis of non-Refuge crossings beyond the Utilities' self-funded research, both defendants and intervenor-defendants have already made their choice and the CHC transmission line will, by right of way or land transfer, still cross the Refuge. In fact, the Utilities continue to clear land on both the Iowa and Wisconsin sides of the Refuge as though its crossing were inevitable. (11/1/21 Op. & Order (dkt. #16) 3.) Thus, the Utilities *must* gain access to the Refuge under either of two ways: receive a right of way through a renewed compatibility determination process or acquire a fee simple title through land transfers with Fish and Wildlife, which as discussed below raises all the same concerns as a compatibility study.

Moreover, the fact that Fish and Wildlife is now expecting to review a land transfer favorably does not mean that a renewed right of way request is in the offing, and as discussed above, a controversy is not moot unless "it is *absolutely clear* [that] the allegedly wrongful behavior could not reasonably be expected to recur," which the Supreme Court has interpreted as an extremely high bar. *Friends of the Earth, Inc.*, 528 U.S. at 189 (citing *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)) (emphasis added). For example, when the Governor of Missouri announced that the state was revoking a challenged policy about grants for religious organizations, the Supreme Court found that the State still had "not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). Similarly, while the Utilities may proceed by land transfer

through the Refuge, it is equally as likely that they will have to revert to seeking a right of way. As such, defendants have not met the heavy burden required to moot plaintiffs' challenge to the Compatibility Determination.

If the land transfer were to fall through, the government defendants alternatively contend that the Utilities would be requesting an *amended* right of way permit, which will be different than the original request. (Defs.' Mot. (dkt. #93) 46.) However, an amended right of way request will not be so different as to moot plaintiffs' challenge. Indeed, such a request would have to cover nearly the same acreage within the Refuge, something that the Utilities are all but assuring as they continue to clear the path for the CHC line up to the Refuge from both the Iowa and Wisconsin sides even as this lawsuit pends. (Zoppo Decl., Ex. B (dkt. #53-2) 5.)

In a case involving preferential treatment for city contracts, the Supreme Court held that similar, minor changes to the repealed conduct cannot moot a case:

> There is no mere risk that [the city] will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect . . . The new ordinance may disadvantage [plaintiffs] to a lesser degree than the old one, but insofar as it accords preferential treatment . . . it disadvantages them in the same fundamental way.

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 662 (1993). Thus, the fact that Fish and Wildlife may grant land transfers or issue a slightly amended right of way that require less acreage does not change plaintiffs' main

complaint that placement of the CHC line through the Refuge is not compatible with its purposes.

Finally, while intervenor-defendants assert they are acting in good faith, there is substantial, contrary evidence in this record. As noted, the Utilities did not ask to amend their right-of-way permit until after this litigation commenced (Zoppo Decl., Ex. A (dkt. #53-1) (letter dated March 1, 2021)), and Fish and Wildlife suddenly "discovered" errors in the Compatibility Determination that warranted withdrawal, which defendants argue conveniently moots any pending challenges to a Refuge crossing, just a week before opening briefs on summary judgment were due in this case. (Not. of Withdrawal (dkt. #69).) Shortly before this, the Utilities suggested a land transfer, which they maintain was only because it would allow construction to begin faster (Zoppo Decl., Ex. B (dkt. #53-3)), an option that Fish and Wildlife promptly indicated may be a good option (*id.*, Ex. C).

At the same time, the Utilities have continued construction on the Iowa side of the line and started construction on the Wisconsin side in October 2021, even as they maintained passage through the Refuge was uncertain, ignoring that the obvious connector between the two portions of the line under construction runs straight through the Refuge. (ROD005063.) In particular, on August 11, 2021, the Utilities requested a stay from the court pending a possible land transfer, stating that they would not begin work in the Refuge until October 2022, while offering to give plaintiffs all of "30 days' notice" before starting actual construction in the Refuge. (Intervenor-Defs.' Mot. (dkt. #50) 3.) Then, on September 24, 2021, the Utilities notified the court that they would start construction in Wisconsin on October 25, 2021, leaving the Refuge and a few, federal wetlands as the only

portion of the line not under construction. (Not. (dkt. #96) 1.) This, despite the fact that the summary judgment motions in this case would have otherwise been due on November 1, 2021, and the Utilities still did not have a valid right of way *or* approved land transfer through the Refuge. (Not. (dkt. #96) 1.)[3]

Given these facts, plaintiffs contend, and the court finds credible, that the Utilities are pushing forward with construction on either side of the Refuge, even without an approved path through the Refuge, in order to make any subsequent challenge to a Refuge crossing extremely prejudicial to their sunk investment, which will fall on their ratepayers regardless of completion of the CHC project, along with a guaranteed return on the Utilities' investment in the project. Thus, if the court does not treat consideration of the essentially inevitable re-proposal for a Refuge crossing as ripe for consideration now, the Utilities will have built up to either side of the Refuge, making entry of a permanent injunction later all the more costly, not just to the Utilities and their ratepayers, but to the environment they are altering on an ongoing basis.

B. Land Transfer

Even if the original challenge to the Compatibility Determination were not ripe, a challenge to land transfer, as the *only* alternative for crossing the Refuge, would be. Of course, the intervenor defendants similarly argue that the court cannot yet review the Fish

[3] Plaintiffs filed a preliminary injunction to halt construction, and the Utilities again emphasized at a court hearing, that they had *always* planned to begin Wisconsin construction in October 2021. (11/22/21 Hr'g Tr. (dkt. #173) 8-14.) Construction is already underway in Iowa, with clearing occurring in Wisconsin subject to the court's preliminary injunction order protecting a few designated wetlands. (*Id.* 9-12.)

and Wildlife's approval of land transfers, as there is no final decision or record to review. (Intervenor-Defs.' Opp'n (dkt. #112) 8.) However, the defendants' argument is premised on the likely mistaken assumption that Fish and Wildlife may apply different decision criteria to the land transfer than the right of way, necessarily leading to the need for the creation of a new administrative record. In fact, the proposed land exchange would very likely have to meet the same compatibility requirements of the Refuge Act, making any analysis done by Fish and Wildlife for the land exchange and the right of way practicably identical.

Thus, the possible, minor change to the proposed Refuge crossing does not constitute a sufficient change to moot the agency's original compatibility analysis, and the difference between the CHC's crossing the Refuge by right of way or fee simple title transfers are negligible where the underlying effect of allowing the crossing is the same. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (holding it does not "matter that the new ordinance differs in certain respects from the old one"). As such, the issue of compatibility -- whether by exchange or by right of way -- is not only ripe, but the only way to ensure an orderly review of the project under the National Environmental Protection Act ("NEPA").

Finally, the Supreme Court has held that the question of whether an agency decision is "final" depends upon "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Thus, "[t]he cases dealing with judicial review of administrative actions have interpreted the

'finality' element in a pragmatic way," with the Supreme Court finding a statement by the Federal Communications Commission as reviewable even though "the FCC regulation could properly be characterized as a statement only of its intentions." *Abbott*, 387 U.S. 136 at 149.

Even if Fish and Wildlife does not have to follow the Refuge Act's compatibility requirements for a land exchange, Fish and Wildlife's own, anticipated approval of a land exchange to proceed with a Refuge crossing *and* the hardship that a delay in consideration would cause plaintiffs compels the court to review the proposed crossing now. Specifically, the letter from Fish and Wildlife stating its concurrence "that a land exchange is a potentially favorable alternative to a right-of-way permit," as well as its subsequent revocation of the original right of way to avoid orderly review, are statements of intent. (Notice (dkt. #69-1) 1.) In fact, as previously discussed, Fish and Wildlife has created a situation where a land exchange or similar right of way are the only options left to defendants, making its statement of intent all but a guarantee, while they continue to attempt to evade judicial review until any route, other than through the Refuge, would be so prejudicial that a court would have little choice but to approve the crossing -- creating the very hardship that the Supreme Court warned against in *Abbot*. If anything, both the government defendants and Utilities appear to be playing a shell game, cavalierly revoking applications for and grants of permits, all as a Refuge crossing becomes a near certainty, while telling this court that *nothing* is yet reviewable.

Defendants also fail on public policy grounds. In *Abbott*, the Supreme Court was being asked to review a drug labeling regulation where the government similarly argued

that reviewing the regulation and halting its enforcement would be harmful to the public given the importance of proper pharmaceutical labeling. 387 U.S. 136 at 154. In rejecting this argument, the Supreme Court found that pre-enforcement review would actually speed up enforcement, as the regulation would either be fully upheld or struck down at once, despite recognizing that pharmaceutical labeling can have drastic negative effects on patient health. *Id*. Here, there is no similar, adverse public safety concern should the court act now; if anything, pre-enforcement review of the right of way or land transfer only affects the proposed crossing through the Refuge sought by the Utilities. As such, the government and Utilities have an even weaker argument for delay than in *Abbott*.

If this were simply a case of a land transfer, the court may be more inclined to wait for Fish and Wildlife's further review. Given the history of this litigation, however, common sense counsels in favor of proceeding. As previously noted, if the issuance of a right of way or land transfer is not reviewed at this stage, there is a strong possibility that the CHC line will be nearly completed in all areas except the Refuge despite its legality being in substantial question. Defendants tout the land transfer as the reason why reissuance of the right of way will not occur, but acknowledge that the contemplated land transfers are uncertain to shield a crossing through the Refuge from review.

Defendants cannot use a possible land exchange as both sword and shield in this litigation, while the public interest and plaintiffs may suffer substantial hardship by further delaying judgment day. Even without questioning the governmental defendants' or the Utilities' motives, their proposed "wait and see" method of proceeding amounts to little more than an orchestrated trainwreck at some later point in this lawsuit. *See City of Mesquite*

v. Aladdin's Castle, Inc., 455 U.S. 283, 289 ("In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.") (citations omitted); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2017) (quoting *Friend of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.* 528 U.S. 167, 190) ("[A] case does not become moot merely because the defendants have stopped engaging in unlawful activity. '[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'"). Given all of the above factors, therefore, the court finds the Compatibility Determination ripe for review.[4]

II. Standing

Defendants further contend that plaintiffs have no standing to bring this action. In order to establish standing, there are three requirements: "First, the plaintiff must have suffered an injury in fact . . . Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be [redressable]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations omitted). Moreover, to

[4] Plaintiffs also seek to challenge the Corps' NWP 12 permit, which defendants note is no longer operational and has been replaced by NWP 57, although the Utilities have yet to submit that application. (Defs.' Mot. (dkt. #93) 35.) Here, the court must again look to likelihood of reoccurrence. The Utilities have chosen their route for the CHC line. With only slight route changes likely between NWP12 and 57, the line *will* cross navigable waters in the Refuge overseen by the Corps and any such crossing will still require the Corps' permit. Additionally, these nationwide permits are otherwise substantially similar: the biggest difference is that the NWP 12 was approved for oil, gas, and electricity lines split into 3 permits, while NWP 57 covers only electricity lines. (*Id.* at 36.) As previously discussed, defendants cannot prevent the court's review by "repealing the challenged [permit] and replacing it with one that differs only in some insignificant respect." *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 662.

demonstrate associational standing to sue on behalf of its members, an organization must show: (1) its members would have standing to sue; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) its claims do not require participation of individual members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In this case, the federal defendants argue that there is no redressability or causation regarding the record of decision. (Defs.' Mot. (dkt. #93) 41.) The intervenor-defendants similarly argue that plaintiffs have failed to show an injury in fact. (Intervenor-Defs.' Opp'n (dkt. #112) 3.) For the reasons explained below, the court disagrees with both arguments.

Standing in environmental cases like this one has been thoroughly addressed in earlier cases, with the Supreme Court's opinion in *Lujan* being among the most instructive. "To survive the Secretary's summary judgment motion," in that case, "respondents had to submit affidavits or other evidence showing, through specific facts . . . that one or more of respondents' members would thereby be 'directly' affected apart from their ''special interest' in th[e] subject.'" *Lujan,* 504 U.S. at 563. For that reason, much of the analysis of standing in this case depends on the adequacy of the affidavits from plaintiffs' members. While the federal defendants do not challenge plaintiffs' injury in fact, the intervenor defendants argue that plaintiffs' purported injuries are neither "actual or imminent," nor concrete and particularized. Regarding the second and third factors, all defendants argue that plaintiffs have not met the bar because only the Rural Utility Services' ("RUS") actions could be impacted. The court addresses each factor individually.

As for the first factor of an "injury in fact," plaintiffs must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.''" *Id.* at 560. At the very least, intervenor-defendants argue that plaintiff Defenders of Wildlife ("Defenders") does not have standing. (Intervenor-Defs.' Opp'n (dkt. #112) 3.) Defenders offered affidavits from two members: Jean Luecke and Mariel Combs. In a two-page statement signed on January 20, 2021, Luecke says that she visited the Refuge twice in 2020 in lieu of her family's yearly cruise ship vacation. (Luecke Decl. (dkt. #77) ¶ 4.) Luecke also stated that she planned to go back in the summer of 2021 to do some boating. (*Id*. ¶ 7.) Meanwhile, Combs does not allege any personal interest in the Refuge specifically, instead noting that she "serve[s] as the organization's lead employee on refuge issues" and that Defenders "focus[es] on preserving biodiversity," such as that found in the Refuge. (Combs Decl. (dkt. #81) ¶¶ 2, 4.) Beyond her work on refuges nationwide, however, Combs offers nothing to suggest that she ever visited, studied, or had any interest in this specific Refuge at issue in this case.

Combs' general interest in biodiversity and refuges is insufficient to support standing with regard to the specific challenged actions in this case. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (plaintiff lacked standing when affiant only expressed a general desire to visit national parks, given that "[t]here may be a chance, but is hardly a likelihood, that [affiant]'s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations"). Thus, Lueke's affidavit alone must be able to support standing for plaintiff Defenders, and while Luecke has not had extremely in-depth connections to the Refuge, she did at least discuss particular visits,

concrete plans to return to the area, and specific aesthetic concerns. (Luecke (dkt. #77) ¶¶ 4, 7.)

In *Lujan*, the Supreme Court took issue with the fact that the two affiants for the plaintiff had only been to the relevant country once, and neither had concrete plans to return any time soon. 504 U.S. at 563. In particular, the Supreme Court held that "past visits and 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564 (internal citations omitted). In *Summers,* the Supreme Court explained that "[a]ccepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." 555 U.S. at 496. As a result, the *Summers* Court found inadequate an affiant's simple statement that he had visited national forests and planned to do so again, without acknowledging that there are over 190 million acres of national forest, much of which would not be impacted by the challenged logging plan. *Id*. at 495. However, Luecke offers more specific interest and particularized injury in the Refuge at issue. In particular, she described her plan to return to the Refuge "within a few months" of signing her affidavit, noticed how obtrusive the existing, smaller electrical lines crossing the Mississippi River are already, and averred that the planned expansion of those lines for the CHC project would further degrade her ability to enjoy boating in the refuge. (Decl. of Luecke (dkt. #77) 1.) Given that Luecke's statements would seem to substantially

assuage the concerns raised by the affidavits considered in *Lujan* and *Summers*, Defenders' Lucke Affidavit has sufficiently shown injury in fact, if only just barely.

Moreover, even if Defenders has shaky grounds for standing, the same is not true for the other plaintiffs. In particular, the Supreme Court ruled in *Summers* that "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." 555 U.S. at 494. Plaintiffs Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and National Wildlife Refuge Association have more than met that bar in their supporting affidavits. For example, Kerry Beheler, a member of the Wisconsin Wildlife Federation, worked on conservation for the Wisconsin Department of Natural Resources and spends time birding at the Refuge. (Beheler Decl. (dkt. # 79) 1-2.) Members from Driftless Area Land Conservancy also own land (Anderson Decl. (dkt. #85) 2); Durtschi Decl. (dkt. #73) 2), care for sensitive habitats (Mittlestadt Decl. (dkt. # 83) 6,) and enjoy recreational activities (Morton Decl. (dkt. #75) 2) within the path of the proposed CHC line. And National Wildlife Refuge Association member Todd Paddington spends a great deal of time exploring the Refuge, volunteers with organizations supporting the Refuge, and even taught a class about the Refuge for four years. (Paddington Decl. (dkt. #86) 1-3.) In fact, all three organizations have provided statements showing that their members go above and beyond simply using the Driftless Area threatened by the CHC line for recreational pursuits. Given these affidavits, plaintiffs have shown a concrete, particularized injury in fact to plaintiffs' members should the CHC transmission line be allowed to proceed through the Driftless Area generally and the Refuge specifically.

Defendants next argue that plaintiffs fail to show causation. (Defs.' Mot (dkt. #93) 41.) For causation, plaintiffs must show an "injury that fairly can be traced to the challenged action of the defendant." *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 41 (1976). Defendants' argument rests entirely on the assertion that only RUS's "Record of Decision" is ripe for review, and that decision only allows RUS to *consider* extending funding to one of the utilities. (Defs.' Mot (dkt. #93) 41.) Even if RUS does offer funding, which is not certain, defendants also point out that funding would only cover 9% of project costs. (*Id*. at 42.)

Standing on its own, defendants' argument holds some weight, but it rests on a set of flawed assumptions about plaintiffs' challenges that this court has already rejected. First, as mentioned above, Fish and Wildlife's Compatibility Determination and proposed land transfer are *not* moot, meaning much more than just the Record of Decision is at issue. Second, even if the court only reviewed the Record of Decision, that decision undergirds more than the RUS's funding decision. Holding otherwise does not comport with a reasonable view of the administrative record. To the contrary, in granting a preliminary injunction in this case, the court found "defendants' suggestion that the EIS is irrelevant to [other permits] because the RUS financing has yet to be approved is just silly on its face." (11/1/21 Op. & Order (dkt. #160) 11.) In part, this conclusion relied on the heavy entanglement between the EIS and permits granted by cooperating agencies. (*Id*.)

Regardless, looking at all of the challenged actions, including the Corps' existing issuance of permits for the Refuge crossing, plaintiffs' affidavits sufficiently show causation. Indeed, affiants amply addressed their specific, personal concerns for the Driftless Area,

Refuge, and Mississippi River, as well as the specific land and recreational opportunities threatened by the CHC project, and overturning the specific permits at issue would ameliorate at least some of plaintiffs' injuries.

Finally, as to "redressability," plaintiffs' supporting affidavits provide ample grounds to conclude that merely rerouting the CHC line outside of the Refuge will substantially address many of their concerns, as would an order requiring greater consideration by the government defendants' as to their other concerns with the proposed project.

III. Merits

A. Refuge Crossing

The Refuge crossing is at the crux of this case, as Congress has provided more protection for refuges than other areas of land. With little in the factual record to support it, the court finds that defendants' decision to grant a right of way or land transfer to the Utilities through the Refuge would be arbitrary and capricious.

1. Compatibility Determination

Under the National Wildlife Refuge System Improvement Act of 1997 ("Refuge Act"), a "Refuge Manager will not initiate or permit a new use of a national wildlife refuge or expand, renew, or extend an existing use of a national wildlife refuge, unless the Refuge Manager has determined that the use is a compatible use." 50 C.F.R. § 26.41. Fish and Wildlife has defined a compatible use as "a wildlife-dependent recreational use, or any other use on a refuge that will not materially interfere with or detract from the fulfillment of the mission of the Service or the purposes of the refuge." (ROD028302 (Upper

Mississippi River National Wildlife and Fish Refuge Comprehensive Conservation Plan).) In cases involving only *maintenance* of an existing right of way, Fish and Wildlife applies a lower standard of scrutiny, basing its "analysis on the existing conditions with the use in place, not from a pre-use perspective." 50 C.F.R. § 25.21. Fish and Wildlife regulations further state that "[m]aintenance of an existing right of way includes minor expansion or minor realignment to meet safety standards." 50 C.F.R. § 26.41(c).

With this standard in mind, intervenor-defendants make two arguments: (1) the CHC transmission line project is a minor expansion deserving of lower scrutiny as an existing right of way; or (2) even if the CHC project were not a minor expansion, it is still compatible with the purposes of the Refuge. (Intervenor-Defs.' Opp'n (dkt. #112) 36-37.) Neither argument is persuasive, as evidenced by the government defendants' unwillingness to join in those arguments. *First*, the CHC project does not qualify as maintenance to an existing right of way under the National Wildlife Refuge System Improvement Act of 1997, as the project is neither "minor" nor being built "to meet safety standards." 50 C.F.R. § 26.41(c). Intervenor-defendants contend that the CHC project is "minor" because it ultimately concerns "a relocated right-of-way that results in a disturbance of some 30 or so acres . . . in the context of a 240,000 acre Refuge." (Intervenor-Defs.' Opp'n (dkt. #112) 37.) However, when read in context, maintenance is defined as a "minor *realignment*." 50 C.F.R. § 26.41(c) (emphasis added).

While the CHC project may be "minor" in comparison with the entire Refuge, the CHC Transmission Line Project is hardly minor when it comes to realignment. Instead, the new, proposed right of way or land acquisition alone would impact 39 acres of land,

with less than 9 acres overlapping with the Utilities' existing rights of way. (ROD007577.) Fish and Wildlife has itself stated, "[w]hen compared to the existing Stoneman right of way, [the CHC] transmission line infrastructure within the Nelson Dewey realignment will be significantly more visible to Refuge visitors." (ROD007578.) Fish and Wildlife now also admits that it looked at the wrong easements for calculating a minor realignment, leading to untrustworthy analysis. (Notice (dkt. #69-1) 1.) Tellingly, Fish and Wildlife has also made *no* attempt to argue that the CHC project would be a minor realignment since withdrawing its permit, making the Utilities' argument even less persuasive. (Defs.' Mot. (dkt. #93) 45-48.)

Finally, as noted, an explicit element of the maintenance exception to compatibility determinations is that the minor expansion or realignment is done to "to meet safety standards." 50 C.F.R. § 26.41(c). There is no indication that the Utilities are building the CHC *through the Refuge* to meet safety standards for their existing rights-of-way. Instead, the Utilities decided to cross the Refuge because other options were not deemed feasible. (ROD005028.) At this point, there is no indication that the preexisting utility lines in the Refuge are unsafe, in need of repair, or non-functional. This, too, shows that Fish and Wildlife's original decision to classify the project as "maintenance" was arbitrary and capricious.

Second, because the CHC project is not subject to the maintenance exception under 50 C.F.R. § 26.41(c), it must fully comply with the Refuge Act's compatibility requirements. Defendants' argument that the project is "fully compatible" is even weaker than that for a maintenance exception. Not only was the project only ever found

compatible under the maintenance exception in the first place, Fish and Wildlife later revoked even that decision. (Notice (dkt. #69-1) 1.) Indeed, "[i]f given a choice, the USFWS Refuge management would prefer a crossing not involving/affecting Refuge-managed lands." (ROD005028.) Still, for the sake of completeness, the court will briefly address the compatibility requirement outside of the maintenance exception.

A "use" is compatible if "in the sound professional judgment of the refuge manager, [it] will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge." (ROD028207.) As Fish and Wildlife guidelines state, "the fact that a use will result in a tangible adverse effect, or a lingering or continuing adverse effect is not necessarily the overriding concern regarding 'materially interfere with or detract from.'" 603 FW 2.11(B)(2). Still, "[a] determination that a use is compatible does not require the use to be allowed." 603 FW 2.15. Most importantly, "[t]he burden of proof is on the proponent to show that they pass; not on the refuge manager to show that they surpass." 603 FW 2.11(B)(1).

The Utilities argue that the CHC project is a compatible use because it does not materially interfere with the Refuge's purposes. Specifically, the Utilities point out that in cases about statutes with stricter wording, courts have found "the statutory term 'interfere with' . . . had to mean more than "any hindrance, delay, or obstruction." (Intervenor-Defs.' Opp'n (dkt. #112) 35 (citing *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424, 2021 WL 641614 *5 (D. Or. Feb. 15, 2021)).) However, this ignores the Utilities' burden of proof and draws the definition of compatibility too narrowly. 603 FW 2.11(B)(1).

Certainly, although a refuge manager has some deference in deciding which uses are compatible, the court is not compelled to take the agency's final word when all factual findings weigh against it. In this way, "deference" does not become the unlimited, get-out-of-jail-free card that the Utilities seem to suggest; rather, "[i]n report language attached to the 1997 Amendments, Congress recognized the conservation groups' concern and expressed its intent not to preclude judicial review of compatibility determinations." Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 Fordham Envtl. L.J. 41, 86 (2000). Thus, the court will afford deference to the Refuge manager's determination here, while also reviewing the entirety of the administrative record.

Of course, the initial question is what the purpose of the Refuge is. The intervening defendants suggest that the court look to 16 U.S.C. § 723, describing the purpose for the Upper Mississippi Refuge as providing a "refuge and breeding place for migratory birds," as well as fish, animals, and plants "to such extent as the Secretary of the Interior may by regulations prescribe." (Intervenor-Defs.' Opp. (dkt. #112) 35.) However, Congress also mandated that a more particular report of purpose be provided by each refuge every 15 years in a Comprehensive Conservation Plan ("CCP"). Specifically, the Refuge Act requires that "[u]pon completion of" a CCP, "the Secretary shall manage the refuge or planning unit in a manner consistent with the plan." 16 USC § 668dd(1)(E). The CCP requirement also comports with the general purposes of the Refuge Act, which aimed to "to guide overall management and to supplement the purposes of individual refuges, responding to decades of calls for organic legislation to provide a unifying purpose for all

refuges in the system." Tredenick, *supra*, at 77 (internal citations omitted). Accordingly, a CCP's express "objectives are designed to help the Refuge achieve its purposes and contribute to the mission and policies of the National Wildlife Refuge System." (ROD028194.)

Given that the Refuge Act mandates a comprehensive, fully researched plan for the Refuge, looking at nothing but the enacting language for the Refuge would be unreasonably narrow. Indeed, if the court only looked to § 723 to understand the Refuge's purposes, its manager could achieve that purpose simply by setting up an artificial lab for breeding trout and birds, which would clearly violate Congress's intent. In addition, while a CCP provides specific guidance to the objectives of this particular Refuge, it is only prudent to also look at the overall purpose of the Refuge Act.

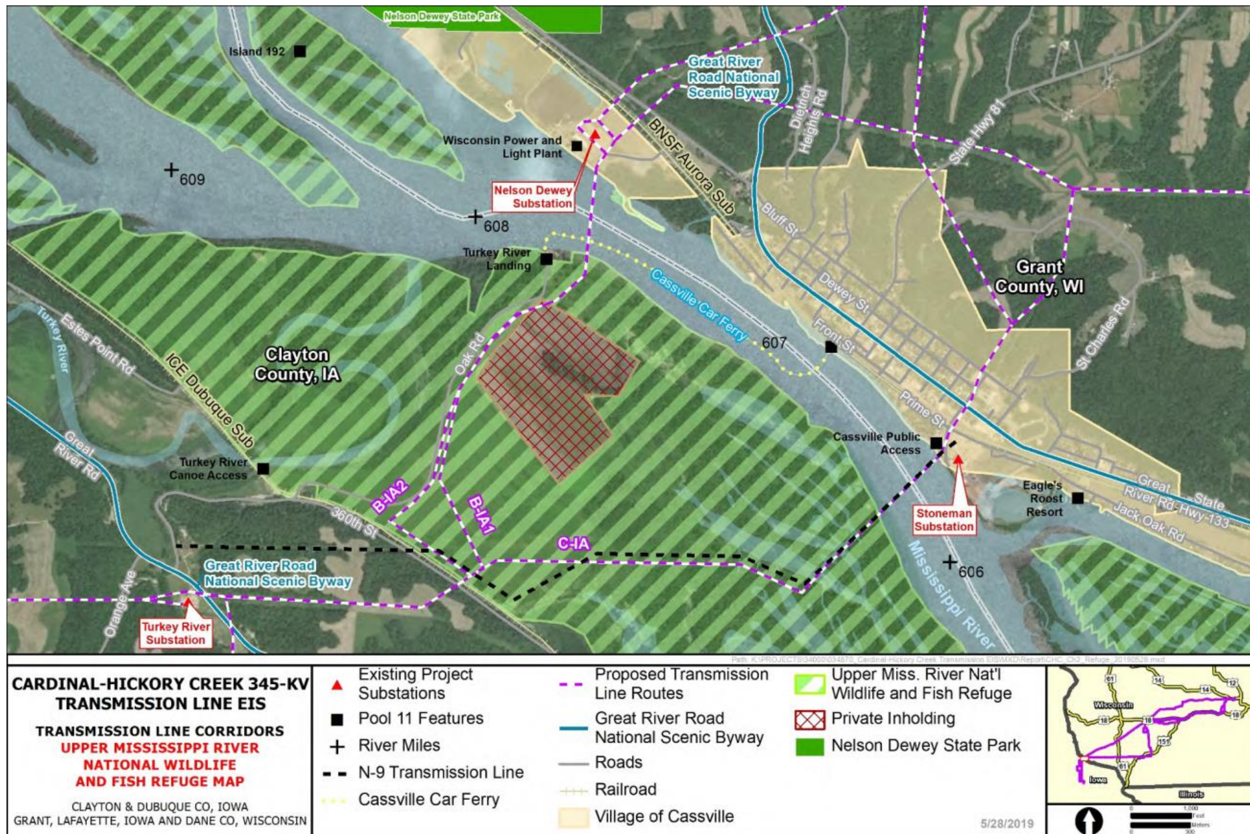
The National Wildlife Refuge System Improvement Act of 1997 was written by Congress to close regulatory holes that had been left by prior legislation. Tredenick, supra, at 77. "In 1989, wildlife refuge managers reported that ninety percent of the refuges had at least one secondary use, seventy percent of the refuges had at least seven different secondary uses, and more than thirty percent of the refuges had fourteen different uses." *Id*. at 68. In response, Congress made several attempts to pass legislation that protected refuges and its primary and secondary uses, while also protecting hunting and fishing rights. *Id*. at 72. After several failed attempts at legislation, "Executive Order 12,996, signed by President Clinton on March 25, 1996, provided the foundation for the 1997 Amendments. Most importantly, it established a policy of wildlife conservation as the singular purpose of the NWRS." *Id*. at 76. Thus, the twin policy aims of the Refuge Act were to reprioritize

wildlife conservation over secondary uses and elevate wildlife-related uses, such as hunting, fishing, photography, and birding. *Id*. For the purposes of the Refuge, therefore, the court looks to the Refuge's CCP and the overall meaning of the Refuge Act.

While plaintiffs offer many reasons why the CHC transmission line project is *incompatible* with the Refuge, the project's direct undercutting of the stated goals of the CCP is most glaring. Specifically, one of the 15-year goals in the Refuge's Comprehensive Plan was to acquire more land for the Refuge, but not land acquisition blind to all other considerations. (ROD028314.) Instead, the goal of the land acquisitions was to protect fish and wildlife by promoting habitat connectivity. (ROD028314 ("Land acquisition is a critical component of fish and wildlife conservation since it permanently protects their basic need of habitat. . . . On a narrow, linear refuge, *land acquisition is a critical component of restoring habitat connectivity* needed for the health of many species.") (emphasis added).) In earlier portions of the Plan, the Refuge Manager also discusses habitat fragmentation as a threat to the Eastern Mississauga Rattlesnake (ROD028252), various raptor species (ROD028267), and sturgeon (ROD028269).

In its compatibility analysis for the CHC, however, Fish and Wildlife acknowledges that "[n]atural forest successional processes would occur in areas adjacent to the proposed right-of-way over the next 30 to 50 years, resulting in habitat gaps and forest fragmentation." (ROD007579; ROD007580 ("Potential construction-related impacts from the project would include the loss, degradation, and/or fragmentation of breeding, rearing, foraging, and dispersal habitats").) As shown in the below map, all of the potential

CHC routes also cut directly through the *middle* of the Refuge, creating an even more serious threat of habitat fragmentation.



(ROD005063 Figure 2.3-14.) Despite this direct contradiction, Fish and Wildlife found the CHC project would be compatible.

The CCP also notes that "there is constant pressure to the integrity of the Refuge from development that encroaches upon Refuge land via tree cutting, dumping, construction, and mowing." (ROD028216.) At the same time, the Compatibility Determination says that:

> The proposed Nelson Dewey realignment passes through the area where reforestation efforts have been conducted. Natural succession of trees planted by the Refuge in the proposed right-of-way would cease. Clearing and maintenance suppression of woody vegetation by the Applicants within the right-of-way

> footprint would alter the forest succession patterns permanently.

(ROD007579.)

Additionally, one of the explicit goals for the Refuge is to "maintain and improve the scenic qualities and wild character of the Upper Mississippi River Refuge." (ROD028215.) Yet the Compatibility Determination notes, "[w]hen compared to the existing Stoneman right-of-way, transmission line infrastructure within the Nelson Dewey realignment will be significantly more visible to Refuge visitors. Negative impacts to the visual qualities of the Refuge, when viewed from Oak Road would occur as a result of realigning the existing right-of-way." (ROD007578.) All of these examples undermine explicit goals set by the Refuge, and all are blatantly contradicted in the Compatibility Determination.

So how did Fish and Wildlife come to find the CHC transmission line project compatible despite these clear contradictions with the Refuge's purposes? For all of its goals, Fish and Wildlife determined that the CHC project is still compatible because the Utilities will revegetate other areas of their previous easements in the Refuge. (ROD007581) ("The Applicants propose to mitigate adverse impacts to forest resources in the Refuge through restoration and enhancement of forest resources both within and off Refuge lands.").) Even accepting the notion that efforts to reclaim the old transmission crossing might eventually mitigate some of the impact of now building a much larger, higher power line, and recognizing that compensatory mitigation is broadly used in environmental reviews, the Refuge Act specifically *prohibits* the use of compensatory mitigation to make a use compatible. 50 C.F.R. § 26.41(b) ("We will not allow

compensatory mitigation to make a proposed refuge use compatible . . . . If we cannot make the proposed use compatible with stipulations we cannot allow the use."). Indeed, as previously discussed, the only time compensatory mitigation can bolster compatibility by regulation is when the requested action consists of maintenance of an existing right of way. *Id*. Because Fish and Wildlife initially chose to categorize the CHC project as maintenance, its Compatibility Determination could cover many sins with compensatory mitigation. Now that Fish and Wildlife has acknowledged that the CHC project is not maintenance, however, compensatory mitigation is categorically disallowed as a reason for compatibility, taking away the one defense the Utilities had to the obvious *in*compatibility of the CHC project with the Refuge's express purposes. Given these direct contradictions, therefore, the CHC project's proposed crossing cannot be deemed compatible with the Refuge. Any Fish and Wildlife decision to the contrary would be arbitrary and capricious.

B. Land Transfer

As discussed, the Utilities and federal defendants have recently agreed to pursue a land exchange crossing the Refuge as an alternative to a right of way. (Notice (dkt. #69-1) 1.) Implicit in this agreement is the belief that a land exchange, unlike a right of way, would not need to be compatible with the Refuge's purposes. Refuge managers are allowed to "[a]cquire lands or interests therein by exchange for acquired lands or public lands, or for interests in acquired or public lands, under [their] jurisdiction which [they] find[] to be suitable for disposition." 16 U.S.C.A. § 668dd. Defendants' position appears to be that, unlike the grant of a right of way, Fish and Wildlife's grant of a land exchange need not be compatible under the Refuge Act because that land would no longer be part of the

Refuge once deeded to the Utilities. This argument defies both congressional intent and common sense.

To begin, Congress wrote the Refuge Act in order to curb incompatible, secondary uses within refuges. To allow anyone to skirt that rule by simply doing a land exchange would obviously undermine the purposes of the Refuge Act. Moreover, the specific facts of this case *strongly* suggest that the Utilities are pursuing a land exchange to evade judicial review. As noted, the Utilities proposed their amended right of way on March 1, 2021, after plaintiff filed this case. (Zoppo Decl., Ex. A (dkt. #53-1).) Then, on July 29, 2021, the Utilities switched tactics and asked for a land transfer instead, writing that the right of way determination would "take too long." (*Id.*, Ex. B (dkt. #53-2).) Within a month of receiving that request, Fish and Wildlife next fully withdrew its Compatibility Determination, citing previously undiscovered "errors." (Not. (dkt. #69-1) 1.) Since that time, however, Fish and Wildlife has made no effort to argue that the CHC is, indeed, compatible with the Refuge.

This quick switch of tactics, along with Fish and Wildlife's abandonment of the compatibility argument, would certainly seem to suggest that the Utilities are pursuing the land exchange in order to avoid a compatibility analysis, which they would likely lose. In *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011 (D. Alaska 2020), the United States District Court for the District of Alaska came to a similar conclusion with regard to an Alaskan refuge. In that case, after finding that the proposed road was not a compatible use, the Fish and Wildlife Service instead attempted to push through a land exchange. The Alaska court found that this switch from incompatible right of way to

land transfer was arbitrary and capricious. *Id*. at 1022. Here, too, an incompatible use cannot become compatible simply by converting it to a land transfer. If the court allowed a comparable land exchange where there is no compatibility, the entire purpose of the Refuge Act would be entirely undermined, just as the Utilities appear to be attempting here, again with Fish and Wildlife's complicity.

Defendants in *Friends of Alaska* also tried to argue that they did not need to follow Title XI of the Alaska National Interest Lands Conservation Act ("ANICLA"), as the land would no longer be "federal conservation land" once transferred to the defendants. *Friends of Alaska*, 463 F. Supp. 3d at 1025. The court rejected this argument as well, noting that "Congress's intent was clear—it enacted Title XI as a 'single comprehensive statutory authority for the approval' . . . To make Title XI subordinate to the exchange provision in § 1302(h) would run counter to that intent." *Id*. (citing 16 USC § 3161). The Refuge Act mirrors much of ANICLA, and it makes sense that the policy goals of the Refuge Act should not be subordinate to an individual manager's general authority to exchange lands, however complicit he or she may be in thwarting its goals. In *Friends of Alaska*, the court further found "under the 'well established canon of statutory interpretation,' the more specific procedural mandates of Title XI govern over the general authority provided in § 1302(h)." *Id*. (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012)). Thus, the holding in *Friends of Alaska* court has been characterized as "exchange agreements are not *exempt* from those procedures simply because the affected land would no longer be located within federal conservation lands." *See* National wildlife refuge land exchanges, 2 Pub. Nat. Resources L. § 13:39 (2nd ed.) (analyzing *Friends of Alaska*).

Moreover, even if the Refuge manager only has to follow the lower bar of "suitable for disposition" suggested by defendants, they have not offered any evidence to suggest that the land is indeed suitable for disposition. 16 U.S.C.A. § 668dd. Returning to the CCP, a goal of the Refuge is to acquire land to reintegrate habitats and bring areas of overlapping jurisdiction under the control of one agency. (ROD028314.) On its face, deeding a long strip of land to private utility companies that cuts through the *middle of the Refuge* for construction of a major power line would not comport with the goals of consolidating jurisdiction and reducing fragmentation. Accordingly, a land exchange that is equally incompatible with the purposes of the Refuge as a right of way cannot be used as a method to evade Congress' mandate.

C. Environmental Impact Statement

Plaintiffs have offered several reasons why the NEPA review in this case was insufficient. Most compelling is the argument that RUS defined the purpose and need of the CHC project so narrowly as to define away reasonable alternatives. As the Seventh Circuit has explained in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997),

> When a federal agency prepares an Environmental Impact Statement (EIS), it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose.

Id. at 666.

In the final EIS here, RUS defined six, sub-purposes of the CHC project, which taken together constitute its stated purpose:

- Address reliability issues on the regional bulk transmission system and ensure a stable and continuous supply of electricity is available to be delivered where it is needed;
- Alleviate congestion that occurs in certain parts of the transmission system and thereby remove constraints that limit the delivery of power from where it is generated to where it is needed to satisfy end-user demand;
- Expand the access of the transmission system to additional resources, including lower-cost generation from a larger and more competitive market that would reduce the overall cost of delivering electricity, and renewable energy generation needed to meet state renewable portfolio standards and support the nation's changing electricity mix;
- Increase the transfer capability of the electrical system between Iowa and Wisconsin;
- Reduce the losses in transferring power and increase the efficiency of the transmission system and thereby allow electricity to be moved across the grid and delivered to end-users more cost-effectively; and
- Respond to public policy objectives aimed at enhancing the nation's transmission system and to support the changing generation mix by gaining access to additional resources such as renewable energy or natural gas-fired generation facilities.

(ROD004984.)

"When evaluating alternatives to a proposed action, an agency must answer three questions in order. First, what is the purpose of the proposed project? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular alternative?" *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 603 F. Supp. 2d 1176, 1184 (E.D. Wis. 2009) (citing *Simmons*, 120 F.3d at 668).

While statements of purpose are meant to narrow reasonably the alternatives analyzed in the EIS to some manageable number, "[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." *Simmons*, 120 F.3d at 666.

Plaintiffs contend that the sub-purposes identified in the EIS, and *especially* the fourth sub-purpose, skew the results strongly in favor of a large, wired transmission line like the CHC. (Pls.' Mot. (dkt. #71) 39.) The court is not convinced that increasing transfer capacity between Iowa and Wisconsin alone is impermissibly narrow; however, when combined with five, other sub-purposes, the overall impact is incredibly specific, resulting in most reasonable alternatives being defined out of the EIS.

Beginning with the fourth sub-purpose in the EIS, plaintiffs argue that the requirement of increasing transfer capacity between Iowa and Wisconsin removes all non-wire alternatives, as non-wire alternatives cannot *increase* capacity. (Pls.' Mot. (dkt. #71) 38.) In so arguing, plaintiffs rely heavily on *Simmons*, in which the Seventh Circuit addressed a plan to provide water to two Illinois towns, with the stipulation that both towns be supplied from the same water source. 120 F.3d at 667. The *Simmons* court found the stipulation of one water source problematic, since "supplying Marion and the Water District from two or more sources is not absurd-- which it must be to justify the Corps' failure to examine the idea at all." *Id.* at 669. Since the EIS did not in fact consider any two-source alternatives in its analysis, the court found the one-source purpose statement unreasonable. *Id*. Thus, while "[t]he 'purpose' of a project is a slippery concept, susceptible of no hard-and-fast definition," *Simmons* stands for the proposition that the purpose

statement should look at the general goal of an action, rather than a specific means to achieve that goal. *Id*. at 666 (*citing Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)). Additionally, "[i]f NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Id.* at 670.

Looking only at the sub-purpose of increasing the transfer capacity between Iowa and Wisconsin, it can reasonably be understood as a general goal, rather than a specific means. Although other than installation of a new power line, there would appear *no* such means unless the Utilities could increase the transfer capacity on existing lines, which the Utilities maintain is not feasible, *or* perhaps increasing transfer at off-hours and somehow economically storing it for use as needed, which seems to remain still a scientifically receding goal despite promises of breakthroughs, except for hydroelectric storage. "Energy & the Environment," EPA, https://www.epa.gov/energy/electricity-storage (last visited January 14, 2022). Further, neither of those other options appear to have been even considered by the EPA in light of the other five, narrow sub-purposes of the project. More importantly, it is hard to conceive of a goal much narrower than increasing transfer capacity between two states, since if that requirement were struck, all that would remain is a project to transfer "some amount" of energy between Iowa and Wisconsin. While this "broader purpose" would widen "the range of alternatives," *Simmons*, 120 F.3d at 666, the simple purpose of transferring energy would not meaningfully guide an alternatives analysis. Still, even considered in isolation, the fourth purpose is arguably as restrictive as the single-source requirement in *Simmons*.

Regardless, this still leaves the question of whether the requirement to meet all six, sub-purposes makes the CHC project a foregone conclusion. Although plaintiffs focus less on the other five, sub-purposes, they do also object to the entire purpose statement in the EIS as a whole. (Pls.' Mot. (dkt. #71) 39.) Having a purpose with several sub-parts is not necessarily a problem for an EIS, as long as the purpose does not become "so slender as to define competing 'reasonable alternatives' out of consideration." *Simmons*, 120 F.3d at 666; *see also Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 593 F. Supp. 2d 1019, 1028 (E.D. Wis. 2009), *aff'd sub nom.* 609 F.3d 897 (7th Cir. 2010).

Taken as a whole here, in order to even be considered as an alternative in this EIS, each option would need to meet the following characteristics:

- Increase reliability in the transmission system
- Stabilize the supply of electricity
- Ensure electricity can be delivered even if power lines or generation facilities are down
- Alleviate congestion in the transmission system
- Remove limitations on delivery of power from generation facilities to locations in need of power
- Expand access to low-cost generation
- Reduce overall cost of delivering electricity
- Expand renewable energy access
- Meet state renewable portfolio standards
- Support the nation's changing electricity mix
- Carry electricity from Iowa to Wisconsin
- Increase the transfer capacity between Iowa and Wisconsin
- Reduce losses during transmission
- Increase efficiency of the transmission system
- Make energy delivery more cost-effective
- Respond to public policy objectives
- Gain access to natural gas-fired generation facilities

Any alternative which fails to achieve even one of the above goals would then be (and was) entirely written out of consideration, leaving the EIS to only consider alternatives so

substantially similar to the CHC project that any distinction would be meaningless, with the possible exception of running adjacent to the Refuge, and even that will soon be written out by the Utilities' ongoing construction of the rest of the line.

Thus, while any one sub-purpose might be sufficiently broad, having adopted so many as part of the overall purpose of the project serves to whittle away any alternatives down to the CHC project alone, especially as the Utilities sink more and more investment in preparing for a Refuge crossing from both the Iowa and Wisconsin sides, and buying or exchanging land with that same goal in mind.

The practical effect of such a specific set of sub-purpose can be seen in the EIS itself, which considered the CHC transmission line project with no other alternative outside of minor route changes. Looking at several, non-wire alternatives favored by plaintiffs, the EIS explicitly noted that each alternative failed at least one sub-purpose of the project, which was used to justify removing the following alternatives from consideration: regional and local renewable electricity generation; energy storage; energy efficiency; demand response; and lower-voltage transmission lines. (ROD005032.)[5] Whether any of those potential alternatives would actually be better than the CHC project after full analysis is immaterial; the "error is in accepting [these narrowing] parameter[s] as a given." *Simmons*, 120 F.3d at 667.

Perhaps unsurprisingly, the EIS actually adopts one of the three utilities' (MISO's) stated purpose for the CHC project almost verbatim. (ROD031341.) The Seventh Circuit

[5] In addition, an underground transmission line alternative that the EIS concedes would meet the purpose was discarded before a full analysis because it would not be economically feasible, apparently even just in crossing the Refuge. (ROD005032.)

has specifically cautioned against adopting a beneficiary's purpose, finding instead that agencies have "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons*, 120 F.3d at 669 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)). Specifically, after considering an agency's statement in *Simmons* that it "must accept [a city's] definition," "[s]ince [it] is the proposer and will construct the project," the Seventh Circuit bluntly stated that "[t]his is a losing position in the Seventh Circuit." *Id*. MISO may have its own reasons for proposing the CHC project as it did, but "[t]he public interest in the environment cannot be limited by private agreements." *Id*. at 670. Given the complexity and depth of the chosen purpose, it also seems unlikely that RUS would have independently come up with such a narrow set of sub-purposes without mirroring MISO's. Because RUS adopted MISO's convoluted purpose statement, which then drastically narrowed the alternatives reviewed in the EIS, that purpose statement fails to comply with NEPA.[6]

D. RUGP

Finally, plaintiffs challenge the Corps' verification of the project under the RUGP permit.[7] Plaintiffs' main challenge to the RUGP is that it did not properly assess

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[6] The obvious result of the EIS' failure is that Dairyland cannot seek funding from the RUS until the EIS is revisited. However, plaintiffs have not explained to what, if any, relief they are entitled beyond this consequence.

[7] Plaintiffs also argue that nationwide permits as a whole are non-compliant with the Clean Water Act; however, plaintiffs themselves acknowledge that argument has been discredited by the Fourth, Tenth, and D.C. Circuits. *See Ohio Valley Env't Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005); *Bostick*, 787 F.3d at 1060 (10th Cir. 2015); *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31,

cumulative impacts. (Pls.' Mot. (dkt. # 70) 69.) With virtually no briefing on the RUGP, the court found at preliminary injunction that, "without *any* apparent analysis of the projects proceeding under the general RUGP, the Corps appears to have no basis on which it could have found harms are no more than minimal." (11/1/21 Op. & Order (dkt. #160) 8.) Now, having the benefit of further briefing, it is evident that the Corps' project-specific verification need not contain much analysis to be considered adequate. In *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), the Tenth Circuit considered a similar challenge to an RUPG permit, but held:

> The record shows three facts:
>
> 1. District engineers prepared verification memoranda that describe the Corps' analysis of pipeline impacts, impose special conditions to ensure minimal impacts, and conclude that the pipeline (with proposed mitigation) would "result in no more than minimal individual and cumulative adverse environmental effects...."
> 2. The verification letters state that district engineers analyzed "[a]ll proposed crossings" of the pipeline "relative to the definition of single and complete project for linear projects."
> 3. Corps officials from separate districts communicated about the pipeline's verification to ensure that officials had necessary information and had fully considered the pipeline's collective impact.
>
> Based on the combination of these three facts, we can reasonably discern that the agency analyzed the cumulative impacts of the proposed crossings.

Id. at 1061. The Tenth Circuit further found that those factors alone were sufficient to uphold a cumulative impact analysis, even though the analysis in the project-specific

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39 (D.C. Cir. 2015). Although the Seventh Circuit has not explicitly ruled on this issue, plaintiffs have offered no good grounds to go against the decisions of these other circuits, nor offered any persuasive counter authority.

verification letter was surface level, because "the engineers need not include a written analysis of cumulative impacts within the verification letters." *Id*. at 1060.

In the case at hand, those same, three facts are present in the record. The Corps prepared a verification memorandum that imposed conditions on the project and purported to assess the cumulative impact of proposed crossings after communicating with the separate districts about the proposed CHC transmission line. (USACE 000679); (USACE000686.) Plus, plaintiff offers no case law to suggest that anything more is needed at the project-specific, verification level. To the contrary, the Ninth Circuit held similarly that the project-specific verification does not need fulsome analysis. *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Engineers*, 683 F.3d 1155 (9th Cir. 2012). Specifically, the court noted that, "a permittee is usually not required to notify the Corps in the first place that it is proceeding under a nationwide permit. . . . And even where pre-construction notification is required, a permittee is not required in most cases to supply the Corps with information about how the project will satisfy each general condition." *Id*. at 1163-64. Such lax notification requirements show that the Corps never intended to have project-specific verifications go through in-depth analysis. Rather, the court held that: "[t]he nationwide permit system is designed to streamline the permitting process. We decline to impose a new requirement of a full and thorough analysis of each general condition based on documentation the Corps may or may not have." *Id*. at 1164.

The Ninth Circuit also explained that "the Corps ordinarily confined its environmental assessments to impacts from the activities authorized under the nationwide permit (construction, maintenance, and repair of utility lines), rather than the eventual

operation of these utility lines," meaning that risks involved with the actual operation of the CHC "would not have alerted the Corps to an obvious deficiency in its environmental assessment. *Id*. at 1050. Thus, with limited scope, limited information, and limited requirements, the Corps did not need to flesh out its entire analysis for why the CHC project complies with the RUGP permit at issue, and the RUGP is, in fact, compliant with the requirements of NEPA.

IV. Next Steps

In light of these rulings, the court invites the parties to brief what additional relief, if any, may be appropriate, including suggested language to be included in a final judgment. Those submissions will be due on or before January 24, 2022.

ORDER

IT IS ORDERED that:

1) Intervenor-defendants' motions to strike plaintiffs' proposed findings of fact (dkt. #113), motion to stay (dkt. #49) and motion to strike or disregard the exhibits of Rachel Granneman (dkt. #117) are DENIED AS MOOT.

2) Plaintiffs' motion for leave to Reply (dkt. #165) is DENIED AS MOOT.

3) Plaintiffs' motion for summary judgment (dkt. #70), defendants' motion for summary judgment (dkt. #88), and intervenor-defendants' motion for summary judgment (dkt. #92) are GRANTED IN PART AND DENIED IN PART consistent with the above opinion.

4) The court DECLARES that the compatibility determination precludes the CCH transmission line from crossing the refuge by right of way or land transfer.

5) The parties' submissions on additional relief and proposed language for a final judgment are due on or before January 24, 2022.

Entered this 14th day of January, 2021.

BY THE COURT:

/s/

____

WILLIAM M. CONLEY
District Judge

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

NATIONAL WILDLIFE REGUGE ASSOCIATION,
DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN
WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE

Plaintiffs,

v.

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

RURAL UTILITIES SERVICE,
CHRISTOPHER MCLEAN, Acting Administrator,
Rural Utilities Service,
UNITED STATES FISH AND WILDLIFE SERVICE,
CHARLES WOOLEY, Midwest Regional Director, and
SABRINA CHANDLER, Manager, Upper Mississippi River
National Wildlife and Fish Refuge,
UNITED STATES ARMY CORPS OF ENGINEERS,
LIEUTENANT GENERAL SCOTT A. SPELLMON, Chief of
Engineers and Commanding General, U.S. Army Corps of
Engineers, COLONEL STEVEN SATTINGER, Commander
And District Engineer, Rock Island District, U.S. Army Corps of
Engineers, and COLONEL KARL JANSEN, Commander and
District Engineer, St. Paul District, U.S. Army Corps of Engineers,

Defendants,

and

AMERICAN TRANSMISSION COMPANY, LLC,
DAIRYLAND POWER COOPERATIVE, & ITC
MIDWEST LLC,

Intervenor-Defendants.

FINAL JUDGMENT

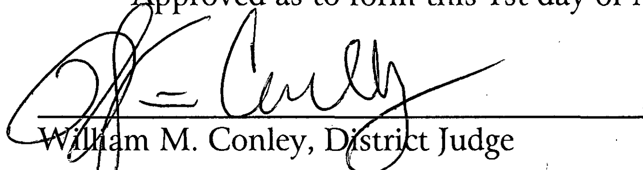
IT IS ORDERED AND ADJUDGED that

In Case No. 21-cv-96, the court enters judgment in favor of plaintiffs and against federal defendants and intervenor-defendants as follows:

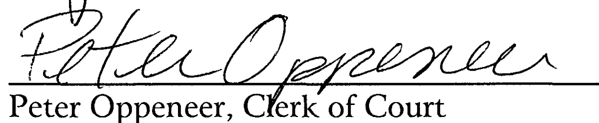
1. The Record of Decision issued by the Rural Utilities Service effective January 16, 2020, is VACATED AND REMANDED to the Rural Utilities Service for further proceedings consistent with the court's January 12, 2022, Opinion and Order on summary judgment (dkt. #175).
2. The court DECLARES that the compatibility determination precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer.
3. The court VACATES AND REMANDS the defendants' Environmental Impact Statement and Records of Decision consistent with the court's January 12, 2022, Opinion and Order on summary judgment (dkt. #175).

In Case No. 21-cv-306, judgment is entered in favor of federal defendants and intervenor-defendants and against plaintiffs on Counts 1, 2, 3, and 5, which are DISMISSED WITH PREJUDICE. Judgment is entered in favor of plaintiffs and against federal defendants and intervenor-defendants on Count 4 as set forth above.

Approved as to form this 1st day of March, 2022.



William M. Conley, District Judge



Peter Oppeneer, Clerk of Court

3/1/22
Date

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, 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 13th day of April 2022.

s/Thomas C. Jensen

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