Nos. 22-1347, 22-1709, 22-1737

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Driftless Area Land Conservancy, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

Rural Utilities Service, et al.,
Defendants-Appellants, Cross-Appellees,

and

American Transmission Company, LLC, et al.,
Intervenor Defendants-Appellants, Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin
The Honorable William M. Conley, Judge
Case Nos. 21-cv-00096-wmc & 21-cv-00306, consolidated

MOTION OF CROSS-APPELLANTS NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, AND DEFENDERS OF WILDLIFE FOR AN INJUNCTION TEMPORARILY STOPPING TRANSMISSION LINE CONSTRUCTION WHILE THE TRANSMISSION COMPANIES' APPEAL IS PENDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

Plaintiffs-Appellees National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife ("Conservation Groups") move for an injunction through October 2022 (following oral argument) under Fed. R. App. P. 8 to stop construction of the Cardinal Hickory Creek ("CHC") high-voltage transmission line to preserve the status quo while this Court considers the consolidated appeals.

This appeal involves the District Court's decision invalidating three federal agency Defendants'—Rural Utilities Service ("RUS"), U.S. Fish & Wildlife Service ("USFWS"), and U.S. Army Corps of Engineers ("Corps")—approvals for the controversial huge CHC transmission line, which would run 102 miles from the Hickory substation near Dubuque, Iowa, cut a wide swath through the Upper Mississippi River National Wildlife and Fish Refuge ("the Refuge"), and plow through the southwest Wisconsin Driftless Area's scenic landscapes, family farms, small town communities, and vital natural resources to the Cardinal substation in Middleton, Wisconsin. App'x 345. The Conservation Groups sued under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, to overturn those federal agency decisions.

On cross-motions for summary judgment, the District Court held that: (1) Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C.

§ 4321 *et seq.*, by using an impermissibly narrow purpose and need statement in their environmental impact statement ("EIS") and record of decision ("ROD") that precluded the required full and fair analysis of "all reasonable alternatives," including different routes and clean energy and local grid upgrade alternatives to the transmission line, *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664 (7th Cir. 1997); and (2) the huge transmission line was not "compatible" with and could not cross through the Refuge without violating the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee ("the Refuge Act"). App'x 61-105. The District Court's Final Judgment "vacated and remanded" the EIS and ROD, and "declare[d]" that the transmission line is precluded from crossing the protected Refuge. App'x 5.

Even though the District Court ruled in the Conservation Groups' favor, Intervenor-Defendants American Transmission Co., ITC Midwest, and Dairyland Power Cooperative ("Transmission Companies") continue to bulldoze through public and private lands and waters, and install transmission line equipment and towers. The Transmission Companies are spending hundreds of millions of dollars, which they are charging to utility ratepayers, causing environmental harm and property damage, and creating precisely the "orchestrated trainwreck" the District Court warned against. App'x 76.

In deciding an injunction pending appeal, the Court must consider: "the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enterprises, Inc.*, 742 F.3d 763, 766 (7th Cir. 2014). The Court uses a "sliding scale" approach: "[T]he greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.*

The Conservation Groups clearly meet all three requirements for an injunction here. *First*, they are likely to succeed on the merits because the District Court has already issued a well-reasoned Opinion ruling in their favor on legal and factual grounds. The District Court properly relied on *Simmons,* which is longstanding controlling NEPA law in the Seventh Circuit. 120 F.3d 664. The District Court's straightforward application of the Refuge Act is consistent with the statute's language, purpose, and the USFWS's rules.

Second, the Conservation Groups and their members are suffering irreparable injury caused by the Transmission Companies' aggressive continued construction of the CHC transmission line. *See* App'x 379-413 (Plaintiff member declarations). The CHC transmission line with its 17-to-20 story high towers would run through the iconic Driftless Area, a unique and fragile landscape of hills and deep river valleys, left unglaciated by the last Ice Age. App'x 173, 189. It

is a "truly unique landscape, rich in natural resources and well-known and appreciated for its natural scenic beauty," which contains many rare woodland, prairie, and riparian habitats. App'x 266. The Driftless Area is home to numerous endangered and threatened species, and includes many coldwater trout streams and high-quality wetlands. *Id*. According to the USFWS, the Refuge "is a Wetland of International Importance and a Globally Important Bird Area." App'x 214, 216.

Third, the public interest favors granting an injunction for several reasons. The Transmission Companies' bulldozing and building up to the edges of the Refuge, while *they* appeal the District Court's decision, is designed to constrain the NEPA process and undermine the required "hard look" at "all reasonable alternatives" on remand. The EIS covers the entire transmission line, including both public and private land, not just some segmented piece. In addition, ratepayers will *benefit* from a delay in construction, and the Transmission Companies overstate any reliance on the CHC line by renewable generators.[1] Finally, the Transmission Companies continue to inflict extensive environmental

[1] Not only is any "contingency" of renewable generators on the CHC overstated, but the line will carry more fossil-fuel generation. App'x 303, 314-15. *See also* App'x 150-58.

damage on the Driftless Area and private property without any lawful Refuge crossing. App'x 361.

In April, ITC began drilling and pouring tower foundations. App'x 361. ATC plans to haul, set, and frame tower structures in May, and begin stringing lines in June or July 2022. *Id*. The Transmission Companies have spent $276 million thus far, including $115 million in the First Quarter of 2022 alone. App'x 364. They are intentionally running full-speed through the District Court's explicit warning flag:

> 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.

App'x 73.

Plaintiff Conservation Groups requested that the District Court enter an injunction against further transmission line construction. App'x 41. The federal agency Defendants stated, however, that an injunction was unnecessary because the federal government would obey a declaratory judgment. App'x 14-15.

The District Court then issued a declaratory judgment on March 1, 2022 that "precludes" the Transmission Companies from running their huge 345-kv transmission line with up to 20-story high towers through the Refuge, but did not grant injunctive relief. App'x 5. The District Court on March 4 denied the Transmission Companies' motion for a stay pending appeal in a text-only order, which also discussed the court's reasoning in declining to issue an injunction. App'x 1.

Even though the huge transmission line is prohibited from crossing the protected Refuge, and even though the EIS has been vacated and remanded, the Transmission Companies are bulldozing along their same proposed route up to both sides of the Refuge, thereby creating two "transmission line segments to nowhere." While their appeal is delaying further legal resolution, they are rapidly plowing ahead, causing unnecessary environmental harm and property damage, and running up millions of dollars of wasteful costs that they are charging to utility ratepayers.

On May 6, 2022, this Court denied the Transmission Companies' motion for a stay pending appeal, thereby indicating that their merits arguments on appeal were not persuasive. Dkt. 52. Nevertheless, the Transmission Companies continue to relentlessly build their costly transmission line, at ratepayer expense, up to the Refuge's borders, to further raise the stakes for granting effective relief.

They are creating precisely the "orchestrated trainwreck" which the District Court warned against. App'x 76.

The Conservation Groups filed their own appeal limited to the District Court's decision not to enjoin continued construction, and are now seeking injunctive relief from this Court. Many courts have recognized the necessity of an injunction to head off the "difficulty of stopping a bureaucratic steam roller, once started." *E.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (quoting *Sierra Club v. Marsh,* 872 F.2d 497, 500 (1st Cir. 1989)). This Court can and should use its equitable authority now to temporarily enjoin construction of the CHC transmission line and preserve the status quo until after oral argument, which the Court set for September. Justice delayed is risking justice denied.

ARGUMENT

For the reasons explained below, the Conservation Groups clearly meet the standards for injunction pending appeal. *In re A & F Enterprises, Inc.*, 742 F.3d at 766.

I. The Conservation Groups Are Likely to Prevail on the Merits.

The District Court issued a detailed, well-reasoned decision granting summary judgment to the Conservation Groups and holding that: (1) Defendants violated NEPA by impermissibly skewing the purpose and need statement in

ways that precluded the required full and fair analysis of "all reasonable alternatives," and (2) the huge CHC transmission line could not cross through the protected National Wildlife and Fish Refuge without violating the Refuge Act, 16 U.S.C. §§ 668dd-668ee. The District Court's decision follows this Court's precedent in *Simmons* and the clear language of the applicable statutes and regulations. The decision is well-grounded in law and fact, and is the law of the case while the appeal is pending. There are no reasonable grounds for reversal.

A. The District Court Correctly Held that the Refuge Act Prohibits the Government from Allowing the CHC Transmission Line to Cross the Refuge.

The proposed CHC transmission line would cut a 260-foot wide swath through the protected Refuge near Cassville, Wisconsin. App'x 247. The Refuge Act flatly prohibits the USFWS from "initiat[ing] or permit[ting] a new use of a refuge or expand[ing], renew[ing], or extend[ing] an existing use of a refuge, unless [USFWS] has determined that the use is a compatible use." 16 U.S.C. §§ 668dd(d)(3)(A)(i). A compatible use is one that "will not materially interfere with or detract from the fulfillment of the mission of the System or purposes of the refuge." *Id.* § 668ee(1). The Refuge System's "mission" is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations

of Americans." 16 U.S.C. § 668dd(a)(2). The Upper Mississippi River National Wildlife and Fish Refuge was established in 1924 as a "refuge and breeding place" for wildlife and "for the conservation of wild flowers and aquatic plants." 16 U.S.C. § 723.

The Refuge Act was Congress's response to a proliferation of transmission lines, pipelines, and other private projects on Refuge lands. The Act clarified that *only* biological, not economic, considerations are relevant to the compatibility analysis, 16 U.S.C. § 668ee(1)–(3), and that developers could not purchase compatibility findings by offering "compensatory mitigation" such as land, dollars, or restoration project assistance, 50 C.F.R. § 26.41(b), (c).

USFWS and the Transmission Companies attempted to evade the Refuge Act's requirements in four ways, all of which the District Court properly rejected.

First, the court concluded that a brand-new high-voltage transmission line, with much higher towers and wider right-of-way, could not be lawfully treated as "maintenance" or a "minor expansion or minor realignment to meet safety standards" of an existing low-voltage transmission line under 50 C.F.R. § 26.41(c). The CHC transmission line's river crossing is over a mile away from a smaller existing line's crossing, the right-of-way width is almost doubled, and the towers will be 20 stories high at the Mississippi River crossing. App'x 243-48. The "minor realignment" exception was intended to cover things like widening a

road shoulder or straightening a curve, 603 FW § 2.11(D), and the court reasonably concluded that the new CHC line didn't fit that category. App'x 84-85.

Second, the court concluded that USFWS's withdrawal of its compatibility determination and permits did not moot the issue. "It 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. v. Laidlaw Envt. Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982)). A controversy is not moot unless "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Here, the wrongful behavior—crossing the Refuge—will recur absent judicial action.

Third, the court rejected the Transmission Companies' argument that converting the proposed easement into a "land exchange" would somehow exempt the right-of-way from the Act's requirements because that same land would no longer be "in" the Refuge. That sleight of hand would render the Refuge Act's requirements a nullity, and would violate the Refuge's Comprehensive Conservation Plan ("CCP"). App'x 87-91. The Refuge Act's land exchange provision, 16 U.S.C. § 668dd(b)(3), empowers USFWS to acquire lands

to enhance the Act's wildlife conservation goals by eliminating inholdings, and cannot be used to create *new* inholdings for private commercial purposes. The District Court recognized that this land exchange would violate the CCP and the Refuge Act, *separating* federal holdings and allowing an incompatible private use.[2] App'x 90-92.

Fourth, the court properly rejected the argument that the "land exchange" issue was unripe because the details had not been finalized. This case falls squarely within the well-established rule that judicial review cannot be avoided when (1) the issues are purely legal and would not benefit from further factual development, *Whitman v. American Trucking Ass'n,* 531 U.S. 457, 479 (2001); and (2) "withholding court consideration" would work a hardship on the plaintiffs. *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.,* 325 F.3d 879, 882 (7th Cir. 2003).

The Transmission Companies state they intend to begin bulldozing through the Refuge in October 2022, Dkt. 9 at 19, and they will likely start the

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[2] A recent 2-1 Ninth Circuit decision upheld a land exchange for a road through an Alaska wildlife refuge. *Friends of Alaska National Wildlife Refuges v. Haaland,* 29 F.4th 432 (9th Cir. 2022) (petition for rehearing pending). That case did not involve the Refuge Act, but turned on a questionable conclusion that the Alaska National Interest Lands Conservation Act allows anything that might serve the "economic and social needs of Alaskans." The Refuge Act was adopted specifically to *prevent* economic interests from trumping the Refuges' wildlife protection purposes.

minute a land exchange is signed.[3] Forcing the Conservation Groups to file a new lawsuit in October seeking emergency injunctive relief would deny them effective relief. The District Court correctly concluded that the legal issue was ready for decision.

B. The Defendants' EIS Violated NEPA by Failing to Seriously Consider and Evaluate All Reasonable Alternatives.

Major federal actions are not valid unless preceded by an EIS that fully complies with NEPA's requirements. 42 U.S.C. § 4321 *et seq*. The "heart" of an EIS is to "[r]igorously explore and objectively evaluate all reasonable alternatives" that could meet the "purpose and need" for the project, but cause less environmental harms. 40 C.F.R. §§ 1502.13, 1502.14.

In *Simmons,* this Court recognized that developers have an incentive to define the purpose and need statement unduly narrowly to preclude a hard look at the full and fair range of alternatives, thereby impermissibly skewing the NEPA analysis in favor of their proposed project. Courts and 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," and must reject those that, in effect, prevent consideration of the full range of reasonable alternatives. *Simmons,*

[3] The Transmission Companies now argue they can build a new line on the existing right-of-way without any further permission. App'x 368-69.

120 F.3d at 669 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (1991)).

In a straightforward application of *Simmons,* the District Court rejected an overly narrow purpose and need statement that could only be met by the proposed transmission line between Dubuque and Middleton. The court found that, as a result, the Defendants did not responsibly analyze all reasonable alternatives, including routes north or south of the Refuge, or packages of non-wires clean energy alternatives and local grid upgrades that would eliminate need for the proposed transmission line altogether.

Simmons is controlling law in this circuit, and the Council of Environmental Quality recently endorsed *Simmons* as the correct interpretation of NEPA's requirements in the preamble to its revised regulations. *National Environmental Policy Act Implementing Regulations Revisions,* 87 Fed. Reg. 23,453, 23,459 (Apr. 20, 2022).

The District Court vacated and remanded the EIS and ROD because the Defendants violated NEPA, violated applicable regulations, and failed to follow this Court's controlling decision in *Simmons*. App'x 5, 101. There are no reasonable grounds for reversal.

C. This Court Has the Power to Enjoin Construction on the Entire CHC Transmission Line to Head Off the "Orchestrated Trainwreck."

The District Court recognized that "entry of a permanent injunction later" might be necessary, App'x 73, but apparently thought enjoining construction of the entire line was "outside the jurisdiction of this court," App'x 110-11, and hoped that the Transmission Companies, cautioned by the court's order, would not proceed with their "orchestrated trainwreck." That was a clear error in judgment.

Article III courts sitting in equity have broad authority and responsibility to issue injunctions when necessary to afford successful plaintiffs "complete relief":

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). This equitable power allows a court to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." *Id.*; *see also AMG Capital Mgmt. LLC v. FTC,* 141 S.Ct. 1341, 1349–50 (2021) (reaffirming *Porter,* but finding that FTC Act precluded

restitution remedies). The injunctive power is not, of course, unlimited; "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979).

The District Court's misapprehension of its own authority is a legal error, which this Court reviews *de novo. LAJIM, LLC v. General Electric Co.,* 917 F.3d 933, 945 (7th Cir. 2019).

The District Court explicitly warned the Transmission Companies against building right up to the Refuge's borders to thereby make enforcement of the Refuge Act and NEPA more difficult, stating: "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… 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." App'x 73.

This Court should prevent the Transmission Companies from playing chicken with the federal judiciary and the public. *See Kettle Range Conservation Group v. U.S. Bureau of Land Management,* 150 F.3d 1083, 1087–88 (9th Cir. 1998).

Federal courts have authority to enjoin conduct on private land if necessary to preserve the public lands under threat. That principle was

established by the U.S. Supreme Court in *Kleppe v. New Mexico,* 426 U.S. 529, 545 (1976), and has been consistently followed thereafter. *E.g. State of Minn. ex rel. Alexander v. Block,* 660 F.2d 1240 (8th Cir. 1981) (enjoining motorized use of public and private lands in Boundary Waters Canoe Area); *Maryland Conservation Council, Inc. v. Gilchrist,* 808 F.2d 1039 (4th Cir. 1986) (enjoining entire highway project, not just segments in a park, to prevent completed segments from "stand[ing] like gun barrels pointing into the heartland of the park").

Likewise, temporary halts of entire construction projects, not just particular segments in dispute, are often part of the remedy in NEPA cases. *E.g. White Tanks Concerned Citizens, Inc. v. Strock,* 563 F.3d 1033 (9th Cir. 2009); *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113 (9th Cir. 2005). It is improper to divide projects into segments, if each individual segment has "no independent justification, no life of its own, or is simply illogical when viewed in isolation." *Highway J Citizens Grp. v. Mineta,* 349 F.3d 938, 962 (7th Cir. 2003).

The identification and comparison of reasonable alternatives, the heart of NEPA review, cannot fully take place on remand if applicants are free to build whatever and wherever they want *before* the EIS process unfolds. Once again, the Defendants would impermissibly skew the analysis of alternatives. NEPA regulations prohibit federal agencies from "commit[ting] resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f). An

order stopping any *further* commitment of resources for construction would allow the federal agencies on remand to define a lawful purpose and need statement, "[r]igorously explore and objectively evaluate all reasonable alternatives," and conduct a NEPA-compliant EIS process. 40 C.F.R. § 1502.14.

Enjoining the entire CHC transmission line is legally justified in these circumstances because the NEPA process has always addressed the entire project, not a small part. The three federal agency Defendants reviewed the CHC transmission line as a whole, their EIS and ROD covered the entire transmission line, and the public understood it as a single transmission line project.

II. The Balance of Hardships Decisively Favors an Injunction Temporarily Stopping Construction Pending the Transmission Companies' Appeal.

A. Allowing Construction to Continue Unabated Will Irreparably Harm the Environment, the Conservation Groups, and Their Members.

The Upper Mississippi River National Wildlife and Fish Refuge is the gem of the Midwest refuges, is a recognized Wetland of International Importance, App'x 214, 216, and encompasses the Mississippi Flyway, a migration route used by 40% of North America's waterfowl. App'x 200, 214. The scenic Driftless Area's unique and beautiful landscape of hills and deep river valleys is a vibrant outdoor recreation tourism destination, boosting the regional economy, and it contains waterways, woodland, prairie, and riparian habitat for many rare wildlife and fish species. App'x 173, 189, 282.

The U.S. Supreme Court has long recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987). The District Court granted a preliminary injunction in October 2021 before construction began in Wisconsin, finding "real and irreparable impacts that will occur from clearing alone; actual groundbreaking will lead to even more severe consequences." App'x 121. *See* App'x 379-413 (Plaintiff member declarations).

The District Court's decision granting summary judgment recognized that continued construction ultimately "mak[es] 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." App'x 73. USFWS has explained that "right-of-way projects," like large transmission lines, result in irreparable environmental harms: loss of wildlife habitat, propagation of invasive species, contaminated stormwater runoff and erosion, bird strikes, lost recreational opportunities, and aesthetic harm. App'x 340-42.

B. Enjoining Construction Pending Appeal Will Not Harm the Federal Agencies or Transmission Companies.

A construction delay will not harm the federal Defendants. As the Conservation Groups explained in responding to the Transmission Companies' stay motion, Dkt. 13-1, the Companies have virtually no exposure to economic

loss from a construction delay with regard to prudently expended funds. Federal Energy Regulatory Commission ("FERC") Order 679 insulates regulated transmission companies from "the risk of non-recovery of costs traditionally associated with project development" if prudent. 116 FERC ¶ 61,057 at 163 (2006), 2006 WL 2039629. All three Transmission Companies applied for, and received, incentive-based rates allowing them to charge ratepayers for (1) 100% of their "construction work in progress" and precertification and regulatory approval costs for the CHC transmission line, *and* (2) 100% of prudently incurred costs associated with potential delay or abandonment of a transmission project for reasons beyond their control.[4] As a result, utility ratepayers are paying the Transmission Companies' prudently incurred costs, plus a guaranteed rate of return.

Courts routinely hold environmental harms to outweigh economic considerations when weighing injunctive relief. *See Wildlands v. U.S. Forest Service*, 791 F.Supp. 2d 979, 994 (D. Or. 2011) (economic benefits "delayed…but

[4] The Conservation Groups asked FERC to consider whether continued construction expenditures are "imprudent" following the District Court's decisions. As of today, the Transmission Companies are fully charging ratepayers.

not extinguished" are outweighed by adverse environmental impacts of proceeding with landscape management project).

III. The Public Interest Weighs in Favor of Granting an Injunction.

An injunction pending appeal would serve the public interest by promoting informed decision-making and environmental preservation, which Congress declared to be the public interest in enacting NEPA and the Refuge Act. An injunction would promote the public interest in conserving public lands and reduce charges to ratepayers for construction of two transmission line segments to nowhere.

This Court should consider the purpose of the statutes that were violated, which reveal "what Congress … declared to be the public interest." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016). *Accord Abbott Labs. v. Mead*, 971 F.2d 6, 19 (7th Cir. 1992). For example, this Court stated that preliminarily enjoining a project's construction would serve the public interest because "requiring the Company to obtain a valid … permit would likely result in decreased emissions and improved public health, which would further a stated goal of the Clean Air Act." *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d 918, 936 (7th Cir. 2008). Granting an injunction here would further the purposes of NEPA and the Refuge Act: "Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any

information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008).

There is a strong public interest in avoiding irreversible environmental degradation, and in preserving public lands and wildlife habitats for future generations of Americans to enjoy. *Anglers of the Au Sable v. U.S. Forest Serv.*, 402 F. Supp. 2d 826 (E.D. Mich. 2005) ("public interest in preserving national forests in their natural states and ensuring that the dictates of NEPA are complied with"); *See also W. Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225 (D. Or. 2019) ("When the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff.").

Where "[t]he 'environmental dangers at stake . . . are serious,'. . . the public interests that might be injured by a [temporary] injunction, such as temporary loss of jobs or delays in increasing energy output in the region, 'do not outweigh the public interests that will be served.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d at 997–98. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765–66 (9th Cir. 2014) (finding the harm of moving jobs and revenue into a future year because of a preliminary injunction is minimal).

Ratepayers will likely *benefit* economically from a construction delay. The Wisconsin Public Service Commission's staff modeling expert testified in state proceedings that delaying the transmission line's in-service date for two years would benefit ratepayers in most future scenarios modeled. App'x 127-149. Expert ratemaking accountant Aaron Rothschild concludes that "the financing cost savings to consumers from a delay in the project may actually save them as much or more than the increased construction cost." App'x 151 at ¶ 5. Moreover, any "potential increase in construction costs is highly speculative, while the financing cost savings from a delay is assured." *Id.*

The Wisconsin Citizens Utility Board concluded that ratepayers would benefit if the CHC project were cancelled altogether because "each day the Utilities continue with construction is a day they are knowingly and intentionally spending Wisconsin customer dollars not just imprudently, but recklessly." App'x 353. Likewise, Dane and Iowa Counties in Wisconsin, and the attorneys general of Michigan and Illinois, all of whom represent the public, concluded that the transmission line's costs to their constituent ratepayers would substantially exceed its benefits. App'x 354-59, 373-78.

IV. This Court Should Impose a Zero Dollar or Minimal Injunction Bond.

An injunction bond exemption is appropriate if: defendants would not be harmed by the injunction, such as when the plaintiffs are "virtually certain to

prevail on the merits"; or the plaintiff "could not afford to post a bond in an amount that would be adequate to compensate the defendants for any delay-related harm they may suffer." *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 677-78 (W.D. Wis. 2013); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (collecting cases). The District Court did not impose a bond when issuing a preliminary injunction below, App'x 125 n.8, and neither should this Court.

First, the costs to Plaintiffs of going without an injunction outweigh the possible harms to Defendants. A temporary construction pause will not harm the federal Defendants, and the Transmission Companies are fully recovering their prudent costs from ratepayers.

Second, the District Court already decided in Plaintiffs' favor. Plaintiffs' likelihood of success on the merits means there is a low likelihood that Defendants would suffer harms from an improperly-issued injunction. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972); *Cronin v. U.S. Dept. of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (collecting cases).

Third, federal courts have consistently waived injunction bonds or set nominal bonds in cases brought by environmental nonprofits. *Scherr* is a NEPA case where plaintiffs sought to preliminarily enjoin a highway project. This Court found that since "the amount of the security rests within the discretion of

the district judge, the matter of requiring a security in the first instance . . . also rest[s] within the discretion of the district judge." 466 F.2d at 1035 *Accord Habitat Educ. Ctr. v.*, 607 F.3d at 458 (collecting cases).

Each of the four Plaintiffs is a nonprofit organization with limited or no capacity to secure a large injunction bond. App'x 159-172. A significant portion of the Plaintiff organizations' budgets are restricted funds that can only be used for specific purposes established by grantors or the government. *Id*. There is no justification for a bond here.

CONCLUSION

For the foregoing reasons, the Conservation Groups request that this Court grant their motion for an injunction temporarily stopping construction.

Respectfully submitted this 18th day of May, 2022,

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

CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Federal Rules of Appellate Procedure 32(g) and 27(d), the foregoing motion contains 5,194 words, as counted by counsel's word processing system, excluding those portions of the document exempted under Rule 32(f).

This document complies with the requirements of Fed. R. App. P. 27(d)(1)(D) & (E) and typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type-style requirements of Fed. R. App. P. Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 13-point Book Antiqua font.

DATED: May 18, 2022

SIGNED: */s/ Howard A. Learner*

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2022, I electronically filed the foregoing 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: May 18, 2022

SIGNED: */s/ Howard A. Learner*

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