Nos. 22-1347; 22-1709; 22-1737

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.

Appeal from U.S. District Court for the Western District of Wisconsin
No. 3:21-cv-96-wmc; No. 3:21-cv-306-wmc (Hon. William M. Conley)

OPENING BRIEF OF FEDERAL DEFENDANTS-APPELLANTS

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GLOSSARY

CHC	Cardinal-Hickory Creek
EIS	Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
MISO	Midcontinent Independent System Operator
NEPA	National Environmental Policy Act
RUS	Rural Utilities Service
ROD	Record of Decision

INTRODUCTION

This case concerns the Cardinal-Hickory Creek ("CHC") Project, a planned electric transmission line that would deliver wind energy from the upper Great Plains to southern Wisconsin. The federal role in the project is limited. As relevant here, the utilities that are building the project have requested a land exchange from the U.S. Fish and Wildlife Service ("FWS") that, if granted, would allow the project to pass through the Upper Mississippi River National Wildlife and Fish Refuge ("Refuge"). In addition, one of the utilities may apply for financial assistance from the Rural Utilities Service ("RUS").

Plaintiffs Driftless Area Land Conservancy, Wisconsin Wildlife Federation, National Wildlife Refuge Association, and Defenders of Wildlife ("Plaintiffs") sued. The district court erroneously granted summary judgment in favor of Plaintiffs. First, the court held that a hypothetical future approval of the pending land exchange request would violate the Refuge Act, despite Plaintiffs' complaint never asserting any such claim, there being no final agency action on the request, and any such claim not being ripe for review.

Second, the district court erred in vacating RUS's Environmental Impact Statement ("EIS") and a Record of Decision ("ROD") determining that the EIS was complete. Plaintiffs failed to meet their burden of demonstrating standing because RUS's sole link to the project is the possibility of one day being asked to provide financial assistance to a minority owner. In any event, the EIS contained a thorough analysis of the project. Even if the district court were correct that the EIS was flawed, the court further exceeded its authority by vacating the entirety of RUS's EIS.

JURISDICTIONAL STATEMENT

Plaintiffs' properly-alleged claims fall within 28 U.S.C. § 1331's grant of subject matter jurisdiction because they arise under federal law, namely the Administrative Procedure Act, 5 U.S.C. §§ 701–706, the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act, 16 U.S.C. §§ 668dd–668ee, the Clean Water Act, 33 U.S.C. § 1344, and the Endangered Species Act, 16 U.S.C. § 1536. As explained below, however, the district court lacked jurisdiction over challenges to RUS's

EIS and the hypothetical approval of Intervenors' land exchange request for lack of standing and ripeness, respectively.

This Court has jurisdiction over Federal Defendants' appeal under 28 U.S.C. § 1291, because the district court's judgment was final and adjudicated all claims with respect to all parties. Federal Defendants seek review of the district court's "Final Judgment," entered March 1, 2022. Federal Defendants' Appendix ("FA") 46–47.[1] Federal Defendants timely filed their notice of appeal on April 29, 2022. ECF No. 208;[2] *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred by adjudicating a challenge to the hypothetical approval of Intervenors' pending request for a land exchange notwithstanding that the complaint did not challenge such an approval, nor did FWS issue such an approval.

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[1] The "Amended Final Judgment," ECF No. 203, entered March 9, 2022, corrected two dates listed in the district court's Final Judgment. However, the court lacked authority to enter the Amended Final Judgment because an appeal had already been docketed in this Court. *See United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013); Fed. R. Civ. P. 60(a).

[2] All ECF documents refer to those filed in Cause No. 3:21-cv-96-wmc.

2. Whether the district court erroneously set aside both RUS's EIS and the ROD determining that the EIS was complete, where:

   a. Plaintiffs did not assert an injury from any activity that RUS can authorize, and RUS has yet to decide whether to fund a small portion of the CHC Project;

   b. the EIS's statement of purpose and need (i) explained the CHC Project's aim of increased power transfer capability between Iowa and Wisconsin, (ii) allowed for robust consideration of six action alternatives, and (iii) relied on the planning process of the entity responsible under federal law for regional transmission planning; and

   c. the EIS, which merely memorializes RUS's efforts to comply with NEPA, is not a decision.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The National Environmental Policy Act

NEPA is an "essentially procedural" statute, *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 558 (1978), that "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Whenever a federal agency proposes to take a "major Federal action[] significantly affecting the quality of the human environment," the agency must prepare a detailed EIS describing the likely environmental effects of the proposal, "any adverse environmental effects which cannot be avoided should the proposal be implemented," and potential alternatives. 42 U.S.C. § 4332(2)(C). Relevant here, an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13.[3]

[3] The claims in this case arise under the NEPA regulations codified at 40 C.F.R. §§ 1500 et seq. (2018), which were in place at the time the challenged agency actions were taken. Subsequent amendments to the regulations are not pertinent to this case.

After preparing an EIS, the agency will "prepare a concise record of decision," in which it will, among other things, "[s]tate what the decision was" and "specify[] the alternative or alternatives which were considered to be environmentally preferable." *Id.* at § 1505.2. Once an EIS's analysis has been solidified in the ROD, "an agency has taken final agency action, reviewable under [5 U.S.C.] § 706(2)(A)." *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118 (9th Cir. 2010).

2. The Refuge Act

The National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd et seq., formally consolidated and provided a governing framework for the various federal wildlife refuges, game ranges, and other waterfowl protection areas established by Congress. *See* H.R. Rep. No. 105-106, at 2 (1997). Congress amended the Act through the National Wildlife Refuge System Improvement Act of 1997. Pub. L. No. 105-57, 111 Stat. 1253 (Oct. 9, 1997). Among other changes, the amendments established the Refuge's System mission of "conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats," and recognized

"wildlife-dependent recreational uses," such as hunting, fishing, and wildlife observation, as "priority general public uses" of the Refuge System. 16 U.S.C. § 668dd(a)(2), (3); H.R. Rep. No. 105-106, at 3–4. Congress did not intend for the amended Act "to in any way change, restrict, or eliminate" existing rights-of-way in Refuges, such as those "for roads, oil and gas pipelines, electric transmission, communication facilities, and other utilities." *Id.* at 13.

The Refuge Act explicitly authorizes FWS to "permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines . . . including the construction, operation, and maintenance thereof." 16 U.S.C. § 668dd(d)(1)(B). To permit such a use of a refuge, FWS must "determine[] that such uses are compatible with the purposes for which these areas are established." *Id.* A "compatible use" is "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or purposes of the refuge." *Id.* § 668ee(1). FWS has

established detailed guidelines for making these "compatibility determinations." *See* 50 C.F.R. § 26.41.

The Refuge Act separately authorizes the Secretary to "[a]cquire lands or interests therein by exchange . . . for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition." 16 U.S.C. § 668dd(b)(3). According to FWS's Manual, "[l]ands under Service or other Federal agency control can be exchanged for land having greater potential for achieving habitat protection objectives." U.S. Fish and Wildlife Service, Fish and Wildlife Service Manual, 341 FW 2.2.D. Land exchange procedures include appraisal, environmental review, and title review, among other requirements. 342 FW 4, 5; U.S. Department of the Interior, Department Manual, 602 DM 1, 2. The approval of the Director or Regional Director of FWS "is required for the acquisition of lands or interests by exchange." 342 FW 5.7.B.

3. The Rural Electrification Act

RUS is a federal agency within U.S. Department of Agriculture that promotes rural infrastructure improvements. The Rural Electrification Act of 1936, 7 U.S.C. §§ 901 et seq., authorizes the

agency to make and guarantee low interest loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines . . . in rural areas." *Id.* § 904(a); *see id.* § 902. Thus, RUS "is a lending agency rather than a classic public utility regulatory body." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 386 (1983).

B. Factual background

1. The CHC Project

This case concerns the CHC Project, a proposed 101-mile, high-voltage transmission line designed to carry electricity between Dubuque County, Iowa, in northeastern Iowa, and Dane County, Wisconsin, in southern Wisconsin. Intervenors' Appendix ("IA") 1176.[4] The line would, among other things, increase the transfer capability of the electric power system between Iowa and Wisconsin, expand access to renewable energy generation, and reduce electric transmission congestion. *Id.* at 838.

[4] Consistent with this Court's order to "avoid unnecessary duplication," Doc. No. 51, Federal Defendants cite to Intervenors' Appendix, Doc. No. 20, where possible.

The CHC Project has its origins in the federally-authorized regional electric transmission planning process. The Midcontinent Independent System Operator ("MISO") is a non-profit regional electric grid transmission organization covering Iowa and Wisconsin, as well as 13 other U.S. states and parts of Canada. *Id.* at 387. As provided by the Federal Energy Regulatory Commission pursuant to the Federal Power Act, MISO is "responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades" to the electric grid. 18 C.F.R. § 35.34(k)(7); *see* 16 U.S.C. § 824; *Reg'l Transmission Organizations*, 89 FERC ¶ 61,285 (1999).

Exercising these federally-authorized powers, MISO issued a Transmission Expansion Plan in 2011. IA 95. The plan identified a series of proposed "multi-value projects" intended to, among other goals, "enable 41 million MWh of wind energy per year to meet renewable energy mandates and goals." *Id.* at 96. One of these proposed projects was the transmission line that would become the CHC Project. *Id.* at 96–97. MISO's Board of Directors approved the proposed multi-value project portfolio in 2012 and directed "transmission owners to use due diligence to construct the facilities approved in the plan." *Id.* at 837.

The Board also reconfirmed the benefits of the portfolio in 2014 and 2017. *Id.* at 835.

American Transmission Company LLC ("ATC"), ITC Midwest LLC ("ITC"), and Dairyland Power Cooperative ("Dairyland"), utilities within the MISO service area and collectively "Intervenors," plan to construct, co-own, and operate the CHC Project. *Id.* at 788, 837. The entire project route is located within a large, four-state region of the upper-Midwest known as the "Driftless Area," which is "distinguished by hilly uplands." *Id.* at 914. Much of the original vegetation in this area has been converted to agricultural uses and scattered residences are common throughout the area. *Id.* Approximately 97 miles of the 101-mile project route are collocated with existing rights-of-way for transmission lines, railroads, and roadways. *Id.* at 1195. As originally proposed, a small portion of the project route, 1.3 miles, would pass through the Refuge on the southwestern bank of the Mississippi River in Iowa. *Id.* However, all other portions of the project would cross private land. *Id.* at 877.

Because the CHC Project utilizes existing rights-of-way and crosses primarily private land, the large majority of the project does not

require federal approval. Rather, the project has already been permitted by state utility regulators in both Wisconsin and Iowa. *Id.* at 673; *In Re: ITC Midwest LLC & Dairyland Power Coop.*, No. E-22386, 2020 WL 2949408 (May 26, 2020). Potential federal approvals related to discrete aspects of this project are the subject of this appeal.

2. RUS's potential financial assistance and EIS

RUS's involvement with the CHC Project began when Intervenor Dairyland indicated its intent to pursue financial assistance from the agency to support its 9% ownership interest in the project. *See* IA 828. As a condition of applying for RUS funding, Dairyland, joined by the other Intervenors, also conducted several preliminary environmental studies required by RUS. *See* 7 C.F.R. § 1970.5(b); 40 C.F.R. § 1506.5(a); Rural Utilities Service, RUS Staff Instructions, Part 1970-O (2016); IA 217–555.

RUS then prepared an EIS studying the effects of the entire CHC Project in anticipation of potentially making a funding decision for Dairyland. *See id.* at 787. It served as the lead agency for the NEPA process, with the U.S. Army Corps of Engineers ("Corps"), FWS, and the U.S. Environmental Protection Agency participating as cooperating

agencies. *Id.* RUS issued a Draft EIS on December 7, 2018, and a Final EIS on October 23, 2019. 83 Fed. Reg. 63,149; 84 Fed. Reg. 56,756. The Final EIS, spanning more than 1,000 pages, outlined a six-part purpose and need statement, setting out the objectives to be furthered:

> (1) Address reliability issues on the regional bulk transmission system, (2) Alleviate congestion that occurs in certain parts of the transmission system, (3) Expand the access of the transmission system to additional resources, (4) Increase the transfer capability of the electrical system between Iowa and Wisconsin, (5) Reduce the losses in transferring power and increase the efficiency of the transmission system, and (6) Respond to public policy objectives aimed at enhancing the nation's transmission system.

IA 838 (cleaned up).

Based on the purpose and need statement, the EIS considered six "action" alternatives, consisting of different combinations of transmission line route segments, as well as a "no action" alternative. *Id.* at 800. The action alternatives included two different feasible Mississippi River crossing points: the Stoneman crossing and the Nelson Dewey crossing, both within the Refuge. *Id.* at 804.

The EIS explained that various other alternatives were considered but not evaluated in detail because they did not meet RUS's purpose and need statement. *Id.* at 799–800. These alternatives included alternative route corridors, alternative river crossing locations

including non-Refuge crossings, a lower voltage transmission line, an underground transmission line, and non-transmission alternatives such as energy storage, energy efficiency, and demand response. *Id.*; *see also* FA 332–48; IA 859–76.

On January 16, 2020, RUS signed a Record of Decision ("ROD"), determining that its NEPA review was complete and met its environmental requirements for financial assistance for Dairyland in connection with the CHC Project.[5] IA 1178, 1223; *see* 85 Fed. Reg. 8,554 (Feb. 14, 2020). The ROD, however, is not a determination as to Dairyland's potential future request for financial assistance. Such a determination is contingent on, among other things, additional financing and engineering considerations. IA 1178; *see* 7 C.F.R. §§ 1710.151, 1710.152. Dairyland intends to seek funding from RUS "only after the completion of construction" of the CHC Project, "likely in the second half of 2023." FA 226.

[5] FWS and the Corps also signed the ROD as cooperating agencies. IA 1224–25.

3. FWS's rescinded Right-of-Way permit and ongoing consideration of other Refuge crossing options

Congress created the Upper Mississippi River National Wildlife and Fish Refuge in 1924, "as a refuge and breeding place for migratory birds," as well as other types of wildlife, wildflowers, and aquatic plants. 16 U.S.C. § 723; *see* Pub. L. No. 68-346, 43 Stat. 650; (June 7, 1924). The Refuge encompasses approximately 240,000 acres in Minnesota, Wisconsin, Iowa, and Illinois, and extends 261 river miles along the Mississippi River. IA 83. However, the Refuge is not continuous along the Mississippi River. It has many small breaks near, for example, dams, bridges, transmission lines, and cities. *See id.* at 231–34.

Intervenors began meeting with FWS in April 2012 to discuss potential routes for the CHC Project across the Mississippi River. *Id.* at 865. At the request of FWS, Intervenors developed the Alternative Crossings Analysis report in order to assess alternatives that would not involve or affect Refuge lands. *Id.* The report, a detailed study spanning more than 400 pages and completed over three years, found that only two crossings within the Refuge, at the Nelson Dewey and

Stoneman locations, were technically and economically feasible. *See id.* at 217–378.

The Stoneman crossing location is subject to two separate easements, a "right of way easement for rural electric line purposes in favor of Dairyland Power Cooperative . . . filed February 4, 1950," and a "transmission line easement in favor of Interstate Power Company. . . filed January 12, 1963." *Id.* at 78–79; FA 314–15. Intervenors now operate two transmission lines, both of which have a lower capacity than the CHC Project, on these easements. IA 60. Rebuilding a transmission line pursuant to the broad terms of the 1963 easement would allow Intervenors to build the CHC Project transmission line through the Refuge at the Stoneman crossing without obtaining any compatibility determination or new property rights from FWS. *See* FA 315; 603 FW 2.10.B ("Where reserved rights or legal mandates provide that we must allow certain activities, we should not prepare a compatibility determination.").

In 2019, Intervenors applied for a Right-of-Way permit and Compatibility Determination that would allow the project to cross the Refuge at the other feasible river crossing, the Nelson Dewey location.

See FA 316–23. As part of the proposal, Intervenors would remove their two existing transmission lines in the nearby Stoneman crossing location, and then restore the decommissioned right-of-way. *See id.* at 322–23. Intervenors also proposed to convey an additional 30 acres of land to FWS for conservation purposes. IA 1160.

The proposed Nelson Dewey crossing had distinct environmental advantages over the Stoneman crossing. First, the proposed route "parallels an active railroad and Oak Road, both of which are existing sources of habitat fragmentation," and so "would have minor additional impacts." *Id.* at 1162, 1164. Thus, the proposal would "result in reduced habitat fragmentation and restoration of larger contiguous blocks of habitat" compared to building the CHC transmission line through the Stoneman crossing. *Id.* at 1164. The proposed right-of-way at the Nelson Dewey crossing also allowed for H-frame utility poles that stand lower than the tree canopy thus reducing avian impacts, whereas the 1963 easement at the Stoneman crossing is not wide enough to support H-frame utility poles. *Id.* at 1156–57; *see* FA 315.

On December 19, 2019, FWS issued a compatibility determination, which provided that Intervenors' proposed right-of-way at the Nelson

Dewey crossing was a "compatible use" that would not "materially interfere with or detract from" the purpose of the Refuge or the refuge system. IA 1166–67. The Compatibility Determination categorized the proposed right-of-way as a "minor realignment of an existing right-of-way to meet safety standards," because it would "significantly reduce safety concerns in the Town of Cassville" by relocating the Intervenors' existing right-of-way at the Stoneman crossing. 50 C.F.R. § 26.41(c); IA 1167. This categorization required FWS to consider whether Intervenors' proposal, including the transfer of 30 acres of conservation land, would "ensure no net loss of habitat quantity and quality" and that mitigation lands would be "permanent[ly] protect[ed] as part of the national wildlife refuge." 50 C.F.R. § 26.41(c); IA 1160.

FWS signed RUS's ROD on January 8, 2020, attaching its 2019 Compatibility Determination and agreeing that the EIS's preferred alternative, utilizing the Nelson Dewey crossing, "most effectively avoids, minimizes, and mitigates impacts to the Refuge." *Id.* at 1178. On September 8, 2020, relying on the Compatibility Determination, FWS issued a Right-of-Way permit authorizing Intervenors to construct the project through the Refuge at the Nelson Dewey crossing. *Id.* at

1228–38. In March 2021, Intervenors applied to FWS for an amended right-of-way so that the Project could be re-routed to avoid a Native American burial mound site off Refuge lands. *See id.* at 54–55; ECF No. 67, at 3.

In July 2021, before receiving a response to their request for an amended right-of-way, Intervenors sent a letter to FWS requesting a land exchange as an alternative to the 2020 Right-of-Way permit. IA 59–61. Under this new proposal, Intervenors would surrender their existing 28.1-acre right-of-way at the Stoneman crossing and a 30-acre parcel of conservation land adjacent to the Refuge; in exchange, FWS would transfer to Intervenors the 19-acre parcel at the Nelson Dewey crossing originally subject to the 2020 Right-of-Way permit. *Id.* On August 3, 2021, FWS indicated by letter that it would timely review Intervenors' land exchange request. *Id.* at 63.

On August 27, 2021, FWS informed Intervenors that in reviewing their amended right-of-way application, it discovered that it had made an error in its 2019 Compatibility Determination. *Id.* at 66–67. In assessing whether the project would constitute a "minor expansion or minor realignment" of an existing right-of-way, 50 C.F.R. § 26.41(c),

FWS had not reviewed the correct easement documents for the "existing rights-of-way for the transmission lines that presently cross the Refuge" at the Stoneman crossing. IA 66–67. Accordingly, FWS determined that it would rescind the 2019 Compatibility Determination and revoke the 2020 Right-of-Way permit. *Id.* The letter reaffirmed that FWS was committed to working with Intervenors toward timely review of the proposed land exchange and provided "that a land exchange is a potentially favorable alternative to a right-of-way permit." *Id.* FWS has not made a decision on whether to approve Intervenors' proposed land exchange.

4. The Army Corps of Engineers' authorizations

The Corps provided a limited number of authorizations for CHC Project activities pursuant to its authority under Section 404 of the Clean Water Act ("CWA") to regulate the discharge of dredged or fill material into waters of the United States. 33 U.S.C. § 1344(e). Under its 2018 Utility Regional General Permit, the Corps issued verifications authorizing Intervenors to place nine transmission structures and temporary timber matting in jurisdictional wetlands in Wisconsin. FA 356, 363. Pursuant to the Corps' 2017 Nationwide Permit 12 ("NWP

12"), the Corps also issued a verification authorizing Intervenors to place fourteen transmission structures and temporary timber matting in jurisdictional wetlands in Iowa.[6] IA 1005. Because the Corps performed independent NEPA processes for these general permits, neither the general permits nor the Corps' project-specific verifications relied on RUS's EIS for the CHC Project. *See id.* at 565, 583.

The CHC Project required a Section 10 Rivers and Harbors Act permit in order to cross the Mississippi River, which the Corps also verified on November 20, 2019. *Id.* at 1005. And because the Corps controls an approximately 9-acre tract of land along the CHC Project's original proposed right-of-way in the Refuge at the Nelson Dewey crossing, the January 2020 ROD provided that the Corps would "issue an easement across USACE-managed/owned lands," which the Corps later executed on September 23, 2020. *Id.* at 1181. Plaintiffs never challenged the Corps' easement grant.

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[6] The Corps reissued NWP 12 in 2021, and the reissued permit no longer covers transmission lines like the one here. *See* 86 Fed. Reg. 2,744 (Jan. 13, 2021). Intervenors have represented that they will seek a new authorization for future work in jurisdictional waters in Iowa if required.

C. Procedural background

This case concerns the most recent of several challenges related to the CHC Project. *See Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 517 (7th Cir. 2021). In February 2021, Plaintiffs sued RUS and FWS, alleging two claims pursuant to the Administrative Procedure Act ("APA"): (1) that the ROD approving RUS's EIS violated NEPA; and (2) that FWS's Right-of-Way permit and Compatibility Determination, both then still in effect, violated the Refuge Act. FA 64–85. The operative complaint does not mention, much less challenge, the approval of a hypothetical land exchange request. In May 2021, Plaintiffs filed a separate action against the Corps, alleging various challenges to the permissions granted by the Corps. *See id.* at 86–128. On joint motion of the parties, the district court consolidated the two actions. *See* ECF No. 46.

In August 2021, Intervenors moved to stay proceedings pending FWS's review of, among other matters, their pending land exchange request. *See* ECF No. 49. The district court did not rule on Intervenors' motion, and later denied it as moot. *See* FA 44. Also in August 2021, Federal Defendants notified the court that FWS had withdrawn the

2019 Compatibility Determination and 2020 Right-of-Way permit. *See* IA 64–65.

While summary judgment briefing was ongoing between September 2021 and November 2021, Intervenors notified Plaintiffs that they intended to start construction in Wisconsin in late October. *See* FA 229. Plaintiffs moved for a preliminary injunction against the entire CHC Project, but the district court granted a narrower injunction, enjoining Intervenors from "any activities requiring permission under" one of the Corps' general permits. *Id.* at 313.[7]

On January 14, 2022, the district court granted summary judgment in favor of Plaintiffs in part, on grounds different from its preliminary injunction order. *See id.* at 1–45. First, it held that Plaintiffs' Refuge Act challenge against FWS's rescinded Compatibility Determination and Right-of-Way permit was not moot. *Id.* at 6–13. It also held that Plaintiffs had a "ripe" challenge to FWS's hypothetical approval of Intervenors' requested land exchange. *Id.* at 13–17. The

[7] Intervenors appealed the district court's preliminary injunction order, ECF No. 167, but later voluntarily dismissed that appeal. *See Driftless Area Land Conservancy v. Am. Transmission Co.*, No. 21-3123 (7th Cir. Mar. 9, 2022).

court further found that Plaintiffs had standing to bring all their claims. *Id.* at 17–23.[8]

On the merits of Plaintiffs' Refuge Act claim, the court held that FWS's withdrawn right-of-way was not a "minor realignment" that allowed for a compatibility determination pursuant to 50 C.F.R. § 26.41(c), and that such a right-of-way would not otherwise meet the requirements for a finding of compatibility. FA 23–32. It also held that it would "undermine the purposes of the Refuge Act" to allow FWS to approve a land exchange request in the future without making a compatibility determination, and that the CHC Project passing through the Refuge by land exchange would not be a compatible use. *Id.* at 32–35. On Plaintiffs' NEPA claim, the court held that RUS's EIS was "insufficient" because it "defined the purpose and need of the CHC project so narrowly as to define away reasonable alternatives." *Id.* at 35–41. Finally, the court affirmed the Corps' determination that its

[8] Without agreeing that the district court's opinion was correct, Federal Defendants have chosen not to appeal the district court's jurisdictional or merits rulings with respect to the 2019 Compatibility Determination and 2020 Right-of-Way permit. Those rulings have no ongoing practical effect because FWS does not intend to issue any similar authorizations at the Nelson Dewey crossing location in the future.

Utility Regional General Permit covered CHC Project activities, departing from its preliminary injunction order. *Id.* at 41–44.

After remedy briefing, the district court issued a final judgment that: (1) vacated and remanded "[t]he Record of Decision issued by [RUS]"; (2) declared "that the compatibility determination precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer"; and (3) vacated and remanded "the defendants' Environmental Impact Statement and Records of Decision." *Id.* at 46–47. The court also entered judgment in favor of Federal Defendants on all remaining claims. *Id.*

Intervenors, after filing their notice of appeal, moved for a stay pending appeal on March 21, 2022, and then filed their opening brief on April 13, 2022. Doc. Nos. 9, 18. Federal Defendants filed their notice of appeal on April 29, 2022. ECF No. 208. This Court denied Intervenors' stay pending appeal motion on May 6, 2022. Doc. No. 52. Plaintiffs cross-appealed, and moved for an injunction pending appeal. Doc. No. 53-1. This Court denied Plaintiffs' motion without prejudice on May 25, 2022. Doc. No. 54.

SUMMARY OF THE ARGUMENT

1. The district court erred in adjudicating whether FWS's hypothetical approval of Intervenors' proposed land exchange would violate the Refuge Act.

a. Plaintiffs simply failed to plead a claim challenging an actual or hypothetical land exchange. The district court erred by adjudicating a claim Plaintiffs improperly argued in briefing, and only clearly asserted in a reply brief filed in support of their motion for summary judgment.

b. Even if Plaintiffs did assert a claim as to the hypothetical approval of Intervenors' pending land exchange request, such a claim did not challenge a final agency action. FWS's ongoing consideration of a potential land exchange does not consummate its decisionmaking process, nor does the mere pendency of Intervenors' land exchange request determine rights and obligations or have legal consequences. FWS's letter stating that it would timely consider that request is the quintessence of non-final action.

c. Even if FWS's uncompleted consideration of a proposed land exchange could be construed as a final agency action (which it could

not), and even if that action had been challenged by Plaintiffs (which it was not), such a challenge would be unripe. First, any claim as to a land exchange is not yet fit for judicial decision because FWS has not prepared an administrative record for, nor rendered a decision on, Intervenors' request. Second, delaying review until FWS makes a decision on the request would not harm Plaintiffs, who suffer no injury from the pendency of the request and may challenge any consummated land exchange at the time of approval.

2. The district court erred in adjudicating Plaintiffs' NEPA challenge, in holding that the purpose and need statement in RUS's EIS was arbitrary and capricious, and in vacating not only RUS's ROD but also its EIS.

a. Plaintiffs fail to meet their burden of demonstrating standing to assert a NEPA claim. Plaintiffs claim injury associated with the construction of the CHC Project, but their complaint expressly invoked NEPA as a basis for relief against *RUS*. RUS completed the EIS in preparation for a potential grant of funding for Dairyland's 9% stake in the CHC Project, but lacks authority to authorize project construction. Plaintiffs have not demonstrated that project construction

is dependent on the approval of funding for Dairyland's minor stake in the project, and indeed concede that it is not clear whether any federal financing will be provided for the project at all. Thus, the mere prospect of RUS possibly later funding a small share of the project does not cause Plaintiffs actual or imminent harm, and delivering relief against that funding is not likely to redress any harm associated with project construction.

b. On the merits, the district court erred in concluding that RUS's EIS contained an impermissibly narrow purpose and need statement that excluded the consideration of reasonable alternatives.

First, RUS permissibly included increasing transfer capability between Iowa and Wisconsin as one of the elements of its purpose and need statement. Courts have upheld similar project goals as reasonable, such as increasing baseload energy generation. As the district court conceded, the purpose of increasing transfer capability between two states cannot become any more general.

Second, RUS's entire six-element purpose and need statement did not unreasonably exclude alternatives. The purpose and need statement allowed for a robust consideration of six different "action"

alternatives and one "no action" alternative in the EIS. In addition, RUS declining to consider Plaintiffs' specific preferred non-transmission alternatives, such as energy efficiency measures, does not make its purpose and need statement arbitrary or capricious.

Third, RUS's EIS reasonably relied on MISO's transmission planning process in defining its purpose and need statement. When MISO recommended the construction of the CHC Project, it did so as part of its federally-authorized transmission planning process. RUS was entitled to rely on that process in developing its EIS. Although the district court did not reach the issue, RUS was also permitted to take Intervenors' goals for the project into account in developing its purpose and need statement.

c. On remedy, an agency's EIS is not the final agency action subject to review in a NEPA challenge. Because a court may only provide relief against a final agency action under the APA, the district court erred in vacating RUS's EIS, separate and apart from its errors on the merits. Vacating the ROD alone, rather than also vacating the entire EIS would allow RUS to correct the specific errors identified by

the district court in the EIS, rather than reworking its entire EIS process from the beginning.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Flexible Steel Lacing Co. v. Conveyor Accessories, Inc.*, 955 F.3d 632, 643 (7th Cir. 2020). To the extent that any of the agency actions challenged by Plaintiffs are subject to judicial review, the APA's "highly deferential" review standard governs. *Smith v. Off. of Civilian Health & Med. Program of Uniformed Servs.*, 97 F.3d 950, 955 (7th Cir. 1996); *see* 5 U.S.C. §§ 701–706. Plaintiffs must show that the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Highway J Citizens Grp. v. Mineta,* 349 F.3d 938, 952 (7th Cir. 2003) (quoting 5 U.S.C. § 706(2)(A)). "The court is not empowered to substitute its judgment for that of the agency." *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

ARGUMENT

I. The district court erred in adjudicating whether the hypothetical approval of Intervenors' pending request for a land exchange would violate the Refuge Act.

The district held that a claim against FWS's hypothetical approval of Intervenors' pending land exchange request was "ripe" for review. *See* FA 13–17. But Plaintiffs never asserted a claim regarding the land exchange in their complaint, FWS took no final agency action with respect to Intervenors' land exchange request, and a claim as to the hypothetical approval of a land exchange request is in any event unripe.

A. The district court erred in adjudicating a claim not pleaded in the operative complaint.

The district court erred in reaching the issue of a land exchange because Plaintiffs never properly pleaded any challenge against a land exchange. In the district court, Plaintiffs filed a complaint challenging FWS's Compatibility Determination and Right-of-Way permit pursuant to the Refuge Act. *See id.* at 75–85. Even the idea of a land exchange is not mentioned in the operative complaint. After Intervenors proposed a possible land exchange with FWS, Plaintiffs opted not to amend or supplement their complaint to add a claim against such an exchange. *See* Fed. R. Civ. P. 15.

Instead, at summary judgment, Plaintiffs initially argued that FWS should not be able to "circumvent" the requirements of the Refuge Act by approving a land exchange. *See* FA 193, 203–06. Plaintiffs then shifted to arguing in their opposition brief that a land exchange was ripe for review. ECF No. 110, at 38–40. It was not until their reply brief that Plaintiffs debuted the argument that a hypothetical land exchange is "reviewable now as a final agency action." *See* ECF No. 163, at 32; *United States v. Diaz*, 533 F.3d 574, 577 (7th Cir. 2008) ("Arguments may not be raised for the first time in a reply brief.").

Because Plaintiffs entirely failed to plead a challenge regarding a land exchange, the district court erred in ruling on Plaintiffs' "challenge to land transfer" (which it alternatively calls a "land exchange"). FA 13. Even under the lenient pleading standards of Fed. R. Civ. P. 8(e), it is impossible to construe Plaintiffs' complaint as challenging the hypothetical future approval of Intervenors' proposed land exchange. *See Holman v. Indiana*, 211 F.3d 399, 407 (7th Cir. 2000). Given the obvious unfairness to a defendant, *see* Fed. R. Civ. P. 1, a district court errs when it grants judgment to a plaintiff on a claim that was not pleaded, and was not even clearly argued until a reply filed in support

of a motion for summary judgment. *Marshall v. Anderson Excavating & Wrecking Co.*, 901 F.3d 936, 943 (8th Cir. 2018) ("Given that the plaintiffs did not raise an alter ego theory in their pleadings or at trial, the district court erred in raising the issue sua sponte."); *Michelson v. Exxon Rsch. & Eng'g Co.*, 808 F.2d 1005, 1009 (3d Cir. 1987) ("We have a problem with the notion of granting summary judgment on a claim that was never pleaded."). This Court should reverse the district court's judgment on the hypothetical approval of Intervenors' land exchange request on this basis alone.

B. Any claim as to the hypothetical approval of the pending land exchange request would not challenge any final agency action.

Under the APA, only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Because the Refuge Act does not separately provide for judicial review, any Refuge Act claim here must challenge "final agency action." *See id.*; 16 U.S.C. § 668dd. The district court erred in deciding a Refuge Act claim as to a

hypothetical approval of Intervenors' pending land exchange request absent final agency action.[9]

First, it is beyond any doubt that a hypothetical future approval of Intervenors' pending land exchange request is not a final agency action that could ground a present APA challenge. A final agency action (1) "must mark the 'consummation' of the agency's decisionmaking process," and (2) "must be one by which 'rights and obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997). On the first *Bennett* factor, FWS's mere consideration of Intervenors' proposed land exchange does not mark the consummation of FWS's decisionmaking process. The land exchange request is still pending with FWS, Plaintiffs themselves acknowledge that "[n]o land exchange has . . . been approved or completed," FWS has not prepared a decision document for a land exchange, and the Director or Regional Director of

[9] Under this Court's case law, lack of final agency action may be viewed as either rendering the claim invalid under the APA, or alternatively depriving the district court of jurisdiction. *See Dhakal v. Sessions*, 895 F.3d 532, 541 (7th Cir. 2018) (affirming dismissal of complaint for lack of final agency action); *Abbs v. Sullivan*, 963 F.2d 918, 925–26 (7th Cir. 1992) (holding that APA "confines . . . review jurisdiction to 'final agency action'"). Under either framework, dismissal was required.

FWS has not approved such an exchange. FA 163. On the second *Bennett* factor, a pending land exchange request that has not yet been approved does not determine any "rights and obligations" or mark any decision from which "legal consequences will flow." *Bennett*, 520 U.S. at 178.

Relatedly, FWS's August 27, 2021 letter regarding Intervenors' land exchange request is not a final agency action. The district court relied on factors articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), to hold that the letter was a reviewable "statement of intent." FA 15. But *Abbott* and its "pragmatic" view of finality does not excuse the district court from analyzing *Bennett*'s two-prong finality test. *See generally*, 520 U.S. 154. FWS's letter states that "a land exchange is a potentially favorable alternative to a right-of-way permit" and agrees to review the utilities' request in a timely fashion, which does not meet *Bennett*'s two-prong test for final agency action. IA 66.

Regarding the first *Bennett* factor, the letter is not the consummation of any decisionmaking process. It states that FWS is committed to "timely review of the land exchange," which itself indicates future action on the land exchange is pending. *Id.*; *see*

Bennett, 520 U.S. at 177–178. FWS's letter allows for further agency evaluation of the land exchange request and so would be "tentative" to the extent it endorsed any outcome at all—which it does not. *Dhakal*, 895 F.3d at 539 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

As to the second *Bennett* factor, the letter does not determine rights and obligations, and is not an action from which legal consequences will flow. The letter only states that "a land exchange is a *potentially* favorable alternative to a right-of-way permit." IA 66 (emphasis added). It is "purely informational in nature," and thus cannot be a final agency action because it "impose[s] no obligations and denie[s] no relief." *Menominee Indian Tribe of Wisconsin v. Env't Prot. Agency*, 947 F.3d 1065, 1070 (7th Cir. 2020) (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)).

Finally, the district court erroneously analogized FWS's letter to agency regulations characterized as final and reviewable statements of intent. *See* FA 15. In *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), the Supreme Court held that a regulation providing that the Federal Communication Commission would not

license local television stations maintaining certain proscribed contracts was a final and reviewable statement of intent. *Abbott*, 387 U.S. at 149–50. But unlike in *Columbia Broadcasting*, which concerns a properly promulgated and final rule, here the district court's analysis concerns a tentative letter contemplating further agency action. *See* FA 14–15. The regulation in *Columbia Broadcasting* also had legal consequence because expected adherence to the regulation would "cause[] injury cognizable by a court of equity," whereas the letter here presents no similar immediate threat to any party. *Abbott*, 387 U.S. at 150.

C. Any claim as to the hypothetical approval of the pending land exchange request would not otherwise be ripe for review.

The ripeness doctrine is designed "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 806 (2003) (citing *Abbott*, 387 U.S. at 148–49). Ripeness determinations depend on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty., 325 F.3d 879, 882 (7th Cir. 2003) (citing *Abbott*, 387 U.S. at 149). Here, even holding aside the fatal flaw of a lack of final agency action, which is a "crucial prerequisite to ripeness," *Sprint Corp. v. F.C.C.*, 331 F.3d 952, 956 (D.C. Cir. 2003) (cleaned up), the district court still erred in holding that a claim concerning the hypothetical approval of Intervenors' pending land exchange request is "ripe" for review under the pragmatic *Abbott* test. *See* FA 13.

On the first prong of the *Abbott* ripeness test, Plaintiffs' claim is not yet fit for decision because the agency has not had the opportunity to develop an administrative record for, or issue a final decision on, Intervenors' pending land exchange request. This factor treats a matter as unripe where "further factual development would 'significantly advance [the court's] ability to deal with the legal issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Here, FWS has not yet developed an administrative record on the hypothetical land exchange, which itself indicates that "further factual development" is required. *Id.*; *see, e.g.*, *Marcum v. Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012); *Schwob v. Standard Ins. Co.*, 37 F. App'x 465,

470 (10th Cir. 2002). Even more importantly, there is no way for a court to assess whether the land the Intervenors wish to exchange would be "suitable for disposition"—a threshold requirement for a land exchange under the Refuge Act, 16 U.S.C. § 668dd(b)(3)—without FWS making factual findings in an administrative record related to this question.

The district court held that it need not wait for the "creation of a new administrative record" because it perceived similarities between the proposed land exchange and the rescinded Compatibility Determination and Right-of-Way permit. FA 14. But at the same time, it held that a land exchange would be impermissible because FWS has "not offered any evidence to suggest that the land [exchange] is indeed suitable for disposition." *Id.* at 35. Essentially, the court penalized FWS for failing to make findings that the court itself indicated were not necessary to review FWS's activities. This logical inconsistency in the district court's analysis further illustrates that a claim as to the hypothetical approval of the pending land exchange request is not fit for decision until FWS can prepare an administrative record.

Under the second prong of the *Abbott* ripeness test, withholding judicial review of a claim as to a hypothetical approval of a pending land exchange request would not present a "hardship to the parties." 387 U.S. at 149. The possible future approval of a pending land exchange request does not "create adverse effects of a strictly legal kind." *Ohio Forestry*, 523 U.S. at 733. Rather, if FWS approves the proposed land exchange, Plaintiffs may challenge such a decision after it is issued, "when harm is more imminent and more certain." *Id.* at 734.

The district court theorized that if it "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" in the interim, inflicting damage on both ratepayers and the environment. FA 13. But ruling on the pending land exchange request now will not prevent these possible harms, because Intervenors may still build the transmission line up to the sides of the Refuge, or even build through the Refuge at the Stoneman crossing, regardless of the outcome in this case. *See supra*, p.16. Essentially, this harm—which is, at most, a practical rather than "strictly legal" harm—is too

attenuated for it to weigh on any ripeness consideration here. *See Abbott*, 387 U.S. at 152 (holding that impacts must be "sufficiently direct and immediate as to render the issue appropriate for judicial review").

Outside of the confines of an ordinary two-prong ripeness analysis under *Abbott*, the district court erroneously constructed its own ripeness theory based on speculation and assumptions about Intervenors' intended construction plans and FWS's land exchange policies. The district court assumed both that it is a foregone conclusion that the CHC Project will cross the Refuge, and that if the CHC Project cannot cross the Refuge by right-of-way, "the only alternative" is to cross the Refuge by land exchange. FA 13. It then theorized that because "the proposed land exchange would very likely have to meet the [] compatibility requirements of the Refuge Act,"[10] the "the issue of

[10] In support of the proposition that a land exchange would have to meet the compatibility requirements of the Refuge Act, the district court relied on *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011 (D. Alaska 2020). *See* FA 33–34. But the Ninth Circuit recently reversed that opinion in *Friends of Alaska National Wildlife Refuges v. Haaland*, 29 F.4th 432 (9th Cir. 2022).

compatibility -- whether by exchange or by right of way" is ripe for review. *Id.* at 14.

We note at the outset that the APA provides for judicial review of final agency actions, not of legal "issues" that may arise in future potential actions, as the district court asserts. *See* 5 U.S.C. § 704. But the district court's ripeness theory also relies on two other erroneous assumptions, both of which reinforce that a claim as to the hypothetical approval of the pending land exchange request is not yet ripe for review.

First, the district court's ripeness theory is based on an erroneous assumption that the CHC Project will be built through the Nelson Dewey crossing location by either right-of-way or land exchange. FWS has made no present commitment allowing the project to be built through the Refuge. Even if it can be assumed that Intervenors plan to construct the CHC Project through the Refuge, they may build the project through an existing transmission line easement at the Stoneman crossing, which would not require a compatibility determination from FWS. *See supra*, p.16. Thus, although the district court assumed otherwise, it is far from a certainty that the CHC Project will require a compatibility determination from FWS that is ripe for

review. Even a hypothetical claim as to a compatibility determination is not yet ripe.

Second, the district court's ripeness theory is based on an unwarranted assumption that a future land exchange would require a compatibility determination. There is an open question about what standards guide land exchanges executed pursuant to the Refuge Act. *See* 16 U.S.C. § 668dd(b)(3) (providing that the Secretary may exchange lands he "finds to be suitable for disposition"). FWS is in the early stages of developing policy or guidance on the appropriate legal standards for Refuge land exchanges, including on what specific findings are needed under the statute to support a land exchange. Thus, the district court's assumption that land exchanges require compatibility determinations "hinder[s] agency efforts to refine its policies." *Ohio Forestry*, 523 U.S. at 735. FWS, not the district court, is charged with administering the Refuge Act, so FWS should have an opportunity to opine on the Refuge Act's meaning in the first instance. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference

with agency processes."). Accordingly, it was not only inappropriate for the district court to assume that land exchanges require compatibility determinations, but FWS's ongoing evaluation of this issue also reinforces that a claim as to the hypothetical approval of the pending land exchange request is not yet ripe for review. *See Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985) ("A case is not ripe if the issues are still poorly formed.").

On the final issue of remedy, the district court's declaratory relief further indicates that a claim as to the hypothetical approval of Intervenors' pending land exchange is not yet ripe. The APA permits a court to "hold unlawful and set aside agency action," not to issue freestanding declaratory judgments regarding hypothetical future decisions the agency might make. 5 U.S.C. § 706(2).[11] Here, in the absence of any final agency action, the district court's final judgment declares "that the compatibility determination precludes the CHC transmission line as currently proposed from crossing the refuge by . . . land transfer." FA 47. This freestanding declaratory relief functions as

[11] Similarly, the Declaratory Judgment Act cannot confer jurisdiction where it does not exist otherwise. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

an impermissible advisory opinion with no legal effect beyond informing the agency how the court would rule on a future decision on the land exchange request. *See Flast v. Cohen*, 392 U.S. 83, 96–97 (1968). That the only available relief for a claim regarding a hypothetical approval of the pending land exchange is impermissible reinforces that such future action is not yet ripe for review.

II. The district court erred in adjudicating Plaintiffs' NEPA challenge, in determining that the NEPA analysis was insufficient, and in vacating RUS's EIS.

The district court reached the merits of Plaintiffs' NEPA challenge to hold that the purpose and need statement in RUS's EIS was arbitrary and capricious. *See* FA 17–23, 35–41. It then entered a remedy order not only vacating RUS's ROD, but also its EIS. *See id.* at 46–47. However, Plaintiffs do not have standing to assert their NEPA challenge, RUS's purpose and need statement was reasonable, and the district court exceeded its jurisdiction under the APA in vacating RUS's EIS.

A. Plaintiffs have failed to demonstrate standing to challenge RUS's EIS.

Without distinguishing between Plaintiffs' Refuge Act and NEPA claims, the district court generally held that Plaintiffs have standing to

bring this lawsuit. *See* FA 17–23. However, Plaintiffs fail to establish standing as to their NEPA claim in particular. Plaintiffs expressly pleaded NEPA as a basis for relief only against RUS, which prepared the EIS in anticipation of a decision on Dairyland's potential future funding application for its 9% ownership interest in the CHC Project. Plaintiffs did not plead NEPA as a basis for relief against FWS, and while they did include a NEPA claim in their complaint against the Corps, that complaint did not challenge the only Corps action relying on the challenged EIS. Thus, Plaintiffs only have a NEPA claim related to RUS's potential future funding decision. They lack standing because their alleged injury associated with construction of the CHC Project is not fairly traceable to RUS's potential future funding decision, nor can a favorable NEPA ruling redress their alleged injuries.

Standing is a jurisdictional question, which "involves whether a plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III." *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7th Cir. 2003). In order to establish standing, the plaintiff "must demonstrate an injury in fact; a causal link between the injury and the challenged action; and

redressability through a favorable court decision." *Texas Indep. Producers & Royalty Owners Ass'n v. E.P.A.*, 410 F.3d 964, 971 (7th Cir. 2005). The plaintiff must also "demonstrate standing for each claim he seeks to press and for each form of relief that is sought," *Davis v. Federal Election Commission*, 554 U.S. 724, 734 (2008) (internal quotations omitted), and carries this burden at successive stages of the litigation. *See Gracia v. SigmaTron Int'l, Inc.*, 986 F.3d 1058, 1063 (7th Cir. 2021). Where, as here, causation and redressability "hinge on the response of the regulated (or regulable) third party to the government action or inaction" being challenged, standing is "ordinarily substantially more difficult to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotations omitted).

Here, Plaintiffs fail to demonstrate standing because they cannot tie their asserted injuries associated with construction of the CHC Project to their challenge to RUS's potential future financial assistance. *See Texas Indep. Producers*, 410 F.3d at 972 (holding that a plaintiff must "tie the asserted injury . . . to the challenged conduct").

First, Plaintiffs' alleged injuries associated with construction of the CHC Project are not fairly traceable to RUS's potential future

financial assistance. Plaintiffs have failed to present evidence, or even allege facts, that RUS will approve Dairyland's potential future financial assistance application based on required finance and engineering reviews. *See* IA 1178. Plaintiffs have also failed to demonstrate that Intervenors' construction of the CHC Project is dependent on RUS providing funding for Dairyland's 9% ownership interest. Indeed, Intervenors have already started construction without RUS providing any definitive commitment on financial assistance, and Dairyland has indicated it will not apply for any financial assistance until after construction is complete. *See* FA 226, 229. Plaintiffs themselves conceded in briefing 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." *Id.* at 249. Thus, Plaintiffs have failed to establish a sufficient causal link between RUS's challenged future financial assistance and their asserted injuries associated with CHC Project construction.

Second, for largely the same reasons, delivering NEPA relief as to future financial assistance for Dairyland will not redress Plaintiffs' alleged injuries. Plaintiffs have not pleaded any facts demonstrating

that delivering the requested NEPA relief against RUS, or even eliminating RUS funding, likely would redress the harms associated with Intervenors constructing the CHC Project. Nor could they, for the reasons stated above. Plaintiffs challenging limited government grants of funding for ongoing third-party projects have similarly failed to establish redressability. *See S. E. Lake View Neighbors v. Dep't of Hous. & Urb. Dev.*, 685 F.2d 1027, 1038 (7th Cir. 1982) (holding that "with or without federal financing, the completed building will be occupied and the attendant congestion inevitable"); *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 70 (D.C. Cir. 2006) (holding that redressability not satisfied due to, among other factors, the "relatively minor role of the LOI dollars in funding Phase I of the O'Hare expansion"); *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1014 (9th Cir. 2018) (declining to find redressability where "[t]he Projects were already underway before the Ex-Im Bank committed financing, and the Ex-Im Bank provided only a minority portion of the Projects' financing").

The "relaxed" formulation of standing for procedural injuries does not apply to this analysis. Courts explain that the causation and

redressability requirements may be somewhat relaxed when examining "whether proper execution of the omitted procedure [here, a different NEPA analysis] will likely prompt a modification of the government's action." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996). But the problem with Plaintiffs' standing is not whether the government will take a different action based on additional NEPA analysis. The problem is that Plaintiffs have not shown "a causal connection between the government action that supposedly required the disregarded procedure," here the possible future financial assistance for Dairyland, "and some reasonably increased risk of injury to [their] particularized interest." *Id.* As explained, RUS's potential future financial assistance to Dairyland does not cause any reasonably increased risk of injury regarding the construction of the CHC Project, because the contemplated financial assistance would be only 9% of the overall project cost and Dairyland will not even request funding until after the project is built.

The district court erred in reaching a contrary conclusion in two related ways. First, it erred by failing to parse standing on a claim-by-claim basis. The court found that Plaintiffs had standing to bring this

lawsuit generally, failing to distinguish between Plaintiffs' Refuge Act claim and NEPA claim. *See* FA 17–23. It reasoned that "much more than just the Record of Decision is at issue," and that "[o]verturning the specific permits at issue would ameliorate at least some of plaintiffs' injuries," appearing to suggest that Plaintiffs' Refuge Act claim as to the Compatibility Determination and Right-of-Way permit conferred standing as to Plaintiffs' NEPA claim. *Id.* at 22–23. However, the district court erred because "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff must "demonstrate standing for each claim he seeks to press." *Davis*, 554 U.S. at 734.

Second, to the extent the district court looked specifically at Plaintiffs' NEPA claim, it erred by failing to recognize that Plaintiffs only sought relief as to RUS. The district court stated that the ROD "undergirds more than the RUS's funding decision," perhaps suggesting that Plaintiffs had standing as to their NEPA claim because FWS relied on the EIS in issuing its Right-of-Way permit, and the Corps relied on the EIS in issuing an easement in the Refuge. FA 22. But Plaintiffs' complaint did not expressly seek relief regarding FWS's Right-of-Way permit. *See id.* at 84 (requesting that the court "[e]njoin Defendant

RUS from providing any financial assistance, permits, or easements for the proposed CHC transmission line unless and until a final EIS is prepared and approved that fully complies with all NEPA requirements"). In its complaint against the Corps, Plaintiffs did not even mention the existence of the Corps' easement, the only Corps action which relies on RUS's EIS approved in the ROD. *See id.* at 86–128.[12] Because Plaintiffs cannot tie their asserted injuries to agency actions which they never challenged, the district court erred in relying on these actions to establish standing. *See Texas Indep. Producers*, 410 F.3d at 972.

B. The purpose and need statement in RUS's EIS was not arbitrary and capricious.

Assuming the district court had jurisdiction to reach the merits, it erred in deeming RUS's EIS arbitrary and capricious. Specifically, it held that RUS's EIS "defined the purpose and need of the CHC project so narrowly as to define away reasonable alternatives." FA 35. As explained above, although the question before RUS was whether to

[12] The Corps' actions challenged by Plaintiffs, such as the various verifications and Utility Regional General Permit, did not rely on RUS's EIS. *See* IA 565, 583; FA 126–27.

potentially provide funding for the project's minority stakeholder rather than to authorize the entire project, RUS prepared an EIS on the effects of the CHC Project as a whole. Accordingly, its purpose and need statement properly focused on the purpose and need for the full CHC Project. The purpose and need statement is based on reasonable general goals, and did not arbitrarily limit the consideration of alternatives. RUS also appropriately considered information provided by MISO in developing its purpose and need statement.

A purpose and need statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Because "an agency need follow only a 'rule of reason' in preparing an EIS," courts will uphold an agency's purpose and need statement, "so long as the objectives that the agency chooses are reasonable." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195–96 (D.C. Cir. 1991). A court should "owe and accord deference" to an agency on whether it has addressed the "purpose of the proposed project . . . in a permissible way." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 668–69 (7th Cir. 1997). Extending deference

as to an agency's definition of purpose and need is also particularly appropriate because the "'purpose' of a project is a slippery concept, susceptible of no hard-and-fast definition." *Id.* at 666. The district court failed to apply this deferential standard of review, *see* FA 35–41, and its ultimate conclusion regarding the purpose and need statement was in error for three reasons.

First, contrary to the district court's view, RUS permissibly included "increas[ing] the transfer capability of the electrical system between Iowa and Wisconsin," IA 788, as one of the elements of its purpose and need statement. In developing the purpose and need statement, this Court has provided that an agency should consider the "general goal" of a proposed action. *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). The district court opined that "it is hard to conceive of a goal much narrower than increasing transfer capacity between two states." FA 38. But contrary to the district court's view, a goal can be bounded by practical, on-the-ground needs and still be sufficiently general. For example, this Court has held that when evaluating whether to grant a permit to a nuclear generation facility, the goal of increasing "baseload energy generation" was a sufficiently

general purpose and need, such that the agency did not have to consider measures to decrease energy demand which the private company seeking the permit could not control. *Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 684 (7th Cir. 2006); *see also Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013) (acknowledging that baseload power is a permissible goal). Here, the EIS reasonably explained that there is a practical need to "create an outlet for additional wind power that would bring electricity from the wind-rich areas of the upper Great Plains to load centers like Madison and Milwaukee." IA 840. That practical need is similar to the need to "deliver coal from mine to utility," which this Court deemed a "general goal" pursuant to NEPA, notwithstanding that—as here—it involved transport from one particular location to another. *Van Abbema*, 807 F.2d at 638 (ruling against Corps on other grounds); *see also Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*, 883 F.3d 644, 655 (6th Cir. 2018) (accepting purpose of creating a continuous scenic pathway between two specific locations).

Furthermore, this case is not like *Simmons v. U.S. Army Corps of Engineers*. *See* FA 38. In *Simmons*, this Court held that because the

Corps had defined a water supply project's purpose as supplying users "from a single [water] source," rather than multiple water sources, it had "defined an impermissibly narrow purpose." 120 F.3d at 667. The "general goal" of the proposed project was "to supply water" to a city and its water district, "not to build (or find) a single reservoir to supply that water." *Id.* at 669. But whereas in *Simmons* a requirement that water be obtained from a single source impermissibly narrowed the "general goal" of supplying users with water, here the general goal of increasing transfer capability between Iowa and Wisconsin—which, as stated, is based on on-the-ground realities regarding where energy is generated and where it is needed—does not impermissibly narrow another reasonable "general goal." *See id.* Indeed, as the district court appears to concede, the purpose of "increas[ing] transfer capability of electric systems between Iowa and Wisconsin," IA 788, cannot become any more "general" without becoming divorced from the reality of where production and demand are located. *See* FA 38. RUS was not required to go any further in broadening this general goal of increasing transfer capability, similar to how *Simmons* did not require the Corps to

abandon the goal of obtaining more water by reconsidering users' "need for water" in the first place. *Env't L. & Pol'y Ctr.*, 470 F.3d at 683.

Second, the district court erred by holding that RUS's purpose of increasing transfer capability, combined with the other five elements of RUS's purpose and need statement, violated NEPA.[13] An agency may not "define the objective of its actions in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action." *Citizens Against Burlington*, 938 F.2d at 196. *Simmons* also provides that an agency cannot develop "a purpose so slender as to define competing 'reasonable alternatives' out of consideration." 120 F.3d at 666. Here, the district court held that RUS's EIS unreasonably constrained its purpose and need statement, writing that "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." FA 40.

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[13] Multi-pronged purpose and need statements themselves do not violate NEPA. *See, e.g.*, *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004); *Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 F. App'x 477, 487 (6th Cir. 2014); *HonoluluTraffic.com v. Fed. Transit Admin*, 742 F.3d 1222, 1231 (9th Cir. 2014).

But to the contrary, RUS's purpose and need statement allowed for reasonable consideration of a range of alternatives, including six "action" alternatives, as well as a "no action" alternative. *See* IA 800. These alternatives are not "substantially similar," FA 40, nor "minor route changes," *id.*, because they consist of different combinations of 30 different transmission line route segments, run anywhere between approximately 100 to 125 miles in length, and include two different crossings of the Mississippi River. *See* IA 876–79. A purpose and need statement allowing for the consideration of such alternatives is not unreasonably narrow. *See Env't L. & Pol'y Ctr.*, 470 F.3d at 684 (holding that "adopted purpose" of baseload energy generation "was broad enough to permit consideration of a host of energy generating alternatives."); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (holding that purpose to "act upon" proponent's drilling proposal "permits a reasonable range of alternatives that either reject the proposal or adopt it to varying degrees or with alterations").

The district court further erred in ruling against the six-element purpose and need statement based on an improper consideration of

specific preferred alternatives identified by Plaintiffs. The court found it problematic that in "looking at several, non-wire alternatives *favored by plaintiffs*, the EIS explicitly noted that each alternatives failed at least one sub-purpose of the project . . . ." FA 40 (emphasis added). But the exclusion of a particular preferred alternative does not invalidate an EIS's statement of purpose and need. *See Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73 ("[I]f the agency's objectives are reasonable," courts "will uphold the agency's selection of alternatives that are reasonable in light of those objectives.").

The exclusion of these preferred alternatives is also unlike *Simmons*, where an arbitrary "single source" requirement eliminated the reasonable alternative of increasing water supply from multiple sources. 120 F.3d at 667. Here, RUS reasonably eliminated the "non-transmission" alternatives favored by Plaintiffs because they failed to meet at least four different elements of the agency's purpose and need statement, each of which the district court acknowledged "might be sufficiently broad," and three of which Plaintiffs did not even

specifically challenge. IA 869; FA 40, 178.[14] Thus, a better analogy to this case is *Environmental Law & Policy Center*, where this Court held that eliminating plaintiffs' preferred "energy efficiency measures" alternative did not invalidate the permissible general purpose of increasing "baseload energy generation." 470 F.3d at 683–84. Like in *Environmental Law & Policy Center*, the exclusion of Plaintiffs' preferred alternatives here, including energy efficiency initiatives, did not render RUS's purpose and need statement arbitrary and capricious. *See id.*

Third, RUS reasonably developed its purpose and need statement based on, among other considerations, information provided by MISO. The district court held that the EIS's purpose and need statement "adopts one of the three utilities' (MISO's) stated purpose for the CHC project almost verbatim," which "drastically narrowed the alternatives reviewed in the EIS," and accordingly "fails to comply with NEPA." FA 40–41. As an initial matter, RUS did not adopt MISO's stated purpose

[14] Plaintiffs Driftless Area Land Conservancy and Wisconsin Wildlife Federation also conceded in their comments on the EIS that the five elements of the purpose and need statement apart from the "transfer capability" element "are broad enough to meet NEPA requirements." FA 354–55.

for the CHC project "almost verbatim." *Id.* at 40. FWS's "Multi Value Project Analysis Report," cited by the court, *id.* (citing IA 138), does not correspond with FWS's six-element purpose and need statement. *Compare* IA 138 *with id.* at 838. MISO also is not one of the three Intervenor utility companies that applied for federal authorizations related to the CHC Project, but rather a non-profit regional electric grid transmission organization. *See id.* at 387.

In any event, RUS permissibly relied on MISO's federally-authorized transmission planning process in developing its purpose and need statement. When MISO conducted a detailed process to study, develop, and approve the multi-value project portfolio, which recommended construction of the CHC Project, it was exercising its federally-authorized authority "for planning and directing expansions and upgrades of its grid." *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013); *see* 16 U.S.C. § 824(a); 18 C.F.R. § 35.34(k)(7); Reg'l Transmission Organizations, 89 FERC ¶ 61,285 (1999). RUS considered MISO's findings when it developed a project purpose and need statement, both generally because MISO originally identified a need for the CHC Project, and specifically by incorporating information

and data compiled by MISO. IA 838, 840–41, 844–45. In so doing, RUS permissibly relied on a federally-authorized planning process. *See North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (holding that "officials complied with federally mandated regional planning procedures in developing the need and purpose section of the EIS."); *HonoluluTraffic.com*, 742 F.3d at 1230 (holding that "purpose was defined in accordance with the statutorily mandated formulation of the transportation plan"). RUS also lacks the expertise to rework MISO's transmission planning process through NEPA, nor should it do so as that would usurp MISO's federally-delegated transmission planning authority. *See Hoosier Env't Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1061 (7th Cir. 2013) (holding that Corps assuming responsibility for Federal Highway Administration's alternatives analysis "would usurp" federal and state law).

Given that MISO was exercising its federally-authorized planning authority when it recommend construction of the CHC Project, the district court erred in analogizing RUS's reliance on MISO to *Simmons*. The district court suggests MISO is a "beneficiary" of the CHC project,

that its studies can be considered "self-serving statements," and that MISO "proposing the CHC Project" is an example of "private agreements" limiting "public interest in the environment." FA 41 (citing *Simmons*, 120 F.3d at 669–70). These assertions carry no weight when MISO carried out its planning process regarding the multi-value project portfolio pursuant to a federally-mandated obligation to conduct transmission planning, rather than as a private project sponsor. *See*, *e.g.*, 18 C.F.R. § 35.34(k)(7).

Finally, the district court did not reach the issue of whether RUS improperly considered Intervenors' objectives in developing its purpose and need statement. *See* FA 40–41. However, even if it the court did reach that issue, RUS did not improperly consider Intervenors' objectives. It is black-letter law that "agency action is entitled to a presumption of regularity," *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 595 (7th Cir. 1991), and a reviewing agency can take an applicant's goals for a project into account." *Env't L. & Pol'y Ctr.*, 470 F.3d at 683. A plain review of RUS's purpose and need statement demonstrates that the agency did not fail to "exercise a degree of skepticism" as to any "self-serving statements" from Intervenors. *Simmons*, 120 F.3d at 669; IA

837–42. Although Intervenors conducted studies which helped inform RUS's assessment of feasible *alternatives* in the EIS, *id.* at 859, the EIS's purpose and need statement only makes two reasonable references to these studies. *See id.* at 840–41 (listing interconnection agreements conditional on project); *id.* at 845 (noting Dairyland's need to replace equipment in absence of project). And in any event, the studies were not self-serving because RUS required their preparation, and in some cases dictated their contents. *See* 7 C.F.R. § 1970.5(b); RUS Staff Instructions, Part 1970-O.

C. The district court lacked authority to vacate RUS's EIS.

Apart from its erroneous consideration of the merits, the district court separately erred in vacating and remanding RUS's EIS. An EIS merely memorializes an agency's efforts to comply with NEPA. It is not by itself a final agency action subject to APA review. *See Oregon Nat. Desert Ass'n*, 625 F.3d at 1118 ("Once an EIS's analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under § 706(2)(A)."). Thus, when a plaintiff challenges the sufficiency of an EIS pursuant to the APA, the agency's ROD approving the EIS and concluding the NEPA process is the relevant decision subject to review.

See id.; *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016) ("The issuance of a ROD generally constitutes a final agency action."). In such a challenge, a court does not have the authority to "hold unlawful and set aside" an EIS, as opposed to the ROD, as the relevant challenged decision. 5 U.S.C. § 706(2); *see* § 704. Accordingly, the district court erred here when it vacated RUS's EIS. FA 47.

The district court's judgment also forces an unworkable mandate on RUS by vacating the agency's EIS. When the court vacated the EIS itself, it was requiring the agency to restart its entire detailed, lengthy, and costly NEPA process, conducted over several years and resulting in an EIS spanning over 1,000 pages. Instead, RUS should be permitted to decide how to fix any possible flaws in its NEPA analysis by either correcting or supplementing its original EIS.

CONCLUSION

For the foregoing reasons, this Court should reverse the portions of the district court's judgment that (1) declared that the CHC Project cannot cross the Refuge by "land transfer," and (2) vacated and remanded "[t]he Record of Decision issued by the Rural Utilities

Service," and "the defendants' Environmental Impact Statement and Records of Decision."

Even if the district court properly concluded that the EIS was flawed, this Court should vacate the district court's remedy order insofar as it vacates the EIS rather than only the ROD.

Respectfully submitted,

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June 8, 2022
DJ # 90-1-4-16344

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1), I certify that the foregoing brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5), (6), and Cir. R. 32(b), and the type-volume limitation provided by Cir. R. 28.1. This brief contains 13,263 words, excluding portions of the brief exempted by Fed. R. App. P. 32(f), as recorded by the word count of the Microsoft Word processing system used to prepare the brief.

s/ Benjamin Richmond
Counsel for Federal Appellants

CERTIFICATE OF SERVICE

I certify that on June 8, 2022, I electronically filed the attached brief 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.

s/ Benjamin Richmond
Counsel for Federal Appellants

Nos. 22-1347; 22-1709; 22-1737

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.

Appeal from U.S. District Court for the Western District of Wisconsin
No. 3:21-cv-96-wmc; No. 3:21-cv-306-wmc (Hon. William M. Conley)

REQUIRED SHORT APPENDIX OF FEDERAL DEFENDANTS-APPELLANTS

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CIRCUIT RULE 30 CERTIFICATION

All of the materials required by Cir. R. 30(a) and (b) are included in the Required Short Appendix bound with the Opening Brief of Federal Defendants-Appellants and the Appendix of Federal Defendants-Appellants.

s/ Benjamin Richmond
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

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

Defendants,

and

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

Intervenor-Defendants.

OPINION AND ORDER

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

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.

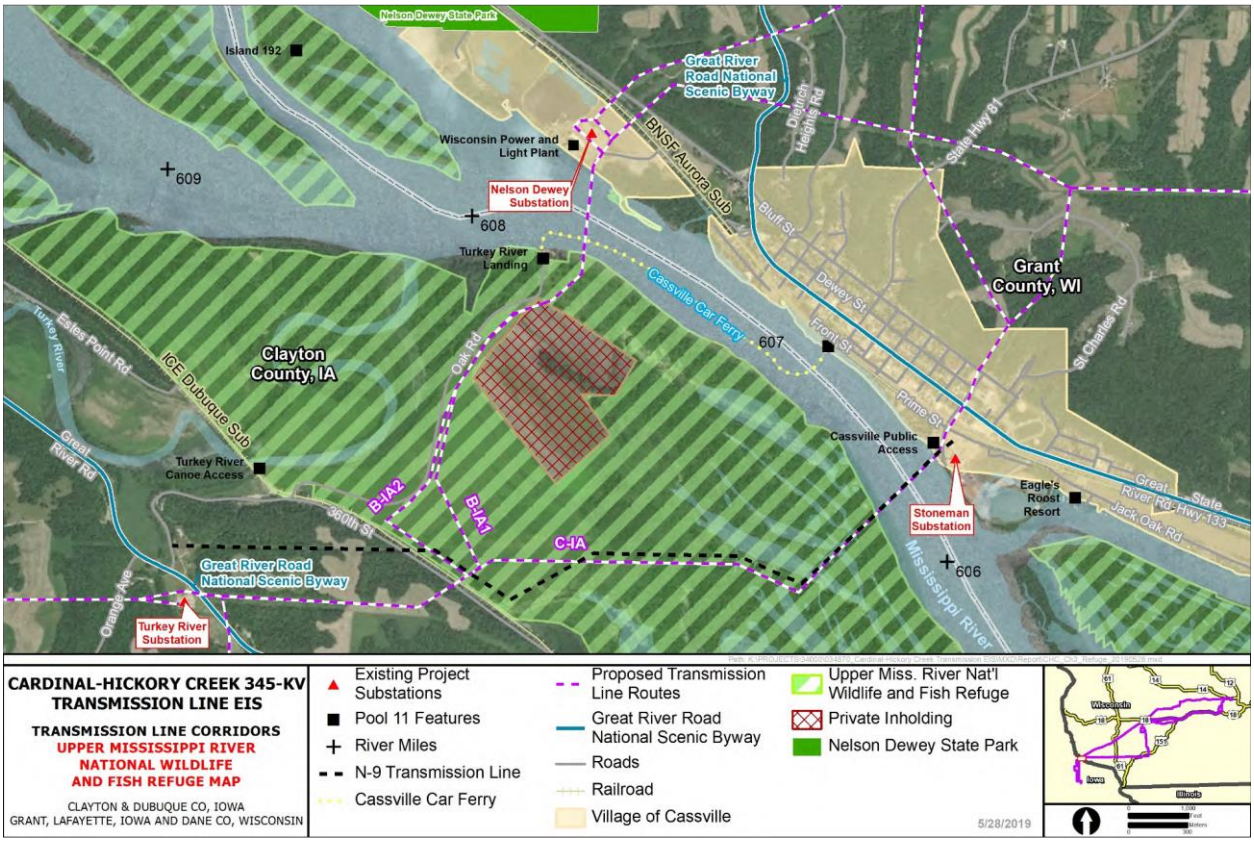
The National Wildlife Refuge System Improvement Act of 1997 was written by Congress to close regulatory holes that had been left by prior legislation. Tredenick, supra, at 77. "In 1989, wildlife refuge managers reported that ninety percent of the refuges had at least one secondary use, seventy percent 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

[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

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