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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

and

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

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

RESPONSE/OPENING BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, AND DEFENDERS OF WILDLIFE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1347

Short Caption: Driftless Area Land Conservancy, et al v. American Transmission Company LLC, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation,

Defenders of Wildlife

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Environmental Law & Policy Center, Defenders of Wildlife, National Wildlife Refuge Association

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s / Howard A. Learner Date: 3/4/2022

Attorney's Printed Name: Howard A. Learner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s / Scott Strand Date: 3/4/2022

Attorney's Printed Name: Scott Strand

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

Attorney's Signature: /s / Ann Jaworski Date: 3/4/2022

Attorney's Printed Name: Ann Jaworski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: 312-795-3711 Fax Number: 312-795-3730

E-Mail Address: ajaworski@elpc.org

RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and Seventh Circuit Rule 26.1, Plaintiffs-Appellees make the following disclosures:

National Wildlife Refuge Association is a not-for-profit corporation organized under laws of Minnesota. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

Driftless Area Land Conservancy is a not-for-profit corporation organized under the laws of Wisconsin. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

Wisconsin Wildlife Federation is a not-for-profit corporation organized under the laws of Wisconsin. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

Defenders of Wildlife is a not-for-profit corporation organized under the laws of the District of Columbia. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

DATED: July 8, 2022

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JURISDICTIONAL STATEMENT

The Intervenor-Appellants' and Defendant-Appellants' jurisdictional statements are not complete and correct.

District Court Jurisdiction

Plaintiffs filed two complaints (now consolidated) alleging that the Defendant federal agencies' approvals for the Cardinal-Hickory Creek transmission line violated the: Administrative Procedure Act, 5 U.S.C. § 706(2)(A); National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee; Endangered Species Act, 16 U.S.C. § 1536(a)(2); and Clean Water Act, 33 U.S.C. § 1344(e). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Appellants' arguments that Plaintiffs lacked standing to bring their NEPA claims, and that the Refuge Act claims were moot and/or unripe were rejected by the district court, and are addressed below.

Appellate Jurisdiction

The district court's January 14, 2022 Opinion and Order, PA 1–45,[1] granted in part and denied in part the cross-motions for summary judgment, ruling for Plaintiffs on their determinative NEPA and Refuge Act claims. The court's

[1] Documents in this Court's docket in Case No. 22-1347 are cited as "Dkt.__." Intervenor-Defendants' Appendix is cited as IA___; Federal Defendants' Appendix as FA__; Plaintiffs' Appendix as PA___.

subsequent March 1, 2022 Final Judgment, PA 46–47, "vacates and remands" the Defendants' Environmental Impact Statement and Record of Decision, and "declares" "that the [Refuge Act] precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer." The court's March 4, 2022 text-only order denied the Transmission Companies' motion for a stay, but declined to enter an injunction. PA 184–86.

Intervenor-Defendants (March 3, 2022) and Defendants (April 29, 2022) appealed from the district court's final judgment order, and Plaintiffs cross-appealed (April 26, 2022). This Court has jurisdiction over the appeals from the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the U.S. Fish and Wildlife Service is violating the National Wildlife Refuge System Improvement Act of 1997's ("Refuge Act") requirement that only "compatible" uses be allowed on Refuges by nonetheless allowing the proposed Cardinal-Hickory Creek ("CHC") high-voltage transmission line to cross through the Upper Mississippi River National Wildlife and Fish Refuge either by an easement and right-of-way permit, or a land transfer.

2. Whether the district court correctly decided that the huge CHC high-voltage transmission line with 20-story high towers on a new, wider right-of-way does not comply with the legal standards for "maintenance" or a "minor realignment" for "safety purposes" and is therefore not exempt from the Refuge Act's prohibition against uses that are not "compatible."

3. Whether the district court properly followed this Circuit's decision in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), in concluding that Defendants' Environmental Impact Statement ("EIS") and Record of Decision ("ROD") for the CHC transmission line violated the National Environmental Policy Act ("NEPA") because its purpose and need statement was defined so unduly narrowly that it precluded the required full and fair "hard look" analysis of "all reasonable alternatives."

4. Whether the district court properly exercised its authority under the Administrative Procedure Act and its equitable powers to vacate the EIS, in addition to the ROD.

5. Whether the district court properly rejected the Defendants' attempts to raise mootness, ripeness, finality and other procedural hurdles to evade judicial review of their NEPA violations and actions approving the CHC transmission line to cross through the Refuge.

6. Whether the district court correctly held that the four Plaintiff Conservation Groups and their members who live, own property, and enjoy recreational opportunities in southwest Wisconsin have standing to challenge Defendants' violations of NEPA's and the Refuge Act's requirements.

7. Whether the district court erred in declining to issue an injunction to pause continued construction of the CHC transmission line, which lacked valid federal approvals, while the Transmission Companies' appeal is pending.

STATEMENT OF THE CASE

Appellants ask this Court to allow them to evade the National Wildlife Refuge System Improvement Act's requirement that proposed new rights-of-way for huge high-voltage transmission lines and other such projects impeding protected National Wildlife Refuges be "compatible" with the statutory purposes and the Refuge itself. The Appellants likewise seek to evade NEPA's core requirements by "contriv[ing] a purpose so slender as to define competing 'reasonable alternatives' out of consideration." PA 37. Their skewed approach "result[ed] in most reasonable alternatives being defined out of the EIS" contrary to this Court's controlling decision in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997). The district court properly saw through Appellants' "shell game," PA 15, and statutory violations. This Court should affirm and also enjoin continued transmission line construction unless and until there are lawful federal approvals and permits.

I. Nature of the Case.

The district court's decision invalidated three federal agency Defendants'—Rural Utilities Service ("RUS"), U.S. Fish & Wildlife Service ("FWS"), and U.S. Army Corps of Engineers ("Corps")—approvals for the controversial 345-kv Cardinal-Hickory Creek ("CHC") transmission line with 17-to-20 story high towers, which would run 102 miles from the Hickory substation

near Dubuque, Iowa, cut a wide swath through the Upper Mississippi River National Wildlife and Fish Refuge ("the Refuge"), which straddles the Mississippi River, and plow through the southwest Wisconsin Driftless Area's scenic landscapes, family farms, small town communities, and vital natural resources to the Cardinal substation in Middleton, Wisconsin. IA 1176-8. Plaintiff-Appellees/Cross-Appellants National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife ("Conservation Groups") sued under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, to overturn these federal agency decisions.

On cross-motions for summary judgment, the district court held that: (1) the huge transmission line was not "compatible" with and could not cross through the protected Refuge without violating the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee ("Refuge Act"); and (2) Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by using an impermissibly narrow purpose and need statement, which skewed their environmental impact statement ("EIS") and record of decision ("ROD") and thereby precluded the required full and fair analysis of "all reasonable alternatives," including alternative routes that would avoid running through the Refuge, and non-wires alternatives—including solar

generation, energy storage resources, energy efficiency, demand response, and local grid improvements. *Simmons*, 120 F.3d 664. PA 309-15.

Even though the district court ruled in the Conservation Groups' favor, Intervenor-Defendants American Transmission Co., ITC Midwest, and Dairyland Power Cooperative ("Transmission Companies"), continue to bulldoze through private and public lands and waters, and install CHC transmission line equipment and 17-story high towers. The Transmission Companies are spending hundreds of millions of dollars, which they are charging to utility ratepayers, creating precisely the "orchestrated trainwreck" the district court warned against. PA 16.

The Conservation Groups now seek an order from this Court: (1) affirming the district court's judgment below on the NEPA and Refuge Act issues, and the remedies provided in the final judgment, and (2) issuing a permanent injunction against the Transmission Companies' continuing transmission line construction unless and until Defendants rectify the statutory violations.

II. The Upper Mississippi River National Wildlife and Fish Refuge and Wisconsin's Scenic Driftless Area.

The proposed CHC transmission line would cross two unique, fragile environments—the Upper Mississippi River National Wildlife and Fish Refuge and Wisconsin's scenic Driftless Area landscape. The Refuge, created by Congress in 1924, is designated as a Wetland of International Importance and a

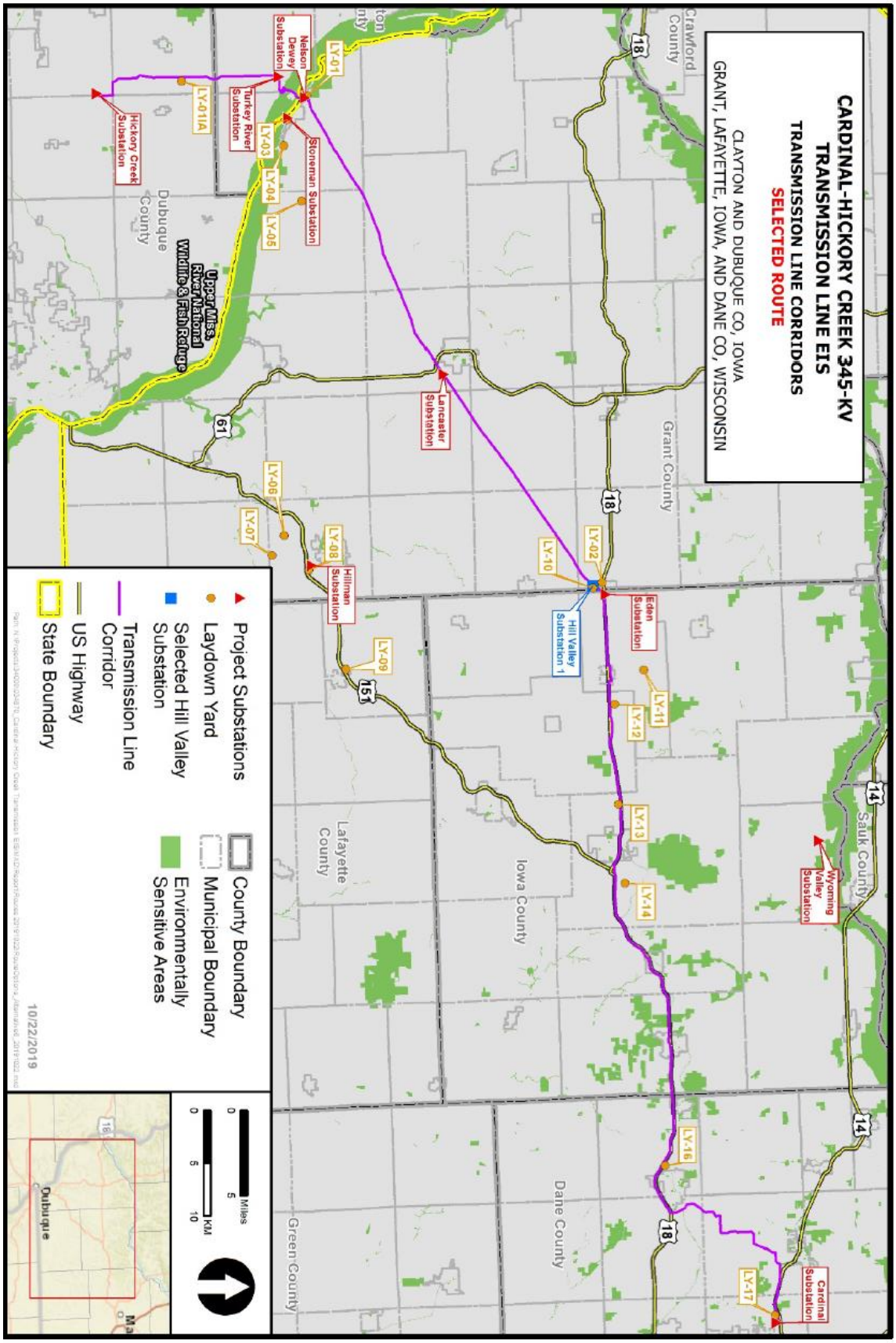
Globally Important Bird Area. IA 916, PA 301. It is within the Mississippi Flyway, which is used by 40% of North America's waterfowl. PA 295, 301. The Refuge's wooded islands, marshes, and backwaters in Wisconsin, Iowa, Minnesota, and Illinois provide a haven for many unique fish, wildlife, and plants. PA 300–01.

The Driftless Area was not flattened by glaciers, but, instead, is a landscape of rolling hills and deep river valleys. PA 293–94. This "truly unique landscape, rich in natural resources and well-known and appreciated for its natural scenic beauty" is home to numerous endangered and threatened species, and contains cold-water trout streams, high quality wetlands, several designated Important Bird Areas, and many rare woodland, prairie, and riparian habitats. PA 293–94, 355.

The huge CHC transmission line with its very high towers would run for about 10 miles in Iowa, cut through the middle of the protected Refuge, and then cut a wide swath for about 90 miles through the Wisconsin Driftless Area's scenic landscape, family farms, and rural small towns. It would run through the Military Ridge Prairie Heritage Area, which "provides habitat for 14 rare and declining grassland bird species and contains more than 60 prairie remnants, representing one of the highest concentrations of native grasslands in the

Midwest,"[2] and Black Earth Creek, a state-designated "Outstanding and Exceptional Resource Waters."[3] See maps below. IA 1196–97.

[2] The Nature Conservancy, *Military Ridge Prairie Heritage Area,* https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/priority-area-military-ridge-prairie-heritage-area/.
[3] Wisconsin Department of Natural Resources, *Black Earth Creek Watershed,* https://dnr.wi.gov/water/basin/lowerwis/watersheds/lw17.pdf.


CARDINAL-HICKORY CREEK 345-KV
TRANSMISSION LINE EIS
TRANSMISSION LINE CORRIDORS
SELECTED ROUTE
CLAYTON AND DUBUQUE CO, IOWA
GRANT, LAFAYETTE, IOWA, AND DANE CO, WISCONSIN
Project Substations
Laydown Yard
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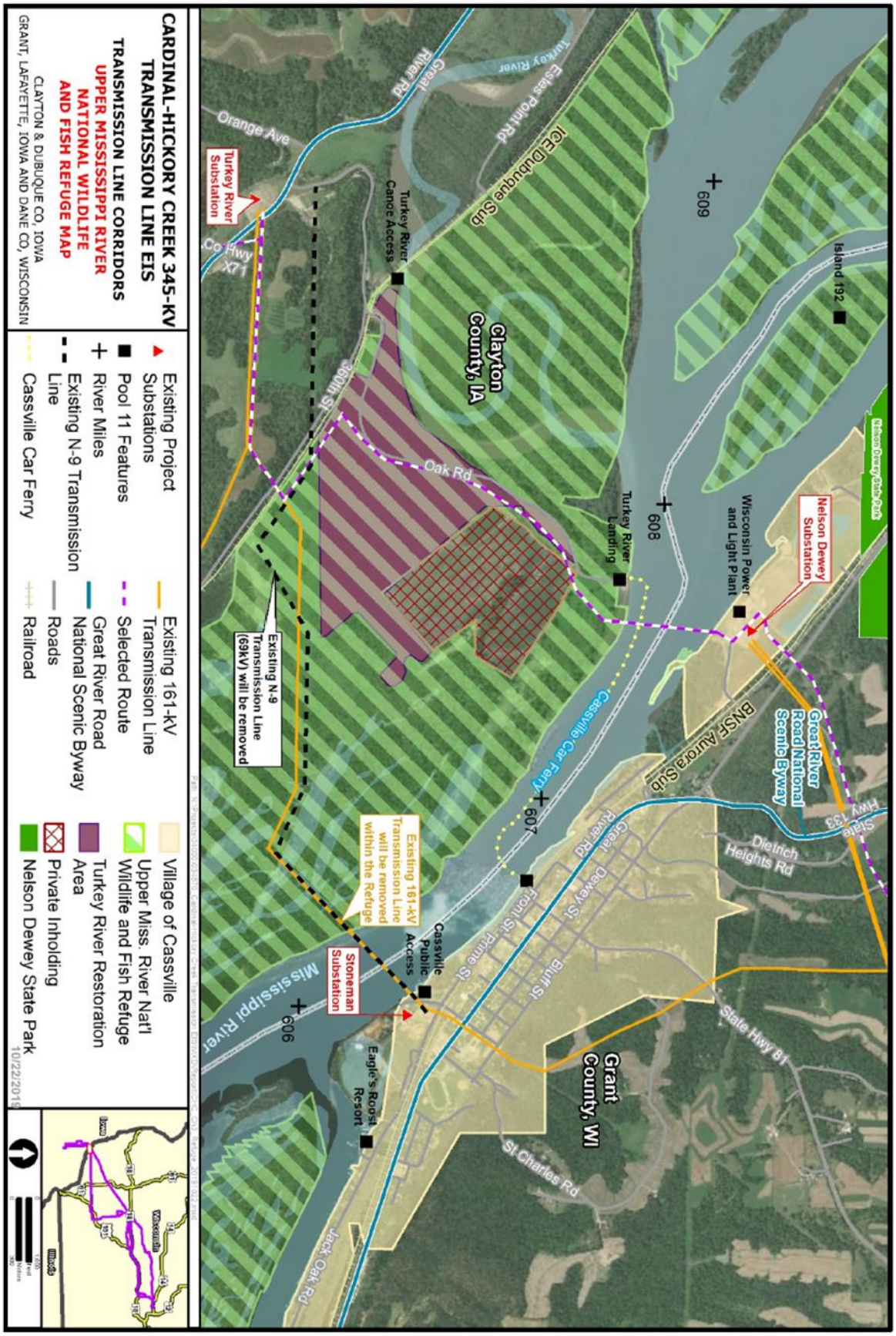

CARDINAL-HICKORY CREEK 345-KV TRANSMISSION LINE EIS
TRANSMISSION LINE CORRIDORS
UPPER MISSISSIPPI RIVER NATIONAL WILDLIFE AND FISH REFUGE MAP
CLAYTON & DUBUQUE CO, IOWA
GRANT, LAFAYETTE, IOWA AND DANE CO, WISCONSIN
Existing Project Substations
Pool 11 Features
River Miles
Existing N-9 Transmission Line
Cassville Car Ferry
Existing 161-kV Transmission Line
Selected Route
Great River Road National Scenic Byway
Roads
Railroad
Village of Cassville
Upper Miss. River Nat'l Wildlife and Fish Refuge
Turkey River Restoration Area
Private Inholding
Nelson Dewey State Park
10/22/2019
Clayton County, IA
Grant County, WI
Nelson Dewey Substation
Stoneman Substation
Turkey River Substation
Cassville Public Access
Turkey River Canoe Access
Turkey River Landing
Wisconsin Power and Light Plant
Eagle's Roost Resort
Island 192
Existing N-9 Transmission Line (69kV) will be removed
Existing 161-kV Transmission Line will be removed within the Refuge
Great River Road National Scenic Byway
Mississippi River
Turkey River
Oak Rd
Orange Ave
Co Hwy X71
360th St
Ice Dubuque Sub
BNSF Aurora Sub
Cassville Car Ferry
Dietrich Heights Rd
St Charles Rd
State Hwy 81
State Hwy 133
Jack Oak Rd
Front St
Prime St
Bluff St
Dewey St
Great River Rd
Eagles Point Rd
Turkey River
Great River Rd
609
608
607
606

The transmission line's right-of-way—260 feet wide in the Refuge and 150 feet wide elsewhere, IA 1195—is being cleared of trees and vegetation, and towers are being installed. PA 289–90. Trees and plants will be suppressed through cutting and herbicides for the transmission line's 40-year life. PA 291–92. The transmission towers will be about 195 feet high on either side of the Refuge, and 150–175 feet high elsewhere. PA 287.

III. Necessary Federal Approvals.

A. NEPA Review, Purpose and Need, and Evaluation of Alternatives.

NEPA requires that "major Federal actions" be preceded by preparation of a detailed EIS. 42 U.S.C. § 4332(C). This EIS requirement is triggered when federal funds, approvals, or permits are sought. Here, Intervenor-Defendant Dairyland plans to request that Defendant RUS help finance this transmission line. The CHC transmission line must receive several federal approvals—including permission from Defendant FWS to run through the protected Refuge, and permits from Defendant Corps to work in navigable waters, including the Mississippi River, and wetlands in Wisconsin's scenic Driftless Area. PA 3-6.

RUS was the "lead agency" for the NEPA review. IA 1177. FWS, Corps, and U.S. Environmental Protection Agency ("USEPA") were "cooperating" agencies. IA 1177–80. The EIS covered the entire 102-mile CHC transmission line, including private property, federal lands and waters, and state lands and waters.

The Transmission Companies and federal Defendants discussed the CHC transmission line long before the draft EIS. In 2012, the Refuge managers advised the developers to find non-Refuge-crossing alternatives because a new high-voltage transmission line would violate the Refuge Act's prohibition against uses not "compatible" with the Refuge's wildlife conservation purposes. IA 152.

Similarly, on January 6, 2017, USEPA submitted EIS scoping comments "strongly recommend[ing]" alternative routes to avoid the Refuge:

> Because the Upper Mississippi River National Wildlife and Fish Refuge encompasses one of the largest blocks of floodplain habitat in the lower 48 states, lies within the Mississippi Flyway, and is designated as a Wetland of International Importance and a Globally Important Bird Area, impacts to fish and wildlife habitat can be detrimental to sustaining wildlife populations. Therefore, EPA strongly recommends that potentially significant impacts to species and to the Refuge be avoided.

PA 250.

Despite those warnings, neither the Transmission Companies nor the Defendant agencies ever seriously considered alternate routes north or south of the Refuge or a package of non-wires alternatives that could avoid crossing the Refuge.

Instead, in 2016, the Transmission Companies submitted two studies. Their Alternatives Evaluation Study considered non-wires alternatives individually, but deliberately did not bundle together a combination of non-wires alternatives that, in combination, could accomplish the same goals as the proposed CHC line.

IA 379–434. Their Alternative Crossings Analysis, IA 217-378, evaluated various Mississippi River crossings for a transmission line between the Cardinal and Hickory Creek substations, including alternatives on existing bridges or dams, which they summarily dismissed. Routes running north or south of the Refuge were not considered. The district court recognized these facts: "the EIS did not even *consider* any routes not crossing the Refuge. [IA 804] 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. [IA 860]." PA 9-10.

All three Defendant agencies participated in the environmental review process, and they issued the final EIS on October 23, 2019. IA 952-54. On January 16, 2020, the three Defendants issued their ROD approving the final EIS and finding it complied with NEPA's requirements. IA 1223-25. (USEPA did not sign the ROD.)

Both the EIS and the ROD contained the identical statement that "[r]egardless of the potential financial assistance from RUS to fund Dairyland's ownership interest in the C-HC Project, a NEPA environmental review would still be required as part of the permitting actions by USACE, USFWS, and potentially other Federal agencies." IA 830, 1177.

As required by Council on Environmental Quality ("CEQ") rules, 40 C.F.R. § 1502.13,[4] the Defendants' EIS contained a "purpose and need statement" comprising six sub-purposes:

- 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 even when facilities (e.g., transmission lines or generation resources) are out of service;
- 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 1) lower-cost generation from a larger and more competitive market that would reduce the overall cost of delivering electricity, and 2) 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.

[4] References to 40 C.F.R. parts 1500-1508 are to the 2019 version controlling when the EIS was completed. The rules were amended in 2020 and 2022.

IA 795–96. This statement is mostly identical to the one in the Alternatives Evaluation Study, which, likewise, was very similar to Midcontinent Independent System Operator's ("MISO") statement proposing the CHC transmission line. PA 40–41; IA 138, 391-393, 795-96.

The Conservation Groups submitted draft EIS comments raising specific concerns that the unduly narrow purpose and need precluded a hard look at reasonable alternatives other than the already-proposed CHC transmission line cutting through the Refuge and the Driftless Area. PA 265–71. In particular, the Conservation Groups contended that the EIS should fully and fairly analyze non-wires alternatives (sometimes called "alternative transmission solutions") with much lower cost and fewer adverse environmental impacts, including solar energy generation combined with energy storage, energy efficiency, demand response, and local grid improvements. PA 271–81. Like the Transmission Companies' Alternative Evaluation Study, the EIS did not evaluate alternatives consisting of various *combinations* of non-wires alternatives, but evaluated these solutions only in isolation. IA 870–72; PA 39-40. The EIS dismissed non-wires alternatives because they did not "increase transfer capacity" from Iowa to Wisconsin, thereby considering only alternatives substantially similar to the CHC transmission line. IA 869. The Conservation Groups' comments also

addressed the EIS's failure to analyze alternative routes that would avoid running a new transmission line through the Refuge. PA 279–80.

B. FWS Compatibility Determination and Permitting.

The Refuge Act prohibits FWS from "initiat[ing] or permit[ting] a new use of a refuge, or expand[ing], renew[ing], or extend[ing] an existing use of a refuge, unless [FWS] has determined that the use is a compatible use … ." 16 U.S.C. § 668dd(d)(3)(A)(i). That prohibition includes new or expanded transmission lines. *Id.* § 668dd(d)(1)(B).

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 the purposes of the refuge." *Id.* § 668ee(1).

FWS issued a final "Compatibility Determination" in December 2019. IA 1149-70. FWS initially decided not to treat the CHC transmission line as a "new" or "expanded" use, but evaluated it under separate rules governing "reauthorization of historic rights-of-way." IA 1221. Those rules only require rights-of-way owners to show that they have complied with existing easements—not with the general "compatibility" standard—and that no net loss of habitat will occur. 50 C.F.R. § 26.41(c); 603 FW § 2.11(H)(3). FWS found that the huge new transmission line could be allowed as "maintenance" of preexisting,

smaller transmission lines, which the Transmission Companies agreed to remove. IA 1151–1170. This transmission line would be "considered a minor realignment due to the relatively short distance the transmission lines would be moved … and the ability to co-locate adjacent to existing disturbed areas." IA 1167. In the same sentence, FWS acknowledged that the existing line would be moved "1,800 feet on the west and 6,000 on the east" to the new right-of-way. *Id.* Of the 38.9 acres in the proposed right-of-way through the Refuge, only a small portion overlapped existing right-of-way, while "30.6 acres of previously unaffected habitat would [now] be affected." IA 1160. The Compatibility Determination claimed that reforestation of the existing transmission line's right-of-way would reduce habitat fragmentation, but this would take "30 to 50 years." IA 1162–63.

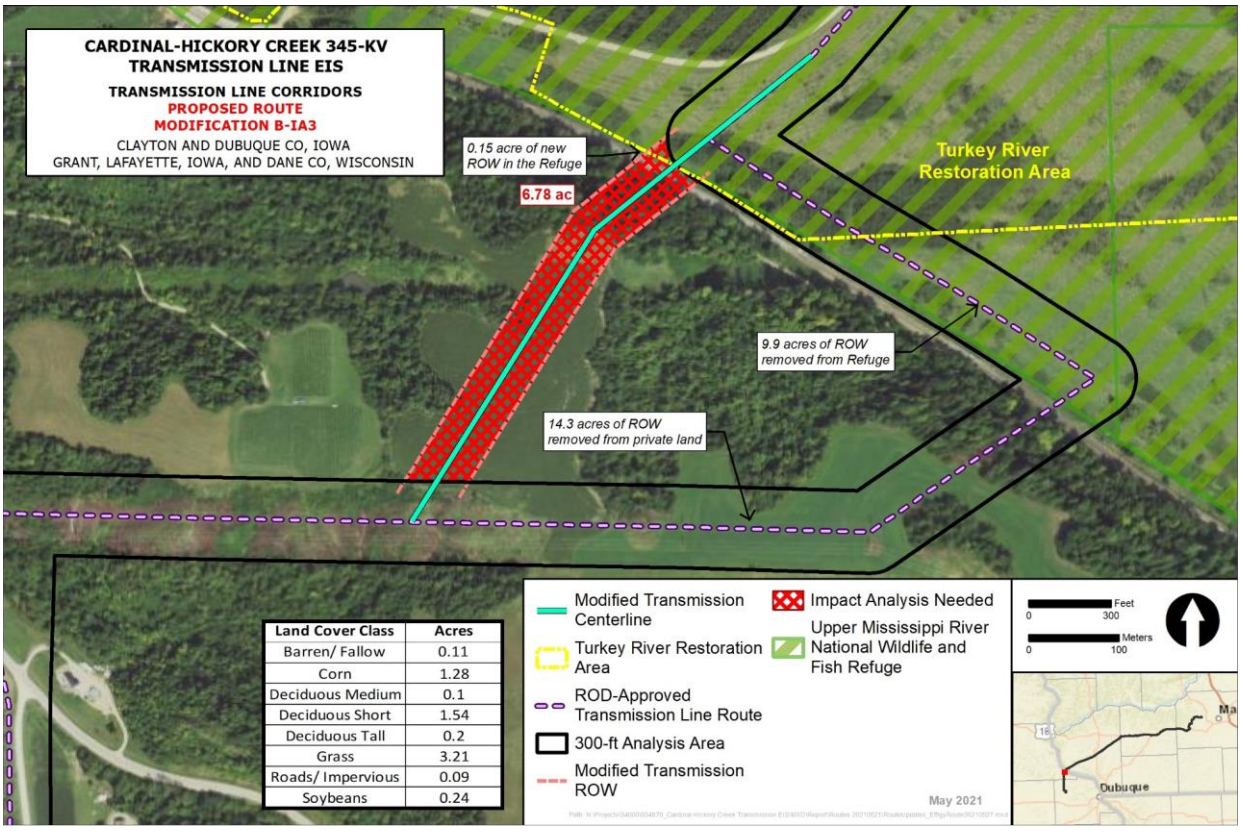
After that Compatibility Determination, FWS issued a right-of-way permit on September 8, 2020, IA 1228-38, but then changed its approach to a land transfer as explained below. The FWS permit was ultimately revoked in summer 2021, after back-and-forth between the Companies and Defendants, including an amended route request on March 1, 2021. The Transmission Companies requested a land transfer on July 29, 2021, culminating in FWS withdrawing its Compatibility Determination and the right-of-way permit on August 27, 2021. *See* PA 4-5.

On December 20, 2019, the Corps issued verifications that the project's water and wetland crossings would be covered by general Clean Water Act permits. FA 356-68.

IV. Disposition in the District Court Below.

The Conservation Groups filed two lawsuits under the APA, now consolidated, contending that: (1) Defendants' final EIS and ROD for the CHC transmission line violated NEPA in multiple respects, and (2) the Compatibility Determination and subsequent FWS permit decisions violated the Refuge Act. Plaintiffs also challenged the Corps' "verifications."

In March 2021, after litigation commenced, the Transmission Companies applied to slightly modify the right-of-way through the Refuge. IA 51–57. In June 2021, RUS issued a draft Environmental Assessment ("EA") examining the modified route's impacts, noting that FWS might issue an amended Compatibility Determination and right-of-way and special use permits. PA 100.



PA 101.

That final EA and amended permits were never issued. In July 2021, the Transmission Companies proposed a land transfer: In exchange for title to the right-of-way land, they would transfer another tract of land to FWS—the very same "Wagner parcel" they had already proposed to transfer to fulfill their permit's "no net habitat loss" requirement. IA 60, 1160; PA 102. The result: the CHC transmission line would cut through the Refuge at a "nearly identical crossing," PA 8, with the same adverse environmental impacts and wildlife harms by, in effect, extracting that land and water from the Refuge, in exchange for the already-committed Wagner parcel.

They claimed this land transfer would avoid the Refuge Act's compatibility requirements. IA 59–61. On August 3, FWS responded via letter that "a land exchange is a potentially favorable alternative to the right-of-way permit, and we are committed to working with you toward timely review of this proposed land exchange." IA 63. Since then, the Transmission Companies and FWS have agreed on an independent appraiser and completed surveys and plats. PA 52.

On August 27, 2021, shortly before cross-motions for summary judgment were due on September 3, FWS informed Plaintiffs and the court that it was withdrawing its original Compatibility Determination and permits, and would instead pursue the land transfer. IA 64–69; PA 4-5. FWS stated that it had erred in reviewing the existing transmission line's easement documents during the Compatibility Determination and that the proposed land transfer would obviate those problems. IA 64–69. The district court concluded that "government defendants and Utilities appear to be playing a shell game, cavalierly revoking applications for and grants of permits… ." PA 15.

In October 2021, Plaintiffs moved for a preliminary injunction, Dist. Ct. Dkt. 97, 98, shortly after the Transmission Companies provided notice that they would commence construction in Wisconsin about October 25, 2021. FA 229–32. On November 1, the district court preliminarily enjoined construction within

"waters of the United States" under the Corps' regulatory jurisdiction. FA 293–313. The Transmission Companies appealed the preliminary injunction (No. 21-3123), but subsequently withdrew their appeal.

On January 14, 2022, the court granted summary judgment for the Conservation Groups on the principal NEPA and Refuge Act issues[5] and rejected the Transmission Companies' and Defendants' standing, finality, and mootness arguments. PA 6–23.

First, the court held that Defendant FWS may not allow the CHC transmission line to cross the Refuge—whether through an easement and right-of-way permit or through a land transfer—without violating the Refuge Act. PA 23–35. The court rejected the "maintenance" theory and the argument that restructuring the transaction as a land transfer could somehow avoid the Refuge Act's compatibility requirements. The court concluded that any finding that this high-voltage transmission line is compatible with the purposes for which the Refuge was established "would be arbitrary and capricious." PA 32.

Second, the court applied *Simmons* to the facts of this case, holding that the EIS violated NEPA because its purpose and need statement was unduly narrow, "resulting in most reasonable alternatives being defined out of the EIS." PA 37.

[5] The court ruled for Defendants regarding the Corps' verifications and Clean Water Act permits.

The skewed purpose and need "[left] 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." PA 39-40.

Following briefs on remedy, the court issued its final judgment on March 1, 2022, vacating and remanding the EIS and ROD, and declaring "that the compatibility determination precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer." PA 47. The court did not, however, issue an injunction against construction of the CHC project. The federal Defendants stated to the court that no injunction was necessary because they would abide by the terms of the declaratory judgment issued. PA 181–82.

All parties appealed. The Transmission Companies moved to stay judgment pending appeal, Dkt. 9. This Court denied their motion on May 6, 2022. Dkt. 52. The Conservation Groups moved to enjoin construction pending appeal, which, on May 25, this Court denied without prejudice to refile after presenting the motion to the district court, Dkt. 54. The Conservation Groups presented their injunction motion below on May 27, and it's pending for decision.

V. Continued Construction of the CHC Transmission Line.

The Transmission Companies have continued construction, clearcutting most of the route, pouring structural foundations and erecting towers in May, and stringing wires in July. PA 361-65. They now acknowledge that construction costs will exceed prior estimates by more than 10% (at least $550 million) and they cannot predict the eventual total. PA 366-67. They plan to begin construction in the Refuge in October 2022. Dkt. 9 at 19.

SUMMARY OF ARGUMENT

This Court should: (1) affirm the district court's summary judgment decisions and remedies in favor of the Plaintiff Conservation Groups on the Refuge Act and NEPA grounds; (2) reverse the district court's erroneous decision declining to grant an injunction against continued transmission line construction; and (3) issue a permanent injunction against continuing construction of the CHC transmission line unless and until Defendants rectify their statutory violations.

Allowing the transmission line to run through the Refuge violates the Refuge Act's requirement that only "compatible" uses be permitted. FWS never argued that the CHC line could be permitted as a new or expanded use, but mischaracterized it as "maintenance" of a smaller existing transmission line over a mile away from the proposed new right-of-way. Carving a new right-of-way through a Refuge is not compatible with the wildlife preservation purposes

inherent in the Refuge Act, the 1924 statute establishing this Refuge, and the Refuge's Comprehensive Conservation Plan. The Transmission Companies and Defendants provide no persuasive rationale for their attempted evasion of the statutory requirements through the land transfer legerdemain. Likewise, their attempt to build the new, huge transmission line on the existing right-of-way surely counts as an extension or expansion.

The Transmission Companies' and Defendants' attempts to evade judicial review amount to arguing that the Conservation Groups are both too early to challenge the land transfer, and too late to challenge the Compatibility Determination. But those are just two different labels for the same continuing unlawful action, which is reviewable.

Moreover, FWS clearly stated the consummation of its thinking on the land transfer—the agency intends to move forward. Further details of the transaction—appraisals, valuation—are immaterial to the Conservation Groups' legal claims. Therefore, the land transfer is final and ripe for review.

This Court should also affirm the district court's decision that the Defendants' EIS and ROD violated NEPA by impermissibly narrowing the purpose and need statement to preclude full and fair consideration of all reasonable alternatives. This holding is compelled by NEPA, its implementing regulations, and applicable caselaw, including *Simmons*, which the district court

carefully followed. The Conservation Groups argued throughout the NEPA process for consideration of non-wires alternatives, including a combination of solar energy development, battery storage, energy efficiency, demand response, and targeted local grid improvements. These solutions work best in combination and can achieve the same grid congestion, reliability, and renewable energy goals as the CHC transmission line, but with less expense, less private property damage, and less environmental destruction. Full and fair analysis of both these alternatives and alternative routes could avoid a new right-of-way through the Refuge.

The Conservation Groups have standing to challenge the NEPA review and have submitted extensive supporting affidavits. Their complaints, read fairly, challenge the actions of all three Defendant agencies that approved an unlawful EIS. NEPA review was required not only because of the planned application for RUS funding, but because of all three agencies' permitting and approval actions, so there is redressability even if federal funding is deferred.

The district court, however, erroneously failed to enjoin transmission line construction. Courts have broad equitable authority to enjoin conduct on non-federal land that threatens federal land and the values Congress has declared in statutes protecting that land. *See Kleppe v. New Mexico,* 426 U.S. 529, 545 (1976). Continued construction creates the "orchestrated trainwreck" that the district

court warned against, PA 16, threatens the Refuge, and threatens the integrity of the NEPA review on remand, as sunk costs may improperly sway the Defendants' consideration of all reasonable alternatives in the new EIS.

ARGUMENT

I. Standards of Review.

While this Court reviews a grant of summary judgment de novo, *Wisconsin Alumni Rsch. Found. v. Xenon Pharms., Inc.*, 591 F.3d 876, 882 (7th Cir. 2010), the district court here reviewed "specific facts" in applying NEPA's and the Refuge Act's requirements, and controlling case law. PA 33. This Court has recognized and respected district court judges' digging into EIS facts in reviewing of large administrative records. *Simmons*, 120 F.3d at 668 ("In his well-reasoned, graceful…opinion, Judge Foreman found manifold flaws in the Corps' conclusion of no significant environmental impact.").

The APA provides for courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law." 5 U.S.C. § 706(2). "The Supreme Court has instructed that the APA requires meaningful review," and the court "should not attempt itself to make up for . . . deficiencies in an agency's reasoning, nor supply a reasoned basis for the agency's action that the agency

itself has not given." *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs,* 893 F.3d 1017, 1024 (7th Cir. 2018) (internal quotation marks and citations omitted).

This Court reviews the district court's denial of an injunction for abuse of discretion, factual determinations for clear error, and legal conclusions de novo. *LAJIM, LLC v. General Electric Co.*, 917 F.3d 933, 945 (7th Cir. 2019).

II. The District Court Correctly Concluded that FWS's Decision Allowing the CHC Transmission Line to Cross the Refuge Violated the National Wildlife Refuge System Improvement Act of 1997.

The district court correctly concluded that "defendants' decision to grant a right of way or land transfer" for the CHC transmission line "through the Refuge would be arbitrary and capricious," because the high-voltage transmission line with up to 20-story high towers does not comply with the Refuge Act's compatibility requirements. PA 23-32. The court explained:

> [A]n 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.

PA 34. This Court should uphold the district court's conclusion that "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." PA 35.

A. The Refuge Act's "Compatibility" Requirement.

The Refuge Act, 16 U.S.C. §§ 668dd–668ee, governs over 100 million acres in all 50 states that comprise the National Wildlife Refuge System. Unlike

National Parks or National Forests, which serve "multiple uses," National Wildlife Refuges' mission is dedicated exclusively to "the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." *Id.* § 668dd(a)(2). The Upper Mississippi River National Wildlife and Fish Refuge was established by Congress in 1924 "as a refuge and breeding place for migratory birds … [and] other wild birds, game animals, fur-bearing animals, and for the conservation of wild flowers and aquatic plants, and . . . as a refuge and breeding place for fish and other aquatic animal life." 16 U.S.C. § 723.

FWS may not "initiate or permit a new use of a refuge, or expand, renew, or extend an existing use of a refuge, unless [FWS] has determined that the use is a compatible use." 16 U.S.C. § 668dd(d)(3)(A)(i).

Contrary to the Transmission Companies' arguments, there is no exception for "powerlines, telephone lines, canals, ditches, pipelines, and roads." Those are subject to the same "compatibility" requirement. *Id.* § 668dd(d)(1)(B). The EEI and EWAC amici likewise overreach in arguing that, in the Refuge Act, Congress specifically authorized transmission line rights-of-way across Wildlife Refuges. Dkt. 38. Even they concede, *id.* at 9, however, that Congress only authorized rights-of-way that are found *compatible*. The Refuge Act was *specifically intended*

to have consequences for the routing of transmission lines and other infrastructure, which too often run through protected public lands.

Congress defined a "compatible use" as "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of [FWS], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the Refuge." 16 U.S.C. § 668ee(1). "Sound professional judgment" here *restricts* FWS's discretion by requiring "a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of this Act and other applicable laws." *Id.* § 668ee(3). Compatibility determinations must be based on biology and ecology, not on economic or other social considerations.

As a rationale for imposing the tight restrictions in the 1997 Refuge Act's text, the statute's legislative history noted "the lack of an overall mission and management procedures [that] had allowed numerous incompatible uses to be tolerated on wildlife refuges." H.R. Rep. 105-106 at 3 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-7. Before the 1997 law, 90% of refuges had at least one secondary (non-wildlife) use, 70% had at least seven secondary uses, and over 30% had fourteen. General Accounting Office, *National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action,* GAO/RCED-89-

196 at 3 (Sept. 1989), https://www.gao.gov/assets/rced-89-196.pdf. FWS had allowed transmission lines, pipelines, and other right-of-way projects to cross nearly half of the country's refuges. *Id.* at 17 tbl. 2.1. As an FWS official testified, "when rights-of-way applications are considered, the strongest biological reasons for disapproving the use can be overcome by the weakest economic rationale." *Id.* at 26.

To address that problem, the Refuge Act clarified that the Refuge System was for wildlife purposes, specifically defined "compatible use," established a compatibility determination process subject to judicial review, and prohibited new incompatible uses and prohibited expanded, renewed, or extended existing incompatible uses. FWS's Refuge Act regulations and policies further clarified that a private economic use could not be deemed compatible unless it "contributes to" the Refuge's wildlife purposes. 50 C.F.R. § 29.1. Project proponents have the burden of proof, 603 FW § 2.11(B)(1), and "compensatory mitigation" cannot be used to make otherwise incompatible projects compatible, 50 C.F.R. § 26.41(b).

Following the Refuge Act's strict standards, FWS and the Upper Mississippi Refuge managers have often stated that large projects like the CHC transmission line are *not* "compatible." In 2014, Refuge managers told the Transmission Companies to explore routes that avoid crossing the Refuge

because the line was not compatible. IA 865. That same year, in response to a proposed Refuge crossing by another high-voltage transmission line, the Refuge managers explained that these projects are not compatible because they fragment habitat, spread invasive species, increase stormwater runoff and erosion, cause migratory bird strikes, and mar the Refuge's scenic vistas. PA 231–33. Neither FWS nor the Refuge managers have backed away from those conclusions. The only question is whether the CHC transmission line fits within any exemptions. It does not.

B. The Huge CHC Transmission Line Cannot Properly Be Characterized as "Maintenance" or a "Minor Realignment" of Existing Transmission Lines.

FWS's original decision treated this new transmission line as somehow being "maintenance" or a "minor realignment for safety purposes" of existing low-voltage transmission lines on an existing right-of-way, as the purported basis to conjure an exemption from the compatibility requirement under FWS rules allowing for "reauthorization of historic rights-of-way," IA 1221, if the easement holder has not violated that easement's terms. 50 C.F.R. § 26.41(c). The district court correctly concluded that "Fish and Wildlife's original decision to classify the project as 'maintenance' was arbitrary and capricious." PA 25.

FWS later withdrew that decision and agreed to pursue the proposed land transfer. PA 32. Nothing, however, would prevent FWS from readopting its

flawed "maintenance" theory, so the Conservation Groups, like the district court, addressed it.

The issue is not moot. The Supreme Court has long recognized, "[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 v. Laidlaw Envt. Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Courts can find mootness only if "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189 (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). The Supreme Court recently reaffirmed this principle, finding that where "the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose [the challenged conduct]; indeed it vigorously defends the legality of such an approach….[the Court will] not dismiss a case as moot … ." *W. Virginia v. Env't Prot. Agency*, No. 20-1530, 2022 WL 2347278 at *11 (U.S. June 30, 2022) (internal citations and quotation marks omitted).

Here, as the district court found, FWS "remain[s] committed to a path through the Refuge (whether by land transfer or a reissued right of way)." PA 8. "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 … .” PA 8.

This Court should also have little trouble concluding that the CHC transmission line is not “maintenance” or a “reauthorization” of an existing right-of-way, but rather a “new” or “expanded” use of the Refuge. Like a nonconforming use provision in a zoning ordinance, the Refuge Act allows continuation of existing rights-of-way, and FWS rules allow “maintenance” (defined to include “minor expansion or minor realignment to meet safety standards”). 50 C.F.R. § 26.41(c). The FWS Manual states that “[e]xamples of minor expansion or minor realignment include: expand the width of a road shoulder to reduce the angle of the slope; expand the area for viewing on-coming traffic at an intersection; and realign a curved section of a road to reduce the amount of curve in the road.” 603 FW § 2.11(D).

Building the CHC high-voltage transmission line with towers either twice as tall or much wider than the current low-voltage lines, IA 1157, is not like expanding the width of a road shoulder. The CHC line’s new right-of-way will be 260 feet wide instead of 150 feet. IA 1195; PA 244. There are no “safety standards” problems to solve. PA 24. The CHC line does not fit within the narrow “maintenance” exception. PA 25.

Defendants now argue that if the new CHC line and towers use the same right-of-way as the smaller old transmission line, they would not need FWS permission at all. Dkt. 56 at 42. But the Refuge Act expressly prohibits FWS from allowing parties to "expand, renew, or extend" an existing noncompatible use, 16 U.S.C. § 668dd(d)(3)(A)(i). It does not say, or even suggest, that owners of existing noncompatible uses have free rein to install structures of any size, forever. To the contrary, the Refuge Act specifically directs FWS to "provide for the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use." *Id.* § 668dd(d)(3)(B)(vi). While a corner bodega may be allowed to continue operating if a neighborhood is rezoned to residential use, it would not be permitted to convert into a big box store just because the two are both stores.

Towers this much higher and wider for a huge new high-voltage transmission line with a decades-long useful life surely constitute an expansion or an extension that violates the Refuge Act.

C. Converting an Easement Grant into a Land Transfer Does Not Avoid the Refuge Act's Compatibility Requirements.

The Refuge Act "was written by Congress to close regulatory holes that had been left by prior legislation." PA 28 (citation omitted). The district court correctly concluded that Defendants' argument for evading the compatibility

requirement by means of a land transfer "defies both congressional intent and common sense." PA 33.

The Transmission Companies argue that the Refuge Act contains a broad loophole allowing FWS to approve virtually any non-compatible private economic use, without having to show compatibility with the Refuge's wildlife purposes. They point to 16 U.S.C. § 668dd(b)(3), which authorizes the Secretary to "[a]quire] lands or interests therein by exchange … which he finds to be suitable for disposition …[if] [t]he values of the properties so exchanged … shall be approximately equal,… ." They argue this sole provision authorizes FWS to override the overall statutory scheme by exchanging land FWS deems "suitable," and that once exchanged, that land is no longer subject to the Refuge Act's requirements because it is no longer in the Refuge. Under that theory, any private use—transmission line, pipeline, or mine—could thereby evade the Refuge Act's compatibility requirements if the transaction is restructured as a land transfer.

The land exchange provision in 1997 Refuge Act continues from the previous National Wildlife Refuge System Administration Act of 1966, Pub. L. 89-669, 80 Stat. 926 (1966). The 1966 provision was picked up in a 1976 bill that prohibited *any* disposition of refuge land without an Act of Congress, but included the land exchange exception. Pub. L 94–223, 90 Stat 199 (1976). Nothing

suggests that land exchanges could evade the 1997 statute's purposes, or were exempt from the law's other requirements.

It's a fundamental canon of construction that "a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). Likewise, when interpreting sections of a statute, the whole-text canon "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.* at 167.

The words "suitable for disposition" must be understood in the context of the whole Refuge Act. Contrary to the whole text canon, Defendants ask this Court to interpret the "land exchange" provision as if it stood alone, rather than surrounded by a comprehensive statutory framework that prioritizes eliminating non-compatible uses, and requires new or expanded uses to meet a strict compatibility requirement. In *County of Maui v. Hawaii Wildlife Fund,* 140 S.Ct. 1462, 1473 (2020), the Supreme Court rejected a similar overreaching argument, concluding that "[w]e do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act." An interpretation that would grant *more* discretion to Refuge managers to allow non-compatible uses would essentially render the rest of the statute ineffective.

Courts "must hesitate to adopt an interpretation that would eviscerate such significant aspects of the statutory text." *American Hospital Ass'n v. Becerra*, 142 S.Ct. 1896, 2022 WL 2135490 at *7 (2022). In that case, a statute allowed the Department of Health and Human Services ("HHS") to adjust hospital groups' reimbursement rates only if HHS first performed surveys of individual hospital acquisition costs. HHS, however, decided to reduce a hospital group's reimbursement rates without the required survey, relying on another provision allowing it to "adjust" average rates "as necessary." The Court rejected that approach. If the agency would never have to do the surveys Congress required because it could always "adjust" rates, why would Congress have created the elaborate survey system, or specified that surveys were required before adjusting rates? The Court found that "HHS ha[d] no good answer to that question." *Id.*

The same reasoning applies here. Why would Congress establish the Refuge Act's elaborate system of compatibility determinations and define "compatible use," if FWS could avoid those requirements by using the land exchange section? Why would Congress so clearly limit FWS's discretion on one hand, then somehow expand it on the other? Defendants have no good answer.

FWS's Refuge Act rules specifically address "right-of-way" applications, and do not contemplate using land exchanges. They provide that "[w]here the land administered by the Secretary is owned in fee by the United States and the

right-of-way is compatible with the objectives of the area, permit or easement may be approved and granted by the Regional Director." 50 C.F.R. § 29.21-3(a).

That language certainly does not authorize right-of-way land exchanges; indeed, under the "negative-implication canon"—that the expression of one thing implies the exclusion of others—this FWS rule precludes allowing rights-of-way across refuges by means other than a limited-term permit or easement. The Transmission Companies' interpretation of the Refuge Act would render those rules a nullity as well.

The Transmission Companies cite the recent 2-1 decision in *Friends of Alaska National Wildlife Refuges v. Haaland*, 29 F.4th 432 (9th Cir. 2022) to argue that FWS is always free to use a land transfer to avoid a compatibility analysis. That case involves a proposed road through Izembek National Wildlife Refuge and interpretation of the Alaska National Interest Lands Conservation Act ("ANILCA"), not the Refuge Act. The Interior Department tried to avoid Title XI of ANILCA, which governs approval of transportation systems in Alaska refuges, 16 U.S.C. § 3164(a), by doing a land transfer under 16 U.S.C. § 3192(h)(1). Applying the canon that more specific provisions govern over general authority, the district court rejected Interior's effort as arbitrary and capricious, finding that "Congress's intent was clear—it enacted Title XI as a 'single comprehensive statutory authority for the approval of transportation systems'… . To make Title

XI subordinate to the exchange provision in [§ 3192(h)] would run counter to that intent." *Friends of Alaska National Wildlife Refuges v. Bernhardt,* 463 F.Supp.3d 1011, 1025 (D. Alaska 2020).

The Ninth Circuit's divided panel reversed. 29 F.4th at 443-44. The panel seemed to agree, without deciding, that land exchanges must be consistent with ANILCA's purposes, but then stretched to construe ANILCA to allow agency actions furthering the "economic and social needs of Alaskans." *Id.* at 438-39. As the dissent notes, ANILCA expressly declares two specific purposes: "to preserve unrivaled scenic and geological values associated with natural landscapes," 16 U.S.C. § 3101(b), and "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." *Id.* § 3101(c). 29 F.4th at 449-50 (Wardlaw, J., dissenting). The proposed road is not consistent with those textual purposes.

The district court and the dissent have the better part of the argument in the Izembek case, and the Ninth Circuit is currently considering whether to grant rehearing *en banc.*

Even if ANILCA could be read to allow agency actions furthering economic purposes, the Refuge Act certainly cannot be. It is instead devoted to guaranteeing that National Wildlife Refuges are not managed for multiple uses, but solely for wildlife and wildlife-related recreation. 16 U.S.C. § 668dd(a)(2).

In the present Refuge Act case, Judge Conley had it right:

> 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.

PA 33.

D. The District Court Correctly Concluded that this Transmission Line Is Not Compatible with the Refuge's Comprehensive Conservation Plan, Whether Through Easement Grant or Land Transfer.

Even if this Court concludes that FWS's land transfer authority is unlimited and not bound by the Refuge Act's compatibility requirement, the Court must still look to the Refuge's Comprehensive Conservation Plan ("CCP"). The Refuge Act requires each Refuge to complete a CCP, 16 U.S.C. § 668dd(e)(1)(A), and then requires FWS to manage each Refuge "in a manner consistent with the plan." *Id.* § 668dd(e)(1)(E). Violating the CCP violates the Act. *Cf. Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 962 (9th Cir. 2005) (Forest Service's failure to comply with Forest Plan violates National Forest Management Act).

The CCP specifies that, for this Refuge, the purpose of land acquisition is to protect fish and wildlife "by promoting habitat connectivity." PA 220. "On a narrow, linear refuge [like the Upper Mississippi], *land acquisition is a critical*

component of restoring habitat connectivity needed for the health of many species." *Id.* (emphasis added).

FWS's original determination acknowledged that the CHC transmission line would result in "habitat gaps and forest fragmentation," IA 1162, and "loss, degradation, and/or fragmentation of breeding, rearing, foraging, and dispersal habitats." IA 1163. A land transfer that exacerbates habitat fragmentation is contrary to the CCP.

The CCP also expressly provides that one of the Refuge goals is to "maintain and improve the scenic qualities and wild character of the Upper Mississippi River Refuge." PA 215. FWS concedes, however, that the CHC transmission line will be "significantly more visible to Refuge visitors," and will have "[n]egative impacts to the visual qualities of the Refuge." IA 1161. For that reason as well, whether by easement, or grant of fee simple title, allowing the CHC transmission line's planned route violates the CCP's express provisions, and therefore violates the Refuge Act.

E. The District Court Correctly Concluded that the Land Transfer Issue Was Ripe for Review and Represented the Consummation of FWS's Decisionmaking Process.

1. *The Land Transfer is Ripe for Review.*

Both the Transmission Companies and Defendants argue that the land transfer is not "final" enough or ripe for review. The district court correctly

concluded, however, that no set of facts would render the land transfer permissible, and no version of the CHC transmission line's proposed crossing the Refuge is legally permissible under the Refuge Act. PA 44.

According to the Defendants and Transmission Companies, the Conservation Groups must wait until the land transfer is actually signed and bulldozers are plowing through the Refuge—currently scheduled for October—and then file a new lawsuit and immediately seek an emergency injunction. The district court properly and pragmatically rejected that argument:

> 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.

PA 16.

Courts recognize an exception to the ripeness doctrine if (1) delayed review would cause hardship; (2) judicial intervention would not inappropriately interfere with further administrative action; and (3) the issues would not benefit from further factual development. *Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 479 (2001).[6] These circumstances all exist here.

[6] *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), is the leading case. The Transmission Companies suggest that *Abbott Labs* was a pre-enforcement rule challenge, and distinct from the agency decision here, but courts have

First, further delay will cause considerable hardship from the bulldozing and building up to the Refuge boundaries on both sides. PA 15. Forcing the Conservation Groups to file a new lawsuit in October, Dkt. 9 at 19, *after* the CHC line is mostly completed makes effective relief harder, runs up costs, and creates unnecessary environmental destruction and property damage.

As the district court recognized:

> 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.

PA 13.

Second, the district court's ruling doesn't interfere with further administrative action. FWS advised the Transmission Companies on August 3, 2021, that "we agree that a land exchange is a potentially favorable alternative to the right-of-way permit, and we are committed to working with you toward

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consistently applied the same ripeness exceptions to both. *E.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016).

timely review of this proposed land exchange." IA 63. Since then, the Transmission Companies "[p]roposed a qualified independent appraiser," whom FWS advised was "acceptable." PA 52. They had previously agreed on the "Wagner parcel" transfer and both parcels have been surveyed and platted. *Id.*

Third, the issues here are purely legal: whether this proposed land transfer violates the Refuge Act and the CCP. The results of an appraisal, drawing up of the deeds, and recording the transaction have nothing to do with the legal issue that the district court properly exercised its jurisdiction to decide.

2. *FWS's Land Transfer Decision Was a Final Agency Action Subject to APA Review.*

The APA "final action" cases do not allow Defendants to evade the statutory violations. On the relevant issue—whether the land transfer scheme can avoid the Refuge Act's applicable requirements—there is nothing "tentative or interlocutory," "rights or obligations have been determined" under FWS's decision, and "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding "biological opinions" under Endangered Species Act to be "final"). *See also Biden v. Texas,* No. 21-954, 2022 WL 2347211 at * 13–15 (U.S. June 30, 2022); *Hawkes*, 576 U.S. at 599. "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Western Illinois Home Health Care, Inc. v.*

Herman, 150 F.3d 659, 662 (7th Cir. 1998) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992)).

Here, FWS's statement that it would pursue a land transfer to serve the same purpose as the earlier easement was "final." FWS wrote, "we agree that a land exchange is a potentially favorable alternative to the right-of-way permit, and we are committed to working with you toward timely review of this proposed land exchange…Based on the information currently available, we expect the process will take up to nine months." IA 63. This letter states more than a "preliminary assessment" of FWS's views. It "commits" the agency to work toward a land transfer, and estimates how long the transaction may take.

Subsequent actions further reinforce the consummation of the agency's thinking on a land transfer. After receiving the letter, the Transmission Companies "[p]roposed a qualified independent appraiser," whom FWS advised was "acceptable." PA 52. They also "reviewed and commented" on surveys and plats for FWS lands and the Wagner parcel. *Id.*

FWS has indisputably decided that it will avoid making a compatibility assessment for this transmission line crossing the Refuge, and that decision directly affects the parties. *See San Francisco Herring Ass'n v. Dept. of Interior*, 946 F.3d 564 (9th Cir. 2019) ("an agency engaging in 'merely tentative or interlocutory' thinking does not state a definitive position in formal notices,

confirm that position orally, and then send officers into the field to execute on the directive" (quoting *Bennett*, 520 U.S. at 178)).

The other cases cited by the Transmission Companies and Defendants don't support their arguments. The issue in *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759 (8th Cir. 2019) was not whether the lawsuit was premature because the agency ROD had not yet been issued, but whether an implied private right of action against non-Federal actors exists under NEPA. *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065 (7th Cir. 2020), involved Michigan's 1984 assumption of regulatory authority from the Corps under the Clean Water Act. There, this Court found that an EPA letter advising the Tribe that Michigan, not the Corps, had jurisdiction was not a "final action," but just "reiterated the status quo," leaving nothing for the court to review. *Id.* at 1070. In *Dhakal v. Sessions*, 895 F.3d 532 (7th Cir. 2018), an asylum seeker filed an APA case instead of using the Immigration Act's administrative processes, which this Court found improper. In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Court found Sierra Club's challenge to a National Forest management plan to be premature because the Club could challenge timber cutting decisions later. Finally, in *Franklin*, the Court found a challenge to a Department of Commerce report on Congressional reapportionment premature because the President had not yet acted. 505 U.S. at 798.

Unlike the situation in those cases, FWS's letter "commit[ing]" to proceed with a land transfer is a reviewable final agency action. In *San Francisco Herring Association,* the Ninth Circuit found final agency action where the Park Service issued written notices asserting jurisdiction over certain waters in San Francisco Bay and a corresponding moratorium on fishing in the area. 946 F.3d 564. This correspondence, coupled with patrol boats' warnings to fishermen, represented the consummation of the agency's thinking on the matter, and was thus reviewable. The court found that:

> It raises questions of basic fairness for the Park Service to assert its jurisdiction over the fishermen and bring them to the precipice of punishment through in-water enforcement orders, only to later claim there is nothing conclusive here for the fishermen to even challenge. The APA's judicial review provisions prevent precisely this "heads I win, tails you lose" approach.

Id. at 575.

FWS stated its intention to approve a land transfer in its letter, and then moved to approve appraisers and review surveys with the Transmission Companies. To deny review here would create the exact "heads I win, tail you lose" approach warned of in *San Francisco Herring Association.*

The prejudice that the Conservation Groups would suffer from a delay in decision—being forced to file a new emergency complaint after the land transfer is "finalized," while bulldozers march forward, trees come down, and towers go

up in an "orchestrated trainwreck," PA 16—would be substantial. The district court's decision was fully consistent with applicable law.

F. No Pleading Defects Prevent This Court from Reaching the Land Transfer.

The Defendants misstate the Fed. Rule Civ. P. 8 standard in arguing, incorrectly, that the land transfer was not pled in the Conservation Groups' complaint. They ignore important allegations in the complaint and completely disregard the timeline of events. The Conservation Groups have maintained since the land transfer was raised that it is nothing more than a re-titling of the original right-of-way transaction.

First, Rule 8 "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)). "One objective of Rule 8 is to decide cases fairly on the merits, not to debate the finer points of pleading where opponents have fair notice of the claim or defense." *Basuch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010).

Second, the Defendants ignore several allegations giving fair notice that the Refuge crossing was alleged to be unlawful in any form. Plaintiffs' Complaint paragraph 196 states that "the proposed CHC transmission line and its new right-of-way through the Upper Mississippi Refuge is therefore either an

incompatible 'new use' of the Refuge, or a project that will 'expand, renew, or extend' an existing incompatible use. *In either case, the CHC transmission line crossing the Refuge is prohibited by the Refuge Act*." FA 83 (emphasis added). Similarly, Plaintiffs' request for relief asked to "[e]njoin the FWS Defendants from permitting or granting any easement *or other authority* to allow the proposed CHC transmission line and towers to run across or cut through [the Refuge]." FA 84 (emphasis added). These allegations gave Defendants "fair notice" of Plaintiffs' claim that any Refuge crossing would be unlawful.

Third, the original Compatibility Determination and right-of-way permits were withdrawn on August 27, 2021, 6 days before summary judgment briefs were due. PA 12; IA 64–69. The Conservation Groups nevertheless addressed the issue, explaining why the land transfer evasion should not work. Amending the complaint in those circumstances would serve no purpose except delay.

Fourth, the Plaintiff Conservation Groups' brief states: "[w]hether the approval is structured as an easement grant, as originally approved by USFWS, or as a land exchange, as the Transmission Companies now propose, the consequences are the same, and both violate the Refuge Act." FA 143-44. So, while the words "land exchange" may not appear in the complaint, the Defendants were on notice about the Conservation Groups' consistent objections to this particular Refuge crossing.

III. This Court Should Affirm the District Court's Decision for Plaintiffs on Their NEPA Claims.[7]

A. The EIS and ROD Violated NEPA By Failing to Fully and Fairly Analyze "All Reasonable Alternatives" to the Proposed CHC Transmission Line.

NEPA requires that major federal actions—involving permits, approvals, or federal funds—that could have significant environment impacts be preceded by an EIS. 42 U.S.C. § 4332(C). That EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14. The district court correctly concluded that the Defendants' EIS "defined the purpose and need of the CHC project so narrowly as to define away reasonable alternatives." PA 35. The Defendants skewed their analysis to exclude non-wires alternatives—including local solar energy generation, energy storage, energy efficiency, and demand response—that could achieve the same grid benefits without building a large new transmission line from Iowa through Wisconsin, PA 40, and "did not even *consider* any [alternative] routes not crossing the Refuge" and ecologically-sensitive portions of the Driftless area. PA 9, 39-40 (citing PA 286).

[7] If this Court were to reverse the district court's decision on the impermissibly constricted purpose and need, Plaintiffs should be allowed to proceed with their additional NEPA claims—on failure to consider cumulative impacts and climate change impacts as required by law—that the district court did not reach below.

The district court properly applied NEPA's requirements and followed *Simmons*, 120 F.3d 664, which is directly on point and which the CEQ endorsed as the proper interpretation of NEPA in regulations issued this year.

The district court correctly concluded that the EIS was unlawful because it rejected "all reasonable alternatives" from consideration on the basis of unlawfully narrow purpose and need:

> Any alternative which fails to achieve even one of the [Defendants' 17 limiting] 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.

PA 39-40.

1. *The EIS's Purpose and Need Statement Was Unlawfully Narrow, Contrary to NEPA and this Circuit's* Simmons *Decision.*

This Court explained in *Simmons*:

> When a federal agency prepares an … 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. The broader the purpose, the wider the range of alternatives; and vice versa.

120 F.3d at 666 (citation omitted). "Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the

agency explore each particular reasonable alternative?" *Id*. at 668. This Court recognized that "[t]he federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act." *Id.* at 666.

In *Simmons*, the Defendant Corps accepted the "self-serving statements from a prime beneficiary of the project," which were designed to support their "single source" plan to dam a free-flowing stream to create a reservoir supplying water for the City of Marion and a nearby Water District. *Id*. at 669. This Court criticized the Corps' approach as the "defining-away of alternatives," *id*. at 666, that could potentially avoid significant harmful environmental impacts, *id*. at 667-68, such as by piping in water from two existing sources.

This Court concluded that the Corps violated its "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project" with "its wholesale acceptance of Marion's definition of purpose." *Id*. at 669 (internal quotation marks and citations omitted).

Just as the district court did here, this Court rejected the argument that "[s]ince Marion is the proposer and will construct the project, the Corps must accept its definition. *That is a losing position in the Seventh Circuit*." *Id*. at 669

(emphasis added). "Over a decade ago, we held that 'the evaluation of "alternatives" mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action.'" *Id*. (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)). The appropriate goal was "to supply water… *not* to build (or find) a single reservoir to supply that water." *Id.*

The district court's decision below, PA 36-38, followed NEPA and this Circuit's line of reasoning in *Simmons* and *Van Abbema*: "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." PA 37.

CEQ, which issues NEPA regulations applicable to all federal agencies, recently explicitly re-affirmed *Simmons* as the correct interpretation of NEPA's purpose and need requirement. In explaining amendments intended to address concerns that the 2020 version of 40 C.F.R. § 1502.13 "may be interpreted to unduly constrain the discretion of agencies leading to the development of unreasonably narrow purpose and need statements," CEQ stated that:

> It is contrary to NEPA for agencies to ''contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence).'' *Simmons*[, 120 F.3d at 666] (citing 42 U.S.C. 4332(2)(E)). Constricting the definition of the project's purpose could exclude ''truly'' reasonable alternatives, making an EIS incompatible with NEPA's requirements. *Id.*

Council on Environmental Quality, *National Environmental Policy Act Implementing Regulations Revisions,* 87 Fed. Reg. 23,453, 23,459 (Apr. 20, 2022).

The district court thoroughly reviewed the Defendants' EIS purpose and need statement, IA 795–96, which contained "six sub-purposes" and seventeen limiting characteristics. PA 35-38. "Any alternative which fails to achieve even one of the above goals would then be (and was) entirely written out of consideration…." PA 39. Most of these "sub-purposes"—addressing reliability issues, alleviating grid congestion, supporting additional renewable energy generation, increasing efficiency to decrease consumer costs—are technology-neutral, and could be met by either a transmission line or non-wires alternatives. The fourth element of purpose and need, however—"[i]ncrease the transfer capability of the electrical system between Iowa and Wisconsin"—is a means, not an end. IA 795. Requiring the project to "increase transfer capability" between Iowa and Wisconsin is no different from requiring one water source to serve two communities as in *Simmons.* It's one way of meeting the other sub-purposes, not the only way. Being confined to only the CHC project proponents' "self-serving" definition unduly limits the alternatives and routes considered. The Defendants used the constricted purpose and need element to dismiss and "whittle away any alternatives down to the CHC project alone," PA 40, as the district court determined:

> The practical effect of such a specific set of sub-purpose[s] 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[IA 869]) 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.

PA 40.

The Defendants offer three reasons why their constricted purpose and need statement and truncated alternatives analysis nonetheless somehow complies with NEPA and the CEQ requirements. None have any merit.

First, they point to a ten-year-old report from MISO, the regional transmission operator,[8] proposing seventeen Midwest "multi-value" transmission lines. They claim that MISO's 2011 report—saying a transmission line between Dubuque and Middleton "creates an additional wind outlet path across the state; bringing power from Iowa into southern Wisconsin, where it can then go east…" IA 138—makes increasing transfer capacity from Iowa to

[8] MISO and the Defendants dispute that the purpose statement was adopted "almost verbatim" from earlier MISO documentation, but to what end? MISO asserts it is the "best source" of information for the project's purpose, Dkt. 39 at 6, and the Defendants say "RUS permissibly relied on MISO's federally authorized transmission planning process in developing its purpose and need statement." Dkt. 56 at 61.

Wisconsin an obligatory purpose.[9] That, however, is a description of only one means to accomplish broader goals, exactly what *Simmons* rejected.

The four amicus briefs (Dkt. 38, 39, 40, 41) further argue for deference to MISO's outdated decade-old planning and argue that affirming the district court's decision on this one Iowa-Wisconsin line will somehow disrupt national transmission planning. They argue that judicial review of agencies' compliance with NEPA's text and regulations would "chill" or "stifle" infrastructure investment, Dkt. 40 at 13, Dkt. 41 at 6, but give short shrift to the text of NEPA, which requires that all federal agencies perform robust environmental review. Neither the *amici* nor this Court may rewrite NEPA's statutory text.

Further, the *amici* are not wholly independent parties. MISO has a longstanding joint litigation strategy agreement with the three Intervenor-Defendant Transmission Companies. Dkt. 35. Dairyland is a dues-paying member of NRECA, and American Transmission Company and ITC Midwest are EEI members. Dkt. 34, 36. The Senior Vice President and Chief Business Officer

[9] MISO is a private planning organization. No transmission company or federal agency is in any way *obligated* to build what MISO once proposed. This is therefore not a situation as in *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004) or *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 664, 679-80 (7th Cir. 2019), in which it was unreasonable to require an agency to consider alternatives when the agency had no discretion to exercise.

of ITC Holdings serves on the American Clean Power Association's Board of Directors. Dkt. 33.

The Transmission Companies misread *Hoosier Env't Council v. U.S. Army Corps of Eng'rs (HEC)*, 722 F.3d 1053 (7th Cir. 2013), in arguing that the federal agencies were free to simply accept analysis performed by MISO and the Transmission Companies. Dkt. 18 at 52-53. Of course, agencies preparing an EIS can look to outside sources for information. In *HEC*, however, this Court emphasized that, while an agency preparing an EIS "is permitted to rely (though not uncritically) on submissions by private permit applicants and on consultants," it retains "an independent responsibility . . . and so cannot just rubberstamp… ." 722 F.3d at 1061. *See also Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 596 (4th Cir. 2018) (Forest Service arbitrarily adopted FERC's flawed analysis based on project proponent's report).

Second, the Transmission Companies incorrectly argue that an agency must accept the project proponent's stated objective (citing *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021)), or accord substantial weight to the proponent's siting and design preferences (citing *Env't L. & Pol'y Ctr. (ELPC) v. U.S. Nuclear Regul. Comm'n.*, 470 F.3d 676 (7th Cir. 2006)). That approach would gut NEPA's requirement to "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[d]evote substantial treatment to each alternative

considered in detail including the proposed action so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14.

Neither of those cases changes the key inquiry under *Simmons*: whether the purpose and need statement is so narrow that it excludes reasonable alternatives. As this Court stated in *ELPC,* "NEPA requires an agency to 'exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project' and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals." 470 F.3d at 683 (quoting *Simmons*, 120 F.3d at 669.)

This Court's recent *Protect Our Parks, Inc. v. Buttigieg*, No. 21-2449, 2022 WL 2376716 (7th Cir. July 1, 2022) decision did not hold that federal agencies must adopt project proponents' proffered purpose and need statements, but that an environmental review must accept external legal constraints on agency authority. Once the City of Chicago decided where to build the Obama Presidential Center, federal agencies made decisions involving the consequences, including the Department of Transportation's approval of street reroutes, and the Park Service's mandatory approval of a conversion of park land. *Id.* at *3 (noting "shall approve" language in statute). The federal agencies did not have to consider alternatives to building the Center because they had no decisionmaking discretion on that issue. That is *not* the situation in this case, where all three

agencies have, and have always had, a wide variety of options and alternatives to consider.

2. *The EIS Did Not Fully and Fairly Analyze Non-Wires Alternatives.*

Due largely to the unlawfully narrow purpose and need statement, the EIS did not adequately consider non-wires alternatives that can achieve the same reliability, congestion relief, and grid enhancement goals as a transmission line, but at a lower cost and with less environmental destruction. PA 37, 40. The Conservation Groups' EIS comments attached expert testimony explaining that these alternatives are feasible, work best in combination, and, like transmission lines, are eligible for cost-sharing across the MISO states. PA 304–338, 349–51.

Instead of evaluating a reasonable package of non-wires alternatives together—solar energy generation and battery storage resources, energy efficiency, demand response, and local existing grid improvements—the EIS concludes that each isolated approach "does not address issues on the regional bulk transmission system at a scale commensurate with transmission." IA 871 (energy storage), 871 (energy efficiency), 872 (demand response). This was despite the EIS's acknowledgement that many of these alternatives can individually meet elements of the purpose and need, and that they work better in combination. IA 870 ("without sufficient power storage capacity, residential photovoltaic solar systems have limited usefulness"); IA 872 ("As with energy

efficiency, demand response (also known as load reduction and load shifting) results in a decreased need for electricity.").

The Transmission Companies rely on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551–52 (1978), in which the Supreme Court held that plaintiffs did not provide sufficient detail for an "energy conservation" alternative to a nuclear power plant. In this case, the Conservation Groups clearly described the alternatives, provided detailed expert support, and specifically advocated that they be considered *in combination*, which EIS entirely failed to do. PA 271–78. That was sufficient detail to obligate the agencies to consider these reasonable cost-effective alternatives that result in much less adverse environmental impacts.

The Transmission Companies argue that agencies may reject distributed renewable energy alternatives as too speculative, citing *Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016). But whether an alternative is speculative turns on the facts. That case's facts are starkly distinguishable: the court upheld an EIS completed in 2011 in which "BLM found the implementation of this alternative to be 'speculative' given the current status of solar technology and the regulatory and commercial landscape." *Id.* at 581. Solar energy technology and the regulatory and commercial landscape have changed enormously since 2011. More than 3,000 megawatts of solar energy is in

development in Wisconsin, and American Transmission Company is itself developing an energy storage project.[10]

The Transmission Companies misstate this Court's reasoning in *ELPC*, 470 F.3d 676. The Court did not hold that the agency was *never* required to analyze energy efficiency alternatives during environmental review of a potential new nuclear power plant; it held instead that for the NRC's two-step licensing process, consideration of energy efficiency alternatives could be deferred to the second step—the actual construction licensing proceeding. *Id.* at 684 ("The need for power could vary considerably over [the up to forty years until the power plant would be built], so any analysis at this stage is speculative at best."). There is no similar two-step process here.

3. *The EIS Did Not Fully and Fairly Analyze Route Alternatives that Avoid Running Through the Refuge.*

The EIS did not seriously consider alternative routes that would avoid cutting through the Refuge and ecologically sensitive portions of the Driftless Area. PA 9, 40. In 2017, USEPA stated that:

> Because the Upper Mississippi River National Wildlife and Fish Refuge encompasses one of the largest blocks of floodplain habitat in the lower 48 states, lies within the Mississippi Flyway, and is designated as a Wetland of International Importance and a Globally

[10] Solar Energy Industries Association, *State Solar Spotlight: Wisconsin*, https://seia.org/sites/default/files/2022-06/Wisconsin%20Solar-Factsheet-2022-Q2.pdf.

> Important Bird Area, … EPA strongly recommends that potentially significant impacts to species and to the Refuge be avoided.

PA 250.

The Transmission Companies argue that alternatives were limited to paths directly connecting MISO's two chosen substations, so that any feasible route would have to cross Refuge. If a lawful purpose statement had been used, however, there clearly would have been no mandated transmission line there. The EIS claims a "need" to facilitate west-to-east transfer of power and to enhance Southwestern Wisconsin's grid; nowhere does it establish that these two particular substations must be directly connected. MISO's planning study did not precisely identify the route for its proposed transmission lines. *See* PA 221 (map noting "line routing shown throughout the report is for illustrative purposes only and do not represent the final line routes"). The electricity grid is a highly-interconnected web, and as a practical matter, can be connected in multiple ways with other lines. *See* PA 280.

The Transmission Companies now argue they did consider non-Refuge-crossing alternative routes. Those "alternatives," however, all crossed the River at locations, IA 217–378, that the Companies knew were not viable. That's not a fair consideration of reasonable alternatives. "The EIS itself … considered the CHC transmission line project with no other alternative outside of minor route changes." PA 40.

As this Court explained in *Simmons*: "a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives. … By focusing on the single-source idea, the Corps never looked at an entire category of reasonable alternatives and thereby ruined its [EIS]." 120 F.3d at 670. The district court correctly concluded that was exactly what the Defendants did in this case.

B. The Conservation Groups Have Standing to Challenge the Three Federal Agencies' Jointly Prepared EIS.

To establish Article III standing, a plaintiff must demonstrate: (1) an injury in-fact, (2) that is fairly traceable to the challenged conduct, and (3) seek a remedy likely to prevent or redress the injury. *Uzuegbunam v. Preczewski,* 141 S. Ct. 792, 797 (2021). The plaintiff's injury must be both: (1) concrete and particularized and (2) actual and imminent. *Spokeo Inc., v. Robins*, 578 U.S. 330, 339 (2016). The Conservation Groups meet all required elements for standing.

The Transmission Companies mischaracterize the EIS, the nature of environmental review, and NEPA law. All three Defendants acknowledged that even without RUS financing, an EIS would still be required before the agency decisions could be issued. IA 830, 1177. The fact that RUS had "lead" responsibility to complete the EIS does not allow the other two federal agencies that participated in NEPA review and signed the ROD to escape scrutiny.

The district court concluded that three of the four Plaintiff Conservation Groups "have more than met that bar in their supporting affidavits," and that the fourth made it, too. PA 21. First, the Conservation Groups' members will be harmed by the CHC transmission line running through members' land and adjacent to one group's conservation easement. *See* PA 73-75, 124-138, 201-214.

Second, Conservation Groups' members enjoy outdoor recreation, care for sensitive habitats, and view native animals and plant species that would harmed by transmission line construction. PA 54-57, 76-99, 139-180. The Supreme Court has "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational value of the area will be lessened' by the challenged activity." *Friends of Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). "[A]ll 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." PA 21. *See Sierra Club v. Franklin Cnty. Power*, 546 F.3d 918, 924 (7th Cir. 2008).

Third, the Conservation Groups' injuries are traceable to the challenged conduct. Their members live, work, and recreate along the transmission line route. The EIS was completed for the entire 102-mile length of the transmission line. IA 794-96. But for the federal approvals challenged in this case, which relied

on the EIS, this project cannot be built, and therefore the Conservation Groups' injuries trace back to the federal approvals.

This is not a "small federal handle" case, where nothing is at stake but noncritical federal funding, or where the project developers can, for example, go around protected wetlands to avoid needing Corps permits. This case involves federal funding *and* FWS/Corps permits *and* a significant public land obstacle to project completion. And, unlike those cases involving agency decisions not to do EISs at all, these three federal Defendants acknowledged that all three needed an EIS completed to comply with NEPA, all three jointly prepared it, and all three approved the ROD. IA 830, 1177, 1223–25. There are no cases holding that an agency can avoid being held accountable for a defective EIS by arguing later it was somehow not required to do an EIS after all.

Fourth, the district court correctly held that the Conservation Groups' injuries would be redressed by a ruling requiring the agencies to conduct a NEPA-compliant EIS with a broader purpose and need statement, which considers non-wires options and alternate routes. PA 23. Caselaw is clear that remanding for an agency to redo its NEPA analysis redresses injuries stemming from environmental harms, because, while a different outcome is not guaranteed, an agency *could* decide differently after completing a lawful NEPA analysis. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992); *American Rivers*

v. Fed. Energy Reg. Comm'n, 895 F.3d 32, 42 (D.C. Cir. 2018). That is, indeed, what actually happened in *Simmons*!

The Transmission Companies dispute redressability by inaccurately attempting to limit the standing inquiry to RUS's funding decision. Both the EIS and the ROD state that "[r]egardless of the potential financial assistance from RUS to fund Dairyland's ownership interest in the C-HC Project, a NEPA environmental review would still be required as part of the permitting actions by USACE, USFWS, and potentially other Federal agencies." IA 830, 1177.

As the district court correctly concluded, the Transmission Companies' attempt to narrow the standing inquiry to RUS's actions must fail. PA 22.

C. Plaintiffs Did Plead NEPA Claims Against FWS.

The Defendants argue that the Conservation Groups failed to plead NEPA violations against FWS, in attempting to "debate finer points of pleading where opponents have fair notice of the claim or defense." *Basuch*, 630 F.3d at 562. While the headings and requested relief of the complaint's NEPA claims focus on RUS, as lead agency, several allegations highlight FWS's role in the NEPA process, putting the agency on notice of the allegations. Plaintiffs alleged that: "Defendant USFWS adopted the Developer's definition of purpose and need for its review, authorizations and other determinations," FA 68, and that "Defendants RUS and USFWS did not consider alternative routes that would

have run north or south of the protected Upper Mississippi Refuge." FA 71; FA 48-85 (¶¶ 1, 96, 106, 125). It is undisputed that "[d]efendant USFWS also signed the ROD." FA 74. The complaint provided FWS clear notice that the EIS *and FWS's* role in the environmental review process were being challenged.

D. The District Court Was Correct to Vacate the EIS.

The Defendants mistakenly argue that the district court lacked power to vacate the EIS because it was supposedly not final agency action. They cite *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118 (9th Cir. 2010), a case that actually string cites several cases finding that *both* EISs and RODs constitute final agency action. *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997), holds that "it appears well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for purposes of the APA." Both EISs and RODs may be vacated. *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1084, 1090 (D.C. Cir. 2016), vacates an EIS. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1240 (10th Cir. 2017), notes that the district court may vacate an EIS. *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1151 (D. Alaska 2020), rejects the government's identical argument that only RODs may be vacated and states "partial vacatur of the Project EIS is an available remedy in this case." *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008), vacates an EIS and ROD.

Defendants argue that vacating the EIS unreasonably requires them to redo the entire NEPA process. On remand, the agencies must review all reasonable alternatives under a valid purpose and need, but may incorporate studies and text from the vacated EIS into a revised EIS. *See Pub. Emps. for Env't Resp.*, 827 F.3d at 1084 n.5.

IV. The District Court Erred by Failing to Enjoin Continued Construction of the Transmission Line.

A. Plaintiffs Meet the *Monsanto* Standard for a Permanent Injunction.

To secure a permanent injunction, a plaintiff who prevailed on the merits must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). As the district court found when granting a preliminary injunction, all of *Monsanto*'s requirements are met here.[11]

[11] The Conservation Groups briefed these issues in their injunction motion. Dkt. 53-1.

First, ongoing construction will irreparably harm Plaintiffs and their members due to private property being taken, and environmental destruction and aesthetic harms lessening property values and recreational enjoyment. PA 124-180, 187-214. The Transmission Companies are now installing 17-story high towers. PA 201-14. In addition, "NEPA plaintiffs are likely to suffer irreparable harm when an agency is allowed to commit itself to a project before it has fully complied with NEPA." *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb,* 944 F. Supp. 2d 656, 664 (E.D. Wis. 2013).

Second, there are no remedies at law available and "[e]nvironmental injury, by its nature, can seldom be adequately remedied by monetary damages and is often permanent or at least of long duration, i.e. irreparable." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987).

Third, whenever environmental injury is likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F. Supp. 2d 1070, 1089 (E.D. Wis. 2005) (quoting *Idaho Sporting Congress, Inc. v. Alexander,* 222 F.3d 562, 569 (9th Cir. 2000)). The Transmission Companies' economic concerns, which are self-inflicted by their gamble that they will ultimately be allowed to build their project, cannot outweigh these environmental harms. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997-98 (8th Cir. 2011). This Court already denied the Transmission

Companies' motion to stay the district court's judgment pending appeal, which involved balancing hardships. Dkt. 52.

Fourth, injunctive relief would promote the public interest. Beyond preventing environmental degradation, which will benefit Plaintiffs and many others, an injunction would also protect ratepayers' economic interests. Plaintiffs and other parties—including Dane County, Iowa County, and Wisconsin Citizens Utility Board, who do actually represent utility ratepayers and taxpayers—have consistently contended that the costly CHC transmission line is not in ratepayers' economic interest. Now, ratepayers are being charged for continued construction of "two transmission line segments to nowhere" that cannot lawfully be completed on the current route and may never be completed. An injunction can prevent that ongoing problem from getting worse.

B. The District Court's View that It Lacked Jurisdiction to Grant an Injunction against Continued Construction Was Legally Erroneous.

When a district court abuses its discretion or makes a legal error in denying a permanent injunction, the Court of Appeals can reverse. *See Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d 694 (7th Cir. 2013).

Although the district court had previously found that the Conservation Groups satisfied the requirements for a preliminary injunction, it chose not to grant injunctive relief against the Transmission Companies in its final judgment.

PA 47. The court did not articulate its rationale, even though it recognized that "entry of a permanent injunction later" would be necessary and appropriate to halt construction on federal land. PA 13.

To the extent the district court believed it lacked jurisdiction to enter broader injunctive relief, that legal conclusion was in error. Article III courts have broad equitable authority to fashion "complete relief," including authority in APA cases to enjoin private conduct when necessary.

C. Article III Courts Sitting in Equity Have Broad Authority and Responsibility to Issue Injunctions When Necessary to Afford Successful Plaintiffs "Complete Relief."

The Supreme Court has made clear:

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

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). The Court emphasized that: "Power is thereby resident in the District Court, in exercising this jurisdiction 'to do equity and to mould [sic] each decree to the necessities of the particular case.'" *Id.* (*quoting Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944)). This equitable power allows a court to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other

relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." *Id*.

In this case, the typical APA remedies of vacatur and remand only afford "truncated justice," not "complete relief." Despite the declared illegality of a Refuge crossing, the Transmission Companies continue to clear right-of-way, lay foundations, erect towers, and plan to being wiring this summer, PA 201-14, 361-65, right up to the Refuge borders, precisely the strategy the district court characterized as an "orchestrated train wreck." PA 16.[12] That strategy is also designed to further skew the new EIS on remand. The district court's failure to stop construction pending that new environmental review was erroneous. The Transmission Companies are playing chicken with the federal judiciary, and this Court's responsibility is to prevent that.

1. *Courts Recognize that Enjoining an Entire Project, Including Actions by Non-Federal Parties, Can Be Necessary to Prevent Unlawful Incursions into Public Land.*

The Supreme Court has recognized that Congress's authority to regulate public lands under the Property Clause "may have some effect on private lands not otherwise under federal control" if needed to protect public land resources.

[12] The fact that the Transmission Companies have sunk ratepayer money into a project they cannot complete does not justify denying injunctive relief. *TVA v. Hill*, 437 U.S. 153 (1978).

Kleppe, 426 U.S. at 545 (*citing Camfield v. United States*, 167 U.S. 518 (1897) (affirming conviction for erecting fences on private land that prevented access to public land)). *State of Minn. ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), examined whether federal restrictions on use of motorized boats and vehicles in Minnesota's Boundary Waters Canoe Area Wilderness were enforceable on non-Federal land. The Eight Circuit held that extending the regulations to non-Federal land was lawful and appropriate because, under the authority to protect public land inherent in the Property Clause, "Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." *Id.* at 1249.

An Article III court fashioning a remedy for a threatened violation of the Refuge Act, 16 U.S.C. §§ 668dd–668ee, and Congress's 1924 statute establishing the Refuge, 16 U.S.C. § 723, can reach activities on "private lands not otherwise under federal control" that threaten the federal lands' designated purposes. Ongoing construction of the CHC transmission line toward the Refuge boundaries does precisely that.

Likely damage to public lands can justify an injunction prior to direct incursions. In *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986), plaintiffs sought to enjoin construction of a highway proposed to run through a state park until after an EIS was completed. The developers were

constructing the segments on either side of the park. The court concluded that circumstances justified a broad injunction to assure environmental review was completed "before any portion of the road is built." *Id.* at 1042. Otherwise, any federal decision "would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS. The completed segments would stand like gun barrels pointing into the heartland of the park." *Id.* (internal quotation marks and citations omitted).

The Transmission Companies' actions here are "gun barrels pointing into the heartland of" the Refuge. Much of the right-of-way and corresponding access roads in Iowa have been bulldozed and clearcut. *See* PA 139-80. The Transmission Companies are building in Wisconsin up to the Refuge's border. PA 361-65. Unloading the guns is within this Court's authority.

2. *Courts Recognize that Injunctions Against Entire Projects Are Lawful and Appropriate Remedies for NEPA Violations.*

Injunctions against non-Federal actors to halt activities requiring federal permits are routine NEPA remedies. In the seminal case, *Minnesota Public Interest Research Group v. Butz,* 358 F. Supp. 584 (D. Minn. 1973), *aff'd* 498 F.2d 1314 (8th Cir. 1974),[13] the court permanently enjoined logging in the Boundary Waters until a legally compliant EIS was completed. The Forest Service argued that a

[13] *See generally* Daniel Mandelker et al., *NEPA Law & Litigation* § 4.77.

permanent injunction was unnecessary, but the court found a need to preserve the area until NEPA's requirements were met. *See Habitat Educ. Ctr.*, 363 F. Supp. 2d at 1088–89 (enjoining logging); *Greater Yellowstone Coal. v. Bosworth,* 209 F. Supp. 2d 156, 163-64 (D.D.C. 2002) (enjoining livestock grazing).

Under NEPA, it is improper to divide projects into segments, which have "no independent utility." *E.g., Swain v. Brinegar,* 542 F.2d 364, 369-70 (7th Cir. 1976); *Hawthorn Envt'l Preserv. Ass'n v. Coleman*, 417 F. Supp. 1091 (N.D. Ga. 1976). The proposed CHC transmission line segment that would cross the Refuge obviously has no independent utility of its own.

Consistent with that anti-segmentation principle, federal courts have often enjoined entire projects. In *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113 (9th Cir. 2005), a district court held that the Corps improperly limited the scope of its NEPA analysis to washes in the development area, vacated the permits, and enjoined all construction. The Ninth Circuit affirmed "[b]ecause the district court found that any development … would impact jurisdictional waters, the whole of the property falls under the Corps' permitting authority and the court's authority to enjoin development." *Id.* at 1123. Facts matter.

Likewise, in *White Tanks Concerned Citizens, Inc. v. Strock,* 563 F.3d 1033 (9th Cir. 2009), the Ninth Circuit held, as in *Save Our Sonoran,* that Corps' limited jurisdiction under the Clean Water Act did not limit the NEPA-required scope

analysis: If building around the water is possible, the Corps' environmental review need only consider the waters; if it is impossible and the project cannot go forward without a permit, the review must consider the entire project's effects.

Here, a lawful EIS analyzing a package of non-wires alternatives, and a route that avoids running through the protected Refuge, is needed to comply with both NEPA and the Refuge Act. An alternative non-Refuge crossing will require realignment of the entire transmission line, making an injunction of all transmission line construction now the appropriate remedy.[14]

If the only remedy for public lands violations is to halt construction within the boundaries of the National Wildlife Refuge or National Park at risk, nothing would discourage more developers of long linear projects from repeating the Transmission Companies' "orchestrated trainwreck" strategy: Bulldoze up to the edge of public lands, run up costs, clearcut, and dare the Court or agency to require the project be left unfinished. If that game of chicken is rewarded, public lands are made more vulnerable, contrary to Congress's purpose in the Refuge Act and other statutes protecting public lands.

[14] To the Conservation Groups' knowledge, there is no case in which agencies agree an EIS covering an entire project is necessary, jointly complete the EIS, make findings that it meets NEPA's requirements, and then argue that the federal role is so small that it would not be equitable to enjoin the entire project if NEPA is violated.

Article III courts have broad equitable discretion to shape remedies to address the facts of the case and serve the purposes of the underlying statutes. *Hecht*, 321 U.S. at 329. Accomplishing that goal in this case requires a broad injunction against continued construction. The district court's conclusion that it lacked the authority to grant such relief was erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees request that this Court:

1. Affirm the district court's summary judgment decisions and remedies in favor of the Conservation Groups on the NEPA and Refuge Act claims.
2. Reverse the district court's erroneous decision declining to grant an injunction against continued transmission line construction.
3. Issue a permanent injunction against continuing construction of the CHC transmission line unless and until the Defendants rectify their statutory violations.

Respectfully submitted this 8th day of July, 2022,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Federal Rule of Appellate Procedure 32(g) and Circuit Rule 32(c), the foregoing Brief contains 16,500 words, as counted by counsel's word processing system, excluding those portions of the brief exempted under Rule 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 13-point Book Antiqua font.

DATED: July 8, 2022

SIGNED: */s/ Howard A. Learner*

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: July 8, 2022

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

and

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

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

REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, AND DEFENDERS OF WILDLIFE

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CIRCUIT RULE 30 CERTIFICATION

All of the materials required by Circuit Rule 30(a) and (b) are included in the Required Short Appendix bound with Plaintiffs-Appellees/Cross-Appellants' Opening/Response Brief and the Appendix of Plaintiffs-Appellees/Cross-Appellants, with the exception (as allowed by Circuit Rule 30(c)) of documents already included in the Appendix of Defendants-Appellants or the Appendix of Intervenor-Defendants.

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INDEX TO PLAINTIFFS' APPENDIX

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

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

Plaintiffs,

v.

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

Defendants,

and

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

Intervenor-Defendants.

OPINION AND ORDER

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

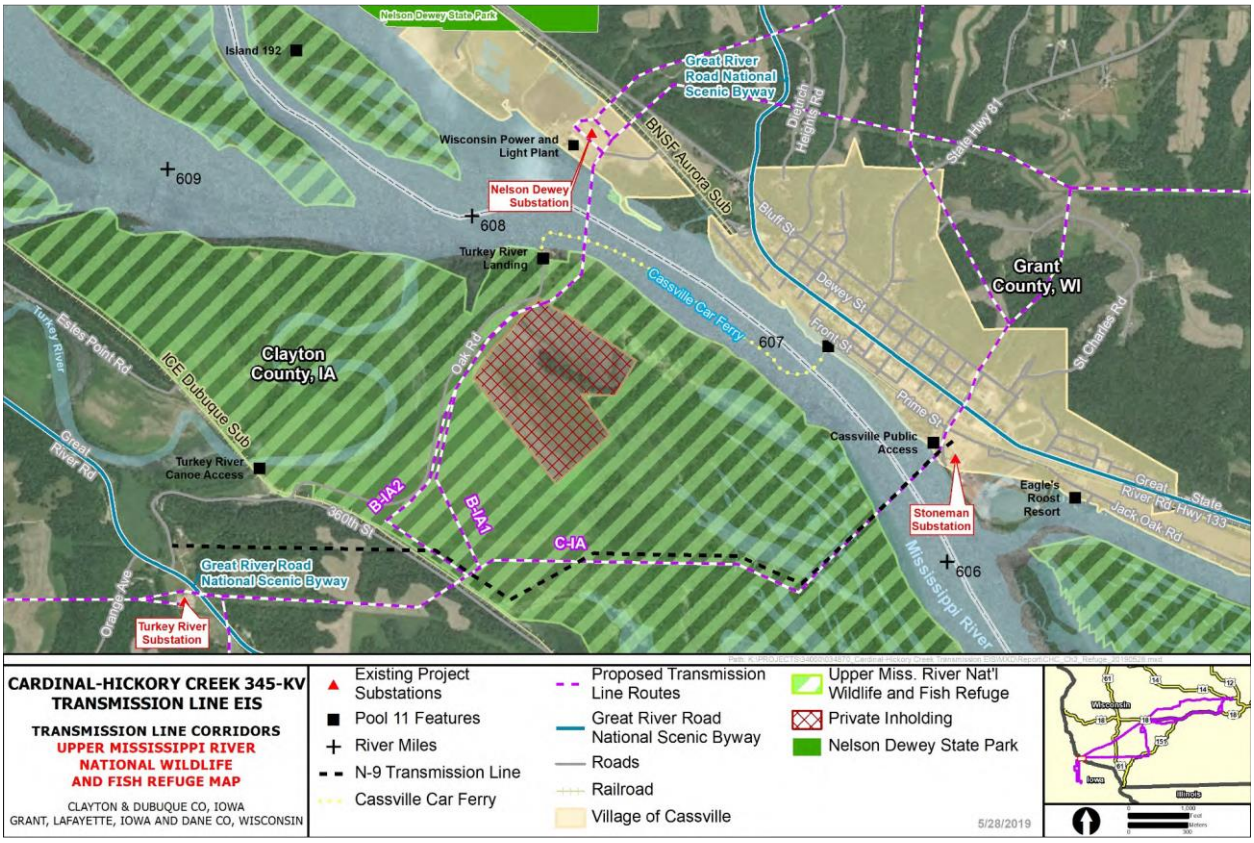
The National Wildlife Refuge System Improvement Act of 1997 was written by Congress to close regulatory holes that had been left by prior legislation. Tredenick, supra, at 77. "In 1989, wildlife refuge managers reported that ninety percent of the refuges had at least one secondary use, seventy percent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