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

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DRIFTLESS AREA LAND CONSERVANCY, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

RURAL UTILITIES SERVICE, et al.,
Defendants-Appellants/Cross-Appellees,

and

AMERICAN TRANSMISSION COMPANY LLC, et al.,
Intervenor Defendants-Appellants/Cross-Appellees.

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

COMBINED REPLY BRIEF ON APPEAL AND RESPONSIVE BRIEF ON CROSS-APPEAL OF FEDERAL DEFENDANTS-APPELLANTS

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GLOSSARY

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

INTRODUCTION

The Cardinal-Hickory Creek ("CHC") Project is a planned electric transmission line between Iowa and Wisconsin with limited federal involvement. Federal Defendants brought their appeal because the district court erroneously issued broad relief against Federal Defendants based on a National Wildlife Refuge System Administration Act ("Refuge Act") claim that was nonjusticiable, and a National Environmental Policy Act ("NEPA") claim that Plaintiffs lacked standing to present and which was unavailing in any event. Plaintiffs have not shown otherwise, and their cross-appeal claim lacks merit.

First, the district court erred by deciding whether the U.S. Fish and Wildlife Service's ("FWS") hypothetical approval of Intervenors' pending land exchange request would violate the Refuge Act. Plaintiffs never asserted any claim regarding the land exchange request, there was never any final agency action on such a request, and such a claim was not ripe for review. Plaintiffs largely eschew these threshold issues in their brief, instead arguing the merits of a Refuge Act claim. But the district court never should have reached the merits of whether a land exchange violates the Refuge Act, nor should this Court on appeal.

Second, the district court erred in its rulings regarding the Rural Utilities Service's ("RUS") Environmental Impact Statement ("EIS") and Record of Decision ("ROD"). Plaintiffs fail to meet their burden to demonstrate standing. On the merits, the purpose and need statement in the EIS was permissible, and the district court improperly vacated the EIS, rather than the ROD, in its remedy order.

On cross-appeal, Plaintiffs request an injunction against the Intervenors' ongoing construction of the CHC Project outside of the Refuge. Although that additional measure of relief would not run against the federal government, Federal Defendants believe that the district court did not err in declining to grant the requested injunction. The district court lacked jurisdiction to issue an injunction against construction of portions of the CHC Project not subject to any challenged federal authorization.

JURISDICTIONAL STATEMENT OF CROSS-APPEAL

The district court had jurisdiction over Plaintiffs' claims only to the extent stated in the jurisdictional summary in Federal Defendants' Opening Brief. *See* Fed. Defs.' Br. 2–3. The jurisdictional statement in Plaintiffs' brief is not correct to the extent it departs from that

summary. Federal Defendants agree that this Court has appellate jurisdiction over Plaintiffs' cross-appeal.

STATEMENT OF CROSS-APPEAL ISSUE

Whether the district court abused its discretion in declining to grant Plaintiffs' request for an injunction against ongoing CHC Project construction, which, other than a limited number of Clean Water Act authorizations no longer at issue here, does not require federal authorization.

STATEMENT OF THE CASE

Federal Defendants presented a complete and correct statement of the case in their Opening Brief. *See* Fed. Defs.' Br. 5–25. Plaintiffs' cross-appeal arises out of the district court's remedy order, which declined to issue Plaintiffs' requested permanent injunction against ongoing construction of the entire CHC Project. Federal Defendants' Appendix ("FA") 47. When Plaintiffs recently requested a similar injunction pending appeal in the district court, the district court denied that request. *See* ECF No. 245, at 8.[1]

[1] All ECF documents refer to those filed in Cause No. 3:21-cv-96-wmc (W.D. Wis.).

SUMMARY OF THE ARGUMENT

1. The district court erred when it held that the FWS's hypothetical approval of Intervenors' pending request for a land exchange violated the Refuge Act.

a. Plaintiffs did not plead, and thus forfeited, any challenge to FWS's hypothetical approval of the pending land exchange request. Plaintiffs' attempts to reinterpret their complaint on appeal do not overcome the basic problem that Plaintiffs did not meet their duties under Federal Rule of Civil Procedure 8 to give Federal Defendants fair notice of a claim related to a hypothetical land exchange.

b. Even if this Court reaches a claim against the hypothetical grant of Intervenors' land exchange request, such a claim does not challenge any final agency action. Plaintiffs argue that FWS's August 3 letter is a final agency action, but all the letter provides is that FWS will review Intervenors' land exchange request, and that such a request is "potentially favorable" to a right-of-way permit. It clearly fails the Supreme Court's required two-prong test for final agency action. *See Bennett v. Spear*, 520 U.S. 154 (1997). Plaintiffs' other arguments

about the FWS's communications to the Intervenors misrepresent the record.

c. A claim against the hypothetical grant of Intervenors' land exchange request is also not ripe for review. The district court's ruling below is an impermissible advisory opinion which only serves to inform FWS how the court would rule if FWS granted the pending land exchange request. Additional factual development is also required before judicial consideration, because FWS has not yet made any of the findings required for a land exchange decision. Delaying review will not create the legal hardship the Plaintiffs claim in their brief. Rather, it is speculative at best whether an immediate ruling on the Refuge Act would cause Intervenors to voluntarily halt project construction outside the Refuge, which is not subject to any challenged federal authorization. Plaintiffs' contrary assumption rests in part on a legal error regarding the permissibility of crossing the Refuge at an alternative location.

d. This Court should reject Plaintiffs' claims that Federal Defendants acted to evade judicial review and the requirements of the Refuge Act. As explained in the administrative record, and in Federal Defendants' prior briefing, FWS reasonably rescinded the 2019

Compatibility Determination and 2020 Right-of-Way permit because it discovered it had reviewed the wrong preexisting easement documents in issuing those authorizations. FWS also previously began conducting a routine review of Intervenors' request for a land exchange, but paused that review in response to the district court's opinion. Any approval of the land exchange request would be subject to judicial review when complete.

2. The district court lacked jurisdiction to adjudicate the merits of Plaintiffs' NEPA claim, erred by holding that the purpose and need statement in RUS's EIS violated NEPA, and erroneously vacated the EIS in addition to the agency's ROD.

a. Plaintiffs lack standing to bring a NEPA claim because they cannot tie their asserted injuries to the agency action they challenge. Plaintiffs' NEPA claim challenges RUS's ROD, which concluded the EIS process as to a potential future funding grant to Dairyland to support a 9% stake in the CHC Project. Given that Plaintiffs pleaded injuries associated with the construction of the CHC Project, they do not meet the bar for causation or redressability because Plaintiffs have failed to establish that construction of the CHC Project is dependent on receiving

funding from RUS. Despite Plaintiffs' arguments on appeal, FWS's involvement in the EIS process does not allow Plaintiffs to meet the bar for standing.

b. On the merits, the district court erred in holding that the purpose and need statement in RUS's EIS violated NEPA. First, RUS reasonably included the goal of increasing transfer capability between Iowa and Wisconsin in the purpose and need statement. Such a purpose based on the practical circumstances on the ground is plainly permissible. RUS comprehensively described how additional wind energy was being produced in Iowa, while there was demand for this energy in southern Wisconsin, particularly the cities of Madison and Milwaukee. RUS's selection of a goal based on real-world conditions is unlike the artificial narrowing at issue in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), on which Plaintiffs principally rely.

Second, RUS reasonably relied on the Midcontinent Independent System Operator's ("MISO") proposal for the CHC Project. Plaintiffs fail to acknowledge that when MISO proposed the CHC Project, it was exercising its federally-authorized power to conduct grid transmission

planning. RUS, which by statute is a loan-granting organization without any expertise in power transmission planning, could permissibly rely on MISO's proposal.

Third, RUS considered a reasonable range of alternatives in the EIS. RUS comprehensively examined non-wire alternatives proposed by Plaintiffs and eliminated them for not meeting at least four different elements of the purpose and need statement. RUS also considered four different non-Refuge routing options and eliminated them from further study because they were not feasible.

c. The district court erred in vacating RUS's EIS, in addition to the agency's ROD because, unlike a ROD, an agency's EIS is not final agency action. An EIS is merely interlocutory analysis, and part of a larger review process that is formalized and concluded in the agency's ROD. The district court thus lacked authority to vacate the EIS here under the Administrative Procedure Act ("APA").

3. Finally, although the injunctive relief that Plaintiffs seek on cross-appeal would not run against the federal government, it is the Federal Defendants' position that the district court did not abuse its discretion in declining to issue that injunction. Critically, the district court lacked

jurisdiction to issue such an injunction. The ongoing construction at issue here is outside the Refuge and not subject to any challenged federal authorization. Even if the district court did have jurisdiction, Plaintiffs fail to demonstrate any specific grounds showing that the refusal to issue an injunction would be an abuse of discretion on these facts.

STANDARD OF REVIEW

This Court always reviews the district court's grant of summary judgment de novo. *See, e.g.*, *Flexible Steel Lacing Co. v. Conveyor Accessories, Inc.*, 955 F.3d 632, 643 (7th Cir. 2020); *Georgia-Pacific Consumer Prods. LP v. Kimberly-Clark Corp.*, 647 F.3d 723, 727 (7th Cir. 2011). To the knowledge of the Federal Defendants, the Court has never applied a deferential standard of review to a district court's review of an EIS on summary judgment, *see* Pls.' Br. 27, but rather has held at least twice that de novo review applies in that situation. *See Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 525 (7th Cir. 2012); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 900 (7th Cir. 2010).

As stated in the Federal Defendants' Opening Brief, to the extent any of the agency actions here are subject to judicial review, courts review whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. This standard of review is "highly deferential," and this Court monitors agencies "only for glaring mistakes" or "obvious wrongness." *Smith v. Off. of Civilian Health & Med. Program of Uniformed Servs.*, 97 F.3d 950, 955 (7th Cir. 1996).

With respect to Plaintiffs' cross-appeal, this Court reviews the district court's "denial of a permanent injunction for abuse of discretion." *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001).

ARGUMENT

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

Plaintiffs argue on the merits that the hypothetical grant of Intervenors' pending land exchange request, as well as FWS's rescinded Compatibility Determination and Right-of-Way permit, violates the Refuge Act. Pls.' Br. 28–41. The Federal Defendants did not appeal the judgment as to the rescinded Compatibility Determination and Right-

of-Way permit.[2] But with regard to a land exchange, Plaintiffs largely overlook the central flaw in the district court's judgment: the district court erred in addressing whether a hypothetical grant of Intervenors' pending land exchange would violate the Refuge Act.

The district court's purely advisory opinion on whether a proposed land exchange violates the Refuge Act must be vacated. The district court erred because: (1) Plaintiffs never asserted a claim regarding the land exchange in their complaint; (2) FWS took no final agency action

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[2] The Federal Defendants nevertheless note for this Court's awareness that Plaintiffs misrepresent the record in their discussion of compatibility determinations. Plaintiffs write that "[i]n 2014, Refuge managers told the Transmission companies to explore routes that avoid crossing the Refuge because the line was not compatible." Pls.' Br. 31–32 (citing Intervenors' Appendix ("IA") 865). But the document Plaintiffs cite provides that "USFWS Refuge management would *prefer* a crossing not involving/affecting Refuge-managed lands." IA 865 (emphasis added). Plaintiffs also state that "in response to a proposed Refuge crossing by another high-voltage transmission line, the Refuge managers explained that these projects are not compatible . . . ." Pls.' Br. 32 (citing Plaintiffs' Appendix ("PA") 231–33). But Plaintiffs here reference a "finding of appropriateness," whereby FWS determined at an earlier stage of the review process that the other proposed power line should not be permitted based on legal requirements other than compatibility. PA 227. The administrative process with respect to the other proposed power line thus terminated before FWS made a compatibility determination. *See* U.S. Fish and Wildlife Service, Fish and Wildlife Service Manual, 603 FW 1.8 (describing framework for finding of appropriateness).

on Intervenors' land exchange request; and (3) a claim as to the hypothetical approval of a land exchange request would be unripe. This Court should also reject Plaintiffs' arguments that FWS is attempting to evade judicial review and the requirements of the Refuge Act.

A. Plaintiffs failed to plead a claim against the hypothetical approval of Intervenors' pending land exchange.

As explained in Federal Defendants' Opening Brief, the district court erred in reaching the issue of a land exchange because Plaintiffs never pleaded any challenge to a land exchange. *See* Fed. Defs.' Br. 31–33. Plaintiffs' operative complaint does not mention even the idea of a land exchange, and Plaintiffs never amended their complaint to allege such a claim.

Plaintiffs argue that Federal Defendants misrepresent the law regarding Federal Rule of Civil Procedure 8, but the Rule 8 cases cited by Plaintiffs instead support Federal Defendants' position. *See* Pls.' Br. 49–50. Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the rule "reflects a liberal notice pleading regime," allegations cannot be "too vague to provide notice to defendants of the contours of

[a] claim." *Brooks v. Ross*, 578 F.3d 574, 580–82 (7th Cir. 2009). The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 581. Notably, the "liberal construction accorded a pleading under Rule 8(f) [that pleadings must be construed so as to do justice] does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings." *Holman v. Indiana*, 211 F.3d 399, 407 (7th Cir. 2000).

Plaintiffs' pleadings failed to meet even Rule 8's lenient pleading standard for a claim as to the hypothetical grant of the pending land exchange request. Plaintiffs argue that they provided notice through the complaint's allegation that "[i]n either case, the CHC transmission line crossing the Refuge is prohibited by the Refuge Act." Pls.' Br. 50 (citing FA 83). But all this allegation claims is that the CHC Project, as originally proposed, is either a "new use" of the Refuge or "expan[sion], renew[al], or exten[sion] [of] an existing use" of the Refuge, either of which may require a compatibility determination. 16 U.S.C. § 668dd(d)(3)(A)(i); *see* FA 83. It says nothing regarding a land exchange.

Plaintiffs also point to their complaint's request for relief 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]." Pls.' Br. 50 (citing FA 84). But a blanket request against "any . . . other authority" allowing the CHC Project to cross the Refuge is "too vague to provide notice to defendants of the contours of [a] claim." *Brooks*, 578 F.3d at 581–82. And, in any event, a request for relief does not state a claim.

Plaintiffs further argue that the timing of the withdrawal of the Compatibility Determination and Right-of-Way permit, as well as their summary judgment brief, excuses their failure to plead a claim challenging the hypothetical denial of Intervenors' request for a land exchange. Pls.' Br. 50. But this Court should not "fabricate a claim that a plaintiff has not spelled out in his pleadings." *Holman*, 211 F.3d at 407. When a plaintiff seeks to challenge an agency action not mentioned in her complaint, her options are either to seek to amend the complaint or to file a new lawsuit. Either option would have allowed Federal Defendants here to prepare an administrative record related to Intervenors' pending request for a land exchange before proceeding to

judicial review of the merits of the claim. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record.").

Plaintiffs' shifting arguments at summary judgment regarding the hypothetical grant of a land exchange request compounded Plaintiffs' failure to amend their complaint. Plaintiffs' initial brief did not argue that a land exchange decision had been made or challenge such a decision; it merely argued in the abstract that FWS should not be able to "circumvent" the requirements of the Refuge Act by approving a land exchange. *See* FA 193, 203–06. It was only in Plaintiffs' brief in opposition to Federal Defendants' cross-motion for summary judgment that Plaintiffs claimed a land exchange was ripe for review. *See* FA 277–79. Plaintiffs finally argued in their reply brief that a hypothetical claim as to a land exchange is "reviewable now as a final agency action." *See* ECF No. 163, at 32. This Court does not entertain arguments made for the first time in a reply brief due to the potential unfairness to opposing parties and the disadvantage to the Court of not obtaining balanced briefing. *See United States v. Diaz*, 533 F.3d 574, 577 (7th Cir. 2008). Accordingly, the district court should not have relied on

arguments Plaintiffs made in their reply brief to entertain a new, unnoticed claim.[3]

B. A claim against the hypothetical approval of a land exchange would not meet the APA's final agency action requirement.

Even if Plaintiffs properly alleged a claim against the hypothetical grant of Intervenors' pending land exchange, the district court erred in adjudicating such a claim in the absence of a challenge to any final agency action. Plaintiffs ignore the requirements of the APA, as well as binding precedent in this Court and the Supreme Court, to argue that a claim against the hypothetical approval of a pending land exchange request challenges final agency action. These arguments are without merit.

Plaintiffs first argue that "the relevant *issue* – whether the land transfer scheme can avoid the Refuge Act's applicable requirements" – is a final agency action. Pls.' Br. 45 (emphasis added). But as already explained in Federal Defendants' Opening Brief, *see* Fed. Defs.' Br. 42,

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[3] Federal Defendants filed their reply brief one day before Plaintiffs and had no opportunity to respond to Plaintiffs' assertion that there was a final agency action with respect to the proposed land exchange. *See* ECF Nos. 161, 163.

the APA authorizes review of "agency action," not of legal issues. 5 U.S.C. § 704.

Plaintiffs then argue that FWS's August 3, 2021 letter to Intervenors constitutes a final agency action, but, in so doing, mischaracterize the letter.[4] Most notably, Plaintiffs assert that "FWS stated its intention to *approve* a land transfer." Pls.' Br. 48 (emphasis added). Plaintiffs also argue that the August 3 letter is "FWS's statement that it would pursue a land transfer," *id.* at 46, "'commits' the agency to work toward a land transfer," *id.*, and is evidence of "commit[ing] to proceed with a land transfer." *Id.* at 48. But FWS merely stated it was "committed to working with [Intervenors] toward *timely review* of this proposed land exchange," and that the land exchange request was a "*potentially* favorable alternative to the right-

[4] FWS's August 27, 2021 letter, cited by the district court and analyzed in Federal Defendants' Opening Brief, has similar language to the August 3 letter. IA 63, 66–67. By not making any arguments concerning the contents of the August 27 letter, Plaintiffs have forfeited any rebuttal to Federal Defendants' arguments that the district court erred when it held that the August 27 letter was a challengeable final agency action. *See* Fed. Defs.' Br. 35–37; *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466–67 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

of-way permit." IA 63 (emphasis added). FWS made no commitments regarding *approval* of the land exchange.

By any metric, the August 3 letter is not final agency action. By its own terms, the letter does not "mark the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177. The letter's purpose was simply to inform Intervenors that FWS had "received [their] letter . . . proposing an exchange of lands," which had been dated just 5 days prior, IA 63, demonstrating that the agency's decisionmaking process had just begun. The letter also states that "[*i*]*f approved*, this proposed land exchange . . . " showing that FWS had not approved or denied Intervenors' land exchange request. *Id.* (emphasis added). Contrary to Plaintiffs' suggestions, the letter estimating that the review process will take "up to nine months," and committing to a "timely review," only underscores that the agency planned to further evaluate the request. *Id.*; *see* Pls.' Br. 46.

Plaintiffs speculatively assert that the letter is the "consummation of [FWS's] thinking," Pls.' Br. 25, 46, but the letter's tentative language emphasizes that "thinking" was still in progress. FWS shared its view only that "a land exchange is a *potentially* favorable alternative to the

right-of-way permit." IA 63. In any event "thinking" is not the equivalent of a final agency action.

Nor do FWS's communications regarding appraisal and surveys indicate, as Plaintiffs wrongly suggest, that the August 3 letter is the consummation of the agency's decisionmaking. *See* Pls.' Br. 46. FWS only advised that the appraiser selected by Intervenors was "acceptable to the Appraisal and Valuations Services office of the U.S. Department of the Interior," and that it had "reviewed and commented" on Intervenors' various survey documents. PA 52. But these are routine communications issued by FWS pursuant to an agency policy intended to ensure that an applicant does not waste resources on hiring an unqualified appraiser or preparing an invalid survey. *See* U.S. Department of the Interior, Department Manual, 602 DM 1.6.B, 1.7.C; U.S. Fish and Wildlife Service, Fish and Wildlife Service Manual, 343 FW 2. Furthermore, appraisal and surveys are themselves intermediate steps in the agency's review process. They are followed by additional steps during which FWS further evaluates the pending land exchange request, including the appraisal and surveys submitted by the applicants, and then makes a final decision. *See* 342 FW 4, 5. Routine

communications concerning intermediate steps of the land exchange review process do not indicate that the August 3 letter is the consummation of the agency's decisionmaking process. *See* Pls.' Br. 46.

The August 3 letter also does not determine any "rights and obligations" from which "legal consequences will flow." *Bennett*, 520 U.S. at 178. Plaintiffs' only argument on this point is based on the idea that FWS has already decided to grant the land exchange. *See* Pls.' Br. 45–46. But as described *supra*, at 17–18, FWS has decided no such thing. Rather, the purpose of the letter here was merely to inform Intervenors of the receipt of their land exchange request. IA 63. Accordingly, the letter is purely informational; it "impose[s] no obligations and denie[s] no relief." *Menominee Indian Tribe of Wisconsin v. Env't Prot. Agency*, 947 F.3d 1065, 1070 (7th Cir. 2020).

Plaintiffs also fail to distinguish the case law cited by Federal Defendants in their Opening Brief. *See* Pls.' Br. 47. In *Menominee Indian Tribe of Wisconsin*, this Court held that a letter from the Corps stating that it could not exercise jurisdiction over the permitting process for a mine, as well as a letter from the EPA offering to speak with a party by phone, were not final agency actions subject to review

because they were "purely informational in nature," and "reiterated the status quo." 947 F.3d at 1069–70. Here, FWS made similar prefatory and purely informational statements by reiterating in its August 3 letter to Intervenors that it would conduct an ordinary review of the recently received land exchange proposal. *See* IA 63.[5]

In *Dhakal v. Sessions*, 895 F.3d 532 (7th Cir. 2018), this Court likewise held that the denial of an asylum application by a subordinate office was "tentative," and did not yet represent the executive branch's "final decision regarding . . . eligibility for asylum." *Id.* at 540. Here, the August 3 letter stating that FWS would review the proposed land exchange did not even reach a "tentative" conclusion, and thus is not a final decision representing final agency action. *See* IA 63.

Finally, Plaintiffs erroneously analogize this case to *San Francisco Herring Association v. Department of the Interior*, 946 F.3d 564 (9th Cir. 2019) ("*SF Herring*"). In *SF Herring*, plaintiffs adequately alleged final agency action where the National Park Service: (1) issued formal

[5] Federal Defendants' arguments here apply equally and with more force to the August 27 letter, given the similarities between the two letters and Plaintiffs' failure to rebut Federal Defendants' arguments regarding the August 27 letter. *See* IA 63, 66–67

notices "asserting federal jurisdiction" over Golden Gate National Recreation Area waters, and "making clear that commercial herring fishing there violated federal law," (2) "consistently expressly stated its intentions to continue to enforce the prohibition on commercial fishing" in meetings and communications, and (3) put that position into action when officers "order[ed] herring fishermen to stop fishing" in the waters. *Id.* at 578. FWS's letter here states no formal position on the pending land exchange request, and only uses the tentative language that the exchange is a "potentially favorable alternative." IA 63. And critically, FWS has undertaken only routine communications regarding intermediate stages in the land exchange review process, rather than taken concrete steps to execute a final decision as in *SF Herring*.

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

As explained in Federal Defendants' Opening Brief, final agency action is a "crucial prerequisite to ripeness." *Sprint Corp. v. F.C.C.*, 331 F.3d 952, 956 (D.C. Cir. 2003) (cleaned up). But even setting aside the lack of final agency action here, the district court still erred in holding that the hypothetical approval of Intervenors' pending land exchange

request is ripe for review. Plaintiffs' analysis of this issue contains multiple flaws.

Whether a claim is ripe depends on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty.*, 325 F.3d 879, 882 (7th Cir. 2003) (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)).[6] Neither factor is present here.

With regard to the first factor, Plaintiffs argue that the legal issue of whether the hypothetical grant of a proposed land exchange violates the Refuge Act is fit for judicial decision. *See* Pls.' Br. 45. But a court is always capable of articulating a view on a hypothetical legal question. The problem is that, absent any present agency decision, the district court's holding on this issue amounts to an advisory opinion on how the court would rule on an action the agency has not yet taken and without the benefit of whatever rationale the agency might advance to support such a decision. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968). The

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[6] The three-part test cited by Plaintiffs is not an "exception" to the doctrine, as Plaintiffs state, Pls.' Br. 43, but simply a slight reformulation. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). As shown below, such a reformulation does not bolster Plaintiffs' arguments.

Federal Defendants explained as much in their Opening Brief, and Plaintiffs have not argued otherwise. *See* Fed. Defs.' Br. 44–45; *Bonte*, 624 F.3d at 466–67.

Advisory opinions like the district court's order "inappropriately interfere with further administrative action." *Ohio Forestry*, 523 U.S. at 733; *see* Pls.' Br. 44. If left in place, the district court's order bars the Service from deciding for itself whether it should undertake the administrative action of granting Intervenors' pending request for a land exchange, impermissibly predetermining that a specific outcome would be unlawful without knowing the facts or rationale the agency might ultimately use to support it.[7] Moreover, the district court's order also interferes with potential future administrative rulemaking. FWS is in the early stages of developing policy or guidance on the appropriate standard to review land exchanges executed pursuant to the Refuge Act, 16 U.S.C. § 668dd(b)(3). FWS should be able to develop that policy

[7] Plaintiffs' argument that there has been no interference to date with other administrative actions, such as appraisal and surveys, does not detract from this point. *See* Pls.' Br. 45. As a factual matter, Federal Defendants have not "previously agreed on the 'Wagner parcel' transfer," a 30-acre parcel of land offered as part of the Intervenors' proposed land exchange. *Id.*

in the first instance, rather than having the district court predetermine the outcome without the benefit of any agency rationale for why a compatibility determination should or should not be required for land exchanges.[8]

A challenge to the land exchange is also not fit for judicial decision because such a challenge "requires further factual development" and would not, as Plaintiffs argue, rest on "purely legal" issues. *Ohio Forestry*, 523 U.S., at 733; *see* Pls.' Br. 45. A threshold issue for an agency's review of a land exchange pursuant to the Refuge Act is whether the agency property to be exchanged is "suitable for disposition." 16 U.S.C. § 668dd(b)(3). Thus, given that FWS could reject the proposed land exchange if the land proposed was not "suitable for disposition," the district court prematurely reached the legal issue of

[8] This question of whether a compatibility determination should be required for a land exchange remains open. Federal Defendants previously noted that the Ninth Circuit reversed *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011 (D. Alaska 2020), which the district court here relied on to hold that a land exchange would have to meet the compatibility requirements of the Refuge Act. *See* Fed. Defs.' Br. 41, n.10. Plaintiffs nowhere dispute this reversal and the district court's erroneous reliance on the district court opinion. *See* Pls.' Br. 39–40. The panel in *Friends of Alaska Nat'l Wildlife Refuges v. Haaland*, 29 F.4th 432 (9th Cir. 2022), has called for federal parties' response to plaintiffs' petition for rehearing *en banc*. *See* 9th Cir. No. 20-35721, Doc. No. 92.

compatibility. FWS should have been allowed to develop a record as to whether the agency land here was "suitable for disposition," and in fact the district court faulted FWS for not doing so. *See* FA 14, 35. Even if the proposed land exchange were reviewed for compatibility, an issue which FWS has not yet resolved, Plaintiffs' challenge is not ripe because FWS has not had the opportunity to develop a factual record on compatibility specific to the facts of Intervenors' most recent land exchange proposal.

With regard to the second ripeness factor, withholding court consideration of the hypothetical grant of the pending land exchange would not cause "hardship to the parties." *Metro. Milwaukee*, 325 F.3d at 882. Courts assess hardship in terms of "adverse effects of a strictly legal kind," or "significant practical harm." *Ohio Forestry*, 523 U.S. at 733. Plaintiffs assert that waiting to properly challenge an approved land exchange request, if any, will "run up costs" or "create[] unnecessary environmental destruction and property damage" in the interim. Pls.' Br. 44; *see also id.* at 42–43. This argument appears to be premised on the speculative belief that Intervenors would cease ongoing construction outside the Refuge now if this Court affirms the district

court's judgment regarding the land exchange. But even if the district court's judgment stands, Intervenors are legally permitted to build the project up to the sides of the Refuge, presumably anticipating that they could build the project through the Refuge utilizing their existing easement at the Stoneman crossing.

Plaintiffs' assumption to the contrary seems to be informed by their belief that the Refuge Act precludes Intervenors from hypothetically building the transmission line at the Stoneman crossing. In arguments about ripeness in their Opening Brief, Federal Defendants raised the possibility that Intervenors could build the CHC Project through existing easements at the Stoneman crossing without obtaining a compatibility determination from FWS. *See* Fed. Defs.' Br. 42–43. Plaintiffs now argue that "the Refuge Act expressly prohibits" Intervenors building through these existing easements because it would "'expand, renew, or extend' an existing noncompatible use.'" Pls.' Br. 35 (quoting 16 U.S.C. § 668dd(d)(3)(A)(i)).

However, Intervenors' current transmission lines at the Stoneman crossing are built on easements granted before the surrounding lands

became part of the Refuge.[9] *See* Fed. Defs.' Br. 16; IA 78–79; FA 314–15. The easements themselves are preexisting uses with reserved legal rights that are not subject to compatibility pursuant to the Refuge Act. *See* H.R. Rep. No. 105-106, at 13 (1997) (providing that the Committee did not intend for the National Wildlife Refuge System Improvement Act of 1997 "to in any way change, restrict, or eliminate" existing rights of way in Refuges, such as those for "electric transmission"); 65 Fed. Reg. 62,458, 62,470 (Oct. 18, 2000) (noting that FWS has "amended and clarified our final policy and regulations to reflect the Committee's intent not to change, restrict, or eliminate existing right-of-ways"). Indeed, Plaintiffs concede that "the Refuge Act allows continuation of existing rights-of-way." Pls.' Br. 34.

Accordingly, Intervenors could likely utilize the broad terms of the preexisting Stoneman crossing easements to construct the CHC Project through the Refuge without obtaining a compatibility determination. For example, one of the Stoneman easements is 150 feet wide, and grants "*forever*, the right, privilege and authority to construct, operate,

[9] The transmission lines built on these easements do not require findings of compatibility, nor have any such findings been made.

maintain and remove lines for the transmission of electric energy . . . ." FA 315 (emphasis added). Although Plaintiffs raise concerns about the "higher and wider" CHC line and towers formerly proposed at the Nelson Dewey crossing, Pls.' Br. 35, if the project can be built within the rights granted by the Intervenors' existing easements, such an activity would not "expand, renew, or extend an existing use of the Refuge," 16 U.S.C. § 668dd(d)(3)(A)(i), and would not require a finding of compatibility. *See* 603 FW 2.10.B ("Where reserved rights or legal mandates provide that we must allow certain activities, we should not prepare a compatibility determination."). This Court should resist Plaintiffs' invitation to speculate that the CHC Project could not be configured to fit within the terms of the existing easements at the Stoneman crossing, Pls. Br. 35, a question not briefed or argued to the district court.[10]

For these reasons, Plaintiffs' unsupported speculation about what Intervenors may or may or not do in response to a judgment does not

[10] If Intervenors do reconfigure the project to build through the preexisting easements at the Stoneman crossing, FWS could, in its discretion, impose requirements through a special use permit or other agreement. *See* 603 FW 2.10.B.

render their Refuge Act claim ripe. *See Ohio Forestry*, 523 U.S. at 733; *cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (noting the difficulty of demonstrating standing when it "depends on the unfettered choices made by independent actors not before the courts").

D. Federal Defendants did not attempt to evade judicial review or the requirements of the Refuge Act.

Throughout their brief, Plaintiffs erroneously suggest Federal Defendants rescinded the 2019 Compatibility Determination and are reviewing Intervenors' proposed land exchange as part of an "attempted evasion" of judicial review and the Refuge Act. Pls.' Br. 25; *see also id.* at 20, 28, 49. Not so, and this Court should reject such speculation because FWS reasonably explained its rescission of the Compatibility Determination and Right-of-Way permit and initiated a routine review of Intervenors' proposed land exchange. Any resulting final agency action will be subject to judicial review.

"[A]gency action is entitled to a presumption of regularity." *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 595 (7th Cir. 1991) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). The burden lies with the Plaintiffs to demonstrate any supposed impropriety of FWS's administrative actions. Plaintiffs cannot do so here.

First, Federal Defendants reasonably rescinded the 2019 Compatibility Determination and 2020 Right-of-Way permit. FWS issued a detailed letter to Intervenors on August 27, 2021, explaining the rescission of these authorizations. *See* IA 66–67. In assessing whether the CHC Project passing through the Refuge at the proposed Nelson Dewey crossing would constitute a "minor expansion or minor realignment" of an existing right-of-way, 50 C.F.R. § 26.41(c), FWS discovered it had not reviewed the correct easement documents. IA 66. After discovering these errors, FWS concluded that the Compatibility Determination and Right-of-Way permit were incorrectly issued and had to be rescinded. *Id.*

Second, Plaintiffs erroneously insist that Federal Defendants have already committed to approving Intervenors' proposed land exchange in order to evade the requirements of the Refuge Act. They argue that FWS "changed its approach to a land transfer," Pls.' Br. 18, elected to "pursue the land transfer," *id.* at 21, and concluded that the proposed land exchange "would obviate [] problems [with the Compatibility Determination]." *Id.* To the contrary, Federal Defendants wrote two relevant letters regarding the land exchange proposal, both of which

indicate that FWS initiated a routine review. *See* IA 63, 66. As outlined in FWS's manual, the agency reviews all proposed land exchanges according to the same procedures, and land exchanges can only be approved by the Director or Regional Director after completing this review process. *See* 341 FW 2; 342 FW 4, 5. Federal Defendants had not completed the review of the land exchange when the district court issued its decision, and, consistent with that court's order, have not resumed any work since then. Allowing FWS to resume its ordinary review process is not irregular; granting Plaintiffs' request for judicial intervention in a still-pending agency proceeding would be.

II. The district court erred by adjudicating the merits of Plaintiffs' NEPA claim, by ruling that the purpose and need statement in RUS's EIS did not satisfy NEPA, and by vacating the EIS.

The district court reached the merits of Plaintiffs' NEPA challenge to hold that the purpose and need statement in RUS's EIS was arbitrary and capricious. *See* FA 17–23, 35–41. It then entered a remedy order not only vacating RUS's ROD, but also its EIS. *See id.* at 46–47. In defending this erroneous judgment, Plaintiffs misconstrue the record and raise new legal theories, none of which have merit. Plaintiffs do not have standing to assert their NEPA challenge, the

purpose and need statement in RUS's EIS was reasonable, and the district court exceeded its jurisdiction under the APA in vacating RUS's EIS.

A. Plaintiffs do not have standing to challenge RUS's EIS pursuant to NEPA.

On appeal, Plaintiffs attempt to overcome standing defects in their NEPA claim by relying on FWS and other agencies' role in the EIS process. *See* Pls.' Br. 64–68. Plaintiffs still fail to meet their burden to demonstrate standing because they pleaded a NEPA challenge as to RUS's ROD, which concluded the EIS process regarding a potential future decision on Dairyland's funding application for a 9% ownership interest in the CHC Project. *See* FA 64–75, 84. Plaintiffs cannot tie their asserted injuries associated with the construction of the CHC Project to their NEPA claim regarding RUS's potential future funding decision for Dairyland.

First, Plaintiffs have failed to show how injuries they have alleged are fairly traceable to RUS's potential future funding decision, given that CHC Project construction is not dependent on Dairyland receiving funding from RUS. *See* Fed. Defs.' Br. 47–48. Plaintiffs assert that "[b]ut for the federal approvals challenged in this case, which relied on

the EIS, this project cannot be built." Pls.' Br. 65–66. But the CHC Project can be built without the federal approvals the district court concluded were unlawful: it just cannot use the originally planned Refuge crossing. *See* Fed. Defs.' Br. 16, 48.

Second, for largely the same reasons, the judgment Plaintiffs sought cannot redress Plaintiffs' asserted injuries because the parties intend to construct the project regardless of RUS's potential future funding decision. *See id.* at 48–49. Plaintiffs argue that "remanding for an agency to redo its NEPA analysis redresses injuries stemming from environmental harms." Pls.' Br. 66. But there must still be a "causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1995). As previously explained, there is no causal connection here because future financial assistance to Dairyland would not cause a reasonably increased risk of injury regarding the CHC Project. *See* Fed. Defs.' Br. 49–50.

FWS's involvement in the EIS process does not allow Plaintiffs to meet the bar for standing. Plaintiffs are correct that the NEPA claim

alleged in their complaint makes references to FWS, and that FWS signed the ROD as a cooperating agency. *See* Pls.' Br. 67–68. However, Plaintiffs did not seek NEPA relief as to FWS, *see* FA 84, and the failure to plead a NEPA claim against FWS would preclude Plaintiffs from meeting the bar for standing. *See* Fed. Defs.' Br. 45–46, 51–52.

Even if the Court reads Plaintiffs' complaint as alleging a NEPA claim against FWS, the EIS creates no concrete or particularized harm as to Plaintiffs regarding FWS's actions that relied on the ROD. The 2019 Compatibility Determination and 2020 Right-of-Way permit have been rescinded, so Plaintiffs' challenge to the EIS would not redress any ongoing injury to Plaintiffs in connection with those documents. *See* IA 66–67. And because FWS has taken no final action on the proposed land exchange, it is unknown if the agency will rely on RUS's EIS and thus whether plaintiffs' challenge to the EIS could redress any injury if the land exchange is approved.

Furthermore, the statements that Plaintiffs pluck from RUS's EIS and ROD do not demonstrate that Plaintiffs have standing. As Plaintiffs point out, *see* Pls.' Br. 14, 67, these documents provide 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. This passage specifically refers to (1) the Corps issuing a right-of-way easement at the Nelson Dewey crossing, and (2) the Service's rescinded Compatibility Determination and Right-of-Way permit. *See* IA 1178. As previously explained, Plaintiffs sought no NEPA relief against FWS, and FWS rescinded its Compatibility Determination and Right-of-Way permit. Plaintiffs also never alleged any NEPA challenge against the Corps' easement. Essentially, as relevant to Plaintiffs' NEPA challenge, the EIS determines only that NEPA is complete as to future financing assistance for Dairyland. That possible future financing does not itself provide a basis for standing, for the reasons already discussed. Plaintiffs' brief does not argue otherwise.

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

Even if Plaintiffs had standing, the district court erred in concluding that the purpose and need statement was arbitrary and capricious. *See* FA 35–41. As this Court has explained, a project's

purpose and need statement developed during the NEPA process "is a slippery concept, susceptible of no hard-and-fast definition," and an issue on which a court should "owe and accord deference" to an agency. *Simmons*, 120 F.3d at 666–69.

1. RUS reasonably included increasing transfer capability as part of its purpose and need statement for the CHC project.

The district court appears to have held that one of the specific elements of the EIS's purpose and need statement, "increas[ing] the transfer capability of the electrical system between Iowa and Wisconsin," IA 788, was arbitrary and capricious. Plaintiffs argue in support that this element is "a means, not an end," Pls.' Br. 55, and "one way of meeting sub-purposes, not the only way." *Id.* Plaintiffs similarly compare this element to the "single source" requirement in *Simmons*, which impermissibly narrowed the "general goal" of a project designed to supply water by specifying that all water would have to come from one source. 120 F.3d at 669. These comparisons are error because increasing transfer capability between Iowa and Wisconsin is a permissible general goal, or an "end" in itself, based on practical, on-the-ground needs identified by RUS.

First, Plaintiffs' reliance on *Simmons* is misplaced. In *Simmons*, the Corps' requirement to obtain water supply from a single source, rather than multiple sources, unreasonably restricted the "general goal" of supplying the City of Marion and its Water District with water. 120 F.3d at 669–70. Here, unlike in *Simmons*, the purpose of increasing transfer capability between Iowa and Wisconsin cannot become any more "general" without being divorced from the reality that renewable wind power is being generated in the upper Midwest and demand is located in cities like Madison and Milwaukee. IA 840. RUS explained its need to "create an outlet for additional wind power that would bring electricity from the wind-rich areas of the upper Great Plains to load centers like Madison and Milwaukee." *Id.* It further clarified that "[t]here are a number of wind generation projects in MISO that are explicitly dependent upon completion of the C[]HC Project," *id.*, and listed 29 wind projects with a MISO generation interconnection agreement conditional on the CHC Project being in service. IA 840–41. Based on these facts on the ground, increasing transfer capability between Iowa and Wisconsin is an end in itself that did not impermissibly narrow RUS's purpose and need.

Numerous cases cited by Federal Defendants, which Plaintiffs largely decline to address, also provide that a purpose and need statement based on practical, on-the-ground needs is permissible. For example, increasing baseload energy generation is a permissible purpose. *See Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 684 (7th Cir. 2006); *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013). Even creating a connection or link between two specified locations is a permissible purpose. *See Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (recognizing delivering coal from mine to utility as a permissible general purpose); *Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*, 883 F.3d 644, 655 (6th Cir. 2018) (accepting purpose of creating a scenic pathway between two specific locations). Accordingly, the district court erred when it departed from this case law to rule against the practical purpose of increasing transfer capability between Iowa and Wisconsin. Referencing this purpose was not arbitrary or capricious.

2. RUS permissibly relied on MISO's transmission planning process in developing the EIS's purpose and need statement.

The district court also held that the purpose and need statement in RUS's EIS did not comply with NEPA because RUS allegedly adopted MISO's stated purpose for the project and MISO—according to the district court—was the project's "beneficiary[]." FA 40–41. As Federal Defendants argued in their Opening Brief, the district court erred because MISO is not a project beneficiary, but rather the organization charged by the Federal Energy Regulatory Commission ("FERC") with conducting federal transmission planning pursuant to the Federal Power Act. *See* Fed. Defs.' Br. 10. Thus, RUS permissibly relied on MISO in order to develop its purpose and need statement. *See id.* at 60–63. Because Plaintiffs, like the district court, misunderstand the role of MISO, Plaintiffs' arguments in support of the district court's holding fail.

As an initial matter, contrary to Plaintiffs' assertions, Federal Defendants never argued that MISO created an "obligatory purpose" for the CHC Project, Pls.' Br. 57, or that RUS was "obligated" to approve financing for construction design exactly in line with what MISO

proposed in its multi-value project portfolio. Pls.' Br. 57, n.9. Rather, Federal Defendants argued that RUS *reasonably relied* on MISO's recommendations regarding energy needs and other relevant issues when it developed its purpose and need statement. *See* Fed. Defs.' Br. 61–62.[11]

To be clear, RUS's EIS reasonably relied on MISO's federally authorized transmission planning process. Plaintiffs write that "MISO is a private planning organization," Pls.' Br. 57, n.9, and later cite *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053 (7th Cir. 2013), analogizing RUS's reliance on MISO to an agency relying on "submissions by private permit applicants and . . . consultants." *Id.* at 1061; *see* Pls.' Br. 58. But MISO is a non-profit power-grid system operator, which, when it recommended construction of the CHC Project in the multi-value project portfolio, was exercising its authority under the Federal Power Act, as delegated by FERC, "for

[11] RUS also did not adopt MISO's proposal for the CHC project "almost verbatim," as held by the district court. FA 40. Federal Defendants' Opening Brief stated that "FWS's 'Multi Value Project Analysis Report,' cited by the court, . . . does not correspond with FWS's six element purpose and need statement." Fed. Defs.' Br. 61. This passage should have referred to MISO and RUS, respectively, rather than FWS.

planning and directing expansions and upgrades of its grid." *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013); *see* 16 U.S.C. § 824(a); 18 C.F.R. § 35.43(k)(1), (7).[12]

In contrast, RUS is a loan-granting organization without statutory authority over, or expertise in, power transmission planning. *See* 7 U.S.C. § 904(a). Thus, RUS could permissibly rely on MISO's federally-authorized transmission planning process in developing its purpose and need statement. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (holding that "an agency should always consider the views of Congress, expressed . . . in the agency's statutory authorization to act, as well as in other congressional directives"). Indeed, courts routinely provide that an action agency preparing a purpose and need statement may rely on another agency or entity's federally-approved planning process. *See N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541–42 (11th Cir. 1990); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014). Plaintiffs wholly fail to engage with this case law.

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[12] It is irrelevant that MISO first approved the multi-value project portfolio in 2012, given that MISO reconfirmed the benefits of the portfolio in 2014 and 2017. IA 835; *see* Pls.' Br. 56.

Hoosier Environmental Council, cited by Plaintiffs, also strengthens RUS's position. In its discussion of the Corps' issuance of a Section 404 permit for a highway project pursuant to the Clean Water Act, this Court held that "[i]f another agency has conducted a responsible analysis the Corps can rely on it in making its own decision." 722 F.3d at 1061. Just like the permissible reliance in *Hoosier*, here RUS reasonably relied on MISO's multi-value project portfolio and other transmission planning studies to help inform its purpose and need statement. *See* IA 838, 840–42, 844–45. True, *Hoosier* also held that the Corps, because it had "an independent responsibility to enforce the Clean Water Act," could not "rubberstamp" another agency's analysis in order to comply with Section 404 permit requirements. 722 F.3d at 1061. But, unlike the Corps' duties under the Clean Water Act, here RUS has no independent responsibility for transmission planning under the Federal Power Act; that responsibility falls to MISO. In any event, Plaintiffs have not demonstrated that RUS uncritically accepted any of MISO's submissions.[13]

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[13] Plaintiffs rely on *Sierra Club, Inc. v. U.S. Forest Service*, 897 F.3d 582 (4th Cir. 2018), but there the Fourth Circuit held that the Forest Service adopted FERC's EIS without explaining changes in position on

Relatedly, Plaintiffs appear to suggest that *Hoosier* requires RUS to independently re-analyze the federal transmission planning process conducted by MISO in order to develop its purpose and need statement for the CHC Project. *See* Pls.' Br. 58. But in *Hoosier*, this Court expressly warned that the Corps assuming "responsibility for determining the acceptability . . . of alternative highway projects," an analysis developed by the Federal Highway Administration in its EIS, "would usurp the responsibility that federal and state law have assigned to federal and state transportation authorities." 722 F.3d at 1061. The Corps was entitled to rely on the "basic purpose of the [] highway project," which was "determined elsewhere in government." *Id.* Here too, forcing RUS to conduct transmission planning through its EIS would usurp the responsibility federal law has assigned to MISO. *See Ill. Commerce Comm'n*, 721 F.3d at 770.

Finally, Plaintiffs mistakenly argue that RUS's purpose and need statement impermissibly relied on "self-serving statements from a prime beneficiary of the project." Pls.' Br. 53 (quoting *Simmons*, 120 F.3d at 669); *id.* at 59 (quoting *Env't L. & Pol'y Ctr.*, 470 F.3d at 683).

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a sedimentation analysis. *Id.* at 596. RUS never made any such change in position here.

Plaintiffs do not clearly identify who these beneficiaries are, or what self-serving statements RUS relied on. To the extent Plaintiffs refer to MISO, adopting the position of the district court, MISO is not a beneficiary of the CHC Project. MISO carried out its transmission planning process regarding the multi-value project portfolio pursuant to its federally-mandated obligation to conduct transmission planning. *See* Fed. Defs.' Br. 63.

To the extent Plaintiffs are arguing that RUS relied on self-serving statements of Intervenors, that argument fails as well. This Court has provided that "a reviewing agency can take an applicant's goals for a project into account," *Env't L. & Pol'y Ctr.*, 470 F.3d at 683, and that "consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." *Id.* at 684 (quoting *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)). This is black-letter law; these cases certainly do not "gut NEPA's requirement[s]," as Plaintiffs insist. Pls.' Br. 58. As argued previously in Federal Defendants' Opening Brief, RUS reasonably relied on Intervenors' studies in developing its purpose and need statement, and the studies were not self-serving

because RUS required their preparation, and supervised their development. *See* Fed. Defs.' Br. 64.

3. RUS's EIS considered a reasonable range of alternatives.

Even though Plaintiffs conceded that five of the six elements of RUS's purpose and need statement are "broad enough to meet NEPA requirements," FA 354–55, the district court held that all six of the elements together unreasonably defined reasonable alternatives out of consideration.[14] FA 40. Federal Defendants already explained in their Opening Brief why the district court erred, and Plaintiffs largely fail to engage with these arguments. *See* Fed. Defs.' Br. 57–60. Plaintiffs appear to argue on alternative grounds that: (1) RUS erred by not considering a "package" of non-wire alternatives; and (2) RUS did not properly consider route alternatives. Neither of these arguments has merit.

Plaintiffs emphasize the district court's holding that RUS's EIS only "consider[ed] alternatives so substantially similar to the CHC

[14] Plaintiffs Driftless Area Land Conservancy and Wisconsin Wildlife Federal conceded that the five elements were broad enough to meet NEPA requirements. *See* FA 354–55.

[P]roject that any distinction would be meaningless." Pls.' Br. 52 (quoting FA 39–40). But as described in Federal Defendants' Opening Brief, the district court erred because RUS reasonably considered six different action alternatives, the district court improperly focused on Plaintiffs' preferred non-wire alternatives, and RUS reasonably eliminated Plaintiffs' preferred non-wire alternatives for not meeting four different elements of RUS's purpose and need statement. *See* Fed. Defs.' Br. 57–60. Plaintiffs do not directly address—and thus forfeit any rebuttal to—these arguments on appeal. *See Bonte*, 624 F.3d at 466–67.

Plaintiffs attempt to distinguish *Environmental Law & Policy Center*, cited by Federal Defendants, but the case supports Federal Defendants' position. *See* Pls.' Br. 62. In *Environmental Law & Policy*, plaintiffs challenged the Nuclear Regulatory Commission's NEPA analysis of an Early Site Permit for a nuclear power generating facility, arguing that the agency "unnecessarily excluded reasonable alternatives like energy efficiency measures" by adopting the project proponent's "goal of generating baseload energy." 470 F.3d at 682. But this Court held that "NEPA did not require consideration of energy

efficiency alternatives" because the project proponent, which dealt only in the sale of wholesale power, "was in no position to implement such [energy efficiency] measures." *Id.* at 684. Essentially, it was not feasible for the project proponent to implement energy efficiency alternatives.

Here too, RUS properly eliminated energy efficiency measures from further study in its EIS due to feasibility concerns. To be sure, RUS did not face precisely the same kind of mission restraints as the project proponent in *Environmental Law & Policy*. But the EIS nevertheless found that, as a technical matter, "[a]n increase in energy efficiency substantial enough to offset the need for the proposed C[]HC Project would not be possible." *See* IA 871. Plaintiffs have not disputed that finding on appeal.[15]

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[15] In *Environmental Law & Policy*, the plaintiffs separately argued that the Nuclear Regulatory Commission's Board should have "independently analyzed energy efficiency alternatives" as part of a "need for power" analysis during proceedings to obtain an Early Site Permit. 470 F.3d at 684. But this Court concluded that the "need for power" analysis, and any examination of energy efficiency as part of that analysis, would take place later during the construction phase of a project. *Id.* That independent holding does not undermine the Court's recognition that technically infeasible alternatives need not be discussed. *See* Pls.' Br. 62.

Plaintiffs next argue that the non-wire alternatives considered in the EIS should have been "considered in combination," which the EIS "entirely failed to do." Pls.' Br. 61; *see id.* at 16, 60.[16] But Federal Defendants' Opening Brief already explained that each of the non-wire alternatives of "Regional and Local Renewable Electricity Generation," "Energy Storage," "Energy Efficiency," and "Demand Response" would not meet the same four different elements of the project's purpose and need statement, including: (1) "Expand Access of Transmission System"; (2) "Increase Transfer Capability"; (3) "Reduce Losses of Transferring Power"; and (4) "Respond to Transmission Public Policy Objectives." Fed. Defs.' Br. 59. RUS's EIS explained as much. IA 869, 870–72.[17]

Whether the EIS considered these non-wire alternatives together, or analyzed each one separately, is irrelevant. The non-wire

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[16] Plaintiffs also argue that Intervenors' "Alternative Evaluation Study" made a similar error, *see* Pls.' Br. 13, but Plaintiffs' NEPA claim only challenges what the EIS analyzed.

[17] Plaintiffs' contentions that "the EIS dismissed non-wires alternatives because they did not 'increase transfer capacity,'" and that the non-wire alternatives "achieve the same grid congestion, reliability, and renewable energy goals as the CHC transmission line," are similarly belied by the analysis in the EIS. *See* Pls.' Br. 16, 26.

alternatives all fail to meet the same four elements of the purpose and need statement outlined in the EIS. IA 869. While there may be small synergies between non-wire alternatives, as Plaintiffs argue, speculation about these synergies cannot overcome RUS's reasonable determination, based on studies and analysis conducted by the expert planning authorities FERC, MISO, and the Public Service Commission of Wisconsin, that the non-wire alternatives do not meet the purpose outlined for the CHC Project. *See* IA 870–72; *Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) ("An agency need not review 'remote and speculative' alternatives."). This determination was not arbitrary or capricious.

Plaintiffs also erroneously argue that RUS's EIS failed to properly analyze routing alternatives that avoid running through the Refuge.[18] In particular, Plaintiffs fault Federal Defendants for not "seriously" considering "alternative routes north or south of the Refuge." Pls.' Br. 13. To the contrary, Federal Defendants have been diligently working

[18] It is unclear whether the district court ruled against the EIS based on inadequate routing alternatives that avoid the Refuge, because the court only addressed the issue in it discussion of "Mootness." FA 6, 9–10.

with Intervenors since 2012 to analyze options for avoiding the Refuge. IA 865. At FWS's direction, Intervenors developed a detailed Alternative Crossings Analysis which explored seven different alternative Mississippi River crossings, three within the Refuge and four on non-Refuge lands. IA 231–34, 860, 865.[19] Drawing on this report, RUS's EIS analyzed four different non-Refuge crossings of the Mississippi River, primarily located along existing gaps in the Refuge near dams, bridges, transmission lines, and cities. *See* IA 862–65. The EIS explained why each option was infeasible, based on detailed engineering, safety, regulatory, environmental, cultural, or historical considerations. *Id.* Because the Refuge extends 261 river miles along the Mississippi River, from Minnesota into Illinois, it was infeasible for RUS to consider routing options north or south of the Refuge. *See* IA 83, 252, 865.

Plaintiffs' argument about routing alternatives outside the Refuge is also flawed because Plaintiffs did not identify any specific routing

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[19] Plaintiffs argue that Intervenors' Alternative Crossings Analysis only considered routes Intervenors "knew were not viable," but the comprehensive scope of the analysis belies Plaintiffs' claim, nor have Plaintiffs offered other viable routes, as explained *infra*, at 51–52. *See* Pls.' Br. 63 (citing IA 217–378).

options that RUS failed to analyze. RUS is not obligated to undertake vague or unspecified requests to further study alternatives. *See River Rd. All., Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 452–53 (7th Cir. 1985) ("The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site-and they were not."); *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 807–08 (7th Cir. 1987). Since RUS engaged in a thorough analysis of non-Refuge crossings and Plaintiffs never identified any specific route outside of the Refuge that RUS failed to consider, the district court erred in concluding that RUS failed to adequately consider alternatives.

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

Notwithstanding Plaintiffs' arguments to the contrary, the district court erred in vacating RUS's EIS because the EIS is not a final agency action. As explained, in order for an agency action to be "final" pursuant to 5 U.S.C. § 704, the action must "mark the consummation of the agency's decisionmaking process," and "must be one by which rights or obligations have been determined or from which legal consequences

will flow." *Bennett*, 520 U.S. at 177–78 (cleaned up). An EIS is not the consummation of the agency's decisionmaking process because it serves as merely interlocutory analysis, which is part of a larger decision-making process that will culminate only upon issuance of a ROD. *See* 40 C.F.R. § 1505.2(a) (providing that the ROD "[s]tate[s] what the decision was").[20] The EIS here also created no independent legal rights or obligations; such consequences flowed only once Federal Defendants signed the ROD.

Although some courts may have treated an EIS as a final agency action, *see* Pls.' Br. 68, other courts have held that because an agency "can change its mind . . . until it issues a Record of Decision," a challenged "EIS is not therefore final agency action." *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 156–57 (D.D.C. 2011). Given that this Court has already held that "[t]he issuance of a ROD generally constitutes a final agency action," *Citizens for Appropriate Rural Roads*

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

v. Foxx, 815 F.3d 1068, 1079 (7th Cir. 2016), it should further clarify that there is only one final agency action here, the ROD.

Because RUS's EIS at issue here is not a final agency action, the district court erred in vacating the EIS. *See* FA 47. In a challenge such as this one, a court does not have the authority to "hold unlawful and set aside" an agency action which is not final. 5 U.S.C. § 706; *see* § 704; *Sierra Club*, 825 F. Supp. 2d at 156–57 (dismissing challenge to an EIS alone as premature).

In any event, RUS should be able to decide how to fix flaws in its NEPA analysis, if any, either by correcting or supplementing its original EIS. That RUS might be able to "incorporate studies and text from [a] vacated EIS into a revised EIS" does little to lessen the burden of being forced to rework an analysis spanning over 1,000 pages, based on the district court's erroneous remedy order. Pls.' Br. 69.

III. The district court did not abuse its discretion by declining to issue an injunction against ongoing CHC Project construction.

Plaintiffs argue on cross-appeal that the district court "erred by failing to enjoin continued construction of the transmission line," specifically construction of the CHC Project occurring outside of the

Refuge. Pls.' Br. 69 (cleaned up).[21] Because Intervenors are constructing the CHC Project, Plaintiffs' requested relief would not run against Federal Defendants. However, given that the cross-appeal implicates important questions of jurisdiction related to those presented by their appeal, Federal Defendants oppose Plaintiffs' injunction request.

This Court "review[s] the district court's grant or denial of a permanent injunction for abuse of discretion." *3M v. Pribyl*, 259 F.3d at 597. "Factual determinations are reviewed for clear error and legal conclusions are given de novo review." *Id.* The abuse of discretion standard is "deferential," and evaluates whether "the judge exceeded the bounds of permissible choice in the circumstances, not what we

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[21] Plaintiffs write that "the district court had previously found that the Conservation Groups satisfied the requirements for a preliminary injunction," Pls.' Br. 71., but that preliminary injunction order concerned the Corps' verifications issued under the Clean Water Act, and the district court later reversed the reasoning in that order to uphold the Corps' verifications on summary judgment. *See* Fed. Defs.' Br. 23; FA 41–44. The district court also did not "recognize[] that 'entry of a permanent injunction later' would be necessary and appropriate." Pls.' Br. 72 (citing FA 13). Rather, the district court erroneously speculated that it would hold Plaintiffs' never-asserted claims against a proposed land exchange to be ripe for review because to do otherwise would hypothetically "mak[e] entry of a permanent injunction later all the more costly." FA 13.

would have done if we had we been in his shoes." *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986).

First, the district court lacked jurisdiction to enter Plaintiffs' requested injunction. Under the APA, only "agency action," meaning an action of an "authority of the Government of the United States," is subject to judicial review. 5 U.S.C. § 551(1); *see* §§ 702, 706. Thus, courts generally lack jurisdiction to enter any permanent injunction against actions that are not subject to federal control. *See Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 361 (D.D.C. 2012) (holding that a "proposed injunction is flawed" when it seeks to enjoin portions of a project not subject to federal control); *Sierra Club v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 9, 37 (D.D.C. 2013) (noting "general reluctance to conclude that federal action with respect to a small portion of a pipeline or other 'linear' project is sufficient to federalize the entire project in the absence of any statute that permits or requires federal oversight regarding such a project."). Many of the activities Plaintiffs seek to enjoin—which include construction outside the Refuge that is not subject to any federal permitting requirement—fit that description.

Indeed, the district court expressly held in its preliminary injunction order (not at issue in this appeal) that ongoing construction activities not subject to the Corps' Clean Water Act authorizations were "outside the jurisdiction of this court." ECF No. 160, at 5–6. And when Plaintiffs recently requested an injunction pending appeal regarding this ongoing construction, the district court denied that request by concluding that "there is nothing in that activity implicating a federal court's jurisdiction." ECF No. 245, at 6.

The cases that Plaintiffs cite in support of the district court's supposed authority to enter an injunction against ongoing CHC Project construction are inapposite. Plaintiffs cite cases relying on the Property Clause, *see* Pls.' Br. 73–74, but the Property Clause primarily concerns the freestanding power of Congress to legislate, not the power of federal courts. *See* U.S. Const. art. IV. Plaintiffs fail to point to any section of the Refuge Act, or the organic act of the Refuge here, which provides FWS or any other agency with the power to regulate the ongoing construction of the CHC Project on non-Refuge lands. *See* Pls.' Br. 74. Plaintiffs also cite *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986), but that case provided that "injunctive relief

in this appeal . . . would be highly improper," and the court determined that the entire project at issue, unlike the CHC Project, was a "federal action." *Id.* at 1043; *see* Pls.' Br. 74–75.

Plaintiffs further cite cases enjoining private actions conditional on federal authorizations with deficient NEPA analyses, *see* Pls.' Br. 75–76, but the ongoing construction of the CHC Project here is not conditioned on any such authorization. *See, e.g.*, *Minnesota Pub. Int. Rsch. Grp. v. Butz*, 358 F. Supp. 584, 630 (D. Minn. 1973). Nor is this a "segmentation" case, like in *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976), because ongoing construction of the CHC Project is not a federal action which requires an independent NEPA review. *See* Pls.' Br. 76. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), and *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009), only concern the scope of NEPA review for projects being built near desert washes that require Clean Water Act permits. *See* Pls.' Br. 76–77.

Furthermore, RUS's decision to prepare an EIS on the effects of the entire CHC Project does not expand federal control over the project or allow for an injunction. Plaintiffs emphasize that "[t]he EIS covered

the entire 102-mile CHC transmission line," and then later suggest that when agencies conduct an EIS "covering an entire project," the federal role is large enough to "enjoin the entire project if NEPA is violated." Pls.' Br. 12, 77. To the contrary, even if Federal Defendants may have used the EIS to disclose environmental impacts beyond their authority or control, such disclosure does not change Federal Defendants' actual authority or jurisdiction over the CHC Project as a whole. To be clear, Federal Defendants only made decisions in the ROD regarding federal authorizations for discrete actions related to the CHC Project, such as the Refuge crossing and funding for Dairyland, rather than over the project as a whole. *See* IA 1178; Fed. Defs.' Br. 9–21. "NEPA does not expand an agency's substantive powers." *Natural Resources Defense Council v. U.S. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988).

Even if Plaintiffs are correct that the district court had jurisdiction to issue the requested injunction, Plaintiffs have not shown that declining to issue such an injunction is an abuse of discretion. Entitlement to the "extraordinary relief of an injunction" turns on the weighing of multiple factors. *Monsanto Co v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010). Plaintiffs have not shown that the facts of this

case are so lopsided that the factors could only reasonably support granting an injunction.

CONCLUSION

This Court should vacate the portions of the district court's judgment that (1) declared that the CHC Project cannot cross the Refuge by "land transfer," and (2) vacated and remanded the ROD and EIS. Even if the district court had jurisdiction and properly concluded that the EIS was flawed, the district court's remedy order should be vacated insofar as it vacated the EIS rather than only the ROD. If the district court had jurisdiction, its decision not to enter an injunction against ongoing CHC Project construction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1), I certify that the foregoing brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5), (6), and Cir. R. 32(b), and the type-volume limitation provided by Cir. R. 28.1. This brief contains 13,422 words, excluding portions of the brief exempted by Fed. R. App. P. 32(f), as recorded by the word count of the Microsoft Word processing system used to prepare the brief.[22]

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[22] As counted by Microsoft Word's Word Count function, Plaintiffs' brief, aside from those sections exempted by Fed. R. App. P. 32(f), contains 16,542 words, in excess of the 16,500 words allowed pursuant to Cir. R. 28.1. *See Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 726 (7th Cir. 2006) ("The way to point out errors in an appellee's brief is to file a reply brief.").

CERTIFICATE OF SERVICE

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

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