



ENVIRONMENTAL LAW & POLICY CENTER

**NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND
CONSERVANCY AND
WISCONSIN WILDLIFE FEDERATION'S COMMENTS ON THE
RURAL UTILITIES SERVICE'S DRAFT SUPPLEMENTAL ENVIRONMENTAL
ASSESSMENT FOR THE CARDINAL-HICKORY CREEK 345-Kv
TRANSMISSION LINE PROJECT**

Submitted on behalf of the
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I. Introduction

These comments on the new Draft Supplemental Environmental Assessment (“DSEA”) for the Cardinal-Hickory Creek (“CHC”) high-voltage transmission line project are submitted on behalf of the Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and National Wildlife Refuge Association (“the Conservation Groups”) and their thousands of members, many of whom live and work in southwestern Wisconsin near the route of the proposed transmission line, use and enjoy the outdoors for recreational and other activities, and enjoy and work to protect wildlife and natural areas in southwestern Wisconsin including the Upper Mississippi National Wildlife and Fish Refuge, which “has been a haven for migratory birds, fish, wildlife, and people since 1924. The refuge stretches 261 miles from Wabasha, Minnesota to Rock Island, Illinois and protects more than 240,000 acres of Mississippi River floodplain. The refuge hosts more than 3.7 annual visits for hunting, fishing, wildlife observations, and other recreation. The refuge is a Wetland of International Importance and Globally Important Bird Area.”¹

These comments are in four broad categories. The **first part** (Section III below) focuses on the alternative methods for crossing the Upper Mississippi River National Wildlife and Fish Refuge (“the Refuge”), including the apparently preferred land exchange, which the Conservation Groups contend violates the requirements of the National Wildlife Refuge System Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (“the Refuge Act”), 16 U.S.C. §§ 668dd-668ee, U.S. Fish and Wildlife Service (“USFWS”) regulations and policies governing national wildlife refuges, and the Comprehensive Conservation Plan for the Upper Mississippi River National Wildlife and Fish Refuge (“the

¹ <https://www.fws.gov/refuge/upper-mississippi-river>

Refuge”). The alternatives considered in the environmental review process under NEPA are not “reasonable alternatives” if they would violate other applicable laws and regulatory standards.

The **second part** (Section IV below) emphasizes some of the most significant defects in the original 2019 Final Environmental Impact Statement, which the DSEA incorporates, and are, therefore, problematic once again. None of those defects are remedied in the DSEA, including several of which that the U.S. District Court for the Western District of Wisconsin has already identified as violations of NEPA, in particular, flaws related to the purpose and need statement and the evaluation of reasonable alternatives.

The **third part** (Section V below) demonstrates how the DSEA itself fails to adequately address the environmental impacts of the Refuge crossing.

In the **fourth part** (Sections VI and VII below) the Conservation Groups’ comments identify significant issues with the procedures that the Federal Agencies have followed: the predetermination of the final decision to allow construction across the Refuge; and the overreliance on analysis and conclusions supplied by the project proponents.

II. The Agencies Provided Defective Notice of the DSEA

As a threshold matter, Rural Utilities Services (“RUS”), U.S. Fish & Wildlife Service (“USFWS”), and U.S. Army Corps of Engineers (“USACE”) (collectively “the Federal Agencies”) failed to comply with the public notice requirements to the Council on Environmental Quality (“CEQ”) and RUS’s NEPA implementing regulations. 40 C.F.R. § 1506.6(b); 7 C.F.R. § 1970.4. The agencies published what they called notice in southwest Wisconsin newspapers on September 7, 2023. Attached as Exhibit A. The link for the DSEA in that notice led, however, only to an error page, until the afternoon of September 8 when it was fixed. In addition, when organization members visited the Dodgeville, Wisconsin public library

on Friday, September 8, 2023, they were unable to take out copies of the DSEA or even scan it for review.

Counsel for the Federal Agencies provided a copy of the DSEA to counsel for the Conservation Groups in response to our request at the close of business on September 8, 2023. We requested, however, by email and then by letter, that the agencies issue a corrected notice to ensure that members of the public could get access to the document. Attached as Exhibit B. The Federal Agencies denied the Conservation Groups' request. Attached as Exhibit C.

Even if the notice itself had not been defective, the 14-day comment period is unreasonably short in this important case, which has involved unprecedented public engagement, and is of significant public interest as the Federal Agencies understand. The DSEA is well over a hundred pages long, and it incorporates the 2019 final environmental impact statement ("FEIS") for the project, which is several hundred pages long. Fourteen days is not enough time for members of the public to do a thorough review and provide written comments in a desirable manner. For the original draft EIS, the comment period was 30 days. The Conservation Groups therefore renew our request for the Federal Agencies to cure their defective notice, and then to provide a 30-day comment period from the time the new notice is out to the public. We also request at least one public hearing to be held for oral comments in Dodgeville, Wisconsin or some other nearby place.

Despite the inadequate time provided, the Conservation Groups submit these substantive comments on the DSEA. If the Federal Agencies issue a Record of Decision ("ROD") based on this DSEA, that will violate NEPA's and other statutory and regulatory requirements for the reasons described in these comments in addition to further problems.

III. The Refuge Crossing Alternatives Analyzed by the Agencies in the DSEA All Violate the Refuge Act and Therefore are Not “Reasonable” Alternatives under NEPA.

The DSEA identifies two alternatives for crossing the Refuge: (1) using the existing right-of-way for two lower-voltage transmission lines, which is an alternative the DSEA summarily (and appropriately) dismisses; and (2) a land exchange in which USFWS would give away land protected in the Upper Mississippi River National Wildlife and Fish Refuge that was established by an Act of Congress in 1924² which the private Transmission Companies want for their proposed right-of-way, and accept in exchange a parcel of land in Wisconsin, the so-called “Wagner parcel.” The DSEA does not even mention the original proposal for crossing the Refuge—which treated the proposed new ROW for the CHC project as “maintenance” of existing transmission lines about a mile south of the proposed CHC crossing route, and thereby “grandfather” the CHC project in to avoid the statutorily-required compatibility determination.³ The Conservation Groups thereby assume that the Federal Agencies have dismissed that alternative as well, and we support that conclusion. We address it, nevertheless, below, because of the assertion by the Transmission Companies that it remains available.

None of these potential alternatives in the DSEA comply with the statutory requirements of the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee. Therefore, all three of these alternatives must be rejected, and the final SEA must reflect that conclusion.

² Congress established the Refuge “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. The statute creating the Refuge does not authorize agencies to dispose of the land.

³ The USFWS has never argued that the transmission line would meet the basic “compatibility” standard in the Refuge Act, that it would “not materially interfere with or detract from the fulfillment of the mission of the System or the purpose of the refuge.” 16 U.S.C. § 668ee(1).

A. Use of the Existing Rights-of-Way Would Violate the Refuge Act’s Treatment of Non-Compatible Existing Use

The Transmission Companies have often stated that, if they cannot proceed on their proposed route, they will simply use the old 1950’s-era rights-of-way⁴ to the south where they currently run low-voltage transmission lines.⁵ The DSEA outlines many of the reasons why that alternative is unacceptable, in particular:

- The taller transmission structures would have greater adverse impacts to migration corridors and bird species when compared to the low-profile H-frame structures (75 feet tall) proposed for crossing the Refuge and the corridor along Oak Road under the Proposed Action. The installation of these transmission structures in this location would also have significant additional impacts to wetlands within these existing ROWs.
- The transmission structures would cross over 19 sensitive receptors in the Village of Cassville, as disclosed in the FEIS under Alternatives 2, 3, and 4 (RUS 2019: 469-472). These adverse impacts to the local community would be greater than the Proposed Action.
- The transmission structures would come into closer proximity (approximately 2,000 feet) to the Cassville Municipal Airport, as disclosed in the FEIS under Alternatives 2, 3, and 4 (RUS 019:280). These adverse impacts to the airport would be greater than the Proposed Action.
- The transmission structures would be built within a sensitive cultural resources located south of the Refuge on private land in Iowa. Per discussions with PA consulting parties, this alternative would result in significant adverse impacts to the cultural resource.

DSEA at 47.

What the DSEA assumes, however, is that this alternative would be lawful, so long as the Transmission Companies stayed on the same 80 and 150-foot-wide “footprint” currently occupied by the old transmission lines. DSEA at 47. (“This alternative would not require any action by USFWS.”). That assumption is not correct. That is not and cannot be a lawful alternative approach.

⁴ The DSEA discusses “the use of Dairyland’s existing 69-kV (approximately 80-foot-wide) and ITC Midwest’s 161-kV (150-foot wide) transmission line ROWs.” DSEA 47.

⁵ The DSEA describes two slightly different ways of using existing utility easements. DSEA at 47.

Under the Refuge Act, the USFWS may “not initiate or permit a new use of a refuge, or *expand, renew, or extend* an existing use of a refuge, unless [USFWS] has determined that the use is a compatible use.” 16 U.S.C. § 668dd(d)(3)(A)(i)(emphasis added). The regulations governing use of national wildlife refuge lands are likewise specific. A Refuge Manager may “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. Not only does the statute prohibit the expansion of an existing noncompatible use, it affirmatively directs USFWS to seek “the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use.” 16 U.S.C. § 668dd(3)(B)(vi).

The issue under the statute and the regulations is not the size of the “footprint,” as the DSEA suggests. The issue is the “use.” There can be little question that replacing 161-kV or 61-kV transmission lines on 75-foot single poles with a 345 kV transmission line on double poles up to 200 feet high would be an “expansion” of the existing use, even if it could be done on the existing footprint by going higher.⁶ The existing easement therefore does not and cannot lawfully give the Transmission Companies the right to go higher or wider or to use the existing ROW more intensely with a high-voltage line. USFWS may not allow it, and the Transmission Companies may not lawfully do it. The Refuge Act’s general prohibition remains in force:

No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System, or take or possess any fish, bird,

⁶ It is a basic principle of zoning that property owners “grandfathered in” and permitted to continue nonconforming uses may not expand those uses, and it is not atypical to require that nonconforming uses be eliminated within a certain amount of time. *See generally* Arden H. Rathkopf et al., *The Law of Zoning and Planning*, 4th ed. § 73:6 (2023) (“restrictions have generally been placed upon these [nonconforming] uses by ordinances designed to prevent renewed and continued viability thereof by the property owner (1) changing the use to a more profitable or viable one, enlarging or extending the use, (2) resuming a use after an interval during which there was no use being made of the structure or rebuilding, or (3) making extensive alterations in the structures utilized for the nonconforming use.”).

mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area, or enter, use, or otherwise occupy any such area for any purpose, unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under [16 U.S.C. § 668dd(d)] or by express provision of the law, proclamation, Executive order, or public land order establishing the area

16 U.S.C. § 668dd(c).⁷ The current easements and permits do not and cannot lawfully permit running the massive proposed Cardinal-Hickory Creek project on the existing small transmission line right-of-way. The final SEA should state that expressly.

NEPA regulations require that agencies always include consideration of a “no action” alternative, what would take place if the agency did not act. In this case, the “no action” alternative is not building on the existing rights-of-way, but rather not having the CHC line cross the Refuge at all. The DSEA says that, but it should be clarified that the existing ROW option is not legally available.

B. A Land Exchange is Not the Proper Mechanism to Approve a Right-of-Way and This Proposed Land Exchange Violates the Refuge’s Comprehensive Conservation Plan and Does Not Comply with the M-Opinion

As stated in the DSEA, the Agencies’ preferred alternative is to exchange the land in Iowa the Transmission Companies want for their proposed right-of-way across the Refuge for the 35.69 acre “Wagner parcel,” primarily a triangular piece of land in Wisconsin along a secondary channel of the Mississippi River south of Cassville. That proposal is unlawful as well, and therefore not a reasonable alternative under NEPA either.⁸

⁷ 16 U.S.C. § 668dd(f) & (g) make violation of the Refuge Act or any of its regulations a criminal act, and grants enforcement authority and responsibility to USFWS (or any Federal or State agency with which USFWS has an agreement).

⁸ We recognize that an eventual Record of Decision may address the question of whether USFWS’s chosen approach is lawful or not, and that will be subject to review in the courts. But, of course, an illegal alternative is not a reasonable alternative, so an SEA that analyzes and ultimately “prefers” an unlawful alternative does not meet the requirements of NEPA either.

First, the Refuge Act expressly addresses “right-of-way projects” across Refuges, saying Refuge Managers may allow them, but only if they are “compatible,” i.e. will not materially detract from the wildlife purposes of the Refuge and the Refuge System. 16 U.S.C. § 668dd(d)(1)(B). Consistent with that statutory language, there are explicit rules regulating when and how USFWS and its Refuge Managers can grant rights-of-way, 50 C.F.R. pt. 29, subpart B. USFWS cannot evade those requirements and give away the designated Refuge lands by structuring a transaction as a “land exchange.” It is a well-established canon of statutory construction that the “specific governs the general.” *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 305 (2017) (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). This is “particularly true where... ‘Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.’” *RadLAX Gateway Hotel, LLC*, 566 U.S. at 645 (quoting *Varity Corp v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J. dissenting)). The specific Refuge regulations regarding right of way projects take precedence over the more general land exchange provision.

The specific requirements for “right-of-way projects” are applicable here and significant. The most significant requirement is, of course, that any permit or easement for right-of-way projects (powerlines, telephone lines, canals, ditches, pipelines, and roads) requires a determination that such uses are compatible with the Refuge’s and Refuge System’s wildlife purposes. 16 U.S.C. § 668dd(d)(1)(B). The rules further clarify that the only land interest that may be granted for a right-of-way is an *easement*. 50 C.F.R. §§ 29.21-1(b) and 29.21-3(a). The USFWS Policy Manual (“FW”), like the rules, contain a separate section for “rights-of-way,” which it defines as “uses that will encumber real property by granting a right to use and alter the landscape through construction of a facility such as a road, powerline,

pipeline, or building.” 340 FW 3.5.A. The Manual only contemplates two options for granting rights-of-way, either by permit or easement. 340 FW 3.6.

“Reasonable alternatives” to be considered under the NEPA environmental review process –as in this DSEA–must be lawful alternatives. There is no specific authority for USFWS to grant a fee simple interest, with or without conditions, to an applicant seeking a right-of-way across a protected Refuge. USFWS must retain the right of access, and no use other than the specific use described may be allowed. And there are specific extra conditions for “electric power transmission line rights-of-way” in 50 C.F.R. § 29.21-8, just as there are for “rights-of-way for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom.” *Id.* § 29.21-9.

When specific procedures and requirements are put in place for specific transactions, they must be followed. They may not be evaded by resort to separate, more general, provisions like the grant of authority in the Refuge Act to acquire land through land exchanges. 16 U.S.C. § 668dd(b)(3).⁹ The specific Subpart B rules for right-of-way grants under the Refuge Act are like Title XI in the Alaska National Interest Lands Conservation Act (ANILCA), which define a very specific agency and public process for transportation systems proposed through ANILCA conservation system units. Whether it be the specific right-of-way project requirements under the Refuge Act or the specific rules for evaluating transportation system proposals under ANILCA, the rules are not optional. They are not requirements USFWS is free to follow or to ignore, at its own discretion. Such an interpretation effectively erases those specific requirements from the law, and that is not an interpretation USFWS should accept. It is certainly not the interpretation the district court adopted in its previous

⁹ That section allows USFWS to exchange away land designated as “suitable for disposition.”

decision in this ongoing dispute, where the court expressly held that USFWS could not evade the compatibility requirement for right-of-way projects with a land exchange. *National Wildlife Refuge Association*, 580 F.Supp.3d 588, 610 (W.D. Wis. 2022), *vacated on other grounds sub. nom. Driftless Area Land Conservancy v. Rural Util. Serv.*, 74 F.4th 489 (7th Cir. 2023). A distinguished group of law professors with strong backgrounds in the law of public lands agree that land exchanges may not be used to evade specific requirements in the wildlife refuge laws. *See* Letter of Gerald Torres et al. to Secy. Haaland, dated August 28, 2023. Attached as Exhibit D.

The Interior Department Solicitor’s recent M-Opinion on land exchanges in national wildlife refuges, dated May 31, 2023 (attached as Exhibit E), says nothing to the contrary. The M-Opinion does not address whether land exchanges are available to use for right-of-way projects, where the Refuge Act and the applicable regulations expressly require a compatibility determination. The M-Opinion acknowledged that “substituting a land exchange for a proposed modification of a right-of-way” had troubled the district court, M Opinion at 8 n. 54, and cautioned that “Congress undoubtedly did not intend the land exchange authority to serve as a workaround to the Improvement Act’s unified mission for the Refuge System.” M-Opinion at 9.¹⁰ The M-Opinion concludes that “[t]he land exchange authority is not an isolated provision disconnected from the rest of the statutory scheme,” M-Opinion at 9, and therefore that all land exchanges had to serve the wildlife conservation purposes of the Act. The goal is to give effect to all of the provisions in the statute, not to let one erase the other. While land

¹⁰ The Supreme Court has also rejected the use of alternate statutory provisions to circumvent Congressional intent thereby “creat[ing] such a large and obvious loophole” in the statutory structure. *See County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020).

exchanges may be available for many purposes, they do not preempt the express requirements for granting rights-of-way.

Second, even if a land exchange might be theoretically an option, this proposed land exchange does not comply with the Refuge's Comprehensive Conservation Plan and would therefore be unlawful. In the DSEA, the Agencies summarily state that "[t]he land exchange would comply with 16 U.S.C. § 668dd(b)(3) as well as the Refuge's *Comprehensive Conservation Plan* ("CCP"), which highlights the desirability of land exchanges as a tool to adjust land ownership in and around the Refuge for the benefit of the Refuge." (USFWS 2006:13). The Agencies' conclusion is circular—they essentially state that the land exchange complies with the CCP because the CCP recognizes that land exchanges adjust land rights in and around the Refuge. This says nothing about the merits of *this* land exchange.

In fact, as the U.S. District Court previously recognized, the USFWS's own CCP takes a much more limited view about the appropriateness of land exchanges. Each time land exchanges are mentioned in the CCP it is in reference to "explor[ing] land exchanges with the states to remove intermingled ownerships." *See e.g.* CCP at 111. The reason that the states are identified as potential trade partners for land exchanges is because they hold public land in and around the Refuge. The CCP discusses "Land Acquisition," in several paragraphs, without mentioning *disposition* of land for private infrastructure projects once. *Id.* at 13. The CCP also outlines land acquisition as a specific objective, stating "By 2021, acquire from willing sellers 58 percent of the land identified for acquisition in the 1987 Master Plan and subsequent approvals as identified on the maps in Appendix G of the Final EIS/CCP (approximately 1,000 acres/year)." *Id.* at 111. The CCP justifies this objective by stating that "[o]n a narrow, linear refuge, land acquisition is a critical component of restoring habitat connectivity needed for the

health of many species.” *Id.* Further, the CCP identifies land acquisition as a means to preserve flood plains, and through the proposed land exchange USFWS intends to dispose 20 acres of valuable floodplain and wetlands. *Id.* at 13. The incongruence with the CCP makes this land not “suitable for disposition,” and therefore ineligible for a land exchange.

According to the CCP, habitat fragmentation is a threat and harm to be avoided. And, of course, as the agencies’ own environmental impacts statement concluded, one of the certain impacts of clearing a new right-of-way through a wetland/forest area is *less* connectivity, and *more* fragmentation. The EIS acknowledged that there would be new “habitat gaps,” more “forest fragmentation,” and “the loss, degradation, and/or fragmentation of breeding, foraging, and dispersal habitat.” The CCP also emphasizes the need to preserve or enhance the “scenic qualities and wild character” of the Refuge, and resist development pressures. The proposed Refuge crossing directly contradicts those CCP goals and objectives, and therefore violates the requirements of the Refuge Act.

The CCP clearly does not contemplate exchanging land for private purposes that would create new habitat fragmentation and new inholdings that detract from habitat. Instead, the CCP focuses on *acquiring* land for “fish and wildlife conservation” in order to “permanently protect[] the[] basic need for habitat.” *Id.* A land exchange creating a new inholding is contrary to the CCP and the Refuge’s mission. The DSEA’s conclusory statements regarding the harmony between a land exchange and the Refuge’s CCP are simply incorrect in this case.

Avoiding habitat fragmentation and enhancing habitat connectivity are a key consideration for the Refuge and USFWS to evaluate. Enhancing habitat connectivity has long been and is now clearly elevated to national policy. On March 21, 2023, the Council on

Environmental Quality (“CEQ”) issued new guidance to all federal departments and agencies “on Ecological Connectivity and Wildlife Corridors.” Attached as Exhibit F. That CEQ guidance “establishes a policy for Federal agencies to promote greater connectivity across terrestrial, marine, and freshwater habitats, as well as across airspaces, to sustain the tremendous biodiversity that exists in the U.S. and enable wildlife to adapt to fluctuating environmental conditions, including those caused by climate change.” *Id.* at 2.

The CEQ guidance explicitly states the expectations for federal agencies: “[t]o the maximum extent practicable, Federal agencies are expected to advance the objectives of this guidance by developing policies, through regulations, guidance, or other means, to consider how to conserve, enhance, protect, and restore corridors and connectivity during planning and decision-making.” *Id.* The CEQ guidance also identifies best practices it expects agencies like USFWS to incorporate into their planning and decision-making, including:

- Elevating the conservation, enhancement, protection, and restoration of connectivity and corridors as a programmatic goal;
- Avoiding or minimizing adverse impacts that would fragment habitat identified as a priority for connectivity or corridors, and where not possible, offsetting or compensating for these impacts;
- Removing, modifying, or avoiding the installation of barriers to wildlife movement along migratory routes; and
- Rehabilitating habitat damaged by natural or human impacts to facilitate continued connectivity.

Id. at 5. The Connectivity Guidance recognizes that:

Connectivity allows wildlife to access needed resources and facilitates fundamental ecological processes. Furthermore, connectivity promotes climate adaptation and resilience by enabling wildlife to adapt, disperse, and adjust to changes in the quality and distribution of habitats, including climate-driven shifts in species’ geographic ranges. Since connectivity is vital to ecosystem health and functions, it is significant to humans as well and supports the cultural and spiritual connections that communities have to nature.

Id. at 1. Although USDA and USFWS participated in the interagency working group that developed this CEQ guidance, it is conspicuously absent from the DSEA. The proposed land transaction that will increase habitat fragmentation in the Refuge is not consistent with this national policy.

Finally, third, the land exchange would be unlawful because the potential wildlife benefits from changing ownership of the “Wagner parcel,” which is largely undeveloped today, cannot exceed the very real risks from allowing the CHC transmission line across the Refuge. Moreover, apparently, the USFWS may opt to build a parking area at the Wagner Tract in the future, after it is incorporated into the Refuge land base. DSEA at 70.

It has long been USFWS’s stated policy that right-of-way projects like the proposed CHC project crossing the Refuge are disfavored. 340 FW 3.3 (“It is the policy of the Service to discourage the types of uses embodied in right-of-way requests.”) In fact, when the Transmission Companies first came to USFWS with a proposal to build the Cardinal-Hickory Creek transmission line across the Refuge, 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.” FWS000071-72; attached as Exhibit G.

The Upper Mississippi River National Wildlife and Fish Refuge Managers have themselves listed the reasons why linear or right-of-way projects like this inevitably damage the wildlife purposes of this Refuge and the entire Refuge system. As detailed in the attached letter expressing the Refuge Managers’ opposition to another transmission line crossing the Refuge at the Black River Bottoms location, “[b]y their nature, right-of ways and some construction projects can cause habitat fragmentation; reduce habitat quality; degrade habitat

quality through introduction of contaminants; disrupt migration corridors; alter hydrology; facilitate introduction of alien, including invasive species; and disturb wildlife.” Exhibit H at 6. In particular, the Refuge Manager explained that “[m]any species, but in particular forest interior species, prefer large unbroken tracts of habitat. Transmission lines which pass through habitats results in habitat fragmentation, whereby a large continuous habitat is divided.” *Id.* at 10.

Likewise, in 2017, for the same reasons, the U.S. Environmental Protection Agency (“EPA”) filed formal written comments during the EIS scoping process “strongly recommended” 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 recommends that potentially significant impacts to species and to the Refuge be avoided.

Exhibit I at 2.

Perhaps changing the ownership of the “Wagner parcel” will have some value. The DSEA indicates that the Refuge may pave at least part of it into a parking lot. DSEA at 70. It has been previously identified as part of the compensatory mitigation to offset the damage that would be done by the CHC project. But there is nothing in the DSEA that supports the conclusion that the wildlife benefits of that triangular parcel and potential parking lot in Wisconsin outweigh the substantial costs to wildlife from the proposed transmission line crossing.

As the M-Opinion properly concludes, no land exchange without a decisive tip toward wildlife purposes, considering both ends of the transaction together, can meet the requirements

of the Refuge Act. That the wildlife benefits to this transaction do not outweigh the costs for the purpose of the NEPA environmental review of “reasonable alternatives,” and that fundamental problem cannot be remedied by kicking the can to some later USFWS decision-making process.

There are other reasonable alternatives that are lawful, but even technically and economically feasible, including an array of grid-enhancing technologies to maximize the value of our existing transmission infrastructure in Wisconsin and routes that go north or south of the Refuge and the Wisconsin Driftless Area. The Refuge crossing is unlawful, and therefore not a reasonable alternative under NEPA.

IV. Numerous Defects in the Original Environmental Impact Statement Were Not Remedied by the DSEA

The DSEA incorporates by reference the 2019 Final Environmental Impact Statement and the 2020 Record of Decision for the Cardinal-Hickory Creek project, with no changes. The DSEA does not address the fundamental defects in the original FEIS.¹¹ Accordingly, the Conservation Groups attach their prior comments on both the original FEIS and the draft EIS. Attached as Exhibits J and K, respectively.

A. The Purpose and Need Statement Unlawfully Pre-Ordains the Selection of a Transmission Line

The DSEA retains the purpose and need statement the U.S. District Court previously rejected as improperly narrow, leading to an unacceptably constrained range of alternatives to be considered. By adopting the Transmission Companies’ proffered “purpose and need” verbatim, and therefore by insisting that any alternative “increase the transfer capacity between Iowa and

¹¹ Two of the Conservation Groups previously submitted comments on the draft and final EIS’s. Those comments are included in and incorporated into this comment. *See* Exhibit J at 9-13; Exhibit K at 3-9 on purpose and need and range of alternatives.

Wisconsin,” the FEIS and, now, the DSEA effectively preclude analyses of any reasonable non-Refuge-crossing alternatives, whether it be non-wires alternatives or alternative routes north or south of the Refuge.

The Purpose and Need Statement is a vital and cornerstone step in the NEPA process. 40 C.F.R. § 1502.13; *see also* Exhibit K at 3; Exhibit J at 2-6. It frames the problem that needs to be solved and defines the range of possible alternatives to be fully evaluated. The United States Court of Appeals for the Seventh Circuit has consistently held that an agency should not rely on a private party’s goals when determining the alternatives to be considered. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997); *see also* Daniel R. Mandelker et al., *NEPA Law and Litig.*, 2d § 9:27 (2019). As explained in *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986), “the evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.”

The Council on Environmental Quality (“CEQ”), the federal agency with the primary responsibility for defining NEPA’s requirements, 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).

Here, the FEIS simply adopts the Purpose and Need Statement provided by the Applicants, which is framed such that only their proposed new high-voltage transmission line from Iowa to Wisconsin could meet the Purpose. This is entirely impermissible:

[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 198 (D.C. Cir. 1991) (internal citations omitted). "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." *Simmons*, 120 F.3d at 666.

A more careful review of the Transmission Companies' proffered purpose and need statement illustrates the difference between statements that meet the statutory standard and statements that do not. The FEIS "project purpose and need" statement has six elements:

- (1) 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;
- (2) Address 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;
- (3) 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;
- (4) Increase the transfer capability of the electrical system between Iowa and Wisconsin;
- (5) Reduce the losses in transferring power and increase the efficiency of the transmission system and thereby allow electricity to be moved across the grid and delivered to end-users more cost-effectively; and

- (6) 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.

FEIS at ES-2 to ES-3.

Mostly, these are general purposes that can reasonably be accomplished by a number of reasonable alternatives, including alternative transmission strategies, upgrades to current transmission lines, or high-voltage transmission lines running on a wide range of different routes. Statement #4—increasing the transfer capability of the electrical system between Iowa and Wisconsin—however, is not a purpose that is essentially a description of the proposed CHC transmission line project itself. Only transmission lines between Iowa and Wisconsin can meet that so-called purpose and need, and the result is that alternative transmission solutions or alternative routes that avoid the Refuge and the scenic Driftless Area's landscape and natural resources are summarily dismissed and not given serious consideration.

Furthermore, the Purpose and Need Statement is not supported by any meaningful demonstration that there is a public need justifying this high-voltage transmission line. RUS regulations state that “[t]he Agency shall not fund the proposal unless there is a demonstrated, significant need for the proposal.” 7 C.F.R. § 1970.4. As explained in DALC's and WWF's comments on the original EIS, scoping comments and DEIS, neither the Applicants nor the Federal Agencies have identified any reliability need for this massive and expensive infrastructure, and other alleged “needs” are similarly unsupported.; Exhibit K at 5-9, Exhibit J at 6-9; DALC/WWF Scoping Comments at 9-15 (attached as Exhibit L). At the Public Service Commission of Wisconsin (“PSCW”) proceeding in which the Transmission Companies sought a Certificate of Public Convenience and Necessity (“CPCN”), a former Mid-Continent Independent System Operator's (“MISO”) employee testified as an expert witness for DALC and WWF that there is no reliability need, as defined by MISO's standards, for the project. *See* Exhibit M, Surrebuttal

Testimony of Konidena, at 7–8; Exhibit N, Direct Testimony of Konidena, at 6–11 (“MISO does not consider the CHC project necessary to maintain reliability and address any market emergencies.”).

As explained in DALC’s and WWF’s previous comments, it is impermissible to rely on the inclusion of this line in the MISO Multi-Value Portfolio (“MVP”) as the basis for this project being needed. First, MISO is a private non-profit organization—not a government entity—and has no authority over agency approvals of transmission lines. Second, the MISO MVP analysis is outdated and relied on assumptions about the growth of electricity demand that have not played out in the real world. *See* Exhibit N at 11–15. Third, MISO never even analyzed this specific transmission line on its own—it only did analyses of the entire portfolio as a whole. *Id.*

DALC’s and WWF’s comments raised other challenges to the alleged need for this line. For example, they questioned the need for the line to help states meet their renewable portfolio standards, explaining in detail which states have already met their standards or would not be able to use Iowa wind to do so. DEIS Comments at 6-7. In response, the FEIS states: “While Wisconsin Utilities are currently in compliance with the Wisconsin RPS for 2015, it is unclear whether the other states that are dependent on the MVP portfolio have also met their requirements.” FEIS Vol. IV, at p. F-90. Whether or not other states have met their standards is easily obtainable public knowledge. The federal agencies cannot simply punt when provided with evidence that undermines the alleged “need.”

The claim that the line is “needed” because there are renewable energy projects that have generation interconnection agreements (“GIA”) that are labeled as “conditional” on the Cardinal-Hickory Creek transmission line is also faulty. DSEA at 14. In the PSCW proceeding, the Mid-Continent Independent System Operator (“MISO”) expert admitted during cross-examination that

just because a generator's GIA is "conditional" on the CHC line does not mean that the generator cannot interconnect and operate at its full potential output without the CHC line in operation. In fact, in reference to the generating units that have GIAs that are "conditional" on the Cardinal-Hickory Creek line, he admitted that, "[t]here's no binding limits on those specific units currently." Exhibit O,¹² Cross Examination of Ellis at 723-724. *See also* Exhibit P, Rebuttal Testimony of Konidena, at 12-15.

Although the Public Service Commission of Wisconsin approved the Certificate of Public Convenience and Necessity, RUS is required to independently make a "need" determination. No evidence was provided showing a reliability need, and the Applicants relied on claims of economic benefits, which they asserted qualified as establishing a "need" for the transmission line. Not only is this a dubious understanding of what "need" is, but the PSCW's own staff questioned whether there were economic benefits. Using Applicants' own methodology, PSCW Staff's lead project engineer, Alexander Vedvik, determined that the Project "could have **negative** net benefits to the MISO footprint" in most of the modeled futures. Exhibit Q, Direct Testimony of Vedvik at 30-31 (emphasis added). Since that time, the Transmission Companies have publicly stated that the construction costs of the CHC transmission line have increased significantly, thereby changing the previous cost-benefit analysis.

The FEIS fails to demonstrate a compelling need for the massive and expensive new high-voltage transmission line—or indeed, any real benefit of building the line, other than ensuring a significant profit to the developers—and frames the Purpose and Need statement to preclude any real alternatives to the developers' proposed project. This is clearly impermissible under NEPA and under RUS's own regulations. The DSEA does not address these problems or demonstrate the

¹² Exhibit O is selected pages from the party hearing transcript available at http://apps.psc.wi.gov/vs2015/ERF_view/viewdoc.aspx?docid=372325.

necessity for the construction of this massive transmission line. The final SEA must fix these errors.

B. The FEIS and Subsequently the DEIS Fail to Meaningfully Study Alternatives

NEPA requires RUS to “rigorously explore and objectively evaluate all reasonable alternatives,” including a no-build alternative and alternatives other than building a massive new transmission line through the Upper Mississippi River National Wildlife and Fish Refuge and through the heart of the Driftless Area. 40 C.F.R. § 1502.14. As explained in the Conservation Groups’ prior comments (Exhibit K at 10, 11-16, Exhibit J at 9-13), the Agencies here relied almost entirely on flawed analyses provided by the Applicants about the feasibility and reasonableness of alternative routes and alternative energy solutions, and whether these sorts of alternatives could meet the Purpose and Need—see citations throughout FEIS Section 2.2 relying on Applicants’ materials for critical analysis of why various alternatives were not considered in detail. The FEIS therefore dismisses numerous alternatives without any independent analysis or verification by the agencies, instead taking the Applicants’ self-serving “analysis” as true. This is a critical failing. NEPA does not allow “blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents.” *Van Abbema v. Fornell*, 807 F.2d 633, 642 (7th Cir. 1986).

Chapter 2 of the FEIS contains the alternatives analysis, and the rationale for dismissing alternatives. Step one is to limit the range of alternatives to those that connect the Hickory Creek substation in Iowa with the Cardinal substation in Wisconsin. FEIS at 33-34. As the FEIS concedes, once you eliminate anything other than “relatively direct” connections between those two substations, alternative routes that might address the reliability, congestion, and access concerns in the FEIS (purposes 1, 2, 3, 5, and 6) but not cross the Refuge or the Driftless Area are automatically excluded from consideration. FEIS at 33-34. Those alternatives are excluded from

the “study area,” they are excluded from the “macrocorridor” study, only “Wisconsin” transmission line corridors get any consideration at all, *id.* at 34-52, and only Mississippi River crossings within the Refuge range (between Wabasha and Rock Island), all of which would necessitate crossing the Driftless Area were included in even the preliminary discussion. *Id.* at 53-58.

The alternatives analysis forms “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.¹³ *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 670 (7th Cir. 1997). The Rural Utilities Service and other Federal Agencies conducted no independent analysis of the reasonableness or feasibility of either route alternatives (*e.g.*, routes that do not cut through the Upper Mississippi River National Wildlife and Fish Refuge or that would largely avoid the Driftless Area) or energy alternatives (*e.g.*, alternative transmission solutions like battery storage and distributed generation that would have the same grid benefits as a new transmission line with a much smaller ecological footprint). Instead, the Federal Agencies impermissibly relied entirely on the Applicants’ determination that these alternatives are infeasible or cannot meet the Purpose and Need, or both. This complete abdication of the Federal Agencies’ responsibilities should not stand.

The evaluation of “non-transmission alternatives”—the applicants’ term, what the Federal Energy Regulatory Commission orders call “alternative transmission solutions”—gets the same cursory and skewed treatment. As explained below, the FEIS uses a divide-and-conquer strategy by analyzing each potential alternative transmission strategy in isolation, and not as a part of a package, but it also simply rejects those alternatives because they do not increase transfer capability between Iowa and Wisconsin. FEIS Vol. I, at p. 60. Obviously, any strategy that takes

¹³ The 2020 CEW NEPA implementation rules adopted during the trump Administration removed this language, but the new 2023 CEQ implementation rules put it back in.

pressure off existing transmission capacity sufficiently can address reliability, congestion, and access, but only a new power line between Iowa and Wisconsin will increase transfer capacity between Iowa and Wisconsin. When the purpose and need statement is drawn that narrowly, so that only slight modifications to the applicants' proposed project can be considered, the requirements of NEPA have not been met. These issues are not addressed by the DSEA and therefore remain unlawful.

The FEIS dismisses some alternatives on the basis that each alternative technology, on its own, cannot meet the Purpose and Need. Yet as DALC and WWF explained in their DEIS comments, alternative transmission solutions must be considered in combinations to be most effective. Exhibit K at 10-12. As the Tenth Circuit ruled, allowing project proponents to “divide and conquer” alternatives, and not consider combinations, makes the NEPA analysis invalid:

Many alternatives were improperly rejected because, standing alone, they did not meet the purpose and need of the Project. Cumulative options, however, were not given adequate study. Alternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion that it was unreasonable to consider them as viable alternatives.

Davis v. Mineta, 302 F.3d 1104, 1122 (10th Cir. 2002).

Expert testimony provided by DALC and WWF in the PSCW CPCN proceeding reaffirms the problems with the FEIS's dismissal of alternative transmission solutions, such as distributed generation, demand response, and battery storage. These resources are less costly, more flexible, and less environmentally damaging than a massive new high-voltage transmission line and towers, and **can provide the same kinds of transmission services as a high-voltage transmission line**, including reducing congestion. Exhibit R, Direct Testimony of Kerinia Cusick. Applicants in the PSCW proceeding “failed to evaluate proven, non-wires based solutions such as power electronics, energy storage, solar, and load control, and energy efficiency and demand response approaches in

effective combinations to augment the performance of the existing transmission infrastructure, thereby potentially meeting the transmission need more effectively and efficiently.” *Id.* at 1. The FEIS relied on this same faulty analysis from Applicants. In fact, alternative transmission solutions **can replicate grid benefits** that the proposed transmission line would create, including any benefits to wind generation, and could therefore meet any alleged need for the line.

Applicants’ own expert estimated that this alternative transmission solution, **which was designed to mimic the Cardinal-Hickory Creek line**, would cost between \$193.6 and \$314.3 million (2018 dollars), significantly less than the \$550 million¹⁴ for the Cardinal-Hickory Creek transmission line. *See* Exhibit S, Rebuttal Testimony of Chao at 16. In fact, former Federal Energy Regulatory Commission Chairman Jon Wellinghoff explained that the Company’s analysis ignored feasible options that would cost even less. Exhibit T, Surrebuttal Testimony of Wellinghoff, at 6-10. Although the FEIS failed to analyze what the environmental impacts of an alternative transmission solution option would be, it would certainly be less damaging than building a massive high-voltage line through the ecologically sensitive Driftless Area of Southwest Wisconsin and across the Upper Mississippi River National Wildlife and Fish Refuge. Expert Cusick explained in her testimony before the PSCW that a battery storage alternative would have a “footprint that is akin to the size of a large shopping complex parking lot.” Exhibit U, Surrebuttal Testimony of Cusick at 5.

The argument in 2023 for non-transmission alternatives as a direct replacement for the more costly and environmentally destructive high-voltage transmission line is even more

¹⁴ The Companies’ originally estimated that line would cost \$492 million, however as of June 30, 2023 they have spent \$582,029,027 and have yet to provide a estimate for the final price tag of the transmission line. *See* <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=474079>

compelling than it was in 2019 when the initial EIS was published. Since that time, there have been thousands of megawatts of new solar energy generation developed in Wisconsin.¹⁵

The FEIS and therefore the DSEA also completely failed to consider a set of technologies that increases the transmission capacity of existing lines, known as “grid-enhancing technologies” and “alternative transmission technologies.” These technologies include advanced conductors, advanced power flow controllers, and dynamic line ratings. As the Department of Energy explained in a 2020 report on these technologies, “[t]hese different technologies can be used in isolation or in tandem to improve the overall efficiency and effectiveness of the transmission network.” Department of Energy, *Advanced Transmission Technologies*, at 4. Attached as Exhibit V.

As with distributed generation and storage, these advanced transmission technologies work well in combination. A case study conducted in South America found that combining power flow controllers and dynamic line ratings could nearly double transmission capacity, adding 300 MW to an existing 350 MW transmission network. Smart Wires, *Combining Digital Power Flow Control and Dynamic Line Rating for a Net Zero Grid in Latin America (2023)*, <https://www.smartwires.com/2023/02/28/combining-pfc-and-dlr-net-zero/>.

Demonstrating the importance of these technologies, the Federal Energy Regulatory Commission (“FERC”) recently issued a final rule that requires consideration of alternative transmission technologies prior to certain transmission system upgrades. FERC Order 2023, 184 FERC ¶ 61,054 at P 1578 (July 28, 2023). FERC explained that “alternative transmission technologies allow for better use of the existing transmission system” and concluded that “failing to evaluate the enumerated alternative transmission technologies renders Commission-

¹⁵ See <https://www.seia.org/state-solar-policy/wisconsin-solar> (identifying 4,049 MW of solar power in development over the next five years).

jurisdictional rates unjust and unreasonable.” *Id.* Hence, FERC’s final rule, which addressed backlogs in the queue for new generators to interconnect to the transmission system, required “transmission providers to evaluate the enumerated alternative transmission technologies in all instances.” *Id.* at P 1585 (emphasis added).

Just like the flawed EIS alternatives analysis, this DSEA does not rigorously explore and objectively evaluate all reasonable alternatives. The DSEA discusses two alternatives in any detail: first, the no action alternative, where the Refuge crossing is not approved, and second, the land exchange (the preferred action). In addition, the DSEA reviews and dismisses two alternatives before detailed analysis, a non-Refuge crossing of the Mississippi River and a Refuge crossing on the Companies’ existing easement. DSEA at 47. This paltry survey of alternatives does not meet the NEPA standard to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R § 1502.14.

The DSEA improperly dismisses the No Action Alternative based on a decade old MISO evaluation, without attempting at any point to update the underlying assumptions for today’s on-the-ground realities. The DSEA concludes that “the wind generation currently developed, under construction or proposed west of Wisconsin would not be adequately served with increased transmission capacity to population centers in the east under the No Action Alternative until the C-HC Project is constructed and energized.” DSEA at 20. The DSEA also warns that “operating guides would need to stay in place to help mitigate the risk of cascading outages in southwestern and south-central Wisconsin” under the no action alternative.” *Id.* at 22. The Agencies have never demonstrated that *this* transmission line is necessary to carry wind generation further west, or that a transmission line is necessary at all to meet energy demand in “population centers in the east.” The Conservation Groups have repeatedly refuted this “need” in prior comments on the

EIS. *See* Exhibit J at 6-7. Equally important, the Agencies’ overblown claim of “cascading outages” in southern Wisconsin is unsubstantiated. In fact, the record in the original case demonstrates the opposite—that Wisconsin has one of the most reliable power grids in the nation. In 2017, then-Chairwoman of the Wisconsin Public Service Commission stated that “[r]ight now, there’s not a need for a lot a new generation of any source in Wisconsin . . . [w]hether it be wind, solar, coal or natural gas. The current fleets are doing well to serve the load that's necessary.”⁴ *See* Exhibit J at 7.

Tellingly, the DSEA also states, without further investigation that “[o]ther transmission system improvements could be necessary to solve the reliability problems that would otherwise be solved by the C-HC project.” DSEA at 22. That is the purpose of a NEPA analysis, to examine whether “other transmission system improvements” that could address the alleged reliability problems. The Agencies fail in this regard, by gesturing towards the possibility of other transmission system improvements, without analyzing their merit as alternatives. These “other transmission system improvements” would likely consist of the combination of non-transmission alternatives that the Conservation Groups have advocated for since the beginning of this process. The Agencies apparent mention of non-transmission alternatives, without any discussion or analysis does not meet NEPA’s requirements.

The DSEA also improperly dismisses Non-Refuge crossings of the Mississippi River without detailed analysis. The Agencies rely entirely on the Alternatives Crossing Analysis documents prepared entirely by the Transmission Companies. In doing so, RUS failed to “independently evaluate the information submitted.” 40 C.F.R. § 1506.5(a); *see also* 7 C.F.R. § 1970.52. The FEIS’s “Development of Alternatives” section, demonstrates the extent to which RUS has chosen to defer to the applicants’ analysis. This section describes documents created by

the applicants or their contractors—the Alternatives Evaluation Study (“AES”), the Alternative Crossings Analysis, and the Macro-Corridor Study—but does not provide any additional analysis of the information contained in those documents or suggest any additional action alternatives. The Macro-Corridor Study and Alternatives Evaluation Study are required by RUS guidance, and the Alternative Crossings Analysis was prepared “at the request of the Refuge Manager who has emphasized that, before determining whether the proposed use would be compatible and consistent with the USFWS Mitigation Policy, no transmission line crossing of the Refuge could be considered by the USFWS unless Utilities could demonstrate that non-Refuge options were infeasible.” ACA at ES-7. Instead of analyzing the information provided by applicants, the DEIS merely parrots the conclusions of those documents. For example, the discussion of alternative transmission corridors begins, “[t]his section describes the alternative transmission line corridors that were identified and investigated *by the Utilities....*” DEIS at 34 (emphasis added). The FEIS dismisses river crossing alternatives because “the Utilities determined” that they were not feasible. DEIS at 51. The discussion of energy storage as an alternative action cites only to Dairyland’s AES and contains language substantially similar to that in the AES. DEIS at 57–58; AES at 46–47. Similarly, the DEIS cites to Dairyland’s AES to support the statement that “[a]n increase in energy efficiency substantial enough to offset the need for the proposed C-HC Project would not be possible.” DEIS at 58. While RUS regulations require applicants to provide necessary environmental information, identify a project’s purpose and need, identify alternatives, and “assist the Agency in all aspects of preparing an EIS ..., including, but not limited to, information and data collection and public involvement activities,” 7 C.F.R. § 1970.5, NEPA “do[es] not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others.” *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir.

1974). In order to comply with NEPA, RUS and the Federal Agencies must undertake the searching, independent inquiry they were required to do at the outset.

V. Like the FEIS, the DSEA Fails to Adequately Evaluate the Environmental Impacts of the Proposed Action

Even the DSEA's limited review of just the impacts of the Refuge crossing is characterized by incomplete information and analysis; failure to fully consider the full range and scope of impacts, including impacts outside of the ROW; understating impacts or failure to fully disclose adverse effects; and overstating or assuming success of avoidance, remediation, and restoration efforts. NEPA requires that for environmental review "[t]he information [in NEPA documents] must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The information in this DSEA, and the incorporated FEIS, is not thorough enough to "provide a full and fair discussion of significant environmental impacts and to inform the appropriate Agency decision maker and the public of ... any measures that would avoid or minimize adverse impacts." 7 C.F.R. § 1970.151. RUS and the other Agencies should respond to these comments by "supplementing or modifying the analysis" contained in the DSEA and EIS so that it is sufficient for them to fulfill their obligations under NEPA. 7 C.F.R. § 1970.154.

The public deserves—and the law requires – a more complete analysis of the environmental impacts, in particular on the Upper Mississippi River National Wildlife and Fish Refuge, which, according to USFWS, "hosts more than 3.7 million annual visits for hunting, fishing, wildlife observations, and other recreation." FEIS at 320. "The refuge is a Wetland of International Importance and a Globally Important Bird Area." FEIS at 161. The Refuge is the jewel of the National Wildlife Refuge system in the Midwest, and the RUS's inadequate

evaluation of environmental impacts improperly ignores the potential degradation associated with a massive transmission line with 20-story high towers traversing the protected Refuge.

A. The DSEA Does Not Adequately Evaluate Environmental Impacts to the Upper Mississippi National Wildlife and Fish Refuge

The FEIS and DSEA's analysis of impacts to the Upper Mississippi River National Wildlife and Fish Refuge are particularly flawed. This is critical because the last remaining unimpacted area of this project is the Refuge. There are several categories of impacts within the Refuge, which the FEIS and the DSEA have not adequately examined.

For example, the adverse aesthetic and scenic impacts are downplayed, and the success of mitigation measures, as well as restoration measures for the existing right-of-way, are assumed. Important impacts associated with the land exchange that divests 19.84 acres of USFWS fee-title land include the loss of 18 acres of wetlands in the divested land. The DSEA also acknowledges that "visual resource impacts to the Refuge from the C-HC Project would be long-term and moderate." DSEA at 87. Members of the Conservation Groups are particularly concerned with the reduction in visual quality of the Refuge as a result of this huge CHC transmission line.

In addition, transferring the land to be used for the CHC transmission line will disrupt the restoration process along the Turkey River floodplain, which are part of ongoing natural forest regeneration process. DSEA at 81.

The Conservation Groups also remain concerned regarding the impacts of construction on wildlife and vegetation in the Refuge. There are three federally listed mussel species found in the Refuge. DSEA at 60. While the DSEA claims that construction would not proceed below the ordinary high-water mark and that erosion control best management practices ("BMPs") would avoid indirect effects to waterways, it also concedes that "siltation" may still occur, which would disrupt these mussels, which play an important role in river ecology. DSEA at 63. The

Conservation Groups remain concerned about the impacts of the line crossing the Mississippi Flyway and how that will impact migratory birds, which the DSEA downplays based on tower design.

Further construction in the Refuge along the steep hillsides leading down to the River could result in severe erosion and disruption of habitat and vegetation.

B. The FEIS and DSEA Do Not Properly Quantify the Climate Change Impacts

The FEIS and the DSEA both fail to properly quantify the climate change impacts of the transmission line. Instead of making a reasonable estimate of carbon emissions, or even giving a likely range, it provides the carbon emissions that would be associated with the transmission line carrying either 100% coal-generated electricity or 100% wind power. Yet neither of these is actually a likely scenario. Instead, the FEIS and the DSEA state that the true carbon impact would lie somewhere in between, although it would certainly carry electricity from fossil-fuel generation. The Citizens Utility Board of Wisconsin's expert witness Mary Neal specifically testified in the PSCW proceeding that the transmission line would carry power generated by coal plants. Exhibit W, Direct Testimony of Mary Neal. It is not a sufficient analysis for the Federal Agencies to provide two extreme situations and saying that the actual impact will be somewhere in between is not a sufficient analysis. The FEIS does not "provide the information necessary for the public and agency decisionmakers to understand the degree to which the [federal action] at issue would contribute to [climate change] impacts." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019). Several recent federal court rulings have overturned NEPA analyses for failure to adequately address climate impacts. In fact, in light of these decisions and additional pending suits, the Bureau of Land Management suspended 130 oil and gas leases in September 2019, seemingly acknowledging the legal vulnerability of its usual NEPA practices. Nicholas Kusnetz, *U.S.*

Suspends More Oil and Gas Leases Over What Could Be a Widespread Problem, Inside Climate News, <https://insideclimatenews.org/news/17112019/oil-gas-leases-suspended-climate-impact-federal-nepa-assessment-blm-utah-colorado-wyoming> (Nov. 17, 2019).

During the EIS process, DALC and WWF argued that the Federal Agencies should include an analysis of carbon impacts based on the social cost of carbon. Exhibit K at 45-47; Exhibit J at 22. The Agencies argued in their response to comments that they are not required to monetize impacts to any resource. FEIS Vol. IV, at p. F-175. The FEIS, however, does attempt to monetize many other impacts of the project. For example, the FEIS quantifies the “positive impacts to employment and income” (FEIS Vol. I, at p. ES-22) and alleged energy cost savings. FEIS Vol. I, at p. 17. Federal courts have found NEPA analyses to be inadequate when they monetize benefits of an action but not costs. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). Likewise, another federal court has stated that NEPA’s “hard look” requirement includes “a ‘hard look’ at whether this tool [the social cost of carbon], however imprecise it might be, would contribute to a more informed assessment of the impacts than if it were simply ignored.” *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014). The Agencies should provide an estimate of the social cost of the project’s GHG emissions and, if they choose not to use the social cost of carbon to create this estimate, must explain its reasons for that choice. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 74-75 & n.30 (D.D.C. 2019).

The new CEQ NEPA implementation rules, which are now being finalized explicitly require all federal agencies completing an EIS to “include any reasonably foreseeable climate change-related effects, including effects of climate change on the proposed action and alternatives” and “to address any risk reduction, resiliency, or adaptation measures included in the proposed

action and alternatives. CEQ, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49924, 49950 (July 31, 2023). The new CEQ climate guidance goes even further. CEQ, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023). The Guidance recommends that agencies:

- Quantify any proposed action’s projected GHG emissions (or reductions) for the expected lifetime of the action, considering available data and GHG quantification tools suitable for the proposed action;¹⁶
- Use projected gross and net GHG emissions associated with proposed actions and their reasonable alternatives to help assess potential climate change effects;
- Use best available social cost of GHG (SC-GHG) estimates to translate climate impacts into the more accessible metric of dollars, allow decision makers and the public to make comparisons, help evaluate the significance of an action’s climate change effects, and better understand the tradeoffs associated with an action and its alternatives;
- Appropriately analyze reasonably foreseeable direct, indirect, and cumulative GHG emissions;
- Consider reasonable alternatives and mitigation measures, and address short-and long-term climate change effects.

Id. at 1198. Neither the DSEA nor the FEIS do any of these things with respect to climate, and therefore they do not meet current NEPA requirements.

¹⁶ The Guidance also rejects the common agency approach of dismissing climate impacts because they “represent only a small fraction of global or domestic emissions.” *Id.* at 1201. It also references the CEQ’s GHG Accounting Tools website, <https://ceq.doe.gov/guidance/ghg-tools-and-resources.html>.

C. The DSEA Did Not Remedy the Flawed Impact Analysis of the FEIS

The Conservation Groups have also described a much larger group of impacts which were inadequately analyzed in the prior EIS. The Conservation Groups' FEIS comments which discussed inadequate impact analysis, are incorporated here. *See* Exhibit J at 25-73. Here is a list and summary of the categories of impacts which were inadequately analyzed in the FEIS, as follows:

- **Geology and Soils**—The FEIS and the DSEA characterize many impacts as temporary by over-relying on mitigations measures, fails to disclose the precise nature and extent of many impacts, and examines an improperly narrow geographic scope.
- **Vegetation and Wetlands**—The FEIS and the DSEA discussion of wetlands relies on generalities and indicates a limited recognition of the importance of wetlands and how they function. RUS does not provide adequate or meaningful quantification of impacts, and relies on BMPs and mitigation without any evidence of their efficacy.
- **Wildlife Impacts**—The FEIS and the DSEA discussion of wildlife impacts is significantly flawed because: (1) species surveys have not been completed, and information on impacted species is therefore inadequate; (2) the analysis misses, discounts, or mischaracterizes several adverse impacts; and (3) the reliance on BMPs and restoration measures is unsupported.
- **Water Quality**—The FEIS and the DSEA discussion of water quality impacts fails to assess many impacts in sufficient detail to inform the decision and improperly concludes that many impacts would be only minor or short term because of supposed success of BMPs and mitigation measures without supporting evidence.
- **Noise**—The FEIS and the DSEA do no remedy or adequately respond to noise impacts resulting from the construction of the transmission line.
- **Cultural and Historic Resources**—The FEIS and the DSEA fail to fully evaluate and disclose the impacts that the high-voltage transmission line would have on cultural and historical resources, because only a small portion of the project route was inventoried for cultural resources.
- **Land Use and Agriculture**—The FEIS and DSEA's discussion and analysis of impacts to land use, agriculture, and recreation are inadequate for a number of reasons.
 - **Conservation Land Uses**—The FEIS and DSEA note the existence of privately-held conservation easements in the analysis area but provide only a cursory discussion, which does not attempt to consider the actual impacts on individual conservation easements.

- **Land Cover**—The FEIS and the DSEA discussion of land cover impacts is flawed because it fails to provide the detail necessary to make an informed decision.
- **Development Plans**—The FEIS and the DSEA ignore key aspects of local development and comprehensive land use plans, including discussions of local community feel, agricultural land, and the scenic natural landscape, which are all relevant when considering the construction of a new high-voltage transmission line.
- **Agriculture**—The FEIS and the DSEA fail to adequately analyze the impact of transmission line construction on the organic certification of many farms along the route. In particular there is no analysis of the impact of chemicals or herbicides that are prohibited in organic crops.
- **Visual Quality and Aesthetics**—In the FEIS and the DSEA the Agencies concede that the high-voltage transmission line will have “major” visual impacts to homes within 150 feet on either side of the transmission line, yet they do not consider homes more than 150 feet away from the line, or visitors to nearby parks who are not at a specific scenic outlook point.
- **Socio-Economic and Environmental Justice Impacts**—The FEIS and the DSEA’s discussion of socio-economic and environmental justice impacts is insufficient and flawed in the following ways:
 - **Tourism**—The FEIS and the DSEA do not appreciate, and therefore analyze, that the degradation of the natural and visual environment from this proposed transmission line would affect tourism to the Driftless Area as a whole.
 - **Property Values**—The FEIS and the DSEA does not fully consider property value impacts of the proposed transmission line, in particular, the analyses fail to estimate the total lost value for properties affected by the construction of the high-voltage transmission line.
 - **Environmental Justice**—The FEIS and the DSEA do not adequately address environmental justice considerations. In particular, the analyses utilize a low poverty threshold excluding a portion of the low-income population. Nor do the FEIS and the DSEA make an adequate comparison between the impacted community and an outside reference area.¹⁷
- **Public Health & Safety**—The FEIS and the DSEA discussion of public health and safety is inadequate because there is no quantitative discussion of fire risk or how fire risk may increase as a result of climate change.

¹⁷ Phase 2 of CEQ’s NEPA implementation rules requires a much more robust analysis of environmental justice impacts. CEQ, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49924 (July 31, 2023). The new section 1502.16(a) will require that the environmental consequences section of an EIS include “[t]he potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.” That requirements is picked up throughout the new rules.

In addition to these documented impacts, the DSEA did not update the public on the many commitments made by the Agencies and Companies' to perform surveys of rare species and vegetation along the transmission line corridor. This leads the Conservation Groups to believe that this work has not been completed. The FEIS repeatedly mentions that "surveys will be completed," but no update has been provided on their progress. *See e.g.* FEIS at 133 (Algific Talus Slopes); FEIS at 134 (eagles nest surveys, northern long-eared bat); FEIS at 135 (Rusty patched bumble bee). Other surveys that were completed were deficient in scope, for example the 2017 fieldwork survey "did not include targeted surveys to identify all invasive species." FEIS at 163. At other points the FEIS concedes that surveys have not been completed but makes no commitment to conduct them in the future. FEIS at 165 (comprehensive vegetation community survey). If the Agencies and the Transmission Companies do not know what exists along the transmission line corridor it is impossible to assess the impacts of construction.

VI. Predetermination of Outcome

The Conservation Groups comments on the original EIS covered this topic extensively. *See* DEIS Comments at 21-23. To summarize, at the time, the Conservation Groups contended that:

RUS's improperly narrow purpose and need statement and its cursory exploration of alternative transmission solutions show that it predetermined the outcome of the NEPA analysis: a large transmission line and tall towers would be built between the Cardinal and Hickory Creek substations, and all that remained for the EIS to determine was the precise route. This approach violates NEPA because "Environmental Impact Statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R § 1502.2(g).

Id. In the original EIS, the Federal Agencies, in concert with the project proponents, worked backwards from the desired transmission line to justify its approval.

The predetermination of outcome is even clearer in this DSEA in which, RUS telegraphs the final decision by stating that "[t]he Utilities are planning to construct the proposed route

modifications prior to the proposed in-service date of December 31, 2023, as the remainder of the C-HC project is being built.” DSEA at 40. This DSEA was published on September 8, 2023. These comments were submitted on September 22, 2023. Exactly 100 days later—the Agencies and the Transmission Companies anticipate that the CHC transmission line will be completed. Never mind that this SEA is only a draft, and there are still several steps in the NEPA process before a Record of Decision. The DSEA gives away the game. The Federal Agencies apparently plan to allow the massive transmission line to bulldoze and cut through the protected Upper Mississippi River National Wildlife and Fish Refuge through an unlawful land exchange regardless of the extent or character of significant public opposition or the requirements of the law.

The failure of the Federal Agencies to consider issues independently of the project proponent (i.e. the Transmission Companies) was addressed extensively in the Conservation Groups earlier comments on the EIS. *See* Exhibit K at 23-25. RUS and the other agencies failed to “independently evaluate the information submitted” or take “responsib[ility] for its accuracy.” 40 C.F.R. § 1506.5(a). By offloading the critical NEPA environmental analysis onto the project proponents the RUS failed to meet its legal responsibilities. RUS regulations require applicants to provide necessary environmental information, identify a project’s purpose and need, identify alternatives, and “assist the Agency in all aspects of preparing an EIS ..., including, but not limited to, information and data collection and public involvement activities,” 7 C.F.R. § 1970.5, NEPA “do[es] not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others.” *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974).

As discussed above, in rejecting non-Refuge crossings of the Mississippi River in both the FEIS and the DSEA, the Agencies improperly relied entirely on the Transmission Companies' Alternative Crossings Analysis, without scrutinizing the data in any regard.

Similarly, rather than draft its own independent purpose and need statement, the Agencies adopted the Midwest Independent System Operator (MISO)'s purpose and need with outdated assumptions for the CHC transmission line, which was already 7 years old when the NEPA process began, and is now well over a decade old. Simply adopting MISO's conclusions is no better than adopting the conclusions of the Transmission Companies, who, after all, along with the investor-owned utilities who own most of the transmission companies, are MISO's owners and primary constituents.

VII. Mitigation and Remediation

The FEIS and DSEA fail to provide adequate details about mitigation and remediation measures. All federal agencies are required to "seek to mitigate potential adverse environmental impacts resulting from Agency actions" and ensure that "[a]ll mitigation measures will be included in Agency commitment or decision documents." *See e.g.* 7 C.F.R. § 1970.16. CEQ regulations require that agencies' records of decision for which an EIS was prepared must "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation." 40 C.F.R. § 1505.2.

Consistent with those rules, CEQ has had mitigation and monitoring guidance applicable to all federal agencies since 2011. CEQ, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 Fed. Reg. 3843 (Jan. 21, 2011). Most recently,

CEQ’s Phase 2 NEPA implementation rules require that any reliance on mitigation, either to support a Finding of No Significant Impact or in an EIS, must include a monitoring and compliance plan adequate to assure that mitigation measures will actually be implemented, including “a description of the mitigation measures, the parties responsible for monitoring and implementation, how the information will be made publicly available, as appropriate; the timeframe for the mitigation, the standards for compliance, and how the mitigation will be funded.” CEQ, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49924, 49954 (July 31, 2023). Neither the FEIS nor the DSEA meet these standards.

The DSEA appears to rely on conditions to be placed on the transfer of fee simple ownership to the Transmission Companies as its primary mitigation tool. DSEA Appendix A (vegetation management, availability of Oak Road, discovery of cultural resources, bald eagle activity). But, as Appendix A itself indicates, the remedy available to USFWS if conditions are violated is only to seek equitable relief in a court with jurisdiction. *Id.* at 2. Plans for monitoring, reporting to the public, assessment of mitigation effectiveness—all of those are conspicuously missing, as is any explanation of where and under what circumstances litigation resources will be available to USFWS to enforce the conditions.

VIII. Conclusion

The DSEA does not meet the requirements for an EA to justify a finding of no significant impact (“FONSI”). It is procedurally defective, because the agencies did not provide necessary notice or opportunity to comment to the public. None of the alternatives for crossing through the Upper Mississippi River National Wildlife and Fish Refuge are legally permissible under the Refuge Act. And the DSEA incorporates a four-year-old EIS for the larger project that a federal district court has already deemed inadequate and legally noncompliant, and which contains a host

of other problems, none of which are addressed in the DSEA. Even the part of the analysis focused just on the Refuge impacts is inadequate. Like the FEIS, the DSEA assumes a predetermined outcome, and it reflects a fatal lack of independent analysis and an undue reliance on the project proponents.

In the end, the Agencies must start over and conduct a new EIS (or prepare a major supplement) that contains a legitimate purpose and need statement, and that “rigorously explores and objectively evaluates all reasonable alternatives” which do not cross through the Refuge.¹⁸ The new EIS must contain a robust analysis of climate impacts, assess environmental justice impacts, and contain much more detail about mitigation, including monitoring, reporting and enforcement plans. It must fill the gaps identified during the original comment periods. The Agencies must take genuine responsibility for the end product—they cannot just subcontract their role to the self-interested private transmission line developers.

¹⁸ Any new consideration of alternatives must assume that no part of the CHC project has been built. Otherwise, the Transmission Companies and the Federal Agencies reap the reward of their own unlawful actions, and a genuine comparison of alternatives status quo ante will be foreclosed.