UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, and WISCONSIN WILDLIFE FEDERATION, Plaintiffs, v. RURAL UTILITIES SERVICE, ANDY BERKE, Administrator, Rural Utilities Service, UNITED STATES FISH AND WILDLIFE SERVICE, WILL MEEKS, Midwest Regional Director, and SABRINA CHANDLER, Manager, Upper Mississippi River National Wildlife and Fish Refuge, UNITED STATES ARMY CORPS OF ENGINEERS, LIEUTENANT GENERAL SCOTT A. SPELLMON, Chief of Engineers and Commanding General, U.S. Army Corps of Engineers, COLONEL STEVEN SATTINGER, Commander and District Engineer, Rock Island District, U.S. Army Corps of Engineers, and COLONEL KARL JANSEN, Commander and District Engineer, St. Paul District, U.S. Army Corps of Engineers, Defendants, and DAIRYLAND POWER COOPERATIVE, & ITC MIDWEST LLC, Intervenor-Defendants.	No. 24-cv-139-wmc

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY

Plaintiffs seek a preliminary injunction[1] against Defendant U.S. Fish & Wildlife Service ("USFWS") to prevent the agency from closing its legally impermissible land exchange that would allow ITC Midwest ("ITC") and Dairyland Power Cooperative ("Dairyland") to bulldoze and construct the controversial Cardinal-Hickory Creek ("CHC") high-voltage transmission line through and across the protected Upper Mississippi River National Wildlife and Fish Refuge ("Refuge"). The USFWS continues to evade the clear legal requirements of the National Wildlife System Improvement Refuge Act of 1997 ("1997 Refuge Act") that Congress enacted to restrict "powerlines," pipelines and other large linear right-of-way projects that are not "compatible" with the Refuge System's wildlife protection purposes from using and running through Refuges' public lands and waters. 16 U.S.C. § 668dd(d)(1)(B).

If the USFWS is allowed to impermissibly create statutory loopholes, the CHC transmission line will cause irreparable harm to Plaintiffs' interests and to the ecological integrity of the Upper Mississippi River National Wildlife and Fish Refuge, established by Congress in 1924. 16 U.S.C. § 723. It will also create a dangerous precedent for running more massive high-voltage powerlines through other protected National Wildlife Refuges. That is exactly the historic practice and use that Congress clearly intended to change by enacting the 1997 Refuge Act's strengthened "compatibility" requirement provision with the additional provision specifically applying compatibility to "powerlines." 16 U.S.C. § 668dd (d)(1)(B).

Plaintiffs' new lawsuit presents the unusual situation where the Court *has already ruled* on the merits in favor of the Plaintiffs against the same Federal Defendants. This Court's January 14,

[1] This memorandum supports Plaintiffs' temporary restraining order motion (Doc. 2), which the Court converted into a preliminary injunction in its March 8, 2024 text order. Doc. 31. Plaintiffs are updating their request for relief to be consistent with a preliminary injunction in light of the Court's Order. *See* Conclusion section below.

2022 Opinion and Order granted partial summary judgment in Plaintiffs' favor on the merits of their claims that are now again before this Court, *Nat'l Wildlife Refuge Ass'n v. Rural Util. Serv.*, 580 F. Supp. 3d 588 (W.D. Wis. 2022). This Court also granted a preliminary injunction in Plaintiffs' favor. *Nat'l Wildlife Refuge Ass'n v. Rural Util. Serv.*, 2021 WL 5050073 (Nov. 1, 2021).[2] On appeal, the Seventh Circuit held that Plaintiffs' claims were premature because the USFWS had not yet issued a "final action," but the Seventh Circuit did not reach the merits of Plaintiffs' substantive claims. *Driftless Area Land Conservancy v. Rural Util. Serv.,* 74 F.4th 489, 494 (7th Cir. 2023). The Seventh Circuit plainly expected that the Plaintiffs would have their "day in court" for adjudication on the merits. Once USFWS issued its final decision, Plaintiffs would then bring their lawsuit and obtain full and fair judicial review.

That time is now. Preliminary injunctive relief is necessary to stop Defendant USFWS from closing its land exchange deal, which would allow bulldozing and construction through the public lands of the Refuge *before* full and fair judicial review on the merits. This Court recognized that the Federal Defendants and Transmission Companies created an "orchestrated trainwreck." They have now "manufactured" "urgency" (*see* Doc. 37 at 11) that would deprive Plaintiffs of effective judicial review and a meaningful remedy. That would result in "justice delayed is justice denied" to Plaintiffs in a very real sense, and is contrary to the public interest. A preliminary injunction is necessary to maintain the *status quo* without a rush to judgment.

In the Seventh Circuit, a plaintiff "must establish that it has some likelihood of success on the merits; that it has no adequate remedy at law; that without relief it will suffer irreparable harm."

[2] Plaintiffs' Complaint is brought against three federal defendant agencies – Rural Utilities Service ("RUS"), U.S. Army Corps of Engineers ("Corps") and USFWS (collectively, "Federal Defendants") – because their joint Final Environmental Impact Statement ("FEIS") and Supplement Environmental Assessment ("SEA") formed the basis for the USFWS's final agency decision at which the preliminary injunction is directed. Plaintiffs will eventually move for summary judgment against all three Federal Defendants, requesting that the environmental reviews be set aside, reversed and remanded, and directing the agencies to do a NEPA-compliant environmental review considering non-Refuge-crossing alternatives, including non-wires alternatives.

Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 896 F.3d 809, 816 (7th Cir. 2018). If the plaintiff passes that threshold, "the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest." *Id.* Courts "employ[] a sliding scale approach" for this balancing: "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Id.*; *see Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017).[3]

Plaintiffs meet the standards for a preliminary injunction stopping Defendant USFWS's closure of the land exchange because:

(1) Plaintiffs are reasonably likely to prevail on the merits because this new lawsuit raises most of the same issues that this Court already decided in granting partial summary judgment in Plaintiffs' favor, *National Wildlife Refuge Ass'n,* 580 F. Supp. 3d 588 (W.D. Wis. 2022), and because of the Defendants' subsequent actions. This Court has already held that Defendant USFWS's identical land exchange and its evasion of the 1997 Refuge Act's "compatibility" requirement and of the USFWS's own Comprehensive Conservation Plan for the Refuge are unlawful. *Id*. at 609-10. This Court has already held that the Federal Defendants' Final Environmental Impact Statement ("FEIS"), which Defendant USFWS and the other agencies *still* rely upon, violates the National Environment Policy Act ("NEPA"). *Id*. at 604-13.

(2) Plaintiffs will clearly suffer obvious irreparable harms. This Court has also already held that construction of the new massive CHC high-voltage transmission line with up to 200-feet high

[3] *See also Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 764 (W.D. Wis. 2020), *stay granted in part on other grounds sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

towers running through the Refuge's protected public lands and waters will cause irreparable harm to the Plaintiff organizations and their members. *Nat'l Wildlife Refuge Ass'n*, 2021 WL 5050073, at *7. This includes "harm relate[d] to the destruction of ecosystems, wetlands, and habitats, and simply awarding damages cannot repair fragile ecosystems that are harmed. . . All of this suggests a strong presumption in favor of an injunction where environmental harm is likely." *Id.* at *8.

(3) Plaintiffs do not have adequate remedies at law because the environmental harms from destroying the ecosystems and waters in the Refuge are not remedied through damages. *Id*. at *8.

(4) The public interest is served because Congress, the branch of government that makes these Refuge designation choices, decided in 1924 to create and protect the Upper Mississippi River National Wildlife and Fish Refuge lands and waters, and then enacted additional protections in 1997 against private economic uses of Refuge lands that would materially interfere with the Refuge's wildlife protection and conservation purposes. Congress then passed the 1997 Refuge Act with the new "compatibility" requirement, which explicitly restricts "powerlines" from running through Refuges. 16 U.S.C. § 668dd and § 668dd(d)(1)(B).

On the "sliding scale approach" for balancing harms, Plaintiffs strongly prevail. Plaintiffs have more than met the required "some likelihood" of success, and the irreparable harms to Plaintiffs and the lack of an adequate remedy at law weigh very heavily in their favor.

As the Court recognizes, the Federal Defendants and Transmission Companies have manufactured an emergency and are rushing to create a *fait accompli* of the huge CHC high-voltage transmission line running through and across the National Wildlife Refuge before Plaintiffs can have their day in court. That would be manifestly unjust and fundamentally unfair. *E.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs,* 645 F.3d 978, 991 (8th Cir. 2011) ("the 'difficulty

of stopping a bureaucratic steam roller, once started' [is] a proper factor for the district court to take into account.") (citing *Sierra Club v. Marsh,* 872 F.2d 497, 504 (1st Cir. 1989)).

Plaintiffs' preliminary injunction relief is especially justified because the Defendants and Transmission Companies "work[ed] hand-in-glove" attempting to preempt meaningful judicial review of Plaintiffs' claims, and they have put Plaintiffs in an extraordinarily unfair position. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 596. *First*, the Transmission Companies, along with the Federal Defendants, created exactly the "orchestrated trainwreck" that this Court warned against. *Id.* at 600-01. They've built the CHC transmission line right up to the Wisconsin and Iowa edges of the protected Refuge without any assurance of a lawful way to cross. SPF at ¶ 26.[4]

Second, the full extent of the Federal Defendants' and Transmission Companies' "shell game," *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 600, was not fully made public until the Federal Defendants published their draft Supplemental Environmental Assessment in October 2023. It was only then revealed that Defendant USFWS and the Transmission Companies had, in fact, executed a written "Statement of Proposed Land Exchange/Purchase" two years before on October 29, 2021. SPF at ¶ 52-54. Back at that time, the parties were briefing the previous preliminary injunction and summary judgment motions before this Court.

That land exchange deal then is the same land exchange deal now. The Federal Defendants, however, hid the ball and failed to disclose that signed document to Plaintiffs, to this Court, and to the Seventh Circuit. SPF at ¶ 54. They argued, instead, that Defendant USFWS had not taken

[4] This memorandum is supported by the Statement of Proposed Record Facts required by this Court's Procedure to be Followed on Motions for Injunctive Relief. Citations to the Statement of Proposed Record Facts are labelled "SPF at ¶ X," corresponding to a paragraph in that document. The Statement contains citations to docket entries from the administrative record in the previous litigation, as well as to documents that Plaintiffs filed with their new Complaint. Doc. 1. Plaintiffs are constrained because the Federal Defendants have not filed the administrative record for their actions over the past three years leading to the Final Supplemental Environmental Assessment in Fall 2023 and the USFWS's February 23, 2024 decisional documents. Plaintiffs are also filing a short Appendix for the Court's convenience in addressing the issues on this expedited briefing and hearing schedule.

final agency action: "The potential land transfer likewise is not ready for judicial review. The Fish and Wildlife Service agreed to consider a proposal but has not reached a decision." *Driftless Area Land Conservancy,* 74 F.4th at 494. Because USFWS hid the ball on the "Statement of Proposed Land Exchange/Purchase," the Seventh Circuit was led to believe that "[t]he agency has not permitted a land transfer and perhaps never will." *Id.* So, after this Court's decision was vacated on finality grounds, Defendant USFWS then issued that very same land exchange on February 23, 2024. SPF at ¶ 80.

Third, Defendant USFWS created another artificial emergency by not releasing its decisional documents until February 23, 2024: (1) their land exchange agreement, (2) their Finding of No Significant Environmental Impact ("FONSI"), which is based largely on the original FEIS that this Court previously declared to violate NEPA; and (3) their "Net Benefits Analysis" document. SPF at ¶¶ 80-81. They then insisted upon a 30-day closing period. Defendant USFWS and Transmission Companies have "created this situation" having known for months that "this [final agency decision] was going to be heavily challenged." Doc. 37 at 8.

Fourth, Defendant USFWS did not provide adequate notice or any opportunity at all for the Plaintiffs and other members of the public to comment in writing or orally on the Net Benefits Analysis. That is both contrary to law and unreasonably limits the administrative record. The first time that Plaintiffs saw the Net Benefits Analysis was on February 23, 2024, even though the Federal Defendants said it would be made public long ago. SPF at ¶ 79.

Fifth, Defendants have not produced the administrative record providing evidence and necessary information to support their post-2020 activities and final documents. They rushed to close the land exchange transaction, and they have yet to expedite the administrative record. Doc. 37 at 8-9. Plaintiffs and the Court are thus unreasonably constrained because they are evaluating

the land exchange agreement and Net Benefits Analysis without the benefit of an administrative record and without public comments. The Seventh Circuit recognized the "impossib[ility]" of judicial review when "the court lacks an administrative record." *Driftless Area Land Conservancy,* 74 F.4th at 494. Without knowing the Federal Defendants' documentary support including internal debates and evidentiary bases, typically found in an administrative record, in addition to, the agencies' ultimate conclusions, a judicial decision on the merits risks being "premature." *Id*. That makes the preliminary injunction all the more justified and necessary to preserve the *status quo* so that the Court can effectively review the administrative record that Defendants have yet to produce in accordance with the APA.

The Seventh Circuit emphasized that it was *not* ruling on the merits. *Driftless Area Land Conservancy,* 74 F.4th at 495. At this stage, however, there can no longer be any question about finality following Defendant USFWS's issuance of its three decisional documents on February 23, 2024. The land exchange that these documents implement is the identical land exchange that this Court previously rejected as unlawful under the Refuge Act. *Nat'l Wildlife Refuge Ass'n,* 580 F.Supp. at 609.

Plaintiffs seek to preliminarily enjoin closure of the land exchange and preserve the *status quo* in order to enable effective judicial review on the merits of their claims on the violations of the 1997 Refuge Act, NEPA and APA. Federal Defendants have done nothing to remedy their ongoing failure to complete a lawful environmental review of non-Refuge-crossing alternatives under NEPA, and they rely heavily on the 2019 FEIS document that violated NEPA. SPF at ¶¶ 72-77, 81, 88; *see also Nat'l Wildlife Refuge Ass'n,* 580 F.Supp. at 610-13.

The public interest will best be served by a preliminary injunction. The Upper Mississippi River National Wildlife and Fish Refuge, 16 U.S.C. § 723, is the gem of the Refuge System in the

Midwest and is "designated as a Wetland of International Importance by the Ramsar Convention and a Globally Important Bird Area." SPF at ¶ 5. The Refuge should be protected as Congress established in 1924 and reinforced with the National Wildlife Refuge System Improvement Act of 1997. Just as long ago, the U.S. EPA and the USFWS Refuge managers both urged the Transmission Companies to build their transmission line on a route that would not run through and across the protected Refuge. SPF at ¶ 28-30, 35.

Preliminary injunctive relief is fully justified in this case. Plaintiffs are likely to succeed on the merits and have a stronger case than the "some likelihood" standard in *Planned Parenthood*, 896 F.3d at 816. Plaintiffs will clearly suffer irreparable harm if the CHC high-voltage transmission line is built across the Refuge before full and fair judicial review of Plaintiffs' claims on the merits. This Court already found that the balance of hardships tipped toward the Plaintiffs, and that is equally true today. *Nat'l Wildlife Refuge Ass'n v. Rural Util. Serv.,* 2021 WL 5050073, at *8-9.

Accordingly, this Court should: (1) grant Plaintiffs' motion for a preliminary injunction to stop the Defendant USFWS from taking any action to close its land exchange agreement in order to thereby maintain the status quo; (2) direct the Federal Defendants to file their full administrative record; and (3) set a reasonable briefing schedule with sufficient time for Plaintiffs and Defendants to file motions for summary judgment and for the Court to conduct effective judicial review and issue its decision on the merits of Plaintiffs' lawsuit.[5]

[5] Plaintiffs will agree to an expedited briefing schedule on summary judgment and a permanent injunction, and are awaiting the Federal Defendants' filing their administrative record.

STATEMENT OF FACTS

Procedural History of Previous Related Litigation

This lawsuit follows on Plaintiffs' previous lawsuit filed against the same Federal Defendants on essentially the same issues that led to this Court's Opinions and Order first granting a preliminary injunction on November 1, 2021 (*Nat'l Wildlife Refuge Ass'n,* 2021 WL 5050073 (W.D. Wis. 2021)) and then granting partial summary judgment and declaratory and injunctive relief in favor of the Plaintiffs on January 14, 2022. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d 588 (W.D. Wis. 2022). This Court held that the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee, prohibits Defendant USFWS from permitting the Transmission Companies' CHC high-voltage transmission line and its very high towers, whether by easement or land exchange, to cross the protected Upper Mississippi River National Wildlife and Fish Refuge because this massive powerline is not "compatible with" the Refuge's wildlife protection and conservation purposes. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 610. This Court concluded that the CHC transmission line was "preclude[d] . . . from crossing the Refuge by right of way or land transfer," and "a land exchange that is equally incompatible with the purposes of the Refuge as a right of way cannot be used as a method to evade Congress' mandate." *Id.* at 610.

This Court also held that the three Federal Defendants' Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") violated the National Environmental Policy Act ("NEPA") because, among other things, the FEIS defined the "purpose and need" so narrowly that non-Refuge-crossing alternatives, including both route alternatives and a combination of non-wires alternatives, were not rigorously explored and objectively evaluated as required by federal law. *Id*. at 613, 615. This Court warned the Transmission Companies against continuing

construction up to the borders of the protected Refuge, and described that approach as an "orchestrated trainwreck," which the Court was not likely to tolerate. *Id.* at 601. The Court issued a final judgment and remedies Order on March 1, 2022. PA[6] at 139-40.

On July 19, 2023, the Seventh Circuit issued an Opinion that: (1) did not reach the merits of Plaintiffs' substantive claims that were resolved in Plaintiffs' favor by this Court in its decision below, but (2) vacated this Court's decision on the grounds that the Federal Defendants had not reached final actions and, therefore, the case was not yet reviewable. *Driftless Area Land Conservancy,* 74 F.4th 489 (7th Cir. 2023). Once a final agency decision was made, Plaintiffs would then be able to bring their lawsuit and obtain meaningful judicial review.

Many of the relevant facts through 2021 are set forth in this Court's and the Seventh Circuit's Opinions and can be relied upon now by this Court. The Court is familiar with the Plaintiff conservation organizations – National Wildlife Refuge Association, Driftless Area Land Conservancy and Wisconsin Wildlife Federation – whose members use and enjoy and plan to continue using and enjoying the Upper Mississippi River National Wildlife and Fish Refuge. *See* Doc. 8-13; SPF at ¶¶ 103-108. This Court held that these Plaintiff organizations each had standing in the previous lawsuit. *Nat'l Wildlife Refuge Ass'n*, 580 F. Supp. 3d at 603.

The Court is also familiar with the Defendants Rural Utilities Service ("RUS"), U.S. Fish & Wildlife Service ("USFWS") and the U.S. Army Corps of Engineers ("the Corps"), along with relevant agency officials who are sued in their official capacity. All three federal agencies participated in the NEPA process, including the October 2019 FEIS, the 2020 ROD and the 2023 Supplemental Environmental Assessment. These environmental review documents underlie

[6] Documents attached in Plaintiffs' Appendix are cited to "PA" including the page numbers at the bottom of each page labelled "Plaintiffs' App'x XX" corresponding with Plaintiffs' Appendix Table of Contents.

Defendant USFWS's February 23, 2024 decision documents and the land exchange that Plaintiffs seek to enjoin.

Defendant USFWS thereby finalized the same land exchange it had agreed to in October 2021, which this Court previously held unlawful, and USFWS incorporated the same environmental review documents this Court previously rejected. Plaintiffs are suing again, and seek a preliminary injunction to preserve the status quo while this Court decides the merits.

The Upper Mississippi River National Wildlife and Fish Refuge

The Upper Mississippi River National Wildlife and Fish Refuge was established by Congress in 1924 as a refuge and breeding place for migratory birds, and as a refuge for other birds, wildlife, fish, and plants. 16 U.S.C. § 723; SPF at ¶ 1. The Refuge covers over 240,000 acres and extends 261 river miles from its north end at the confluence of the Chippewa and Mississippi Rivers and its south end near Rock Island, Illinois. SPF at ¶ 3.

This Refuge is one of the largest blocks of floodplain habitat in the lower 48 states. SPF at ¶¶ 3, 7. According to Defendant USFWS: "Bordered by steep wooded bluffs that rise 100 to 600 feet above the river valley, the Mississippi River corridor and refuge offer scenic beauty and productive fish and wildlife habitat unmatched in the heart of America." SPF at ¶ 4. This Refuge "is designated as a Wetland of International Importance by the Ramsar Convention and a Globally Important Bird Area." SPF at ¶ 5. The Ramsar site designation "embodies the government's commitment to take the steps necessary to ensure that its ecological character is maintained." SPF at ¶ 5. Ramsar sites "are recognized as being of significant value not only for the country or the countries in which they are located, but for humanity as a whole." SPF at ¶ 6.

This Refuge is designated as a Globally Important Bird Area because it is located within the Mississippi Flyway. SPF at ¶ 7. "More than 290 species of birds migrate throughout the refuge

every year. About 40% of the waterfowl in the nation use the Mississippi River as a travel corridor in the fall migration and the refuge is particularly known to host large flocks of tundra swans and large rafts of canvasback ducks between mid-October and the winter freeze-up. In addition, Upper Mississippi River National Wildlife and Fish Refuge hosts more than 300 pairs of bald eagles in part due to having one of the largest blocks of floodplain forest habitat in the lower 48 states." SPF at ¶ 7.

The Refuge is managed according to the Refuge Act, USFWS rules and a Refuge-specific Comprehensive Conservation Plan, which makes enhancing ecological connectivity and avoiding habitat fragmentation a clear goal of the Refuge. SPF at ¶ 9. The Refuge is linear, following the Mississippi River for hundreds of miles, one of the Refuge's values is its ability to allow uninterrupted movement of wildlife north and south along the River. SPF at ¶ 11.

The National Wildlife Refuge System Improvement Act of 1997 and the Cardinal-Hickory Creek High-Voltage Transmission Line's Proposed Crossing of the Refuge

The Transmission Companies' massive CHC high-voltage transmission line begins at the Hickory Creek substation in Dubuque County, Iowa, and then would run with a wide clear-cut right of way through and across the middle of the protected Upper Mississippi River National Wildlife and Fish Refuge, and then cut a wide swath east through Southwest Wisconsin's scenic Driftless Area landscape, vital natural resources, conservation areas, family farms and rural small town communities on the way to the Cardinal substation in Middleton, Wisconsin. SPF at ¶ 18.

While migratory birds fly north and south along the Mississippi Flyway, the Transmission Companies plan to build the CHC high-voltage transmission line and high towers east and west across the Refuge. SPF at ¶ 8. USFWS recognizes that the CHC transmission line will cause migratory bird kills, injuries and deaths. SPF at ¶ 8.

The National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd-668ee, prohibits private economic use – and, specifically, "powerlines" – of National Wildlife Refuge lands and waters unless the use is determined to be "compatible" with the exclusively wildlife purposes of the Refuge and the Refuge system. Defendant USFWS has long acknowledged that the CHC line cannot pass that statutory test. SPF at ¶ 42. Defendant USFWS did not make a scientific determination that the proposed massive CHC high-voltage transmission line: (1) would "not materially interfere with or detract from" the purposes of the Upper Mississippi River National Wildlife and Fish Refuge or the National Wildlife Refuge System; or (2) would "contribute to" the achievement of the purposes of the Refuge or the mission of the National Wildlife Refuge System. SPF at ¶¶ 43-44.

In 2012, the Transmission Companies met with the USFWS's Refuge managers to discuss whether their proposed CHC transmission line could be allowed to run through and across the protected Refuge. SPF at ¶ 27. The USFWS Refuge managers advised the Transmission Companies to find a non-Refuge-crossing alternative because the proposed CHC transmission line could not meet the 1997 Refuge Act's requirement that it be "compatible" with the Refuge's wildlife protection and wildlife habitat management purposes. SPF at ¶ 30. At about that time, the Refuge managers also advised a different group of transmission developers (including Dairyland Power) that the USFWS would not allow their proposed high-voltage transmission line to run across the Refuge at the Black River Bottoms area further north. SPF at ¶ 31.

The USFWS Refuge managers explained the reasons why a project like the CHC high-voltage transmission could not meet the 1997 Refuge Act's requirements because right-of-way 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." SPF at ¶ 32. They also explained that transmission line crossings would: compromise the area's scenic qualities; encourage establishment of invasive species like reed canary-grass, European buckthorn, Japanese knotweed, and others; compromise threatened and endangered and candidate species like the Higgins Eye pearlymussel, Massasauga rattlesnake, and sheepnose mussel; pose a significant hazard to bald eagles; and greatly increase the risk of harmful bird strikes. SPF at ¶ 34.

In 2017, the U.S. Environmental Protection Agency concurred with the USFWS Refuge managers concerns and specifically advised the Transmission Companies to find a non-Refuge-crossing alternative. SPF at ¶ 35. The Transmission Companies, however, pressed forward with their plan for the CHC high-voltage transmission line to run through the protected Refuge.

The Defendant USFWS and the Transmission Companies looked for ways to avoid the "compatibility requirement" enacted by Congress in the 1997 Refuge Act. First, Defendant USFWS decided that because the Transmission Companies were willing to tear down some old low-voltage powerlines about a mile south of the proposed CHC high-voltage transmission line crossing, the CHC project could be grandfathered in by deeming the much larger new CHC project as "maintenance" of the old lines, which predated the Refuge Act and never needed to pass the compatibility test. SPF at ¶ 38. On that basis, Defendant USFWS granted the Transmission Companies an easement and a special use permit. SPF at ¶ 41.

Plaintiffs sued, challenging Defendant USFWS's "maintenance" theory, and contending that the proposed CHC transmission line right-of-way project violated the 1997 Refuge Act's compatibility requirement. Plaintiffs further claimed the Federal Defendants' approvals and permits were invalid because their jointly signed FEIS and ROD violated NEPA requirements for multiple reasons, including, but not limited to, unduly constricting the "purpose and need"

statement to avoid rigorously exploring and objectively evaluating all reasonable alternatives especially routes that would avoid running through the protected Refuge and non-wires alternatives. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 610-13.

Then, on August 27, 2021, "less than a week before summary judgment motions were due," Defendant USFWS "withdrew" its "maintenance exception" SPF at ¶ 49; *see also Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 594, and decided that rather than grant a right-of-way easement and special use permit subject to the compatibility requirement, USFWS would instead entertain the idea of a land exchange. *Id*.; *see also* SPF at ¶¶ 49-51.

Under this deal: (1) the Transmission Companies would get fee simple title to their preferred right-of-way through the Refuge near Oak Road and along the Turkey River Bottoms, which is where the proposed CHC transmission line would cross the Mississippi River; (2) USFWS would get the 35.6-acre "Wagner parcel" of land in Wisconsin that the Transmission Companies purchased for $324,380[7] in 2021, and had already proposed as compensatory mitigation for granting the original easement; and (3) the 1997 Refuge Act's compatibility requirements would thus be evaded in their view. SPF at ¶ ¶ 47, 52-53. USFWS found this transaction "favorable" even though the Refuge Act requires compatibility and the USFWS's own regulation "specifically *prohibits* the use of compensatory mitigation to make a use compatible." *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 608; *see also* 50 C.F.R. § 26.41(b).

So, the proposed land exchange essentially amounts to the Transmission Companies buying longstanding Refuge public lands for conversion to their powerline right-of-way corridor for less than $325,000.

[7] Based on documents Plaintiffs have reviewed – the title insurance documents that USFWS included in the previous case record, *see* SPF at ¶ 47 – this appears to be ITC Midwest's purchase price for the Wagner Parcel.

On October 29, 2021, Defendant USFWS and the Transmission Companies formally executed and signed a "Statement of Proposed Land Exchange/Purpose," which detailed the terms. They did not disclose that document, however, to Plaintiffs and the public, to this Court, or to the Seventh Circuit.[8] SPF at ¶ 52. The land exchange proposes to swap the 35.6-acre Wagner Parcel owned by ITC Midwest for 19.36 acres of Refuge land near Oak Road and the Turkey River Bottoms. SPF at ¶ 53.

On November 1 and November 3, 2021, this Court entered a preliminary injunction. *Nat'l Wildlife Refuge Ass'n,* 2021 WL 5050073 (Nov. 1, 2021); *see also* PA 92-93. On January 14, 2022, this Court granted partial summary judgement in favor of Plaintiffs' substantive claims on Defendants' violations of the 1997 Refuge Act and NEPA. This Court rejected the Defendants' "maintenance" theory and their attempted evasion of the 1997 Refuge Act's "compatibility" requirement through a land exchange, and criticized the "shell game" that the Defendants were playing. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 600, 610-15. The Court declared that allowing the CHC transmission line to cross what is now protected Refuge land would violate the 1997 Refuge Act. *Id.* at 604-10. The Court further held that the Defendants' failure to fully and fairly evaluate non-Refuge-crossing alternatives invalidated the FEIS prepared for the entire project. *Id.* at 610-13. On March 1, 2022, this Court ultimately entered judgment for the Plaintiffs. PA at 139-40.

The Federal Defendants and Transmission Companies appealed. SPF at ¶ 64. They requested that this Court's decision be stayed, but the Seventh Circuit denied their stay motion. SPF at ¶ 65. The Federal Defendants and Transmission Companies still did not disclose their signed "Statement of Land Exchange/Purpose." SPF at ¶ 54. Without the benefit of this document,

[8] The agreement between the Federal Defendants and the Transmission Companies was first revealed on September 7, 2023 in Federal Defendants' appendix to the Draft Supplemental Environmental Assessment. SPF at ¶ 52.

the Seventh Circuit concluded: "Fish and Wildlife Service has not issued a final decision that could harm plaintiffs. The agency has not permitted a land transfer and perhaps never will." *Driftless Area Land Conservancy,* 74 F.4th at 494. The Seventh Circuit did not rule on the merits, but instead concluded that USFWS had not completed a "final agency action." *Id.* at 495. The Seventh Circuit's decision cautioned that "[t]he cost of construction is one the utility companies have opted to incur and bear the risk of." *Id.* Meanwhile, the Transmission Companies continued building the CHC transmission line up to the Refuge's edged in the face of this Court's and the Seventh Circuit's warnings and without any assurance that a Refuge crossing would be found lawful in light of the 1997 Refuge Act and NEPA requirements.[9] SPF at ¶ 26.

Final Agency Actions Since the Seventh Circuit Decision

On September 7, 2023, Federal Defendants issued a new draft Supplemental Environmental Assessment ("DSEA"), incorporating and re-adopting their previous October 23, 2019 FEIS and January 16, 2020 ROD signed by all three Federal Defendant agencies, which was rejected by this Court. *See* SPF at ¶ 67; *see also Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 613.

The Federal Defendants' public notice was defective, and they provided only 14 days for public comments in writing. SPF ¶ 68. They did not provide for a public hearing that would have allowed people to be heard orally. SPF at ¶ 68. Plaintiffs and others submitted detailed written comments on the compressed schedule,[10] (SPF ¶ 69), but the Federal Defendants finalized the

[9] The Transmission Companies informed the Public Service Commission of Wisconsin that they have spent $649 million on the CHC transmission line thus far, which exceeds the $492 million cost they previously asserted in gaining approval. SPF at ¶ 26. Those cost overruns, if taken into account earlier, would have changed the economic analysis of reasonable alternatives. The Transmission Companies should not be allowed to charge costs that are not "prudent," under utility laws, to ratepayers.

[10] USFWS provided only newspaper notice, offering a 14-day comment period, with a copy of the DSEA only available at a local public library, which would not allow photocopying. Eventually, after a day or two, the document appeared on the website of Defendant Rural Utilities Service. SPF at ¶ 68.

Supplemental Environmental Assessment ("FSEA") and their finding of no significant environmental impact ("FONSI") on October 6, 2023, only two weeks after the close of the comment period. SPF ¶ 71. The Federal Defendants' DSEA and FSEA said that Defendant USFWS would complete a "net benefits analysis" to justify the land exchange at some unspecified future date. SPF at ¶ 79.

On February 23, 2024, Defendant USFWS issued three documents: (1) an executed Land Exchange, the same transaction that this Court previously invalidated; (2) a Finding of No Significant Environmental Impact ("FONSI") under NEPA; and (3) a "Net Benefits Analysis" for the land exchange. SPF at ¶ 80. These documents formally execute the land exchange which USFWS and the Transmission Companies signed and agreed to in principle back on October 29, 2021.

The Net Benefits Analysis asserts that the wildlife value of the Wagner parcel compensates for the lost wildlife value of the land within the transmission right-of-way corridor. SPF at ¶ 84. It does not assess the loss of wildlife value in lands surrounding the right-of-way. SPF at ¶ 85. It also discounts the risk of habitat fragmentation, (SPF at ¶ 86), contrary to what Defendant USFWS had previously told the Transmission Companies and despite the policies expressed in the USFWS's Comprehensive Conservation Plan for the Refuge and general federal policies directing agencies to enhance ecological connectivity and avoid habitat fragmentation. SPF at ¶ 10.

Defendant USFWS did not issue a draft version of its Net Benefits Analysis or its new FONSI document for public notice. SPF at ¶ 90. USFWS did not provide an opportunity for public comments. SPF at ¶ 90.

Defendant USFWS thus made a final agency decision approving the same land exchange by which it will transfer fee simple title to the Transmission Companies for the 20 acres where

they will clearcut and run the transmission line and up to 200-foot high towers through the protected Refuge in exchange for the same Wagner parcel of land on the Wisconsin side of the River, which the Companies purchased a few years ago for less than $325,000. SPF at ¶¶ 46, 47, 53.

The Transmission Companies have assembled and moved heavy equipment and personnel into place on the Refuge's edge. Doc. 8; SPF at ¶ 110. They apparently intend to start clearcutting and construction through the Refuge as soon as the land exchange is closed. Even though the Transmission Companies had previously committed to avoid construction activities in the Refuge during the January to June period, which is eagle nesting season, (SPF at ¶ 98), they now plan to bulldoze, clearcut and build during April to June 2024 and turn on the powerline crossing the Refuge in June 2024. SPF at ¶ 97.

This New Lawsuit

On March 7, 2024, Plaintiffs timely filed their Complaint commencing this lawsuit, along with a motion for a temporary restraining order ("TRO") and their memorandum supporting the TRO motion. Doc. 1-3. This Court held an emergency hearing on March 7, 2024, at which the Court converted the TRO motion into a preliminary injunction motion and set an expedited briefing schedule leading to a preliminary injunction hearing on March 22, 2024. Doc. 37. The Federal Defendants have not yet filed their administrative record supporting their decision-making process since about 2020.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Although the standard for a preliminary junction only requires Plaintiffs to show "some likelihood of success on the merits," Plaintiffs can show a reasonably higher likelihood of success.

Planned Parenthood, 896 F.3d at 816; *see also McKinsey & Co., Inc. v. Boyd,* 2022 WL 1978735, at *1 (W.D. Wis. June 6, 2022) (stating the standard as showing a "reasonable likelihood of success on the merits"). This preliminary injunction motion presents the very unusual situation where the Court *has already ruled* on the merits of the case in Plaintiffs' favor. Neither the governing statutory law nor the facts have materially changed since this Court's original January 2022 decision:

(1) Defendant USFWS and the Transmission Companies are proposing the same land exchange as their "Statement of Proposed Land Exchange/Purpose" signed on October 29, 2021, which they did not disclose to Plaintiffs, and to this Court and the Seventh Circuit while the prior case was being adjudicated, and they were arguing there was no final agency action. SPF at ¶¶ 53-54.

(2) Congress has not changed the boundaries of the Upper Mississippi River National Wildlife and Fish Refuge, or the designation legislation. 16 U.S.C. § 723; SPF at ¶ 2.

(3) Congress has not changed the National Wildlife Refuge System Improvement Act of 1997. The statutory "compatibility" requirement remains in force: Defendant USFWS 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 [USFWS] has determined that the use is a compatible use." 16 U.S.C. § 668dd(d)(3)(A)(i).

(4) Congress has not changed its definition under the 1997 Refuge Act that a "compatible use" is "a wildlife dependent recreational use, or any other use on a refuge that . . . will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1).

(5) Congress has not changed the specific provision in the 1997 Refuge Act that expressly subjects "powerlines" to the compatibility requirement, 16 U.S.C. § 668dd(d)(1)(B).

(6) Defendant USFWS has not changed its regulation prohibiting use of "compensatory mitigation" to meet the 1997 Refuge Act's compatibility requirements. 50 C.F.R. § 26.41(b).

(7) Defendant USFWS's own Comprehensive Conservation Plan for the Upper Mississippi River National Wildlife and Fish Refuge has not changed. SPF at ¶ 13. *See also National Wildlife Refuge Association,* 580 F. Supp. 3d at 606.

(8) Congress has not changed NEPA in ways that affect the outcome of this Court's decision in *National Wildlife Refuge Association,* 580 F. Supp. 3d at 610-13.

(9) The Federal Defendants' FEIS has not changed, and it was fully relied upon by the Defendants in their environmental reviews resulting in FONSIs. SPF at ¶¶ 74, 88.

The only regulatory changes since January 2022 are (1) the Council on Environmental Quality's ("CEQ") Guidance for Federal Departments and Agencies on Ecological Connectivity and Wildlife Corridors, dated March 21, 2023, which directs federal agencies to develop policies "to conserve, enhance, protect and restore [wildlife] corridors and [ecological] connectivity during planning and decision-making," PA at 17-27; (2) the Defendant USFWS's proposed new "BIDEH" rule on biological integrity, diversity and environmental health, 50 C.F.R. § 29.3 (new). U.S. Fish & Wildlife Service, Proposed Rule: Biological Integrity, Diversity, and Environmental Health ("BIDEH"), 89 Fed. Reg. 7345, 7351 (February 2, 2024), which states: "We allow for and defer to natural processes on habitats within the Refuge System and promote conservation, restoration, and connectivity to meet refuge habitat objectives and landscape planning goals. We will avoid and minimize habitat fragmentation to sustain biological integrity and diversity," PA at 28-35; (3) the Department of Interior's Solicitor's M Opinion, which provides guidance on how

USFWS should interpret its land exchange authority, PA 153-164; and (4) CEQ's new NEPA regulations that specifically cite the case this Court previously relied on, *Simmons v. U.S. Army Corps of Eng'rs,* 120 F.3d 664 (7th Cir. 1997): "[i]t 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)." CEQ, National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23459 (April 20, 2022), *quoting Simmons,* 120 F.3d at 669; PA 42. These regulatory changes bolster the holdings in this Court's previous decision.

A. Plaintiffs Are Likely to Prevail on Their 1997 Refuge Act Claims

1. This Court Has Already Ruled in Favor of Plaintiffs on the Merits of Their 1997 Refuge Act Claims

When the Transmission Companies were planning the CHC project, they sought permission from USFWS to cross the protected Refuge near Cassville, Wisconsin. SPF at ¶ 27. The Refuge managers advised that crossing the Refuge with a high-voltage transmission line could not meet the National Wildlife Refuge System Improvement Act of 1997's requirement that private economic uses of Refuge land must be "compatible," and will "not materially interfere with" the Refuge's sole purpose, which is to protect wildlife and wildlife-dependent recreation. SPF at ¶¶ 28-30. Similarly, during the NEPA EIS scoping process, the U.S. EPA urged the Transmission Companies to find a non-Refuge crossing alternative because of the environmental damage from a high-voltage transmission line running through the Refuge. SPF at ¶ 35.

In 2017, however, Defendant USFWS and the Transmission Companies jointly sought a way to evade that statutory requirement. Their first try: the Transmission Companies take down an existing low-voltage powerline and USFWS would agree to grant an easement and special permit for a new much wider right-of-way about a mile north to serve the much larger CHC high-voltage transmission line with much higher towers. SPF at ¶ 36. USFWS characterized this as

"maintenance" of the old powerlines or a "minor realignment of an existing right-of-way to meet safety standards," that would be "grandfathered in" under the Refuge Act. SPF at ¶ 36. As part of the "mitigation," the Transmission Companies would agree to convey the Wagner Parcel to USFWS. SPF at ¶ 40. Plaintiffs sued, and less than a week before summary judgment motions were due, USFWS "withdrew" its "maintenance" decision. SPF at ¶ 49; *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 594.

Their second try: USFWS decided that rather than grant a right-of-way easement and special use permit, subject to the statutory compatibility requirement, they might "respond[] favorably to a proposed land transfer." SPF at ¶ 51. Under the proposed transaction, USFWS would grant the Transmission Companies fee simple title, not just an easement, for their proposed right-of-way, and the Transmission Companies would convey the Wagner parcel, which they had recently purchased for less than $325,000 and already intended to transfer as compensatory mitigation, to USFWS. SPF at ¶¶ 40, 46, 47. The theory was that, while the Refuge Act may prohibit USFWS from granting easements and permits for private uses without first making favorable compatibility determinations, USFWS can exchange away the land, thereby avoiding the need to find compatibility. In effect, Defendant USFWS was selling the public lands and waters in the Congressionally-designated Upper Mississippi River National Wildlife and Fish Refuge to the Transmission Companies for less than $325,000.

This Court made several key rulings in *National Wildlife Refuge Ass'n v. Rural Utilities Serv.*, 580 F. Supp. 3d 588 (W.D. Wis. 2022). *First*, the Court held that the proposed CHC project could not meet the "compatibility" requirement in the Refuge Act because this project would result in habitat fragmentation in Refuge land dedicated to protecting wildlife and wildlife habitat according to USFWS in the FEIS. *Id.* at 608.

Second, the Court rejected the "just-call-it-maintenance" theory. *Id.* at 605. The massive new CHC transmission line and up to 200-feet high towers is much larger, will carry much more voltage, and will follow a different route a mile away from the existing low-power lines. *Id.*

Third, the Court held that the Defendants could not avoid the 1997 Refuge Act's compatibility requirements by recharacterizing their deal as a "land exchange." *Id.* at 609-10. The Court concluded that Congress did not intend to leave such a giant loophole in the statute, which was specifically intended to constrain agency discretion to allow private "powerline" development on federal Refuge lands. *Id*.

This Court called out the "shell game" that the Federal Defendants and Transmission Companies were playing on the public. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 600. The 1997 Refuge Act specifically allows "powerlines" only if USFWS "determines that such use[is] compatible with the purposes" of the Refuge System and individual Refuge, 16 U.S.C. § 668dd(d)(1)(B). Defendant USFWS's own regulation also expressly prohibits using "compensatory mitigation" to meet the compatibility requirements. 50 C.F.R. § 26.41(b). Defendants have now returned with the same flawed land exchange.

The Seventh Circuit vacated this Court's ruling, but did so on the grounds that the land exchange was not "final" and reviewable under the APA. At that time, the Seventh Circuit said that USFWS had only "agreed to consider a proposal" and had not reached a final decision. *Driftless Area Land Conservancy,* 74 F.4th at 494.

As it has now been revealed, USFWS clearly had done more than just "consider" the land exchange. On October 29, 2021, USFWS and the Transmission Companies formally executed a "Statement of Proposed Land Exchange/Purchase," which identified the parcels that would be swapped and the conditions of the deal. SPF at ¶¶ 52-53. The Defendants played "hide the ball"

and then never made that document available to Plaintiffs, to this Court, or to the Court of Appeals. The Seventh Circuit's finality decision was thus made without a complete record. SPF at ¶ 54. Be that as it may, the Seventh Circuit did *not* reverse this Court's reasoning on the merits.

This Court's previous decision on the merits remains sound. The 1997 Refuge Act still prohibits building powerlines through protected National Wildlife Refuge land unless the use is "compatible with" the wildlife purposes of the individual Refuge and the Refuge System as a whole. "Compatible" means, at minimum, that the proposed use does not "materially interfere with or detract from the fulfillment of" those wildlife purposes. 16 U.S.C. § 668ee(1). Defendant USFWS finally recognized and this Court concluded that the CHC transmission line could not meet those statutory requirements or the stated purposes of the 1997 Refuge Act. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 606. The massive CHC high-voltage transmission line with towers up to 200 feet high and a wide new clearcut right-of-way crossing through the middle of the Refuge is plainly *not* "compatible." It would fragment wildlife habitat, lead to more migratory bird strikes, detract from the aesthetics of the area, facilitate the spread of invasive species, and threaten downstream rivers and wetlands. SPF at ¶¶ 31-32. The law has not changed since this Court's previous decisions.

2. USFWS's Approval of the Land Exchange Violates the Plain Language and Purposes of the 1997 Refuge Act

The 1997 Refuge Act specifically requires that "powerlines" like the CHC transmission line here must meet the "compatibility" requirement. Right-of-way projects may not be permitted unless they are "compatible": they will not materially interfere with the wildlife purposes of the Refuge and the Refuge system. 16 U.S.C. § 668dd(d)(1)(B). There might be a small powerline maintenance project somewhere or the addition of tower support cables that could be argued as

allowed under the compatibility requirement. That is clearly not the situation with the massive new CHC transmission line and its up to 200-feet high towers running through the heart of the Refuge.

The Federal Defendants and the Transmission Companies argue that the land exchange provision of the Act, which is in subsection (b)(3) of 16 U.S.C. § 668dd, instead of in subsection (d), does not mention compatibility, but only that the land must be "suitable for disposition." By the Defendants' logic, while a grant of an easement or a special permit for a right-of-way project *is* subject to the compatibility requirement, the grant of fee simple title, which conveys away even more property rights for the identical purpose, is somehow not. That defies common sense and would treat the land exchange subsection as an isolated provision without construing the language in the context of the "overall statutory scheme."

The U.S. Supreme Court has long cautioned, however, that "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994). In *West Virginia v. EPA,* the Court reaffirmed: "[i]t is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view for their place in the overall statutory scheme." 142 S.Ct. 2587, 2607 (2022) (*quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." *Brown & Williamson,* 529 U.S. at 133 (citations omitted).

Consequently, the "land exchange" provision must be read in the context of the entire statute. This Court recognized that overall context: "The National Wildlife Refuge System Improvement Act of 1997 was written by Congress to close regulatory holes that had been left by prior legislation" that allowed the national wildlife refuges to be crisscrossed by non-wildlife projects like powerlines and pipelines. *National Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 606 (*citing* Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century,* 12 Fordham Envtl. L.J. 41, 77, 86 (2000)). As a rationale for imposing the tight restrictions in the 1997 Refuge Act's text, the legislative history noted "the lack of an overall mission and management procedures [that] had allowed numerous incompatible uses to be tolerated on wildlife refuges." H.R. Rep 105-106 at 3 (1997). Before the 1997 law, a GAO report determined that 90% of Refuges had at least one secondary (non-wildlife use), 70% had at least seven secondary uses, and over 30% had fourteen. SPF at ¶ 59; 580 F. Supp. 3d. at 606.

Defendant USFWS's own rules set out specific separate processes for considering right-of-way applications. Those rules only contemplate granting "easements" for ROW projects; they do not provide for giving Transmission Companies fee simple ownership of rights-of-way through land exchanges or outright sales. *See* 50 C.F.R. § 29.21-3(v).

"Congress has provided more protection for refuges than other areas of land," and USFWS must therefore proceed cautiously when considering the authorization of new secondary uses. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 604. In examining the proposed land exchange in the previous case, the Court concluded that evading the compatibility requirement through a land exchange "defies both congressional intent and common sense." *Id.* at 608. "If the court allowed a comparable land exchange where there is no compatibility, the entire purpose of the Refuge Act

would be entirely undermined, just as the Utilities appear to be attempting here, again with Fish and Wildlife's complicity." *Id.* at 609.

The stakes are high. If USFWS's approach here were upheld, land exchanges could become a preferred end-around to sell off federal lands and evade the Congress's protective statutes and National Wildlife Refuge designations. "Congress wrote the Refuge Act in order to curb incompatible, secondary uses within refuges. To allow anyone to skirt that rule by simply doing a land exchange would obviously undermine the purposes of the Refuge Act." *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 609. It will be a rare land exchange where an agency won't be able to claim some "benefit" and urge the court to provide a "get-out-of-jail free" card.

Congress understood that allowing protected public lands to be used for powerlines and pipelines would always be attractive, at least in the short term. For the developers, it means avoiding having to negotiate and pay private landowners, or having to use the eminent domain process. For individual Refuge (or other federal lands) managers, it means avoiding conflict and being able to obtain financial concessions from motivated buyers—in this case, less than $325,000 worth of the recently purchased Wagner Parcel land. SPF at ¶ 47.

When the details of the transaction are laid bare, a clear picture comes through: Refuge lands are being put up for sale in the form of "let's make a deal" or a "swap-o-rama," which is exactly what Congress' new "compatibility" requirement text, especially applied to "powerlines," in the 1997 Refuge Act, and the overall statutory purpose were designed to stop.

The Upper Mississippi River National Wildlife and Fish Refuge was created by Congressional statute in 1924, not administrative action. SPF at ¶ 1-2. For less than $325,000, Defendant USFWS is allowing private developers to essentially purchase part of the land that Congress has designated for the National Wildlife Refuge. SPF at ¶ 47. The Transmission

Companies expediently bought the 35.6-acre Wagner Parcel a few years ago so the parties could call it a land exchange instead of a sale of Congressionally-designated Refuge land. SPF at ¶ 46.

This scheme puts Refuge lands are effectively up for sale, just as before the Refuge Act was adopted in 1997. For the nation's National Wildlife Refuge system, Congress chose to lean against this temptation to barter away protected public lands by prohibiting the use of Refuge lands for powerline right-of-way projects unless the developers could prove that their projects would somehow *not* materially interfere with the Refuge System's wildlife, conservation protection, and recreational purposes. The Defendant USFWS and the Transmission Companies violate that statutory standard in this case.

3. This Court Previously Recognized that the Proposed Land Exchange Is Inconsistent with the USFWS's Own Comprehensive Conservation Plan for the Upper Mississippi River National Wildlife and Fish Refuge

The 1997 Act requires Refuge managers to develop Comprehensive Conservation Plans ("CCP") for their Refuges. 580 F. Supp. 3d at 606; 16 U.S.C. § 668dd(e)(1)(A). Congress instructed that once a CCP is finalized, the National Wildlife Refuge must be managed "in a manner consistent with the plan. . . ." The CCP's express "objectives are designed to help the Refuge achieve its purposes and contribute to the mission and policies of the National Wildlife Refuge System." *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 606; 16 U.S.C. § 668dd(e)(1)(E). Thus, if the Refuge managers act contrary to their CCP, they are acting arbitrarily and capriciously, and violating the statute.

This Court previously recognized that, even if the statute theoretically allowed use of land exchanges for right-of-way projects—which it does not—this particular land exchange would not pass muster under USFWS's own CCP for the Refuge. "[T]he project's direct undercutting of the stated goals of the CCP is most glaring" because it will increase, not decrease, habitat

fragmentation and create, not eliminate, inholdings and noncompatible uses within the Refuge. *National Wildlife Refuge Association,* 580 F. Supp. 3d at 606-07.

The CCP only mentions land exchanges in reference to "explor[ing] land exchanges with the states to remove intermingled ownerships," SPF at ¶ 15. That is not the situation here. The CCP encourages "land acquisition," but only to "restor[e] habitat connectivity needed for the health of many species" or to "restore flood plains." SPF at ¶ 16. This transaction does neither. It will lead to *less* connectivity and *more* fragmentation, directly contrary to the CCP's goals and objectives. Instead of eliminating inholdings—the usual purpose for land exchanges—this transaction would create an entirely new inholding of a massive new high-voltage transmission line with very high towers cutting through the middle of the Refuge. Based on the USFWS's own guidance and planning documents, this land is not "suitable for disposition." 16 U.S.C. § 668dd(b)(3).

Defendant USFWS attempts in its Net Benefits Analysis to diminish the value of the land they are trading away, saying it has "little to no wildlife or habitat value." SPF at ¶ 92. But the USFWS's own CCP for the Refuge tells a different story. The CCP states that river bottom flood plains like the Oak Road parcel in the Turkey River floodplain in the right-of-way corridor area are singled out for land *acquisition,* not for selling off or trading away. *See* SPF at ¶ 94. ("Th[e] presence of the Refuge in the floodplain has played a crucial role in protecting the natural and wild character of the river for 80 years."); *see also* 580 F. Supp. 3d at 607 ("[O]ne of the 15-year goals in the Refuge's Comprehensive Plan was to acquire more land for the Refuge, but not land acquisition blind to all other considerations. Instead, the goal of land acquisitions was to protect fish and wildlife by promoting habitat connectivity.") (citations omitted).

Moreover, as this Court previously explained, "[t]he CCP also notes that 'there is constant pressure to the integrity of the Refuge from development that encroaches upon Refuge land via tree cutting, dumping, construction, and mowing (ROD028216)," while at the same time the USFWS's own compatibility determination acknowledged that "[c]learing and maintenance suppression of woody vegetation by the [Companies] within the right-of-way footprint would alter the forest succession patterns permanently. (ROD0007579)." *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 608. Similarly, this Court identified that "one of the explicit goals for the Refuge is to 'maintain and improve the scenic qualities and wild character of the Upper Mississippi River Refuge.' (ROD029215). Yet the Compatibility Determination notes… '[n]egative impacts to the visual qualities of the Refuge, when viewed from Oak Road would occur as a result" of the upgraded CHC transmission line, which Plaintiffs' members have already described as impairing the scenic stretch of the river where the line would be constructed. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 608; *see also* SPF at ¶ 39. It is arbitrary and capricious to authorize an exchange so contrary to the Refuge's congressionally mandated plan.

4. Defendant USFWS's Net Benefits Analysis" Cannot Avoid the Specific Statutory Compatibility Requirement for Right-Of-Way Projects, and is Contrary to USFWS's Previous Statements, its CCP, and Federal Policy Against Habitat Fragmentation

The USFWS's Net Benefits Analysis, and the land exchange it supports, is fatally flawed as a matter of law. In its hurry, the USFWS failed to provide a reasonable process. *First*, the land exchange violates the 1997 Refuge Act and is contradictory to the UFSWS's CCP for the Refuge. See Sections. I.A.2; I.A.3. *Second*, the USFWS did not allow public comments on the Net Benefits Analysis or its FONSI, and hasn't published an administrative record providing evidence and necessary information to support the agency's February 23, 2024 final decision documents. SPF at ¶ 90. *Third*, the Net Benefits Analysis states that the divested land along the Turkey River

bottoms has "little to no wildlife or habitat value," (SPF at ¶ 92), but that contradicts USFWS's previous discussion of the promise of the restoration work it had done on the Turkey River bottoms, which the USFWS plans to trade away in this land exchange. In the 2019 FEIS, the USFWS stated that it "intended to manage this restoration area so the natural forest regeneration and succession results in much of the Turkey River floodplains' growing into bottomland forest within 100 years." SPF at ¶ 96.

The Net Benefits Analysis cannot somehow excuse the USFWS's violations of the 1997 Refuge Act's plain language and purpose, and the land exchange's contradiction with the CCP. The Net Benefits Analysis is based on an "M-Opinion" issued by the Department of Interior's Solicitor on May 31, 2023. SPF at ¶¶ 82-83. While the M-opinion states that land exchanges generally do not require compatibility determinations, it says nothing about whether land exchanges are available in the first place for large right-of-way projects like powerlines, pipelines, and roads, which Congress explicitly addressed in the 1997 Refuge Act. 16 U.S.C. § 668dd(d)(1)(B). The M-Opinion specifically recognizes that "Congress undoubtedly did not intend for the land exchange provision to circumvent the underlying mission of the Refuge System." PA 160. Elsewhere the Solicitor's Opinion concludes that, "[t]he land exchange authority is not an isolated provision disconnected from the rest of the statutory scheme." PA 161. The land exchange provision cannot be read to supersede the 1997 Refuge Act's provisions that "permit[s] the use of, or grant easement" for "powerlines…whenever [USFWS] determines that such uses are compatible with purposes for which these areas are established." 16 U.S.C. § 668dd(d)(1)(B).

The M-Opinion does instruct Refuge managers, when considering *any* land exchange to determine, first, that the exchange will "fulfill the conservation mission of the Refuge System and the purpose of the individual Refuge," PA 154, and, then, second, to "determine that the potential

conservation benefits, viewed in light of the particular refuge's purposes, outweigh the potential harm." PA 162.

This Net Benefits Analysis here does not meet either requirement. *First*, the Net Benefits Analysis and the land exchange in this case are contrary to Congress' 1924 legislation creating the Refuge and Congress' 1997 Refuge Act. "For the purposes of the Refuge, therefore, the court looks to the Refuge's CCP and the overall meaning of the Refuge Act." *Id.* at 607. The USFWS's CCP for *this* Refuge has already determined that the Refuge's purpose would not be served by any land exchange that would contribute to habitat fragmentation, diminish viewshed quality, or pose a threat to the migratory birds that travel along the Mississippi Flyway, certainly not a massive high-voltage transmission line which would bisect the Refuge. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 607. As Plaintiffs have identified in prior comments, habitat fragmentation is about more than "just" the land that has been clearcut because fragmentation has a negative environmental impact on the adjacent land that remains. SPF at ¶ 70.

Second, the USFWS did not provide public notice or an opportunity for public comments – either in writing or orally – on the Net Benefits Analysis. SPF at ¶ 90. Nor, in its rush, has the Defendant USFWS submitted a conventional, required administrative record. Because there is no post-2020 administrative record to review, Plaintiffs, the public and this Court cannot know what the evidentiary and scientific basis might be for the Net Benefits Analysis document, what fieldwork might have been done, what assumptions were made, what the scientific literature might say, or whether there were divisions of opinion within USFWS or comments from other staffers. Defendant USFWS is essentially saying "just trust us."

Third, "trust us" doesn't work here because of the USFWS's diminution of the negative consequences of additional habitat fragmentation in the new Net Benefits Analysis. While agency

action normally carries the presumption of regularity, this court has already concluded that USFWS has worked "hand-in-glove with the Utilities" to undermine the purposes of the Refuge and the Refuge Act. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 596, 609. The danger of habitat fragmentation to the Refuge are explained above and recognized in this Court's previous summary judgment decision. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 607. Defendant USFWS's Refuge managers early on urged the Transmission Companies to find non-Refuge-crossing alternatives because the massive CHC transmission line crossing would cause habitat fragmentation. SPF at ¶¶ 32-33.

The harms of habitat fragmentation to the Refuge are not just Plaintiffs' opinion, but also reflect the recent position of both USFWS and the federal government more broadly. Just last month, on February 2, 2024, Defendant USFWS published its proposed "BIDEH" rule on biological integrity, diversity, and environmental health, 50 C.F.R § 29.3 (new), which states: "We allow for and defer to natural processes on habitats within the Refuge System and promote conservation, restoration, and connectivity to meet refuge habitat objectives and landscaping planning goals. *We will avoid and minimize habitat fragmentation to sustain biological integrity and diversity.*" *Id.* (emphasis added); PA 33-35.

Similarly, on March 2023, CEQ issued its regulatory Guidance on Ecological Connectivity and Wildlife Corridors, which states: "To 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 [wildlife] corridors and [ecological] connectivity during planning and decision-making," PA 18. These regulations and prior statements contradict USFWS's attempt here – without administrative record support – to minimize the negative impact on habitat connectivity caused by the massive new CHC

transmission line right-of-way running through the middle of the Refuge. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 607.

Even if a land exchange were appropriate for a powerline project, the divested land in this particular exchange would not be "suitable for disposition." 16 U.S.C. § 668dd(b)(1)(3). As part of the Net Benefits Analysis, USFWS downplays the progress made in the restoration project along the Turkey River Bottoms area that has been ongoing for at least a decade. SPF at ¶ 95. USFWS concedes that clearing a right-of-way for the CHC transmission line would eliminate whatever progress had been made. SPF at ¶ 96. Defendant USFWS does not address the impacts that cutting a new wide high-voltage transmission line corridor through the Refuge may have on the wildlife habitat value of the land surrounding it and on birds in the air above it. SPF at ¶ 70.

Allowing Refuge managers to execute land exchanges whenever they can plausibly articulate a net benefit would mark a return to the free-for-all, "let's make a deal" times that the 1997 Refuge Act was designed to end. More than half of the Refuges were criss-crossed by powerlines, pipelines and similar projects, thereby creating the proverbial death by a thousand cuts. Congress responded by enacting a bright line rule—no "powerline" right-of way projects that do not meet the compatibility requirement. 16 U.S.C. § 668dd(d)(1)(B).

The Net Benefits Analysis is an additional gloss on what was wrong pre-1997 Refuge Act. To allow Refuge managers to exchange the Refuge land for a $325,000 piece of land elsewhere is the same as selling the right-of-way for $325,000. There could be few results that would so squarely defeat the plain language of the 1997 Refuge Act and Congress's clear purpose.

The Net Benefits Analysis facilitates diminishes the value of the divested land while highlighting the conservation value of the land it acquires. There is *no* evidentiary record available because the Defendant USFWS didn't allow for public comments and a public hearing, and has

not provided an administrative record. Moreover, the Federal Defendants and Transmission Companies shouldn't be rewarded for hiding the ball on the Statement of Proposed Land Exchange that they signed back on October 29, 2021. The public and the Courts deserve better. Granting a preliminary injunction is especially justified in these circumstances of this case.

B. This Court Has Already Ruled in Favor of Plaintiffs on Their NEPA Claims

The Federal Defendants' "new" October 2023 Final Supplemental Environmental Assessment ("FSEA") and Defendant USFWS's FONSI "incorporate," rely upon and are based on the 2019 FEIS and the 2020 ROD, all signed by the Federal Defendants. That's the *very same* FEIS that this Court already reversed as violating NEPA's statutory requirements and applicable regulations. *National Wildlife Refuge Association,* 580 F.Supp. 3d at 610-13. This Court relied on the Seventh Circuit's controlling decision in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), which CEQ subsequently adopted in its new NEPA guidance regulations: "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)." CEQ, *National Environmental Policy Act Implementing Regulations Revisions,* 87 Fed. Reg. 23453, 23459 (April 20, 2022) (quoting *Simmons,* 120 F.3d at 669).

The Federal Defendants here have "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project" about purpose and need and the reasonable range of alternatives. *Simmons,* 120 F.3d at 669. They did not do so then, and by once again relying on the same flawed FEIS, they have not done so now. *National Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 613. The Federal Defendants' 2019 FEIS "defined the purpose and need of the CHC project so narrowly as to define away reasonable alternatives." The requirement that the transfer capacity between Iowa and Wisconsin be increased, coupled with the

other sub-purposes, left "the EIS to only consider alternatives so substantially similar to the CHC project that any distinction would be meaningless." *Id. at* 610, 613.

The Federal Defendants' October 2023 FSEA for the land exchange simply "incorporate[s] by reference" and "tiers" to the 2019 FEIS and the 2020 ROD approving it, with no meaningful changes. SPF at ¶ 72. Similarly, the FONSIs issued by both RUS and USFWS relate back to the original 2019 FEIS without any modification. SPF at ¶¶ 74, 81. All three documents utilize the same flawed purpose and need statement as the 2019 FEIS. SPF at ¶¶ 73, 74, 88. In fact, the RUS's FONSI continues to tout the 2019 FEIS's supposed study of non-Refuge alternatives, despite this Court's having held that analysis to be wholly inadequate. SPF at ¶ 75; *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 597. There has been *no* attempt by any of the Federal Defendants to address the fundamental problems with the underlying 2019 FEIS.

Plaintiffs are asking the Court to preliminarily enjoin Defendant USFWS from closing the land exchange, and, ultimately, hold that the Federal Defendants' final actions were contrary to law. Plaintiffs are suing all three agencies because they all participated in the 2019 FEIS and FSEA, and Defendant USFWS is relying on the 2019 FEIS and FSEA for its FONSI. SPF at ¶¶ 72, 74, 81. Because the 2019 FEIS and SEA are being treated as final for the purposes of the agencies' decision-making in the FONSI and other purposes, they *are* final agency action. RUS, ACE and USFWS can't have it both ways. Otherwise, Defendant USFWS needs to do a full EIS here, not a limited FONSI.

The 2019 FEIS and now the 2023 FSEA still do not comply with NEPA's requirements and *Simmons,* 120 F.3d at 666 in the following ways:

- The Federal Defendants adopted the Transmission Companies' "purpose and need" statement verbatim for their 2019 Final EIS, and adopted the same thing again in the October 2023 Draft SEA and Final SEA for the proposed land exchange. SPF at ¶ 73. That "purpose and need" statement for the 2019 FEIS required an "increase [in] the transfer capability of the

electrical system between Iowa and Wisconsin." *National Wildlife Refuge Association,* 580 F. Supp. 3d at 612-13.

- That statement unduly restricted the range of alternatives to only high-voltage transmission lines running between Iowa and Wisconsin, and, thus, violated NEPA. *Id.* at 612-13. This Court's conclusions and judgment are still correct.

- The Defendants' 2019 FEIS did not rigorously explore or objectively evaluate at reasonable alternatives that would meet the general objectives of the CHC transmission line. *Id.* at 610-13.

- The Defendants' 2019 FEIS did not rigorously explore or objectively evaluate whether a package of non-wires alternatives would meet the general objectives of the CHC transmission line. *Id.* at 610-13.

- The Defendants' 2019 FEIS did not rigorously explore or objectively evaluate alternative routes either north or south of the Upper Mississippi River National Wildlife and Fish Refuge, or that would otherwise avoid running through and across the Refuge. *Id.* at 611.

- The Defendant RUS's October 2023 Final SEA, which incorporates the 2019 FEIS, does nothing to remedy the lack of the Federal Defendants' "hard look" and failure to analyze of reasonable alternatives. They only looked at minor route modifications. SPF at ¶ 76; *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 596.

- The Defendants' 2019 FEIS did not adequately analyze the additional greenhouse gas emissions and potential climate impacts attributable to the CHC transmission line and the fossil-fuel generated electricity it would carry. SPF at ¶ 78.

- The Defendant USFWS' FONSI, issued on February 23, 2024, relies upon the legally flawed 2019 FEIS and the October 2023 Final SEA. SPF at ¶ 88.

An unlawful alternative is not a "reasonable" alternative under NEPA. The Federal Defendants' purpose and need statement still requires that any alternative "increase the [electrical] transfer capacity between Iowa and Wisconsin," and, therefore, only transmission line alternatives were analyzed. SPF at ¶¶ 73-74. There was no "hard look" at alternative routes north or south of the Refuge, or of a combination of non-wires alternatives. SPF at ¶ 76; *National Wildlife Refuge Association,* 580 F. Supp. 3d at 612-13.

Likewise, the 2019 EIS and the 2023 FSEA do not fully and fairly analyze climate impacts of the CHC transmission line, which will carry a significant amount of electricity generated from coal and other fossil fuel-power generating plants. SPF at ¶ 78. The January 2023 CEQ regulations require all executive agencies to consider and assess climate impacts in the environmental review process. *See* CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023), PA 54-71.

It remains the law in the Seventh Circuit that purpose and need statements in environmental review documents must incorporate the "general goal" of an action, not just the means by which a particular applicant can reach their own predetermined results. Otherwise, applicants can always evade NEPA's purposes by narrowing the purpose and need so that only something very much like what they are proposing gets evaluated. *Simmons,* 120 F.3d at 669; *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). If anything, Plaintiffs' NEPA claims and the regulations governing purpose and need statements and the range of alternatives for federal agencies to fully and fairly evaluate in the NEPA environmental review process have grown stronger and more compelling because of the CEQ's new January 2023 NEPA implementing regulations following this Court's 2022 decision. This Court should hold that Plaintiffs are reasonably likely to prevail on the merits of their claims that the Federal Defendants' have violated NEPA's requirements and, therefore, grant Plaintiffs' injunctive relief.

C. The Federal Defendants Violated NEPA's Public Participation Requirements

Defendants and the Transmission Companies apparently made the decision to go ahead with the proposed land exchange twenty-nine months ago when they signed their "Statement of Proposed Land Exchange/Purpose" on October 29, 2021, and then played "hide the ball" by failing to disclose it while the previous case was being litigated. Now, Defendant USFWS has manufactured an emergency by issuing its final "Net Benefits Analysis" and land exchange

without providing any public notice or opportunity for the public to submit written comments or oral comments at a public hearing, and with less than 30 days for any party to appeal these final agency actions and achieve effective judicial review. SPF at ¶ 90. The Defendants' denied *any* opportunity for public comments and for Plaintiffs and other members of the public be heard. Defendant USFWS rushed its process so that the CHC transmission line's bulldozing and crossing through the protected Refuge would become a *fait accompli,* and that flawed process violates NEPA's and the APA's procedural requirements.

CEQ's regulations implementing NEPA require that agencies "involve the public. . . to the extent practicable in preparing environmental assessments." 40 C.F.R. § 1501.5(e); *see also* 40 C.F.R. § 1506.6(a). That duty includes requiring agencies to "[p]rovide public notice of. . . opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions," (*id.* at § 1506.6(b)), and "[h]old or sponsor public hearings, public meetings, or other opportunities" and "[s]olicit appropriate information from the public." *Id.* § 1506.6(c)-(d). The requirement to provide the public with a meaningful opportunity to comment is "to insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken.*" 40 C.F.R. § 1500.1(b)(emphasis added).

The U.S. Supreme Court has recognized that "the broad dissemination of information mandated by NEPA" is to "permit[] the public and other government agencies to react to the effects of a proposed action at a meaningful time," not "after it is too late to correct." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989).

The Federal Defendants have persistently failed to provide the public adequate notice or a reasonable opportunity to comment on the documents as required by NEPA. The Federal

Defendants published their draft SEA on September 7, 2023, but actually provided less than 14 days for the public to submit written comments, and did not provide any public hearing at all for oral comments to be submitted for consideration in the process. SPF at ¶ 67. Then, Defendant USFWS published its February 23, 2024 decisional documents without any public notice other than placement on RUS's (not USFWS's) website. SPF at ¶ 90. The USFWS did not provide *any* opportunity for Plaintiffs or any other members of the public to be heard either through written comments on a draft of the Net Benefits Analysis and FONSI with the land exchange, or through oral comments at a public hearing. SPF at ¶ 90. The Federal Defendants and, specifically, Defendant USFWS's failure to provide public notice and for Plaintiffs and the public to have a reasonable opportunity to be heard before the final agency decisions violates NEPA and the APA, and is an additional basis for this Court to grant Plaintiffs' requested preliminary injunction in this case.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED IF A PRELIMINARY INJUNCTION IS NOT GRANTED TO PRESERVE THE STATUS QUO

Plaintiffs will clearly suffer irreparable harm to their interests if Defendant USFWS closes the land exchange and the Transmission Companies commence bulldozing and construction in the Refuge "in the absence of an injunction." *Whitaker by Whitaker*, 858 F.3d at 1044-45. Plaintiffs have submitted declarations establishing both their standing to sue and some of the irreparable harms that will be caused by building through the Refuge. *See* Docs. 8-13; SPF at ¶¶ 112-31. Harm is considered irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Id.* at 1045, *quoting Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1089 (7th Cir. 2008). "Environmental harm, by its nature . . . is often permanent or at least of long duration, i.e. irreparable." *Nat'l Wildlife Refuge Ass'n,* 2021 WL 5050073 at *8 (*quoting Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

This Court has also already held that construction of a new large high-voltage transmission line with close to 200-feet high towers running through protected public lands and waters like the Upper Mississippi River National Wildlife and Fish Refuge will cause irreparable harm to the Plaintiff organizations and their members. *Nat'l Wildlife Refuge Ass'n, 2*021 WL 5050073 at *7. The Court stated:

> [That] does not change the fact that some harm will come to the environment. . . . Specifically, even the first stage of construction will involve ground clearing, which in and of itself causes harms. . "[c]learing of vegetation as well as grading would disturb topsoil. . that could be subject to accelerated soil erosion by wind and water.". . invasive species… And regarding animal species which live in the right of way, "[l]ong-term moderate impacts associated with clearing the ROW would include habitat loss, fragmentation, and degradation along with changes to species movement."
>
> *All of the above represent real and irreparable impacts that will occur from clearing alone; actual groundbreaking will lead to even more severe consequences*.

Id. at *7 - 8 (emphasis added, citations omitted).

This Court further found that the harms of construction to Plaintiffs would exceed whatever financial harm might accrue to the Transmission Companies if the project is delayed enough to get a decision on the merits. *Id*. at *9 ("[W]hile intervenor-defendants have represented that they will suffer monetary damages due to an injunction, these limited damages are unlikely to outweigh the permanent damage threatened.").

The Refuge managers have themselves described these exact harms. In 2012, Defendant USFWS cooperated with RUS on a NEPA review of a different transmission line through the Refuge. USFWS's comments described the following harms, including "caus[ing] habitat fragmentation; reduc[ing] habitat quality; degrad[ing] habitat quality through introduction of contaminants; disrupt[ing] migration corridors; alter[ing] hydrology; facilitat[ing] introduction of alien, including invasive, species; and disturb[ing] wildlife." SPF at ¶¶ 32-33.

Likewise, in this case, the Federal Defendants' 2019 FEIS incorporated into the FSEA for the Refuge crossing recognizes that land clearing, grading, and filling leads to erosion, sedimentation, and construction-related pollution. SPF at ¶ 117. That also creates a new pathway for the spread of noxious and invasive vegetation, which can happen quickly and then permanently, thereby affecting existing vegetation communities. SPF at ¶ 118. Clearcut corridors, of course, directly cause fragmentation of habitat. SPF at ¶ 32. The 2019 FEIS lists the "anticipated potential irreversible" impacts as including "destruction of wetland and floodplains," "destruction of terrestrial and aquatic vegetation and wildlife habitat, including forested areas and bluffs," and "alteration to the viewshed by clearing land, cutting and filling, and constructing transmission line structures." SPF at ¶ 114.

In their rush to close the land exchange, Defendant USFWS is allowing the Transmission Companies to violate their important previous wildlife protection commitments. The Transmission Companies provided a declaration to this Court stating that "construction [in the Refuge] would occur outside of eagle nesting season (January 15 to June 15) or outside a 660-foot exclusion zone" and that they had "committed to USFWS that [construction] activities…would occur from late fall to early winter (October through February). This schedule allows for ground disturbances to generally occur during frozen conditions which minimizes potential wetland impacts…" SPF at ¶¶ 98, 100.

The Transmission Companies, however, now plan to immediately bulldoze, clearcut and build through the Refuge, complete construction, and energize the transmission line by June 2024. SPF at ¶ 97. That means construction during times that completely conflict with their prior commitment. In addition, instead of strict mitigation measures to protect the eagle population, USFWS only asks that the Transmission Companies "coordinate with the Service's Migratory Bird

Program to limit potential impacts to bald eagles if work occurs between February and July." SPF at ¶ 99.

Federal courts have long recognized that these types of activities—clearing trees, filling wetlands, altering water quality and aesthetics—cause irreparable injury. *See e.g. Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d at 991 (filling of wetlands); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-36 (D.C. Cir. 1987) (destruction of wildlife habitat, water quality, natural beauty, and other environmental and aesthetic values); *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (logging mature trees, planting of new seedlings cannot remedy harm); *see also Western Land Exchange Project v. BLM,* 315 F.Supp.2d 1068 (D. Nev. 2004) (enjoining BLM land sales and exchanges). Unfortunately, so far, the predictions of irreparable harm have come true at those parts of the CHC transmission line that have already been built. SPF at ¶ 126-31.

In cases like this one—where Plaintiffs have also suffered "procedural" or "informational" injury because of an inadequate environmental review under NEPA—this Court and other courts have held that such injury strongly bolsters the case for a preliminary injunction. *E.g. Western Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1258 (D. Ore. 2019) ("When a court finds a likelihood of success on the merits of a NEPA claim coupled with likely environmental harm . . . the NEPA violation generally is found to rise to the level of irreparable harm supporting preliminary injunctive relief."). The First Circuit explained why "NEPA harm" is irreparable environmental harm:

> NEPA is not designed to prevent all possible harm to the environment. It foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, *when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that*

> *NEPA intends to prevent has been suffered.* . . . [T]o set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a *new* decision, but it is that much less likely to bring about a *different* one. It is far easier to influence an initial choice than to change a mind already made up.

Sierra Club v. Marsh, 872 F.2d at 500.; *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009).

Plaintiffs' members use and enjoy Refuge areas that will be severely damaged. SPF at ¶ ¶ 104, 106, 108, 109. *See generally Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011) (preliminarily enjoining construction of coal-fired power plant and power lines, citing injury to plaintiff's members). Plaintiffs' members live near and recreate in and near the Refuge as explained in their declarations. SPF at ¶ 103-11. Many of Plaintiffs' members reasonably fear the consequences of the construction of the transmission line across the Refuge including the impacts on birds, aquatic wildlife and the aesthetic qualities they value in the Refuge. SPF at ¶ 111.

This Court previously found that CHC transmission line construction would irreparably harm Plaintiffs and their members, and granted a preliminary injunction. The same is true now – even more compellingly in light of the Transmission Companies' construction timing during the March to June period, which is contrary to their prior commitment – and further justifies the Court's granting of Plaintiffs' requested preliminary injunction.

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR GRANTING A PRELIMINARY INJUNCTION

This Court previously concluded that the harms to Plaintiffs would exceed whatever financial harm might accrue to the Transmission Companies if the project is delayed enough to get a decision on the merits. "[W]hile intervenor-defendants have represented that they will suffer monetary damages due to an injunction, these limited damages are unlikely to outweigh the permanent damage threatened." *Nat'l Wildlife Refuge Ass'n,* 2021 WL 5050073 at *9. Here, the

balancing is even more in favor of Plaintiffs because the preliminary injunction is directed at Defendant USFWS, which doesn't face any apparent financial loss.[11]

Likewise, this Court already recognized that the environmental harms from bulldozing and destroying public lands and waters in the Upper Mississippi River National Wildlife and Fish Refuge would not be remedied by "money damages and/or an injunction ordered at final judgment." *Abbott Lab'ys v. Mead Johnson & Co.,* 971 F.2d 6, 16 (7th Cir. 1992):

> Here, the potential harm relates to the destruction of ecosystems, wetlands, and habitats, and simply awarding damages cannot repair fragile ecosystems that are harmed. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545, (1987) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") Accordingly, an injunction on the final merits is not likely to be sufficient to repair this kind of environmental damage once it occurs, as money cannot reverse soil erosion or reintegrate fragmented habitats. *Id*. Indeed, "[i]f [environmental] injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.* 480 U.S. at 545.
>
> All of this suggests a strong presumption in favor of an injunction where environmental harm is likely. As before, defendants signed off on the Environmental Impact Statement, which explicitly outlines the environmental harms that will occur from clearing activities. (USACE000001.) Given the presumption in favor of injunctions and the fact that defendants' own documents show a likelihood of environmental harm, this prong of the test is also satisfied.

Nat'l Wildlife Refuge Ass'n, 2021 WL 5050073 at *8.

What the Court characterized as "manufactured" "urgency" by the Federal Defendants and Transmission Companies further tilts the balance in Plaintiffs' favor. *See* Doc. 37 at 11. The public interest also favors granting this preliminary injunction because to allow the CHC transmission line to cross the Congressionally-designated Upper Mississippi River National Wildlife and Fish

[11] Because the Defendant USFWS does not face any significant financial exposure from a pause in closing the land exchange, the proper amount for the injunction bond required by Fed. R. Civ. P. 65(c) should be zero. *See generally Monroe Cty. Bd. of Comm'rs v. U.S. Forest Serv.,* 2023 WL 2683125 (S.D. Ind. Mar. 29, 2023)(collecting cases). When this Court granted a preliminary injunction in the previous litigation, it did not impose an injunction bond. *Nat'l Wildlife Refuge Ass'n* , 2021 WL 5050073 at *9 (W.D. Wis. Nov. 1, 2021).

Refuge would perversely reward the Federal Defendants and the Transmission Companies for the "orchestrated trainwreck" they have engineered.

The Transmission Companies will likely point to the further delay that injunctive relief will inflict on certain electricity generators that intend to connect to the CHC transmission lines. While this may be a concern for particular developers and operators, this a symptom of the "orchestrated trainwreck" that the Transmission Companies and Federal Defendants created. *Nat'l Wildlife Refuge Ass'n,* 580 F. Supp. 3d at 601. Three points are worth noting here. *First,* the CHC transmission line is not needed to ensure reliability in the region; that's not its purpose. SPF at ¶ 20. *Second,* following this Court's granting of a preliminary injunction and then granting summary judgment in favor of Plaintiffs more than two years ago, generators had notice to look to other options. That is especially true after the Seventh Circuit's language that "[t]he cost of construction is one the utility companies have opted to incur and bear the risk of...." *Driftless Area Land Conservancy,* 74 F.4th at 495. *Third*, many other new high-voltage transmission lines are in planning and construction – in part to facilitate renewable energy and none of the other Midwest transmission lines appear to cross Congressionally-protected National Wildlife Refuges. SPF at ¶¶ 21-24. As more of these projects are proposed, and clean energy infrastructure is planned, this is a vital time to set the ground rules for responsible planning. The strategy of forcing a *fait accompli,* building to the edges of National Wildlife Refuges and other protected public lands and forcing the judiciary's hand should be stopped in its tracks here.

This emergency litigation is moving forward now even though the Federal Defendants have yet to file an administrative record. The Plaintiffs can only rely on the documents to which they are privy to make their case for a preliminary injunction. The Federal Defendants and the Transmission Companies hid the ball on their October 29, 2021 Statement of Proposed Land

Exchange. A preliminary injunction serves the public interest because it allows the Plaintiffs to have the substantive merits of their claims be finally and fairly adjudicated and for judicial review to be conducted before irreparable harm occurs.

Preserving the status quo while this Court makes a final decision on the merits is the best and most legally-justified course under these circumstances. Plaintiffs' likelihood of success on the merits, Plaintiffs' demonstration of irreparable harms, and the inadequacy of money damage remedies at law collectively weigh very heavily in Plaintiffs' favor for the "sliding scale" test used in this Circuit. *See Ty. Inc. v. Jones Group, Inc.,* 237 F.3d 891, 895 (7th Cir. 2001).

CONCLUSION AND REQUESTED PRELIMINARY INJUNCTIVE RELIEF

For the reasons stated above, and in Plaintiffs' previous filings, Plaintiffs respectfully request that the Court: (1) grant their motion for a preliminary injunction to stop the Defendant USFWS from taking any action to close its land exchange agreement in order to thereby maintain the status quo; (2) direct the Federal Defendants to file their full administrative record; and (3) set a reasonable briefing schedule with sufficient time for Plaintiffs and Defendants to file motions for summary judgment and for the Court to conduct meaningful judicial review and issue its decision on the merits of Plaintiffs' lawsuit.

Respectfully submitted this 13th day of March,

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