



ENVIRONMENTAL LAW & POLICY CENTER

March 21, 2022

Preston D. Cole
Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street PO Box 7921
Madison, WI 53707

RE: Revocation of the DNR Wetlands and Waterways Permit for the High-Voltage Cardinal-Hickory Creek Transmission Line DNR

Dear Secretary Cole,

On behalf of the Wisconsin Wildlife Federation, Driftless Area Land Conservancy, Defenders of Wildlife and National Wildlife Refuge Association (“Conservation Groups”), we request that the Wisconsin Department of Natural Resources (“DNR”) **take immediate action to stop construction and revoke the Wetlands and Waterways permits** that DNR issued to American Transmission Company, Dairyland Power Cooperative and ITC Midwest (“Transmission Companies”) for the high-voltage Cardinal-Hickory Creek (“CHC”) transmission line unless and until DNR and the Public Service Commission jointly complete a lawful environmental review under the Wisconsin Environmental Policy Act (“WEPA”), Wis. Stat. § 1.11. DNR must:

1. Find and declare that the Transmission Companies are violating General Permit Condition #9 of DNR Permit IP-SC-2019-25-03588 (attached) by continuing to build the CHC transmission line without a valid federal Environmental Impact Statement (“EIS”) and Records of Decision because of the U.S. District Court for the Western District of Wisconsin’s decisions invalidating, vacating and remanding them, as explained below.
2. Modify the “finding of fact” in DNR Permit IP-SC-2019-25-03588 to state that the EIS, environmental review and the analysis of alternative for the CHC transmission line do not comply with WEPA’s requirements, Wis. Stat. § 1.11. and Wis. Admin. Code, Ch. 150.
3. Exercise its authority under General Permit Condition #11 of DNR Permit IP-SC-2019-25-03588 to revoke the Chapter 30 Wetlands and Waterways permit and **immediately halt construction of the CHC transmission line** unless and until the Transmission Companies receive all required state and federal permits and approvals.

Wisconsin laws governing WEPA environmental reviews require state agencies to “substantially follow[] the guidelines issued by the United States council on environmental quality” for the National Environmental Policy Act (“NEPA”). Wis. Stat. § 1.11(2)(c). “Federal law construing NEPA is persuasive authority with respect to the interpretation of WEPA.” *State ex rel. Boehm v. Wisconsin Dep't of Nat. Res.*, 174 Wis. 2d 657, 676, 497 N.W.2d 445, 453 (1993) (citing

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Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 79 Wis.2d 161, 174, 255 N.W.2d 917 (1977)).

The U.S. District Court's January 14, 2022 Opinion and Order, and March 1 and March 9 Final Judgments vacate and remand the federal agencies' Environmental Impact Statement and Records of Decision for the CHC transmission line because they violated NEPA by improperly and unduly constraining the foundational statement of "purpose and need" in a manner that precluded the required rigorous exploration and objective evaluation of all reasonable alternatives. The state agencies' EIS under WEPA contains the same fundamental flaws. Therefore, the PSC's September 26, 2019 Certificate of Public Convenience and Necessity ("CPCN") and the DNR's October 25, 2019 Wetlands and Waterways permit, IP-SC-2019-25-03588, which both depend on a legally-compliant EIS, are also invalid.

The Federal Court Reversed and Vacated the Federal EIS

On January 14, 2022, Judge William Conley of the United States District Court for the Western District of Wisconsin issued the attached comprehensive 45-page Opinion and Order granting the Conservation Groups' motion for summary judgment on key grounds and reversing the federal government agencies' approvals and permits for the CHC transmission line as violating NEPA, the Administrative Procedure Act, and the National Wildlife Refuge System Improvement Act of 1997. *Nat'l Wildlife Refuge Ass'n et. al v. Rural Utilities Serv. et. al*, No. 21-CV-096-WMC (W.D. Wis., Jan. 14, 2022 Opinion and Order).

The U.S. District Court's January 14, 2022 Opinion and Order concludes that the federal EIS prepared for the CHC transmission line was fatally flawed because it "defined the purpose and need for the CHC project so narrowly as to define away reasonable alternatives." Jan. 14, 2022 Opinion & Order at 35–41. "Because [the Rural Utilities Service] adopted MISO's convoluted purpose statement, which then drastically narrowed the alternatives reviewed in the EIS, that purpose statement fails to comply with NEPA." *Id.* at 41.

The U.S. District Court relied upon the U.S. Court of Appeals for the Seventh Circuit's decision in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997). The federal Council on Environmental Quality ("CEQ") has specifically and recently endorsed *Simmons* on the proper scope of "purpose and need" statements and the proper range of alternatives in the EIS process. CEQ recently explained that any requirement by which agencies "prioritize the applicant's goals over other relevant factors, including the public interest" is contrary to NEPA's objectives. CEQ, *National Environmental Policy Act Implementing Regulations Revisions*, 86 Fed. Reg. 55,757, 55,760 (Oct. 7, 2021).

On March 1, 2022, U.S. District Court Judge Conley issued a Final Judgment, and, on March 9, 2022, issued an Amended Final Judgment, which vacated and remanded the federal Record of Decision and EIS. These Final Judgments further declared that the CHC transmission line as currently proposed, either designed as a land transfer or as a right-of-way, is not compatible with the purposes of the Refuge. *Nat'l Wildlife Refuge Ass'n et al. v. Rural Utilities Serv. et. al*, No. 21-CV-096-WMC (W.D. Wis., Mar. 1, 2022) ("Final Judgment") (attached). On March 9, 2022, the

U.S. District Court issued an Amended Final Judgment, which corrected small typos in its March 1, 2022 Final Judgment. *Nat'l Wildlife Refuge Ass'n et. al. v. Rural Utilities Serv. et al.*, No. 21-CV-096-WMC (W.D. Wis., Mar. 9, 2022) (“Amended Final Judgment”)(attached).

The “Orchestrated Trainwreck”: The Transmission Companies are Continuing to Construct the CHC Transmission Line and Run Up the Meter on Utility Ratepayers and Cause Unnecessary Environmental Harms and Property Damages

Despite this recent U.S. District Court decision, the Transmission Companies “continue to clear the path for the CHC line up to the Refuge from both the Iowa and Wisconsin sides.” Jan. 14, 2022 Opinion and Order at 10. As of December 31, 2021, the Transmission Companies had incurred \$161 million in project costs, with an estimated \$331 million remaining project costs prior to completion.¹ The Transmission Companies have clearly been aggressively building and spending in 2022.

The U.S. District Court explained that the Transmission Companies’ approach “amounts to little more than an orchestrated trainwreck at some later point in this lawsuit.” *Id.* at 16. The Court recognized that the Transmission Companies are pushing forward with construction despite their lack of a lawful path to completion so they can create maximum leverage for the huge CHC transmission line while passing on costs and risks to the captive utility ratepayers:

Given these facts, plaintiffs contend, and the court finds credible, that the Utilities are pushing forward with construction on either side of the Refuge, even without an approved path through the Refuge, in order to make any subsequent challenge to a Refuge crossing extremely prejudicial to their sunk investment, which will fall on their ratepayers regardless of completion of the CHC project, along with a guaranteed return on the Utilities’ investment in the project. Thus, if the court does not treat consideration of the essentially inevitable re-proposal for a Refuge crossing as ripe for consideration now, the Utilities will have built up to either side of the Refuge, making entry of a permanent injunction later all the more costly, not just to the Utilities and their ratepayers, but to the environment they are altering on an ongoing basis.

Id. at 13.

There Are No Longer Legally Compliant Environmental Impact Statements in Effect Under NEPA and WEPA, and the Transmission Companies Are Violating Their DNR Wetlands and Waterways Permits

The Wisconsin DNR has the authority and duty under Wisconsin law to stop this “orchestrated trainwreck” engineered by the Transmission Companies and ensure that a fully lawful

¹ See Cardinal-Hickory Creek Transmission Line Project Quarterly Progress Report for 4th Quarter of 2021 (available at <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=430064>).

environmental review is completed *before* the Transmission Companies continue any additional construction of the CHC transmission line. The DNR should not allow the Transmission Companies to continue running the meter on utility ratepayers and creating unnecessary property damages and environmental harms.

First, the DNR’s Wetlands and Waterways permit is explicitly conditioned upon the applicant “obtaining any federal, state, and local permits or approvals that may be required before starting [the] project.” DNR Permit IP-SC-2019-25-03588 General Condition #9. **In light of the U.S. District Court’s November 1, 2021 Opinion and Order granting a preliminary injunction in favor of the Plaintiff Conservation Groups (attached), the Court’s January 14, 2022 Opinion and Order granting summary judgment in favor of the Conservation Groups, and the March 1 and 9, 2022 Final Judgments, the Transmission Companies are violating and failing to comply with this permit condition.** The U.S. District Court vacated and remanded the federal agencies’ EIS and Records of Decisions because they violated NEPA, and the Court also “declare[d] that the [agencies’] compatibility determination precludes the CHC transmission line as currently proposed from crossing the refuge by right of way or land transfer.” Therefore, the Transmission Companies do not have the requisite federal permits and approvals to continue construction of the CHC transmission line.

Second, once the U.S. District Court held that the federal EIS and Records of Decision violated NEPA, that ruling directly undermined the lawfulness of the state’s EIS under WEPA. It is well established that federal NEPA law defines and controls DNR’s obligations under WEPA. *See, e.g., State ex rel. Boehm* 184 Wis. 2d at 676 n.4, (relying on federal NEPA case law to define DNR’s obligations in a WEPA case) (citing *Wis. Env’tl Decade*, 79 Wis.2d at 174.)). WEPA explicitly requires state agencies to “substantially follow []” federal NEPA guidance, Wis Stat. § 1.11(2)(c). The Public Service Commission’s regulations require an EIS that is “consistent with” federal NEPA regulations. Wis. Admin. Code § PSC 4.30(1)(a).² Specifically—and most directly relevant in this case—the requirement for state agencies to “[s]tudy, develop, and describe appropriate alternatives” to a proposed project is identical to the parallel statutory language in NEPA. *Wis. Env’tl Decade*, 79 Wis.2d at 174 (explaining that WEPA was “patterned after” NEPA and that the relevant alternatives analysis requirement in WEPA “is identical to” the parallel language in NEPA) (comparing WEPA Sec. 1.11(2)(e) to NEPA Sec. 102(2)(D)).

The “purpose and need” statements and the corresponding alternatives analyses are substantively the same in both the federal and state EIS documents. For instance, the federal EIS defines the “purpose and need” as to “increase transfer capability between Iowa and Wisconsin,” which is an improperly particular and unduly constraining characterization. Therefore, U.S. District Court Judge Conley found the constricted purpose and need statement impermissibly led the agencies to conclude that the CHC line was the only proper solution and precluded full and fair analysis of all reasonable alternatives. Jan 14, 2022 Opinion and Order at 37-38; *see also* Federal EIS at 12 (attached). The state EIS contains a nearly identical statement of purpose and need: to “increase

² While the PSC retains ultimate control of the environmental review under the statutory process, DNR retains responsibility that the EIS, and subsequently its own permitting decisions, comply with Wisconsin laws.

the transfer capability of the electric system between northeastern Iowa and southcentral Wisconsin.” See State EIS at XXIX (attached). Beyond this example, the five other objectives of the federal EIS likewise track in theme and scope with the state EIS.

Because the facts and law are substantively the same, the state EIS is invalid, and the DNR must immediately revoke the Wetlands and Waterways permits and take all necessary actions to ensure that the Transmission Companies stop construction until a lawful EIS is completed. The Wisconsin Supreme Court has held that Section 102(2)(D) of NEPA “imposes an independent and affirmative obligation which *must be fulfilled by state agencies.*” *Wis. Env’tl Decade*, 79 Wis.2d at 174 (emphasis added). If the law is the same and the facts are the same, then the outcome must be the same.

State Law Requires DNR to Enforce WEPA/NEPA

The DNR has the legal duty to ensure that a legally compliant EIS is completed *before* the Transmission Companies can continue construction of the CHC transmission line. General Permit Condition #11 provides DNR with the authority to “modify or revoke this permit for good cause, including if the project is not completed according to the terms of the permit, or if the DNR determines the activity is detrimental to the public interest, results in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.” IP-SC-2019-25-03588 General Condition #11. There is good cause to do so here.

First, General Permit Condition #9 requires that the Transmission Companies obtain “any federal, state, and local permits or approvals that may be required *before starting your project.*” DNR Permit IP-SC-2019-25-03588 General Condition #9 (emphasis added). The Transmission Companies currently lack key federal permits and approvals, and they lack a lawful path to complete the CHC transmission line, which is barred from its proposed route cutting a wide swath through the protected Upper Mississippi River National Wildlife and Fish Refuge. They are therefore violating General Permit #9, and DNR should immediately order the Transmission Companies to cease construction until they can demonstrate compliance with all required permit conditions.

Second, DNR cannot issue a Chapter 30 Waterways Permit unless and until it determines that the proposal “[c]omplies with environmental statutes administered by the department and rules promulgated thereunder, and federal environmental standards which the department has authority to enforce.” Wis Stat. § 30.025(3). The Wisconsin Supreme Court has similarly held that Section 102(2)(D) of NEPA (the alternatives analysis requirement) “imposes an independent and affirmative obligation which must be fulfilled by state agencies.” *Wis. Env’tl Decade*, 79 Wis.2d at 175. DNR must immediately revoke the permit and direct that construction be halted in order to meet its affirmative obligation to ensure WEPA/NEPA compliance under state law.

In DNR’s Chapter 30 Wetlands and Waterways permit issued for the CHC transmission line, the Department found as fact that “preparation of the EIS and analysis of the alternatives for this project meets the requirements of s. 1.11, Wis. Stat., WEPA and Ch. 150, Wis. Admin. Code.”

DNR Permit IP-SC-2019-25-03588, Finding of Fact #28. That “fact” has now been directly negated by the U.S. District Court’s Opinion and Order, and Final Judgments. DNR also found that it had “completed all procedural requirements” related to WEPA. DNR Permit IP-SC-2019-25-03588, Finding of Fact #29. The U.S. District Court’s Opinion and Order, and Final Judgments also negate this conclusion. State law requires Wisconsin agencies to follow NEPA, and therefore the EIS cannot logically “meet[] the requirements of s. 1.11, Wis. Stats.” if it does not also meet the requirements of NEPA. *See Wis. Env’tl Decade*, 79 Wis.2d at 174-75.

Conclusion and Request for Relief

The Transmission Companies are aggressively continuing to build two costly and environmentally destructive high-voltage transmission line segments in Wisconsin and in Iowa with no legally permissible connection through the protected Upper Mississippi River National Wildlife and Fish Refuge. Therefore, they cannot achieve their own stated goal of the project – transferring electricity generated in Iowa to Middleton, WI – which the DNR relied upon in the state EIS, which is not legally compliant in any event. In the process, “the Utilities are pushing forward with construction on either side of the Refuge, even without an approved path through the Refuge, in order to make any subsequent challenge to a Refuge crossing extremely prejudicial to their sunk investment, which will fall on their ratepayers regardless of completion of the CHC project.” Jan. 14, 2022 Opinion and Order at 13. The Transmission Companies are, in effect, building two unconnected costly and environmentally destructive high-voltage transmission line segments to nowhere.

The Wisconsin DNR should no longer be a partner to the Transmission Companies’ “orchestrated trainwreck.” Jan. 14, 2022 Opinion and Order at 16. The DNR should and must divorce itself from the Transmission Companies’ bulldozing and bullying, which is causing unnecessary environmental harms and property damages, and wasting utility ratepayers’ money.

The CHC 345-kv high-voltage transmission line with 17-to-20 story high towers, as designed, would include over 150 wetland and waterway crossings which require permits, run over 100 miles, and would set in motion a range of adverse environmental impacts to the scenic Driftless Area landscape, communities and ecosystem including adverse impacts on fish, wildlife and birds, and their habitats, harms to family farms and rural communities, and the degradation of the aesthetic value of this prime tourist destination and Southwest Wisconsin’s regional economy.

These adverse and harmful impacts warrant full, fair and legally compliant EISs and environmental reviews with a legally compliant foundational statement of purpose and need, and with a legally compliant rigorous exploration and objective evaluation of “all reasonable alternatives.” That is required by both NEPA and WEPA. Among other things, the new EIS must fully and fairly consider the less environmentally harmful “non-wires” alternatives, including battery storage and upgrades to Wisconsin’s existing transmission system, that were proposed by the Conservation Group’s expert witnesses and the PSC’s own expert staff in the PSC proceedings.

Under Wisconsin law, the DNR has the sole and independent authority and duty to issue, monitor and assure compliance with its Wetland and Waterway statutes and permits. In addition, the DNR

has the sole and independent authority to carry out and assure its compliance with WEPA relative to the issuance, monitoring and enforcement of its Wetland and Waterway permits. DNR cannot rely on any other agency decisions or actions to fulfill its statutory permitting and its WEPA compliance responsibilities in this case.

Wisconsin DNR has the obligation and duty under Wisconsin law to stop this orchestrated trainwreck, pause the construction spree, and provide for the proper environmental process to take its course without the specter of a rushed construction process and a forced decision leading to wasteful costs and unnecessary environmental harms and property damages.

For the reasons explained above, the Wisconsin DNR must revoke the Wetlands and Waterways permits, and halt continued construction of the CHC high-voltage transmission line unless and until a legally compliant state EIS and federal EIS are conducted and completed in accordance with law.

Sincerely,

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