No. 22-1347

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Driftless Area Land Conservancy, et al.,
Plaintiff-Appellees,

v.

American Transmission Company LLC, et al.,
Intervenor-Defendant-Appellants.

On Appeal from the United States District Court for the Western District of Wisconsin, Case Nos. 21-cv-0096 and 21-cv-0306 The Honorable William M. Conley, Judge

INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The Co-owners[1] of the Cardinal-Hickory Creek 345-kilovolt Transmission Line Project ("Project") move this Court to stay pending appeal the final judgment, App'x 46–47, and associated Opinion and Order on summary judgment, App'x 1–45 ("Order"), entered in the proceedings below.[2] The district court exceeded its jurisdiction by ruling on agency actions that are unripe, moot, or which Plaintiffs lack standing to challenge. The district court's ruling rests on a fundamentally flawed application of the National Wildlife Refuge System Administration Act ("Refuge Act"), 16 U.S.C. §§ 668dd–668ee, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321–4347. There is a high likelihood that this Court will reverse the district court on appeal, which alone warrants a stay.

The district court's flawed decision will adversely impact the Co-owners. The court issued a declaratory judgment concerning an agency action—the U.S. Fish & Wildlife Service's ("FWS") potential approval of a proposed land exchange for the Project's crossing of the Mississippi River—that has not yet even occurred. The practical effect of the court's speculative ruling is to impede the Co-owners and FWS from consummating a land exchange that would

[1] The Co-owners are American Transmission Company LLC by its corporate manager ATC Management Inc., Dairyland Power Cooperative ("Dairyland"), and ITC Midwest LLC.
[2] Documents from the district court docket (No. 21-0096) and administrative record cited herein are provided in the concurrently filed appendix.

enable the Project to cross the Mississippi River on land currently within the Upper Mississippi National Wildlife and Fish Refuge ("the Refuge"). Given the district court's ruling, it is unlikely that the Co-owners will be able to commence construction at the river crossing this winter, which will increase construction costs and the risk that the Project will miss its crucial December 2023 in-service date.

A delay in the Project's in-service date will harm the public interest. The Project's many public benefits include improved grid reliability, reduced energy costs for consumers, and full interconnection of more than 7,500 megawatts of renewable generation, enough to power millions of homes per year. If the Project's in-service date slips, it will delay realization of these important benefits and cause significant harm to the renewable generators (and their customers) depending on this Project to go into service by December 2023.

This Court should stay the Order and final judgment pending appeal.

BACKGROUND

I. Factual Background

The Project is an approximately 101-mile, 345-kilovolt transmission line that will run from the Hickory Creek Substation in Dubuque County, Iowa across the Mississippi River through southwest Wisconsin to the Cardinal Substation in Middleton, Wisconsin. App'x 342; App'x 530–31, 548–550. Aside

from an approximately 1.3-mile segment crossing the Refuge area, the rest of the Project will be built on non-federal land, with nearly 95 percent sited along existing transportation, utility, or railroad rights-of-way ("ROW") or property boundaries. App'x 549.

The Midcontinent Independent System Operator, Inc. ("MISO"), a regional transmission organization responsible for overseeing, planning, and operating the regional transmission system across fifteen states, studied and approved the Project as part of its Multi-Value Project ("MVP") portfolio more than a decade ago. *See Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 770–72 (7th Cir. 2013); App'x 377–393; App'x 574. MISO determined that the MVP portfolio, including this Project, will improve transmission reliability, reduce energy costs, and help states achieve renewable energy standards by transporting low-cost renewable energy from the Great Plains eastward. *Ill. Com. Comm'n*, 721 F.3d at 772; App'x 444–454.

Wisconsin and Iowa utility commissions have also approved the Project. The Public Service Commission of Wisconsin found that the Project is needed "to improve electric system reliability locally and regionally, deliver economic savings for Wisconsin utilities and electric consumers, and provide infrastructure to support the public policy of greater access to renewable-based electric generation." App'x 432. Likewise, the Iowa Utilities Board granted a franchise for construction of the Project, finding that it is "necessary to meet

current and future transmission needs" by supporting the interconnection of renewable energy in Iowa and improving the reliability of the transmission system. *See* Order, *In re ITC Midwest LLC and Dairyland Power Cooperative*, No. E-22386, 2020 WL 2949408, at *9–15 (I.U.B. May 26, 2020).

The Project also required environmental review by and/or authorizations from three federal agencies: FWS, the U.S. Army Corps of Engineers ("Corps"), and Rural Utilities Service ("RUS").

RUS is authorized to make loans and loan guarantees to finance construction of electric distribution, transmission, and generation facilities. 7 U.S.C. §§ 902(a), 904(a). Dairyland intends to seek financing from RUS to fund its nine percent ownership stake in the Project. App'x 532–33. Because RUS's regulations require it to analyze lending decisions under NEPA, RUS prepared a 1,241-page environmental impact statement ("EIS") for the Project. RUS published the final EIS in October 2019 and (along with FWS and the Corps) issued a record of decision ("ROD") in January 2020, finding that the EIS complied with NEPA. App'x 525–581.

FWS issued a ROW permit for the Project to cross the Refuge in September 2020 after preparing and issuing a Compatibility Determination ("CD"). App'x 503–524; App'x 707–717. In March 2021, in response to concerns raised by a Native American Tribe, the Co-owners applied to amend the ROW through the Refuge to avoid impacts to burial mounds outside the Refuge and reduce the

Project's impacts within the Refuge. App'x 57–62. Then, on July 29, 2021, the Co-owners proposed a land exchange in lieu of the amended ROW, explaining that a "land exchange with [FWS] on the terms described in this letter could be completed more promptly than the current right-of-way proceedings, while securing equal or greater benefits for the Service and Refuge." App'x 64–66.

FWS agreed that a land exchange could be a "potentially favorable alternative to the right-of-way permit" and stated that it expected to act on the Co-owners' application by May 2022. App'x 68. On August 27, 2021, FWS revoked the CD and ROW permit after concluding that its original analysis had been based on a review of incorrect easement documents. App'x 77–78. FWS's consideration of the land exchange was still underway at the time the district court issued the Order. FWS has not taken final action on the Co-owners' application for a land exchange and (to the Co-owners' knowledge) has not determined what interim steps it may take given the district court's rulings.

The Co-owners began Project construction in Iowa in early 2021, App'x 167 ¶ 13, in Wisconsin in November 2021, App'x 141 ¶ 22, and are scheduled to start construction in the Refuge/river crossing area this winter. App'x 326 ¶ 7. The Project is to be placed in-service by December 2023. App'x 131 ¶ 17.

II. Procedural History

Plaintiffs filed two complaints concerning the Project's federal approvals—one against RUS and FWS, challenging the EIS and (now revoked) CD and ROW permit,[3] and another against the Corps, challenging Clean Water Act ("CWA") general permits issued for the Project. *See* App'x 584–89; App'x 590–92; App'x 656–58. On January 14, 2022, the district court issued the Order, App'x 1–45, holding that the Project cannot cross the Refuge through the (now revoked) ROW permit or the (potential future) land exchange. App'x 23–35. Relying on *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), the district court held that the EIS's purpose and need statement was too narrow and did not comply with NEPA. App'x 35–41. The district court upheld the CWA general permits the Corps issued for the Project.

On March 1, 2022, the district court issued a final judgment vacating and remanding the ROD and EIS.[4] App'x 46–47. The final judgment also "declares that the compatibility determination precludes [the Project] as currently proposed from crossing the [R]efuge by right of way or land transfer." *Id.*

[3] Plaintiffs never amended their complaint to challenge the proposed land exchange, nor would doing so have been proper, given that FWS has not taken final agency action on the land exchange.

[4] The district court issued an amended final judgment on March 9, 2022, to correct a clerical mistake in the March 1 final judgment. Because the amended final judgment issued after this appeal was docketed, it is a nullity. *See* Fed. R. Civ. P. 60(a); *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013).

On March 4, 2022, the district court denied the Co-owners' motion for stay pending appeal but acknowledged "the impact of its ruling will work important limitations on both defendants and the intervening defendants." App'x 50. Accordingly, the district court granted a stay until April 4, 2022, providing the Co-owners with time to seek a stay pending appeal with this Court. *Id.*

ARGUMENT

I. Standard of Review

In determining whether to issue a stay pending appeal, this Court considers (1) the likelihood the applicant will succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties; and (4) the public interest. *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)). A "'sliding scale' approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *Camelot Banquet Rooms, Inc. v. U.S. Small Business Admin.*, 14 F.4th 624, 628 (7th Cir. 2021) (granting stay where movant demonstrated strong likelihood of success on the merits and other factors were "essentially a wash").

II. The Co-owners are likely to prevail on the merits of their appeal.

A. The district court lacked jurisdiction to review the proposed land exchange because FWS has not taken final action on that proposal.

The district court exceeded its jurisdiction by issuing a declaratory judgment concerning an agency action that is not final—the proposed land exchange. Under the Administrative Procedure Act ("APA"), the court only had jurisdiction to review "final" agency action—that is, an action that "mark[s] the 'consummation' of the agency's decisionmaking process" and is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted); 5 U.S.C. § 704. Neither condition is satisfied here. FWS has not made *any* decision regarding the land exchange, and there can necessarily be no "legal consequences" from a decision that has not happened. The district court exceeded its jurisdiction by issuing an advisory opinion on a land exchange that FWS has not authorized. *See, e.g.*, *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 761 (8th Cir. 2019) (affirming dismissal of complaint against FTA where agency had not yet issued ROD).

In concluding that the proposed land exchange was sufficiently "final," the district court relied heavily on FWS's statement—from a one paragraph letter—that such an exchange could be a "potentially favorable alternative to

a right-of-way-permit." *See* App'x 15. The court reasoned that the letter "all but guarantee[s]" the agency's approval. *Id*.

This was clear legal error. FWS's letter begins, rather than consummates, its decisionmaking process. The letter reflects, *at most*, a preliminary assessment that the land exchange *could be* a "potentially favorable alternative" to the (now revoked) CD and ROW permit. App'x 68. Courts lack jurisdiction to review these types of preliminary assessments, which are simply "informational in nature." *See Menominee Indian Tribe of Wis. v. Env't Prot. Agency*, 947 F.3d 1065, 1070 (7th Cir. 2020). Indeed, "[a]n agency action is not final if it is only . . . 'tentative.' The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Dhakal v. Sessions,* 895 F.3d 532, 539 (7th Cir. 2018) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

Here, FWS's decisionmaking process is far from complete. The multiple procedures that apply to land exchanges include an appraisal, environmental review, title review, and potential review by the House and Senate Committees on Appropriations.[5] FWS has not completed this process or developed an administrative record for judicial review, let alone decided whether to approve

[5] *See* U.S. Fish & Wildlife Service, 342 FW 5, Non-Purchase Acquisition (Jun. 21, 1994) (as amended Apr. 14, 2008), https://www.fws.gov/policy/342fw5.html.

the land exchange. The district court's determination that FWS's one-paragraph letter constituted a "final agency action" under the APA is clearly erroneous. *Audubon of Kansas, Inc. v. U.S. Dep't of the Interior*, No. 221CV02025, 2021 WL 4892916, at *9 (D. Kan. Oct. 20, 2021), *appeal docketed*, No. 21-3209 (10th Cir. Nov. 17, 2021) (dismissing Refuge Act claim based on memorandum of understanding that "at best reflect[s] the *initiation* of the decision-making process regarding the Refuge Water Right, not the *consummation* of it.").

The district court was wrong to rely on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), App'x 14–16. In those cases, regulated entities sought pre-enforcement review of regulations they feared would be aimed at them, forcing them to "modify [their] behavior to avoid future adverse consequences," such as monetary sanctions or license revocation. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 727, 734 (1998) (contrasting unripe challenges before it with the regulations at issue in *Abbott* and *Columbia Broadcasting*, which "force[d] immediate compliance through fear of future sanctions."). Here, in contrast, FWS has made *no decision* and nothing is being enforced—against Plaintiffs or anyone else. The district court clearly erred in concluding that the land exchange was sufficiently "final" for purposes of judicial review under the APA.

B. Even if the district court had jurisdiction to review the proposed land exchange, it erred as a matter of law in concluding that the exchange must be supported by a compatibility determination.

After erroneously concluding that the land exchange was "ripe for review," App'x 17, the district court concluded that the Project could not cross land currently within the Refuge through a land exchange because such a crossing would be incompatible with the Refuge's purposes. App'x 32–35. This represents a fundamental misinterpretation of the requirements that apply to land exchanges under the Refuge Act.

The Refuge Act allows the Secretary (acting through FWS) to authorize private uses within a wildlife refuge, so long as she determines in her "sound professional judgment" that such uses "are compatible with the major purposes for which such areas were established." 16 U.S.C. §§ 668ee(1), 668dd(d)(1)(A); 50 C.F.R. §§ 29.21.1–8. However, under different statutory authority, the Secretary can "[a]cquire lands or interests therein by exchange for acquired lands or public lands . . . under [her] jurisdiction which [she] finds to be *suitable for disposition*," provided the lands being exchanged are "approximately equal" in value or equalized by cash payment. 16 U.S.C. § 668dd(b)(3) (emphasis added). The latter authority governs the proposed land exchange and contains no compatibility requirement.

The district court erred by conflating the requirements that apply to proposed *uses* within the Refuge (e.g., the now revoked ROW permit) with those that apply when FWS seeks to *exchange* Refuge lands for non-Refuge lands. App'x 32–33. While FWS must determine that a proposed *use* of the Refuge is compatible "with the major purposes for which such areas were established," *see* 16 U.S.C. § 668dd(d)(1)(A), there is no similar requirement for land exchanges. *Id.* § 668dd(b)(3). The plain language of the Refuge Act simply *does not require* a CD for land exchanges. *See Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F.Supp.2d 1087, 1111 (D. Colo. 2012*), aff'd sub nom. WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677 (10th Cir. 2015). The district court's conclusion that FWS must issue a CD before entering into a land exchange contradicts the Refuge Act's plain language and is likely to be reversed on appeal.

C. Plaintiffs lack standing to challenge the EIS.

To establish Article III standing, a plaintiff must show, among other things, that a favorable decision will prevent or redress its injury. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009). In NEPA cases involving federal financial assistance for private projects, courts have consistently found that a plaintiff cannot establish redressability (and thus, lacks standing) when it is unable to show that the party receiving the challenged funding would abandon the project without it. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571

(1992); *see also Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1014 (9th Cir. 2018) ("[T]he fact that both Projects were already underway by the time funding from the Ex-Im Bank was authorized—nearly halfway complete in the case of [one] Project—suggests that the Projects did not rely on Ex-Im Bank financing."); *S. E. Lake View Neighbors v. Dep't of Hous. & Urb. Dev.,* 685 F.2d 1027, 1036 (7th Cir. 1982) (no redressability where housing development would continue to exist even if federal financial assistance were enjoined).

Plaintiffs have failed to show how vacating the ROD would redress their alleged harms. As noted above, FWS revoked the only other decision that Plaintiffs challenged and depended on the EIS and ROD.[6] The only extant federal action challenged here that relies on the EIS and ROD is RUS's potential future funding of Dairyland's nine percent ownership stake in the Project—which is "only a fraction of the funding" required for the Project. *Lujan*, 504 U.S. at 571. Dairyland will not apply for this funding (if at all) until the second half of 2023, at which time Project construction is scheduled to be complete. App'x 83 ¶¶ 9–10. Even Plaintiffs acknowledge that "[i]t is not clear whether federal financing will be provided, or what a denial of federal

[6] The ROD provided support for three agency decisions: FWS's (now withdrawn and moot) CD and ROW permit; RUS's (future) funding decision; and the Corps' issuance of an easement across Corps-owned and managed lands within the Refuge. FWS withdrew the CD and ROW permit, App'x 532, 535; App'x 77–78, and Plaintiffs never challenged the Corps' easement.

financing might mean to the CHC transmission line." App'x 87 n.10; *see also* App'x 575 ("This ROD is not an approval of the expenditure of Federal funds."). Plaintiffs lack standing because they failed to show that a decision by RUS to deny funding would stop the Project.

D. The Federal Defendants properly relied upon more than a decade of planning and analysis by MISO and the Co-owners and state utility regulators when preparing the EIS's purpose and need statement and alternatives analysis.

The district court effectively concluded that it is better equipped than the transmission planning experts at MISO, state utility regulators, and three federal agencies to assess the need for the Project. But in an APA case, it is the agency—not the court or the plaintiffs—that is entitled to deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 765 (7th Cir. 2021). The district court had no basis to second-guess the purpose and need statement in the EIS or the Federal Defendants' evaluation of Project alternatives.

NEPA requires an agency to "briefly specify the underlying purpose and need for the proposed action." 40 C.F.R. § 1502.13. An agency has "considerable discretion to define the purpose and need of a project," which is reviewed under a deferential reasonableness standard. *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066–67 (9th Cir. 1998). The district court's reasoning lacks factual

support, incorrectly applies NEPA, and disregards the APA's deferential standard of review.

The district court's reasoning was based on a fundamental mistake of fact. The court posited that MISO is a "utility" that would be a "self-serving . . . beneficiary" of the Project and the EIS's purpose and need statement was flawed because it echoed the grid planning criteria MISO used when addressing the regional need for the Project. App'x 40–41.

MISO is not a utility. MISO is a not-for-profit regional transmission organization empowered by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act with planning and operating the high-voltage transmission system across the Midwest. *See Ill. Com. Comm'n*, 721 F.3d at 770–72. MISO is responsible for "adher[ing] to the reliability standards by providing a high-voltage transmission system grid in the midcontinent region of the United States." App'x 574.

RUS did not uncritically adopt "self-serving statements" from the Co-owners, as the district court claimed. App'x 41. Yes, the Co-owners support the Project. Their support follows from the fact that MISO's expert grid planners and state utility regulators have consistently found that the Project is needed to improve grid reliability, alleviate transmission congestion, expand access to low-cost renewable energy, increase transfer capability between Iowa and Wisconsin, and improve the efficiency of the transmission system. App'x 447.

MISO sought to address these needs when, after three years of intensive study, it approved the Project as part of the MVP portfolio more than a decade ago. *See* App'x 468–69; App'x 336; App'x 350, 369; App'x 388; *see also Ill. Com. Comm'n*, 721 F.3d at 776. Wisconsin and Iowa utility commissions conducted extensive public hearings and reaffirmed MISO's analysis when they approved the Project.

RUS's decision to rely on the needs that MISO identified, other grid and utility experts affirmed, and the Co-owners are working to address was entirely reasonable and consistent with NEPA. *See, e.g.*, *Protect Our Cmtys. Found. v. U.S. Dep't of Agric.,* 845 F.Supp.2d 1102, 1110 (S.D. Cal.), *aff'd*, 473 F. App'x 790 (9th Cir. 2012) (upholding purpose and need statement where "the EIS relies on CAISO's and CPUC's conclusions that a need existed" for 117-mile transmission line).

RUS's decision-making role is not that of a grid planner. RUS simply lends money for rural development. Among all federal agencies, only FERC has authority over the interstate transmission of electricity and FERC has tasked MISO with responsibility for the Midwest's grid.[7] As the final EIS explains, routing and siting decisions on non-federal lands are regulated by state utility

[7] The Co-owners respectfully suggest that the Court consider inviting FERC, not otherwise a party to this action, to participate as amicus curiae during merits briefing.

commissions acting under state law, not RUS or any other federal agency. App'x 460.

NEPA does not require RUS to substitute its judgment for that of FERC or MISO or the states and "reinvent the wheel" by developing a purpose and need statement wholly divorced from the years of planning and analysis by transmission grid experts. *Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013). This Court has repeatedly approved of the common-sense proposition that "a reviewing agency can take an applicant's goals for a project into account." *Env't L. & Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n* ("*ELPC*"), 470 F.3d 676, 683 (7th Cir. 2006) (collecting cases); *see also Protect Our Parks*, 10 F.4th at 764 ("[T]he agencies must take the objectives they are given and consider alternatives means of achieving *those* objectives, not alternative objectives." (emphasis added)). Here, the applicant's goals are those identified by MISO and the states.

Citing *Simmons*, the district court concluded that, by relying on the Co-owners' and other agencies' planning analyses, the purpose and need statement improperly limited the alternatives RUS reviewed in the EIS. App'x 41. But *Simmons* is inapposite: in that case, the agency formulated a purpose and need statement so narrow that it did not even consider a reasonable and concrete alternative to the project at issue. *Simmons*, 120 F.3d at 669.

Alternatives that "do not accomplish the purpose of an action are not reasonable" and need not be studied in detail. *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001). The EIS adequately explains why system alternatives preferred by Plaintiffs—such as energy efficiency, demand response, or renewable generation—were not reasonable or feasible. *See* App'x 493–502. Courts have universally recognized that similar alternatives are too speculative or infeasible to merit in-depth consideration. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 552–53 (1978) (licensing agency not required to consider as alternative to a nuclear plant "energy conservation," a term that encompassed "a virtually limitless range of possible actions"); *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 581 (9th Cir. 2016) (upholding agency's determination that "implementation of [the distributive generation] alternative to be 'speculative' given the current status of solar technology and the regulatory and commercial landscape"); *ELPC*, 470 F.3d at 684 (NEPA satisfied despite agency's failure to consider energy efficiency alternatives when project proponent "was in no position to implement such measures").

III. The balance of harms favors a stay.

A stay of the judgment pending appeal is necessary to prevent irreparable harm to the Co-owners. Building a major energy infrastructure project is a costly, time-consuming, and logistically complex endeavor. App'x 139 ¶¶ 15–

21. Construction work must occur in a carefully choreographed sequence, in part because environmental considerations, permitting requirements, and outage constraints on the transmission system limit the times during which certain work can occur. App'x 140–41 ¶¶ 18–21; App'x 167 ¶¶ 11–12; App'x 325–26 ¶¶ 4–6. As a result, delays *now* will lead to cascading delays *later* that will increase costs and likely delay the Project's December 2023 in-service date. App'x 139–143 ¶¶ 17–27; App'x 168–170 ¶¶ 17–24; App'x 326–27 ¶ 8.

This is especially true for construction work within the Refuge/river crossing area: to protect nesting birds, endangered bats, and wetlands, the Co-owners committed to FWS to conduct work within the Refuge between late fall to early winter (i.e., October to February). App'x 325–26 ¶¶ 4–6. The Co-owners planned to start work in the Refuge area this winter, *id.* ¶¶ 6–7, but that cannot happen without a land exchange—which the district court effectively enjoined. Without a land exchange, construction work in the Refuge area will be delayed until the winter of 2023. At that time, the Co-owners could attempt to expedite construction using atypical and more expensive methods, but this year-long delay makes it unlikely that the Project will meet its December 2023 in-service date. *Id.* ¶¶ 6–9. These delays and increased costs constitute clear irreparable harm to the Co-owners. *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, No. 17-00289, 2017 WL 1105237, at *5 (M.D. Pa. Mar. 24, 2017) ("Each piece of the construction puzzle depends on

the prior piece timely placed. Untimeliness in one small part of this enormous project would result in a domino effect on the timeliness of all other areas of the project.").

By contrast, Plaintiffs will not be harmed if this Court issues a stay. The procedural violation associated with the EIS—its (allegedly) unduly narrow purpose and need statement—is insufficient to demonstrate irreparable harm. *See, e.g., E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, No. CV-20-757, 2020 WL 2079443, at *4 (D.D.C. Apr. 30, 2020) ("A chorus of federal courts . . . has found that procedural injury, standing alone, cannot constitute irreparable harm."). Plaintiffs also cannot claim any irreparable injury associated with the Project's crossing of the Refuge: the revoked CD and ROW permit have no continuing effect and FWS has not acted on the land exchange, which Plaintiffs can challenge if and when it is approved. *Cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 (2010) (no irreparable injury existed as to an agency action—partial deregulation of genetically modified crops—that had not yet occurred).

IV. A stay is in the public interest.

The public interest also strongly favors as stay. As discussed above, by delaying work within the Refuge area for another year, the district court's decision makes it unlikely that the Project will achieve its December 2023 in-

service date. This will significantly and irreparably harm the public interest in at least three ways.

First, a delayed in-service date could compromise reliable operation of the regional electric transmission system. Since 2015, MISO has identified the Project as a critical upgrade needed to prevent voltage collapse, which can lead to outages on the transmission system. App'x 198–99 ¶ 45. Until the Project is placed in-service, "the transmission system will be less secure, with additional voltage and transient stability limitations." App'x 132–33 ¶¶ 19, 23; App'x 207 ¶ 71; App'x 322 ¶ 9. Extreme weather events, such as the severe winter storm that hit Texas in February 2021, are more likely to lead to outages and compromise grid reliability. App'x 132–33 ¶¶ 19–23; App'x 198–201 ¶¶ 43–51; App'x 207 ¶ 71; App'x 322 ¶ 9.

Second, delaying the Project's in-service date will result in higher energy costs. The Project is designed to relieve congestion on the existing transmission system, which reduces market prices for electricity. App'x 191–96 ¶¶ 27–36; App'x 130–32 ¶¶ 10–14, 18. If the Project is not placed in service by December 2023, this congestion will continue unabated, adversely impacting utilities and consumers alike, since energy prices will be higher than they otherwise would be with the Project in-service. App'x 207 ¶ 70; App'x 157–59 ¶¶ 11–14.

Third, delay will harm the power producers who own 7,500 megawatts of renewable generation in the upper Midwest that is "conditioned" on the

Project. *See* App'x 203–05 ¶¶ 60–62. Until the Project goes into service, MISO could limit the electrical output of these "conditional generators," financially harming their owners and the communities they serve. App'x 132 ¶ 20; App'x 201–08 ¶¶ 52–62, 72–75. For example, three of Wisconsin's largest electric utilities—who provide retail electric service to approximately 1.75 million customers—have invested $390 million into a 300-megawatt solar project that is conditioned on the Project. App'x 146–49 ¶¶ 7–8, 26. A delay of even *two months* in the Project's in-service date would cause these utilities to lose approximately $15 to $20 million in 2024 alone. *Id.* ¶ 32. This is just one example—other renewable generators in the region would similarly be faced with increased risks, lost revenues, and potential abandonment of their projects. *See* App'x 94 ¶¶ 5–7; App'x 102–03 ¶¶ 7–9; App'x 176 ¶ 12; App'x 180 ¶¶ 8–9; App'x 203–08 ¶¶ 60–62, 72–75.

CONCLUSION

The Co-owners respectfully request that this Court stay the district court's final judgment and Order pending appeal and that such a stay be entered no later than April 4, 2022, when the temporary stay the district court granted expires. Absent such a stay by April 4, the Co-owners intend to file a motion to expedite the Court's consideration of this appeal to prevent serious adverse consequences to the Co-owners, the public at large, and other third parties who are depending on the Project to be completed by December 2023.

Respectfully submitted this 21st day of March 2022.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(a)(A) because this brief contains 5,200 words.

This document complies with the requirements of Fed. R. App. P. 27(d)(1)(D) & (E) and typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type-style requirements of Fed. R. App. P. Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-point Century Schoolbook font.

Dated this 21st day of March 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 21st day of March 2022.

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