

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NATIONAL WILDLIFE REFUGE ASSOCIATION,  
DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN  
WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE,

Plaintiffs,

v.

OPINION AND ORDER

21-cv-096-wmc &  
21-cv-306,  
Consolidated

RURAL UTILITIES SERVICE,  
CHRISTOPHER MCLEAN, Acting Administrator,  
Rural Utilities Service,  
UNITED STATES FISH AND WILDLIFE SERVICE,  
CHARLES WOOLEY, 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

AMERICAN TRANSMISSION COMPANY, LLC,  
DAIRYLAND POWER COOPERATIVE, & ITC  
MIDWEST LLC,

Intervenor-Defendants.

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In this lawsuit, plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife challenge the actions of various federal agencies permitting the Cardinal-Hickory Creek (“CHC”) Transmission Line Project, which would run from the Hickory Creek substation west of

Dubuque, Iowa, through far Southwest Wisconsin near Cassville and the Mississippi River to Middleton in the center of Southern Wisconsin, all through what is known as “the Driftless Area.”<sup>1</sup> The utility companies charged with building and operating the CHC -- American Transmission Company, LLC (“ATC”), Dairyland Power Cooperative (“Dairyland”) and ITC Midwest LLC (“ITC”) (the “Utilities”) -- later joined the suit as intervenor-defendants. Now at the merits stage, the court finds that defendants fail to meet legal requirements for the Environmental Impact Statement, Compatibility Determination, and Land Transfer.

## BACKGROUND<sup>2</sup>

As proposed, the CHC project would create a 345-kilovolt electricity transmission line between 100 and 125 miles long. (ROD004933-34.) As part of the project, a new electricity substation would also be constructed in Montfort, Wisconsin. (*Id.*) Intervenor-defendants Dairyland, ATC, and ITC intend to construct, own and operate the CHC line jointly. (ROD004940.) Several areas of the proposed CHC project cover existing rights-

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<sup>1</sup> The Driftless area is a region in Iowa, Wisconsin, and Minnesota. This region was not flattened by glaciers like many other areas of the Upper Midwest, leading to a unique geographic region with hills, bluffs and valleys. Many species of plant and animal call this region home, such as the Timber Rattlesnake, the Northern Monkshood, and the Brook Trout. “Defining the Driftless,” <https://driftlesswisconsin.com/defining-the-driftless/> (last visited December 30, 2021).

<sup>2</sup> Intervenor-defendants moved to strike plaintiffs’ proposed findings of fact (dkt. #113) from consideration, as the parties agreed in their preliminary pretrial conference report that proposed findings would be unnecessary. (Report (dkt. #40) 13.) Because the court did not rely on any parties’ proposed findings of fact for summary judgment, but instead relied directly on the administrative record, that motion will be denied as moot, along with plaintiffs’ related motion for leave to reply (dkt. #165).

of-way owned by the Utilities and would also involve replacing or upgrading existing facilities. (*Id.*)

Midcontinent Independent System Operator, Inc. (“MISO”), an independent not-for-profit group which manages the power grid in 15 states, worked with various state regulators and utility industry stakeholders from 2008 to 2011 to identify projects that would increase energy transmission and usage of renewable energy. (ROD004981.) One identified project was to connect Dubuque, Iowa, to southwest Wisconsin, which would provide cheaper wind power to Milwaukee and Chicago, as well as reduce overloaded power lines. (ROD031340-41.) This in turn developed into the proposed CHC transmission line project. (ROD004981.)

Because Dairyland expressed an intent to request funding for its 9% stake in the CHC project from the U.S. Department of Agriculture Rural Utilities Service (“RUS”), that government entity led the effort to prepare an Environmental Impact Statement (“EIS”) in cooperation with U.S. Fish and Wildlife Service (“Fish and Wildlife”), the U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”). (ROD004941.) The Utilities also asked (1) Fish and Wildlife for a right of way easement and special use permit to cross the Upper Mississippi River National Wildlife and Fish Refuge (“the Refuge”), and (2) the Corps for permits to build in navigable waters of the United States. (ROD004942.)

Before granting a right of way through the Refuge, Fish and Wildlife must confirm that the proposed project comports with the purposes of the Refuge under 16 U.S.C.A. § 668dd. Fish and Wildlife originally finalized its “Compatibility Determination for the

CHC” on December 20, 2019. (ROD007584.) Because the Utilities already had a prior right of way through the Refuge, where a 161 and 69kv transmission line had been previously installed (ROD17047) *and* the Utilities had agreed to transfer back that right of way (ROD007574), Fish and Wildlife found the proposed CHC line was compatible with the purposes of the Refuge as “a minor realignment of an existing right-of-way” and granted a permit to the Utilities. (ROD007574.)

On March 1, 2021, however, the Utilities contacted Fish and Wildlife and asked for a slightly amended right of way through the Refuge, ostensibly to avoid Ho-Chunk burial grounds. (Zoppo Decl., Ex. A (dkt. #53-1) 2-3.) Then, before Fish and Wildlife could issue a decision on the proposed amendment, the Utilities again contacted Fish and Wildlife on July 29, 2021, this time asking for an expedited land exchange instead of an amended right of way, ostensibly because approval for a new right of way would take too long. (Zoppo Decl. (dkt. #53-2) 1.) Specifically, in exchange for a land exchange in the Refuge, the Utilities were now proposing to transfer a 30-acre parcel to Fish and Wildlife. (*Id.*) On August 3, 2021, Fish and Wildlife confirmed receipt of the Utilities’ latest proposal, indicating that its response to such a land exchange “may” be “favorable.” (Zoppo Decl. (dkt. #53-3) 1.)

Then, on August 27, 2021, less than a month after Fish and Wildlife responded favorably to a proposed land transfer, and less than a week before summary judgment motions were due in this case, Fish and Wildlife “withdrew” its entire original Compatibility Determination, stating it “learned that an error had previously been made regarding the 2019 Compatibility Determination when identifying the existing rights-of-

way proposed for re-alignment.” (Not. by Def. (dkt. #69-1) 1.) As a result, any approved right of way through the Refuge was rescinded, along with the compatibility determination. (*Id.*) However, in its letter of withdrawal to the Utilities, Fish and Wildlife did note that the agency “is committed to working with you toward timely review of the land exchange you have proposed in lieu of your March 2021 application for an amended right-of-way permit . . . [and] concurs that a land exchange is a potentially favorable alternative to a right-of-way permit.” (*Id.*)

As for the Corps’ involvement, both its Rock Island and Saint Paul district offices issued permits, as each office covers a different area of the CHC line. (USACE000094; USACE000679.) Specifically, the Corps’ Rock Island office is responsible for those sections of the CHC project running through Iowa and authorized the project under Nationwide Permit 12 (“NWP 12”). Generally, such nationwide permits (“NWPs”) are used as a means to expedite permissions to build without needing to go through the more demanding, individual permitting process. (USACE001200.) Instead, proposed projects permitted by an NWP only require that the Corps do a project-specific “verification” to ensure that it meets the requirements of the nationwide permit. (USACE001199.) The CHC was verified in November of 2019. (USACE001199.) However, NWP 12 was later revoked by the Corps in part, and now only covers oil and gas pipelines, meaning that companies building utility lines like the CHC project will need to be permitted under NWP 57. To date, the Utilities have not yet reapplied for an NWP 57 permit. *See* “Regulatory Program & Permits,” U.S. Army Corps of Engineers,

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