

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Sierra Club North Star Chapter,

Plaintiff,

v.

Mary Peters, Secretary of Transportation;  
J. Richard Capka, Federal Highway  
Administrator; Dirk Kempthorne,  
Secretary of the Interior; and Mary Bomar,  
Director of the National Park Service,

Defendants.

---

Civil No. 07-02593-MJD-SRN

**PLAINTIFF’S MEMORANDUM IN  
OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS**

In their Motion to Dismiss, Defendants contend that Sierra Club’s lawsuit is both too early and too late. This Court should reject Defendants’ attempt to evade review of their actions in approving the construction of a four-lane highway bridge (the “Proposed Bridge”) over the Lower St. Croix River, a federally-designated wild and scenic river.

Sierra Club’s claims fall into two categories. One set of claims, which allege violations of Section 4(f) of the Transportation Act and the National Environmental Policy Act, challenge the Federal Highway Administration’s (“FHWA”) approval of this bridge. *See* Complaint for Declaratory and Injunctive Relief ¶¶ 122-34 (the “FHWA claims”). The second set of claims, which allege violations of the Wild and Scenic Rivers Act, National Park Service Organic Act, General Authorities Act, and their implementing regulations and policies, challenge the actions of the National Park Service (“NPS”). *See id.* ¶¶ 94-121 (the “NPS claims”). Defendants argue that the FHWA

claims are untimely because Sierra Club had the temerity to believe the FHWA, which issued a Notice in the Federal Register stating that legal challenges to the Proposed Bridge must be “filed on or before June 6, 2007.” 71 Fed. Reg. 70580 (Dec. 5, 2006), attached as Ex. A. In the same breath, Defendants assert that the NPS claims are premature. But Defendants mischaracterize the law, and they should not be permitted to whipsaw Sierra Club’s claims in this fashion. The Motion should be denied.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### **A. The Wild And Scenic Rivers Act**

The Wild and Scenic Rivers Act (“WSRA”), which was enacted in 1968, established a national policy that rivers with “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271. The WSRA implemented this policy by creating a national Wild and Scenic River System and developing a process so other rivers with “outstandingly remarkable” values could be added to the system.

The upper stretch of the St. Croix River was one of eight rivers that were originally included in the Wild and Scenic River System. *See* 16 U.S.C. § 1274(a)(6). At the time of the Act’s passage, the Lower St. Croix was designated a study river that could potentially be added to the system at a later date. *Id.* § 1276(a)(21).

## **B. The Lower St. Croix National Scenic Riverway**

The Lower St. Croix, which runs along the Minnesota-Wisconsin border near the Twin Cities, has been widely recognized for its natural and scenic qualities. This river passes through a variety of landscapes, including a deep, narrow gorge buttressed by sheer rock cliffs and broad valleys lined with wooded bluffs. This “juxtaposition of landforms and geologic features, including the bluffs, islands, the Dalles, and Lake St. Croix, [is] unique.” Final Cooperative Management Plan for the Lower St. Croix National Scenic Riverway at 11, *available at* [http://www.nps.gov/sacn/parkmgmt/upload/Final\\_St\\_Croix\\_CMP\\_EIS.pdf](http://www.nps.gov/sacn/parkmgmt/upload/Final_St_Croix_CMP_EIS.pdf) (hereafter “CMP”).<sup>1</sup> Moreover, the towns along the Lower St. Croix, like Taylors Falls and Stillwater, Minnesota, have “retain[ed] their historic small town character.” *Id.*

The Lower St. Croix is also “considered to be a hot spot from a biodiversity standpoint, supporting a rich fauna and flora population.” *Id.* at 173. Indeed, the Lower St. Croix “has one of the richest freshwater mussel communities in the world and serves as a major refuge for both globally and regionally endangered mussel species.” *Id.* at 177. The river harbors forty species of mussel, including the federally-endangered Higgins’ eye pearl mussel and the winged mapleleaf mussel, whose only known population is in this river. *Id.* at 171, 177.

---

<sup>1</sup> The Cooperative Management Plan, which was adopted in 2001, governs management of the Lower St. Croix National Scenic Riverway. The Riverway is jointly administered by the NPS, Minnesota Department of Natural Resources, and Wisconsin Department of Natural Resources, who manage the Riverway through the Lower St. Croix Management Commission. Complaint ¶ 17; Answer ¶ 17.

Because of its natural and scenic qualities, as well as its proximity to the Twin Cities, the Lower St. Croix is a popular destination for recreational activities, including boating, hiking, skiing, canoeing, camping, and fishing. The parks and other destinations along the Lower St. Croix receive more than 2 million visitors annually. CMP at 155.

In recognition of the river's "outstandingly remarkable scenic, recreational, and geologic values," *id.* at 9, Congress passed the Lower St. Croix Act in 1972. Pub.L. 92-560, 86 Stat. 1174 (Oct. 25, 1972). This Act designated the upper portion of the Lower St. Croix as a wild and scenic river and provided a means for the designation of the southernmost stretch, which occurred four years later in 1976. 16 U.S.C. § 1274(a)(9). At the time of its designation, Congress recognized the importance of this resource and the need for its strict protection:

[T]his is one of the last remaining major rivers in the United States which lies within a major metropolitan area and is still relatively unspoiled. The river borders the eastern boundary of the Minneapolis-St. Paul urban area and is within easy access of over 2 million people. Ironically, it is this accessibility which places in jeopardy the features which make this river an outstanding natural resource, and which makes it imperative that the river quickly receive protection under the Wild and Scenic Rivers Act. . . . Final action on the St. Croix bill is urgently needed. If comprehensive protection is not extended to the riverway, the St. Croix will eventually become one more city river, its waters poisoned with pollution, its shorelines gutted with indiscriminate development.

118 Cong. Rec. 34390, 34393 (Oct. 9, 1972) (remarks of Sen. Jackson and Sen. Nelson).

### **C. The 1995 Bridge Proposal**

In recent years, the most serious threat to the Lower St. Croix's scenic, recreational, and natural values has been an unrelenting effort by highway departments to construct a large new bridge over the river. This effort, which has been led by the

FHWA, Minnesota Department of Transportation, and Wisconsin Department of Transportation, initially resulted in the release of a final environmental impact statement (“EIS”) in April 1995, and a record of decision that July.

The highway departments’ preferred alternative was a four-lane bridge that would cross the river about a mile south of Stillwater, Minnesota (the “1995 Bridge Proposal” or “1995 Proposal”). The total length of the bridge project would be six miles, and the project called for the construction of eight bridge piers in the riverbed. *See* Section 7(a) Evaluation; Wild and Scenic Rivers Act; Proposed New St. Croix Crossing 13-14 (Nov. 1996) (“Section 7 Evaluation”), attached as Ex. B.

In June 1996, Sierra Club and another conservation group filed suit to enjoin construction of the project. The suit alleged violations of Section 4(f) of the Transportation Act and Section 7 of the WSRA. Among other claims, Sierra Club alleged that the NPS had failed to discharge its obligation under the WSRA to analyze whether the 1995 Proposal satisfied the standards of Section 7 of that Act.

Section 7 is the WSRA’s principal conservation tool. As explained by the Interagency Wild and Scenic Rivers Coordinating Council, a multi-agency group charged with improving the administration of the WSRA, none of the provisions designed “to protect and enhance” wild and scenic rivers “is more significant than the restrictions to water resources projects provided in Section 7.” *Wild and Scenic Rivers Act: Section 7*, at 1 (Oct. 2004), *available at* <http://www.rivers.gov/publications/section-7.pdf>.

Section 7 provides that “no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project

that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.” 16 U.S.C. § 1278(a). Thus, Section 7 requires the NPS to evaluate whether a “water resources project” – such as a bank stabilization project, docking facility, or bridge – “would have a direct and adverse effect” on the river’s values. When a water resources project is found to have a “direct and adverse effect” on a wild and scenic river, the project cannot be authorized or funded absent congressional intervention.

After the plaintiffs filed suit, the NPS conducted the necessary Section 7 evaluation to determine whether the 1995 Proposal “would have a direct and adverse effect” on the Lower St. Croix’s scenic and recreational values. 16 U.S.C. § 1278(a). Because the FHWA had issued a Record of Decision before the NPS completed a Section 7 evaluation, the FHWA suspended its authorization of the 1995 Proposal pending the outcome of the Section 7 process. *See Sierra Club North Star Chapter v. Peña*, 1 F. Supp. 2d 971, 975 (D. Minn. 1998). In late 1996, the NPS issued its Section 7 evaluation, which concluded that the 1995 Proposal would have a direct and adverse impact on the Lower St. Croix’s scenic, recreational, and biological values. *See generally* 1996 Section 7 Evaluation.

In its evaluation, the NPS recognized that this bridge would have a far more significant impact on the Riverway’s scenic values than any shoreline development possibly could. The NPS wrote:

Placing a massive bridge where there previously was not one results in a fundamental change in the scenic qualities that existed in this portion of the Riverway at the time of designation. . . . The visual impacts of the existing

shoreline development . . . [are] not comparable to visual impacts which would occur if the proposed bridge is constructed. A bridge cutting across the river is fundamentally different in terms of its visual impacts than the impacts of shore and bank development.

1996 Section 7 Evaluation at 62-63.

The NPS further observed that “[o]pportunities to mitigate the visual impacts of the proposed bridge are very limited” because “a four-lane bridge cannot be hidden from view.” *Id.* at 61 (citation omitted). After considering the mitigation possibilities, the NPS concluded that mitigating the bridge’s “design elements *even along with all other available mitigation strategies* would not be sufficient to less[e]n the negative visual impacts of the proposed bridge on the scenic values for which the river was designated.” *Id.* at 63 (emphasis added). The NPS also found that the 1995 Proposal would negatively affect the Lower St. Croix’s recreational values and its rare mussel populations, which “should be protected to the same extent as the outstandingly remarkable scenic and recreational values.” *Id.* at 37, 47.

After this Section 7 evaluation was released, the federal government withdrew its authorization and financial support of the 1995 Proposal. In an effort to save the project, the Minnesota and Wisconsin Departments of Transportation (“state DOTs”) intervened in Sierra Club’s lawsuit and directly challenged the Section 7 evaluation. Among other arguments, the state DOTs disputed the NPS’s conclusion “that the Proposed Bridge would have a direct and adverse effect on the values for which the Lower St. Croix was included in the [Wild and Scenic River System].” *Peña*, 1 F. Supp. 2d at 981.

This Court rejected that argument, emphasizing that the new bridge “would

change the scenic qualities of the Lower St. Croix more than any development since the river's designation," and that "because the Proposed Bridge would cut across the river, it would have a fundamentally greater visual impact than any of the current shoreline development." *Id.* at 982. These observations bear equally on the latest bridge proposal for the Lower St. Croix.

#### **D. The 2006 Bridge Proposal**

After this Court's 1998 decision, the FHWA and state DOTs began working to revive the project. Eventually, the transportation agencies issued a supplemental draft EIS in August 2004. This document identified four "build" alternatives, including one (Alternative B-1) that was nearly identical to the 1995 Proposal. Alternative B-1 included two sub-alternatives: Alternative B-1<sub>a</sub> proposed closing the Stillwater lift bridge to vehicular traffic and converting it into a non-motorized pathway, while Alternative B-1<sub>b</sub> would leave the lift bridge open to local traffic. *See* Complaint ¶ 72; Answer ¶ 72.

In connection with this effort, in October 2005 the NPS issued a "draft" Section 7 evaluation of the project. Draft Section 7(a) Evaluation; Wild and Scenic Rivers Act; St. Croix River Crossing Project 8-9 (Oct. 2005) ("2005 Section 7 Evaluation"), Hanson Decl., Ex. B. Notwithstanding its earlier conclusion that a nearly identical bridge would impermissibly damage the scenic and recreational values for which the Lower St. Croix was designated a wild and scenic river, the NPS this time concluded that the bridge would *not* adversely affect those values.

When the transportation agencies released the supplemental final EIS in June 2006, they chose Alternative B-1<sub>a</sub> as the Preferred Alternative. This proposal (the

“Proposed Bridge” or “Proposed Bridge project”) became the Selected Alternative when the FHWA issued its Record of Decision in November 2006.

In their Motion, Defendants note that the Proposed Bridge and its associated mitigation package were developed with a stakeholders group. *See* Memorandum of Law in Support of Motion to Dismiss (“Mot.”) at 13-14 & n.3. Although Sierra Club was a good-faith participant in this process, it did not approve the Proposed Bridge. Nor did the City of Oak Park Heights. Indeed, the City had to go to court to protect its municipal consent rights under state law. On October 18, 2007, the Washington County District Court issued an opinion upholding the City’s right to proceed under the municipal consent statutes that were in effect at the time of the 1995 Proposal. The basis for the court’s ruling was that the Proposed Bridge “*is materially and substantially the same project as it was in 1995* when it was first submitted for municipal approval.” *City of Oak Park Heights v. State*, Case No. 82-C0-06-006815, Order at 5 (Oct. 18, 2007) (emphasis added), Ex. C.

Indeed, the Proposed Bridge bears remarkable similarities to the 1995 Proposal that was rejected by the National Park Service. Among other things:

- a) Both the Proposed Bridge project and the 1995 Proposal call for the construction of a four-lane highway bridge that would span the Lower St. Croix National Scenic Riverway.
- b) Both the Proposed Bridge and the 1995 Proposal would be placed in an entirely new transportation corridor, one that had never been previously developed.
- c) Both the Proposed Bridge and the 1995 Proposal would rise more than 100 feet above the river.

d) The width of the two bridges is nearly identical: 104 feet for the 1995 Proposal and a total width of 118 feet (including the cable tie-in areas) for the Proposed Bridge.

e) The length of the Proposed Bridge is even greater than its 1995 predecessor: 3930 feet for the 1995 Proposal and 4953 feet for the Proposed Bridge.

f) The Proposed Bridge is in nearly the same location as the 1995 Proposal.

g) Both the Proposed Bridge and the 1995 Proposal call for the construction of several large piers in the Lower St. Croix riverbed. The 1995 Proposal contemplated eight piers, and while the final design for the Proposed Bridge has not been announced, the FHWA estimates that the Proposed Bridge will require at least four to six piers in the riverbed.

*See* Complaint ¶ 74 (listing citations).

In an effort to draw some distinction between these two proposals, the transportation agencies offered several mitigation items, including the use of a “context sensitive” bridge design, the removal of a shoreline barge facility and some nearby industrial buildings, some limited bluffland restoration and purchases, and the conversion of the Stillwater lift bridge from vehicular to pedestrian and bike traffic. *See* 2005 Section 7 Evaluation at 8-9. The NPS had previously found that such mitigation efforts could not offset the negative effects of a massive new bridge. *See* 1996 Section 7 Evaluation at 63. Yet, inexplicably, the NPS reached the opposite conclusion in the Section 7 Evaluation it issued in October 2005. *See* 2005 Section 7 Evaluation at 45, 49, 50-52.

In its 2005 Section 7 Evaluation, the NPS identified two contingencies that must occur in order for the decision to become final. The first contingency was the Visual Quality Planning Process, 2005 Section 7 Evaluation at 45, 49, 51, which concluded in

January 2007. *See* Ex. D (handout for the final open house of the Visual Quality Planning Process). The second contingency was that the NPS sought assurances that the mitigation items would be implemented. 2005 Section 7 Evaluation at 51-52. That issue was addressed in April 2006, when the NPS, FHWA, state DOTs, and Minnesota and Wisconsin Departments of Natural Resources entered into a Memorandum of Understanding for the Implementation of Riverway Mitigation Items. *See* Ex. E. Because the Proposed Bridge did not change materially between the supplemental draft EIS and the Record of Decision, it appears that the NPS's "draft determination [now] stand[s]." 2005 Section 7 Evaluation at 52.

#### **E. Sierra Club's Lawsuit**

On December 5, 2006, the FHWA published a Notice in the Federal Register. *See* 71 Fed. Reg. 70580. That Notice was premised on the statute of limitations set forth at 23 U.S.C. § 139(*I*)(1), which was enacted in 2005. *See* Pub.L. 109-59, Title VI, § 6002(a), 119 Stat. 1857 (Aug. 10, 2005).

The Notice announced that "[a] claim seeking judicial review of the Federal agency actions of the highway project will be barred unless the claim is filed on or before June 6, 2007." 71 Fed. Reg. at 70580. Consistent with the FHWA's instruction, Sierra Club filed this lawsuit on June 5, 2007 – one day *before* the agency's self-announced deadline.

In its complaint, Sierra Club brought seven claims against the FHWA and the NPS:

- Count I alleges violations of the Wild and Scenic Rivers Act and the Lower

St. Croix Management Plan because the Proposed Bridge project creates a new transportation corridor without restoring the existing corridor to natural conditions. Complaint ¶¶ 93-99.

- Count II alleges violations of the WSRA because the NPS’s 2005 Section 7 Evaluation arbitrarily concluded that the Proposed Bridge project would not “have a direct and adverse effect on” the Lower St. Croix’s scenic, recreational, and wildlife values. *Id.* ¶¶ 100-04 (quoting 16 U.S.C. § 1278(a)).
- Count III is stated in the alternative: If the NPS’s 2005 Section 7 Evaluation was not final agency action, Count III alleges that the NPS’s failure to issue a Section 7 determination represents “agency action unlawfully withheld or unreasonably delayed.” *Id.* ¶¶ 105-11 (quoting 5 U.S.C. § 706(1)).
- Count IV alleges violations of the WSRA, Organic Act, and General Authorities Act because the NPS’s approval of the Proposed Bridge is contrary to the non-degradation and non-impairment policies promulgated under those statutes. *Id.* ¶¶ 112-17.
- Count V alleges violations of the WSRA because the NPS’s grant of a new right-of-way for the Proposed Bridge does not protect the qualities for which the Lower St. Croix was designated a wild and scenic river. *Id.* ¶¶ 118-21.
- Count VI alleges that the FHWA violated Section 4(f) of the Transportation Act by 1) approving the Proposed Bridge without adequately considering alternatives that could have avoided use of the Lower St. Croix Riverway, and 2) approving a project that does not minimize harm to the Riverway. *Id.* ¶¶ 122-28.
- Count VII alleges that the FHWA violated the National Environmental Policy Act due to inadequacies in the EISs and Record of Decision. *Id.* ¶¶ 129-34.

For the Court’s convenience in analyzing this Motion, this brief refers to Counts I-V as the “NPS claims” and Counts VI-VII as the “FHWA claims.”

## LEGAL STANDARD

Dismissal for lack of subject matter jurisdiction under Federal Rule of Procedure 12(b)(1) will not be granted lightly. *Wheeler v. St. Louis Sw. Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996). Because Defendants’ Motion seeks dismissal on two distinct grounds, two different standards of review apply.<sup>2</sup> Defendants’ statute of limitations challenge to the FHWA claims is based on the pleadings and therefore presents a facial challenge to jurisdiction. *Gilmore v. Northwest Airlines, Inc.*, 504 F. Supp. 2d 649, 653 (D. Minn. 2007). In a facial attack, “all of the factual allegations concerning jurisdiction are presumed to be true.” *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). The non-moving party is entitled to the same protections it would have in defending against a Rule 12(b)(6) motion. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003); *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Defendants’ ripeness challenge to the NPS claims presents a factual attack. For a factual attack, the court may consider materials outside the pleadings and the non-moving party does not receive the 12(b)(6) safeguards. *Osborn*, 918 F.2d at 729 n.6.

## ARGUMENT

In their Motion, Defendants argue that dismissal is warranted because this lawsuit was filed after the statute of limitations had run, and because Sierra Club’s claims against

---

<sup>2</sup> Sierra Club understands Defendants to be requesting that Counts VI and VII (the FHWA claims) be dismissed with prejudice, and Counts I, II, III, IV, and V (the NPS claims) be dismissed without prejudice. *See* Mot. at 39 (“[T]his Court should dismiss the action without prejudice for lack of subject matter jurisdiction.”).

the NPS are unripe. Both contentions are without merit.

First, Defendants incorrectly assert that equitable tolling and estoppel are unavailable for the statute of limitations in 23 U.S.C. § 139(*I*)(1). To the contrary, well-settled Supreme Court precedent demonstrates that the limitations period can be equitably modified. And in this case, the FHWA's misrepresentation of the filing deadline justifies equitable relief.

Second, although the NPS characterized its 2005 Section 7 Evaluation as a "draft," this Evaluation is final agency action ripe for review under the Administrative Procedure Act ("APA"). Moreover, if the Section 7 Evaluation was not final, then the FHWA's Record of Decision was issued prematurely and should be suspended pending the outcome of the Section 7 process. And even if this Court accepts Defendants' representation that the NPS's 2005 Section 7 Evaluation is not final agency action, one of Sierra Club's claims would nevertheless survive: Count III alleges that the NPS's failure to conduct an evaluation is "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see* Complaint ¶¶ 105-11. There are thus no circumstances under which this lawsuit can be dismissed in its entirety.

**I. SIERRA CLUB'S CLAIMS AGAINST THE FHWA SHOULD BE EQUITABLY TOLLED.**

**A. 23 U.S.C. § 139(*I*)(1) Is An Ordinary Statute of Limitations Subject To Equitable Modification.**

The core of Defendants' argument for dismissal is that equitable tolling and equitable estoppel are unavailable under 23 U.S.C. § 139(*I*)(1). *See* Mot. at 20-28. But

well-settled case law establishes that a statute of limitations like the one set forth at 23 U.S.C. § 139(*I*)(1) is subject to equitable modification.

The availability of equitable tolling in this case is controlled by *Irwin v. Department of Veterans Affairs*, which involved the statute of limitations for Title VII of the Civil Rights Act of 1964. 498 U.S. 89 (1990). In *Irwin*, the Supreme Court found that equitable tolling was available, and further announced a “general rule to govern the applicability of equitable tolling in suits against the Government.” *Id.* at 95. The *Irwin* Court then created a “rebuttable presumption of equitable tolling applicable . . . to suits against the United States.” *Id.* at 95-96. The Court explained that this rule was “a realistic assessment of legislative intent as well as a practically useful principle of interpretation.” *Id.* at 95. Thus, under *Irwin*, courts should presume that equitable tolling is available in suits against the federal government unless Congress has specifically provided otherwise. *Id.* at 96 (“Congress, of course, may provide otherwise if it wishes to do so.”).

In this case, there is little question that equitable tolling is available under 23 U.S.C. § 139(*I*)(1). In answering that question, the first step is to apply the rebuttable presumption in favor of equitable tolling. *Irwin*, 498 U.S. at 95-96. Thus, unless Congress specified otherwise, this Court should presume that equitable tolling is available. And here there is nothing in this straightforward statute to suggest that Congress intended to foreclose the availability of equitable tolling. *See* 23 U.S.C. § 139(*I*)(1) (“[A] claim arising under Federal law seeking judicial review . . . shall be barred unless it is filed within 180 days after publication of a notice in the Federal

Register . . .”). Defendants point to the “shall be barred” language as implying that equitable tolling is unavailable. *See* Mot. at 27-28. But the Supreme Court rejected that line of reasoning in *Irwin*, where the Court compared the “shall be barred” language in one statute with the less emphatic language found in another statute of limitations. The Court concluded that although “[a]n argument can undoubtedly be made that the [‘shall be barred’] language is more stringent[,] . . . we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling.” 498 U.S. at 95. Because there is nothing to rebut *Irwin*’s presumption, equitable tolling is available under 23 U.S.C. § 139(*l*)(1).

Defendants nevertheless insist that equitable tolling is unavailable because this limitations period was set forth in a *statute*. Mot. at 20-28. Defendants’ principal authority for this argument is the Supreme Court’s decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). *Bowles*, however, is inapposite. For one thing, *Bowles* did not involve a statute of limitations at all. Rather, that case concerned the time limits for filing a notice of appeal, a requirement that the Supreme Court had long held was mandatory and could not be enlarged. *Bowles*, 127 S. Ct. at 2363 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982)). The *Bowles* majority made no attempt to extend its holding to statutes of limitations generally, and indeed, did not even cite *Irwin*.

The Supreme Court recently confirmed that *Bowles* did not upset its longstanding statute of limitations jurisprudence in *John R. Sand & Gravel Company v. United States*, which recognized *Irwin*’s continuing durability. Case No. 06-1164, 552 U.S. \_\_\_, 2008 WL 65445 at \*5-6 (Jan. 8, 2008) (citing *Irwin* with approval). In *John R. Sand & Gravel*,

the Supreme Court concluded that equitable tolling was unavailable for the special statute of limitations governing the Court of Federal Claims. In a line of pre-*Irwin* cases, the Court had definitively found that this particular statute was not subject to equitable modification. Contrasting this statute with other statutes of limitations (to which the *Irwin* presumption would apply), the Supreme Court applied *stare decisis* and adhered to its pre-*Irwin* interpretation of the Court of Claims statute. 2008 WL 65445 at \*6-7.

The unpersuasiveness of Defendants' position is further underscored by the necessary implications of their argument. Because all statutes of limitations are, by definition, statutory, Defendants suggest that equitable tolling and equitable estoppel are *never* available under federal law. Under Defendants' theory, federal courts simply cannot equitably modify a statute of limitations enacted by Congress. Mot. at 20, 27, 28-29.

This theory would not only cripple the judiciary's power to prevent unfair and harsh results, but it would also do considerable violence to congressional intent. The 1990 *Irwin* decision announced a "general rule" that equitable tolling would be presumed unless Congress specified otherwise. *Irwin*, 498 U.S. at 95-96; *see also John R. Sand & Gravel*, 2008 WL 65445 at \*5 ("*Irwin* recognized that it was announcing a general prospective rule."). Thus, for nearly two decades Congress has been legislating against the backdrop of *Irwin*'s presumption, secure with the knowledge that equitable tolling would be available unless it specifically provided otherwise. Among others, 23 U.S.C. § 139(l)(1) – the very statute at issue here – was enacted under the *Irwin* presumption. *See* Pub. L. 109-59, 119 Stat. 1857 (Aug. 10, 2005). Defendants, however, urge this Court to

adopt the *opposite* presumption: “Courts . . . should not read or imply into those statutes any equitable modifications unless Congress has clearly manifested an intention that the courts are free to so.” Mot. at 27. Adopting the rule advocated by Defendants would directly undermine Congress’s understanding that many of their post-1990 statutes of limitations – like the one at issue here – were subject to equitable tolling. *See Young v. United States*, 535 U.S. 43, 49-50 (2002) (citing the *Irwin* rule and noting that “Congress must be presumed to draft limitations periods in light of this background principle”).

Defendants also attempt to minimize *Irwin*’s relevance by arguing that “[t]he rationale underpinning *Irwin* does not apply in this case” because the *Irwin* presumption only applies to lawsuits against the government that have a private analogue. Mot. at 22-23 (“[H]ere, there is no private analog among private parties to a suit for judicial review of agency action . . .”). This argument is wholly without merit. First, the ruling in *Irwin* itself made no such distinction. Instead, the Court there announced a “*general rule* to govern the applicability of equitable tolling in suits against the Government.” 498 U.S. at 95 (emphasis added). The breadth of *Irwin*’s holding cannot be squared with the narrow interpretation urged by Defendants.

Moreover, the Supreme Court has already rejected the very argument Defendants advance. In *Scarborough v. Principi*, the Court considered the limitations period for seeking fees and costs from the federal government under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B). 541 U.S. 401 (2004). The Court first reaffirmed *Irwin*’s rule that “limitations principles should generally apply to the Government ‘in the same way that’ they apply to private parties.” *Id.* at 421 (citing *Irwin*). The Court then

considered the government’s argument that *Irwin* does “not bear on this case, for § 2412(d) authorizes fee awards against the government under rules that have no analogue in private litigation.” *Id.* at 421-22 (alteration omitted). The Court responded that

it is hardly clear that *Irwin* demands a precise private analogue. Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government’s engagements with private persons--matters such as the administration of benefit programs. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*’s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.

*Id.* at 422. This Court should likewise reject Defendants’ effort to cabin *Irwin* in this fashion.

Defendants also suggest that *Irwin* is no longer good law. Mot. at 22-27. In support of this argument, Defendants cite *United States v. Brockamp*, 519 U.S. 347 (1997), as well as decisions from the Eighth Circuit Court of Appeals. But here again, Defendants misconstrue the law. The Eighth Circuit, of course, has no power to overrule Supreme Court precedent. And far from disavowing *Irwin*, the Supreme Court has reaffirmed that decision multiple times, as recently as last week. *See John R. Sand & Gravel*, 2008 WL 65445 at \*5-6 (citing *Irwin* with approval); *see also Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (“In suits against the United States . . . there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States’ immunity.”); *Young*, 535 U.S. at 49 (citing *Irwin* for the “hornbook” rule “that limitations periods are customarily subject to equitable tolling”) (quotation marks omitted); *Scarborough*, 541 U.S. at 420-22 (citing *Irwin* with approval).

As the Supreme Court recently observed in *John R. Sand & Gravel*, “[c]ourts do not normally overturn a long line of earlier cases without mentioning the matter.” 2008 WL 65445 at \*5. There is simply no basis for Defendants’ suggestion that *Irwin*’s “continued viability . . . is uncertain.”<sup>3</sup>

Nor do the Eighth Circuit authorities cited by Defendants support their assertion that equitable tolling is unavailable for 23 U.S.C. § 139(l)(1). Defendants rely heavily on *Loudner v. United States*, Mot. at 20, 24, but that case neither cites *Irwin* nor discusses equitable tolling at all. See 108 F.3d 896, 900 & n. 1 (8th Cir. 1997).<sup>4</sup> *Ingram v. United States*, 443 F.3d 956 (8th Cir. 2006), is similarly unhelpful to Defendants’ cause. For one thing, nothing in *Ingram* undermines the rebuttable presumption established in *Irwin*. And even if 23 U.S.C. § 139(l)(1) could be construed as “jurisdictional,” that would not

---

<sup>3</sup> The holding in *Brockamp* itself was based on the specific characteristics of the tax refund statute, 26 U.S.C. § 6511. There, the Supreme Court found that this statute’s “detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate . . . that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute that it wrote. There are no counter-indications.” *Brockamp*, 519 U.S. at 352. The Court also noted the enormous practical problems that would result if equitable tolling were available for tax refund claims. *Id.* at 352-53. Any doubts as to *Irwin*’s continuing viability have been erased by the Supreme Court’s more recent decisions. See, e.g., *Young*, 535 U.S. at 49; *Raygor*, 534 U.S. at 543.

<sup>4</sup> Defendants suggest that *Loudner* held that equitable tolling is unavailable under the six-year statute of limitations set forth at 28 U.S.C. § 2401(a). Mot. at 23-24 & n.4. *Loudner*, which involved the accrual of claims for purposes of *starting* the limitations period, held nothing of the sort. Moreover, other courts have expressly found that this statute of limitations is subject to equitable modification. See, e.g., *Bertin v. United States*, 478 F.3d 489, 494 n.3 (2d Cir. 2007) (“We have previously held that equitable tolling may be available for actions against the federal government, and may toll the catch-all statute of limitations, 28 U.S.C. § 2401(a).”) (citation omitted).

foreclose the availability of equitable tolling, because *Ingram* found “no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling.” 443 F.3d at 961. Indeed, *Ingram* itself found that equitable tolling was available under the “jurisdictional” statute of limitations for FTCA claims. *Id.* at 961, 963.<sup>5</sup> Accordingly, there is no basis for concluding that equitable tolling or estoppel is unavailable for 23 U.S.C. § 123(D)(1).

**B. The Statute of Limitations Should Be Tolloed To Permit Sierra Club’s Claims.**

Sierra Club is entitled to equitable tolling here. In its Federal Register Notice, the FHWA expressly invited legal challenges filed “on or before June 6, 2007.” 71 Fed. Reg. at 70580. Sierra Club complied with this instruction, filing suit on June 5, 2007. Yet, notwithstanding that announcement, made in the federal government’s official publication for agency rules and notices, Defendants now argue that Sierra Club’s claims against the FHWA should be barred because they were not filed by June 4. Mot. at 28.

There are only two possible explanations for the FHWA’s publication of a false deadline in the Federal Register, and Sierra Club is entitled to equitable relief under either circumstance. If, as Defendants now claim, the FHWA’s Federal Register Notice was an innocent mistake, *see* Mot. at 30, then Sierra Club’s claims should be equitably

---

<sup>5</sup> As a “shorthand,” the Supreme Court has sometimes described statutes for which equitable tolling is unavailable as “jurisdictional.” *See John R. Sand & Gravel*, 2008 WL 65445 at \*3. Whether or not *Ingram* is in tension with that view is immaterial to this case. The *Irwin* rule remains good law, and equitable tolling is available under Eighth Circuit precedent.

tolled. But if, in fact, the FHWA deliberately published the wrong date or consciously failed to correct the error, then Sierra Club's claims should be permitted under equitable estoppel.

A statute of limitations may be equitably tolled due to "the plaintiff's excusable neglect, which may or may not be attributable to the defendant." *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998) (citing *Anderson v. Unisys Corp.*, 47 F.3d 302, 306 (8th Cir. 1995)). Thus, for example, equitable tolling may be appropriate where "a claimant has received inadequate notice, . . . [or] where affirmative misconduct on the part of the defendant lulled the plaintiff into inaction." *Warren v. Dep't of the Army*, 867 F.2d 1156, 1159-60 (8th Cir. 1989) (quoting *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)). In considering whether to equitably toll the statute of limitations, courts "must consider both the conduct of the plaintiff and the prejudice to the defendant." *Koss v. YMCA of Metro. Minneapolis*, 504 F. Supp. 2d 658 (D. Minn. 2007); *see also Baldwin County*, 466 U.S. at 152 (noting that "absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply").

In this case, Sierra Club's FHWA claims should be equitably tolled because the FHWA – through its publication of a misleading Federal Register notice – "lulled the plaintiff into inaction." *Warren*, 867 F.2d at 1160 (quoting *Baldwin County*, 466 U.S. at 151); *see also Schlueter*, 132 F.3d at 458-59 (holding that an agency's mistaken beliefs, which were communicated to the plaintiff, justified equitable tolling); *Anderson*, 47 F.3d at 306-07 ("[W]hen an administrative agency misleads a complainant, particularly one

who is without the benefit of counsel, equitable tolling may be justified.”);<sup>6</sup> *Irwin*, 498 U.S. at 96 (“[W]e have allowed equitable tolling in situations . . . where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”). In its Federal Register Notice, the FHWA specifically directed that legal challenges be “filed on or before June 6, 2007.” 71 Fed. Reg. at 70580. By filing this case on June 5, Sierra Club satisfied that requirement.

Even assuming that publication of the wrong date was a mistake, the FHWA had a federally-mandated duty to review this Federal Register Notice and ensure that any errors were corrected. *See* 1 C.F.R. § 18.15(b) (“The issuing agency shall review published documents and notify the Office of the Federal Register of printing errors found in published documents.”). When an agency’s mistake lulls a plaintiff into inaction, that is a sufficient basis for equitable tolling. *See Schlueter*, 132 F.3d at 459 (noting that the agency’s belief “were mistaken, and we will not hold Schlueter responsible for the EEOC’s mistake”). Here, where the agency itself is the defendant, it would be especially inequitable to allow the FHWA to profit from its own mistake. Indeed, had the FHWA properly discharged its duty to review the Federal Register Notice, in all likelihood the agency would have republished the Notice at a later date, thereby triggering a new 180-day limitations period, and Sierra Club’s June 5 filing would have fallen within that time

---

<sup>6</sup> Although equitable tolling is granted more readily in cases where the plaintiff is unrepresented, *Anderson*, 47 F.3d at 306, representation by counsel does not preclude equitable relief. *See Schlueter*, 132 F.3d at 459 n.3.

period. *See, e.g.*, 71 Fed. Reg. 59410 (Oct. 10, 2006) (correcting errors in a prior notice of proposed rulemaking and reopening comment period).<sup>7</sup>

Equitable tolling is particularly appropriate in this case because there is no prejudice resulting from the one-day delay. *Koss*, 504 F. Supp. 2d at 662 (tolling the statute of limitations where the “YMCA has not alleged any prejudice that results from the Court extending the limitations period”).<sup>8</sup> Defendants have made no such allegation, nor could they. As the Federal Register Notice makes clear, the FHWA itself anticipated that claims against it could be filed up until June 6, 2007. 71 Fed. Reg. at 70580. Thus, because Sierra Club filed its complaint within the time period that Defendants themselves expected, they cannot claim to have been prejudiced by the untimely filing. Finally, the minimal length of the delay – one day – militates in favor of equitable tolling. In this respect, Sierra Club’s suit is analogous to *Koss*, where the Court found no prejudice resulting from a three-day delay. 504 F. Supp. 2d at 662.

---

<sup>7</sup> Defendants cite *Bowles* in arguing that Sierra Club is not entitled to equitable tolling. Mot. at 30. But *Bowles* has no bearing on this issue, because the time limit there was not subject to equitable modification – no matter how compelling the circumstances. *Bowles*, 127 S. Ct. at 2366. Here, by contrast, equitable tolling *is* available.

<sup>8</sup> Applying South Dakota law, the Eighth Circuit recently noted that “reasonable, good-faith conduct by the plaintiff” is relevant to the equitable tolling inquiry. *Pecoraro v. Diocese of Rapid City*, 435 F.3d 870, 875 (8th Cir. 2006). In this case, Sierra Club attempted to comply with the statute of limitations in good faith by filing its lawsuit “on or before June 6, 2007” – as directed by the FHWA. 71 Fed. Reg. at 70580. *See also United States v. \$39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929, 932 (W.D. Tex. 2002) (applying equitable tolling where “the Government’s good faith reliance on the July 27 date-stamp caused it to miss the filing deadline by one day,” and where the Government “made every effort to comply with both the spirit and the letter of the law and was clearly not attempting to frustrate the purpose of the statutory deadline”).

Alternatively, if equitable tolling is not appropriate here, then equitable estoppel is. As noted above, there are only two possible explanations for the FHWA's misleading Federal Register Notice: either it was a mistake or it was intentional. Regardless, the FHWA had a federally-mandated duty to inspect this Notice and identify any errors. *See* 1 C.F.R. § 18.15(b). Although the agency probably never reviewed the Notice at all, it is also possible that the FHWA learned of the mistake but chose not to correct it. Correcting the error would have likely required the publication of a revised notice, thereby extending the period of time during which a legal challenge could be brought. And because the FHWA controlled the decision whether to publish a Federal Register Notice, as well as the timing of the Notice, the agency may have deliberately kept silent about the error in an effort to restrict opportunities for judicial review.<sup>9</sup> Thus, if this Court concludes that the publication of an erroneous date – or the FHWA's failure to correct it – was knowing conduct, then equitable estoppel should be applied.

Under the doctrine of equitable estoppel, non-compliance with the statute of limitations can be excused “when a defendant takes active steps to prevent a plaintiff from suing on time.” *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (citations omitted). The focus of the equitable estoppel inquiry is “whether the

---

<sup>9</sup> The decision whether to publish a Federal Register Notice, and thereby invoke the 180-day statute of limitations, is left to the discretion of the FHWA. *See* SAFETEA-LU Environmental Review Process Final Guidance at 65 (Nov. 15, 2006), *available at* <http://www.fhwa.dot.gov/hep/section6002/section6002.pdf> (The “decision whether to use the [statute of limitations] notice process is one that the FHWA Division Office will make in consultation with the other lead agencies.”).

defendant should be able to take advantage of his misleading statement upon which the plaintiff had detrimentally relied.” *Id.* at 1329 n. 3 (citing *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959)); *Immanual-St. Joseph’s Hosp. v. Leavitt*, No. 06-1039 (PAM/JSM), 2007 WL 2108761 at \*4 (D. Minn. July 18, 2007) (“The Eighth Circuit Court of Appeals has found affirmative misconduct in cases where government agencies have actively misled complainants by providing them with inaccurate or misleading information.”).<sup>10</sup> Thus, to the extent that the FHWA intentionally published an erroneous date, or opted not to correct that error, the agency should be estopped from taking advantage of its own misconduct.

The decision whether to apply either equitable tolling or equitable estoppel ultimately requires a “case-by-case analysis, the ‘balancing of the equities.’” *Dring*, 58 F.3d at 1330. In this case, the FHWA invokes the statute of limitations to bar a complaint that, but for the FHWA’s misleading Federal Register Notice, would have been filed within the limitations period, which the FHWA has discretion to trigger. Whether accidental or intentional, the FHWA should not be allowed to profit from its own misrepresentation in connection with a discretionary act. Sierra Club thus requests this

---

<sup>10</sup> Defendants cite *Bensman v. United Forest Service*, 408 F.3d 945 (7th Cir. 2005), in urging the Court not to apply equitable tolling and equitable estoppel. In *Bensman*, the Seventh Circuit reviewed for clear error a district court’s refusal to equitably modify a limitations period. Defendants’ reliance on this out-of-Circuit precedent is misplaced, because the Eighth Circuit has consistently recognized that equitable tolling or estoppel is appropriate where a government agency or the defendant misleads the plaintiff. *See, e.g., Schlueter*, 132 F.3d at 458-59; *Anderson*, 47 F.3d at 306-07; *Dring*, 58 F.3d at 1329.

Court to apply equitable tolling or equitable estoppel, and permit it to litigate its claims against the FHWA.<sup>11</sup>

## **II. THE NPS CLAIMS ARE RIPE FOR ADJUDICATION.**

In addition to seeking dismissal of the FHWA claims, Defendants argue that Sierra Club's claims against the NPS (Counts I-V) should be dismissed for lack of ripeness. In doing so, Defendants implicitly concede that the NPS claims are not time-barred under 23 U.S.C. § 139(l)(1). *See* Mot. at 39 (seeking dismissal without prejudice).<sup>12</sup> Nevertheless, Defendants are wrong in contending that these claims are unripe, because although the NPS characterized its 2005 Section 7 Evaluation as a "draft," that evaluation represents final agency action. And even *if* Sierra Club's claims were otherwise unripe, Count III remains ripe for review.

### **A. Section 7 Of The Wild And Scenic Rivers Act**

Understanding why Sierra Club's NPS claims are ripe requires some additional background on Section 7 of the WSRA. As noted above, Section 7 mandates that no

---

<sup>11</sup> If the Court is disinclined to apply equitable tolling or estoppel based on the motion papers, Sierra Club requests discovery and/or an evidentiary hearing so it can learn the circumstances surrounding the FHWA's publication of, and failure to correct, the Federal Register Notice. This factfinding would reveal the extent to which the FHWA's conduct was deliberate and therefore subject to equitable estoppel. *See Osborn*, 918 F.2d at 730 (noting the appropriateness of an evidentiary hearing to resolve factual questions in the context of a Rule 12(b)(1) motion).

<sup>12</sup> Regardless of the Court's disposition of the FHWA claims, Sierra Club's claims against the NPS are not affected by the statute of limitations. Defendants acknowledged this by seeking dismissal based on lack of ripeness. Moreover, the FHWA's Federal Register Notice omits any mention of the National Park Service or claims under the

(continued on next page)

federal agency “shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.” 16 U.S.C. § 1278(a). Section 7 thus requires the NPS to evaluate whether a “water resources project” – such as the Proposed Bridge – “would have a direct and adverse effect” on the Lower St. Croix’s “outstandingly remarkable scenic, recreational, and geologic values.” Complaint ¶ 22. If the NPS finds that the water resources project would result in a direct and adverse effect, then any federal funding or authorization of that project is prohibited. 16 U.S.C. § 1278(a).

Because other federal agencies may neither authorize nor fund water resources projects that adversely affect the Lower St. Croix, it is axiomatic that the NPS must complete its Section 7 evaluation *before* another agency approves or funds such a project. To construe the statute otherwise would render Section 7 meaningless.

In the litigation over the 1995 Bridge Proposal, Defendants recognized that the NPS must complete a Section 7 evaluation before another federal agency authorizes or funds a water resources project. There, the FHWA had issued a Record of Decision in July 1995, before a Section 7 evaluation had been completed. *See* Record of Decision: TH 36/STH 64, New St. Croix River Crossing (July 10, 1995), Ex. F. Sierra Club subsequently filed suit, claiming, among other things, that the NPS violated the WSRA

---

(continued from previous page)

WSRA, General Authorities Act, Organic Act, or their implementing regulations and policies. *See* 71 Fed. Reg. 70580-81.

by failing to prepare a Section 7 evaluation. *Peña*, 1 F. Supp. 2d at 975. After the NPS announced its intent to complete an evaluation, the FHWA “rescinded its authorization of the Project pending the outcome of the Section 7 determination.” *Id.*; *see also* Letter from Alan R. Steger, FHWA, to James N. Denn, Minnesota Department of Transportation, Oct. 2, 1996, Ex. G (noting that the FHWA would reconsider its authorization of the 1995 Proposal “[u]pon completion of the Section 7 determination by the NPS”). By doing so, the Federal Government acknowledged the need for the NPS to complete the Section 7 evaluation before the FHWA approves a water resources project.<sup>13</sup>

Here, however, the NPS did not release a final Section 7 evaluation prior to the FHWA’s issuance of a Record of Decision in November 2006. *See* Complaint ¶ 73; Answer ¶ 73. Instead, the NPS issued what it styled as a “Draft Section 7(a) Evaluation” in October 2005, and it produced no additional WSRA-related documents before the FHWA published the Record of Decision. *See generally* Hanson Decl., Ex. B (copy of the 2005 Section 7 Evaluation). In light of the WSRA’s statutory scheme, which requires the NPS to make a Section 7 determination before another federal agency approves a

---

<sup>13</sup> Defendants also implicitly conceded this point in their Answer to Sierra Club’s Complaint. In reference to the 1995 Proposal, Sierra Club stated that the NPS’s adverse “Section 7 determination precluded the Federal Highway Administration . . . from assisting in or *authorizing construction of the bridge.*” Complaint ¶ 5 (emphasis added). Defendants admitted this allegation, Answer ¶ 5, thereby acknowledging that the FHWA cannot approve a bridge if the NPS issues a negative Section 7 evaluation. A necessary corollary of that point is that no Record of Decision for a “water resources project” can

(continued on next page)

water resources project, the NPS’s actions can only be construed in one of two ways: either the NPS’s “Draft” Section 7 evaluation was, de facto, a *final* Section 7 evaluation, or the NPS simply did not complete a Section 7 evaluation before the Record of Decision was released. As discussed below, Sierra Club believes that the 2005 Section 7 Evaluation was, in truth, a final agency decision. But if it was not, then the NPS’s inaction violated federal law and Count III of the Complaint is ripe for adjudication.

Moreover, if this Court accepts Defendants’ representation that the 2005 Section 7 Evaluation is merely a draft unripe for review, then the Record of Decision was unlawfully issued. To remedy this outright violation of Section 7, the Court should direct the FHWA to rescind the Record of Decision “pending the outcome of the Section 7 determination” – just as the FHWA did in *Peña*. 1 F. Supp. 2d at 975; *see also* Ex. G (explaining that the FHWA would reconsider its authorization of the 1995 Proposal “[u]pon completion of the Section 7 determination”). If the FHWA refuses to do so, Sierra Club requests that the Court vacate the Record of Decision *sua sponte*. *See* Complaint, Request for Relief ¶ 6;

**B. Counts I, II, IV, And V Are Ripe For Review.**

With limited exceptions discussed below at II.C, judicial review under the Administrative Procedure Act (“APA”) is generally confined to final agency action. *See* 5 U.S.C. § 704. An agency’s action is “final” for purposes of the APA if two conditions

---

(continued from previous page)

be issued *until* the NPS has determined whether or not the project will adversely affect the river’s values. 16 U.S.C. § 1278(a).

are met: First, “the action must mark the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Second, “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 178 (citation omitted). In determining whether a claim is ripe, courts examine “the state of the case at the time of review, not at the time of filing.” *Public Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005) (citations omitted).

**1. The 2005 Section 7 Evaluation Was Final Agency Action.**

In this case, notwithstanding the 2005 Section 7 Evaluation’s purportedly “draft” status, that Evaluation represented “the ‘consummation’ of the agency’s decisionmaking process.” *Bennett*, 520 U.S. at 178. In its Evaluation, the NPS determined that the Proposed Bridge, “when taken along with its mitigation package would not have a direct and adverse effect on the scenic and recreational values” of the Lower St. Croix, so long as the mitigation package was incorporated into the Proposed Bridge project. 2005 Section 7 Evaluation at 51. The NPS issued no further evaluation prior to the FHWA’s release of the Record of the Decision. And because the Record of Decision authorized a “water resources project” within the meaning of Section 7, 16 U.S.C. § 1278(a), the 2005 Section 7 Evaluation was, for all practical purposes, the culmination of the NPS’s decisionmaking process.

In their Motion to Dismiss, Defendants point to several contingencies which, they claim, demonstrate the 2005 Evaluation’s tentative nature. *See generally* Mot. at 33-34.

Of course, none of these contingencies obviate the fact that the FHWA has already authorized the Proposed Bridge.

But regardless, Defendants' argument is meritless, because the contingencies they point to have already occurred. The first contingency was that the Section 7 Evaluation would "be reexamined in light of the outcome of the Visual Quality Planning Process." 2005 Section 7 Evaluation at 51; *see also id.* at 45, 49. That process ended a year ago. *See* Ex. D (handout for the January 18, 2007, final open house of the Visual Quality Planning Process). The second contingency was the NPS's request for assurances that the mitigation measures would be implemented. *See* 2005 Section 7 Evaluation at 51-52. This contingency was resolved in April 2006, when the NPS, FHWA, and several state agencies entered into a Memorandum of Understanding for the Implementation of Riverway Mitigation Items. *See* Ex. E. Thus, because the Visual Quality Planning Process has been completed, and because the mitigation package has been incorporated into the Proposed Bridge project, there are no remaining contingencies and the NPS's "draft determination will stand." 2005 Section 7 Evaluation at 52. This "Draft" Section 7 Evaluation therefore represents the NPS's final word on whether the Proposed Bridge violates the WSRA.<sup>14</sup>

---

<sup>14</sup> Defendants argue that the 2005 Section 7 Evaluation lacks finality because "[i]f the scope of the project or mitigation package should change substantially, the NPS will need to reevaluate the project under Section 7(a)." Mot. at 33 (quoting 2005 Section 7 Evaluation at 51-52). This argument has been repeatedly rejected by the courts. *See, e.g.,* 13A Fed. Prac. & Proc. § 3532.6 (2007) ("[A]ny agency attempt to defeat review by the bare assertion that the agency position may some day change should be summarily

(continued on next page)

Moreover, even assuming Defendants could identify a minor contingency that had not yet occurred – Sierra Club is aware of none – that would not affect the legal significance of the 2005 Section 7 Evaluation. Where, as here, “the agency has issued ‘a definitive statement of its position, determining the rights and obligations of the parties,’ that action is final for purposes of judicial review despite the ‘possibility of further proceedings in the agency’ to resolve subsidiary issues.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 813 (8th Cir. 2006) (citation omitted); *see also South Carolina Wildlife Fed’n v. South Carolina Dep’t of Transp.*, 485 F. Supp. 2d 661, 677 (D.S.C. 2007) (finding a federal highway project ripe for review where the “only remaining step – preparation of a supplemental EIS – is relatively minor”).

The finality of the 2005 Section 7 Evaluation is further demonstrated by the “legal consequences [that] flow” from that decision. *Bennett*, 520 U.S. at 178. Had the NPS issued a negative Section 7 evaluation – as it did for the 1995 Proposal – no further steps could be take towards construction. But instead, the FHWA relied on the NPS’s 2005 Section 7 Evaluation in issuing the Record of Decision in November 2006. And that Record of Decision indisputably has consequences. According to the FHWA, the state DOTs can now begin implementation of the Proposed Bridge project. *See Ex. H* (Secretary of Transportation’s announcement in November 2006 that “preliminary work

---

(continued from previous page)

rejected.”); *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) (“[A]n agency always retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.”).

is beginning on this project”). Indeed, Defendants suggest that with the Record of Decision in hand, the state DOTs could do virtually *everything* but sink piers in the Lower St. Croix or adjacent wetlands. *See* Mot. at 10, 36 (stating that a final Section 7 determination will not be made until the 404 permitting process, and that a 404 permit is needed “[p]rior to any construction in the river”).

It would be unlawful for the FHWA to publish the Record of Decision before the NPS issued a final Section 7 evaluation, *see* Complaint ¶¶ 105-11 (Count III), but the unlawfulness of Defendants’ actions does not obviate the risk of irreparable harm that could result from those actions. The legal consequences of the 2005 Section 7 Evaluation thus demonstrate its finality for purposes of judicial review. *See Nat’l Wildlife Fed’n v. Harvey*, 440 F. Supp. 2d 940, 947 (E.D. Ark. 2006) (finding that a “conditional concurrence letter” by the Fish and Wildlife Service was final agency action because the “letter allowed additional construction and represented an ‘irreversible commitment of agency resources’”).<sup>15</sup>

Defendants nevertheless contend that the NPS need not issue a Section 7 determination until the Corps of Engineers considers whether to issue a permit under

---

<sup>15</sup> Although Sierra Club has heard reports that the Proposed Bridge currently faces funding constraints, that is no obstacle to judicial review. *Corps of Eng’rs*, 446 F.3d at 816 n.3 (noting that judicial review is more appropriate “at the end of the agency’s decision-making process than after Congress has appropriated funds”). In any event, the implementation of this project is no hypothetical concern: Not only did the Secretary of Transportation announce that “preliminary work is beginning,” Ex. H, but the Minnesota DOT has already begun implementing the mitigation package. *See* Annual Project

(continued on next page)

Section 404 of the Clean Water Act. *See* Mot. at 34, 36; *see generally* 33 U.S.C. § 1344 (Section 404). This position cannot be squared with Section 7 of the WSRA, whose entire purpose is prevent the construction of water resources projects “that would have a direct and adverse effect” on the outstandingly remarkable values of a wild and scenic river. 16 U.S.C. § 1278(a). Section 7 precludes the construction of a project that adversely affects the Lower St. Croix’s scenic and recreational values. But if, as Defendants maintain, the NPS’s evaluation could be delayed until the 404 permitting process, the state DOTs could proceed with onshore construction activities that would seriously harm the Lower St. Croix.<sup>16</sup> By then – with the rights-of-way purchased, the Wisconsin bluff destroyed, and the roadway approaches built – the Section 7 evaluation process would be a *fait accompli*: much of the damage would already be done, and the NPS would have little motive to block construction of the bridge. In other words, Defendants’ theory could result in “direct and adverse effect[s]” on the river before the

---

(continued from previous page)

Summary Report 2 (Mar. 1, 2007), Ex. I (noting demolition of the Terra Terminal building).

<sup>16</sup> The situation may have been different if Defendants had been able to provide assurances that the FHWA and state DOTs would not commence any construction activities until the Section 404 permits were issued. But when Sierra Club’s counsel contacted Defendants to request a stipulation, or some other assurances from the federal government that no construction activities would take place pending the outcome of this case, Defendants’ counsel was unable to provide such assurances. Defendants’ counsel informed Sierra Club’s attorney that if the state DOTs could obtain the necessary funding, they could move forward on the Proposed Bridge project.

NPS even evaluates the project. 16 U.S.C. § 1278(a). For the WSRA to have any teeth, the NPS's evaluation must precede the Record of Decision.<sup>17</sup>

By greenlighting the Proposed Bridge, the NPS's 2005 Section 7 Evaluation gave the FHWA the legal authority it needed to publish the Record of Decision. Apparently, the FHWA believed that the NPS's Section 7 Evaluation was final – otherwise it could not have issued the Record of Decision. In doing so, the NPS's actions “alter[ed] the legal regime to which the action agency [*i.e.*, the FHWA] is subject.” *Bennett*, 520 U.S. at 178. The 2005 Section 7 Evaluation thus represents final agency action for purposes of APA review. *Bennett*, 520 U.S. at 177-78.

## **2. The NPS's Actions Satisfy The Ripeness Requirements.**

The NPS's actions are also ripe when analyzed under the standards of *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998). In *Ohio Forestry*, the Supreme Court identified three factors for determining ripeness: “(1) whether delayed review

---

<sup>17</sup> The internal guidance memorandum submitted by Defendants does not affect this conclusion. *See* Mot. at 12; Hanson Decl., Ex. A. This informal document has not gone through notice-and-comment rulemaking, and is not entitled to much deference. *TeamBank, N.A. v. McClure*, 279 F.3d 614, 619 (8th Cir. 2002) (“*Chevron* deference is generally reserved for interpretations reached through ‘relatively formal’ administrative procedures, such as ‘notice-and-comment rulemaking or formal adjudication.’”) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

In any event, it appears that in this case the NPS failed to follow its own procedures. The memorandum calls for a draft Section 7 evaluation to be issued with the draft EIS, and a final Section 7 evaluation to be issued with the final EIS. Hanson Decl., Ex. A at 5. Here, however, the “Draft” 2005 Section 7 Evaluation was included with the *final* EIS, and no further evaluations have been issued. Now that the contingencies identified in the 2005 Section 7 Evaluation have come to pass, this document is apparently final. *See* 2005 Section 7 Evaluation at 52 (“If there is no substantial change, the draft determination will stand.”).

would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Id.* at 733. In this case, all of these factors militate in favor of judicial review.

First, delayed review would cause serious hardship to Sierra Club. *See* 13A Federal Prac. & Proc. § 3532.4 (2007) (“The most important aspect of the hardship determination is a clear recognition that a decision of legal relationships often should be available *before irrevocable commitments are made.*”) (emphasis added); *see also Corps of Eng’rs*, 446 F.3d at 816 (finding ripeness where judicial review was necessary to “ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast”) (citation omitted). Ten years ago, Sierra Club successfully challenged the construction of a bridge that would have destroyed the Lower St. Croix’s scenic and recreational qualities. *Peña*, 1 F. Supp. 2d at 981-83. Rather than learn the lessons of that case, the FHWA and state DOTs have instead proposed a bridge that is identical in all relevant respects to the bridge repudiated by the NPS and this Court in *Peña*. *See supra* at 9-10 (comparison between the 1995 and 2006 bridge proposals); *City of Oak Park Heights*, Ex. C, Order at 5 (recognizing that the Proposed Bridge project “is materially and substantially the same project as it was in 1995”).

The NPS’s 2005 Section 7 Evaluation cleared the way for the FHWA to issue a Record of Decision, and according to Defendants, this Record of Decision allows the state DOTs to begin implementing portions of the very project rejected in *Sierra Club*.

See Ex. H (Secretary of Transportation’s announcement that “preliminary work is beginning on this project’). In doing so, the NPS’s actions have created “legal rights or obligations” that harm Sierra Club’s interests. *Cf. Ohio Forestry*, 523 U.S. at 733 (finding no hardship because the National Forest Plan did not “grant, withhold, or modify any formal legal license, power, or authority”). Moreover, the NPS’s actions “inflict[] significant practical harm upon” Sierra Club’s interests. *Id.* If Sierra Club is forced to wait until the end of the Section 404 permitting process before filing suit, the Lower St. Croix could be irreparably damaged before judicial review even begins.<sup>18</sup>

Second, judicial review would not inappropriately interfere with administrative action. *Ohio Forestry*, 523 U.S. at 735-36. As explained above, the FHWA has already issued its Record of Decision; the Proposed Bridge has been authorized. See *South Carolina Wildlife Fed’n.*, 485 F. Supp. 2d at 671 (finding ripeness for judicial review of a federal highway project “because the primary policy-setting documents have already been produced”). And with the remaining contingencies resolved, and the final project substantially the same as the proposal described in the supplemental draft EIS, the 2005

---

<sup>18</sup> Defendants’ reliance on *Eastern Connecticut Citizens Action Group v. Dole*, 638 F. Supp. 1297 (D. Conn. 1986), is misplaced. See Mot. at 36-37. In *Eastern Connecticut*, there was uncontroverted evidence that the Connecticut Department of Transportation would not begin any construction activities – either within or outside areas that required a Section 404 permit – until all state and federal permits had been issued. 638 F. Supp. at 1299 n.2. *Eastern Connecticut* is thus distinguishable from this case, where Defendants have not provided any assurances that construction activities will await the outcome of the 404 permitting process.

Section 7 Evaluation is now apparently final. 2005 Section 7 Evaluation at 52 (“If there is no substantial change, the draft determination will stand.”).

The fact that some additional permits may be needed for parts of the project does not obviate the finality of the Record of Decision. *See Corps of Eng’rs*, 446 F.3d at 813 (noting that agency action is reviewable “despite the ‘possibility of further proceedings in the agency’ to resolve subsidiary issues”) (citation omitted). Because the FHWA has already signed off on the project, the NPS no longer has “an opportunity to correct its own mistakes.” *Ohio Forestry*, 523 U.S. at 735 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980)).

Finally, this Court would not benefit from further development of the factual record on this issue. The Supreme Court’s decision in *Ohio Forestry* was motivated by the enormous practical problems involved with reviewing an entire National Forest Plan to detect “whether the Plan as a whole was ‘improperly skewed’” towards timber production and clearcutting. *Ohio Forestry*, 523 U.S. at 736. The Court contrasted that situation with judicial review of site-specific projects, explaining that courts would benefit from “[r]eview where the consequences had been reduced to more manageable proportions, and where the factual components were fleshed out, by some concrete action.” *Id.* at 736-37 (quotation marks and alterations omitted).

The concerns expressed by the *Ohio Forestry* Court are absent here. Whereas the Forest Plan in *Ohio Forestry* encompassed 178,000 acres and affected numerous projects that had not even been proposed, Sierra Club is asking this Court to review a site-specific project that the FHWA has already approved. *See also South Carolina Wildlife Fed’n*,

485 F. Supp. 2d at 672 (finding a highway project ripe for review where the transportation agencies “have already chosen the site, millions of dollars have already been appropriated, and an FEIS and record of decision have already been completed”). The 2005 Section 7 Evaluation and Record of Decision are “not some abstract, complicated plan rife with mere potentialities such that the court would have to engage in ‘abstract disagreements over administrative policies.’” *Id.* (citing *Ohio Forestry*, 523 U.S. at 737. There is thus no need for further factual development. This case is ripe.

**C. Even If The NPS Claims Were Otherwise Unripe, Count III Remains Ripe For Review.**

In their Motion, Defendants argue that the NPS claims are unripe because the NPS has not issued a final Section 7 determination. Mot. at 32-34. But Defendants fail to mention Count III of the Complaint, which alleges the alternative claim that the NPS’s failure to finalize its Section 7 determination violates the WSRA and the APA. *See* Complaint ¶¶ 105-11. Because Count III challenges agency action “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), rather than final agency action, this Count is unaffected by Defendants’ ripeness argument.

Under the APA, a plaintiff may seek an order compelling “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see also EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978) (holding that a federal agency unreasonably delayed action in disregard of its legal duty). Here, there is no dispute that NPS has a legal duty under Section 7 of the WSRA to determine whether a proposed water resources project will “have a direct and adverse effect on the values for which

such river was established.” 16 U.S.C. § 1278(a); *see, e.g.*, Mot. at 4. The question presented by Count III is whether the final Section 7 determination has been “unreasonably delayed.” 5 U.S.C. § 706(1).

Assuming, *arguendo*, that the 2005 Section 7 Evaluation is *not* final agency action, Count III alleges that the NPS’s failure to finalize its Section 7 determination violates federal law. Defendants assert that the Section 7 evaluation will occur during the Section 404 permitting process. But waiting until that late hour would foreclose meaningful judicial review of the NPS’s actions. As explained above, the Proposed Bridge has already been approved by the FHWA. Defendants have taken the position that the FHWA’s authorization would allow construction to begin at any time, and that the state DOTs can move forward on much of the project without further federal approval. That possibility prejudices the Sierra Club and the interests it seeks to protect. *See Telecommunications Res. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (in assessing a claim of unreasonable delay, courts should “take into account the nature and extent of the interests prejudiced by delay”). By allowing initiation of construction, Defendants’ theory would allow irreparable harm to the Lower St. Croix before judicial review even begins.

Sierra Club believes that its claims challenging the NPS’s approval of the bridge project (Counts I, II, IV, V) are ripe for judicial review. But even if the Court finds that those claims are not yet ripe, Sierra Club should still be permitted to litigate its claim that the NPS’s failure to issue a final Section 7 determination is “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

**CONCLUSION**

For the foregoing reasons, the motion to dismiss should be denied.

Dated: January 17, 2008

Respectfully submitted,

s/ Michael C. Soules

---

Brian B. O'Neill, MN Bar # 82521

boneill@faegre.com

Richard A. Duncan, MN Bar # 192983

rduncan@faegre.com

Elizabeth H. Schmiesing, MN Bar #  
229258

eschmiesing@faegre.com

Michael C. Soules, MN Bar # 0387936

msoules@faegre.com

Kristen M. Gast, MN Bar # 0346007

kgast@faegre.com

FAEGRE & BENSON LLP

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-3901

(612) 766-7000

(612) 766-1600 (facsimile)

*Attorneys for Plaintiff Sierra Club*