

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Sierra Club North Star Chapter,

Plaintiff,

vs.

**CIVIL NO. 07-2593 (MJD/SRN)**

Ray La Hood, Secretary of  
Transportation; Jeffrey Paniati,  
Federal Highway Administrator; Ken  
Salazar Secretary of the Interior; and  
Daniel Wenk, Director of the National  
Park Service,

Defendants,

**MEMORANDUM OF LAW IN  
SUPPORT OF INTERVENOR-  
DEFENDANT STATE OF  
MINNESOTA DEPARTMENT OF  
TRANSPORTATION'S MOTION  
FOR SUMMARY JUDGMENT**

State of Minnesota Department of  
Transportation,

Intervenor - Defendant,

State of Wisconsin Department of  
Transportation,

Intervenor - Defendant.

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**INTRODUCTION**

Flowing 164 miles and dividing segments of Minnesota and Wisconsin is the Saint Croix River. The southern 52-mile stretch of the river between the dam near Taylors Falls, Minnesota and its confluence with the Mississippi River makes up the Lower Saint Croix River ("Lower Saint Croix"). Based upon its outstanding values, the Lower Saint Croix is protected under the Wild and Scenic Rivers Act ("WSRA"). One of the five crossings of the Lower Saint Croix is the Stillwater Lift Bridge ("Lift Bridge"), a two-

lane structure connecting Minnesota Trunk Highway 36 (“TH 36”) in Stillwater, Minnesota and Wisconsin State Trunk Highway 64 (“STH 64”) in Houlton, Wisconsin. The Lift Bridge is listed on the National Register of Historic Places.

Despite its cultural significance, the Lift Bridge is an outdated method of crossing the Lower Saint Croix. It was not designed for today’s travel demands, and as the Twin Cities metropolitan area has grown, its ability to meet today’s travel needs has become increasingly strained. Standstill traffic approaching the Lift Bridge in Stillwater is a regular occurrence, and the Lower Saint Croix’s high water periods have resulted in the Lift Bridge’s closure, necessitating timely detours. Additionally, the structure itself has become increasingly deficient. For decades, a new crossing solution has been needed.

Such a solution has been difficult to reach, however. Since the 1960s, the Minnesota and Wisconsin Departments of Transportation (“MnDOT” and “WisDOT,” respectively), as well as the federal government, have conducted studies and set forth various proposals for an improved crossing. In the process, millions of dollars have been spent, and one federal lawsuit regarding a replacement bridge has already been litigated. As of 2001, all of that effort had not fixed the problems associated with the Lift Bridge. It appeared that the inconsistent interests surrounding the project -- the development of a safe and efficient transportation system in the corridor, the protection of the Lower Saint Croix, and the preservation of the Lift Bridge -- would continue to make a mutually agreeable outcome difficult, if not impossible, to reach.

However, in November, 2001, a study by the United States Institute for Environmental Conflict Resolution was released, indicating that a solution could still be

obtained. Thereafter, MnDOT, WisDOT, and the Federal Highway Administration (“FHWA”) spearheaded a new effort to arrive at such a solution. Through an exhaustive process that accounted for numerous and divergent parties’ priorities, a “Preferred Alternative” package was reached for a new TH 36/STH 64 crossing, as documented in the 2006 Supplemental Final Environmental Impact Statement (“SFEIS”). Among other specifics, the Preferred Alternative package (the “Project”) includes the construction of a new bridge, the identification of a context-sensitive bridge design, plans for the retention of the Lift Bridge as a pedestrian/bicycle facility, and the implementation of a comprehensive mitigation package. Thereafter, the Project received the necessary approvals of the National Park Service (“NPS”), the FHWA, and other federal and state agencies.

In 2007, Plaintiff Sierra Club North Star Chapter (“Plaintiff” or “Sierra Club”) filed a complaint (the “Complaint”) against the above-captioned federal defendants seeking: (1) a declaration under the Administrative Procedure Act (“APA”) that the federal Defendants violated the WSRA, the Organic Act and General Authorities Acts, Section 4(f) of the Transportation Act of 1966 (“Transportation Act”), and the National Environmental Policy Act (“NEPA”); (2) an injunction from constructing the bridge and its approach; and (3) an order vacating the authorization of the Project by the federal Defendants. Since the filing of the Complaint, both MnDOT and WisDOT were permitted to intervene. MnDOT now brings this motion for summary judgment based on the administrative record submitted to the Court. The record reflects that the Project was comprehensively studied by the federal Defendants in tandem with MnDOT and

WisDOT, and that the federal Defendants' decisions did not violate the APA, but were completed in a careful and thoughtful manner. Because of this, summary judgment in the Defendants' favor is appropriate.

## **FACTUAL BACKGROUND**

### **I. THE LOWER SAINT CROIX RIVER**

In 1968, the WSRA was enacted to protect rivers that possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." Pub. L. No. 90-542, Sec. 1, 82 Stat. 906 (codified as amended at 16 U.S.C. § 1271-1287). One of the eight rivers originally designated as a component of the National Wild and Scenic Rivers System (the "Rivers System") was the Saint Croix River between the dam near Gordon, Wisconsin and the dam near Taylors Falls, Minnesota ("Upper St. Croix"). Pub. L. No. 90-542, Sec. 3(a)(6), 82 Stat. 907 (codified as amended at 16 U.S.C. § 1274, subd. (a)(6)). Additionally, the WSRA designated the Lower Saint Croix for potential addition to the Wild and Scenic Rivers system. Pub. L. No. 90-542, Sec. 5(a)(21), 86 Stat. 1174.

Four years later, the "Lower Saint Croix River Act of 1972" was enacted, designating the Lower Saint Croix for inclusion in the Wild and Scenic River system. Pub L. No. 92-560. The Act provided for the upper 27 miles of the Lower Saint Croix to be administered by the Secretary of the Interior, with the lower 25 miles to be administered by the States of Minnesota and Wisconsin. *Id.*, Sec. 3; (codified at 16 U.S.C. § 1274(a)(9)). The Lower Saint Croix was included in the Rivers System for its scenic, recreational, and geologic values. NPS\_AR\_00016.

Wild and Scenic Rivers are governed by Comprehensive Management Plans (“CMP”). 16 U.S.C. §§ 1274(d); 1281(a). The Lower Saint Croix’s CMP was passed in January 2002. NPS\_AR\_00001-00078. The Lower Saint Croix Management Commission (“Management Commission”) is the primary policy body for joint management of the riverway. NPS\_AR\_00004. The Management Commission consists of three voting members: NPS and the Minnesota and Wisconsin Departments of Natural Resources (“MnDNR” and “WisDNR,” respectively). NPA\_AR\_00004-00005.

The Lower Saint Croix’s CMP states that its purpose is to “describe the direction the managing agencies intend to follow in managing the lower riverway for the next 15 to 20 years while meeting the riverway’s stated purposes.” NPS\_AR\_00009. The CMP’s general policy on river crossings is that “[t]here will be no net increase in the number of transportation corridors.” NPS\_AR\_00053. The CMP also states that “[a]ny new bridge or alteration of an existing bridge must be of a scale and character that the area was designated under the Wild and Scenic Rivers Act (scenic, recreational, geologic). Construction projects must include appropriate mitigation to compensate for any impact on these values.” *Id.*

## **II. THE LIFT BRIDGE AND THE HIGHWAYS IT CONNECTS**

Built in 1931, the Lift Bridge is 1,070 feet long and consists of 10 spans, one of which is a vertical lift span. FHWA\_AR\_00630. The Lift Bridge was the last of six vertical lift highway bridges constructed in Minnesota and Wisconsin prior to World War II and is now considered one of the area’s significant landmarks. FHWA\_AR\_00628.

Because of its age and design, the Lift Bridge was listed on the National Register of Historic Places in 1989. NPS\_AR\_00079-00101.

Minnesota Trunk Highway 36 (“TH 36”) is a four-lane, east-west highway connecting the Twin Cities Metro area with the Saint Croix River Valley and western Wisconsin. FHWA\_AR\_30160. Due to its importance in inter- and intrastate commerce, MnDOT designated TH 36 as part of the National Highway System. *Id.* TH 36 provides one of the few continuous east-west roadways in the Stillwater-Oak Park Heights area, and is a focal point of commercial development. *Id.* The Lift Bridge connects TH 36 and STH 64 over the Lower Saint Croix.

There are long-standing problems associated with the Lift Bridge and its approach roadways. FHWA\_AR\_09147. Traffic congestion in downtown Stillwater is a frequent occurrence, due in large part to delays caused by the Lift Bridge’s raising and lowering for watercraft to pass. FHWA\_AR\_07783. Growing population on both sides of the river, as well as increased tourism in the Saint Croix Valley, have increased traffic and exacerbated congestion. *Id.* The Lift Bridge is also susceptible to closures due to flooding, maintenance activities, and vehicle incidents numerous times per year. FHWA\_AR\_07842. Additionally, the Lift Bridge, after more than 70 years of service, has structural, operational, and maintenance issues. FHWA\_AR\_07783. A 1999 study commissioned by MnDOT revealed the bridge deck had a life expectancy of 10-20 years, and several other deficiencies were noted. FHWA\_AR\_00617-00685.

### III. PRIOR ATTEMPTS AT UPGRADING THE CROSSING

#### A. The 1995 Preferred Alternative & The *Pena* Decision

The factual background describing earlier attempts to establish a new crossing solution for the Lower Saint Croix is set forth in *Sierra Club North Star Chapter v. Pena*, 1 F.Supp.2d 971 (D. Minn. 1998).<sup>1</sup> Consideration of a replacement for the Lift Bridge began in the late 1960s. *Id.* at 974. In 1985, MnDOT and WisDOT entered into a Cooperative Agreement for the preparation of various studies regarding the Lift Bridge's replacement. *Id.* In 1987, MnDOT and WisDOT issued the "Scoping Decision Document/Final Study Outline for the Stillwater-Houlton Bridge Study" (the "1987 Scoping Document")<sup>2</sup>, representing a record of the decisions that were reached regarding the scope and content of a forthcoming Environmental Impact Statement ("EIS")<sup>3</sup> to be issued for the project. FHWA \_AR\_30000-30017. The 1987 Scoping Document

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<sup>1</sup> The *Pena* decision is located in the administrative record at NPS\_AR\_00102-00124.

<sup>2</sup> The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, is the basic national charter for protection of the environment. 40 C.F.R. § 1500.1. NEPA's enabling legislation requires that "[t]here shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping." 40 C.F.R. § 1501.7. The 1987 Scoping Document was prepared pursuant to NEPA.

<sup>3</sup> NEPA also requires that, in any recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, federal agencies must prepare a "detailed statement" on, among other things, the proposed action's environmental impact, alternatives to the action, and any unavoidable environmental harm that would result from the action. 42 U.S.C. § 4332(2)(C). Such "detailed statement[s]" are referred to as "Environmental Impact Statements." 40 C.F.R. § 1508.11.

identified various bridge and tunnel proposals over four broad corridors (North, Central, Central-Alternate, and South), as well three “No-Build” alternatives (“No Action,” “Transit Systems Management,” and “Replacement-on-Site”), that had been studied during the scoping phase. *Id.* The study ultimately carried forward bridge and tunnel options for three corridors (North, Central, and South) and two “No-Build” alternatives (“No Action” and “Transit Systems Management”) for study in the forthcoming EIS. *Id.*

Based on the 1987 Scoping Document and following extensive study and input, MnDOT, WisDOT and FHWA issued a Draft Environmental Impact Statement (“DEIS”)/Section 4(f) Statement<sup>4</sup> in 1990. *Pena*, 1 F.Supp.2d at 974. The DEIS analyzed the various bridge and tunnel options in the three corridors identified for study in the 1987 Scoping Document, along with the “Transportation System Management” alternative that examined options to maximize use of the existing transportation system, and the “No Action” alternative that would have concluded that no action was needed. FHWA\_AR\_000047-00075.

Following public hearings and comments on the DEIS, a Final Environmental Impact Statement (“FEIS”)/Section 4(f) Statement was issued in April 1995. FHWA\_AR\_000001-00486. The FEIS identified a “Preferred Alternative” crossing

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<sup>4</sup> By virtue of what is known as “Section 4(f)” of the Transportation Act, 49 U.S.C. § 101, *et seq.*, the Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land or a public park, recreation area, or other land of significance only if there is “no prudent and feasible alternative to using that land” and the program or project includes “all possible planning to minimize harm” resulting from the use. 49 U.S.C. § 303(c). Those resources that the Secretary of Transportation must consider are generally known as “Section 4(f) resources.”

“1995 Preferred Alternative”) to be constructed at the north alignment of the South Corridor, located approximately 6,300 feet south of the Lift Bridge. *Id.* A Record of Decision (the “1995 ROD”) was issued by FHWA in July, 1995, concluding the environmental review process that had begun in 1985. FHWA\_AR\_00491-00499.

However, the NPS later determined that the 1995 Preferred Alternative was a “water resources project,”<sup>5</sup> and thereafter conducted an evaluation under Section 7 of the WSRA.<sup>6</sup> NPS\_AR\_00373, *et seq.* NPS found that the 1995 Preferred Alternative would have a direct and adverse effect on the outstandingly remarkable values for which the Lower Saint Croix was included in the Rivers System. *Id.* As a result, permits from the Army Corps of Engineers (“ACOE”) and the Coast Guard were denied, and the project could not proceed. *Id.* In April 1998, the U.S. District Court upheld the NPS determination. *Pena*, 1 F.Supp.2d 971.

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<sup>5</sup> A “water resources project” is “any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act ... or other construction of developments which would affect the free-flowing characteristics of a Wild and Scenic River or Study River.” 36 C.F.R. § 297.3.

<sup>6</sup> Evaluations of water resources projects under the WSRA are done pursuant to 16 U.S.C. § 1278(a), which states, in part, 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.” When the WSRA was passed into law, this provision was included in Section 7 of the Act. Pub. L. No. 90-542, Sec. 7 (Oct. 2, 1968). An evaluation under 16 U.S.C. § 1278(a) is still generally referred to as “Section 7 evaluation.” *See Pena*, 1 F.Supp.2d at 975.

**B. The Braun Facilitation Process**

In 1998, the issue of an improved river crossing was revisited when retired MnDOT Commissioner Richard P. Braun was asked to facilitate a process (“Braun Facilitation Process”) to determine whether a replacement crossing was needed, and to investigate potential bridge alignment alternatives in the corridor between the 1995 Preferred Alternative and the Lift Bridge. FHWA\_AR\_09149.

Over several months, Braun performed an independent review of the project, conducted extensive discussions and meetings with key individuals and organizations, and facilitated public meetings with a 21-member coalition that included representatives from federal and state regulatory agencies, local, and regional units of government, environmental groups, historic preservation groups, and chambers of commerce. *Id.* As a result of the Braun Facilitation Process, a report, “St. Croix River Crossing: A Graceful Solution for a Magnificent River” (“Braun Report”), was issued in September, 1998. FHWA\_AR\_00565-00614.

The Braun Report concluded that a new four-lane bridge would be required to satisfy present and future traffic demands and recommended further study of a bridge alignment 3,600 feet south of the Lift Bridge and 800 meters north of the 1995 Preferred Alternative (“Consensus Alternative”). *Id.* On January 20, 1999, the FHWA recorded a Notice of Intent in the Federal Register, stating that a new EIS would be prepared to supplement the FEIS that was issued in 1995. FHWA\_AR\_00615-00616. The Consensus Alternative would be the only new alternative studied in this Supplemental EIS (“SEIS”). *Id.*

Thereafter, work began on the SEIS and a draft Section 7(a) evaluation. FHWA\_AR\_09149. This included three options for the Lift Bridge: removal, conversion to a pier, or retention as a lift bridge. *Id.* These options were discussed in the context of three proposed mitigation packages. *Id.* Subject to the mitigation packages, the NPS's Draft Section 7(a) determination found no direct and adverse effect when the project was taken along with its mitigation package. NPS\_AR\_01307-01365.

Work on the project was suspended in January 2001 due to the inability to reach a consensus on the future of the Lift Bridge, insufficient federal funding for the conservation fund, and the anticipated failure to obtain municipal consent on the project. FHWA\_AR\_09150. Due to project suspension, an SEIS addressing the Consensus Alternative was never published.

#### **IV. THE CURRENT PROJECT**

##### **A. The Stakeholder Resolution Process**

In the summer of 2001, FHWA and the two States engaged the United States Institute for Environmental Conflict Resolution ("IECR") to review the feasibility of a new crossing over the Lower St. Croix. FHWA\_AR\_00991. The IECR met with adjacent communities, potential permitting agencies, and other interested parties, and issued a report in November, 2001, entitled "One River, Two Bridges." FHWA\_AR\_00992-01044. The IECR report summed up the feeling that existed about the project:

The people we have interviewed are tired of the current terms of the debate and the seemingly endless impasse. To some exten[t] they appear tired of the issues, even though when they begin to talk they obviously feel

passionately about them. Virtually all of those we interviewed would like to chart some new course.

FHWA\_AR\_00997. The report concluded that a consensus decision regarding the crossing was possible if the governing parties could arrive at two separate solutions: one to find a suitable new crossing situation, and another to determinate what to do with the Lift Bridge. FHWA\_AR\_01031.

Following the IECR report, Minnesota Commissioner of Transportation Elwyn Tinklenberg and Wisconsin Governor Scott McCallum held a joint press conference on June 21, 2002, reiterating support for a new crossing solution. NPS\_AR\_01478-01484. Based on her review of the IECR report, FHWA Administrator Mary Peters issued letters to MnDOT and WisDOT in June, 2002, stating that the FHWA was willing to assume a leadership role in resolving "this longstanding controversy." FHWA\_AR\_20025-20026.

In September 2002, President George W. Bush issued an Executive Order to enhance environmental stewardship and streamline review of transportation infrastructure projects. Exec. Order 13,274, 67 Fed. Reg. 59,449 (Sept. 18, 2002). A solution to the Lower Saint Croix impasse was selected by the Department of Transportation as a "Priority Project," pursuant to the Executive Order. FHWA\_AR\_00749.

In October 2002, the IECR convened a number of parties with interest in the project and facilitated the selection of a mediation team, RESOLVE, Inc. ("RESOLVE"), to help the project move forward. NPS\_AR\_01589-01590. RESOLVE developed a dispute resolution process (the "Stakeholder Resolution Process") that included 28 separate organizations representing the diverse interests in the project area (the

“Stakeholder Group”).<sup>7</sup> FHWA\_AR\_09216. An Operating Agreement for the Stakeholder Resolution Process (“Operating Agreement”) was developed and accepted by the Stakeholder Group in June, 2003. FHWA\_AR\_09215-09220. The Operating Agreement guided the manner in which meetings were conducted, procedures were established, and milestones were set for deciding on a Preferred Alternative and mitigation measures. *Id.*

Pursuant to the Operating Agreement, the Stakeholder Group informed the decision-making process of the project. *Id.* However, if a consensus was unreachable, the “permitting/cooperating/core agency” representatives<sup>8</sup> were to participate in final consensus-building efforts. *Id.* If a consensus still proved unreachable, the lead agencies -- MnDOT, WisDOT, and FHWA -- were given final decision-making authority, taking into account the Stakeholder Group’s prior deliberations. *Id.*

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<sup>7</sup> The Stakeholder Group consisted of the Advisory Council on Historic Preservation, City of Oak Park Heights, City of Stillwater, FHWA, Friends of the St. Croix, Minnesota Center for Environmental Advocacy, MnDNR, MnDOT, Minnesota State Historic Preservation Office (MnSHPO), NPS, New St. Croix Bridge Coalition, Preservation Alliance of Minnesota, Sierra Club, St. Croix Alliance for an Interstate Bridge, St. Croix County Highway Association, St. Croix River Association, Stillwater Area Chamber of Commerce, Stillwater Heritage Preservation Commission, Stillwater Lift Bridge Association, Inc., Town of St. Joseph, U.S. Army Corps of Engineers (ACOE), U.S. Coast Guard, U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service, Western Wisconsin Realtors Association, WisDNR WisDOT, and Wisconsin State Historic Preservation Office (WisSHPO). FHWA\_AR\_08500-08503.

<sup>8</sup> The “permitting/cooperating/core agencies” were: MnDOT, WisDOT, WisDNR, MnDNR, MnSHPO, WisSHPO, City of Stillwater, City of Oak Park Heights, NPS, FHWA, ACOE, US Coast Guard, EPA, Advisory Council on Historic Preservation, and US Fish and Wildlife Service. FHWA\_AR\_09216; NPS\_SAR\_02085.

## **B. Scoping the Current Project**

Discussions regarding scoping alternatives were reinitiated as part of the Stakeholder Resolution Process. At the Stakeholders Group meetings, all alternatives previously studied, as well as new alternatives, were considered or reconsidered. FHWA\_AR\_09156. In addition to a “No Build” alternative, five other alternatives were identified and included in the Amended Scoping Document/Draft Scoping Decision Document (“Amended Scoping Document”), published in November, 2003. FHWA\_AR\_09140-09273.

Of the alternatives considered in the Amended Scoping Document, Alternatives B, C, D, and E included construction of a new crossing, while the “No Build” alternative and Alternative A did not. *Id.* The “No Build” Alternative would have included no new river crossing or improvements to the existing transportation system, allowing current conditions to perpetuate. FHWA\_AR\_09156. Alternative A, the “transit alternative,” entailed the permanent rehabilitation and continued vehicle use of the Lift Bridge. FHWA\_AR\_09161. Alternative A also included modifications to improve mobility through a combination of transit and emergency vehicle advantages, new transit travel options, use of advance technologies for mobility enhancement, and regional policy changes. *Id.*

Placement of a tunnel in various locations beneath the Lower Saint Croix had been considered in the 1995 FEIS. FHWA\_AR\_00073-00074. However, such tunnel options were not included in the Amended Scoping Document. Studies made after the 1995 FEIS was issued concluded that a tunnel option would be cost-prohibitive and not feasible from

engineering and geological standpoints. *See* FHWA\_AR\_30585-30589. Additionally, it was found that a tunnel option would present numerous environmental and safety concerns, and would result in marked impacts on the natural resources within the river channel. *Id.*

Open scoping meetings were held in Stillwater, Minnesota, and Houlton, Wisconsin in December, 2003, allowing the public to opine on the alternatives identified in the Amended Scoping Document. FHWA\_AR\_30627, 30667, 30672, 30712. Following input from the Stakeholders and the public, five options were identified for inclusion in the Amended Final Scoping Decision Document (“AFSDD”), issued in March, 2004. FHWA\_AR\_02907-02986. Following their identification in the AFSDD, these options would be studied in a forthcoming Supplemental Draft EIS (“SDEIS”).

The AFSDD found that Alternative A, the transit alternative, would not be considered in the forthcoming Supplemental Draft EIS (“SDEIS”), and Alternatives B and D would be studied with significant modifications. *Id.* The AFSDD stated that, during the scoping process, it was determined that Alternative A would not “meet the purpose and need of the project through analyses of the travel demand forecasting results.” FHWA\_AR\_02966. The AFSDD found that Alternative A would not resolve congestion problems or address concerns of reliability associated with the Lift Bridge’s susceptibility to flooding, repair, and maintenance problems. *Id.*

The AFSDD also altered Alternative B, since its original location would be in the same place as the 1995 Preferred Alternative, a location that the NPS previously had determined would violate Section 7 of the WSRA. FHWA\_AR\_02967. Instead, the

Stakeholder Group chose to move Alternative B to a southern location, allowing for a shorter crossing more perpendicular to the river. *Id.* Additionally, revised Alternative B (now known as “Alternative B-1”) was subdivided into discreet options, Alternatives B-1(a) and B-1(b). FHWA\_AR\_002961. The difference between the two involved the utilization of the Lift Bridge; Alternative B-1(a) would convert the Lift Bridge to a pedestrian and bicycle facility, while B-1(b) would keep it open to vehicular traffic. *Id.*

With regard to Alternative D, modifications were made due to its excessive impacts on the Wisconsin river bluff. FHWA\_AR\_002964. Compared to its description in the Amended Scoping Document, revised Alternative D eliminated vehicular traffic on the Lift Bridge and made modifications to interchanges on both sides of the river. *Id.*

### **C. The Supplemental Draft Environmental Impact Statement**

Taking into consideration the alternatives listed in the AFSD ( “No Build,” B-1(a), B-1(b), C, D, and E), MnDOT, WisDOT, and FHWA began work on a SDEIS. A “Cooperating Agency Review” draft of the SDEIS was disseminated in June, 2004, to the Stakeholders. FHWA\_AR\_30802-31560. Following revisions, the SDEIS was published in August, 2004. FHWA\_AR\_04019-04884. Included in the SDEIS was an analysis of why Alternative A was no longer being studied. FHWA\_AR\_04111-04113. Also included were Draft Section 4(f) Evaluations issued by the FHWA for nine different Section 4(f) resources<sup>9</sup> that could potentially be impacted by the SDEIS’s five alternative crossings. FHWA\_AR\_04741-04872.

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<sup>9</sup> Section 4(f) resources are discussed, *supra*, at fn 4.  
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No “Preferred Alternative” was identified in the SDEIS; instead, that selection would be made in the Supplemental Final EIS (“SFEIS”) once all public and agency comments on the alternatives included in the SDEIS were fully evaluated. FHWA\_AR\_04062. Public hearings on the SDEIS were held between September 21-22, 2004, in Wisconsin and Minnesota. FHWA\_AR\_32723-32766. Comment forms were accepted from the public through October 5, 2004. FHWA\_AR\_08578-08579. During this same period, the Stakeholder Group and other individuals and agencies, both governmental and non-governmental, submitted comments about the SDEIS.<sup>10</sup> Among those that submitted comments was the Sierra Club, which endorsed the “No Build” alternative. FHWA\_AR\_08377-08143.

During this time period, the NPS began its analysis of the alternatives listed in the SDEIS under Section 7(a) of the WSRA. In a July 26, 2004 letter, the NPS provided the FHWA with its preliminary assessment of the viability of each alternative, stating:

We believe that the alternatives under review with the possible exceptions of D and E, should be able to sustain Section 7(a) review if the following conditions are met: 1) our aforementioned concerns, especially those regarding bridge design, are adequately addressed; 2) an effective mitigation strategy is developed; and 3) close consultation between the transportation agencies, Minnesota and Wisconsin Departments of Natural Resources, National Park Service and others continues. Should a new bridge be constructed, conversion of the lift bridge to a pedestrian/bike

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<sup>10</sup> The administrative record includes voluminous documentation of comments on the SDEIS submitted by both Stakeholders and other groups. Summaries of comments were prepared in October, 2004, by SRF Consulting Group, Inc. *See* FHWA\_AR\_0033046, *et seq.*; FHWA\_AR\_0033150, *et seq.* These comments, with responses, were later included as Chapter 17 of the SFEIS. FHWA\_AR\_08257-08491.

crossing until such time as it may be removed would satisfy the spirit of the CMP's guidance of non-proliferation of crossings.

FHWA\_AR\_32468-32472.

In July, 2005, a "Cooperating Agency Review" draft of the SFEIS was issued to the Stakeholders. FHWA\_AR\_33916-34829. Comments from these parties' reviews were then considered or reconsidered prior to the issuance of SFEIS.

FHWA\_AR\_34884-34888.

**D. The Supplemental Final Environmental Impact Statement & The Record of Decision**

Nearly two years after the SDEIS's publication in 2004, the SFEIS was issued in June, 2006. FHWA\_AR\_07751-08731. The SFEIS found that a new bridge was necessary and identified Alternative B-1(a) as the Preferred Alternative location. FHWA\_AR\_07864. An extradosed bridge design was identified as the Preferred Alternative design, as it would minimize the visual impact of the project. *Id.* The Lift Bridge would be converted to a pedestrian/bicycle facility as part of a loop trail system. *Id.* Additionally, a mitigation package was identified to offset any adverse impacts construction might cause. *Id.* (Collectively, these measures identified as the Preferred Alternative package are hereafter referred to as "the Project.")

Included as an appendix to the SFEIS is the NPS' Draft Section 7 evaluation.<sup>11</sup>

FHWA\_AR\_08580-08649. There, the NPS found that the Project:

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<sup>11</sup> The Section 7(a) evaluation is called a "draft evaluation," but this Court found, in its May 15, 2008 Order, that the NPS issued a final agency action. Therefore, the "draft evaluation" is treated as a final Section 7(a) evaluation for purposes of this memorandum. (Footnote Continued on Next Page)

would not have a direct and adverse effect on the scenic and recreational values for which the Riverway was included in the System provided that the measures identified [in the evaluation] are incorporated into the project to insure that the mitigation package remains intact in perpetuity. Therefore, in compliance with the Act, the NPS would not object to Federal Highway Association funding of this project.

FHWA\_AR\_08632. The measures identified in the Section 7 evaluation included the identification of a “context sensitive design” of the bridge by the Visual Quality Planning Process, assurances that mitigation measures would have long-term success, and a final design of the loop trail that minimizes safety hazards. FHWA\_AR\_08626, 08630.

Environmental analysis accounts for much of the SDEIS’s 20 chapters and numerous appendices. Full chapters are dedicated to in-depth analyses of “Potential Indirect Effects” (Chapter 13), FHWA\_AR\_08141-08163, and “Cumulative Impacts” (Chapter 14), FHWA\_AR\_08164-08194. As additional guarantees that mitigation will be a central part of the Project, a Memorandum of Understanding for the Implementation of Riverway Mitigation Items (“Riverway MOU”), FHWA\_AR\_08691-08710, and a Memorandum of Understanding for the Implementation of Growth Management Items (“Growth Management MOU”), FHWA\_AR\_08711-08719, were entered and included as SFEIS appendices.

The FHWA published a Record of Decision (“ROD”) in the Federal Register on November 21, 2006, noting the selection of Alternative B-1(a) as the Preferred

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Alternative and stating that it had concluded that all issues relative to the adequacy of the SFEIS were fully addressed. FHWA\_AR\_09021-09052. This lawsuit followed.

## ARGUMENT

### **I. THE STANDARD OF REVIEW FOR THE FEDERAL AGENCIES' DECISIONS IS NARROW AND DEFERENTIAL**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (summary judgment appropriate where “one party must prevail as a matter of law”). A party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party carries its burden, the non-moving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Anderson*, 477 U.S. at 256. A party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts demonstrating that there is a genuine issue for trial. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

#### **B. Review of Administrative Decisions**

Plaintiff claims that the federal Defendants violated the WSRA, 16 U.S.C. § 1271 *et seq.*; the Transportation Act, 49 U.S.C. § 101, *et seq.*; NEPA, 42 U.S.C. § 4321 *et seq.*; and the Organic Act and General Authorities Act, 16 U.S.C. §§ 1, *et seq.* None of these

statutes authorizes a private right of action itself. Instead, Plaintiff's challenges arise under the APA, which provides for judicial review of agency action. 5 U.S.C. § 706(2).

Under the APA, a Court may set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.*, § 706(2)(A). An agency's decision or action is arbitrary or capricious if:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)

In a case brought under the APA, a court bases its decision on a review of the administrative record. 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). A court's inquiry into the facts surrounding an agency's action or decision must be "searching and careful," but "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). A reviewing court may not substitute its judgment for that of the agency, as long as the agency's determination is supported by any rational basis. *Izaak Walton League of America v. Kimbell*, 516 F.Supp.2d 982, 986 (D. Minn. 2007). When a dispute is primarily factual and "requires a high level of technical expertise," resolution of the dispute "is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S.

390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); *see also Friends of Boundary Waters Wildernness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999).

The Court's role is simply to assess whether the agency's decision is "within the bounds of reasoned decision-making." *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). In making such a review, the Court must determine whether the federal agencies followed from the facts on which they relied, or whether the agencies "made a clear error of judgment." *Sierra Club v. Bosworth*, 352 F.Supp.2d 909, 917 (D. Minn. 2005) (citing *Earth Protector, Inc. v. Jacobs*, 993 F.Supp. 701, 706 (D. Minn. 1998)).

Plaintiff bears the burden of proof to demonstrate that the federal Defendants' actions violated the APA. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005). In order to meet its burden of proof, Plaintiff "must present evidence that the agency did not consider a particular factor; it may not simply point to the end result and argue generally that it is incorrect." *Id.*

## **II. NPS AND FHWA DID NOT VIOLATE THE WSRA**

Four counts of the Complaint allege violations of the WSRA.<sup>12</sup> All four counts allege NPS violations, while Count 1 also alleges a violation by FHWA. In light of the administrative record before the Court, none of Plaintiff's claims can demonstrate that the federal Defendants' actions were arbitrary, capricious, an abuse of discretion or otherwise

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<sup>12</sup> Counts I, II, III, IV, and V of the Complaint allege violations of the WSRA. Count III was dismissed from this action pursuant to the Court's May 15, 2008 Order.

not in accordance with law, and all allegations of WSRA violations should be dismissed with prejudice.

**A. NPS's Section 7 Evaluation Did Not Violate the WSRA**

Plaintiff contends that NPS's Section 7 evaluation wrongly concluded that the Project would not have a direct and adverse effect on the Lower Saint Croix's values, in violation of the WSRA and its implementing policies.<sup>13</sup> Section 7 of the WSRA states that:

[N]o 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). Here, NPS, an agency within the Department of Interior, is charged with the Lower Saint Croix's administration. Thus, NPS was charged with making the Section 7(a) determination.

NPS found that the Project is a water resources project. FHWA\_AR\_08582. As a result, the NPS conducted a Section 7 evaluation. FHWA\_AR\_08580-08649. That evaluation concluded that the Project, when taken along with numerous mitigation measures, would not have a direct and adverse effect on the values for which the Lower Saint Croix was included in the Rivers System. FHWA\_AR\_08632.

The administrative record demonstrates that NPS was aware of the environmental impacts that the Project would present. Environmental groups, including the Sierra Club,

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<sup>13</sup> Complaint, Count II.

were members of the Stakeholder Group and their opinions were considered when decisions were made about the Project. FHWA\_AR\_08500-08503. The Section 7(a) evaluation recognizes the concerns Plaintiff had with the Project. For example, the Section 7(a) determination states that “[t]he visual impacts of the proposed bridge would be highly disruptive for many reasons.” FHWA\_AR\_08619. It also states “[t]he preferred crossing would negatively impact recreation by creating a visual intrusion, generating noise, and placing obstructions in the river channel.” FHWA\_AR\_08629.

Unlike Plaintiff, however, the NPS recognizes the substantial mitigation measures that will be undertaken as part of the project. The NPS found these measures adequate to offset the impact of a new bridge’s construction on the Lower Saint Croix’s scenic and recreational values, concluding that:

Pursuant to Section 7(a) of the Act, the National Park Service has determined that the preferred crossing, when taken along with its mitigation package would not have a direct and adverse effect on the scenic and recreational values for which the Riverway was included in the System provided that the measures as identified in Section VII and IIX of this document are incorporated into the project to insure that the mitigation package remains intact in perpetuity.

FHWA\_AR\_08632.

Plaintiff consistently references the 1995 Bridge Proposal in an attempt to draw parallels between it and the current Project. Plaintiff calls the current Project “nearly identical to the 1995 Proposal” and therefore finds the 2006 NPS Section 7 (a) determination “inexplicabl[e].” Complaint, ¶¶ 79, 81.

Despite Plaintiff’s contentions, the current Project and the 1995 Preferred Alternative are fundamentally different in nature. Notes from a July 27, 2004, meeting

summarizing a question-and-answer session between the Stakeholder Group and NPS Superintendent Thomas Parker demonstrate the major differences between the current Project and the 1995 Preferred Alternative. FHWA\_AR\_32671, *et seq.* Those notes state:

Q: Is there a significant enough difference between 1995 alignment and B1 to satisfy NPS?

A: In 1997 there was no mitigation, the bridge design had greater impacts than current designs under consideration, the alignment was less perpendicular, and NPS was not consulted.

FHWA\_AR\_32679.

Chapter 3 of the SFEIS documents the various differences between the 1995 Preferred Alternative and the current Project. FHWA\_AR\_07876-07877. Among the differences are:

- The Project contains exhaustive mitigation measures, while the 1995 Preferred Alternative contained few.
- The Project calls for the conversion of the Lift Bridge into a bicycle/pedestrian path as part of a loop trail system, while the 1995 Preferred Alternative did not specify the Lift Bridge's future use.
- The Project uses an extradosed bridge type, which is more environmentally sensitive than that proposed in the 1995 Preferred Alternative.
- The Project will place four to six piers in the riverway, whereas the 1995 Preferred Alternative required eight.

- The Project is in a different location that is more perpendicular to the river than the 1995 Preferred Alternative.
- The Project makes use, for staging purposes, of the Xcel Energy barge currently located in the Lower Saint Croix. The barge will then be removed entirely from the river as part of the Project's mitigation.
- The Project will avoid the 200-foot mussel shelf along the Wisconsin shoreline and not impact this aquatic habitat.

Clearly, the Project and the 1995 Preferred Alternative are substantially different in nature. Plaintiff seems to contend, however, that the NPS's Section 7 evaluation completed for the 1995 Preferred Alternative permanently precludes the construction of a new crossing. This is simply not the case. Instead of permanently precluding any new crossing, the previous Section 7 evaluation illuminated the deficiencies in the 1995 Preferred Alternative. Since the current Project includes a dramatically improved environmental analysis and substantially more mitigation measures, the NPS approval is entirely justified.

Based on the comprehensive environmental considerations given to the Project, NPS's Section 7 evaluation was not arbitrary, capricious, or an abuse of discretion, and is completely in accordance with law. NPS's Section 7 evaluation should be upheld.

**B. Neither NPS or FHWA Violated the WSRA By Acting Inconsistently With the Lower Saint Croix's CMP**

Plaintiff alleges that the NPS and FHWA approvals of the Project violate the WSRA and the Lower Saint Croix's CMP.<sup>14</sup> Namely, Plaintiff contends that the Project violates two of the CMP's provisions: (1) its policy of "no net increase in the number of transportation corridors;" and (2) its provision permitting the relocation of existing transportation corridors "only if . . . all built elements of the existing corridor are removed, and the corridor is restored to natural conditions." NPS\_AR\_00053.

For rivers designated as of 1986, the WSRA requires governing agencies to develop CMPs to provide for Wild and Scenic Rivers' protection. *See* 16 U.S.C. § 1274(d)(1). The WSRA requires that management plans must "address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter." *Id.* For rivers designated prior to 1986, as the Lower Saint Croix was, "plans shall be reviewed for conformity with these requirements." *Id.* at § 1274(d)(2). Nowhere in the WSRA is there an indication that the provisions contained in a CMP shall be given the force of law, however. Nor is there a provision in the WSRA requiring federal agencies to rely solely on a CMP to make a determination of whether a water resources project has a direct and adverse effect on the protected river's values.

Instead, CMPs act as general guidelines for the administration of Wild and Scenic Rivers. In this case, NPS, MnDNR, and WisDNR prepared a CMP for the Lower Saint

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<sup>14</sup> Complaint, Count I.

Croix, finalized in January, 2002. NPS\_AR\_00001-00078. The ROD issued after completion of the CMP referred to it as a “policy-level management framework for the riverway.” 66 Fed. Reg. 56848, 56851 (Nov. 13, 2001).

In *Riverhawks v. Zepeda*, 228 F.Supp.2d 1173 (D. Ore.), the court reviewed a challenge to actions by the United States Forest Service that allegedly violated a CMP. There, the Rogue River’s CMP limited motorized use of the river to levels specified in 1968. Additionally, the CMP stated that a “recreation plan” would be prepared for the river area. Plaintiffs alleged that the defendants had permitted motorized use of the river to exceed 1968 levels and that the defendants never prepared a “recreation plan” despite the mandate to do so in the CMP.

In ruling for the federal defendants, the court stated that the CMP language did not prohibit the Forest Service from permitting motorized use of the river in excess of 1968 levels, as “the [CMP] language is suggestive rather than mandatory.” *Id.* at 1182. Further, the court stated that “[e]ven if one could arguably interpret the [CMP] language as imposing mandatory limits, the court must afford deference to the Forest Service’s interpretation of the Plan.” *Id.* (citing *Alaska Center for the Environment v. United States Forest Service*, 189 F.3d 851, 856-57 (9th Cir. 1999)). Additionally, the court stated that it “cannot find that defendants failed to act in the face of a clear and mandatory duty” by not issuing a recreation plan, despite the CMP’s provision that it would do so. *Id.* at 1186.

In this case, the CMP language is also suggestive, stating that its purpose is to “describe the direction the managing agencies intend to follow in managing the lower

riverway for the next 15 to 20 years while meeting the riverway's stated purposes." NPS\_AR\_00009. Nothing about this language bound NPS or FHWA to make specific decisions when completing their environmental evaluations of the Project.

Plaintiff's assertion that the NPS and FHWA violated the WSRA by acting inconsistently with the CMP lacks merit, since the CMP does not have the force of law. The record indicates that the NPS and FHWA made reasonable decisions in light of the information that was before them, and that their actions were not arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. As such, the NPS and FHWA complied with the WSRA, and their actions should be upheld.

**C. The NPS Did Not Violate the WSRA, Since It Did Not Grant an Easement or Right-of-Way Over the Lower Saint Croix**

The WSRA states:

The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic rivers system in accordance with the laws applicable to the national park system and the national forest system, respectively: Provided, That any conditions precedent to granting such easements and rights-of-way shall be related to the policy and purpose of this chapter.

16 U.S.C. § 1284(g). NPS's laws regarding the grant of easements and rights-of-way, which the WSRA references, are found at 43 U.S.C. § 1702, *et seq.*

Plaintiff alleges that NPS and the Lower Saint Croix Management Commission granted an easement over the Lower Saint Croix in violation of the WSRA.<sup>15</sup> The Complaint does not identify a specific easement or right-of-way that NPS granted over the Lower Saint Croix, but instead makes a general allegation that an easement was granted when NPS endorsed the Project.

The land in the Project area is located in the State-administered portion of the riverway. The NPS cannot grant an easement or right-of-way over this portion of the riverway, since it does not own it in the first place. Summary judgment in Defendants' favor is appropriate on Count V.

**III. THE NPS DID NOT VIOLATE THE ORGANIC ACT OR GENERAL AUTHORITIES ACT BY APPROVING THE PROJECT**

Plaintiff contends that NPS violated the Organic Act, the General Authorities Act, and their implementing policies' "non-impairment policy," in addition to the WSRA and its implementing policies.<sup>16</sup> As demonstrated above, NPS's Section 7 evaluation was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. As such, NPS did not violate the WSRA's "nondegradation and enhancement policy," and further analysis would simply be repetitive.

Pursuant to the WSRA, any part of the Rivers System administered by NPS becomes part of the National Park System. 16 U.S.C. § 1281(c). The National Park

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<sup>15</sup> In Count V of the Complaint, Plaintiff asserts this claim against both the NPS and the Lower Saint Croix Management Commission. The Lower Saint Croix Management Commission is not a named party in this lawsuit, however.

<sup>16</sup> Complaint, Count IV.

System is protected through the Organic Act and General Authorities Act. The Organic Act, 16 U.S.C. § 1, *et seq.*, established the NPS and provides that national parks shall be administered so as “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” *Id.*, § 1. Neither the word “unimpaired” nor the phrase “unimpaired for the enjoyment of future generations” is defined in the Organic Act. “It is unclear from the statute itself what constitutes impairment, and how both the duration and severity of the impairment are to be evaluated or weighed against the other value of public use of the park.” *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000).

The General Authorities Act was passed as an amendment to the Organic Act. 16 U.S.C. § 1a-1. Pursuant to it, the authorization of activities on National Park Service lands shall be construed, and the protection, management and administration of these areas shall be conducted, with consideration given to the value and integrity of the system. *Id.* Such authorization and administration “shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.” *Id.*

As noted in *Sierra Club v. Andrus*, 487 F.Supp. 443 (D.C.D.C. 1980), “nowhere in either 16 U.S.C. §§ 1 or 1a-1 is there a specific direction as to how the protection of Park resources and their federal administration is to be effected. Certainly the Secretary is not restricted in the protection and administration of Park resources to any single means.” *Id.* at 448. Instead, the NPS has “broad discretion” in determining what actions are best

intended to protect Park resources. *Id.* The ROD issued after completion of the CMP affirms the wide discretion that these Acts gives the NPS in making “impairment” determinations:

Impairment that is prohibited by the NPS Organic Act and the General Authorities Act is an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of riverway resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. In determining whether impairment would occur, park manager examine the duration, severity, and magnitude of the impact; the resources and values affected; and direct, indirect, and cumulative effects of the action.

66 Fed. Reg. at 56,580.

While the Organic Act and General Authorities Act set forth broad policy about how the National Park System is to be administered, the WSRA deals specifically with how NPS must administer the Rivers System. The WSRA specifically mandates that NPS must evaluate the Preferred Alternative package through a Section 7 evaluation. 16 U.S.C. § 1278(a). In this case, the Section 7 evaluation for this project, based upon the “professional judgment of the responsible NPS manager,” indicated that the Preferred Alternative package would not have a direct and adverse effect on the scenic and recreational values for which the Lower Saint Croix was included in the Wild and Scenic Rivers System, provided that specified mitigation measures were undertaken. FHWA\_AR\_08632.

Based on the ample discretion it is given to make an “impairment” decision, as well as the thorough Section 7 evaluation that it completed, the NPS’s actions were not arbitrary, capricious, or an abuse of discretion, and were completely in accordance with

law. Any allegations that the NPS violated the Organic Act's or General Authorities Act's general provisions are unmeritorious.

#### **IV. FHWA DID NOT VIOLATE SECTION 4(F) OF THE TRANSPORTATION ACT**

Section 4(f) of the Transportation Act prohibits the FHWA from approving a project requiring the use of parks, wildlife refuges, or historic properties unless "there is no prudent and feasible alternative to using that land" and the project "includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c). Plaintiff claims that FHWA violated Section 4(f) by failing to consider prudent and feasible alternatives to use of the riverway, and by not minimizing harm to the riverway.<sup>17</sup>

Congress did not include a specific standard in the Transportation Act for judicial review of the FHWA's decisions. Accordingly, these decisions must be reviewed pursuant to the APA. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413, 91 S.Ct. 814, 822, 28 L.Ed.2d 1236; 5. U.S.C. § 706.

While noting that the Secretary of Transportation's decision is entitled to a presumption of regularity, the Supreme Court established a three-prong test under the APA to review the FHWA's § 4(f) determinations. *Overton Park*, 401 U.S. at 415. First, the court must decide whether the Secretary acted within the scope of his authority. *Id.* at 415-16. Part of this inquiry is a determination by the Court whether, on the facts, the Secretary's decision was reasonably within the range of choices the Secretary was

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<sup>17</sup> Complaint, Count VI.

permitted to make. *Id.* at 416-17. Second, the court must decide whether the Secretary's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 416; 5 U.S.C. § 706(2)(A). To make this finding, the court must consider whether the Secretary's decision "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Id.* at 417. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* Third, the Court must inquire whether the Secretary's action followed the necessary procedural requirements. *Id.*

**A. FHWA Adequately Considered All Prudent and Feasible Alternatives For the Project, as Required by Section 4(f)**

Section 4(f) of the Transportation Act requires that the Secretary of Transportation, prior to approving a project requiring use of federally protected land, must adequately consider whether there are prudent and feasible alternatives that could avoid use of that land. 49 U.S.C. § 303(c)(1). In *Overton Park*, 401 U.S. 402, the Supreme Court defined "feasible" and "prudent." *Id.* at 411. An alternative is "feasible" if it can be built as a manner of sound engineering. *Id.* An alternative is "prudent" unless there are "truly unusual factors present in a particular case or the cost or community disruptions resulting from alternative routes reach[es] extraordinary magnitudes" or the alternative routes present "unique problems." *Id.* at 413.

The administrative record indicates that the FHWA adequately considered numerous alternatives that would have avoided use of the riverway. As discussed above,

when the Project was reinitiated as the “Stakeholder Resolution Process,” all alternatives previously studied, as well as new alternatives, were considered. FHWA\_AR\_09156. Those alternatives that were documented in the Amended Scoping Document included two alternatives that would not have required construction of a new crossing – the “No Build” alternative and the transit alternative (Alternative A) – as well as four “build” alternatives (Alternatives B, C, D, and E). FHWA\_AR\_09140-09273. While tunnel options were included in the 1995 FEIS, they were not considered during the Stakeholder Resolution Process due to prohibitive monetary and environmental costs associated with such options. FHWA\_AR\_30585-30589.

During the scoping process, input was obtained from both the public and governmental and non-governmental agencies. Based on this input and further analysis of the six options, Alternative A was not included in the AFSD, since it was found not to meet the purpose and need of the project. FHWA\_AR\_02907-02986. The “No Build” option was included in the Amended Final Scoping Decision Document (“AFSD”). *Id.* The options included in the AFSD were then evaluated in the SDEIS. FHWA\_AR\_04019-04884. Following exhaustive review of each of the options, Alternative B-1(a) was chosen as the Preferred Alternative in the SFEIS. FHWA\_AR\_07857-07891. The “No-Build” alternative was given a hard look but not chosen as the Preferred Alternative, as the “existing approach roadways and river crossing contain a number of transportation deficiencies that would be perpetuated under the No-Build Alternative.” FHWA\_AR\_07875.

All prudent and feasible alternatives that could have avoided use of the Riverway were studied exhaustively. Both the “No-Build” alternative and Alternative A were given comprehensive studies during both the scoping and SDEIS stages of the project. Plaintiff’s allegation that these options were not adequately considered lacks merit.

**B. FHWA Included All Possible Planning to Minimize Harm to the Riverway, as Required by Section 4(f)**

Section 4(f) of the Transportation Act also requires that the Secretary of Transportation, prior to approving a project requiring use of federally protected land, must include all possible planning to minimize harm to federally protected resources resulting from the use. 49 U.S.C. § 303(c)(2). Here, FHWA’s approval of the Project included all possible planning to minimize harm to the Lower Saint Croix.

The Project includes extensive measures to minimize harm to the riverway. Among them, the Alternative B-1(a) bridge alignment minimizes river crossing distance through an alignment more perpendicular to the Lower Saint Croix centerline than the 1995 Preferred Alternative. FHWA-AR\_07875. Additionally, the Project confines construction on the riverway to a site previously disrupted by construction of a water treatment facility and an electrical generating plant. *Id.* By confining construction to this location, disruption to the riverway will be minimized. *Id.*

The Preferred Alternative bridge type is “extradosed,” which minimizes bluff disturbance, reduces the number of piers in the river, and allows for an aesthetic design compatible with the riverway’s character and importance. FHWA\_AR\_07876. Alternative B-1(a) will result in less removal of trees and undergrowth along shorelines

and upland/bluff areas than the other “build” options. *Id.* It will also impact the fewest acres of wetlands. *Id.*

The Project requires that the Lift Bridge shall be retained as a pedestrian/bicycle facility as part of a loop trail system. FHWA\_AR\_07873. Vehicular traffic will cease on the Lift Bridge and it will be removed from the Minnesota state trunk highway system. *Id.* An endowment fund for future Lift Bridge operations and maintenance will be established by MnDOT. *Id.*

Additionally, extensive non-design items were included in the Preferred Alternative mitigation package to address impacts to the riverway. As stated above, the Riverway MOU and Growth Management MOU were entered into and included as parts of the SFEIS. FHWA\_AR\_08691, 08711. Simply put, the Project included all possible planning to minimize harm to the Lower Saint Croix. Plaintiff’s allegations to the contrary ignore the facts.

In making its Section 4(f) evaluation, FHWA analyzed all prudent and feasible alternatives that could have avoided use of the Riverway, and included all possible planning to minimize harm to the Riverway. The 4(f) evaluation was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as it was based on a consideration of relevant factors and followed the necessary procedural requirements of the Transportation Act.

## **V. FHWA DID NOT VIOLATE NEPA**

NEPA requires that federal agencies take a “hard look” at the environmental consequences of a project before taking a major action. *Baltimore Gas & Elec. Co. v.*

*Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999). NEPA does not mandate particular results but “prohibits uninformed -- rather than unwise agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351. (1989).

To that end, NEPA requires that federal agencies complete an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The statute requires a detailed statement “from which a court can determine whether the agency has made a good faith effort to consider the values NEPA seeks to protect.” *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1340, 51 L.Ed.2d 601 (1977). NEPA “does not require an objection-free document or exhaustive discussion of the effects on the environment, but rather, substantial compliance with its goals of disclosure of environmental impacts.” *Olmsted Citizens for a Better Community v. U.S.*, 606 F.Supp. 964, 976 fn. 9 (D. Minn. 1985) (citations omitted).

Judicial review of the adequacy of a final EIS prepared by a federal agency is limited. *Farmland Preservation Ass’n v. Goldschmidt*, 611 F.2d 233, 237 (8th Cir. 1979). A court reviewing an agency’s EIS must determine “whether the agency has made a good faith effort to consider the values NEPA seeks to protect.” *Minn. Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976). The Eighth Circuit stated:

The [environmental impact] statement must not merely catalog environmental facts, but also explain fully its course of inquiry, analysis and reasoning. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary and capricious. Adequate agency consideration is evidence through the EIS's form, content, and preparation. We need not "fly speck" an EIS for inconsequential for technical deficiencies. Instead, we consider whether the agency's actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental values.

*Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1127-28 (8th Cir. 1999) (internal quotations and citations omitted).

**A. FHWA Considered Alternatives to Construction of a New Four-Lane Bridge, as Required by NEPA**

NEPA's implementing regulations require federal agencies undertaking an EIS to "[r]igorously explore and objectively evaluate all reasonable alternatives." Plaintiff alleges that FHWA violated NEPA by failing to consider alternatives to the construction of a new four-lane bridge.<sup>18</sup> The administrative record again proves otherwise.

As established above, FHWA adequately considered all prudent and feasible alternatives to construction of a new four-lane bridge. Alternatives were vigorously explored and researched during the scoping process, not just prior to the Amended Scoping Document, but prior to the 1987 Scoping Study, which was incorporated into the current EIS process. Such consideration, over more than 20 years, displays that all reasonable alternatives were rigorously explored and objectively evaluated. As stated above, FHWA complied with § 4(f) of the Transportation Act by considering all prudent

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<sup>18</sup> Complaint, Count VII.

and feasible alternatives that could have avoided use of the Riverway. In the same respect, FHWA complied with NEPA by taking a “hard look” at all alternatives to construction of the Project. Plaintiff’s allegation that FHWA violated NEPA by not considering alternatives to building the bridge lack merit, and FHWA’s actions be upheld.

**B. FHWA Adequately Identified the Indirect and Cumulative Impacts of the Project, as Required by NEPA**

Plaintiff also alleges that FHWA violated NEPA by failing to adequately identify the indirect and cumulative impacts of the Project.<sup>19</sup> Such a claim is baseless, as the FHWA took a “hard look” at both the indirect and cumulative impacts of the Project.

**1. Indirect Impacts**

NEPA established the Council on Environmental Quality (“CEQ”). 42 U.S.C. § 4342. The CEQ promulgates regulations listing factors that federal agencies should account for when taking the requisite “hard look” at environmental impacts. *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428, 431 (8th Cir. 2004). These administrative regulations are set forth in 40 C.F.R. § 1500.1, *et seq.* Among these regulations is a mandate that requires discussions of direct and indirect effects, and their significance. 40 C.F.R. § 1502.16(b). “Indirect effects” as those:

which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and

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<sup>19</sup> Complaint, Count 7.

impacts as used in these regulations is synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.8(b).

Analysis of indirect effects is, by nature, an inexact prognosis of what might happen in the future. The SFEIS acknowledges the speculative nature of such an analysis, stating that:

Research to date has indicated that no empirically valid and reliable measure of anticipated indirect impacts exists. Rather, analysis of indirect impacts requires a rational assessment using a variety of qualitative and quantitative techniques. The focus on this analysis is to examine what is anticipated to occur based on known information and data, while avoiding speculative conclusions.

FHWA\_AR\_08141. Among the measures the FHWA took in taking a “hard look” at the potential indirect impacts that the Project could have was the commission of an “Indirect Land Use Study.” FHWA\_AR\_31985. Meetings were also dedicated to the issue of indirect impacts. FHWA\_AR\_32007; 32087; 32128; 33429.

The SDEIS did not have an individual chapter dedicated to indirect impacts. FHWA\_AR\_04019-04884. Following the issuance of the SDEIS, the adequacy of the indirect effects analysis was raised by the Stakeholders Group. FHWA\_AR\_33046-33132; FHWA\_AR\_33150-33204. The administrative record shows that the chapter received special attention from the FHWA. FHWA\_AR\_33704-33707.

Thereafter, it was determined that an entirely new chapter would be devoted specifically to an analysis of indirect effects in the SFEIS. FHWA\_AR\_08141-08163. The chapter noted that substantial growth has already been experienced in the counties surrounding the Project's area, and demographers expect such trends to continue whether or not a bridge is built. *Id.* Additionally, it was noted that while studies have demonstrated transportation facilities influence the type, amount, timing, and location of development, they are not the sole factor, or even the major factor, influencing land development. *Id.* The Indirect Effects chapter noted that many of the Western Wisconsin communities that could potentially benefit from the construction of an improved crossing already had comprehensive plan policies reflecting a desire to develop a diversity of land uses to advance their own self-sufficiency. *Id.* Such policies suggest that land use change is anticipated in these communities even without the construction of the Project. *Id.*

Chapter 13 also contains a thorough analysis of potential indirect effects to natural, social, and cultural resources resulting from additional land developments in the area, including water quality and supply, wetlands, wildlife habitat, parkland and recreational areas, mussels and fisheries, and cultural and administrative resources. *Id.* The FHWA noted that local governments have the ability to control development, and therefore have the ability to control many of the potential indirect effects to natural, social, and cultural resources. *Id.* The FHWA did, however, go a step further, identifying an additional set of mitigation items totaling \$2.7 million. *Id.* Details

regarding the implementation of these additional mitigation items was documented in the Growth Management MOU. FHWA\_AR\_08711-08719.

Based on the comprehensive analysis in the SFEIS, the FHWA took the “hard look” at indirect impacts that NEPA requires. FHWA’s actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. These actions should be upheld.

## 2. Cumulative Impacts

While the CEQ’s regulations specifically require an EIS to include discussions of direct and indirect effects, 40 C.F.R. § 1502.16, there is no such requirement for cumulative impacts. *See Edwardsen v. U.S. Dept. of Interior*, 268 F.3d 781, 786 (9th Cir. 2001). Instead, the requirement arises from a regulation directing agencies to consider cumulative impacts in determining the *scope* of an EIS. *See* 40 C.F.R. § 1508.25(c)(3).

The cumulative impact of a project is:

the impact on the environment which results from the incremental impact on the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

The Complaint alleges that FHWA failed to properly assess the cumulative impacts of the Project.<sup>20</sup> Nowhere in the comments it submitted about the SDEIS did Sierra Club raise any specific issues with the cumulative impacts analysis.

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<sup>20</sup> Complaint, Count VII.

FHWA\_AR\_08377-08143. Without raising an issue during the comment period, Plaintiff has forfeited its ability to make such an objection now. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004).

Notwithstanding this bar to Plaintiff's allegation, Chapter 14 of the SFEIS comprehensively addresses cumulative impacts that could result following implementation of the Project. FHWA\_AR\_008164, *et seq.* From the outset of the project, the Stakeholder Group held regular meetings to discuss and study cumulative impacts. FHWA\_AR\_30192, 30199, 30215, 30218, 30606, 31597, 31673, 31877, 32018, 32087, 32128. Sierra Club was a member of this subgroup. FHWA\_AR\_08167.

The cumulative impacts analysis of the SFEIS identified five general areas where cumulative impacts might arise: Land Use and Related Issues, FHWA\_AR\_08171; Physical Environment, FHWA\_AR\_08176; Water Resources, FHWA\_AR\_08180; Natural Resources, FHWA\_AR\_08184; and Recreational, Visual and Cultural Resources, FHWA\_AR\_08189. Each of the five areas was evaluated in depth. For example, the Natural Resources section had separate analyses for Aquatic Resources, Vegetation, and Wildlife. FHWA\_AR\_08184, *et seq.*

Based on these separate evaluations, the SFEIS concluded that there is potential for cumulative impacts in areas such as wildlife, prime agricultural land, and water quality and quantity, whereas other areas such as air quality, wetlands, and social conditions had less potential to be effected. FHWA\_AR\_08194. The SFEIS notes that FHWA policy does not allow federal project funds to be utilized for mitigation of impacts not caused by a proposed project. *Id.* It did, however, point to a list of planning tools

available to local governments to address potential cumulative impacts, found earlier in the SFEIS. *Id.*

Just as it did with its indirect impacts analysis, FHWA took the requisite “hard look” at cumulative impacts that NEPA requires. FHWA’s actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

### CONCLUSION

Under the APA, Sierra Club bears the burden of proof to show that the federal Defendants’ decisions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This standard is extremely deferential to the agencies’ actions. The Court cannot substitute its judgment for that of the agency, as long as the agency’s determination is supported by any rational basis. Minus a clear error of judgment, the federal actions must be upheld.

In this case, the analysis that led to the choice of the Preferred Alternative package was comprehensive and exhaustive. Sierra Club was a member of the Stakeholder Group and had its views heard throughout the development of the Project. The fact that Sierra Club is now dissatisfied with the outcome of this process does not mean the Defendants violated any federal laws or regulations, however. As exhibited by the voluminous administrative record before the Court, the Defendants diligently performed their duties and arrived at an outcome that will finally resolve longstanding transportation problems over the Lower Saint Croix. Each decision that Sierra Club challenges was supported by

a rational basis. Therefore, summary judgment should be granted in the Defendants' favor in this action for all counts pursuant to Minn. Fed. R. Civ. P. 56(c).

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Respectfully submitted,

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