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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 22-AP-1106

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

Petitioners-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

On Review from Dane County Circuit Court Case No. 20-CV-585

The Honorable Jacob B. Frost, Presiding

RESPONSE BRIEF OF INTERESTED PARTIES-RESPONDENTS DAIRYLAND POWER COOPERATIVE AND SOUTH SHORE ENERGY LLC

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STATEMENT OF THE ISSUES

1. **Whether the Public Service Commission of Wisconsin ("Commission") properly interpreted and applied the Certificate of Public Convenience and Necessity Law ("CPCN Law"), Wis. Stat. § 196.491(3), when it granted a CPCN for the Nemadji Trial Energy Center ("NTEC" or Project")?**

   The Honorable Jacob Frost, Dane County Circuit Judge, answered yes. The Commission answered yes.

2. **Whether the factual findings in the Commission's Final Decision granting a CPCN for the Project were supported by substantial evidence?**

   The Honorable Jacob Frost, Dane County Circuit Judge, answered yes.

3. **Whether the Commission made reversible error under the Energy Priorities Law, Wis. Stat. § 1.11, by finding the extensive Applicant and Commission staff expert testimony more persuasive and credible than Appellants'?**

   The Honorable Jacob Frost, Dane County Circuit Judge, answered no.

4. **Whether the Commission's Environmental Impact Statement, prepared jointly with the Wisconsin Department of Natural Resources, complied with the Wisconsin Environmental Policy Act?**

   The Honorable Jacob Frost, Dane County Circuit Judge, answered yes. The Commission answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary for the legal issues presented in this matter, as the briefs will fully present and meet the issues on appeal and the arguments of the Appellants are plainly contrary to relevant legal authority that appear to be sound and are not significantly challenged. Wis. Stat. § 809.22(2)(a) 1. and 2. Publication is warranted under Wis. Stat. § 809.23(1)(a)5 because this is a case of substantial and continuing public interest.

INTRODUCTION

The Nemadji Trail Energy Center ("NTEC" or "Project") is a gas-fired, combined cycle electric generation facility proposed by Dairyland Power Cooperative ("Dairyland") and South Shore Energy, LLC ("South Shore" and, together, "Co-owners") to facilitate the deployment of renewable resources and support system reliability. The Project is a critical component of the rapid development of renewable electric generation in Wisconsin and Minnesota. (R. 45, p. 2-3; R. 63, p. 3 et seq).[1] Unlike coal plants, the Project can quickly increase or decrease electric production so that intermittent electric generation resources such as wind and solar may be used to their fullest potential. (R. 45, p. 2-3). The Co-owners identified the Project site as the best option after evaluating multiple sites across the upper Midwest, considering multiple factors such as electric transmission, fuel and water supply and delivery, environmental resources, and air quality impacts.

The Public Service Commission of Wisconsin ("Commission") considered the Project in a comprehensive process which included multiple opportunities for public comments; discovery requests; the intervention of multiple parties; a public hearing; preparation of an environmental impact statement ("EIS"); rounds of pre-filed written testimony; a technical hearing; briefing; and, an open meeting at which the Commission deliberated and reached a decision. After this robust process, the Commission issued a certificate of public convenience and necessity ("CPCN") for the Project, finding that "the weight of the evidence indicates that the project is in the public interest and will not have an undue adverse environmental impact." The Commission likewise found that the Project will "facilitate deployment of [renewable] resources, and that such resources alone could not provide the

[1] Co-owners adopt the Appellants' citation formats. Citations to the Record preceded by R. shall refer to the Record number before the Commission. Citations preceded by Doc. Refers to the record number from the trial court. The Commission's Record can be found at Doc.28, A-App-102.

reliability benefits that are the target of [the Project]." The Commission's decision reflects a thoughtful consideration and weighing of the record evidence. The record demonstrates the Commission specifically considered the evidence and arguments advanced by Appellants, but ultimately determined Appellants' evidence and arguments were not persuasive and that the weight of the evidence instead warranted approving the Project. Appellants disagree, apparently believing they know better how to ensure safe and reliable energy. But Wisconsin law grants the Commission—not Appellants—the authority to make these determinations.

Recognizing the Commission's expertise and the robust record in this matter, the circuit court rejected Appellants' arguments and affirmed the Commission's decision. Both the circuit court and the Commission have now detailed the infirmities of Appellants' arguments, noting that Appellants not only misapply the law, but also fail to account for the actual facts of this case. Nonetheless, Appellants continue to advance largely the same arguments before this Court. The facts and the law have not changed since Appellants' arguments were rejected twice before, and the Co-owners request the Court reject the arguments once more and affirm the Commission's decision.

STANDARD OF REVIEW

The Wisconsin Supreme Court has previously discussed the scope of judicial review when reviewing an order granting a CPCN:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the power plant at issue in this case is in the public interest. These are legislative determinations that the legislature has assigned to the PSC. Whether a given decision is in the public interest "is a matter of public policy and statecraft and not in any sense a judicial question." This court "cannot substitute its judgment for that of an administrative agency determining a legislative matter within its province."

Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin, 2005 WI 93, ¶ 35, 282 Wis. 2d 250, 306, 700 N.W.2d 768.

Courts review conclusions of law de novo. *Tetra-Tech EC, Inc. v. Dep't of Revenue of Wisconsin*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21. Even so, courts may afford "due weight" to an agency's experience or specialized or technical knowledge. *Id.* at ¶ 3. This means "giving respectful, appropriate consideration to the agency's views," which "is a matter of persuasion, not deference." *Id.* at ¶ 78; Wis. Stat. § 227.57(10), (11).

A court "shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8). Here, the Commission must use its experience and technical expertise to weigh a variety of factors and make what is fundamentally a discretionary decision as to the grant of a CPCN, or, in the words of the Supreme Court, a "legislative determination". *Clean Wisconsin*, 2005 WI 93, ¶ 35.

Finally, the Court applies the substantial evidence standard to an agency's factual findings. Wis. Stat. § 227.57(6). "Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674. "The weight and credibility of the evidence are for the agency, not the reviewing court, to determine. An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence." *Id.*

THE CPCN LAW

The CPCN Law, as applied to NTEC and this appeal, allows the Commission to grant a CPCN only if it determines that:

- The design and location of the Project is in the public interest considering alternative locations or routes, individual hardships, safety, reliability and environmental factors. Wis. Stat. § 196.491(3)(d)3.
- The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public

> health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. Wis. Stat. § 196.491(3)(d)4.

This is not the first case in which Clean Wisconsin has attempted to change common-sense practices under the CPCN Law. In 2005, the Wisconsin Supreme Court soundly rejected every argument put forth attempting to overturn a CPCN authorizing construction of another power plant. *Clean Wisconsin*, 2005 WI 93. In that decision, the Supreme Court affirmed certain fundamental principles regarding challenges to the granting of a CPCN. While the standard of review for conclusions of law was changed in *Tetra-Tech*, 2018 WI at ¶ 84, that decision did not overturn *Clean Wisconsin*. The Supreme Court held the following in *Clean Wisconsin*:

> [T]he PSC's interpretation and application of § 196.491(3)(d) inherently calls for a variety of policy determinations. Even a cursory review of the Plant Siting Law reveals that the PSC is charged with making a number of legislative-type policy determinations when determining if a CPCN should be issued. For instance, the PSC must determine whether: "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"; "[t]he design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors"; "[t]he proposed facility will not have undue adverse impact on other environmental values"; "[t]he proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved"; and "[t]he proposed facility will not have a material adverse impact in competition in the relevant wholesale electric service market."
>
> All of these determinations are legislative-type determinations that require the PSC to make factual findings and apply its technical knowledge and expertise. The final decisions as to where and when a proposed power plant should be constructed, how large the plant should be, how it should be constructed, and what fuel it should use are quintessentially legislative policy choices that have been delegated to the PSC.

Id. at ¶ 138 to 139 (emphasis in original).

The Supreme Court thus recognized that the CPCN Law does not set forth a rigid set of prescriptive requirements. No single factor is dispositive. Rather, the Commission's job is to balance whether the proposal on balance meets the standards set forth in the law. *See, e.g., id.* at ¶ 158 ("… 'economics' is but one factor in the multifaceted decision-making process the PSC utilizes").

The CPCN Law also contains procedural mandates that protect an applicant from delay and recognize the importance of electric infrastructure. Most notably, the law allows for the passive approval of an application if the Commission fails to take action within the prescribed time period. *See* Wis. Stat. § 196.491(3)(a)2. (application is deemed complete in the absence of Commission action). Once an application is deemed complete, the Commission must take action within 360 days, or the application is granted by operation of law. Wis. Stat. § 196.491(3)(g).

Finally, the Commission is not required to deny an application if the record does not fully support approval. The Commission is authorized to issue conditional orders. Wis. Stat. §196.395. The CPCN Law further states that an application that does not meet the substantive standards for approval may be approved with whatever modifications the Commission "deems necessary" to find the project will meet the statutory criteria. Wis. Stat. § 196.491(3)(e). The Commission routinely relies upon such orders when it authorizes construction of large energy infrastructure. *Clean Wisconsin.*, 2005 WI 93, ¶ 22-23.

STATEMENT OF THE FACTS

On September 21, 2018, Co-owners filed the Engineering Plan for the Project. (R. 109). Commission regulations require that, prior to filing the Engineering Plan, applicants (1) notify the DNR and the Commission of the applicant's intention to apply for a CPCN; and (2) consult with Commission and department staff to coordinate the potential information needs for the docket. Wis. Admin. Code § PSC 111.51(2). In this case, the consultations included a pre-application meeting on August 31, 2017, a site tour for PSCW staff on September 20, 2017, and a site tour for DNR staff on August 22, 2018. (R. 47, p. 2).

The Application was filed on January 8, 2019. (R. 66 to 108). The Application is several hundred pages long. It contains information about nearly every aspect of the Project. For example, significant portions of the Application are dedicated to how the Project will obtain fuel, how it originally proposed to obtain water for operations, how much water would be consumed, how the air pollution control equipment functions, and how the Project will connect with the electric transmission system. (R. 67 Table of Contents).

The Application also has extensive information about the Project's relationship to both community and natural resources in the area. (R. 67 §§ 5 & 6). The previous land use, plans for construction areas, geology, topology, and soil conditions are all provided before a proceeding even formally commences. *Id.* at §§ 5.2 to 5.6. Similarly, Co-owners and their consultants identified historical and cultural resources in the area and analyzed the potential effect of the Project on those resources. *Id.* at § 5.7.

The proposed sites were surveyed for invasive species and proposed plans to mitigate spread of invasive species were provided. *Id.* at § 5.9. The Application describes pre-application consultations with DNR and the United States Fish and Wildlife Service regarding potential impacts to state and federally listed threatened or endangered species. *Id.* at § 5.20. An Endangered Resources Review Study was

then performed by a certified Environmental Reviewer for both sites and provided in the Application. *Id.* at 5.10; (R. 103). Biological Surveys and Habitat Assessments were also conducted. (R. 67 § 5.10.4; R. 103 Appendix C).

The Application further provided a wetland inventory and delineation report which identified and mapped specific wetlands potentially impacted at each proposed site. (R. 67 § 5.11, p. 5-23 to 5-30; R. 77 to 95). The wetland information included specific characteristics of each individual wetland potentially impacted by the Project. *Id.* For example, Wetland 502 is described in the Application as having been field surveyed/delineated and having the following characteristics:

> W-502f is a moderately sized PSS/shrub-carr wetland located within the Preferred Site boundary adjacent to W-503f, along 31st Avenue East (Volume II Appendix H, Figure A-5. 5). W-502f was documented as having wetland characteristics such as hydric soil indicators F6 (Redox Dark Surface) and F21 (Red Parent Material), Salix petiolaris and Phalaris arundinacea vegetation dominates, and soil saturation at six inches below surface.

Likewise local zoning and land use plans were provided to the Commission as well as summaries of the pre-Application public outreach. (R. 67 §§ 6.3 & 6.7; R. 96 to101). The potential impacts of the Project on local services, local governmental infrastructure, local budgets (including both costs and revenue), workforce, traffic (from both construction and normal operations) were all detailed in depth in the Application. (R. 67 § 6.3 to 6.11).

The Commission determined that the Application was complete on February 15, 2019. (R. 185). The Commission extended the deadline for final commission action on April 4, 2019 and issued a Notice of Proceeding on April 11, 2019. (R. 4 & 1). Throughout the proceeding, the parties conducted discovery and the Co-owners were subject to data requests from Commission and DNR staff. (See gen. R. 141 to 148). The Co-owners also provided access to the proposed Project sites to Clean Wisconsin's witness, Mr. Mosca, on multiple occasions. (R. 48, p. 3).

Multiple rounds of written "pre-filed" testimony were required, each intended to winnow the number of issues subject to debate at the technical hearing.

(R. 12, Facilitating Matters § 3.a.5). The Co-owners sponsored testimony from seven experts in various fields such as electric generation resource planning, hydrogeology, environmental science, and engineering. (R. 44 to 47, R. 58 to 60, R. 62 to 63). DNR provided expert testimony from a hydrogeologist, a water resource specialist, a licensed Professional Engineer who is also a Certified Professional Environmental Auditor, a wastewater specialist, an environmental scientist with a specialty in endangered species, and an environmental specialist in the waterway and wetland program. (R. 51 to 56). Commission staff provided expert testimony from one of its in-house environmental specialists and from a registered Professional Engineer who specializes in utility projects. (R. 49 to 50). Appellants also sponsored three witnesses.

Concurrent with the pre-filed testimony process, the Commission and DNR staff drafted an environmental impact statement ("EIS") as required by Wis. Stat. § 1.11 and Wis. Admin. Code §§ PSC 4.10, 4.30 and Ch. 4 Table 1. The Commission's professional team of contributors included seven staff members from its environmental and engineering departments. The DNR similarly employed the expertise of nine of its staff members to prepare the Final Environmental Impact Statement ("FEIS"). (R. 138, Ex. Summary p. IX).

The Commission and DNR commenced the EIS process by requesting comments on the proposed scope of review. Three-hundred and sixteen comments were made during initial scoping. *Id.* at p. 4. After the Commission's staff and DNR review of the scoping comments, they created a Draft EIS ("DEIS") and published it for comment. *Id.* at p. 5. Fifty comments were received during the comment period, including comments from Appellants and the Co-owners. *Id.* Commission and DNR staff reviewed and considered the comments to the DEIS, the document was amended, finalized, and published. (R. 138; R. 49, p.1).

On October 28, 2019, following the filing of direct, rebuttal, and surrebuttal testimony and the preparation of the FEIS, the Commission's Administrative Law

Judge ("ALJ") conducted a technical hearing and public hearing. During the technical session, party witnesses affirmed their pre-filed testimony and were subject to cross-examination. *See gen.* R. 164.

After the hearing, the parties filed briefs. (R. 23 to 32). The Open-Meeting discussion primarily took place on January 16, 2020, with the Commission voting to approve the CPCN by a vote of 2-1. (R. 170). The written Final Decision was approved on January 30, 2020. (R. 171; R. 22).

ARGUMENT

I. The CPCN Law Has No "Burden of Proof".

Appellants argue that the Commission erred when it allegedly ascribed no apparent burden of proof to the Co-owners. (App. Br. at 21; 23). This argument, previously rejected by the circuit court, is Appellants' attempt to read a burden of proof into the CPCN statute. Under the guise of "burden of proof," Appellants further requested that the Commission – and now this Court –place greater weight upon their evidence than evidence presented by others. This is a misstatement of law.

A. Appellants' claims are contrary to the plain language of the CPCN Law.

The CPCN Law, unlike other sections of public utility law, assigns no burden of proof with respect to any determination that the Commission must make. Other unrelated sections of Chapter 196 may require findings of "clear and convincing evidence" or a "preponderance of the evidence,"[2] but the CPCN Law does not. Rather, multiple provisions note that an applicant need not meet a specific standard. For example, Wis. Stat. § 196.491(3)(e) provides that if an application "does not meet the criteria" for obtaining a CPCN, "the commission shall reject the application

[2]*See, e.g.,* Wis. Stat. § 196.499(5)(d) (explicitly establishing a preponderance standard for the Commission in evaluating complaints); Wis. Stat. § 196.64 (explicitly establishing a clear and convincing standard for the Commission in evaluating treble damages).

or approve the application with such modifications as are necessary for an affirmative finding under par. (d).” (emphasis added). Appellants do not attempt to explain how a statute that expressly allows the Commission to proceed even if the statutory requirements are not met could be read to impose the burden of proof they assert should be applied.

Likewise, Wis. Stat. § 196.491(3)(g) authorizes the approval of applications through passive review. If the Commission does not take action within a specified timeframe, the CPCN is granted. Thus, the statute does not set forth an express burden of proof, let alone instill the sort of “heavy burden” now espoused by Appellants.

B. Appellants Ignore Binding Caselaw.

Appellants’ attempt to read in a civil burden of proof is not only contrary to the statute; it makes no sense. It has long been held by the Wisconsin Supreme Court that the Commission, in making the types of findings the CPCN Law requires, is acting in a legislative *and* quasi-judicial role:

> Hearings before the Public Service Commission… are not to be treated as civil actions. They are legislative in character and while they are, because of the fact-finding powers of the commission, quasijudicial, nevertheless they operate in the legislative field.

Gateway City Transfer Co. v. Pub. Serv. Comm'n, 253 Wis. 397, 405, 34 N.W.2d 238, 242 (1948). Critically, the court continued to explain that review under Chapter 227 was confined to whether substantial evidence supports factual findings:

> The court is not authorized to inquire where the burden of proof lies further than may be necessary to determine whether there is substantial evidence to support the decision or whether it is capricious or arbitrary. Upon the record the commission is to determine whether in the public interest a certificate of convenience and necessity should be issued.

Id. (emphasis supplied).

In *Clean Wisconsin*, the Supreme Court confirmed that the Commission acts in legislative function under the CPCN Law:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the power plants at issue in this case is in the public interest. These are legislative determinations that the legislature has assigned to the PSC. *See* Wis. Stat. § 196.491(3)(d)3. Whether a given decision is in the public interest is a matter of public policy and statecraft and not in any sense a judicial question. This court cannot substitute its judgment for that of an administrative agency determining a legislative matter within its province.

Id. at ¶ 35, 282 Wis. 2d at 306, 700 N.W.2d at 795 (emphasis added). Reading *Clean Wisconsin* and *Gateway* together, it is clear that Appellants' efforts to impose a civil burden of proof are misplaced.

Ignoring *Gateway* completely, Appellants incredibly instead rely on a dissenting opinion from a case that predates *Gateway.* (App. Br. at 24) (citing *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 83, 21 N.W.2d 5, 17 (1945)). There, an applicant was denied a permit and argued it was legally entitled to the permit. The lead opinion *agreed with the applicant* that it should receive the permit and found that the applicant did not have a civil burden of proof as Appellants claim. *Id*. at 77. The opinion explains that the Commission's determinations as to public convenience and necessity are legislative decisions. *Id.* The only reason the appellate court did not direct the Commission to issue the permit on remand was that that the court felt that it would be unconstitutionally acting in a legislative function if it had done so. *Id.* at 77-78. That power rested with the Commission and not with the Court. *Id.*

Appellants' reliance on the dissent in *Clintonville* is wholly inappropriate. *Gateway, Clean Wisconsin,* and the majority opinion of *Clintonville* control, and they do not support Appellants' view of the law.

Appellants similarly misplace reliance upon *Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 191 N.W.2d 833 (1971) (App. Br. at 27). There, appellant was discharged from her job. *Id.* at 125. Following a hearing, the personnel board concluded her discharge was for just cause. *Id*. On appeal, when discussing whether the board should be a rubber stamp for firing decisions, the court did find error when the board

simply looked to affirm a decision of a supervisor by determining whether substantial evidence supported the decision. *Id*. at 134-35. But the court did not overturn the decision on that basis. It continued, as this Court must, to evaluate whether there was evidence that supported the actual decision. *Id*. at 139-40.

Reineke also does not support the imposition of a general rule that the "movant" has the burden. Ultimately, the court found that even though the employee was seeking reinstatement, the appointing authority had the burden of proving that the discharge was for just cause. *Id*. at 133.

Appellants' reliance on a "general rule" was correctly rejected by the Circuit Court:

> The general statement in 2 Am. Jur. 2d Administrative Law §344 is not helpful. That section attempts to distill a general rule applicable to administrative proceedings. Though such a general rule may be helpful for the majority of circumstances, it will not apply to all such proceedings. For example, many administrative proceedings involve determinations as to specific rights … Where someone is asserting a right or alleging violation of a right, the party seeking relief generally can and must prove her case to a specific standard of proof, such as the preponderance of the evidence.

See Order, Doc. 237 (dated May 17, 2022, at 8) (emphasis added).

Moreover, Appellants' reliance on *Wisconsin Ass'n of Mfrs. & Com., Inc. v. Pub. Serv. Comm'n* is misplaced. 94 Wis. 2d 314, 287 N.W.2d 844 (Ct. App. 1979). That case involved the review of an order from the Commission affirming a natural gas rate design. *Id*. at 318-19. On review, the appellate court explained that when an agency's decision is challenged, the reviewing court itself will apply the substantial evidence test, "and must give due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as the discretionary authority conferred upon it." *Id*. at 321. The court ultimately concluded that:

> We will not substitute our judgment for that of the PSC. While one may differ with the conclusion reached by the PSC, it cannot be said that a reasonable person could not have reached that conclusion. The record documents the PSC's course of

> reasoning. We affirm the finding of the circuit court that the PSC's adoption of the gas rate design in question is supported by substantial evidence in the record.

Id. at 324 (emphasis added). Even Appellants' cited case law does not support their proposition that a preponderance standard is appropriate for this case.

C. The Commission Diligently Considered an Exhaustive Record.

In addition to misstating the law, Appellants grossly mischaracterize the diligence with which the Commission considered the extensive evidence in this proceeding. Any reasonable review of the Commission's record and Final Decision shows that the Commission did not simply grant a CPCN "on very minimal factual information." (App. Br. at 26). The Commission heard expert testimony from over a dozen witnesses, reviewed the transcripts of the public and technical hearing, reviewed parties' briefs, discussed the evidence at an open meeting, and rendered a decision. Ultimately, the Commission determined the Project was in the public interest, demonstrating conclusively that any "burden of persuasion" had been met. The mere fact that Appellants disagree with the Commission's decision does not mean that it erred.

D. Burden of Proofs do Not Apply to Laws that Clearly Require the Government to Act in a Certain Manner.

Finally, Appellants argue that the Commission's discussion of the burden of proof was erroneous because it did not address who was responsible for "WEPA compliance" or compliance with the Energy Priorities Law (App. Br. at 29-30). The argument is nonsensical and at best, a red herring. There is no reason whatsoever for the Commission to address a "burden of proof" under these laws. There is no debate about who was responsible for compliance with those laws - the Commission is. No party is required to provide evidence that the Commission must comply with blackletter law. Nor is it even clear how an applicant could do what Appellants ask. Does a witness remind the Commission of its statutory duties at the outset of a case? Is it also the applicant's "burden" to ensure the ALJ conducts a hearing correctly or

makes no incorrect evidentiary rulings? Is the opponents' "burden" to convince the Commission not to allow passive approval under Wis. Stat. § 196.491 (3)(a)2. to occur? The argument is absurd. In any event, the record is clear. The EIS plainly indicates that Commission and DNR staff authored it. (R. 138).

II. The Energy Priorities Law Does Not Apply to Wholesale Merchant Plants, But Even If It Does, The Commission's Determination That It Was Satisfied Was Founded Upon Substantial Evidence.

The Energy Priorities Law requires the Commission to consider certain priorities when making energy decisions so long as those priorities are cost-effective and technically feasible. Wis. Stat. § 1.12(4). However, to the extent that the Energy Priorities Law requires a showing that a project is cost-effective or more technically feasible than alternatives, it is directly inconsistent with the more specific provisions of the CPCN Law which specifically states that: (a) wholesale merchant plant owners do not need to establish that a facility "satisfies the reasonable needs of the public for an adequate supply of energy" or that the project is cost-effective; (b) the Commission may not consider economic or engineering factors when deciding whether the proposed design and location is in the public interest; and (c) the Commission may not consider alternative sources of supply when deciding whether the proposed design and location is in the public interest. Wis. Stat. § 196.491(3)(d)2., 3., and 5. While the Commission attempted to harmonize the two statutes, they are fundamentally inconsistent for merchant plants. The more specific statute relating to Commission review of merchant plants, the CPCN Law, should control, not the Energy Priorities Law. *State v. Wilson*, 2017 WI 63, ¶22, 376 Wis. 2d 92, 101-02, 896 N.W.2d 682, 687.

If the Court determines the Energy Priorities Law applies, it must affirm the Commission's decision that the Co-owners satisfied the Energy Priorities Law because the decision was supported by substantial evidence. Once again, it is not legal error for the Commission to find in favor of one party's experts (and its own staff) over another party's. Now that the Commission has acted, the only question

for this Court is whether that decision was supported by substantial evidence. In this case, the Co-owners and the regulatory bodies that oversee their long-term operations determined there is a need for up to 625 MW of dispatchable generation in the area of the Project to support the integration of renewables and provide market opportunities when renewables are not producing power. (R. 62, p. 2).

As Mr. Coughlin testified:

> The fundamental purpose of the Project is to provide energy when intermittent renewables are not. The plant will also be capable of quick start-up, rapid ramping, and dispatch to realize market opportunities, and support system reliability. The plant will be capable of providing energy at any time of the day at any time of the year, except during outages. These attributes provide both reliability benefits as well as market opportunities to the Applicants that cannot be replicated by higher priority alternatives.

Id. Mr. Coughlin's surrebuttal testimony further described the technical capabilities of the plant. From a cold start, the facility can produce 150 MW in ten minutes at any time of day, any day. *Id.* at 1. After the initial ten-minute start-up, the plant can add, or subtract 30 MW per minute, up to the full 300 MW output of the combustion turbine. *Id.* Once the plant is running and hot, it can ramp up and down 45 MW every minute. *Id.* And perhaps most importantly, the plant can generally provide these services any time of day, any day of the year. *Id.*

Mr. Coughlin's surrebuttal testimony also described the process by which the Co-owners approached alternatives analyses:

> Both Minnesota Power and Dairyland employ professional planning departments with expert engineers, analysts, and planners who constantly review resource options including renewable plus storage. In our experience, batteries plus storage or batteries alone are not a cost-effective way to replace the Project. I would also note that, while I was not personally involved in the proceedings, the Minnesota Public Utilities Commission and the Dairyland Board of Directors both extensively evaluated and affirmed that NTEC is the appropriate option.

Id. at 2.

Mr. Lind also testified on behalf of the Co-owners, primarily to respond to Sierra Club's witness Mr. Goggin. Mr. Lind testified:

- Renewable development in the midcontinent is likely to exceed Mr. Goggin's predictions and as development increases, reliability challenges associated with the intermittent nature of renewable generation increase. (R. 64, p. 4, 6-8, 8-9)

- Combined cycle resources, such as the Project, have significant advantages over batteries, which require recharge, have limited duration, and have shorter lifecycles and are not as cost-effective as the Project. *Id.* at 11 to 13; R. 164, Trp. 292: 22 to 293: 1.

The Sierra Club failed to provide any evidence on the relevant question before the Commission: what is the highest priority alternative that is cost-effective and technically feasible to provide dispatchable generation in northwestern Wisconsin? Mr. Goggin admitted that his testimony is primarily related to whether the Project is needed, not how to address that need. (R. 164, Trp. 329: 10-13). He did not attempt to compare the cost-effectiveness of batteries to combined-cycle plants and most of his testimony does not even discuss a higher priority resource. *Id.* at Trp. 329: 2-9. He also admitted that he did not analyze how to create 600 MW of dispatchable generation in northwestern Wisconsin cost-effectively. *Id.* at Trp. 329: 14 to 330:1.

Mr. Goggin's testimony was essentially a marketing pitch for batteries by a social scientist arguing for policies to promote storage and renewable development. *Id.* at Trp. 326: 5-10 & Trp. 328: 23 to 329: 1. To that end, he might be an effective advocate. But he is not responsible for the operation of safe, reliable, and cost-effective provision of electricity. He is not an engineer or transmission planner; he has never been responsible for operating transmission or generation assets; he has never worked for a load serving entity or regional transmission organization that operates and plans the bulk power system, and has never been responsible for purchasing, siting, or designing any generating assets. *Id.* at Trp. 326: 5 to 328: 22. His opinions are inconsistent with actual industry experience, and the record supports a conclusion that his proposals were not reasonable.

In Mr. Goggin's view, the concepts of baseload and intermediate generation are "largely obsolete." (R. 61, p. 9). He opined that batteries are already proliferating, although he did not explain what "proliferate" means in any relevant context. *Id.* at 12. In fact, there were no utility scale batteries in operation in Wisconsin when he testified, there was only a single 4-hour 10 MW battery in operation in Minnesota, and Mr. Goggin was unaware of a single 10-hour battery in operation anywhere in the United States. (R. 164, Trp. 331:14 to 332: 4; Trp. 335: 4-8). Appellants' Initial Brief notes Mr. Goggin's opinion that "there is 'not an engineering basis'" for requiring 10-hour batteries. (App. Br. at 55 n.4). But it was not legal error for the Commission to give greater weight to the testimony of *engineers* when deciding whether or not there are *engineering* reasons for selecting one technology over another.

The record also showed that if every battery in the interconnection queues in the next four years in Wisconsin is placed into operation, a dubious assumption, they will provide only two-thirds of the capacity of the Project. *Id.* at Trp. 335:9 to 336:4. They will provide this benefit for four hours, and if they are used in this fashion repeatedly, their useful life will degrade. *Id.* at Trp. 337: 20-22, 338: 8-18. The record supports a conclusion that batteries are not a technically feasible alternative to this Project, nor are they a preferred resource under the law.

Commission staff witness, Ms. Hammil, also contested Mr. Goggin's sunny view of the technical capabilities of batteries compared to the Project. Unlike Mr. Goggin, Ms. Hammil is an engineer and has experience reviewing utility construction projects. Appellants quibble with her analysis, but the Commission had ample reason to find her more credible than Mr. Goggin. In any event, it is a curious view of the standard of review adopted by Appellants to suggest that Mr. Coughlin, Mr. Lind, and Ms. Hammil's testimony do not collectively constitute "substantial evidence." Appellants appear to believe that any party can prevent the issuance of a CPCN simply by having one witness disagree with another. That is not reasonable.

The Commission's consideration of the combined weight of the evidence was lawful and its determination that the law was satisfied was supported by substantial evidence.

III. The Commission's Determinations Under Wis. Stat. §§ 196.491(3)(d)3. & 4. Were Lawful.

Appellants assert that the Commission abdicated its responsibilities under § 196.491(3)(d) to consider environmental factors because it "did not discuss these impacts in any meaningful detail or describe the affirmative evidence it was relying on to make a policy determination." (App. Br. at 35). This claim of error was explicitly rejected by the Wisconsin Supreme Court in *Clean Wisconsin*, 2005 WI 93. There, the appellants similarly argued that the Commission's final decision "merely recited the statutory criteria and labeled them 'Findings,' such that it is impossible to review the PSC's decision." *Id.* at ¶ 145. The court disagreed, holding that it was "easily able to determine whether the PSC acted appropriately" following a 50-page Final Decision:

> There is no requirement that the agency provide an elaborate opinion. All that is required is that the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision.

Id. (citation omitted). So too, in the instant case, the Commission made findings of fact and issued a 68-page decision explaining its conclusions. (R. 22). No more is required to demonstrate the Commission's weighing of environmental factors as a component of its public interest determination or its consideration of whether the Project presents undue adverse environmental impacts.

Appellants' citations to *Rickaby v. Dep't of Health & Soc. Servs*., 98 Wis. 2d 456, 462, 297 N.W.2d 36 (Ct. App. 1980) and *Rutherford v. Lab. & Indus. Rev. Comm'n*, 2008 WI App 66, ¶24, 309 Wis. 2d 498, 752 N.W.2d 897 are inapposite to the issues here. (See App. Br. at 34-35). *Rickaby* involved an agency decision which the appellate court held was inconsistent with the plain language of the rule at issue and effectively "rewrites the rules," and *Rutherford* involved an ALJ

imposing a rule of evidence uncontemplated by applicable statutes or rules. Those cases have no bearing here.

Appellants next argue that, by conditioning the CPCN on receipt of applicable DNR permits, the Commission made a "piecemealed" decision related to environmental factors. (App. Br. at 37). Even if Appellants' characterization of the Final Decision was accurate, which it is not, the case law is to the contrary. "An agency may assume that any environmental consequences will be controlled through compliance with the applicable administrative code provisions." *Clean Wisconsin*, 2005 WI 93, ¶ 167. Moreover, the record demonstrates that the Commission did indeed approach the public interest inquiry in a wholistic manner—weighing environmental considerations against the range of other factors that make up the public interest. As just one example, on siting, the Commission found:

> [T]he Nemadji River Site is preferable as it is closest to the needed and related infrastructure, has the least amount of impacts to landowners and residents, and . . . has the lowest wetland and associated natural resource impacts.

(R.22, p. 28). Appellants' contention that the Commission must "wholistically" consider all potentially adverse environmental impacts suggests either that the whole is greater than the sum of its parts, or that there are gaps in DNR's regulatory jurisdiction[3] that the Commission must fill. There is no support in law or logic for either conclusion.

Appellants cite *Madison Gas & Elec. Co. v. PSC*, 109 Wis. 2d 127, 325 N.W.2d 339 (1982) for the proposition that the Commission improperly applied the applicable legal standard and erroneously exercised its discretion. But as is evident from Appellants' block quote, (App. Br. at 36), that case has nothing to say about the Commission's evaluation of environmental factors under the CPCN Law, nor is it relevant for Appellants' general proposition. The Commission's decision on

[3]Appellants cite as examples "secondary impacts to rivers and streams, protection of rare plants, and designing stormwater systems in excess of regulatory requirements to account for unique site conditions and heavier rains caused by climate change." (App. Br. at 38).

review in *Madison Gas & Elec.* stands in clear contrast to its decision here, in which it expressly identified the applicable standard:

> DNR's authority over the issuance of the relevant permits in no way relieves the Commission of its duty under the CPCN Law to judge whether the project will have undue adverse environmental impact. This is a function that the Commission must perform for itself, and in doing so, must weigh the evidence and not substitute the judgment of any other entity for its own.

(R.22, p. 38). The decision demonstrates that the Commission was well aware of the applicable legal standard and applied it correctly to the facts of the proceeding. Appellants simply disagree with the weight accorded by the Commission to the various environmental factors and potential impacts of the Project, but that is no basis for reversal.

Appellants acknowledge that *Clean Wisconsin* supports the Commission's reliance on DNR's special expertise, but nevertheless assert that the Commission should "explain the basis for why it believed the more limited DNR permits would address outstanding issues and environmental impacts within the Commission's broader purview." (App. Br. at 39). But the Commission *did* explain its reasoning. Extensively. In a sixty-eight-page order.

First, understanding that it owed no deference to DNR, the Commission explicitly rejected a DNR witness's provisional testimony concerning the capacity of the aquifer supplying the Co-owners' proposed high-capacity wells. (R.22, pp. 38-39). In addition, it concluded that the claimed risk of slope failure associated with the retaining wall proposed for the Nemadji River Site was "conjectural." *Id.* at p. 37. The Commission also found that while it was "sensitive to the wetland impacts associated with developing the sites," nevertheless, "the conditions recommended by DNR staff and incorporated into this decision . . . will mitigate the impacts associated with construction and thereby prevent the project from having an undue adverse environmental impact." *Id.* at pp. 37-38, 49-50.

Appellants' claim that the Commission erred by failing to explain why it determined that DNR's recommended conditions will mitigate the risk of undue impacts is unfounded. Here again, Appellants' position that there is a legal requirement to address every theoretical objection in a written order is contrary to the Supreme Court's holding in *Clean Wisconsin.*

A. The Commission's Findings of Facts are Supported by Substantial Evidence.

Appellants continue to radically understate the quality and quantity of evidence before the Commission. The substantial evidence standard does not allow a court to ignore one party's evidence. Rather, it requires a court to affirm the decision if reasonable minds could arrive at the conclusion reached by the Commission. *Milwaukee Symphony*, 2010 WI 33, ¶ 31. All of the Commission's determinations were supported by substantial evidence.

1. The Commission's Determination that the Preferred Site was in the Public Interest was Supported by Substantial Evidence.

The Commission rightfully considered both the benefits and challenges of the site when it weighed whether the design and location of the Project is in the public interest. The CPCN Law does not give supremacy to any one factor in the public interest determinations. Nor does any discrete component (such as an alleged indirect impact to a single wetland) of any single factor ("environmental factors") control the public interest determination. The law requires the Commission to determine whether:

> The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant. In its consideration of environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

Wis. Stat. § 196.491(3)(d)3.

It is important to begin by recognizing, at least insofar as possible in a brief, all of the evidence in the voluminous record. The record contains, for example:

1. Uncontested evidence, supported by a scientific study, that the Project will comply with Environmental Protection Agency noise standards. (R. 67 § 6.12; R. 101 Appendix N).

2. Expert testimony explaining the benefits of the sites, including: the proximity to transmission and natural gas infrastructure in industrialized Superior; proximity to the area where both owners' operations intersect; the sites are under the control of the Co-owners and the preferred site had previously been approved by the Commission for the development of a large natural gas electric generation. (R. 44, p. 8; R. 59 p. 3-4).

3. The siting studies used by Co-owners to inform their site selection process. (R. 67, § 1.4; R. 75 Appendix A).

4. Legally binding commitments to use best management practices ("BMPs") that developed from experience with past projects and are in compliance with DNR-approved Technical Standards/BMPs for erosion control. (R. 45, p. 3).

5. A binding commitment to have construction inspectors "onsite throughout construction to ensure compliance with PSCW and DNR permit requirements" (R. 45, p. 3).

6. Testimony from the DNR wetland specialist that Douglas County is replete with wetlands, contrary to Clean Wisconsin's suggestions that there *might* be a site nearby without the same level of impacts to wetlands. (R. 164, Trp. 403-404).

7. Unanimous resolutions in support of the Project from both the City Council and Douglas County Board; personal comments from representatives from the City Council (including the representative whose district includes the neighborhood located closest to the Project), the County Board, the Mayor of Superior, and *sixteen* state legislators representing both parties in support of the Project. (R. 165, Trp. 89: 16-22; Trp. 95: 8-13; Trp. 549: 7-15); (R. 140; R 191).

8. A habitat assessment study, an Endangered Resources Review, Biological Surveys, and a commitment to survey for rare plants once the site is selected. (R. 103, R. 59, p. 1-2).

9. Testimony from multiple DNR and Commission expert witnesses who did not express or appear in any way to share Clean Wisconsin's concern that the plant would create a risk to public health or safety. (R. 164, Trp. 264-268).

The primary evidence that the site location was in the public interest was entirely uncontested. Mr. Daniel McCourtney was one of several experts who testified on behalf of the Co-owners. When he testified, Mr. McCourtney had nearly twenty years of experience in resource development and environmental compliance, including nine years as environmental and permitting lead for large capital projects for ALLETE. He sponsored the Application, which included both the initial siting study and a significant summary of the factors by which sites were evaluated, both in the siting study and subsequently to it. (R. 47 & R. 59). His testimony explained that, among other benefits of the site, it is located in an industrialized area of Superior, it is in close proximity to needed related infrastructure, it is near the border where the Co-owners' service territories interconnect, and the site had previously been through regulatory review for the siting of a large electric generation facility. (R. 47 at 8).

There is zero evidence in the record that the critical benefits summarized by Mr. McCourtney are not accurate. Appellants may be dissatisfied that the Commission allegedly did not weigh other considerations more heavily, but that does not mean that there is no substantial evidence to support a conclusion that the design and location is in the public interest.

Appellants may downplay the critical importance of being close to required infrastructure, but it was not unreasonable for the Co-owners to give strong consideration to such a site, nor was it unreasonable for the Commission to recognize these benefits. Appellants also unreasonably give no weight whatsoever

that the approved site is entirely owned by the Co-owners and is physically located in an industrial area of Superior (and physically contiguous to a large gas and oil storage "tank farm"). They similarly offer no rebuttal to Mr. McCourtney's opinion that it is wise to construction large energy infrastructure near where the ultimate owners conduct their business.

The Final Decision demonstrates the careful consideration the Commission gave to the parties' respective positions. As the Commission noted, in part:

> The Commission's analysis of alternative locations is guided by Wis. Admin. Code § PSC 111.53(1)(e) and (f), which require the applicants to provide the Commission with a description of the alternatives considered, a description of the siting process, a list of the factors considered in choosing and ranking the alternatives, and detailed site-specific information on two proposed sites. The purpose of requiring this information is to equip the Commission to: (1) understand the overall context of site alternatives; (2) understand and potentially judge an applicant's decision to move forward with a site, given the other alternatives considered; (3) understand in great detail the characteristics of the gtwo sites proposed to the Commission; and (4) determine whether one, both, or neither of the two sites is in the public interest…
>
> The Commission finds that the applicants appropriately considered environmental factors and individual hardships in ranking and choosing among site alternatives. The sites considered by the applicants were reviewed for their impacts to wetlands, as well as other environmental impacts. The sites were ranked based, in part, on their anticipated environmental impacts as well as considerations that were reasonable predictors of the extent to which the sites would impose individual hardships. Under this methodology, the Nemadji River Site compared favorably to all of the other sites considered. It was reasonable for the applicants to move forward with a proposal to develop NTEC at the Nemadji River Site.

(R. 22, p. 25 to 26).

Appellants next argue that the Commission did not properly consider safety, individual hardships, reliability, and environmental factors. Here again Appellants' argument misstates the CPCN Law. Safety, individual hardships, reliability, and environmental factors must be considered, but are not individual criteria to be independently satisfied. (*See* App. Br. at 41).

It was entirely appropriate for the Commission to focus on disputed issues in the Final Decision. Doing so is not flipping a burden. Rather, the practice

demonstrates that the Commission diligently considered Appellant's complaints. For example, Appellants now allege that the Final Decision does not sufficiently address the Project's potential impacts to geological formations. But no law requires the Commission to extensively discuss one of a multitude of factors that no party contested with testimony in the proceeding.

Regardless, there was evidence in the record that the Project does not impact any unique geological formations. The Application described the geology on site and in the area at length, including identifying that there were no mines or quarries in the area and that no unique geological features were present. (R. 67, Section 5.4). Mr. McCourtney, whose company has operated in the area for over a hundred years, also testified similarly. (R. 47 at 11). No other witness mentioned the subject for the entire length of the proceeding. Appellants' suggestion that the Commission is legally required to imagine what unexpressed concerns they may have and preemptively write extensively about them in its Final Decision is preposterous and contrary to the holding in *Clean Wisconsin.*

In any event, it is the Commission's broader finding that the Project's design and location is in the public interest that is subject to the substantial evidence test—not individual statements taken in isolation. The extensive evidence supporting the Commission's conclusions is summarized above, but that is just a summary—the record is even more expansive. As to Appellants' current complaints, the suggestion that concerns like truck traffic require the Commission to reject a CPCN is not reasonable. (App. Br. at 41). The Commission was well aware of the amount of truck traffic, the amount of ground fog and rime ice that potentially could be created, and all of the public comments in the record (not just the minority who objected to the Project). (R. 22, p. 29-30). It is not unlawful for the Commission to consider those concerns and find them outweighed by other factors.

As to reliability, it was not unlawful for the Commission reach conclusions regarding credibility in a battle of experts. Appellants' witness Mr. Mosca raised

concerns that the Project will be constructed on a steep slope "on highly erodible soils". (R. 48; Tr. 264; 16-24). Mr. Mosca is not an engineer, he conducted no specific analysis to conclude the plant would fall into the river, did not review any geotechnical reports, and despite spending considerable time discussing the potential impact of rainfall on the Project, admitted on cross-examination that the entire plant is located above the 500-year floodplain. (R. 64 at 7, R. 164, Trp. 267: 18-22, 268: 6-8). The Commission did not ignore that testimony: it specifically found it was not credible. (R. 22, p. 37).

None of Mr. Mosca's concerns were shared by DNR or Commission staff, who concluded that erosion concerns can be adequately addressed with appropriate construction practices. (R. 138, Section 3.2.4.1; R. 164, Trp. 264- 267). Co-owners committed to using BMPs, continuing to work with the DNR, and complying with all applicable regulatory requirements. (R. 59, p. 2; R. 45, p. 3). Co-owners are now legally bound to do so by the Final Decision.

The Commission did not commit reversible error by failing to adopt Mr. Mosca's opinions. Ultimately, considering the full record of Project impacts and benefits before it, the Commission accepted the common-sense proposition that adding generating resources will provide additional reliability. *Id.* at 29. See also (R. 45, 62, 63).

Similarly, the Commission properly considered environmental factors in its consideration of whether the design and location are in the public interest. As the Commission aptly recognized, environmental factors are germane to two separate determinations the Commission was required to make. With respect to those determinations, it was not legal error for the Commission to issue a conditional order and it was not unreasonable for the Commission to consider other significant legal/regulatory constraints placed on the Co-owners that will limit potential environmental harm of the Project.

2. The Commission's Determination that the Project Does Not Have "Undue" Adverse Environmental Consequences is Supported By Substantial Evidence.

The Commission did not "punt[]" on environmental issues, despite Appellants' accusations otherwise. (App. Br. at 22). The Commission did exactly was it is supposed to do: consider all of the evidence, and then weigh all of the adverse environmental impacts against Project's benefits. (R. 22, p. 34- 40; 42-56). Appellants' complaints that certain issues were not adequately reviewed ignores any evidence that does not support their negative view of the Project. The argument also presupposes that the Commission *had* to agree with Appellants' witness on every issue. That is not what the CPCN Law requires.

Appellant's theme that the DNR was not sufficiently informed or involved in the process also does not stand up to scrutiny. (App. Br. 11, 39). The DNR was far from a passive and uninformed participant in the proceeding. *When* DNR staff had a concern, they went to extraordinary efforts to convince the Commission they were correct. *See e.g.* (R. 38, 41, 51-52, 65, 151-162). *When* DNR staff wanted more control over the Project than their statutory jurisdiction allowed, they proposed lengthy conditions for the Commission's consideration, each of which is reflected in the Final Decision. (R. 22, p. 46-56).

Appellants' claims that the Commission lacked sufficient information on waterway impacts is wrong. Appellants create the impression that (1) absolutely nothing was known about the ephemeral stream that is on the preferred site and the potential impacts of the Project on the water and (2) there was no engineering plan filed in the case. (App. Br. at 22; 49 (positing that the DNR did not have in hand an engineering plan to "evaluate whether a chapter 30 permit is required for direct impacts.")). That is not correct.

Waterway WW-501f is an intermittent stream running from the Enbridge tank farm stormwater ponds to the preferred site via culvert. (R. 164; Trp. 418: 10

to 20) It was technically considered "navigable," but as DNR witness Ms. Tekkler noted, it is unlikely anyone actually boats on an intermittent drainage stream from the Enbridge tank farm. (R. 56, p. 5).

The Application specifically discloses that the waterway was planned to be moved by construction, that the impact to the waterway would require a Chapter 30 permit, and that the impact would include 1503 square feet of placement fill. (R. 77, p. 3) The waterway permit was filed with the DNR on December 18, 2018. (R. 67, p. 5-23).

After the Co-owners identified their plans to impact WW-501f, described those impacts, and applied for its wetland and water permits, the DNR raised concerns with the proposal, and the Co-owners thus modified the proposal. (R. 56, p. 5). The Co-owners were continuing to work with the DNR to avoid impacts to the intermittent stream. The fact that the process was not complete at the time of the hearing is no reason to overturn the CPCN. This type of cooperation with DNR should be encouraged, not severely punished.

Appellants raise similar arguments about the wetland impacts of the Project. Once again, their selective reading of the testimony should be rejected. The wetland impacts of the Project were described to a substantial degree and, for the most part, were not subject to any debate in the proceeding. (R. 67, p. 5-23 to 5-30; R. 77-95; R. 56, p. 6-10, DNR testimony from wetland specialists). The Commission was well aware of the wetland impacts of the Project. *Id.* The Commission simply did not weigh those impacts as Appellants desired. That does not make the Commission's decision arbitrary and capricious or unsupported by substantial evidence.

IV. The Commission Complied with WEPA.

Appellants challenge the Commission's determination that the EIS complied with the Wisconsin Environmental Policy Act ("WEPA"), arguing that the EIS did not sufficiently address methane emissions and climate change impacts. (App. Br.

at 22; 60). Appellants' arguments misconstrue the law and the facts. An examination of the Commission's decision and the EIS under the applicable legal standard demonstrates that the Commission's analysis was robust, exceeded WEPA's requirements, and should be affirmed.

"The purpose of WEPA is to insure that agencies consider environmental impacts during decision making." *Clean Wisconsin*, 2005 WI 93, ¶ 188. The Commission complied with that directive by preparing, jointly with WDNR, an EIS for this Project. The purpose of an EIS "is to enable agencies to take a 'hard look' at the environmental consequences of a proposed action." *Id at* ¶ 189. Agencies are not required to engage in "remote and speculative analysis" or evaluate "every potentiality." *Id. at* ¶ 191. Likewise, "[n]o matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed." *Id.* Rather, "the rule of reason," requires an EIS to "furnish only such information as appears reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *Id.* (citation omitted).

The Project's EIS is nearly 300 pages. (R. 138). It describes the Project in detail; discusses multiple alternatives to building the Project; analyzes the Project's environmental and socioeconomic impacts; and identifies potential mitigation strategies. (R. 138, FEIS at XII-XXII and §§ 2.1.14, 2.8, 3.4, 3.3.11.7, 4.3.11.7, 5.1.2.2). The EIS included detailed consideration of the Project's cumulative impacts on greenhouse gas emissions, including methane. (*See* R. 138, FEIS § 3.2.1.6., Tables 3-7, 3-8, and 3-9). Not only does the EIS acknowledge (in analysis spanning several pages) the methane that will be associated with natural gas extraction, it quantifies how much methane (CH4) will serve as a multiplier for the global warming potential of GHG components. (R. 138, § 3.2.1.6). Appellants fail

to identify with any specificity what they believe is lacking. The EIS reflects exactly the "hard look" that WEPA requires.

Appellants argue that the EIS should have done more to characterize the Project's greenhouse gas emissions. (App. Br. at 57; 59; 61). Appellants acknowledge, as they must, that the EIS includes not one, but *two* estimates for total emissions from Project, depending on its capacity factor. (App. Br. at 60). Appellants nonetheless fault the EIS for not discussing the "relative significance of these emissions. . . ." (*Id.*). However, Appellants fail to identify a standard they assert the Commission failed to meet or any specific information or methodology the Commission should have employed. The EIS already includes a quantification of direct greenhouse gas emissions from the Project; it also includes a qualitative discussion of recent climate research and the Project's potential indirect impacts. As the circuit court explained, Appellants "never explain what further analysis was required . . . I consider Appellants' argument at least partially undeveloped. . . . I must be provided some standard to say the PSC failed to meet. Appellants do not provide such a standard and I am in no position to invent one." (Doc., at 18). WEPA does not require the Commission or this Court to guess.

Appellants next argue that the EIS did not "analyze the indirect effects as a result of hydraulic fracturing necessary to supply the proposed project with methane gas." (App. Br. at 60). Once again, Appellants acknowledge that the EIS discusses that the Project would consume natural gas, and that natural gas extraction (an indirect impact of "any new, large natural gas consumer"), does have "potential environmental impacts." (App. Br. at 60 (quoting the EIS)). Nonetheless, without any citation to Wisconsin law (or identification of facts which would support such analysis), Appellants assert that the EIS should have "further attempt[ed] to characterize" these impacts, including a quantitative estimate of any increase in GHG emissions "that would result from the increased hydraulic fracturing necessary to fuel" NTEC. (App. Br. at 60-61).

Appellants cite two inapposite federal cases in support of their argument that the Commission should have attempted to perform a quantitative analysis of indirect, upstream emissions. In *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017), the court discussed downstream (not upstream) impacts[4] and held that an EIS prepared by FERC should have "estimated the amount of power-plant carbon emissions that the pipelines would make possible." That case involved the environmental review of a natural gas pipeline that would transport natural gas directly to power plants in Florida. *Id.* The court explained that quantification is not required every time emissions may be an indirect effect of an agency action because "quantification may not be feasible." *Id.* at 1374. However, in that case, the court held that quantification of indirect downstream impacts should have been feasible because the pipeline was transporting natural gas directly to power plants. *Id.* at 1371-72. The same is not true here—Appellants have not identified any "downstream" impacts that should have been analyzed (and there are none), and Appellants' vague references to upstream indirect impacts do not come close to identifying any facts or methods which would make the analysis demanded by Appellants at all feasible.

Likewise, Appellants also cite an unpublished district court decision, *Columbia Riverkeeper v. U.S. Army Corps of Eng'rs*, No. 19-6071, 2020 WL 6874871, *4 (W.D. Wash. Nov. 23, 2020). There, the court held that the U.S. Army Corps of Engineers erred in discussing only the direct impacts of a proposal, but not considering reasonably foreseeable GHG emissions and instead asserting that those emissions were outside the agency's jurisdiction. (App. at 61). Again, the same is not true here. The EIS properly includes information available to the Commission;

[4]"Downstream" emissions are typically understood as those emissions that occur "downstream" from an action, generally as a result of combustion of fossil fuels. "Upstream" emissions are those that occur "upstream" of the proposed action, such as emissions from fossil fuel extraction. Because the Project is a power plant, it will not have downstream emissions (because the fossil fuel combustion will occur at the Project).

it acknowledges that upstream impacts may occur because of natural gas extraction, with resulting potential emissions, and contains a qualitative discussion of those impacts. (R. 138 at 46-47).

Apart from the fact that those cases do not support Appellant's arguments, federal NEPA cases may be persuasive, but they are not controlling. WEPA requires that agencies "substantially" follow "guidelines" issued by the Council for Environmental Quality under its authority under NEPA. *See* Wis. Stat. § 1.11. WEPA does *not* require Wisconsin agencies to follow all NEPA rules, guidance, and related case law, as Appellants suggest. Appellants' implied theory that the Commission (and, subsequently, Wisconsin courts) are required to monitor and then apply, in real time, the federal agencies' and courts' decisions related to complex issues under NEPA is unworkable.

Regardless, Appellants fail to cite more recent federal circuit court decisions holding that the broad-reaching, vague analysis of the very same upstream indirect impacts demanded by Appellants here is not feasible and not required by NEPA. *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109 (D.C. Cir. 2022) (upholding FERC decision, which did not quantify upstream emissions, where plaintiffs did not identify any record evidence "that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project."); *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019) (rejecting challenge and explaining that plaintiffs "identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project").

Apart from Appellants' inapposite cases, they provide no support for their assertion that the analysis they believe is required is even possible to perform. Even the cases relied upon by Appellants only require analysis of impacts which are "reasonably foreseeable," and Appellants have pointed to nothing in this record

which would allow a specific, quantitative analysis of indirect upstream impacts to be performed.[5] As the circuit court explained, "Appellants do not point me to any information saying that it is even possible to perform such an analysis." (Doc. 237, at 18).

Overall, Appellants seek to second-guess and nitpick the Commission's EIS. However, the EIS reflects a detailed analysis of the Project's potential direct and indirect impacts—including potential emissions. The Commission complied with WEPA's directive to take a "hard look" at the Project's environmental effects.

CONCLUSION

The decision was supported by substantial evidence and was issued in accordance with the law in every respect. Accordingly, it must be affirmed.

Respectfully submitted this 28th of November, 2022.

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[5]Appellants further appear to argue that the EIS should have contained additional discussion of the impacts of fracking, apart from greenhouse gas emissions analysis. (*See*, *e.g.*, App. Br. at 61-62). Appellants did not raise this argument to the circuit court, and it should not be considered. *See Mueller v. Bull's Eye Sport Shop, LLC*, 398 Wis.2d. 329, 961 N.W.2d 112, 131 (2021) (declining to address issue raised for first time on appeal). Regardless, the EIS does discuss potential impacts of fracking (*e.g.*, R. 138 at 47, 112-13), and Appellants have failed to identify what else they believe the Commission should have done.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,918 words.

Dated this 28th of November, 2022.

By: *Electronically signed by Justin W. Chasco*

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