

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 19-cv-1945-REB (AP Case)

OREGON-CALIFORNIA TRAILS ASSOCIATION, a nonprofit corporation;
WESTERN NEBRASKA RESOURCES COUNCIL, a nonprofit corporation;
HANGING H EAST, L.L.C., a limited liability corporation;
WHITETAIL FARMS EAST, L.L.C., a limited liability corporation;

Petitioners,

v.

NOREEN WALSH, in her official capacity as the Regional Director of the Mountain-Prairie
Region of the U.S. Fish and Wildlife Service;
DAVID BERNHARDT, in his official capacity as the Secretary of the U.S. Department of the
Interior;
AURELIA SKIPWITH, in her official capacity as the Director of the U.S. Fish and Wildlife
Service;

Respondents,

and

NEBRASKA PUBLIC POWER DISTRICT,

Intervenor.

PETITIONERS' REPLY BRIEF¹

Expedited Consideration Requested

Oral Argument Requested

¹ Following the style utilized by Federal Respondents and Intervenor in their respective briefs, Petitioners cite to the administrative record in this reply brief by eliminating the USFWS designation at the beginning of record citations, which also promotes judicial efficiency and economy through submission of a shorter brief.

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ACRONYM LIST

ABB	American Burying Beetle
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPPD	Nebraska Public Power District

INTRODUCTION

As explained in Petitioners’ opening brief, the evidence before the Court overwhelmingly demonstrates that the U.S. Fish and Wildlife Service (“Service”) issued an incidental take permit (“ITP”) to Intervenor Nebraska Public Power District (“NPPD”) for a 225-mile transmission line slicing through the heart of the Central Flyway, which will likely kill and/or otherwise “take” at least one highly imperiled whooping crane (and other federally protected birds) during the project’s fifty-year lifespan. However, the Service granted this permit without covering the whooping crane—as required by Section 10 of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B), (a)(2)—meaning that the Service’s permit decision has now sanctioned a likely ESA violation that could have severe and irreversible consequences for the highly depleted whooping crane population. In so doing, the Service summarily rejected from consideration a project configuration that the agency’s own experts determined to be technically and economically feasible, and which would indisputably have resulted in far less impacts to ESA-protected species, vulnerable habitat, and historic resources. The Service also gave short shrift to the additive impacts induced by this project later in time through the construction of myriad wind energy facilities that cannot—and would not—be built absent the R-Project.

In response, the Service and NPPD make internally inconsistent arguments, contending both that the Service’s decision was plagued by immense uncertainty and that the Court should defer to the agency’s conclusion that there is a reasonable certainty that no whooping cranes will be taken by the R-Project. Moreover, Respondents brush aside the serious errors contained in the Service’s Final Environmental Impact Statement (“FEIS”) and National Historic Preservation Act (“NHPA”) Programmatic Agreement, asserting without support that the agency conducted the analysis required by law. As explained below, Respondents’ *post hoc* attempts to shore up the Service’s defective record fare no better than the fatally flawed environmental evaluations they

attempt to cure. Thus, the Service acted arbitrarily and capriciously in issuing the R-Project ITP, and the agency's decisions must be set aside and remanded. *See* 5 U.S.C. § 706(2).

I. RESPONDENTS HAVE RAISED SEVERAL OVERARCHING ARGUMENTS THAT CANNOT PASS MUSTER.

Before turning to Respondents' specific legal contentions in the context of particular statutes, Petitioners first address three cross-cutting arguments that cannot withstand scrutiny.

A. Although The Final ITP Decision Is The Focal Point For Judicial Review, The Court Must Review The Full Record In Determining Whether The Service Acted Arbitrarily Or Capriciously.

In an effort to insulate from the Court's review the highly damaging evidence from the agency's own expert wildlife biologists (Eliza Hines and Robert Harms) who routinely assess project impacts to whooping cranes and whom the agency therefore designated as the Service's leads on the R-Project, *see* NEPA_5, the government contends that "Petitioners improperly focus on intermediate steps of the agency's analysis and decisionmaking process, seeking to elevate those interim assessments over the Service's final reasoned decisions." ECF No. 34 at 19. However, while Petitioners agree that the focal point for judicial review is the Service's final decision, the Court cannot assess whether that final decision was arbitrary and capricious without reviewing *all* evidence in the record and determining whether the Service "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 whether the agency's decision "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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).¹

¹ In another lawsuit, the Service designated Eliza Hines as the agency's whooping crane expert to provide a detailed "expert report." EMAIL_9829-59. That report is contained in the record for this litigation, and demonstrates the agency's perspective that she is a recognized whooping crane expert with significant experience evaluating project-related impacts to whooping cranes. *See* EMAIL_9830-33; EMAIL_9855-59.

It is axiomatic in Administrative Procedure Act (“APA”) cases that a court “shall review *the whole record*” in determining whether an agency acted arbitrarily, capriciously, or contrary to law. 5 U.S.C. § 706 (emphasis added); *see also Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (“To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of the whole record.” (citation omitted)). The “whole record” necessarily contains the views of experts (whether inside or outside the agency) that were before the decisionmaker at the time of the final decision. Thus, contrary to the government’s suggestion, Petitioners do not seek to “elevate” interim assessments over the final decision. Rather, Petitioners aim to demonstrate that the Service’s conclusion that whooping crane take is not likely to result from the R-Project—which is contradicted by the detailed analyses and data adduced by the Service’s own whooping crane experts (among others)—was arbitrary, capricious, and cannot be ascribed to a difference in view or the product of agency expertise where the agency’s own designated experts strenuously disagreed.

It would be particularly anomalous if the Court could disregard extensive evidence in the record suggesting that at least one whooping crane is likely to be taken because it was supplied by the expert biologists that the agency itself designated as project leads, especially when the applicable legal standard requires the Service to make decisions based upon the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Given this evidence-based standard and the technical nature of this decision, courts place heavy weight on the analysis of the agency’s subject matter experts in determining whether the Service’s decisionmaker ultimately relied upon the best available scientific evidence. *See, e.g., Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 683 (D.D.C. 1997) (rejecting ESA decision where the Service “ignore[d] the evidence and analysis of its experts in making conclusory statements” and reaching the opposite outcome supported by its experts’ analysis); *Defs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 986 (D. Mont. 2016)

(overturning ESA decision based on the Service’s conclusions that “mischaracterized” analyses by “experts from whom the Service specifically elicited remarks”); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 3:04-cv-4324, 2005 WL 2000928, at *14-15 (N.D. Cal. Aug. 19, 2005) (rejecting ESA decision where the Service failed “to draw a discernible path from their own scientists’ analysis to the ordained outcome”).²

The cases cited by Respondents are not to the contrary. *See* ECF No. 34 at 19-21. In fact, those cases involved changes in *legal* interpretations—i.e., whether or not a particular legal provision applies—but not situations, such as here, where a decisionmaker reaches a factual conclusion that is contradicted by the highly technical *scientific* evidence and assessments proffered by its own experts. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (allowing change in interpretation of whether the ESA applies to state transfers of Clean Water Act jurisdiction); *Audubon Soc’y of Greater Denver v. U.S. Army Corps of Eng’rs*, 908 F.3d 593, 605 n.6 (10th Cir. 2018) (focusing on final inter-agency regulatory interpretation).

Accordingly, because this case does not address an evolving legal interpretation, but rather a factual decision to issue a permit that fails to cover a species that the agency’s own recognized whooping crane experts repeatedly concluded was likely to be taken by the R-Project, the Court must duly consider the whole record that was before the decisionmaker to determine whether the

² As noted in Petitioners’ opening brief, *see* ECF No. 22 at 36 n.7, the *Jewell* case involved Respondent Walsh and the same regional office that issued the ITP here. The Service’s decision there was invalidated due to numerous legal deficiencies and procedural abnormalities, which the court suspected to result from “immense political pressure” because “the reality is that, in some instances, species conservation is a political issue as much as it is a scientific one.” *Jewell*, 176 F. Supp. 3d at 1000. While the government accuses Petitioners of a “spurious attack” on Ms. Walsh merely by highlighting a public court ruling involving similar facts, Petitioners clarify that their intent was merely to apprise the Court of an analogous context in which immense pressure (here by NPPD) appears to have allowed politics to prevail over science, in express violation of the ESA’s best available scientific evidence standard. *See* ADD_915 (Service admitting in the DEIS that the decision of whether to include the whooping crane in the ITP is “a risk tolerance policy decision, *not a science-directed decision*” (emphasis added)).

final decision relied upon the best available scientific evidence. *Cf. Babbitt*, 958 F. Supp. at 685 (“Although the Court must defer to an agency’s expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.”).

B. The Voluntary Nature Of An ITP Does Not Allow The Service To Issue A Permit That Is Arbitrary, Capricious, Or Likely To Violate Federal Law.

Recognizing the vulnerability of the Service’s ITP that fails to cover the whooping crane, Respondents harp on the fact that the decision of whether to seek an ITP is made by the developer instead of the Service. *See, e.g.*, ECF No. 34 at 3 (“Private entities are not required to obtain an ESA Section 10(a)(1)(B) permit.”); ECF No. 37 at 1 (asserting that an ITP is a “voluntary permit” and this is an “applicant-driven permit process”). In turn, Respondents mistakenly argue that even if whooping crane take were certain to result from the R-Project (and even should it result in jeopardy), NPPD could refuse to include the whooping crane in the ITP and the Service must nevertheless issue the permit in the face of known legal violations. *See* ECF No. 37 at 22 (asserting that “the Service cannot compel an applicant to include a particular species in an HCP”). The ESA and the APA do not countenance such an absurd result.³

To begin with, no party disputes that the *initial* decision to seek an ITP rests with the applicant. *See* ADD_02506 (“[S]eeking an incidental take permit is a voluntary action”). But once an applicant has determined that an ITP is necessary—and thus that the Service must make a permitting decision subject to the APA—the Service, as in any other decisionmaking context, may not issue an ITP that is arbitrary, capricious, or contrary to law. As the Service itself has

³ Taken “to its logical (but absurd) conclusion,” Respondents’ position is that the Service lacks discretion to deny an ITP where an applicant agrees to cover certain species (and meets the criteria for doing so), but refuses to include another species that will be taken where “one mating pair” remains and thus after ITP issuance “the species would be doomed to extinction.” *Animal Welfare Inst. v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540, 561 n.24 (D. Md. 2009). Nothing could be more incongruous with the text and purposes of the ESA. *Id.*

interpreted the ESA in its Handbook (and consistent with common sense), the Service must deny an ITP application if it fails to cover all species that are *likely* to be taken by the activity. *See* ADD_2532 (“If an applicant ultimately decides against covering a species, they face the risk that we would be unable to process the permit application as *all species likely to be taken are to be covered by the permit*” (emphasis added)); ADD_2576 (stating that “[t]he applicant *must include* ESA-listed animal species that are *expected to be taken by*” the activity (emphases added)).⁴

Therefore, if the best available evidence indicates that it is more likely than not (i.e., a 50% or greater probability) that the R-Project will kill, harass, or otherwise take at least one endangered whooping crane, the Service could not lawfully grant (rather than deny) NPPD’s ITP that fails to cover the crane. To do so would provide federal authorization for an activity that the Service expects to violate the ESA, and would thereby sanction likely violations of federal law by paving the way for project construction. This is precisely why the D.C. Circuit held in an analogous context that an agency may not issue an incidental take permit that covers some—but not all—species that are likely to be taken by an activity because such agency “has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act.” *Kokechik Fishermen’s Ass’n v. Sec’y of Commerce*, 839 F.2d 795, 799-803 (D.C. Cir. 1988).

⁴ Both the Handbook and Respondents’ briefs interchangeably use the terms “likely” and “reasonably certain” when referring to the probability of take required for inclusion in an ITP. *Compare* ADD_2532 (“all species likely to be taken are to be covered by the permit”), *with* ADD_2571 (an ITP must include all species for which “take is reasonably certain to occur”). Since the Handbook uses the “likely” and “reasonably certain” standards interchangeably—and because likelihood (in contrast to “reasonably certain”) has a fixed definition—it is reasonable to assume that a listed species must be covered by an ITP/HCP so long as take of the species is *more likely than not* to occur. Indeed, in other ESA contexts, the Service has defined “likely” to mean “more likely than not.” *See W. Watersheds Proj. v. Fish and Wildlife Serv.*, 535 F. Supp. 2d 1173, 1184 (D. Idaho 2007) (“Here, the [Service] defined ‘likely’ as meaning ‘more likely than not,’ which is a probability of 50% or greater.”); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 944-49 (D. Or. 2007) (upholding agency interpretation of “likely” under the ESA as “more likely than not” standard requiring “a greater than 50% likelihood”).

Moreover, that “the project proponent is liable for violation of ESA Section 9” if unpermitted take occurs after project construction, ECF No. 34 at 4, is *not* the same as the Service ensuring, through its permitting decision, that all species likely to be taken by the activity are covered by the ITP *prior* to construction. Even if the Service routinely enforced Section 9 of the ESA against violators—which it does not—this “kill first, enforce later” approach, when the Service is afforded an opportunity to avoid any take through an upfront ITP, is the antithesis of the “institutionalized caution” Congress required the Service to apply when addressing take of imperiled species. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1973).

Respondents’ error in logic is even more conspicuous in light of recent peer reviewed literature authored by the Service’s own biologists concluding that “1 to 2 additional mortalities per year could result in a declining population” of whooping cranes, EMAIL_13625-26, meaning that even a single death may jeopardize the species’ recovery prospects, and thus after-the-fact enforcement would be too little too late for this species. In short, the proper time for ensuring compliance with the ESA is at the critical juncture when the Service is considering an ITP application and has the maximum ability (and obligation) to ensure adoption of project configurations that “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking,” 16 U.S.C. § 1539(a)(2)(B)(ii), rather than allowing high-risk projects to be built such that future routing modifications to reduce mortality risk are rendered impossible.⁵

⁵ Not only does the Service rarely enforce Section 9 against violators, but especially under these facts the Service is disingenuous in suggesting that it could enforce that provision given that the Service has itself excluded the whooping crane from its ITP and approved NPPD’s “adaptive management” regime in the event that the R-Project kills a whooping crane. *See* HCP_1791-92.

C. The Indirect Effects Of Wind Energy Projects That Would Not Occur Absent Construction Of The R-Project Must Be Properly Analyzed.

Relevant to Petitioners’ ESA, NHPA, and National Environmental Policy Act (“NEPA”) claims is whether and how the Service must evaluate the impacts of wind projects that would not be built in the absence of the R-Project, which will, and is expressly intended to, supply the necessary infrastructure for transmitting energy many miles from rural areas of the Nebraska Sand Hills to substations. While the government acknowledges “the Service’s recognition that no new wind development could occur without the R-Project” and that the R-Project “is a necessary antecedent to future wind power development,” ECF No. 34 at 32, Respondents never come to grips with the fact that the Service therefore erroneously evaluated wind energy effects as cumulative, rather than indirect effects. *See* ECF No. 22 at 45-48. Indeed, the government asserts without support that “indirect effects are typically not separate projects, but rather biological impacts from the proposed action that are farther away and/or later in time.” ECF No. 34 at 33.⁶

In reality, courts have repeatedly held in both the ESA and NEPA contexts that the growth-inducing effects of an activity—i.e., later development projects or actions by third parties that are reasonably foreseeable to occur as a result of, or in response to, an activity—must be analyzed as *indirect* effects of an action. *See Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512-13 (10th Cir. 1985) (finding that where a dam would increase consumptive use of water in a creek, resulting in adverse effects to whooping crane habitat, the Corps must consider the impacts of third party depletion of water as indirect effects); *Nat’l Wildlife Fed’n v. Coleman*, 529 F.3d

⁶ Under the ESA, “[i]ndirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” 50 C.F.R. § 402.02. Likewise, indirect effects under NEPA are those “caused by the action” that occur “later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Crucially, indirect effects “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.” *Id.* (emphasis added).

359, 373 (5th Cir. 1976) (“Principal among the indirect effects of the highway on the crane is the residential and commercial development that can be expected to result from the construction of the highway.”); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 867–70 (9th Cir. 2005) (holding that an agency violated NEPA by failing to account for the indirect effects of tanker traffic and oil spills that would be caused by a dock expansion); *High Country Conservation Advocates v. U.S. Forest Serv.* (“*High Country*”), 52 F. Supp. 3d 1174, 1188 (D. Colo. 2014) (“No one disputes that foreseeable development resulting from an agency decision is an indirect impact that must be analyzed.” (citation omitted)). Hence, the Service’s failure to evaluate the *indirect effects* of the Thunderhead Wind Energy Center or any other wind project by misconstruing them as cumulative effects—an error of grave legal significance especially under the ESA, *see* ECF No. 22 at 46-47—is fatal to the ITP, Biological Opinion, and FEIS.

Likewise, Respondents are incorrect in asserting that, for purposes of evaluating effects under all three federal laws at issue, the Service “properly evaluated generalized cumulative effects of future wind development and was not required . . . to conduct further analysis in the absence of available data regarding specific future wind projects.” ECF No. 34 at 50. In Respondents’ view, no wind projects (except for the Thunderhead Wind Energy Center) are reasonably foreseeable because the Service lacked “information as to ‘the number of projects, their configuration, whether funding exists, whether environmental reviews have occurred, and whether permits have been issued or power purchase agreements entered into.” *Id.* at 49 (citing LIT_CITED_032749). This misguided defense cannot withstand scrutiny.

First, even if the Service genuinely lacked site-specific information as to proposed wind projects, the fact that the R-Project is expressly intended to facilitate extensive wind energy in the region, *see* LIT_CITED_32211, obligates the Service to attempt to quantify the estimated number of wind turbines likely to result from construction of this transmission line (and the impacts

stemming from those projects that would not exist in the absence of the R-Project). *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975) (holding that where the “raison d’etre” for the project is to promote development, the agency cannot “reasonably conclude” that such effects do not merit in-depth analysis in an EIS); *Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000) (“Since the economic development of these areas is an announced goal and anticipated consequence of the casino projects, the Corps cannot claim that the prospect of secondary development is ‘highly speculative.’”).

In similar contexts, courts have rejected agency efforts to avoid any attempt to quantify and examine such impacts merely because site-specific project information was lacking or because projects had yet to be constructed. *See Shearwater v. Ashe*, No. 14-cv-2830, 2015 WL 4747881, at **19-21 (N.D. Cal. Aug. 11, 2015) (rejecting the Service’s failure to estimate and analyze impacts of wind projects where the agency claimed that the environmental impacts were “too broad, speculative, or conjectural to lend themselves to meaningful analysis”); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1157 (N.D. Cal. 2013) (finding that the agency failed to evaluate the reasonably foreseeable impacts of an oil and gas leasing sale because although “the exact scope and extent of drilling that will involve fracking is unknown . . . ‘the basic thrust’ of NEPA is to require that agencies consider the range of possible environmental effects before resources are committed and the effects are fully known”).

Simply put, the Service failed in the record to provide any coherent explanation for why it could not reasonably forecast the overall number of wind turbines expected to flow from the R-Project’s construction and, based on this estimate, evaluate generally the impacts to wildlife based on known per-turbine mortality data from existing projects in this region. This glaring omission violates the ESA, NEPA, and the APA. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1371-74 (D.C. Cir. 2017) (“NEPA analysis necessarily involves some reasonable forecasting, and that

agencies may sometimes need to make educated assumptions about an uncertain future.” (citation omitted)); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67 (D.D.C. 2019) (“While BLM could not, at the leasing stage, reasonably foresee the environmental impacts of specific drilling projects, it could reasonably foresee and forecast the impacts of oil and gas drilling across the leased parcels as a whole.”); *High Country*, 52 F. Supp. 3d at 1196 (“Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities . . . by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’” (quotation marks and citation omitted)).

Second, the Service’s refusal to grapple with the impacts of wind energy resulting from construction of the R-Project is even more perplexing in light of the numerous wind projects the public identified and urged the Service to analyze. For example, commenters repeatedly supplied detailed information concerning one wind energy company (Cherry County Wind, LLC) that is in the process of developing a 147-turbine wind project in Cherry County adjacent to the R-Project. *See, e.g.*, NEPA_1784 (investor ownership maps); NEPA_2481-2512 (extensive documentation, court filings, and maps substantiating the extent, location, and design of this commercial wind project in Cherry County). Rather than analyze the expected impacts to whooping cranes and other affected wildlife that reside in or migrate through Cherry County resulting from a 147-turbine project (based on existing per-turbine mortality data collected from operational wind projects in the region), the Service refused to examine this project’s effects *at all* because it claimed that it “was not able to find any publicly available information that specifically describes the status of this potential project, its specific potential location, or other details essential to analyzing the specific cumulative impacts it might pose.” NEPA_2469. Yet, in asserting that no data existed, the Service admitted that it had been supplied with copious information including “[l]eases or invested lands, meetings between local boards and developers, evaluations from the

FAA, and registration of meteorological equipment towers.” *Id.* In light of extensive evidence before the Service indicating that at least one company is aggressively pursuing a 147-turbine wind project in Cherry County, it was arbitrary and capricious to forgo any analysis of impacts to wildlife, historic, and other resources merely because its precise final location is unknown. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (“[P]rojects need not be finalized before they are reasonably foreseeable.”).⁷

Accordingly, the Service’s failure to reasonably forecast the generalized or site-specific impacts of wind projects dependent on the R-Project violates the ESA, NEPA, and the NHPA.

II. THE SERVICE VIOLATED THE ESA.

A. By Gambling With The Fate Of The Whooping Crane Despite Strong Evidence That At Least One Crane Is Likely To Be Taken, The Service Violated The Letter And Spirit Of Sections 7 And 10 Of The ESA.

As explained above, the ESA compelled the Service to deny NPPD’s ITP application if it failed to cover all species that are more likely than not to be killed, harmed, and/or harassed by the R-Project—i.e., if there is a 50% or greater probability of at least one member of the species being taken. *See supra* at 6 & n.4. Hence, because the totality of the evidence before the Service overwhelmingly indicated the likelihood that at least one whooping crane would be taken, the Service’s ultimate conclusion that “incidental take of whooping cranes with the R-Line Project is not reasonably certain to occur,” WHCR_188, is arbitrary, capricious, and contrary to the ESA.

⁷ It is not difficult to discern *why* the Service studiously avoided evaluating wind project impacts flowing from the R-Project, since the additive take associated with these wind projects will likely jeopardize the whooping crane, thus requiring ITP denial. The Service’s biologists noted that “[t]he R-Project will facilitate wind energy development in the whooping crane migration corridor in the Sandhills. The impact of wind turbines on whooping cranes has been identified as a conservation concern, particularly during migration The impact can be direct via collision with wind energy infrastructure including powerlines . . . or indirect via an impact to energetics Wind turbines sited in the AWBP migration corridor *have the potential to cause significant mortality, thereby threatening the recovery of the species.*” WHCR_94-95 (emphasis added).

At the outset, the Service and its counsel strenuously dispute the detailed analyses and findings of two separate groups of undisputed whooping crane experts—Drs. Gil and Weir (outside experts) and Eliza Hines and Robert Harms (internal Service biologists who collaborated with other agency biologists and a statistician)—all of which determined, using different methodologies, that *many* whooping cranes would be killed by this project. *See* CORRESPONDENCE_2797-2854 (Drs. Gil and Weir finding that “the R-Project may take as many as 1.73 to 4.46 individuals per year,” and estimating that “even with bird diverters, there will be 1-3 crane collisions per year from the R-Project”); CORRESPONDENCE_2831 (opining that “the harm to the Whooping Crane population associated with this Project . . . will jeopardize the species, undermining recovery efforts and risking the continued existence of this iconic species”); WHCR_372-95 (Service biologists finding that the R-Project will result in “an expected take of 40-84 whooping cranes over the 50-year life of the R-Project using two take calculation methods”); WHCR_373 (concluding that “operation of the R-Project over the 50-year life of the Project has negative implications for recovery of this species”).⁸

While pointing to certain concerns in these two distinct expert analyses that reached similar conclusions, neither the record nor the government’s brief explains why the Service refused to credit at least those portions of these detailed evaluations that were *not* in dispute, especially in light of the uncontroverted credentials of these whooping crane biologists and their decades of expertise examining precisely the subject matter before the agency. *See* ECF No. 34 at

⁸ The Service’s experts concluded that flight diverters will have very limited impact in reducing collision risk to cranes. *See* EMAIL_9607-10 (flight diverters “are only 40-60 percent effective because they cannot be seen at night and are less visible in inclement weather (rain, snow and fog),” and the “physiological characteristics of cranes limit their ability [even further] to avoid a powerline even when it is marked with [flight diverters]”). NPPD has also not committed to mark an equal amount of existing transmission lines with flight diverters (i.e., it will only mark this new line), further limiting its efficacy in contravention of the Service’s own guidance. NEPA_25.

15 (explaining that *in their entirety* “the Service rejected the Ecosystems Advisors 2017 report and the Nebraska office’s 2018 attempt as unreliable”). Indeed, in sharp contrast to the vehement criticisms Dr. Craig Davis lodged in response to the analysis conducted by NPPD’s consultant, Dr. Davis was far more charitable in his assessment of Drs. Gil and Weir. *See* ECF No. 22 at 22-23 (citing EMAIL_8933-55). In fact, Dr. Davis found several of the assumptions applied by Drs. Gil and Weir “reasonable,” EMAIL_8944; *id.* (“I do not disagree with the assumption.”). Importantly, despite identifying relatively modest “concerns about some aspects of Gil and Weir’s approach,” he concluded that they “*have attempted to base their approach on the best available scien[tific]” evidence.* EMAIL_8945 (emphasis added). Hence, where the Service-retained independent reviewer found many of the assumptions used by Drs. Gil and Weir to be reasonable—and found that these experts generally relied on the best available scientific evidence in reaching their conclusions—the Service acted arbitrarily and capriciously by deciding to entirely jettison this analysis, its methodologies, and assumptions that lead to the inevitable conclusion that at least one whooping crane is likely to be taken.⁹

⁹ The Service refers to Dr. Davis as an “independent peer reviewer.” To be clear, Dr. Davis did not engage in the very rigorous process that is commonly referred to as “peer review” that accompanies the publication of scientific literature in a refereed journal. However, the Service belatedly commissioned a peer review process—i.e., a process that did not conclude until six months *after* the Service’s decision to issue an ITP to NPPD—to determine the likelihood of R-Project whooping crane collisions. *See* U.S. Fish & Wildlife Serv., *Peer Review Plan*, https://www.fws.gov/mountain-prairie/science/documents/Peer_review_plan_whooping_crane_collision_risk_2019_11_26b.pdf. In response to that peer review charge, bird expert Dr. Sammy King concluded that “based on the literature *we can expect that there will be Whooping Crane mortality from this project, and it **could possibly be high.***” Peer Review of Dr. Sammy L. King at 1, <https://www.fws.gov/mountain-prairie/science/documents/11.29.19%20Attachment%202%20-%20King%20peer%20review.pdf> (emphasis added). This compelling expert opinion by a peer reviewer that the Service itself selected—which does not appear in the Service’s administrative record and was only uploaded to the Service’s website in January 2020—further underscores the likelihood of at least one whooping crane being killed or otherwise taken by the R-Project.

Even if the expert analyses by Drs. Gil and Weir and the Service’s project leads supplied no value to the agency’s evaluation of whooping crane mortality—which is not the case—even the Service’s own data that is *not in dispute* establish that one whooping crane is likely to be taken. When presented in visual form, it becomes strikingly clear that the best available evidence affirms a 50% or higher probability that a whooping crane will be taken by the R-Project:

DATE OF ANALYSIS	LIKELIHOOD OF STRIKES OVER 50-YEAR PERMIT TERM	RELEVANT QUOTES	RECORD CITATION
Service 2016	0.5 crane strikes	“ Conclusion – take of at least 1 whooping crane is likely over the 50 year permit duration.”	WHCR_215-16
Service 2016 (Joseph Skorupa statistical analysis)	Range of 0.28 to 1.47 strikes at 95% confidence interval Maximum likelihood of 0.75 strikes	If the assumptions change slightly, “our results would change to a 95% confidence interval of: 0.73 to 3.8 cumulative strikes, with a maximum likelihood of 1.9 cumulative strikes for the R-Project during 2018 to 2068.”	CORRESPONDENCE_2926-29
Service 2017	Range of 0.008 to 4.96 strikes at 90% confidence interval Maximum likelihood range from a 0.422 to 0.619 strikes (median of 0.521 strikes)	“[T]he uncertainty surrounding these maximum likelihood estimates is so enormous that they should not be considered very much more plausible than any other outcomes embraced by our 90% confidence interval.”	WHCR_218-22
Davis 2018	No estimate	“[T]he prevalent issue of estimating the risk of whooping crane power line collisions—there are too few documented collisions and too much uncertainty to produce reliable and realistic estimates.” “Without better data, we cannot be confident in our assessments.”	WHCR_283-305

To summarize these analyses—none of which the agency disputes—they concluded, respectively, that the probability of at least one crane striking the R-Project is 50%, 75%, and 52%. *See also* ECF No. 34 at 26 (noting that “the Service’s internal review in 2018 estimated 0.58 strikes over

the life of the project”—i.e., a 58% probability). The fact that every single evaluation determined it is 50% or likelier that at least one crane will strike the R-Project is facially inconsistent with the Service’s conclusion that “there is a low likelihood of whooping crane strikes with the R-Project over the 50-year project life.” WHCR_188. This alone is fatal to the ITP and Biological Opinion.

In addition, as explained in the record, these probabilities of whooping crane strikes may be substantial underestimates because, as Dr. Davis explained, there is “too much uncertainty to produce reliable and realistic estimates” and thus “we cannot be confident in our assessments.” WHCR_283-305. Indeed, Joseph Skorupa’s 2016 analysis reveals that up to 1.47 cranes may strike the R-Project using the standard 95% confidence interval, and that even a modest tweak to the modeling inputs increases that figure to 3.8 crane strikes (with a *maximum likelihood* of 1.9 crane strikes). CORRESPONDENCE_2926-29. Likewise, the Service’s 2017 analysis shows that it is almost as “plausible” that 4.96 cranes will be struck as it is that 0.521 cranes (the median of the maximum likelihood range) will be struck. WHCR_218-22. In sum, even the most conservative Service estimates demonstrate that there is a 50% or greater probability of at least one crane striking the R-Project, and other very “plausible” estimates reveal that several cranes will likely strike the R-Project. This is not a close call—the Service violated the ESA’s best available science standard in issuing an ITP that fails to cover all species likely to be taken.¹⁰

Moreover, although an ITP and Biological Opinion must address all forms of take, the Service’s assessments focus solely on *collision deaths* with the R-Project in determining the probability of take. If, however, the Service had included in its evaluation other forms of lethal

¹⁰ Further causing underestimates in crane strike predictions is the fact that there are “significant concerns about the detectability of a whooping crane collision with a power line . . . given the miles of power lines in the Central Flyway, the location of many of these power lines in remote, unpopulated areas, and the low probability of finding a whooping crane carcass should a collision occur.” CORRESPONDENCE_2928. Thus, models significantly underrepresent the ratio of mortalities due to transmission line strikes compared to other sources of mortality.

and non-lethal whooping crane take that are very likely to stem from the R-Project—including harm in the form of habitat modification, effects to energetics, harassment during migratory and stopover seasons, and the related impacts of wind energy facilities dependent on the R-Project, *see* WHCR_94-95—it would be impossible to conclude that not one whooping crane is likely to be taken during the next fifty years. *See, e.g., Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 1:14-cv-737-CL, 2016 WL 10637010, at **12-13 (D. Or. Sept. 12, 2016) (finding that the Service’s “omission” of any analysis of various forms of “non-lethal take” “arbitrarily hides the likelihood and amount of non-lethal take” under the ESA).

In any event, although Petitioners believe the best available evidence—as demonstrated through many external and internal strike estimates—corroborates the obvious conclusion that at least one crane is likely to be taken by the R-Project, Respondents have not persuasively rebutted the argument that excluding the highly imperiled crane from the ITP and Biological Opinion in the face of what the Service’s views as immense uncertainty is antagonistic to the ESA. WHCR_183-88 (admitting to “substantial uncertainty” due to “lack of data” that “makes it challenging to evaluate the risks to whooping cranes of a specific power line project”). Not only does this “enormous” uncertainty, WHCR_222, severely undercut the Service’s assertion that it “is comfortable concluding that whooping crane collision with the R-Project is not reasonably certain to occur,” WHCR_188, but it is also not in keeping with the ESA or its explicit purposes.

As explained, the Service’s decision to exclude the highly endangered whooping crane from the R-Project ITP—a species which is already in an extremely precarious situation—merely by asserting that there is “substantial uncertainty” as to how this decades-long project will impact the whooping crane and its recovery efforts, is not consistent with the Service’s fundamental duty to avoid jeopardy under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Indeed, if there is in fact enormous uncertainty, Congress has already mandated that the Service must carry out its

ESA duties by applying an approach of “institutionalized caution” *in favor of species protection* rather than gambling with the fate of the species. *Hill*, 437 U.S. at 194. Any other result would elevate economic or other considerations above species conservation, in direct contravention of congressional intent. *Id.* at 185 (Section 7 “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies”).

Simply put, if the Service legitimately views the evidence as highly uncertain—especially where all experts agree there is *some* risk that at least one crane will be killed and it is “plausible” that several cranes will die, *see* ECF No. 34 at 28—Congress has made abundantly clear that such uncertainty must be resolved by including the crane in the ITP. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006) (“To the extent that there is any uncertainty as to what constitutes the best available scientific information, Congress intended ‘to give the benefit of the doubt to the species.’” (quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988))); *Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 390 F. Supp. 2d 993, 1008-09 (D. Mont. 2005) (holding that “a tie in the evidence should go to the species” because of “the principle that Congress has expressed a preference for the species in a context of uncertainty”); *cf. Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (“If the science on population size and trends is underdeveloped and unclear, the [Service] cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence.”).¹¹

¹¹ The illogical notion advanced by the government that the Service may resolve substantial uncertainty *against* an endangered species—indeed, one of the most endangered species—is not supported by the ESA, its legislative history, or precedent. While the government primarily cites a Ninth Circuit case for the generic proposition that “the ESA accepts a certain amount of uncertainty,” ECF No. 34 at 27, that case actually supports Petitioners’ position because the court deferred to the Service’s resolution of uncertainty in a manner that *benefits*—rather than undercuts—the conservation of the species at issue. *See Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1164-68 (9th Cir. 2010) (upholding the Service’s broader and more protective definition of “occupied” habitat under the ESA despite some uncertainty as to the presence or absence of protected owls in those “occupied” areas, and finding that “this interpretation is

Accordingly, the Service committed a flagrant legal error by granting (rather than denying) a permit that fails to cover all species that are likely to be taken by the R-Project, in violation of Sections 7 and 10 of the ESA and the best available science standard. And, in so doing, the Service failed to insure against jeopardy of the species, 16 U.S.C. § 1536(a)(2), and also failed to ensure that NPPD's selected project configuration "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking," 16 U.S.C. § 1539(a)(2)(B)(ii).

B. The Service's Failure To Include Other ESA-Protected Bird Species In The ITP And Biological Opinion Does Not Hold Water.

For the same reasons that the Service violated the ESA by granting an ITP and issuing a Biological Opinion that failed to cover the whooping crane, the Service flouted the Act and its regulations by failing to cover the interior least tern and piping plover. *See* ECF No. 22 at 33-34.

Indeed, there is arguably *more* uncertainty in the record about the impacts to terns and plovers because, in contrast to the whooping crane, the Service did not even *attempt* to estimate the likelihood that at least one tern and/or one plover would be killed or otherwise taken by the R-Project, while acknowledging that both species reside in the project area and are vulnerable to transmission line and wind turbines collisions. *See* LIT_CITED_32451-52 (conceding that terns "likely" migrate through the project area; concluding that the R-Project "would create a collision hazard, possibly resulting in injury or death to individuals"; and acknowledging at least one confirmed tern death from a Nebraska transmission line); LIT_CITED_32454 (noting that plovers likely reside in or migrate through the project area and finding that the R-Project "would result in a long-term collision hazard" to plovers).

supported by the purpose of the ESA" by "promot[ing] the ESA's conservation goals and comport[ing] with the ESA's policy of 'institutionalized caution'" (citations omitted)).

Given the Service’s stated concerns about the R-Project serving as a “long-term collision hazard” to these two protected species that migrate through the project area and the already-documented death of at least one tern from a nearby transmission line, coupled with the additive mortality risk posed by wind projects induced by the R-Project’s construction, the Service acted arbitrarily and capriciously by assuming, without any evidentiary support, that it is unlikely that even a single tern or plover will be killed or otherwise taken by the R-Project or indirect effects stemming from it. *Cf. Tucson Herpetological Soc’y*, 566 F.3d at 879 (“If the science on population size and trends is underdeveloped and unclear, the [Service] cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence.”). In short, the Service acted arbitrarily and capriciously both by “entirely fail[ing] to consider an important aspect of the problem” and by “offer[ing] an explanation for its decision that runs counter to the [limited] evidence before the agency.” *State Farm*, 463 U.S. at 43. This, too, requires vacatur and remand for further consideration and analysis.¹²

C. The Service Violated Section 10 In Finding That NPPD’s Desired Route Minimizes And Mitigates Take To The Maximum Extent Practicable.

Starting from two erroneous premises—(1) the Service lacks discretion to consider minimization and/or mitigation for species for which the applicant does not seek coverage (or to at least deny the permit under those circumstances), and (2) it is unlikely that even a single whooping crane, tern, or plover will be taken through lethal or non-lethal means as a result of the R-Project or dependent wind turbines—Respondents contend that NPPD “fully offset” all take of listed species affected by this project by siting the line in the location that everyone agrees is the

¹² Although the government asserts that “wind project impacts to waterfowl and shorebirds ‘tends to be relatively minor,’” ECF No. 34 at 37 (quoting LIT_CITED_32758), the case cited by Petitioners disproves this point because there *the Service* conceded that a single wind project would kill 80-100 endangered terns and at least 10 piping plovers, which are waterfowl and shorebirds. *See Pub. Emps. for Envtl. Resp. v. Hopper*, 827 F.3d 1077, 1088 (D.C. Cir. 2016).

most devastating for American burying beetles (“ABBs”), whooping cranes, and other protected wildlife species. *See* LIT_CITED_32273. This is not what Congress intended in Section 10.

The fact that the challenged ITP does not address at all the crane, tern, or plover itself demonstrates that the Service has failed to comply with its duty to minimize and mitigate take of *those* species to the maximum extent practicable. 16 U.S.C. § 1539(a)(2)(B)(ii). However, even setting those species aside, the Service has equally failed its duty for the ABB by summarily dismissing an alternative route (the Central Route) that would significantly reduce impacts to ABBs and its essential habitat. Respondents’ arguments to the contrary are unavailing.¹³

Respondents’ attempts to distinguish analogous Section 10 cases involving the Service’s independent duty to ensure that the applicant has adopted the least harmful practicable alternative are futile. For example, in *Gerber v. Norton*, the D.C. Circuit addressed functionally indistinguishable facts involving an ITP/HCP for a developer, where the developer protested the consideration (and ultimate adoption) of any alternative that would either increase project costs or delay project construction by requiring the applicant to obtain new permits and approvals. 294 F.3d 173, 185 (D.C. Cir. 2002). The court rejected the ITP on the basis that the Service did not supply “any *analysis* whatsoever as to whether implementation of the [alternative with less species impacts] would actually result in additional costs and delay, or *whether the magnitude of such costs or delay would render the alternative impracticable.*” *Id.* (second emphasis added).

¹³ Based on the Service’s Handbook, Respondents argue that the “maximum extent practicable” standard “will always be met” if mitigation measures fully offset any take. ECF No. 34 at 38 (citing ADD_2633). The Service does not request any deference for this interpretation, nor is this guidance document binding. In any event, given the major flaws in NPPD’s ABB take estimates identified by leading ABB researcher Dr. Bedick, *see* CORRESPONDENCE_3112-26—many of which NPPD and the Service failed to address, *see infra* at 24-25—there is no basis to conclude that NPPD’s off-site mitigation will remotely offset the immense on-site harm to ABBs.

This case is no different. Although the Service admits that far fewer ABBs would be taken by the Central Route, *see* LIT_CITED_32273 (noting that the Central Route would affect 92% less ABB habitat than NPPD’s preferred route), the agency rejected this alternative after it purportedly examined “the costs and consequences associated with a five-year delay along with additional costs of over \$38,000,000.” ECF No. 34 at 41. But, as Petitioners already explained (without any response whatsoever), neither ground makes any legal or logical sense.¹⁴

As to the additional cost of \$38,000,000, Respondents fail in the record or their briefs to address the fact that NPPD would bear only 5-7% of this additional cost (between \$1.9 million and \$2.7 million). *See* NEPA_994; NEPA_385-86. In other words, the Service engaged in the *wrong* inquiry by concluding that it would be impracticable if NPPD had to spend an extra \$38,000,000, when Section 10 requires the Service to determine whether the costs *to the applicant* (only \$1.9 million to \$2.7 million) would, in fact, render the project impracticable. Considering that this modest cost would be shared over decades by hundreds of thousands of ratepayers and not by NPPD itself, and further that this figure is a fraction of the overall R-Project costs that NPPD has already agreed to pay, there is no basis in the record or otherwise for concluding that this relatively nominal cost increase to NPPD would render the R-Project impracticable, in violation of the ESA. *See Gerber*, 294 F.3d at 185 (finding that the Service must determine “whether the magnitude of such costs or delay would render the alternative impracticable”).

Likewise, the Service never analyzed—let alone concluded—that a delay of up to three years, during which NPPD would continue implementing ongoing interim measures, would, in fact, “render the alternative impracticable.” *Id.* The fact that NPPD has *already* been implementing these same interim measures for more than two years without jeopardizing the

¹⁴ Although the government’s cites a five-year delay, the FEIS clarifies that, at most, adoption of the Central Route would cause a “3-year delay.” LIT_CITED_32277.

project’s long-term viability severely undercuts the notion that a few more years of interim measures will, in fact, “render the [Central Route] impracticable.” *Id.* Moreover, for the Court to accept Respondents’ “delay” argument, it would have to overlook NPPD’s role in substantially protracting the agency decisionmaking process by sparring with the Service’s experts at every step. *See* ECF No. 22 at 12-19. Had NPPD allowed the ITP and EIS process to unfold in a more customary fashion, the decisionmaking process would have concluded several years earlier and delay would be a non-issue at this juncture. *Cf. Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1158 (S.D. Cal. 2006) (explaining that, if the Service determines in its “expert judgment” that an “alternative that would have provided more mitigation or caused less harm to the endangered species” was “in fact feasible,” then the agency “cannot approve the application for an ITP” using a “less protective proposal” due to delay or any other rationale).

Equally important—and unaddressed by Respondents—is that *any* project alternative would necessarily occasion *some* delay to obtain permits and approvals. Hence, if the Court sustains the Service’s Section 10(a)(2)(B)(ii) determination, it would render this statutory provision completely meaningless because *every* alternative to any applicant’s preferred project, if adopted by the Service after a practicability analysis near the conclusion of the ITP process, would require the applicant to start over in obtaining approvals since by definition an “alternative” is not the specific project the applicant has been pursuing. Such a ruling would set a dangerous precedent, relieving the Service of its explicit duty “before issuing [an ITP] . . . to find independently that no practicable alternative to [the applicant’s] development plan would minimize the taking” of listed species likely to be taken by the action. *Gerber*, 294 F.3d at 185.

Thus, the Service has “failed to consider an important aspect of the problem” by failing to properly analyze whether the Central Route is, in fact, impracticable. *State Farm*, 463 U.S. at 43.

D. The Service Failed To Address Serious Concerns Raised By An Undisputed ABB Expert.

As explained, leading ABB expert Dr. Jon Bedick—whose peer-reviewed studies the Service cites several times in its Biological Opinion, SECTION_7_17—submitted extensive comments raising specific concerns including that “[t]he analysis and assumptions regarding the density of ABBs in the Project area are not supported by reliable data, and therefore the potential for ‘take’ of ABBs (as defined under the ESA) may be significantly higher than” assumed; there are “several incorrect assumptions underlying NPPD’s analysis, which render it suspect”; the ABB surveys involved improper timing; there is insufficient support for “claims regarding the extent of habitat impacts”; and the “assessment of ABB density” is inaccurate due to “readily apparent” defects in the model used. CORRESPONDENCE_3112-26. Although the Service admits that it never reached out to Dr. Bedick, nor referenced his expert comments, the agency claims that it nonetheless fully addressed his comments. ECF No. 34 at 41-43. This is not so.

For example, Dr. Bedick extensively explained the problems inherent in the model used by the Service and NPPD to calculate the likelihood of ABB take, and concluded on the basis of his professional experience and applicable literature that this model, based on a single paper, “does not provide an accurate assessment of the likelihood of take from this Project” and thus “is likely underestimating the level of take from this Project.” CORRESPONDENCE_3115-16. In turn, Dr. Bedick found that the use of this model—despite more effective and well-established models for calculating ABB take—means “that the best available science has [not] been used to arrive at NPPD and the Service’s conclusions regarding impacts to ABB.” *Id.* While Respondents point to the fact that the Service purportedly addressed these concerns by merely stating that their model and surveys “us[ed] best practices,” ECF No. 34 at 42, the Service neither adopted a better-validated model for estimating ABB take (as urged by Dr. Bedick), nor explained why it would

not do so. This glaring omission—in the face of compelling comments from a recognized expert finding the Service’s ABB take estimate model inferior—cannot withstand scrutiny under the ESA or APA. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156-57 (D.C. Cir. 2011).¹⁵

III. THE SERVICE VIOLATED NEPA.

In addition to the NEPA violations described above concerning the Service’s failure to properly examine the indirect impacts of wind projects dependent on the R-Project, the Service violated NEPA by considering an overly narrow range of alternatives and by dismissing from detailed analysis an alternative that would better protect all affected resources.

As to the range of alternatives, Respondents do not (and cannot) dispute that the *only* action alternatives analyzed in detail in the FEIS were two virtually identical alternatives that followed precisely the same route and differed only in terms of the transmission tower design. LIT_CITED_32200-01. All other alternatives (including the Central Route) were dismissed after a brief discussion, and thus were *not* analyzed in detail. LIT_CITED_32224 (explaining that these alternatives were “eliminated from further study in the FEIS” and thus did not receive detailed evaluation). Remarkably, the government asserts that “the alternatives considered by the Service here are sufficiently varied,” ECF No. 34 at 45. Nothing could be further from the truth.

When determining whether an agency adopted a reasonable range of alternatives, courts properly focus only on the action alternatives that the agency analyzed *in detail* rather than those briefly considered and then eliminated. For example, in *Western Watersheds Project v. Abbey*, the

¹⁵ The government essentially makes a harmless error argument that even if Dr. Bedick is correct that the Service significantly underestimated ABB take, it will not have a major “impact to the rangewide population of about 50,000 beetles.” ECF No. 34 at 42-43. But substantially underestimating take is very consequential under the ESA both because it means that NPPD has *not* fully offset ABB take with off-site mitigation and because it skews future ESA analyses for other projects due to the fact that the Service there must take into account past ABB take in determining how much additional take can be permitted without causing jeopardy to the species.

Ninth Circuit concluded that an agency adopted an unreasonably narrow range of alternatives “when each alternative considered would authorize the same underlying action [of renewing grazing permits],” despite the fact that the agency also “*considered but did not analyze in detail* a no-grazing alternative, a reduced-stocking-level alternative . . . and an alternative that would manage the area for potential natural community.” 719 F.3d 1035, 1050-54 (9th Cir. 2013) (emphasis added); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (rejecting EIS that analyzed in detail “only a no action alternative along with two virtually identical alternatives”); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (“[T]he range of action alternatives is unreasonably narrow [where] the alternatives are virtually indistinguishable from each other.”). Hence, because the Service admittedly eliminated the Central Route without detailed consideration, the Service’s range of action alternatives analyzed in detail—i.e., two virtually identical alternatives—flouts NEPA.

Moreover, distinct from the Service’s unduly narrow range of alternatives, the agency violated NEPA by failing to analyze in detail (instead eliminating from further examination) the Central Route—an alternative that would cause far less adverse impacts to wildlife, historic, and other affected resources. LIT_CITED_32273. Although the Service’s project leads formally concluded in the DEIS that the Central Route was, in fact, “feasible from both a technical and economic perspective,” ADD_197, the Service’s Regional Office reversed that determination primarily due to the additional \$38, 000,000 cost and three-year delay the Central Route might entail. LIT_CITED_32277. However, as explained above, the Service’s cursory explanations for eliminating the Central Route are arbitrary and capricious because NPPD’s ratepayers would pay a much more modest sum than \$38,000,000 (i.e., less than \$2,700,000) over many years, and there are reasonable means of mitigating NPPD’s largely self-inflicted delay that NPPD has been implementing for several years without jeopardizing project viability at all. *See supra* at 22-23;

WildEarth Guardians v. Bernhardt, No. 19-cv-1920, 2019 WL 5853870, at *8 (D. Colo. Nov. 8, 2019) (“Because the alternative met the criteria for a reasonable alternative, and neither [federal agency] reasonably concluded it was infeasible, the agencies were required to consider it.”).¹⁶

For these reasons, the Service’s overly narrow range of alternatives and elimination of an obviously practicable alternative without adequate explanation for such dismissal violates NEPA. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708-11 (10th Cir. 2009) (invalidating agency’s dismissal from detailed consideration in an EIS a reduced-impact alternative and holding that agency’s rationales for dismissal were arbitrary and capricious).

IV. THE SERVICE VIOLATED THE NHPA.

Petitioners previously explained that the Service violated the NHPA’s basic procedural requirements by issuing an ITP and entering into a Programmatic Agreement before all historic resource surveys had been completed, by failing to analyze alternatives that would reduce harm to historic resources, and by failing to evaluate—let alone resolve—impacts from the Thunderhead wind project that the Programmatic Agreement conceded “is a reasonably certain foreseeable action” resulting from the R-Project and thereby requiring consultation under the NHPA. ECF No. 22 at 51-53 (citing NHPA_545). Respondents’ cursory arguments are misplaced.

The Service’s only defense is that the mere existence of “the Programmatic Agreement is enough to satisfy the Service’s Section 106 consultation obligation.” ECF No. 34 at 50-51. It relies upon a regulation for the proposition that a “signed Programmatic Agreement satisfies the

¹⁶ The government asserts that it eliminated detailed consideration of the Central Route because “it lacked authority to require NPPD to implement this route” and thus “it was required to issue the ITP if the applicant meets all the permit issuance criteria.” ECF No. 34 at 44. But Congress directed that the Service *must* deny an ITP if there is an alternative of any kind that would further minimize take of listed species without rendering the project impracticable on cost or other grounds. *See Gerber*, 294 F.3d at 185. Thus, there is no support for the government’s position that it must (or even may) grant an ITP in the face of a known alternative that would minimize harm as compared to the applicant’s preferred approach while maintaining project viability.

Service’s Section 106 consultation obligations.” *Id.* (citing 36 C.F.R. § 800.14(b)). But whatever the purpose of that regulation, it cannot usurp clear statutory language nor bar judicial review of whether an agency acted arbitrarily or capriciously in entering into a Programmatic Agreement that fails to adhere to the requirements of federal law. *See, e.g., San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (holding that Section 106 of the NHPA “does not give rise to a ‘private’ right of action against the federal government,” but that “[a]n aggrieved party *may pursue its remedy under the APA*” (emphasis added)). Indeed, courts routinely review an agency’s compliance with the NHPA—including in cases where agencies entered into programmatic agreements—and often invalidate agency action on those grounds. *See Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1088-89 (D.C. Cir. 2019) (invalidating agency decision on NHPA grounds despite the existence of a programmatic agreement); *cf. CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 109 (D.C. Cir. 2006) (reviewing NHPA programmatic agreement to determine whether the FCC acted arbitrarily and capriciously in entering into it).¹⁷

For its part, NPPD argues that the Service acted lawfully because any unsurveyed lands will be surveyed prior to construction and that the indirect and cumulative effects of wind projects need not be addressed under the NHPA. *See* ECF No. 37 at 45-47. But NHPA precedent clarifies that historic resource surveys must occur *prior* to EIS issuance, and Respondents have not identified a single case allowing the approach adopted here by the Service. *See, e.g., Oglala Sioux*

¹⁷ The government cites *Dine Citizens Against Ruining Our Env’t v. Bernhardt* for the proposition that “compliance with the procedures in that agreement satisfies the agency’s NHPA Section 106 responsibilities.” 923 F.3d 831, 846 (10th Cir. 2019). But that case arose in a very different context, in which the plaintiffs were trying to *enforce* the terms of the programmatic agreement against the agency, and thus the court explained that there could be no legal violation where the agency had adhered to the agreement. *Id.* Here, Petitioners argue that the Service’s cavalier treatment of the NHPA—including through its signing of the Programmatic Agreement—constitutes arbitrary and capricious decisionmaking. Thus, the context is different because adhering to an unlawful Programmatic Agreement that failed to resolve issues required by the NHPA does not change the fact that entering into the agreement was arbitrary and capricious.

v. Nuclear Regulatory Comm’n, 896 F.3d 520, 533 (D.C. Cir. 2018) (“The purpose of an EIS is, in part, to determine whether the land contains such resources and where they are located, so that damage to them can be avoided or mitigated.”). Nor do the NHPA and its regulations allow agency discretion to refuse to analyze indirect (or cumulative) effects of an action. To the contrary, the NHPA’s implementing regulations make plain that agencies “shall” evaluate “adverse effects,” which “include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” 36 C.F.R. § 800.5(a)(1). Thus, where the law requires evaluation of indirect (or cumulative) effects that are “reasonably foreseeable,” *id.*, it is textbook arbitrary and capricious decisionmaking for the Service to determine that the “Thunderhead Wind Energy Center *is a reasonably certain foreseeable action*” resulting from the R-Project, and nevertheless refuse to analyze or resolve those effects before issuing an FEIS, ITP, and Record of Decision. NHPA_545 (emphasis added).

V. RESPONDENTS HAVE NOT CARRIED THEIR HEAVY BURDEN TO DEMONSTRATE THAT VACATUR IS UNWARRANTED.

In their opening brief, Petitioners specifically requested that the Court vacate the Service’s unlawful decisions and analyses challenged in this case. *See* ECF No. 22 at 54. While the government has requested separate briefing on remedy, ECF No. 34 at 51-52—an approach to which Petitioners do not object—NPPD erroneously argues that Petitioners have not established that they are entitled to vacatur. *See* ECF No. 37 at 47-49. While Petitioners will await the separate remedy briefing requested by the government to make additional points concerning the appropriate remedy, Petitioners briefly address the flaws in NPPD’s contention.

Contrary to NPPD’s suggestion, Congress instructed that vacatur is the standard, default remedy under the APA, and therefore defendants have a very heavy burden to demonstrate that an unlawful agency decision should not be vacated. *See* 5 U.S.C. § 706(2)(A), (D) (mandating that

courts “*shall . . . set aside* agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . or without observance of procedure required by law” (emphasis added)). Thus, in APA cases, there is a strong presumption that vacatur applies, and unless defendants rebut this presumption vacatur is the default remedy a court must issue. *See, e.g., Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (“[B]oth the Supreme Court and the D.C. Circuit have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA.” (citations omitted)); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014) (“Vacatur is the normal remedy for an agency action that fails to comply with NEPA.” (citations omitted)); *Ctr. for Env'tl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016) (“[G]iven that vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants’ burden to show that vacatur is unwarranted.”).

Further, NPPD is also wrong in self-servingly asserting that this case concerns only “procedural errors.” ECF No. 37 at 48. In reality, Petitioners are seeking to enforce the most critical substantive provisions in the ESA—including the requirement to insure against jeopardy of whooping cranes and other imperiled species—by affirming that impacts to species likely to be affected by this massive transmission line project are, in fact, minimized and mitigated as Congress intended in the ESA, in order to avoid tipping them towards extinction. Especially where NPPD has itself raised questions as to whether the Service is foreclosed from issuing an ITP for whooping cranes due to the risk of jeopardizing the species, *see* EMAIL_5330, Petitioners’ claims are neither strictly procedural nor minor in terms of their practical import for the fate of the R-Project. In turn, allowing this project to be built while the Service decides whether it can even issue an ITP for whooping cranes (and other ESA-listed birds) without jeopardizing the species would contravene the letter and spirit of the ESA.

As a result, NPPD has greatly overstated the importance of its transmission line relative to the survival and recovery of the whooping crane. *See Hill*, 437 U.S. at 187-88 (explaining that “Congress viewed the value of endangered species as ‘incalculable,’” and noting that “it would be difficult for a court to balance the loss of a sum certain—even \$100 million—against a congressionally declared ‘incalculable’ value, even assuming we had the power to engage in such a weighing process, which we emphatically do not”). In any event, future briefing will elucidate that the presumptive remedy of vacatur is the only sensible remedy under these facts.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court vacate and remand the Service’s ITP, ROD, FEIS, Biological Opinion, and Programmatic Agreement.

Respectfully submitted,

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