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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE; RURAL UTILITIES SERVICE; THOMAS VILSACK, in his official capacity as Secretary of Agriculture; JAMES R. NEWBY, in his official capacity as Acting Administrator, Rural Utilities Service, United States Department of Agriculture, Defendants, and SUNFLOWER ELECTRIC POWER CORPORATION, Intervenor-Defendant.	)	No. 1:07-cv-01860-EGS

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), plaintiff Sierra Club respectfully submits this motion for a preliminary injunction against defendant Rural Utilities Service ("RUS") and defendant-intervenor Sunflower Electric Power Corporation ("Sunflower"). An injunction is warranted because Sierra Club is likely to prevail on the merits of its claims under the National Environmental Policy Act ("NEPA"), and because the balance of harms and the public interest support issuance of an injunction until this case is resolved on the merits.

Sierra Club seeks an injunction against RUS from taking any additional action, including any approval of Sunflower actions pursuant to the governing loan contracts, in support of the expansion of Sunflower's existing coal-fired generation facility in Holcomb, Kansas. Sierra Club also seeks an injunction against Sunflower from taking any action that requires the approval of RUS under those contracts and agreements. Such injunction should remain in place until either the case is resolved on the merits or until RUS considers the environmental impacts of—and the alternatives to—the expansion projects through an adequate environmental impact statement ("EIS").

Pursuant to Fed. R. Civ. P. 65(a)(2), the Court may, if it finds the existing administrative record adequate to find in favor of plaintiffs, convert this motion to a motion for summary judgment and rule on the merits at this time. However, because the administrative record is not complete, ruling against plaintiff on summary judgment would be premature at this time.

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Respectfully submitted this 31st day of July, 2009.

/s/ Jan Hasselman
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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (REDACTED)

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REFERENCES TO THE ADMINISTRATIVE RECORD

Defendant Rural Utilities Service ("RUS") filed an initial administrative record in this action and multiple supplements to that record. Some of these documents are not separately bates-stamped, such that there are more than one document in the record with the same record number. To avoid confusion, Sierra Club will adhere to the following convention in identifying administrative record documents.

All documents will be preceded by AR, i.e., "AR 8050." Documents that are subject to the Court's privilege order will be identified with a P, i.e., "AR P4532A."

Documents submitted in the first supplement to the administrative record, which refer to the promulgation of RUS's NEPA regulations, share numbers with other AR documents. This supplement was filed on Nov. 10, 2009. (Docket #35). Documents from this record will be identified with a "S" preceding the number, i.e., "AR S0020." Pursuant to L.R. 7(n), plaintiff's index of administrative record documents will include this identification.

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INTRODUCTION

Plaintiff Sierra Club respectfully moves for a preliminary injunction against defendant Rural Utilities Service ("RUS") and defendant-intervenor Sunflower Electric Power Corporation ("Sunflower"). The Court should enjoin RUS and Sunflower from taking any further steps towards the completion of the Holcomb Expansion Project, a coal-fired power plant currently planned as a single 895-megawatt facility in Holcomb, Kansas. An injunction is warranted because Sierra Club is likely to prevail on the merits of its claims under the National Environmental Policy Act ("NEPA") that RUS should have prepared an environmental impact statement ("EIS") evaluating the impacts of—and alternatives to—the Expansion before authorizing the project to proceed and before providing financial assistance to (and becoming a financial partner with) Sunflower. An injunction is also appropriate in light of the irreparable harm that Sierra Club and its members will suffer if the Expansion, which will generate vast amounts of global-warming gases and other harmful pollutants, proceeds.

Sierra Club seeks this injunction because Sunflower is once again moving forward with the Holcomb Expansion. A recent agreement between the Governor of Kansas and Sunflower, and accompanying state legislation, purports to require issuance of the Clean Air Act permit that Kansas had previously denied. Every additional step taken towards completion of the project renders the consideration of impacts and alternatives mandated by NEPA less useful. An injunction will maintain the status quo while the Court considers the pending motions and a schedule is adopted for final resolution of Sierra Club's claims.

FACTUAL BACKGROUND

I. SUNFLOWER'S ORIGINAL DEBTS AND THE 1987 RESTRUCTURING.

Sunflower is an electric generation and transmission cooperative that supplies power to six member distribution cooperatives. AR 0068. RUS's involvement with Sunflower dates back

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to the 1950s. AR 4546. In the early 1980s, RUS committed $543 million in loans and guarantees so Sunflower could build its existing 360-MW coal-fired power plant, Holcomb 1. Id.; AR 8715. Soon after the construction of Holcomb 1, Sunflower experienced financial difficulties and defaulted on its debt service payments. AR 4546. Sunflower's financial difficulties have been attributed to its construction of excess capacity. AR 4320A.2 ("Due to lower than anticipated load growth, lower than expected rate increases allowed by the Kansas Corporation Commission, and Sunflower's inability to sell excess capacity, Sunflower faced serious cashflow problems . . ."); AR 0074 ("The ratepayers of Western Kansas can no longer tolerate the excessive rates they pay to support Sunflower's excess capacity."); AR 8383A.1.

As a result, RUS and Sunflower in 1987 entered into an agreement to restructure Sunflower's debts. AR 0149. Under the Debt Restructuring Agreement ("DRA"), Sunflower was indebted to RUS via three notes with different terms: the "A Note" ($383 million) payments were fixed and serviced from current cash flow, the "B Note" ($173 million) was paid from incremental increases in Sunflower's available cash flow, and the "C Note" ($106 million) was to be paid after the B Note was fully repaid. Id.; AR 4320A.2.

Even after the restructuring, Sunflower was unable to generate sufficient cash flow to satisfy its obligations to RUS on these notes. Unpaid interest on the B Note was capitalized and, by 2002, the B Note debt had ballooned from $173 million to $518 million. AR 4546; AR 0150, 0169 (total Sunflower debt in 2002 was over $914 million). RUS acknowledged that the B and C notes were unlikely to "ever generate any appreciable payments" and that additional restructuring would be required. AR 4320A.2; AR 0183 ("If not paid, the balance on the [B note] in 2021 will be over $2.7 billion.") Additionally, Sunflower claimed that conditions imposed by the 1987 DRA restricted its ability to access capital markets for improvements to

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Holcomb 1. AR 0070-71. Sunflower also believed that the DRA prevented it from moving forward with construction of a second electric generation facility at the Holcomb site. AR 0072 ("such development is impossible under the current DRA").

II. THE 2002 RESTRUCTURING

RUS and Sunflower entered into another debt restructuring agreement in 2002.[1] In the 2002 restructuring, the old A, B, and C notes were effectively retired, and Sunflower issued a series of new notes to RUS: a new A Note that simply continued the obligations of the DRA A Note (which at that time totaled $287 million), AR 0173-75; a new B Note worth $44 million, AR 0174[2]; a "residual value note" redeemable in 2016 for the higher of either $125 million or 43% of the value of Holcomb 1; and finally a "Holcomb 3" note, worth $1.8 million, that would be payable if and when Sunflower built a third generating facility at the Holcomb site. AR 0175. RUS signed the "Agreement and Consent" to Sunflower's restructuring in September of 2002, AR 0216, and the agreement was consummated with revised loan documentation in 2003. AR 2730 (amended mortgage); 4371 (amended contract).[3]

[1] Associated with the debt restructuring was a complex corporate restructuring in which the old corporate form of Sunflower was effectively retired, and new ones created in its place. AR 0004-11 (term sheet); AR 0171-94 (Watkins testimony). The specific details of that restructuring are not significant here.

[2] The face value of the new B note was $88 million, however, each scheduled quarterly payment would reduce the principal balance on a 2 for 1 basis. AR 0174. As long as RUS paid on time, its total payments would be $44 million.

[3] Another refinancing occurred in 2004. AR 4545A. In this one, Sunflower borrowed money from private investors to prepay RUS the A notes (valued at $210 million), leaving its debts with RUS limited to the B Note, Residual Value Note, and H.3 Note (valued at $204 million). AR 8712; RUS Motion to Dismiss, at 6; AR 4443 (2004 Mortgage). Sunflower's prepayment was occasioned by the availability of lower interest rates, allowing Sunflower to reduce its interest expenses by almost $5 million per year. AR 8500.

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These debt restructurings provided significant financial benefits to Sunflower. See Declaration of Stephen Williams ("Williams Decl."), at ¶ 11-12;[4] AR P0002A_DOC4.5 [redacted].

Most significantly, RUS in 2002 wrote off a vast amount of accumulated debt that it perceived Sunflower would never be able to pay. Williams Decl., ¶ 6, 9; AR P4602A. The purpose of this restructure—and its unquestionable impact—was to allow Sunflower to move ahead with plans to build additional coal-fired units at Holcomb Station. See AR 8383A.1 (the "purpose of the 2002 corporate restructuring was to enable Sunflower to make more effective use of the potential of the Holcomb Station to host additional generating plants to be owned by third parties"). In a 2005 letter to Sunflower, RUS outlined the gains for Sunflower that have resulted from RUS's "extensive and time-consuming" assistance in both the 2002 refinance and other steps it had taken to aid Sunflower: "Combined, these actions enabled Sunflower to rid itself of over [redacted] in debt, reduce its depreciation expense by about [redacted] a year, and, through the 2004 refinancing, reduce its interest expense by about [redacted] annually." AR P4545.

In granting Sunflower this debt relief, RUS acquired significant control over Sunflower's operations. Under the 2002 agreements, virtually any action by Sunflower required prior approval from RUS, and RUS had unfettered discretion over the terms of those approvals. See

[4] While normally review of agency action under the Administrative Procedure Act ("APA") is confined to the administrative record, this Circuit recognizes several exceptions to that rule. Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). One of those exceptions allows the Court to consider extra-record evidence where the issues are sufficiently complex that the Court needs to look outside the record in order to understand the issues clearly. Id.; Fund for Animals v. Williams, 391 F. Supp. 2d 191, 198 (D.D.C. 2005); see also Gov't of Province of Manitoba v. Norton, 398 F. Supp. 2d 41, 48 n.7 (D.D.C. 2005) ("deviation from this 'record rule' is common in NEPA cases"). Because the financial transactions at issue in this case are complicated, Sierra Club has submitted the declaration from Stephen Williams to assist in explaining them. The purpose of Mr. Williams' declaration, an expert in utility finance and real estate, is not to offer expert opinion evidence but simply to assist the Court in explaining a complex record.

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Sierra Club's Opp. to Sunflower Motion to Dismiss (Docket #66) at 17-22; AR 4371 at § 5.14-.15; AR 8218 at 1 (RUS approvals are "given in its sole discretion").

III. THE EXPANSION PROJECT MOVED AHEAD

Once the 2002 restructuring was complete, planning for the Expansion projects began in earnest. AR 8383A.1. Sunflower anticipated a number of benefits arising out of these projects, including reduced operating and transportation costs for Holcomb 1 (as certain common operating costs would be shared across multiple plants), development fees, and generation of operating fees from the owners of the projects. AR P4535-36. Sunflower estimated benefits in the [redacted] per year. AR P4535-36; AR 4557 ("Approving this transaction will result in substantial economic benefits to Sunflower and its lenders.").

RUS also had much to gain from the Expansion. For example, the owners of the new facilities would pay "rent" to Sunflower for use of the "common facilities" (for example, the rail and coal handling facilities) that would be shared by Holcomb 1 and the Expansion projects. Pursuant to the restructuring agreements, RUS was entitled to most of this rent. AR 4558 (estimating rent from common facilities to RUS at $3.75 million per year from Holcomb 2 and $1.8 million from Holcomb 3); AR 4602A (Sunflower memo to RUS) ("RUS is a direct economic benefactor" of the Expansion projects); P4602A.

In accordance with the requirements of the governing contracts, Sunflower on many occasions sought approval from RUS to take steps in pursuit of the expansion. See, e.g., AR 8482 (Nov. 8, 2006 RUS approval to enter letter of intent and other agreements with project partners); AR 4574 (Nov. 9, 2005 RUS conditional approval to enter into MOA with Tri-State); AR 8473 (Oct. 29, 2004 RUS approval to amend contracts with Sand Sage for H.2 development). In November of 2005, RUS approved Sunflower's execution of several key agreements with other parties necessary for development of the Expansion projects.

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AR 8482A.1. RUS conditioned this approval on the requirement that Sunflower deposit all funds it received pursuant to the agreements in an escrow account approved by RUS. Id. RUS required that "[s]uch funds will remain in escrow until such time that the Utilities Programs and Sunflower have reached a definitive agreement on the amount of additional consideration due to the Utilities programs for the Holcomb Expansion Projects . . . ." Id.

Sunflower immediately deemed this condition to be unacceptable, and claimed that it would "prevent us from proceeding with either the Expansion projects or the Bioenergy Center. . . . Even if we wanted to proceed with the development transactions under your conditional consents, we cannot do so." AR 4614A. Not only did Sunflower need access to some of the funds, Sunflower claimed it needed to know what "share of the gain" RUS would demand from the Expansion project before proceeding with their partners. Id. Sunflower CEO Earl Watkins declared that the Expansion was "in immediate and great jeopardy" as a result of the conditions RUS had placed in the consent. Id.

This breakdown increased the importance of a parallel negotiation: an effort by Sunflower to "buy out" its debt from RUS so that additional RUS approvals would not be needed. See AR 9727 ("[I]t is in the best interest of both parties to terminate Sunflower's current relationship with RUS. The relationship has proved to be untenable and unworkable . . ."); AR 8483A.2 (discussing negotiations between RUS and Sunflower). The negotiations were extensive and intense, lasting between October of 2006 and March of 2007. See, e.g., AR 8485A.2 (letter from Sunflower CEO to Undersecretary of Department of Agriculture) ("frankly, I am pleading with you"). Ultimately, however, the parties could not come to terms. AR 8486A.1. Recognizing that "the buyout effort [was] now behind us," Sunflower

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acknowledged that it "will remain an RUS borrower and will have an ongoing need for RUS consents and approvals" as part of the Expansion projects. Id.

In the wake of the failed buyout and the disputed escrow condition, Sunflower and RUS reached an agreement in May 2007 whereby Sunflower would have greater flexibility to pursue the project in exchange for RUS obtaining an agreed "share of the gain" of the Expansion projects. AR 7703. Sunflower agreed to provide RUS with notes worth $52 million, $23 million, and $16 million payable respectively on the date of commercial operation of the H.2, H.3 and H.4 units. AR 7710-18; AR 4619. The notes were by their terms cancelled if the commercial operation date had not occurred by December 31, 2021. In exchange, Sunflower asked RUS to waive its claim for any "additional consideration or future revenue streams" associated with the Holcomb Expansion, to lift the escrow condition that it had previously imposed, and to grant a package of approvals. Id. AR 7707 (Sunflower's draft proposal); AR 8208 (summarizing exchange); AR 8218 (letter describing package of approvals).

From that point forward, RUS provided several additional approvals allowing the project to move forward. See, e.g., AR 8400, AR 8403, AR 8435, AR 8442. In keeping with the July 26 agreements and its acquisition of a $91 million stake in the expansion, RUS did not ask for anything in exchange for these approvals.

As Sierra Club has previously explained, the new Governor of Kansas and the state legislature have recently taken action that purports to require issuance of an air pollution permit that had previously been denied due to its global warming impacts. See Sierra Club Opp. to Sunflower Motion to Dismiss at 2-4. While there remain unresolved issues with respect to that process, the Expansion is now actively moving ahead.

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STANDARD OF REVIEW

To obtain preliminary injunctive relief, Sierra Club must show: "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006).

In applying this standard, "district courts may employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another." Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009) (citing Chaplaincy of Full Gospel Churches, 454 F.3d at 297). While the standard provides some flexibility in balancing the various factors, a plaintiff must still "demonstrate that irreparable injury is likely in the absence of an injunction." Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 375 (2008) (emphasis in original). This District has observed that the D.C. Circuit's "sliding scale" remains viable in the wake of Winter because the standard requires a movant to demonstrate "that it would suffer irreparable injury if the injunction were not granted." Brady Campaign, 612 F. Supp. 2d at 12 (internal quotation marks and citations omitted).

In evaluating the likelihood that plaintiff will prevail on the merits, the Court owes no deference to RUS's legal arguments. RUS's position that its role in the Sunflower Expansion Projects is exempt from NEPA "'is not entitled to the deference that court must accord to an agency's interpretation of its governing statute' and is instead 'a question of law, subject to *de novo* review.'" Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 54 (D.D.C. 2003) (quoting Citizens Against Rails-to-Trails v. Surface Trans. Bd., 267 F.3d 1144, 1150-51 (D.C. Cir. 2001)). Nor is deference owed to RUS's NEPA regulations. Id. at 53-54; Grand Canyon Trust v. Fed. Aviation Admin., 290 F.3d 339, 342 (D.C. Cir. 2002) ("the court owes no deference to

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the FAA's interpretation of NEPA or the CEQ regulations"). In contrast, the CEQ regulations are entitled to substantial deference, particularly where they conflict with the interpretation of NEPA advocated by another agency. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

ARGUMENT

I. NEPA REQUIRES THAT AGENCIES CONSIDER THE IMPACTS OF—AND ALTERNATIVES TO—MAJOR FEDERAL ACTIONS THAT WILL SIGNIFICANTLY AFFECT THE ENVIRONMENT.

A. NEPA Requires All Federal Agencies to Consider the Environmental Consequences of Their Actions

The National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1); Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971). It requires federal agencies to take environmental considerations into account in their decisionmaking "to the fullest extent possible." 42 U.S.C. § 4332; 40 C.F.R. § 1500.2; Envtl. Def. Fund v. Matthews, 410 F. Supp. 336, 338 (D.D.C. 1976). It also supplements the existing authority of agencies to allow them to act based on environmental considerations. Envtl. Def. Fund, 410 F. Supp. at 337-38; see also 42 U.S.C. § 4335. NEPA seeks to ensure that federal agencies take a "hard look" at environmental concerns. Young v. Gen. Servs. Admin., 99 F. Supp. 2d 59, 67 (D.D.C. 2000). One of NEPA's primary purposes is to ensure that an agency, '"in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" Id. (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). NEPA also '"guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that may also play a role in the decisionmaking process and the

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implementation of the decision.'" Id. As the D.C. Circuit has noted, "NEPA thus stands as landmark legislation, requiring federal agencies to consider the environmental effects of major federal actions, [and] empowering the public to scrutinize this consideration. . . ." Found. on Econ. Trends v. Heckler, 756 F.2d 143, 147 (D.C. Cir. 1985).

NEPA established the Council on Environmental Quality ("CEQ"), which issued uniform regulations implementing NEPA. 42 Fed. Reg. 26,967 (May 25, 1977); 40 C.F.R. § 1500.1 et seq. Executive Order No. 11991, 3 C.F.R. § 124 (1978), directs all federal agencies to comply with CEQ's regulations "except where such compliance would be inconsistent with statutory requirements." 40 C.F.R. § 1507.1. The Supreme Court and the D.C. Circuit have consistently held that the CEQ regulations are entitled to substantial deference. Robertson, 490 U.S. at 355-56; Andrus, 442 U.S. at 358; Grand Canyon Trust, 290 F.3d at 341.

The cornerstone of NEPA's protections is the environmental impact statement ("EIS"). Young, 99 F. Supp. 2d at 67. NEPA requires federal agencies to prepare an EIS before undertaking any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS requires a detailed, "hard look" at the environmental impact of—and alternatives to—the proposed action. Id. The EIS serves to ensure informed decisionmaking to the end that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1979).[5] Through complying with NEPA, agencies "consider

[5] An EIS is required whenever a federal agency takes action with "significant" effects on the human environment. 42 U.S.C. § 4332(2). If an agency is unsure whether the effects of any given action are significant enough to warrant preparation of an EIS, it may prepare an environmental assessment ("EA"), a concise public document that provides enough evidence and analysis to either support a finding of no significant impact, or to facilitate preparation of an EIS if effects are significant. 40 C.F.R. § 1508.9; S. Utah Wilderness Alliance v. Norton, 326 F. Supp. 2d 102, 116 (D.D.C. 2002). Agencies can also "categorically exclude" certain kinds of

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environmental issues just as they consider other issues within their mandates." Calvert Cliffs, 449 F.2d at 1112. By considering these issues, compliance with NEPA's procedure is "almost certain to affect the agency's substantive decision." Robertson, 490 U.S. at 350.

B. Significant Federal Agency Involvement in Non-Federal Actions Is Subject to NEPA

NEPA's obligation to consider impacts and alternatives in an EIS is not limited to projects that are directly carried out by federal agencies. CEQ regulations define "major federal action" to include non-federal actions "which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Such actions can include:

> (a) [N]ew and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . . [and]
>
> (b)(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Id. Consistent with these regulations, the D.C. Circuit recognizes that "major federal action" can occur even where it is chiefly advanced by a non-federal party. See, e.g., Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("there is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"); Karst Envt'l Educ. & Prot. v. Envt'l Prot. Agency, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (NEPA imposes procedural obligations on agencies "after a certain threshold of federal involvement"). All of the other circuits come to the same conclusion. See, e.g., Save Barton Creek Ass'n v. FHWA, 950 F.2d 1129, 1134 (5th Cir. 1992)

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actions that do not individually or cumulatively have a significant effect on the environment. 40 C.F.R. § 1508.4. For such actions, neither an EA nor EIS is required. Id.

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("We recognize that 'major federal action' can exist when the primary actors are not federal agencies."); Ramsey v. Kantor, 96 F.3d 434, 443-44 (9th Cir. 1996) (NEPA applies where private activity would be unlawful without federal action).

There is no single litmus test to determine when such non-federal activities constitute "major federal action" under NEPA. Hammond v. Norton, 370 F. Supp. 2d 226, 255 (D.D.C. 2005); Mineral Policy Ctr., 292 F. Supp. 2d at 54; see also Ka Makani'O Kohala Ohana, Inc. v. Water Supply Dept. of County of Hawaii, 295 F.3d 955, 960 (9th Cir. 2002) ("There are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action . . . . The matter is simply one of degree. . . ." (internal quotation marks and citations omitted)). Courts consider a number of factors, Mineral Policy Ctr., 292 F. Supp. 2d at 54-55, and the analysis calls for "a situation-specific and fact-intensive analysis." S.W. Williamson County Comm. Assoc. v. Slater, 243 F.3d 270, 281 (6th Cir. 2001).

II. RUS'S APPROVAL OF AND FINANCIAL PARTICIPATION IN THE HOLCOMB EXPANSION PROJECT CONSTITUTES "MAJOR FEDERAL ACTION."

The central question in this case is whether the Holcomb Expansion is a "major federal action" that is subject to NEPA because of RUS's approval of, support for, and participation in that project. If it is, RUS violated NEPA by failing to prepare an EIS analyzing the serious environmental impacts of the project, as well as alternative options that would meet the project's goals with less environmental impact. RUS and Sunflower argue that the Expansion is a purely private activity in which RUS played only a minor or ministerial role, and for which RUS provided no financial assistance. Even though the administrative record remains incomplete, their position collides with the evidence before the Court.[6]

[6] The Court has not yet ruled on Sierra Club's Motion for Discovery or Supplementation of Administrative Record (Docket #44). Sierra Club is moving ahead with this Motion for a

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There are two independent reasons for this Court to find that RUS's participation in the project constitutes major federal action; each alone is sufficient to subject the project to NEPA's requirements. First, without RUS's formal written approval, which was granted at several stages, the Expansion could never have occurred. Second, RUS provided substantial financial assistance to Sunflower that allowed the project to proceed, by writing off hundreds of millions of dollars of debt and by subordinating its lien on the Holcomb site to third parties. In fact, RUS eventually became a financial "stakeholder" in the project, obtaining notes worth tens of millions of dollars if and only if the Expansion projects are built before the end of 2021. With respect to both, the administrative record and RUS's governing authorities make clear that RUS has broad discretion over its decisions and actions. Nothing more is needed to find that the Holcomb Expansion is subject to NEPA.

A. RUS's Approval of the Holcomb Expansion Constitutes Major Federal Action.

1. Non-federal projects are "major federal actions" when they cannot proceed without federal agency approval.

The CEQ regulations could not be more clear: non-federal activities are subject to NEPA where they are subject to the approval of a federal agency before they can proceed. 40 C.F.R. § 1508.18 (major federal actions include "actions approved by permit or other regulatory decision" and "approval of specific projects"). The D.C. Circuit has confirmed this repeatedly. See Found. on Econ. Trends, 756 F.2d at 134 (NEPA extends to private projects where "'non-federal action cannot lawfully begin or continue without the prior approval of a federal agency'"); Macht v. Skinner, 916 F.2d 13, 18 (D.C. Cir. 1990) (activities subject to NEPA when

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Preliminary Injunction on the basis of what it believes to be an incomplete record, but one that nonetheless demonstrates that it is likely to prevail on the merits of its NEPA claims.

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agency "issue[s] a permit allowing a nonfederal project to go forward").[7] So has every other circuit to consider the issue. See, e.g., Maryland Conserv. Council v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986) ("A nonfederal project is considered a 'federal action' if it cannot 'begin or continue without prior approval of a federal agency.'"); Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974) (same).

Where a project cannot lawfully proceed in the absence of some affirmative action by a federal agency, it is subject to NEPA. See Gilchrist, 808 F.2d at 1042. In Gilchrist, the Fourth Circuit found that a state-funded highway needed to be evaluated through an EIS because it could not be built without the approval of the U.S. Secretary of Interior. Interior's approval was required because the highway would cross a federally-funded park and, under governing statutes, conversion of such park land requires federal approval. Id. Such approval made the entire highway—otherwise entirely non-federal—a "major federal action" for NEPA purposes. Id.

In contrast, in Mineral Policy Center, this District found that non-federal mining projects were not major federal action because the Bureau of Land Management did not approve them "or take any other overt act in support thereof." 292 F. Supp. 2d at 56-57. While project proponents needed to provide BLM notice of their activities, governing regulations made clear that BLM was not required to approve the projects before they commence: the notices were used merely to ensure the distribution of information. Id.; accord Citizens Alert Regarding the Env't v. Envtl. Prot. Agency, 259 F. Supp. 2d 9, 20-21 (D.D.C. 2003). Similarly, where the federal agency's role is advisory only, its involvement does not constitute major federal action. Ka Makani, 295 F.3d at 960-61 (U.S. Geological Survey played an "advisory role" in state water development

[7] As discussed below, the D.C. Circuit later appears to have questioned portions of the Macht decision. See infra 22 n.10; Karst, 475 F.3d at 1297. Karst did not question the basic principle

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project, and was not "'placed in a decisionmaking role'"); State of New Jersey v. Long Island Power Auth., 30 F.3d 403, 417 (3d Cir. 1994) (submission of transportation program for nuclear fuel for voluntarily approval was not subject to NEPA; agency action must be "legal precondition" to project). Finally, where the agency's approval role only pertains to a very insignificant portion of a larger non-federal project, the project will not rise to the level of major federal action. See, e.g., Macht, 916 F.2d at 19 (entire highway not subject to NEPA where federal agency wetland permit covered only a "negligible" portion of large project).

Even where affirmative agency approval is required, the approval in question must not be so statutorily constrained that the agency lacks any actual decisionmaking authority over the action. See Citizens Against Rails-to-Trails v. Surface Trans. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("The touchstone of whether NEPA applies is discretion."). In Citizens Against Rails-to-Trails, the D.C. Circuit found that the agency lacked any discretion over whether to issue a permit allowing conversion of a railway right of way to a trail, and hence, was not subject to NEPA. Id. This rule makes sense, the court held, in light of the purposes of NEPA: "If . . . the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency's actions, and therefore NEPA is inapplicable." Id.; see also S.W. Williamson Cty, 243 F.3d at 281 (federal action subject to NEPA "when the federal decisionmakers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project"); Save Barton Creek, 950 F.2d at 1134 ("The distinguishing feature of federal involvement is the ability to influence or control the outcome in material respects. The EIS

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that federal approval of a non-federal action is subject to NEPA, a conclusion that necessarily follows from both the CEQ regulations and the Circuit's longstanding prior case law.

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process is supposed to inform the decision-maker. This presupposes the decision-maker has judgment to exercise." (internal alterations and quotations omitted)).

2. The Holcomb Expansion would have been impossible without RUS approval.

Applying these standards to the facts of this case is not difficult. There can simply be no dispute that RUS: a) was required to take affirmative action on several occasions before the project could lawfully proceed; and b) had substantial discretion over those actions that could have been informed by broader consideration of environmental impacts and available alternatives. Nothing more is needed to establish that the project should be considered major federal action for purposes of NEPA. Citizens Against Rails to Trails, 267 F.3d at 1151.

In 2002, unable to meet its debt obligations, Sunflower had to seek RUS's approval for a significant corporate restructuring as well as an overhaul of its debt. There is no question that the Expansion project would be impossible without the restructuring: Sunflower said exactly that in a 2002 letter to RUS. AR 0071-72. Nor can there be any doubt that the central purpose of the 2002 restructuring was to allow the Expansion project to proceed. AR 8383A.1. Indeed, Sunflower and RUS jointly issued a press release announcing the consummation of the deal, in which the administrator of RUS is quoted saying: "RUS participated in this restructuring to help Sunflower stabilize its future and because of the potential for enormous economic development activity which will result from the continued development of the new 600 MW coal-fired power plant . . . ." AR 2555.

Under the restructured loan, RUS obtained comprehensive oversight over the Expansion project and virtually every other aspect of Sunflower's operations. Specifically, Sunflower was contractually prohibited from entering into "any agreement or other arrangement" for the development of the Holcomb site without RUS's prior written approval. AR 4371, § 5.14-.15;

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AR 4443, §§ 4.03, 4.07, 4.10, 4.21. Any action by Sunflower towards completion of the project without RUS approval would have violated the contracts. Id. Consistent with the requirements of the loan agreement, Sunflower returned to RUS for approvals at multiple stages in the development of the project. See, e.g., AR 4574; AR 4610; AR 8473; AR 8482; AR 8488; AR P7726; AR 8492-93; AR 8047; AR 8208; AR 8400; AR 8403; AR 8435; AR 8442. Highlighting the importance of these approvals, when RUS conditioned one of them on the requirement that Sunflower put all of the development funds into escrow, Sunflower flatly declared the Expansion could not proceed. AR 4614A. The parties ultimately negotiated a deal where the condition was lifted in exchange for RUS obtaining a $91 million dollar stake in the Expansion. See supra at 7.

Finally, Sierra Club has already explained why RUS had unfettered discretion over the terms of its approvals, both with respect to the 2002 restructuring and with respect to the specific approvals granted thereunder. See Sierra Club Opp. to Sunflower Motion to Dismiss at 19-22. For example, the Consolidated Farm and Rural Development Act—which provided the statutory authority for RUS to write off millions in Sunflower debt in 2002 so that the Expansion project could proceed—sets virtually no limits at all on RUS's discretion. Id. at 20; 7 U.S.C. § 1981(b), § 1989. Similarly, the contracts that governed the Sunflower-RUS relationship were explicit that approvals "will be on such terms and conditions as RUS, in its sole discretion, may require. . . ." AR 4371, § 5.15 (emphasis added), § 5.14; Sierra Club Opp. at 20-22. Indeed, it is difficult to think of a federal agency action that would have fewer statutory or regulatory constraints than the ones at issue in this case.[8]

[8] As Sierra Club explained in its opposition to Sunflower's motion to dismiss, even if RUS's discretion was statutorily constrained to considering the financial impacts of these decisions—and it clearly was not—the risks posed by constructing a series of new, expensive coal fired

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Accordingly, RUS's approvals were not like the "advisory" input at issue in Ka Makani, 295 F.3d at 960-61, or the nonbinding notification requirements at issue in Mineral Policy Center, 292 F. Supp. 2d at 56-57. To the contrary, they appear to be precisely the kinds of "approvals" that CEQ regulations are explicitly directed to. 40 C.F.R. § 1508.18 (major federal actions "include actions approved by permit or other regulatory decision" and "approval of specific projects"). Because Sunflower could not lawfully proceed with the project in the absence of affirmative action by RUS, the Expansion project is "major federal action." See Scientists' Inst. for Pub. Info., 481 F.2d at 1088 (NEPA applies "not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties").

The Third Circuit considered an analogous situation in Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 278 (3d Cir. 1983). In Morris County, the Department of Housing and Urban Development ("HUD") provided grant funding to a town for urban renewal projects. Id. at 273. As part of the grant, the parties entered into a contract that required the town to provide notice of any projects covered by the grant, and allow HUD to object and withhold funds if the town proceeded. When the town sought to demolish a historic building under the grant, a local historical preservation group brought a NEPA case to compel HUD to consider the impacts of the action in an EIS. The Third Circuit, like the district court, found that the contract "provided HUD with sufficient authority over the Dover Urban Renewal Plan to constitute major federal action." Id. at 278. The court reasoned that every approval required

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power plants at the same time that the federal government is preparing to regulate and/or tax carbon emissions implicates those concerns. See, e.g., AR 4545A (RUS letter re. expansion) ("we foresee that these expansion and development activities could necessitate a reassessment of RUS's risk profile with Sunflower"); AR P0002A_DOC1.4 [redacted].

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under the contract "provided HUD with an opportunity to alter the plan" if necessary to meet environmental standards. Id. In support of its decision, the court noted NEPA itself requires compliance "to the fullest extent possible," and that the purposes of NEPA would be served by requiring consideration of the federally-approved action through an EIS. Id. at 275.

In short, the record is clear that the Holcomb Expansion project could not lawfully proceed without RUS's explicit and affirmative approval. The record is equally clear that RUS had broad discretion over the terms of its approvals, discretion that could have been informed by consideration of the environmental impacts of the project. Nothing more is needed to establish that RUS's actions constitute major federal action.

B. RUS's Extensive Assistance in Support of the Project Constitutes Major Federal Action.

1. Federal assistance to non-federal projects is subject to NEPA.

Non-federal activities can also become subject to NEPA where a federal agency provides assistance—financial or otherwise—in support of the activity. This is confirmed by the CEQ regulations, which define major federal actions to include actions financed in whole or in part by federal agencies or otherwise "assisted" by them, 40 C.F.R. § 1508.18, as well as RUS's own NEPA regulations. See 7 C.F.R. § 1794.3 (actions requiring environmental review include "approval of financial assistance"). Indeed, NEPA's implementing regulations are written in the broadest possible terms, defining major federal action to include any activity that is "entirely or partly financed, assisted, conducted, regulated, or approved" by a federal agency. 40 C.F.R. § 1508.18; see also Found. on Econ. Trends, 756 F.2d at 155 ("Federal funding has long been recognized as an appropriate basis to enforce NEPA's requirements on non-federal parties."). This broad language is consistent with Congress's explicit requirement that agencies comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

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No "bright line" rule exists with respect to how much financial assistance constitutes major federal action. Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988) (holding NEPA may be triggered depending on "the nature of the federal funds used and the extent of the federal involvement"). Where the federal contribution is "minuscule in comparison with the cost of" the project as a whole, courts are less likely to find a major federal action. Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1482 (10th Cir. 1990); Rattlesnake Coal v. Envtl. Prot. Agency, 509 F.3d 1095, 1101 (9th Cir. 2007) (no major federal action where federal funds comprised six percent of total project budget). In comparison, where federal funding for a private project is substantial, NEPA applies. See, e.g., Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1121 (D. Or. 2002).[9]

Courts also look to whether the projects in question would be able to proceed in the absence of the federal financial assistance, and whether the agency—by virtue of its funding role—"can influence or does possess actual power to control" the project. Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889, 915 (N.D. Cal. 2007); Ka Makani, 295 F.3d at 961 (courts consider financial assistance to be "major federal action" if the agency is "placed in a decisionmaking role" in relation to the non-federal project). In Friends of the Earth, for example, the district court rejected a NEPA claim against federal agencies who provided loan guarantees

[9] RUS's NEPA regulations contain similar distinctions regarding RUS's funding of a utility's participation in a project that has other partners. 7 C.F.R. § 1794.20. Where the applicants for RUS funding cumulatively own less than five percent of a project, it is not major federal action. Id. § 1794.20(a). Where they own more than a third, the NEPA regulations apply. Id. §1794(b). And where ownership is between 5% and 33.3%, RUS must determine whether the applicants have "sufficient control and responsibility to alter the development of the proposal such that RUS's action will be considered a Federal action subject to" the NEPA regulations. Id. § 1794(c). Factors for consideration include whether construction would be completed regardless of RUS "assistance or approval," the stage of planning, and contractual provisions. Id.

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for overseas fossil fuel projects. The court found that the projects would have proceeded even in the absence of the financial assistance, and that the assistance did not provide the agency with any actual control or authority over the projects. 488 F. Supp. 2d at 915-17 ("the Court cannot say the conditions imposed to receive the financing would give the defendants sufficient control and responsibility to render those projects major federal action"). Similarly, in Citizens Alert, this District found that a local sewage pipeline project would have proceeded even in the absence of an anticipated federal grant. 259 F. Supp. 2d at 21. The Court found no indication that the absence of the federal money would "'end, cripple or at least significantly affect the project.'" Id. (quoting Envtl. Rights Coal. v. Austin, 780 F. Supp. 584, 594-95 (S.D. Ind. 1991)); see also Sugarloaf Citizen's Ass'n v. FERC, 959 F.2d 508, 514 (4th Cir. 1992) (no federal agency action where state could "lawfully disregard[]" FERC certification requirements and proceed with construction of facility).

In contrast, the First Circuit, in a case involving federal financial assistance for housing development, observed that it "would be reluctant not to find a continuing major federal involvement so long as it was established that HUD retained any significant discretionary powers as might permit it to effect an alteration of building or design plans to enhance the urban living environment." Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973). Similarly, in Wilson v. Lynn, 372 F. Supp. 934, 936 (D. Mass. 1974), a district court found that an agency's contractual obligation to provide mortgage insurance for a private development constituted major federal action because the agency could withhold the insurance if the project didn't satisfy certain standards. Even though it lacked authority to require changes to any project directly, the agency "retain[ed] significant discretionary powers to indirectly effect an alteration of plans" by withholding insurance. Id.

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Several courts have observed that a "partnership" or "joint venture" between a private entity and the federal government can trigger NEPA. See, e.g., Fund for Animals v. Lujan, 962 F.2d 1391, 1397 (9th Cir. 1992); Dalsis v. Hills, 424 F. Supp. 784, 787 (W.D.N.Y. 1976) (even in absence of formal partnership, "nexus" between federal agency and private developer was sufficient to invoke NEPA). In Macht v. Skinner, for example, the D.C. Circuit found that a state light rail project did not constitute major federal action in part because the federal government "has given no direct—or indirect, for that matter—financial aid to the state for the Project. . . . This is clearly not a case in which the state has entered a 'partnership' or 'joint venture' with the federal government by contracting with a federal agency to obtain goods, service, or financing." 916 F.2d at 19-20.[10] The Macht decision is consistent with a long series of cases in which federal financial involvement, or the existence of a "partnership or joint venture," with a non-federal project was found sufficient to subject that activity to compliance with NEPA. See Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974) (citing cases). For example, courts have observed that when an agency becomes entitled to a share of revenue from a private project, that project is subject to NEPA. Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1322-23 (8th Cir. 1974) (private logging subject to NEPA because Forest Service, *inter alia*, obtained revenue from project).

[10] The D.C. Circuit has since questioned the outcome in Macht, observing that the "federalization theory . . . lacks vitality" in light of subsequent court decisions. Karst, 475 F.3d at 1297. However, in Karst, the court was addressing a situation where plaintiffs had failed to allege a "final agency action," a jurisdictional prerequisite to suit. Indeed, plaintiffs in Karst appeared to argue that the a non-federal project itself was subject to NEPA because of the "cumulative substantial involvement" of numerous agencies. While the Karst decision foreclosed the argument that general federal involvement in a non-federal project can "federalize" it in the absence of final agency action, it did not undermine the long-standing principle—embodied both in CEQ regulations and governing case law—that a federal permit or substantial federal funding for a project can constitute "major federal action" subject to NEPA. Moreover, there is no

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Notably, "assistance" does not need to take the form of direct financial assistance such as a grant or loan. This District has held that a federal agency's extensive involvement in planning a state-conducted bison hunt was subject to NEPA. See Fund for Animals v. Clark, 27 F. Supp. 2d 8, 12-13 (D.D.C. 1998) ("having become so intimately involved in the discussion and planning of the hunt, the federal defendants cannot now claim to have no responsibility under NEPA with respect to the hunt or the supplemental feeding programs"); see also Fund for Animals v. Mainella, 283 F. Supp. 2d 418, 432 (D. Mass. 2003) (where the National Park Service made a "substantial contribution of personnel and equipment" toward a state hunting program, EIS was required); Scottsdale Mall v. State of Indiana, 549 F.2d 474, 489 (7th Cir. 1977) (NEPA applies to state highway where federal agency participated in "programming, location, design, preliminary engineering and right of way acquisition"). Similarly, where a federal agency agreed to construct a transmission line and supply power to a private power project, the entire project was deemed major federal action requiring an EIS. Sierra Club v. Hodel, 544 F.2d 1036, 1044 (9th Cir. 1976); accord Natural Res. Def. Council v. Hodel, 435 F. Supp. 590 (D. Or. 1977) (power plants subject to NEPA because "[w]ithout federal peaking power and transmission systems and the services performed by [the federal agency], construction of these plants would be inconceivable in the absence of very substantial change."), vacated as moot, Natural Res. Def. Council v. Munro, 520 F. Supp. 17 (D. Or. 1981).

2. RUS assisted Sunflower with this project, and is now in a "partnership" with Sunflower.

Again, applying these legal standards to the facts of this case is not difficult. While RUS asserts that it did not provide "direct" assistance like a grant or loan, there can be no question

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dispute here that Sierra Club has properly identified final agency actions. See Transcript of Hearing on Motion to Dismiss (July 18, 2008) at 32-33.

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that it financially assisted Sunflower in its effort to develop this project. The most obvious financial assistance came in the 2002 debt restructure, in which RUS wrote off hundreds of millions of dollars in Sunflower's loans so that the project could proceed. Supra at 4; Williams Decl. at ¶ 11-12. Sunflower candidly concedes that this assistance was a necessary prerequisite for the Expansion to occur. AR 0070-72 ("development of additional generation . . . . would not be achievable" and is "impossible" without restructure); AR 0157 (restructure "necessary to facilitate development of" Holcomb 2), AR 0192. Because the project could not have proceeded without this assistance, it is subject to NEPA. See Citizens Alert, 259 F. Supp. 2d at 21.

RUS provided additional "assistance" in the form of releasing its lien on the site so that Tri-State would not be exposed to the risk of a Sunflower default. Williams Decl., ¶ 13-15; AR 8383A.2 ("RUS will release or subordinate its lien" to other participants that obtain an ownership interest in the common facilities); AR P8468A.8; AR P8473A.3-A.4; AR P4591A.14 [redacted] AR P4591.24 [redacted] RUS executed the Subordination, Non-Disturbance and Attornment Agreement ("SNDA") as part of the July 2007 package. AR 8050. The RE Act itself recognizes that lien subordinations are a form of "financial assistance." 7 U.S.C. § 936. The RUS's regulations, and the preamble to its NEPA rule, likewise recognize that this kind of action can be a form of financial assistance subject to NEPA. 7 C.F.R. § 1717.850(d) ("the environmental requirements of 7 C.F.R. part 1794 may apply to applications for lien accommodations, subordinations, and releases"); 63 Fed. Reg. 68,648, 68,650 (Dec. 11, 1998) (recognizing that other types of financial assistance, including "lien subordinations," may trigger NEPA).

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There is no dispute that if the Holcomb Expansion received a new grant or loan from RUS it would be subject to NEPA. See Transcript at 27 (Counsel for RUS: "Under RUS's regulations, if RUS were financing this I do have to admit RUS would have provided an EIS, but that's not the case here."); 7 C.F.R. § 1794.25(a) (RUS NEPA regulations) ("An EIS will normally be required in connection with proposed actions involving the following types of facilities: (1) new electric generating facilities of more than 50 MW . . ."). It defies logic for RUS to argue that a new loan for the Expansion project would trigger NEPA, but forgiving hundreds of millions of dollars of its existing debt and providing other forms of assistance—for the express purpose of enabling the project—does not. Williams Decl., ¶ 11.

Even in a hypothetical scenario in which RUS did not provide direct or indirect financial assistance, its extraordinary involvement of time and staff in the planning for this project render it "major federal action." See Fund for Animals, 27 F. Supp. 2d at 12-13. RUS itself recognized that the burden of overseeing Sunflower was already very high, see AR 8383A.1 (noting that "heavy ongoing loan administration on RUS" is "grossly disproportional" to loan levels) and that construction of the Expansion projects would "increase the administrative burdens at [the agency] exponentially . . . ." Id. It specifically noted how its "extensive and time consuming actions to support Sunflower" had enabled Sunflower to proceed with the project. AR 4544A. An email from Department of Agriculture counsel confirmed that Sunflower was getting his "preferred attention every day." AR 7750A. The record demonstrates an extraordinary level of involvement of federal staff time in the planning and execution of these projects.

Finally, if there is any doubt that RUS's role passed the threshold of "negligible" involvement, the record shows that RUS became a significant stakeholder in the Expansion project. RUS holds notes worth close to $100 million that are payable if—and only if—the

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Expansion projects are built. Supra at 7. These notes are held in addition to Sunflower's underlying debt to RUS. Williams Decl., ¶ 17. RUS also reached agreements under which it was entitled to millions of dollars in rental income each year from the "common facilities." AR 4534-35A (75% of common facility income allocated to RUS); AR 7750A ("Going forward produces significant payments from Tri-State to which RUS is entitled."). In other words, RUS effectively entered a "partnership" or "joint venture" with Sunflower. AR 8696 (RUS Administrator observes that RUS is "a partner in the shared mission of providing electrical service and fostering economic development in rural areas of our country") (emphasis added); Macht, 916 F.2d at 19; see also Davis v. Morton, 469 F.2d 593, 595 (10th Cir. 1972) (federal agency approval of a lease agreement between Indian Tribe and developer subject to NEPA because it "makes the government more than an impartial, disinterested party to the contract"). As a major stakeholder in the project, with a clear financial interest in seeing its completion, RUS cannot disclaim all responsibility for compliance with NEPA.

Notably, RUS provided financial and other assistance, and negotiated the additional notes, with few, if any, boundaries on its discretion. No provision of law, regulation or contract prevented RUS from imposing additional constraints on the Expansion project, and the record is clear that RUS had sufficient control to affect the project. See Jones, 477 F.2d at 890. Indeed, its imposition of a simple escrow requirement in one of the 2007 approvals threatened to completely derail the entire project. AR 4614A. RUS had ample discretion to impose conditions on its approvals, and this was plainly not a situation where the project would proceed without regard to RUS's actions. Citizens Alert, 259 F. Supp. 2d at 21.

C. 7 C.F.R. § 1794.3 Does Not Exempt the Holcomb Expansion From NEPA.

RUS has adopted its own NEPA regulations that complement CEQ regulations. See 7 C.F.R. Part 1794. The RUS regulations identify actions that are generally categorically

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excluded from environmental review, id. § 1794.21(b); actions generally requiring some intermediate level of environmental review, id. §§ 1794.22 to 1794.24; and actions that generally require the preparation of a full EIS. Id. § 1794.25.[11] Separate from these categories is § 1794.3, which addresses the threshold question of the regulations' applicability. This section provides:

> The provisions of this part apply to actions by RUS including the approval of financial assistance. . . . Approvals provided by RUS pursuant to loan contracts and security instruments, including approvals of lien accommodations, are not actions for the purposes of this part and the provisions of this part shall not apply to the exercise of such approvals.

RUS's primary position in this litigation to date has been that all of its actions related to the Holcomb Expansion are exempt from NEPA review pursuant this provision. See RUS Motion to Dismiss (Docket #12) at 21-31. As both the administrative and historical records reveal, however, this section does not apply to RUS's approval of and financial support for the Holcomb Expansion. Alternatively, if the Court believes that the Holcomb Expansion is covered by § 1794.3, then the regulation is invalid as applied here.[12]

1. Section 1794.3 is inapplicable.

Section 1794.3 was added to RUS's NEPA regulations in response to the passage of an amendment to the RE Act in 1993. See 7 U.S.C. § 936e; AR S0013-14; 63 Fed. Reg. 68,648, 68,649 (Dec. 11, 1998) ("Congress required RUS to abandon its close hands-on control of its applicants and instead follow the practices of private market lenders. . . . Reflecting these changes and reforms, RUS has revised § 1794.3 of the rule."). This "major amendment" specifies that RUS should substantially reduce its supervision of financially sound borrowers:

[11] Proposals to construct "[n]ew electric generating facilities of more than 50 MW" fall into the latter category. 7 C.F.R. § 1794.25(a).

[12] The applicability of § 1794.3 was briefed extensively in response to RUS's earlier motion to dismiss. See Sierra Club Opp. to RUS Motion to Dismiss at 27-30. The discussion here seeks to build on that argument, not repeat it.

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> For the purpose of relieving borrowers of unnecessary and burdensome requirements, the Secretary, guided by the practices of private lenders with respect to similar credit risks, shall issue regulations, applicable to any electric borrower under this chapter whose net worth exceeds 110 percent of the outstanding principal balance on all loans made or guaranteed to the borrower by the Secretary, to minimize those approval rights, requirements, restrictions, and prohibitions that the Secretary otherwise may establish with respect to the operations of such a borrower.

7 U.S.C. § 936e(a) (emphasis added); see also H.R. Rep. 103-381, 1993 U.S.C.C.A.N. 2988 (Nov. 19, 1993) (RUS should "minimize the imposition of requirements and control on any [RUS] borrower whose net worth exceeds 110 percent of the borrower's outstanding loan balance.") The amendment also provides that RUS shall promptly share or subordinate the government's lien on borrower assets to facilitate private financing for future projects—again, only so long as the borrower is financially sound. Id. § 936e(b).[13]

RUS responded to this Congressional mandate by revising its regulations, including § 1794.3. Section 1794.3 clarifies that routine, ministerial approvals under loan contracts are not subject to environmental review. 63 Fed. Reg. at 68,650 (approvals pursuant to loan contracts that are "ministerial" are not major federal actions). So understood, § 1794.3 is consistent with the rest of the RUS NEPA regulations, which categorically exclude insignificant actions from environmental review, see 7 C.F.R. § 1794.21, and require review for major actions even where financed in whole or in part by private lenders. See id. §§ 1794.25, 1794.20, 1717.850. Such an interpretation is also consistent with CEQ regulations and governing case law, which confirm that ministerial and insignificant actions do not require NEPA review.

Section 1794.3 does not exempt RUS's actions here from NEPA for several reasons. First, § 1794.3 explicitly confirms that NEPA is required for "financial assistance." While the

[13] Sunflower, with its history of defaults and its continued "negative net worth," plainly is not the kind of borrower Congress was addressing in this amendment. AR 4546.

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term "financial assistance" as used in this provision is not defined, the RE Act indicates that it encompasses more than just direct loans. See 7 U.S.C. § 936. Similarly, RUS's regulations observe that even projects that are completely financed with private sector funds may be subject to NEPA where RUS is asked to release, subordinate, or accommodate its lien. 7 C.F.R. § 1717.850(a), (d).[14] As RUS itself confirmed, "RUS believes that, while it is principally the approvals of loans and loan guarantees to which environmental reviews attach, it is possible that other types of discretionary financial assistance could be available under the RUS program, which would trigger environmental reviews. Examples include lien subordinations under § 306 of the RE Act (7 U.S.C. § 936). The regulatory text should not limit those actions requiring environmental review to the approval of loans and loan guarantees." 63 Fed. Reg. at 68,650 (emphasis added). As Sierra Club has already explained, RUS provided extensive financial assistance to Sunflower, by writing off substantial Sunflower debt and by subordinating its lien position to other project participants, for the purpose of carrying out this project. Whatever the nuances of § 1794.3's applicability as applied to "approvals," it does not exempt financial assistance for new construction from NEPA review.

Second, the regulation seeks to exempt "approvals" under "loan contracts and security instruments" from NEPA review. 7 C.F.R. § 1794.3. Such an exemption may make sense for truly ministerial approvals, or where they have no perceptible impact on the environment. However, the exemption should not be read to include actions taken in support of a major new

[14] Section 1794.3 purports to exempt from review lien "accommodations," which refers to sharing the government lien on property with other parties. See 7 C.F.R. § 1717.851. It does not refer to lien subordination, which means "allowing another lender to take a first mortgage lien on certain property covered by the mortgage, and the Government (RUS) taking a second lien on such property." Id. RUS regulations confirm that lien subordinations may be subject to NEPA requirements. Id. § 1717.850(d).

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construction project. Indeed, the 2002 restructure and refinance was not an "approval" under a loan contract at all. Rather, it was a decision by RUS to dramatically restructure Sunflower's debts, including writing off hundreds of millions of dollars in loans, that resulted in completely new loan contracts and mortgages. Moreover, it was not a "ministerial" action: RUS had complete discretion over whether to proceed with the refinance at all, as well as its terms. It also did not have a negligible environmental impact: as Sierra Club has explained, the restructure and refinance was carried for the express purpose of allowing the Expansion to proceed. Additionally, many of the approvals that RUS gave to Sunflower following the 2002 restructure were not merely ministerial, as is evidenced by RUS's ability to impose significant conditions on the approvals. AR 8482A.1 (RUS conditioned approval on the requirement that Sunflower deposit all funds it received pursuant to the agreements in an escrow account approved by RUS). These non-ministerial approvals are likewise not covered by § 1794.3.

Finally, even if the narrow language of § 1794.3 covered RUS's actions with regard to the Holcomb expansion, the provision simply addresses the applicability of RUS's NEPA regulations, not the applicability of NEPA (and implementing CEQ regulations) altogether. Section 1794.3 does not exempt major federal actions from the CEQ regulations or the plain language of NEPA itself. See 7 C.F.R. § 1794.2(a) (RUS NEPA regulation "derives its authority from and is intended to be compliant with" CEQ regulations and NEPA). Nor would RUS have any authority to issue such a regulation. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (regulation cannot stand if it is contrary to statute). If § 1794.3 does exempt RUS's actions from RUS's specific NEPA rules—and it does not—those actions remain subject to NEPA and the CEQ regulations, which require an EIS.

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2. If § 1794.3 controls, it is invalid as applied because it conflicts with NEPA and CEQ regulations.

If the Court disagrees and finds that § 1794.3 exempts all of the approvals and assistance RUS has given to Sunflower, then it should find § 1794.3 invalid as applied here because it conflicts with NEPA and the CEQ regulations. NEPA itself must be complied with "to the fullest extent possible." 42 U.S.C. § 4223(2). As observed above, the CEQ regulations interpreting NEPA are entitled to substantial deference. Andrus, 442 U.S. at 358; see also 40 C.F.R. §§ 1507.1, 1507.3, 1508.1 (CEQ regulations are binding on all federal agencies). In contrast, this Court owes no deference at all to § 1794.3 or to RUS's legal positions. See Grand Canyon Trust, 290 F.3d at 342; Citizens Against Rails-to-Trails, 267 F.3d at 1150; Mineral Policy Ctr, 292 F. Supp. 2d at 53-54 & n.28; see also Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 801 (D.C. Cir. 2002) (An "agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue."). Accordingly, in the event of a conflict between § 1794.3 and the CEQ regulations, the latter clearly controls. See Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 276 (3d Cir. 1983) ("the CEQ guidelines are entitled to substantial deference in interpreting the meaning of NEPA provisions, even when CEQ regulations are in conflict with an interpretation of NEPA adopted by one of the Federal agencies"); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1335 n.50 (S.D. Ala. 2002) (in case of a conflict between the CEQ regulations and regulations adopted by another agency, "the court would be required to defer in a NEPA action to the regulations drafted by the CEQ, as that agency was created by NEPA with the authority to issue regulations on its implementation").

For the reasons discussed already, under the CEQ regulations and the case law interpreting them, RUS's repeated steps to approve the Expansion, and substantial financial

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assistance to Sunflower, constitute "major federal action." Any regulation that mandates a different outcome cannot stand. See Envtl. Def. v. E.P.A., 467 F.3d 1329 (D.C. Cir. 2006) (regulations invalid where contrary to statute); Nat'l Treasury Employees Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006) (same).[15]

D. Conclusion Regarding NEPA

Binding CEQ regulations define major federal action very broadly to include any activity that is "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18. Remarkably, the Holcomb Expansion project was each of these: without RUS's extensive oversight and assistance, financial support in various forms, and necessary approvals, the project could never have occurred. Indeed, RUS even became a project partner with a $91 million stake in seeing the projects constructed. It had virtually unfettered control over Sunflower's actions, and the exercise of its discretion was not constrained by statute or regulation. This is precisely the sort of federal action that should have been informed by a consideration of environmental impacts and alternatives. Sierra Club is likely to prevail on the merits of its claim that the Holcomb Expansion is subject to NEPA.

III. THE BALANCE OF HARMS SUPPORTS AN INJUNCTION

Courts have recognized two kinds of "irreparable harm" warranting an injunction in NEPA cases. See Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998). First are the environmental or aesthetic harms that can occur when a major project or action is allowed to proceed. The possibility of such environmental injury creates a strong presumption in favor of

[15] The proper standard for evaluating a facial challenge to a regulation based on a conflict with the governing statute has been the subject of substantial confusion. See Am. Petroleum Inst. v. Johnson, 541 F. Supp. 2d 165, 187-88 (D.D.C. 2008); Mineral Policy Ctr., 292 F. Supp. 2d at 38-40. As plaintiff is not bringing a facial challenge to § 1794.3, this Court need not decide what standard would govern such a challenge.

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injunctive relief. The U.S. Supreme Court has observed that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). Accordingly, courts "have been wary of even relatively modest environmental harm." Envtl. Def. v. Army Corps of Eng'rs, No. 04-1575 (JR), 2006 WL 1992626, at *8 (D.D.C. July 14, 2006); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 220-21 (D.D.C. 2003). The fact that the environmental impacts of an action are uncertain does not militate against a finding of irreparable harm. See Brady Campaign, 612 F. Supp. 2d at 25. Indeed, the very purpose of the EIS is to analyze and consider such impacts.

Second, as this Circuit has emphasized, "[t]he NEPA duty is more than a technicality: it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur. . . . If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate and irreparable injury." Found. on Econ. Trends, 756 F.2d at 157 (emphasis in original). Accordingly, the "procedural harm" suffered by plaintiffs when the analysis mandated by NEPA is ignored "bolsters" a request for an injunction. Fund for Animals, 281 F. Supp. 2d at 222; Fund for Animals, 27 F. Supp. 2d at 14. The D.C. Circuit has emphasized this theme repeatedly:

> NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions . . . Thus the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates.

Found. on Econ. Trends, 756 F.2d at 157; Jones v. Dist. of Columbia, 499 F.2d 502, 512 (D.C. Cir. 1974). As a result, when a showing of possible environmental or aesthetic injury is

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combined with a procedural violation of NEPA, "courts have not hesitated to find a likelihood of irreparable injury." Brady Campaign, 612 F. Supp. 2d at 24.

Sierra Club is entitled to an injunction because the construction and operation of an 895-MW coal-fired power plant will present serious risks to human health and the environment.[16] First, the plant will generate vast quantities of carbon dioxide—the primary cause of global warming—over its lifetime. As the U.S. Supreme Court has observed, "[t]he harms associated with climate change are serious and well recognized." Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 521 (2007) ("global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in winter snowpack in mountainous regions with direct and important economic consequences, and increases in the spread of disease" and the ferocity of weather events (internal citations omitted)). These threats have been echoed by the U.S. Environmental Protection Agency, which recently issued a proposed finding that carbon dioxide endangers public health and welfare, subjecting it to regulation under the Clean Air Act. 74 Fed. Reg. 18,886 (Apr. 24, 2009). Likewise, the U.S. House of Representatives recently passed the American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009), which explicitly finds that "greenhouse gas emissions cause or contribute to injuries to persons in the United States." Id. § 701.

[16] Sierra Club is submitting herewith the declarations of Dr. Johannes Feddema of the University of Kansas and Dr. Jonathan Levy of the Harvard School of Public Health to provide additional evidence on these risks. Consideration of these declarations is entirely proper. Judicial review of the merits of Sierra Club's NEPA claims is—with certain exceptions—confined to the administrative record. No such limitation exists with respect to the Court's consideration of the balance of harms in assessing the remedy. See, e.g., Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 816 n.29 (9th Cir. 2005).

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Sunflower had estimated that the project as currently configured will emit over six and a half million tons of carbon dioxide per year. Dr. Johannes Feddema, a Kansas-based climate expert, provides an overview of the impacts of these emissions both globally and in Kansas, where global warming threatens to disrupt the state's agricultural economy. See Declaration of Dr. Johannes Feddema ("Feddema Decl."), ¶ 18-21. Dr. Feddema also explains that, although there are many sources of greenhouse gases around the world, every additional significant new source of carbon dioxide—including this project—should be considered a serious matter. See id. at ¶ 22-26. Dr. Feddema's statements in this respect have been repeated elsewhere. For example, the American Clean Energy and Security Act of 2009 observes that "[e]ach increment of emission, when combined with other emissions, causes or contributes materially to the acceleration and extent of global warming and its adverse effects for the lifetime of such gas in the atmosphere. Accordingly, controlling emissions in small, as well as large, amounts is essential to prevent, slow the pace of, reduce the threats from, and mitigate global warming and its adverse effects." H.R. 2454 § 701; see also 74 Fed. Reg. at 18,907 (small sources of CO_2 still significant). Similarly, in 2007, the Kansas Department of Health and Environment denied a Clean Air Act permit for the Holcomb Expansion because its air emissions, including CO_2, presented a "substantial endangerment" to humans and the environment. See Ex. 1.[17]

The Holcomb expansion will emit large quantities of other air pollutants, including particulate matter, mercury, and ozone-forming constituents. See Declaration of Dr. Jonathan Levy ("Levy Decl."), § II. As explained in the declaration of Dr. Levy, an expert in public health impacts of coal-fired power plants with the Harvard School of Public Health, these

[17] At that time, the project was configured as two 700-MW plants rather than a single 895 MW plant.

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emissions will increase the risk of harm to human health in potentially significant ways. This increased risk of harm will occur both close to and potentially far downwind of the plant, and will occur even if the facility meets all existing regulatory standards for such emissions. Id. Indeed, Dr. Levy estimates that construction of this facility will potentially result in dozens of deaths and hundreds of millions of dollars in public health costs every year. Id. at ¶ 13. It is difficult to imagine harm that is any more "irreparable."

Sierra Club is also entitled to an injunction because of the "procedural harm" that has occurred when RUS approved of and supported a project without thoughtful consideration of its impacts. Because RUS failed to comply with NEPA, its decision was uninformed by an understanding of the environmental consequences and a careful analysis of alternatives, such as renewable energy projects or support for conservation. Additionally, because of RUS's NEPA violation, Sierra Club, its members, and the public at large lost the opportunity to provide input into RUS's decision. These kinds of harm are entitled to significant weight in the injunction balancing. Found. on Econ. Trends, 756 F.2d at 157.

Conversely, it is difficult to discern what harm of any kind—let alone "irreparable" harm—RUS would suffer if it was preliminarily enjoined from issuing any further consents or approvals associated with this project. The same is true with respect to Sunflower. The Holcomb Expansion has been discussed for almost ten years. While an injunction might reduce the potential financial gains Sunflower hopes to obtain from the project, NEPA itself contemplates some delay while the process is undertaken. See Park County Res. Council v. U.S. Dept. of Agric., 817 F.2d 609, 618 (10th Cir. 1987) ("Any increased costs from delay in drilling while an EIS is being prepared on the lease issue is not sufficient to establish prejudice, because NEPA contemplates just such a delay."), overruled on other grounds, Village of Los Ranchos de

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Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir.1992). In any event, Sunflower's potential reduction in financial gain is not an irreparable harm, especially when balanced against harm to the environment and human health. Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2001); see also Portland Audubon Soc. v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989) ("NEPA provides no protection for the purely economic interests" of intervenors). Plaintiff has met its burden of establishing irreparable harm.

IV. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION

The D.C. Circuit has confirmed that "when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977) ("[C]ourts will not hesitate to stop projects that are in the process of affecting the environment when the agency is in illegal ignorance of the consequences."). In Eckerd, the D.C. Circuit explained its rationale for this presumption:

> The first rationale for injunctions is that a project should not proceed, with its often irreversible effect on the environment, until the possible adverse consequences are known. In affording injunctive relief in one case Judge Friendly observed that if a NEPA analysis were done, it might "reveal substantial environmental consequences" which might be critical to further consideration of the propriety of the action. Similarly, another court noted, where an EIS had not been prepared, an injunction is justified against an ongoing project because "the decision makers are entitled to all the information relevant to a determination whether to abandon the project or to alter it." . . . Another reason for enjoining ongoing projects is to preserve for the agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA, e.g., after finding out about the possible adverse environmental effects of its action. This rationale often requires an injunction against all the activities of a project, even activities that themselves have no effect on the environment.

Id. (citations omitted); see also Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502,513 (D.C. Cir. 1974) ("In most cases, perhaps, it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public

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interest, be enjoined until such compliance is forthcoming."); Am. Oceans Campaign v. Daley, 183 F. Supp. 2d 1, 21 (D.D.C. 2000) ("If an injunction [in a NEPA case] is in the public interest and would serve a remedial purpose, it should be granted.").

These considerations weigh heavily in a preliminary injunction request. See, e.g., Fund for Animals v. Clark, 27 F. Supp. 2d at 15. For example, the public interest—as expressed by Congress in NEPA—is frustrated when there is approval of a proposal with likely environmental consequences without NEPA compliance. Id. ("Therefore, the public interest would be served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements."); Fund for Animals v. Espy, 814 F. Supp. 142, 152 (D.D.C. 1993). A strong public interest has also been recognized "in meticulous compliance with the law by public officials." Fund for Animals v. Espy, 814 F. Supp. at 152; see also Fund for Animals v. Mainella, 294 F. Supp. 2d 46, 59 (D.D.C. 2003).

In enacting NEPA and demanding compliance "to the fullest extent possible," Congress has declared it to be in the public interest that RUS consider the environmental consequences of partnering with Sunflower on a coal-fired power plant that will degrade local air quality and increase the threat to the global climate. It has declared it to be in the public interest that RUS consider alternative approaches such as conservation and renewable energy. And it has declared it to be in the public interest that the citizens of Kansas and the nation have an opportunity to participate in that process and to be assured that the appropriate consideration was taking place. In the absence of an injunction, Sunflower and RUS will push the project even farther along than it already is, generating political and economic momentum towards its construction and rendering moot a dispassionate analysis of impacts and alternatives. The public interest favors an injunction.

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V. SIERRA CLUB HAS SATISFIED ITS BURDEN OF SHOWING THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION AGAINST BOTH RUS AND SUNFLOWER.

Based on the foregoing, Sierra Club is entitled to an injunction until either this case is resolved on the merits or until RUS prepares a legally adequate EIS for the Holcomb Expansion. Until that time, Sierra Club asks this Court to enjoin RUS from consenting or approving to any other actions by Sunflower related to the Holcomb Expansion project. Sierra Club also asks this Court to enjoin Sunflower from taking any action that would require RUS approval. For example, the 2003 RUS loan contract prohibits Sunflower from entering "any agreement or arrangements, whether or not in writing" for either "Holcomb site development" or any other use of the Holcomb 1 site with a fair market value of over $1 million, without RUS's prior approval. AR 4371 at § 5.15.[18] Such an injunction would not preclude Sunflower from taking reasonable interim steps to pursue the project, such as discussing the Holcomb expansion with third parties. It will, however, preclude Sunflower from entering into contractual commitments that bind it to any course of action or create potential liabilities if the project does not proceed. See 7 C.F.R. § 1794.15 ("Until RUS concludes its environmental review process, the applicant shall take no action concerning the proposed action which would have an adverse environmental impact or limit the choice of reasonable alternatives being considered in the environmental review process.") (emphasis added); 40 C.F.R. § 1506.1.

This Court has ample authority to enjoin Sunflower. In Foundation on Economic Trends, 756 F.2d at 155, the D.C. Circuit rejected the argument that it lacked authority to enjoin non-federal actions in a NEPA case. "[I]t is well established that judicial power to enforce NEPA extends to private parties where non federal action cannot lawfully begin or continue without the

[18] Sunflower appears to have already violated these contractual restrictions, by signing the Settlement Agreement with the Governor of Kansas without prior approval of RUS.

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prior approval of a federal agency. Were such non-federal entities to act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction." Id. (internal citations, alterations, and quotations omitted). Other circuits have made the same observation: "[n]onfederal actors may also be enjoined under NEPA if their proposed action cannot proceed without prior approval of a federal agency." Fund for Animals v. Lujan, 962 F.2d 1391, 1397 (9th Cir. 1992); see also S.W. Williamson County, 243 F.3d at 277 ("If we conclude that the highway corridor constitutes a 'major federal action,' then we have the authority to instruct the district court to enjoin the state from further construction on the highway."); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 645-46 (9th Cir. 2004); Save Greers Ferry Lake, Inc. v. Dep't of Def., 255 F.3d 498 (8th Cir. 2001).

Similarly, "it is well settled that non-federal parties can be enjoined, pending completion of an EIS, where those non-federal entities have entered into a partnership or joint venture with the Federal Government. . . ." Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974); Silva v. Romney, 473 F.2d 287, 289-90 (1st Cir. 1973) ("[I]t is 'beyond challenge' that one in partnership with the federal government can be prohibited from acting in a certain manner."). Since Sunflower cannot lawfully enter into any agreement for the development of the Holcomb site without prior RUS approval, an injunction is warranted. Additionally, because RUS and Sunflower have entered a "partnership" to advance the Sunflower project, it should be "beyond challenge" that both can be enjoined.

CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Court grant its motion for a preliminary injunction. A proposed order is submitted herewith.

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Respectfully submitted this 31st day of July, 2009.

/s/ Jan Hasselman
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EXHIBIT 1

K A N S A S

RODERICK L. BREMBY, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF HEALTH AND ENVIRONMENT

October 18, 2007

Sunflower Electric Power Corporation
Mr. Wayne Penrod
Senior Manager
301 W. 13th
Hays, KS 67601

Dear Mr. Penrod:

It is my duty as Secretary of the Kansas Department of Health and Environment, as authorized by the Kansas air quality act, K.S.A. 65-3001 et seq. to protect the public health and environment from actual, threatened or potential harm from air pollution.

The secretary has broad authority under the act and the regulations adopted thereunder to achieve protection of the health of the people and the environment. . The secretary has authority under K.S.A. 65-3008a(b) to affirm, modify or reverse a decision on an air quality permit after the public comment period or public hearing. The secretary also has authority under K.S.A. 65-3012 as interpreted by the Attorney General of the state of Kansas, to take such action as is necessary to protect the health of persons or the environment, notwithstanding a permit applicant's compliance with all other existing provisions of the Kansas air quality act, upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of person or the environment. The endangerment may be a threatened or potential harm as well as an actual harm.

The Supreme Court of the United States found in Massachusetts v. E.P.A., 127 S.Ct. 1438 (April 2, 2007) that carbon dioxide, a greenhouse gas, meets the broad definition of air pollutant under the Clean Air Act. The Kansas air quality act similarly has a broad definition of what constitutes air pollution. The Court also recognized the significant existing national and international information available on the deleterious impact of greenhouse gases on the environment in which we live.

I have given due consideration to the scientific and technical information related to carbon dioxide including but not limited to many oral and written comments submitted in the public hearing and comment period. The information provides support for the position that emission of air pollution from the proposed coal fired plant, specifically

carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment.

Based on this information, the permit is denied. Pursuant to K.S.A. 65-3008b(e),the permit applicant has the right to appeal this decision within fifteen (15) days and request an administrative hearing under the Kansas administrative procedures act set forth at K.S.A. 77-501 *et seq.*

Sincerely,

Roderick L. Bremby
Secretary