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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.	Case No. 1:07-cv-01860-EGS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION (REDACTED)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION (REDACTED)

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INTRODUCTION

Plaintiff Sierra Club respectfully moves for summary judgment on its claim that defendant Rural Utilities Service ("RUS") has violated the National Environmental Policy Act ("NEPA"). RUS violated NEPA when it approved and provided financial assistance for (and became a stakeholder in) the Holcomb Expansion Project, currently planned as a single 895-megawatt coal-fired power plant in Holcomb, Kansas. Summary judgment is warranted because the administrative record in this case demonstrates that RUS should have prepared an environmental impact statement ("EIS") evaluating the impacts of, and alternatives to, the Expansion before taking action in support of the project. Sierra Club further requests entry of an injunction preventing both RUS and defendant-intervenor Sunflower Electric Power Corporation ("Sunflower") from taking certain steps towards the completion of the Expansion until a valid EIS has been completed. Sierra Club's requested injunction is necessary and appropriate in light of the harm that Sierra Club and its members will suffer if the Expansion proceeds in the absence of a valid EIS. Sierra Club has sought to narrowly tailor the injunction to minimize any potential harm to Sunflower, and the minor delay occasioned by an injunction does not outweigh the serious environmental risks posed by this project and the importance of NEPA compliance.

FACTUAL BACKGROUND

As required by the local rules, Sierra Club has submitted a concise statement of material facts with this motion for summary judgment. Sierra Club incorporates that statement by reference.[1]

[1] Sierra Club is attaching five exhibits to this motion, all of which have been previously provided to the Court with other briefing. The first, a letter from RUS to the Attorney General, was erroneously withheld from the administrative record but later provided by RUS's counsel. AR 2949. The other exhibits are primarily relevant to the issue of remedy, not the merits, and hence are properly before the Court. Plaintiff also relies in this motion on two expert witness

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STANDARD OF REVIEW

This case requires the Court to determine whether, as a matter of law, RUS's actions in support of the Holcomb Expansion constitute "major federal action" pursuant to NEPA. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law). As both this district and the D.C. Circuit have held, an agency's position on the threshold legal question of NEPA's applicability "'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)). This Court owes no deference to RUS's legal arguments on NEPA's applicability because RUS is not the agency Congress charged with interpreting and implementing NEPA. Nor is any 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 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). This is not a case in which an agency's factual determination that the environmental impacts of its actions are too insignificant to warrant preparation of an EIS is at issue, a determination that implicates the agency's expertise and typically is reviewed under the much more deferential "arbitrary and capricious" standard. See, e.g., Nat'l Comm. for the New River v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

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declarations that accompanied plaintiff's motion for a preliminary injunction. These declarations are also pertinent to the issue of remedy, not the merits.

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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 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

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Econ. Trends v. Heckler, 756 F.2d 143, 147 (D.C. Cir. 1985).

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. Young, 99 F. Supp. 2d at 67. 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). Through complying with NEPA, agencies "consider 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.[2]

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. Council on Environmental Quality ("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

[2] 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 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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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 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) ("We recognize that 'major federal action' can exist when the primary actors are not federal agencies.").

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."

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Southwest Williamson County Comm. Assoc. v. Slater, 243 F.3d 270, 281 (6th Cir. 2001).

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, financial 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. As discussed further below, 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 at several stages the Expansion could never have occurred—affirmative RUS action was a "legal precondition" to the Expansion project. Second, RUS provided financial assistance to Sunflower that allowed the project to proceed, by effectively writing off hundreds of millions of dollars of debt and by releasing its lien on the Holcomb site. In fact, RUS eventually because a partner with Sunflower in the project, staking nearly $100 million in potential debt recovery to the construction of the three expansion projects.[3]

[3] Although no party has contested Sierra Club's standing, plaintiff has adequately demonstrated that it has standing to bring this action. Plaintiff has submitted several declarations from individual members whose environmental, aesthetic, health, and economic interests would be adversely effected by construction of any additional coal-fired generation project in Holcomb, Kansas. See Docket Nos. 73-76 (member declarations), 95-96 (expert declarations). Potential harm to these interests is an adequate basis on which to establish standing in environmental cases. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Additionally, for the reasons discussed in Sierra Club's opposition to Sunflower's motion to dismiss, this Court has jurisdiction over plaintiff's claims. See Docket No. 71.

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II. RUS'S APPROVALS FOR THE HOLCOMB EXPANSION PROJECT CONSTITUTE "MAJOR FEDERAL ACTION."

A. A Non-Federal Project Is "Major Federal Action" When It Cannot Proceed Without Federal Agency Approval.

Under CEQ regulations, 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 agency "issue[s] a permit allowing a nonfederal project to go forward"). 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); Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974). Agency approval triggers NEPA whether the agency is acting under direct regulatory authority or under contract. See, e.g., Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278 (3d Cir. 1983); Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973); Wilson v. Lynn, 372 F. Supp. 934, 936 (D. Mass. 1974).

Accordingly, where a project cannot lawfully proceed in the absence of 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

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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. 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 project, and was not "'placed in a decisionmaking role'").

Even where agency approval is required, for NEPA to apply the approval in question must not be so constrained that the agency lacks any actual decisionmaking authority over the action. See Citizens Against Rails-to-Trails, 267 F.3d at 1151 ("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 Southwest Williamson County, 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 process is supposed to inform the decision-maker. This presupposes the decision-maker has judgment to exercise." (internal alterations and

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quotations omitted)).

B. The Holcomb Expansion Could Not "Lawfully Begin or Continue" Without RUS Approval.

There can be no dispute that RUS was required to take affirmative action on several occasions before the project could lawfully proceed. In 2002, unable to meet its debt obligations or proceed with the desired Expansion projects, Sunflower had to seek RUS's approval for a significant corporate restructuring as well as an overhaul of its debt. Statement of Facts ¶¶ 7-8. There is no question that the Expansion project would be impossible without the restructuring: Sunflower said exactly that in a 2002 letter to RUS. Statement of Facts ¶ 6; 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. 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"). 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 . . . ." Statement of Facts ¶ 7; AR 2555. Governing regulations confirm that the 2002 restructuring could not lawfully proceed without formal RUS action. 7 C.F.R. § 1717.1202(b) (explicit written approval of RUS Administrator required for modification of a borrower's debt under the Con Act); see generally 7 C.F.R. § 1717 subpt. Y (regulations implementing RUS debt settlement authority under the Con Act).

Under the terms of the restructured loan, RUS obtained comprehensive oversight over virtually every aspect of Sunflower's operations, including the Expansion. Specifically,

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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; see also AR 4443, §§ 4.03, 4.07, 4.10, 4.21. [redacted]. AR P04591A.11. Sunflower also worked hard (albeit unsuccessfully) to buy out its RUS debt so that it would not be subject to such approvals in the future. Statement of Facts ¶¶ 31-32; AR 8486A.1 ("Sunflower will remain a RUS borrower and will have an ongoing need for RUS consents and approvals"). Plainly, Sunflower understood that in the absence of these approvals, the Expansion could not lawfully proceed.

RUS regulations, in addition to the governing loan contracts, also dictate that RUS approval for Sunflower's actions was required. See, e.g., 7 C.F.R. § 1717.608 (RUS approval required for loan recipient to enter into certain contracts); id. § 1717.616 (RUS approval required for sale, lease, or transfer of capital assets unless certain conditions are met); id. § 1717.657 (RUS approval required for investments that allow a borrower to add to their electric system); id. § 1717.853 (RUS approvals required for terms of private loans where RUS lien accommodation or subordination is requested); see generally 7 C.F.R. § 1717 subpt. M (regulations establishing circumstances in which RUS approval of borrower actions is required, unless governing documents specify otherwise); 7 C.F.R. § 1717 subpt. R (regulations establishing requirements for approval of release or subordination of RUS liens).

Any action by Sunflower towards completion of the project without a mandatory RUS approval would have violated both the contracts and the regulations and given rise to a default, allowing RUS to demand full and immediate payment on its debts and take possession of and sell

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Sunflower's property. Statement of Facts ¶ 23. Consistent with the requirements of the loan agreement, Sunflower returned to RUS for approvals at multiple stages in the development of the project. Statement of Facts ¶ 28. 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 Statement of Facts ¶¶ 33-34.

In other words, RUS's formal written approval—both of the 2002 restructuring and the subsequent agreements necessary for the Expansion to proceed—was both a contractual and a regulatory "precondition" to the Expansion. Because Sunflower could not "lawfully begin or continue" with the project in the absence of approval by RUS, those approvals constitute "major federal action." See Found. on Econ. Trends, 756 F.2d at 134; 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").

C. RUS Had Discretion Over the Terms of Its Actions in Support of the Expansion.

As noted above, when an agency is acting under its permitting authority, NEPA applies as long as the agency has some "ability to influence or control" the private project. Southwest Williamson County, 243 F.3d at 275; United States v. S. Florida Water Mgmt Dist., 28 F.3d 1563, 1572 (11th Cir. 1994) ("The touchstone of major federal activity constitutes a federal agency's authority to influence nonfederal activity."). Where the approval in question is mandatory upon the satisfaction of specific criteria, NEPA may not apply. Sugarloaf Citizens Assoc. v. FERC, 959 F.2d 508, 513 (4th Cir. 1992) (agency approval was nondiscretionary). However, agencies need only some ability to exert leverage on a private project in order to trigger NEPA—they do not need comprehensive control. See Wilson, 372 F. Supp. at 936;

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Citizens Alert Regarding the Envt. v. Envtl. Prot. Agency, 259 F. Supp. 2d 9, 22 (D.D.C. 2003) (partial federal funding of private project would give agency "leverage"); Landmark West! v. U.S. Postal Serv., 840 F. Supp. 994, 1005 (S.D.N.Y. 1993) ("In assessing the degree of federal control and responsibility, this Court must consider both de jure and de facto influence.").

The same is true when an agency is acting pursuant to limits imposed by contract: agency approval pursuant to the terms of a contract is subject to NEPA as long as the agency has some discretion over the terms of such approval. Compare Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995) (pursuant to pre-NEPA contact terms, agency had no ability to deny approval to private party to build road through federal lands); Landmark West!, 840 F. Supp. at 1007 (agency "had extremely limited contractual ability to control the Project") with Morris County Trust, 714 F.2d at 278 (contract approvals "provided HUD with an opportunity to alter the plan" if necessary to meet environmental standards); Jones, 477 F.2d at 890 (NEPA would apply "so long as it was established that [the agency] retained any significant discretionary powers as might permit it to effect an alteration of building or design plans to enhance the urban living environment."); Wilson, 372 F. Supp. at 936 (agency action subject to NEPA because agency could withhold mortgage insurance—and "indirectly effect an alteration of plans" where necessary to ensure safety and health of tenants); see also Oregon Nat'l Resources Counc. v. U.S. Forest Serv., 445 F. Supp. 2d 1211, 1220 (D. Or. 2006) (contracts allowing timber sales did not constrain agency from considering environmental impacts of sales).

1. RUS Had Discretion Over the Terms of the 2002 Restructure.

There can be no question that RUS had discretion over the terms of the 2002 restructure and was in a position to influence the direction of the Expansion project. RUS negotiated and executed the 2002 debt restructure under its Con Act authority. The Con Act gives RUS broad discretion to decide whether to enter into such settlements at all, and sets few if any boundaries

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on the terms that can be imposed in such a debt settlement. 7 U.S.C. §§ 1981, 1989. In fact, implementing regulations explicitly direct RUS to "consider" a broad set of factors in structuring such settlements, including, inter alia, the RE Act (which explicitly encourages conservation and renewable energy, 7 U.S.C. § 904(a)), the National Energy Policy Act of 1992 (which calls for "the stabilization and eventual reduction in the generation of greenhouse gases," Pub. Law 102-486, § 1602), the policies of FERC (whose mission is to protect the nation's "economic, environmental, and safety interests"), and state legislative and regulatory actions. 7 C.F.R. § 1717.1202(d).

Borrowers are further required to implement whatever "changes in structure, management, operations and performance" are imposed by RUS as a condition of debt settlement, and the content of such changes is wholly within the agency's discretion. Id. § 1717.1204(j); see also id. § 1717.1204(l) ("The Administrator may impose such other terms and conditions of debt settlement as the Administrator determines to be the government's interests."); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (declaring "beyond challenge . . . the power of the federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges"); Wabash Valley Power v. Rural Elec. Admin., 988 F.2d 1480, 1485 (1993) (RUS "exercises control over all of its borrowers through the imposition of contractual requirements").

Accordingly, nothing in the Con Act would have prevented RUS from conditioning its agreement to the 2002 restructure on requirements to reduce or mitigate the environmental impacts of new power plant construction. In fact, RUS had explicit authority to direct Sunflower to focus its efforts on conservation or renewable energy sources if it wished. While Con Act regulations reflect that RUS should seek to maximize the recovery of the government's loans,

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7 C.F.R. § 1717.1202, there is no evidence that steps to reduce the environmental impacts of a project would jeopardize the government's loans, or that the duty to maximize recovery trumps all other considerations. To the contrary, Sunflower's entry into agreements for the construction of a massive and controversial project at the same time Congress and regulatory agencies are considering imposing significant costs on additional carbon dioxide generation implicates RUS's interests in maximizing the recovery of its loans. 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]; see also Ex. 4 (U.S. Rep. Waxman letter expressing concern that RUS support for Holcomb Expansion puts taxpayers at risk because of potential carbon regulation).

In short, RUS had discretion in 2002 to negotiate a debt settlement with Sunflower that put it on a track towards more sustainable practices such as conservation or renewable energy, or even just a project with a smaller footprint or greater mitigation. Instead, RUS agreed to a deal under which the recovery of its loans was expressly linked to the construction of new coal-fired power plants. This is precisely the sort of agency decision that should have been informed by an evaluation of environmental impacts and available alternatives. It is wholly unlike cases where NEPA was deemed inapplicable because the federal agencies lacked any discretion over their actions. See, e.g., Sugarloaf, 959 F.2d at 513 (because facility was "automatically" entitled to certification as long as certain fixed criteria were met, and FERC had no discretion to deny this certification, it was not subject to NEPA).

2. RUS Had Discretion Over Its Subsequent Approvals.

Even a cursory review of the governing contracts confirms that the same is true of RUS's later actions in support of the Expansion that were carried out pursuant to the 2002 agreements.

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Under the terms of those agreements, virtually any action taken by Sunflower in pursuit of the Expansion required RUS's prior written approval. Such approval was to be given on whatever "terms and conditions as RUS, in its sole discretion, may require." AR 4371 §§ 5.14, 5.15 (emphasis added). RUS further had open-ended authority to require additional consideration for such approvals—again, "in its sole discretion." Id. § 5.15. One would be hard pressed to imagine a contract that gave RUS greater discretion over the decision to grant the approvals, and over any terms that would be required in exchange for such approval. These contract terms are complemented by RUS regulations which require RUS approval for certain actions by borrowers, and—like the contracts—do not put boundaries on the terms and conditions that RUS can impose along with those approvals. See 7 C.F.R. § 1717 subpt. M.

Accordingly, it cannot be seriously argued that RUS had no ability to "influence" or exert "leverage" over Sunflower's plans to build and operate additional coal-fired power plants under the terms of these agreements. See supra at 11-12. Its inclusion of a simple escrow condition in one approval brought the Expansion to a grinding halt, Statement of Facts ¶¶ 29-30, and put RUS in a position to renegotiate new terms moving forward. RUS could have conditioned its approvals on actions that would reduce or mitigate environmental impacts. It could have used the leverage it had through the approval process to put Sunflower on a direction towards a different project. Instead, it further yoked the recovery of federal debt to the construction of new coal generation. Statement of Facts ¶¶ 33-34.

In short, the record is clear that the Holcomb Expansion Project could not lawfully proceed without RUS's explicit and affirmative approval, first in 2002 and then at several stages subsequently. 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

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impacts of the project. Nothing more is needed to establish that RUS's actions constitute major federal action.

III. RUS'S ASSISTANCE FOR, AND PARTNERSHIP IN, THE PROJECT CONSTITUTE MAJOR FEDERAL ACTION.

A. 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. It is also echoed in 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.

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

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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).

Courts also look to 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). For example, 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.; see also Sugarloaf Citizen's Ass'n, 959 F.2d at 514 (no federal agency action where state could "lawfully disregard[]" FERC certification requirements and proceed with construction).

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, 477 F.2d at 890. Similarly, in Wilson, 372 F. Supp. at 936, 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 did not 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.[4] 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, 497 F.2d at 1147 (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).

[4] 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 484, 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.").

B. RUS Provided Financial Assistance to Sunflower in Support of This Project, and Is Now in a "Partnership" With Sunflower.

There can be no question that RUS provided financial assistance to Sunflower in its effort to develop this project. The most obvious financial assistance came in the 2002 debt restructure, in which RUS effectively wrote off hundreds of millions of dollars in Sunflower's loans so that

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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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the project could proceed. Statement of Facts § II. [redacted]. AR P4602A. RUS negotiated and executed the 2002 debt restructure under its Con Act authority to "compromise, adjust, reduce, or charge-off debts or claims" and "adjust, modify, subordinate, or release the terms of security instruments, leases, contracts, and agreements." 7 U.S.C. § 1981(b)(4). The simple fact that RUS was acting under its Con Act authority, rather than its more limited RE Act authority to modify schedules of repayment, 7 U.S.C. §§ 912, 912a, is prima facie evidence that it "compromised, adjusted, reduced, or charged-off" Sunflower's debts.

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.

The financial assistance provided by RUS was substantial. Prior to the 2002 restructuring, Sunflower owed close to a billion dollars on the old A, B, and C notes, and that debt was projected to grow to $2.7 billion by 2021. Statement of Facts ¶¶ 4-5. While these debts were not formally written off, Old Sunflower was stripped of its assets in the corporate restructuring, and was essentially rendered a shell corporation with no ability to ever pay these debts. Id. § II. The New Sunflower notes would be credited against the old notes but would never come close to paying them off. Compare id. ¶¶ 4-5 (old B note debt stood at $518 million in 2002, with 9.5% interest capitalizing annually) with id. ¶ 14 (new B note worth $44 million and residual value note worth $125 million). Similarly, the only payments that would offset the $108 million C note debt was the $1.8 million Holcomb 3 note payable if and when a third

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Expansion Project was constructed. Id. ¶ 15. While Sunflower would also be required to devote a portion of the rental payments from the Expansion projects to pay down B note debt, that amount did little to offset the old B note's rapidly growing debts. Id. ¶ 17. Those rental payments were later converted to a flat sum of $91 million if all three Expansion projects were built. AR 7710-18; AR 4619. RUS later calculated that its actions had allowed Sunflower "to rid itself of over $300 million in debt." Statement of Facts ¶ 22; see also AR P0002A_DOC4.5 [redacted].

RUS provided additional assistance to the project by committing to release its lien on the site to facilitate the Expansion. Statement of Facts § III; 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 SDNA obligates RUS to not disturb Tri-State's interests in the event of a Sunflower default, making it more difficult for RUS to recover its loans.

The RE Act itself recognizes that lien subordinations are a form of "financial assistance." 7 U.S.C. § 936. The RUS 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

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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).

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.

Finally, the record shows that RUS became a stakeholder in the Expansion project. RUS holds notes worth close to $100 million that are payable if—and only if—the Expansion projects are built. Supra at 21-22; Statement of Facts ¶¶ 33-34.[5] RUS negotiated these notes with Sunflower in an effort to recoup some of Sunflower's federal debts by negotiating a "share of the gain" from the Expansion. In so doing, RUS effectively entered a "partnership" or "joint venture" with Sunflower with respect to the Expansion. AR 8696 (RUS Administrator observes that RUS is "a partner in the shared mission of providing electrical service and fostering

[5] In the original restructure, the owners of the new facilities would pay "rent" to Sunflower for use of the "common facilities," and 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. RUS and Sunflower later reached an agreement that converted this right to receive rent from the projects to notes payable when each of the three projects were constructed. AR 7710-18; AR 4619.

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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 responsibility for compliance with NEPA. See, e.g., Minnesota Pub. Interest Research Group, 498 F.2d at 1322-23 (agency's financial stake in private project a factor in determining that it was subject to NEPA).[6]

As the nearly 10,000-page record filed by RUS in this case attests, RUS's involvement in the project was extensive. 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 . . . ."); AR 4544A (RUS has provided "extensive and time consuming actions to support Sunflower"); AR 7750A (email from Department of Agriculture counsel) (Sunflower getting "preferred attention every day"). This kind of intensive federal involvement in private action confirms that it has crossed the threshold into major federal action. Fund for Animals v. Clark, 27 F. Supp. 2d at 12-13.

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 as a condition of granting this assistance. RUS hence had sufficient control to affect the project. See Jones, 477

[6] RUS does not have to be an investor or be entitled to share in profits in order for it to be considered in "partnership" with Sunflower. See, e.g., Dalsis v. Hills, 424 F. Supp. 784, 787 (W.D.N.Y. 1976) ("The partnership or joint venture need not exist in a formal sense and the funds need not be directly received. Rather, a factual analysis must be undertaken to determine if a sufficient interrelationship exists . . . .").

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F.2d at 890. Indeed, its imposition of a simple escrow requirement in one of the 2007 approvals threatened to completely derail the entire Expansion. 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.

IV. 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. Pt. 1794. The RUS regulations identify actions that are generally categorically 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. Proposals to construct "[n]ew electric generating facilities of more than 50 MW" fall into the latter category. Id. § 1794.25(a). Separate from these categories is section 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 has been that all of its actions related to the Holcomb Expansion are exempt from NEPA review pursuant to this provision. As noted above, RUS's positions with respect to NEPA's applicability are not entitled to deference. See supra at 2; Mineral Policy Ctr., 292 F. Supp. 2d at 54.

A. Section 1794.3 Is Inapplicable.

Section 1794.3 does not apply to RUS's actions with respect to the Holcomb Expansion. RUS's decision in 2002 to dramatically restructure Sunflower's debts was a debt settlement

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under RUS's Con Act authority to compromise or charge off debts—it was not an "approval" under a loan contract at all. The 2002 actions resulted in entirely new contracts and security agreements, in a negotiation over which RUS had open-ended discretion. See supra at 12-14 (discussing Con Act authority). This regulation—which limits NEPA compliance for ministerial actions under existing agreements—simply has nothing to do with RUS's negotiation and execution of new contracts with Sunflower in 2002.

Indeed, section 1794.3 explicitly confirms that NEPA is required for "financial assistance," and, as discussed above, RUS provided financial assistance to Sunflower in support of this project by effectively writing off debt and subordinating its lien. While the term "financial assistance" as used in this provision is not explicitly defined, the RE Act indicates that it encompasses more than just direct grants and 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).[7] 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

[7] 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," or lien releases. Id. RUS regulations confirm that lien subordinations may be subject to NEPA requirements. Id. § 1717.850(d).

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68,650 (emphasis added). Whatever the nuances of section 1794.3's applicability as applied to "approvals," it plainly does not exempt financial assistance or lien subordinations for new construction.

The same is true of the key decisions in 2007 that allowed the project to go forward, which simply continued the negotiations under which RUS could claim a "share of the gain" of the Expansion. Like the 2002 decisions, the key RUS actions in 2007 were not even "approvals" under the contracts at all but entirely new agreements that the parties negotiated in order to move the project forward. See, e.g., AR 8218 (additional consideration letter) ("This letter confirms the mutual agreement of [RUS] and Sunflower" with respect to Expansion). In the July 2007 letters, RUS and Sunflower negotiated and executed agreements under which RUS gave up its share of the "rent" from the common facilities, and the ability to condition future approvals, in exchange for $91 million in notes to be paid when the Expansion projects are built. AR 8221-22. Like the 2002 negotiation, this action was not a ministerial approval under the contract but an open negotiation where the parties struck a new bargain to move the Expansion forward. Id.

Section 1794.3 clarifies that NEPA would not apply to routine, ministerial approvals under loan contracts. 63 Fed. Reg. at 68,650 (approvals pursuant to loan contracts that are "ministerial" are not major federal actions). So understood, section 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 (i.e., nondiscretionary) actions and actions with insignificant environmental impacts do not require NEPA review. Accordingly, it may be the case that some of RUS's 2007

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consents and approvals would fall under section 1794.3 because they involved genuinely minor or ministerial consents. See, e.g., AR P8435 (approving sale of SO2 allowances); AR 8442 (approval of request to extend letter of credit). But those are not the key actions at issue here: RUS's decision to compromise the federal debts to allow the Expansion to proceed, and subsequently to execute various other agreements staking recovery of the federal debt to the projects, are either not "approvals" at all, or were not "ministerial" approvals over which the agency lacked discretion. Most importantly, they are decisions that were necessary for the construction of new coal-fired power plants with significant impacts. 7 C.F.R. § 1794.3 does not exempt such significant agency actions with such significant environmental impacts.

B. If Section 1794.3 Controls, It Is Invalid as Applied Because It Conflicts With NEPA and CEQ Regulations.

If the Court disagrees and finds that section 1794.3 exempts all of RUS's actions with respect to the Holcomb Expansion, then it should find section 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. § 4332. 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 (CEQ regulations are binding on all federal agencies). In contrast, this Court owes no deference at all to section 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. Accordingly, in the event of a conflict between section 1794.3 and the CEQ regulations, the latter controls. See Morris County Trust, 714 F.2d at 276 ("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

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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 assistance to Sunflower, constitute "major federal action." Any regulation that mandates a different outcome, and exempts NEPA compliance in the face of the plain language of NEPA and CEQ regulations, 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). Accordingly, if the Court accepts RUS's position that 7 C.F.R. § 1794.3 exempts NEPA compliance for RUS's actions here, the Court should strike down as invalid the regulation as applied here.[8]

C. Conclusion Re. NEPA

NEPA itself requires agency compliance "to the fullest extent possible." 42 U.S.C. § 4332. 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 almost all of these: without RUS's extensive oversight and assistance, financial support in various forms, and necessary approvals, the project could never have occurred. RUS even became a project partner

[8] The proper standard for evaluating a facial challenge to a regulation based on a conflict with the governing statute has been the subject of 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 section 1794.3, this Court need not decide what standard would govern such a challenge. There is nothing in the record to suggest that the regulation cannot be validly applied in appropriate instances.

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with a $91 million stake in seeing the projects constructed. It was in a position to exercise significant influence over Sunflower's actions, by denying support for an environmentally harmful project or by conditioning its approval and assistance in a way that might protect the environment. The issue is not whether RUS's actions were sound decisions from the perspective of RUS's goals of recovering federal debt or encouraging "rural electrification." The issue is whether its actions should have been informed by a consideration of environmental impacts and alternatives. Because Sierra Club has established that RUS is in violation of NEPA, summary judgment is warranted.

V. SIERRA CLUB IS ENTITLED TO INJUNCTIVE RELIEF.

Because RUS is in violation of NEPA, this Court should order RUS to immediately commence preparation of a valid EIS on its actions in support of the Expansion. Additionally, because continuing work on the Expansion while the EIS is being prepared will impermissibly narrow the available range of alternatives for RUS to consider in the EIS, and because such work is prohibited under CEQ and RUS regulations, Sierra Club requests an injunction preventing RUS and Sunflower from taking certain steps to advance the Holcomb expansion project until a legally adequate EIS is complete. As Sierra Club explained in the briefing on Sunflower's motion to dismiss, there is a significant prospective role for RUS going forward because of the recent reconfiguration of the Expansion occasioned by the settlement between Sunflower and the governor of Kansas. Docket No. 71 at 22-24. Many of the 2007 approvals are no longer effective because they were specific to either two or three 700 MW projects, not a single 895 MW project, and hence additional approvals by RUS will be required. Statement of Facts ¶ 36 (any changes to approved agreements need to be separately approved by RUS). It is important to ensure that these additional approvals do not occur until their impact has been considered under

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NEPA.[9]

A. The D.C. Circuit's Presumption of Injunctive Relief for NEPA Violations.

An injunction until the agency completes an adequate EIS is the standard remedy for NEPA violations in the D.C. Circuit. Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 364 (D.C. Cir. 1981); Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977). In Eckerd, the D.C. Circuit 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." 564 F.2d at 456 ("[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

[9] Accordingly, it is unnecessary for this Court to "unwind" any completed transactions in order to craft an effective injunction. Docket No. 71 at 22-24. However, if the Court disagrees, it is within the Court's authority to invalidate those agreements. Id. at 24-29 Lemon v. Geren, 514 F.3d 1312 (D.C. Cir. 2008).

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courts to insist on strict compliance with NEPA, and actions can, consistently with the public 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.").[10]

This presumption in favor of injunctions in NEPA cases is mirrored in both the CEQ and RUS regulations, which explicitly prohibit both the agency and the private entity from taking any steps "which would have an adverse environmental impact or limit the choice of reasonable alternatives" while an EIS is being prepared. 7 C.F.R. § 1794.15; 40 C.F.R. § 1506.1.

Of course, the decision to grant injunctive relief in a NEPA case is not automatic; rather, the decision "rests, of course, in the sound discretion of the court." Eckerd, 564 F.2d at 457. Thus "[w]here the countervailing equities are exceptional, as where 'further delay might injure our nation's defense posture,' the action may be allowed to proceed." Id. (internal citations omitted). Similarly, where no remedial purpose would be served by an injunction, no injunctive relief is necessary. Id. at 457 (no injunction where EIS had been completed before construction began). Absent such extraordinary circumstances, however, "the presumption is that an action proceeding in violation of NEPA should be enjoined." Id.

The presumption that injunctive relief is the appropriate remedy for NEPA violations applies here. There are no "exceptional" countervailing equities that would counsel against

[10] Other circuits take a similar approach. See Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.) (injunction is appropriate under NEPA to prevent agency from committing to a course of action before considering environmental consequences); Davis v. Mineta, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002) (enjoining earlier, less harmful phases of highway project because they would build momentum towards later, more harmful stages: "[I]f any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project."); Envtl. Def. Fund v. Andrus, 596 F.2d 848, 853 (9th Cir.1979) (waiting until

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injunctive relief. Indeed, as discussed below, the balance of equities strongly supports injunctive relief. Moreover, an injunction is necessary to remedy RUS's violation of NEPA. RUS and Sunflower should therefore be enjoined from proceeding with the Holcomb Expansion until RUS has complied with NEPA.

B. 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 at 14. 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 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 to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 25 (D.D.C. 2009). 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

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additional time and money is invested in a project simply creates more risk that "more environmental harm will be tolerated").

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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 v. Norton, 281 F. Supp. 2d at 222; Fund for Animals v. Clark, 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, 499 F.2d at 512. As a result, when a showing of possible environmental or aesthetic injury is 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. For this reason, courts should not wait until actual, on-the-ground environmental harm is imminent before issuing an injunction against a project. Jones, 499 F.2d at 511-12.

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.[11] The Holcomb expansion will emit large quantities of dangerous air pollutants, including particulate matter, mercury, and ozone-forming constituents. See Declaration of Dr. Jonathan

[11] Sierra Club previously submitted 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. See Docket Nos. 95 & 96. Consideration of these declarations is 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., Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1259-1261 (10th Cir. 2003) (allowing evidence from expert witnesses on the issue of irreparable harm in a record review case); Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) (party must make specific showing of irreparable injury); Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 816 n.29 (9th Cir. 2005).

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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 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. The U.S. EPA has also observed that any increase in background concentrations of some of these pollutants poses serious risks to human health. 71 Fed. Reg. 2620, 2635 (Jan. 17, 2006); 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005); see also North Carolina v. TVA, 593 F. Supp. 2d 812, 822 (W.D.N.C. 2009) ("there is an increased risk of incidences of premature mortality in the general public associated with $PM_{2.5}$ exposure, even for levels at or below the NAAQS standard . . . ."); Sierra Club v. TVA, 592 F. Supp. 2d 1357, 1371 (N.D. Al. 2009) ("there is no level of primary particulate matter concentration at which it can be determined that no adverse health effects occur"). It is difficult to imagine harm that is any more "irreparable."

Additionally, 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

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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), and proposed a rule under which all major stationary sources that would emit more than 25,000 tons of greenhouse gases per year would be subject to Clean Air Act permit requirements. 74 Fed. Reg. 55,292 (Oct. 27, 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, and the U.S. Senate is currently considering a similar bill.

Sunflower has estimated that the project as currently configured will emit over six and a half million tons of carbon dioxide per year. Statement of Facts ¶ 46. Dr. Johannes Feddema, a University of Kansas 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. Indeed, the effects of climate change are already evident, see id. ¶ 6, and once additional carbon dioxide is added to the atmosphere, the effects it will cause become irreversible. See id. ¶¶ 23-25. 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. ¶¶ 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

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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 are 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 human health and the environment. See Ex. 2.

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, support for conservation, improved technology or mitigation. 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 enjoined from issuing any further consents or approvals associated with this project. RUS is required to comply with federal law, and nothing in the RE Act forecloses RUS's ability to comply with NEPA here.

C. Sierra Club Is Entitled to an Injunction Against Sunflower.

In addition to enjoining RUS from granting any additional approvals pending completion of a legally valid EIS, Sierra Club also asks this Court to enjoin Sunflower from taking any action that would require RUS approval under the terms of the governing contracts. Such an injunction is necessary because Sunflower may seek to proceed with additional agreements to move the Expansion forward without first obtaining required RUS approval. Sierra Club has

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sought to craft a narrowly tailored injunction that should minimize the potential for harm to Sunflower.

As an initial matter, it is clear that 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 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 Southwest 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, 497 F.2d at 1147; 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 written RUS approval, and because RUS and Sunflower have entered a "partnership" to advance the Sunflower project, it

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should be "beyond challenge" that this Court has the authority to enjoin Sunflower.

This Court should enjoin Sunflower here because an injunction is necessary to ensure full compliance with NEPA. If the Court were to only enjoin RUS from taking action, Sierra Club is concerned that Sunflower would forego requesting required RUS approvals and move ahead with the Project while the EIS is being prepared. This concern is well-founded: Sunflower failed to seek or obtain prior written approval from RUS before executing the 2009 Settlement Agreement. See Statement of Facts ¶ 41. While RUS has authority to declare a default if Sunflower fails to obtain required approvals, it is not required to do so. Absent an injunction against Sunflower, it is possible that Sunflower could enter third party agreements or take other steps in a way that makes RUS's consideration of impacts and alternatives less useful.[12] As noted above, this is the very standard that RUS itself applies to project applicants when it is undertaking a NEPA analysis. 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); see also 40 C.F.R. § 1506.1.

Sierra Club is requesting the Court to enjoin only those actions by Sunflower that require RUS approval. Such 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

[12] Similarly, Sunflower has argued that RUS's approvals on these third-party agreements are moot at or very close to the time they are granted. While Sierra Club obviously disagrees with their analysis, it is simpler to prevent Sunflower from entering into new agreements than it is to consider voiding or unwinding these agreements after they are made.

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course of action or create potential liabilities if the project does not proceed. The narrowly-tailored injunction requested by Sierra Club should not substantially harm Sunflower. At worst, the proposed injunction might result in some moderate delay of the Holcomb Expansion, but even this is unclear. The Holcomb Expansion has been discussed for almost ten years, and the recent settlement agreement effectively postpones the start date of the project still further. Sunflower must restart the application process for its PSD permit, a process that generally takes at least 18 months. Sunflower must also renegotiate many of the major agreements with its potential partners now that the project configuration has changed substantially. Indeed, it may well be possible for RUS to complete an EIS without imposing any significant additional delay.

In any event, any harm arising from a small delay does not outweigh the substantial environmental harm that Sierra Club will suffer absent the injunction. See State of New Mexico v. Watkins, 969 F.2d 1162, 1138 (D.C. Cir. 1992) (finding environmental harm outweighed cost of delay, and specifically noting that some aspects of the enjoined project could still proceed under the injunction until the FLPMA violation was remedied); Am. Rivers v. U.S. Army Corps of Engineers, 271 F. Supp. 2d 230, 260-61 (D.D.C. 2003) (finding environmental harm outweighed economic harm to defendants and third parties, particularly where the high amount of economic harm alleged was highly speculative). While a slight delay 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 Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir.1992). The balance of equities strongly

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supports injunctive relief against Sunflower.

D. The Public Interest Supports an Injunction.

The public interest will also be served by enjoining additional federal support for the Expansion until its impacts have been fully considered. 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 is 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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CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Court grant its motion for summary judgment and enter an injunction against further work on the Holcomb Expansion. A proposed order is submitted herewith.

Respectfully submitted this 28th day of October, 2009.

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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.	Case No. 1:07-cv-01860-EGS

PLAINTIFF'S CONCISE STATEMENT OF MATERIAL FACTS (REDACTED)

I. SUNFLOWER'S ORIGINAL DEBTS AND THE 1987 RESTRUCTURING

1. Sunflower is an electric generation and transmission cooperative that supplies power to six member distribution cooperatives. AR 0068. In the early 1980s, the Rural Utilities Service ("RUS"), an arm of the U.S. Department of Agriculture charged with assisting in rural electrification, committed $543 million in loans and guarantees so Sunflower could build its existing 360-MW coal-fired power plant, Holcomb 1. AR 4546; AR 8715. Holcomb 1 was constructed with certain oversize infrastructure that would accommodate construction of additional generating units in the future.

2. Soon after the construction of Holcomb 1, Sunflower experienced financial difficulties and defaulted on its debt service payments. AR 4546. These 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.

3. As a result of these defaults, RUS and Sunflower entered into an agreement to restructure Sunflower's debts. AR 0149. Under the 1987 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) payments were to be 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. Unpaid B note interest is capitalized and added to the outstanding principal

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balance each year. AR 0169. The A and B notes never expired, however, the C note was to be cancelled and any unpaid balances forgiven in 2019. Ex. 1 at 3; AR 0010.

4. Even after the 1987 restructuring, Sunflower was unable to generate sufficient cash flow to satisfy its obligations to RUS and other debtors. Sunflower had met its obligations on the A notes, but as of 2002 had not made any payments on the B or C notes. Unpaid interest on the B Note was capitalized and, by 2002, total B note debt had grown from $173 million to $518 million. AR 4546. Total Sunflower debt to RUS was over $914 million. AR 0150, 0169.

5. The value of Sunflower's assets was far less. AR 0069; see also AR 4546, AR P4603A [redacted]. RUS acknowledged that the B and C notes were unlikely to "ever generate any appreciable payments" and that the balance on the B note was anticipated to grow to over $2.7 billion by 2021. AR 4320A.2; AR 0183; see also AR 0498 (unless B note debt was eliminated, "it would be very likely that Sunflower creditors would effectively own Sunflower's assets, including the Holcomb power plant" by 2021).

6. Additionally, Sunflower believed that conditions in the DRA prevented it from moving forward with construction of additional electric generation facility at the Holcomb site. AR 0072 ("such development is impossible under the current DRA").

II. THE 2002 RESTRUCTURING

7. RUS and Sunflower entered into a second debt restructuring agreement in 2002 to help Sunflower regain its financial footing and move forward with constructing additional generation. 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"); AR 0157 (restructuring "necessary to facilitate the development of a second coal fired-generating unit" which would provide various benefits to

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Sunflower); AR 2555 (RUS confirms in press release that RUS participated in restructure to help Sunflower with 600 MW coal-fired plant).

8. The parties to the restructuring acknowledged from the outset that "any agreement concerning development of additional generating units at the Holcomb Unit 1 site will be subject to RUS approval and will be subject to terms and conditions to be developed at the time. RUS may require that a portion of such revenues inure to the benefit of" RUS and other B note holders. AR 0009.

9. The debt restructure was closely linked with a significant corporate restructuring for which RUS approval was also required. In the corporate restructure, Sunflower's members created a "new" corporate form ("New Sunflower") that acquired most of Sunflower's assets, including Holcomb 1. AR 0004. New Sunflower acquired these assets by issuing notes to RUS and other Sunflower debtors. Those notes were worth significantly less than what Old Sunflower still owed on those assets. AR 0173-75; AR 4663A (comparing Sunflower debt before and after restructure). In this transaction, New Sunflower obtained all of Old Sunflower's employees on the same terms and conditions, all of its power supply obligations, and all of its vendor obligations. AR 0152, 0181. The board of directors of the new Sunflower was the same as Old Sunflower, and New Sunflower acquired the logo, telephone and fax numbers, and internet service and addresses of Old Sunflower. Id.

10. The only assets that New Sunflower did not acquire in the restructure were those that could be used for the Expansion projects, called the "common facilities." AR 0006. The common facilities are those parts of Old Sunflower's infrastructure that could be shared by additional generation units, for example, coal handling equipment, water treatment facilities, ash disposal facilities, and rail lines, as well as the land beneath the future units. AR 0166.

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11. The common facilities were transferred to another new corporate entity, Holcomb Common Facilities ("HCF"), a wholly owned subsidiary of Old Sunflower). AR 0004; AR 0167. Whatever corporate entity developed the Expansion projects would pay "rent" to HCF for the use of such common facilities. AR 0010. The purpose of leaving the common facilities in separate corporate ownership was to "facilitate development" of Expansion units. AR 0167.

12. The Expansion projects originally would be developed by Sand Sage, yet another wholly-owned subsidiary of Sunflower created in the 2002 restructure. AR 0226. New Sunflower later sold the development rights to the Expansion to third parties, under which Sunflower would operate the projects. AR 4864.

13. While Old Sunflower's assets were transferred to other corporate entities, it was not divested of its rapidly growing debt, estimated to reach $2.7 billion by 2021. AR 0183, AR 0157. Despite acquiring Holcomb 1 and other Old Sunflower assets, New Sunflower did not acquire these debts and was not liable for them. AR 0152-53.

14. In order to acquire Holcomb 1, New Sunflower issued a series of new notes to RUS as payment for the Old Sunflower assets: a new "A Note" that 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;[1] a "residual value note" redeemable in 2016 for the higher of either $125 million or 43% of the value of Holcomb 1; and a "Holcomb 3" note, worth $1.8 million, that would be payable if and when Sunflower built a third (not second) generating facility at the Holcomb site. AR 0175.

15. Payments on the new notes issued by New Sunflower are credited against the old

[1] 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.

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notes held by Old Sunflower. AR 0006. The new A note payments mirror the old A note payments, and hence no significant difference before and after the debt restructure is apparent. AR 0173. Payments on the new B note and residual value note are credited against the old B note. These new payments could not pay off the old B note debt of over half a billion dollars in 2002, with 9.5% interest capitalizing annually. See AR 4663A; AR 0498 (referring to benefits of "eliminating" B note debt). The Holcomb 3 note ($1.8 million contingent on construction of a third generating unit) would be credited against the C Note debt, worth $106 million. Ex. 1 at 9; AR 0149, AR 0169.

16. Under the 2002 restructure, while Old Sunflower would remain technically obligated under the old A, B and C notes, it could not incur any new liabilities, and its only income would be through future rental payments associated with the Expansion. AR 0010; AR 0153; AR P4323A.9; Ex. 1 at 10.

17. Separate from New Sunflower's payments on the new notes (which are credited against the old notes), the only other way that the old notes can be paid down is through payments from Old Sunflower itself and, as noted above, the only income Old Sunflower receives is the "rent" for use of the common facilities by Expansion project partners. Those rent payments are estimated at $3.75 million a year for the first unit, and $1.8 million per year for the second unit. AR 4558. Old Sunflower was required to use the bulk of these rental payments to pay down the old notes.

18. RUS and Sunflower later reached an agreement in which they converted the right to receive this rent to notes with fixed sums payable at the time the projects are built, worth $91 million if all three projects proceed. AR 8221; see infra ¶¶ 33-34 (The 2007 Agreement).

19. RUS signed the "Agreement and Consent" to Sunflower's restructuring in

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September of 2002, AR 0216, and the agreement was consummated with revised loan documentation in 2003. AR 2730 (amended mortgage); 4371 (amended contract).

20. The 2002 debt restructurings provided significant benefits to Sunflower. AR P0002A_DOC4.5 [redacted]. These benefits include 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. [redacted]. Id.; 4557 ("Approving this transaction will result in substantial economic benefits to Sunflower and its lenders.").

21. 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. AR 8712; 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.

22. 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: [redacted]

AR P4545.

III. RUS'S LIEN SUBORDINATIONS

23. As a result of its loans to Old Sunflower, RUS had a priority lien on Holcomb 1

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facility. A default by Sunflower would give RUS the option to take title to that facility. At the time of the 2002 restructure, RUS agreed that it would release its lien on Holcomb 1 to other parties. AR 0008 (Sunflower assets "will be transferred to New Sunflower free and clear of the lien of the Sunflower Common Mortgage"); AR P04591A.14 [redacted]; AR 8220 (RUS is "obligated . . . to release the lien of the 1988 Mortgage on the Common Facilities, HCP/Unit 2 Site, and Retained Infrastructure").

24. Additionally, in 2007 Sunflower and RUS executed a Subordination, Non-disturbance and Attornment Agreement ("SDNA"), which commits RUS, in the event of a Sunflower default, to not foreclose on the Sunflower property in a way that disturbs the Expansion projects. AR 8050.

25. These lien releases were necessary for the expansion project to proceed. AR P4715A.9 [redacted].

IV. RUS APPROVALS PURSUANT TO THE 2002 AGREEMENTS

26. In granting Sunflower the debt relief that occurred in 2002, RUS acquired significant control over Sunflower's operations. Under the 2002 agreements, virtually any action by Sunflower to advance the Expansion required prior approval from RUS, and RUS's discretion over the terms of those approvals was not constrained by the agreements. AR 4371 at §§ 5.14-.15; AR 2730 at §§ 4.03, 4.07, 4.10, 4.11, 4.21, AR 8218 at 1 (RUS approvals are "given in its sole discretion").

27. Under these agreements, the failure by Sunflower to obtain a required approval constitutes a default and gives RUS authority (after notice and opportunity to cure) to demand full and immediate payment on its debts, and/or to take possession of and sell Sunflower's assets. AR 2756 (§ 5.01(d), (aa)-(dd)); AR 4393.

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28. 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); AR 4610; AR 8473; AR 8488; AR P7726; AR 8492-93; AR 8047; AR 8208; AR 8400; AR 8403; AR 8435; AR 8442.

29. In November of 2005, RUS approved Sunflower's execution of several key agreements with other parties necessary for development of the Expansion projects. 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.

30. Sunflower objected to RUS's escrow condition, claiming 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.

31. At about the same time, Sunflower engaged in an effort to buy out its debt from

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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 lasted between October of 2006 and March of 2007. AR 8485A.2.

32. The parties did not reach agreement on a buyout. AR 8486A.1. Recognizing that "the buyout effort [was] now behind us," Sunflower 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.

V. THE 2007 AGREEMENT

33. In the wake of the failed buyout and the disputed escrow condition, Sunflower and RUS negotiated a new 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 4614A; 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 second, third and fourth Holcomb units respectively. AR 7710-18. The notes were by their terms cancelled if the commercial operation date had not occurred by December 31, 2021.

34. These notes were deemed by RUS to constitute the "sole consideration" it required to lift the escrow condition that it had previously imposed, grant a package of approvals, and release its lien on Holcomb 1. AR 8208 (summarizing exchange); AR 8218 (additional consideration letter). RUS also agreed to not seek any additional form of consideration for providing additional consents and approvals for Sunflower to move the Expansion forward in the future.

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35. 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 exercise its authority to demand additional consideration or impose additional terms and conditions as part of these approvals.

36. The terms of the 2007 agreements and the $91 million in negotiated notes were highly specific to construction of three 600-700 MW coal-fired generation projects. AR 8209; AR 8228, AR 8239, AR 8224 (notes); see also AR P04533A [redacted]. In approving of Sunflower's entry into third party agreements for construction of these projects, RUS confirmed that those approvals only extended to the specific form of agreements that had been provided. AR 4610. Those agreements, in turn, were again specific to various parties roles' in one of the three Expansion 600-700 MW projects. See, e.g., AR 5551. "Any and all" changes to these agreements would require the separate written approval of RUS prior to execution. AR 4610. In other documents, "material" changes to approved agreements required RUS's approval, and RUS's determination of what constituted a "material" change was conclusive. AR 7446.

VI. THE 2009 SETTLEMENT AGREEMENT

37. On October 17, 2007, the Kansas Department of Health and Environment ("KDHE") issued an initial denial of the air quality permit for the Holcomb expansion on the grounds that it would harm human health and the environment by contributing to global warming. Ex. 2. Following an administrative hearing, the Secretary of the Kansas Department of Health and Environment issued a final order denying the permit on January 12, 2009.

38. Concurrently, the Kansas legislature passed a bill restricting the authority of the Secretary to deny the Sunflower permit and to regulate greenhouse gases. Kansas Governor

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Kathleen Sebelius vetoed the bill and each of the three other similar bills passed after that.

39. President Obama nominated Governor Sebelius to be the U.S. Secretary of Health and Human Services in March 2009. She was confirmed by the U.S. Senate on April 28, 2009 and sworn into office that day. That same day, Lt. Gov. Mark Parkinson was sworn in as the 45th Governor of Kansas. Within days, Gov. Parkinson negotiated a settlement agreement with Sunflower that would allow a modified version of the project to proceed. See Ex. 3 (Settlement Agreement).

40. Under the settlement agreement, KDHE would provide the requisite air permit for a single 895 MW pulverized coal-fired electric plant. In return, Sunflower agreed to meet stricter emissions standards at Holcomb 1 and invest in alternative energy projects. Id. Art. II, III. The agreement was signed on May 4, 2009, by Gov. Parkinson and Earl Watkins, the president and CEO of Sunflower. The agreement is conditioned on passage of state energy legislation, id. § 4.1, which passed on May 7, 2009.

41. Although Sunflower is contractually required to seek prior written RUS approval before entering into "any agreement or other arrangement . . . for the development" of the Holcomb Expansion, AR 4391 at §§ 5.14, 5.15 (emphasis added), Sunflower neither sought nor obtained prior written approval from RUS before entering into the settlement agreement with the Governor of Kansas.

VII. POLLUTION FROM COAL-FIRED POWER PLANTS

42. Operation of a 895 MW coal-fired power generation facility at the Holcomb site would result in significant emissions of pollutants including fine and coarse particulate matter, sulfur dioxide, nitrogen oxides, volatile organic compounds, mercury, and other air toxics.

43. These pollutants adversely impact the environment and human health. See 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005) (particulate matter); 65 Fed. Reg. 79,825, 79,827

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(Dec. 20, 2000) (mercury); Decl. of Jonathan Levy, ¶¶ 10-13 (discussing modeling that shows $200 million in public health damages based on 30 human deaths per year as a result of the operation of a 895 MW coal-fired power plant).

44. The U.S. EPA has observed that fine particulate matter is not a threshold pollutant, so any increase in background concentrations poses risks to human health. See 71 Fed. Reg. 2620, 2635 (Jan. 17, 2006); 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005).

45. Nitrogen oxides and volatile organic compounds can combine in the atmosphere to form ground level ozone, which, like particulate matter, is not a threshold pollutant, so any increase in background concentrations poses risks to human health. See Decl. of Jonathan Levy, ¶¶ 16-22. Likewise, any increase in mercury emissions poses risks to human health. Id. ¶¶ 23-30.

46. Sunflower estimates that the single, 895 MW coal-fired power generation facility referred to in the 2008 settlement agreement would generate approximately 6.7 million tons of carbon dioxide per year, or 335 million tons over a fifty-year lifetime. See Decl. of Johannes Feddema, at ¶ 22.

47. Carbon dioxide emissions are the primary cause of anthropogenic global warming, which has caused and will cause numerous adverse effects to the environment and human health. See American Clean Energy and Security Act of 2009, § 701, H.R. 2454, 111th Cong. (2009); EPA, Proposed Endangerment Finding, 74 Fed. Reg. 18,886 (Apr. 24, 2009).

48. Every significant new source of carbon dioxide "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." H.R. 2454 § 701; see also 74 Fed. Reg. at 18,907 (small sources of CO_2 still significant); Decl. of Johannes Feddema, at ¶¶ 22-26.

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VIII. RECENT LEGISLATIVE AND REGULATORY CHANGES TO THE REGULATION OF GREENHOUSE GAS EMISSIONS

49. Subsequent to a U.S. Supreme Court ruling that found unlawful EPA's failure to regulate carbon dioxide, EPA has taken several steps to regulate greenhouse gases as pollutants under the Clean Air Act. See 42 U.S.C. § 7521(a). On April 17, 2009, EPA Administrator Lisa Jackson issued a proposed rule finding that greenhouse gas emissions, including carbon dioxide, endanger the public health and welfare. 74 Fed. Reg. 18,886 (Apr. 24, 2009). EPA has also published a proposed rule regulating greenhouse gas emissions from passenger cars and light trucks under the Clean Air Act. See 74 Fed. Reg. 49,454 (Sept. 28, 2009). Most recently, EPA has issued a proposed rule confirming the need to include carbon dioxide and other greenhouse gas emissions in Clean Air Act permits for new stationary sources once greenhouse gas emissions from vehicles are regulated. See EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009). Under this proposed rule, all major stationary sources that would emit more than 25,000 tons of greenhouse gases per year would be subject to Clean Air Act permitting requirements. Id.

50. On June 26, 2009, the U.S. House of Representatives passed comprehensive global warming legislation. See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. Under the "cap-and-trade" program that would be required under this legislation, polluters will be required to purchase permits to emit greenhouse gases from the government or through an open market. The U.S. Senate is currently considering companion legislation.

51. Regulation of greenhouse gas emissions could significantly impact the financial viability of new coal-fired power plants. In a letter to RUS, Chairman Henry Waxman of the House Committee on Oversight and Government Reform expressed concern that RUS financial support for new coal power plants built without adequate emissions controls puts taxpayer

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dollars at risk. See Ex. 4. Chairman Waxman singled out Sunflower's planned Holcomb expansion, noting that the substantial cost of compliance with greenhouse gas emissions limits may put Sunflower at serious risk of default on its government loans and that RUS may have put "both taxpayer funds and Kansas ratepayers in jeopardy." Id. at 4.

52. Shortly thereafter, RUS announced that it was suspending all new loans for coal fired power plants for 2008 and 2009. See Letter from James M. Andrew to Henry A. Waxman (Mar. 11, 2008) (Ex. 5). The agency advised that it needed to further consider the financial risks associated with funding new coal plants before approving any new loans for coal power. Id.

53. For the same reasons, private financing for coal plants has been increasingly difficult to obtain, as many leading private financial institutions have begun to make conservative assumptions about future climate regulation on their assessments of projects' financial viability. Ex. 4 at 2.

Respectfully submitted this 28th day of October, 2009.

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