No. 17-2585

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

SAUK PRAIRIE CONSERVATION ALLIANCE,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE, *IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF INTERIOR*; NATIONAL PARK SERVICE; MICHAEL REYNOLDS, *IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL PARK SERVICE*; U.S. GENERAL SERVICES ADMINISTRATION; AND TIMOTHY O. HORNE, *IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION*,

Defendants-Appellees,[1]

v.

STATE OF WISCONSIN,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin, Case No. 17-cv-35
The Honorable James D. Peterson, Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT SAUK PRAIRIE CONSERVATION ALLIANCE

Brian H. Potts (Counsel of Record)
Jeff J. Bowen
Danielle S. Grant-Keane
PERKINS COIE LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: (608) 663-7460

Jacob E. Aronson
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105
Telephone: (415) 344-7048

Attorneys for Plaintiff-Appellant

[1] Pursuant to Fed. R. Civ. P. 25(d), Ryan Zinke and Timothy O. Horne are substituted for their predecessors in office, Sally Jewell and Denise Turner Roth, respectively.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

REGULATIONS

INTRODUCTION

The wheels of justice move much slower than the wheels of a motorcycle across prairie or the blades of a helicopter scaring away endangered and rare birds. The Master Plan for the Sauk Prairie State Recreation Area ("the Area") will allow dual-sport motorcycle events on trails, dog training and trialing with firearms, and Wisconsin Army National Guard helicopter training exercises. The Master Plan admits that these high-impact activities will harm wildlife and their habitat, a conclusion that is echoed by the affidavits of four scientific experts that Plaintiff-Appellant Sauk Prairie Conservation Alliance ("the Alliance") submitted to the district court. This type of injury, but its nature, is irreparable because it cannot be remedied by money damages. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1981). Yet the district court erroneously found that these high-impact activities are not likely to cause irreparable harm while it considers the merits of this case. In light of the imminent threat of irreparable harm in the coming months and the Alliance's likelihood of success on the merits of its claims, a preliminary injunction is necessary to prevent high-impact activities from harming wildlife and their habitat.

ARGUMENT

I. Issue preclusion did not bar the district court from considering the Alliance's preliminary injunction motion.

In a related case in Wisconsin state court, the Sauk County Circuit Court denied the Alliance's motion for a partial stay or temporary injunction, Wis. Suppl. App., ECF 25, at 131–51,[2] and the Wisconsin Court of Appeals denied the Alliance's petition for leave to appeal that non-final order, Wis. Suppl. App., ECF 25, at 326–29. Intervenor-Defendant-Appellee State of Wisconsin ("the State") argues that issue preclusion barred the district court from considering the Alliance's preliminary injunction motion in light of these state court proceedings. Wis. Resp. Br., ECF 24, at 19–24. The State argues that because the Alliance actually litigated the issue of irreparable harm in the Sauk County Circuit Court, and because this issue was essential to that court's interlocutory order denying preliminary injunctive relief, the Alliance was precluded from litigating the issue in federal district court. Wis. Resp. Br., ECF 24, at 20–24. While the State is correct that federal courts evaluating the preclusive effect of an earlier state court proceeding are to apply that state's preclusion rules, it is incorrect that the state court proceedings in a related case precluded the district court from considering

[2] Citations to Dkt. ___ are to the docket in the district court, with page references to the PDF pagination. Citations to ECF ___ are to this Court's docket. Citations to AR ___ are to the administrative record lodged in the district court on August 25, 2017, which the district court clerk transmitted to this Court on October 5, 2017.

whether irreparable harm is likely to occur before the district court issues a decision on the merits in this case.

Wisconsin law does not support applying the principle of issue preclusion to issues considered on a motion for a stay or temporary injunction or a petition for leave to appeal. The cases cited by the State do not support this assertion. In *Gates v. Paul*, 127 Wis. 628 (1906), the Wisconsin Supreme Court held that an interlocutory judgment was conclusive with respect to certain findings, but the judgment in that case was not an order on preliminary injunctive relief. Likewise, in *Thorp Sales Corp. v. Gyuro Grading Co.*, 111 Wis. 2d 431, 434 (1983), the court's interlocutory order was a finding on the merits of a breach of contract claim, not a preliminary injunction. The State also points to *Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 302–03 (Ct. App. 1998), where the court held that issue preclusion applied to issues decided on summary judgment because summary judgment is a final and conclusive judgment. None of these cases suggests that issues determined on a motion for preliminary injunctive relief or a petition for leave to appeal are subject to issue preclusion.

In fact, Wisconsin law indicates that issue preclusion would not apply to an order denying a motion for preliminary injunctive relief. In *Ellifson v. W. Bend Mut. Ins. Co.*, 312 Wis. 2d 664, 673–74 (Ct. App. 2008), the court held that while a grant of a summary judgment is a conclusive and final

judgment, a *denial* of a motion for summary judgment is not a conclusive and final judgment and issue preclusion would not apply in subsequent proceedings. The court based this distinction on Wis. Stat. § 808.03(1), which defines "final judgment" as "a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties." Because a denial of summary judgment does not dispose of the litigation, it is not a final order. Similarly, the denial of a preliminary injunction is also not a final judgment under Wis. Stat. § 808.03(1) because it does not dispose of the entire matter in litigation. Accordingly, the state court proceedings are not preclusive on the issue of irreparable harm in this case.

Cases from other jurisdictions also suggest that an interlocutory order on a motion for preliminary injunctive relief generally has no preclusive effect. *See, e.g.*, *A.J. Canfield v. Vess Beverages, Inc.*, 859 F.2d 36, 38 (7th Cir. 1988) ("In general, rulings in connection with grants or denials of preliminary injunctive relief will not be given preclusive effect."); *Medtronic, Inc. v. Gibbons*, 684 F.2d 565, 569 (8th Cir. 1982) ("[T]he granting or denial of a preliminary injunction is generally not based on a final decision on the merits and is not a final judgment for the purposes of collateral estoppel.").

Even if this Court determines that issue preclusion does apply to proceedings for injunctive relief under Wisconsin law, issue preclusion should not apply here because the district court was presented with different facts

than the state courts considered. The rule of issue preclusion "guards against inconsistent decisions on the same set of facts." *Precision Erecting*, 224 Wis. 2d at 301–02. This was not the case here. The facts before the district court were different than those presented before the Sauk County Circuit Court (in the Alliance's motion for a partial stay or temporary injunction) and the Wisconsin Court of Appeals (in the Alliance's petition for leave to appeal a non-final order). Defendants-Appellees Department of the Interior, et al. ("Federal Defendants") were not parties to the state court proceedings, and the state courts did not consider the expert affidavits that the Alliance included with its motion to the district court.

II. The challenged high-impact activities are likely to cause irreparable harm before the district court issues a decision on the merits.

A. Federal Defendants misstate the standard that the Alliance must show to demonstrate irreparable harm.

The Alliance need only show that irreparable harm is *likely* to occur before a decision on the merits, not that harm is certain to occur. Federal Defendants cite cases from other circuits for the notion that the Alliance must show that irreparable harm will be "certain and great," "actual and not theoretical," and "actual and imminent." Fed. Defs. Resp. Br., ECF 21, at 17–18 (quoting *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985), *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60

F.3d 27, 37 (2d Cir. 1995)). But in the Seventh Circuit, a party need only "establish that irreparable harm is *likely* without an injunction." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 787 (7th Cir. 2011) (emphasis added). The Seventh Circuit's standard "does not . . . require that the harm actually occur before injunctive relief is warranted. Nor does it require that the harm be certain to occur before a court may grant relief on the merits." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) (citations omitted).

B. The Alliance has shown a likelihood of irreparable harm before the district court issues a decision on the merits.

The evidence presented before the district court—both expert affidavits and information taken from the Master Plan[3]—demonstrated that irreparable harm is likely to occur before the district court issues a decision on the merits. The Alliance explained before the district court and in its opening brief that the high-impact activities are likely to harm wildlife year-round, not just during the summer bird nesting season. *See* Alliance's Opening Br., ECF 10, at 18–25.

Federal Defendants incorrectly argue that because some birds have returned to the Area since the Badger Army Ammunition Plant was decommissioned in 1997, the harm caused by the high-impact activities will

[3] Federal Defendants do not address the evidence in the Master Plan that the high-impact activities will cause irreparable harm. *See* Alliance's Opening Br., ECF 10, at 22–23.

not be irreparable. First, this argument completely ignores the harm that high-impact uses will cause to animals other than birds. *See, e.g.*, Compl. Ex. 1, Dkt. No. 1-8 at 155 (ECF 28-3 at 205) ("[s]ome slow-moving animals such as snakes could be hit by dual-sport motorcycles"). Second, this argument ignores the harm that high-impact uses will cause to individual birds. Even assuming that bird *populations* may be able to recover in the long term, the deaths and disturbances to *individual* birds are still irreparable. *See Whitaker*, 858 F.3d at 1045 ("harm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial" (internal quotation marks and citation omitted)). By Federal Defendants' reasoning, clear-cutting a forest would not be irreparable harm because one could plant new trees to grow and eventually replace the felled trees.

III. The Alliance is likely to succeed on its National Environmental Policy Act claim because the National Park Service's action was not categorically excluded from environmental review.

Federal Defendants are correct that when the Alliance filed its motion for preliminary injunction in the district court (June 23, 2017) and its opening brief in this Court (August 8, 2017), it was not aware that Defendant-Appellee National Park Service ("NPS") had determined that approving the Master Plan as an amendment to the Program of Utilization ("POU") was categorically excluded from environmental review. *See* Fed. Defs. Resp. Br., ECF 21, at 20 n.4. NPS did not publicly release its categorical

exclusion determination until it lodged the administrative record for this case in the district court on August 25, 2017. *See* Dkt. No. 42 (ECF 28-9 at 172). NPS's categorical exclusion documentation, however, does not indicate that it complied with the National Environmental Policy Act ("NEPA"). The Alliance is likely to succeed on its NEPA claim because the record does not support NPS's determination that adopting the Master Plan as a POU amendment—to allow dual-sport motorcycle events, dog training and trialing with firearms, and helicopter training—would have no environmental impacts.

1. A categorical exclusion is appropriate only when there is no possibility that an action would have a significant environmental effect.

A categorical exclusion may apply to actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. Before determining that an action is categorically excluded, agencies must consider whether there are any extraordinary circumstances that would necessitate preparation of an environmental assessment or environmental impact statement. *See id.*; 43 C.F.R. § 46.205(c); 43 C.F.R. § 46.215 (list of Department of the Interior extraordinary circumstances). "[S]ubstantial evidence in the record that exceptions to the categorical exclusion *may* apply . . . is all that is required to

prohibit use of the categorical exclusion." *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (emphasis in original).[4] "When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) (citation omitted). "Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions." *Norton*, 311 F.3d at 1177.

"The arbitrary and capricious standard applies to an agency's determination that a particular action falls within one of its categorical exclusions." *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 924 (9th Cir. 2000) (internal quotation marks and citation omitted). An action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: [The court] may

[4] Because many NEPA cases are brought in courts in the Ninth Circuit, this Court has looked to the Ninth Circuit's NEPA jurisprudence for guidance in understanding the statute. *See Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 857 (7th Cir. 2003) ("While this is the first instance that we have had an opportunity to address this issue, a substantial body of case law has developed in the Ninth Circuit.").

not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). A court "applying the arbitrary and capricious standard in the NEPA context [must] insure that the agency has taken a 'hard look' at environmental consequences." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (internal quotation marks and citation omitted). To prevail on a claim that an agency should have prepared an environmental impact statement, a plaintiff "need not demonstrate that significant effects *will* occur. A showing that there are *substantial questions* whether a project may have a significant effect on the environment is sufficient." *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (emphasis in original) (internal quotation marks and citation omitted).

Riverhawks v. Zepeda, 228 F. Supp. 2d 1173 (D. Ore. 2002), a case in which the court held that an agency's use of a categorical exclusion was arbitrary and capricious, is instructive. In *Riverhawks*, the U.S. Forest Service determined that issuing certain permits qualified for a categorical exclusion because the action would have no significant environmental impacts. After considering evidence in the record regarding the potential for significant environmental impacts, the court held that the agency's decision to use a categorical exclusion was arbitrary and capricious. The court

explained that a categorical exclusion "is appropriate only when the agency determines that the proposed action will have 'no effect' on the environment." *Riverhawks*, 228 F. Supp. 2d at 1189 (citing 40 C.F.R. § 1508.4, *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). The agency's categorical exclusion documentation had "explicitly state[d] that the permitted actions 'may affect' the Western Pond Turtle and are likely to adversely effect threatened coho salmon." *Id.* In addition, various documents in the record "reflect[ed] the potential for impacts on turtles and salmon, as well as conflicts between various user groups." *Id.* at 1190. Because "the record clearly establishe[d] the presence of potentially significant effects," the court held that the agency's use of a categorical exclusion was arbitrary and capricious. *Id.* at 1191.

2. In reviewing the categorical exclusion determination, the court must consider whether there is a possibility of significant environmental impacts.

NPS determined that adopting the Master Plan as a POU amendment—to allow dual-sport motorcycle events, dog training and trialing with firearms, and helicopter training—qualified for National Park Service Categorical Exclusion 3.3 B1: "Changes or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." AR 4154 (categorical exclusion determination); *see* AR 2659 (NPS NEPA

Handbook). Of course, this categorical exclusion begs the question of whether the changes would have "no or only minimal environmental impacts"—a question that should be addressed in an environmental assessment or environmental impact statement. *See* AR 2642 (NPS NEPA Handbook explaining that an environmental assessment should be prepared when "the proposal has an applicable [categorical exclusion] but may trigger an extraordinary circumstance"); AR 2644 (NPS NEPA Handbook explaining that an environmental impact statement must be prepared if "an action has the potential to result in significant adverse impacts and applying mitigation measures cannot ensure that significant adverse impacts will be avoided"). In determining that the action qualified for Categorical Exclusion 3.3 B1, NPS also determined that no extraordinary circumstances applied. AR 4148–4150. NPS explained its categorical exclusion decision in an "Environmental Screening Form," AR 4145–4153, and a three-page narrative that lacks in-depth analysis, AR 4154–4157. Because NPS's categorical exclusion documentation stated that the Master Plan was "the basis" for its analysis and environmental review, AR 4145, 4154, the reviewing court must consider whether the Master Plan and NPS's own explanations support the conclusions in NPS's categorical exclusion documentation.

NPS's determination that the POU amendment qualified for Categorical Exclusion 3.3 B1 and that no extraordinary circumstances

applied was arbitrary and capricious. In particular, the record indicates that the following extraordinary circumstances may apply to the high-impact activities included in the Master Plan (which were adopted as a POU amendment): "significant impacts on . . . ecologically significant or critical areas," 43 C.F.R. § 46.215(b); "highly controversial environmental effects or . . . unresolved conflicts concerning alternative uses of available resources," 43 C.F.R. § 46.215(c); "highly uncertain and potentially significant environmental effects," 43 C.F.R. § 46.215(d); and actions that "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects," 43 C.F.R. § 46.215(e). These extraordinary circumstances are essentially the same as several of the intensity factors that agencies should consider to determine whether impacts are significant. *Cf.* 40 C.F.R. § 1508.27(b). Thus, the questions of whether the action falls within the plain language of Categorical Exclusion 3.3 B1 and whether there are extraordinary circumstances are essentially two sides of the same coin: Whether there is a possibility of significant environmental impacts.

The record demonstrates that adopting the Master Plan as a POU amendment—to allow dual-sport motorcycle events, dog training and trialing with firearms, and helicopter training—has the potential to cause significant noise impacts and impacts to air quality and wildlife. This fact is bolstered by

actions of the Wisconsin Department of Natural Resources ("WDNR") regarding the Master Plan. WDNR determined that the activities in the Master Plan might have significant environmental impacts and, accordingly, prepared its Master Plan "consistent with Wisconsin Environmental Policy Act (WEPA) requirements for environmental review (NR 150, Wis. Adm. Code)." AR 4002.

Federal Defendants' argument that the Alliance's critiques of the Master Plan are "flyspecks" is off point. *See* Fed. Defs. Resp. Br., ECF 21, at 22. The reviewing court is not presented with the issue of whether the Master Plan is an adequate environmental impact statement under NEPA. Indeed, Federal Defendants do not assert that the Master Plan is an environmental impact statement that satisfies NEPA's requirements. *See* Fed. Defs. Resp. Br., ECF 21, at 23. The issue before the court is whether there is sufficient evidence in the record to support NPS's determination that the high-impact activities will have *no* environmental impact, and that a categorical exclusion was therefore appropriate.

3. The National Park Service considered the wrong baseline for determining that its action would have no significant environmental impact.

NPS's determination of no environmental impacts appears to have been based on the wrong baseline. Because NPS was considering the Master Plan as an *amendment* to the POU, the appropriate baseline for comparison was

the scenario of the existing POU remaining in place, not the current ecological condition. NPS had previously taken this position in communications with WDNR:

> Our environmental analysis will be focused on the new proposed uses (primarily active recreation uses) that are different from the ones in the original application, as the original passive uses were previously considered in the original land disposal for SPRA. . . . In our environmental reviews, the NPS typically evaluates the "no action" alternative, meaning the continuation of current management practices or the current plan. In the SPRA scenario, this would mean continuing the Program of Utilization in the original application by which the property was granted with no changes in the current recreational uses (i.e. primarily passive recreation, trails, habitat management, and prairie restoration).

AR 3407–3408. This was consistent with Department of the Interior regulations and the NPS NEPA Handbook guidelines regarding "no action" alternatives in environmental analyses. *See* 43 C.F.R. § 46.30(1) ("'no action' may mean 'no change' from a current management direction"); AR 2680 ("The term 'no action' . . . may mean 'no change' from a current management direction or level of management intensity, which would be the case for proposals involving an update to an existing plan").

Instead, NPS's categorical exclusion documentation indicated that NPS considered the environmental impacts of the Master Plan relative to a baseline of the current ecological condition. For example, NPS stated that "we feel much of the impacts from the actions listed in the plan will be an improvement to the natural habitats and any potential negative impacts such

as noise, air quality, impact to wildlife, will be minor." AR 4156–4157. And NPS explained that "[o]verall, through managed recreational opportunity and active land management activities, the overall quality of the natural environment at the park should improve." AR 4156. But NPS's NEPA obligation did not extend to the entirety of activities addressed in the Master Plan; NPS only had an obligation to consider those high-impact activities that would constitute an amendment to the original POU. *See* AR 4154 ("NPS must consider *proposed changes* and evaluate and disclose impacts from those uses" (emphasis added)). There is no support for NPS's conclusion that allowing dual-sport motorcycle use, Class 2 dog training and trialing with firearms, and helicopter training would improve natural habitats and the overall quality of the natural environment, as compared to implementing the same Master Plan without these high-impact uses.

In addition, it was arbitrary and capricious for NPS to conclude that there will be no environmental impacts simply because the Master Plan in its entirety may improve the overall quality of the natural environment. "A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1224 (9th Cir. 2008) (the fact that an action will be an improvement over the baseline scenario "does not necessarily mean that it will not have a

'significant effect' on the environment"). Indeed, using NPS's logic, there would be no impact unless the property would be damaged more over the next 40 years than it had been when used for an ammunition plant.

4. Allowing dual-sport motorcycle use, dog training and trialing with firearms, and helicopter training could have significant noise impacts.

NPS's Environmental Screening Form provided the following explanation for its conclusion that noise impacts would be "minor": "DNR has provided explanation of the effects of noise caused by motorcycles, snow mobiles, rockets and other recreational activity. These effects were compared with existent noise levels of nearby roads and found to be minor to negligible impacts." AR 4146. This conclusion and justification is unsupported by the record.

First, the justification only mentioned noise impacts from *recreational activities*. NPS provided no justification for concluding that noise impacts of helicopter training flights would be minor. Indeed, the evidence in the administrative record (in addition to common sense) indicates that noise from helicopter flights would be anything but "minor to negligible." For example, the Master Plan stated that "[h]elicopter flights generate *substantial noise* and wind," which would be anticipated for 5 to 10 hours per week. AR 4009 (emphasis added).

Second, nothing in the record indicates that NPS considered noise impacts from gunshots during dog training and trialing events. NPS's categorical exclusion documentation does not mention noise impacts from these events. Nor does the Master Plan section on sound and noise impacts mention dog training and trialing events. To the contrary, the record indicates that the discharge of firearms during dog training and trialing events could have significant impacts on birds. The Alliance submitted several comment letters to WDNR and NPS that raised this issue and included an expert sound study. *See, e.g.*, AR 3228 (September 24, 2015, letter from Plaintiff); AR 4350 (December 9, 2016, letter from Plaintiff); AR 4520 (December 13, 2016, letter from Plaintiff). The expert sound study concluded that a rifle range at SPRA "will have immediate adverse impacts on current breeding populations of vireos, meadowlarks, grosbeaks, warblers, and grassland sparrows, and will prohibit any re-establishment of former breeding populations of upland sandpipers." AR 3207; AR 3282; AR 4332; AR 4503.[5] The expert sound study casts doubt on NPS's unsubstantiated conclusion that allowing dog training and trialing events with the discharge of firearms would have minor to negligible noise impacts. Although the expert sound study considered the effects of a potential rifle range at the Area, the study is useful for understanding the impacts of gunshots during

[5] The same study is in the administrative record four different times.

dog training and trialing on birds at the Area, and nothing else in the record explains the environmental impacts of firearm use at the Area.

Finally, NPS's justification regarding noise from recreational activity is directly contradicted by the Master Plan, which NPS stated was "the basis" for its categorical exclusion documentation. NPS explained that noise impacts would be "minor to negligible" because the Master Plan compared the noise of dual-sport motorcycles to the noise levels of nearby roads. Yet the Master Plan's own comparison directly contradicts the NPS's conclusion:

> For up to six days per year, up to half of the biking and equestrian trails may be repurposed for use by dual-sport motorcycles. On these days, these trail corridors will experience sounds analogous to those that may be heard along the road corridors on the property. Depending on the speed of the motorcycles and the number that are traveling together, it is possible that the sound level along the travel route during these six days may be *considerably higher* than the sound level along the roads during their typical use throughout the year.

AR 4008 (emphasis added). The Master Plan also explained:

> The impacts from dual-sport motorcycles will be different from the regular vehicle traffic in that during the six days of special events the motorcycles will be travelling in areas of the property that won't normally experience motor vehicles in the immediate vicinity. . . . Depending on the speed of the motorcycles and the number that are traveling together, it is possible, and potentially likely, that the sound level along the designated travel route during these six days will be *higher than the sound level along the roads* during their typical use throughout the year.

AR 4015 (emphasis added). It is inexplicable how NPS concluded that the Master Plan indicated that noise impacts from motorcycles would be "minor

to negligible" in comparison to noise levels of nearby roads, when the Master Plan actually stated that noise impacts from motorcycles would be "different from the regular vehicle traffic," that it was potentially likely that the sound level along trail corridors "will be higher" than along the road, and that the sound level could be "considerably higher." NPS's conclusion regarding noise impacts from dual-sport motorcycles was clearly arbitrary and capricious.

5. The National Park Service did not take a hard look at whether allowing dual-sport motorcycle use would have significant impacts on air quality.

The record does not support NPS's conclusion that allowing dual-sport motorcycle riding on biking and equestrian trails would cause no or only minor air quality impacts. NPS's Environmental Screening Form concluded that air quality impacts would be "minor," but did not provide any further explanation. AR 4146. And the Master Plan contained only cursory and conclusory statements regarding the impacts of dual-sport motorcycle use on air quality.

The Master Plan's purported analysis of dust impacts from dual-sport motorcycle use is contained in a single conclusory sentence: "Dust is likely to be created during the dual-sport motorcycle events, although the magnitude is expected to be minor and localized." AR 4006. The Master Plan cited no studies, reports, or other evidence to support its conclusion that dust impacts from motorcycle events would be "minor." Nor did the Master Plan quantify

how much dust would be created by motorcycle events or otherwise explain the associated environmental impacts. "[V]ague and conclusory statements, without any supporting data, do not constitute a 'hard look' at the environmental consequences of [an] action as required by NEPA." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006). Nothing in the record indicates that NPS adequately considered whether dust impacts would have a significant environmental effect.

As discussed in the Alliance's opening brief, the Master Plan also did not adequately explain the air quality impacts from dual-sport motorcycle emissions. *See* Alliance's Opening Br., ECF 10, at 36. For that reason, the Master Plan cannot support NPS's conclusion that air quality impacts will be minor. The Master Plan did not explain the type or quantity of pollutants that are emitted by dual-sport motorcycles. By comparison, the Master Plan's analysis of air quality impacts from helicopters stated the specific pollutants that would be emitted, the quantity of each pollutant emitted per hour of flight time, and the estimated hours of helicopter flights per week. AR 4006. The Master Plan's analysis of emissions did not allow NPS (or the public) to adequately understand the air quality impacts associated with dual-sport motorcycle use. Because this does not constitute a hard look at air quality impacts, NPS's conclusion that air quality impacts would be minor must be set aside.

B. Allowing dual-sport motorcycle use, dog training and trialing with firearms, and helicopter training could have significant impacts on wildlife.

While all of the previously discussed noise and air quality impacts are significant in their own right, they will also have significant effects on wildlife at the Area. The Area contains important grassland birds that will be harmed by dual-sport motorcycle use, dog training and trialing with firearms, and helicopter training.

NPS's categorical exclusion documentation glossed over any adverse impacts to important animals or plants at the Area. NPS concluded that impacts to "species of special concern (plant or animal; state or federal listed or proposed for listing) or their habitat"[6] will be negligible, because "[t]here are no federally listed or proposed-listed species" and the Master Plan "addresses management and timing of uses to avoid potential negative impacts to wildlife." AR 4146. And NPS concluded that impacts to "unique or important wildlife or wildlife habitat" would be minor, referencing only the neotenic tiger salamander in its explanation. *Id.* Elsewhere in the document, NPS explained that there would be no significant negative impacts because the Master Plan "has limited the frequency of motorized use and provides

[6] The term "listed" presumably refers to plants or animals that are on the federal or state lists of threatened or endangered species. *See* 43 C.F.R. § 46.215(h).

management guidelines to limit impacts on wildlife such as rare and grassland birds." *Id.*

NPS's analysis of impacts to species of special concern is both factually incorrect and incomplete. Contrary to NPS's statement that "there are no federally listed or proposed-listed species," *id.*, WDNR's Rapid Ecological Assessment stated that the prairie bush-clover (*Lespedeza leptostachya*), a federally listed threatened plant species, has been documented at the Area. AR 2091. In addition, there is no indication that NPS considered impacts to *state* listed species and other rare plants and animals. Yet the Rapid Ecological Assessment detailed four state threatened animal species, two state endangered plant species, and five state threatened plant species, in addition to 29 animal species of special concern. AR 2070, 2090–2091. Moreover, the Master Plan concluded that it was anticipated to cause the populations of four special concern species to decrease. AR 4080.

NPS's conclusions regarding impacts to birds and other wildlife are unsupported by the record. The Master Plan explained that noise, air pollution, and physical impacts from dual-sport motorcycle use could harm or kill wildlife:

> The use of dual-sport motorcycles at SPSRA, even with the limitations listed above, is likely to have some level of impact on terrestrial resources. . . . This use may cause displacement, nest desertion, breeding failure, and other impacts to some native species. The sounds and movement of motorcycles may also result

> in animals being displaced for longer periods than just the days that the motorcycles are using the repurposed trails. Some slow-moving animals such as snakes could be hit by dual-sport motorcycles during these six days. In addition, exhaust from the motorcycles could impact sensitive species.

AR 4014–4015. The Master Plan noted that "individual animals may experience stress and stress responses (e.g., increased time and energy spent on vigilance and avoidance movements that results in weight loss, reduced breeding success, and susceptibility to disease)" as a result of dual-sport motorcycle use. AR 4015. The Master Plan also stated that "[e]xisting research indicates that trails open to motorized vehicle traffic year round, as well as more concentrated motorized recreation sites, can have a noticeable effect on the number and diversity of species in an area." AR 4014.

Yet the Master Plan concluded that "any impacts to populations are expected to be minor." AR 4015. The only possible support for the Master Plan's conclusion that impacts would be minor is a statement that "[g]eneralized bird survey data" from another state recreation area that allows off-road vehicle use indicated that "[t]here doesn't appear to be a sizeable reduction in the number of species or number of birds in the area where motorized recreation is allowed compared to other areas on the property." AR 4014. In its categorical exclusion documentation, NPS explained that dual-sport motorcycle use would only have a minor impact on wildlife such as rare and grassland birds because the Master Plan "has

limited the frequency of motorized use and provides management guidelines to limit impacts." AR 4149. Neither NPS's categorical exclusion documentation nor the Master Plan explained how the proposed frequency limitations and management guidelines would ensure that dual-sport motorcycle use does not have significant impacts on wildlife.

The record also indicates that noise from helicopter training and from gunshots during dog training and trialing could have significant adverse impacts on wildlife. NPS's categorical exclusion documentation did not indicate that it ever considered these impacts. The Master Plan noted that the discharge of firearms during dog training and trialing is likely to disturb wildlife—which is consistent with the findings of the expert sound study submitted by the Alliance, AR 3207; AR 3282; AR 4332; AR 4503—yet it concluded that impacts would not be significant (without providing adequate justification):

> The department operates over fifty Class 2 dog training sites around the state varying in size from tens to hundreds of acres. The department is not aware of any research on the effects that training hunting dogs has on the plant and animal populations at the sites. However, it is likely that the wildlife composition of these sites is reduced to some degree during the more intensively used periods. In addition to the disturbance that dogs may cause, wildlife may also flush or exhibit avoidance behaviors due to the occasional discharge of firearms used in training, similar to the impacts that occur from hunting. Thus, it is likely that the proposed 72-acre Class 2 dog training ground will be similar to the impacts at other dog training sites around the state.

> Dog trialing events cover larger areas and thus have the potential to affect more lands. However, these events are shorter in duration (e.g., a weekend) and more spread out (e.g., throughout the Magazine Area). Any impacts to biological resources from dog trials are likely to be minimal, localized, and of short duration.

AR 4018. The information in the Master Plan indicates that there is at least the potential that allowing helicopter training and dog training and trialing would cause significant impacts to wildlife, which should have been appropriately studied in an environmental assessment or environmental impact statement. Accordingly, NPS's conclusion that the POU amendment would have no impacts on wildlife was arbitrary and capricious.

IV. The Alliance is likely to succeed on its Federal Property and Administrative Services Act claim.

Federal Defendants violated the Federal Property and Administrative Services Act by failing to enforce the reverter clause in the deeds and by approving the high-impact activities as an amendment to the Program of Utilization.

First, under *Heckler v. Chaney*, 470 U.S. 821, 834 (1985), cited by Federal Defendants, agency non-enforcement actions are subject to judicial review under the Administrative Procedure Act when the statute clearly withdraws enforcement discretion and provides guidelines for the agency's exercise of its enforcement power. Such is the case here. The Federal Property and Administrative Services Act requires that the Secretary of the

Interior "*shall* determine and *enforce* compliance with the terms, conditions, reservations, and restrictions contained in an instrument by which a transfer under this section is made." 40 U.S.C. § 550(b)(1) (emphasis added). Although the statute requires that the deed include a term that reversion is "at the option of the Government," the statute also requires the Secretary of the Interior to enforce compliance with this term. The purpose of allowing reversion at the option of the Government was likely to allow the grantee a chance to correct noncompliance. *See* AR 32–36 (Federal Lands to Parks Program Handbook explaining that NPS "shall" notify the grantee when property is in noncompliance and "shall" initiate reversion if the grantee does not take corrective action within one year of receiving a notice of noncompliance).

Second, the POU amendment—in the form of NPS's approval of the Master Plan—must be set aside because it is not "consistent with purposes for which the property was originally transferred," as the original POU requires. AR 1642. Under the doctrine of *ejusdem generis*, acceptable activities must be consistent with those proposed activities in the Program of Utilization: "hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education and cultural/historical interpretation." AR 1650. None of these uses is similar to the contested high-impact recreational uses or helicopter training. *See*

United States v. Sec. Mgmt. Co., 96 F.3d 260, 265 (7th Cir. 1996) ("Under the ejusdem generis rule, where a general term . . . is preceded or followed by a series of specific terms, the general term is viewed as being limited to items of the same type or nature as those specifically enumerated" (ellipsis in original) (internal quotation marks and citation omitted)). Any common or reasonable understanding of the term "low-impact" would not include dog training and trialing with firearms, dual-sport motorcycle events, helicopter training, and other as-yet unidentified special events with high-impact uses.

CONCLUSION

For the foregoing reasons and the reasons presented in the Alliance's opening brief, this Court should hold that the district court abused its discretion in denying the Alliance's motion for a preliminary injunction. Moreover, because the Alliance satisfies all required elements for a preliminary injunction, the Court should remand to the district court with an instruction to enjoin the high-impact activities—dual-sport motorcycle use, dog training and trialing, helicopter training exercises, and other special events that include off-road motorized vehicles or firearms—until the district court issues a decision on the merits.

DATED: October 12, 2017

Respectfully submitted,

PERKINS COIE LLP

By: *s/ Brian H. Potts*

Brian H. Potts *(Counsel of Record)*
BPotts@perkinscoie.com
Jeff J. Bowen
JBowen@perkinscoie.com
Danielle S. Grant-Keane
DGrantKeane@perkinscoie.com
1 East Main Street, Suite 201
Madison, WI 53703-5118
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

Jacob E. Aronson
JAronson@perkinscoie.com
505 Howard Street, Suite 1000
San Francisco, CA 94105
Telephone: (415) 344-7048
Facsimile: (415) 344-7050

Attorneys for Plaintiff-Appellant
Sauk Prairie Conservation Alliance

RULE 32 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Century Schoolbook font.

Dated this 12th day of October, 2017.

s/ Brian H. Potts

Brian H. Potts *(Counsel of Record)*
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608-663-7493
BPotts@perkinscoie.com

Attorneys for Plaintiff-Appellant,
Sauk Prairie Conservation Alliance

RULE 30 CERTIFICATE OF COMPLIANCE

I hereby certify that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

Dated this 12th day of October, 2017.

s/ Brian H. Potts

Brian H. Potts *(Counsel of Record)*
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608-663-7493
BPotts@perkinscoie.com

Attorneys for Plaintiff-Appellant,
Sauk Prairie Conservation Alliance

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 12th day of October, 2017.

s/ Brian H. Potts

Brian H. Potts *(Counsel of Record)*
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608-663-7493
BPotts@perkinscoie.com

Attorneys for Plaintiff-Appellant,
Sauk Prairie Conservation Alliance