No. 19-

IN THE

Supreme Court of the United States

SAUK PRAIRIE CONSERVATION ALLIANCE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Acting Secretary of the U.S. Department of the Interior; NATIONAL PARK SERVICE; EMILY W. MURPHY, in her official capacity as Administrator of the U.S. General Services Administration; and THE STATE OF WISCONSIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Seventh Circuit err in concluding that the National Park Service's approval of military helicopter training exercises on property conveyed for the purpose of recreation was not "arbitrary and capricious" where such use was not subject to a "determin[ation]" by the Secretary of the Interior that such use is "necessary to safeguard the interests of the Government" pursuant to the Federal Property and Administrative Services Act?

Is the arbitrary and capricious standard of review appropriate for an agency's threshold determination, pursuant to the National Environmental Policy Act (42 U.S.C. § 4321 et seq.), of whether an action is categorically excluded from preparation of an environmental impact statement and environmental assessment?

RULE 29.6 DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies involved in this case.

RELATED CASES STATEMENT

Sauk Prairie Conservation Alliance v. United States Department of the Interior, et al., No. 3:17-cv-00035, U.S. District Court for the Western District of Wisconsin. Order Denying Preliminary Injunction dated June 26, 2017. Judgment entered May 3, 2018.

Sauk Prairie Conservation Alliance v. United States Department of the Interior, et al., No. 18-2213, U.S. Court of Appeals for the Seventh Circuit. Judgment entered December 12, 2019.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sauk Prairie Conservation Alliance respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 12, 2019. *See Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 664 (7th Cir. 2019).

OPINIONS BELOW

The December 12, 2019 opinion of the Seventh Circuit Court of Appeals is reported as *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 644 (7th Cir. 2019) and is reprinted at Appendix A. The May 4, 2018 opinion of the district court is reported as *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 320 F. Supp. 3d 1013 (W.D. Wis. 2018) and is reprinted at Appendix B. The district court order denying the Alliance's motion for a preliminary injunction (*Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, No. 17-CV-35 JDP, 2017 WL 2773718 (W.D. Wis. June 26, 2017)) is unreported and is reprinted as Appendix C.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 12, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

40 U.S.C. § 550(b)(1) provides that "[s]ubject to disapproval by the Administrator of General Services within 30 days after notice of a proposed action to be taken under this section, except for personal property transferred pursuant to section 549 of this title, the official specified in paragraph (2) 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. The official shall reform, correct, or amend the instrument if necessary to correct the instrument or to conform the transfer to the requirements of law. The official shall grant a release from any term, condition, reservation or restriction contained in the instrument, and shall convey, quitclaim, or release to the transferee (or other eligible user) any right or interest reserved to the Federal Government by the instrument, if the official determines that the property no longer serves the purpose for which it was transferred or that a release, conveyance, or quitclaim deed will not prevent accomplishment of that purpose. The release, conveyance, or quitclaim deed may be made subject to terms and conditions that the official considers necessary to protect or advance the interests of the Government."

40 U.S.C. § 550(b)(2)(C) provides that "[t]he official referred to in paragraph (1) is . . . the Secretary of the Interior, for property transferred under subsection (e) for public park or recreation area use."

40 U.S.C. § 550(e)(4)(B) provides that deeds of conveyance for recreational properties "may contain additional terms, reservations, restrictions,

and conditions the Secretary of the Interior determines are necessary to safeguard the interests of the Government."

42 U.S.C. § 4332(C) directs agencies of the federal government, "to the fullest extent possible," to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action . . . ."

40 C.F.R. § 1508.4 reads: "Categorical exclusion means a category of 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 in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."

5 U.S.C. § 706(2) reads: "The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (D) without observance of procedure required by law."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Federal jurisdiction arose via Petitioner's invocation of three federal statutes in a lawsuit to halt certain high-impact activities, including dog training with firearms, off-road motorcycle riding, and military helicopter drills, from occurring on land the National Park Service donated to the Wisconsin Department of Natural Resources. App. A at 2a. The first of these statutes is the Federal Property and Administrative Services Act (FPASA or Property Act), which controls the terms of deeds issued through the Federal Lands to Parks Program (40 U.S.C. § 550). The statute requires the federal government to enforce the terms of any deed it issues. *Id.* The Property Act also requires that, with some qualifications, any land conveyed through the program must be conveyed solely for park and recreational purposes. *Id.* Second, Petitioner invoked the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.). NEPA requires a federal agency to prepare an environmental impact statement (EIS) for all "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency can decide not to prepare an EIS or a shorter environmental analysis (EA) if it relies on a "categorical exclusion" to determine that its action is categorically excluded from NEPA. 40 C.F.R. § 1508.4. Third, Petitioner invoked the Administrative Procedure Act (APA). 5 U.S.C. § 706. The APA requires that courts "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law." *Id.* at § 706(2)(A).

Petitioner brought suit to enjoin the aforementioned activities when the National Park Service approved them as a last-minute revision to the use plan in the final stages of the property transferal process. Petitioner contends that the National Park Service's late approval of these uses was arbitrary and capricious and in violation of the Property Act. Petitioner also contends that the National Park Service (NPS) wrongly relied on a categorical exclusion in failing to conduct either an EA or an EIS, in violation of NEPA.

The district court granted the Defendants' motion for summary judgment, holding that the Defendants did not violate the APA, NEPA, or FPASA. App. B. The court concluded that Petitioner "failed to show either that the National Park Service (NPS) lacked authority under the FPASA to approve the proposed uses for the recreation area or that it was arbitrary and capricious for NPS to conclude under NEPA that the proposed uses would have no more than a minimal impact on the environment." App B. at 2a. The Seventh Circuit affirmed, holding that NPS's approval of these uses did not violate the Property Act because (1) dog training and off-road motorcycle riding, although not mentioned in the State's initial application, are both recreational uses and therefore consistent with the original purposes of the park; and (2) while military helicopter training is "obviously not recreational," the National Park Service reserved the right to continue the activity, consistent with the Property Act. App. A at 3a. As to the NEPA claims, the Seventh Circuit scrutinized NPS's actions under a deferential arbitrary and capricious standard. The

court determined that the agency reasonably concluded that its approval of dog training and off-road motorcycle riding fell within a categorical exclusion to NEPA's requirements—one for amendments to actions with no or only minimal impact—such that the agency need not conduct an environmental assessment of these additional uses on the park. App. A at 3-4a. Petitioner now asks this Court to review the Seventh Circuit's decision.

II. STATEMENT OF RELEVANT FACTS

This case arises from the National Park Service's donation of more than 3,000 acres of land in central Wisconsin to the state's Department of Natural Resources, now known as the Sauk Prairie State Recreation Area (the "Area" or "SPRA"). AR 3876.[1] The purpose of the donation was to turn a former munitions plant into a state park designed for various recreational uses. AR 3869-70. Starting in 1997, numerous federal and state administrations worked collaboratively to come up with a plan regarding how to repurpose these thousands of acres in Sauk County, Wisconsin. AR 3869. The Wisconsin Department of Natural Resources ("WDNR"), General Services Administration ("GSA"), and National Park Service ("NPS")—after consultation with the Sauk County Board of Supervisors, the Ho-Chunk Nation, local municipalities, and countless members of the public—agreed that the property's best uses were

[1] The required Appendix bound with this brief is cited as "App __." Documents in the District Court docket (W.D. Wis., Case No. 17-cv-35 are cited as "Dist. Ct. Doc. No.___." Documents in the Seventh Circuit docket (7th Cir., Case No. 18-2213) are cited as "Cir. Doc. No.__." The administrative record (*see* Dist. Ct. Doc. Nos. 41-43) is cited as "AR ___."

conservation, education, and low-impact recreation, such as hiking, biking, fishing, horseback riding, and hunting. App. B at 45a; AR 1175-76. These federal and state agencies worked together for more than a decade, culminating in the creation of a full-blown environmental impact statement, to transfer the property from the federal government to the WDNR, the Ho-Chunk Nation, and the U.S. Department of Agriculture's Dairy Forage Research Center. *Id.* (describing the 2003 state environmental impact statement focused on low and medium intensity uses); AR 1607-13. All parties agreed in writing at the time that WDNR's portion of the property would be managed cooperatively and would only be used for low-impact recreation and conservation. App. B at 46-47a.

In 2004, WDNR submitted an application to acquire portions of the property through the Federal Lands to Parks Program, which is administered by NPS pursuant to the Property Act. AR 1614–1634 (original application); AR 1640–1661 (amended application). The application contained a Program of Utilization ("POU") in which WDNR described its proposed uses for the property. AR 1650–1653. WDNR's POU included only the following uses: "hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education and cultural/historical interpretation." AR 1650. The POU additionally stated: "Many groups with varying interests in Badger share a common goal with the WDNR to convert it to a recreational property with low impact recreation (hiking, picnicking, primitive camping) prairie, savanna and grassland restoration, environmental education and cultural/historical interpretation, with the potential for an education center." AR

1651. In 2005, NPS sent a letter to GSA approving WDNR's application to receive the lands through the Federal Lands to Parks Program, requesting assignment of the property for conveyance to WDNR, and stating that "[t]he DNR will develop and use the property as described in the Program of Utilization." AR 1663.

But then, in 2011, a new Wisconsin gubernatorial administration took over after all of the prior federal and state administrations' decisions had been made and finalized. Despite decades of careful consideration and analysis from federal, local, state, and tribal representatives, local business representatives, local landowners, and the general public, this new administration decided it wanted to use the property for higher-impact uses, such as off-road motorcycle riding, dog training with guns, and helicopter training. Beginning in July 2012, WDNR released a Regional & Property Analysis that, for the first time in the history of the planning process, proposed "non-traditional outdoor recreation uses" such as "rocketeering, shooting ranges, geocaching, dog parks, paintball . . . and other recreation activities not typically found on Department Lands." AR 2176. WDNR then issued its "Preliminary Vision and Goal Statements and Three Draft Conceptual Alternatives" document in July 2013, which similarly included several high-impact uses, such as a shooting range and motorized recreation opportunities. AR 2361. WDNR's 2015 Draft Master Plan for the property also included proposals for these high-impact uses that had not been vetted in the original impact assessment. *See generally* AR 2989-3164 (2015 Draft Master Plan and Environmental Impact Statement).

Because these new uses had not been considered in the environmental impact statement conducted back in 2003 and were not included in the POU, NPS initially pushed back, determining that the proposed uses were not in accordance with the POU and notifying WDNR that it would need to apply for an amendment and consider numerous environmental impacts consistent with NEPA. AR 3405, 3407. Instead, the WDNR ignored the NPS's correspondence and issued its 2016 Draft Master Plan & *Final* Environmental Impact Statement authorizing dual-sport motorcycle riding and dog training. It also authorized military helicopter training. The reservation for military helicopter use was only in the deed for Parcel VI (the landfill area where helicopters are allowed to land). The deeds for all the other parcels (i.e., most of the park) do not include a reservation, but helicopters are allowed to fly as low as 25 or 80 feet over those areas. AR 3894-3911, 3977, 4166. Notwithstanding the WDNR's failure to heed the NPS's prior admonitions, NPS informed WDNR that it would nonetheless consider the WDNR's Final 2016 Master Plan as an amendment to the POU and categorically exclude it from environmental analysis via an exclusion for "changes or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." App. A at 9a. Petitioner sued soon after.

Overall, Petitioner has contended that without a legislative change to the Property Act, it is too late for WDNR, GSA, and NPS to switch course and unilaterally approve these contested uses. And even if it were not too late and GSA and NPS could go back and redo the property transfer approvals that occurred more than ten years ago, NPS and GSA would have to conduct a full-blown

environmental impact statement to analyze these new high-impact activities.

REASONS FOR GRANTING THE PETITION

This Petition raises important questions as to which uses are allowed on federal property disposed of pursuant to the Federal Lands to Parks Program and which standard of review should apply to review of an agency's decision to apply a categorical exclusion under NEPA.

According to the NPS's website, over 1,575 properties covering approximately 178,000 acres have been transferred to state and local governments for parks and recreation areas under the Property Act since the program's inception in 1949. [2] Yet, to the Alliance's knowledge, the decisions in this case are the only federal court decisions interpreting the Property Act. The lower court's decisions will therefore have an outsized influence over how the Federal Lands to Parks Program is administered going forward.

In other words, the lower courts' decisions in this case are not just about the specific uses that will occur at this property in Wisconsin. They are about certainty in all of NPS's property planning. If WDNR and NPS can simply switch course about this property's use - and use it for non-recreational purposes - more than a decade after the original

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[2] *See* National Park Service, Federal Lands to Parks Program, About Us Page at https://www.nps.gov/ncrc/programs/flp/flp_abt_us.html (last visited March 6, 2020).

use decisions were made and finalized, without doing any environmental impact analysis, then what prevents an NPS property owner like WDNR from turning this or any other property in the NPS program into an amusement park or a protected wilderness that no one is allowed to access at all? What prevents NPS, in other actions, from conducting no independent analysis and applying a categorical exclusion to NEPA in every case?

This is precisely why the safeguards in the Property Act and NEPA exist: to ensure that property decisions are not made on a willy-nilly basis, to provide certainty to the public about the uses that will occur, and to adequately plan and budget for the uses of the property on a long-term basis.

This is a case of administrative overreach, ignorance of procedure, and a failure of the judiciary to check and balance the inadequacies of federal and state agencies. It involves the scope of permissible determinations under the Federal Property and Administrative Services Act and an improper judicial reliance on the APA's "arbitrary and capricious" standard to avoid holding agencies accountable for failing to comply with Congress's "broad national commitment[s]" under the National Environmental Protection Act. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

I. THE SEVENTH CIRCUIT ERRED IN CONCLUDING THAT THE NATIONAL PARK SERVICE'S APPROVAL OF MILITARY HELICOPTER TRAINING EXERCISES ON PROPERTY CONVEYED SOLELY FOR RECREATIONAL PURPOSES WAS PERMISSIBLE

In the section of the Property Act titled "Property for Use as a Public Park or Recreation Area," the Act provides that the Administrator of the General Services Administration "may assign to the Secretary of the Interior for disposal surplus real property . . . that the Secretary recommends *as needed for use as a public park or recreation area*." 40 U.S. Code § 550(e)(1) (emphasis added). Later in that same section, the Property Act provides that the "deed of conveyance" of any such surplus real property "shall provide that all of the property be used and maintained for the purpose for which it was conveyed *in perpetuity* . . . and may contain additional terms, reservations, restrictions, and conditions *the Secretary of the Interior determines* are necessary to safeguard the interests of the Government." *Id.* § 550(e)(4) (emphasis added).

Military helicopter training is not a recreational use. That fact is not in dispute. Although the Sauk Prairie Recreation Area was conveyed to the State of Wisconsin exclusively for recreational uses, the Seventh Circuit nonetheless found that the National Park Service did not violate the Property Act in approving military helicopter training exercises on the property. App. A at 19-25a, 40a; 40 U.S.C. § 550(e); AR 4565 (Quitclaim deed for Parcels R3 and V1 stating that "the Property shall be used and maintained exclusively for public park or public recreation

purposes for which it was conveyed in perpetuity"). The Seventh Circuit concluded that the helicopter training was permissible "because the Department [of the Interior] concluded, in light of a request by the Army, that the provision was necessary to safeguard the nation's interests in training members of the National Guard." App. A at 21-22a. However, the Seventh Circuit's decision gets this critical issue of first impression wrong.

The Administrative Procedure Act requires reviewing courts to "hold unlawful and set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Here, the Secretary of the Interior made no conclusion or determination to justify the inclusion of helicopter training as a permissible use on the property, which is fundamentally "arbitrary and capricious." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (finding a decision by the National Highway Traffic Safety Administration "arbitrary and capricious" where the agency's analysis "was nonexistent" and lacked "findings" or "analysis . . . to justify the choice made"). The Seventh Circuit's decision misrepresented the actual evidence in the record and conflated the statutorily mandated actors without reference to any controlling law.

Without judicial intervention, the NPS will now be able to proceed *carte blanche* in conveying properties subject to the Property Act, and states and other municipalities that have obtained property will be able to do with it whatever they please.

A. The Secretary of the Interior Never "Determine[d]" That a Reservation Permitting Helicopter Training Exercises Is "Necessary to Safeguard the Interests of the Government"

As described above, the Property Act provides that deeds of conveyance for recreational properties "may contain additional terms, reservations, restrictions, and conditions the *Secretary of the Interior determines* are necessary to safeguard the interests of the Government." 40 U.S.C. § 550(e)(4)(B) (emphasis added). However, there is no document in the administrative record indicating that the Secretary of the Interior made this statutorily required determination. The only "determination" the NPS could produce in the entire record was in the form of an internal staff email from NPS representative Elyse LaForest to Andrew Tittler of the Department of the Interior, which asked: "[a]re you okay with my previous explanation that the helicopter use is a condition of assignment by the Army??? [sic] I'm trying to get this off for signature." The Department's response: "OK.". AR4365; *see* n. 3, infra, and accompanying text.

The Secretary never acted or expressly delegated authority to act. Such inaction does not permit the inclusion of additional terms which allegedly "safeguard" the Government's interests. 40 U.S.C. § 550(e)(4)(B); *see* App. A at 22a.

"The interpretation of a statute[] begins with its text." *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medellin v. Texas*, 552 U.S. 491, 506 (2008)). The Property Act states that *the Secretary of the Interior* "shall determine and enforce

compliance with the terms, conditions, reservations, and restrictions contained in an instrument by which [the] transfer . . . is made." 40 U.S.C. § 550(b)(1)(emphasis added); 40 U.S.C. § 550(b)(2)(c). The deed of conveyance for such a transfer may contain additional terms and reservations, but only if "*the Secretary of the Interior* determines [those terms] are necessary to safeguard the interests of the Government." 40 U.S.C. § 550(e)(4)(B) (emphasis added). Thus, the Secretary of the Interior is the primary actor in enforcing the deed of conveyance and amending the terms where necessary. Nowhere in the Property Act does the statute permit the Secretary of the Interior to delegate its responsibilities to another individual or entity. It is the Secretary of the Interior who must make such a determination.

That the Secretary of the Interior must "determine" additional terms are necessary implies at least involvement from the Secretary, if not a level of analysis regarding the necessity of including such terms. An internal email from NPS to a low-level Department staff member cannot constitute a determination of the Secretary. This Court, for example, has interpreted "determine" to mean "to fix conclusively or authoritatively" and "to set bounds or limits to." *Abbott*, 560 U.S. at 11; *see also Allen v. Sec'y of Health & Human Servs.*, 837 F.2d 267, 270 (6th Cir. 1988). Other courts have interpreted the term to mean "to explain or state the exact meaning of words and phrases; to state explicitly; to limit; to determine essential qualities of; to determine the precise signification of." *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 173, 796 N.E.2d 205, 212 (2003). Interpreting "determine" as such, the Property Act requires an affirmative statement or explanation from the Secretary of the Interior

regarding the decision to include additional terms; it is not sufficient that the Government merely *has* interests at play surrounding the conveyance. Additional terms beyond those in the original deed must be "*necessary* to *safeguard* the interests of the Government." 40 U.S.C. § 550(e)(4)(B).

In this case, the record is devoid of any formal communications or even emails from the Secretary of the Interior regarding National Guard helicopter training in the Area. In support of its improper finding that the Secretary made the requisite "determination," the Seventh Circuit alludes to three impertinent email chains,[3] none of which came from the Secretary, none of which constituted a statutorily mandated "determination," and none of which addressed whether helicopter usage was "necessary to safeguard the interests of the Government." 40 U.S.C. § 550(e)(4)(B). Even considering the sole email which includes *anyone* from the Department of the Interior, such communication could hardly be considered a Department response, let alone a "determination." AR 4365.

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[3] Although the Seventh Circuit did not provide citations to these emails, the court likely cited to (1) a December 9, 2016 email from a General Services Administration representative to Elyse LaForest of the National Park Service stating that the helicopter provision was "a requirement imposed by [the] Army" (AR 4363), (2) a December 8, 2016 email between Andrew Tittler of the Department of the Interior and Elyse LaForest of the National Park Service stating that "helicopter use is a condition of assignment by the Army" (AR 4365), and (3) a December 2, 2016 email from Elyse LaForest to a GSA representative stating that NPS needs "word from [the] Army" before it could "do anything" (AR 4168).

This Court has held that agencies "must examine the relevant data and articulate a satisfactory explanation for [] action[s]," which "include[es] a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Further, "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem." *Id.* But here, the Secretary of the Interior has failed to consider *any* aspect of the problem. "An agency must cogently explain why it has exercised its discretion in a given manner," and this Court has previously deemed agency inaction "arbitrary and capricious" where agency analysis is "nonexistent." *Id.* at 48.

In fact, the few communications from the Department that are present in the record demonstrate that the Department's own employees expressed disbelief that helicopter training would constitute a permissible use on the property.[4] In another email from the same Andrew Tittler dated just two days before the email cited above, he states that the Army's helicopter practice ". . . seems like

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[4] *See, e.g.*, AR 2831 (marked-up version of the 2015 draft master plan with two large exclamation points next to the paragraph describing helicopter training); AR 3179 (noting that helicopter use is "[n]ot recreation" and questioning whether NPS could allow it); AR 3319 (noting that "WDNR must come to an agreement for phasing out the guard's use of the property (as it is not a recreational use) within a reasonable time frame"); AR 3412 ("the use of the area by the National Guard for training with helicopters or any other purpose (except training exercises which assist the DNR with cleanup or development of the site) is not a recreational use and is not allowable under the requirements of the FLP program").

a problem to me. If the area is being used for rotary wing aviation training, in what way is it still being used for public park purposes? *I don't think this comports with the Act and its intent*." AR 4175 (emphasis added). If the Department staff could simply make the statutorily permitted determination that helicopter training is "necessary to safeguard the interests of the Government," why question the legality of such use under the Act? The "arbitrary and capricious" standard holds a narrow scope of review, and a court is "not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Thus, the Seventh Circuit could not possibly have concluded that the Department of the Interior made an explicit reservation for helicopter usage consistent with the Property Act's requirements.

B. Contrary to the Seventh Circuit's Opinion, the Alliance Preserved This Argument in the Proceedings Below.

The Seventh Circuit also concludes that the Alliance did not preserve this argument in the district court. But this is false. Because there are no documents in the record to suggest that the Secretary of the Interior "determine[d]" that helicopter usage was a "necessary" term "to safeguard the interests of the Government," the Alliance did not affirmatively raise this issue in its original Brief in Support of its Motion for Summary Judgment. But then in response, for the first time, the federal Defendants argued, without any substantiation, that they did "not need to meet the 'public park and recreation' standard" as the Department is authorized "to include 'additional terms, reservations, restrictions[,] and conditions the Secretary of the Interior determines are

necessary to safeguard the interests of the Government" in their Opposition to Plaintiff's Motion for Summary Judgment. Dist. Ct. Dkt. No. 3:17-cv-00035, ECF No. 63 at 11. Federal Defendants did not—and could not—cite to any alleged analysis or determination from the Department of the Interior as evidence. The Alliance responded immediately in its Reply Brief in Support of Its Motion for Summary Judgment and on appeal, arguing that this position contradicts several prior statements made by the Federal Defendants as cited above and does not excuse compliance with the Property Act and the Federal Lands to Parks Program. Dist. Ct. Dkt. No. 3:17-cv-00035, ECF No. 67 at 2-4; App. Ct. Dkt. No. 18-2213, ECF No. 22 at 9-12.

In sum, this Court should grant the Alliance's Petition in order to rectify the Seventh Circuit's mistaken waiver holding, the NPS's and the Department's gross administrative overreach, and to provide clarity on the appropriate administrative procedures for drafting and approving deeds of conveyance for federal transfers of property. Because there have not been any other cases interpreting the Property Act, and the Act covers approximately 1,575 properties and 178,000 acres, the Seventh Circuit's erroneous decision will have wide-ranging national impacts if it is left in place.

II. THE SEVENTH CIRCUIT SHOULD NOT HAVE RELIED ON A DISFAVORED "ARBITRARY AND CAPRICIOUS" STANDARD WHEN REVIEWING NPS'S CATEGORICAL EXCLUSION DETERMINATION

NEPA requires a federal agency to prepare an EIS for all "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether an EIS is required because an agency action will "significantly" affect the environment, an agency can prepare an EA, which is a shorter, much less detailed version of an EIS. App. A at 26a. An agency must prepare an EIS or an EA unless it relies on a "categorical exclusion" to determine that its action is categorically excluded from NEPA. 40 C.F.R. § 1508.4.

Here, NPS relied on a categorical exclusion, and as such, failed to conduct an EA or an EIS. Specifically, NPS relied on a categorical exclusion in its own handbook that applied to "[c]hanges or amendments to an approved plan, when such changes would cause *no or only minimal environmental impact*." App. B at 50a (emphasis added).[5] To conclude that the exclusion applied, NPS:

> [R]el[ied] almost exclusively on the [state] DNR's environmental impact statement. The National Park Service itself prepared only a short 13-page screening form in which it

[5] The Seventh Circuit questioned the circular nature of this exclusion. App. A at 27-28a.

> checked a few boxes and included a few lines of brisk explanation. Its final conclusions rested almost entirely on conclusions already made by the state environmental agency.

Id. at 29a. Of note, the Seventh Circuit's 33-page opinion in this case was longer than NPS's 13-page conclusion that no environmental impact analysis was necessary.

At issue now is whether this was appropriate.[6] That is, whether NPS may fail to conduct its own analysis in determining that a categorical exclusion applies such that it need not carry out its procedural mandate under NEPA. 40 C.F.R. § 1501.4. The lower court has decided that it may; this Court should determine that the proper standard of review in such a case is whether such a decision was in "observance of procedure required

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[6] While Petitioner has not directly raised this standard of review issue until now, it would have been futile to do so below considering the 7th Circuit's previous reliance on the "arbitrary and capricious" standard in NEPA litigation. *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003) ("The APA instructs courts to set aside agency action only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' 5 U.S.C. § 706(2)(A)."). Petitioner has also previously cited *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007), a decision which in addition to applying an arbitrary and capricious standard of review, explains that "when an agency has taken action without observance of the procedure required by law, that action will be set aside." (citing *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000)).

by law." 5 U.S.C. § 706(2)(D); App. A at 29a. Application of 5 U.S.C. § 706(2)(D) would occur under a limited but exacting de novo standard. *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 116 (1st Cir. 2002). At a minimum, the Seventh Circuit should have used a standard of reasonableness.

This Court has not decided what standard applies to review of a federal agency's decision to employ a categorical exclusion. Because the Seventh Circuit has given broad deference to an agency's interpretation of its own categorical exclusion standard, the Court has now paved the way for federal agencies to apply no independent analysis before applying a categorical exclusion to federal actions that may have an environmental impact. This method of review allows the agency to avoid the procedures of NEPA entirely and fails to fulfill the goals of NEPA that require agencies to take a "hard look" at the environmental consequences of their actions to "the fullest extent possible." 42 U.S.C. § 4332; *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976).

There is "deep ambiguity" as to the standards of review that govern NEPA litigation.[7] The Supreme Court has ruled that an arbitrary and capricious review should apply to factual questions and to the decision not to prepare an EIS after completion of an EA, but it "has not yet decided whether this standard applies when courts review

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[7] Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205, 212 n. 34 (2011); DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIG. § 8:6 (2019).

the adequacy of an impact statement" (DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIG. § 10:17 (2019) (citing *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989)), nor has it decided what standard applies when courts review the decision whether to rely on a categorical exclusion.

Some courts, including the Seventh Circuit, have reviewed various NEPA questions under the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A). *Highway J. Citizens Group v. Mineta*, 349 F.3d 938, 952-53 (7th Cir. 2003). Courts outside of the Seventh Circuit have, however, applied standards other than "arbitrary and capricious" when conducting various parts of NEPA-based review. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (citing to Section 706(2)(A) but also stating: "When an agency has taken action without observance of the procedure required by law, that action will be set aside."); *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir.2000); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 641 (9th Cir. 2014) (citing *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 667 n.46 (9th Cir. 1998) ("We hold the less deferential standard of 'reasonableness' applies to threshold agency decisions that certain activities are not subject to NEPA's procedures.")) *And see Piedmont Envtl. Council v. F.E.R.C.,* 558 F.3d 304, 315 (4th Cir. 2009) ("Thus, according to FERC, neither an EA nor an EIS was required. FERC's determination is reviewed for reasonableness under the circumstances.")

Courts historically were split between a "vigorous de novo" review under a "rule of reason" approach and a narrower "arbitrary and capricious" standard. James M. Koshland, *The Scope of the*

Program EIS Requirement: The Need for a Coherent Judicial Approach, 30 STAN. L. REV. 767, 802 (1978) (outlining the circuit split between the two standards). They have since shifted to a more lopsided split between the reasonableness approach and the deferential arbitrary and capricious approach. However, this "split" is not clear or binary, and in fact the jurisprudence of NEPA is a conflation of various standards applied at different times and in different ways, leading to confusion as to what standards of review should apply where and questions regarding when the review should involve (among other issues) analysis of whether the question is factual or legal and substantive or procedural. As the questions at play in this matter are legal and procedural, the proper standard of review should not be "arbitrary and capricious." Instead, compliance with procedures required by law should be conducted under a narrow de novo standard of review, which determines whether statutorily prescribed procedures have been followed. *Campanale*, 311 F.3d at 116. This analysis is not properly conducted under Section 702(2)(A), which demands an arbitrary and capricious standard, but under Section 702(2)(D), which adequately accounts for whether NEPA's "essentially procedural" mandates are conformed with. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (describing the requirements of NEPA as "essentially procedural.").

Under any standard, judicial review in NEPA litigation is heightened by the requirement that courts must take a "hard look" at the environmental problems at play, as opposed to relying on bald conclusions. *Maryland-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973); *and see Kleppe*, 427 U.S. at 410 n. 21. "Hard looks" require a

"searching and careful inquiry into the facts" and that courts "must take a holistic view of what the agency has done to assess environmental impact." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185-86 (4th Cir. 2005)

The Seventh Circuit's application of the "arbitrary and capricious" standard results from a brief citation to *Highway J. Citizens Group v. Mineta*, 349 F.3d 938, 952-53 (7th Cir. 2003) ("arbitrary and capricious review prohibits a court from 'substitut[ing] its judgment for that of the agency as to the environmental consequences of its actions'"). However, the lower court too quickly reached for this standard of review as *Highway J.* is not comparable. *Highway J* did not consider a categorical exclusion, but rather found that federal and state agencies needed not supplement a thorough environmental assessment with an environmental impact statement. [8] *Id.* at 960. *Highway J*'s standard of review is for that reason factually and legally distinct from the question of whether a categorical exclusion may be employed to avoid not only an impact statement, but an environmental assessment as well, and as a result, NEPA altogether. 40 C.F.R. § 1501.4. Extrapolating the use of *Highway J*'s broad and deferential standard out to the procedural and legal question of whether an agency may apply a categorical

[8] This standard is the same as that previously held by the Supreme Court. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) ("An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 5 U.S.C. § 706(2)(A). *See also Marsh*, 490 U.S. at 375–76; *Kleppe*, 427 U.S. at 412).

exclusion without conducting its own review is improper. It is this broad and confused application of the arbitrary and capricious standard in the NEPA context that has led to a proliferation of agency deference and general confusion about which standards to apply in which scenarios, considering courts must also take a hard look at NEPA compliance. *Kleppe*, 427 U.S. at 410 n. 21.

> Thus, application of a categorical exclusion sidesteps NEPA's mandate that the agency "carefully consider" "detailed information" regarding environmental impacts and apply its procedural requirements "to the fullest extent possible." 42 U.S.C. § 4332. *And see Robertson*, 490 U.S. at 348. In failing to follow NEPA, the agency fails to participate in Congress's "broad national commitment to protecting and promoting environmental quality." *Id*.

Rather than the scenario analyzed in *Highway J*, this case concerns the purely procedural requirements of NEPA, and therefore should be analyzed under § 706(2)(D) for whether the National Park Service complied with the procedures required by law. 40 C.F.R. § 1501.4. At a minimum, the Court should have applied a less deferential standard such as one of reasonableness or an at times de novo review.

A. Application of an Arbitrary and Capricious Standard Is Disfavored Considering NEPA Is Purely Procedural and Should Be Reviewed Under 8 U.S.C. § 706(2)(D)

The National Environmental Policy Act ("NEPA") is "a purely procedural statute." *Save Our Wetlands v. Julich*, No. Civ.A.01–3472, 2002 WL 59401, at *3 (E.D. La. Jan. 15, 2002). Because NEPA is purely procedural, review of decisions related to compliance with NEPA's procedures should be conducted under the provision of the APA under which a reviewing court shall hold unlawful or set aside agency action, findings, and conclusions found to be without observance of procedure required by law. 5 U.S.C. § 706(2)(D). Courts have and do enforce this provision in the NEPA context. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (citing to Section 706(2)(A) but also stating: "When an agency has taken action without observance of the procedure required by law, that action will be set aside."). Review under this provision is warranted considering NEPA is purely procedural. *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 558 (describing the requirements of NEPA as "essentially procedural."); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 12 (2d. Cir. 1997) ("[B]ecause NEPA provides a procedural framework ... courts are responsible for ensuring that agencies comply with the statutory duty imposed on them by Congress.").

The chiefly procedural provisions of NEPA require that federal agencies examine "to the fullest extent possible" the environmental effects of major federal actions. 42 U.S.C. § 4332. This is accomplished through the following of a particular

procedure that involves the analysis of information, culminating in the release of an EIS and ensuring a detailed examination of the potential environmental effects of an action that has taken place. 40 C.F.R. § 1501.4; *and see Robertson*, 490 U.S. at 351 (NEPA prohibits uninformed agency action). NEPA "does not mandate particular results, but instead prescribes only a process to ensure that federal agencies consider the environmental consequences of particular actions." *Goos v. I.C.C.*, 911 F.2d 1283, 1293 (8th Cir. 1990) (citing *Robertson*, 109 S.Ct. at 1846). Its focus is to ensure "that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts." *Robertson*, 490 U.S. at 349.

Yet, that focus is denied where agencies forgo the independent gathering of information by which it can determine whether it need assess these impacts. Thus, "when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *N.W. Bypass Grp. v. U.S. Army Corps of Eng'rs*, 470 F. Supp. 2d 30, 64 (D.N.H. 2007) (citing *Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) and *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)). When federal agencies apply circular exclusions to avoid the procedural requirements of NEPA that they examine environmental impact "to the fullest extent possible," the harm that NEPA intends to prevent has been suffered. *Id*. Such a decision, one to ignore NEPA's "essentially procedural" mandate, should be reviewable by the courts without heightened deference. The proper standard is to review such decisions as to whether they were made without

observance of procedure required by law. 8 U.S.C. 706(2)(D). Review under this standard is not foreign to NEPA litigation, but is an underused line of precedent frequently overlooked due to the confusion regarding EAs versus EISs and an over willingness of courts to apply the arbitrary and capricious standard. *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 810 n. 27 (9th Cir. 2005) (Because the statute is procedural in nature, we "will set aside agency actions that are adopted 'without observance of procedure required by law.'"), (quoting 5 U.S.C. § 706(2)(D)). *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir. 2003).

As the Fifth Circuit has said in explaining the need for a more invasive reasonableness standard: [9]

> The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the

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[9] The 5th Circuit has since transitioned to an arbitrary and capricious standard for review of the decision whether to prepare an EIS. *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 202 F. Supp. 2d 594, 649 (W.D. Tex. 2002) (citing *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992)). But other courts continue to carry its mantle. *See Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990) (applying the reasonableness standard to the threshold determination of whether NEPA applied to a particular action and distinguishing threshold questions from the scenario in *Marsh*); *Jones v. Gordon*, 792 F.2d 821, 827 (9th Cir. 1986) ("Federal courts must uphold an agency decision not to prepare an environmental impact statement unless that decision is unreasonable.")

> environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered "to the fullest extent possible." The primary decision to give or bypass the consideration required by the Act must be subject to inspection under a more searching standard.

Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973). The National Park Service in this case decided it need not consider whether there is a significant impact, because it relied on an exclusion for circumstances where there is no or only minimal impacts, and NPS did so *despite* not conducting its own analysis, in contradiction to the procedural requirements of NEPA. 40 C.F.R. § 1501.4. Put simply, an agency should not be allowed to avoid the requirements of § 1501.4 by relying on a state's conclusions without doing an independent analysis. A court that applies an "arbitrary and capricious" standard to this question erodes the spirit of the act, allowing an ex parte decision that the project will not affect the environment to be "too well shielded from impartial review." *Kreger*, 472 F.2d at 466.

The Seventh Circuit should have reviewed NPS's actions for whether they were in conformance with the procedures of NEPA required by law. In failing to do so, the lower court sanctioned an ignorance of procedure that caused the exact harms NEPA seeks to avoid.

B. Whether a Categorical Exclusion Applies in This Case Is a Question of Law That Should Be Reviewed De Novo

Finally, approaching review of categorical exclusions from a standard other than arbitrary and capricious is appropriate considering current NEPA jurisprudence regarding whether a court is reviewing questions of law or fact. Questions of law are usually reviewed de novo. *Cty. of Trinity v. Andrus*, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977) ("The issue here is not whether the actions are of sufficient magnitude to require the preparation of an EIS, but rather whether NEPA was intended to apply at all to the continuing operations of completed facilities. This is purely a matter of statutory construction and thus a question of law for the Court to consider de novo"); *and see Marsh*, 490 U.S. at 377 (indicating application of legal standards to settled facts would not employ an "arbitrary and capricious" review). The analysis here should also be de novo considering it necessarily involves only application of law to settled facts. *Marsh*, 490 U.S. at 377.

When an agency, like NPS, uses a categorical exclusion, the agency is affirmatively finding that it does not need to do any environmental analysis—i.e., it does not need to create any new facts. That is exactly what happened here. The NPS did not do any of its own analysis, and instead relied on the WDNR's environmental impact statement to determine that there would be no or only minimal impacts. The facts relied on here were contained solely in the state agency's analysis: a state-level EIS that only needed to be prepared because the state determined that there were significant environmental impacts. Putting aside the illogical

nature of the NPS's decision to rely on a state's determination that there will be a significant environmental impact to itself find that there would be no or only minor impacts, the NPS is in no better place than a court to review the WDNR's analysis and come to its own conclusions.

The Seventh Circuit should therefore have used 5 U.S.C. § 706(2)(D) instead of (2)(A) to derive its standard of review.

CONCLUSION

The petition for writ of certiorari should be granted.[10]

RESPECTFULLY SUBMITTED, this 9th day of March, 2020

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[10] This petition was drafted using LegalBoards®, the first and only computer keyboards designed by lawyers, for lawyers.

No. 19-

In the

Supreme Court of the United States

SAUK PRAIRIE CONSERVATION ALLIANCE,

Petitioner

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Acting Secretary of the U.S. Department of the Interior; NATIONAL PARK SERVICE; EMILY W. MURPHY, in her official capacity as Administrator of the U.S. General Services Administration; and THE STATE OF WISCONSIN,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-2213

SAUK PRAIRIE CONSERVATION ALLIANCE,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin,
No. 17-cv-35 — **James D. Peterson**, *Chief Judge*.

ARGUED MAY 17, 2019
DECIDED DECEMBER 12, 2019

Before RIPPLE, MANION and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. The National Park Service donated more than 3,000 acres in central Wisconsin to the state's Department of Natural Resources. The goal was to turn the site of a Cold War munitions plant into a state park designed for a variety of recreational uses. That land now

makes up the Sauk Prairie Recreation Area ("Sauk Prairie Park"). The Sauk Prairie Conservation Alliance ("the Alliance"), an environmentalist group, sued to halt three activities now permitted at the park: dog training for hunting, off-road motorcycle riding, and helicopter drills conducted by the Wisconsin National Guard. The defendants include the Department of the Interior, the National Park Service, and several federal officers. The State of Wisconsin intervened.

The Alliance invokes two federal statutes. The first is the Property and Administrative Services Act ("the Property Act"), which, among other things, controls the terms of deeds issued through the Federal Land to Parks Program, 40 U.S.C. § 550, the program that led to the creation of Sauk Prairie Park. The statute requires the federal government to enforce the terms of any deed it issues. And here, the relevant deeds provide that Wisconsin must use Sauk Prairie Park for its originally intended purposes. The Alliance argues that dog training and motorcycle riding are inconsistent with the park's original purposes because neither was mentioned in Wisconsin's initial application. So, the argument goes, the statute requires the National Park Service to enforce the deeds by taking action to end those uses. The Property Act also requires, with some important qualifications, that any land conveyed through the program must be conveyed for recreational purposes. The Alliance argues that

this provision precludes military helicopter training.

The second statute at issue is the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq. The Alliance claims that the federal defendants violated NEPA by failing to prepare an environmental-impact statement prior to approving these three uses.

The district court entered summary judgment for the defendants on all claims, and we affirm. To start, the National Park Service's approval of these three uses did not violate the Property Act. Dog training and off-road motorcycle riding were not explicitly mentioned in the State's initial application, but both are recreational uses and therefore consistent with the original purposes of Sauk Prairie Park. And while military helicopter training is obviously not recreational, the National Park Service included a provision in the final deed explicitly reserving the right to continue the flights, and the Property Act authorizes reservations of this kind.

As for the NEPA claim, the Alliance failed to show that the National Park Service acted in an arbitrary and capricious manner. The agency reasonably concluded that its approval of both dog training and off-road motorcycle riding fell within a categorical exclusion to NEPA's requirements—an exclusion for minor amendments to an existing

plan. Helicopter training, on the other hand, likely doesn't fall within that category. Still, the National Park Service was not required to prepare an environmental-impact statement for this use because the agency had no authority to discontinue the flights. Because the Park Service had no discretion, it was not required to prepare an environmental-impact statement.

I. Background

The former Badger Army Ammunition Plant was once the world's largest propellant-manufacturing facility. Years of heavy industrial use contaminated the area's soil and groundwater with asbestos, lead paint, PCBs, and oil. Plant operations ceased in 1975, and since then the Army's remediation efforts have yielded thousands of acres suitable for recreational use.

In 2001 the General Services Administration ("GSA") prepared an environmental-impact statement assessing various uses for the site. Given the property's proximity to other recreation areas, the GSA concluded that low- and medium-intensity recreational uses—activities ranging from hiking to snowmobiling—would be most appropriate. Around the same time, then-Congresswoman Tammy Baldwin and local officials formed the Badger Reuse Committee, which recommended uses for the property.

Three years later the Wisconsin Department of Natural Resources ("DNR") applied to acquire portions of the property through the Federal Land to Parks Program. See 40 U.S.C. § 550. As part of its application, the DNR prepared a Program of Utilization, a four-page document describing the proposal at a general level. It said that the area would be used for recreational purposes and that it would "include facilities for hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education, and cultural/historical interpretation." The Program of Utilization added that many local groups "shared a common goal" of converting the property into a recreation area that would include low-impact uses. But while the proposal said that the permitted activities would include these low-impact uses, it never said that the list was exhaustive. To the contrary, it explicitly stated that the DNR would prepare a more detailed "Master Plan" at a later date to "define appropriate land uses." Indeed, when the DNR wrote the Program of Utilization, it had no idea which parts of the future Sauk Prairie Park it would receive, so a detailed proposal simply wasn't possible. To give an example, the state agency did not yet know that it would receive Parcel V1, a heavily contaminated area that for decades had been used by the Wisconsin National Guard for helicopter training.

In 2005 the National Park Service approved the application, stating that the DNR would convert the land primarily for recreational use, including the activities listed in the Program of Utilization. Over the next decade, the National Park Service began transferring the land piece by piece. Between May 2010 and February 2015, the agency executed six deeds conveying all but a few of the parcels that would eventually make up Sauk Prairie Park (we'll say more on the remaining parcels in a moment). Each of these six deeds included the following language:

> [T]he property shall be used and maintained exclusively for public park or public recreation[al] purposes for which it was conveyed in perpetuity … as set forth in the program of utilization … , which program and plan may be amended from time to time at the request of either the Grantor or Grantee.

In other words, each deed explicitly incorporated the DNR's Program of Utilization—subject to amendment—as a statement of the purposes for which the land was conveyed. The deeds also said that if the DNR violated this condition (or any others), the land "shall revert to and become the proper-ty of the [federal government] at its option."

During those same years, the DNR was developing its Master Plan for Sauk Prairie Park. It released a rough draft in late 2015 and a final draft a year later. Each version proposed to permit two of the activities contested here. The first is dog training. Under the Master Plan, hunters may use a small area—roughly 2% of the park—to train their dogs; namely, they acclimate the dogs to gunshots, though the parties tell us that only blanks are used. (Relatedly, the Master Plan permits "dog trialing," a competitive event that also involves hunting dogs.) It's worth noting that the Alliance has chosen not to challenge any of the other ways in which parkgoers may bring dogs to and shoot guns in the park. For instance, no one is challenging the fact that hunting itself is permitted throughout the park during certain months of the year.

The second contested use is off-road motorcycle riding. Six days a year up to 100 riders may use a limited portion of the bike trails at Sauk Prairie Park. The motorcycles must meet several environmental standards, including a noise restriction.

As for helicopter training, the Master Plan was more tentative. By the time the DNR submitted its final draft, the National Park Service had executed the six deeds we've just mentioned, but it had not yet transferred Parcel V1 where the helicopters land. The Master Plan

did say that the DNR would support the continued use of the land for "limited training exercises." But because helicopter training is not a recreational use, the Master Plan said that it would have to be phased out "unless the V1 deed includes specific language allowing future use by the [Wisconsin National Guard]."

The Master Plan also included the DNR's state-level environmental-impact statement. The DNR concluded that dog training and off-road motorcycle riding would not have a significant effect on the environment. Most of the state agency's analysis focused on the fact that the Master Plan as a whole would improve the environment by converting a former munitions plant into a conservation-focused recreation area—in other words, that the positive effects would outweigh the negative. But the plan also included a meaningful explanation of why the DNR thought dog training and off-road motorcycle riding specifically would have a minimal impact, even when viewed in isolation. The DNR's assessment of helicopter training was less optimistic. The Master Plan noted that helicopters, if permitted, would generate substantial noise, wind, and dust, and that "[t]here is a lack of information about other potential impacts [on wildlife,] including reproduction, physiological stresses, and behavior patterns."

The National Park Service approved the final draft of the Master Plan and told the DNR that it would treat the document as an amendment to the Program of Utilization. The National Park Service did not, however, prepare its own environmental-impact statement before approving the plan. Instead, it prepared a short screening form in which it concluded that the changes to the Program of Utilization were categorically excluded from NEPA's requirements. According to the agency, an environmental-impact statement wasn't necessary for "[c]hanges or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." Relying almost entirely on the DNR's environmental analysis, the agency concluded that the changes to the Program of Utilization would have "only minimal" environmental impact.

After the Master Plan went into effect, the National Park Service executed two final deeds conveying what remained of the site. One included essentially the same terms as the previous six: that the DNR must use the land in ways consistent with the purposes described in the Program of Utilization, subject to amendment, and that the federal government can reclaim the land if the DNR violates that condition.

But the final deed broke new ground. This instrument conveyed Parcel V1, the site of the

helicopter exercises. Like the other seven, this deed incorporated the Program of Utilization to define the "purposes for which [the property] was conveyed." Unlike the other seven, it included a new provision:

> Notwithstanding [the paragraph incorporating the Program of Utilization], if requested by the WDNR or by the Governor of the State of Wisconsin, the Wisconsin National Guard may enter into an agreement with the WDNR to utilize Parcel V1 for rotary wing aviation training conducted in a manner that is consistent with [the] WDNR's approved Master Plan for the Property.

According to e-mails between GSA and the National Park Service, the United States Army imposed this requirement. After the parcel was transferred, the DNR and the Wisconsin National Guard entered into an agreement permitting continued helicopter training on Parcel V1. The agreement also specified a limited flight path for helicopters crossing the rest of Sauk Prairie Park to reach Parcel V1. Over certain areas the helicopters may fly as low as 25 feet above the ground, while in others they must clear 500 feet.

The Alliance is an environmental organization whose members use Sauk Prairie

Park for recreational purposes. It sued the federal defendants, and the DNR later intervened. The Alliance claims that the National Park Service violated the Property Act by authorizing dog training and off-road motorcycle riding, uses that are inconsistent with the park's original purposes. The Alliance also claims that the agency violated the Act by approving helicopter training, a plainly nonrecreational use. Finally, the Alliance claims that the agency violated NEPA by failing to prepare an environmental-impact statement for these uses.

The Alliance moved for a preliminary injunction, which the district judge denied. While the Alliance's interlocutory appeal of that ruling was pending, the judge entered summary judgment for the defendants on all claims. The judge ruled that the contested uses do not conflict with the Property Act and that the amendments to the Master Plan do in fact fall within a categorical exclusion to NEPA's requirements. We now review that final judgment on the merits.

II. Discussion

"We review a summary judgment de novo, asking whether the movant has shown that there is no genuine dispute as to any material fact." Kopplin v. Wis. Cent. Ltd., 914 F.3d 1099, 1102 (7th Cir. 2019) (quotation marks omitted). Under the Administrative Procedure Act, which controls

our review, we may set aside the agency's decisions only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "standard of review is a narrow one." Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989) (quotation marks omitted). "We only must ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952–53 (7th Cir. 2003) (quotation marks omitted). Regarding the NEPA claim in particular, "arbitrary and capricious review prohibits a court from substituting its judgment for that of the agency as to the environmental consequences of its actions." Id. at 953 (quotation marks and alteration omitted).

Before we take up the merits, a brief word about standing. The district judge appropriately began his analysis by examining whether the Alliance has standing to challenge the contested uses. Citing well-established principles governing suits brought by environmental groups, the judge concluded that the Alliance has established standing to sue. More specifically, the judge evaluated the following requirements for associational standing:

> An organization has standing to sue if (1) at least one of its members would

> otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit.

Sierra Club v. Franklin Cty. Power of Ill., LLC, 546 F.3d 918, 924 (7th Cir. 2008). The judge concluded that the Alliance satisfies each of these elements, and we agree. No one contests the point, so no more needs to be said.

A. The National Park Service's approval of the contested uses was fully consistent with the Property Act.

We start with an overview of the statutory framework. Four aspects of the Property Act are important here:

First, the statute authorizes the Secretary of the Interior (the "Secretary") to sell surplus land to states to build parks. "[T]he Secretary, for public park or recreation area use, may sell or lease property assigned to the Secretary … to a State, a political subdivision or instrumentality of a State, or a municipality." 40 U.S.C. § 550(e)(2).

Second, the statute mandates that whenever the Secretary executes a deed, the

government must retain the option to retake the land if the state stops using the property for its intended purposes.

> The deed of conveyance of any surplus real property disposed of under this subsection … shall provide that all of the property be used and maintained for the purpose for which it was conveyed in perpetuity, and that if the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the Government, revert to the Government.

§ 550(e)(4)(A).

Third, the statute authorizes the Secretary to include other necessary reservations in addition to the option to retake the land. "The deed of conveyance of any surplus real property disposed of under this subsection … may contain additional terms, reservations, restrictions, and conditions the Secretary of the Interior determines are necessary to safeguard the interests of the Government." § 550(e)(4)(B).

Fourth, the statute imposes an affirmative obligation on the Secretary to enforce the terms of the deeds. The Secretary "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."

§ 550(b)(1).

1. Dog Training and Off-Road Motorcycle Riding

No one disputes that both dog training and off-road motorcycle riding are recreational activities. The Alliance argues that the National Park Service nonetheless violated the Property Act when it approved these uses because (1) the federal government has an obligation under § 550(b)(1) to enforce the terms of the deeds; (2) the deeds say, in accordance with § 550(e)(4)(A), that the property may be used only for its originally intended purposes; and (3) these two activities were not among the originally contemplated uses. This argument turns on how the park's originally intended purposes are defined. For what it's worth, we agree with the Alliance that we begin with the Program of Utilization. All eight deeds explicitly incorporate that document as a statement of the "public park or public recreation purposes for which [the property] was conveyed in perpetuity." But the Alliance fails to appreciate the broad strokes with which the Program of Utilization discussed the park's purpose. The document is written at a high level of generality. It simply says that Sauk Prairie Park will be used

for recreation with the specifics to be filled in later by the Master Plan. And that's exactly what happened here.

The Alliance insists that the Program of Utilization limits the park's uses to the specific activities listed—things like hiking and camping—or at the very least to low-impact uses. But that's not what the Program of Utilization says. It says only that the proposed uses will *include* those listed. And we generally read the word "including" to "introduce[] examples, not an exhaustive list." *Bernal v. NRA Grp., LLC*, 930 F.3d 891, 894 (7th Cir. 2019) (quoting Antonin Scalia & Bryan A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012)).

So we frame the purpose of the conveyance at an appropriately general level: the property was conveyed for recreational use, writ large. And dog training and off-road motorcycle riding are fully consistent with that broad recreational purpose. When the Master Plan filled in the details by adding these uses (among others), it did no more than implement what was laid out in the Program of Utilization. So there was no deed violation—and therefore nothing for the National Park Service to enforce.

The Alliance offers two responses. First, it says that the DNR was bound not just by the Program of Utilization but also by the

recommendations of the Badger Reuse Committee, the group of local officials organized early in the process. The Alliance maintains that the committee recommended only low-impact uses. But it has never explained why those recommendations are binding. Granted, the Program of Utilization says that the Master Plan would "build upon work done" by the committee. But it never said that the Master Plan's authors were bound to what the committee had in mind. As far as we can gather from the record, the committee's recommendations were exactly that: recommendations.

Second, the Alliance argues that the DNR was authorized to add new activities only if the additions were similar to the activities that were already listed—namely, those with similarly minimal environmental impact. The Alliance frames this argument as a variation on the *ejusdem generis* canon of interpretation. *See* SCALIA & GARNER, *supra* at 199 ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."). Once again, nothing in the Program of Utilization called for that kind of rigidity. The document included a nonexhaustive list of examples with a separate provision explaining that the list would be expanded. Indeed, the most the document says is that the listed activities were "the types of uses we'd anticipate would come out

of the planning process." Nothing in that language outright prohibited the DNR from exploring other recreational uses.[1]

Simply put, nothing in the text of the document suggests a restriction on the DNR's ability to add new recreational uses. The National Park Service did not violate the Property Act when it approved dog training and off-road motorcycle riding at Sauk Prairie Park.[2]

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[1] As for *ejusdem generis*, there are several reasons the canon doesn't apply. For one, we typically use it "to ensure that a general word will not render specific words meaningless," *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011), and there's no risk of that here. To the contrary, it's obvious why this document would include some specifics in addition to a general reservation for amendments: It was an early proposal for a large-scale plan, so it would be natural to give as many details as possible while otherwise retaining flexibility. So the canon just doesn't do any work here—for this reason, and others. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (explaining that the canon is relevant only when the text follows an exact pattern: where there is "a list of specific items separated by commas and followed by a general or collective term"); *Tourdot v. Rockford Health Plans, Inc.*, 439 F.3d 351, 354 (7th Cir. 2006) (explaining that the canon applies only if "uncertainty or ambiguity exists").

[2] The Alliance also raises a technical challenge to a provision in the Master Plan permitting the DNR to hold unspecified special events outside the park's normal use patterns. But the Alliance offered almost no independent analysis of why that provision violates the Property Act. In any event, the special events will be recreational in nature,

2. The National Guard's Helicopter Exercises

Unlike dog training and off-road motorcycle riding, military helicopter training is legitimately inconsistent with the recreational uses laid out in the Program of Utilization. No one argues otherwise. But the National Park Service included a provision in the deed conveying Parcel V1 that explicitly permits the DNR to reach an agreement with the Wisconsin National Guard to authorize continued helicopter training. This counts as an "additional … reservation[] … necessary to safeguard the interests of the Government" as permitted under § 550(e)(4)(B).

In response the Alliance argues that § 550(e)(4)(B) is still subject to the statute's overarching requirement that the property be conveyed for recreational use. That is, the Alliance contends that the "additional reservations" can include whatever reservations the government finds are in its interests unless those reservations would permit non-recreational activity.

We disagree with this interpretation of the Property Act. It is perfectly consistent with the statute for the federal government to convey its

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so they—like dog training and off-road motorcycling—are perfectly consistent with the purposes for which Sauk Prairie Park was conveyed.

property to the State of Wisconsin "for public park or recreation area use," § 550(e)(2), and to require that "the property be used and maintained" by the State in perpetuity for recreational use, § 550(e)(4)(A), while simultaneously including "reservations" in its own interests that have nothing to do with recreation. The Alliance counters that the statute puts the government to an all-or-nothing choice: abandon all nonrecreational interests in the property or don't use the § 550(e) land-grant program at all. But that ultimatum simply isn't in the statute's text. The statute instead broadly permits reservations—i.e., "[t]he establishment of a limiting condition or qualification." *Reservation*, BLACK'S LAW DICTIONARY (11th ed. 2019); id. ("A keeping back or withholding."). That is, while § 550(e)(2) authorizes the government to sell or donate the property for recreational use, § 550(e)(4)(B) authorizes the government to limit and qualify that transfer. The fact that the transfer must be for a given reason doesn't mean that the limitations on that transfer must advance the same purpose. If they did, they wouldn't even be limitations.

After all, it's hard to imagine a reservation aimed exclusively at recreation that would be "necessary to safeguard the interests" of the United States Government. § 550(e)(4)(B). Indeed, the Alliance's argument would invalidate most of the other reservations found in these deeds, none

of which it contends were unlawful. For example, the deeds retain for the federal government "a non-exclusive easement for use of … roadways," presumably for nonrecreational purposes. The deeds also grant the government the right "to enter upon the Property for any purpose of its own as long as [the] Army continues to occupy any portion of the former" munitions plant. (Emphasis added.) And the deeds grant the Army "the right to excavate and remove clay from any portion of the Property." If the Alliance's interpretation is correct, all of these unchallenged reservations would also violate the Property Act because they all permit nonrecreational uses. But the Alliance's interpretation is not correct; the clear terms of § 550(e)(4)(B) permit the government to include exactly these kinds of qualifications.

Next, the Alliance says that the helicopter-training provision is unlawful because it conflicts with other parts of the deed that require the property to be used for recreational purposes consistent with the Program of Utilization. But the paragraph of the deed authorizing helicopter training explicitly says that it applies "notwithstanding" the parts of the deed that discuss recreational uses. Because of that superordinating language, there is no conflict.

Finally, the Alliance says that § 550(e)(4)(B) should not apply because there is no evidence that the Secretary actually determined that this

reservation is "necessary to safe-guard the interests of the Government." This argument is new on appeal; the Alliance never mentioned it in the district court. When we raised the prospect of waiver at oral argument, the Alliance's attorney directed us to two pages of its summary-judgment brief. But those pages never mention this point, nor does anything in the rest of the brief. The argument is therefore waived. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("It is a well-established rule that arguments not raised to the district court are waived on appeal.").

Even if the Alliance had preserved this argument, the available evidence suggests that the Secretary included this reservation because the Department concluded, in light of a request by the Army, that the provision was necessary to safeguard the nation's interests in training members of the National Guard. In one e-mail, a GSA representative explained to Elyse LaForest of the National Park Service that the helicopter provision was "a requirement imposed by [the] Army to allow continued use of the parcel by [the] Wisconsin National Guard for helicopter training activities." In a second e-mail, LaForest explained to the DNR that "helicopter use is a condition of assignment by the Army." And in a third e-mail chain, LaForest informed the State that the provision was originally requested by the Pentagon and that the National Park Service did not have the authority to move forward until it got

"word from [the] Army." So waiver aside, the Alliance's argument is meritless.

As a fallback the Alliance argues that even if helicopter training in Parcel V1 is not unlawful, the low-level flights over the rest of the park are a step too far. As the Alliance correctly notes, the deeds conveying the other parcels said nothing about helicopters. They simply said that the "property shall be used and maintained exclusively for public park or public recreation[al] purposes … in perpetuity." The federal defendants argue that the other deeds are relevant only in defining which land uses are permitted and that the military has the right to use the airspace over those parcels regardless of whether the deeds explicitly permit it.

We're hard-pressed to evaluate this argument because no party cites any support for its position—not a single case, statute, or regulation. The Alliance simply declares that the flights violate the deeds; the federal defendants declare that they do not. But this isn't an easy question with an obvious answer. We've identified a number of legal principles that could plausibly be relevant. For instance, a Wisconsin statute declares that "[t]he ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath." WIS. STAT. § 114.03. Like-wise, the Wisconsin Supreme Court has said that "a land-

owner has a three dimensional property interest in … the block of air that is bounded by … the person's land holdings … and rises up to approximately the height of the government-defined minimum safe altitude of flight." *Brenner v. New Richmond Reg'l Airport Comm'n*, 816 N.W.2d 291, 303 (Wis. 2012). And the state high court has also held that the government takes a property interest in a piece of land if it flies "low enough and with sufficient frequency to have a direct and immediate effect on the use and enjoyment of the property." *Id.* at 310. On the other hand, while federal regulations prohibit aircraft from flying below certain altitudes, *see* 14 C.F.R. § 91.119, they carve out an exception for helicopters, which "may be operated at less than the minimums prescribed" elsewhere so long as the pilot follows federal law and flies "without hazard to persons or property on the surface," *id.* § 91.119(d).

Without the benefit of any briefing on these issues, we have no basis to properly evaluate this argument. Because the Alliance did not develop its position in a meaningful way, this argument is also waived. *See Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007) ("A party waives any argument that it does not raise before the district court or, if raised in the district court, it fails to develop on appeal.") (quotation marks omitted).

B. The National Park Service's NEPA analysis was not arbitrary or capricious.

NEPA requires federal agencies to prepare environmental-impact statements for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). The federal defendants argue that the National Park Service was not required to prepare an impact statement evaluating dog training or off-road motorcycling because the agency's approval of these uses was categorically excluded from NEPA's requirements. As for helicopter training, they argue that the National Park Service had no discretion to discontinue the flights in light of the Army's demands.

1. Dog Training and Off-Road Motorcycle Riding

Whether an environmental-impact statement is required hinges on whether the action at issue will "significantly affect" the environment. The question here is how much analysis an agency must do before deciding that an action won't have significant environmental effects. More specifically, how can an agency know what effects the action will have without preparing the environmental-impact statement in the first place?

In the typical case, an agency will prepare an "environmental assessment," see 40 C.F.R. §

1501.4(b), which we've described as "a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary," *Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998) (quotation marks omitted). But an agency can skip the environmental assessment if an action falls within a "categorical exclusion," see 40 C.F.R. § 1501.4(a)(2), which the regulations define as "a category of 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 in procedures adopted by a Federal agency," *id.* § 1508.4. If an action falls within a categorical exclusion, the agency generally does not need to prepare an environmental-impact statement, subject to one carveout: Even if an action falls within a specified category, an environmental-impact statement is still necessary if there are "extraordinary circumstances" indicating that the action will nonetheless have a significant effect. See *id.* So the inquiry presents two questions: Does this action fall within a category that generally has no significant effect? And will it nonetheless have a significant effect because of extraordinary circumstances unique to this case?

The National Park Service prepared neither an environmental-impact statement nor an

environmental assessment. Instead it took the position that the decision to permit the contested uses fell within a categorical exclusion for "[c]hanges or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." We'll call this the minor-amendment category.

We begin by noting that the Alliance has never challenged whether the minor-amendment category is legitimate in the first place—despite several potential problems with its provenance. For one, the substance of this category of exclusion is rather unusual. As mentioned, section 1508.4 permits an agency to skip an environmental-impact statement for actions falling within a specified category, but only if it uses established procedures to determine that actions within that category generally have no significant effect. In other words, NEPA always requires some sort of environmental analysis, but the agency may do it at the categorical level rather than on a case-by-case basis. But the minor-amendment category is defined in terms of whether an action's impact will be minimal, which is completely circular: Why doesn't the agency have to assess whether the action will have a significant effect? Because it falls within the minor-amendment category. Why does it fall within that category? Because it won't have a significant effect. Given that circularity, it's unclear what kind of environmental analysis the

National Park Service could have possibly done at a categorical level.[3]

Nonetheless, the Alliance did not raise this point in its briefs, and at oral argument it affirmatively waived any challenge to the substance of the minor-amendment category. For the purpose of this litigation, no environmental-impact statement was required if the National

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[3] There was also some uncertainty at oral argument about whether this category was developed through notice-and-comment rulemaking and whether it appears in the Federal Register—both of which are indisputably required. See 40 C.F.R. §§ 1508.4, 1507.3. But after oral argument the government was finally able to confirm that the minor-amendment category went through the rulemaking process and that it appears in the federal register. See National Environmental Policy Act; Revised Implementing Procedures, 49 C.F.R. §Fed,233, 39,235 (Oct. 4, 1984).

Likewise, there was some uncertainty about whether the minor-amendment category appeared anywhere in the record on appeal. In the National Park Service's NEPA screening form—the document in which it determined that no environmental-impact statement was needed—the agency claimed that the minor-amendment category could be found in section 3.3(B)(1) of the agency's NEPA handbook. But the parties could not identify at oral argument where section 3.3(B)(1) appeared in the record. The agency's appendix includes only section 3.3(A)(1)—a similarly worded category that applies to changes to "actions related to general administration." But the agency indisputably did not rely on that category here. It wasn't until after oral argument that the government finally supplemented the record with the correct portion of its NEPA handbook.

Park Service found that the amendments to the Program of Utilization "would cause no or only minimal environmental impact."

The first major dispute is whether it was appropriate for the National Park Service to rely almost exclusively on the DNR's environmental-impact statement. The National Park Service itself prepared only a short 13-page screening form in which it checked a few boxes and included a few lines of brisk explanation. Its final conclusions rested almost entirely on conclusions already made by the state environmental agency. The Alliance claims that the National Park Service was required to conduct its own independent analysis to satisfy NEPA.

We disagree. To be sure, there are several places where either NEPA or its associated regulations require independent actions by the federal agency itself. For instance, when a full environmental-impact statement is necessary, the statute requires "a detailed statement by the responsible official." § 4332(C) (emphasis added). Likewise, an agency can approve a category of use as a categorical exclusion only if the category first passes through procedures established "by a Federal agency." See 40 C.F.R. § 1508.4 (emphasis added). But the Alliance hasn't cited any legal authority that limits what kind of information an agency may rely on in determining whether a properly promulgated category applies. And that's

the kind of choice that's usually left to the agency. *See La. ex rel. Guste v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988) ("[O]ur deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology.").

We dealt with a similar question in a different context in Highway J Citizens Group. The question there was whether a federal agency could rely on a state-level environmental analysis—not at the first step of the categorical-exclusion analysis (whether a categorical exclusion applies at all) but at the second step (whether extraordinary circumstances require an impact statement despite the category's application). We said that the federal agency could rely on the state's analysis because "neither a statute nor a rule requires the agency to write its own analysis." Highway J Citizens Grp., 891 F.3d at 699. That is just as true at the first step of the categorical-exclusion analysis: No statute or rule requires an independent evaluation. Accordingly, a federal agency may rely on a state's environmental-impact analysis to determine whether a categorical exclusion applies.

The next major dispute concerns the appropriate base-line. An action with "minimal" impact falls within the exclusion. But "minimal" compared to what? The Alliance insists that because the minor-amendment category is defined

in terms of "amendments," we should compare the impact of these three uses to "the impacts that would occur under the original Program of Utilization." The National Park Service disagrees. Rather than compare the amended plan to what would have happened under the original proposal, the National Park Service says that we should focus on the final plan's impact on the park's actual, current conditions.

According to the Alliance, the National Park Service's baseline distorts the inquiry in two ways. First, it absolves the agency of doing meaningful analysis because pretty much any plan would improve the park's current conditions. Sauk Prairie Park sits on the remains of a contaminated munitions plant, so any kind of recreation area will be an improvement. Second, the Alliance argues that the National Park Service's baseline allows for too much balancing of distinct impacts. Namely, the federal agency claims it can offset the negative impacts of these uses with the positive impacts of the plan's extensive habitat-restoration efforts. The problem, according to the Alliance, is that we're evaluating proposed changes to the Program of Utilization, and the original program already included those restoration efforts. The Alliance also argues that federal regulations prohibit this kind of offsetting. See 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.").

We need not decide which baseline is correct. Under either framework there was enough analysis in the Master Plan and in the NEPA screening form to support the National Park Service's conclusion that the amendments would have minimal impact. In other words, some of the analysis truly does evaluate the effect of the amendments as amendments, just as the Alliance demands.

As discussed, the National Park Service's NEPA screening form relied heavily on the environmental analysis that the DNR provided in the Master Plan. It's important to remember that when the state agency prepared its own environmental-impact statement, it was evaluating the plan in its entirety. As a result, it includes analysis of both the total result—that is, the cumulative effect of the beneficial and harmful impacts—as well as of individual uses on their own.

To give just a few examples, the Master Plan describes nine ways in which it proposed to limit the harmful effects of off-road motorcycling. Among others, riding would be limited to six days per year and to half the park's trails, and each bike would have to be tested to ensure its noise did not exceed 96 decibels. The Master Plan then explained that at Wisconsin's Bong State Recreation Area, data showed 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." Finally, the Master Plan concluded, "[w]hile individual animals may experience stress and stress responses[,] … any impacts to populations are expected to be minor." Largely relying on these findings, the National Park Service noted in its NEPA screening form that because the "plan has limited the frequency of motorized use and provides management guidelines to limit impacts on wildlife," the use would not "[h]ave significant negative impacts on species."

Note that this analysis explicitly compares what would happen with motorcycle riding to what would happen without it. In other words, it compares the effect of a plan with amendments to the effect of a plan with none. That's the Alliance's baseline.

The analysis of dog training was less extensive, but the Master Plan still assessed its impact under the Alliance's proposed baseline, at least to some extent. For instance, the plan says that "[a]ny impacts to biological resources from dog trials are likely to be minimal, localized, and of short duration." It also says that because there is no "pattern of problems or complaints related to the use of dog training grounds" at other recreation areas in the state, "[a]ny impacts

associated with the dog training at [Sauk Prairie Park] are expected to be minor and temporary."

Granted, the Master Plan also included language about the impact of the plan as a whole rather than of the amendments in isolation. For instance, it said, "When balanced against the habitat improvements that are planned and associated increases in wildlife that are expected, impacts from the use of dual-sport motorcycle[s] at [Sauk Prairie Park] are expected to be limited." But the fact that the Master Plan included some "whole plan" analysis doesn't change the fact that it also included ample analysis directly assessing the impact of the amendments themselves.

That analysis was sufficient—certainly so under our narrow standard of review. As noted earlier, we may set aside the agency's decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has directed us to ask whether the "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), but "the ultimate standard of review is a narrow one," Marsh, 490 U.S. at 378 (quotation marks omitted). In the NEPA context, we have said that "[i]f an agency considers the proper factors and makes a factual determination on whether the

environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Highway J Citizens Grp.*, 349 F.3d at 953. The agency relied on the State's analysis, which in turn evaluated the expected impact of the contested uses and concluded that the impact would be minimal—even when considered in isolation, without reference to other beneficial parts of the plan. Nothing about the agency's conclusion was arbitrary or capricious, and its application of expertise is entitled to deference.

As a final rejoinder, the Alliance falls back on the second step of the categorical-exclusion analysis. It argues that even if this use falls within the categorical exclusion, the National Park Service was still required to prepare an environmental-impact statement because of extraordinary circumstances. As required by federal regulations, the Department of the Interior has promulgated a list of potentially extraordinary circumstances that should be considered in this context. *See* 43 C.F.R. § 46.215. The Alliance claims four are at issue here.

The first three involve issues similar to those we've already discussed. The Alliance argues that the action will have "significant impacts on such natural resources and unique geographic characteristics as … park, recreation, or refuge lands[,] … and other ecologically significant or

critical areas." *Id.* § 46.215(b). It then argues that the action will have "highly uncertain and potentially significant environmental effects." *Id.* § 46.215(d). And finally, it argues that the action will "[e]stablish a precedent for future action … with potentially significant environmental effects." *Id.* § 46.215(e). But we've already held that the National Park Service adequately explained why dog training and motorcycle riding will not have significant environmental effects. These arguments fail for the same reasons.

The fourth provision is slightly more plausible. The Alliance claims that the action will have "highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources." *Id.* § 46.215(c). The National Park Service acknowledged in its NEPA screening form that there was public controversy over whether to permit active or passive recreation. The agency discounted that problem by noting that the State—not the federal government—defines the property's uses. But it's not clear why that matters: The National Park Service concedes that its decision to *approve* the State's proposed uses is a major federal action for NEPA purposes. So it has an obligation to determine whether its own extraordinary-circumstances regulations require an impact statement. And those regulations say that "highly controversial environmental effects or … unresolved conflicts" can be enough to trigger

further review. Nonetheless, the Alliance never argued before the district court that public controversy warranted a full impact statement under this regulation. The argument is therefore waived. *See Puffer*, 675 F.3d at 718.

The National Park Service's approval of dog training and off-road motorcycling fits comfortably within the categorical exclusion, and no extraordinary circumstances otherwise required a full environmental-impact statement.

2. Helicopter Training

In its NEPA screening form, the National Park Service offered essentially no independent analysis of the environmental impact of helicopter training at Sauk Prairie Park. And unlike with the other two contested uses, the agency didn't even purport to rely on the state-level environmental-impact statement. That was likely because the DNR couldn't say with certainty that continued helicopter training would not harm the environment. It noted that helicopters "will generate considerable wind and dust" and "substantial noise," and that "[t]here is a lack of information about other potential impacts [on wildlife,] including reproduction, physiological stresses, and behavior patterns."

All the same, the federal defendants argue that no impact statement was required because

NEPA applies only when an agency has discretion over whether to take the proposed action. The National Park Service had no discretion here because the Army conditioned its approval of this land transfer on continued helicopter use. It was the Army's land to begin with, and the Army would not release it without this provision. In other words, helicopter training was going to continue at Parcel V1 one way or another.

Earlier in this opinion we addressed a similar issue when we discussed whether the Secretary actually determined that the helicopter-training provision was necessary to safeguard the nation's interests as required by § 550(e)(4)(B). As we observed, the available evidence shows that the Secretary included this provision in the final deed based on the Army's request. Communications between different government agencies reveal that continued helicopter use was "a requirement imposed by [the] Army," that "helicopter use is a condition of assignment by the Army," and that the National Park Service did not have the authority to move forward until it got "word from [the] Army" on this issue.

Given that the National Park Service had no independent authority to end helicopter training at Parcel V1, no environmental-impact statement was required. The Supreme Court addressed this question in Department of Transportation v. Public Citizen, 541 U.S. 752, 766

(2004). That case involved the regulation of motor carriers (i.e., highway trucks); more specifically, it dealt with the authorization of Mexican motor carriers to operate in the United States. The statutory and regulatory background is somewhat complex, but the central question was whether an agency had to evaluate the environmental effects of opening the United States market to Mexican motor carriers if the agency had no authority to categorically exclude applications from that country.

The Court held that the agency was not required to conduct any analysis. The decision started with causation principles. NEPA requires an environmental-impact statement only when a federal action will "significantly affect" the environment, § 4332(C), and federal regulations define "effects" as something "caused by the action" the federal agency is contemplating, 40 C.F.R. § 1508.8; see Public Citizen, 541 U.S. at 763–64. The Court held that an action must be both the "but for" cause of the environmental impact as well as the proximate cause. See Public Citizen, 541 U.S. at 767. In Public Citizen there was an insufficient causal connection between the agency's proposed regulations and the environmental effect of new applications because the agency had no authority to prohibit those applications. See id. at 768–70.

This case is exactly the same. The National Park Service could either approve the provision that permitted helicopter training in the recreation area or it could permit the Army to retain the land and continue the helicopter training all the same. Because the National Park Service had no authority to end the helicopter training, there is no causal connection between its decision to approve the provision and any environmental effects continued training might have. Accordingly, the National Park Service was not required to prepare an environmental-impact statement.[4]

III. Conclusion

In sum, the National Park Service did not violate the Property Act when it approved the three contested uses. Two of the three uses are

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[4] The Alliance also briefly argues that the National Park Service should have prepared an environmental-impact statement evaluating the provision of the Master Plan permitting unspecified special events. But because these are unplanned events outside the park's normal use patterns, the Master Plan says that each permit applicant must show that the event will not unduly impact the park's resources. Today those events are merely hypothetical, so no impact statement is needed: "[NEPA] speaks solely in terms of proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145 (2010) (quotation marks omitted).

recreational activities perfectly consistent with Sauk Prairie Park's recreational purposes, and the third was authorized by an explicit reservation in the deed, as permitted by statute. Nor did the National Park Service violate NEPA. It provided enough explanation for why two of the contested uses fell within a categorical exclusion. And because it had no authority to discontinue the third use, no environmental analysis was required.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SAUK PRAIRIE CONSERVATION ALLIANCE,
Plaintiff,

v. Case No. 17cv-35-jdp

U.S. DEPARTMENT OF THE INTERIOR, SALLY JEWELL, NATIONAL PARK SERVICE, MICHAEL REYNOLDS, U.S. GENERAL SERVICES ADMINISTRATION, and DENISE TURNER ROTH,
Defendants.

v.

STATE OF WISCONSIN,
Intervenor Defendant.

OPINION AND ORDER

This case involves a dispute over the proper use of the Sauk Prairie State Recreation Area, which is located on the lands of the former Badger Army Ammunition Plant in Sauk County, Wisconsin. The federal government transferred the land to Wisconsin over a period of several years, beginning in 2009 and ending in 2016.

Plaintiff Sauk Prairie Conservation Alliance says that the recreation area should be limited to "low impact" uses, such as hiking, birding, and bicycling and it objects to a plan prepared by the Wisconsin Department of Natural Resources and approved by the National Park Service that allows dog training and dual-sport motorcycle events. The Alliance also objects to allowing the Wisconsin National Guard to continue its longstanding practice of conducting helicopter training on a portion of the property. The Alliance contends that the federal government violated both the Federal Property and Administrative Services Act (FPASA) and the National Environmental Policy (NEPA) when it allowed these uses.

Both sides have moved for summary judgment. Dkt. 47 and Dkt. 61. The court will grant defendants' motion and deny the Alliance's motion because the Alliance has failed to show either that the National Park Service (NPS) lacked authority under FPASA to approve the proposed uses for the recreation area or that it was arbitrary and capricious for NPS to conclude under NEPA that the proposed uses would have no more than a minimal impact on the environment.

UNDISPUTED FACTS

The facts are taken from the administrative record and are undisputed.

A. History of the recreation area

The Sauk Prairie State Recreation Area is made up of 3,385 acres of land in Sauk County, Wisconsin. The area was once part of the Badger Army Ammunition Plant, which covered more than 7,300 acres. **R. 3870 and 3876.** Beginning in World War II, the plant was used to manufacture military propellants, but the plant ceased operating in 1975 and the army decommissioned the land in 1997. **R. 3869 and R. 3987–88.**

The industrial activities at the plant caused contamination from asbestos, lead paint, PCBs, and oil in the buildings, sewer systems, and groundwater. The Army has undertaken efforts to remediate the contamination, so the land now meets the requirements to be used as a recreation area, **R. 3873**, but there is still "an extensive invasive species problem," **R. 3892.**

Plaintiff Sauk Prairie Conservation Alliance is a non-profit corporation located in Sauk County that promotes education and cooperative conservation on the former Badger Army Ammunition Plant lands and in the surrounding Sauk Prairie area. The Alliance was organized after the plant was decommissioned. **R. 3190–91 and 4367.**

The Wisconsin National Guard has performed helicopter training in part of what is

now the recreation area for decades. **R. 38–40.** The training is typically conducted during the week, often in the evenings or at night, and includes tactical flight training, including flights at low levels and night vision flight training over the property. Pilots also practice landings, take-offs, picking up heavy loads (typically a concrete-filled barrel on a sling), and flying a designated loop route and then setting it back down at the same site. There are approximately eight flights per week using one or two helicopters, three to five days per week. **R. 3910.**

B. GSA's decision to dispose of the land

In 2001, the General Services Administration (GSA) announced that the land that made up Badger Plant was available for disposal. **R. 3884.** The GSA prepared an environmental impact statement (EIS), considering different scenarios involving "low intensity use," "low/medium intensity use," and "medium intensity use." **R. 2528–30.** The EIS says that the property "is close to Devil's Lake State Park, [so] low intensity recreation use would be most appropriate under this land use. Low intensity uses would include passive or non-invasive nature based 'ecotourist' activities such as hiking and camping. Biking, horseback riding, snowmobiling, interpretive trails, and nature programs would also be included in this land use

classification." **R. 1175–76.** After reviewing the final EIS, GSA issued a decision confirming that it had sufficiently analyzed the environmental impacts of the disposal and would proceed with disposal of the property. **R. 1607–13.**

C. WDNR's application for the land

In 2004, the Wisconsin Department of Natural Resources (WDNR) submitted an application to acquire portions of the property through the Federal Lands to Parks Program, which is administered by the National Park Service (NPS). **R. 1614–34 and1640–61.** The application contained what is called a Program of Utilization (POU), which described WDNR's proposed uses for the property:

> WDNR will develop and manage the land at Badger Army Ammunitions Plant for public recreational purposes. The property will be classified as a recreational area, and will include facilities for hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education and cultural/historical interpretation. . . . The specifics for how the property will be developed and managed will come from a master planning process WDNR is required to prepare. However, these are

> the types of uses we'd anticipate would come out of the planning process.

R. 1650–51.

In 2005, NPS sent a letter to GSA approving WDNR's application and requesting that the property be assigned to NPS for conveyance to WDNR.

D. Transfer of the land to WDNR

From 2009 to 2016, GSA assigned portions of the land to NPS for disposal, and NPS subsequently transferred those properties to **WDNR. R. 1973–2007 and 4562–93.** Each deed contained the restriction that the property "shall be used and maintained exclusively for public park or public recreation purposes for which it was conveyed in perpetuity." The deed also stated that the POU "may be amended from time to time at the request of either the Grantor or Grantee, with the written concurrence of the other party, and such amendments shall be added to and become a part of the original application." **R. 1976, 2023, 2544, 2567, 2735, 2762, 4530, and 4565.**

E. Master plan

After WDNR began to receive the property, it initiated the process of preparing a "master plan" for the recreation area. **R. 3881.** In

December 2011, WDNR completed a "Rapid Ecological Assessment of the Area" that documented ecologically important areas, rare species, and high-quality natural communities. R. 2071. The assessment included the following information:

> The Sauk Prairie Recreation Area (SPRA) supports numerous rare species. Thirty-three rare animal species are known from the SPRA, including four State Threatened and 29 Special Concern species. Seven rare plant species are known from the SPRA, including two State Endangered (one is also Federally Threatened) and five State Threatened species. . . .
>
> Biologists and birders are concerned about population declines of many grassland bird species. Since the North American Breeding Bird Survey (BBS) began in 1966, grassland birds have declined more steeply than any other group of birds in North America and the Midwest. The SPRA provides extensive surrogate grassland, shrubland, and savanna habitat for 97 confirmed or probable breeding bird species. This is an impressive list for an area the size of the SPRA, especially the number and

> diversity of grassland and shrubland birds (21 species).

R. 2070. The assessment identified the prairie bush-clover (Lespedeza leptostachya) as a federally listed threatened plant species that had been documented in the area. **R. 2091.** However, the plant had not been observed since 1993 and the area where it was found is now fenced off. **R. 1307–08.**

In August 2015, WDNR released a draft master plan for operation of the recreation area. **R. 3003 and 3021–33.** Among other things, the plan included proposals for dual-sport motorcycle access, a dog training and dog trialing area involving the discharge of firearms using blanks, helicopter training exercises by the Wisconsin Army National Guard, and unspecified "special uses." **R. 3003 and 3021–3033.**[5] In response to WDNR's draft, NPS wrote that several of the proposed uses were not in the original application. As a result, WDNR would have to amend the POU and NPS would have to "consider proposed changes . . . and evaluate and disclose impacts from those uses." **R. 3405 and 3407.**

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[5] Dog training is teaching dogs or exercising dogs for hunting game birds or mammals to improve their hunting performance. **R. 3905.** Dog trialing is not separately defined in the record, but WDNR says that it is an "organized, short-duration competition[] that test[s] dogs' hunting skills." Dkt. 64, at 21.

On November 8, 2016, WDNR issued a "Draft Master Plan and Final Environmental Impact Statement." **R. 3862–4103.** The revised plan contained descriptions of the proposed use and management of the property and some analysis regarding potential impacts, alternatives, and public input. **R. 3862–4103.** The proposed uses in this version of the plan included off-road motorcycle events, dog training, and helicopter training by the Wisconsin National Guard. The court will discuss each of these uses and their potential environmental impact in the analysis section of the opinion.

F. NPS approval of the plan

On December 1, 2016, NPS determined that it did not need to prepare an environmental impact statement (EIS) or an environmental assessment (EA), relying on a provision in its handbook that applies to "[c]hanges or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." **R. 2659.** In concluding that neither an EIS nor an EA was needed, NPS relied on WDNR's findings in the master plan. **R. 4145–57.** NPS wrote, "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," and that "[o]verall, through managed recreational

opportunity and active land management activities, the overall quality of the natural environment at the park should improve." **R. 4156–57.**

On December 8, 2016, NPS informed WDNR that once the Wisconsin Natural Resources Board approved the plan, NPS "will consider the plan to be an amendment to the Program of Utilization (POU) contained in the state's application for the property and referenced in the deeds which transferred the property to the state and will guide the development of the site going forward." **R. 4181.** On December 14, the board approved the plan, but deleted a provision that would have allowed high-powered rocket usage on a few days each year. R 4559–64. At this point, NPS had transferred all but three parcels to WDNR. **R. 3876.**

G. Final deed

On December 15, 2016, NPS executed a deed that conveyed a 75-acre parcel (Parcel V1) to WDNR but permitted the Wisconsin Army National Guard to use the parcel for helicopter training in accordance with the master plan. **R. 4565.** (The two other remaining parcels are not at issue in this case.) The final deed included the following provision: "[I]f requested by WDNR or by the Governor of the State of Wisconsin, the Wisconsin National Guard may enter into an

agreement with WDNR to utilize Parcel V1 for rotary wing aviation training conducted in a manner that is consistent with WDNR's approved Master Plan for the Property." *Id*.

WDNR and the National Guard have entered into a "memorandum of understanding" governing helicopter training at the recreation area. **R. 3910–11 and 4162–66.** The memorandum contains a map designating a primary flight path, **R. 4166**, as well as flight restrictions, **R. 4162–63.**

A. Standing

One of the jurisdictional prerequisites to filing a lawsuit in federal court is standing to sue under Article III of the U.S. Constitution. The doctrine of constitutional standing requires the plaintiff to show that it has suffered an "injury in fact" that is "fairly traceable" to defendants' conduct and capable of being redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). None of the parties discuss the issue of standing, so it appears that defendants concede that the Alliance has it. Nevertheless, the court has an independent obligation to consider the issue. *DeBartolo v. Healthsouth Corp.*, 569 F.3d 736, 740 (7th Cir. 2009).

"An organization has standing to sue if (1) at least one of its members would otherwise have

standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit." *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 924 (7th Cir. 2008). As to the first requirement, the Alliance has submitted affidavits from several of its members. Dkts. 50–56. For example, member Charles Luthin avers that he "regularly use[s] the [Sauk Prairie State Recreation Area] for recreational purposes," such as hiking and bird watching, and that "the proposed high-impact uses conflict loudly with" his "quiet recreation." Dkt. 54, ¶¶ 9–10. The other members make similar statements, none of which defendants challenge. Although the members could have provided more specific details regarding how the proposed uses will affect them, it is reasonable to infer from the affidavits that the proposed uses will diminish the members' enjoyment of the recreation area, which is all that is required for an individual to show an injury in this context. *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 658 (7th Cir. 2011) ("[I]t is enough to confer standing that their pleasure is diminished even if not to the point that they abandon the site. For that diminution is an injury.") (citations omitted). Because it is also reasonable to infer that the members' injuries are fairly traceable to defendants' conduct and success in this lawsuit would redress those injuries, the

Alliance has satisfied the first requirement of organizational standing.

The Alliance satisfies the other two requirements of organizational standing as well. The Alliance was formed to protect the Sauk Prairie State Recreation Area, so the interests at stake in the litigation are germane to the organization's purpose. And the court sees no reason why the members would need to bring the claims in this case as individuals rather than through the Alliance. The court concludes that the Alliance has constitutional standing to sue.

B. Standard of review under the Administrative Procedure Act

The Alliance contends that defendants have violated the Federal Property and Administrative Services Act of 1949 (FPASA) and the National Environmental Policy Act (NEPA), but the Alliance does not contend that either statute creates a private right of action. Rather, the parties appear to agree that judicial review for violations of both statutes is provided under the Administrative Procedure Act. *See Milwaukee Inner-City Congregations for Hope v. Gottlieb*, No. 12-cv-556-bbc, 2013 WL 12234624, at *3 (W.D. Wis. Jan. 29, 2013) ("[T]he National Environmental Policy Act does not confer a private right of action at all. Rather, judicial review of agency action under the National Environmental

Policy Act is governed by the Administrative Procedures Act."); *Conservation Law Found. of New England, Inc. v. Harper*, 587 F. Supp. 357, 366–67 (D. Mass. 1984) ("[Plaintiffs] do not have a private right of action under the FPAS," but "Plaintiffs' claims that defendants have failed to comply with the FPAS may be construed . . . as arising under the APA."). An agency decision may be set aside under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 525 (7th Cir. 2012).

C. Federal Property and Administrative Services Act

"Under the Federal Property and Administrative Services Act of 1949 ('FPASA'), the Administrator of General Services is entrusted with the broad task of supervising and directing the disposition of surplus property, which includes any excess property not required for the needs of any federal agency." *Grammatico v. United States*, 109 F.3d 1198, 1201 (7th Cir. 1997) (citing 40 U.S.C. § 484(a) and § 472(g)). At issue in this case is 40 U.S.C. § 550(e), which allows GSA to "assign to the Secretary of the Interior for disposal surplus real property . . . that the Secretary recommends as needed for use as a public park or recreation area." The Alliance contends that defendants have violated FPASA in two ways: (1) defendants

allowed the recreation area to be used for helicopter training, which is not a recreational use; (2) defendants' approval of the area for all of the disputed uses is inconsistent with the purposes for which the property was conveyed to the state.

1. Zone of interests

Another threshold question that the parties do not address is whether the Alliance's claims fall within the "zone of interests" of FPASA, a question raised in every case brought under the APA. *Am. Fed'n of Gov't Emps.*, Local 2119 v. Cohen, 171 F.3d 460, 465 (7th Cir. 1999) ("Those seeking judicial review of administrative actions under the APA must show that they have . . . an interest falling within the 'zone-of-interests' protected by the relevant statutes."). In one of the few judicial decisions interpreting FPASA, the Court of Appeals for the First Circuit held that area residents who objected to the sale of federal land to an electric utility that planned to build a nuclear power plant did not fall within FPASA's zone of interests. *Rhode Island Comm. On Energy v. Gen. Servs. Admin.*, 561 F.2d 397, 402 (1st Cir. 1977) ("Nowhere in the FPAS statute or in the committee reports accompanying its 1949 enactment and 1952 amendments can we discern any congressional solicitude for the interests of abutters or nearby residents of real property which has become excess or surplus.") (footnote

omitted). The parties do not address this decision in their briefs.

But Rhode Island may no longer be good law. In recent years, the Supreme Court has stated that the zone of interests test "is not meant to be especially demanding" and must be applied in light of the rule that the APA makes agency action presumptively reviewable. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (internal quotations omitted). The test is satisfied if the plaintiff is "arguably" within the zone of interests, even if there is no evidence of a congressional purpose to benefit the plaintiff. Id. "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id. (internal quotations omitted).

Although Patchak did not involve FPASA, the case is instructive. The Court held that a neighboring landowner could use the APA to challenge a federal agency's decision to purchase property because the landowner alleged that the decision would "cause him economic, environmental, and aesthetic harm as a nearby property owner," id. at 224, which is similar to the Alliance's alleged harm in this case.

In any event, the zone of interests requirement is an element of prudential standing, not constitutional standing, *Bennett v. Spear*, 520 U.S. 154, 162, (1997), which means that it can be waived. *RK Co. v. See*, 622 F.3d 846, 851-52 (7th Cir. 2010) ("Prudential standing issues are subject to waiver."); *In re Ray*, 597 F.3d 871, 875 (7th Cir. 2010) ("[N]onconstitutional or prudential lack of standing may be waived by a party that fails to timely raise the issue."). "[T]he court may raise an unpreserved prudential-standing question on its own, but unlike questions of constitutional standing, it is not obliged to do so." *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008). In light of the uncertainty in the law on this issue and defendants' failure to raise it, the court will assume that the Alliance's claim falls within FPASA's zone of interests.[6] The court will turn to the merits of the Alliance's FPASA claims.

2. Helicopter training

The Alliance says that helicopter training is not a recreational use and that § 550(e) prohibits any portion of the land from being used for a nonrecreational purpose. Missing from the Alliance's briefs is any discussion of how defendants violated any of FPASA's requirements.

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[6] For the same reasons, the court will assume that the Alliance's claims under NEPA fall within the zone of interests of that statute as well.

Instead, the Alliance's arguments focus on various other documents in which either the federal or state government represented that the property would be used for recreational purposes. But the Alliance does not explain why any of those documents would be enforceable under FPASA, so any argument that relies on these documents is forfeited.

Section 550(e)(4) is the only part of § 550(e) that addresses the content of a deed:

> Deed of conveyance.--The deed of conveyance of any surplus real property disposed of under this subsection--
>
> (A) shall provide that all of the property be used and maintained for the purpose for which it was conveyed in perpetuity, and that if the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the Government, revert to the Government; and
>
> (B) may contain additional terms, reservations, restrictions, and conditions the Secretary of the Interior determines are necessary to safeguard the interests of the Government.

Section 550(e)(4) does not require the government to reserve all of the property being transferred for a particular use. Rather, it says that the deed must require the property to "be used and maintained for the purpose for which it was conveyed in perpetuity." In this case, it is undisputed that the deed for the parcel on which the helicopter training will be performed allows WDNR to enter into an agreement with the Wisconsin National Guard for "aviation training." **R. 4565**.[7]

In any event, the Alliance ignores § 550(e)(4)(B), which expressly allows the government to include reservations in the deed that are "necessary to safeguard the interests of the Government." Defendants say that "[t]he reserved helicopter use in the deed serves the United States' defense and safety interest by ensuring a well-trained state National Guard which has both a federal and a state mission." Dkt. 63, at 12 (citing **R. 4168**). Because the Alliance does not even respond to this argument in its reply

[7] Although the deed also says that the parcel will be used "exclusively for public park or public recreation purposes," **R. 4565**, the Alliance does not develop an argument that any inconsistency in the document would require the court to disregard the provision that allows helicopter training. *Boatmen's Nat. Bank of St. Louis v. Smith*, 835 F.2d 1200, 1203 (7th Cir. 1987) ("Where the document contains both general and specific provisions relating to the same subject, the specific provision controls.").

brief, the court concludes that the Alliance has failed to show that allowing part of the recreation area to be used for helicopter training violates FPASA.

3. Other challenged uses

The Alliance contends that FPASA prohibits defendants from approving any uses that were not identified in the original "program of utilization" that WDNR submitted with its application for the land. This contention has two problems. First, the document the Alliance cites does not prohibit uses such as dog training or motorcycle events. Although the document says that WDNR "anticipate[s]" that the area will include facilities for activities such as "hiking, picnicking, primitive camping, Lake Wisconsin access and viewing, savanna and grassland restoration, environmental education and cultural/historical interpretation," **R. 1650**, the document also says that "[t]he specifics for how the property will be developed and managed will come from a master planning process WDNR is required to prepare." **R. 1651.**

Second, and more important, the Alliance again fails to explain how FPASA supports the claim. The Alliance cites the language in § 550(e)(4)(A) that the property must "be used and maintained for the purpose for which it was conveyed in perpetuity." But that language relates to the requirements of the *deed*, not the "program

of utilization," which is not a document discussed in the statute. And the only limitation cited by the parties in the deeds is that the property "shall be used and maintained exclusively for public park or public recreation purposes." Because the Alliance concedes that all of the uses in dispute are "recreational" (other than the helicopter training, which is permitted for the reasons discussed above), those uses are permitted under the deed and also under § 550(e)(4)(A).

D. National Environmental Policy Act

1. Legal standard

The Alliance does not contend that NEPA prohibited defendants from approving any of the uses in dispute. Rather, the Alliance's claim is that NPS failed to adequately consider the environmental impact that the disputed uses would have before approving WDNR's plan. This is because "NEPA . . . does not mandate particular results. It simply prescribes the necessary process." *Envtl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 682 (7th Cir. 2006) (citation omitted). The purpose of the law is to foster public comment and help the agency make an informed decision about the environmental consequences of its actions. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). See also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely

prohibits uninformed—rather than unwise—agency action.").

NEPA requires a federal agency to prepare an environmental impact statement (EIS) for all "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Obviously, the agency must determine whether its action will "significantly" affect the environment before deciding whether to prepare an EIS and there are two ways an agency can make that determination. First, the agency can prepare an "environmental assessment" (EA), which is "a shorter, rough-cut, low-budget EIS." Highway J Citizens Grp. v. Mineta, 349 F.3d 938, 953 (7th Cir. 2003). Second, the agency can decide that the action falls within a "categorical exclusion," so it does not require either an EIS or an EA. *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 525 (7th Cir. 2012).

In this case, the parties assume that the land transfers at issue were "major federal actions." The question is whether NPS erred in concluding that WDNR's plan for the recreation area was categorically excluded from the requirement to prepare an EIS.[8]

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[8] WDNR prepared a state version of an EIS, but defendants do not contend that WDNR's EIS qualifies as an EIS under NEPA.

The statute does not define the term "categorical exclusion." There is a definition in the regulations, but it is somewhat circular:

> Categorical exclusion means a category of 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 in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. § 1508.4. Thus, a categorical exclusion may apply when an action will not have a significant environmental impact, which is essentially the same standard that governs whether an EIS is required. D. Mandelker, *NEPA Law and Litigation* § 7:10 (2017) ("The effect of this method of defining categorical exclusions is to apply the same criteria for determining whether an impact statement is necessary to the categorical exclusion decision.").

NPS has its own guidelines, but they do not provide much more specificity, at least for the purpose of this case. NPS relies on a categorical exclusion in its handbook that applies to "[c]hanges or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." R. 2659. The parties debate whether the NPS guidelines impose a stricter standard than the regulation, that is, whether there is a difference between a "significant environmental effect" and a more than "minimal environmental effect." For the purpose of this decision, the court will assume that "minimal environmental effect" is the appropriate standard.

The parties do not cite any cases from this circuit in which a court considered whether it was appropriate for an agency to invoke a categorical exclusion. But both the Supreme Court and the court of appeals have consistently held that the APA's "arbitrary and capricious" standard applies to alleged NEPA violations in similar contexts. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (decision to prepare an EA instead of an EIS); *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1075 (7th Cir.), cert. denied sub nom. *Citizens for Appropriate Rural Roads, Inc. v. Foxx*, 137 S. Ct. 310 (2016) (decision whether to supplement EIS).

In the context of a case in which a plaintiff challenged an agency's decision to prepare an EA instead of an EIS, the court of appeals described the arbitrary and capricious standard as follows:

> [O]ur inquiry is searching and careful but the ultimate standard of review is a narrow one. We only must ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference. In the context of NEPA, arbitrary and capricious review prohibits a court from substituting its judgment for that of the agency as to the environmental consequences of its actions. In fact, the only role for a court in applying the arbitrary and capricious standard in the NEPA context is to insure that the agency has taken a hard look at environmental consequences.

Highway J, 349 F.3d at 952–53 (internal quotations, citations, and alterations omitted). *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotations omitted).

2. Challenged uses

The Alliance contends that that NPS failed to adequately consider the environmental impacts of three types of proposed uses: (1) helicopter training; (2) off-road motorcycle events; and (3) dog training. The Alliance also mentions dog trialing but does not discuss that activity separately from dog training. And the Alliance does not respond to WDNR's contention that dog trialing is not at issue because it is not a preapproved use under the master plan and cannot be approved without a special permit that takes into consider the environmental impact of the activity. Accordingly, any challenge to dog trialing—as distinct from dog training—is forfeited. The court will consider the other three proposed uses in turn.

NPS acknowledges that it relied primarily on the findings in WDNR's master plan to determine whether a categorical exclusion should apply. The parties assume that it was not inappropriate for NPS to do that, so the court will make the same assumption and consider the master plan on its own merits.

a. Appropriate baseline

There is a threshold question regarding how NPS should have measured any potential impact of the proposed uses. Defendants say that the appropriate baseline was the condition of the environment at the time the use was approved. The Alliance says that the appropriate baseline is what the condition of the environment *would have been* under the original "program of utilization." The Alliance's logic is that the challenged uses were not included in the program of utilization and were added later as an amendment, so the original proposal should control. The Alliance does not say in its briefs why the baseline is important, but presumably the Alliance's view is that the original proposal did not allow as many uses (including helicopter training), so environmental conditions would have improved under that plan.

As with many of the Alliance's arguments, the problem with this logic is that it is not tied to the statute at issue. NEPA directs the agency to determine whether its actions will "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). The regulation governing categorical exclusions similarly directs the agency to consider whether its actions will have "a significant effect on the human environment." Both the statute and the regulation presuppose that the agency will determine the effect on the environment as it actually exists.

The original program of utilization never took effect, so it had no impact on the environment. How would NPS determine the impact of the master plan on a set of conditions that never occurred? Was NPS supposed to speculate what the conditions would have been under the original program of utilization at some undetermined point in the future and then speculate as to how the disputed uses would affect those conditions? The Alliance does not explain why that would be logical or how it would even be possible.

The Alliance relies on the language of the particular categorical exclusion that NPS invoked, but it provides no support for the Alliance's view. The exclusion applies to changes that will have no more than a minimal environmental impact. Nothing in the exclusion suggests that the NPS should engage in a counterfactual exercise regarding the impact of changes on a set of ecological conditions that might have existed under a plan that never took effect.

The Alliance also cites language in the NPS handbook:

> 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.

R. 3407–08. The Alliance says that the cited language supports its view, but that would be the case only if "no action" and "baseline" meant the same thing. As NPS points out, the handbook treats the two concepts as distinct: "the no-action alternative is different than the baseline used for predicting changes to the conditions of resources." **R. 2681.** According to the handbook, "[t]he current state of the resources affected serves as the baseline for predicting changes to the human environments that could occur if any of the alternatives under consideration, including the no-action alternative, are implemented." Id. In accordance with the statute, regulation, and handbook, the court concludes that the appropriate baseline for determining the impact to the environment is the condition of the environment at the time NPS approved the conditions.

b. Helicopter training

The Alliance objects to helicopter training on the ground that it will generate substantial

noise and wind. NPS says that the helicopter training "was properly excluded from the analysis of environmental impacts" because the training was a "right reserved in the deed [to Parcel V1] and therefore the Park Service did not have jurisdiction to review and concur in it." Dkt. 65, at 21. The court would be inclined to agree. But even setting that point aside, the Alliance's challenge to the helicopter training fails because the training has been occurring for decades. Although the original proposal excluded helicopter training as a use, as noted above, the original proposal never went into effect, so that training was already taking place when WDNR prepared the master plan. Whatever effect the helicopters have on the environment has already occurred.

The Alliance points to no evidence that the amount of training is likely to increase or that the response of the area wildlife to the helicopters is likely to change in any way. Also, helicopter training is limited, as to area (take off and landing are restricted to one parcel of land that is closed to the public and pilots must follow a restricted flight path that "avoid[s] over flight of people and livestock below 500 feet"), timing (flights are not permitted during deer-hunting season, on the weekends or before 10 a.m.), and volume (the number of flights is limited "to reduce the noise signature to the area"). R. 3910 and 4162–63. The court sees no reason that NPS should have concluded that continuing the use of the

helicopters will have any additional impact on the environment.

c. Off-road motorcycle events

The Alliance says that that NPS failed to adequately consider several potential environmental effects of the off-road motorcycle events: (1) the noise caused by the motorcycle engines; (2) pollution from emissions; (3) dust generated on the trails; and (4) harm to local wildlife, especially grassland birds in the area where some of the trails are planned. The last issue is related to the first three because the Alliance's allegations about harm to wildlife are based primarily on their allegations about the other issues.

In arguing that the environmental effects from the motorcycles will be more than minimal, the Alliance relies primarily on language in the master plan itself:

- Sound level on the trails may be "higher" or even "considerably higher" than the sound level on the roads in and around the park. R. 4008 and 4015; the sound "may cause displacement, nest desertion [and] breeding failure" and "may also result in animals being displaced for longer periods than just the days that the motorcycles are using the repurposed trails," **R. 4015**;

- "dust is likely to be created during dual-sport motorcycle events," **R. 4006**;

- "exhaust from the motorcycles could impact sensitive species," **R. 4015.**

The problem with relying on the master plan is that, after acknowledging these potential issues, WDNR identified numerous restrictions that it is placing on the use of the motorcycles to minimize any impact. The motorcycles will be permitted in the area only six days a year and on no more than two consecutive days. Only two of the six days may fall between April 15 and July 31, which is the nesting period for birds. The motorcycles are limited to 50 percent of the trails designated for bicycling or horse riding. On the days when motorcycles are permitted, they will be restricted to the hours between 9:00 a.m. and 4:00 p.m. Participation is limited to 100 riders. All motorcycles will have to undergo noise testing, with a limit of 96 decibels. In addition to these required limitations, WDNR reserves the right to set additional restrictions on particular events to prevent any impact to the recreation area. **R. 4014–15.**

WDNR also provided comparisons for context. For example, it estimated that the motorcycles will generate emissions from approximately 100 gallons of gas on the days that

they are permitted. This compares to emissions from an estimated 1,660 gallons of gas from vehicles driving on roads surrounding the recreation area. R. 4006. As a result, WDNR estimated that the motorcycles' effect on air quality will be "minimal." *Id*.

As to the effect on grassland birds in particular, WDNR noted that most of the "high-priority" habitat for grassland birds has been transferred to the Ho-Chunk Nation and is not part of the recreation area. R. 2096 and 3877. Of the habitat that remains in the recreation area, some of it "was heavily disturbed during plant operations and was used primarily in the production of rocket propellant and related materials. Hundreds of structures and dozens of miles of roads were constructed [t]here. Much of the topography and soils were altered during construction and deconstruction (e.g., contaminated ditches were dug out and filled)." **R. 3948.** WDNR's goal is to improve and further restore the habitat to make it more hospitable for grassland birds by controlling woody invasive species and establishing native grasslands. Id. Although there are some trails in the habitat, they are placed "around the exterior of [the habitat] to create an interior core of contiguous habitat for grassland birds." Dkt. 64, at 18 (citing **R. 3948**). As a result of its restoration efforts, WDNR anticipates that its plan will lead to "substantial and long-term increases in

populations of native species." **R. 3873** (emphasis added).

The Alliance does not respond to WDNR's argument about the grassland birds in its reply brief, so the court assumes that the Alliance has abandoned its argument on that issue. The Alliance does challenge the view that the restrictions WDNR has imposed will be sufficient to prevent adverse environmental impacts. The Alliance's primary argument is that defendants have not adequately explained how the restrictions will prevent adverse environmental impact.

The court disagrees for two reasons. First, WDNR did provide some data in the master plan to support its conclusions. For example, the master plan discusses research related to the effect that motorized traffic can have on the number and diversity of species in the area. **R. 4014.** The research showed a "correlation between the volume of traffic and the level of impact." *Id*. The plan cites data from the Bong State Recreation Area, which allows ATV and off-road motorcycle riding. According to that data, there did not "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 of the property. Rather, the distribution of birds appears more influenced by the type and quality of habitats present." *Id*. This data supports WDNR's conclusion that limited off-road

motorcycle events will have no more than a minimal effect on the environment.

Second, "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS." Pub. Citizen, 541 U.S. at 767–68 (citations omitted). In other words, both federal agencies and courts reviewing agency decisions under NEPA must take a pragmatic approach and consider the likelihood that requiring the agency to go through the additional time, effort, and expense of collecting more data will lead to useful information. *River Rd. All. v. Corps of Eng'rs of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985) ("[T]he purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement."). Courts must "take care to distinguish between claimed deficiencies . . . that are 'merely flyspecks' and those that are 'significant enough to defeat the goals of informed decisionmaking and informed public comment.'" *Habitat Educ. Ctr.*, 673 F.3d at 528 (quoting *Utahns for Better Transp. v. U.S.*

Dep't of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002)).

In the context of categorical exclusions in particular, courts have held that "[d]ocumentation of reliance on a categorical exclusion need not be detailed or lengthy. It need only be long enough to indicate to a reviewing court that the agency indeed considered whether or not a categorical exclusion applied and concluded that it did." *Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004). A more burdensome requirement would defeat the purpose of categorical exclusions, which is "to streamline procedures and reduce paperwork and delay." *Id.*

The Alliance is correct that defendants did not cite any studies that considered the effect that dust generated by the motorcycles would have on the environment. But at the same time, the Alliance has not provided any basis for believing that it *will* have a harmful effect. WDNR has placed such significant restrictions on the use of motorcycles that it is not unreasonable—in the absence of evidence to the contrary—to find that any environmental effects will be minimal. Even the authority that the Alliance cites says that a plaintiff must show that there are "substantial questions whether a project may have a significant effect on the environment" to successfully challenge an agency's invocation of a categorical

exclusion. Anderson v. Evans, 314 F.3d 1006, 1017 (9th Cir. 2002). The Alliance has not shown that. Even if the court assumes that the master plan suggests that the motorcycles will have *some* adverse impact on the environment, that is not the standard. It was not arbitrary and capricious for NPS to conclude that there would be no more than minimal effects on the environment.

For the sake of completeness, the court will address one other issue that the Alliance raises in its briefs regarding off-road motorcycle events. The Alliance says that it was not reasonable for WDNR to rely on data for automobile emissions to support a conclusion that emissions from dual-sport motorcycles would not have more than a minimal effect on air quality. Although it is true that WDNR did not cite data showing "what pollutants are emitted by dual-sport motorcycles," Dkt. 48, at 33, the Alliance does not allege that the pollutants are any different from automobiles and it provides no grounds for inferring that 100 dual-sport motorcycles will have any greater effect on the environment than the more than 10,000 vehicles (which may include dual-sport motorcycles) that pass by the recreation area each day. **R. 4006.**

d. Dog training

One portion of the recreation area will be designated as a dog training ground. R. 3905. The Alliance does not contend that the dogs themselves

will have any adverse environmental effects. Instead, the Alliance focuses on the discharge of firearms (using blanks) that may occur during the training, alleging that the noise could disrupt breeding of animals in the area.

NPS's conclusion that the dog training would not have more than a minimal impact on the environment was not arbitrary and capricious. First, dog training is limited to a 72-acre portion of the recreation area, which covers 3,385 acres. R. 3905. That in itself substantially limits the impact that dog training might have on wildlife in the recreation area. The Alliance does not identify any sensitive species that are concentrated in the two percent of the recreation area that will allow dog training.

Second, the Alliance does not challenge various findings in the master plan that support NPS's conclusion: (1) based on WDNR's experience with 50 other sites in the state that allow dog training, WDNR anticipates that "the use level of at any given time at training grounds" will be "low" because "people prefer to train their dogs with few distractions," **R. 4023**; (2) the discharge of firearms during dog training will be "occasional," **R. 4018**; (3) the dog training area abuts a highway, **R. 4094**, which generates its own noise; and (4) the effect of firearms used in training will be "similar to the impacts that occur from hunting." **R. 4018.**

The last finding is particularly noteworthy. Hunting is also permitted in the recreation area, **R. 3903–04**, and the Alliance is not challenging that use. In fact, the Alliance classifies hunting as "low-impact recreation." Dkt. 48, at 17. The Alliance fails to explain why the occasional discharge of firearms is "low-impact" in the context of hunting but harmful in the context of dog training.

The only evidence the Alliance cites in favor of a conclusion that dog training will have an adverse environmental impact is an "expert sound study" the Alliance submitted that concluded that a rifle range would 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." **R. 3207.** But the reasons why the study is not probative are obvious. There will be no rifle range at the recreation area and the Alliance provides no basis for concluding that effects of a shooting range would be similar to the effects of dog training. The study itself relies on a view that "rifle ranges are traditionally highly trafficked sites in Wisconsin," **R. 3213**, which alone distinguishes a range from WDNR's description of dog training areas in the state. Particularly because the Alliance does not even attempt to challenge the finding that dog training and hunting have similar effects on the environment,

the study does not render the NPS's decision arbitrary and capricious.

E. Conclusion

The Alliance has failed to show either that: (1) NPS lacked authority under FPASA to approve helicopter training, dual-sport motorcycle events, and dog training and trialing at the Sauk Prairie State Recreation Area; or (2) it was arbitrary and capricious for NPS to decide that an EIS was not needed. Accordingly, the court will grant defendants' motion for summary judgment.

ORDER

IT IS ORDERED that:

1. Defendants' motion for summary judgment, Dkt. 61, is GRANTED and plaintiff Sauk Prairie Conservation Alliance's motion for summary judgment, Dkt. 47, is DENIED.

2. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered May 3, 2018.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SAUK PRAIRIE CONSERVATION ALLIANCE,
Plaintiff,

v. Case No. 17cv-35-jdp

U.S. DEPARTMENT OF THE INTERIOR, SALLY JEWELL, NATIONAL PARK SERVICE, MICHAEL REYNOLDS, U.S. GENERAL SERVICES ADMINISTRATION, and DENISE TURNER ROTH,
Defendants.

v.

STATE OF WISCONSIN,
Intervenor Defendant.

ORDER

This suit arises from a dispute over the use of the Sauk Prairie State Recreation Area (the Area), where the Badger Army Ammunition Plant used to be. According to plaintiff Sauk Prairie Conservation Alliance, the federal government gave the land to the Wisconsin Department of National Resources on the condition that it be

reserved for conservation, education, and low-impact recreational use such as hiking. But in December 2016, the WDNR approved high-impact uses, including motorcycle racing, helicopter flight training by the Wisconsin Army National Guard, hunting dog training, and paintballing. According to the complaint filed in January 2017, these high-impact uses violate the terms of the transfer to the state, and the defendants, federal agencies and administrators, violate federal law by allowing them. The Alliance wants the high-impact uses stopped.

It's five months after the filing of the complaint, and the Alliance now moves for a preliminary injunction enjoining defendant the National Park Service and intervenor defendant the State of Wisconsin from allowing three of the high-impact uses: (1) off-road motorized vehicles; (2) increased gun use; and (3) helicopter training by the Wisconsin Army National Guard in the Area. Dkt. 19. The Alliance says that it did not move for preliminary injunctive relief sooner, because it had filed a similar motion in state court. But the state court denied that motion, and the Wisconsin Court of Appeals denied the request for interlocutory appeal. So the Alliance wants to try again in this court, and it asks for expedited briefing to avoid irreparable harm to nesting birds in the area during the summer breeding season. Because the Alliance has not shown that it is likely to suffer irreparable harm before this case

can be decided on the merits, the court will deny its motion without need for a response from defendants.

The court will assume here that the Alliance can make the requisite showing of likely success on the merits. But to obtain preliminary injunctive relief, the Alliance must also demonstrate the lack of an adequate remedy at law and irreparable harm absent the injunction. *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002). Environmental injury may be irreparable, but a preliminary injunction is warranted only if the injury is sufficiently likely and permanent. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The parties' motions for summary judgment will be fully briefed by December 2017, and given the nature of the claims here, it is reasonably likely that those motions will resolve the case. Accordingly, the Alliance must demonstrate that irreparable harm is sufficiently likely to occur before spring 2018, when the court will decide the case on the merits.

The Alliance explains that the Area is home to 33 rare animal species and 97 breeding bird species. It contends that noise and exhaust from motorized vehicles "may cause displacement, nest desertion, [and] breeding failure" to some native species, and that the vehicles could compact and erode the soil and hit some slow-moving animals. Dkt. 21, at 26. Firearm discharge "may disturb

wildlife and cause wildlife to flush or exhibit avoidance behaviors." *Id.* at 28. Helicopter flights may disturb "geese and nesting bald eagles" and "generate considerable wind and dust." *Id.* at 29. And visitor traffic may increase trash and attract predators such as raccoons, killing endangered grassland birds by "trampling or eating nests on the ground." *Id.* at 32. The Alliance explains that the harm to breeding birds is more pronounced during the nesting season, which runs from late May through late July. "Any disturbance within that time frame, even for just a few days, would prove significantly detrimental to the likelihood of breeding success." *Id.* at 33.

The Alliance has made a good showing that the contested high-impact uses will disrupt wildlife in the Area, including some vulnerable species. But there are fatal flaws with the Alliance's motion.

First, the Alliance has not shown that a preliminary injunction would actually prevent the alleged environmental harm. The Alliance focuses on the disruption of the current nesting season, which may reduce the breeding success of some species. But even on an expedited briefing schedule, the court would not be able to issue an injunction before the end of the nesting season in July.

Second, the Alliance does not explain why enjoining the three specific activities will prevent the negative environmental impact. One expert explains that gunfire has "severe effects on bird populations." *Id*. at 30. But the Alliance does not request a total ban on gun use, only the *increased* gun use connected with dog training, leaving people free to continue to hunt in the Area. Another expert explains that some birds are "vulnerable to predation and nest disturbance by dogs." *Id*. at 29. But the Alliance does not request a ban on dogs, only the cessation of hunting dog training.

Third, and most fundamentally, the Alliance has not shown that the wildlife disruptions and resulting environmental harm would be permanent. The Alliance does not explain how a few more months of high-impact activities in the Area will cause harm that would not be remediated if and when the offending activities cease. After all, the Area was once home to a munitions plant, and wildlife returned to the Area after the plant was decommissioned and the Army cleaned up the site.

The Alliance has not shown that it will likely suffer irreparable harm before its case is decided on the merits. The court will deny its motion for a preliminary injunction without need for a response from defendants.

ORDER

IT IS ORDERED that plaintiff Sauk Prairie Conservation Alliance's motion for preliminary injunction, Dkt. 19, is DENIED.

Entered June 26, 2017.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge