COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2024

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2022AP1106
2023AP120

Cir. Ct. No. 2020CV585

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

PETITIONERS-APPELLANTS,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-RESPONDENT,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

INTERESTED PARTIES-RESPONDENTS,

V.

MICHAEL HUEBSCH,

OTHER PARTY.

APPEALS from orders of the circuit court for Dane County: JACOB B. FROST, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Gill, JJ.

¶1 HRUZ, J. Clean Wisconsin, Inc. and Sierra Club (collectively, "Clean Wisconsin") appeal circuit court orders affirming a decision of the Public Service Commission of Wisconsin ("Commission"). The Commission conditionally granted a Certificate of Public Convenience and Necessity ("CPCN"), pursuant to WIS. STAT. § 196.491(3) (2021-22),[1] to South Shore Energy, LLC, ("South Shore") and Dairyland Power Cooperative ("Dairyland") for the construction of a natural-gas-fired electric-generating facility in Superior, Wisconsin.[2]

¶2 Clean Wisconsin contends that the Commission committed several reversible errors in reaching its decision: (1) the Commission failed to assign a burden of proof and incorrectly applied the substantial evidence test—which is used upon judicial review of agency decisions under WIS. STAT. ch. 227—as its own standard for evaluating the evidence submitted; (2) the Commission misinterpreted—and thus misapplied—WIS. STAT. § 196.491(3)(d)3. and 4., and its findings under those subdivisions are not supported by substantial evidence; (3) when the Commission interpreted and applied the priorities listed in

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] On March 9, 2023, we issued an order consolidating appeal Nos. 2022AP1106 and 2023AP120. The Commission originally questioned whether a May 17, 2022 circuit court order was a final order for purposes of appeal, but it later conceded that an October 25, 2022 order was a final order addressing the merits of the existing appeal. Clean Wisconsin appealed both orders. We retroactively construed Clean Wisconsin's notice of appeal of the May 17 order as a petition for leave to appeal that order, granted the petition, and consolidated that appeal with Clean Wisconsin's appeal from the October 25 order.

subsection (4) of Wisconsin's Energy Priorities Law ("EPL")—WIS. STAT. § 1.12—as it is required to do pursuant to WIS. STAT. § 196.025(1)(ar), it did so incorrectly; and (4) the Commission's Environmental Impact Statement ("EIS") did not comply with the Wisconsin Environmental Policy Act ("WEPA"), WIS. STAT. § 1.11.

¶3 We reject each of Clean Wisconsin's arguments. First, WIS. STAT. § 196.491(3) does not explicitly assign a burden of proof or standard of proof for the Commission to apply when reviewing a CPCN application, and there is nothing in that statute or any other applicable statute requiring an applicant to do anything more than establish, to the Commission's satisfaction, that it should receive a CPCN. As such, so long as the Commission's determination in that regard is reasonable and supported by substantial evidence, it is valid upon judicial review. Here, the record establishes that the Commission fulfilled its responsibility by considering all of the materials submitted and by making the determinations required by § 196.491(3)(d), which were supported by substantial evidence.

¶4 Second, the Commission correctly interpreted subsection (4) of the EPL by determining that higher priority energy options could not satisfy the energy demand that the proposed facility would satisfy. *See* WIS. STAT. § 1.12(4). Therefore, the Commission correctly applied the EPL, and its finding that the proposed facility complied with subsection (4) of the EPL is supported by substantial evidence. Third, the Commission adequately assessed the EIS, which addressed the environmental impacts—including greenhouse gas emissions—resulting from the construction and operation of the proposed facility, and correctly determined that the EIS complied with WEPA.

¶5 The foregoing conclusions are consistent with, and largely compelled by, existing Wisconsin law regarding judicial review of Commission decisions pertaining to the siting and approving of electric-generating facilities, most notably our supreme court's decision in ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768. And, in this particular context, that case law is not materially impacted by our supreme court's decision in ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. The decision to issue a CPCN remains a legislative one that the Commission is charged with making pursuant to WIS. STAT. § 196.491(3)(d), requiring the application of its technical expertise and knowledge. Accordingly, we affirm.

BACKGROUND

¶6 On January 8, 2019, and pursuant to WIS. STAT. § 196.491(3)(a)1., South Shore and Dairyland (collectively, "Applicants") submitted a detailed application with the Commission for a CPCN. The Applicants sought to construct a natural-gas-fired, combined-cycle electric-generating facility in Superior consisting of one gas turbine generator, one heat recovery steam generator with duct firing, and one steam turbine generator.[3] The facility would burn natural gas with the capability to use fuel oil as a backup fuel. The facility would be called the Nemadji Trail Energy Center ("NTEC").

[3] A combined-cycle power plant uses both gas and steam turbines. The gas-fired turbine generator "produces electricity using a simple-cycle generation process." Hot gases from the gas-fired turbine generator exhausts are then directed into a heat recovery steam generator, and the resulting steam is "sent through a steam turbine generator to produce additional electricity."

¶7 The NTEC would have a generating capacity of 550-625 megawatts,[4] and it would operate as a "wholesale merchant plant" as defined in WIS. STAT. § 196.491(1)(w).[5] The application proposed the construction of five non-potable, high-capacity water wells and a cooling tower to be used by the facility. The application also provided extensive information, including potential impacts on wetlands, impacts on nearby animal species, and other environmental matters.

¶8 In April 2019, the Commission issued a notice of a class 1 contested case proceeding regarding the application.[6] Clean Wisconsin, Sierra Club, and other parties were allowed to intervene with full party status.[7] The Commission then scheduled three hearings to be held in Superior before an administrative law judge: one hearing was scheduled to receive evidence from the parties, and two

[4] The generating capacity for the NTEC was 550 megawatts with the technology available at the time of the application. Because it would take a few years for the NTEC to "come online" and improvements would be made to the facility to increase its generating capacity, the Applicants used the 625 megawatts number in their application.

[5] A "[w]holesale merchant plant" is defined as "electric generating equipment and associated facilities located in this state that do not provide service to any retail customer and that are owned and operated by" either "an affiliated interest of a public utility," subject to the Commission's approval under WIS. STAT. § 196.491(3m)(a), or "[a] person that is not a public utility." Sec. 196.491(1)(w)1.a.-b. A wholesale merchant plant "does not include an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract." Sec. 196.491(1)(w)2.

[6] A "[c]ontested case" is "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order." WIS. STAT. § 227.01(3). There are three classes of contested cases. ***Id.*** Relevant here, "'a class 1 proceeding' is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon it" and includes the granting of a CPCN. Sec. 227.01(3)(a).

[7] The other parties were American Transmission Company LLC, Citizens Utility Board of Wisconsin, Wisconsin Legislative Black Caucus, and Wisconsin Senator Janet Bewley. These parties did not join Clean Wisconsin and Sierra Club in their WIS. STAT. ch. 227 petition for judicial review.

hearings were scheduled to receive public comments. The hearings were preceded by several rounds of written, pre-filed testimony and exhibits from witnesses—including expert witnesses—for the Applicants, Clean Wisconsin, the Commission, and the Wisconsin Department of Natural Resources ("DNR"). The Commission and the DNR also prepared an EIS as required for this type of proceeding under WIS. STAT. § 1.11(2)(c) and WIS. ADMIN. CODE § PSC 4.10(1) (Feb. 2011).[8] At the hearings, the Commission received testimony from these witnesses and heard public comments on the CPCN application. As relevant to this appeal, there was competing testimony regarding the project's EIS as well as its compliance with the EPL.

¶9 On January 16, 2020, the Commission conditionally approved the CPCN application in a two-to-one vote. The Commission later issued a written, sixty-eight-page final decision with its findings of fact and conclusions of law. Given the nature of Clean Wisconsin's challenges in this appeal, we outline many of the Commission's findings and conclusions in relative detail below.

¶10 As required by administrative regulations regarding CPCN applications, the Applicants had presented information on, and the Commission considered, two proposed sites for the NTEC: the Nemadji River site (the Applicants' preferred site) and the Hill Avenue site (the Applicants' alternative site). *See* WIS. ADMIN. CODE §§ PSC 111.51-111.53 (June 2014). Both sites are in the city of Superior. The Commission authorized the construction of the NTEC at the Nemadji River site, which is located along the banks of the Nemadji River. The site is approximately fifty-one acres, is mostly wooded, and includes a small stormwater retention pond on its southwest corner. The land on which the NTEC

[8] All references to the WIS. ADMIN. CODE ch. PSC 4 are to the February 2011 register.

would be built is relatively flat, but the surrounding area slopes from higher elevations northwest of the site to lower elevations southeast of the site and near the river. The total elevation change is forty-six feet.

¶11 The Commission concluded that the NTEC project satisfied the requirements of WIS. STAT. § 196.491(3). In particular, pursuant to § 196.491(3)(d)3., the Commission found that the design and location of the NTEC were "in the public interest considering alternative locations, individual hardships, safety, reliability, and environmental factors." The Commission also found, pursuant to § 196.491(3)(d)4., that the NTEC would "not have undue adverse impacts on environmental values including ecological balance, public health and welfare, historic sites, geological formations, aesthetics of land and water, and recreational use." Of note, the Commission specifically credited the Applicants' evidence that sufficient groundwater was available to supply the plant. Finally, the Commission concluded that the NTEC complied with the EPL and that the prepared EIS complied with WEPA.

¶12 The Commission's EIS, which was prepared jointly with the DNR, considered a range of impacts resulting from the construction and operation of the NTEC. These included impacts to: "local natural resource areas, landowner rights, aesthetics, airports and airstrips, archaeological and historic resources, cultural resources, electric and magnetic fields, property values, radio and television reception, recreation and tourism, safety, communication facilities, endangered resources, forested lands, grasslands, invasive species, waterways, wetlands, and wildlife." The EIS also included information on environmental impacts associated with upstream gas extraction. Additionally, the EIS assessed "wetland, waterway, water use, water withdrawal, air emission, and endangered resource impacts."

¶13 In all, the Commission found that the record supported conditional approval of the CPCN because the evidence, as a whole, indicated that the NTEC was in the public interest and would not have an undue adverse environmental impact if certain conditions were satisfied. Accordingly, the Commission imposed multiple conditions—approximately seventy in total—that the Applicants were required to meet before they could begin constructing the NTEC. The Commission found that the main environmental concerns were "impacts associated with construction on highly erodible soil, loss and fragmentation of wetland and upland habitat, and the ability of the local aquifer to sustain continued operation of the proposed high-capacity wells."

¶14 To address these concerns, the Commission required the Applicants to obtain DNR permits "for construction in waterways and wetlands, construction site erosion, and stormwater handling." The Commission also found that it could address the groundwater impacts associated with the affected aquifer by conditioning the approval on the Applicants obtaining DNR permits for high-capacity wells, water use, and the water loss approval. The Commission further required the Applicants to obtain "all required local, state, and federal permits and regulatory approvals" before starting construction of the NTEC, describing these approvals as "essential to its determination that the project meets the standards for issuance of a CPCN."

¶15 The Commission also imposed general conditions that it commonly used to address construction activities and operation of the proposed facility. In addition, the Commission imposed specific conditions addressing endangered resources; slope erosion and stormwater control; wetland impacts mitigation; and waterway impacts mitigation. The Commission further required the Applicants to: employ an independent environmental monitor, perform pre-construction and

post-construction noise studies, and submit a post-construction noise study with the Commission.

¶16 One commissioner dissented in the decision to conditionally approve the CPCN, concluding that using either the Nemadji River site or the Hill Avenue site was not in the public interest. Nevertheless, the dissenting commissioner concurred that any approval had to be conditional and agreed with including most of the imposed conditions.

¶17 Clean Wisconsin sought judicial review of the Commission's decision in the circuit court pursuant to WIS. STAT. ch. 227. The court affirmed the Commission's decision. Clean Wisconsin now appeals.

DISCUSSION

¶18 On appeal from an administrative agency's decision, we review the agency's decision, not the circuit court's. ***Clean Wis.***, 282 Wis. 2d 250, ¶36. We affirm the agency's decision unless we find "a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of" WIS. STAT. § 227.57. Sec. 227.57(2). If the agency "erroneously interpreted a provision of law and a correct interpretation of law compels a particular action," we set aside or modify the agency's decision or we "remand the case to the agency for further action under a correct interpretation of the provision of law." Sec. 227.57(5). On discretionary issues, we reverse or remand the case to the agency if we find "that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law." Sec. 227.57(8). We will not, however, substitute our judgment for that of the agency on an issue of discretion. ***Id.***

¶19 We review an agency's conclusions of law de novo. ***Tetra Tech***, 382 Wis. 2d 496, ¶84. We give "no deference to an agency's interpretation of law," WIS. STAT. § 227.57(11), but give due weight to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it," Sec. 227.57(10); *see also* ***Tetra Tech***, 382 Wis. 2d 496, ¶3 (ending the practice of deferring to an administrative agency's conclusions of law, but, pursuant to § 227.57(10), giving "due weight" to an agency's "experience, technical competence, and specialized knowledge" in considering its arguments). "Due weight" means "giving 'respectful, appropriate consideration to the agency's views,'" but this approach "is a matter of persuasion, not deference." ***Tetra Tech***, 382 Wis. 2d 496, ¶78.

¶20 Given Clean Wisconsin's appellate arguments, we must also interpret certain statutory provisions regarding the Commission's role in reviewing applications for a CPCN. In doing so, our review begins with the language of the statute. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶21 Finally, if an agency's decision "depends on any fact found by the agency in a contested case proceeding," we will not substitute our judgment "for that of the agency as to the weight of the evidence on any disputed finding of fact." WIS. STAT. § 227.57(6). We will set aside the decision or remand the case to the agency if the agency's decision "depends on any finding of fact that is not supported

by substantial evidence in the record." ***Id.*** Substantial evidence does not mean preponderance of the evidence. ***Town of Holland v. PSC***, 2018 WI App 38, ¶22, 382 Wis. 2d 799, 913 N.W.2d 914. An agency's findings of fact are supported by substantial evidence if, after considering all of the evidence in the record, reasonable minds could arrive at the conclusion that the agency reached. ***Id.*** "[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine." ***Id.*** (alteration in original; citation omitted).

I. The Commission applied correct standards of proof in its decision applying the relevant statutory criteria and approving the CPCN application.

¶22 The parties agree that WIS. STAT. § 196.491(3)(d) provides the criteria that the Commission must consider when deciding whether to issue a CPCN. Clean Wisconsin argues, however, that the Commission erred by failing to assign any burden of proof to the Applicants and by applying the substantial evidence test to the Commission's own determinations made under § 196.491(3)(d). In response, the Commission and the Applicants principally note that, unlike other provisions in WIS. STAT. ch. 196,[9] § 196.491(3)(d) does not expressly assign a burden of proof to any party, and it does not specify a standard of proof with respect to the determinations the Commission must make to approve a CPCN application. Instead, the provisions in § 196.491(3) indicate only that it is the Commission's responsibility to make the determinations in § 196.491(3)(d).

[9] *See, e.g.*, WIS. STAT. § 196.499(5)(am) (assigning the burden of proof to the complainant for complaints against telecommunications services that violate § 196.499(2) or (3)(a)); § 196.499(5)(d) (specifying preponderance of the evidence as the standard for the Commission's finding that a telecommunications service violated § 196.499(2) or (3)(a)); WIS. STAT. § 196.795(7)(c) (specifying a clear and convincing standard for the Commission's finding that termination of a public utility holding company's interest in a public utility affiliate "is necessary to protect the interests of utility investors in a financially healthy utility and consumers in reasonably adequate utility service at a just and reasonable price").

¶23 We agree with—and adopt—the Commission's and the Applicants' characterization of the proof requirements attendant to the statutory criteria in WIS. STAT. § 196.491(3)(d). Contrary to Clean Wisconsin's overarching objection to the Commission's decision, Wisconsin law is clear that the determinations in § 196.491(3)(d) are "legislative-type policy" ones that the Commission is charged with making when deciding whether a CPCN should be issued. *See* ***Clean Wis.***, 282 Wis. 2d 250, ¶¶35, 138. Courts are not to substitute their judgment for that of the Commission on these matters. ***Id.***, ¶35. These determinations are matters of public policy that do not require an applicant to prove it is entitled to a CPCN by some specific standard of evidence. Instead, the Commission is required to consider the evidence before it and to determine, based on that evidence, whether approving the CPCN application is, broadly speaking, in the public interest. Put another way, if the Commission, with its technical expertise on the matter of approving electric-generating facilities, reasonably reviews the available evidence relevant to the statutory criteria, makes a reasonable decision, and there is "substantial evidence" (as the law understands that phrase) to support that decision, courts will uphold it, barring some other legal basis for invalidating it.

¶24 To explain, when read together with the other provisions in WIS. STAT. § 196.491(3), § 196.491(3)(d) does not assign a burden to any party regarding a CPCN application, but it places the responsibility on the Commission to make the necessary legislative determinations that § 196.491(3)(d) charges it with making. This is clear from the language in § 196.491(3)(d), which provides that the Commission "shall approve" a CPCN application only if it makes the determinations outlined in that paragraph. Those determinations include finding that: a proposed facility is in the public interest; a proposed facility will not have an undue adverse impact on other environmental values, such as public health and

welfare or historic sites; and a proposed facility "will not unreasonably interfere with the orderly land use and development plans for the area involved." Sec. 196.491(3)(d)3., 4., 6. If the Commission cannot make the necessary determinations in § 196.491(3)(d)—or, relatedly, if the Commission concludes that the application does not meet those requirements—the Commission must take one of two actions: (1) "reject the application"; or (2) "approve the application with such modifications as are necessary for an affirmative finding under par. (d)." Sec. 196.491(3)(e). In other words, the Commission is expressly allowed to conditionally approve a CPCN application regardless of whether the statutory requirements are met.

¶25 Similarly, we note that the Commission is considered to have approved a CPCN application if it fails to act on an application within a specific time period. *See* WIS. STAT. § 196.491(3)(g). The Commission must approve or deny an application within 180 days, and it may extend that period for an additional 180 days for good cause. ***Id.*** If the Commission takes no action within this period, then the application is considered to be approved by the Commission. ***Id.*** This language, again, expressly approves a CPCN application regardless of whether any requirements are met. The provision does not place the burden of proof on any party. Instead, it allows for approval based on *the Commission's* failure to act on the application.

¶26 Thus, when read together, WIS. STAT. § 196.491(3)(d), (e), and (g) do not assign a burden to any party regarding a CPCN application. Nevertheless, a party seeking to have its CPCN application approved by the Commission must obviously provide the Commission with evidence that enables the Commission to make the necessary determinations. In this sense, and this sense only, the burden *is* on the applicant.

¶27 Accordingly, while there is no burden of proof per se, the Commission is still tasked with weighing the evidence presented to it by the applicant and making findings that are reasonably supported by that evidence. In doing so, it need not address every statutory factor or fully explain why it believes the proposed project meets the standards under the law. There need only be enough evidence in the record and analysis by the Commission such that courts can discern the basis for its decision and the reasonableness of it. *See* ***Clean Wis.***, 282 Wis. 2d 250, ¶145. As explained in Section II.B. below, that is what occurred here.

¶28 Clean Wisconsin cites ***Reinke v. Personnel Board***, 53 Wis. 2d 123, 137-38, 191 N.W.2d 833 (1971), in support of its argument that the Commission should have applied a "preponderance of the evidence" standard in its decision approving the CPCN application. In ***Reinke***, our supreme court concluded that the personnel board, a state agency, misinterpreted its function in reviewing a discharge decision by finding that substantial evidence supported the employer's decision. ***Id.*** at 132-34. The court noted that the substantial evidence test was limited to judicial review of administrative decisions, and it was not applicable to the discharge decision that the board was reviewing. ***Id.*** at 136. Because the court found no statutes or case law "to determine the proper evidentiary standard for the [b]oard to apply in determining whether the evidence justifies a dismissal," the court looked to a charter for the city of Milwaukee relating to disciplinary decisions of the board of fire and police commissioners. ***Id.*** at 136-37. It found the charter persuasive and concluded that the board's function in reviewing a discharge decision was "to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence." ***Id.*** at 137-38.

¶29 ***Reinke*** is materially distinguishable and otherwise unhelpful to this case. Here, the Commission is not functioning as a quasi-judicial review board as

the personnel board was doing in ***Reinke***. The Commission is making an initial, legislative-type determination that requires it to consider all of the evidence submitted before it and then decide whether approving a CPCN application is in the public interest. Whether a decision is in the public interest "is a matter of public policy and statecraft and not in any sense a judicial question." ***Clean Wis.***, 282 Wis. 2d 250, ¶35 (citation omitted). Because the personnel board in ***Reinke*** was not functioning in a legislative role (or even acting in the first instance), as the Commission was here, ***Reinke*** does not require the imposition of a standard of proof on the Commission when deciding whether it should approve or deny a CPCN application.

¶30 Clean Wisconsin also invokes ***Tetra Tech*** to question the Applicants' and the Commission's reliance on ***Clean Wisconsin***'s conclusion, made in 2005, that CPCN decisions are legislative ones. In essence, Clean Wisconsin questions ***Clean Wisconsin***'s validity, given that it relied on a deferential standard of review as to an agency's interpretations of law, which ***Tetra Tech*** later overruled. This argument is of no help to Clean Wisconsin because CPCN decisions remain legislative ones that the Commission is charged with making pursuant to WIS. STAT. § 196.491(3)(d). Those legislative determinations are not interpretations of law. They are policy determinations that require the Commission's application of the facts to the law, using its technical expertise and knowledge.

¶31 Quite simply, while Clean Wisconsin proclaims that "[r]obust judicial review must be available for agency decisions, especially those as consequential as the CPCN here," that argument fails for at least two reasons. First, the applicable statutes and governing precedent are plainly to the contrary, and Clean Wisconsin's attempts to supply relevant authority are lacking. Second, and relatedly, Clean Wisconsin's demand essentially—and invariably—would require this court to

reweigh the extensive record evidence provided by the multiple parties in this case—including the extensive materials provided by Clean Wisconsin. We are not permitted to do so. That said, an agency's decision remains subject to judicial review under the substantial evidence standard, which, while deferential in nature, is still a burden to be met. Clean Wisconsin is wrong to otherwise state that a burden "met by substantial evidence is no burden at all."

¶32 In sum, WIS. STAT. § 196.491(3)(d) does not assign an express burden of proof to an applicant seeking a CPCN, and it does not specify a standard of proof that the Commission must deem met when deciding whether to approve or deny a CPCN application. The statute plainly lays the responsibility on the Commission to make the necessary legislative determinations in approving a CPCN application, which must be supported by substantial evidence in the record. Accordingly, the Commission here did not err by failing to assign a burden of proof to the Applicants and by understanding that its decision approving the CPCN application, if challenged, must survive judicial review under the substantial evidence standard.

II. The Commission correctly interpreted WIS. STAT. § 196.491(3)(d)4., and its findings under § 196.491(3)(d)3. and 4. are supported by substantial evidence.

¶33 Among the findings the Commission must make under WIS. STAT. § 196.491(3)(d), two are at issue here. First, § 196.491(3)(d)3. requires the Commission to find that the proposed facility's "design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors." Sec. 196.491(3)(d)3. However, if the application is for a wholesale merchant plant, as here, the Commission "may not consider alternative sources of supply or engineering or economic factors." ***Id.*** Further, in considering

environmental factors, "the [C]ommission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of [WIS. STAT.] ch. 285." Sec. 196.491(3)(d)3.

¶34 Second, WIS. STAT. § 196.491(3)(d)4. requires the Commission to find that "[t]he proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use." ***Id.*** Again, in considering the impact on environmental values, "the [C]ommission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of [WIS. STAT.] ch. 285." Sec. 196.491(3)(d)4.

A. The Commission correctly interpreted WIS. STAT. § 196.491(3)(d)4.

¶35 Clean Wisconsin argues that the Commission erroneously interpreted WIS. STAT. § 196.491(3)(d)4. by not considering and addressing all of the environmental values listed in that subdivision. Clean Wisconsin asserts that the Commission's decision must discuss all of these values and that the Commission failed to do so in its decision. Clean Wisconsin further contends that the Commission "abdicat[ed]" its responsibility to make the environmental impact determinations in § 196.491(3)(d)3. and 4. to the DNR. We disagree with Clean Wisconsin's arguments.

¶36 First, the plain language of WIS. STAT. § 196.491(3)(d)4. does not require the Commission to address every listed environmental value. The use of the phrase "such as, but not limited to" indicates that the Commission can consider the

listed values (ecological balance, public health and welfare, etc.), but the Commission is not limited to considering just those values nor is it always required to consider them. *See* § 196.491(3)(d)4. In some instances, a proposed facility may have no impact on certain listed values, which would not require the Commission to consider or address those values. In other instances, a proposed facility may impact values that are not listed in § 196.491(3)(d)4., but those values still require the Commission's consideration. Thus, § 196.491(3)(d)4. allows the Commission to consider other environmental values, does not limit the Commission to considering only the listed ones, and recognizes the Commission's flexibility on which values to weigh. Accordingly, the Commission did not err in its interpretation of § 196.491(3)(d)4.

¶37 Second, the Commission did not defer its responsibility under WIS. STAT. § 196.491(3)(d) to the DNR by finding that the future issuance of DNR permits would sufficiently mitigate environmental impacts. Our supreme court has "previously concluded that 'an agency may assume that any environmental consequences will be controlled through compliance with the applicable administrative code provisions.'" ***Clean Wis.***, 282 Wis. 2d 250, ¶167 (citation omitted). Moreover, given the DNR's expertise on environmental issues, the Commission did not err by conditioning its approval of the CPCN application on the future issuance of DNR permits. *See* ***id.***, ¶168 ("[I]t is not error for the [Commission] to rely on the DNR's expertise and regulatory approval process when making its finding under … § 196.491(3)(d)4., even if those determinations are forthcoming."). Finally, § 196.491(3)(e) allows the Commission to approve a CPCN "application with such modifications as are necessary for an affirmative finding under [§ 196.491(3)(d)]." In other words, the Commission may condition its approval of a CPCN application on, for example, the issuance of future DNR

permits. The Commission does not "abdicate" its role by intelligently assigning to the DNR oversight over certain requirements on which it has expertise, and the Commission committed no error in doing so here.

B. Substantial evidence supports the Commission's findings under WIS. STAT. § 196.491(3)(d)3. and 4.

¶38 Clean Wisconsin next argues that the Commission's findings under WIS. STAT. § 196.491(3)(d)3. and 4. were not supported by substantial evidence. Specifically, Clean Wisconsin claims that "large evidentiary gaps did not allow the Commission to find the statutes were satisfied, or that generic permit conditions and future permit processes would address them." As our supreme court has noted, however, "[t]here is no requirement that the agency provide an elaborate opinion." ***Clean Wis.***, 282 Wis. 2d 250, ¶145. "All that is required is that the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision." ***Id.*** Here, the Commission issued a detailed, sixty-eight-page decision that included its findings of fact, conclusions of law, and analyses of the issues. That written decision allows us to discern the basis and reasonableness of the Commission's decision.

¶39 Notwithstanding, Clean Wisconsin argues that the Commission's finding that the NTEC's "design and location or route is in the public interest" was not supported by substantial evidence because the Commission failed to adequately address "individual hardships …, safety, reliability and environmental factors" in its decision. *See* WIS. STAT. § 196.491(3)(d)3. Clean Wisconsin further contends that the Commission failed to cite any evidence demonstrating that the safety and individual hardship elements were satisfied and, relatedly, it inappropriately shifted the burden to Clean Wisconsin to demonstrate that those elements were not satisfied.

¶40 The Commission's decision here considered the safety and individual hardship concerns raised by Clean Wisconsin, especially those affecting residential neighborhoods near the NTEC's proposed location. In particular, the Commission noted concerns about the large amount of traffic from construction trucks; the ground fog and rime icing resulting from the facility's proposed cooling tower;[10] noise pollution; and, because of an accident at the nearby Husky oil refinery,[11] the possibility of "a catastrophic industrial accident." The Commission found that most of these concerns were temporary, given that traffic and noise would substantially decrease or disappear after construction of the NTEC was complete. The Commission also recognized the concerns caused by the Husky oil refinery accident, but it concluded that without there being any evidence suggesting that a similar accident would occur at the NTEC, the mere possibility of an industrial accident was "far too remote and hypothetical" to justify denying the CPCN application.

¶41 The Commission also found that the significant conditions it imposed in its decision would lessen the impacts of the identified safety and individual hardship concerns. For example, to address concerns with noise resulting from the construction and operation of the NTEC, the Commission imposed a condition requiring the Applicants to conduct pre-construction and post-construction noise studies "to ensure that any noise created by the project will be identified and mitigated." In all, the Commission found that the safety and individual hardship concerns were insufficient to require denial of the CPCN application.

[10] Rime ice forms when supercooled water droplets impact and freeze on contact with structures within a fog plume.

[11] On April 26, 2018, there was an explosion at the Husky oil refinery in Superior.

¶42 The Commission did not err in doing so. Contrary to Clean Wisconsin's arguments, the Commission did not place the burden on any party to demonstrate that the safety and individual hardship factors were or were not satisfied, given that these factors are not "elements" that need to be satisfied. They are simply factors the Commission considers in determining whether a proposed facility's "design and location or route is in the public interest." *See* WIS. STAT. § 196.491(3)(d)3. After considering the safety and individual hardship concerns raised by Clean Wisconsin here, the Commission found that those concerns did not weigh against a finding that the proposed NTEC is in the public interest. Accordingly, the Commission appropriately considered those factors in making its finding.

¶43 Clean Wisconsin also argues that the Commission focused only on "whether the plant would increase the supply of electric generation in the state" when considering the NTEC's reliability and that the Commission "brushed aside" environmental impact concerns. It contends that the Commission did not consider how site limitations, such as soil stability, affected reliability. Clean Wisconsin's arguments, however, are essentially that the Commission gave too much weight to the evidence that the Applicants presented and too little weight to the evidence that Clean Wisconsin presented. It seeks to have us reweigh the evidence and reach a different conclusion than the Commission, which we cannot do. *See* WIS. STAT. § 227.57(6).

¶44 For example, the Commission noted that one of the main environmental concerns that was raised related to the "impacts associated with construction on highly erodible soil." It found, however, that Clean Wisconsin's concern with the major slope failure that could impact the Nemadji River's water quality was "too conjectural to be given credence." The Commission further found

that the Applicants provided ample evidence that their proposed sheet pile wall would be "designed and constructed in accordance with professional standards" and that Clean Wisconsin had failed to demonstrate that the proposed wall's "design entails deficiencies that would present an actual risk of slope failure." In making these findings, the Commission considered the evidence presented by both the Applicants and Clean Wisconsin, and it chose to give more weight to the Applicants' evidence.

¶45 The Applicants' evidence included testimony that: the sheet pile wall would be built on the slope that leads from the top of the site down to the Nemadji River; the wall would function as a thick retaining wall and would cover eighty percent of the site, but the thickness and height depended on the wall's design; a final engineering design is usually completed after a site is selected because "final engineering is a significant and site-specific process"; the construction process will follow best management practices that are compliant with DNR standards for erosion control; and the Applicants will develop construction and mitigation practices to minimize impacts based on "the proposed schedule for activities, permit requirements, prohibitions, maintenance guidelines, inspection procedures, terrain, and other factors."

¶46 Clean Wisconsin's evidence included testimony that: the slope at the Nemadji River site is "known for slope erosion and slope failure due to the local soils and geology"; the amount of engineering, grading, and construction required for the sheet pile wall "would be very expensive, risky, and easily avoidable if a different site [were] selected"; major slope failure "could result in a catastrophic water quality impact to the [Nemadji] river and loss of built infrastructure"; factors contributing to slope failure include "concentrated stormwater runoff, overbank river floodwaters, soil types and construction activities"; and the risk of slope failure

was not based on any kind of analysis by Clean Wisconsin's witness, but on that witness's "best professional judgment and previous experience."

¶47 The Commission considered all of the foregoing evidence, gave it the weight it believed was appropriate, and found that the concerns with the sheet pile wall would be sufficiently addressed. That the Commission gave more weight to the Applicants' evidence does not mean the Commission "brushed aside" Clean Wisconsin's concerns.

¶48 Similarly, in arguing that the Commission did not sufficiently consider erosion and stormwater impacts, Clean Wisconsin is again asking us to reweigh the evidence the Commission considered regarding those environmental impacts.[12] The Commission considered the Applicants' initial erosion control and stormwater management plan, which provided procedures to manage the quality of stormwater runoff from construction activities and to control soil erosion and sedimentation. The Commission also considered several proposed DNR conditions regarding soil erosion and stormwater impacts, and the Commission adopted those conditions in its decision. The Commission further considered Clean Wisconsin's concern that the Applicants' plan was "inadequate for preventing stormwater from contributing to slope failure." Specifically, Clean Wisconsin was concerned that the planned stormwater system would not safely convey stormwater to the Nemadji River, had a high risk of failure, and did not account for recent, large rainfall events in the region.

[12] Clean Wisconsin also argues that the Commission "unreasonably deferred to future DNR permit proceedings" regarding erosion and stormwater impacts rather than making the required findings. We have already concluded that the Commission did not "defer" or otherwise improperly abdicate its responsibility to make the required findings by determining that future issuance of DNR permits sufficiently mitigated environmental impacts. *See supra* ¶37; *see also* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶¶167-68, 282 Wis. 2d 250, 700 N.W.2d 768.

¶49 The Commission found that the Applicants' plan and the DNR's conditions sufficiently addressed the erosion and stormwater impacts from the NTEC's construction. Again, the Commission appropriately considered the evidence before it and chose to give more weight to the Applicants' evidence than to Clean Wisconsin's evidence regarding erosion and stormwater impacts. Indeed, the Commission agreed with Clean Wisconsin's concerns over the erosion and stormwater impacts due to construction. To ensure that those impacts were continually monitored, the Commission required the Applicants to file a final plan with the DNR for review, to file that plan with the Commission after approval from the DNR, and to follow the plan during the NTEC's construction. In short, the Commission considered the evidence regarding erosion and stormwater impacts, and it reasonably found that those impacts did not weigh against a finding that the proposed NTEC is in the public interest.

¶50 Clean Wisconsin next argues that the Commission's finding that the NTEC would not have an undue adverse impact on other environmental values was not supported by substantial evidence. Specifically, Clean Wisconsin argues that there is insufficient evidence showing that the impacts to wetlands and waterways are not undue "or that the mitigation measures proposed by the Commission would offset these impacts to the point that they are no longer 'undue.'"[13] Yet, the record contains extensive evidence presented by the Applicants, Clean Wisconsin, and the DNR regarding the impacts to wetlands and waterways. The Commission considered this evidence in finding that those impacts would be sufficiently

[13] Clean Wisconsin also contends that the Commission is required, and failed, to address each factor listed in WIS. STAT. § 196.491(3)(d)4. (including "ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use"). We have already concluded that the use of the phrase "such as, but not limited to" indicates that the Commission may consider those factors, but it is not required to do so and is not limited to considering just those factors. *See supra* ¶36.

addressed by the conditions it imposed upon conditionally approving the CPCN application.

¶51 The record also includes evidence that the Applicants submitted a Wetland Rapid Assessment Methodology assessment (WRAM), which documents the overall quality of wetlands. Although this assessment characterized the wetlands as low to medium quality, the DNR stated that it was likely an overgeneralized characterization because the data were not taken for each individual wetland, but were grouped together, which, according to Clean Wisconsin's witness, resulted in an "undervaluing of the ecosystem services provided by the existing wetlands and the amount of compensatory mitigation that would be needed if impacted." As a result, the DNR advised that it would require the Applicants to resubmit the WRAM assessment and that it would conduct its own field investigations.

¶52 The evidence presented by the Applicants, Clean Wisconsin, and the DNR also noted that the impacts to wetlands were unavoidable. These impacts included "sedimentation, spreading invasive species, increasing runoff, and decreasing flood storage" caused by construction activities (e.g., grading and vegetation clearing) and the creation of "new impervious surfaces." The DNR advised that wetland fill should be minimized, and it proposed additional conditions to minimize the potential impacts to wetlands. These conditions would become conditions of the required DNR permit for placement of dredge and fill material into wetlands.

¶53 The DNR also expressed concern over the impact to waterway WW-501f—a stream on the north end of the site and a tributary to the Nemadji River—given that the Applicants initially proposed to place the footprint of the

NTEC over that waterway and to relocate it as a concrete-lined channel. When the Applicants modified the site's footprint to avoid waterway WW-501f, the revised project information included a security fence across the waterway that effectively obstructed public use of the waterway, but the DNR noted that the waterway was likely not used for navigation because of the steep slopes leading to the Nemadji River. Other impacts to waterway WW-501f included "dredging, bank grading, filling, and riprap placement below the ordinary high water mark." These impacts required a DNR permit and additional project details—including a final engineering plan—for DNR review. The DNR noted that the permits would likely include its proposed conditions to mitigate the impacts to the waterway.

¶54 In all, the Commission found that the NTEC project would affect waterways and wetlands, and its order included an extensive list of conditions that specifically addressed "some of the ecological and environmental impacts" to waterways and wetlands resulting from the NTEC's construction, which included obtaining DNR permits. The Commission imposed specific conditions for wetlands that addressed: construction on wetlands, sedimentation, vegetation clearing, soil impacts, and invasive species. The Commission noted that it was "sensitive" to the NTEC's impact on wetlands, and it found that these conditions would "mitigate the impacts associated with construction and thereby prevent the project from having an undue adverse environmental impact."

¶55 The Commission imposed similar conditions regarding any construction on waterways. It also imposed specific conditions on waterways that addressed: sedimentation, dredging, soil impacts, the use of herbicides near waterways, the installation of temporary clear span bridges, and debris clearing. These conditions also required the Applicants to restore waterway banks and beds to their pre-existing conditions, to "segregate excavated stream bed layers to help

facilitate restoration," and to "monitor and maintain any fences placed across waterways on a regular basis to address debris accumulation."

¶56 Contrary to Clean Wisconsin's claims, these are not "general" conditions; they are specific to the particular impacts noted by the Applicants, Clean Wisconsin, and the DNR. Again, Clean Wisconsin simply seeks to have us reweigh this evidence and reach a different conclusion than the Commission, which we cannot do. In short, the Commission considered the evidence regarding impacts to wetlands and waterways, and it reasonably found that those impacts would be sufficiently addressed by the conditions it imposed with its approval of the CPCN application.

¶57 To summarize, Clean Wisconsin's arguments amount to a misreading of WIS. STAT. § 196.491(3)(d)3. and 4. as well as a disagreement with the weight the Commission gave to the evidence presented by the parties in making its findings under those subdivisions. Indeed, many of Clean Wisconsin's arguments in these regards are based on its rejected arguments regarding burdens of proof. *See supra* ¶¶28-32. After considering the evidence in this extensive record, the Commission reasonably found that the NTEC's "design and location or route is in the public interest" and that the NTEC "will not have undue adverse impact on other environmental values." *See* § 196.491(3)(d)3.-4. Accordingly, the Commission's findings are supported by substantial evidence.

III. The Commission correctly interpreted and applied the EPL.

¶58 Clean Wisconsin also argues that the Commission erred by finding that the Applicants' CPCN application and corresponding NTEC project satisfied the EPL. As a threshold matter, the Applicants argue that the EPL does not apply to wholesale merchant plants, such as the NTEC, because the priorities provision—

WIS. STAT. § 1.12(4)—of the EPL is inconsistent with the more specific provisions of the CPCN law, WIS. STAT. § 196.491(3)(d). Alternatively, if subsection (4) of the EPL does apply to their application, the Applicants contend that the Commission properly applied that subsection.

¶59 For its part, the Commission maintains that it is obligated to comply with the EPL in assessing the NTEC, even if it cannot consider certain aspects of the EPL under WIS. STAT. § 196.491(3)(d), and that it properly did so in issuing its decision. For purposes of this opinion, we assume, without deciding, that the EPL applies to wholesale merchant plants, including the NTEC. Even so, we conclude that the Commission did not erroneously interpret or apply the EPL and that there is substantial evidence supporting the Commission's finding that the NTEC complied with the EPL.

¶60 The EPL establishes Wisconsin's energy policy and "gives agencies and governmental units a list of energy source options and the priority in which they should be considered when making decisions" on whether to "approv[e] CPCNs for large electric generating facilities." ***Clean Wis.***, 282 Wis. 2d 250, ¶98. One of the EPL's stated goals is "that, to the extent that it is cost-effective and technically feasible, all new installed capacity for electric generation in the state be based on renewable energy resources, including hydroelectric, wood, wind, solar, refuse, agricultural and biomass energy resources." WIS. STAT. § 1.12(3)(b). When making all energy-related decisions and orders, the Commission is required to implement the priorities listed in subsection (4) of the EPL "to the extent cost-effective, technically feasible and environmentally sound." WIS. STAT. § 196.025(1)(ar). Subsection (4) of the EPL specifically provides that:

> In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be

> considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
>
> (b) Noncombustible renewable energy resources.
>
> (c) Combustible renewable energy resources.
>
> ....
>
> (d) Nonrenewable combustible energy resources, in the order listed:
>
> 1. Natural gas.
>
> 2. Oil or coal with a sulphur content of less than 1 percent.
>
> 3. All other carbon-based fuels.

Sec. 1.12(4).

¶61 Here, based on the evidence presented, the Commission found that "[e]nergy conservation, renewable resources, or other energy priorities" in WIS. STAT. § 1.12(4) were "not cost-effective, technically feasible, or environmentally sound alternatives to the" proposed NTEC and that the NTEC complied with the EPL. The Commission noted that because the NTEC would be a natural-gas-fired facility, it would not satisfy the higher priorities of energy conservation and efficiency, noncombustible renewable energy resources, and combustible energy resources. The Commission also correctly noted that the EPL does not require satisfaction of those priorities; "[i]nstead, [Wisconsin] legislators made clear that agencies should look to how a project could fit into the entire energy mix."

¶62 Importantly, the Commission noted that the NTEC's main purpose is to "facilitate the deployment of renewable resources and overall system reliability by providing energy when intermittent renewable resources cannot." In other

words, the Commission focused on the role—and beneficial effect—that the NTEC would have on the overall energy supply in the area, including its support of higher-priority energy sources.

¶63 To explain, the Commission considered the Applicants' evidence that: the NTEC would provide up to 625 megawatts of dispatchable electric generation to support the integration of renewable energy resources; the NTEC would "enhance system reliability because it will be able to ramp up and down very quickly"; and "no higher priority options that could provide reliable and dispatchable generation were cost-effective and technically feasible." The Applicants also presented evidence that combined-cycle resources such as the NTEC have significant advantages over batteries, given that batteries require recharge, have limited duration, and have shorter life cycles. Evidence also showed that combined-cycle resources are also more cost effective than both batteries and batteries paired with renewable resources.

¶64 The Commission also considered Clean Wisconsin's evidence that there are other ways to support intermittent renewable resources, such as battery storage systems paired with renewable resources. Although evidence showed that large-scale battery storage technologies are proliferating and are "poised to grow as the economics of batteries continue to improve," Clean Wisconsin's own witness admitted that such technology is not currently available in Wisconsin.

¶65 The Commission also considered wind and solar generating resources. Its staff provided evidence that those resources "experience variations depending on factors like outdoor temperature, wind conditions, cloud cover, and resources out of service for maintenance." The Commission staff noted that solar resources "commonly ramp up to, and down from, full production very quickly." Because

facilities such as the NTEC have the capability of doing the same, they are "appropriate resources to accommodate greater proliferation of intermittent resources." Further, Commission staff provided testimony that battery storage is not a "viable method for effectively integrating wind and solar resources at all times of day" and that "it is unclear when and to what extent storage will proliferate."

¶66 Based on the foregoing, the Commission reasonably determined that "ample testimony" supported a conclusion that the NTEC would facilitate the deployment of noncombustible renewable energy resources and that "such resources alone could not provide the reliability benefits" that the NTEC sought to provide. The Commission also found that "no substantive evidence was presented to demonstrate how the energy and capacity from the proposed project could be replaced by energy conservation and efficiency." Finally, the Commission found that batteries are not higher priority resources under the EPL and that current battery technology is not yet capable of replacing a facility the size of the NTEC. The Commission thus concluded that the proposed NTEC complied with the EPL.

¶67 Despite the foregoing, Clean Wisconsin argues that the Commission erroneously interpreted the EPL by failing to consider whether higher priority resources could satisfy the identified purpose of the NTEC and instead focused "only on alternatives that could provide the exact amount of energy contemplated by the entire NTEC Project." Clean Wisconsin asserts that providing the exact amount of energy as the NTEC will produce does not further its purpose of "providing energy when intermittent renewables are not" and does not achieve the EPL's purpose of finding the highest priority option for that purpose. As support, Clean Wisconsin cites to ***Clean Wisconsin*** for the proposition that the Commission "cannot approve a CPCN for a facility that is not the highest-priority project

alternative that is both cost effective and technically feasible." *See* ***Clean Wis.***, 282 Wis. 2d 250, ¶122.

¶68 Clean Wisconsin's view of existing law is incorrect. In ***Clean Wisconsin***, our supreme court concluded that the Commission, in applying the EPL, chooses the highest priority energy option that is both cost effective and technically feasible *in the context of* the public need for an adequate supply of electric energy. *See* ***Clean Wis.***, 282 Wis. 2d 250, ¶124. This command does not mean, as Clean Wisconsin seems to contend, that the Commission must automatically choose the highest priority option that is both cost effective and technically feasible.[14] Rather, the Commission must consider these factors in the context of the public's overall need for an adequate supply of electric energy. Here, the Commission was permitted to make that consideration in light of the specific—and continuous—amount of energy the NTEC could produce relative to other available energy resources.

¶69 Based on its review of the evidence, the Commission determined that higher priority options could not satisfy the energy demand that the proposed NTEC would satisfy. Relatedly, the Commission reasonably concluded that noncombustible renewable energy sources are intermittent and that more-reliable, but lower-priority, energy sources (such as those the NTEC would supply) are needed to complement and sustain those existing, higher-priority resources in the

[14] We note that the language from ***Clean Wisconsin*** that Clean Wisconsin cites in support of its alleged categorical rule was actually just our supreme court noting how the EPL requires the Commission to consider such matters—i.e., "*The question the [Commission] should ask* is thus: Given the requirements of the Plant Siting Law, what is the highest priority energy option that is also cost effective and technically feasible?" ***Clean Wis.***, 282 Wis. 2d 250, ¶122 (emphasis added).

overall energy-production context. In doing so, the Commission followed the dictates in ***Clean Wisconsin*** and did not erroneously interpret the EPL.

¶70 Clean Wisconsin next argues that the Commission made factual errors underlying its finding that the CPCN application satisfied the EPL and that the Commission lacked sufficient evidence to make this finding.

¶71 First, Clean Wisconsin asserts that the Applicants submitted no evidence regarding the highest priority of energy conservation and efficiency and that they had "an affirmative duty to show they satisf[ied] this factor, especially if they have the burden to show it is met by a preponderance of the evidence." But the EPL does not require the satisfaction of each priority. The Commission is only required to consider the priorities in the order listed in WIS. STAT. § 1.12(4) when deciding on a CPCN application and to consider the highest energy priority option that is also cost effective, technically feasible, and environmentally sound in the overall energy-production context. *See* WIS. STAT. § 196.025(1)(ar); *see* ***Clean Wis.***, 282 Wis. 2d 250, ¶122; *see also supra* ¶68 & n.14.

¶72 The Commission considered the Applicants' evidence that the NTEC would ensure overall system reliability and facilitate the integration of renewable resources by providing energy when intermittent renewable resources could not. The Applicants did not present evidence on higher priority options because their witnesses testified that no higher priority alternative that was technically feasible, cost effective, and environmentally sound could replace the NTEC to fulfill its overall purpose of providing energy when intermittent renewable resources could not. Neither the Commission staff nor Clean Wisconsin presented any evidence that a higher priority alternative could fulfill the NTEC's purpose. Thus, the Commission did not err by concluding that "no substantive evidence was presented

to demonstrate how the energy capacity from the proposed project could be replaced by energy conservation and efficiency."

¶73 Second, Clean Wisconsin argues that the Commission misrepresented testimony from Clean Wisconsin's witness and relied on errors in an analysis made by a Commission witness. Again, Clean Wisconsin simply disagrees with the weight the Commission gave to each witness's testimony and related evidence. As we have previously noted, we do not reweigh the evidence before the Commission. Rather, we need only consider whether reasonable minds could arrive at the determination the Commission reached.

¶74 The Commission's decision considered the evidence presented by the Applicants, the Commission's own staff, *and* Clean Wisconsin regarding higher priority alternatives, found that higher priority alternatives—such as wind or solar—were not cost effective or technically feasible to satisfy the energy demand that the lower priority NTEC could satisfy, and explained its reasoning for its finding based on the evidence it considered. That Clean Wisconsin disagrees with the relative merit of some testimony (and other evidence) and the weight the Commission gave to that testimony does not mean that the Commission lacked evidence to reasonably make this finding, and it is not a basis for reversal of the Commission's decision.

IV. The Commission did not err by concluding that the EIS complied with WEPA.

¶75 Finally, Clean Wisconsin argues that the Commission wrongly concluded that the EIS it jointly prepared with the DNR for the NTEC complied with WEPA. In particular, Clean Wisconsin claims that the EIS did not fully address the "indirect and cumulative impacts of the NTEC plant, particularly [those] associated with the process of extracting fuel to serve the plant." In addressing these

claims, we review the determination of the EIS's adequacy in the Commission's order, not the adequacy of the EIS itself. ***Citizens' Util. Bd. v. PSC***, 211 Wis. 2d 537, 543, 565 N.W.2d 554 (Ct. App. 1997). The Commission's determination that an EIS complied with WEPA is a conclusion of law that we review de novo. *See* ***Clean Wis.***, 282 Wis. 2d 250, ¶190.

¶76 WEPA requires state agencies to "[i]nclude in every recommendation or report on … major actions significantly affecting the quality of the human environment, a detailed statement" regarding, among other things, a proposed action's environmental impact and any adverse environmental effects of the proposed action that cannot be avoided. WIS. STAT. § 1.11(2)(c)1.-2. The NTEC project is the type of action that required the Commission to prepare such a detailed statement—an EIS. *See* WIS. ADMIN. CODE § PSC 4.10(1) (requiring the Commission to prepare an EIS for Type I actions, which are "major actions that significantly affect the quality of the human environment"). WEPA ensures "that agencies consider environmental impacts during decision making," ***Clean Wisconsin***, 282 Wis. 2d 250, ¶188 (citation omitted), but it "is not intended to control agency decision making," ***Applegate-Bader Farm, LLC v. DOR***, 2021 WI 26, ¶37, 396 Wis. 2d 69, 955 N.W.2d 793. If an EIS adequately evaluates the adverse environmental consequences of a proposed action, neither it nor WEPA prevents the Commission from making a particular decision or determining that "other values outweigh the environmental consequences of a proposed action." ***Clean Wis.***, 282 Wis. 2d 250, ¶¶188, 203.

¶77 The EIS is an informational tool that allows the Commission "to take a 'hard look' at the environmental consequences of a proposed action." ***Id.***, ¶¶189, 203. While a particular EIS may be exhaustive in its discussion of environmental impacts, our supreme court has recognized that "a challenger can always point to a

potentiality that was not addressed." ***Id.***, ¶191 (citation omitted). Every potentiality, therefore, does not need to be addressed, "as '[t]he duty of an agency to prepare an EIS does not require it to engage in remote and speculative analysis.'" ***Id.*** (alteration in original; citation omitted). The EIS is assessed "in light of the 'rule of reason,' which requires an EIS 'to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.'" ***Id.*** (citation omitted).

¶78 Here, the Commission and the DNR jointly prepared a detailed, 265-page EIS. In its decision, the Commission noted that the EIS considered a broad range of environmental impacts resulting from the construction and operation of the NTEC, which included impacts to: air quality, soil, existing vegetation communities, wetlands, waterways, and endangered and rare plants and animals. Per the EIS, the Commission found that the most significant environmental impacts were those to wetlands and to nearby natural resources resulting from construction on soil that was highly susceptible to erosion.

¶79 On appeal, Clean Wisconsin claims that the EIS failed to address the direct effects and significance of greenhouse gas emissions resulting from the operation of the NTEC and that it failed "to analyze the indirect effects of NTEC's construction and operation as a result of hydraulic fracturing necessary to supply the proposed project with methane gas." But the EIS *did* address these impacts, and substantially so. The EIS noted that the NTEC was expected to emit several air pollutants, including greenhouse gases, and that an indirect environmental impact on air quality was associated with the hydraulic fracturing method of gas extraction,

known as fracking.[15] Clean Wisconsin's real complaint, as articulated in its briefing on appeal, is that the EIS neither "sufficient[ly]" and "fully" addressed nor properly "quantif[ied]" such impacts. But the law does not require such an evaluation of an EIS, and, notably, Clean Wisconsin cites no authority in support of its assertion to the contrary.[16]

¶80 To elaborate, and as the Commission noted in its decision, the EIS assessed the impacts from air emissions and estimated the total potential emissions resulting from the NTEC project to be 2,738,198 tons per year. The EIS acknowledged that the NTEC would emit greenhouse gases during operation and that those greenhouse gases would impact global climate change. The EIS quantified global warming potentials for greenhouse gases based on the components of those gases and assigned a multiplier for each component. The greenhouse gases emitted from the NTEC's combustion turbine and duct burners would consist mainly of carbon dioxide and methane. Based on those components and multipliers, the EIS included estimated annual greenhouse gas emissions based on the facility running at full capacity and expected capacity.[17] In all, and as even Clean Wisconsin concedes, the EIS offered two estimates for total annual emissions based on the

[15] Fracking is an extraction technique used to obtain natural gas from difficult locations in shale rock by injecting "pressurized water with sand and thickening agents to fracture the rock and free the gas." Once pressure is removed, sand grains hold the fractures open.

[16] Clean Wisconsin's citation to ***Applegate-Bader Farm, LLC v. DOR***, 2021 WI 26, ¶19, 396 Wis. 2d 69, 955 N.W.2d 793, in support of its contention that the impacts the EIS "must review explicitly include indirect impacts" is of no help here. In ***Applegate-Bader Farm***, our supreme court reviewed an agency's decision not to issue an EIS at all and whether Applegate-Bader had raised a bona fide WEPA claim. ***Id.***, ¶¶3, 17. It did not address the adequacy of an EIS. Nevertheless, the court did hold that agencies must consider direct and indirect "environmental effects of their proposed rules when deciding whether to prepare an EIS." ***Id.***, ¶3.

[17] Because the NTEC would not run at full capacity for every hour of the year, the EIS presented annual emission estimates based on the facility running at an expected capacity of 47.5%.

NTEC's capacity factor, ranging from 1.5 to 2.7 million tons of carbon-dioxide-equivalent gases.

¶81 The Commission also found that the EIS considered the indirect environmental impact resulting from extracting natural gas fuel from the earth, which is mostly in the form of methane gas. General impacts from fracking included those to public health and groundwater because of the use of water and chemicals as well as the potential for "seismic events like small earthquakes." As to specific impacts, the EIS noted that the "distant adverse impacts to air, lands and waters" resulting from fracking were indirectly related to the construction and operation of the NTEC. It further noted the impact to land in western Wisconsin where the sand used for fracking is mined. These mines require removing "overburden," which includes soils and plants above the sand. Finally, the EIS noted that greenhouse gas emissions "that are not countered by resequestering carbon in the necessary timeframe" are indirect impacts resulting from fracking that could contribute to "more rapid and intense global climate change."

¶82 In short, the EIS addressed the impacts that Clean Wisconsin argues the EIS did not address, just not to the level that Clean Wisconsin desires. Clean Wisconsin does not clearly explain, however, what further analysis is required by the EIS or point to a standard that the Commission is required to meet when evaluating greenhouse gas impacts, much less one that it failed to meet. Faulting the EIS for not discussing the "relative significance of these emissions," is far too nebulous of a concept and, more importantly, is not a requirement set forth in any controlling statute or precedent.

¶83 Similarly, Clean Wisconsin contends that the Commission is "obligated to provide a quantitative estimate of the increased greenhouse gas

emissions" caused by fracking, but it does not point to a method for determining the amount of methane gas released from fracking or address whether it is possible to perform such an analysis. The EIS must address only "reasonably foreseeable, significant effects to the human environment," *see* WIS. ADMIN. CODE § PSC 4.30(1)(b), and must provide information that is "reasonably necessary under the circumstances for evaluation of the project," ***Clean Wis.***, 282 Wis. 2d 250, ¶191 (citation omitted). As to the impacts of greenhouse gas emissions, the EIS did so here.[18] That Clean Wisconsin believes a more detailed analysis is required does not mean that the Commission wrongly concluded that the EIS sufficiently addressed the nonspeculative impacts of greenhouse gas emissions.

[18] Clean Wisconsin cites two federal cases—***Sierra Club v. FERC***, 867 F.3d 1357 (D.C. Cir. 2017), and ***Columbia Riverkeeper v. United States Army Corps of Engineers***, No. 19-6071 RJB, 706 F. Supp. 3d 1127, 2020 WL 6874871 (W.D Wash. Nov.23 2020)—to support its contention that the EIS was insufficient in addressing the indirect impacts resulting from fracking. These cases, however, show that the Commission correctly determined that the EIS sufficiently addressed those impacts. Because WEPA is based principally on the National Environmental Policy Act (NEPA), federal law construing NEPA is persuasive authority. ***Clean Wis.***, 282 Wis. 2d 250, ¶188 n.43.

In ***Sierra Club***, the United States Court of Appeals for the District of Columbia Circuit held that FERC's EIS for a pipeline project "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so" because those greenhouse gas emissions were foreseeable, indirect effects of authorizing the project. ***Sierra Club***, 867 F.3d at 1374. The EIS in this case did just that—it provided two estimates for annual greenhouse gas emissions resulting from the operation of the NTEC based on its capacity factor.

In ***Columbia Riverkeeper***, the United States District Court for the Western District of Washington concluded that the Army Corps of Engineers failed to consider the reasonably foreseeable indirect effects of a project's greenhouse gas emissions and that its assertion that greenhouse gas emissions were outside its jurisdiction did "not relieve it of its duty to take a 'hard look.'" ***Columbia Riverkeeper***, 706 F. Supp. 3d at 1137. Here, the Commission correctly noted that the EIS considered the impacts resulting from fracking.

CONCLUSION

¶84 As to all of Clean Wisconsin's assertions of reversible error in this case, Clean Wisconsin simply presents a view of the facts and an assessment of environmental impacts that are different from those reached by the Commission. Furthermore, its critiques focus on only a few portions of an otherwise thorough and well-documented set of determinations, all of which considered the evidence that Clean Wisconsin submitted in a contested proceeding. While Clean Wisconsin's view of the record appears itself to be reasonable, our standard of review does not permit this court to overturn the Commission's own, differing reasonable view of these matters.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.