IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-2195

SIERRA CLUB; NATURAL RESOURCES COUNCIL OF MAINE; and APPALACHIAN MOUNTAIN CLUB,

Plaintiffs - Appellants,

v.

U.S. ARMY CORPS OF ENGINEERS; COLONEL JOHN A. ATILANO II; and JAY CLEMENT,

Defendants - Appellees,

CENTRAL MAINE POWER COMPANY,

Intervenor-Defendant - Appellee.

BRIEF OF APPELLANTS SIERRA CLUB, *et al.*

APPEAL FROM DECEMBER 16, 2020 ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26(1), Appellants Sierra Club, Natural Resources Council of Maine, and Appalachian Mountain Club submit the following Corporate Disclosure Statements.

Appellant Sierra Club states that it has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Sierra Club.

Appellant Natural Resources Council of Maine states that it has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Natural Resources Council of Maine.

Appellant Appalachian Mountain Club states that it has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Appalachian Mountain Club.

Dated this 2nd day of February, 2021.

s/ Kevin Cassidy
Kevin Cassidy
Earthrise Law Center
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JURISDICTIONAL STATEMENT

Appellants Sierra Club, Natural Resources Council of Maine, and Appalachian Mountain Club (collectively, "the Sierra Club") allege the U.S. Army Corps of Engineers' ("Corps") issuance of an Environmental Assessment/Finding of No Significant Impact ("EA/FONSI") and a Clean Water Act ("CWA") Permit for the Central Maine Power ("CMP") transmission line project ("the Project") violated the National Environmental Policy Act ("NEPA") and the CWA. APP-10–55. The district court has subject-matter jurisdiction over the case pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, and 5 U.S.C. §§ 701 *et seq*. Appellants have Article III standing. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000); *see also* Joint Appendix ("APP")-62–68, 72–77, 89–97. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1), because the Sierra Club is appealing the district court's December 16, 2020 denial of its motion for a preliminary injunction. The Sierra Club filed its timely notice of appeal on December 21, 2020. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

1. Whether the district court erred in denying the Sierra Club's motion for a preliminary injunction.

STATEMENT OF CASE

I. The National Environmental Policy Act

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (1978).[1] Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* § 1500.1(b), (c). "Public scrutiny [is] essential to implementing NEPA." *Id*. § 1500.1(b).

To accomplish its purposes, NEPA requires all federal agencies to prepare a "detailed statement," known as an Environmental Impact Statement ("EIS"), for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). By definition, the impacts that require analysis under NEPA are far broader than just those affecting the environment; such effects include "aesthetic, historic, cultural, economic, social, or health" impacts. 40 C.F.R. § 1508.8(b). If an agency is uncertain whether an action will have significant effects, it may begin the review process by preparing an EA. *Id.* §§ 1501.3, 1508.9. Agencies "shall involve . . . the public, to the extent practicable, in preparing" EAs. *Id.* §

[1] CEQ issued revised NEPA regulations, which became effective on September 14, 2020. The Corps completed its NEPA analysis on July 7, 2020 and applied the regulations in effect at that time to its analysis. Accordingly, the applicable NEPA regulations for this matter are the 1978 regulations, which the Sierra Club sets forth herein and includes in the Addendum. The Corps also has promulgated its own NEPA-implementing regulations. *See generally* 33 C.F.R. Part 325, App'x B.

1501.4(b). Only if the EA concludes that the action clearly will not have a significant effect may the EA culminate in a FONSI. *Id.* §§ 1501.4(e), 1508.13. To support a FONSI the agency must "make a convincing case." *Nat'l Parks Cons. Assoc. v. Semonite* ("*NPCA*"), 916 F.3d 1075, 1082 (D.C. Cir. 2019). Otherwise, the action agency must prepare an EIS. *Id.*

II. The Central Maine Power Transmission Project

Massachusetts has long sought electrical power from large hydropower dams in northern Canada. Most recently, several investor-owned electric distribution companies solicited proposals for "Clean Energy Generation" projects as required by Massachusetts law. APP-499. The first project chosen was the Northern Pass Project, which was to run through New Hampshire. *See* 76 Fed. Reg. 7,828 (Feb. 11, 2011); *see also* APP-500. Because Northern Pass would cross the border between Canada and the United States, it required a Presidential Permit from the Department of Energy ("DOE"). 76 Fed. Reg. at 7,829. DOE, in coordination with several federal agencies including the Corps, conducted an EIS for the project. *See id.*; *see also* 82 Fed. Reg. 39,424 (Aug. 18, 2017) (notice of final EIS). However, in 2018, New Hampshire denied a necessary permit for the project. APP-500.

Massachusetts' "Plan B" was Central Maine Power's ("CMP's") proposal,[2] a

[2] Massachusetts chose the CMP Project over another fully permitted project in Vermont, for which the federal government also conducted an EIS. *See* APP-501; 80 Fed. Reg. 68,867, 68,868 (Nov. 6, 2015).

substantially similar project through Maine that includes construction of a 144.9-mile electrical transmission line corridor from the Canadian border to Lewiston, Maine. APP-403. APP-500. Because the Project will impact CWA jurisdictional waters, it requires a CWA Permit. APP-321. And because the Project will cross the United States-Canadian border, the Project also requires a Presidential Permit from DOE. *See* 82 Fed. Reg. 45,013 (Sept. 27, 2017).

The Project consists of five segments requiring the clearing and permanent degradation of more than 1,000 acres of forest for the corridor, the installation of hundreds of 100-foot tall or taller steel poles strung with electrical lines visible for miles over the landscape, and related infrastructure. APP-405–08; APP-566–68. Segment 1 is a new, 53.1-mile long, 150-foot wide transmission line corridor that will cut through the Western Maine Mountains, and pass beneath the Kennebec River via horizontal directional drilling.[3] APP-405. Segment 1 will cross 481 freshwater wetlands and 300 rivers, streams, or brooks (223 of which contain coldwater fisheries habitat), including the Upper Kennebec River, a state-listed Outstanding River Segment. APP-405. The forest conversion will impact at least 110 vernal pools. APP-405; APP-177–80.

III. The Western Maine Mountains Region

[3] Segments 2, 3 and 4 run along 91.8 miles of existing corridor and require clearing and widening of up to 75 feet to accommodate the new lines. APP-406–07.

The Western Maine Mountains are a unique and incredibly important ecological region "of superlatives." *See* APP-109–12; APP-1077–78 (Tr. 49:20–50:13). As one paper recently summarized:

> It includes all of Maine's high peaks and contains a rich diversity of ecosystems, from alpine tundra and boreal forests to ribbed fens and floodplain hardwood forests. It is home to more than 139 rare plants and animals, including 21 globally rare species and . . . includes more than half of the United States' largest globally important bird area, which provides crucial habitat for 34 northern woodland songbird species. It provides core habitat for marten, lynx, loon, moose and a host of other iconic Maine animals. Its cold headwater streams and lakes comprise the last stronghold for wild brook trout in the eastern United States. Its unfragmented forests and complex topography make it a highly resilient landscape in the face of climate change.

APP-109. The unique landscape is "one of the few areas, if not the only area, in the eastern United States capable of supporting viable populations of all native species of wildlife." APP-1076–77 (Tr. 48:25–9:15). Simply put, "[t]here is no place like it in the eastern United States." APP-1078 (Tr. 50:13–14).

Many Mainers choose to visit or live in or near the region, to hunt, fish, hike, snowmobile, paddle and whitewater raft, and otherwise appreciate the largely unfragmented and undeveloped natural environment and unmatched scenery. *See*, *e.g.*, APP-62–66, 70–74, 76, 89–91. The new corridor will be one of the largest permanent fragmenting features bisecting the region, APP-109, and it will have immediate and irreparable adverse effects on the region's environment, scenic character, and existing uses, particularly recreation, tourism and guiding industries.

See e.g., APP-64–67, 72–77, 93–94, 96, 606, 612–13.

IV. The Federal Government's Environmental Review Process

On March 26, 2019, the Corps issued its Public Notice for the Project. APP-321–47. On April 25, 2019, the Sierra Club submitted comments to the Corps noting multiple deficiencies in the Public Notice which made it impossible to submit fully informed comments. APP-371–72. The U.S. Environmental Protection Agency ("EPA") agreed with the Sierra Club's assessment of the "deficien[t]" public notice, stating it "was issued prematurely" and recommending the Corps "issue a revised public notice" that "provide[s] a link to the draft [EA]." APP-1037–38. The Corps disregarded both of EPA's recommendations. The Sierra Club also noted the Project's significant impacts required an EIS and requested an opportunity to comment on any EA. APP-353–57.

On July 7, 2020, the Corps finalized the Project's EA/FONSI without giving the public an opportunity to comment. The Corps did not notify the public of the final EA/FONSI or post it on its website. On November 6, 2020, the Corps issued the CWA Permit. APP-624–40. At that point, the Project still lacked the required Presidential Permit. On January 14, 2021, without any public comment, DOE issued its EA/FONSI and the Presidential Permit.

V. The Proceedings Below

On October 27, 2020, the Sierra Club filed a complaint in the District of Maine

alleging the Corps violated NEPA by failing to prepare an EIS for the Project; issuing a legally deficient EA/FONSI; and failing to release the EA for public comment. ECF No. 1.[4] Because CMP intended to begin work as early as December 4, 2020, ECF No. 19-14, on November 11, 2020, the Sierra Club moved for a preliminary injunction. ECF No. 18. The district court held a hearing on December 2, 2020, at which the Sierra Club, but not CMP or the Corps, presented evidence. ECF Nos. 35, 55. On December 16, 2020, the district court denied the Sierra Club's motion for preliminary injunction. ECF No. 42 ("Order").[5] On December 21, 2020, the Sierra Club timely filed its notice of appeal of the court's denial of the preliminary injunction, ECF No. 44, and also filed an emergency motion for an injunction pending appeal, which the court denied. ECF Nos. 45, 49.

SUMMARY OF ARGUMENT

In denying the Sierra Club's preliminary injunction motion, the district court abused its discretion in three ways in how it applied the four-part injunction framework. First, the court failed to consider the Sierra Club's direct, on-the-ground irreparable harm from the Project, including harms to the Sierra Club's members' aesthetic, recreational, and professional interests, which remain largely undisputed by the Corps and CMP. Second, the court improperly conflated the irreparable harm

[4] The Sierra Club supplemented its Complaint to add claims regarding the CWA Permit after the Corps issued that Permit. *See* APP-10–55.
[5] Per Circuit rules, the district court's Order is included in this brief's Addendum.

and merits factors. Because the court already had determined the Sierra Club was not likely to succeed on the merits of its claims—a separate legal error—its merging of these factors caused it to find irreparable harm lacking.

Third, the court failed to apply the sliding scale approach to determine whether a preliminary injunction should issue. As Justice Ginsburg observed in *Winter v. Natural Resources Defense Council*, the Supreme Court "has never rejected" the sliding scale formulation, which recognizes flexibility as the "hallmark of equity jurisdiction." 555 U.S. 7, 51 (2008) (Ginsburg, J. dissenting). The Court should follow the majority of circuits post-*Winter* in reaffirming the sliding scale approach. Under that formulation, a preliminary injunction to prevent construction activities in Segment 1 should issue. Irreparable harm is nearly certain—indeed, CMP had begun construction prior to this Court's injunction issuing. *See* Resp. Mot. for Reconsideration, ATT-13–15. Given such high likelihood of irreparable harm, the merits factor should be analyzed pursuant to the serious questions standard.

The Sierra Club, at a minimum, has raised serious questions going to the merits of their claims. First, the Corps' EA was flawed in multiple ways. Most fundamentally, the Corps impermissibly narrowed the scope of its NEPA analysis to "impacted" waters of the United States. This error permeated the entirety of the Corps' analysis. In addition, the Corps failed to establish the baseline conditions for the affected area, did not take the requisite "hard look" at the Project's impacts, and

conducted its NEPA analysis separate from DOE's analysis even though the agencies were analyzing the same Project. Second, several factors set forth in NEPA's implementing regulations mandate the Corps complete an EIS for the Project, including the Project area's unique characteristics and proximity to ecologically critical areas and the Project's multitude of significant ecological and aesthetic impacts, many of which are highly controversial and uncertain. Lastly, the Corps did not release its EA for public comment as required by NEPA.

ARGUMENT

When considering a preliminary injunction motion, courts analyze four factors: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm absent an injunction; (3) a balancing of the hardships; and (4) the public interest. *Respect Maine PAC v.* McKee, 622 F.3d 13, 15 (1st Cir. 2010). "The first two factors are the most critical." *Id.* An appellate court reviews a denial of a preliminary injunction under an abuse of discretion standard. *See Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21, 30 (1st Cir. 2001). "This deferential standard . . . applies to 'issues of judgment and balancing of conflicting factors,' and we still review rulings on abstract legal issues de novo and findings of fact for clear error." *Id*. (internal citations omitted). "Ordinarily, a district court's application of an erroneous legal standard is a per se abuse of discretion, which necessitates remand." *U.S. ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 195 (1st Cir. 2015).

I. The Sierra Club will suffer irreparable harm absent a preliminary injunction, and the district court's decision otherwise was in error.

In NEPA cases, plaintiffs can demonstrate irreparable harm by showing either on-the-ground harm to their interests or procedural injury based on NEPA violations. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013) (describing plaintiffs' "two distinct types of harm"). Here, the Sierra Club put forth extensive evidence of both types of harm, but the district court only considered the harm stemming from the Corps' NEPA violations. *See* Order at 47. While the court acknowledged the Project "is unpopular and deeply disturbing to many people," *id.*, it did not refer to or consider the concrete, on-the-ground harm the Project will cause the Sierra Club's members absent an injunction, and whether such harm is "irreparable." The court's failure to do so was in error.

The district court also erred in concluding that because the Sierra Club was not likely to succeed on the merits, irreparable harm was also lacking. *See* Order at 47. The court's conflation of these factors was legal error, as the two steps in the analysis play different roles and must be evaluated independently of each other:

> The likelihood of success on the merits is an early measurement of the quality of the underlying lawsuit, while the likelihood of irreparable harm takes into account how urgent the need for equitable relief really is. Typically, these lines of inquiry will have some overlap, but they should not be treated as the same.

Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 788 (7th Cir. 2011).

The Sierra Club demonstrated its members will likely suffer irreparable harm

from Segment 1. *See, e.g.*, APP-73–76 (Todd Towle describing harm to recreational and professional guiding interests, and to native brook trout streams); APP-63–67 (Carey Kish's recreational and aesthetic interests will be "forever [] marred by the CMP line"); *see also* APP-1061–65, 1097–98 (Tr. 33:2–37:13 and Exhibits P-2, P-3). These harms are not imagined, speculative, or remote; there is no dispute the cleared corridor and related infrastructure are permanent or at least of long duration. *See* APP-117; APP-1089–90 (Tr. 61:4–62:19). The Sierra Club's members' irreparable harm testimony is corroborated by expert testimony regarding the Project's harms to the environment and wildlife. *See, e.g.*, APP-116–22; APP-140–44; *see also* Order at 15 (listing the many "ecological values within the Corridor's footprint" and acknowledging the Project's "adverse" impacts on scenic and recreational values). These types of injuries are "irreparable." *See, e.g., Nat'l Wildlife Fed. v. Burford*, 835 F.2d 305, 324 (D.C. Cir. 1987) (finding irreparable injury to group's members' "interests in conserving natural resources for their aesthetic, recreational, and environmental use and enjoyment").[6]

Absent an injunction, the Sierra Club's "rights to secure meaningful review"

[6] In evaluating irreparable harm, courts consider both impacts from the challenged action and those from the larger project to which that particular action is related. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995–96 (8th Cir. 2011) (in NEPA challenge to Corps' CWA permit, finding irreparable harm based in part on plaintiffs' concerns about the "power line system that is currently being cleared" and "light and noise pollution caused by plant construction").

with respect to Segment 1 will be destroyed. *NCTA-Internet & Television Ass'n v. Frey*, No. 2:19-CV-420-NT, 2020 WL 2529359, at *2 (D. Me. May 18, 2020). The district court recognized this when it stated the "environmental and scenic values existing in Segment 1" "cannot be restored through issuance of a later court order," Order at 47, but nevertheless found no irreparable harm. *But see* APP-64–66; APP-1063–65 (Tr. 35:8–37:13), 1097; APP-1070 (Tr. 42:5–20). The court's conclusion was based on a misapplication of the injunction four-factor test and thus was "a per se abuse of discretion." *EV3, Inc.*, 802 F.3d at 195.

II. The district court erred by not reviewing the irreparable harm and merits factors on a sliding scale.

Where a strong likelihood of irreparable harm exists and where the balancing of the equities demand it, the party need only show serious questions going to the merits. *See, e.g., Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 37 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011).[7] This requires a court to determine the relative strength of a movant's irreparable harm showing so it can determine whether the movant must meet either a likelihood of success standard or

[7] *But see*, *e.g., Pashby v. Delia*, 709 F.3d 307, 320–21 (4th Cir. 2013).

the less demanding "serious questions" standard.[8]

This approach comports with Supreme Court law, which long has recognized flexibility as "[t]he essence of equity jurisdiction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). *Winter* did not alter that fundamental principle. 555 U.S. at 51 (Ginsburg, J., dissenting) (citing 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.3, p. 195 (2d ed.1995)). This Circuit has used the "sliding scale" approach on a number of occasions. *See, e.g.*, *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) ("[T]he measure of irreparable harm is not a rigid one; it has been referred to as a sliding scale, working in conjunction with a moving party's likelihood of success on the merits."). The sliding scale is not one-sided: the two factors "'must be weighed inter sese'" and "'more of one excuses less of the other.'" *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 743–44 (1st Cir. 1996). The sliding scale approach is not an alternative test to the four-factor framework, but rather a different standard on a single continuum. *See Tillamook Cty. v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1143 (9th Cir. 2002).

Because, as discussed *infra*, the court did not properly consider the Sierra

[8] *See also Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011) (where plaintiffs "have not shown they are more likely than not to succeed on the merits" the court must nonetheless "determine whether the other three factors so much favor the plaintiffs that they need only have raised a 'serious legal question' on the merits").

Club's irreparable harm, the court was unable to weigh the likelihood of success on the merits *inter sese* with the strong showing of irreparable harm using the sliding scale approach. *See Astra U.S.A., Inc.*, 94 F.3d at 743–44; *see also Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) ("'[T]he application of an improper legal standard in determining the likelihood of success on the merits is never within the district court's discretion.'").

III. The Sierra Club raised serious questions on the merits of its claims.

In its preliminary injunction motion, the Sierra Club argued the Corps violated NEPA by failing to: (1) issue a legally sufficient EA; (2) complete an EIS; and (3) provide opportunity for public comment on the EA/FONSI. The district court's conclusion the Sierra Club was not likely to succeed on the merits of its claims was largely the result of the court's failure to apply the sliding scale and its unwarranted deference to the Corps' decision, especially regarding the Corps' impermissibly narrow scope of NEPA analysis. While the APA's deferential "arbitrary and capricious" standard of review applies to the Sierra Club's claims, *see* 5 U.S.C. § 706(2)(A), such deference is not unfettered or always due. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (unfettered deference "render[s] judicial review generally meaningless"). When the sliding scale is applied, the Sierra Club clearly has at least demonstrated "serious questions" going to the merits.[9]

[9] The Sierra Club also meets the higher "likelihood of success" standard.

A. The Corps' EA/FONSI was arbitrary and capricious.

1. The scope of the Corps' NEPA analysis was overly narrow.

Where the Corps has "sufficient control and responsibility" over a project, the scope of its NEPA analysis must include all of the project's environmental impacts. *See* 33 C.F.R. § 325, App'x B(7)(b)(2). When determining its scope, the Corps considers (1) "[w]hether or not the regulated activity comprises 'merely a link' in a corridor type project"; (2) "[w]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity"; (3) "[t]he extent to which the entire project will be within the Corps jurisdiction"; and (4) "[t]he extent of cumulative Federal control and responsibility." *Id.*

Based on its interpretation of this regulation, the Corps limited the scope of its NEPA analysis to "impacts to waters of the U.S. and the immediately surrounding uplands[.]" APP-441. Many of the Project's impacts—including *inter alia*, forest and habitat fragmentation, increased fire danger, and greenhouse gas ("GHG") emissions—fell outside this scope, and thus the Corps ignored or only cursorily examined them, in violation of NEPA's requirement the Corps take a "hard look" at the Project's effects. *See Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273, 1284 (1st Cir. 1996). The district court, deferring to the Corps, found the Sierra Club unlikely to succeed on its argument that the Corps had applied an impermissibly narrow scope

of review. Order at 23–34. This decision was in error.

First, the Corps' regulated activity is not "merely a link" in the Project because the aquatic resources are "spaced throughout the corridor." *See* APP-438; *see also generally*, APP-916–1034 (Aquatic Resources Maps). The Corps' regulatory example supports the Sierra Club's position: "if 30 miles of the 50-mile transmission line *crossed* wetlands or other [aquatic resources], the scope of analysis should reflect impacts of the whole 50-mile transmission line." 33 C.F.R. § 325, App'x B(7)(b)(3) (emphasis added). Here, the Project crosses more than 1,800 aquatic resources, including multiple resources along almost every half-mile of Segment 1. APP-1088–89 (Tr. 60:1–61:3), 1099–104. The Corps' unreasonable interpretation converts its "merely a link" regulation into merely hundreds of links. *See* APP-405–07, 438, 916–1034. By contrast, the Corps' "merely a link" example describes a single river crossing. *See* 33 C.F.R. § 325, App'x B(7)(b)(3) ("a 50-mile electrical transmission cable crossing a 1 1/4 mile wide river"). The Corps' decision to narrow its scope of NEPA review was arbitrary and capricious, and not entitled to deference. *See Dubois*, 102 F.3d at 1284–85 (discussing case law regarding when agency is entitled to deference, including that agency's decision must be reasoned, supported by the substantial evidence, and "'make[] sense'").

Second, aspects of the upland right-of-way and existing infrastructure affected the transmission line's configuration. *See* APP-495–96 (ruling out zig-zagging the

line due to aquatic resources impacts); APP-438–39 (noting line's location dependence on upland existing infrastructure). The district court concluded, without support, that the zig-zagging "would not normally require the Corps to expand its assessment of significance to encompass non-[waters of the U.S.] impacts." Order at 30. But the factor is unambiguous, and the EA is clear the location of the transmission line was influenced by upland area and facilities. *See Kisor v. Wilkie*, 130 S.Ct. 2400, 2415 (2019) (agency not entitled to deference for interpretation of unambiguous regulation).

Third, 17 percent of the Project is within the Corps' jurisdiction, APP-404, but the Corps based its review on only a smaller percentage of "impacted" waters. Order at 32.[10] The "better model for the ratio" is "the total amount of land or water under federal jurisdiction relative to the total length of the project." *Sierra Club*, 990 F. Supp. 2d at 36; *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1041 (9th Cir. 2009) (rejecting argument that narrow scope was justified because impacted waters made up only a small percentage of overall project acreage).

Lastly, there is significant cumulative federal control and authority over the Project. Besides the Corps' Permit, the Project also required a Presidential Permit

[10] The Corps' calculations of "impacted" waters "do not appear to encompass [waters of the U.S.] cross-over," Order at 32, despite the fact the Project will cross more than 1,800 aquatic resources, APP-405–07, and those resources will be impacted by the corridor clearing and maintenance. APP-243–46, 251–52, 257–58.

from DOE, with concurrences from the Secretaries of State and Defense, for the construction, operation, maintenance, and connection of the transmission line from the border crossing to its first connection with existing infrastructure in Lewiston, at the end of the 144.9-mile corridor. *See* APP-402, 437, 440, 511. DOE conducted a separate NEPA analysis for its Permit. APP-402. The Federal Energy Regulatory Commission ("FERC") is responsible for transmission rate approval and an interconnection and operating agreement, APP-440; *see also* APP-450 (recognizing "responsibility of agencies such as FERC" over public safety issues related to fires). Additionally, the Corps consulted with the U.S. Fish and Wildlife Service on federally threatened and endangered species and critical habitat. APP-633–40. Consultation also was required under the National Historic Preservation and Magnuson-Stevens Acts, and with the National Park Service. APP-551–53, 908–15.

Thus, all four factors weigh in favor of considering Project-wide impacts. The Corps' conclusion otherwise is not supported by the evidence and is inconsistent with its regulations. *See Stewart v. Potts*, 996 F. Supp. 668, 672, 680, 682–83 (S.D. Tex. 1998) (rejecting Corps' argument it need not consider impacts from forest fragmentation, and referring to the Corps' argument as "an impermissible abdication of [the Corps'] duties under NEPA"); *see also Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121–24 (9th Cir. 2005). As the Ninth Circuit explained in *White Tanks*, there is a "spectrum" of project types based on whether the waters are

concentrated in a particular part of the project area such that the project could occur without the CWA permit. 563 F.3d at 1040. Here, that is not possible. *See* APP-460 ("No action alternative" stating that without CWA Permit "the proposed transmission system would not be constructed"). As the Corps failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," its decision was arbitrary and capricious, and the district court erred in deferring to it. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal quotations omitted).[11]

Beyond improperly deferring to the Corps, the district court also erred in concluding the Supreme Court's decision in *Department of Transportation v. Public Citizen* precluded a finding that the Corps should have applied a broader NEPA scope. Order at 24 (quoting 541 U.S. 752, 767 (2004)). The "critical feature" of the Supreme Court's analysis in *Public Citizen* was that the agency had no discretion regarding the relevant action, and the Court found the agency was not required to consider "the environmental impact of an action it could not refuse to perform." *Pub. Citizen*, 541 U.S. at 766–70. Here, the Corps has significant discretion: it could deny

[11] Additionally, the Corps used a broader scope of review to analyze the Project's benefits than impacts, in contravention of the Corps' unambiguous regulation requiring it to apply the same scope to a project's impacts and benefits. *See* 33 C.F.R. § 325 App'x B(7)(b)(3); *compare* APP-460 (in NEPA No Action Alternative, noting Project's region-wide benefits) *with* APP-441 (limiting scope of NEPA analysis to impacts to aquatic resources and immediate uplands).

the Permit or impose conditions to protect the environment after conducting a broader NEPA analysis. *See White Tanks*, 563 F.3d at 1040–42 (distinguishing *Public Citizen* and holding "[b]ecause this project's viability is founded on the Corps' issuance of a [CWA] permit, the entire project is within the Corps' purview"). Indeed, the Permit includes conditions unrelated to aquatic resources. *See*, *e.g.*, APP-635–36 (Permit conditions 9 and 17 regarding invasive species and tree clearing prohibitions to protect bats). Thus, the Corps' authority to prevent environmental effects goes far beyond the causation at issue in *Public Citizen*.

2. The Corps failed to adequately define the Project area's baseline conditions.

"Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); *see also Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810, 2014 WL 3019165, at **30–33 (D. Or. July 3, 2014) (discussing baseline condition requirement for EAs).

The Corps' discussion of baseline conditions for Segment 1 is inadequate. Beyond a "waterbody table" in the yet-to-be-produced administrative record, the baseline discussion for the entire Project is a single paragraph. *See* APP-435–36. Without an adequate baseline analysis, the Corps "cannot carefully consider information about significant environment impacts." *N. Plains Res. Council, Inc. v.*

Surface Transp. Bd., 668 F.3d 1067, 1085 (9th Cir. 2011). The district court was skeptical of and expressed concern regarding the Corps' baseline conditions discussion, *see* Order at 43, but then skipped straight to discussing the Project's impacts to aquatic resources. *Id.* at 43–46. As neither the Corps nor the court could take a "hard look" at the Project's impacts without an adequate baseline analysis, this omission was in error, and the Corps' EA/FONSI was arbitrary and capricious.

3. The Corps improperly segmented its NEPA analysis from DOE's NEPA analysis.[12]

NEPA requires federal agencies to complete one combined NEPA document for connected (i.e., "closely related") actions. 40 C.F.R. § 1508.25(a)(1). This requirement "prevent[s] agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *NRDC v. Hodel*, 865 F.2d 288, 297–98 (D.C. Cir. 1988). Here, the Corps and DOE permits are for the same Project, yet the agencies completed separate NEPA analyses, *see* APP-402–564 and CMP Mot. for Reconsideration Att. 2, and thus avoided taking a hard look at the Project's cumulative and synergistic impacts. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 409–

[12] The Sierra Club did not discuss this argument in detail below because DOE had not released its EA. *See* ECF No. 34 at 6. DOE has now done so, and to prevent injustice the Sierra Club requests the Court exercise its discretion to consider this argument. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Court can take judicial notice of the fact DOE prepared a separate EA. *See* Fed. R. Evid. 201(b)(2).

10 (1976). The division of the Project's NEPA analysis is inconsistent with NEPA's requirements, arbitrary and capricious, and not entitled to deference.

B. The Project requires an EIS.

Federal agencies must prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). To determine if a project will "significantly" affect the environment, "NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27. CEQ regulations list several factors to determine a Project's intensity, or "severity of impact", including *inter alia*, the "unique characteristics of the geographic area" and proximity to ecologically critical areas; the Project's impacts; and the degree to which those impacts are highly controversial or uncertain. *Id.* § 1508.27(b). "'Implicating any one of the factors may be sufficient to require development of an EIS.'" *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng'rs*, No. 20-5197, 2021 WL 244862, at *1 (D.C. Cir. Jan. 26, 2021).

As discussed *supra* at 4–6, the Project area contains unique characteristics and is itself an ecologically critical area. The Corps ignored the Project area's significance, and baseline conditions, and arbitrarily adopted CMP's facile description of the area as "heavily managed commercial timberlands." APP-561. The Corps also limited the scope of "ecologically critical areas" by arbitrarily inserting the word "designated"—which does not appear in the regulations—in front

of that term in the EA. *Compare* APP-561 *with* 40 C.F.R. § 1508.27(b)(3).[13]

The Project will have significant impacts not only to aquatic resources but also the surrounding forest and wildlife. Segment 1 alone will run through more than 800 aquatic resources, and will establish new, fragmenting electrical infrastructure through the Western Maine Mountains. *See e.g.*, APP-108–12, 140, 180–82, 184–85, 241–42, 405. But the Corps failed to consider the effects from forest fragmentation. *Compare* APP-448 (upland forest fragmentation is outside scope of EA and "not discussed in great detail or considered further") *with* APP-116–24, APP-140–44, APP-177–85, APP-243–258; APP-276–82 (expert declarations discussing forest fragmentation impacts). The corridor clearing will permanently convert forested wetlands to scrub-shrub wetlands, and the opening of the forest canopy will have numerous negative impacts, including increased solar heating of the converted and adjacent wetlands, which leads to temperatures less suitable for certain wildlife, and increased risk of storm damage from trees along the corridor's margins, which leads to wider forest canopy openings. *See* APP-140–41. The "edge effects" from the new and expanded corridors will cause a decline in interior forest habitat, which will impact aquatic resources in the edge zone. *See* APP-182, APP-144*; see also* APP-118–19 (discussing edge effects and how the "edge zone" can

[13] Even so, the Project will impact *designated* critical habitat for Canada lynx and potential habitat for Atlantic salmon. APP-417–18, 422–23.

extend up to 300 feet into forest); APP-142, 144.[14]

Because of its many impacts, the Project is highly controversial. *See generally, e.g.*, APP-106–35 (disagreeing with Corps about the characterization of the Project area and forest fragmentation impacts, and the purported benefits of mitigation and compensation); APP-171–206 and APP-136–70 (disagreeing with Corps about impacts to aquatic resources); APP-235–72 (same, regarding impacts to coldwater fisheries); APP-273–320 (same, regarding impacts to deer); APP-207–34 (same, regarding impacts on GHG emissions). Courts regard disagreement among experts or knowledgeable individuals as evidence that a project is controversial.[15] *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193–94 (9th Cir. 1988) (finding controversy warranting an EIS where plaintiff "introduced affidavits and testimony of conservationists, biologists, and other experts who were highly critical of the EAs and disputed the [agency's] conclusion"); *see also Standing Rock*, 2021 WL 244862, at *5; APP-102 (noting 25 towns adjacent to the Project have opposed or rescinded their support for the Project). While the Corps acknowledged some of these concerns,

[14] In addition, Segment 1 will impact many high-value native brook trout streams, APP-241–58, 260; clear and fragment two critically-imperiled Jack Pine Forests, APP-121–22; and bisect the only substantial deer yard in Segment 1, APP-276–80.

[15] "A determination that significant effects on the human environment will in fact occur is not essential. If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (internal citations omitted).

mere acknowledgment is not enough to satisfy NEPA. *See Standing Rock*, 2021 WL 244862, at *4 (“‘The question is not whether the Corps attempted to resolve the controversy, but whether it succeeded.’”). For example, even though one of the Project’s purposes is “to help Massachusetts meet its [GHG] emissions reduction goals,” APP-442, and the district court relied on that purported benefit in its public interest evaluation, Order at 48–49, the Corps did not resolve the significant disagreement regarding GHG impacts. *Compare* APP-207–34 and APP-104–05 *with* APP-454 (Corps acknowledging GHG concerns but summarily stating concerns “appear to be unfounded”); *see also* APP-104–05 & n.4 (discussing how Project will not result in decreased GHG emissions due to energy shuffling).

Additionally, the Project also presents several unique risks and highly uncertain effects. For example, late in the permitting process a forest “tapering” mitigation measure in Segment 1 was added to limit clearing to the middle 54 feet of the right-of-way (“ROW”), with gradually increasing vegetation heights moving out from the 54 feet clearing to the edge of the 150-foot corridor, to a maximum height of 35 feet. APP-412, 418. But if the trees in a particular segment of the ROW are all greater than 35 feet, they will all be cleared across the entire 150-foot ROW. APP-1085–86 (Tr. 57:3–58:23). No data was provided to or analyzed by the Corps regarding the number of even-aged stands of trees over 35 feet in the Segment 1 corridor. APP-1096 (Tr. 68:7–17). Thus, while the Corps lists purported benefits of

tapering, *id.*, the efficacy of this mitigation measure and the effects of the forest clearing generally remain highly uncertain.[16] *See* APP-113, 122–24, 126, 183–84, 187, 257–58, 278 (discussing concerns regarding tapering). For similar reasons, the tapering is highly controversial. *Id.* Other highly uncertain effects include *inter alia*, the risk of drilling under the Kennebec River, *see* APP-405; the public safety risk due to increased fire hazard in a remote region, *see* APP-607–10; the uncertain effects on GHG emissions, *see* APP-211, 215–16; and the uncertainty surrounding effects on regional renewable energy sources, *see* APP-596–601.

The court only viewed the Project's context and intensity through the lens of the Corps' improperly narrow scope. Order at 33. But under both the improperly narrow scope and the correct, broader scope an EIS was required. This case presents "'precisely' the circumstances in which Congress intended to require an EIS, namely 'where, following an [EA], the scope of the project's impacts remains both uncertain and controversial.'" *Standing Rock*, 2021 WL 244862, at *11. EAs, even lengthy ones, are no substitute for EISs because the documents serve very different purposes.

[16] The district court discussed CMP's mitigation measures when evaluating the Project's impacts, Order at 36–43, but such measures are no substitute for NEPA's requirement the Corps take a hard look at the Project's *actual* impacts. Moreover, mitigation measures must be "supported by substantial evidence." *Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005). Here, there is no evidence demonstrating the efficacy of the tapering, or of other mitigation measures. *See e.g.*, APP-410 (listing wetlands impacts mitigation, but not mentioning evidence); APP-415–16 (same, for vernal pools); *see also* APP-186–87 (discussing concerns with vernal pool impact mitigation).

Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985) (e.g., "those outside the agency have less opportunity to comment on an EA than on an EIS."). As the Corps was not "'able to make a convincing case for its [FONSI]'", its failure to do an EIS was arbitrary and capricious. *NPCA*, 916 F.3d at 1082.

C. The Corps violated NEPA by not releasing its EA for comment.

Agencies "*shall* involve environmental agencies, applicants, *and the public*, *to the extent practicable*, in preparing" EAs. 40 C.F.R. § 1501.4(b) (emphasis added). Here, rather than asking whether additional public involvement in preparing the EA—specifically a public comment period—was practicable, the Corps arbitrarily declined to circulate the draft EA for comment. In a March 2020 meeting, in response to a question from the National Park Service regarding whether there was an estimated schedule for public review of [the] EA," Defendant-Appellee Clement replied, the "[Corps] does not publish EAs." APP-907. Such a pre-determined refusal is incompatible with the Corps' mandatory duty to involve the public "to the extent practicable," 40 C.F.R. § 1501.4(b), and with its mandatory duty to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." *Id*. § 1506.6(a). Public comment on the EA also is required because the Project is "closely similar to [projects] which normally requires the preparation of an EIS." *Id.* § 1501.4(e)(2)(ii); *see also* APP-500–01 (describing two other border-crossing transmission line projects to bring electricity from Canada that required

EISs, including the Northern Pass, this Project's predecessor).[17]

The Corps' failure to provide adequate public participation prejudiced the Sierra Club and the public. The amount of information available in the EA stands in sharp contrast to the limited information in the Corps' March 19, 2019 public notice. *Compare* APP-402–564 (EA/FONSI) *with* APP-321–347 (Public Notice); *see also* APP-1037–38. For example, at the time of the Corps' public notice (or December 2019 public hearing, *see* APP-621–23) the public did not know the considered Project alternatives, the final mitigation and compensation measures, the limited extent of the baseline analysis, the Corps' determination of the scope of its NEPA analysis, and the contents and outcomes of the Corps' consultation with U.S. Fish and Wildlife Service and the National Park Service. These and other determinations are critical aspects of the Project on which the public was not provided an opportunity to comment.

It would have been eminently practicable for the Corps to provide a comment period for the draft EA before issuing CMP's CWA permit. The EA was finalized on July 7, 2020, APP-564, and the Corps did not issue CMP's permit until November 6, 2020. APP-628. Thus, the Corps had ample time and opportunity to accept and

[17] The Corps' pre-determined decision not to publish the EA, without examining the practicability of doing so, distinguishes this case from *Alliance to Protect Nantucket Sound v. U.S. Dept. of Army*, 398 F.3d 105, 114–15 (1st Cir. 2005). *Alliance* also did not examine whether the action was "closely similar to one which normally requires the preparation of an EIS," as is the case here. *Id*. at 115, n.8.

respond to public comments on the EA prior to its action, and its pre-determined decision not to do so was arbitrary and capricious. *See* 5 U.S.C. § 706(1), (2).

IV. The equities weigh in favor of a preliminary injunction.

The balance of the equities and public interest factors require courts to weigh the impact on each party of the grant or denial of the requested preliminary injunction, and to consider whether the injunction is in the public interest. *See Winter*, 555 U.S. at 24. In balancing the equities, the district court focused on economic harms CMP claimed it will suffer if the court issued the injunction. Order at 48. However, the court discussed these harms "simply to recognize that there are competing concerns to weigh," and concluded that because the irreparable harm and merits factors weighed against a preliminary injunction, the equities factor likewise did so. Order at 48. The court's errors in its irreparable harm and merits analyses thus carried over into its evaluation of this factor. Moreover, the Sierra Club's near-certain irreparable harm outweighs CMP's claimed harms to its economic interest, and the court abused its discretion in concluding otherwise. *See Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987) (recognizing if environmental harm appears sufficiently likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment); *see also Sierra Club*, 645 F.3d at 996 (when "[b]alancing 'monetary costs against loss to the environment,' . . . 'environmental harm outweigh[ed] monetary harm'").

The district court's flawed irreparable harm and merits analyses similarly tainted its evaluation of the public interest factor. *See* Order at 48–49. The court further erred in weighing the public interest benefits of the *completed* project against the public interest in a temporary injunction, *id.* at 49, as the Project is not slated for completion until May 31, 2023, APP-616, so none of those purported benefits will accrue, if at all, until that time. Ultimately, the idea that informed decision-making prior to project implementation is in the public interest is embedded into NEPA's purpose. *Sierra Club v. Marsh*, 714 F. Supp. 539, 593 (D. Me. 1989), *amended* 744 F. Supp. 352 (D. Me. 1989), *aff'd*, 976 F.2d 763 (1st Cir. 1992). Given the Project's significant impacts and irreparable harm to the environment and to Sierra Club's members, the public interest in ensuring the Corps complies with the law and adequately considers the Project's impacts, with the required public participation, far exceed any limited public interest in allowing CMP to commence work in Segment 1 while this litigation is pending.

CONCLUSION AND REQUESTED RELIEF

For the above reasons, the Sierra Club respectfully requests the Court reverse the district court decision, order the court to entire a preliminary injunction against any clearing and construction activities for Segment 1, and continue the existing injunction until the district court does so.

Respectfully submitted this 2nd day of February, 2021.

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CERTIFICATE OF COMPLIANCE

This document complies with the Court's January 15, 2021 Order requiring that Appellants' opening brief be limited to 30 pages because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), Appellants' brief is 30 pages.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word version 16 in Times New Roman font size 14.

Respectfully submitted this 2nd day of February, 2021.

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ADDENDUM

Addendum Index

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SIERRA CLUB, *et al.*, Plaintiffs v. UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, Defendants v. CENTRAL MAINE POWER CO., Intervenor Defendant	)	No. 2:20-cv-00396-LEW

ORDER ON MOTION TO SUPPLEMENT OR AMEND COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

The Sierra Club, the Natural Resources Council of Maine, and the Appalachian Mountain Club ("Plaintiffs") filed this civil action to challenge the decision of the United States Army Corps of Engineers ("the Corps") to issue a permit to Intervenor Defendant Central Maine Power Company ("CMP") under section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The Corps' decision turns on the Corps' finding that the permitted activities are not likely to have a significant adverse environmental impact on waters of the United States and, therefore, do not require the Corp to prepare an environmental impact statement.

The matter is before the Court on Plaintiffs' Motion for Leave to Supplement the Complaint (ECF No. 40) and Motion for Preliminary Injunction (ECF No. 18). Plaintiffs' Motion for Leave is hereby summarily GRANTED without further discussion. Plaintiffs' Motion for Preliminary Injunction is DENIED for reasons set forth at length below.

BACKGROUND STATEMENT

Central Maine Power Company proposes to construct the New England Clean Energy Connect ("NECEC"), an electricity transmission project that would connect Hydro Quebec to the New England energy grid ("the NECEC Project" or "the Project").[1] After proceedings by the Maine Department of Environmental Protection, the Land Use Planning Commission, and the Public Utilities Commission, the Project has evolved in a variety of ways designed to reduce its environmental impact and the Project has been green lighted by the State to begin construction. More specifically, the Maine Public Utilities Commission granted the Project a certificate of public convenience and necessity. The Commission's certificate has been subjected to legal challenge and that challenge has failed. *NextEra Energy Res, LLC v. Maine Pub. Util. Comm'n*, 227 A.3d 1117 (Me. 2000).

Because the Project passes over waters of the United States ("WOTUS"), inclusive of adjacent wetlands, and because the Project proposes both temporary and permanent fill of wetlands, CMP must obtain a permit from the Army Corps of Engineers under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. Additionally, because the Project proposes that CMP

[1] Although the NECEC Project affects the entire New England energy grid, which includes Maine's population centers, the primary anticipated beneficiaries of the project in terms of the volume of energy consumed are the much larger population centers in Massachusetts. Legislative initiatives in Massachusetts are, in fact, the impetus for the Project. *See Next Era Energy Res*, *LLC v. Maine Pub. Util. Comm'n*, 227 A.3d 1117, 1119-20 (Me. 2020).

will bore a channel beneath the Kennebec River using horizontal directional drilling (HDD), CMP also must obtain a permit from the Corps under the Rivers and Harbors Act, 33 U.S.C. § 403. *See also* 33 C.F.R. § 322.3. The Corps' exercise of CWA and RHA permitting authority over the Project is subject to the National Environmental Policy Act, 42 U.S.C. §§ 4331 *et seq.*, which requires the Corps to assess the environmental impacts of these proposed actions before permitting them.

On July 7, 2020, the Corps memorialized its NEPA assessment in a document entitled Department of the Army Environmental Assessment and Statement of Findings for the [NECEC Project] (hereafter "EA") (ECF No. 19-6). The Corps concluded its EA with a finding that the proposed actions subject to its CWA/RHA permit review authority do not amount to "a major federal action significantly affecting the quality of the human environment." EA at 160 § 12.3. The Corps then provided CMP with an "initial proffered permit" and, after reviewing CMP's objections to certain permit conditions, produced an EA Addendum (ECF No. 19-13) that "finalized" the permit on November 6, 2020.

The Corps's EA is subject to judicial review under the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*. *U.S. Army Corps of Eng'rs v. Hawkes Co*., 136 S. Ct. 1807, 1813 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (to be final, agency action must consummate the decisionmaking process and determine rights and obligations such that legal consequences follow)).[2] Plaintiffs contend the Corps abused its discretion when it found the proposed actions are not a major federal action and they ask this Court

[2] The Corps and CMP argue Plaintiffs filed suit too soon because they filed after the Corps produced its initial EA but before it finalized its permit. Primarily to avoid stumbling over this technical legal hurdle, and to address issues related to the Corps' revision of its EA through an Addendum, Plaintiffs filed their Motion to Supplement (ECF No. 40).

to vacate the Corps' EA, remand the CWA and RHA permit applications for further NEPA proceedings, and enjoin construction of the NECEC until the Corps produces an environmental impact statement for the Project.

LEGAL BACKDROP

The Clean Water Act (CWA) is part of "a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *United States v. Riverside Bayview Homes*, *Inc*., 474 U.S. 121, 132 (1985) (quoting 33 U.S.C. § 1251). Section 404 of the CWA assigns the Corps jurisdiction to issue permits following public hearings, which permits, if granted, authorize the discharge of "any pollutant," including "fill material," into "navigable waters." 33 U.S.C. §§ 1342(a)(1), (4), 1344(a).

The CWA defines "navigable waters" as "the waters of the United States" (hereafter "waters" or "WOTUS"). *Id.* § 1362(7). That definition "makes it clear that the term 'navigable' … is of limited import." *United States v. Riverside Bayview Homes*, *Inc*., 474 U.S. 121, 133 (1985). However, the CWA's definition of waters necessarily "delineates the geographic reach" of the Corps' permitting power. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 625 (2018). As construed by the Supreme Court, the definition authorizes the Corps to extend its permitting authority at least as far as "wetlands adjacent to navigable waters." *Id.* (citing *Riverside*, 474 U.S. at 133). As explained in *Riverside*, it is reasonable for the Corps to exercise CWA jurisdiction over wetlands because it is reasonable for the Corps to conclude "that wetlands may affect the water quality of adjacent lakes, rivers, and streams." 474 U.S. at 134.

The Corps also has jurisdiction under Section 10 of the Rivers and Harbors Act (RHA) to authorize "any obstruction" of "the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403. Pursuant to the Corps' regulations, "[f]or purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody." 33 C.F.R. § 322.3(a). Here, the proposed HDD activity is subject to RHA review. CMP's handling of extracted materials during this activity is also subject to the Corps' CWA oversight, if only to ensure that the materials are not released into the River or other waters and/or wetlands.

The Corps' does not exercise its CWA and RHA permit authority in a silo. The Corps takes into consideration other federal statutory schemes and regulations, as applicable, and the Corps generally considers inputs from federal and state regulatory agencies when reviewing permit applications, all of which it did for the NECEC.

Of particular significance to this civil action, the National Environmental Policy Act requires federal agencies to take a hard look at environmental concerns before approving actions that require federal permits or other forms of authorization. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). More specifically, NEPA requires federal agencies "to the fullest extent possible" to:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality [to] insure that presently unquantified

> environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for … major Federal actions significantly affecting the quality of the human environment, a [detailed environmental impact statement with five subject areas[3]];
>
> (D) [independently evaluate the relevant findings of state agencies or officials with statewide jurisdiction over the project to the extent they contribute to the preparation of any statement required in subparagraph (C)];
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
>
> (F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to

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[3] The five subject areas for detailed discussion, when applicable based on a "significant" impact finding, are:

> (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,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). Furthermore:

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

Id.

> maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
>
> (G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
>
> (H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
>
> (I) assist the Council on Environmental Quality established by subchapter II of this chapter.

42 U.S.C. § 4332(2) (alterations my own).

These requirements are "designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). NEPA "'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action' and to 'ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 300 (1st Cir. 1999) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)). However, these requirements "are procedural in nature and are not intended to dictate any particular substantive outcome." *Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d 202, 217 (1st Cir. 2011) (emphasis added).

As reflected in § 4332(2)(C), the Corps is required to consider whether a project is a "major Federal action[] significantly affecting the quality of the human environment." When federal involvement is limited to the exercise of permit review authority for private

activity[4], the exercise of that authority can result in major federal action where the permitted action is itself major and subject to the agency's power to prevent or influence results. *Mayaguezanos*, 198 F.3d at 302 ("[W]e look to whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome.").[5]

The parties dispute whether the Corps' exercise of its authority to grant CMP's CWA and RHA permit applications is a "major federal action" that requires an "environmental impact statement" ("EIS") under 42 U.S.C. § 4332(2)(C). The Corps' process of making that determination began—and here ended—with an environmental assessment. If the Corps' EA reasonably demonstrates that the permitted actions will not produce significant impacts on the human environment, then the Corps was not required to go the extra distance to produce an EIS and permissibly concluded its NEPA review with a "finding of no significant impact" ("FONSI"). 40 C.F.R. § 1508.9(a) (2018) (superseded effective Sept. 14, 2020).[6]

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[4] The NECEC is not a federal project and there is no federal statute that imposes on the Corps project-wide control and oversight, unlike, for example, FERC's responsibility to review natural gas pipeline projects under the Natural Gas Act, *see*, *e.g.*, *Twp. of Bordentown*, *New Jersey v. Fed. Energy Regulatory Comm'n*, 903 F.3d 234, 243 (3d Cir. 2018), or the Forest Service's responsibility to review programs and projects that take place in a national forest under the National Forest Management Act, *see*, *e.g.*, *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 441 (7th Cir. 1990).

[5] Regulations issues by the Council on Environmental Quality (CEQ) state that NEPA's "federal actions" include both the federal government's own actions, such as promulgation of a rule or construction of a public project, as well as government actions that authorize non-federal activities, such as approving private projects "by permit or other regulatory decision." 40 C.F.R. § 1508.18(a), (b)(4) (2018) (superseded effective Sept. 14, 2020). "The CEQ's regulations clarify that the term 'major' 'reinforces but does not have a meaning independent of significantly,' *id.* § 1508.18, and explain that interpretation of the term 'significantly' entails case-by-case consideration of the context of the action and the severity of its impact, *id.* § 1508.27." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015).

[6] "The importance of an EA or an EIS lies not merely in the aid it may give to the agency's own decisionmaking process, but also in the notice it gives the public of both the environmental issues the agency

THE PROJECT

The NECEC Project is a large-scale electrical power transmission project proposal designed, principally, to connect a source of non-fossil-fuel energy (Hydro Quebec) with a New England population center (Massachusetts). The Project is divided into five segments. Segment 1, the most controversial segment, involves the creation of a new transmission line corridor over 53 miles of forested terrain in the western Maine mountain region. Segments 2 through 5 involve expansion and upgrade of an existing transmission line corridor. Based on Plaintiffs' presentation thus far, Segment 1 of the Project is the primary driver of this litigation.

As a result of regulatory review by state agencies, several requirements have been imposed on or assumed by CMP related to cutting and clearing activity. The Corps has adopted these requirements as special conditions of the Corps' permit. EA at 156-57 § 11.2(15)-(19). Relative to watershed concerns, these requirements include buffers of 100 feet for fisheries habitat and 75 feet for other rivers, streams, and brooks. *E.g.*, EA at 16 ("All streams identified as Atlantic salmon habitat will have a 100-foot riparian buffer and any non-capable species [of tree] exceeding 10 feet will remain within the stream buffer

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is aware of and those it has missed." *Illinois Commerce Comm'n v. I.C.C.*, 848 F.2d 1246, 1260 (D.C. Cir. 1988). Ordinarily, preparation of an EIS opens the door to greater scrutiny by the public and other branches of the government by exposing in greater detail the reasoning and data the agency relies on to determine that a particular project or particular component of a project is well designed to avoid unnecessary harm to environmental resources. *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 92-94 (2d Cir. 1975). Still, even the preparation of an EA can be a rather elaborate process, and even an EA includes public notice and comment. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763–64 (2004).Where it is obvious that a permitted action would be major in its impacts on the human environment, the Corps need not draft an EA and may, instead, get on with the business of preparing an EIS. "The purpose of an EA is simply to help the agencies decide if an EIS is needed." *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985).

outside the wire zone."). Within Segment 1, CMP will apply buffers to all riparian crossings. Additionally, the entire length of Segment 1 involves a buffered approach to cutting outside the 54-foot wide wire zone. EA at 18. In the other Segments, CMP will apply buffers to "all coldwater fisheries." EA at 11. This does not mean that no trees will be cleared in the buffers. In Segment 1, for example, capable tree species – those trees capable of growing to heights that would threaten the transmission lines – would be cleared in the wire zone, and all other species of woody vegetation would be cut back to a height of 10 feet. Forest clearing and thinning activity is also scheduled for the winter months to reduce soil disturbance and other surface impact. After the Corridor is cut, proposed maintenance includes periodic application of "environmentally friendly … chemical treatments." However, "CMP has committed to not using herbicides in any location along the 53.1 miles of new corridor (Segment 1) or proximate to waterways or rare plants to include federally listed small whorled pogonia." EA at 10. See also EA at 13 ("Herbicides will not be used within the stream buffers [or] within 25 feet of standing water."). Installation of the Project, as proposed, also involves temporary fill of wetlands with construction pads that enable equipment to transit certain wetlands with less intensive resulting impact for purposes of tree cutting, hole drilling and pole-installation activity.[7] These requirements and others not specified in this Order reduce, but do not negate impacts to fisheries habitat, vernal pools, and wetlands resulting from, for example, increased sunlight infiltration producing increased water temperatures and decreased contribution of woody debris to habitats.

[7] CMP is required to place temporary bridges that fully span streams over which work crews transit.

The project also involves permanent fill of wetlands to install 98 support poles (of a total of roughly 1,450 poles) and to expand or build electrical stations along the Corridor.

As for the path and footprint of the project ("the Corridor"), the motion record includes the following information.

Segment 1

Segment 1, as proposed, would run by means of overhead transmission lines 53 miles from the Maine-Canada border at Beattie Township to the Forks Plantation. The Corridor would run in a generally eastward direction until the western edge of Parlin Pond Township, where the line would veer southward through Johnson Mountain Township before cutting east and crossing Moose Alley (U.S. Route 201) and then dropping south again through West Forks Plantation and into Moxie Gore Township where the line would cross the Kennebec River along the boundary between the West Forks and Moxie Gore, CMP would construct a transition station on each side of the Kennebec River and run its transmission lines between the two transition stations by horizontal directional drilling (HDD) of a tunnel[8] beneath the Kennebec River. After this subterranean crossing, the Corridor would once more be an overhead transmission line that would travel in a generally southerly direction until meeting an existing transmission corridor at the north eastern edge of the Forks Plantation.

Although CMP has acquired a 300-foot right of way for the NECEC in Segment 1, CMP is not authorized by state regulators—and does not itself propose—to clear cut the

[8] CMP's original proposal was to span the River with overhead lines, but it amended its proposal "to eliminate visual impacts on recreational users of this Outstanding River Segment and the associated concerns of environmental regulators, the host communities, and other stakeholders." EA at 89.

entire width of its right of way in Segment 1. Instead, CMP would use the southern 150 feet, in which it would cut a swath approximately 54 feet wide and gradually increase tree heights toward the edge of the 150-foot corridor.

The transmission line in Segment 1 would cross over parts of 481 freshwater wetlands, 300 rivers, streams or brooks (most of which are fishery habitat), and 6 water bodies designated Inland Waterfowl and Wading Bird Habitats. The line support structures (principally poles) are spaced at a significant distance (on average 900 feet) and are tall enough to make the line stand proud of the surrounding canopy. In 12 wildlife areas totaling about 14 miles, the poles will be tall enough to permit full height vegetation. EA at 12, 18.

Segment 2

In Segment 2, the NECEC would join an existing 150-foot wide transmission corridor and, over its 22-mile run upgrade and widen by 75 feet the existing corridor. In Segment 2 the existing corridor crosses the Appalachian Trail three times.[9] Segment 2 terminates at the Wyman Dam hydroelectric facility where there is an existing overhead crossing of the Kennebec River.

The Corps states that the freshwater impacts are largely avoided in this segment because they are crossed by overhead lines. However, 1.13 acres of forest cover for wading bird habitat and 18 vernal pools will be converted to scrub/shrub.

[9] CMP's proposal is to use nonreflective cable housings near the AT crossing and allow a greater canopy height beneath the line. CMP's proposal also would adjust the AT so hikers would pass beneath the Corridor one time rather than three.

Segments 3 and 4

In Segments 3 and 4, which run 70 and 16 miles, respectively, the Corridor would continue to follow an existing transmission corridor but widen it by an average of 75 feet. These Segments would extend the NECEC from Wyman Dam southward to a proposed new converter station on the Merrill Road in Greene. From Greene, the Corridor continues through three existing substations in Lewiston, before terminating at a proposed new substation in Pownal.

The existing corridor in these Segments makes a second crossing of the Kennebec River (at Wyman Dam) and crosses the Carrabassett River and the Sandy River. There are more than 200 streams and brooks along the Corridor in these two Segments, 84 of which contain fisheries habitat. Conversion of tree cover for 5.65 acres will impact 9 wading bird habitats in Segment 3. Conversion of 4.4 acres of cover in Segment 4 will impact 6 vernal pools.

Segment 5

Segment 5 involves upgrades to 26 miles of an existing transmission line corridor between the Coopers Mills substation in Windsor, Maine and the Maine Yankee substation in Wiscasset. This separate corridor passes over but does not touch down in 159 wetlands and 104 rivers, streams, or brooks, including the Sheepscot River. CMP proposes to clear roughly 19 acres to widen this corridor. Cover conversion will also occur for some wetlands/vernal pools.

Cumulative WOTUS Impacts

Permanent fill impacts for wetlands along the Corridor's entire run are envisioned for roughly 82 wetlands. These wetlands would experience partial, not total fill. In addition, 83 vernal pools will be partly, permanently filled. EA at 3. These impacts result in part from the placement of support structures to carry the transmission line. The Corps states that 98 support poles (of a total of roughly 1,450) will be placed in wetlands. The footprint of these structures (e.g., cement fill) would vary between 30 and 195 square feet. Total permanent wetland fill for all 98 wetland-embedded support structures is less than one-half acre. Permanent wetland fill associated with the larger structures (the transition stations and substations) is estimated to be under 5 acres.

The total surface area of land existing in the proposed NECEC Corridor is said to be 8,600 acres. Of this approximately 1,500 acres (17.4%) constitute waters of the U.S. (inclusive of wetlands). Total conversion of the forest canopy is said to be in excess of 1,000 acres, but only 111.44 of these acres provide canopy to waters of the United States.

Non-WOTUS Environmental Impacts

In addition to WOTUS impacts, the NECEC Project would impact the human environment in other ways. The Corps' EA discusses these impacts as "project elements … that do not impact navigable or other waters of the U.S." EA at 4. It is not necessary for me to cover that ground in this Order because the issue before me is, in part, whether these other environmental impacts are necessary inputs in the Corps' assessment of whether its exercise of permitting authority is a major federal action. If these other impacts are necessary inputs, one could much more readily second guess the Corps' EA. Indeed, a

remand would be necessary given the Corps' specific indication that it did not include these other impacts in its finding of no significant impact.

Most obvious here is the fact that Segment 1 involves a new permanent corridor through western Maine woodlands. Although the Corps opines that the impact is not so substantial given that the Segment 1 right of way runs through managed timberlands (which the Corps describes as "heavily managed" "working forests" – EA at 4, 9), a reasonable person would appreciate the view of the Land Use Planning Commission that impacts on "scenic and recreational values" will be adverse. Order Granting Certificate of Public Convenience and Necessity at 6 (ECF No. 19-19). Carey Kish, one of Plaintiffs' hearing witnesses, shares my own view that these lands, managed or not, afford a "vast, grand view scape of mountains and valleys and rivers and streams and lakes and ponds all relatively undisturbed by human activity, which, while not true wilderness with a capital W, is nonetheless some of the wildest and remote country not only anywhere in Maine, but in the northeastern United States." Declaration of Carey Kish ¶ 14 (ECF No. 18-1) & Hr'g Testimony. Furthermore, as described by Dr. David Publicover in his declaration (ECF No. 18-10) and hearing testimony, there are many ecological values within the Corridor's footprint other than WOTUS values. These include fauna concerns like deer wintering areas, nesting eagles, and Canada lynx, and flora concerns like small whorled pogonia and Jack Pine communities.[10]

[10] Agencies reviewing this Project have imposed a host of conditions to mitigate ecological impacts in Segment 1. For example, CMP must comply with state requirements to substantially reduce cutting in twelve wildlife areas to preserve some wildlife travel corridors and reduce the negative impact of the NECEC's transit through deer wintering areas (DWA). Long-term corridor maintenance practices in these areas would attempt to foster conifer growth that provide winter cover for deer. At the Moxie Gore crossing, where the transmission line would pass beneath the Kennebec River, tree cutting adjacent to the Kennebec

DISCUSSION

The Corps' limited its NEPA review of CMP's CWA and RHA permit applications to an Environmental Assessment (EA) (ECF No. 19-6 (EA) & 19-13 (Addendum)) that concluded with a finding of no significant impact (FONSI) (EA at 160 § 12.3). In the Corps' view, the FONSI is appropriate because the CWA and RHA components of the larger NECEC Project will not significantly affect the human environment.

Plaintiffs challenge the FONSI as unreasonable and argue that a project the size and scope of the NECEC cannot be permitted by the Corps unless and until the Corps prepares an EIS for the entire Project that describes the environmental impacts holistically and in detail and subjects the EIS to public review and comment.

The Corps and CMP, on the other hand, argue that Plaintiffs are unreasonably attempting to make the Corps of Engineers arbiter of all environmental impacts generated by the NECEC even though it is a private project and the Corps' jurisdiction is limited to safeguarding waters of the United States. In their view, the Corps paid greater than necessary homage to NEPA, but also reasonably concluded that the CWA and RHA components of the Project will not significantly affect the quality of the human environment when one considers the cumulative impact of these components on a watershed scale.

A. Standard of Review

Injunctive relief is "an extraordinary and drastic remedy that is never awarded as of

River is minimized to avoid disrupting the scenic quality of the River in that location. The transition stations are well set back to not be seen by persons recreating on the River.

right." *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (citations and quotation marks omitted). "To grant a preliminary injunction, a district court must find the following four elements satisfied: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest." *Arborjet*, *Inc. v. Rainbow Treecare Sci. Advancements*, *Inc*., 794 F.3d 168, 171 (1st Cir. 2015). As the party seeking injunctive relief, Plaintiffs bear the burden of establishing that the factors weigh in their favor. *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 117, 119-20 (1st Cir. 2011).

"Likelihood of success is the main bearing wall of the four-factor framework." *Ross-Simons of Warwick*, *Inc. v. Baccarat*, *Inc*., 102 F.3d 12, 16 (1st Cir. 1996). On this issue "the district court is required only to make an estimation of likelihood of success and 'need not predict the eventual outcome on the merits with absolute assurance.'" *Corp. Techs*., *Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013) (quoting *Ross–Simons*, 102 F.3d at 16). If the party seeking injunctive relief fails to make a persuasive showing of likelihood of success, then generally the court acts within its discretion if it denies relief without addressing the remaining factors. *New Comm. Wireless Servs*., *Inc. v. SprintCom*, *Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity."). However, a likely NEPA violation does not automatically call for an injunction if the balance of harms points the other way. *Conservation Law Found*., *Inc. v. Busey*, 79 F.3d 1250, 1272 (1st Cir. 1996). *See also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) ("It is not enough for a court considering a [NEPA] request for injunctive relief to ask whether

there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test ….").

Plaintiffs' ability to demonstrate a likelihood of success depends on their ability to demonstrate that the Corps' FONSI was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When reviewing an agency's NEPA compliance under the Administrative Procedures Act, my "only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983) (citations omitted). To uphold challenged agency action, I must be satisfied that the Corps fulfilled its procedural duties under NEPA and gave "good faith consideration to the environmental consequences of its actions," but I "should not pass judgment on the balance struck by the agency among competing concerns." *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (Coffin, J.).

"While this is a highly deferential standard of review, it is not a rubber stamp." *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1285 (1st Cir. 1996) (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 290 (1st Cir.1995)). In the final analysis, the decision must make sense, and only through careful review of the record can I "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). I am not empowered to substitute my judgment for that of the Corps. [11]

[11] My personal opinion on the Project is, of course, utterly immaterial to the decision. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.").

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

If the record reveals it likely that the Corps paid heed to NEPA's procedural dictates, considered the relevant factors, and adequately explained its rationale, and did not clearly err in its judgment, then I should deny Plaintiffs' motion for a preliminary injunction. *Id; Penobscot Air Servs.*, 164 F.3d at 719 n.3; *Grazing Fields*, 626 F.2d at 1072.

B. Analysis

1. Likelihood of Success

The merits issues before me for preliminary estimation are whether the Corps abused its discretion when it declined to weigh every environmental impact of the entire NECEC in its EA/FONSI and, if not, whether the Corps abused its discretion when it determined that the cumulative impacts to WOTUS do not cross the significance threshold that would require preparation of and EIS. Unless Plaintiffs can demonstrate likelihood of success on one of these issues their request for a preliminary injunction should be denied. Before addressing these core issues, I will address two ancillary issues Plaintiffs raised in their Motion for Preliminary Injunction: (a) that the Corps arbitrarily removed a special condition that forestalled construction activity pending the Department of Energy's approval of the border connection and (b) that the Corps needed to provide its EA to the public and allow 30 days for comment. I will then consider the central argument in terms of (c) the Corps' decision to limit the scope of its review to WOTUS impacts and (d) the reasonableness of its FONSI given that narrow scope of review.

a. Special Condition 3

Plaintiffs assert that the Corps' removal of Special Condition 3 was arbitrary and capricious. Special Condition 3 of the initial proffered permit stated work could not begin until CMP obtained a presidential permit from the Department of Energy. Plaintiffs argue the Corps owes an explanation why it withdrew Special Condition 3 following CMP's letter response to the initial proffered permit. Motion at 30-32.

The Corps keeps a regulation to "guide" determinations about the "timing of processing of applications." 33 C.F.R. § 325.2(d). The relevant guidance states: "Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit." *Id.* § 325.2(d)(4).

In the EA Addendum, the Corps explained that the condition was "not necessary to satisfy the public interest requirement and not directly related to the aquatic resource impacts evaluated as part of the Corps review." EA Addendum at 1. That is an explanation concerning a discretionary exercise of permitting authority. Moreover, the regulation is advisory, not mandatory. I am not persuaded that it is appropriate for me to overrule the Corps' exercise of permitting discretion in this regard.

Plaintiffs' argument appears, in part, to presume that it is the legal obligation of some federal agency to produce an EIS for the entire private NECEC Project before CMP can start work. At least as of this stage of the proceedings, they have not persuaded me that NEPA requires the DOE to produce an EIS of the entire Project, or that the Corps cannot

authorize CMP to take actions that impact WOTUS pending DOE's review of the border-crossing connection. In their Reply, Plaintiffs also suggest that DOE's review of the application for a presidential permit will turn in some way on DOE's consideration of aquatic resources, but they do not elaborate on this contention and it is not evident why that would be the case. Given that Plaintiffs bear the burden of persuasion on the Motion, and given Plaintiffs' failure to make a persuasive presentation in that regard, I decline to enjoin work on the Project pending DOE's issuance of a presidential permit allowing connection at the border.

b. Further Public Comment

Plaintiffs also argue a preliminary injunction is needed to protect the public's interest in commenting on the EA itself. Motion at 29-30. The Council on Environmental Quality (CEQ) has stated that a federal agency reviewing a project that integrates mitigation measures can rely on the mitigation measures in support of a FONSI, but "should" then make the FONSI available for public comment before issuing a permit. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18038 (Mar. 23, 1981). In contrast to the CEQ's FAQ document, its NEPA regulations call upon agencies to "involve" the public "to the extent practicable," 40 C.F.R. § 1501.4(b) (2018), to make a FONSI "available to the affected public as specified in § 1506.6" (a FOIA provision – not an affirmative disclosure obligation), *id*. § 1501.4(e) (2018); to give the public notice of NEPA-related hearings and public meetings, which hearings and meetings should be held "whenever appropriate or in accordance with statutory requirements applicable to the agency," *id*. § 1506.6(b), (c)

(2018); and to make findings "available to the public pursuant to the provisions of the Freedom of Information Act, *id.* § 1506.6(f) (2018). Only when a FONSI addresses proposed action that would ordinarily require an EIS or is "without precedent" must the agency allow the public 30 days for review of and comment on a FONSI. *Id*. § 1501.4(e)(2) (2018).

I do not believe that the CEQ's public comment regulations support a preliminary injunction. After all, the Corps did provide public notice and held a public hearing as part of its EA review process. The Corps' public hearing complemented other public hearings associated with the Project but overseen by other agencies. Before I would countermand the judgment of the Corps that a 30-day period for public review and comment concerning the EA would not be practicable, I would expect Plaintiffs to identify some critical deficiency in the information available to the public as of the date of the public hearing. Yet Plaintiffs have not demonstrated that the materials that were available for the public hearing were critically deficient in some regard and that the deficiency would have been remedied had the Corps allowed for the public to review and comment on its EA draftsmanship. Furthermore, to the extent Plaintiffs rely on the CEQ's FAQ, the FAQ is not mandatory.

Although I might have exercised discretion differently, I am not persuaded that the law compels the Corps to publish its draft and allow 30 days for public feedback. Plaintiffs lean heavily on the FAQ document, which document likely amounts to an interpretive rule lacking the force of law, *New Hampshire Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir.

2018), but which is, more importantly, stated in advisory rather than mandatory terms.[12] Because it is not clear that any applicable regulation mandates a different approach than what happened before the agency, it is not readily apparent to me that there is a good and valid reason, let alone an adequate hearing record, for me to substitute my own judgment about the practicable extent of public involvement, unless I am persuaded that the Corps' FONSI likely was erroneous and that an EIS is needed.[13]

c. Scope of Review

Plaintiffs argue they must merely show that the Corps' determination that a roughly 200-mile transmission corridor that cuts a new, 53-mile permanent path through undeveloped timberlands, cuts through deer yards, bores a hole underneath the Kennebec River, constructs new terminal stations on either side of the Kennebec River, encumbers the artistry of the existing Appalachian Trail crossing, widens by on average 75 feet the remaining 147 miles of corridor, and constructs two new substations affects the human environment in a significant way. When it's put like that, the answer seems obvious.

However, the fulcrum upon which the Corps' EA pivots is the idea that the Corps does not have to exercise NEPA review beyond the limited scope of the clean water

[12] Plaintiffs also cite *Sierra Club v. Wagner*, where the Court of Appeals stated: "An agency that adopts a FONSI without seeking input can be expected at least to accept comments before acting on the merits of a decision[.]"555 F.3d 21, 31 (1st Cir. 2009). In *Wagner*, the Forest Service circulated for public review drafts EAs that evidently did not include the agency's FONSIs. The Court of Appeals did not find that to be a cause for concern. Here, the Corps sought public input through its public hearing process. Having done so, the expectations established in *Wagner* is not on point.

[13] During the briefing cycle, Plaintiffs brought to my attention the fact that EPA took issue with the timing of the Corps' public notice and thought the Corps should issue another notice after consolidating and organizing the available information that was then existing in part with Maine DEP and in part with the Corps. *See* Apr. 25, 2019 EPA Region 1 Letter to USACE re. Public Notice at 3 (ECF No. 39-1). However, the Corps did not conduct its public hearing until December and I lack the ability on the current record and briefing to assess the adequacy of the information available to the public by the December timeframe.

interests that make it a federal permitting authority for this project. This position is clearly stated in the EA:

> Many public comments expressed concerns about forest and habitat fragmentation, especially in Segment 1. As noted above, the USACE's jurisdiction and the scope of USACE NEPA analysis is limited to the proposed impacts to waters of the U.S. and the immediately surrounding uplands to facilitate the regulated work. Upland forest fragmentation is outside the scope of this EA.

EA at 51.

The Supreme Court instructs that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 & n. 7 (1983)). In *Public Citizen*, the Court observed that an agency's NEPA responsibility to account for environmental effects should be a function of the agency's "authority to prevent the effect." *Id.* The ability of a party to make a "but for" argument "is insufficient to make an agency responsible for a particular effect." *Id.*

Whether the exercise of permitting authority over part of a project will impose NEPA procedural responsibility for other parts or for an entire project involves "policy considerations" related to the legal responsibility of administrative agencies. *Id.* It also requires consideration of whether the additional procedural burden is useful to the process of determining whether to issue the permit. *Id.* My own reflection on these cautionary words suggests to me that because it is doubtful that the Corps has the final authority and responsibility to decide whether or not a transmission line project can run through Maine's western mountain region and the non-wetland values present in it, it is unreasonable to

expect the Corps to prepare an EIS for all regional impacts associated with the Project. Instead, we must expect the Corps to evaluate the Project in terms of its impacts on WOTUS.

Of course, the Corps' EA discusses at some length environmental impacts beyond those associated with the Corps preliminary "limited jurisdiction" statement. That begs the question whether the discussion of so many environmental concerns is a tacit acknowledgement of a proximate connection between the Corps' regulatory oversight of WOTUS and the wider regional environmental impacts of the completed Project. As of this writing, I think the answer is likely to be no. Although it may be odd that the Corps would adorn its EA with the discussion of impacts it would not place on the EA/EIS scale, it is not unlawful for it to do so. There is no harm in producing a document that serves the witness-bearing procedural interests that inform the NEPA-review process. Moreover, the Corps' acknowledgment of these other environmental concerns strikes me as a perfectly reasonable response to public commentary, including commentary by organizations like Plaintiffs. For it now to be used as a forensic clue of the Corps' capriciousness seems especially rich. Public comments thoroughly addressed the wider implications of the overall project. Having conducted a public hearing and having elicited this information, it would have been solipsistic of the Corps to ignore the public's wider concerns altogether.[14]

[14] The Corps' announcement of public hearing advised interested persons:

> The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit, which may reasonably accrue from the proposal, must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects thereof; among those are: conservation, economics, aesthetics,

In short, the fact that the Corps expanded its EA to acknowledge regional impacts, the work of state regulatory agencies related to these concerns, and mitigation and compensation beyond the Corps' own WOTUS mitigation and compensation requirements,[15] does not prove that the EA fails to set forth a concise assessment of WOTUS impacts in its pages.

NEPA is a process statute for the environment. *Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir. 1989). How much of a process is required to shepherd stakeholders through the review of a permit-application depends on the circumstances of the proposed action, but it is not unlawful to give more process or more consideration than necessary.[16] And where the Corps must evaluate whether components of a major private undertaking are major in terms of their impact on WOTUS, there is no procedural harm in taking stock of

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> general environmental concerns, wetlands, cultural value, fish and wildlife values, flood hazards, flood plain value, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food production and, in general, the needs and welfare of the people.

Announcement of Public Hearing at 2 (ECF No. 31-3).

[15] The following mitigation/compensation measures are highlighted in the Corps' EA:

> To specifically address USACE requirements as they relate to unavoidable direct and indirect impacts to aquatic resources, the applicant has proposed to contribute $3,046,648.37 to Maine's In Lieu Fee Program (ILF), the Maine Natural Resources Conservation Program, and preserve approximately 1022.4 acres of land on three parcels containing a total of 510.75 acres of wetland, 3.95 miles of streams, 16 vernal pools, 75 acres of state mapped Inland Wading Bird and Waterfowl habitat, and 511.65 acres of upland buffer.

EA at 24. These measures in part imposed on and in part assumed by CMP exceed the Corps' regulatory requirements by a considerable margin. EA at 24-34 § 1.3.2.

[16] *See*, *e.g.*, *Wagner*, 555 F.3d at 30-31 ("The Forest Service did no EIS but also did not brush off environmental concerns. Its EAs are lengthy by any standard (appendices aside, the Than EA is 194 pages and the Batchelder EA is 146 pages) addressing in detail the environmental concerns that might arise before concluding that, as subject to intended mitigation, the impacts were not significant. The substantive decisions thus did not ignore the possible environmental effects. … Possibly little was saved by doing EAs of this character instead of EISs, but it is not clear that anything was lost.").

the wider pickerel-versus-paycheck tradeoffs involved in the larger private action. For these reasons, I do not view – at least not at this juncture – the Corps' more wide-ranging discussion of environmental impacts in the EA as a logical contradiction, let alone a concession, of the Corp's preliminary jurisdictional statement that, in the final analysis, it would limit its EA to WOTUS impacts.[17]

NEPA required the Corps to consider the "environmental impact of the proposed action." 42 U.S.C. § 4332(C)(i). From the Corps' perspective, the "proposed action" is to temporarily and permanently fill certain wetlands, clear or convert cover provided to WOTUS by forest canopy, and drill a tunnel beneath the Kennebec River. "To determine whether [NEPA] requires consideration of a particular effect, [I] must look at the relationship between that effect and the change in the physical environment caused by the [proposed] action at issue." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983). Moreover, I must remain mindful that "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' is to be accomplished." *Metro. Edison Co*., 460 U.S. at 776 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

The Corps' regulations state that when the Corps is required to assess under NEPA the appropriateness of a permit for "one component of a larger project," it need address only "the impacts of the specific activity requiring a … permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to

[17] The Corps may be required to consider other concerns such as endangered species and historic properties, as is reflected in the Corps' EA for the NECEC. Plaintiffs have not demonstrated that the Corps' handling of these concerns warrants vacatur of the Corps' EA.

warrant Federal review." 33 C.F.R. Pt. 325, App'x B, § 7(b)(1). The regulations further state that the Corps has "sufficient control and responsibility" to warrant review of a project as a whole, rather than just the specific activity requiring a Corps permit, when "the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* § 7(b)(2). In other words, as envisioned by the Corps, its control and responsibility are circumscribed by its jurisdictional authority, unless federal involvement "is sufficient to turn an essentially private action into a Federal action," by which the Corps means "cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* § 7(b)(2).

Nothing in the language Congress employed in NEPA precludes the Corps' placement of a jurisdictional limitation on its review of private projects under NEPA. To the extent Plaintiffs challenge the logic of the restriction, it strikes me at this initial stage of the litigation that the restriction is permissible given the deference owed to agency expertise, the reasonableness of the Corps' desire to calibrate its NEPA involvement to the scope of its jurisdictional power, and statements by the Supreme Court and the First Circuit Court of Appeals that such a restriction is appropriate from a purely legal perspective. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007); *Metro. Edison Co.*, 460 U.S. at 776; *Mayaguezanos*, 198 F.3d at 302.

As for the merits of the Corps' application of the regulatory guidance, discussed below, I am at this stage required only to estimate Plaintiffs' likelihood of success, not to resolve the merits in a conclusory fashion. *Harnett*, 731 F.3d at 10. Based on my preliminary review of the regulations, Plaintiffs have not persuaded me that they likely will

succeed in proving that the Project is a major federal action consisting of the full-blown NECEC Project such that all environmental impacts that can be identified by their members and the interested public must be addressed by the Corps through an EIS. Rather, my initial impression is that Plaintiffs' position relies heavily on but-for causation rather than a pragmatic assessment of the Corps' purpose and function. *Pub. Citizen*, 541 U.S. at 767.

The major-federal-action regulatory thicket is comprised of a variety of factors. Based on my review of the EA, I am persuaded at this juncture that the Corps gave each of its regulatory factors (in particular the scoping factors of 33 C.F.R. Part 325, Appendix B, and intensity factors of 40 C.F.R. § 1508.27 (2018)) due consideration and reasonably exercised judgment on the appropriate application of the same. EA at 160-62 § 12.3.[18] I will touch on some of these factors now, but it is not my intention to finally determine these issues once and for all. This is review of a preliminary injunction, not a motion for final judgment on the administrative record.

i. Whether the regulated activity comprises "merely a link" in a corridor type project (e.g. a transportation or utility transmission project).

Plaintiffs argue, not unreasonably, that the Corps' jurisdictional concern with wetlands could be considered more than a mere link, given that the transmission lines

[18] Plaintiffs argue the project is federal given the requirement that the Department of Energy authorize the border connection. I do not see how DOE's oversight of the border connection compels the Corps to expand its NEPA review of CWA/RHA permit applications to every externality of the overall project. Plaintiffs also point to the fact that the Corps, DOE, and other federal agencies were signatories to a Historic Properties Memorandum of Agreement related to the NECEC (ECF No. 31-18). Again, it does not follow that the Corps' participation in historic property proceedings compels an all-encompassing NEPA-EIS review by the Corps. In any event, the Corps acknowledged the historical property concern in its EA. EA at 106 § 6.4.3.

would be suspended over a substantial acreage of waters. However, the Corps also offers a reasonable assessment: that the wetland impacts can be localized to separate and distinct impacts comprising roughly 1.9% of the total corridor.[19] EA at 37. The Corps' perspective may be debatable, but it does not strike me as arbitrary and capricious. EA at 37.

ii. Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity

Plaintiffs observe that the Corps considered an alternative proposal to have the supports in Segment 1 zig-zag through the 300-foot right of way to reduce impact on wetlands. The Corps did not think this approach would be advantageous to wetlands and rejected the idea. EA at 94. It seems to me that this kind of consideration would not normally require the Corps to expand its assessment of significance to encompass non-WOTUS impacts. *See also* EA at 37-38.

iii. The extent to which the entire project will be within Corps jurisdiction

Plaintiffs again emphasize that WOTUS are "spaced throughout the corridor" and are roughly 17% of its footprint. Motion at 15 (quoting EA at 37). This is a fair consideration, but it is not compelling. My initial impression is that the Corps did not act in an arbitrary fashion when it discussed cumulative impacts to wetlands, inclusive of

[19] According to the Corps:

> Jurisdictional wetland impacts consist of 4.72 acres of permanent fill at two new converter/substations and one HDD termination station, 0.15 acres of permanent fill for pole structures, 47.64 acres of temporary fill, and 111.55 acres of forested wetlands affected by clearing and conversion to scrub-shrub and emergent cover types. Thus, only 164.06 of the project's approximately 8,600 acres are within USACE jurisdiction (approximately 1.9%).

EA at 38.

temporary fills and cover conversion, yet found them inadequate for the Corps to assume NEPA responsibility for the entire Project. EA at 38-39.

Plaintiffs flag a statement in the Corps' Appendix B that offers an example of how to assess a transmission line project. The entire example reads as follows:

> For example, a 50–mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.
>
> Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50–mile transmission line crossed wetlands or other "waters of the United States," the scope of analysis should reflect impacts of the whole 50–mile transmission line.

33 C.F.R. Pt. 325, App'x B, § 7(b)(3). In Plaintiffs' view, the NECEC is the transmission line suggested by the second example and, therefore, the Corps's NEPA review should treat the entire Project as one major federal action.

To advance the argument, Plaintiffs draw on the total area of WOTUS existing in Segments 1 through 4, although Segments 2 through 4 involve expansion of a preexisting corridor and do not fit neatly within the example. Plaintiffs' argument would be stronger if they showed that Segment 1 fits the second example, but they would still be faced with the fact that the example is written in advisory rather than mandatory terms.

The EA does not include a discussion of the transmission line examples in Appendix B. However, the Corps does reference certain proposed-action acreage figures to support its conclusion that wetland impacts are not considerable enough to bring the entire Project into its jurisdiction. In particular, the Corps references 5 acres of permanent fill, 48 acres or temporary fill, and 112 acres of cover conversion. These, we are told, are less than 2% of the total acreage impacted. The numbers do not appear to encompass WOTUS cross-over, as in the example, but they still suggest something other than an arbitrary and capricious exercise of regulatory judgment.[20]

iv. The extent of cumulative Federal control and responsibility

The Corps is not the only federal agency with authority over components of the NECEC Project. Plaintiffs think the Project should be federalized for this reason. I am not persuaded that the involvement of the DOE and the Federal Energy Regulatory Commission with distinct project concerns, one with the border connection, the other with utility regulation, transforms the private NECEC Project into a major federal project for purposes of NEPA. Based on the current briefing of the legal issue, I cannot say that the Corps abused its discretion or violated federal law when it reasoned that these "authorities are separate and independent" and that "[t]he scope of review for the Corps waters of the US [sic] does not overlap with the DOE review of the border crossing [or] with the operational review of the FERC." EA at 39.

[20] An EPA letter in the record references removal of "11 linear miles of riparian vegetation adjacent to … aquatic resources." Apr. 25, 2019 EPA Region 1 Letter to USACE re. public notice at 4 (ECF No. 39-1). Presumably that is project-wide, but even if it concerned only Segment 1, it would be shy of the 30:50 ratio used in Appendix B's second transmission line example.

v. CEQ context and intensity factors

The CEQ offers a listing of factors that can suggest the existence of a major federal action in need of an EIS, which factors "should be considered." 33 C.F.R. § 1508.27(b). The Corps explained:

> Under the Council on Environmental Quality ("CEQ") NEPA regulations, "NEPA significance" is a concept dependent upon context and intensity (40 C.F.R. § 1508.27). When considering impacts to waters of the US on a linear transmission project like the current proposal, significance is measured by the impacts felt at a local scale, as opposed to a regional or nationwide context.

EA at 161-62 § 12.3.

Plaintiffs argue the context and intensity factors "nearly all … weigh in favor of an EIS." Motion at 21. Plaintiffs then argue the factors from the perspective of impacts associated with the entire NECEC Project, even to the extent of challenging assumptions about the likelihood that the NECEC Project will reduce greenhouse gas emissions, but they principally focus on the ecological and scenic impact of Segment 1. I am not persuaded by Plaintiffs that the Corps' WOTUS-focused discussion of these factors was arbitrary and capricious, abusive of discretion, or a violation of law. Nor, at this stage, am I persuaded that the Corps' decision to permit HDD, wetland cover conversion, and temporary and permanent fill makes it the NEPA shepherd of the entire regional impact of the fully installed Project, rather than the permitted actions.

vi. Stewart v. Potts

Plaintiffs argue the circumstances of this case are like the circumstances in *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1996), in which case the district court rejected the Corps' assessment that its jurisdiction did not extend to upland forest fragmentation. In

Stewart, a municipality sought to develop a golf course on a 200-acre forested parcel and, after redesign efforts to avoid filling wetlands, arrived at a proposal that would directly impact with fill only two acres of the wetlands, but also clear or thin the surrounding forest that sheltered other wetlands scattered throughout the forest. *Id.* at 673, 682. Additionally, the EPA characterized the forest as a "floodplain forest" and both it and the FWS found that development of the surrounding forest would impose "considerable" indirect adverse impacts on area wetlands and neotropical migratory birds. *Id.* In this factual context, the court found arbitrary the Corps' refusal to exercise NEPA jurisdiction over forest clearing that would impact the wetlands and migratory birds that depend on them. Clearly, the court reasoned, concentrated denuding ("clearing 115 acres") of a 200-acre forested parcel would impact the scattered wetlands in the same 200-acre footprint quite intensively. *Id.* at 682-83.

Plaintiffs' attempt to cast this case in the image of *Stewart* is unpersuasive. The NECEC entails linear development. At 150 feet wide, 115 acres of forest impacts would be spread out along more than six miles of Corridor and the surrounding forest in Segment 1 (the segment that Plaintiffs focus on for purposes of their fragmentation argument) would continue to shelter the scattered wetlands over which the Corridor passes. That is quite unlike the situation in *Stewart*, where the development project involved clearing 115 of 200 acres sheltering wetlands.

d. The Corps' watershed FONSI

Turning the focus from the forest to the waters, what remains for consideration is whether the Corps' EA/FONSI makes sense from a WOTUS perspective. Drawing on

Ninth Circuit precedent, Plaintiffs best argument, as I see it, is that the Corps' EA is deficient because it gives insufficient attention to "baseline" conditions. Motion at 16-18, 28-29; Reply at 8-10. This is a sound concept that warrants consideration. However, an EA is not an EIS, and the baseline concept effectively could require an EIS in most cases if taken to the extreme. Additionally, I cannot lightly dismiss the notion that the Corps exercised expertise in assessing the relative significance of the proposed WOTUS impacts. To be victorious in this action, Plaintiffs must convince me that the Corps's FONSI is unreasonable or nonsensical in relation to the significance of impacts to WOTUS. They do not need to prove it conclusively at this stage of the proceedings; nevertheless, even in the context of a preliminary injunction motion the burden rests squarely on their shoulders. After very careful consideration of Plaintiffs' preliminary injunction presentation, I conclude that they have not carried their burden.

When it comes to discussing watershed impacts, the Corps' baseline portrayal of WOTUS values is cast in broad brush strokes. EA section 1.2 states the proposed activity impacts "multiple locations of aquatic resources" inside the NECEC's footprint. EA at 1-2. It then describes the following "jurisdictional" impacts.

> A total of 4.87 acres of jurisdictional wetlands will be permanently impacted and 47.64 acres will be temporarily impacted. Permanent fills are limited in size and are at separate and distinct locations along the corridor, and include minor fills for substation construction or limited pole placement in wetlands (ranging from approximately 30 to 195 square feet of fill per structure). An additional 111.55 acres of forested wetlands will be affected by clearing and conversion to scrub-shrub and emergent cover types. This area for total wetlands converted includes 105.25 acres of forested wetland, 3.678 acres of forested wetland habitat proximate to vernal pools, and 2.622 forested wetland associated with state mapped Inland Waterfowl & Wading Bird Habitat (IWWH).

Id. at 2-3.[21] The Corps explains that it is important to its assessment that these impacts to WOTUS are but a small percentage of a very large project. *Id.* at 3. This logic is repeated in the Corps' briefing of the preliminary injunction motion. The idea seems to be that the Corps' jurisdictional components of a project become less significant as the project increases in scale. That is false logic. But like Plaintiffs, the Corps is so obsessed with whether the regulations make it permitting authority for the entire Project that it tends to hammer away at that issue every chance it gets. Jurisdictional impacts can be significant impacts even if they are a small subset of a very large project.

The Corps also described the following WOTUS-specific considerations. In Segment 1, cover conversion will occur for 8.24 acres of forest, which will become a scrub-shrub or "emergent habitat type" impacting 110 vernal pools. There will be 0.26 acre of permanent fill to access one of the new transition stations for the subterranean crossing of the Kennebec River. Beneath the proposed line in Segment 1 are 223 rivers, streams, or brooks providing habitat to coldwater fisheries and six inland waterfowl and wading bird habitats (IWWH). In Segment 2, cover conversion will occur for 1.13 acres impacting two IWWH and 18 vernal pools. In Segment 3, cover conversion will occur for 5.65 acres impacting nine IWWH, plus 381 vernal pools. There are 84 rivers, streams, or brooks with coldwater fisheries, in which all woody vegetation would be cleared and non-capable woody vegetation would be allowed to regrow to a height of 10 feet. In Segment 4, cover conversion will occur for 4.4 acres impacting 6 vernal pools and there will be 0.03 acre of

[21] The Corps also observes that there are many aerial crossings of WOTUS, and it finds these not to be significant because they do "not include impacts to waters." *Id.* at 4.

permanent wetland fill. In Segment 5, cover conversion will impact 11 vernal pools and there will be 0.04 acre of wetland fill. Finally, the Merrill Road Converter Station improvements involve 3.16 acres of permanent wetland fill, including 0.273 acres of fill in vernal pool habitat, and the Fickett Road Substation improvements involve 1.33 acres of permanent wetland fill.

Concerning wetlands project-wide, the Corps found it significant that 1332 wetlands were avoided out of a total of 1404, but recognized that in addition to direct impacts to 72 wetlands, other wetlands would be impacted indirectly by the "removal of capable species … result[ing] in long-term conversion of wetland habitat type from forested to scrub-shrub and/or emergent." EA at 10.

Concerning vegetation practices, the Corps says CMP has committed to not using herbicide in Segment 1 to "minimize impacts, particularly to high value brook trout resources." *Id.*

Concerning watercourses, the Corps acknowledges that cutting the Corridor involves many potential impacts but also recognizes that the work is subject to several conditions and restrictions designed to soften the impact:

> Potential indirect impacts include sedimentation and turbidity, introduction of pollutants, and locally increased stream insolation (exposure to sunlight, increased temperature, and diminished woody debris contributions) associated with the clearing. Direct and indirect impacts are anticipated from future actions associated with implementation of their Culvert Replacement Plan, a mitigation requirement of the Maine DEP to enhance fisheries habitat. Based on USACE review of similar private, municipal, and state installations throughout the state however, these impacts are generally minimal compared to the long-term benefit achieved.
>
> Potential sedimentation associated with soil disturbance from equipment use and vehicle access proximate to streams can result in temporary short-term

impacts to fishery resources. Sedimentation can result in reduced light penetration, smothering of aquatic feeding and spawning areas, and impairment of aquatic respiration. Sedimentation can also impact the quality of coldwater fish habitat in waterbodies by burying higher value substrates, reducing habitat complexity, and altering stream channels. To avoid these impacts, CMP will implement its Environmental Guidelines during construction to minimize the potential for sedimentation and to protect fishery resources. CMP's Environmental Guidelines include detailed erosion and sedimentation control measures, resource identification procedures, access road and equipment travel impact minimization measures, and restoration and stabilization measures that will minimize the potential for impacts to waterbody resources. Implementation of the provisions of these Guidelines will be included as a condition of any permit.

Increased sun exposure on smaller waterbodies due to transmission line tree clearing can result in a negative impact due to an increase in water temperature, which can pose problems for coldwater fisheries. Tree clearing has been minimized by co-locating new lines in existing transmission line corridors where practicable and on segments requiring widening, minimizing clearing to only the width necessary to construct and safely operate the facilities. The waterbody crossing table located the administrative record identifies the amount of additional clearing width required within each respective corridor, if applicable.

To minimize any potential for negative impacts to stream habitat and fisheries from vegetative clearing, CMP proposes to allow vegetation to remain in place to the extent practicable and install appropriate sedimentation controls. Furthermore, all waterbody crossings will be spanned by the NECEC transmission line, and no work will take place within stream channels during construction. No new poles will be installed within 25 feet of these waterbodies, and only minimal tree removal is proposed in these stream buffer areas. All capable species will be removed from the stream buffer during initial clearing for construction. Vegetation maintenance, conducted on a 4-year cycle, in the stream buffer areas will consist of cutting back to ground level, all woody vegetation over 10 feet in height, whether capable or non-capable within that portion of the 25-foot stream buffer within the wire zone (i.e., that area within 15 feet, horizontally, of any conductor). Only capable species will be removed outside of the wire zone during vegetation maintenance activities. Otherwise, stream side vegetation will not be disturbed during construction or during future maintenance activities and the buffer will continue to function in a similar manner as before construction. Future maintenance activities in these areas will consist of hand removal of those capable species that are likely to encroach on the conductor safety zone within the next 4 years1. Herbicides will not be used within the

> stream buffers, within 25 feet of standing water or along any portion of Segment 1. Stream buffers are described in more detail in the NECEC Vegetation Clearing Plan (VCP) and Vegetation Maintenance Plan (VMP) contained in the administrative record.

EA at 11-13.

Concerning vernal pools, the Corps begins by emphasizing the number of vernal pools (757) in the Corridor that are avoided *in terms of permanent fill* over the 83 that will be partially filled. As for the more expansive impact of cutting activity and cover conversion, the Corps states:

> However, recognizing that many vernal pools are part of a larger wetland system and that important habitat/water quality contributions are served by the surrounding vernal pool envelope, and in order to be consistent with the state permitting authority, the applicant calculated impacts to the vernal pool depressions and the 100' envelope. The applicant also based the mitigation plan using the same methodology. In instances where a pool's surrounding habitat spans the entire width of the corridor; impacts associated with equipment access will be minimized by utilizing temporary timber mats to reduce disturbance. For vernal pools that will be spanned by electric conductors, there is still the potential for limited indirect impacts through conversion of minor amounts of adjacent forested uplands and wetlands. The potential for these indirect impacts is minimal since the transmission line corridor will be maintained in a well vegetated state, and only a small proportion of the forested area around any of these pools will be removed for the proposed transmission line corridor. There should still be ample foraging and overwintering habitat available and the pools themselves are expected to remain productive for the most part. Temporary impacts to adjacent wetlands can occur from equipment travel along the transmission line corridor. These impacts will be minimized by working during frozen conditions (outside the breeding season) or by employing other techniques to minimize impacts. Disturbed areas within the surrounding habitat of vernal pools will be stabilized and restored as soon as practicable.

EA at 14. The Corps also observes that CMP will adhere to operational practices consistent with state and federal vernal pool habitat management guidelines and will execute "a detailed Compensation Plan." *Id.* at 14-15.

The Corps also addresses concern for "potential Atlantic salmon habitat" existing in "various waterbodies crossed by the Project." *Id.* at 16. These areas are identified in maps in the administrative record and they are supposed to receive the least impactful clearing/cutting activity. To get a sense of the impact, and the Corps' considered the following:

> Potential Atlantic salmon habitat occurs within various waterbodies crossed by the Project. The Project will have no direct impact on Atlantic salmon habitat. However, potential indirect impacts to this species include increased stream insolation due to tree removal, sedimentation and turbidity, and the introduction of pollutants from construction-related activities. To minimize these indirect impacts during clearing, riparian buffers will be flagged prior to clearing, a 100-foot buffer will be established for these waterbodies, and these buffers will be cleared in accordance with the NECEC Plan for Protection of Sensitive Natural Resources During Initial Vegetation Clearing (VCP). All streams identified as Atlantic salmon habitat will have a 100-foot riparian buffer and any non-capable species exceeding 10 feet will remain within the stream buffer outside the wire zone. Inside the wire zone all woody vegetation over 10 feet whether capable or non-capable will be cut to ground level. Within this 100-foot buffer any capable species will be removed by hand cutting, herbicides will not be used, and if the construction schedule allows, clearing will occur during frozen ground conditions to minimize soil disturbance.

EA at 16 (emphasis added). From a lay perspective, I cannot say that I am resoundingly reassured. However, the Corps elsewhere specifically references the "Final Biological Assessment" submitted to the U.S. Fish and Wildlife Service and observes that FWS "concurs … that the proposed project may affect but is not likely to adversely affect Atlantic salmon … and critical habitats for Atlantic salmon." EA at 104. *See also id.* at 148-150 § 10.1. Plaintiffs have not presented me with a contrary assessment by a regulatory agency such as Maine DEP or DFW. Given the assessment of FWS and the absence of a strongly worded counter statement by another regulatory agency, and recognizing the

deference owed to the Corps in its exercise of regulatory oversight concerning WOTUS, I conclude it is unlikely Plaintiffs will demonstrate that the Corps' assessment is arbitrary or unreasonable.

Another obvious WOTUS concern involves brook trout habitat. The Corps did not overlook this concern. For example:

> Provided all applicable conditions are implemented and state and local authorizations have been issued, the project is not expected to have more than short-term minimal effect on waterways supporting wild brook trout. State mandated compensatory mitigation in the form of a culvert replacement program should result in long-term benefits to fisheries in terms of improved passage and greater habitat connectivity.
> …. Construction could temporarily disturb fish populations (noise, tree clearing, increased human activity, etc) and could displace individual fishermen from certain waterways. A return to baseline conditions is expected upon completion of the project.

EA at 105. There is countervailing evidence in the record presented by Plaintiffs, discussed below, but again I am struck by the absence of any outcry on the part of state or federal environmental agencies. I am engaged in a deferential review process, not a free-ranging fact-finding exercise. This presents Plaintiffs with a significant uphill climb.

In addition to substantial mitigation requirements designed to reduce the intensity of environmental impacts, projects of this kind come with significant compensatory price tags. The EA describes several compensation requirements for the Project's wetland impacts. Most salient to the Corps' review: "Prior to the start of construction, the applicant proposes to contribute $3,046,648.37 to the Maine Natural Resource Conservation Program" as "a requirement of both the USACE and the DEP as compensation for direct and indirect impacts to vernal pools and permanent wetland fills." EA at 25. This compensation is only partial. CMP also will conserve three large tracts of land.

> The applicant has proposed 3 preservation sites to provide compensatory mitigation for impacts to WOTUS. They are the Flagstaff Lake Tract; Little Jimmie Pond-Harwood Tract; and the Pooler Pond Tract. Each site has been evaluated via 33 CFR 332.4(c)(2) through (c)(14) or 12 Components of a Mitigation Plan in Section 8.0.
>
> The Flag Staff Lake Tract currently has approximately 423.96 acres of mapped wetlands; 10,790 linear feet of stream and 417.33 acres of riparian upland. Therefore the site has the potential to produce 49.02 wetland credits (21.918 wetland conversion@20:1 + 27.822 upland conversion@15:1).
>
> The Little Jimmie Pond-Harwood Tract currently has 68.46 acres of mapped wetland; 2 vernal pools; 3,030 linear feet of stream and 41.31 acres of riparian upland. Therefore the site has the potential to produce 6.177 wetland credits (3.423 acres + 2.754 acres).
>
> The Pooler Pond Tract currently has 18.33 acres of mapped wetland; 1 vernal pool; and 4,480 linear feet of street, and 62.91 acres of riparian upland. Therefore the site has the potential to produce 5.11 wetland credits (0.916 acres + 4.194 acres).
>
> To summarize, the applicant proposes to purchase 13.361 wetland credits from the MNRCP ILF Program and will generate approximately 60.307 wetland credits through permitee responsible mitigation to offset impacts to WOTUS. This exceeds the USACE required generation of 38.933 wetland credits.

EA at 26.

On the one hand, these substantial compensation requirements tend to demonstrate the significance of the Project's watershed impacts. On the other hand, the existence of a substantial quid pro quo or environmental compensation regime does not compel a finding that a project's WOTUS impacts significantly affect the human environment. Investment in wetland land bank credits and direct preservation of existing ecological assets reflect forward-thinking environmental policy. Plaintiffs have not convincingly demonstrated that these regulatory schemes provide a litmus test for when an EIS is legally mandated. Moreover, in comparison with the Project's scattered and diffuse impacts to wetlands and

the predominantly cover-conversion type of impact, CMP's credit purchases and preservation projects tend to improve or preserve more cohesive land banks and expansive tracks of forest with high-value wetlands and other WOTUS assets. This is not a case of destroying or crippling one significant WOTUS asset and preserving another, in which case I might be able to say the impact is a relatively clear and a significant net loss. Instead, this case involves scattered adverse WOTUS impacts of relatively mild intensity (according to expert regulators) balanced against improvement and preservation of larger and more coherent aquatic ecosystems. Plaintiffs have not yet persuaded me that there is a readily applicable judicial rule that I could employ here to say when regulators can or cannot consider these sorts of tradeoffs and offsets in their effort to measure the significance of proposed actions on the human environment.

As for impacts to specific WOTUS assets, I can agree with Plaintiffs that it is concerning that the Corps' discussion of baseline WOTUS conditions consists primarily in a recitation of numbers of vernal pools, brooks and streams, and acreage of wetlands. For example, there is no specific identification of a WOTUS asset within the Corridor having special value other than the Rivers and perhaps "coldwater fisheries" in the aggregate.[22] Yet even after reviewing Plaintiffs' motion record, principally comprised of declarations by individuals who submitted written and oral testimony during Maine DEP proceedings, Motion at 6 n. 6, I do not believe I can readily conclude that a specific WOTUS asset

[22] In comparison, where it was possible to identify a specific asset to illustrate CMP's care and consideration, the Corps so indicated. For example, consider the Corps' discussion of project alterations to avoid Beattie Pond. EA at 87.

existing in the human environment will be significantly undermined by the proposed actions.

I have reviewed the declarations submitted by Dr. Matthew Schweisberg (ECF No. 18-11) and Dr. Aram Calhoun (ECF No. 18-12). However, I am not persuaded at present that Dr. Schweisberg's identification of "immediate and irreparable harm," Schweisberg Decl. ¶¶ 15, 24, is likely to compel a finding that the localized impact of corridor cover conversion and clearing significantly affect waters of the United States. Nor am I persuaded that Dr. Calhoun's advocacy for vernal pools compels the Corps to produce a vernal pool EIS based on "cumulative impacts … to all vernal pools and wetland resources [that], although potentially small if considered on a pool-by-pool assessment …, are significant taken together …." Cahoun Dep. ¶ 11. This reluctance on my part is also informed by Dr. Calhoun's recognition that Segment 1, the primary focus of this litigation so far, already involves environmental baseline impacts because the transmission line's path would run over "working forest under varied management regimes." *Id.* ¶ 26. My impression after considering this evidence is that there is room for disagreement about the efficacy of state and federal mitigation requirements and whether the Project will significantly destabilize or affect the health of the aquatic ecosystem. *Id.* ¶¶ 29-37. The Corps recognized that corridor cutting will impact the wetlands, but concluded the impacts do not significantly affect the quality of the human environment. It seems to me this conclusion was made after considering the relevant evidence and is the product of reason rather than caprice.

I also have considered the important perspective offered by Jeffrey Reardon, a man with many years of Maine-based expertise in brook trout conservation. Mr. Reardon

describes the western mountain region through which the Project would pass as "the nation's most significant stronghold of native brook trout populations," Reardon Decl. ¶ 14 (ECF No. 18-15), and he regards the Corps' assessment of impacts on fisheries as inadequate and inaccurate. He explains that the 100-foot buffers in Segment 1 are a compromise between protecting a transmission line and preserving brook trout habitat and fall short of a Maine Department of Inland Fisheries standard that call for 60-70% crown closure and resistance to wind throw. *Id.* ¶¶ 17, 33. He also believes the Project threatens the Cold Stream brook trout population, a resource he describes as currently protected by an 8,200 acre preserve. *Id.* ¶ 26. Mr. Reardon believes that cutting of some 1,400 feet of corridor where it crosses the Capital Road east of Route 201 poses a special threat to this preserve and will "degrade the public's investment in protecting this valuable habitat." *Id.* ¶ 27. Nevertheless, I am concerned that Mr. Reardon's dire predictions about the Project's harm to, specifically, the expansive Cold Stream preserve and, more generally, the wider stronghold of brook trout habitat throughout the western mountain region (thousands upon thousands of acres through which the Project would not pass) are inflated by his devotion to brook trout conservation work.[23] I would expect the Maine Department of Fisheries and Wildlife or the Department of Environmental Protection to echo his sentiments loudly if his perspective were not overly strident.

The work of these experts is of great value and I respect their insights and concern for the health of Maine's ecosystems. However, given the nature of my review, it is not

[23] Mr. Reardon also appears to be disappointed that CMP's investment in preservation tracts will not focus on expanding brook trout preserves. Id. ¶ 39.

simply a matter of choosing my preferred expert perspective. Given my review thus far, although I might have acted differently had I been standing in the Corps' shoes, Plaintiffs have not persuaded me that they are likely to prevail in this litigation.

2. Irreparable harm

Plaintiffs bear the burden to show that a denial of interim relief in this case is likely to cause irreparable harm. *See Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009). Although the "measure of irreparable harm can be a sliding scale, working in conjunction with a moving party's likelihood of success on the merits," *Vaqueria Tres Monjitas, Inc., v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009), the movant must provide the court with more than "conjecture, surmise or a party's unsubstantiated fears of what the future might have in store." *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). Even a showing as to the "possibility" of such harm will not suffice. *Winter v. Nat. Res. Def. Council*, *Inc*., 555 U.S. 7, 22 (2008).

Plaintiffs remind the Court that "if any [important] decision is made without the information that NEPA seeks to put before the decision maker, the harm that NEPA seeks to prevent occurs . . . and courts are to take account of that kind of harm when they consider whether to enjoin governmental actions that plaintiffs claim violate NEPA." Motion at 11 (quoting *Sierra Club v. Marsh*, 872 F.2d at 497 (1st Cir. 1989)). Plaintiffs posit: "when considering preliminary injunctions based on NEPA violations, the potential harm to the environment stemming from the project for which the NEPA analysis was conducted is attributable to the NEPA violation itself." *Id.*

The First Circuit holds that irreparable harm exists "when agencies become entrenched in a decision uninformed by the proper NEPA process because they have made commitments or taken action to implement the uninformed decision." *Busey*, 79 F.3d at 1271. This is a function of the fact that NEPA is a procedural statute "designed to influence the decision making process by making governmental officials notice environmental considerations and take them into account." *Id.* (quoting *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1996)).

Based on my review of the record, I am not persuaded that Plaintiffs are likely to prove that the Corps failed to take Plaintiffs' WOTUS concerns into account. Rather, my initial impression is that before the Corps issued its FONSI it collected and considered a fulsome record containing thorough and detailed inputs from expert administrative agencies and outside experts, including experts who stand behind the respective parties in this litigation, and also from the lay public, including individuals who live and work in the western mountain region and rely on a healthy aquatic ecosystem for their livelihoods. While I recognize that the Project is unpopular and deeply disturbing to many people, in particular those persons devoted to the environmental and scenic values existing in Segment 1, which cannot be restored through issuance of a later court order, my preliminary findings on the merits inform my assessment of whether or not the Corps has run roughshod over the NEPA values at stake in this litigation. As to that question, I believe the answer is no.

3. Balance of equities

Given my assessment of the first two preliminary injunction factors, identification of equitable interests on the other side of the balance only serves to undermine further Plaintiff's Motion. Delay of construction pending further litigation is no great imposition for the Corps. However, equitable interests held by an intervenor defendant whose economic interests are impacted by a preliminary injunction are legitimate considerations. *Town of Weymouth v. Massachusetts Dep't of Envtl. Prot*., 973 F.3d 143, 145 (1st Cir. 2020) (per curiam). CMP has committed to the Project considerable human and economic resources and is in the position of expending considerably more – to little or no effect – based on contractor commitments that do not disappear if it loses most of the winter months while defending this litigation. I make this finding simply to recognize that there are competing concerns to weigh, not to suggest that these economic concerns are weightier than environmental concerns. It also strikes me that even if I concluded that the Corps failed to afford adequate procedural protection to WOTUS impacts, or that the Corps should be compelled to publish its draft EA for public comment, it would not necessarily follow that I should enjoin cutting activity outside the riparian buffer zones. For example, I might fashion relief more equitably by enjoining cutting inside those zones. However, because I have ruled against Plaintiffs on the first two factors, I would be abusing my discretion if I devised that kind of preliminary injunctive relief here.

4. Service of the public interest

The parties all make persuasive arguments concerning the public interest. Because NEPA is a procedural statute and the Corps's FONSI comes at the end of a process that

likely ensured the Corps was "well informed" about the WOTUS impacts it authorized, this factor does not weigh decisively in Plaintiffs' favor, even if the outcome is unpopular. Moreover, as emphasized by Intervenor Defendant CMP, the Maine Public Utilities Commission has granted CMP a certificate of public convenience and necessity, concluding the Project will benefit Maine in a variety of ways, including by reducing rates, improving reliability, and reducing regional greenhouse gas emissions. This finding demonstrates that the public interest is not monolithic.

CONCLUSION

For the foregoing reasons Plaintiffs' Motion for Leave to Supplement the Complaint (ECF No. 40) is GRANTED. Plaintiffs' Motion for Preliminary Injunction (ECF No. 18) is DENIED.

SO ORDERED.

Dated this 16th day of December, 2020.

/s/ Lance E. Walker
UNITED STATES DISTRICT JUDGE

Code of Federal Regulations
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 325. Processing of Department of the Army Permits (Refs & Annos)

33 C.F.R. Pt. 325, App. B

Appendix B to Part 325—NEPA Implementation Procedures for the Regulatory Program

Currentness

18. Record of Decision

19. Predecision Referrals by Other Agencies

20. Review of Other Agencies' EISs

21. Monitoring

1. Introduction. In keeping with Executive Order 12291 and 40 CFR 1500.2, where interpretive problems arise in implementing this regulation, and consideration of all other factors do not give a clear indication of a reasonable interpretation, the interpretation (consistent with the spirit and intent of NEPA) which results in the least paperwork and delay will be used. Specific examples of ways to reduce paperwork in the NEPA process are found at 40 CFR 1500.4. Maximum advantage of these recommendations should be taken.

2. General. This Appendix sets forth implementing procedures for the Corps regulatory program. For additional guidance, see the Corps NEPA regulation 33 CFR part 230 and for general policy guidance, see the CEQ regulations 40 CFR 1500–1508.

3. Development of Information and Data. See 40 CFR 1506.5. The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). See also 40 CFR 1502.22 regarding incomplete or unavailable information.

4. Elimination of Duplication with State and Local Procedures. See 40 CFR 1506.2.

5. Public Involvement. Several paragraphs of this appendix (paragraphs 7, 8, 11, 13, and 19) provide information on the requirements for district engineers to make available to the public certain environmental documents in accordance with 40 CFR 1506.6.

6. Categorical Exclusions—a. General. Even though an EA or EIS is not legally mandated for any Federal action falling within one of the “categorical exclusions,” that fact does not exempt any Federal action from procedural or substantive compliance with any other Federal law. For example, compliance with the Endangered Species Act, the Clean Water Act, etc., is always mandatory, even for actions not requiring an EA or EIS. The following activities are not considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:

(1) Fixed or floating small private piers, small docks, boat hoists and boathouses.

(2) Minor utility distribution and collection lines including irrigation;

(3) Minor maintenance dredging using existing disposal sites;

(4) Boat launching ramps;

(5) All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).

b. Extraordinary Circumstances. District engineers should be alert for extraordinary circumstances where normally excluded actions could have substantial environmental effects and thus require an EA or EIS. For a period of one year from the effective data of these regulations, district engineers should maintain an information list on the type and number of categorical exclusion

actions which, due to extraordinary circumstances, triggered the need for an EA/FONSI or EIS. If a district engineer determines that a categorical exclusion should be modified, the information will be furnished to the division engineer who will review and analyze the actions and circumstances to determine if there is a basis for recommending a modification to the list of categorical exclusions. HQUSACE (CECW–OR) will review recommended changes for Corps-wide consistency and revise the list accordingly.

7. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions)—a. Environmental Assessment (EA) and Findings of No Significant Impact (FONSI). The EA should normally be combined with other required documents (EA/404(b)(1)/SOF/FONSI). "EA" as used throughout this Appendix normally refers to this combined document. The district engineer should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired) and when the EA is a separate document it must be completed prior to completion of the statement of finding (SOF). When the EA confirms that the impact of the applicant's proposal is not significant and there are no "unresolved conflicts concerning alternative uses of available resources * * * ' (section 102(2)(E) of NEPA), and the proposed activity is a "water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps permit). The combined document normally should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district engineer may delegate the signing of the NEPA document. Should the EA demonstrate that an EIS is necessary, the district engineer shall follow the procedures outlined in paragraph 8 of this Appendix. In those cases where it is obvious an EIS is required, an EA is not required. However, the district engineer should document his reasons for requiring an EIS.

b. Scope of Analysis. (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

(i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).

(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(iii) The extent to which the entire project will be within Corps jurisdiction.

(iv) The extent of cumulative Federal control and responsibility.

A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).

B. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.

C. The district engineer should also refer to paragraphs 8(b) and 8(c) of this appendix for guidance on determining whether it should be the lead or a cooperating agency in these situations.

These factors will be added to or modified through guidance as additional field experience develops.

(3) Examples: If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute. The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.

For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies).

For example, a 50–mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.

Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404

regulatory jurisdiction. To use the same example, if 30 miles of the 50–mile transmission line crossed wetlands or other "waters of the United States," the scope of analysis should reflect impacts of the whole 50–mile transmission line.

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

8. Environmental Impact Statement—General—a. Determination of Lead and Cooperating Agencies. When the district engineer determines that an EIS is required, he will contact all appropriate Federal agencies to determine their respective role(s), i.e., that of lead agency or cooperating agency.

b. Corps as Lead Agency. When the Corps is lead agency, it will be responsible for managing the EIS process, including those portions which come under the jurisdiction of other Federal agencies. The district engineer is authorized to require the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix. It is permissible for the Corps to reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.

c. Corps as Cooperating Agency. If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.5 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority. As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of an EIS. This in no way shall be construed as lessening the district engineer's ability to request the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix.

When the Corps is a cooperating agency because of a regulatory responsibility, the district engineer should, in accordance with 40 CFR 1501.6(b)(4), "make available staff support at the lead agency's request" to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the EIS, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within its own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps expenses on a cost reimbursable basis. If the district engineer believes a public hearing should be held and another agency is lead agency, the district engineer should request such a hearing and provide his reasoning for the request. The district engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns.

d. Scope of Analysis. See paragraph 7b.

e. Scoping Process. Refer to 40 CFR 1501.7 and 33 CFR 230.12.

f. Contracting. See 40 CFR 1506.5.

(1) The district engineer may prepare an EIS, or may obtain information needed to prepare an EIS, either with his own staff or by contract. In choosing a contractor who reports directly to the district engineer, the procedures of 40 CFR 1506.5(c) will be followed.

(2) Information required for an EIS also may be furnished by the applicant or a consultant employed by the applicant. Where this approach is followed, the district engineer will (i) advise the applicant and/or his consultant of the Corps information requirements, and (ii) meet with the applicant and/or his consultant from time to time and provide him with the district engineer's views regarding adequacy of the data that are being developed (including how the district engineer will view such data in light of any possible conflicts of interest).

The applicant and/or his consultant may accept or reject the district engineer's guidance. The district engineer, however, may after specifying the information in contention, require the applicant to resubmit any previously submitted data which the district engineer considers inadequate or inaccurate. In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a).

g. Change in EIS Determination. If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent. The district engineer shall notify in writing the appropriate division engineer; HQUSACE (CECW–OR); the appropriate EPA regional administrator, the Director, Office of Federal Activities (A–104), EPA, 401 M Street SW., Washington, DC 20460 and the public of the determination.

h. Time Limits. For regulatory actions, the district engineer will follow 33 CFR 230.17(a) unless unusual delays caused by applicant inaction or compliance with other statutes require longer time frames for EIS preparation. At the outset of the EIS effort, schedule milestones will be developed and made available to the applicant and the public. If the milestone dates are not met the district engineer will notify the applicant and explain the reason for delay.

9. Organization and Content of Draft EISs—a. General. This section gives detailed information for preparing draft EISs. When the Corps is the lead agency, this draft EIS format and these procedures will be followed. When the Corps is one of the joint lead agencies, the joint lead agencies will mutually decide which agency's format and procedures will be followed.

b. Format—(1) Cover Sheet. (a) Ref. 40 CFR 1502.11.

(b) The “person at the agency who can supply further information” (40 CFR 1502.11(c) is the project manager handling that permit application.

(c) The cover sheet should identify the EIS as a Corps permit action and state the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction.

(2) Summary. In addition to the requirements of 40 CFR 1502.12, this section should identify the proposed action as a Corps permit action stating the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction. It shall also summarize the purpose and need for the proposed action and shall briefly state the beneficial/adverse impacts of the proposed action.

(3) Table of Contents.

(4) Purpose and Need. See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, “The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.”) If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, “The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.”) Normally, the applicant

should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, “to construct an electric generating plant”). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, “to meet the public's need for electric energy”). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.

(5) Alternatives. See 40 CFR 1502.14. The Corps is neither an opponent nor a proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the “applicant's preferred alternative” in the final EIS. Decision options available to the district engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions or deny the permit.

(a) Only reasonable alternatives need be considered in detail, as specified in 40 CFR 1502.14(a). Reasonable alternatives must be those that are feasible and such feasibility must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance). The alternatives analysis should be thorough enough to use for both the public interest review and the 404(b)(1) guidelines (40 CFR part 230) where applicable. Those alternatives that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative. Such alternatives should be evaluated only to the extent necessary to allow a complete and objective evaluation of the public interest and a fully informed decision regarding the permit application.

(b) The “no-action” alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work under the jurisdiction of the Corps or (2) by the denial of the permit. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.

(c) The EIS should discuss geographic alternatives, e.g., changes in location and other site specific variables, and functional alternatives, e.g., project substitutes and design modifications.

(d) The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit. 40 CFR 1502.23 states that the weighing of the various alternatives need not be displayed in a cost-benefit analysis and “* * * should not be when there are important qualitative considerations.” The EIS should, however, indicate any cost considerations that are likely to be relevant to a decision.

(e) Mitigation is defined in 40 CFR 1508.20, and Federal action agencies are directed in 40 CFR 1502.14 to include appropriate mitigation measures. Guidance on the conditioning of permits to require mitigation is in 33 CFR 320.4(r) and 325.4. The nature and extent of mitigation conditions are dependent on the results of the public interest review in 33 CFR 320.4.

(6) Affected Environment. See Ref. 40 CFR 1502.15.

(7) Environmental Consequences. See Ref. 40 CFR 1502.16.

(8) List of Preparers. See Ref. 40 CFR 1502.17.

(9) Public Involvement. This section should list the dates and nature of all public notices, scoping meetings and public hearings and include a list of all parties notified.

(10) Appendices. See 40 CFR 1502.18. Appendices should be used to the maximum extent practicable to minimize the length of the main text of the EIS. Appendices normally should not be circulated with every copy of the EIS, but appropriate appendices should be provided routinely to parties with special interest and expertise in the particular subject.

(11) Index. The Index of an EIS, at the end of the document, should be designed to provide for easy reference to items discussed in the main text of the EIS.

10. Notice of Intent. The district engineer shall follow the guidance in 33 CFR part 230, Appendix C in preparing a notice of intent to prepare a draft EIS for publication in the Federal Register.

11. Public Hearing. If a public hearing is to be held pursuant to 33 CFR part 327 for a permit application requiring an EIS, the actions analyzed by the draft EIS should be considered at the public hearing. The district engineer should make the draft EIS available to the public at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction as provided in 40 CFR 1506.6(c)(2), the district engineer should coordinate a joint hearing with that agency whenever appropriate.

12. Organization and Content of Final EIS. The organization and content of the final EIS including the abbreviated final EIS procedures shall follow the guidance in 33 CFR 230.14(a).

13. Comments Received on the Final EIS. For permit cases to be decided at the district level, the district engineer should consider all incoming comments and provide responses when substantive issues are raised which have not been addressed in the final EIS. For permit cases decided at higher authority, the district engineer shall forward the final EIS comment letters together with appropriate responses to higher authority along with the case. In the case of a letter recommending a referral under 40 CFR part 1504, the district engineer will follow the guidance in paragraph 19 of this appendix.

14. EIS Supplement. See 33 CFR 230.13(b).

15. Filing Requirements. See 40 CFR 1506.9. Five (5) copies of EISs shall be sent to Director, Office of Federal Activities (A–104), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The official review periods commence with EPA's publication of a notice of availability of the draft or final EISs in the Federal Register. Generally, this notice appears on Friday of each week. At the same time they are mailed to EPA for filing, one copy of each draft or final EIS, or EIS supplement should be mailed to HQUSACE (CECW–OR) WASH DC 20314–1000.

16. Timing. 40 CFR 1506.10 describes the timing of an agency action when an EIS is involved.

17. Expedited Filing. 40 CFR 1506.10 provides information on allowable time reductions and time extensions associated with the EIS process. The district engineer will provide the necessary information and facts to HQUSACE (CECW–RE) WASH DC 20314–1000 (with copy to CECW–OR) for consultation with EPA for a reduction in the prescribed review periods.

18. Record of Decision. In those cases involving an EIS, the statement of findings will be called the record of decision and shall incorporate the requirements of 40 CFR 1505.2. The record of decision is not to be included when filing a final EIS and may not be signed until 30 days after the notice of availability of the final EIS is published in the Federal Register. To avoid duplication, the record of decision may reference the EIS.

19. Predecision Referrals by Other Agencies. See 40 CFR part 1504. The decisionmaker should notify any potential referring Federal agency and CEQ of a final decision if it is contrary to the announced position of a potential referring agency. (This pertains to a NEPA referral, not a 404(q) referral under the Clean Water Act. The procedures for a 404(q) referral are outlined in

the 404(q) Memoranda of Agreement. The potential referring agency will then have 25 calendar days to refer the case to CEQ under 40 CFR part 1504. Referrals will be transmitted through division to CECW–RE for further guidance with an information copy to CECW–OR.

20. Review of Other Agencies' EISs. District engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise as defined in 40 CFR 1508.15 and 1508.26 and identified in Appendix II of CEQ regulations (49 FR 49750, December 21, 1984). If the district engineer determines that another agency's draft EIS which involves a Corps permit action is inadequate with respect to the Corps permit action, the district engineer should attempt to resolve the differences concerning the Corps permit action prior to the filing of the final EIS by the other agency. If the district engineer finds that the final EIS is inadequate with respect to the Corps permit action, the district engineer should incorporate the other agency's final EIS or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action. See 33 CFR 230.21 for guidance. The agency which prepared the original EIS should be given the opportunity to provide additional information to that contained in the EIS in order for the Corps to have all relevant information available for a sound decision on the permit.

21. Monitoring. Monitoring compliance with permit requirements should be carried out in accordance with 33 CFR 230.15 and with 33 CFR part 325.

Credits
[53 FR 3134, Feb. 3, 1988]

SOURCE: 51 FR 41236, Nov. 13, 1986; 55 FR 27821, July 6, 1990, unless otherwise noted.

AUTHORITY: 33 U.S.C. 401 et seq.: 33 U.S.C. 1344; 33 U.S.C. 1413.

Notes of Decisions (4)

Current through January 29, 2021; 86 FR 7512.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1500. Purpose, Policy, and Mandate (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1500.1

§ 1500.1 Purpose.

Effective: [See Text Amendments] to September 13, 2020

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1501. NEPA and Agency Planning (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1501.3

§ 1501.3 When to prepare an environmental assessment.

Effective: [See Text Amendments] to September 13, 2020

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514, (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1501. NEPA and Agency Planning (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1501.4

§ 1501.4 Whether to prepare an environmental impact statement.

Effective: [See Text Amendments] to September 13, 2020

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days

before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514, (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1506. Other Requirements of NEPA (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1506.6

§ 1506.6 Public involvement.

Effective: [See Text Amendments] to September 13, 2020

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.8

§ 1508.8 Effects.

Effective: [See Text Amendments] to September 13, 2020

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Effective: [See Text Amendments] to September 13, 2020

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.13

§ 1508.13 Finding of no significant impact.

Effective: [See Text Amendments] to September 13, 2020

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.25

§ 1508.25 Scope.

Effective: [See Text Amendments] to September 13, 2020

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

Effective: [See Text Amendments] to September 13, 2020

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Credits
[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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