Appeal No. No. 20-2195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellants
v.

UNITED STATES ARMY CORPS OF ENGINEERS;
COLONEL JOHN A. ATILANO, II, Commander and District Engineer, in his official capacity; JAY L. CLEMENT, Senior Project Manager, in his official capacity;
CENTRAL MAINE POWER COMPANY

Defendants-Appellees

On Appeal from Order of
United States District Court for the District of Maine

BRIEF OF APPELLEE CENTRAL MAINE POWER COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor-Appellee Central Maine Power Company hereby states that Central Maine Power Company's common stock is owned by Avangrid, Inc., through wholly owned subsidiaries Avangrid Networks, Inc. and CMP Group, Inc. Avangrid, Inc. is a publicly held corporation listed on the NYSE (NYSE:AGR). Iberdrola, S.A., a corporation (sociedad anónima) organized under the laws of the Kingdom of Spain, directly owns 81.5% of outstanding shares of Avangrid, Inc. common stock. The shares of Iberdrola, S.A. are listed in the Madrid, Bilbao, Barcelona and Valencia stock exchanges. Iberdrola, S.A. has an American Depositary Receipts program (OTCMKTS: OBDRY). No other entities or individuals own 10% or more of the stock of Central Maine Power Company.

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STATEMENT OF THE ISSUES

1. Whether Appellants waived the argument that they need not demonstrate likelihood of success, and, if not, whether the district court erred by requiring such a showing consistent with the holdings of the Supreme Court and this Court?

2. Whether the district court acted within the scope of its discretion in determining that Appellants failed to demonstrate likelihood of success on the merits because the Army Corps of Engineers' ("Corps") Environmental Assessment / Finding of No Significant Impact ("EA/FONSI") for the New England Clean Energy Connect project ("NECEC" or "Project") was neither arbitrary nor capricious?

3. Whether the district court acted within the scope of its discretion in finding that Appellants failed to demonstrate that the irreparable harm, balance of the equities, and public interest factors support an injunction?

STATEMENT OF THE CASE

Central Maine Power Company ("CMP") proposes to build the NECEC, a private electric transmission project that will deliver clean energy from Québec to New England. App. 403. CMP proposed the NECEC in response to a request for proposals by the Commonwealth of Massachusetts as part of its efforts to reduce greenhouse gas ("GHG") emissions. *Id.* The NECEC will result in annual reductions in regional GHG emissions equivalent to removing 700,000 cars from the road.[1]

[1] *See Central Maine Power Company*, Case No. 2017-00232, Dkt. No. 632, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, at 72 (Me.

The Project consists of transmission lines and related facilities, such as substations. *Id.* at 405-08. The Project includes about 145 miles of high voltage direct current ("HVDC") line from the Canadian border to Lewiston, Maine, as well as over 25 miles of alternating current lines. *Id.* at 403. Nearly three-quarters of the transmission line components will be developed on existing transmission corridors. *Id.* at 410. Of the HVDC line specifically, "63% . . . will be co-located within existing CMP transmission corridors and the remaining 37% will be developed in a region where active timber harvesting occurs on heavily managed commercial timberlands." *Id.*[2]

The NECEC in its entirety is subject to comprehensive state oversight, including by the Maine Public Utilities Commission ("MPUC"), Maine Department of Environmental Protection ("MDEP"), and Maine Land Use Planning Commission ("MLUPC"). *Id.* at 444. MPUC approved the Project after assessing public need, *see NextEra*, 2020 ME 34, ¶¶ 2-7, 30, 227 A.3d 1117; 35-A M.R.S. § 3132, while MLUPC certified the Project after considering land use standards, *see* App. 860-904; 12 M.R.S. § 685-B. MDEP approved the Project after assessing its environmental, scenic, aesthetic, and recreational impacts as a whole. App. 666-67; 38 M.R.S. §§ 480-D, 484. After six days of MDEP hearings that "highlighted the impacts the proposed project

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PUC 2019) ("CPCN Order"), *available at* https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/CaseMaster.aspx?CaseNumber=2017-00232, *aff'd NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 30, 227 A.3d 1117. The CPCN Order is in the administrative record. *See* App. 523.

[2] The Project is not substantially similar to other proposals for delivery of clean energy to Massachusetts, and Appellants' claim to the contrary is unsupported by evidence.

would have on fish and wildlife habitat, scenic character, and recreational uses," MDEP ordered "an unprecedented level of natural resource protection" and found that the Project would not have substantial impacts with those protections in place. App. at 666-67; *see id.* at 740-57 (analyzing impacts in light of mitigation and compensation, including payment of over $3.7 million and conservation of over 41,000 acres encompassing substantial wetlands, streams, and vernal pools); *see also id.* at 429, 434.

Discrete components of the Project also require two federal permits. A presidential permit is required for the international border crossing. 10 C.F.R. § 205.320.[3] In addition, a Corps permit is required for the discharge of fill into or work in waters of the United States ("WOTUS"). 33 U.S.C. §§ 403, 1344. Only 1.9% of the Project – 164 acres out of 8,600 – will impact WOTUS. App. 404, 439.

CMP applied for a Corps permit for construction activities that would impact WOTUS (*i.e.*, wetland fill), and later for drilling beneath the Kennebec River, triggering over three years of intensive review by the Corps. The Corps issued a public notice, received hundreds of written comments, and held a hearing attended by more than 300 individuals. *Id.* at 443-44. The Corps collaborated with federal agencies to build a record to understand Project impacts, *id.* at 448-49, 541-42, 549-53, and participated in MDEP's extensive hearings (which became part of the Corps record), *id.* at 444.

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[3] The Department of Energy ("DOE") issued a Presidential Permit for the Project on January 14, 2021. *See* Presidential Permit, OE Dkt. No. PP-438 (DOE Jan. 14, 2021), *available at* https://www.energy.gov/sites/prod/files/2021/01/f82/PP-438%20NECEC%20LLC%20_1-14-21-FINAL.pdf.

This process culminated in a 162-page EA/FONSI and a Corps permit. *Id.* at 560-63, 624-40. In the EA, the Corps analyzed "impacts to waters of the U.S. and the immediately surrounding uplands," *id.* at 441, but also addressed impacts more broadly, *see, e.g.*, *id.* at 449-55 (addressing public comments), 542-49 (assessing impacts at watershed scale). The Corps extensively discussed existing conditions, *see, e.g.*, *id.* at 435-37; alternatives, *see id.* at 460-502; Project impacts, including on aesthetics, the environment, wetlands, fish and wildlife, recreation, and climate change, *see, e.g. id.* at 512-25, 539-51; and CMP's avoidance, minimization, and mitigation efforts, *see, e.g.*, *id.* at 410-34.[4] The EA concluded with a finding of no significant impact. *Id.* at 560-63.

Appellants filed a complaint, alleging that the Corps' review failed to comply with the National Environmental Policy Act ("NEPA").[5] ECF 1. NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Agencies may prepare an EA to determine whether an EIS is necessary. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985); 40 C.F.R. § 1501.4 (1978). "[T]he EA is a 'concise' document that 'briefly' discusses the relevant issues" and either concludes that an EIS is required or concludes with a FONSI. *Marsh*, 769 F.2d at 870;

[4] The Corps required further compensatory mitigation, including preservation of over 1,000 acres (including more than 510 acres of wetland), in addition to the conservation of wetlands, vernal pools, and linear stream miles required by the State. App. 526-27.
[5] No Clean Water Act ("CWA") claims are at issue on appeal. Plaintiffs-Appellants did not file an amended complaint asserting a CWA claim until after the preliminary injunction hearing, App. 10-55, and thus *only* NEPA claims were addressed below.

see 40 C.F.R §§ 1508.9, 1508.13. "Most permits will normally require only an EA." 33 C.F.R. § 230.7(a). Appellants filed a preliminary injunction motion, arguing that the Corps should have prepared an EIS. The district court denied the motion.

SUMMARY OF THE ARGUMENT

The primary question in this appeal is whether Appellants have demonstrated substantial likelihood of success on the merits. The "extraordinary remedy" of injunctive relief is not available absent such a showing. The Court may begin and end its analysis with likelihood of success because Appellants have failed to demonstrate that the district court abused its discretion in finding that the Corps' EA/FONSI is not arbitrary. First, the Corps reasonably applied its regulations in defining the scope of the EA. As it found, the Project's minimal impacts on WOTUS do not "federalize" the otherwise private endeavor and require the Corps to consider Project-wide impacts. State agencies with primary regulatory oversight have already conducted that broader analysis. Second, the Corps rationally concluded that permitting the Project would not significantly impact the environment. After extensive review and public input, the Corps established a proper baseline and assessed each of the potential impacts Appellants raise on appeal. That is all that NEPA requires.

Because Appellants cannot demonstrate likelihood of success, the district court could not grant an injunction. In any event, the district court did not abuse its discretion in weighing the remaining factors. First, Appellants cannot establish irreparable harm under NEPA, and the record amply supports the conclusion that the Project will not

cause the aesthetic or environmental harms that Appellants claim – particularly given the mitigation efforts required by the Corps and the State. Second, CMP indisputably will suffer tens of millions of dollars in delay costs if an injunction issues. Third, the public would be harmed by an injunction, which would delay the creation of over 1,600 new jobs during the pandemic and seriously impede efforts to reduce carbon emissions.

ARGUMENT

This Court's preliminary injunction standard is well-settled. A preliminary injunction is "an extraordinary remedy" available only if the movant makes "a clear showing" of entitlement to relief. *Winter v. NRDC*, 555 U.S 7, 22 (2008). An injunction is "never awarded as of right." *Id.* at 24; *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 8-9 (1st Cir. 2012). The movant must show "(1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit . . . between the injunction and the public interest." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003).

A district court's "conclusions regarding these factors and its determinations as to their relative weight deserve considerable deference on appeal." *Peoples Fed. Sav. Bank*, 672 F.3d at 9. This Court will reverse a preliminary injunction order only if the district court "clearly erred in assessing the facts, misapprehended the applicable legal principles, or otherwise is shown to have abused its discretion." *Id.* (citation omitted). Appellants carry the "considerable burden" of showing error. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996). They have not done so here.

I. The district court correctly applied the preliminary injunction standard.

Despite this well-settled injunction test, Appellants argue that the district court erred by requiring a showing of likelihood of success. Appellants cannot raise this argument now, as they waived it below. Appellants did not advocate for a "serious questions" test in their preliminary injunction motion. To the contrary, Appellants acknowledged that likelihood of success is the "*sine qua non*" for an injunction. ECF 18, at 20; *see* ECF 45, at 6 (admitting Appellants "did not explicitly ask" the court to apply the sliding scale).[6] Appellants' fleeting reference to a sliding scale does not suffice. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work . . . ." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *see Snyder v. Collura*, 812 F.3d 46, 54 (1st Cir. 2016). Appellants cannot complain that the district court failed to apply a standard they did not ask it to apply.

In any event, Appellants' argument is wrong: even a strong showing of irreparable harm (which has not been made here) would not lessen the required showing on the merits. The Supreme Court has repeatedly held that the preliminary injunction factors are free-standing, independent requirements. *Winter*, 555 U.S. at 21-22; *see Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-58 (2010); *Nken v. Holder*, 556 U.S. 418, 434-35 (2009); *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). In *Winter*, the Supreme Court rejected the argument that a movant who demonstrates a "strong likelihood of

[6] In each instance where CMP cites an ECF entry herein, reference is made to the page number assigned by the court's ECF system.

prevailing on the merits" need only demonstrate a "possibility" of irreparable harm, reasoning that such an approach is inconsistent with the principle that injunctive relief may be awarded only upon a "clear showing." 555 U.S. at 21-22. *Winter* forecloses application of the sliding scale. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

Moreover, Appellants' proposed test is incompatible with this Court's precedent. As the Court has made clear, Appellants must demonstrate a "strong likelihood" of success. *Am. Freedom Defense Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 578 (1st Cir. 2015); *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). This showing is the "*sine qua non*" of the injunction analysis, and failure to demonstrate likelihood of success renders the remaining factors of "idle curiosity." *Ryan v. ICE*, 974 F.3d 9, 18 (1st Cir. 2020). Applying these principles, the Court has recently and repeatedly affirmed denials of preliminary injunctions on the likelihood-of-success factor alone – without considering irreparable harm. *See, e.g.*, *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 158, 164-65 (1st Cir. 2021); *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92-93, 100 (1st Cir. 2020); *Ryan*, 974 F.3d at 18, 33; *Russomano v. Novo Nordisk Inc.*, 960 F.3d 48, 53, 55 (1st Cir. 2020).[7] Appellants' proposed "serious questions" test, which would

[7] It is true that the Court has noted that irreparable harm is more important than the third and fourth factors. *Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014). The fact that it has done so while also declining to consider irreparable harm absent a showing of likelihood of success, however, establishes the primacy of the first factor. *Id.*

subordinate the likelihood of success factor to the irreparable harm factor, therefore flies in the face of the Court's "luminously clear" precedent. *Akebia*, 976 F.3d at 100.[8]

II. Appellants have failed to demonstrate substantial likelihood of success.

Appellants cannot make a clear showing of likelihood of success, or even serious questions, on the merits given the deference owed to the district court and the Corps. Not only is a preliminary injunction order reviewed only for "manifest mistake of law" or "abuse of discretion," but agency action "shall not be overturned unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Conservation Law Found. v. F.H.A.*, 24 F.3d 1465, 1467, 1471 (1st Cir. 1994) (quoting 5 U.S.C. § 706(2)(A)). Under this "highly deferential" standard, a court "must presume the agency action to be valid." *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir. 1992).

Judicial review in this case is further cabined by NEPA's procedural nature: NEPA "does not mandate particular results, but simply prescribes the necessary process" for environmental review. *Robertson v. Methow Valley Citizens Council*, 490 U.S.

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[8] Appellants identify only a single post-*Winter* case from this Circuit in support of their argument. But *Vacqueria Tres Monjitas, Inc. v. Irizarry* does not address *Winter* and, in any event, applies a sliding scale only for irreparable harm. 587 F.3d 464, 485 (1st Cir. 2009). Further, the Court's pre-*Winter* case law provides scant support for a sliding scale on the merits. *Providence Journal Co. v. FBI* stands for the limited proposition that "appellants need not show an absolute probability of success," 595 F.2d 889, 890 (1st Cir. 1979), and did not lessen the requirement to make a "strong showing" on likelihood of success – as later cases establish, *see Respect Me. PAC*, 622 F.3d at 15. In *Pub. Serv. Co. of N.H. v. Patch*, moreover, the Court did not need to consider whether a lower merits standard applied: the defendant "respond[ed] to none" of the plaintiff's "substantial" merits arguments. 167 F.3d 15, 26 (1st Cir. 1998). *See also EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 743-44 (1st Cir. 1996) (sliding scale for irreparable harm, not likelihood of success).

332, 350 (1989). As long as environmental effects have been "adequately identified and evaluated," the agency has the discretion to decide that "other values outweigh the environmental costs." *Id.* at 351. Thus, a court "is not to 'flyspeck' an agency's environmental analysis, . . . but instead simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019) (citations and quotation marks omitted). Courts only "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) (emphasis added).

A. As the district court concluded, the Corps did not arbitrarily define the scope of its NEPA analysis.

NEPA applies only to major *federal* actions. 42 U.S.C. § 4332(2)(C). Thus, when a Corps permit is required for an activity that is merely a "component" of a private project, the Corps' review does not encompass the project as a whole except in the extraordinary circumstance where the Corps has "sufficient control and responsibility" over the entire project "to turn an essentially private action into a Federal action." 33 C.F.R. Pt. 325, Appx. B § 7(b)(1), (2). "These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* § 7(b)(2). As the district court recognized, the Corps did not act arbitrarily in concluding that the Project was not federalized and therefore limiting its NEPA analysis to impacts of regulated activities on WOTUS and immediately surrounding uplands.

1. The Corps did not need to conduct a Project-wide analysis because state agencies have primary regulatory oversight.

The district court correctly rejected Appellants' argument that the Project as a whole should be treated as a federal action merely because discrete aspects require a Corps permit. Order at 24-25, 29. State agencies, not the Corps, exercise control.

"Proximate causation," not "but for causation," determines whether the effects of an entire project are products of Corps action. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *Ctr. for Biological Diversity v. U.S. ACOE*, 941 F.3d 1288, 1294-95, 1297-98 (11th Cir. 2019).[9] Thus, when regulatory control is lodged primarily with state agencies rather than the Corps, requiring the Corps to consider the impact of non-jurisdictional activities "is not reasonable." *Ctr. for Biological Diversity*, 941 F.3d at 1296; *see id.* at 1296-98, 1302-03 (NEPA analysis appropriately limited to wetlands, because state had authority over "mining, and the Corps has authority only over [WOTUS]"); *Kentuckians for the Commonwealth v. U.S. ACOE*, 746 F.3d 698, 710-11 (6th Cir. 2014) (similar); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (similar); *Sylvester v. U.S. ACOE*, 884 F.2d 394, 401 (9th Cir. 1989) (federal environmental review should not duplicate state environmental analyses).[10]

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[9] *Public Citizen* is not limited to situations in which an agency lacks discretion. The agency in *Public Citizen* retained discretion in its rulemaking process to mitigate environmental impacts. *See Ctr. for Biological Diversity*, 941 F.3d at 1298.

[10] *Kentuckians* and *Aracoma Coal* are not distinguishable simply because they involved federal statutes recognizing state regulatory oversight. The critical issue is whether state agencies functionally exercise primary regulatory oversight – not whether the federal-state balance is set forth in statute. *See Ctr. for Biological Diversity*, 941 F.3d at 1303.

Here, the Corps' oversight over the Project was limited, as the Corps has no power to regulate matters unrelated to WOTUS impacts from permitted activities. *Solid Waste Agency of N. Cook Cty. v. U.S. ACOE*, 531 U.S. 159, 173-74 (2001). In contrast, the entire Project is subject to multiple state agencies' regulatory authority. MDEP specifically took into account all relevant aesthetic and environmental impacts of the Project as a whole. App. 689-770. The Corps' limited oversight and the state's comprehensive regulatory oversight precludes any proximate causal relationship between the Corps permit and any impacts from non-jurisdictional Project activities.

2. The Corps did not arbitrarily apply its regulations in finding that it did not need to conduct a Project-wide analysis.

The district court also correctly concluded that the Corps' regulations, which establish factors for determining whether the Corps has "sufficient control and responsibility" to federalize a project, *see* 33 C.F.R. Pt. 325, Appx. B § 7(b)(2), do not compel a broader NEPA analysis. Order, at 29-32. Deference is owed to the Corps' application of its regulations. *Kentuckians*, 746 F.3d at 708 & n.3, 710; *Sierra Club v. Wagner*, 555 F.3d 21, 25 (1st Cir. 2009). The Corps did not apply them arbitrarily.

First, the Corps rationally concluded that the regulated areas are "'merely a link' in a corridor type project." 33 C.F.R. Pt. 325, Appx. B § 7(b)(2)(i). The Project encompasses roughly **8,600** acres, but the discrete aspects of the Project requiring a Corps permit only affect a small number of wetland acres. App. 404, 438. Fewer than **5** acres of wetland will be permanently filled; approximately **48** acres will be impacted

by temporary fill (*e.g.*, construction mats).[11] *Id.* at 404, 439. Approximately **64** acres of wetland will be impacted by permanent forest conversion, while roughly an additional **47** acres will be impacted by temporary conversion. *Id.* at 404, 412, 439. All told, only about 164 acres of WOTUS, or **1.9%** of the Project, will be impacted. *Id.* at 404, 439.

Given these facts, as the district court recognized, the Corps was well within its discretion to determine that wetland segments constitute mere "links" in the utility corridor project. Indeed, its regulations provide an example stating that a 50-mile transmission line corridor is not federalized simply because 1 ¼ miles of the project (*i.e.*, 2.5% of the project) impact WOTUS. 33 C.F.R. Pt. 325, Appx. B § 7(b)(3). The Project is much more comparable to this example than it is to the example of a federalized utility project provided in the regulations (namely, a 50-mile transmission corridor that impacted 30 miles of WOTUS – more than 50% of the project). *Id.*[12]

Second, the Corps did not act arbitrarily in concluding that the relationship between upland aspects of the Project and the location of regulated activities does not compel federalization. *Id.* § 7(b)(2)(ii); *see* App. 438. The mere fact that the Corps considered an alternative "zig-zag" alignment of the corridor to minimize impacts to

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[11] Out of 1,450 transmission poles to be used, only 98 will be located in wetlands, resulting in 0.15 acre of permanent fill. The other 4.72 acres of wetland will be permanently filled for substations. App. 404, 439-40.

[12] Appellants point to the word "crossing" in the Corps' examples, arguing that the Corps erred by considering the amount of WOTUS impacted by the Project rather than the number of wetlands along the Project. As discussed below, however, the Corps' examples are premised on actions requiring a Corps permit. In this case, "most" wetlands within the Project "are not affected by crossings." App. 438.

WOTUS (a proposal that would not have been effective in reducing impacts), App. 495-96, does not suggest that the Project was federalized. Appellants have provided no support for this notion, and it would in fact be counterintuitive: it would discourage consideration of such alternatives lest it drive federalization.

Third, "the extent to which the entire project will be within Corps jurisdiction," 33 C.F.R. Pt. 325, Appx. B § 7(b)(2)(iii), supports the Corps' conclusion. Appellants object to the Corps' reliance on the fact that only 1.9% of the Project will impact WOTUS, emphasizing instead that WOTUS comprise 17% of the land "associated with the project" (*i.e.*, within the Project right-of-way ("ROW"), not all of which will be used). App. 404-05; Order at 11-12, 14. But WOTUS that are not impacted by regulated activities are irrelevant to determining whether the Corps exercises sufficient control over the Project so as to render it a federal action. For that reason, the Corps' regulations specify that the analysis begins by identifying "those activities that *require a [Corps] permit*," such as obstructing the navigable capacity of or discharging into WOTUS, and then considers whether those permitted actions involve "a major portion of [the] . . . utility transmission project." 33 C.F.R. Pt. 325, Appx. B § 7(b)(3) (emphasis added).[13] The impacts on WOTUS requiring CMP to apply for a Corps permit for discrete aspects of the Project are not sufficient to federalize the entire Project.

[13] *White Tanks Concerned Citizens, Inc. v. Strock* does not support the argument that the Corps should consider WOTUS not impacted by the Project. 563 F.3d 1033, 1041 (9th Cir. 2009). In that case, the court observed that "the fact that the waters *will be affected*" drove its scope of analysis inquiry. *Id.* (emphasis added). *Sierra Club v. U.S. ACOE*

Fourth, the limited "extent of cumulative Federal control and responsibility," 33 C.F.R. Pt. 325, Appx. B § 7(b)(2)(iv), supports the Corps' conclusion. The Corps permit is only required for "work in navigable waters and discharges of fill" into WOTUS. App. 440. A presidential permit is required only for activities at the "international border." *Id.*; 82 Fed. Reg. 45,013. The Federal Energy Regulatory Commission only approves rates and related contracts. App. at 437, 440. Other federal agencies were involved solely for consultation. *Id.* at 418, 515. No federal agencies have siting authority. *Id.* at 440. Such limited jurisdiction does not federalize the Project.

The Corps therefore properly exercised its discretion in determining the scope of its NEPA review. *See Kentuckians*, 746 F.3d at 708 & n.3; *Winnebego Tribe of Neb. v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980) (Corps properly limited its NEPA analysis to 1.25 miles of 67-mile transmission line crossing Missouri River). Neither *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), nor *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1998), compels a contrary conclusion. These cases and *White Tanks* adopt a simplistic "but-for" analysis in tension with *Public Citizen*. Further, they involve a "single-location endeavor[], not the corridor-type projects" referred to in the Corps' regulations. *Sierra Club*, 990 F. Supp. 2d at 36. The examples in the regulations provide the better model for corridor projects. *Id.* Ultimately, Appellants overstate the degree

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likewise does not support Appellants' argument, because it assumed that the land under federal jurisdiction would be impacted and ultimately rejected the argument that "the number of water crossings and the fact that they are spread throughout the length of the pipeline" federalized the project. 990 F. Supp. 2d 9, 36 (D.D.C. 2013).

of federal involvement in the Project to create "the unwarranted situation where the Federal tail wags the non-Federal dog." *Kentuckians*, 746 F.3d at 709 (quotation marks omitted). Because every transmission project "of any reasonable length is likely to pass over some segment of federal land or waters of the United States, the practical effect of the result that [Appellants] seek would be to transform NEPA into a statute that requires federal oversight of all" such projects. *Sierra Club*, 990 F. Supp. 2d at 37.[14, 15]

B. The Corps did not improperly segment its EA.

Appellants' complaints regarding "segmentation" of the Corps' NEPA analyses miss the mark. As Appellants admit, they did not raise this argument below, and it is therefore appropriately barred from consideration in this appeal. Appellants knew that DOE would be issuing "an independent assessment in support of their permit decision" pursuant to NEPA. App. 402. In any event, NEPA does not require the Corps and DOE to issue a single NEPA document where, as here, those agencies are taking

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[14] Appellants also claim that the Corps erred by discussing benefits more broadly than impacts in its alternatives analysis. Appellants, however, elide the fact that the EA includes both NEPA's "reasonable alternatives" analysis and the CWA's "practicable alternatives" analysis. App. 460. These are distinct analyses, *compare* 40 C.F.R. § 230.10(a) *with* 40 C.F.R. § 1502.14, both of which should be included in the EA, 33 C.F.R. Pt. 325, Appx. B § 7(a). Inclusion of the broader CWA analysis "does not mean that the Corps violated its NEPA obligations." *Kentuckians*, 746 F.3d at 711-12.

[15] Even if Appellants could show error in the scope of the Corps' analysis, they cannot carry their burden to show harm from this error. *See Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 61-62 (1st Cir. 2001). It is a "waste of time" to remand "where the project's negative consequences have already been analyzed and found to be absent and the findings have been disclosed." *Id.* Here, the Corps' discussion of impacts reached the Project as a whole, *see, e.g.*, App. 542-49 (assessing cumulative impact at a watershed scale), and DOE has fully assessed impacts along Segment 1, *supra* note 3.

separate actions and there is insufficient federal control over the entire Project. The connected actions regulation on which Appellants rely "does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions." *Sierra Club v. U.S. ACOE*, 803 F.3d 31, 49 (D.C. Cir. 2015). It requires federal agencies to review "an agency action jigsaw puzzle" as a whole; "it does not add a multitude of private pieces to the puzzle and so require review of a much larger picture." *Id.* at 50. Accordingly, Appellants cannot use this doctrine to federalize the entire Project. The Corps properly defined the scope of analysis for its EA, *see* App. 441, and the DOE thereafter properly incorporated the Corps' EA and conducted additional analysis, *see supra* note 3. Appellants have identified no arbitrary action.

C. As the district court concluded, the Corps adequately analyzed baseline conditions in the EA.

The Corps sufficiently established baseline conditions for the affected environment. Order at 35. Appellants seek to foist upon the Corps a depth of analysis required in an EIS, not an EA. *See W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1274 (10th Cir. 2013).[16] The Court "cannot set aside the agency's decision merely because the EA could have been more thorough than it was." *Id.* at 1275 (no NEPA violation despite dispute over baseline analysis for EA). The EA describes existing conditions at length. *See, e.g.*, App. 435-37 (describing project area, including by noting

[16] Appellants rely on circuit cases that involve an EIS, not an EA. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1073, 1085 (9th Cir. 2011); *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 507-08, 510 (9th Cir. 1988).

"state and federal listed threatened and endangered species and associated habitat," "Inland Waterfowl & Wading Bird Habitat (IWWH)," "Deer Wintering Areas (DWA)," and "native wild brook trout habitat"). This level of analysis is all that is required in an EA. 40 C.F.R. § 1508.9(b) (EAs are "brief"). Appellants simply disagree with the extent of the Corps' discussions, which is a matter committed to the Corps' sound discretion.

D. The district court did not abuse its discretion in finding that the Corps rationally determined that an EIS is not required.

In determining whether an action will have a significant impact, thus requiring an EIS, an agency considers a project's "context and intensity." 40 C.F.R. § 1508.27. Appellants focus solely on intensity, which is "the severity of the impact" determined in light of ten factors. *Id.* § 1508.27(b)(1)–(10). Appellants' intensity argument falters as an initial matter because it assumes that the Corps erred in assessing the proper scope of analysis – they make no effort to analyze the severity of the impact of Corps jurisdictional activities standing alone. Appellants also overstate the Project's intensity.

"[A] project's potential to affect one [intensity] factor[] does not require an agency to prepare an EIS. The relevant analysis is the *degree* to which the proposed action affects this interest." *Hillsdale Envtl. Loss Prevention v. U.S. ACOE*, 702 F.3d 1156, 1180 (10th Cir. 2012) (emphasis added); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 240-41 (5th Cir. 2006); *Friends of Animals v. Phifer*, 238 F. Supp. 3d 119, 144 (D. Me. 2017). As the district court found, the Corps considered all relevant factors, but rationally disagreed with Appellants. This does not justify reversal, as a court cannot

substitute its judgment for the Corps'. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Coal. On Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 67-68 (D.C. Cir. 1987).

1. The Corps considered the Project's impacts on the unique characteristics of the geographic area.

Appellants argue that the Projects' impacts on the unique characteristics of the area demonstrate significant environmental impact. The Corps, however, considered and disclosed in the EA the impacts jurisdictional activities in light of the characteristics of the region, which is all NEPA requires. *Baltimore Gas & Elec.*, 462 U.S at 97-98; *see Wagner*, 555 F.3d at 30-31 (no NEPA violation because the agency "considered all of the arguable categories of harm"); *Friends of Animals*, 238 F. Supp. 3d at 144.

Appellants incorrectly argue that the Corps failed to consider the region's "ecologically critical areas," including vernal pools, cold-water fish habitat, IWWH, and habitat for lynx and deer.[17] The Corps in fact considered each of these issues. *See, e.g.*, App. 415-16, 435 (vernal pools), 417-18, 550-52 (impacts on salmon, lynx); 452-53, 516 (habitat fragmentation); 435, 457-58, 504-05, 540-41 (impact on fisheries, including salmon and brook trout, and IWWH), 561 (summarizing conclusion on the region's unique characteristics). The Corps concluded, based on an extensive record, that the

[17] Appellants largely re-hash evidence that was presented to, and rejected by, MDEP in testimony that was made part of the Corps record. *See, e.g.*, App. 108, 444, 1093. To the extent the evidence was not in the record, it cannot be considered on the merits. *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 14 (1st Cir. 2008).

impacts on these resources would not be significant.[18] For instance, the Corps concluded that the Project was designed to minimize impacts on brook trout and Atlantic salmon. *Id.* at 411, 417, 457, 516, 550-51. The Corps also concluded that cutting restrictions, buffers, and habitat preservation would mitigate effects on habitat. *Id.* at 416-17, 516, 550-51.

Appellants argue that the Corps failed to consider impacts of "forest fragmentation." The Corps, however, did consider these impacts and concluded that the environmental effect of the clearing "is not significant." App. 452. The Corps observed that, as far as jurisdictional wetlands are concerned, MDEP had required CMP to "substantially reduce tree clearing in Segment 1 through maintenance of taller vegetation in twelve Wildlife Areas (14.08 miles) and to implement vegetation tapering throughout the remainder of Segment 1 (39.02 miles)." *Id.* The Corps concluded that specific MDEP requirements for the Project would reduce permanent total forested wetland conversion and minimize edge effects. *Id.* at 411-12, 452. Further, although upland fragmentation was properly outside the scope of the EA, the Corps considered the issue and found that the Project would "not measurably contribute to forest

[18] The Corps' record includes substantial evidence contrary to Appellants' claims. *See, e.g.*, App. 747-49 (impacts to vernal pools and IWWH), 749-51 (coldwater fisheries), 751-52 (DWAs), 752-53 (threatened and endangered species habitat), 755-56 (natural resource impacts); ECF 31-21, at 66-73, 80-82 (coldwater fisheries and habitat fragmentation); ECF 31-21 at 105, 107-116 (coldwater fisheries, habitat fragmentation, and vernal pools); ECF 31-22, at 28-35 (vernal pools); ECF 31-22, at 95-103 (coldwater fisheries); ECF 31-22, at 123-25 (habitat fragmentation, including DWAs).

fragmentation" because (1) the lines would largely be co-located within existing transmission corridors, and (2) a new corridor in Segment 1 would be located "within heavily managed commercial timberlands." *Id.* at 452-53.[19] The Corps further found that, in addition to the mitigation efforts required of CMP, CMP would be required "to fully compensate for conversion impacts." *Id.* at 412; *see id.* at 429, 514.[20]

The Corps' conclusions were not arbitrary. The district court considered Appellants' evidence, but rightly concluded that "it is not simply a matter of choosing my preferred expert perspective." Order, at 44-46. That choice is left to the Corps.

2. The Corps considered whether the Project is controversial.

An action is "controversial" if "a substantial dispute exists as to [its] size, nature, or effect." *Town of Cave Creek v. F.A.A.*, 325 F.3d 320, 331 (D.C. Cir. 2003). The term "controversial" is not synonymous with "opposition," to avoid a heckler's veto. *Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1181; *Friends of Magurrewock, Inc. v. U.S. ACOE*, 498 F. Supp. 2d 365, 376-77 (D. Me. 2007). An agency's "careful evaluation . . . would be for naught" if a plaintiff could simply hire experts to supply affidavits "predicated upon the same facts relied upon by the agency but reaching a different conclusion."

[19] Again, the Corps' conclusions on habitat fragmentation were supported by substantial evidence. *See, e.g.*, App. 740-47; ECF 31-21, at 109-113; ECF 31-22, at 113-30.

[20] The Corps did not err by considering efforts to avoid or mitigate environmental impacts. *Wagner*, 555 F.3d at 29; *see Atchafalaya Basinkeeper v. U.S. ACOE*, 894 F.3d 692, 698 (5th Cir. 2018); *Advocates For Transp. Alternatives, Inc. v. U.S. ACOE*, 453 F. Supp. 2d 289, 300-01 (D. Mass. 2006). Further, the mitigation efforts were supported by evidence in the record. *See, e.g.*, App. 742-43 (tapering and edge effect); ECF 31-23, at 15-16 (same); ECF 31-23, at 66 (same).

Greenpeace Action v. Franklin, 14 F.3d 1324, 1335 (9th Cir. 1992). Thus, even where contrary evidence exists, substantial deference is due the agency's finding as to the merit of that evidence. *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1182.

As the EA demonstrates, there is no substantial scientific dispute over the effects of the Project's regulated activities on the environment. As discussed above, the Corps considered Appellants' evidence, and found that it did not create a substantial controversy.[21] Further, as the district court noted, the unanimous agreement of the relevant agencies regarding the issues raised by public comments strongly supports a finding that there is no substantial controversy. *See Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1182 (citing cases); Order at 40-41, 43-45. Ultimately, upon thorough evaluation, the Corps found that the "Project's effects on the aquatic environment are clearly understood, fully discussed, generally minimal, and confined to relatively small individual impact areas." App. 562. These conclusions are not arbitrary.

The Corps' thorough analysis regarding the Project's impact on GHG emissions, *see* App. 521-24, illustrates the emptiness of Appellants' "controversy" argument. Appellants raise no issues regarding reduction of GHG emissions that were not considered by MPUC and MDEP, and incorporated into the Corps record. In

[21] Accordingly, *Standing Rock Sioux Tribe v. U.S. ACOE*, No. 20-5197, 2021 WL 244862 (D.C. Cir. Jan. 26, 2021), is inapposite. In that case, the Corps entirely failed to address certain issues raised by the plaintiffs, *id.* at *6-7, 9, and "made no effort" to explain its conclusions as to others, *id.* at *8. As demonstrated by the Corps' EA and MDEP's lengthy order approving the Project, there are no such unresolved issues in this case.

analyzing GHG emissions, the Corps justifiably relied on the conclusion of MPUC and MDEP that the Project would lead to "reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region." *Id.* at 523; *see id.* at 769-70; *NextEra*, 2020 ME 34, ¶ 30, 227 A.3d 1117 (affirming MPUC finding of GHG benefits). Not satisfied to rest on this analysis alone, however, the Corps also reviewed the "large amount of detailed and often conflicting information submitted by both sides," and coordinated with DOE to conduct a peer review of all the relevant analyses. App. at 523. This review confirmed that the Project would result in reduced GHG emissions. *Id.* at 523-24.[22] This analysis more than adequately establishes that there is no substantial controversy over GHG emissions.

3. The Corps gave due consideration to uncertainties.

Because there is always some "quotient of uncertainty" present when making predictions regarding the natural world, agency decisions are generally upheld despite such uncertainty. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009). Risks must be "highly uncertain" or "highly unknown" to support the need for an EIS. *Id.*; *see Advocates*, 453 F. Supp. 2d at 305. The impacts of the Project are readily understood based on the Corps' experiences with similar projects, as documented in the EA. The Corps carefully considered Appellants' arguments and made conclusions

[22] Based on this record, the Corps rejected Project opponents' "energy shuffling" theory. The Corps found that Hydro-Québec "will not have to divert existing energy exports from other markets to supply the NECEC." App. 524; *see* CPCN Order, at 71-72 ("the NECEC will result in significant incremental hydroelectric generation").

regarding horizontal directional drilling, App. 490; fire hazards, *id.* at 449-50, 520, 561; GHG emissions, *id.* at 521-24; and effects on renewable energy resources, *id.* at 458-59.[23] There have been "many past transmission line projects that . . . have been reviewed . . . by the USACE in New England," and the "[c]onstruction techniques and impacts to aquatic and other natural resources are expected to be of a similar nature for the NECEC." *Id.* Accordingly, the Corps' conclusion that the "impacts of the proposed project are not uncertain," *id.* at 562, is not arbitrary.

E. The Corps did not act arbitrarily or capriciously by not issuing the EA for public comment.

Appellants' complaint that the Corps erred by failing to provide an opportunity for public comment on the EA also misses the mark. A public comment period on an EA is not required except in the following "limited circumstances:" (i) "[t]he proposed action is, or is closely similar to, one which normally requires preparation of an" EIS, or (ii) "[t]he nature of the proposed action is one without precedent." 40 C.F.R. § 1501.4(e)(2); *see All. to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 115 (1st Cir. 2005). These circumstances do not exist here. Transmission projects do not normally require an EIS nor is the NECEC unprecedented, as the Corps' discussion

[23] Appellants argue that there is uncertainty regarding the effects of tapering, but their argument – namely, that every single tree in a segment of the ROW may be taller than 35 feet, resulting in clear cutting – is speculative. MDEP examined tapering at length, concluding that, in light of the "mosaic of different aged forest" in the region, tapering would "provide improved habitat and improved passage" and "avoid creation of a hard forest edge and help mitigate the edge effect." App. 742-43. The Corps was certainly entitled to rely on such analysis. *Id.* at 452, 542.

of CMP's Maine Power Reliability Program project – also approved after issuance of an EA – demonstrates. App. 462, 543, 562; *see* ECF 31-24. In any event, public involvement in the Corps' proceeding[24] more than met NEPA's standard to involve the public "to the extent practicable." 40 C.F.R. § 1501.4(b); *see Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010).

III. The district court did not abuse its discretion in finding that Appellants failed to establish irreparable harm.

Because Appellants failed to demonstrate substantial likelihood of success, the district court did not even need to consider irreparable harm. *Russomano*, 960 F.3d at 55. Appellants' claim of error regarding the district court's analysis thus fails at the very outset. This Court may "begin and end [its] analysis with the likelihood-of-success-on-the-merits prong." *Bayley's Campground*, 985 F.3d at 158. In any event, as CMP has consistently argued, Appellants did not demonstrate irreparable harm.

The district court correctly found that Appellants could not make a showing of harm based on an alleged NEPA violation. Order at 46-47. Because NEPA merely prescribes a deliberative process and does not mandate particular results, *Robertson*, 490 U.S. at 350, the risk of harm from a NEPA violation is that "environmental harm will

[24] The Project's impacts have been the subject of extensive public comment. After public notice, the Corps held a well-attended public hearing in December 2019 and received and considered public comments on, among other topics, the proper scope of NEPA review. App. 436, 445-48, 449-60; *see id.* at 621-23. MDEP and MLUPC also held public hearings on the Project, which the Corps attended. *Id.* at 436. The fact that Appellants rely on testimony submitted to state agencies and in the Corps record, *see supra* n. 17, belies Appellants' claim that they were unaware of the issues they now raise.

occur through inadequate foresight and deliberation." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). Failure to demonstrate a likely NEPA violation therefore undermines any showing of related harm because, if adequate deliberation took place, then the environmental costs of a project do not constitute NEPA harm. *See Water Keeper All. v. U.S. Dep't of Defense*, 271 F.3d 21, 33-34 (1st Cir. 2001) (failure to show likelihood of success on claim that Endangered Species Act required a biological assessment undermined irreparable harm argument); *Nw. Bypass Grp. v. U.S. ACOE*, 470 F. Supp. 2d 30, 64-65 (D.N.H. 2007).[25] Appellants' failure to demonstrate likelihood of success therefore undercuts their "NEPA harm" theory.

To the extent Appellants attempted to show harm independent of NEPA, it is not supported by the record. The Supreme Court has declined to impose a presumption of irreparable injury in the environmental context. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see Geertson*, 561 U.S. at 157-58. The aesthetic, recreational, and environmental harms asserted by Appellants have been considered and rejected by the relevant agencies. For example, as discussed above, the Corps found that the Project is designed to protect fish and wildlife values. *See, e.g.*, App. 416-18, 457-58, 516, 540-41, 550-51 (discussing, among other things, coldwater fisheries and potential impacts to endangered species). This finding was consistent with the MDEP's findings.

[25] Other courts have found likewise. *See, e.g.*, *Sierra Club*, 990 F. Supp. 2d at 41. *Michigan v. U.S. ACOE* is not to the contrary as it involved a public nuisance claim rather than a NEPA claim. 667 F.3d 765, 768 (7th Cir. 2011).

See id. 740-54. The Corps also discussed the extensive efforts undertaken to minimize visual impacts, including tapering and buffer plantings. *See, e.g.*, App. 419-20, 458, 514, 518, 541-42 (discussing mitigation efforts). As the Corps noted, MDEP likewise concluded that the Project "will not have an unreasonable adverse effect on scenic uses or character." *Id.* at 514; *see id.* at 700-21.[26] In addition, CMP will preserve tens of thousands of acres, including DWAs, wetlands, vernal pools, and linear miles of streams. *Id.* at 425-34. The record supports a finding of no irreparable harm.

IV. The district court did not abuse its discretion in finding that neither a balancing of the equities nor the public interest favors an injunction.

Even "a likely NEPA violation" does not "automatically call[] for an injunction; the *balance of harms* may point the other way." *Conservation Law Found. v. Busey*, 79 F.3d 1250, 1272 (1st Cir. 1996) (quotation marks omitted). The district court did not abuse its discretion in finding that "identification of equitable interests on the other side of the balance only serves to undermine further [Appellants'] motion" and that "the Project will benefit Maine in a variety of ways." Order at 48-49.

A. The hardship to CMP of a preliminary injunction outweighs the impact of no injunction on Appellants.

The hardship to CMP of over $30 million in delay costs weigh against issuing an injunction. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 843

[26] The findings by the Corps and MDEP regarding scenic impacts are supported by substantial evidence, including comprehensive visual impact analysis and photosimulations. *See, e.g.*, ECF 31-21, at 3-37; ECF 31-22, at 3-25. Appellants' witness at the injunction hearing had no training in visual impact assessments. App. 1072.

F.3d 886, 913-14 (10th Cir. 2016); *Friends of Magurrewock*, 498 F. Supp. 2d at 378; *Nw. Bypass Grp.*, 470 F. Supp. 2d at 65-66. These costs outweigh any hardship to Appellants.

Construction of transmission projects like the NECEC requires careful sequencing that takes into account, *e.g.*, weather conditions, environmental limitations, and time of year restrictions to protect wildlife and natural resources. App. 617, ¶ 7. Construction begins with corridor clearing, followed by the erection of poles and the stringing of electrical conductor. Concurrently, associated substation work (notably, the construction of a converter station in Lewiston) must be completed. *Id.* ¶¶ 8-9. Clearing activities are restricted after the spring thaw and prohibited during June and July to mitigate impacts on a federally threatened bat species. *Id.* at 618, ¶ 12.

On November 9, 2020, CMP instructed the clearing contractor (Northern Clearing, Inc. ("NCI")) to mobilize in order to prepare sufficient corridor during the winter for the transmission line contractors to begin erecting poles. *Id.* ¶ 10. CMP had contemplated that NCI would start its work by January 2021 at the latest, *id.* ¶ 11, in order to meet the Project in-service date of May 31, 2023. *Id.* at 617, ¶ 6.

Due to the complexities of construction and environmental restrictions, an injunction delaying commencement of clearing in Segment 1 by as little as three months (to April 2021) will result in a delay in the project in-service date by six months or more, thereby increasing project costs and delaying NECEC's delivery of clean hydropower. *See* CMP Objection to Emergency Motion for Injunction, Dickinson Decl., ECF 117689996, at 7 ¶¶ 18-20; App. 618-19, ¶¶ 14-21. CMP's damages would be substantial,

as delay would give rise to increased costs in the form of contractually-mandated delay penalties paid to contractors, incremental project costs driven by adjusted construction plans, and escalation of costs to reflect new contract timeframes and the extension of fixed costs. App. 618-19, ¶¶ 14-20. A 6-month delay in commercial operation would result in increased project costs of $31 million, while a 12-month delay would result in $37 million in increased costs. *Id.* at 619, ¶ 21.[27]

B. An injunction would harm the public interest.

The public interest would also be seriously harmed by an injunction, and this harm further weighs against the issuance of an injunction. *See W. Watersheds Proj. v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1103-04 (D. Nev. 2011) (public interest in clean energy goals and jobs weighed against injunction), *aff'd* 443 F. App'x 278 (9th Cir. 2011); *Friends of Magurrewock*, 498 F. Supp. 2d at 379. An injunction would immediately halt the creation of over 1,600 new construction jobs—a substantial boost to Maine's economy in these difficult times—and stall provision of clean energy to New England.

The State of Maine has already determined that the Project will provide significant benefits to the public, including: (1) lower energy costs; (2) enhanced transmission and supply reliability; (3) annual increases in Maine's gross domestic product of $94-96 million during construction and $25-29 million during operation; (4) creation of over 1,600 jobs annually during construction and 300 jobs during

[27] Because an injunction would impose millions of dollars of delay damages on CMP, no injunctive relief should issue absent a bond. Fed. R. Civ. P. 65(c).

operation; and (5) annual reductions in regional carbon emissions of approximately 3 million metric tons, the equivalent of removing 700,000 cars from the road. *See* CPCN Order, at 6-7, 45, 71-72; *NextEra Energy Res.*, 2020 ME 34, ¶¶ 25-43, 227 A.3d 1117. The Project is a critical part of Massachusetts' climate efforts. *See NextEra Energy Res., LLC v. Dep't of Pub. Utils.*, 485 Mass. 595, 598-99 & n.3, 152 N.E.3d 48 (Mass. 2020) (affirming approval of agreements to purchase power transmitted over the NECEC, and noting their "essential role" in efforts to reduce GHG emissions). MDEP found that climate change is creating ongoing harm, and concluded that any delay in addressing the issue "will exacerbate" negative environmental impacts. App. 770. An injunction would harm the public by delaying realization of the Project's benefits.

Appellants attempt to downplay this delay by suggesting that none of the benefits will accrue until construction is complete in 2023. That is wrong. Job creation and the related increase in Maine's domestic product is immediate, as is the reality of layoffs if contractors must demobilize. App. 618, ¶ 16. Protecting and creating new jobs is strongly in the public interest. *See The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (harm to "struggling local economy" from forced lay-offs of timber workers weighed against injunction), *overruled in part on other grounds by Winter*, 555 U.S. 7.

CONCLUSION

Appellants have not made a "clear showing" supporting the "extraordinary relief" of a preliminary injunction. Accordingly, this Court should affirm the district court's order and lift the temporary injunction that was entered pending appeal.

Dated: February 16, 2021

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CERTIFICATE OF COMPLIANCE WITH RULE 32

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

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CERTIFICATE OF SERVICE

I certify that the within brief has been electronically filed with the Clerk of the Court on February 16, 2021. All attorneys listed below are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing:

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