No. 20-2195

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,
Defendants/Appellees,

CENTRAL MAINE POWER COMPANY
Intervenor/Appellee.

Appeal from the United States District Court for the District of Maine
No. 2:20-cv-00396 (Hon. Lance E. Walker)

RESPONSE BRIEF FOR FEDERAL APPELLEES

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INTRODUCTION

Massachusetts has chosen Central Maine Power (CMP) to build transmission lines from a hydro-electric facility in Canada to bring power to Massachusetts as part of the State's plan to aggressively reduce its greenhouse gas emissions over the next few decades. The transmission lines will pass through commercially harvested forests in Maine and connect to existing electrical infrastructure. The State of Maine granted CMP permits to construct the power lines after extensive review of the environmental and other effects. It found that the project would benefit the State and not unreasonably impact the environment. Following issuance of the Maine permits, the U.S. Army Corps of Engineers (Corps) issued a permit under the Rivers and Harbors Act and the Clean Water Act for actions that were much more limited in scope—tunneling under a river and filling or cutting vegetation in small patches of wetlands.

Several environmental groups ("Sierra Club") opposed construction and sued to enjoin the Corps permit based on alleged deficiencies in the Corps' environmental analysis. All of Sierra Club's arguments rely on the Corps' role under the National Environmental Policy Act being much larger than it actually is. The Corps has limited jurisdiction to permit drilling under rivers or discharging fill into waters of the United States. The project involves only minimal effects within that jurisdiction. Courts have rejected the idea that such effects require the comprehensive review process that Sierra Club seeks. The district court correctly found that Sierra Club's poor showing on the merits and the other equitable factors did not support a preliminary injunction.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because plaintiffs' claims arose under the Administrative Procedure Act, 5 U.S.C. § 706; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (ECF 1). This Court has jurisdiction under 28 U.S.C. § 1292 because the plaintiffs appealed the district court's denial of a preliminary injunction. Order at 49 (ECF 42). That order was entered on December 16, 2020. *Id.* Plaintiffs timely filed their notice of appeal on December 21, 2020. APP-1104; *cf.* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred in its application of the preliminary injunction standard.

2. Whether the district court abused its discretion in refusing to enter a preliminary injunction against the Federal Defendants.

STATEMENT OF THE CASE

I. Statutory and regulatory background

The Clean Water Act prohibits discharge of pollutants, including dredged or fill material, into "waters of the United States" unless permitted by the appropriate agency (here, the Corps) under Section 404 of the Act. 33 U.S.C. §§ 1311(a), 1344, 1362(7). Waters of the United States include certain wetlands. 33 C.F.R. § 328.3(a).

The Rivers and Harbors Act also requires a permit by the Corps to "excavate" or "alter" the capacity of navigable waters. 33 U.S.C. § 403. Regulations require a permit to construct a tunnel under them. 33 C.F.R. § 322.3(a).

The Corps' exercise of its permitting authority is subject to the National Environmental Policy Act (NEPA). NEPA is a procedural statute that requires federal agencies to "consider all significant environmental impacts before choosing a course of action," but it does not mandate particular results. *Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir. 1989). Under NEPA, agencies must prepare an Environmental Impact Statement (EIS) only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1501.4.[1]

An agency may first prepare an Environmental Assessment (EA) to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.3(a), 1508.9. An EA is "a concise public document" with "brief discussions" of the need for the proposed action, the alternatives, and the environmental impacts. *Id.* § 1508.9. If the agency determines that there will be no significant impact on the environment, it may issue a Finding of No Significant Impact (FONSI) and need not prepare an EIS. *Id.* § 1508.13.

II. Factual background

The project includes construction of an electrical transmission line and substations that will bring electricity from a hydroelectric plant in Quebec to existing electric infrastructure in Maine. APP-403, 405. It is CMP's response to a request for

[1] NEPA regulations were recently updated. 85 Fed. Reg. 43,304 (July 16, 2020). This brief cites the prior, operative regulations, which are included in the Addendum.

proposals for clean energy from the State of Massachusetts, which seeks to reduce its greenhouse gas emissions and obtain stable year-round energy. APP-403, 499. These benefits and lower energy prices will help all of New England. APP-501.

The transmission line will run 144.9 miles in multiple segments. APP-403. Segment 1 is 53.1 miles long and will be constructed through commercial timberlands and under the Kennebec River, while the other segments are co-located next to existing transmission lines. APP-405, 407, 410. Trees and tall vegetation will be cut to varying heights for the power lines along the right of way, a tunnel will be constructed under the Kennebec River, and small portions of wetlands and vernal pools will be filled permanently to allow transmission poles or substations to be built upon them, whereas other wetlands and pools will only be filled temporarily. *Id.*

CMP needed permits from several regulatory bodies, federal and state, to construct the project. The State of Maine, through its Department of Environmental Protection (DEP) and Land Use Planning Commission (LUPC), extensively reviewed the project and issued a comprehensive report and permit on May 11, 2020. APP-666–901. DEP considered the project's impacts and various alternatives, and it imposed many changes to minimize negative effects. APP-689–756. It concluded that the project would not unreasonably interfere with existing uses or harm the environment, and that it would create benefits from reduced emissions. APP-770, 772. As part of the process, DEP held hearings in April and May of 2019. APP-436.

Because the project requires a tunnel under the Kennebec River and filling small portions of certain wetlands (less than 2% of the area of the project), CMP also sought a permit from the Corps. APP-403. The Corps published a public notice on March 26, 2019, which provided information concerning CMP's application. APP-321–47. It held a hearing on December 15, 2019, attended the DEP hearings, and accepted voluminous public comments. APP-436, 443. The Corps prepared an EA, finalized on July 7, 2020, which analyzed the project's "proposed impacts to waters of the [United States] and the immediately surrounding uplands." APP-441, 564. The Corps considered the Maine DEP order and incorporated that into its analysis. *See, e.g.*, APP-412, 417–18, 436, 444-45, 451–52. The EA concluded with a FONSI, APP-561, and the Corps issued the final permit on November 6, 2020, 624–25.

III. Proceedings below

Plaintiffs sued on October 27, 2020, after the Corps issued its EA but before it finalized the permit. ECF 1. On November 11, Plaintiffs moved for a preliminary injunction against Federal Defendants for NEPA violations and to prevent them from allowing construction. ECF 18. The district court held a hearing on the motion in which it heard testimony from Plaintiffs' witnesses and took evidence. ECF No. 35; *see* APP-1052–1104. It then denied Plaintiffs' motion in a December 16 Order ("Order"), determining that Plaintiffs failed to meet their burden on the preliminary injunction factors. ECF 42. On December 21, Plaintiffs filed a notice of appeal. APP-1105. Plaintiffs sought an injunction pending appeal to prevent construction on

Segment 1, first from the district court (which denied it), ECF 45, 49, and then from this Court, which granted it on January 15, 2020. This Court expedited this appeal.

SUMMARY OF ARGUMENT

The district court appropriately denied the preliminary injunction. While Sierra Club asserts that the district court erred by not using a sliding scale to allow less of a showing of success on the merits, this is wrong in several ways. This Circuit has never had a robust sliding scale, and what it had did not survive *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which made clear that issuance of an injunction requires a showing that success and incurrence of irreparable harm are "likely." The logic of this precludes use of a sliding scale now. Yet even under this Circuit's limited pre-*Winter* sliding scale, Sierra Club has not made the necessary showing, never even argued that it should apply, and has shown no error.

The district court also did not abuse its discretion. While Sierra Club nitpicks the Corps' environmental review of the project, the district court properly found it was not arbitrary and capricious. The Corps has jurisdiction over only a small part of the project, so it was reasonable for the Corps to focus its analysis there. It did not need to perform a more detailed analysis of the effects of the whole project, including of baselines conditions or the effects of other agencies' actions. The limited scope of its analysis properly informed its finding of no significant impact. The Corps also appropriately incorporated the public in its review. Accordingly, Sierra Club's weak merits showing did not justify an injunction under any standard. The district court also did not abuse its discretion in considering Sierra Club's evidence of harm but finding that it did not support an injunction under the other injunction factors.

STANDARD OF REVIEW

This Court affords considerable deference to the district court's evaluation of the preliminary injunction factors, and the appellant has the burden to show that the district court committed a "palpable abuse of discretion" or an error of law; otherwise, this Court will not intervene. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996). This Court can affirm the district court's decision on a preliminary injunction as long as there are factual and legal bases for its substantive conclusions. *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996). In reviewing the merits, this Court will hesitate to overturn the district court's judgment when that judgment relies on the district court's own assessment of the evidence or a detailed explanation of the agency's analysis. *Id.* at 1256.

ARGUMENT

I. The district court made no error in the standard it applied to deny a preliminary injunction.

Sierra Club first argues that the district court erred in applying the standard for a preliminary injunction by not reviewing the likelihood of success on the merits and irreparable harm factors on a "sliding scale." Br. at 12. Under such an approach, Sierra Club argues that it should have had an opportunity to obtain an injunction by showing only "serious questions going to the merits." *Id.* But it is wrong.

A. There was never much of sliding scale in this Circuit.

Sierra Club asserts that *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) did not reject the sliding scale standard. But it never explains what the sliding scale is, why *Winter* did not reject it, or even why one might think that *Winter* did. In

Winter, the Supreme Court stated that a party seeking a preliminary injunction "must establish" that it is "likely" to succeed on the merits and "likely" to suffer irreparable harm absent the injunction. 555 U.S. at 20. The requirement that the moving party be "likely" to ultimately succeed, moreso than the non-moving party, was always the ordinary requirement in this Court. *See, e.g.*, *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) ("Plaintiffs must show a strong likelihood of success."); *Conservation Law Found. of New England, Inc. v. Andrus*, 617 F.2d 296, 297–98 (1st Cir. 1979) (analyzing whether appellants "stood a better chance of success on the merits" as the "customary" standard). Some circuits have *always* required a demonstration of predominance on preliminary injunction factors, but others have allowed a relaxed showing on one with a heightened showing on another. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 36 n.5 (2d Cir. 2010) (collecting cases). Under the Ninth Circuit's pre-*Winter* formulation,

> A preliminary injunction may issue when the moving party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases.

Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007) (citations and internal quotation marks omitted); *see also Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999).

The First Circuit has never had such a robust or permissive sliding scale standard. While this Circuit has suggested in dicta that a lowered showing on the

merits may be permissible in an "unusual case" where "the harm to plaintiffs is particularly severe and disproportionate," *Cintron-Garcia v. Barcelo*, 671 F.2d 1, 4 n.2 (1st Cir. 1982), such a case was more hypothetical than real. The rare case permitting less than "an absolute probability of success" was for a *stay pending appeal* (not an injunction) of a court order to disclose information; not granting the stay would have "entirely destroy[ed] appellants' rights to secure meaningful review."[2] *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

This Circuit has more often required a likelihood or "probability" of success regardless of other factors. *See, e.g.*, *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 277 (1st Cir. 1981) ("The moving party must exhibit a likelihood of success on the merits; indeed, the probability-of-success component has loomed large in cases before this court."); *Coal. for Basic Human Needs v. King*, 654 F.2d 838, 841 (1st Cir. 1981) (requiring plaintiffs to be "likely to succeed" even after finding irreparable harm "excruciatingly obvious"). Indeed, this Circuit often has stopped after analyzing success on the merits, even when that required close analysis. *See, e.g.*, *New Comm Wireless Servs., Inc. v. SprintCom*, Inc., 287 F.3d 1, 9 (1st Cir. 2002); *Weaver v. Henderson*, 984 F.2d 11, 13–14 & n.5 (1st Cir. 1993). And in many cases discussing the sliding scale, this Circuit has suggested only that it lowers the showing on irreparable harm.

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[2] Amicus Environmental Law Clinic Directors cites one other case, which permitted an injunction based on a showing of "fair grounds for further litigation" because of a "rather powerful showing of irreparable injury." *Pub. Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15, 26–27 (1st Cir. 1998). That case cited only one D.C. Circuit case in support, did not analyze First Circuit precedent, and has not been relied upon for its standard by other cases in this Circuit. At most, this case should be understood in line with *Cintron-Garcia* and *Providence Journal*, which set the standard.

See, e.g., *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) (discussing sliding scale as part of irreparable harm); *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 743–44 (1st Cir. 1996) (allowing "somewhat less in the way of irreparable harm"). There has never been much of a sliding scale "continuum" in this Circuit.

B. The sliding scale standard did not survive *Winter*.

While Sierra Club and amici make it sound as if sliding scale tests have survived *Winter* fully intact, this is clearly wrong—they at least have been severely constrained. In *Winter*, the Supreme Court not only gave a single standard; it also explicitly rejected one point on the Ninth Circuit's sliding scale—that only on a "'possibility' of irreparable harm" sufficed for an injunction if the moving party demonstrates a "strong likelihood of prevailing on the merits." 555 U.S. at 22. That standard was "too lenient" and inconsistent with injunctive relief being an "extraordinary remedy" only awarded upon a "clear showing" of entitlement. *Id.* Accordingly, the Supreme Court's "frequently reiterated" standard requires that irreparable injury be "likely." *Id.*

After cutting off at least half of the sliding scale in *Winter*, the Supreme Court went further in *Nken*. It articulated one of the stay factors—which have "substantial overlap" with the preliminary injunction factors—as "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Then, the Court explicitly rejected a point on the Seventh Circuit's sliding scale, which had allowed an injunction when the chance of success was "better than negligible" with a strong showing on irreparable harm. *Id.* (quoting *Sofinet*, 188 F.3d at 707). The Court noted, just as it had decided in *Winter* for irreparable harm, that more than a "mere 'possibility'" of success is required. *Id.*

This Circuit has not decided whether a sliding scale still exists, *Russomano v. Novo Nordisk Inc.*, 960 F.3d 48, 53 n.4 (1st Cir. 2020), though it has often adopted the *Winter* factors without comment, *see, e.g.*, *Respect Maine PAC*, 622 F.3d at 15.[3] Sierra Club provides no reason the sliding scale *should* survive. It cites Justice Ginsburg's dissent in *Winter*, stating that she did not "believe" that the Court "rejected" the sliding scale standard. 555 U.S. at 51 (Ginsburg, J., dissenting). The specific point she defended, though, was that courts could award relief "on a lower likelihood of harm when the likelihood of success is very high." *Id.* Even circuits with the sliding scale post-*Winter* think this is wrong and that *Winter* requires "likely" irreparable harm. *See, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011).

Post-*Winter*, half of the continuum of the sliding scale—anywhere irreparable harm dips below "likely"—is off-limits, leaving little reason to call it a "sliding scale" anymore. But *Nken* addressed the opposite end of the continuum, at the very least cutting off any portion where there is only a better than negligible chance or possibility of success on the merits. While two circuits simply ignore this, *see id.*; *Citigroup Glob. Mkts.*, 598 F.3d at 37 ("*Nken* likewise did not address the issue of a moving party's likelihood of success on the merits."), the Seventh Circuit was forced to recognize that *Nken* narrows the continuum further, *see Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020).[4]

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[3] While two post-*Winter* cases mention the sliding scale, neither the case nor the briefs discuss *Winter*. *See Vaqueria Tres Monjitas*, 587 F.3d at 485; *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 42–43 (1st Cir. 2010).

[4] Sierra Club (and amici) suggests that a "majority" of circuits have reaffirmed the sliding scale, Br. at 8, but only some have addressed the question, and others never had it. Sierra Club notes that the Fourth Circuit has rejected it post-*Winter*, as did the

Such a lopsided, constrained sliding scale is contrary to Supreme Court and First Circuit precedent. It ignores clear statements of the former that the moving party must make a "strong showing" that it is "likely" to succeed on the merits. This Circuit respects even Supreme Court dicta. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991); *see also Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (holding that *Winter* controlled because circuit does not approach Supreme Court opinions by "reaching the narrowest construction").

Such a standard also ignores the logic behind the relevant precedents. This Circuit has repeatedly stressed (and not just in trademark cases, as amici assert) that "likelihood of success on the merits is the most important of the four preliminary injunction factors." *Doe v. Trustees of Bos. Coll.*, 942 F.3d 527, 533 (1st Cir. 2019); *see, e.g.*, *New Comm Wireless Servs.,* 287 F.3d 1, 9 (1st Cir. 2002) (it is the "sine qua non of" the four-factor standard); *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 115 (1st Cir. 2006) ("the cynosure"); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996) ("main bearing wall"). At the least, it and irreparable harm are the two most important. *Nken*, 556 U.S. at 434. In discussing them together, *Nken* rejected precisely the same standard for the merits (a "possibility") that was

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Tenth, *see Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (holding "modified test" for injunction with "serious, substantial, difficult, and doubtful" merits questions to be incompatible with *Winter*). Amici misinterpret a Sixth Circuit case as suggesting reaffirmance when it does not discuss *Winter*, *see Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012), and suggest the same for the Eighth when it just made contradictory statements about whether success must be likely, *see Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 992–93 & n.7 (8th Cir. 2011). The D.C. Circuit has suggested that the sliding-scale standard is unviable. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

rejected in *Winter* for irreparable harm (without much more discussion than in *Nken*) and which led to a requirement that irreparable harm be "likely." *Id.* Beyond this equation of these two showings, the underlying logic compels applying the same standard to each. If irreparable harm must be "likely," but success on the merits can be much more doubtful, the latter is clearly a less critical and important factor.

C. No departure from the ordinary preliminary injunction standard is warranted here.

Even if some limited version of the First Circuit's sliding scale has survived, it would not apply here, for several reasons. *First*, this case has nothing like the extraordinary facts that justified a stay in *Providence Journal Co.* Indeed, environmental groups tried to rely on that case for an injunction pending appeal of oil and gas leases that would purportedly endanger whales. *Andrus*, 617 F.2d at 297. This Court rejected that bid, holding that while there would "undoubtedly be some legal and environmental consequences" from the lease, that was not a sufficiently "massive, irretrievable alteration of the status quo." *Id.* at 298. Furthermore, there was "a countervailing national policy favoring expeditious development of energy resources," and even an injunction pending appeal would "mean further delay," which was not a "relatively slight harm." *Id.* Here, the delay to the energy project is enough to keep the equities from being so one-sided to justify an injunction on anything less the "customary standard" of "likely" success on the merits. *See id.*

Second, Sierra Club forfeited its argument by not raising it below. In its opening brief below, plaintiffs recited the *Winter* standard and then noted that "[w]ithout citing *Winter*, the First Circuit has applied a 'sliding scale' approach to evaluating the factors

for issuing a preliminary injunction." ECF 18 at 10. They then stated that "[r]egardless," they had "met their burden." *Id.* That is their only mention of the sliding scale. Plaintiffs never argued that the court *should* apply the sliding scale, much less *how* it could do so. They did not argue that they made the extreme showing that could justify an extraordinary injunction based on a lesser showing on the merits, *see Andrus*, 617 F.2d at 297–98, or even that they were trying to. All of their arguments were consistent with *Winter*. *See* ECF 18 at 14, 32; ECF 34 at 1, 3 n.4. There was nothing below on which the district court could ground a ruling based on the sliding scale. A party has a duty "to spell out its arguments squarely and distinctly" before the district court, and it has no right to review otherwise. *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988). Sierra Club may not now raise such a theory on appeal. *See McCoy*, 950 F.2d 13, 22 (1st Cir. 1991).

Third, Sierra Club does not even point to some clear rejection of the sliding scale standard by the district court or any misstatement of law. The district court actually noted the sliding scale in considering irreparable harm. Order at 46 (citing *Vaqueria Tres Monjitas*, 587 F.3d at 485). Thus, the district court's balancing of the factors was within its discretion, *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003), including, if the sliding scale applies, how much less of a showing is required on any given factor, *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018). And even if the district court did make some error of law, it does not warrant reversal unless it actually requires changing the outcome. *See Winter*, 555 U.S. at 22; *Puerto Rico Hosp. Supply, Inc. v. Bos. Sci. Corp.*, 426 F.3d 503, 507 (1st Cir. 2005). It does not, because Sierra Club's showing on the merits was too weak under any standard.

II. The district court appropriately concluded that Sierra Club is not likely to succeed on the merits of its NEPA challenges.

Sierra Club has built its case on a fundamental assumption: that the Corps' NEPA review should have considered every environmental effect of the entire project rather than just those within the Corps' jurisdiction. For the reasons discussed below, that assumption fails and, with it, the merits of Sierra Club's claims.

Because Sierra Club challenges the Corps' application of its NEPA regulations to this project, judicial review is under the "highly deferential abuse of discretion standard of review." *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1471 (1st Cir. 1994). A court can only overturn the Corps' decision if it was "arbitrary and capricious." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004). Review is limited to the administrative record before the Corps at the time of its decision, *see, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 142 (1973), even though it is not fully compiled, *see California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1083 & n.11 (9th Cir. 2020).

A. The Corps' jurisdiction is narrow.

Sierra Club challenges only the Corps' permit for this project. But that permit is narrow because the Corps' jurisdiction is narrow. The Corps is limited to authorizing the "discharge of dredged or fill material into" waters of the United States and "any obstruction" of "the navigable capacity" of navigable waters of the United States. 33 U.S.C. §§ 403, 1344(a); *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 625 (2018) (noting those waters "delineate[] the geographic reach of" the Corps' permitting power); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th

Cir. 2009) ("The specific activity that the Corps is permitting when it issues a § 404 permit is nothing more than the filling of jurisdictional waters . . . .").

Here, that means permitting CMP to "[p]lace temporary and permanent fill in waters of United States" to construct the project (and drill under the Kennebec River). APP-626. Neither the permit nor the Corps' jurisdiction extend further. If CMP avoided these activities, the Corps would have no jurisdiction over the project. *See Aracoma Coal*, 556 F.3d at 194. Without a permit, CMP could still do all other construction activities. Permitting fill and drilling is the Corps' only leverage.

The construction activities touching the Corps' jurisdiction are quite limited. They relate solely to wetlands and vernal pools (apart from the Kennebec River tunnel). A total of 4.87 acres of wetlands will be permanently filled—4.72 acres for three power stations and 0.15 acres for the base of pole structures. APP-403–04, 439, 629. A further 47.64 acres will be filled temporarily by timber mats for construction and then restored. APP-404, 439, 503, 629. The Corps also considered 111.55 acres of forested wetlands that will be converted to scrub-shrub or emergent cover types in its jurisdictional analysis, *id.*, though they will not be filled. Much of this cover will grow back, so only 63.62 acres will permanently be converted. APP-452. While the power line also goes over streams and open water, those are all aerial crossings; there will be no "discharge" regulated by the Corps there. APP-405–08. The Corps' jurisdictional foothold is accordingly only 1.9% of this 8,600-acre project. APP-404. Indeed, the Corps' jurisdiction is even more limited in Segment 1, where Sierra Corp focuses—only half of the 300-foot right-of-way will be used, meaning that wetlands in the other half are untouched. See APP-405. There is only 0.26 acres of permanent

wetland fill for minor termination stations and a fraction of the 0.15 acres of fill for poles (each of which sits on 50 square feet of fill on average). APP-403, 405–07.

By contrast, the State of Maine asserted comprehensive jurisdiction over the entire project's construction, including the aspects that concern Sierra Club. *See* APP-451 (Maine "has broader authority in this matter"). For example, DEP performed a detailed review of visual impacts; considered effects on recreation and commercial activities (hunting, fishing, hiking, etc.); and analyzed environmental effects, including forest fragmentation and effects on watercourses, wetlands, and vernal pools, as well as varied wildlife. APP-689–756. DEP considered various alternatives and imposed many changes to minimize negative impacts, including creating twelve "Wilderness Areas"—where tress will be maintained in a forested condition. *Id.* at 56, 79–80. These minimization measures especially reduced effects in Segment 1, where 14.08 miles will be maintained as forested, and the remainder of the corridor will be tapered such that only 54 feet will be fully cleared, with tree cover in the rest. APP-742–745. Maine's analysis and requirements occurred prior to, were examined by, and were incorporated into the Corps' analysis. *See, e.g.*, APP-412, 417–18, 436, 444, 451–52.

B. The Corps properly limited its NEPA review to the small areas where it has jurisdiction.

1. The Corps' regulations define when it has sufficient control to "federalize" a project, which it did not here.

This power line is a private project on non-federal land. A Corps permit, however, is "federal action." NEPA is silent on how broad an agency's environmental review on a Federal permit for an otherwise private project must be.

Aracoma, 556 F.3d at 194. Corps regulations, not challenged here, fill in this gap. 33 C.F.R. Part 325, App. B § 7(b). Under them, the critical question is whether the Corps has "sufficient control and responsibility" over the project "to turn an essentially private action into a Federal action," such that "the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* Corps regulations identify four typical factors for the district engineer to consider when deciding on the scope of the analysis. *Id.*

For projects like this, the first factor is most relevant: whether "the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project)." *Id.* There are examples: for a "50-mile electrical transmission cable crossing a 1¼ mile wide river," the Corps should limit its NEPA review to "the impacts of the specific cable crossing." *Id.* By contrast, if "a major portion" of a project requires a Corps permit—"if 30 miles of the 50-mile transmission line crossed wetlands or other 'waters of the United States,'" (60%)—the whole power line should be considered because the permits bears "upon [its] origin and destination" and its route "outside the Corps regulatory boundaries." *Id.*

The Corps applied these regulations. APP-438–441. It found that "[j]urisdictional impacts are limited to approximately 1.9%" of the project, and the vast "majority of the project occurs in uplands and is therefore outside our federal control and responsibility." APP-441. The Corps concluded that its NEPA review was properly "limited to the proposed impacts to waters of the U.S. and the immediately surrounding uplands." APP-438. This decision also respected the role of the State of Maine, with which the "primary responsibility for determining zoning and

land use matters rests," 33 CFR § 320.4(j)(2). The Corps is entitled to deference here because it has adopted a reasonable interpretation of its own NEPA regulations. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 708 n.3 (6th Cir. 2014).

2. The Corps' decision to limit its scope of NEPA review is consistent with the law.

Courts have concluded that linear, corridor-type projects are not "federalized" merely because they require Corps permits to cross "waters of the United States." While it appears no published court of appeals case has analyzed such a project falling within the four-factor regulations applied here, one did apply that framework in the alternative. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1054 (10th Cir. 2015). It found that the Corps was not required to analyze the effects of an entire 485-mile pipeline, even though it required a Corps permit to cross 2,000 waterways, because the Corps "neither acted as a 'gatekeeper' nor approved the pipeline." *Id.* at 1052.

Similar cases are instructive. The D.C. Circuit found a pipeline that made "nearly two thousand minor water crossings" was not federalized because those segments made up "less than five percent of its overall length," a "negligible portion." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 34, 50-51 (D.C. Cir. 2015). *See also Macht v. Skinner*, 916 F.2d 13, 19–20 (D.C. Cir. 1990) (concluding that light-rail project not "federalized" by a Corps permit to fill wetlands); *Winnebago Tribe of Nebraska v. Ray* 621 F.2d 269, 271–72 (8th Cir. 1980) (holding that Corps permit to cross Missouri

River, representing 3% of project, 2 miles of a 67-mile power line, did not give Corps sufficient "control and responsibility" to "federalize" project).[5]

The First Circuit has not addressed this issue in the context of a linear project yet, but its decisions and those of lower courts in the Circuit are consistent with the above. *See City of Boston v. Volpe,* 464 F.2d 254, 259 (1st Cir. 1972) (holding tentative Federal funding did not "federalize" construction of new taxiway); *Conservation Law Found.*, 24 F.3d at 1475–76; *Conservation Law Found. v. U.S. Army Corps of Eng'rs*, 457 F. Supp. 3d 33, 62 (D.N.H. 2019); *Touret v. NASA*, 485 F. Supp. 2d 38, 43 (D.R.I. 2007) (holding 11% Federal funding insufficient to "federalize" construction of building).

Sierra Club makes no attempt to distinguish these cases. It relies primarily on two Ninth Circuit decisions holding that housing developments were "federalized" because ephemeral desert "washes" throughout the sites would be permanently filled. *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1040 (9th Cir. 2009); *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1118–19 (9th Cir. 2005); *see also Stewart v. Potts*, 996 F. Supp. 668, 672, 680, 682–83 (S.D. Tex. 1998). These cases are easily distinguished because they did not involve linear projects, which Corps regulations treat differently. Indeed, one case that Sierra Club cites distinguished both for that reason. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 35–36 (D.D.C. 2013).

Sierra Club also relies on the idea that the Corps controls this project because it could not be built without a Corps permit. Br. at 19. Even so, that "but for" causation is "insufficient to make an agency responsible for a particular effect under

[5] Two of these cases involved a Corps "verification" under Nationwide Permit 12, not an individual permit as here. *Sierra Club*, 803 F.3d at 34; *Bostick*, 787 F.3d at 1052. There is no reason individual permits should create wider federal jurisdiction.

NEPA." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). Federal control requires "a reasonably close causal relationship," *id.*, like "proximate cause from tort law," *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Winnebago Tribe*, 621 F.2d at 272–73 ("'but for' veto power" insufficient); *Kentuckians*, 746 F.3d at 706; *Aracoma*, 556 F.3d at 195–96.

A contrary decision would inappropriately expand the Corps' analysis. "[E]very oil pipeline project of any reasonable length is likely to pass over some segment of federal land or waters," so "the practical effect" of Sierra Club's position is "federal oversight of all domestic oil pipelines." *Sierra Club*, 990 F. Supp. 2d at 37 (D.D.C. 2013); *see also Sierra Club*, 803 F.3d at 40 (in 2015, an estimated "180 oil pipelines were built . . . without NEPA review" of the whole pipeline).

3. The EA's scope was not arbitrary and capricious.

While Sierra Corps nitpicks the Corps' application of the four factors in its regulations, it fails to show that the Corp was arbitrary and capricious.

First, Sierra Club argues that the Corps' regulated activity is not "merely a link" because "more than 1,800 aquatic resources" fall within its footprint. Br. at 16. But Federal "control and responsibility" is limited to effects on only 164 acres of wetlands, most temporary—only 1.9% of the project's footprint.[6] APP-404. The vast majority of streams, wetlands, and vernal pools will not be affected jurisdictionally. *Id.*

[6] Sierra Club suggests that the project is similar to the example of 30 out of 50 miles of transmission line crossing wetlands. Br. at 16 (citing 33 C.F.R. Part 325, App. B §§ 7(b)(3)). The example does not indicate whether those 30 miles are all wetlands—if they are, *most* power line poles would be located in jurisdictional waters, unlike here, where only 98 out of 1,450 are. APP-404. The Corps has the right to interpret this regulation, not Sierra Club, and rationally concluded that example is inapposite.

The Corps rationally concluded that these small areas are "merely a link" and fall far short of the control necessary to federalize the project. Many linear projects affect as many "waters of the United States" without being "federalized." *See supra* p. 19.

Second, Sierra Club argues that the Corps "federalized" this project by mentioning an alternative in which the power line would "zig zag" across the right of way, which Sierra Club argues shows that "aspects of the upland right-of-way and existing infrastructure affected the transmission line's configuration." Br. at 16. This argument is entirely unexplained. The factor in the Corps' regulations—"[w]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect [its] location and configuration," 33 C.F.R. Part 325, Appendix B § 7(b)(2)(ii)—is inapt for corridor projects. *See id.* § 7(b)(3) (example of "a shipping terminal"). The Corps noted that most of the project facilities had no "regulated" impact at all. APP-438–439. Maine DEP requested the alternative to be analyzed and rejected it because it did not benefit the environment. APP-495–96. Because the right of way would still be in the same location, it is also unclear how zig-zagging makes much difference to the project-wide environmental effects.

Third, Sierra Club argues 17% (rather than 1.9%) of the project is actually within the Corps' jurisdiction because 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." Br. at 17 (citing *Sierra Club*, 990 F. Supp. 2d at 36). But that statement was actually a repudiation of the Ninth Circuit cases on which Sierra Club relies and the basis for finding that a pipeline crossing 15 miles of federal jurisdiction was not federalized. *Sierra Club*, 990 F. Supp. 2d at 36. On appeal, the D.C. Circuit confirmed

that the proper measure is the "discrete geographic segments of the pipeline" affected by the Federal "agencies' respective regulatory actions"; the pipeline was not federalized because agency actions affected "less than five percent of its overall length." *Sierra Club*, 803 F.3d at 34. Here, the 17% is at most hypothetical jurisdiction. The vast majority of those 1,500 acres (including nearly 90% of wetlands) are not impacted by project activities, and certainly not by fill.[7] *See* APP-404. And 17% is still nowhere near 60%, as in the example. As the district court concluded, the 1.9% figure is not arbitrary. Order at 32.

Fourth, Sierra Club argues that "there is significant cumulative federal control and authority over the project" because it also requires a Department of Energy ("DOE") Presidential permit and a Federal Energy Regulatory Commission ("FERC") permit, as well as agency consultations. Br. at 17–18. Besides reciting these facts, Sierra Club has no argument. The Corps concluded the cumulative federal authority here was minimal. APP-440. Each authority is "separate and independent": the Corps' permitting does not "overlap with the . . . [DOE] review of the border crossing, nor does it overlap with the operational review of the FERC." *Id.* The Corps rationally concluded that these small "links" of Federal jurisdiction do not "federalize" this project. APP-440–441; *see Sierra Club*, 803 F.3d at 34 (holding that various Federal agencies' "respective regulatory actions" did not "federalize" an

[7] Sierra Club criticizes the Corps for excluding "aquatic resources" that are aerially crossed because they will be "impacted by the corridor clearing and maintenance." Br. at 17 n.10. But even aerially crossed waters were counted if impacted by cover type conversion—*i.e.*, "clearing and maintenance." AP-404. Sierra Club fails to show any waters not counted are affected by some activity within the Corps' jurisdiction.

oil pipeline because—even together—they "were limited to discrete geographic segments of the pipeline comprising less than five percent of its overall length").

Accordingly, the Corps properly limited the scope of its analysis.[8]

C. Sierra Club's other attacks on the Corps' analysis also fail.

Sierra Club attempts to attack the limited scope of the Corps' analysis in two other ways. First, it faults the Corps for failing to adequately define "baseline conditions." Br. at 20. But there is no "independent legal requirement" to establish a "baseline"; it is a gloss adopted largely by the Ninth Circuit on EIS (not EA) requirements and certain other regulatory regimes. *See Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016) (citing 40 C.F.R. § 1502.15), *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999). Even an EIS need only "succinctly describe the environment of the area(s) to be affected," no more "than is necessary to understand the effects." 40 C.F.R. § 1502.15. EAs are even more "concise," so any discussion of existing conditions should also be concise. *See W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1274–75 (10th Cir. 2013). NEPA regulations leave to the agency's discretion how to "brief[ly] discuss[]" the "environmental impacts" of alternatives (not "baselines"). 40 CFR § 1508.9. Sierra Club identifies no substantive problem with the EA's analysis, only that it is short, Br. at 20—which is the point of an EA. Sierra Club also criticizes the district court's focus on "impacts to aquatic resources," Br. at 21, but that is just another attack on the EA's scope.

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[8] The Corps did not improperly discuss benefits of the whole project, Br. at 19 n.11, because they are part of a public interest analysis under the Clean Water Act. 33 C.F.R. § 320.4(a); *see also Kentuckians*, 746 F.3d at 712.

Regardless, beyond the "existing conditions" section, APP 435–36, the EA includes further descriptions, including in its segment-by-segment discussion of the project, APP-404–08, its cumulative effects analysis, APP-543–44, and the waterbody table with "detailed segment-specific information for each waterbody," APP-435, which is part of the record, APP-806–55. Nothing more was required for filling small portions of a few wetlands. The impacts—all that is required to be analyzed in an EA—are "clearly understood" and similar to those in past projects. APP-462, 562.

Second, Sierra Club argues that the Corps was required to combine its NEPA analysis with DOE's. Br. at 21. But it did not make this argument below, so it would be inappropriate to enter injunctive relief on a ground not fully addressed by the district court, particularly this fact-bound one. *See New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 13 (1st Cir. 2002). The argument is also cursory and not worth consideration. *See Rodriguez v. Municipality of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011). Sierra Club does not explain why a regulation that facially applies only to EISs and is really about a single agency combining multiple actions pending before *that agency* into a single EIS, 40 C.F.R. § 1508.25, should require combining the Corps' EA with DOE's EA. Yet even if *some* federal entity needed to analyze combined effects, as plaintiffs recognized below, that could be DOE, ECF 18 at 1. This argument would require examination of the DOE EA and should not be considered.

D. The Corps properly determined that no environmental impact statement was necessary.

Because the Corps' EA found that there were no significant impacts, the Corp did not prepare an EIS. *See* 40 C.F.R. §§ 1501.4, 1508.9, 1508.13. While Sierra Club

acknowledges that the Corps' examination of the significance factors was limited to the scope of the EA, Br. at 26, Sierra Club uses its argument that an EIS was required again primarily to attack the EA's scope and to focus on impacts outside it.

This Circuit has noted that a FONSI for even more ambitious projects is defensible. *Sierra Club v. Marsh*, 769 F.2d 868, 873, 877–78 (1st Cir. 1985) (holding EA would have been acceptable even when project involved more jurisdictional waters and woodlands, as well as disagreement among many agencies over the scope of the effects and whether an EIS was required). Other circuits have upheld agencies not performing EISs for similar projects. See cases cited *supra* p.19.

Sierra Club's argument focuses on three "intensity" factors within the definition of significance, but its showing is minimal, based almost exclusively on documents outside the administrative record.[9] First it argues that the project area is unique and contains "ecologically critical areas," but it mostly focuses on effects outside the scope of the permit area. Br. at 22–23. These wetlands are not so unique that they require an EIS, especially because they are logged, APP-450, 561, and only a small portion of them is affected. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012); *see also Conservation Law Found.*, 24 F.3d at 1475 (not requiring EIS for Corps permit to fill 4.6 acres of wetlands).

[9] Sierra Club identifies many "controversies" outside the scope of the Corps analysis, including the project's effect on greenhouse gas emissions, which amici also discuss. The Corps addressed some of these issues in recounting public meetings, what Maine DEP did, or its public interest analysis. APP-445–47, 453–60, 512–24. These discussions are a "reasonable response to public commentary," but to use them "as a forensic clue of the Corps' capriciousness" would be absurd. Order at 25.

Second, Sierra Club argues that the project is "highly controversial" "[b]ecause of its many impacts." Br. at 24. But highly controversial refers to "a substantial dispute" about "the size, nature, or effect of the major federal action." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). The only evidence of a dispute regarding jurisdictional waters in the administrative record that is noted by Sierra Club is one witness's cursory treatment; he states that the effects "could be significant" but that he could not evaluate them because CMP did not provide a "complete listing and thorough description of adverse impacts." APP-160–62. As the EA states, the project's effects "are clearly understood, fully discussed, generally minimal, and confined to relatively small individual impact areas." APP-562. The fact that "the Sierra Club disagrees with the [Corps'] conclusions . . . is not sufficient by itself to warrant an EIS." *Sierra Club v. Wagner*, 555 F.3d 21, 30 (1st Cir. 2009).

Third, Sierra Club argues that that there are "highly uncertain effects": 1) the "risk of drilling under the Kennebec River," which it does not even explain (citing only the EA's description of the drilling) and 2) the effects of tree tapering and other minimization measures. Br. at 25–26 & n.6. On the latter, the impacts on jurisdictional waters (regardless of tapering) are not "uncertain" because the fill and crossing activities are "no different than many past transmission line projects" that "have been reviewed and monitored by the [Corps]." APP-562. While the Corps took the minimization procedures as imposed by Maine DEP, APP-412, it did not assume that they would eliminate impacts; indeed, CMP's compensation plan provides compensation without regard to a reduction in impact from tapering, APP-526.

Accordingly, Sierra Club cannot succeed in showing than an EIS was required.

E. The Corps fulfilled its notice obligations under NEPA.

Sierra Club also launches a procedural attack, arguing that the Corps had to publish a draft EA for public comment. Br. at 27. No regulation requires that. *See* 40 C.F.R. §§ 1501.4(b), 1506.6(a). The circuits have uniformly held that draft EAs need not necessarily be circulated for comment and have upheld EAs prepared with similar public participation as here. *See Alliance To Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 115 (1st Cir. 2005); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 952 (9th Cir. 2008) (collecting cases). Sierra Club cites no contrary authority. The NEPA exception requiring publication when the proposed action is "closely similar" to one "normally" requiring an EIS, 40 C.F.R. § 1501.4(e)(2), does not apply. As discussed, similar projects proceeded on EAs. The Corps found this project similar to other "large scale linear projects" requiring only an EA. APP-462; ECF 31-24. While Sierra Club argues that having only the public notice prejudiced it, that notice was lengthy and touched on most issues Sierra Club notes. APP-321–47. Sierra Club commented on those in detail. APP-348–400.

III. The district court did not abuse its discretion in weighing the other equitable factors and denying the preliminary injunction.

This Court "affords considerable deference" to the district court's evaluation of the other injunction factors. *Ross-Simons*, 102 F.3d at 16. While Sierra Club nitpicks the district court's evaluation of them, there was no "palpable abuse of discretion," *id.*

A. The district court appropriately analyzed irreparable harm.

Sierra Club criticizes the district court's irreparable harm analysis on two grounds. First, it asserts that the district court conflated the merits with irreparable

harm. Br. at 10. But even the case Sierra Club cites notes that they "have some overlap" and because the "same evidence will inform both steps," "there is no harm in analyzing all of [it] once." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011). The district court's analysis was informed by the merits because Sierra Club argued that a NEPA violation presumptively creates irreparable harm. Order at 47. That argument requires considering the merits. *Sierra Club*, 990 F. Supp. 2d at 40–41. But the Supreme Court has also rejected that position, *Monsanto Co. v. Geertson Seed Farm*, 561 U.S. 139, 157-58 (2010), so Sierra Club's argument fails.

Second, Sierra Club also criticizes the district court for not considering the "concrete, on-the-ground harm" to its members. Br. at 10. But the district court knew these harms, having taken witness testimony, Order at 15; APP-1052–96. It reviewed the record evidence, including declarations concerning "immediate and irreparable harm." Order at 43–44. It found that the witnesses' showing was not stronger than the Corps', especially after credibility judgments, *see id.* at 44–45. While this analysis was in the court's discussion of the merits, the district court can analyze the same evidence once. *See Michigan*, 667 F.3d at 788. Even if it did not discuss the same evidence under irreparable harm, such omission is at most harmless error. *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996).

B. Sierra Club errs in its analysis of the other factors.

While CMP can expound on the harms it faces, Sierra Club's legal analysis errs on the final two factors. Sierra Club suggests that environmental injury generally warrants an injunction, but the balance of harms may militate against one, *Sierra Club*, 872 F.2d at 504, and both cases it cites undermine its position, *see Amoco Prod. Co. v.*

Village of Gambell, 480 U.S. 531, 545 (1987) (affirming denial of injunction based on potential loss of $70 million in oil exploration); *Sierra Club*, 645 F.3d at 997 (affirming injunction because it was tailored *only* to § 404 permit activities). Similarly, while Sierra Club denigrates the public interest in procuring energy, that interest militates against an injunction. *See Amoco Prod. Co.*, 480 U.S. at 545; *Andrus*, 617 F.2d at 297.

IV. Sierra Club has changed its requested relief on appeal.

On appeal, Sierra Club asks this Court to "reverse the district court decision, order the court to entire [sic] a preliminary injunction against any clearing and construction activities for Segment 1." Br. at 30. Below, plaintiffs sought a "preliminary injunction against Federal Defendants preventing them from allowing any construction activities" or other implementation of the permit. ECF 18 at 1. In other words, plaintiffs requested a suspension of the Corps permit, not an injunction against CMP. Most construction has nothing to do with the federal permit. If a party generally cannot advance a new argument on appeal, *see New Comm Wireless Servs.*, 287 F.3d at 13, it seems especially wrong to seek an entirely different form of relief.

CONCLUSION

For the foregoing reasons, the district court's denial of a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the Court's January 15, 2021 Order requiring that this brief be limited to 30 pages because, excluding the portions exempted by Fed. R. App. P. 32(f), this brief is 30 pages. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 8,941 words.

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