IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-2195

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

REPLY BRIEF OF APPELLANTS SIERRA CLUB, *et al.*

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

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I. The District Court misapplied the four-factor preliminary injunction test.

In arguing the district court's decision should be upheld, the Corps and CMP skip over the fundamental principle of equity jurisdiction: judicial flexibility. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Instead, they ask the Court to apply a rigid formulation of the injunction factors that is inconsistent with this principle and Supreme Court law. As both CMP and the Corps admit, the First Circuit never has rejected the flexibility of the sliding scale approach, including the serious questions formulation, either pre- or post-*Winter*, and on occasion has applied it.[1]

The Corps argues that logic compels applying the same "likelihood" standard to both the merits and irreparable harm factors, Corps Br. at 13, but the opposite is true, and the Corps' argument ignores the second part of the serious questions analysis requiring the equities and public interest to tip sharply in the movant's favor, which redistributes but does not lessen the overall burden. *See Citigroup Glob. Mkts, Inc. v. VCG Special Opport. Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (citation omitted). This case is a textbook example of why it is more logical to lessen the showing of likelihood of success on the merits in a case's early stage. If the Project moves forward, irreparable harm is certain absent an injunction. Opening Brief ("Op. Br.") at 10–12. By contrast, the merits are far more difficult for a court to evaluate early in litigation without a record, as the district court noted. *See, e.g.*, Order at 23,

[1] The Corps suggests such a case is "more hypothetical than real," Corps Br. at 9, but then acknowledges the real case. *Id.* at n.2 (citing *Pub. Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15, 26–27 (1st Cir. 1998)).

n.13. Thus, the serious questions formulation provides the necessary judicial flexibility.

The Corps argues the district court made no clear error of law in applying the four-factor test, but the Corps repeats the court's error by improperly narrowing Sierra Club's basis of irreparable harm. The Corps acknowledges the district court "noted the sliding scale in considering irreparable harm,"[2] Corps Br. at 14, but that does not mean the court applied it correctly, especially since the court only considered Sierra Club's harm flowing from NEPA violations. This case, at a minimum, raises serious questions going to the merits, irreparable harm is certain and severe in Segment 1, and the equities and public interest tip sharply in Sierra Club's favor. Accordingly, the Court should follow the majority of Circuit Courts post-*Winter* in explicitly endorsing the serious questions formulation for injunctions and apply it here.

II. Irreparable harm will occur absent an injunction.

CMP suggests Sierra Club relies on a "presumption of irreparable injury" because this is an environmental case. CMP Br. at 26. That ignores the extensive evidence Sierra Club introduced showing harm to its members' interests. Op. Br. at 10–12. CMP attempts to dismiss this evidence by pointing to the Corps' and state agencies' generic discussions of Project impacts. But CMP's brief suffers from the

[2] This acknowledgment undermines the Corps' and CMP's waiver argument. Sierra Club raised the sliding scale before the district court, first in its Preliminary Injunction Motion, ECF No. 18, at 10, which the court acknowledged in its Order at 46, and then again in its Emergency Motion for Injunction Pending Appeal. ECF No. 45, at 3–7. In any event, it is well within the Court's discretion to address this legal argument for which no further factual development is needed. *See Pub. Serv. Co.*, 167 F.3d at 26.

same flaw the Corps' NEPA analysis does—it focuses on mitigation rather than actual impacts to the baseline. Sierra Club's witness literally wrote the book on hiking in Maine and does not need, as CMP suggests (CMP Br. at 27, n.26), training in "visual impact assessments" or "photosimulations" to know when a scenic view and outdoor recreational experience will be ruined and forever marred by a 150-foot cleared corridor and related infrastructure.[3] APP-1063–64, 1068; *see also* APP-76.

The Corps attempts to sidestep the district court's failure to analyze Sierra Club's on-the-ground harms by pointing to the court's references to Sierra Club's witnesses outside the context of the court's irreparable harm discussion. But such fleeting references do not analyze the extent or degree of Sierra Club's harm.[4] The court's omission is not harmless because it fundamentally undermined its ability to correctly apply the four-factor test. Op. Br. at 13–14; 29–30.

III. The Corps applied an improperly narrow NEPA scope of review.

The Corps and CMP focus on the "fill" activities that give rise to CWA jurisdiction. Corps Br. at 15–17; CMP Br. at 15–17. But the more relevant question is: what is the proper scope of the *NEPA* analysis? As the D.C. Circuit explained:

To the extent that the Corps . . . understood its NEPA obligations as

[3] Neither CMP nor the Corps challenged Sierra Club's standing, thus tacitly conceding Sierra Club will suffer injuries caused by the Corps' action. Accordingly, the only question is whether such injury is irreparable, which it is. *See, e.g.*, APP-1089–90.

[4] The Corps' attempt to distinguish *Michigan v. U.S. Army Corps of Eng'rs* fails because here the merits question is a NEPA violation, which involves a separate and distinct inquiry—*e.g.*, was the Corps' EA flawed—than the question of on-the-ground harms, unlike the public nuisance claim in *Michigan*. 667 F.3d 765, 788 (7th Cir. 2011).

> confined to considering environmental effects on CWA jurisdictional waters, its view misapprehends the obligations of any agency taking action subject to NEPA to do a comprehensive analysis of all types of foreseeable environmental effects.

See Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 40, n.3 (D.C. Cir. 2015). That is precisely what should have happened here; instead the Corps passed on analyzing impacts such as those from forest fragmentation. APP-448. Given the pervasiveness of jurisdictional waters throughout the Project area, the Corps' Permit was necessary to enable the Project to move forward. *See* APP-495 (discussing decision not to use the northern part of the right-of-way because aquatic impacts would be more significant).

The Corps' reasons for limiting its NEPA analysis fall short. The Corps emphasizes the Project is a "corridor-type project" and cites cases involving such projects where courts upheld the Corps' limited NEPA analysis. Corps Br. at 19–20. But two key cases involved impacts that had *already been subject to NEPA review* because they were covered under a Corps' Nationwide Permit, and the courts deferred to the Corps' position that its NEPA scope of analysis regulation does not apply to nationwide permits.[5] *See Sierra Club*, 803 F.3d at 51–52; *Sierra Club v. Bostick*, 787 F.3d 1043, 1054 (10th Cir. 2015).

The Corps' regulatory examples make clear that what matters is the geographical extent of jurisdictional waters *crossed* by the corridor and whether waters

[5] The Corps suggestion that individual permits should not create wider federal jurisdiction than nationwide permits, Corps Br. at 20 n.5, is belied by this position.

are concentrated in particular areas (i.e., a single river crossing) or dispersed throughout the Project area (occurring in 30 out of 50 miles). 33 C.F.R. § 325 App'x B(7)(b)(3); *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040 (9th Cir. 2009). Here, the waters are dispersed and pervasive throughout the corridor; maps show Segment 1 alone crosses multiple waters in almost every half-mile. APP-438, 916–1034, 1084, 1088–89. The Corps and CMP ignore this (and the maps) and focus on a superficial percentage of impacted waters. Corps Br. at 21–23; CMP Br. at 12–13. This obscures the ubiquitous nature of the waters, which are clearly not "merely a link."[6] The Corps interpretation of its regulation is not rational. *See U.S. v. Coalition for Buzzards Bay*, 644 F.3d 26, 33 (1st Cir. 2011) (in NEPA case, agency's "interpretation of its own procedures itself defies logic and exceeds the bounds of reasonable agency interpretations entitled to deference").[7]

Lastly, the Corps' characterizes other federal agency involvement as "consultations" and accuses Sierra Club of as merely "reciting th[e] facts[.]" Corps Br. at 23; *see also* CMP Br. at 15. But these facts matter, according to the Corps' regulations. *See* 33 C.F.R. § 325 App'x B(7)(b)(3); *see also* Op. Br. at 17–18. And the "consultations" resulted in enforceable Permit conditions for corridor construction

[6] The Corps cites *Winnebago Tribe of Nebraska v. Ray*, where the Corps' activity was limited to one river crossing. 621 F.2d 269, 270 (8th Cir. 1980); *see also Conservation Law Found. v. U.S. Army Corps of Eng'rs*, 457 F. Supp. 3d 33 (D.N.H. 2019) (same). These cases are distinguishable, as the Project crosses more than 1,800 waters. APP-405–07.

[7] The Corp and CMP also claim the EA discusses the Project's benefits only as part of the CWA analysis, Corps Br. at 24 n.8 and CMP Br. at 16 n.15, but this is belied by the EA. *See* APP-460 (Alternatives Analysis, citing 33 C.F.R. § 325 App'x B(7)).

and ongoing maintenance activities not related to aquatic impacts. *See, e.g.*, APP-633–40 (special conditions 9, 17, 20, 23(d), and 25, imposing restrictions not related to waters).

The Corps' and CMP's reliance on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), is misplaced. The instant case is distinguishable in the same way the Ninth Circuit distinguished *Public Citizen*. *White Tanks*, 563 F.3d at 1040–42 (distinguishing *Public Citizen* and holding "[b]ecause this project's viability is founded on the Corps' issuance of a [CWA] permit, the entire project is within the Corps' purview"). Here the amount of discretion the Corps has over the Project is far greater than was at issue in *Public Citizen*, and the level of causation far less attenuated. *Compare* 541 U.S. at 770 (agency had "no ability to prevent a certain effect due to its limited statutory authority over the relevant actions") *with* Op. Br. at 19–20 (the Corps has the authority to deny or condition the Permit to prevent or minimize impacts).[8]

The Corps and CMP also point to Maine DEP's jurisdiction over the Project. Corps Br. at 17 (citing DEP Order); CMP Br. at 11–12.[9] But while federal agencies can cooperate with state agencies to reduce duplication, the Corps maintains an

[8] For the same reason, *Center for Biological Diversity v. U.S. Army Corps of Engineers* is distinguishable. 941 F.3d 1288, 1292, 1298–99 (11th Cir. 2019) (Corps had no discretion over offsite processing and storage of mined materials, and thus NEPA analysis could omit those impacts).

[9] Cases CMP relies upon are inapposite. *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers* and *Ohio Valley Environmental Coalition v. Aracoma Coal Co.* involved mining projects where impacts beyond those to jurisdictional waters were delegated to state agencies under federal law, and thus the Corps did not have sufficient control and responsibility to warrant expanded NEPA review. 746 F.3d 698, 707–08 (6th Cir. 2014); 556 F.3d 177, 197 (4th Cir. 2009). No such delegation exists here.

independent obligation under NEPA to evaluate a Project's impacts. *See, e.g.*, *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (state permit "cannot satisfy a federal agency's obligations under NEPA"). Moreover, the Corps' NEPA obligation is broader than and involves different standards than DEP's.[10] *See, e.g.*, APP-100, ¶6 (describing DEP's dismissal of GHG testimony); Op. Br. at 25–26 (discussing tapering mitigation measure). And the argument that a ruling in Sierra Club's favor opens the floodgates to "federal oversight of all domestic oil pipelines," Corps Br. at 21, ignores the existence of Nationwide Permit 12.

IV. Sierra Club has raised serious questions on the merits of its other claims.

Baseline conditions: The Corps and CMP complain Sierra Club is seeking to impose an EIS requirement on an EA, but the baseline conditions concept is fundamental to both because it is necessary to determine whether an EIS is needed in the first instance. Op. Br. at 20. Here, the Corps' "analysis" is a single paragraph. APP-435–36. The Corps points to other parts of the EA, Corps Br. at 25, but they say little or nothing about baseline conditions. *See, e.g.,* APP-404–08 (describing Project elements and impacts to aquatic resources, not existing conditions); *see also* Order at 43 (expressing concern regarding the Corps' baseline conditions discussion).

Improper Segmentation: NEPA prohibits agencies from segmenting their

[10] The Corps' scope of analysis error was not harmless. CMP Br. at 16 n.15. Unlike in *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61–62 (1st Cir. 2001), the Corps has not made a "reasoned finding" that the action's effects were *de minimis*, and Sierra Club has raised serious questions regarding the Corps' scope of review. *See* Op. Br. at 15.

NEPA analyses for "closely related" projects because it allows agencies to avoid a comprehensive evaluation of a project's impacts. Op. Br. at 21–22 (discussing 40 C.F.R. § 1508.25(a)(1) (1978)). The Corps claims the regulation is aimed at a single agency, Corps Br. at 25, but the regulation is not so limited, its reasoning logically applies regardless of whether a single or multiple agencies are segmenting their analyses, and the Corps cites no cases saying otherwise.[11]

The Project requires an EIS**:** If the Court agrees with Sierra Club that the Corps' scope of analysis was improper, then the Project's impacts and highly controversial and uncertain effects mandate an EIS. *See* Op. Br. at 22–27. Contrary to CMP's argument, Br. at 22, this case is not like *Greenpeace Action v. Franklin*, where the plaintiff attempted to "establish a scientific controversy post hoc . . . when at the time of the [agency] action, there existed no substantial dispute." 14 F.3d 1324, 1334 (9th Cir. 1992). Here, substantial scientific and public disputes existed well before the Corps' action and they are ongoing. *See, e.g.*, APP-100–05, 603–10. The Corps' conclusory statement that no controversies exist because "all concerns have been fully discussed," APP-562, is insufficient. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 205197, 2021 WL 244862, at *4 (D.C. Cir. Jan. 26, 2021).

Public Participation: Neither the Corps nor CMP address Defendant Clement's

[11] The Corps attempts to pass the buck for considering combined impacts to DOE, and argues Sierra Club's argument "would require examination of the DOE EA." Corps Br. at 25. But CMP already has put DOE's EA before this Court and DOE claims it is not required to comply with NEPA. *See* Resp. to Mot. for Reconsideration, at 2–3. For similar reasons, DOE's EA does not save the Corps' flawed EA. *Id.* at 1–6.

unequivocal statement that his office "does not publish EAs." APP-907. This preordained outcome is incompatible with the Corps' mandatory duty to involve the public "to the extent practicable" in preparing the EA. 40 C.F.R. § 1501.4(b) (1978); *see also id.* § 1500.2(d) (1978). Both cases the Corps cites acknowledge that while "draft EAs need not necessarily be circulated for comment" (Corps Br. at 28), there are circumstances when they must be. Here, the Project is "closely similar" to one normally requiring an EIS.[12] Op. Br. at 3 (discussing Northern Pass); *see also* APP-147. Finally, the suggestion the public notice was sufficient because it was "lengthy and touched on most issues," Corps Br. at 28, ignores EPA's criticism. APP-1038.

V. The equities and public interest tip sharply in Sierra Club's favor.

CMP claims financial harm if the Segment 1 injunction continues, but does not explain why this is so since, given the injunction, CMP has shifted construction to other parts of the line and the project is still on track to meet its May 2023 in-service date. Resp. to Mot. for Reconsideration, ATT-15. CMP vaguely blames construction and environmental restrictions in claiming a three-month delay now will delay the project's meeting its in-service date, but the only clearing prohibitions are during June and July, and based on CMP's construction schedule[13] it appears CMP can complete

[12] The Maine Power Reliability Program project is not "closely similar" because it did not cross an international border, among other differences. APP-37, 138 ¶8, 147–48 ¶33. The more closely similar projects are the Northern Pass and the Bangor Hydro projects, *id.*, which required EISs and which the Corps and CMP fail to address.

[13] CMP's schedule (with a prior in-service date) shows it allotted 20 months to construct Segment 1; there are 27 months between March 1, 2021, and May 31, 2023.

Segment 1 by the in-service date even with a temporary delay due to an injunction. APP-1048. Further, CMP does not explain why it cannot make up for lost time if needed by, *inter alia*, increasing its workforce.

Likewise, CMP's arguments that an injunction would harm the public interest due to a halt in job creation and a temporary delay in realizing the Project's purported benefits are not specific to Segment 1 and highly speculative, especially in comparison to the certain, immediate irreparable harm to Sierra Club's members. *See League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (finding public interest in irreparable harm to elk habitat outweighed "temporary delay of economic benefit of jobs"). CMP makes no effort to tie the purported temporary delay in job creation or the delay of purported Project benefits specifically to the Segment 1 injunction. To the contrary, CMP, at its own risk, is continuing clearing and construction work in other segments.[14]

CONCLUSION

The Court should reverse the district court and continue the injunction.[15]

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[14] The Court should require no or a nominal bond because to do otherwise would be contrary to the public interest and congressional intent, prohibit Sierra Club from vindicating its rights, and negatively impact its work. ECF Nos. 34-1, 34-2, and 34-3; *see also, e.g.*, *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016) (affirming district court order not imposing bond for preliminary injunction in NEPA case and collecting cases).

[15] Sierra Club does not advance a new argument regarding relief. Corps Br. at 30. All along, Sierra Club has sought a preliminary injunction to prevent clearing and construction activities. *See* ECF No. 18 at PageID#96–97. The Court entered an injunction pending appeal for Segment 1. Sierra Club seeks to continue that injunction.

Respectfully submitted this 24th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

This document complies with the Court's January 15, 2021 Order requiring that Appellants' reply brief be limited to 10 pages because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), Appellants' brief is 10 pages.

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

Respectfully submitted this 24th day of February, 2021.

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SUPPLEMENTAL ADDENDUM

Supplemental Addendum Index

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

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

40 C.F.R. § 1500.2

§ 1500.2 Policy.

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

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

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

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

§ 1500.2 Policy., 40 C.F.R. § 1500.2

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