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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SIERRA CLUB, et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORP OF ENGINEERS, et al.,

Defendants.

CIVIL NO. 2:20-CV-00396-LEW

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

(EXPEDITED SCHEDULE AND HEARING REQUESTED)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR HEARING

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Sierra Club, Natural Resources Council of Maine, and Appalachian Mountain Club hereby move the Court for a preliminary injunction to enjoin Federal Defendants from allowing certain actions specified below that would irreparably harm Plaintiffs. Absent such an injunction, these on-the-ground clearing and construction activities would be carried out pursuant to Clean Water Act ("CWA) section 404 Permit No. NAE-2017-01342 (the "Permit"), issued to Central Maine Power ("CMP"), authorizing CMP to construct 177 miles of new electrical transmission lines and related facilities originating from the Maine-Quebec border in Beattie Township (the "Project"), and before this Court could issue a final ruling on the merits of Plaintiffs' legal challenges to that Permit.

Approximately 53.1 miles of this new transmission line will require construction of a new corridor through the Western Maine Mountains (Segment 1 of the Project), a unique and globally significant forest region that is largely undeveloped and unfragmented. Construction and operation of this new corridor will significantly impact and/or irreparably harm hundreds of aquatic resources, including native brook trout streams, scores of wetlands and vernal pools, as well as important bird and wildlife areas, require the clearing and conversion of hundreds of acres of forest, and the installation of hundreds of 100-foot tall steel poles strung with electrical lines visible for miles over the landscape. Those clearing and conversion activities will irreparably harm the recreational, professional and aesthetic experiences of Plaintiffs' members and many other Mainers who use and enjoy these resources. Specifically, to prevent this irreparable harm, Plaintiffs request a preliminary injunction against Federal Defendants preventing them from allowing any construction activities or other implementation of CMP's Clean Water Act Permit unless and until the Court has the opportunity to determine if the Federal Defendants' actions

comply with the National Environmental Policy Act ("NEPA"), the CWA, and the Administrative Procedure Act.

Despite the extremely controversial nature of this Project and the fact that it will significantly impair an ecologically and recreationally unique geographic region of Maine, the Federal Defendants violated NEPA and the APA by not analyzing the enormous and irreversible consequences of its decision in an Environmental Impact Statement ("EIS") or otherwise take a "hard look" at the impacts of this industrial project that will cut through the heart of the Western Maine Mountains, as required by NEPA. Moreover, the Federal Defendants' Permit improperly allows CMP to begin work on the Project despite the fact that the Department of Energy has not yet completed its own NEPA analysis for a Presidential Permit that it must issue in order for the Project to go forward.

As explained in the accompanying Memorandum, the Federal Defendants issued the CWA Permit to CMP on November 6, 2020, less than one week ago. A preliminary injunction is necessary because, pursuant to the permit and a Work-Start Authorization Form submitted by CMP to the Federal Defendants, CMP can begin the work authorized under the Permit as early as December 4, 2020, before this Court could issue a final ruling on Plaintiffs' legal challenges to the Permit. CMP's counsel has confirmed that the company intends to start work "promptly thereafter" its authorized work start date.[1] On November 10, 2020, Plaintiffs and Federal Defendants filed a Joint Motion for Expedited Briefing Schedule, Extension of Page Limits, and To Set a Hearing Date. ECF No. 17. Potential Intervenor CMP intends to file a response in opposition to the Parties agreed-upon briefing schedule on November 13, 2020. ECF No. 17, at 4, ¶13. In the event the

[1] As noted, this request is based on information obtained from the Federal Defendants and CMP regarding the proposed construction schedule and activities. Should Plaintiffs obtain any additional information bearing on those matters, Plaintiffs will of course promptly advise the Court accordingly.

Court is inclined to alter the Plaintiffs' and Federal Defendants' agreed-upon schedule in any way that would not permit briefing and a hearing to occur prior to December 4, 2020, Plaintiffs respectfully request the Court treat this Motion as a Motion for a Temporary Restraining Order pursuant to Federal Rule of Civil Procedure 65(b).

Plaintiffs are filing this Motion in order to preserve the Court's ability both to issue meaningful relief at the conclusion of this case and, in the meantime, to avoid irreparable harm to Plaintiffs' interests and the public's overriding interest in preserving Maine's natural heritage.[2] Plaintiffs' Motion is supported by the accompanying memorandum, the declarations of Dr. Aram Calhoun, Bradford H. Hager, Ronald Joseph, David Publicover, Jeff Reardon, Matt Schweisberg, Nicholas T. Bennett, and Kevin Cassidy, additional declarations submitted in support of Plaintiffs' standing, and any attachments to these declarations, all of which are being filed contemporaneously with this Motion, and any evidence and argument presented at a hearing on this Motion.

[2] Given the emergency nature of this Motion and the parties' attempts to confer regarding a mutually acceptable briefing schedule, the parties' were unable to file their Joint Motion to govern the case (ECF No. 17) three business days prior to filing this Motion as required by Local Rule 7(d). Plaintiffs respectfully request the Court excuse Plaintiffs from this Local Rule requirement under the circumstances this case presents.

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MEMORANDUM OF LAW

INTRODUCTION

This case is about the U.S. Army Corps of Engineers' ("Corps") granting of a Clean Water Act ("CWA") Permit to Central Maine Power ("CMP") to construct 177 miles of electrical transmission lines, 53 miles of which will clear a new corridor through the Western Maine Mountains region (hereafter, "Project"). The Project will have significant and long-term impacts on Maine's environment and natural resources and on the communities through which the corridor will pass. The Project will bisect a globally significant, unfragmented forest region, impact numerous wetlands, brook trout streams, bird and wildlife habitat areas, and deer wintering areas, and permanently mar a landscape that countless Mainers depend on for personal recreation and the region's recreation-based tourism economy. Yet the Corps somehow reached the conclusion that the Project "would not result in a significant impact—neither beneficial nor detrimental—to the human environment." Based on this improbable finding, the Corps determined it did not need to conduct an Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act, ("NEPA"), 42 U.S.C. §§ 4321–4347.

To support its incongruous conclusion, the Corps adopted CMP's dismissive characterization of the Project area—an ecologically and recreationally unique region—as "heavily managed commercial timberlands" instead of determining the area's true biological baseline. And despite a requirement to broadly examine the Project's impacts, the Corps applied a myopic view of its jurisdiction, improperly limiting the scope of its analysis. That limited and compartmentalized approach might be appropriate if the other federal agency with jurisdiction over the Project, the Department of Energy ("DOE"), were planning to conduct a broader environmental analysis of all the Project impacts, but the scope of DOE's review is unknown and

the Corps is not waiting for that process to conclude. Instead, the Corps, at CMP's behest, removed a condition from CMP's CWA permit that would have required CMP to receive its Presidential Permit from DOE prior to beginning construction, and gave CMP the green light to start clearing the corridor as early as December 4, 2020. The Corps compounded these deficiencies by not affording the public the legally required opportunity to comment on its environmental analyses.

A preliminary injunction is appropriate and necessary in this case given the irreparable harm Plaintiffs' members and Maine's environment will suffer if construction is allowed to take place prior to the Court's ruling on the merits of Plaintiffs' claims. Those harms cannot be undone. A temporary and tailored injunction will balance the hardships among the affected parties and be in the public interest, especially for a project that has such significant immediate and future implications for Maine.

FACTUAL BACKGROUND

I. CMP's Proposed Project and the NEPA Process

The Western Maine Mountains region is an incredible ecological resource. *See* Declaration of David Publicover ¶¶8–16. As one paper recently summarized:

> The five million acre Western Maine Mountains region is a landscape of superlatives. It includes all of Maine's high peaks and contains a rich diversity of ecosystems, from alpine tundra and boreal forests to ribbed fens and floodplain hardwood forests. It is home to more than 139 rare plants and animals, including 21 globally rare species and many others that are found only in the northern Appalachians. It includes more than half of the United States' largest globally important bird area, which provides crucial habitat for 34 northern woodland songbird species. It provides core habitat for marten, lynx, loon, moose and a host of other iconic Maine animals. Its cold headwater streams and lakes comprise the last stronghold for wild brook trout in the eastern United States. Its unfragmented forests and complex topography make it a highly resilient landscape in the face of climate change. It lies at the heart of the Northern Appalachian/Acadian Forest, which is the largest and most intact area of temperate forest in North America, and perhaps the world. Most importantly, the Western Maine Mountains region is the critical ecological link between the forests of the Adirondacks, Vermont and New Hampshire and northern Maine, New Brunswick and the Gaspé.

See id. ¶9. Many Mainers choose to visit or live in or near the region, to hunt, fish, hike, and otherwise appreciate the largely unfragmented and undisturbed environment. *See generally*, Declarations of Robert Bryan, Carey Kish, Monica McCarthy, and Todd Towle.

On March 26, 2019, the Corps issued a Public Notice for CMP's Permit application for a proposed project to build an electrical transmission line corridor and related facilities from the Canadian border in Beattie Township, to Lewiston, Maine. *See* Declaration of Kevin Cassidy, Ex. 1 (Public Notice).[1] The Project is being constructed due to its selection to fulfill the "Request for Proposals for Long-Term Contracts for Clean Energy Projects from the State of Massachusetts" ("RFP"), and the line would transmit electricity from hydroelectric dams in Quebec, Canada to southern New England. *Id.* CMP needs a CWA Permit because the Project will impact CWA-jurisdictional waters as it bisects Maine on its way to Massachusetts. *Id.*

Plaintiffs submitted comments in response to the Public Notice. *See* Cassidy Dec., Exs. 2–5 (Sierra Club comments); *see also* Declaration of Nick Bennett ¶9 & n.1. The Corps did not release a draft Environmental Assessment ("EA") or the final EA and Finding of No Significant Impact ("FONSI") for public comment. Bennett Dec. ¶10. Plaintiffs finally received a copy of the final EA and accompanying FONSI ("EA/FONSI") on September 23, 2020, in response to a Freedom of Information Act request. *See* Cassidy Dec. ¶4 and Ex. 6 (hereafter "EA/FONSI").[2] The Corps had signed and approved the EA/FONSI on July 7, 2020. EA/FONSI at 163.

The Project includes a 144.9 mile transmission line corridor with related facilities, broken into four segments. *Id.* at 2. Segments 2, 3, and 4 will be built by widening existing transmission

[1] Throughout this brief, Plaintiffs will refer to the proposed project as "the Project." In exhibits or declarations, the Project may also be referred to as "New England Clean Energy Connect," or "NECEC."
[2] The EA/FONSI that Plaintiffs received from the Corps only included page numbers through page 70. For the Court's and the parties' convenience, Plaintiffs have added page numbers to the remainder of the document.

line corridors. *Id.* at 5–6. A fifth section, Segment 5, is a 26.5-mile long transmission line that will be built in a separate, existing corridor. *Id.* at 2; *see also* Cassidy Dec., Ex. 7 (CMP maps of Project). While the other Segments will have numerous detrimental impacts to the environment and people who live and recreate in these areas, the most significant environmental impacts will flow from Segment 1: a new, 53.1 mile transmission line corridor cutting through the heart of the Western Maine Mountains from the Quebec/Maine border in Beattie Township to The Forks Plantation, Maine. EA/FONSI at 4. The right-of-way ("ROW") for the corridor is 300 feet wide, and the transmission line will be constructed along the southernmost 150 feet of the ROW. *Id.* For 39.02 miles of the new corridor, the middle 54-feet will be entirely cleared of the existing forest during construction and then maintained as scrub-shrub habitat. *See* Maine Department of Environmental Protection, Findings of Fact and Order in the Matter of Central Maine Power Company (May 11, 2020) (hereafter "DEP Order") at 43 and Appendix C-5.[3] The line will pass beneath the Kennebec River via horizontal directional drilling, which will require termination stations on both sides of the River. *Id.* at 4–5. All in all, Segment 1 will cross 481 freshwater wetlands; 300 rivers, streams, or brooks, 223 of which contain coldwater fisheries habitat, and including the Upper Kennebec River, a state-listed Outstanding River Segment; and six Inland Waterfowl and Wading Bird Habitats. EA/FONSI at 4.[4] Segment 1 will result in the clearing of 303.5 acres of forest. Cassidy Dec., Ex. 8 at 14.[5] This includes 8.24 acres of forested wetland that will be converted to a scrub-shrub or emergent habitat type, and forest cover for 110 vernal pools

[3] The DEP Order is available at https://www.maine.gov/dep/ftp/projects/necec/2020-05-11-final-department-order.pdf (last visited Nov. 8, 2020).
[4] CMP compiled a series of maps shows the transmission corridor overlaying the aquatic resources (hereafter, "Aquatic Resources Maps"). The maps for Segment 1 are available at https://www.maine.gov/dep/ftp/projects/necec/applications/hdd-amend/NECEC%20Natural%20Resources%20Maps_Seg1.pdf (last visited Nov. 9, 2020). Maps for the other segments (filenames starting "NECEC Natural Resource Maps") are available at https://www.maine.gov/dep/ftp/projects/necec/applications/hdd-amend/ (last visited Nov. 8, 2020).
[5] Segments 2 through 5 include an additional 734.5 acres of clearing. Cassidy Dec., Ex. 8 at 14–18.

will be affected. EA/FONSI at 4.

Massachusetts had originally selected New Hampshire's "Northern Pass" transmission line project to fulfill its RFP. *Id.* at 99. As with the CMP Project, Northern Pass required numerous local, state, and federal approvals and permits, including both a Presidential Permit issued by the U.S. Department of Energy ("DOE") and a CWA section 404 Permit from the Corps. *See* 76 Fed. Reg. 7828, 7828–30 (Feb. 11, 2011). DOE was the lead agency in charge of NEPA and the Corps was a cooperating agency. *Id.* at 7828. The agencies completed an EIS for Northern Pass. 82 Fed. Reg. 39424 (Aug. 18, 2017). Ultimately, Northern Pass failed to receive the requisite state-level approval. EA/FONSI at 99. Unable to get its electricity through New Hampshire, Massachusetts turned to Maine, and CMP's proposed Project. *Id.*

II. Mainers' Opposition to the Project, and State Administrative and Legal Actions

Mainers strongly oppose the CMP Project. Twenty-five towns along the transmission corridor's route voted to oppose or rescinded their support of the Project. Bennett Dec. ¶14. A statewide survey of Mainers conducted in March 2019 revealed that 65 percent of Mainers opposed the Project and only 15 percent of Mainers expressed support for the Project. *Id.* ¶11. Additionally, project opponents gathered more than 66,000 certified signatures in support of a ballot measure aimed at preventing the Project. *Id.* ¶12. The Maine Supreme Court ultimately invalidated this measure, but citizens are in the process of gathering signatures for a similar measure that would appear on the November 2021 ballot. *Id.* ¶13.

Plaintiffs NRCM and AMC intervened and testified in opposition to the Maine DEP's issuance of two state permits CMP needed for the Project. *See* Bennett Dec. ¶¶5–6; Declaration of

Susan Arnold ¶6.[6] In May 2020, DEP granted CMP these permits. Bennett Dec. ¶7. NRCM and others are appealing the DEP's decision to Maine's Board of Environmental Protection. *Id.* ¶8. If any of these appeals succeed, the Project could not move forward.

III. The Corps' CWA Permit and DOE's NEPA Analysis and Presidential Permit

On August 19, 2020, the Corps transmitted the initial proffered CWA Permit to CMP. *See* Cassidy Dec., Ex. 9. CMP did not accept this Permit but instead, on August 31, 2020 sent the Corps several objections to special conditions in the Permit. *See* Cassidy Dec., Ex. 10. Among other objections, CMP objected to Special Condition 3, which prohibited it from starting work until DOE issued a Presidential Permit for the Project. *Id.* at 1–2. DOE has not yet issued a Presidential Permit for the Project, which is required because the electrical transmission line crosses an international border. Ex. Order No. 10485 (1953), *as amended by* Exec. Order. No. 12038 (1978).[7] DOE is conducting its own NEPA analysis separate from the Corps' analysis. *See* EA/FONSI at 1. The scope of DOE's NEPA analysis is unknown. However, for Northern Pass, the scope was broad and included the environmental impacts for the entire project "in accordance with NEPA and the CEQ regulations."[8] The scope of DOE's NEPA analysis for the CMP Project maybe equally broad, especially because, as discussed *infra*, the Corps' NEPA analysis was overly narrow in scope. DOE intends to release its EA for a 30-day public comment period prior to issuing the Presidential Permit, and that release has not yet occurred. Cassidy Dec, Ex. 11 at 2.

On November 6, 2020, the Corps transmitted the final and fully executed CWA Permit to

[6] Plaintiffs' declarants David Publicover, Dr. Aram Calhoun, Ronald Joseph, and Jeffrey Reardon, submitted written and oral testimony in opposition to the Project during the DEP proceedings. NRCM submitted this testimony to the Corps, *see* Bennett Dec., ¶9 & n.1, and thus it should be part of the Administrative Record in this matter.

[7] The Presidential Permit docket for the Project (No. PP-438) is available at https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulation/pending-applications (last visited Nov. 8, 2020).

[8] *See* Northern Pass EIS Vol. 1, at 1-5, *available at* https://www.energy.gov/nepa/downloads/eis-0463-final-environmental-impact-statement (last visited Nov. 10, 2020); *see also id.* at Vol. 2, Appendix B, at B-1-B-5.

CMP. *See* Cassidy Dec., Ex. 12. The final permit does not include Special Condition 3. *Id.* at Permit p.13. The final permit includes other changes to the permit conditions, including requiring a Work Start Notification form at least four weeks before CMP begins construction. On November 4, 2020, Defendant Atilano signed an addendum to the EA that explained the changes to the special conditions. *See* Cassidy Dec., Ex. 13. The EA Addendum stated its findings did not affect the July 7, 2020 FONSI. *Id.* at 3. On November 6, 2020, the same day the permit was finalized, CMP submitted its Work Start Notification Form to the Corps, which states CMP proposes to start work on December 4, 2020.[9] Cassidy Dec., Ex. 14.

LEGAL BACKGROUND

I. The National Environmental Policy Act

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1 (July 2020).[10] Among the purposes of the statute are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken," and to "help public officials make decisions that are based on understanding of environmental consequences …." *Id.* § 1500.1(b)-(c). To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a "detailed" environmental impact statement ("EIS") regarding all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

To determine if a project will "significantly" affect the environment and require an EIS, "NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27 (July 2020).

[9] On a November 9, 2020 conferral call with counsel for the Corps and CMP, CMP counsel confirmed December 4, 2020 as the date the 28-day waiting period ended and that CMP intended to start construction "promptly thereafter."
[10] The Corps issued its FONSI for the Project on July 7, 2020, prior to the new NEPA regulations taking effect on September 14, 2020. Accordingly, the applicable NEPA regulations for this matter are the regulations effective as of July 7, 2020, which the Corps cited in the EA/FONSI and which Plaintiffs set forth herein. For the Court's convenience, Plaintiffs include the cited regulations in an Addendum to this memorandum.

Context refers to "significance of an action...in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." *Id.* at § 1508.27(a). Intensity "refers to the severity of impact" and involves the consideration of several factors, including, but not limited to:

> (1) Impacts that may be both beneficial and adverse….
> (2) The degree to which the proposed action affects public health or safety.
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, … wetlands, … or ecologically critical areas.
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
> (6) The degree to which the action may establish a precedent for future actions with significant effects.
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts…
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. § 1508.27(b). The presence of "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

The scope of NEPA's environmental effects review is broad, including consideration of direct, indirect and cumulative impacts on "ecological … aesthetic, historic, cultural, economic, social, or health" interests. 40 C.F.R. § 1508.8 (July 2020). "Indirect effects" are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* "[R]easonable foreseeability means that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (internal quotes omitted).

If an agency is uncertain whether an action will have a significant effect on the environment, the agency may begin the environmental review process by preparing an

environmental assessment ("EA"). 40 C.F.R. §§ 1501.3, 1508.9 (July 2020). If the conclusion of the EA is that the action clearly will not have a significant effect, then the EA should culminate in a Finding of No Significant Impact ("FONSI"). *Id.* §§ 1501.4(e), 1508.13. The agency must supply a convincing statement of reasons to explain why a project's impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a "hard look" at the potential environmental impact of a project. *See Dubois*, 102 F.3d at 1284. If substantial questions are raised, an EIS must be prepared. 40 C.F.R. § 1501.4(c) (July 2020).

II. Clean Water Act

The CWA prohibits the discharge of pollutants, including dredge and fill material, into waters of the United States without a permit. 33 U.S.C. § 1311(a). CWA section 404 authorizes the Corps to, after notice and opportunity for comment, issue permits for the discharge of dredge or fill material into such jurisdictional waters. *Id.* § 1344. The Corps reviews proposed CWA section 404 permits under its public interest factors and the CWA section 404(b)(1) Guidelines. *See id.* § 1344(b)(1); 33 C.F.R. § 320.2(f). The Corps must deny a permit if it is contrary to the public interest or does not comport with the 404 (b)(1) Guidelines. 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10, 230.12. In this case, the issuance of a CWA permit is a major federal action subject to NEPA. *See, e.g., Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989).

III. The Administrative Procedure Act

The APA provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Only "final agency actions" are reviewable. *Id.* § 704. A final agency action is one that marks the consummation of the agency's decision-making process and one by which rights or obligations have been determined or from which legal consequences flow.

Bennett v. Spear, 520 U.S. 154, 177–78 (1997). An agency's issuance of a FONSI is a final agency action subject to judicial review under the APA. *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815–16 (8th Cir. 2006). A court must "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A court must also "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

STANDARD OF REVIEW

A court may issue a preliminary injunction pending final resolution of Plaintiffs' claims. Fed. R. Civ. P. 65. Courts review four factors when ruling on a motion for a preliminary injunction: (1) whether the plaintiffs are likely to prevail on the merits of their claims; (2) whether the plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of the equities; and (4) whether a preliminary injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). This Court weighs all four factors, but the "*sine qua non* … is likelihood of success on the merits." *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.,* 287 F.3d 1, 9 (1st Cir. 2002). Without citing *Winter*, the First Circuit has applied a "sliding scale" approach to evaluating the factors for issuing a preliminary injunction. *See Braintree Labs., Inc. v. Citigroup Glob. Markets Inc*., 622 F.3d 36, 42–43 (1st Cir. 2010). Regardless of whether the Court applies the sliding scale approach, Plaintiffs' arguments show they have met their burden.

ARGUMENT

I. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

An injury is "irreparable" if it "cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). For cases

alleging irreparable harm to plaintiffs' members based on harm to the environment, irreparable harm to the environment "necessarily means" irreparable harm to plaintiffs' interests in that environment. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987).

The leading NEPA case in the First Circuit examining irreparable harm is *Sierra Club v. Marsh*. In *Marsh*, the plaintiffs challenged an EIS and sought a preliminary injunction. 872 F.2d at 497–99. The district court found the plaintiffs had failed to show "irreparable environmental injury" because work done on the project could be removed and the affected habitat could be restored. *Id.* at 499. The First Circuit reversed, reaffirming its holdings in *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), that "if any [important] decision is made without the information that NEPA seeks to put before the decisionmaker, the harm that NEPA seeks to prevent occurs," and "courts are to take account of that kind of harm when they consider whether to enjoin governmental actions that plaintiffs claim violate NEPA." *Id.* at 497. The *Marsh* Court elaborated:

> [T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steamroller, once started, still seems to us … a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction."

Id. at 504 (citations omitted). In other words, when considering preliminary injunctions based on NEPA violations, the potential harm to the environment stemming from the project for which the NEPA analysis was conducted is attributable to the NEPA violation itself.

Here, the Project will irreparably harm the environment. Segment 1 will cleave through the Western Maine Mountains, a largely undeveloped area notable for its relatively natural forest

composition, lack of permanent development, and high level of ecological connectivity. Publicover Dec. ¶¶7–16. The new corridor will cause the permanent loss or degradation of nearly 1,000 acres of forest habitat, reduce forest connectivity, fragment the landscape, and create a barrier to species needing to cross the corridor, isolating populations from one other. *Id.* ¶¶30, 36–37. Species that avoid large openings or extensive shrub or regenerating forest habitat, such as American marten, some salamander species, and wood frogs, will be most affected by the fragmentation. *Id.* ¶¶38–39. The new corridor will cause many problematic "edge effects," including increased penetration of light and wind, increased temperatures, lower humidity and soil moisture, and increased blowdown and growth of understory and early successional vegetation, that will cause a decline in the interior forest habitat reaching as much as 150 to 300 feet into the adjacent forest. *Id.* ¶¶31–32, 34. The corridor's linear nature maximizes the "edge zone." *Id.* ¶35. Species that avoid edges are more likely to be species of high conservation concern. *Id.* ¶¶32, 33.

Beyond the harms due to forest fragmentation from the new corridor, the Project will cause other significant and irreparable harms to the environment. The Project will fill numerous vernal pools and wetlands and convert acres of forested wetlands to scrub-shrub habitat, irreparably damaging these waters and causing significant harm to the species that depend on them for survival. *See generally*, Declarations of Dr. Aram Calhoun (explaining importance of vernal pools and focusing on harm to vernal pools in Segment 1) and Matt Schweisberg (explaining same regarding wetlands). The Project will transect 22 deer years, including the Upper Kennebec Deer Wintering Area, causing negative impacts to deer populations and deer habitat. Declaration of Ron Joseph ¶16–17. And Segment 1 will cut through some of the largest blocks of intact coldwater aquatic habitat in the Northeast, a resource of national significance and the "last true stronghold for brook trout in the United States." Declaration of Jeff Reardon ¶¶11, 13–15. It will cross some

of the best brook trout streams multiple times. *See id.* ¶19. The Project will permanently degrade these irreplaceable streams by removing vegetative cover in and around the streams and leaving inadequate riparian buffers that will not provide for sufficient shading, recruitment of organic matter and large woody debris, and bank stabilization. *Id.* ¶¶17, 30–33. The measures that CMP will employ to minimize impacts of the Project to brook trout and cold-water fisheries are likewise inadequate. *Id.* ¶¶33–38. Moreover, increased access to the area due to the ROW may result in the introduction of non-native fish species that compete with or prey on brook trout. *Id.* ¶28.

These impacts—especially those caused from Segment 1—will irreparably harm Plaintiffs' members, who visit the area affected by the Project to hike, fish, hunt, boat, camp, and view wildlife and birds. *See generally*, Declarations of Robert Bryan, Carey Kish, Monica McCarthy, and Todd Towle. These members place immense value on the natural beauty of the area, the scenic panoramic vistas, and the aesthetic, recreational, professional, and economic opportunities available due to this undeveloped environment. For example, NRCM member and fly-fishing guide Todd Towle has spent more than twenty years guiding fishing clients to the remote brook trout streams in the region. Towle Dec. ¶¶1–7. The Project will cause irreparable harm to Mr. Towle and his business through its impacts to brook trout and their habitat, and mar the aesthetic experience of fishing and recreating in the remote, wild woods and waters of Maine. *Id.* ¶¶8–20. AMC member Carey Kish has hiked every trail in the region to be affected by the Project. Kish Dec. ¶¶3–12. Mr. Kish hikes these trails for recreational pleasure and enjoyment, as an alternative to the "daily grind" of home and work, and to renew and refresh amid Maine's natural beauty. *Id.* ¶¶3–12, 14. The Project will cause Mr. Towle, Mr. Kish, and Plaintiffs' other members irreparable harm by decreasing the enjoyment and the outdoor experience they receive from visiting the affected area, and cause them to recreate elsewhere and/or visit the area less.

II. Plaintiffs Are Likely To Succeed On the Merits of Their Claims.

A. The Corps' EA Is Arbitrary and Capricious.

Plaintiffs are likely to succeed on their Second Claim for Relief that the Corps' EA is arbitrary, capricious, an abuse of discretion, or otherwise contrary to NEPA.

1. The Corps Improperly Narrowed the Scope of its NEPA Analysis.

Although the Corps' jurisdiction is based on impacts to waters of the United States, because the Corps has "sufficient control and responsibility" over the entire Project, the scope of its NEPA analysis must include all environmental impacts from the Project. *See* 33 C.F.R. Part 325, Appendix B(7)(b)(2), (3). "The Corps has 'control and responsibility' for portions of the project … where the environmental consequences of the larger project are essentially the products of the Corps permit action.'" *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121 (9th Cir. 2005) (quoting 33 C.F.R. Part 325, Appendix B(7)(b)(2)). "[I]t is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility. The Corps' responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all." *Id.* at 1122.

The Corps' NEPA regulations set forth several "typical" factors it must consider when determining the scope of its analysis, including "whether or not the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project"; "[w]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity"; "[t]he extent to which the entire project will be within the Corps jurisdiction"; and "[t]he extent of cumulative Federal control and responsibility." 33 C.F.R. Part 325, Appendix B(7)(b)(2). The Corps, applying these factors, limited its scope "to the proposed impacts to waters of the U.S. and the immediately surrounding

uplands to facilitate the regulated work." EA/FONSI at 40. This determination was in error.

First, the Corps' regulated activity is not "merely a link" in the Project. The jurisdictional waters are not located all together in one portion of the corridor, but rather are prevalent throughout the length of the corridor. *See generally*, *supra* n.4 (citing Aquatic Resources Maps); *see also* EA/FONSI at 37 ("Wetland resources, are spaced throughout the corridor[.]"). Second, the presence of jurisdictional waters in the ROW affected the location and configuration of the transmission line. For Segment 1, the Corps considered, and ruled out, zig-zagging the transmission line through the 300-foot ROW or placing the transmission line along the northern side of the ROW because neither of these alternatives would result in less impact to waters of the United states. *Id.* 94–95. Third, that 17 percent of the corridor is comprised of jurisdictional waters "spaced throughout the corridor," *id.* at 37, 40, shows the scope of the Corps' jurisdiction extends to the entire Project. Moreover, if Corps did not issue the Permit, the Project could not go forward at all. *See id.* at 59 (Corps' "no action" alternative"); *see also Flowers*, 408 F.3d at 1122 (recognizing importance of fact that entire project would be halted if permit were denied when evaluating proper scope of Corps' NEPA analysis). "Lastly, there is significant cumulative federal control and authority over the Project. Beside the Corps, DOE must issue a Presidential Permit for the Project, and the Federal Energy Regulatory Commission is responsible for transmission rate approval and interconnection and operating agreement. EA/FONSI at 39.

The factual situation here is very similar to the situation in *Stewart v. Potts*, where plaintiffs challenged the Corps' issuance of a CWA permit to fill in wetlands for a golf course. 996 F. Supp. 668, 672 (S.D. Tex. 1998). The Corps in *Stewart* argued it need not consider the upland impacts of the Project, including impacts from forest fragmentation, because it lacked jurisdiction over those impacts. *Id.* at 680. The court rejected this argument, stating:

> Although the Corps attempts to create the inference that the two acres of wetlands are in a nice, neat square of land, and that the "upland" area beyond this square cannot possibly be considered to be within the navigable waters over which the Corps has jurisdiction, it is undisputed that the two acres of wetlands that will be directly impacted are scattered throughout the 200–acre tract. The impacted wetlands range in size from a couple of feet in diameter to less than one-quarter of an acre each. These facts lead the Court to the inescapable conclusion that the Corps' characterization of the project as a filling of the wetlands separate and distinct from the clearing of forest located on those wetlands is irrational. To suggest that the Corps has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which co-exist underneath those very trees, is asinine on its face, and an impermissible abdication of a federal agency's duties under NEPA.

Id. at 682–83 (internal footnote omitted). Here, just as in *Stewart,* the waters are "widely dispersed over the length of the project," range in size (including many small waters), and together make up approximately 17 percent of the corridor. EA/FONSI at 40, 104; *supra* n.4 (Aquatic Resources Maps). The Corps' argument that it has to consider impacts to wetlands from cutting down the trees around them, but does not have to consider *other* impacts relating to cutting down those same trees, including the impacts of forest fragmentation, is "an impermissible abdication of [the Corps'] duties under NEPA." *Stewart*, 996 F. Supp. at 683; *see also* EA/FONSI at 47 (excluding forest fragmentation impacts from the scope of NEPA analysis); 33 C.F.R. Part 325, Appendix B(7)(b)(3) (stating where "the Corps permit bears upon the origin and destination as well as the route" of a major portion of a utility transmission project, the scope of the Corps' NEPA analysis "should include portions of the project outside the boundaries of" Corps jurisdiction).

2. The Corps Did Not Adequately Define the Baseline Conditions of the Affected Environment or Consider the "No Action" Alternative.

Establishing the baseline conditions of the environment that would be affected by a proposed project is a critical component of the NEPA analysis. "Without establishing the baseline conditions which exist … before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to

comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Here, the Corps' discussion of baseline conditions is inadequate, especially for Segment 1. *See* EA/FONSI at 34–36. Beyond a "waterbody table" purportedly included in the administrative record, the conditions of the baseline environment is vague sparse and vague. *See e.g.*, *id.* at 34 (providing general description of Segment 1 and vague list of wetland functions and benefits). These cursory descriptions do not satisfy NEPA's requirements. The Corps fails to describe the value and significance of the area, the connected nature of the forest, and the relative absence of large fragmenting features, and the brook trout resource. *Id.*; *see also* Publicover Dec. ¶19; Reardon Dec. ¶16. There is no explanation regarding what the Corps means by "heavily managed" forest or the nature or scope of those management activities. EA/FONSI at 34. In the absence of an adequate baseline, the EA summarily minimizes the impacts of the new corridor by discounting the value of the existing forest merely because it contains managed timberlands. *See e.g.*, *id.* at 11 (stating Segment 1 will be "in an area that has been dominated by industrial scale timber harvesting for over 100 years"); *see also* Publicover Dec. ¶¶20–23. In fact, the area is largely unfragmented and undeveloped, and the timber harvesting that occurs is primarily partial harvesting that retains some overstory. *Id*.

The Corps evaluates a project's impacts by comparing them to the baseline conditions, i.e., impacts of the "no action" alternative. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (stating the purpose of the "no action" alternative is to "provide a baseline against which the action alternative … is evaluated") (internal quotes omitted). But because the Corps did not adequately set forth and analyze the baseline conditions of the Project area, the Corps could not properly compare the "no action" alternative to the Project and determine the actual impacts to the baseline conditions. *See Oregon Nat. Desert Assoc. v. Jewell*, 840 F.3d

562, 568–70 (9th Cir. 2016) (finding it was impossible for agency to assess impacts from project without appropriate data regarding baseline conditions).[11]

3. The Corps Ignored or Did Not Take a "Hard Look" at the Direct, Indirect, and Cumulative Effects of the Project.

The Corps must take a "hard look" at the direct, indirect, and cumulative effects of the Project on the environment. *See Dubois*, 102 F.3d at 1284. The Corps failed to do so. First, because the Corps did not adequately establish the baseline conditions of the affected area, it could not determine the impacts to that area from the Project. Second, because the Corps improperly narrowed the scope of its analysis, it ignored or only cursorily discussed many of the direct, indirect, and cumulative effects of the Project. *See* EA/FONSI 138–39 (explaining that direct and indirect effects considered were limited to only effects to waters of the U.S.); *id.* at 142–43 (only evaluating cumulative impacts of actions resulting from direct and indirect impacts to aquatic resources). One of the most significant effects the Corps neglected to consider was the effect of forest fragmentation in Segment 1. *See id.* at 47 ("The limited extent of USACE scope of authority in this Project has been repeatedly noted in this EA. As such, activities occurring on uplands that are outside our control and responsibility, e.g. upland forest conversion/fragmentation are not discussed in great detail or considered further."); *see also* Publicover Dec. ¶¶24-40 (discussing impacts from forest fragmentation). The Corps also failed to consider environmental justice impacts, in particular impacts to indigenous communities in Canada, *see* EA/FONSI at 52; *see also* Cassidy Dec., Ex. 15 (letter from First Nations to DOE regarding Project); impacts to deer, *see generally*, Declaration of Ronald Joseph; climate change impacts, including whether the Project

[11] The Corps' "no action" alternative also is inadequate because it depends on the assumption that if the action does not occur, the purported project benefits will not be achieved. EA/FONSI at 59. The EA contains no analysis of whether the Project is the only way to achieve reduced regional GHG emissions. *See generally*, EA/FONSI. If this project were not built, Massachusetts would choose a different project that would reduce GHG emissions, as required by the legislation.

would actually result in GHG reductions[12]; and impacts from opening up the area to more traffic, which could introduce invasive species to the area.

Third, the Corps flipped the environmental impacts analysis on its head: instead of starting at the baseline and focusing on impacts to that baseline, the Corps started with the Project and all its associated impacts, and focused instead on how CMP would avoid and minimize those impacts. *Cf.* EA/FONSI at 2–8 (section titled "Description of activity requiring permit") *with* EA/FONSI at 9–19 (section 1.3.1, titled "Proposed avoidance and minimization measures"). This leads to a very one-sided analysis that emphasized how the Project will avoid or minimize certain impacts instead of looking at the actual impacts the Project will have on the environment. A good example of this is herbicide use: the Corps acknowledged CMP may use herbicides, but instead of analyzing the effects of the herbicides practices CMP will use, the Corps instead focused on restrictions to CMP's use of herbicides. *See e.g.*, *id.* at 10, 13, 16, 56. Similarly, the Corps acknowledged the Project might introduce invasive plant species to the area, but only considers what CMP will do to address such species and not what the impacts from such species would be. *Id.* at 139.

Even for effects the Corps did consider, the EA's analysis is inadequate, largely just listing numbers and percentages of aquatic resources that will be affected and forested wetlands that will be converted. *See id.* at 3–7. However, there is no discussion of the ecological significance of these resources, and how the loss of or impacts to these resources will actually affect the environment, including, e.g., how the impacts to wetlands and vernal pools will affect amphibians that depend on these resources for survival. *See* Calhoun Dec. ¶¶17, 23–25 discussing impacts to vernal pools in Segment 1). Simply reciting numbers and percentages, without explaining what these numbers

[12] Without independent analysis or verification, the Corps adopted CMP's and Hydro-Quebec's statements that the Project will reduce GHG emissions and not require new dams in Canada. *See* EA/FONSI at 53–54. However, the Corps was presented with significant evidence that the Project may have no impact, or result in an increase in GHG emissions, and may contribute to the construction of new dams in Canada. *See, e.g.*, Hager Dec. ¶¶5–17.

actually *mean* in terms of impacts to the environment, is not an adequate NEPA analysis. *See* Schweisberg Dec., ¶32; *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1223–24 (9th Cir. 2008) (finding EA inadequate where it was "devoid of meaningful analysis" and agency failed to explain "*why* its [action] will not have a significant effect") (emphasis in original).[13]

The Corps also improperly assumed that the hundreds of aquatic resources subject to aerial crossings of the transmission line would not be impacted and thus were "avoided" by the Project. *See e.g.*, EA/FONSI at 4 ("[A]erial crossings do not include impacts to waters of the US, thus these resources have been avoided."). But these resources will be directly impacted by the clearing of the corridor during construction, the conversion of the corridor from forest to scrub-shrub habitat, and the ongoing vegetative maintenance work CMP will conduct. The EA does not even address the fact that, for 39.02 miles of the new corridor, all vegetation within a 54-foot wide swath of the corridor will be cut to ground during initial construction, *see* DEP Order, Appendix C-5, and instead only mentions that this area will be "maintained" in scrub-shrub habitat. *See* EA/FONSI at 17 ("CMP will manage the remainder of Segment 1, approximately 39.02 miles, in a tapered configuration, where only a width of 54 feet will be cleared of tall vegetation and maintained in a scrub-shrub condition."). There is no discussion of the impacts of the clearing or the ongoing vegetative management to the many aquatic resources in the corridor. This is a violation of NEPA.

B. The Corps Violated NEPA by Failing to Complete An EIS.

Federal agencies must prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). To determine if a project will "significantly" affect the environment, "NEPA requires considerations of both context and

[13] In addition, the EA is largely silent as to effects due to the Project's horizontal directional drilling under the Kennebec River, and the discussion that is included contains unsubstantiated generalizations. EA/FONSI at 13–14.

intensity." 40 C.F.R. § 1508.27 (July 2020). Here, the Project is significant in every context, and nearly all the NEPA intensity factors weigh in favor of an EIS. *See Ocean Advocates*, 402 F.3d at 865 (the presence of "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances"). Accordingly, Plaintiffs are likely to succeed on their First Claim.

1. The Project's Context Demonstrates the Need for an EIS.

The Project's purpose and need is the starting point for understanding its significance to society as a whole, the affected region, the affected interests, and the affected localities. *See* 40 C.F.R. § 1508.27(a) (July 2020). The EA/FONSI describes the Project's purpose and need as delivering "up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Area" to "provide renewable energy to help Massachusetts meet its greenhouse gas (GHG) emissions reduction goals." EA/FONSI at 41.

Society as a whole is affected by GHG emissions, which is what the Project purportedly seeks to address. But there is serious and significant disagreement as to whether this Project will result in the reduction of GHG emissions. *See infra* at 26–28; *see also* Declaration of Bradford Hager ¶¶5–17. Further, the Corps focuses on "regional" benefits of GHG emissions. *See id.* ¶4 (listing citations in the EA/FONSI emphasizing local reduction of GHGs). The relevant question, however, is "what would be the change in total *global* emissions of GHGs that would result from NECEC, *not* whether NECEC would give a net reduction in *local* GHG emission in New England." Hager Dec. ¶3. Accordingly, "in order to assess the global impact that NECEC would have on GHG emissions, the GHG emissions from power provided by Hydro Québec must be quantified." *Id*. The Corps does not attempt such quantification; rather it states claims and public concerns about GHG impacts "appear to be unfounded." EA/FONSI at 53. "These are the kind of conclusory statements, based on 'vague and uncertain analysis,' that are insufficient to satisfy NEPA's

requirements." *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) (finding Forest Service's decision not to prepare an EIS arbitrary and capricious).

The EA/FONSI references a DOE peer review of various analyses on the GHG emissions impacts "in New England and neighboring markets," which concluded the Project "would likely result in a reduction of [GHG] emissions[.]" EA/FONSI at 56. There are several problems with the Corps' reference to this review. First, neither DOE nor the Corps has released the review to the public for vetting by experts outside the agencies. Second, DOE has not finished its NEPA review, which will include a comment period. Cassidy Dec., Ex. 11 at 2. Third, despite acknowledging the "large amount of detailed and often conflicting information submitted by both sides" on the GHG emissions issue—enough conflicting information to cause DOE to hire a contractor "with special expertise in this area" to perform a review—the Corps still determined the Project was not significant enough to warrant an EIS. *See* EA/FONSI at 56; Hager Dec. ¶9.

The Project also is significant regionally with respect to its indirect impacts on the development of local, renewable energy projects in Maine. *See* Cassidy Dec., Ex. 16 at 23–27 (excerpt of ENERGYZT Report). The EA/FONSI claims there is "no evidence" that the *operation* of the CMP Project "will suppress statewide renewal energy initiatives." EA/FONSI at 57; *but see* Cassidy Dec., Ex. 16 at 24 (concluding that as a result of the Project "[n]ew renewable developments would face higher costs to connect and higher price premiums, making them less competitive than potential similar renewable developments in other New England locations outside of Maine"). Illogically, the Corps then describes current renewable initiatives in Maine as evidence that the Project will not suppress *future* renewable energy initiatives. EA/FONSI at 57–58. The relevant question, however, which the Corps does not answer, is what will happen to the current renewable energy initiatives once the Project is operational.

Moreover, the interests of the approximately 38 municipalities or townships transected by or adjacent to the transmission route are affected by the Project, many of which oppose the Project. *See* EA/FONSI at 34; Bennett Dec. ¶14. Finally, the Project's acknowledged impacts on the environment, Maine's natural resources, including the Kennebec River and Appalachian Trail, and wildlife species, affect recreational and tourism interests in Maine further demonstrate the threshold for an EIS is met. *See generally*, Declarations of Todd Towle and Carey Kish; *see also* Cassidy Dec., Ex. 19 at 65 (excerpt of Maine Public Utilities Commission ("PUC") Order finding "the perpetually-cleared corridor, and the transmission line located in that corridor, will have an adverse impact on the recreational values in the area in question and, a corresponding impact on tourism and the economy in the host communities").

2. The Project's "Intensity" Strongly Supports the Need for an EIS.

a. The Project Area Contains Unique Characteristics Including Proximity to Ecologically Critical Areas.

Maine's Western Mountains region, through which CMP will cut the transmission corridor, contains many unique characteristics. It is "the heart of a globally significant forest region that is notable for its relatively natural forest composition, lack of permanent development, and high level of ecological connectivity." Publicover Dec. ¶7; *see also* ¶9 (quoting McMahon (2016)); ¶10 (the region "is one of the few areas in the eastern United States that is sufficiently intact and natural to maintain viable populations of almost all native species."); ¶¶12–16 (also noting the area's uniqueness "for outdoor recreational experiences") (quoting MDIFW 2010). The Project also crosses several Outstanding River Segments and Inland Waterfowl and Wading Bird Habitats. EA/FONSI at 4.

In the face of all of the region's exceptional and distinct geographic features, the Corps summarily states Segment 1 "will be almost entirely located within heavily managed commercial

timberlands" and "there are no unique characteristics that will be impacted by the proposed project." EA/FONSI at 160; *but see* Publicover Dec. ¶¶18–23 (explaining why the Corps' adoption of CMP's characterization of the Project area as intensively managed forest is inaccurate); ¶21 (citing to a recent Down East Magazine photo essay on Segment 1)[14]; *cf.* Schweisberg Dec. ¶8 (comparing EA in this case to EIS done for Bangor Hydro-Electric transmission line for 83.8 miles through "mostly commercial timberlands").

The CMP Project area is also in proximity to several ecologically critical areas. Reardon Dec. ¶¶10–15 (explaining importance of region for brook trout). Additionally, "[t]he new corridor would clear and fragment two occurrences of the rare Jack Pine Forest natural community," which is ranked as critically imperiled in Maine. Publicover Dec. ¶¶41–47. In its EA/FONSI, the Corps attempts to limit the scope of "ecologically critical areas" by inserting the word "designated" in front of that term, but "designated" does not appear in the NEPA regulations. *Cf.* EA/FONSI at 160 *with* 40 C.F.R. § 1508.27(b)(3) (July 2020). Even so, the CMP Project will impact *designated* critical habitat for Canada lynx and Atlantic salmon. EA/FONSI at 16–17; s*ee Altamaha Riverkeeper v. U.S. Army Corps of Eng'rs*, 355 F. Supp. 3d 1181, 1193 (S.D. Ga. 2018) (areas can be considered unique for purposes of NEPA analysis due to proximity to habitats for endangered and threatened species). Finally, the corridor will bisect the Upper Kennebec River Deer Wintering Area, "the only remaining substantial deer yard in the entire length of CMP's proposed new stretch of corridor." Joseph Dec. ¶¶17–21; *see also id.* ¶12 (noting that much of Maine's winter yard habitat has been destroyed). The Corps' conclusion that there are no "ecologically critical areas" impacted by the Project, *see* EA/FONSI at 160, is neither credible nor supported by evidence.

[14] The photo essay can be found at https://downeast.com/issues-politics/cmp-corridor/?fbclid=IwAR0HDH1Hg5SmkQsrUBWbS5z2xYdeqsXBKJTCWhZvxSaJJReedotIJGDwRQc (last visited Nov. 8, 2020).

b. The Number, Variety, and Magnitude of the Project's Impacts

The Project will have significant impacts on the unique and ecologically critical areas described above, as well as to other important habitats and communities. Segment 1 crosses 481 freshwater wetlands; 300 rivers, streams, or brooks (of which 223 contain coldwater fisheries habitat); and 6 wading bird habitats. *See* EA/FONSI at 4.[15] The Project would cause immediate and irreparable harm to these important resources. Schweisberg Dec. ¶¶15, 16. For example, the permanent conversion of forested wetlands to scrub shrub wetlands will open the forest canopy and increase the solar heating of the converted wetlands and adjacent areas, which will render habitat less suitable or unsuitable for several types of wildlife; increase the risk of invasive species; increase the risk of storm damage for trees along the margins of the corridor, which leads to even wider openings in the forest canopy. *Id.* ¶¶17–18; *see also* Publicover Dec. ¶¶ 24–40 (detailing the adverse impacts due to fragmentation caused by Segment 1). Other Segments also will impact the environment, in particular the additional widening of the existing corridor in Segments 2 and 3. This widening will result in 713.8 acres of trees/forest being cut. *See* Cassidy Dec., Ex. 8 at 14–16. Wetlands and vernal pools in the newly cleared area will suffer impacts similar to those described above, and "edge effects" from the new Segment 1 corridor and expanded corridors in the other Segments will be pushed out, to encompass new areas of the forest. *See* Schweisberg Dec. ¶¶20–21, 24; Calhoun Dec. ¶19; Publicover Dec. ¶¶31–35.

The Project also presents public safety impacts. Several commenters expressed concerns about the possibility of wildfires caused by the transmission lines, particularly due to rural Maine's lack of fire suppression capacity. *See e.g.*, Cassidy Dec., Ex. 17 (excerpt of DEP/LUPC Testimony by Town of Caratunk). As stated by the Maine Emergency Management Agency, "a major forest

[15] By contrast, the Northern Pass project would have directly impacted only two acres of wetlands and less than 0.5 acres of vernal pools. *See supra* n.8 at Northern Pass EIS Vol. 1, at 2-78.

fire would have a long-term economic impact affecting industry, causing unemployment, serious erosion, loss of wildlife and agricultural land, and significantly impacting the tourism industry."[16] The Project also will affect emergency services needed to respond to wildfires. *See e.g.*, Cassidy Dec., Ex. 18 (Firefighters' Federation letter). Finally, the Project will have significant impacts on the localities through which the transmission line will be built. *See e.g.*, Cassidy Dec., Ex. 19 at 6, 65 (PUC Order excerpt).

c. The Project is Highly Controversial.

The highly controversial nature of the Project is undeniable. For NEPA analysis, the term "controversial" refers to projects where a "substantial dispute exists as to the size, nature, or effect of the major federal action." *Found. For N. Am. Wild Sheep v. U.S. Dep't. of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982). Disagreement among experts or knowledgeable individuals regarding a proposed project's impacts is often regarded as evidence that the project is controversial. *See id.* ("[T]he [agency] received numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and [its] conclusion … [T]his is precisely the type of 'controversial' action for which an EIS must be prepared"); *see also Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (finding a project controversial where "[t]he Sierra Club introduced affidavits and testimony of conservationists, biologists, and other experts who were highly critical of the EAs and disputed the [agency's] conclusion"). Here, as evidenced by the conflicting expert declarations and testimony offered in the state proceedings, in comments to the Corps and as part of this Motion, there are multiple and significant disagreements among experts regarding the Project's impacts. *See generally, e.g.*, Publicover Dec. (disagreeing with Corps about the characterization of the Project area and forest fragmentation impacts, as well as

[16] Maine Emergency Management Agency, Wildfires, *available at* https://www.maine.gov/mema/hazards/natural-hazards/*wildfires* (last visited Nov. 9, 2020).

the purported benefits of mitigation and compensation); Calhoun and Schweisberg Decs. (disagreeing with Corps about impacts to aquatic resources); Reardon Dec. (same regarding impacts to cold water fisheries); Joseph Dec. (same regarding impacts to deer wintering habitat); Hager Dec. (same regarding impacts on GHG emissions).

The Corps sidesteps these significant scientific disagreements by stating there are no objections from federal or state resource agencies regarding environmental impacts. EA/FONSI at 161. But as Mr. Publicover points out this ignores the testimony from three University of Maine faculty members, one of Maine's most widely respected consulting ecologists, and an ecologist from the Maine Chapter of the Nature Conservancy. Publicover Decl. ¶25. The Corps also tries to avoid finding scientific controversy by claiming it has discussed non-aquatic environmental impacts "to the degree that [it] has authority." EA/FONSI at 162. As discussed above, the Corps' unduly narrow view of the scope of its authority is arbitrary.

d. The Project Presents Uncertain Effects and Unknown Risks.

The Project presents several unique risks and possible effects that are highly uncertain. First, it involves the unique risk of horizontal directional drilling under the Kennebec River, an Outstanding River Segment and popular recreational resource. EA/FONSI at 4. Second, Segment 1 presents a unique public safety risk due to fire hazard in a remote region. *See* Cassidy Dec., Ex. 18 (Firefighters' Federation letter). Third, the effects of the Project on GHG emissions remain highly uncertain. *See* Hager Dec. ¶¶9, 16–17. Fourth, the impacts to aquatic and other resources, as well as the ability of proposed mitigation to offset those impacts, are highly uncertain given the Corps' failure to adequately establish baseline conditions of the Project area. *See supra* at 16–18; *see also* Calhoun Dec. ¶¶39–42 (noting uncertainty in Segment 1 vernal pool numbers and the uncertainty that creates for compensatory mitigation); Publicover Dec. ¶¶48–56 (discussing

CMP's inadequate mitigation for forest fragmentation); Reardon Dec. ¶¶18, 39–40. Fifth, the Project's effects on regional sources of renewable energy are highly uncertain and the EA/FONSI does not resolve this uncertainty. *See* Cassidy Dec., Ex. 16. The Project also presents highly uncertain effects on local economies, specifically related to impacts on tourism and recreation-based businesses. *See e.g.*, Cassidy Dec., Ex. 19 at 6 (PUC Order excerpt finding "the effects of the Project on scenic and recreational values, and the associated impacts on tourism and the economies of communities in proximity to the Project, … will be adverse"). This is not an exhaustive list of the Project's unique risks and highly uncertain effects, but these alone show the necessity for an EIS.

e. Other Intensity Factors Weigh In Favor of an EIS.

Several other intensity factors also point to an EIS being required. The Project will likely set precedent for future actions with significant effect. 40 C.F.R. § 1508.27(b)(6) (July 2020). For example, the Project sets a precedent in allowing additional projects throughout this region, which may result in expanded development (including additional transmission line corridors) in currently undeveloped areas near the transmission line corridor. Indeed, as the EA/FONSI repeatedly states, all but 53.1 miles of the Project's transmission line is being built by widening an existing transmission line corridor, demonstrating the precedential impact of existing corridors on future actions. For Segment 1, the right-of-way is 300 feet wide, EA/FONSI, at 4, of which the current corridor will only use 150 feet, leaving 150 feet for future development in the same way the current corridors are being widened for this Project.

The potential violation of local laws is another prominent intensity factor here, where 25 municipalities along the transmission corridor either oppose or have withdrawn their support for the Project. *See* 40 C.F.R. § 1508.27(b)(10) (July 2020); Bennett Dec. ¶14. At least two towns

along the Project's route have enacted electric transmission line ordinances regulating the construction and operation of transmission lines. *See id*. ¶15. The EA/FONSI did not address whether the Project would violate these ordinances and any other local laws. EA/FONSI at 162 (only noting "[p]otential violation of state or federal law"). Moreover, there are three ongoing appeals challenging the DEP's decision to grant the required state permits. Bennett Dec. ¶8.

Lastly, the cumulative impacts of the Project also weigh in favor of an EIS. 40 C.F.R. § 1508.7 (July 2020) (defining "cumulative impacts" and stating such impacts "can result from individually minor but collectively significant actions taking place over a period of time"). The Corps acknowledges other past, present, and future projects that have or may affect aquatic resources. EA/FONSI at 142, 146, but because of the improper scope ignored other possible cumulative impacts including *e.g.*, cumulative impacts to the forest and habitat fragmentation. Regardless, the cumulative impacts acknowledged by the Corps demonstrate the need for an EIS.

C. The Corps Failed to Provide Opportunity for Public Comment on the EA/FONSI.

Plaintiffs also are likely to succeed on their third claim, which alleges the Corps violated NEPA by failing to provide opportunity for public comment on the EA/FONSI. NEPA's implementing regulations require agencies "make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a) (July 2020). Here, despite numerous requests to release the draft EA for public comment, the Corps refused to do so. For such a controversial project, there is little doubt that a "diligent effort to involve the public" should have included allowing the public to comment on the draft EA.

Furthermore, the CEQ has been clear that "where the [original] proposal so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation," an agency can rely on those measures to reach a FONSI but it "should make the

FONSI and EA available for 30 days of public comment before taking action." CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18038 (Mar. 23, 1981). Here, the EA is clear that the project, as originally proposed, relied heavily on mitigation measures, but the Corps nonetheless did not put the EA out for public comment. *See e.g.*, EA/FONSI at 9–19 (discussing CMP's avoidance and minimization measures, most of which were part of original proposal). Moreover, "[a]s a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement." 46 Fed. Reg. at 18038. The Corps relied on significant mitigation measures developed *after* the original proposal, but nonetheless reached a FONSI instead of doing an EIS. *See* also EA/FONSI at 160 (stating "[t]he permit has been conditioned to further minimize the project's … impacts"). Because the Corps did not put the EA out for public comment even though CMP's original proposal significantly integrated mitigation measures, and because the Corps relied on mitigation measures developed *after* the proposal to reach its FONSI and avoid completing an EIS, the Corps did not act diligently to involve the public in its decision-making process and did not satisfy NEPA's requirements.

D. The Corps' Deletion of Special Condition No. 3 And Issuance of the CWA Permit Without That Condition Was Arbitrary and Capricious and Contrary to Applicable CWA Regulations.

The EA/FONSI listed special conditions that the Corps determined were "required to protect the public interest, ensure effects are not significant and/or ensure compliance of the activity with any of the laws above [in Section 10 of the EA/FONSI]." *Id.* at 153. Special Condition No. 3 stated, "Prior to initiating work authorized by this permit, the permittee must obtain a Presidential Permit from" DOE. *Id.* The Corps included this condition in its initially proffered permit. Cassidy Dec., Ex. 9 at 13. In an August 31, 2020 letter, CMP objected to Special Condition

No. 3, and in response, the Corps eliminated the condition completely, "as it is not necessary to satisfy the public interest requirement and not directly related to the aquatic resource impacts evaluated as part of the Corps review of the NECEC project." Cassidy Dec., Ex. 13 at 1. But the Corps did not explain *why* Special Condition No. 3 was "required" in the final EA/FONSI but then "not necessary" four months later. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotations omitted). The Corps' lack of explanation is glaring given its regulatory guidance stating:

> [p]ermits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the [Corps] permit.

33 C.F.R. § 325.2(d)(4). This is just such an appropriate situation.[17] The Corps and DOE have joint jurisdiction over the Project, and DOE's Presidential Permit is a necessary permit for the Project; without the Presidential Permit, the Project cannot proceed.

Further, when DOE completes its NEPA analysis, it will publish its EA for 30 days of public comment and then, "in coordination with [the Corps]," "evaluate and respond to comments as appropriate." Cassidy Dec., Ex. 11 at 2. Thus, the Corps will play a role in DOE's consideration of public comments on DOE's EA. Likewise, the Corps referenced and relied on a DOE-contracted peer review of various analyses related to the Project's impacts on greenhouse gas emissions, which has not been released to the public. *See* EA/FONSI at 56, 122. By deleting Special Condition

[17] The Corps' regulation also contemplates "in unusual cases" that "the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization." 33 C.F.R. § 325.2(d)(4). This is an "unusual case" given the agencies' shared jurisdiction, separate EAs for the Project, and high level of public controversy surrounding it. Thus, the "prudent" option for the Corps would have been to "advise [DOE] of [its] position on the … permit while deferring [its] final decision." *Id.*

No. 3 and thereby allowing CMP to move forward with construction prior to DOE issuing the Presidential Permit, the Corps risks CMP "biasing [DOE's] review by making substantial resource commitments on the basis of the [Corps] permit." 33 C.F.R. § 325.2(d)(4). Given the shared federal jurisdiction and necessity of the Presidential Permit, it would be "appropriate" for the Corps to allow DOE to conclude its NEPA process prior to authorizing work on the Project. By removing Special Condition No. 3 and not "cogently explain[ing] why it has exercised its discretion" to do so, the Corps violated NEPA and the CWA. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48.

III. The Balance of the Equities and Public Interest Favor Preliminary Relief.

The last two preliminary injunction factors require the Court to weigh the impact on each party of the grant or denial of the requested preliminary injunction and to consider whether the injunction is in the public interest. *See Winter*, 555 US. at 24. When the government is a party, these factors merge. *Cf. Nken v. Holder*, 556 U.S. 418, 428, 435 (2009) (in case considering whether to stay litigation pending appeal, stating the analysis has "some functional overlap" with the preliminary injunction analysis and the last two factors "merge when the Government is the opposing party"); *Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 991 (9th Cir. 2020) (applying *Nken* statement in NEPA case and affirming preliminary injunction).

Here, if the Court denies Plaintiffs' motion, CMP will start work on the Project. *See* Cassidy Dec., Ex. 14. As discussed above, this will significantly and irreparably harm the environment and Plaintiffs' members. It will also harm the public interest. *See Amoco*, 480 U.S. at 545 (when injury to the environment is at stake, "the balance of the harms will usually favor the issuance of an injunction to protect the environment"); *Sierra Club v. Marsh*, 714 F. Supp. 539, 593 (D. Me.), *amended*, 744 F. Supp. 352 (D. Me. 1989), *aff'd*, 976 F.2d 763 (1st Cir. 1992) ("The public interest is better served by a preliminary injunction that ensures maintenance of the *status*

quo pending agency recourse to the NEPA process"). Moreover, the idea that informed decision-making prior to project implementation is in the public interest is embedded into NEPA's purpose. *See id*. ("NEPA implements a *legislative determination* that the public interest is served by ensuring that agency decisionmakers have before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.") (emphasis in original).

In contrast, an order temporarily enjoining the CWA Permit would have little, if any, burden on the Corps. And while CMP may argue a preliminary injunction will cause it and/or the public financial harm, financial harm does not outweigh environmental harm. *See e.g.*, *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1087 (10th Cir. 2004); *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994, 1006 (D.N.H. 1979) (in case challenging failure to prepare an EIS, rejecting argument that public interest weighs against preliminary injunction because of great financial cost to the public because Congress, in enacting NEPA, "determined that the cost of compliance is warranted").

IV. Plaintiffs Have Article III Standing

To demonstrate standing, a plaintiff organization must show (1) it has members who would have standing to sue in its own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim nor the relief requested requires the participation of individual members. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000). Plaintiffs have members who would have standing to sue in their own right. *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 517 (2007) (explaining a person has standing if they have or will suffer an injury that is fairly traceable to the defendant and which is likely to be redressed by a favorable court order). Plaintiffs' members use and enjoy the lands and forests in Maine in the Project area, and the Project will injure these interests. *See generally*, Declarations of Robert

Bryan, Carey Kish, Monica McCarthy, and Todd Towle; *see also Friends of the Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."). These injuries would not occur absent the Corps issuance of the CWA Permit and its failure to comply with NEPA. An order requiring the Corps to vacate the CWA Permit and EA/FONSI would redress Plaintiffs' members' injuries. Moreover, Plaintiffs' members do not need to participate in this case, and there is no question that the interests at stake in this lawsuit are germane to Plaintiffs' purposes. *See* Declarations of Sue Arnold and Huda Fashho; *see also* Bennett Dec. ¶¶2, 4.

V. The Court Should Impose No Bond, or a Nominal One.

The Court has discretion regarding whether to order Plaintiffs to post a bond as security and over the amount of any bond. *See* Fed. R. Civ. P. 65(c) (providing courts may issue preliminary injunctions only if the movant gives security in the amount the court deems "proper"). In the First Circuit, in non-commercial cases, courts consider two factors: (1) "the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant"; and (2) "in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right." *Crowley v. Local No. 82*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

Plaintiffs are non-profit organizations seeking to protect the environment and vindicate the public interest by exercising their federal rights to sue the government for violating NEPA and the CWA. They have no financial interest in the case's outcome. An order requiring more than a nominal bond would impose a significant hardship on Plaintiffs and effectively preclude their

ability to enforce the CWA and NEPA, both in this case and in other cases. Such an order would be contrary to the public interest and congressional intent in enacting these statutes. *See e.g.*, *State of Kan. Ex. rel. Stephan v. Adams*, 705 F.2d 1267, 1269–70 (10th Cir. 1983) (affirming district court's decision to require nominal bond in NEPA case, even where defendants claimed significant costs due to preliminary injunction, where district court had found "only nominal bonds … are imposed in NEPA cases"); *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 similar cases).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their motion for a preliminary injunction.

Respectfully submitted this 11th day of November, 2020.

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ADDENDUM

(NEPA Regulations cited in Plaintiffs' memorandum,
effective on July 7, 2020)

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

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

40 C.F.R. § 1500.1

§ 1500.1 Purpose.

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

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

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

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

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

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

End of Document

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

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

40 C.F.R. § 1501.3

§ 1501.3 When to prepare an environmental assessment.

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

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

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

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

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

End of Document

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

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

40 C.F.R. § 1501.4

§ 1501.4 Whether to prepare an environmental impact statement.

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

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

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

(1) Normally requires an environmental impact statement, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 C.F.R. § 1506.6

§ 1506.6 Public involvement.

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

Agencies shall:

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

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

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

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

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

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

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

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

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

(v) Notice through other local media.

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

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

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

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

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

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

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

(d) Solicit appropriate information from the public.

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

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

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

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

End of Document

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

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

40 C.F.R. § 1508.7

§ 1508.7 Cumulative impact.

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

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

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

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

End of Document

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

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

40 C.F.R. § 1508.8

§ 1508.8 Effects.

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

Effects include:

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

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

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

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

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

End of Document

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

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

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

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

Environmental assessment:

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

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

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

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

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

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

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

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

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

40 C.F.R. § 1508.13

§ 1508.13 Finding of no significant impact.

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

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

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

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

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

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

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits

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

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

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

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2020, I electronically filed PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Susan Ely, Kevin Cassidy, Counsel for Plaintiffs

Jacob Ecker, Kristofor Swanson, Counsel for Defendants

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