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How "Extraordinary" Is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective

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Summary

Despite recent efforts by the U.S. Supreme Court to emphasize the "drastic and extraordinary" nature of injunctive relief, many lower federal courts continue to issue injunctions in cases alleging harm to the environment as if injunctive relief were the norm rather than the exception. Apparently reluctant to accept constraints on the exercise of equitable powers, a number of federal courts have interpreted and applied the governing legal standard as set out in the Supreme Court's 2008 Winter *decision with more latitude than that decision would seem to permit. This circumstance may well lead in time to additional clarification by the Supreme Court. In the meantime, defense practitioners should be prepared to advocate for a strict application of the* Winter *standard, while recognizing that the standard as actually applied by some courts may be somewhat less demanding in practice.*

The U.S. Supreme Court has repeatedly admonished that an injunction is a "drastic and extraordinary" remedy that is only to be granted in exceptional circumstances. Nonetheless, plaintiffs routinely seek—and often obtain—injunctive relief in federal environmental litigation. A motion for a preliminary injunction (or a temporary restraining order) is typically one of the first filings in an environmental lawsuit, especially where the plaintiffs are challenging a permit or approval for a specific project (such as an energy facility or residential development). And if an environmental plaintiff is successful on the merits, the relief sought often includes a permanent injunction.

The traditional legal standard for injunctive relief requires a plaintiff to show that (1) he is likely to suffer irreparable harm absent injunctive relief, (2) he is likely to succeed on the merits, (3) the balance of harms weighs in his favor, and (4) the public interest favors an injunction. Over the past few decades, a number of federal circuits have departed from the strict application of this traditional legal standard, adopting more "flexible" approaches that balance these factors so that a strong showing on one factor may compensate for a weak showing on another. Often, this takes the form of a less demanding requirement to show likely success on the merits where the balance of harms particularly favors the plaintiff. This practice has produced "a bewildering variety of formulations of the need for showing some likelihood of success."[1]

The federal courts' departure from a strict application of the traditional four-factor test has been particularly notable in environmental cases. This movement can be traced in part to the Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*,[2] in which the Court concluded that it had no choice but to enjoin the Tellico Dam project—after construction of the dam was nearly complete at a cost in excess of $100 million—based on the finding that the project would violate the Endangered Species Act (ESA)[3] by jeopardizing the continued existence of the snail darter. Environmental plaintiffs subsequently relied on *TVA* to argue that injunctions are (or should be) favored where harm to the environment is alleged, and some federal courts eventually went so far as to suggest that injunctions are "usual" in environmental litigation.[4] *TVA* has

1. 11A Charles Alan Wright, Arthur Raphael Miller & Mary Kay Kane, Federal Practice and Procedure §2948.3 (2d ed. 1995).
2. 437 U.S. 153, 171, 195. 8 ELR 20513 (1978).
3. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
4. *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756-57, 40 ELR 20167 (2010) (noting that "the District Court cited pre-*Winter* Ninth Circuit precedent for the proposition that, in 'the run of the mill NEPA case,' an injunction delaying the contemplated government project is proper until the NEPA violation is cured") (internal quotations omitted). *See also* Daniel R. Mandelker, NEPA Law and Litigation, §4:55 (2011) ("a number of courts adopted an exception for NEPA cases to the traditional balancing rules courts usually apply when deciding whether to grant a preliminary injunction"); Sarah Axtell, *Reframing the Judicial Approach to In-*

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little relevance for the application of the traditional legal standard for injunctive relief in most environmental cases, however, because it involved an undisputed violation of a particular statutory requirement—§7 of the ESA—that compelled TVA to ensure that its actions did not jeopardize a listed endangered species,[5] and that constrained the Court's discretion to weigh the impact to the snail darter against countervailing considerations, such as the loss of public resources expended on the project.[6]

In recent years, the Supreme Court has called a stop to the use of relaxed standards for injunctive relief in environmental cases. In its landmark decisions in *Winter v. Natural Resources Defense Council, Inc. (NRDC)* and *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court made clear that, even in cases raising claims under environmental statutes, the issuance of an injunction—far from being automatic or even favored— "is a drastic and extraordinary remedy, which should not be granted as a matter of course" and should issue only if the traditional legal standard is strictly satisfied.[7] Not all lower federal courts have faithfully heeded this seemingly clear admonition. A number of courts continue to apply more relaxed or "flexible" standards in considering requests for preliminary injunctive relief, while others go through the motions of applying the standards under *Winter* and *Monsanto*, but without giving genuine effect to the principle that injunctive relief should be limited to truly extraordinary circumstances.

This Article begins with a discussion of the recent Supreme Court jurisprudence regarding injunctive relief in environmental cases, with a particular focus on the decisions in *Winter* and *Monsanto*. This Article next describes the differing ways in which the lower federal courts have interpreted and applied these Supreme Court precedents, including as a case study the U.S Court of Appeals for the Eighth Circuit's recent decision in *Sierra Club v. U.S. Army Corps of Engineers (Corps)*,[8] in which the authors participated and which—the authors submit—fails to faithfully apply the governing legal standard for injunctive relief articulated by the Supreme Court in *Winter*. Finally, this Article offers some practical considerations for practitioners.

I. The Supreme Court's Standard for Injunctive Relief: Strict Application of the Traditional Requirements—Even in Environmental Cases

The Supreme Court's landmark 2008 decision in *Winter* reaffirmed in plain terms the requirement that federal courts must strictly apply the traditional legal standard for preliminary injunctive relief, even in cases involving claims of environmental harm. That case arose in the context of a suit alleging violations of the ESA and the National Environmental Policy Act (NEPA).[9] The plaintiffs sued the U.S. Navy over its use of active sonar during training exercises in the Pacific Ocean, alleging that the sonar harms whales and other marine mammals and that the Navy should have prepared an environmental impact statement (EIS) prior to conducting such training. The district court preliminarily enjoined the Navy's use of active sonar unless the Navy incorporated certain operating restrictions. The district court concluded that the plaintiffs had demonstrated a likelihood of success on their NEPA claims and "at least a possibility of irreparable harm," and that the balance of equities favored an injunction. The U.S. Court of Appeals for the Ninth Circuit affirmed the preliminary injunction.

The Supreme Court reversed, emphasizing that a preliminary injunction "is an extraordinary remedy never awarded as of right," but only "upon a clear showing that the plaintiff is entitled to such relief."[10] The Court explained that its "frequently reiterated standard" for injunctive relief requires a plaintiff seeking a preliminary to establish: "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest."[11] Although the courts of appeal have resisted the notion (as discussed below), the clear import of *Winter* is that these

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junctive Relief for Environmental Plaintiffs in Monsanto Co. v. Geertson Seed Farms, 38 Ecology L.Q. 317 (2011) ("the *Monsanto* decision cuts away at the longstanding judicial approach of granting near automatic injunctions for environmental harms").

5. TVA did not dispute that the dam would "either eradicate the known population of snail darters or destroy their critical habitat" in direct violation of the ESA, which "affirmatively command[s] all federal agencies 'to insure'" against jeopardy to the continued existence, or adverse modification to the critical habitat, of endangered species. 437 U.S. at 171, 173.
6. *Id.* at 194 (in enacting the ESA, Congress was "abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"); *see also* Nat'l Wildlife Fed'n v. Burlington Northern RR, 23 F.3d 1508, 24 ELR 20802 (9th Cir. 1994) (ESA removes "from the courts their traditional equitable discretion in injunction proceedings" and tips the balance of hardships and public interest "heavily in favor of protected species").
7. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376, 38 ELR 20279 (2008); *Monsanto*, 130 S. Ct. at 2757, 2761).
8. 645 F.3d 978 (8th Cir. 2011).
9. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
10. 129 S. Ct. at 376. Chief Justice John Roberts authored the majority opinion, in which Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined. Justice Stephen Breyer filed an opinion concurring in part and dissenting in part, in which Justice John Paul Stevens joined. Justice Ruth Bader Ginsberg filed a dissenting opinion in which Justice David Souter joined.
11. *Id.* at 374-75. These same four factors were previously cited by the Supreme Court as the essential requirements for injunctive relief, including in litigation under environmental laws. *See, e.g.*, Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542, 17 ELR 20574 (1987) (considering claims under Alaska National Interest Lands Conservation Act); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12, 12 ELR 20538 (1982) (considering claims under the Clean Water Act).

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four factors are not to be balanced against one another, but that *each* of the four factors must be met before any injunction may issue.[12] Thus, in *Winter*, after finding that the public interest in effective, realistic training by the Navy to protect national security "plainly outweighs" any possible harm to the ecological, scientific, and recreational interests asserted by the plaintiffs (including whale watching, scientific research, and photography), the Court held that this finding "alone require[d] denial of the requested injunctive relief" regardless of whether the other factors might have supported an injunction.[13] In addition, the Court criticized the lower courts for employing a standard that would grant preliminary injunctive relief based on a showing of only a "possibility" of irreparable harm provided that the plaintiff has demonstrated a strong likelihood of success of the merits, holding that this "possibility" standard was "too lenient."[14] Rather, in every case, there must be a showing that irreparable harm is *likely*.

The Court in *Winter* also pointed out that its conclusion that the public interest was best served by allowing the Navy to conduct sonar training exercises would preclude the imposition of a permanent injunction, even after a finding on the merits that the Navy had failed to satisfy the requirements of NEPA. The Court emphasized that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."[15] Rather, a court must consider factors such as the balance of the equities and the public interest "in assessing the propriety of any injunctive relief, preliminary or permanent."[16]

In its subsequent decision in *Monsanto*, the Supreme Court addressed the standard for permanent injunctive relief in greater depth, citing its decision in *Winter* to emphasize once again the extraordinary nature of injunctive relief and the need for strict application of the traditional requirements. Specifically, the Court held that a permanent injunction may be granted only where the plaintiff demonstrates:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiffs and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[17]

In *Monsanto*, the lower court found that the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) had violated NEPA in deregulating a genetically engineered plant called Roundup-Ready Alfalfa (RRA) without first preparing an EIS (relying instead on a finding of no significant impact (FONSI) after preparing an environmental assessment (EA)). As part of the remedy for that violation, the court set aside the deregulation order and remanded the matter to APHIS to prepare an EIS, and enjoined the agency from deregulating RRA, in whole or in part, until the EIS was completed. The Ninth Circuit affirmed the permanent injunction. The Supreme Court reversed, holding that the permanent injunction did not meet *any* of the four factors under the traditional legal standard noted above.[18] Moreover, the Court criticized the courts below for proceeding "on the erroneous assumption that an injunction is generally the appropriate remedy for a NEPA violation."[19] Relying on pre-*Winter* appellate case law, the district court had determined that an injunction is the proper remedy in "the run of the mill" NEPA case, but could be withheld or limited in scope "in unusual circumstances." The Supreme Court found that this approach "invert[ed] the proper mode of analysis": "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four factor test. . . ."[20] Although the specific requirements for preliminary and permanent injunctive relief differ in some respects, the Supreme Court has emphasized that these standards must be strictly applied in every case, and that there is no special rule for injunctions seeking to avoid alleged harm to the environment.[21]

It is also important to consider carefully the Supreme Court's treatment of "environmental harm" in applying the "irreparable harm" requirement for injunctive relief. Plaintiffs frequently cite the Supreme Court's decision in *Amoco Production Co. v. Gambell*[22] for the proposition that environmental harm by its nature is often "irreparable," and they seek to rely on this general observation to argue that injunctive relief therefore is warranted as a matter of course to prevent harm to the environment. Plaintiffs citing this case, however, usually fail to acknowledge either

12. This reading of the text of *Winter* is consistent with the familiar principle of statutory construction that the use of the conjunctive "and" at the end of a list of requirements means that all of the listed requirements must be satisfied. *See* Norman J. Singer, Statutes and Statutory Construction, vol. 1A §21.14.
13. 129 S. Ct. at 376.
14. *Id.* at 375. The Court noted that it was unclear whether the Ninth Circuit's articulation of the incorrect standard affected its substantive analysis of irreparable harm, which the Ninth Circuit elsewhere characterized as "a near certainty." *Id.* at 376. The Court did not accept the Ninth Circuit's assessment at face value, however, but questioned whether the plaintiffs in fact had made a showing that irreparable harm was likely, noting that the district court failed to consider the likelihood of irreparable injury after the Navy agreed to comply with several of the injunction conditions (such as a 12-mile exclusion zone along the coastline), and that the training exercises had been taking place for 40 years with no documented sonar-related injury to a marine mammal in the southern California region. *Id.*
15. 129 S. Ct. at 381 (citing *Romero-Barcelo*, 456 U.S. at 313).
16. *Id.* (citing *Amoco Production*, 480 U.S. at 546 n.12) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").
17. *Monsanto*, 130 S. Ct. at 2756.
18. *Id.* at 2758.
19. *Id.* at 2756.
20. 130 S. Ct. at 2757.
21. In this regard, *Winter* is consistent with the Court's earlier decision in *United States v. Bestfoods*, 524 U.S. 51, 28 ELR 21225 (1998), in which the Court ruled that the federal Superfund statute did not authorize the adoption of a special federal common-law rule for cases involving environmental contamination that expands on traditional principles of corporate liability.
22. 480 U.S. 531 (1987).

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the Supreme Court's sweeping rejection of any presumption in favor of injunctive relief in an environmental case,[23] or the actual holding of the case—in which the Court reversed the injunction.

More importantly, the standard for injunctive relief under *Winter* requires a showing of harm *to the plaintiff*—not just to the environment. This is a distinction that the Supreme Court has been careful to observe. In *Amoco*, the Court focused not on the alleged harm to the environment from the challenged arctic oil drilling activities, but on the alleged harm to the plaintiffs' subsistence fishing and hunting activities as a result of the environmental impacts of the drilling activities, and ultimately concluded that the monetary harm to the defendants outweighed any such harm to the plaintiffs.[24] Likewise, in *Winter*, the Court focused on the plaintiffs' interest in studying marine mammals, not on the impact to the mammals alone.[25] A plaintiff cannot satisfy the irreparable harm requirement based solely on an impact to the environment, however significant or irreparable, without showing that such environmental impact would cause irreparable harm to a legally cognizable interest of the plaintiff. It is not enough that a wetland will be filled in the absence of an injunction; if the filling of the wetland does not affect the plaintiff (for example, because he does not use the wetland for any recreational, aesthetic, or educational purpose), he is not entitled to a preliminary injunction to stop the filling activity.[26]

II. Grappling With *Winter*: Resistance by the Courts of Appeal

Prior to *Winter*, the federal courts of appeal employed a number of different standards for preliminary injunctive relief. Although the various standards generally focused on the same four traditional factors identified in *Winter*, they did so with varying degrees of emphasis and flexibility. In the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, for example, all four factors were assessed on a sliding scale, so that "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak."[27] Likewise, the Eighth Circuit applied a standard in which "no single factor is determinative," and an injunction could issue, even where the probability of success was judged to be less than 50%, as long as the other factors "strongly favored the moving party."[28] In the Ninth Circuit, a stronger showing on one element could offset a weaker showing on another, such that an injunction could issue, as long as there are "serious questions" going to the merits and the balance of hardships "tips decidedly" in favor of the party requesting preliminary relief.[29]

The standards followed in other circuits pre-*Winter* were somewhat more structured in their articulation, but were no less flexible in their application. The U.S. Court of Appeals for the Second Circuit required a party seeking a preliminary injunction to show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief."[30] In the U.S. Court of Appeals for the Fourth Circuit, a court would first determine whether the balance of hardships favored the moving party, and then, if so, whether the plaintiff had raised questions going to the merits "so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation."[31] For most cases, the U.S. Court of Appeals for the Tenth Circuit applied a rule adopted from the Second Circuit according to which the requirement to show likelihood of success is "relaxed" where the other factors tip "decidedly" in favor of an injunction,[32] but required a party requesting one of three types of "historically disfavored" injunctions to meet a heightened standard under which the plaintiff must make strong showing "both with regard to the likelihood of success on the merits and with regard to the balance of harms."[33]

The relaxation of the traditional factors under these flexible preliminary injunction standards cannot be reconciled with the Supreme Court's decision in *Winter*, as recognized by at least some of the federal circuits. In *Real Truth About Obama, Inc. v. Fed. Election Comm'n*,[34] the Fourth Circuit held that its prior rule "now stands in fatal tension" with *Winter*. The court in that case read *Winter* as "articulat[ing] four requirements, each of which must be satisfied as articulated," thereby precluding any standard that depends on a "flexible interplay" among the four factors.[35] In particular, the court observed that *Winter* requires a plaintiff to make

23. *See* 480 U.S. at 545 (stating that any such presumption in favor of injunctive relief "is contrary to traditional equitable principles").
24. *See* 480 U.S. at 541-42.
25. The Court's analysis would have been no different even if the marine mammals had themselves been named as the plaintiffs. In a recent case filed in district court in California seeking a declaration that the treatment of orcas at Sea World was a violation of the 13th Amendment, the court held that the orcas lacked standing to assert such a claim in federal court. Tilikum et al. v. Sea World Parks & Entertainment, Inc., No. 11-cv-2476, (S.D. Cal. 2012). The authors are unaware of any case specifically holding that any flora, nonhuman fauna, or other environmental resource has standing to sue for a violation of NEPA, or any other environmental law.
26. A mere interest in protecting wetlands is not a sufficient basis for demonstrating irreparable harm. The plaintiff actually must be harmed in some concrete manner by the action to be enjoined. *See infra* note 76 and accompanying text.
27. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006).
28. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981).
29. Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003).
30. *See, e.g.,* Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).
31. Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977).
32. Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003).
33. Summum v. Pleasant Grove City, 483 F.3d 1044, 1048 (10th Cir. 2007). The three types of disfavored preliminary injunctions are (1) those altering the status quo, (2) those imposing a mandatory requirement (as opposed to a prohibition), and (3) those affording the moving party all of the relief it could recover after a full resolution on the merits.
34. 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated*, 130 S. Ct. 2371 (2010), *legal standard reinstated*, 607 F.3d 355 (4th Cir. 2010).
35. *Id.* at 347.

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a "clear showing" in every case that it "will likely succeed on the merits," a requirement that the court viewed as "far stricter" than the requirement to demonstrate only a "serious question" for litigation.[36] Accordingly, the Fourth Circuit has abandoned its so-called balance of hardship test in favor of a strict application of the *Winter* standard, which "governs the issuance of preliminary injunctions, not only in the Fourth Circuit, but in all federal courts."[37]

In an early post-*Winter* decision, *Davis v. Pension Benefit Guaranty Corp.*,[38] a panel of the D.C. Circuit likewise acknowledged that "the analysis in *Winter* could be read to create a more demanding burden" with respect to likelihood of success, while observing also that "the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale." The panel ultimately declined to decide whether the D.C. Circuit's sliding scale survived *Winter* because it concluded that the plaintiff failed to meet even the more relaxed requirements for injunctive relief under pre-*Winter* D.C. Circuit precedent.[39] Notably, two of the three judges on the panel joined in a concurring opinion specifically to express their view that the sliding scale test was no longer viable, and that a plaintiff cannot obtain a preliminary injunction without showing "*both* a likelihood of success *and* a likelihood of irreparable harm."[40] A subsequent D.C. Circuit panel endorsed the position of the concurring opinion in *Davis*, stating that "we read *Winter* at least to suggest if not hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction."[41] Thus, while the D.C. Circuit has not yet abandoned its sliding scale test in the wake of *Winter*, its continued viability appears to be in serious question.

Not all circuits have been as willing to accept the constraints on their equitable powers imposed by *Winter*. Several circuits have expressly rejected the contention that *Winter* undermines the continued validity of the various "sliding scale" preliminary injunction standards.[42] Asserting that *Winter* did not "comment at all, much less negatively, upon the application of a preliminary injunction standard that softens the strict 'likelihood' requirement in cases that warrant it," the Second Circuit has taken the position that if the Supreme Court had intended to abrogate more flexible standards for a preliminary injunction, "one would have expected some reference to the considerable history of flexible standards" that have been applied in the federal courts.[43] The Ninth Circuit endorsed the same argument in retaining the "serious question" version of the sliding scale, relying on Justice Ruth Bader Ginsburg's dissent in *Winter* (as if it carried equal weight to the actual holding in the case).[44] The U.S. Court of Appeals for the Seventh Circuit likewise has taken the position that the sliding scale approach is consistent with *Winter*, albeit without even acknowledging the tension observed by other courts.[45] The Tenth Circuit has cited *Winter* as the standard, but has continued to apply a relaxed requirement for likelihood of success where the balance of harms decidedly favors the moving party (except with respect to "disfavored" injunctions), also without engaging the question of whether its prior standard remains viable after *Winter*.[46]

The reluctance of the courts of appeal to relinquish a substantial measure of the equitable discretion conferred by the various sliding scale standards is understandable. However, their efforts to retain these standards in light of *Winter* (even if only in some truncated form) are unconvincing. Although it is true that *Winter* does not expressly reject all of the flexible preliminary injunction standards then in use, it plainly rejected the particular flexible standard that was before the Court in that case—according to which an injunction could issue based on showing of only a "possibility" of irreparable harm where the plaintiff demonstrates a strong likelihood of prevailing on the merits. There is nothing in the majority opinion from which to infer that the Court intended for the other factors to be applied other than strictly as articulated—i.e., upon a showing that the plaintiff "is likely to succeed on the merits," as opposed to a showing that the plaintiff has raised "serious questions" presenting a "fair ground for litigation."[47] Moreover, Jus-

36. *Id.*
37. *Id.* The *Real Truth* decision has been cited as sound authority in subsequent Fourth Circuit decisions, *see, e.g.,* Dewhurst v. Century Aluminum Co., 649 F.3d 287 (4th Cir. 2011), and has been widely followed by district courts in the Fourth Circuit.
38. 571 F.3d 1288, 1293 (D.C. Cir. 2009).
39. *Id.*
40. *Id.* at 1296 (Kavanagh, J., concurring).
41. Sherley v. Sebelius, 644 F.3d 388, 394 (D.C. Cir. 2011) (citations and internal quotations omitted).
42. At least one commentator also contends that nothing in *Winter* is inconsistent with the use of a sliding scale to evaluate likelihood of success. *See* Reconciliation After *Winter*: The Standard for Preliminary Injunctions in Federal Court, 111 Col. L. Rev. 1522, 1553 (2011).
43. Citigroup Global Markets, Inc. v. VGC Special Opportunities Master Fund Limited, 598 F.3d 30, 37-38 (2d Cir. 2010).
44. Alliance for the Wild Rockies v. Cottrell, 613 F.3d 960, 965 (9th Cir. 2010) ("Justice Ginsburg emphasized the importance of the sliding scale approach, writing '[f]lexibility is the hallmark of equity jurisdiction.'") (citing 129 S. Ct. at 391 (Ginsburg, J., dissenting)).
45. *See, e.g.*, Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (stating the four requirements as articulated in *Winter*, and asserting that "[t]hese considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted").
46. Awad v. Ziriax, 2012 WL 50636 (10th Cir. 2012).
47. Other recent Supreme Court decisions likewise suggest that the Court expects a party seeking a preliminary injunction to demonstrate that it is more likely than not to succeed on the merits, without regard to the strength of its showing as to the other factors. In a decision issued a few months prior to *Winter*, the Supreme Court vacated a preliminary injunction solely because the courts below had failed to make any finding that the plaintiff had demonstrated that he was likely to succeed on the merits of his claims, relying instead on the conclusion that the plaintiff merely had raised jurisdictional issues "so serious, substantial, difficult and doubtful as to make them fair ground for litigation." Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008) (internal quotations and citations omitted). Considerations of irreparable harm and public interest played no role in the Court's decision, belying any notion that the Court would endorse an approach that would accept a weak showing regarding likelihood of success on the merits provided that there was a strong showing as to the other factors. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006), the Court ruled that evidentiary "equipoise," i.e., where the trial court found that the plaintiff and defendant were equally likely to succeed, was a sufficient basis for a preliminary injunction only because the defendant had the burden of proof on the merits to demonstrate a compelling state interest in the restriction on

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tice Ginsburg's dissenting opinion aside, nothing in *Winter* indicates that the Supreme Court placed any particular value on preserving a federal court's discretion to balance all the facts and circumstances in deciding whether to grant an injunction. To the contrary, the Court's overriding consideration was in maintaining the extraordinary nature of injunctive relief by holding plaintiffs strictly to the traditional governing standards.

Applying a standard such as "a fair ground for litigation" instead of "likely to succeed on the merits" runs directly counter to the idea that preliminary injunctive relief should be available only in exceptional circumstances. In practice, this kind of relaxed requirement regarding the merits of the plaintiff's claims can be satisfied in virtually any case that can survive a motion to dismiss, or that simply passes muster under Rule 11 of the Federal Rules of Civil Procedure. Supporters of the sliding scale sometimes argue that a court is simply not in a position in most cases to make a determination at the preliminary injunction stage that the plaintiff is more likely than not to succeed on the merits, and therefore only should be called upon to determine if there are serious questions going to the merits.[48] But this circumstance is entirely consistent with the Supreme Court's view that a preliminary injunction is an extraordinary remedy that should be granted only in unusual cases—i.e., where it is apparent even at the preliminary injunction stage that the plaintiff is likely to prevail on the merits. An inability to determine whether success on the merits is likely should not be an excuse to allow a court to preserve the status quo whenever the plaintiff has presented a nonfrivolous claim.

There are also important practical reasons, as well as legitimate concerns for the due process rights of defendants whose actions would be enjoined, for requiring a plaintiff seeking a preliminary injunction to make a strong showing, independent of the other factors, that it is likely to succeed on the merits. A preliminary injunction may be enough to kill a project altogether by increasing costs and uncertainties that can undermine the project economics or jeopardize financing. Even if the project survives a preliminary injunction, a defendant that has been wrongfully enjoined (because the plaintiff ultimately was determined not be entitled to relief) in most cases will have suffered irreparable harm itself as a consequence of the injunction. Such a party typically has no cause of action against the plaintiff to recover losses resulting from a preliminary injunction, and courts have been reluctant to require plaintiffs to post any kind of meaningful bond in most environmental cases.[49]

No doubt, future cases will bring additional perspective, particularly as other circuits are called upon to interpret and apply *Winter*. Given the disparity that already exists among the circuits, it would not be surprising if the Supreme Court decided to take up this question once again. Indeed, if the Court wants to see a strict application of the *Winter* standard by the lower courts, it appears to have no choice but to do so.

III. Applying *Winter* in Form but Not Substance: A Case Study From the Eighth Circuit

Even where courts have acknowledged that *Winter* is the governing legal standard, they are not necessarily applying that standard faithfully, as illustrated by the Eighth Circuit's decision last year in *Sierra Club*.[50] This case is particularly instructive because it is one of the few federal circuit court cases to consider and apply *Winter* in the context of a NEPA claim. In fact, of 185 federal circuit opinions that cite *Winter*, Westlaw Keycite lists *Sierra Club* as one of only two cases falling into the "Negative Case–Declined to Extend" category.[51]

A. *Background*

The *Sierra Club* decision arose from two separate challenges under the Administrative Procedure Act (APA) to a permit issued by the Corps authorizing certain filling activities and other work in waters of the United States in connection with the construction of ancillary components of a coal-fired power plant. Specifically, pursuant to the Corps' authority under §404 of the Clean Water Act (CWA),[52] the permit authorized the discharge of dredged or fill material into a total of 5.6 acres of wetlands and along 8,150 linear feet of mostly intermittent stream channels. The Corps permit also authorized the placement of a water intake structure and six aerial transmission line crossings above navigable rivers pursuant to the Corps' authority to regulate potential obstructions to navigation under §10 of the Rivers and Harbors Act of 1899.[53] The Corps permit was challenged in two separate actions by different environmental groups. In each case, the plaintiffs alleged that the Corps had failed to comply with NEPA, in particular by issuing a FONSI based on an EA, rather than preparing a full EIS. A key issue in the case was whether the scope of the Corps' NEPA review was properly limited to the specific activities authorized by the Corps permit, or was required to consider impacts from the construction and operation of the entire power plant.

In each action, the plaintiffs moved for a preliminary injunction to halt all work on the power plant pending a decision on the merits of their claims. After several days of evidentiary hearings, the district court entered an order enjoining all further construction work authorized by

religious practice at issue in that case. Under normal circumstances, where the plaintiff bears the burden of proof, a tie goes to the defendant—meaning that the plaintiff must show more than a 50% chance of success on the merits.

48. *See, e.g.*, *Alliance for the Wild Rockies*, 613 F.2d at 973 (Mosman, J., concurring).
49. *See* Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 Hastings L.J. 1863, 1887-89 (1994-1995).
50. 645 F.3d 978 (8th Cir. 2011).
51. Based on Westlaw Keycite review conducted on April 16, 2012.
52. 33 U.S.C. §1344.
53. 33 U.S.C. §403.

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the Corps permit—but not work on the majority of the power plant project for which no Corps authorization was required. By the time the preliminary injunction was issued, work under the Corps permit had been underway for nearly a year, and most of the authorized activities already were completed. The remaining authorized work involved a total of only 0.067 acres of permanent impacts to wetlands and waters in connection with two underground water line stream crossings, the installation of fewer than 10 transmission line poles, the placement of a subsurface water intake structure, and four aerial transmission line river crossings.

B. District Court's Application of the Preliminary Injunction Standards

Although the district court stated its intention to apply the *Winter* standard, the actual analysis and reasoning underlying its decision fell well short of the *Winter* requirements. First, relying on the Eighth Circuit's 30-year-old decision in *Dataphase*,[54] the district court applied an incorrect legal standard, concluding that a party need only show "a fair ground for litigation" on the merits if the other factors weigh strongly in favor of an injunction. Consistent with this relaxed standard, the district court's assessment of the plaintiffs' likelihood of success consisted of the conclusory statement that they had "submitted ample evidence to cause me to be dubious about, among other things, the sufficiency of the alternatives analysis, the project's defined purpose, analysis of the cumulative and indirect environmental impacts, and the scope of authority the Corps claims to have."[55] This conclusion was not supported by explicit legal analysis, citation to authority, or consideration of the administrative record, and did not reflect any acknowledgement of the deferential standard governing a court's review of agency action under the APA.[56]

The district court also failed to apply the *Winter* standard with respect to irreparable harm. The court based its decision to issue the injunction on its conclusion that the plaintiffs had shown "a likelihood of irreparable harm *to the environment* if a preliminary injunction is not entered," and that allowing the permitted activities to continue would "pose a real threat of harm *to the environment*."[57] The district court made no finding that any of the plaintiffs *themselves* would suffer irreparable harm if the remaining authorized activities were not enjoined, and it was far from self-evident that the limited remaining activities under the Corps permit would result in any significant environmental impact—let alone any environmental impact that would affect (much less "irreparably" harm) the plaintiffs. The district court repeated this error in evaluating the balance of harms, concluding that it was called upon in this case to balance "monetary costs against loss to the environment," rather than against the harm to the plaintiffs.[58]

C. Eighth Circuit's Application of Preliminary Injunction Standards

In upholding the preliminary injunction order on appeal, an Eighth Circuit panel cited *Winter* as the governing standard for preliminary injunctive relief, but it did not faithfully apply the *Winter* standard in substance, and its decision paid little heed to the Supreme Court's admonition that a preliminary injunction is a drastic remedy that should be awarded only in extraordinary circumstances.

The panel acknowledged that *Winter* requires a showing that the plaintiff is likely to succeed on the merits.[59] However, despite extensive briefing on the question of whether *Winter* overruled the Eighth Circuit's sliding scale standard applied by the district court, the panel did not directly address the issue. Instead, the panel brushed aside the district court's reliance on the "fair ground for litigation" standard as merely "imprecise use of language" and a harmless "failure to use the preferred wording," insisting that the district court was "clearly familiar" with *Winter*, having cited it in evaluating the plaintiffs' claims of irreparable harm.[60]

Citing *Winter* is not the same as applying it, and the Eighth Circuit panel's attempt to explain away the district court's legal error does not stand up to scrutiny. The district court clearly understood that a "fair ground for litigation" was a materially less stringent standard than "likely to succeed on the merits." The district court expressly relied on pre-*Winter* Eighth Circuit precedent, reaching back to *Dataphase*, in holding that a party seeking a preliminary injunction need not prove a greater than 50% likelihood of success on the merits if the other factors weigh strongly in favor of injunctive relief and there is a "fair ground for litigation." The district court also cited a pre-*Winter* decision by the Ninth Circuit in *Marbled Murrelet v. Babbit*, in which the court applied a standard that required the moving party to demonstrate either "(1) a *likelihood of success* and the possibility of irreparable injury, or (2) sufficiently serious questions going to the merits to make them *a fair ground for litigation*, and the balance of hardships tips

54. *Sierra Club et al. v. U.S. Army Corps of Engineers*, ECF No. 143, Oct. 27, 2010, (W.D. Ark. 2010) (Preliminary Injunction Order) at 15.
55. *Id.*
56. *See, e.g.*, Motor Vehicle Mfrs' Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983); South Dakota v. Ubbelohde, 330 F.3d 1014, 1026-27 (8th Cir. 2003).
57. Preliminary Injunction Order at 12, 13 (emphasis added). The district court provided no explanation for this conclusion other than to observe that "Plaintiffs have raised several potential harms apparently not considered by the Corps," Order at 12. The district court simply presumed that the Corps' "apparent" failure to consider certain factors will result in "potential" harm to the environment. As discussed above, such a presumption is contrary to law. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545, 17 ELR 20574 (1987) (irreparable harm may not be presumed when an agency allegedly "fails to evaluate thoroughly the environmental impact of a proposed action").
58. Preliminary Injunction Order at 14.
59. 645 F.3d at 993.
60. *Id.* at 994. Although the Eighth Circuit panel did not rely on *Dataphase*, it appeared to leave open the possibility that the *Dataphase* sliding scale approach remains viable. In a footnote, the panel asserted that because *Winter* did not discuss the likelihood of success element, that decision "expressed no opinion about various approaches in the circuit courts." *Id.* at 994 n.7.

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sharply in favor of the party seeking relief."[61] The court in *Marbled Murrelet* drew a clear distinction between "likelihood of success" and "a fair ground for litigation," the latter being a less stringent standard requiring a correspondingly higher showing with respect to the balance of hardships. Thus, contrary to the Eighth Circuit panel's claim in *Sierra Club*, the difference between the *Winter* standard and the approach taken by the district court was not merely a matter of semantics.

The Eighth Circuit panel also downplayed the significance of the district court's application of the incorrect legal standard by purporting to conduct its own assessment of the merits of the plaintiffs' claims. The panel concluded that there was "ample evidence" in the record to show that the plaintiffs were likely to succeed on at least three of their claims. The panel's assessment, however, was little more than a rehash of the plaintiffs' arguments and the district court's conclusions, rather than actual analysis of the merits to confirm that the plaintiffs were indeed "likely" to succeed on the merits.[62] In particular, the panel's discussion of these claims did not address key facts in the record to test the plaintiffs' assertions, did not engage the central legal issue regarding the required scope of the Corps' NEPA review, and did not reflect any application of the deferential standard of review under the APA.[63]

The panel's assessment of just one of the claims illustrates the point. The plaintiffs alleged that the Corps' cumulative impacts analysis failed to meet the requirements of NEPA because it did not consider impacts from a possible construction in the future of a second generating unit at the plant. The panel's analysis of this claim consisted of a single sentence: "[The power plant owner] has previously admitted that it had planned to add a second unit at the Hempstead County site, and the Permit Decision failed to analyze the possible cumulative impacts from that second unit."[64] The panel provided no citation to the administrative record to support this statement. In fact, the record specifically and consistently showed that there were no plans to add a second unit, and the Corps thus had no obligation under NEPA to consider impacts from a second unit in its cumulative effects analysis.[65]

Moreover, the panel's analysis simply assumed that the required scope of the Corps' NEPA review included impacts from a second generating unit. The Corps took the position, however, that its NEPA review was limited to the specific activities authorized by the Corps permit, and the scope of review did not extend to other parts of the power plant (including any second generating unit) over which the Corps had no regulatory jurisdiction and as to which there was no federal control or responsibility. Thus, any alleged failure to consider the impacts from a second unit would be legally irrelevant to the assessment of the Corps' NEPA compliance.[66] As noted above, the scope of the Corps' NEPA review was a central issue in the case, which had been briefed extensively by the parties at each stage of the litigation. Resolving this question was critical to any rigorous analysis of the merits of the plaintiffs' NEPA claims, but the panel failed even to acknowledge it.

The panel's decision departs from *Winter* even more starkly with respect to its consideration of the irreparable harm factor. Once again, the panel sought to discount the district court's error in relying solely on alleged harm to the environment, rather than harm to the plaintiffs, as merely "imprecise language."[67] The panel concluded that "in this case irreparable harm to the environment necessarily means harm to the plaintiffs' specific aesthetic, educational and ecological interests."[68] In contrast with the Supreme Court's approach in *Winter*, however, the panel did not conduct a detailed assessment of the actual environmental impacts associated with the limited activities remaining under the Corps permit, much less explain how the plaintiffs would suffer any actual irreparable harm unless those activities were enjoined.

The panel began its discussion of irreparable harm by citing the U.S. Court of Appeals for the First Circuit's 1989 decision in *Sierra Club v. Marsh*[69] for the proposition that a violation of NEPA's procedural requirements causes actual environmental harm, but the panel did not identify or explain the nature of any such harm in the particular case under review. Although *Marsh* is often cited by environmental plaintiffs for the proposition that any NEPA violation causes environmental harm, that decision stands for a more limited principle arising from its unusual facts. In that case, the district court had denied a motion for a preliminary injunction, concluding that such relief could not be predicated on a likely NEPA violation unaccompanied by a showing of actual irreparable environmental injury.[70] The First Circuit remanded the matter for further consideration by the district court, pointing to the "added risk to the environment that takes place when governmental deci-

61. 83 F.3d 1068, 1073 (9th Cir. 1996) (emphasis added).
62. *See* Earth Island Inst. v. Carlton, 2010 WL 4399138 (9th Cir. Nov. 8, 2010) (characterizing the requirement to prove likely success on the merits as a "heavy burden," and emphasizing the importance of a "thoroughly reasoned opinion" which explains exactly why success on the merits is or is not likely).
63. The cases were settled while summary judgment motions were pending. As a result, no decision was ever made on the merits based on a full consideration of the administrative record.
64. 645 F.3d at 991.
65. *See* 40 C.F.R. §1508.7 (defining cumulative impacts as including those resulting from "reasonably foreseeable future actions").
66. Under both the Corps' regulations and governing Eighth Circuit precedent, a Corps permit for discharges to waters of the United States in connection with the construction of certain ancillary components of a power plant, such as a road, pipeline, or loading terminal, does not "federalize" the entire power plant project for purposes of NEPA. 33 C.F.R. pt. 325, app. B, §7.b.(1), (3); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272, 10 ELR 20243 (8th Cir. 1980) (Corps permit for a 1.25-mile river crossing did not establish federal control over the entire 67-mile transmission line project, even where project could not proceed at all with the permit). *See also* Natural Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs, No. 1:09-cv-588, 2010 WL 1416681, at *5 (N.D. Ohio Mar. 31, 2010) ("The construction and operation of a coal-to-liquid fuel plant is physically, functionally, and logically separable from the filling and/or impacting a relatively small area of United States waters, which happen to lay under or near the proposed construction site.").
67. 645 F.3d at 996.
68. *Id.*
69. 872 F.2d 497 (1st Cir. 1989).
70. *Id.* at 499.

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sionmakers make up their minds" without adequate information about the likely effects of their decision upon the environment, and holding that the possibility that federal officials may be reluctant to change a decision after significant resources have been expended was a proper factor to be considered in ruling on a motion for a preliminary injunction.[71] In sharp contrast to the circumstances in *Marsh*, by the time the district court issued its preliminary injunction order in the *Sierra Club* case, the authorized work under the Corps permit was nearly complete (and more than $1 billion already had been expended on construction of the plant). Neither the district court nor the Eighth Circuit panel found that the commitment of additional resources for the very limited remaining work under the Corps permit would affect the integrity of any potential subsequent decisionmaking by the Corps in response to a ruling in favor of the plaintiffs on their NEPA claims.[72]

The panel made no effort to assess the actual environmental impacts from the remaining activities under the Corps permit, pointing only to the fact that the plaintiffs' expert had opined that there was a viable population of endangered Ouachita pocketbook mussels in the river within which the water intake would be located. The record was undisputed, however, that no live mussel specimens had been found in the specific location of the intake structure, despite extensive survey efforts. The panel did not explain how the Ouachita pocketbook mussel could possibly be affected by the work on the intake structure—which was limited to a 50-square-foot area of the river bed six miles downstream from the closest location of any live mussel specimens. Instead, the panel sought to rely on the district court's fact-finding, asserting that the court had credited the testimony of the plaintiffs' expert, and did not commit clear error in doing so.[73] But the district court in fact made no factual findings regarding potential harm to the Ouachita pocketbook mussel from the activities enjoined.

The Eighth Circuit panel conceded that it was not enough just to show harm to the environment; the plaintiffs also needed to show harm to themselves. The panel asserted, however, that any injury to the environment "will necessarily harm the plaintiffs' environmental interests." To support this assertion, the panel cited the impairment of the plaintiffs' aesthetic enjoyment of the area around the plant site as a result of "light and noise pollution," alleged siltation from the plant site, and increased dust from traffic on the highway.[74] None of these effects, however, was attributable to any of the remaining authorized activities under the Corps permit. As a result, even if these effects could be characterized as irreparable harm to the plaintiffs, enjoining the remaining activities under the Corps permit provided no relief. These effects therefore could not satisfy the clear requirement under *Winter* to show that the injunction was necessary to avoid irreparable harm to the plaintiffs.

The panel also asserted that work remaining to be done under the Corps permit for the water intake structure and transmission line crossings posed a threat to both the Ouachita pocketbook mussel and the interior least tern (another endangered species present in the vicinity of the plant site), and thus would cause "irreparable harm" to the plaintiffs' interest in the protection of these species and their general enjoyment of the environment.[75] Even assuming that these limited remaining authorized activities did pose some risk to individual birds or mussels (a questionable proposition, as noted above), the panel erred in relying on the plaintiffs' general interest in the protection of endangered species to conclude that the environmental effects of the remaining Corps permitted activities would cause irreparable harm to the plaintiffs themselves.

The Supreme Court long ago rejected the notion that a mere interest in a problem—in particular, a concern for the environment—is enough to establish an injury for purposes of standing to assert a claim, let alone to satisfy the more demanding requirement of irreparable harm for purposes of obtaining injunctive relief. In *Sierra Club v. Morton*,[76] the Supreme Court ruled that the Sierra Club's interest in preserving the aesthetics and ecology of an area of the Sequoia National Forest was insufficient to establish standing to challenge the U.S. Forest Service's approval of the development of a ski resort in the area, holding that "the 'injury in fact' test requires something more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." The Court held that the Sierra Club was not among the injured in that case because it had "failed to allege that it or its members would be affected *in any of their activities or pastimes* by the [proposed] development."[77] The Court further empha-

71. *Id.* at 501. The First Circuit subsequently observed, in *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 26 ELR 20959 (1st Cir. 1996), that *Marsh* was focused on the prospective commitment of resources that could be prevented by means of preliminary injunctive relief. Thus, even though the district court in *Conservation Law Foundation* found that the federal defendants there had violated NEPA and directed them to prepare a supplemental EIS for the conversion of an Air Force base to civilian use, it denied the plaintiffs' request to enjoin the continued implementation of the project because the plaintiffs had not demonstrated that they would suffer irreparable harm in the absence of injunctive relief. 79 F.3d at 1271. On appeal, the plaintiffs challenged the district court's finding regarding irreparable harm, citing *Marsh*. The First Circuit found that *Marsh* was not applicable, noting that "the type of public and private commitments with which . . . *Marsh* [was] concerned had already been made here by the time plaintiffs sought injunctive relief," and that the impact of work that will continue while the supplemental NEPA review is undertaken "will only be incremental." *Accord* State of Wisconsin v. Weinberger, 745 F.2d 412, 14 ELR 20744 (7th Cir. 1984) (injunctive relief would not be proper where the commitment of additional resources is small relative to resources already expended, and "thus the injunction's service to NEPA in preserving unbiased decision-making would be slight").
72. The panel also cited with approval the Tenth Circuit's decision in *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002), holding that harm to the environment may be presumed when an agency fails to comply with NEPA. As noted above, however, such a presumption was flatly rejected long ago by the Supreme Court in *Amoco*. 480 U.S. at 545 (rejecting the contention that harm may be presumed whenever an agency "fails to evaluate thoroughly the environmental impact of a proposed action").
73. 645 F.3d at 996.
74. *Id.*
75. *Id.*
76. 405 U.S. 727, 735 (1972).
77. *Id.* (emphasis added).

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sized that the Sierra Club would have to show not just that its members use the affected area generally, but that they use the affected area "in a way that would be significantly affected by the proposed actions."[78]

Accordingly, the fact that certain of the plaintiffs in the *Sierra Club* case professed an interest in the protection of endangered species was legally insufficient by itself to satisfy the irreparable harm requirement. There was no evidence that any of these persons actually engaged in any activity or pastime—recreational, educational, ecological, or scientific—related to the interior least tern or the Ouachita pocketbook mussel, let alone any activity or pastime that would have been affected in any way by the specific activities that were enjoined by the district court. The most the panel could say was that mussel specimens were located in the river adjacent to the property of one of the plaintiffs. There was no evidence, however, that this person ever studied or even casually observed the mussels adjacent to his property (and there was no practical way for him to have done so, as the mussels were buried in the sediment), or that he even was aware of the existence of the mussels before hearing the expert testimony during the preliminary injunction hearing. Moreover, this property was located six miles *upstream* from the location of the plant intake structure, and thus entirely unaffected by the intake construction work. In contrast, the plaintiffs in *Winter* submitted declarations showing that they took whale watching trips, observed marine mammals underwater, conducted scientific research on marine mammals, and photographed these animals in their natural habitats, demonstrating that adverse impacts on the marine mammals would harm the plaintiffs *themselves* by impairing those activities.[79]

These analytical flaws regarding irreparable harm were carried forward to the Eighth Circuit panel's assessment of the balance of harms. Quoting *Amoco*, the panel asserted that the plaintiffs "would suffer harm to their enjoyment of the environment, which 'can seldom be adequately remedied by money damages and is often permanent or at least of long duration.'"[80] Once again, the panel conflated harm to the environment, which was the subject of the quoted text from *Amoco*, with the harm to the plaintiffs. Nowhere did the panel take the true measure of the actual harm to the plaintiffs in assessing the validity of the preliminary injunction under the *Winter* standards.

Finally, the panel strayed from the *Winter* standard in endorsing the district court's conclusion that the preliminary injunction served the public interest because "it would convey to the public the importance of having government agencies fulfill 'their obligations and comply[ ] with the laws that bind them.'"[81] There is nothing in *Winter*, despite its particular focus on evaluating the public interest factor under the traditional standard for preliminary injunctive relief, to suggest that conveying the importance of NEPA compliance to the public is an important or even relevant consideration. Moreover, because this factor could be invoked in every case alleging a violation of NEPA, it is contrary to the Supreme Court's clear rejection of any special rule favoring injunctive relief in NEPA cases.

IV. Considerations for Practitioners

The threat of injunctive relief is a fact of life in environmental cases. As noted above, often the outcome of a case will depend largely on how the court rules on a motion for a preliminary injunction. Outlined below are a few measures that may be helpful to practitioners on the defense side in opposing a request for preliminary injunctive relief.

First, it is important to anticipate the threat of a preliminary injunction long before the motion is filed. A NEPA challenge to an agency action—such as the issuance of a permit—should not come as any surprise. Such agency action will have been the result of an administrative process in which any party likely to bring suit in federal court in most cases will have actively participated. This process will flag the issues that such a party can be expected to raise in seeking to demonstrate a likelihood of success on the merits (by whatever standard that may be judged). As a result, the research and analysis to respond to these claims should begin even before the agency has issued its final decision, which may be followed very quickly by a complaint and a preliminary injunction motion.

It is also important to be prepared to present evidence relevant to the governing legal standard. The defense practitioner should be prepared to challenge the plaintiff's claims of irreparable harm. Many plaintiffs (and too many courts) are content to rely on harm to the environment, without attempting to connect such harm to the plaintiffs. In some cases, however, even where the impact to the environment appears to be substantial, the actual impact to the plaintiff may be difficult to discern or establish. Although a preliminary injunction motion often proceeds on an expedited schedule that does not permit extensive discovery, defense counsel should not be shy about requesting at least limited discovery regarding the plaintiff's harm allegations. Even one or two depositions can be helpful to expose a weakness in the link between the environmental impact sought to be enjoined and any actual harm to the plaintiff, particularly where the court does not intend to conduct an evidentiary hearing on the motion.

The defense practitioner also should be prepared to present evidence regarding the balance of harms. Although conceptually it is the moving party's burden to demonstrate that the balance of harms weighs in its favor, in practice, many courts effectively shift the burden to the defendant in environmental cases. Courts often accept claims of harm associated with environmental impacts at face value, and the onus is on the non-moving party to make a countervailing showing that the harm it would suffer from an

78. *Id. See also Lujan*, 504 U.S. at 566 (standing cannot be premised on a mere interest in endangered animals).
79. 129 S. Ct. at 377-78.
80. 654 F.3d at 996.
81. 645 F.3d at 998.

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injunction is even greater.[82] In the case of an injunction to stop a construction project, for example, such harm would include direct costs for idled construction contractors, demobilization and remobilization of equipment or crews, and contractual penalties for delay. Often one of the largest economic impacts from an injunction is the carrying cost of work in progress if construction is interrupted. The actual (or imputed) interest cost can quickly reach into the millions of dollars for even a month or two of delay after a major construction project has been commenced. Other kinds of harm relevant to the court's analysis include lost construction jobs and indirect impacts to the local economy. Witnesses who can testify to these facts should be identified early on, and affidavits prepared in advance so they can be filed on short notice if necessary. Some courts may require live testimony, so it is also important to be prepared to get the witnesses to the courthouse on short notice. Finally, practitioners should be mindful of the need to make an evidentiary record for appeal, even if it appears that such evidence is unlikely to persuade the trial court.

In briefing the preliminary injunction issues, the defense practitioner should look out for, and respond aggressively to, citations to authority by the plaintiff that are not well-founded. As noted above, both the Supreme Court's decision in *Amoco* and the First Circuit's decision in *Marsh* are frequently cited to support legal positions for which they do not necessarily stand. It can be anticipated that environmental plaintiffs also now will seek to rely on the Eighth Circuit's decision in *Sierra Club*. The foregoing discussion may provide a basis for distinguishing that case, or dissuading a court in another circuit from relying on its approach or reasoning. In addition, the defense practitioner should advocate aggressively in favor of a strict application of *Winter* according to which the plaintiff must do more than show a "serious question" on the merits or a "fair ground for litigation," particularly in a jurisdiction—such as the D.C. Circuit—where the impact of *Winter* on the governing legal standard for showing success on the merits remains in flux.

Finally, defense counsel should always request that the plaintiff be required to post a substantial bond prior to the issuance of any preliminary injunction. Under Rule 65(c) of the Federal Rules of Civil Procedure, a party seeking an injunction must post security "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." On its face, Rule 65(c) provides no exceptions. Although plaintiff environmental organizations often obtain relief from the bond requirement based on their alleged lack of substantial resources and their status as parties allegedly seeking to promote the public interest,[83] defense practitioners should be prepared to challenge those allegations. In particular, many national environmental organizations have substantial resources, raising tens of millions of dollars every year (as can be shown, for example, by means of the organization's tax return).[84] Even if the plaintiff is not in a position to post a bond sufficiently large to cover all of the potential losses to a party that is wrongfully enjoined, a bond of some significance in light of the plaintiff's actual ability to pay still would help ensure that the plaintiff appreciates the serious and drastic nature of preliminary injunctive relief, and does not cavalierly seek or accept such relief.

V. Conclusion

The Supreme Court has repeatedly emphasized that, even in environmental cases, an injunction is a drastic and extraordinary remedy governed strictly by the traditional four-factor standard and should not be granted as a matter of course. Although the Supreme Court is the "final arbiter of federal law,"[85] some federal courts of appeal persist in applying more relaxed or "flexible" standards akin to the Ninth Circuit test rejected in Winter. This circumstance may well lead in time to additional clarification by the Supreme Court. In the meantime, defense practitioners should advocate for a strict application of Winter while understanding that the standard actually applied by some courts is likely to be somewhat less demanding in practice.

82. For an example of a court properly applying the evidentiary burden for a preliminary injunction motion, see Memorandum Opinion, *Sierra Club v. DOE*, No. 1:11-cv-514, ECF No. 30, at 10-11 (D.D.C. Nov. 18, 2011) ("The Sierra Club's protestation that [defendant's statement that it would continue with construction even if certain DOE grant funding were enjoined] is without 'evidence' gets the burden backwards; it is the Sierra Club, not the defendants, that must make the showing at the preliminary injunction stage.").

83. *See supra* note 49.

84. For example, last year, New York City Mayor Michael R. Bloomberg donated $50 million to the Sierra Club to support its nationwide campaign against coal-fired power plants. *Mayor Bloomberg Gives $50 Million to Fight Coal-Fired Power Plants*, Wash. Post, July 21, 2011.

85. Danforth v. Minnesota, 552 U.S. 264, 291-92 (2008) (Roberts, J., dissenting); *see also* United States v. Aguon, 851 F.2d 1158, 1173 (9th Cir. 1988) (en banc), *overruled on unrelated grounds by* Evans v. United States, 504 U.S. 255 (1992) (the Supreme Court is "the final arbiter of federal law" and "[w]hen the Supreme Court has spoken, its pronouncements become the law of the land").