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Sarah J. Morath

*University of Montana*, sarahmorath@gmail.com

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## A Mild *Winter*: The Status of Environmental Preliminary Injunctions

*Sarah J. Morath*\*

Since the enactment of environmental legislation in the 1970s, the preliminary injunction standard articulated by the Supreme Court for environmental claims has evolved from general principles to enumerated factors. In *Winter v. Natural Resource Defense Council, Inc.*, the Court's most recent refinement, the Court endorsed but failed to explain the application of a common four-factor test when it held that the alleged injury to marine mammals was outweighed by the public interest of a well-trained and prepared Navy.<sup>1</sup> While a number of commentators have speculated about *Winter*'s impact on future environmental preliminary injunctions, this article seeks to more precisely determine *Winter*'s effect. It does so by providing a quantitative and qualitative analysis of data collected from federal district and circuit courts three years before and three years after *Winter*.

This data demonstrates that not only has the number of injunctions granted and denied stayed relatively consistent but most trial courts have not altered their approach to environmental preliminary injunction requests. Instead, they continue to look to their circuit court rather than the U.S. Supreme Court for guidance when reviewing these requests. Several circuit courts have addressed *Winter*, and apart from the Fourth Circuit, these circuits reconciled *Winter* with their earlier preliminary injunction

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\* Assistant Professor of Legal Writing, University of Akron School of Law. J.D., University of Montana School of Law; M.E.S., Yale University School of Forestry and Environmental Studies; B.A., Vassar College. Many thanks to Tracy Thomas, Jack Tuholske, Tracy Hester, and Kevin Lynch for reading and commenting on earlier drafts of this article. Thanks also to the participants of the 2012 Colloquium on Environmental Scholarship at Vermont Law School and the 2012 Central States Law School Association Scholarship Conference. Thank you to Kate Sheets and Julie Toth for their outstanding research assistance. Special appreciation to the University of Akron School of Law Faculty for their helpful comments and to the Seattle University Law Review Editors for their excellent editorial assistance. This article was supported by a summer research grant from the University of Akron School of Law.

1. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

standard. Thus, while *Winter*'s effect is significant in form, it is mild in substance.

## I. INTRODUCTION

The motion for preliminary injunction is a popular tool used by environmental plaintiffs.<sup>2</sup> While the factors used to evaluate preliminary injunctions have been established for some time, the application of these factors has varied.<sup>3</sup> The “dizzying diversity of [preliminary injunction] formulations”<sup>4</sup> resulted in “confusion”<sup>5</sup> among courts.<sup>6</sup> In the environmental context,<sup>7</sup> one scholar recently remarked that “the supply of [preliminary injunctions] is notoriously uneven, subject to misappropriation, and of a perennially-questioned legal pedigree.”<sup>8</sup> Judges have called for a “uniform federal standard,”<sup>9</sup> and scholars have requested “order of a doc-

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2. *Sierra Club v. Espy*, 822 F. Supp. 356, 362 (E.D. Tex. 1993) (noting that preliminary injunctions are “[t]he most common form of remedy sought by citizens suing federal agencies in environmental cases”).

3. See, e.g., Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1552 (2011) (arguing for uniformity in granting preliminary injunctions to prevent “inconsistent and inequitable decisions”); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 497 (2003) (“[C]onfusion persists’ regarding which standard should apply for granting or denying the preliminary injunction motion.”).

4. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978).

5. See *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992) (noting the “confusion” that surrounds the “four-part preliminary injunction standard”).

6. Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of Its Parts*, 63 CHL-KENT L. REV. 279, 279 (1987) (stating “[t]he law on standards for granting or denying preliminary injunctions has never been a model of clarity”).

7. For purposes of this Article, I have focused on “environmental” preliminary injunctions. I agree with those environmental law scholars who argue that environmental injury is different from other types of injury because environmental injury cannot be remedied with money damages and can span time and space. “Environmental law” is distinct from other areas of the law, and therefore, environmental cases should be treated differently from other types of cases. For a detailed discussion on the uniqueness of environmental law, see Richard J. Lazarus, *Resorting What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706–07 (2000); see also Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 282 (2010) (advocating for a use-conflict framework to conceptualize environmental law as a distinct legal field). *But cf.*, Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 261 n.11, (2006) (arguing that environmental law is a subset of administrative law rather than a radically unique or distinct area of law).

8. Jamison E. Colburn, *The Cynic at the Circus*, 45 TULSA L. REV. 307, 321–22 (2009).

9. See Denlow, *supra* note 3, at 533.

trine applied in so many disparate settings.”<sup>10</sup> *Winter* is one of several recent Supreme Court decisions that attempt to clarify this doctrine.<sup>11</sup>

Before *Winter*, the Court had three opportunities to articulate a clear preliminary injunction standard and a clear application of this standard for alleged violations of environmental statutes.<sup>12</sup> In each decision, the Court relied on general principles instead of a precise formula when reviewing the injunction request.<sup>13</sup> In *Winter*, the Court refined these earlier decisions and, for the first time, endorsed a four-factor test for preliminary injunctions: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>14</sup> Thus, the Court clarified the relevant preliminary injunction factors in environmental cases.<sup>15</sup> In particular, the Court reinvigorated the public interest factor, a factor that had effectively fallen by the way side, and cast doubt on but did not eliminate a flexible application of all four factors.<sup>16</sup>

Even before *Winter* most lower courts agreed that four factors should be evaluated as part of an injunction request.<sup>17</sup> What courts struggled with and what the Court in *Winter* failed to fully explain was the application of these factors.<sup>18</sup> For example, should all factors have the same weight? Should certain factors be considered threshold factors? Do all factors need to be evaluated? Because the Court failed to describe

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10. David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. IN BRIEF 17, 21 (2010) (noting that it would be a “worthwhile endeavor” for “law professors to” “help the court” in this way).

11. See Anthony DiSarro, *Freeze Frame: The Supreme Court’s Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 83 (2012) (identifying five recent Supreme Court decisions, including *Winter*, that show “the Supreme Court is clearly unwilling to permit lower federal courts to alter the traditional standards for assessing whether preliminary injunctive relief is appropriate”); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1016 (2012) (identifying three recent Supreme Court decisions, including *Winter*, that “provide new clues as to which preliminary injunction test the Court prefers”).

12. See *infra* Part I.

13. *Id.*

14. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19 (2008). In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the Supreme Court endorsed a similar four-part test for permanent injunctions.

15. Colburn, *supra* note 8, at 322 (stating that in *Winter*, “[t]he Supreme Court (finally) explicitly endorsed [a] four-factored test, perhaps even turning the four factors into elements”).

16. See *infra* Part III.

17. See cases in Appendix.

18. See *infra* Part I; see also Morton Denlow, *Preliminary Injunctions: Look Before You Leap*, 28 LITIG. 2, 3 (2002) (explaining up to four different standards used by circuit courts, and therefore trial courts, and noting that “[t]he standard can greatly impact the result”).

how the four factors relate to each other or to the greater purposes of a preliminary injunction,<sup>19</sup> *Winter* failed to answer the more pressing question: how should a trial court apply these factors?

Consequently, *Winter*'s significance has been debated. Some commentators predicted that because of its unique facts and narrow holding, *Winter*'s applicability would be limited to only those injunction requests involving homeland security or military preparedness.<sup>20</sup> Others criticized *Winter* for creating a higher preliminary injunction standard by raising the bar for a requisite showing of irreparable harm,<sup>21</sup> most likely making it more difficult for environmental plaintiffs to succeed in their future requests for preliminary injunctions.<sup>22</sup> Courts too have characterized the *Winter* standard as being "more rigorous."<sup>23</sup>

Assessing these concerns requires an understanding of earlier Court precedent addressing environmental preliminary injunctions. Many

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19. See Bates, *supra* note 3, at 1552, 1553. The author explains that the sliding-scale analysis survives *Winter* because "contemporary Supreme Court cases also support the use of the sliding scale approach." *Id.* at 1552. *Winter* merely held that "only showing a 'possibility' of irreparable harm was not enough" to obtain a preliminary injunction but "failed to comment on whether courts could use a sliding scale analysis or whether a movant could be granted a preliminary injunction based on a showing that there are serious questions going to the merits." *Id.* at 1523.

20. See William S. Eubanks II, *Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 658 (2009) ("Based on its narrow holding on equitable balancing grounds, it is clear that the Court perceived *Winter* as a case predominantly about the public's interest in military preparedness and less about environmental protection under NEPA."); see also Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, 343 (2010) (stating that "the *Winter* Court focused heavily on the importance of military readiness in its opinion, so the decision might be limited to disputes arising in similar contexts in the future").

21. See Erwin Chemerinsky, *Court Sets Higher Hurdle for Preliminary Injunctions*, 45 TRIAL 58, 59 (Jan. 2009) (describing the Supreme Court's approach as "strict"); see also Benjamin I. Narodick, *Winter v. National Resources Defense Council: Going into the Belly of the Whale of Preliminary Injunctions and Environmental Law*, 15 B.U. J. SCI. & TECH. L. 332, 342 (2009) (calling the standard in *Winter* a "newly intensified standards for obtaining a preliminary injunction"); John C. Stellakis, *U.S. Navy Torpedoes NEPA: Winter v. Natural Resources Defense Council May Sink Future Environmental Pleas Brought Under the National Environmental Policy Act*, 21 VILL. ENVTL. L.J. 353, 378 (2010) ("The Court also expressly set, and arguably raised, the bar for a requisite showing of irreparable harm to obtain a preliminary injunction for NEPA actions.").

22. Nate Hausman, *Monsanto Co. v. Geertson Seed Farms: Breathing a Sigh of Equitable Relief*, 25 TUL. ENVTL. L.J. 155, 182-83 (2011) ("Post-*Winter* courts will undoubtedly be more reluctant to issue injunctions."); William Krueger, *In the Navy: The Future Strength of Preliminary Injunctions Under NEPA in Light of NRDC v. Winter*, 10 N.C. J. L. & TECH. 423, 443 (2009) ("This new, formulaic rubric for the issuance of an injunction removes much of the flexibility that has historically been the 'hallmark of equity jurisdiction,' and will likely lead to a reduced number of injunctions in environmental enforcement actions." (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 50 (2008) (Ginsburg, J., dissenting))).

23. *San Luis & Delta-Mendota Water Auth. v. Locke*, No. 1:09-cv-01053, 2010 WL 500455, at \*2 (E.D. Cal. Feb. 5, 2010); see also *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208-09 (10th Cir. 2009) (noting that the movant seeking a mandatory preliminary injunction after *Winter* is required "to make a heightened showing of the four factors").

scholars believe that these earlier decisions created a more lenient standard unique to environmental plaintiffs.<sup>24</sup> They argue that *Winter* has somehow disrupted the existing standard for environmental plaintiffs.<sup>25</sup> Environmental practitioners have a similar perspective: *Winter* has “had a stifling effect” on environmental plaintiffs.<sup>26</sup> Many environmental organizations have abandoned the preliminary injunction route because “*Winter* has implicitly raised the bar.”<sup>27</sup>

Absent from this discussion, however, is any study evaluating whether, post-*Winter*, the preliminary injunction standard is more stringent and whether courts are more reluctant to issue injunctions. A more fundamental question is whether post-*Winter* trial courts approach environmental preliminary injunctions differently.

This Article explores these questions through an analysis of quantitative and qualitative data collected from federal district and circuit courts three years before and three years after *Winter*. The quantitative analysis counts the number of environmental injunctions granted, denied, or granted in part and denied in part during this time, while the qualitative analysis evaluates the content of the judicial decisions focusing on the preliminary injunction standard cited and the manner in which the preliminary injunction factors are evaluated.

In Part II, the Article begins by tracing the evolution of the environmental preliminary injunction standard from general principles to the precise four-factor preliminary injunction standard articulated in *Winter*. Part III describes the *Winter* decision and highlights concerns from academics about the *Winter* decision and its application by trial courts. Part IV explains the study designed to evaluate changes in the environmental preliminary injunction standard in light of *Winter*'s pronouncement of a four-factor standard and presents the qualitative and quantitative results of this study. Part V then provides an assessment of these results. Part VI concludes.

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24. Eubanks, *supra* note 20, at 658 (“[I]nterpretations of NEPA’s unique statutory scheme and purpose resulted in more lenient irreparable harm analyses in the post-*Gambell* judicial arena.”); see also Sarah Axtell, *Reframing the Judicial Approach to Injunctive Relief for Environmental Plaintiffs in Monsanto Co. v. Geertson Seed Farms*, 38 *ECOLOGY L.Q.* 317, 328 (2011) (“For a long time, environmental plaintiffs enjoyed strong injunctive relief as a protection from environmental harm.”).

25. See Hausman, *supra* note 22, at 182–83 (“Post-*Winter* courts will undoubtedly be more reluctant to issue injunctions for NEPA violations than before.”).

26. Email from Professor Jack Tuholske, Visiting Professor of Law, Dir. of Water & Justice, Vermont Law Sch. to Sarah J. Morath, Assistant Professor of Legal Writing, Univ. of Akron Sch. of Law (Nov. 11, 2012) (on file with author).

27. *Id.*; see also John E. McCann, Jr., *Evolving State and Federal Court Injunction Standards*, 44 *MD. B.J.* 48, 48 (Jan./Feb. 2011) (explaining that under the *Winter* standard, “obtaining a preliminary injunction in the Fourth Circuit . . . is now much more difficult”). Mr. McCann is an assistant practice group leader and principal at the law firm Miles & Stockbridge P.C. in Baltimore, MD.

Briefly, the quantitative data suggests little change. Injunctions overall were denied 51.5% of the time pre-*Winter*, compared to 53.6% of the time post-*Winter*. Injunction requests under the National Environmental Policy Act (NEPA), the most commonly used environmental statute, were denied 53.6% of the time pre-*Winter* compared to 55.1% of the time post-*Winter*. Similarly, the qualitative data shows little change in the injunction standard used by trial courts post-*Winter*. Trial courts continue to look to their circuit court for guidance on what standard to apply. Seven circuit courts (the Second, Third, Fourth, Seventh, Eighth, Ninth, and Tenth) have addressed their standard, either implicitly or explicitly, in light of *Winter*, and of these circuits, only the Fourth Circuit has expressly held that *Winter* invalidates its earlier standard.<sup>28</sup>

Given the disconnect between what scholars argue, what environmental practitioners perceive, and what the quantitative and qualitative data demonstrate, perhaps the full effects of *Winter* have not yet emerged. Scholars and practitioners agree that the preliminary injunction standard is at a crossroads,<sup>29</sup> and *Winter* is unlikely to be the final word on preliminary injunctions.<sup>30</sup> In the absence of further clarification from the Court, this article offers a starting point for discussing the appropriate preliminary injunction standard for environmental cases. The time is ripe for discussing the appropriate standard for preliminary injunctions generally,<sup>31</sup> environmental injunctions more specifically, the role of statutes in evaluating the injunction request,<sup>32</sup> and the interrelationship between the four preliminary injunction factors.<sup>33</sup>

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28. The First, Fifth, Sixth, Eleventh, and D.C. Circuits have not yet weighed in on the validity of their earlier standards in light of *Winter*. See *infra* Part III.

29. See Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 204 (2012) ("The law of equitable remedies is the in midst of an American revolution.").

30. See Paul W. Conable & Frank J. Weiss, *Surviving Winter: The Ninth Circuit Reaffirms the "Serious Questions" Test for Injunctive Relief*, 30 OR. ST. BAR LITIG. J. 15, 19 (2011), available at <http://www.osblitigation.com/lj2011-fall.pdf> (concluding that "it is possible that further guidance from the Supreme Court will be forthcoming on this issue").

31. Schoenbrod, *supra* note 10, at 21 (2010) (noting that it would be a "worthwhile endeavor" for law professors to "help the court" by "mak[ing] order of a doctrine applied in so many disparate settings").

32. Compare Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 488 (2010) (arguing that "equitable balancing in statutory cases should be abandoned because it conflicts with separation of powers principles"), with Schoenbrod, *supra* note 10, at 18 (disagreeing with Goldstein's premise that "equitable balancing inevitably gives judges open-ended discretion to reach whatever result makes sense to them").

33. Commentators in several recent articles have suggested different applications of the *Winter* standard. See DiSarro, *supra* note 11, at 90–98 (arguing for a "freeze frame" approach that requires proof of both a likelihood of success and irreparable injury); Weisshaar, *supra* note 11, at 1048 (arguing that the Supreme Court should adopt a sequential tests and use a serious-questions test in narrow circumstances); see also Bates, *supra* note, 3 at 1523 (arguing that all district courts should

## II. THE EVOLUTION OF THE ENVIRONMENTAL PRELIMINARY INJUNCTION

The *Winter* appeal was not the first time the Court evaluated a preliminary injunction arising from a violation of an environmental statute. With the enactment of environmental statutes in the early 1970s, an era of citizen enforcement of environmental statutes followed.<sup>34</sup> Injunctive relief quickly became the most common form of remedy sought by citizens suing federal agencies in an environmental case.<sup>35</sup> In such cases, a court would balance the potential harms to each party before deciding whether to enjoin the challenged conduct.<sup>36</sup> Through citizen enforcement actions, the Court issued a series of decisions addressing environmental preliminary injunctions: *Tennessee Valley Authority v. Hill*, *Weinberger v. Romero-Barcelo*, and *Amoco Production Company v. Village of Gambell*.

These cases, however, discuss when a court should engage in equitable balancing rather than how a court should perform such balancing. Thus, while the Court identified when equitable balancing was appropriate and the constitutional limits to a trial court's equitable discretion when statutory violations were alleged, it failed to articulate a "coherent theory" for determining remedies in such instances.<sup>37</sup> In addition, the Court described preliminary injunctions more generally as a remedy that involves "commonplace considerations" and "well-established principles," never fully defining or explaining how these considerations or principles relate to each other.<sup>38</sup>

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"incorporate a sliding scale analysis that weighs the four factors against one another"); Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions* (forthcoming) (on file with author) (proposing a flexible preliminary injunction standard requiring only "serious questions" on the merits).

34. See Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything Is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 361 (1999) (The "first Earth Day galvanized a cadre of attorneys, law teachers, law students, and citizens to begin integrating the lessons of environmental awareness into the legal system . . ."); see also Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 983 (1994) ("[E]nvironmental law has developed its complex, extended, doctrinal structure in a process dependent upon confrontational, pluralistic citizen activism, operating in every area of governance, but particularly in judicial and administrative litigation.").

35. See Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1, 2 (1988).

36. *Yakus v. United States*, 321 U.S. 414, 440 (1944) (stating that the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction" (citation omitted)).

37. See Axline, *supra* note 35 (discussing the Supreme Court's interpretation and application of equitable discretion and the separation of powers in these three decisions).

38. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (using the phrase "common place considerations"); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987) (using the phrase "well-established principles").

Because the Court applied these considerations and principles without much discussion, courts were left with little guidance. Lower courts were free to evaluate preliminary injunctions flexibly, emphasizing those considerations and principles they deemed most important.<sup>39</sup> Not surprisingly, confusion and inconsistency emerged.<sup>40</sup>

A. *Tenn. Valley Auth. v. Hill and the Limits to Equitable Balancing*

Interestingly, the most well-known decision addressing an environmental preliminary injunction,<sup>41</sup> *Tenn. Valley Auth. v. Hill*,<sup>42</sup> is known more for its discussion of statutory interpretation than equitable balancing.<sup>43</sup> In that case, environmental groups sought to enjoin the actions of the Tennessee Valley Authority (TVA) using the Endangered Species Act (ESA).<sup>44</sup> TVA had almost completed a multi-million dollar hydroelectric project, the construction of the Tellico Dam, when a three-inch fish, the snail darter, was discovered in an area that “would be completely inundated by the reservoir created as a consequence of the Tellico Dam’s completion,”<sup>45</sup> thereby destroying the snail darter’s habitat.<sup>46</sup> Because the snail darter was a listed endangered species, its habitat was protected under Section 7 the ESA.<sup>47</sup> Using Section 11(g) of the ESA,<sup>48</sup> an environmental group sought “to [permanently] enjoin completion of the dam and impoundment of the reservoir” arguing that those actions would violate the ESA by directly causing the extinction of the snail darter.<sup>49</sup> The United States District Court for the Eastern District of Tennessee denied the request, and the Sixth Circuit Court of Appeals reversed this decision explaining “that the District Court had abused its

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39. See DiSarro, *supra* note 11, at 75 (discussing three modifications made by federal appellate courts to the preliminary injunction standard).

40. Axline, *supra* note 35, at 34; see also Leubsdorf, *supra* note 4, at 526 (noting a “dizzying diversity of formulations”).

41. See Michael R. Lozeau, *Preliminary Injunctions and the Federal Water Pollution Control Act: The Clean Water Permit Program as a Limitation on the Courts’ Equitable Discretion*, 42 RUTGERS L. REV. 701, 712 (1990) (calling *Tenn. Valley Auth. v. Hill* “a landmark decision in environmental law”).

42. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) [hereinafter *TVA*].

43. See J.B. Ruhl, *The Endangered Species Act’s Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 498 (2012) (noting that the “central dispute” in *TVA* involved a “battle of statutory interpretation” between the majority and dissent).

44. *TVA*, 437 U.S. at 156.

45. *Id.* at 161.

46. *Id.* at 162.

47. *Id.*

48. Section 11(g) of the ESA allows “any person” to bring a civil action to “enjoin any person including the United States . . . who is alleged to be in violation of any provision of the Act.” 16 U.S.C. § 1536.

49. *TVA*, 437 U.S. at 164.

discretion by not issuing an injunction in the face of ‘a blatant statutory violation.’”<sup>50</sup>

On appeal, the Supreme Court analyzed two questions: whether completing the dam would violate the ESA; and, if there was a violation of the Act, whether an injunction was the appropriate remedy.<sup>51</sup> To answer the first question, the Court spent considerable time examining the language, history, and structure of the ESA and concluded “beyond a doubt that Congress intended endangered species to be afforded the highest of priorities,”<sup>52</sup> and “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>53</sup> The Court explained that “[t]he repeated expressions of congressional concern” over the eradication of endangered species “suggest how the balance would have been struck had the issue been presented to Congress in 1973.”<sup>54</sup> Thus, the Court concluded that completion of the dam would violate the ESA.<sup>55</sup>

Having determined that the operation of the Tellico Dam would violate the ESA, the Court turned to the second question, the requested remedy: an injunction. TVA requested that the Court simply issue a remedy “that accords with some modicum of common sense and the public weal.”<sup>56</sup> In response, the Court explained that general “principles,” instead of “common sense and the public weal,” determine the appropriate remedy.<sup>57</sup> One such principle is that a “federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of the law.”<sup>58</sup> Additionally, while in most cases “the balancing of equities and hardships is appropriate,”<sup>59</sup> these principles “take a court only so far.”<sup>60</sup>

The Court recognized the intrinsic limits of a tripartite system of government and explained that “[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.”<sup>61</sup> Although the Court noted that the burden on

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50. *Id.* at 168 (citing the Sixth Circuit’s decision).

51. *Id.* at 172.

52. *Id.* at 174.

53. *Id.* at 184.

54. *Id.* at 186.

55. *Id.* at 193 (“[T]here is an irreconcilable conflict between operations of the Tellico Dam and the explicit provisions of Section 7 of the Endangered Species Act . . .”).

56. *Id.* at 194.

57. *Id.*

58. *Id.* at 193.

59. *Id.*

60. *Id.* at 194.

61. *Id.*

the public through the loss of millions of dollars could greatly outweigh the loss of the snail darter, the Court did not have the authority to make such a decision, stating “emphatically” that it did not “[have] the power to engage in such a weighing process.”<sup>62</sup> Because Congress had already decided through the enactment of the ESA that the scales of equity tipped in favor of the endangered species, the snail darter, the Court did not balance any “equities and hardships” and simply affirmed the decision to grant the injunction.<sup>63</sup>

Since this decision, many courts have interpreted *TVA v. Hill* as foreclosing equitable balancing in ESA cases and have refused to engage in equitable balancing when an injunction request alleges a violation of the ESA.<sup>64</sup> Others have determined that an alternative preliminary injunction standard applies to injunction requests under the ESA.<sup>65</sup> Some scholars, too, have described the *TVA v. Hill* decision as either “explicitly preclud[ing] courts from engaging in traditional equitable balancing in determining whether to issue an injunction in the face of a violation of the Act”<sup>66</sup> or requiring a different standard.<sup>67</sup> *TVA v. Hill* may be useful to trial court judges confronted with the occasional injunction request alleging an ESA violation; however, in terms of analyzing a preliminary injunction based on a violation of NEPA or some other environmental statute, *TVA v. Hill*’s usefulness is limited.

First, because the Court did not engage in equitable balancing, *TVA v. Hill* did not give federal courts any guidance on how to apply the general preliminary injunction principles it discussed. In addition, although the Court noted the separation of powers in injunction cases, some scholar’s argue it did not provide a coherent theory for when a court’s equita-

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62. *Id.* at 187–88.

63. *Id.* at 194. (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” (citation omitted)).

64. Federico Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedge, Lilies, Checker-Mallows and Why the Prohibition Against Judicial Balancing of Harm Under the Endangered Species Act Is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 313, 316 (1998); see also Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 333–34 (2004) (describing cases where district courts have explained that the public interest favors the imposition of an injunction in ESA cases).

65. See *infra* Part III (discussing the different standard used with injunctions brought under the Endangered Species Act (ESA)).

66. See Cheever, *supra* note 64, at 316; but see Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill’s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 MO. ENVTL. L. & POL’Y REV. 318 (2010) (arguing for a more narrow interpretation of the ESA).

67. See Cheever, *supra* note 64, at 314 (“[T]he orthodoxy [of *TVA*] makes sense. The Endangered Species Act . . . cannot tolerate judicial balancing of species harm and economic dislocation while still honoring the purpose of the statute—the preservation and recovery of protected species and the ecosystems on which they depend.”); see also Parenteau, *supra* note 64, at 333–34.

ble powers may be limited.<sup>68</sup> Sensing that this decision may lead environmental plaintiffs to argue that the traditional rules of equitable balancing do not apply when statutory violations are alleged, the Court clearly distinguished *TVA v. Hill* the next time it addressed an environmental preliminary injunction.

*B. Weinberger v. Romero-Barcelo and Commonplace Considerations*

The next Supreme Court decision involving environmental injunctive relief reviewed the limits to a court's equitable discretion and further discussed the "commonplace considerations" of a court when reviewing injunction requests. Decided in 1982, a few years after *TVA v. Hill*, *Weinberger v. Romero-Barcelo*<sup>69</sup> involved the Federal Water Pollution Control Act (FWPCA), which is now the Clean Water Act (CWA). Under both versions of the Act, facilities must obtain a national pollution discharge elimination system (NPDES) permit from the Environmental Protection Agency before discharging a pollutant, which the Navy had failed to do.<sup>70</sup> Environmental plaintiffs, using the citizen suit provision of the FWPCA, sued the Navy for unpermitted discharges.<sup>71</sup> Characterizing the Navy's conduct as "technical violations" that were not causing any "appreciable harm" to the environment, the United States District Court for the District of Puerto Rico denied the injunction but ordered the Navy to apply for a NPDES permit.<sup>72</sup> Relying on *TVA v. Hill* and the position that a clear violation of a statute required injunctive relief, the First Circuit Court of Appeals vacated the order and remanded with instructions for the Navy to cease the violation until it obtained a permit.<sup>73</sup> On appeal, the Supreme Court considered whether the district court was required to issue an injunction given the Navy's failure to comply with the permit requirements of the FWPCA or retained discretion to issue other relief.<sup>74</sup>

As in *TVA*, the Court noted the limits Congress may place on a court's equitable discretion but cautioned that the Court should not "lightly assume that Congress has intended to depart from established principles,"<sup>75</sup> including the principle that a court is not "mechanically obligated to grant an injunction for every violation of the law."<sup>76</sup> Alt-

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68. See Axline, *supra* note 35, at 34 (stating that these three decisions failed "to develop clear rules of decision for federal courts to apply in later cases").

69. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

70. *Id.* at 308.

71. *Id.* at 307–08.

72. *Id.* at 309–10.

73. *Id.* at 310.

74. *Id.* at 306–07.

75. *Id.* at 313 (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

76. *Id.* at 313.

though the violation of the FWPCA statute was clear, unlike *TVA v. Hill*, the Court considered the failure to get a permit a procedural rather than a substantive violation.<sup>77</sup> Furthermore, the Court noted that the purpose and language of the ESA, and not the bare fact of a statutory violation, prevented equitable balancing and compelled the injunction of the dam in *TVA*.<sup>78</sup>

Thus, the Court evaluated FWPCA's "scheme and purpose" to determine whether equitable discretion was foreclosed.<sup>79</sup> First, the Court noted that unlike the ESA, FWPCA had other means, apart from an injunction, to ensure compliance, including a provision for fines and criminal penalties.<sup>80</sup> Second, the Court emphasized that the purpose of the FWPCA was to maintain "[t]he integrity of the Nation's waters, . . . not the permit process."<sup>81</sup> Upon receipt of the NPDES permit, the Navy would be in compliance with the FWPCA. The permitting program thus "contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute."<sup>82</sup> A final aspect of the statutory scheme that suggested courts retained their traditional equitable discretion was the statute's "phased compliance."<sup>83</sup> The "scheme of phased compliance" further suggested that FWPCA, unlike ESA, was a statute in which Congress "envisioned, rather than curtailed, the exercise of discretion."<sup>84</sup>

Based on the Court's interpretation of the statutory scheme and purpose of FWPCA, the Court rejected the plaintiffs' argument that procedural violations of environmental statutes gave rise to automatic injunctions.<sup>85</sup> Instead, it interpreted FWPCA as not "foreclosing completely the exercise of the court's discretion."<sup>86</sup> The district court could order the relief it considered necessary to secure prompt compliance with the

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77. *Id.*

78. *Id.* at 314. ("The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the [ESA].").

79. *Id.* at 314–20.

80. *Id.* at 314.

81. *Id.*

82. *Id.* at 316.

83. *Id.* The Court noted that the "ultimate objective of the FWPCA was to eliminate all discharges of pollutants into navigable waters by 1985." *Id.* To meet this goal, the statute required the use of "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. *Id.* (citing 33 U.S.C. § 1311(b)).

84. *Id.*

85. *Id.* at 320. ("Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include but is not limited to an order of immediate cessation.").

86. *Id.*

FWPCA, including but not limited to an order of immediate cessation.<sup>87</sup> The Court's holding was clear: unlike the ESA, FWPCA did not limit a court's equitable discretion in ordering remedies.

The Court further described the requested remedy, a preliminary injunction, in terms of "commonplace considerations."<sup>88</sup> First, an injunction is not a "remedy which issues as of course."<sup>89</sup> Rather, injunctions are appropriate only where the intervention of a court of equity "is essential 'to protect property rights against injuries otherwise irreparable.'"<sup>90</sup> Second, when there are competing claims of injury, the court "balances the conveniences of the parties and the possible injuries to them according as they may be affected by the granting or withholding of the injunction."<sup>91</sup> Third, even when there are instances where irreparable injury may result to the plaintiff, an injunction may be postponed if the injunction will "adversely affect a public interest."<sup>92</sup>

The Court did not apply these considerations beyond noting equitable balancing could "fully protect the range of public interests" at issue.<sup>93</sup> Because a permit was likely to be issued and compliance with FWPCA was forthcoming, the balance struck in favor of the Navy.

*Weinberger* further highlights the importance of the statute involved and makes clear that the "statutory scheme and purpose," in conjunction with the alleged violation, governs whether a court can engage in equitable balancing.<sup>94</sup> However, the *Weinberger* Court was "unclear on the critical issue of the extent of equitable discretion."<sup>95</sup> In addition, while the court reiterated a few commonplace considerations, it did not explain how to balance these considerations nor did it mention the suc-

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87. *Id.*

88. *Id.* at 313.

89. *Id.* at 311 (quoting *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–38 (1933)).

90. *Id.* at 312 (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)).

91. *Id.* at 312 (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)). *Yakus v. United States* is the first Supreme Court decision to introduce the public interest, albeit in dictum, as a factor in evaluating preliminary injunctive relief. See Orin H. Lewis, "The Wild Card That Is the Public Interest": Putting a New Face on the Fourth Preliminary Injunction Factor, 72 TEX. L. REV. 849, 858 (1994).

92. *Weinberger*, 456 U.S. at 312 (quoting *Yakus*, 321 U.S. at 440).

93. *Id.* at 320.

94. For further discussion on reconciling traditional equitable discretion with environmental statutes see Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984). Focusing on *TVA* and *Weinberger*, Farber argues that courts and scholars have not spent enough time evaluating the duties created by Congress through environmental statutes. He explains that when confronted with an injunction alleging a violation of an environmental statute, a court's focus "should always be on congressional intent, unclouded by the equity mystique." *Id.* at 515. Equitable discretion should only be used when "that intent cannot be discerned." *Id.* at 545.

95. *Id.* at 523.

cess on the merits factor. Thus, courts continued to develop preliminary injunction standards that weighed these commonplace considerations differently.

C. *Amoco Production Co. v. Village of Gambell and Well-Established Principles*

The final Supreme Court decision before *Winter* to address environmental preliminary injunctions did so in terms of “well-established principles.” Like *Weinberger, Amoco Production Co. v. Village of Gambell*<sup>96</sup> involved a procedural violation of a statute, the Alaska National Interest Lands Conservation Act (ANILCA), which protects natural resources in Alaska.<sup>97</sup> Several Alaskan native villages sued under ANILCA to enjoin the Secretary of the Interior’s sale of oil and gas leases, arguing that the sale would “adversely affect their aboriginal rights to hunt and fish on the “Outer Continental Shelf.”<sup>98</sup> Much like NEPA, ANILCA requires government agencies to prepare environmental impact statements evaluating the potential environmental impacts of a proposed project.<sup>99</sup> Although the United District Court for the District of Alaska found that the Secretary of Interior “did not have the policy precepts of ANILCA in mind at the time of evaluation” and thus had likely violated the Act, it denied the injunction because the balance of the harms did not favor the movant and the public interest favored continued oil exploration.<sup>100</sup> In reversing the district court’s decision, the Ninth Circuit Court of Appeals explained that “[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action . . . . Injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances.”<sup>101</sup>

On appeal, the Supreme Court began by reviewing its decision in *Weinberger*. The *Amoco* Court explained its description of the preliminary injunction standard in *Weinberger* as a “review” of “well-established principles” governing equitable relief in federal courts.<sup>102</sup>

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96. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987).

97. *Id.* at 535.

98. *Id.*

99. *See id.* at 535 n.2; The relevant portion of ANILCA states:

“In determining whether the withdraw, reserve, lease or otherwise permit the use, occupancy or disposition of public lands . . . the head of the Federal agency having primary jurisdiction of such land, . . . shall evaluate the effect of such use, occupancy, or disposition, . . . the availability of other lands . . . and other alternatives.”).

ANCILA § 810(a), 16 U.S.C. § 3120(a) (1980).

100. Farber, *supra* note 94, at 540.

101. *Id.* at 541 (citation omitted).

102. *Id.* at 542.

One such principle requires the court to “balance the competing claims of injury and must consider the effect on each party of granting or withholding of the requested relief.”<sup>103</sup> The Court reiterated that “particular regard should be given to the public interest,” but “a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.”<sup>104</sup> Finally, the Court echoed *Weinberger* and emphasized the underlying scheme and purpose of the statute by concluding that the district court’s refusal to issue a preliminary injunction against all exploration activities did not undermine the purpose of the Act: to preserve subsistence resources.<sup>105</sup>

Unlike *Weinberger*, the Court in *Amoco* spent more time analyzing these principles of equitable relief. Specifically, the Court noted that the injury to subsistence resources from exploration was “not at all probable.”<sup>106</sup> On the “other side of the balance of harms” was the monetary loss the oil company petitioners would have experienced “had exploration been enjoined.”<sup>107</sup> The implied conclusion was that the balance of harms did not tip in favor of the environment. The Court also discussed “the important role of the ‘public’ interest in the exercise of equitable discretion.”<sup>108</sup> In particular, the Court discussed the policy behind ANILCA, noting that in ANILCA Congress “expressly declared that preservation of subsistence resources is a public interest and established a framework for reconciliation, where possible, of competing public interests.”<sup>109</sup> Because the Secretary’s action did not undermine ANILCA’s substantive policies, the equities indicated that injunctive relief was not warranted.<sup>110</sup>

#### D. The Impact of TVA, *Weinberger*, and *Amoco*

While these three Supreme Court decisions set forth important considerations for determining injunctive relief, the decisions did not provide much guidance on how to balance the various considerations in an injunction request. Left unanswered was whether all the “well-established principles” or “commonplace considerations” need to be evaluated or whether one principle or consideration was more important than the others. For instance, the analysis of “public interest” in all three decisions arises when discussing whether a statutory violation foreclosed

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103. *Id.*

104. *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

105. *Id.* at 544.

106. *Id.* at 545.

107. *Id.*

108. *Id.*

109. *Id.* at 546.

110. *Id.*

a balancing of harms.<sup>111</sup> Beyond this, how “public interest” should be defined or evaluated as a separate factor is not discussed.<sup>112</sup> Similarly, none of the three decisions evaluated “success on the merits” as a separate factor, despite the Court’s recognition that a district court must consider whether plaintiffs have demonstrated that they are likely to prevail on the merits.<sup>113</sup> This is surprising given that the Court and scholars treat success on the merits as “an important, perhaps the most important, factor” in determining whether to issue a preliminary injunction.<sup>114</sup>

The Court’s failure to articulate a clear standard for preliminary injunctions and, more importantly, its failure to articulate how the standard should be applied resulted in inconsistency and confusion among the district courts.<sup>115</sup> Inconsistency was particularly common in cases involving NEPA violations, a statute not addressed in *TVA*, *Weinberger*, or *Amoco*.<sup>116</sup>

The confusion, however, was not over *what* principles to evaluate, but *how* to evaluate these principles. For the most part, courts addressed the general principles contained in *Amoco*: irreparable injury, balancing

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111. See Lewis, *supra* note 91, at 890 (stating that the court in *TVA* and *Weinberger* “merely used the public interest as a platform for discussing whether or not a showing of a likely statutory violation foreclosed the balancing of harms”).

112. See Ryan Griffin, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values When Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839, 845 (2010) (explaining that the Supreme Court has given “scant explanation of how to identify situations in which the public interest may override a showing of irreparable harm”). This is surprising given circuit court characterizations of this factor as a “wild card” in *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986), and criticism of this factor as one that “may disguise and superficially legitimize a judge’s or party’s personal agenda.” Donald B. Haller, Note, *Granting Preliminary Injunctions Against Dealership Terminations in Antitrust Actions*, 67 VA. L. REV. 1395, 1403–04 (1981).

113. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.”).

114. See, e.g., *Sole v. Wyner*, 551 U.S. 74, 83 (2007) (“At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff’s ultimate success on the merits.”); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (“In deciding whether to grant a preliminary injunction, a district court *must* consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits.”) (emphasis added); John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 35 (2007). In *Nken v. Holder*, 556 U.S. 418, 434 (2009), less than a year after *Winter*, the Court also announced that the first two factors—success on the merits and irreparable injury—“are the most critical” in requests to stay the enforcement of a judgment pending the outcome of an appeal. While a stay is not the same as a preliminary injunction, the Court in *Nken* noted the “overlap” between the four factors considered in both because “similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.” *Id.*

115. See Axline, *supra* note 35, at 34 (“The Supreme Court’s failure to articulate a coherent theory for determining remedies in cases involving statutory violations by federal agencies has created confusion and inconsistency in lower court opinions.”).

116. For cases, see Eubanks, *supra* note 20.

the harms, and the public interest. The individual and collective weight courts gave these principles varied. In some instances, balancing of harms and public interest received cursory treatment, if they were evaluated at all.<sup>117</sup> In other instances, both likelihood of success on the merits and irreparable harm were required for an injunction to issue.<sup>118</sup> Still in other instances, success on the merits and irreparable harm were interrelated, and a strong showing of irreparable harm could offset less certainty on the success of the merits factor, requiring only a showing of “serious questions going to the merits.”<sup>119</sup>

This variation, also known as the “sliding scale” or “serious questions” test, is central to the environmental plaintiff’s argument for a more lenient preliminary injunction standard. In some circuits, plaintiffs alleging environmental harm argued that a different preliminary injunction standard applied when “environmental harms” were alleged.<sup>120</sup> These plaintiffs often quoted the now famous lines from *Amoco*: “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. If such injury is sufficiently likely, therefore, the balance of the harms will usually favor the issuance of an injunction to protect the environment.”<sup>121</sup> Not surprisingly, the plaintiffs in *Winter* quoted this language from *Amoco* when they argued to the Supreme Court that the district court’s finding of a “near certainty” of irreparable harm was plainly supported by the record.<sup>122</sup>

### III. *WINTER V. NATURAL RESOURCE DEFENSE COUNCIL, INC.* AND THE FOUR-FACTOR TEST

#### A. *The Winter Decision*

In *Winter*, environmental organizations including the Natural Resource Defense Council (NRDC) challenged the U.S. Navy’s testing of a mid-frequency sonar detection system by arguing that this military practice was harming sea mammals such as whales and dolphins.<sup>123</sup> The NRDC sought to enjoin the Navy from using sonar during its training exercises based on alleged violations of NEPA, the ESA and the Coastal

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117. See *infra* Part IV.

118. See *infra* Part IV.

119. Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 113 (2001) (citation omitted).

120. See *infra* Part IV.

121. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

122. Brief for the Respondents at 48, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (No. 07–1239).

123. *Winter*, 555 U.S. 7, 15 (2008).

Zone Management Act (CZMA).<sup>124</sup> Specifically, the NRDC argued in its request for an injunction that there was “the clear potential for significant impact” on the marine environment and that the Navy violated NEPA by approving the training exercises based only on an Environmental Assessment rather than a full Environmental Impact Statement.<sup>125</sup>

The United States District Court for the Central District of California granted the plaintiffs’ motion for preliminary injunction, and the Ninth Circuit Court of Appeals upheld the injunction.<sup>126</sup> The Navy appealed to the Supreme Court and the Court reversed the Ninth Circuit’s decision, holding that the District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions.<sup>127</sup>

In reversing the Ninth Circuit’s decision, the Supreme Court, in a 5-4 decision, rejected the argument that a preliminary injunction is appropriate when there is only a “possibility” of irreparable harm.<sup>128</sup> Instead, the Supreme Court announced a clear four-factor<sup>129</sup> test for preliminary injunctions.<sup>130</sup> Specifically, the Court stated that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>131</sup>

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124. *Id.*

125. Complaint for Declaratory and Injunctive Relief at 5, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (No. CV06-4131), available at [http:// docs.nrdc.org/water/wat\\_06062801A.pdf](http://docs.nrdc.org/water/wat_06062801A.pdf). For a more detailed discussion of the complicated procedural history of *Winter*, see Lisa Lightbody, Comment, *Winter v. Natural Resources Defense Council, Inc.*, 33 HARV. ENVTL. L. REV. 593, 597–600 (2009).

126. *Winter*, 555 U.S. at 15–17.

127. *Id.* at 15–17, 33.

128. *Id.* at 21.

129. Although the Court did not use the term factor at this point, it did use the term “factor” later in its opinion. See *id.* at 32 (“The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief . . .”).

130. Colburn, *supra* note 8, at 321–22 (explaining that in *Winter*, “the Supreme Court (finally) explicitly endorsed [a] four-factored test, perhaps even turning the four factors into elements”).

131. *Winter*, 555 U.S. at 19. After setting forth this standard, the Court cited three of its prior decisions: *Munaf v. Geren*, 553 U.S. 674, 692 (2008) (holding that a court must consider the merits of an underlying habeas petition before granting a preliminary injunction prohibiting the transfer of an American citizen to Iraqi custody), *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982), and *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987). As explained in Part II.A–B., the *Amoco* and *Weinberger* decisions described the preliminary injunction standard in terms of “well-established principles” and “commonplace considerations” rather than the “four-factor” test seen in *Winter*. Similarly, *Munaf* did not provide a “four-factor” test and instead stated that “[a] preliminary injunction is an ‘extraordinary and drastic remedy’ . . . never awarded as of right. Rather, a party seeking a preliminary injunction must demonstrate, among other things, ‘a likelihood of success on the merits.’” *Munaf*, 553 U.S. at 690–91 (citation omitted).

The majority, unsurprisingly,<sup>132</sup> held that the trial court abused its discretion in issuing equitable relief because “even if plaintiffs have shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the public interest in effective, realistic training of its sailors.”<sup>133</sup> Justice Breyer, joined by Justice Stevens, concurred in part and dissented in part noting that the District Court and Ninth Circuit failed to “adequately explain . . . its conclusion that the balance of the equities tips in favor of plaintiffs.”<sup>134</sup> Justice Ginsburg and Justice Souter, on the other hand, dissented and noted that courts do not require litigants to always show “a particular, predetermined quantum of probable success or injury before awarding equitable relief.”<sup>135</sup> Instead, “courts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.”<sup>136</sup> Justice Ginsburg and Justice Souter concluded that the NRDC demonstrated “substantial harm to the environment,” “almost inevitable success on the merits of its claim,”<sup>137</sup> and that “the District Court conscientiously balanced the equities and did not abuse its discretion.”<sup>138</sup>

### B. Winter’s Preliminary Injunction Standard Analyzed

The majority’s analysis of the injunction request in *Winter* has been described as “cursorily,”<sup>139</sup> “summarily,”<sup>140</sup> and “limited.”<sup>141</sup> These cri-

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132. See Joel R. Reynolds et al., *No Whale of a Tale: Legal Implications of Winter v. NRDC*, 36 *ECOLOGY L.Q.* 753, 753 (2009) (calling the outcome of *Winter* “hardly revolutionary”).

133. *Winter*, 555 U.S. at 23.

134. *Id.* at 41 (Breyer, J., concurring in part, dissenting in part).

135. *Id.* at 51 (Ginsburg, J., dissenting).

136. *Id.*

137. *Id.* at 53–54.

138. *Id.* at 44. Environmental advocates have relied on Justice Ginsburg’s dissent to argue that the sliding-scale language has survived.

139. Peter Manus, *Five Against the Environment*, 44 *NEW ENG. L. REV.* 221, 225 (2010) (noting that the majority opinion “rested on an all-or-nothing comparison of two dissimilar and only cursorily analyzed public interests”).

140. Lightbody, *supra* note 125, at 602 (stating that the Court “summarily concluded” that “[t]he public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the [environmental] interests advanced by the plaintiffs”).

141. See Manus, *supra* note 139, at 224 (stating that “the Court considered the outcome of this comparison so obvious that it offered little in the way of analysis in its opinion”); see also Susan Lee, *Winter v. Natural Resources Defense Council, Inc.: The U.S. Supreme Court Vacates a Preliminary Injunction That Imposed Mitigation Measures on Defense Training*, 16 *U. BALT. J. ENVTL. L.* 187, 191 (2009) (“[T]he Court’s limited analysis, consisting only of the procedural aspects of the preliminary injunction, rather than the plaintiffs’ substantive claim, undermined the policy goal of the NEPA to ensure ‘that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989))).

tiques stem from the Court's brief discussion of the NEPA statute, the four preliminary injunction factors, and the relationship between each factor.

Some of the harshest criticisms focus on the Court's cursory treatment of the alleged statutory violation. Unlike the Court's decisions in *TVA*, *Weinberger*, and *Amoco* where the Court thoroughly analyzed the correlating statutes, the Court in *Winter* gave little thought or acknowledgement of the purpose or objectives of NEPA.<sup>142</sup> Instead, the Court addressed NEPA in a perfunctory manner.<sup>143</sup> In particular, the Court's unwillingness to examine the merits of the case—whether NEPA was violated—allowed the Court in *Winter* to avoid any serious consideration of NEPA or its purposes.<sup>144</sup> One scholar has noted that “[t]o the majority, it appears, NEPA represents nothing more than paper work.”<sup>145</sup> And this “brush-off of the statute suggests an almost taunting commentary on its purpose.”<sup>146</sup> As a result, *Winter* has been labeled a decision based on the “unarticulated personal value system shared by five Supreme Court Justices.”<sup>147</sup>

The Court's treatment of the individual factors was equally deficient. Although *Winter* outlined a four-factor standard and stated that the plaintiff “must establish” all four factors, the Court did not define or explain how these factors are demonstrated<sup>148</sup> or how they relate to one another.<sup>149</sup> In fact, the Court's discussion of these factors does not re-

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142. See Manus, *supra* note 139; Lee, *supra* note 141. But see Eubanks, *supra* note 20, at 657 (stating that the Court in *Winter* “implicitly” acknowledges the “‘statutory scheme and purpose’ approach” to NEPA and that “the Court factored NEPA’s unique scheme and purpose into its preliminary injunction analysis, but it qualified the level of weight accorded to the statutory purpose”).

143. In fact, the Court only spent one paragraph discussing what I would call the “scheme and purpose” of NEPA when discussing the preliminary injunction standard. See *Winter*, 555 U.S. at 23 (majority opinion).

144. See Richard Lazarus, *The National Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtain*, 100 GEO. L.J. 1507, 1561 (2012) (stating that the “Court relied on NEPA’s procedural-only character to justify its ruling” and “never needed to reach the issue whether the Navy had in fact violated NEPA”). The majority of Justice Ginsburg’s dissent, however, addresses the underlying merits of plaintiffs’ claims directly noting that “[i]f the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis – and the Navy’s training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve.” *Winter*, 555 U.S. at 43 (Ginsburg, J., dissenting).

145. See Manus, *supra* note 139, at 242.

146. *Id.*

147. *Id.* at 224.

148. See *id.* (noting that the two public interests at stake were “broadly” defined).

149. See e.g., Amber R. Woodward, *The Scope of “Plaintiffs’ Harm” in Environmental Preliminary Injunctions*, 88 WASH. U.L. REV. 507, 522 (2010) (“In defining the plaintiffs’ harm, the Court did not state whether it should consider the harm to the NRDC organizations members, the harm to the marine mammals, or the harm to both”); see also John M. Newman, *Raising the Bar and the Public Interest: On Prior Restraints, “Traditional Contours,” and Constitutionalizing Prelimi-*

flect a standard requiring satisfaction of all four factors. For example, after clearly stating the four factors of a preliminary injunction, the Court began its analysis with a summary of the parties' position and a discussion of the second factor, irreparable harm, not the first, success on the merits.<sup>150</sup> The Court discussed whether the plaintiffs must demonstrate a "likelihood" of irreparable injury—not just a possibility—in order to obtain preliminary relief.<sup>151</sup> Finding the "'possibility' standard . . . too lenient," the Court reiterated that the second factor of the preliminary injunction standard requires showing that "irreparable injury is *likely* in the absence of an injunction."<sup>152</sup>

The Court, however, did not rule conclusively on whether irreparable harm to plaintiffs was likely, instead stating that "even if plaintiffs [had] shown irreparable injury from the Navy's training exercises, any such injury [was] outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."<sup>153</sup> Similarly, the Court did not analyze whether the first factor—success on the merits—was met,<sup>154</sup> a factor that the district court, the appellate court, and Justice Ginsburg in her dissent all concluded weighed in the plaintiffs favor. Rather, the majority stated that it did "not have to address the lower courts' holding . . . [on] likelihood of success on the merits" because "public interest and the Navy's interest in effective, realistic training of its sailors" weighs against granting injunctive relief.<sup>155</sup>

The Court's decision thus rests on the last two factors: balancing the competing interests of the parties and the public interest.<sup>156</sup> Drawing

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*nary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 359 (2011) (explaining that "neither *eBay* nor *Winter* was sufficiently clear on the question of how to apply the new test"); Griffin, *supra* note 112, at 845 (explaining that in *Winter*, "the Supreme Court once again failed to provide a comprehensive standard").

150. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). This is unusual because most trial courts begin by discussing success on the merits. An exception to this was the Fourth Circuit where before *Winter*, courts first engaged in a balancing of the "likelihood of irreparable harm to the plaintiff, against the likelihood of harm to the defendant." See *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 528 F. Supp. 2d 625, 630 (S.D. W. Va. 2007). If this balance of harm favored the plaintiffs, then the court considered the likelihood of success on the merits. *Id.*; see also *Montrose Parkway Alt. Coal. v. U.S. Army Corps of Eng'rs*, 405 F. Supp. 2d 587, 592 (D. Md. 2005).

151. *Winter*, 555 U.S. at 375.

152. *Id.*

153. *Id.* at 376.

154. *Id.* at 381 ("[W]e do not address the underlying merits of plaintiffs' claims. While we have authority to proceed to such a decision at this point, doing so is not necessary here.").

155. *Id.* at 376.

156. *Id.* at 376–381; see also *Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 2d 546, 562 (D. Del. 2010) (acknowledging "the substantial weight accorded to the public interest by the Supreme Court in *Winter*"); Manus, *supra* note 139, at 225 (noting that the majority opinion "rested on an all-or-nothing comparison of two dissimilar and only cursorily

from *Amoco* and *Weinberger*, the Court describes these factors as “balanc[ing] the competing claims of injury and . . . the effect on each party of the granting or withholding of the requested relief”<sup>157</sup> and as “the public consequences in employing the extraordinary remedy of an injunction.”<sup>158</sup> As for balancing the harms, the Court determined that the harm to the safety of a Navy fleet if deployed with inadequate training was greater than the harm to the unknown number of marine mammals.<sup>159</sup> With the final factor, the Court concluded that “the public interest in conducting training exercises with active sonar under realistic conditions outweighs the [environmental] interests advanced by the plaintiffs.”<sup>160</sup> In the end, the Court determined that “the balance of equities and consideration of the overall public interest in [the] case tip strongly in favor of the Navy.”<sup>161</sup>

Because the Court’s analysis focused on the last two factors, it does not provide any instruction on how all four factors should be balanced in relation to each other. In addition, the Court did not address whether the sliding scale approaches of the Ninth Circuit and other circuits were still valid.<sup>162</sup> This lack of guidance has led to a few unique interpretations of *Winter*. One trial court has stated that the preliminary injunction standard only requires consideration of the last two factors. In *Wildlands v. U.S. Forest Service*, the United States District Court for the District of Oregon cited *Winter* when stating that “the court considers [only] the balance of equities and the public interest” when determining “whether to issue the injunctive relief requested by the plaintiffs.”<sup>163</sup> This decision, however, appears to be an aberration.

The more pressing concern is whether the preliminary injunction standard is a factor or element test.<sup>164</sup> Elemental tests and factor tests are

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analyzed public interests”); Stellakis, *supra* note 21, at 374 (referring to the last two factors as the “vastly dominant factors” and the factors on which the Court “hangs its harpoon”).

157. *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 541 (1987) (internal quotation marks omitted)).

158. *Id.* at 24–25 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotation marks omitted)).

159. *Id.* at 26.

160. *Id.*

161. *Id.* Another criticism of *Winter* involves the standard of review used by the Supreme Court. See Reynolds et al., *supra* note 132, at 765 (“[T]he majority never explicitly measured the district court’s factual findings against the well-established standard for appellate review of factual findings—that is, whether the court’s findings were clearly erroneous.”).

162. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting) (“This Court has never rejected [the sliding scale test], and I do not believe it does so today.”).

163. *Wildlands v. U.S. Forest Serv.*, 791 F. Supp. 2d 979, 993 (D. Ore. 2011) (citing *Winter*, 555 U.S. 7).

164. As a legal writing professor, I spend some time in the first semester teaching the difference between factor tests and element tests. Many legal writing and analysis texts emphasize this

two different types of inquiries that a court may use to determine whether a party has satisfied its burden of proof.<sup>165</sup> In an element test, a party must meet each element to meet its burden of proof.<sup>166</sup> In contrast, in a factor test, each factor does not need to weigh in favor of the party as long as some of the factors do.<sup>167</sup>

This misperception of the standard set forth by the Supreme Court in *Winter* as a more stringent element test is reflected in several subsequent decisions. A few trial courts post-*Winter* treat the preliminary injunction standard as an element test. For example, the United States District Court for the Western District of Texas recently noted after quoting the *Winter* standard that “[t]he plaintiff must satisfy all four requirements.”<sup>168</sup> In another example, the United States District Court for the Eastern District of California characterized the preliminary injunction standard as “the four-element *Winter* test.”<sup>169</sup> Practitioners, too, have explained the *Winter* standard as an element test such that the “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.”<sup>170</sup>

These varying interpretations of *Winter* support the complaint that the Supreme Court’s analysis of the preliminary injunction standard is imprecise. And the treatment of the factors as elements supports the argument that *Winter* is more stringent. Under an element standard, environmental plaintiffs would be required to satisfy all of the factors—success on the merits, irreparable harm, balancing, and public interest—in their favor. Requiring all four “prongs” to be shown separately under all circumstances heightens the preliminary injunction standard and in effect converts a factor test into an element test.<sup>171</sup> This lack of guidance

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difference. See DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 32–33 (2009); CHRISTINE COUGHLIN ET AL., A LAWYER WRITES 61–63 (2008).

165. ROMANTZ & VINSON, *supra* note 164, at 32.

166. *Id.*

167. *Id.*

168. *Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 564 (W.D. Tex. 2011) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21–22 (2008)).

169. *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, No. 2:10-cv-02350-GEB-CMK, 2010 WL 3958640, at \*1 (E.D. Cal. Oct. 8, 2010). After determining that the plaintiff did not satisfy the first factor—likelihood of success—the court determined that it “need not address the three remaining *Winter* factors, i.e. whether Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and [the] preliminary injunction is in the public interest.” *Id.* at \*15.

170. Eric J. Murdock & Andrew J. Turner, *How “Extraordinary” Is Injunctive Relief in Environmental Litigation? A Practitioner’s Perspective*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10464, 10466 (2012).

171. A similar complaint has been made about the U.S. Supreme Court decision *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 338 (2006). See Gergen et al., *supra* note 29, at 208 (stating that the four-factor test for the permanent injunction in *eBay* “presents its factors as four separately assessed

from the Supreme Court may lead judges to rule how they desire, whether pro-environment or pro-defendant.<sup>172</sup> This reliance on personal preference is particularly true with the “wild card”<sup>173</sup> factor: public interest.

Juxtaposing these scholarly concerns is the reality: Because of this lack of detail, most courts—for the time being—have been able to retain their earlier flexible standards.<sup>174</sup> On the ground, many circuit courts have reevaluated their circuit standard in light of *Winter*, and of those circuits, only the Fourth Circuit has stated that *Winter* overrules its earlier preliminary injunction standard.<sup>175</sup> One circuit, the Second Circuit, has expressly stated that *Winter* does not alter any earlier standard, while three circuits, the Third, Seventh, Eighth have implied the same.<sup>176</sup> Two circuits, the Tenth and Ninth Circuits, now apply *Winter* in conjunction with their earlier standards.<sup>177</sup>

### C. Testing the Waters: Research Design and Results

#### 1. Research Design

Many commentators have made sweeping claims about the status of preliminary injunctions post-*Winter* with few data points.<sup>178</sup> Similarly, focusing only on the quantitative results excludes any analysis of the content of the trial court orders. This study includes a textual analysis of the trial court orders to complement the numerical findings, thereby allowing for a more robust analysis of *Winter*'s effect.<sup>179</sup>

In an effort to better understand what changes *Winter* may have caused to a trial court's analysis of an environmental preliminary injunction request, I evaluated six years' worth of preliminary injunctions issued by federal district courts.<sup>180</sup> To fall within my data set, the case had

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prongs, rather than as true ‘factors’—i.e., elements of an overall decision making process that can be weighed with or against one another”).

172. See Woodward, *supra* note 149, at 527–28 (stating with regard to the irreparable harm factor that “[a] clear standard is necessary because, without it, both parties are unable to properly prepare for litigation, and courts are left to their own devices in choosing between outcome-dispositive standards”).

173. Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986).

174. See *infra* Part III.

175. See *infra* Part III.

176. See *infra* Part III.

177. See *infra* Part III.

178. See *supra* notes 20–22.

179. “[D]ata capture[s] votes rather than opinions. For the actual development of the law, the opinion matters a great deal.” CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 65 (2006).

180. Using November 12, 2008, the date of the *Winter* decision, as my starting point, I gathered decisions from online legal research search engines covering the three years before and the three years after the *Winter* decision. My search terms included “preliminary injunction” and “envi-

to be “environmental”; that is, environmental protection or natural resource matters were at stake,<sup>181</sup> and it had to involve a preliminary injunction, as opposed to a permanent injunction,<sup>182</sup> a temporary restraining order (TRO), or a stay pending appeal.<sup>183</sup> I further refined my data set to focus on litigation involving an environmental plaintiff, such as an environmental group, seeking an injunction from a governmental entity, most often through a citizen suit provision of an environmental statute, similar to *TVA*, *Weinberger*, *Amoco*, and *Winter*.<sup>184</sup> My final data set

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ronmental harm” or “environmental injury” on Westlaw, WestlawNext, LexisNexis, and LexisNexis Advance. These search terms returned an over-inclusive list of cases from which I narrowed the data set to include only trial court decisions.

181. See Lazarus, *supra* note 7, at 708 n.4 (describing environmental cases as those cases whose “threshold inquiry turns on whether environmental protection or natural resources matters are at stake”).

182. While the standard for preliminary and permanent injunctions is almost identical, there are substantial differences in the application of these standards. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 691–92 (1990) (describing the differences between permanent and preliminary injunctions and noting that “[a]lthough the vocabulary of adequate remedy and irreparable injury is common to both preliminary and permanent relief, the competing considerations are quite different at the two stages of litigation”); see also Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205, 222 n.94 (2011) (stating that “substantial differences exist between preliminary and permanent injunctions”).

183. While the standards for temporary restraining orders (TROs) and stays pending appeal appear similar to preliminary injunctions, they are in fact different. In a TRO, an evaluation of the last factor is one-sided—the harm from the issuing of the TRO itself. See 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 65.36(1), at 65–83 (3d ed. 2004); see also *Cnty. of Los Alamos v. U.S. Dep’t of Energy*, No. CIV 05–1343 JB/LAM, 2006 WL 1308305, at \*7 (D. N.M. Jan. 13, 2006) (“To obtain a TRO, the moving party must establish four requirements: (i) a substantial likelihood of success on the merits; (ii) irreparable injury to the movant if the relief is denied; (iii) the threatened injury to the movant outweighs the injury to the other party under the TRO; and (iv) the TRO, if issued, is not adverse to the public interest.”). Stays, like TROs, are similar but not the same as preliminary injunctions. In *Nken v. Holder*, the Supreme Court rejected the argument that a stay is a type of injunction. Instead, the Supreme Court explained that each is a distinct action. 556 U.S. 418, 425 (2009). A stay operates on the “judicial proceeding itself” while an injunction “direct[s] the conduct of a particular actor.” *Id.* at 428.

184. See Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 889–90 (2009) (describing the usual characteristics of public interest litigation: (1) the lawsuit is directed against the government agency, and the resource developer who stands to lose if the suit is successful often intervenes on the side of the government; (2) the plaintiffs claim that the agency has violated several federal (and state) statutes; (3) procedural claims are more numerous and more likely to succeed than substantive claims; (4) the relief demanded is equitable, obviating the need for jury trials; and (5) the request for a preliminary injunction, often with a companion request for summary judgment, often is the critical stage in the litigation) (citing GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 1 PUBLIC NATURAL RESOURCES LAW § 2:10 (2d ed. 2007)); see also Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1, 3 (1999) (calling the role of citizen suit enforcement in environmental law “one of environmental law’s essential hallmarks”). I also had a few cases involving a state, city, or Indian tribe suing a governmental entity.

consists of 74 trial court decisions: 33 were issued in the three years before *Winter*, and 41 were issued in the three years after *Winter*.<sup>185</sup>

To help better understand whether *Winter* had altered the way in which trial courts approached environmental preliminary injunctions, I gathered quantitative and qualitative data from these cases. Together, this data provides a more complete evaluation of the changes in environmental preliminary injunctions since *Winter*.

## 2. Numerical and Textual Results: A Summary

To summarize the numerical results,<sup>186</sup> Tables 1 and 2 provide the distribution of injunction requests and the types of environmental claims involved in these requests. Tables 3 and 4 display the number of injunction requests granted and denied both overall (Table 3) and by statute (Table 4). Tables 5, 6, and 7 include the injunction standard used by trial courts and assess any change in the standard used. More specifically, Table 5 reports whether trial courts post-*Winter* cited the standard of their circuit, the *Winter* standard, or some combination of the two, while Table 6 records the number of courts referencing the “sliding scale” or “serious questions” test. Table 7 adds further information by assessing whether the standard articulated post-*Winter* is a change to the standard used pre-*Winter*. Finally, Table 8 records trial courts’ treatment of the public interest factor both before and after *Winter*.

In addition to the numerical data, the results include a textual analysis of post-*Winter* trial court decisions for a more thorough evaluation of *Winter*’s influence.<sup>187</sup> Although not every court has confronted *Winter*, a textual analysis of those that have uncovers three approaches to evaluating preliminary injunction requests post-*Winter*: apply the *Winter* standard, apply the relevant circuit standard, or apply both the *Winter* and the relevant circuit standard.

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185. I recognize that I may be missing injunction orders that are not available through on-line sources. I also recognize that my evaluation does not take into account those plaintiffs who have intentionally avoided pursuing preliminary injunctions post-*Winter* because of the perceived heightened standard. Again, this study is a starting point for assessing *Winter*’s effect.

186. My research looked at the entire population of environmental preliminary injunctions issued over a six year period, as opposed to a random sample. For that reason, significance tests were not performed. Using the term “statistically significant” in light of the fact that a random sample was not used would be misleading because it may implicitly attribute to finding greater scientific importance than it merits. I would note, however, that whether statistical significance tests should be applied to population data remains contested. See Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 739 n.66 (2009).

187. I am cognizant of the argument that through the selection of my cases, I somehow created a sample, thereby necessitating a statistical analysis. For this reason and the reasons stated above, I engaged in a qualitative analysis of the decisions in my data set.

### 3. The Universe of Environmental Preliminary Injunctions

The first two tables provide background information on the environmental injunction requests reviewed for this study. Table 1 provides the number of injunction requests ruled on by trial courts in each circuit, while Table 2 records the environmental statute involved in the injunction request.

Table 1: Distribution of Injunction Requests

<u>Circuit of Trial Court Decision</u>	<u>Pre-Winter</u>	<u>Post-Winter</u>
First	3	3
Second	1	2
Third	2	1
Fourth	2	1
Fifth	1	1
Sixth	2	0
Seventh	0	1
Eighth	1	2
Ninth	16	23
Tenth	4	3
Eleventh	1	1
D.C.	1	3
<b>Total Number</b>	<b>33</b>	<b>41</b>

Table 2: Types of Claims

<u>Type of Claim</u>	<u>Pre-Winter</u>	<u>Post-Winter</u>
National Environmental Protection Act (NEPA)	28	29
National Forestry Management Act (NFMA)	6	4
Clean Water Act (CWA)	6	7
Endangered Species Act (ESA)	4	10
Coastal Zone Management Act (CZMA)	2	1
National Historic Preservation Act (NHPA)	1	3
Federal Land Management and Policy Act (FLMPA)	1	4
Public Nuisance	0	2
<i>Other</i> : MLA, NMSA, SMCRA, OCSLA, LWCFA, and others	5	8

Table 1 shows an increase in the number of preliminary injunctions ruled on after *Winter*. Specifically, eight more injunctions were ruled on during the three years evaluated post-*Winter*. Table 1 also shows that both before and after *Winter*, trial courts in the Ninth Circuit evaluated the greatest number of preliminary injunction requests with trial courts in the Tenth and First Circuits following at a distant second and third. The increase in the number of preliminary injunctions reviewed suggests that *Winter* has not discouraged environmental plaintiffs from bringing injunction requests.

Table 2 shows little change in the statutes involved in environmental injunction request. Not surprisingly, injunction requests for NEPA violations are significantly more than any other environmental statute both before and after *Winter*. The National Forestry Management Act (NFMA) and the Clean Water Act (CWA) round out the second and third most popular act in injunction requests pre-*Winter*, but ESA is the second most frequent act in injunction requests post-*Winter*. The increase in the number of injunction requests under the ESA may be the result of the different standards courts used for evaluating injunction requests for ESA violations.<sup>188</sup> For example, in *Center for Biological Diversity v. U.S. Forest Service*, the United States District Court for the District of Arizona noted that the defendant confused the “irreparable harm” standard from *Winter* with the “institutionalized caution” standard used in injunctions brought under the ESA.<sup>189</sup> However, not all courts treat preliminary injunctions for ESA violations in the same manner.<sup>190</sup>

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188. *Compare* *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1167 (D. Mont. 2008) (stating that “[t]he third [preliminary injunction] test applies to ESA injunctions. Applying this test, the court must still measure the likelihood of success on the merits as well as the possibility of irreparable injury. . . . [O]nce likelihood of success and irreparable injury are shown, the court may not fine-tune its analysis by weighing the hardships of the parties. This legal principal is a direct acknowledgment of congressional intent. . . . What this means is that if a plaintiff is likely to succeed on its ESA claim and irreparable injury is possible, then the court should issue an injunction when it is necessary to effectuate the purpose of the ESA.”); *see also* *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1284 (S.D. Fla. 2005) (“In cases involving the ESA, the standard is different. Specifically, the third and fourth prongs of the injunction analysis have been foreclosed by Congress.”); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d 1029 (D. Ariz. 2011) (“By enacting the ESA, Congress altered the normal standards for injunctions under Federal Rule of Civil Procedure 65. The Ninth Circuit has consistently held that ‘[t]he traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA.’ (quoting *Nat’l Wildlife Fed’n v. NMFS*, 422 F.3d 782, 793 (9th Cir. 2005))). The Supreme Court stated that in enacting the ESA “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” *TVA v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). “Accordingly, courts may not use equity’s scales to strike a different balance.” *Nat’l Wildlife Fed’n*, 422 F.3d at 794 (internal quotation omitted).

189. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d 1029, 1039 (D. Ariz. 2011).

190. *See* *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1207 (D. Mont. 2009)

There is also an increase in the number of injunction requests brought under public nuisance claims, which may be a result of the return to public nuisance actions in environmental litigation.<sup>191</sup>

#### 4. The Outcome of Environmental Preliminary Injunctions

The next two tables present the outcomes of the preliminary injunction requests. Table 3 displays the overall results based on three possible outcomes of the requests: denied, granted, or granted in part/denied in part. Table 4 displays the outcome of the injunction requests based on the environmental statute involved. Both tables present the data numerically and as a percentage.

Table 3: Injunctions Overall

<u>Injunction Outcome</u>	<u>Pre-Winter (33)</u>	<u>Post-Winter (41)</u>
Denied	17	22
Granted	13	12
In part	3	7
Denied	51.5%	53.6%
Granted	39.4%	29.3%
In part	9.1%	17%

Table 4: Injunctions by Statute

<u>Most Common Environmental Statutes</u>	<u>Pre-Winter</u>	<u>Post-Winter</u>
NEPA	<u>Denied:</u> 15 (53.6 %) <u>Granted:</u> 12 (42.9%) <u>In part:</u> 1 (3.6%) <b>Total: 28</b>	<u>Denied:</u> 16 (55.1%) <u>Granted:</u> 11 (34.5%) <u>In part:</u> 3 (10.3%) <b>Total: 29</b>
NFMA	<u>Denied:</u> 3 (50%) <u>Granted:</u> 3 (50%)	<u>Denied:</u> 3 (75%) <u>Granted:</u> 0

(noting that *Hill* “does not command a separate ESA standard when measured by the Court’s ruling in *Winter*”); see also *Defenders of Conewango Creek v. Echo Developers, LLC.*, No. 06–242E, 2007 WL 3023927, at \*3 (W.D. Pa. Oct. 12, 2007) (stating the court “will not disregard the traditional analysis” as it rejected the argument that a court of equity is stripped of its usual discretion in cases alleging a violation of the ESA).

191. See Richard O. Faulk, *Uncommon Law: Ruminations of Public Nuisance*, 18 MO. ENVTL. L. & POL’Y REV. 1, 2 (2010) (noting the “growth” in public nuisance claims “in climate change and environmental litigation, where it seems to be the ‘tort of choice’ for plaintiffs seeking breathtakingly broad relief from global warming and trans-border pollution”).

	<u>In part:</u> 0 <b>Total: 6</b>	<u>In part:</u> 1 (25%) <b>Total: 4</b>
CWA	<u>Denied:</u> 4 (66.6%) <u>Granted:</u> 2 (66.6%) <u>In part:</u> 0 <b>Total: 6</b>	<u>Denied:</u> 5 (71.4%) <u>Granted:</u> 0 <u>In part:</u> 2 (28.6%) <b>Total: 7</b>
ESA	<u>Denied:</u> 2 (50%) <u>Granted:</u> 2 (50%) <u>In part:</u> 0 <b>Total: 4</b>	<u>Denied:</u> 4 (40%) <u>Granted:</u> 3 (30%) <u>In part:</u> 3 (30%) <b>Total: 10</b>

As demonstrated in Table 3, the overall number of injunctions denied has not changed dramatically (51.5% pre-*Winter* compared to 53.6% post-*Winter*—a difference of 2.1%). The number of injunctions granted has decreased slightly (39.4% pre-*Winter* compared to 29.3% post-*Winter*—a difference of 10.1%), but the number of injunctions granted in part and denied in part has increased slightly by almost the same amount. (9.1% pre-*Winter* to 17% post-*Winter*—a difference of 7.9%).

A similar trend appears with percentages by statute. Table 4 illustrates that the number of NEPA injunctions denied increased by 1.5%, the number of injunctions granted decreased by 8.4%, and the number of injunctions granted in part and denied in part increased by 6.7%. The numbers in these tables suggest that an injunction is less likely to be issued post-*Winter* but only slightly so. Again, the percentages suggest that *Winter* has had a mild effect on environmental preliminary injunctions.

##### 5. The Preliminary Injunction Standard Used: Numerical Results

Tables 5 and 6 record the standard trial courts employed when reviewing preliminary injunctions in environmental cases. Table 5 displays the preliminary injunction standard that appears in post-*Winter* trial court decisions, while Table 6 records whether the trial court mentioned an alternative sliding scale or serious questions test as part of the preliminary injunction standard.

Table 5: Post-*Winter*: Preliminary injunction standard stated by trial courts

Standard	Number of Trial Courts (41)
<i>Winter</i> & Circuit Standard	22
<i>Winter</i> Standard Only	13
Circuit Standard Only	3
No Standard	3

Table 6: Pre- and Post-*Winter* reference to sliding scale or serious questions

	Pre- <i>Winter</i> (33)	Post- <i>Winter</i> (40)
Sliding Scale or Serious Questions Test Mentioned	Total: 20 60.6%	Total: 23 57.5%

As shown in Table 5, many trial courts state the four-factor standard from *Winter*, but most trial courts cite *Winter* along with their circuit standard. This data suggests that while some courts are relying on only *Winter*, more than half of the trial courts confronted with a preliminary injunction state the *Winter* standard in conjunction with their earlier circuit standard. Table 6 supports the argument that the sliding scale test has survived *Winter*,<sup>192</sup> but reference to this test has decreased slightly. Thus, *Winter* has a presence, but it does not dominate trial court orders.

Asserting conclusions based on only the numbers presented in the tables shown is problematic. First, the number of injunctions evaluated in my data set is small. Second, the time span evaluated is short. Third, an evaluation of the number of injunctions granted or denied focuses on the results and not on why the results are what they are. A similar problem arises if only the number from the standard stated (Table 5) is evaluated, as factors can be applied in a variety of ways. Given this reality, I am reluctant to rely on the quantitative data alone to argue that *Winter* had a mild effect. Instead, the number of injunctions granted and denied and

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192. Susan Jane Brown & Rachel Fazio, *Preliminary Injunctive Relief in the Ninth Circuit after Winter v. Natural Resources Defense Council*, 37 *ECOLOGY L. CURRENTS* 78, 87 (2010), available at [http://elq.typepad.com/currents/2010/10/currents37-09-brown-2010-1012.html#\\_edn22](http://elq.typepad.com/currents/2010/10/currents37-09-brown-2010-1012.html#_edn22) (remarking that the “sliding scale test remains good law”); see also Jean C. Love, *Teaching Preliminary Injunctions After Winter*, 57 *ST. LOUIS U. L.J.* 689, 707–08 (2013) (Professor Love, as a remedies professor, teaches her students that the “door [is] open for the United States Supreme Court to approve a federal circuit court’s ‘sliding scale’ test for preliminary injunctions that does not include the mere possibility of irreparable harm standard”).

the preliminary injunction standard stated is a starting point for further analysis of *Winter*'s true effect: how the factors are applied.

*D. The Preliminary Injunction Standard Use: The Textual Results*

To answer this "application" question, an evaluation of circuit court opinions was required. Seven circuits have confronted *Winter* with differing depths of treatment and varying outcomes. From these seven circuits, three approaches have emerged: (1) expressly state that *Winter* applies; (2) expressly state or imply that the circuit standard applies; (3) apply *Winter* with the circuit standard. In addition, two circuits have expressly declined to state whether their earlier preliminary injunction standard survives post-*Winter*.<sup>193</sup>

1. Expressly State That *Winter* Applies: The Fourth Circuit

The first circuit court to discuss its standard in light of *Winter* is also the only circuit to reject its earlier standard for *Winter*. Before *Winter*, trial courts in the Fourth Circuit Court of Appeals used the *Blackwelder* balance-of-hardships test.<sup>194</sup> Under this analysis, the trial court first "balance[d] the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant."<sup>195</sup> The next step in the test involved looking at the sliding scale between the merits and irreparable harm. If the hardship balanced in favor of the plaintiff, the plaintiff only had to show that questions raised concerning the merits were "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation," rather than a likelihood of success.<sup>196</sup> The importance of the merits of the case increased, however, as the "probability of irreparable injury diminished."<sup>197</sup> Thus, under the *Blackwelder* preliminary injunction test, the balancing of hardships occurred before a court addressed the question of likelihood of success on the merits, and success on the merits was linked to irreparable injury in a sliding scale manner.

After *Winter*, the Fourth Circuit reevaluated the *Blackwelder* standard in a non-environmental case, *Real Truth About Obama, Inc., v. Fed.*

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193. Both the D.C. and Eleventh Circuits explained that they did not have to decide the correct injunction standard in light of *Winter*. See *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009); *Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1312 n.10 (11th Cir. 2008), *abrogated on other grounds by CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011).

194. *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)).

195. *Id.*

196. *Id.* (citing *Blackwelder*, 550 F.2d at 195).

197. *Id.*

*Election Committee*.<sup>198</sup> In *Real Truth About Obama*, the Fourth Circuit recognized that the *Blackwelder* standard stood “in fatal tension” with *Winter*<sup>199</sup> for four reasons and held that the balancing test established in *Blackwelder* no longer applied.<sup>200</sup> First, the Fourth Circuit interpreted *Winter* as requiring the plaintiff to “clearly demonstrate that it will likely succeed on the merits”<sup>201</sup> in all circumstances. Second, the Fourth Circuit interpreted *Winter* as requiring the plaintiff to “make a clear showing that it is likely to be irreparably harmed absent preliminary relief,” effectively eliminating any balancing or use of a sliding scale.<sup>202</sup> Third, the court noted that *Winter* “emphasized the public interest requirement,” a factor courts did not always evaluate, and now “it must always be considered.”<sup>203</sup> Finally, the Fourth Circuit stated that its earlier standard allowed for a “flexible interplay” of factors in contrast to the four *Winter* requirements, “each of which must be satisfied as articulated.”<sup>204</sup> Beyond requiring a “clear showing,” the Fourth Circuit did not say by how much each factor must be met. But by requiring each factor to be met, the Fourth Circuit turned a balancing-factor test into an element test.

The one post-*Winter* trial court decision from the Fourth Circuit evaluating an environmental injunction was issued after the *Real Truth About Obama* and is consistent with this decision. In *America Whitewater v. Tidwell*, the United States District Court for the District of South Carolina reviewed a preliminary injunction for an alleged violation of several environmental statutes including the Wild and Scenic Rivers Act and NEPA.<sup>205</sup> In its decision, the trial court cited *Winter* when it restated the four factors of the preliminary injunction standard and, in accordance with the *Real Truth About Obama*, marched through an analysis of each

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198. *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342 (4th Cir. 2009), *overruled on other grounds by* *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 130 S. Ct. 2371 (2010).

199. *Id.* at 346.

200. *Id.* The Fourth Circuit was very clear in its position: “[T]he *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.” *Id.* at 347.

201. *Id.*

202. *Id.* (noting a standard that allows for a “possibility of irreparable injury” when there is a “strong showing on the probability of success” was “explicitly rejected in *Winter*”).

203. *Id.*

204. *Id.*; *see also* McCann, *supra* note 27, at 49 (stating that “the new *Obama* standard rigidly requires a ‘clear showing’ of each factor independently and deems the failure to make that showing as to any single factor fatal to the motion for preliminary injunctive relief” (citation omitted)).

205. *Am. Whitewater v. Tidwell*, No. 8:09-cv-02665-JMC, 2010 WL 5019879 (D. S.C. Dec. 2, 2010).

factor.<sup>206</sup> After finding that each factor had not been met, the court denied the plaintiffs' request for a preliminary injunction.<sup>207</sup>

While *American Whitewater* is the only environmental preliminary injunction decision from the Fourth Circuit, subsequent evaluations of injunction requests will, like *American Whitewater*, follow the *Real Truth About Obama* and require that each factor be met. As a result of this stricter standard,<sup>208</sup> future environmental plaintiffs in the Fourth Circuit will have less success with their injunction requests. For the moment, this is the only circuit in which this is true. The Fourth Circuit is also a circuit that does not evaluate very many environmental preliminary injunctions,<sup>209</sup> and its impact on the overall number of injunctions granted and denied is minor. Fortunately for the environmental plaintiff, all the circuits to address *Winter* have taken approaches different from the *Real Truth*. These circuits have either retained or reconciled their earlier standards with *Winter* or have avoided the issue all together.

## 2. Expressly State or Imply the Circuit Standard Applies

### *a. Expressly State the Circuit Standard Applies: The Second Circuit*

Like the Fourth Circuit, the Second Circuit Court of Appeals, when confronted with a preliminary injunction, clearly evaluated its standards in light of *Winter*. The Second Circuit, however, reached the opposite conclusion. Like trial courts in the Fourth Circuit, trial courts in the Second Circuit before *Winter* used a sliding scale approach to weigh the preliminary injunction factors. The most common standard stated was a three-part test requiring the plaintiff to establish: (1) irreparable harm; (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them fair ground for litigation; and (3) a balance of hardships tipping decidedly in its favor.<sup>210</sup>

After *Winter*, the Second Circuit addressed the viability of this standard in *Citigroup Global Markets v. VCG Special Opportunities Master Fund*.<sup>211</sup> In *Citigroup*, the Second Circuit noted that the Supreme Court in *Winter* “expressly withheld any consideration of the merits of

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206. *Id.* at \*10.

207. *Id.* at \*10–14.

208. In fact, in *Real Truth About Obama*, the Fourth Circuit noted that *Winter* requirements were “far stricter” than the *Blackwelder* requirements. *Real Truth*, 575 F.3d at 347.

209. See *supra* Part III (showing the distribution of environmental preliminary injunctions).

210. *Sadler v. Mineta*, No. 3:05–CV–1189 (MRK), 2006 WL 2772699, at \*18 (D. Conn. Sept. 26, 2006) (citing *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348–49 (2d Cir. 2003)).

211. *Citigroup Global Markets v. VCG Special Opportunities Master Fund*, 598 F.3d 30 (2d Cir. 2010).

the parties' underlying claims."<sup>212</sup> The Second Circuit interpreted this silence to mean that the Supreme Court had not foreclosed application of the "serious question" standard.<sup>213</sup> Thus, the Second Circuit held that its earlier flexible standard "remain[ed] valid."<sup>214</sup>

Only two trial courts in the Second Circuit have addressed environmental preliminary injunctions post-*Winter*. Both stated the four factors from *Winter*. One trial court mentioned that the Second Circuit's serious question standard survives,<sup>215</sup> while the other did not.<sup>216</sup> Therefore, no clear trend has emerged. By citing *Winter*, trial courts in the Second Circuit have signaled that *Winter* has a role, but that role is limited to identifying the preliminary injunction factors.

*b. Imply That the Circuit Standard Survives: The Third, Seventh, and Possibly Eighth Circuits*

A third approach is to imply that an earlier circuit standard applies. Unlike the Second Circuit, which clearly stated that the "serious question" standard remains valid after *Winter*, the Third, Seventh, and possibly the Eighth Circuit Courts of Appeals have subtly suggested that their circuit standards survive.

*i. The Third Circuit*

Before *Winter*, trial courts in the Third Circuit used a traditional four-factor test balancing all four factors against each other.<sup>217</sup> In the one post-*Winter* environmental preliminary injunction request from a trial court in the Third Circuit, the Delaware Department of Natural Resources and Environmental Control sought to enjoin the United States Army Corp of Engineers from a river deepening project, under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.<sup>218</sup> The trial court cited *Winter* instead of the Third Circuit when stating the four-factor preliminary injunction standard.<sup>219</sup> The court then evaluated each of the factors, finding that the first two weighed against the injunc-

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212. *Id.* at 37.

213. *Id.* at 38.

214. *Id.*

215. *Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 447 (S.D.N.Y. 2010)

216. *City of Newburgh v. Sama*, 690 F. Supp. 2d 136, 163 (S.D.N.Y. 2010)

217. *Defenders of Conewango Creek v. Echo Developers, LLC.*, No. 06-242E, 2007 WL 3023927, at \*3 (W.D. Pa. Oct. 12, 2007) (citing *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995)); *see also* *FiberMark N. Am., Inc. v. Jackson*, CIV. A. 07-839 (MLC), 2007 WL 4157235 (D. N.J. Mar. 28, 2007)).

218. *Del. Dep't of Natural Res. & Env'tl. Control v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 2d 546, 554 (D. Del. 2010).

219. *Id.*

tion.<sup>220</sup> With the final two factors, the court briefly balanced the environmental preservation efforts against the economic interests and concluded that it was in the public interest to proceed with the deepening project.<sup>221</sup> The trial court, therefore, denied the injunction request.<sup>222</sup>

The Third Circuit Court of Appeals' treatment of *Winter* is consistent with the trial court's approach. In *Minard Run Oil Co. v. U.S. Forest Service*, a mineral rights group sought to enjoin the Forest Service from implementing a policy that would have prevented the owners from drilling in the national forest until the completion of an EIS.<sup>223</sup> The mineral-rights owner moved for a preliminary injunction and the injunction was granted.<sup>224</sup> The trial court noted that, according to the Third Circuit's four-factor standard, the movant bears the burden to demonstrate that all four factors favor preliminary relief.<sup>225</sup> These factors, however, are balanced so that if the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are weak.<sup>226</sup> The court also explained that in the Third Circuit, "if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff."<sup>227</sup> After determining that all the factors weighed in the mineral owners' favor, the district court issued the injunction.

On appeal, the Third Circuit affirmed the trial court's decision after evaluating the same four factors.<sup>228</sup> When stating the preliminary injunction standard, the Third Circuit cited its four-factor standard<sup>229</sup> and cited *Winter* only once, when noting that the public interest analysis may change when military interests are involved.<sup>230</sup> This treatment by the Third Circuit of its standard and *Winter* implies that the Third Circuit standard survives. In the Third Circuit, a four-factor standard where all the factors are balanced against each other is not viewed to be in conflict with *Winter*.

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220. *Id.* at 558–562.

221. *Id.* at 563.

222. *Id.*

223. *Minard Run Oil Co. v. U.S. Forest Serv.*, No. 09–125, 2009 WL 4937785, at \*23 (W.D. Pa. Dec. 15, 2009).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at \*33 (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

228. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011).

229. *Id.* at 250 (citing *Kos Pharm. Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2005)).

230. *Id.* at 256 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

## ii. The Seventh Circuit

The Seventh Circuit standard, which treated success on the merits as a threshold factor, appears to be valid post-*Winter* as well. In the Seventh Circuit, a movant was required to make a threshold showing that demonstrated (1) some likelihood of succeeding on the merits and that it has “no adequate remedy at law” and (2) it will suffer “irreparable harm” if preliminary relief is denied.<sup>231</sup> If the moving party could not meet these requirements, the injunction was denied.<sup>232</sup> If, however, the movant prevailed, the court then considered (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.<sup>233</sup> Furthermore, these factors were applied on a “sliding scale” approach, under which “the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side.”<sup>234</sup>

This sliding scale standard appears to survive *Winter*.<sup>235</sup> The one trial court decision to evaluate a preliminary injunction post-*Winter* involved a public nuisance claim that alleged that the potential entry of Asian carp into Lake Michigan posed a public nuisance.<sup>236</sup> In *Michigan v. U.S. Army Corps of Engineers*, several states sought an injunction to prevent the emigration of Asian carp through the Chicago Area Waterways System into Lake Michigan.<sup>237</sup> After applying the Seventh Circuit standard, the United States District Court for the Northern District Court of Illinois denied this request.<sup>238</sup> The trial court cited the Seventh Circuit threshold and sliding scale standard but added that *Winter* clarified that the irreparable harm must be likely.<sup>239</sup> Because the plaintiffs did not show sufficient likelihood of success on the merits or a sufficient pro-

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231. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992).

232. *Id.*

233. *Id.* at 11–12.

234. *Id.* at 12.

235. *See* *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (where the Seventh Circuit, after reciting the *Winter* standard, remarked that “[t]hese considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must present in order for preliminary relief to be warranted”).

236. *Michigan v. U.S. Army Corps of Eng’rs*, No. 10–CV–4457, 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010) *aff’d on other grounds*, 667 F.3d 765 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

237. *Id.* at \*1.

238. *Id.* at \*2.

239. *Id.* at \*13.

spect of irreparable harm absent an injunction, the court denied the injunction.<sup>240</sup>

On appeal, the Seventh Circuit Court of Appeals affirmed the district court's decision denying the injunction because it found the balance of harms favored the defendants.<sup>241</sup> The Seventh Circuit stated the four-factor preliminary injunction standard for *Winter* and analyzed each of the factors, but it continued to refer to the irreparable harm factor as a threshold requirement.<sup>242</sup> The Seventh Circuit did not comment on the trial court's reference to the sliding scale approach.<sup>243</sup>

In another post-*Winter* decision, the Seventh Circuit, in reference to the first factor, stated that there must be "a plausible claim on the merits."<sup>244</sup> Although the Seventh Circuit cited *Winter*, it did not analyze the validity of its standard post-*Winter*. Instead, it stated that the strength of the first factor depends on the remaining factors: "[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."<sup>245</sup> Thus, the sliding scale standard continues as a viable standard in the Seventh Circuit.<sup>246</sup>

### iii. The Eighth Circuit

The Eighth Circuit Court of Appeals has offered a similar implied endorsement of its earlier standard. Before *Winter*, two standards existed in the Eighth Circuit: a four-factor standard and an "alternative" standard that allowed an injunction based on either "(1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting preliminary relief."<sup>247</sup> In *Sierra Club v. United States Army Corps of Engineers*, an environmental organization sued the U.S. Army Corps of Engineers, the Fish and Wildlife Service, and an electric utility alleging the process for permitting the construction of a new coal-fired power plant

240. *Id.* at \*2.

241. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (7th Cir. 2011) *cert. denied*, 132 S. Ct. 1635 (2012).

242. *Id.* at 787.

243. *Id.* at 782–790.

244. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

245. *Id.*

246. See Bates, *supra* note 3, at 1543; Weisshaar, *supra* note 11 at 1037. Also, in *Alliance for the Wild Rockies*, 622 F.3d 1045, 1053 (9th Cir. 2010), the Ninth Circuit noted that the Seventh Circuit has held that its earlier standard continues to apply. See *infra* notes 283–288 and accompanying text.

247. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 112 (8th Cir. 1981).

violated the CWA, NEPA, and the ESA.<sup>248</sup> The trial court granted the injunction request and the utility appealed, arguing that the court “‘erred with respect to each’ of the four requirements for preliminary injunctive relief cited by the Supreme Court.”<sup>249</sup> Specifically, the utility took issue with the language used by the trial court to describe each factor.<sup>250</sup>

On appeal, the Eighth Circuit did not recite a preliminary injunction standard from *Winter* or the Eighth Circuit.<sup>251</sup> Instead, it launched into an analysis of success on the merits and continued by analyzing the trial court’s decision on the remaining three factors.<sup>252</sup> Although the trial court used phrases such as “at the very least,” “fair ground for litigation,” and “serious issues” similar to the “alternative standard” that existed in the Eight Circuit before *Winter*,<sup>253</sup> the Eighth Circuit held that “any error by the district court in the wording of its order [was] harmless.”<sup>254</sup> It was clear from the court’s order that the trial court was familiar with *Winter*.<sup>255</sup> In addition, the parties discussed *Winter* extensively, and the Eighth Circuit found no reason to believe that the court overlooked any part of this standard.<sup>256</sup>

No trial court in the Eighth Circuit has addressed an environmental preliminary injunction post-*Winter*, so it is difficult to confidently state what change has occurred. Practitioners, however, have criticized the *Sierra Club* decision for “not faithfully apply[ing] the *Winter* standard in substance,”<sup>257</sup> noting that some “federal courts of appeal persist in applying more relaxed or ‘flexible’ standards.”<sup>258</sup> So, from a practitioner standpoint, the Eighth Circuit’s flexible factor standard remains intact post-*Winter*.

### 3. Apply *Winter* with the Circuit Standard: Ninth and Tenth Circuits

Less certainty exists in the viability of the standards of the Ninth and Tenth Circuit Courts of Appeals post-*Winter*. Before *Winter*, the Tenth Circuit used the same four factors stated in *Winter*.<sup>259</sup> The Tenth

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248. *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978 (8th Cir. 2011).

249. *Id.* at 989.

250. *Id.* at 990.

251. *Id.*

252. *Id.*

253. *Id.* at 992 (noting that the trial court “used wording once familiar”).

254. *Id.* at 994.

255. *Id.*

256. *Id.*

257. See *Murdock & Turner*, *supra* note 170, at 10470.

258. *Id.* at 10474.

259. See *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, No. 08-cv00462-REB-MEH, 2008 WL 1946818, at \*2 (D. Colo. Apr. 30, 2008) (citing *Lundgrin v. Clayton*, 619 F.2d 61, 63 (10th Cir. 1980) for the following standard: “A party seeking a preliminary injunction must show (1)

Circuit, however, relaxed the first factor, success on the merits when the moving party established that the three remaining factors tipped decidedly in its favor.<sup>260</sup> In such circumstances, the movant “need only show questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation.”<sup>261</sup>

*a. The Tenth Circuit*

After *Winter*, the Tenth Circuit Court of Appeals reviewed a mandatory preliminary injunction in *RoDa Drilling* and noted that the *Winter* standard was a “heightened standard.”<sup>262</sup> However, the Tenth Circuit cautioned that the heightened standard applied only to those preliminary injunctions that are disfavored: preliminary injunctions that alter the status quo, mandatory preliminary injunctions, and preliminary injunctions that give the movant all the relief it would be entitled to if it prevailed in the full trial.<sup>263</sup> Thus, when the San Luis Valley Ecosystem Council requested a mandatory preliminary injunction for an alleged NEPA violation, the United States District Court for the District of Colorado stated both the *Winter* standard and the earlier Tenth Circuit standard stated in *Lundgrin*.<sup>264</sup> In a footnote, the trial court noted that while the United States Supreme Court “made clear in *Winter* that all four elements must be established to justify issuance of a preliminary injunction,” in certain circumstances the Tenth Circuit “appears to recognize the continuing validity of the modified success-on-the-merits formula notwithstanding the *Winter* decision.”<sup>265</sup>

When it came time to apply the preliminary injunction factors, the district court addressed all “four prongs,”<sup>266</sup> saving the likelihood of success on the merits for last. Having found that the first three factors weighed in the plaintiff’s favor, the court applied the modified test on the likelihood of success factor.<sup>267</sup> The court held that the plaintiff had at

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a substantial likelihood that the movant eventually will prevail on the merits; (2) that the movant will suffer imminent and irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.”).

260. *Id.* at \*2.

261. *Id.* (citing *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.10 (10th Cir. 2006)).

262. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208-09 (noting that the movant seeking a mandatory preliminary injunction post-*Winter* is required “to make a heightened showing of the four factors”).

263. *Id.* at 1208 n.3.

264. *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1239 (D. Colo. 2009).

265. *Id.* (citing *RoDa Drilling*, 552 F.3d at 1208n.3).

266. *Id.* at 1239.

267. *Id.* at 1242–46.

least raised questions going to the merits, which was sufficient when the plaintiff had established the other three factors in its favor.<sup>268</sup> Thus, despite the “clear” statement from the Supreme Court that all factors must be met, the trial court exercised its discretion in determining how the factors were met.

More recently, the United States District Court for the District of Kansas recognized the continuing validity of the Tenth Circuit’s modified test while applying both the *Winter* and Tenth Circuit standards. In *Hillsdale Environmental Loss Prevention*, the trial court denied an injunction pending appeal and TRO request for alleged NEPA and CWA violations after analyzing the request under both the *Winter* standard and the Tenth Circuit standard.<sup>269</sup> The trial court again noted in a footnote that the Supreme Court in *Winter* “did not specifically address the modified test for the ‘likelihood of success’ factor” and therefore “neither rejected the modified test nor endorsed it.”<sup>270</sup> Citing *RoDa Drilling* and *San Luis Valley*, the court recognized that it was “bound by Tenth Circuit precedent, which appears to recognize the continuing validity of the modified test post-*Winter*.”<sup>271</sup>

Based on these decisions, the trial court applied both tests and held that the plaintiffs failed to satisfy the first factor under both the modified Tenth Circuit test and the *Winter* test.<sup>272</sup> More specifically, the plaintiffs failed to show a “likelihood of success on the merits” and failed to show “questions going to merits so serious, substantial, difficult, and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.”<sup>273</sup> The court noted that the plaintiffs’ failure to satisfy the first factor under either standard was sufficient for the court to deny the current relief.<sup>274</sup> Nonetheless, the court evaluated the final injunction factors and noted that neither weighed in the plaintiffs’ favor.<sup>275</sup>

#### *b. The Ninth Circuit*

Before *Winter*, trial courts in the Ninth Circuit Court of Appeals could employ one of two tests. Under the “traditional test,” the plaintiff

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268. *Id.* at 1243.

269. *Hillsdale Evtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, No. 10–CV–2008 CM/DJW, 2011 WL 3847383 (D. Kan. Aug. 26, 2011).

270. *Id.* at \*1 n.1.

271. *Id.* (citing *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 12009 n.3 (10th Cir. 2009); *San Luis Valley Ecosystem Council*, 657 F. Supp. 2d at 1239 n.1.).

272. *Id.* at \*1 (“In this case, plaintiffs failed to satisfy the first factor under either standard, which means injunctive relief—even for seven days—is not warranted.”).

273. *Id.* at \*2.

274. *Id.* at \*3.

275. *Id.*

had to show the same four factors from *Winter*.<sup>276</sup> Under the “alternative test,” the plaintiff could establish “either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in his favor.”<sup>277</sup> The two formulations of the alternative test represent a sliding scale in which the required degree of irreparable harm increased as the probability of success decreased.<sup>278</sup>

Before the Ninth Circuit had an opportunity to address *Winter*, trial courts in the Ninth Circuit questioned whether this alternative “sliding-scale” test survived.<sup>279</sup>

The Ninth Circuit, too, is divided on whether the sliding scale standard continues to apply. In the Ninth Circuit’s first post-*Winter* decision, *Earth Island Institute v. Carlton*, it reviewed a decision denying an injunction pending appeal for an alleged violation of NFMA and NEPA.<sup>280</sup> Although the Ninth Circuit did not comment on the trial court’s assertion that “there is no longer a viable sliding scale test,”<sup>281</sup> it found no abuse of discretion in the trial court’s analysis of all four factors from *Winter*.<sup>282</sup>

In contrast, the Ninth Circuit explicitly analyzed its earlier standard in light of *Winter* in *Alliance for the Wild Rockies v. Cottrell*.<sup>283</sup> *Alliance for the Rockies* involved a timber sale that allegedly violated of NEPA and NFMA.<sup>284</sup> The United States District Court for the District of Montana applied *Winter* as an element test and denied the injunction because the plaintiffs had not shown a likelihood of success on the merits, nor that irreparable injury was likely in the absence of an injunction.<sup>285</sup>

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276. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1158 (9th Cir. 2006).

277. *Id.*

278. *Berryessa for All v. U.S. Bureau of Reclamation*, No. C 07–259 SI, 2007 WL 4209551, at \*2 (N.D. Cal. Nov. 27, 2007) (noting that a plaintiff can demonstrate it is entitled to preliminary relief “in two ways”).

279. *Compare Earth Island Inst. v. Carlton*, No. CIV.S–09–2020FCD–EFB, 2009 WL 2905801, at \*1 n.2 (E.D. Cal. Sept. 4, 2009) (noting that “contrary to plaintiff’s continued protestations, *Winter* represents the sole, controlling standard for preliminary injunction relief. There is no longer a viable, alternative sliding-scale test . . .”), with *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, No. 2:10–cv–02350–GEB–CMK, 2010 WL 3958640 (E.D. Cal. Oct. 8, 2010), *aff’d sub nom. Klamath Siskiyou Wildlands Ctr. v. Grantham*, 424 F. App’x 635 (9th Cir. 2011) (stating that the Ninth Circuit’s “‘serious questions’ approach survives *Winter* when applied as part of the four-element *Winter* test”).

280. *See Earth Island Inst. v. Carlton*, 626 F.3d 462 (9th Cir. 2010).

281. *Earth Island Inst.*, 2009 WL 2905801, at \*1 n.2.

282. *Earth Island Inst.*, 626 F.3d at 476.

283. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

284. *Id.* at 1130.

285. *Id.*

In reversing this decision, the Ninth Circuit evaluated what other circuit courts had done in light of *Winter* and recognized that the Supreme Court did not expressly overrule the sliding scale test.<sup>286</sup> In light of this, the Ninth Circuit held that the serious question standard survives but that the other factors of *Winter* must also be met.<sup>287</sup> Therefore, the “serious questions” test “survives ... when applied as part of the four-element *Winter* test.”<sup>288</sup> The standard from *Alliance for the Wild Rockies*, as opposed to *Earth Island Institute*, has taken hold in the trial courts of the Ninth Circuit. Most trial courts list the four factors from *Winter* followed by the language from *Alliance* that the serious questions standard survives and conclude with the statement that the plaintiff must meet all four factors.<sup>289</sup>

#### 4. Apply the Circuit Standard When the Circuit Court Is Silent: Trial Courts in the First, Fifth, and D.C. Circuits

Several circuit courts have not yet addressed *Winter*. For trial courts in these circuits, the trend appears to follow their established circuit standard rather than adopt *Winter*.

The First Circuit Court of Appeals’ earlier standard included all four factors, but trial courts placed the greatest emphasis on the first factor, success on the merits. If the plaintiff could not demonstrate that “he is likely to succeed on his quest, the remaining factors [became] matters of idle curiosity.”<sup>290</sup> However, even upon a finding that the first factor had not been met, trial courts often evaluated the remaining factors.<sup>291</sup>

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286. *Id.* at 1131, 1134 (reviewing at the Fourth, Seventh, and Second Circuits’ standard and joining with the Seventh and Second Circuits “concluding that the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*”).

287. *Id.* at 1134–35.

288. *Id.* at 1131–32.

289. *Save the Peaks Coal. v. U.S. Forest Serv.*, No. CV-09-8163-PCT-MHM, 2011 WL 671766, at \*2 n.1 (D. Ariz. Feb. 11, 2011). After quoting the *Winter* standard, the trial court noted in a footnote that “[i]n the alternative, the moving party may show, ‘serious questions on merits.’” See *Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1048–49 (N.D. Cal. 2011); *Conservation Congress v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126 (E.D. Cal. 2011); *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1093 (D. Nev. 2011), *aff’d*, 443 F. App’x 278 (9th Cir. 2011); *Bair v. Cal. Dep’t of Transp.*, No. C 10-04360 WHA, 2011 WL 2650896 (N.D. Cal. July 6, 2011); *W. Watersheds Project v. Salazar*, No. CV 11-00492 (DMG) 2011 U.S. Dist. LEXIS 151556 (N.D. Cal. Aug. 10, 2011).

290. *Nw. Bypass Group v. U.S. Army Corps of Eng’rs*, 470 F. Supp. 2d 30, 36 (D. N.H. 2007) (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)).

291. *Id.* at 63 n.49 (“Having concluded that the Plaintiffs failed to meet their burden to demonstrate a reasonable likelihood of success, the Court need not proceed any further. For the sake of completeness, the Court will evaluate the remaining three prongs.”); see also *Food & Water Watch, Inc. v. U.S. Army Corps of Eng’rs*, 570 F. Supp. 2d 177, 184 (D. Mass. 2006) (stating that “the first two factors—likelihood of success on the merits and irreparable harm—are threshold issues,” which

This practice remains in place after *Winter*. Trial courts give credence to *Winter* by citing the decision for certain principles, such as preliminary injunctions are an extraordinary remedy, but cite to First Circuit decisions when restate the preliminary injunction standard. Furthermore, when it comes to applying the standard, trial courts continue to place emphasis on the first factor and address the remaining factors for completeness sake.<sup>292</sup> Thus, there appears to be no change in the approach taken by trial courts in the First Circuit when reviewing preliminary injunctions.

There also appears to be little change in the approach taken by trial courts in the D.C. and Fifth Circuits. Before *Winter*, the D.C. Circuit Court of Appeals employed a version of the sliding scale standard where all four factors had to be balanced against one another; it placed particular emphasis on irreparable injury.<sup>293</sup> After *Winter*, the trial courts presented with environmental preliminary injunctions have cited *Winter*, but they continue to view the four factors as a “continuum, with more of one factor compensating for less of another,” requiring “at least some injury” for an injunction to issue.<sup>294</sup> The D.C. Circuit has addressed *Winter* in non-environmental injunction requests and noted that *Winter* “could be read to create a more demanding burden” than the sliding-scale analysis.<sup>295</sup> However, the court did not resolve whether the “sliding-scale analysis survives” *Winter* because the injunction being reviewed could have been denied under either approach.<sup>296</sup>

In contrast to the D.C. Circuit, the Fifth Circuit Court of Appeals’ pre-*Winter* standard required all four factors to be met.<sup>297</sup> The only post-*Winter* environmental preliminary injunction request within the Fifth

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did not weigh in movant’s favor, but evaluated the remaining two factors nonetheless); *Sierra Club v. Wagner*, Civil No. 07-cv-257-SM, 2008 WL 3823700 (D. N.H. Aug. 15 2008) (noting the importance of the first factor but evaluating all four factors).

292. *Phippsburg Shellfish Conservation Comm’n v. U.S. Army Corps of Eng’rs*, 800 F. Supp. 2d 312, 323 (D. Me. 2011). After resolving the “first and most important injunction criterion against the Plaintiff,” the court noted that it “could stop here. However for the sake of completeness,” the court addressed the remaining three injunction criteria. *Id.* at 326; *see also* *Friends of Merrymeeting Bay v. United States Dep’t of Commerce*, 810 F. Supp. 2d 320, 322 (D. Me. 2011) (addressing all four factors but noting that likelihood of success on the merits is the “most important part of the preliminary injunction assessment”).

293. *Natural Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 119 (D.D.C. 2007) (citing *Davenport v. Int’l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 361 (D.C. Cir. 1999)).

294. *In Def. of Animals v. Salazar*, 675 F. Supp. 2d 89 (D.C.C. 2009).

295. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

296. *Id.*

297. *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046, at \*6 (E.D. La. Aug. 14, 2006) (stating all four factors and requiring that the “movant, by a clear showing, carr[y] a burden of persuasion); *see also* *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 371 (5th Cir. 2008) (requiring that the plaintiff carry “the burden of persuasive on all four requirements”).

Circuit arose in the U.S. District Court for the Western District of Texas. That trial court interpreted *Winter* as requiring the plaintiff to “satisfy” all four requirements.<sup>298</sup> These similar pre-and-post-*Winter* approaches suggest that *Winter* has not had a dramatic effect in the Fifth Circuit.

#### 5. Not Enough Information to Make a Conclusion: The Eleventh and Sixth Circuits

Before *Winter*, the Eleventh Circuit Court of Appeals, similar to other circuits, allowed for a lesser showing of the first factor, serious legal question present as opposed to likelihood of success on the merits, but only when the other three factors heavily tilted in favor of an injunction.<sup>299</sup> Whatever standard employed, a trial court was required to make “individualized judgments” of each factor.<sup>300</sup> In the only post-*Winter* environmental preliminary injunction request to arise in the Eleventh Circuit, the United States District Court for the Northern District of Georgia did not mention the “serious questions” approach as an alternative to evaluating injunction requests.<sup>301</sup> The court also did not mention a four-factor test or the factors that must be evaluated when reviewing a request.<sup>302</sup> Instead, the trial court cited *Winter* when stating that the plaintiff must show that irreparable harm is “likely” and when pointing out that the Supreme Court emphasized the harm to marine mammals as being weighed against national interest.<sup>303</sup> The court ultimately denied the injunction request, focusing on the failure of the plaintiff to demonstrate that irreparable harm was likely in the absence of an injunction.<sup>304</sup>

In addition, like the D.C. Circuit, the Eleventh Circuit has avoided weighing in on *Winter*. The one Eleventh Circuit decision discussing a preliminary injunction noted that because it found a preliminary injunction unwarranted, it “need not address . . . the correct equitable standard for a district court to apply in awarding an injunction . . . in light of the U.S. Supreme Court’s decision . . . in *Winter*.”<sup>305</sup> This limited commen-

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298. *Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 564 (W.D. Tex. 2011).

299. *Sierra Club v. U.S. Army Corps of Eng’rs*, Nos. 3:05-cv-362-J-32TEM, 3:05-cv-459-J-32TEM, 2007 WL 402830, at \*1 (M.D. Fla. Feb. 1, 2007) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

300. *Id.*

301. *Sierra Club v. U.S. Forest Serv.*, 593 F. Supp. 2d 1306 (N.D. Ga. 2008).

302. *Id.*

303. *Id.* at 1323–34.

304. *Id.* at 1327.

305. *Norfolk S. Ry. Co. v. Ala. Dep’t of Revenue*, 550 F.3d 1306, 1312 n.10 (11th Cir. 2008), *abrogated on other grounds by CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 131 S. Ct. 1101 (2011). *Norfolk*, however, is a non-environmental case.

tary is not enough to reach a conclusion on *Winter*'s effect in the Eleventh Circuit.

I am also unable to make a conclusion about changes in the Sixth Circuit Court of Appeals because there were no environmental injunction cases to come out of this circuit in the three years post-*Winter*. I can only note that the Sixth Circuit before *Winter* used a "four factor balancing test" when considering whether to grant a request for injunctive relief.<sup>306</sup>

A summary of these results appear in the following chart. The overall results in those circuit courts that have addressed their preliminary injunction standard in light of *Winter* show that only one circuit—the Fourth Circuit—has overruled its pre-*Winter* standard. The Ninth and Tenth Circuits have modified earlier standards, three circuits have implied that earlier standards continue, while one circuit—the Second Circuit—has expressly held that its pre-*Winter* standard remains valid.<sup>307</sup>

Table 7: Summary pre- and post-*Winter* Injunction Standards Trial Courts by Circuit

<u>Circuit of Trial Court Decision</u>	<u>Pre-<i>Winter</i></u>	<u>Post-<i>Winter</i></u>	<u>Pre-<i>Winter</i> Standard</u>	<u>Change in standard</u>
First	Denied: 3 Granted: 0 In part: 0 <b>Total: 3</b>	Denied: 2 Granted: 0 In part: 1 <b>Total: 3</b>	Four-factor test	No change in trial courts.
Second	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	Denied: 2 Granted: 0 In part: 0 <b>Total: 2</b>	Three-factor test requiring irreparable harm (includes serious questions as an alternative to likelihood of success)	No change in trial courts. Second Circuit has expressly addressed <i>Winter</i> . Second Circuit standard still applies.

<sup>306</sup> Heartwood, Inc. v. Peterson, 2008 WL 2151997 at \*7 (E.D. Ky. May 21, 2008) (citing Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1381 (6th Cir.1995)).

<sup>307</sup> See *infra* Part III for further analysis of these results.

Third	Denied: 1 Granted: 1 In part: 0 <b>Total: 2</b>	Denied: 0 Granted: 0 In part: 1 <b>Total: 1</b>	Four-factor test. All factors balanced against each other.	No change in trial courts. Third Circuit has impliedly addressed <i>Winter</i> . Third Circuit standard still applies.
Fourth	Denied: 1 Granted: 1 In part: 0 <b>Total: 2</b>	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	<i>Blackwelder</i> balance of the hardships test—balance hardships first, then look at merits.	Change in trial courts. Fourth Circuit has expressly addressed <i>Winter</i> . Fourth Circuit standard no longer applies.
Fifth	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	All four factors must be met.	No change in trial courts.
Sixth	Denied: 1 Granted: 1 In part: 0 <b>Total: 2</b>	Denied: 0 Granted: 0 In part: 0 <b>Total: 0</b>	Four factor balancing test.	Not enough information
Seventh	Denied: 0 Granted: 0 In part: 1 <b>Total: 1</b>	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	Success on the merits a threshold. If met, other factors applied on sliding scale.	No change in trial courts. Seventh Circuit has impliedly addressed <i>Winter</i> . Seventh Circuit standard still applies.
Eighth	Denied: 0 Granted: 0 In part: 0 <b>Total: 0</b>	Denied: 1 Granted: 0 In part: 1 <b>Total: 2</b>	Two approaches: Four-factor test or serious questions	No change in trial courts. Eighth Circuit has impliedly addressed <i>Winter</i> . Eighth Circuit standard still applies.

Ninth	Denied: 6 Granted: 18 In part: 2 <b>Total: 16</b>	Denied: 10 Granted: 10 In part: 3 <b>Total: 23</b>	Two approaches: Four-factor test or sliding scale.	Change in trial court. Ninth Circuit has expressly addressed <i>Winter</i> . Trial courts in the Ninth Circuit apply both, but if using sliding scale other factors must be met.
Tenth	Denied: 2 Granted: 2 In part: 0 <b>Total: 4</b>	Denied: 2 Granted: 1 In part: 0 <b>Total: 3</b>	Modified success-on-the merits test. First factor relaxed when the moving party establishes that the remaining three factors tip decidedly in its favor.	Change in trial court. Tenth Circuit has addressed <i>Winter</i> . Trial courts in the Tenth Circuit apply Tenth Circuit standard or both Tenth Circuit and <i>Winter</i> .
Eleventh	Denied: 0 Granted: 0 In part: 0 <b>Total: 0</b>	Denied: 0 Granted: 1 In part: 0 <b>Total: 1</b>	Serious questions allowed for first factor when other factors tip in favor of an injunction	No enough information.
D.C. Circuit	Denied: 1 Granted: 0 In part: 0 <b>Total: 1</b>	Denied: 2 Granted: 1 In part: 0 <b>Total: 3</b>	Four factors balanced against each other.	No change in trial court.

A possible explanation for these different approaches turns on the Supreme Court's treatment of the individual four factors in *Winter*; the public interest factor received most of the Court's attention, while the success on the merits factor was given passing treatment. In addition, apart from the Ninth Circuit standard, the Court did not address other circuit courts' treatment of the success of the merits factor or its relation to the other factors, and in particular to irreparable harm. The Court's uneven analysis of the factors, coupled with its silence on existing flexible preliminary injunction standards, has enabled many circuits to retain their earlier standards. In particular, those circuits that allowed a lesser showing of one factor when other factors were clearly demonstrated continue to apply a similar flexible preliminary injunction standard. For these reasons, I also looked at trial courts' treatment of the public interest factor, the trump card in the *Winter* decision.

#### *E. The Influence of the Public Interest Factor*

Because the public interest factor was uniquely important to the *Winter* decision, I singled out this factor for discussion. The final table, Table 8, focuses on changes to trial courts' analysis of the public interest factor. In particular, I looked at whether the trial court (1) analyzed the factor to determine the outcome of the injunction, (2) mentioned but did not analyze the factor to determine the outcome of the injunction, or (3) did not mention or analyze public interest factor to determine the outcome of the injunction.

Table 8: Post-*Winter*: Importance of Public Interest

<u>Public Interest Factor</u>	<u>Pre-<i>Winter</i> (33)</u> <sup>308</sup>	<u>Post-<i>Winter</i> (41)</u>
Analyzed	24 (72.7%)	33 (80.5%)
Mentioned, But Not Analyzed	3 (9.1%)	3 (7.3%)
Not Mentioned or Analyzed	5 (15%)	5 (12.2%)

As the numbers show, there is a slight increase in the number of trial courts analyzing the public interest factor, and there is a slight decrease in the number of courts that do not mention or analyze this factor.

308. One of the pre-*Winter* trial court decisions (number 28) could not be located, and it was unclear from the decision on appeal whether the trial court evaluated this factor.

These numbers support the argument that in environmental cases, trial courts are spending more time on the public interest factor post-*Winter*—that *Winter*, in fact, gave teeth to the individual factors.<sup>309</sup> A brief comparison of how trial courts evaluated the public interest before and after *Winter* further illustrates this point. For example, in *Northwest Ecosystem Alliance v. Rey*, a pre-*Winter* decision, the court described the preliminary injunction standard as “irreparable injury and inadequacy of legal remedies.”<sup>310</sup> The public interest was not enumerated as a factor to evaluate and the court merely mentioned that “[o]n balance, . . . the competing equities and the public interest weigh in favor of” the plaintiffs.<sup>311</sup> In that case, the injunction was granted.<sup>312</sup>

Compare that non-existent treatment of the public interest factor to *Confederate Tribes and Bands of Yakama Nation v. U.S. Department of Agriculture*, where the court stated the *Winter* standard and then evaluated each factor sequentially, first, second, third, and fourth.<sup>313</sup> In discussing the public interest factor, the trial court began by stating, “Fourth, a preliminary injunction is in the public interest.”<sup>314</sup> The court went on to weigh the harm of having baled garbage remain at the Honolulu port against the harm of introducing invasive species from Hawaii to the mainland.<sup>315</sup>

Before *Winter*, trial courts often did not fully analyze the public interest factor because that factor was often subsumed into the balance of relative hardships.<sup>316</sup> This lack of analysis was not always the courts’ fault. For example, in *Defenders of Conewango Creek v. Echo Developers, LLC.*, the court noted the four traditional preliminary injunction factors.<sup>317</sup> After addressing the first three factors, the court engaged in a weighing of the environmental harms against economic concerns.<sup>318</sup> The court simply noted that “general assertions [by the movant] about the

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309. See Newman, *supra* note 149, at 350 (noting that post-*Winter* and *eBay*, courts are “giving real teeth to the individual factors of the [preliminary injunction] test”).

310. *Nw. Ecosystem v. Rey*, No. 04-844P, 2006 U.S. Dist. Lexis 1846, at \*8 (W.D. Wash. Jan. 9, 2006).

311. *Id.* at 18.

312. *Id.*

313. *Confederated Tribes & Bands of Yakama Nation v. U.S. Dep’t of Agric.*, No. CV-10-3050-EFS, 2010 WL 3434091, at \*4 (E.D. Wash. Aug. 30, 2010).

314. *Id.* at \*5.

315. *Id.*

316. See, e.g., *Caribbean Marine Serv., Inc. v. Baldrige*, 844 F.2d 668, 676-677 (9th Cir. 1999) (holding that the district court abused its discretion by ordering preliminary relief when it failed to identify and weigh the public interests at stake).

317. No. 06-242 E, 2007 WL 3023927, at \*3 (W.D. Pa. Oct. 12, 2007).

318. *Id.* at \*5.

need to protect the environment and endangered species are unavailing to achieve its end.”<sup>319</sup>

Post-*Winter*, courts are making a more concerted effort to analyze the public interest factor. For example, in *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, the plaintiffs sought to enjoin the defendants from constructing a railyard under NEPA and the CWA because a Section 404 CWA permit was granted without the completion of an Environmental Impact Statement (EIS).<sup>320</sup> The United States District Court for the District of Kansas determined that the plaintiff had not demonstrated a likelihood of success on the merits or serious questions going to the merits.<sup>321</sup> The court stated that failure to satisfy the first factor under either standard was sufficient for the court to deny injunctive relief.<sup>322</sup> Instead of ending its analysis there, however, the court evaluated the balance of equities and the public interest.<sup>323</sup> The court recognized the public interests on both sides of the debate: compliance with federal environmental statutes versus job growth, energy savings and congestion relief.<sup>324</sup> The economic benefit to the public was the stronger public interest, however, and further supported the court’s decision to deny the injunction.<sup>325</sup>

In addition to having a specific analysis of the public interest factor, post-*Winter* orders include headings which highlight the analysis of each of the factors.<sup>326</sup> When addressing public interest, courts post-*Winter* more clearly note the public interest competing with environmental concern.<sup>327</sup> This is where the environmental plaintiffs’ concern becomes a reality. Which public interest, environmental or economic concerns, deserves greater weight? In *Winter*, the majority valued the public interest in military readiness above the public interest in preserving marine mammals. By focusing its analysis on the public interest factor, the Supreme Court has reenergized this factor, which often does not depend on what evidence is presented, but on what personal values a judge holds.

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319. *Id.*

320. *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, No. 10–CV–2008 CM/DJW, 2011 WL 3847383 (D. Kan. Aug. 26, 2011).

321. *Id.* at \*2.

322. *Id.* at \*3.

323. *Id.*

324. *Id.*

325. *Id.*

326. *See, e.g., W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089 (D. Nev. 2011), *aff’d*, 443 F. App’x 278 (9th Cir. 2011) (including four headings in the analysis section: Likelihood of Success on the Merits, Irreparable Harm, Balancing the Equities, Public Interest).

327. *Id.* at 1103.

## V. ASSESSMENT: LOTS OF FORM AND LITTLE SUBSTANCE

What do these quantitative and qualitative analyses demonstrate? First, numbers are not enough. Numbers show little change in environmental preliminary injunction standards pre- and post-*Winter*, but they do not explain why there is little change. A textual analysis of trial and circuit court opinions addressing preliminary injunction post-*Winter* better explains the quantitative data.

The textual analysis also shows that circuit courts are more likely to try to reconcile their earlier circuit standard with *Winter* than overtly state that a new standard applies. This is particularly true in circuits where the flexibility arose in the first factor—success on the merits, and the first factor was always evaluated. Pre-*Winter*, the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits all had preliminary injunction standards that in certain instances allowed the success on the merits factor to be modified. In these instances, success on the merits became “serious questions” on the merits or some variation thereof.<sup>328</sup>

These different iterations of the first factor can be summarized as follows. In the Second Circuit, “serious questions” on the merits could replace a “likelihood of success” on the merits, as long as the plaintiff demonstrated both irreparable harm and a balance of hardships that tipped in its favor. Similarly, the Eighth and Ninth Circuits allowed for “serious questions” when the balance of hardships tipped in the movant’s favor. “Questions going to the merits so serious, substantial, difficult, and doubtful” was also permissible in the Tenth Circuit when the movant demonstrated that the remaining three factors—irreparable injury, balance of the injuries, and the public interest—“decidedly” tipped in its favor. The Third and Seventh Circuit did not rename the first factor but, instead, balanced all the factors against each other so that a strong showing of one factor could offset a weak showing of another. For the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits, success on the merits was an important but flexible factor. Success on the merits did not have to be strong or “likely” when the other factors weigh in the movant’s favor.

The Fourth Circuit standard has also been interpreted as being a flexible standard, but there are two differences between the Fourth Circuit standard and the standards just reviewed and thus two possible explanations for why the Fourth Circuit post-*Winter* took a different approach. One difference has to do with the order in which the factors are addressed, and the other has to do with the passing reference to the final factor—public interest. While these differences are subtle, they help ex-

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328. See *supra* Part III.

plain the “fatal tension” the Fourth Circuit described in the *Real Truth About Obama*.

The Fourth Circuit standard before *Winter* was commonly referred to as the “*Blackwelder* balance-of-hardship test.”<sup>329</sup> The focus of this standard was on balancing the harms of the parties.<sup>330</sup> Only when the balance tipped in the movant’s favor would the court consider the success on the merits.<sup>331</sup> This approach is different from the one taken by other circuits and by the Court in *Winter*. The Fourth Circuit in *Real Truth About Obama* interpreted the *Winter* standard to require all four factors to be satisfied “as articulated,”<sup>332</sup> devoid of some sequential test. The Fourth Circuit before *Winter* also paid little attention to the final factor, public interest, which was an important, if not the most important, factor to the Court in *Winter*.

When viewed this way, the Fourth Circuit was compelled to reach an outcome different from other circuits and to overrule its pre-*Winter* standard. Its unique approach was more difficult to reconcile with the *Winter* four-factor standard. The Fourth Circuit, however, has little impact on the overall percentages of injunctions granted and denied because of the small number of environmental preliminary injunction requests this circuit reviews.

In those circuits with the greatest number of preliminary injunction requests, earlier preliminary injunction standards continue today. The Supreme Court’s silence on the first factor helps explain why these circuits have held either expressly or impliedly that their pre-*Winter* standards continue. In addition, the Court’s silence on how the factors relate to one another has enabled courts to continue to balance the factors against one another so that a weaker showing in one factor can be displaced by a strong showing in another. Because these requests are reviewed in essentially the same manner post-*Winter* as they were pre-*Winter*, it is not surprising that there is little change in the number of injunctions granted or denied.<sup>333</sup>

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329. See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977).

330. See *id.* at 195–96 (expressing no opinion on the merits of the issues and noting that noting that the “two more important factors” are irreparable injury to the plaintiff and likely harm to the defendant).

331. See *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng’rs*, 890 F. Supp. 2d 688, 691 (S.D. W. Va. 2012) (emphasizing that “in *Blackwelder*, [the Fourth Circuit] instructed that the likelihood-of-success requirement be considered, if at all, only *after* a balancing of hardships is conducted . . .”).

332. *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009), *overruled on other grounds by Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 130 S. Ct. 2371 (2010).

333. A similar effect can be seen with *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), a Supreme Court decision that altered the standard for permanent injunctive relief. See Stacy

## VI. CONCLUSION

Although the Supreme Court in *Winter* clearly stated the preliminary injunction standard in an environmental case as a four-factor test, it did not explain the relationship of the four factors to each other. As a result, most trial courts post-*Winter* have been able to apply an injunction standard similar to the one they used pre-*Winter*, thereby preventing significant changes to the number of environmental injunctions issued at the trial level.

In turn, the quantitative data suggests that *Winter* has not created a stricter standard; the percentage of injunctions issued post-*Winter* is essentially the same as the pre-*Winter* percentage. The qualitative data also suggests that *Winter* has not dramatically altered preliminary injunctions; the preliminary injunction standards recited and used by the majority of trial courts post-*Winter* are essentially the same as pre-*Winter* standards. Circuit courts recognize the *Winter* standard at least in form but have made efforts to keep all or some portion of their earlier flexible standards in tack.

As expected, these findings complement each other. Because most trial courts employ the same standard pre- and post-*Winter*, the number of injunctions granted or denied pre- and post-*Winter* is similar, suggesting that *Winter*'s effect has been mild.

Perhaps *Winter*'s limited analysis and cursory approach was a good thing. Circuit courts would have been unwilling or unable to retain earlier "flexible" standards had the Supreme Court addressed all of the factors or been more explicit in how these factors interrelate. For the time being, *Winter*'s deficiencies are a blessing in disguise for the environ-

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Streur, *The eBay Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions For Patent Infringement*, 8 NW. J. TECH. & INTELL. PROP. 67, 88 (2009) (noting that *eBay* "has had a significant impact on the analytical process courts use to determine whether a patent holder is entitled to an injunction" but "has not had a significant and lasting impact on the outcome of those decisions"); see also Jedediah Wakefield & Sebastian E. Kaplan, *Irreparable Harm, I Presume?*, FENWICK & WEST LLP (Oct. 8, 2012), <http://www.fenwick.com/publications/Pages/Irreparable-Harm-I-Presume.aspx> (concluding that "[t]he fears that *eBay* and *Winter* heralded the end of injunctions in intellectual property cases have proven unfounded for trademark litigation").

mental plaintiff.<sup>334</sup> The judicial landscape for environmental preliminary injunctions remains relatively unchanged.<sup>335</sup>

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334. Brown & Fazio, *supra* note 192 (recognizing that *Winter* is not a “watershed moment in environmental law” because the sliding scale remains intact); *see also* Love, *supra* note 192, at 712 (describing the Ninth Circuit’s articulation of the “serious questions” sliding-scale test post-*Winter* as a “godsend” for those who live and practice in the Ninth Circuit).

335. *See* Lawrence Hurley, *Debate Continues over Impact of Supreme Court’s Whale Ruling on Enviro’s Bid to Halt Projects*, N.Y. TIMES, Nov. 1, 2011, available at <http://www.nytimes.com/gwire/2010/11/01/01greenwire-debate-continues-over-impact-of-supreme-courts-47696.html> (quoting Susan Jane Brown, staff attorney at the Western Environmental Law Center, as stating that *Winter* “doesn’t reshape the judicial landscape”).

## Appendix A: Pre-Winter Trial Court Decisions

<u>Case Name</u>	<u>Circuit</u>	<u>Claim</u>	<u>Sliding scale or serious questions</u>	<u>Treatment of Public Interest</u>	<u>Preliminary Injunction</u>
<i>Food &amp; Water Watch, Inc. v. U.S. Army Corps of Eng'rs</i> , 570 F. Supp. 2d 177 (D. Mass 2008)	First Circuit	NEPA	No	Analyzed	Denied
<i>Devs. of Wildlife v. Hall</i> , 565 F. Supp. 2d 1160 (D. Mont. 2008)	Ninth Circuit	ESA	Yes	Mentioned	Granted
<i>Lands Council v. McNair</i> , 2006 WL 5883202 (D. Idaho Dec. 18, 2006) <sup>336</sup>	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Denied
<i>Alliance for the Wild Rockies v. Wood</i> , 2008 WL 2152237 (D. Idaho May 21, 2008)	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Granted
<i>Heartwood, Inc. v. Peterson</i> , 2008 WL 2151997 (E.D. Ky. May 21, 2008)	Sixth Circuit	ESA	No	Analyzed	Denied
<i>Wilderness Workshop v. U.S. Bureau of Land Mgmt.</i> , 2008 WL 11946818 (D. Colo. Apr. 30, 2008).	Tenth Circuit	NEPA	Yes	Analyzed	Denied
<i>Ocean Mammal Inst. v. Gates</i> , 546 F. Supp. 2d 960 (D. Haw. 2008)	Ninth Circuit	NEPA, CZMA, NMSA	Yes	Analyzed	Granted (NPEA & CZMA), Denied (NMSA)
<i>S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation &amp; Enforcement</i> , 2007 WL 4300095 (D. Utah Dec. 5, 2007)	Tenth Circuit	Surface Mining Control and Reclamation Act	Yes	Analyzed	Denied
<i>Natural Res. Def. Council v. Kempthorne</i> ,	D.C. Circuit	Permits to drill violated	Yes	Analyzed	Denied

<sup>336</sup> Affirmed by Ninth Circuit on July 2, 2008. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

525 F. Supp. 2d 115 (D.D.C. 2007)		the APA & NEPA			
<i>Berryessa for All v. U.S. Bureau of Reclamation</i> , 2007 WL 4209551 (N.D. Cal. Nov. 27, 2007 )	Ninth Circuit	NEPA	Yes	Not Mentioned	Denied
<i>Protect Lake Pleasant L.L.C. v. Johnson</i> , 2007 WL 1486869 (D. Ariz. May 21, 2007) <sup>337</sup>	Ninth Circuit	NEPA	Yes	Not Mentioned	Denied
<i>Sierra Nevada Forest Prot. Campaign v. Rey</i> , 2007 WL 3034931 (E.D. Cal. Oct. 16, 2007) <sup>338</sup>	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Denied
<i>Defenders of Conewango Creek v. Echo Developers, L.L.C.</i> , 2007 WL 3023927 (W.D. Pa. Oct. 12, 2007)	Third Circuit	CWA, ESA	No	Analyzed	Denied
<i>Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs</i> , 528 F. Supp. 2d (S.D. W. Va. 2007)	Fourth Circuit	CWA, NEPA	Yes	Analyzed	Granted
<i>Colo. Wild, Inc. v. U.S. Forest Serv.</i> , 523 F. Supp. 2d 1213 (D. Colo. 2007)	Tenth Circuit	NEPA	Yes	Analyzed	Granted
<i>N. Plains Res. Council v. U.S. Bureau of Land Mgmt.</i> , 2005 U.S. Dist. LEXIS 25238 (D. Mont. Apr. 5, 2005) <sup>339</sup>	Ninth Circuit	NEPA	No	Analyzed	Granted

<sup>337</sup> Affirmed on Appeal in November 2011. *Protect Lake Pleasant, LLC v. Johnson*, 2007 WL 3230335 (Nov. 1, 2007).

<sup>338</sup> Reversed and reversed and remanded post-*Winter*. 577 F.3d 1015 (9th Cir. Aug. 13, 2009).

<sup>339</sup> Affirmed on appeal. *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836

<i>Friends of Maguirewock, Inc. v. U.S. Army Corps of Eng'rs</i> , 498 F. Supp. 2d 365 (D. Me. 2007)	First Circuit	CWA, NEPA	No	Analyzed	Denied
<i>Colo. Wild, Inc. v. U.S. Forest Serv.</i> , 2007 WL 1834029 (D. Colo. Apr. 25, 2007)	Tenth Circuit	NEPA	Yes	Analyzed	Granted
<i>W. Watersheds Project v. Kraayenbrink</i> , 2006 WL 2735772 (D. Idaho Sept. 25, 2006)	Ninth Circuit	NEPA	Yes	Analyzed	Granted
<i>Geertson Farms, Inc. v. Johanns</i> , 2007 WL 776146 (N.D. Cal. Mar. 12, 2007) <sup>340</sup>	Ninth Circuit	NEPA	No	Not Mentioned	Granted
<i>Nw. Bypass Grp v. U.S. Army Corps of Eng'rs</i> , 470 F. Supp. 2d 30 (D. N.H. 2007)	First Circuit	CWA, NEPA, NHPA	No	Analyzed	Denied
<i>Lands Council v. McNair</i> , 2006 U.S. Dist. LEXIS 98785 (D. Idaho Dec. 18, 2006) <sup>341</sup>	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Denied
<i>Fibermark N. Am. Inc. v. Jackson</i> , 2007 WL 4157235 (D. N.J. Mar. 28, 2007)	Third Circuit	CWA & 14 <sup>th</sup> and 13 <sup>th</sup> A.	Yes	Analyzed	Granted
<i>Baykeeper v. U.S. Army Corp of</i>	Ninth Circuit	NEPA	Yes	Not Mentioned	Granted

(9th Cir. 2007).

<sup>340</sup> Permanent injunction granted May 3, 2007. *Geertson Farms Inc. v. Johanns*, No. C 06-01075 CRB, 2007 WL 1302981 (N.D. Cal. May 3, 2007), *aff'd sub nom.* *Geertson Seed Farms v. Johanns*, 541 F.3d 938 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g*, 570 F.3d 1130 (9th Cir. 2009), *rev'd and remanded sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (U.S. 2010), *aff'd sub nom.* *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009) *rev'd and remanded sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (U.S. 2010).

<sup>341</sup> Affirmed en banc. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2007).

<i>Eng 'rs</i> , 2006 WL 2711547 (E.D. Cal. Sept. 20, 2006)					
<i>Cal. Oak Foundation v. U.S. Forest Serv.</i> , 2006 WL 2454438 (E.D. Cal. Aug. 23, 2006)	Ninth Circuit	NEPA, NFMA	No	Not Mentioned	Granted
<i>Blanco v. Burton</i> , 2006 WL 2366046 (E.D. La. Aug. 14, 2006)	Fifth Circuit	Outer continental Shelf Lands Act, NEPA, CZMA	No	Analyzed	Denied No IR
<i>Natural Wildlife Fed. v. Harvey</i> , 820 F. Supp. 2d 1029 (E.D. Ark. 2008)	Eighth District	NEPA and ESA	No	Analyzed	Granted (ESA) Denied (NEPA)
<i>Earth Island Inst. v. U.S. Army Corp. Eng 'rs</i> <sup>342</sup>	Ninth Circuit	NEPA	Yes	Unclear	Denied
<i>Natural Res. Def. Council v. U.S. Army Corp. Eng 'rs</i> , 457 F. Supp. 2d 198 (S.D.N.Y. 2006)	Second Circuit	NEPA	No	Analyzed	Denied- available remedy remand
<i>Nw. Ecosystem Alliance v. Rey</i> , 2006 U.S. Dist. LEXIS 1846 (W.D. Wash. Jan. 9, 2006)	Ninth Circuit	NEPA	No	Mentioned	Granted in part and denied in part
<i>Montrose Parkway v. U.S. Army Corp. Eng 'rs</i> , 405 F. Supp. 2d 587 (D. Md. 2005)	Fourth Circuit	NEPA, CWA	No	Analyzed	Denied
<i>Anglers of the Au Sable v. U.S. Forest Serv.</i> , 402 F. Supp. 2d 826 (E.D. Mich. 2005)	Sixth Circuit	NEPA, NFMA, MLA, APA	Yes	Analyzed	Granted
<i>Sierra Club v. Bosworth</i> , 2005 WL 3096149 (N.D. Cal. Nov. 14, 2005)	Ninth Circuit	NEPA	Yes	Mentioned	Granted

<sup>342</sup> Reversed on appeal. *Earth Island Inst. v. U.S. Army Corp. of Eng 'rs*, 442 F.3d 1147 (9th Cir. 2006).

Appendix B: Post-*Winter* Trial Court Decisions  
(Nov. 9, 2008–Nov. 8, 2011)

<u>Name</u>	<u>Circuit</u>	<u>Claim</u>	<u>Sliding Scale or Serious Questions</u>	<u>Treatment of Public Inter- est</u>	<u>Preliminary Injunction (PI)</u>	<u>Which PI standard?</u>
<i>Ctr. for Biological Diversity v. U.S. Forest Serv.</i> , 820 F. Supp. 2d 1029 (D. Ariz. 2011)	Ninth Circuit	ESA	No	Not mentioned	Granted	<i>Winter</i> mentioned, but not applied b/c ESA case
<i>Hillsdale Envtl. Loss Prevention v. U.S. Army Corp. Eng'rs</i> , 2011 WL 3847383 (D. Kan. Aug. 26, 2011)	Tenth Circuit	NEPA, CWA	Yes	Analyzed	Denied	<i>Winter</i> & Circuit Standard
<i>Friends of Merrymeeting Bay v. U.S. Dep't of Commerce</i> , 810 F. Supp. 2d 320 (D. Me. 2011)	First Circuit	ESA	Yes	Analyzed	Denied	Circuit Standard
<i>W. Watersheds Project v. Salazar</i> , 2011 U.S. Dist. LEXIS 151556 (C.D. Cal., Aug. 10, 2011)	Ninth Circuit	NEPA	Yes	Analyzed	Denied	<i>Winter</i> & Circuit
<i>Phippsburg Shellfish v. U.S. Army Corp. Eng'rs</i> , 800 F. Supp. 2d 312 (D. Me. 2011)	First Circuit	CWA, NEPA	No	Analyzed	Denied	<i>Winter</i> & Circuit Standard
<i>Audubon Soc. of Portland v. Nat'l Marine Fisheries Serv.</i> , 849 F. Supp. 2d 1017 (D. Ore. 2011)	Ninth Circuit	ESA	Yes	Not Mentioned	Denied	Ninth Circuit

<i>Sierra Club v. U.S. Army Corp of Eng'rs</i> <sup>343</sup>	Eighth Circuit	CWA, NEPA, ESA		Not Mentioned	Granted in part	Winter and Circuit Standard
<i>Or. Nat'l Desert Ass'n v. McDaniel</i> , 2011 U.S. Dist. LEXIS 100815 (D. Ore. July 6, 2011) <sup>344</sup>	Ninth Circuit	NEPA, FLPMA& Wilderness Act	Yes	Analyzed	Granted	No standard
<i>Bair v. Cal. Dep't of Transp.</i> , 2011 WL 2650896 (N.D. Cal. July 6, 2011)	Ninth Circuit	NEPA, Dept. of Trans. Act, Wild and Scenic Rivers Act, APA	Yes	Analyzed	Granted	Winter and Circuit Standard
<i>Wildlands v. U.S. Forest Serv.</i> , 791 F. Supp. 2d 979 (D. Ore. 2011)	Ninth Circuit	NEPA	Yes	Analyzed	Granted	Winter
<i>Aquifer Guardians in Urban Areas v. Fed. Highway Admin.</i> , 779 F. Supp. 2d 542 (W.D. Tex. 2011)	Fifth Circuit	APA, NEPA	No	Analyzed	Denied	Winter
<i>W. Watersheds Project v. Bureau of Land Mgmt.</i> , 774 F. Supp. 2d 1089 (D. Nev. 2011) <sup>345</sup>	Ninth Circuit	NEPA	Yes	Analyzed	Denied	Winter
<i>Conservation Congress v. U.S. Forest Serv.</i> , 803 F. Supp. 2d 1126 (E.D. Cal. 2011) <sup>346</sup>	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Granted in part, denied in part	Winter and Circuit Standard
<i>Los Padres Forest-watch v. U.S. Forest</i>	Ninth Circuit	NEPA	Yes	Analyzed	Granted	Winter and Circuit

343. I was unable to locate this trial court decision. The appellate decision however affirmed the trial court's decision to grant in part and deny in part the injunction. *See Sierra Club v. U.S. Army Corp of Eng'rs*, 645 F.3d 978 (8th Cir. 2011).

344. Permanent injunction construed as a preliminary injunction

345. Affirmed on appeal. *See W. Watersheds Proj. v. Bureau of Land Mgmt.*, 443 Fed. Appx. 278 (9th Cir. 2011).

346. Affirmed on appeal. *See Conservation Congress v. U.S. Forest Serv.*, 2012 WL 1979133 (9th Cir. June 4, 2012).

<i>Serv.</i> , 776 F. Supp. 2d 1042 (N.D. Cal. 2011)						Standard
<i>Ctr. for Food Safety v. Vilsack</i> , 753 F. Supp. 2d 1051 (N.D. Cal. 2010) <sup>347</sup>	Ninth Circuit	NEPA	No	Analyzed	Granted	Winter
<i>Alliance for the Wild Rockies v. Cottrell</i> <sup>348</sup>	Ninth Circuit	NEPA, NFMA	Yes	Analyzed	Denied	Winter and Circuit Standard
<i>Quechan Tribe v. U.S. Dep't of the Interior</i> , 755 F. Supp. 2d 1104 (S.D. Cal. 2010)	Ninth Circuit	NEPA, NHPA, FLPMA	Yes	Analyzed	Granted	Winter
<i>Michigan v. U.S. Army Corp of Eng'rs</i> , 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010)	Seventh Circuit	Public Nuisance	Yes	Analyzed	Denied	Winter and Circuit Standard
<i>Am. Whitewater v. Tidwell</i> , 2010 WL 5019879 (D. S.C. Dec. 2, 2010)	Fourth Circuit	WRSA, APA, NEPA	No	Analyzed	Denied	Winter
<i>Habitat for Horses v. Salazar</i> , 745 F. Supp. 2d 438 (S.D.N.Y. 2010)	Second Circuit	Wild Free Roaming Horses/Burros Act, NEPA & FLPMA	Yes	Analyzed	Denied	Winter and Circuit Standard
<i>Animal Welfare Inst. v. Martin</i> , 588 F. Supp. 70 (D. Me. 2008) <sup>349</sup>	First Circuit	ESA	No	Analyzed	Granted in part	Winter and Circuit Standard
<i>Klamath-Siskiyou Wildlands Ctr. v. Grantham</i> , 2010 WL	Ninth Circuit	NEPA, ARA, NFMA	Yes	Mentioned	Denied	Winter and Circuit Standard

347. Reversed on appeal. See *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166 (9th Cir. 2011).

348. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1053 (9th Cir. 2010), *reh'g denied*, 632 F.3d 1127 (9th Cir. 2011) (withdrawing and replacing prior opinion on denial of rehearing en banc).

349. The permanent injunction on this matter was denied by the trial court and affirmed by the First Circuit. *Animal Welfare Inst. v. Martin*, 668 F. Supp. 2d 254 (D. Me. 2009) *aff'd* 623 F.3d 19 (1st Cir. 2010).

3958640 (E.D. Cal. Oct. 8, 2010) <sup>350</sup>						
<i>Confederated Tribes and Bands of Yakama Nation v. U.S. Dep't of Agric.</i> , 2010 WL 343409 (E.D. Wash. Aug. 30, 2010)	Ninth Circuit	NEPA, NHPA, and others	Yes	Analyzed	Granted	Winter and Circuit Standard
<i>In Def. of Animals v. U.S. Dep't of the Interior</i> , 737 F. Supp. 2d 1125 (E.D. Cal. 2010)	Ninth Circuit	Wild Free Roaming Horses/Burros Act, NEPA	Yes	Analyzed	Denied	Winter and Ninth Circuit
<i>Appalachian Voices v. Chu</i> , 725 F. Supp. 2d 101 (D.D.C. 2011)	D.C. Circuit	NEPA, ESA, APA	No	Mentioned	Denied	Winter and D.C. Circuit
<i>Consol. Delta Smelt Cases</i> , 717 F. Supp. 1021 (E.D. Cal. 2010)	Ninth Circuit	ESA, NEPA	No	Analyzed	Granted	Winter
<i>City of Newburgh v. Sarna</i> , 690 F. Supp. 2d 136 (S.D.N.Y. 2010) <sup>351</sup>	Second Circuit	CWA, public nuisance	No	Not Mentioned	Denied	Winter and Circuit Standard
<i>Sierra Club v. Clinton</i> , 689 F. Supp. 2d 1123 (D. Minn. 2010)	Eighth Circuit	NEPA	Yes	Analyzed	Denied	Winter and Circuit Standard
<i>Del. Dep't of Natural Res. v. U.S. Army Corps of Eng'rs</i> , 681 F. Supp. 2d 546 (D. Del. 2010)	Third Circuit	CWA, CAA, CZMA	No	Analyzed	Granted in part, denied in part	Winter
<i>In Def. of Animals v. Salazar</i> , 675 F. Supp. 2d 89 (D.D.C. 2009)	D.C. Circuit	Violation of Wild Horses Act	Yes	Analyzed	Denied	Winter & Circuit Standard
<i>S. Fork Band Council of W. Shoshone v. U.S.</i>	Ninth Circuit	NEPA, APA,	No	Analyzed	Denied	Winter

350. Affirmed on appeal. See *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, 424 Fed. Appx. 635 (9th Cir. 2011).

351. Affirmed in part, dismissing appeal in part. *City of Newburgh v. Sarna*, 406 Fed. App'x 557 (2d Cir. 2011).

<i>Dep't of the Interior</i> , 643 F.Supp.2d 1192 (D. Nev. 2009) <sup>352</sup>		FLPMA				
<i>League to Save Lake Tahoe v. Tahoe Regional Planning Agency</i> , 2009 WL 3048739 (E.D. Cal. Sept. 18, 2009)	Ninth Circuit	Tahoe Regional Compact	No	Analyzed	Granted in part	Winter
<i>Def. of Wildlife v. Salazar</i> , 812 F. Supp. 2d 1205 (D. Mont. 2009)	D.C. Circuit	ESA	No	Analyzed	Denied	Winter
<i>San Luis Valley Ecosystem Council v. U.S. Fish &amp; Wildlife Serv.</i> , 657 F. Supp. 2d 1233 (D. Colo. 2009)	Tenth Circuit	NEPA	Yes	Analyzed	Granted	Winter and Circuit Standard
<i>Or. Natural Desert Ass'n v. Kimbell</i> , 2009 WL 1663037 (D. Ore. June 15, 2009) <sup>353</sup>	Ninth Circuit	ESA	No standard mentioned	Analyzed	Granted in part	No standard except <i>Hill</i>
<i>Greater Yellowstone Coal. v. Timchak</i> , 2008 WL 5101754 (D. Idaho Nov. 26, 2008) <sup>354</sup>	Ninth Circuit	NEPA, CWA, NFMA	Yes	Analyzed	Denied	Winter and Circuit Standard
<i>City and Cnty. of Honolulu v. E.P.A.</i> , 2009 WL 855896 (D. Hawaii Mar. 27, 2009)	Ninth Circuit	FIOA, CWA	No	Mentioned	Denied	Winter
<i>Brady Campaign to Prevent Gun Violence v. Salazar</i> , 612 F. Supp. 2d 1 (D.D.C. 2009)	D.D. Circuit	NEPA, APA, ESA, NWRSA, A, NHPA	Yes	Analyzed	Granted	Winter and Circuit Standard

352. Affirmed in part and reversed in part. *S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718 (9th Cir. 2009).

353. Vacated in part. *Oregon Natural Desert Ass'n v. Kimbell*, 2009 WL 1663037 (D. Ore. June 15, 2009).

354. Affirmed in part, vacated in part and remanded. *Greater Yellowstone Coal. v. Timchak*, 323 Fed. App'x 512 (9th Cir. 2009).

<i>Save Strawberry Canyon v. Dep't of Energy</i> , 612 F. Supp. 2d 117 (N.D. Cal. 2009)	Ninth Circuit	NEPA	Yes	Analyzed	Granted	Winter and Circuit Standard
<i>Sierra Club v. U.S. Forest Serv.</i> , 593 F. Supp. 2d 1306 (N.D. Ga. 2008)	Eleventh Circuit	NEPA	No	Analyzed	Granted in part	Winter
<i>Uranium Watch v. U.S. Forest Serv.</i> , 2010 WL 3703807 (D. Utah Sept. 14, 2010)	Tenth Circuit	NEPA	No	Not mentioned	Denied	Circuit Standard