EQUITY & THE ENVIRONMENT: PROPOSING A FLEXIBLE APPROACH TO STAYS PENDING APPEAL

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Stays pending appeal have long been a part of courts' "traditional equipment" for granting equitable relief. However, in contexts like environmental law and litigation, the problems with present stay frameworks become clear. These issues stem from (i) the inherent complexity in environmental statutes and (ii) the difficulties in showing environmental harm, even where such harm would be genuinely irreparable.

To ameliorate these problems, I propose courts uniformly apply an approach combining two complementary stay frameworks extant in the case law: sliding scale and "serious questions." Taking these together addresses the issues identified above. First, this flexible consideration for stays allows for a strong showing of irreparable harm to make up for a lesser showing of success on the merits, a situation that may arise where the relevant law is particularly complex. Second, when a clearer likelihood of success on the merits is shown, the sliding scale framework excuses a slightly weaker showing of irreparable harm, such as where some harm can be shown but its true magnitude is not immediately apparent.

If courts apply the sliding scale and serious questions approach when considering a motion for a stay pending appeal, this will lead to fairer outcomes, proper consideration of the merits and harms that might be at issue, and the reinforcement of equity's fundamental tenet: flexibility.

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Introduction

The Supreme Court's stay of the Obama Administration's Clean Power Plan in 2016[1] was unprecedented and highly controversial.[2] The Court had never stayed a federal agency rule when a challenge to that rule was still pending before the D.C. Circuit.[3] The Court had instead always waited until that appellate court had ruled on the merits of a challenge.[4] The Justices made their decision in only a few days based on limited briefing[5] after the D.C. Circuit had itself concluded a stay was not warranted based on weeks of briefing and careful consideration.[6] Whatever one's views of its propriety, the Court's action placed the practice of courts issuing stays pending appeals squarely in the legal limelight.

Stays operate to "pause" litigation. Following a final judgment, parties can move to stay enforcement of the court's decision until an appeal can be heard in a higher court.[7] Courts can also stay the implementation of an agency rule, such as the Clean Power Plan or the Occupational Safety and Health Administration's "vaccine or test" rule.[8] On their face, stays are but one small part of remedies available to litigants in federal court. However, the judicial power to maintain the status quo in this way is a unique remedy with particularly high stakes for litigants, both as to the actions they are subsequently able to take and the procedural consequences that may follow. A lower court may enjoin a defendant from taking a particular course of action, such as commencing construction. The same court or the applicable court of appeals can then stay this injunction. The opportunity for that party, then, to move for a stay gives them a second bite at the apple. With a sufficient showing, a party may then have that

1. *See* West Virginia v. EPA, 577 U.S. 1126 (2016); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

2. *See, e.g.*, Robinson Meyer, *Did the Supreme Court Doom the Paris Climate Change Deal?*, Atlantic (Feb. 12, 2016), https://perma.cc/84V4-BN8R; Jonathan H. Adler, Opinion, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, Wash. Post (Feb. 9, 2016), https://perma.cc/X33M-R5CX.

3. Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 Geo. Env't L. Rev. 425, 430 (2016).

4. *See id.* at 425.

5. *See id.* at 436.

6. Order Denying Stay, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

7. Fed. R. App. P. 8. For a general discussion of the operation of stays pending appeal, see Portia Pedro, *Stays*, 106 Calif. L. Rev. 869 (2018).

8. Nat. Fed'n Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 666 (2022) (per curiam).

injunction stayed until the appellate court completes its review.[9] While this hypothetical represents an extreme case, it demonstrates the unique scenarios stays present: the potential for continued harm in the time before an appeal can be decided.

Stays' procedural posture leads to an increased likelihood of irreparable harm because of the nature of environmental harms themselves.[10] Environmental harms can be difficult to perceive, and are often irreparable; once a tree has been cut down, or land cleared for development, those resources and ecosystems remain altered well beyond the foreseeable future.[11] Further, environmental harms may present a threshold issue—for example, if a litigant were to move to stay an injunction of a project in a wilderness area, the court may grant the stay if the court did not immediately perceive the potential harm to the wilderness as irreparable. But the irreparable harm may result while the stay is in place, when the ongoing harm to the ecosystem reaches a degradation point beyond which negative effects may snowball or worsen in unpredictable ways.[12] Thus, the posture of stays can give rise to situations in which irreparable environmental harm occurs due to its sometimes-imperceptible nature at the time the stay is granted.

The difficulties raised by environmental law in the context of granting stays illustrates the need for a flexible stay framework. A more flexible approach would comport with the values of equitable relief, while more accurately squaring the realities and complexities of the law with the decision to grant such relief. This Note is divided into three parts. Part I provides an overview of the background legal rules against which judges make stay decisions in federal courts. Part II discusses those principles as applied in environmental litigation and identifies two problems with the current stay jurisprudence: first, that many of the federal circuits apply a legal test that fails to account for the dynamic and often subtle nature of irreparable environmental harm; and second, that the complex statutes underlying most environmental claims are necessarily difficult to parse, risking inaccurate decisions on the merits. Part III argues that courts can address these issues by applying the "sliding-scale" test when considering motions for a stay in environmental litigation.

I. Stays in Context

A court ruling on a motion for a stay pending appeal in a case involving an injunction must consider the same four factors that govern preliminary injunc-

9. *See* Pedro, *supra* note 7, at 886.

10. *See infra* Part I.

11. *Id.*

12. Richard J. Lazarus, The Making of Environmental Law (2d ed. forthcoming 2022) (manuscript at 17–18) (on file with author).

tions.[13] However, federal courts across circuits have developed a variety of analytical frameworks for considering these factors. This Part reviews these frameworks and highlights the varied ways courts consider the relevant factors in granting or denying a stay.

A. Procedural Mechanisms & Requirements

Requests for stays pending appeal in district court are governed by Federal Rules of Civil Procedure Rule 62(c) and, in the Courts of Appeals, by Federal Rules of Appellate Procedure Rule 8.[14] The mechanics of a decision to grant or deny a stay roughly resemble the weighing of parties' respective harms seen in other forms of equitable relief, albeit applied in a slightly different context.[15] Commentators note that a party seeking a stay of an adverse ruling in the district court should normally move for such relief in the district court itself, regardless of that party's expectations of success there.[16] The initial application for a stay can be made in the court of appeals, but this is subject to certain requirements, including a showing that moving in the district court would have been "impracticable."[17] Impracticability can manifest in several ways, including unavailability of the judge assigned to the case or the judge's unwillingness to rule as quickly as a time-constrained claim might require.[18] Or, the time window might be too narrow to renew the motion in the court of appeals if the district court has disposed of the motion with a denial.[19] Of course, these hurdles need not be cleared where the district court has either denied the application for a stay or failed to grant the relief requested below.[20] Applications for stays of administrative rules proceed similarly, with the added caveat that litigation must commence in a particular district court.[21]

The Supreme Court's consideration of applications for stays does not deviate in any significant way from the lower courts' exhaustion and impracticability requirements, at least not procedurally. The Supreme Court Rules state that, barring "extraordinary circumstances," the Court will not entertain motions for

13. Pedro, *supra* note 7, at 873.
14. *Id.*
15. David G. Knibb, Federal Court of Appeals Manual § 21:5 (7th ed. 2021).
16. *Id.*
17. *Id.* § 21:4.
18. *Id.*
19. *See, e.g.*, Populist Party v. Herschler, 746 F.2d 656, 657 n.1 (10th Cir. 1984) (holding movant properly applied for stay given the narrow time window before an election in a voting rights proceeding).
20. Knibb, *supra* note 15, § 21:5.
21. For example, the Clean Air Act's judicial review provision mandates petitions for review of agency action based on, *inter alia*, sections 7411 and 7412 of the Act, which govern new stationary sources and hazardous air pollutants, respectively, be brought exclusively in the D.C. Circuit. 42 U.S.C. § 7607.

a stay unless "the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."[22]

B. Legal Rules

The same four factors that govern preliminary injunctions also govern stays pending appeal.[23] As the Supreme Court restated in *Nken v. Holder*,[24] these four factors are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[25]

The federal courts of appeals have developed approaches differing in small, yet still significant ways, for deciding whether a stay pending appeal should be granted. Generally, courts use some combination of the following approaches.

1. The Four Independent Factors Test

Under the four independent factors approach, courts consider the four stay factors in isolation, without reference to one another; a finding of all four factors weighing in favor of movant will lead a court to grant their motion for a stay.[26] The Fifth Circuit took such an approach in granting a stay of the Environmental Protection Agency's ("EPA") regional haze rule in the context of two national parks and a federal wildlife refuge in Oklahoma and Texas.[27] After receiving the two states' State Implementation Plans as required for compliance under the Clean Air Act ("CAA"), EPA determined the plans were deficient and began work promulgating a federal implementation plan to both supplement and partially replace the plan the states submitted.[28] EPA issued a notice of proposed rulemaking indicating that it would amend the Regional Haze

22. SUP. CT. R. 23.

23. Nken v. Holder, 556 U.S. 418, 425–26 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

24. 556 U.S. 418 (2009).

25. *Id.* at 425–26.

26. *See* Texas v. EPA, 829 F.3d 405, 411 (5th Cir. 2016) ("Because Petitioners have demonstrated a strong likelihood of success on the merits, because they are likely to suffer irreparable injury in the absence of a stay while EPA has not shown similar injury from the issuance of a stay, and because the public interest weighs in favor of a stay, we [grant] the motion for a stay pending resolution of the petitions for review on the merits.").

27. *Id.* at 411–14; 40 C.F.R. § 51.308 (2021).

28. *Texas*, 829 F.3d at 14.

Rule and change its governing standards that would ostensibly control in the 2018–2028 regulatory window.[29]

Various parties, including power companies, labor unions, state regulators, steel manufacturers, and the state of Texas, petitioned for review of the rule and moved for a stay pending appeal.[30] The court began by addressing the question of success on the merits, and concluded petitioners had made a sufficient showing. In particular, Judge Jennifer Elrod noted EPA's failure to consider the impacts of compliance on energy as a strong indication this would render the rule arbitrary and capricious.[31] The court, next, considered the question of irreparable harm, and concluded this prong was similarly satisfied, as the costs of implementation were estimated at over $2 billion and regulated entities would need to commence installation of improvements to their facilities almost immediately.[32] The court concluded harm to EPA would be minimal: first, any difference between the state and federal haze goals was "miniscule;" second, the emissions regulations at issue would not take effect for at least three more years, with some portions of the regulation coming into effect five years from the time the case was handed down.[33] Finally, the court concluded the "public's interest in ready access to affordable electricity" outweighed the supposed "inconsequential visibility differences" that the proposed Regional Haze Rule amendments would provide, in holding the stay was in the public interest.[34]

The defining feature of the court's analysis in ruling in favor of a stay was that each of the four factors were evaluated independently, in contrast to the approaches described below.[35] Indeed, Judge Elrod's opinion considered each in turn, not unlike a checklist. The other approaches discussed below demonstrate just how "hazy" the legal standard for stays can be; given the strictly time-bound nature of stays, the murkiness of standards complicates matters where genuine questions of irreparable harm exist.[36]

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29. *Id.* at 416; *see also* Protection of Visibility: Amendments to Requirements for State Plans, 81 Fed. Reg. 26,942 (proposed May 4, 2016) (to be codified at 40 C.F.R. pt. 51, 52).

30. *Texas*, 829 F.3d at 416–17.

31. *Id.* at 433.

32. *Id.* Petitioners' further arguments included endangerment of the reliability of power in the Electric Reliability Council of Texas, harm to steel mills and business associations as their input costs increase, loss of jobs affecting labor unions, and significant outlay of state resources by the state of Texas to enforce compliance. *Id.* The majority concluded that the alleged harms were sufficient to satisfy this prong. *Id.*

33. *Id.* at 434.

34. *Id.* at 434–35.

35. For another case considering the stay factors under a similar framework, see *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366 (9th Cir. 2016).

36. *See* Pedro, *supra* note 7, at 896.

2. Balancing the Four Factors

Courts in the Fourth Circuit follow a different approach when considering motions for stays pending appeal. Instead of considering all four factors independently, courts "balance[ ]" them.[37] While this balancing is an open-ended test the court conducts, where the factors weigh in movant's favor "[i]t may be possible that showing somewhat less than a 'strong showing' or 'likelihood' of success on the merits can suffice if the harm to the moving party without a stay is great enough."[38] Finally, any showing on the merits *must* be greater than "serious questions."[39] Taken together, the Fourth Circuit's approach excuses a somewhat lesser showing on the merits where the other stay factors weigh in movant's favor, but this showing may not be "so reduced" to serious questions.[40]

In *Ohio Valley Environmental Coalition, Inc. v. U.S. Army Corps of Engineers*,[41] for example, the U.S. District Court for the Southern District of West Virginia considered a motion for an injunction pending appeal after that court declined to enjoin a mining project.[42] The Army Corps of Engineers ("the Corps") had granted to the Highland Mining Company a Clean Water Act ("CWA") section 404 permit,[43] which authorized the mine's discharging of fill material into streams nearby in order to facilitate surface mining.[44] Plaintiffs, consisting of environmental groups from the region, challenged the permit. The district court granted summary judgment for the Corps, and plaintiffs then sought relief in the form of an injunction pending appeal.[45]

After setting forth the standard for stays in the Fourth Circuit discussed above, the court turned to the factors themselves, immediately concluding that plaintiffs would fail on the merits prong under directly controlling precedent in the circuit, though their case presented "serious questions."[46] The court then considered harms to environmental plaintiffs and government defendants, respectively—as to the harm to plaintiffs, the court noted that, where environ-

37. *See* Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 693 (S.D. W.Va. 2012).

38. *Id.* at 692.

39. *Id.*

40. *Id.* ("On the first prong, the Fourth Circuit has always required more than serious questions going to the merits in order to get a stay pending appeal . . . .").

41. 890 F. Supp. 2d 688 (S.D. W.Va. 2012).

42. *Id.* at 689. While there are minor differences between stays pending appeal and injunctions pending appeal, an injunction pending appeal is discussed here as the district court analyzes the four factors as they would in a stay context. *Id.* Further, the differences between stays and injunctions pending appeal are minute to the extent that they would undermine the argument here. *See* KNIBB, *supra* note 15, § 21:6.

43. 33 U.S.C. § 1344.

44. *Ohio Valley*, 890 F. Supp. 2d at 689.

45. *Id.*

46. *Id.* at 693.

mental harm is likely, the balance of harms favors granting relief in favor of that environmental interest.[47] After a brief discussion of harm to defendants, the court concluded the balance of hardships *did* tip in plaintiffs' favor, as did the overall public interest.[48] However, the court denied the motion to enjoin activity pending appeal. While three of four factors weighed in plaintiffs' favor, including the balancing of the hardships, that plaintiffs had shown no more than "serious questions" going to the merits proved fatal.[49]

This "balancing" test, then, has a lower limit: the party moving for a stay must show something greater than serious questions going to the merits. While balancing of some sort *does* ostensibly occur, this approach also resembles the four independent factors test outlined above in *Texas v. EPA*.[50] This outcome, described by one scholar as "somewhat puzzling,"[51] also highlights the lack of clarity for courts and litigants arising when courts consider the four stay factors.

3. "Serious Questions"

Some courts, including the Ninth Circuit, will consider a stay even if some level of unlikelihood of success on the merits exists—the Ninth Circuit has explicitly written that petitioners seeking a stay need *not* demonstrate that they are "more likely than not" to win on the merits.[52] The rationale for this "serious questions" approach rests, in many ways, on judicial common sense. According to the Ninth Circuit, a more stringent requirement would force courts into an unreasonable dichotomy between briefing and arguing the merits of the case in every instance where a stay is requested or attempting to predict the resolution of "often-thorny" legal issues without such briefing and argument.[53]

Applying this framework in *Leiva-Perez v. Holder*,[54] the Ninth Circuit granted petitioner's motion for a stay of his removal from the United States.[55] Under the Ninth Circuit's formulation of the test, the threshold question of

47. *Id.*

48. *Id.* at 694–95.

49. *Id.* at 693.

50. *See* Texas v. EPA, 829 F.3d 405, 424 (5th Cir. 2016).

51. Pedro, *supra* note 7, at 894 n.150 (discussing the *Ohio Valley* court's holding that a showing on all four factors is required but applying a balancing test).

52. Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011). The court in *Leiva-Perez* further noted the numerous terms referring to similar analyses of the stay factors: "There are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect'. . . a 'substantial case on the merits'. . . or . . . that 'serious legal questions are raised.'" *Id.* at 967. For simplicity's sake, approaches similar to the one taken by the court in *Leiva-Perez* will be referred to as the "serious questions" approach.

53. *Id.* at 967; *see also* Nken v. Holder, 556 U.S. 418, 427 (2009) (stating a court's choices should not be between "justice on the fly" or participation in an "idle ceremony").

54. 640 F.3d 962 (9th Cir. 2011).

55. *Id.* at 970–72.

irreparable harm must be met before the court continues to the merits prong.[56] Here, the court began its analysis presupposing that petitioner, who fled El Salvador due to religious persecution, would face harm if a stay of his removal was not granted.[57] The Board of Immigration Appeals, in earlier proceedings concerning Mr. Leiva-Perez's removal, had held that he failed to show a nexus between the persecution he had suffered in his home country of El Salvador and his genuinely held political opinions, a prerequisite to remaining in the United States as an asylee.[58] However, the Ninth Circuit disagreed with this previous holding; while the Board of Immigration Appeals' judgment seemed to rest on some notion of Mr. Leiva-Perez being afraid of crime and violence more generally, the court pointed to precedent teaching that political persecution may be *but one* reason for an asylum seeker's fear of returning to their country of origin.[59] The court, emphasizing that this was not an "easy" case, noted:

> "[A] generalized or random possibility of persecution" is, of course, insufficient to support an asylum claim . . . [b]ut that does not mean that where, as may be the case here, the persecutors were motivated by an economic or other criminal motive *in addition to* a protected ground, the petitioner cannot show a nexus.[60]

For the Ninth Circuit, this was a sufficiently strong showing to reach the conclusion the merits prong had been satisfied.[61] Leiva-Perez had a "substantial case—a case which raises serious legal questions."[62] The court went on to grant Leiva-Perez's stay, after a sufficient finding in his favor on the remaining prongs of the stay calculus.[63]

Other courts rest the decision to grant or deny a stay on a similar framework. The Fifth Circuit in *Ruiz v. Estelle* (*Ruiz I*)[64] and *Ruiz v. Estelle* (*Ruiz II*)[65] established that the likelihood of success is a prerequisite in the "usual case" and only if the balance of the equities tip strongly in favor of movant will a court issue a stay with "patent substantial merit."[66] In *United States v. Trans-*

56. *See id.* at 965, 971.
57. *Id.* at 970–71.
58. *Id.*
59. *Id.* at 971.
60. *Id.* (first alteration in original, other alterations added) (citation omitted).
61. *Id.*
62. *Id. But see* Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 693 (S.D. W.Va. 2012) (acknowledging the applicable science was "disputed" but "tend[ed] to favor plaintiffs" and concluding that despite serious questions raised on the merits, environmental plaintiffs had failed to make a sufficient showing on the merits prong).
63. *Leiva-Perez*, 640 F.3d at 970–72.
64. 650 F.2d 555 (5th Cir. 1981).
65. 666 F.2d 854 (5th Cir. 1982).
66. *Id.* at 856–57.

ocean Deepwater Drilling, Inc.,[67] the Fifth Circuit applied the test established in the *Ruiz* line of cases.[68] Unlike in its opinion in *Texas v. EPA*,[69] the Fifth Circuit analyzed the merits prong under the test established in *Ruiz I* and *Ruiz II*.[70] In *Transocean*, the court denied the requested relief, concluding that while "serious questions" had been raised as to the merits, the remaining factors did not weigh sufficiently in Transocean's favor to warrant granting a stay.[71]

The Tenth Circuit has fashioned a similar test to those the Ninth and Fifth Circuits apply. Where the moving party establishes that the three "harm" factors—irreparable harm to movant, harm to non-moving party, and the public interest—weigh heavily in their favor, the "'probability of success' requirement is somewhat relaxed."[72] When this has been established, courts are then to measure probability of success by determining whether movant has raised serious questions to the merits "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[73] In *Federal Trade Commission v. Mainstream Marketing Services, Inc.*,[74] the court held that the harm showing by the Federal Trade Commission ("FTC") did not weigh "heavily," and therefore reviewed the merits prong under the typical "substantial likelihood" analysis.[75] The court held the FTC did not make a showing of substantial likelihood of success on the merits and accordingly denied the stay pending appeal.[76]

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67. 537 F. App'x 358 (5th Cir. 2013).
68. *Id.* at 361–62.
69. 829 F.3d 405 (5th Cir. 2016) (discussed *supra* notes 26–36).
70. *Transocean*, 537 F. App'x at 361–62.
71. *Id.* The court found Transocean's argument on the irreparable harm prong unavailing. Transocean attempted to argue the disclosure of the subpoenaed documents at issue would constitute such harm without possibility of later relief; the Fifth Circuit countered that a court may simply order the documents returned to their original owner, restoring the status quo. *Id.* at 362. The court further concluded both the public interest and harm to the opposite party weighed heavily in the public and opposite party's favor; the then-protracted litigation stemmed from the Chemical Safety and Hazard Investigation Board's inquiry into the Deepwater Horizon oil spill of 2010. *See id.* at 359, 362.
72. Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852 (10th Cir. 2003) (quoting Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001)).
73. *Id.* at 853 (quoting *Prairie Band of Potawatomi Indians*, 253 F.3d at 1246–47).
74. *Id.*
75. The district court had found the FTC's telemarketing regulations unconstitutional, and the agency then moved for a stay of the adverse judgment. *Id.* at 852–53. In concluding there had been an insufficient showing of the three "harm" prongs—harm to movant and public interest collapsed into a singular consideration as the FTC is a government agency—the court first pointed to the strong privacy interests of the public in the implementation of the rule continuing through the appeals process. *Id.* at 854–55. However, industry respondent would suffer harm if the rule was implemented, then later found unconstitutional. *Id.* at 853. The court concluded the factors, on balance, did tip in the FTC's favor. *Id.*
76. *Id.*

The "serious questions" framework, though articulated differently across courts, can result in weaker showings on the merits carrying the day where other stay factors weigh strongly in support of granting a stay. Underlying some courts' reasoning for such an approach is an emphasis on the complex issues implicated in the applicable law, therefore justifying the framework where the matter "deserve[s] . . . more deliberate investigation."[77]

4. "Sliding Scale"

Another approach courts, including the D.C. Circuit, use is similar to the "balancing the four factors" approach, though in practice it seems to manifest as a combination of that balancing test along with the "serious questions" framework. The sliding scale approach, "long adhered to" in the D.C. Circuit, has been articulated as allowing for a weaker showing on one prong to be made up by a stronger showing on other factors: "Ultimately, a court asks whether all four factors 'taken together' favor a preliminary injunction."[78]

In *Soundboard Ass'n v. Federal Trade Commission*,[79] the U.S. District Court for the District of Columbia considered whether to grant industry petitioner's motion for equitable relief pending review on appeal.[80] Applying the sliding scale framework, Judge Amit Mehta first held petitioners had not made a sufficient showing on the merits.[81] The court concluded that while the relevant case law was "quite difficult and confused," such ambiguity on the merits did not "cut in favor" of relief.[82] Following the sliding scale approach, the court then considered whether the remaining factors "weigh so strongly in favor of injunctive relief that they make up for [p]laintiff's deficient showing of a likelihood of success."[83]

The court held petitioner had, at most, demonstrated that the public and private interests stood in equipoise.[84] Given the weak showing on the merits,

77. *Mainstream Mktg. Servs.*, 345 F.3d at 853.

78. Soundboard Ass'n v. FTC, 254 F. Supp. 3d 7, 10 (D.D.C. 2017) (quoting Davis v. Pension Ben. Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009)). The court in *Soundboard* noted an "open question" remains in the circuit as to whether *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), forecloses the "sliding scale" approach. *Soundboard*, 254 F. Supp. 3d at 10. As of late 2021, it would seem the question indeed remains open in the circuit. *See* Altschuld v. Raimondo, No. 21-CV-02779, 2021 WL 6113563, at *2 (D.D.C. Nov. 8, 2021) (identifying this open question in the context of preliminary injunctions).

79. 254 F. Supp. 3d 7 (D.D.C. 2017).

80. *Id.* at 7.

81. *Id.* at 12–13.

82. *Id.* at 13.

83. *Id.*

84. Judge Mehta noted that while some members of the Soundboard Association industry group would suffer some economic harm if the FTC "robocall" rule went into effect, he also

"even applying a sliding scale" in such circumstances did not warrant granting the requested relief.[85] Accordingly, the court denied the motion.[86]

Finally, the Supreme Court's own consideration of the decision to grant or deny a stay warrants special mention, given the high court's role as a court of last resort with discretion to grant review. In reviewing an application for a stay made to him in his capacity as Circuit Justice, Justice Stephen Breyer articulated the "traditional factors" the court looks to in this context.[87] Aside from factors discussed up until this point including the public interest, irreparable harm to movant, and irreparable harm to other parties, Justice Breyer noted the merits prong requires an examination into whether it is "reasonably likely" that four Supreme Court Justices would vote to grant certiorari and whether there is a "fair prospect" that a majority of the Court would agree with movant on the merits.[88] The nature of the Supreme Court's role and practices seems to warrant the added consideration of whether a movant for a stay has the votes under the overall umbrella of the "likelihood of success" prong. Though the Supreme Court does not seem to have blessed a particular approach to the stay determination, it has indicated some sort of balancing ought to occur in limited contexts.[89]

In addition to summarizing the general approaches courts take in considering whether to grant a stay pending appeal, the above discussion highlights two attributes of the larger body of jurisprudence relating to stays. First, the approaches courts take can vary widely even within circuits, and these approaches vary by name as well as application.[90] For example, some courts also

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pointed to the public interest in freedom from the overuse of such prerecorded messages in telemarketing calls. *Id.*

85. *Id.* at 15.

86. *Id.*

87. O'Brien v. O'Laughlin, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers).

88. *Id.*

89. *See* Pedro, *supra* note 7, at 887–88 ("[T]he Court's standard for stays pending certiorari calls for balancing the relative harms to the applicant and respondent, and to public interest only in a 'close case.'" (citing Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers))). Some Courts of Appeals have also taken Supreme Court precedent as an "indication" that the type of approach applied in *Leiva-Perez* is permissible. *See, e.g.*, Leiva-Perez v. Holder, 640 F.3d 962, 965 (interpreting several Supreme Court decisions as endorsing a flexible approach to stays pending appeal). The Ninth Circuit there concluded a balancing approach was not foreclosed. *Id.* at 966.

90. The Fifth Circuit has taken different approaches in varied contexts. In *Texas v. EPA*, the court considered each factor in turn, requiring each be sufficiently satisfied to grant relief, 829 F.2d 405, 435 (5th Cir. 2016); in *United States v. Transocean Deepwater Drilling, Inc.*, the same court instead rested its ruling in something more like the "serious questions" framework, but declined to grant the stay where the other factors weighed did not weigh sufficiently in movant's favor to warrant a stay with only "serious questions" presented, 537 F. App'x 358, 361 (5th Cir. 2013). For an in-depth discussion of the various terms that courts use in identifying the legal standard for stays, see Pedro, *supra* note 7, at 892–96.

invoke notions of "serious questions" in conjunction with a balancing test.[91] Second, this cornucopia of approaches to stays pending appeal generates confusion for litigants, and even courts.[92] Such diversity of methods is also likely to lead to forum-shopping where the facts of the case afford the opportunity to do so.

II. Problems with Stays in Environmental Litigation

In the context of environmental litigation, the stakes of stays can be high, especially when the potential for irreparable harm exists. The matters at issue are typically time-sensitive in some way, yet the appeals process can be drawn out for years. And while an appeal is pending, serious and irreversible harms can accrue.[93] While Part I focused on stays more generally and the context in which they occur, this Part will address stays in the environmental context, and the sometimes-problematic results that can occur under the extant approaches to deciding stays. This Part begins with a discussion of several cases in which environmental harms played a role in the court's analysis.

A. The Outcomes of Stays in Environmental Litigation

A common scenario in environmental litigation is one in which there is a developer or government entity planning for a construction project and a group challenging the developing party's action as unlawful. *Stewart Park and Reserve Coalition v. Slater*[94] and *Ohio Valley*[95] are both such cases. However, despite their similar factual backgrounds, courts making stay determinations reached contrary outcomes in the two cases.

The project at issue in *Stewart Park* was the construction of an interstate highway interchange connecting the highway to a local road; plaintiffs moved to stay the judgment of the district court permitting construction to proceed.[96] Beginning with likelihood of success on the merits, the court noted that while plaintiffs had been denied preliminary relief, the Second Circuit's "independent analysis of the administrative record" could be different than that of the district

91. *See, e.g.*, *Transocean*, 537 F. App'x at 360–61 ("[I]nstead, the movant need only present a substantial case on the merits when a serious legal question is involved and show the balance of the equities weighs heavily in favor of granting the stay."). Notably, the *Transocean* court went on to reject the sliding scale approach, holding the Fifth Circuit applies the above-mentioned test from *Ruiz I*. *Id.* at 361.

92. Pedro, *supra* note 7, at 892–96.

93. *Id.* at 875.

94. 232 F. Supp. 2d 1 (N.D.N.Y. 2002).

95. Ohio Valley Env't Coal v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 689 (S.D. W.Va. 2012).

96. *Stewart Park*, 232 F. Supp. 2d at 2.

court.[97] As the court went on to find for plaintiffs on the remaining prongs in the stay analysis, Judge Randolph Treece applied a sort of sliding scale test, noting that given the otherwise-strong showing, plaintiffs likelihood of success need not be "high."[98] In considering the harms that each respective party might incur, the court first considered harms to plaintiffs', concluding they had met their burden of irreparable harm as the roadwork and newly-constructed overpass would necessarily destroy part of the preserve.[99] As for harm to government-developer defendants, the court concluded any harm to them, which would only be financial harm, would be due to their own "hastiness" and not the stay itself.[100] Concluding the public also had an interest in the stay due to their ability to use the park in the meantime (whereas they otherwise could not) the court granted the stay of summary judgment pending appeal in the Second Circuit.[101]

The court in *Ohio Valley*[102] reached an opposite conclusion on similar facts; if anything, the harm resulting from mine stream fill in *Ohio Valley* would be of an even greater magnitude, or at least physical scope.[103] On the merits, the court reasoned that environmental plaintiffs were unlikely to prevail on appeal of the grant of summary judgment in favor of defendant Army Corps of Engineers below, despite "the applicable science in this case" being "dispute[d] but tend[ing] to favor plaintiffs."[104] Unlike *Stewart Park*, the court did not refer to the administrative record and the potential for a contrary reading by the court of appeals, here, the Fourth Circuit.[105] As to irreparable harm to plaintiffs, the

97. *Id.* at 3.

98. *Id.* at 2. The court pointed to a recent Second Circuit decision adopting this formulation of the stay framework, which it had borrowed from the Sixth Circuit. While mechanically operating in a similar manner to the "sliding scale" approach, the Sixth Circuit describes it as follows: "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[ ] will suffer absent the stay. . . . [M]ore of one excuses less of the other." Mohammed v. Reno, 309 F.3d 95, 99 (2d Cir. 2002) (quoting Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)). Post-*Winter*, the Second Circuit has held "flexible standards" to equitable relief survive *Winter*'s holding. *See, e.g.*, Citigroup Glob. Mkts., Inc. v. VCG Spec. Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010) (holding the district court did not err in applying a flexible approach).

99. *See Stewart Park*, 232 F. Supp. 2d at 4.

100. The court expressed disapproval of the haste in which the government had sought and accepted bids for the project—the government had, in fact, accepted bids despite ongoing litigation on the issue. Therefore, Judge Treece ruled against defendants on this point. *Id.* at 3.

101. *Id.* at 4.

102. Discussed *supra* notes 42–51.

103. Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688 (S.D. W.Va. 2012).

104. *Id.* at 693.

105. *Stewart Park*, 232 F. Supp. 2d at 3.

court found plaintiffs had easily met their burden in showing such harm would be likely.[106] "Plaintiffs need not specify the exact species that will be affected by these mining activities . . . because irreparable environmental injury occurs instantaneously with the filling of the stream itself."[107] Stream fill from mountaintop mining is highly destructive to the natural environment in which it occurs.[108] In next considering harm to defendants, here both the Corps and the operator of the mine, the court concluded that plaintiff's harm outweighed that of defendants.[109] The mine operator's harms were seen as at least somewhat significant, because volatility in the price of coal might mean losses to the company if they could not begin production in the imminent future.[110] Conversely, the Corps would face "at most" minimal harm.[111] The court concluded that when weighed against the interests of plaintiffs, plaintiffs had made a stronger showing on balance.[112]

The two cases illustrate the enormous significance of the decision to grant or deny a stay. In one instance, a court granted a stay, thereby temporarily suspending commencement of a construction project that would necessarily irreparably destroy portions of a nature preserve and park. While plaintiffs did not make a showing that they would certainly succeed on the merits, the court looked to the other relevant factors and reasoned a stay was warranted given the strong showings of harm to plaintiffs and public and the potential for the court of appeals to reach a different result on the merits in favor of the environmental plaintiffs. In the other case, the court denied relief pending appeal where the same factors aligned similarly. The court in *Ohio Valley* even conceded that they tended to favor environmental plaintiffs' position.[113] Even so, the stay was denied. The upshot here is that even where irreparable environmental harm is all but certain and the balance of hardships, the public interest, and the "science"

106. *Ohio Valley*, 890 F. Supp. 2d at 694.

107. *Id.*

108. In mountaintop mining, the peak of the mountain or hill is removed—this material is referred to as "overburden" or "spoil" once explosives have been used to displace it. Jason Rapp, *Coal and Water: Reclaiming the Clean Water Act for Environmental Protection*, 25 TUL. ENV'T L.J. 99, 107 (2011). This overburden is then typically disposed of in valleys and as a result "the mountain streams that often run into Appalachian Valleys are effectively covered and obliterated, along with any life within." *Id.* at 107–08. For further background on the destruction this practice leaves in its wake, see generally M.A. Palmer et al., *Mountaintop Mining Consequences*, 327 SCIENCE 148 (2010) ("The extensive tracts of deciduous forests destroyed by [mountaintop mining and valley fill] support some of the highest biodiversity in North America, including several endangered species.").

109. *Ohio Valley*, 890 F. Supp. 2d at 695.

110. *Id.*

111. *Id.*

112. *Id.* ("On the one hand, one of the Corps' duties is to issue permits in a way that properly protects the environment within the confines of the law; on the other, the Corps suffers minimal harm to its permitting process when its decision about a permit is stayed.").

113. *Id.* at 693.

ostensibly underlying the merits all point in movants' favor, courts may nevertheless deny relief. A stay is not a matter of right, but rather an "exercise of judicial discretion."[114] However, a denied stay could mean, like it did in *Ohio Valley*, irreparable harm to an ecosystem such as the streams located near the Reylas Surface Mine in Logan County, West Virginia.[115]

Similar disparities can occur when the matter at issue is a motion to stay the implementation of a rule or regulation promulgated by an administrative agency. Comparing the petition for a stay of EPA's regional haze rule"[116] with a similar petition regarding the National Marine Fisheries Service's ("NMFS") rule promulgated to prevent further degradation of the Atlantic right whale[117] provides similar illustration.

EPA promulgated the regional haze rule at issue in *Texas v. EPA* under the CAA.[118] Petitioners argued EPA exceeded its authority in imposing requirements found neither in the Act nor in the haze rule itself.[119] On the merits, the Fifth Circuit concluded petitioners were likely to succeed because EPA had not properly deferred to Texas's application of the statutory factors in preparing its State Implementation Plan and improperly required a "source-specific" analysis.[120] The court found the irreparable harm to movant prong was satisfied by heavy compliance costs; Fifth Circuit precedent, unlike some other federal courts of appeals, allows such economic harm to satisfy this prong.[121] Conversely, the court held harm to EPA would be minimal if the stay was granted and great to the public if it was not, emphasizing the public's interest in affordable energy as opposed to "miniscule" improvements in visibility.[122] Accordingly, the court denied the stay.[123]

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114. Nken v. Holder, 556 U.S. 418, 433 (2009).

115. *Ohio Valley*, 890 F. Supp. 2d at 689. While the district court left in place previously granted relief that would suspend further actions at the mine for fourteen days during which plaintiffs sought a stay in the Fourth Circuit, this relief was denied; the decision from the court of appeals was not handed down until May 2013, more than a year after the *Ohio Valley* plaintiffs' motion for a stay in the district court. *See* Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 716 F.3d 119 (4th Cir. 2013).

116. 40 C.F.R. § 51.308 (2021).

117. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 86 Fed. Reg. 51,970 (Sept. 17, 2021) (to be codified at 50 C.F.R. pts. 229, 697).

118. Texas v. EPA, 829 F.3d 405, 411 (5th Cir. 2016).

119. *Id.*

120. *Id.* at 427–28.

121. *Id.* at 434. The court also pointed to the Courts of Appeals for the Seventh Circuit, Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980); Second Circuit, Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005); and D.C. Circuit, Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544 (D.C. Cir. 2015). Texas v. EPA, 829 F.3d at 434.

122. Texas v. EPA, 829 F.3d at 435.

123. *Id.*

The First Circuit considered a motion for a stay of the district court's ruling halting implementation of a rule limiting lobstering off the East Coast so as to protect the endangered North Atlantic right whale from extinction, since the right whale's habitat overlaps with waters frequently lobstered.[124] The rule at issue barred the most popular method of lobstering off the coast of Maine from October to January, and the government moved for a stay pending appeal.[125] The court began its merits analysis by pointing to the "clear policy choices" Congress made in passing the Endangered Species Act ("ESA").[126] With such a clear mandate absent any challenges by plaintiffs bringing to light *procedural* defects with the promulgation of the rule, the court turned to the administrative record to determine whether the agency action was arbitrary and capricious.[127] The court concluded the action was neither arbitrary nor capricious and next looked to harms to the respective parties. The court found compelling that, despite the closure at issue contributing to a smaller portion of whale "takes," such a regulation contributed significantly to a "larger, interrelated regulatory scheme."[128] Discussing the harms that would befall plaintiffs, mostly lobstermen in the region, the court concluded that the government's implementation of duly enacted law (and reduction of harms it was designed to prevent) outweighed plaintiffs' interest and their risk of harm; after further concluding that Congress had "effectively declared" the public interest here, the stay of the judgment below halting the implementation of the rule was granted.[129]

In addition to contrasting two approaches to stay considerations in the context of administrative rules, the preceding discussion illustrates another question about the grant of a stay: how heavily to weigh Congress's intent to deal with a particular problem. In one case, Congress intended to preserve the use and enjoyment of federal lands in conditions of clear visibility, and in another Congress intended to protect the severely endangered North Atlantic right whale.[130] While the ESA has been held out by courts as a particularly strong congressional statement that preservation of such threatened species should never take second chair to other considerations,[131] the previous discus-

124. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38, 40 (1st Cir. 2021).

125. *Id.*

126. 16 U.S.C. §§ 1531–1544; *Raimondo*, 18 F.4th at 43. In particular, the court singled out congressional intent to protect wildlife warranting the strict protection of the act, even if such protection harmed industry, such as commercial fishing operations. *Id.*

127. *Raimondo*, 18 F.4th at 44.

128. *Id.* at 49.

129. *Id.*

130. In 2019, NMFS estimated there remained, at most, 368 right whales living in the ocean. *Id.* at 40.

131. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (enjoining the operation of a nearly completed dam where its operation would harm an endangered species of fish, emphasizing

sion illustrates how courts might—or might not—rely on such intent as a thumb on the scale in granting equitable relief. Second, the four cases just outlined demonstrate where courts converge and diverge in finding irreparable harm. Taking the example of *Texas v. EPA*, the court pointed to the fact that changes in visibility, and therefore implicitly the amount of emissions in the air reducing such visibility, would not change perceptively in the *near* future.[132] However, a lack of change in the near future need not mean the effects of the delay would not be seen and felt later. Finally, the preceding four cases highlight the vast universe of considerations surrounding the stay decision, even though courts, in the end, consider the "traditional" four factors.

B. The Problems with Stays in Environmental Litigation

The above discussion has served to outline some real-world implications of stays in environmental litigation, whether it be the suspension of a rule promulgated to combat degradation of the natural environment of our National Parks or maintenance of a ban on lobstering techniques to ensure the safety of endangered whale species. The following discussion demonstrates the difficulties in applying a more rigid framework for evaluating motions for stays, as illustrated by the application to environmental litigation. First, stays in environmental litigation almost necessarily implicate the interpretation of complex statutes and regulations.[133] Second, environmental harms can be difficult to show, and irreparable harm may take years to be revealed as having been truly irreparable.[134] Further complicating matters—and raising the stakes even higher—is the time-sensitive nature of the motion for a stay, and the risk an unfavorable outcome creates for the cementing of irreparable harm.[135]

1. Complexity and Cognitive Bias

Environmental law in the United States is a complex web of statutes, regulations and common law.[136] EPA's website points to over thirty different stat-

Congress's speaking "in the plainest of words, making it abundantly clear the balance has been struck in favor of affording endangered species the highest of priorities").

132. Texas v. EPA, 829 F.3d 405, 435 (5th Cir. 2016). *But see* Salix v. U.S. Forest Serv., 995 F. Supp. 2d 1148, 1154–55 (D. Mont. 2014) (finding irreparable harm to nonmoving party where procedural issues arose in an ESA case).

133. *Raimondo*, 18 F.4th at 42–43.

134. LAZARUS, *supra* note 12 (manuscript at 17–20).

135. Pedro, *supra* note 7, at 875.

136. It has been described as "enormous, labyrinthian, and of confusing complexity." Robert F. Blomquist, *The Beauty of Complexity*, 39 HASTINGS L.J. 555, 570 (1987); *see* LAZARUS, *supra* note 12 (manuscript at 22) (describing environmental law's reflection of nature and consequently its characteristics of complexity, scientific uncertainty, dynamism, precaution, and controversy); J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System:*

utes and executive orders currently operative in the United States with respect to environmental law; they run the gamut from the Beaches Environmental and Coastal Health Act of 2000,[137] to the CWA[138] and the CAA,[139] along with the National Environmental Policy Act ("NEPA"),[140] Comprehensive Environmental Response, Compensation and Liability Act,[141] and the Resource Conservation and Recovery Act,[142] to name a few.[143] Of course, the implementation of these laws calls for an even larger pool of regulations and administrative decisions. The role of an Article III judge is not to limit oneself to matters only relating to a specific subject matter, whether it be environmental law, trusts and estates, or contracts.[144] Therefore, it would be absurd to argue such specific legal expertise ought to be a prerequisite for the bench.

Even justices of the U.S. Supreme Court have spoken to the difficulties posed by the complexity of environmental law.[145] In 1971, members of the court expressed concern at granting leave to a party to file an original action to address pollution due to the complex nature of the issues involved.[146] In his conference notes for the seminal administrative law case *Chevron Inc. v. Natural Resources Defense Council, Inc.*,[147] commentators have noted Justice Harry Blackmun suggests the very holding in that case was "born in part out of the Justices' frustration at the difficulty of understanding the workings of complex, new regulatory programs like the [CAA]."[148] In his review of Justice Blackmun's and Justice Thurgood Marshall's papers from their time on the court, Professor Robert Percival commented that "several references make it clear that cases

How to Clean Up the Environment by Making a Mess of Environmental Law, 34 HOUS. L. REV. 933, 939–40 (1997) (arguing the complexity of the environment necessarily calls for laws that rise to meet that complexity).

137. Pub. L. No. 106–284, 114 Stat. 870 (codified in scattered sections of 33 U.S.C.).

138. 33 U.S.C. §§ 1251–1387.

139. 42 U.S.C. §§ 7401–7671.

140. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

141. 42 U.S.C. §§ 9601–9675.

142. *Id.* §§ 6901–6992k.

143. *Laws and Executive Orders*, EPA (Aug. 16, 2021), https://perma.cc/8Q2V-Z8Y6.

144. *See* Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 L. & SOC. INQUIRY 55, 56 (2013) (discussing the fact that individual judges on the courts of appeals sometimes have subject matter expertise in a particular area, but these remain generalist courts in contrast with the Federal Circuit).

145. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENV'T L. REP. 10,637, 10,639 (2005).

146. *Id.* at 10,638–39.

147. 467 U.S. 837 (1984).

148. Percival, *supra* note 145, at 10,644. Professor Percival's thorough review of Justice Blackmun's papers revealed that during conference Justice Stevens expressed his confusion over the House Committee Reports for the CAA, stating "[w]hen I am so confused, I go with the Agency." *Id.*

involving complicated regulatory programs are not among the Justices' favorites."[149] If even seasoned jurists express frustration and doubt regarding the complexity of environmental law, then certainly judges at all levels of the judiciary feel similarly when considering such issues, whether it be with respect to complex fact patterns or intricate regulatory mechanisms such as the various technology standards prescribed under the CAA[150] and CWA.[151]

In addition to parsing through the sheer complexity of our environmental laws, judges, like any other professionals, are subject to cognitive bias. One particular bias of relevance here has been referred to as the "lock-in effect."[152] The lock-in effect explains how decision-makers—here, judges—get "trapped or locked into a particular course of action," such as the granting or denial of preliminary injunctive relief.[153] The cognitive reasons underlying the lock-in effect are complex, but its cause can be traced to the "tendency to want to justify the initial allocation of resources by confirming that the initial decision was correct."[154] Professor Kevin Lynch posits the most likely situation for lock-in to occur is one where a change in the decision upon later review would imply that the first decision, and thereby its respective allocation of resources, "was not the best course of action."[155] In the context of stays, such a situation could arise where a district court ruling on a Federal Rule of Civil Procedure 65(a) motion may need to return to decisions previously made and analysis previously performed. This might create friction where a decision maker reconsiders their own prior decision; in environmental litigation, this could mean the difference

149. *Id.* Perhaps signaling an even deeper discomfort with the complexity underlying RCRA, Justice Blackmun's oral argument notes—his only notes—were "all very dull" in respect to litigation arising under that Act. *Id.* at 10,645; City of Chicago v. Env't Def. Fund, 511 U.S. 328 (1994).

150. 42 U.S.C. §§ 7411–7412.

151. For example, in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), the Supreme Court grappled with the meaning of "best technology available for minimizing adverse environmental impact" for water intake cooling structures typically located at power generation facilities. *Id.* at 213; 33 U.S.C. § 1326(b) ("Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.").

152. Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779 (2014). It should be noted that Professor Lynch's article does not purport to empirically prove such a lock-in effect exists, but rather that the circumstances under which courts grant preliminary relief overlap with prime conditions for the cognitive bias to occur. *Id.* at 813. Professor Lynch argues a more uniform, flexible standard should be applied to the decision to grant relief which is applied to stays below. *See infra* Conclusion.

153. *Id.* at 781; *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) (arguing judges are subject to the influence of cognitive "illusions" like anyone else).

154. Lynch, *supra* note 152, at 783.

155. *Id.*

between irreparable harm and the avoidance of such harm.[156] Lynch argues for the recognition of the risk of this bias, particularly in the context of assessing likelihood of success on the merits.[157] Consider the facts presented in *District 4 Lodge of the International Ass'n of Machinists and Aerospace Workers Local Lodge 207 v. Raimondo*,[158] where the district court first granted plaintiffs' motion for a preliminary injunction of a lobstering prohibition rule.[159] The government then moved for a stay of the injunction, which the district court denied.[160] However, what if the judge had been confronted with new evidence supporting the government's position that had developed in the interim, or was reexamining the facts with "fresh eyes"? According to Lynch, the stage has been set for lock-in to occur when the district court reconsiders their prior ruling.[161] Thus, the judge will "face pressure to justify the denial of the initial injunction to herself and to her peers, the parties, and the public" in light of the now-dispensed resources.[162]

The purpose of this discussion is not to cast doubt on every judicial reconsideration of an issue or a case. However, the unique complexity of environmental statutes and cases, as well as that of the science that underlies them, heightened by the potential for cognitive bias, highlights the problems endemic to the application of a more rigid framework for evaluating stays pending appeal, such as the four independent factors test.[163]

2. The Difficulty of Proving Irreparable Harm in Environmental Cases

Proving irreparable harm in the context of environmental litigation presents its own set of challenges. These challenges have not proven any simpler over time, after the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*[164] narrowed the "irreparable harm to movant" prong in the context of preliminary injunctions. While the Supreme Court in *Winter* ruled on preliminary injunctions, judges consider the same four factors in the stay analysis; as discussed above, there remains an "open question" across courts just how *Winter* affects motions for stays.[165] Even so, the realities of environmental harm present difficulty in proving irreparable harm; such difficulty flows from the unique nature of environmental harms, especially the prevalence of threshold

156. *Id.* at 784.

157. *See id.* at 807.

158. 18 F.4th 38 (1st Cir. 2021).

159. *Id.* at 40.

160. *Id.* at 42.

161. Lynch, *supra* note 152, at 807.

162. *Id.*

163. *Id.* at 800 (quoting Nken v. Holder, 129 U.S. 418, 427 (2009)).

164. 555 U.S. 7, 22 (2008).

165. *Id.*; *see infra* Part III.B; *see also* Pedro, *supra* note 7, at 895.

and cumulative effects, as well as courts' differing perceptions of whether certain harms rise to the level warranting relief.[166]

While it may be easy to find irreparable harm where a portion of a nature reserve is cleared for a highway interchange[167] or the filling-in of mountain streams with surplus mining material,[168] other environmental harms can be less obviously immediate. Threshold effects might appear initially innocuous. After all, removing a small grove of trees is just that—removing a grove of trees. Not so. "One cannot safely assume a predictable linear correspondence between cause and effect. Just a little more pollution or a little more natural resource extraction does not necessarily lead to just a little more environmental harm or a little less available resource."[169] The lobstering regulation at issue in *District 4 Lodge* provides further illustration.[170] NMFS set the maximum level of take with a particular number in mind: the optimum sustainable population.[171] The maximum number of whales that could be taken every ten years was eight; any number of take above that and, over time, the whale population would gradually dwindle.[172] This sort of "threshold effect" also appears in other contexts, such as the effects of pollution on the human body.[173] A small amount of pollution might not affect a human over a short period of time, but the same amount of pollution, or even less, over a longer period of time can have deleterious effects.[174] The earth's atmosphere is likewise subject to threshold effects.[175] While water temperature increases in certain areas of the Atlantic Ocean do not have any noticeable effect on the development of hurricanes, once twenty-six degrees Celsius is reached there is a nonlinear increase in the spawning of hurricanes.[176] On their face, minor deviations in ocean temperature or habitat size

166. *Compare* Fund for Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1993) (finding irreparable harm to aesthetics and enjoyment of bison in a national park where such bison would be culled), *with* S. Utah Wilderness All. v. Thompson, 811 F. Supp. 635, 641–42 (D. Utah 1993) (finding no irreparable harm in loss of enjoyment of land and psychological pain where coyotes would be killed).

167. Stewart Park & Res. Coal. v. Slater, 232 F. Supp. 2d 1 (N.D.N.Y. 2002).

168. Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688 (S.D. W.Va. 2012).

169. LAZARUS, *supra* note 12 (manuscript at 17).

170. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38 (1st Cir. 2021).

171. *Id.* at 41.

172. *Id.* ("In other words, even one additional death a year increases the odds that the right whale will go extinct.").

173. LAZARUS, *supra* note 12 (manuscript at 20).

174. *Id.* Professor Lazarus also points out the inverse can also occur; exposure to an "extremely high" level of a particular pollutant can cause harm even when length of exposure is "exceedingly short." *Id.*

175. *Id.* at 20–21.

176. *Id.* Since 1980, storms have *doubled* in frequency as the temperature of Earth's oceans rise. *Id.*

and quality might seem to be of little effect on the overall environment; but, the imperceptible-until-it-is-too-late nature of threshold effects can lead to irreparable harm in many contexts.

The cumulative effects of environmental harm can be similarly devastating even where a singular destructive event or source of pollution is all an individual (or court) perceives.[177] "Many of environmental law's greatest remaining problems are caused by the cumulative effects of many actions, each of which contributes only a small increment to the larger problem."[178] Often, much in the same way as threshold effects, the causal chain between individual actions and the larger problem is indirect or obscure, making redress in court more difficult.[179] While climate change is a "classic example" here as well,[180] there are other situations where cumulative effects become problematic. Stormwater runoff is one such example, as the CWA excludes "nonpoint" sources such as stormwater drains as well as agricultural runoff.[181] Another example is the collective emissions from millions of car engines that contribute cumulatively to environmental degradation.[182] Much like threshold effects, cumulative effects do not appear destructive in isolation, but can certainly be so in the aggregate.[183]

Further complicating the matter is the inherent difficulty for a lawyer to stand before a court and argue such irreparable harm has occurred or is imminent when harm must be shown in *some* way, no matter which conception of the stay framework the court applies and despite the sometimes-obfuscated nature of that harm. Often, this difficulty can arise specifically in endangered species litigation,[184] though not exclusively in that context.[185] In endangered species litigation, some courts have held destruction of portions of an endan-

177. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 143 (2012).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*; *see also* Jonathan Cannon, *A Bargain for Clean Water*, 17 N.Y.U. ENV'T L.J. 608, 608–15 (2008) (reviewing the state of water pollution in the United States).

182. Owen, *supra* note 177, at 143; *see, e.g.*, Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 LEWIS & CLARK L. REV. 273, 279–80, 283 (2005) (describing regulatory challenges in combating air pollution resulting from many diffuse sources).

183. *See generally* J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away,* 98 CALIF. L. REV. 59 (2010) (discussing the larger "massive problems" environmental law faces and how difficult these problems can be to remedy and prevent).

184. *See generally* Owen, *supra* note 177 (highlighting the difficulty of environmental enforcement in the endangered species context, particularly as to habitat degradation).

185. *See, e.g.*, Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1494, 1496–98 (W.D. Wash. 1992) (holding out harm as irreparable to owls' habitat in denying the Forest Service's motion for a stay of an injunction granted below enjoining the Service from increased timber sales until a new environmental impact statement was prepared in a NEPA claim).

gered species' habitat does not rise to the type of irreparable harm warranting the granting of equitable relief. For example, in *Protect Our Water v. Flowers*,[186] the court declined to enjoin[187] continued work on a road development pending appeal that would cut across the red-legged frog and San Joaquin kit fox's habitat.[188] The court had denied plaintiffs' motion for a preliminary injunction, and declined to enjoin work here where there was an insufficient showing of harm to the specific animals despite construction work near their habitat.[189] Similar litigation, with differing results, arose under a claim challenging a CWA permit allowing a golf course and resort near Yellowstone National Park, arguing the project at issue would threaten bald eagles.[190] Reversing the district court's denial of injunctive relief, the Tenth Circuit held harm to the overall species of bald eagle need not be shown; rather, because the claim arose under the CWA, the court looked to whether the planned development would harm *some* bald eagles.[191] Concluding it did, the court held the irreparable harm prong was satisfied.

As *Protect Our Water* demonstrates, harm can be difficult to show where a particular specimen cannot be held out as having been injured.[192] While the court in *Greater Yellowstone Coalition v. Flowers*[193] conversely *did* find irreparable harm to individual bald eagles, this also occurred almost on a "technicality"—because the case arose out of the CWA, as opposed to the ESA, a showing that the species as a whole would be harmed was not needed.[194] The requirement to show harm to entire species under the ESA does raise questions; for example, whether a showing that the harm to a few specimens can threaten the existence of the entire species (as would be the case if perhaps a certain threshold of habitat or specimen loss were attained) can meet the standard the court in *Greater Yellowstone* referenced.[195] Such a requirement again calls for a departure from more rigid conceptions of the stay framework and

186. 337 F. Supp. 2d 882 (E.D. Cal. 2004).

187. Irreparable harm is discussed in the context of both stays and other forms of injunctive relief in this section; here, the discussion concerns harm in the general context but the argument is applicable to stays as well.

188. *Protect Our Water*, 337 F. Supp. 2d at 885.

189. *Id.*

190. Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1252–53 (10th Cir. 2003).

191. *Id.* at 1258–62.

192. *Protect Our Water*, 337 F. Supp. 2d at 884–85.

193. 321 F.3d 1250 (10th Cir. 2003).

194. *Id.* at 1258 ("We can find no compelling reason why the ESA language should serve as a benchmark . . . by adopting the ESA standard . . . in a CWA or NEPA challenge, the district court based its decision on an erroneous conclusion of law."); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 544 (1987) (requiring the type of harm in the context of equitable relief be the type of harm contemplated under the relevant Act).

195. *Greater Yellowstone*, 321 F.3d at 1258; LAZARUS, *supra* note 12 (manuscript at 17–19) (discussing threshold effects).

towards a more flexible one, which would allow for harm, perhaps harm to an entire species, to be recognized, even where that harm might otherwise be seen as minimal if it has not reached the requisite threshold to perpetuate eventual species collapse.[196]

The previous discussion has outlined the two key problematic facets of rigid applications of the stay framework. First, when a court considers an environmental case, whether it be as a claim brought under a particular statute or a challenge to an agency rule, it must grapple with the complexities of environmental law.[197] This complexity is coupled with a decision-making framework ripe for cognitive bias[198] and the time-sensitive nature of the motion for a stay pending appeal. Second, harms to the natural environment can be difficult to show due to threshold effects as well as pernicious cumulative effects of extended pollution or emissions release.[199]

III. Solutions for Resolving Issues with the Stay Analysis in Environmental Cases

The above has demonstrated the difficulties inherent in seeking a stay pending appeal to prevent environmental harm, whether in the context of an air quality regulation or a nature preserve slated for destruction for a highway interchange. This Note next considers two possible solutions for resolving these tensions in the stay jurisprudence, each premised in both tenets of equitable relief and case law: expansion of the so-called "NEPA exception" from stringent injunction standards to other environmental statutes, and application of sliding-scale and serious-question doctrines in environmental litigation. It concludes that the latter approach is more appropriate in light of these considerations and affords both flexibility and the opportunity to have harms properly considered where they are genuinely irreparable, even if such harm might not be as readily visible.

A. "NEPA Exception" Analogue

The first solution would be an expansion of a doctrine known as the "NEPA Exception," which holds that once a violation of NEPA has been shown, a preliminary injunction should issue "without detailed consideration of traditional equity principles."[200] In summarizing the exception as typically for-

196. *See, e.g.*, Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38, 41 (2021) (discussing the "critical" nature of the North Atlantic Right Whale's population level).

197. *See supra* text accompanying notes 136–50.

198. *See supra* text accompanying notes 152–61.

199. *See* Lazarus, *supra* note 12 (manuscript at 17–20) (discussing threshold and cumulative effects).

200. Daniel R. Mandelker et al., NEPA Law and Litigation § 4:66 (2d ed. 2021).

mulated,[201] the U.S. District Court for the Eastern District of California pointed to NEPA representing "declared Congressional policy requiring assessment of environmental concerns."[202] To some courts, the NEPA exception comes from Congress having weighed the equities at first instance and determined the lack of consideration of environmental effects and questions equates with irreparable harm.[203]

An expansion of this doctrine to other environmental statutes like the CWA, CAA, and ESA could allow for a similar approach to stays pending appeal when considering irreparable harm. For example, section 7 of the ESA requires consultation between relevant agencies where there is "reason to believe that an endangered species or a threatened species may be present in the area affected by this project and that implementation of such action will likely affect such species."[204] If the NEPA exception were more broadly extended to the stay context, such as in considering the ESA's procedural requirements, a party seeking to prevent harm to such a species would therefore need only show a violation of the ESA, such as the lack of sufficient consultation between the relevant agencies when required.[205]

Section 401 of the CWA similarly requires any applicant for a license or discharge permit to obtain a certification from the relevant state or local agency that such discharge will comply with the requirements of the CWA.[206] These requirements include adherence not only to the procedural provisions, but also *substantive* provisions.[207] If the NEPA Exception were to also be expanded in the CWA context, a sufficient showing of harm in order to obtain relief might be a procedural error or an improper substantive certification. As with the ESA hypothetical discussed above, a court would be able to maintain the status quo—whether it be slightly delaying construction in a sensitive habitat area or the operation of a manufacturing plant—in order to more fully consider the potentially pernicious environmental harms that might result if the status quo were not maintained. Such an approach would also avoid the often-difficult matter of showing more specific environmental harm at first instance.[208]

However, there are a few reasons such an approach is foreclosed. First, the Supreme Court has time and again reiterated the "extraordinary" nature of

201. *Id.*

202. California v. Bergland, 483 F. Supp. 465, 498–99 (E.D. Cal. 1980), *aff'd in part, rev'd in part on other grounds*, 690 F.2d 753 (9th Cir. 1982).

203. *Id.* at 499.

204. 16 U.S.C. § 1536(a)(3).

205. MANDELKER ET AL., *supra* note 200, § 4:66; 16 U.S.C. § 1536.

206. 33 U.S.C. § 1341(a)(1).

207. *See id.*

208. *See* Owen, *supra* note 176, at 143.

courts' equitable powers, and that such relief is not awarded "as a right."[209] Such clear statements expressing such broad skepticism of automatic relief in any context seems to indicate a NEPA Exception analogue implemented more broadly might be unworkable.[210]

Precedent itself instructs against such an approach as well. In *Amoco Production Co. v. Village of Gambell*,[211] the Supreme Court held that, without clear statutory discretion, Congress does not "[intend] to deny federal district courts their traditional equitable discretion in enforcing [a statute],"[212] reaffirming *Weinberger v. Romero-Barcelo*.[213] While courts have indicated that NEPA provides such a clear congressional statement,[214] there is little to indicate courts deviate from the familiar four factors in considering preliminary injunctions, let alone stays, in other contexts.[215] A NEPA Exception-like approach further deviates from equity's "fundamental tenet" of flexibility, and rather imposes a

209. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (discussing preliminary injunctions); *see also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) ("[A]n injunction is an equitable remedy that does not issue as of course.").

210. While declining to grant a stay of a preliminary injunction pending an appeal where environmental plaintiffs had prevailed below, Chief Justice Warren Burger commented:

> Our society and its governmental instrumentalities, having been less alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. . . . The decisional process for judges is one of balancing and it is often a most difficult task.

Aberdeen & Rockfish R.R. Co. v. Students Challenging Agency Procs. (SCRAP), 409 U.S. 1207, 1217–18 (1972).

211. 480 U.S. 531 (1987).

212. *Id.* at 542–44.

213. 456 U.S. 305 (1982).

214. MANDELKER ET AL., *supra* note 200, § 4:66; *see also, e.g.*, California v. Bergland, 483 F. Supp. 465, 498–99 (E.D. Cal. 1980) ("NEPA represents a declared Congressional policy requiring assessment of environmental concerns . . . . Congress has weighed the equities and determined that failure to examine environmental issues represents irreparable injury."), *judgment aff'd in part, rev'd in part on other grounds*, 690 F.2d 753 (9th Cir. 1982); Colo. Wild, Inc. v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007) (recognizing harm flowing from NEPA violation before ground-disturbing activity began).

215. MANDELKER, *supra* note 200, § 4:66 (indicating the NEPA Exception in preliminary injunctions itself might be "in doubt"). The Supreme Court has entirely foreclosed the NEPA Exception in the context of permanent injunctions. *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010) ("An injunction should issue only if the traditional four-factor test is satisfied. . . . In contrast, the [court filings] quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted." (citation omitted)).

more rigid approach.[216] In any event, whether a court uses the sliding scale approach or considers each stay factor in isolation, courts across the country continue to adhere to the "traditional" four factors.[217]

B. Sliding Scale and "Serious Questions"

To align stays pending appeal with the unique complexity of environmental law and potential difficulties proving environmental harm in seeking such relief, courts should uniformly apply the sliding scale approach to their consideration of the four factors when a motion for a stay pending appeal has been made, with "serious questions" going to the merits standing at one end of the scale where serious possibility of irreparable harm has been shown. Likewise, a strong showing on likelihood of success on the merits would excuse a lesser showing of irreparable harm, perhaps where a threshold or cumulative effect might make the long-term effects less perceptible at the present time, but irreparable in the future.[218] I invoke the sliding scale approach in conjunction with "serious questions" because taking them together addresses the two core issues I raised above with regards to stays—the complex analysis required for judicial calculus and the unique nature of harms.[219] First, incorporation of the "serious questions" approach allows for more careful consideration where the law is murky, but irreparable harm is clear. Second, the sliding scale approach accommodates the opposite extreme where harm is less clear, but the law is more so. This built-in flexibility would not break from equitable principles, but it *would* allow for consideration of the complexity of the underlying law and the sometimes-unique character of environmental harms in litigation.

While "open question[s]" remain,[220] such an approach can pass muster under the restrained conception of the four factors articulated in *Winter*.[221] First, *Winter* held that harm must be more than possible, it must be likely in the absence of relief;[222] nothing in this approach would conflict with that holding.

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216. 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, 210 (2011).

217. *See, e.g.*, Texas v. EPA, 829 F.3d 405 (5th Cir. 2016) (considering all four factors); Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688 (S.D. W.Va. 2012) (balancing hardships and considering all four factors); Leiva-Perez v. Holder, 640 F.3d 962 (9th Cir. 2011) (considering all four factors as well as "serious questions"); Soundboard Ass'n v. Fed. Trade Comm'n, 254 F. Supp. 3d 7 (D.D.C. 2017) (considering all four factors in the sliding scale approach).

218. LAZARUS, *supra* note 12 (manuscript at 17–20).

219. *See infra* Parts II.B.1, II.B.2.

220. *Soundboard Ass'n*, 254 F. Supp. 3d at 9–10 (discussing the "open question" of the sliding scale framework's viability but concluding it has not been foreclosed by either the court of appeals or the Supreme Court).

221. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

222. *Id.* at 22.

Instead, there is simply a higher floor for the evidentiary showing. In any event, the *Winter* majority did not address sliding scale approaches in the preliminary injunction context, and certainly not the stay context.[223] Indeed, the Ninth Circuit, to name one court, continued applying the approach after *Winter* was handed down.[224] While the Supreme Court has, generally speaking, narrowed opportunities for claimants to seek injunctive relief in the courts in recent years, this approach survives without stepping out of the bounds of the law.[225]

This approach is also workable in both the administrative and general litigation contexts. While the merits of the litigation will naturally vary between the two (i.e., a challenge to an agency rule as opposed to an action arising under a particular statute), the proposed approach to the stay decision does not. Further, given that the stay of a rule often has nationwide impacts, adopting this approach would likely lead to more consistent outcomes across courts.[226]

Beyond comporting better with the facts implicated in the stay decision, applying this approach uniformly would discourage forum shopping.[227] The current mix-and-match approach, if anything, encourages forum shopping where possible, as a court with a more rigid application might be less friendly to environmental plaintiffs given the previously discussed difficulties in making the requisite evidentiary showing. Instead, a more flexible approach like the one this Note proposes "levels the playing field" and allows for adequate consideration of all parties' interests.

Finally, the framework proposed for the decision to grant or deny a stay slots neatly into core equitable principles: flexibility and the "eschew[ing of] mechanical rules."[228] While equitable relief in all its forms remains "extraordinary," this need not mean the stay decision ought to disregard such flexibility. Further, the approach remains within the confines of the law; it is the unique circumstances of environmental law that call for flexibility.

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223. *See id. But see id.* at 392 (Ginsburg, J., dissenting) ("[C]ourts 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. This Court has never rejected that formulation, and I do not believe it does so today.").

224. *See, e.g.*, All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–35 (9th Cir. 2011) (discussing the residual validity of the sliding scale approach following *Winter* and concluding it survives that case's holding); *see also Soundboard Ass'n*, 254 F. Supp. 3d at 9–10 (declaring "serious questions" survives *Winter*); Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 692 (S.D. W.Va. 2012) ("*Winter*'s standard for preliminary injunctions . . . does not apply directly to stays pending appeal.").

225. For a thorough discussion of this narrowing in the context of NEPA, see generally Mach, *supra* note 216.

226. *See, e.g.*, West Virginia v. EPA, 577 U.S. 1126 (2016) (staying the nationwide implementation of the Clean Power Plan).

227. "[F]orum-shopping . . . [has become] a national legal pastime." J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

228. Mach, *supra* note 216, at 208 (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

Conclusion

A court's decision whether to grant a stay pending appeal arising in the context of environmental litigation should take into account features of environmental law that create heightened risks of judicial errors and irreparable injury. In particular, courts must heed how, due to environmental law's inherent complexity, the court's ability to assess the merits at a preliminary stage may be limited, and how, given the irreversible nature of many environmental injuries, the resulting injury from a mistaken ruling on the stay question may produce irreparable injury.

A more flexible approach to stays pending appeal would remedy the latter two of these difficulties, and lessen the impact of the first, both in environmental litigation and other substantive contexts. This would not be a radical departure from the ways courts currently consider the decision to grant or deny a stay; indeed, it closely tracks existing approaches. The sliding scale approach, together with the recognition of serious questions, would simply reframe courts' thinking about the laws at issue and the potential for harm. Such a reframing would put front and center the true implications of the decision to grant a stay, leading to a fairer outcome for litigants and the environment itself.