RULES WITHOUT REASONS: THE DIMINISHING ROLE OF STATUTORY POLICY AND EQUITABLE DISCRETION IN THE LAW OF NEPA REMEDIES

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Historically, the law governing injunctive relief for violations of the National Environmental Policy Act of 1970 has been informed both by interpretation of the statute's environmental purpose and by policies associated with the administrative law framework through which NEPA is implemented. The resulting case law reflects tensions between general legal canons and the fact-bound, equitable nature of trial courts' injunction orders. This Note argues that the Supreme Court's recent decisions addressing NEPA remedies do not effectively resolve those tensions. Through a case study of Monsanto v. Geertson Seed Farms*, this Note argues that the Court's development of rigid rules of equity for NEPA injunction decisions threatens to divorce those trial-level decisions from relevant legal, institutional, and factual considerations. For this reason, further efforts to circumscribe rules for NEPA injunctions by formalizing principles of equity ought to take into account that tradition's most central tenet, that equity "eschews mechanical rules" and "depends on flexibility." Specifically, an effective law of NEPA remedies will require a workable balance of statutory interpretation, administrative law policy, and deference to trial courts' equitable discretion.*

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I. Introduction: Environmental Law, Equity, and NEPA Injunctions

Since the early common law nuisance actions of the industrial era, environmental plaintiffs have relied on the federal courts' authority to force the abatement of pollution by injunctive order where fines, damages, or other legal remedies are inadequate.[1] The modern environmental laws incorporated this remedy into their statutory framework, explicitly authorizing courts to issue injunctions in various circumstances.[2] The pivotal place of the injunction in environmental law may be explained by perceptions that natural resources are public, irreplaceable, and "priceless."[3] Whatever the reason, courts today regularly make use of equity's "extraordinary remedy" to correct violations of environmental statutes.[4] Even where the substantive statutes do not explicitly provide for injunctive relief, judges have assumed the power to issue injunctions for statutory violations.[5] Armed with this powerful tool, trial judges inevitably exercise substantial discretion in crafting remedies that account for the complex scientific, evidentiary, and societal questions raised by environmental harms.[6]

The standards that courts apply in this process are inherited from equity jurisprudence, a tradition that stands in contrast to principles of common law and canons of statutory interpretation. Indeed, in earlier times equity was administered through entirely separate Chancery courts, with their own pro-

[1] *E.g.*, Georgia v. Tennessee, 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

[2] *E.g.*, 33 U.S.C. § 1319(b) (2006); 42 U.S.C. §§ 6973, 7413(b), 9606 (2006).

[3] *See generally* Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2005).

[4] Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524, 545–46 n.71 (1982) (compiling past cases asserting that injunctive relief is an "extraordinary remedy").

[5] *E.g.*, Tenn. Valley Auth. ("TVA") v. Hill, 437 U.S. 153, 193-94 (1978) (issuing an injunction against the destruction of critical habitat notwithstanding the absence of a statutory provision authorizing relief); Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1129 (D.C. Cir. 1971).

[6] *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2767 & nn.3–4 (2010) (Stevens, J., dissenting) ("[H]istorically, courts have had particularly broad equitable power — and thus particularly broad discretion — to remedy public nuisances and other 'purprestures upon public rights and properties,' . . . which include environmental harms." (citation omitted)).

cedures, standards, and remedial powers.[7] Within this bifurcated legal world, equity was valued for its flexible principles and processes, which operated as a corrective when the application of the common law's rigid rules to unusual circumstances resulted in unfair outcomes.[8] The gulf that separates the traditions of law and equity is made evident by Blackstone's relatively sparse treatment of equity in his otherwise exhaustive review of English common law in the *Commentaries*.[9] Today, while equity has been merged with other powers exercised by the federal courts, equitable remedies continue to be governed by principles developed in the old courts of equity.[10] Due to the frequent use of injunctive relief in environmental cases, those alternative modes of analysis underlie environmental remedies.[11]

The relationship of equity to environmental law is complicated, however, by the fact that environmental statutes are often implemented by administrative agencies. In this context, the Administrative Procedure Act ("APA") provides its own set of procedures and remedies apart from those found in equity. The interpretation of these rules reflects policies associated with administrative law: policies favoring systemic efficiency, deference to agency expertise, and procedural formality.[12] While these tenets surely influence judicial review of administrative action, the APA's remedies have not displaced the injunction as a form of relief in those cases. As a result, judges enforce environmental laws not only according to rules of statutory interpretation, but also in light of the equitable and administrative law traditions they implicate.[13] The necessity of weighing the potentially conflicting policies contained in these three areas of jurisprudence suggests an inherently discretionary process.

Nowhere are the tensions among equity, environmental statutes, and administrative procedure more evident than in the use of injunctive relief to remedy violations of the National Environmental Policy Act of 1970

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[7] *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) (explaining the existence of separate equity courts in post-revolution America).

[8] Thus, Blackstone wrote, "[T]here can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to positive law" and "since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances." 1 WILLIAM BLACKSTONE, COMMENTARIES, *61–62. Modern American courts have acknowledged the function of a court acting in equity "to mould each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[9] *See* BLACKSTONE, *supra* note 8. *See generally* Holdswerth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1929).

[10] Subrin, *supra* note 7, at 1000.

[11] *See generally* Russ Winner, *The Chancellor's Foot in Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477 (1979).

[12] *See generally* BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 3–22 (6th ed. 2006) (defining principles of administrative law and explaining development of administrative law and the APA).

[13] *See* Winner, *supra* note 11, at 478–79 (describing role of courts applying equitable remedies to enforce environmental laws as "quasi-administrative").

("NEPA").[14] NEPA mandates environmental review of proposed actions as part of federal agencies' decisionmaking process, thereby bringing environmental consideration into the fold of procedural requirements imposed on those agencies by the APA.[15] Not long after the statute's enactment, courts adopted injunctive relief as a mechanism for ensuring agencies' compliance.[16] Violations of NEPA are therefore subject to two forms of judicial enforcement: they may be remedied both by the APA's provisions for judicial review and by courts' separate equitable authority. This merger of traditional equitable doctrine with modern administrative and environmental laws presents a clash of the old and the new.

NEPA's integration of administrative process (with its emphasis on agency expertise), equitable discretion (with its emphasis on a fact-specific balance of equities), and environmental statutory standards (with their emphasis on legal rules interpreted by appellate judges) has resulted in a legal framework that is shot through with technical and philosophical ambiguities. These ambiguities include uncertainties about: (1) the relative functions of agencies and reviewing courts in considering environmental harms; (2) the relationship between statutory norms and equitable standards; and (3) the distinction between appellate courts' setting of legal standards and their review of district courts' application of those standards.

While appellate precedent is the starting point in resolving legal questions of statutory interpretation, it historically played a lesser role in courts of equity. The Chancellor's independence reflected the maxim that equity "eschews mechanical rules" and "depends on flexibility."[17] Thus, even as appellate courts regularly define legal norms and reverse decisions that appear contrary to those norms, equity, like evidence, is an area of law where deference to trial court determinations may be particularly appropriate.[18] After all, "[f]or the judge, the most discretionary rule is no rule at all,"[19] and appellate-level precedents will tend to erode that baseline of equitable flexibility. Appellate courts reviewing the exercise of equity by district courts must therefore be conscious of the tension between their own function in

[14] For a review of the use of injunctions to cure NEPA violations, see Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263 (1992).

[15] 42 U.S.C. §§ 4321–4370 (2006); 5 U.S.C. §§ 500–596 (2006).

[16] Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115, 1129 (D.C. Cir. 1971); *see also* Envtl. Def. Fund v. Corps of Eng'rs of the U.S. Army, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

[17] Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); Winner, *supra* note 11, at 481 (noting that "[u]sually the Chancellor did not, and really could not, rely on precedents"); Subrin, *supra* note 7, at 920 (explaining that the Chancellor "was less bound by precedent" than the common law judge).

[18] *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2766 (2010) (Stevens, J., dissenting) (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997)) (asserting that "[w]hen a district court takes on the equitable role of adjusting legal obligations, we review the remedy it crafts for abuse of discretion;" and that abuse-of-discretion review is marked by deference to trial court determinations).

[19] Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 65 (2007).

creating rule-oriented precedents and review of trial court equitable decisions, on the one hand, and, on the other, the discretionary application of those rules by trial judges.

In two decisions in recent years, the U.S. Supreme Court has demonstrated an interest in developing the rules governing injunctive relief for NEPA violations. In *Winter v. Natural Resources Defense Council, Inc.*,[20] the Court heightened the standard for when preliminary injunctions may be used, holding that irreparable harm must be "likely," not merely "possible," in order to justify that equitable remedy. In *Monsanto Co. v. Geertson Seed Farms*,[21] the Court confirmed that this higher standard also applied to permanent injunctions issued after the finding of a NEPA violation. Underneath the *Monsanto* decision, however, lies a more complicated set of questions concerning the balance of equitable, legal, and administrative principles. These questions include how equitable relief overlaps and conflicts with APA remedies, whether higher courts should defer to district court injunction decisions, and how courts may consider environmental and administrative principles in their exercise of equitable discretion.

This Note does not consider the effect *Winter* and *Monsanto* will have on the degree of environmental protection provided by NEPA. Commentators have already addressed the impacts of *Winter* on NEPA enforcement,[22] and evaluations of *Monsanto* will likely follow.[23] Instead, this essay argues that rules imposed by appellate courts, like *Winter*'s "likely" standard, will be difficult both to apply and to review largely because of NEPA's conflation of equitable, administrative, and legal domains. Because of the tensions in this legal patchwork, such rules continue to give rise to questions of implementation that are answered at the trial level: how an injunction will relate to APA remedies; how, as a practical matter, NEPA's statutory policy influences the equities of the case; how best to establish the facts material to

[20] 129 S. Ct. 365, 375 (2008).

[21] 130 S. Ct. at 2756–57.

[22] *See generally* 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 (2009); 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 (2009); Ian K. London, Winter v. Natural Resources Defense Council*: Enabling the Military's Ongoing Rollback of Environmental Legislation*, 87 DENV. U. L. REV. 197 (2009); Caroline Milne, Winter v. Natural Resources Defense Council*: The United States Supreme Court Tips the Balance Against Environmental Interests in the Name of National Security*, 23 TUL. ENVTL. L.J. 187 (2009); Joel R. Reynolds, Taryn G. Kiekow & Stephen Zak Smith, *No Whale of a Tale: Legal Implications of* Winter v. NRDC, 36 ECOLOGY L.Q. 753 (2009); Avalyn Taylor, *Rethinking the Irreparable Harm Factor in Wildlife Mortality Cases*, 2 STAN. J. ANIMAL L. & POL'Y 113 (2009).

[23] Some such assessments have already arrived. *See, e.g.*, Rebecca Bratspies, *Some Thoughts on the American Approach to Regulating Genetically Modified Organisms*, 16 KAN. J.L. & PUB. POL'Y 393, 417–19 (2007); Thomas P. Redick & A. Bryan Endres, *Litigating the Impacts of Biotech Crops*, 22 NAT. RESOURCES & ENV'T 24, 25–26 (2008); Allison M. Straka, Note, Geertson Seed Farms v. Johanns*: Why Alfalfa is Not the Only Little Rascal for Bio-Agriculture Law*, 21 VILL. ENVTL. L.J. 383, 383 (2010).

remedy selection; and how agencies' expertise may properly inform the remedy decision.

These questions suggest that the Court should remain cognizant of the limits of formalized rules as a tool for guiding NEPA remedy selection by trial courts. Specifically, *Monsanto* demonstrates how such rules may fail to provide meaningful guidance for courts conducting an equitable balancing of the legal, administrative, and scientific complexities of a NEPA case. Instead, appellate precedent may operate merely to provide legal hooks for reversal on appeal when trial courts and courts of appeals disagree with regard to fact-specific circumstances. This result would be unsatisfactory under the policies of both equity and administrative law. Higher courts should therefore craft rules of equity to preserve trial judges' traditional function as the primary architects of injunctive remedies. In that role, lower courts are often the best equipped to balance administrative, equitable, and environmental policies against the facts of the case.

Appellate precedents establishing formal rules of equity may have a place in this dynamic. If so, however, their place must be to fashion rules that accommodate NEPA's function as an environmental statute and as a creature of the administrative state. The Court's new rules of injunctive relief, designed after chimerical notions of equity as a fixed set of principles that exists in isolation from statutory, institutional, and factual contexts, are inadequate in this regard. As such, they fall short of that tradition's most fundamental tenet: that equity depends on flexibility to adapt to circumstances.

This Note aims to explain how the relationship between NEPA, equity, and the administrative state might guide courts to a better approach to remedying NEPA violations. Part II reviews the legal framework of NEPA and the statutory and equitable remedies courts use to enforce its procedural requirements. Part III looks at ways in which appellate courts have developed rules and doctrines to influence the exercise of equitable discretion by district courts in fashioning NEPA relief. Part IV explains the *Monsanto* case and how it modified these rules so as to formalize the role of equity and limit trial court discretion. Part V analyzes how the case reflects how the Court might better contextualize the law of NEPA remedies.

II. Statutory and Equitable Remedies for NEPA Violations

When a federal agency fails to consider the environmental consequences of a proposed action as required by NEPA, the statute itself does not explicitly authorize courts to remedy the error. Nevertheless, courts have relied on both the APA and on their own equitable authority to develop an elaborate legal framework for ensuring ultimate compliance with NEPA's environmental mandate. This section reviews that framework, noting how

many of its aspects reveal ambiguity as to where the lines between legal and equitable remedies are drawn.

A. Judicial Review of NEPA Compliance

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for "every . . . major Federal action significantly affecting the quality of the human environment."[24] A full EIS is unnecessary if a shorter environmental assessment ("EA") finds that the proposed action will not have significant impacts.[25] "NEPA itself does not mandate particular results, but simply prescribes the necessary process"[26] that will "insure a fully informed and well-considered decision."[27] During the environmental review process, however, regulations require that the agency take "no action concerning the proposal . . . which would . . . [h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives" to the proposed action.[28] NEPA does thereby create a procedural safeguard against action prior to proper consideration of the action's effects.

Litigation over NEPA compliance often pertains either to an agency's decision not to prepare a full EIS or to the adequacy of the EIS that has been prepared.[29] NEPA does not provide a private right of action, but the preparation of an EIS, as well as a decision not to prepare an EIS, is a "final agency action" reviewable under the APA.[30] Section 706 of the APA, which defines standards of review applicable to various types of agency actions, contains two separate provisions pertaining to NEPA compliance.

The first of these provisions, section 706(2)(D), requires the reviewing court to "hold unlawful and set aside" any action that an agency takes "without observance to procedure required by law."[31] Some courts have ruled that application of this provision to NEPA review "is limited, but exacting," consisting of *de novo* review, but only on the narrow question of whether "statutorily prescribed procedures [in this case, the NEPA EIS

[24] 42 U.S.C. § 4332(2)(C) (2006).

[25] 40 C.F.R. §§ 1501.4(c), 1508.9(a), 1508.13 (2010).

[26] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

[27] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

[28] 40 C.F.R. § 1506.1(a) (2010).

[29] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 867 (6th ed. 2009).

[30] 5 U.S.C. § 702 (2006) (providing a right to judicial review to persons "adversely affected or aggrieved by agency action"); 5 U.S.C. § 704 (2006) (limiting right to review to "review of final agency action"); Izaak Walton League of America v. Marsh, 655 F.2d 346, 369 (D.C. Cir. 1981) ("An environmental impact statement is a 'final agency action' within the meaning of the APA."); McDowell v. Schlesinger, 404 F. Supp. 221, 249 (W.D. Mo. 1975) (determining that a decision not to conduct an EIS was reviewable holding "[a]n agency decision concerning NEPA requirements is not one committed to the agency's discretion by law within the meaning of the APA, 5 U.S.C. § 701," and are therefore reviewable).

[31] 5 U.S.C. § 706(2)(D) (2006).

processes] have been followed."[32] Under this view, section 706(2)(D)'s standard of review is "particularly stringent" when applied to NEPA review.[33] Notably, however, not every circuit acknowledges the applicability of section 706(2)(D) to NEPA cases.[34]

When an agency follows the formal procedures required by NEPA, section 706(2)(A) provides a second standard for reviewing agencies' environmental compliance. Section 706(2)(A), which governs review of agency discretion, provides for review both of the adequacy of the EIS and of the substantive agency decision to which the EIS pertains.[35] Although it addresses a wider scope of agency action than procedural review under 706(2)(D), review under 706(2)(A) is highly deferential, allowing the court to set aside only those agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] In circuits that do not apply the section 706(2)(D) standard to NEPA review, 706(2)(A) is the only applicable APA standard; thus, the section's deferential standard applies even to the procedural question of whether NEPA procedures were followed at all. Nevertheless, courts do use this section to require agencies to take a "hard look" at adverse environmental effects of proposed actions.[37] Thus, although a court conducting "arbitrary and capricious" review may not "substitute its judgment for that of the agency,"[38] an EIS can present a record on the basis of which a court may judge if an agency is giving environmental concerns adequate consideration in its decisionmaking process.[39]

Although the standards provided for in APA sections 706(2)(A) and (D) are crucial to determining how aggressively courts will review agency deci-

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[32] Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 116 (1st Cir. 2002) (citing Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045–48 (D.C. Cir. 1979)).

[33] Natural Res. Def. Council, Inc. v. SEC, 606 F.2d at 1048 (citing W. RODGERS, ENVIRONMENTAL LAW 716–17 (1977) and Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974)).

[34] *Compare* Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994) (applying APA section 706(2)(D) standard in reviewing NEPA compliance); Natural Res. Def. Council, Inc. v. SEC, 606 F.2d at 1048; Sierra Club v. Froehlke, 630 F. Supp. 1215, 1223 (S.D. Tex. 1986) (same), *rev'd on other grounds*, 816 F.2d 205 (5th Cir. 1987), *with* City of Olmsted Falls, Ohio v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002) (applying only APA section 706(2)(A) "arbitrary and capricious" standard); Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1992) (same); Coal. for Responsible Reg'l Dev. v. Coleman, 555 F.2d 398, 399–400 (4th Cir. 1977) (same); Robinson v. Knebel, 550 F.2d 422, 426–27 (8th Cir. 1977) (same); Chelsea Neighborhood Ass'ns v. U.S. Postal Serv., 516 F.2d 378, 387 n.23 (2d Cir. 1975) (same); Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973) (same). Some courts have applied both standards simultaneously. *See, e.g.*, Sierra Club v. Sigler, 695 F.2d 957, 964–65 (5th Cir. 1983); Silva v. Lynn, 482 F.2d 1282, 1283 (1st Cir. 1973). The result of these splits (both across circuits and within some) is deep ambiguity about the precise standard of review appropriate in NEPA cases.

[35] 5 U.S.C. § 706(2)(A) (2006).

[36] *Id.*

[37] *See, e.g.*, Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing Oregon Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997)).

[38] Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Marsh, 490 U.S. at 375 (applying arbitrary and capricious standard to the Army Corps's decision not to conduct an EIS).

[39] 5 U.S.C. § 706(2)(A) (2006). *See supra* note 34 for cases applying the APA section 706(2)(A) "arbitrary and capricious" standard.

sions in deciding whether the agency violated NEPA's procedural mandate, they do not govern the process of remedy selection once a violation has been found. This remedy stage of NEPA litigation, which is controlled by a combination of statutory rules and judicial traditions discussed below, is the focus of this article. Nevertheless, the ambiguity in judicial interpretations of the APA's standards of review in the context of finding NEPA violations is relevant to the question of remedy selection insofar as the ambiguity illustrates the courts' apparent struggle to define their relation to federal agencies in administering NEPA.

B. Statutory Remedies

Once a court finds a NEPA violation, section 706 of the APA provides its own remedy apart from the court's equitable authority: the court must "hold unlawful and set aside agency action" that does not meet the APA's standards of review.[40] This statutory mandate is generally understood to require courts to remand decisions that do not comply with NEPA.[41] Two primary variations of this remedy exist. In the first, courts both vacate and remand the agency decision, rendering it ineffective pending NEPA compliance. In the second form of APA remedy, the "remand without vacatur," the administrative decision remains effective while the agency corrects its NEPA compliance. Aside from these two APA remedies, courts have occasionally remedied NEPA injunctions by issuing only a declaratory judgment announcing the NEPA violation. Each of these remedies is discussed below.

1. *Vacatur and Remand*

Traditionally, courts have interpreted section 706(2)'s "set aside" language to require a vacatur and remand of the agency's existing decision.[42] Under NEPA's regulations, this remedy can bring entire agency programs to a halt. These regulations prohibit, during the preparation of an EIS, activities that either (1) have "an adverse environmental impact" or (2) limit the

[40] 5 U.S.C. § 706(2). However, monetary damages are not available for NEPA violations. *See, e.g.*, Pye v. Dep't of Transp. of Ga., 513 F.2d 290, 293 (5th Cir. 1975) (collecting cases).

[41] Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 568 (1985) ("Traditionally, courts faced with an arbitrary and capricious regulatory decision have ordered relief similar to that ordered in cases of agency inaction: the court normally vacates the decision and remands the matter to the agency for further proceedings 'consistent with' the court's opinion."); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 294 n.5, 298 n.20 (2003) (citing Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976)) (holding that agency decisions not supported by the administrative record must be vacated).

[42] Levin, *supra* note 41, at 309–15. Vacatur was universally applied to rules violating the APA until the 1990s. Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 111–12 (2001).

agency's choice of "reasonable alternatives."[43] Following a vacatur and remand order, an agency therefore must also halt any preparatory and implementing activities that fall under those categories until it has remedied any inadequacies in its NEPA-mandated environmental analyses.

A court's application of the APA's vacatur and remand remedy can have the severe consequence of undoing an agency rule or order that has been in place for some time or that has undergone substantial administrative development, even for minor violations.[44] Commentators have been critical of courts' interpretation of section 706's "set aside" language as requiring a remedy that may thereby have an ossifying effect on administrative action.[45] That is to say, agencies may hesitate to issue rules or may conduct unnecessarily thorough preparations for rules if they fear that even the smallest error will result in judicial reversal of otherwise beneficial rules. Nevertheless, the remedy of vacatur seems to follow most naturally from the text of the APA, suggesting that it is a mandatory remedy that courts must apply to all APA violations.[46]

2. *Remand Without Vacatur*

Since the early 1990s, the "vacate and remand" remedy has given some ground to an alternative understanding of section 706 under which courts remand the agency decision without vacating it during the interim reconsideration period.[47] Sometimes, courts order remands without vacatur with spe-

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[43] 40 C.F.R. § 1506.1(a) (2010) ("Until an agency issues a record of decision [finalizing the EIS] . . . , no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.").

[44] *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 765 (D.C. Cir. 1991) (vacating, on procedural grounds, eleven-year-old rules that had served as a cornerstone of the EPA's regulation of hazardous waste facilities); *see also* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 278–79 (2005) ("[T]he National Highway Traffic Safety Administration estimates that had the D.C. Circuit not vacated a rule requiring passive restraints in automobiles, 'thousands of lives [would have been saved] and millions of serious injuries would have been prevented between 1972 and [1987].' In another instance, a reviewing court's decision to vacate a rule promulgated by the Environmental Protection Agency ("EPA") ten years earlier threatened to invalidate scores of criminal convictions and civil fines for polluters." (citing Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 295 (1987))); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 627 (1994) (discussing D.C. Circuit's decision in Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991)).

[45] *See, e.g.*, Levin, *supra* note 41, at 301; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96 (1992) (warning about a trend toward ossification). *But see* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997) (acknowledging the trend but warning that "many of the proposed solutions will do more harm than good").

[46] *See, e.g.*, Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662–63 (1997) (arguing that courts should not adjust review standards out of consideration of agency resources).

[47] See, *e.g.*, Checkosky v. SEC, 23 F.3d 452, 462–65, 490–93 (D.C. Cir. 1994); *see* Garland, *supra* note 41, at 568–73; Levin, *supra* note 41, at 298–302; Prestes, *supra* note 42, at

cific deadlines to ensure that agencies will not abuse the remedy and delay actual reconsideration.[48] These judgments can ensure eventual NEPA compliance without the disruption to agencies and regulated entities that a vacatur would create.[49] Courts and commentators have debated both whether the language of the APA permits this remedy and whether it is an advisable judicial innovation.[50] In any case, the courts' ability to choose the remand-without-vacatur remedy is well established, and it has been used to cure NEPA violations.[51]

Courts have adopted a balancing-of-factors approach to determine whether the remand-without-vacatur remedy is appropriate in a particular case. The test was formulated in two leading cases, *International Union, United Mine Workers of America v. Federal Mine Safety and Health Administration*[52] and *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*.[53] In those decisions, the D.C. Circuit ruled that courts should weigh (1) the seriousness of the APA violation and (2) the disruptive consequences of an interim vacatur.[54] While critics have pointed out that this test is unmanageable and, if applied literally, would require a remand without vacatur too often,[55] courts continue to cite it when issuing remands without vacatur.[56]

110; Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Environmental Law*, 36 ARIZ. ST. L.J. 599 (2004).

[48] Levin, *supra* note 41, at 384–85 (citing ABA guidelines advocating timelines in some cases and collecting cases using the mechanism to avoid "unduly dilatory bureaucratic behavior").

[49] *See, e.g.*, Levin, *supra* note 41, at 300 ("Frequently, when a rule is held invalid after it has already gone into effect, private citizens will already have arranged their expectations around it. Companies may have entered into contracts, made capital investments, and shifted business operations in light of the rule.").

[50] *See, e.g.*, Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) (arguing that a literal reading of the APA would not allow remand without vacatur and noting that "when we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted."); *Checkosky*, 23 F.3d at 462–64, 490–93 (Silberman, J.) (arguing that the APA allows remand without vacatur under the rationale that "reviewing courts will often and quite properly pause before exercising full judicial review and remand to the agency for a more complete explanation of a troubling aspect of the agency's decision.") (Randolph, J., dissenting) (arguing that the APA requires vacatur); Boris Bershteyn, Note, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 362 (criticizing remand without vacatur on constitutional separation-of-powers grounds).

[51] *See, e.g.*, Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206–07 (D.C. Cir. 1991) (remanding to the FAA for supplementation of an environmental impact statement with a required conflict-of-interest form, but declining to invalidate the FAA's approval of airport expansion plan); *see also* Levin, *supra* note 41, at 324–26, 334–341 (noting that contemporary decisions reflect a "commitment to flexibility in judicial remedies . . . in a number of . . . administrative law contexts" and reviewing examples of such flexibility in the context of environmental injunctions).

[52] 920 F.2d 960, 966–67 (D.C. Cir. 1990).

[53] 988 F.2d 146 (D.C. Cir. 1993).

[54] *Id.* at 151–52; Int'l Union, 920 F.2d at 966–67.

[55] Daugirdas, *supra* note 44, at 294 ("The application of the *Allied-Signal* test in the *Allied-Signal* case itself suggests that almost all inadequately explained rules would qualify for [remand without vacatur].").

The open-ended nature of the test thus forces courts in effect to make case-by-case judgments to decide the form of the APA remedy, an exercise of discretion comparable to decisions made in equity to determine the propriety and the scope of injunctive relief.[57] Indeed, defenders of the remand without vacatur have argued that the APA's mandate, that courts "shall set aside" defective agency actions, should be interpreted as a variation of the district courts' equitable discretion to issue injunctive relief.[58] If adopted by courts, this view would represent a substantial transfer of authority from appellate courts to trial judges, who would thereby decide not only the facts of a case but also which interpretation of the APA should govern those facts.

3. *Declaratory Relief*

In some NEPA cases, courts have chosen to forego a remand altogether and to limit relief to a declaratory judgment.[59] That is, instead of issuing an order with prospective effect, the court simply announces that the agency has violated the statute. The decision to limit relief to a declaration alone seems inconsistent with APA section 706's mandate to "set aside" faulty agency action. Declaratory judgment thus presents a marked departure from the vacatur without remand and vacatur with remand remedies applied under the APA.

The use of declaratory judgments in spite of the APA's apparent mandate to remand the agency action reflects an equitable approach to remedy selection. By declining to apply the APA's "set aside" mandate where it goes beyond what is necessary to "provide effective relief to the plaintiffs,"[60] these courts tailor the requirements of the law to minimize any unnecessary burden it imposes. For example, one court has held that "declaratory relief alone is sufficient to enforce NEPA's EIS requirement," and so may be awarded without further relief, where the court can "assume that if it determines that the final EIS here in issue is inadequate, then the defendants [will] correct the deficiencies in the EIS 'without the coercion of

[56] Heartland Reg'l Med. Ctr. v. Sebelius, 566 F.3d 193, 197–98 (D.C. Cir. 2009); Public Citizen Health Research Grp. v. U.S. Dept. of Labor, 557 F.3d 165, 191 (3d Cir. 2009); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380 (Fed. Cir. 2001); Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001); Cent. and Sw. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000).

[57] *See, e.g.*, Sugar Cane Growers Co-op. of Fla. v. Veneman, 289 F.3d 89, 97–98 (D.C. Cir. 2002) ("[B]ecause we denied preliminary relief in this case, the 2001 program was launched and crops were plowed under. The egg has been scrambled and there is no apparent way to restore the status quo ante . . . . Appellants insist that we have no discretion in the matter; . . . [b]ut that is simply not the law.").

[58] Levin, *supra* note 41, at 322 ("[A] statutory review provision should not be read too literally, where such a reading would confine the court's equitable remedial authority . . . . This approach . . . has migrated into judicial interpretation of section 706 of the APA.").

[59] *E.g.*, Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974); Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Atchison, T. & S. F. Ry. Co. v. Callaway, 431 F. Supp. 722 (D.D.C. 1977).

[60] *Atchison*, 431 F. Supp. at 730.

a court order.'"[61] This rule embodies two tenets of equitable relief: first, that a court in equity may "soften and mollify the Extremity of the Law;"[62] and, second, that an equitable remedy should be limited to that which the law itself is inadequate in providing to achieve justice.[63]

As courts bend the law in this way, they appropriately premise their quasi-equitable decision on a quasi-equitable analysis of case-specific factors weighing in favor of declaratory relief. This analysis is reflected by the fact that these courts premise their choice of remedy on specific findings that the declaration is suitable to the particularities of the case.[64] In fact, as one commentator has noted, courts choose this form of relief *only* after explicitly noting that it is adequate to ensure abatement of the NEPA violation.[65] This inquiry into the balance of the interest in ensuring abatement against the interest in reducing administrative burdens and costs to the parties is treated as a factual inquiry, within the discretion of the trial court. In this way it resembles the equitable analysis by which courts evaluate NEPA's purpose, administrative considerations, and the balance of harms in injunction decisions discussed in Part II.C, below.

When reviewing these case-specific decisions, at least one circuit court has applied a lenient "abuse of discretion" standard.[66] This standard is notable because, while the factual findings relevant to remedies decisions may be the province of trial courts, a clear legal question remains as to whether mere declaratory relief is consistent with the APA. This paradox may be resolved by an analogy to the broad discretion afforded to trial courts' equitable decisions.[67] In equity, "abuse of discretion" review can be justified on the grounds that "sometimes, one judicial actor is better positioned than another to decide the issue in question."[68] The same reasoning might lead a court of appeals to hesitate before interfering in the lower court's remedy selection in a complex NEPA case.

The issuance of declaratory relief in NEPA cases thus exhibits characteristics of equity through its aim (correction of the law), process (fact-bound balancing of interests), and effect (entitlement to deference). This aspect of NEPA remedy selection may not be surprising in its own right. Set alongside the discretionary approach courts have taken to applying APA remedies, however, it presents a world of NEPA remedies that lacks legal

[61] *Atchison*, 431 F. Supp. at 730 (quoting Dunlop v. Bachowski, 421 U.S. 560, 576 (1975)).

[62] The Earl of Oxford's Case in Chancery, 21 E.R. 485, 487 (1615).

[63] 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 217, at 300 (3d ed. 1905) (stating that the "insufficiency and inadequacy of legal remedies . . . are the essential facts upon which the existence of [equity's] jurisdiction depends").

[64] *See D.C. Redevelopmen*t, 499 F.2d at 512; *Scientists' Inst.*, 481 F.2d at 1082 n.1.

[65] *See* Plater, *supra* note 4, at 529 ("It is difficult, if not impossible, to find cases in which courts have permitted proved statutory violations to continue unabated.").

[66] *See D.C. Redevelopment*, 499 F.2d at 514.

[67] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.").

[68] Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2772 (2010) (Stevens, J., dissenting) (internal quotes omitted).

clarity despite its statutory basis. In this world, trial judges appear to enjoy wide discretion to select among statutory remedies so as to balance NEPA's purpose, administrative considerations, and the relative interests of the parties.

4. *Summary of Statutory Remedies*

The statutory remedies provided by NEPA and the APA have been applied with a surprising degree of flexibility. The discretionary authority that courts have assumed in tailoring statutory relief to particular cases is illustrated by the fact that some courts have declined even to explain their decision not to vacate the agency action found to violate NEPA.[69] Because it deprives courts of appeals legal grounds for reversal, this shroud of silence enables district courts to use discretion in forming NEPA remedies with regard to a wide gamut of considerations. The only general rule with which they must comply appears to be that the remedy should ensure the abatement of the defendant agency's violation of NEPA's procedural requirements.[70] Within that framework, they choose freely among available statutory — and, as discussed below, equitable — remedies to do so.

This emphasis on flexibility in choosing among statutory remedies resembles the relatively unconstrained analysis, explained in Part II.C below, by which courts determine the propriety and scope of injunctive relief.[71] In this sense, courts' application of APA section 706 suggests that judges view these statutory remedies within the framework of traditional equitable analysis.[72] Indeed, it is not clear to what extent NEPA's statutory and equitable remedies mirror each other, and whether judges apply distinct legal standards in fashioning the two forms of relief. Nevertheless, judges often pair the APA and NEPA's statutory remedies with complementary injunctions.[73] The following section reviews the equitable standards that guide courts in crafting those injunctions. Those standards should be viewed in light of the possibility that they do or should apply with equal force in the analytic framework controlling statutory relief under NEPA as well.

[69] *E.g.*, Sinclair Broad. Grp., Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002). For discussion, see Levin, *supra* note 41, at 296–97.

[70] *See* Plater, *supra* note 4, at 529 (noting, in discussion of the frequency of injunctive relief in NEPA cases, that regardless of the remedy chosen, "[i]t is difficult, if not impossible, to find cases in which courts have permitted proved statutory violations to continue unabated").

[71] Thus, Levin notes, "[t]he 'set aside' remedy of section 706 of the APA is functionally similar to an injunction and . . . is rooted in the traditions of equity." Levin, *supra* note 41, at 341.

[72] *Id. See also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2767 (2010) (noting that "the District Court's decision can be understood as an equitable application of administrative law" and that "[t]here is an ongoing debate about the role of equitable adjustments in administrative law.").

[73] *See infra* Parts II.C and V.A.1.

C. Equitable Remedies For NEPA Violations

Despite overlaps between its statutory remedies and those available in equity, the APA does not displace courts' authority to issue injunctions to force agency compliance with NEPA procedures.[74] Courts may therefore issue equitable remedies not only as an alternative to those provided by the APA, but in addition to them. This section reviews how courts approach the equitable side of this overlapping remedy process.

While the APA's "set aside" remedy is automatically triggered by the finding of a NEPA violation, equity requires that remedies be warranted by the facts of each case. Four such findings are necessary to support an injunction under this case-specific equitable analysis: (1) that plaintiffs have suffered irreparable injury; (2) that remedies at law are inadequate; (3) that, considering the balance of hardships as between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by an injunction.[75] When a potential harm has not yet occurred, the first factor may be met by a showing that irreparable harm is likely.[76] *Winter* and *Monsanto* have made clear that this four-factor analysis must be applied and that factual findings supporting injunctive relief must be made in NEPA cases just as in any other context.[77]

The four-factor equitable analysis is notable for its flexibility. Its focus on a vague definition of "harm," a balance of parties' respective claims, and public interests arguably allows judges to weigh a wide variety of factors. These factors might include the value of public goods such as environmental quality, the parties' role in administrative proceedings, and the operative statute's purpose. In its application of the four-factor analysis, the court has

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[74] *See, e.g.*, Turtle Island Restoration Network v. U.S. Dep't of Commerce, 438 F.3d 937, 938 (9th Cir. 2006) (naming preliminary injunctive relief "a remedy ordinarily available under the APA").

[75] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982)). The *Winter* decision rephrases the fourth factor slightly, holding that this prong requires that the "injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

[76] *Winter*, 129 S. Ct. at 375 (naming "likely" as the standard for irreparable harm in issuing a preliminary injunction). In NEPA cases, the question arises whether the relevant "likelihood" is the probability that an agency will not adequately consider environmental effects or the probability that actual environmental effects will materialize. This distinction is significant because while judges may be equipped to evaluate the risk of procedural error, they may struggle to understand the science of environmental risks.

[77] *Monsanto*, 130 S. Ct. at 2757; *Winter*, 129 S. Ct. at 374. As discussed below, some courts have considered exceptions to this requirement for NEPA plaintiffs. Environmental plaintiffs rarely, however, claim such a "NEPA exception" at the Supreme Court level. *See, e.g.*, Brief for Respondents at 26–31, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1500893. *But see* Brief for Defenders of Wildlife et al. as Amici Curiae Supporting Respondents at 14–23, *Winter*, 129 S. Ct. 365 (No. 07-1239), 2008 WL 4642202. Arguments for these types of exceptions will become increasingly difficult to make as a result of the *Winter* and *Monsanto* decisions.

"broad latitude" to determine whether considerations like these warrant an injunction and what form the injunction should take.[78]

Through this discretionary process, trial courts often find injunctive relief is suitable to remedy NEPA violations. Thus, despite the common declaration by courts at all levels that the injunction is an "extraordinary remedy," applicable only in exceptional cases, courts regularly award injunctions alongside APA remand orders in response to NEPA violations.[79] One survey of decisions has found that the only NEPA cases in which courts do not issue injunctions are those in which NEPA compliance has either become moot or is assured through other remedial mechanisms.[80] The prevalence of NEPA injunctions seems to reflect a judicial acknowledgement that "[e]nvironmental 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 harms will usually favor the issuance of an injunction to protect the environment."[81]

As the product of the trial judge's "broad" equitable discretion, an injunction decision would seem to be reversible on appeal only if it constitutes an abuse of that discretion.[82] However, appellate courts do have an opportunity to cabin trial judges' equitable discretion. When appellate courts do reverse NEPA injunctions, their reasons for reversal contribute to a body of legal rules concerning equitable standards that narrow the range of options before lower courts.[83] Even decisions affirming injunctions may draw boundaries around the equitable analysis if they are based on legal rationales instead of deference to the trial court's discretion. Appellate courts may establish rules that either encourage or discourage the use of injunctive relief. Either way, rules of equity impinge on the "broad latitude" purportedly afforded to district courts by formalizing the four-factor equitable analysis.

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[78] High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 645 (9th Cir. 2004); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); LaShawn v. Barry, 144 F.3d 847, 853 (D.C. Cir. 1998); United States v. Yonkers Bd. of Educ., 29 F.3d 40, 43 (2d Cir. 1994).

[79] Plater, *supra* note 4, at 545 n.71 ("Despite regular protestations to the contrary, the status of the injunction as an extraordinary remedy has evaporated. The injunction has become a common, widely used judicial remedy precisely because of its ability to fine-tune the requirements of private conduct in a complex, modern society.") (compiling cases asserting that injunctive relief is an "extraordinary remedy" as well as cataloging the frequent use of injunctions in NEPA cases).

[80] Plater, *supra* note 4, at 530–31, 564–65.

[81] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987).

[82] *See Monsanto*, 130 S. Ct. at 2766 (Stevens, J., dissenting) ("When a district court takes on the equitable role of adjusting legal obligations, we review the remedy it crafts for abuse of discretion."). *But see* Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 939 (7th Cir. 1984) (Posner, J., concurring) (arguing, with respect to trial finding of laches, that "[t]here is no reason why its equity origins and character should determine the scope of appellate review").

[83] Judge Posner has expressed the effect of this process in strong terms, stating that "[t]he time when equity relief really was discretionary . . . is past . . . the law of equity having long ago crystallized in a system of rules similar in basic character to the rules of the common law, though perhaps marginally more flexible." *Piper Aircraft*, 741 F.2d at 939.

Courts of appeals that adopt rules of equity should consider how the flexibility of the equitable analysis has allowed lower courts to craft remedies that accommodate the particular statutory and administrative contexts in which NEPA violations arise.

III. Appellate Court Strategies for Guiding Equitable Discretion in NEPA Cases

Since NEPA's enactment, a body of appellate case law has developed concerning the scope of discretion that trial courts have in deciding whether to provide injunctive relief under the statute. These efforts to define the role of equity in NEPA remedies has generally taken either a legalistic or a deferential approach. The legalistic approach consists of limiting equitable discretion by defining bright-line rules to guide trial judges in their four-factor "balance of equities" analysis. The deferential approach protects trial judges' discretion by insulating equitable analysis from categorical rules or reviewable standards. In these forays into the traditional territory of equitable discretion, appellate courts are often forced to consider the contextual factors that lead to the trial court's decision. The choice whether to approach such contextual decisionmaking from a legalistic or deferential perspective raises questions regarding the appropriate allocation of power between appellate and trial courts. Questions about the proper degree of discretionary authority, in turn, threaten to frustrate efforts both by district courts to apply equitable analyses and by appellate courts to review those decisions for abuse of discretion.

This Part proposes that efforts to formalize standards of equity as relevant to NEPA injunctions are undermined by the inherently discretionary and fact-bound nature of injunction decisions. The challenges that emerge in this Part form the basis, in Part V, of an analysis of how the merger of law and equity in NEPA remedies requires that appellate courts approach the topic cognizant of the tensions between NEPA's statutory purpose, administrative law policies, and the need to balance legal form with equitable flexibility.

A. The Automatic NEPA Injunction

Environmental plaintiffs and academics have argued that NEPA should be understood to restrict district courts' discretion by requiring an injunction for every NEPA violation. This argument rests on the theory that Congress may explicitly or implicitly limit the courts' equitable discretion by statute.[84]

[84] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) (implying that Congress may limit courts' exercise of equity, but ruling that the particular statute at issue did not do so). *See also* Plater, *supra* note 4, 546–53 (analyzing *Hecht Co. v. Bowles* vis-à-vis the role of statutory interpretation in determining courts' equitable authority to remedy statutory violation).

When such a limitation is implicit, courts' determination of whether an injunction should issue necessarily becomes a question of statutory interpretation. As such, it is inherently a legal, as opposed to equitable, process, focusing on general interpretations and appellate precedent rather than the specific needs of a particular case.

The argument for bringing NEPA injunctions under the yoke of legal structures focuses on a test that courts have developed in other contexts for determining whether a statute implicitly requires injunctive relief. In this three-pronged test, the court looks to (1) whether the statute expressly prohibits certain conduct that would allow a violation to continue unabated absent an injunction; (2) whether the purpose of a statute aims to prevent that conduct; and (3) whether the statute lacks other remedies for curing improper conduct.[85] Where these factors support an "inescapable inference" that Congress intended to limit equitable discretion, it may be held that a statute requires injunctive relief as a matter of law.[86]

This canon has been applied to justify automatic injunctions in the environmental context, most notably in a seminal case on the Endangered Species Act, *Tennessee Valley Authority v. Hill*.[87] Because the Act provided no penalties for violations of its prohibition against destruction of critical habitat, the Supreme Court ruled in 1978 that courts must issue injunctions for every violation of section 7 of the Act, without any inquiry into the "wisdom or unwisdom" of doing so.[88] Since NEPA also lacks statutorily defined remedies for violations of its procedural mandate, commentators and environmentalists have argued that it also limits courts' equitable discretion and that injunctions must issue for all NEPA violations.[89]

In other environmental contexts, courts have rejected arguments that the relevant statute predetermines the issuance of injunctions. One such decision is *Weinberger v. Romero-Barcelo*.[90] In that case, the Circuit Court had held that the Clean Water Act required an injunction for every violation of the act's permit requirement. The Supreme Court reversed, pointing out that because the Act provides civil and criminal penalties to remedy violations, it is not necessary to interpret the statute as requiring injunctive relief.[91] Yet, while the *Weinberger* decision rejected a legal rule *requiring* injunctive relief, it also declined to declare that a district court could *never*

[85] Sarah W. Rubenstein, *Injunctions under NEPA after* Weinberger v. Romero-Barcelo *and* Amoco Production Co. v. Village of Gambell, 5 WIS. ENVTL. L.J. 1, 7 (1998).

[86] Weinberger v. Romero-Barcelo, 456 U.S. 305, 313–15 (1982) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)) (discussing precedent for finding implicit limitations on courts' equitable discretion and noting the application of that doctrine in *TVA v. Hill* to find that the Endangered Species Act implicitly required an injunction for every violation of certain provisions).

[87] 437 U.S. 153 (1978).

[88] *Id.* at 193–94. For discussion of the decision, see Rubenstein, *supra* note 85, at 7–8.

[89] *E.g.*, Brief for Defenders of Wildlife et al. as Amici Curiae Supporting Respondents at 13–17, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (1998) (No. 07-1239), 2008 WL 4642202; Rubenstein, supra note 85, at 17–20.

[90] 456 U.S. at 310–11.

[91] *Id.* at 314; *See* 42 U.S.C. §§ 4321–4370(a) (2006).

issue an injunction.[92] The decision thus insulated the equitable discretion of district courts by rejecting any legal rule governing remedies under the statute.

Because NEPA lacks the kind of penalty provisions that were dispositive in *Weinberger*, the decision is not directly relevant to whether the statute requires injunctive relief. Nevertheless, courts and NEPA defendants often cite *Weinberger* for the proposition that a NEPA injunction should be reversed on appeal because the trial court's finding on one of the four requirements for injunctive relief was erroneous.[93] This argument misrepresents the broader holding of *Weinberger,* that where Congress has not limited the courts' equitable authorities, deference to the discretionary judgment of the district court is appropriate.

Until recently, the Supreme Court had never ruled directly on whether NEPA itself may require an injunction for every violation.[94] The *Winter* and *Monsanto* decisions together resolve this question in the negative. In *Winter,* the court ruled that the traditional four-factor test applies with full force when NEPA plaintiffs seek preliminary injunctions, and the *Monsanto* decision extended that ruling to the context of permanent injunctions issued to cure NEPA violations.[95]

Indeed, the *Monsanto* Court rejected the "automatic NEPA injunction" theory without engaging in any interpretation of NEPA itself, as the *Weinberger* approach would require. Instead, the Court relied solely on the alleged error in the lower court's application of the four-factor injunction analysis. This approach contrasts with *Weinberger*'s holding that equitable discretion should be insulated from aggressive review absent a legislative

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[92] *Weinberger*, 456 U.S. at 314–15.

[93] *E.g.*, Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010) (citing *Weinberger* for the same proposition); *Winter*, 129 S. Ct. at 374 (citing *Weinberger* for proposition that equitable factors must be met prior to issuing an injunction in NEPA context); Brief for Petitioners at 26, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 723014; Brief for the Federal Respondents Supporting Petitioners at 16, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 740752.

[94] The ruling, in *Winter*, that in the context of an alleged NEPA violation, a *preliminary* injunction is "never awarded as a right" has been interpreted as weighing against a "NEPA exception" to the balancing of equities. Brief for Petitioners *supra* note 93, at 27. Petitioners in *Monsanto* argued that the same standard applies to permanent injunctions, a view that is supported by dicta from the *Amoco* decision stating that "'[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction.'" *Id.* at 32 (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987)). Nevertheless, substantial differences exist between preliminary and permanent injunctions. For example, by the time a permanent injunction is considered, the court knows whether a statutory violation — the basis of the "irreparable injury" which would warrant an injunction — exists. Absent a court ruling that directly addresses the applicability of the *TVA/Weinberger* doctrine to NEPA, it is premature to extend *Winter* to the standard for permanent injunctions.

Another recent decision, *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006), held that the Patent Act does not create an exception to the four-factor test for permanent injunctive relief. This decision reaffirmed the maxim that "'a major departure from the long tradition of equity practice should not be lightly implied.'" *Id.* at 391 (quoting *Weinberger*, 456 U.S. at 320). It does not, however, affirmatively resolve whether NEPA might imply such a departure.

[95] *Winter*, 129 S. Ct. at 374; *Monsanto*, 130 S. Ct. at 2756.

decision to narrow its scope. The Court assumed its own authority to cabin trial court discretion by interpreting traditional equitable principles as firm legal rules. A consequence of this judicial infringement on equitable processes may be that injunctions will receive less deference on appeal. Aggressive review is likely to undercut the flexibility that has made equitable analysis suitable in forming NEPA remedies. It is especially problematic that the Court has formed rules for that review without reference to NEPA, in contradiction to the notion that equitable judgments "cannot ignore the judgment of Congress, deliberately expressed in legislation."[96]

B. Presumption of Irreparable Harm

Another approach appellate courts have taken to NEPA remedies is to hold that NEPA violations create either a rebuttable or a non-rebuttable presumption of "irreparable harm" for purposes of the four-part equitable analysis. This approach, which has been called the "NEPA Harm Rule," favors the use of injunctive relief without necessarily requiring it in every case.[97] While the "automatic injunction" theory implies a statutory limitation on equitable discretion, the NEPA Harm Rule rests on a more subtle argument: that equitable discretion should be informed by statutory definitions of relevant legal harms. The "balance of equities" still must support an injunction, but the rule prevents plaintiffs from being "stopped at the *threshold*" by the "irreparable harm" requirement merely because environmental injuries are less cognizable than other types of harms.[98]

The principal Supreme Court case to address this approach is *Amoco Production Co. v. Village of Gambell*.[99] In *Amoco*, the Court held that a violation of the Alaska National Interest Lands Conservation Act's ("ANILCA") permitting process did not, in itself, constitute irreparable harm.[100] The Court applied *Weinberger*'s principle that statutes must be interpreted to determine whether Congress has limited the scope of equitable discretion. But *Amoco* presented a more narrow question than *Weinberger*: whether ANILCA's statutory framework implied a congressional choice to preserve courts' equitable discretion while guiding their analysis on one of the four factors. As in *Weinberger*, the Court decided that the statute did not dispossess or limit trial judges' discretion.[101] Thus, issuance of an injunction

[96] United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497 (2001) (internal quotes omitted).

[97] Rubenstein, *supra* note 85, at 20–22.

[98] Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (emphasis in original).

[99] 480 U.S. 531 (1987).

[100] The court also declined to interpret the statute as completely eliminating district courts' equitable discretion. It distinguished *TVA* by reference to the analysis in *Weinberger*, holding that the statute did not require the issuance of injunctions. *Amoco*, 480 U.S. at 542–43.

[101] *Id.* at 543 ("[W]e found nothing in the Act's language and structure or legislative history which suggested that Congress intended to deny courts their traditional equitable discretion").

would require findings on each of the four equitable factors to support an injunction, without any presumption on the "irreparable harm" factor.

Interestingly, the language and reasoning of the *Amoco* opinion inadvertently suggest that NEPA, unlike ANILCA, may create such a presumption. The opinion explains that the Ninth Circuit, in holding that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action,"[102] had "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect — preservation of subsistence resources."[103] In other words, to find "irreparable injury" in every process foul would place undue emphasis on "the integrity of the *permit process* rather than on the integrity of the Nation's water."[104]

Distinctions in the statutory schemes created by ANILCA and NEPA respectively suggest that NEPA's emphasis on process may justify a presumption of irreparable harm. Unlike ANILCA, NEPA does not act to enforce substantive environmental goals; courts have routinely held that the statute is procedural rather than substantive in its mandate.[105] Rather, the harm NEPA is most clearly designed to prevent is the risk of inadequately informed agency decisionmaking. Thus, a NEPA violation is itself the harm the statute aims to prevent. The reasoning of *Amoco* thus supports a presumption of irreparable harm because NEPA justifies the kind of emphasis on process that the Court criticized in the context of ANILCA.[106]

This justification for a presumption of irreparable harm for NEPA violations has been expounded most notably by the First Circuit, in a series of opinions by then-Judge Breyer. In *Massachusetts v. Watt*,[107] decided before *Amoco*, then-Judge Breyer explained, "[w]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered."[108] So once a court has found a NEPA violation, it has also found an irreparable injury for the purposes of the four-factor injunction test. In *Sierra Club v. Marsh*,[109] decided after *Amoco*, then-Judge Breyer reaffirmed this theory's relevance to NEPA injunctions. He distinguished *Amoco* according to the same reasoning explained above, contrasting ANILCA's substantive purpose with NEPA's purely procedural mandate.[110]

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[102] *Id.* at 541 (quoting People of the Vill. of Gambell v. Hodel, 774 F.2d 1414, 1423 (9th Cir. 1985)).

[103] *Id.* at 544.

[104] *Id.* at 543 (emphasis in original).

[105] 42 U.S.C. §§ 4331–4370(h). Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

[106] As discussed immediately *infra*, this argument has support in case law from the First Circuit.

[107] 716 F.2d 946 (1st Cir. 1983).

[108] *Id.* at 952 (citing Alaska v. Andrus, 580 F.2d 465, 485 (D.C. Cir. 1978)); Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 512–13 (D.C. Cir. 1974).

[109] 872 F.2d 497 (1st Cir. 1989).

[110] *Id.* at 502.

Environmental advocates did not argue for the "NEPA harm" rule before the Supreme Court in either *Winter* or *Monsanto*.[111] Nevertheless, the *Monsanto* decision includes language that appears to preclude the rule. In the decision, Justice Alito wrote that "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue"[112] and that "no such thumb on the scales is warranted."[113] Rather, he wrote, "a court must determine that an injunction *should* issue under the traditional four-factor test."[114] These statements seem to address the Court's uncertainty as to whether the district court had applied a presumption without explicitly stating so.[115] The Court answered that possibility with the rule that, whatever the lower court may have done, courts going forward should not apply a presumption of harm in NEPA cases.

The law on this issue may be less relevant than it seems. The development of a NEPA presumption in the First Circuit provides an example of the logical thought process that may lead some judges to incorporate consideration of NEPA's statutory purpose into the standards of the four-factor test. If judges continue to have those thoughts, interpretations of statutory definitions of harms may, as a practical matter, persist in that amorphous analysis even if unstated by the judge. In this sense, the legal tool of formal presumptions may be incompatible with the nature of equitable balancing, and decisions like *Monsanto* may have limited effect on future injunction decisions.

Determining when interpretations of statutory purposes *should* tip trial courts' balance of equities presents an even more difficult question. At times a "thumb on the scales" may further legislative purposes; at others it may simply impair trial courts' ability to fashion fair remedies responsive to specific circumstances. As discussed in Part V.A, below, the intertwining of equitable rules with purposivist rules is likely to continue to complicate appellate review of this issue by disguising whether trial judges make their determinations based on legal policies or, instead, based on equitable judgments. In forming rules to reflect their normative policy, however, judges should be aware of the practical limits of applying those rules in equity.

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[111] Brief for Petitioners, *supra* note 93, at 30 ("The lower courts did not create a 'NEPA exception' to the traditional legal standard for injunctive relief."); Brief for Respondents at 38, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2010) (No. 07-1239), 2008 WL 4154536 ("The courts below applied traditional equitable principles in granting tailored preliminary relief.").

[112] Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010) (emphasis in original).

[113] *Id.*

[114] *Id.*

[115] *Compare* Reply Brief for Petitioners at 7, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1619255 (arguing that a presumption of irreparable harm had been applied), *with* Brief for Respondents, *supra* note 77, at 26–27 (arguing that no presumption of irreparable harm has been applied).

C. Defining the Parameters of "Irreparable Harm"

Another tactic appellate courts have used to guide the issuance of injunctive relief is to define the types of injury, or magnitude thereof, that courts may or must consider in their four-prong equitable analysis. A court might hold that purely economic harms cannot constitute "harm" in equity,[116] or that only species-level harm, rather than harm to individual animals, constitutes "irreparable harm."[117] In the NEPA context, this approach could be used to instruct district judges to base injunctions only on harms defined in NEPA regulations, on harms to the parties to the specific lawsuit, or on some other sub-class of harms resulting from a NEPA violation.[118] The *Winter* decision provides a clear example of this kind of rule, holding that injunctive relief must be premised on irreparable harm that is "likely" to occur, and not merely "possible."[119]

In the case of the *Winter* "likely" standard, this rule-making approach seems to create more questions than answers for the courts that must apply it. For example, notwithstanding common dictionary meanings of "likely" that suggest a high probability,[120] it seems impossible that the *Winter* standard requires that harm be "more likely than not" to occur. That standard would force courts to refrain from injunctive relief even in the face of an intolerable level of risk exposure (such as a forty nine percent probability of a catastrophic environmental event). Indeed, in his dissent to the *Monsanto* decision, Justice Stevens rejected a mechanical rule regarding the likelihood of irreparable harm necessary to support an injunction. Citing a leading treatise, he argued that "it is sufficient . . . that the risk of its happening is greater than a reasonable man would incur."[121] This statement reveals the implausibility of reading *Winter* to define a precise threshold. District courts are therefore left to apply a standard that lacks a bright line: the probability of harm must be something greater than "possible." The result is that, whenever a trial court finds that harm is "likely," the reviewing court will

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[116] *See* Reply Brief for Petitioners, *supra* note 115, at 10–12; Brief for the Respondents, *supra* note 77, at 40; *see also* 40 C.F.R. § 1508.8 (2009) (declaring that NEPA is concerned with "ecological . . . , aesthetic, historic, cultural, economic, social, [and] health" effects). It is unclear whether the same considerations that NEPA requires in an EIS must also be considered relevant to the standards for injunctive relief in the equitable balancing of harms that control the decision to issue an injunction.

[117] *See* Brief for Petitioners, *supra* note 93, at 36; Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 28–29; Brief for Respondents, *supra* note 77, at 38.

[118] *See generally* Dep't of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004) (holding that agency was not required, in EIS, to consider environmental impacts when agency lacked discretion to deny permit based on factors relevant to environmental impact of action). The *Public Citizen* holding could conceivably limit courts' equitable analyses to the evaluation of harms that the agency was allowed to consider in its permit decision.

[119] *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375–76 (2008).

[120] RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 786 (1996) (defining "likely" as "probably or apparently destined (usu. fol. by an infinitive)").

[121] Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2770 (2010) (quoting 5 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES, § 1937 (§ 523), at 4398 (2d ed. 1919)) (internal quotations omitted).

be left with the enigmatic question of whether the district court's "likely" is "likely" enough.[122]

While all legal standards may suffer from ambiguity in application, formalization of the precise contours of analysis is especially problematic in the injunction analysis because of the need, in equity, to match the remedy to the precise context of the case. The *Winter* standard presents a true challenge to courts in NEPA cases not because it is too rigid (as noted, it is virtually formless), but because its meaning is particularly difficult to ascertain in the context of environmental harms. While "likely" connotes probability and tangibility, environmental harms may consist of low-probability, low-visibility risks. The difficulty of applying the *Winter* rule serves as a lesson in the effective design of equitable rules. Just as trial courts tailor injunctions to the facts of the case, appellate precedents may better promote the principles of equity if they design rules that fit the statutory, policy-related, and scientific context in which they are applied.

D. Defining Fact-Finding Procedures

Equity is inherently rooted in facts — the particular aspects of a case that render rigid application of legal rules inadequate.[123] A consequence of this rooting is that rules defining fact-finding processes to be used in equity may serve to guide equitable discretion. In the 2001 case *United States v. Microsoft*,[124] the D.C. Circuit announced a bright-line procedural rule governing the use of injunctive relief. The court held that "an evidentiary hearing is required before an injunction may be granted" except "when the facts are not in dispute, or when the adverse party has waived its right to a hearing."[125] By announcing a procedural rule governing equity in all but a narrow set of exceptional cases, the *Microsoft* rule would diminish the control of trial judges over their courtrooms when considering injunctive relief. This procedural requirement might, in practice, radically alter the ability or willingness of judges to exercise remedial discretion.

The *Microsoft* rule leaves open the question of *what* is required as part of an "evidentiary hearing." Historically, courts of equity had authority to limit evidentiary submissions to documentary evidence; the chancellor thus

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[122] An intuitive rule, much like the rule suggested by Justice Stevens, would require courts to weigh the magnitude of a potential harm with its likelihood of materializing. This is the approach promoted by the respondents in the *Monsanto* oral argument. *See* Transcript of Oral Argument at 42, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-475.pdf. It is presumably the standard that district courts actually apply when making such judgments.

[123] 1 POMEROY, *supra* note 63, § 174, at 206 (describing the class of cases in which equity jurisdiction exists concurrently with legal jurisdiction as those "in which, from the special circumstances of the case itself, . . . the remedy at law is inadequate").

[124] 253 F.3d 34, 101 (2001) (internal quotations omitted) (citing United States v. McGee, 714 F.2d 607, 613 (6th Cir. 1983) and Charlton v. Estate of Charlton, 841 F.2d 988, 989 (9th Cir. 1988)).

[125] *Id.* (citing *Charlton*, 841 F.2d at 989).

retained substantial discretion regarding fact-finding processes.[126] This tradition suggests that the hearing required by *Microsoft* need not necessarily involve live witness testimony and other administratively burdensome processes. By setting a requirement without defining it, the *Microsoft* rule may suffer the same drawback as the *Winter* standard. That is, it ties the trial judge's hands without offering meaningful guidance.

Defining fact-finding procedures for equity has both benefits and drawbacks. Rules, like the *Microsoft* rule, which require admission of more evidence may ensure that judges maximize the information available when "balancing the equities." They could also aid appellate review by providing more complete factual records of trial-level decisions. On the other hand, the burden of such procedures might outweigh their beneficial effects on the exercise of judicial discretion. This may be particularly true for the complex factual disputes in NEPA cases, where district courts may in some cases limit review of the administrative record to promote the policy of deferring to agency expertise.[127]

The tensions between policies favoring and disfavoring rules for fact-finding procedures illustrate a general challenge facing appellate courts in fashioning broad rules of equity. Like rules that require particular injunction decisions or which create presumptions or rigid threshold requirements, evidentiary process requirements detach the equitable analysis from its context.

E. Summary of NEPA Rules

This section has shown how appellate courts might (and, in some cases, do) guide the use of injunctive relief under NEPA by laying down rules that eliminate trial court discretion, that narrow the range of discretion, that give definition to elements of the four-factor analysis, or that establish evidentiary procedures as prerequisites to its application. In this review, it is apparent that each of these strategies is subject to two criticisms. First, rules of equity tend to lack effectiveness insofar as they merely require judges to pay lip-service to legal standards without actually precluding judges from effecting a discretionary application of the four-factor equitable analysis. Second, when they do effectively cabin trial judge discretion, rules of equity may

[126] *See, e.g.*, Lee v. State & Trust Co., 38 F.2d 45, 49 (2d Cir. 1930) ("Originally, in equity, no oral evidence was taken at the hearing, but testimony was taken by deposition in answer to formal written interrogatories."). *See generally* Subrin, *supra* note 7, at 919 ("Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions."); JOHN ADAMS, THE DOCTRINE OF EQUITY 716 (1873); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 855 (13th ed. 1886).

[127] *See* Cronin v. U.S. Dep't. of Agric., 919 F.2d 439, 444 (1990) (noting that, in NEPA injunction cases, review may be limited to administrative record and explaining that "[c]onfining the district court to the record compiled by the administrative agency rests on practical considerations that deserve respect. Administrative agencies deal with technical questions, and it is imprudent for the generalist judges of the federal district courts and courts of appeals to consider testimonial and documentary evidence bearing on those questions unless the evidence has first been presented to and considered by the agency.").

strip the four-factor analysis of the statutory policies, environmental realities, and institutional considerations that give NEPA injunctions their "equitable" character. These observations counsel caution lest rules of equity fail to improve NEPA injunction decisions and become no more than a legal basis for reversal by opportunistic appellate courts. For this reason, when the Court cannot define a standard that is both effective and responsive to the equities of NEPA cases, it may do better to adhere to a rule of deference to the trial court's discretion.

The following review of the *Monsanto* case illustrates how the same two pitfalls observed in historical efforts to standardize NEPA remedy law appear in the many legal issues that arose in that case. In light of that observation, the final section explores how the challenge of forming NEPA remedies was exacerbated in *Monsanto* by conflicts among statutory policies, environmental regulatory risks, and administrative context. It suggests that an understanding of those conflicts is crucial to developing a law of NEPA remedies that strikes a workable balance between rules of equity and deference to trial courts' discretion.

IV. *Monsanto* Case Study

In *Monsanto*, the petitioners' challenge to the district court's injunction raised many questions about the extent of trial judges' equitable discretion to issue injunctions in NEPA cases. The case is also one in which injunctive relief is intertwined with statutory APA remedies which were issued by the district court as part of the same order. The resulting multitude of legal issues reveals how NEPA's unique place at the juncture of administrative procedure, environmental statutory law, and equity is largely responsible for the difficulty of developing an effective and equitable body of rules for NEPA remedies.

A. Background and Procedural History

Roundup Ready Alfalfa is a genetically engineered ("GE") crop developed by Monsanto Company and Forage Genetics ("Monsanto") to be resistant to the common pesticide Roundup.[128] In accordance with a "Coordinated Framework" agreed to by interested federal agencies, the Animal and Plant Health Inspection Service ("APHIS"), a section of the U.S. Department of Agriculture ("USDA"), regulates the commercial planting of genetically engineered crops under the Plant Protection Act.[129] By

[128] Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 4.

[129] 51 Fed. Reg. 23,302, 23,302–09 (June 26, 1986). The framework coordinates regulation by several agencies, including the Food and Drug Administration ("FDA"), EPA and the USDA. The FDA is responsible for reviewing GE products for safety as food for humans and animals. 21 U.S.C. §§ 301–399b (2006); 51 Fed. Reg. 23,302, 23,302–09 (June 26, 1986). The EPA regulates potential environmental impacts from pesticide use associated with GE crops. 7 U.S.C. §§ 136a-136y (2006); 51 Fed. Reg. 23,302–09 (June 26, 1986). USDA's province under

default, the commercial movement or release into the environment of each GE crop is prohibited.[130] Upon petition, APHIS may "deregulate" the GE crop variety in whole or in part if, based on "available information" and "sound science," the service determines that the crop variety is not a "plant pest."[131]

APHIS has deregulated numerous Roundup Ready varieties of commonly cultivated crops, including corn, soy, alfalfa, and sugar beets.[132] Deregulation occurs through notice-and-comment rule-makings subject to NEPA.[133] In its final rule, the agency can choose to keep the GE plant regulated, to deregulate in part and allow planting subject to precautionary measures, or to deregulate unconditionally.[134] If APHIS completes an EA and issues a Finding of No Significant Impact, it may deregulate without completing a full EIS.[135]

In 2004, Monsanto petitioned APHIS to deregulate Roundup Ready Alfalfa.[136] In 2005, APHIS announced the unconditional deregulation of the crop.[137] Eight months later, Geertson Seed Farms, a producer of conventional (non-GE) alfalfa seeds, sued APHIS for failing to conduct an EIS pursuant to NEPA.[138] Geertson alleged that APHIS violated the statute by failing to evaluate several risks, including the risk of inadvertent cross-pollination of GE plants with conventional alfalfa. Cross-pollination, Geertson claimed, would render its products unmarketable in foreign and domestic markets that do not accept agricultural products that cannot be guaranteed to be free of GE products.[139] The district court agreed with Geertson, finding that the deregulation of Roundup Ready Alfalfa without the preparation of an EIS to take a "hard look" at whether deregulation would lead to genetic contamination of non-genetically engineered alfalfa violated NEPA.[140]

B. Trial-Level Remedy Proceedings

At the remedies stage, Geertson asked the court for an injunction against all further planting and sales of Roundup Ready Alfalfa.[141] Also at this time, Monsanto intervened in the action to present evidence and argue

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the framework is limited to determining whether each GE crop may be a "plant pest" under the Plant Protection Act. 7 U.S.C. §§ 7701, 7711 (2006); 7 C.F.R. § 340.6(c)(4)(2010); 51 Fed. Reg. 23,302–09 (June 26, 1986).

[130] 7 C.F.R. § 340.0(a)(2) n.1 (2010).

[131] 7 C.F.R. § 340.6(d)(3)(2010); 7 U.S.C. § 7701(4)(2006).

[132] Brief for Petitioners, *supra* note 93, at 8.

[133] 69 Fed. Reg. 68,300 (Jan. 2, 2004).

[134] Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1134 (9th Cir. 2008) [hereinafter "*Geertson II*"]; 7 C.F.R. § 340.1 (2010).

[135] 40 C.F.R. §§ 1501.4(c), 1508.9(a), 1508.13 (2010).

[136] *Geertson II*, 570 F.3d at 1134.

[137] 70 Fed. Reg. 36,917, 36,918 (Jan. 3, 2005).

[138] *Geertson II*, at 1135.

[139] *Id.* at 1134. Another prominent risk in the litigation was that extensive use of the Roundup pesticide would speed the development of pesticide-resistant weeds. *Id.*

[140] *Id.*

[141] Brief for Petitioners, *supra* note 93, at 10.

against injunctive relief.[142] The court issued a preliminary injunction, and a hearing was held on the scope of permanent injunctive relief.[143] At this point, APHIS suggested that the injunction take the form of a set of planting and harvesting conditions that the agency claimed would minimize certain environmental risks without requiring a halt on all planting.[144] The judge rejected this position and issued a blanket permanent injunction against all further planting.[145]

While the trial judge viewed voluminous documentary evidence, he refused Monsanto's request for an evidentiary hearing with live witness testimony on the question of the degree of environmental risks posed by deregulation.[146] The court explained its denial of an evidentiary hearing on these factual questions as a refusal "'to engage in precisely the same inquiry . . . APHIS failed to do and must do in an EIS.'"[147]

C. Appeal to the Ninth Circuit

APHIS and Monsanto appealed to the Ninth Circuit on two grounds. First, they argued that the district court, by failing to take into account evidence that the likelihood of environmental harm was extremely low, had in effect presumed that deregulation would cause "irreparable injury."[148] Their second claim was that the district court also erred in refusing to hold an evidentiary hearing with live witness testimony prior to issuing the injunction.[149]

The Ninth Circuit panel affirmed the district court judgment on both issues.[150] On the first, the panel noted that the district court made findings on each of the four traditional requirements for injunctive relief.[151] In response to Monsanto's claim that the trial judge did not adequately take into account certain evidence regarding irreparable harm, the court ruled that the district court was "not clearly erroneous" in finding that harm was "sufficiently likely" to warrant an injunction.[152] On the second issue, the panel cited *Idaho Watersheds Project v. Hahn*[153] as circuit precedent for the rule that an evidentiary hearing is not required for injunctions of limited scope

[142] *Geertson II*, 570 F.3d at 1135.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 1136.
[146] *Id.* at 1139.
[147] *Id.* (quoting district court transcript).
[148] *Geertson II*, 570 F.3d at 1136.
[149] *Id.* at 1139.
[150] Geertson Seed Farms v. Johanns, 541 F.3d 938, 941 (9th Cir. 2008) [hereinafter "*Geertson I*"].
[151] *Id.* at 944.
[152] *Id.* at 945.
[153] 307 F.3d 815 (9th Cir. 2002).

and duration.[154] Since the district court's injunction would last only until the agency complied with NEPA, no hearing was required.[155]

Judge Randy Smith dissented from the Ninth Circuit opinion on the evidentiary hearing issue.[156] He distinguished *Idaho Watersheds*, pointing to the fact that, in that case, the trial court refused to conduct an evidentiary hearing on the grounds that it was deferring to the agency's proposed interim injunction.[157] In *Monsanto*, by contrast, the trial judge denied an evidentiary hearing but also rejected the agency's proposal.[158] Judge Smith found the *Idaho Watersheds* approach permissible because it "result[ed] in an efficient resolution pending completion of the agency determinations."[159] Judge Smith also noted that the evidentiary hearing he thought necessary in the *Monsanto* case "did not need to resolve the very disputes over the risk of environmental harm that APHIS might resolve" in its EIS.[160] Rather, the district court's hearing might be limited to deciding "what it would do in the mean time [sic]."[161]

Monsanto petitioned for rehearing and filed supplemental briefings highlighting the Supreme Court's *Winter* decision as an intervening change in the law. Decided after the initial Ninth Circuit decision, *Winter* held that the "irreparable harm" prong of the four-factor analysis required harm that was "likely," and not merely "possible," for an injunction to issue.[162] Because the initial Ninth Circuit decision had upheld the district court injunction under the old "possible" standard, Monsanto could argue that it should be reversed under the new, more stringent, rule.

In response, the Ninth Circuit panel issued an amended opinion, with two additions which appeared to attempt to align the decision with the new Supreme Court precedent without changing the Circuit's decision or substantively altering its reasoning.[163] First, Judge Schroeder cited *Winter* following a sentence from the prior opinion asserting that the district court had validly found irreparable harm that was "sufficiently likely" to warrant "broad injunctive relief."[164] In doing so, she did not explicitly hold that the decision met *Winter*'s "likely" standard. On the evidentiary hearing issue, the amended opinion suggested that the district court had in fact met the evidentiary hearing requirement of *United States v. Microsoft* by holding hearings

[154] *Geertson I*, 541 F.3d at 947.
[155] *Id.* at 947.
[156] *Id.* at 948–950.
[157] *Id.* at 948–49.
[158] *Id*. at 949.
[159] *Id.* at 948.
[160] *Geertson II*, 570 F.3d 1130, 1143 (9th Cir. 2008). This last comment was not included in Judge Smith's dissent in the original opinion. Instead, it appeared in the amended Ninth Circuit opinion, discussed below.
[161] *Id*. This sentence, as well, was included only in the amended opinion.
[162] Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008).
[163] *See Geertson II*, 570 F.3d at 1130.
[164] *Id.* at 1137.

on the scope of injunctive relief, even though it had denied live witness testimony during those hearings.[165]

D. Certiorari

Monsanto sought certiorari to determine whether the Ninth Circuit had erred on three questions. First, the petition alleged that the Circuit Court erred in exempting NEPA plaintiffs from the traditional "irreparable harm" requirement for injunctive relief. Second, it claimed error in the Court's upholding of an injunction that had been issued without a full evidentiary hearing sought by the adverse party. Finally, Monsanto asked whether the Circuit could uphold an injunction issued based on a finding of a "sufficient likelihood" of harm. The third question emphasized that the district court had used those words prior to the *Winter* decision, when the Ninth Circuit considered "possible" harm to be sufficient for injunctive relief, regardless of whether the harm was "likely."[166]

The federal government opposed certiorari, arguing that, while the Ninth Circuit erred in upholding the injunction, the Ninth Circuit itself announced the correct post-*Winter* legal standards.[167] Thus, the government claimed, certiorari would resolve no legal issues; it would merely create a second review of the district court's admittedly erroneous application of those standards to the specific facts of the case.[168]

When the Court did grant certiorari, the government supported Monsanto on the injunction issue, but advocated a narrower ground for reversal than the company offered. The government argued that the district court applied the wrong standard in determining whether an injunction was merited, and that the court failed to limit the scope of its injunction to what was necessary to cure the NEPA violation.[169] At the same time, the government opposed Monsanto on the question of whether an evidentiary hearing was required prior to issuing the injunction. Because the injunction was inappropriate, the government argued, the Court should reverse it without considering the processes used to arrive at an erroneous conclusion.[170] In the alternative, the government argued that an evidentiary hearing was not required. It grounded its position in the administrative law context of this case, arguing that agency technical expertise required that, wherever possi-

[165] *Id.* at 1140–41.

[166] Petition for Writ of Certiorari at i, Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743 (2010) (No. 09-475), 2009 WL 3420495. *See also Geertson II,* 570 F.3d at 1138 (declaring injunctive relief suitable where plaintiff can show that irreparable harm is "sufficiently likely"). Brief for Petitioners, *supra* note 93, at 41–42 (quoting district court's finding that Geertson had established a "sufficient likelihood" of irreparable harm).

[167] Brief for the Federal Respondents in Opposition to Certiorari at 10–13, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), 2009 WL 5017538.

[168] *Id.* at 13–14.

[169] Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 15.

[170] *Id.* at 38.

ble, trial courts defer to agencies' fact-finding records rather than conduct independent evidentiary investigations.[171]

In its response brief, Geertson raised a novel issue. It alleged that Monsanto lacked standing to challenge the injunction.[172] Geertson presented the theory that the district court's injunction itself added little or nothing to the vacatur of APHIS's deregulation mandated by the APA (the vacatur itself was not specifically challenged by petitioners).[173] As such, petitioners could hope to achieve no redress through a decision lifting the injunction.

Over the course of the merits briefings, the parties raised seven distinct legal issues relating to NEPA injunctive relief:

> (1) Whether a party subject to both an APA-mandated vacatur order and an overlapping injunction has standing to appeal the injunction alone;[174]
> (2) Whether NEPA provides an exception to the traditional four-factor test for injunctive relief, either mandating automatic injunctions or presuming irreparable harm;[175]
> (3) How "likely" a harm must be to support injunctive relief, and whether the district court's finding that harm was "sufficiently likely" met this standard;[176]
> (4) Whether individual instances of cross-pollination of fields constitute "irreparable environmental harm" for purposes of injunctive relief;[177]
> (5) Whether purely economic injuries to plaintiffs, such as diminution of the price for which they may sell their alfalfa, may constitute "irreparable harm," when the cause of the injury is damage to the genetic integrity of their organic crop;[178]
> (6) Whether a court fashioning a NEPA injunction should defer to the expertise of the agency and adopt interim measures proposed by the agency at the remedy stage;[179]
> (7) Whether an adverse party must be allowed to present live witness testimony prior to the issuance of a NEPA injunction.[180]

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[171] *Id*. at 39.
[172] Brief for Respondents, *supra* note 77, at 19–24.
[173] *Id*. at 20.
[174] *Id*. at 19–20.
[175] Brief for Petitioners, *supra* note 93, at 26–33; Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 18–28.
[176] Brief for Petitioners, *supra* note 93, at 41–47; Reply Brief for Petitioners, *supra* note 115, at 13–14.
[177] Brief for Petitioners, *supra* note 93, at 35–41.
[178] *Id.* at 38–39; Reply Brief for Petitioners, *supra* note 115, at 10–13.
[179] Brief for Petitioners, *supra* note 93, at 47–49; Reply Brief for Petitioners, *supra* note 115, at 19–20.
[180] Brief for Petitioners, *supra* note 93, at 50–57; Brief for Respondents, *supra* note 77, at 51–58; Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 38–42; Reply Brief for Petitioners, *supra* note 115, at 20–23; Reply Brief for the Federal Respondents Supporting Petitioners at 19–22, Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743 (2010) (No. 09-475), 2010 WL 1619256.

The Supreme Court did not reach all of the issues raised. However, the relevance of these questions to what rulings it did make can be found in its discussion of the relative roles of agencies, judges, and the law in developing equitable remedies to statutory violations. The *Monsanto* litigation and the Court's decision therefore serve as examples of the tensions underlying those overlapping functions.

V. NEPA's Balance of Equity, Statutory Purpose, and Administrative Process

This Part addresses how the ideological tensions exemplified in *Monsanto* appear to obfuscate both the job of lower courts in determining NEPA remedies and the job of courts of appeals in reviewing district court decisions addressing whether and to what extent to award injunctive relief following NEPA violations. At each of these points of tension, the balance of environmental, administrative, and pragmatic policies may favor different resolutions. For some legal questions, it may be possible to apply rules of equity, either on a generalized basis or specific to NEPA, which provide effective guidance. For others, contextual factors may favor deference to trial courts' equitable discretion. Where appellate courts do choose a legalistic rather than deferential approach, they should not abandon statutory interpretation of NEPA and the APA as a guide in forming rules that are responsive to the statutory and institutional realities of NEPA enforcement. Consideration of the relationship of those statutes to equity would lead to better rules of NEPA remedies.

A. Equity and Statutory Interpretation

While equity is usually viewed as an alternative to law, legal and equitable remedies do operate simultaneously in NEPA enforcement. This uneasy merger of statutory law and equity raises the question of supremacy. It is clear that the exercise of equitable discretion may be informed by the statute it is being used to enforce.[181] An extension of this principle is that appellate courts may fashion rules of equity that incorporate statutory purpose. This process has been at work whenever courts have tailored the normal equitable requirements for injunctive relief to account for the particularities of NEPA's mandate to protect environmental review procedures. A less obvious side of the equity-statutory law tension is that interpretation of statutes themselves may take the form of an equitable judgment. This possibility appears to lead courts to mold statutory remedies under the APA, whether issued alone or alongside injunctive relief, as if fashioning

[181] Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("Congress may intervene and guide or control the exercise of the courts' discretion . . . ."). *See also* 1 Pomeroy, *supra* note 63, § 425, at 705 ("Equity follows the law . . . , conforming to its general rules and policy, whether contained in the common or in the statute law.").

equitable relief. Thus, courts have brought equity into the realm of statutory remedies even as the higher courts have attempted to bring legalistic form to the application of equitable remedies. This back-and-forth between statutory and equitable remedies suggests that appellate courts should form rules for both APA and equitable remedies that accommodate their dual nature. As the following section illustrates, these rules ought to be formed with the understanding that rigid constraints on equity may become either ineffectual or even inappropriate for the policy of NEPA and its administrative law context.

1. *The Overlap of Vacatur Orders and Injunctions*

The *Monsanto* plaintiff's standing argument opened a Pandora's box by drawing attention to the elusive line separating the trial court's APA remedy from its injunction. During oral argument, the Justices peppered counsel for all parties on the issue — presaging Justice Alito's decision to dedicate nearly half of the majority opinion to standing questions. Specifically, the Justices asked which aspects of the district court's judgment constituted the APA-mandated vacatur of APHIS's deregulation rule and which aspects were contained within the district court's injunction.[182]

The ambiguity as to where injunction ends and vacatur begins is legally important. It separates different levels of deference, different standards of law, and different policy orientations (as represented by the APA and NEPA's statutory purposes as opposed to equity's interest in case-specific justice). Still, in typical court orders, judges largely leave unclear whether their NEPA injunctions duplicate or complement APA statutory remedies. For example, to remedy deficiencies in a rule promulgated by the USDA, one district court declared, "the Court *vacates* the 2008 Rule, *enjoins* the USDA from further implementing it and *remands* it to the USDA for further proceedings."[183] It is unclear what the injunction adds to the vacatur: once the rule is vacated, it is redundant to enjoin USDA from implementing it by regulations prohibiting implementation of agency action prior to NEPA compliance.[184]

In contrast, the district court's order in *Monsanto* contains distinct statutory and injunctive remedies. The order included three parts: (1) a vacatur of APHIS's deregulation, (2) an injunction prohibiting APHIS from partial der-

[182] Transcript of Oral Argument, *supra* note 122, at 5–11, 15–16, 21–25, 28, 36–38, 46–50, 55.

[183] Citizens for Better Forestry v. U.S. Dep't of Agric., 632 F. Supp. 2d 968, 982 (N.D. Cal. 2009) (emphasis added). *See also*, *e.g.*, Ohio Valley Env't Coal. v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009) ("I VACATE NWP 21 (2007) and REMAND this matter to the Corps for further proceedings consistent with this opinion. I ENJOIN the Corps from issuing authorizations pursuant to NWP 21 (2007) in the Southern District of West Virginia until the Corps prepares a revised EA or an EIS and also determines that NWP 21 (2007) will not have adverse cumulative impacts as required by CWA § 404(e) and ENJOIN the Corps and the Intervenors from all activities authorized under NWP 21 (2007).").

[184] 40 C.F.R. §§ 1506.1(a),(c) (2010).

egulation and stopping farmers from planting Roundup Ready Alfalfa prior to completion of the EIS, and (3) an exception for growers who had already planted which allowed them to continue growing it.[185] Here, the injunction went beyond the vacatur by preventing APHIS from pursuing alternative courses of action specifically authorized by other statutory provisions. For example, APHIS might have created an interim rule under the APA's "good cause" exception to allow planting prior to completion of the EIS to alleviate the financial hardship of a total ban.[186] Finally, by permitting some growing to continue despite the vacatur, the injunction also limited the effect of the APA statutory remedy to bring it in line with an equitable outcome. Thus, even as the *Monsanto* Court differentiated equitable and statutory remedies, the two forms of relief were intertwined.

The potential redundancy between a vacatur order and an injunction complicates review of each remedy individually by creating uncertainty as to where the statutory remedy ends and injunctive relief begins. A legal rule that eliminates the overlap between statutory and equitable remedies under NEPA and the APA might simplify judicial review of injunction decisions by separating those issues subject to firm legal standards from those worthy of deference to the trial judge's discretion. On the other hand, this solution would have costs. The device of remand without vacatur, for example, is a useful tool against agency ossification[187] that might not survive a separation of equitable and statutory modes of remedies because it is an "equitable" variation on a seemingly inconsistent statutory rule.[188] A more pragmatic approach would acknowledge that NEPA remedies, whether vacaturs or injunctions, are neither purely statutory nor purely equitable. This view would resolve the logical incompatibility of the remand-without-vacatur remedy with its statutory source. It also would advise against the Court's effort, in *Winter* and *Monsanto*, to define rules of equity based on traditional principles of equity apart from NEPA's statutory context.

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[185] *See* Brief for Respondents, *supra* note 77, at 19–20; Reply Brief for Petitioners, *supra* note 115, at 4–6; Reply Brief for the Federal Respondents Supporting Petitioners, *supra* note 180, at 9–11.

[186] The "good cause" exception allows agencies to promulgate regulations without complying with the APA's notice-and-comment procedures when exigent circumstances justify doing so. 5 U.S.C. § 553(b)(2)(B)(2006). In the *Monsanto* litigation, the government argued that this pathway could allow APHIS to bypass NEPA compliance in its deregulation effort. Transcript of Oral Argument, *supra* note 122, at 18.

[187] That is to say, since remand without vacatur lowers the cost of new rules to agencies and industry by reducing the level of variability of the law, it enables agencies to pursue a regulatory agenda that might be too uncertain if remand necessarily involved vacatur of the existing rule.

[188] As noted above, some commentators have attempted to reconcile remand without vacatur with the text of the APA through statutory interpretation. *See* Levin, *supra* note 41, at 310. Notwithstanding these efforts, it seems clear that the most natural reading of the APA's "set aside" language does not allow for remand without vacatur.

2. *NEPA Exceptions*

Interpretations of NEPA that have supported applying an automatic "NEPA injunction" or a "NEPA harm rule" also go to the tension between NEPA's statutory mandate and traditional equitable principles. Even in the absence of this kind of legal rule, NEPA's statutory policies may infuse trial judges' application of the four-factor analysis to such a degree as to establish de facto presumptions supporting injunctive relief. In *Winter* and *Monsanto*, the Court expressed its unwillingness both to interpret NEPA as a statutory limitation on equity and to permit trial courts to give NEPA's statutory purpose undue weight in the four-factor analysis. It is unclear whether this approach strikes a workable balance between statutory and equitable policies.

The *Monsanto* Court's inclination against a legal "NEPA presumption" conforms to precedent requiring legal infringements on equity to be based in Congress's "unequivocal statement of its purpose" to limit the scope of judges' equitable discretion.[189] Its hostility toward equitable consideration of NEPA's purpose, however, cuts against that judicial canon. Avoiding statutory constructions that limit equitable discretion insulates trial judges' judgment and enables judges to consider the widest range of factors in injunction decisions. Reversing injunction decisions that are perceived to give undue weight to statutory purpose does the opposite, excluding legislative policy from the range of considerations judges freely apply in the four-factor analysis. Ironically, the Court's rules of equity accomplish this limitation on equitable discretion without any evidence of Congressional intent, much less an "unequivocal statement" in a statute.

Another critique of the Court's efforts to excise interpretation of NEPA from equitable analysis relates to the difficulty of policing lower court's reliance on NEPA's policies to injunction decisions. That is to say, notwithstanding the *Monsanto* rule that a NEPA violation creates no presumption of irreparable harm, judges may make findings of irreparable harm more regularly in NEPA cases than in others if they subjectively give environmental considerations extra weight. Alternatively, considerations of NEPA's statutory purpose might slip into other stages of analysis within the traditional four-factor inquiry. For example, courts might grant environmental harms special weight on the grounds that environmental injunctions are generally in the public interest (another element of the four-factor test).[190] This pro-

[189] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[190] *See* 42 U.S.C § 4331 (2006) ("The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."); *Hecht*, 321 U.S. at 331 (When acting within context of a statute, courts' "discretion . . . must be exercised in light of the large objectives of the Act."). In his dissent to the *Monsanto* decision, Justice Stevens specifically identifies the possibility that statutory purpose might impact other factors of the equitable analysis, writing that "[w]hile a court may not presume that a NEPA violation requires an injunction, it may take into account the principles

cess may even be inadvertent. In *Monsanto*, the parties debated the significance of the district court's statement that "an injunction is warranted in 'the run of the mill NEPA case.'"[191] Respondents characterized the statement as an "empirical observation" about NEPA cases, not an element of the judge's reasoning in this case.[192] Petitioners, on the other hand, argued that because the statement appeared in the "LEGAL STANDARD" section of his opinion, it amounted to a legal presumption in favor of an injunction.[193] Even with the *Monsanto* decision's preclusion of the statement as a legal standard,[194] the empirical observation that other courts generally issue injunctions is itself likely to bias future judges' discretionary judgment in favor of that form of relief. Given that the line between empirical observation and legal rule might be unclear even in the mind of the district judge, appellate rules based on such a distinction may prove hard to apply and to enforce.

These considerations suggest that a better approach to NEPA remedies would acknowledge trial courts' discretionary power to weigh NEPA's statutory policy within the four-factor injunction analysis. This rule would reconcile NEPA's clear statutory purpose of favoring environmental values with the equitable principle that appellate courts should avoid treating statutes as unnecessary infringements on trial court discretion. While this approach lacks a bright-line rule, a degree of ambiguity between equity and the NEPA statute may be an important mechanism for insulating trial courts from overly aggressive appellate review. In his dissent to *Monsanto*, Justice Stevens emphasized the disheartening possibility that the Supreme Court's review was based on a misunderstanding of the trial court injunction.[195] This possibility highlights how the tension between statutory construction and equity favors deference to equitable discretion in the NEPA context.

B. Equity and the Administrative Process

In addition to the uneasy balance struck between equity and the statutory law, NEPA remedy proceedings pose questions about the relative roles

embodied in the statute in considering whether an injunction would be appropriate." Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2771 (2010).

[191] Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) (naming one of the four threshold requirements for injunctive relief to be "that an injunction is in the public interest."). The traditional four-factor test merely states four necessary conditions for injunctive relief, so the fact that an injunction is in the public interest should not be considered sufficient or even necessarily prominent in determining that an injunction *will* issue. Nevertheless, it is well established that the public interest is also a factor in the overall "balance of equities" considered in the judge's equitable discretion. Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 (2d Cir. 1975) ("[C]ourts of equity may go much further both to give or to withhold preliminary injunctive relief in furtherance of the public interest than where only private interests are involved."); s*ee also* Yakus v. United States, 321 U.S. 414, 440–41 (1944); *Hecht*, 321 U.S. at 329–30; Inland Steel Co. v. United States, 306 U.S. 153, 156–57 (1939); Winner, *supra* note 11, at 497–98.

[192] Brief for Respondents, *supra* note 77 at 27.

[193] Reply Brief for Petitioners, *supra* note 115, at 7.

[194] *Monsanto*, 130 S. Ct. at 2748.

[195] *Monsanto*, 130 S. Ct. at 2766 (Stevens, J., dissenting).

of agencies and the courts in evaluating environmental harms. While courts reviewing administrative actions under the APA generally defer to the expert judgment of agencies, this policy loses force in NEPA remedy proceedings, which are premised on the finding that the agency make an adequate expert evaluation of environmental risks.[196] Indeed, judges' unwillingness to rely on agency fact-finding in NEPA cases reflects the broader skepticism courts show toward agencies that present "post-hoc rationalizations" as litigating positions during APA review.[197] In *Monsanto*, two legal issues reflected this tension between deference and skepticism: (1) the district court's refusal to conduct an evidentiary hearing which would replicate "precisely the same inquiry" required of APHIS in its EIS or, alternatively, to defer to a technical solution proposed by the agency; and (2) the parties' disagreement as to whether the administrative and equitable inquiries did actually consist of the same factual questions regarding deregulation's environmental harms. Both of these issues raise a related question: should the trial judge play the role of environmental expert by evaluating technical testimony at the remedy stage, or instead should he or she allow the agency to assume a quasi-judicial role by proposing terms for equitable relief?

1. *The Equitable Evidentiary Hearing Requirement and Judicial Deference to Agency Remedy Preferences*

In the *Monsanto* case, the district judge was reluctant to conduct a live-testimony evidentiary hearing prior to issuing an injunction because such a measure would replicate the environmental analysis that NEPA required APHIS to conduct in its EIS. This reluctance reflected a desire to separate the judge's role in equity from that of the agency in technical fact-finding concerning scientific questions. On appeal, the parties debated this issue in terms of the applicability of the *Microsoft* evidentiary hearing requirement to NEPA injunction proceedings.[198] The focus on this formal rule, however,

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[196] Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7, 14–15 (1997) (explaining that "[g]enerally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision," but that "[d]eviation from this 'record rule' occurs with more frequency in the review of agency NEPA decisions than in the review of other agency decisions . . . . This occurs because NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention."); *see also* Susannah French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 931 (1993).

[197] *See*, *e.g.*, Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87 (1943); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).

[198] Brief for Petitioners, *supra* note 93, at 53; Brief for the Federal Respondents Supporting Petitioners, *supra* note 93, at 41 n.13 (distinguishing *Microsoft* on the basis of *Monsanto*'s administrative law context); Brief for Respondents, *supra* note 77, at 56.

threatened to disguise ways in which, in NEPA proceedings and other APA-based cases, administrative processes may provide a legitimate substitution for many trial fact-finding procedures.

In *Hecht v. Bowles*,[199] the Supreme Court noted that judicial review of agency action creates a system in which "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice." This interrelationship is evident in the redundancy of fact-finding processes involved in NEPA remedy proceedings. While NEPA provides an administrative process for studying those risks, equity requires a similar analysis as part of the "irreparable harm" prong of the four-factor injunction analysis. How these respective administrative and equitable inquiries might be differentiated was a contentious issue in the *Monsanto* litigation. In the Ninth Circuit decision, both the majority and dissent point to the distinction of NEPA cases from the *Microsoft* evidentiary hearing rule made in *Idaho Watersheds*.[200] One rationale for this exception to the *Microsoft* rule was that the NEPA injunction was temporary (lasting only until the agency completed an EIS) and so warranted fewer procedural requirements that applied in a "normal injunctive setting."[201] In the *Monsanto* litigation, the Ninth Circuit majority applied the same reasoning.[202]

Judge Smith, in his dissent, viewed the temporary nature of the court injunction as supporting the opposite conclusion. Because the court did not need to determine whether the agency action would go forward, but "only . . . what it would do in the mean time [sic]," Judge Smith argued that the court was not replicating at all the agency's function in conducting an EIS.[203] Because its inquiry went to a different question, Judge Smith argued that the district court could not abdicate its fact-finding duty. Even so, Judge Smith's approach would admit relaxation of evidentiary requirements where the court defers to the agency's proposed remedy because such reliance on agency expertise would "result in an efficient resolution."[204]

This approach suggests a resolution to the tension between equity and administrative process on this issue. That is, Judge Smith would acknowledge that the overlap between equitable and administrative processes could justify a looser judicial inquiry when it took advantage of the administrative process as a reliable substitute. On the other hand, it would prevent judicial abdication of equitable fact-finding duties where workable administrative alternatives are not provided. This position has reason: if a judge leaves scientific inquiries to the administrative sphere, no hearing should be needed in

[199] 321 U.S. 321, 331 (1944) (quoting United States v. Morgan, 207 U.S. 183, 191 (1939)).

[200] *Geertson I*, 541 F.3d 938, 947 (9th Cir. 2008); *Geertson II*, 570 F.3d 1130, 1143 (9th Cir. 2008); Idaho Watersheds Project v. Hahn, 307 F.3d 815, 831 (9th Cir. 2002).

[201] Idaho Watersheds, 307 F.3d at 831.

[202] *Geertson II*, 570 F.3d at 1140–41.

[203] *Id.* at 1143.

[204] *Geertson II*, 570 F.3d 1130, 1142 (9th Cir. 2008).

equity proceedings; but if the judge pulls those questions into his field of discretion, he should be obliged to take a hard look at the facts.

The question of whether the district court owed deference to the agency gave rise to a second quandary: in reviewing the injunction decision, could the Ninth Circuit or the Supreme Court adopt APHIS's proposed remedy, or were these appellate courts bound to either uphold the lower court's injunction or reverse it in its entirety? While APHIS's compromise terms may seem like an obvious solution, its adoption in appellate proceedings would be conceptually problematic. Specifically, adopting APHIS's remedy on appeal would amount to enforcing a set of rules that had never been found sufficient under *either* the agency's administrative process *or* the district court's equitable mode of evaluation. Rather than resolving the conflict, adopting a remedy that was no more than a litigating position of one party would spurn both the administrative and the equitable processes. Like other topics explored in this Note, the issue of appellate deference thus reflects a conflict of policies: administrative law urges deference to agencies, while equitable doctrine supports deference to trial court discretion.

This article does not aim to decide what rule would best resolve the tension between administrative and equitable processes as it relates to evidentiary hearings. Instead, the author notes that this is an area where both the Ninth Circuit majority and dissenting opinions in the *Monsanto* litigation at least sought to answer the right question: how an appellate court may form a general rule that strikes the right balance between administrative and judicial processes in NEPA remedy selection. Given the Supreme Court's apparent preference for rules of equity, it is surprising that it declined to address the evidentiary hearing issue despite that issue's potential amenability to a formalized rule.[205]

2. *Defining the Harms to be Weighed in Equitable Analysis*

A second set of questions regarding the relative roles of courts and agencies in remedy selection involves the types of harms considered in the administrative and equitable processes respectively. Those processes may be distinguished as to the kinds of harms to be considered as well as to whose harms — just those of the litigants or those of third parties as well — fall within the court's remedy selection analysis. An inquiry relevant to these questions would consider the relative capacities of the agencies and the courts to gather and evaluate relevant information.

Concerning the types of harms considered, NEPA's regulations state that the administrative EIS process must consider all "ecological . . . aesthetic, historic, cultural, economic, social, [and] health" effects.[206] The parties in *Monsanto* cited this regulatory standard as evidence of the types of

[205] Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2762 (2010).
[206] 40 C.F.R. § 1508.8 (2010).

environmental harms to be weighed in the equitable "balance of equities."[207] By suggesting that courts look at the same factors as an EIS, these arguments implied a substantial overlap between the purposes of the EIS process and the judicial remedy proceeding, lending support to the *Monsanto* district court's concern that courts in equity are asked, in effect, to duplicate functions for which agencies are better equipped. Still, the breadth of factors included in the regulatory standard might provide judges with a legal rationale for incorporating a wide set of relevant types of harm into the four-factor injunction analysis. If so, a broader definition of relevant harms might improve judges' discretionary weighing of those harms in equity.

Defining whose harms a court may consider in the equitable analysis — those of the litigants alone or those of a wider class of interested parties — also raises contentious questions. Petitioners in *Monsanto* argued that, even if cross-pollination may occur and cause harm to other parties, NEPA plaintiffs must show that they themselves will suffer in order to justify an injunction.[208] In other words, petitioners quipped, Geertson, in seeking an injunction, may not "represent the interests of alfalfa itself, as the Lorax speaks for the trees."[209] The majority adopted this view, reversing the lower courts' findings of "likely irreparable harm" because "partial deregulation need not cause *respondents* any injury at all, much less irreparable injury."[210] The Court added that "respondents in this case do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties."[211] Justice Stevens' dissent vigorously opposed this approach to the balancing of equities. Citing Circuit precedent for the principle that "[t]here is no general requirement that an injunction affect only the parties in the suit,"[212] Justice Stevens emphasized equity's traditional regard for harms to the public interest and "purprestures upon public rights and properties."[213]

The Court's division on the scope of equity's inquiry into third-party harms reveals deeply rooted tensions between administrative and equitable

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[207] Brief for Petitioners, *supra* note 93, at 38 (citing Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1038 (8th Cir. 2002)) (arguing that diminished crop value is not "irreparable harm" in injunction analysis because "remedying such an economic harm is simply not one of NEPA's purposes"); Brief for Respondents, *supra* note 77, at 39–40 (citing 40 C.F.R. § 1508.14 (2010)) (arguing that the district court properly found "irreparable harm" in economic impacts because "where, as here, those effects 'are interrelated' with 'natural or physical environmental effects,' agencies must consider them in an EIS.").

[208] Brief for Petitioners, *supra* note 93, at 40. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) ("plaintiff . . . must establish . . . that *he* is likely to suffer irreparable harm" (emphasis added)); *eBay Inc. v. MercExchange LLC*, 126 S. Ct. 1837, 1839 (2006) ("plaintiff must demonstrate . . . that *it has suffered* an irreparable injury" (emphasis added)).

[209] Brief for Petitioners, *supra* note 93, at 40 (citing DR. SEUSS, THE LORAX (1971)).

[210] *Monsanto*, 130 S. Ct. at 2760 (emphasis added).

[211] *Id.*

[212] *Id.* at 2771 n. 12 (Stevens, J., dissenting) (quoting Bresgal v. Brock, 843 F.2d 1163, 1169 (9th Cir. 1987)).

[213] *Id.* at 2766–67 (quoting Mugler v. Kansas, 123 U.S. 623, 672 (1887)).

principles. Ostensibly, administrative rulemaking's nation-wide notice-and-comment process appears better suited to evaluate public and third-party harms than a judicial hearing. However, the assumption that courts should limit their inquiry to the interests of the litigants appears contrary both to equitable principles and to NEPA's statutory purpose. Further, judicial inquiry into these factors in NEPA proceedings would allow agencies to present evidence on such harms derived from their administrative process. Thus, the *Monsanto* Court's sharp distinction between the types of harms deemed relevant in the EIS process and those considered in the related equitable analysis serves the policies of neither equity nor administrative law.

The Court's holding in *Monsanto* may be undermined in practice. As has been discussed, the "public interest" is the fourth factor in the traditional equitable analysis. Thus, attempts to remove public harms from the "irreparable injury" analysis may simply shift those effects into a separate factor under the judge's consideration. If *Monsanto*'s rule on third-party harms proves ineffective, it will be because the Court focused on legalistic distinctions rather than a definition of harm that would bridge the pragmatic differences between the administrative EIS process and the judicial equitable analysis.

VI. Conclusion

Litigation over the application of equitable principles to NEPA harms has provided the Circuits and the Supreme Court with ample opportunities to guide district courts' use of injunctions through rules that cabin equitable discretion. The Court's recent trend toward making use of these opportunities reflects the American legal system's merger of the legal value of clarity with equitable principles which aim "to soften and mollify the Extremity of the Law."[214] In the wake of the *Winter* and *Monsanto* decisions, it appears that, more often than not, equity is being molded so as to conform with legal formalism rather than to soften it.

Environmental injunction decisions expose untied ends in this merger because they are implemented amidst the legal frameworks created by environmental and administrative statutes while addressing cases that demand equity's flexibility to balance fact-intensive economic and social interests. It is therefore unsurprising that, as early as 1979, Russ Winner could write that, while "[a]t the remedies stage, law and equity remain quite distinct, . . . courts are beginning to rely more on precedents and to write more complete decisions concerning injunctions," and that "[e]nvironmental injunctions are the cutting edge of this merger of law and equity at the remedies stage."[215] The Supreme Court's efforts in *Monsanto* and *Winter* to bring legal formalism to NEPA injunctions show that this transition continues today.

[214] The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (1615).
[215] Winner, *supra* note 11, at 484.

As appellate courts delve into these issues in reviewing NEPA remedies, it is often unclear where legal principles end and case-specific application — the province of the trial judge's equitable discretion — begins. Such frustration may have led Justice Alito, in the oral argument for *Monsanto*, to open discussion by asking whether certiorari was improvidently granted; it also appears to have given rise to Justice Sotomayor's question to petitioners' counsel: "Put it in a legal box for me. What are your legal claims?"[216] Until the Court has disentangled the statutory, administrative, and equitable remedies available under NEPA, however, it may find that the line between legal standards and factual application is hard to trace.

The challenge of creating rules of equity is indicative of the fundamental purpose of equity: to craft case-specific remedies to problems that do not fit "in a legal box." Efforts by appellate courts to lay down rules governing equitable relief for NEPA violations suggest growing skepticism of the assumption that environmental harms lie outside that box. By forming rules within the context of equity, however, those judges will continue to face two countervailing principles reminiscent of Llewellyn's dueling canons.[217] On the one hand, "[e]quity eschews mechanical rules,"[218] and district judges' ability to administer case-specific judgments should not be subsumed by overly general rules. On the other hand, the complexity of environmental litigation and the risk of error by generalist judges calls into question the reliability of equitable discretion, which "varies like the Chancellor's foot."[219]

The merger of statutory environmental and administrative law with equitable remedies creates temptations to establish generalized standards and legal hooks that structure appellate review of trial court's decisions in equity. The experience of the *Monsanto* litigation suggests, however, that such rules may often prove difficult to apply and to enforce. Where appellate courts choose to pursue a rule-oriented approach, they should therefore contextualize those rules in accordance with the administrative policies, statutory purposes, and equitable principles relevant to NEPA. Where these conflicting policies cannot be balanced and formalized rules of equity risk raising more questions than they answer, appellate courts would do best to adhere to the time-honored tradition of deferring to trial-level equitable discretion.

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[216] Transcript of Oral Argument, *supra* note 122, at 13.

[217] *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950).

[218] Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

[219] Weinberger v. Romero-Barcelo, 456 U.S. 305, 330 n. 11 (1982) (citing Holmberg, 327 U.S. at 396).