Monsanto Co. v. Geertson Seed Farms: Breathing a Sigh of Equitable Relief

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The National Environmental Policy Act's (NEPA)[1] best years may well be behind it. Enacted over four decades ago, NEPA announced grandiose goals "to promote efforts which will prevent or eliminate damage to the environment and biosphere."[2] Despite early bipartisan support,[3] NEPA has been significantly circumscribed over its lifespan.[4] Indeed, some say that NEPA remains under siege, threatened by a host of legislative and administrative proposals aimed at curtailing its requirements.[5]

The Supreme Court of the United States dealt NEPA an early series of devastating blows.[6] Just six years after President Nixon signed NEPA into law, the Supreme Court handed down *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, holding that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[7] The very same Term, in *Kleppe v. Sierra Club*, the Court ruled that an agency need not conduct a collective, comprehensive NEPA review of individual activities planned to occur within a region unless there has been an actual proposal for a regional plan of development.[8] A year later, the Court determined that the proper role for a court reviewing an agency decision under NEPA is "to insure that the agency has considered the environmental consequences," not to second-guess the agency's substantive decision.[9] Then, in 1989, in *Robertson v. Methow Valley Citizens Council*, in what many thought to be NEPA's death knell, the

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1. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370f (2006).

2. *Id.* § 4321.

3. JAY E. AUSTIN ET AL., ENVTL. LAW INST., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 5 (2004); ROBERT G. DREHER, GEORGETOWN ENVTL. LAW & POL'Y INST., NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 1 (2005), http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPAUnderSiegeFinal.pdf.

4. Matthew M. Villmer, *Procedural Squabbling Ahead of Global Annihilation: Strengthening the National Environmental Policy Act in a New Technological Era*, 11 FLA. COASTAL L. REV. 321, 321 (2010); Nicholas C. Yost, *NEPA's Promise-Partially Fulfilled*, 20 ENVTL. L. 533, 539 (1990).

5. DREHER, *supra* note 3, at 4-11; *see also* Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50 (2003).

6. Two years after NEPA's passage, Justice Douglas dissented from a decision to deny review of a NEPA case warning of "the beginning of the demise of the mandate of NEPA." Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 407 U.S. 926, 933 (1972); *see also* Donald N. Zillman & Peggy Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505, 513 (1990).

7. 426 U.S. 776, 778 (1976).

8. *See* 427 U.S. 390, 414-15 (1976).

9. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

Court held the statute's mandates to be strictly procedural.[10] Prior to *Methow Valley*, many federal circuit courts had held that NEPA, coupled with the Administrative Procedure Act (APA), afforded courts a right of review on the environmental merits of agency decision making.[11] After *Methow Valley*, it seemed that far from preventing damage to the environment, NEPA guaranteed little more than the felling of trees as a comprehensive federal paperwork scheme.[12]

But NEPA's influence on environmental decision making can scarcely be doubted.[13] Examples abound where the NEPA process, sometimes spurred by litigation, has helped minimize and mitigate the environmental impacts of projects, or has prompted federal agencies to scrap certain projects altogether, due to environmental concerns.[14] And NEPA litigation has carried on doggedly. At least one study indicated that the rate of new NEPA litigation had, in fact, increased in recent years.[15] Still, the statute's track record at the Supreme Court suggests that the high court may harbor some hostility toward it.[16] On January 1, 2010,

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10. 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." (citing *Strycker's Bay*, 444 U.S. at 227-28; Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978))).

11. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 n.10 (D.C. Cir. 1971) (emphasizing "the necessity to separate the two, substantive and procedural, standards" when analyzing an agency's compliance with NEPA); Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298 (8th Cir. 1972) ("Given an agency obligation to carry out the substantive requirements of [NEPA], we believe that courts have an obligation to review substantive agency decisions on the merits."); Conservation Council of N.C. v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam) ("District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA."); Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1139-40 (5th Cir. 1974) (holding that "an agency's ecological decisions under NEPA are not beyond APA scrutiny"); *see also* Harvey Bartlett, Comment, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENVTL. L.J. 411, 419-24 (2000).

12. Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277, 277 (1990) (citing *Methow Valley*, 490 U.S. at 332-33; Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989)).

13. DREHER, *supra* note 3, at 4.

14. For a short list of examples where NEPA has had profound, on-the-ground impacts, see *id.* at 4-6.

15. AUSTIN ET AL., *supra* note 3, at 12.

16. David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 553-54 (1990) (citing D. MANDELKER, NEPA LAW AND LITIGATION, at vi-vii (1984); Daniel A. Farber, *Disdain for 17-Year-Old Statute Evident in High Court's Rulings*, NAT'L L.J., May 4, 1987, at 22; Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 4-5 (1983)); *see* Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 561 (1997).

the statute turned forty, with NEPA plaintiffs batting a discouraging 0-for-15 before the Supreme Court.[17]

A mere two weeks after the statute turned forty, the Supreme Court granted certiorari in another NEPA case: *Monsanto Co. v. Geertson Seed Farms*.[18] *Geertson* came to the Court on a petition from Monsanto, the leading corporate producer of genetically engineered (GE) seeds.[19] Monsanto appealed to the high court after the United States Court of Appeals for the Ninth Circuit affirmed a district court's decision that vacated an agency rule deregulating a variety of GE alfalfa and enjoining the further planting or selling of seed pending the release of a full environmental impact statement.[20] Monsanto argued that the lower court erred in granting injunctive relief without requiring plaintiffs to show a sufficient likelihood of "irreparable harm" and without conducting an evidentiary hearing to resolve facts related to the scope of the injunction.[21]

When the Supreme Court granted certiorari in *Geertson*, word quickly spread around the environmental law blogosphere that NEPA could be dealt another crippling blow.[22] In light of NEPA plaintiffs' dismal overall track record at the Supreme Court and environmental

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17. William H. Rodgers Jr., *NEPA's Insatiable Optimism*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10618, 10618 (2009).

18. Geertson Seed Farms v. Johanns, 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

19. Amanda L. Kool, *Halting Pig in the Parlor Patents: Nuisance Law as a Tool To Redress Crop Contamination*, 50 JURIMETRICS J. 453, 459 (2010). GE crops are plant varieties derived from a process of genetic manipulation. Sheryl Lawrence, *What Would You Do with a Fluorescent Green Pig?: How Novel Transgenic Products Reveal Flaws in the Foundational Assumptions for the Regulation of Biotechnology*, 34 ECOLOGY L.Q. 201, 209-10 (2007) (citing NAT'L RESEARCH COUNCIL, SAFETY OF GENETICALLY ENGINEERED FOODS: APPROACHES TO ASSESSING UNINTENDED HEALTH EFFECTS, REPORT IN BRIEF (2004)). More specifically, genetic engineering involves the insertion of genetic code from one organism into another organism—possibly from a different species or kingdom altogether—to form a new genetic combination that would never occur in nature without human intervention. *Id.* GE crop developers and purveyors have staunchly defended the practice as a way of increasing crop yields in the face of growing population demands and changing climatic conditions. Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT'L L.J. 47, 55-56 (2001) (citing AGRICULTURAL BIOTECHNOLOGY IN INTERNATIONAL DEVELOPMENT (Catherine L. Ives & Bruce M. Beford eds., 1988)). Some studies indicate that genetic engineering does not increase crop yields, however. *See, e.g.*, DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, FAILURE TO YIELD: EVALUATING THE PERFORMANCE OF GENETICALLY ENGINEERED CROPS (Apr. 2009), http://www.ucsusa.org/assets/documents/food_and_agriculture/failure-to-yield.pdf.

20. *Geertson*, 130 S. Ct. at 2750-51.

21. *Id.* at 2760-62.

22. *See, e.g.*, Reed Rubinstein, *Supreme Court To Trim NEPA?*, ENVTL. & ENERGY L. BLOG (Feb. 9, 2010), http://www.environmentalandenergylawblog.com/2010/02/articles/court-cases/supreme-court-to-trim-nepa/.

plaintiffs' less than exemplary track record before the Roberts Court,[23] the prospect of high-court review was deeply unsettling for environmentalists. Moreover, the case represented the Supreme Court's first-ever look at the regulation of a GE crop.[24] Environmentalists, wary of the safety and ecological soundness of growing and consuming crops with novel gene combinations,[25] worried that the case might set a precedent for greater GE crop deregulation.[26] Legal pundits voiced particular concern that the Court might impose additional hurdles on plaintiffs seeking injunctive relief under NEPA.[27] This concern was especially present in environmentalists' minds because a mere two years prior the Supreme Court had held in *Winter v. Natural Resource Defense Council, Inc.*,[28] that NEPA plaintiffs seeking a preliminary injunction were required to demonstrate a likelihood of irreparable injury absent injunctive relief, rather than merely a possibility of it. While violations of substantive statutes may well constitute irreparable harm as a matter of law,[29] violations of a procedural statute like NEPA do not.[30] After the Court's decision in *Winter*, demonstrably proving that advancement of a

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23. Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, 330 (2010).

24. Gabriel Nelson, *Supreme Court To Take First Look at Genetically Modified Crops in Case with NEPA Implications*, N.Y. TIMES, Apr. 22, 2010, http://www.nytimes.com/gwire/2010/04/22/22greenwire-supreme-court-to-take-first-look-at-genetically-4425.html.

25. *See* Allison M. Straka, Case 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) (citing Anthony J. Conner et al., *The Release of Genetically Modified Crops into the Environment, Part II Overview of Risk Assessment*, 33 PLANT J. 19, 19-20 (2003); Rebecca Bratspies, *Some Thoughts on the American Approach To Regulating Genetically Modified Organisms*, 16 KAN. J.L. & PUB. POL'Y 393, 394 (2007)).

26. *See id.*; Heather Whitehead, *Supreme Court To Hear First GE Case*, CIVIL EATS (Apr. 27, 2010), http://civileats.com/2010/04/27/supreme-court-to-hear-first-ge-crop-case/.

27. *See* Nelson, *supra* note 24; Straka, *supra* note 25, at 403-04 (citing Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1142-43 (9th Cir. 2009) (Smith, J., dissenting); Conner, *supra* note 25, at 34).

28. 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." (citing Los Angeles v. Lyons, 461 U.S. 95, 103 (1983); Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 441 (1974); O'Shea v. Littleton, 414 U.S. 488, 502 (1974); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2948.1, at 139, 154-55 (2d ed. 1995))).

29. Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents at 29, Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010) (No. 09-475), 2010 WL 1393439, at *29 (quoting United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." (alteration in original))); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978). In *Tennessee Valley Authority v. Hill*, the Court affirmed an injunction prohibiting the completion of a dam where its construction would eradicate an endangered species. *Id.* The Court held that "the explicit provisions of the Endangered Species Act *require* precisely that result." *Id.* at 173 (emphasis added).

30. *Winter*, 555 U.S. at 22-23.

project without proper NEPA review causes a sufficient likelihood of substantive irreparable harm became a daunting task for plaintiffs.[31] The issue of whether or not the *Geertson* plaintiffs carried their burden was squarely before the Court.[32]

To the relief of many in the environmental community, the *Geertson* Court, in a 7-1 decision authored by Justice Alito, rejected the district court's injunction as being overbroad, without elevating the likelihood of irreparable harm requirement[33] or passing judgment on whether the lower court improperly issued the injunction absent an additional evidentiary hearing.[34] Although the Court set aside the injunction prohibiting the further planting or selling of GE alfalfa seed pending the release of an environmental impact statement, the Court's decision nevertheless left the lower court's vacatur of the rule deregulating GE alfalfa in place.[35] Because the rule formed the basis of the agency's action in this case, vacatur of the rule deregulating GE alfalfa had the same practical effect as the injunction keeping GE alfalfa seed off the market.[36] Despite losing the case, environmentalists hailed the *Geertson* ruling as a victory.[37]

For NEPA plaintiffs, *Geertson* illustrates the wisdom of seeking multiple forms of equitable relief.[38] Where an agency rule forms the basis of a major federal action under NEPA, vacatur and injunctive relief can effect similar results.[39] In such circumstances, plaintiffs challenging an agency action are well-served to press for vacatur of the rule above and beyond injunctive relief since the standards governing vacatur tend to

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31. *See infra* Part III.A-C.

32. Petition for a Writ of Certiorari, *Geertson*, 130 S. Ct. 2743 (No. 90-475), 2009 WL 3420495.

33. *Geertson*, 130 S. Ct. at 2761-62; *see infra* Part II.G.

34. *Geertson*, 130 S. Ct. at 2762.

35. *Id.* at 2761-62. Curiously, both sides claimed victory in *Geertson*. Mike Ludwig, *Monsanto, Opponents Both Claim Victory in Historic Genetically Modified Crop Case*, TRUTHOUT (June 22, 2010), http://archive.truthout.org/monsanto-opponents-both-claim-victory-historic-genetically-modified-crop-case60678.

36. Ludwig, *supra* note 35; *see also Geertson*, 130 S. Ct. at 2761. The rule deregulating GE alfalfa was vacated for a time; however, in early 2011, GE alfalfa once again was deregulated through rule making. Mike Ludwig, *Farmers Sue USDA over Monsanto Alfalfa—Again*, GLOBAL REALM (Mar. 25, 2011), http://theglobalrealm.com/2011/03/27/farmers-sue-usda-over-monsanto-alfalfa-again/. The new rule deregulating GE alfalfa has also been challenged. *Id.*

37. *Supreme Court Ruling in Monsanto Case Is Victory for Center for Food Safety, Farmers*, TRUE FOOD NETWORK (June 21, 2010), http://truefoodnow.org/2010/06/21/supreme-court-ruling-in-monsanto-case-is-victory-for-center-for-food-safety-farmers/.

38. *See Geertson*, 130 S. Ct. at 2761.

39. *Id.* Vacatur and injunctive relief both represent prescriptive equitable remedies. *Id.* at 2766-67 (Stevens, J., dissenting) ("At the outset, it is important to observe that when a district court is faced with an unlawful agency action, a set of parties who have relied on that action, and a prayer for relief to avoid irreparable harm, the court is operating under its powers of equity.").

be more easily met than the test for injunctive relief.[40] Some courts, in fact, have treated vacatur as the presumptive remedy for APA § 706 rule-making violations.[41] Section 706 of the APA plainly directs reviewing courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42]

Other courts have been more reluctant to assume that a full vacatur should follow a determination that a rule is unlawful.[43] In recent years, interpreting the admonition in APA § 706 that "due account shall be taken of the rule of prejudicial error,"[44] the Supreme Court has guided lower courts to vacate unlawful rules only if their deficiencies are prejudicial.[45] Under this prejudicial error test, an agency rule found to violate APA § 706 would nonetheless stand if its deficiencies were merely harmless.[46] Like the irreparable injury prong of the test for injunctive relief, the burden of showing prejudicial error usually falls on plaintiffs attacking an agency's decision.[47] Unlike the irreparable harm requirement, however, the test for prejudicial error has often proven relenting for plaintiffs challenging unlawful procedural deficiencies.[48] Given NEPA's ambitious statutory aims and the flexible nature of equitable relief, the rule of prejudicial error provides a more sensible and

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40. Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 78-79 (D.D.C. 2010) (citing *Geertson*, 130 S. Ct. at 2757; Fed. Commc'ns Comm'n v. NetWave Personal Commc'ns Inc., 537 U.S. 293, 300 (2003); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001)). The *Geertson* Court styled vacatur a "less drastic remedy" than an injunction. *Geertson*, 130 S. Ct. at 2761 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982); Winter v. Natural Res. Def. Council, 555 U.S. 7, 29-33 (2008)).

41. *See* Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable . . . the . . . decision must be vacated and the matter remanded . . . for further consideration.'" (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973))); *Van Antwerp*, 719 F. Supp. 2d at 78-79 (citing *Geertson*, 130 S. Ct. at 2757; *NextWave*, 537 U.S. at 300; *Nat'l Mining Ass'n*, 145 F.3d at 1409; *Am. Bioscience*, 269 F.3d at 1084).

42. Administrative Procedure Act (APA), 5 U.S.C. § 706(2) (2006).

43. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

44. 5 U.S.C. § 706.

45. Shinseki v. Sanders, 129 S. Ct. 1696, 1704 (2009); *see also* Craig Smith, Note, *Taking "Due Account" of the APA's Prejudicial-Error Rule*, 96 VA. L. REV. 1727, 1727 (2010) ("[U]nder a doctrine called both the 'harmless-error' rule and the 'prejudicial-error' rule, agencies must correct their mistakes only if they have injured someone." (footnote omitted)).

46. *See* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 765 (9th Cir. 1986) (citing Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982)).

47. *Sanders*, 129 S. Ct. at 1706 (citations omitted).

48. *See, e.g.*, Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090-1106 (9th Cir. 2011).

accommodating test for prescriptive equitable relief than does the irreparable harm requirement for injunctive relief.[49]

This Article explores the issues that *Geertson* raised with respect to the standards for prescriptive equitable relief—vacatur under the APA and injunctive relief more broadly. Part I of this Article examines the statutory framework of NEPA. Part II looks at *Geertson*. Part III examines the irreparable harm prong of the test for injunctive relief in the context of NEPA. Part IV first considers the alternative of seeking vacatur of a rule under the APA where the rule forms the basis of a major federal action. Part IV then turns to the interplay between vacatur and the prejudicial error rule, and ultimately recommends a new test for vacatur that integrates the prejudicial error rule. Finally, Part V proposes to replace the irreparable harm requirement for injunctive relief with the prejudicial error rule to better effectuate the aims of procedural statutes like NEPA and to help harmonize the disparate standards governing prescriptive equitable relief in the administrative law context.

I. ENVIRONMENTAL REVIEW UNDER NEPA

NEPA has been called the "basic national charter for protection of the environment."[50] For a statute that has received so much hermeneutical attention by the courts and regulatory explication by administrative agencies, NEPA is remarkably straightforward.[51] At its core, the statute simply requires agencies to take a "hard look" at the environmental considerations of proposed actions and to broadly disseminate relevant information to the public in the course of decision making.[52] Although the Supreme Court in *Methow Valley* held that an "agency is not constrained by NEPA from deciding that other values outweigh the environmental costs,"[53] the Court also noted that NEPA's prescribed process will "inevitably bring pressure to bear on agencies 'to respond to the needs of environmental quality.'"[54]

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49. *See infra* Part V.B.

50. 40 C.F.R. § 1500.1(a) (2011).

51. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 909 (2002).

52. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989) ("[T]he EIS requirement and NEPA's other 'action-forcing' procedures implement that statute's sweeping policy goals by ensuring that agencies will take a 'hard look' at environmental consequences and by guaranteeing broad public dissemination of relevant information.").

53. *Id.* at 350 (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam); Kleepe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

54. *Id.* at 349 (quoting 115 CONG. REC. 40,425 (1969) (remarks of Sen. Muskie)).

In spite of NEPA's procedural construction, Congress intended for the statute to effectuate broad substantive goals.[55] In stirring diction on the Senate floor before NEPA's final passage, Senator Henry Jackson, who introduced the bill, declared:

> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. . . .
>
> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.[56]

NEPA proclaims "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."[57] NEPA's goals may be lofty,[58] but they are not hollow.[59] This Part looks first at NEPA's procedural mandates and then examines the judicial relief available to remedy NEPA violations.

A. The NEPA Process

The Environmental Impact Statement (EIS) is NEPA's central instrument for achieving its broad goals.[60] Before undertaking "major Federal actions significantly affecting the quality of the human environment,"[61] NEPA requires federal agencies to prepare and publicly produce a detailed EIS on the impacts of the proposed action,[62] its alternatives,[63] and available mitigation measures to offset impacts.[64] An EIS is designed to provide decision makers and the public with information about the environmental ramifications of a proposed action.[65] An EIS must contain "relevant information"[66] related to the reasonably

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55. *See* Leslye A. Herrmann, Comment, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263, 1266-72 (1992).
56. 115 CONG. REC. 40,416 (1969) (remarks of Sen. Jackson).
57. 42 U.S.C. § 4331 (2006).
58. United States v. Students Challenging Regulatory Agency Procedures (*SCRAP I*), 412 U.S. 669, 693 (1973).
59. *See Methow Valley*, 490 U.S. at 350-51.
60. *See SCRAP I*, 412 U.S. at 693 (citing 42 U.S.C. § 4331).
61. 42 U.S.C. § 4332(C).
62. *Id.* § 4332(C)(i)-(ii).
63. *Id.* § 4332(C)(iii); 40 C.F.R. § 1502.14(a)-(c) (2011).
64. 40 C.F.R. § 1502.14(f).
65. Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).
66. Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1030 (2d Cir. 1983).

foreseeable environmental consequences of both the proposed action and any feasible alternatives.[67] This information must be thorough enough to allow for a critical evaluation of whether to proceed with the project in light of its environmental impacts.[68] An EIS should respond to issues raised[69] and should include reasoned, comprehensible scientific analysis and explanation.[70]

When questions arise as to whether an EIS is necessary, an agency must ordinarily prepare a less extensive Environmental Assessment (EA) to determine whether the environmental effects of its proposed action are significant.[71] If the proposed action meets the "significance" threshold, the agency must prepare a full EIS.[72] If, on the other hand, an agency concludes that impacts from an action will not significantly affect the environment (thus, making the preparation of an EIS unnecessary), the agency must issue a Finding of No Significant Impact (FONSI).[73]

B. Judicial Review

NEPA itself does not authorize a private right of action.[74] Plaintiffs, however, may challenge NEPA decisions pursuant to the APA.[75] EISs and

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67. City of Grapevine, Tex. v. Dep't of Transp., 17 F.3d 1502, 1503 (D.C. Cir. 1994) (citing 42 U.S.C. § 4332(2)(c)(i), (iii)).

68. *Trout Unlimited*, 509 F.2d at 1282 (citing Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (1971)); *see also* Iowa Citizens for Envtl. Quality, Inc. v. Volpe, 487 F.2d 849, 851 (8th Cir. 1973) (citing Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 350-51 (8th Cir. 1972); Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297-99 (8th Cir. 1972); *Calvert Cliffs*, 449 F.2d at 1114).

69. 40 C.F.R. § 1503.4.

70. Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916, 933 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

71. 40 C.F.R. §§ 1501.4(c), 1508.9; *see also id.* § 1508.27.

72. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.27. NEPA's implementing regulations establish that significance determinations are guided by two factors: context and intensity. 40 C.F.R. § 1508.27. Context means that the significance of proposed action must be analyzed at several levels (e.g., society, region, interested parties, locality, etc.). *Id.* § 1508.27(a). Intensity, in turn, requires the consideration of factors including, but not limited to:

> (2) The degree to which the proposed action affects public health or safety. (3) Unique characteristics of the geographic area . . . . (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial. (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. (6) The degree to which the action may establish a precedent for future actions with significant effects . . . . (7) . . . [C]umulatively significant impacts.

Id. § 1508.27(b)(2)-(7).

73. 40 C.F.R. § 1501.4(e).

74. Sierra Club v. Slater, 120 F.3d 623, 630 (6th Cir. 1997) (citing Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988)).

FONSIs constitute final agency actions that are reviewable under APA § 704.[76] Upon review, agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[77] or "without observance of procedure required by law"[78] must be "h[e]ld unlawful and set aside."[79] In spite of this clear statutory directive, reviewing courts have often found occasion not to set aside unlawful agency actions at the remedies phase.[80] For example, some courts have ordered an agency to rectify its NEPA analysis to comply with the statute, but have nonetheless allowed the agency's action to move forward.[81] Other courts have simply remedied NEPA violations with declaratory judgments forgoing any kind of prescriptive order.[82] At the remedies phase of litigation, equitable discretion has pervaded NEPA jurisprudence.[83] Indeed, courts remedying NEPA violations have

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75. *See, e.g.*, Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993) (citing 5 U.S.C. § 702).

76. APA, 5 U.S.C. § 704 (2006) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 369 (D.C. Cir. 1981).

77. 5 U.S.C. § 706(2)(A).

78. *Id.* § 706(2)(D).

79. *Id.* § 706(2). Courts have not settled the question of whether the appropriate standard of review for assessing the adequacy of a NEPA document is conformance with the "procedure required by law"—the standard provided in APA § 706(2)(D)—or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"—the standard provided in APA § 706(2)(A). *See* 86 AM. JUR. 3D *Proof of Facts* 99 § 19 (2008). The decision as to which of these standards to apply may hinge on whether a court considers only NEPA's procedural mandates, in which case APA § 706(2)(D) may provide a more appropriate standard, or whether a court decides to review the substance of the agency's decision expressed in a NEPA document, in which case APA § 706(2)(A) may be the more appropriate standard. *Id.*

80. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see also*, *e.g.*, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990); La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003). Some have sharply criticized judicial remedies that allow agency actions to proceed in the face of NEPA violations. Herrmann, *supra* note 55, at 1270. Herrmann notes, "Ignoring procedural infirmities, or condoning them by letting agency action proceed notwithstanding, undermines NEPA's goals." *Id.* Elsewhere, Herrmann urges, "Courts must remember that in many cases allowing an agency to proceed makes a mockery of the EIS process, converting it from analysis to rationalization." *Id.* at 1289.

81. *See, e.g.*, 'Ilio̲ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1101-02 (9th Cir. 2006).

82. *See* Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1098-99 (D.C. Cir. 1973).

83. Levin, *supra* note 43, at 323 ("For more than sixty years, courts have drawn upon the traditions of equity to support a broad understanding of the remedial powers of federal courts in administrative law cases—even in the face of arguably contrary statutory directives."); Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205, 218 (2011). Mach notes, "The statutory remedies provided by NEPA and the APA have been applied with a surprising degree of flexibility." *Id.* Mach also observes, "[C]ourts' application of APA section 706 suggests that judges view these statutory remedies within the framework of traditional

frequently coupled their decisions to "hold unlawful and set aside" agency actions, the APA's prescribed vacatur and remand remedy,[84] with injunctive relief-the equitable power of courts to order prospective action and "to mould each decree to the necessities of the particular case."[85] For a court to grant injunctive relief, a prevailing plaintiff must satisfy a four-factor test.[86] As outlined by the Supreme Court:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[87]

Where plaintiffs meet this test and a court grants injunctive relief in addition to the statutory relief provided in APA § 706, redundancies in the effect of the court's remedial order can occur.[88] Where plaintiffs are unable to satisfy the four-factor test for injunctive relief but nevertheless demonstrate an administrative rule underlying an agency action to be unlawful, vacatur of the rule may effectively halt the action.[89]

It is important to note that vacatur of a rule will provide relief for NEPA violations only where the rule forms the basis of an agency action under NEPA.[90] Furthermore, vacatur of a rule will not always thwart a major federal action under NEPA in its entirety.[91] An agency could still undertake various measures, short of triggering rule making, in the face of vacatur.[92] It could also promulgate a new or improved rule.[93] Thus,

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equitable analysis." *Id.* (citing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2767 (2010)).

84. 5 U.S.C. § 706(2).

85. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); *see also* Greater Yellowstone Coal. v. Bosworth, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("Courts have not hesitated to enjoin an agency action that was taken in violation of NEPA."); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 237 (D.D.C. 2003).

86. *Geertson*, 130 S. Ct. at 2756-57 (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006)) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 29-33 (2008)).

87. *eBay Inc.*, 547 U.S. at 391 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13 (1982); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)).

88. Mach, *supra* note 83, at 237. Mach explains that determining the bounds of where an "injunction ends and vacatur begins is legally important" because vacatur and injunctive relief implicate "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)." *Id.*

89. *See, e.g.*, *Geertson*, 130 S. Ct. 2743.

90. *See supra* Part I.B.

91. *See, e.g.*, *Geertson*, 130 S. Ct. at 2754 ("[T]here is more than a strong likelihood that APHIS would partially deregulate RRA were it not for the District Court's injunction.").

92. *See* Levin, *supra* note 43, at 303.

plaintiffs should not assume that every vacatur will affect a NEPA action in the same way as injunctive relief.[94] In some circumstances, vacatur of a rule could inject additional environmental uncertainty into a proposal or could be counterproductive to a plaintiff's goals.[95] For example, vacating the entirety of a rule establishing critical habitat for an endangered species where environmental plaintiffs seek additional habitat designations would weaken environmental protections for that species, at least in the short-term.[96] Where rule vacatur does not provide the relief that NEPA plaintiffs seek, plaintiffs will still have to rely on injunctive relief to remedy their grievances.[97]

II. ALFALFA STRAWS IN THE WIND: THE FORETELLING OF *MONSANTO CO. V. GEERTSON SEED FARMS*

The case of *Monsanto Co. v. Geertson Seed Farms* casts doubt on a court's equitable discretion to tailor relief where a statutory remedy plainly prescribes a particular remedial outcome.[98] More specifically, *Geertson* calls into question a district court's decision to grant injunctive relief above and beyond vacatur where vacatur of a rule was sufficient to redress plaintiffs' NEPA grievances.[99] This Part tracks the development of *Geertson* from a challenged administrative rule-making decision through its various levels of judicial appeal to its ultimate resolution at the Supreme Court.

A. Back at the Agency

The proverbial seeds of *Geertson* were sown in an administrative quarrel over the fate of Monsanto's Roundup Ready alfalfa long before anyone had dreamed that the case might set Supreme Court precedent.[100] Alfalfa, often used as cattle forage, is the United States' fourth largest

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93. Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 279 (2005).

94. *See* Mach, *supra* note 83, at 238. Injunctive relief is variable as well depending upon the particular facts of a case. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Injunctions are not predictable, one-size-fits-all remedies. *Id.*

95. *See, e.g.*, Natural Res. Def. Council v. U.S. Dep't of Interior, 275 F. Supp. 2d 1136, 1145-46 (C.D. Cal. 2002).

96. *See* Catron County Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1433-37 (10th Cir. 1996) (discussing NEPA's application to critical habitat designations under the Endangered Species Act).

97. *See infra* Part V.

98. *See* Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

99. *Id.* at 2757-62.

100. Geertson Seed Farms v. Johanns, No. C 06-01075 CRB, 2007 WL 518624, at *1 (N.D. Cal. Feb. 13, 2007).

crop and boasts substantial export returns.[101] The pollination of alfalfa, primarily by bees, can occur up to two miles from the pollen source.[102] Monsanto had genetically engineered its Roundup Ready alfalfa to be resistant to the herbicide glyphosate (the active ingredient in Monsanto's Roundup).[103] This resistance allows Roundup Ready alfalfa growers to apply glyphosate on their fields to kill weeds without harming their sought-after alfalfa crop.[104]

Pursuant to the Plant Protection Act,[105] the Animal and Plant Health Inspection Service (APHIS), an administrative body within the United States Department of Agriculture (USDA), regulates "organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests."[106] APHIS treats novel GE crop varieties as regulated articles.[107] Unless and until APHIS expressly deregulates a particular GE crop variety, it cannot be commercially grown or sold in the United States.[108]

In April 2004, Monsanto Company and its licensee, Forage Genetics International, petitioned APHIS for the full deregulation of Roundup Ready alfalfa.[109] In November 2004, APHIS released for public comment a draft EA on Monsanto and Forage Genetics' deregulation proposal.[110] Of the 663 comments the agency received in response to the

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101. Rebecca Porter, *Ninth Circuit Backs Injunction Banning Sale of Biotech Crop*, TRIAL, Nov. 2008, at 78; *see* Brief of Amicus Curiae Ark. Rice Growers Ass'n et al. in Support of Respondents at 24-25, *Geertson*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1393443, at *24-25 ("[Alfalfa] [e]xports to Japan and Korea exceed $159 million dollars annually." (citing GLYPHOSPHATE-TOLERANT ALFALFA EVENTS J101 AND J136: REQUEST FOR NONREGULATED STATUS—DRAFT ENVIRONMENTAL IMPACT STATEMENT, APHIS, USDA (Nov. 2009), http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gealfalfa_deis.pdf [hereinafter DRAFT EIS])).

102. *Johanns*, 2007 WL 518624, at *2 (citing the administrative record).

103. *Id.* at *1.

104. *See id.* at *1-2.

105. Plant Protection Act, 7 U.S.C. §§ 7701-7786 (2006).

106. 7 C.F.R. § 340.0(a)(2) n.1 (2011).

107. *Id.* § 340.2(a).

108. *See id.* § 340.0. Several GE crops varieties have been fully deregulated in the United States by APHIS. *See* Jorge Fernandez-Cornejo & Margriet Caswell, *The First Decade of Genetically Engineered Crops in the United States*, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC. 6 (Apr. 2006), www.ers.usda.gov/publications/eib11/eib11.pdf. Many more petitions are currently pending. *Id.* at 7 fig.5. Corn, cotton, and soybeans are the three most widely planted GE crops in the United States. *Id.* at 8. In 2009, eighty-five percent of the corn cultivated in the United States, eighty-eight percent of the cotton, and ninety-one percent of the soybeans were genetically engineered. *USA: Cultivation of GM Plants, 2009*, GMO COMPASS (July 30, 2009), http://www.gmo-compass.org/eng/agri_biotechnology/gmo_planting/506.usa_cultivation_gm_plants_2009.html.

109. Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1134 (9th Cir. 2009), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

110. *Id.*

draft EA, 520 opposed the deregulation of Roundup Ready alfalfa.[111] Particularly concerning to many commentators was Roundup Ready alfalfa's potential to contaminate organic or conventional alfalfa crops,[112] its potential to give rise to increased glyphosate use, and its accompanying potential to precipitate the development of glyphosate-resistant weeds.[113] In spite of these objections, however, APHIS issued a deregulation determination and FONSI concluding that the impacts of Roundup Ready alfalfa-deregulation would be less than significant.[114]

APHIS dismissed the commentators' concerns in its final EA and FONSI. Specifically, with respect to the concerns about genetic contamination of organic alfalfa crops, APHIS determined that organic farmers bore the onus of ensuring that their crops met organic standards and did not become genetically contaminated through cross pollination.[115] With respect to concerns about genetic contamination of conventional alfalfa crops and the concomitant potential to destroy export markets that reject GE crops, APHIS's analysis focused on Japan, by far the largest international alfalfa market for the United States.[116] Despite Japan's widespread rejection of GE alfalfa, APHIS noted that Japan nevertheless allows up to one percent of a crop import to be GE contaminated.[117] APHIS summarily concluded: "[B]y employing reasonable quality control, it is highly unlikely that the level of glyphosate tolerant alfalfa will exceed 1% in conventional alfalfa hay."[118] With proper seed labeling, APHIS reasoned, farmers would know what kind of alfalfa they were planting.[119] Finally, with respect to concerns about Roundup Ready alfalfa's potential to precipitate the development of glyphosate-resistant weeds, APHIS noted that the problem was not limited to the use of Roundup Ready alfalfa; weeds of various kinds had developed resistance to most every widely used agricultural herbicide.[120] In the end, APHIS

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111. *Id.*

112. Geertson Seed Farms v. Johanns, No. C 06-01075 CRB, 2007 WL 518624, at *2 (N.D. Cal. Feb. 13, 2007). Alfalfa growers who sell to markets that reject GE crops rely on the purity of their yield to ensure its marketability. *See* Brief of Amicus Curiae Ark. Rice Growers Ass'n et al. in Support of Respondents, *supra* note 101, at 24. Commentators noted that genetic contamination could threaten conventional and organic alfalfa markets including major export markets. *Id.*

113. *Johanns*, 2007 WL 518624, at *2.

114. *Id.* (citing the administrative record at 5488).

115. *Id.*

116. *Id.* ("75 percent of the alfalfa exported from the United States . . . is exported to Japan.").

117. *Id.*

118. *Id.* (quoting the administrative record).

119. *Id.* at *3.

120. *Id.*

determined that alternative herbicide application and other strategies could cut down on the problem of glyphosate-resistant weeds and that "good stewardship" was apt to be the only defense against them.[121] APHIS's rationale hardly mollified the critics of deregulation.

B. Geertson *at the District Court*

In February 2006, environmentalists filed suit against the Secretary of the USDA in federal court in the Northern District of California, alleging that the agency violated NEPA by failing to prepare an EIS before making its deregulation determination. Judge Charles R. Breyer, the brother of U.S. Supreme Court Justice Stephen G. Breyer, presided over the case at the district court level—a fact which would come back to haunt environmentalists when the environment-friendly Justice Stephen Breyer recused himself from hearing the case when it ultimately made its way to the Supreme Court.[122] Weighing the evidence, Judge Breyer found that the environmental plaintiffs had raised "[s]ubstantial questions" as to whether the deregulation of Roundup Ready alfalfa would "lead to the transmission of the engineered gene to organic and conventional alfalfa" and "the extent to which Roundup Ready alfalfa will contribute to the development of Roundup-resistant weeds."[123] Judge Breyer held that APHIS had failed to take NEPA's requisite "hard look" by not preparing a full EIS.[124]

While the merits of the case thus far presented no insuperable issues, how best to remedy the NEPA violation posed thornier questions. After APHIS had issued its deregulation determination, albeit unlawfully, some growers had already planted Roundup Ready alfalfa seed.[125] Others had bought seed in anticipation of the upcoming planting season.[126] Monsanto and Forage Genetics intervened at the remedies phase, arguing that any enjoinder preventing farmers from growing Roundup Ready alfalfa would be manifestly unjust to those who had already planted or bought the seed.[127] On March 12, 2007, Judge Breyer issued a preliminary injunction barring all further sales of Roundup Ready alfalfa, as well as any planting of it after March 30, 2007, pending the

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121. *Id.* (quoting the administrative record at 5492).
122. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 1133 (2010).
123. *Johanns*, 2007 WL 518624, at *12.
124. *Id.*
125. Geertson Farms Inc. v. Johanns, No. C 06-01075 CRB, 2007 WL 776146, at *1 (N.D. Cal. Mar. 12, 2007).
126. *Id.*
127. *See id.* at *2.

issuance of a permanent injunction.[128] Judge Breyer's preliminary injunction gave farmers, who had already purchased Roundup Ready alfalfa seed, a short window of asylum to plant their seed and those who had already planted it immunity from the injunction.[129]

In April 2007, Judge Breyer held a hearing on the scope of permanent injunctive relief.[130] The environmental plaintiffs asked the court to permanently enjoin all future planting of Roundup Ready alfalfa pending NEPA compliance.[131] Defendant APHIS and intervenors Monsanto and Forage Genetics requested that the planting of Roundup Ready alfalfa proceed subject to certain conditions.[132] The intervenors also requested an evidentiary hearing to probe the veracity of plaintiffs' contamination claims vis-à-vis the scope of injunctive relief.[133] In May 2007, the court denied intervenors' request for an additional evidentiary hearing and issued a permanent injunction enjoining all further planting of Roundup Ready alfalfa pending the completion of a full EIS.[134] The court found that the risk of potential genetic contamination "sufficiently established irreparable injury and that the balance of the equities weighs . . . against allowing the continued expansion of the Roundup Ready alfalfa market pending the government's completion of the EIS."[135] The district court entered its final judgment:

> (1) vacating the June 2005 deregulation decision; (2) ordering the government to prepare an EIS before it makes a decision on Monsanto's deregulation petition; (3) enjoining the planting of any Roundup Ready alfalfa in the United States after March 30, 2007 pending the government's completion of the EIS and decision on the deregulation petition; and (4) imposing . . . conditions on the handling and identification of already-planted Roundup Ready alfalfa.[136]

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128. *Id.*

129. *Id.* at *2-3.

130. Geertson Farms Inc. v. Johanns, No. C 06-01075 CRB, 2007 WL 1302981 (N.D. Cal. May 3, 2007), *aff'd sub nom.* Geertson Seed Farms v. Johanns, 541 F.3d 938 (9th Cir. 2008), *amended and superseded by* 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

131. *Id.* at *2.

132. *Id.*

133. *Id.* at *4.

134. *See id.* *8-9.

135. *Id.* at *6.

136. *Id.* at *9.

C. Geertson *at the Ninth Circuit*

APHIS, along with intervenors Monsanto and Forage Genetics, appealed the application of the district court's test for injunctive relief[137] and the propriety of the district court's enjoinder absent an evidentiary hearing to resolve disputed facts.[138] On September 2, 2008, a three-judge panel from the Ninth Circuit affirmed the district court's decision.[139] One judge dissented, insisting that the district court abused its discretion procedurally by failing to conduct the additional evidentiary hearing.[140]

D. Winter Blows In

Meanwhile, another NEPA case from the Ninth Circuit, with the proper standard for injunctive relief at issue, had made its way to the Supreme Court. Two months after the Ninth Circuit upheld the district court's decision in *Geertson* denying the deregulation of Roundup Ready alfalfa pending the preparation of an EIS, the Supreme Court decided *Winter v. Natural Resource Defense Council, Inc.*[141] *Winter* addressed the Navy's use of mid-frequency active sonar in training exercises in waters off the coast of Southern California.[142] Environmental plaintiffs claimed that the Navy's use of mid-frequency active sonar adversely affected marine mammals in the area and that the Navy violated NEPA by failing to prepare an EIS before conducting its latest series of training exercises.[143] After an initial appeal and remand, the district court issued a preliminary injunction restricting the Navy's use of mid-frequency active sonar.[144] The Navy moved to vacate the district court's preliminary injunction based on intervening administrative actions aimed at circumventing NEPA. The district court denied the Navy's motion. The Ninth Circuit affirmed. The Navy took its case to the Supreme Court.[145]

In a 5-4 decision penned by Chief Justice Roberts, the Supreme Court held that the public interest concerns of the military in conducting its exercises using mid-frequency active sonar decidedly outweighed the

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137. The *Geertson* appeal focused on the irreparable harm prong of the test for injunctive relief. Geertson Seed Farms v. Johanns, 541 F.3d 938, 943 (9th Cir. 2008), *rev'd and remanded sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

138. *Id.* at 946.

139. *Id.* at 948.

140. *Id.* (Smith, J., dissenting).

141. 555 U.S. 7 (2008).

142. *Id.* at 12-14.

143. *Id.* at 12.

144. Natural Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118-21 (C.D. Cal. 2008), *in subsequent determination, rev'd by Winter*, 555 U.S. 7.

145. *Winter*, 555 U.S. at 12-19.

environmental concerns advanced by the plaintiffs.[146] The Court reversed the Ninth Circuit and vacated the challenged portion of the injunction accordingly.[147] But Justice Roberts' opinion was quick to reproach the Ninth Circuit on another point. In the majority's view, the Ninth Circuit had applied the wrong legal standard for injunctive relief with respect to the "*possibility* of irreparable harm"[148] (although the majority acknowledged that the error may not have affected the appellate court's analysis).[149] "[T]he Ninth Circuit's 'possibility' standard is too lenient," Justice Roberts wrote bluntly.[150] The proper standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."[151]

E. Geertson *Petition to Rehear En Banc*

For the *Geertson* appellants, *Winter*'s holding that plaintiffs must demonstrate a *likelihood* of irreparable harm in order to obtain injunctive relief and the connection the majority spelled out between the Ninth Circuit and the erroneous *possibility* of irreparable harm standard could not have come at a more opportune time. Monsanto and Forage Genetics, this time unaided by APHIS, petitioned the Ninth Circuit to rehear their case en banc.[152] They argued that the Ninth Circuit would

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146. *Id.* at 24-26.

147. *Id.* at 33.

148. *Id.* at 21-22.

149. *Id.* at 22 ("It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm.").

150. *Id.* Prior to *Winter*, the Ninth Circuit had frequently recited its operative standard for preliminary injunctive relief as a "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." Sammartano v. First Judicial Dist. Court, Cnty. of Carson City, 303 F.3d 959, 965 (9th Cir. 2002) (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001)); Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000) (quoting Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 939 (9th Cir. 1987)); *see also* Natural Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118 (C.D. Cal.), *aff'd*, 518 F.3d 658 (9th Cir.), *rev'd*, 555 U.S. 7 (2008) ("Where, as here, plaintiffs demonstrate a strong likelihood of prevailing on the merits of their claims and there is a 'possibility of irreparable harm,' injunctive relief is appropriate." (quoting Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006); Cmty. House Inc. v City of Boise, 468 F.3d 1118, 1123 (9th Cir. 2006))).

151. *Winter*, 555 U.S. at 22 (citing Los Angeles v. Lyons, 461 U.S. 95, 103 (1983); Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 441 (1974); O'Shea v. Littleton, 414 U.S. 488, 502 (1974); WRIGHT ET AL., *supra* note 28, § 2948.1, at 139, 154-55). The majority relied on the Court's previous characterization of injunctive relief as "an extraordinary remedy" to show inconsistency with the *possibility* of irreparable harm standard. *Id.* (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam)).

152. Geertson Seed Farms v. Johanns, 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

flout *Winter* if it allowed its prior decision upholding the application of a relaxed irreparable harm standard to stand.[153]

The notoriously stubborn Ninth Circuit[154] proved to be unmoved by the newly-minted *Winter* decision. On June 24, 2009, the Court of Appeals denied the intervenors' petition to rehear.[155] In a gesture seemingly aimed at showing obeisance to the high court, however, the Ninth Circuit amended its opinion to include a citation to *Winter* where the court had found that "genetic contamination was sufficiently likely to occur so as to warrant broad injunctive relief."[156] The Ninth Circuit's cursory treatment of *Winter* was no consolation for Monsanto. It petitioned the Supreme Court for review.[157]

F. Geertson *Goes to the Supreme Court*

Many thought *Geertson* had reached its final resolution at the Ninth Circuit and would quietly fade into history. After all, APHIS had released a Draft EIS on the deregulation of Roundup Ready alfalfa indicating that it was advancing toward deregulation, notwithstanding the ongoing litigation.[158] Some thought that APHIS's Draft EIS release mooted Monsanto's appeal since it meant the agency's final EIS would soon follow, thereby terminating both the district court's vacatur and its injunction.[159] Further, from a purely statistical standpoint, the probability that the Supreme Court would take up the case was minute. In the 2009 term, the Supreme Court received 8131 petitions for review.[160] The Court granted only seventy-seven of them; less than one percent. The environmentalists seemed confident the Supreme Court would deny Monsanto's petition for certiorari.[161]

The environmentalists' predictions proved to be overly sanguine. Monsanto had scripted its petition for certiorari pointedly targeting the

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153. *See id.* at 1136.

154. Stephanie M. Greene, *Sorting Out "Fair Use" and "Likelihood of Confusion" in Trademark Law*, 43 AM. BUS. L.J. 43, 60 (2006); *see* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 408-09 (1998).

155. *Johanns*, 570 F.3d at 1133.

156. *Id.* at 1137 (citing *Winter*, 555 U.S. at 21-22). The amended opinion also added a new paragraph responding to the dissent's contention that the district court failed to hold an evidentiary hearing. *See id.* at 1140.

157. *Geertson*, 130 S. Ct. 2743.

158. DRAFT EIS, *supra* note 101, at xiv.

159. *See, e.g.*, Transcript of Oral Argument at 4, *Geertson*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1686195, at *4; *see also* Nelson, *supra* note 24.

160. *The Statistics*, 124 HARV. L. REV. 411, 413 tbl.II (2010).

161. Gina Keating, *US Court Cuts Off Appeals in Monsanto Alfalfa Case*, REUTERS (June 24, 2009, 4:35 PM), http://www.reuters.com/article/idUSN2449560120090624.

standard of irreparable harm affirmed by the Ninth Circuit after *Winter*.[162] Monsanto contended that the infinitesimally small possibility that GE alfalfa would contaminate organic and conventional alfalfa crops in no way satisfied the "sufficient likelihood" standard under *Winter*.[163] Under Monsanto's reading of *Winter*, a fifty percent possibility of irreparable harm or less would automatically fail the test for a grant of injunctive relief.[164] The Supreme Court, with its record of rebuffing the Ninth Circuit,[165] found Monsanto's petition to be inviting of review and granted certiorari for the 2010 term.[166]

Justice Breyer recused himself from considering *Geertson*, presumably on the basis of his fraternal ties to District Court Judge Breyer.[167] Some thought that Justice Breyer's recusal might set up a 4-4 split in the case. Some press columns urged Justice Clarence Thomas to recuse himself as well.[168] Justice Thomas had worked as a Monsanto attorney in the 1970s.[169] According to some, Justice Thomas's previous employment created a conflict of interest for him in hearing a case to which Monsanto was a party.[170] Justice Thomas declined to step aside.[171]

Both sides in *Geertson* readied themselves for the Supreme Court showdown. Predictably, Monsanto's petition posited that the Ninth Circuit had erroneously affirmed the *possibility* of irreparable harm standard after *Winter* had obliterated it.[172] According to Monsanto, the Ninth Circuit's standard would "effectively permit district courts once again to *presume* irreparable harm in NEPA cases."[173] Monsanto later noted in its Reply, "[T]his Court has squarely rejected the notion that a

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162. Petition for a Writ of Certiorari, *supra* note 32.

163. *Id.* at 29-34. Monsanto also argued that contamination was not an irreparable injury because it was economic, *id.* at 33-34, and that even if it was, the district court could have more narrowly tailored its relief by imposing "isolation distances at which the risk of cross-pollination is no longer even theoretically possible—let alone 'likely,'" *id.* at 31.

164. *See id.* at 28-35; *see also* Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29.

165. Herald, *supra* note 154, at 407-09.

166. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 1133 (2010).

167. *Id.*

168. *See, e.g.*, Lynda Waddington, *Justice with Monsanto Ties Should Recuse Himself, Environmentalists Say*, IOWA INDEP. (Apr. 27, 2010, 6:00 AM), http://iowaindependent.com/32870/justice-with-past-monsanto-ties-should-recuse-himself-environmentalists-say.

169. *Id.*

170. *Id.* Justice Thomas had acquired a business-friendly reputation on the Court. Further fueling the calls for his recusal, in 2001 Justice Thomas wrote the majority opinion in the case of *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001), which had helped pave the way for the patenting of GE seeds.

171. *See Geertson*, 130 S. Ct. at 2748.

172. Petition for a Writ of Certiorari, *supra* note 32, at 16-18.

173. *Id.* at 15.

procedural violation of NEPA or similar statutes creates a presumption of irreparable environmental harm, much less that such a procedural violation itself constitutes a harm justifying injunctive relief."[174]

The environmentalists countered that the Ninth Circuit had in fact applied the proper *likely* standard, expressly saluting *Winter* in its amended opinion.[175] In the environmentalists' estimation, they had more than met their evidentiary burden under the higher standard.[176] Further, the high court had no place sifting through the voluminous evidentiary record second-guessing the district court's evidentiary findings, they said.[177] A footnote in their brief, however, brought to light an alternative tact, which the environmentalists were prepared to take if the case demanded it. Their brief's fine print read:

> The record demonstrates that contamination was more likely than not, but irreparable harm may be sufficiently "likely" without, of course, being "more likely than not." Especially in a case in which the agency has failed to prepare a required EIS, it would be passing strange to require private plaintiffs—bereft of the agency's findings—to make a "more likely than not" showing in order to preserve the status quo. Such a requirement also would conflict with this Court's precedent stating that parties need only demonstrate a "*sufficient* likelihood" of irreparable injury for an injunction to issue. "Sufficient" hardly connotes "51 percent." What is more, whether injury is "sufficient" is clearly the appropriate standard, given the highly contextual inquiry necessary to issue equitable relief. A contrary standard would fundamentally change the nature of equitable proceedings and would undermine the ability of parties to obtain injunctive relief.[178]

Because widespread genetic contamination could permanently mar alfalfa trade in organic and conventional alfalfa markets,[179] environmentalists claimed that the "sufficient likelihood" test was met even absent a preponderant likelihood that contamination would materialize.[180] An amicus curiae brief in support of the environmentalists fleshed out the position further. Amicus curiae Natural Resources Defense Council argued that the traditional jurisprudential approach to equitable relief treats risk of harm as something more than a simple

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174. Reply Brief for Petitioners at 10, *Geertson*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1619255, at *10.

175. Brief for Respondents at 32, *Geertson*, 130 S. Ct. 2743 (No. 09-475), 2010 WL 1500893, at *32.

176. *Id.* at 36-45.

177. *Id.* at 24.

178. *Id.* at 36 n.18 (citations omitted) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983)) (citing Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987)).

179. *Id.* at 40.

180. Brief for Respondents, *supra* note 175, at 36 n.18.

probabilistic calculation; it necessarily takes into account the severity of the potential injury as well.[181]

At oral argument, Chief Justice Roberts struck at the heart of the matter. He probed the environmentalists' counsel from the bench:

> CHIEF JUSTICE ROBERTS: Could I go back to something you said a while ago, that "likely" does not mean more likely than not?
>
> MR. ROBBINS: Yes.
>
> CHIEF JUSTICE ROBERTS: It's -- I thought that would be obvious. If I say your friends are likely to win, that means they are more likely than you.
>
> MR. ROBBINS: Well, I -- I -- you know, I think the -- the answer is contextual, but in this context, "likely" for purposes of an injunction, Mr. Chief Justice, has I think never been understood to mean more likely than not.
>
> CHIEF JUSTICE ROBERTS: Do you have -- I -- I was surprised that this apparently hasn't been decided over the however many years we've had this standard. Is there a case that says "likely" does not mean more likely than not?
>
> MR. ROBBINS: No. But there are cases -- I mean, the issue has not been addressed by this Court one way or the other. I would say City of Los Angeles v. Lyons and the Amoco case both used the phrase "sufficiently likely," and the lower courts have understood that to mean sufficiently likely in light of the nature of the harm.
>
> Consider, if we were talking about the probability of the contamination of the water supply of New York City, would anybody suppose that the -- if the probability were 10 percent rather than 50.9 percent, that no one could go into court and get an injunction? Neither the private litigants -- you know, put them to one side. The government's own authority to obtain injunctive relief would be critically hampered if such an order came about, and—
>
> JUSTICE SCALIA: This isn't contamination of the New York City water supply. It's the creation of plants of -- of genetically engineered alfalfa which spring up that otherwise wouldn't exist. It doesn't even destroy the current plantings of non-genetically engineered alfalfa. This is not the end of the world. It really isn't.[182]

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181. Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29, at *1-2. The record, in fact, showed that some contamination had occurred. Geertson Farms Inc. v. Johanns, No. C 06-01075 CRB, 2007 WL 1302981, at *1 (N.D. Cal. May 3, 2007), *aff'd sub nom.* Geertson Seed Farms v. Johanns, 541 F.3d 938 (9th Cir. 2008), *amended and superseded by* 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

182. Transcript of Oral Argument, *supra* note 159, at 41-43.

G. The Decision

The *Geertson* Court never ultimately decided the question of whether, as Justice Roberts put it, "likely . . . mean[s] more likely than not."[183] Justice Alito, writing for the majority, instead held on narrower grounds that the district court abused its discretion by completely enjoining the deregulation of Roundup Ready alfalfa preventing APHIS from effecting even a partial deregulation until an EIS was prepared.[184] "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," Justice Alito wrote.[185] "If a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."[186] According to the Alito majority, the district court erred by precluding APHIS's ability to effect a better-hewn, partial deregulation order. A properly enforced partial deregulation order limited in geographic area with mandatory isolation distances to prevent the genetic contamination of conventional crops surely would not pose *likely* irreparable harm, Justice Alito professed.[187] Only one justice dissented.[188]

Justice Stevens' dissent in *Geertson* was one of the last opinions he authored before retiring from the high court. His dissent questioned whether the majority had properly interpreted the district court's order and whether Monsanto had adequately preserved the objection upon

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183. *Id.* at 41. The Court also declined to weigh in on the issue of whether the district court was required to conduct an evidentiary hearing before entering its remedial order. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2762 (2010).

184. *Geertson*, 130 S. Ct. at 2761.

185. *Id.* (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982)).

. 186. *Id.* (citing *Weinberger*, 456 U.S. at 311-12; Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 29-33 (2008)).

187. *Id.* at 2760-61. Justice Alito even went so far as to declare that "there is more than a strong likelihood that APHIS would partially deregulate [Roundup Ready alfalfa] were it not for the District Court's injunction." *Id.* at 2754. The problem with the majority's position was that APHIS itself had espoused the position that it was powerless to issue a partial deregulation order for Roundup Ready alfalfa. DRAFT EIS, *supra* note 101, at 12. APHIS's Draft EIS on the deregulation of Roundup Ready alfalfa maintained that under the Plant Protection Act, in order for the agency to grant nonregulated status to a novel GE crop variety, it must be unlikely to pose a plant pest risk. *Id.* at 11. The agency only had the ability to issue a partial deregulation where there was a geographic variation in plant pest risk. *Id.* at 12. For Roundup Ready alfalfa, APHIS had found that no geographic differences in plant pest risk existed. *Id.* at 15. The Draft EIS stated, "APHIS will have no regulatory authority over [glyphosate tolerant] alfalfa and will be unable to require regulatory restrictions or management practices for these GE alfalfa varieties once it is granted nonregulated status." *Id.* at 14-15. From APHIS's perspective, deregulation of Roundup Ready alfalfa was an all-or-nothing proposition. *Id.* at 12. Apparently, the majority afforded the agency no deference on this point. *Geertson*, 130 S. Ct. at 2761-62.

188. *Geertson*, 130 S. Ct. at 2762.

which the Court ultimately ruled.[189] But the essence of Justice Stevens' disagreement focused on the extent of the court's equitable powers. Justice Stevens believed that the district court had acted "well within its discretion" in ordering the injunction.[190] With respect to the likelihood of irreparable harm requirement, Stevens quoted from Pomeroy's 1919 *Treatise on Equitable Jurisprudence and Equitable Remedies*: "Although 'a mere possibility of a future nuisance will not support an injunction,' courts have never required proof 'that the nuisance *will* occur'; rather, 'it is sufficient . . . that the *risk* of its happening is greater than a reasonable man would incur.'"[191] Justice Stevens declined to include the sentence from Pomeroy's *Treatise* which followed: "And the balance . . . will be affected by the seriousness of the nuisance feared, the strength required for the plaintiff's proof diminishing somewhat as the greatness of the apprehended damage increases."[192] Perhaps Justice Stevens did not want to expound upon the issue in dissenting dicta. Perhaps he thought that Pomeroy's *seriousness-of-the-nuisance-feared* approach strained too far. Whatever the case, the snippet of Pomeroy's *Treatise* that Justice Stevens included leaves one with the idea that "likely"[193] should be measured using a *reasonable person* standard. Under this reading, a "likelihood of irreparable harm" should be properly understood as a judgment of whether a reasonable person standing in the place of the plaintiff would

189. *Id.* at 2765-66 (Stevens, J., dissenting).

190. *Id.* at 2772.

191. *Id.* at 2770 (quoting 5 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 1937, at 4398 (2d ed. 1919)).

192. 5 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 1937, at 4398 (2d ed. 1919).

193. The Supreme Court has never directly ruled on what "likely" means. The issue, however, is bound to come up again and has significant import in the NEPA context. *See* Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29, at 2-5. Some Justices may think it obvious that based on the plain meaning, that "likely" should be understood sheerly as a function of probability. In fact, *Webster's* defines "likely" in these very terms as "having a high probability of occurring or being true: very probable." *Likely*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/likely (last visited Oct. 2, 2011). The *Geertson* environmentalists and some legal scholars have argued that "likely" should be contextual, encompassing the gravity of the potential harm as well. *See, e.g.*, Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29, at *2-5. Their approach may indeed square better with traditional equities jurisprudence and with the reality that severe threats may present grave, but less-than-probable risks. *Id.* at *3. Others still, in the same vein of Justice Stevens' dissent, may think that *likely* should be framed objectively using a reasonable person approach, granting courts some flexibility but at the same time grounding their inquiry in the pragmatic terms of reasonableness. *Geertson*, 130 S. Ct. at 2765-66 (Stevens, J., dissenting).

be willing to risk the apprehended harm, rather than *more likely than not* in a probabilistic sense.[194]

Geertson reinforced the *likelihood-of-irreparable-harm standard*,[195] but it did not resolve the question of whether it contemplates consideration of both the probability and the gravity of the potential harm.[196] Moving forward, the current lack of binding judicial guidance makes determining "likely" an imprecise inquiry. Justice Stevens' approach suggests that a "likelihood of irreparable harm" may not connote a definite and constant threshold at all.[197] Whether "'likely' is 'likely' enough," as one commentator put it,[198] remains an open question.

III. THE IRREPARABLE HARM TEST: ADDING INSULT TO INJURY?

What *irreparable harm* itself means for NEPA plaintiffs seeking injunctive relief bears consideration. On one hand, the Supreme Court has recognized that environmental injury is often irreparable.[199] On the other hand, the Court seems unwilling to find that procedural violations of NEPA—a decidedly environmental statute—by themselves constitute irreparable harm.[200] This Part explores that tension. The first Subpart addresses instances outside the sphere of NEPA where courts have considered procedural violations to be cognizable harms. Part III.B looks at what *irreparable harm* could mean in the NEPA context. Part III.C argues that the Supreme Court's current understanding of irreparable harm disincentivizes agencies from complying with NEPA when proposing to undertake major federal actions.

A. Irreparable Harm in the Context of Procedural Error

The *Geertson* decision stemmed from a NEPA violation.[201] That violation—namely, failure to prepare an EIS[202]—was distinctly procedural.[203] To warrant injunctive relief, however, the *Geertson*

194. If adopted, of course, this reasonable-person approach would accord courts with more interpretive flexibility than a rigid *more-likely-than-not* calculus.

195. *Geertson*, 130 S. Ct. at 2760-61 (majority opinion).

196. *See id.*

197. Mach, *supra* note 83, at 227.

198. *Id.* at 228.

199. Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987).

200. *See, e.g.*, *Geertson*, 130 S. Ct. 2743.

201. *Id.* at 2749.

202. *Id.* at 2750.

203. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

plaintiffs had to show a likelihood of substantive injury.[204] So why was the agency's procedural violation not a cognizable harm in and of itself? Indeed, in some realms, the Supreme Court has readily embraced the notion that improper process voids particular results. Look no further than our deeply embedded constitutional notion of due process.[205] Due process roots itself in the ideal of procedural justice.[206] The government cannot deprive a person of a liberty or property interest without undertaking a hearing process.[207] Where due process violations occur, courts typically invalidate the action.[208] Or consider the exclusionary rule: generally, in criminal proceedings, courts will set aside evidence acquired unlawfully, along with all evidence which derives from it, so called "fruit of the poisonous tree."[209] The same fate befalls presentment clause violations.[210] Failure to abide by the prescribed legislative process will invalidate an otherwise constitutional statutory provision.[211]

The Supreme Court has not shied away from enjoining a result on the basis of bad process in some statutory contexts. In *Clark v. Roemer*,[212] for example, the Court reversed a district court decision which had allowed an election to proceed and those elected to provisionally assume their posts in the face of a violation of a procedural provision of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[213] A unanimous Court held that the district court was required to enjoin the illegal election without discussing the likelihood of irreparable harm requirement.[214]

B. Environmental Injury in the NEPA Context

While the Supreme Court has clearly found that violations of NEPA offer no presumptions of injunctive relief, the Court has also stated that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long

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204. *See Geertson*, 130 S. Ct. at 2760-61. The harm alleged in *Geertson* involved the threat posed by Roundup Ready Alfalfa of genetic contamination of organic and conventional alfalfa and the development of Roundup resistant weeds. *Id.* at 2754-55.

205. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

206. *Id.* at 332.

207. *Id.*

208. Karena C. Anderson, *Strategic Litigating in Land Use Cases:* Del Monte Dunes v. City of Monterey, 25 ECOLOGY L.Q. 465, 477 (1998).

209. *E.g.*, Wong Sun v. United States, 371 U.S. 471, 488 (1963).

210. I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).

211. *Id.*

212. 500 U.S. 646 (1991).

213. *Id.* at 652, 658.

214. *Id.* at 654-55.

duration, *i.e.*, irreparable."[215] Before assuming his current position on the Supreme Court, then-United States Court of Appeals for the First Circuit Judge Stephen Breyer authored a decision directly addressing the nature of NEPA harm. Then-Judge Breyer observed:

> [T]he harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize that risk, the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project. In *Watt* we simply held that the district court should take account of the potentially irreparable nature of this decisionmaking risk to the environment when considering a request for preliminary injunction.[216]

For then-Judge Breyer, NEPA violations surely increase the risk of uninformed agency decision making. Under this view, NEPA violations put a thumb on the scale of irreparable harm.[217] *Geertson*, however, rejected any standard that "presume[s] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances."[218] The majority plainly stated, "No such thumb on the scales is warranted."[219]

C. The Irreparable Harm Requirement Hinders NEPA Compliance

Injunctive relief allows courts to tailor their remedy to fit the demands of a particular case by ordering a party to take, or abstain from taking, certain actions.[220] Post-*Winter*, courts will undoubtedly be more

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215. Amoco Prod. Co. v. Village of Gambell, Alaska 480 U.S. 531, 545 (1987). In *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court likewise held: "A district court cannot . . . override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. . . . Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." 532 U.S. 483, 497 (2001) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)).

216. Sierra Club v. Marsh, 872 F.2d 497, 500-01 (1st Cir. 1989).

217. Judge Breyer was not alone in this view. One commentator notes:

> For the first decade or so of NEPA's history, most courts presumed that an injunction should issue to halt a federal action proceeding in the face of a NEPA violation. Typically, these cases focused on the irreparable harm element of the balancing test, presumptively finding irreparable harm when NEPA was violated.

Herrmann, *supra* note 55, at 1277 (footnote omitted).

218. Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010).

219. *Id.*

220. J. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 499 (2003). What separates vacatur of a rule from injunctive relief, beyond the different tests courts apply for each, is that vacatur is the prescribed

reluctant to issue injunctions for NEPA violations than before.[221] And courts that do issue injunctions will surely be observant of the likelihood of irreparable harm requirement.[222] This hurdle presents serious challenges for plaintiffs. Merely showing that a NEPA violation is likely to result in uninformed decision making will not satisfy the harm requirement.[223] This may seem odd given that uninformed agency decision making is one of the chief harms that NEPA seeks to prevent.[224] Yet, case law makes clear that NEPA plaintiffs must demonstrate a likelihood of *substantive* injury to warrant injunctive relief.[225] The emphasis on *irreparable* harm has also led some courts to conclude that commitments of money, time, and energy do not satisfy the harm requirement.[226] Further, courts often demand that the harm be *environmental* in nature because other alleged injuries fall outside NEPA's zone of interest.[227] Unrealized, prospective harm is already difficult to prove for NEPA plaintiffs.[228] Demonstrating a *likelihood* of

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statutory remedy under the APA when a rule is found to be unlawful whereas injunctive relief invokes the more "extraordinary" equitable powers of a court to tailor a nonstatutory, case-specific remedy. *See* Mach, *supra* note 83, at 213-20; Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (characterizing injunctive relief as "extraordinary"); *Geertson*, 130 S. Ct. at 2761.

221. 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, 657 (2009); Mach, *supra* note 83, at 209.

222. *See, e.g.*, Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 954 (N.D. Cal. 2010).

223. *See, e.g.*, Town of Huntington v. Marsh, 884 F.2d 648, 653 (2d Cir. 1989) ("[A] threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA.").

224. Mach, *supra* note 83, at 225 ("[T]he harm NEPA is most clearly designed to prevent is the risk of inadequately informed agency decisionmaking.").

225. *Town of Huntington*, 884 F.2d at 653.

226. Vine St. Concerned Citizens, Inc. v. Dole, 604 F. Supp. 509, 513 (E.D. Pa. 1985) (quoting Oburn v. Shapp, 521 F.2d 142, 151 (3d Cir. 1975)).

227. *See, e.g.*, *id.* (noting that plaintiffs' "alleged injuries are economic rather than environmental" and denying preliminary injunctive relief); Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate, 690 F. Supp. 1192, 1199 (E.D.N.Y. 1988) (noting that "economic damages do not justify preliminary injunctive relief") (citing Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986)). Generally, because NEPA's recognized zone of interests are environmental, alleging purely economic injury will fail on prudential standing grounds before courts even entertain the question of a proper remedy. Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005).

228. Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 A.L.I.-A.B.A. 757, 798 (2010). Already plaintiffs suing over NEPA violations face many impediments. They first must demonstrate that they have standing under Article III of the United States Constitution. *See, e.g.*, Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-72 (1992). Although the causation and redressability standing requirements relax for violations of procedural statutes like NEPA, plaintiffs still must show (1) that the action will result in an actual or impending injury, (2) that

substantive, irreparable, environmental harm is even trickier, especially given the nebulous state of the current standard.[229]

In the wake of *Winter*, NEPA plaintiffs face an unreasonably tall order.[230] Because NEPA plaintiffs necessarily want an agency to consider the environmental consequences of a proposed action adequately before it moves forward, injunctive relief ordinarily becomes the principal remedy sought by plaintiffs in an effort to halt a project—at least long enough for an agency to conduct the requisite NEPA review.[231] Declaratory relief, by itself, is hardly gratifying for NEPA plaintiffs; they still incur the threat of harm and the project moves forward without its due environmental review.[232] Vacatur is likewise unavailing where an agency can continue to move forward with a project in the face of the rule vacatur or unavailable entirely where no rule underlies the agency's action.[233] Whether advancement of a project without proper NEPA review causes a sufficient likelihood of irreparable harm to warrant

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the injury has a causal connection to the NEPA violation, and (3) that the injury would be redressed in some way by a favorable decision. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 516-28 (2007). Because NEPA itself does not provide a private right of action for violations of its provisions, NEPA plaintiffs usually seek judicial review pursuant to the APA's waiver of sovereign immunity. Sabrina C.C. Fedel, *Causes of Action Against the Federal Government Under the National Environmental Policy Act of 1969 (NEPA)*, *in* 12 CAUSES OF ACTION 2D 321 (1999) (citing *Lujan*, 497 U.S. 851; Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994)). As a result, plaintiffs must also establish prudential standing under the APA by showing that their claims fall within the "zone of interests" protected by NEPA. *See* Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1433 (10th Cir. 1996); State of Idaho, By & Through Idaho Pub. Utils. Comm'n v. I.C.C., 35 F.3d 585, 590 (D.C. Cir. 1994). To state a claim within NEPA's "zone of interest" means alleging some kind of environmental injury, above and beyond any economic impairment. *See Ashley Creek*, 420 F.3d 934; *Stand Together Against Neighborhood Decay*, 690 F. Supp. 1192; *Vine St. Concerned Citizens*, 604 F. Supp. 509. In some cases, courts further require plaintiffs to have exhausted the issues they intend to raise by presenting their specific claims to the agency in the administrative record before filing suit. *See, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764 (2004). Finally, NEPA plaintiffs must establish their prima facie case by showing that (1) NEPA applies to the agency's proposed action, and (2) that the agency proposing the action has failed to comply with the statute. Fedel, *supra*, § 4. In a case where an agency has prepared an EA and FONSI but plaintiffs claim that a full EIS is required, plaintiffs often must put on considerable evidence in the form of scientific data and expert testimony to prove that the proposed action may significantly affect the environment. *Id.*

229. *See supra* Part II.G.

230. Eubanks, *supra* note 221, at 657 (citing Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008)); *see also infra* Part V.A.

231. Realty Income Trust v. Eckerd, 564 F.2d 447, 457 (D.C. Cir. 1977); *see also* Russ Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477, 477 (1979).

232. Herrmann, *supra* note 55, at 1269 ("Victory for the plaintiffs means only that the agency must reconsider its decision to go forward with a project."); *see also* Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 941 (5th Cir. 1982).

233. *See supra* Part I.B.

injunctive relief becomes an evidentiary issue to be decided by courts on a case-by-case basis.[234] Yet, NEPA squarely places the burden on federal agencies to prepare reports on the environmental impacts of "major [f]ederal actions significantly affecting the quality of the human environment" before proposed projects can move forward.[235] *Winter*'s requirement that NEPA plaintiffs challenging proposed actions prove a likelihood of irreparable harm before enjoining a project fundamentally alters the arrangement of obligations contemplated by the statute.[236] Plus, the burden for NEPA plaintiffs will only become more onerous if courts interpret the likelihood of irreparable harm test to demand a preponderant probability of injury showing.[237]

Absent a showing of likely irreparable harm, a project may proceed even if NEPA plaintiffs win on the merits of their claim.[238] Requiring a likelihood of irreparable harm for injunctive relief could significantly discourage NEPA plaintiffs from challenging agency projects in the future.[239] Further, the test almost entirely eliminates an agency's incentive to perform environmental review on a proposed action in the first place. NEPA's legal mandate begins to lose its teeth when the bar to enforcing it is so high.[240]

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234. *See Winter*, 555 U.S. 7.

235. 42 U.S.C. § 4332(C) (2006); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1073 (1st Cir. 1980) ("NEPA expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency's action.").

236. NEPA, of course, does contemplate public participation through its notice-and-comment provisions. *Id.*; 40 C.F.R. § 1506.6 (2011). However, NEPA's comment provisions impose no evidentiary thresholds for concerns raised or the likelihood of impacts conceived of to materialize by commentators. Further, an agency proposing an action "need not respond to every single scientific study or comment." Ecology Ctr. v. Castaneda, 574 F.3d 652, 668 (9th Cir. 2009) (citing Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)). NEPA's notice-and-comment provisions do not fundamentally change an agency's "hard look" statutory obligation. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

237. *See* Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29.

238. *See, e.g.*, *Winter*, 555 U.S. 7. When a major federal action under NEPA has no administrative rule underlying it, vacatur presents no remedy. *See supra* Part I.B.

239. Levin, *supra* note 43, at 298 ("[W]idespread judicial refusal to disturb administrative actions that are poorly reasoned or procedurally defective might unduly reduce the public's incentive to challenge official mistakes."); Benjamin I. Narodick, Winter v. National [sic] Resources Defense Council*: Going into the Belly of the Whale of Preliminary Injunctions and Environmental Law*, 15 B.U. J. SCI. & TECH. L. 332, 344 (2009). Narodick observes, "*Winter* places environmental litigation in a particularly precarious position. . . . [T]he shifting standard of irreparable harm may place environmental litigants at a significant procedural disadvantage." *Id.*

240. *See* Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 999 (1993) ("Since no enforcement agency oversees the various federal agencies' implementation of NEPA, the absence of judicial review will enable agencies to avoid NEPA procedural duties." (footnote omitted));

Under the likelihood of irreparable harm test, the prospect of a NEPA suit for an agency deciding whether to conduct a full environmental review on a project presents a threat with little, if any, deterring power. Instead, an agency that turns a blind eye to NEPA review finds itself in a win-win scenario. Without environmental review, an agency project otherwise subject to NEPA will often move forward absent a court challenge and proof by plaintiffs of a likelihood of environmental injury.[241] In the unlikely event that plaintiffs do sue, the agency's statutory duty of reviewing the environmental consequences of an action in part fall upon plaintiffs as a requirement for obtaining injunctive relief. Put another way, plaintiff's hefty burden of production serves the agency since the likelihood of environmental harm showing required for plaintiffs to obtain injunctive relief replicates some of environmental review obligations NEPA imposes upon agencies.[242] Effectively, a stringent likelihood of irreparable harm requirement compels plaintiffs to shoulder a burden that NEPA commands agencies to bear.

When an agency begins a project without environmental review, NEPA plaintiffs face a particularly steep uphill battle. Beyond the usual hurdles that NEPA plaintiffs encounter,[243] a project that is already underway may have garnered considerable inertia, and consequently, face less public scrutiny.[244] When NEPA plaintiffs challenge a partially

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Jonathan Weems, *A Proposal for a Federal Genetic Privacy Act*, 24 J. LEGAL MED. 109, 125 (2003) ("A desirable law, without effective enforcement mechanisms, confers little benefit.").

241. *See Winter*, 555 U.S. 7; *supra* text accompanying note 238.

242. *See* 42 U.S.C. § 4332(C)(i)-(ii) (2006).

243. *See* discussion and sources cited *supra* note 228.

244. Herrmann, *supra* note 55, at 1289 ("If an agency has been allowed to spend more resources on the project it is more likely to go forward with the previously selected options so as not to waste its investment."); Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989). In *Sierra Club v. Marsh*, then-Judge Stephen Breyer of the First Circuit observed:

> [A]s time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies and the relevant interest groups (suppliers, workers, potential customers, local officials, neighborhoods) may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a new and different course of action. And the court, under NEPA, normally can do no more than require the agency to produce and consider a proper EIS. It cannot force the agency to choose a new course of action. Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility.

872 F.2d at 503.

completed project, courts exhibit a greater reluctance to grant relief in some cases finding that public interests weigh against ordering an injunction, and in others, finding the suit to be barred entirely by mootness or laches.[245] Under the current test for injunctive relief, an agency proposing a project may be well served to eschew its NEPA obligations.

Even if plaintiffs prevail in obtaining injunctive relief, a court order demanding more thorough NEPA review may be more easily met by an agency after losing a court challenge since some of the agency's work has already been done for it. Because environmental review can be costly,[246] an agency's initial disregard for the NEPA process may even prove to be financially advantageous for the agency[247] (or it may go unreviewed entirely if prospective plaintiffs decide not to expend considerable resources to meet their evidentiary burdens in court).[248] After all, an agency ordered to conduct NEPA review after a project has begun would already be equipped with valuable NEPA compliance information produced by plaintiffs in the course of litigation. The project may not be permanently halted, too, since NEPA does not prevent agencies from making environmentally unwise decisions, only uninformed ones.[249] Although late review may be better than no review, when NEPA compliance occurs only as an afterthought, it does not allow environmental considerations to meaningfully influence the project's conceptualization and design.[250] NEPA's policy is undermined.

IV. TO VACATE OR NOT TO VACATE?

Plaintiffs face a high bar for injunctive relief—a bar which will only be made higher if courts decide that a likelihood of irreparable harm in

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245. *See* Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569, 580-81 (1990).

246. Ben Schifman, *The Limits of NEPA: Consideration of the Impacts of Terrorism in Environmental Impact Statements for Nuclear Facilities*, 35 COLUM. J. ENVTL. L. 373, 379 (2010) (citing Karkkainen, *supra* note 51, at 905).

247. McGarity, *supra* note 245, at 580-81.

248. *See* Gerschwer, *supra* note 240, at 999.

249. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed-rather than unwise-agency action."). After a full environmental review, an agency project may move forward regardless of its environmental consequences under NEPA. *Id.*

250. Silvia L. Serpe, *Reviewability of Environmental Impact Statements on Legislative Proposals After* Franklin v. Massachusetts, 80 CORNELL L. REV. 413, 435 (1995) ("Decisionmakers must consider the environmental effects of their options early to allow them to choose wisely among options and benefit from the environmental assessment."); Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989).

fact means a preponderant probability of injury.[251] In the administrative context, where a rule forms the basis of an agency action under NEPA, *Geertson* illuminates another path for prospective plaintiffs to achieve their desired ends.[252] In some circumstances, vacatur of a rule underlying an agency action can effectively halt the action pending further administrative consideration.[253] As *Geertson* demonstrated, vacatur often presents a more attainable remedy than injunctive relief for plaintiffs.[254] This Part examines the dynamic of vacatur. Part IV.A looks at how vacatur works. Part IV.B examines the tests courts use for vacatur.

A. How Vacatur Works

Vacatur of a rule invalidates it.[255] After a rule is vacated, an agency may either abandon its rule-making effort or promulgate an amended rule.[256] The agency's amended rule could be substantively different from the original one or it could simply be the same rule with a new or improved rationale.[257] A remand without vacatur, on the other hand, leaves the agency rule intact.[258] An agency presented only with a remand may freely implement the challenged rule while it addresses any defects identified by the court in the rule's rationale.[259]

Both administrative remedies—remand with vacatur and remand without vacatur—pose challenges. A remand with vacatur can cause considerable disruption to a regulatory program.[260] Consider, as the D.C. Circuit did, a rule promulgated by the USDA to implement the Food Stamp Act.[261] The rule effectuated a coupon allotment system for low-income families to obtain nutritionally adequate food, but plaintiffs maintained that the rule failed to conform to the mandates of the Food Stamp Act and the APA.[262] The D.C. Circuit held that the USDA's

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251. *See supra* Part III.A-C.

252. *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

253. As previously discussed, vacatur of a rule only provides relief for NEPA violations where rules form the basis of a major federal action under NEPA. *See supra* Part I.B. Moreover, vacatur will not always produce the same on-the-ground results as injunctive relief. *See supra* Part I.B. In some cases, a blanket rule vacatur remedy could even be detrimental to the aims of NEPA plaintiffs seeking greater environmental protections. *See supra* Part I.B.

254. *See Geertson*, 130 S. Ct. 2743.

255. Daugirdas, *supra* note 93, at 279.

256. *Id.*

257. *Id.* (citing Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991)).

258. *Id.*

259. *Id.*

260. *See* Rodway v. U.S. Dep't of Agric., 514 F.2d 809 (D.C. Cir. 1975).

261. *Id.*

262. *Id.* at 812.

allotment rule did not meet the notice requirements of the APA.[263] Nonetheless, the court declined to vacate the USDA's procedurally defective rule due to its "critical importance [in] the functioning of the entire food stamp system."[264] Given the reliance interests involved, rendering the allotment rule void by immediately vacating it in such an instance would have been undeniably harsh.[265]

While vacatur of a rule can produce severe results, remand without vacatur poses problems from a policy perspective as well. An agency facing a remand without a vacatur has little incentive to revise its flawed or inadequate rule rationale.[266] As the co-authors of one law review article remarked, "The idea that an agency can or will quickly turn to remedying the factual or analytic defects in its remanded rule is surely naive, however minor those problems might appear in the abstract."[267] Once an agency has a court's blessing to implement a rule, the agency's impetus to engage in the often costly and time-consuming process of revising its rule rationale vanishes.[268] A survey of rule-making remands from the D.C. Circuit between 1985 to 1995 partially corroborates their observation: a third of the time agencies took longer than five years to respond to a court-ordered remand without vacatur.[269]

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263. *Id.* at 817.

264. *Id.*

265. Many attribute the Supreme Court's holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 209 (1988), which limited the ability of agencies to promulgate retroactive regulations absent express statutory language authorizing it, to the incidence of temporary regulatory vacuums created by court-imposed vacaturs. One commentator argues:

> After *Georgetown*, the "disruptive consequences" of the vacate and remand remedy are far more serious. For the potentially lengthy period between the statutorily mandated effective date of the new regulatory requirement and the issuance of a new rule on remand, there is not, and can never be, any effective rule governing the area of conduct at issue. . . .
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> . . . .
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> . . . An agency's ability to issue an interim rule on remand became much less valuable after *Georgetown* because the vacate and remand remedy always creates a regulatory void between the putative effective date of the vacated rule and the effective date of the interim rule issued on remand.

Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 77-78 (1995); *see also* Daugirdas, *supra* note 93, at 287.

266. Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 295 (1987).

267. *Id.*

268. *Id.*

269. Daugirdas, *supra* note 93, at 302 (citing William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 414 (2000)).

B. The Legal Tests for Vacatur

Courts have variously articulated and variously applied the standards governing vacatur.[270] While the Supreme Court has stated that individual agency decisions "must be vacated and the matter remanded" if unsupported by the administrative record,[271] it has also declared that when "the record before the agency does not support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation," omitting any mention of vacatur.[272] Case law and commentary reveal a distinct lack of consensus about whether vacatur should be a presumptive remedy for violations of the APA.[273]

Some argue that upon finding a rule unlawful, a court is statutorily obligated to remand and vacate the rule.[274] According to these commentators, the APA makes vacatur automatic when a court determines that a rule violates any of the administrative rule-making requirements.[275] At first blush, the language of APA § 706(2)(A) leaves little room for doubt: "The reviewing court *shall* . . . hold unlawful and *set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[276] *Black's Law Dictionary* defines "set aside" as

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270. *See id.* at 296.

271. Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)). If the Court believed that the APA mandates vacatur, it certainly has not been quick to correct lower courts, which have frequently remanded rules without vacating them.

272. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

273. *See* Pierce, *supra* note 265, at 75-76. *But see* Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (citing 5 U.S.C. § 706).

274. Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 130 (2001).

275. *Id.*; *see also* Checkosky v. S.E.C., 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., separate opinion, dissenting from the court's decision to remand without vacatur). In *Checkosky v. S.E.C.*, Judge Randolph filed a separate opinion dissenting from the panel's lead opinion in so far as it ordered a remand without vacatur of an agency's suspension order. According to Judge Randolph, remanding the case without vacatur defied the APA's clear mandate in § 706(2)(A). Judge Randolph maintained:

> Once a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court-in the absence of any contrary statute-to vacate the agency's action. The Administrative Procedure Act states this in the clearest possible terms. Section 706(2)(A) provides that a "reviewing court" faced with an arbitrary and capricious agency decision "shall"—*not may*—"hold unlawful and set aside" the agency action.

Checkosky, 23 F.3d at 491 (footnote omitted) (citing 15 U.S.C. § 78y(a)(3) (2006)). Setting aside means vacating; no other meaning is apparent. *Id.* (Randolph, J., separate opinion, dissenting from the court decision to remand without vacatur).

276. 5 U.S.C. § 706 (emphasis added). In full, APA § 706 reads:

"[t]o reverse, *vacate*, cancel, annul, or revoke a judgment, order, etc."[277] Circularly, *Black's Law Dictionary* defines the verb "vacate," in part, as "[t]o annul; to *set aside*; to cancel or rescind."[278] The Supreme Court has held that statutory employment of the word "shall" creates a mandatory obligation "normally . . . impervious to judicial discretion."[279] Taken together, APA's § 706 command comes across as strikingly unambiguous. Add to this the Supreme Court's proclamation in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.* that "[i]f the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'"[280]

Some courts, however, have treated vacatur as neither an automatic nor a presumptive remedy where rules are found to be unlawful under the APA. In fact, the test typically applied by the D.C. Circuit to determine

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> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. The label "arbitrary and capricious" generally has become the all-encompassing catchphrase for challenges to the legality of an agency rule under any of the criteria set out in APA § 706. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 233-34 (1996) ("'Arbitrary and capricious' has turned out to be the catch-all label for attacks on the agency's rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issues or lack of evidence in the record to support key findings is alleged.").

277. BLACK'S LAW DICTIONARY 1372 (6th ed. 1990) (emphasis added).

278. *Id.* at 1548 (emphasis added).

279. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

280. 423 U.S. 326, 331 (1976) (alterations in original) (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)).

whether vacatur should accompany a remand reflects a presumption *against* vacatur.[281] Because the D.C. Circuit hears many of the challenges to federal agency rules, the D.C. Circuit's test—the *Allied-Signal* test[282]—has proven quite influential.[283] The *Allied-Signal* test for determining whether or not to vacate a rule hinges upon "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[284] A leading scholar has noted that "[t]he vast majority of agency rules that are held to be invalid under the arbitrary and capricious standard are likely to qualify for remand without vacat[ur] through application of the test announced in *Allied-Signal*."[285] Because courts are loathe to stand in the place of administrative decision makers equipped with expertise in agency regulatory matters, courts often declare rules unlawful based on the insufficiency of their rationales rather than pronounce them irremediably untenable.[286] That means that unlawful administrative rules, even those found to be arbitrary and capricious, are rarely deemed so utterly deficient as to warrant vacatur under the first prong of the *Allied-Signal* inquiry. And, under the second prong of the test, vacatur of an administrative rule may well be disruptive to the agency's regulatory agenda since it will expose a regulatory vacuum.[287] The upshot is that the D.C. Circuit usually remands rules without vacating them.[288]

Other courts have articulated the test for vacatur differently.[289] One court's treatment suggests that vacatur may be a form of injunctive relief

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281. Boris Bershteyn, Note, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 387 (2004).

282. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

283. *See* Daugirdas, *supra* note 93, at 308.

284. *Allied-Signal*, 988 F.2d at 150-51 (quoting Int'l Union, UMW v. FMSHA, 920 F.2d 960, 967 (D.C. Cir. 1990)).

285. Pierce, *supra* note 265, at 75-76.

286. Daugirdas, *supra* note 93, at 286-87; *see also* Prestes, *supra* note 274, at 123.

287. Daugirdas, *supra* note 93, at 294.

288. *Id.* at 295; *see also*, *e.g.*, La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003); Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002); U.S. Telecom Ass'n v. FBI, 276 F.3d 620, 627 (D.C. Cir. 2002); Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 888 (D.C. Cir. 1999); Davis Cnty. Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1273 (D.C. Cir. 1994); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1184 (D.C. Cir. 1994); ICORE, Inc. v. FCC, 985 F.2d 1075, 1081 (D.C. Cir. 1993); United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990); Md. People's Counsel v. FERC, 768 F.2d 450, 455 (D.C. Cir. 1985).

289. Academics have aired sundry theories to account for courts' disparate treatment of the remand without vacatur remedy. *See, e.g.*, Daugirdas, *supra* note 93, at 290-92; Prestes, *supra*

in and of itself.[290] In *Northwest Environmental Advocates v. United States EPA*, environmental plaintiffs challenged a regulation promulgated by the EPA exempting effluent discharges incidental to the normal operation of a vessel from the National Pollution Discharge Elimination System permit requirement under the Clean Water Act. The District Court for the Northern District of California granted summary judgment for the plaintiffs holding the EPA's regulation to be *ultra vires*.[291] The district court vacated the regulation effective two years henceforth. Essentially, the district court's order amounted to a vacatur and remand with a stay of the vacatur, but the court nonetheless treated its vacatur order as a permanent injunction applying the test for injunctive relief to it.[292] The EPA appealed. The Ninth Circuit affirmed the district court's "permanent injunction" order vacating the challenged regulation as of September 30, 2008.[293]

More recently, the D.C. District Court in *Sierra Club v. Van Antwerp* made note of the *Allied-Signal* test,[294] but nonetheless characterized vacatur and remand as "the *presumptively appropriate* remedy for a violation of the APA," citing both Supreme Court and D.C.

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note 274, at 120-30. Some suggest that courts are less prone to vacate a rule where they have found that an agency has simply offered an insufficient rationale (as opposed to where an agency has promulgated an untenable rule or employed faulty logic in its rule making). *See, e.g.*, Prestes, *supra* note 274, at 112. Others have suggested the practice of issuing remands without vacatur has evolved temporally, slowly gathering steam in the 1970s and 1980s and achieving widespread acceptance when the United States Court of Appeals for the District of Columbia Circuit handed down *Allied-Signal* in 1993. *Id.* at 111-14; *see also* Daugirdas, *supra* note 93, at 290-92. Still, others might suggest that the disparate treatment of vacatur has to do with jurisdictional differences in approach (for example, the differences between the D.C. Circuit's *Allied-Signal* test and the standards employed by other jurisdictions). Or, one could theorize that discrepancies between courts' treatment of vacatur has more to do with the subject matter of the underlying rule at issue than anything else. (For instance, it could be the case that some matters such as military defense trump environmental concerns with respect to the likelihood that a court will decline to vacate an agency rule.) In reality, some combination of most or all of these theories may play into courts' treatment of vacatur as a remedy for APA violations.

290. Nw. Envtl. Advocates v. U.S. EPA, No. C 03-05760 SI, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006), *aff'd*, 537 F.3d 1006 (9th Cir. 2008).

291. *Id.* at *1.

292. *Id.* at *12. Applying the four-factor test for injunctive relief is especially noteworthy in this context since APA § 705 independently grants courts the authority to stay its orders "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705 (2006).

293. Nw. Envtl. Advocates v. U.S. EPA, 537 F.3d 1006, 1026 (9th Cir. 2008) (quoting *Nw. Envtl. Advocates*, 2006 WL 2669042, at *10).

294. 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Circuit precedent.[295] The *Van Antwerp* court in part relied on *Geertson*'s assumed legality of vacatur to suggest a presumption in favor of vacatur. Yet, in light of the court's decision in *Allied-Signal*, the *Van Antwerp* court's characterization may have reached too far,[296] and its reliance on *Geertson* may be misplaced. In *Geertson*, the vacatur of APHIS's deregulation rule was not part of the relief that Monsanto appealed, at least not directly anyway;[297] Monsanto only challenged the district court's injunction.[298] The Supreme Court has long held that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[299] As a result, it is hard to know how much to read into *Geertson*. While it is probably too much of a stretch to say that *Geertson* creates a presumption in favor of vacatur as a remedy for APA rule violations, it is not entirely silent on the issue either. One might fairly glean from *Geertson* that a decision to vacate need not undergo the same scrutiny that injunctive relief does, despite vacatur's distinctly injunction-like qualities.[300] The *Geertson* Court did parenthetically declare vacatur "a less drastic remedy" than an injunction.[301] At a bare minimum, this indicates that the court views vacatur somewhat differently than injunctive relief.[302]

Allied-Signal still reigns as the leading test for vacatur,[303] but courts have applied the test unevenly at best.[304] In fact, some courts have issued decisions related to vacatur without mentioning *Allied-Signal* or

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295. *Id.* (emphasis added) (citing FCC v. NextWave Personal Commc'ns Inc., 537 U.S. 293, 300 (2003); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

296. *See* Pierce, *supra* note 265, at 75-76.

297. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2753 (2010) ("[P]etitioners did not challenge the vacatur directly.").

298. *See id.*; *see also* Sarah Axtell, Note, *Reframing the Judicial Approach to Injunctive Relief for Environmental Plaintiffs in* Monsanto Co. v. Geertson Seed Farms, 38 ECOLOGY L.Q. 317, 324 (2011).

299. Webster v. Fall, 266 U.S. 507, 511 (1925) (citing New v. Oklahoma, 195 U.S. 252, 256 (1904); Teft, Weller & Co. v. Munsuri, 222 U.S. 114, 119 (1911); United States v. More, 7 U.S. 159, 172 (1805); The Edward, 14 U.S. 261, 275-76 (1816)); *see also* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979).

300. *Geertson*, 130 S. Ct. at 2761.

301. *Id.*

302. The *Geertson* majority's designation of vacatur as "a less drastic remedy" than an injunction may signal the emergence of a sliding scale approach to injunctive relief. *See id.*

303. *See* Daugirdas, *supra* note 93, at 308. A federal district court outside the D.C. Circuit's jurisdiction recently applied *Allied-Signal* to vacate a rule promulgated by APHIS deregulating GE sugar beets. Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 952 (N.D. Cal. 2010).

304. *See* Daugirdas, *supra* note 93, at 296.

meaningfully discussing the matter whatsoever.[305] One survey found that the D.C. Circuit may cite *Allied-Signal* more as a justification for a decision to remand without vacatur than as a tool to genuinely evaluate whether vacatur of a rule is appropriate in a given case.[306] The survey concluded: "[T]he D.C. Circuit selectively applies the *Allied-Signal* test when deciding whether to remand without vacatur."[307]

To the extent that one can find a common thread running through vacatur jurisprudence, it may simply be an embrace of equitable balancing.[308] APA § 706 has clearly proved to be more yielding than the statute's stiff "shall . . . set aside" command suggests.[309] Indeed, offsetting the crisp command of APA § 706(2)(a) is the language of APA § 702, which provides, "Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[310] Equitable discretion may be the best explanation for courts' unsteady approach to vacatur.[311]

C. The Overlay of the Prejudicial Error Rule

While equity's hallmark of flexibility[312] has triumphed in the domain of vacatur, another provision of APA § 706 may offer courts some helpful guidance for navigating more generally through the fluid landscape of administrative equitable relief. Dangling statutory text at the end of APA § 706 instructs courts reviewing the lawfulness of agency actions, findings, and conclusions to take "due account . . . of the rule of prejudicial error."[313] What this oblique provision means is hardly clear on

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305. Sinclair Broad. Grp., Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

306. Daugirdas, *supra* note 93, at 293-94.

307. *Id.* at 294.

308. Mach, *supra* note 83, at 218 ("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." (citing *Sinclair Broad. Grp.*, 284 F.3d 148)).

309. 5 U.S.C. § 706(2) (2006); *see* Allied-Signal, Inc. v. U.S. Nuclear Regulator Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993).

310. 5 U.S.C. § 702.

311. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 727 n.391 (2010) (citing 5 U.S.C. § 702 and noting that "the APA expressly preserves the courts' equitable discretion to fashion a remedy appropriate to the case").

312. Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2766 (2010) (Stevens, J., dissenting) (citing Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

313. 5 U.S.C. § 706. The APA's prejudicial error clause in full reads, "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." *Id.*

its face. Admittedly, at a glance, it seems to inject more ambiguity into the picture. Section 706's prejudicial error provision, however, is not nugatory. In 2009, in *Shinseki v. Sanders*, the Supreme Court explicated a like provision of the Veterans Claims Assistance Act.[314] In *Sanders*, the Court held that the statutory command to "take due account of the rule of prejudicial error"[315] pertains to "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases."[316] The Court specifically noted that the Attorney General's *Manual on the Administrative Procedure Act* had interpreted the rule of prejudicial error to "su[m] up in succinct fashion the harmless error rule applied by the courts *in the review of lower court decisions as well as of administrative bodies*."[317] The prejudicial error rule found in APA § 706 and the harmless error rule essentially articulate the same principle:[318] a court usually will not disturb an action, even an unlawful one, when its error is merely harmless.[319]

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314. Shinseki v. Sanders, 129 S. Ct. 1696, 1704 (2009) (noting that "Congress used the same words in the Administrative Procedure Act," 5 U.S.C. § 706, as it did in the Veterans Claim Assistance Act of 2000, 38 U.S.C. § 7261(b)(2) (2006)). The provision of the Veterans Claim Assistance Act at issue in that case reads: "[T]he Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall . . . take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b).

315. 38 U.S.C. § 7261(b)(2).

316. *Sanders*, 129 S. Ct. at 1704.

317. *Id.* (alteration in original) (quoting Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 110 (1947) (internal quotation marks omitted)).

318. Smith, *supra* note 45, at 1727 n.2 (noting that the harmless error rule and prejudicial error rule "are opposite sides of the same judicial-review coin"). This Article freely refers to both names for the test in part reflecting the lack of a nomenclatural consensus among courts and commentators. *Id.* at 1727.

319. *Id.* at 1732. To be clear, the prejudicial error analysis is separate and distinct from the vacatur analysis. Not all courts deciding whether to vacate a rule have even engaged the prejudicial error test. *See, e.g.*, Md. People's Counsel v. FERC, 768 F.2d 450, 455 (D.C. Cir. 1985). However, the prejudicial error rule's administrative application is attracting more academic attention. Smith, *supra* note 45, at 1737-38; *Sanders*, 129 S. Ct. 1696. Many APA cases have held that a showing of prejudicial error is a prerequisite for relief. *See, e.g.*, Conservation Law Found. v. Evans, 360 F.3d 21, 29 (1st Cir. 2004). This Article argues that courts reviewing administrative decisions should consistently apply the prejudicial error rule by incorporating it into the vacatur analysis. *See infra* Part IV.D. To some degree, the prejudicial error test already helps inform the resulting remedy when it is applied. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1095 (9th Cir. 2011). For example, the prejudicial error test clearly shares common ground with the first prong of the *Allied-Signal* test—"the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)." Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146, 150 (D.C. Cir. 1993) (quoting United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)); *see also infra* Part IV.D. In the recent case of *California Wilderness Coalition v. U.S. Department of Energy*, the court linked the concept of prejudicial error and vacatur noting that "where a regulation is promulgated in violation of the APA and the violation is not harmless, the remedy is

The prejudicial error doctrine invoked by APA § 706 finds its roots in common law. Historically, courts presumed that judicial errors made in the course of trials were prejudicial unless they could be shown to be harmless.[320] In the 1919 Judicial Code, Congress codified a new harmless error rule, which deviated from the common law rule.[321] The new rule provided that federal courts were to reverse rulings only where lower court errors were found to affect a person's substantial rights.[322] This new rule shifted the burden of demonstrating impacts to a person's substantial rights—something more than "merely formal or technical"[323] errors—onto the appealing party.[324] This remains the essence of the harmless error rule today.[325] As the Supreme Court articulated in *Sanders*, "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."[326]

Notably, the rule set out in *Sanders* is not without exception. The *Sanders* Court itself recognized the possibility for exception to its rule where "the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said."[327] Moreover, the *Sanders* Court observed, "To say that the claimant has the 'burden' of showing that an error was harmful is not to impose . . . a particularly onerous requirement."[328]

Prior to *Sanders*, the D.C. Circuit held that where an agency wholly fails to comply with APA § 553's notice and comments requirements,[329] requiring challengers to shoulder the burden of showing prejudicial error

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to invalidate the regulation." *Cal. Wilderness Coal.*, 631 F.3d at 1095 (citing Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005)).

320. Smith, *supra* note 45, at 1732 (citing Deery v. Cray, 72 U.S. 795, 807-08 (1866); Chapman v. California, 386 U.S. 18, 24 (1967)).

321. Judicial Code of Feb. 26, 1919, ch. 48, § 269 (codified as amended at 28 U.S.C. § 391 (1946)) (repealed by Judicial Act of 1948) ("On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.").

322. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 10 (2002) (citing 28 U.S.C. § 391 (1946) (repealed 1948)).

323. United States v. River Rouge Improvement Co., 269 U.S. 411, 421 (1926).

324. Smith, *supra* note 45, at 1733.

325. Shinseki v. Sanders, 129 S. Ct. 1696, 1706 (2009); *see also* Nat'l Labor Relations Bd. v. Seine & Line Fishermen's Union of San Pedro, 374 F.2d 974, 981-82 (9th Cir. 1967).

326. *Sanders*, 129 S. Ct. at 1706 (citations omitted).

327. *Id.*

328. *Id.*

329. 5 U.S.C. § 553 (2006); Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 96-97 (D.C. Cir. 2002); *see, e.g.*, McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1324 (D.C. Cir. 1988).

"is normally inappropriate."[330] The D.C. Circuit reasoned that under such circumstances, "[e]ven if the challenger presents no bases for invalidating the rule on substantive grounds, we cannot say with certainty whether petitioner's comments would have had some effect if they had been considered when the issue was open."[331] Similarly, in another case, the D.C. Circuit noted that "if the government could skip [notice-and-comment] procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—§ 553 obviously would be eviscerated."[332] While *Sanders* may have effectively overruled the D.C. Circuit's per se prejudice exception for notice-and-comment violations,[333] the logic of the line of cases recognizing this exception applies to procedural violations more widely. The D.C. Circuit might well have found that NEPA violations per se satisfied the prejudicial error test too where an agency failed to prepare an EIS. An agency's failure to comply with NEPA may harm the environment, but it almost certainly harms the public's interest in transparent and informed decision making and dilutes the force of the statute itself.[334]

Courts have applied the prejudicial error rule in the administrative law context inconsistently, if at all. Different articulations of the test have emerged.[335] Applying the prejudicial error test to substantive defects, some courts have articulated the prejudicial error test as a results-based inquiry.[336] One formulation of the results-based inquiry demands that a party attacking an agency finding demonstrate "substantial doubt . . . the administrative agency would have made the same ultimate finding with the erroneous finding removed from the picture."[337] Other courts have focused their formulation of the prejudicial error test on whether a procedural violation prevented facts or claims from being entered into the administrative record.[338] The Ninth Circuit recently applied a version

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330. *McLouth Steel*, 838 F.2d at 1324.

331. *Id.*

332. *Veneman*, 289 F.3d at 96.

333. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1109 (9th Cir. 2011) (Ikuta, J., dissenting) ("[T]he Supreme Court repudiated the Federal Circuit's mandatory presumption that certain types of notice errors were per se prejudicial." (citing *Sanders*, 129 S. Ct. at 1704)).

334. *See* Herrmann, *supra* note 55, at 1285-89.

335. Smith, *supra* note 45, at 1739.

336. *Id.* at 1740-41.

337. Kurzon v. U.S. Postal Serv., 539 F.2d 788, 796 (1st Cir. 1976) (quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 139 (1st Cir. 1953)).

338. Smith, *supra* note 45, at 1744; *see also* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008).

of the test applicable to both substantive[339] and procedural[340] deficiencies couched in terms of harmless error.[341] The Ninth Circuit's formulation asks whether "a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached."[342] The Ninth Circuit explained:

> [W]e must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result. We have held that the failure to provide notice and comment is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached."[343]

The Ninth Circuit has affirmed this prejudicial error test for violations even after *Sanders*.[344] In *California Wilderness Coalition v. United States Department of Energy*, a divided court held that neither the DOE's failure to consult with affected states on the designation of national interest electric transmission corridors (NIETCs) in violation of the Energy Policy Act[345] nor the agency's failure to prepare either an EA or an EIS in violation of NEPA[346] were harmless errors.[347] With respect to the NEPA violation, the Ninth Circuit required the environmental groups challenging the agency's determination to show that the agency's failure to undertake environmental review was not harmless error.[348] The court nevertheless determined that the environmental petitioners easily met their burden: "[h]ere, even a cursory review of petitioners' contentions

339. 5 U.S.C. § 706(2)(A) (2006).

340. *Id.* § 706(2)(D).

341. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090-94 (9th Cir. 2011).

342. Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) (quoting Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 466 (D.C. Cir. 1967)).

343. Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992) (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir. 1986)).

344. *Cal. Wilderness Coal.*, 631 F.3d at 1090-93.

345. 16 U.S.C. § 824p(a)(1)-(2) (2006).

346. 42 U.S.C. § 4332 (2006).

347. *Cal. Wilderness Coal.*, 631 F.3d at 1090-1106.

348. *Id.* at 1105.

raises 'substantial questions . . . as to whether [the NIETCs] may cause significant degradation of some human environmental factor.'"[349] As *California Wilderness Coalition* exhibits, plaintiffs tend to fare well under the Ninth Circuit's prejudicial error test.[350]

D. Incorporating the Prejudicial Error Rule into the Test for Vacatur

Applying the prejudicial error test evenly when courts find an agency rule to be unlawful could serve as a useful guidepost for deciding whether to vacate and remand a rule or whether to remand it without vacatur. It could also make for greater consistency in the unsteady landscape of administrative remedies jurisprudence. As it stands, the leading test for vacatur—the *Allied-Signal* test[351]—betrays the presumption explicit in APA § 706(2)(A) as plaintiffs rarely make it past the first prong of the test.[352] Employing the prejudicial error test in place of the first prong of the *Allied-Signal* test could better honor the language of APA § 706(2)(A) because the prejudicial error test offers a lower bar for plaintiffs. Moreover, in so far as the judicially forged *Allied-Signal* test[353] remains untethered to the statutory language of the APA, the rule of prejudicial error could provide an anchor in APA § 706.

This Article advocates for a formulation of the prejudicial error test similar to the Ninth Circuit's by asking plaintiffs to show that an agency violation is *one that materially affects the larger procedure employed in reaching a decision or the substance of the decision itself*. Articulating the prejudicial error rule this way conforms to *Sanders*'s holding that the burden of demonstrating prejudicial error be placed upon plaintiffs without imposing "a particularly onerous requirement" on them.[354] It also takes into account both procedural and substantive violations,[355] while raising the bar from the Ninth Circuit's more relaxed standard.[356]

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349. *Id.* (quoting Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006)).

350. *See, e.g.*, *id.* at 1107. Plaintiffs sometimes succeed in meeting the prejudicial error test even when it is articulated in a way that imposes a higher evidentiary burden than in *California Wilderness Coalition*. *See, e.g.*, Miami-Dade Cnty. v. U.S. EPA, 529 F.3d 1049, 1062 (11th Cir. 2008); Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 202-03 (D.C. Cir. 2007); Conservation Law Found. v. Evans, 360 F.3d 21, 29-30 (1st Cir. 2004); Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002); Safari Aviation, Inc. v. Garvey, 300 F.3d 1144, 1152 (9th Cir. 2002); Texas v. Lyng, 868 F.2d 795, 800 (5th Cir. 1989).

351. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993).

352. APA, 5 U.S.C. § 706(2)(A) (2006).

353. *Allied-Signal*, 988 F.2d 146.

354. Shinseki v. Sanders, 129 S. Ct. 1696, 1706 (2009).

355. This formulation of prejudicial error test can be applied both when an agency rule is found to be "arbitrary and capricious" as a substantive matter under APA § 706(2)(A) and when a

Rather than assessing the seriousness of an agency order's deficiency as the first prong of *Allied-Signal* demands, courts should require plaintiffs to show that an agency violation is one that materially affects the larger procedure employed in reaching a decision or the substance of the decision itself. If plaintiffs satisfy this inquiry, courts should then assess the disruptive consequences of imposing an interim rule change under *Allied-Signal*'s second prong. If plaintiffs show a *material* effect stemming from the agency violation and a significant regulatory disruption is unlikely to occur by setting the rule aside, courts should vacate and remand the rule. Conversely, when either prong of this test fails, courts should remand the rule without vacatur.

This application of the prejudicial error test provides a cleaner and clearer benchmark than the *Allied-Signal*'s existing first prong[357] because it creates a discernible standard and clearly places the burden on plaintiffs to meet that standard.[358] *Allied-Signal*'s existing first prong assessing the seriousness of an agency order's deficiency is vague and susceptible to judicial manipulation.[359] The first prong asks a court to assume the awkward position of calculating how deficient is too deficient without guidance or special expertise in the field being regulated.[360] To undertake this kind of analysis, a court effectively has to speculate what the agency's rule should have been and then gauge how

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rule is promulgated "without observance of procedure required by law" as a procedural matter under APA § 706(2)(D).

356. The proposed prejudicial error test departs from the approach the Ninth Circuit has applied in three distinct ways. First, while the rule commonly articulated by the Ninth Circuit deems a violation to be "harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached,'" Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (1992) (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir. 1986)), this test would elevate the threshold to instances where a violation *materially* affects the larger procedure employed by an agency in reaching a decision or the substance of the decision itself. Interposing the adverb *materially* into the formulation of the prejudicial error test ensures that it has some force and that a finding of prejudicial error is not assured with every violation. Second, the proposed test injects the word *larger* to modify *procedure* signaling that the relevant agency procedure is the broader rule-making or adjudicative process (since arguably every procedural violation would *ipso facto* satisfy the Ninth Circuit's test by bearing upon some procedure). Finally, while the Ninth Circuit's test implies that an agency has the burden of demonstrating that its violation clearly had no bearing on the procedure used or the substance of the decision reached, the proposed test squarely places the burden of demonstrating prejudice on the plaintiffs. All of these refinements would make the proposed prejudicial error test more demanding than the Ninth Circuit's commonly applied formulation.

357. *Id.*

358. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090-93 (9th Cir. 2011).

359. Prestes, *supra* note 274, at 130.

360. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993).

far the agency strayed from that.[361] This asks too much of the judiciary. It is not a court's role to stand in the place of agency decision makers equipped with regulatory expertise and conjecture about the decisions they should have made.[362] The proposed procedural error rule avoids this outcome by instead requiring plaintiffs to show that a violation materially affects the larger procedure employed by the agency in reaching a decision or the substance of the decision itself.[363] Admittedly, courts will still have to determine the materiality of a violation, but this inquiry is judicially manageable. The proposed rule only demands that courts look at the significance a breach has on the broader administrative process or the substance of an agency decision, rather than grasp the often complex factual matters underpinning a proposed rule.

Although this prejudicial error test is likely to be more easily met by plaintiffs than the first prong of the *Allied-Signal* test, it is not meaningless. For procedural violations, plaintiffs will fail to satisfy the test where they are unable to connect a violation with a material effect. For example, an agency's failure to provide proper public notice of an EIS for a proposed rule in violation of the APA[364] and NEPA[365] may not materially affect the agency's larger rule-making procedure if the those likely to be impacted by the rule already had constructive notice of it.[366] Other procedural violations may fail as well. In *California Wilderness Coalition*, for example, the dissent vigorously disputed the notion that DOE's failure to consult with affected states on the designation of NIETCs affected the larger designation procedure employed by the agency in any way.[367] Judge Ikuta wrote:

> [T]he record shows that this failure [to consult] neither impacted the outcome of the designation process nor deprived petitioners of the required opportunity to contribute all comments, facts, and analysis that they wished to submit. The affected states had actual notice that DOE was producing a

361. Prestes, *supra* note 274, at 134.

362. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").

363. *Cal. Wilderness Coal.*, 631 F.3d at 1090-93.

364. 5 U.S.C. § 553(b) (2006).

365. *See* 40 C.F.R. § 1506.6 (2011) ("Agencies shall . . . [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures[,] . . . [p]rovide public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected[, and] [s]olicit appropriate information from the public."); *see also* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 970 (9th Cir. 2003).

366. *See supra* Part IV.D.

367. *Cal. Wilderness Coal.*, 631 F.3d at 1108 (Ikuta, J., dissenting).

> congestion study that would inform its decision to designate NIETCs, and all but two of them actually participated and provided feedback . . . .[368]

Applying the prejudicial error rule instead of the first prong of the *Allied-Signal* test does not create a universal per se vacatur rule. And, even if plaintiffs satisfy the prejudicial error test, vacatur still does not ensue if the result would be overly disruptive to the regulatory scheme under the second prong of the test. In cases where plaintiffs are unable to meet this test for vacatur or where vacatur of a rule does not provide the relief that NEPA plaintiffs seek, plaintiffs will have to look to injunctive relief to remedy their grievances.

V. APPLYING THE PREJUDICIAL ERROR RULE TO THE TEST FOR INJUNCTIVE RELIEF

Injunctive relief is often NEPA plaintiffs' preferred form of relief because it allows them to seek a remedy tailored to the demands of their particular case.[369] Where a full rule vacatur might be excessive or overly disruptive to a regulatory scheme, a narrower injunction may be the more appropriate remedy. Conversely, where a rule does not underlie agency action under NEPA or where vacatur of a rule would be insufficient to redress the full range of plaintiffs' grievances, a broader injunction may be more suitable. The current test for injunctive relief, however, does not adequately value NEPA's procedural mandates.[370] This Part first looks at why the current test for injunctive relief fails and then proposes to revise the test for injunctive relief in the administrative law context by implementing the prejudicial error rule in place of the likelihood of irreparable harm requirement.

A. The Test for Injunctive Relief Subverts NEPA's Aims

"[T]he test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute."[371] Regrettably, this once self-evident truism no longer reflects the trend of recent Supreme Court NEPA

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368. *Id.* Judge Ikuta also contended that *Sanders* compelled a different harmless error test. Much of her dissent focused precisely on the required harmless error showing for procedural violations. *Id.* at 1107-16.

369. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

370. *See supra* Part III.C.

371. Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)).

jurisprudence.[372] In the face of NEPA violations, the test for injunctive relief, with its formidable evidentiary requirements, threatens to impair, rather than effectuate, the statute's policy aims.[373] *Winter*'s requirement that NEPA plaintiffs prove a likelihood of irreparable harm before obtaining injunctive relief fundamentally alters the "hard look" obligation that Congress placed on federal agencies.[374] It effectively shifts the responsibility of assessing and substantiating a project's anticipated environmental harm from federal agencies onto plaintiffs.[375] Imposing this high bar for injunctive relief unduly eases the pressures on agencies to do their NEPA analysis carefully, or at all, the first time around.[376] The high bar may also dissuade concerned citizens from initiating NEPA challenges altogether.[377]

Procedural statutes like NEPA have meaningful substantive goals.[378] Through NEPA, Congress embraced the notion that good process makes for good policy.[379] The Court's decision in *Winter* undermined this idea.[380] The Supreme Court's likelihood of irreparable harm requirement presumes that violations of procedural statutes will not have substantive implications unless a plaintiff can overwhelmingly prove otherwise. This elevated bar for injunctive relief drains the NEPA process of its substantive import.[381]

B. Replacing the Irreparable Harm Requirement with the Prejudicial Error Rule

Looking ahead, courts must find a way to honor the substantive ambitions of procedural statutes when they are breached while at the same time bringing analytic structure to the unpredictable world of equitable relief. In the administrative law context, courts should scrap the likelihood of irreparable harm test for injunctive relief in favor of a more sensible approach.[382] The prejudicial error rule embedded in the

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372. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008); Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

373. *See, e.g.*, Sierra Club v. Marsh, 872 F.2d 497, 500-01 (1st Cir. 1989).

374. *See supra* text accompanying note 236.

375. *See supra* Part III.C.

376. Levin, *supra* note 43, at 298; *see also supra* Part III.C.

377. Levin, *supra* note 43, at 298; *see also supra* Part III.C.

378. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989).

379. *See id.*

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

381. Sierra Club v. Marsh, 872 F.2d 497, 500-01 (1st Cir. 1989).

382. At the very least, courts ought to be able to consider the gravity of a perceived threat in addition of its probability of occurring in their likelihood of irreparable harm calculus. *See* Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note

text of APA § 706 offers a viable alternative focusing on both the process and outcome of agency decision making.[383] Where plaintiffs can show that a NEPA violation materially affects the larger procedure employed by an agency in reaching a decision or the substance of the decision itself,[384] they should satisfy their required showing of harm for injunctive relief. The other three prongs of the test for injunctive relief—(1) that other remedies available at law are inadequate to compensate for that injury, (2) that the balance of hardships tips in favor of granting injunctive relief, and (3) that the public interest would not be disserved by a grant of injunctive relief[385]—should remain intact. Satisfying these three prongs, plus demonstrating prejudicial error, should collectively meet the requirements for injunctive relief.

The likelihood of irreparable harm standard and the prejudicial error standard both get at the same essential concern: they seek to ensure that a violation has caused or is likely to cause some quantum of harm.[386] The difference is that the prejudicial error rule acknowledges the value of procedural mandates in effectuating substantive goals and sidesteps some of the current uncertainty around what constitutes a *likelihood* of irreparable harm. The prejudicial error rule recognizes the consequence of procedural violations for statutory schemes like NEPA and demands only that breaches materially affect the larger decision-making process or the substance of an agency decision for the test to be satisfied.[387] Applying this prejudicial error rule avoids placing judges in the uncomfortable position of trying to predict the probability (and perhaps the gravity) of an unrealized and uncertain harm.[388] Instead, it only asks judges to make an up or down determination of a violation's materiality. Indeed, in many instances, the materiality of a violation's impact on the larger decision-making process or the substance of an agency decision will be patently clear by the time the issue comes to a court.

29; Mach, *supra* note 83, at 227 ("[N]otwithstanding common dictionary meanings of 'likely' that suggest a high probability, it seems impossible that the *Winter* standard requires that harm be 'more likely than not' to occur." (footnote omitted)). Where, for example, an action threatens nuclear disaster, courts should be able to enjoin that action from moving forward even if the threat is mathematically less than fifty-one percent likely to materialize. *See* Brief for Amici Curiae Natural Res. Def. Council et al., in Support of Respondents, *supra* note 29.

383. Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072 (9th Cir. 2011).

384. *See supra* Part IV.D.

385. 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); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)).

386. It should be noted that injury is already part of the standing analysis. *See* discussion and sources cited *supra* note 228.

387. *See supra* Part IV.D.

388. *See supra* Part II.G.

Undoubtedly, plaintiffs challenging agency violations stand a better chance of meeting their evidentiary burdens under the proposed prejudicial error test, but not every NEPA violation would automatically satisfy the test. As previously noted, an agency's failure to provide public notice of an EIS in violation of NEPA,[389] for example, may not materially affect the agency's larger rule-making procedure where constructive notice and comment opportunity has already occurred. Further, plaintiffs would still need to prevail on the merits of their claim and meet the other three prongs of the test for injunctive relief. In light of all of these hurdles, implementing the prejudicial error rule would by no means unduly compromise the "extraordinary" nature of injunctive relief.[390] Applying the proposed prejudicial error rule in place of the likelihood of irreparable harm requirement creates a more practicable standard that better effectuates NEPA's broad policy aims.

VI. CONCLUSION

Prescriptive equitable relief jurisprudence is an area of law fraught with inconsistent and imprudent standards.[391] *Geertson* highlighted the disparity between these standards: the high bar for injunctive relief reaffirmed by the Court juxtaposed with the fluid, but often lower, standards governing vacatur.[392] In the midst of these judicial incongruities, the prejudicial error rule offers helpful guidance.[393] Replacing prongs of both the test for vacatur and the test for injunctive relief with the prejudicial error rule would help clarify and narrow the gap between the discordant standards governing prescriptive equitable relief, while at the same time staying faithful to the text of APA § 706.[394] It would breathe new life into the procedural mandates of NEPA by recognizing that process influences outcome.[395] As alfalfa growers may attest, sowing seeds with care yields generous harvests.

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389. *See* 40 C.F.R. § 1506.6 (2011); *see also* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961 (9th Cir. 2003).

390. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

391. *See supra* Parts III.C, IV.B.

392. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

393. *See supra* Parts IV.D, V.B.

394. *Id.*; 5 U.S.C. § 706 (2006).

395. *See supra* Parts IV.D, V.B.