
Reframing the Judicial Approach to Injunctive Relief for Environmental Plaintiffs in *Monsanto Co. v. Geertson Seed Farms*

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In Monsanto Co. v. Geertson Seed Farms, the Supreme Court reversed the Ninth Circuit’s permanent injunction against partial deregulation and planting of genetically engineered alfalfa. The Court held that a four-factor test applies when a plaintiff seeks a permanent injunction to remedy a National Environmental Policy Act violation. Even though the only remedy available to the plaintiffs was an injunction, the Court reasoned that it was overbroad because irreparable harm to the environment was not certain.

This Note argues that the Monsanto decision cuts away at the longstanding judicial approach of granting near automatic injunctions for environmental harms by requiring judges to instead follow a balancing test to determine whether an injunction should issue. Further, it discusses how the Monsanto decision fits into established trends of the conservative Supreme Court. Finally, this Note analyzes the implications of the four-factor balancing test, focusing on how it affects the availability of judicial remedies and the standards of judicial review.

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INTRODUCTION

Alfalfa is the fourth-most planted crop in the United States.¹ It is a nine-billion dollar industry.² A scientific innovation that alters the genetic makeup of alfalfa, permitting an almost limitless amount of herbicide to be dumped on its fields, is a tremendous ecological event. In the legal world, though, it creates a garden-variety environmental lawsuit.

On the surface, the Supreme Court's decision in *Monsanto Co. v. Geertson Seed Farms* was not earth-shattering.³ The Supreme Court carefully avoided mentioning the herbicide conflict, choosing instead to focus on a narrow procedural issue. The decision did not pass down a new legal rule, nor gather much public attention. The Court's decision appears, at least at first, to be banal; after all, the Court only reaffirmed the necessary four-part standard for injunctive relief from its earlier decision in *Winter v. Natural Resources Defense Council*, and confirmed that this standard applies to cases arising under the National Environmental Policy Act (NEPA).⁴

However, beneath the inconsequential surface of *Monsanto* is language that has the potential to reframe how courts approach environmental plaintiffs and their requests for injunctive relief. The *Monsanto* decision cuts away at the longstanding judicial approach of granting near-automatic injunctions for environmental harms by requiring judges to instead follow a balancing test to determine whether an injunction should issue.⁵

The new four-part balancing test has far-reaching consequences and changes the remedial landscape facing environmental plaintiffs for the worse.

1. See Greg Stohr, *Monsanto Wins as Court Backs Alfalfa Seed Planting (Update2)*, BLOOMBERG BUS. WEEK (June 21, 2010, 1:40 PM), <http://www.businessweek.com/news/2010-06-21/monsanto-wins-as-court-backs-alfalfa-seed-planting-update2-.html>.

2. See *id.*

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

4. See National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (2006); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 370 (2008); *Monsanto Co.*, 130 S. Ct. at 2756.

5. See discussion *infra* Part II.B.1.

The new rule makes it more difficult for plaintiffs to stop irrevocable projects from moving forward, threatening the ability of many environmental parties to obtain protection from projects that violate the law. The balancing test also decreases the robustness of appellate review and increases the litigation expenses for environmental plaintiffs. Further, the balancing test may allow judges to imbue their personal politics into the decision.

On the other hand, however, the balancing test can also be understood as a reaction to the procedural requirements of NEPA, which do not have clear mandates. Balancing therefore provides judges much-needed discretion to consider the severity of the legal or environmental wrong before issuing a far-reaching injunction. Additionally, the balancing test may be a useful tool to restrain overly litigious environmental groups.

This Note begins in Part I with a case overview and analysis of the surrounding case law and statutory regime. Part II discusses how the *Monsanto* decision fits into established trends of the conservative Supreme Court. Finally, Part III analyzes the implications of the four-factor balancing test, focusing on how it affects the availability of judicial remedies and the standards of judicial review.

I. CASE OVERVIEW

A. *Factual and Statutory Background*

Monsanto Co. v. Geertson Seed Farms involves a challenge to the Animal and Plant Health Inspection Service's (APHIS) decision to approve a blanket deregulation of Roundup Ready alfalfa (RRA).⁶ RRA is a variety of alfalfa that has been genetically engineered to tolerate the herbicide Roundup.⁷ The Secretary of Agriculture has authority under the Plant Protection Act (PPA) to issue regulations "to prevent the introduction of plant pests into the United States," and has delegated that authority to APHIS.⁸ Pursuant to that authority, APHIS promulgated regulations under which genetically engineered plants are presumed to be "plant pests" and therefore are "regulated articles" under the PPA until APHIS determines otherwise.⁹ Any person may petition APHIS to deregulate an article and allow planting upon a determination that it does not present a plant pest risk.¹⁰

APHIS must comply with NEPA in deciding whether to deregulate a genetically modified plant. Congress enacted NEPA in 1969 to ensure that federal agencies consider the environmental consequences of proposed major

6. *Monsanto Co.*, 130 S. Ct. at 2749.

7. *See id.* at 2750.

8. 7 U.S.C. § 7711(a) (2006); 7 C.F.R. §§ 2.22(a)(2)(xxxi), 2.80(a)(36) (2010).

9. *See* 7 C.F.R. § 340(a).

10. *See* 7 U.S.C. § 7711(c)(4); 7 C.F.R. § 340.6(c)(4).

federal actions.¹¹ The purpose of NEPA is to foster better decision making and informed public participation for actions that affect both people and the natural environment.¹² NEPA does not “mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.”¹³

By mandating a fluid exchange of information between the agency and the public, the touchstone of NEPA compliance is not the final agency decision but the process of disclosure and inclusion. To carry out the “hard look” requirement, NEPA requires all federal agencies to prepare a detailed environmental impact statement (EIS) for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”¹⁴ Under the Council on Environmental Quality’s implementing regulations, an agency may prepare an environmental assessment (EA) as a preliminary step to determine whether the environmental impact of the proposed action is significant enough to warrant an EIS.¹⁵ If an EA establishes that the agency’s action “may have a significant effect upon the . . . environment, an EIS must be prepared.”¹⁶ If the proposed action is found to have no significant effect, the agency must issue a finding to that effect (a finding of no significant impact, or FONSI), “accompanied by a convincing statement of reasons to explain why a project’s impacts are insignificant.”¹⁷

Monsanto, owner of the intellectual property rights to RRA, and Forage Genetics International, the exclusive developer of the seed, petitioned APHIS to deregulate RRA in 2004.¹⁸ In response to the deregulation petition, the agency subsequently published a draft EA, received public comment, and then issued a FONSI, forgoing preparation of an EIS.¹⁹ APHIS decided to deregulate RRA unconditionally, which allowed the plant to be sold freely without regulation by the U.S. Department of Agriculture (USDA).²⁰ This decision triggered the lawsuit.

B. Procedural History

Geerston Seed Farms, a conventional alfalfa seed farm, and several environmental groups and farmers filed an action against the Secretary of

11. See 42 U.S.C. § 4321 (2006); 40 C.F.R. § 1501.1(c) (2010).

12. See 42 U.S.C. § 4321.

13. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002) (internal quotation marks omitted).

14. 42 U.S.C. § 4332(2)(C).

15. See *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001); 40 C.F.R. § 1508.9 (2010).

16. *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 730 (internal quotation marks omitted).

17. *Id.* (internal quotation marks omitted).

18. See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750 (2010).

19. See *id.*

20. See *id.*

Agriculture challenging APHIS's decision to completely deregulate RRA.²¹ The plaintiffs brought claims under NEPA, the PPA, and the Endangered Species Act (ESA).²² The District Court for the Northern District of California granted summary judgment for the plaintiffs and held that APHIS violated NEPA in not preparing an EIS.²³ The court accepted the agency's determination that RRA does not have any harmful effects on humans and livestock.²⁴ However, the court still found that there were "substantial questions" and risk concerning (1) the extent of "gene transmission to non-genetically engineered alfalfa" and the ability of conventional farmers to "protect their crops" from acquiring the gene;²⁵ (2) "the development of Roundup-resistant weeds";²⁶ and (3) the "increased use of glyphosate," the active ingredient in Roundup herbicide, and its effect on the environment.²⁷ The district court took these risks seriously and devoted over ten pages of the decision to a discussion of their significance.²⁸

The court held that the agency's conclusion of insignificant impacts was "not convincing" and "demonstrate[d] that the agency did not take a hard look" at the effects of its decision.²⁹ The court ordered the parties to submit proposed judgments and dismissed the plaintiff's ESA and PPA claims without prejudice.³⁰

Based on the NEPA violation, the district court vacated APHIS's deregulation decision, which returned RRA to a regulated article under the PPA.³¹ The court also ordered the agency to prepare an EIS, and issued a nationwide preliminary injunction against the planting and harvesting of RRA in the interim.³² The court order permitted the planting and harvesting of alfalfa that was planted before March 30, 2007, in order to protect those farmers who had already purchased or planted seed in reliance upon APHIS's deregulation decision.³³

Two months later, the court denied a motion for reconsideration and permanently enjoined the complete deregulation and planting of RRA

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

22. *See id.*

23. *See id.* at *12.

24. *See id.* at *8.

25. *Id.* at *12.

26. *Id.*

27. *Id.* at *10.

28. *See id.* at *4-13.

29. *Id.* at *10.

30. *See id.* at *12.

31. *See id.*

32. *See* Geertson Farms Inc. v. Johanns, No. C 06-01075 CRB, 2007 WL 776146, at *3 (N.D. Cal. Mar. 12, 2007).

33. *See id.*

nationally, without holding an evidentiary hearing.³⁴ Significantly, the court rejected the agency's proposed judgment of just a partial deregulation of RRA;³⁵ instead of a complete ban, APHIS wanted planting permitted subject to certain conditions, such as isolation distances, which allow planting outside a specified distance from traditional alfalfa fields.³⁶

Monsanto appealed the injunction to the Ninth Circuit Court of Appeals and argued that the district court "erred in ordering injunctive relief because it improperly presumed irreparable injury instead of applying the traditional four factor test for the issuance of a permanent injunction, as required under *eBay Inc. v. MercExchange*."³⁷ The Ninth Circuit, in a two-to-one opinion,³⁸ affirmed the district court order. Although the circuit panel agreed that courts cannot categorically grant or deny injunctive relief without applying the traditional "balancing of harms test" in *eBay*,³⁹ the panel held that the lower court properly applied the *eBay* test.⁴⁰

Shortly after the initial Ninth Circuit affirmance, the U.S. Supreme Court issued its decision in *Winter v. Natural Resources Defense Council*.⁴¹ In *Winter*, environmental groups challenged the United States Navy's ability to use sonar during training exercises in the Pacific Ocean, which the groups claimed harmed whales and other marine mammals.⁴² The Supreme Court vacated the preliminary injunction issued by the Ninth Circuit, stating that the lower court's "test for issuance of a preliminary injunction was too lenient because the Ninth Circuit test required only a possibility of harm."⁴³ The Court held that plaintiffs must show that irreparable injury is "likely" in the absence of an injunction, not

34. See *Geertson Farms Inc. v. Johanns*, No. C 06-01075 CRB, 2007 WL 1302981, at *9 (N.D. Cal. May 3, 2007), *order and scope of injunctive relief modified (upon Rule 59(e))*, 2007 WL 1839864 (N.D. Cal. June 26, 2007).

35. See *id.*

36. See *id.* at *2. APHIS's proposal included three other conditions. First, that pollinators shall not be added to Roundup Ready alfalfa fields grown only for hay production. Second, farm equipment used in Roundup Ready alfalfa production shall be properly cleaned after use. Third, Roundup Ready alfalfa shall be handled and clearly identified to minimize commingling after harvest. See *id.*

37. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009), *amending and superseding*, 541 F.3d 935 (9th Cir. 2008); see *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); see also discussion *infra* note 61.

38. See *Geertson Seed Farms*, 570 F.3d at 1136. The panel consisted of Mary Schroeder and Randy Smith, Circuit Judges, and Valerie Fairbank, District Judge for the Central District of California sitting by designation. Schroeder and Fairbank were in the majority and Smith filed a dissenting opinion.

39. See *id.* at 1137; see also *eBay*, 547 U.S. at 391. The test requires a plaintiff to demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law 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.

40. See *Geertson Seed Farms Inc.*, 570 F.3d at 1137.

41. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

42. See *id.* at 370.

43. *Id.* at 376.

just “possibl[e].”⁴⁴ However, even if plaintiffs had met this standard, the Court, relying on the “public interest” prong of the *eBay* injunctive test, held that the Navy’s interest in effective, realistic training of its sailors still “plainly outweighed” the environmental interests protected by the injunction.⁴⁵

Monsanto filed for a rehearing and asked the Ninth Circuit to reconsider the case in light of *Winter*.⁴⁶ The district court’s decision was prior to the *Winter* decision, during a time when the Ninth Circuit allowed injunctions in NEPA cases to prevent irreparable harm found to be a “possibility.”⁴⁷ Whereas post-*Winter*, the Ninth Circuit required that NEPA injunctions aim to prevent only irreparable harm that is “likely.”⁴⁸ Nevertheless, the Ninth Circuit denied rehearing and issued an amended opinion identical to the original, save for a few extra sentences of analysis and a citation to *Winter* inserted at the end of a sentence approving of the district court’s original analysis.⁴⁹

In its request for a rehearing, Monsanto argued that the district court should have held an evidentiary hearing before issuing a nationwide injunction.⁵⁰ The court conceded that, in general, a district court should hold an evidentiary hearing before issuing a permanent injunction, but that the injunction in this case was “not a typical permanent injunction” since it “involved only interim measures” pending the completion of an EIS.⁵¹ The Ninth Circuit held that the district court did not err in denying a request for an evidentiary hearing because such a hearing would require the court “to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS.”⁵²

Circuit Judge Randy Smith dissented from the majority on the issue of the evidentiary hearing and would have remanded to the agency to conduct a hearing.⁵³ According to Smith, a court cannot forego an evidentiary hearing simply because the injunction may dissolve in the future and the issues to be raised overlap with issues the agency must consider in an EIS.⁵⁴ The Ninth Circuit’s opinion affirming permanent injunctive relief against deregulation and planting was appealed to the Supreme Court.

44. *Id.*

45. *See id.* at 382. The Court did not address the merits of the lawsuit—that is, whether the Navy exercises violated NEPA or the other federal environmental laws claimed to be violated.

46. *See Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009), *amending and superseding* 541 F.3d 935 (9th Cir. 2008).

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

48. *See id.*

49. *See Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1133, 1137 (9th Cir. 2009), *amending and superseding* 541 F.3d 935 (9th Cir. 2008).

50. *See id.* at 1139.

51. *Id.* at 1139–40.

52. *Id.* at 1139.

53. *See id.* at 1143 (Smith, J., dissenting).

54. *See id.*

C. Supreme Court Opinion

The Supreme Court reversed the Ninth Circuit and remanded to the district court, setting in motion a drastically new approach to the judicial review of NEPA injunctions.⁵⁵ After first determining that petitioners had standing to seek review,⁵⁶ the Court reversed the injunction prohibiting APHIS from partially deregulating RRA pending completion of an EIS, and reversed the nationwide injunction against planting.⁵⁷ Monsanto did not challenge the district court order vacating the agency's decision to completely deregulate RRA, so the vacatur remained in effect.⁵⁸ The Court did not address the requirement for an evidentiary hearing.⁵⁹

In a seven-to-one opinion,⁶⁰ the Court reversed the permanent injunctions against partial deregulation and against planting. It made clear that the "traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation."⁶¹ The four-factor test requires a plaintiff to 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 the defendant, a remedy in equity is warranted; and
- (4) that the public interest would not be disserved by a permanent injunction.⁶²

The Court held that none of the four factors supported permanent injunctive relief in this case.⁶³

55. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. at 2749.

56. *See id.* at 2752–56. The court determined that both parties satisfied the requirements for constitutional standing. *Id.* at 2752. Standing requires that an injury be (1) "concrete, particularized, and actual or imminent;" (2) "fairly traceable to the challenged action;" and (3) "redressable by a favorable ruling." *Id.* The court held that Monsanto had standing to appeal the District Court's order because they were injured by their inability to sell or license RRA, which was caused by the District Court's order, and would be redressed by a favorable ruling. *Id.* at 2753–55. The Court found it unnecessary to determine if the agency would be likely to afford the relief Monsanto sought if deregulation was permitted, since elimination of that possibility is itself sufficient to establish injury. *Id.* Likewise, the court held that Geertson Seed Farms had standing to seek injunctive relief because the substantial risk of gene transmission injured them. *Id.* at 2754–56. Even if the crops are never actually infected, conventional farmers are injured because of an increased need for expensive testing for the genetically modified gene. *Id.* Since this economic injury is tied to an environmental harm, the Court held that the injury is sufficiently within the "zone of interests" that NEPA protects to confer standing. *Id.*

57. *See id.* at 2754.

58. *See id.* at 2761.

59. *See id.*

60. The majority opinion, written by Justice Alito, was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsberg, and Sotomayor. Justice Stevens authored the lone dissent. Justice Breyer recused himself because his brother, Northern District of California Judge Charles J. Breyer, authored the District Court opinion in the case. *Id.* at 2749.

61. *Monsanto Co.*, 130 S. Ct. at 2756.

62. *Id.* (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

63. *See id.* at 2758.

In reversing the injunction, the Supreme Court rejected the approach taken by both lower courts. The Supreme Court held that the district court and Ninth Circuit had “invert[ed] the proper mode of analysis” when the district court declared that “in unusual circumstances, an injunction may be withheld, or, more likely, limited in scope.”⁶⁴ Concluding that both lower courts had it backwards, Justice Alito stated:

[T]he statements quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather a court must determine that an injunction *should* issue under the traditional four-factor test set out above.⁶⁵

The Court focused on a particular interpretation of the district court’s order in holding that an injunction against deregulation was not warranted. The relevant part of the district court’s judgment states that, “[b]efore granting Monsanto’s deregulation petition, even in part, the federal defendants shall prepare an environmental impact statement.”⁶⁶ The Court interpreted this as “prohibit[ing] *any* partial deregulation, not just the particular partial deregulation embodied in APHIS’s proposed judgment.”⁶⁷ The Supreme Court agreed that the district court was within its discretion to enjoin the complete deregulation decision that was found to be in violation of NEPA, but reasoned that the district court cannot enjoin all future partial deregulation decisions.⁶⁸

The Court explained that the injunction against any deregulation was not warranted because it was “premature,” and because it did not meet the four-factor test. First, a judicial ban on any deregulation was “premature” because APHIS did not have the opportunity to submit a partial deregulation proposal.⁶⁹ Thus, the district court cannot enjoin a hypothetical future decision. The Court held that APHIS has the authority to pursue partial deregulation, independent of the complete deregulation decision at issue. Although the decision to completely deregulate RRA required an EIS to meet the mandates of NEPA, a partial deregulation may not require an EIS. For instance, a very limited partial deregulation for RRA in a remote wilderness that is nowhere near any conventional alfalfa might not need an EIS, and therefore the injunction requiring the agency to complete an EIS before allowing this partial deregulation would be overbroad. The Court explained that because a partial deregulation decision, based on a particularized EA or EIS, could satisfy the

64. *Id.* at 2757.

65. *Id.*

66. *Id.*

67. *Id.* at 2757–58.

68. *See id.* at 2758.

69. *See id.*

applicable statutory and regulatory requirements, the broad injunction was unwarranted.⁷⁰

Second, the Court held that any partial deregulation was not warranted because the lower court incorrectly applied the proper four-factor test.⁷¹ In particular, the injunction failed factor one of the test because a partial deregulation might not cause any “irreparable injury.”⁷² The Court hypothesized that if the scope and risks of gene transmission were sufficiently limited, it would not be certain that an injury would occur.⁷³ Since respondents did not meet the irreparable injury requirement, the injunction was reversed.⁷⁴ Even though the Court mentions that none of the four factors were met, the decision does not discuss the remaining three factors. The failure to prove irreparable injury alone foreclosed the granting of an injunction.

Similarly, the Supreme Court reversed the district court’s injunction against planting RRA.⁷⁵ The Court held that the injunction was too broad; if USDA determines that partial deregulation is appropriate and the requirements of NEPA have been met, the ban would prevent farmers from legally planting RRA in accordance with the partial deregulation.⁷⁶ Additionally, the Court held that since the vacatur already foreclosed planting by returning RRA to a regulated article, the injunction was unnecessary.⁷⁷ Therefore, the Court held that the district court’s permanent injunction order against deregulation and against planting was too “drastic” and should not issue.⁷⁸

D. Stevens’s Dissent

Justice Stevens filed a lone dissent, arguing to uphold the district court’s order for four reasons.⁷⁹ First, Stevens disagreed with the majority’s interpretation of the district court’s order.⁸⁰ Although he conceded that the order was “opaque,” Stevens did not think that the order enjoined all partial deregulation; rather, it only enjoined the particular partial deregulation that APHIS proposed.⁸¹ Even under the majority’s interpretation, however, Stevens

70. See *id.* at 2760.

71. *Id.* at 2756; see balancing test *supra* note 39.

72. *Id.* at 2759–60.

73. See *id.* at 2769.

74. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The court did not address the other three factors of the test. See *Monsanto Co.*, 130 S. Ct. 2743.

75. See *Monsanto Co.*, 130 S. Ct. at 2761.

76. See *id.* at 2761.

77. See *id.*

78. See *id.* at 2761–62.

79. See *id.* at 2762 (Stevens, J., dissenting).

80. See *id.*

81. See *id.* at 2762, 2766.

would still uphold the judgment as “an equitable application of administrative law” and “as a reasonable response to the nature of the risks posed by RRA.”⁸²

Second, Stevens noted that neither the government nor Monsanto submitted that the district court had exceeded its authority in this manner until their reply brief to the Supreme Court.⁸³ Since the issue was not presented or briefed properly, Stevens wrote that it is “not standard—or sound—judicial practice” to decide this legal matter.⁸⁴

Third, Stevens was worried that, by striking down the injunction against partial deregulation, the Court could possibly be undermining the agency’s eventual decision.⁸⁵ If partial deregulation was allowed to go forward, it may have the effect of rationalizing the eventual EIS decision, instead of encouraging full analysis.⁸⁶

Finally, Stevens highlighted the considerable risks the district court had to weigh. The threat of gene transfer is great, and once it occurred it “would be difficult—if not impossible—to reverse the harm.”⁸⁷ Stevens pointed out that APHIS had only limited capacity to monitor planted RRA, and he expressed some skepticism in the agency’s abilities.⁸⁸ Accordingly, Stevens would have held that the district court acted within its discretion when it was faced with great risks and limited monitoring ability.⁸⁹

II. IMPLICATIONS OF THE DECISION

A. *A Puzzling Case*

The *Monsanto* decision is a puzzling case. On the surface, the Supreme Court did not reach a very surprising result, and neither party to the suit claimed that the decision was wrong.⁹⁰ In fact, the grounds for reversing the lower court turned on a narrow procedural issue that did not gather much media

82. *Id.* at 2767, 2769.

83. *See id.* at 2765.

84. *Id.*

85. *See id.* at 2768.

86. *See id.* at 2768–69.

87. *Id.* at 2770 (citing *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010)).

88. *See id.* at 2764.

89. *See id.* at 2770.

90. See Ian Froeb, *Monsanto v. Geertson Seed Farms: The Supreme Court Rules, Everyone Claims Victory*, NEWS OF THE WORLD BLOG (June 22, 2010), http://blogs.riverfronttimes.com/gutcheck/2010/06/monsanto_v_geertson_seed_farms_supreme_court_ruling_genetically_modified_gmo_alfalfa_st_louis_food_blog_news_062210.php; Brent Kendall, *High Court Sides with Monsanto in Alfalfa Case*, WALL STREET J. (June 22, 2010), <http://online.wsj.com/article/SB10001424052748704895204575320664136428870.html>; Andrew Kimbrell, *Supreme Court Case a Defeat for Monsanto’s Ambitions*, HUFFINGTON POST (June 21, 2010), http://www.huffingtonpost.com/andrew-kimbrell/supreme-court-case-a-defe_b_620087.html.

attention.⁹¹ Interestingly, although the Supreme Court reversed the Ninth Circuit, it did not upend the the status quo of RRA.⁹² APHIS's decision to deregulate RRA was still vacated under the district court's order, so alfalfa remains a regulated article that cannot be planted freely, even after the Supreme Court reversed the injunction against planting.⁹³ The duplicative nature of this regulatory and statutory scheme is unusual because vacatur of the administrative decision prevents planting, and an injunction against planting accomplishes the same thing. All of this raises the question: Why did the Supreme Court grant certiorari on this case?

One important reason may be that language in the decision contributes to a reframing of how courts approach environmental plaintiffs and their requests for injunctive relief. This matters tremendously because injunctive relief is often the primary remedy that environmental plaintiffs seek in court.⁹⁴ The *Monsanto* court views requests for injunctive relief skeptically.⁹⁵ Lower courts are instructed to cautiously determine that injunctions should issue by using the four-factor balancing test from *Winter*.⁹⁶ The balancing test is a significant departure from the historical approach to environmental relief, and the test makes it significantly harder for environmental plaintiffs to obtain relief.

B. *Far-Reaching Consequences of the Balancing Test*

The *Monsanto* court, led by the decision's conservative author, Justice Alito, frames requests for environmental injunctive relief skeptically and adopts the use of the four-factor balancing test to embody this skepticism. Under the test, environmental plaintiffs must demonstrate that the injunction they seek is necessary to stop harm. To fully understand how *Monsanto* changes the remedial landscape and tone of injunctive relief in environmental cases, one must consider the history of environmental remedies.

91. See sources *supra* note 90.

92. See *Monsanto*, 130 S. Ct. at 2761.

93. See *id.*; see also 7 C.F.R. § 340 (2010). As of January 24, 2011, RRA remains a regulated article. However, that status is going to change. On December 26, 2010, APHIS published the EIS for RRA. See U.S. DEP'T OF AGRIC., GLYPHOSATE-TOLERANT ALFALFA EVENTS J101 AND J163: REQUEST FOR NONREGULATED STATUS: FINAL ENVIRONMENTAL IMPACT STATEMENT (2010), available at http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gt_alfalfa%20_feis.pdf. The USDA considers two options in the EIS, complete deregulation as one option, and deregulation accompanied by a combination of isolation distances and geographic restrictions on the production of GE alfalfa seed as the other. *Id.* at 10 There is a minimum thirty-day period required between publication of the EIS in the *Federal Register* and a deregulation decision by the agency. *Id.* at ii.

94. See ANDERSON ET AL., ENVIRONMENTAL LAW PRACTICE 4 (3d ed. 2000).

95. See *Monsanto*, 130 S. Ct. at 2757.

96. See *id.*; see also *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008); balancing test *supra* note 39.

1. *History of Injunctive Relief in Environmental Cases*

For a long time, environmental plaintiffs enjoyed strong injunctive relief as a protection from environmental harm. One of the best examples of that strong environmental protection through injunctive relief is the seminal case *Tennessee Valley Authority v. Hill*,⁹⁷ an endangered species case concerning the Little Tennessee River and the snail darter.⁹⁸ The Tennessee Valley Authority had been building the Tellico Dam on the Little Tennessee River for ten years and the dam was almost completed when an endangered fish species, the snail darter, was found upstream.⁹⁹ If the dam were completed, the resulting upstream reservoir would flood the snail darter's river habitat, causing considerable harm to the fish.¹⁰⁰ Environmental groups filed the case to enjoin completion of the dam and impoundment of the reservoir on the ground that those actions would violate the ESA by directly causing the extinction of the species.¹⁰¹

The district court denied the plaintiff's request for injunctive relief and based its decision on the court's powers in equity.¹⁰² The court stated that equity prevents such an "unreasonable result."¹⁰³ However, the Sixth Circuit and Supreme Court reversed the lower court and granted a permanent injunction to halt completion of the Tellico dam.¹⁰⁴ The Supreme Court identified a prima facie violation of section 7 of the ESA in that the Tennessee Valley Authority had failed to take necessary action to avoid jeopardizing the snail darter's critical habitat.¹⁰⁵ To reach that result, the Court focused on the plain statutory language of the ESA, which the Court said could not be clearer.¹⁰⁶ The Court also relied on the plain intention of Congress to halt species extinction, whatever the cost, since the value of the species was "incalculable" and damage irreparable.¹⁰⁷ The immense significance of the decision is evidenced by the following words of the Court:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would

97. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

98. *See id.* at 153.

99. *See id.*

100. *See id.*

101. *See id.*; *see also* Endangered Species Act of 1973, 87 Stat. 884 (1973) (current version at 16 U.S.C. § 1540(g) (2006)). The ESA requires that "Federal departments and agencies shall . . . tak[e] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical." 16 U.S.C. § 1536.

102. *See Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976).

103. *Id.*

104. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

105. *See id.* at 190.

106. *See id.* at 173.

107. *See id.*

require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.¹⁰⁸

It is clear from this statement that the Supreme Court afforded the highest of priorities to creating a remedy that would prevent the environmental harm.

In Justice Rehnquist's dissenting opinion, he argued that the significant public and social harms that would flow from such relief outweighed the harm to the species.¹⁰⁹ He wrote that equitable factors should play a central role in the decisions of courts whether to grant or deny an injunction.¹¹⁰ Justice Rehnquist stated that equity is the proper instrument for reconciliation between the public interest and private needs, and that here the immense public expense outweighs the private interest of the species.¹¹¹ His dissent emphasizes the powers of equity in a way that foreshadows the four-factor balancing test in *Monsanto* and *Winter*.

Tennessee Valley Authority was a defining moment for the environmental legal world because of the case's high public profile¹¹² and because of its utmost support for an injunction to prevent environmental harm, even in the face of immense social costs. In the decades since the case, lower courts have looked favorably on environmental plaintiffs and issued injunctions in environmental cases where they believed environmental harm might occur and when laws had been violated.¹¹³

However, the right to an injunction was not absolute.¹¹⁴ A tension developed in the case law over the proper mode of analysis between the primacy of statutory language that afforded environmental harms the highest priority, like that in *Tennessee Valley Authority*, and equitable discretion. After *Tennessee Valley Authority*, some Courts recognized the powers of equitable discretion in determining the proper remedy for violations of environmental law. For example, in *National Wildlife Federation v. Espy*, the Ninth Circuit stated that "although the District Court has power to do so, it is not required to

108. *Id.* at 172.

109. *See id.* at 213 (Rehnquist, J., dissenting).

110. *See id.*

111. *See id.* at 211.

112. Zygmunt J.B. Plater, *The Snail Darter, The Tellico Dam, and Sustainable Democracy—Lessons for the Next President from a Classic Environmental Law Controversy* (Boston College Law School Lectures and Presentations, Paper No. 4, 2000), available at <http://lawdigitalcommons.bc.edu/lslp/4>.

113. *See* discussion *infra* Part II.B.1.

114. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995).

set aside every unlawful agency action.”¹¹⁵ “The court’s decision to grant or deny injunctive or declaratory relief under the [Administrative Procedure Act (APA)] is controlled by principles of equity.”¹¹⁶

In addition, the Supreme Court decided a series of cases where they denied requests for injunctive relief based on equity considerations.¹¹⁷ For instance, in *Weinberger v. Romero-Barcelo*, the Supreme Court found that the Navy had violated the Clean Water Act¹¹⁸ by discharging weapons into the sea without a permit.¹¹⁹ The Court refused to enjoin operations because the Navy’s violations were not causing any “appreciable harm” to the quality of the water.¹²⁰ The Court stated, “[a]n injunction should issue only where the intervention of a court of equity ‘is essential in order to effectively protect property rights against injuries otherwise irremediable.’”¹²¹ This decision is noticeably different from that in *Tennessee Valley Authority* because, while the *Tennessee Valley Authority* Court granted an immediate injunction after finding a violation, the Court in *Weinberger* decided on the proper remedy after an analysis of equitable balancing.

These cases highlight the previously unresolved nature of the Supreme Court’s precedent on the proper analysis in deciding requests for injunctive relief. There was a tension over the primacy of interpretation between statutory mandates and equitable discretion. *Monsanto* resolves this tension. The Supreme Court in *Monsanto* decided on the equitable balancing test and discarded statutory analysis that prioritizes environmental harms.

Monsanto’s language noticeably shifts the tone for courts to approach requests for injunctive relief for environmental plaintiffs. The *Monsanto* four-part test is the generic legal standard for injunctive relief. First outlined in *eBay v. MercExchange, LLC*, a copyright case, the test is used across subject areas for injunctive relief.¹²² But *Tennessee Valley Authority*’s legacy for environmental injunctions is very different than the generic standard, in part due to compelling statutory language that underscored the intrinsic value of the environment.¹²³ For instance, the *Tennessee Valley Authority* Court’s concern with the “incalculable value of the species” that tipped the scales in favor of an

115. *Id.*

116. *Id.*

117. *See, e.g., Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987) (denying injunction preventing Secretary of Interior from selling oil and gas leases for federally owned lands in outer continental shelf of Alaska, since the leases probably did not injure Alaskan tribes’ interest in subsistence resources protected by Alaska National Interest Lands Conservation Act).

118. 33 U.S.C. § 1251–1375 (2006).

119. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 307 (1982).

120. *Id.* at 310.

121. *Id.* at 312.

122. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see* balancing test *supra* note 39.

123. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978).

injunction is not likely to be mirrored in a large intellectual property suit between two corporations.¹²⁴ Under *Monsanto*'s mode of analysis, a court must first *justify* the injunction.¹²⁵ Irreparable harm to the environment is no longer presumed and cannot alone mandate an injunction, because *Monsanto* characterizes environmental harm as just another factor in the test, and not one of highest priority.¹²⁶

One cannot help but hypothesize that the outcome of *Tennessee Valley Authority* would be drastically different if the Court had employed the four-part balancing test the modern Court uses in *Monsanto*.¹²⁷ It is likely that the environmental groups' request for injunctive relief in *Tennessee Valley Authority* would have satisfied part one and two of the test—irreparable injury and inadequate remedies, respectively—but the request would likely fail parts three and four, balancing of hardships and the public interest, respectively.¹²⁸ The *Monsanto* Court would probably hold that wasting a ten million dollar dam disservices the public interest and is a significant hardship that favors the dam defendants over the environmental species.¹²⁹ The fact that in *Tennessee Valley Authority* it was certain the species would be extinguished, whereas in *Monsanto* the same degree of certainty did not exist, would likely not be enough to override the Court's focus on the financial hardships to others and the public interest.

The significant shift in the legal analysis surrounding environmental injunctions suggests that the conservative majority of the Court is gradually trying to reshape the remedial landscape. It is a deliberate effort and one that is plausible because it is supported by an established trend of the Supreme Court cutting back on NEPA and procedural rights generally for environmental plaintiffs. *Monsanto* fits into this trend.¹³⁰

2. History of NEPA

The Supreme Court has a history of selectively cutting back on NEPA, with the substantive provisions of the law fairing particularly poorly. Although NEPA has been interpreted as strictly a procedural statute,¹³¹ this was not initially the case. The statutory text of NEPA does state that "it is the continuing responsibility of the Federal Government to use all practical means,

124. *See id.*

125. *See Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

126. *See id.*

127. *See id.* at 2756; *see also Tenn. Valley Auth.*, 437 U.S. at 187.

128. For a discussion of the four-factor test, *see Monsanto Co.*, 130 S. Ct. at 2756 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

129. *See id.*

130. *See id.*

131. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 335 (1989); *Strycker's Bay Neighborhood Council Inc. v. Karlen*, 444 U.S. 223, 228 (1980).

consistent with other essential consideration of national policy, to improve and coordinate plans, . . . to attain the widest range of beneficial uses of the environment.”¹³² Further, NEPA directs that “to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.”¹³³ This lofty language from the statute arguably demonstrates a substantive dimension to agency decision making in NEPA. In fact, dicta in early NEPA cases suggested that NEPA contained a substantive element.¹³⁴ And despite some early disagreement, by the mid-1970s, a majority of reviewing courts were holding that NEPA contained substantive law.¹³⁵

One of the first federal appellate decisions to address NEPA was *Calvert Cliffs’ Coordinating Committee v. United States Atomic Energy Commission*.¹³⁶ In this case, the D.C. Circuit considered whether rules adopted by the Atomic Energy Commission were adequate under NEPA.¹³⁷ The court made clear that the Commission could not adopt rules that took a narrow and hostile view of their obligations under the Act to internalize the values set forth in NEPA.¹³⁸ The court rejected the Commission’s argument that NEPA has a “vague mandate,” stating, “[w]e find the policies embodied in NEPA to be a good deal clearer and more demanding than does the Commission.”¹³⁹ Indeed, the court identified a substantive, “flexible” component to NEPA, and said that “Congress . . . desired a reordering of priorities, so that environmental costs and benefits would assume their proper place along with other considerations.”¹⁴⁰ It was not enough for the agency to give insincere consideration to environmental concerns; the agency must actually prioritize them.¹⁴¹

However, in *Strycker’s Bay*, the Supreme Court did not require the Department of Housing and Urban Development to implement an alternative option that was less environmentally damaging than the chosen program.¹⁴² The

132. 42 U.S.C. § 4321 (2006).

133. *Id.* § 4332; *see also id.* § 4331(b)(3).

134. *See Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

135. *See* Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 13 n.87 (1983).

136. *Calvert Cliffs’ Coordinating Comm.*, 449 F.2d 1109. The United States Atomic Energy Commission is now known as the Nuclear Regulatory Commission.

137. *See id.* at 1109.

138. *See id.* at 1115. For a discussion of the evolution of the substantive elements to NEPA, *see* generally E. RAY CLARK & LARRY W. CANTER, *ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE* (1997).

139. *Calvert Cliffs’ Coordinating Comm.*, 449 F.2d at 1112.

140. *Id.*

141. *See id.*

142. *See Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980).

Court held that “the only role for a court is to ensure that the agency has considered the environmental consequences.”¹⁴³

Justice Marshall criticized the majority’s approach in his dissent.¹⁴⁴ He wrote, “I do not subscribe to the Court’s apparent suggestion that [NEPA] limits the reviewing court to the essentially mindless task of determining whether an agency ‘considered’ environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion.”¹⁴⁵ Marshall would have imposed some substantive requirements on the agency, but the majority found no such requirements, undercutting NEPA’s impact.¹⁴⁶ The majority’s approach has been described as an “almost talismanic recitation of deference supposedly due administrators,” followed by a “rubber stamping” of administrative decisions by courts.¹⁴⁷

In the absence of substantive environmental direction, NEPA’s “procedural” provisions play the central role. These are designed so that all federal agencies do in fact weigh environmental impacts and gather perspectives from the community. The procedural provisions include broad requirements on the preparation of an EIS or EA, and more detailed provisions on the proper time for project scoping and notice and comment.¹⁴⁸ These provisions are not flexible; indeed, they establish a strict multi-step standard of compliance. The *Monsanto* decision takes what was once the stalwart of securing a judicial remedy for an environmentally harmful project—a procedural violation—and undermines it. Under *Monsanto* and the four-part balancing test, environmental groups who challenge a federal action that violated the procedural steps of NEPA cannot be sure they will get any injunctive relief at all.¹⁴⁹

C. Understanding the Balancing Test

The balancing test can be understood in many ways. First, the four-part balancing test has far-reaching consequences.¹⁵⁰ It threatens the ability of many environmental parties to obtain protection from projects that violate the law,

143. *Id.* at 227.

144. *See id.* at 228 (Marshall, J., dissenting).

145. *Id.* at 229.

146. *See id.* at 230.

147. *See* Goldsmith & Banks, *supra* notes 135, at 5 n.33. There are innocuous reasons why the courts may have steered clear of substantive law that do not include limiting relief for environmental plaintiffs. One is that substantive requirements to value the environment would be difficult to enforce and would almost certainly create scientific disagreements. Another reason is simply that agencies want to avoid policy constraints. *See* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 12 YALE J. ON REG. 407, 415 (1997).

148. *See* 42 U.S.C. § 4321 (2006).

149. *See* discussion *infra* Part II.B.

150. *See* balancing test *supra* note 39. *Winter v. Natural Res. Def. Council*, 129 S. Ct. at 380–82 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

because the balancing test diminishes the importance of the irreparable injury factor, affects the powers of judicial review, and increases the litigation expenses for environmental plaintiffs. Next, the balancing test can also be understood as a reaction to the limitations of NEPA's procedural requirements. And finally, the *Monsanto* decision leaves unaddressed how vacatur and injunctive relief will work together in the future as courts use the balancing test.

1. *Harmful to Environmental Interests*

The judicial standard of review for injunctive relief in NEPA cases likely disfavors environmental plaintiffs under the new balancing test. It is especially important what outcome the lower court reaches because that outcome will be judged under an abuse of discretion standard.¹⁵¹ The record developed by the lower court remains on appeal and is reviewed for an abuse of discretion.¹⁵² When the legal standard for an injunction focused primarily on the irreparable injury harm of violating environmental laws, appellate courts would have more ease in reversing incorrect district court decisions.¹⁵³

Now, however, the four-factor balancing test requires the lower court to undertake a fair amount of fact-finding, and balance the competing interests and consequences. This has two negative results. First, it allows lower courts more freedom to reach the conclusion they are ideologically predisposed to make because decisions that require balancing are inherently driven by how one weighs competing interests. And second, the appellate court will have less judicial review power to overturn district court decisions since it is more difficult to find an abuse of discretion with an intensive balancing test.¹⁵⁴ This is the real danger of the subjective and malleable four-factor test: appellate courts will have less judicial review power to overturn decisions against injunctions when the decision is based on a complicated balancing test.

Another serious implication of the balancing test is that it is likely to increase the costs for environmental plaintiffs. First, the balancing test is likely to promote courts' use of evidentiary hearings. Evidentiary hearings are held at the district court level to gather the facts and details surrounding the claim and to create a factual record upon which a court can base its decision.¹⁵⁵ The four-factor balancing test is fact intensive, requiring the weighing of public benefits

151. 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.2 (2d ed. 1995). The appellate court will not substitute its judgment and discretion for that of the trial court except where the record reflects a clear abuse of discretion. See generally DANIEL MANDELKER, NEPA LAW AND LITIGATION ch. 3 (1984).

152. See 11 WRIGHT & MILLER, *supra* note 151, § 2948.2.

153. See *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009), *amending and superseding* 541 F.3d 935 (9th Cir. 2008).

154. See 11 WRIGHT & MILLER, *supra* note 151, § 2948.2.

155. Wright and Miller have said that "regardless of what the rule in terms requires, whenever decision of a matter requires the court to resolve conflicting versions of the facts, findings are desirable and ought to be made." 11 WRIGHT & MILLER, *supra* note 151, § 2575.

against the likelihood of environmental harms. The more a judge needs to weigh together a multitude of facts, the more likely the judge is to require an evidentiary hearing.¹⁵⁶ The plaintiff has the burden to prove the facts that support its allegation, and this can be costly.¹⁵⁷ Scientific experts and commissioned reports are expensive to prepare and may prevent some legitimate claims from being brought to court by publically funded environmental interest groups who lack up-front capital. The balancing test increases the costs of litigation for environmental plaintiffs who, in return, have less certainty in the outcome because the balancing test involves more factors and thus more unpredictable results.¹⁵⁸ The combination of these considerations creates a higher cost burden on the plaintiffs and makes it less likely that they will bring environmental action suits to the courts.

2. *A Reaction to the Limitations of NEPA*

The balancing test can also be understood as a reaction to the limitations of NEPA's procedural requirements. NEPA has no "teeth" since it cannot force a federal actor to choose the most environmentally responsible choice; it can only ensure that specified procedures are followed.¹⁵⁹ The Supreme Court seems to recognize that NEPA is often just a dance.¹⁶⁰ For instance, environmental groups may sue for a violation of procedure, and a court may then enjoin or suspend the project or regulation, but only until the agency corrects its "paperwork mistake" and moves forward with the original plan.¹⁶¹ The "better" review process that the agency was supposedly doing to correct their mistake often results in the same decision they arrived at in the first place.¹⁶² This is bolstered by the fact that agencies are sometimes even allowed

156. *See id.*

157. *See id.*

158. In addition to the cost of evidentiary hearings, the balancing test requires more complicated briefing since there are more factors that require analysis.

159. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 335. (1989); Strycker's Bay Neighborhood Council Inc. v. Karlen, 444 U.S. 223, 228 (1980); *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) ("[NEPA's] mandate to the agencies is essentially procedural"); discussion *supra* Part II.B.2.

160. The Court in *Winter* appeared to discern no value in the EIS process, as if it presented nothing more than an administrative burden that will postpone, but under no circumstances change, the Navy's planned training exercises. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008).

161. Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 136 ARIZ. ST. L.J. 559, 600 (2004).

162. *See* Allegheny Def. Project v. U.S. Forest Serv. (W.D. Pa. 2000), *aff'd*, 423 F.3d 215 (3rd Cir. 2005) (upholding the agency determination that no new decision was necessary after a supplemental environmental assessment was completed in response to a new species discovery); *Native Ecosystems Council v. Kimbell (Basin Creek Project)*, 304 Fed. App'x 537, 539 (9th Cir. 2008) (upholding the Forest Service's conclusion that the production of a new EIS due to insufficient soils analysis in the original, and a subsequent determination not to issue a new record of decision, did not trigger an administrative appeal opportunity).

to keep the flawed decision in place while the agency conducts the required NEPA review.¹⁶³

Indeed, this is exactly what is happening with RRA. Since the Supreme Court's ruling in *Monsanto*, APHIS conducted and published an EIS that analyzes the deregulation of RRA.¹⁶⁴ The two remaining viable alternatives both deregulate RRA.¹⁶⁵ Therefore, even if the Supreme Court had enjoined planting, it would have only been a matter of time before a new and improved EIS, which followed the requirements of NEPA, permitted planting.

The Court's pessimistic outlook on the effectiveness of NEPA to actually influence an agency's decision is correct. Public comment and education may put more pressure on the agency, but in the end the agency is still free to do as it chooses, so long as it follows the correct procedures and its actions do not violate other statutes.¹⁶⁶ Environmental plaintiffs, rightfully frustrated with this dance, can end up using NEPA as a strategy to postpone projects or attempt to bankrupt them.¹⁶⁷ This strategy, however, may produce more harm than good by perpetuating a negative stereotype of environmentalists as uncompromising and radical.¹⁶⁸

Courts are more likely to be receptive to environmental plaintiffs when they present serious and pressing environmental harms and put forward a compelling example of a NEPA violation. Violations of NEPA procedural requirements that can be resolved through remedial agency action may be very different from substantive claims of environmental harm or egregious violations that the Court appears mainly to want to hear. The balancing test therefore is useful to the Court, because by limiting or reducing the frequency of judicial relief, fewer plaintiffs will come to court and argue for large

163. See *Basin Creek Project*, 304 Fed. App'x 537, 539 (9th Cir. 2008) ("[T]he District Court's decision not to automatically vacate the Record of Decision upon finding it legally deficient as to the soils analysis was not an abuse of discretion.").

164. See U.S. DEP'T OF AGRIC., GLYPHOSATE-TOLERANT ALFALFA EVENTS J101 AND J163: REQUEST FOR NONREGULATED STATUS: FINAL ENVIRONMENTAL IMPACT STATEMENT (2010), available at http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gt_alfalfa%20_feis.pdf.

165. See *id.* at 10.

166. See, e.g., COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS ix, 11 (1997); Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 SCIENCE 743, 744 (1978) (arguing that EIS process is counterproductive because it arrives too late and is not fully integrated into the agency decision-making process); Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 346 (2004) ("Due to the time it takes to produce, the EIS will also typically arrive too late in the process to inform and influence the agency's decision.").

167. See Robert Lahey, *To Put Solar Power on Federal Land, or Not*, RENEWABLE ENERGY WORLD (Jan. 19, 2011), <http://www.renewableenergyworld.com/rea/news/article/2010/01/to-put-solar-power-on-federal-land-or-not> ("NEPA, combined with state-level regulations, offers conservationists an opportunity to slow down or cancel projects.").

168. See, e.g., Karen Budd Falen, *Radical Environmental Groups Extorting Federal Money with Lawsuit Threats*, PAJAMAS MEDIA (Sept. 22, 2010), <http://pajamasmedia.com/blog/radical-environmental-groups-extorting-federal-money-with-lawsuit-threats> ("A federal project comes up, radical groups threaten to entangle it in litigation, the government pays them to go away. Fundraising!").

remedies for procedural violations of NEPA when a “re-do” of the agency procedure can cure the violation.

3. *Unresolved Issues*

In the background of this case is an unusual statutory and regulatory scheme dealing with vacatur and injunctive relief that present unresolved issues for the future.¹⁶⁹ Vacatur is a judicial action that sets aside or voids a proceeding.¹⁷⁰ Vacatur operates under the APA, whereby a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.”¹⁷¹

Vacatur and injunctive relief both operate in *Monsanto*. The PPA sets a default rule against planting for regulated articles, such as RRA.¹⁷² The district court’s vacatur of APHIS’s deregulation decision prevented any planting,¹⁷³ therefore an injunction against planting was unnecessary and duplicative. It can be argued that the balancing test functioned properly to craft a remedy that handled the environmental harms in this case, without the court doing more than it needed. But not all vacaturs of agency decisions, without more, have the effect of preventing environmentally harmful activity from occurring.

The *Monsanto* decision does not address how vacatur and injunctive relief should work together in future situations. The interplay between the two forms of remedies could lead to unpredictable results for environmental plaintiffs. There are two possible arrangements: first, that a court could use the balancing test to deny both injunctive relief and vacatur; and second, that a court would grant an injunction or vacatur but not both, as the Court did in *Monsanto*.

The first arrangement, of course, is likely the worst outcome for environmental plaintiffs because they would get no remedy at all. In fact, there is already some controversy over the construction of “shall set aside” in the APA and whether it places a strict affirmative duty on a court to vacate agency

169. See *supra* Part I. C.

170. See BLACK’S LAW DICTIONARY 1584 (8th ed. 2004).

171. Administrative Procedure Act, 5 U.S.C. § 706(2) (2006). The court may also vacate if the agency action is

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) 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 (5) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id.

172. Plant Protection Act, 7 U.S.C. § 7701 (2006).

173. See *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, 2007 WL 518624, at *12 (N.D. Cal. Feb. 13, 2007).

programs found to violate the law.¹⁷⁴ Ninth Circuit precedent says not all unlawful actions must be set aside.¹⁷⁵ For example, in *Westlands Water District v. U.S. Department of the Interior*, the Ninth Circuit stated that, “[d]espite the mandatory language, ‘shall,’ courts retain equitable discretion.”¹⁷⁶

This controversy parallels the tension in the case law in the time period between *Tennessee Valley Authority v. Hill* and *Monsanto* over what standard governed the order of injunctive relief. The fight between the primacy of statutory construction (*Tennessee Valley Authority*) and equitable powers (*Monsanto*) is directly relevant to the interpretation of “shall.” A plain meaning statutory interpretation of “shall” suggests an affirmative, mandatory duty to vacate;¹⁷⁷ however, the Ninth Circuit and Supreme Court suggest that equitable discretion might be appropriate instead. If district courts apply the Supreme Court’s favoring of equitable balancing to the unresolved tension in the law over the proper interpretation of “shall” under the APA, it is possible that the right to a vacatur will also be reframed and constrained.

CONCLUSION

Monsanto presents a troubling development in environmental law. The Supreme Court uses a seemingly innocuous case to significantly reframe how courts approach environmental plaintiffs and requests for injunctive relief. The decision cuts away at the longstanding judicial approach of granting nearly automatic injunctions for violations of environmental law where environmental injury was presumed irreparable.

Monsanto replaces the prioritization of environmental injury with a balancing test. The four-part balancing test is not well suited to remedying environmental harms. Although it is the generic standard for injunctive relief across legal disciplines, environmental harm is different and deserves special attention. Environmental harms do not nicely map onto a balancing scale because the injury is often irreversible and physically and temporally distant.¹⁷⁸

174. For instance, in *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995), the Ninth Circuit held that “[a]lthough the District Court has power to do so, it is not required to set aside every unlawful agency action.”

175. See *Westlands Water Dist. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1157, 1231 (E.D. Cal. 2002); see also *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 541–45 (1987) (“There is no clear indication in § 810 [of the Alaska National Interest Lands Conservation Act] that Congress intended to limit district courts’ traditional equitable discretion by requiring them to issue injunctions in all cases); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (“To determine whether injunctive relief is appropriate, even in the context of environmental litigation, we apply the traditional balance of harms analysis.”).

176. *Westlands Water District*, 275 F. Supp. 2d 1157, 1231 n.50.

177. See MERRIAM WEBSTER’S DICTIONARY 383 (11th ed. 2008); *Nat’l Wildlife Fed’n*, 45 F.3d at 1343.

178. See DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS (2002); Richard Lazarus, *Restoring What’s Environmental about Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744–48 (2000).

It is difficult for judges to properly value harms that develop in the future or may occur in different jurisdictions.¹⁷⁹ Therefore, if irreparable harm is not presumed, judges may devalue complicated environmental effects in the face of urgent economic needs.

Although a balancing of factors in equity may eliminate some of the unnecessary litigation that arises under NEPA, the tradeoff is too severe. Environmental plaintiffs often seek injunctive relief as their only remedy, so reducing the frequency of injunctive relief reduces the frequency of environmental relief as a whole. Further, the balancing test makes it more difficult for environmental plaintiffs to obtain judicial review under the deferential abuse-of-discretion standard, which is particularly troubling since ideologically driven decisions will be more likely to stand. Environmental protection is too important to be put in such a precarious position.

Over time, the balancing test will become the familiar mode of analysis, and it will become easier to translate its application to other unresolved issues of the law. For instance, it may be extended to the current controversy over whether the APA requires vacatur of regulations or programs when they violate environmental law. If district courts apply the Supreme Court's favoring of equitable balancing over statutory construction, it is possible that the right to vacatur of unlawful regulations will also be reframed and constrained.

Caselaw is shaped through incremental steps, and when the Supreme Court takes certiorari on the next environmental case, *Monsanto* leaves the Justices a lot of room to maneuver. Just as *Monsanto* fits into an established trend of the conservative Court cutting back on the rights of environmental plaintiffs to sue and obtain relief, future maneuvers will likely also continue to constrain the protections of environmental law. Certainly, any cause for Justice Scalia's concern about the "judiciary's long love affair with environmental litigants" has come to an end.¹⁸⁰

179. *See id.*

180. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

