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No. 09-475

In The
Supreme Court of the United States

MONSANTO CO., ET AL.,

Petitioners,

v.

GEERTSON SEED FARMS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE PEOPLE OF THE STATE OF CALIFORNIA *EX REL.* EDMUND G. BROWN JR., ATTORNEY GENERAL; COMMONWEALTH OF MASSACHUSETTS, MARTHA COAKLEY, ATTORNEY GENERAL; STATE OF OREGON, JOHN R. KROGER, ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

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Amici respectfully submit this brief pursuant to Rule 37.4 of the Rules of the United States Supreme Court, in support of respondents Geertson Seed Farms, *et al.*

INTEREST OF THE AMICI CURIAE

States have an obvious interest in the federal government's compliance with laws that Congress enacted to protect the environment. One of the most important of those laws is the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (2009). It requires federal agencies to take a hard look at the potential environmental consequences of their proposed actions, and to inform the public about those consequences, *before* the agencies proceed. 42 U.S.C. § 4332. When a federal agency fails to do so, as here, it affects the States' interests in protecting their natural resources and their citizens' rights to be informed about the environmental impacts of federal actions.

Although this case concerns the federal deregulation of genetically modified seed, the issues raised extend beyond the specific facts of this case. They involve the proper scope of an injunction and the nature of irreparable harm when a federal agency proposes to take actions before it has complied with NEPA. The case also raises the question of whether the district

court must hold trial-type evidentiary hearings to resolve factual disputes about the environmental impacts of proposed actions, when the federal agency is required to evaluate and determine those very same impacts through the NEPA review process. These issues arise during the remedy phase of nearly all cases in which the federal government violates NEPA, and are of vital concern to the States.

Over one hundred years ago, this Court recognized that a State has significant interests "independent of and behind the titles of its citizens, in all the earth and air within its domain." *State of Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Those same interests were recognized more recently by this Court in *Massachusetts* v. *Environmental Protection Agency,* 549 U.S. 497, 518-21 (2007).

The potential for federal actions to affect these state interests is immense. Proposed federal actions raise environmental concerns of many types, including protection of wilderness, habitat preservation for endangered species, watershed protection, air quality, off-shore drilling in coastal areas, development and movement of petroleum and natural gas, movement and storage of nuclear waste, building of power plants in the desert and transmission lines across public lands, and many more.

Consistent with their duty to protect their resources, the States of California and Oregon,

and the Commonwealth of Massachusetts have, on numerous occasions, filed suit to challenge federal actions that failed to comply with NEPA, and have successfully obtained injunctions that prevent federal agencies from acting until they have completed the required environmental review. Injunctions requiring the agency to cease the proposed activity pending compliance with NEPA often profoundly affect the project or the proposed action. In some cases, after the required environmental review occurs, the project is changed to avoid environmental impacts; in others, additional mitigation is required; and in still others, the project is shelved in light of its true costs and risks.

The environmental harm that will occur directly from a proposed federal action is often apparent and undisputed—acres of trees will be cut, or a river will be dammed—making the plaintiff's showing of likely irreparable harm a straightforward exercise. There are, however, occasions when the harm is a matter of significant dispute. The proposed action may involve unprecedented risks, new technology, or may operate in an area where the science is as yet undeveloped or uncertain. In those situations, it may be impossible for the States, the public at large, and the courts to ascertain with certainty the full extent of the harm that is likely to result from the proposed action. Indeed, it would be surprising if they could, because the agency's violation leaves them without a full and

objective analysis of all of the potential environmental consequences and reasonable alternatives that must be considered.

When an inadequate environmental review impairs the ability of a challenger to establish with certainty the harm that is likely to occur from a proposed action, permitting a federal agency to proceed without the review required by NEPA heightens the risks to the environment and effectively rewards the federal agency for its failure to study the impacts of its actions. Thus, this Court's formulation of irreparable harm under NEPA and the discretion of the district courts in shaping injunctive relief will directly affect the ability of the States and their citizens to participate fully in the NEPA review process, to ensure the integrity of that process, and to protect their natural resources.

SUMMARY OF ARGUMENT

It is settled that a plaintiff seeking a permanent injunction must meet the traditional four-part test for injunctive relief. To do so, the plaintiff must demonstrate that irreparable harm is likely, the remedies available at law are inadequate, the balance of hardships warrants injunctive relief, and the public interest would not be disserved by a permanent injunction. *eBay* v. *MercExchange*, *LLC,* 547 U.S. 388, 391 (2006).

In fashioning injunctive relief and determining what constitutes irreparable harm, courts must consider the purpose and language of the statute at issue, not merely the fact of a statutory violation. NEPA is a procedural statute that requires federal agencies to evaluate and consider environmental consequences and values before they make a decision or take an action that may have a significant impact on the environment. 42 U.S.C. § 4332(C). In *Winter* v. *Natural Resources Defense Council*, this Court recognized that part of the particular harm that NEPA seeks to prevent is the harm that arises when an agency acts with little information about potential environmental harms and mitigation measures. __ U.S. __, 129 S. Ct. 365, 376 (2008).

Thus while there are situations in which actions should be permitted to proceed pending completion of the environmental review, a district court has discretion to enjoin actions when the lack of information poses too great a risk of the harms against which NEPA is intended to protect. An injunction therefore may be warranted where (1) there is a substantial dispute or insufficient information about the potentially serious and irreparable environmental effects of an action, such that the NEPA review process would provide the information necessary to evaluate those risks before proceeding; or (2) implementation of the action may foreclose consideration of other, potentially less harmful alternatives or significant mitigation measures that the agency would otherwise have been required to consider if it

had complied with NEPA in the first instance. This standard for evaluating irreparable harm under NEPA ensures that NEPA's mandate is met and furthers the public interest in informed decisionmaking. Significantly, it also comports with the Council on Environmental Quality's regulations, which prohibit federal agencies from taking actions that would have adverse environmental impacts or limit the choice of reasonable alternatives. See 40 C.F.R. § 1506.1 (2009).

Further, a district court may properly decline to hold a trial-type evidentiary hearing to resolve factual disputes over the immediate and direct environmental harm that will result from a proposed action, if those facts are not material to its determination of injunctive relief. The critical issues at the injunction stage are limited to those made relevant by NEPA and the four-part test for injunctive relief. If a court determines that, due to the lack of required NEPA review, the proposed action raises significant factual disputes about the likely and serious harm to the environment, the court may exercise its discretion to enjoin the proposed action pending NEPA review, rather than assuming the agency's job and resolving the disputes itself. Similarly, if a court determines that allowing a proposed action to proceed may eliminate feasible alternatives that must be considered as part of the NEPA review process, the court should have the discretion to preserve the status quo until the agency

complies with NEPA, so that the outcome of the process is not skewed.

Finally, while the district courts have broad discretion to defer to submissions from a federal agency concerning the scope of injunctive relief, that deference is not automatic. Deference to an agency is warranted where the agency exercises its expertise through the proper administrative review process. Where it does not, the courts may defer to the opinion of an agency director or employee submitted in a declaration, as with any expert witness, based on an assessment of the demonstrated expertise of the declarant, the thoroughness of the analysis, and the persuasiveness of the reasoning.

ARGUMENT

I. IN FASHIONING INJUNCTIVE RELIEF UNDER NEPA, THE COURTS MUST CONSIDER ALL OF THE ENVIRONMENTAL HARMS THAT ARE LIKELY TO RESULT FROM SUBVERTING THE NEPA PROCESS.

A party seeking an injunction pursuant to NEPA must meet the normal requirements for injunctive relief, including demonstrating that "irreparable injury is *likely* in the absence of an injunction." *Winter,* 129 S. Ct. at 375. It is axiomatic, however, that in fashioning injunctive relief, courts must also consider the statute at issue, both in terms of whether Congress has limited the scope of the courts'

traditional equitable power to fashion relief, and in terms of the objectives of the statute and the harm it is intended to prevent. "The purpose and language of the statute under consideration . . . , not the bare fact of a statutory violation," compel the injunctive relief. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 314 (1982). Then-Circuit Judge Breyer echoed this rule in the NEPA context, stating that, "the kinds of 'harms' that are relevant, and that may be 'irreparable,' will be different according to each statute's structure and purpose." *Sierra Club* v. *Marsh*, 872 F.2d 497, 502-03 (1st Cir. 1989).

Where statutes impose substantive requirements on environmental action, decisions by this Court have stressed that a claim for injunctive relief must be based on a showing of irreparable harm to the environment from a violation of those substantive requirements, not on a showing of irreparable harm to the statutory procedure itself. See *Romero-Barcelo*, 456 U.S. at 314 (Navy's failure to obtain discharge permit under Federal Water Pollution Control Act (FWPCA) was irreparable harm only to the extent it polluted the nation's waterways: "The integrity of the Nation's waterways, however, not the permit process, is the purpose of the FWPCA"); *Amoco Production Co.* v. *Village of Gambel*, 480 U.S. 531, 544 (1987) (purpose of Alaska National Interest Lands Conservation Act "is to protect Alaskan subsistence resources from unnecessary destruction," and, in granting injunction, Court of Appeals had "erroneously focused on the statutory procedure rather than on the

underlying substantive policy the process was designed to effect—preservation of subsistence resources").

Unlike the statutes at issue in *Romero-Barcelo* and *Amoco*, which impose substantive requirements on federal actions,[1] "NEPA imposes only procedural requirements to 'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning environmental impacts.'" *Winter*, 129 S. Ct. at 376 (citation omitted). NEPA thus manifests a critical concern "with preventing uninformed action," *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989), and seeks to ensure that the agency "will not act on incomplete information, only to regret its decision after it is too late to correct." *Id*.

NEPA's goals are realized through a set of "action-forcing" procedures, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), including preparation of an environmental impact statement (EIS), which ensures that the detailed

[1] The FWPCA limits the discharge of pollutants except under specified conditions subject to permit. 33 U.S.C. § 1311. ANILCA requires that federal decisions to permit the use of public land must include reasonable steps to minimize adverse impacts on subsistence uses and resources, 16 U.S.C. § 3120, ensure that rural residents engaged in subsistence uses have access to resources on public land, *id*. at § 3121(a), permit appropriate use for subsistence purposes of snowmobiles, motorboats, *id*. at § 3121(b), etc. See also discussion in *Sierra Club,* 872 F.2d at 500-02.

environmental information considered by the agency, is available to a larger public audience that may also play a role in the decisionmaking process, and to other state and federal agencies from which a project proponent may need permits. *Id*. at 349. The NEPA requirement that agencies "study, develop, and describe appropriate alternatives to recommended courses of action," 42 U.S.C. § 4332(E), further ensures that each agency "takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." *Calvert Cliffs Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

When a federal agency acts or proposes to act without having completed the mandated environmental review and without having prepared the detailed environmental statement, it violates the most basic tenet of NEPA. This is true even if the action would have been entirely legal after completion of environmental review, and even if the action ultimately causes no harm to the environment. "If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [NEPA] § 102(2)(C) would be lost." *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-51 (1979).

In its most recent discussion of the standard for granting a preliminary injunction in the NEPA context, this Court acknowledged NEPA's focus on the decisionmaking process as the crucial mechanism for

advancing the broad congressional goals and the public's interest in ensuring that federal agencies consider environmental consequences *before* they act. While the Court ultimately did not reach the question of what constitutes irreparable harm under NEPA, it did state that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter,* 129 S. Ct. at 376. This recognition is critical to any analysis of what constitutes irreparable harm in the NEPA context.

In assessing irreparable harm under NEPA, the courts must therefore consider more than the direct physical harm to the environment from the proposed action, i.e., the "ground-disturbing" harm, such as the logging of timber, the damming of a river, or the commencement of mining. They must consider as well the environmental harm that results from the circumvention of the decisionmaking process. This includes the fact that the plaintiff "will have been deprived of the opportunity to participate in NEPA process at a time when such participation is required and is calculated to matter," *Save Strawberry Canyon* v. *Dep't of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009), and the government decisionmaker will make an uninformed choice and may act when there is "little if any information about prospective environmental harms and potential mitigating measures." *Winter,* 129 S. Ct. at 376; see also *Marsh,* 490 U.S. at 371. "Thus, when a decision to which

NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *Sierra Club,* 872 F.2d at 500.

These NEPA violations result in more than simply a procedural harm. The harm "at stake in a NEPA violation is a harm to the environment, not merely to a legalistic 'procedure.'" *Sierra Club,* 872 F.2d at 504. Permitting action to proceed without adequate environmental review both increases the likelihood of environmental harm and limits the possibility of the selection of other, potentially less environmentally harmful courses of action. After all, it is "far easier to influence an initial choice than to change a mind already made up." *Massachusetts* v. *Watt,* 716 F.2d 946, 952 (1st Cir. 1983) (Breyer, J.).

In exercising its equitable discretion to decide whether to enjoin further action pending the outcome of environmental review, the court must therefore consider and weigh the danger to the environment from proceeding without full environmental review. This, in turn, will depend on the nature of the proposed action and the extent of any environmental review already conducted. This weighing and balancing is part of the district court's inherent discretion in issuing injunctive relief. See *eBay,* 547 U.S. at 391. And where the district court has insufficient information to determine harm with some degree of certainty, it must have the discretion in equity to enjoin an action until more information

exists, i.e., until the agency fully and properly complies with NEPA.

In *Winter,* this Court noted that the existence of adequate information about the environmental consequences of a proposed action is a critical factor that the courts should consider in exercising their discretion to decide whether to enjoin an action. The Court explained that one reason it was appropriate to permit the Navy to proceed with its sonar training activity was that adequate information was available about the proposed interim action.

> [T]his is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment . . . Here, in contrast, the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years. And the latest series of exercises were not approved until after the defendant took a "hard look at environmental consequences."

Winter, 129 S. Ct. at 376 (citation omitted).

In contrast to *Winter*, where a proposed federal action is relatively new, is unstudied, has unknown consequences, or where the risks are highly disputed, there is a greater violation of the decisionmaking process which, in turn, results in a higher likelihood of harm to the environment. It is this harm that NEPA is intended to foreclose. Thus, a court exercising its discretion to enjoin action pending

required NEPA review may be faced with entirely new and novel questions that arise as technology develops. While the cutting down of a forest may present clear evidence of irreparable harm, other actions—the handling of nuclear waste, the employment of new technologies to reduce greenhouse gas emissions, the use of genetic engineering—are on the cutting edge of science. The district court must therefore exercise its discretion to assess the need for an injunction, not based solely on the known and demonstrated direct harms to the environment, but on the broader harms that arise when the government seeks to proceed with actions that push the limits of known technology, without first conducting environmental review to determine the full extent of the likely harms.

In addition to the increased risk to the environment from permitting the agency to proceed in the absence of full environmental review, each action is a link in a longer set of actions leading to an ultimate outcome. If a federal agency is permitted to proceed with certain actions pending completion of the environmental review, even if actions themselves do not cause direct harm to the environment, they can create bureaucratic momentum—the "bureaucratic steam roller"—which may skew the analysis toward the original non-NEPA compliant decision. "[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)." *Sierra Club,* 872 F.2d at 503.

Once the agency embarks down a certain path, the court can require it to go back and prepare the required environmental review document, but the court cannot require it to change course. "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." *Sierra Club,* 872 F.2d at 503; see also *San Luis Valley Ecosystem Council* v. *U.S. Fish and Wildlife Service*, 657 F. Supp. 2d 1233, 1241-42 (D. Colo. 2009) (irreparable injury is not simply whatever "ground-disturbing activities are conducted in the relatively short interim before this action is decided"; it is the risk that the "bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the [agency] toward its original, non-NEPA compliant access decision" (citation omitted)). NEPA's purposes are not served by environmental documents that are simply post hoc rationalizations for decisions already made.[2]

Thus, in assessing the scope of injunctive relief in the NEPA context, the courts must consider not only

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[2] See also Brief for the Federal Respondents Supporting Petitioners (U.S. Br.) at p. 31 (prior to completing environmental review, federal agency must show "that the actions it will take pending preparation of an EIS will not materially harm the environment and will leave open a reasonable range of alternatives for final agency decision").

the direct physical harm that will result from the proposed action, but also (1) the harm that results from permitting an action to proceed "with little if any information about prospective environmental harms and potential mitigating measures," *Winter,* 129 S. Ct. at 376, and (2) the harm of allowing the action to proceed where it will limit or even foreclose consideration of other, potentially less harmful alternatives, or significant mitigation measures that should be considered by the agency. Each of those harms is sufficient to justify a finding of likely "irreparable harm" that will support an injunction that prohibits the proposed action from advancing until the federal agency has fully complied with NEPA.

II. THE APPLICABLE CEQ GUIDELINES PROHIBIT ACTIONS THAT HAVE AN ADVERSE ENVIRONMENTAL IMPACT OR LIMIT THE CHOICE OF REASONABLE ALTERNATIVES.

The regulations promulgated by the Council for Environmental Quality (CEQ) to implement NEPA[3] make clear that the statute's essence is to require that "environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R § 1500.1(b) (2009) (emphasis added). Therefore, until the NEPA process

[3] This Court has recognized that the CEQ regulations are entitled to substantial deference. *Robertson,* 490 U.S. at 355; *Andrus,* 442 U.S. at 358.

is completed, the CEQ regulations, which are binding on all federal agencies, see *id.* at § 1500.3, impose strict limitations on federal action, prohibiting agency action that would have an adverse environmental impact or limit the choice of reasonable alternatives:

> (a) Until an agency issues a record of decision as provided in § 1505.2 . . . no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or
>
> (2) Limit the choice of reasonable alternatives.

40 C.F.R. § 1506.1(a) (2009).

The CEQ regulations therefore clarify the focus of environmental harm in the NEPA context. The purpose of NEPA is not merely to prevent irreparable harm to the environment as defined by the immediate known effects of a proposed action or set of actions; it is to prevent harm to the environment that results from permitting an agency to proceed with unexamined or insufficiently examined actions with unknown consequences, and which may limit the availability of reasonable alternatives. Pursuant to these CEQ regulations courts have properly enjoined further actions where the "options open to the [agency] would diminish, and at some point [its] consideration would become a meaningless formality." *National Audubon Society* v. *U.S. Dep't of the Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (quoting *Arlington*

Coal. on Transp. v. *Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972).[4]

III. UNDER NEPA THE COURTS MAY EXERCISE THEIR DISCRETION TO ENJOIN PROPOSED ACTION WHEN THERE ARE SIGNIFICANT DISPUTES ABOUT SERIOUS ENVIRONMENTAL IMPACTS THAT WILL BE CONSIDERED AS PART OF THE NEPA REVIEW.

NEPA is intended to prevent federal agencies from acting without full consideration of the environmental impacts of their actions. See *Marsh,* 490 U.S. at 371. NEPA thus directs federal agencies to consider the potential environmental consequences of their actions "to the fullest extent possible," 42 U.S.C. § 4332, which is "a deliberate command that the duty NEPA imposes upon agencies . . . not be shunted aside in the bureaucratic shuffle." *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976). It would entirely subvert this purpose if a federal agency could ask a district court to resolve disputes about the environmental impacts of a proposed action before the agency has completed its consideration of those very same issues in a full and public NEPA process. Requiring district court

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[4] As the Fourth Circuit cautioned, however, this analysis does not require a court to enjoin all agency activity while the EIS is completed. *National Audubon Society,* 422 F.3d at 201-02 (modifying injunction to permit certain assessment, planning, and preliminary activities).

judges to assume this role violates the basic precepts of NEPA and administrative law.

The role of the courts in determining the scope of injunctive relief is different from the role of the federal agency in preparing an EIS. In the EIS process, the agency must consider all scientific evidence and make a determination as to the credibility and reliability of that evidence and the ultimate outcome of any scientific disputes. Thus, courts routinely defer to agency decisions taken after proper and full environmental review. See *Marsh,* 490 U.S. at 376-77; *Baltimore Gas & Electric* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 98-99 (1983) (decision made after the "careful consideration and disclosure required by NEPA").

In contrast, a court fashioning injunctive relief should not attempt to decide the ultimate scientific disputes that the agency must decide pursuant to NEPA. Rather, to the extent the court determines, after a review of the evidence submitted, that the harms from a proposed action are serious and a matter of significant dispute that will be the subject of subsequent NEPA review, the court need not and indeed, should not, attempt to resolve those disputes. To do so subverts the NEPA process, requiring the court to make a decision that was expressly left to the discretion of the expert agency after full public input and review. See 42 U.S.C. § 4332. Under these circumstances, the court has discretion to enjoin the proposed action pending agency review.

Similarly, if the court determines that the proposed action will eliminate or diminish the availability of reasonable alternatives, it has the discretion to enjoin the action, even if the action itself will not cause direct irreparable harm to the environment. See *Nat'l Audubon Society,* 422 F.3d at 201; see also discussion in Part II. An injunction preserving the status quo is critical in these circumstances because NEPA's alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (2009). It "requires federal agencies to consider whether they can carry out their proposed action in a less environmentally damaging manner and whether alternatives exist that make the action unnecessary." DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 9:18, at 9-45 (2d ed. 2009). The requirement to study, develop, and describe alternatives "both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place." *Bob Marshall Alliance* v. *Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988). When an agency violates NEPA, a district court must retain the discretion to enjoin agency action pending full environmental review, lest the interim action effectively preordains the outcome.

Thus, applying the traditional rules for injunctive relief, a district court should have the discretion to determine, *inter alia*, that specific factual disputes presented by the parties concerning the direct harm from a proposed project or action

are not material to the court's determination of the scope of the NEPA injunction, and need not be decided by the court prior to issuing injunctive relief. Exercising discretion in this fashion is consistent with both the standard governing permanent injunctions and NEPA's purposes and textual mandate. See *Romero-Barcelo*, 456 U.S. at 312 (stating that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each degree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it" (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944))). Respect for this discretion ensures that district court judges are not forced to step into the shoes of federal agencies, acting as environmental experts, and that the status quo is preserved while the federal agency goes back to consider the environmental consequences of the action and makes a fully informed decision, untainted by litigation or interim resource commitments. Injunctions in this context thus serve to ensure that NEPA's statutory goals are achieved "to the fullest extent possible." 42 U.S.C. § 4332.

IV. IN FASHIONING INJUNCTIVE RELIEF UNDER NEPA THE COURTS SHOULD NOT AUTOMATICALLY DEFER TO THE CONCLUSIONS OF THE AGENCY THAT FAILED TO CONDUCT THE ENVIRONMENTAL REVIEW.

In deciding whether to issue an injunction, and the scope of that injunction, courts routinely give substantial weight to declarations submitted by

experts from federal agencies, based on the persuasiveness of those declarations and the particular context in which they arise.[5] This is appropriate. The United States, however, asks for something more. Relying on general principles of administrative law, the United States urges this Court to rule that the courts must defer automatically to the federal agency director's conclusions concerning what conditions the court should impose on interim actions pending the agency's compliance with NEPA. U.S. Br. at 35. In particular, the United States argues that "[j]ust as a court would have deferred to the agency's decision on an administrative remand, so too the district court should have deferred to the Director's submission." *Id*. at 37.

The United States' argument is precisely what this Court cautioned against in *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mutual Auto Insurance*, when it stated that "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" 463 U.S. 29, 48 (1983) (citation omitted).

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[5] See, e.g., *Winter,* 129 S. Ct. at 379 (court failed to give sufficient weight to evidence submitted by top Navy officers concerning harm that would result to Navy training efforts from the injunction).

Granting deference to a federal agency based only on its director's declarations would result in just such "a monster which rules with no practical limits on its discretion."

Courts are readily able to distinguish between those situations in which it is appropriate to defer to an agency and those in which it is not. Deference in the NEPA context is warranted only if the agency's decision, as reflected in the administrative record, is "fully informed and well-considered." *Save the Yaak Committee* v. *Block*, 840 F.2d 714, 717 (9th Cir. 1988). Deference is not warranted, however, where a court already has found that the agency failed to comply with NEPA and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, in a way that affected the agency's ability to make a fully informed and objective decision.[6] Indeed, where a plaintiff has prevailed on the merits of its NEPA claim, the federal agency's views on the nature and scope of what actions should be taken pending environmental review are by definition post hoc and therefore not

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[6] In contrast to issues of environmental harm raised in the NEPA context, the deference afforded to agency declarations in *Winter* was based on deference to the opinion of military officials about the harm that the injunction would cause to military interests. *Winter*, 129 S. Ct. at 377 (courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (citation omitted)). It was not deference that depended in any way on compliance with or expertise obtained through a public administrative procedure.

entitled to the type of deference courts generally give to agency decisions that are made in compliance with applicable procedures and supported by the administrative record.[7] Where an agency has violated NEPA by not adequately considering all of the environmental consequences of the proposed action, a court may choose to look with a critical eye at the agency's attempts to justify continuation of the action, in whole or in part, based on statements that the action is not likely to result in irreparable harm to the environment in the interim. See *Citizens Advisory Comm. on Private Prisons, Inc.* v. *U.S. Dep't of Justice*, 197 F. Supp. 2d 226, 251 (W.D. Pa. 2001) (agency attempt to cure NEPA violation "viewed with [some] suspicion"). This skepticism of an agency's views that are not the product of a full administrative proceeding, is appropriate where the agency's position skirted statutory procedures and "may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views." *Federal Labor Relations Authority* v. *U.S. Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989). Replacing agency deference based on an administrative procedure that includes public notice

[7] "The purpose of confining judicial review to the administrative record is to ensure that agencies adequately evaluate their proposed course of action before they act and do not simply attempt to justify rash, uniformed actions through 'post hoc' rationalizations once they are aware they are being sued." *Highway J Citizens Group* v. *Mineta*, 349 F.3d 938, 958 (5th Cir. 2003) (citations and internal quotations omitted).

and opportunity to be heard, with blind deference to declarations submitted for purpose of litigation, is unwarranted and inappropriate.

The cases on which the United States relies to justify deference in the face of agency failure to comply with procedural requirements do not involve NEPA and are factually and legally inapposite. In *Brock* v. *Pierce County*, the procedural breach at issue was the agency's failure to act to recover misused funds within a 120 day time period. 476 U.S. 253, 254-55 (1986). Relying on the principle that the public interest should not be prejudiced by the negligence of federal agents, this Court ruled that the agency did not lose its power to act through the procedural misstep. *Id*. at 260. *Barnhart* v. *Peabody Coal Co.* involved the failure of an agency to assign coal industry retirees to an operating company by a certain date for purposes of benefits. 537 U.S. 149, 152 (2003). The Court held that the failure to act within the statutory time limit did not divest the agency of its jurisdiction to act. *Id*. at 172.

In marked contrast here, the "procedural requirement" is the essence of the statute, and the public interest is in the information-gathering procedure itself. See *Sierra Club,* 872 F.2d at 500.[8] It

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[8] Again, as stated by then-Circuit Judge Breyer:

> Rather, the 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

(Continued on following page)

would be peculiar, to say the least, to give automatic deference to the statement of an agency official concerning the likelihood of environmental harm, when the agency violated its statutory duty to conduct an adequate review of that harm.

In sum, a court, exercising its judgment and discretion to determine whether an injunction should issue and the scope of that injunction, may find that declarations submitted by the agency are persuasive and therefore are entitled to substantial weight. Such a determination must be based, as with other expert witnesses, on the court's evaluation of the scientific expertise of the person presenting the evidence, the nature of the scientific review conducted, the strength and thoroughness of the analysis, and, where relevant, consideration of the agency's expertise and statutory mandates. What a court should not do, however, is afford the agency the type of deference to which its determinations and opinions are entitled only on administrative record review after that agency has complied with the Administrative Procedure Act. Deference of this latter type would be

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> 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.

Sierra Club, 872 F.2d at 500-01.

an abrogation of the judiciary's authority and responsibility to fashion equitable relief.

CONCLUSION

The proper scope of injunctive relief depends on the nature of the statute at issue and the harm it seeks to avoid. NEPA does not mandate particular substantive environmental results. Rather, it promotes its environmental goals by "focusing Government and public attention on the environmental effects of proposed agency action. . . . By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371.

Accordingly, injunctive relief to prevent the agency from proceeding with a proposed action pending environmental review may be appropriate, even where immediate harm to the environment from the proposed action is not absolutely certain to occur. In assessing harm, a court must consider environmental harm that is likely to result from violation of the critical decisionmaking processes mandated by NEPA—the fact that the proposed action is undertaken when "there may be little if any information about prospective environmental harms and potential mitigating measures," *Winter*, 129 S. Ct. at 376, as well as the fact that the action may eliminate reasonable alternatives that might be less

harmful to the environment and should be considered in the NEPA review process. 40 C.F.R. § 1506.1.

Thus, if NEPA is not to be merely a "paper tiger," see *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114, the courts must have the mandate to consider and the discretion to enjoin not only actions that have direct and known adverse impacts on the environment, but also those actions that subvert NEPA's procedural requirements, distort the outcome of the process, and increase the likelihood of serious, irreparable harm to the environment that cannot be addressed by after the fact environmental review.

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