No. 09-475

In The Supreme Court of the United States

MONSANTO COMPANY, ET AL.,

Petitioners,

v.

GEERSTON SEED FARMS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* DEFENDERS OF WILDLIFE, HUMANE SOCIETY OF THE UNITED STATES, AND THE CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit conservation and animal protection organizations with longstanding interests in the effective implementation of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370f, and other environmental statutes, particularly with regard to ensuring that federal agencies adequately consider the actual and potential effects of their actions on the natural environment, including wildlife and plants.

Defenders of Wildlife ("Defenders") is a non-profit organization with over one million members and supporters across the country. Defenders is dedicated to the protection and restoration of all native wild animals and plants in their natural communities.

The Humane Society of the United States ("HSUS") is the nation's largest animal protection organization. HSUS has over eleven million members and constituents across the country, and is dedicated to the protection of all animals, including wildlife, through education, advocacy, and hands-on programs.

The Center for Biological Diversity ("CBD") is a national non-profit membership organization that

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

strives to secure a future for animals and plants hovering on the brink of extinction. On behalf of its more than 225,000 members and supporters, CBD is actively involved in species and habitat protection advocacy throughout the United States.

Amici seek to protect and restore the natural environment through participation in administrative proceedings before government agencies, litigation in federal court, and public education activities. In carrying out these activities, *amici* and their members participate extensively in NEPA processes pertaining to federal agency actions that may significantly affect wildlife and plants, including by commenting on Environmental Impact Statements ("EISs") and Environmental Assessments ("EAs") that address environmental effects of federal actions. In addition, when the NEPA process is not implemented sufficiently to consider an adequate range of alternatives or to otherwise take a hard look at environmental impacts, *amici* rely on litigation to ensure that NEPA's purposes are fulfilled. The positions advanced by petitioners here would, if adopted by the Court, greatly impede the ability of *amici* to rely on NEPA to ensure a meaningful consideration by federal agencies of the impacts of their actions on the environment, and particularly wildlife and plants.

BACKGROUND

To illuminate the narrow nature of the controversy here, it is necessary at the outset to highlight two crucial aspects of this case that are not seriously addressed in either the petitioners' or the government's brief, but that should bear heavily on the issues that Monsanto does raise.

First, petitioners expound at length on their view that the large-scale introduction of genetically-modified alfalfa (called Roundup Ready Alfalfa, or "RRA") into the environment will have no adverse environmental impacts, describing as "bad science fiction," Petitioners' Brief (Pet. Br.) at 34, the very environmental concerns that the district court found warranted an EIS pursuant to NEPA. However, no party in this case is challenging the district court's Order finding that an EIS must be prepared under the circumstances here. *See* Pet.App.108a; Pet. Br. at 9 (explaining that the district's court order requiring an EIS "is not challenged here"); Government's Brief ("Gov't Br.) at 11-12 (noting that "[n]o appellant challenged the district court's merits determination").

Hence, it is uncontested that the underlying agency action at issue – the deregulation of RRA, thereby allowing the crop to be planted anyplace and at any time, *see* 70 Fed. Reg. 36,917 (June 27, 2005) – at least poses environmental hazards sufficient to warrant a full-blown EIS, rather than the EA that the United States Department of Agriculture ("USDA") had prepared and originally defended in the district

court. Indeed, as the government points out, in compliance with the district court ruling, an EIS *is* being prepared at this time. Gov't Br. at 14.

But this concession on the underlying merits of the NEPA claim is crucial because, as this Court has previously recognized, NEPA requires an agency to prepare an EIS "*only* if it will be undertaking a 'major Federal actio[n]' which 'significantly affect[s] the quality of the human environment.'" *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (quoting 42 U.S.C. § 4332(c) (emphasis added)); *see also Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 772 (1983) ("where an agency action significantly affects the quality of the human environment, the agency must evaluate the 'environmental impact' and any unavoidable adverse environmental effects of its proposal"). Thus, there is a fundamental disconnect between Monsanto's and the government's acquiescence in the district court's ruling that potential environmental impacts *are* sufficiently significant to warrant an EIS, and their simultaneous insistence that the agency action as to which that EIS is being prepared carries no meaningful environmental risks at all.

Second, having determined that the agency violated NEPA, and hence the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, by failing to prepare an EIS before making its deregulation determination, the district court *vacated* the agency's determination in accordance with the plain terms of the APA. *Id.* at § 706(2); Pet.App.58a. The legal effect of that vacatur

order was to render the planting of RRA unlawful under the agency's regulatory scheme. *See* 7 C.F.R. § 340.0(a). However, neither Monsanto nor USDA has challenged *that* element of the relief awarded below, let alone argued that the district court was obligated to conduct a separate trial-type proceeding on irreparable injury before awarding the standard APA relief for agency actions that have been adopted in violation of federal law.

This unchallenged feature of the relief is also critical here because the "injunction" that Monsanto so vigorously opposes actually had no practical effect beyond that accomplished by vacatur of the agency action pending completion of the EIS. In other words, either the petitioners are attempting to launch a back-door challenge to the vacatur, which should not be allowed at this late date, or they are complaining about an injunction that merely forbids them from doing that *which they could not lawfully do in any event* as a direct consequence of the vacatur as to which they are *not* objecting. In either event, it is highly problematic for all of petitioners' arguments that, although petitioners purport to be challenging only the district court's *injunctive relief*, they would be in essentially the same legal and practical posture *without* that specific relief having been awarded.

SUMMARY OF ARGUMENT

1. NEPA claims are resolved under the APA, pursuant to which a court must typically "set aside" unlawful agency action, often accompanied by remand to the agency for further investigation or explanation. 5 U.S.C. § 706(2); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). When a court, as here, vacates an unlawfully adopted agency action pending compliance with federal law, no separate proceeding on irreparable injury is required, and petitioners here advance no argument or precedent to the contrary.

That the district court could (and did) vacate USDA's deregulation decision pending compliance with NEPA has important consequences for the proper resolution of this case. In sharp contrast to a situation in which a court's injunctive relief extends far beyond the traditional APA relief authorized by 5 U.S.C. § 706(2) – and hence in which some further analysis of irreparable injury or a balancing of equities may be appropriate – here the injunction that petitioners object to merely took the district court's unchallenged vacatur order (which by operation of law made the planting of RRA illegal pending issuance of an EIS) and framed essentially the same relief as an injunction applicable to the parties before the Court. *See* Pet.App.108a. Conspicuously, however, petitioners do not articulate what, if anything, they were prevented from doing by virtue of the injunction that they would have been legally permitted to do in the aftermath of vacatur alone. In the absence of such

an explanation, petitioners' protestation that the lower courts fashioned some draconian relief without taking into account the necessary equitable factors or following the correct process rings hollow.

Moreover, especially in a situation in which a court has done little more than effectuate vacatur of an unlawful agency action, a separate trial-type proceeding on remedies for cases arising under the APA – which must generally be resolved on an administrative record, and without the need for live witnesses – makes little legal, logical, or practical sense. It makes even less sense when the underlying claim concerns a failure to prepare an EIS in compliance with NEPA, since the purpose of the EIS process is to consider essentially the same issues that the court would have to address in an evidentiary hearing. Such overlapping proceedings would not only detract from the agency's ability to complete the required EIS – especially if, as would often be the case, one or more of the parties would seek testimony from the very same agency experts responsible for preparing the EIS – but would also potentially place the trial court and the agency in the untenable position of coming to conflicting conclusions, during essentially the same time frame, on the nature and degree of harm posed by a particular environmental impact.

In addition to encroaching on the role assigned by Congress to the executive branch agency, such parallel proceedings would necessitate extensive remedy trials – preceded, presumably, by, *e.g.*, expert reports, depositions, document requests, and other forms

of discovery – that ordinarily have no role in an APA case and that would dramatically increase the amount of time that federal courts must spend on NEPA cases, of which there are many pending in the federal courts.[2] There is at present no precedent that demands such an increase in the workload of already overburdened federal trial judges, and this Court should be loathe to create one here. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that even when substantial property interests are implicated, it is rare that district courts initiate evidentiary hearings "closely approximating a judicial trial"); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (recognizing the flexibility district courts ordinarily have to determine what process is due under the particular circumstances of a case).

2. The assertion by Monsanto and the government that an impact on a wildlife or plant species may only be deemed "irreparable" if the plaintiffs can prove "species-level harm," Pet. Br. at 36-37; Gov't Br. at 28-29, is not only totally unnecessary to the resolution of this case, but is also legally groundless. As this and other courts have long recognized, the analysis of irreparable injury in the wildlife context turns not only on the specific statutory provisions at issue, but also on the nature of the injury inflicted on

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[2] For example, in 2008 alone, 132 NEPA cases were filed in federal district courts, bringing the total nationwide number of pending NEPA cases to 233. http://ceq.hss.doe.gov/nepa/nepa 2008litigationsurvey.pdf.

the *plaintiffs. See Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008). Just as plaintiffs may be irreparably injured by the destruction or degradation of a particular forest they enjoy although forests may exist elsewhere, plaintiffs may also be irreparably harmed by the loss or impairment of wildlife they enjoy or benefit from in a particular location regardless of whether the wildlife species is abundant elsewhere. *E.g.*, *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250 (10th Cir. 2003) (finding irreparable injury to plaintiffs' interests under NEPA based on harm to bald eagles in a particular location enjoyed by plaintiffs).

Thus, where plaintiffs have concrete aesthetic, recreational, or other interests in wildlife or plant species in specific refuges, parks, forests, or other natural areas, plaintiffs' demonstration of a significant impact on or threat to *those concrete interests* by virtue of the government's failure to prepare an EIS before the harmful action ensues should be sufficient to establish irreparable injury irrespective of any potential species-wide impact stemming from such activities. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 (1992) (plaintiffs may "seek[ ] to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., . . . the procedural requirement for an [EIS] before a federal facility is constructed next door to them"). Accordingly, there is no legal basis for a holding that species-level harm is necessary to establish irreparable injury whenever plaintiffs complain about

NEPA violations in connection with federal actions that impact wildlife or plant species.

ARGUMENT

I. WHERE, AS HERE, AN AGENCY DECISION HAS BEEN VACATED PURSUANT TO THE APA ON THE GROUNDS THAT THE DECISION VIOLATED NEPA, AND A CHALLENGED INJUNCTION IMPOSES NO DISCERNIBLE BURDEN BEYOND THE VACATUR, PETITIONERS' ARGMENT THAT THEY WERE ENTITLED TO A SEPARATE PROCEEDING ON IRREPARABLE INJURY MAKES NO LEGAL OR LOGICAL SENSE.

A. Upon Finding A Legal Violation, A Court May Vacate An Agency Action Without Looking Beyond The Administrative Record And Without The Plaintiffs Meeting The Same Burden That Applies To The Crafting Of Injunctive Relief.

The Court would not know it from Monsanto's brief – which, remarkably, does not cite the APA even once, *see* Pet. Br. at Table of Authorities – but this case, as with most cases seeking relief for violations of NEPA, was brought pursuant to the APA, and hence is governed by the APA's standard of review and other directives. *See, e.g.*, *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (because NEPA has no private right of action "federal courts have jurisdiction over NEPA challenges pursuant to the APA").

As with other APA claims, NEPA claims are generally resolved based on the administrative record that was before the agency at the time of its decision, rather than some new evidentiary record compiled in the district court in the first instance. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419-420 (1971).

In addition, and of particular importance to the relief issues raised by Monsanto, the APA provides that if, based on a review of the administrative record, a reviewing court concludes that an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that the action has been adopted "without observance of procedure required by law," the reviewing court "*shall* . . . hold unlawful and set aside" – *i.e.*, order vacatur of – the agency action. 5 U.S.C. § 706(2)(A) (emphasis added); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

In view of the plain terms of the APA, the "normal course of action" followed by this Court and other federal courts has been to do what the APA says:

> [f]or most of the relatively brief history of administrative law, the court's proper course when it deems an action unlawful has been considered self-evident: the court declares the action void and sends it back to the agency for further consideration.

Ronald M. Levin, *'Vacation' At Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 294 (2003); *id.* at 309 (a "literal reading of section 706 . . . says that a court 'shall' set aside an agency action found to be unlawful"); *see also Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("Section 706(2)(A) of the APA could not be clearer: a court faced with an arbitrary and capricious agency rule . . . 'shall hold unlawful and set aside' that agency action. 'Set aside' means vacate, according to the dictionaries and the common understanding of judges") (quoting 5 U.S.C. § 706(2)(A)). Indeed, this Court has stated that "[i]n all cases *agency action must be set aside* if the action was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *FCC v. Nextwave Personal Commc'ns*, 537 U.S. 293, 300 (2003) (citation omitted) (emphasis added); *id.* ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.") (internal citation omitted); *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) ("if the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded'") (citation omitted).

As respondents explain, Respondents' Brief ("Resp. Br.") at 19-24, petitioners did *not* object to the vacatur of the deregulation decision in the courts below,

and they say nothing about it in their brief to this Court. Accordingly, this omission is not only fatal to petitioners' standing, *id.*, but it also completely undermines Monsanto's arguments concerning the standards and process that petitioners maintain should have been applied before "injunctive" relief was fashioned. Simply put, since Monsanto advances no argument concerning the legal validity of the vacatur – which itself rendered unlawful the conduct Monsanto seeks to pursue until a new decision is made following NEPA compliance – Monsanto cannot reasonably (or even sensibly) contend that some extensive trial-type proceeding on irreparable injury (or other equitable factors) should have been conducted before the district court issued injunctive relief that merely mirrors the *uncontested* vacatur.[3]

Given the legal corner into which it has painted itself, it is difficult to discern how Monsanto could prevail here without attempting to argue in its reply brief that *because* the district court's vacatur had essentially the same practical effect as the injunction, the district court should have required some further showing of irreparable injury, or held a trial-type proceeding, before merely setting aside the deregulation

[3] As respondents note, the district court essentially crafted injunctive relief that afforded respondents *less* relief than that afforded by complete vacatur of the deregulation decision. *See* Resp. Br. at 20 n. 11. Monsanto surely cannot complain about an injunction that had *less* practical impact on alfalfa planting than the vacatur remedy authorized by the plain terms of the APA.

decision. But any such argument should not only be emphatically rejected on waiver and timeliness grounds, it would also fly in the face of elementary APA principles. This Court has certainly never suggested that injunction-type standards must be met or trial-type proceedings pursued before reviewing courts in APA cases may set aside unlawfully adopted agency decisions pursuant to the plain terms of 5 U.S.C. § 706(2).

Nor is there any precedent for such a holding in the lower courts. For example, although the D.C. Circuit has authorized remand without vacatur in some circumstances, it has repeatedly characterized vacatur as the "ordinary result," *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), the "normal[ ]" approach to APA review, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001), and the courts' usual "responsibility under the APA" when it discerns that an agency action has been adopted in violation of federal law. *Md. Pharm., Inc. v. DEA*, 133 F.3d 8, 16 (D.C. Cir. 1998). And even when the D.C. Circuit has departed from that presumptive remedy, it has never suggested that those who have successfully challenged the legality of agency action must satisfy some additional stringent standard merely to accomplish the relief that the plain language of the APA authorizes. Rather, that court has appropriately placed the burden *on the agency* to demonstrate that special circumstances justify departing from the APA's plain terms. *E.g.,*

Chamber of Commerce of the United States v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).[4]

Moreover, in deciding whether to issue the APA's standard relief of vacatur, the D.C. Circuit (and other federal courts) have certainly never suggested that an evidentiary hearing is necessary or appropriate. To the contrary, when the D.C. Circuit sets aside agency action that has been found to violate the APA's standard of review – including because the agency violated NEPA – it generally does so as a matter of course, and with no extended analysis.[5] Therefore,

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[4] As one member of the D.C. Circuit has explained, a vacatur order provides the agency with much stronger incentives to remedy the defects in a rulemaking or other agency decision than a remand-only remedy, which allows the agency to continue to act under its defective rule. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (awarding mandamus relief where agency had refused to act on a remand without vacatur). Of course, a court may award vacatur and then consider whether to *stay* that order in whole or in part in light of equitable considerations. *E.g. Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring). Once again, however, the *agency* must establish that the standards for a stay are satisfied, including that there "will be irreparable harm without the stay. . . ." *Id.*; *see also Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) (in an analysis of whether vacatur should be stayed, explaining that the "burden is where it should be – on the losing agency").

[5] *See, e.g.*, *Dillmon v. NTSB*, 588 F.3d 1085, 1095 (D.C. Cir. 2009) ("[B]ecause the Board departed from its precedent without reasoned explanation, we grant the petition for review, vacate the order, and remand for further proceedings."); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033-35 (D.C. Cir.

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any notion that a reviewing court must hold a separate proceeding on irreparable injury (or other equitable considerations) before vacating an action under the APA would be a stark departure from the longstanding practices of the federal courts. *See, e.g.*, *Lorion*, 470 U.S. at 744 (emphasizing that a "formal hearing . . . is in no way necessary" under the APA, and that "[t]he APA specifically contemplates judicial review on the basis of the agency record compiled in the course of [proceedings] in which a hearing has not occurred").[6]

2008) (vacating an FCC order concerning the effect of communications towers on birds because the "[o]rder fails to follow the Commission's own regulations implementing NEPA"); *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (Roberts, J.) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.") (internal citation omitted); *Davis County Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1411 (D.C. Cir. 1996) (holding that "we have no choice but to vacate substantial portions of the 1995 standards, based on our conclusion that they exceed the EPA's authority").

[6] It also bears noting in this regard that courts of appeals often have original jurisdiction over review of agency action, and requiring extended proceedings on the equities to resolve among basic APA forms of relief would be wholly inconsistent with Congress' decision to vest original jurisdiction in the courts of appeals for such claims. Indeed, even where petitioners challenge an agency's *failure* to act under the APA, 5 U.S.C. § 706(1), claims which necessarily implicate facts that may go beyond the confines of an administrative record – such as, *e.g.*, the consequences of delay for the public interest and "the effect of expediting delayed action on agency activities of a higher or competing priority," *Telecommunications Research & Action Center v. FCC*,

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In sum, because petitioners are *not* challenging the vacatur of the deregulation order – and they have advanced no argument whatsoever that the district court abused its discretion merely by doing what the APA authorizes – they must lose on the grounds that the district court's "injunction" had no discernible impact on them beyond that flowing from the vacatur itself. On the other hand, if petitioners *had* timely challenged the vacatur along with the injunction, they would lose on the alternate grounds that the lower courts acted well within their discretion in abiding by the "shall . . . set aside" proviso in the APA while USDA brought itself into compliance with NEPA's EIS requirement. *See* 5 U.S.C. § 706(2). In any event, petitioners' confused legal position hardly warrants a sweeping ruling by this Court on the nature of relief in NEPA cases specifically, or APA cases generally.[7]

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750 F.2d 70, 80 (D.C. Cir. 1984) – courts of appeals routinely resolve such claims without resort to trial-type proceedings. *Id.* at 80-81 (rejecting the suggestion that appellate review of mandamus claims "may be inadequate due to Courts of Appeals' inability to take evidence").

[7] Although petitioners rely heavily on this Court's ruling in *Winter*, that case simply did not involve a comparable legal situation in which a court had vacated a final agency action in accordance with the APA. Indeed, in that case – which involved the propriety of a preliminary injunction challenged by the Navy on national security grounds – the Court stressed that the NEPA challenge involved "training exercises that have been taking place . . . for the last 40 years," 129 S. Ct. at 376, rather than

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B. As A General Matter, NEPA's Purposes Are Best Served When The Regulatory And Environmental Status Quo Is Maintained While An Agency Prepares A Legally Mandated EIS.

Since petitioners have not challenged vacatur of the deregulation decision, and in any case that relief is fully supported by the plain terms of the APA and the case law construing it, the Court need not go further in addressing what is essentially an academic discourse in *this* case on the appropriate standards and procedures for injunctive relief in NEPA challenges. But if the Court does address that issue, NEPA's overarching purposes should play a central role in the Court's analysis.

While respondents have pinpointed the many errors in petitioners' assertion that the lower courts improperly relied on a "NEPA exception" to the traditional injunction standards, and respondents have also explained that the district court did *not* craft equitable relief based simply on the NEPA violation the court discerned, Resp. Br. at 30, it is also the case that maintaining the environmental and regulatory status quo pending preparation of a required EIS – through vacatur, an injunction, or a combination of both – is ordinarily essential to the accomplishment of NEPA's purposes. By the same token, to allow an

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any discrete final agency action that was susceptible to vacatur under the APA.

agency action to be implemented while the same action is supposedly being studied in a legally required EIS will, as a general rule, make a total mockery of the statutory scheme crafted by Congress. Taking these realities into account in addressing the relief issue in a NEPA case comports fully with this Court's approach to injunctive relief in other environmental cases.

As this Court has instructed, and as the government recognizes, *see* Gov't Br. at 30, in evaluating whether to craft equitable relief to remedy a particular statutory violation, a reviewing court must consider the extent to which such relief is appropriate in light of the "purpose and language of the statute under consideration." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-98 (2001); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 541-43 (1987); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). For example, in *Weinberger*, the Court upheld the district court's discretion to determine that a particular violation of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1251-1387 – which involved the Navy's discharge of ordnance into the ocean – did not need to be remedied by an immediate injunction against such discharges because the "purpose" of the FWPCA, to protect the "integrity of the Nation's waters," could be achieved through relief *other than an injunction*, namely, an order directing the Navy to apply for a permit. 456 U.S. at 314-15 ("The integrity of the

Nation's waters, however, not the permit process, is the purpose of the FWPCA . . . . [A]though the District Court declined to enjoin the discharges, *it neither ignored the statutory violation nor undercut the purpose and function of the permit system*.") (emphasis added).

Likewise, in *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, the Court held that a finding of a likely violation of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120, did not necessitate the issuance of preliminary injunctive relief because the "underlying substantive policy the [ANILCA] process was designed to effect – preservation of subsistence resources" for Alaskan natives – could be served without enjoining the oil and gas exploration activities at issue. 480 U.S. 531, 544 (1987). While observing that generally "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable," and that "[i]f such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment," in that case, the district court had made the factual determination that the "exploration activities would not significantly restrict subsistence uses," and hence injunctive relief was not needed to accomplish the "underlying substantive policy" embodied in ANILCA. *Id.* at 544-45.

As these and other precedents hold, therefore, a court's injunction analysis cannot occur in a legal vacuum; rather, although district courts must

determine whether injunctive relief is appropriate under the particular facts of the case, they must also consider whether the statutory purpose can meaningfully be furthered by relief other than that which maintains the *status quo* while the legal violation is being addressed. Indeed, this Court has stressed that a "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation,'" and hence it is the court's role to assess whether the "selection of an injunction *over other enforcement mechanisms*" is appropriate to effectuate the particular scheme adopted by Congress. *Oakland Cannabis Buyers' Coop.,* 532 U.S. at 497-98 (emphasis added) (citation omitted); *cf. Weinberger,* 456 U.S. at 314 (explaining that, in *Hill*, 437 U.S. 153, the Court had determined that the "purpose and language of the [Endangered Species Act] limited the remedies available to the District Court").

When this analysis is applied to NEPA, it dictates the conclusion that plaintiffs in NEPA cases surely satisfy the irreparable injury element of the test for injunctive relief when, as here, they establish that (1) an agency has failed to prepare an EIS that is required by law, and (2) the statutory violation is accompanied by a "significant risk" of harm to the environment that implicates plaintiffs' concrete interests in affected resources. *Greater Yellowstone Coal.*, 321 F.3d at 1261. Once again, an EIS is required *only* when an action threatens significant environmental harm. *See supra* at 4. Moreover, given NEPA's unique "purpose and language," *Weinberger*, 456 U.S.

at 314, in most cases, it is simply impossible for the statutory scheme to be carried out as Congress intended unless the *status quo* is maintained during the time that a legally mandated EIS is being prepared. Consequently, where (as here) a reviewing court has made a final, unchallenged determination that an EIS is required by law, *and* the plaintiffs have established that *their* interests are threatened by the very environmental impacts and risks that necessitate preparation of the EIS, that should ordinarily be sufficient to maintain the *status quo* while the EIS is being prepared, at least unless overriding equitable factors dictate a contrary result.[8]

Thus, as the Court explained in *Winter*, NEPA imposes purely "procedural requirements to ensur[e] that the agency, *in reaching its decision*, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter*, 129 S. Ct. at 376 (citations omitted; emphasis added). Those procedural safeguards are "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States."

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[8] In this case, the significant environmental risks that warrant preparation of an EIS, and that also implicate respondents' interests in particular, involve not only whether RRA would further contaminate conventional alfalfa (as it already has), *see* Resp. Br. at 6-15, but also the risk that large-scale use of RRA will dramatically increase the use of the Roundup pesticide, Pet.App.48a, which, among other impacts, may result "in the development of Roundup-tolerant weeds." Pet.App.45a.

Pub. Citizen, 541 U.S. at 756 (quoting 42 U.S.C. § 4321).

However, in contrast to substantive environmental statutes like those at issue in *Weinberger* and *Village of Gambell*, "'NEPA itself does not mandate particular results' in order to accomplish" its goal of increased environmental protection. *Id.* at 756 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Instead, the "NEPA EIS requirement" is designed to inject environmental considerations "in the agency decisionmaking process itself," and to "'help public officials *make decisions that are based on understanding of environmental consequences*, and take actions that protect, restore, and enhance the environment.'" *Id.* at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)).[9]

Because "NEPA's core focus [is] on improving agency decisionmaking," *Pub. Citizen*, 541 U.S. at 769 n. 2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a

[9] *See also Robertson*, 490 U.S. at 349 (The EIS requirement "ensures that the agency, in reaching its decision, will have available, *and will carefully consider,* detailed information concerning significant environmental impacts") (emphasis added); 40 C.F.R. § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.").

particular federal action," *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983), the "moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in original) (quoting *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 320 (1975)); *see also* 42 U.S.C. § 4332(C). This requirement is designed to "place[ ] upon an agency the obligation to consider every significant aspect of the environmental impact" at a stage when such impacts can most meaningfully influence the agency's deliberations, *i.e.,* after the agency has settled on a "proposed action," but *before* any decision and its environmental effects are a *fait accompli*. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978).[10]

[10] *See also Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (the CEQ regulations "require federal agencies to 'integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values'") (quoting 40 C.F.R. § 1501.2); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) ("NEPA's instruction that all federal agencies comply with the impact statement requirement and with all the other requirements of § 102 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.").

This Court's longstanding recognition of NEPA's fundamental "action-forcing" function of ensuring that "environmental concerns are . . . interwoven into the fabric of agency planning," *Andrus*, 442 U.S. at 351, has important implications for whether the environmental and regulatory *status quo* should ordinarily be maintained while a legally mandated EIS is being prepared. Although there may be unusual circumstances compelling a contrary result, *see Winter*, 129 S. Ct. at 381 (finding that national security considerations dictated that naval training exercises proceed notwithstanding a likely NEPA violation), as a general matter, for a court to allow an agency action to be implemented while an EIS is being prepared renders NEPA compliance a make-work exercise and "makes a mockery of the EIS process, converting it from analysis to rationalization." Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. Chi. L. Rev. 1263, 1289 (1992).

As this Court has stressed time and again, that is precisely what Congress did *not* intend when it imposed the EIS obligation on federal agencies. *See Pub. Citizen*, 541 U.S. at 768-69 (rejecting the concept of NEPA compliance that can have "no effect" on agency decisionmaking because "'*NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action*'") (quoting 40 C.F.R. § 1500.1(c) (emphasis added); *see also Andrus*, 442 U.S. at 351 n. 3 (explaining that an EIS must be "prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and

will not be used to rationalize or justify decisions already made") (emphasis added); *Baltimore Gas and Electric Co.,* 462 U.S. at 100 ("Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise."). Moreover, allowing an agency to implement an action before the agency has completed a legally required EIS not only renders the EIS the "abstract exercise" Congress wanted to avoid, *id.*, but it also affords prevailing NEPA plaintiffs who are directly threatened by the action (as are respondents here) with *no meaningful remedy at all* – a result that should generally be avoided. *See Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497-98.[11]

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[11] For these reasons, it is commonplace for federal courts throughout the country to maintain the *status quo* pending agencies' compliance with NEPA, particularly when allowing the agency action to go forward will foreclose alternative courses of action that may entail less environmental damage and that the agency might elect to adopt based on its "hard look" in an EIS. *See* Daniel R. Mandelker, *NEPA Law and Litigation, 2d,* at § 4:61 (2008) ("In the usual case in which the court grants a preliminary injunction, it enjoins all further work until an adequate impact statement has been prepared or NEPA responsibilities have been met . . . .") (citing cases from the Second, Fourth, Eighth, and Ninth Circuits); *see also* William Rodgers, *Environmental Law* § 7.7 at 767 (1977) ("[NEPA's] purpose is to require consideration of environmental factors *before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete*.") (emphasis added); 42 U.S.C. § 4332(C)(iii) (requiring that EIS's address "alternatives to the proposed action").

Indeed, notwithstanding their insistence that respondents did not demonstrate the requisite irreparable injury to warrant the issuance of equitable relief, petitioners' ultimate request, paradoxically, is that the Court *should* order that such relief be issued – albeit a narrower remedy than the one adopted by the district court. Presumably, this is because even petitioners recognize the peculiarity of a holding that an agency action should proceed unabated *before* a legally mandated EIS has been completed. In any event, when the "purpose and language of the statute under consideration" are brought to bear on the remedy issue, *Weinberger*, 456 U.S. at 314, they strongly suggest that, in the routine NEPA case (such as this one), if the environmental impacts and risks associated with an agency action are significant enough to warrant an EIS informing the agency's views on *whether and how to proceed with the action* – as is unchallenged by petitioners here – and if the plaintiffs demonstrate that their interests are threatened by the very impacts and risks being scrutinized in the EIS, then the plaintiffs have established sufficient irreparable injury to maintain the *status quo* until the agency has informed its decisionmaking in the manner mandated by federal law. *See also* 40 C.F.R. § 1506.1(a) ("no action concerning the [agency's] proposal shall be taken which would . . . [h]ave an

adverse environmental impact" or "[l]imit the choice of reasonable alternatives").[12]

II. TO OBTAIN RELIEF FOR A NEPA VIOLATION AFFECTING A WILDLIFE OR PLANT SPECIES, PLAINTIFFS NEED NOT DEMONSTRATE SPECIES-LEVEL HARM.

In arguing that respondents were not entitled to the specific injunctive relief granted by the district court, petitioners (echoed by the government, Gov't Br. at 28) proffer an extreme position regarding the irreparable injury standard in this case, arguing that respondents must show "species-level harm" to conventional and organic alfalfa before an injunction may issue; in advancing that argument, petitioners purportedly borrow the applicable standard from the irreparable injury standard in the context of an affected wildlife species. Pet. Br. at 36-37. As

[12] The petitioners' and government's contention that the lower courts should have deferred to USDA's proposed interim measures is also impossible to reconcile with NEPA's design. *See* Gov't Br. at 39-42. Not only are courts under no obligation to defer to an agency's post-hoc rationalizations in any APA case, *see* Resp. Br. at 47 – let alone one in which the agency has already been found to have violated federal law – but the entire premise behind the EIS requirement is that, without that document, the agency itself lacks information essential to informed decisionmaking. *See Pub. Citizen*, 541 U.S. at 769. Indeed, for a court to simply rubber-stamp measures that the agency may prefer but have not been afforded the requisite "hard look" in an EIS, *Baltimore Gas and Elec. Co.*, 462 U.S. at 100, would be to compound, rather than rectify, the NEPA violation.

respondents point out, this argument was not advanced below and hence should be deemed waived. Resp. Br. at 38-39. But if the Court nevertheless addresses the argument, any notion that irreparable injury to a NEPA plaintiff's interests in a wildlife or plant species may *only* be established by demonstrating species-level harm is impossible to reconcile with this Court's own precedents, lower court rulings applying NEPA, and the statute itself.

To begin with, it is now well-established that the "desire to use or observe an animals species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes" of both injury in fact and irreparable injury analysis. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562 (1992). This Court has further held that a "person who *observes or works with a particular animal* threatened by a federal decision is facing perceptible harm, since the subject of his interest will no longer exist." *Id*. at 566. Plainly, a plaintiff's interest in "us[ing] or observ[ing] an animal species" (or plant species) or in "observ[ing] or work[ing] with a particular animal" (or plant) may be gravely impaired through *adverse impacts on wildlife or plants in a specific location frequented by the individual* regardless of whether the species as a whole will be driven to extinction by the action under review.

Indeed, this Court evidently recognized the potential for precisely such injury in *Winter*. Thus, although the Navy asserted that the plaintiffs in that case needed to show species-level harm in order to

demonstrate irreparable injury to their interests in observing and enjoying marine mammals off the coast of Southern California, 129 S. Ct. at 375, the Court's ruling did *not* endorse that argument. Rather, in view of declarations from the plaintiffs and their members that they routinely observed and studied whales and other marine mammals in specific locations where the training exercises were occurring, and that their ability to engage in those localized activities would be irreparably injured by the Navy's use of sonar *regardless* of whether entire species would be wiped out, the Court found that the plaintiffs *had* indeed asserted "serious[ ]" and "legitimate[ ]" injuries due to *their* diminished opportunities to view, photograph, enjoy, and research members of the affected species in particular geographical areas used by the plaintiffs. *Id.* at 377-78. The Court simply held that those acknowledged interests were *outweighed* by overriding national security interests. *Id.* at 378 (concluding that "the balance of equities and consideration of the overall public interest in this case [protecting national security] tip strongly in favor of the Navy").

The Court's recognition in *Winter* that those whose ability to enjoy or benefit from a species in a *particular geographical area* will be impaired by a federal action do indeed have "serious" interests that may support relief in a NEPA case is consistent with the Court's pronouncement as to who has standing to seek such relief. In *Lujan*, the Court observed that "under our case law, one living adjacent to the site for

proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement." 504 U.S. at 572 n. 7.

Thus, expanding on the Court's paradigmatic example, those "living adjacent" to the proposed dam site would certainly have standing to argue, among other issues, that an EIS should be prepared because the dam would destroy a river that had long been used by local residents to fish for trout. Yet, under petitioners' approach to the irreparable injury analysis, although the nearby residents "would obviously be concretely affected" by this localized wildlife impact, *id.* at n. 8, and hence would have standing to *bring* a NEPA case, they could not rely on that same impact to argue that the dam should be halted pending completion of a required EIS unless they could show that the dam would cause the extinction of trout everywhere. That argument makes no sense. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (individuals who refrained from using a nearby river because of pollution concerns were "persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" regardless of whether they could go to *other* rivers) (citation omitted); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n. 4 (1986) (conservation organizations "undoubtedly have alleged a sufficient 'injury in fact' in that the whale

watching and studying *of their members* will be adversely affected by continued whale harvesting") (emphasis added).

The argument makes even less sense when NEPA's specific requirements are considered. As respondents point out, Resp. Br. at 32, and as the example in *Lujan* illustrates, a federal action's environmental impacts may be deemed significant, and hence require an EIS, *solely* because it has locally or regionally significant effects on the human environment. *See* 40 C.F.R. § 1508.27(a). Congress further emphasized the importance of analyzing environmental impacts on a local scale, requiring agencies completing an EIS to consider "the relationship between *local short-term uses* of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(C)(iv) (emphasis added).

Hence, it is indisputable – and petitioners surely do not deny here – that an agency action can necessitate preparation of an EIS because it has a regionally or locally significant effect on a wildlife or plant species, and thus a serious adverse impact on the ability of regional or local residents to use or enjoy that species, even if the action does not cause the extinction of an entire species. *E.g.*, *Anderson v. Evans*, 371 F.3d 475, 490 (9th Cir. 2004) ("Even if the eastern Pacific gray whales overall . . . are not significantly impacted by the Makah Tribe's whaling, the summer whale population in the *local* Washington area may be significantly affected. Such local effects are a

basis for a finding that there will be a significant impact from the Tribe's hunts.") (citing 40 C.F.R. § 1508.27(a)); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232-34 (D.D.C. 2003) ("[T]he impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on broader populations, is a basis for a finding that there will be a significant impact" that should be studied in an EIS (quotation omitted)). It surely cannot be the law that a level of environmental injury that is significant enough to trigger the EIS requirement – as is the case for locally or regionally significant wildlife impacts – is, at the same time, legally incapable of supporting injunctive relief while the EIS is being prepared.

Indeed, petitioners' demand for such species-level impacts is not only difficult to harmonize with this Court's precedents and with NEPA itself, but it has been squarely rejected by the vast majority of lower courts that have considered the issue and have correctly reasoned that the *plaintiffs*' aesthetic, recreational, research, or other interests may be impaired by regional or local impacts on wildlife resources. *E.g.*, *Greater Yellowstone Coal.*, 321 F.3d at 1261 (finding that threats to the "primary breeding area for bald eagles in the Greater Yellowstone area" qualified as irreparable injury to plaintiffs' interests under NEPA even if plaintiffs did not "establish harm to the species as a whole"); *Fund for Animals v. Clark*, 27

F. Supp. 2d 8, 14 (D.D.C. 1998) (the combination of the injury suffered by plaintiffs due to federal defendants' procedural failure to comply with NEPA and "the aesthetic injury the individual plaintiffs would suffer from seeing" bison being killed in a federally authorized hunt met plaintiffs' "burden of demonstrating the presence of an irreparable harm").[13]

Likewise, under NEPA and other federal environmental statutes, courts have long found irreparable injury where the plaintiffs' concrete interests in a particular forest are adversely affected by agency action – irrespective of whether the action at issue would entirely eliminate all forests or the affected tree species. *E.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) (finding irreparable injury where trees in certain forests would be logged or burned in violation of NEPA); *Idaho Sporting Cong. v. Rittenhouse,* 305 F.3d 957, 974 (9th Cir. 2002) (enjoining two timber sales after finding irreparable injury to plaintiffs if old-growth forests were cut); *Buckeye Forest Council v. U.S. Forest Serv.*, 337

[13] *See also Ala. Wildlife Alliance v. Jensen,* 108 F.3d 1065, 1068 (9th Cir. 1997) (plaintiffs challenging an agency decision to allow commercial fishing in Glacier Bay National Park suffered serious "aesthetic and recreational harm" by seeing "sea lions in the bay with huge trolling lures hanging from their mouths"); *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (organizations' members were injured by federal actions that resulted in their witnessing "animal corpses and environmental degradation" at federal wildlife refuges).

F. Supp. 2d 1030, 1039 (S.D. Ohio 2004) (preliminarily enjoining the Forest Service from "tree cutting, thinning, logging, and prescribed burning" because of the irreparable harm that would result to the plaintiffs' interests). Once again, these rulings correctly recognize that plaintiffs in NEPA cases may be irreparably harmed by injury to the localized environment in which the plaintiffs have a concrete interest, regardless of whether they are able to demonstrate a "species-level harm" from an agency's failure to comply with NEPA. Pet. Br. at 36-37.

Indeed, petitioners cite to a single NEPA case in support of their position that species-level harm must be shown to demonstrate irreparable injury in a wildlife context. Pet. Br. at 36. However, in that case, *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975), the court not only found that an EIS was *not* required with regard to the action at issue, *id.* at 988 n. 15, but the court did not even address the question of whether a local or regional impact on wildlife could be sufficient to support an injunction because no such argument was made. Accordingly, the ruling has been distinguished by other courts which *have* addressed that specific question, and have found that such an impact may be sufficient to maintain the *status quo*

pending compliance with NEPA. *See Greater Yellowstone Coal.*, 321 F.3d at 1256-57.[14]

[14] The only other case cited by petitioners (or the government) – *Water Keeper Alliance v. Dep't of Defense*, 271 F.3d 21 (1st Cir. 2001) – is even less apposite. *Water Keeper Alliance* did not involve a NEPA claim but, rather, an *unsuccessful* challenge under section 7 of the ESA, which requires federal agencies to consult with the Fish and Wildlife Service regarding the impacts of their activities on listed species. *Id.* at 25; *see* 16 U.S.C. § 1536(a)(2). In reviewing a district court's refusal to issue a preliminary injunction based on an asserted procedural violation of that provision, the First Circuit first found that the plaintiffs were "unlikely to succeed on the merits" of their claim that the Navy had failed to adequately solicit the expert agency's views on the impacts of training exercises on listed species. *Water Keeper Alliance*, 271 F.3d at 31-33. Thus, while recognizing that the "ESA restricts the equity power of the court as to findings of irreparable injury," *id.* at 33 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153); *see also Oakland Cannabis Buyers' Coop.*, 532 U.S. at 496-98, and clearly suggesting that a proven violation of the section 7 process could *alone* have been sufficient to warrant injunctive relief in view of *Hill*, 271 F.3d at 33, the court reasoned that, *in the absence of any violation* of the ESA's procedural or substantive mandates, the plaintiffs could not support such relief without making some "concrete showing" of how the action "may affect the species" in ways the consultation had not addressed. *Id.* Accordingly, while there is no reason for the Court to address ESA precedents in resolving this case, nothing in *Water Keeper Alliance* supports the notion that a species-level impact is necessary to support injunctive relief in every legal context; indeed, the ruling does not even discuss, let alone reject, the proposition that regional or local impacts on wildlife or plant species may be sufficient to support such relief in appropriate cases.

CONCLUSION

For the foregoing reasons, the Court should reject petitioners' challenges to the ruling below.

Respectfully submitted,

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