NOTE

"VACATION" AT THE FARM: WHY COURTS SHOULD NOT EXTEND "REMAND WITHOUT VACATION" TO ENVIRONMENTAL DEREGULATION

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INTRODUCTION

In *Monsanto Co. v. Geertson Seed Farms*, the U.S. Supreme Court reversed a nationwide injunction that prohibited the planting of Monsanto's genetically modified (GM) Roundup Ready Alfalfa.[1] The Court reaffirmed its holding from *Winter v. Natural Resources Defense Council, Inc.* and *eBay Inc. v. MercExchange, L.L.C.* that obtaining permanent injunctive relief requires surmounting a four-factor test, making injunctive relief harder to obtain.[2] But the Court left in place the district court's order vacating the U.S. Department of Agriculture's (USDA's) deregulation of the GM alfalfa seed.[3] Environmental groups claimed victory because the district court's vacation order returned the seed to its regulated state, effectively prohibiting planting.[4] *Geertson* was a watershed case—the first Supreme Court opinion to consider the potential impacts of agricultural biotechnology.[5]

Geertson, *Winter*, and *eBay* have changed the landscape of remedies.[6] Under the Administrative Procedure Act (APA), when a court finds that an agency has acted arbitrarily and capriciously, it typically

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1 *See* 130 S. Ct. 2743, 2761–62 (2010).

2 *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22–24 (2008); eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (enunciating the four-factor test in the context of permanent injunctive relief); Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1172–74 (9th Cir. 2011) (citing *Winter* and *Geertson* and denying injunctive relief); *see also* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. (forthcoming 2012) (discussing courts' application of the four-factor test and the resulting controversy).

3 *See Geertson*, 130 S. Ct. at 2756 ("Because petitioners and the Government do not argue otherwise, we assume without deciding that the District Court acted lawfully in vacating the deregulation decision.").

4 *See* Victor Li, Monsanto v. Geertson Seed Farms*: Supreme Court Rules, Everyone Says They Won*, CORP. COUNS. (July 1, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202463170985.

5 *See* Thomas P. Redick, *Biotech Liability's Watershed Year*, 42 TRENDS: A.B.A. SEC. ENV'T, ENERGY & RESOURCES NEWSL. 1, 14 (2010) (discussing *Geertson*'s likely economic and legal impact on agricultural biotechnology). Agricultural biotechnology refers to the technique of genetically engineering food in various forms (e.g., seeds, enzymes, animals) to impart new characteristics or to enhance existing traits. *See generally* PEW INITIATIVE ON FOOD & BIOTECHNOLOGY, APPLICATION OF BIOTECHNOLOGY FOR FUNCTIONAL FOODS 7–9 (2007), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/PIFB_Functional_Foods.pdf [hereinafter PEW REPORT].

6 *See* Gergen et al., *supra* note 2.

vacates the action and remands to the agency to cure the defect.[7] In addition to vacation, a party also frequently seeks an injunction, requiring the agency or regulated entity to perform or not to perform some action.[8] Injunctive relief allows courts greater flexibility to tailor the relief.[9] By raising the bar for this more targeted remedy, the *Geertson* Court has incentivized parties, and thus courts, to focus more squarely on vacation for allegedly improper agency action, particularly in environmental cases.[10]

To mitigate the regulatory gap that often ensues upon vacating an agency rule, the D.C. Circuit Court of Appeals began applying a two-part test to determine whether the consequences of vacation were so disruptive or the flaw in the agency action was so minimal that the action should remain in place on remand.[11] If so, the court would remand without vacation (RWV).[12] Facing a potential rise in vacation requests fueled by the heightened standard for injunctive relief, courts may respond by employing the legally questionable but increasingly utilized judicial remedy of RWV.

RWV has spread to other federal courts of appeals but remains controversial,[13] and the Supreme Court has not addressed its legality.[14] Proponents of RWV point to the judiciary's historical discretion in crafting equitable remedies.[15] They laud RWV's ability to leave agency action in place—purportedly aiding regulated entities, beneficiaries, and the agency—while allowing the agency to fix procedural

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7 *See* Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (citing Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1061 (D.C. Cir. 2000)).

8 *See, e.g.*, Or. Natural Res. Council v. Lyng, 882 F.2d 1417, 1419 (9th Cir. 1989) (seeking to enjoin a timber sale by the U.S. Forest Service).

9 *See* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed. 1995).

10 *Cf.* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 4:7 4-16 n.2 (2d ed. 2010) ("An injunction is . . . often the main remedy sought in environmental cases . . . .").

11 *See* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (ruling that the decision whether to vacate an inadequately supported rule depends on "the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed" (internal quotation marks omitted)).

12 *See, e.g.*, Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 528 (D.C. Cir. 2009) (per curiam) (remanding the Environmental Protection Agency's (EPA's) revision of national ambient air-quality standards for particulate matter without vacating the EPA's determination); North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (remanding aspects of the Clean Air Interstate Rule to the EPA without vacating the rule).

13 *See* Comité de Apoyo a los Trabajadores Agrícolas v. Solis, No. 09-240, 2010 WL 3431761, at *24 (E.D. Pa. Aug. 30, 2010); *see also* Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) (stating that the Ninth Circuit has found RWV warranted when serious irreparable environmental injury is present).

14 *Comité de Apoyo*, 2010 WL 3431761, at *24.

15 *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 323–25 (2003); *infra* Part I.C.2.

defects or flaws in the reasoning underlying the rule.[16] Opponents attack the device on both statutory and functional grounds. They argue that it violates the APA's directive and that it disincentivizes an agency from taking a "hard look" at its rulemaking in the first instance and on remand.[17]

This Note argues that, whether or not RWV is lawful, the device is an improper remedy for invalidated environmental deregulation. Indeed, the reasons courts give for using RWV in cases of defective environmental regulation demonstrate precisely why courts should not use RWV in cases involving defective environmental deregulation.[18]

Part I briefly describes how courts review agency action under the APA. It then summarizes the development and present use of RWV, detailing the leading arguments for and against the device. Part II explores *Geertson* and how it has set the stage for increased focus on vacation requests. Part III analyzes the impact of *Geertson* on the incidence of vacation requests and how the changed landscape may tempt courts to import RWV into the deregulatory context. Part IV examines recent agricultural biotechnology cases to demonstrate why courts should not extend RWV to invalidated environmental deregulation. This Part concludes that if courts nonetheless employ the D.C. Circuit's two-part test, they should still vacate the invalid environmental deregulation, as one court already has.[19]

I
The History of Remand Without Vacation

This Part discusses the development of RWV in the D.C. Circuit. After briefly explaining the standard for whether agency action is defective, it sets forth the framework of RWV.

A. Evolution of "Hard Look" Review

Before vacating an agency action, a court must find some deficiency requiring a remedy. The APA mandates that a court "shall . . . set aside agency action [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[20] To "set aside agency action" means to vacate the action, which could be,

16 *See, e.g.*, Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 34, 47–48 (1st Cir. 2001) (remanding without vacating and allowing the agency to correct its reasoning).

17 *See infra* Part I.D.1–2.

18 *See infra* Part IV.A.

19 Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 955 (N.D. Cal. 2010).

20 5 U.S.C. § 706 (2006). The focus below is on the "shall . . . set aside" remedial language. *See infra* Part I.D.2. Here, the Note considers "arbitrary [and] capricious" as the ground for remediation.

for example, a regulation, a permit, or a decision to deregulate.[21] The Supreme Court has explained that the arbitrary and capricious standard requires a "searching and careful" review but that the "court is not empowered to substitute its judgment for that of the agency."[22] These somewhat conflicting marching orders have placed lower courts in a difficult position when reviewing agency action.[23]

Because agencies have the expertise to tailor rules for often technical problems, courts recognize the importance of allowing agencies flexibility.[24] But since regulations frequently have far-reaching effects, courts understand the need to ensure that the agency arrived at its conclusions in a reasoned way and followed proper procedure.[25] "Hard look" review attempts to strike this balance.[26]

In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court held that to survive review, an agency must not only devise a rule that could achieve the desired result but also adequately explain how it made the decision.[27] *State Farm*, which concerned the rescission of the passive-restraint requirement in automobile safety standards, was a politically charged and policy-laden deregulatory case.[28] It illustrates that the Court intended greater scrutiny for deregulation as compared with regulation, particularly in light

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21 *See infra* Part I.D.2.

22 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

23 *See* Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 610 (2004) ("The fundamental challenge for the courts is to maintain the ability of political officials in the legislative and executive branches to appropriately supervise agency policymaking, while making sure that the constitutional rules are followed."); *cf.* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 16 (2009) (discussing the difficulty of judicial review).

24 *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies." (internal quotation marks omitted)).

25 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983).

26 *See* Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (1970) (explaining hard-look review). Although this Part focuses on hard-look review in the context of agency action that is arbitrary and capricious, hard look also applies to the other circumstances listed in section 706(2). *See* 5 U.S.C. § 706(2) (2006). Under any of these circumstances, vacation is the typical remedy, though courts may use RWV. *See infra* Part I.B.

27 *See State Farm*, 463 U.S. at 57; *see also* Checkosky v. SEC (*In re* Checkosky), 23 F.3d 452, 491 (D.C. Cir. 1994) (per curiam) ("It is firmly settled that if a court must 'guess as to what the [agency's] decisional criteria are or should be,' the agency's order is arbitrary and capricious." (alteration in original) (quoting Airmark Corp. v. FAA, 758 F.2d 685, 695 (D.C. Cir. 1985))); *cf.* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 8:31 (3d ed. 2010) ("Remand is the proper remedy where the court doubts that the agency has properly exercised its discretion but recognizes that it is the agency which should exercise that discretion and not the court.").

28 *See State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting).

of the potential for agency inertia.[29] The case led to a "significant expansion of judicial intervention in the administrative process."[30]

B. Development of Remand Without Vacation

As arbitrary and capricious review became more robust, courts more frequently vacated agency regulations.[31] Historically, reviewing courts would vacate and remand agency rules found to be arbitrary and capricious because of "the agency's failure to . . . engage in reasoned decisionmaking."[32] In the 1970s and 1980s, a limited number of courts (without citing the APA's arbitrary and capricious provision, 5 U.S.C § 706(2)) began remanding cases without vacating, primarily when vacation would lead to an unusually severe regulatory gap.[33] For example, in *Western Oil & Gas Ass'n v. EPA*, the Environmental Protection Agency (EPA) had promulgated a rule concerning air-quality standards that the Ninth Circuit held invalid.[34] Reasoning that an imperfect rule addressing air pollution was preferable to no rule at all, the court left the defective regulation in place.[35]

In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, the D.C. Circuit, after finding a rule invalid, enunciated a two-part test for determining whether to use RWV: "The decision whether to vacate depends on [1] 'the seriousness of the order's deficiencies . . . and [2] the disruptive consequences of an interim change that may itself be changed.'"[36] Courts may use RWV if the violation is an inadequate procedure (such as not allowing proper notice and comment)[37] or an inadequate explanation of a rule, order, or action.[38] As of this writ-

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29 *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 573 (1985); Gregory Bradshaw Foote, Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 254 (1985) (discussing how the Court uses greater scrutiny for deregulatory agency actions).

30 Rodriguez, *supra* note 23, at 603.

31 *See id.*

32 Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75 (1995).

33 *See, e.g.*, Md. People's Counsel v. Fed. Energy Regulatory Comm'n, 768 F.2d 450, 455 (D.C. Cir. 1985); Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701, 703–04 (2d Cir. 1975); *see also* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 290 n.57, 291 & nn.59–60 (2005) (listing cases in which the D.C. Circuit remanded without vacating primarily because of "defects in an agency's substantive explanation for its policy choice . . . but . . . also . . . [for] procedural defects in an agency's rulemaking").

34 *See* 633 F.2d 803, 812–13 (9th Cir. 1980).

35 *See id.*

36 *See* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)). The D.C. Circuit was the main architect of RWV. *See id.* at 150–51.

37 *See Western Oil*, 633 F.2d at 812–13.

38 *See* Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 949–50 (D.C. Cir. 2004) (per curiam) ("Although EPA's failure to set forth its rationale requires us to remand . . . ,

ing, the Courts of Appeals for the Federal Circuit, the First Circuit, the Fifth Circuit, and the Ninth Circuit have adopted RWV.[39] Although the Third Circuit has addressed RWV, it has not formally adopted it.[40]

The *Allied-Signal* test is essentially a cost–benefit analysis.[41] Vacating the rule may impact the following parties: regulated entities, beneficiaries, and the agency.[42] If the potential "disruptive consequences" of vacating the rule or action at issue outweigh the "seriousness of the . . . deficiencies" of the flawed agency action, then RWV is the likely remedy.[43] Put differently, if the benefits to the aforementioned parties outweigh the costs of keeping the flawed rule in place, then a court may remand without vacating.[44] Courts tend not to focus on how the agency is likely to respond to the remedy.[45] Environmental cases are a subset in which the costs to beneficiaries can be high and courts have frequently deemed RWV the appropriate remedy.[46]

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that defect does not require us to vacate the rule." (citation omitted)); *cf.* Daugirdas, *supra* note 33, at 283 (explaining that courts will not apply RWV where the agency's rule violates its organic statute).

39 *E.g.*, Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380–81 (Fed. Cir. 2001); Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 34, 48 (1st Cir. 2001); Cent. & Sw. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995).

40 *See* Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235, 257–59 (3d Cir. 2010) (finding that, even if applied, RWV would not be appropriate under the *Allied-Signal* test). *But cf.* Comité de Apoyo a los Trabajadores Agrícolas v. Solis, Civil Action No. 09-240, 2010 WL 3431761, at *24–25 (E.D. Pa. Aug. 30, 2010) (applying the *Allied-Signal* test and remanding without vacating).

41 *See* Daugirdas, *supra* note 33, at 291–93 (noting that RWV considers whether the "costs of vacatur would significantly exceed the benefits in terms of improving the quality of agency decisionmaking").

42 *See id.* at 285.

43 *See, e.g.*, Davis Cnty. Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1458–59 (D.C. Cir. 1997) (balancing interests according to the two-part test and concluding that "the more equitable and appropriate course for this court to take is to retain the . . . emission guidelines . . . on remand" because "vacating the guidelines [would] result in an eighteen month period in which greater . . . emissions [would] occur than would occur [if the court] remand[ed] for further rulemaking without vacating"). A court might also use RWV if vacating a rule would have little to no effect. *See, e.g.*, Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 91, 97–98 (D.C. Cir. 2002) (using RWV where payments had already been made under the invalid regulation—"[t]he egg [had] been scrambled and there [was] no apparent way to restore the status quo ante").

44 Benefits accrue on both sides of the equation. Keeping a faulty rule in place may benefit all parties involved. Conversely, vacating an invalid rule may also bring benefits. Likewise, costs (from either the deficiency prong or the disruption prong) accrue both from leaving a deficient rule in place and from vacating a deficient rule.

45 *See* Comcast Corp. v. FCC, 579 F.3d 1, 12 (D.C. Cir. 2009) (Randolph, J., concurring) ("A remand-only disposition leaves the unlawful rule in place and allows agencies to postpone responding to the court's merits decision. Agencies do not necessarily give remand-only decisions high priority and may delay action for lengthy periods.").

46 *See e.g.*, Envtl. Def. Fund, Inc. v. Adm'r of U.S. EPA, 898 F.2d 183, 190 (D.C. Cir. 1990) (remanding without vacating because vacation "would at least temporarily defeat . . . the enhanced protection of the environmental values covered by [the EPA rule at issue]").

C. Arguments for Remand Without Vacation

Proponents of RWV make three arguments[47]: (1) used properly, RWV is a better remedy for all parties; (2) courts have broad equitable remedial discretion; and (3) courts can interpret the APA to encompass RWV.[48]

1. *Remand Without Vacation Is a Better Remedy*

For advocates, RWV has three primary salutary effects: (1) it avoids a regulatory gap caused by vacation, thus maintaining more stability in the system; (2) it protects the "reliance interests" of regulated entities, beneficiaries, and the agency; and (3) it allows the agency the opportunity to correct flawed reasoning that underlies an otherwise sound rule.[49]

When a court vacates a rule, the regulated area returns to its unregulated state.[50] This may cause concern for one of the parties and the court.[51] For example, like the Ninth Circuit in *Western Oil & Gas Ass'n*, the D.C. Circuit in *American Farm Bureau Federation v. EPA*[52] found the EPA's particulate-matter regulation invalid.[53] Recognizing the consequences of having no regulation of air contaminants, the court left the flawed rule in place while the agency corrected the deficiency.[54] The court explained that "vacating a standard because it may be insufficiently protective would sacrifice such protection as it now provides, making the best an enemy of the good."[55]

Regulated entities, the agency, and particularly beneficiaries rely on existing regulations. Once parties structure their lives and businesses around a regulation, the disruption caused by the regulatory

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47 For a look at the first formal debate over RWV, compare Checkosky v. SEC (*In re* Checkosky), 23 F.3d 452, 462–66 (D.C. Cir. 1994) (opinion of Silberman, J.) (declaring RWV lawful), with *id.* at 490–93 (opinion of Randolph, J.) (declaring RWV unlawful). For many of the arguments for and against RWV, see generally Levin, *supra* note 15, at 305–85 (arguing for RWV); Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 111–51 (2001) (arguing against RWV); Rodriguez, *supra* note 23, at 607–37 (arguing generally against RWV); Daugirdas, *supra* note 33, at 285–90 (explaining arguments for and against RWV).

48 *See* Levin, *supra* note 15, at 298–300.

49 *See* Rodriguez, *supra* note 23, at 617–18.

50 *See, e.g.*, North Carolina v. EPA, 550 F.3d 1176, 1178–79 (D.C. Cir. 2008) (Rogers, J., concurring in part) (per curiam) (explaining that RWV is appropriate because vacating the Clean Air Interstate Rule would leave an important area unregulated).

51 *See, e.g.*, *id.* at 1178 ("[T]he court has adhered to its traditional position where vacating would have serious adverse implications for public health and the environment.").

52 559 F.3d 512 (D.C. Cir. 2009) (per curiam).

53 *See id.* at 528.

54 *See id.*

55 *Id.*

void could be more harmful than the invalid regulation itself.[56] Thus, RWV preserves the status quo until the agency cures the defective rule, which may require something as simple as additional reasoning.[57]

With some invalidated rules, all the agency may need to correct on remand is its reasoning.[58] Judge Patricia Wald notes that many remands because of inadequate explanation result merely from "the agency's failure to communicate or explain to generalist judges what they are doing, not by the agency's failure to do enough research or garner sufficient expert opinions for the record."[59] Vacating the entire rule can thus impose substantial, seemingly unnecessary costs on an agency.[60]

2. *Courts Have Broad Equitable Remedial Discretion*

The Supreme Court has long recognized the judiciary's need for flexibility in issuing remedies.[61] In *Hecht Co. v. Bowles*,[62] the Court "rejected an interpretation of price control legislation that would have compelled district courts to issue an injunction whenever they found a violation of that law."[63] More recently, the Court noted that "traditional equitable principles requiring the balancing of public and pri-

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56 *See* Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (remanding without vacating because of "the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets"); Levin, *supra* note 15, at 298 ("Increasingly, therefore, courts now find themselves examining the validity of agency actions that directly implicate the rights of thousands or millions of persons. Vacation of such an action can upset a legal regime on which many citizens depend.").

57 *See, e.g.*, Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 34, 48 (1st Cir. 2001) (giving the Federal Energy Regulatory Commission on remand the discretion simply to "write a further decision").

58 *See id.*

59 Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 665–66 (1997).

60 *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1050 (finding agency postremand proceedings took seventeen months on average).

61 *See, e.g.*, Miller v. French, 530 U.S. 327, 340 (2000) ("[W]e should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary . . . ." (citations omitted)). *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), is a seminal case restricting agencies' ability to mitigate vacation and thus leading to more use of RWV. *See id.* at 208–09 (stating that agencies do not have the authority to promulgate rules that apply retroactively unless expressly granted by Congress). In *Georgetown*, the Court held that, absent express statutory authority, agencies could not retroactively apply rules promulgated in response to vacation. *See id.* at 215. Because parties could suffer losses during the gap between the vacation and the fresh regulation without the possibility of the agency remediating their hardship after promulgating the new rule, courts began remanding without vacating to compensate for these losses. *See* Levin, *supra* note 15, at 348–53.

62 321 U.S. 321 (1944).

63 Levin, *supra* note 15, at 310.

vate interests control the grant of declaratory or injunctive relief in the federal courts."[64] This long-recognized need for flexibility in tailoring judicial remedies lends support to proponents of RWV.[65]

3. *Courts Can Interpret the APA to Encompass Remand Without Vacation*

Irrespective of strong functional reasons for RWV, if RWV contradicts the statute, it is unlawful. Supporters must therefore be able to interpret section 706(2) to allow RWV. Section 706(2) requires that a reviewing court "shall . . . set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[66] Although detractors claim that "set aside" demands only vacation, proponents assert that section 706 otherwise uses general language allowing for creative judicial interpretation.[67] Further, section 705 confers on courts the power to grant a stay "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury"—an equitable power.[68] Proponents, then, read the statute in context to give courts sufficient discretion to remand without vacating.[69]

Congress has also given courts broad discretion in related contexts. For example, Title 28 of the U.S. Code, which discusses the judiciary generally, provides that a "court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."[70] Thus, Congress codified the longstanding need for judicial discretion to fashion unique remedies in the broader statutory framework in which the APA itself sits.[71] Nonetheless, textualists would likely struggle to reconcile RWV with the clear language of section 706(2).[72]

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64 Webster v. Doe, 486 U.S. 592, 604–05 (1988); *see* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006).

65 *See* Levin, *supra* note 15, at 324–25 (explaining that the APA drafters incorporated equitable discretion at the time of drafting).

66 5 U.S.C. § 706(2) (2006).

67 *See* Levin, *supra* note 15, at 312 ("[Section 706] contains open-ended phrases such as 'arbitrary and capricious,' 'substantial evidence,' and 'unreasonably delayed,' which plainly invite judicial creativity.").

68 *Id.* at 324–25 (quoting 5 U.S.C. § 705).

69 *See id.*

70 28 U.S.C. § 2106 (2006).

71 *See* Levin, *supra* note 15, at 312–13.

72 *See id.* at 362–63 (admitting that some members of the Court would find RWV hard to swallow).

D. Arguments Against Remand Without Vacation

Opponents of RWV counter with (1) functionalist arguments weighing against the device and, more strongly, (2) statutory-interpretation arguments purportedly invalidating RWV.[73]

1. *Opponents' Functionalist Arguments Against Remand Without Vacation*

Left unchecked, RWV threatens to erode hard-look review and the presumption of vacation.[74] Professor Richard Pierce found that "[t]he vast majority of agency rules" held arbitrary and capricious would likely meet the *Allied-Signal* test for RWV.[75] Further, because agencies know that a flawed rule may remain in force, RWV disincentivizes them from performing competent and exacting rulemaking in the first instance and from correcting the rule on remand.[76]

RWV also threatens to deny effective relief to a party who has successfully demonstrated that a rule is invalid.[77] As an alternative, if a court is concerned that the resulting regulatory gap (particularly in the environmental context) will actually harm the victorious party, then it can issue a stay of the vacation.[78] This remedy has the twin advantages of adhering to the letter of section 706(2) while leaving the rule in place and pressuring the agency to fix the flaw in a specified time lest the court lift the stay.[79]

2. *Opponents' Statutory Arguments Against Remand Without Vacation*

RWV opponents find strong support in statutory arguments. In a line of cases inapposite to the RWV cases, the D.C. Circuit has inter-

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73 *See generally* Prestes, *supra* note 47, at 111–51 (demonstrating the practical difficulties and negative policy implications of employing RWV and pointing to statutory language, history, and judicial precedent that undermine the validity of RWV).

74 *See id.* at 120–21.

75 Pierce, *supra* note 32, at 75–76.

76 *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 295 (1987) ("The idea that an agency can or will quickly turn to remedying the factual or analytic defects in its remanded rule is surely naive, however minor those problems might appear in the abstract."); Daugirdas, *supra* note 33, at 280–81 ("[T]he regular use of RWV by courts may reduce the incentives for agencies to engage in carefully reasoned decisionmaking."); *id.* at 302–04 (illustrating extensive agency delays in responding to RWV).

77 *See* Levin, *supra* note 15, at 298 (explaining how RWV can deprive deserving parties of relief because RWV disincentivizes parties from litigating "official mistakes" and reduces the incentive for agencies to render lawful decisions).

78 *See* Comcast Corp. v. FCC, 579 F.3d 1, 11 (D.C. Cir. 2009) (Randolph, J., concurring) ("[T]he losing agency may always file a post-decision motion for a stay of the mandate showing why its unlawful rule or order should continue to govern until proceedings on remand are completed.").

79 *See id.* at 11–12. *But see infra* note 199.

preted the language "shall . . . set aside" to mean that it must vacate.[80] A simple search of dictionary definitions of "set aside"[81] coupled with the Court's direction that "'shall' . . . normally creates an obligation impervious to judicial discretion"[82] confirm this reading.[83]

Supreme Court precedent also supports a formalist reading of section 706(2). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, for example, the Court wrote 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.'"[84] Congress purposefully limited the discretion of the courts by passing the APA, which "establishe[s] the maximum procedural requirements [for] . . . courts [to] impose upon federal agencies in conducting rulemaking proceedings."[85]

In response to the argument that courts have broad equitable discretion, Judge A. Raymond Randolph asserts that equity cases are inapposite to the mandate of section 706(2):

> [J]udicial review of agency rulemaking is not a traditional proceeding in equity. Nor do I believe that a challenge to an agency rule in an enforcement action seeking a fine or a penalty is in the nature of an action in equity.
>
> Furthermore, [Supreme Court precedent] . . . does not preserve a court's remedial discretion even in injunction actions if Con-

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80 *See, e.g.*, Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 198 (D.C. Cir. 2007); Am. Fed'n of Gov't Emps. v. Nicholson, 475 F.3d 341, 354 (D.C. Cir. 2007); Williams Gas Processing-Gulf Coast Co. v. Fed. Energy Regulatory Comm'n, 475 F.3d 319, 326 (D.C. Cir. 2006); Exxon Mobil Corp. v. Fed. Energy Regulatory Comm'n, 430 F.3d 1166, 1172 (D.C. Cir. 2005); Southern Co. Servs. v. Fed. Energy Regulatory Comm'n, 416 F.3d 39, 46–47 (D.C. Cir. 2005); Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1256 (D.C. Cir. 2005); Tourus Records, Inc. v. DEA, 259 F.3d 731, 736 (D.C. Cir. 2001); D&F Afonso Realty Trust v. Garvey, 216 F.3d 1191, 1194–95 (D.C. Cir. 2000); Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 8 (D.C. Cir. 2000); Exxon Co., U.S.A. v. Fed. Energy Regulatory Comm'n, 182 F.3d 30, 37 (D.C. Cir. 1999); BellSouth Corp. v. FCC, 162 F.3d 1215, 1221–22 (D.C. Cir. 1999); AT&T Corp. v. FCC, 86 F.3d 242, 247 (D.C. Cir. 1996); Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1408 (D.C. Cir. 1996); Steel Mfrs. Ass'n v. EPA, 27 F.3d 642, 646 (D.C. Cir. 1994); *see also* Checkosky v. SEC (*In re* Checkosky), 23 F.3d 452, 492 n.35 (D.C. Cir. 1994) (listing numerous pre-1994 cases).

81 *See* Prestes, *supra* note 47, at 130–31 (equating "set aside" with "vacate" based on several dictionaries' definitions).

82 Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

83 *See* Prestes, *supra* note 47, at 129–32.

84 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413–14 (1971); *see also* Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam) ("If [the agency's] finding is not sustainable on the administrative record made, then the . . . decision *must* be vacated and the matter remanded to [the agency] for further consideration." (emphasis added)).

85 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

> gress has limited the discretion in clear terms. To my mind, § 706(2)(A) is stated in clear terms.[86]

Thus, the argument goes, Congress has spoken clearly, and courts must follow the letter of the APA.[87] In sum, opponents claim that the perceived benefits of RWV are illusory and that the text of section 706(2) forecloses any option other than vacation.[88]

Even if opponents are winning the theoretical argument, they are losing the judicial war.[89] RWV has spread from the D.C. Circuit.[90] Because its use will likely continue to flourish,[91] litigants must be prepared to brief—and courts must be ready to decide—whether and how to apply the device appropriately. This Note does not argue whether RWV is lawful. Rather, it uses existing rationales to justify excluding RWV from environmental deregulatory cases.

II
Setting the Stage for Heightened Focus on Vacation Requests

A. Agricultural Biotechnology

Breeders have been using "conventional genetic techniques" to crossbreed plants for years.[92] Many common foods are products of such hybridization—a nectarine is an example of a genetically altered peach.[93] Modern genetic engineering uses recombinant DNA and cell fusion to introduce, for example, "traits from bacteria or animals into plants."[94] By this process, seed manufacturers such as Monsanto can produce crops that are resistant to herbicides, allowing farmers to apply the chemicals without damaging the plant.[95]

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86 Comcast Corp. v. FCC, 579 F.3d 1, 10 n.1 (D.C. Cir. 2009) (Randolph, J., concurring) (internal citation omitted).

87 *Id.* at 10.

88 *See, e.g.*, *id.*

89 *See, e.g.*, Comité de Apoyo a los Trabajadores Agrícolas v. Solis, Civil Action No. 09-240, 2010 WL 3431761, at *25 (E.D. Pa. Aug. 30, 2010) (implementing RWV).

90 *See supra* note 39 and accompanying text.

91 *See infra* Part III.

92 *See Agricultural Research and Development: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 106th Cong. 209 (1999) [hereinafter *Hearing*] (statement of James H. Maryanski, Biotechnology Coordinator, Center for Food Safety & Applied Nutrition, Food and Drug Administration).

93 *Id.*

94 *Id.* at 209–10. ("The United States uses the term genetic modification to refer to all forms of breeding, both modern, i.e. genetic engineering, and conventional.") This Note uses the terms "genetically modified," "genetically modified organism," and "genetically engineered" interchangeably.

95 *See* Geertson Seed Farms v. Johanns, 541 F.3d 938, 941 (9th Cir. 2008), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).

GM seeds purportedly create a number of risks.[96] As farmers douse crops with greater amounts of herbicide, weeds become increasingly resistant, giving rise to "superweeds."[97] In turn, farmers escalate the battle and spray more potent herbicides.[98] Also, GM seed can pollinate farmers' non-GM crops.[99] Because seed manufacturers patent their GM seeds,[100] if they discover their seeds growing on a farm that has not purchased the product, they may bring suit against the farmer.[101] Further, some domestic markets refuse to purchase GM food[102] and some countries prohibit its importation.[103]

While the Food and Drug Administration (FDA) regulates GM food that can eventually find its way to the dinner table,[104] the USDA is responsible for regulating GM crops.[105] The Plant Protection Act gives the USDA the power to regulate "plant pests."[106] The Animal and Plant Health Inspection Service (APHIS), part of the USDA, has

96 *But see* BIOTECHNOLOGIES UNIT, EUROPEAN COMM'N, A DECADE OF EU-FUNDED GMO RESEARCH (2001–2010) 15–17 (2010) (surveying studies finding GMOs no riskier than alternative technologies).

97 *See* James Randerson, *Genetically-Modified Superweeds "Not Uncommon,"* NEWSCIENTIST (Feb. 5, 2002, 3:34 PM), http://www.newscientist.com/article/dn1882-geneticallymodified-superweeds-not-uncommon.html; *see also Geertson*, 130 S. Ct. at 2762 (Stevens, J., dissenting) (discussing the possibility that GM crops could "contaminat[e] other plants and breed[ ] a new type of pesticide-resistant weed").

98 *See* Randerson, *supra* note 97; *cf.* ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., GLYPHOSATE-TOLERANT ALFALFA EVENTS J101 AND J163: REQUEST FOR NONREGULATED STATUS: FINAL ENVIRONMENTAL IMPACT STATEMENT app. G at G-4 (2010) (discussing the risk of "rapid shifts" of herbicide-resistant weeds "if best management practices are not utilized").

99 *See* CATHERINE L. MOYES & PHILIP J. DALE, JOHN INNES CENTRE, ORGANIC FARMING AND GENE TRANSFER FROM GENETICALLY MODIFIED CROPS 2–20 (1999), http://orgprints.org/8260/1/OF0157_2153_FRP.pdf.

100 *Johanns*, 541 F.3d at 941.

101 *See, e.g.*, Monsanto Can., Inc. v. Schmeiser, 2004 SCC 34, [2004] 1. S.C.R. 902 (Can.) (finding that defendant "used" Monsanto's patented GM cell by cultivating seeds that blew onto the defendant's farm but denying damages because the defendant gained no unjust advantage); *Saved Seed and Farmer Lawsuits*, MONSANTO, http://www.monsanto.com/newsviews/Pages/saved-seed-farmer-lawsuits.aspx (last visited Oct. 21, 2011) (noting that Monsanto has filed suit against U.S. farmers 145 times since 1997).

102 *See* Elizabeth Weise, *Biotech Corn Mixes with Beans*, USA TODAY (Nov. 13, 2002, 4:08 PM), http://www.usatoday.com/news/health/2002-11-13-biotech-corn-usat_x.htm.

103 *See* PEW INITIATIVE ON FOOD & BIOTECHNOLOGY, U.S. VS. EU: AN EXAMINATION OF THE TRADE ISSUES SURROUNDING GENETICALLY MODIFIED FOOD 1–2 (2005), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/Biotech_USEU1205.pdf ("In June 2005 . . . a qualified majority of the Council of Ministers refused to lift certain EU member state bans on GM products that had been approved by the Commission, creating new doubts about the viability of an EU-wide policy on GM crops, food and feed."); *cf.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2762 (2010) (Stevens, J., dissenting) ("Farmers and scientists opined that RRA could contaminate alfalfa that has not been genetically modified, destroying the American export market for alfalfa . . . .").

104 *See Hearing*, *supra* note 92, at 208–12 (statement of James H. Maryanski).

105 *See* 7 U.S.C. § 7712 (2006).

106 *Id.* § 7712(c).

promulgated regulations under which "certain genetically engineered plants are presumed to be 'plant pests'—and thus 'regulated articles.'"[107] Because a GM seed is a regulated article, a grower cannot plant the seed without a permit.[108]

However, anyone may petition APHIS to deregulate a given seed.[109] If APHIS attempts to deregulate a genetically modified organism (GMO), other federal environmental laws are implicated. For example, the agency might need to conduct an endangered-species analysis under the Endangered Species Act.[110] Similarly, the National Environmental Policy Act of 1969 (NEPA) demands that before deregulation can occur APHIS must produce an environmental impact statement (EIS) that assesses the potential environmental and health impacts of deregulating the GM seed.[111]

B. *Monsanto Co. v. Geertson Seed Farms*

In 2004, Monsanto petitioned APHIS to deregulate its Roundup Ready Alfalfa, the first crop genetically engineered to resist an herbicide—Monsanto's Roundup weed killer—and to "transmit the genetically engineered gene to other plants."[112] The following year, APHIS agreed to deregulate the alfalfa but decided that a full EIS was unnecessary.[113] Conventional (non-GM) alfalfa farmers, including Geertson Seed Farms, Inc., brought suit to compel APHIS to prepare an EIS.[114] After the district court ruled against APHIS on the merits, the court vacated the deregulation (once again turning Roundup Ready Alfalfa into a regulated article), ordered preparation of an EIS, and enjoined future planting of Roundup Ready Alfalfa pending completion of the EIS.[115] The Ninth Circuit affirmed.[116]

The Supreme Court considered only the propriety of injunctive relief and held that even in the context of NEPA, injunctive relief is still a "drastic and extraordinary remedy" that requires surmounting

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107 *Geertson*, 130 S. Ct. at 2749 (citing 7 C.F.R. §§ 340.0(a)(2) & n.1, 340.1, 340.2, 340.6 (2010)).

108 *See* 7 C.F.R. § 340.3 (2011).

109 *See Geertson*, 130 S. Ct. at 2750.

110 *See* Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2006).

111 *See* 42 U.S.C. § 4332(2)(C) (2006); *Geertson*, 130 S. Ct. at 2750.

112 *Geertson*, 130 S. Ct. at 2762 (Stevens, J., dissenting).

113 *See* Geertson Seed Farms v. Johanns, 541 F.3d 938, 942 (9th Cir. 2008), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010); *see also infra* Part III.A (discussing NEPA).

114 *See Johanns*, 541 F.3d at 942.

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

116 *Johanns*, 541 F.3d at 948.

the "traditional four-factor test."[117] In reversing the Ninth Circuit, the Court ruled that the district court abused its discretion by prohibiting all planting of the GM alfalfa and enjoining APHIS from possibly effecting a partial deregulation. Importantly, the Court reasoned that because the district court's vacation of APHIS's deregulation had the same effect as the injunction—prohibiting planting—"no recourse to the additional and extraordinary relief of an injunction was warranted."[118]

Indeed, the vacate-and-remand order still required APHIS to complete a full EIS before determining whether it could fully deregulate the GM seed.[119] An EIS takes on average 3.6 years, but can take as long as twelve years.[120] For proregulatory parties who believe that GE food "pose[s] serious risks to humans, domesticated animals, wildlife and the environment,"[121] vacation could significantly help their cause by slowing deregulation.[122] On the other hand, this could have a substantial economic impact on GM seed manufacturers and farmers—the GMO industry helps produce over 90% of U.S. acres of beets,[123] up to 45% of U.S. corn, 85% of soybeans, and an estimated 70%–75% of processed foods on supermarket shelves.[124] *Geertson* has thus set the stage for fierce battles over not only the merits of deregulatory cases but also the proper remedy if a court invalidates the deregulation.

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117 *See Geertson*, 130 S. Ct. at 2756, 2761 ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." (alteration in original) (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006))). The four-factor test for obtaining permanent injunctive relief has raised a few eyebrows. Some commentators question whether such a test is "traditional" at all and to what extent courts should apply it. Gergen et al., *supra* note 2. Lower courts, however, have vigorously applied the test, *see id.*, lending credence to the conclusion in Part III that vacation requests will continue to increase.

118 *Geertson*, 130 S. Ct. at 2761 ("[W]e do know that the vacatur of APHIS's deregulation decision means that virtually no [Roundup Ready Alfalfa] can be grown or sold until such time as a new deregulation decision is in place.").

119 *See id.* at 2747.

120 *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 918–19 (2002); *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance*, FED. HIGHWAY ADMIN., http://www.environment.fhwa.dot.gov/strmlng/baseline/section4.asp (last visited Oct. 21, 2011).

121 *See Genetically Engineered Crops*, CENTER FOR FOOD SAFETY, http://www.centerforfoodsafety.org/campaign/genetically-engineered-food/crops/ (last visited Oct. 21, 2011).

122 *See* Redick, *supra* note 5 ("With more limited launches and legal challenges to EIS findings ahead, . . . innovation in biotech crops may suffer over the coming decade.").

123 *Id.*

124 *Genetically Engineered Crops*, *supra* note 121.

III
Why Focus Will Shift to Vacation Requests in Environmental Cases

A. Legal Reasons Focus Will Shift to Vacation Requests

Focus will shift to vacation because the Supreme Court has made permanent injunctive relief more difficult to obtain.[125] Vacation, by contrast, is precisely the default remedy that the APA requires courts to impose for arbitrary and capricious agency action.[126] Particularly in the context of NEPA after *Geertson* and *Winter*, parties may forego the burdensome four-factor test for a permanent injunction and instead ask solely for vacation.

NEPA requires federal agencies to assess the environmental impact of any proposal for "major [f]ederal action[ ]" that "significantly affect[s] the quality of the human environment."[127] Attempted deregulation likely qualifies as such a proposal.[128] Under NEPA, an agency must either (1) prepare an environmental assessment (EA) to determine if any impact will be significant, and, if so, prepare an EIS, or (2) prepare an EIS in the first instance.[129] But the Supreme Court has interpreted NEPA's mandate as purely procedural—all NEPA requires is informed decision making, not any substantive outcome.[130] An agency must jump through the procedural hoops (which can take many years), but once the proper assessment is complete, the respective proposal can likely move forward as planned. The Roundup Ready Alfalfa at issue in *Geertson* is a prime example. In January 2011, APHIS again deregulated the seed after completion of an EIS.[131] Nonetheless, NEPA still has force because it can substantially delay a project, sometimes mitigating a project's environmental impact.[132]

Historically, plaintiffs have sought remedial relief in the form of an injunction for NEPA violations.[133] If the project or proposal at issue continues during the pendency of the litigation, the entire reason for the suit—assessing environmental impacts before the action oc-

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125 *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756 (2010); *supra* note 117 and accompanying text.

126 *See* 5 U.S.C. § 706(2) (2006).

127 *See* 42 U.S.C. § 4332(2)(C) (2006).

128 *See Geertson*, 130 S. Ct. at 2761–62.

129 *See* 40 C.F.R. § 1501.3–.4 (2011) (setting forth whether and when to prepare an EA and an EIS).

130 *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (per curiam).

131 *See Roundup Ready Alfalfa*, Monsanto, http://www.monsanto.com/newsviews/Pages/roundup-ready-alfalfa-supreme-court.aspx (last visited Oct. 21, 2011). On March 18, 2011, the Center for Food Safety again filed suit, fighting deregulation of Roundup Ready Alfalfa. *See id.*

132 *See* Karkkainen, *supra* note 120, at 929.

133 *See* Mandelker, *supra* note 10, § 4:52.

curs—could become moot.[134] But *Geertson* reminded prospective litigants that, even under NEPA, injunctive relief requires hurdling the four-factor test.[135] In *Geertson*, *Winter*, and *Center for Food Safety v. Vilsack*, a recent district court case concerning deregulation of a GM crop,[136] the plaintiffs failed to show that the likelihood of irreparable harm warranted injunction.[137]

With injunctive relief now harder to obtain,[138] plaintiffs will work swiftly to convince a court to vacate the challenged EA or EIS. Challenges to agency deregulation will likely often implicate an agency's failure to prepare an EIS, as *Geertson*, *Winter*, and *Center for Food Safety* demonstrate.[139] Vacating a deregulation based on an inadequate environmental review would arguably achieve the same result as an injunction—halt the action at hand.[140] With environmental cases arising under NEPA every year,[141] a proportionate increase in requests solely for vacation (as opposed to requests for both vacation and injunction) is now likely. Moreover, in *Geertson*, the Supreme Court essentially gave its imprimatur for plaintiffs to challenge a partial deregulation while the agency completes a court-ordered EIS.[142]

B. Factual Reasons Focus Will Shift to Vacation Requests

Agricultural biotechnology is a big business that has a strong incentive to fight hard for the deregulation of GM seed.[143] Genetically engineered crops not only produce vast profits but also account for a large and growing amount of the food that Americans consume. As of

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134 *See id.*

135 *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756 (2010).

136 734 F. Supp. 2d 948, 950 (N.D. Cal. 2010); *infra* Part IV.

137 *See Geertson*, 130 S. Ct. at 2761–62; Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20–24 (2008); *Ctr. for Food Safety*, 734 F. Supp. 2d at 954–55.

138 *See, e.g.*, Reed v. Salazar, 744 F. Supp. 2d 98, 120 (D.D.C. 2010) (denying injunctive relief but ordering vacation); *supra* note 117 and accompanying text.

139 *See Geertson*, 130 S. Ct. at 2761–62; *Winter*, 555 U.S. at 31–33; *Ctr. for Food Safety*, 734 F. Supp. 2d at 950.

140 *See* Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001) ("Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement."), *abrogated by Geertson*, 130 S. Ct. at 2761.

141 NEPA does not provide for judicial review—thus, the APA creates the cause of action and sets "arbitrary and capricious" as the standard of review. *See* Davis v. Mineta, 302 F.3d 1104, 1111–12 (10th Cir. 2002) (explaining that courts must consider whether an agency acted arbitrarily and capriciously when considering whether the governmental action will significantly affect the human environment).

142 *See Geertson*, 130 S. Ct. at 2761 ("[W]e also know that any party aggrieved by a hypothetical future [partial] deregulation decision will have ample opportunity to challenge it, and to seek appropriate preliminary relief, if and when such a decision is made.").

143 *See generally* CTR. FOR FOOD SAFETY, MONSANTO VS. U.S. FARMERS 4–5 (2004), http://www.centerforfoodsafety.org/pubs/CFSMOnsantovsFarmerReport1.13.05.pdf [hereinafter CFS REPORT] (describing how Monsanto invested its resources in litigation against farmers to protect its profitable GM seed patents).

2007, seven million farmers in eighteen countries grew genetically engineered crops.[144] The global cultivation of GM crops expanded 10% every year from 1996 to 2003.[145] One major company alone invested, in a single year, "85 percent of its research and development budget in seeds, genomics and biotechnology, a total investment of over $430 million."[146] And in 2004, herbicide-resistant engineering technology accounted for 85% of all U.S. soy acreage, 45% of all corn acreage, and 76% of all cotton acreage, and in 2003, 84% of U.S. canola acreage.[147] An ever-present market and an expanding global population will likely keep up demand for increased crop productivity.[148] The potential for hefty profit margins combined with the food supply's reliance on GM crops will incentivize interested companies to push for deregulation of GM seed and fight proregulatory litigation.[149]

Groups concerned about the negative effects of GM crops on health and the environment as well as farmers intent on using exclusively non-GM seed are poised to fight with equal fervor to maintain the regulation of GMOs.[150] Regulatory advocates argue that GM food may be harmful to people suffering from chronic diseases[151] and may produce pests resistant to natural pesticides, jeopardizing all non-GM crops.[152] These advocates claim that contamination of nonbiotechnology crops has already "impacted tens of thousands of farmers . . . [and] affected nearly every major commercial crop in the United States."[153]

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144 PEW REPORT, *supra* note 5, at 8.

145 *Id.*

146 *See* CFS REPORT, *supra* note 143, at 7. Investment in educational research has increased as well. *See id.* at 10 ("[T]he direction of land-grant university research has been shifting away from producing new conventional seed varieties and toward biotech applications.").

147 *Id.* at 8–9; *see also* GRAHAM BROOKES & PETER BARFOOT, PG ECON. LTD., CO-EXISTENCE IN NORTH AMERICAN AGRICULTURE: CAN GM CROPS BE GROWN WITH CONVENTIONAL AND ORGANIC CROPS? 8 tbl.1 (2004), http://www.pgeconomics.co.uk/pdf/CoexistencereportNAmericafinalJune2004.pdf; ANNE HILLSON, CTR. FOR FOOD SAFETY, A NEW VIEW OF U.S. AGRICULTURE 2 (2006), http://www.centerforfoodsafety.org/pubs/US_Ag_Report.pdf ("Food ingredients from [genetically modified corn and soy] are found in hundreds if not thousands of processed foods in American supermarkets.").

148 *Cf.* HILLSON, *supra* note 147, at 2 ("[T]he vast majority of foods produced in the U.S. are not gene altered.").

149 *See* CFS REPORT, *supra* note 143, at 23 (noting one company with a department of seventy-five employees and an annual budget of $10 million for patent infringement litigation against farmers).

150 *See* Li, *supra* note 4, at 3 ("[T]he organic food industry will fight the expansion of genetically modified food until the cows come home.").

151 *See* FOOD SAFETY: CONTAMINANTS AND TOXINS 369 (J.P.F. D'Mello ed., 2003).

152 *See* CFS REPORT, *supra* note 143, at 8.

153 *Id.* at 14; *supra* Part II.A.

APHIS's current process for deregulating GM seed[154] also frustrates those concerned about GMOs. As APHIS explains, "[m]ost plants are field-tested under notification, a streamlined process that takes up to 30 days for a decision. . . . Once [APHIS's Biotechnology Regulatory Services (BRS)] has granted a product nonregulatory status, the product may be freely . . . planted without the requirement of permits or other regulatory oversight by BRS."[155] Notifications comprise the "vast majority of [field] trials."[156] However, according to the Center for Food Safety, the USDA "rarely conducts [e]nvironmental [a]ssessments . . . prior to GE field trials."[157] The Center for Food Safety asserts that when the USDA does conduct EAs, they are often woefully inadequate at detecting potential harm to non-GM crops.[158] Without such regulatory controls, contamination of non-GM crops is almost inevitable.[159]

Fueling the fire is a recent move by APHIS, which, regulatory advocates are likely to claim, circumvents the deregulatory process. In 2010, the Scotts Miracle-Gro Company requested that APHIS confirm that Scotts' Roundup-resistant Kentucky bluegrass does not qualify as a regulated article because it has been genetically modified "without using plant pest components."[160] On July 1, 2011, APHIS issued a letter confirming that the Kentucky bluegrass is not a regulated article

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154 *See* BIOTECHNOLOGY REGULATORY SERVS., U.S. DEP'T OF AGRIC., BRS FACTSHEET: USDA'S BIOTECHNOLOGY DEREGULATION PROCESS 1–2 (2006), http://www.aphis.usda.gov/publications/biotechnology/content/printable_version/BRS_FS_biodereg_02-06.pdf; *cf.* BIOTECHNOLOGY REGULATORY SERVS., U.S. DEP'T OF AGRIC., BRS FACTSHEET: APHIS BIOTECHNOLOGY: PERMITTING PROGRESS INTO TOMORROW 1 (2006), http://www.aphis.usda.gov/publications/biotechnology/content/printable_version/BRS_FS_permitprogress_02-06.pdf [hereinafter APHIS FACTSHEET] ("Genetically engineered (GE) organisms are big news—corn that resist attacks by insect pests, papayas that are resistant to viruses, and bananas that might one day carry vaccines to developing countries are all made possible by the science of biotechnology. Newspapers and magazines regularly announce the latest advancements in the great biotechnology race. While many products are already on the market, many more are being developed and tested every day.").

155 APHIS FACTSHEET, *supra* note 154, at 1–2.

156 *See* DOUG GURIAN-SHERMAN, CTR. FOR FOOD SAFETY, CONTAMINATING THE WILD? 10 (2006), http://www.centerforfoodsafety.org/pubs/Contaminating_the_Wild_Report.pdf.

157 *See id.* at 3.

158 *See id.*

159 *See* CFS REPORT, *supra* note 143, at 37 ("The concern that cross-pollination (also referred to as 'genetic drift') is unavoidable was confirmed by a British Royal Society report that found hybridization between plants to be pervasive, frequent, and not limited by physical barriers such as buffer zones.").

160 *See* Letter from Richard Shank, Senior Vice President, Regulatory & Gov't Affairs, The Scotts Miracle-Gro Co., to Tom Vilsack, U.S. Sec'y of Agric. (Sept. 13, 2010), http://www.aphis.usda.gov/brs/aphisdocs/scotts_kbg.pdf; *see also* Brandon Keim, *Genetically Modified Grass Could Make Superweed Problem Worse*, WIRED SCI. (July 11, 2011, 2:28 PM), http://www.wired.com/wiredscience/2011/07/engineered-bluegrass/ (discussing the controversy over Scotts Miracle-Gro's Kentucky bluegrass regulation exemption).

and thus is not subject to the Plant Protection Act.[161] Since the seed is not, and never has been, a regulated article, APHIS can claim that it has taken no deregulatory action that requires preparation of an EIS. This paves the way for other GM seed manufacturers to attempt what arguably amounts to an end run around the formal deregulatory process.[162] Lawsuits challenging the legality of this action without preparing an EIS are likely to emerge.

The potential economic threat that genetically engineered crops bring to farmers also points to an increase in litigation over GM seed deregulation. In 2002, for example, GM corn contaminated and ruined 500,000 bushels of soybeans.[163] Similarly, because the European Union (EU) maintains stricter regulation of genetically engineered foods, the United States could "lose as much as $4 billion annually in agricultural exports."[164]

These examples, combined with the potential health and environmental risks associated with GM crops, will likely bring conventional and organic growers to the courtroom. Likewise, agricultural biotechnology companies will continue to push for and defend deregulation. The Supreme Court has thus laid the groundwork for heightened focus on vacation requests in environmental deregulatory cases, particularly for those dealing with agricultural biotechnology.

C. Heightened Focus on Vacation Requests Will Place Pressure on Courts to Consider Remand Without Vacation

With increased pressure to vacate deregulatory actions, courts, prompted by seed manufacturers as parties to the litigation, will likely seek to mitigate the consequences of vacation. Historically, when courts have granted RWV in environmental cases, they have looked primarily to whether vacating the regulation at issue would be so severely disruptive that keeping the defective regulation in place would be preferable to having no regulation at all.[165] Even if the rule cannot

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161 Letter from Michael C. Gregoire, Deputy Adm'r, U.S. Dep't of Agric., to Richard Shank, Senior Vice President, Regulatory & Gov't Affairs, The Scotts Miracle-Gro Co. (July 1, 2011), http://www.gaia-health.com/articles451/000489-usdaresponse.pdf.

162 *See* Tom Philpott, *Wait, Did the USDA Just Deregulate All New Genetically Modified Crops?*, MOTHER JONES (July 8, 2011, 11:23 AM), http://motherjones.com/environment/2011/07/usda-deregulate-roundup-gmo-tom-philpott.

163 *See* Weise, *supra* note 102.

164 *See* CFS REPORT, *supra* note 143, at 14; Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2762 (2010) (Stevens, J., dissenting) ("[G]enetic contamination from RRA could decimate farmers' livelihoods and the American alfalfa market for years to come."). *But see Food Safety – From the Farm to the Fork*, EUROPA, http://ec.europa.eu/food/dyna/gm_register/index_en.cfm (last visited Oct. 22, 2011) (listing GMOs authorized in the EU).

165 *See, e.g.*, Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 528 (D.C. Cir. 2009).

be cured, courts have used "ad hoc balancing" to determine whether RWV is proper, staving off the disruptive impact of vacation.[166]

As agricultural biotechnology companies and agencies pushing deregulation face an increasing number of lawsuits requesting vacation, these parties will likely adapt their strategy to argue for RWV.[167] Deregulatory proponents can use arguments typically made by conservation groups in environmental suits[168] to advocate for leaving the deregulation of GM seed in place. The presence of some reliance interest is essential to the granting of RWV.[169] By the time a biotech deregulatory case reaches a court, many farmers will likely already have planted the GM seed at issue.[170] Although vacation might affect only future planting,[171] reregulating the seed could still significantly harm not only the farmers and companies themselves but also the intended beneficiaries of the GM crops, such as food companies, supermarkets, and general consumers of GM food.[172]

A court would balance these interests against the seriousness of the deficiency (or absence) of the environmental review. This inquiry amounts to analyzing the threat that continued planting of GM crops without an adequate environmental review might pose to non-GM farmers.[173] Industry and the agency can argue that vacating the deregulation would be of little benefit—it would not vitiate the risk of cross contamination because the court would likely not order the destruction of GM seed already in the ground at the time of trial.[174] Moreover, because APHIS has already deregulated a number of GM crops,[175] the findings of the EIS would serve as a mere formality, resulting in deregulation down the road. Like other RWV cases where the agency could fix its reasoning on remand,[176] APHIS could merely "cure" the defect.

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166 *See* Levin, *supra* note 15, at 380–81.

167 *See, e.g.*, Federal Defendants' Reply Brief in Opposition to Plaintiffs' Petitions for Review of Agency Action at 30, Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs, No. 10-cv-2008-CM/DJW, 2011 WL 2579799, at *15 (D. Kan. June 28, 2011) (arguing that the Tenth Circuit should import the *Allied-Signal* test if it found the Corps' EA inadequate).

168 *See Am. Farm Bureau Fed'n*, 559 F.3d at 528.

169 *See* Rodriguez, *supra* note 23, at 618.

170 *See, e.g.*, Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 950 (N.D. Cal. 2010).

171 *See id.* at 955.

172 *See* HILLSON, *supra* note 147, at 2 (noting the widespread use of deregulated GM crops like soybeans and corn in thousands of processed foods in American supermarkets).

173 *See* Levin, *supra* note 15, at 380.

174 *See Ctr. for Food Safety*, 734 F. Supp. 2d at 955.

175 *See supra* Part III.B.

176 *See, e.g.*, Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 34, 47 (1st Cir. 2001) (tailoring the remand order to allow the Federal Energy Regulatory Commission to correct the errors and omissions in its original hearing).

Agricultural biotechnology companies that strategically reframe the consequences of vacating deregulation could bring (and have already brought)[177] RWV within the purview of courts considering the likely onslaught of cases in this realm. As the next Part of this Note demonstrates, however, courts should not extend RWV to this context. Doing so would undermine the best interests of the judiciary, the agencies, the parties, and the public.

IV
Courts Should Not Extend Remand Without Vacation to Environmental Deregulatory Cases

Aside from RWV's dubious legality, strong reasons militate against extending RWV to environmental deregulatory cases. *Center for Food Safety*, the first and only post-*Geertson* case to consider a challenge to the deregulation of a GM crop, serves as a model for why RWV is a grossly inadequate remedy.

Center for Food Safety involved the deregulation of Monsanto's GM sugar beets.[178] In 2009, the U.S. District Court for the Northern District of California ordered APHIS to conduct a full EIS on GM sugar beets. The *Center for Food Safety* court denied the plaintiffs' request for a permanent injunction, citing *Geertson*, though it expressed concern about APHIS's failure to prepare an EIS before deregulating the crop.[179]

The court then applied the *Allied-Signal* test to determine if it should remand without vacating. It began by noting that the Ninth Circuit has issued RWV only in environmental cases where it was concerned that vacating the existing regulation would cause "irreparable environmental injury."[180] In *Center for Food Safety*, however, the defendant biotechnology companies focused on the "economic consequences."[181] The court expressed doubt that economic harm could ever form the basis for RWV. Regardless, the defendants had "failed to demonstrate that serious economic harm would be incurred pending a full environmental review."[182] The court was also concerned that defendants were not taking the process "seriously," since defendants asserted that APHIS would simply find deregulation proper after completing the EIS.[183] Ultimately, the *Center for Food Safety* court vacated APHIS's deregulatory decision.[184]

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177 *See Ctr. for Food Safety*, 734 F. Supp. 2d at 951–55.
178 734 F. Supp. 2d at 949.
179 *See id.* at 950, 955.
180 *See id.* at 951, 953.
181 *Id.* at 953.
182 *Id.* at 954.
183 *Id.* at 953.
184 *See id.* at 955.

Center for Food Safety should give proregulatory litigants pause because, even though the court rejected RWV, it considered RWV as an option.[185] Importantly, however, *Center for Food Safety* illustrates two principles: (1) RWV is inadequate as a remedy for environmental deregulatory cases and (2) even if a court applies the *Allied-Signal* test, RWV should fail as the remedy.

A. Remand Without Vacation Is an Inadequate Remedy for Environmental Deregulation

Center for Food Safety shows that deregulatory cases are the mirror image of the environmental cases in which courts often issue RWV orders.[186] For example, the court in *Idaho Farm Bureau Federation v. Babbitt* left in place a defective regulation meant to protect an endangered snail species.[187] Absent RWV, by the time the agency promulgated a new regulation, the reason for its enactment could have been moot—the species might already have been extinct.[188] In the deregulatory context, the opposite is true. Remanding without vacating would actually ensure that the risky environmental activity would remain unregulated. Only by vacating could the court safeguard the interests the regulation aims to protect while the agency determines whether deregulation would indeed pose no risk to environmental degradation.[189] Particularly in the recent agricultural biotechnology cases, the faulty deregulation is not merely a "curable defect."[190] Only by conducting the required EIS will the agency know the extent of the disruptive consequences of the deregulation.[191] Just as a regulatory environmental suit presents the strongest case for a court to employ RWV, so does a deregulatory environmental suit present the strongest case for a court to refrain from using RWV.[192]

In fact, in *Geertson*, the Court partly rested its reversal of the nationwide injunction on the premise that the vacation achieved the same effect as the injunction—it prohibited planting pending the

185 *See id.* at 953–55.

186 *Compare id.* at 950–55 (vacating and remanding because of the risk of crop contamination while AHIPS was preparing an EIS), *with* Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 528 (D.C. Cir. 2009) (remanding without vacation so environmental protections could remain in place until the EPA cured the defective regulation).

187 *See* 58 F.3d 1392, 1405 (9th Cir. 1995).

188 *See id.*

189 If a court leaves an agency's deregulation decision intact while waiting for the agency to complete an EIS, contamination by GM crops could occur in the interim and could not be undone.

190 *Am. Farm Bureau Fed'n*, 559 F.3d at 528.

191 *See Ctr. for Food Safety*, 734 F. Supp. 2d at 953.

192 Again, the legality of RWV is beyond the scope of this Note.

completion of the EIS.[193] Remanding without vacating would run counter to the Court's rationale.

Interestingly, a deregulatory challenge under NEPA presents the most powerful case for rejecting RWV precisely because NEPA is a procedural statute. NEPA is concerned solely with informed decision making.[194] If a court finds an EA or EIS inadequate but remands to the agency without vacating the deregulation, then no possibility exists for the agency to make a fully informed decision before taking the "[m]ajor [f]ederal action[ ]."[195] The very action the EIS would be meant to evaluate—deregulation—would already have occurred. This would undermine the purpose of NEPA.[196]

RWV is particularly harmful to the judiciary in the deregulatory context because it risks continuing the trend of administrative agencies ignoring judicial orders, or at least significantly delaying renewal of the requisite rulemaking process.[197] Under an RWV order, agencies would have less incentive to thoroughly conduct a statutorily mandated procedure, such as an EIS.[198] Agencies would know that a remand would be toothless—the deregulation would remain in place even if a court ordered the agency to conduct the flouted procedure.[199]

Over time, RWV would be similarly harmful to administrative agencies implementing the erroneous deregulation. With little incentive to cure the faulty deregulation, the agency risks losing the public

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193 *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010).

194 *See supra* Part III.A.

195 *See* 40 C.F.R. §§ 1502.4–.5 (2011).

196 *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (per curiam) (outlining the purpose of NEPA as promoting informed decision making). Of course, this risk exists in most NEPA cases. If a court were to remand without vacating a case involving, for example, an inadequate EIS for a construction project, the project may be finished long before the agency rectifies the EIS. This calls into question the Court's reasoning in *Winter* regarding injunctive relief in a NEPA case.

197 *See supra* note 45 and accompanying text.

198 *See* Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010).

199 *See* Comcast Corp. v. FCC, 579 F.3d 1, 12 (D.C. Cir. 2009) (Randolph, J., concurring) (noting that courts can tailor a vacate-and-remand order to address concerns arising from complete vacation). A court can require the agency to file a motion to stay the vacation "showing why its unlawful rule or order should continue to govern until proceedings on remand are completed." *Id.*; *see also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2767 (2010) (Stevens, J., dissenting) (discussing the ability to stay a vacation). By contrast, "[a] remand-only disposition leaves the unlawful rule in place and allows agencies to postpone responding to the court's merits decision. Agencies do not necessarily give remand-only decisions high priority and may delay action for lengthy periods." *Comcast Corp.*, 579 F.3d at 12 (Randolph, J., concurring). But, despite this protestation, a court can achieve similar tailoring with RWV. *See* Cook Inletkeeper v. U.S. EPA, 400 F. App'x 239, 241–42 (9th Cir. 2010) (enforcing deadlines for compliance on remand). Although either alternative (stay of the vacation or RWV with time-sensitive requirements) might pressure the agency to correct its invalid action more quickly, the flawed deregulation remains in place, risking the harm that the vacation order and the EIS aim to address.

trust. The success of notice-and-comment rulemaking depends upon the public's perception that an agency follows all aspects of the administrative process for regulation and deregulation.[200] Granted, interested parties would likely be more aware of whether a given agency takes account of their comments in the resulting deregulation or regulation than parties would be aware of a court order. Nonetheless, those same parties who commented during the deregulatory process would also likely take note of whether an agency abides by the terms of a judicial order requiring, for example, the agency to conduct an EIS. RWV would disincentivize an agency to conduct the EIS in a timely manner, risking erosion of the public's confidence in the agency's process.

Moreover, an agency can respond flexibly to vacation. In *Geertson*, APHIS could have partially deregulated the GM seed in response to the vacation order "during the pendency of the EIS process."[201] Thus, both courts and the agency possess a finer tool than RWV with which to tailor a vacation order.

Excluding RWV from environmental deregulatory cases clearly benefits parties opposing deregulation.[202] For example, it assuages concerns that deregulation of GM seed threatens conventional or organic crops with contamination.[203] Vacation maintains the status quo pending completion of the EIS.[204]

The benefit to advocates of deregulation is admittedly less clear. At least in the agricultural-biotechnology subset of environmental cases, benefits may accrue in the long term. A full EIS would allow more comprehensive study of the environmental impacts of GM crops. This could lead to additional studies concerning the human health effects of genetically engineered foods.[205] Depending on the results, such studies could lend credibility to industry claims about the safety and utility of GM food. A consensus within the scientific community could bolster public support and, in turn, hasten the infusion of GM seed into the marketplace. The full disclosure and data produced might lead to increased exportation of such foods, enabling companies to tap into the four-billion-dollar foreign market.[206]

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200 *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 40–43 (1995) (discussing the importance of public trust for effective rulemaking).

201 *See Geertson*, 130 S. Ct. at 2754.

202 *See* Li, *supra* note 4, at 1–2.

203 *See* CFS REPORT, *supra* note 143, at 14.

204 *See* Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010).

205 The results of such studies could, of course, be detrimental to biotechnology companies if research showed GM food to be harmful.

206 *See* CFS REPORT, *supra* note 143, at 14.

Even if this long-term prospect proved illusory, domestic consumers would still receive more information about the impact of genetically engineered foods. At the very least, delaying deregulation would ensure more careful consideration of potentially ill effects on conventional, organic, and wild crops.[207]

B. If a Court Applies the *Allied-Signal* Test, Remand Without Vacation Should Fail as the Remedy

The two cases that have held the deregulation of GM seed invalid have resulted in vacation.[208] *Center for Food Safety* provides a ready example of why even if a court employs the *Allied-Signal* test, the result should be vacation. As referenced above, the test is two-pronged: "The decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed."[209] The district court in *Center for Food Safety* found that the environmental deregulation was invalid and that the plaintiffs demonstrated that "deregulation [might] significantly affect the environment."[210] The deficiency was great enough that APHIS could not, in other words, "rehabilitate its rationale for the [de]regulation" on remand.[211]

The deficiency prong of the *Allied-Signal* test weighs heavily in favor of vacation. Unlike a mere inadequate explanation, easily corrected on remand,[212] a flawed EIS is a significant deficiency. The district court in *Center for Food Safety* even chastised the defendants for "not taking this process seriously" when they asserted that the EIS was merely a procedural hurdle and that APHIS would simply affirm its decision after preparing an EIS.[213] Leaving the flawed deregulation in place could significantly affect non-GM crops in the interim.

The disruption prong also tilts in favor of vacation. In *Center for Food Safety*, the court found that the purported economic harm cited by defendants did not warrant RWV.[214] As previously discussed, agricultural biotechnology defendants could change their argument to show real environmental or human harm rather than purely adverse economic consequences.[215] Still, the risk of environmental disruption

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207 *See* HILLSON, *supra* note 147, at 1–38.

208 *See* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754, 2756 (2010); *Ctr. for Food Safety*, 734 F. Supp. 2d at 954–55.

209 *See* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotation marks omitted).

210 *Ctr. for Food Safety*, 734 F. Supp. 2d at 953.

211 Comcast Corp. v. FCC, 579 F.3d 1, 9 (D.C. Cir. 2009); *see Ctr. for Food Safety*, 734 F. Supp. 2d at 952–53.

212 *See, e.g.*, Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1133 (D.C. Cir. 1995).

213 *Ctr. for Food Safety*, 734 F. Supp. 2d at 952–55.

214 *See id.* at 952–55.

215 *See supra* Part III.C.

for the non-GM-seed farmers would likely outweigh the potential harm to seed manufacturers awaiting completion of the EIS.[216] Farmers would likely not have to destroy GM seed already in the ground. But non-GM farmers face ongoing risk of crop contamination if planting continues during the pendency of the EIS. This risk of disruption, due precisely to the risks the agency would be studying in the EIS, merits vacating the defective deregulatory decision.

Answering the RWV question correctly in the lower courts is especially important since the issue of RWV's legality is unlikely to reach the Supreme Court. Only the precise set of circumstances would create such an opportunity. The defendant in an RWV case has little incentive to apply for writ of certiorari to the Court since avoiding vacation will likely satisfy the party. The winning party would also be unlikely to expend further time and money on such a legal question in a case in which the party was already victorious on the merits.

Conclusion

The agricultural biotechnology industry affects a number of administrative agencies, scores of regulated industries, and millions of regulatory beneficiaries—farmers and consumers alike. As the USDA grapples with the exponential growth of complex GMOs, courts will undoubtedly continue to find themselves in the center of a deregulatory battle. Courts have their hands full simply determining whether deregulation is defective. But courts must consider (and litigants must appreciate) the likely consequences on remand of the remedy ultimately imposed.

Arguments for and against RWV support excluding this remedial device from environmental deregulatory cases. Once a court finds the deregulation invalid, it should vacate. Even if courts apply the two-part RWV test to flawed environmental deregulation, the result should be vacation—the benefits of vacation far outweigh the costs.

Presently, the subset of environmental deregulation making its way to the judiciary is agricultural biotechnology. But such deregulation occurs in other areas as well. Courts have the ability to set wise precedent in these cases by following the APA's mandate and vacating defective deregulation.

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216 *See Ctr. for Food Safety*, 734 F. Supp. 2d at 952–55. Although courts speak of balancing interests and although the possible harm may not merit injunctive relief, vacation is still the presumptive remedy under the APA. *See* 5 U.S.C. § 706(2) (2006); *see also* Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("While the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief, both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA." (citation omitted)). Balancing in this context simply determines whether to use the legally questionable RWV tool.