Monsanto Co. v. Geertson Seed Farms: US Supreme Court Decides GM Alfalfa Case

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In June 2010, the United States Supreme Court decided its first case involving genetically modified crops. *Monsanto Co. v. Geertson Seed Farms* held that the federal district court had abused its discretion when it issued a broad injunction that prohibited even partial deregulation of genetically modified Roundup Ready® alfalfa and also prohibited planting of the crop pending completion of a detailed environmental impact statement. To some extent, both sides of the dispute can claim victory in the decision: the Supreme Court overturned the broad injunction, but Roundup Ready alfalfa remains a regulated crop that cannot be planted or sold.

I. Regulatory Background

An article published in *EFFL* in 2007 explained the regulatory setting and focused on district court decisions in this case. In short, the US regulatory system for genetically modified organisms (GMOs) assigns to the US Department of Agriculture (USDA) the authority to determine that GMOs are safe to grow. Until the USDA makes its determination, a new GMO is considered a "regulated article," which cannot be sold or planted commercially.

Acting through the Animal and Plant Health Inspection Service (APHIS), USDA authorizes field tests of new GM crops. APHIS evaluates results of field tests and other scientific information submitted by the company that developed the crop. If a crop is unlikely to be a plant pest, APHIS makes a determination of "nonregulated status," and the crop can move freely in commerce. This determination is sometimes called "deregulation."

The National Environmental Policy Act (NEPA) plays a role in the regulatory process, because NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." Before GM crops are deregulated, the USDA prepares a less detailed environmental assessment. If the assessment shows that a crop may significantly affect the quality of the human environment, the USDA must prepare an EIS to help determine whether the GMO can be released safely. The EIS is a disclosure document; that is, it discloses environmental effects of (and alternatives to) the proposed federal action, but it does not require programmatic changes.

II. Geertson Seed Farms (Federal District Court and Ninth Circuit, 2007–2009)

US producers grow about 23 million acres (9.3 million hectares) of alfalfa annually. Alfalfa, a perennial, is the US’s fourth most important cash crop, used for feed (forage) both in the US and abroad.

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1 *Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057 (US S.Ct.), decided June 21, 2010 [hereinafter *Monsanto*]. Justice Alito wrote the opinion for a 7-1 majority; Justice Stevens dissented. Justice Breyer, whose brother decided the District Court case in California, took no part in the case.


3 The US Environmental Protection Agency and the Food and Drug Administration also have responsibilities in authorization of GM crops and their food and feed products. The three agencies cooperate, so that a new GMO is released only after it meets USDA, EPA, and FDA requirements.


5 42 USC §§ 4321–4370f, quotation from § 4332(C).
Monsanto Company developed Roundup Ready alfalfa, genetically engineered to be tolerant to Roundup, Monsanto’s glyphosate herbicide. After eight years of field trials, Monsanto petitioned APHIS for nonregulated status for the alfalfa. APHIS published an environmental assessment and received hundreds of public comments, most opposing deregulation because of the possibility of gene transmission to conventional and organic alfalfa. Nonetheless, APHIS made a finding of no significant impact and in 2005 granted nonregulated status to Roundup Ready alfalfa without preparing an EIS. In the next two years, a few thousand farmers in 48 states grew the genetically engineered alfalfa on about 220,000 acres (89,105 hectares).

Farmers who grew seed for conventional alfalfa and several environmental groups challenged APHIS’s decision to deregulate Monsanto’s Roundup Ready alfalfa. Plaintiffs alleged, in part, that APHIS had violated NEPA by failing to prepare an EIS before deregulating the alfalfa. In a series of opinions and orders in Geertson Seed Farms v. Johanns, the US District Court for the Northern District of California held that APHIS had violated NEPA by its failure to prepare an EIS before its determination of nonregulated status. The court vacated APHIS’s determination of nonregulated status, and APHIS returned the alfalfa to regulated status.

The court also permanently enjoined most commercial planting of Roundup Ready alfalfa until APHIS prepared an EIS and made a new determination on the petition for deregulation.

The USDA and Monsanto (an intervenor at the remedies phase of the case) appealed the injunction, but not the finding of a NEPA violation, to the US Court of Appeals for the Ninth Circuit. Because of the importance of NEPA, the case attracted the interest of environmental groups, states, and business groups; a number of stakeholders filed amicus (friend of the court) briefs with the Supreme Court.

III. Monsanto Co. v. Geertson Seed Farms

The Supreme Court decision in Monsanto Co. v. Geertson Seed Farms focused primarily on the rather narrow, procedural issue of the district court’s broad injunction against the Roundup Ready alfalfa. Nonetheless, several other aspects of the Court’s opinion are significant.

1. Standing

A threshold issue in the case was standing (locus standi). The respondents (Geertson Seed Farms and others) alleged that the petitioners (Monsanto) lacked standing to appeal, and Monsanto alleged reviewed the district court decision for abuse of discretion in issuing the injunction. In two separate opinions, the Ninth Circuit held that the district court had not abused its discretion and affirmed the district court’s decision. The Ninth Circuit also held that the district court was not required to hold an evidentiary hearing before issuing the permanent injunction; the court had already received significant evidence about environmental effects of the alfalfa, and APHIS would document potential effects in its EIS.

Monsanto (supported by the USDA) appealed to the US Supreme Court, which granted certiorari (that is, agreed to hear the appeal) and heard oral arguments on April 27, 2010. Because of the importance of NEPA, the case attracted the interest of environmental groups, states, and business groups; a number of stakeholders filed amicus (friend of the court) briefs with the Supreme Court.

6 70 Fed. Reg. 36,917 (June 27, 2005).
7 Monsanto at *6. Westlaw documents use “star pages.”
10 For more detail, see Grossman, supra note 2, at 374-75. Producers who had already purchased seed could plant before 30 March 2007, but the court imposed conditions on handling and identification of Roundup Ready alfalfa.
11 Geertson Seed Farms v. Johanns, 570 F.3d 1130 (9th Cir. 2009); 541 F.3d 938 (9th Cir. 2008).
12 As framed by the US government, issues in the Supreme Court were
1. Whether the court of appeals erred in affirming a permanent nationwide injunction based on a legal standard that presumed irreparable harm.
2. Whether the court of appeals erred in determining that the district court did not abuse its discretion when it declined petitioners’ request for an evidentiary hearing on the scope of the permanent injunctive relief.
Brief for the Federal Respondents Supporting Petitioners, Monsanto Co. v. Geertson Seed Farms (March 2010), 2010 WL 740752 (US) at I. Other parties framed the issues differently and included additional issues (e.g., standing).
that Geertson lacked standing to seek an injunction. Under the US Constitution, a plaintiff may sue only if he or she has standing, which requires that "an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." \(^{13}\)

The Court held that Monsanto met all three criteria of the test for standing. Monsanto suffered an injury, because it is unable to sell Roundup Ready alfalfa until APHIS completes the EIS. The district court’s order caused that injury, which would be redressed if the Court ruled in Monsanto’s favor.

The seed farmers also met the test for standing to seek an injunction. The substantial risk of injury from gene flow, established by evidence in the district court, could injure the farmers, who grew nonGM alfalfa seed. To market their products as nonGM alfalfa, they would bear expenses to test for contamination. To minimize gene flow, they would take measures that resulted in higher costs. These harms satisfy the “injury in fact” requirement for standing. Moreover, the harms are clearly connected to APHIS’s deregulation decision and would be remedied by prohibition of Roundup Ready alfalfa. \(^{14}\)

Petitioners also suggested that the farmers did not satisfy an additional “prudential” test for standing, the “zone of interests” test, because NEPA was not enacted to address economic harm. The Court referred to the substantial environmental effects of the alfalfa (for example, gene flow), which fit within the intentions of NEPA and which caused the seed farmers’ economic harm. In language that may prove important in future NEPA cases, the court said, “The mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow [an environmental harm for purposes of NEPA] does not strip them of prudential standing.” \(^{15}\) That is, although NEPA was enacted to address the environmental effects of federal actions (NEPA’s zone of interests), plaintiffs whose economic injuries are closely related to environmental harms within the purview of NEPA may have standing to challenge a federal agency’s failure to comply with NEPA.

2. The Injunction

Having held that both petitioners and respondents had standing, the Supreme Court turned to the merits of the case. It outlined the district court’s remedies: “First, it vacated the agency’s decision completely deregulating [the alfalfa]; second, it enjoined APHIS from deregulating [the alfalfa], in whole or in part, pending completion of the mandated EIS; and third, it entered a nationwide injunction prohibiting almost all future planting” of Roundup Ready alfalfa (even if authorized by an APHIS decision for partial deregulation). \(^{16}\) The parties did not challenge the vacatur (that is, the requirement that APHIS reverse its decision to deregulate the alfalfa), so the Court addressed only the injunctions. In the course of its opinion, the Court noted that an “injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” \(^{17}\)

The plaintiff who “seeks a permanent injunction to remedy a NEPA violation” must demonstrate that it suffered an irreparable injury; that legal remedies (e.g., damages) are inadequate; that a balance of plaintiff’s and defendant’s hardships warrants the remedy; and that the injunction will not disserve the public interest. \(^{18}\) Instead of merely presuming that an injunction is the proper remedy in a NEPA case, a court must apply this four-factor test. In light of this test, the Supreme Court scrutinized both the broad injunction against deregulating the Roundup Ready alfalfa while APHIS completed the EIS and the nationwide injunction against planting the alfalfa.

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13 Monsanto at *8; US Const. art. III, § 2, cl. 1. Respondents argued (but the Supreme Court did not agree) that Monsanto lacked standing because its injury was caused by the district court’s vacatur of APHIS’s decision to deregulate the alfalfa, a decision that they did not challenge on appeal.

14 Monsanto at *10.

15 Id. at *10.

16 Id. at *11.

17 Id. at *16.

a. Injunction against Deregulation

In addressing the injunction against deregulation, the Supreme Court noted that respondent seed farmers had challenged APHIS’s complete deregulation of Roundup Ready alfalfa. APHIS had not yet exercised its authority, under applicable laws and regulations, to deregulate the alfalfa in part.19 The broad injunction therefore deprived APHIS of its legal authority to consider partial deregulation. After preparing a new environmental assessment, APHIS could decide that a “limited and temporary deregulation,” even before completion of the court-mandated EIS, met legal requirements.20 Only then would a decision on partial regulation be subject to judicial review if challenged by alfalfa seed farmers or others.

The Supreme Court observed that the district court’s injunction prevented APHIS from any deregulation without an EIS, no matter how limited or how stringent the conditions. This prohibition seemed inconsistent with the district court’s decision to allow the harvest and selling of Roundup Ready alfalfa planted before March 30, 2007, even though no EIS had been prepared.21

The district court’s injunction against any deregulation did not satisfy the four-factor test for permanent injunctive relief. In particular, the seed farmers “cannot show that they will suffer irreparable injury if APHIS can proceed with any partial deregulation.”22 Indeed, partial deregulation of limited scope may pose little risk of gene flow and therefore cause no injury. If the seed farmers did suffer harm from a partial deregulation, they could avoid irreparable injury by filing a new lawsuit to challenge APHIS’s decision. As the Court stated, the broad injunction “pre-empts the very procedure by which the agency could determine, independently of the pending EIS process for assessing the effects of a complete deregulation, that a limited deregulation would not pose any appreciable risk of environmental harm.”23

b. Injunction against Planting

The Court also rejected the district court’s injunction against planting the Roundup Ready alfalfa for two reasons. The first flowed from the injunction against deregulation. Because the district court could not “foreclose even the possibility of a partial and temporary deregulation,” it could not enjoin parties from planting if a partial deregulation did eventually permit planting.24 The second is that, even without an injunction, the court’s vacatur of APHIS’s decision to deregulate would prohibit planting of the alfalfa, because the alfalfa was again a regulated article. Therefore the situation did not warrant the “extraordinary relief of an injunction.”25

Thus, the Supreme Court held that the district court had “abused its discretion in enjoining APHIS from effecting a partial deregulation and in prohibiting the possibility of planting in accordance with the terms of such a deregulation.”26 The Court did not decide whether some kind of injunctive relief might have been available to the seed farmers. Nor did it decide whether the district court was required to hold an evidentiary hearing before issuing its injunctions. The Court reversed the judgment of the Ninth Circuit and remanded the case.

3. Dissenting Opinion

In a strong dissenting opinion, Justice Stevens (recently retired from the Court) asserted that the district court’s injunction was a reasonable exercise of discretion, either as “an equitable application of administrative law,” or as “a reasonable response to the nature of the risks posed” by the alfalfa.27

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19 At the remedy phase, APHIS had proposed to allow limited planting, subject to stringent conditions – in effect, a partial deregulation. The district court rejected this proposal. Monsanto at *13.
20 Id. at *13. The Court did not express any view about whether NEPA requires an EIS for partial deregulation.
21 Id. at *14. See supra note 10.
22 Id. at *14.
23 Id. at *15.
24 Id. at *16.
25 Id.
26 Id. at *17.
27 Id. at *22, *24 (Stevens, J., dissenting).
Justice Stevens cited substantial evidence that planting Roundup Ready alfalfa “can cause genetic contamination of other crops, planting in controlled settings had led to contamination, APHIS is unable to monitor or enforce limitations on planting, and genetic contamination could decimate the American alfalfa market.” This evidence, he believed, could reasonably have led the district court to conclude that any deregulation of the alfalfa, even in a limited area, requires an EIS. Indeed, Justice Stevens insisted, “it appears that any deregulation of a genetically modified, herbicide-resistant crop that can transfer its genes to other organisms and cannot effectively be monitored easily fits the criteria for when an EIS is required. That is especially so when, as in this case, the environmental threat is novel.”

IV. Implications of Monsanto

Although the Supreme Court decision in Monsanto lifted the injunction against planting Roundup Ready alfalfa, the decision may have little practical effect. The crop cannot be planted immediately. It remains a regulated article until APHIS complies with NEPA by completing its EIS and makes a new determination of nonregulated status. In addition, however, the Court decision opens the possibility for APHIS to allow a partial deregulation of APHIS even before completion of its EIS. A new environmental assessment (but not necessarily an EIS, if the assessment finds no significant impacts) must precede partial deregulation. APHIS might consider strict limitations on location (e.g., areas with no conventional alfalfa), mandated isolation distances to control gene flow, and vigorous enforcement of its restrictions.

The Supreme Court decision did not affect the district court’s February 2007 decision that APHIS violated NEPA or its March 2007 decision to vacate the APHIS determination of nonregulated status for Roundup Ready alfalfa. Neither was appealed, so the Court did not address those decisions.

Moreover, because the Supreme Court held that the district court had abused its discretion in issuing its broad injunction, the Court did not rule on the question of whether the district court should have held an evidentiary hearing before issuing the injunction. Therefore the Ninth Circuit decision that no hearing was necessary stands and may influence other cases.

The Supreme Court’s decision in Monsanto is likely to have implications for litigation focused on other genetically modified crops. For example, Center for Food Safety v. Schafer, currently pending in California, involves a NEPA challenge to APHIS’s deregulation of a variety of GM sugar beets. As in Geertson, the court ruled that APHIS had violated NEPA by failing to prepare an EIS before its decision to deregulate the sugar beets. The court mandated preparation of an EIS, but denied plaintiffs’ motion for a preliminary injunction, allowing continued planting of the GM sugar beets. The court has not yet ruled on the motion for a permanent injunction while APHIS prepares an EIS, but recommended that that farmers “take all efforts, going forward, to use conventional seed.” Proceedings have been postponed to allow the parties to analyze the Monsanto decision. In May 2010, APHIS announced its intention to prepare an EIS for the GM sugar beets in connection with the court’s mandate.

V. Monsanto’s Petition for Nonregulated Status — The EIS

Even before the Supreme Court had agreed to hear Monsanto’s appeal, APHIS had begun to reconsider Monsanto’s petition for nonregulated status for Roundup Ready alfalfa. In November 2009, APHIS...
published a draft of the EIS required by the district court and requested comments from the public.\textsuperscript{36} The draft, nearly 1500 pages, considers the various possible impacts — for example, human health and safety, agricultural, environmental, and socio-economic — of its proposed action (deregulation of the alfalfa); it also considers the alternative of maintaining the alfalfa as a regulated article.

In the draft EIS, APHIS made a preliminary conclusion that Roundup Ready alfalfa is "unlikely to pose plant pest risks" and that a determination of nonregulated status "will not result in significant impacts to the human environment."\textsuperscript{37} APHIS therefore proposed to grant nonregulated status to Monsanto’s Roundup Ready alfalfa, but the decision on deregulation will be made only after APHIS reviews public comments and publishes the final EIS.\textsuperscript{38} APHIS indicated that it planned to finish its deregulation process in time for the Spring 2011 planting season.\textsuperscript{39}

\textsuperscript{36} APHIS, USDA, Glyphosate-Tolerant Alfalfa Events J101 and J163: Request for Nonregulated Status. Draft Environmental Impact Statement – November 2009, with notice of availability at 75 Fed. Reg. 1585 (Jan. 12, 2010). As of April 2010, APHIS had received more than 14,000 comments; these are collected, along with USDA documents and transcripts of public meetings, at http://www.regulations.gov, under docket number APHIS-2007-0044.

\textsuperscript{37} Draft EIS, supra note 36, Executive Summary, at xiii.

\textsuperscript{38} On June 21, 2010, 56 members of Congress (including six senators) wrote to the Secretary of Agriculture. The letter refers to the likelihood that gene flow from Roundup Ready alfalfa will contaminate conventional and organic alfalfa crops, causing "significant economic harm to both the alfalfa seed and forage export markets and to the organic dairy industry." The letter therefore asked the Secretary to deny Monsanto’s petition for nonregulated status. Letter from Senator Patrick Leahy, Congressman Peter Defazio, and 54 others to Thomas Vilsack, Secretary of Agriculture (June 21, 2010), http://leahy.senate.gov/imo/media/doc/AlfalfaLetter.pdf.

\textsuperscript{39} Pollack, supra note 30.