

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR FOOD SAFETY,)
303 Sacramento Street, 2nd Floor)
San Francisco, CA 94111)

BEYOND PESTICIDES)
701 E Street, SE, Ste. 200)
Washington, DC 20003)

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY)
2000 P Street, NW, Ste. 240)
Washington, DC 20036)

Plaintiffs,)

vs.)

KEN SALAZAR, Secretary, United)
States Department of the Interior,)
1849 C Street, NW)
Washington, DC 20240)

DANIEL M. ASHE, Director of US)
Fish and Wildlife Service)
1849 C Street, NW)
Washington, DC 20240)

UNITED)
STATES FISH AND WILDLIFE)
SERVICE, an administrative agency)
of the United States Department of the)
Interior,)
1849 C Street, NW)
Washington, DC 20240)

Defendants.)

Case No.

**COMPLAINT FOR DECLATORY
AND INJUNCTIVE RELIEF**

COMPLAINT

Plaintiffs Center for Food Safety, Beyond Pesticides, and Public Employees for Environmental Responsibility, on behalf of themselves and their members, allege as follows:

I. NATURE OF ACTION

1. This action concerns Defendants' management and operation of the National Wildlife Refuges of the National Wildlife Refuge System (NWR System) in U.S. Fish and Wildlife Service's (FWS) Midwest Region (Region 3). FWS, acting under Defendants' supervision and/or control, has entered into Cooperative Farming Agreements with private parties that allow National Wildlife Refuge (NWR) land to be farmed, some with genetically engineered (GE) crops. In order to support its decision to enter into the Cooperative Farming Agreements, FWS prepared a region-wide Environmental Assessment (EA) encompassing a total of sixty-six refuges and managed wetlands that span across eight states and issued a Finding of No Significant Impact (FONSI), despite evidence that growing GE crops on refuge lands is a major federal action which significantly impacts the quality of the human environment, is highly controversial, and which has potentially harmful effects on human health, the environment, and wildlife.

2. Defendants' decision to permit the growing of GE crops on refuges in Region 3 violates federal statutes. Defendants' approval of the cultivation of GE crops on NWR System lands in Region 3, a major federal action with significant impacts on the human environment, based on an EA and FONSI rather than preparing an Environmental Impact Statement (EIS), violates the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). Defendants' failure to complete a compatibility determination (CD) regarding the cultivation of GE crops for each and every refuge on which such crops are cultivated, as well as Defendants' determination that cultivation of GE crops is a compatible use of some refuges in

Region 3, despite the admitted risks, scientific uncertainty, and controversial nature of the practice, violate the National Wildlife Refuge System Administration Act of 1966 (NWRSA), the National Wildlife Refuge Improvement Act of 1997 (the Improvement Act), and APA. Plaintiffs seek a declaration that Defendants are violating NEPA, NWRSA, the Improvement Act, and APA. Plaintiffs also seek a vacatur of Defendants' decision to permit the growing of GE crops on refuges throughout Region 3, and injunctive relief preventing the cultivation of GE crops in such refuges until Defendants: (1) fulfill their statutory obligations under NEPA by producing an EIS concerning the use of GE crops at each refuge in Region 3, as required by 42 U.S.C. § 4332(2)(C); and (2) complete CDs for the use of each GE crop proposed for cultivation for each and every refuge in Region 3 seeking to grow GE crops as part of their agricultural program under NWRSA, as required by 16 U.S.C. § 668dd(d)(3)(A). Plaintiffs also seek attorneys' fees and costs pursuant to 28 U.S.C. § 2412(d).

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 5 U.S.C. § 702 (APA).

4. Venue in this court is proper under 28 U.S.C. § 1391(e) because Plaintiffs Beyond Pesticides and Public Employees for Environmental Responsibility and Defendant Fish and Wildlife Service, having authority over the actions or inactions alleged herein, reside in this judicial district.

III. PARTIES AND STANDING

Plaintiff Beyond Pesticides

5. Plaintiff BEYOND PESTICIDES is a national nonprofit organization based out of Washington D.C. with members in 44 states and the District of Columbia, including Illinois,

Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin in FWS Region 3. Beyond Pesticides and its members are being, and will be, adversely affected by Defendants' actions alleged herein. Beyond Pesticides promotes safe air, water, land, and food, and works to protect public health and the environment by encouraging a transition away from the use of toxic pesticides, including herbicides such as glyphosate.

6. With Beyond Pesticides' resources made available to the public on a national scale, Beyond Pesticides contributes to a significant reduction in unnecessary pesticide use, thus improving protection of public health and the environment. The risks to public health and the environment from pesticides are large.

7. Beyond Pesticides and its members aim to reduce the proliferation of GE crops designed to be herbicide-resistant, because herbicide-resistant crops exacerbate the herbicide and pesticide treadmill that threatens the health of Beyond Pesticides' members. About 85 percent of all GE crops are altered to be herbicide-resistant. Thus, it is the goal of Beyond Pesticides to educate on the public health and environmental consequences of this technology, and generate support for sound ecological-based regulatory and management systems.

8. Many members of Beyond Pesticides live, work, and recreate in and near refuges within Region 3. The farming of GE crops injures Beyond Pesticides' members by interfering, *inter alia*, with their aesthetic enjoyment of wildlife refuges and their inhabitants. In addition, GE crops injure Beyond Pesticides' members' recreational enjoyment of refuges within Region 3 because they increase use of herbicides by encouraging the growth of weeds which are resistant to herbicides. The use of GE crops results in the use of environmentally damaging practices such as excessive use and misuse of glyphosate and other herbicides. As a result, Beyond Pesticides' members are at greater risk of suffering health effects from increased herbicide use.

Additionally, cultivation of GE crops compromises members' enjoyment of refuges within the Region 3 refuges because the crops pose risks to wildlife and offend those opposed to altering the DNA of natural plants.

9. FWS's actions in allowing the introduction of GE crops in Region 3 will make it more difficult for Beyond Pesticides' members to produce, sell, and eat foods not contaminated by GE material. Beyond Pesticides' members grow organic seed crops and consume products made with non-GE materials. The planting of GE crops on refuge lands will contaminate non-GE crops nearby, and reduce the supply of food processed with ingredients that is not contaminated with GE material.

Plaintiff Center for Food Safety

10. Plaintiff CENTER FOR FOOD SAFETY (CFS) is a national nonprofit organization with nearly 200,000 members nationwide. CFS has offices in Washington, DC and San Francisco, CA, with members in nearly every state including Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin in FWS Region 3. CFS and its members are being, and will be, adversely affected by FWS's actions.

11. CFS seeks to protect human health and the environment by advocating thorough, science-based safety testing of GE products prior to any marketing; cultivation of GE crops in a manner that minimizes any risk of contaminating conventional food supplies or the environment, and that minimizes negative impacts such as increased use of pesticides and evolution of resistant weeds; and appropriate labeling of foods that are or contain GE products. CFS also seeks to provide consumers with a means of identifying GE foods on the market and to encourage full public participation in defining the issues presented by GE crops.

12. To achieve its goals, CFS disseminates to government agencies, members of

Congress, and the general public a wide array of educational and informational materials addressing the introduction of GE crops into the environment and food supply. These materials include, but are not limited to, reprints of news articles, policy reports, legal briefs, press releases, action alerts, and fact sheets. CFS also sends out action alerts to its True Food Network. These action alerts generate public involvement, education, and engagement with governmental officials on issues related to genetic engineering and other issues affecting a sustainable food system. Collectively, the dissemination of this material has made CFS an information clearinghouse for public involvement and governmental oversight of the use of genetic engineering in our nation's food supply.

13. CFS also engages in public interest litigation to address the impacts of GE crops on the environment, its members, and the public interest. Many of CFS's past lawsuits involved protecting wildlife and the environment of the NWR System. CFS was a plaintiff in litigation concerning the planting of GE crops on the Prime Hook National Wildlife Refuge, which resulted in a decision enjoining the planting of GE crops until full compliance with NEPA and the NWRSA. *Del. Audubon Soc'y, Inc. v. Sec'y of the U.S. Dep't of Interior*, 612 F. Supp. 2d 442 (D. Del. 2009). CFS was also a plaintiff in litigation concerning the planting of GE crops on Bombay Hook National Wildlife Refuge, *Del. Audubon Soc'y, Inc. v. U.S. Dep't of the Interior*, No. C10-162 GMS (D. Del. filed Feb. 25, 2010), which was resolved by a settlement agreement in February 2011. On August 11, 2011, CFS filed a lawsuit challenging FWS's issuance of a regional EA to allow cultivation of GE crops in the Southeast Region. *Ctr. for Food Safety v. Salazar*, No. C11-1457 (D.D.C. filed Aug. 11, 2011).

14. The farming of GE crops injures CFS members by interfering, *inter alia*, with their aesthetic enjoyment of wildlife refuges and their inhabitants. GE crops injure CFS

members' recreational enjoyment of refuges within Region 3 because they increase use of herbicides by encouraging the growth of weeds which are resistant to herbicides. The use of GE crops results in the use of environmentally damaging practices such as excessive use and misuse of glyphosate and other toxic herbicides. As a result, CFS members are at greater risk of suffering health effects from increased herbicide use. Additionally, cultivation of GE crops compromises members' enjoyment of Region 3 refuges because the crops pose risks to wildlife and injure the aesthetic and recreational interests of those who seek to maintain biodiversity and are opposed to altering the DNA of natural plants.

15. In addition, CFS members grow organic seed crops and consume products made with non-GE materials. CFS members also regularly eat organic foods and desire foods that are free of GE material and chemical pesticides. The proliferation of GE crops on refuge lands will contaminate non-GE crops nearby, and reduce the supply of food processed with ingredients that are not contaminated with GE material. FWS's actions in allowing the introduction of GE crops in Region 3 will make it more difficult for CFS members to produce, sell, and eat foods not contaminated by GE material.

Plaintiff Public Employees for Environmental Responsibility

16. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER) is a national nonprofit organization, based in Washington, D.C. with field offices throughout the United States. PEER is a national alliance of local, state, and federal scientists, law enforcement officers, land managers and other professionals dedicated to upholding environmental laws and values. Members of PEER retreat to NWRs throughout the Midwest to partake in their unique birding opportunities and derive aesthetic enjoyment from wildlife refuges and have firm plans to do so again in the future. In addition, PEER members who are

also FWS professionals are being harmed by having to engage in practices they believe are detrimental to the refuges, not in compliance with the NWRSA and the Improvement Act, and in violation of NEPA. Further, PEER members are being harmed by the failure of FWS to comply with environmental laws and act in accordance with the mission of the NWR System to conserve and manage land and water, and where appropriate, to provide for the restoration of fish, wildlife and plants within the refuge system.

17. PEER is active in addressing issues concerning the planting of GE crops on National Wildlife Refuges. PEER was a plaintiff in litigation concerning the planting of GE crops on the Prime Hook National Wildlife Refuge, which resulted in a decision enjoining the planting of GE crops until full compliance with NEPA and the NWRSA. *Del. Audubon Soc'y, Inc. v. Sec'y of the U.S. Dep't of Interior*, 612 F. Supp. 2d 442 (D. Del. 2009). PEER was also a plaintiff in litigation concerning the planting of GE crops on Bombay Hook National Wildlife Refuge, *Del. Audubon Soc'y, Inc. v. U.S. Dep't of the Interior*, No. C10-162 GMS (D. Del. filed Feb. 25, 2010), which was resolved by a settlement agreement in February 2011. PEER is currently involved in litigation under the Freedom of Information Act seeking information about the White House Agricultural Biotechnology Working Group, *PEER v. OSTP*, No. 11-01583 (D.D.C. filed Sept. 1, 2011), which appears to be working to defend the planting of GE crops on National Wildlife Refuges, as well as litigation against FWS for issuing an EA that approves the cultivation of GE crops in the entire Southeast Region. *Ctr. for Food Safety v. Salazar*, No. C11-1457 (D.D.C. filed Aug. 11, 2011).

18. Defendant KEN SALAZAR is the Secretary of the United States Department of the Interior (the "Secretary"). The Secretary is the federal official in whom the NWRSA vests responsibility for making decisions and promulgating regulations required by the NWRSA.

The Secretary is the official ultimately responsible for management of Region 3 and for compliance with all laws applicable to the refuges within Region 3, including the NWRSA, NEPA, and APA. The Secretary is being sued in his official capacity.

19. Defendant DANIEL M. ASHE is the Director of FWS. He is legally responsible for overseeing the activities of the FWS, including the actions of FWS agents who enter into Cooperative Farming Agreements at refuges within Region 3. He is being sued in his official capacity.

20. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the Federal Agency responsible for the management and operation of NWRs and charged with the task of ensuring NWRs are in compliance with the regulations and laws that govern them, including NWRSA, NEPA, and APA.

21. Plaintiff organizations have standing to bring this action on behalf of themselves and their members. Members of Plaintiff organizations live adjacent to and enjoy the use of NWR System lands within Region 3 on which the planting of GE crops is currently approved, as well as the additional NWR System lands on which farming occurs but planting of GE crops is not approved. The above-described educational, scientific, aesthetic, conservation, and recreational interests of the Plaintiff organizations and their members have been and will continue to be adversely affected and irreparably injured by Defendants' decision to allow cultivation of GE crops on refuges in the Region 3 based on an inadequate EA, without preparation of individual EISs or issuance of individual CDs.

IV. LEGAL BACKGROUND

National Wildlife Refuge System Administration Act of 1966 and National Wildlife Refuge Improvement Act of 1997

22. Management of all NWRs in Region 3 is governed by NWRSA under 16 U.S.C.

§ 668dd. The Secretary and FWS are responsible for managing all NWRs, including those in Region 3. 16 U.S.C. § 668dd(a)(1). Under 16 U.S.C. § 668dd(d)(1)(A), “[t]he Secretary is authorized . . . to permit the use of any area within the System for any purpose . . . whenever he determines that such uses are compatible with the major purposes for which such areas were established.”

23. The NWRSA provides that it is “[t]he mission of the [NWR] System . . . to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

24. The NWRSA specifically states: “the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety.” 16 U.S.C. § 668dd(d)(3)(A)(i).

25. A compatible use is defined as a “wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee(1). The Director delegates authority to make CDs through the Regional Director to the refuge manager. Therefore, CDs are based on the sound professional judgment of the refuge manager. That sound professional judgment must be “consistent with principles of sound fish and wildlife management and administration, [and] available science and resources.” 16 U.S.C. § 668ee(3). The regulations require that a CD contain the following fifteen items:

- (1) The proposed or existing use;
- (2) The name of the national wildlife refuge;
- (3) The authorities used to establish the national wildlife refuge;
- (4) The purpose(s) of the national wildlife refuge;
- (5) The National Wildlife Refuge System mission;
- (6) The nature and extent of the use including the following:
 - (i) What is the use? Is the use a priority public use?;
 - (ii) Where would the use be conducted?;
 - (iii) When would the use be conducted?;
 - (iv) How would the use be conducted?; and
 - (v) Why is the use being proposed?.
- (7) An analysis of costs for administering and managing each use;
- (8) The anticipated impacts of the use on the national wildlife refuge's purposes and the National Wildlife Refuge System mission;
- (9) The amount of opportunity for public review and comment provided;
- (10) Whether the use is compatible or not compatible (does it or will it materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge);
- (11) Stipulations necessary to ensure compatibility;
- (12) A logical explanation describing how the proposed use would, or would not, materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge;
- (13) The Refuge Manager's signature and date signed; and
- (14) The Regional Chief's concurrence signature and date signed.
- (15) The mandatory 10- or 15-year re-evaluation date.

50 C.F.R. § 26.41. If a proposed use is found to be incompatible with the NWR's purpose then "the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System."

16 U.S.C. § 168dd(a)(4)(D).

Fish and Wildlife Service's Policy on Biological Integrity, Diversity, and Environmental Health

26. FWS's own agency guidance states, "We do not use genetically modified organisms in refuge management unless we determine their use is essential to accomplishing refuge purpose(s) and the Director approves the use." 601 FW 3.15(C).

National Environmental Policy Act

27. NEPA sets forth substantive environmental quality goals for the government and the nation. *See* 42 U.S.C. § 4331. Under NEPA, every agency of the United States Government must include an EIS in every “recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

28. NEPA’s implementing regulations, promulgated by the Council on Environmental Quality (CEQ), provide that:

NEPA procedures must insure [sic] that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

40 C.F.R. § 1500.1(b).

29. NEPA’s implementing regulations list a number of factors that an agency must consider in deciding whether the impact of an agency action on environment is significant enough to require an EIS. 40 C.F.R. § 1508.27. If the action is one that normally requires an EIS, the agency is to prepare an EIS without first preparing an EA. 40 C.F.R. §§ 1501.4(a)-(b), 1501.3(a).

30. The CEQ regulations define the term “significantly” as used in NEPA to determine when an EIS is required, to require consideration of, among other things, the unique characteristics of the geographical area impacted, such as park lands, wetlands, ecologically critical areas, or prime farmland, 40 C.F.R. § 1508.27(b)(3); “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” *id.* § 1508.27(b)(4);

“[t]he degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks,” *id.* § 1508.27(b)(5); and “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* § 1508.27(b)(10).

31. The CEQ regulations provide that:

- (a) Until an agency issues a record of decision [on an EIS] . . . no action concerning the proposal shall be taken which would:
- (1) Have an adverse environmental impact; or
 - (2) Limit the choice of reasonable alternatives.

40 C.F.R. § 1506.1.

32. When the proposed action is one which does not normally require an EIS, an agency may prepare an EA to determine whether or not to prepare an EIS. 40 C.F.R. § 1501.4(a)-(c). The agency must involve the public, by providing notice and an opportunity for comment, in preparing EAs. *Id.* § 1501.4(b). An EA must “provide sufficient evidence and analysis” for determining whether to prepare an EIS, 40 C.F.R. § 1508.9(a)(2), and “include brief discussions of the need for the proposal, of alternatives . . . [and] of the environmental impacts of the proposed action and alternatives.” *Id.* § 1508.9(b). If the agency determines on the basis of the EA not to prepare an EIS, it must prepare a “finding of no significant impact” (FONSI) and make it available to the public. 40 C.F.R. §§ 1501.4(e), 1508.13.

33. The CEQ regulations also require that agencies “[s]tudy, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources,” even where an EIS is not required. 40 C.F.R. § 1507.2(d).

Administrative Procedure Act

34. Under the APA, courts “shall compel agency action unlawfully withheld or

unreasonably delayed,” 5 U.S.C. § 706(1), and “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Courts may only review a final agency action, 5 U.S.C. § 704, and “agency action” includes a “failure to act.” 5 U.S.C. § 551(13).

V. FACTUAL BACKGROUND

35. GE crops are the subject of great controversy both in the U.S. and abroad. Controversial issues include the growing control of seed supply by biotechnology/pesticide firms, their inability to live up to the promises made for them, transgenic contamination of non-GE crops, and the adverse environmental impacts associated with their use.

36. GE crops such as “Roundup Ready” soybeans and corn are dependent on herbicide use. These crops, often referred to as glyphosate-tolerant, are specifically engineered to withstand the broad application of the herbicide Roundup (with glyphosate being the active ingredient) without harming the plant. 94% of soybean acres and 88% of corn acres planted in the United States in 2011 were planted with GE varieties.

37. Studies have shown that cultivation of herbicide-tolerant GE crops such as Roundup Ready soybeans and corn dramatically increases the use of herbicides, particularly glyphosate. Herbicides such as glyphosate degrade the soil ecosystem and pollute nearby wetlands, streams, lakes, and rivers. Herbicides also harm habitats of wildlife and in many instances, directly harm plants and wildlife, including listed endangered species.

38. Region 3 of the NWR System includes 66 refuges and wetland management districts encompassing over 1.2 million acres. Over 20,000 acres of refuge system land are currently used for cultivation of row crops, most commonly through Cooperative Farming Agreements with local farmers. Row crops are usually cultivated for three to five years on

farmland acquired by Region 3 before it is restored to natural habitat. While GE corn and soybeans are among the crops planted during those three to five years, they are typically the only crops planted during the last two years before farmland is restored to natural habitat. 94% of soybean acres and 88% of corn acres planted in the United States in 2011 were planted with GE varieties.

39. In January 2011, FWS solicited comments on a Draft EA on the cultivation of GE crops in Region 3. The Draft EA proposed four alternatives: two of the four alternatives, alternatives A and B, would allow the continued use of Roundup Ready GE corn and soy on refuge land; while two other alternatives, alternatives C and D, would discontinue the use of Roundup Ready GE corn and soybeans in Region 3 NWRs. FWS indicated in the Draft EA that the agency's preferred alternative was Alternative A, the no action alternative, which would allow continued farming for multiple objectives and the continued use of Roundup Ready GE corn and soybeans.

40. In April 2011, FWS released the Final EA and issued a FONSI to allow the continued use of row crop farming and cultivation of GE corn and soybeans on refuge land in Region 3. In the Final EA, FWS elected to combine two of its proposed alternatives as Alternative E, which would allow continued farming for multiple objectives, and also permit the continue planting of GE, Roundup Ready corn and soybeans for habitat restoration.

41. Moreover, eighteen of the refuges and districts in Region 3 have received approval from the regional refuge chief to cultivate GE crops in 2011. Plaintiffs are aware that GE crops are currently being grown on the Upper Mississippi River National Wildlife & Fish Refuge. It is highly likely that GE crops are currently being cultivated on other NWR System lands in Region 3.

42. While twenty-three refuges and districts in Region 3 have completed CDs for the use of GE crops as required by NWRSA, fifteen of the thirty-one refuges and districts listed in the EA as having “Crop Management Acres” in 2010 have not. Some of the refuges and districts that have not yet completed a CD contain significant cropland acreage. Based on the prevalence of GE crop use, Region 3’s practice of planting GE corn and soybeans in the years leading up to conversion to natural habitat, the increasing difficulty of obtaining non-GE corn and soybean seed, and the dwindling number of cooperator farmers who are willing to farm non-GE corn and soybeans, it is likely that GE crops are currently in use on those refuge system lands. Those refuges and districts that devote acreage to farming but have not completed a CD for GE crop use (and their crop management acreages) are:

Iowa

Driftless Area NWR (50)
Iowa WMD (3,451)

Michigan

Shiawassee NWR (1,146)

Minnesota

Agassiz NWR (155)
Big Stone NWR (295)
Detroit Lakes WMD (776)
Fergus Falls WMD (400)
Hamden Slough NWR (218)
Tamarac NWR (15)
Windom WMD (120)

Missouri

Clarence Cannon NWR (700)
Great River NWR (423)
Mingo NWR (315)
Squaw Creek NWR (354)

Ohio

Ottawa NWR (210)

43. The decision to allow GE crops to be planted on the more than 20,000 acres of

farmland located on refuge system lands within Region 3 is a major federal action that may significantly affect human health and the environment. Thus, FWS must produce an EIS. FWS's preparation of an EA and issuance of FONSI are arbitrary, capricious, and not in accordance with the law, in violation of both NEPA and APA.

44. The use of GE crops is a significant change from using conventional crops. Their use is a highly controversial issue in the scientific community and has many harmful and uncertain consequences to the health and quality of the human environment.

45. Gene flow from GE crops to conventional and organic crops, or transgenic contamination, is one adverse environmental impact stemming from the cultivation of GE crops. Gene flow occurs in numerous ways, including when a crop disperses its seeds or pollen to propagate itself. Gene flow results in transgenic contamination of related conventional or organic cultivars or wild species with potentially hazardous or simply unwanted genetically engineered content. Transgenic contamination can also result from seed mixing, flooding, improper cleaning of machinery used with seeds, spillage during transport, and a variety of human errors that may occur at each stage of the crop production process.

46. There have been over 200 documented episodes of transgenic contamination. Among the most well-known contamination episodes is the contamination incident involving genetically engineered StarLink corn. StarLink was a GE corn approved for animal feed or industrial use, but not for human foods, due to the concerns of leading American food allergists that the insecticidal toxin produced in StarLink grain could trigger food allergies. In 1998, StarLink contaminated the U.S. corn supply chain, resulting in rejection by foreign markets, the recall of over 300 corn products, the destruction of numerous lines of contaminated corn seed, lawsuits by farmers who lost hundreds of millions of dollars due to depressed corn prices, and

losses to the food industry as a whole estimated at \$1 billion.

47. Additionally, GE corn varieties engineered for herbicide resistance, such as the Roundup Ready corn and soy approved for cultivation in Region 3 under the challenged EA, have resulted in increased herbicide use, specifically glyphosate use.

48. Glyphosate formulations such as Roundup are lethal to many amphibians; they kill human cells, disrupt formation of sex hormones, and interfere with animal embryonic development in laboratory experiments; and are associated with increased rates of certain cancers in farmers who apply them. Glyphosate use with Roundup Ready crops is also linked to higher incidence of plant disease, plant nutrient deficiencies, and adverse impacts on soil microbes. Use of GE crops may also have detrimental effects on wildlife. Numerous studies document the risks glyphosate herbicides pose to threatened and endangered plants and animals. In 1996, FWS identified 74 endangered plant species believed to be at risk as a result of glyphosate use. Listed species known to be harmed or put at further risk by glyphosate specifically include the California red-legged frog, the Houston toad, and the Valley Elderberry Longhorn beetle. Some studies also indicate that GE crops have adverse effects on birds because the farming system associated with herbicide tolerant crops alters the plant and weed communities in farmed areas, thus affecting the diets of birds.

49. Widespread adoption of “Roundup Ready” technology in corn and soybeans has led to glyphosate-resistant “superweeds.” These “superweeds” evolve quickly when Roundup Ready crops are grown year after year, without break, on the same fields; like bacteria exposed to antibiotics, some weeds naturally resistant to glyphosate will survive exposure, and will then reproduce and flourish. There are reported incidences of glyphosate-resistant weeds in the states in Region 3.

50. The development of glyphosate-resistant weeds compounds the problem of increased herbicide use because farmers respond to control the weeds with more applications of the herbicide or use additional herbicides with relatively greater environmental impacts.

51. The use of GE crops on NWR System lands is so highly controversial that the FWS policy on Biological Integrity, Diversity, and Environmental Health provides that “[w]e do not use genetically modified organisms in refuge management unless we determine their use is essential to accomplishing refuge purpose(s) and the Director approves the use.” 601 FW 3.15(C). FWS implemented an entirely separate application and approval process for GE crops on refuges. Of the eighteen refuges and districts that submitted eligibility questionnaires explaining why use of GE crops is essential to accomplishing refuge purposes, at least one, Cypress Creek NWR, determined that GE crops were only essential for the 2011 field season because GE crop production was already underway at the time the questionnaire was completed. In future years, GE crops “will not be essential for achieving refuge purposes and their use will be discontinued.” If GE crops are not essential to Cypress Creek’s refuge purposes, which are largely similar to the purposes of the other refuges in the region, it seems unlikely that GE crops are truly essential to achieving the purposes of the other refuges and districts in Region 3 for which GE crop use is approved.

52. The Biological Integrity, Diversity and Environmental Health Policy of the NWRs further states, “We do not allow refuge uses or management practices that result in the maintenance of non-native plant communities unless we determine there is no feasible alternative for accomplishing refuge purposes.” 601 FW 3.15(C). Despite the fact that farming of either GE or non-GE crops entails the maintenance of non-native plants, Region 3’s EA quickly dismissed not farming on refuge system lands as an alternative without giving it the hard look

required by NEPA or showing that it is not feasible.

53. A proposed use of refuge system lands is compatible if, in the refuge manager's sound professional judgment, it does not materially interfere with the purposes of the refuge or district for which it is proposed. 16 U.S.C. § 668ee(1). Twenty-three refuge managers have determined that farming of GE crops is a compatible use of their refuge. While the NWRSA and its implementing regulations grant refuge managers discretion to base these determinations on "sound professional judgment," the determinations have consistently been made despite the admitted risks, scientific uncertainty, and controversial nature of the farming of GE crops. *Id.*; 50 C.F.R. § 26.41. Therefore, the CDs regarding farming of GE crops are arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of both NWRSA and the APA.

FIRST CAUSE OF ACTION

DEFENDANTS HAVE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO PREPARE AN EIS

54. Plaintiffs hereby incorporate paragraphs one through fifty-three as set forth herein.

55. FWS performed a major Federal action by determining to permit thousands of acres of Region 3 refuge system lands in annual Cooperative Farming Agreements that allow the use of GE crops.

56. Because the leasing of thousands of acres of Region 3 refuge land through Cooperative Farming Agreements that allow the use of GE crops by FWS is a major Federal action and the practice of farming GE crops has significant environmental consequences, is highly controversial and has unknown risks, FWS has violated Section 4332(2)(C) of NEPA by failing to prepare a full EIS.

57. The issuance of a Final EA and FONSI under NEPA is a final agency action under 5 U.S.C. § 704. Defendants' final agency actions described herein violate Section 706 of the APA, 5 U.S.C. § 706, in that Defendants acted arbitrarily, capriciously, abused their discretion, and failed to act in accordance with the law by failing to adhere to NEPA and its implementing regulations.

58. Defendants failed to take a hard look at the environmental effects of its decision to allow GE crops on refuge lands, improperly narrowed the analysis that it performed in the EA, inadequately assessed alternatives, and failed to consider the broad array of potential environmental impacts stemming from the planting of GE crops on refuge lands.

59. The FONSI must be invalidated because it did not fulfill the agency's statutory mandates by not adequately considering the significant impacts from GE crops on the environment, and is arbitrarily and capriciously based on a flawed EA with insufficient analysis of cumulative impacts and inadequate consideration of alternatives. The EA prepared by FWS in connection with its decision to allow GE crops to be planted in Region 3 is inadequate and flawed, and FWS's reliance on it was and is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, and without observance of procedures required by law, in violation of NEPA and the APA.

SECOND CAUSE OF ACTION

DEFENDANTS HAVE VIOLATED THE NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATIVE ACT OF 1966, THE NATIONAL WILDLIFE REFUGE IMPROVEMENT ACT OF 1997, AND THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO MAKE A COMPATIBILITY DETERMINATION FOR EACH REFUGE CULTIVATING GE CROPS AND BY FINDING CULTIVATION OF GE CROPS TO BE A COMPATIBLE USE FOR SOME REFUGES

60. Plaintiffs hereby incorporate paragraphs one through fifty-three as set forth herein.

61. Defendants violated section 668dd(d)(3)(A)(i) of the NWRSA, 16 U.S.C. § 668dd(d)(3)(A)(i), and its implementing regulations, by failing to perform CDs for the use of GE crops for each refuge and district on which GE crops are cultivated and by determining that cultivation of GE crops is a compatible use of twenty-three refuges and districts.

62. Defendants' decision to allow the use of GE crops without preparing the requisite CDs also violate the agency's own guidance that prohibits the use of GE crops unless "their use is essential to accomplishing refuge purpose(s) and the Director approves the use." 601 FW 3.15(C).

63. Allowing the cultivation of GE crops without a CD and determining that farming of GE crops is a compatible use of refuge system lands is a final agency action under 5 U.S.C. § 704.

64. Defendants' final agency actions described herein violate Section 706 of the APA, 5 U.S.C. § 706, in that Defendants acted arbitrarily, capriciously, abused their discretion, and failed to act in accordance with the law by allowing GE crops to be farmed without performing the CDs required by NWRSA and by determining that farming of GE crops is a compatible use of refuge system lands despite significant evidence to the contrary.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that the Defendants have violated NEPA by issuing a FONSI and failing to prepare an EIS for the use of GE crops on refuge lands in Region 3, a major Federal action that will have significant environmental consequences;

B. Declare that the EA prepared by FWS in connection with its decision to allow GE crops on refuge lands in Region 3 violated and is violating NEPA and the APA;

C. Declare that Defendants have violated NWRSA and the Improvement Act by

failing to complete a CD for GE crop use for each refuge or district on which GE crops are cultivated;

D. Declare that Defendants have violated APA by allowing the cultivation of GE crops on Region 3 refuge lands while failing to complete a specific CD for each refuge on which they are used as required by NWR SAA, the Improvement Act, and without adhering to NEPA regulations;

E. Declare that Defendants violated the NWR SAA, the Improvement Act, and the APA by issuing CDs approving the cultivation of GE crops on some refuges despite significant evidence that cultivation of GE crop is not a compatible use of refuge system lands.

F. Enter an order vacating Defendants' decision to permit the growing of GE crops on NWR System lands in Region 3;

G. Issue preliminary and permanent injunctive relief barring Defendants from allowing GE crops to be cultivated on any refuge or district in Region 3 that has not completed a CD until that refuge completes a CD in compliance with NWR SAA and the Improvement Act; or that has completed an inadequate CD that fails to meet the requirements of the NWR SAA

H. Issue preliminary and permanent injunctive relief barring Defendants from allowing any cultivation of GE crops on wildlife refuges until an EIS in compliance with NEPA is conducted for the region and at each refuge seeking to allow cultivation of GE crops;

I. Award Plaintiffs their costs and reasonable attorneys' fees under the Equal Access to Justice Act or other applicable statute; and,

J. Grant Plaintiffs such further relief as the court deems to be just proper and equitable.

Dated this 2nd day of November, 2011.

Respectfully submitted,

CENTER FOR FOOD SAFETY, BEYOND PESTICIDES, and
PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY,

PAULA DINERSTEIN
D.C. Bar No. 333971
KATHRYN DOUGLASS
D.C. Bar. No. 995841
Public Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036
Phone: (202) 265-7337
Fax: (202) 265-4192
Emails: pdinerstein@peer.org
kdouglass@peer.org

GEORGE A. KIMBRELL (*Pro Hac Vice Pending*)
PAIGE M. TOMASELLI (*Pro Hac Vice Pending*)
Center for Food Safety
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
Phone: (415) 826-2770
Fax: (415) 826-0507
Emails: ptomaselli@icta.org
gkimbrell@icta.org

Counsel for Plaintiffs