

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

DELAWARE AUDUBON SOCIETY,)	
CENTER FOR FOOD SAFETY, and)	
PUBLIC EMPLOYEES FOR)	
ENVIRONMENTAL RESPONSIBILITY,)	
)	
Plaintiffs,)	Case No.
)	
vs.)	
)	
)	COMPLAINT FOR DECLATORY
KEN SALAZAR, Secretary, United)	AND INJUNCTIVE RELIEF
States Department of the Interior, and)	
ROWAN GOULD, Acting Director of US)	
Fish And Wildlife Service, and UNITED)	
STATES FISH AND WILDLIFE)	
SERVICE, an administrative agency)	
of the United States Department of the)	
Interior,)	
)	
Defendants.)	
)	
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COMPLAINT

Plaintiffs, Delaware Audubon Society, Inc., Center for Food Safety, and Public Employees for Environmental Responsibility and on behalf of themselves and their members, allege as follows:

I. NATURE OF ACTION

1. This action concerns the Defendants’ management and operation of the Bombay Hook National Wildlife Refuge in Kent County, Delaware (Bombay Refuge). Since at least 1996 and continuing to the present, authorized agents of the United States Fish and Wildlife Service (FWS), acting under Defendants’ supervision and/or control, have entered into Cooperative Farming Agreements with private parties that allow hundreds of acres of land in the Bombay Hook Refuge to be farmed, some with genetically engineered crops (“GE crops”), in

exchange for a fee and/or services. Entering into these Cooperative Farming Agreements violates the National Environmental Policy Act (NEPA) by engaging in a major federal action, which significantly impacts the quality of the environment, is highly controversial and which has potentially harmful effects on human health, the environment and wildlife, without performing the environmental assessment (EA) or environmental impact statement (EIS) required by NEPA and is therefore arbitrary, capricious, and contrary to law, in violation of the Administrative Procedures Act (APA).

2. Plaintiffs seek a declaration that Defendants are violating NEPA and APA. Plaintiffs also seek injunctive relief preventing agricultural activity at the Bombay Hook Refuge until Defendants satisfactorily fulfill their statutory obligations under NEPA by producing an EA and/or EIS concerning use of GE Crops at the Bombay Hook Refuge.

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 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, and Defendant Fish and Wildlife Service, having authority over the actions or inactions alleged herein, has offices located in this judicial district.

III. PARTIES AND STANDING

5. Plaintiff DELAWARE AUDUBON SOCIETY, INC. (“Delaware Audubon”) is a chapter of the National Audubon Society. It currently serves over 1500 members in Delaware. Delaware Audubon participates in programs at the Refuge. Members of Delaware Audubon live near, use, recreate, and/or are keenly interested in the activities at Bombay Hook Refuge which directly affect and impact the economic, aesthetic, and/or recreational interests of

Delaware Audubon Society, Inc. members.

6. Plaintiff CENTER FOR FOOD SAFETY (“CFS”) is a national nonprofit organization, with offices in Washington, D.C. and San Francisco, CA, with members in nearly every state. CFS addresses the impacts of industrial farming and food production systems on human health, animal welfare, and the environment. CFS seeks to protect human health and the environment by ensuring that genetically engineered products are reviewed in a manner that minimizes any risk of contaminating food supplies and the environment. CFS members live near and visit the Bombay Hook Wildlife Refuge. The farming of GE crops injures CFS members by interfering, *inter alia*, with their aesthetic enjoyment of wildlife refuge and its inhabitants. In addition, GE crops injure CFS members’ recreational and physical enjoyment of Bombay Hook because they increase use of herbicides and promote weediness of certain plants. This results in the use of more environmentally damaging techniques such as excessive use and misuse of glyphosate and other herbicides. As a result, CFS members are at greater risk of suffering health effects of increased herbicide use. Additionally, cultivation of genetically engineered crops compromises members’ enjoyment of the Bombay Hook Refuge because the crops pose risks to wildlife and offend those opposed to altering the DNA of natural plants.

7. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (“PEER”) is a national nonprofit organization, based in Washington, D.C. and has field offices throughout the United States, including the Northeast. Members of PEER retreat to Bombay Hook National Wildlife Refuge to partake of its unique birding opportunities 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 Refuge and in violation of NEPA. Further, staff members at the PEER Refugekeeper Field Office are also

being harmed by the failure of FWS to comply with environmental laws and act in accordance with the mission of the National Wildlife Refuge 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.

8. Defendant KEN SALAZAR is the Secretary of the United States Department of the Interior (“Secretary”). Specifically, he is the official ultimately responsible for management of the Bombay Hook Refuge and for compliance with all laws applicable to the Bombay Hook Refuge, including NEPA and APA. He is sued in his official capacity.

9. Defendant ROWAN GOULD is the Acting Director of the FWS. He is legally responsible for overseeing the activities of FWS, including the actions of FWS agents who enter into Cooperative Farming Agreements at the Bombay Hook Refuge. He is sued in his official capacity.

10. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) is the Federal Agency responsible for the regulation of National Wildlife Refuges and charged with the task of ensuring National Wildlife Refuges are in compliance with the regulations and laws that govern them, including NEPA and APA.

11. Members of the Plaintiff organizations live in, adjacent to or near, and/or enjoy the use of the Bombay Hook Refuge. The above-described educational, scientific, aesthetic, conservation and recreational interests of the Plaintiff organizations and their members have been, are being and will continue to be adversely affected and irreparably injured by the Defendants’ failure to perform an EA and/or EIS for agricultural uses involving GE Crops. Therefore, Plaintiff organizations bring this action on behalf of themselves and their members.

IV. LEGAL BACKGROUND

National Environmental Policy Act

12. The National Environmental Policy Act of 1969 (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.” 43 U.S.C. § 4332(2)(C).

13. NEPA’s implementing regulations, promulgated by the Council on Environmental Quality (CEQ), provide that if the action is not covered by a categorical exclusion from NEPA, the agency must prepare an EA to determine whether or not an EIS is required. 40 C.F.R. § 1501.4(a) –(c). If the action is one that normally requires an EIS, the agency is to prepare an EIS without first preparing an EA. *Id.*, § 1501.4(a) and (b); §1501.3(a).

14. The CEQ regulations define the term “significantly” as used in NEPA to determine when an EIS is required, to require consideration of the unique characteristics of the geographical area impacted, such as park lands, wetland, ecologically critical areas, or prime farmland, *id.* § 1508.27(b)(3); “the degree to which the effects on the quality of the human environment are likely to be highly controversial,” *id.* § 1508.28(b)(4); “the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks,” *id.* § 1508.27(b)(5); and “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* § 1508.28(b)(10).

15. The CEQ regulations also require that agencies “study, 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. § 1507.3(d).

16. NEPA's implementing regulation at 40 C.F.R. §§ 1500.1(b) provides that:

NEPA procedures must ensure 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.

17. The CEQ regulations at 40 C.F.R. § 1506.1 further 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.

Administrative Procedure Act

18. 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). Courts may only review a final agency action, 5 U.S.C. §551, and "agency action" includes a "failure to act." *Id.*

19. Defendants failed to adhere to the NEPA requirement that if a major federal action is not covered by a categorical exclusion from NEPA, the agency must prepare an EA to determine whether or not an EIS is required, thus violating the APA in allowing the planting of GE crops within the Refuge.

V. FACTUAL BACKGROUND

20. For several decades, FWS has been leasing acres of land on the Refuge to private parties for farming through annual Cooperative Farming Agreements. Many of these Cooperative Farming Agreements allow the use of GE crops. The number of acres leased has varied annually and in 2009 alone, at least 801.27 acres were leased through these agreements.

21. Despite the high number of acres leased, FWS has never provided an EA or EIS under NEPA for any of these Cooperative Farming Agreements or for the use of GE crops within the Bombay Hook Refuge.

22. The use of GE crops is a significant change from using conventional crops and 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. For example, GE crops may harm beneficial insects, increase weeds, alter soil ecology, and contaminate non-genetically engineered plants.

23. GE crops such as Roundup Ready soybeans and corn are dependent on herbicide use. These crops are specifically engineered to withstand the broad application of the herbicide Roundup (glyphosate) without harming the plant. Studies have shown that cultivation of herbicide-tolerant GE crops dramatically increases the use of herbicides. Herbicides degrade the soil ecosystem and pollute nearby wetlands, streams, lakes, and rivers.

24. Use of GE crops may also have detrimental effects on wildlife. The most common pesticide formula used with GE crops, Roundup, harms and kills amphibians. Some studies also indicate an adverse effects of GE crops on birds because the farming system associated with herbicide tolerant GE crops alters the plant and weed communities in farmed areas, thus affecting the diets of birds. FWS did not consider any of these environmental effects prior to allowing GE crop planting.

25. Widespread adoption of Roundup Ready technology in corn and soybeans has led to weeds developing resistance to glyphosate, the active ingredient in Roundup. Delaware was the first state to report a “superweed” resistant to glyphosate. Delaware mares tail (*Conyza Candensis*) developed resistance from the use of Roundup Ready soybeans and corn. These GE

crops have been consistently used at the Bombay Hook Refuge (Roundup Ready corn since 1996, and Roundup Ready soybeans since 2001.)

26. The development of 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.

27. FWS is fully aware of the potential risks of using GE crops on the quality of the human environment. FWS has stated that: “Potential risks of GMC’s include gene flow, non-target effects, pest resistance and increased use of certain pesticides.” Internal FWS Draft Delegation of Authority and Process for Approving the Use of Genetically Modified Crops on the National Wildlife Refuge System, Risks of GMC’s section. Despite these concerns, FWS has repeatedly ignored its legal obligation under NEPA to provide an EA and/or EIS.

28. Even though farming and the use of GE crops on the Refuge is highly controversial, FWS has failed to provide a single EA or EIS in accordance with NEPA, prior to finalizing any of the Cooperative Farming Agreements.

FIRST CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED NEPA

29. Plaintiffs hereby incorporate by reference paragraphs 1 through 28 as if set forth herein.

30. FWS performed a major Federal action by leasing hundreds of acres of Bombay Hook Refuge land in annual Cooperative Farming Agreements that also allowed the use of GE crops.

31. Because the leasing of hundreds of acres of Bombay Hook Refuge land through Cooperative Farming Agreements that allow the use of GE crops by FWS is a major Federal action, and farming on the Bombay Hook Refuge and the use of GE crops has potential

environmental consequences, is highly controversial and has unknown risks, FWS violated Section 4332(2)(C) of NEPA by failing to prepare an EIS, or at least an EA.

SECOND CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED APA BY FAILING TO ADHERE TO NEPA REGULATIONS

32. Plaintiffs hereby incorporate by reference paragraphs 1 through 31 as if set forth herein.

33. The failure to prepare an EA under NEPA prior to allowing farming and use of GE crops is final agency action under 5 U.S.C. §701.

34. 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 regulations requiring the preparation of an EIS or an EA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare that Defendants have violated NEPA by allowing the cultivation of GE crops within the Bombay Hook Refuge without preparing an EIS or an EA;
- B. Declare that Defendants have violated the APA by allowing the cultivation of GE crops within the Bombay Hook Refuse without adhering to NEPA regulations;
- C. Issue preliminary and permanent injunctive relief barring Defendants from allowing any cultivation of GE crops at the Bombay Hook Refuge until compliance with NEPA is achieved;
- D. Award Plaintiffs their costs and reasonable attorneys fees under the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, or other applicable statutes; and,

E. Grant Plaintiffs such further relief as this Court deems to be just, proper, and equitable.

Dated this 25th day of February 2010.

Respectfully submitted,

DELAWARE AUDUBON SOCIETY, CENTER FOR FOOD
SAFETY, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY

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