

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

CENTER FOR FOOD SAFETY,)
2601 Mission Street, Ste. 803)
San Francisco, CA 94110)

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,) Case No.

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.)

COMPLAINT FOR DECLATORY
AND INJUNCTIVE RELIEF

COMPLAINT

Plaintiffs Beyond Pesticides, Center for Food Safety, and Public Employees for Environmental Responsibility, 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 National Wildlife Refuges of the National Wildlife Refuge System (NWRS) in U.S. Fish and Wildlife Service's (FWS) Southeast Region (Region 4). 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 six-page Environmental Assessment (EA) 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 4 violates the Administrative Procedure Act (APA) by (a) allowing new activity on refuges within Region 4 without completing the compatibility determinations (CD) required by the National Wildlife Refuge System Administration Act (NWRSA), and (b) violating the National Environmental Policy Act (NEPA) by preparing an EA and issuing a FONSI for a major federal action with significant environmental impacts rather than preparing an Environmental Impact Statement (EIS). Plaintiffs seek a declaration that Defendants are violating APA, NWRSA, and NEPA. Plaintiffs also seek a vacatur of Defendants' decision to permit the growing of GE crops on Region 4 refuges, and injunctive relief preventing the cultivation of GE crops in Region 4 refuges until Defendants satisfactorily fulfill their statutory obligations under NWRSA by

completing a CD for the use of each GE crop proposed for cultivation at each refuge seeking to use GE crops as part of their agricultural program, as required by 16 U.S.C. § 668dd(d)(3)(A); and under NEPA by producing an EIS concerning use of GE crops at each refuge in Region 4 as required by 42 U.S.C. § 4332(C) with adequate notice and opportunity for public comment. 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 Professional 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 Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. 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 push for labeling as a means to identify products that contain GE ingredients, 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 4. Among others, these refuges include all refuges in the West Tennessee Complex, including the Lower Hatchie NWR, Chickasaw NWR, Lake Isom NWR, and the Reelfoot NWR. 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 4 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 4 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 4 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, D.C. and San Francisco, CA, with members in nearly every state including 21,590 in FWS Region 4. 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. Where necessary, CFS engages in public interest litigation to address the impacts of GE crops on the environment, its members and the public interest.

13. 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 4 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, CFS members are at greater risk of suffering health effects from increased herbicide use. Additionally, cultivation of GE crops compromises members' enjoyment of Region 4 refuges because the crops pose risks to wildlife and injure the aesthetic and recreational interests of those opposed to altering the DNA of natural plants.

14. In addition, CFS's members grow organic seed crops and consume products made with non-GE materials. CFS's 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 4 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

15. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER) is a national nonprofit organization, based in Washington, D.C. with field offices throughout the United States, including the Southeast. 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 Southeast to partake of 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 Refuge Improvement Act of 1997 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 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.

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 United States DOI*, 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, Ca No. 10-162 GMS (D. Del.), 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, which appears to be working to defend the planting of GE crops on National Wildlife Refuges.

16. 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 4 and for compliance with all laws applicable to the refuges within Region 4, including the NWRSA, NEPA and the APA. The Secretary is being sued in his official capacity.

17. 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 4. He is being sued in his official capacity.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (FWS) 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.

19. Members of the Plaintiff organizations live adjacent to or near, and/or enjoy the use of the twenty-five refuges and/or complexes within Region 4 of the NWRs currently planting or planning to plant GE crops. 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 and complete CDs for planting GE crops in refuges within Region 4 and for failing to complete adequate EAs and/or EISs for agricultural uses involving

GE crops. Therefore, Plaintiff organizations have standing to bring this action on behalf of themselves and their members.

IV. LEGAL BACKGROUND

National Wildlife Refuge System Administration Act

20. Management of all NWRs in Region 4 are governed by NWRSAA under 16 U.S.C. § 668dd. The Secretary and FWS are responsible for managing all National Wildlife Refuges, including those in Region 4. 16 U.S.C. § 668dd(a)(1). Under 16 U.S.C. § 668dd(d)(1)(A) of NWRSAA, “the 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.” The NWRSAA 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).

21. A compatible use is defined as, “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 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(4)(D).

National Environmental Policy Act

22. 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).

23. NEPA's implementing regulations, promulgated by the Council on Environmental Quality (CEQ), list a number of factors that an agency must consider in deciding whether to prepare 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) and (b); §1501.3(a). 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 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.

24. 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, *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).

25. 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. § 1507.2(d).

26. The CEQ regulations explain that for action of national concern, “notice shall

include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter.” 40 C.F.R. § 1506.6(b)(2).

27. NEPA’s implementing regulation at 40 C.F.R. § 1500.1(b) provides 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).

28. The CEQ regulations 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.

40 C.F.R. § 1506.1.

Administrative Procedure Act

29. 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

30. GE crops have been grown in Region 4 since at least 2006. Currently, the use of GE crops on refuge lands in Region 4 is at an all-time high, with sixty-nine percent of refuge agricultural lands in Region 4 currently growing GE crops. Region 4 includes 128 refuges encompassing four million acres. By allowing GE crops to be planted on refuge land in Region

4, FWS has opened at least 44,317 acres of refuge land in Region 4 to the cultivation of GE crops. The decision to allow GE crops to be planted on such vast acreage of refuge land is a major federal action that may significantly affect human health and the environment. Yet, FWS's decision to adopt a FONSI for its decision based on a regional EA that is only six pages long, without providing proper opportunity for public notice and comment, is arbitrary and capricious, in violation of NEPA and the APA. To date, twenty-five refuges and/or refuge complexes have indicated a desire to continue to use or begin using GE crops in their agricultural programs. These Refuges are:

Alabama

Eufaula NWR
Wheeler NWR
Key Cave NWR

Arkansas

Cache River NWR
Bald Knob NWR
Wapanocca NWR
Felsenthal NWR
Holla Bend NWR
White River NWR

Kentucky

Clarks River NWR

Louisiana

Central Louisiana Complex
North Louisiana Complex
Lacassine NWR
Tensas River NWR

Mississippi

North Mississippi Complex
Noxubee NWR
St. Catherine Creek NWR
Theodore Roosevelt Complex

North Carolina

Alligator River NWR
Mattamuskeet NWR
Pee Dee NWR
Pocosin Lakes NWR

South Carolina

Santee NWR

Tennessee

West Tennessee Complex
Tennessee NWR

30. Despite the high percentage of GE crops already in use throughout Region 4 and the high number of acres impacted by the decision to allow GE crops to be planted in all of Region 4, not one of the twenty-five refuges at issue has completed a CD that specifically addresses the impacts of having GE crops planted on refuge lands. Tennessee NWR addressed the use of GE crops in the refuge's CD for cooperative farming, but the CD merely mentioned

that GE crops would be some of the crops planted as part of the cooperative farming program and provided no analysis of the potential impacts of planting GE crops on refuge lands, no indication of what percentage of crops planted would be GE crops, and no explanation of how planting GE crops is compatible with the major purposes for which the refuge was established.

31. The allowance of GE crops on Region 4 refuges directly contradicts FWS's own agency guidance, which requires that "if GE crops are to be used, they must be addressed in refuge NEPA documents and CDs."

32. 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. For example, GE crops may harm beneficial insects, increase weeds, alter soil ecology, and contaminate non-genetically engineered plants.

33. 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.

34. Use of GE crops may also have detrimental effects on wildlife. The most common herbicide formula used with GE crops, Roundup, harms and kills amphibians. 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.

35. Widespread adoption of "Roundup Ready" technology in corn and soybeans has

led to weeds developing resistance to glyphosate. Tennessee, Mississippi, Arkansas, North Carolina, Alabama, Kentucky and Georgia have all reported at least one “superweed” resistant to glyphosate. Arkansas is home to six of the refuges at issue in this case and has six different reported glyphosate resistant species.

36. 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.

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

38. In addition, the use of GE crops on NWR land is so highly controversial that the FWS policy on Biological Integrity, Diversity and Environmental Health provides that “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). Moreover, FWS implemented an entirely separate application and approval process for GE crops on refuges. The introduction to this application questionnaire states, “601 FW 3 clearly sets a high bar for the use of GE crops as well as farming and pesticides in general. This was intentional and is something to keep in mind when considering the content of the eligibility questionnaire and subsequently when considering requests for the use of GE crops.”

39. Additionally, the Biological Integrity, Diversity and Environmental Health Policy of the NWRS 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 Part 3.15C.

40. The decision to grow GE crops on the NWRs in Region 4 of the FWS is of national concern. The refuges in this region receive 11.9 million visitors annually, thirty percent of all refuge visitors nationwide. For actions of national concern, "notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter." 40 C.F.R. § 1506.6. Region 4 posted a paper copy of the EA at only the 25 refuges already growing GE crops. FWS failed to publish the EA in the Federal Register and failed to inform interested parties such as Plaintiffs.

FIRST CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED THE APA BY FAILING TO MAKE A COMPATIBILITY DETERMINATION FOR THE USE OF GE CROPS ON EACH REFUGE PLANNING TO CULTIVATE GE CROPS

41. Plaintiffs hereby incorporate paragraphs one through forty as set forth herein.

42. Defendants violated section 668dd(d)(3)(A)(i) of the NWRSAA, 16 U.S.C. § 668dd(d)(3)(A)(i), and its implementing regulations, by failing to perform CDs for the use of GE crops on each refuge before approving their use and allowing GE crops to be planted on Region 4 refuge lands.

43. The decision to allow the farming of GE crops on twenty-five NWRs without a CD is a final agency action under 5 U.S.C. §701.

44. Defendants' final agency action described herein violates 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 perform the CDs required by NWRSA before approving the use of GE crops on NWRs on at least 44,317 acres in Region 4.

SECOND CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

45. Plaintiffs hereby incorporate paragraphs one through forty as set forth herein.

46. FWS performed a major Federal action by determining to lease tens of thousands of acres of Region 4 refuge land in annual Cooperative Farming Agreements that allow the use of GE crops.

47. Because the leasing tens of thousands of acres of Region 4 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.

48. The issuance of a Final EA and FONSI under NEPA is a final agency action under 5 U.S.C. § 701. 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.

49. 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, and failed to consider the broad array of potential environmental impacts stemming from the planting of GE crops on refuge lands.

50. Specifically, the EA failed to take a hard look at the effect of allowing GE crops

on refuge lands in Region 4, including the contamination of crops on nearby farmlands with GE traits, increased application of the herbicide glyphosate, and the development of glyphosate-tolerant weeds, which will harm farmers economically, as well as deny them their fundamental right to grow the crop of their choice. FWS also failed to take a hard look at the significant cumulative effects of glyphosate use; the potentially significant harm to threatened and endangered species and their critical habitats; the potentially significant harm to native plant species, aquatic organisms, birds, insects and other non-targets species; the alternatives other than the allowance of GE crops in cooperative farming agreements; and potential mitigation of the effects of allowing GE crops on NWRs. Because the EA failed to adequately consider these impacts from allowing GE crops on refuge lands, the EA must be invalidated.

51. 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 4 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.

52. Moreover, FWS provided insufficient notice regarding the EA, because allowing GE crops to be planted on Refuge lands throughout the Southeast is a matter of national concern which requires FWS to provide notice in the federal register and to send notification to potentially interested parties. 40 C.F.R. § 1506.6. FWS did not publish notice of the EA in the federal register nor did it notify Plaintiffs of the availability of the EA. Instead FWS posted a

paper copy of the EA at the 25 refuge headquarters that are *already* growing GE crops. Only one comment was received on the EA, demonstrating the lack of adequate public involvement as *required* by NEPA. 40 C.F.R. § 1506.1(b). The decision to grow GE crops on NWR land is of national concern given high number of visitors these refuges receive each year, the great acreage of land the refuges cover, and the many states with refuges in the region.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

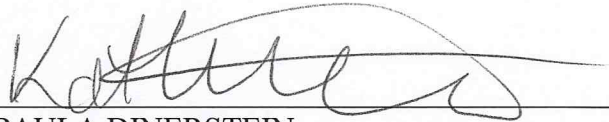
- A. Declare that Defendants have violated the NWRSAA by failing to complete a CD specifically for intended uses of GE crops on each of the twenty-five refuges and complexes listed in the FWS's FONSI;
- B. Declare that the EA prepared by FWS in connection with its decision to allow GE crops on refuge lands in Region 4 violated and is violating NEPA and the APA;
- C. 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 4, a major Federal action that will have significant environmental consequences;
- D. Declare that Defendants have violated the APA by allowing the cultivation of GE crops on Region 4 refuge lands by failing to complete a specific CD for each refuge on which they are intended for use as required by the NWRSAA and without adhering to NEPA regulations;
- E. Enter an order vacating Defendants' decision to permit the growing of GE crops on Region 4 Refuges;
- F. Issue preliminary and permanent injunctive relief barring Defendants from allowing GE crops to be cultivated on any refuge in Region 4 until that refuge completes a CD in compliance with NWRSAA;

- G. 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;
- H. Award Plaintiffs their costs and reasonable attorneys' fees under the Equal Access to Justice Act or other applicable statute; and,
- I. Grant Plaintiffs such further relief as the court deems to be just proper and equitable.

Dated this 11th day of August 2011.

Respectfully submitted,

BEYOND PESTICIDES, CENTER FOR FOOD SAFETY, 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
2601 Mission St., Suite 803
San Francisco, CA 94110
T: (415) 826-2770 / F: (415) 826-0507
Emails: ptomaselli@icta.org
gkimbrell@icta.org

Counsel for Plaintiffs