

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

**INTERNATIONAL CENTER FOR
TECHNOLOGY ASSESSMENT,**
660 Pennsylvania Ave. SE, Suite 302
Washington, DC 20003

CENTER FOR FOOD SAFETY,
660 Pennsylvania Ave. SE, Suite 302
Washington, DC 20003

JEAN BECK,
3201 Noble Ave.
Richmond, VA 23222

HEATHER BURNS,
4 Millstone Road
Richmond, VA 23238

FAITH CAMPBELL,
8208 Dabney Ave.
Springfield, VA 22152

JOE KATROSCIK,
706 NW Herriman Street
Bend, OR 97701

KLAMATH SISKIYOU WILDLANDS CENTER,
84 4th Street
Ashland, OR 97520

CLAIRE WATKINS,
1616 Monument Ave., #1
Richmond, VA 23220

Plaintiffs,

v.

ANN VENEMAN,
in her official capacity as Secretary,
United States Department of Agriculture
Room 200-A, Admin. Bldg.
14th St & Independence Ave. S.W.
Washington, DC 20259

Civil Action No.

03-00020 (HHK)

BOBBY ACORD,)
in his official capacity as Administrator,)
Animal Plant Health and Inspection Service)
United States Department of Agriculture)
14th & Independence Ave. S.W., Room. 312-E)
Washington, DC 20259)
))
ALAN TASKER,)
in his official capacity as)
Noxious Weed Program Manager)
Animal Plant Health and Inspection Service)
United States Department of Agriculture)
4700 River Road)
Riverdale, MD 20737)
))
Defendants.)
_____)

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment and injunctive relief challenging the Defendants’ implementation of the Plant Protection Act (PPA), 7 U.S.C. § 7701 *et seq.*, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. 551, *et seq.*, and the regulations implementing these statutes.

2. On July 26, 2002, Plaintiffs filed with Defendants a legal petition entitled “Petition on Genetically Engineered Turfgrasses, including a Noxious Weed Listing Petition” (hereinafter Noxious Weed Petition). The Noxious Weed Petition contained, *inter alia*, a well-supported request to list genetically engineered (GE) varieties of creeping bentgrass and Kentucky bluegrass as noxious weeds under the PPA. In response to the initiation of this action on January 8, 2003, Defendants provided a response to the Noxious Weed Petition on May 13, 2003. Defendants’ response to the Noxious Weed Petition denied Plaintiffs’ requests and refused to amend USDA’s regulations to list the GE varieties of creeping bentgrass and Kentucky bluegrass as noxious weeds.

3. Defendants’ decision and action refusing to list GE varieties of creeping bentgrass and

Kentucky bluegrass was arbitrary and capricious, an abuse of discretion, not in accordance with law and violates the PPA and Defendants' implementing regulations.

4. Additionally, Defendants have allowed numerous field tests of GE varieties of creeping bentgrass and Kentucky bluegrass since the filing of the Noxious Weed Petition. Defendants actions in allowing these field tests to proceed without adequate weed risk analysis and without any environmental impact analysis are in violation of the PPA and NEPA and its implementing regulations.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to the PPA, 7 U.S.C. § 7736(a) (jurisdiction), as well as 28 U.S.C. § 1331 (Federal question), 28 U.S.C. § 1346 (United States as Defendant), and 28 U.S.C. § 1361 (mandamus).

6. The relief requested is authorized pursuant to 28 U.S.C. § 2201 (declaratory relief) and 28 U.S.C. § 2202 (further relief), and the Plaintiffs have a right to bring this action pursuant to the APA, 5 U.S.C. §§ 701-706.

7. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because the Defendants in this action reside in this district and a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

8. Plaintiff International Center for Technology Assessment (CTA) is located at 660 Pennsylvania Ave., S.E., Suite 302, Washington, DC 20003. Plaintiff is a tax-exempt, non-profit organization incorporated in the District of Columbia. Since its inception in 1994, the activities of CTA have been centered in several areas including addressing the environmental, economic, and ethical concerns raised by the development and commercialization of agricultural technologies. CTA was the lead organization filing the Noxious Weed Petition.

9. The interests of CTA are being, and will be, adversely affected by Defendants' actions complained of herein. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures that individuals serving on CTA's board of directors are, and will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. In particular, CTA's Board Members regularly visit parks, natural areas and other habitats with native grasses in States where GE turfgrass field tests are occurring. The release, introduction and spread of these GE turfgrasses into the environment via field tests (and their imminent release via deregulation) injures CTA Board Members when visiting recreational activities by interfering, *inter alia*, with their aesthetic enjoyment of native species and their use and enjoyment of parks, natural areas and other habitats with native grasses. Similarly, CTA Board Members' recreational and physical enjoyment of natural and recreational areas are injured as the introduction of these GE glyphosate resistance turfgrasses makes it more difficult for stewards of such natural and recreational areas to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations. Such removal activities requires more environmentally damaging techniques such as excessive use and misuse of glyphosate and other herbicides, and as such CTA Board Members are at greater risk of suffering health effects from such increased herbicide use.

10. Plaintiff Center for Food Safety (CFS) is located at 660 Pennsylvania Ave., SE, Suite 302, Washington, DC 20003. Since the organization's founding in 1997, CFS has sought to address the impacts of current industrial farming and food production systems on human health, animal welfare and the environment. CFS is a national non-profit membership organization with members in almost every State across the country, including members in states and locations (on information and belief) where GE turfgrasses are being field tested. Plaintiff CFS is one of the petitioning organizations on the

Noxious Weed Petition.

11. The interests of CFS and its members are being, and will be, adversely affected by Defendants' actions complained of herein. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures that CFS members are, and will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. In particular, CFS members regularly aesthetically and recreationally enjoy athletic facilities, golf courses and their own home yards where non-GE turfgrasses are present, and they enjoy recreational areas, such as nature preserves and parks, that are threatened by non-native GE turfgrasses. The release, introduction and spread of these GE turfgrasses into the environment via field tests (and their imminent release via deregulation) injures CFS' members when visiting recreational activities by interfering, *inter alia*, with their aesthetic enjoyment of native species and their use and enjoyment of parks, natural areas and other habitats with native grasses. Similarly, CFS members' recreational and physical enjoyment of natural and recreational areas is injured as the introduction of these GE glyphosate resistance turfgrasses make it more difficult for stewards of such natural and recreational areas to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations. Such removal activities will require more environmentally damaging techniques such as excessive use and misuse of glyphosate and other herbicides, and as a result CFS' members are at greater risk of suffering health effects of increased herbicide use.

12. Defendants' actions in allowing the introduction of these GE glyphosate resistance turfgrasses into the environment also will imminently make it more difficult for CFS members to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations on their land and will require more environmentally damaging removal techniques. Such imminent impacts pose increased health risks to CFS members from a greater risk of exposure to

excessive use and misuse of glyphosate and other herbicides, and cause aesthetic injury to their property.

13. Plaintiff Jean Beck resides at 3201 Noble Avenue, Richmond, Virginia 23222. The interests of Ms. Burns are being and will be adversely affected by Defendants' actions complained of herein. Plaintiff lives in an area in which Defendants have allowed at least one field test of GE glyphosate resistant creeping bentgrass to proceed subsequent to the date of filing of Plaintiff CTA/CFS' Noxious Weed Petition. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures that Ms. Beck will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. Plaintiff regularly enjoys the use of her non-GE lawn. The aesthetic and recreational enjoyment of this lawn are now at imminent risk from genetic pollution of GE grasses being grown in the area at field test sites allowed by Defendants.

14. Additionally, Plaintiff regularly enjoys the Richmond area's nature preserves and parks. Defendants' actions improperly regulating GE glyphosate resistant creeping bentgrass poses a direct threat to Plaintiff Beck's continued aesthetic enjoyment and recreational use of these areas and habitats. Her enjoyment of native plants and habitats is at imminent risks of genetic pollution from, and invasion by, non-native, GE glyphosate resistant grasses and the weedy relatives with which these GE grasses can hybridize.

15. Defendants' actions also have caused Plaintiff Beck to have a reasonably foreseeable risk of increased exposure to excessive use and misuse of glyphosate and other herbicides in areas nearby to her, and suffering health effects resulting from such increased exposure. The ongoing field test(s), the escape of these GE grasses from such test plots, the hybridization of such grasses with weedy relatives, and the imminent commercialization of these GE glyphosate tolerant grasses combine to create conditions under which the use of these herbicides will significantly increase. This use increase

and the accompanying reasonably foreseeable exposure concerns applies not just to her as a person, but also to the organic garden Plaintiff maintains in her back yard. Plaintiffs' garden would be rendered non-organic and potentially hazardous should increased use of glyphosate and other damaging herbicides occur in the surrounding area. Moreover, Defendants' actions in improperly allowing the environmental release of GE glyphosate resistant creeping bentgrass in Virginia will make it more difficult for Plaintiff Beck to remove this weedy grass (and the weedy relatives with which it readily hybridizes) from unwanted locations on her property and will require more environmentally damaging techniques. As such, Plaintiff Beck is also concerned that the mitigation of these impacts will cause her economic injuries in the form of reduced property values and out-of-pocket expenses.

16. Plaintiff Heather Burns resides at 4 Millstone Road, in Richmond, Virginia. The interests of Ms. Burns are being and will be adversely affected by Defendants' actions complained of herein. Plaintiff is a member of the Center for Food Safety. Plaintiff lives in an area in which Defendants have allowed at least one field test of GE glyphosate resistant creeping bentgrass to proceed subsequent to the date of filing of Plaintiff CTA/CFS' Noxious Weed Petition. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures that Ms. Burns is, and will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. Plaintiff regularly enjoys the use of her non-GE lawn and other commonly owned open space at the condominium where she resides. Her aesthetic and recreational enjoyment of this lawn is now at imminent risk from genetic pollution of GE grasses being grown in the area at field test sites allowed by Defendants.

17. Plaintiff regularly enjoys the Richmond area's nature preserves and parks. Defendants' actions improperly regulating GE glyphosate resistant creeping bentgrass pose an imminent and direct

threat to Plaintiff Burns' continued aesthetic enjoyment and recreational use of these areas and habitats. Her enjoyment of native plants and habitats is at imminent risks of genetic pollution from, and invasion by, non-native, GE glyphosate resistant grasses and the weedy relatives with which these GE grasses can hybridize.

18. Defendants' actions also have caused Plaintiff Burns to have a reasonably foreseeable risk of increased exposure to excessive use and misuse of glyphosate and other herbicides in areas nearby to her, and suffering health effects resulting from such increased exposure. The ongoing field test(s), the escape of these GE grasses from such test plots, the hybridization of such grasses with weedy relatives, and the imminent commercialization of these GE glyphosate tolerant grasses combine to create conditions under which the use of these herbicides will significantly increase. Moreover, Defendants' actions in improperly allowing the environmental release of GE glyphosate resistant creeping bentgrass and/or Kentucky bluegrass in Virginia will make it more difficult for Plaintiff Burns' condominium association to remove these weedy grasses (and the weedy relatives with which they readily hybridize) from unwanted locations on jointly owned property and will require more environmentally damaging techniques. As such, Plaintiff Burns is also concerned that the mitigation of these impacts will cause her economic injuries in the form of reduced property values and out-of-pocket expenses.

19. Plaintiff Faith Campbell, resides, and owns land, at 8208 Dabney Ave., Springfield, VA 22152. Her interests are being, and will be, adversely affected by Defendants' actions complained of herein. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures Plaintiff Campbell is, and will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. Plaintiff resides in Virginia, a state in which Defendants have allowed at least

two field tests of GE glyphosate resistant turfgrasses to proceed and will imminently allow at least one more such field test. Defendants' actions in allowing the introduction of these GE glyphosate resistance turfgrasses into the environment also will imminently make it more difficult for Plaintiff to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations. Accordingly, Defendants' actions in Virginia adversely affect Plaintiff's use and enjoyment of her non-GE lawn and her ability to allow her horse to graze only on non-GE turfgrass.

20. Additionally, Plaintiff regularly enjoys, and occasionally rides her horse, in Virginia's recreational areas, such as nature preserves and parks (including those in and around Prince William county) where native species and human uses are threatened by non-native turfgrasses. The release, introduction and spread of these GE turfgrasses into the environment via field tests (and their imminent release via deregulation) injures Plaintiff when visiting recreational activities by interfering, *inter alia*, with their aesthetic enjoyment of native species and their use and enjoyment of parks, natural areas and other habitats with native grasses. Similarly, Plaintiff's recreational and physical enjoyment of natural and recreational areas is harmed as the introduction of these GE glyphosate resistance turfgrasses make it more difficult for stewards of such natural and recreational areas to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations. Such removal efforts require more environmentally damaging techniques such as excessive use and misuse of glyphosate and other herbicides, and as a result Plaintiff and her horse are at greater risk of suffering health effects from such herbicide use.

21. Plaintiff Joe Katroschik resides at 706 NW Herriman Street, Bend, Oregon 97701. The interests of Mr. Katroschik are being and will be adversely affected by Defendants' actions complained of herein. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, ensures

that CFS members are, and will be, aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. Plaintiff lives in an area in which Defendants have allowed at least one large field test, up to 600 acres, of GE, glyphosate resistant creeping bentgrass to proceed. At home, Plaintiff Katroschik regularly enjoys the use of his non-GE lawn. The aesthetic and recreational enjoyment of this lawn are now at imminent risk from genetic pollution of GE grasses being grown in the area at field test sites allowed by Defendants.

22. Plaintiff also regularly walks, hikes and uses Oregon's nature preserves and parks including those in the Bend and Madras, OR areas. Defendants' actions of improperly regulating GE glyphosate resistant creeping bentgrass poses direct and imminent threats to Plaintiff Katroschik's continued aesthetic enjoyment and recreational use of these areas and habitats. Plaintiff regularly enjoys viewing native plants and habitats that are threatened due to the imminent risk of genetic pollution from, and invasion by, non-native, GE glyphosate resistant grasses and the weedy relatives with which these GE grasses can hybridize.

23. Defendants' actions also have caused Plaintiff Katroschik to have a reasonably foreseeable concern of increased exposure to excessive use and misuse of glyphosate and other herbicides, and suffering health effects resulting from such increased exposure. The ongoing field test(s), including the large Oregon field test site, the escape of these GE grasses from such test plots, the hybridization of such grasses with weedy relatives, and the imminent commercialization of these GE glyphosate tolerant grasses combine to create conditions under which the use of these herbicides will significantly increase.

24. Plaintiff Klamath Siskiyou Wildlands Center (KS Wild) is located at 84 4th St., Ashland, OR, 97520. KS Wild is committed to conserving the outstanding natural biodiversity in Oregon through education, outreach and litigation. KS Wild is a non-profit organization with members throughout Oregon, including members who live and/or recreate near locations (on information and

belief) where GE turfgrasses are being field tested.

25. The interests of KS Wild and its members are being, and will be, adversely affected by Defendants' actions complained of herein. Defendants' actions allowing the release of GE turfgrass varieties into the environment via field tests, and the imminent commercial release via an approved petition for deregulated status, will result in KS Wild members being aesthetically, physically and recreationally injured by the spread of these turfgrass varieties. In particular, KS Wild members enjoy recreating in natural areas and public lands that are threatened by non-native GE turfgrasses.

26. The release, introduction and spread of these GE turfgrasses into the environment via field tests (and their imminent release via deregulation) injures KS Wild members when visiting recreational activities by interfering, inter alia, with their aesthetic enjoyment of native species and their use and enjoyment of parks, natural areas and other habitats with native grasses. Similarly, KS Wild members' recreational and physical enjoyment of natural and recreational areas is injured as the introduction of these GE glyphosate resistance turfgrasses make it more difficult for stewards of such natural and recreational areas to remove these weedy grasses, and weedy relatives with which they readily hybridize, from unwanted locations. Such removal activities will require more environmentally damaging techniques such as excessive use and misuse of glyphosate and other herbicides, and as a result KS Wild members may be at a greater risk of suffering health effects from increased herbicide use.

27. Plaintiff Claire Watkins resides at 1616 Monument Avenue, #1, Richmond, Virginia 23220. The interests of Ms. Watkins are being and will be adversely affected by Defendants' actions complained of herein. Plaintiff lives in an area in which Defendants have allowed at least one field test of GE glyphosate resistant creeping bentgrass and/or Kentucky bluegrass to proceed subsequent to the date of filing of Plaintiff CTA/CFS' Noxious Weed Petition. Plaintiff regularly enjoys the use of the non-GE lawn and other open space at the apartment building she resides. The aesthetic and

recreational enjoyment of this lawn are now at imminent risk from genetic pollution of GE grasses being grown in the area at field test sites allowed by Defendants.

28. Plaintiff regularly enjoys the Richmond area's nature preserves and parks. Defendants' actions improperly regulating GE glyphosate resistant creeping bentgrass and Kentucky bluegrass pose an imminent and direct threat to Plaintiff Watkins' continued aesthetic enjoyment and recreational use of these areas and habitats. Her enjoyment of native plants and habitats is at imminent risks of genetic pollution from, and invasion by, non-native, GE glyphosate resistant grasses and the weedy relatives with which these GE grasses can hybridize.

29. Defendants' actions also have caused Plaintiff Watkins to have a reasonably foreseeable risk of increased exposure to excessive use and misuse of glyphosate and other herbicides in areas nearby to her, and suffering health effects resulting from such increased exposure. The ongoing field test(s), the escape of these GE grasses from such test plots, the hybridization of such grasses with weedy relatives, and the imminent commercialization of these GE glyphosate tolerant grasses combine to create conditions under which the use of these herbicides will significantly increase.

30. Defendant Ann Veneman is sued in her official capacity as Secretary of the USDA, with her principal place of business located at Room 200-A, Admin. Bldg., 14th St & Independence Ave. S.W., Washington, DC 20259. As Secretary, Defendant Veneman has the ultimate responsibility for the activities of the USDA, including those actions complained of herein.

31. Defendant Bobby Acord is sued in his official capacity as Administrator of the Animal Plant Health Inspection Service (APHIS), with his principal place of business located at Room 312 East, 14th & Independence Ave. S.W., Washington, DC 20259. As Administrator of APHIS, Defendant Acord is delegated the responsibility for activities of the USDA APHIS, including those actions complained herein.

32. Defendant Alan Tasker, is sued in his official capacity as Noxious Weed Program Manager of USDA APHIS, with his principal place of business located at 4700 River Road Riverdale, MD 20737. As Noxious Weed Program Manager of USDA APHIS, Defendant Tasker is delegated the responsibility to take certain actions of the USDA APHIS, including those complained of herein.

STATEMENT OF FACTS

33. Turfgrasses are perennial plants generally planted as permanent ground cover. These common plants are wind pollinated (their pollen is light and blows easily) and readily outcross with other grass species. Some grasses, such as creeping bentgrass, also spread vegetatively by rhizomes and stolons. They are ubiquitous in and near almost every type of habitat in the United States including approximately 40 million lawns, 40,000 athletic facilities and 17,000 golf courses. The turfgrass seed market is the second largest seed market in the United States with sales estimated between \$580 million and \$1.2 billion annually.

34. The turfgrass varieties creeping bentgrass and Kentucky bluegrass are on several expert-developed lists of non-native weeds. These turfgrass varieties already cause problems because of their invasiveness in at least 20 distinct habitat types across the country. Glyphosate is one of the most common herbicides and it is considered by many people to be one of the most useful and least environmentally damaging products to control the spread of these varieties, especially where they occur in environmentally sensitive areas. The loss of glyphosate as an effective tool for removing creeping bentgrass and Kentucky bluegrass will allow specific types of these turfgrasses to spread into numerous sensitive habitats and unwanted locations.

35. Researchers and companies have begun to develop and to test genetically engineered (GE) varieties of non-native creeping bentgrass and non-native Kentucky bluegrass that are engineered to be resistant to applications of the herbicide glyphosate (the herbicide commercially sold under the

trade name Roundup). As GE plant varieties, these novel turfgrasses are subject to certain regulatory requirements under the PPA prior to their open-field testing.

36. Under the Defendants' implementation of the PPA, the field testing of GE grass varieties are subject to meeting performance standards. These performance standards do not fully prevent the escape of pollen and seeds from these GE turfgrass varieties from existing test plots. Defendants' website contains guidance documents concerning meeting and developing performance standards to minimize, but not wholly prevent, the likelihood of pollination and successful fertilization of plants outside the test site with the tested GE traits. Defendants direct those field testing crops such as GE grasses to consult with entities such as the Association of Official Seed Certifying Agencies (AOSCA) to use existing minimum plant isolation requirements for maintaining seed purity standards as basis for developing GE test site protocols that meet Defendants' performance standards. However, reliance on AOSCA-based performance standards for GE creeping bentgrass and Kentucky bluegrass field tests does not, and will not, prevent these non-native grasses from escaping beyond test sites into the environment. Recent scientific data shows that pollen from GE creeping bentgrass can travel and be viable for distance beyond AOSCA's isolation requirements for grasses and can successfully compete with non-genetically engineered pollen in hybridizing (hence transferring its genetically engineered trait) with nearby grasses. Other avenues for GE seeds and pollen to move outside of field test readily exist including but not limited to the distribution of GE grass seed into the environment from improperly cleaned equipment used on the GE grass test plots, via transport on the clothing of those working at such field test sites and even via animals that have entered and left the test plots.

37. Violations of existing performance standards have occurred regularly during the field tests of GE crops under Defendants' oversight. The White House Council on Environmental Quality and the Office of Science Technology Policy reported that from 1995 through 2000 that Defendants

had recorded a total of 63 compliance infractions. In 2002, the National Research Council released a report entitled “Environmental Effects of Transgenic Plants” that found, inter alia, a number of inadequacies in Defendants’ regulatory oversight concerning the field testing of GE crops. The report pointed out that only a subset of all field test sites under Defendants’ notification regulations are inspected annually. Additionally, the report’s findings include that there have been several instances in which GE crop producers have used the notification field testing system to produce commercial products absent specific approval via granted petitions for deregulated status.

38. Furthermore, past experiences with GE crops have shown that Defendants’ regulatory oversight of field test sites and the absence of an approved petition for deregulated status do not prevent the escape of GE crops and traits into the environment and commercial channels. For example, in 2002 USDA was forced to approve the petitions for deregulated status of several varieties of GE canola because these varieties had already inadvertently contaminated the United States canola seed market and were already in commercial channels.

39. Since 1998, Defendants have allowed various applicants to plant at least 2,000 acres of GE glyphosate resistant creeping bentgrass in 58 field tests across 32 States and at least 500 acres of GE glyphosate resistant Kentucky bluegrass in 12 field tests across 6 States. These field tests are continuing and have been allowed by Defendants to increase in number and scope. Since the filing of Plaintiffs’ Noxious Weed Petition with Defendants on July 26, 2002, at least 28 further field tests for glyphosate resistant GE creeping bentgrass have been formally acknowledged and allowed by Defendants across the country, in at least 15 States, covering more than 100 acres.

40. Recently, under permit number 02-198-01n, and a pending extension as permit number 03-181-02n, approximately 400 non-contiguous acres of this bentgrass have been planted and are growing near Madras, OR. This field test plot has been described as one of the most controversial

pieces of agricultural ground in the country. The size of this field test is such that experts in the field have concluded that it will be able to produce seed in quantities sufficient to support commercial release. Its existence makes commercialization imminent and foreseeable. Recent press reports indicate that the first harvest of seed from this test plot could take place by the end of August, and that such seed would be used for commercial sale.

41. The companies Monsanto and Scotts have also applied to the Defendants to deregulate glyphosate tolerant creeping bentgrass so that it may be widely distributed through commercial channels. The companies originally filed a petition for deregulation in May of 2002. This petition was withdrawn in October of 2002 so that the companies could cure deficiencies in the petition. A new petition was filed by Monsanto on April 14, 2003, and it is currently pending with the agency. To date, the Defendants have never denied the approval of a completed petition for deregulated status for any genetically engineered crop. Given this agency track record and the past procedural efforts allowing Monsanto and Scotts to cure deficiencies in its past GE creeping bentgrass petition efforts, the approval of the GE creeping bentgrass petition for deregulation allowing widespread commercial use is imminent.

42. Sound science, based on evidence provided by weed experts, indicates that GE glyphosate resistant creeping bentgrass and Kentucky bluegrass varieties qualify as noxious weeds under the PPA and under Defendants' own criteria set forth in Defendants' "Weed-Initiated Pest Risk Assessment Guidelines for Qualitative Assessments." Sound science shows that glyphosate resistant creeping bentgrass receives the highest score in almost every risk category in those guidelines and glyphosate resistant Kentucky bluegrass is close behind. Glyphosate resistance will make these species more difficult and costly to remove where unwanted, especially in environmentally sensitive areas, and they, and the related species with which they can readily hybridize, will become demonstrably worse weeds across countless landscapes.

43. With these concerns in mind, on July 26, 2002, Plaintiffs filed a scientifically supported legal petition with the Defendants, which included a noxious weed listing petition submitted pursuant to the PPA, 7 U.S.C. § 7712(f)(2), pursuant to the APA, 5 U.S.C. § 553(e), and pursuant to USDA's own regulation, 7 C.F.R. § 1.28. The Noxious Weed Petition requested, *inter alia*, that the Defendants list GE glyphosate resistant creeping bentgrass and GE glyphosate resistant Kentucky bluegrass as designated noxious weeds on the Federal Noxious Weed List found at 7 C.F.R. § 360.200. If designated as noxious weeds, the Defendants can prohibit or restrict the movement to prevent introduction into the United States and their use in interstate commerce.

44. Defendants acknowledged receipt of, and briefly responded to, the Plaintiffs' Noxious Weed Petition by way of a letter dated September 18, 2002, from Defendant Tasker, APHIS's Noxious Weed Coordinator, the official designated by the Secretary as preliminarily responsible for such petitions. The letter stated the agency refused to consider the Plaintiffs' Noxious Weed Petition because the turfgrass varieties were GE. Upon receiving Dr. Tasker's letter, Plaintiffs sought a reversal of the Defendants' refusal to consider the Noxious Weed Petition by letter to Defendant Acord, copied to the other Defendants, sent on October 3, 2002. Plaintiffs received no response to this letter.

45. On October 18, 2002, Plaintiffs sent a letter requesting a personal meeting with Defendant Acord, with copies of the letter to the other Defendants, to address this matter, but again received no response. As a result, Plaintiffs filed the original Complaint in this action on January 8, 2003, seeking, *inter alia*, to compel Defendants to respond to the Noxious Weed Listing Petition. Defendants offered no response until April 7, 2003, during the required pretrial meeting of counsel to discuss scheduling for the case. By letter of that date, Defendants agreed to provide a response to the Noxious Weed Petition on its merits. By way of a letter dated May 13, 2003, and accompanying documents, Defendants denied Plaintiffs' Noxious Weed Petition.

46. Defendants' denial did not respond to any of the more than 16 documents and other references in Plaintiffs' initial and supplemental submissions in support of their Noxious Weed Petition. Further, in denying Plaintiffs' petition the Defendants failed to respond to scientific information submitted by outside experts and failed to fully consider the record before them. Defendants' response also did not contain or refer to any scientific information in support of their denial, other than their unsupported assertion that engineering of known weeds to make them resistant to the leading weedkiller does not make them potentially worse weeds. The rest of Defendants' response relies not on the plain terms of the PPA weed provisions, but on international trade laws that are irrelevant because the GE turfgrass varieties complained of are of U.S. origin, are being planted in the United States now, and are not being proposed for import into the United States.

47. The GE turfgrass varieties complained of herein are being developed directly for the vast consumer and commercial markets. The Defendants' imminent decision to allow these varieties to be planted out as seeds, plugs and turf rolls on public and private land of every conceivable kind, will make it impossible to recall them; they will represent a unique man-made form of biological pollution. The impacts will include out competing and genetically contaminating both native vegetation and other non-native lawn grasses; increasing overall glyphosate use, misuse, and related impacts; increasing glyphosate resistance in other related weeds; and a broad array of other significant direct and indirect environmental and economic impacts.

48. Defendants' statutory and regulatory duties under NEPA and the PPA are to ensure that the risks of these GE varieties are fully assessed and minimized or avoided outright, using the full range of regulatory authority available to them. Defendants' failure to fully and adequately utilize their noxious weed regulatory authority based on sound science is arbitrary, capricious, an abuse of discretion, and contrary to the PPA. Further, Defendants' failure to adequately consider the weediness of GE

glyphosate resistant bentgrass and Kentucky bluegrass during its PPA and NEPA reviews undertaken prior to the approval of all open-field testing of these varieties, particularly subsequent to the filing of Plaintiffs' Noxious Weed Petition, is arbitrary, capricious, and an abuse of agency discretion.

CAUSES OF ACTION

COUNT I - NOXIOUS WEED PROVISIONS OF THE PLANT PROTECTION ACT

49. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 48 *supra*.

50. The PPA, 7 U.S.C. § 7712(f)(2), provides that any person, defined broadly, may petition Defendant Veneman to add plants to the list of Federally-regulated noxious weeds. Section 7712(f)(3), requires that Defendant Veneman “*act on the petition within a reasonable time and notify the petitioner of the final action the Secretary takes on the petition. The Secretary's determination on the petition shall be based on sound science.*”

51. Defendants have failed to respond to the scientific evidence submitted in support of Plaintiffs' Noxious Weed Petition for GE glyphosate resistant creeping bentgrass and Kentucky bluegrass, or to any of the evidence submitted by outside experts, and failed to provide a determination on the Petition based on sound science that is supported by the administrative record. Defendants' actions violate 7 U.S.C. § 7712(f)(3).

52. In light of the foregoing, Defendants have violated the noxious weed listing provisions of the PPA and abrogated Plaintiffs' rights thereunder, and their actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and without observance of the procedures required by law, in violation of the APA.

COUNT TWO - PLANT PEST PROVISIONS OF THE PLANT PROTECTION ACT

53. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 52, *supra*.

54. Under regulations implemented by the Defendants, 7 C.F.R. Part 340, certain GE plant varieties are defined as “regulated articles.” GE glyphosate resistant creeping bentgrass and Kentucky bluegrass are treated by Defendants as such regulated articles.

55. Prior to introduction into the environment in field tests, as regulated articles GE glyphosate resistant creeping bentgrass and Kentucky bluegrass must go through either a permitting or notification review for each such field test. Pursuant to 7 C.F.R. § 340.3(b)(1), when being considered for release in a field test, the Defendants must determine whether these novel plant varieties are noxious weeds and whether they may become weeds in the area of release into the environment.

56. Subsequent to the filing with Defendants of Plaintiffs’ Noxious Weed Petition on July 26, 2002, the Defendants’ have continued to ignore the scientific evidence in the Petition. Defendants have continually failed to fully and accurately determine the noxious weed status and weediness risks of GE glyphosate resistant creeping bentgrass and Kentucky bluegrass prior to allowing their release into the environment in numerous ongoing field tests across the country in violation of the requirements of 7 C.F.R. § 340.3(b)(1).

57. In light of the foregoing, Defendants’ actions in assessing each and every GE glyphosate resistant creeping bentgrass and Kentucky bluegrass field trial notification since July 26, 2002, fail to comply with USDA’s own regulations for field tests and is in violation of the PPA. Such agency actions is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and without observance of the procedures required by law, in violation of the APA.

COUNT THREE - NATIONAL ENVIRONMENTAL POLICY ACT

58. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 57 *supra*.

59. Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C.

§4332(2)(C), requires each federal agency to prepare an environmental impact statement (EIS) with respect to each major action of such agency that may significantly affect the quality of the human environment.

60. Defendants' regulations implementing NEPA, 7 C.F.R. Parts 1b and 372, require that the agency undertake a formal EIS or an environmental assessment (EA) for actions involving the introduction of GE and non-native species.

61. Subsequent to the filing of Plaintiffs' Noxious Weed Petition on July 26, 2002, Defendants have improperly allowed at least 28 field tests across the country using GE glyphosate resistant creeping bentgrass and Kentucky bluegrass to proceed under NEPA categorical exclusions. These new plant products are non-native weeds which pose potentially significant environmental impacts. Defendants have failed to prepare any EIS or EA for the approval of any of these field tests. The Defendants' actions violate section 102(2)(C) of NEPA and the implementing regulations promulgated by USDA and by the Council on Environmental Quality, at 40 C.F.R. § 1500 *et seq.*

62. In light of the foregoing, Defendants have violated NEPA and the implementing regulations by not preparing an adequate EA or EIS for each and everyone of the at least 28 field tests and such actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and without observance of procedures required by law, in violation of the APA.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request this Court to,

(1). Pursuant to Count One:

(A). Declare that Defendants' actions in refusing to adequately consider the scientific evidence submitted in support of Plaintiffs' Noxious Weed Petition, and to the evidence submitted by outside experts, and to respond to it based on sound science, and in denying the Noxious Weed

Petition, are arbitrary, capricious, an abuse of discretion, and not in accordance with law and a violation of the Plant Protection Act and the Administrative Procedure Act;

(B). Order the Defendants to classify “genetically engineered glyphosate resistant creeping bentgrass” and “genetically engineered glyphosate resistant Kentucky bluegrass” as noxious weeds under the Plant Protection Act and its implementing regulations;

(2). Pursuant to Count Two:

(A). Declare that Defendants’ actions in failing to consider and accurately determine the weed status and weed risks posed by all of the field tests for GE glyphosate resistant creeping bentgrass and Kentucky bluegrass acknowledged and allowed by Defendants from July 26, 2002, until the date of the entrance of the Court’s Order, are a violation of the Plant Protection Act and the implementing regulations issued thereunder and are arbitrary, capricious, an abuse of discretion, and not in accordance with the law;

(B). Enjoin the Defendants from allowing any further proposed field tests of GE glyphosate resistant creeping bentgrass and Kentucky bluegrass until Defendants have otherwise complied with the law and with the Court’s decree;

(3). Pursuant to Count Three:

(A). Declare that Defendants’ actions in allowing categorical exclusions and failing to adequately assess the environmental impacts posed by each and everyone of the field tests for GE glyphosate resistant creeping bentgrass and Kentucky bluegrass allowed by Defendants, from July 26, 2002, until the date of the entrance of the Court’s Order violate the National Environmental Policy Act and the implementing regulations issued thereunder and are arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(B) Enjoin Defendants from allowing any further field tests pursuant to categorical

exclusions under the National Environmental Policy Act for GE glyphosate resistant creeping bentgrass and GE glyphosate resistant Kentucky bluegrass;

- (4). Retain jurisdiction of this action to ensure compliance with its decree;
- (5). Award Plaintiffs' attorney's fees and other reasonable expenses occurred in this action; *and*
- (6) Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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DATED: August 6, 2003.