



660 PENNSYLVANIA AVE., SE , SUITE 302, WASHINGTON, DC 20003
(202) 547-9359 • FAX (202) 547-9429
1009 GENERAL KENNEDY AVE., #2 SAN FRANCISCO, CA 94129
(415) 561-2524 • FAX (415) 561-7651
WWW.CENTERFORFOODSAFETY.ORG

Testimony of Joseph Mendelson III
Legal Director
Center for Food Safety

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Before a Joint Hearing of the Vermont House
Agriculture and Judiciary Committees
1 p.m. EST, February 5, 2005

Good morning [afternoon]. My name is Joseph Mendelson. I am legal director for the Center for Food Safety. The Center for Food Safety is a national, non-profit organization that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. Our organization is supported by members from across the country, including individuals in Vermont. I thank you for the invitation to speak before you today and the Center for Food Safety is please to lend its support to passage of [S. 18] the Farmer Protection Act.

The Farmer Protection Act proactively addresses two concerns associated with the use of genetically engineered crops in Vermont. First, it seeks to address the impacts to Vermont's agricultural resources caused by the uncontrollable spread of genetically engineered crops and traits into agricultural lands and markets where it is not wanted and causes economic injury. Second, the legislation rectifies the inequitable shifting of the liability by the manufacturers of the technology onto Vermont farmers who have purchased the technology and used it on their farmers.

The threat of contamination of Vermont's environment from these crops is not theoretical. A small sampling of recent reports and occurrences from across the country indicate that the contamination is almost certainly occurring already.

- In 2001, while only 1% of Iowa corn fields were sown with StarLink, a genetically engineered corn variety unapproved for human consumption, half the state's harvests showed at least a trace of StarLink contamination. This contamination resulted in one of the largest food recalls in the U.S., and over a hundred million dollars lost to farmers (Associated Press, February 2003).
- In 2002, a pharmaceutical-producing corn, developed by Prodigene, and grown in plots in Nebraska in 2001, was found to have contaminated soybeans grown on the same ground a year later. The USDA ordered the destruction of 500,000 bushels of soybeans destined for human consumption.
- In 2003, an organization in Vermont documented the presence of genetic material from a genetically engineered variety of corn in the corn of an organic farmer.
- In a 2004 study, the Union of Concerned Scientists analyzed samples of six conventional varieties each of corn, soybeans and canola for the presence of DNA sequences originating in genetically engineered varieties. The results for that 50% of the corn, 50% of the soybeans, and between 83 and 100% of canola seed was contaminated. (UCS, "Gone to Seed," 2004)

These selected events (and there are many more), confirm what both the federal government and the manufacturers of genetically engineered crops now readily acknowledge - that the spread of these crops is inevitable and inherent in the nature of seeds and plants. Late in 2004, the Food and Drug Administration issued guidelines designed to address the issue of contamination caused by genetically engineered crops that were in research stating:

As the number and diversity of field tests for bioengineered plants increase, the likelihood that cross-pollination due to pollen drift from field tests to commercial fields and co-mingling of seeds produced during field tests with commercial seeds or grain may also increase. 69 Fed. Reg. 68381 (Nov. 24, 2004)

Similarly, one manufacturer, Monsanto, admits that pollen-flow is inevitable. In its 2005 Technology Agreement, the company states, "Since corn is a naturally cross-pollinated crop, a minimal amount of pollen movement...between neighboring fields is well known and is a normal occurrence in corn seed or grain production." Monsanto Co., *2005 Technology Use Guide*, at 17.

Clearly, contamination of non-genetically engineered varieties by pollen from genetically engineered crops or other means is virtually unavoidable in Vermont today.

Just as the issue of contamination is not theoretical, the economic injuries caused by genetically engineered crop pollution are real. For example:

- The American Farm Bureau estimates that U.S. farmers have lost \$300 million per year due to lost European markets for genetically engineered corn. *See U.S. vs. EU: An Examination of the Trade Issues Surrounding Genetically Modified Food*, Pew Initiative on Food And Biotechnology (August 2003).
- Even whole commodity markets are at risk. A University of Iowa economist predicts a 30 to 50% loss in U.S. wheat export markets if genetically engineered wheat is introduced in the U.S. because of the threat it will contaminate the entire U.S. wheat supply. *See Market Risks of Genetically Modified Wheat*, Robert Wisner (2003).

Maybe more important though are the individuals and small businesses that suffer the injuries caused by this contamination

- In 1998, Terra Prima, Inc., a Wisconsin manufacturer of organic tortilla chips had to pull 87,000 units of tortilla chips from the European market after testing revealed that its product was contaminated with a genetically engineered corn variety. Because of testing costs, lost sales and other expenses the direct loss was over \$147,000 and totaled 15% of their yearly sales.
- In 2001, Tom Wiley, a conventional soybean farmer from near Montpelier, ND, was growing soybeans under a contract for use in Japan as soy sauce. Three weeks before delivery date a sample from his field tested positive for genetically engineered content. As a result, the contract was voided and he lost \$6,000.

Make no mistake, the issue of contamination is real and so are the losses, the remaining question before you today is how can you protect the farmers of Vermont from suffering the losses of a Terra Prima, Tom Wiley or the other farmers that contact our office on a regular basis.

It is important to note that Terra Prima and Tom Wiley didn't know where to seek recovery for their losses. Currently, the state of the law is unclear as to whether a contaminated farmer could recover under common law theories such as nuisance, trespass or strict liability. Beyond even finding a valid legal theory, there remains the question from whom should contaminated farmer seek to recover their

losses. Contracts by manufacturers of genetically engineered seed attempt to shift all liability burdens onto the contracting purchaser of the genetically engineered seed even if the farmer does not use such seed in a negligent manner. As a result, despite acknowledgment by the federal government and the manufacturers that genetically seeds and crops by their design and biological functions will contaminate farms that do not want to use the technology and cause injury. At best the current system sets up a scenario where farmer are forced to sue a neighboring farmer to recoup losses and with the vague hope that after several years of litigation a court may determine that one common law theory is useable. The Center for Food Safety believes that leaving this status quo is bad policy and harmful to farmers across the state of Vermont. The Farmer Protection Act represents a well thought out codification of a cause of action that will address the contamination issue.

More specifically, the Farmer Protection Act would provide for at least six important things:

1. Codifies a defined cause of action so that farmers that are contaminated are assured of a legal means to pursue genetically engineered seed manufacturers for injuries that include economic loss.
2. Prevent the genetically engineered seed manufacturer from using their inequitable bargaining power to shift all liability for contamination onto genetically engineered seed purchasers through contracts.
3. Shields a contaminated farmer from any liability for economic losses that may result for subsequent contamination originating from his or her farm.

4. Prevent the genetically engineered seed manufacturer from using the seeds inherent ability to contaminate as a weapon to sue contaminated farmers for patent infringement.
5. Ensures through an affirmative defense that manufacturers are not punitively punished for instances where contamination occurs because of a farmer's gross negligence.
6. Provides that any dispute arising from a seed contract executed in Vermont - genetically engineered or otherwise - is heard by Vermont courts under Vermont laws.

Obviously, this has been a very quick overview of the legislation and I'm sure you have additional and more detailed questions - which I'm happy to answer. In sum, the Center for Food Safety believes the Farmer Protection Act provides a viable means of addressing the injuries caused by contamination and appropriately adheres to the polluter pays principle by distributing the liability back to manufacturer that is responsible for the contamination.

Thank you.