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, et al, 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, et al, Defendants.	**Civil Action No.** 03-00020 (HHK)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 65, LCvR 65.1(c) and the Administrative Procedure Act, Plaintiffs International Center for Technology Assessment (CTA), Center for Food Safety (CFS), Jean Beck, Heather Burns, Faith Campbell, Joe Katroscik, Klamath Siskiyou Wildlands Center (KS Wild) and Claire Watkins hereby request the Court to issue a preliminary injunction enjoining the Defendants from authorizing or otherwise allowing any future field tests of genetically engineered glyphosate tolerant creeping bentgrass until resolution of the matters before the Court. Further, Defendants should be required to order termination of all such ongoing field tests in an orderly manner.

Pursuant to LCvR65.1(d), Plaintiffs request that the Court expedite consideration of this matter. As described in Plaintiffs' accompanying memorandum of points and authorities, the Environmental Protection Agency (EPA) recently documented the escape of genetically engineered glyphosate tolerant

creeping bentgrass from at least one field test site that is subject of this action. The glyphosate tolerant trait has escaped and become established in grasses resident in the environment over 12 miles away from this field test location. As a result, the spread of invasive, glyphosate tolerant weedy grasses is occurring and will increase unless the Court enjoins the Defendants. The spread of these glyphosate tolerant grasses will cause serious and irreparable impacts to Plaintiffs and to our national grasslands, national forests and other ecosystems. Delay in addressing this matter will allow these environmental injuries to continue unabated when it is essential that they be stopped.

Thus, under LCvR 65.1(c), Plaintiffs respectfully request that the Court expedite this matter by either deciding this motion on the papers or holding a hearing on this matter within twenty days.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

DATED: October 5, 2004.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Introduction

In this lawsuit, filed January 8, 2003, Plaintiffs have challenged the Defendants' authorization of numerous field tests of non-native, genetically engineered, glyphosate tolerant creeping bentgrass without first requiring the completion of environmental assessments (EA) and/or environmental impact statements (EIS) as required under the National Environmental Policy Act (NEPA).[1] Pls.' 2nd Am. Compl. ¶¶ 58-62. Recent scientific discoveries concerning the impact

[1] Monsanto Co. and Scotts Co. want to commercialize this herbicide tolerant creeping bentgrass, a common turfgrass used for golf greens, which also is found in countless other lawns across the country. Specifically, their genetically engineered variety can tolerate glyphosate, the trade name of which is Roundup™. Roundup is the top-selling weedkiller in the country and a brand owned by Monsanto for which it has licensed the exclusive marketing rights to Scotts. Planting the

of these field tests on the surrounding environment necessitate the Court's immediate intervention in this matter.

On September 24, 2004, researchers from the Environmental Protection Agency (EPA) confirmed the escape of the genetically engineered, glyphosate tolerant creeping bentgrass (*Agrostis stolonifera*) from a test site that is the subject of this action. In a peer-reviewed paper published in the Proceedings of the National Academy of Sciences, EPA researchers released results of monitoring studies undertaken around a genetically engineered, glyphosate tolerant creeping bentgrass field test location in Central Oregon, near the town of Madras. See Decl. Mendelson, Ex. 1 (hereinafter "EPA study"). The EPA study documented that grass species up to twenty-one kilometers (12.6 miles) from the test site were pollinated by genetically engineered, glyphosate tolerant creeping bentgrass grown on the USDA-approved site and produced new seedlings that had acquired the engineered glyphosate tolerance trait. Id. The study also concluded that the distance of the glyphosate tolerance genetic trait escape from the field test site may be biased low because the sampling design of the tests was limited to twenty-one kilometers. Id. at 3. The study further found that the genetically engineered, glyphosate tolerant creeping bentgrass had hybridized with resident and invasive grass species other than creeping bentgrass such as a widely distributed, invasive grass known as redtop (*Agrostis gigantea*). Id. at 3; see also, Decl. Wilson ¶ 2; Decl. Gurian-Sherman ¶¶ 5-6. Finally, the study asserted that the creation of new hybrid, glyphosate tolerant grass species in the environment caused by the gene escape from the field test cite may create significant weed problems in areas where weed control or land restoration efforts are being practiced. Id. at 5.

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new engineered variety would allow users to spray Roundup all over their lawns to kill weeds without killing the grass itself, eliminating the need for spot spraying or hand-pulling of weeds. If commercialized, it would be the first-ever genetically engineered plant intended for use by property managers and eventually by homeowners, and would be sold nationwide.

Publication of the EPA study confirms the imminent hazard and irreparable injury to the environment and Plaintiffs posed by Defendants' allowance of ongoing open air, genetically engineered, glyphosate tolerant creeping bentgrass field tests. Invasive grasses such as creeping bentgrass and redtop pose a direct threat to native grasslands and other ecosystems by reducing the ability of these habitats' native plants to reproduce and prosper. Decl. Wilson ¶ 2; see also Decl. Mendelson, Ex. 2, 3, 5-8. As these plants acquire the ability to resist glyphosate applications, the ability to control and reduce the spread of these invasive species is seriously harmed and they will spread and damage numerous sensitive ecosystems. Decl. Wilson ¶ 2. Plaintiffs now request the Court to prevent this from happening.

The escape of the glyphosate tolerance gene from genetically engineered, creeping bentgrass test sites confirms warnings placed before the Defendants for a number of years. On July 26, 2002, Plaintiffs CTA and CFS filed an administrative petition (Petition) with the agency seeking, *inter alia*, the listing of genetically engineered, glyphosate tolerant creeping bentgrass and Kentucky bluegrass as noxious weeds and the completion of an EIS prior to any decision concerning commercialization of these species.[2] Defs.' Mot. Summ. J., Ex. K. Evidence submitted to United States Department of Agriculture (USDA) supporting the Petition included material solicited by Defendants from The Nature Conservancy (TNC) in which that organization warned of the potential impact of genetically engineered, glyphosate tolerant creeping bentgrass escaping into the environment. In responding to

[2] Plaintiffs acknowledge that on September 24, 2004, the Defendants' agency the Animal and Plant Health Inspection Service (APHIS) announced its intent to prepare an EIS prior to the agency's decision concerning deregulation of genetically engineered glyphosate tolerant creeping bentgrass. 69 Fed. Reg. 57257 (Sept. 24, 2004). This USDA APHIS action would complete an EIS prior to the agency's decision on whether to allow commercialization of this product. In the case before the Court, Plaintiffs challenge the APHIS's failure to perform the required environmental review prior to authorizing numerous field tests of the product. Separate from the commercialization proposal, as described herein, these tests are continuing all across the country and the environmental impacts associated with these tests are ongoing. See Decl. Mendelson, Ex. 4.

the USDA's solicitation of material concerning the impacts of this novel grass, the TNC ecologist stated:

> I also hope that all field tests of herbicide resistant turfgrasses will be stopped immediately. Because of the great distances which pollen can be carried it is highly likely that the gene for herbicide resistance will inevitably escape into the environment, if it hasn't already. Defs.' Mot. Summ. J., Ex. K, Tab 2, Cover Letter.

The USDA has also been warned consistently about the environmental impacts associated with the escape of the glyphosate tolerance trait into existing grass species and the resulting spread of glyphosate tolerant hybrid grasses. Recently, the USDA solicited comments concerning the potential commercialization of genetically engineered creeping bentgrass. 69 Fed. Reg. 351 (Jan. 5, 2004). Both the United States Forest Service (USFS), another agency of the USDA, and the United States Department of the Interior, Bureau of Land Management (BLM) submitted unprecedented comments opposing commercialization of these grasses and described the potential problems should these glyphosate tolerant grasses get out into the environment. Specifically, the USFS stated:

> Our concern stems from the demonstrated ability (**per documents obtained from APHIS**) of [creeping bentgrass] to participate in long distance pollen exchange and the documented tendency of this particular species to form intra- and intergeneric hybrids. . . . The deregulation of this organism has the potential to adversely impact all 175 national forests and grasslands.

Decl. Mendelson, Ex. 2 (emphasis added). The Forest Service also discusses how the transfer of the glyphosate tolerance trait into endemic bentgrass populations would pose threats to the Agency's land and vegetation management goals and could harm rare plant species managed by the Agency. Id.

Similarly, the BLM stated that the acquisition of glyphosate tolerance traits in creeping bentgrass that was already present in the environment would pose significant new management problems including the hampering of its ability to restore riparian habitats. Id., at Ex. 3. The agency further warned that it had neither the management measures in place to control glyphosate tolerant

creeping bentgrass nor the budget to address this problem. Id.

While these agency comments were made in response to the possible commercialization of glyphosate tolerant creeping bentgrass, they represent stern warnings as to the impacts that will occur as a result of the glyphosate resistant trait escaping existing field test locations. As demonstrated in the EPA study, regardless of its commercial status, the field tests authorized by the USDA have allowed the glyphosate tolerance trait to escape and become established in grasses resident in the environment over twelve miles away from the field test location. As a result, the fears of the TNC, the USFS, and the BLM have been realized and the spread of glyphosate tolerant, invasive grasses is occurring and will continue to occur unless the Court enjoins Defendants' actions.

Despite the EPA's clear documentation that the glyphosate tolerance trait is escaping from genetically engineered creeping bentgrass field tests areas, spreading into surrounding plants and habitats, and will cause serious environmental impacts, the Defendants continue to allow and permit field tests for genetically engineered creeping bentgrass across the country without first performing the required environmental review to analyze these issues. Currently, the Defendants have allowed ongoing field tests of glyphosate tolerant creeping bentgrass on 1217.5 acres located in thirty-three states, including three 200-acre sites in the state of Idaho. Id., at Ex. 4. Plaintiffs now seek preliminary injunctive relief to enjoin all ongoing genetically engineered, glyphosate tolerant creeping bentgrass field tests from continuing and to prevent the Defendants from permitting or allowing any new creeping bentgrass field tests to begin until the Court has fully considered the merits of this case.

Status of Proceedings

On January 8, 2003, Plaintiffs filed their original Complaint in this matter. The action

challenged, *inter alia*, Defendants' failures to perform the written environmental reviews required pursuant to NEPA, 42 U.S.C. § 4321, et seq., on numerous field tests of genetically engineered, glyphosate tolerant grasses prior to allowing such grasses to be planted in open-air fields. The Complaint also challenged, *inter alia*, Defendants' refusal to answer Plaintiffs' administrative petition requesting the agency to list genetically engineered, glyphosate tolerant varieties of creeping bentgrass and Kentucky bluegrass as noxious weeds pursuant to the Plant Protection Act (PPA), 7 U.S.C. § 7701, et seq.

Subsequent to the filing of the original Complaint, on March 28, 2003, Defendants filed their Answer. EDD No. 9. The Court issued an Order for an Initial Scheduling Conference on March 31, 2003. EDD No. 10. Consistent with the meet and confer requirements of LCvR 16.3, on April 7, 2003, the parties discussed initial scheduling matters. During this discussion Defendants notified Plaintiffs of their intent to provide a substantive answer to Plaintiffs' Petition. EDD No. 11. On May 2, 2003, the Court held an initial scheduling hearing. See EDD No. 10. The end result of these procedural actions and the scheduling hearing was that Defendants provided Plaintiffs with a written denial of their administrative Petition, and, unopposed and with leave of the Court, Plaintiffs filed their First Amended Complaint. EDD No. 12, Attach. 1.

On July 11, 2003, Defendants filed their Motion to Dismiss Or, In the Alternative, For Summary Judgment (Mot. Summ. J.). EDD No. 17. On August 6, 2003, Plaintiffs moved for leave to file a Second Amended Complaint. EDD No. 18. At the same time, Plaintiffs separately filed a Motion to Compel the Defendants to File the Full Administrative Record. EDD No. 19. On October 22, 2003, the Court issued an order granting Plaintiffs leave to file their Second Amended Complaint. Plaintiffs' Second Amended Complaint challenged, *inter alia*, the Defendants' failure to perform the required NEPA analysis prior to allowing the 600-acre field test in Central Oregon that

is the subject of the recent EPA study. The Motion to Compel is still pending before the Court.

Plaintiffs now seek injunctive relief to halt the irreparable injuries being caused by Defendants' failure to analyze the environmental impacts associated with allowing these genetically engineered, glyphosate resistant creeping bentgrass field tests.

Argument

I. Plaintiffs Have Met The Requirements Needed For Injunctive Relief

A. Standard for Preliminary Injunction

In order to succeed on a motion for a preliminary injunction, Plaintiffs carry the burden of demonstrating (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that there will be no substantial injury to other interested parties, and (4) that the public interest would be served by the injunction.[3] Fund for Animals v. Norton, 281 F. Supp. 2d 209, 219 (D.D.C. 2003).

These four factors are not considered in isolation from one another, and no one factor is dispositive as to whether preliminary injunctive relief is warranted. Morgan Stanley DW Inc. v. Rothe, 150 F. Supp. 2d 67, 72 (D.D.C. 2001). Rather, the factors "interrelate on a sliding scale and must be balanced against each other." Id. Thus, a particularly strong showing on one factor may compensate for a weak showing on one or more of the other factors. Id.; see also, Nat'l Mining Ass'n v. Babbitt, 2001 U.S. Dist. LEXIS 25533 (2001).

For the following reasons, Plaintiffs have made the necessary showing in relation to one or

[3] "The D.C. Circuit has clearly held that court should not issue preliminary injunctions without a review of the entire administrative record to determine a plaintiff's likelihood of success on the merits." Fund for Animals v. Mainella, 2004 U.S. Dist. LEXIS 17724, *18 (quoting CollaGenex Pharms., Inc. v. Thompson, 2003 U.S. Dist. LEXIS 12523 (D.D.C. 2003)).

more of these factors and the Court should grant a preliminary injunction.

1. Unless the Field Tests Are Halted Plaintiffs Will Suffer Irreparable Harm

The party requesting an injunction must demonstrate that the alleged harm is "both certain and great; it must be actual and not theoretical." Nat'l Mining Ass'n, 2001 U.S. Dist. LEXIS 25533, at *6. Plaintiffs have shown that the harm caused by release of the glyphosate tolerance gene into native grass species is actually happening and that environmental injury will occur. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Production Co. v. Vill. of Gambell., 480 U.S. 531, 545 (1987); see also Humane Soc'y of the U.S. v. Clark, 1999 U.S. Dist. LEXIS 3686, at * 18 (D.D.C. 1999) (citing New Mexico v. Watkins, 969 F.2d 1122, 1137 (D.C. Cir. 1992)). Evidence now before the Court shows that environmental injury is occurring, that injury is likely to be permanent, and that it will negatively impact Plaintiffs.

As shown by the recent EPA study, the field tests under regulatory control of the Defendants are releasing pollen and other material from genetically engineered, glyphosate tolerant bentgrass into the environment at significant distances from the field test locations. See Decl. Mendelson, Ex 1. Moreover, this material is causing grass species in the wild to produce offspring grasses that contain the genetically engineered glyphosate tolerance trait. Id. This biological pollution is ongoing and the damage to numerous ecosystems that will result from the spread of glyphosate tolerant creeping bentgrass and other species is now irreparable. Once the genetic trait has been released into the environmental it is virtually impossible for any intervention to recall it or stop its spread into more plants. Decl. Gurian-Sherman ¶¶ 6-7. Numerous scientific authorities and

federal agencies have determined that once the glyphosate tolerance trait is out in the environment in certain grass species, as now confirmed by the EPA study, the impacts will be severe and unmanageable.[4] Decl. Wilson ¶¶ 2-5; see also, Decl. Mendelson, Ex. 3 (Comment of Gina Ramos, Senior Weed Specialist, BLM, stating that management of the glyphosate tolerance trait in bentgrass would be "extremely difficult, if not impossible" and that BLM has neither the management nor the budgetary capabilities to control glyphosate tolerant creeping bentgrass if it were to become established on public lands); Id., at Ex. 5 (Comment of Peter Warner, Associate State Park Resource Ecologist, California Department of Parks & Recreation, describing the inability of local and state agencies to manage the invasive, glyphosate tolerant creeping bentgrass and the impacts that will be caused by such grasses, like displacement of native species on coastal California grasslands); Id., at Ex. 6 (Comment of Dale T. Steele, Supervising Biologist, California Department of Fish and Game, opposing the introduction of glyphosate tolerant grasses and describing that it is a concern to restorationists and botanists working with native California plants); Id., at Ex. 7 (Comment of Toby Query, Botanist, City of Portland, stating that glyphosate tolerant creeping bentgrass will pose a difficult to manage plant pest risk to natural areas as well as to gardens and landscapes); Id., at Ex. 8 (Comment of Thomas K. Hodges, Professor Emeritus Purdue University, discussing the spread of

[4] Glyphosate tolerance will make creeping bentgrass - and the weedy relatives it outcrosses with - much more difficult to control, requiring the use of more toxic weedkillers than Roundup. This could prevent their control altogether in some places, such as in sensitive nature preserves that provide habitat for rare, State and Federally-listed endangered plant and animals. See Defs.' Mot. Summ. J., Ex. K, Tab 2 (TNC report documenting the occurrence of creeping bentgrass as an invasive weed in at least 18 distinct North American habitat types, i.e., boreal forest, riparian sedge, open canopy woodlands, shrublands, shrub-steppe, rare calcerous fens, rare native grasslands and prairies, moist meadows, swamps, coastal marshes, dunes, shorelines, swales, ditches, pastures, urban streets and vacant lots. TNC Preserve Managers and others state that glyphosate is a superior herbicide for creeping bentgrass and that no effective alternatives are available for sensitive wetland areas.); see also Mot. Summ. J., Ex. K at 8, n.21. (Monsanto's own promotional information has described bentgrass (*Agrostis Spp.*) as a weed that Roundup is formulated to control.)

glyphosate tolerant grasses as agricultural weeds).

In this case Plaintiffs are being harmed by the spread of these invasive, glyphosate tolerant grasses and their progeny. Such an injury is clearly irreparable. In Fund for Animals v. Clark, this Court granted a preliminary injunction based upon irreparable harm to plaintiffs caused by the defendants' failure to comply with NEPA and the aesthetic injury the individual plaintiffs would suffer from seeing or *even contemplating* bison being killed in an organized hunt. Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (emphasis added); See also Fund for Animals v. Norton, 281 F.Supp.. 2d 209, 221 (D.D.C. 2003)(noting several cases in which this Court found irreparable harm even though plaintiffs did not establish that the exact animals they regularly observed would be affected by the challenged agency action.). In this instance no contemplation of injury is needed. As the EPA study shows, Plaintiffs, forest managers, land restorationists, botanists, and others now confront the reality that the national grasslands, national forests, other natural areas, and even their own lawns will be negatively impacted by creeping bentgrass and other grass species that have acquired the glyphosate tolerance trait. See generally, Decl. Adams; Decl. Beck; Decl. Clery; Decl. Gledhill; Decl. Gurian-Sherman; Decl. Katroscik; Decl. Wilson. While the initial size and scope of these injuries may not appear large, the injuries are irreparable and will grow in nature as more of these grasses permanently acquire the glyphosate resistant trait, reproduce, and spread. Decl. Gurian-Sherman ¶ 9. "The question of irreparable injury does not focus on the significance of the injury, but rather, whether the injury, irrespective of its gravity is *irreparable* - that is whether there is any adequate remedy at law . . ." Sierra Club v. Martin, 933 F. Supp. 1559, 1570-71 (N.D. Ga. 1996) (cited in Fund for Animals v. Norton, 281 F. Supp. 2d 209, 221 (D.D.C. 2003)). Plaintiffs have shown that they are injured and that the injury results from Defendants' allowance of the release of genetic material into the environment that will be inherited prolifically and spread in a manner in

which no law or monetary relief can now adequately prevent.

When the Plaintiffs make a compelling showing of irreparable harm, as is the case here, it reduces their burden of persuasion with respect to other factors to be considered when adjudicating a motion for injunctive relief and the Court should first consider the harm that will arise absent such relief. Fund for Animals v. Norton, 281 F. Supp. 2d 209, 219 (D.D.C. 2003)(granting environmental plaintiffs injunctive relief based upon showing of irreparable harm). Absent preliminary relief, more field tests will occur creating more opportunities for the glyphosate tolerance trait to enter the environment and, ultimately, harm a wider range of ecosystems and more of Plaintiffs' members.

2. Plaintiffs Are Substantially Likely to Succeed on the Merits

A strong showing of likely success on the merits may warrant issuance of preliminary injunctive relief even if the plaintiff makes a less compelling showing on the other three factors. Morgan Stanley, 150 F. Supp. 2d at 72-73. Likewise, "a court may accept a modified showing of a 'substantial case on the merits,' where the other three factors strongly favor interim relief." Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C.Cir. 1977). As with their showing of irreparable harm, Plaintiffs can make a strong showing that they will succeed on the merits.

(A) Plaintiffs Have Standing

"The first component of the likelihood on the merits prong usually examines whether the plaintiff has standing in a given case." Id., at 74, n.3; See also, Born Free USA v. Norton, 278 F.Supp. 2d 5 (D.D.C. 2003). Plaintiffs in this case have clearly met the burden of standing.[5]

[5] If the Court finds that any one plaintiff has standing, then it need not decide whether any other plaintiff has standing. Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160

(1). Plaintiffs Satisfy the Constitutional Standing Requirements.

To satisfy Article III's standing requirements:

> First, the plaintiff must have suffered an 'injury in fact' --- an invasion of a legally protected interest which is (a) concrete and particularized; (b) 'actual or imminent', not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of --- the injury has to be fairly trace[able] to the challenged action of the defendant. . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Each of these requirements are met.

(a). Plaintiffs Are Threatened With An Imminent Injury.

Plaintiffs' aesthetic and recreational interests in enjoying the natural state and beauty of national grasslands, forests, nature preserves and other managed lands are directly and imminently threatened by the USDA's failure to review the environmental impacts associated with ongoing open air field tests of genetically engineered, glyphosate resistant creeping bentgrass. These and other unique ecosystems are immediately threatened by the ongoing escape of the glyphosate tolerance genetic traits into invasive grass species present in the environment. Numerous experts, including several federal agencies, agree that presence of invasive, glyphosate tolerant grasses poses significant threats to the environment. Decl. Wilson ¶¶ 2-4; Decl. Gurian-Sherman ¶¶ 6-10; Decl. Mendelson, Ex. 2, 3, 5-7. Plaintiffs regularly use and enjoy these imminently threatened natural areas.

For example, Declarants Adams, Clery and Katroscik visit natural areas in Central Oregon, such as the Crooked River National Grassland, Deschutes River, Ochoco Mountains and Newberry Crater National Volcanic Monument, that are located near the Madras, Oregon, field test that is the subject of the EPA report. Decl. Adams ¶¶ 3-4 ; Decl. Katroscik ¶ 3; Decl. Clery ¶ 3; see also, Decl. Blanton,

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(1981); Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998)(en banc).

Pls' Rep. Defs.' Opp'n Mot. Leave, Ex. 4. The spread of glyphosate tolerant grass species imminently threatens the declarants' use of these natural areas in numerous ways. Declarant and KS Wild member Adams will have her hiking, birding, studying and aesthetic enjoyment of rare grassland ecosystems and national forests harmed as a result of glyphosate tolerant, invasive grasses invading these ecosystems. Decl. Adams ¶ 6. Along with an injury to his use and enjoyment of his lawn, Plaintiff and Declarant Katroscik will be similarly harmed. Decl. Katroscik ¶¶ 6, 7; see also Decl. Gledhill ¶¶ 2, 3 (discussing injuries to her use and enjoyment of agricultural lands and natural areas in Idaho). Declarant and KS Wild member Clery's ability to continue her livelihood as a field botanist is also imminently threatened. Decl. Clery ¶ 5. Such aesthetic and recreational injuries have been recognized as conferring plaintiffs standing. See Lujan, 504 U.S. at 562-63 (1992) (explaining that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."); see also Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003) (explaining that an "injury in fact can be found when a defendant adversely affects plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions"). Further, Plaintiff Jean Beck is a property owner near an active field test in Richmond, Virginia, who is threatened with damage to her lawn and organic garden resulting from grass pollen spread from that test site and by the foreseeable increase in use of glyphosate should genetically engineered, glyphosate tolerant creeping bentgrass be commercialized. Decl. Beck ¶¶ 2-4.

In addressing the issue of injury for standing purposes, the Supreme Court has explained that a plaintiff "must demonstrate a realistic danger of sustaining a direct injury" and "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (other citations

omitted). Given the scientific evidence demonstrating release of the glyphosate tolerance trait into the environment far beyond field test borders and that such a release poses threats to numerous ecosystems, Plaintiffs have more than shown that their injuries are imminent and reasonable, and, in fact, have shown their injuries have started to occur. See Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 181, 183 (2000) (reviewing the "reasonableness of [the] fear" alleged by plaintiffs). As a result, Plaintiffs have demonstrated injury to their aesthetic and recreational interests in enjoying natural and preserved areas, as well as to their property interests, sufficient to satisfy the first prong of Constitutional standing.

(b). Plaintiffs' Injuries Are Traceable To The Challenged Action And Will Be Redressed By A Favorable Decision.

To meet causation, there must be a "direct causal connection between plaintiff's asserted injury and defendant's challenged action." Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 54 (D.C. Cir. 1991) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). Here, Plaintiffs' aesthetic, recreational, property and other injuries are traceable to the failure of Defendants to adequately conduct environmental review prior to allowing genetically engineered, glyphosate tolerant creeping bentgrass field tests to proceed. As Plaintiffs have demonstrated, the Defendants were aware of the problems associated with the open air field testing of genetically engineered, glyphosate resistant creeping bentgrass but failed to analyze these impacts prior to allowing such field testing. See, e.g., Defs.' Mot. Summ. J., Ex. F, Tab 2; Ex. K (Petition); Ex. K, Tab 2.

Should the Court grant Plaintiffs' relief, including the preliminary injunction, the ongoing environmental effects would be mitigated by reducing the occurrences of the genetically engineered, glyphosate tolerance trait escaping into the environment from field test sites. Moreover, by requiring a thorough environmental analysis consistent with NEPA of each field test's environmental impacts the agency will obtain additional scientific information that may allow for the

creation of mitigating containment standards and other new requirements before the agency approves any further field tests take place. Accordingly, such relief would redress Plaintiffs' injuries. See Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (explaining that redressability examines whether the relief sought will likely alleviate the alleged injury).

(c). Plaintiffs Have Standing To Bring This Lawsuit On Behalf Of Their Members.

Organizational plaintiffs have standing to sue on behalf of their members when their members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and the suit does not require the participation of individual members. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The organizational plaintiffs meet this burden. Here, for example, several members of Plaintiff KS Wild have standing to sue on their own, the interests in this lawsuit are germane to organizational purpose of exploring, enjoying, and protecting ecosystems in the Pacific Northwest, and the suit does not require the participation of individual members. See Decl. Adams; Decl. Blanton, Pls.' Rep. Defs.' Opp'n Mot. Leave, Ex. 4; Decl. Clery; see also Decl. Kimbrell, Pls' Rep. Defs.' Opp'n Mot. Leave, Ex. 5 (CFS member and CTA Board Member describing aesthetic and recreational injuries);[6] Decl. Gledhill (CFS member); Pl. Heather Burns, 2nd Am. Compl. ¶16 (Plaintiff in her own right and CFS member).

(d). Plaintiffs Satisfy The Prudential Standing Requirement.

In addition to the constitutional and organizational standing requirements, there is a prudential standing requirement under the Administrative Procedure Act (APA) that requires the plaintiff to show that "the interest sought to be protected by the complainant is arguably within the

[6] See Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991, 992 (D.C. Cir 1996) (a non-profit organization "may act in a representative capacity for the members of its board of trustees and may treat their interests as its own for the purposes of establishing its standing to sue when those interests 'are germane to the organization's purpose'").

zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 10 (D.D.C. 1999) (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)). The test is not meant to be especially demanding. See Clarke v. Security Indus. Assoc., 479 U.S. 388, 399 (1987); see also TOMAC v. Norton, 193 F. Supp. 2d 182, 188 (D.D.C. 2002). The test asks only "whether the interests sought to be protected by the complaint are *arguably* within the zone of interest protected by the statute." Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 444 (D.C. Cir. 1998) (quoting Nat'l Credit Union Admin. v. First Nat'l. Bank, 522 U.S. 479, 493 (1998)).

In this case, Plaintiffs' claims fall under two statutes: the Plant Protection Act (PPA) and NEPA. Under the PPA, the USDA is required to ensure that noxious weeds and plant pests are not disseminated into the environment. As a result, Plaintiffs' interests in preventing the dissemination of a new invasive and weedy species from causing environmental damage to their own property and numerous ecosystems falls within the zone of interest of the PPA.

Plaintiffs' interests are also within the zone of interests to be protected by NEPA. The primary underlying purpose of NEPA is protection of the procedural integrity with which agencies consider environmental factors in the decision-making process. Citizen's Alert Regarding the Env't v. De'pt of Justice, 1995 U.S. Dist. LEXIS 18619, at *15 (D.D.C. 1995). The overall purpose of the Act is imbedded in the need to ensure maintenance of our nation's environmental quality. See 42 U.S.C. § 4331(a). Here, USDA's failure to adequately review the environmental harm caused by the testing of genetically engineered, glyphosate tolerant bentgrass and to make an informed decision puts Plaintiffs' interests squarely within the zone of interests of NEPA.

In conclusion, Plaintiffs satisfy each element of the standing requirements.

(B). Plaintiffs' NEPA Claims Will Succeed on the Merits

In the matter before the Court, Plaintiffs challenge the Defendants' use of categorical exclusions (CE's) to excuse numerous field tests of genetically engineered, glyphosate tolerant creeping bentgrass from formal NEPA compliance. An agency's decision to invoke a CE is reviewed using an arbitrary and capricious standard. Nat'l Trust For Historic Pres. v. Dole, 828 F.2d 776, 781 (D.C. Cir. 1987). In this matter, extraordinary circumstances warrant review of Defendants' actions and the facts show that the agency acted in an arbitrary and capricious manner.

Pursuant to the authority of NEPA, the Council on Environmental Quality (CEQ) directed each federal agency to establish regulations that create CE's to NEPA's environmental review requirements. 40 C.F.R. §§ 1508.4, 1507.3. Under its implementing regulations, USDA delegates to each of its agencies the authority to create regulations determining what actions are categorically excluded from environmental review. 7 C.F.R. § 1b.3(b). However, USDA also requires each of its agencies to continuously scrutinize its application of CE's. 7 C.F.R. § 1b.3(c).

APHIS has established its list of CE's at 7 C.F.R. § 372.5(c). Among the categorical exclusions listed is "[p]ermitting, or acknowledgment of notifications for, **confined** releases of genetically engineered organisms." 7 C.F.R. § 372.5(c)(3)(ii) (emphasis added). It is this regulation upon which Defendants rely and base their defense against Plaintiffs' challenge that each application of such CE's does not apply to the field testing of genetically engineered grasses because they obviously are not "confined" in any reasonable scientific or linguistic sense. Defendants' defense also ignores further APHIS regulations. Specifically, APHIS regulations, 7 C.F.R. § 372.5(d), provide for exceptions to the application of CE's:

> Whenever the decisionmaker determines that a categorically excluded action may have the potential to affect "significantly" the quality of the "human environment," as those terms are defined at 40 C.F.R. 1508.27 and 1508.14, respectively, an environmental assessment or an environmental impact statement will be prepared.

For example: . . . .

> (4) When a confined field release of genetically engineered organisms or products involves new species or organisms or novel modification that raise new issues.

At issue here is whether the agency applied the CE contained in 7 C.F.R. § 372.5(c)(3)(ii) in an arbitrary and capricious manner. In questions of interpretation of categorical exclusions deference is given to an agency interpretation of its own regulations. See Alaska Ctr. for Env't v. U.S. Forest Serv., 189 F.3d 851 (9th Cir. 1999) (finding the U.S. Forest Service's application of a CE arbitrary and capricious for failing to provide a reasoned explanation of its decision). However, an agency's decision is arbitrary and capricious if the agency "offered an explanation of its decision that runs counter to evidence before the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In Chamber of Argentine-Paraguayan Producers of Quebracho Extract v. Holder, 2004 U.S. Dist. LEXIS 15431 (D.D.C. 2004), this Court further elaborated on the arbitrary and capricious standard, stating:

> Deference to agency decisionmaking, however, does not require the Court to accept an agency's failure to consider relevant factors or accept its clear errors of judgment. Sloan, 231 F.3d at 15 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). The "agency must cogently explain why it has exercised its discretion in a given manner, and that explanation must be sufficient to enable [the Court] to conclude that the agency's action was the product of reasoned decisionmaking." A.L. Pharma, Inc. v. Shalala, 314 U.S. App. D.C. 152, 62 F.3d 1484, 1491 (D. C. Cir. 1995) (internal citations and quotation marks omitted). An agency's action may be deemed arbitrary and capricious if its rationale does not appear in the administrative record so that its decisionmaking "path may reasonably be discerned." See Sierra Club v. EPA, 334 U.S. App. D.C. 421, 167 F.3d 658, 665 (D. C. Cir. 1999) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974)); see also Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654, 110 L. Ed. 2d 579, 110 S. Ct. 2668 (1990) (an agency's action is arbitrary and capricious if it has not taken "whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision"). If an agency merely "parrots the language of a statute" without providing a rational -- much less reasoned --explanation for its result, the agency has not met its burden. Dickson v. Sec'y of Def., 314 U.S. App. D.C. 345, 68 F.3d 1396, 1404-05 (D. C. Cir.

1995).

Confronted with this standard of review, Defendants' actions in this case cannot be upheld by the Court. Defendants have failed to point to any material in the Administrative Record that reasonably discerns its path to applying the CE's to each field test, have offered minimal, if any, explanations that run counter to the evidence before the agency, and now simply parrot back one section of regulatory language to justify their actions. Defendants ignored the evidence before the agency that these tests are not "confined" and simply make a post hoc argument that because the agency considers that the genetically engineered, glyphosate tolerant bentgrass tests are "contained" field tests they per se fall under the CE at 7 C.F.R. § 372.5(c)(3)(ii). Such agency actions exemplify unreasoned, arbitrary and capricious action. See Alaska State Snowmobile Ass'n v. Babbitt, 79 F. Supp. 2d 1116, 1137-1138 (D. Alaska) (Here the agency "merely restated the categorical exclusion language . . . without any explanation or analysis why it considered the activity insignificant or how the several attached permit conditions would prevent application of an exception to a categorical exclusion. . . . Under these circumstances, the [agency] abused its discretion in not explaining its reliance on the categorical exclusion it applied.")

First, the Defendants cannot point to any analysis showing that the agency was continually scrutinizing its application of the CE's to genetically engineered, glyphosate tolerant creeping bentgrass field test as required by 7 C.F.R. §1b.3(c). Indeed, Defendants' defense virtually admits that the Agency's operating procedure is to assume any and all field tests of genetically engineered organisms, regardless of the facts surrounding such each test, fall under its CE regulation. See Defs.' Mot. Summ. J. at 24-25. This violates the clear intent of 7 C.F.R. § 1b.3(c) to keep the application of CE's dynamic and not *pro forma*.

Second, the recent EPA study confirms the arguments Plaintiffs have repeatedly made to

Defendants for several years that the genetically engineered creeping bentgrass field tests are not "confined" as required to qualify for a CE. Indeed, in 2001, the agency was told by the ecologists from TNC that field tests should be stopped because the bentgrass would escape the field test site. Defs.' Mot. Summ. J., Ex. K, Tab 2. Further, an interagency process reviewing the federal regulatory regime concerning agricultural biotechnology assessed the bentgrass issue and described that even extremely low levels of escape from the areas using the genetically engineered bentgrass could have significant consequences. Defs.' Mot. Summ. J., Ex. F, Tab 10 at 4-5.

In contrast, Defendants have offered no evidence that the Agency in any way analyzed such material before concluding that individual bentgrass tests fell under the 7 C.F.R. § 372.5(c)(3)(ii) CE. Moreover, the agency provides no evidence that it considered whether these field tests fell within the exception to the broad application of a CE as provided for under 7 C.F.R. § 372.5(d)(4). Indeed, the evidence before the agency clearly shows that creeping bentgrass raised new issues of escape and invasiveness that should have been analyzed prior to allowance of any field tests. In 2000, an internal memo to an Associate Deputy Administrator in the Agricultural Research Service concludes that the risk of genetically engineered glyphosate resistance genes outcrossing to naturalized species was a "considerable risk." Defs.' Mot. Summ. J., Ex. F, Tab 5 at 2. The same document also finds that:

> From our own analysis, we conclude that there are insufficient data to support release at this time. **This proposed release is different from herbicide-tolerant row crops in commercial production**, which are not competitive except under agricultural management to optimize their environment.

Id. at 2 (emphasis added). Despite this evidence, Defendants did nothing but unanalytically apply its CE to the field tests. This action ignores the evidence before the agency and demonstrates a refusal to comply with its own regulation found at 7 C.F.R. § 372.5(d)(4).

Furthermore, Defendants' "matter of law" position that all agency CE decisions are "unquestionably" entitled to an ironclad assumption of validity has been rejected. In California v. Norton, 311 F.3d 1162 (9th Cir. 2002), the Department of the Interior (DOI) refused to point to any documentation in the administrative record to justify its decision to categorically exclude the approval of certain offshore drilling lease suspensions from further NEPA review. The government, like Defendants here, argued that the lease suspensions were exempt because it was simply clear that a CE applied. Id. at 1175. The Ninth Circuit struck down the DOI's reliance on the CE's because there was nothing in the record to show that the agency even considered the environmental effects of its action before a decision to apply a CE was made. Id. at 1177. Defendants are in a similar position in this case. Defendants can neither point to documentation in the current Administrative Record before the Court that shows it even considered the potential for impacts caused by any of the genetically engineered creeping bentgrass field tests nor can it point to documentation to show agency personnel even considered whether any of the field tests did not qualify for a CE because of the presence of conditions that would trigger 7 C.F.R. § 372.5(d)(4). California v. Norton holds that federal agencies are required to document and support their application of CE. Defendants have not met this burden.

California v. Norton reiterates a long line of cases concerning NEPA that Defendants simply choose to ignore. For example, in Jones v. Gordon, 792 F. 2d 821, 828 (9th Cir. 1986), the Ninth Circuit reviewed a CE decision made by the National Marine Fisheries Service (Service) with respect to a permit for capturing marine mammals and stated:

> The Service's explanation is deficient in that it fails to explain why issuance of the permit does not fall within an exception to the categorical exclusions under section 6.c.(7) of the Administrative directive.

The Court remanded the matter to the Service to explain its decision on the record. See also

Rhodes v. Johnson, 153 F.3d 785, 790 (7th Cir. 1998) (upholding a lower court ruling that a Forest Service decision that a CE applied to certain management actions was overturned because Service should have applied "exceptions" language in its CE guidelines and required an EA); Alaska Ctr. for the Envt., 189 F.3d 851 (9th Cir.); Alaska State Snowmobilers Ass'n, 79 F.Supp. 2d 1116 (D. Alaska 1999).

Finally, this Court has previously held that plaintiffs are likely to succeed on the merits in instances where the federal agency cannot point to any contemporaneous determination that a CE applies to the particular action at hand. See Fund for Animals v. Espy, 814 F. Supp. 142, 150 (D.D.C. 1993). Defendants can point to no such determinations for each of the genetically engineered, glyphosate tolerant creeping bentgrass field tests challenged by Plaintiffs. Here, the Agency's reliance on conclusory applications of its CE regulation to explain its decision not to require further NEPA compliance for each of the creeping bentgrass field tests involved is arbitrary and capricious.[7] See e.g., Chem. Mfrs. Ass'n v. EPA, 28 F,3d 1259, 1266 (D.C. Cir. 1994) (unsupported and conclusory statements regarding scientific modeling "added nothing to the agency's defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary.")

[7] Defendants' failure to take the minimal steps necessary to properly consider the applicability of a CE indicates that the Agency also did not: (1) take a "hard look" at the impacts of each field test; (2) properly identify all the relevant areas of concern with the field tests; (3) make a convincing case that any impacts from the field test were insignificant; and (4) convincingly show that it changed the field test requirements to sufficiently minimize their impacts. See Born Free USA v. Norton, 278 F. Supp. 2d 5, 21-22 (D.D.C. 2003); See Chesapeake & Ohio Canal Ass'n v. Federal Highway Admin., 1990 U.S. Dist. LEXIS 12500 (D.D.C. 1990)(applying the four-part test used to review agency decisions not to complete EISs to judicial review of a CE applied to a state bridge replacement project).

3. Halting Field Tests Will Not Substantially Injure Other Interested Parties

Granting Plaintiffs' request for injunctive relief halting all ongoing and future genetically engineered, glyphosate resistant creeping bentgrass field tests until the merits of this matter are addressed will not substantially injure other interested parties. The product in question has not yet been commercialized, and the EPA study has resulted in government actions that will prevent commercialization from occurring soon. In contrast, the EPA study makes it clear that even testing these plants will cause substantial environmental impacts. The most another interested party can claim is that there may be some minor financial injury in halting ongoing and planned field tests. However, in a preliminary injunction analysis broad economic injury to an entire industry and declaration of macroeconomic injury is not irreparable. Nat'l Mining Ass'n, 2001 U.S. LEXIS 25533 at *7-8 ("A business alleging a threat to its existence must prove that the alleged harm is likely to occur in the near future.")

In a balance of these equities, the irreparable nature of the injury caused by the release into the environment of glyphosate tolerant creeping bentgrass clearly outweighs any speculative economic injury that might temporarily occur on the part of producers should the field tests be halted.

4. The Public Interest Will Be Served By Issuance of a Preliminary Injunction

The public interest will be served by issuance of the preliminary injunction requested. An injunction will prevent further release of harmful and invasive genetically engineered, glyphosate tolerant creeping bentgrass into the environment. As discussed by the USFS, BLM, TNC, California Department of Fish & Game, and many others, there is a clear interest in protecting the integrity of parks, national forests, national grasslands, and other natural areas from the invasive nature and management problems that will be caused by the spread of glyphosate tolerant creeping bentgrass.

The public interest in ensuring that the glyphosate tolerance trait does not spread has been echoed throughout the national press in editorials. Decl. Mendelson, Ex. 9 (Toledo Blade stating "The drive for bio-engineered grass for use on golf courses should be ruled a two-stroke penalty. The risks greatly outweigh the rewards."); Decl. Mendelson, Ex. 10 (Boston Globe asking "But what if errant pollen produces a super-crab variety or pollinates the lawn of a neighbor who prefers fine fescue or bluegrass?").

Moreover, where Plaintiffs have demonstrated a likelihood of prevailing upon claims that a federal agency has failed to consider environmental impacts under NEPA, the courts have found injunctive relief warranted to serve the strong public interest NEPA expresses. Fund for Animals v. Norton, 281 F.Supp. 2d 209, 237 (D.D.C. 2003); see also Citizen's Alert Regarding the Env't v. U.S. Dep't of Justice, 1995 U.S. Dist. LEXIS 18619, at *33-34 (D.D.C. 1995)("Issuance of a preliminary injunction here would thus directly serve the public interest by ensuring that federal agencies thoroughly consider the environmental consequences of their actions as mandated by NEPA."). Such is the case here.

"Finally, there is a strong public interest in meticulous compliance with the law by public officials." Fund for Animals, 814 F. Supp. at 152 (noting that the Constitution declares a prime public interest in the laws being faithfully executed by the Executive Branch). As described *supra*, the Defendants' actions in allowing the genetically engineered, glyphosate tolerant creeping bentgrass to grown in open-air field tests scattered across thousands of acres in the country has been anything but meticulous compliance with NEPA. The agency failed to uphold the mandate of its own regulation to review the environmental impacts associated with these unique crops, and widespread genetic contamination has resulted. The agency's flaunting of its regulations should not be rewarded.

Conclusion

New, peer-reviewed scientific evidence published by the National Academy of Sciences has shown that pollen and other material from ongoing field tests of genetically engineered, glyphosate tolerant creeping bentgrass are escaping into the environment and pose an imminent and irreparable injury to the environment. Plaintiffs ask this Court to halt the harm. For the reasons stated herein, Plaintiffs have met the legal burden necessary to show that preliminary relief is warranted.

Respectfully submitted,

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