

CQ476

**Comments of the  
International Center for Technology Assessment  
and the Center for Food Safety**

September 23, 2002

NEPA Task Force  
c/o James L. Connaughton, Chairman  
White House Council on Environmental Quality  
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ELECTRONIC SUBMISSION  
AND FAXED TO 801.517.1021

Greetings,

Thank you for the opportunity to submit comments on NEPA implementation on behalf of the *International Center for Technology Assessment* (CTA) and the *Center for Food Safety* (CFS). CTA and CFS are non-profit, membership organizations located in Washington, DC. CTA is devoted to fully exploring the economic, ethical, social, environmental and political impacts that can result from the applications of technology. CFS was established to address the increasing concerns about the impacts of our crop production systems on human health, animal welfare and the environment. We have many active members with diverse economic, recreational, health, conservation and other interests that may be affected by NEPA changes.

Our organizations have extensive experience with NEPA primarily related to proposed introductions of genetically modified organisms (GMOs) and to broader non-native (invasive) species problems. In addition, the primary author of this comment, Peter T. Jenkins, CTA/CFS Attorney and Policy Analyst, previously worked for six years as a contractor to the U.S. Fish and Wildlife Service on NEPA and Endangered Species Act compliance projects. He has experience coordinating and preparing NEPA documents of all types, including an Environmental Impact Statement (EIS) from start to finish. As an Adjunct Professor at the University of New Mexico Law School's Center for Wildlife Law, he taught NEPA training courses to Department of Interior employees. He also was retained by the National Invasives Species Council as a NEPA consultant in 2000 to assist in implementing Executive Order 13112 on Invasive Species. In that capacity he drafted a NEPA Guidance document for Federal decision-making affecting invasive species problems, as mandated in the EO. Since 2001, he has worked on numerous NEPA-related matters for CTA and CFS.

A primary theme of this comment, falling primarily under your issue **Category F**, is that, with respect to GMO and invasive species issues, the Federal agencies involved - primarily the USDA's Animal and Plant

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Health Inspection Service - have been allowed to engage in what can only be characterized as "EIS avoidance." One glaring illustration: APHIS has approved dozens of GM crop proposals based only on thin EAs. Today, more than 30 million acres of GM crops exist, serious genetic contamination sources have been allowed literally to take root across the country, and significant environmental and associated economic impacts have come to pass - all without preparation of a single programmatic or crop-specific EIS. **The Task Force should make recommendations aimed at correcting EIS avoidance strategies by APHIS, and by other agencies where it exists, as it violates Congress's intent in adopting the statute.**

As the Task Force is aware, NEPA requires all Federal agencies to prepare an EIS regarding all "major federal actions significantly affecting the quality of the human environment . . ." <sup>1</sup> The CEQ, which oversees NEPA implementation by Federal agencies, has adopted regulations listing factors for determining the potential "significance" of an action's effects. Those factors most applicable to novel GMO proposals, for example, include:

- *the degree to which the effects on the quality of the human environment are likely to be highly controversial,*
- *the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,*
- *the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.* <sup>2</sup>

According to Court decisions, the "presence of one or more of these factors should result in an agency decision to prepare an EIS." <sup>3</sup> The presence in GMO proposals of scientific controversy, unique risks, potential irreversibility and their precedent-setting nature plainly establish the potential for "significant" impacts, mandating a decision under NEPA to prepare a full EIS. Yet, APHIS has done none, opting for largely boilerplate EAs instead, this despite the fact that the full EIS process is very constructive as it fleshes out alternative actions, increases interdisciplinary and interagency advice, and provides opportunities for public and expert input.

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<sup>1</sup> 42 USC § 4332(C).

<sup>2</sup> 40 CFR § 1508.27(b)(2)(4)(5)(6)(9). The Supreme Court has held that the CEQ regulations are entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 348 (1979); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989).

<sup>3</sup> Public Service Co. of Colo. v. Andrus, 825 F. Supp. 1483, 1495 (D. Idaho 1993).

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The Task Force needn't take just our word for this; the National Academy of Sciences (NAS), following a thorough review, recently concluded with respect to APHIS's EAs on proposals for permission to commercialize (deregulate) GM crops:

*Finding 5.12: APHIS [environmental] assessments of petitions for deregulation are largely based on environmental effects considered at small spatial scales. Potential effects from scale-up associated with commercialization are rarely considered.*

.....

*Finding 7.13: Currently APHIS environmental assessments focus on the simplest ecological scales, even though the history of environmental impacts associated with conventional breeding points to the importance of large-scale effects, as seen in the impacts of Green Revolution cultivars.<sup>4</sup>*

These findings by independent scientific experts represent a stunning indictment of APHIS's NEPA work, indicating the agency is using "quick and dirty" EA's focused on limited spatial and ecological scales instead of full EIS's in which "potential effects from scale-up associated with commercialization" are fully considered. Many other commenters have criticized the comprehensiveness of APHIS EAs. The major environmental impacts of many biotech crops are just being ignored under NEPA. This is completely unacceptable and the NEPA Task Force should come right out and say so, otherwise it will be aiding and abetting further EIS avoidance.

This avoidance phenomenon is rooted in APHIS's own NEPA regulation, 7 CFR § 372.5(b)(4)(b), which provides (emphasis added):

*372.5 Classification of actions....(b) Actions normally requiring environmental assessments but not necessarily environmental impact statements. This class of APHIS actions may involve the agency as a whole or an entire program, but generally is related to a more discrete program component and is characterized by its limited scope (particular sites, species, or activities) and potential effect (impacting relatively few environmental values or systems)....Actions in this class include:....(4) Approvals and issuance of permits for proposals involving **genetically engineered or nonindigenous species**, except for actions that are categorically excluded, as provided in paragraph (c) of this section.*

The provision that an EA normally will suffice rather than a full EIS amounts to a presumption that the

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<sup>4</sup> National Research Council/National Academy of Sciences. 2002. *Environmental Effects of Transgenic Plants: The Scope and Adequacy of Regulation*. Washington, DC., at p. 189 and 252.

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impacts of a GM or non-native species release will not be "significant" and that a Finding of No Significant Impact should result. Sec. 372.5 is absurd when applied to broad APHIS actions like deregulating and allowing the nationwide commercialization of a fertile, possibly weedy, GM crop that will cover millions of acres, or a potential invasive species (see the kudzu disaster, introduced by USDA, for illustration). 7 CFR § 372.5(b)(4)(b) blithely presumes that the effects of these novel introductions - which plainly may pose potentially significant impacts - will "impact[] relatively few environmental values or systems." This built-in presumption in favor of EAs for these actions contravenes the purpose of NEPA and contravenes the CEQ regulations by minimizing the analytical requirements.

The well-known Starlink corn fiasco illustrates this EIS-avoidance phenomenon. This GM corn product was approved only for cattle feed due to human allergenicity risks, but the grain was then massively diverted by farmers and distributors into the human food supply. Huge swaths of non-GM corn fields were contaminated with it. It amounted to a national crop segregation failure crisis leading to widespread food product recalls, several credible cases of allergic reactions to a genetically engineered protein (Cry9c) inserted into the corn, roughly one **billion** dollars in costs to the crop's manufacturer, Aventis, and significant other monetary damages at all levels of the grain industry.

**This entire costly fiasco could have been avoided had APHIS not engaged in EIS avoidance.** Plainly the risks of segregation failure existed at the time APHIS approved the product, which on the whole amounted to "potentially significant impacts" under NEPA. But, due to APHIS's blind adherence to its defective NEPA regulation, discussed above, the agency only required an EA, which failed to look in-depth at the foreseeable risks of Starlink segregation failure. An EIS, with associated scoping and expert analysis, would have opened the proposal up to more outside public and scientific scrutiny and helped to alleviate APHIS's pro-GM bias. The potential for crop segregation failure and resulting contamination impacts would have been looked at in advance, and likely mitigated through appropriate precautionary measures. In the end, APHIS's NEPA avoidance strategy was penny wise and pound foolish.

**Recommendation 1: Advise USDA APHIS to promulgate a new implementing regulation revising 7 CFR § 372.5 to eliminate the presumption that an EA normally will suffice rather than a full EIS in order to analyze the release of a new GM crop or other non-native species.**

With respect to your **Category E**, on categorical exclusions, we call the Task Force's attention to APHIS's categorical exclusion at 7 CFR 372.5(c)(ii), providing a general exclusion for "permitting, or acknowledgment of notifications for, confined field releases of genetically engineered organisms and products." The situation now exists in which APHIS has done no NEPA analysis on GM glyphosate resistant (RoundUp Ready) creeping bentgrass (*Agrostis stolonifera*). Under APHIS's categorical exclusion, the product's proponents, Monsanto and Scotts, have been allowed to plant about 2,000 acres

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of this product in 35 field trials across 32 States.<sup>5</sup> According to weed experts, glyphosate-resistant creeping bentgrass is - **right now, in these excluded field test plots** - a serious genetic pollution and invasion risk. Based on the scientific evidence she gathered, Marilyn Jordan, Ph.D., an ecologist with The Nature Conservancy (TNC), the world's largest private land preserve organization, pleaded with APHIS:<sup>6</sup>

*...bentgrass and other turfgrass are indeed widespread and serious weeds across the United States and Canada. We sincerely hope that... these herbicide resistant turfgrasses will NOT be released for commercial use. 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.*

TNC's report on the matter concludes:

*Ultimately permits may be sought for commercial release of herbicide-resistant bentgrass and bluegrass. Field tests of these grasses are likely to result in escape of herbicide-resistance into surrounding natural areas, since wind borne pollen carries long distances.*

Yet, according to a recent Oregon Department of Agriculture report, Scotts already intends to engage in seed production in that State as part of its ramping up to anticipated commercial release **before APHIS conducts any NEPA compliance whatsoever to determine that it is safe, despite scientific evidence that it is not.**<sup>7</sup> The point is that by taking advantage of the far-too-generous categorical exclusions allowed by APHIS for field tests of GM crops, Scotts is creating a genetic pollution *fait accompli*. This must be stopped.

Again, do not just take our word for it: the NAS report on APHIS and biotech crops says the same thing,

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<sup>5</sup> See APHIS biotech field test database at [www.nbiap.vt.edu/cfdocs/fieldtests1.cfm](http://www.nbiap.vt.edu/cfdocs/fieldtests1.cfm).

<sup>6</sup> Marilyn Jordan, TNC, email to James White, USDA APHIS, and attached unpublished report dated Dec. 28, 2001, entitled "References documenting the widespread presence of bentgrass and bluegrass (*Agrostis species*, *Poa pratensis*) in natural ecosystems." For further information on this situation and more background to the TNC position, see the formal CTA/CFS petition to the Secretary of Agriculture seeking improvements in the regulation and analysis of GM turfgrasses, and seeking listing of certain GE turfgrasses as noxious weeds, available online at [www.icta.org/petit-grass.htm](http://www.icta.org/petit-grass.htm).

<sup>7</sup> Presiding Officer's Report, In the matter of proposed rulemaking hearing to create a control area for genetically modified bentgrass in Jefferson County. Oregon Dept. of Agric., July 1, 2002, p. 1.

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referring to the categorically excluded "notification" process for field tests.

*The assessment of notifications is not subject to external scientific review or any other public input. A few transgenic plants are now grown to produce commercial products under notification.<sup>8</sup>*

This is not a NEPA process at all if companies are allowed to commercialize GM plant products and sow them anywhere they want across the country, while evading any formal public or outside expert review. It is worse than EIS avoidance, it is EA avoidance.

**Recommendation 2. Eliminate the existing APHIS categorical exclusions for extensive field tests of risky GM products. Clarify that genetic pollution and other environmental risks presented by potentially invasive GM species in even limited plantings are such that EAs and in some cases full EISs must be required before field tests.**

The broader problem with categorical exclusions is their application to various other decisions that may in fact pose significant environmental impacts. For example, new routes for airline and ship arrivals create new "pathways" for invasive species introduction, but Federal approval of these changes evades NEPA review. Thus, the nation is subjected to frightening, yet foreseeable, risks such as airplanes bringing in West Nile virus-vectoring mosquitoes, and ships bringing in new aquatic nuisance species from new foreign source waters attached to their hulls and in ballast water, without any NEPA analysis whatsoever regarding these new pathways. The nation's environment and public health are clearly being victimized as a result; the NEPA Task Force needs to step in and do something.

This problem has long been understood but ignored. The seminal U.S. Congress, Office of Technology Assessment (OTA) report of 1993, "Harmful Non-Indigenous Species in the United States," looked at the role of categorical exclusions and the lack of clear triggering mechanisms as to when NEPA applies to certain actions, stating:<sup>9</sup>

*[E]xisting regulations lack a clear definition of when NEPA should be triggered for governmental approval of new imports...Agencies' existing "categorical exclusions - regulations that excuse NEPA compliance for certain activities - can result in*

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<sup>8</sup> National Research Council/National Academy of Sciences. 2002. *Environmental Effects of Transgenic Plants: The Scope and Adequacy of Regulation*. Washington, DC., at p. 108.

<sup>9</sup> OTA. 1993. *Harmful Non-Indigenous Species in the United States*. Govt. Printing Office; Washington, DC., at p. 121. Online at: [www.wws.princeton.edu/~ota/disk1/1993/9325](http://www.wws.princeton.edu/~ota/disk1/1993/9325)

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Plainly, the Task Force should encourage Federal agencies to revisit and review their categorical exclusions, which they previously adopted - in some cases decades ago - to determine whether they are still appropriate in light of the mandates of EO 13112 on Invasive Species. The same modernization likely is necessary for categorical exclusion regulations in other areas.

**Recommendation 3: Review all agency categorical exclusions, including, but not limited to, those for Federal actions that may affect invasive species pathways, to determine which exclusions are allowing actions with potentially significant environmental impacts to escape analysis.**

With respect to your **Category C, Programmatic Analysis and Tiering**, another disturbing method of EIS-avoidance is the notion APHIS introduced of "tiering" one EA off of an earlier EA, instead of off an earlier EIS. APHIS has recently sought to avoid standard NEPA tiering requirements and produced EAs that are inadequate and violate CEQ regulations. We refer to several EAs on industry petitions to deregulate new GM herbicide resistant canola products.<sup>10</sup>

For example, in the EA for the proposal by Aventis CropScience seeking an "extension" of an earlier APHIS approval for a different canola variety, the EA claims: "This EA is tiered to the original EA of 98-216-01p...", that is, for the decision on the earlier variety. If the "original EA" was indeed adequate for the subsequent canola variety, no need would exist for the additional separate EA, but plainly this was not the case as the new one was prepared. The problem is that, under NEPA, an agency cannot legally tier one EA to an earlier EA.

The CEQ's implementing regulation, 40 CFR § 1508.28, defines "tiering" as:

*Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.*

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<sup>10</sup> EA on Aventis CropScience proposal (No. 01-206-02p) seeking an Extension of Determination of Nonregulated Status for Glufosinate Tolerant Canola Event Topas 19/2; 67 Fed. Reg. 9431, Mar. 1, 2002; APHIS regulatory docket No. 01-101-1. The same tiering problem exists in several other contemporaneous EAs for proposed new GM canola products.

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*Tiering is appropriate when the sequence of statements or analyses is: (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis. (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.*

Not just this definition, but every other reference to the term in the CEQ regulations refers to tiering from a prior EIS, never just from a prior EA (other references at 40 CFR §§ 1500.4(i), - 1502.4(d), and - 1502.20). Further, nothing in the definition of an EA (40 CFR § 1508.9), nor in any mention of EAs in the CEQ regulations, supports the idea that an EA can tier from an earlier EA.

If a proposal is in essence equivalent to a prior proposal, then it may be categorically excluded from NEPA compliance. If it is not categorically excluded, then a proper EA with the legally required elements must be prepared. No "middle way" exists. The legally required elements are listed in 40 CFR § 1508.9, which defines an EA, as (in pertinent part; emphasis added):

*(b) Shall include brief discussions of the **need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.***

The allegedly tiered EA for Aventis CropSciences' GM canola proposal lacks virtually all of the required elements. It lacks sections on "Need," "Alternatives" and "Listing of agencies and persons consulted." The sections simply don't exist - not even discussion of a "No Action Alternative". This is not just a matter of form. For example, the EA's failure to list the "agencies and persons consulted" leaves the ultimate APHIS decisionmaker - and the public - to guess about who was involved in preparation of the later "EA". By law, EAs must take a "hard look" at potential impacts and cannot take shortcuts and rubberstamp actions when the agency finds full compliance inconvenient. Kleppe v Sierra Club, 427 US 390 (1976). Improper tiering and conclusory claims in incomplete EAs that no impacts exist cannot suffice.

APHIS is repeatedly avoiding the fact that NEPA's procedures are both required and useful for structuring the analysis of proposed novel GM products. No agency has the discretion to violate NEPA or to ignore the CEQ's implementing regulations, which are entitled to substantial deference, Andrus v. Sierra Club, 442 U.S. 347, 348 (1979); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989).

**Recommendation 4: Clarify that EAs may not tier off of an earlier EA and that all EAs must at**

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least contain each of the required elements of 40 CFR § 1508.9, that is: need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Finally, with respect to your **Category A, Technology**, it is objectionable to use computer software in order to review, categorize using key words, and then respond to public comments on NEPA documents. Knowledgeable agency personnel, not a machine, should review the actual comments and decide on the agency's response. This response process can be an important part of the agency consideration of alternative actions, ones that may be environmentally preferable to actions and alternatives the agency has considered on its own. On the other hand, extensive use of websites to inform the public on the status of proposals is welcome, so long as the sites are user-friendly and maintained up-to-date.

**Recommendation 5: Prohibit excessive impersonal use of computer technology to process, categorize, and respond to public comments.**

Thank you for the opportunity to submit these comments and five recommendations aimed at improving NEPA implementation and to better fulfill the intent of Congress in adopting this vital environmental statute. We look forward to your formal response to each of the recommendations. For further information, please contact us directly at [peterjenkins@icfa.org](mailto:peterjenkins@icfa.org) or tel: 202.547.9359.

Very truly yours,



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NOTES:

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