THE CENTER FOR FOOD SAFETY

HOUSE COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM
SUBCOMMITTEE ON DOMESTIC POLICY

ARE SUPERWEEDS AN OUTGROWTH OF USDA BIOTECHNOLOGY POLICY

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Good Afternoon Chairman Kucinich, Ranking Member Jordan and Members of the House Committee on Oversight and Government Reform, Subcommittee on Domestic Policy.

My name is Andrew C. Kimbrell. I am a public interest attorney and the Executive Director of the Center for Food Safety. I founded the Center over fifteen years ago in order to help protect human health and the environment, curb the proliferation of harmful food production technologies, and promote organic and other forms of sustainable agriculture. CFS is a 501(c)(3) non-profit based here in Washington, DC.

I appreciate the invitation to testify before the Subcommittee. As the other panelists, I'm here today to discuss the glyphosate resistant weed crisis facing U.S. farmers. Equally important and relatedly, I will discuss the concurrent and interconnected failure of the U.S. Department of Agriculture (USDA) to address the negative environmental, agronomic and socioeconomic impacts of agricultural biotechnology using its existing statutory authority.

The history of USDA's oversight of genetically engineered (GE) crops is littered with failures. The Government Accountability Office (GAO), the USDA's own Office of Inspector General (OIG), and the Federal Courts have repeatedly condemned USDA for oversight deficiencies and inadequate management. Regarding the latter, regulation of

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GE crops has in part been defined by judicial decisions in lawsuits brought by CFS and others on behalf of farmers, consumers, and environmental groups. American agriculture cannot afford such "regulation by litigation," an approach that has become standard operating procedure at USDA. I am hopeful that today's hearing will initiate a transformation in agricultural biotechnology oversight that more appropriately balances the interests of the farmer, the environment and the consumer with those of the biotechnology industry.

CFS and its coalition of government watchdogs are not alone in condemning USDA on this issue. Numerous government assessments have found USDA's oversight severely lacking. For example, a 2005 OIG Audit of GE crop field trials revealed frequent cases where the agency did not know the planting locations of field trials, did not require submission of written protocols prior to issuing a permit, did not maintain a list of planted field trials, and, in the case of pharmaceutical crops, failed to conduct scheduled field trials. In two cases, OIG inspectors found two tons of pharmaceutical crops that had been harvested and held in storage for more than one year without APHIS' knowledge and inspection, contrary to permit requirements. As a result of these failures, OIG issued a series of recommendations to strengthen USDA's management and oversight of field trials.

Unfortunately, the OIG recommendations went largely unheeded, and less than one year later, LL601, an unapproved experimental GE rice also known as "Liberty Link rice," contaminated U.S. rice producers. This contamination event cost rice producers and the rice industry more than one billion dollars. Several cases have gone to trial with farmer plaintiffs recovering millions in jury awards. After an internal investigation, USDA concluded that its own mismanagement of field trials was responsible for the Liberty Link rice contamination event. Initial contamination occurred as much as 5 years earlier, going undetected and spreading throughout much of the southern rice producing states. The recommendations for strenthening management and oversight of GE crop field trials identified by USDA as corrective measures, many of which were identical to the recommendations contained in the OIG Audit, were published in a manual entitled Lessons Learned. This USDA manual was later codified in the 2008 Farm Bill amendment sponsored by Sen. Pryor (D– AR) and enacted into law. Despite an 18 month implementation deadline, USDA has still not complied with the statutory mandates.

This arrogance is characteristic of USDA's attitude regarding regulation of biotech crops and its responses to criticism of its regulatory processes. A 2008 GAO Report requested by Senators Harkin and Chambliss, noting the billions of dollars in economic damages associated with GE crop contamination events, concluded that "such contamination

events are not isolated incidents, as biotechnology proponents argue. *Rather the ease with which genetic material from crops can be spread makes future releases likely*." The Report called on the USDA "to monitor for other unintended consequences, such as economic impacts on other agricultural sectors, such as organic crops, which may become contaminated by GE crops." As particularly relevant here, the Report further recommended the mandatory monitoring of resistant weeds, with continuing regulatory authority to mitigate impacts should they arise.

Farmers have long demanded economic injury to be part of the assessment process for GE crop commercialization. USDA has steadfastly maintained that it lacks the statutory authority to make that assessment a part of the deregulation decision-making process. We believe that clear and unequivocal statutory authority exists in the Plant Protection Act (PPA) to consider economic harm to farmers as part of this process. Not only does the statutory authority exist, but the PPA actually confers a mandatory obligation on the Secretary to consider any and all, direct and indirect impacts, including economic harms, to farmers and the agriculture of the United States.

Instead, USDA has self-imposed a very limited interpretation of its regulatory ambit, claiming that once that narrow review is completed, all further oversight or inquiry must end. USDA has repeatedly taken the position that its limited authority precludes assessments of a wide array of environmental impacts stemming from biotech crops – including but not limited to glyphosate resistant weeds – under the PPA, the National Environmental Policy Act, and other environmental laws.

Like the independent governmental reviews, our courts have been forced to repeatedly condemn USDA's failings. For example, in holding that USDA failed to comply with NEPA and the Administrative Procedure Act (APA) in approving Roundup Ready alfalfa, a federal district court concluded that "even though the agency acknowledged that gene transmission could and had occurred with Roundup Ready alfalfa, it *refused* to analyze the likely extent of such gene flow and how it could be eliminated or at least minimized." *Geertson Seed Farms v. Johanns*, 2007 WL 1302981 (N.D. Cal. 2007) (May 3, 2007), at *1. In setting aside the agency's approval of the biotech crop, the same court also held that "APHIS *simply ignored* the concerns of farmers that do not want to grow or feed to their livestock genetically engineered alfalfa." 2007 WL 518624, at *7. These merits findings by the court were not appealed. Another district court concluded in 2006 that USDA's approval of biotech, pharmaceutical-producing plant field trials in Hawaii violated the Endangered Species Act (ESA) with "utter disregard":

> APHIS's utter disregard for this simple investigation requirement, especially given the extraordinary number of endangered and threatened

> plants and animals in Hawaii, constitutes an unequivocal violation of a clear congressional mandate.

Center for Food Safety v. Johanns, 451 F.Supp.2d 1165, 1182 (D. Hawaii 2006). That same court held that USDA's NEPA decision "abdicate[d]" its responsibilities and instead asked for deference to "post hoc rationalizations." *Id.* at 1184-1185.

In another case regarding the field testing of GE Roundup Ready bentgrass, which eventually contaminated a protected national grassland, a court found the record "devoid of *any* evidence" USDA had complied with NEPA, and held the agency's PPA analysis "backwards." *International Center for Technology Assessment v. Johanns* 473 F.Supp.2d 9, 26 & 29 (D.D.C. 2007). Finally, in yet another case, this time concerning Roundup Ready sugar beets, a court held USDA's analysis was not "'convincing' and d[id] not demonstrate the 'hard look' that NEPA requires." *Center for Food Safety v. Vilsack*, 2009 WL 3047227, 9 (N.D. Cal. 2009); *id.* ("To the limited extent APHIS did examine this issue, it did so only on a cursory level. ... Moreover, there is *no support* in the record for APHIS' conclusion that non-trangenic sugar beet will likely still be sold and will be available to those who wish to plant it ....").

I could elaborate on many more examples of the outrage expressed by courts on USDA regulatory failures and deficiencies. The clear picture they draw is of a rogue agency unwilling to comply with its statutory and legal responsibilities.

USDA's unnecessarily cabined view of its regulatory authority is often compounded by the agency's use of questionable facts and faulty assumptions that have no basis in "sound science," as required by the PPA. Glyphosate resistant weed issues exemplify how USDA minimizes significant potential environmental impacts by applying questionable assumptions to randomly selected facts.

Since the first glyphosate resistatn weed populations were confirmed in 1998, 53 populations of 10 different weed species at tens of thousands of sites have evolved glyphosate resistance. Glyphosate resistant weeds now infest an estimated 11.4 million acres. North Carolina Weed Scientist, Alan York, has called glyphosate resistant weeds "potentially the worst threat to cotton since the boll weevil" due to extraordinary levels of dependence on glyphosate.

The December 2009 draft of the court-ordered Environmental Impact Statement (EIS) on Roundup Ready alfalfa – the *first* EIS USDA has ever completed on *any* biotech crop – acknowledges the existence of glyphosate resistant weeds, citing research that has identified 9 glyphosate resistant weeds in the U.S. since 1998, admitting that 8 out of the

14 glyphosate resistant weeds known globally are prevalent in alfalfa stands and, that of the 21 weeds naturally resistant to glyphosate, 10 are problems in alfalfa. Yet despite this acknowledgement, USDA concluded in its draft that, since herbicides are used in alfalfa predominantly during stand establishment with minimal applications after the first year, there is little chance that glyphosate resistant weeds will develop as a result of deregulating RR Alfalfa. What is the sound science basis this conclusion? I find no support in the research or the literature.

Moreover the EIS claims that even if glyphosate resistance is a problem, USDA lacks authority to address it. This conclusion is despite the fact that the epidemic stems from and is exacerbated by the approval of biotech, pesticide-dependent cropping systems. In the original litigation forcing this EIS (again, not appealed) the lower court held USDA's original assessment of weed resistance harm arbitrary and capricious and "cavalier":

> APHIS's reasons for finding the development of glyphosate resistant weeds not to be significant are not convincing. Reasoning that weed species often develop resistance to herbicides is tantamount to concluding that because this environmental impact has occurred in other contexts it cannot be significant. Nothing in NEPA, the relevant regulations, or the case law support such a cavalier response.

2007 WL 518624 (N.D. Cal. 2007) at *10. USDA's current dismissal of the problem unfortunately seems similarly cavalier.

A larger issue looms with respect to glyphosate resistant weeds. Because the industry or government has not undertaken a concerted effort to address the serious and growing threats posed by glyphosate resistant weeds, the standard response has been to switch modes of action through the use of other chemical pesticides in combination with tillage. Increasingly, farmers are forced to return to soil-damaging tillage practices and the use of toxic chemical pesticides that were supposed to have been made extinct through the introduction of glyphosate. Triazines, 2,4D and Dicamba are being tank mixed with glyphosate to eliminate problems with glyophosate resistant weeds. Some glyphosate resistant weeds are beginning to demonstrate a tolerance to other classes of herbicides being tank mixed with glyphosate, namely ALS and PPO inhibitors and triazines. As weed resistance to multiple herbicides grows, industry has begun experimentation with biotech varieties that are genetically engineered to be tolerant to multiple herbicides, including 2,4D and Dicamba. We simply cannot afford to rubber stamp approval of these proposed new GE varieties now in research and development. Weed scientists are cautioning that should weeds develop resistance to these multiple herbicide tolerant varieties, no solution is readily foreseeable. USDA simply cannot afford to continue to

abdicate its regulatory responsibilities with these new untested technologies on the horizon.

CFS, on behalf of farmers, environmental and other groups, has filed and prevailed in multiple lawsuits on the appropriate processes and analyses required in USDA's biotech crop oversight. Unfortunately, rather than correct its errors, USDA has thus far repeatedly "doubled down" on them. For example, courts struck down USDA's view that it need not assess potential injury because the harm was not legally cognizable (in cases regarding GE alfalfa and GE bentgrass). USDA then claimed that even if such harm *is* cognizable, the agency *still* need not address such harms, because it lacks authority to address them. A different federal court had already ruled against this argument in another case, concerning GE Roundup Ready sugar beets. *Center for Food Safety v. Vilsack*, No. C 08-00484 JW, 2009 WL 3047227, at *13 n.3 (N.D. Cal. Sept. 21, 2009). The Supreme Court's recent decision in the GE Roundup Ready alfalfa case is also predicated on the conclusion that USDA has the authority to address and regulate transgenic contamination. There, the Court found standing for the Plaintiffs and posited a potential future in which USDA could limit Roundup Ready alfalfa's planting to specific geographic zones to protect against contamination harm. *Monsanto v. Geertson Seed Farms*, ___ S.Ct. ___, 2010 WL 2471057, *11-14, 21 (U.S. June 21, 2010).

USDA's position on weed resistance harm has thus far mirrored its overarching and repeated recidivism. In the face of this growing epidemic, USDA has passed the buck. It is time for change under this new administration. It is past time that USDA adopt a new policy of risk assessment and biotech crop regulation that complies with its statutory mandates. At bare minimum, the USDA must reconcile contradictory policies within the agency. While USDA/APHIS barely acknowledges the existence of glyphosate resistant weeds, USDA/NIFA has determined that "there have been increasing numbers of species and an expanded distribution of the range of broadleaf weeds with resistance to glyphosate" and dedicated Critical Issues: Emerging and New Plant and Animal Pest and Diseases grant program funding to examine herbicide resistance development, economic impacts of glyphosate resistance and current distribution and the risk of expanded herbicide resistance among other weed species in additional cropping systems. While APHIS minimizes the risks, impacts and significance of glyphosate resistant weeds in order to deregulate new GE varieties, its sister agency is expending taxpayer dollars to eradicate the problems created by overuse of the technology.

USDA has also failed to utilize the broad authority conferred in the Plant Protection Act (PPA) over plant pests and noxious weeds. Plant pests are defined broadly to include "substances, which can directly or indirectly injure or cause disease or damage in or to any plants or parts thereof, or any processed, manufactured, or other products of plants."

7 C.F.R. 340.1. The PPA provides significant authority to prohibit or regulate noxious weeds, which again are broadly defined to include "any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment." 7 U.S.C. 7702(10). It is implausible and irresponsible to read this legislative language in such a way as to preclude regulation. Yet that is precisely what USDA does.

Congress provided the Secretary of the USDA with expansive powers to protect the vast interests of the U.S. farmer and American agriculture. USDA needs to use the powers available to it to better protect those broad interests, not merely those of the biotech companies which it is charged with regulating. We call on the Secretary to take action to broaden the scope of its regulatory powers through the finalization of the currently halted PPA rule-making and its Programmatic EIS that has languished for over 6 ½ years. That rule-making contemplated a more expansive regulatory implementation, to meet the challenges of new innovations in agricultural biotechnology. We cannot afford to regulate by court order any longer.

I thank the Chair and the Members for the opportunity to testify before the Subcommittee. Should the Members have questions, I would be happy to answer them.