



VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 3, 2010

Cindy Smith, Administrator
Animal and Plant Health Inspection Serv.
4700 River Road
Riverdale, MD 20737

Ken Salazar, Secretary of the Interior
U.S. Dept. of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Sixty-Day Notice of Intent to Sue APHIS Pursuant to the Endangered Species Act Re: ArborGen Eucalyptus Hybrid Permits

Dear Administrator Smith and Secretary Salazar,

The Animal and Plant Health Inspection Service (“APHIS”) is hereby notified that the Center for Biological Diversity, The Center for Food Safety, The International Center for Technology Assessment, Global Justice Ecology Project, Northwest Resistance Against Genetic Engineering, the Dogwood Alliance, and the Sierra Club intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), concerning APHIS’ approval of numerous permit applications by ArborGen LLC regarding the field testing of genetically engineered eucalyptus trees in the southeastern United States. APHIS has violated and remains in violation of Section 7 of the ESA by failing to insure, through consultation with the U.S. Fish and Wildlife Service (“FWS”), that the ArborGen eucalyptus hybrid permits are not likely to jeopardize the continued existence of any threatened or endangered species in the southeastern United States and/or result in the destruction or adverse modification of the critical habitat of any listed species.

I. Identity of the Organizations Giving Notice: The name, address, and phone number of the organizations giving notice of intent to sue under the ESA are:

Center for Biological Diversity
P.O. Box 710
Tucson, Arizona 85702-0710
Tel: 520-623-5252

The Center for Food Safety
660 Pennsylvania Ave, SE, Suite # 302
Washington DC 20003
Tel: 202-547-9359

International Center for Technology Assessment
660 Pennsylvania Ave., SE, Suite # 302
Washington, DC 20003
Tel: 202-547-9359

Global Justice Ecology Project
P.O. Box 412
Hinesburg, VT 05461
Tel: 802.482.2689

NW Resistance Against Genetic Engineering
P.O. Box 15289
Portland, Oregon 97293
Tel: 503-239-6841

Dogwood Alliance
P.O. Box 7645
Asheville, NC 28802
Tel: 828-251-2525

Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
Tel: 415-977-5500

II. Counsel for the party giving notice:

Marc D. Fink, Attorney
Center for Biological Diversity
209 East 7th St.
Duluth, Minnesota 55805
Tel: 218-525-3884

George A. Kimbrell, Attorney
The Center for Food Safety
International Center for Technology Assessment
2601 Mission Street, Suite 803
San Francisco, CA 94110
Tel: 415-826-2770

III. Requirements of the ESA

Section 7 of the ESA requires APHIS, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02.

For each federal action, APHIS must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, APHIS must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If APHIS determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide APHIS with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b);

50 C.F.R. § 402.14. Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by APHIS to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, APHIS must monitor and report the impact of its action on the listed species to FWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, APHIS must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

The reinitiation of formal consultation is required and must be requested by APHIS or FWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

During consultation with FWS, APHIS is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

IV. APHIS Approval and Authorization of Eucalyptus Hybrid Permits

APHIS has approved numerous permit requests by ArborGen to bring a new experimental hybrid of eucalyptus tree into the United States, plant these genetically engineered trees in multiple sites scattered across the southeastern United States, and allow these trees to flower. These permits include: 05-072-03m (allowing the import of hybrid eucalyptus trees from New Zealand into the United States); 05-256-03n (Alabama); 06-325-111r (Alabama); 08-

151-101r (Florida); 08-039-102rm (7 states in southeastern United States); 08-014-101rm and 08-011-106rm (7 states in southeastern United States); 09-070-101rm (Florida).

There is no evidence that APHIS consulted with FWS prior to approving any of these permits. For three of the permits (08-014-101rm, 08-011-106rm, and 06-325-111r), APHIS unilaterally considered the potential for adverse effects on threatened and endangered species as result of the eucalyptus hybrid permits, and determined that there would be “no effect” on listed species or designated critical habitat. For the remainder of the permits, there is no evidence that APHIS considered the potential impacts on threatened and endangered species or critical habitat prior to issuing the permits.

V. Violations of the ESA

Prior to issuing permits 05-072-03m, 05-256-03n, 06-325-111r, 08-151-101r, 08-039-102rm, 08-014-101rm, 08-011-106rm, and 09-070-101rm, APHIS failed to insure, in consultation with FWS, that the authorization and implementation of the ArborGen eucalyptus hybrid permits is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

Prior to issuing permits 05-072-03m, 05-256-03n, 06-325-111r, 08-151-101r, 08-039-102rm, 08-014-101rm, 08-011-106rm, and 09-070-101rm, APHIS failed to request from FWS whether any threatened or endangered species, or designated critical habitat, may be present within or near the areas of the proposed actions. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

Prior to issuing permits 05-072-03m, 05-256-03n, 06-325-111r, 08-151-101r, 08-039-102rm, 08-014-101rm, 08-011-106rm, and 09-070-101rm, APHIS failed to prepare a “biological assessment” to determine whether any threatened and endangered species that may be present within or near the areas of the proposed actions may be affected. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

Prior to issuing permits 05-072-03m, 05-256-03n, 06-325-111r, 08-151-101r, 08-039-102rm, 08-014-101rm, 08-011-106rm, and 09-070-101rm, APHIS failed to engage in consultation with FWS regarding the potential adverse affects of the ArborGen eucalyptus hybrid permits on threatened and endangered species, and critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.13-14.

APHIS has failed to insure that the agency or permittee will not make any irreversible or irretrievable commitment of resources with respect to the ArborGen eucalyptus hybrid permits prior to initiating and completing consultation with FWS. 16 U.S.C. § 1536(d).

VI. Conclusion

For the above stated reasons, APHIS has violated and remains in ongoing violation of Sections 7 of the ESA. If these violations of law are not cured within sixty days, the Center for Biological Diversity, The Center for Food Safety, The International Center for Technology

Assessment, Global Justice Ecology Project, Northwest Resistance Against Genetic Engineering, the Dogwood Alliance, and the Sierra Club intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



Marc D. Fink
Center for Biological Diversity
209 East 7th St.
Duluth, Minnesota 55805
Tel: 218-525-3884

cc: Tom Vilsack, Secretary of Agriculture, USDA
Eric H. Holder, Jr., U.S. Attorney General