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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,)	Case No. 11-1310-SC
)	
Plaintiffs,)	ORDER REGARDING CROSS-
)	<u>MOTIONS FOR SUMMARY JUDGMENT</u>
v.)	
)	
THOMAS J. VILSACK; GREGORY)	
PARHAM,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiffs Center for Food Safety, et al. ("Plaintiffs") bring this action for violations of the National Environmental Policy Act ("NEPA"), the Plant Protection Act ("PPA"), the Endangered Species Act ("ESA"), and the Administrative Procedure Act ("APA") against Defendant Thomas J. Vilsack, in his official capacity as Secretary of the United States Department of Agriculture ("USDA"), and Defendant Gregory Parham, in his official capacity as the Administrator for the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") (collectively, "Defendants").¹ Now before the Court are cross-motions for summary judgment filed by Defendants, Plaintiffs, and Intervenor

¹ Parham was substituted for Cindy Smith as a defendant on May 24, 2011. ECF No. 43 ("Not. of Substitution"). Parham took over for Smith as Administrator of APHIS, effective April 29, 2011. Id.

1 Defendants.² ECF Nos. 103 ("Defs.' MSJ"), 104 ("Intervenor Defs.'
2 MSJ"), 106 ("Pls.' MSJ"). These motions are fully briefed,³ and
3 the Court held a hearing on December 9, 2011. For the reasons set
4 forth below, the Court GRANTS Defendants and Intervenor Defendants'
5 motions for summary judgment and DENIES Plaintiffs' motion for
6 summary judgment.⁴

7 8 **II. BACKGROUND**

9 **A. Roundup Ready Alfalfa**

10 Plaintiffs challenge the decision of APHIS, an agency within
11 the USDA, to deregulate genetically engineered alfalfa lines J101
12 and J1063, also known as Roundup Ready Alfalfa ("RRA"). Alfalfa is
13 the fourth most widely grown crop in the nation, and the third most
14 valuable. Final Environmental Impact Statement ("FEIS") at 22-23.⁵
15 It is a perennial crop typically grown three to six years or more
16 in succession. Id. at 22, 24. Because of its dense growth,
17 alfalfa is often grown without using herbicides; less than 17

18
19 _____
20 ² The Intervenor Defendants are Monsanto Company ("Monsanto"),
21 Forage Genetics International, LLC ("Forage Genetics"), John
22 Grover, Daniel Mederos, Dan Scheps, Carl Simmons, Mark Watte,
23 California Alfalfa and Forage Association, Eureka Seeds, Gardena
24 Alfalfa Seed Growers Association, and Midwest Forage Association.
25 Intervenor Defs.' MSJ at 45. On July 18, 2011, the Court issued an
26 order stating that Intervenor Defendants could share a joint brief,
27 subject to the Court's local rules regarding page limitations. ECF
28 No. 86.

³ See ECF Nos. 158 ("Defs.' Opp'n"), 161 ("Intervenor Defs.'
Opp'n"), 168 ("Pls.' Opp'n"), 174 ("Defs.' Reply") 175 ("Intervenor
Def.' Reply"), 176 ("Pls.' Reply").

⁴ The Court also GRANTS the American Farm Bureau and Biotechnology
Industry Organization's motion for leave to file a brief amici
curiae. See ECF No. 157 ("Amici Mot.").

⁵ The FEIS can be found at Administrative Record ("AR") 3 12012-
12275.

1 percent of conventional growers use any herbicides. Id. at 81,
2 146; ECF No. 42 ("Defs.' Answer") ¶ 101.

3 RRA is designed to withstand direct application of glyphosate,
4 the active ingredient in herbicide formulations manufactured and
5 sold by Monsanto by the commercial name Roundup. See 70 Fed. Reg.
6 36917-19; AR 1 1555. A farmer planting this genetically engineered
7 form of alfalfa could spray glyphosate directly on or over crops to
8 remove weeds without harming the alfalfa plants. See FEIS at 3-4.
9 Monsanto and Forage Genetics developed RRA to "increase alfalfa
10 forage and seed purity through better control of most of the weeds
11 that impact forage and seed production;" "enable alfalfa production
12 on marginal lands with severe weed infestations;" and "provide
13 growers with a weed-control system that has a reduced risk profile
14 for the environment"; among other things. Id. at 4.

15 Plaintiffs argue that deregulation of RRA poses significant
16 risks to the environment. First, deregulation will increase the
17 use of glyphosate, which is toxic to various plant and animal
18 species. See FEIS at vi; Pls.' MSJ at 5. Second, replacing
19 conventional alfalfa with RRA may worsen the problem of glyphosate
20 resistant weeds. See FEIS at 132; Pls.' MSJ at 6. When glyphosate
21 is used year after year, weeds naturally resistant to glyphosate
22 survive, and may then reproduce and flourish. See FEIS at 131-35.
23 Third, deregulation could result in increased gene flow from
24 genetically engineered crops to conventional, organic, and wild
25 plants. See FEIS at 17; Pls.' MSJ at 6. Plaintiffs contend that
26 such transgenic contamination could result in the loss of natural
27 varieties of alfalfa and hurt organic growers, whose customers

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1 demand conventional and organic foods free of transgenic content.
2 Pls. MSJ at 7.

3 **B. Initial Deregulation Determination**

4 The PPA gives the Secretary of the USDA the authority to adopt
5 regulations preventing the introduction and dissemination of plant
6 pests. 7 U.S.C. § 7711(a). Pursuant to this authority, the USDA,
7 through APHIS, regulates "organisms and products altered or
8 produced through genetic engineering that are plant pests or are
9 believed to be plant pests." 7 C.F.R. § 340.0(a)(2) n.1. Such
10 products and organisms are known as "regulated articles." See id.
11 § 340.0.

12 APHIS originally considered RRA to be a regulated article.
13 See 70 Fed. Reg. 36917-36918. Accordingly, it was unlawful for any
14 person to introduce RRA without first obtaining permission from
15 APHIS. In April 2004, Monsanto and Forage Genetics submitted to
16 APHIS a request for determination of nonregulated status for RRA
17 pursuant to 7 C.F.R. § 340.6. AR 1 1553-1958. In 2005, after
18 considering hundreds of public comments and preparing an
19 Environmental Assessment, APHIS issued a Finding of No Significant
20 Impact and decided to deregulate RRA unconditionally, without
21 preparing an Environmental Impact Statement ("EIS"). 70 Fed. Reg.
22 36917-36918.

23 Approximately eight months later, various plaintiffs,
24 including a number of the plaintiffs in the instant action, filed
25 suit in this district to challenge APHIS's Environmental
26 Assessment, Finding of No Significant Impact, and its decision to
27 deregulate RRA. Geertson Seed Farms v. Johanns, No. 06-01075 CRB
28 ("Alfalfa I"). The court granted summary judgment in favor of the

1 plaintiffs, finding that APHIS had violated NEPA because its
2 Environmental Assessment was inadequate and its Finding of No
3 Significant Impact was arbitrary and capricious. Alfalfa I, 2007
4 U.S. Dist. LEXIS 14533, *37-38 (N.D. Cal. Feb. 13, 2007). The
5 Court found that APHIS's Environmental Assessment failed to answer
6 "substantial questions" concerning the impacts of deregulation,
7 including "whether [] the deregulation of RRA would lead to the
8 transmission of the engineered gene to organic and conventional
9 alfalfa" and "the possible extent of such transmission"; "farmers'
10 ability to protect their crops from the genetically engineered
11 gene"; and "the extent to which RRA will contribute to the
12 development of Roundup-resistant weeds." Id. Through subsequent
13 orders, the court (1) vacated APHIS's deregulation of RRA; (2)
14 ordered APHIS to prepare an EIS before it made any decision on
15 Monsanto's deregulation petition; and (3) enjoined the planting of
16 any RRA in the United States after March 30, 2007.⁶ Alfalfa I,
17 2007 U.S. Dist. LEXIS 21491, at *8-9 (N.D. Cal. Mar. 12, 2007);
18 Alfalfa I, 2007 U.S. Dist. LEXIS 32701, at *29 (N.D. Cal. May 3,
19 2007).

20 APHIS, Monsanto, and Forage Genetics appealed the Alfalfa I
21 remedy. The Ninth Circuit affirmed the decision of the district
22 court, but the Supreme Court reversed and remanded. Monsanto Co.
23 v. Geertson Seed Farms, 130 S. Ct. 2743, 2761-62 (2010). The
24 Supreme Court held that the district court "abused its discretion
25 in enjoining APHIS from effecting a partial deregulation [pending
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27 ⁶ The Court also allowed those who had already purchased RRA to
28 plant their seeds until March 30, 2007, and imposed certain
conditions on the handling of already planted RRA. Alfalfa I, 2007
U.S. Dist. LEXIS 32701, at *30; Alfalfa I, 2007 U.S. Dist. LEXIS
48383, at *6-12.

1 APHIS's preparation of an EIS] and in prohibiting the possibility
2 of planting in accordance with the terms of such a deregulation."
3 Id. at 2761. However, the Supreme Court left in place the district
4 court's vacatur of APHIS's deregulation decision. Id. at 2756.
5 Subsequently, Forage Genetics petitioned APHIS for such a partial
6 deregulation while APHIS completed its EIS. AR 3 4361.

7 **C. Current Deregulation Determination**

8 In December 2009, APHIS published a draft EIS ("DEIS")
9 concerning the deregulation of RRA. The DEIS analyzed only two
10 alternatives: (1) "no action," i.e., the regulated status of RRA
11 would remain unchanged; and (2) full deregulation. DEIS (AR 2
12 13640-15115) at 11-14. The DEIS dismissed partial deregulation
13 options, such as imposing isolation distances and geographic
14 restrictions to restrict transgenic contamination, because APHIS
15 concluded that it lacked the regulatory authority to enforce such
16 options. Id. at 14-15. Specifically, APHIS concluded that it had
17 no jurisdiction to regulate RRA once it determined that RRA did not
18 pose a plant pest risk. See id. at 14. During the 75-day comment
19 period, APHIS received approximately 244,000 public comments on the
20 DEIS. FEIS at 9.

21 In December 2010, APHIS released its final EIS ("FEIS"), which
22 included a new, "co-preferred" alternative. See FEIS at 13. Under
23 the new alternative, APHIS would partially deregulate RRA through a
24 combination of isolation distances and geographic restrictions
25 intended to reduce the risks of transgenic contamination. Id. In
26 this alternative, a marketer of RRA would ensure that end users
27 implemented the required management practices through contracts,
28 licenses, or other means. Id.

1 In January 2011, APHIS issued a Record of Decision ("ROD"),
2 fully deregulating RRA and allowing it to be grown without any
3 restriction or oversight. ROD (AR 4 988-1004) at 1. APHIS stated
4 that the full deregulation alternative was consistent with the
5 regulatory requirements in 7 C.F.R. part 340 and that RRA "do[es]
6 not pose a greater plant pest risk than other conventional alfalfa
7 varieties." Id. at 5. APHIS acknowledged that full deregulation
8 could lead to transgenic contamination through the transfer of
9 pollen or seed mixing, increased use of glyphosate, and the
10 evolution and proliferation of glyphosate-resistant weeds. Id. at
11 8-10. APHIS identified the no action alternative as the
12 "environmentally preferred alternative," but decided against
13 adopting it because "it d[id] not meet the agency's purpose and
14 need . . . to make a decision that is consistent with its existing
15 statutory authority and regulatory program" and because "APHIS has
16 not identified any plant pest risks associated with [RRA]." Id. at
17 15. APHIS explained that it decided against partial deregulation
18 because it had not identified any plant pest risks associated with
19 RRA and, accordingly, "the restrictions in [the partial
20 deregulation alternative] are not consistent with APHIS' regulatory
21 authorities." ROD at 14.

22 **D. Plaintiffs' Lawsuit**

23 Plaintiffs filed the instant action in federal court on March
24 18, 2011 and filed their First Amended Complaint ("FAC") one month
25 later. ECF Nos. 1 ("Compl."); 13 ("FAC"). The FAC asserts five
26 claims against Defendants. See FAC ¶¶ 176-221. The first three
27 claims are for violations of NEPA and the APA, the fourth is for
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1 violations of the PPA and the APA, and the fifth is for violation
2 of the ESA. Id.

3 Plaintiffs' three NEPA claims assert, respectively, that (1)
4 APHIS failed to adequately consider the various environmental
5 consequences of its deregulation determination, (2) APHIS's NEPA
6 process was procedurally flawed and predetermined, and (3) a
7 supplemental EIS is required. Id. ¶¶ 176-201. Specifically,
8 Plaintiffs contend that the FEIS is flawed because it failed to
9 take a hard look at the environmental effects of deregulation on
10 transgenic contamination, conventional and organic growers,
11 glyphosate resistant weeds, the overall use of glyphosate, and the
12 availability of conventional alfalfa seed varieties (i.e., seed
13 concentration), among other things. FAC ¶¶ 178-88. Plaintiffs
14 also allege that APHIS improperly: limited its assessment to its
15 regulatory authority rather than its statutory authority; failed to
16 acknowledge its mandate to minimize noxious weed impacts;
17 predicated its scope and conclusions on its separate, previously
18 decided PPA "plant pest risk determination"; rejected the partial
19 deregulation alternative based on the erroneous conclusion that
20 APHIS does not have the authority to implement isolation distances
21 and geographic limitations; failed to account for the direct and
22 indirect impacts of increased glyphosate use; and relied on future
23 agency actions to mitigate the impacts of transgenic contamination.
24 See id. ¶¶ 189-198. Finally, Plaintiffs allege that APHIS's
25 reliance on new agency policies concerning the coexistence of RRA
26 and conventional alfalfa requires a supplemental EIS to study the
27 efficacy of any such measures. FAC ¶¶ 199-201.

28

1 Plaintiffs' fourth claim for violations of the PPA and APA
2 assert that APHIS's deregulation determination was arbitrary and
3 capricious and not based on sound science. Plaintiffs allege that
4 APHIS violated the PPA by failing to adequately consider: the
5 effects of the glyphosate use that will result from deregulation;
6 noxious weed risks; and transgenic contamination. Id. at 205-207.
7 Plaintiff also challenges as arbitrary and capricious APHIS's
8 conclusions that partial deregulation of RRA was inconsistent with
9 APHIS's authority and mission, that RRA will not harm organic
10 growers or various species beneficial to agriculture, and that RRA
11 will not create a noxious weed risk. Id. ¶¶ 208-211.

12 Finally, Plaintiffs' fifth claim for violation of the ESA
13 asserts that APHIS failed to insure, in consultation with the
14 United States Fish and Wildlife Service ("FWS"), that deregulation
15 of RRA would not harm protected species or critical habitat. Id. ¶
16 215.

17

18 **III. LEGAL STANDARD**

19 Entry of summary judgment is proper "if the movant shows that
20 there is no genuine dispute as to any material fact and the movant
21 is entitled to judgment as a matter of law." Fed. R. Civ. P.
22 56(a). Summary judgment should be granted if the evidence would
23 require a directed verdict for the moving party. Anderson v.
24 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]
25 mandates the entry of summary judgment . . . against a party who
26 fails to make a showing sufficient to establish the existence of an
27 element essential to that party's case, and on which that party
28 will bear the burden of proof at trial." Celotex Corp. v. Catrett,

1 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be
2 believed, and all justifiable inferences are to be drawn in his
3 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence
4 of a scintilla of evidence in support of the plaintiff's position
5 will be insufficient; there must be evidence on which the jury
6 could reasonably find for the plaintiff." Id. at 252.

7 When the court reviews a government agency's final action, the
8 Rule 56 standard for summary judgment is amplified by 5 U.S.C. §
9 706(2) of the Administrative Procedure Act. Title 5 U.S.C. § 706
10 provides the applicable standard of review for agency action.
11 Under § 706, "the reviewing court shall decide all relevant
12 questions of law, interpret constitutional and statutory
13 provisions, and determine the meaning or applicability of the terms
14 of an agency action." Under § 706(2), the reviewing court shall
15 set aside agency action found to be "arbitrary, capricious, an
16 abuse of discretion, or otherwise not in accordance with law" or
17 "in excess of statutory jurisdiction, authority, or limitations, or
18 short of statutory right[.]"

19 "In making the foregoing determinations, the court shall
20 review the whole record or those parts of it cited by a party, and
21 due account shall be taken of the rule of prejudicial error." 5
22 U.S.C. § 706. Summary judgment in a case of judicial review of
23 agency action requires the court to review the administrative
24 record to determine whether the agency's action was "arbitrary and
25 capricious, an abuse of discretion, not in accordance with law, or
26 unsupported by substantial evidence on the record taken as a
27 whole." Environment Now! v. ESPY, 877 F. Supp. 1397, 1421 (E.D.
28

1 Cal. 1994) (citing Good Samaritan Hospital, Corvallis v. Mathews,
2 609 F.2d 949, 951 (9th Cir. 1979)).

3 "The court is not empowered to substitute its judgment for
4 that of the agency." Citizens to Preserve Overton Park, Inc. v.
5 Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds by
6 Califano v. Sanders, 430 U.S. 99, 105 (1977). The Ninth Circuit
7 recognizes a narrow scope of review applicable to agency action:
8 "Assuming that statutory procedures meet constitutional
9 requirements, the court is limited to a determination of whether
10 the agency substantially complied with its statutory and regulatory
11 procedures, whether its factual determinations were supported by
12 substantial evidence, and whether its action was arbitrary,
13 capricious or an abuse of discretion." Toohey v. Nitze, 429 F.2d
14 1332, 1334 (9th Cir. 1970), cert denied, 400 U.S. 1022 (1971).
15 Despite this narrow scope of review, the court is still expected to
16 make a "thorough, probing, in-depth review" of the administrative
17 record to ensure the validity of the agency action and "must
18 consider whether the decision was based on a consideration of the
19 relevant factors and whether there has been a clear error of
20 judgment." Overton Park, 401 U.S. at 415-16.

21 22 **IV. DISCUSSION**

23 **A. Plant Protection Act ("PPA")**

24 Congress enacted the PPA in 2000 to replace the former Plant
25 Quarantine Act, the Federal Plant Pest Act, and the Federal Noxious
26 Weed Act. See Pub. L. No. 106-224, 114 Stat. 438 (codified at 42
27 U.S.C. § 7701 et seq.) The PPA provides that APHIS may take
28 certain actions "necessary to prevent . . . the dissemination of a

1 plant pest or noxious weed within the United States." 7 U.S.C. §
2 7712(a). Congress mandated that all of APHIS's decisions "shall be
3 based on sound science." Id. §§ 7701(4), 7711(b), 7712(b).
4 APHIS's implementing regulations concerning transgenic plants, 7
5 C.F.R. Part 340, were promulgated pursuant to its previous,
6 narrower Federal Plant Pest Act authority and therefore reference
7 only plant pest harms, and not noxious weed harms. See 52 Fed.
8 Reg. 22,908; 58 Fed. Reg. 17,044; 62 Fed. Reg. 23,945.

9 Plaintiffs assert that APHIS violated the PPA because (1)
10 APHIS failed to consider the noxious weed harms of deregulation;
11 (2) APHIS's conclusion that it could not partially deregulate RRA
12 was arbitrary and capricious; and (3) APHIS's plant pest
13 determination was not based on sound science. See Pls.' MSJ at 36-
14 31 30; Pls.' Opp'n at 20-31; FAC ¶¶ 202-12. For the reasons
15 discussed below, the Court finds that the plant pest risk
16 assessment made in connection with RRA was consistent with the PPA.
17 Accordingly, the Court GRANTS Defendants and Intervenor Defendants'
18 motions for summary judgment with respect to Plaintiffs' PPA claim.

19 1. Noxious Weed Risk

20 Plaintiffs first argue that "APHIS completely failed to
21 undertake its statutorily mandated obligation to investigate
22 whether RRA poses noxious weed risks." Pls.' MSJ at 25.
23 Plaintiffs argue that, under the PPA's expansive noxious weed
24 mandate, APHIS was required, to the extent practicable, to limit
25 the resulting noxious weed impacts of deregulating RRA. Id. at 28.
26 Yet, "APHIS nowhere applied or even acknowledged its noxious weed
27 authority in approving RRA." Id. at 29. Plaintiffs concede that 7
28 C.F.R. Part 340, the regulation under which APHIS exercised its

1 authority to deregulate RRA, does not require an analysis of
2 noxious weed effects. Id. Plaintiffs also concede that the
3 proposed amendments to Part 340 - which would incorporate noxious
4 weed effects - have not been finalized. Id. However, Plaintiffs
5 argue that APHIS was still required to analyze noxious weed effects
6 pursuant to its express statutory mandate. Id. Plaintiffs contend
7 RRA poses the types of noxious weed risks encompassed by the
8 statute since it may foster the development of glyphosate resistant
9 weeds and threaten organic growers through transgenic
10 contamination. Id. at 28.

11 Defendants respond that Plaintiffs' noxious weeds argument is
12 premised on a misunderstanding of the PPA's existing statutory and
13 regulatory structure. Defs.' Opp'n at 2. Defendants argue that,
14 in enacting the PPA, Congress maintained the distinction between
15 the regulation of plant pests and noxious weeds and that APHIS's
16 regulations reflect that distinction. Defs.' MSJ at 18.
17 Defendants acknowledge that APHIS has issued a proposed rule that
18 would amend the regulations so as to incorporate noxious weed
19 effects into decisions on petitions to deregulate genetically
20 engineered plants. Defs.' Opp'n at 3. However, Defendants insist
21 that APHIS is bound to act in accordance with its current rules and
22 regulations until they have been formally amended. Id. Intervenor
23 Defendants argue that Plaintiffs' noxious weed argument is barred
24 by their failure to exhaust administrative remedies as they have
25 failed to petition APHIS to add RRA to the regulatory list of
26 noxious weeds. Intervenor Defs.' MSJ at 44. Intervenor Defendants
27 further argue that Plaintiffs cannot show that RRA is a noxious
28 weed. Id. at 43.

1 In enacting the PPA, Congress provided distinct mechanisms for
2 regulating plant pests and noxious weeds. Section 7711(a) of the
3 codified Act prohibits the "unauthorized movement of plant pests"
4 absent regulatory permission, while section 7712(f)(1) provides
5 that "the Secretary may publish, by regulation, a list of noxious
6 weeds that are prohibited or restricted from entering the United
7 States or that are subject to restrictions on interstate
8 movement[.]" In accordance with this framework, APHIS exercises
9 its statutory authority over plant pests and noxious weeds pursuant
10 to two distinct regulations -- 7 C.F.R. Part 340 relates to plants
11 pests and 7 C.F.R. Part 360 relates to noxious weeds. APHIS's
12 reasonable interpretation of its statutory mandate is entitled to
13 deference.⁷ See Chevron, U.S.A., Inc. v. Natural Res. Def.
14 Council, Inc., 467 U.S. 837, 865 (1984).

15 In light of the prevailing statutory and regulatory framework,
16 the Court agrees with Defendants. Prior to the decision challenged
17 by Plaintiffs, RRA was a regulated article under the plant pest
18 regulations in 7 C.F.R. Part 340. APHIS was then presented with a
19 petition for nonregulated status brought under 7 C.F.R. § 340.6,
20 see AR 1 1553, and it acted accordingly. APHIS's decision to
21 deregulate RRA was based on its determination that RRA did not pose
22 a plant pest risk and there is no indication that the agency
23 strayed from the current regulations in Part 340 in reaching that

24
25 ⁷ Plaintiffs argue that APHIS's attempt to "ignore the PPA's
26 noxious weed mandates" is not entitled to deference since it is
27 merely a "convenient litigation position." See Pls.' Opp'n at 23.
28 This argument is unpersuasive. First, as evidenced by 7 C.F.R.
Part 360, the agency has not ignored its noxious weed mandate.
Second, the distinct regulatory frameworks for noxious weed and
plant pest risks were developed, through notice and comment
rulemaking, long before the inception of the instant litigation.

1 determination. Plaintiffs do not dispute that RRA has never been
 2 included on the regulatory list of noxious weeds promulgated
 3 pursuant to Part 360. Nor do Plaintiffs dispute that they have not
 4 petitioned APHIS to include RRA on this list.⁸ Accordingly, the
 5 Court finds that APHIS was under no obligation to assess whether
 6 RRA posed a noxious weed risk when it made its deregulation
 7 determination.

8 2. Plant Pest Risk

9 Plaintiffs next argue that APHIS's determination that RRA does
 10 not pose a plant pest risk was arbitrary and capricious and not
 11 based on sound science. Pls.' Opp'n at 25-32. Plaintiffs
 12 specifically point to four instances in which APHIS allegedly
 13 ignored record evidence in reaching its plant pest risk
 14 determination. See id.

15 First, Plaintiffs argue that APHIS improperly ignored evidence
 16 that RRA deregulation will harm "raw or processed commodities"
 17 through transgenic contamination, i.e., cross-pollination with
 18 organic and conventional alfalfa. Id. at 25. The Court disagrees.
 19 Nothing in the PPA indicates that APHIS must account for the
 20 effects of cross-pollination on other commercial crops in
 21 conducting its plant pest risk assessment. The PPA defines a plant
 22 pest as a "protozoan," "nonhuman animal," "parasitic plant,"

23 ⁸ Plaintiffs contend they should not be required to file such a
 24 petition since "APHIS cannot outsource the agency's statutory
 25 duties to Plaintiffs." Pls.' Opp'n at 24. This argument is
 26 unavailing. Plaintiffs cite no authority which would have required
 27 APHIS to take up the issue of noxious weed risks in response to a
 28 petition brought under 7 C.F.R. Part 340. Notably, the statutory
 language on which Plaintiffs rely is permissive. See 7 U.S.C.
 7712(a) ("The Secretary may prohibit or restrict the importation .
 . . of any . . . noxious weed" (emphasis added)); id. § 7712(f)(1)
 ("the Secretary may publish, by regulation, a list of noxious weeds
 that are prohibited" (emphasis added)).

1 "bacterium," "fungus," "virus or viroid," or "infectious agent or
2 other pathogen." 7 U.S.C. § 7702(14). None of these organisms are
3 pests because they might cross-pollinate with commercial crops.
4 Thus, there is no reason to believe that Congress intended for
5 APHIS to regulate commercial crops as plant pests because they pose
6 a risk of transgenic contamination. APHIS's regulatory list of
7 plant pests is consistent with this interpretation. See 7 C.F.R. §
8 340.2. Additionally, APHIS did not ignore the potential economic
9 impacts on conventional and organic alfalfa growers. These issues
10 were considered in the agency's NEPA analysis. See FEIS at 38-70.
11 Accordingly, the Court finds that APHIS's plant pest risk
12 determination did not improperly ignore the risk of transgenic
13 contamination.

14 Second, Plaintiffs contend that APHIS failed to consider the
15 effect of deregulation on the development on glyphosate resistant
16 weeds. See Pls.' Opp'n at 28. Plaintiffs argue that deregulation
17 will result in increased use of herbicides by farmers which, in
18 turn, will enable herbicide resistant weeds to flourish. See id.
19 Defendants respond that Plaintiffs misinterpret the scope of
20 APHIS's plant pest risk assessment by focusing on the consequences
21 of the use of pesticide by third parties rather than the plant pest
22 risk directly posed by RRA. See Defs.' Opp'n at 10. The Court
23 agrees with Defendants and finds that APHIS's interpretation of its
24 plant pest mandate is consistent with the PPA and its implementing
25 regulations. APHIS's task in performing its plant pest risk
26 assessment was to determine whether RRA itself posed a plant pest
27 risk because of its genetic modifications. See 7 U.S.C. § 7702(14)
28 (defining plant pest as "any living stage" or an enumerated list of

1 organisms "that can directly or indirectly injure, cause damage to,
2 or cause disease in any plant or plant product.") Nothing in the
3 PPA suggests that APHIS was required to consider the effects of
4 increased herbicide use or the development of herbicide resistant
5 weeds in making this assessment. See id. Nor do APHIS's plant
6 pest regulations require such an analysis. See 7 C.F.R. Part 340.

7 Third, Plaintiffs argue that APHIS improperly ignored evidence
8 that deregulation will increase the risk of plant disease. Pls.'
9 Opp'n at 31. APHIS had concluded that RRA, "whether sprayed with
10 glyphosate or not, w[as] found to be similarly affected by typical
11 plant diseases found in alfalfa, and do[es] not harbor an altered
12 pest or pathogen community compared to other alfalfa varieties."
13 AR 3 11816-17. Plaintiffs argue that APHIS reached this conclusion
14 by improperly relying on Monsanto's "anecdotal, unscientific
15 'observations,'" and ignored other studies reaching contrary
16 conclusions. Pls.' Opp'n at 32. Plaintiffs contend that the
17 administrative record shows that glyphosate treated Roundup Ready
18 crops harbor elevated levels of soil pathogens in their root
19 tissues and that such pathogens increase the severity of crop
20 disease. Id. Plaintiffs' argument is unpersuasive since, as
21 discussed above, the PPA requires APHIS to consider the plant pest
22 risks posed by a regulated article -- in this case, RRA -- not
23 herbicides which may be used in conjunction with that regulated
24 article. Further, in its NEPA analysis, APHIS considered a number
25 of studies not addressed by Plaintiffs; these found no direct
26 evidence that glyphosate use is linked to the development of plant
27 disease. See, e.g., AR 3 11360-61. Courts "grant considerable
28 discretion to agencies on matters 'requir[ing] a high level of

1 technical expertise.'" Ecology Ctr. v. Castaneda, 574 F.3d 652,
2 658 (9th Cir. 2009) (quoting Marsh v. Or. Natural Res. Council, 490
3 U.S. 360, 377 (1989)). "[I]t is not our role to weigh competing
4 scientific analyses." Id. at 659. Accordingly, based on the
5 conflicting studies in the administrative record, the Court cannot
6 conclude that APHIS's conclusions concerning plant disease lacked a
7 basis in sound science.

8 Fourth, Plaintiffs contend APHIS ignored evidence that RRA
9 deregulation will increase the "weediness" of feral alfalfa. Pls.'
10 Opp'n at 26-28. Specifically, Plaintiffs argue that RRA will
11 cross-pollinate with feral alfalfa and that the resulting feral RRA
12 will become a problem weed which farmers will be unable to
13 eradicate through the application of glyphosate. Id. at 27.
14 Plaintiffs' argument fails for several reasons. First, the
15 administrative record shows that APHIS's plant pest risk assessment
16 addressed the potential weed risks posed by RRA. See AR 3 11807-
17 15. After considering a number of technical studies involving
18 field trials and growth experiments, the agency concluded that "no
19 unusual characteristics were noted that would suggest increased
20 weediness of [RRA] plant populations." AR 3 11815. Second,
21 Plaintiffs' argument ignores the fact that APHIS considered and
22 discussed alternative methods to control RRA in feral stands,
23 including the application of non-glyphosate herbicides. See AR 3
24 11808. Third, as discussed above, there is no indication that
25 Congress intended APHIS to regulate genetically engineered crops as
26 plant pests based on their potential to interbreed with other
27 crops.

28

1 For these reasons, the Court cannot conclude that APHIS's
2 plant pest risk assessment was arbitrary and capricious or lacked a
3 basis in sound science.

4 3. Partial Deregulation

5 Plaintiffs also challenge as arbitrary and capricious APHIS's
6 conclusion that it could not partially regulate RRA under the PPA
7 once it determined that RRA was not a plant pest. See Pls.' MSJ at
8 30. In the ROD, APHIS had rejected the partial deregulation
9 alternative because it was "not consistent with APHIS's regulatory
10 authorities." ROD at 14. Plaintiffs argue that APHIS's final
11 decision was based on the false assumption that its authority was
12 so limited that it had to ignore the impacts of glyphosate
13 resistant weeds and transgenic contamination. See Pls.' MSJ at 31.
14 Plaintiffs further argue that APHIS's contention that it could not
15 partially deregulate RRA is inconsistent with its own prior
16 positions as well as judicial precedent. See id. at 33.

17 Defendants do not dispute that APHIS's decision against
18 partial deregulation was predicated on its finding that RRA did not
19 pose a plant pest risk. Defendants also agree that, under the PPA,
20 APHIS may regulate a genetically engineered plant in part. Defs.
21 Opp'n at 5. However, Defendants contend that partial regulation
22 must be based on either (1) an acknowledged plant pest risk or (2)
23 the continued presumption of such a risk in the absence of APHIS's
24 scientific finding to the contrary. Id. at 7. Defendants submit
25 that, in the instant action, neither element is present since APHIS
26 determined that RRA did not present a plant pest risk. Id.

27 The Court agrees with Defendants. APHIS's conclusion that it
28 could not continue to regulate RRA once it determined that the crop

1 did not pose a plant pest risk is entitled to deference as it is
2 consistent with the current statutory and regulatory framework.
3 See Chevron, 467 U.S. at 865. Under both the PPA and agency
4 regulations, APHIS's authority to regulate organisms such as RRA is
5 predicated upon the existence of a plant pest risk. The PPA
6 provides, in relevant part, that APHIS may regulate any plant or
7 plant product if it determines that regulation is necessary to
8 prevent the dissemination of a plant pest. See 7 U.S.C. § 7712.
9 APHIS's regulations also define a "regulated article" according to
10 plant pest risk. See 7 C.F.R. § 340.1. As explained in section
11 IV.A.2 supra, the Court declines to second-guess APHIS's
12 determination that RRA does not pose a plant pest risk.

13 The Court also rejects Plaintiffs' contention that APHIS's
14 deregulation decision is somehow inconsistent with the agency's
15 prior determinations. Plaintiffs point to APHIS's decision to
16 partially deregulate Roundup Ready sugar beets. But that
17 determination was made in response to a request for partial
18 deregulation, not full deregulation, and APHIS's assessment of the
19 request did not reach the issue of whether the crops would pose a
20 plant pest risk if they were fully deregulated. See Sugar Beets
21 Interim PPRA at 1.⁹ In contrast, in the instant action, Plaintiffs
22 are challenging APHIS's final determination that RRA does not pose
23 a plant pest risk.

24 The judicial precedent relied on by Plaintiffs is also
25 inapposite. In Monsanto, the Supreme Court addressed the different
26 regulatory alternatives available to APHIS pending or following the

27 _____
28 ⁹ Available at http://www.aphis.usda.gov/brs/aphisdocs/03_32301_p_ppra.pdf.

1 completion of an EIS, including partial deregulation. See 130 S.
2 Ct. at 2759. Similarly, the district court in Alfalfa I discussed
3 the possibility of including a partial deregulation alternative in
4 APHIS's EIS, stating that "further collection of data can inform
5 APHIS as to the likely extent of any gene transmission and the
6 realistic measures, if any, that may be taken to prevent or at
7 least reduce such contamination." 2007 U.S. Dist. LEXIS 14533, at
8 *18. However, neither court directly addressed APHIS's authority
9 to partially regulate RRA under the PPA. Nor did either court
10 suggest that APHIS could continue to regulate RRA after the agency
11 had determined that the crop did not pose a plant pest risk.

12 For these reasons, the Court finds that APHIS's RRA
13 deregulation determination did not violate the PPA.

14 **B. Endangered Species Act ("ESA")**

15 Section 7(a)(2) of the ESA requires each federal agency to
16 "insure that any action, authorized, funded, or carried out by
17 [the] agency . . . is not likely to jeopardize the continued
18 existence of any endangered species or threatened species or result
19 in the destruction or adverse modification of habitat of such
20 species[.]" 16 U.S.C. § 1536(a)(2). To this end, Section 7(b)
21 requires an action agency to consult with FWS if it finds that a
22 federal action may affect a listed species or critical habitat.
23 Id. § 1536(b); 50 C.F.R. § 402.14(a). If the action agency
24 determines that its action "may affect" critical species or
25 habitat, then formal consultation is mandated. Nat'l Res. Def.
26 Counsel v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998).

27 Plaintiffs argue that APHIS violated the ESA by failing to
28 consult with FWS to determine the effect of RRA deregulation on

1 threatened and endangered plants and animals and their habitats.
2 Pls.' MSJ at 11-12. APHIS declined to consult with FWS because it
3 concluded that the RRA gene product would have "no effect" on
4 federal listed threatened or endangered species or on critical
5 habitat. See ROD at 11. Plaintiffs argue that Defendants' finding
6 of "no effect" improperly focused on the RRA gene product and
7 unlawfully ignored the glyphosate use that will inevitably
8 accompany the planting of the glyphosate resistant crop. Pls.' MSJ
9 at 11-12. Plaintiffs suggest that the increased use of glyphosate
10 resulting from deregulation will jeopardize a number of threatened
11 and endangered species listed under the ESA. See id. at 13.
12 Plaintiffs point out that, under Wild Fish Conservancy v. Salazar,
13 628 F.3d 513, 525 (9th Cir. 2010), the agency must consider
14 indirect effects on threatened and endangered species when making a
15 finding of "no effect." Id. at 12.

16 Defendants respond that APHIS was not required to consult on
17 the effects of glyphosate use because APHIS does not authorize or
18 regulate herbicide use and, as such, RRA deregulation is not the
19 legally relevant cause of any effects of such use on listed
20 species. Defs.' MSJ at 31. Defendants point out that Congress
21 tasked EPA, not APHIS, with regulating herbicide use through the
22 Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Id.
23 at 32. In 2004 and 2005, pursuant to FIFRA, EPA authorized
24 glyphosate for use on RRA. See AR 2 429-31; AR 2 438-40. Relying
25 in part on the Supreme Court's decisions in Department of
26 Transportation v. Public Citizen, 541 U.S. 752 (2004), and National
27 Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644
28 (2007), Defendants argue that a defendant agency must be the "legal

1 cause" of the allegedly harmful effects in order for the agency to
2 be required to consult under Section 7 of the ESA. Id. at 32-33.
3 Defendants reason that APHIS's deregulation determination is not
4 the legally relevant cause of harms stemming from glyphosate use
5 since EPA, not APHIS, regulates glyphosate.¹⁰ Id.

6 Plaintiffs argue that APHIS should not be allowed to ignore
7 its duties under the ESA by passing the buck to EPA. They contend
8 that "Plaintiffs are not challenging EPA's registration of
9 glyphosate, but APHIS's decision to allow unrestricted use of a
10 cropping system specifically designed to be dependent on glyphosate
11 use." Pls.' MSJ at 22. Plaintiffs also challenge APHIS's
12 conclusion that adherence to EPA guidelines will ensure that the
13 glyphosate used in conjunction with RRA will not adversely affect
14 threatened or endangered species. Id. at 23. Plaintiffs point to
15 EPA's comments on the FEIS, stating that APHIS had "erroneously
16 assum[ed]" that EPA had determined that glyphosate "poses no
17 unreasonable environmental risk to federally listed threatened and
18 endangered species." Id. (quoting AR 4 670). Plaintiffs also
19 argue that EPA has yet to assess the effects of glyphosate on
20 species found near the acreage on which glyphosate has or will be
21 used.¹¹ Id. at 24.

22
23 ¹⁰ APHIS made a similar argument in Alfalfa I, asserting that the
24 agency need not have considered glyphosate use in its NEPA analysis
25 since "there are other federal agencies, primarily [EPA], that are
26 responsible for regulating herbicides[.]" 2007 U.S. Dist. LEXIS
27 14533, at *32. The district court declined to rule on the issue
28 because it had already determined that APHIS's NEPA analysis must
consider the cumulative impact of increased glyphosate use with
respect to the development of glyphosate resistant weeds. Id.

¹¹ EPA has stated that it "intends to conduct a national-level
Endangered Species Assessment as part of its registration review
for glyphosate." AR 4 670. Registration review began in 2009 and
a final registration review decision is expected in 2015. Id.

1 As the administrative record shows that RRA itself will have
2 no effect on listed species, see FEIS 238-42, Plaintiffs' ESA claim
3 ultimately turns on whether APHIS's actions are the legally
4 relevant cause of increased glyphosate use. The Supreme Court
5 recently addressed the issue of legally relevant causation in
6 Public Citizen. In that case, the Supreme Court held that the
7 Federal Motor Carrier Safety Administration ("FMCSA") did not need
8 to consider the environmental effects of cross-border operations of
9 Mexican-domiciled trucks in its NEPA Environmental Assessment
10 because it lacked the discretion to prevent those operations.
11 Public Citizen, 541 U.S. at 770. The court explained that "where
12 an agency has no ability to prevent a certain effect due to its
13 limited statutory authority over the relevant actions, the agency
14 cannot be considered a legally relevant 'cause' of the effect."
15 Id. "[T]he legally relevant cause of the entry of the Mexican
16 trucks [was] not FMCSA's action, but instead the actions of the
17 President in lifting the moratorium [on their entry] and those of
18 Congress in granting the President this authority while
19 simultaneously limiting FMCSA's discretion." Id. at 769. The
20 Court found that FMCSA did not have the discretion to countermand
21 the decisions of the President or Congress. Id. The court
22 explained:

23 [By statute,] FMCSA must grant registration to all
24 domestic or foreign motor carriers that are "willing and
25 able to comply with" the applicable safety fitness and
26 financial responsibility requirements. [Citation] FMCSA
27 has no statutory authority to impose or enforce emissions
28 controls or to establish environmental requirements
unrelated to motor carrier safety.

1 Id. at 758-759. The court found that a "'but for' causal
2 relationship is insufficient to make an agency responsible for a
3 particular effect under NEPA." Id. at 767.

4 In Homebuilders, the Supreme Court found that the principle
5 enunciated in Public Citizen -- "that an agency cannot be
6 considered the legal 'cause' of an action that it has no statutory
7 discretion not to take" -- also applied in the context of section 7
8 of the ESA. 551 U.S. at 667. In that case, the plaintiffs
9 challenged EPA's decision to transfer Clean Water Act ("CWA")
10 permitting authority to a state without first insuring that the
11 transfer would not jeopardize endangered or threatened species.
12 Id. at 649. The Supreme Court stated that an agency's duties under
13 section 7(a)(2) of the ESA only applied to discretionary action.
14 Id. at 669. The court found that EPA had no discretion in
15 Homebuilders because the CWA required transfer of permitting
16 authority as certain triggering criteria had been met. Id.

17 In the instant action, APHIS is not the legally relevant cause
18 of the glyphosate use complained of by Plaintiffs. Under the PPA,
19 APHIS may only regulate a genetically engineered crop such as RRA
20 where the crop presents plant pest or noxious weed risk. See
21 Section IV.A supra. Once APHIS determined that RRA did not pose a
22 plant pest risk, it lacked further discretionary authority to
23 regulate the crop and thus could not be obligated to conduct
24 additional ESA analysis. APHIS has no authority to regulate where
25 and how glyphosate is used. Congress has delegated that authority
26 to EPA through FIFRA and, pursuant to that authority, EPA has
27
28

1 registered glyphosate for use on RRA.¹² The Court must "draw a
2 manageable line between those causal changes that may make an actor
3 responsible for an effect and those that do not." Public Citizen,
4 541 U.S. at 767 (internal quotations and citations omitted).
5 Accordingly, the Court cannot hold APHIS responsible for herbicide
6 use regulated by EPA.^{13, 14}

7 If Plaintiffs allegations are true, then it is disturbing that
8 EPA has yet to assess the effects of glyphosate on most of the
9 species found near the acreage on which RRA will be planted and
10 glyphosate will be used. See Pls.' MSJ at 23-24. The
11 administrative record indicates that EPA will not complete a
12 national-level Endangered Species Assessment with respect to RRA
13 glyphosate use until 2015. See AR 4 670. However, the Court is in
14 no position to evaluate EPA's compliance with the relevant
15 environmental laws. EPA is not a party to this action and its
16 administrative record is not before the Court.

17
18 ¹² Further, EPA must comply with the consultation requirements of
19 the ESA when it registers herbicides and pesticides under FIFRA.
20 See Wash. Toxics Coalition v. Env'tl. Prot. Agency, 413 F.3d 1024,
21 1032 (9th Cir. 2005).

22 ¹³ Despite APHIS's position that its deregulation determination is
23 not the legally relevant cause of third-party glyphosate use, the
24 agency's FEIS addresses the impact of glyphosate on the development
25 of weeds. See Section IV.C.4 infra. The Court declines to address
26 whether NEPA required APHIS to undertake this analysis.

27 ¹⁴ Plaintiffs filed three extra-record declarations in support of
28 their ESA claims. ECF Nos. 107 ("Cox Decl."), 108 ("Kegley
Decl."), 109 ("Relyea Decl."). These declarations concern the risks
posed to threatened and endangered species by glyphosate use.
Defendants and Intervenor Defendants move to strike these
declarations on the grounds that the Court's review should be
limited to the administrative record. ECF Nos. 167 ("Intervenor
Defs.' MTS"), 170 ("Defs.' MTS"). As the Court finds that APHIS's
deregulation determination is not the legally relevant cause of
increased glyphosate use, Plaintiff's extra-record declarations are
irrelevant to the Court's ESA analysis. Accordingly, Defendants
and Intervenor Defendants' motions to strike are DENIED as moot.

1 For these reasons, the Court GRANTS Defendants and Intervenor
2 Defendants' motions for summary judgment with respect to
3 Plaintiff's ESA claim.

4 **C. National Environmental Policy Act ("NEPA")**

5 With respect to Plaintiffs' NEPA claims, the Court must
6 determine whether APHIS's "decision was based on a consideration of
7 the relevant factors, or whether its actions were arbitrary,
8 capricious, an abuse of discretion or otherwise not in accordance
9 with the law." Blue Mountains Biodiversity Project v. Blackwood,
10 161 F.3d 1208, 1211 (9th Cir. 2011) (internal quotation marks and
11 citation omitted). "In short, [the Court] must ensure that the
12 agency has taken a 'hard look' at the environmental consequences of
13 its proposed action." Id. "A hard look includes considering all
14 foreseeable direct and indirect impacts.'" Earth Island Inst. v.
15 U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006) (internal
16 quotation marks and citation omitted), overruled on other grounds
17 by Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 21 (2008).

18 Plaintiffs argue that APHIS violated NEPA by (1) manipulating
19 the scope of its EIS and ROD and its analysis of alternatives to
20 favor full deregulation of RRA, (2) failing to adequately analyze
21 the effectiveness of mitigation measures that APHIS claimed would
22 lessen the adverse impacts associated with deregulation, (3)
23 relying on data and analysis supplied by Monsanto, (4) failing to
24 adequately analyze the risks posed by glyphosate resistant weeds,
25 and (5) relying on unsupported assumptions in its contamination
26 assessment.¹⁵ Pls.' MSJ at 35-40; Pls.' Opp'n at 34-36, 38. The
27

28 ¹⁵ Plaintiffs appear to have abandoned their third claim that APHIS's reliance on new agency policies on "coexistence" was arbitrary and capricious. See FAC ¶ 201.

1 Court disagrees and finds that APHIS took the hard look required by
2 NEPA. Accordingly, the Court GRANTS Defendants and Intervenor
3 Defendants' motions for summary judgment with respect to
4 Plaintiff's NEPA claims.

5 1. Alternatives Analysis

6 Plaintiffs argue that APHIS's failure to acknowledge its
7 authority under the PPA to prevent noxious weed harms and to
8 partially deregulate RRA, discussed in Section IV.A supra, also led
9 APHIS to conduct a fundamentally flawed NEPA alternatives analysis.
10 See Pls.' MSJ at 35. Plaintiffs assert that, based on APHIS's
11 erroneous view of its statutory authority, the agency established
12 an overly restrictive purpose and need statement in its EIS and
13 then improperly rejected the partial deregulation alternative. Id.
14 at 34-38. APHIS did discuss partial deregulation in its FEIS.
15 However, Plaintiffs contend that this analysis was "superfluous and
16 illusory" since, in the ROD, APHIS ultimately determined that it
17 lacked the authority to adopt such an option. Id. at 37.
18 Plaintiffs state that they "are not challenging an exercise of
19 APHIS's discretion to select an alternative that Plaintiffs might
20 not prefer, but rather APHIS's erroneous failure to acknowledge and
21 exercise its discretion at all." Id.

22 NEPA regulations provide that an EIS "shall briefly specify
23 the underlying purpose and need to which the agency is responding
24 in proposing the alternatives including the proposed action." 40
25 C.F.R. § 1502.13. Courts evaluate a statement of purpose under a
26 reasonableness standard. Westlands Water Dist. v. U.S. Dep't of
27 Interior, 376 F.3d 853, 866 (9th Cir. 2004). In doing so, the
28 Ninth Circuit "has afforded agencies considerable discretion to

1 define the purpose and need of a project." Friends of Se.'s Future
2 v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998). "[T]he statutory
3 objectives of the project serve as a guide by which to determine
4 the reasonableness of objectives outlined in an EIS." Westlands
5 Water Dist., 376 F.3d at 866. An agency may not "slip past the
6 strictures of NEPA" by "contriv[ing] a purpose so slender as to
7 define competing 'reasonable alternatives' out of consideration
8 (and even out of existence)." Simmons v. U.S. Army Corps of
9 Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997).

10 The Court finds that Plaintiffs' arguments concerning APHIS's
11 alternatives analysis fail for the same reasons as their PPA
12 claims. As discussed in Section IV.A supra, APHIS's interpretation
13 of its plant pest and noxious weed authority in this context is
14 consistent with the PPA and, thus, entitled to deference.
15 Accordingly, the Court cannot find that APHIS's purpose and need
16 statement is overly restrictive or that APHIS's decision to reject
17 the partial deregulation alternative was arbitrary and capricious.

18 2. Analysis of Mitigation Measures

19 Plaintiffs also argue that APHIS's NEPA analysis failed to
20 adequately consider the effectiveness of the mitigation measures
21 proposed to reduce the environmental impacts of deregulation.
22 Pls.' MSJ at 40. Plaintiffs complain that, because APHIS retained
23 no oversight authority whatsoever, not one of the mitigation
24 measures proposed in the EIS is legally mandated. Id. at 41.
25 Instead, the measures are premised on best management practices,
26 joint agreements among members of alfalfa grower trade
27 associations, or contractual arrangements between growers and
28 suppliers of seed. Id. Plaintiffs contend that these mitigation

1 measures are unlikely to work since private actors have little
2 incentive or ability to enforce them. See id. at 41-43.
3 Plaintiffs specifically criticize mitigation strategies intended to
4 address the risks of transgenic contamination and the development
5 of glyphosate resistant weeds. Id.

6 Plaintiffs' arguments are unpersuasive. "[I]t would be
7 inconsistent with NEPA's reliance on procedural mechanisms . . . to
8 demand the presence of a fully developed plan that will mitigate
9 environmental harm before an agency can act." Robertson v. Methow
10 Valley Citizens Council, 490 U.S. 332, 353 (1989). A mitigation
11 plan "need not be legally enforceable, funded or even in final form
12 to comply with NEPA's procedural requirements." National Parks &
13 Conservation Ass'n v. U.S. Dep't of Transp., 222 F.3d 677, 681 (9th
14 Cir. 2000). The Court "need only be satisfied that the agency
15 took the requisite "hard look" at the possible mitigating
16 measures[.]" Okanogan Highlands Alliance v. Williams, 236 F.3d
17 468, 473 (9th Cir. 2000). Here, APHIS's FEIS discussed the
18 effectiveness of various mitigation strategies, including those
19 intended to reduce the risk of transgenic contamination and
20 glyphosate resistant weeds. See, e.g., FEIS 111, 115, 164, 205-07;
21 AR 3 11774-80; AR 3 10680-89. This analysis meets NEPA's hard-look
22 requirements. The Court declines to vacate APHIS's deregulation
23 determination merely because stronger mitigation measures might
24 have been available.

25 3. Monsanto's Contributions to the FEIS

26 Plaintiffs argue that the FEIS was flawed because "APHIS
27 simply cut and pasted Monsanto's reports into the FEIS's
28 appendices, passing them off as agency work product." Pls. Opp'n

1 at 36. Plaintiffs contend this practice violated APHIS's duty to
2 independently evaluate the information submitted. Id. This
3 argument lacks merit. NEPA regulations provide that a federal
4 agency may use information submitted by a third party in its FEIS,
5 "either directly or by reference," so long as that information is
6 independently evaluated and the names of the persons responsible
7 for the independent evaluation are included in the list of
8 preparers. 40 C.F.R. § 1506.5(a). The purpose of the regulation
9 is that "acceptable work not be redone." Id. In the instant
10 action, there is no indication that APHIS failed to independently
11 evaluate the material submitted by Monsanto. Further, the list of
12 preparers of the FEIS identifies the APHIS employees responsible
13 for review and acceptance of the material included in the FEIS,
14 including the appendices. See AR 3 9624.

15 4. Glyphosate Resistant Weeds

16 Plaintiffs contend that APHIS's discussion of glyphosate
17 resistant weeds was fundamentally flawed for a variety of reasons.
18 These arguments are undercut by the administrative record.

19 Plaintiffs first complain that the agency "undertook no
20 analysis of the overall acreage that will be in continual
21 [glyphosate-tolerant] crop rotation with RRA, such as corn[,] . . .
22 or how the RRA deregulation will affect resistant weed development
23 in these rotations." Pls.' Opp'n at 39 (internal quotations
24 omitted). However, as Plaintiffs concede, the ROD acknowledged
25 that RRA introduction will "increase the number of acres in a
26 continual [glyphosate tolerant] crop rotation" and thereby could
27 "contribute to the development of these [glyphosate-resistant]
28 weeds in agricultural systems." ROD at 15. The FEIS also

1 discussed the possibility that deregulation could lead to the
2 development of glyphosate resistant weeds. See, e.g., FEIS 127-
3 129, 217-20, 222-23. APHIS found that the development of such
4 weeds depended on a number of factors and that, "[c]urrently, there
5 are no concrete data, information, or models that provide a
6 prescriptive determination on if or how many weed species may
7 evolve resistance to glyphosate[.]" Id. at 129. The agency was
8 "not aware of any models that simulate the evolution of weeds
9 resistant to glyphosate in a [glyphosate tolerant] alfalfa
10 production system." Id. In light of limited data and models
11 available, APHIS was not required to estimate the amount overall
12 acreage in continual glyphosate-tolerant crop rotation. "NEPA
13 requires not that an agency engage in the most exhaustive
14 environmental analysis theoretically possible, but that it take a
15 'hard look' at relevant factors." Nw. Env'tl. Advocates v. Nat'l
16 Marine Fisheries Serv., 460 F.3d 1125, 1139 (9th Cir. 2006).

17 Next, Plaintiffs argue that APHIS minimized the problem of
18 glyphosate resistant weeds by stating that they infest only two
19 million acres when the agency knew the figure was five times higher
20 and by omitting discussion of factors that make RRA more likely to
21 foster such weeds. Pls.' Opp'n at 39-40. This argument is
22 unavailing. The FEIS reports figures from several studies with
23 different estimates of the total number of crop acres infested by
24 glyphosate resistant weeds. See, e.g., FEIS at 34 (2 million
25 acres); AR 3 10684 (7 million acres). Plaintiffs offer no reason
26 why one report is more accurate than the others. Further, as APHIS
27 included a variety of figures on this topic in the FEIS, including
28 one indicating that 38 million acres could be infested by 2013, AR

1 3 10684, there is no indication that the agency was trying to
2 minimize the risk. Additionally, contrary to Plaintiffs'
3 assertion, the FEIS does include a discussion of why RRA is likely
4 to foster glyphosate resistant weeds. See AR 3 10678-689.

5 Plaintiffs also claim that APHIS failed to assess the
6 cumulative impacts of the increase in non-glyphosate herbicide,
7 which will be used to control glyphosate resistant weeds. Pls.'
8 Opp'n at 40-41. This argument is contradicted by the FEIS, which
9 acknowledges that deregulation could result in increased use of
10 non-glyphosate herbicides and assesses the cumulative impacts of
11 such a development. See, e.g., FEIS at 152-55, 179-85, 187-88,
12 222-23, 231-32. Plaintiffs complain that APHIS failed to assess
13 the cumulative impacts associated with particular projections for
14 herbicide use. Pls. Opp'n at 40-41. However, the absence of such
15 an exhaustive analysis does not render the FEIS "so incomplete or
16 misleading that the decision maker and the public could not make an
17 informed comparison of the alternatives." Animal Def. Council v.
18 Hodel, 840 F.2d 1432, 1439 (9th Cir. 1988).

19 Finally, Plaintiffs argue that APHIS violated NEPA by failing
20 to address EPA's comments concerning herbicide resistant weeds.
21 Pls.' Opp'n at 41. This argument lacks merit. NEPA regulations
22 provide that "[t]he agency shall discuss at appropriate points in
23 the final statement any responsible opposing view which was not
24 adequately discussed in the draft statement and shall indicate the
25 agency's response to the issues raised." 40 C.F.R. § 1502.9.
26 EPA's comments on the DEIS concerning herbicide resistant weeds
27 primarily sought to clarify terms. See AR 4 666-68. EPA later
28 commented that it was dissatisfied with the FEIS because the

1 language on which it had previously commented remained "confusing,"
2 and suggested further clarifying language. Id. There is no
3 indication that EPA disagreed with APHIS's ultimate conclusion or
4 that EPA's suggestions for clarification represented an "opposing
5 view." Further, APHIS stated that it took EPA's comments into
6 consideration before making its decision. ROD at 5.

7 Accordingly, the Court finds that APHIS's analysis of
8 glyphosate resistant weeds satisfied NEPA's hard look requirements.
9 None of the purported deficiencies raised by Plaintiffs in this
10 area, considered independently or holistically, provide sufficient
11 grounds to set aside APHIS's deregulation determination.

12 5. Transgenic Contamination

13 Finally, Plaintiffs contend that APHIS's discussion of
14 transgenic contamination relies on unsupported assumptions that are
15 contrary to the record. Pls.' Opp'n at 42. Specifically,
16 Plaintiffs contend that APHIS failed to assess evidence of
17 contamination resulting from the limited acreage of RRA planted
18 prior to deregulation, including 2008 and 2009 contamination
19 reports by alfalfa seed producer Cal/West. Id.

20 The Court finds that APHIS took the required hard look at the
21 risk of transgenic contamination. As Plaintiffs concede, APHIS did
22 in fact mention evidence of the contamination experienced by
23 Cal/West. Id. Plaintiffs complain that APHIS failed to "assess"
24 this evidence, but it is unclear what more Plaintiffs would have
25 APHIS do. The agency discussed the likelihood of gene transfer
26 between alfalfa varieties, the potential socioeconomic impacts of
27 deregulation on conventional alfalfa farmers, and ultimately
28 concluded that contamination was possible but unlikely. See, e.g.,

1 FEIS 25-28, 109-26, App. I (AR 3 10816), App. V (AR 3 11684).
2 Accordingly, the FEIS "contains a reasonably thorough discussion of
3 the significant aspects of the probable environmental consequences"
4 of deregulation, including the potential for transgenic
5 contamination. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d
6 1062, 1071 (9th Cir. 2002).

7

8 **V. CONCLUSION**

9 For the foregoing reasons, the Court GRANTS the motions for
10 summary judgment filed by Defendants Thomas Vilsack and Gregory
11 Parham and by Intervenor Defendants and DENIES the motion for
12 summary judgment filed by Plaintiffs Center for Food Safety, et al.
13 The Court declines to vacate the deregulation of Roundup Ready
14 alfalfa.

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16 IT IS SO ORDERED, ADJUDGED, and DECREED.

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18 Dated: January 5, 2012



19 UNITED STATES DISTRICT JUDGE

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