

FLAG



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February 25, 2004

President Joseph Chapman
Office of the President
North Dakota State University
Old Main 102 - PO Box 5167
Fargo, ND 58105-5167

Dear Mr. Chapman:

On behalf of Dakota Resource Council and the Northern Plains Sustainable Agricultural Society, we write to provide information on potential liability risks North Dakota State University (NDSU) may incur by partnering with Monsanto in the development and marketing of genetically engineered (GE) wheat. As you know, Monsanto has yet to receive final approval from the United States Department of Agriculture (USDA) or the Food and Drug Administration (FDA) to begin marketing GE wheat. However, those approvals are likely to occur in the near future and with governmental approval, Monsanto could begin marketing GE wheat to North Dakota farmers.

It is our understanding that North Dakota State University is working with Monsanto to develop GE wheat, and will be the primary decision maker in the commercial release of this GE wheat. Furthermore, it is our understanding that the NDSU Research Foundation will be the likely partner to Monsanto in the licensing and marketing of this GE wheat. Before going any further in this partnership, we think NDSU should consider the following important issues.

Tort Liability

With GE crops, comes the concern that what one farmer grows may end up in a neighboring farmer's fields. This is true because certain crops, including wheat, cross-pollinate, causing genetic material to migrate beyond where the crop was planted. In addition, kernel flow can also disperse genetic material. As a developer of GE wheat, NDSU may be responsible for genetically contaminating neighboring fields and therefore may be liable for any resulting damages based on tort claims of trespass to land, nuisance, negligence, and perhaps strict liability. For example, the

tort of nuisance occurs when someone interferes with another person's use and enjoyment of his or her property. The interfering act does not need to cause property damages, just affect a person's ability to use and enjoy his or her property. GE wheat contamination could affect what crops a neighboring farmer can grow, thereby interfering with the farmer's ability to use his or her property. This is especially troublesome for organic wheat farmers who may no longer be able to market their wheat as organic due to GE contamination.

Regulatory Liability

There is a patchwork of federal and state regulations that companies and farmers must follow in developing, marketing, growing, and harvesting GE crops or else face fines or lawsuits. For example, farmers who plant Bt crops are required by EPA to set up Bt refuges to limit insects developing resistance to the Bt pesticide. Failure to plant Bt refuges could potentially result in EPA bringing enforcement actions against not only seed companies, but also individual farmers. By marketing GE wheat, NDSU would be responsible for ensuring these and any new regulatory requirements are met by farmers or possibly be subject to fines and sanctions.

Economic Liability

Finally, NDSU may be on the hook for economic liability by marketing GE wheat. There have been many studies that have concluded if GE wheat is introduced by Monsanto foreign markets across the globe will reject most if not all American produced wheat. If these foreign markets do accept GE wheat, it will come at a cost of segregating GE wheat from non-GE wheat at every stage of production from developing foundation seeds (a job currently entrusted to NDSU), to planting, harvesting, storage and transportation of wheat, not to mention processing and consumer sales. The recent spate of lawsuits resulting from Aventis' imprudent introduction of StarLink corn that resulted in millions of dollars in damages for American corn farmers may be a drop in the bucket compared to what the introduction of GE wheat will do to American wheat exports as well as domestic demand. Also, under current law, USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA) is required to certify to foreign buyers that American grown wheat is free of GE wheat. If Monsanto and NDSU continue field testing GE wheat, the GIPSA certification may cease and without GIPSA certification, wheat exports are in jeopardy, thereby causing immediate economic harms to North Dakota wheat farmers.

The bottom line is that if consumers do not want GE wheat then North Dakota wheat farmers, regardless of whether they raise GE wheat or not, will be in danger of losing markets. If any portion of those damages are traced back to NDSU's marketing of GE wheat, then NDSU may incur legal liability and be forced to compensate farmers and others for those lost markets.

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NDSU may face legal liability for all of the above issues and others because it is the entity that is working to develop GE wheat, will make the decision to commercially release it, and will control the marketing of the seed to farmers. With control comes potential liability. We hope that NDSU takes these concerns into consideration before it proceeds any further down the path of developing GE wheat with Monsanto. This path is a path of uncertainty and potential legal liability.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/David R. Moeller

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