No. 09-475

In the Supreme Court of the United States

MONSANTO COMPANY, ET AL., PETITIONERS

v.

GEERTSON SEED FARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case arose out of the decision of the Animal and Plant Health Inspection Service (APHIS) to deregulate alfalfa that had been genetically engineered to tolerate glyphosate, the active ingredient in the herbicide Roundup, based on APHIS's determination that the alfalfa did not present a plant pest risk. After finding that APHIS had not adequately analyzed the environmental impacts of its deregulation action under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, the district court entered, and the Ninth Circuit affirmed, a permanent injunction requiring APHIS to prohibit further planting of Roundup Ready alfalfa pending the agency's completion of an Environmental Impact Statement and final decision regarding deregulation. The questions presented are:

1. Whether the Ninth Circuit erred in affirming the permanent injunction entered by the district court, where the district court applied an incorrect legal standard that presumed irreparable harm.

2. Whether the Ninth Circuit erred in determining that the district court did not abuse its discretion when it declined to hold an evidentiary hearing before it entered the permanent injunction.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 1130. The opinion of the district court (Pet. App. 60a-79a) is unreported.

JURISDICTION

The amended judgment of the court of appeals was entered and a petition for rehearing was denied on June 24, 2009 (Pet. App. 104a-107a). On September 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 22, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Plant Protection Act (PPA), 7 U.S.C. 7701 *et seq.*, provides that "no person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit" and is in accordance with regulations issued by the Secretary of Agriculture to prevent the "introduction of plant pests into the United States or the dissemination of plant pests within the United States." 7 U.S.C. 7711(a). The Secretary of Agriculture delegated his responsibilities under the PPA to the Animal and Plant Health Inspection Service (APHIS). 7 C.F.R. 2.22(a), 2.80(a)(36). The United States Department of Agriculture (USDA) has promulgated regulations governing, *inter alia*, the introduction (*i.e.*, importation, interstate movement, or release into the environment, see 7 C.F.R. 340.1) of "organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests," 7 C.F.R. 340.0(a)(2) n.1. See 7 C.F.R. Pt. 340. Such items are referred to in the regulations as "regulated articles." 7 C.F.R. 340.1.

The PPA and its implementing regulations authorize any person to petition APHIS for a determination that an article does not present a plant pest risk and therefore should not be regulated under 7 C.F.R. Part 340. 7 U.S.C. 7711(c)(2); 7 C.F.R. 340.6(a). If APHIS determines, "based upon available information," that the regulated article should not be regulated under Part 340, it will approve the petition, either in whole or in part. 7 C.F.R. 340.6(d)(3). The PPA mandates that the Secretary's ultimate decision to approve or deny the petition must be based on "sound science." 7 U.S.C. 7701(4).

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires that, whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must examine the reasonably foreseeable environmental effects of the proposed action and inform the public about its effects on the environment. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pt. 1508; see *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). In so doing, the agency must prepare a "detailed statement" of the environmental impact of the proposed action—an "environmental impact statement" (EIS)—the requirements of which are set out in the regulations implementing NEPA. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508. Those regulations govern, *inter alia*, an agency's decision whether to prepare an EIS for a particular project. The regulations permit an agency to comply with NEPA by preparing an "environmental assessment" (EA) in lieu of an EIS in certain circumstances. 40 C.F.R. 1501.4. The regulations define an EA as a "concise public document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. 40 C.F.R. 1508.9. If the agency determines based on the EA that the proposed federal action will not significantly affect the quality of the human environment, it then makes a "finding of no significant impact" (FONSI), 40 C.F.R. 1508.13, and it need not prepare an EIS, 40 C.F.R. 1501.3. If the agency determines that the proposed action will significantly affect the environment, it must prepare a more thorough EIS. See 40 C.F.R. Pt. 1502.

NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350

(1989). NEPA's "mandate to the agencies is essentially procedural" and is designed "[t]o insure a fully informed and well-considered decision" on the part of the federal agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

2. This case concerns "Roundup Ready alfalfa" (RRA), an alfalfa crop that was genetically engineered by petitioner Monsanto Company (Monsanto) to tolerate glyphosate, the active ingredient in the herbicide Roundup. Pet. App. 5a. The advantage of this tolerance to growers and seed producers of alfalfa is twofold: (1) it allows them to supply a market demand for weed-free alfalfa; and (2) it allows them to apply herbicide more sparingly because they can apply it after weeds have germinated. See *id.* at 6a. Monsanto owns the intellectual property rights to RRA and licenses the technology exclusively to co-petitioner Forage Genetics International, LLC (FGI). *Id.* at 5a.

APHIS initially classified RRA as a regulated article under the PPA. Pet. App. 5a. In 2004, petitioners submitted to APHIS a petition requesting non-regulated status for RRA under the PPA. *Ibid.* On November 24, 2004, after completing a draft EA, APHIS published a notice in the *Federal Register* (1) advising the public of APHIS's receipt of the petition, (2) making the EA available for public comment, and (3) soliciting public comment on whether RRA presents a plant pest risk. See *id.* at 6a; 69 Fed. Reg. 68,300-68,301.

On June 27, 2005, APHIS published in the *Federal Register* a notice that it had prepared a final EA regarding the possibility of deregulating RRA and had "reached a finding of no significant impact." 70 Fed. Reg. 36,917-36,919. APHIS issued the FONSI after analyzing "data submitted by Monsanto/FGI, a review

of other scientific data, field tests of the subject alfalfa, and comments submitted by the public." *Id.* at 36,918. Based on that analysis, APHIS determined that RRA: (1) exhibits no plant pathogenic properties; (2) exhibits no characteristics that would cause it to be more weedy than other alfalfa; (3) is unlikely to increase the weediness potential of other species; (4) will not damage raw or processed agricultural commodities; (5) should not damage or harm organisms beneficial to agriculture; and (6) should not reduce the ability to control pests or weeds in alfalfa or other crops. *Id.* at 36,918-36,919. On the basis of its FONSI, APHIS concluded that it did not need to prepare an EIS, and it unconditionally deregulated RRA. Pet. App. 7a.

3. a. In February 2006, more than eight months after APHIS's decision to deregulate RRA, respondents Geertson Seed Farms and others (plaintiffs) filed suit against the Secretary of Agriculture and other federal officials alleging violations of NEPA, the Endangered Species Act (ESA), and the PPA. Pet. App. 7a, 27a. Because plaintiffs did not seek preliminary injunctive relief prior to a determination of the merits of their claims, RRA was commercially planted pursuant to its deregulated status beginning June 14, 2005. *Id.* at 55a, 58a. On cross-motions for summary judgment, the district court found that APHIS had violated NEPA in failing to prepare an EIS. *Id.* at 37a-53a. The court noted that it was called upon to answer what it identified as a "close question of first impression: whether the introduction of a genetically engineered crop that might significantly decrease the availability or even eliminate all non-genetically engineered varieties is a 'significant environmental impact' requiring the preparation of an environmental impact statement." *Id.* at 27a. The court

ultimately found that APHIS's EA was insufficient in two respects: (1) it did not adequately consider the potential for gene transmission between RRA and non-genetically engineered alfalfa; and (2) it did not adequately consider the potential for the development of glyphosate-resistant weeds. *Id.* at 7a-8a, 32a-51a. The district court declined to reach the respondents' ESA and PPA claims. *Id.* at 51a.

Following the district court's decision on the merits, petitioners moved to intervene as defendants for the remedial phase of the litigation. The district court granted their motions, agreeing to give them the opportunity "to present evidence to assist the court in fashioning the appropriate scope of whatever relief is granted." Pet. App. 54a (citing *Forest Conservation Council* v. *USFS*, 66 F.3d 1489, 1496 (9th Cir. 1995)); *id.* at 8a. The court received evidence from all parties and heard several hours of oral argument, on the basis of which it issued a preliminary injunction. *Id.* at 63a; see *id.* at 54a-59a. APHIS proposed a remedy under which it would, in addition to preparing an EIS, impose six restrictions on the planting of RRA and on the handling of RRA seed pending the completion of the EIS. *Id.* at 184a-187a. Instead of adopting APHIS's suggested limitations, however, the district court issued a preliminary injunction on March 12, 2007, enjoining all planting of RRA and all sales of RRA seed beginning March 30, 2007. *Id.* at 8a, 54a-59a.

The district court cited *Idaho Watersheds Project* v. *Hahn*, 307 F.3d 815, 833 (9th Cir. 2002), for the proposition that, "[i]n the run of the mill NEPA case, the contemplated project, whether it be a new dam or a highway extension, is simply delayed until the NEPA violation is cured." Pet. App. 55a. But the court noted that

this was not a run of the mill case in certain respects because some alfalfa growers had already purchased and planted RRA in reliance on APHIS's deregulation decision. *Id.* at 8a, 55a. The district court did not require those growers to remove or destroy their already-planted RRA; the court also allowed growers who had already purchased RRA seed to plant it until March 30, 2007. *Id.* at 8a, 55a-58a. In other respects, however, the court found that this case was a "run of the mill" NEPA case, and that neither APHIS nor petitioners had identified any "unusual circumstances" that would lead the court to permit an increase in the number of acres planted with RRA while the court considered the appropriate scope of permanent injunctive relief. *Id.* at 56a-57a. The court noted that it would consider "whatever additional evidence [petitioners] wish to provide," would provide APHIS the opportunity to present additional evidence, and would allow plaintiffs to respond to any such evidence before fashioning permanent injunctive relief. *Id.* at 58a-59a.

The parties submitted evidence concerning the appropriate scope of permanent injunctive relief, Pet. App. 9a, 64a, and the court issued such relief on May 3, 2007, *id.* at 60a-79a. The court ordered APHIS to prepare an EIS and enjoined all planting of RRA from March 30, 2007, until the completion of the EIS. *Id.* at 79a. In its order, the court acknowledged that petitioners had "requested an evidentiary hearing, apparently so the Court can assess the viability of its witnesses' opinions regarding the risk of contamination if APHIS's proposed conditions are imposed, as well as to resolve disputes with plaintiffs' witnesses." *Id.* at 67a. The court rejected that request based on its view that making the findings requested by petitioners would be tantamount to "en-

gag[ing] in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS." *Id.* at 68a.

The district court explained that it rejected APHIS's proposed restrictions on the planting and harvesting of RRA because APHIS had not submitted evidence suggesting that its proposed interim conditions would be followed. Pet. App. 69a-70a. In addition, the court criticized the efficacy of particular proposed restrictions in eliminating the possibility of gene flow because growers cannot always harvest at the optimal time due to weather restrictions. *Id.* at 70a-71a. The court also found that "contamination of organic and conventional alfalfa crops with the genetically engineered gene has occurred and defendants acknowledge as much. Such contamination is irreparable environmental harm." *Id.* at 71a; see *id.* at 70a-71a. The court concluded that the harm to "farmers and consumers who do not want to purchase genetically engineered alfalfa or animals fed with such alfalfa outweighs the economic harm to Monsanto, Forage Genetics and those farmers who desire to switch to Roundup Ready alfalfa." *Id.* at 71a.

b. APHIS and petitioners appealed on the ground that the permanent injunction was overly broad. Pet. App. 10a. Petitioners further argued that the district court erred by denying their request for an evidentiary hearing. *Id.* at 16a. No appellant challenged the district court's merits determination that APHIS's NEPA analysis was insufficient. *Id.* at 5a. On June 24, 2009, the court of appeals issued an amended decision affirming the district court's entry of the permanent injunction. *Id.* at 1a-20a.

The court of appeals found that "the record demonstrates that the district court applied the traditional four-factor test" for the issuance of an injunction, as

"required by" *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006). Pet. App. 13a; *id.* at 10a-16a. The court noted that the district court had found that gene contamination of organic and conventional alfalfa had already occurred while petitioners had contractual obligations in place that were similar to the proposed mitigation measures, and that such contamination constituted irreparable harm because contamination cannot be reversed and farmers cannot replant alfalfa for two to four years after contaminated alfalfa has been removed. *Id.* at 13a-14a. The court also found that the district court adequately considered the interests of both petitioners and the public. *Id.* at 14a-15a. In upholding the scope of the injunction, the court of appeals rejected the government's argument that the district court should have deferred to the agency's proposed interim measures. *Id.* at 15a-16a.

Finally, the court rejected petitioners' argument that the district court erred in declining to hold an evidentiary hearing before issuing the permanent injunction. Pet. App.16a-20a. The court reasoned that, although a district court should generally hold an evidentiary hearing absent waiver by the adverse party, the district court in this case "did not believe defendants had established any material issues of fact that were in dispute in the case before the court." *Id.* at 17a. The court of appeals also noted that the injunction at issue here was similar to the one at issue in *Idaho Watersheds*—where the court of appeals also upheld a permanent injunction issued without the benefit of an evidentiary hearing, 307 F.3d at 830-831—because the injunction will be in effect only until APHIS completes an EIS. Pet. App. 17a-19a. In addition, the court disagreed with the dissent on the antecedent issue of whether the district court failed to

hold an evidentiary hearing at all, noting that the court held one hearing on the NEPA violation, held two hearings on the scope of injunctive relief, and reviewed extensive documentary submissions. *Id.* at 19a-20a.

Judge Smith dissented on the issue of whether the district court should have held an evidentiary hearing before issuing the permanent injunction. Pet. App. 20a-26a. He would have held that, under Federal Rule of Civil Procedure 65, a district court must hold an evidentiary hearing unless the material facts are undisputed or the adverse party waives its right to such a hearing. Pet. App. 20a-21a (citing *Charlton* v. *Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988)). Judge Smith found that neither exception applied, and dismissed as insignificant the fact that APHIS did not request an evidentiary hearing because, he noted, petitioners did. *Id.* at 21a-22a.

ARGUMENT

The court of appeals erred in determining that the permanent injunction entered by the district court was appropriately tailored and that the district court applied the correct legal standard. Further review is not warranted, however, because the court of appeals itself set forth the correct legal standard and its decision does not squarely conflict with any decision of this Court or of any other court of appeals.

1. Neither the breadth of the injunction entered by the district court nor the propriety of the district court's approach in entering the injunction merits further review by this Court in light of APHIS's subsequent administrative action. By its terms, the injunction will terminate when APHIS completes the EIS the district court found it was required by NEPA to prepare before

deregulating RRA. See Pet. App. 79a. On December 14, 2009, APHIS announced the availability for public review of a nearly 200-page draft EIS, which addresses, *inter alia*, the potential for gene flow to conventional and organic alfalfa as well as the potential for an increase in glyphosate-resistant weeds. Http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gealfalfa_deis.pdf (draft EIS); Http://www.aphis.usda.gov/newsroom/content/2009/12/printable/alfalfa_brs.pdf (press release). The 60-day comment period (which commenced on December 18, 2009, the date of publication of the draft EIS in the *Federal Register*) will close on February 16, 2010. After the close of the public comment period, APHIS will issue a final EIS in light of its consideration of the comments it receives. Http://www.aphis.usda.gov/publications/bio-echnology/content/printable_version/faq_alfalfa.pdf (questions and answers about EIS process). When that process is complete, the injunction will expire and render the current appeal moot.

2. The government agrees with petitioners that the court of appeals erred in concluding that the district court applied the four-factor test governing the issuance of a permanent injunction. The government also agrees with petitioners that the court of appeals was wrong in finding that the district court did not presume irreparable harm from the fact of APHIS's NEPA violation. In *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006), this Court reaffirmed that:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies

> available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. at 391. Contrary to this mandate, the district court enjoined—first preliminarily and then permanently—all commercial planting of RRA without requiring plaintiffs to demonstrate that the balance of harms necessitated such relief. Pet. App. 54a-59a, 60a-79a. Rather, the district court turned the appropriate analysis on its head by assuming that, in the "run of the mill NEPA case," an injunction is warranted halting the activity in question "until the NEPA violation is cured." *Id.* at 55a (quoting *Idaho Watersheds Project* v. *Hahn*, 307 F.3d 815, 833 (9th Cir. 2002)). The court thus required APHIS and petitioners to demonstrate that an injunction was not warranted due to the presence of "unusual circumstances." *Id.* at 55a-56a.[1] The district court erred in effectively applying a presumption in favor of a nationwide injunction.

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[1] Notably, the agency action at issue in this case is unlike the site-specific projects at issue in many NEPA cases, *e.g.*, timber sales or permit issuances. While a presumption of irreparable harm is no more permissible in the site-specific context than it is here, the district court's characterization of this case as a "run of the mill" NEPA case led it to enter an injunction that is significantly different from and broader than the injunctions entered in many NEPA cases. Here, the district court's injunction did not merely delay a site-specific project. Instead, it effectively required APHIS to re-regulate RRA nationwide, notwithstanding APHIS's determination that RRA did not pose a plant pest risk and should no longer be regulated under the PPA.

Although the government disagrees with the court of appeals' conclusion that the district court applied the correct legal standard, further review of that conclusion is not warranted because the court of appeals itself set forth the correct legal standard and made clear that it applies in NEPA cases. Pet. App. 12a ("The Supreme Court held in *eBay* that courts cannot grant or deny injunctive relief categorically in place of applying the four-factor test."). The court of appeals also correctly noted that NEPA plaintiffs seeking injunctive relief must demonstrate a likelihood, rather than a mere possibility, of irreparable harm in order to justify injunctive relief. *Id.* at 13a (citing *Winter* v. *NRDC*, 129 S. Ct. 365, 375 (2008)); see also *id.* at 12a (citing *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 545 (1987)). The court of appeals' statements regarding the governing law are consistent with this Court's precedents. Although the court of appeals also noted its prior precedent stating that an injunction should issue to remedy a NEPA violation absent "unusual circumstances," *id.* at 12a, the court's acknowledgment of that precedent alone does not warrant this Court's review at the present time. This Court's decisions in *eBay* and *Winter* are relatively recent, and it would be appropriate for this Court to stay its hand in order to consider the manner in which the Ninth Circuit (and the district courts therein) will apply the principles set forth in those decisions. Thus, in spite of the fact that the government agrees with petitioners that the Ninth Circuit erred in its application of the governing legal standards to the circumstances of this case, in the government's view, this case does not appear to meet this Court's traditional criteria for plenary review.

3. There is similarly no need for this Court to review the court of appeals' determination that the district

court did not abuse its discretion by declining to hold an evidentiary hearing prior to issuing a permanent injunction. The government did not request an evidentiary hearing at that stage of the proceedings and does not believe that one was necessary in this case, although it does believe that the district court should have deferred to the remedial order proposed by the government.

The court of appeals correctly noted that, "generally, a district court must hold an evidentiary hearing before issuing a permanent injunction unless the adverse party has waived its right to a hearing or the facts are undisputed." Pet. App. 17a (citing *United States* v. *Microsoft Corp.*, 253 F.3d 34, 101-103 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001); *Charlton* v. *Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988)). Although petitioners argue (Pet. 26-27) that the court of appeals' decision conflicts with decisions of other courts of appeals as to the necessity of holding such a hearing, the various courts in fact agree about that general rule. See *Four Seasons Hotels & Resorts, B.V.* v. *Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003); *In re Rationis Enters.*, 261 F.3d 264, 269 (2d Cir. 2001); *Microsoft*, 253 F.3d at 101-103; *Professional Plan Examiners of N.J., Inc.* v. *Lefante*, 750 F.2d 282, 288 (3d Cir. 1984).[2] Accordingly, review is

[2] Petitioners also argue (Pet. 21) that the court of appeals' decision conflicts with the Second Circuit's decision in *Town of Huntington* v. *Marsh*, 884 F.2d 648 (1989), cert. denied, 494 U.S. 1004 (1990), because, by refusing to require the district court to convene an evidentiary hearing, the court of appeals sanctioned the district court's assumption that the NEPA violation on its own constituted irreparable harm. That is simply another way of asserting that the district court erroneously assumed such harm. As discussed above (see pp. 11-15, *supra*), to the extent the district court assumed irreparable harm, it was in error; but because the court of appeals did not make the same error, further review is not warranted.

not required to ensure that the Ninth Circuit adopts the correct general legal principle.

Nor is there any reason for this Court to review the court of appeals' fact-specific determination that the district court did not abuse its discretion in declining to hold an hearing in this case, including its partial reliance on the fact that the permanent injunction at issue in this case would terminate as soon as APHIS cured the NEPA violation by completing an EIS. The court of appeals concluded that "[t]he district court did not believe defendants had established any material issues of fact that were in dispute in the case before the court." Pet. App. 17a; cf. *id.* at 13a (noting that the district court "found that genetic contamination of organic and conventional alfalfa had already occurred, and it had occurred while [petitioners] had contractual obligations in place that were similar to their proposed mitigation measures"). Although petitioners protest (Pet. 18) that there were material issue of fact in dispute, review of that issue does not merit further review because the views of the various parties as to the many issues related to the propriety of injunctive relief were fully aired before the district court. As the court of appeals noted, before the district court entered the permanent injunction, the court "considered extensive evidentiary submissions from all parties pertaining specifically to the remedy phase," Pet. App. 19a; see *id.* at 9a, and "held one hearing on the nature of the NEPA violation [and] two hearings on the scope of injunctive relief," *id.* at 19a-20a. The court of appeals thus concluded that the district court did not abuse its discretion in declining to hold a hearing specifically devoted to the issuance of a permanent injunction. *Id.* at 20a.

In addition, the granting of injunctive relief in a suit challenging agency action under the Administrative Procedure Act (APA) presents different considerations than the granting of such relief in private litigation. In an APA suit, review of the merits is based on the administrative record and is deferential insofar as factual issues are concerned. At least some factors bearing on the propriety of injunctive relief will often have already been addressed by the agency or will be on remand, and the agency should typically be given the opportunity in the first instance to address the appropriate interim response to the court's determination that the agency's prior decision was inconsistent with legal requirements. These additional considerations, which are not discussed at any length by petitioners, would have to be taken into account in a case such as this. Review should be denied for this and the other reasons discussed above, and because the injunction entered by the district court will soon expire once APHIS issues the EIS that it has already released in draft form for public comment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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