May 13, 2020

Ms. Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: Petitioners' Letter Brief re Order, ECF 111 (Apr. 29, 2020), *National Family Farm Coalition et al. v. Environmental Protection Agency et al.*, No. 19-70115.

I. This Case Challenges EPA's October 31, 2018 Decision to Continue All the New Uses of Dicamba on Genetically-Engineered Cotton and Soybean.

The scope of the petition for review is governed by the applicable FIFRA judicial provision, which broadly authorizes appellate review of "any order" issued by the EPA following a public hearing. 7 U.S.C. § 136n(b). The Petition expressly stated that Petitioners sought review of EPA's order granting the registration for all "the new uses" being approved pursuant to the registration, and referred to and attached as its only exhibit, EPA's October 31, 2018 registration decision document entitled: "Registration Decision for the Continuation of Uses of Dicamba on Dicamba Tolerant Cotton and Soybean." ECF 1-7 (reproduced at ER1-24); ECF 1-6 at 1 ("The challenged order was announced in a document signed on October 31, 2018, EPA Docket No. EPA-HQ-OPP2016-0187-0968[1]); *id.* at 1-2 (seeking this

[1] That docket links to the October 31, 2018 registration decision document. https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0968.

Court "to review the order of the United States Environmental Protection Agency (EPA) extending the conditional registration for the new uses of the herbicide dicamba for use on genetically engineered cotton and soybean that have been engineered to resist dicamba in thirty-four states."). Unambiguously the order sought for review was the October 31 registration decision. FRAP 15(a)(2) (petitions for review specify the order to be reviewed).

That decision—and thus the scope of the petition for review and its remedy—plainly covers three pesticide products. The decision begins by stating that EPA is granting requests from three companies—Bayer/Monsanto, Corteva, and BASF—to amend their conditional new use registrations then set to expire. ER3 (listing companies and registration numbers, top of first paragraph). The first paragraph also specifies that the three registrations concern identical uses of dicamba on the same crops and in the same states. *Id.*; *see id.* (describing them collectively as the "OTT dicamba use registrations" in the second paragraph). Throughout, EPA consistently refers to its decision as concerning all three registrations. ER4 ("This registration decision refers to all current dicamba registrations for OTT uses on dicamba-tolerant soybean and dicamba-tolerant cotton. This includes three pesticide products (EPA Registration Numbers 352-913, 524-617, and 7969-345)"); ER4-5, Table 2 (listing

Corteva's FeXapan, Bayer/Monsanto's XtendiMax, and BASF's Engenia).[2] The registration's terms and conditions applied equally to all the products and registrants. ER23 ("As part of its decision to extend registrations for OTT uses of dicamba-tolerant cotton and soybeans, the Agency will require that registrants meet certain terms as a condition of the registration."). The administrative record EPA lodged in response to the Petition for Review has documents applying to all three pesticides, including each individual product label, since the over-the-top applications approved are identical. ER65-120 (XtendiMax), ER121-166 (FeXapan), ER167-210 (Engenia). EPA summarized its decision at the end of the introductory paragraph by concluding that "EPA has reviewed these applications" and "has decided to extend these registrations." *Id.*

II. Respondents' Potential 11th Hour "Gotcha" Mischief Should Be Rejected.

Given the unambiguous scope of the registration decision and challenge,[3] Respondents cannot square any arguments they make with the positions they have taken in the case until now, and the Court should reject such arguments.

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[2] Similar references to the "registrants" (plural) or all "OTT uses" covered are used throughout the decision. *E.g.*, ER4, ER5, ER6, ER12, ER13, ER19, ER22, ER23.

[3] Petitioners referred to the three products collectively as "XtendiMax" in their briefing for simplicity' sake, but still made clear that the challenged registration decision covered "competitor dicamba varieties approved by EPA for the same use." ECF 37-2 p.2 n.4.

Respondents may try to claim that Petitioners could only challenge the issuance notices or final approved labels for the individual products EPA later issued pursuant to the registration decision. Nothing in FIFRA limits judicial review in that way; to the contrary the applicable judicial review provision broadly authorizes Petitioners to challenge "the validity of *any order*." 7 U.S.C. § 136n(b) (emphasis added). Here, the October 31 registration decision is unquestionably the cognizable order for the use approval: Without it, there could be no later notices to registrants, nor any labels to issue. *See* ER18 (section titled "Registration Decision", announcing "EPA will be extending the registrations for OTT applications of dicamba" and explaining that "as part of this registration extension, EPA is requiring additional label restrictions as described in Section VII. Required Label Changes."). The issuance notices—which were not referenced in nor attached to Petitioners' Petition for Review, merely notify the registrants of their obligations as commanded by the October 31 registration decision. 40 C.F.R. § 152.117 (a notice of registration is a "notification to applicant" of EPA's approval). 11B Fed. Proc. L. Ed. § 32:1587 (2020) (same). The Oct 31 decision is the controlling EPA decision.[4]

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[4] The petition in *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015), the leading case in this area, identically challenged the sulfoxaflor registration as the challenged order, not the three individual pesticide issuance notices discussed in that decision document. No. 13-72346, ECF No. 2-2.

Neither EPA nor Monsanto have ever disputed that the October 31, 2018 registration decision, ECF 1-7 & ER1-24, was the proper EPA order for judicial review purposes, nor alleged other purported procedural infirmity because Petitioners did not challenge the "correct" order.[5] As such they have now conceded it. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir.2009) (arguments not addressed in answering brief are waived). (Nor is EPA's sole cryptic passing footnote mention (ECF 48-1 at 12n.3) sufficient. *U.S. v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007) ("The summary mention of an issue in a footnote, without reasoning in support of the … argument, is insufficient to raise the issue on appeal.")).

Further, any argument now that the scope is limited to solely XtendiMax is irreconcilable with Respondents' hyperbolic remedy arguments, about vacatur allegedly leaving farmers with "no alternatives." ECF 61 at 58 (arguing there are no alternatives to "XtendiMax and the other new dicamba formulations registered in the 2018 registration"); ECF 48-1 at 74 (alleging vacatur would cause "overwhelming

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[5] Monsanto challenged the *timeliness* of the petition, but that separate argument was still predicated the October 31 registration order that Petitioners challenged as the proper one for judicial review. In any event, the challenge is meritless. In the registration decision EPA did not "otherwise explicitly provide" for a different "date of entry" for purposes of judicial review under 40 C.F.R. § 23.6, meaning the 60-day clock for judicial review began two weeks after the decision was signed. ECF 73 at 1-3. Petitioners were timely under FIFRA and EPA's longstanding regulations, as EPA acknowledges; Monsanto's far-reaching challenge to those regulations as *ultra vires* should be rejected.

disruption" for farmers). Those arguments are meritless, *see* ECF 35 at 35, ECF 72 at 33-37, & ECF 73 at 32-37, but nonetheless reveal Respondents' agreement with the proper scope of this registration, this case, and its remedy.

Respondents may also try to paint Petitioners' 2018 challenge as limited to XtendiMax by citing the prior 2016 registration decision and challenge, which was limited to XtendiMax. While, as Petitioners explained in their Petition for Review, the 2018 decision is intertwined with and extended the 2016 registration for that product, this is a *different action*, as this Court has held. And among other differences, it expanded its scope, to cover all three products. ER3 (XtendiMax "was the only registration included in the 2016 decision; two additional OTT dicamba use registrations [FeXpan and Engenia] were approved after the publication of the 2016 decision."); *compare* ER3 ("Three registrations, EPA Registration Number 352-913, 524-617, and 7969-345, are impacted by this decision.") *with* ER213 (2016 registration listing only Xtendimax, Registration Number 524-617). Petitioners have consistently petitioned for review of the entire registration decision being challenged (and lodged the registration decision itself, not a product notice label).[6]

[6] It would also be flatly inconsistent for Respondents to argue that the Oct 31 registration decision was a cognizable order only for XtendiMax, but not the other two pesticides it plainly covers.

EPA may also claim that it only permitted comment on XtendiMax prior to the 2016 decision, not the other OTT uses, and so any challenge to those products can only be brought in district court, since there was no "hearing" for them. In addition to being exceptionally tardy, this argument is a red herring. As explained above, the record EPA produced includes materials regarding all three products. *E.g.*, ER417 (drift distance studies on Engenia as well as XtendiMax); ER467-68 (volatility testing done on FeXapan and XtendiMax). And crucially, all EPA risk assessments and use conditions *were the same* for all products. As EPA stressed to the Court otherwise, while the agency did not have a "formal" 2018 comment period, EPA made stakeholders very aware of the automatic registration expiration provision in fall 2018, and in summer 2018 EPA received an outpouring of comments on how/if to approve/reject the registration extension decision. ER6-7 (recounting comments from state agencies, farm bureaus, trade associations, nonprofits, academics, and farmers, among others). The agency housed comments on a single docket on www.regulations.gov, made them part of the record, and relied on them in the decision. *Id.* (the comment "information provided allowed the agency to consider different viewpoints from their unique perspectives, and EPA reviewed this feedback prior to issuing this regulatory decision."). Those comments were on *all the OTT uses*, not just XtendiMax. *E.g.*, ER0615 (state pesticide regulators urging early cutoff date,

naming all three); SFER006 (major seed company seeking/naming all three be restricted to pre-plant only); ER510 (naming all 3 products, asking extension denied for all). This was more than sufficient. *United Farm Workers of America, AFL-CIO v. EPA*, 592 F.3d 1080, 1082 (9th Cir. 2010) ("Hearing" is a familiar term in the legal process. It identifies elements essential in any fair proceeding—notice be given of a decision to be made and presentation to the decisionmaker of the positions of those to be affected by the decision. By itself, the term does not connote more.").

III. Any Distinction Between Which Products Are at Issue May Be Illusory in Practical Result, Which the Court Can Ensure Through Declaratory Relief.

While all the products listed are covered, any distinction as to them should not matter as a practical result. This Court should grant the petition, hold that EPA violated FIFRA and the ESA in granting the registration, and vacate it. In that scenario, any other EPA action, including subsequent individual product label approvals, that rely on the 2018 registration of OTT dicamba uses for its lawful predicate should fall like dominos. This is exactly what happened in *Pollinator Stewardship*, where, after this Court vacated the registration, 806 F.3d at 533, EPA issued a cancellation order for *all* sulfoxaflor products the agency had approved based on the registration decision Petitioners challenged.[7]

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[7] EPA, *Sulfoxaflor Final Cancellation Order* 1 (2015) (7 products, including 3 initial product registrations and 4 subsequent ones, that are subject to the Court's vacatur),

To ensure effective relief the Court should also issue declaratory relief establishing that EPA's registration was unlawful. Declaratory relief's purpose is "clarify and settle the legal relations at issue" and to "afford relief from the uncertainty and controversy giving rise to the proceedings." *E.g.*, *NRDC v EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992) (declaratory relief "delineates important rights and responsibilities" to the parties "but also to the public" with "significant educational and lasting importance"). Here declaratory relief could spell out that any products dependent on the underlying registration now are unlawful, until and unless EPA complies with the Court's order on FIFRA and the ESA.

IV. The Court Should Issue a Summary Decision with Full Opinion to Follow.

Absent this Court's decision, these new uses will continue to cause a *25 million pound* annual *increase* in dicamba spraying. ER1347 (citing USDA analysis and conclusions). And the critical spring-summer window is soon: over-the-top spraying on tens of millions of acres, and dicamba's inevitable volatilization and drift. *E.g.,* ER482 (first drift incident reported in late May in both 2017 and 2018, rising steadily through August); SFER 017-023 (2018 June damage reports); USDA

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https://www.epa.gov/sites/production/files/2015-11/documents/final_cancellation_order-sulfoxaflor.pdf; *id.* at 2 ("In the absence of any action by EPA, all sale and distribution of formerly-registered sulfoxaflor products would be unlawful under FIFRA upon vacatur.").

Weekly Crop Progress Report (May 12, 2020) (38% of soybeans planted and 32% of cotton already planted).[8] The evidence is overwhelming that EPA/Monsanto's half-measures cannot fix the inherent volatility problem: experts in the field have found drift "has often travelled a half-mile to three-quarters of a mile" off-field. ER667-68.

Accordingly, given the expedited case and circumstances, Petitioners respectfully request this Court issue a decision soon, to ensure its decision and relief is as meaningful as possible. One option the Court could utilize to good effect is a per curiam order granting the petition and vacating the registration, halting any sale and use of these pesticide products, and notifying the parties that the Court's reasons will be more fully explained in a forthcoming opinion. *See e.g.*, *Alliance for Wild Rockies v. Cottrell*, 385 Fed. Appx. 683 (9th Cir. 2010) (summary reversal of district court injunction denial, directing lower court to enter injunction and noting that opinion will follow in due course) *opinion issued* 632 F.3d 1127 (9th Cir. 2011) (Fletcher, J.); *Sierra Club v. Dep't of Interior*, 722 Fed. Appx. 321 (4th Cir. 2018) (setting aside ESA action "for reasons to be more fully explained in a forthcoming opinion").[9]

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[8] https://www.dtnpf.com/agriculture/web/ag/news/article/2020/05/11/corn-67-planted-soybeans-38-planted.

[9] *See also Sierra Club v. U.S. Army Corps of Engineers*, 905 F.3d 285 (4th Cir. 2018); *Am. Wild Horse Pres. Campaign v. Jewell*, 669 F. Appx 516 (10th Cir. 2016).

Respectfully submitted,

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