

No. 19-70115

IN THE
**United States Court of Appeals
for the Ninth Circuit**

NATIONAL FAMILY FARM COALITION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**BASF CORPORATION'S EMERGENCY MOTION TO INTERVENE
UNDER FEDERAL RULE OF APPELLATE PROCEDURE 15(D) AND
NINTH CIRCUIT RULE 27-3**

Neal Kumar Katyal
Kirti Datla
Jo-Ann Sagar
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

John C. Cruden
Kathryn E. Szmuszkovicz
Anthony L. Michaels
David A. Barker
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6000
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and Federal Rule of Appellate Procedure 26.1, counsel for Proposed-Intervenor BASF Corporation (“BASF”) certifies that BASF Corporation is a wholly owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly owned subsidiary of BASFIN Corporation. BASF Corporation, BASF Americas Corporation, and BASFIN Corporation are all Delaware corporations. BASFIN Corporation is a majority owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly owned subsidiary of BASF Nederland BV, a Dutch limited liability company, which in turn is a wholly owned subsidiary of BASF SE (Societas Europaea – “SE”), a publicly traded European Company. BASF Corporation, BASF Americas Corporation, BASFIN Corporation, BASF USA Holding LLC and BASF Nederland BV are not publicly held. No publicly held corporation owns 10% or more of BASF’s stock.

June 12, 2020

/s/ Kathryn E. Szmuszkovicz
Kathryn E. Szmuszkovicz
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6037
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following information is true and correct, as required by Circuit Rule 27-3:

1. Telephone numbers and addresses of the attorneys for the parties.

Counsel for Proposed Intervenor BASF Corporation

John C. Cruden
Kathryn E. Szmuszkowicz
Anthony L. Michaels
David A. Barker
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6000

Neal Kumar Katyal
Kirti Datla
Jo-Ann Sagar
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

Counsel for Petitioners

George A. Kimbrell
Sylvia Shih-Yau Wu
Amy van Saun
CENTER FOR FOOD SAFETY
2009 NE Alberta St., Suite 207
Portland, OR 97211
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org
avansaun@centerforfoodsafety.org
(971) 271-7372

Stephanie M. Parent
CENTER FOR BIOLOGICAL
DIVERSITY
PO Box 11374
Portland, OR 97211
(971) 717-6404
SParent@biologicaldiversity.org

Counsel for Respondents

Sarah A. Buckley
J. Brett Grosko
UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
P.O. Box 7611
Washington, D.C. 20044
(202) 616-7554 (Buckley)
(202) 305-0342 (Grosko)
sarah.buckley@usdoj.gov

brett.grosko@usdoj.gov

Counsel for Intervenor-Respondent

Philip J. Perry
Richard P. Bress
Stacey L. VanBelleghem
Andrew D. Prins
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

2. Facts showing the existence and nature of the emergency.

As this emergency motion explains in full, the panel decision vacated EPA's registration of Engenia issued to BASF. Neither the petition for review, nor subsequent developments in this litigation, put BASF on notice that its Engenia registration was at issue because Petitioners' challenge was to the registration of a different pesticide, XtendiMax, which EPA registered in a separate agency action. The panel decision ordered the mandate issued immediately, which has forced BASF to act on a tremendously expedited basis to protect its rights with respect to its Engenia product, as well as the rights of farmers that depend on that product to grow their crops.

Exacerbating the need for expedited action by BASF to protect its rights, Petitioners have now moved to recall the mandate and seek to hold EPA in contempt for its actions taken in the wake of the panel's extraordinary decision. The mandate issued the same day as the decision. This left BASF and farmers that

use Engenia in a state of flux—as it did for Monsanto and Corteva, whose registrations were also vacated in this decision. EPA attempted to address this real problem by issuing an order restricting the use of existing stocks by growers and certified applicators to those stocks that were in their possession as of the date of the mandate issuance, but only through July 31, 2020, and only consistent with the label restrictions associated with the now-vacated product registrations. Petitioners now seek to invalidate that effort to address the effects of the panel’s decision to issue the mandate immediately. That action directly affects BASF’s interests in the use of its Engenia product.

Petitioners have sought expedited consideration of their motions, and BASF similarly needs expedited consideration of its intervention motion to allow it to participate in these proceedings.

3. Why the motion could not have been filed earlier.

As explained in full in the accompanying motion, BASF did not have notice that its rights in its Engenia registration were at issue in this litigation until the panel decision on June 3, 2020. BASF is filing this motion within ten days of that decision. And it is filing immediately after Petitioners filed their motion to recall the mandate and seek contempt.

4. When and how BASF gave notice to, and served the motion on, counsel for the other parties and the other parties’ positions on the motion.

Counsel for BASF notified counsel for Petitioners of BASF’s intent to file

this motion on June 11, 2020 by e-mail. Petitioners oppose this motion.

Counsel for BASF notified counsel for Respondents of BASF's intent to file this motion on June 11, 2020 by e-mail. Respondents do not oppose this motion.

Counsel for BASF notified counsel for Intervenor-Respondent Monsanto of BASF's intent to file this motion on June 11, 2020 by e-mail. Monsanto consents to this motion.

Service will be effected by electronic service through the CM/ECF system.

5. Whether the relief sought was first sought in the agency, and if not, why the motion should not be remanded or denied.

This motion seeks relief that is not available before the EPA: to intervene in a petition for review proceeding before this Court.

6. Proposed briefing schedule.

BASF proposes the following schedule for briefing this motion: any opposition to be filed on Tuesday, June 16, 2020, and any reply to be filed on Wednesday, June 17, 2020.

June 12, 2020

/s/ Kathryn E. Szmuszkovicz

Kathryn E. Szmuszkovicz
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6037
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

EMERGENCY MOTION TO INTERVENE

The panel issued a decision with broad reach. Petitioners sought review of the EPA's 2018 registration of a single pesticide—XtendiMax—made by a single manufacturer—Monsanto Corporation. The panel decision nonetheless reached *not just* that registration but also the separate registrations of two different pesticides—Engenia and FeXapan—made by two different manufacturers—BASF Corporation and Corteva—neither of whom were parties to this case. In the same opinion that faulted Respondents' risk-benefit analysis, the panel chose to *vacate* these three registrations nationwide despite the undisputed harm doing so will cause farmers across this country. And ensuring it would be exceedingly difficult for the non-party manufacturers to protect their rights after the panel decision brought them into the case, the panel ordered the mandate to issue *immediately*. This decision left the manufacturers, and the growers who use their products, in a state of uncertainty in the midst of the growing season, and so EPA issued an order implementing the mandate that addressed the use of existing stocks. Petitioners yesterday moved to recall that mandate, vacate EPA's order, and hold EPA in contempt. BASF now respectfully moves to intervene in this appeal under FRAP 15(d) in support of Respondent to protect its rights.

STATEMENT

In this appeal, Petitioners challenged EPA's 2018 registration of Monsanto's

XtendiMax pesticide. EPA registers pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C. § 136a(a). “No person may distribute or sell any pesticide product that is not registered under the Act.” 40 C.F.R. § 152.15; *see also* 7 U.S.C. § 136j(a)(1)(A). A “registration” is a “license that allows a pesticide product to be distributed or sold for specific uses under specified terms and conditions.” *Pesticides; Procedural Regulations for Registration Review*, 71 Fed. Reg. 45,720, 45,720 (Aug. 9, 2006); *see Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1133 (D.C. Cir. 2010). A registration is issued to a specific registrant, for a specific formula, packaging, and label. *See* 40 C.F.R. § 152.3 (defining “[p]esticide product” as “a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold”); 7 U.S.C. § 136a(c)(1)(C).

Petitioners’ challenge began in 2016. That year, EPA issued a registration for an agricultural herbicide called XtendiMax for post-emergent use—on crops that have emerged but are not ready to be harvested—on dicamba-tolerant soybean and cotton. After Petitioners petitioned this Court for review of the 2016 registration, EPA amended the registration in 2017, and Petitioners amended their petition to seek review of the amended order. *See* Case No. 17-70196, ECF Nos. 62, 68. The 2016 registration expired by its own terms, and EPA issued a new registration for XtendiMax on November 1, 2018. This Court then dismissed

Petitioners’ challenge as moot. *See Nat’l Family Farm Coal. v. U.S. EPA*, 747 F. App’x 646, 647-648 (9th Cir. 2019). The Court’s dismissal order directed the Clerk to expedite briefing and argument if Petitioners challenged “the 2018 registration decision of the EPA.” *Id.* at 648.

Petitioners filed this petition for review on January 11, 2019, continuing their challenge to the sole product they had previously challenged—XtendiMax. They cited the regulatory docket that had been opened for Monsanto’s XtendiMax registration (EPA-HQ-OPP-2016-0187-0968) and their prior petition for review that had challenged the 2016 XtendiMax registration. ECF No. 1-6 at 1. And they described their challenge as one to a document that “extended two earlier registration decisions by EPA over *this same pesticide product*.” *Id.* at 2 (emphasis added). Monsanto intervened. ECF No. 11. EPA had issued registrations for BASF’s Engenia on November 2 and for Corteva’s FeXapan on November 5. The petition did not mention these other companies, or their products and registrations.

After argument this April, the panel directed supplemental briefing on the scope of Petitioners’ challenge. *See* ECF No. 111. Responding to a footnote in Petitioners’ brief, Respondents’ principal brief stated that the challenge was limited to the XtendiMax registration. ECF No. 48 at 12–13 n. 3. Petitioners did not respond—not in their reply brief, and not at oral argument. *See* ECF No. 72 (reply brief); ECF No. 110 (oral argument recording); *see also* ECF No. 112 at 9–10

(EPA’s supplemental brief noting these omissions, and arguing that Petitioners waived any argument that the petition encompasses BASF’s Engenia registration). In response to the supplemental briefing order, Petitioners argued—for the first time—that the petition covered the separate Engenia and Corteva registrations in addition to Monsanto’s XtendiMax registration. ECF No. 115-1 at 2–3.

Nine days ago, the panel issued its decision. It concluded that the petition was a challenge to an earlier-in-time decision document on which the order extending the XtendiMax registration—and separate orders extending the Engenia and FeXapan registrations—had been based. It thus held that “all three registrations are at issue in the petition.” *Nat’l Family Farm Coal. v. U.S. EPA*, No. 19-70115, 2020 WL 2901136, at *9 (9th Cir. June 3, 2020). The panel vacated that decision document and the three registrations, acknowledging the significant hardship this choice would inflict on farmers that use these pesticides, including BASF’s Engenia. *See id.* at *19 (noting “the difficulties these growers may have in finding effective and legal herbicides to protect their DT crops if we grant vacatur . . . through no fault of their own”); *see also* Key Decl, Ex. A at ¶¶ 11–15 (discussing effects on growers and BASF’s manufacturing and sales).

The panel ordered the mandate to issue immediately. *See* ECF No. 125. Consistent with the mandate, EPA issued an order addressing existing stocks of products with vacated registrations. ECF No. 127-3. Yesterday, Petitioners filed a

motion to recall the mandate, for an order instructing EPA to revoke the existing stocks order, and to hold EPA in contempt. *See* ECF No.127.

ARGUMENT

Now that the panel has placed BASF's Engenia registration at issue, this Court should permit BASF to intervene and protect its interests. Rule 15(d) permits intervention in a proceeding for review of an agency order where sought "within 30 days after the petition for review is filed" and where the intervenor states an adequate "interest" and "grounds for intervention." Fed. R. App. P. 15(d). The petition did not put BASF on notice that its November 2 registration was at issue, and BASF has moved expeditiously to seek intervention in light of the panel's decision. This Court routinely finds that regulated parties meet this standard where the challenged regulatory action implicates their interests. *See, e.g., Ctr. for Food Safety v. U.S. EPA*, No. 14-73359 (9th Cir. Dec. 11, 2014), ECF No. 12 (granting motion to intervene of Dow AgroSciences to defend its pesticide registration); *Sierra Club v. U.S. EPA*, 762 F.3d 971, 976 (9th Cir. 2014) (intervention granted to applicant of challenged EPA permit); *Akiak Native Cmty. v. U.S. EPA*, 625 F.3d 1162, 1165 (9th Cir. 2010) (same).

I. GOOD CAUSE EXISTS TO PERMIT INTERVENTION AFTER THE ORDINARY PERIOD SPECIFIED IN RULE 15(D).

This Court should allow BASF to intervene though the ordinary time frame provided in FRAP 15(d) has passed. Under that rule, a motion for leave to

intervene in a proceeding to review agency action “must be filed within 30 days after the petition for review is filed.” Fed. R. App. P. 15(d). This “deadline is a claim-processing rule,” one that this Court “can excuse.” *Int’l Union of Operating Eng’rs, Local 18 v. NLRB*, 837 F.3d 593, 595-596 (6th Cir. 2016) (listing reasons such as “waive[r],” “forfeiture,” “equitable” considerations, and whether no party “oppose[d]” or would be “prejudice[d]” by the intervention); *Zeigler Coal Co. v. Office of Workers’ Comp. Programs*, 490 F.3d 609, 610 n.1 (7th Cir. 2007) (holding that a coal company’s surety showed cause to intervene after the 30-day period because the company’s liquidation in bankruptcy meant it lacked an interest in the matter and would not protect the surety’s rights).

Intervention past the 30-day deadline is warranted here. First, BASF did not have notice that the petition put its Engenia registration at issue within the 30-day period, and it acted expeditiously after the panel decision vacated its Engenia registration. Second, intervention would be timely under the ordinary rules.

A. Good Cause Exists To Permit Intervention Because BASF Did Not Have Notice That The Petition For Review Put Its Engenia Registration At Issue Until The Panel Decision.

Because the petition for review did not refer to BASF’s Engenia registration, BASF had no basis to intervene within Rule 15(d)’s 30-day period, and it should be permitted to do so now. The petition did not reference the registration for BASF’s Engenia pesticide. Read fairly, it referred *only* to the XtendiMax

registration. It referred to the regulatory docket that EPA opened for the 2016 XtendiMax registration and continued for the 2018 XtendiMax registration. And it stated that the challenge was limited to the same pesticide product at issue in Petitioners' earlier litigation in this Court, that is, XtendiMax. *See supra* at 3.

Both during and after that 30-day intervention period, Petitioners' filings repeatedly confirmed that their petition was limited to challenging the XtendiMax registration. For example, just days after the petition was filed, EPA sought a stay. When Petitioners opposed, they identified only "Monsanto's dicamba pesticide" and "Monsanto's XtendiMax" as the subject of the petition. ECF No. 8 at 2, 6. Petitioners did not mention BASF or Engenia. *See id.* Shortly thereafter, all parties jointly confirmed that the "petition, filed on January 11, 2019, challenges EPA's order . . . granting a conditional approval of pesticide registration for new uses of Movant-Intervenor Monsanto Company's Xtendimax." ECF No. 21 ¶ 1; *see also* ECF No. 77-2, at 4 ("the pesticide registration issues in this petition involve . . . EPA's decision to continue the registration of XtendiMax until 2020.").

EPA proceeded in reliance on this description of the petition. It repeatedly made clear that the Administrative Record it was compiling consisted of the documents considered in connection with EPA's XtendiMax approval. ECF 26-2 at 1–2 (certifying administrative record consisting of documents relating to EPA's November 1 XtendiMax registration); ECF 34-2 at 1–2 (same). Petitioners did not

contest the scope of the Administrative Record, and have not argued that EPA also needed to compile the complete Administrative Record for the separate Engenia registration. Because the Administrative Record for Engenia was never produced to the Court, the panel did not have before it a dozen studies of the spray drift and volatilization characteristics of the Engenia formulation. *See* Kay Decl. ¶ 7 & Attach. A. These materials would be required to be included in the Administrative Record in any challenge to the Engenia registration.

The panel's actions confirm that Petitioners had not clearly demonstrated that they meant to challenge BASF's Engenia registration. Petitioners mentioned Engenia in a cursory footnote in their opening brief, filed long *after* the 30-day period for intervention. *See* ECF No. 35 at 2 n.4. Respondents argued that this passing mention did not put Engenia within the scope of Petitioners' challenge. ECF No. 48-1 at 12-13 & n.3. Petitioners challenging agency orders bear the burden to "specify" each order "or part thereof" they are challenging. Fed. R. App. P. 15(a)(2)(C); *see Gottesman v. U.S. INS*, 33 F.3d 383, 388 (4th Cir. 1994) (specification requirement is jurisdictional). And yet Petitioners did not show that they had met this burden, not in their reply brief or their presentation at oral argument, both of which were silent in response to the EPA's argument.

It was precisely this *lack* of clarity that led the panel to issue a supplemental briefing order. That order observed, "[t]he briefing now before this Court does

little more than to indicate disagreement between the parties” as to whether the Engenia and FeXapan registrations were implicated. ECF No. 111 at 3. Then, for the first time, Petitioners’ supplemental brief argued that they had intended to challenge BASF’s Engenia registration along with Monsanto’s XtendiMax registration. *See* ECF No. 115-1 at 2–3.

It was thus not until the panel decision three weeks later that BASF simultaneously received notice that its Engenia registration was at issue, in the portion of the decision ruling on the scope of Petitioners’ challenge, and that its registration was no more, in the portion of decision vacating that registration and ordering the mandate to issue immediately. The panel held that the petition for review included the registration for BASF’s Engenia because the petition noted that the EPA decision document at issue “was ‘intertwined with and extended two earlier registration decisions by EPA over this same pesticide product.’” *Nat’l Family Farm Coal.*, 2020 WL 2901136, at *8 (quoting ECF No. 1-6 at 2). The panel inferred that this reference to the EPA decision document swept in the registrations for BASF’s Engenia and Corteva’s FeXapan because that document announced EPA’s intent to amend those registrations. It reached this conclusion even though that document was not the final agency action as to Engenia’s registration; that required a separate action taken on November 2. *See supra* at 3.

The panel’s conclusion that *it* was satisfied that the petition encompassed

BASF's Engenia registration—after supplemental briefing by the parties—says nothing about whether BASF had notice before the panel reached that conclusion. In the same sentence the panel quoted, the petition made explicit that Petitioners were challenging only the “same pesticide product” its earlier petition had challenged: XtendiMax. ECF No. 1-6 at 2. Engenia was not at issue in that litigation. *See* ECF No. 115-1 at 6 (Petitioners conceding that the earlier petition “was limited to Xtendimax”); Case No. 17-70196, ECF Nos. 1-5, 1-6, 62, 68.

Petitioners' statement that they challenged an action that was “intertwined with and extended two earlier registration decisions by EPA over this same pesticide product” cannot be fairly read to have put BASF on notice that Petitioners' challenge also extended to the Engenia registration. And, as explained, the petition expressly challenged an order it described as having “extended two earlier registration decisions . . . over this same pesticide product” that were “challenged in this Court.” ECF No. 1-6 at 2 (emphasis added). Those earlier registrations were for XtendiMax, and the earlier case in this Court challenged those XtendiMax registrations. *See supra* at 3. Engenia was not at issue in those registrations, or those cases, and BASF had no reason to think that it was suddenly put at issue in this continuation of those earlier cases. While the panel viewed its expansive interpretation as consistent with one sentence in a footnote of Petitioners' opening brief, there is no reason BASF should have drawn that same conclusion

given the scope of the petition for review itself, and given that the panel itself required supplemental briefing to reach that conclusion.

BASF has acted expeditiously since the panel decision. *Cf. United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-396 (1977) (noting there is good cause to allow a late motion to intervene when “in view of all the circumstances the intervenor acted promptly” after the change that gave rise to the intervenor’s desire to participate in the litigation as a party). The panel issued its decision just nine days ago. And while it would be unreasonable to hold that a potential intervenor must read every filing on a docket even when the petition itself does not implicate its interests, even if Petitioners’ supplemental brief were deemed to put BASF on notice, it is seeking to intervene within 30 days of that filing.

Not permitting BASF to intervene when BASF’s substantial interests are at stake, would be inequitable. The panel’s late-breaking decision reading the petition to include BASF’s Engenia registration—after the ordinary 30-day period for intervention in Rule 15(d)—raises due process concerns. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (internal quotation marks omitted)). As the owner of the Engenia registration, BASF has a property interest in that registration. *See Ctr. for Biological Diversity v. U.S. EPA*, 847 F.3d 1075, 1085 (9th Cir. 2017) (“FIFRA establishes

comprehensive procedures for the EPA’s . . . cancellation of registration of pesticide[s.]”); *Indus. Safety Equip. Ass’n v. EPA*, 837 F.2d 1115, 1122 (D.C. Cir. 1988) (“There is no question that appellants possess cognizable property interests in their respirator certifications.”). And yet that registration has been vacated without notice to BASF and without its participation in this case.

For related reasons, courts generally treat parties whose property rights may be harmed as necessary parties who should be joined in the litigation. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 270 (1978) (plurality op.) (“Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties.”); *see also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002) (explaining that whether a decision will “impair or impede its ability to protect that interest” is relevant to whether a party is necessary). Yet neither the panel nor the parties took any steps to ensure that BASF would be joined in this appeal.

Not permitting BASF to intervene after Petitioners’ new motion for further extraordinary relief would exacerbate the due process problem. Petitioners now ask this Court to direct EPA’s activities post-*vacatur* and to invalidate EPA’s existing stocks order. That requested relief directly affects BASF’s interests. Ruling on Petitioners’ request without BASF’s participation would compound the

due process injury that BASF suffered from the panel's decision.¹ For all of these reasons, there is good cause to permit BASF to intervene after the 30-day period of Rule 15(d).

B. BASF's Intervention Is Timely Under The General Standard.

Even if the Court finds that BASF had adequate notice that the petition put its Engenia registration at issue, the Court should still excuse the 30-day deadline because this motion would be timely under the ordinary rules. Outside of the administrative review context, this Court “weigh[s] three factors in determining whether a motion to intervene is timely: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (internal quotation marks omitted). Applying these factors, this Court has granted a motion to intervene in circumstances identical to this one—*i.e.*, after the issuance of a panel decision, and for the purpose of pursuing panel rehearing and rehearing en banc. *See Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Because each of the three factors weighs in BASF's favor, the

¹ Indeed, Petitioners' motion to recall appears to attempt an end-run around the jurisdictional requirement that challenges to an EPA order under FIFRA issued without a hearing—like the existing stocks order here—be filed in district court. *See* 7 U.S.C. § 136n(a); 5 U.S.C. § 702. Had Petitioners initiated a new challenge to this order in district court, BASF could have timely intervened.

Court should do the same here.

First, although the panel has issued a decision, BASF's intervention does not come at a late stage of the case. The petition for review at issue in this case was filed directly in the court of appeals. There was no earlier district court phase of the litigation. This is thus not the ordinary case in which a court deems intervention untimely, where intervention after an appellate opinion indicates that "none was sought in the district court." *Peruta v. County of San Diego*, 771 F.3d 570, 574 (9th Cir. 2014) (internal quotation marks omitted). Moreover, Petitioners' motion to recall the mandate and to hold EPA in contempt for its existing stocks order presents a natural opportunity for BASF's intervention in this case. Petitioners have now asked the panel to recall its mandate to address an order that directly affects BASF's interests. BASF seeks to participate in the Court's decisionmaking process with respect to the Petitioners' request.

Second, allowing BASF to intervene would not prejudice any party. Respondents' and Intervenor-Respondents' supplemental briefs argued that BASF was not on notice that the Engenia registration might be at issue and recognized that BASF would have intervened if it were on notice. *See* ECF No. 116 at 9 (Monsanto urging the panel not to read the petition to cover BASF's Engenia registration because to do so "would be profoundly unfair to . . . BASF, which lacked notice that [its] registration[] w[as] at stake and did not intervene to protect

[its] rights”); ECF No. 112 at 8-9 (similar statement from EPA).

Third, BASF has not delayed in filing its motion for intervention. “In analyzing timeliness . . . the focus is on the date the person attempting to intervene should have been aware his interest[s] would no longer be protected adequately by the parties.” *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 934 F.2d 1092, 1095 (9th Cir. 1991) (internal quotation marks omitted). As explained, *see supra* at 9–10, BASF lacked notice until the panel issued its decision. BASF filed this motion virtually immediately after that decision. In any event, “mere lapse of time, without more, is not necessarily a bar to intervention.” *Day*, 505 F.3d at 965 (quoting *Alisal*, 370 F.3d at 921) (deeming intervention motion filed two years after case began timely); *see also Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (twenty years).

II. BASF MEETS RULE 15(D)’S OTHER REQUIREMENTS.

Allowing BASF to intervene in this appeal is appropriate under any applicable standard. Courts evaluate whether intervention is warranted under Rule 15(d) by reference to the parallel rule governing intervention before the district court. *See Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216-217 & n.10 (1965) (directing appellate courts to look to the “policies underlying intervention” under Rule 24 of the Federal Rules of Civil Procedure in considering a motion to

intervene in a proceeding to review agency action); *see also Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–518 (7th Cir. 2004) (citing *Scofield* and applying Civil Rule 24 principles to Appellate Rule 15(d) motions to intervene). Rule 24 provides for intervention as of right and permissive intervention, and BASF meets both standards here.²

A. Allowing BASF To Intervene Serves The Policies Underlying Intervention As Of Right.

Intervention as of right under Rule 24(a) is appropriate if the movant establishes that (1) “it has a significant protectable interest relating to . . . the subject of the action;” (2) “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest;” and (3) “the existing parties may not adequately represent the applicant’s interest.” *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (quoting *Alisal*, 370 F.3d at 919). This Court has emphasized that, “[i]n general, we construe Rule 24(a) liberally in favor of potential intervenors.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993); *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003).

BASF satisfies each requirement. *First*, it has protectable interests in the

² Courts consider timeliness when evaluating both forms of intervention. As explained above, BASF’s motion to intervene is timely. *See supra* at 616.

outcome of this appeal. An applicant for intervention has adequate interests in a suit where “the resolution of the plaintiff’s claims actually will affect the applicant.” *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted). Here, the Panel’s decision “actually”—and gravely—affected BASF’s registration for Engenia. Under FIFRA, no pesticide may be sold in the United States absent registration by EPA. The registration for Engenia—which is owned by BASF—effectively constitutes a license to sell Engenia for a period of time. 7 U.S.C. § 136a(a). This Court has recognized similar licenses as squarely within Rule 24’s protectable interests. *See, e.g., Sierra Club*, 995 F.2d at 1482-84 (holding that owner of a water quality permit issued by EPA had a “legally protected interest” in suit challenging its validity that fell “squarely in the class of interests traditionally protected by law”); *see also* Memorandum & Order at 4-5, *Pesticide Action Network N. Am. v. U.S. EPA*, No. 3:08-cv-01814-MHP (N.D. Cal. July 8, 2008), ECF No. 43 (FIFRA registrations “constitute property”).

Second, the disposition of the action has already impaired BASF’s ability to protect its interest in the registration of Engenia. This Court has made clear that impairment is demonstrated where the “relief sought by the p[etitioners] will have direct, immediate, and harmful effects upon [the proposed intervenor’s] legally protectable interests.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (quoting

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1494 (9th Cir. 1995)). That is indisputably true here. The Panel decision, in vacating the Engenia registration, deprives BASF of its property. And Petitioners' post-decision challenge to EPA's effort to properly address the use and disposition of existing stocks already in the possession of farmers and other BASF customers would likewise impair BASF's interests.

Third, BASF's interests are not adequately represented by the parties. This final requirement of the test for intervention is "minimal," and is satisfied so long as "the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki*, 324 F.3d at 1086); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Three factors are relevant in conducting this inquiry: "(1) whether the interest of a present party is such that it will *undoubtedly* make *all* of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (emphases added) (quoting *Arakaki*, 324 F.3d at 1086).

These factors all point in the same direction. There is no party that has the same incentive as BASF to explain why the panel decision should not have reached

the Engenia registration. Monsanto's interest is in a competing product with different intellectual property supporting it, a different administrative record explaining its approval, and different financial investments at stake. *See* ECF No. 61 at 2 & n.1 (Monsanto supplemental brief, noting that XtendiMax and Engenia “contain *different* formulations” and “are authorized by separate orders”); ECF No. 112 at 7 (EPA supplemental brief stating that “the administrative record EPA filed with the Court contains documents EPA considered in registering Xtendimax”); *see also* Kay Decl., Ex. A at ¶¶ 6–7 (discussing EPA's regulatory process and the differences between Engenia and XtendiMax). And EPA's “general interest” in seeing its decision upheld “does not mean [the parties'] particular interests coincide so that representation by the agency alone is justified.” *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). Both EPA and Monsanto might, for example, focus only on cross-cutting deficiencies in the panel decision rather than narrower grounds for modifying that decision, such as its too-broad scope. BASF would thus offer necessary elements to the proceeding that other parties could neglect.

B. Allowing BASF To Intervene Serves The Policies Underlying Permissive Intervention.

BASF also satisfies the requirements for permissive intervention under Rule 24(b). Permissive intervention requires (1) “an independent ground for jurisdiction;” and (2) “a common question of law and fact between the movant's

claim or defense and the main action.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (internal quotation marks omitted). BASF easily satisfies both of these requirements. *First*, because this is “a federal-question case” and BASF “does not seek to bring any counterclaims or cross-claims,” “the independent jurisdictional grounds requirement does not apply.” *Id.* at 844 (explaining that in this circumstance, the court’s jurisdiction “is grounded in the federal question(s) raised by the plaintiff,” and so “the identity of the parties is irrelevant”). *Second*, BASF is not raising any claims significantly “different from the issues in the underlying action.” *S. California Edison*, 307 F.3d at 804. The panel decision vacated BASF’s Engenia registration and so BASF now—like EPA and like Monsanto—has cause to challenge that decision. BASF’s participation will not “unduly delay the main action” or “unfairly prejudice the existing parties.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

CONCLUSION

This Court should grant BASF’s emergency motion to intervene under Rule 15(d) and Ninth Circuit Rule 27-3.

June 12, 2020

Respectfully submitted,

Neal Kumar Katyal
Kirti Datla
Jo-Ann Sagar
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

John C. Cruden
Kathryn E. Szmuszkovicz
Anthony L. Michaels
David A. Barker
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6000
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2010. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4,794 words.

June 12, 2020

/s/ Kathryn E. Szmuszkovicz

Kathryn E. Szmuszkovicz
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6037
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

June 12, 2020

/s/ Kathryn E. Szmuszkovicz

Kathryn E. Szmuszkovicz
BEVERIDGE & DIAMOND PC
1350 I Street NW Suite 700
Washington DC 20005-3311
(202) 789-6037
kes@bdlaw.com

Counsel for Proposed Intervenor BASF Corporation

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

National Family Farm Coalition,
Center For Food Safety, Center For
Biological Diversity, Pesticide Action
Network North America,

Petitioners,

v.

U.S. Environmental Protection
Agency; Andrew Wheeler in his
capacity as Administrator,

Respondents,

Monsanto Company,

Respondent-Intervenor

No. 19-70115

DECLARATION OF FREDRIC SCOTT KAY

I, Fredric Scott Kay, am over 18 years of age, and I am competent to be a witness in this proceeding.

1. I currently serve as Vice President, US Crop Protection, Agricultural Solutions at BASF Corporation, a position I have held since 2013. My office is located at 2 TW Alexander Drive, Research Triangle Park, North Carolina 27709-3528. In this role, I am responsible for all aspects of BASF's United States crop

protection business, including marketing, sales, product development and branding.

2. I have spent my entire career in agriculture. Before this position, I served as BASF's Canadian business director and was responsible for all Canadian agricultural operations and long-term planning. Before that I served in a marketing role for BASF and in a sales role for a different crop protection company.

3. I hold a BS Degree in Agriculture, Public Service and Administration from Iowa State University. I serve on the Board of Directors for the Agriculture Future of America, whose mission is to build bridges for young leaders to foster engagement and innovation in food and agriculture.

4. In carrying out my responsibilities, I have gained familiarity with BASF's United States crop protection business, including the Engenia product that the Court included in its vacatur decision, agricultural practices and timing related to planting soybeans and cotton, including dicamba-tolerant soybeans and cotton, and use of crop protection products over the top of these plants. I also am familiar with the business implications of the U.S. Environmental Protection Agency's (or EPA's) regulation of pesticides, including the products in the Court's decision.

5. No company or person can sell a pesticide in the United States unless EPA has issued that company a specific license or "registration" to sell the pesticide. Companies wishing to obtain a registration such as the registration at

issue here must each file a unique application with EPA, with a unique confidential statement of formula that includes specific details on the manufacturing process and the individual ingredients and sources of those ingredients for the product. For this type of application, each company also submits supporting data and a proposed label, among other items.

6. EPA creates a separate file on each application, known as the “registration jacket,” with confidential information on each application. It issues a distinct decision on each application, resulting in a unique license with a unique number that is the property of the particular registrant.

7. I understand that the Court reviewed EPA’s decision based on a specific Administrative Record that is intended to show what EPA considered in making its decision. Based on a review of the publicly-available index to that Administrative Record, it is evident that it does not include items specific to Engenia from the normal submissions and files mentioned above. For instance, if the Administrative Record encompassed Engenia, it would have included the data identified in the attached list, titled “Examples of Engenia Drift and Volatilization Studies Not Included in the Administrative Record Compiled by EPA.”

8. BASF’s product Engenia is a different formulation than Monsanto’s Xtendimax product, with different intellectual property supporting it and separate financial investments by BASF.

9. BASF manufactures Engenia at its facility in Beaumont, Texas, where it employs 170 people. BASF invested \$370 million to improve that plant in the five years leading up to Engenia's entry into the marketplace, \$270 million of which was spent to expand BASF's capacity to produce Engenia in the last three years before market launch. BASF made additional substantial investments in research, development, training, and stewardship for Engenia that are not included in these figures.

10. BASF is a competitor to Monsanto/Bayer and Corteva, the other two companies whose registrations were vacated by the Court's decision.

11. One pesticide product cannot be easily substituted for another. There are performance considerations (what the labeled uses are and how effective the product is) and practical logistical considerations. In other words, the substitute must be able to perform the functions of the original product and must be available to growers on the schedule needed.

12. Here the Court made its decision immediately effective with no notice to the entire distribution channel, including registrants, distributors, retailers, licensed or "certified" applicators (who are the only people allowed to apply these three products), and the ultimate customers, the growers who are in the midst of the busiest time for application of these three products. Even if there were adequate alternatives to the three products covered by the Court's decision, and

even if there were theoretically sufficient stocks of adequate alternatives to the three products covered by the Court's decision, which we have no reason to believe is the case, growers do not have access to alternative products instantaneously. On a normal cycle, product decisions and orders for over-the-top products such as Engenia started last December.

13. In addition there is a significant lead time to plan for new manufacturing capacity. The planning process typically takes between nine and twelve months and even under the best circumstances requires at least six months.

14. Only about 25% of the expected applications of over-the-top dicamba products had been made by the date of the Court's decision on June 3. The majority of the remaining applications will be made in the next approximately 30 days.

15. BASF estimates that there is enough Engenia currently located throughout the customer channel to treat 26.7 million acres of soybeans and cotton.

16. In addition, BASF stopped all its sales upon learning of the Court's decision, and has an additional \$44 million of Engenia in its possession, enough to treat 6.6 million acres of soybeans and cotton.

17. The BASF Beaumont plant operates 24 hours a day and nearly continuously throughout the year to produce Engenia and other dicamba products. The majority of the production is devoted to Engenia. For technical reasons

related to the manufacturing process, the facility cannot operate at less than 50% capacity so would need to be shut down without Engenia production.

18. In addition to the significant investments mentioned above, BASF developed the On Target Application Academy or OTAA. Through this unique undertaking, BASF has provided stewardship training to over 10,000 applicators across 31 states.

19. In my experience the Court's general comments about compliance with labels are not accurate for pesticide products, particularly Engenia. Crop protection labels are detailed and precise for intentional and good agricultural, human health and environmental reasons. For some products, like, Engenia, there are many crops on the label, each with its own application instructions, which accounts for much of the length mentioned by the Court. Also, products such as Engenia may only be applied by trained, licensed applicators known as "certified applicators." State certifying agencies as well as registrants invest substantial efforts to train such expert applicators properly and keep them up-to-date on requirements. For BASF, it is both good stewardship and good business to make certain that label instructions are understood and complied with.

20. Beyond its impact on Engenia, the Court's decision also is very important to BASF's business in general because of the Court's broad and in some ways unique statements about the standard applicable to EPA's pesticide

registration decisions. EPA's pesticide program has made thousands of decisions on individual registrations for competitive products. We study these and learn from them to make our investment decisions. The Court's decision here singles out three products to evaluate in new ways. I am very concerned about the confusion and differing impact the Court's decision may have on our product's registration and potentially others, especially because all products should be addressed under the same set of ground rules in a science-based regulatory program. As noted above, BASF made enormous investments in this product based on its understanding of the FIFRA requirements and how they are applied based on a robust scientific foundation.

I hereby declare and affirm, subject to the penalties of perjury, that the foregoing statement is true and correct to the best of my knowledge, information, and belief.

Dated: June 12, 2020

s/ Fredric Scott Kay
Fredric Scott Kay

KAY DECLARATION ATTACHMENT A

Examples of Engenia Drift and Volatilization Studies Not Included
in the Administrative Record Compiled by EPA

STUDY TITLE	EPA Master Record Identification Number (MRID)	SUBMISSION DATE
Jonas, W. (1994) Evaporation Behaviour from Soil and Plants (Large-Scale Model Chamber): Test Product: Frontier (SAN 582 H 900 EC 408 DP): Test substance: (3-[Carbon 14]-Thienyl)-Dimethenamid. Project Number: 1994/10642 NA/94/9405. Unpublished study prepared by NATEC Institut fuer Naturwissenschaftlich Tech Dienste GmbH. 66p.	49067703	3/26/2013
Birk, J. (2013) Dicamba Delayed Injury Response in Sensitive Plants. Project Number: 2013/7000699. Unpublished study prepared by BASF Corporation. 21p.	49067705	3/26/2013
Jackson, S. (2013) Dicamba Behavior Based on Various Guideline Environmental Fate Studies. Project Number: 2013/7000538, 99AG08, 2000/5000171. Unpublished study prepared by BASF Corporation. 480p.	49067706	3/26/2013
Jackson, S. (2015) Wind Tunnel Particle Size Analysis of Various Nozzles and Tank Mix Partners for BAS183 ..H (Round I): Final Report. Project Number: 2015/7000616, 2015/7005414, 2009/7003309. Unpublished study prepared by BASF Crop Protection. 61p.	49671601	7/15/2015
Jackson, S. (2015) Wind Tunnel Particle Size Analysis of Various Nozzles and Tank Mix Partners for BAS183 ..H (Round II): Final Report. Project Number: 2015/7001196, 2012/7005414, 429625. Unpublished study prepared by University of Nebraska and BASF Crop Protection. 98p.	49671602	7/15/2015
Jackson, S. (2015) Comparison of Physical/Chemical Properties for BAPMA and DGA Salts Using the Estimations Programs Interface for Windows (EPI Suite) QSAR Tool. Project Number: 2015/7001693. Unpublished study prepared by BASF Corporation. 44p.	49676101	7/23/2015
Jackson, S. (2015) Wind Tunnel Particle Size Analysis of Various Nozzles and Tank Mix Partners for BAS183 ..H (Round I): Final Report. Project Number: 2015/7005615, 2012/7005414, 2009/7003309. Unpublished study prepared by BASF Crop Protection and University of Nebraska. 61p.	49695601	8/21/2015

STUDY TITLE	EPA Master Record Identification Number (MRID)	SUBMISSION DATE
Jackson, S. (2015) Wind Tunnel Particle Size Analysis of Various Nozzles and Tank Mix Partners for BAS183 ..H (Round III): Final Report. Project Number: 2015/7005773, 2012/7005414, 429625. Unpublished study prepared by BASF Corporation and University of Nebraska. 28p.	49696001	9/10/2015
Jackson, S. (2016) 2016 Wind Tunnel Particle Size Analysis of Various Nozzles and Tank Mix Partners for BAS183 ..H (Round IV): Final Report. Project Number: 2016/7006248, 2012/7005414, 429625. Unpublished study prepared by BASF Corporation. 30p.	49952901	6/21/2016
Hewitt, A. (2016) Atomization Droplet Size Spectra for Engenia with Adjuvants. Project Number: BASF/819164, 2016/7010997, T94/001. Unpublished study prepared by The University of Queensland. 121p.	50106001	11/11/2016
Reiss, R. (2016) Deposition Modeling for Dicamba from BASF Study in Preston, Georgia (MRID 50020301). Project Number: 1608866/000/2587, 2016/7011170. Unpublished study prepared by Exponent. 24p.	50112001	11/21/2016
Winchell, M.; Rathjens, H.; Goetz, A. (2017) Prediction and Comparison of AgDISP-Predicted Off Field Deposition of Engenia Tank Mix Formulations for Ground Applications Using Various Air-Induction Nozzles: Final Report. Project Number: 2017/7008135, 17/012. Unpublished study prepared by Stone Environmental Inc. 112p.	50269301	5/2/2017