

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN SOYBEAN ASSOCIATION,

Petitioner,

v.

JANE NISHIDA,¹ Acting Administrator, U.S.
Environmental Protection Agency, et al.,

Respondents.

No. 20-1441 and
consolidated cases

RESPONDENTS' UNOPPOSED MOTION FOR ABEYANCE

Respondents Acting Administrator Jane Nishida, Acting Division Director Marietta Echeverria, and the U.S. Environmental Protection Agency (collectively, “EPA”) respectfully request that the Court hold these consolidated cases in abeyance and toll all deadlines for a period of 60 days. EPA also respectfully requests that the Court toll all deadlines in these consolidated cases while this Motion for Abeyance is pending. EPA consulted with counsel for all other parties in these consolidated cases, and no party opposes this Motion for Abeyance.

¹ Following the resignation of Administrator Andrew Wheeler, Jane Nishida has assumed the position of Acting Administrator of the U.S. Environmental Protection Agency, and is automatically substituted as a party in these cases. Fed. R. App. P. 43(c)(2).

This case concerns petitions for review of EPA's October 27, 2020 issuance of notices of registration under the Federal Insecticide, Fungicide, and Rodenticide Act for three pesticide products: the "Engenia Herbicide Registration," the "A21472 Plus VaporGrip Technology Registration," and the "XtendiMax with VaporGrip Technology Registration" (collectively, the "Registrations").

Petitioners filed petitions for review of the Registrations in this Court (Nos. 20-1441 and 20-1445), the U.S. Court of Appeals for the Fifth Circuit (No. 20-1484), and the U.S. Court of Appeals for the Ninth Circuit (No. 21-1043). On December 1, 2020, pursuant to 28 U.S.C. § 2112(a), EPA submitted a notice of multicircuit petitions for review to the Judicial Panel on Multidistrict Litigation ("JPML"). On December 3, 2020, the JPML randomly selected this Court as the court in which to consolidate the petitions for review of the Registrations and issued a consolidation order. *See* ECF 1874319. As of February 2, 2021, all petitions for review of the Registrations have been consolidated in this case. *See* ECF 1883240.

On January 20, 2021, President Biden issued Executive Order 13,990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order directs the heads of all agencies to "immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January

20, 2021, that are or may be inconsistent with, or present obstacles to” certain policies set forth in the Executive Order. *Id.* at 7037. In conformance with that Executive Order, EPA is reviewing its agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, including the Registrations at issue here. In light of that review, EPA has requested that the Department of Justice seek abeyances, stays, or extensions of time in cases challenging such agency actions, including this case. *See* Letter from Melissa A. Hoffer, Acting General Counsel, EPA, to Jean E. Williams & Bruce S. Gelber, Deputy Assistant Attorneys General, Environment & Natural Resources Division, U.S. Department of Justice (attached as Exhibit 1).

Accordingly, EPA respectfully requests that the Court hold these consolidated cases in abeyance and toll all deadlines for 60 days. The requested abeyance period is necessary to allow time for EPA staff to brief new leadership on the Registrations challenged here and for new EPA leadership to review the Registrations in conformance with Executive Order 13,990. It is possible that in response to this review, EPA may undertake actions that could resolve some or all of the issues in these cases. Abeyance is appropriate to preserve the resources of the parties and of the Court, especially at this early stage of litigation, when EPA has not filed the certified index to the administrative record and the parties’ deadlines for procedural and dispositive motions have not yet passed. Likewise,

EPA requests that the Court toll all deadlines in these cases while this Motion for Abeyance is pending in order to preserve the parties' and the Court's resources.

For the foregoing reasons, EPA respectfully requests that the Court hold these consolidated cases in abeyance and toll all deadlines for a period of 60 days.

EPA also respectfully requests that the Court toll all deadlines in these consolidated cases while this Motion for Abeyance is pending.

Respectfully submitted,

Dated: February 3, 2021

/s/ Andrew D. Knudsen
ANDREW D. KNUDSEN
Environmental Defense Section
J. BRETT GROSKO
Wildlife & Marine Resources Section
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, DC 20044
(202) 353-7466
andrew.knudsen@usdoj.gov
brett.grosko@usdoj.gov

Counsel for Respondents

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1) and the word limit of Fed. R. App. P. 27(d)(2) because it was typed using 14-point Times New Roman font and, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 637 words.

Respectfully submitted,

Dated: February 3, 2021

/s/ Andrew D. Knudsen
ANDREW D. KNUDSEN

Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that on this 3d day of February, 2021, I filed the foregoing via the Court's CM/ECF system, which will provide electronic notice to all counsel of record.

/s/ Andrew D. Knudsen
ANDREW D. KNUDSEN

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL**January 21, 2021**

Jean E. Williams
Bruce S. Gelber
Deputy Assistant Attorneys General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
transmitted electronically

Re: Abeyances in EPA Rule Cases

Dear Jean and Bruce:

In conformance with President Biden's *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* issued January 20, 2021, (Health and Environment EO), this will confirm my request on behalf of the U.S. Environmental Protection Agency (EPA) that the U.S. Department of Justice (DOJ) seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021, or seeking to establish a deadline for EPA to promulgate a regulation in connection with the subject of any such regulation, in order to provide an opportunity for new Agency leadership to review the underlying rule or matter. *See Health and Environment EO* at Section 2; *see also Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review*, January 20, 2021. For a case where an abeyance or stay of proceedings is not feasible, we request that DOJ seek extensions of time that are of sufficient duration to allow this review. While these rule cases are a particularly high priority, we also anticipate that a similar request may apply for additional cases in a defensive posture. For any case that you believe merits separate consideration, or for which you believe an abeyance, stay of proceedings, or sufficient extension is not feasible, please promptly notify us and the involved EPA Office of General Counsel's Associate General Counsel for a discussion.

The EPA Office of General Counsel will work with DOJ to help carry out this request. If there are questions, feel free to contact me, Jim Payne, payne.james@epa.gov, 202-672-3727, or the

Associate General Counsel for the case. Thank you.

Sincerely,

**Melissa A.
Hoffer**

Digitally signed by
Melissa A. Hoffer
Date: 2021.01.21
18:51:13 -05'00'

Melissa A. Hoffer
Acting General Counsel

Cc: Jim Payne