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**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA  
 TUCSON DIVISION**

**Center for Biological Diversity, et al.,**

Plaintiffs,

v.

**United States Environmental Protection  
 Agency, et al.,**

Federal Defendants, and

**Bayer Cropscience LP, BASF Corp., and  
 Syngenta Crop Protection, LLC,**

Defendant-Intervenors.

) No. 4:20-cv-00555-DCB

)  
 )  
 )  
 ) **EPA’S RESPONSE IN  
 ) OPPOSITION TO PLAINTIFFS’  
 ) MOTION TO LIFT THE STAY**

1 Nothing in Plaintiffs' Motion to Lift the Stay undercuts the current stay's  
 2 rationale, which is as valid today as it was the month before last when the stay was  
 3 entered. Plaintiffs' motion should therefore be denied.

4 **I. Jurisdictional Ambiguity and Pending Circuit Court Action Still Justify the Stay.**

5 Jurisdiction to review EPA's 2020 registrations of dicamba-based pesticides lies  
 6 with the district courts or the courts of appeals, but not both. 7 U.S.C. § 136n(a) & (b).  
 7 EPA has consistently maintained that district court jurisdiction is proper. *See* EPA's  
 8 Resp. to Pls.' Mot. to Determine Jurisdiction ("EPA's Resp.") at 11, Dkt. No. 58. But  
 9 Plaintiffs thought the question close enough to take the opposite position, arguing to the  
 10 D.C. Circuit that the "law of this Circuit (and others) is clear: the overwhelming  
 11 administrative record in this case provides the courts of appeals with jurisdiction."  
 12 Pet'rs' Combined Opp'n to Mot. to Dismiss & Mots. to Stay at 13, *Am. Soybean Ass'n v.*  
 13 *EPA*, No. 20-1441 (D.C. Cir. May 17, 2021), Doc. No. 1898988. Suffice it to say that the  
 14 issue of jurisdiction "is not free from doubt." EPA's Resp. at 1.

15 The D.C. Circuit will take up that issue when it considers the petition challenging  
 16 the 2020 registrations that is now before it. As EPA previously noted, "there is much to  
 17 be gained from knowing whether" that court "considers itself to have exclusive  
 18 jurisdiction over review of the final agency action" also challenged here. EPA's Resp.  
 19 at 13 (quoting *Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987 PKC, 2007 WL 4208757 at  
 20 \*2 (S.D.N.Y. Nov. 26, 2007)). "The alternative—'charg[ing] ahead with all proceedings  
 21 necessary to bring the case to final judgment'—would only 'delay a final adjudication in  
 22 the proper court' and 'waste[] resources of the parties and the Court,' were it 'later  
 23 determined that this Court lacked jurisdiction.'" *Id.* (quoting *Riverkeeper, Inc.*, 2007 WL  
 24 4208757 at \*2).

25 For those reasons, a stay "to allow time for resolution of the case pending in the  
 26 United States Court of Appeals for the District of Columbia" was, and still is, warranted.  
 27 Order at 4, Dkt. No. 64.

## II. Plaintiffs' Argument to Lift the Stay is Unavailing.

Unable to show that “the court’s reasons for imposing the stay no longer exist or are inappropriate,” *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002), Plaintiffs argue instead that their interest in proceeding outweighs the rationale for the stay. *See* Pls.’ Mot. to Lift the Stay (“Pls.’ Mot.”) at 1, Dkt. No. 66. This argument fails for two reasons.

First, but for their voluntary dismissal of their petition challenging the 2020 Registration decisions, Plaintiffs could have made their case to the D.C. Circuit, notwithstanding the stay in the case. To the extent Plaintiffs are harmed by their unilateral decision to foreclose that opportunity, that harm is self-inflicted and should not weigh in favor of lifting the stay.

Second, Plaintiffs’ demand for a resumption of this case distorts EPA’s report on impacts from dicamba use during the 2021 growing season. According to Plaintiffs, the Court must lift the stay because “[i]n the Report, EPA rejected amending the 2020 Registrations to add further use restrictions,” Pls.’ Mot. at 14, “admit[ted] that there is no way to fix the 2020 Registrations,” *id.* at 15, and “refused [] to amend the 2020 Registrations with further restrictions,” *id.*

But EPA’s report clearly states that it “does not contain any regulatory or policy decisions related to dicamba.” Pls.’ Mot. Ex. A at 4, Dkt. No. 66-1. It concludes by noting that EPA “has not conducted a full assessment” of mitigation measures that “may reduce off-target movement or misuse.” *Id.* at 44. And the report’s discussion of various proposed mitigation measures (pages 38–42) shows only that there are potential advantages and drawbacks associated with each, not that all “mitigation measures are ‘infeasible.’” Pls.’ Mot. at 15.<sup>1</sup>

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<sup>1</sup> Plaintiffs quote the incident report as dismissing mitigation measures as “‘infeasible.’” Pls.’ Mot. at 15. This quotation is erroneous. The incident report makes no such determination and does not even use the word “infeasible.”

In point of fact, since the report's release, registrants, in consultation with states, have submitted additional proposed restrictions on dicamba use. EPA has not, as Plaintiffs claim, "declare[d] its intention to do nothing." Pls.' Mot. at 2. On the contrary, EPA is "evaluating all of its options for addressing future dicamba-related incidents." EPA Releases Summary of Dicamba-Related Incident Reports from the 2021 Growing Season, (Dec. 21, 2021) (available at <https://www.epa.gov/pesticides/epa-releases-summary-dicamba-related-incident-reports-2021-growing-season>).

### CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied and the current stay should remain in place.

Respectfully submitted this 20th day of January, 2022.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 20, 2022, I filed the foregoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Andrew S. Coghlan  
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