**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

AMERICAN SOYBEAN ASSOCIATION, and PLAINS COTTON GROWERS, INC.,

*Plaintiffs*,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Federal Defendants*, and

BASF CORPORATION, *et al.*

*Defendant-Intervenors*.

Case No.: 1:20-CV-03190

**GROWERS' UNOPPOSED MOTION TO TEMPORARILY LIFT STAY AND FOR LEAVE TO SUPPLEMENT THE AMENDED COMPLAINT**

## INTRODUCTION

Late last year, at EPA's[1] request, the Court stayed this case pending resolution of related protective proceedings in the U.S. Court of Appeals for the D.C. Circuit. Since then, EPA amended the challenged herbicide registrations, further limiting use of the herbicides at issue. Growers[2] now move to temporarily lift the stay for the limited purpose of supplementing their pleadings to include this related regulatory development. Because

[1] "EPA" means defendants U.S. Environmental Protection Agency, EPA Administrator Michael S. Regan (automatically substituted for Andrew R. Wheeler under Federal Rule of Civil Procedure 25(d)), and Acting Division Director of EPA's Office of Pesticide Programs, Registration Division, Marietta Echeverria.

[2] "Growers" refers to plaintiffs American Soybean Association and Plains Cotton Growers, Inc.

Growers' request maximizes judicial efficiency, follows judicial practice, and otherwise satisfies the supplementation rule, the Court should grant Growers' motion.

This motion is unopposed. The Parties' particular positions follow.

**EPA:** Counsel for EPA indicated that they do not oppose Growers' motion to temporarily lift the stay for the limited purpose of allowing Growers to request leave to file their Supplemental Amended Complaint. EPA also does not oppose Growers' motion for leave to file the Supplemental Amended Complaint, but reserves all rights, including the right to file a motion to dismiss the Supplemental Amended Complaint.

**Bayer:** Counsel for Bayer Cropscience LP does not oppose the motion, consistent with EPA's position.

**BASF**: Counsel for BASF does not take a position on this motion.

**Syngenta:** Counsel for Syngenta Crop Protection, LLC does not take a position on this motion.

## BACKGROUND

This case challenges EPA regulatory restrictions on when (through date cutoffs) and where (through spray buffers) Growers can use the herbicide dicamba over-the-top of dicamba-resistant soybean and cotton. *See* Dkt. 1, Compl. ¶¶ 1–8. EPA implemented these restrictions through three product registrations, which established rules governing Growers' application of dicamba-based herbicides. *See id.* ¶¶ 87–89. Growers allege that several of those restrictions threaten to diminish crop yields, cut farmland productivity, and increase farm-operation costs. *See* Dkt. 60, Am. Compl. ¶ 7. Growers also contend that these use conditions are arbitrary and capricious and beyond EPA's authority under law. *Id.* ¶ 8.

Before EPA answered the Amended Complaint, the agency moved to stay this case while the D.C. Circuit considered Growers' consolidated protective proceedings challenging the same agency actions. *See* Dkt. 64, EPA Mot. to Stay. The Court granted that motion, staying this action pending issuance of the mandate in the D.C. Circuit action. *See* Dkt. 70, Order Granting Mot. to Stay.

While this case was stayed, however, EPA materially amended the challenged herbicide registrations (the "Registration Amendments"). *See* Dkt. 74, EPA Notice of Regulatory Action. As EPA explained to the Court, the amended dicamba registrations—issued late last month—"further restrict[] the use of over-the-top dicamba in Minnesota and Iowa." *Id.* at 1. More specifically, the Registration Amendments impose more restrictive cutoff dates (June 20 in Iowa and June 12 in southern Minnesota) and a new temperature-based restriction. *See* Ex. 2, Proposed Supp. Am. Compl. ¶¶ 119–22. Because the "Registration Amendments even further restrict Growers' access to the Dicamba Products, the Registration Amendments amplify the harm caused by EPA's usage conditions." *Id.* ¶ 122.

The Registration Amendments supplement the preexisting dicamba registrations, which otherwise remain in force. *See*, *e.g.,* Ex. 2, Ex. M, Engenia Registration Amendment at 1 (explaining that "[t]his amendment does not affect any conditions that were previously imposed on this registration. You continue to be subject to existing conditions on your registration"). And EPA has signaled that that Registration Amendments rest on largely the same administrative record and supporting analyses. *See, e.g., id.* at 2 (observing that "because this amendment does not allow for exposures beyond what was considered in the [original] ecological risk assessment, [it] thus does not require a new ecological risk

assessment."). In short, the Registration Amendments are tied to—and follow from—the original dicamba registrations at the heart of this case.

In their D.C. Circuit case, Growers moved to amend their petitions to include these regulatory developments. *See, e.g., Am. Soybean Ass'n v. EPA*, No. 20-1441, (D.C. Cir. 2022), ECF No. 1941202. The D.C. Circuit granted those motions. *See id.*, ECF No. 1941355. Growers now move to supplement their Amended Complaint in this Court on the same basis. *See* Ex. 1, Proposed Supp. Am. Compl. Because the Registration Amendments are part and parcel of the dicamba registrations disputed here, Growers' challenge to the Registration Amendments fits naturally into this case.

**LEGAL STANDARD**

"In choosing 'how to manage their dockets . . . the decision to grant [or lift] a stay . . . is generally left to the sound discretion of district courts." *Hulley Enter. Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 276 (D.D.C. 2016) (quoting *Ryan v. Gonzales*, 568 U.S. 57, 74 (2013)). "Logically, the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay." *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002).

Under Federal Rule of Civil Procedure 15(d), "the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). "Rule 15(d) is used to set forth new facts that update the original pleading or provide the basis for additional relief; to put forward new claims or defenses based on events that took place after the original complaint or answer was filed; to include new parties where subsequent events have made it necessary to do so." *United States v. Hicks*, 283 F.3d 380, 386 (D.C. Cir. 2002).

The Rule "promote[s] as complete an adjudication of the dispute between the parties as is possible." *Thorp v. District of Columbia*, No. 15-195, 2016 WL 10833538, at *2 (Apr. 12, 2016) (quoting Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1504 (3d ed.)).

Courts "resolve Rule 15(d) motions under the same standard as they resolve motions to amend under Rule 15(a)." *Banner Health v. Burwell*, 55 F. Supp. 3d 1, 8 n.9 (D.D.C. 2014). "The court has broad discretion in determining whether to allow supplemental pleadings in the interests of judicial economy and convenience." *Jones v. Bernanke*, 685 F. Supp. 2d 31, 35 (D.D.C. 2010). "Typically, courts grant leave to amend or supplement 'unless there is a good reason, such as futility, to the contrary.'" *Thorp*, 2016 WL 10833538, at *2 (quoting *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996)). Likewise, motions to supplement "are to be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." *Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006). In short, "it is an abuse of discretion to deny leave to amend" or supplement without sufficient reason. *Bode & Greiner, LLP v. Knight*, 808 F.3d 852, 860 (D.C. Cir. 2015) (internal citations omitted).

## ARGUMENT

### I. The Court should allow Growers to supplement the Amended Complaint.

The Court should grant Growers' motion to supplement because folding the Registration Amendments into this case enhances judicial efficiency, conforms with precedent, and furthers Rule 15.

*First*, because the Registration Amendments flow from the underlying registrations at issue, judicial economy favors hearing those challenges together. The original dicamba

registrations and the Registration Amendments are rooted in a common administrative record, rely on the same supporting analyses, and apply to the same end users (Growers) in much the same way (through label restrictions). *See supra* at 3. Likewise, Growers' legal claims turn on the same law (FIFRA, the ESA, and the APA) and overlapping facts (the same EPA decision-making processes and the same kinds of impacts on Growers). *See generally* Ex. 2. In short, because the Registration Amendments are an outgrowth of the original registrations, combining Growers' claims about both "will promote the economic and speedy disposition of the entire controversy between the parties." *Hall*, 437 F.3d at 101. At the same time, the alternative—forcing Growers to file a separate action over Registration Amendments—would undermine judicial efficiency. Another case also risks conflicting results, since the Registration Amendments implicate overlapping claims, facts, and parties. Accordingly, because combining Growers' claims about the Registration Amendments with this case about the underlying registration decisions "promote[s] as complete an adjudication of the dispute between the parties as is possible," the Court should grant this motion. *Thorp*, 2016 WL 10833538, at *2.

*Second*, and by extension, courts regularly grant motions to supplement and amend in similar situations. *See, e.g., Wyandotte Corp. v. Costle*, 582 F.2d 108, 112 (1st Cir. 1978) (allowing amendment of a petition for review in a case involving "sequential regulations" that "arose from the same administrative proceeding"). Indeed, the D.C. Circuit just granted Growers' analogous motion in the related case above. *See supra* at 3. Taking another example, in litigation involving earlier dicamba registrations, the Ninth Circuit granted the challengers' motion to amend their petition to reach an amended registration that—like the Registration Amendments—"include[d] additional terms and conditions for the herbicide's

use." *Nat'l Fam. Farm Coal. v. EPA*, No. 17-70196 (9th Cir. 2018), ECF No. 10651707 at 1–2 (motion); *id.,* ECF No. 10733749 (order granting that motion). And in *The Fund for Animals v. Hall*, the Court granted a motion to supplement to "permit the plaintiffs to challenge three additional rules" issued while the litigation was pending. 246 F.R.D. 53, 54 (D.D.C. 2007). There, as here, "the defendants ha[d] not yet filed the administrative record," the "claims [we]re closely related to the claims already before the court," and supplementation could "avert[] a separate, redundant lawsuit." *Id.* at 55. In sum, the cases agree—because Growers' supplemental allegations involve related agency actions, issues, and legal claims, supplementation serves "[t]he interests of judicial economy and convenience." *Id.*

*Third*, "there is [no] sufficient reason, such as undue delay, bad faith[,] dilatory motive[,] [or] repeated failures to cure deficiencies by previous amendments" to deny Growers' motion. *Knight*, 808 F.3d at 860 (internal quotations and citations omitted). Without such a reason, "it is an abuse of discretion to deny leave to amend" or supplement. *Id.* Growers moved quickly to supplement—the Registration Amendments became effective just a month ago. *See* 40 C.F.R. § 23.6. Nor are Growers acting in bad faith: merging Growers' challenges strengthens judicial economy, reduces the litigation burden on EPA, and keeps Growers' claims in a single district court forum. And Growers' proposed supplement does not aim to cure purported pleading deficiencies; it only adds allegations about EPA actions that postdate the Amended Complaint. *See* Proposed Supp. Am. Compl. ¶¶ 8, 40, 119–22, 138–45. At any rate, Rule 15(d) is clear: "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d). Although Growers still oppose EPA's pending motion to dismiss, Growers would not

oppose EPA refiling its motion to dismiss—on the same grounds—as to Growers' proposed supplemental pleading.

## CONCLUSION

For these reasons, the Court should grant Growers' motion and deem the proposed Supplemental Amended Complaint filed.

Dated: May 9, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed electronically with the United States District Court Electronic Filing System, which will electronically send copies to all counsel of record.

*/s/ Kyle W. Robisch*
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