

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

AMERICAN SOYBEAN ASSOCIATION, et al.,

Plaintiffs,

v.

No. 1:20-cv-03190-RCL

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

Federal Defendants,

and

BASF CORPORATION, et al.,

Intervenor-Defendants.

**FEDERAL DEFENDANTS' MOTION FOR STAY AND
EXTENSION OF DEADLINE TO FILE CERTIFIED LIST OF
ADMINISTRATIVE RECORD CONTENTS**

Federal Defendants, the U.S. Environmental Protection Agency ("EPA"), Administrator Michael S. Regan, and Marietta Echeverria in her official capacity as Acting Director of the Registration Division of EPA's Office of Pesticide Programs respectfully request that the Court stay this case pending the D.C. Circuit's resolution of petitions for review of the same agency actions challenged here. Federal Defendants also request that the Court suspend the deadline for Federal Defendants to file a certified list of the contents of the administrative record during the pendency of the stay, or in the event the Court declines to stay this case, until seven days after the Court's resolution of this Motion. Counsel for Federal Defendants consulted with counsel for Plaintiffs and Intervenor-Defendants regarding this Motion. Counsel for Plaintiffs represented that they oppose this Motion. Counsel for Intervenor-Defendants represented that they do not oppose the Motion.

In support of this Motion, Federal Defendants state the following:

1. In this action, Plaintiffs the American Soybean Association and Plains Cotton Growers, Inc. (collectively, “Growers”) allege that EPA violated the Federal Insecticide, Fungicide, and Rodenticide Registration Act (“FIFRA”) and the Administrative Procedure Act in its decisions to register three dicamba-based pesticide products for use on dicamba tolerant cotton and soybeans under FIFRA section 3(c)(5) (the “Registration Decisions”). Dkt. No. 50 ¶ 8 (“Amended Complaint”). As noted in Federal Defendants’ Motion for Partial Dismissal of Plaintiffs’ Amended Complaint (“Motion for Partial Dismissal”) and the reply in support thereof, the Amended Complaint also improperly alleges that Federal Defendants violated the Endangered Species Act. *See* Dkt. Nos. 57, 59.

2. Federal Defendants have not filed an answer to the Amended Complaint. On April 6, 2021, Federal Defendants moved for partial dismissal of Counts II and IV of Growers’ original Complaint. Dkt. No. 43. On April 27, Growers filed their Amended Complaint. Dkt. No. 50. Federal Defendants filed a motion to dismiss all claims in the Amended Complaint concerning EPA’s compliance with Section 7 of the Endangered Species Act. Dkt. No. 57. The Motion for Partial Dismissal has been fully briefed.

3. FIFRA provides a bifurcated system for judicial review of agency actions taken under that statute. Under 7 U.S.C. § 136n(b), circuit courts have exclusive jurisdiction to review cases involving “the validity of any order issued by the Administrator following a public hearing.” Otherwise, FIFRA provides for district court review of certain enumerated actions and “other final actions of the Administrator not committed to the discretion of the Administrator by law.” 7 U.S.C. § 136n(a).

4. Several petitioners, including Growers, have filed petitions for review of the same Registration Decisions challenged here in the federal circuit courts of appeals under 7 U.S.C. § 136n(b).¹ Growers' petition for review is styled as a protective petition intended to preserve Growers' ability to challenge the Registration Decisions in the event that subject matter jurisdiction is found to lie in the appellate courts. The petitions for review have been consolidated in the D.C. Circuit under *American Soybean Association v. Regan*, No. 20-1441. No briefing schedule has been established in that case and EPA has not yet filed the administrative record.

5. The D.C. Circuit ordered the parties in *American Soybean Association v. Regan* to file motions to govern at the conclusion of a previous abeyance period in that case. In response, EPA moved to dismiss the petitions for review, arguing that under 7 U.S.C. § 136n subject matter jurisdiction over challenges to the Registration Decisions lies with the federal district courts and not the appellate courts. ECF No. 1895893, *Am. Soybean Ass'n v. Regan*, No. 20-1441 (D.C. Cir. Apr. 23, 2021). Growers and the intervenors in that case (who are the same as Intervenor-Defendants here) filed motions to stay the D.C. Circuit proceedings while the district court challenges to the Registration Decisions (including this case) proceed. ECF Nos. 1895857, 1895674, *Am. Soybean Ass'n v. Regan*, No. 20-1441 (D.C. Cir. Apr. 23, 2021). The Environmental Group petitioners moved to transfer the petitions for review to the Ninth Circuit. ECF No. 1895679, *Am. Soybean Ass'n v. Regan*, No. 20-1441 (D.C. Cir. Apr. 22, 2021).

¹ In addition, one group of petitioners in the D.C. Circuit case has also filed a challenge to the Registration Decisions in the U.S. District Court for the District of Arizona. *Ctr. for Biological Diversity v. EPA*, No. 20-cv-555 (D. Ariz. filed Dec. 23, 2020) ("*CBD v. EPA*"). Intervenors in that case, who are the same as Intervenor-Defendants here, have moved to transfer the District of Arizona challenge to this Court. Dkt. No. 30, *CBD v. EPA*, No. 20-cv-555 (D. Ariz. May 21, 2021). EPA filed a response in support of transfer. Dkt. No. 43, *CBD v. EPA*, No. 20-cv-555 (D. Ariz. June 18, 2021). The motion to transfer in that case has been fully briefed.

6. On July 14, 2021, the D.C. Circuit issued an order addressing the motions to govern. ECF No. 1906276, *Am. Soybean Ass’n v. Regan*, No. 20-1441 (D.C. Cir. July 14, 2021). The court denied the motions to stay and the motion to transfer and referred EPA’s motion to dismiss to the merits panel that will hear the petitions for review. The D.C. Circuit also directed the parties to submit a proposed format for briefing subject matter jurisdiction and arguments on the merits.

7. In light of the foregoing, Federal Defendants respectfully request that the Court stay this case pending issuance of the D.C. Circuit’s mandate in *American Soybean Association v. Regan*, No. 20-1441. “District courts have broad discretion to stay all proceedings in an action pending the resolution of independent legal proceedings.” *Nat’l Indus. for the Blind v. Dep’t of Veterans Affairs*, 296 F. Supp. 3d 131, 137 (D.D.C. 2017) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). This is particularly true “where the parties and the issues are the same” in both cases. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). The authority to issue such a stay flows from “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Id.* (quoting *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n.6 (1998)). A stay may be warranted where another case “which may have preclusive effect over the instant proceedings is pending on appeal.” *Univ. of Colo. Health at Memorial Hosp. v. Burwell*, 233 F. Supp. 3d 69, 87 (D.D.C. 2017).

8. Federal Defendants believe that subject matter jurisdiction over challenges to the Registration Decisions properly lies in the district courts because the Registration Decisions were not issued “following a public hearing” under 7 U.S.C. § 136n(b), and have been proceeding with this case on that basis. Nonetheless, the D.C. Circuit has declined to resolve EPA’s motion

to dismiss the petitions for review of the Registration Decisions at this time and is proceeding to consider the issue of subject matter jurisdiction along with the merits of the petitioners' claims. Accordingly, the D.C. Circuit will ultimately issue a decision that is binding on this Court that either: (1) holds that subject matter jurisdiction to review the Registration Decisions lies with the district courts and dismisses the petitions for review; or (2) holds that subject matter jurisdiction lies with the appellate courts and decides the challenges presented by the petitioners (including Growers) on their merits. Because the D.C. Circuit is proceeding to resolve these issues, the appropriate course of action here is to stay this case to preserve the Court's and the parties' resources.

9. It would be inefficient to proceed with duplicative challenges to the Registration Decisions in both this Court and the D.C. Circuit. *See Nat'l Shopmen Pension Fund v. Folger Adam Security, Inc.*, 274 B.R. 1, 3 (D.D.C. 2002) ("Litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests regarding time, cost, and effort.") (citing *Air Line Pilots Ass'n*, 523 U.S. at 879 n.6). Indeed, the D.C. Circuit will resolve some or all of the same issues involving the same agency actions and underlying administrative record that are before this Court. *See Univ. of Colo. Health*, 233 F. Supp. 3d at 88 (granting stay where "many of the applicable issues may be resolved by the D.C. Circuit"). If the D.C. Circuit decides that it has subject matter jurisdiction and resolves the Growers' petitions for review on their merits, any briefing and decision on the merits in this case will be rendered moot.

10. The benefits to judicial economy outweigh any possible hardship to Growers from staying this case. *See Nat'l Indus. for the Blind*, 296 F. Supp. 3d at 137 (stating "hardship to the parties and benefits to judicial economy are the key interests to consider in evaluating a motion

for a stay”). Because Growers are also petitioners in the D.C. Circuit proceedings, they will be able to protect their interests in this case through their participation in the briefing on jurisdiction and the merits before the D.C. Circuit.

11. Federal Defendants also request that the Court suspend the deadline for filing a certified list of the contents of the administrative record during the pendency of the stay, or in the event the Court declines to stay this case, until seven days after the Court resolves this Motion. Granting this extension will promote efficiency because if the Court grants Federal Defendants’ request to stay this case, the Court will have no need for the administrative record until the stay is lifted. Likewise, if the Court does not stay this case, the requested extension will not unreasonably delay these proceedings or prejudice any party. Federal Defendants have not yet answered the Amended Complaint, no briefing schedule has been established, and Federal Defendants’ Motion for Partial Dismissal is pending before the Court.

For the foregoing reasons, EPA respectfully requests that the Court stay this case pending issuance of the D.C. Circuit’s mandate in *American Soybean Association v. Regan*, No. 20-1441. Federal Defendants also request that the Court suspend the deadline for Federal Defendants to file a certified list of the contents of the administrative record during the pendency of the stay, or in the event the Court declines to stay this case, until seven days after the Court’s resolution of this Motion.

Dated: July 23, 2021

Respectfully submitted,

/s/ Andrew D. Knudsen

ANDREW D. KNUDSEN

Environmental Defense Section

(202) 353-7466

Andrew.Knudsen@usdoj.gov

J. BRETT GROSKO

Wildlife and Marine Resources Section

(202) 305-0342

Brett.Grosko@usdoj.gov

U.S. Department of Justice

Environment and Natural Resources Division

P.O. Box 7611

Washington, DC 20044

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I certify that on July 23, 2021, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Andrew D. Knudsen
Andrew D. Knudsen