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18 **THE UNITED STATES DISTRICT COURT**
19 **OF ARIZONA**

20 Center for Biological Diversity, et al.,) Case No. CV-20-00555-DCB
21)
22 *Plaintiffs,*)
23) **STATUS REPORT**
24 v.)
25)
26 United States Environmental Protection)
27 Agency, et al.)
28)
29 *Defendants.*)
30)

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STATUS REPORT

Pursuant to the Court's November 15, 2021 Order, ECF No. 74, denying Plaintiffs' Motion to Determine Jurisdiction, ECF No. 57, and Intervenors' Motion to Transfer, ECF No. 30, and staying this case, Plaintiffs report on the status of appellate proceedings in this case:

1. Briefing has not yet begun in the D.C. Circuit, nor has EPA filed the Administrative Record. Instead, the D.C. Circuit has granted motions to push back deadlines multiple times since the D.C. Circuit's initial November 4, 2021 scheduling order.

2. Specifically, the D.C. Circuit initially ordered that Grower Petitioners file their opening brief on February 7, 2022; EPA on April 25, 2022; Intervenors on May 9, 2022; and Petitioners on June 10, 2022. *Am. Soybean Ass'n v. EPA*, No. 20-1441 (D.C. Cir. filed Nov. 4, 2021), ECF No. 1921044. However, on December 15, 2021, the D.C. Circuit granted Petitioners' Motion to push back the briefing schedule by nearly two months because EPA had not yet produced the Administrative Record, originally due on November 26, 2021 (21 days after the court issued a protective order). Motion, ECF No. 1926722; Order, ECF No. 1926842.

3. On December 22, 2021, EPA filed the same Notice it filed in this Court regarding its December 2021 report in which the agency admitted it had been aware for months that the 2020 registrations have caused extensive drift damage to millions of acres and may have jeopardized endangered species. Notice, ECF No. 1927851. As further detailed in Plaintiffs' Motion to Lift the Stay, the 2020 registrations caused at least one million reported soybean acres damaged by dicamba drift in summer 2021, as well as drift damage to a wide range of crops and a variety of landscapes in at least 29 of the 34 states for which EPA registered dicamba. Pls.' Mot. to Lift Stay 5-6, ECF No. 66; *see* EPA's December 2021 Report at 43 (drift damage to sugar beets, rice, sweet potatoes, peanuts, vineyards, cucurbits, vegetables, fruit trees, cranberries, cotton, tree nurseries, timber,

1 landscape plants, home gardens, non-fruit trees, and native plant species), ECF No. 66-1;
2 *id.* at 17, 24 (damage to also over 160,000 acres of national wildlife refuge lands, university
3 research farms, cemeteries, churchyards, state fish and game properties, state natural areas,
4 city parks, state parks, and county and state roads). And as EPA itself repeatedly
5 acknowledged, these reported findings represent a significant underestimate of the actual
6 acreage damaged by the 2020 registrations. *See* EPA’s December 2021 Report at 18.¹

7 4. Nearly three months later, on March 16, 2022, EPA informed this Court
8 and the D.C. Circuit that it had approved additional use restrictions (Registration
9 Amendments), but only after the registrant Intervenors proposed them. *See* ECF No.
10 1939375. EPA’s Registration Amendments require only two additional use restrictions,
11 and in only Minnesota and Iowa, two out of the thirty-four states where EPA has
12 authorized the spraying of the 2020 registered dicamba products, despite EPA’s undisputed
13 evidence of extensive dicamba drift damage across U.S. landscapes from the 2021 season.

14 5. Specifically, EPA moved up the cut-off date for dicamba spraying over the
15 top of dicamba-resistant crops in those two states, as well as approved a prohibition on
16 spraying when the temperature is over 85 degrees in Minnesota. *See* EPA’s Ex. A at 1, ECF
17 No. 73-1 (“The amendment approved through this letter includes additional, state-specific
18 application date (Iowa) and application date and temperature (Minnesota) restrictions
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21 ¹ EPA Press Release, *EPA Approves Label Amendments that Further Restrict the Use of Over-the-*
22 *Top Dicamba in Minnesota and Iowa* (Mar. 15, 2022) (“Based on prior research and
23 numerous stakeholder meetings, EPA has reason to believe the number of incidents
24 reported *significantly understates* the actual number of incidents related to dicamba use.”)
25 (emphasis added), *available at* [https://www.epa.gov/pesticides/epa-approves-label-](https://www.epa.gov/pesticides/epa-approves-label-amendments-further-restrict-use-over-top-dicamba-minnesota-and-iowa)
26 [amendments-further-restrict-use-over-top-dicamba-minnesota-and-iowa.](https://www.epa.gov/pesticides/epa-approves-label-amendments-further-restrict-use-over-top-dicamba-minnesota-and-iowa)
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1 intended to further reduce volatility to minimize off-field movement of the active
2 ingredient dicamba.”); Ex. B at 1, ECF No. 73-2 (same); Ex. C at 1, ECF No. 73-3 (same).

3 6. On the other hand, the Registration Amendments failed to address the
4 myriad of impacts to other states described in the December 2021 report. EPA provided no
5 explanation as to why its additional use restrictions only apply to Iowa and Minnesota, or
6 why it only added the temperature-based prohibition to dicamba use in Minnesota, other
7 than those were the only measures in the only two states for which the registrants had
8 proposed label amendments. See EPA’s Report Regarding Notice of Regulatory Action at 1
9 (“[T]he registrants submitted requests to EPA for label amendments further restricting the
10 use of over-the-top dicamba in Minnesota and Iowa”), ECF No. 73. As EPA recognizes, the
11 drift damage incidents reported by those two states account for less than half of the total
12 number of drift incidents EPA received concerning summer 2021. See EPA’s Press Release
13 (“EPA received approximately 3,500 dicamba-related incident reports from the 2021
14 growing season, including approximately 711 incidents reported in Minnesota and 528
15 incidents reported in Iowa.”).

16 7. Nor did EPA’s Registration Amendments address the core flaw in the 2020
17 registrations, namely, that the myriad of use restrictions made compliance impossible. See
18 Pls.’ Mot. Lift Stay 7-8; EPA’s December 2021 Report at 34; see *Nat’l Family Farm Coalition*
19 *v. EPA*, 960 F.3d 1120, 1139 (9th Cir. 2020) (holding the predecessor 2018 registration
20 unlawful in light of “extensive evidence in the record” indicating a risk of “substantial non-
21 compliance” with complicated use instructions). EPA previously admitted to the same
22 problem with “product usability” in the 2020 registrations. See EPA’s December 2021
23 Report at 33. But once again, EPA chose to add even more restrictions to the 2020
24 registrations, which already had more restrictions than those the Ninth Circuit found
25 “difficult if not impossible” to follow.” *Nat’l Family Farm Coal.*, 960 F.3d at 1124.
26 Significantly, EPA did not explain how these very same use restrictions it found infeasible
27 and insufficient just months prior will now prevent unreasonable effects on the
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1 environment in Minnesota and Iowa. EPA’s December 2021 Report at 38 (rejecting earlier
2 cutoff dates as “unusable”); *id.* (stating “unreasonably warm temperature may still occur
3 before earlier cutoff date” leading to drift); *see also id.* (“temperature-based application
4 cutoff ... is much less predictable” for users, and “may be less enforceable than a calendar-
5 based cutoff date.”).

6 8. The Registration Amendments also failed to address the outright “takes” to
7 federally protected species EPA found just months prior. EPA cited approximately 280
8 reported dicamba drift incidents in counties where endangered species and/or their critical
9 habits may be present, 34 of which occurred in Minnesota and 69 in Iowa. EPA’s
10 December 2021 Report at 5, 18; Pls.’ Mot Lift Stay 13-14; *see also* EPA’s Press Release. But
11 instead of consulting as required under the Endangered Species Act, 16 U.S.C. §
12 1536(a)(2); 50 C.F.R. § 402.14(a), EPA announced it was still “reviewing whether over-the-
13 top dicamba can be used in a manner that does not pose unreasonable risks ... to listed
14 species and their designated critical habitats.” EPA’s Press Release.

15 9. Nevertheless, Grower Petitioners once again sought to challenge the
16 Registration Amendments as overly restrictive: On March 25, 2022, Grower Petitioners
17 moved to amend the briefing schedule, this time to challenge the Registration
18 Amendments. ECF No. 1940620. Furthermore, Grower Petitioners explained that EPA
19 still had not filed the Administrative Record. *Id.*

20 10. The D.C. Circuit granted this Motion on March 29, 2022, requiring Grower
21 Petitioners to file their brief on May 19, 2022; Respondents to file their brief on July 20,
22 2022; Intervenors to file their brief on August 3, 2022; and Grower Petitioners to reply on
23 August 30, 2022. ECF No. 1941031.

24 11. On March 30, 2022, both Grower Petitioners filed Motions for Leave to File
25 Amended Petitions to include the Registration Amendments for over-the-top dicamba use
26 in Minnesota and Iowa. *See* Am. Soybean Ass’n Mots. to Am., ECF Nos. 1941202 &
27 1941208; *see also* Plains Cotton Growers Mot. To Am., ECF No. 1941211. Each Grower
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1 Petitioner explained its position that the Registration Amendments' new restrictions, like
2 those in the original 2020 registrations, are allegedly arbitrary and capricious, not
3 supported by substantial evidence, and are not otherwise in accordance with law. (Yet they
4 again still did not seek to vacate them). *Id.*

5 12. On March 31, 2022 the D.C. Circuit granted Grower Petitioners' Motions
6 for Leave to File Amended Petitions. ECF No. 1941355. To date, EPA still has not yet
7 filed its Administrative Record in this case. In their March 25, 2022 Motion to Amend the
8 Briefing Schedule, Grower Petitioners indicated that the May 19, 2022 deadline for its
9 brief would provide sufficient time to review the yet-to-be filed Administrative Record
10 associated with the Registration Amendments, and incorporate challenges to the
11 Registration Amendments into their merits brief. ECF No. 1940620 at 4. Petitioners
12 explained that EPA stated it would produce any non-publicly available Administrative
13 Record documents by April 27, 2022. *Id.* However it remains unclear when EPA will do so
14 or if Petitioners will file their opening brief on May 19, 2022.

15 13. Grower Petitioners also moved in the D.C. district court to lift the stay put
16 in place in September 2021, *Am. Soybean Ass'n v. EPA*, No. 20-03190 (D.D.C. filed May 9,
17 2022), ECF No. 72, to amend their complaint to include the Registration Amendments.
18 *Mots.*, ECF No. 75. The D.C. district court granted this Motion on May 11, 2022. ECF
19 No. 76.

20 14. EPA has now repeatedly admitted to the widespread damage its 2020
21 registrations caused. The Registration Amendments represent EPA's only attempt so far to
22 mitigate these impacts, yet they only add restrictions that EPA itself admitted will be nearly
23 impossible to follow. This Court should not wait for the slow-moving appellate proceedings
24 to conclude before acting on these illegal registrations. Instead, this Court can resolve this
25 case on the merits and immediately lift the stay.

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Respectfully submitted this 12th day of May, 2022.

s/ George Kimbrell
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