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

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

18 Plaintiffs,

19 v.

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

22 Federal Defendants, and

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

25 Defendant-Intervenors.
26

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

) **STATUS REPORT**

1 The United States Environmental Protection Agency (EPA) submits this status
2 report in response to the Court’s Order of March 21, 2022. Dkt. No. 74. There, the Court
3 requested “a clearer picture of the relevant growing seasons in relation to the timing of
4 [EPA’s] ongoing review” of the EPA’s 2020 registrations under the Federal Insecticide
5 Fungicide and Rodenticide Act (FIFRA) authorizing over-the-top (OTT) application of
6 three dicamba-based products on dicamba-tolerant cotton and soybean (the 2020
7 Registrations). *Id.* at 2. The Court also directed EPA to detail “its ongoing evaluation of
8 its options for addressing future dicamba-related incidents relevant to any potential
9 regulatory action related to the 2020 dicamba registrations” and to explain how the
10 timing of potential actions relates to “the D.C. Circuit briefing schedule.” *Id.*

11 Accordingly, Section I of this report summarizes milestones during the growing
12 seasons for cotton and soybean, including the approximate periods of OTT dicamba
13 application. Section II provides an overview of EPA’s recent and potential future actions
14 related to the 2020 Registrations. And Section III provides a summary of recent
15 developments in the related petitions for review currently pending in the D.C. Circuit.

16 **I. Growing Seasons for Cotton and Soybean and Approximate Timing of OTT** 17 **Dicamba Application**

18 Information on soybean and cotton growing seasons comes from the U.S.
19 Department of Agriculture (USDA)’s National Agricultural Statistics Service (NASS).
20 NASS surveys growers on a weekly basis, and, based on five years of survey data,
21 estimates the dates by which seeds will be planted. *See* Surveys: Crop Progress and
22 Conditions, USDA NASS,
23 [https://www.nass.usda.gov/Surveys/Guide to NASS Surveys/Crop Progress and Cond](https://www.nass.usda.gov/Surveys/Guide%20to%20NASS%20Surveys/Crop%20Progress%20and%20Condition/index.php)
24 [ition/index.php](https://www.nass.usda.gov/Surveys/Guide%20to%20NASS%20Surveys/Crop%20Progress%20and%20Condition/index.php) (last visited May 13, 2022). NASS provides early, middle, and late
25 planting dates for various crops, which correspond, respectively, to the dates by which
26 10%, 50%, and 90% of seeds have been planted in a given state. As reflected in the data,
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1 planting dates for soybean and cotton vary by region with seeds planted earlier in
2 warmer, southern states, and later in cooler, northern states.

3 The most recent NASS data show planting dates for the 2021 growing season.
4 Exhibit 1 includes a detailed state-by-state breakdown of NASS planting dates for cotton
5 and soybean. The earliest relevant planting dates are in Arizona, where NASS estimated
6 that 10% of cotton seeds would be planted by February 28, 2021, 50% by April 25, and
7 90% by June 6. Ex. 1 at 1. In most other states, estimated early, mid-point, and late
8 planting dates occur throughout April, May, and June, respectively. *See id.* at 1–3.

9 The time between seed planting and crop emergence varies based on local factors
10 and crop varieties. But generally speaking, cotton and soybean both emerge within
11 roughly one-to-two weeks of planting. *See* USDA FEDERAL CROP INSURANCE
12 CORPORATION, AUP & ELS COTTON LOSS ADJUSTMENT STANDARDS HANDBOOK, 2020
13 AND SUCCEEDING CROP YEARS (NOV. 26, 2019) at 8–9, [https://rma.usda.gov/-](https://rma.usda.gov/-/media/RMA/Handbooks/Loss-Adjustment-Standards---25000/AUP-and-ELS-Cotton/2020-25090-1H-AUP-and-ELS-Cotton-Loss-Adjustment-Standards.ashx)
14 [/media/RMA/Handbooks/Loss-Adjustment-Standards---25000/AUP-and-ELS-](https://rma.usda.gov/-/media/RMA/Handbooks/Loss-Adjustment-Standards---25000/AUP-and-ELS-Cotton/2020-25090-1H-AUP-and-ELS-Cotton-Loss-Adjustment-Standards.ashx)
15 [Cotton/2020-25090-1H-AUP-and-ELS-Cotton-Loss-Adjustment-Standards.ashx](https://rma.usda.gov/-/media/RMA/Handbooks/Loss-Adjustment-Standards---25000/AUP-and-ELS-Cotton/2020-25090-1H-AUP-and-ELS-Cotton-Loss-Adjustment-Standards.ashx); *See*
16 *also* Mike Statin, *Identifying and responding to soybean emergence problems*, Michigan
17 State Univ. Extension (May 14, 2015)
18 [https://www.canr.msu.edu/news/identifying_and_responding_to_soybean_emergence_pr](https://www.canr.msu.edu/news/identifying_and_responding_to_soybean_emergence_problems)
19 [oblems](https://www.canr.msu.edu/news/identifying_and_responding_to_soybean_emergence_problems) (“Soybean emergence ranges from six days under ideal conditions to 15 days
20 under more challenging soil conditions.”).

21 OTT dicamba application typically occurs roughly two weeks after emergence.
22 *See* EPA, MEMORANDUM ON DICAMBA USE ON GENETICALLY MODIFIED DICAMBA-
23 TOLERANT (DT) COTTON AND SOYBEAN: INCIDENTS AND IMPACTS TO USERS AND NON-
24 USERS FROM PROPOSED REGISTRATIONS (October 26, 2020) at 13–17,
25 <https://www.regulations.gov/document/EPA-HQ-OPP-2020-0492-0003>. The 2020
26 Registrations prohibit post-emergence application after June 30 (for soybean) and July 30
27 (for cotton). And five states—Arkansas, Illinois, Indiana, Iowa, and Minnesota—have
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1 earlier cut-off dates, ranging from June 12 (areas in Minnesota south of Interstate 94), to
 2 June 30 (Arkansas).¹ Thus, depending on crop and state, OTT application of the
 3 dicamba-based products at issue in this case likely commence sometime between mid-
 4 March and early May, and will cease sometime between June 12 and July 30.

5 **II. EPA’s Regulatory Review During the 2022 Growing Season and Beyond**

6 In December 2021, EPA released a report on dicamba-related incidents from the
 7 2021 growing season (2021 Incident Report) “to inform growers, state legislatures, and
 8 state pesticide regulators as they make decisions about the 2022 growing season.” 2021
 9 Incident Report at 6, [https://www.regulations.gov/document/EPA-HQ-OPP-2020-0492-
 10 0021](https://www.regulations.gov/document/EPA-HQ-OPP-2020-0492-0021).² Following EPA’s release of the report, two states—Iowa and Minnesota—worked
 11 with registrants to develop new restrictions on dicamba application within their
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13
 14 ¹ Cut-off dates in Arkansas, Indiana, and Illinois were adopted pursuant to state law. See
 15 ARKANSAS DEPARTMENT OF AGRICULTURE, ARKANSAS RULES ON PESTICIDE USE (2021)
 16 at 16, [https://www.agriculture.arkansas.gov/wp-content/uploads/2021/07/Rules-on-
 17 Pesticide-Classification-adopted-clean.pdf](https://www.agriculture.arkansas.gov/wp-content/uploads/2021/07/Rules-on-Pesticide-Classification-adopted-clean.pdf) (noting Arkansas’ June 30 cutoff date for
 18 dicamba application on agricultural crops); OFFICE OF INDIANA STATE CHEMIST, 2022
 19 DICAMBA FREQUENTLY ASKED QUESTIONS at 1
 20 https://oisc.purdue.edu/pesticide/dicamba/pdf/dicamba_faq_032122.pdf (noting Indiana’s
 21 June 20 cutoff date for dicamba application during the 2022 growing season); Press
 22 Release, Illinois Department of Agriculture, IDOA Announces Permanent Dicamba
 23 Rules (Apr. 12, 2022), [https://www2.illinois.gov/IISNews/24763-
 24 IDOA_Announces_Permanent_Dicamba_Rules.pdf](https://www2.illinois.gov/IISNews/24763-IDOA_Announces_Permanent_Dicamba_Rules.pdf) (noting Illinois’ adoption of
 25 permanent restrictions on dicamba application, including a June 20 application cut-off
 26 date). As detailed in Section II, *infra*, cut-off dates in Iowa and Minnesota were adopted
 27 through voluntary amendments to the 2020 Registrations, which EPA approved in March
 28 of this year.

² In their May 12, 2022 status report, Plaintiffs claim that EPA “found” that there had
 been “outright ‘takes’ to federally protected species” from off-target movement of
 dicamba. Pls.’ Status Report ¶ 8 (Dkt. 75 at 5). EPA noted in the 2021 Incident Report
 that reports from “counties where additional restrictions were implemented to prevent
 off-field exposures to endangered species and critical habitat . . . suggest a possibility that
 a ‘take’ could occur.” 2021 Incident Report at 5. But the Agency also stated that it was
 “not aware of any ‘take’ where an endangered species or critical habitat has been
 harmed.” *Id.*

1 jurisdictions. *See* Report Regarding Notice of Regulatory Action, Dkt. 73. Registrants
2 then proposed that EPA approve those new restrictions as voluntary label amendments
3 pursuant to 40 C.F.R. § 152.44. EPA approved the proposed amendments on March 15,
4 2022 (2022 Amendments), through letters which are available here:

5 https://www3.epa.gov/pesticides/chem_search/ppls/000264-01210-20220315.pdf;

6 https://www3.epa.gov/pesticides/chem_search/ppls/007969-00472-20220315.pdf;

7 https://www3.epa.gov/pesticides/chem_search/ppls/000100-01623-20220315.pdf.

8 The amendments set earlier dicamba application cut-off dates: June 20 for Iowa;
9 June 12 for areas of Minnesota that lie south of Interstate 94; and June 30 for areas of
10 Minnesota north of I-94. Press Release, EPA, EPA Approves Label Amendments that
11 Further Restrict the Use of Over-the-Top Dicamba in Minnesota and Iowa (March 15,
12 2022) ([https://www.epa.gov/pesticides/epa-approves-label-amendments-further-restrict-
13 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)). The amendments also prohibit applications
14 in Minnesota at air temperatures over 85 degrees Fahrenheit. *Id.* These additional
15 restrictions are intended to further reduce volatility to minimize off-field movement of
16 dicamba. *Id.* As discussed in the ecological risk assessment that accompanied the 2020
17 Registrations, ambient temperature is directly related to the volatility of dicamba, with
18 higher temperatures leading to increased volatility. *See, e.g.*, Letter from Lindsay Roe,
19 Office of Pesticide Programs, EPA, to Steven Callen, Bayer CropScience LP (March 15,
20 2022) at 1–2 ([https://www3.epa.gov/pesticides/chem_search/ppls/000264-01210-
21 20220315.pdf](https://www3.epa.gov/pesticides/chem_search/ppls/000264-01210-20220315.pdf)). Both cutoff dates and temperature-based application restrictions can
22 reduce potential volatilization by restricting product use to periods of lower temperature
23 during and in the days following application. *Id.* EPA will monitor the effectiveness of
24 these measures in Iowa and Minnesota over the 2022 growing season.

25 EPA also notes that on March 18, 2022, it received a request from Registrant
26 Bayer to amend the 2020 registration for Bayer’s XtendiMax product by adding
27 additional use restrictions that would be applicable in counties where there are certain
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1 federally-listed endangered or threatened plant species. Decl. of Maria Echevarria
2 (Echevarria Decl.) ¶ 5. EPA cannot provide further details on the substance of this
3 request as it is pending and Bayer has claimed confidentiality. *Id.* ¶ 6. EPA can state,
4 however, that Bayer supported its request with several studies conducted during the 2021
5 growing season and with other analyses. *See id.* EPA is considering Bayer’s request.
6 The statutory timeline for EPA’s review of Bayer’s application is nine months from the
7 date submitted. 7 U.S.C. § 136w-8(b)(3). Other dicamba registrants have informed EPA
8 that they may propose alternative restrictions on OTT dicamba use prior to the 2023
9 growing season. Echevarria Decl. ¶ 7. EPA will review any additional proposals when
10 they are submitted. *Id.* ¶ 8.

11 Apart from action on registrant-submitted proposals, EPA also anticipates
12 completing additional milestones in the registration review of all dicamba-based
13 products—including those at issue in this litigation—under FIFRA Section 3(g), 7 U.S.C.
14 § 136a(g). “A registration review decision” reflects “the Agency’s determination
15 whether a pesticide meets, or does not meet, the standard for registration in FIFRA.” 40
16 C.F.R. § 155.57. EPA may make an “interim registration review decision” in which it
17 “require[s] new risk mitigation measures, impose[s] interim risk mitigation measures,
18 identif[ies] data or new information required to complete the review,” and more. *Id.*
19 § 155.56. When it undertakes a registration review, EPA establishes a docket for public
20 participation and provides opportunities for comment. 40 C.F.R. §§ 155.42, 155.50. The
21 dicamba registration review docket can be found at www.regulations.gov in docket EPA-
22 HQ-OPP-2016-0223.

23 Currently, EPA anticipates issuing a Draft Risk Assessment for dicamba by the
24 third quarter of Fiscal Year 2022—that is, by the end of June 2022. Upcoming
25 Registration Review Actions, [https://www.epa.gov/pesticide-reevaluation/upcoming-](https://www.epa.gov/pesticide-reevaluation/upcoming-registration-review-actions)
26 [registration-review-actions](https://www.epa.gov/pesticide-reevaluation/upcoming-registration-review-actions) (enter “dicamba” into search field) (last visited May 16,
27 2022). During Fiscal Year 2023 (October 2022–September 2023), EPA anticipates
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1 issuing a proposed interim decision for public comment. *Id.* After considering
2 comments received, EPA anticipates issuing an interim registration review decision,
3 which is currently estimated for fiscal year 2023, depending on the volume of public
4 comments received on the proposed interim decision. *Id.* Additional new or interim risk
5 mitigations measures for the products at issue here would be included in the proposed
6 interim and interim decisions.

7 Finally, over the course of the 2022 growing season and until the 2020
8 Registrations lapse following the 2025 growing season, EPA will continue to engage with
9 federal, state, and local partners—including university agricultural scientists—and will
10 remain in close communication with state departments of agriculture about any concerns
11 related to the use of dicamba-based products. Echeverria Decl. ¶ 8. EPA will also
12 continue to review information on adverse effects contained in the reports that registrants
13 are required to submit under the terms of the 2020 Registrations. And the Agency, in
14 coordination with the states, will likewise monitor applicators' compliance with training
15 and reporting requirements included as terms in the 2020 Registration.

16 **III. Briefing Schedule in Related Petitions for Review of the 2020 Registrations** 17 **Now Pending in the D.C. Circuit.**

18 Petitioners in *American Soybean Association v. Regan*, No. 20-1441 have
19 challenged EPA's approval of additional use restrictions for Minnesota and Iowa in the
20 2022 Amendments. On March 25, they moved the D.C. Circuit for an extension in
21 briefing schedules to allow sufficient time for them to incorporate those challenges into
22 their underlying case challenging the 2020 Registrations. ECF 1940620. The D.C.
23 Circuit granted Petitioners' motion on March 29. ECF 1941031. Briefing will now
24 conclude on September 28 (rather than August 19, as was the case at the time of the
25 Court's March 21, 2022 Order). *Id.*

26 In their May 12, 2022 status report, Plaintiffs contend that the current stay in this
27 case should be lifted because EPA has not "filed the [a]dministrative [r]ecord" for the
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1 2020 Registrations in the D.C. Circuit case, and because delays in record production
2 could further push back the briefing schedule. Pls.' Status Report at ¶¶ 1, 9, 12, 14.
3 Plaintiffs are mistaken. First, the D.C. Circuit's rules require EPA to file a certified index
4 of the contents of the administrative record for a challenged agency action rather than file
5 the record with the court in its entirety. D.C. Cir. R. 17(b). EPA filed its certified index
6 for the 2020 Registrations on August 24, 2021, *see* ECF No. 1911185, and will timely
7 file its certified index for the 2022 Amendments within the time provided by the D.C.
8 Circuit's rules.

9 Second, although EPA was not required to file the record with the court, EPA
10 agreed to provide to the other parties certain administrative record documents from the
11 2020 Registrations and the 2022 Amendments. *See* ECF Nos. 1910249, 1940620. EPA
12 provided those documents to the other parties in December 2021 and April 2022,
13 respectively. Accordingly, EPA has completed all of the document productions
14 contemplated in the current briefing schedule. Petitioners' opening brief is due in three
15 days, on May 19.

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18 DATED this 16th day of May, 2022.

19
20 /s/ Andrew S. Coghlan
21 ANDREW S. COGHLAN
22 Attorney for Federal Defendants
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16 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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