ORAL ARGUMENT NOT YET SCHEDULED

Case No. 20-1441 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN SOYBEAN ASSOCIATION,
Petitioner,

v.

MICHAEL S. REGAN, Administrator,
U.S. Environmental Protection Agency, et al.,
Respondents.

On Petitions for Review of Actions by Environmental Protection Agency

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FINAL FORM BRIEF FOR RESPONDENTS

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CERTFICIATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing in this Court are listed in the Joint Brief for Petitioners American Soybean Association and Plains Cotton Growers, Inc.

B. Ruling Under Review

References to the rulings at issue appear in the Joint Brief for Petitioners American Soybean Association and Plains Cotton Growers, Inc.

C. Related Cases

References to related cases appear in the Joint Brief for Petitioners American Soybean Association and Plains Cotton Growers, Inc.

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GLOSSARY

APA	Administrative Procedure Act
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FIFRA	Federal Insecticide, Fungicide, & Rodenticide Act
FWS	Fish & Wildlife Service
JA	Joint Appendix

INTRODUCTION

This case concerns dicamba, an herbicide used to control broadleaf weeds in crops. Dicamba can also cause damage in other, desirable plants, if the product moves away from the target field during application or if it converts to a vapor after application. In 2016 and 2018, the U.S. Environmental Protection Agency ("EPA") registered certain dicamba products under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") for post-emergence use on soybean and cotton plants that have been genetically modified to be dicamba-tolerant. Those registrations included requirements on the product labels designed to reduce the risk that off-site movement of the product would occur and to mitigate the risk of damage in the event such movement occurred. In 2020, the Ninth Circuit vacated the 2018 registrations. *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120 (9th Cir. 2020) ("*Dicamba II*").

In the actions challenged here, on October 27, 2020, EPA granted applications from Bayer CropScience LP, BASF Corporation, and Syngenta Crop Protection LLC (collectively, "Registrants") to register or amend the registrations of three dicamba products in the wake of the Ninth Circuit's decision: XtendiMax, Engenia, and Tavium, respectively (the "2020 Registrations"). The 2020 Registrations included numerous label requirements to further minimize the risks from potential off-site dicamba movement. These requirements include a

prohibition on applying the products after June 30 (for soybeans) or July 30 (for cotton) of each calendar year; use of a 240-foot downwind in-field "buffer zone"; and, in counties containing threatened or endangered species listed under the Endangered Species Act ("ESA"), use of a larger 310-foot downwind buffer and a 57-foot omnidirectional buffer (the "ESA Buffers"). In addition, on March 15, 2022, EPA granted applications to amend the 2020 Registrations to include state-specific application cutoff dates for Minnesota and Iowa (the "2022 Amendments").

Petitioners, the American Soybean Association and Plains Cotton Growers, Inc. (collectively, the "Growers"), object to certain label requirements in the 2020 Registrations.[1] However, as all parties agree, this Court lacks statutory subject matter jurisdiction to review these actions. Direct circuit court review of EPA actions under FIFRA is limited to orders issued "following a public hearing." Because the statute and case law indicate that public notice is a minimum requirement for a public hearing under FIFRA, and because EPA did not provide specific public notice or otherwise hold a public hearing before issuing the 2020 Registrations or 2022 Amendments, judicial review of these actions belongs in the district court.

[1] Although the Growers have also filed petitions for review of the 2022 Amendments, they have not presented any challenge to those actions.

Furthermore, the Growers lack standing to raise their ESA challenge to the 2020 Registrations, and their substantive arguments lack merit. The Growers fail to show how EPA's use of their preferred data would have changed the ESA Buffers' applicability or size. On the merits, EPA's action should be upheld because EPA reasonably made the ESA Buffers applicable on a county level based on the best available science for the 2020 Registrations and to provide clarity to users of these particular products. EPA also reasonably considered field studies that included use of dicamba at the 2020 Registrations' full authorized rate when calculating the size of the ESA Buffers.

Finally, EPA's approval of the labels' uniform application cutoff dates should be upheld under FIFRA because it is supported by substantial evidence in the record. FIFRA does not task EPA with identifying and imposing some ideal set of label requirements for each pesticide. Rather, EPA's role is to review a product's registration application to determine whether its use under the applicant's proposed labeling will cause unreasonable adverse effects on the environment. Here, the record shows that the application cutoffs provide additional protection against potential off-site dicamba movement as compared to prior registrations and offer greater label clarity than other approaches while preserving growers' ability to use over-the-top dicamba.

The petitions for review should be dismissed for lack of jurisdiction, or if the Court finds that it has jurisdiction, should be denied.

STATEMENT OF JURISDICTION

For the reasons stated in Argument Section I below, this Court does not have statutory subject matter jurisdiction to review the 2020 Registrations or the 2022 Amendments because those actions were not "issued by the Administrator following a public hearing." 7 U.S.C. § 136n(b). Further, for the reasons stated in Argument Section II, this Court lacks Article III jurisdiction to review the Growers' ESA challenges to the 2020 Registrations.

STATEMENT OF THE ISSUES

1. Whether the 2020 Registrations or 2022 Amendments were issued following a "public hearing" under 7 U.S.C. § 136n(b), as is necessary for this Court to have statutory subject matter jurisdiction, where EPA did not provide specific public notice of those actions prior to issuing them but received and considered unsolicited comments on the 2020 Registrations.
2. Whether the Growers have standing to challenge the ESA Buffers, in light of the fact that none of their standing declarations demonstrates that the declarant has suffered an injury-in-fact, that any such harm is fairly traceable to the challenged aspects of the ESA Buffers, and that any such harm would be redressed if the Growers prevail.

3. Whether EPA's decisions to expand the downwind ESA Buffer to 310 feet, in light of thousands of off-site incident reports indicating the previously established downwind buffer was insufficient to protect listed species, and to make the ESA Buffers applicable on a county level, based on the best available science, were arbitrary and capricious.
4. Whether EPA's decision to grant the 2020 Registrations with uniform application cutoff dates as part of the labeling requirements was supported by substantial evidence under FIFRA where the record shows that these cutoffs provided additional protection against potential harm from off-site movement of dicamba in all states, that uniform cutoff dates provided the greatest label clarity, and that granting the registrations would still provide substantial benefits.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not provided in the addendum to the Growers' Opening Brief ("Growers' Br.") (ECF 1947596) are provided in the addendum following this brief.

STATEMENT OF THE CASE[2]

I. Statutory and Regulatory Background

A. FIFRA

FIFRA generally precludes the distribution or sale of any pesticide unless it is "registered" by EPA. 7 U.S.C. § 136a(a). A FIFRA registration is a license that establishes the terms and conditions under which a pesticide may be lawfully sold, distributed, and used in the United States. *Id.* §§ 136a(c)(1)(A)-(F). These terms and conditions include the specific formulation and packaging, and labeling that contains, among other things, requirements for lawful use. *See* 7 U.S.C. § 136(p); 40 C.F.R. §§ 152.115, 156.10.

An applicant seeking registration of a pesticide must submit specific information to EPA, including supporting data and proposed labeling. 7 U.S.C. § 136a(c)(1); 40 C.F.R. § 152.50. If the application for registration includes any new active ingredient or would entail a changed use pattern, EPA must publish a notice of its receipt of the application in the Federal Register and provide a public comment period; otherwise, no public notice is required. 7 U.S.C. § 136a(c)(4).

[2] The Growers' Statement of the Case relies heavily (and in some parts, exclusively) on extra-record reports, internet sources, the Growers' standing declarations, and other non-record materials. Growers' Br. 7-25. Because the Court's review is limited to the administrative record, the Court may not consider the Growers' improper extra-record assertions. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).

Under FIFRA, EPA must register a pesticide if it meets specific statutory criteria, including that its use "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). Action under this provision is known as unconditional registration. Where data may be insufficient to support unconditional registration, EPA may conditionally register new uses of a currently registered pesticide if the applicant "has submitted satisfactory data" on the proposed new use and that use will not "significantly increase the risk of any unreasonable adverse effect on the environment." *Id.* § 136a(c)(7)(B).

Congress expressly directed EPA to balance benefits and risks in this analysis, defining "unreasonable adverse effects on the environment" to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* § 136(bb). In addition, EPA evaluates whether particular terms and conditions of registration or labeling restrictions for use of the product are necessary to prevent unreasonable adverse effects. These terms and conditions can restrict who may buy or use the pesticide product, and the labeling requirements provide directions for and restrictions on use of the pesticide. *See id.* § 136(p); 40 C.F.R. § 156.10.

It is unlawful to use a registered pesticide "in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). A registration's terms and conditions and

labeling statements are therefore integral to EPA's registration decision and are a primary means of accomplishing FIFRA's mandate to prevent unreasonable adverse effects.

B. ESA

Congress enacted the ESA in 1973 to, among other things, conserve species deemed to be endangered or threatened. *See* 16 U.S.C. §§ 1531(b), 1532(6), 1532(20), 1533. The ESA requires a list of all endangered or threatened species to be maintained. *Id.* § 1533(c). Section 4(b)(2) of the ESA requires the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service to designate critical habitat for threatened and endangered species, to the maximum extent prudent and determinable. A listed species' "critical habitat" includes areas occupied by the species that are "essential to the conservation of the species" and whose "physical or biological features . . . may require special management considerations or protection." *Id.* § 1532(5)(A)(i).

The ESA imposes certain legal requirements protecting "listed species" and their designated "critical habitat." As pertinent here, ESA Section 7(a)(2) requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id.* § 1536(a)(2). To meet this

requirement, Section 7 and its implementing regulations delineate a process for determining the biological impacts of a proposed action, known as Section 7 consultation. *Id.* § 1536; 50 C.F.R. pt. 402. Through this process, an agency proposing an action ("the action agency") must determine whether its action "may affect" a listed species or the designated critical habitat for a listed species. 50 C.F.R. § 402.14. If the action agency determines that its proposed action will have "no effect" on listed species or designated critical habitat, Section 7 consultation is not required. *Id.* § 402.12; *Growth Energy v. EPA*, 5 F.4th 1, 30 (D.C. Cir. 2021); *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 597 (D.C. Cir. 2019) ("if the agency makes a 'no effect' determination by finding that its proposed action 'will not affect any listed species or critical habitat,' then 'it is not required to consult' with the [FWS or National Marine Fisheries Service]") (citation omitted); *see also* Memorandum, "Dicamba DGA and BAPMA salts – 2020 Ecological Assessment of Dicamba Use on Dicamba-Tolerant (DT) Cotton and Soybean Including Effects Determinations for Federally Listed Threatened and Endangered Species" at 65 (Oct. 26, 2020) ("Ecological Assessment"), Joint Appendix ("JA") p. JA0203.

Where the action agency determines that its action "may affect" listed species or designated critical habitat, it must consult with either the FWS or the National Marine Fisheries Service, depending on the species involved. 50 C.F.R.

§§ 402.13, 402.14. There are two types of consultation: informal and formal. Informal consultation is an optional process that includes all discussions, correspondence, etc., between the action agency and consulting agencies undertaken to assist in determining whether formal consultation is required. *Id.* § 402.13(a). If during informal consultation the consulting agency concurs with the action agency's determination that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary. *Id.*

II. Factual Background

A. Use of Dicamba to Control Herbicide-Resistant Weeds

Dicamba is an herbicide used for control of broadleaf weeds in crops. "Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean," at 12 (Oct. 27, 2020) ("Decision Memo"), JA0529. Dicamba has been registered under FIFRA since 1967, but was generally restricted to application as part of a "burndown" program for pre-planting weed control. *See* Memorandum, "Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba-Tolerant Soybean Production," at 12 (Oct. 26, 2020) ("Soybean Benefits Memo"), JA0496; Memorandum, "Dicamba Use on Genetically Modified Dicamba-Tolerant (DT) Cotton and Soybean:

Incidents and Impacts to Users and Non-Users from Proposed Registrations," at 7, 13 (Oct. 26, 2020) ("Registration Impacts Memo"), JA0053, 0059.

In January 2015, the U.S. Department of Agriculture allowed commercial sale of soybean and cotton seeds that have been genetically modified to be dicamba-tolerant. Decision Memo at 6, JA0523. In addition, companies have developed dicamba products intended for post-emergence (or "over-the-top") use on these dicamba-tolerant crops with lower volatility than the formulations historically used for pre-emergence application. *See id.* at 7, JA0524. When used together, these products provide a program for soybean and cotton growers to control broadleaf weeds during the period after crop emergence without damaging the crops themselves. Soybean Benefits Memo at 2, JA0486. Over-the-top dicamba formulations are primarily used to target weeds that have developed resistance to other commonly used herbicides like glyphosate. *Id.* The prevalence of these herbicide-resistant weeds has led to reduced crop yield and economic losses for affected soybean and cotton growers. *See* Decision Memo at 15, JA0532 (noting 14 percent reduction in total returns per planted acre where glyphosate resistant weeds were present in soybeans). In addition, use of over-the-top dicamba can also help prevent further spread of weed species with resistance to other herbicides, such as glyphosate. *Id.* at 16, JA0533.

B. The 2016 Registrations and 2017 Amendments

EPA first issued registrations authorizing over-the-top use of dicamba on dicamba-tolerant soybeans and cotton in late 2016 (the "2016 Registrations").[3] Decision Memo at 7, JA0524. In addition to publishing notice of its receipt of an application to register a new use as required under 7 U.S.C. § 136a(c)(4), EPA later provided notice of its proposed registration decision and solicited an additional round of comments under its public participation policy. *Id.* at 7 n.6, JA0524. After considering more than 21,000 public comments, numerous studies, draft labeling, and the Agency's own risk assessments, EPA determined that the dicamba products met the standard for conditional registration under 7 U.S.C. § 136a(c)(7). *Id.* at 7, JA0524. The 2016 Registrations authorized these dicamba products for over-the-top use in 34 states as two-year time-limited registrations with automatic expiration dates in late 2018. Decision Memo at 7, JA0524.

The 2016 Registrations were also subject to numerous use restrictions in their required labeling to prevent potential adverse effects to the environment from use of the products. Dicamba-based herbicides can affect non-target plants via offsite movement, either through particle drift during application to targeted fields ("spray drift") or through emissions when atmospheric and meteorological

[3] The dicamba products involved in the 2016 Registrations were XtendiMax and Engenia (which are at issue here) and FeXapan (which is not).

conditions convert it into a vapor after application ("volatility"). Ecological Assessment at 18-19, JA0156-57. If off-site movement occurs, dicamba has the potential to also damage other crops (including soybeans and cotton) if they are not dicamba-tolerant, as well as other desirable plants. *See* Decision Memo at 17, JA0534; Registration Impacts Memo at 7, JA0053. Accordingly, the 2016 Registrations included numerous label requirements to minimize any risks from off-site movement, such as prohibitions on applying the products during wind speeds above 15 miles per hour, during temperature inversions, or if rain was expected in the next 24 hours. *See Dicamba II*, 960 F.3d at 1127.

Following the 2017 growing season, state agencies received over 2,700 reports of plant and crop damage, many of which were consistent with off-site movement of dicamba. Decision Memo at 7, JA0524. In response, EPA worked with the registrants to amend the 2016 Registrations by strengthening the label directions and requiring additional mitigation measures to further minimize the potential for off-target movement (the "2017 Amendments"). *Id.* These additional measures included limiting application to between sunrise and sunset and during periods with wind speeds between 3-10 miles per hour. *Dicamba II*, 960 F.3d at 1128. The 2017 Amendments also classified the dicamba products as restricted use pesticides and imposed enhanced recordkeeping, training, and application requirements. *Id.*

Parties petitioned for review of the 2016 Registrations under 7 U.S.C. § 136n(b). *Nat'l Family Farm Coal. v. EPA*, 747 F. App'x 646 (9th Cir. 2019) ("*Dicamba I*"). However, the 2016 Registrations expired before the court decided the case. *Id.* at 647. As a result, the court granted a motion to dismiss the challenges as moot and did not reach the merits. *Id.*

C. The 2018 Registrations and *Dicamba II*

Prior to the 2016 Registrations' expiration, in November 2018, EPA granted applications to renew the registrations for XtendiMax, Engenia, and FeXapan for an additional two years (the "2018 Registrations"). Decision Memo at 8, JA0525. Because these applications did not entail a new use or new active ingredient, EPA did not publish notice under 7 U.S.C. § 136a(c)(4) or solicit public comment before granting the 2018 Registrations. During the prior growing season, despite the additional label requirements included in the 2017 Amendments, state agencies and others received additional reports of plant and crop damage consistent with off-site movement of dicamba. *Id.* The registrants submitted draft labeling containing additional restrictions to further reduce off-site movement, including: a limit of two over-the-top applications per field per year; a prohibition on applying 60 days after planting cotton and 45 days after planting soybeans, or after a specified crop growth stage; limiting over-the-top applications to between one hour

after sunrise and two hours before sunset; requiring application by certified applicators; and equipment clean-out requirements. *Id.*

After considering new data submitted by the registrants, input from stakeholders, and the impact of these additional labeling restrictions and other new registration conditions, EPA determined that the uses met the standard for conditional registration under 7 U.S.C. § 136a(c)(7). *Id.* at 8-9, JA0525-26. EPA also determined that the 2018 Registrations would not affect listed species, relying in part on a new labeling restriction requiring use of a 57-foot omnidirectional buffer in areas containing such species. *Id.* at 8, JA0525. The 2018 Registrations were set to expire in December 2020. *Id.* at 9, JA0526.

Parties petitioned for review of the 2018 Registrations in the Ninth Circuit, which heard the case on an expedited basis. *Dicamba II*, 960 F.3d at 1130. Although the 2018 Registrations were not issued following notice-and-comment proceedings, the court determined that it had subject matter jurisdiction to review the registrations under 7 U.S.C. § 136n(b) because they "arise[] from a notice-and-comment period held prior to the related 2016 registration decision." *Id.* at 1132. On the merits, the court held that EPA's decision to grant the 2018 Registrations was not supported by substantial evidence. *Id.* at 1144. The court found that EPA had understated certain risks by: underestimating the amount of dicamba-tolerant seed that had been planted in the most recent growing season; assuming that

complaints of off-site damage may have been over-reported; and declining to quantify the amount of damage caused by dicamba use. *Id.* at 1136-39.

The Ninth Circuit also found EPA failed to consider other risks, *see id.* at 1139-43, including particularly the "risk of substantial non-compliance" with the 2018 Registrations' label requirements due to their complexity, *id.* at 1139. The court observed that as use restrictions were successively added in the labels for the 2016 Registrations, 2017 Amendments, and 2018 Registrations to address continuing reports of off-site movement, the labels "became increasingly restrictive and, correspondingly, more difficult to follow." *Id.* at 1140. The court noted record evidence suggesting that "even conscientious applicators had not been able consistently to adhere to the label requirements," even before additional restrictions were added in the 2018 Registrations. *Id.* Because misuse of dicamba can result in damage, the court held EPA should have considered this factor. *Id.* at 1139.

As a result, the Ninth Circuit vacated the 2018 Registrations.[4] *Id.* at 1145. Following the court's decision in *Dicamba II*, EPA issued a cancellation order for

[4] In April 2019, EPA conditionally registered an additional product containing dicamba—A21472 Plus VaporGrip Technology, also known as Tavium—with an expiration date in December 2020. Decision Memo at 9, JA0526. Because the Tavium registration was not challenged in *Dicamba II*, it was not vacated. *Id.*

the 2018 Registrations providing direction for growers, commercial applicators, and distributors regarding the vacatur. Decision Memo at 9, JA0526.

D. The 2020 Registrations

Following the Ninth Circuit's vacatur of the 2018 Registrations, EPA received applications for new product registrations for XtendiMax and Engenia on July 2, 2020, and received an application to amend and extend the upcoming expiration date for the existing registration of Tavium on August 12, 2020. *Id.* Because none of these applications involved a new active ingredient or changed use pattern, no public notice or comment period was required. *See id.* at 3 n.2, JA0520; 7 U.S.C. § 136a(c)(4). Accordingly, EPA did not publish a notice of receipt in the Federal Register or formally solicit public comment on the three applications. Decision Memo at 7 n.6, JA0524.

Nonetheless, EPA did receive and consider over 120 unsolicited comments related to the 2020 registration applications from stakeholders. *Id.* at 7 n.6, 10, JA0524, 0527. The comments included letters from the Growers as well as other stakeholders representing environmental advocacy groups, state agencies, farm bureaus, industry, other growers, non-governmental organizations, academia, congressional committees, and Members of Congress. *See id.* at 10-11, JA0527-28 (describing comment letters). In evaluating the applications, EPA considered these comments along with information and data from the Registrants, academics, weed

scientists, field experts, and the open literature. *Id.* at 3, 10, JA0520, 0527. The record includes relevant studies and information that EPA considered in granting the 2016 Registrations, the 2017 Amendments, the 2018 Registrations, and the 2019 registration of Tavium. *See id.* at 10, JA0527. EPA also considered new studies and information, including recent studies addressing potential human health risks and new information on the availability and effectiveness of using additives and hooded sprayers to reduce off-site movement. *See id.* at 3, 11, 13-14, JA0520, 0528, 0530-31.

EPA granted the 2020 Registrations on October 27, 2020.[5] *Id.* at 1, JA0518. The 2020 Registrations authorize over-the-top use of the dicamba products XtendiMax, Engenia, and Tavium on dicamba-tolerant soybeans and cotton in 34 states for a five-year period, with an expiration date of December 20, 2025. *Id.* at 3, 26, JA0520, 0543. Unlike the previous registrations, EPA found that the applications met the standard for unconditional registration under 7 U.S.C. § 136a(c)(5). *Id.* at 3, JA0520. The 2020 Registrations include revised label requirements presented in a simpler format than previous registrations. *Id.* at 21,

[5] Notice of Registration, XtendiMax with VaporGrip Technology (Reg. No. 264-1210) (Oct. 27, 2020), JA0639-74 ("XtendiMax Registration"); Notice of Registration, A21472 Plus VaporGrip Technology (Reg. No. 100-1623) (Oct. 27, 2020), JA0546-0600 ("Tavium Registration"); Notice of Registration, Engenia Herbicide (Reg. No. 7969-472) (Oct. 27, 2020), JA0601-38 ("Engenia Registration").

JA0538. The label requirements submitted by the Registrants include many of the same mitigation measures included in the 2018 Registrations, with significant additions and alterations to further minimize risks from spray drift and volatility. *See id.* at 4-5, JA0521-22 (summarizing major control measures).

To address spray drift, the label requires use of a 240-foot downwind buffer during application, which may be reduced to 110 feet for users applying the products to soybeans via hooded sprayers. *Id.* at 24, JA0541; *see id.* at 4, JA0521 (comparing to 110-foot buffer required in 2018 Registrations). To address volatility, the products now must be applied in a tank mix with additives designed to control their volatility, known as volatility reduction adjuvants ("Adjuvants"). *Id.* at 21, JA0538. In addition, because volatility is more likely to occur on days with high temperatures, the label includes application cutoff dates designed to reduce the probability of dicamba use on days more favorable for volatilization. *Id.* at 14, JA0531. In contrast to the application cutoffs in the 2018 Registrations, which were based on each field's growth stage and number of days since planting, the 2020 Registrations include a uniform prohibition on application after June 30 and July 30 for soybeans and cotton, respectively. *See id.* at 23-24, JA0540-41. In counties containing species listed under the ESA, users must also comply with additional requirements developed by EPA to prevent effects on those species, as discussed in Section II.E below.

EPA determined that when used in accordance with the control measures on the product labeling, the uses authorized in the 2020 Registrations would not generally cause unreasonable adverse effects to human health or the environment. *Id.* at 22, JA0539. EPA did not find any human health risks of concern from dicamba. *Id.* at 11, JA0528. As to the environment, EPA found that "negative impacts to non-users … will be minimal" because the label requirements are sufficient to ensure, with 90 percent certainty, that there will be no off-site movement of dicamba. *Id.* at 17, JA0534. In particular, EPA determined that the 240-foot downwind in-field buffer would eliminate risks from spray drift outside of the treated field with 90 percent certainty, and that the mandatory use of Adjuvants would ensure volatile emissions do not go beyond the field's edge with 89 percent certainty. *Id.* at 13-14, JA0530-31. EPA also determined that the application cutoff dates would provide additional protective certainty against volatility, albeit with varying magnitude across different states. *Id.* at 14, JA0531.

EPA then weighed any remaining environmental risk against the benefits of over-the-top dicamba use, noting that soybeans and cotton are important agricultural commodities and that the proliferation of herbicide-resistant weeds threatens to reduce yields and impose economic consequences. *Id.* at 21-22, JA0538-39. EPA found that granting the 2020 Registrations would provide growers with an additional tool to manage herbicide-resistant weeds that may be

less expensive than existing alternatives, and that doing so may help prevent further spread of herbicide-resistant weeds. *Id.* at 22, JA0539. Granting the registrations would also allow use of these less volatile dicamba formulations for pre-emergent use with fewer restrictions than current formulations, providing growers with greater flexibility. *Id.* at 16, JA0533. EPA acknowledged that some label requirements could increase growers' costs of application or result in reduced flexibility of use, but found that, on balance, the benefits of granting the 2020 Registrations with the Registrants' proposed label requirements would still outweigh any potential risks of concern. *See id.* at 18, 19, JA0535, 0536.

E. EPA's Analysis of the 2020 Registrations Under the ESA

EPA included several additional measures to protect ESA-listed species in 287 counties where they are located. These measures include the 57-foot omnidirectional buffer (replicated from the 2018 Registrations) and an expanded downwind buffer of 310 feet.[6] Decision Memo at 4, 26-28, JA0521, JA0543-45.; Registration Impacts Memo at 21 n.1, JA0067. In soybean fields, if the individual

[6] In defining the footprint of the dicamba product registrations and arriving at "no effect" determinations for multiple ESA-listed species and their designated critical habitats, EPA considered the mandatory control measures on the dicamba product labels for the 2020 Registrations. Ecological Assessment at 66, JA0204 (describing how to establish action area for pesticide registrations). Because EPA arrived at those "no effect" determinations, the Agency was not required to consult, formally or informally, with the FWS or the National Marine Fisheries Service on the 2020 Registrations as to those species. 50 C.F.R. § 402.12.

applying dicamba uses a hooded sprayer, they may reduce the downwind buffer to 240 feet. Decision Memo at 13-14, 28, JA0530-31, JA0545; Ecological Assessment at 17, JA0155.

The ESA Buffers do not apply in the vast majority of counties where dicamba is registered (2,384 out of 2,671 counties). Ecological Assessment at 7, 68-69, JA0145, 0206-07. And alternative products, such as glufosinate, can be used in any of the ESA Buffer areas. *Cf.* Growers' Br. DEC19 (Meadows Decl.) ¶ 11 (suggesting growers can make second, non-dicamba application in buffer areas). Also, the 2020 Registrations do not prevent applicators from going back over downwind ESA Buffer areas after the wind direction has shifted to apply dicamba. Growers' Br., Robertson Decl. ¶ 10 (recognizing possibility of using more than one pesticide product on fields).

EPA based the ESA Buffers on the overlap between the presence of a soybean or cotton field and the presence of a listed species. Decision Memo at 26–28, JA0543-45. EPA relied on publicly-available species location data published by the expert wildlife agency, the FWS, to determine the scope of the necessary ESA Buffers. Ecological Assessment at 74, JA0212. If a potential soybean or cotton field and a listed species overlapped in the same county, EPA imposed the ESA Buffers for use of the registered products in that county. Growers' Br. 41 (citing Ecological Assessment at 68–69, Table 2.1 (listing counties where ESA

Buffers have been implemented)). EPA concluded that overlap is reasonably expected to occur for those counties with greater than one percent overlap of a species' range or critical habitat with a soybean or cotton field. Ecological Assessment at 72-73, JA0210-11.

F. The 2022 Amendments

During and after the 2021 growing season, EPA continued to receive reports alleging adverse effects of off-target dicamba movement. Memorandum, "Status of Over-the-Top Dicamba: Summary of 2021 Usage, Incidents and Consequences of Off-Target Movement, and Impacts of Stakeholder-Suggested Mitigations" at 4 (Dec. 15, 2021) ("2021 Incident Report"), available at https://www.regulations.gov/document/EPA-HQ-OPP-2020-0492-0021. EPA consulted with stakeholders regarding these reports, including state pesticide regulatory agencies and state agricultural extension specialists from areas where dicamba incidents were common. *Id.* at 38. These stakeholders suggested various mitigation measures, including near-term revisions of label requirements, that EPA could implement to reduce off-target movement or misuse of dicamba. *Id.* EPA did not conduct a full assessment of these suggestions but concluded that some could reduce off-target movement. *Id.* at 6.

In response to these reports, in early 2022 the Registrants submitted proposed label amendments for their products. *See* Letter from L. Roe, EPA, to J.

Birk, BASF (Mar. 15, 2022) ("Engenia Amendment"), JA0881-0913; Letter from L. Roe, EPA, to A. McCaskill, Syngenta Crop Protection, LLC (Mar. 15, 2022), JA0914-55; Letter from L. Roe, EPA, to S. Callen, Bayer CropScience LP (Mar. 15, 2022), JA0956-84. The proposed label amendments included more restrictive application cutoffs for Iowa and Minnesota intended to further reduce the potential for off-site movement due to volatility in those states. *See* Engenia Amendment at 1, JA0881. In Iowa, the amended label prohibits application after June 20. *Id.* at 25, JA0910. And in Minnesota, the amended label prohibits application (1) after June 12 in areas south of Interstate 94, and (2) on days for which the air temperature or forecasted high temperature exceeds 85 degrees Fahrenheit. *Id.* at 27, JA0912 (retaining June 30 cutoff north of Interstate 94).

EPA granted the 2022 Amendments on March 15, 2022. *See id.* at 1, JA0881. The Agency did not give public notice or solicit comments before granting these applications. EPA relied on the ecological risk assessment and other analyses performed for the 2020 Registrations and found that the proposed label amendments met FIFRA's standard for registration. *Id.* The Agency determined that the amendments would not allow for exposures beyond what was considered in the 2020 Registrations because the state-specific cutoff dates are earlier or no later than those already approved and because the temperature cutoff for Minnesota adds further restriction. *Id.* at 2, JA0882.

G. Proceedings in This Case

The Growers timely filed petitions for review of the 2020 Registrations in this Court (Nos. 20-1441 and 20-1445) and the Fifth Circuit (No. 20-1484). *See* ECF 1870257. On December 3, 2020, the Judicial Panel on Multidistrict Litigation randomly selected this Court as the court in which to consolidate all petitions for review of the 2020 Registrations and issued a consolidation order. *See* ECF 1874319. On December 21, 2020, a coalition of environmental groups filed a petition for review in the Ninth Circuit, which was transferred to this Court under 28 U.S.C. § 2112(a)(5).[7] *See* ECF 1883240.

In December 2020, the Registrants filed motions to intervene as respondents. *See* ECF 1874331, 1874735, 1874738. The Court granted those motions on July 12, 2021. ECF 1905826.

On April 23, 2021, following a brief abeyance, the parties filed competing motions to govern further proceedings. The Growers and Registrants argued that judicial review of the 2020 Registrations belongs in the district courts and requested a stay for the parties to litigate their district court challenges. ECF 1895857, 1895674. The environmental group petitioners argued for direct circuit

[7] The Growers and the environmental group petitioners also filed complaints challenging the 2020 Registrations in the U.S. District Courts for the District of Columbia and the District of Arizona, respectively. *Am. Soybean Ass'n v. EPA*, No. 20-cv-3190 (D.D.C. filed Nov. 4, 2020); *Ctr. for Biological Diversity v. EPA*, No. 20-cv-555 (D. Ariz. filed Dec. 23, 2020).

court review of the 2020 Registrations under 7 U.S.C. § 136n(b) and moved to transfer the consolidated cases to the Ninth Circuit. ECF 1895679. EPA agreed with the Growers and Registrants that judicial review belongs in the district court and moved to dismiss the petitions for lack of subject matter jurisdiction. ECF 1895893.

On July 14, 2021, the Court denied the motions for stay and transfer and referred EPA's motion to dismiss to the merits panel.[8] ECF 1906276. The environmental group petitioners filed a motion to voluntarily dismiss their petition for review, which the Court granted on September 8, 2021. ECF 1913270.

Shortly after EPA granted the 2022 Amendments, the Growers filed additional petitions for review of those actions in this Court and the Fifth Circuit, which were consolidated in this Court with the challenges to the 2020 Registrations on April 20, 2022. *See* ECF 1943658. The Growers also filed motions to amend their petitions for review of the 2020 Registrations to include challenges to the 2022 Amendments, which the Court granted on March 31, 2022. ECF 1941355.

[8] In light of the Court's decision to proceed with merits briefing, the Growers' and the environmental groups' district court cases are both stayed pending resolution of this case.

SUMMARY OF ARGUMENT

All parties agree that this Court lacks subject matter jurisdiction to review the 2020 Registrations and the 2022 Amendments because those actions were not issued following a "public hearing" within the meaning of 7 U.S.C. § 136n(b). Although FIFRA does not define what constitutes a "public hearing," the statutory text and case law indicate that, at a minimum, there must be some public notice of EPA's pending action. Because EPA did not provide specific public notice prior to issuing the 2020 Registrations or 2022 Amendments, judicial review of those actions belongs in the district courts. The petitions therefore should be dismissed.

Even if the Court finds that it has subject matter jurisdiction, Growers' objections to the ESA Buffers must fail. As a threshold matter, the Growers lack standing because they do not connect the dots to show how any of their criticisms, if credited, would actually alter the areas where the ESA Buffers apply or their magnitude. On the merits, regarding applicability, the granular species range data Growers claim EPA should have considered were not before the Agency at the time of its action and do not reflect the best available science. Moreover, EPA's county-level approach was appropriate here because it provided label clarity for users of these products. Regarding the application rate argument, the difference between the recommended label rate and the Growers' proposed average post-

emergence rates is *de minimis*. In any event, EPA reasonably assumed that at least some users would apply dicamba at the label's full recommended rate.

The Growers' argument challenging the use of uniform application cutoff dates also lacks merit. The 2020 Registrations' cutoff dates provide additional protection against damage from volatility in every state above and beyond the protection from other labeling requirements addressing volatility. EPA reasonably considered the greater label clarity of uniform cutoff dates in determining that more narrowly tailored cutoffs were not necessary to avoid unreasonable adverse effects on the environment. And EPA found the 2020 Registrations with uniform cutoff dates would still provide substantial benefit. Thus, EPA's decision to grant the 2020 Registrations is supported by substantial evidence in the record.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") provides the standard of review for the Growers' ESA claims. *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 923 (9th Cir. 2020). Under the APA, a reviewing court may only set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Shafer & Freeman Lakes Envt'l Conservation Corp. v. FERC*, 992 F.3d 1071, 1090 (D.C. Cir. 2021) ("*Shafer*"). Agency action is valid if the agency considered the relevant factors and articulated

a rational connection between the facts found and the choices made. 5 U.S.C. § 706(2)(A); *Shafer*, 992 F.3d at 1090.

For claims brought under FIFRA, agency action subject to appellate review "shall be sustained if it is supported by substantial evidence when considered on the record as a whole." 7 U.S.C. § 136n(b). Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Because this standard "is something less than the weight of the evidence," "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Env't Def. Fund v. EPA*, 489 F.2d 1247, 1251 (D.C. Cir. 1973) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)). The "substantial evidence" and "arbitrary and capricious" standards "require equivalent levels of scrutiny." *Mem'l Hosp./Adair Cnty. Health Ctr., Inc. v. Bowen*, 829 F.2d 111, 117 (D.C. Cir. 1987) (citations omitted); *accord Daikin Applied Americas Inc. v. EPA*, No. 20-1479, 2022 WL 2565083, at *7 (D.C. Cir. July 8, 2022).

The reviewing court must "ensure that the EPA has examined the relevant data and has articulated an adequate explanation for its action." *City of Waukesha*

v. EPA, 320 F.3d 228, 247 (D.C. Cir. 2003) (cleaned up). The Court "will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *Id.* (cleaned up). Moreover, even if the agency's rationale is "of less than ideal clarity," its decision will be upheld as long as "the agency's path may reasonably be discerned." *Casino Airlines, Inc. v. NTSB*, 439 F.3d 715, 717 (D.C. Cir. 2006) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

ARGUMENT

I. This Court Lacks Statutory Subject Matter Jurisdiction Because EPA Did Not Issue the 2020 Registrations or 2022 Amendments Following a Public Hearing.

The petitions for review should be dismissed because this Court lacks subject matter jurisdiction to review the 2020 Registrations and the 2022 Amendments. Under FIFRA, direct circuit court review of agency action "is precluded unless there is a 'controversy as to the validity of [an] order issued by the Administrator [of EPA] following a public hearing.'" *Humane Soc'y of U.S. v. EPA*, 790 F.2d 106, 110 (D.C. Cir. 1986) (quoting 7 U.S.C. § 136n(b)) (alterations in original). FIFRA does not define what constitutes a "public hearing," but the

statutory text and case law interpreting it indicate that, at a minimum, there must be some public notice of EPA's pending action.[9]

Neither the 2020 Registrations nor the 2022 Amendments followed a public hearing within the meaning of FIFRA. While EPA compiled a lengthy administrative record in the actions challenged here and received unsolicited comments on the 2020 Registrations, it did not (and was not required to) provide public notice of its receipt of the registration applications or of its proposed decisions before issuing either the 2020 Registrations or the 2022 Amendments. Thus, none of the actions challenged here are orders issued "following a public hearing," and this Court lacks jurisdiction to review them.

A. FIFRA's Text Requires District Court Jurisdiction Here.

FIFRA grants the circuit courts "exclusive jurisdiction" to review orders issued following a "public hearing." 7 U.S.C. § 136n(b). In order for there to be a "public" hearing under FIFRA there must be, at a minimum, specific pre-action notice from the Agency to potentially affected parties—*i.e.*, the "public." Notably, FIFRA limits who may challenge an order following a "public hearing" to persons "who will be adversely affected by such order and who had been a party to the proceedings." *Id.* That limitation necessarily informs the meaning of the term

[9] EPA expresses no position here regarding what form, medium, or timing of notice to the public is required for purposes of 7 U.S.C. § 136n(b).

"public hearing." *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (noting that in interpreting statute, courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose") (cleaned up). Because Congress restricted the availability of circuit court review to those who participate in the proceedings, it is necessary to read "public hearing" to require specific public notice of EPA's possible action so that parties can preserve their ability to seek judicial review.

A contrary interpretation could lead to cases where a party is barred from seeking review of final agency action under FIFRA despite never having been aware of the proceedings or having an opportunity to comment on them. For example, if public notice is not required for a public hearing under FIFRA, then the circuit courts could obtain exclusive jurisdiction to review an order based on EPA's consideration of unsolicited comments from a subset of potentially affected parties. A party that claims to be adversely affected by the order but did not submit comments would be barred from seeking review in either the circuit courts (because it was not a "party to the proceedings") or the district courts (because of the circuit courts' "exclusive jurisdiction") even though EPA did not notify the public of its pending action. 7 U.S.C. § 136n(b). Although there is no indication that has occurred in this case, it is implausible that Congress intended the term "public hearing" to be interpreted in a way that would allow potentially affected

parties to be barred from judicial review in cases where the party's reasonable diligence would not put them on notice of the pending agency proceedings.

Accordingly, a "public hearing" for purposes of FIFRA must include specific pre-action notice to potentially affected parties. Because there was no specific pre-action public notice of the 2020 Registrations or the 2022 Amendments, this Court lacks jurisdiction to review them.

B. The Weight of Judicial Authority Also Supports Finding District Court Jurisdiction Here.

Case law affirms what the statute itself makes clear. This Court and others have clarified that a "public hearing" as used in 7 U.S.C. § 136n(b) does not require an "adjudicative process" or a "quasi-judicial" proceeding. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 187 (D.C. Cir. 2017) ("*CBD I*"); *United Farm Workers of Am., AFL-CIO v. Adm'r, EPA*, 592 F.3d 1080, 1083 (9th Cir. 2010). But at a minimum, there must be some specific public notice of the Agency's action.

In *United Farm Workers*, the Ninth Circuit held that an "essential" element of a public hearing is that "notice be given of a decision to be made." 592 F.3d at 1082. Consistent with that principle, the decisions of this Court and others finding appellate jurisdiction under FIFRA have all involved some pre-action notice by EPA to potentially affected parties, either by soliciting briefs from the parties to an informal adjudication, *see Env't Def. Fund, Inc. v. Costle*, 631 F.2d 922, 925-26

(D.C. Cir. 1980), or by holding a public notice-and-comment process, *see, e.g.*, *CBD I*, 861 F.3d at 187 (noting EPA provided "three notice and comment periods"); *Humane Soc'y*, 790 F.2d at 111-12 (noting EPA published notices of experimental use permit application receipt in Federal Register); *Nat'l Grain Sorghum Producers Ass'n v. EPA*, No. 95-1244, 1996 WL 250327, at *2-3 (D.C. Cir. Apr. 22, 1996) (finding jurisdiction where EPA provided notice of proposed action in Federal Register); *Dicamba II*, 960 F.3d at 1132 (finding 2018 Registrations followed public hearing because they "arise[] from a notice-and-comment period held prior to" prior registrations they extended and amended); *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1090 (9th Cir. 2017) ("*CBD II*") (noting registrations were "preceded by a public comment and notice period published in the Federal Register"); *United Farm Workers*, 592 F.3d at 1082 (finding "[t]he plain meaning of 'hearing' is satisfied by" notice and comment process); *Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 102 n.3 (D.D.C. 2011) ("Courts have generally interpreted [public hearing requirement] to include Agency orders following public notice and comment.").

Conversely, in cases where EPA did not give public notice of the specific action being challenged, courts have found there was no public hearing—even where EPA actually considered objections to that action from the public or held a hearing on a related action. In *Northwest Food Processors Association v. Reilly*,

the Ninth Circuit considered challenges to an EPA order that canceled a registration for the pesticide dinoseb and allowed some limited use of existing dinoseb stocks. 886 F.2d 1075 (9th Cir. 1989). EPA had published notice of its intent to cancel all dinoseb registrations and provided a hearing on the proposed cancellation.[10] However, "the notice calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing." *Id.* at 1078 (cleaned up). Nonetheless, some parties to the cancellation hearing presented objections regarding the disposition of existing stocks, and EPA considered those objections in issuing its final order. *Id.* at 1078 n.4.

The Ninth Circuit found it had jurisdiction to review EPA's cancellation decision because the Agency held proceedings on the issue "in which interested parties are afforded an opportunity to present their positions …," noting favorably that those cancellation proceedings "were conducted pursuant to notice." *Id.* at 1077-78. But it held the existing stocks decision did not follow a public hearing because EPA's notice for the cancellation proceeding had not put parties on notice that EPA would be addressing the treatment of existing stocks. *Id.* at 1078 (noting

[10] Unlike the registrations at issue here, FIFRA requires EPA to publish notice in the Federal Register before issuing a cancellation order and to hold an adjudicative hearing on any proposed cancellation upon a timely request from an adversely affected person. 7 U.S.C. § 136d(b). Those requirements do not apply to a decision to permit continued sale and use of existing stocks of a pesticide whose registration is cancelled. *Id.* § 136d(a).

that "the contrary result would be very unfair" to parties potentially affected by existing stocks provision as the notice "did not even hint that [parties'] interests could be adversely affected"). Thus, the court found it lacked jurisdiction to review the existing stocks decision due to the lack of notice, notwithstanding that EPA actually considered that provision and the parties' objections to it during the agency proceedings. *Id.*

Likewise, in *Center for Biological Diversity v. EPA* ("*CBD III*"), a district court held that public notice and comment on an earlier action are insufficient to constitute a public hearing for a later, related action for which EPA did not give public notice. 316 F. Supp. 3d 1156 (N.D. Cal. 2018). A party argued that although EPA had not provided notice and comment on the challenged orders reregistering certain pesticide products, those orders nonetheless followed a public hearing because EPA had provided notice and comment on its earlier decisions finding those pesticides *eligible* for reregistration. *Id.* at 1172-73. The court found that the earlier proceedings did not satisfy 7 U.S.C. § 136n(b) because they had not put the public on notice of any of the actual decisions being challenged. *Id.* at 1174; *see id.* at 1173 (noting Federal Register notices for eligibility decisions "stopped short of stating intent to actually reregister those products on any particular terms").

Here, it is undisputed that EPA did not provide public notice of its pending actions prior to issuing the 2020 Registrations or the 2022 Amendments. Growers' Br. 2-3. EPA did receive a significant number of unsolicited comments both supporting and opposing the 2020 Registrations, and considered those comments, along with both new and previously considered studies and other information, as part of the extensive record supporting those actions. *Supra* pp. 17-18. If they had been preceded by some public notice, those proceedings may have been sufficient to qualify as a "public hearing" under FIFRA. But the weight of case law indicates that absent such notice, they lack an "essential" minimum element necessary for a public hearing. *See United Farm Workers*, 592 F.3d at 1082; *Nw. Food Processors Ass'n*, 886 F.2d at 1078.

This Court's decision in *Environmental Defense Fund v. Costle* is not to the contrary. 631 F.2d 922 (D.C. Cir. 1980). There, the Court found that the challenged action followed a public hearing because EPA's proceedings had produced a record that was "wholly adequate for judicial review" despite an apparent lack of notice to the broader public. *Id.* at 932. But the subject matter and procedural background of *Costle* are unusual and distinguishable. The petitioners did not challenge EPA's decision cancelling the relevant pesticide registration, but rather EPA's decision denying their *requests for an administrative hearing* on that cancellation—requests that followed EPA's Federal Register notice

of the cancellation proceeding. *Id.* at 924-25, 930. And in the informal adjudication denying those hearing requests, the parties to the proceeding—whose "filing of objections," 7 U.S.C. § 136d, was the only reason that proceeding was necessary—presented their positions to EPA in written briefs. *Id.* at 924-25; *see also id.* at 932 (stating "few, if any, further insights could have been gained through further proceedings"). Thus, given the limited nature of the challenged action, all potentially affected parties were given notice of EPA's action and had an opportunity to present the Agency with their objections to denial of their cancellation hearing requests. *Costle* does not stand for the proposition that in every case, the availability of an adequate record for review is sufficient evidence of a public hearing under FIFRA absent public notice of EPA's action.

Finally, the Ninth Circuit's decision in *Dicamba II* is also not to the contrary. There, the court asserted jurisdiction to review the 2018 Registrations because they arose from notice-and-comment proceedings held prior to the 2016 Registrations. *Dicamba II*, 960 F.3d at 1132. But the court recognized that the 2018 Registrations of XtendiMax, Engenia, and FeXapan were actions extending and amending the then-existing 2016 Registrations for those same products, not new registrations. *See id.* at 1129, 1131. Thus, the court could logically conclude that the 2016 and 2018 Registrations were sufficiently related that they arose from the same public hearing.

Here, by contrast, the 2020 Registrations did not amend or extend registrations issued following a previous notice and comment proceeding. The Ninth Circuit vacated the 2018 Registrations of XtendiMax and Engenia, nullifying the prior actions and thus severing any direct link between the 2020 Registrations (which did not follow a public hearing) and the 2016 Registrations (which did). The 2020 Registrations concern two applications for *new* registrations for XtendiMax and Engenia following that vacatur, and one application to amend and extend the expiration date for the registration of Tavium, which was not part of the 2016 or 2018 actions and was first authorized for use in 2019 without notice and comment. Moreover, the 2020 Registrations are legally and factually distinct from the 2016 and 2018 actions: they are unconditional rather than conditional registrations; they include numerous additional label requirements and other terms and conditions to minimize off-site movement of dicamba; and they are supported by their own administrative record with additional studies, new analyses, and other information that were not considered in the earlier actions. *See* Decision Memo at 10, JA0527. Because there was no specific public notice of these new and distinct actions, there was no public hearing under FIFRA and this Court lacks subject matter jurisdiction.[11] *See CBD III*, 316 F. Supp. 3d at 1173 (finding notice and

[11] Likewise, the 2022 Amendments did not follow a public hearing under the *Dicamba II* approach because the actions they arose from (*i.e.*, the 2020 Registrations) were not themselves issued following a public hearing.

comment on prior related action was too far removed to constitute public hearing on challenged action). Accordingly, the Court should dismiss the petitions for review.

II. The Growers Have Failed to Demonstrate Standing to Raise Their ESA Arguments.

The Growers lack standing to raise their ESA arguments. Growers' Br. 43-45. To establish standing, the Growers must show that they have "suffered an injury-in-fact, that the injury is fairly traceable (causally connected) to the challenged agency action, and that it is likely as opposed to merely speculative, that their injury will be redressed by a favorable decision of the court." *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 738 (D.C. Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

They have not done so here. As to the county-level data argument, the Growers included five declarations with their opening brief. Growers' Br. DEC1-DEC32. However, no declarant demonstrates traceability by contending that his farm is subject to the ESA Buffers *because* EPA relied on county- instead of subcounty-level data. *Id.* For instance, the Jorgenson Declaration does not describe any alleged impact from the ESA Buffers. *Id.* at DEC8-DEC14. Moreover, the Meadows and Bessent Declarations do no more than generically describe theoretical (not actual) impacts to the Growers' members from the ESA

Buffers. *Id.* at DEC15-27. Thus, those declarations also fail to show injury-in-fact.

Only two declarants even suggest that their farms are located in counties where the ESA Buffers apply. *Id.* at DEC1-DEC7 (Howell), DEC28-DEC32 (Robertson); Ecological Assessment at 68-69, JA0206-07 (listing Beaufort County, North Carolina and Nueces County, Texas as counties in which ESA Buffers apply). But nowhere does either declarant suggest that, had EPA used subcounty-level NatureServe data, the scope of the ESA Buffers would be reduced and no longer apply to them. Growers' Br. DEC1-7, DEC28-32; *see also id.* at 43-45 (also not suggesting that employing subcounty-level data would result in smaller ESA Buffers and redress any injury anywhere for any member). In sum, because they do not connect the dots, they have failed to demonstrate that any of their members has suffered an injury-in-fact or that any such injury is causally connected to the ESA Buffers.

Their application rate argument is similarly flawed. *Id.* at 6, 47-50. For starters, the Growers' argument does not account for the fact that to calculate the size of the ESA Buffers, EPA logically relied on actual field studies. By doing so, EPA was able to model the application of dicamba in real world conditions. Decision Memo at 13, JA0530; Ecological Assessment at 7, 18, 46, 66, 185, 239-247, 297, JA0145, 0156, 0184, 0204, 0323, 0377-85, 0435. Here, the field studies

available in the administrative record and on which EPA relied to calculate the size of the ESA Buffers were provided by the Registrants. *Id.* Those studies unsurprisingly relied on the Registrants' recommended application rate. *Id.* The Growers have not suggested that any field studies existed using their preferred average rates. Growers' Br. 47-50. Nor have they argued that EPA could have calculated the downwind ESA Buffer without using actual field studies. *Id.* Thus, EPA's use of the Registrants' field studies did not cause the Growers' alleged injury.

Moreover, only use of field studies utilizing average application rates could hypothetically redress Petitioners' alleged injury. The Growers do not allege that such studies exist, and EPA is not aware of any such studies. Nor do the Growers allege that EPA was required to create new studies, which it was not. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("[I]n the absence of available evidence, Congress does not require the agency to conduct its own studies.") (citing 16 U.S.C. § 1533(B)(1) and *Sw. Ctr. for Biol. Div. v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)). As such, the Growers have not shown that their alleged injury is "likely" to be redressed by a decision in their favor. *Klamath Water Users Ass'n*, 534 F.3d at 738.

Accordingly, the Court should find the Growers lack standing to challenge EPA's action under the ESA. *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017).

III. Even if the Growers Have Standing to Challenge the ESA Buffers, the ESA Buffers Were Reasonable Under the ESA and APA.

A. The Court Should Not Consider NatureServe Data, Which Is Extra-Record Material.

Even if the Growers had standing to raise their subcounty-level data argument, the Court should reject it as improperly based on extra-record material. The over-arching principle of judicial review of agency action is that a court must review agency action based on the administrative record that was before the agency at the time of final decision making. *Citizens to Preserve Overton Park*, 401 U.S. at 419-20; *Esch v. Yuetter,* 876 F.2d 976, 991 (D.C. Cir. 1989). That axiom "exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny . . . ." *Id.* The Growers' argument that EPA should have used NatureServe data fails because the NatureServe data is extra-record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-43 (1976).

The Growers' reliance on extra-record evidence is contrary to these basic black-letter administrative law rules because they seek to improperly expand the scope of review beyond the administrative record. *Cabinet Mountains Wilderness*

v. Peterson, 685 F.2d 678, 685 (D.C. Cir. 1982) (rejecting attempt to expand review beyond administrative record because permitting consideration of extra-record evidence would effectively allow for *de novo* review of what is, at bottom, review of agency decision); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (stating "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [as in the ESA citizen suit provision] . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held") (citations omitted).

The Court should, moreover, reject any contention on reply that the Court should now consider the NatureServe data. The Growers did not submit the NatureServe data with their comments on the 2020 Registrations. *See, e.g.*, Letter from B. Gordon, Am. Soybean Ass'n, to A. Wheeler, EPA (May 8, 2020), JA0769-70; Letter from B. Gordon, Am. Soybean Ass'n, to A. Wheeler, EPA (Aug. 10, 2020), JA0841-45; Letter from B. Gordon, Am. Soybean Ass'n, to A. Wheeler, EPA (Sept. 15, 2020), JA0771-74. Nor have they moved to supplement the administrative record or argued that an exception to the record review limitation applies. They have forfeited any such argument. *New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (stating that petitioners waive arguments that they fail to raise in opening briefs).

The Growers' argument that Intervenor-Respondent Bayer submitted some unidentified NatureServe data to EPA with some comments in March 2021, moreover, is irrelevant. Growers' Br. 44-45. Bayer did not provide those comments to EPA until five months *after* EPA issued its 2020 Registrations. Moreover, the 2021 Bayer Comments did not include any particular data from NatureServe, and Bayer submitted them in connection with an entirely different pesticide: glyphosate. Growers' Br. 45. Not dicamba. Neither the 2021 Bayer Comments nor any NatureServe data became part of the 2020 Registrations' administrative record when Bayer submitted them in connection with the glyphosate registration review process. The Court should decline to consider the 2021 Bayer Comments, which concern a different chemical in a separate action not at issue here.

Additionally, even if the NatureServe data *had* been before EPA, FWS is the expert agency regarding conservation of ESA-listed species. *Shafer*, 992 F.3d at 1079. EPA rationally credited the publicly available FWS data as the best available scientific information. In contrast to some third-party sources, like NatureServe, FWS's range data typically include input and knowledge from species experts who can consider the habitat requirements and the biology of species. FWS is not limited to data showing where species have been observed by individuals or researchers. EPA wisely relied on FWS data. *Id.*

Moreover, EPA—and the Registrants, who did not object to EPA's methodology—chose to rely on the county-level information available from FWS because a county-level approach for requiring control measures provided more clarity to users of these products. The Ninth Circuit was critical of the 2018 label because, in the court's view, it was difficult for individual users to comprehend. *Dicamba II*, 960 F.3d at 1124 (finding "EPA entirely failed to acknowledge record evidence showing the high likelihood that restrictions on [over-the-top] dicamba application imposed by the 2018 label would not be followed" and "restrictions on the 2016 and 2017 labels had already been difficult if not impossible to follow for even conscientious users; the restrictions on the 2018 label are even more onerous"); *see also id.* at 1139-42; Presentation by D. Peterson, "The Dicamba Conundrum" at 2, JA0986 (discussing "confusing labelling"); Decision Memo at 21, JA0538 (stating 2020 labels "involve a simpler format that is easier to understand and follow, which will help to prevent potential misuse of these dicamba products"). EPA sought to ensure that the 2020 label would be easier for users to understand and follow, in part by using county boundaries to demarcate where the ESA Buffers would and would not apply. EPA's county-level approach was reasonable with respect to the 2020 Registrations.

B. EPA Logically Chose to Rely on the Registrant-Recommended Application Rate When Calculating the Size of the ESA Buffers.

The Growers' second argument—that the ESA Buffers are arbitrary and capricious because EPA relied on the recommended label rate, 0.5 pounds per acre, when determining the size of the ESA Buffers—also fails. Growers' Br. 44; *see also id.* at 47-50. EPA relied upon certain field studies that tested over-the-top use of dicamba at the recommended label rate to gauge the risks posed to ESA-listed species by such use. *Id.* at 45. The Growers maintain that EPA should have substituted the *average* use rates for post-emergent use for determining buffer distances. *Id.*

The Growers fail to specify which average rate they believe EPA should have used. Growers' Br. 45-49. Additionally, while the Growers note that the 2020 downwind ESA Buffer is larger than its 2018 predecessor, they do not argue (much less demonstrate) that the size of the 2020 downwind ESA Buffer is incorrect or that using average application rates would have altered its size.[12] *Id.* But even if they had, EPA logically assumed that at least some dicamba users

[12] The difference between the post-emergence average rates that the Growers prefer (0.44 and 0.48 pounds per acre) and the recommended rate of 0.5 pounds per acre–0.06 and 0.02 pounds per acre, respectively–is, in any event, *de minimis*. Growers' Br. 48.

would apply the product at the recommended, effective rate.[13] Application of 0.5 pounds per acre is the rate that *the Registrants* placed on their product labels to ensure that the products effectively control weeds in the field.[14] Registration Impacts Memo at 18, JA0064 (noting a "reduced application rate might not be effective on difficult to control weed species").

The Registrants also used 0.5 pounds per acre to reduce the risk that weeds might develop resistance to dicamba. Decision Memo at 17, JA0534 (discussing Herbicide Resistance Management plan to preserve efficacy and benefit of "this important weed management tool"), 20, JA0537 (herbicide resistance is significant pest-management issue), 25, JA0542 (requiring reporting of information concerning dicamba-resistant weeds and cases of weed control failure); Registration Impacts Memo at 27, JA0073 (EPA has "information about multiple cases of suspected dicamba-resistant Palmer amaranth and waterhemp populations"). Weed resistance to glyphosate was the reason the pesticide industry developed glyphosate alternative technologies, like post-emergence use of 2,4-D

[13] EPA reasonably used certain field studies that included over-the-top dicamba use at the recommended label rate to gauge the risks posed to ESA-listed species by such use. Growers' Br. 47-48.

[14] Application of 0.5 pounds per acre is *required* for XtendiMax and Tavium and is the recommended rate for Engenia. XtendiMax Registration at 13, 14, JA0670, 0671; Tavium Registration at 29, JA0595; Engenia Reservation at 7, 16, 18, 19, JA0624, 0633, 0635, 0636.

and dicamba, in the first place. *Nat'l Family Farm Coal*, 966 F.3d at 905 (discussing Enlist Duo, one component of which is 2, 4-D); Registration Impacts Memo at 2, JA0048 (noting 14 percent reduction in returns per acre due to glyphosate resistance); Growers' Br., Robertson Decl. DEC29, ¶ 3 (recognizing need to "avoid expanding glyphosate tolerant weeds"); Growers' Br., Howell Decl. DEC2-DEC3, ¶ 3 (discussing problem of glyphosate-resistant weeds); Soybean Benefits Memo at 2, JA0486 ("[d]icamba-resistant Palmer amaranth have been confirmed in two states"), 26, JA0510 (noting "resistance to dicamba . . . also confers resistance to 2,4-D"). Growers therefore have a strong incentive not to depart from the recommended labeled rate. EPA's reliance on studies conducted at the effective, recommended, labeled rate was eminently reasonable. *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1260–61 (D.C. Cir. 2004).

C. EPA Was Justified in Increasing the Size of the Downwind ESA Buffer in Light of the Off-Target Incidents from 2017-2019.

The Growers also neglect to mention why EPA set the downwind ESA Buffer at 310 feet. The administrative record contains studies that firmly support the increased downwind ESA Buffer. *See infra* at 50. As EPA discussed in the risk assessment supporting the 2020 Registrations, incidents reported to EPA indicated that the downwind spray drift buffer established in 2018 was insufficient to avoid off-site incidents and was not protective of listed species. *Cf. Dicamba II*,

960 F.3d at 1124. These reports, many of which were submitted by the Registrants at EPA's request, further suggest that the downwind buffer contained in the 2018 Registrations was insufficient. Indeed, the Registrants reported approximately 5,600 off-target incidents from 2017 through 2019. Decision Memo at 9, JA0526; *see also* Letter from K. Nesse to Ass't Adm'r Alexandra Dunn, JA1032 (commenting that "nearly every time that I have seen these products used there is at least a small amount of off target movement."); E. Unglesbee, "Dicamba Limits Sought," Progressive Farmer (Apr. 30, 2020), JA0001 (discussing "millions of dollars' worth of expenses conducting [dicamba] investigations"); Presentation by D. Peterson, "The Dicamba Conundrum" at 3, JA0987 (discussing "off-target movement to non-target crops"), 11, JA0995 (map showing injury investigations); Decision Memo at 9, JA0526 (describing off target incidents); Registration Impacts Memo at 2, 9-10, JA0048, 0055-56 (noting "large numbers of incidents of damage from offsite movement have been reported," with magnitude of underreporting approximately 25-fold). This information indicated that incidents occurred over the majority of the cotton- and soybean-growing states. The reports contain information on incidents occurring beyond the designated distances from treated fields, including the setback restrictions contained on earlier labeling intended to address spray and vapor drift. Registration Impacts Memo at 28, JA0074 (10 percent increase in reported off-target incidents from 2018-2019).

The Growers ignore this history. Because EPA is charged with meeting its obligations under FIFRA and the ESA, it responded in a responsible, carefully-calibrated fashion when it determined that adopting a downwind buffer of 310 feet and maintaining the 2018 Registrations' 57-foot omnidirectional buffer were necessary to meet FIFRA's registration standard and make no-effect determinations under the ESA. Decision Memo at 4, 8, JA0521, 0525 (describing omnidirectional 57-foot buffer); *id.* at 21, JA0538 ("Based on rigorous review of all the scientific information, EPA has determined that an increased infield buffer was necessary to address spray drift and to protect non-target plants."); Ecological Assessment at 19, JA0157 (effects without ESA Buffers predicted past field edge).

IV. The Application Cutoffs are Supported by Substantial Evidence and Should Be Sustained Under FIFRA.

The Growers' narrow challenge to the application cutoff dates under FIFRA also lacks merit. The Growers do not object to the 2020 Registrations' use of application cutoffs to prevent dicamba application during temperatures that favor volatility, the use of calendar dates rather than temperature or growth stage as the basis for the cutoffs, or the specific cutoff dates adopted in the 2020 Registrations.[15] *See* Growers' Br. 53-56. They simply object to the labels' use of

[15] The Growers do not articulate any challenge to the state-specific application cutoffs in the 2022 Amendments, other than a vague assertion that "aspects of those registrations could also be more localized." Growers' Br. 55.

uniform cutoff dates applicable in all 34 states where dicamba is registered for over-the-top use, arguing that the 2020 Registrations "should have adopted narrower cutoff dates" reflecting "regional climate discrepancies." *Id.* at 56. But contrary to the Growers' assertions, EPA's decision to approve the 2020 Registrations with uniform application cutoffs is supported by substantial evidence showing that these cutoffs, along with other mitigation measures included in the proposed labeling, would prevent unreasonable adverse effects to the environment from over-the-top dicamba use.

FIFRA does not task EPA with identifying and imposing the ideal set of label requirements for each registration application it receives. Rather, EPA's role is to review the application and supporting materials submitted with it—including the applicant's proposed pesticide labeling—and determine whether, *inter alia*, the pesticide's use under the proposed label will cause unreasonable adverse effects on the environment. *See* 7 U.S.C. § 136a(c)(1), (c)(3), (c)(5). If it will not, then EPA is required by statute to grant the application. *See id.* § 136a(c)(5).

In finding that the 2020 Registrations would not generally cause unreasonable adverse effects on the environment, EPA relied on the requirements of the Registrants' proposed labeling, which included uniform application cutoff dates as part of a suite of measures to minimize off-site movement from volatility. The most significant measure is the requirement to add an approved Adjuvant to

the tank with every over-the-top dicamba application. Decision Memo at 21, JA0538. EPA's analysis determined that use of these additives would prevent off-site movement from volatility with 89 percent certainty. *Id.* at 14, JA0531; Ecological Assessment at 56-57, JA0194-95. EPA also determined that the proposed label's uniform application cutoff dates would further reduce risks by reducing dicamba application on days with temperatures favoring dicamba volatility. Decision Memo at 14, JA0531 (noting over 94 percent and 82 percent of reported incidents occurred at temperatures above 75 degrees and 80 degrees, respectively); Ecological Assessment at 323, JA0461 (finding application cutoff dates "provide a margin of extra safety" on top of Adjuvant requirement). Together, these label requirements "provide[d] EPA with high confidence that risks of concern from volatile emissions are addressed." Ecological Assessment at 57, JA0195.

EPA acknowledged that the magnitude of additional protection offered by the application cutoffs would vary by state because "the dates are the same in all 34 states and the meteorological data vary across these geographies." Decision Memo at 14, JA0531. But EPA found that the uniform application cutoffs provided at least some margin of extra safety in each state. *Id.*; Ecological Assessment at 323, JA0461. Because the Adjuvant requirement already provides significant protection against volatility, the application cutoffs did not need to

achieve substantial additional protection in all 34 states. *See* Decision Memo at 14, JA0531 (noting that the estimates of cutoff date effectiveness cited by Growers (Growers' Br. 54-55) do not reflect, and are in addition to, volatility reduction expected from Adjuvant use). Further, EPA also found that the application cutoffs would reduce any damage from off-site movement that does occur by prohibiting dicamba use later in the season, when non-target plants are in more vulnerable growth stages and more susceptible to dicamba damage. *Id.* at 18, 20, JA0535, 0537.

As the Growers recognize, the Agency did consider the potential impacts of using regional cutoff dates or growth stage cutoffs rather than uniform cutoff dates. Registration Impacts Memo at 15-18, JA0061-64. But EPA determined that the uniform approach was appropriate because it "offers the greatest label clarity." *Id.* at 17, JA0063; Decision Memo at 20 n.18, JA0537. The Growers argue this decision inappropriately "prioritize[s] simplicity over science." Growers' Br. 51. However, the ability to effectively comply with and enforce a pesticide's label requirements is a relevant factor for EPA to consider in evaluating a registration application. Indeed, the Ninth Circuit in *Dicamba II* vacated the 2018 Registrations at least in part because EPA had not considered the "risk of substantial non-compliance with the EPA-mandated label" due to its complexity. 960 F.3d at 1139. And in its own comment letters to EPA, Petitioner the American

Soybean Association stressed the need for "practical" labeling requirements in the 2020 Registrations. *See, e.g.*, Letter from B. Gordon, Am. Soybean Ass'n, to A. Wheeler, EPA at 1, JA0771 (Sept. 15, 2020). As part of its unreasonable adverse effects analysis, EPA considers whether additional or more complex restrictions on a pesticide's use might actually undermine environmental protections by making compliance with and enforcement of the label requirements impractical. *See* Decision Memo at 21, JA0538 (noting 2020 Registrations' simplified labels will make their requirements "straightforward and prominent for the user and make enforcement easier for state regulatory officials").

Here, EPA considered alternative cutoff approaches and found drawbacks to each. A growth stage cutoff can be difficult for a grower, applicator, or enforcement agency to interpret over an entire field and does not prevent landscape effects where the target field is at a different growth stage than neighboring sensitive plants. Registration Impacts Memo at 17, JA0063. And regional cutoff dates can lead to arbitrary differences in impacts for growers in neighboring states with similar climates. *Id.* at 17-18, JA0063-64. EPA determined the uniform application cutoffs would provide the greatest label clarity, and that the 2020 Registrations' simpler label requirements would improve compliance over the

2018 Registrations.[16] *See id.* at 18, 20, 23, JA0064, 0066, 0069. "Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Public Citizen*, 374 F.3d at 1260–61 (cleaned up).

Finally, EPA concluded that granting the 2020 Registrations with the uniform cutoff dates would still provide substantial benefits, ensuring that any remaining environmental risks not addressed by the label requirements would not be "unreasonable." 7 U.S.C. § 136a(c)(5); *see id.* § 136(bb) (requiring EPA to weigh costs and benefits in "unreasonable adverse effects" analysis). Although it is not clear from their brief, the Growers appear to believe that the application cutoffs do not provide sufficient time for users to implement the two over-the-top applications authorized in the 2020 Registrations.[17] But EPA addressed precisely this issue in its registration analysis.

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[16] The 2022 Amendments do not "undercut" EPA's decision. Growers' Br. 55-56. In 2022 the Registrants requested changes to the cutoffs for two states based on new information about dicamba-related incident reports that was unavailable in 2020. EPA determined that using the products with the Registrants' amended labelling would not cause unreasonable adverse effects to the environment. That determination does not conflict with EPA's previous finding, based on a different record, that using the products under the Registrants' proposed 2020 labelling met FIFRA's registration standard.

[17] While the Growers state elsewhere that the application cutoffs fall too early in the season, *see* Growers' Br. 18-20, they appear to be arguing EPA should have adopted *even earlier* application cutoffs in at least some regions. *See id.* at 55 (arguing for "potentially more effective" localized cutoffs).

Based on conservative assumptions, EPA estimated that with a June 30 application cutoff for soybeans, 84 percent of the soybean crop could be treated at least once and nearly 45 percent could be treated twice with dicamba. Registration Impacts Memo at 14-15, JA0060-61. Notably, in the prior growing seasons for which EPA had data (2017 and 2018), only 17 percent of soybean acres nationwide were treated with over-the-top dicamba, and only 8 percent of that acreage was treated twice. Soybean Benefits Memo at 11, Tbl. 3c, 12, JA0495, 0496. For cotton, EPA estimated that with a July 30 application cutoff, over 90 percent of the cotton crop could be treated at least twice. Registration Impacts Memo at 15, JA0061. By contrast, only 34 percent of cotton acreage was treated with over-the-top dicamba in 2017 and 2018, 44 percent of which was treated twice. Cotton Benefits Memo at 11, Tbl. 3c, 12, JA0120, 0121. Thus, the record shows that the application cutoffs provide sufficient time for dicamba to be applied as the Growers need.

Accordingly, EPA's decision to approve the 2020 Registrations with the uniform application cutoff dates is supported by substantial evidence in the record as a whole, and the Court should uphold that decision under FIFRA.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petitions for review for lack of statutory subject matter jurisdiction. If the Court finds that it has such

jurisdiction, it should dismiss the ESA claims for lack of Article III jurisdiction (or alternatively, reject those claims on the merits) and otherwise deny the petitions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: September 28, 2022

/s/ *Andrew D. Knudsen*
ANDREW D. KNUDSEN

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2022, I filed the foregoing via the Court's CM/ECF system, which will provide electronic notice to all registered counsel.

/s/ *Andrew D. Knudsen*
ANDREW D. KNUDSEN