ORAL ARGUMENT NOT YET SCHEDULED

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

American Soybean Association, et al. *Petitioners*, vs. Michael S. Regan, Administrator, U.S. Environmental Protection Agency, *Respondents*.	No.: 20-1445 Consolidated with No. 20-1441, 20-1484, and 21-1043

GROWER PETITIONERS' MOTION TO GOVERN FURTHER PROCEEDINGS BY EXTENDING STAY

INTRODUCTION

The United States Environmental Protection Agency has released three herbicide registrations authorizing over-the-top use of the herbicide dicamba on dicamba-tolerant soybean and cotton. Petitioners American Soybean Association and Plains Cotton Growers ("Grower Petitioners") believe aspects of those registration decisions (collectively, the "Dicamba Decision") are arbitrary and capricious and not supported by substantial evidence when considered on the record as a whole. Under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), registration decisions made without a "public hearing" are subject to

judicial review in the United States District Court, 7 U.S.C. § 136n(a), while registration decisions made following a "public hearing" are subject to review in the United States Court of Appeals, 7 U.S.C. § 136n(b). Neither FIFRA nor case law articulates a clear definition of the term "public hearing."

Because Grower Petitioners believe that EPA's Dicamba Decision was made without a "public hearing," Petitioners filed a petition for review in the United States District Court for the District of Columbia. *See Am. Soybean Ass'n v. EPA, et al.*, No. 20-cv-03190 (D.D.C.). To be safe, Grower Petitioners also filed substantively identical protective petitions in the appropriate United States Courts of Appeal in the event that EPA is determined to have conducted a "public hearing" under FIFRA. Because the district court likely is the proper jurisdictional venue for this dispute, Grower Petitioners move to extend the current stay of these proceedings. A stay would avoid duplicative parallel proceedings, preserve the status quo while the district court develops the case and resolves the issues presented in the first instance, and preserve Grower Petitioners' ability to challenge the Dicamba Decision in the event Grower Petitioners were required to bring their challenge in this Court.

BACKGROUND

These consolidated petitions concern three pesticide registrations (the Dicamba Decision) issued by EPA last year. Grower Petitioners filed the first challenge to the Dicamba Decision in the United States District Court for the District

of Columbia on November 4, 2020. *See Am. Soybean Ass'n v. EPA.*, No. 20-cv-03190 (D.D.C.). The next day, the American Soybean Association filed its protective petition in this Court (No. 20-1441) while Plains Cotton Growers filed its protective petition in the United States Court of Appeals for the Fifth Circuit (now No. 20-1484).[1]

Faced with two petitions challenging the Dicamba Decision within ten days of same, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel") conducted a consolidation lottery, as required by statute. *See Plains Cotton Growers v. EPA*, No. 20-1484 (D.C. Cir.), ECF No. 1874435, Doc. 4 (MDL Panel Consolidation Order) (citing 28 U.S.C. § 2112(a)(3)). The MDL Panel ultimately consolidated Grower Petitioners' petitions in this Court.

About three weeks later (and roughly a month and a half after Grower Petitioners filed their Dicamba Decision challenges), Consolidated Petitioners[2] filed a separate petition challenging the Dicamba Decision in the United States Court of

[1] Because the American Soybean Association and Plains Cotton Growers, Inc. do not "reside[] or ha[ve] a place of business" in the same circuit, FIFRA required that each party file separate protective petitions. *See* 7 U.S.C. § 136n(b). American Soybean Association also filed an identical petition in this Court (No. 20-1445) five days later, to account for potential ambiguity concerning the "effective date" of the Dicamba Decision. *See* 40 C.F.R. § 23.6.

[2] The "Consolidated Petitioners" are the National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and the Pesticide Action Network North America.

Appeals for the Ninth Circuit (No. 21-1043). Two days after that, Consolidated Petitioners filed a companion case in the United States District Court for the District of Arizona. *See Ctr. for Biological Diversity v. EPA*, No. 4:20-cv-00555 (D. Ariz.).

The day after Consolidated Petitioners filed their Ninth Circuit petition, EPA informed that court that because the MDL Panel consolidated the related petitions in this Court, 28 U.S.C. § 2112(a)(5) required that the Ninth Circuit "transfer those proceedings" here to this consolidated action. *See Ctr. for Food Safety v. EPA*, No. 20-73750 (9th Cir. 2020), ECF No. 11937642. The Ninth Circuit subsequently transferred the Consolidated Petitioners' challenge here, uniting all circuit court petitions challenging the Dicamba Decision in this Court.

ARGUMENT

I. This Court should temporarily stay these proceedings while the district court considers the same legal and factual issues.

Judicial review under FIFRA usually proceeds in one of two ways. On the one hand, challenges to "the refusal of the [EPA] Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law are judicially reviewable by the district courts of the United States." 7 U.S.C. § 136n(a). On the other hand, challenges "to the validity of any order issued by the Administrator following a public hearing" are reviewable "in the United States court of appeals . . . within 60 days after the entry of such order." 7 U.S.C. § 136n(b).

Because "[n]either FIFRA nor federal law articulates a definition of the term 'public hearing,'" assessing whether an EPA decision follows a "public hearing" is often a close call. *See Envtl. Dev. Fund v. Costle*, 631 F.2d 922, 927–28 (D.C. Cir. 1980).

Grower Petitioners believe their challenge to the Dicamba Decision belongs in the district court, where they filed the initial challenge to the Dicamba Decision.[3] Respondents appear to have issued the Dicamba Decision without hearings and without notice and comment, making the Dicamba Decision a "final action[] of the Administrator not committed to the discretion of the Administrator by law." *See* 7 U.S.C. § 136n(a). Because "[c]ourts have generally interpreted" FIFRA's public hearing provision "to include Agency orders following public notice and comment," Grower Petitioners' challenge to the Dicamba Decision should start in the district court. *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 102 n.3 (D.D.C. 2011) (citing D.C. Circuit and Ninth Circuit precedent). But given FIFRA's ambiguity and the statute's strict 60-day circuit court filing window, Grower Petitioners filed this action to preserve their right of review.

Because Grower Petitioners' district court and circuit court cases are substantively identical, and because the latter are merely protective, this Court

[3] Consolidated Petitioners apparently agree that jurisdiction properly lies in the district court. *See See Ctr. for Food Safety v. EPA*, No. 20-73750 (9th Cir. 2020), ECF No. 11944884 (Consolidated Petitioners' Motion to Quality as a Comeback Case) at 11 (arguing that review is proper in the district court because EPA did not undertake any notice and comment).

should temporarily stay this matter. Every federal court is inherently empowered "to control the disposition of the causes on its docket," considering "economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936); *see also Bledsoe v. Crowley*, 849 F.2d 639, 645 (D.C. Cir. 1988) (quoting *Landis* for the same proposition). When evaluating a stay, courts balance several factors (the *Landis* factors), including prejudice to non-moving parties, any hardship or inequity, and whether a stay would save "time and effort" for the court, counsel, and litigants. *Id.*; *see also Belize Social Dev. Ltd. v. Government of Belize*, 668 F.3d 724, 731–32 (D.C. Cir. 2012) (observing that *Landis* governs stays issued under a "court's inherent authority in the interest of judicial economy").

The *Landis* factors favor a stay. Above all, a stay promotes judicial economy. Because the district court is already considering the same factual questions, the same legal issues, and the same agency actions, all with the same parties, letting this case progress now "is a pointless waste of judicial energy." *See TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989). There is no need for duplicative parallel proceedings. Indeed, this Court has stayed similar FIFRA protective petitions to give the district court an opportunity to develop the legal and factual issues in the first instance. *See Ctr. for Biological Diversity, et al. v. EPA*, No. 14-1036 (D.C. Cir. June 13, 2014) (granting motion to stay a protective FIFRA petition on similar

grounds). Circuit courts, including this one, also stay protective petitions filed under other environmental statutes, so that the most appropriate venue can proceed. *See Texas v. EPA, et al.*, No. 18-1263 (D.C. Cir. Oct. 23, 2018) (holding a "protective petition" in abeyance pending other litigation); *Sierra Club v. EPA*, No. 18-9507 (10th Cir. Aug. 22, 2018) (granting a motion to stay a "protective petition" pending other litigation). Staying this case also avoids wasting judicial resources on unnecessary—and likely academic—procedural issues like which circuit court should retain "protective" jurisdiction.

Nor would a stay cause any prejudice. Indeed, the dicamba "registrants"—the companies whose dicamba products EPA "registered" through the Dicamba Decision—have intervened in the district court. If anything, then, the district court case is *more* protective of the collective parties' interests than these proceedings. Additionally, a stay would preserve Grower Petitioners' ability to challenge the Dicamba Decision in this Court in the event FIFRA required the action to be brought in the circuit court rather than the district court.

The limited duration of the continued stay also supports holding this case in abeyance. Grower Petitioners seek a short six-month stay, designed to give the district court time to begin resolving in the first instance the same issues presented here. Such a finite, tailored stay gives the district court time to develop its docket, preserves scarce judicial resources, and allows this Court to revisit its stay (if

necessary) soon. *See Belize Social Dev. Ltd*, 668 F.3d at 731-32 ("moderate" stays are favored over "indefinite," "immoderate" stays).

In sum, because the Dicamba Decision is properly before the district court, judicial economy and the balance of the equities support staying this case. After the district court issues an appealable order, jurisdiction will likely pass to this Court. But until then, letting this case proceed in parallel wastes judicial resources, risks unnecessary and inconsistent rulings, and undermines judicial efficiency.

CONCLUSION

For these reasons, Grower Petitioners respectfully request that the Court preserve the status quo by extending this Court's stay for six months.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 27(d)(1) and the word limit of Federal Rule of Appellate Procedure 27(d)(2) because it was typed using 14-point Times New Roman Font and, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 1,680 words.

/s/ Edmund S. Sauer
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Govern Further Proceedings by Extending Stay on all counsel of record, on April 23, 2021, through the Appellate CM/ECF system.

/s/ Edmund S. Sauer
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