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THE UNITED STATES DISTRICT COURT
OF ARIZONA

Center for Biological Diversity, et al., *Plaintiffs,* v. United States Environmental Protection Agency, et al., *Defendants.* and Bayer Cropsciences LP, et al., *Defendant-Intervenors.*	Case No. CV-20-00555-DCB **PLAINTIFFS' MOTION TO LIFT THE STAY AND MEMORANDUM IN SUPPORT** **(Oral Argument Requested)** **Expedited Hearing and Consideration Requested**

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Pursuant to Federal Rule of Procedure 7 and Civil Local Rule 7.2, Plaintiffs National Family Farm Coalition, Center for Biological Diversity, Pesticide Action Network, and Center for Food Safety (Plaintiffs) move to lift this Court's stay of the above-captioned proceedings, *see* Order, ECF No. 63, in light of the Environmental Protection Agency (EPA)'s recent December 2021 admissions that the challenged 2020 registrations (the 2020 Registrations) have continued to cause agricultural and environmental destruction, including potential harm to endangered species. *See* EPA, *Status of Over-the-Top Dicamba: Summary of 2021 Usage, Incidents and Consequences of Off-Target Movement, and Impacts of Stakeholder-Suggested Mitigations* (Dec. 15, 2021) (attached as Exhibit A) (the Report); *see also* EPA's Report Regarding Potential Future Regulatory Action, ECF No. 65. All parties agree that district courts are the proper jurisdiction for review of the 2020 Registrations. Thus, lifting the stay and allowing the present litigation to proceed is necessary to protect Plaintiffs' interests, U.S. agriculture, and the environment, and would not prejudice or cause any hardship to the other parties. Conversely, continuing a stay of the case risks significant harms to U.S. agriculture and the environment. Accordingly, Plaintiffs respectfully ask that the Court expedite consideration of the present motion, lift the stay, and grant Plaintiffs' Motion to Determine Jurisdiction, ECF No. 57.[1]

MEMORANDUM IN SUPPORT OF MOTION

On December 21, 2021, EPA issued a dramatic report that acknowledged for the first time what Plaintiffs have argued from the outset of this case: EPA's 2020 Registrations of the dicamba products do not comply with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Endangered Species Act (ESA) mandates to protect farmers and the environment. EPA now admits not only uncertainty regarding whether the 2020 Registrations continue to cause unreasonable adverse effects on the environment, but

[1] Defendants and Intervenors indicated that they oppose the present motion and will file oppositions.

uncertainty as to whether it can continue to defend itself in this very lawsuit.[2] Unsurprisingly, EPA's heavy reliance on many of the same label restrictions that allowed "enormous and unprecedented damage," *Nat'l Family Farm Coalition v. EPA* (*NFFC II*), 960 F.3d 1120, 1144 (9th Cir. 2020), in 2017 and 2018, as well as a handful of new restrictions resulted in—in EPA's own words—"little change in number, severity, or geographic extent of dicamba-related incidents." Ex. A at 43. Instead, rampant off-field dicamba drift from the 2020 Registrations has already damaged over one million acres—and EPA admits that reported acreage figure is a significant underestimate of the actual acres damaged. *Id.* at 18. Further, hundreds of these drift incidents occurred in sixty-three counties with endangered species concerns, "suggest[ing] the possibility that a 'take' could occur," *id.* at 5, meaning endangered species likely have been harmed by the 2020 Registrations. 16 U.S.C. § 1532(19) (defining "take").

EPA's recent admissions mark a drastic change in circumstances warranting a lift of this Court's stay. When this Court granted its initial stay, EPA stood firmly behind the adequacy of its assessments and label restrictions to prevent unreasonable adverse environmental effects and behind its no effect determinations for endangered species, and the extent of the dicamba drift damage caused by the 2020 Registrations was yet unknown. That is no longer the case.[3]

In the face of such overwhelming evidence of harm caused by the 2020 Registrations, rather than taking swift actions, EPA has chosen to simply notify this Court of the harm and declare its intention to do nothing to stop the harm now, in flagrant

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[2] Emily Unglesbee, *EPA Mulls Dicamba Changes*, Progressive Farmer (Dec. 7, 2021), https://www.dtnpf.com/agriculture/web/ag/crops/article/2021/12/07/epa-weighs-changes-dicamba-use (Meg Hathaway, a senior regulatory specialist within EPA's Office of Pesticide Programs stating "EPA is not sure that it can continue to defend the 2020 dicamba registration against a lawsuit that the agency is facing from environmental groups.").

[3] *Id.*

disregard of the law. *See* ECF No. 65 (informing the Court of "potential future regulatory action").[4] Media reports and meeting notes EPA released along with the Report show that weed science researchers, extension specialists, and states began telling EPA at least four months ago that the 2020 Registrations failed to mitigate another season of widespread harm. *See* September 2021 American Association of Pesticide Control Officials (AAPCO) Meeting Notes (Exhibit B); *see also* August 2021 Specialist Meeting Notes (Exhibit C). But EPA catered to the profits of the registrant pesticide companies and waited until the quiet holiday period to release this damning report, only to now claim that it is now too late to do anything since growers may have already purchased dicamba-resistant seeds for planting. Instead of acting to bring the 2020 Registrations into compliance and comply with its duties under FIFRA and the ESA to protect farmers and the environment, EPA ironically pledged its commitment to help individual states restrict dicamba spraying,[5] despite this very EPA decision removing (unlawfully) much of that state ability, and EPA's admission that many states lack the time and capacity for the only option EPA left them (formal rulemaking). Ex. A at 29.

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[4] There is no excuse for EPA's inaction in the face of overwhelming evidence of dicamba damage. EPA regularly seeks remand of pesticide registrations after-the-fact on the basis of merely *potential* harm, let alone the *certain* harm here. *See, e.g.*, Mot. Remand, *Rural Coal. v. EPA*, No. 20-73320 (9th Cir. Aug. 30, 2021), ECF No. 26-1 (requesting remand on certain aspects of its registration for the herbicide atrazine after concluding that the average atrazine concentration threshold used in EPA's assessment may not sufficiently protect aquatic ecosystems); Mot. Remand, *Rural Coal. v. EPA*, No. 20-70801 (9th Cir. May 18, 2021), ECF No. 82-1 (requesting remand of parts of EPA's interim registration decision on glyphosate to reassess its ecological risk assessment and complete effects determinations for endangered species); Mot. Remand, *Ctr. for Food Safety v. EPA*, No. 19-72109 (9th Cir. Oct. 26, 2020), ECF No. 51-1 (requesting remand after admitting that EPA failed to consider effects on endangered species prior to issuing the registration for the pesticide sulfoxaflor).

[5] EPA, *EPA Releases Summary of Dicamba-Related Incident Reports from the 2021 Growing Season* (Dec. 21, 2021), https://www.epa.gov/pesticides/epa-releases-summary-dicamba-related-incident-reports-2021-growing-season (December 21 Press Release).

This Court previously stayed the present proceedings due to parallel challenges to the 2020 Registrations in the D.C. Circuit ginned up by two agrochemical lobbying groups closely affiliated with the Intervenors. *See* Stay Order, ECF No. 64. EPA has now spent the past year allowing spraying of a pesticide that the Ninth Circuit found it had unlawfully approved just the year before, predicated on new label restrictions purporting to solve the many problems of the prior unlawful registrations, measures that now EPA admits do not work. Yet briefing before the D.C. Circuit will not even conclude until another season wreaks havoc on millions of acres across the U.S. Order, *Am. Soybean Ass'n v. EPA*, No. 20-1445 (D.C. Cir. Dec. 15, 2021), ECF No. 1926842 (setting briefing schedule with final briefs due in mid-August 2022). In light of the severity of ongoing harm to U.S. agriculture and the environment, including potential threats to endangered species, Plaintiffs respectfully request that this Court expedite briefing on Plaintiffs' present request to lift the stay. Because of EPA's inaction, the only chance to stop the unabated and known harm now moving like a freight train for this summer is for this Court to immediately lift the stay and allow the present case to proceed by granting Plaintiffs' Motion to Determine Jurisdiction.

LEGAL STANDARD

Just as a district court has broad discretion to stay proceedings, a court has broad discretion to lift a stay. *U.S. v. Fallbrook Pub. Util. Dist.*, No. 51CV1247-GPC(RBB), 2017 WL 1281915, at *2 (S.D. Cal. Apr. 6, 2017) (citing *Landis v. N. Am. Co.*, 299 U.S. 248 (1936)); *see also Akeena Solar Inc. v. Zep Solar Inc.*, No. C 09-05040 JSW, 2011 WL 2669453, at *2 (N.D. Cal. July 7, 2011) (quoting *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002)). Among other reasons and as most relevant here, "[a] court may lift the stay when 'circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate.'" *Fallbrook*, 2017 WL 1281915, at *2 (quoting *Canady*, 271 F. Supp. 2d at 75); *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV130883JGBSPX, 2017 WL 10581085, at *4 (C.D. Cal. June

5, 2017).

EPA's Report presents a ghastly account of the real-world impacts of the challenged 2020 Registrations warranting lifting the stay. "In determining whether to grant a motion to stay, 'the competing interests which will be affected by the granting or refusal to grant a stay must be weighed.'" *Id.* (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)). The interests to be considered by the court include: (1) the possible damage which may result from the maintenance of the stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* at 2. As detailed below, EPA's Report makes clear that harm to Plaintiffs' interests and the environment at-large from the 2020 Registrations is not just a possibility, it is an ongoing reality: EPA has told the Court that left up to its own volition, it is just going to let the same thing happen this summer. Nor would proceeding with the present litigation prejudice any party. The Court should lift the stay so that judicial review can proceed in as timely a fashion as possible.

ARGUMENT

From the start of this litigation, EPA has relied on three differences between the 2020 Registrations and the prior unlawful and vacated registrations: (1) new label restrictions; (2) a handful of new studies on the social, economic, and environmental impacts of over-the-top dicamba spraying; and (3) its revised endangered species assessment. With the Report, EPA now admits that the 2020 label restrictions and assessments EPA relied on to correct deficiencies in the vacated registrations have in fact failed to prevent another season of widespread dicamba drift. Instead, EPA found over one million reported soybean acres damaged in summer 2021, as well as reported damage to sugar beets, rice, sweet potatoes, peanuts, vineyards, cucurbits, vegetables, fruit trees, cranberries, cotton, tree nurseries, timber, landscape plants, home gardens, non-fruit trees, and native plant species. Ex. A at 43. This widespread damage, which EPA also recognizes is underreported

by as much as by 25-fold, *id.* at 9, has continued to result in social and economic impacts to farming communities. Nor did the 2020 Registrations offer any protection for the nation's imperiled species. As EPA admits, there have been nearly 300 dicamba drift damage reports in those vital counties where EPA knew there were endangered species and/or critical habitats, and despite EPA's 2020 registration measures. *See* Ex. A at 17. This Court should immediately lift the stay to protect Plaintiffs' interests and the interests of U.S. agriculture and the environment.

I. EPA Admits that the 2020 Registrations Continue to Violate FIFRA.

EPA's December 2021 findings confirm another growing season of dicamba drift detrimental to Plaintiffs' interests, and in support of Plaintiffs' claims that EPA failed to remedy the deficiencies found by the Ninth Circuit and support the 2020 Registrations with substantial evidence. Not only did EPA acknowledge widespread damage in the Report, but it made plain that numerous deficiencies under FIFRA previously found by the Ninth Circuit in reviewing the prior registrations—and that Plaintiffs again allege in this case—continued in the 2020 Registrations. EPA can no longer maintain its reasoning that the 2020 Registrations comply with the Ninth Circuit's decision and are supported by substantial evidence as required by FIFRA.

A. EPA Admits Its Latest Label Restrictions Made No Difference in Stopping Dicamba Drift Damage.

The Report leaves no question that the 2020 label use mitigations actually failed to prevent dicamba volatilization and drift. The hundreds of incident reports and more than one million damaged acres left EPA with little choice but to admit that "despite the control measures … 2021 incident reports show little change in number, severity, or geographic extent of dicamba-related incidents" in comparison to prior years. Ex. A at 43. Instead, there has been damage to at least one million acres of crops in at least 29 of the 34 states for which EPA registered dicamba, and EPA acknowledges that figure is a significant underestimate. Drift from these dicamba products injured not only crop fields, but also

over 160,000 acres of national wildlife refuge lands, Ex. A at 17, university research farms, cemeteries, churchyards, state fish and game properties, state natural areas, city parks, state parks, and county and state roads. *Id.* at 24. In fact, numerous states have reported their worst year of dicamba drift yet, including Minnesota where incidents *doubled* from the prior year, *see* Ex. B at 4, Kansas, *id.* at 6, and Missouri. *Id.* at 7 (impacted acres increased).

EPA's Report also details how, yet again, EPA's registration failed to provide feasible use instructions that farmers could actually follow in the real world despite their best efforts. This failure follows the Ninth Circuit's holding that EPA lacked substantial evidence to support the feasibility of complying with the prior 2018 label restrictions in light of "extensive evidence in the record" indicating a risk of "substantial non-compliance." *NFFC II*, 960 F.3d at 1139; *see id.* at 1141 (restrictions allowed for only 47 hours during June for legal spraying); *see also id.* at 1140 (agricultural company executive estimating he had 44 hours of application time during all of summer 2017). EPA now admits the same problem with "product usability" in the 2020 Registrations, Ex. A at 33, and acknowledges state reports that applicators did not adhere to cutoff dates by as much as four weeks. *Id.* at 34-35. In South Dakota alone, roughly two-thirds of the reported incidents of dicamba drift were directly tied to a label violation. *See* Ex. A at 35. And as EPA admits, these use violations happened in spite of extensive training designed to ensure applicators implement EPA's control measures. *Id.* at 37. This level of noncompliance is unsurprising, given that the 2020 Registrations only added more restrictions to the prior registration label that the Ninth Circuit already found "difficult if not impossible" to follow." *NFFC II*, 960 F.3d at 1124. Plaintiffs warned that the 2020 Registrations require many of the same infeasible restrictions, Am. Compl. ¶ 253, ECF No. 28, as well additional restrictions that further narrow the application window. Am. Compl. ¶ 258. EPA now agrees—admitting in the Report that the new restrictions, such as the new calendar date cutoff, "may have further increased difficulty in compliance by reducing the amount of time a grower could lawfully apply [over-the-top (OTT)] dicamba." Ex. A at 34.

Echoing EPA's admissions, states too continue to emphasize the impossibility of spraying the dicamba products under the current label restrictions. In early September, EPA met with the Association of American Pesticide Control Officials (AAPCO), which represents state pesticide control officials in the development of policies regarding pesticide application, and states repeatedly told EPA that "environmental conditions required on the label are so rare that it is impossible to follow," Ex. B at 1, and described the label as the "biggest, gnarliest label ever seen." *Id.* at 9. Specifically, state representatives explained that keeping applications within certain weather conditions is not functional, *id.*, and that temperature cut offs as detailed in the label are especially difficult in southern states where the temperatures get high early in the year. *Id.* at 10. Others explained that adhering to measures for cleaning would require applicators to spend *hours* every day cleaning out their tanks, *id.* at 9, and "there are simply not enough hours in a spray season to [spray dicamba] legally." *Id.* at 10. A representative from Minnesota expressed concern that *no applicator* has been fully in compliance with the label since 2018. *Id.* at 9.

But feasibility aside, EPA's Report also provides substantial evidence that the label restrictions neither reduce volatilization nor prevent spray drift. To the contrary, states reported that the majority of the hundreds of incidents from last summer resulted from volatility. Ex. A at 6, 21 (e.g., Nebraska, North Dakota, Missouri, Arkansas). Several states reported landscape level ("fence row to fence row") damage despite applicators doing their best to follow the labels. Ex. A at 21. State officials in Minnesota received reports that "dicamba is everywhere" and continues to damage entire fields in a pattern consistent with volatilization rather than drift. Ex. B at 4. Weed scientists similarly reported entire soybean fields damaged with no difference in severity across fields which is "clearly volatility." Ex. C at 3 (statement of Dr. Hager).

It only follows that EPA's 2020 control measures to prevent damage from volatility failed. And states and scientists agree. For example, numerous states including North Dakota, Tennessee, Ex. B at 1, Missouri, *id.* at 7, and South Dakota, *id.* at 8, reported that

EPA's new requirement to use volatility reduction agents (VRAs) simply did not reduce volatility. *See also* Ex. A at 37. Crucially, EPA now admits it never had information about the current availability of the required buffering agents. Ex. A at 32. And EPA's cutoff date for applying dicamba on soybeans, intended to reduce volatility, proved too late in the season for many states. For example, incidents in Minnesota doubled from 2020 following Minnesota's compliance with the federal cutoff date of June 30 instead of the cutoff date of June 20 from the year prior. Ex. B at 4. Further, Minnesota described EPA's removal of its FIFRA Section 24(c) authority to change this cutoff date to address volatility—yet another part of the 2020 decision challenged here—as "having their feet cut out from under them." Ex. B at 9.

In addition to volatilization and the resulting vapor drift, EPA's label restrictions also failed to prevent spray drift. EPA claimed its 110-foot downwind buffer, and 310-foot buffer (or 240 feet for soybeans with a qualified hood sprayer) with endangered species present, would render incidents from spray drift minimal. Am. Compl. ¶¶ 291, 304; Ex. A at 5. But both Texas, Ex. B at 6, and Kentucky, *id.* at 3, reported ongoing problems with damage from spray drift during the 2021 growing season. Again, these results are unsurprising given that small droplets remain aloft for considerable periods and are carried by even moderate winds to damage neighboring fields. Am. Compl. ¶ 90. EPA admitted from the start its "limited number of field studies" to support these new buffer zones, Am. Compl., Ex. A at 13, and expressed concern that the buffers and equipment "could add an additional layer of complexity and unintentionally result in misuse." Am. Compl. ¶ 307.[6] EPA's Report now further admits noncompliance with buffers was likely. Ex. A at 32.

The failure of these label restrictions directly supports two of Plaintiffs' primary claims in this case: EPA's lack of substantial evidence supporting the 2020 Registrations.

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[6] EPA, *Dicamba Use on Genetically Modified Dicamba-Tolerant (DT) Cotton and Soybean: Incidents and Impacts to Users and Non-Users from Proposed Registrations* 31-32 (Oct. 26, 2020) (hereafter Dicamba Incident Report).

Am. Compl. ¶¶ 358-68 (Claim 1); 374-77 (Claim 2). And EPA not only relied on these measures but described them as "*necessary* to approve these registrations," Am. Compl., Ex. A at 13. Plaintiffs have argued since the start of this litigation that EPA's determination of "minimal" negative impacts to farmers and agriculture due to the new control measures, *id.* at 17, lacks substantial evidence regarding both effectiveness and feasibility. EPA has now admitted this. These new admissions warrant lifting the stay.

B. Substantial Underreporting of Incidents Continued in 2021.

Second, the Report directly contradicts EPA's contention that complaints from 2017-2019 may have been overreported. Am. Compl., Ex. A at 8; Am. Compl. ¶ 244. Just the opposite: As in 2018, EPA still has substantial evidence before it that incidents in 2020 were *underreported* to EPA, now by approximately 25-fold. Ex. A at 9; *see also id.* at 31 (registrant estimating underreporting rate of 20 percent or more based on 6(a)(2) letters). For example, a survey of Midwestern specialty crop growers found that 45% of the nearly 300 growers had pesticide drift damage in 2020, but only an average of 6% reported this damage detected in 2019 and 2020. Ex. A at 31. EPA concluded that underreporting occurred due to no meaningful consequences to the offender, concerns over crop insurance claims, preserving neighbor relations, fear of having a non-marketable crop, and/or growers having worked out incidents amongst themselves. Ex. A at 31-32.

Once again, findings by state regulators confirm this. Representatives from states in which growers reported fewer incidents this past summer explained that these incidents still occurred but just went unreported. Ex. A at 21; *see also* Ex. B at 4-5 (Indiana, Minnesota, Ohio, and Oklahoma representatives all confirm underreporting). A Nebraska state representative estimated that for every acre of damage to soybeans reported this past summer, 10-20 acres went unreported. Ex. B at 7. Most alarmingly, for several states in the Midwest, experts and states explained this underreporting actually *increased* in 2021 due to severe drought intensifying visible crop damage and decreasing incident reporting. Ex. B at

1; Ex. C at 1. Growers' insurance policies for drought damage disincentivized reporting dicamba damage. Ex. C at 3.

This underreporting not only counters EPA's unsubstantiated claims of overreporting but reveals EPA's failure to correct yet another deficiency the Ninth Circuit found. The Ninth Circuit held EPA violated FIFRA due to "overwhelming" evidence supporting underreporting that contradicted EPA's "purported agnosticism" as to the damage being over or under reported. *NFFC II*, 960 F.3d at 1137. According to EPA's own documents, drift injury complaints spiked in 2017 and 2018, and EPA had "no explanation for the spike other than" the new over-the-top products. *Id.* Here, too, EPA has no other explanation. The Report admits that "while some small number of reported dicamba-like incidents may be the result of environmental stress or exposure to other pesticides, the Agency considers the preponderance of incidents to be the result of dicamba exposure." Ex. A at 6. And not just any dicamba exposure, but over-the-top exposure (e.g., the use approved in this registration). The Report explains that, given Indiana's restrictions, applicators likely did not use non-OTT products, suggesting the state's more than 130 incidents resulted from over-the-top dicamba products. *Id.* at 34.

C. The 2020 Registrations Continue to Cause Social Upheaval Within Farming Communities.

The Report also reveals that the 2020 Registrations continue to take a toll on the social fabric of rural communities. EPA dismissed this impact as "minimal" simply by speculating that such social costs, absent over-the-top dicamba, would continue to happen due to illegal use of other forms of dicamba that are currently registered by EPA. Am. Compl. ¶ 282.[7] But the reported social unrest is not minimal, ranging from strained relationships with neighbors and vandalism all the way to violent altercations and threats. Ex. A at 5. The representative from Nebraska reported that growers with damaged crops in

[7] *See also* Dicamba Incident Report at 46.

2021 continued to threaten "if the government didn't fix the problem they would take matters into their own hands, 'just like what happened in Arkansas a few years ago,'" referring to a fatal shooting that was caused by dicamba drift damage. Ex. B at 10.

EPA's acknowledgement of the dire social impacts again highlights its failure to correct the deficiencies noted by the Ninth Circuit. The Ninth Circuit held EPA's 2018 registrations had "torn apart the social fabric of many farming communities," an impact which the EPA had entirely failed to take into account. *NFFC II*, 960 F.3d at 1143. Yet again, EPA's failure to fully assess this impact led to another summer of grave social impacts, fear of reporting, strained relationships, and threats of violence.

D. Defensive Planting and Economic Impacts Continued.

Reports from academics presented to EPA also counter EPA's dismissal of the 2020 Registrations' anti-competitive effect. Several academics reported that this past summer, farmers purchased and planted dicamba-resistant seeds defensively to avoid damage from neighbors spraying. Ex. C at 1. EPA previously dismissed this impact because it had "no systematic study to determine how common [defensive planting] may be," Am. Compl. ¶ 271; Incident Report at 43, and because EPA speculated defensive planting could continue without the 2020 Registrations. Am. Compl. ¶ 278; Incident Report at 45. But as Plaintiffs laid out, EPA had more than enough evidence before it to have foreseen this impact academics acknowledge continued in 2021. *See* Am. Compl. ¶¶ 112; 272-276.

In striking down the prior dicamba registrations, the Ninth Circuit specifically held that EPA had "entirely failed to recognize the economic cost imposed by the coercion of [non-Dicamba Tolerant (DT)] farmers to convert to DT crops, and the resulting anti-competitive effect of that coercion." *NFFC II*, 960 F.3d at 1144. The Court held that the over-the-top registrations "create[] a substantial risk that DT soybeans, and possibly DT cotton, will achieve a monopoly or near-monopoly" and that this "anti-competitive effect" of the registrations would "impose a clear economic cost." *Id.* This new evidence confirms

again Plaintiffs' claims that EPA failed to remedy the deficiencies found by the Ninth Circuit and support the 2020 Registrations with substantial evidence.

II. The 2020 Registrations Violated the ESA.

The Report's findings further eviscerate EPA's "no effect" determinations for all endangered species but one. Not only did EPA *admit* the 2020 Registrations may have resulted in outright "takes"[8] to federally protected species in 63 counties, Ex. A at 5, it admitted that its rationale to arrive at the no effect determinations failed to account for numerous affected endangered species, as well as dicamba's propensity to volatilize and drift. In fact, EPA now claims that, based on the widespread dicamba drift, it is "no longer certain whether over-the-top dicamba can be used in a manner that is protective of listed endangered species, critical habitats and non-target plants."[9] Put in ESA's statutory language and sharply contrary to the registration conclusions of just a year ago, EPA has now admitted that the 2020 Registrations "may affect" endangered species and/or their critical habitats, triggering its duty to consult. *See* 50 C.F.R. § 402.13.[10] Most alarmingly, EPA now admits that potential takes could have occurred to *far more* endangered species than the 23 species EPA included in its initial assessment. *See* Am. Compl. ¶ 293; Ex. A at

[8] There is no question that potential takes fall into the category of "may affect," not "no effect." The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (defining "harass" as "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."); *id.* (defining harm as "an act which actually kills or injures wildlife," including significant habitat modification or degradation).

[9] Emily Unglesbee, *EPA Mulls Dicamba Changes*, Progressive Farmer (Dec. 7, 2021), https://www.dtnpf.com/agriculture/web/ag/crops/article/2021/12/07/epa-weighs-changes-dicamba-use.

[10] The "may affect" standard is extremely low: "[A]ctions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (emphasis added).

18. Yet rather than immediately pulling the 2020 Registrations off-market, EPA is still just "reviewing whether over-the-top dicamba can be used in a manner that does not pose unreasonable risks to … listed species and their designated critical habitats."[11] EPA's admission and inaction violate the ESA.

In fact, EPA has now admitted that the mitigation measures it relied on to unlawfully constrict its analysis to 23 in-field species failed. EPA initially claimed a 310 feet in-field downwind spray drift buffer (and 240 feet in soybeans with a hooded sprayer), as well as control measures for volatility (VRAs, application cut-off dates, and an in-field 57-ft omnidirectional volatile emissions application buffer) achieved a 95% probability that any effects would only occur in treated fields. Am. Compl. ¶¶ 304; 312; 405-6. But in the Report EPA acknowledges *at least* 290 off field incidents in 63 counties with endangered species, Ex. A at 18, and concedes that takes can occur more than a mile from the treated field. *Id.* at 26. As explained *supra* widespread damage continued off-field throughout 2021 despite EPA's control measures.

III. EPA Refuses to Take Any Action to Stop the Harm of the 2020 Registrations.

EPA has now acknowledged that, just like its predecessor registrations struck down by the Ninth Circuit, the 2020 Registrations are causing unreasonable adverse effects on agriculture and the environment. EPA also admitted that it has evidence that the 2020 Registrations may have affected endangered species and their critical habitats. But despite requesting remand without vacatur in numerous other instances *supra* note 4, here EPA has chosen to do the registrants' bidding and take no action.

In the Report, EPA rejected amending the 2020 Registrations to add further use restrictions—suggested by state agencies and experts—to curtail the widespread dicamba damage. EPA declined moving up the cutoff date for spraying dicamba because doing so

[11] EPA, *EPA Releases Summary of Dicamba-Related Incident Reports from the 2021 Growing Season* (Dec. 21, 2021), https://www.epa.gov/pesticides/epa-releases-summary-dicamba-related-incident-reports-2021-growing-season.

would "preclude applications later in the season." *See* Ex. A at 38. And even though EPA recognized that "[d]icamba volatilization … increases at a greater rate at temperatures above 80-85 degrees," EPA also rejected imposing a temperature-based cutoff date, because doing so "would reduce the number of hours or days available to users to apply dicamba." *Id.* at 38-39. EPA claims that these mitigation measures are "infeasible" because they would prohibit farmers from spraying the dicamba products later in the season—the very purpose and benefit EPA claimed in issuing the 2020 Registrations. *See* Ex. A at 4 (explaining that these dicamba products are "for post-emergence" weed control). Thus, according to EPA, the registered dicamba uses as applied under the terms of the 2020 Registrations are causing widespread dicamba damage and harming our nation's most sensitive species, yet there is no way to amend the Registrations without erasing the Registrations' sole benefit.

Despite admitting that there is no way to fix the 2020 Registrations, EPA nonetheless declined calls for EPA to cancel them. *See* Ex. A at 37. After sitting on these dicamba drift reports for months, EPA now insists it is too late to cancel the 2020 Registrations because growers may have already purchased dicamba-resistant seeds and the registered dicamba products. *See* Ex. A at 6. But nothing precludes these growers from recouping their investment in the seeds and dicamba products in a future season, if and when EPA figures out how it can approve these dicamba uses without causing unreasonable adverse effects on agriculture and the environment, as required under FIFRA. Moreover, the Ninth Circuit has already rejected EPA's excuse when it vacated the prior registrations, holding that the fact that some farmers may have purchased this technology does not negate EPA's duty to support the registrations with substantial evidence. *See NFFC II*, 960 F.3d at 1145 (acknowledging the difficulties to growers who purchased seeds but "the absence of substantial evidence to support EPA's decision compels us to vacate the registrations").

Nor is cancellation the only option EPA has under FIFRA. As discussed *supra*, EPA could—but refused—to amend the 2020 Registrations with further restrictions to prevent

further dicamba damage. Additionally, under FIFRA, EPA could issue a stop sale order to halt the sale and use of any pesticide so long as "there is reason to believe … that such pesticide is in violation of [FIFRA]." 7 U.S.C. § 136k(a). EPA has admitted as much, notifying this Court that "the nature and extent of" the harms caused by the 2020 Registrations "have led EPA to consider further regulatory action." ECF No. 65. FIFRA also authorizes EPA to immediately suspend a pesticide's registration if "necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings." 7 U.S.C. § 136d(c). The harm from the 2020 Registrations is not imminent; it has already occurred. EPA must not be allowed to do nothing but simply sit back and allow the same harm to farmers, endangered species, and the environment to unfold again. The Court should lift the stay now.

IV. Proceeding with Litigation on the Merits Will Serve the Orderly Course of Justice and Will Not Result in Hardship to Any Party.

Finally, proceeding with litigation in this Court will serve the orderly course of justice and avoid hardship to any party for several reasons. First, all parties agree jurisdiction is proper in this court. Intervenors and EPA have argued throughout this case that district court jurisdiction is unequivocally proper. *See* Pls.' Mot. Determine Jurisdiction, ECF No. 57; EPA's Mot. Dismiss, *Am. Soybean Ass'n v. EPA*, No. 20-1441 (D.C. Cir. filed Apr. 23, 2021), ECF No. 1895893; Intervenors' Resp. Mots. 22, *Am. Soybean Ass'n v. EPA*, No. 20-1441 (D.C. Cir. filed May 17, 2021), ECF No. 1898982. They have disagreed that any jurisdictional ambiguity exists, asserting that district court jurisdiction is proper under FIFRA. Plaintiffs agree that there is supporting caselaw for this position. *See* Pls.' Mot. Determine Jurisdiction 2-6.

Second, lifting this stay now will avoid further hardship to Plaintiffs and is in the public interest. EPA has now admitted the 2020 Registrations have caused significant harms last summer, but has chosen to do nothing to prevent further injuries to Plaintiffs. Plaintiffs have maintained throughout this litigation that the 2020 Registrations harm

members with home gardens, farms, orchards, and vineyards in Arizona, Am. Compl. ¶¶ 330-343, *e.g.*, Bloomfield Decl. ¶¶6-10, ECF No. 41-1, and members with strong, longstanding interests in endangered species, such as the Southwestern willow flycatcher, the yellow-billed cuckoo, and the Chiricahua leopard frog and their habitat, Am. Compl. ¶¶ 344-360; Suckling Decl. ¶¶ 7-17 ECF No. 41-4, Silver Decl. ¶¶ 14-17, ECF No. 41-2. Now, EPA has provided proof: more than a million acres damaged, hundreds of incidents near endangered species, and confirmation that label restrictions failed to mitigate widespread damage.

Third, proceeding in this Court provides the only chance to stop another summer of unprecedented damage from the 2020 Registrations. EPA has rejected potential amendments to the 2020 Registrations and chosen to take no regulatory action. *See supra* at 14-16. Yet continuing the present stay pending outcome of the D.C. Circuit litigation would mean another season of harm, since the briefing schedule in the D.C. Circuit does not even begin until late March and concludes in August 2022, assuming no further extensions. *See* ECF No. 1926842. Considering that decisions on the merits in the D.C. Circuit can take years, EPA's Resp. Mot. Stay, ECF No. 48, at 2; Intervenors' Opp'n Mot. Stay, ECF No. 47, at 13, EPA could very well get away with not only the 2022 growing season, but even a third or fourth season, despite admitting its 2020 Registrations violate FIFRA and the ESA. And that is not the end, only the start, with the overwhelmingly likely result of the D.C. Circuit case then being returned to the currently stayed D.C. district court case to start anew based on a finding of a lack of appellate jurisdiction.

CONCLUSION

EPA has admitted the insufficiency of its assessments and label restrictions to prevent further widespread damage from its 2020 Registrations. This Court should not allow another summer of damage from registrations EPA now admits may cause unreasonable adverse environmental effects and takes of listed species. Instead, this Court can resolve this case on the merits and immediately lift the stay.

Respectfully submitted this 6th day of January, 2022.

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