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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 CropScience LP, et al., *Defendant-Intervenors.*	Case No. CV-20-00555-DCB **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Oral Argument Requested

NOTICE OF MOTION

Pursuant to Local Rule of Civil Procedure 56.1 and Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Center for Biological Diversity, National Family Farm Coalition, Pesticide Action Network, and Center for Food Safety (Plaintiffs) hereby move for summary judgment on all claims of their Third Amended Complaint for Declaratory and Equitable Relief on the grounds that the Environmental Protection Agency's (EPA) approval violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA). This motion is based on the pleadings and Administrative Record on file in this case and the Statement of Facts based on that Record, the points and authorities herein, and the declarations submitted herewith.

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GLOSSARY

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FIFRA	Federal Insecticide, Fungicide, Rodenticide Act
FWS	Fish and Wildlife Service
LOC	Level of Concern
NAS	National Academy of Sciences
NMFS	National Marine Fisheries Service
NOAEC	No Observed Adverse Effect Concentration
OTT	Over-the-Top
PCE	Primary Constituent Elements
RQ	Risk Quotient
VRA	Volatility Reduction Adjuvant
VSI	Visual Sign of Injury

INTRODUCTION AND SUMMARY OF ARGUMENT

Today's summary judgment filing has been some time coming, for multiple reasons beyond Plaintiffs' control. And it is comprehensive, as Plaintiffs have endeavored to provide the Court with the clearest picture possible, marshaling all the evidence and setting forth the lengthy background. But stepping back, this case is also quite straightforward. Less than three years ago, the Ninth Circuit held unlawful EPA's controversial dicamba approval for multiple reasons and vacated its registration. The court's factual findings cataloged the damning, unprecedented record of widespread harm from dicamba drift to farmers and the environment. The court gave a long laundry list of errors for EPA to fix, if it were to try and re-register the same dicamba use. Most importantly, EPA had to actually analyze and *weigh* the costs of drift damage to farmers, and could not rely on an unrealistic, impossible label to conclude dicamba use does not cause unreasonable adverse effects, when all the evidence screams that it does. Instead, EPA, under the prior administration, rushed to re-approval in a matter of months, fixing *none* of it, thumbing its nose at the court.

EPA also found new, different ways to violate FIFRA, ignoring additional costs and adverse impacts, like harm to trees and orchards, and harm from dicamba runoff and contaminated rainwater. This time EPA mysteriously registered dicamba use under the harder unconditional standard, but without meeting any of the prerequisites for it. And in its rush, EPA skipped no less than *three* separate required public notice-and-comment processes (any of which would have put the case back right before the Ninth Circuit on direct review). And last, but definitely not least, EPA continued to flout its ESA responsibilities, refusing to seek the guidance of the expert wildlife agencies to protect endangered species from dicamba harm, despite putting literally hundreds of species at risk.

Any of those violations, let alone all of them, are more than enough. But there's still

more: the new administration's EPA put out an absolutely damning 2021 report basically admitting its mitigation in the 2020 Decision had failed, showing drift harm continuing or worsening and admitting harm to endangered species, and consequently admitting that even EPA—the responsible defendant agency—was not sure the registration complied with FIFRA and the ESA. And then did… essentially nothing about it.

And so it's left to this Court. This is an important case with a lengthy record, but in terms of outcome it is crystal clear: Plaintiffs are entitled to summary judgment, and the Court should vacate the 2020 Decision.

PROCEDURAL HISTORY[1]

This case is the latest chapter in a series. In this case's direct precursor, the Ninth Circuit struck down Defendant EPA's registration of the same over-the-top use of dicamba at issue in this case. *Nat'l Fam. Farm Coal. v. EPA*, 960 F.3d 1120, 1124, 1144–45 (9th Cir. 2020) (*NFFC*). The Court held EPA violated FIFRA six separate ways, *id.* at 1124, 1144 (summarizing holdings), separated into two parts: EPA "substantially understated three risks it acknowledged" and "also entirely failed to acknowledge three other risks." *Id.* at 1124. As that case was heard on direct appellate review, the court's detailed decision was also filled with factual record findings recounting the catastrophic result for farmers and the environment from EPA's novel registration: millions of acres of off-field dicamba drift, as well as damage to crops, wild plants, and native ecosystems each growing season since EPA first approved over-the-top spraying in 2016. *Id.*; *see* Pls.' Stmt. Facts (SOF) ¶¶ 17–53 (filed concurrently).

The first group of holdings all related to costs to farmers from dicamba drift. The Ninth Circuit held that EPA understated the dicamba amount sprayed (and thus the drift harm from it), *id.* at 1124, 1136, improperly minimized the amount of under-reporting of

[1] The Statement of Facts is submitted separately per the Court's rules and covers the procedural history in more detail.

drift damage, *id.* at 1137–38, and, despite the copious record evidence of drift harm, in its registration decision "refused to quantify or estimate the amount of damage caused" by drift as an economic cost. *Id.* at 1138.

As to the second group of violations, the Ninth Circuit first held that EPA had predicated its registration on unrealistic and unanalyzed mitigation, entirely failing to account for the substantial non-compliance with the dicamba use instructions or grapple with the near impossibility of following the label in real-world farming conditions, and what that would mean for increased drift damage. *Id.* at 1144. That is, the Court held that EPA improperly based its approval on the premise that the label's mitigation would be followed and thus limit off-field drift, when the record evidence showed that label instructions were "difficult if not impossible" to follow. *Id.* at 1124. Second, EPA similarly failed to recognize and factor in another, separate "clear" economic cost: drift damage coercing farmers to defensively adopt dicamba-resistant crops, and its anti-competitive, monopolistic ramifications. *Id.* at 1142. Finally, EPA entirely failed to consider the social costs to farming communities: dicamba drift had "torn apart" their "social fabric," pitting neighbor against neighbor, causing damage to crops and also trees and gardens. *Id.* at 1143. For these reasons, the Ninth Circuit held EPA's decision was contrary to the record and the agency had "failed to perform a proper analysis of the risks and the resulting costs of the uses." *Id.* at 1144.

As to remedy, the Ninth Circuit vacated EPA's decision, finding it "exceedingly unlikely" EPA could (lawfully) issue the same registration again and that EPA failed to overcome its burden of showing why vacatur is not warranted. *Id.* at 1145. EPA subsequently issued its own "final cancellation order" for the dicamba uses. SOF ¶ 54.

Yet four months later, in late October 2020, EPA re-approved over-the-top dicamba

spraying,[2] and Plaintiffs filed this corresponding case. Compl., ECF 1. In December 2021, with a year's worth of evidence under the new registration, EPA issued a damning report (the Report) revealing significant drift damage continuing despite the 2020 Decision's mitigation measures and openly admitting that the agency was no longer sure if the registration could be sustained under FIFRA or the ESA. EPA subsequently minorly revised the 2020 Decision with superseding amendments for a handful of states but otherwise decided to largely leave it as is, twice, in March 2022 and in February 2023. Notices, ECFs 73 & 137. Each time, Plaintiffs supplemented their Complaint to encompass the most recent EPA decisions. Am. Compls., ECFs 84 & 149.

STANDARDS OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

Under the APA, a court must "hold unlawful and set aside" agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2). In determining if an action is "arbitrary and capricious," courts evaluate whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

[2] Plaintiffs refer to EPA's continued approval of over-the-top dicamba use collectively as the Decision or the Registration Decision, and specify agency decisions by year (2020 Decision, 2022 Decision, or 2023 Decision) where appropriate.

agency expertise." *Id.*

In APA review, the Court must conduct a "searching and careful inquiry, the keystone of which is to ensure that the [agency] engaged in reasoned decision making." *Nw. Coal. for Alts. to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotation omitted). The APA standards apply here. *See, e.g.*, *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 656 (9th Cir. 2022) (explaining that "because the ESA does not specify a standard of review, we review EPA's compliance under the [APA]"); *Ellis v. Housenger*, 252 F. Supp. 3d 800, 808 (N.D. Cal. 2017) (reviewing FIFRA challenge under 7 U.S.C. § 136n(a) under APA standards); *Friends of Animals v. EPA*, 383 F. Supp. 3d 1112, 1120 (D. Or. 2019) (holding APA standards for "other final actions" of EPA under § 136n(a)).[3]

SELECT STATUTORY BACKGROUND[4]

FIFRA: In registering pesticides, the core standard is the "unreasonable adverse effects" standard. That is, EPA applies a cost-benefit analysis "to ensure that there is no unreasonable risk created for people or the environment from a pesticide." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 522–23 (9th Cir. 2015). That cost-benefit analysis "is the *critical determination* that the pesticide complies with FIFRA's safety standard." *NRDC*, 38 F.4th at 53 (emphasis added). Congress anticipated that EPA's balancing of costs and benefits would "take every relevant factor [the agency] can conceive into

[3] FIFRA also provides its own standard of review for direct appellate review: EPA must support registrations with "substantial evidence." 7 U.S.C. § 136n(b). Like APA review, the agency's reasoning "must also be coherent and internally consistent." *Nat. Res. Def. Council v. EPA (NRDC)*, 38 F.4th 34, 44 (9th Cir. 2022). Given that this case was previously heard via that provision, and the difference is EPA's (unlawful) failure to hold notice-and-comment, *see supra*, there is some question if it should also apply. Regardless, the standards are similar, and any difference between them is irrelevant, as EPA's 2020 Decision does not pass muster under either. *See, e.g., Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) (Scalia, J.) (holding "there is no *substantive* difference between" arbitrary and capricious and substantial evidence tests).

[4] For more detail, *see* ECF 149 ¶¶ 43–97 (pp. 17–32).

account," S. Rep. 838, 92d Cong. 2d Sess., reprinted in 1972 U.S.C.C.A.N. 3993, 4032–33, and thus defined "unreasonable adverse effects on the environment" to mean "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." 7 U.S.C. § 136(bb).

The challenged 2020 Decision is an "unconditional" registration, which EPA can only grant if it concludes that the pesticide (1) "will perform its intended function without unreasonable adverse effects on the environment," *id.* § 136a(c)(5)(C), and (2) "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(D); *see also* 40 C.F.R. § 152.112(e).

FIFRA also requires that EPA hold notice-and-comment for pesticide registrations that create, *inter alia*, a "changed use pattern," 7 U.S.C. § 136a(c)(4), which EPA interprets to include, *inter alia*, "any additional use pattern that would result in a significant increase in the level of exposure, or a change in the route of exposure, to the active ingredient of man or other organisms." 40 C.F.R. § 152.102; *id.* at § 152.3 ("new use"). Finally, after a pesticide cancellation, EPA's regulations impose even more procedural requirements and a heightened standard for un-canceling and re-approval. *See* 40 C.F.R § 164.

ESA: Congress enacted the ESA to ensure the survival and recovery of endangered species. 16 U.S.C. § 1531(b), (c). Unlike FIFRA's cost-benefit analysis, Congress made a "conscious decision" to give endangered species priority over the "'primary missions' of federal agencies." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

Section 7 is the ESA's "heart," crucial to the recovery of ESA-protected species. *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir. 2012) (en banc). Through it, EPA has a substantive duty to "insure" authorizations of pesticides are not likely to jeopardize any species or adversely modify any critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. To satisfy its substantive duties, EPA has a procedural duty: evaluating the registration's effects "in consultation with and with the assistance of" the agencies that—

unlike EPA—Congress designated as having endangered species expertise any time EPA determines its actions "may affect" protected species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(a), 402.01(b). "[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because [they] are designed to ensure compliance with the substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original), *abrogated on other grounds by Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088–89 (9th Cir. 2015).

APA: Under the APA, agency actions that qualify as rules must go through notice-and-comment. 5 U.S.C. §§ 553(b), (c). The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). Legislative rules are agency decisions that "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003).

ARGUMENT[5]

I. The Registration Is Arbitrary and Capricious, Contrary to FIFRA and the APA.

EPA has been sitting on dynamite since rushing to re-issue the challenged dicamba use approval in late 2020 (the 2020 Decision). And by December 2021—then with a year under the new registration—EPA had compiled the dicamba drift evidence, *see* U.1 (the Report), and the results were *devastating*: the registration measures that registrants and EPA assured stakeholders would, this time, finally halt the problem had utterly failed.

The evidence left EPA little choice but to admit that "despite the control measures

[5] Plaintiffs have standing because the Decision injures Plaintiffs' professional, economic, environmental, aesthetic, and recreational interests. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977). *See* Clauser Decl.; Bradley Decl.; Newman Decl.; Hess Decl.; Limberg Decl.; Faux Decl.; Mormann Decl.; Smith Decl.; Buse Decl.; Trimble Decl.; Nelms Decl.; Suckling Decl.

... 2021 incident reports *show little change* in number, severity, or geographic extent of dicamba-related incidents" compared to prior years. Ex-R.9 at 2 (emphasis added); U.1 at 43. [redacted], U.1 at 9, 30 & 43, and drift hit between 65,000 to over a quarter-million soybean fields, indicating damage to as many as *15.6 million* farmland acres. A.6 at 31, tbl.8. [redacted], U.1 at 18, tbl.3, fn.1, [redacted]. *Id.* at 18 tbl.3, fn.5; *see also id.* at 17.

[redacted], *id.* at 17, [redacted] *Id.* at 24. [redacted] *Id.* at 5.

These are all reasons why EPA said in its official release accompanying the Report that it was no longer sure "whether over-the-top dicamba can be used in a *manner that does not pose unreasonable risks* to non-target crops and other plants, or to listed species and their designated critical habitats." Ex-R.10 at 2;[6] *see also* Pls.' Mot. Complete, ECF 108; Ex-R.9 at 2–3. Thus, the agency was "evaluating all of its options for addressing future dicamba-related incidents." Ex-R.10 at 3 (EPA repeated this verbatim to the Court later, *see* EPA's Opp'n, ECF 67 at 3). Even more bluntly, EPA admitted to reporters that the agency was not even sure it could "continue to defend the 2020 dicamba registration" as it was in this lawsuit. Ex-R.11 at 2 ("[W]e [EPA] do have significant concerns about the ability for us to continue to make arguments in the ongoing litigation. ...[W]e are examining our ability to continue to defend it.").

[6] For the Court's convenience, Plaintiffs concurrently reattach the extra-record materials cited to in Plaintiffs' pending Motion to Complete/Supplement the Administrative Record, ECF 108, and distinguish them from the record citations by "Ex-R."

Yet in March 2022, four months later, when EPA did finally act, it was a whimper, not a roar: it only made minor registration amendments for two of 34 states (Minnesota and Iowa), including a June 20th cutoff in Iowa, and a June 12th cutoff and 85-degree temperature restriction for part of Minnesota. *See* ECF 73-1. Beyond that, EPA declared that the 2022 Decision "does not affect any conditions that were previously imposed on this registration," Q.9 at 1, and that the agency did not prepare a "new ecological risk assessment" beyond what it had done in 2020. *Id.* at 2.[7] *In other words: everything we said in 2020 in terms of the Decision and risk assessment, still goes.*

Given the minor 2022 amendment, and for only two states, it was perhaps no surprise that the 2022 season turned out to be just as disastrous. *See* SOF ¶ 157 ("EPA has reason to believe dicamba-related incidents continued through the 2022 growing season as well."). Yet now faced with a *second* chance to fix the 2020 Decision, instead EPA again largely just doubled down on it, this time making minor changes to further restrict over-the-top dicamba use in three more states (Iowa again, plus Illinois, Indiana, and South Dakota), merely tightening the application dates in those states. *See* SOF ¶ 158. EPA's actions are classic arbitrary and capricious agency action, contrary to the record before the agency at the time and failing to make a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

First, the scope of EPA's 2022 & 2023 Decisions is arbitrary and capricious. There are multiple aspects of the 2020 Decision that the Report and the Record exposed as wholly inadequate, yet EPA did not even attempt to address them, in either 2022 or 2023. The 2022 Decision only covered two states, when the Report showed drift harm continuing in 29 of 34 states; the 2023 Decision made changes in three more states, when the Record showed that multiple states sought further use restrictions. SOF ¶¶ 159–160,

[7] EPA used the same language for the other product registration amendments. *See also* ECFs 73-1 & 73-2 & 73-3; S.1; R.9.

168, 171. EPA "entirely failed to consider" these myriad problems. *Id.*

Unrealistic reliance on an impossible label: For example, [redacted]. *NFFC*, 960 F.3d at 1139–41 (detailing "extensive evidence" of the real-world difficulty in complying and citing numerous examples of how few hours the extensive restrictions left available for legal spraying). [redacted], U.1 at 33–34, [redacted] *Id.*; SOF ¶¶ 117–125.

Yet EPA's 2022-2023 Decisions did nothing to address the problem. *State Farm*, 463 U.S. at 43. [redacted]. U.1 at 38.

Volatility: And lack of feasibility aside, [redacted]. U.1 at 6, 21; SOF ¶ 122–124. [redacted] *Id.* at 37; *see* SOF ¶ 125.

The same can be said for all the other critical failings the Ninth Circuit found, *NFFC*, 960 F.3d at 1124, 1144, and that EPA claimed to have assessed and remedied, including: buffers' inadequacy; under-reporting of drift incidents; social costs to farming communities; and economic costs, including monopolistic effects.[8] The Report revealed

[8] *See* SOF ¶¶ 55–82; Mot. Lift Stay, ECF 66 at 10–13 (and citations therein).

that all continued and in some cases *worsened*. Yet EPA in its 2022-2023 Decisions arbitrarily and capriciously failed to address *any* of them. *State Farm*, 463 U.S. at 43.

Second, there is also a major "failure to explain" APA violation. In light of the new evidence summarized in the Report, EPA said it was re-reviewing "*whether* over-the-top dicamba can be used in a manner that *does not pose* unreasonable risks to non-target crops and other plants, or to listed species and their designated critical habitats." Ex-R.10 at 3 (emphases added). In other words, EPA admitted it was not sure whether the Decision might be posing unreasonable risks. This makes sense, considering widespread damage in the Report and potential jeopardy to endangered species from incidents in ESA counties.

Yet under FIFRA and the ESA, EPA *must* be sure of the opposite: first that the Decision will "*not* generally cause unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(D) (emphasis added); 40 C.F.R. § 152.112(e); and second that the Decision is not likely to jeopardize any federally listed species or adversely modify any designated "critical" habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

It follows then that EPA needed to explain how its 2022-2023 Decisions cleared up its own admitted uncertainties, yet EPA failed to explain: (1) how the amendments address the many problems with the Decision that the Report revealed; and (2) how the amendments meet EPA's FIFRA and ESA statutory duties in light of the Report (and its own prior statements about its import). *A Community Voice v. EPA*, 997 F.3d 983, 986 (9th Cir. 2021) (holding that a "failure to explain" how addressing a harm by an agency in the "face of mounting evidence" of that danger is arbitrary and capricious).

Instead, EPA's sparse rationale[9] for the 2022-2023 Decisions raises more questions than answers. In March 2022, [redacted]

[9] Any explanation the agency provides now is *post hoc* litigation positioning that cannot sustain the Decision. *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 877 (9th Cir. 2013) ("'It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'") (quoting *State Farm*, 463 U.S. at 50).

[redacted] U.1 at 38, EPA suddenly found it "likely" that more restrictions would *help* the situation without any explanation of their feasibility in real-world farming conditions. Q.9 at 1–2; R.9 at 1–2; S.1 at 1–2. EPA then based its 2022 Decision (a June 20th cutoff date for Iowa and June 12th/85-degree temperature restriction for southern Minnesota) solely on the 2020 ecological risk assessment's general conclusion that volatility is reduced in lower temperatures, without explaining why then the 2020 assessment would not also support such restrictions in the 27 other states that also experienced significant damage. *Id.*

And after another season of widespread damage in 2022, *see* SOF ¶¶ 157–165, EPA again found it "likely" that the 2023 Decision would reduce volatility based again on the 2020 assessment and alleged success in Minnesota. SOF ¶ 170. But according to states and academics, the 2022 growing season in Minnesota did not provide a reliable metric for whether the June 12th cutoff date reduced damage (due to an unusually wet spring preventing many growers from using dicamba before the cutoff date as well as underreporting following five years of growing dicamba fatigue). Stevenson Decl., Ex. I at 1; Ex. H at 5; Ex. K at 26 (filed concurrently). And Bayer admitted that its amendment rationale (adopted by EPA) was not based on peer-reviewed studies. Z.41 at 4.

Nevertheless, EPA moved forward with the 2023 Decision in four states because they accounted for a "significant" percentage of off-target movement in the last three years. [redacted] U.1 at 18, tbl.3. [redacted] Nowhere did EPA explain how its 2023 Decision will mitigate damage in those states.

Finally, nowhere did EPA explain how the 2023 Decision will protect federally

protected species. Even if the additional restrictions do protect species in Indiana, Illinois, Iowa, Minnesota, and South Dakota, [redacted] U.1 at 18.

II. EPA Failed to Fix the Violations the Ninth Circuit Held.

Even without the Report confirming the hard truth—that the 2020 Decision failed to prevent unreasonable adverse effects and risks to endangered species—there was plenty of evidence this would be the result. In the frantic months—SOF ¶¶ 55–60—between the vacatur of the prior approval and the 2020 Decision, EPA tried to paper over the violations the Ninth Circuit had held, but it could not fix them.

A. Unreasonable Reliance on Infeasible Use Instructions

The Ninth Circuit held that EPA failed to study and account for the fact that, under the 2018 label measures approved, farmers could not both follow directions and control weeds. *NFFC*, 960 F.3d at 1139–42, 44. But just months later EPA again relied on many of the *exact same* mitigation use instructions, despite the fact that in prior seasons they had proved "difficult if not impossible to follow." *Id.* at 1124, 1140–41; *see* SOF ¶ 70 (listing measures). Indeed, the 2020 Decision not only included but *added to* the complex directions the court previously found deficient, producing a myriad of evidence that in the real world of farming they cannot be followed in most cases. *See* SOF ¶¶ 117–125. EPA relied on these measures' effectiveness to support its no "unreasonable adverse effects" determination in 2018 and has done so again. Yet EPA has again improperly failed to account for the risk of users' inability to follow these instructions despite their best efforts.

Importantly, EPA wrongly presents the crux of this issue as applicators' inability to properly understand a complex label, E.3 at 4 ("[redacted]"); E.17 at 4 ("[redacted]

[redacted]"), when the real issue is that the weather-related usage instructions are so numerous and restrictive as to make it impossible, on a consistent basis in the real world, to successfully use the products for their intended purpose of weed control while still complying with the label. *See* SOF ¶¶ 117–125, 42–47, 72.

B. Drift and Its Economic Costs

The Ninth Circuit also held that EPA violated FIFRA multiple ways with regards to drift's economic costs: EPA understated the amount sprayed, improperly minimized under-reporting of incidents, and overall for its cost-benefit analysis "refused to quantify or estimate the amount of damage caused." *NFFC*, 960 F.3d at 1124, 1136–38.

And just as in 2018, the Record before EPA in 2020 was replete with evidence of crop damage, as well as injury to beekeepers, orchards, vineyards, and non-agricultural trees and plants ensuing from dicamba drift.[10] *See* SOF ¶¶ 77–79.[11] Such damages resulted in significant yield losses, and in the case of perennial plants like fruit and ornamental trees, recultivation of the damaged trees to maturity meant economic losses for multiple years. *See id.*

Yet despite the Ninth Circuit's unambiguous instruction, *nowhere* in the 2020 Decision documents did EPA assess, quantify (or even provide rough estimates) and weigh the costs of farmers' losses, or economic impacts to seed companies and other stakeholders as a result of off-target drift. (EPA did not do so in the Report *either*.) Instead, the best EPA could muster was vaguely acknowledging that "non-users may experience impacts from crop

[10] EPA also again made the same unfounded claim that "there may have been issues of overreporting," A.4 at 8, despite the Ninth Circuit finding no evidence to support this. *See NFFC*, 960 F.3d at 1137.

[11] In fact, the 2020 Decision Record is even *stronger* than before because of market harm evidence from class action damages litigation over dicamba drift since, evidence EPA had. *See, e.g.*, *Bader Farms, Inc. v. BASF Corp.*, 39 F.4th 954 (8th Cir. 2022). *See* SOF ¶ 78.

injury or increased costs resulting from offsite movement of dicamba." A.6 at 7. This does not come close to complying with the Ninth Circuit's directive.

C. Economic Costs: Anti-Competitive, Monopolistic Effects

The Ninth Circuit also held EPA failed to consider another separate but equally "clear" economic cost that is "virtually certain" to stem from the Decision: the coercive effect of drift forcing farmers to defensively buy dicamba-resistant seeds and its anticompetitive, monopolistic ramifications. *NFFC*, 960 F.3d at 1142. Again, if anything, the 2020 record evidence of this cost was even stronger than previously. *See* SOF ¶¶ 78; A.6 at 43–44 (EPA's data analysis indicating "large proportion" of dicamba seeds remain untreated relative to other herbicide tolerant soybean, indicating growers plant defensively since only half of dicamba-resistant soybean and 60 percent of dicamba-resistant cotton acreages receive over-the-top spraying).

Yet in the 2020 Decision EPA *still* meaningfully never "took into account this cost." *NFFC*, 960 F.3d at 1142. While EPA concedes that defensive planting could entail "increased cost and/or reduced yields," A.6 at 45, it provides no *assessment* of these costs to either farmers or seed dealers. Nor did EPA attempt to actually *weigh* these costs against the purported benefits, as FIFRA requires. *Pollinator*, 806 F.3d at 522–23; 7 U.S.C. § 136(bb).[12]

D. Social Costs

The Ninth Circuit also held EPA failed to consider the "clear social cost," *NFFC*, 960 F.3d at 1142 (citing 7 U.S.C. §136(bb)), caused by the 2018 registration: the "severe strain on social relations in farming communities" that has "torn apart the[ir] social fabric"

[12] The "costs" EPA considered refer almost exclusively to putative costs on growers from compliance with use measures or costs of alternatives, not costs externalized on other farmers. *See* A.6 at 43–45.

and was "likely to increase." *NFFC*, 960 F.3d at 1143 (describing evidence of harm to off-field crops as well as old-growth trees and gardens).

Yet the 2020 Decision again failed to abide by this requirement, despite a robust record that such social strife has continued. *See, e.g.*, SOF ¶¶ 81–82. Instead, EPA justified its refusal by speculating that such social costs would continue even without the 2020 Decision, due to illegal dicamba use. A.6 at 46. This excuse fails because the Ninth Circuit has already held, as a matter of law, that this is a cognizable cost of the *over-the-top use registration*. *NFFC*, 960 F.3d at 1143. [redacted] U.1 at 5, 28; *see also* Ex-R.4 at 6. EPA's nonresponsive response is wholly insufficient to meet its duties under FIFRA to assess, consider, and weigh social costs, 7 U.S.C. § 136(bb), a duty the Ninth Circuit has already held EPA must meet for this specific cost, for this registration. *Id.*

III. EPA Failed to Address Other Risks from the 2020 Decision.

In addition to failing on remand to abide by the Ninth Circuit's commands, EPA also made other legal errors, failing to consider and weigh other problems from dicamba's continued registration, rendering the Decision arbitrary and capricious. *State Farm*, 463 U.S. at 43 (arbitrary and capricious if agency fails to consider important aspect of the problem).

A. EPA's Disregard of Dicamba Runoff Violated FIFRA

As with volatility, EPA has always known that dicamba runoff is another major cause of damage: in the 2018 registration, EPA required as a condition of registration that registrants study off-field effects including runoff. SOF ¶ 14. That study revealed dicamba concentrations in runoff—seven days after spraying—*still* exceeded EPA's own plant harm threshold. A.9 at 61. Other record studies similarly showed significant damage from runoff up to ten days after spraying. SOF ¶¶ 84–85. [redacted]

[redacted] E.15 at 1, and that [redacted] E.13 at 2; SOF ¶¶ 84–85.

Yet EPA still *failed to mitigate* the unreasonable adverse effects of dicamba runoff. In its rush to re-approval, all EPA did was extend the limitation on spraying when rainfall is forecasted from the previous 24 hours to 48 hours, as well as noting generally "best management practices for minimizing runoff should be employed." A.9 at 8. However, EPA already acknowledged with the 2018 registration that identifying the conditions likely to cause dicamba runoff "currently exceed the capabilities of most applicators and most regulatory compliance officials." M.37ag at 8. Nor does EPA have any explanation as to why it prohibited spraying only *within 48 hours* of rainfall when the data before the agency found runoff damage *up to ten days* after spraying. *See supra.* EPA's conclusion that dicamba runoff would not have unreasonable adverse effects was arbitrary and capricious and unsupported by the Record.

B. EPA Failed to Consider Harm from Dicamba-Contaminated Rainfall

EPA also failed to consider harm from dicamba in rainfall. Intensive dicamba use leads to "atmospheric loading," the accumulation of dicamba vapor in the air. M37o at 15; M.64 at 4; M.32; M.16. Rainfall then results in "extremely high amounts of dicamba in rainwater" at levels injurious to sensitive plants, as was found in Missouri in 2019-2020. SOF ¶¶ 87–88.

EPA was well-aware of this threat prior to the Decision. Missouri provided EPA with a report recording over one hundred dicamba detections in rainfall and streams in 2019. M.95 at 4; *see* SOF ¶ 87. [redacted] E.12 at 4. Instead, EPA's subsequent 2020 ecological risk assessment *entirely*

failed to address the issue of dicamba-contaminated rainfall injuring crops or plants; any rainfall mentions concerned only dicamba runoff from fields. *See, e.g.*, A.9 at 8, 17, 24.

C. EPA Failed to Account for "Wide Area Effects" of Dicamba Spraying

Dicamba drift is not merely a nearby problem, it also results in "wide-area effects": dicamba damage episodes caused by vapor drift that occur well beyond buffer zones established to protect against near-field effects. A.9 at 309–10; E.12 at 1. Indeed, the Record shows that EPA was well-aware that injury from dicamba drift has been reported from sites as far away as [redacted] feet from the original potential sources of dicamba spraying.[13] Even field studies have been damaged by incursions of dicamba drift from external sources traveling over 1400 feet, "far greater distances than the labeled in-field setbacks." A.9 at 261; *see* SOF ¶¶ 89–90.

Yet despite evidence of extensive, long-distance drift damage, EPA's dicamba drift mitigations are based on 10- to 20- acre field studies and modeling, and are only designed to address "near field" effects, A.9 at 9, meaning those "adjacent to the treatment site," *id.*, at most 400 feet from a treated field, *id.* at 309. [redacted] *See* E.12 at 3 ([redacted]); SOF ¶ 91. EPA again failed to address this important part of the problem. *State Farm*, 463 U.S. at 43.

D. EPA Failed to Consider Dicamba Harm to Trees

Like runoff, another 2018 conditional registration requirement was studies on effects of dicamba on "trees, shrubs, and perennials" in light of reports of damage to tree species and orchards. M.168 at 19; SOF ¶ 93. EPA reviewed only one such preliminary

[13] This figure is based on 2017–2019 data reported by BASF, *see* I.2; I.3, and Bayer, I.4; I.6, [redacted], U.1 at 31.

(Tier 1) study submitted by Bayer (Bayer Tree Study), but that study—which contained numerous deficiencies[14]—actually showed that EPA lacked sufficient data to rule out unreasonable harm to trees. *See* SOF ¶¶ 93–95.

EPA categorized the Bayer Tree Study as a preliminary (Tier 1) study because it only tested one dicamba concentration and its effects on five different tree species, and therefore could not be used to determine—*nor prevent*—harm to the most sensitive tree species. *See* G.31 at 14–15 ("This test was conducted with a single test concentration (Tier 1); therefore, the most sensitive species could not be determined."). In it, Bayer researchers studied dicamba at an extremely low concentration (0.000153 lb/acre)—the concentration that EPA found to have inhibited growth in soybeans by 25%, A.9 at 49—and its effects on trees. [redacted] F.80 at 9, 21, 32. In other words, [redacted]. A.9 at 31. And, EPA has no idea just how little dicamba it would take to stunt growth in American red oak (or other similar trees) because all that the study concluded was that the harm threshold (the NOAEC) for American red oak and apple saplings is less than the concentration EPA found significantly injurious to soybeans. *See* G.31 at 2 ("NOAEC: <0.000513 lb ae/A (apple and American red oak height)"). Yet, EPA did not call for another study nor examine any other data. EPA's cavalier disregard of the significant harm to trees and orchards from dicamba drift violated FIFRA.

[14] In addition to being a preliminary study, the Bayer Tree Study is also deficient [redacted], F.80 at 1, and the testing ended after just 90 days, leading the EPA reviewer to conclude that the Study was "*not scientifically sound*." G.31 at 15 (emphasis in original).

IV. EPA Failed to Meet the Unconditional Registration Standard.

EPA also violated FIFRA by failing to meet the rigorous preconditions for an "unconditional" registration.[15] The past registrations were conditional, *see NFFC*, 960 F.3d at 1133, an easier standard to meet. *Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 915–16 (9th Cir. 2020) (*Enlist*) (unconditional standard is "higher" and "more burdensome" than conditional); *cf.* 7 U.S.C. § 136a(c)(7) (conditional) *with id.* § 136a(c)(5) (unconditional). Unconditional registrations have several prerequisites, all of which EPA failed to meet.

A. No Additional Data Necessary

While mere "satisfactory data" are required for conditional registration, *id.* § 136a(c)(7)(B), for unconditional, EPA must determine that "*no* additional data are necessary," 40 C.F.R. § 152.112(c) (setting forth registration requirements under FIFRA Section 3(c)(5)). Even under the *lesser* conditional standard, EPA previously lacked the required support. *NFFC*, 960 F.3d at 1124 (data had "several flaws"), *id.* at 1133–36 (discussing data's flaws). EPA again fails here under this tougher standard.

First, the nearest EPA comes to affirming the "no additional data" requirement is vaguely saying that "EPA received studies and other information, necessary to comply with the data requirements for the uses of these products." A.4 at 19. Then there is the issue of the studies, data, and monitoring that EPA conditioned registration upon in 2018 and what became of them, M.168 at 23; EPA does not say, nor give any rationale as to why the agency did not continue to require similar data and monitoring in this Decision. EPA's failure to explain and support the significant registration change is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

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[15] FIFRA Section 3(c)(7)(B) authorizes EPA to conditionally register some pesticides while missing data is prepared. Despite eliminating the conditionality of prior approvals, EPA is silent about the approval now being unconditional other than stating that the approval, like all unconditional registrations, is pursuant to FIFRA section 3(c)(5) (as opposed to conditional registrations under section 3(c)(7)). *See* A.4 at 3, 18 (quoting section 3(c)(5)).

Second, and speaking of this Decision's continued reliance on pre-2020 data, EPA admitted that much of the 2018 assessments were irreparably *tainted* with politic interference. *See* SOF ¶¶ 61–64. The 2020 Decision was overseen by the same administration and same political EPA officials. And the 2020 Decision refers back, incorporates, and relies on the admittedly tainted 2018 studies. *See* SOF ¶¶ 63–64. EPA's continued and unexplained reliance on admittedly tainted data is arbitrary and capricious.

Finally, even if the politically tainted assessments EPA re-used are somehow magically absolved, the Record is replete with evidence that—in the frenzied few months between the Ninth Circuit's vacatur of the registration and the 2020 Decision, SOF ¶¶ 55–61—EPA did *not* have all the data it needed to determine risks unconditionally. For example, even though EPA relied heavily on the use requirement that farmers mix volatility reducing agents (VRAs or pH buffering agents) into spraying tanks, [redacted], P.481, despite [redacted] E.7 at 3; *id.* at 1 ([redacted]) (emphasis added); *see also* SOF ¶ 74.[16] [redacted] E.12 at 3; *see also* E.5; SOF ¶¶ 89–91; *supra* at 18. Other issues for which EPA lacked data include: dicamba in rain; dicamba in runoff; and dicamba's effects on trees, shrubs, and other woody perennial species seedlings. *See supra* Section III; SOF ¶¶ 83–95.

[16] And, even assuming the agents work, in its rush to re-register dicamba, EPA failed to ensure [redacted]. E.1; E.2; *see also* Ex-R.22 at 154 ("If we had more time…"); SOF ¶ 60.

B. Performing Intended Function Without Causing Unreasonable Adverse Effects

The unconditional registration standard also requires EPA to find and support with the Record that the dicamba uses can perform their "*intended function without* [causing] unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). Yet the record evidence strongly belies any such conclusion. Over and over again, experts—scientists, state regulators, and commercial applicators—told EPA that, due to the byzantine, unprecedented use directions that set forth near impossible conditions for lawful use, farmers are *not* able to use the products lawfully (1) for their "intended function" of suppressing weeds, and (2) *without* actually causing unreasonable adverse effects through off-field drift and runoff. *See supra* at 10; SOF ¶¶ 42–47, 70–72, 117–125.

Even before EPA added additional use restrictions in its 2020 Decision, experts described the prior label as "probably the most complex label I have ever seen in my 40-year career." *NFFC*, 960 F.3d at 1140 (estimating only 44 hours of application time allowed under the label during 2017); *id.* at 1140 ("There doesn't appear to be any way for an applicator to be 100% legal in their application."); A.1 at 6 ("Label requirements essentially make it impossible to do an on-label application"). Unsurprisingly, then state regulators described the even *more* restrictive 2020 label as the "biggest, gnarliest label ever seen," Ex-R.5 at 10, requiring conditions "so rare that it is impossible to follow." Ex-R.5 at 2; *see also* U.1 at 33 [redacted]. And even when farmers *did* have the rare conditions making the 2020 use directions feasible, vapor drift *still* occurred. Ex-R.1 at 2–3; SOF ¶¶ 121–123.

C. No Unreasonable Adverse Effects When Used in Widespread and Common Ways

Finally, EPA must find and support with the Record that the over-the-top dicamba spraying will not cause unreasonable adverse effects when used in "widespread and commonly recognized practice." 7 U.S.C. § 136a(c)(5)(D). Congress underscored its intent that "[i]f a pesticide is such that when used in accordance with its *label or common practice* it is injurious to man, other vertebrates, or useful plants, *it cannot be registered* under the Act

and cannot be sold or distributed in interstate commerce." S. Rep. 838, 92d Cong. 2d Sess., 1972 U.S.C.C.A.N. 3993, 3996 (emphases added). Registration under any possible contrived, hypothetical, laboratory scenario—no matter how difficult to follow, or how much of a weather/wind "fairy tale," *NFFC*, 960 F.3d at 1140, it is in the real world of farming—is *not* what Congress meant.

Indeed, "widespread and commonly recognized practice" is the *antithesis* of the practices EPA approved safety under here: what EPA approved requires use instructions unlike any other farmers have ever seen. *See* Ex-R.5 at 10; *NFFC*, 960 F.3d at 1140; SOF ¶¶ 42–47, 72, 119–121. Approval under such "complex and onerous" requirements—both putting farmers in a no-win situation and making the "restrictions" illusory—is not what Congress intended. EPA violated FIFRA's registration mandates.

V. EPA Violated the Endangered Species Act.

EPA's 2020 "no effect" determination is arbitrary and capricious, flies in the face of documented damage, lacks analysis, and risks harm to hundreds of ESA-protected plants and animals and their habitat. And despite the Report's admission of [redacted], EPA's 2022-2023 Decisions *still* failed to protect species.

A. <u>EPA Arbitrarily Applied Its FIFRA Approach to ESA Effects Determinations</u>

For the third time, EPA circumvented ESA Section 7 consultation with expert wildlife agencies regarding dicamba's use registration. Despite documented damage, including potential harm to *hundreds* of endangered plants and animals and their critical habitats, EPA made the unprecedented finding, again, that dicamba's novel over-the-top uses could nonetheless have "no effect" on all but one species and its designated critical habitat. *See* SOF ¶¶ 15-16, 101-110. EPA's "no effect" determination also violates its substantive duty to ensure against jeopardy and destruction or adverse modification of designated critical habitat.

As in 2016 and 2018, in the 2020 Decision EPA arrived at this conclusion by substituting the less protective FIFRA standards for the ESA's standards in its Ecological Assessment. *See generally* A.9; SOF ¶¶ 101-104. Namely, instead of determining whether the 2020 Decision met the low ESA "may affect" threshold, EPA's flawed methodology only evaluated whether exposing species or their habitat to dicamba exceeds EPA's self-determined "level of concern" under the FIFRA standard. SOF ¶¶ 102-104.

EPA must complete interagency consultation whenever it proposes an action that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). The "may affect" threshold is extremely low—intentionally—to ensure the expert agencies are consulted to implement congressional intent of "institutionalized caution." *Hill*, 437 U.S. at 194; 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement."); "[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*, 681 F.3d at 1027 (emphasis added).

To arrive at "no effect" for hundreds of ESA species, EPA in 2020, and as re-affirmed unchanged in 2022 and 2023, applied its Risk Quotient (RQ)/Level of Concern (LOC) assessment, designed to address FIFRA's registration standard of no "unreasonable adverse effects," just as it did in 2016 and 2018. SOF ¶¶ 15-16, 102-104. These are fundamentally different: the FIFRA standard includes a risk-benefit consideration, in contrast to the ESA's low bar of "may affect" that cannot allow *any* chance of impacts on protected species without consultation. A.9 at 33–34; 7 U.S.C. § 136(bb); *Wash. Toxics Coal. v. U.S. Dep't of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1184 (W.D. Wash. 2006) ("The risk framework of FIFRA (no unreasonable adverse effects) does not equate to the survival and recovery framework of the ESA.").

Whatever its merit in the FIFRA context, in the ESA context, this approach is "*not scientifically defensible*" for judging risks to endangered species from pesticides, as no less a

source than the expert National Academy of Sciences (NAS) told EPA in a sharply critical 2013 report.[17] SOF ¶ 104; *Enlist*, 966 F.3d at 925; *id.* at 932–33 (Watford, J., dissenting). In *Enlist*, faced with the identical approach, the majority gave it a one-time pass for that registration, but cautioned it did not expect use of the FIFRA methodology "to reoccur given EPA's commitment to gather the data necessary to implement NAS's new methodology going forward." *Id.* at 926. That was *prior* to the 2020 Decision and years before the 2022-23 Decisions. It has been *a decade* since NAS leveled its critique, and EPA had no deadline to register dicamba again four months after the Ninth Circuit vacated it. *NFFC*, 960 F.3d at 1145. EPA cannot legally persist in applying an unsound method, and its reliance on it here once again, despite the Ninth Circuit's admonition, was arbitrary and capricious.

Further, after the 2017 *Enlist* registration, EPA has *not* relied solely on the FIFRA RQ/LOC to eliminate species for ESA "may affect" determinations and instead *has* initiated consultation based on newer methodologies resulting in "may affect" determinations for many pesticides, including chlorpyrifos (2018),[18] diazinon (2018), malathion (2018), carbaryl (2021), methomyl (2021), atrazine (2021) and glyphosate (2021). *See* ADD47-50 (Donley Decl. ¶¶ 7–14); SOF ¶ 105. The results are strikingly different. EPA determined there were *zero* "no effect" determinations for the pesticide glyphosate. ADD50 (Donley Decl. ¶ 13). Thus, EPA has not only had the time to

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[17] National Research Council, Nat'l Academies, *Assessing Risks to Endangered and Threatened Species From Pesticides* (2013), https://nap.nationalacademies.org/catalog/18344/assessing-risks-to-endangered-and-threatened-species-from-pesticides.

[18] *See* Donley Decl., Ex. 1; *see also* EPA, *Biological Evaluation Chapters for Chlorpyrifos ESA Assessment*, https://www.epa.gov/endangered-species/biological-evaluation-chapters-chlorpyrifos-esa-assessment (last visited Apr. 11, 2023) (EPA based its Biological Evaluation on methods developed with FWS and NMFS "in response to the National Academy of Science report.").

implement better ESA assessment methods; it has *already done so repeatedly*; the scientific data to do so is necessarily available. As such, EPA's failure also violates the ESA's mandate that every agency "shall" use the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

Finally, applying the correct "may affect" standard is crucial to the survival of species on the brink of extinction, as compared to effects on non-listed species. 16 U.S.C. § 1532(6) ("endangered" species are "in danger of extinction"); *id.* § 1532(20) ("threatened" species are likely to become endangered). Yet in another fatal flaw, EPA used the *exact same* LOC for both listed and non-listed plants.[19] SOF ¶ 103. In other words, EPA applied the same LOC to soybeans as it does to endangered plants. For example, FWS listed the whorled sunflower (*Helianthus verticillatus*) as endangered due to threats to its survival that include agricultural "chemical vegetation management" (herbicides) and "limited distribution and small population sizes." SOF ¶ 103. EPA's reliance on the outdated and flawed RQ/LOC "could underestimate risk and EPA would never know it." *Enlist*, 966 F.3d at 932–33 (Watford, J., dissenting). Not only did EPA unlawfully fail to consult with the wildlife agencies, it could be jeopardizing the continued existence of species like the sunflower in violation of its substantive ESA duty to avoid this. 50 C.F.R. § 402.02 (defining "jeopardize").

B. EPA's "Action Area" Is Unsupported

The ESA "action area" is broadly defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The potential "effects" an agency must consider are similarly broad, including both the "direct" and "indirect" effects of the action. *Id.*

[19] To determine acute effects to animals, EPA used the "lethality-based" endpoint of the median lethal dose or concentration (LD50 or LC50), which is the amount of a chemical that *kills 50% of the exposed animals*. A.9 at 30.

Vaper Drift Buffer Belied by the Evidence: Here, the most significant flaw is EPA's continued reliance on a 57-foot buffer to assume any volatility effects are limited to the sprayed field, despite contrary evidence. Faced with evidence of off-field damage, *supra* at 18, in the 2018 registration, EPA added a 57-foot buffer only in certain counties where listed plant species survive near cotton and soybean fields. A.4 at 24. The buffer's size contradicted EPA scientists' 2018 recommendation to expand the action area to *443 feet* (135 meters) after a study revealed injury to dicamba-sensitive soybeans 135 meters away. M.37o at 72–74. EPA has now admitted these studies were ignored due to improper political influence, which "compromised the integrity of [EPA's] science." *See* SOF ¶¶ 62-66. Nonetheless, EPA *again* relied on the same unsound ESA buffer distance in the 2020 Decision, even though damage continued much farther off field in 2019 and 2020 with the buffer in place. *See supra* at 18.

In 2021, [redacted], *see* SOF ¶¶ 137–140, [redacted] U.1 at 5.[21] Because of this, EPA admitted that 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." Ex-R.11 at 2; Ex-R.8 at 3.

Even Bayer urged EPA to enact ESA protections prior to the 2022 season. Ex-R.12 at 3. Yet, in its 2022 Decision, EPA re-affirmed use of the 57-foot buffer by only amending the registration for Minnesota and Iowa, and then only to address cut-off dates, not the 57-foot ESA buffer. "[M]itigation measures that merely 'reduce,' but cannot scientifically

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[20] [redacted] U.1 at 5.

[21] Harm to individual species is considered "take." 50 C.F.R. § 402.02. It is unlawful for any person to take any species, unless such "incidental" take is allowed by the expert agency biological opinion, upon completion of consultation. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(b)(4).

'eliminate' an 'effect' probably compel a 'may affect' finding." *Enlist*, 966 F.3d at 924. EPA's decision not to alter its buffer in the 2022 Decision—in the face of the damning evidence of its failure—was arbitrary and capricious and contrary to law.

Ignored Evidence for Larger Drift Buffer: An additional scientific flaw is EPA's reliance on a threshold of 10% visual sign of injury (VSI) as a threshold to require the 310-foot drift buffer to limit the action area and arrive at its "no effect" conclusions. A.9 at 51.

[redacted] E.9 at 1–2; E.15 at 3–4 ([redacted] E.16 at 3 (emphasis added); E.13 at 2–3 ([redacted]). [redacted] E.9 at 3, 5; E.10 at 2.

Within a few weeks, something changed: [redacted] E.2 at 1. [redacted] E.1 at 1. [redacted] This appears to be another political taint that permeated the 2020 Decision.

Indirect Effects: Finally, in setting the action area, EPA failed to include the 310- and 57-foot ESA buffers in counties with species that rely on plants (obligate relationship). A.9 at 72. For example, the Poweshiek skipperling requires grasses and flowering plants, such as non-listed black-eyed Susan and purple coneflower. 17 C.F.R. § 17.95(i) (insects).[22] The skipperling has critical habitat in eleven counties where EPA does not require any ESA

[22] *Available at* https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-17/subpart-I/section-17.95 (searchable by species name).

buffers. Donley Decl. ¶ 15. Likewise, the Dakota skipper requires grasses and flowering plants within small, scattered critical habitat units. 17 C.F.R. § 17.95(i). The skipper has critical habitat in eight countries where EPA does not require any ESA buffers. Donley Decl. ¶ 15. EPA's failure to determine effects on species that rely on plants is arbitrary and not in accordance with the ESA.

Enlist Duo: The arbitrary dicamba action area is legally and factually distinct from *Enlist*. *Compare* 966 F.3d at 928. Here, Plaintiffs point to EPA scientists and studies that undermine EPA's politically tainted decision to limit the ESA volatility buffer to 57 feet and the drift buffer to 310 feet. *See supra.* Here, the damage reported every year since EPA approved these new dicamba uses very much shows that "mitigation measures are not working." *Id.* at 928; *Sierra Club v. Marsh*, 816 F.2d 1376, 1386–89 (9th Cir. 1987) (consultation should occur if mitigation ineffective), *abrogated on other grounds as recognized in Cottonwood Env't Law Ctr.*, 789 F.3d at 1075. And here, the mitigation measures are not "reasonably certain to occur" due to their complexity on the labels, *see supra* at 10, contributing to the fact that damage from dicamba volatility has "materialized in the real world." *Enlist*, 966 F.3d at 921.

C. EPA Violated the ESA's Critical Habitat Mandates

Critical habitat is "critical" because it is imperative to allow species to recover so that they no longer need ESA protection.[23] EPA's conclusion that there would be no effect (destruction or adverse modification) of critical habitat is likewise arbitrary. Rather than

[23] 50 C.F.R. § 402.02 (definition); 16 U.S.C. § 1532(5)(A) ("critical habitat" contains the "physical or biological features … essential to the conservation of the species" and "which may require special management considerations or protection"); *id.* § 1532(3) ("conservation" means using all methods to bring species to the point that they no longer need protection under the ESA); 50 C.F.R. § 402.02 (adverse modification is "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species").

evaluating whether the 2020 Decision may affect critical habitat that overlaps with dicamba uses, EPA limited its analysis to just the sprayed field, based on its assumption that dicamba will not drift off it: an assumption that the Record conclusively shows is faulty. EPA then added more hurdles—that the species itself must use the agricultural field and have a "direct toxic effect concern," and the action area must include dicamba effects on plants that are characteristic of the critical habitat. A.9 at 111. EPA's miserly framework does not satisfy its robust ESA duty to insure no destruction or adverse modification of critical habitats in the path of dicamba drifting and volatizing miles from the fields. 16 U.S.C. § 1536(a)(2). EPA's arbitrary approach resulted in a "no effect" determination for hundreds of critical habitats overlapping with the approved dicamba uses.

Using these tactics, EPA concluded that only critical habitat for the whooping crane met its criteria. A.9 at 111. However, even there EPA concluded that whooping crane critical habitat would not be modified based on residues of dicamba that "are not reasonably expected to be at a level raising concern for direct effects to the whooping crane." *Id.* But ensuring against destruction or adverse modification of critical habitat is a *separate* inquiry from EPA's duty to ensure against jeopardy. *Gifford Pinchot Task Force v. Fish & Wildlife Servs.*, 378 F.3d 1059, 1069–70 (9th Cir. 2004) (to meet ESA critical habitat mandates, agencies must ensure not only species survival but recovery).

The "no effect" determination for dicamba, which is known to volatilize and drift, is again factually distinguishable from *Enlist*. The *Enlist* majority again relied on the lack of evidence of damage from Enlist drift or volatilization off fields, affirming appropriateness of limiting EPA's critical habitat assessment to the fields themselves and species whose critical habitat contained Primary Constituent Elements (PCEs) related to agriculture on those fields. *Enlist*, 966 F.3d at 928–29; *id.* at 922–23 (explaining critical habitat and PCEs). But, for dicamba, damage far off the fields has been reported *every year* since 2016 "in the real world," and EPA's inadequate ESA buffers are not supported by science in the Record.

The *Enlist* majority also pointed to the whooping crane and Virginia bat as species with critical habitat designations without PCEs.[24] *Id.* at 929 (citing 50 C.F.R. § 17.95(a) (mammals) and *id.* § 17.95(b) (birds)). But other species' critical habitats that overlap with cotton and/or soy, *see* Bradley Decl. & Clauser Decl., *do* have PCEs within harm's way from dicamba drift. For example, the Southwestern willow flycatcher and yellow-billed cuckoo PCEs in their critical habitats include vegetation required for nesting and breeding (trees and shrubs) and low vegetation habitat for insects and small vertebrates on which the birds feed. 50 C.F.R. § 17.95(b); Suckling Decl. ¶¶ 8, 11. Likewise, the Chiricahua leopard frog critical habitat PCEs require vegetation as habitat for its food and to provide cover from predators. 50 § C.F.R. 17.95(d) (amphibians); Suckling Decl. ¶ 16. These species' critical habitats are unlawfully at risk from dicamba drift far off fields.

VI. EPA Violated the Procedural Mandates of FIFRA and the APA.

EPA also made a series of procedural violations. First, EPA flouted its own regulations requiring a different process, including notice-and-comment, because it cancelled the prior dicamba registration. Second, EPA violated its regulations for its failure to have notice-and-comment in re-registering the new over-the-top dicamba uses. And finally, EPA violated the APA by amending its regulations under FIFRA 24(c) without notice-and-comment.

A. EPA Violated FIFRA's Post-Cancellation Regulations

After the Ninth Circuit vacated the 2018 registration, EPA issued a "final cancellation order."[25] Unlike a new or renewed pesticide, if a registration is canceled, FIFRA regulations require EPA to go through a special process to "un-cancel" it, to explain

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[24] Even if not explicitly set forth in the critical habitat designation, by definition, designated critical habitat contains the "physical or biological features' essential to conservation of the species … ." 16 U.S.C. § 1532(5); 16 U.S.C. § 1533(a)(3).

[25] Stevenson Decl., Ex. J (EPA, *Final Cancellation of Three Dicamba Products* (June 8, 2020), https://www.epa.gov/sites/default/files/2020-06/documents/final_cancellation_order_for_three_dicamba_products.pdf).

what has so substantially changed. *Compare* 40 C.F.R. §152.100(a) (registration process for all pesticides "except" those that were the "subject of a previous Agency cancellation or suspension notice") *with id.* § 152.100(b) (EPA must use "subpart D of part 164" when evaluating "registration of a pesticide involving use of the pesticide in a manner that is prohibited by a suspension or cancellation order"). Subpart D requires EPA to "determine whether reconsideration of the Administrator's prior cancellation or suspension order is warranted." *Id.* § 164.131(a). Among other things, EPA must assess whether there is "substantial new evidence" affecting the prior cancellation decision. *Id.* If EPA finds reconsideration is warranted, EPA must publish notice in the Federal Register and hold a "public hearing" to decide the matter. *Id.* § 164.131(c). (This means hold notice-and-comment: the courts have equated "public hearing" in FIFRA with notice-and-comment, including in cancellation proceedings). *See United Farm Workers of Am., AFL-CIO v. EPA*, 592 F.3d 1080, 1083 (9th Cir. 2010); *Nw. Food Processors v. Reilly*, 886 F.2d 1075, 1077 (9th Cir. 1989).

Nevertheless, in October 2020 EPA again re-registered dicamba products for over-the-top use, proceeding as if *the agency had never issued a cancellation order*. The agency made zero effort to comply with the procedures of 40 C.F.R. Part 164 and the "substantial new evidence" findings required of the agency to reverse its previous cancellation order. *See id.* § 164.131(a). Had EPA followed the correct procedures, it would have had to consider whether the registrants had presented substantial evidence that materially altered the prior cancellation order; at a minimum, EPA had to justify that re-registration was warranted. Instead, EPA re-registered without evaluating whether the reconsideration was warranted, rendering its decision arbitrary and capricious and contrary to procedures required by law.

B. EPA Violated FIFRA's "New Use" Notice-and-Comment Requirements

In *Center for Food Safety v. Regan*, 56 F.4th 648 (9th Cir. 2022), the Ninth Circuit confirmed that EPA violates FIFRA if it fails to provide notice-and-comment before *re-*

approving the same pesticide uses that the court *previously vacated*. *Id.* at 661 ("FIFRA requires EPA to 'promptly' publish in the Federal Register 'a notice of each application for any pesticide if it contains any new active ingredient or if it would entail a changed use pattern.'") (quoting 7 U.S.C. § 136a(c)(4)). EPA made the same violation here.

EPA received new applications for the three dicamba pesticides in July 2020, B.1 (Xtendimax); C.6 (Engenia); D.4 (Tavium), and had to hold notice-and-comment if they posed a "changed use pattern." FIFRA does not define "changed use pattern," but its regulations explain it is "a new use," 40 C.F.R. § 152.102, which is defined in relevant part as "(2) any … use pattern, if no product containing the active ingredient is currently registered for that use pattern, *or* (3) [a]ny *additional use pattern that would result in a significant increase in the level of exposure* … to the active ingredient of man or other organisms." 40 C.F.R. § 152.3 (emphases added). Prior to the 2016 registration, never before had dicamba been sprayed over-the-top of genetically engineered crops resistant to it; EPA's approval was undeniably (and very controversially) a "changed use patten" for dicamba. EPA acknowledged this and held notice-and-comment. SOF ¶¶ 5, 17, 65; *NFFC*, 960 F.3d at 1132.

This time, in its rush to re-approve dicamba, EPA bypassed notice-and-comment despite the obvious controversy of dicamba's continued over-the-top use. EPA claims that notice-and-comment was not required because, even though the prior uses were vacated, there was still one such later approved "me too" over-the-top dicamba product active.[26] A.4 at 3 n.1, n.2. EPA's reliance is incorrect as a matter of law and contradicted by the Record.

[26] EPA's 2018 Decision and the scope of the Ninth Circuit's review included the over-the-top dicamba use approval and three dicamba products, two of which—XtendiMax and Engenia—were renewed and re-approved in EPA's 2020 Decision. Another product, Tavium, was registered in April 2019, five months after EPA had issued the October 2018 decision, and was not at issue in the case.

First, even though the Ninth Circuit did not directly reach the later "me too" product registration, the court vacated as unlawful the underlying use registration on which it was based: EPA had conditionally registered Tavium under "FIFRA section 3(c)(7)(A),"[27] 7 U.S.C. § 136a(c)(7)(A), which authorizes registration of pesticide uses "identical or substantially similar to any currently registered pesticide and use thereof" under a fast-track process (known as "me too" registrations) where EPA does not conduct new analyses, instead relying on the data and analyses for the prior registration.[28] *Id.* It makes no sense that over-the-top spraying of Tavium would remain legal when the Ninth Circuit struck down the *underlying* use registration (and identical products) upon which it was based.

Second, EPA's reliance is belied by the definition of "new use," which includes not just "any … use pattern, if no product containing the active ingredient is currently registered for that use pattern," but also "[a]ny additional use pattern that would result in a *significant increase in the level of exposure* … to the active ingredient of man or other organisms." 40 C.F.R. § 152.3 (emphasis added). For the 2020 Decision, the *prior* Tavium registration would have expired in December 2020. A.4 at 3 n.1.[29] The current/active Tavium application specifically *extended* over-the-top Tavium use beyond 2020: an "additional use" that significantly increased the level of exposure to dicamba. *See* SOF ¶ 59.

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[27] EPA, *Notice of Pesticide Registration: A21472 PLUS VAPORGRIP TECHNOLOGY* (Apr. 5, 2019), https://www3.epa.gov/pesticides/chem_search/ppls/000100-01623-20190405.pdf.

[28] EPA, *Identical/Substantially Similar (Formerly "Me-Too") Product*, https://www.epa.gov/pesticide-registration/pesticide-registration-manual-chapter-2-registering-pesticide-product#meetoo (last visited Apr. 11, 2023).

[29] EPA itself previously recognized over-the-top dicamba spraying as a "new use." Back in 2018, EPA explained that because the "[dicamba] use will expire before the end of 2018 unless these amendment requests are granted … EPA believes it appropriate to consider the extension of these uses *as a 'new use'*… ." M.168 at 17 (emphasis added). Nothing changed in 2020, except this time, EPA had to justify its use extension after the Ninth Circuit's ruling, so EPA conveniently decided not to refer to the 2020 Decision as a new use approval to avoid going back directly before the same Ninth Circuit panel.

The Ninth Circuit squarely rejected EPA's similar reliance on previous and ongoing uses of the pesticide to avoid its notice duties. *Regan*, 56 F.4th at 662 (rejecting EPA's claim that the uses were not new because they had been previously registered and emphasizing that "EPA documents repeatedly refer[red] to the 2019 amendment[] as 'new uses'"). [30] The 2020 Decision was for "changed use" within the definition of that term, requiring EPA to hold notice-and-comment under FIFRA.

C. The APA Required Notice-and-Comment for the FIFRA 24(c) Rulemaking

Nor did EPA hold notice-and-comment on its sweeping 24(c) rule change for not just dicamba but all pesticides. For decades, FIFRA 24(c) provided a critical tool for states to install their own "special local needs labels" to address agricultural, environmental, or public health needs. This was particularly important for mitigating dicamba damage: states relied on 24(c) to step into the breach left by EPA and address the rampant drift. SOF ¶ 96. But EPA reversed this decades-old policy in its 2020 Decision, for the first time prohibiting states from "impos[ing] further restrictions on the dicamba products, or any other federally registered pesticides" through 24(c), in a footnote no less. A.4 at 20 n.19. That decision violated the APA for three reasons.

First, the 24(c) change is a legislative rule: an agency decision that "create[s] rights, impose[s] obligations, or effect[s] a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n*, 333 F.3d at 1088; *Ctr. for Env't Health v. Vilsack*, 2016 WL 3383954, *4 (N.D. Cal. 2016) (applying and quoting). EPA did not just one but *all* of these: it amended a longstanding interpretation allowing states to restrict pesticide uses through 24(c);[31] imposed an obligation for states to undergo the time-intensive 24(a)

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[30] *See also* Ex.R-22 at 48 (EPA stating that it "expects to announce for public comment its decisions on whether to register/renew the products by the end of October.").

[31] Stevenson Decl., Ex. B at 10 ("[S]tates may issue §24(c) registrations to implement more restrictive labeling under certain circumstances."); *id.* at 2 (explaining the prior

process, resulting in many states' inability to adapt effectively; and altered rights for farmers, conservationists, and state regulators that relied on the flexible 24(c) process for protection. SOF ¶¶ 96–99.

Second, none of the rulemaking exceptions apply here. *Ctr. for Env't Health*, 2016 WL 33833954, at *4 (exceptions must be "narrowly construed and only reluctantly countenanced."). The 24(c) rule change is not an interpretive rule, 5 U.S.C. § 553(b)(A), which do "not itself purport *to impose new obligations or prohibitions* or requirements on regulated parties." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (emphasis added); *Kollasoft Inc. v. Cuccinelli*, 2020 WL 263618, at *6 (D. Ariz. Jan. 17, 2020) (interpretive rules "merely explain, but do not add to, the substantive law that already exists."). Rather, it creates a "strict and specific set of obligations," binding states to the new formal legislative process and prohibiting restrictions under 24(c). *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.D.C. 2011) (finding the decision to screen airline passengers with advanced imaging technology legislative because it "substantially change[d] the experience of airline passengers and [was] therefore not merely 'interpretative' either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures.").

Nor is the 24(c) rule change a "general statement of policy," 5 U.S.C. § 553(b)(A), a directive that cannot "establish a 'binding norm,' … but must instead leave [agency] officials 'free to consider the individual facts in the various cases that arise.'" *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987). The registration decision absolutely establishes a "binding norm": it flatly prohibits states from restricting uses under 24(c). A.4 at 20 n.19. Additionally, the rule change is not a "procedural," internal agency

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interpretation culminates the efforts of the 1992 24(c) Center for Excellence); *NFFC*, 960 F.3d at 1128–29 (describing 24(c) rules in Minnesota and Arkansas).

"housekeeping" rule governing "organization, procedure, and practice," *Chrysler Corp. v. Brown*, 441 U.S. 281, 283 (1979); 5 U.S.C. § 553(b)(A), because here, "the agency action trenches on substantial private rights and interests." *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980). *See supra.*

And third, EPA cannot demonstrate that "good cause" supported issuing the 24(c) rule change—for all pesticides, in a surprise, buried footnote—without going through notice-and-comment. 5 U.S.C. § 553(b)(B). This standard imposes a "high bar," applying "only in those narrow circumstances in which 'delay would do real harm.'" *United States v. Valverde*, 628 F.3d 1159, 1164–65 (9th Cir. 2010). EPA knew how critical 24(c) was, knew it was controversially contemplating a major rule change requiring notice-and-comment. In fact, *EPA repeatedly reassured stakeholders it would hold notice-and-comment*, and even prepared two draft 2019 Notices for public comment but never issued them. SOF ¶ 98 This was rulemaking, plain and simple, and it required notice-and-comment.

REMEDY

The Court should declare that EPA has violated FIFRA, the ESA, and the APA and set aside, or vacate, the Decision.

Under the APA, a reviewing court "*shall … hold unlawful and set aside* agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (emphasis added).[32] As such, vacatur is the default, presumptive remedy for invalid agency action. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) ("Presumption of vacatur" unless *defendants* meet burden showing otherwise); *NRDC*, 38 F.4th at 51 ("[v]acatur is the traditional remedy for erroneous administrative decisions."). Just as in the prior dicamba case, *NFFC*, 960 F.3d at 1144–45 (vacating registration), this default goes for unlawful pesticide registrations. *E.g., Pollinator*, 806 F.3d at 532–33 (vacating sulfoxaflor registration);

[32] FIFRA includes similar "set aside" language. 7 U.S.C. § 136n(b).

NRDC, 38 F.4th at 52 (vacating glyphosate registration); *Farmworker Ass'n of Fla. v. EPA*, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021) (vacating aldicarb registration); *NRDC v. EPA*, 676 F. Supp. 2d 307, 311–17 (S.D.N.Y. 2009) (vacating spirotetramat registration).

As such, the Ninth Circuit authorizes remand without vacatur only in "limited circumstances," *Pollinator*, 806 F.3d at 532; *Ctr. for Food Safety*, 56 F. 4th at 668 ("unique facts"), and only when "*equity demands*" that result, *Pollinator*, 806 F.3d at 532 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)) (emphasis added).

To determine if these "rare" circumstances are present, courts "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *NFFC*, 960 F.3d at 1144 (quoting *Pollinator*, 806 F.3d at 532). Within this framework, in environmental cases courts consider "the extent to which either vacating or leaving the decision in place would risk environmental harm." *NRDC*, 38 F.4th at 51–52. Finally, courts have also considered whether an agency "could adopt the same rule on remand," or, on the other hand, whether there are "fundamental flaws" in the decision that make it "unlikely the same rule would be adopted on remand." *Id.*; *see also NFFC*, 960 F.3d at 1144–45.

Seriousness of Violations: First, the seriousness of the agency's violations weighs heavily in favor of vacatur. The very same types of FIFRA violations the Ninth Circuit held in the prior dicamba litigation—understating some risks, failing to assess other costs—were plenty serious enough to vacate then, and they are again. *NFFC*, 960 F.3d at 1125, 1145. Despite rushed efforts to paper over them, EPA again understated, failed to acknowledge, and/or failed to assess important costs and risks. *See supra* Section II. EPA also made new errors, failing to assess other ecological risks, and failing to meet the unconditional registration requirements. *Supra* Sections III & IV. And, just as in 2018, when EPA continued the registration in the face of the damaging 2017 summer evidence, in 2021 EPA had one better still: its own confirmatory Report, compiling that damage while openly

questioning whether the registration met the required ESA and FIFRA mandates. But in EPA's 2022-23 amendments, the agency *still* failed to meaningfully address the damage.

Similarly, a violation of Section 7 is a violation of the "heart" of the ESA's scheme, *Kraayenbrink*, 632 F.3d at 495, warranting vacatur. *E.g., Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20–22 (D. D.C. 2014) (holding a failure to consult violation to be a serious error for purposes of vacatur and vacating the agency action); *Defs. of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005) ("Typically, when an agency violates the Administrative Procedure Act and the Endangered Species Act, we vacate the agency's action and remand to the agency to act in compliance with its statutory obligations."), *rev'd and remanded sub nom. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

ESA violations risk the "incalculable" loss of endangered species, *Hill*, 437 U.S. at 187, and the consultation process EPA violated is how agencies carry out the ESA's substantive mandate to protect endangered species from jeopardy. 50 C.F.R. §§ 402.12–402.16; *Thomas*, 753 F.2d at 764 ("[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.") (emphasis in original), *abrogated on other grounds by Cottonwood Env't Law Ctr.*, 789 F.3d at 1075.

Finally, as to the *thrice* ways EPA unlawfully failed to hold public notice-and-comment procedures, such procedural violations raise significant doubts about the correctness of EPA's decision and thus even a *single* such violation qualifies as a "fundamental flaw" that "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *NRDC v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (vacating and explaining notice-and-comment violation is a "fundamental flaw that normally requires vacatur"); *AFL–CIO v. Chao*, 496 F.Supp.2d 76, 90–91 (D.D.C. 2007) (compiling cases) (failure to comply with notice-and-comment requirements is "unquestionably a 'serious' deficiency" for purposes of vacatur); *NRDC*, 676 F. Supp.2d at

312–17 (vacating pesticide for failure to hold FIFRA notice-and-comment).

Consequences of Vacatur: Second, this is not one of those "limited" or "unique" instances, *see supra*, where the Court should remand without vacatur.[33] Whatever alleged "disruptive" consequences Intervenors spin, the Ninth Circuit *already rejected* those *same* arguments just a few years ago, *NFFC*, 960 F.3d at 1144–45, and the drastic consequences they claimed did not occur.

As to any reliance on the registration and whether the "*same* rule would be adopted on remand," *Pollinator*, 806 F.3d at 532 (emphasis added), the Ninth Circuit held it was "*exceedingly unlikely*" EPA could lawfully re-approve the same or substantially similar registration. *NFFC*, 960 F.3d at 1145 (emphasis added). The same is true again: any future EPA dicamba decision will differ procedurally and substantively because EPA will need to incorporate any number of changes including the substantive results of ESA consultation, FIFRA notice-and-comment, and the lawful re-assessment of risks and costs. Even without vacatur, any reliance on past EPA dicamba approvals is misplaced, as the parameters have shifted nearly every year. Under vacatur law, when "a different result *may* be reached" after remand, it undermines any "disruptive consequences of an interim change that may itself be changed" and supports vacatur. *Id.* (emphasis added). That is the case here.

Finally, the "consequences" inquiry in environmental cases should be guided towards the result that is the most environmentally protective. *All. for the Wild Rockies*, 907 F.3d at 1122 (vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it"); *Pollinator*, 806 F.3d at 532 ("given the precariousness of bee populations, leaving EPA's registration of sulfoxaflor in place risks more potential environmental harm than vacating it."). And here the answer to that inquiry is plain: vacate.

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[33] It should *not*, but if it does remand without vacatur, the Court should require compliance by a court-ordered deadline of at most 180 days. *Ctr. for Food Safety*, 2022 WL 17826872, *17 (requiring same).

CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court **grant** their Motion for Summary Judgment and **vacate** the 2020 Decision, as amended in 2022 and 2023.

Respectfully submitted this 12th day of April, 2023.

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