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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity, et al., Plaintiffs, v. United States Environmental Protection Agency, et al., Defendants.	No. CV-20-00555-TUC-DCB **ORDER**

Plaintiffs, Environmental Groups, filed this action on December 23, 2020. They challenge pesticide registration actions for dicamba by Defendant, the Environmental Protection Agency (EPA), pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq., for use over soybean and cotton crops in thirty-four states, including Arizona (the registration actions) and rulemaking limiting states' ability to place local restrictions on pesticide registrations under FIFRA Section 24(c). Plaintiffs allege that the registration actions are not supported by substantial evidence in violation of FIFRA and violate FIFRA's unconditional registration standard. The Plaintiffs allege that the EPA failed to provide notice and comment for new uses in violation of FIFRA and the APA, failed to provide notice and comment for rulemaking in violation of the APA, and failed to consult and ensure against jeopardy/adverse habitat modification in violation of the ESA.

On May 3, 2021, Plaintiff filed the First Amended Complaint (FAC). On May 10, 2021, the Court granted unopposed motions for intervention by dicamba manufacturers,

the Defendant Intervenors. The EPA answered on May 24, 2021; the Intervenors answered on June 1, 2021. The parties filed a Joint Case Management Plan, but the scheduling conference was vacated because motions were pending raising issues of jurisdiction and venue. In the United States District Court in the District of Columbia (D.C.), end users of dicamba, the Farmers, filed what is essentially the flip side to this case and challenge the registrations as being too restrictive. Also, pending in the D. C. is an appellate case which addresses both jurisdiction and the merits. The D.C. district court case has been stayed pending a decision from the D.C. appellate court.

As alleged by Plaintiffs, the 2020 dicamba registrations required notice and public hearings, which did not occur. This resulted in the jurisdictional cloud floating over the case because in *Nat'l Family Farm Coalition v. EPA* (*NFFC II*), 960 F.3d 120, 1132 (9th Cir. 2020), the case that invalidated the 2018 revised, dicamba-registration actions, the Ninth Circuit Court of Appeals exercised its jurisdiction to hear the claim based on dicamba-registration public hearings held in 2016. As this Court explained in its prior Order, "FIFRA provides two primary avenues for judicial review of EPA's actions: 1) the courts of appeals have 'exclusive jurisdiction to affirm or set aside' orders that EPA issues 'following a public hearing,' 7 U.S.C. § 136n(b), and 2) district courts have jurisdiction to hear challenges of all other 'final actions' that are 'not committed to the discretion of the Administrator by law,' *id*. § 136n(a)." (Order (Doc. 64) at 2.) "All parties agree that the FIFRA's plain language and case law supports jurisdiction in the federal district courts due to the lack of a public hearing. (Motion to Determine Jurisdiction (Doc. 57) at 6.)

However, both plaintiffs in this case and the case before the D.C. district court filed protective proceedings in the respective appellate courts. Because the D.C. case was filed first, "[t]he Ninth Circuit Court of Appeals transferred its case to the District of Columbia pursuant to Multidistrict Litigation (MDL) rules." *Id.* at 3. On November 15, 2021, this Court stayed the case to afford time for the D.C. appellate court to issue a decision, which while not precedentially binding it might "be persuasive in its own right." The Court stayed this proceeding without addressing the question of jurisdiction or whether transfer of this

case to the D.C. district court "would best serve the interests of judicial efficiency." *Id.* The Court denied both motions without prejudice to them being reurged, pending lifting of the stay. The Court ordered the Plaintiffs to file six-month status reports.

Since then, the Plaintiffs voluntarily dismissed the ninth circuit appellate proceeding; the dismissal was with prejudice, removing the Plaintiffs from all proceedings in the D.C. circuit. The status reports reflect that the EPA issued a Report of Information Re: Potential Future Regulatory Action (Doc. 65) on December 22, 2021. This Court understood the report to be an "initial step" by the EPA in evaluating all of its options for addressing future dicamba-related incidents. (Order (Doc. 74) at 2.) The Plaintiffs have, with every status report, asked this Court to lift the stay and find jurisdiction exists to decide the merits of the case. Where Plaintiffs previously asserted jurisdiction might lie in the appellate courts, they now argue like all the other parties that jurisdiction sits with the district courts. Jurisdiction is a question for each court to assess for itself; it is not an issue to be agreed upon by the parties.

The "federal courts are courts of limited jurisdiction and may only hear cases they have been authorized to hear by the Constitution and Congress. A party cannot waive a lack of subject matter jurisdiction." *N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 40 F. Supp. 3d 1238, 1253–54 (C.D. Cal. 2014) (citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986)). "For that reason, every federal [ ] court has a special obligation to 'satisfy itself ... of its [ ] jurisdiction ...' even though the parties are prepared to concede it." *Id.* "Challenges to subject matter jurisdiction cannot be waived and may be raised at any point in the proceeding." *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 1983) (*abrogated on other grounds)*. "The defense of lack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983).

This Court finds that under the express terms of FIFRA, jurisdiction exists in the district courts, not the appellate court. In the event the D.C. courts should issue a decision

regarding jurisdiction that is contrary to this Court's opinion, the matter may be revisited at any time.

The Court turns to Plaintiffs' request to lift the stay. The record reflects that the initial step by the EPA in evaluating all of its options for addressing future dicamba-related incidents, post the December 22, 2021, Report, resulted in two amended registrations in 2022 for Minnesota and Iowa. The United States District Court in the D.C. has allowed plaintiffs in that case to amend the complaint to add the two 2022 amendments. The Plaintiffs in this case ask the same. There is no objection.

The Plaintiffs ask the Court to lift the stay, allow the amendment for a Second Amended Complaint (SAC) to add the 2022 use restrictions for Minnesota and Iowa, and move forward with the merits of the case. The Plaintiffs allege that the 2022 registration amendments simply add to the myriad of use restrictions that makes compliance impossible. The EPA has still done nothing to address the issues identified in *NFFC II* that invalidated the dicamba registrations or the problems identified in the December 22,2021 Report. All of the deficiencies alleged in the Plaintiffs' complaint remain, such as insufficient use restrictions to limit dicamba's volatility or the alleged outright "takes" to federally protected species. (Status Report (Doc. 75)). The D.C. district court case remains stayed and the appellate case is just now being fully briefed; final briefs were scheduled to be filed at the end of September. Even if the D.C. appellate court issues a decision on the merits, it is not binding here. Plaintiffs are not a party in either D.C. proceeding, which both raise issues that are not issues here. While there is potential for conflict between the D.C. proceedings and this case because the cases are the flipsides of each other's challenges, the issues resolved in the D.C. courts will not address nor necessarily resolve the issues raised in this case, especially the ESA claims.

The Defendants' response that nothing has changed since the case was stayed on November 15, 2021, rings hallow because the passage of time, approximately a full year, suggests the stay should be lifted. This is not a case involving private parties, like a contract dispute, where monetary damages can cure any injury. This case is of public concern,

involving environmental and endangered species protections and allegations against the agency charged with protecting the public's interests that it has failed to do so.

Based on the record currently before it, the Court finds no reason for this case to remain stayed. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court's discretionary exertion of this power must be based on a weighing of the competing interests that will be affected by the granting or refusal to grant a stay. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and 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. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). A stay may be entered for the efficiency of a court's docket or because it is the fairest course for the parties to enter a stay, pending resolution of independent proceedings which bear upon the case. *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979).

The efficiency of the Court's docket is no longer benefited by a continued stay of this matter. The pendency of the case will now exceed one year, which is the time frame generally needed to resolve a civil case before this Court. Continuing the stay is not the fairest course for the Plaintiffs nor the public and the hardship or inequity of requiring the Defendant to go forward in this case is less now than it was before because it has necessarily compiled the administrative record and honed its arguments given the D.C. appellate case on the merits has been fully briefed. The Court's lifting of the stay does not preclude any party from filing a motion for a stay to expand on the record currently before the Court or to raise arguments that are not readily apparent and were, therefore, not considered here.

In the Ninth Circuit, it is the rare circumstances when a litigant in one case will be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. *Landis*, 299 U.S. at 255. It is an abuse of discretion to stay a case indefinitely in the absence of a pressing need, *id.*; on one hand there is "inconvenience and costs of piecemeal review" . . . "and the danger of denying justice by delay on the other." *Gillespie v. United States Steel Corp*., 379 U.S. 148, 153 (1964); *see also Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007). The courts "must guard against depriving the processes of justice of their suppleness of adaptation to varying conditions," which can include stays inconveniencing the individual in cases of extraordinary public moment, if the delay is "not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.*at 256. Moderation and public welfare are the guiding factors. As the record now stands, the Court finds both cut in favor of lifting the stay. There is no requirement for district court cases in different circuits to move lock-in-step or for them to issue conforming decisions on the merits of the cases pending before them. To the same extent that a decision by a court in the D.C. is not precedentially binding on this Court, any decision by this Court is not binding there, but may be persuasive in its own right.

Accordingly,

IT IS ORDERED that the STAY IS LIFTED, and this case is returned to this Court's active docket.

IT IS FURTHER ORDERED that the Plaintiffs' Motion to Amend the First Amended Complaint (Doc. 77) is GRANTED.

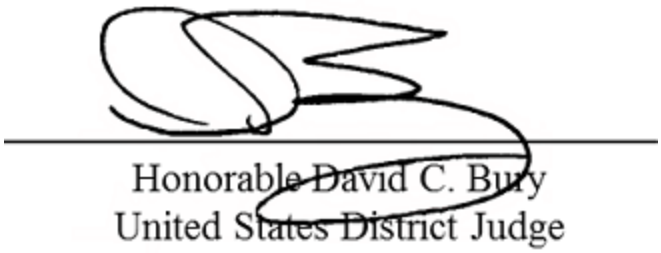
IT IS FURTHER ORDERED that the Plaintiffs shall have 7 days from the filing date of this Order to file the Second Amended Complaint.

IT IS FURTHER ORDERED that within 21 days of the filing date of this Order, the parties shall file the joint motion for a protective order.

IT IS FURTHER ORDERED that within 30 days of the entry of the Protective Order, the Defendants shall file the Administrative Record.

IT IS FURTHER ORDERED that the case management scheduling conference is reset to Tuesday, November 1, 2022, at 10:30 a.m. telephonically with the law clerk, Greer Barkley, for the Honorable David C. Bury.

Dated this 14th day of October, 2022.



Honorable David C. Bury
United States District Judge