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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.*	Case No. CV-20-00555-DCB **MOTION TO DETERMINE JURISDICTION**

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INTRODUCTION

Throughout this case Plaintiffs have had one guiding through-line, which is that this follow-on case belongs in the Ninth Circuit, either directly or on appeal. Given the D.C. Circuit's recent decision, the way forward is plain. This Court should hold that it has jurisdiction, deny the transfer motion, and proceed to the merits of this case.

All the parties are now in agreement that this Court has jurisdiction: EPA and Intervenors agree that jurisdiction is proper in the district courts and have already presented extensive case law supporting that conclusion. Plaintiffs, on the other hand, previously argued that this question remained unclear and took the position that appellate jurisdiction is proper only in the hopes of a more expeditious resolution of this case. However, given the D.C. Circuit's decision to punt the jurisdictional question to a merits panel, that will not occur. Accordingly, Plaintiffs have now moved to voluntarily dismiss their petition for review in the D.C. Circuit, extricating themselves from a quagmire not of their making, and instead take the affirmative position that jurisdiction is proper here. Plaintiffs have never argued, here or in past cases, that notice and comment on a pesticide registration prior to a continuation of a registration, a vacatur, then a new registration without notice and comment four years later unequivocally establishes jurisdiction in the courts of appeals. That question is for this Court to decide.

For the reasons explained below, this Court has jurisdiction. It is undisputed that the public notice and comment procedures that normally constitute a FIFRA § 16(b) "public hearing" were not provided for in the 2020 registrations. *See* Am. Compl. ¶ 25, ECF No. 28; *see also* Am. Compl., Ex. A. There is further no question that EPA provided no formal notice to "affected parties," nor conducted any sort of adversarial proceeding, as would support direct appellate jurisdiction under FIFRA 16(b). While Plaintiffs have consistently taken the position that EPA *should* have conducted notice and comment, as required by 7 U.S.C. § 136a(c)(4), *see* Am. Compl. ¶¶ 378-383 (claim 3), and that EPA's failure to do so tore this case away from the same panel that previously reviewed it, the fact

remains that EPA did not. Even while presenting an argument for appellate jurisdiction, Plaintiffs repeatedly acknowledged that public notice would have unquestionably resulted in appellate jurisdiction; without it, Plaintiffs had only an adequate record for review and EPA's 2016 notice and comment with which to establish appellate jurisdiction: neither of which, standing alone, have ever been held sufficient without notice. Instead, the precedent supports a determination that this case remains within the scope of FIFRA § 16(a) and provides this Court jurisdiction to review.

ARGUMENT

I. All Parties Agree that FIFRA's Plain Language and the Case Law Supports Jurisdiction Here Due to Lack of a Public Hearing.

As a threshold matter, all parties agree that this Court has jurisdiction. Intervenors and EPA have argued throughout this case that district court jurisdiction is unequivocally proper. *See* EPA's Mot. Dismiss, *Am. Soybean Ass'n v. EPA*, No. 20-1441 (D.C. Cir. filed Apr. 23, 2021), ECF No. 1895893; Intervenors' Resp. Mots. 22, *Am. Soybean Ass'n v. EPA*, No. 20-1441 (D.C. Cir. filed May 17, 2021), ECF No. 1898982. They have disagreed that any jurisdictional ambiguity exists, asserting that district court jurisdiction is proper because EPA failed to hold notice and comment on the 2020 registrations. Plaintiffs agree that there is supporting caselaw for this position.

First, it is undisputed that EPA did not hold notice and comment prior to the 2020 registrations. Now, as Plaintiffs previously argued in the D.C. Circuit, and will argue here again, EPA should not have been able to escape appellate jurisdiction through refusing to conduct notice and comment. *See* NFFC Pet'rs' Opp'n Mot. Dismiss 17-20, *Am. Soybean Ass'n v. EPA*, No. 20-1043 (D.C. Cir. filed May 17, 2021), ECF No. 1898988. Yet unfortunately, the plain language of FIFRA 16(b) does not make such an exception and grants the courts of appeals jurisdiction to review *only* cases involving "the validity of any order issued by the Administrator following a public hearing." *Id.* § 136n(b). And courts have interpreted this "public hearing" requirement, time and time again, to require public

notice prior to a registration for appellate jurisdiction. *See, e.g.*, *United Farm Workers of Am. v. EPA*, 592 F.3d 1080, 1082 (9th Cir. 2010). (concluding that the term "hearing" "identifies elements essential in any fair proceeding—notice be given of a decision to be made and presentation to the decisionmaker of the positions of those to be affected by the decision."); *see also Defs. of Wildlife v. Jackson*, 791 F.Supp.2d 96, 102 n.3 (D.D.C. 2011) ("[C]ourts have generally interpreted [§ 136n(b)'s jurisdictional grant] to include [a]gency orders following public notice and comment."); *see Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 187 (D.C. Cir. 2017) (finding jurisdiction following "three notice and comment periods"); *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1090 (9th Cir. 2017) (finding jurisdiction where registrations were "preceded by a public comment and notice period published in the Federal Register"); *Humane Soc'y v. EPA*, 790 F.2d 106, 111 (D.C. Cir. 1986) (finding jurisdiction after EPA published notices in the Federal Register); *Nat'l Grain Sorghum Producers Ass'n v. EPA*, 1996 WL 250327, *2-*3 (D.C. Cir. 1996) (noting EPA's notice of proposed action in Federal Register); *Nat'l Family Farm Coal.* v. EPA (*NFFC II*), 960 F.3d 1120, 1132 (9th Cir. 2020) (finding jurisdiction because the 2018 dicamba registrations "[arose] from a notice-and-comment period held prior to" the original registration decision in 2016).

Second, even in cases more similar to this one—in which EPA held notice and comment on an *earlier* stage of a pesticide re-registration but not the actual registration—courts have found no public hearing occurred and thus district court jurisdiction was proper. For example, in *Center for Biological Diversity v. EPA* (*CBD III*), a district court held that public notice and comment on the re-registration eligibility determinations for active ingredients dazomet, malathion, and permethrin was insufficient to constitute a public hearing for the later re-registration of the pesticide products containing them, for which EPA did not give public notice. 316 F. Supp. 3d 1156 (N.D. Cal. 2018). The court found that the earlier notice had fallen short of notifying the public on any of the actual re-registrations and thus failed to constitute a "public hearing." *Id.* at 1174; *see id.* at 1173

(noting the earlier re-registration eligibility determinations "stopped short of stating intent to actually reregister those products on any particular terms").

Further, the Ninth Circuit's determination of jurisdiction in *NFFC II* is inapposite. There, the Ninth Circuit found notice and comment on the prior 2016 registration sufficient for appellate jurisdiction over Plaintiffs' challenge to the 2018 registrations because the 2018 registrations "[arose] from a notice-and-comment period held prior to the related 2016 registration decision." *NFFC II*, 960 F.3d at 1132. Yet, despite the numerous other important similarities between the litigations, the 2020 registrations challenged here did not "arise" from the 2016 notice and comment in the same way as the 2018 decision. This time, EPA issued the 2020 registrations in response to new registration applications, unlike in 2018. And EPA issued the 2020 registrations following vacatur of the 2018 registrations; the 2020 registrations did not continue the 2016 registrations, as they did in *NFFC II*. Really, the 2020 registrations instead directly arose from the 2018 registration, since they were issued on the heels of its vacatur and purport to address its flaws held by the Ninth Circuit. But that 2018 registration, unlike the 2016 one, did *not* have notice and comment. So while this makes the 2018 and 2020 cases closely related and intertwined, it does not suffice for initial direct appellate review.

Third, the only other major factor courts have considered under FIFIRA 16(b) is whether EPA has produced an "adequate record." Yet no court has found that an "adequate record" alone definitively establishes appellate jurisdiction within the meaning of FIFRA 16(b) when no notice was provided to the affected parties. *See Nw. Food Processors Ass'n v. Reilly*, 886 F.2d 1075, 1077 (9th Cir. 1989) ("We conclude that 136n(b)'s public hearing requirement is satisfied when the EPA conducts proceedings in which interested parties are afforded an opportunity to present their positions by written briefs *and* a sufficient record is produced to allow judicial review.") (emphasis added). Even in *Environmental Defense Fund v. Costle*, 631 F.2d 922 (D.C. Cir. 1980), the case establishing the importance of an adequate record for appellate jurisdiction under FIFRA 16(b), the

court also considered notice to affected parties. There, the court found jurisdiction proper because EPA's proceedings had produced a record that was "wholly adequate for judicial review." *Id.* at 932; *see id.* at 927 (claiming "lack of public notice"). Yet, unlike here, the court did not require notice to the public because the petitioner did not challenge a pesticide registration affecting the public, but rather challenged EPA's decision denying the petitioner's request for a public hearing. *Id.* at 930. Because EPA's decision to deny the request affected only the petitioner, not the public, the court did not require notice to the public. That is not the case here.

The statutory requirement that EPA provide notice to the affected parties would be rendered meaningless if a court could rely solely on the adequacy of the record for review. FIFRA specifically states "[F]ollowing a public hearing, any person who will be adversely affected by such order *and* who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals." 7 U.S.C. §136n(b) (emphasis added). Without proceedings, no affected party could fulfill this requirement. Nor would a free-standing inquiry into the adequacy of the record be workable as a practical matter, since a would-be plaintiff would not know where jurisdiction lies until a court deemed the record adequate or inadequate for judicial review. In short, no circuit precedent goes so far as to require only an adequate record without any notice to affected parties, as is lacking here.

Other cases finding an adequate record for review sufficient for appellate jurisdiction similarly had the notice lacking here. In *Center for Biological Diversity v. EPA*, the court noted the adequacy of the record as one factor *in addition to* three notice and comment periods on the registration of cyantraniliprole. 106 F. Supp. 3d 95, 102 (D.D.C. 2015). The court quoted *Costle*, stating that "the adequacy of the record—not the formality of the proceedings—governs the question of whether there has been a 'public hearing.'" *Id.* at 102. Yet the court *also* noted Ninth Circuit precedent that notice and the opportunity to comment constitute a "public hearing" for purposes of § 136n(b) in finding appellate

jurisdiction. *Id.* at 103. On the basis of both, the court held a public hearing occurred. Overall, the plain language of FIFRA and caselaw interpreting it requires *some* public notice to affected parties for appellate jurisdiction.

II. Review Here Conserves Judicial Resources and Supports Expeditious Resolution of this Case.

Beyond the case law supporting jurisdiction here, judicial efficiency and fairness also supports this Court's review, considering the likelihood of appeal and the Ninth Circuit panel's deep familiarity with this litigation. First, courts have consistently held that where the same or an interrelated action was previously remanded by a court of appeals, hearing that follow-on case in the same appellate tribunal best serves the interests of sound judicial administration.[1] This present situation is a classic example: the Ninth Circuit has

[1] *See, e.g.*, *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003); *see E. Air Lines v. C.A.B.*, 354 F.2d 507, 510 (D.C. Cir. 1965) ("Certainly one factor that has considerable weight in the guidance of judicial discretion is the desirability of transfer to a circuit whose judges are *familiar with the background of the controversy* through review of the same or related proceedings.") (emphasis added); *Liquor Salesmen's Union Loc. 2 of State of N. Y. v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981) (listing "whether one circuit is more familiar with the same parties and issues or related issues than other courts" as a factor); *ITT World Comm., Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) ("[T]here is a significant interest in transferring a case to a court that has already ruled on an identical or related case.") (citing D.C. Circuit decisions); *Mun. Distrib. Grp. v. Fed. Power Comm'n*, 459 F.2d 1367, 1368 (D.C. Cir. 1972) (transfer was in the public interest because 5th Circuit was "familiar with the background of the controversy through review of the same or related proceedings"); *ATT v. FCC*, 519 F.2d 322, 327 (D.C. Cir. 1975) (transferring a petition because "the D.C. Circuit is intimately familiar with the background of this controversy through review of the Phase I decision."); *United Steelworkers of Am. v. Marshall*, 592 F.2d 693 (3d Cir. 1979) (transferring petitions challenging OSHA's occupational health standard governing exposure to lead to the D.C. Circuit where another petition had been filed challenging EPA's Clean Air Act standard for lead, finding that "the institutional interest in having one court consider air standards for lead issued by both federal agencies issuing such standards…is decisive."); *Indus. Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 972 (D.C. Cir. 1977); *Oil, Chem. & Atomic Workers Loc. Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1300 (D.C. Cir. 1982).

for the past four years presided over prior closely related matters, deciding them last June. There is no question that the Ninth Circuit panel possesses significant familiarity with the dicamba controversy, the science of dicamba drift, and EPA's detailed spraying mitigation. *NFFC II*, 960 F.3d at 1137 (describing "overwhelming record evidence" of under-reported dicamba damage); *id.* at 1139, 1143-44. The panel is familiar with the background of dicamba spraying for the first time over-the-top of cotton and soy. *See NFFC II*, 960 F.3d at 1125-1127. It is also highly cognizant of the facts of the extensive vapor and spray drift damage in the subsequent growing seasons, caused by EPA's 2016 and 2018 approvals, which is now occurring again. *Id.* at 1127-1129. It has in-depth knowledge of the 2018 registration, *id.* at 1120-1130, and the procedural history of the cases, *id.* at 1130-1131.

Furthermore, the Ninth Circuit also has extensive knowledge of, and familiarity with, the complex process by which EPA assesses dicamba's risks, the damage that dicamba caused, and how EPA weighs the costs and benefits of these risks, concluding that EPA substantially understated some risks and entirely failed to acknowledge other risks. *Id.* at 1136-1143. The prior court is also well-versed in the "mitigation" of dozens of pages of instructions that EPA asserted would prevent extensive damage to crops, trees, other crops, and the wildlife that depend upon them, but for which EPA failed to assess whether farmers could follow in real world conditions, and which the Ninth Circuit found nearly impossible to follow. *Id.* at 1124-26, 1142. Finally, although the prior court did not find it necessary to reach the ESA arguments in the prior cases, those arguments were fully briefed both in the 2016 briefing and again in the 2018 briefing, and will be substantially similar this time around, as EPA still has failed to consult with the expert wildlife agencies under Section 7 before re-registering the products. *See id.* at 1124-25.

Similarly, the overlap between the administrative records in *NFFC I* and *NFFC II* and the present case is substantial. EPA, charged with compiling the record, acknowledges it will include the "relevant studies and information that were considered in EPA's earlier registration actions" in 2016 and 2018, as well as new studies, which still reference the

earlier supporting documents. Am. Compl., Ex. A 10.[2] Indeed, EPA acknowledges that the Ninth Circuit has already reviewed nearly half of the documents in the record. *See* Case Management Plan 11, ECF No. 44. Having immersed itself in the prior record and its assessments and data (and lack thereof), the panel will be best equipped to provide an assessment of any new supplemental studies done by EPA.

Second, the connection between *NFFC I* and *II* and the present case is even further pronounced because the question of whether EPA actually addressed the multiple deficiencies the court found in *NFFC II* is central to this proceeding. Allowing the same court to review related proceedings on appeal arising from the same underlying controversy avoids the duplication of judicial resources and the possibility of inconsistent results. *Cf. Va. Elec. & Power Co. v. EPA*, 655 F.2d 534, 536 n.2 (4th Cir. 1981) (explaining that permitting two separate courts to render potentially conflicting decisions "makes little sense either in terms of judicial consistency or economy."). On appeal the Ninth Circuit panel is best positioned to determine whether EPA has, in fact, acknowledged, assessed, and cured the many deficiencies in its registration actions recounted at length in *NFFC II*, and has already indicated that it would assign any appeal to the same panel when and if the case is returned. *See NFFC III*, No. 20-73750 (9th Cir. Jan. 26, 2021).

And to be sure an appeal is likely here, given the vast scope of damage to Plaintiffs' members, Intervenors' financial interests in their dicamba products, and the procedural history of this litigation. Following the Ninth Circuit's decision last summer, Intervenors Bayer and BASF immediately applied for re-registration of their dicamba products just weeks after the decision, on July 2. *See* Am. Compl. ¶ 12. EPA, in turn, wasted no time re-registering dicamba less than five months after the Ninth Circuit's decision, based on a handful of new studies. *Id.* ¶ 233. EPA has even publicly admitted that political

[2] EPA, Supporting and Related Material: Dicamba for Use on Dicamba-Tolerant Cotton and Soybeans, https://www.regulations.gov/search?filter=EPA-HQ-OPP-2020-0492%20 (listing only ten new supporting documents, only five of which contain new analyses).

considerations tainted its scientific integrity in registering dicamba, but refuses to reconsider its decision. *Id.* ¶¶ 23, 367. This inevitable appeal regarding this product used on millions of acres in 34 states belongs in the Ninth Circuit.

Finally, for all these reasons, Plaintiffs have concurrently moved to voluntarily dismiss their petition for review in the D.C. Circuit. *See* Mot. Voluntarily Dismiss Pet., *Am. Soybean Ass'n*, No. 21-1043 (D.C. Cir. filed Aug. 6, 2021). The pursuit of two simultaneous lawsuits does not align with Congress's intent for efficient resolution for pesticide registrations. *See, e.g.*, *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.3d 908, 912 (9th Cir.1989) ("[T]he point of creating a special review procedure in the first place is to avoid duplication and inconsistency."); *see also Ctr. for Biological Diversity v. EPA*, No. 11-CV-00293-JCS, 2013 WL 1729573, at *21 (N.D. Cal. Apr. 22, 2013). Congress specifically included FIFRA's 16(a) and 16(b) to avoid just this situation of the same Plaintiffs proceeding at the same time in both district and appellate courts. It would make little sense for Plaintiffs to continue in the D.C. Circuit now that they have taken the definitive position that jurisdiction is proper here.

III. Plaintiffs May Argue for District Court Jurisdiction Here.

In their response, Intervenors may try and argue that Plaintiffs are barred from revising their position on where the best argument for this situation's ambiguous jurisdiction lies. They would be both factually and legally incorrect.

First, it is black-letter law that principles of judicial estoppel do not apply to questions of subject matter jurisdiction. The Supreme Court has explained that because subject matter jurisdiction is "an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign[,] . . . no action of the parties can confer subject matter jurisdiction upon a federal court . . . thus principles of estoppel do not apply [to questions of subject matter jurisdiction]." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702

(1982); *see also In re Sw. Bell Tel. Co.*, 535 F.2d 859, 861 (5th Cir. 1976) ("Whatever the scope of the doctrine [of judicial estoppel] may be, so far as we have been able to discover it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. Persons who meet those criteria have a statutory, and indeed a constitutional, right to resort to the federal courts. A district court has no authority to negate that right simply because such a person has not observed the consistency in pleading.") (footnotes omitted); *see also Alkayali v. Eclipse Grp., LLP*, No. 13CV954-WQH-KSC, 2013 WL 4525231, at *2 (S.D. Cal. Aug. 26, 2013) (holding that Defendants may not be judicially estopped from taking a position on subject matter jurisdiction inconsistent with their prior positions in other lawsuits).

Second, any such argument would be rebutted by Intervenors themselves, who repeatedly argued that Plaintiffs had unequivocally argued for *district court* jurisdiction in this case. *See* Intervenors' Resp. Mots. 22; Intervenors' Resp. Mot. Stay, ECF No. 45. Indeed, Intervenors repeatedly drilled that Plaintiffs had claimed jurisdiction was proper here because of Plaintiffs' statement in their Complaint and to the Ninth Circuit. *See* Complaint ¶ 23 (D. Ariz. Dec. 23, 2020), ECF No. 1 ("This Court has jurisdiction pursuant to 7 U.S.C. § 136n(a) of FIFRA because EPA issued the Registration Actions without a public hearing."); Am. Compl. ¶ 25 (same). They are correct: Plaintiffs have always submitted that district court jurisdiction may be proper by virtue of filing this case.

Third and finally, considering Plaintiffs' consistent view that jurisdiction is ambiguous, and their acknowledgement of the possibility of district court jurisdiction, it could hardly be argued that Plaintiffs' position now is fully inconsistent. In truth Plaintiffs never took one position without also acknowledging ambiguity. *See* Mot. Assign Prior Panel 11, *Nat'l Family Farm Coal. v. EPA*, No. 20-73750 (9th Cir. Dec. 24, 2020), ECF No. 6 ("[J]urisdiction direct in the Court of Appeals in this case is *far from clear*.") (emphasis added). From the start of this case, Plaintiffs filed in both in this Court and the Ninth Circuit, uncertain which court had jurisdiction based on the unique facts presented here.

Plaintiffs even admitted to the Ninth Circuit that "EPA did not undertake any notice and comment" here, and that "[i]n such instances, review is *generally proper* in the district court." NFFC Pet'rs' Mot. Assign Prior Panel 11 (emphasis added). In the D.C. Circuit, Plaintiffs explained "[T]he jurisdictional ambiguity caused by EPA's failure to hold notice and comment propelled Petitioners to file cases in both district and appellate courts," NFFC Pets.' Opp'n Mot. Dismiss 18, and noted that such a jurisdictional determination would require "a highly fact specific inquiry." *Id.* at 7.

In this Court, Plaintiffs continued to plainly state their position regarding jurisdictional ambiguity. On page one of Plaintiffs' Motion to Stay, Plaintiffs explained that "it is undisputed that there is a question of which court has jurisdiction over this case," Pls.' Mot. Stay 1, ECF No. 42. In Plaintiffs' Opposition to Motion to Transfer, Plaintiffs also recognized the uncertainty created by EPA's failure to conduct notice and comment, noting "Had EPA [conducted notice and comment], jurisdiction would indisputably lie in the Ninth Circuit; since they did not, Plaintiffs filed in this Court." Pls.' Opp'n Mot. Transfer 17, ECF No. 41.

CONCLUSION

For the foregoing reasons, Plaintiffs request this Court hold jurisdiction proper here.

Respectfully submitted this 6th day of August, 2021.

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