Nos. 19-72109 & 19-72280

OPINION ISSUED DECEMBER 21, 2022
(O'SCANNLAIN, MILLER, AND LEE, CIRCUIT JUDGES)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY, *et al.*,
Petitioners,
v.
MICHAEL S. REGAN, *et al.*,
Respondents.

POLLINATOR STEWARDSHIP COUNCIL, *et al.*,
Petitioners,
v.
U.S. ENVT'L PROT. AGENCY, *et al.*,
Respondents.

On Petition for Review of an Order of the
United States Environmental Protection Agency

POLLINATOR STEWARDSHIP COUNCIL, ET AL.'S PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, petitioners American Beekeeping Federation and Pollinator Stewardship Council each certify that they have no parent corporation, nor are they owned, wholly or in part, by any publicly held corporation.

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INTRODUCTION AND RULE 35 STATEMENT

On behalf of a commercial beekeeping industry facing economic collapse, petitioners American Beekeeping Federation, Pollinator Stewardship Council, and Jeffrey Anderson (Beekeepers) request rehearing and rehearing en banc.

These consolidated cases challenge a July 19, 2020, decision by the U.S. Environmental Protection Agency (EPA) that registered a "very highly toxic" insecticide called sulfoxaflor for use on important bee-attractive crops before and during bloom. 3-PSCER-365. To avoid duplication with the petition for rehearing filed by the Center for Food Safety, *et al.* petitioners in the consolidated case, Beekeepers emphasize here three points that warrant rehearing.

First, the majority's holding that EPA's admitted failure to assess the economic cost of its decision on beekeepers "is not an error serious enough to warrant vacatur," Op. 38, directly conflicts with this Court's opinion in *National Family Farm Coalition v. EPA* ("*Family Farm*"), 960 F.3d 1120 (9th Cir. 2020). There, the Court held that EPA's failure to address the economic cost of pesticide registration is a "fundamental flaw" requiring vacatur. *Id*. at 1142, 1145.

Second, the majority's holding that "a vacatur may end up harming the environment more," Op. 8, directly conflicts with *Pollinator Stewardship Council v. EPA* ("*Pollinator I*"), 806 F.3d 520 (9th Cir. 2015). In that case, the Court held

that "leaving the EPA's registration of sulfoxaflor in place risks more potential environmental harm than vacating it." *Id*. at 532.

Third, this case involves questions of exceptional importance warranting rehearing. Across America, honey bee colonies are collapsing at rates that are unprecedented and unsustainable. The crisis is accelerating. In 2013, when EPA first registered sulfoxaflor, U.S. beekeepers reported losing just over 34% of their colonies. In 2019, when EPA re-registered sulfoxaflor's riskiest uses after remand from *Pollinator I*, U.S. beekeepers lost nearly 44% of their colonies. *See* Exh. D to Decl. of Elizabeth Conrey, ECF 37-3 (Aug. 31, 2020) at 2 [Bates 114].

The plight of the honey bee is a matter of critical importance, not just for the beekeepers who filed this suit to protect their livelihoods, but for all of us. At least one-third of our diet depends upon crops that will not produce unless pollinated by a bee. Exh. B to Decl. of Bret Adee, ECF 37-3 (Aug. 31, 2020) at iii [Bates 23]. According to the California Legislature, the colony collapse crisis "has created a serious threat to our food supply, and this crisis threatens to wipe out production of crops dependent on bees for pollination." Stats. 2016, ch. 138 (A.B. 2755), § 1, subd. (a)(6). We remain on the brink of what the U.S. Department of Agriculture (USDA) has termed "a pollination disaster." Exh. B to Decl. of Steve Ellis, ECF 37-3 (Aug. 31, 2020) at 5 [Bates 174].

Alarmingly, EPA has advised the Court that it does not read the majority opinion as imposing *any* deadline for EPA to issue on remand a new registration decision for sulfoxaflor that complies with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Endangered Species Act (ESA). *See* Resp'ts' Mot. for Clarification, ECF 188 (Jan. 23, 2023) at 3. EPA's unfortunate track record of illegal delay on remand in pesticide cases is well established. *See, e.g.*, *In re Nat. Res. Def. Council*, 956 F.3d 1134, 1136 (9th Cir. 2020) ("[W]e hold that the EPA has unreasonably and egregiously delayed the performance of its statutory duties."); *In re Pesticide Action Network N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015) ("Issuing a writ of mandamus is necessary to end this cycle of incomplete responses, missed deadlines, and unreasonable delay."); *In re Ctr. for Biological Diversity*, 53 F.4th 665, 670-71 (D.C. Cir. 2022) (same). The reality is that EPA is unlikely to complete its latest remand without further litigation, and leaving EPA's registration decision in place indefinitely while EPA drags its feet will only exacerbate the pollination disaster underway.

The majority's decision to remand EPA's illegal registration decision without vacatur departs from precedent and places bees, beekeepers, and U.S. food security at significant risk. Rehearing is necessary both to maintain uniformity of the Court's vacatur caselaw and because these consolidated cases involve questions of exceptional importance. *See* Fed. R. App. P. 35(a).

ARGUMENT

I. Rehearing Is Necessary to Maintain Uniformity of the Court's Vacatur Caselaw.

This Court has well established that "vacatur of an unlawful agency action normally accompanies a remand." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018); *see also Cal. Wilderness Coal. v. Dept. of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate, the appropriate remedy is to vacate that action."). This Court has described the circumstances warranting remand without vacatur as "limited" and "rare." *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). Consistent with this Court's precedent, for example, a court may "decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. NMFS*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015).

As set forth below, the majority's conclusion that this is an extraordinary case requiring remand without vacatur cannot be reconciled with this Court's precedent regarding vacatur and conflicts directly with the Court's prior opinions in *Family Farm* and *Pollinator I*.

A. The Majority's Holding that EPA's Failure to Address Economic Costs to Beekeepers "Is Not an Error Serious Enough to Warrant Vacatur" Conflicts with *Family Farm.*

The majority's holding that EPA's admitted failure to consider the economic cost of its registration decision to commercial beekeepers "is not an error serious enough to warrant vacatur," Op. 38, conflicts directly with this Court's opinion in *Family Farm*.

In *Family Farm*, the Court held that EPA's failure to address the economic cost of registering an herbicide called dicamba for use on dicamba-tolerant soybeans and cotton constituted a "fundamental flaw" requiring vacatur. 960 F.3d at 1145. EPA had assessed the potential economic benefits of its registration decision for growers of dicamba-tolerant crops. But EPA had understated and ignored the cost of its decision to growers of conventional soy and cotton that cannot tolerate dicamba. *Id.* at 1142-45. *Family Farm* concluded that EPA's one-sided assessment of dicamba's economic impact violated FIFRA and required vacatur. In the absence of information about the cost of its registration decision, the Court explained, "the fundamental flaws in the EPA's analysis are so substantial that it is exceedingly unlikely that the same rule would be adopted on remand." *Id.* at 1145 (quoting *Pollinator I*, 806 F.3d at 532).

EPA made precisely the same fundamental flaw when it re-registered sulfoxaflor for use on bee-attractive crops before and during bloom. Indeed, EPA

admitted that it "did not identify the potential economic cost to beekeepers." Op. 38. As Judge Miller put it, EPA's approach to beekeepers was "one of thorough disregard . . . [t]he agency 'entirely' failed to assess the costs they would incur." Op. 46 (dissent) (quoting *Family Farm*, 960 F.3d at 1145).

EPA's conceded failure to consider economic costs that will be borne by U.S. beekeepers is a serious legal violation requiring vacatur, because "FIFRA uses a cost-benefit analysis to ensure that there is no unreasonable risk created for people or the environment from a pesticide." *Family Farm*, 960 F.3d at 1133 (quoting *Pollinator I*, 806 F.3d at 522-23). Specifically, FIFRA allows EPA to grant registration only if EPA determines the pesticide "will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA defines the phrase "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 a pesticide." *Id.*, § 136(bb) (emphasis added). Thus, "FIFRA requires the EPA to gather data to determine if the benefits of a particular pesticide product outweigh its economic, social, and environmental costs." *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1085 n.9 (9th Cir. 2017). EPA's careful weighing of costs and benefits "is *the critical determination that the pesticide complies with FIFRA's safety standard*." *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 53 (9th Cir. 2022)

(emphasis added). "Without any investigation of those economic effects, however, the EPA could not do even a rough and ready balancing" of sulfoxaflor's costs and benefits, as FIFRA unambiguously requires. *Love v. Thomas*, 858 F.2d 1347, 1361-62 (9th Cir. 1988).

Had EPA considered the economic cost to beekeepers associated with registering sulfoxaflor—a systemic insecticide that is "very highly toxic" to bees—for use on bee-attractive crops during an unprecedented pollinator die-off, it would have discovered those costs are enormous and easily offset any potential benefits associated with registering those uses. "Commercial honey bee colonies are an integral part of agricultural production in the United States," and hives moved across the country "pollinate crops that generate billions of dollars to the agricultural economy." Exh. A to Decl. of Steve Ellis, ECF 37-2 (Aug. 31, 2020) at 1 [Bates 149]. According to USDA, "[a] frequently used estimate of the value of insect pollination services to crops is $15 billion, of which $12 billion is attributable to honey bees." Exh. A to Decl. of Bret Adee, ECF 37-3 (Aug. 31, 2020) at 2 [Bates 26].

Collapsing honey bee populations are making it increasingly difficult for beekeepers to fulfill agricultural demand for pollination services. In California, for example, USDA found "[t]he cost of honey-bee almond pollination services is believed to have risen in connection with increased costs of maintaining hives in

the midst of an industrywide overwintering loss epidemic." Exh. A to Decl. of Bret Adee, ECF 37-3 (Aug. 31, 2020) at 3 [Bates 14]. According to USDA, "[i]t is imperative that we increase honey bee survival both to make beekeeping profitable but more importantly to meet the demands of U.S. agriculture for pollination and thus ensure [our] food security." Exh. B to Decl. of Steve Ellis, ECF 37-3 (Aug. 31, 2020) at 5 [Bates 174]. Notably, the States that collectively produce about 90 percent of the fruits, nuts, berries, fruiting vegetables, and other bee-attractive crops that EPA illegally added to sulfoxaflor's registration in 2019 have urged the Court to "vacate EPA's registration of sulfoxaflor." Amicus Br. of the States, ECF 40 (Aug. 3, 2020) at 2.

Unless and until EPA assesses and balances the economic cost of its registration decision on beekeepers, there is no lawful basis for EPA's assertion that registration will have no unreasonable adverse effect on the environment. The majority's holding that EPA's failure to address economic costs to beekeepers "is not an error serious enough to warrant vacatur," Op. 38, is incorrect and cannot be squared with this Court's precedent.

B. The Majority's Holding that "Vacatur May End Up Harming the Environment More" Conflicts with *Pollinator I.*

The majority's additional holding that "vacatur may end up harming the environment more," Op. 8, cannot be reconciled with *Pollinator I*. "[G]iven the precariousness of bee populations," *Pollinator I* held, "leaving the EPA's

registration of sulfoxaflor in place risks more potential environmental harm than vacating it." 806 F.3d at 532. Rehearing is necessary to resolve this inconsistency in the caselaw.

The majority's conclusion that vacatur may cause environmental harm is premised entirely on EPA's argument that "sulfoxaflor has a more favorable toxicological profile compared to alternatives." Op. 39. EPA made precisely this same argument in *Pollinator I*, and the Court properly rejected it then. *See* Answering Br. for Resp'ts in case 13-72346, ECF 30-1 (Feb. 14, 2014) at 54 ("[S]ulfoxaflor would be a comparatively better pesticide with regard to effects on bees than other currently available pesticides."). As Judge Miller explained in dissent, EPA's admitted failure to assess the economic costs of its registration decision undermines EPA's assertions regarding sulfoxaflor's environmental benefits relative to other pesticides. "The costs to beekeepers and the risks to bees are unknown and may chip away at the claimed benefits, whether or not they cancel them out." Op. 48 (dissent) (citing *Pollinator I*, 806 F.3d at 532).

Moreover, EPA's own analysis contradicts the agency's Orwellian argument that bees are better off if an insecticide that is "very highly toxic" to them remains registered for use on bee-attractive crops. The majority opinion cites EPA's rough comparison of sulfoxaflor's direct toxicity relative to a small handful of other insecticides. EPA conceded, however, that "[a] full comparison of honeybee

toxicity for sulfoxaflor and its main alternatives cannot be made because EPA does not yet have all the data for the other insecticides." 1-PSCER-21. EPA has also acknowledged that an abstract "hazard comparison" of a pesticide's relative toxicity that fails to account for the conditions under which the pesticide will actually be used "does not provide an indication of the likelihood of the adverse effect occurring in the environment." Exh. A to 2nd Decl. of Gregory Loarie, ECF 124-2 (June 4, 2021) at 17. Finally, EPA's analysis confirms sulfoxaflor will be used as a rotational partner to supplement, rather than displace, other insecticides. *See, e.g.,* 4-PSCER-644 ("[S]ulfoxaflor would offer growers a different mode of action with which to rotate insecticides."); 4-PSCER-662 ("Sulfoxaflor will provide a rotation partner for scale control but may not replace market leading chemistries."). As in *Pollinator I,* the record here simply does not support EPA's argument that remand without vacatur is necessary to avoid "serious and irremediable" environmental harm. *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242. Rather, "given the precariousness of bee populations, leaving the EPA's registration of sulfoxaflor in place risks more potential environmental harm than vacating it." *Pollinator I* 806 F.3d at 532.

In summary, the majority's view that vacating sulfoxaflor's registration would harm the environment is counterfactual and conflicts with this Court's opinion in *Pollinator I*. Rehearing is necessary to resolve this conflict.

II. This Case Involves Questions of Exceptional Importance Relating to Pollinator Health and Food Security.

Rehearing is warranted for the additional reason that this case involves questions of exceptional importance relating to pollinator health and U.S. food security. Fed. R. App. P. 35(a)(2). Eight years ago, this Court recognized honey bees were "dying at alarming rates." *Pollinator I*, 806 F.3d at 522. Since then, the crisis has not subsided—it has worsened. In 2019, when EPA re-registered sulfoxaflor's riskiest uses, "beekeepers in the U.S. lost an estimated 43.7% of their honey bee colonies." *See* Exh. D to Decl. of Elizabeth Conrey, ECF 37-3 (Aug. 31, 2020) at 2 [Bates 114]. "This average annual loss rate is greater than [the previous] year's estimate of 40.4% (a 3.3 percentage point increase), as well as the average annual loss rate since 2010-2011 (39.0%, a 4.7 percentage point increase)." *Id.* Indeed, 43.7% is "the second highest annual colony loss rate reported since the survey began estimating this measure in 2010-2011." *Id.*

In the midst of the accelerating pollinator crisis, whether "equity demands" that EPA's illegal registration decision for sulfoxaflor be remanded without vacatur is a question of exceptional importance warranting rehearing. Op. at 30. EPA's own analysis confirms that sulfoxaflor is "very highly toxic" to honey bees. 3-PSCER-365. EPA's analysis also confirms the use of sulfoxaflor on bee-attractive crops before and during bloom will expose colonies to a dose of sulfoxaflor that exceeds the minimum dose demonstrated to have an "adverse

effect" on the entire colony, which, according to EPA, indicates "a potential for colony level risk." 3-PSCER-497.

The majority's finding that the potential for colony level risk exists only if bees forage on crops sprayed with sulfoxaflor for longer than 10 days is incorrect and misconstrues EPA's ecological risk assessment. Op. 35-36. In fact, EPA determined that colonies that forage on many crops treated with sulfoxaflor for no more than 10 days will receive a dose of sulfoxaflor that exceeds the "no observed adverse environmental concentration" (NOAEC) and/or the "lowest observed adverse effect concentration" (LOAEC), indicating a potential for "colony level risk." 3-PSCER-441. Because the studies used to determine the NOAEC and LOAEC were unable to assess the affect of exposing colonies to sulfoxaflor for more than 10 days, EPA cautioned that its analysis "could underestimate colony level risk to honey bees" exposed to sulfoxaflor for "substantially longer than 10 days." 3-PSCER-498.

Thus, EPA's analysis found that honey bee colonies that forage on crops sprayed with sulfoxaflor for just 10 days will receive a dose of sulfoxaflor that is known to cause adverse, colony-level effects. In addition, EPA acknowledged that colonies exposed to sulfoxaflor for more than 10 days will receive an even larger dose of sulfoxaflor. As Judge Miller warned, "Longer exposure is a real possibility because growers of blooming crops like citrus and strawberries may repeatedly

apply sulfoxaflor and because some colonies pollinate multiple crops in succession." Op. 45 (dissent). EPA's ecological risk assessment confirms Judge Miller's conclusion in this regard. *See* 4-PSCER-497-98 (acknowledging both "a potential for repeated applications of sulfoxaflor to honey-bee attractive crops during or near bloom to result in combined oral exposures that exceed the 10-d[ay] exposure duration" and the potential that "colonies used to pollinate multiple crops in succession could potentially become exposed to sulfoxaflor for combined time periods lasting longer than 10 days").

Ultimately, EPA's analysis confirms that registering sulfoxaflor for use on bee-attractive crops before and during bloom will place bees and beekeepers already reeling from years of unprecedented colony collapse at significant additional risk. Whether equity in fact "demands" this result is a question of exceptional importance warranting rehearing. Op. 30.

CONCLUSION

For these reasons, Beekeepers respectfully request rehearing and rehearing en banc.

Dated: April 10, 2023

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