

Nos. 19-72109 & 19-72280

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency

MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

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INTRODUCTION

This case involves challenges under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to the U.S. Environmental Protection Agency's (EPA) 2019 amendments to registrations of the pesticide sulfoxaflor.¹ One of the consolidated petitions for review also advances claims under the Endangered Species Act (ESA). EPA recognizes that the Agency failed to comply with the ESA's requirements prior to issuing the registration amendments for sulfoxaflor. Accordingly, EPA respectfully requests that this Court remand the challenged registration amendments to the Agency to allow EPA to correct the ESA error—specifically, to make an “effects determination,” and take additional follow up action as appropriate. Granting this motion will conserve the Court's and the parties' resources, as it will allow EPA to address acknowledged deficiencies in

¹ The actions challenged in this case are amendments to the registrations that were first issued in 2016. The amendments are attached to the Center for Food Safety's petition for review at Exhibits B-D. *See* Pet. for Review, Case No. 19-72109, Doc. Id. No. 11403618, Exhs. B-D. The rationale supporting these amendments is reflected in the decision document attached as Exhibit A to the petition for review. *Id.*, Exh. A.

the challenged amendments without the need for further briefing, oral argument, or a Court decision.

EPA further seeks that the remand be granted without vacatur because EPA's legal error may be remedied through further Agency action. Vacatur would be inequitable here because it would render sale and distribution of sulfoxaflor unlawful under FIFRA, thereby removing a pesticide with reduced risks from the market and very likely increasing the use of older, riskier alternatives. The Court should thus grant EPA's motion, allow the Agency to address the acknowledged ESA legal defects in the first instance.

Intervenor—the registrant Dow Agrosiences—consents to the remand without vacatur, and will separately file a response in support of EPA's motion. Petitioners oppose the motion.

BACKGROUND

A. Legal Background

1. Federal Insecticide, Fungicide, and Rodenticide Act

FIFRA generally precludes the distribution or sale of any pesticide unless it is “registered” by EPA. 7 U.S.C. § 136a(a). EPA issues a license, referred to as a “registration,” for each specific pesticide product

allowed to be marketed. *Id.*; see also *Nat'l Family Farm Coalition v. EPA*, 966 F.3d 893, 912 (9th Cir. 2020) (same). “The terms and conditions on the license include exactly what product can be sold, the specific packaging it must be sold in, and labeling that contains instructions on proper use.” *Nat'l Family Farm*, 966 F.3d at 912 (citing 7 U.S.C. § 136(p)). The Act directs that EPA “shall register a pesticide” if the Agency determines that:

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5).

To evaluate whether an application to amend an existing registration should be granted, EPA evaluates whether the requested amendment, *e.g.*, a proposed new use, is likely to cause unreasonable adverse effects. Relevant here, Congress expressly directs EPA to balance benefits and costs. Thus, “unreasonable adverse effects on the

environment” include “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.” *Id.* § 136(bb). It is unlawful to use a pesticide “in a manner inconsistent with its labeling.” *Id.* § 136j(a)(2)(G).

2. Endangered Species Act

Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531. ESA section 7 directs each federal agency to insure, in consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service (collectively, the Services), that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of” any listed species or destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2).

If the agency proposing the relevant action (referred to as the action agency) determines that the action “may affect” listed species or critical habitat, the action agency must pursue either informal or formal

consultation with one or both of the Services. 50 C.F.R. § 402.13-402.14. Formal consultation is required unless the action agency determines, with the Services' written concurrence, that the proposed action is "not likely to adversely affect" a listed species or critical habitat. *Id.*

§§ 402.13(a), 402.14(b)(1). If formal consultation is required, then one or both of the Services must prepare a biological opinion stating whether the proposed action is likely to "jeopardize the continued existence of" any listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14.

B. Historical Background

Many hundreds of pesticides have been approved and are available for use that have not undergone ESA review—namely, without EPA first undertaking ESA consultation or making a "no effect" determination under the statute. *See Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), *abrogation on other grounds recognized by Cottonwood Environmental Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015). EPA has acknowledged its duty to consult under ESA section 7 prior to issuing a registration for a pesticide. *See id.* In recent years, EPA has worked with the Services,

along with help from the National Academy of Sciences, to address the backlog and remedy noncompliance by creating a framework for pesticide consultation. *See* App'x, Appx001-016, Decl. ¶¶ 11-12.

Congress is aware of this dialogue and has requested that EPA report on consultation progress and streamline integration of ESA and FIFRA procedures. Pub. L. No. 113-79, § 10013, 128 Stat. 649 (2014).

To this end, EPA began several “pilot” Biological Evaluations using the methods identified by the National Academy of Sciences as a first step towards implementing the Academy’s recommendations. *See* Decl. ¶ 12. In doing so, EPA has been allocating most resources to the review of older, more toxic pesticides, rather than to the first-time registration of new, less toxic ingredients. *See* Decl. ¶¶ 13, 23.

Subsequently, EPA, the Department of Interior, and the Department of Commerce signed a memorandum of agreement establishing an interagency working group to include these and other federal agencies tasked with providing recommendations to the agencies’ leadership on improving the ESA consultation process for pesticides. *See* Decl. ¶ 12. The intent of the interagency working group is to improve the consultation process required under ESA section 7 for

pesticide registration and registration review. *Id.* On December 20, 2018, President Trump signed into law the Agriculture Improvement Act of 2018 (2018 Farm Bill), Pub. L. No. 115-334, 132 Stat. 4490 (2018), codifying the interagency working group and the memorandum of agreement. As required under section 10115 of the 2018 Farm Bill and FIFRA, 7 U.S.C. § 136a(c)(11), the interagency working group report was delivered to Congress in December 2019, and an update was provided in June 2020. *Id.*

B. Procedural History

a. 2013 Registration

Sulfoxaflor is an insecticide that targets a broad range of piercing and sucking insects including aphids, plant bugs, whiteflies, planthoppers, mealybugs, and scales. *See* EPA, Decision Mem. Supporting Registration Decision for New Uses of the Active Ingredient Sulfoxaflor (July 12, 2019) (hereinafter July 2019 Decision), EPA-HQ-OPP-2010-0889-0570, *available at* Pet. for Review, Case No. 19-72109, Doc. Id. No. 11403618, Exh. A. In 2010, Intervenor Dow AgroSciences, LLC (Dow) submitted registration applications to EPA for three pesticide products that contain sulfoxaflor as their active ingredient. In

May 2013, EPA granted unconditional registration of these products under FIFRA, 7 U.S.C. § 136a(c)(5), with certain mitigating measures to protect pollinators. App’x, Appx017-034, EPA, Registration of the New Active Ingredient Sulfoxaflor for Use on Multiple Commodities, Turfgrass and Ornamentals (May 2013), EPA-HQ-OPP-2010-0889-0396. These registrations were challenged on FIFRA grounds by a number of environmental petitioners. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015). No party challenged the registrations under the ESA at that juncture—rather, challenges were solely brought under FIFRA. *See id.*

In 2015, the Court granted the petitions for review on the grounds that EPA lacked sufficient data on the impacts of sulfoxaflor on bee populations. *Id.* at 531. Because of this, the Court held that EPA’s decision was not supported by substantial evidence under FIFRA. *Id.* The Court then vacated the registration. *Id.* at 532.

**b. 2016 Registrations and 2019
Registration Amendments.**

After the vacatur of the registration in 2015, EPA re-evaluated the sulfoxaflor application to take into account the errors identified by the

Pollinator Stewardship Council court. In 2016, EPA granted unconditional registrations of three pesticide products containing sulfoxaflor for use on specified crops, turf and ornamentals. *See* App'x, Appx035-045, EPA, Registration Decision for Sulfoxaflor for Use on Agricultural, Crops, Ornamentals and Turf (Oct. 14, 2016), EPA-HQ-OPP-2010-0889-0563 (discussing issuance of registrations for Sulfoxaflor Technical (Registration No. 62719-631, and two end use products: Transform WG (Registration No. 62719-625) and Closer SC (Registration No. 62719-623)). These registrations were not challenged.

Then, in July 2019, EPA granted unconditional amendments under FIFRA section 3(c)(5) to those same registrations. *See* July 2019 Decision. Finally, certain restrictions that were included on the October 2016 registrations were removed. *Id.*

As part of these decisions, EPA prepared an assessment of the ecological risks from the proposed amendments to the registrations. App'x, Appx092-377, EPA, Sulfoxaflor: Ecological Risk Assessment for Section 3 Registration for Various Proposed New Uses (July 10, 2019), EPA-HQ-OPP-2010-0889-0566. EPA also considered the impacts to pollinators based on existing and newly submitted data. *See* July 2019

Decision at 7-9. Finally, EPA prepared a benefits analysis of the amendments to help determine whether the pesticide poses unreasonable adverse effects to the environment. *See* App'x, Appx046-091, EPA, Benefits for New Uses of Sulfoxaflor on Alfalfa, Avocado, Citrus, Corn, Cotton, Cucurbits, Fruiting Vegetables, Pineapple, Pome Fruit (Pre-bloom), Rice, Sorghum, Soybean, Strawberry, Ornamentals and Home Fruit Trees (Mar, 7, 2019), EPA-HQ-OPP-2010-0889-0569.

c. Petitions for Review

Shortly after the 2019 amendments were issued, the petitioners filed petitions for review challenging these amendments. Petitioners Center for Biological Diversity and Center for Food Safety challenged the registration amendments on ESA and FIFRA grounds. *See* Pet. for Review, Case No. 19-72109, Doc. Id. No. 11403618. Petitioners Pollinator Stewardship Council, American Beekeeping Federation, and Jeffrey Andersen challenged the actions on FIFRA grounds alone. *See* Pet. for Review, Case No. 19-72280, Doc. Id. No. 11423191. The petitions for review have been consolidated. *See* Nov. 4, 2019 Order, Doc. Id. No. 11487539.

ARGUMENT

I. The Agency Should Be Permitted to Remedy the Acknowledged ESA Defect On Remand.

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal initial actions. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). Allowing for voluntary remand is consistent with this principle. *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). “[W]hen an agency action is reviewed by the courts, in general the agency may take one of five positions,” one of which is the agency may request a remand to reconsider its position and ensure proper procedures were followed. *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027-29 (Fed. Cir. 2001); *see also California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (same and citing *SKF*, 254 F.3d at 1029).

Indeed, courts generally only “refuse voluntarily requested remand when the agency’s request is frivolous or made in bad faith.” *California Communities*, 688 F.3d at 992. This is for good reason: “[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the

federal courts.” *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (internal quotation marks omitted). As *Ethyl Corp.* explained, “[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” 989 F.2d at 524.

In *California Communities*, for example, this Court granted voluntary remand reasoning that because EPA “recognized the merits of the petitioners’ challenges and has been forthcoming in these proceedings, there is no evidence that the EPA’s request is frivolous or made in bad faith.” 688 F.3d at 992. The Court reached the same result in *NRDC v. EPA*, involving a challenge to EPA’s registration of the pesticide commonly known as “Enlist Duo.” *See* No. 14-73353 (9th Cir.), Jan. 25, 2016 Order, Doc. Id. No. 9839194. There, EPA sought a remand to reconsider the registration in light of newly received information that the ingredients in the chemical at issue could potentially interact in ways that the Agency had not considered. *See Nat’l Family Farm Coal. v. EPA*, Mot. For Remand, Doc. Id. No. 9770038. EPA explained that it “can no longer represent to the Court that its conclusions were correct

regarding whether issuance of the registration met the standard in FIFRA.” *Id.* at 7-8. The Court granted EPA’s motion for voluntary remand without vacating the registration. Jan. 25, 2016 Order, Doc. Id. No. 9839194; *see also Nat’l Family Farm*, 966 F.3d at 906 (discussing remand without vacatur of registration earlier in proceedings).

So, here, the Agency’s request is timely and made in good faith. EPA reached out to Petitioners in August of 2020, acknowledged the ESA defect with the amendments, and expressed the intention of seeking a remand. The parties then sought an extension of the merits briefing deadlines to facilitate the discussions on the parties’ positions regarding the motion to remand. Aug. 17, 2020 Mot. for Ext., Doc. Id. No. 11791959. These discussions began in earnest before any party had filed their merits brief.

Further, EPA “recognizes the merits” of Center for Biological Diversity and Center for Food Safety petitioners’ claim that the Agency failed to comply with the requirements of the ESA, including making the procedural determination of whether the action has an effect on a listed species. 688 F.3d at 992. EPA acknowledges that it has not made

an “effects determination” for sulfoxaflor, as it must do, or initiated consultation, if appropriate. 16 U.S.C. § 1536(a)(2).

Specifically, EPA must determine either that sulfoxaflor has “no effect” on ESA listed species or their critical habitat, or that the pesticide “may affect” those species or their critical habitat. 50 C.F.R. § 402.14(a); *see Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *see also* Decl. ¶¶ 16-17. Then, if the Agency reaches the latter determination, it must consult with Fish and Wildlife Service and/or National Marine Fisheries Service (Services). If the Agency finds that the action is “not likely to adversely affect” listed species or their critical habitat, then it must informally consult with the Services and obtain written concurrence. *See* 50 C.F.R. §§ 402.13, 402.14(b)(1); Decl. ¶¶ 17-20.

If the Agency finds that the action is “likely to adversely affect” listed species or their critical habitat, then it must formally consult with the Services, who must prepare a biological opinion assessing whether the action would jeopardize the continued existence of the listed species or result in the destruction or adverse modification of habitat of such species. *See* 16 U.S.C. § 1536(a); 50 C.F.R. § 402.14, Decl. ¶¶ 17-20. The

“effects determination” must be made by the Agency in the first instance. 50 C.F.R. § 402.14(a).

EPA explains in its declaration that it will undertake the ESA analysis for sulfoxaflor as expeditiously as practicable, taking into account its legal obligations to complete draft biological evaluations for a series of other chemicals, as well as the priorities from the memorandum of agreement described above. *See Decl.* ¶ 26. The Agency can thus begin the assessment of sulfoxaflor in mid-2025. *Id.* The standard for voluntary remand is met here. *California Communities*, 688 F.3d at 992.

II. Vacatur of the Registration Amendments Is Not Required During the Pendency of the Remand.

This Court should grant remand without vacatur, leaving in place the amendments as EPA satisfies its obligations under the ESA. “[T]he decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *Cal. Communities*, 688

F.3d at 992 (same). Also relevant is whether “by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand.” *See Pollinator Stewardship Council*, 806 F.3d at 532.

This Court has acknowledged that “when equity demands, the regulation can be left in place while the agency follows the necessary procedures” to correct its action. *See Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). Indeed, even though the agency’s error was significant in *Idaho Farm Bureau*, the Court did not vacate the action at issue because it could have had adverse environmental effects, and wiped out a species of snail. *Id.* at 1405–06. Likewise, in *California Communities*, the Court acknowledged that the rule was invalid, but declined to vacate it, reasoning that vacatur would delay a needed power plant undermining the reliability of the power supply and causing economic hardship. 688 F.3d at 994.

The D.C. Circuit reached the same result in *Center for Biological Diversity*, where, as here, EPA had failed to comply with the ESA before issuing a registration for a pesticide under FIFRA. 861 F.3d at 188-89.

The court reasoned that “[n]otwithstanding the EPA’s failure to make an effects determination and to engage in any required consultation, it did not register [the pesticide cyantraniliprole] in total disregard of the pesticide’s deleterious effects” because it assessed the ecological risks for cyantraniliprole as part of the registration process. *Id.* at 188.

The “seriousness of the [action’s] deficiencies . . . and the disruptive consequences of an interim change that may itself be changed,” weigh in favor of leaving the sulfoxaflor registration amendments in place during the remand proceedings. *Allied-Signal*, 988 F.2d at 150-51 (internal quotation marks omitted). Vacatur would render sale and distribution of sulfoxaflor unlawful, thereby removing from the market a pesticide that poses less risks than its alternatives.

EPA’s July 2019 Decision and declaration before this Court support the possibility that, in the absence of the sulfoxaflor amendments at issue, farmers will likely revert and increase their use of older, riskier substitutes. July 2019 Decision at 10; Decl. ¶ 23. Indeed, the July 2019 Decision acknowledges that sulfoxaflor has numerous benefits both to the environment and to the farmers that use it. Specifically, sulfoxaflor has a better ecological and human health

profile than the alternatives, and it performs as well or better than other registered insecticides by targeting hard to control pests. July 2019 Decision at 10-21; Decl. ¶ 24. And, sulfoxaflor is highly selective at targeting pests. Decl. ¶ 24.

Moreover, sulfoxaflor is less harmful to beneficial insects than the alternatives. *Id.* Sulfoxaflor offers a new mode of action and is also compatible with and easily included in Integrated Pest Management and Insect Resistant Management programs. *Id.* Thus, vacating the amendments here removes these and other benefits from the market, resulting in farmers moving back to and using the older, riskier pesticides that sulfoxaflor was intended to replace. The consequence of such a loss could have disruptive consequences.

Center for Biological Diversity concluded that similar concerns made vacatur inequitable. The D.C. Circuit reasoned that cyantraniliprole had “a more favorable toxicological profile compared to currently registered alternatives.” 861 F.3d at 188-89. Thus, it was appropriate to leave the “registration order to remain in effect until it is replaced by an order” [compliant with the ESA which] will maintain ‘enhanced protection of the environmental values covered by’ the

registration. *Id.* at 189 (internal quotation marks omitted). The same logic applies in this case.

Vacatur is further unwarranted because there is “at least a serious possibility that the [EPA would] be able to substantiate its decision on remand.” *Allied-Signal*, 988 F.2d at 151. The ESA errors here do not go to the heart of the FIFRA analysis. In fact, EPA acknowledges no defect in the FIFRA analysis, which evaluates whether there are “unreasonable adverse effects on the environment.” 7 U.S.C. § 136(bb). It maintains that the FIFRA analysis is supported by substantial evidence.

This contrasts markedly with situations where this Court has found vacatur proper. For example, in *North Carolina v. EPA*, the court concluded that the EPA's rule “must” be vacated because “fundamental flaws” prevented EPA from promulgating the same rule on remand. 531 F.3d 896, 929 (D.C. Cir. 2008). But here, EPA’s failure to comply with the ESA does not necessarily imperil its decision to grant the registration under FIFRA. EPA could reach the same result it did here and conclude that registration amendments were proper after the additional analysis required under the ESA.

That distinguishes the amendments here from 2013 registration at issue in *Pollinator Stewardship Council*, which was vacated on the grounds that it was not supported by substantial evidence as required by FIFRA. 806 F.3d at 532. By contrast, the Agency has since re-evaluated the risks to pollinators, taking into account additional data and the current state of the science supporting assessment of pesticide risks to bees. July 2019 Decision at 7-9. The conceded error here lies not in the FIFRA analysis, but in the procedural requirements of different statute entirely—the ESA. *See Nat’l Family Farm*, 966 F.3d at 922 (describing ESA’s procedural requirements, and that “no effect” determination for pesticide like the one made there does not require further action or consultation). As a consequence, the *Pollinator Stewardship* analysis does not show that vacatur is warranted.

Moreover, the very factor that the Court looked to in that case—whether leaving in place the registration created “more potential environmental harm than vacating it”—weighs in favor of leaving the amendments in place on remand here because vacatur could cause more environmental harm than good for the reasons described above. The high likelihood that farmers would use riskier, more damaging

pesticides in the absence of sulfoxaflor shows that vacatur would be inequitable.

CONCLUSION

For the foregoing reasons, the Court should grant EPA's motion and remand the registration amendments without vacatur.

Dated: October 26, 2020.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because this document contains 3,776 words.

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/s/ Meghan E. Greenfield
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