

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

National Family Farm Coalition, <i>et al.</i>)	
<i>Petitioners,</i>)	
Dow AgroSciences LLC,)	
<i>Intervenor</i>)	No. 17-70810
v.)	
U.S. Environmental Protection Agency, <i>et al.</i>)	
<i>Respondents.</i>)	
Natural Resources Defense Council, Inc.)	
<i>Petitioner,</i>)	
Dow AgroSciences LLC,)	
<i>Intervenor</i>)	No. 17-70817
v.)	
E. Scott Pruitt and the U.S. Environmental Protection Agency,)	
<i>Respondents.</i>)	

MOTION TO DISMISS FOR LACK OF JURISDICTION

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May 10, 2017

Intervenor Dow AgroSciences LLC (DAS) respectfully moves to dismiss for lack of jurisdiction the petitions for review filed by petitioners National Family Farm Coalition, *et al.* (collectively NFFC) (No. 17-70810) and Natural Resources Defense Council, Inc. (NRDC) (No. 17-70817), on March 21, 2017. In support of this motion, DAS states as follows:

1. Both petitions purport to challenge “the final order of the United States Environmental Protection Agency (EPA) granting a conditional registration of Enlist Duo Herbicide (Enlist Duo)” NFFC Pet. 2; *see also* NRDC Pet. 2. According to Petitioners, “[t]he challenged final order was announced in a regulatory decision document that was dated and entered on EPA docket EPA-HQ-OPP-2016-0594 on January 12, 2017” NFFC Pet. 3; *see also* NRDC Pet. 2. Further, petitioners assert, “[t]he order does not explicitly provide for a time for its entry,” and “[a]ccordingly, pursuant to 40 C.F.R. § 23.6, became final for the purpose of this Court’s jurisdiction to review as of 1:00 p.m. eastern time on January 26, 2017.” NFFC Pet. 3; *see also* NRDC Pet. 2.

2. Petitioners invoke this Court’s jurisdiction “[p]ursuant to Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA], 7 U.S.C. § 136n(b), and Rule 15 of the Federal Rules of Appellate Procedure.” NFFC Pet. 1; *see also* NRDC Pet. 2.

3. Rule 15 of the Federal Rules of Appellate Procedure specifies that a petition to review administrative agency action must be filed “within the time prescribed by law.” Fed. R. App. P. 15(a)(1). Section 16(b) of FIFRA, in turn, specifies “the time prescribed by law”: a petition for review of the “validity of any order” issued after a public hearing (like the order here) must be filed in the relevant court of appeals “within 60 days after the entry of such order.” 7 U.S.C. § 136n(b).

4. As petitioners acknowledge, the challenged final order was signed and issued on *January 12, 2017*. *See* NFFC Pet. 2; NRDC Pet. 2. The petitions were not filed, however, until *March 21, 2017*—68 days later. Accordingly, the petitions are untimely under the plain language of the statute.

5. Petitioners argue, however, that the petitions are timely because “[t]he order became final on January 26, 2017, at 1:00 p.m. eastern time, pursuant to 40 C.F.R. § 23.6.” NRDC Pet. 2; *see also* NFFC Pet. 3. That argument is incorrect as a matter of law.

6. The regulation on which petitioners rely to support the timeliness of their petitions states, in full, as follows:

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of entry of an order issued by the Administrator following a public hearing for purposes of section 16(b) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after it is signed.

40 C.F.R. § 23.6 (emphasis added).

7. The problem with petitioners’ argument is that the Notice of Pesticide Registration—the legally operative order here—*did* “explicitly provide” a different “date of entry”—January 12, 2017. That date is right on the face of the Notice, in a data field entitled “Date of Issuance.” NRDC Pet. Ex. A [Dkt. 1-5] (Tab A), at p. 5 of 56. The Date of Issuance is not merely the date on which the order was signed; to the contrary, the latter date appears in a separate data field at the bottom right hand corner of the same page. *See id.* Rather, the Date of

Issuance is the effective date of the registration, and thus the registrant is entitled to begin distributing or selling the registered pesticide as of that date. *See id.* (“[T]he above named pesticide *is hereby registered* under [FIFRA].”) (emphasis added); *see also, e.g.*, 40 C.F.R. § 152.130(a) (“A registrant may distribute or sell a registered product ... currently approved by the Agency.”); Trichoderma Species Final Registration Review Decision (Sept. 11, 2008), *available at* <http://tinyurl.com/mnsbnwk> (last visited May 10, 2017) (“RootShield WP Biological Fungicide, was approved ... on August 14, 2008,” the “Date of Issuance” on the product’s Notice of Pesticide Registration)¹; EPA Letter re: Petition for Exclusive Use Data Protection for Minor Use Registration for Quinoxifen, *available at* <https://tinyurl.com/mhzipulq> (last visited May 10, 2017) (“According to Agency records, quinoxifen was first registered ... on September 30, 2003 and the exclusive use

¹ The relevant Notice of Pesticide Registration provides a “Date of Issuance” of August 14, 2008. *See* Notice of Pesticide Registration, *available at* <http://tinyurl.com/mkxu869> (last visited May 10, 2017).

period for quinoxyfen will not expire until September 30, 2013.”)² And the registration for Enlist Duo is valid for precisely five years, which is why it expires on January 12, 2022, *see* Pet. Ex. A [Dkt. 1-5] (Tab A), at p. 6 of 56—not January 12, 2022 plus two weeks.³

² The relevant Notice of Pesticide Registration provides a “Date of Issuance” of September 30, 2003. *See* Notice of Pesticide Registration, available at <https://tinyurl.com/lvwykpt> (last visited May 10, 2017).

³ The NFFC petitioners obscure the jurisdictional problem by failing to attach the relevant order: the Notice of Pesticide Registration, which—as noted in the text—explicitly provides a “Date of Issuance” of January 12, 2017. *See* NRDC Pet. Ex. A [Dkt. 1-5] (Tab A), at p. 5 of 56. Instead, the NFFC petitioners attached to their petition only the “Final Registration Decision of Enlist Duo™ Herbicide.” *See* NFFC Pet. Ex. A. But that decision merely provides the reasoning underlying the registration order; it is not itself a registration order subject to judicial review. *See, e.g., Center for Biological Diversity v. U.S. E.P.A.*, 106 F. Supp. 3d 95, 97 (D.D.C. 2015) (“EPA’s registration of a pesticide constitutes an Order within the meaning of the Administrative Procedure Act (‘APA’) and FIFRA.”), *appeal pending*, D.C. Cir. No. 15-5168. Even assuming that the NFFC petitioners have not created an independent jurisdictional problem for themselves by failing to attach the correct order to their petition, *cf. LaRouche’s Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 739 (D.C. Cir. 2006); *Small Business in Telecomms. v. FCC*, 251 F.3d 1015, 1019-23 (D.C. Cir. 2001); *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 312-13 (D.C. Cir. 2000); *City of Benton v. NRC*, 136 F.3d 824, 826 (D.C. Cir. 1998); *John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988), they certainly cannot avoid the effect of the Issuance Date specified on the face of the Notice of Pesticide Registration by failing to attach that document to their petition.

8. The Federal Register Notice accompanying the promulgation of 40 C.F.R. § 23.6 in 1985 underscores that, in this context, the “date of entry” is synonymous with the “issuance date,” and will not delay an order that is immediately effective. *See* 50 Fed. Reg. No. 35 (Feb. 21, 1985) (Tab B), at 7269 (“EPA recognizes that the courts would not follow the rule’s deferral of the *issuance date* if EPA sought to make a rule or action *effective* prior to its *issuance* for judicial review purposes.”) (emphasis added).

9. A separate regulation in existence at the time that 40 C.F.R. § 23.6 was promulgated in 1985 further underscores that the latter regulation was not intended to delay the effective date of pesticide registration orders. *See* 40 C.F.R. § 162.47(d)(3) (1975) (Tab C) (“Registration becomes effective on the date the ‘Notice of Registration’ or letter of approval is issued.”). Nothing in the 1985 regulation suggested any intent to override that existing 1975 regulation and delay the effective date of pesticide registration orders for two weeks. Indeed, the 1975 regulation remained in effect for *three years* after adoption of the 1985 regulation, until the entire section in which it was located was

revamped in 1988 as part of a broader streamlining of the rules for reviewing and approving pesticide registration applications. If EPA had meant for the adoption of Section 23.6 in 1985 to change the agency's practice of making a pesticide registration order effective on the date a Notice of Registration is issued, it would have eliminated Section 162.47(d)(3) at that time. It did not do so. And nothing about the 1988 amendments suggests any intent to change agency practice by delaying the effective date of pesticide registration orders by two weeks. To the contrary, the Federal Register Notice describing those amendments emphasized that they were intended to make the regulations "clearer and more useful to applicants and registrants," and "did not propose a significant departure from [existing] procedures." 53 Fed. Reg. No. 86 (May 4, 1988) (Tab D), at 15952, 15958. It would have been a very significant departure from existing procedures to establish a practice of delaying the effective date of pesticide registration orders for two weeks. As noted above, EPA's practice was—and continues to be—to make pesticide registration orders effective immediately upon issuance.

10. Because the Notice of Pesticide Registration at issue here was effective immediately upon its date of issuance—January 12, 2017—any petition challenging that order was due no more than 60 days later, *i.e.*, by March 13, 2017. Because petitioners filed their petitions after that date, both petitions are untimely as a matter of law and must be dismissed. *See, e.g., Stone v. INS*, 514 U.S. 386, 405 (1995) (with regard to “statutory provisions specifying the timing of review, ... those time limits are, as we have often stated, mandatory and jurisdictional, and are not subject to equitable tolling.”) (internal quotation omitted); *Utah ex rel. Utah Dep’t of Env’tl Quality v. U.S. E.P.A.*, 750 F.3d 1182, 1184-86 (10th Cir. 2014) (same); *Selco Supply Co. v. U.S. E.P.A.*, 632 F.2d 863, 865 (10th Cir. 1980) (“[T]ime limits for judicial review of actions taken under environmental protection statutes provide a statute of limitations which bars late filings.”).

11. Pursuant to this Court’s Circuit Rule 27-1 and the accompanying Advisory Committee Note, intervenor states that it contacted counsel for the parties in this case yesterday evening about this motion, and requested a response by 4 PM EDT today. Counsel for

NFFC stated that they oppose the motion. Counsel for respondents stated that the United States reserves the right to take a position after reviewing the motion. Counsel for NRDC did not respond to the request for their position.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petitions for lack of jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher Landau, hereby certify that on May 10, 2017, I caused the **MOTION TO DISMISS FOR LACK OF JURISDICTION** to be filed via the Court's CM/ECF system on the following counsel for parties to this action:

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