

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Natural Resources Defense Council,)	
Inc.)	
)	
Petitioner,)	
)	
v.)	Case No. 14-73353
)	
United States Environmental Protection)	
Agency,)	
)	
Respondent.)	

Center for Food Safety, et al.,)	
)	
Petitioners,)	
)	
v.)	Case No. 14-73359
)	
United States Environmental Protection)	
Agency, et al.,)	
)	
Respondents.)	

**REPLY IN SUPPORT OF PETITIONER NATURAL RESOURCES
DEFENSE COUNCIL’S MOTION FOR STAY PENDING REVIEW**

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Petitioner Natural Resources Defense Council (NRDC) has moved to stay the unlawful registration of Enlist Duo, a pesticide that threatens the imperiled population of North American monarch butterflies through its inclusion of the chemical glyphosate. Respondent EPA concedes that it approved Enlist Duo without considering glyphosate's effects on monarchs. EPA, Respondent-Intervenor Dow, and proposed amicus CropLife (together, Respondents) claim that EPA's past analyses of glyphosate absolved the agency of its duty to ensure Enlist Duo's safety before putting it on the market; that EPA's risk assessment of 2,4-D (Enlist Duo's other active ingredient) was adequate; that the balance of harms favors giving growers immediate access to this unproven pesticide; and that EPA's decision will not increase the overall use of glyphosate and thus cannot injure NRDC. But EPA was not entitled to ignore harm to monarchs, and it improperly discounted risks to human health from 2,4-D. These lapses injure NRDC's members, and NRDC has demonstrated the need for a stay.

I. NRDC has shown more than a substantial likelihood of success on the merits; it has demonstrated that Enlist Duo's registration is deficient as a matter of law

Despite compelling evidence that Enlist Duo would harm monarchs, EPA completely failed to consider this harm before registering the new pesticide. On this basis alone, NRDC is substantially likely to prevail on the merits.

A. EPA's failure to consider Enlist Duo's impacts on monarchs was arbitrary, capricious, and not in accordance with FIFRA

1. Glyphosate's outsized role in the decline of the North American monarch population is well established

EPA does not deny that glyphosate is the dominant cause of monarch population decline. Although Dow and CropLife rightly note that there are multiple contributors to the butterflies' decline, monarch experts have recently considered these various factors and concluded that glyphosate is a driving cause. *See* Fallon Decl. ¶ 14, ECF No. 15-2. Moreover, contrary to Dow's representation, Dow Opp'n 11, ECF No. 26-1, annual data since the late 1990s, when glyphosate use began to rise dramatically, show a clear pattern of overall long-term monarch decline. Fallon Decl. ¶¶ 8, 12; Fallon Reply Decl. ¶¶ 4-5.

In addition, recent action by the Fish and Wildlife Service (FWS) on a petition to list monarchs under the Endangered Species Act only underscores that monarchs are in peril: FWS found substantial evidence that the species may be threatened. *Endangered and Threatened Wildlife and Plants; 90-Day Findings on Two Petitions*, 79 Fed. Reg. 78,775 (Dec. 31, 2014). CropLife argues there is no need to protect monarchs under FIFRA, because FWS did not impose interim emergency measures under an entirely different statute, and because there is a major monarch conservation initiative underway. *See* CropLife Opp'n 8-10, ECF

No. 27-2. But the FWS findings and the conservation efforts serve only to highlight monarchs' imperiled status.

To succeed on the merits, NRDC need not prove—and this Court need not find—that glyphosate adversely affects monarchs. That is the question for EPA. The agency's legal error lay in its failure even to consider this pressing question. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. EPA had a statutory duty to ascertain that registration of Enlist Duo would not unreasonably harm monarchs

FIFRA required EPA to consider Enlist Duo's impacts on the vulnerable remnant of the monarch population. The statute authorizes EPA to register a pesticide only after the agency has determined that the pesticide will not cause "unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(C), (D); *accord* 40 C.F.R. § 152.112(e). This requirement is absolute. Contrary to EPA's suggestion, *see* EPA Opp'n 7-9, ECF No. 24, FIFRA nowhere waives EPA's duty simply because a pesticide contains an active ingredient that appears in previously registered pesticides. Nor does the mandatory nature of these determinations turn on whether a new pesticide will change the scope of use of an active ingredient found in other pesticides. Thus, because Enlist Duo is, incontestably, a new pesticide that EPA has registered for the first time, EPA was obligated to

determine that Enlist Duo—including any ingredients therein—would not cause unreasonable adverse environmental effects *before* registering it.

To make that determination, EPA needed to consider data “sufficient to evaluate the potential of the product to cause unreasonable adverse effects on man or the environment,” 40 C.F.R. § 158.75; *see also* 7 U.S.C. § 136a(c)(2); 40 C.F.R. § 158.1(a). FIFRA regulations underscore that EPA will not register a pesticide until it “has reviewed all relevant data in the possession of the Agency,” 40 C.F.R. § 152.112(b), and “has determined that no additional data are necessary to make the determinations required by FIFRA sec. 3(c)(5),” *id.* § 152.112(c). Yet in this case, EPA does not dispute that it disregarded evidence cited in NRDC’s June 30, 2014 public comments to EPA demonstrating that glyphosate use causes significant harm to monarchs. *See* EPA Opp’n 9 (claiming that “EPA properly relied on its prior assessments and existing glyphosate registrations,” rather than data NRDC supplied, in registering Enlist Duo). By ignoring evidence germane to the safety determinations it was required to make prior to approving Enlist Duo, EPA abdicated its statutory duty, and “entirely failed to consider an important aspect of the problem,” rendering its order arbitrary, capricious, and not in accordance with the law. *State Farm*, 463 U.S. at 43; *accord Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1034 (9th Cir. 2011).

3. EPA's duty to ensure the safety of Enlist Duo at the time of registration is independent from, and in addition to, its duty to ensure the continued safety of previously registered pesticides containing glyphosate

FIFRA provides multiple mechanisms for re-evaluating the safety of a pesticide that it has already registered. Pursuant to FIFRA's "registration review" provision, EPA must reassess existing pesticide registrations every fifteen years to ensure their continued compliance with the FIFRA standard. *See* 7 U.S.C. § 136a(g); *see also* 40 C.F.R. § 155.40. FIFRA also authorizes EPA to conduct "interim administrative review" of a pesticide registration "based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to the environment." 7 U.S.C. § 136a(c)(8); *see also* 40 C.F.R. § 154.7(a).

That these avenues exist does not relieve EPA of its duty to make an initial safety decision for *new* pesticides. Nor, as Respondents suggest, does it absolve EPA from considering in an initial registration decision all the effects of any already-registered active ingredients contained in the pesticide under consideration. To hold otherwise would turn the FIFRA process on its head: Rather than reviewing "all relevant data" before making a registration decision, *see* 40 C.F.R. § 152.112(b), EPA would ignore and save for some future, collateral proceeding the *most* relevant data—those describing the impacts of the new pesticide's active ingredients.

More importantly, it would lead to absurd results inconsistent with FIFRA's objectives. Assume that an active ingredient is already used in registered pesticides. Subsequently, new evidence overwhelmingly shows that dermal contact with this ingredient causes death within five years. EPA nevertheless receives an application to register a new pesticide containing this ingredient. The proper mechanism for preventing unreasonable adverse effects from this pesticide is not first to register it, then to review the flawed registration through registration review or interim administrative review, and only finally to modify, restrict, suspend, or cancel the registration. Rather, the proper mechanism is not to register the pesticide in the first place.

Here, similarly, FIFRA requires EPA to consider—at the time of registration—relevant evidence that Enlist Duo will cause unreasonable adverse effects to the environment. EPA cannot lawfully defer consideration of Enlist Duo's impacts on monarchs until the completion of interim administrative review or registration review at some unknown later date.

4. FIFRA did not permit EPA to disregard new evidence that Enlist Duo will harm monarchs, even if it allowed the agency to consider old information submitted to support the registration of other glyphosate-containing pesticides

While “proposed agency action [may] build[] on existing agency action,” Dow Opp'n 7, it must do so in a way that comports with FIFRA. FIFRA clearly specifies what shortcuts EPA may take when deciding whether to register a new

pesticide. In particular, EPA is allowed to consider data submitted to support prior pesticide applications, provided certain conditions are met. *See* 7 U.S.C.

§ 136a(c)(1)(F). In deciding whether to register Enlist Duo, EPA was thus permitted to consider glyphosate-related data that were previously submitted to support the registration of older glyphosate-containing pesticides.

But this is different from saying that EPA needed *only* to consider glyphosate-related data submitted in conjunction with prior pesticide applications, excluding new information in its possession that is also relevant. Nothing in FIFRA supports this second, more expansive kind of shortcut, which EPA has tried to take here. EPA acknowledges it never considered monarch impacts when approving Enlist Duo, and yet public comments show that the potential harm to monarchs is severe. FIFRA required EPA to consider that information before registering the new pesticide. Holding the agency to this statutory duty hardly requires it to “re-invent the wheel.” Dow Opp’n 7. Given that EPA has *never* considered glyphosate’s impacts on monarchs, there is nothing to reinvent.

B. Additionally, substantial questions undermine EPA’s conclusion that 2,4-D in Enlist Duo does not adversely affect human health

In addition to EPA’s complete failure to assess glyphosate’s impacts on monarchs, NRDC has identified numerous flaws in EPA’s analysis of 2,4-D that caused the agency to underestimate the risk Enlist Duo poses to human health, and to register the pesticide unlawfully as a result. Most notably, EPA inappropriately

disregarded low-dose thyroid impacts when setting a no-observed adverse effect level (NOAEL) for 2,4-D, failed to use the tenfold safety factor mandated by the Food Quality Protection Act (FQPA) despite significant uncertainties about 2,4-D exposure, and erred in concluding that these mistakes did not influence its decision to register Enlist Duo. *See* NRDC’s Mot. for Stay Pending Review 11-13, ECF No. 15-1 [hereinafter “Mot.”]; Pullen Decl. ¶¶ 10-14, ECF No. 15-3. Respondents attempt to justify EPA’s analysis, but fail to dispel the serious questions NRDC has raised.

First, Respondents do not contest that a critical animal study on which EPA relied showed effects on thyroid function at exposures of 100 ppm—below the level that EPA deemed the starting point for possible adverse effects. *See* EPA Opp’n 11. Instead, they insist, as EPA did in its response to comments, that the low-exposure effects were “adaptive” rather than “adverse.” *Id.*; *see also* EPA Resp. to Public Cmts. 3, ECF No. 15-15. EPA argues, citing a document published in 1998, that “widely-accepted toxicology principles” support its analysis. EPA Opp’n 12. But just last year, the National Academies of Sciences, a highly-regarded, non-profit research body charged with advising decision makers on sound science, cautioned EPA *against* drawing sharp lines between adaptive and adverse effects, because “effects that are adaptive in some people are adverse in others.” Pullen Reply Decl. ¶ 4(d). A phenomenon noted by the National

Academies is far from “speculation.” *Contra* Bus Decl. ¶ 52, ECF No. 26-6. EPA has not justified its departure from this more up-to-date scientific counsel in choosing a less-protective NOAEL.

There are also still substantial unanswered questions surrounding EPA’s breast milk exposure and spray drift exposure estimates. *See* Mot. 12-13; Pullen Decl. ¶¶ 12-13. In light of this uncertainty, EPA erred in not applying the FQPA’s tenfold safety factor, especially given that it chose a less protective NOAEL.

Finally, EPA is incorrect, both in its response to public comments and in its response to NRDC’s motion, that even if it had set a NOAEL of 100 ppm and applied the requisite tenfold safety factor, it would have found that Enlist Duo posed no unacceptable risks to human health. *See* Resp. to Public Cmts. at 7-8; EPA Opp’n 14-15 n.5. Using a NOAEL of 100 ppm and factoring in the tenfold safety factor, EPA’s own estimated dietary exposures for all population groups would far exceed acceptable levels—by more than four times for children between one and two years old. *See* Pullen Reply Decl. ¶ 5. EPA’s reliance on this discredited assumption alone warrants remand. *See* Resp. to Public Cmts. at 7-8; *see NRDC v. EPA*, 735 F.3d 873, 884 (9th Cir. 2013) (vacating registration decision where EPA discounted a risk that was unacceptable under the agency’s own rule of decision).

II. The balance of harms tips sharply in favor of granting a stay pending review

Respondents insist that registering Enlist Duo will not cause a net increase in glyphosate use and will not cause NRDC irreparable harm. They are wrong on both counts. Given the absence of compelling countervailing harms, the equities strongly favor granting a stay.

A. NRDC's members face irreparable injury in the absence of a stay

1. The record undermines Respondents' claim that Enlist Duo will not cause any increase in glyphosate use

As explained above, NRDC has demonstrated that glyphosate, one of Enlist Duo's active ingredients, substantially contributes to monarch population decline by killing milkweed, which monarch butterfly larvae need to survive. *See* Mot. 9-11; Cmts. of NRDC on Dow AgroSciences' Application to Register Enlist Duo Herbicide 6-14 (June 30, 2014), ECF No. 15-14. No party has challenged the declarations submitted by NRDC members, explaining how monarch loss adversely affects them. *See generally* Moravec Decl., ECF No. 15-7; Olmsted Decl., ECF No. 15-8; Wetzel Decl., ECF No. 15-9. Yet Respondents insist that registering Enlist Duo does not harm NRDC, because the registration will not *increase* glyphosate use. The available record documents undermine their assumption.

First, EPA's decision documents contain only conclusory statements, wholly lacking in evidentiary support, that registering Enlist Duo will not increase overall glyphosate use. For example, EPA's final registration decision asserts, without basis, that "[a]ll uses for this product are already registered on other glyphosate products and are currently in use on GE corn and soybeans for the same use pattern" and that registration will result in "no new [glyphosate] exposures." Final Registration of Enlist Duo Herbicide (Oct. 15, 2014), ECF No. 15-12. Likewise, in its response to comments, EPA declares that "[g]lyphosate is presently being applied in the same fields where Enlist Duo applications would be expected," but it cites no evidence to support that assertion. Resp. to Public Cmts. 32. To withstand review, an agency's conclusions must be supported by evidence in the record, not merely the agency's say-so. *State Farm*, 463 U.S. at 50.

These assertions, moreover, are contradicted by the record. During the public comment period, multiple growers supported registering Enlist Duo on the basis that pesticides containing glyphosate alone are no longer effective at controlling herbicide-tolerant weeds.¹ Even if those growers cope in the short-term

¹ See, e.g., Decl. of Nancy S. Marks Ex. A, Cmt. of Brian M. Scott, EPA-HQ-OPP-2014-0195-1888; Marks Decl. Ex. B, Cmt. of John H. Davis, EPA-HQ-OPP-2014-0195-2091; Marks Decl. Ex. C, Cmt. of Dale Zelhart, EPA-HQ-OPP-2014-0195-2102; see also Marks Decl. Ex. D, Cmt. of Mo. Agribusiness Ass'n, EPA-HQ-OPP-2014-0195-2463; Marks. Dec. Ex. E, Cmt. of S.C. Farm Bureau, EPA-HQ-OPP-2014-0195-2369.

by applying existing pesticides in greater amounts, *see* Palmer Decl. ¶ 24, ECF No. 26-2, the record suggests that in the longer term, they would be compelled to seek other weed control methods. *See, e.g.*, Marks Decl. Ex. A, at 2 (portending a return to “steel [tilling] as a primary method of weed control” if Enlist Duo were not approved); Marks Dec. Ex. D, at 2 (“Without [products such as Enlist], farmers may well resort back to old-fashion tillage to address these weed problems.”); *see also* Benbrook Decl. ¶¶ 12-13, ECF No. 15-4. In other words, absent Enlist Duo, glyphosate use should decline, because it is losing its effectiveness and farmers are abandoning it. Enlist Duo’s entry onto the market delays this phase-out.

2. Even if Enlist Duo does not increase net glyphosate use, its registration harms NRDC’s members

When Enlist Duo is applied to corn and soy fields, the glyphosate it contains will kill milkweed, depriving monarchs of essential habitat. Destroying a species’ habitat causes irreparable harm. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 n.13 (9th Cir. 1987). It is especially dangerous for monarchs, given that every additional loss renders the already-diminished population more susceptible to eradication. *See* Mot. 14; Fallon Decl. ¶ 17. Monarch loss in turn deprives NRDC’s members of a source of aesthetic, recreational, and spiritual enjoyment. *See* Moravec Decl. ¶¶ 5-6, 9; Olmsted Decl. ¶¶ 9-11; Wetzell Decl. ¶¶ 11-14. That growers *might* resort to other glyphosate-containing pesticides if Enlist Duo does not go on the market does not negate Enlist Duo’s role in causing this harm. Unlike

in *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011), cited by EPA, NRDC has amply demonstrated that Enlist Duo contributes to its injury. *See id.* at 981-82 (declining to grant preliminary injunction where movant failed to demonstrate that the challenged actions had played any role in forcing movant into bankruptcy).

Additionally, NRDC has shown that exposure to 2,4-D poses a greater threat to human health than EPA acknowledges, particularly to the delicate thyroid system. All parties recognize that Enlist Duo's registration will increase 2,4-D exposure. That exposure imminently threatens NRDC's members, posing a second serious and irreparable harm.

That Dow plans to introduce Enlist Duo over a limited geographic area in 2015, *see* Palmer Decl. ¶ 17, does not change the fact that both people (including NRDC members) and wildlife within the roll-out regions will face these likely irreparable harms.

B. Respondents have not identified equitable considerations that counterbalance the harm to NRDC

EPA correctly concedes that the balance of harms “will usually favor an injunction to protect the environment.” EPA Opp'n 19; *see Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). The same is true of an injunction to protect human health. *See Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). The types of weighty

countervailing factors that have tipped this balance in the cases cited by EPA are simply not present here.

First, Respondents' claims that immediate access to Enlist Duo benefits growers are not supported by any showing of harm if the registration is stayed. NRDC has demonstrated through the declaration of Dr. Charles Benbrook that non-pesticide weed control methods exist to help growers combat glyphosate-resistant weeds—and that they will do so better than Enlist Duo. *See* Mot. 18; Benbrook Decl. ¶ 14. EPA insists that Enlist Duo is “new” and “improved” compared to other weed control methods, EPA Opp'n 19, and Dow purports that it “will expand options” and is therefore “important.” Dow Opp'n 18-19. But neither party contends that growers will face significant hardship if Enlist Duo's registration is delayed. Moreover, no one has disputed Dr. Benbrook's explanation that Enlist Duo will actually *harm* growers, by promoting the development of still more glyphosate-resistant weeds. *See* Benbrook Decl. ¶ 15.

Respondents' claims that Enlist Duo is preferable to other pesticides that use more volatile formulations of 2,4-D ignores these non-pesticide alternatives, as well as the fact that Enlist Duo's registration is slated to *increase* net 2,4-D exposure. *See* Final Registration of Enlist Duo 1, ECF No. 15-12.

Finally, the asserted interest in “allowing government agencies to fulfill their legal duties,” Dow Opp'n 20, cuts the other way here, where the whole premise of

the case is EPA's *failure* to fulfill a statutory duty before allowing a dangerous substance on the market. Instead, the public's "undoubtedly . . . strong interest in ensuring that [pesticide] products do not present an unreasonable adverse risk to the environment, including to human and animal health" trumps. *Woodstream Corp. v. Jackson*, No. 11-867 (JEB), 2011 WL 8883395, at *10 (D.D.C. June 3, 2011).

III. No other obstacle exists to granting the requested stay

A. NRDC has standing to bring this action

1. Enlist Duo's effects on monarchs confer standing on NRDC

The basis of EPA's challenge to NRDC's standing is, again, the agency's belief that registering Enlist Duo will not cause an increase in glyphosate use. As explained above, the record does not support that assumption. But even if EPA were correct, and Enlist Duo caused no net increase in glyphosate use, NRDC still would have standing to challenge its registration.

NRDC has demonstrated that a causal connection exists between glyphosate-containing pesticides, milkweed loss, and monarch decline. Monarch decline, in turn, impairs NRDC members' enjoyment of the outdoors. That harm is actionable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Registering Enlist Duo continues that harm. Even if, contrary to evidence in the record, Enlist Duo were to have no effect on the *net* amount of glyphosate used, it will help

perpetuate NRDC's injury. Contribution to an ongoing injury is sufficient to confer standing. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 523-24 (2007).

Respondents repeatedly emphasize that Enlist Duo is a substitute for other glyphosate-containing pesticides, as if Enlist Duo's ousting of similarly harmful pesticides should be treated as a benefit, to be weighed against the harm Enlist Duo causes. In the first place, the standing inquiry does not work that way: It is concerned only with identifying an injury, not comparing the relative magnitudes of all of an action's various effects. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 657 (9th Cir. 2011) (rejecting "premise that a hospice provider may be found to have standing . . . only if it suffered a 'net' increase in its overpayment liability within the accounting year"). More importantly, to suggest that Enlist Duo does not truly injure NRDC because it maintains the status quo ignores that the status quo in this case *is* injurious. EPA is responsible for authorizing all of the glyphosate-containing pesticides that contribute to NRDC's injury. That EPA has replaced one method of causing injury with another hardly means that it does no harm.

Finally, the relief NRDC seeks—invalidating Enlist Duo's registration—would redress NRDC's injury by eliminating one of its contributing causes. *See, e.g., Massachusetts*, 549 U.S. at 523-24; *Mendia v. Garcia*, 768 F.3d 1009, 1013-14 (9th Cir. 2014) (finding standing to challenge agency action, where action was

one of several links in causal chain leading to injury). This redress would be especially effective, insofar as removing Enlist Duo from the market would leave growers with other glyphosate pesticide options that they are likely to abandon as weeds become more resistant. Moreover, invalidating Enlist Duo's registration would necessarily threaten the validity of even those less-attractive options. As Respondents themselves stress, in approving Enlist Duo, EPA relied only on existing analysis that undergirds its prior glyphosate pesticide registrations. A decision here acknowledging the gaps in that analysis would render all of those registrations more vulnerable to ongoing legal challenges. *See* CropLife Opp'n 1 (noting that "dozens, if not hundreds, of [glyphosate product registrations] . . . could be impacted" by a stay).

2. NRDC also has standing to challenge EPA's inadequate evaluation of 2,4-D's human health risks

Enlist Duo's other active ingredient, 2,4-D, has been demonstrated to cause serious health harms. EPA's approval of Enlist Duo will substantially increase the risk that NRDC's members will be exposed to 2,4-D. *See* Gruber Decl., ECF No. 15-5; Olmsted Decl.; Wetzel Decl. NRDC's members have no way to protect themselves from this risk of exposure; the decision to apply Enlist Duo lies not with them, but with the growers who maintain neighboring corn and soy fields. This increased risk gives NRDC standing to challenge EPA's inadequate investigation of 2,4-D on its members' behalf without first verifying that the

neighboring growers actually will use Enlist Duo. *See NRDC*, 735 F.3d at 878 (holding injury sufficiently actual and imminent where pesticide approval increased chances that NRDC members might be exposed to fabrics containing that pesticide, without proof of particular exposures).

B. NRDC has diligently pursued a stay pending review

Dow mistakenly suggests that NRDC tarried in requesting a stay. *See Dow Opp'n 3*. NRDC challenged EPA's decision the day it became final, and moved for a stay a mere six weeks after seeking review of EPA's order—long before the statutory deadline for filing a petition for review had elapsed. *See 7 U.S.C. § 136n(b)*. NRDC acted with urgency and diligence.² In addition, Dow has not identified any prejudice to Respondents from the short time that elapsed between NRDC's petition and stay motion. *Cf. Rodriguez*, 715 F.3d at 1145 n.12; *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012).

Furthermore, the need for a stay became more pressing after EPA obtained a lengthy extension that significantly prolonged the period before a decision would be rendered in this case—a period during which NRDC would suffer irreparable harm. NRDC moved for a stay on December 18, 2014, only a week after EPA

² *See, e.g., Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (action within “only months” deemed diligent); *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 n.12 (9th Cir. 2013) (three months deemed diligent); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (four months deemed diligent).

received its extension. Particularly in light of the changed circumstances, NRDC acted diligently. *See* Order, *Alaska Survival v. Surface Transp. Bd.*, No. 12-70218 (9th Cir. Oct. 1, 2012), ECF No. 44; *see generally* Pet'r's Emergency Mot. Under Circuit Rule 27-3 for a Stay Pending Appeal, *Alaska Survival*, No. 12-70218, at 2-4 (9th Cir. Sept. 21, 2012), ECF No. 38-1.

C. This lawsuit is the proper avenue for challenging EPA's final decision to register Enlist Duo

It is a bedrock principle of administrative law that a person aggrieved by a final agency action may seek judicial review of that action. *See* 5 U.S.C. § 702. No party contends that EPA's registration of Enlist Duo is other than what EPA itself titled it: a final decision. Thus, this Court has "exclusive jurisdiction to affirm or set aside the order complained of in whole or in part," taking into account "all evidence of record." 7 U.S.C. § 136n(b); *see, e.g., NRDC*, 735 F.3d at 875.

As Dow notes, NRDC has petitioned EPA to review all glyphosate registrations on an urgent basis to consider harm to monarchs. EPA has to date ignored that petition, and, in the meantime, has registered Enlist Duo. CropLife is wrong that NRDC must wait until EPA acts on that separate petition before challenging EPA's decision to register Enlist Duo. As explained above, reconsideration of old glyphosate registrations is a separate administrative matter from the decision to issue a new registration for Enlist Duo. This lawsuit does not

challenge EPA's prior decisions to register other glyphosate-containing herbicides, but rather EPA's determination that it did not need to perform any analysis beyond what is contained in those old registrations to ascertain Enlist Duo's safety.

To be sure, if EPA cancelled registrations of glyphosate-containing pesticides as a result of its administrative review, that decision could have a collateral effect on Enlist Duo's registration. But there is simply no requirement that a party must exhaust administrative remedies in a separate proceeding before challenging an undisputedly final agency action. *See* 7 U.S.C. § 136n(b). To the contrary, Petitioners would have lost their ability to challenge Enlist Duo's new registration if they had waited untold years for separate administrative proceedings to conclude before filing for review here. *See id.* (giving persons adversely affected by an order issued after public hearing sixty days to file for review in the court of appeals).

* * *

For the reasons set forth above, NRDC respectfully requests that the Court stay EPA's registration of Enlist Duo pending review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Petitioner NRDC's Motion for Stay

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