IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Natural Resources Defense Council, Inc., Petitioner, v. United States Environmental Protection Agency, Respondent.	Case No. 15-71213 Consolidated with Nos. 14-73353, 14-73359, 15-71207

PETITIONER NATURAL RESOURCES DEFENSE COUNCIL'S REPLY IN SUPPORT OF MOTION TO STAY AMENDED REGISTRATION PENDING REVIEW

EPA approved Enlist Duo without considering documented harm to monarch butterflies or new evidence of a human cancer risk. The Court should grant a stay pending review to avoid harm and preserve the status quo until the merits of NRDC's claims can be decided.

I. NRDC has shown a substantial likelihood of success on the merits

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

EPA acknowledges that it registered Enlist Duo, and then expanded that registration, without evaluating the pesticide's potential impacts on monarch butterflies. FIFRA authorizes EPA to register Enlist Duo only *after* the agency determines that the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C), (D); *see also* 40 C.F.R. § 152.112(e). To make that determination, EPA must 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. §§ 152.112(b), (c). Yet EPA ignored evidence cited in public comments demonstrating that glyphosate use causes significant harm to monarchs. *See* ECF No. 29-1 at 3-4. By ignoring relevant evidence before approving Enlist Duo, EPA "entirely failed to consider an important aspect of the problem," rendering its order arbitrary, capricious, and contrary to law. *See Motor Vehicle Mfrs. Ass'n of the*

U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *accord Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1034 (9th Cir. 2011).

EPA's promise to evaluate harm to monarchs after Enlist Duo has already gone on the market does not excuse this failure. FIFRA provides a mechanism for re-evaluating the safety of older pesticides through the "registration review" process. *See* 7 U.S.C. § 136a(g); 40 C.F.R. § 155.40. That does not relieve EPA of its duty to make an initial safety decision for *new* pesticides. EPA must review "all relevant data" before making a registration decision. 40 C.F.R. § 152.112(b).

Nor does EPA's prior review of glyphosate decades ago, for use in other pesticide products, allow it to ignore the evidence available now that Enlist Duo will harm monarchs. EPA is allowed to consider data submitted to support prior pesticide applications, 7 U.S.C. § 136a(c)(1)(F), but it does not follow that EPA may consider *only* the data submitted in conjunction with prior pesticide applications. Insisting that EPA consider glyphosate's impact on monarchs now, before putting Enlist Duo on the market, hardly requires it to "re-invent the wheel," as Dow declares. ECF No. 28-1 at 5. Since EPA has *never* considered glyphosate's impacts on monarchs, there is nothing to reinvent.

B. EPA was required to evaluate the cancer risk posed by Enlist Duo

Shortly before EPA amended the Enlist Duo registration to expand the approval to nine new states, the International Agency for Research on Cancer

concluded that glyphosate is "probably carcinogenic to humans." ECF No. 13-1 at 7, 11. IARC's reports on carcinogenicity are "the 'gold standard' in evaluating evidence on cancer causation."[1] EPA expanded the pesticide registration anyway, and explicitly refused to evaluate this new information.

In response, EPA first claims that NRDC's argument is "untimely" because the agency "expressly declined to revisit any human health risk issues" in its expanded registration decision. ECF No. 29-1 at 11. But it is precisely that express refusal which is under review here. EPA was not entitled to ignore this health risk before approving increased use of the pesticide, 7 U.S.C. §§ 136a(c)(5)(C)-(D), 136(bb), and NRDC has timely challenged the agency's decision to do so.

EPA next suggests this argument was waived because it is not included in NRDC's public comments to the agency. ECF No. 29-1 at 12. However, the IARC finding was published after the close of the comment period, but before EPA amended the registration, and EPA was already aware of it at the time it expanded the Enlist Duo registration. *See id*. at 13. Thus, EPA had ample opportunity "bring its expertise to bear" on the potential relevance of the IARC finding, *Native Ecosys. Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002); it simply chose not to. *See* ECF No. 29-1 at 11. Nor was NRDC required to expressly mention the

[1] The President's Cancer Panel, *Reducing Environmental Cancer Risk*, at 13 (Apr. 2010), *available at* http://deainfo.nci.nih.gov/advisory/pcp/annual-Reports/pcp08-09rpt/PCP_Report_08-09_508.pdf.

IARC finding in its stay motion to the agency. Nothing mandates that a party request a stay from the agency before seeking a stay pending review from the Court. *See* Order, *Alaska Survival v. Surface Transp. Bd.*, No. 12-70218 (9th Cir. Oct. 1, 2012), ECF No. 44 ("Our authority to grant this stay is not limited by Fed. R. App. P. 18(a)(2)(A). The text of that rule makes it clear that requesting a stay from the agency is not a mandatory prerequisite to our issuance of a stay."). Moreover, by the time NRDC made its request, EPA had already announced that it would only consider the IARC finding later, and that it was refusing to reopen any health risk questions before expanding the Enlist Duo registration. "[E]xhaustion of administrative remedies is not required where exhaustion would have been futile." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 552 (9th Cir. 1997).

EPA argues that NRDC may not even cite the IARC decision on appeal, because the finding does not appear in the certified administrative record. ECF No. 29-1 at 13. But it is well-settled that a party challenging agency action may cite extra-record information to prove that the agency failed to consider all relevant factors. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004).

EPA also claims that it makes no difference that it ignored the new finding of cancer risk, because there are many other glyphosate-containing pesticides already on the market. ECF No. 29-1 at 14. However, to make a reasoned decision, EPA was required to consider whether Enlist Duo causes cancer, even if there are

other pesticides (and even other glyphosate-containing pesticides) that may cause cancer too. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 523-24 (2007) (petitioner may challenge an incremental contribution to climate change pollutants, even if eliminating that contribution would not reduce global emissions increases).

Finally, EPA declares that it "*did* evaluate potential cancer risks from glyphosate," back in 1991. ECF No. 29-1 at 14. A 24-year-old cancer review is no substitute for assessing the risk now, *before* putting Enlist Duo on the market, in light of significant new developments in the science in those intervening decades.

Dow, for its part, attempts to debate the science itself, filing hundreds of pages of declarations and exhibits to argue that glyphosate is not a carcinogen. ECF No. 28-1 at 10-11; ECF No. 28-4; ECF No. 28-5. Dow's argument misses the point entirely. NRDC does not argue that EPA erred in the exercise of scientific judgment after weighing the cancer risk. Instead, EPA's mistake was in refusing to evaluate the cancer finding at all.

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

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

EPA insists that registering Enlist Duo will not cause a net increase in glyphosate use and therefore will not cause irreparable harm. ECF No. 29-1 at 9-10, 15-16. But the only "proof" EPA cites that glyphosate use will not increase is its own conclusory statement to the same effect in its decision documents. *Id*. at 9.

This bootstrapping does not constitute reliance on record evidence. And even if EPA's guess proves to be correct, its reasoning is faulty: If the status quo causes harm, a decision that perpetuates that status quo contributes to the harm. Given the absence of any countervailing public interest, the equities support granting a stay.

EPA's assertions, moreover, are contradicted by the record. The prime factor behind Dow's development of Enlist Duo is that glyphosate alone is becoming ineffective because of glyphosate-resistant weeds. Case No. 14-73353, ECF No. 26-1 at 2. By pairing glyphosate with a second herbicide, Enlist Duo can be used in places where glyphosate alone would be ineffective and therefore could not be used as a practical matter. Indeed, those few public comments filed in *favor* of registering Enlist Duo were largely filed by growers and agribusiness associations asserting that pesticides containing glyphosate alone are no longer effective at controlling resistant weeds. *See, e.g.*, Case No. 14-73353, ECF Nos. 36-4 to 36-9. Thus, absent Enlist Duo, glyphosate use would presumably decline. EPA elsewhere admits this very point: One of the perceived benefits of Enlist Duo, in the agency's eyes, is "*extending* the viability of glyphosate." Docket No. EPA-HQ-OPP-2014-0195-2414, at 33 (Oct. 14, 2014), *available at* http://www.regulations.-gov/#!documentDetail;D=EPA-HQ-OPP-2014-0195-2414 (emphasis added).

Even if Enlist Duo does not increase net glyphosate use, it will perpetuate ongoing, irreparable harm to monarch butterflies by contributing to habitat

destruction. *See* Case No. 14-73353, ECF No. 15-2 ¶ 17; *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 n.13 (9th Cir. 1987). Monarch loss also deprives NRDC's members of a source of aesthetic and recreational enjoyment. *E.g.*, ECF No. 13-7 ¶¶ 6,7; ECF No. 13-8 ¶¶ 8,9. Unlike in *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011), cited by EPA, NRDC has demonstrated that Enlist Duo contributes to its injury. *See id.* at 981-82 (declining to grant injunction where movant failed to show that challenged actions played any role in forcing movant into bankruptcy).

NRDC has also shown that exposure to 2,4-D poses human health threats, and all parties admit that Enlist Duo's registration will increase 2,4-D exposure. That exposure constitutes a second irreparable harm.

B. No countervailing factors weigh against granting a stay

The balance of harms typically favors an injunction to protect the environment and human health. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). Here, there are no countervailing factors on the other side. First, there is no demonstrated need for immediate access to Enlist Duo. EPA claims vaguely that Enlist Duo is a "new tool" that provides "expanded options," ECF No. 29-1 at 18, but neither EPA nor Dow assert that growers or the public will face hardship if they cannot use Enlist Duo while this

case is pending. Second, Dow's asserted interest in "allowing governmental agencies to fulfill their legal duties," ECF No. 28-1 at 13-14, cuts the other way, where the premise of the case is EPA's *failure* to fulfill a statutory duty before approving a new pesticide. Third, Dow's argument that Enlist Duo will have only a limited rollout this year ignores the fact that a stay is required to prevent potential sale and use of Enlist Duo in *future* growing seasons, not just this year. There is no guarantee that this case will be decided before the 2016 growing season. Finally, EPA's citation to *Almond Hill School v. U.S. Department of Agriculture*, 768 F.2d 1030, 1033 (9th Cir. 1985), is off-base. In that case, this Court affirmed denial of an injunction against spraying pesticides to combat a beetle infestation because, if the spraying were halted, the "risk of significant agricultural losses was great." *Id*. Neither EPA nor Dow has even suggested, let alone proven, that Enlist Duo is needed to prevent any risk of "significant agricultural losses."

III. No other obstacle exists to granting the requested stay

A. NRDC has standing to bring this action

EPA challenges NRDC's standing by arguing, again, that registering Enlist Duo will not cause an increase in glyphosate use. Even if Enlist Duo caused no net increase in glyphosate use, NRDC still would have standing to challenge its registration. NRDC has demonstrated a causal connection between glyphosate-containing pesticides, milkweed loss, and monarch decline. Monarch decline

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. Thus, even if registering Enlist Duo has no effect on the *net* amount of glyphosate used (contrary to the record evidence), it will perpetuate NRDC's injury. Contribution to an ongoing injury is sufficient to confer standing. *See, e.g.*, *Massachusetts*, 549 U.S. at 523-24. The relief NRDC seeks—invalidating Enlist Duo's registration—would redress that injury by eliminating one of its contributing causes. *See id*. at 523-24; *Mendia v. Garcia*, 768 F.3d 1009, 1013-14 (9th Cir. 2014) (finding standing to challenge agency action that was one of several links in causal chain leading to injury).

NRDC also has standing to challenge EPA's inadequate evaluation of 2,4-D's human health risks, because EPA's expanded approval of Enlist Duo increases the risk that NRDC's members will be exposed to 2,4-D. EPA downplays the statements about unwanted exposure to 2,4-D in the declaration of NRDC member Carl Jorgensen. ECF No. 29-1 at 17. Yet far from asserting speculative injuries only, Mr. Jorgensen states that he lives in an area with "heavy agribusiness" where Enlist Duo has now been approved for use, and he regularly sees trucks spraying herbicides near his house, to such an extent that he can smell the chemicals in the air. ECF No. 13-9 ¶¶ 3-4. He could never voluntarily eliminate his exposure, because other people's application of this pesticide and its subsequent offsite drift

are outside his control. This is more than adequate to establish cognizable harm. *See NRDC v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (holding injury sufficiently actual and imminent where pesticide approval increased chances that NRDC members might be exposed to fabrics containing that pesticide).

B. NRDC can challenge EPA's final registration decision now

EPA's amended registration of Enlist Duo is final agency action. 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. A person aggrieved by a final agency action may seek judicial review of that action. *See* 5 U.S.C. § 702. Dow claims that EPA can consider the health and environmental problems that it ignored here in a separate proceeding at some point in the future, because EPA will evaluate the safety of all glyphosate-containing products, not just Enlist Duo, every 15 years. ECF No. 28-1 at 6, 8. But that is no substitute for an adequate *pre-approval* review of Enlist Duo, which otherwise will be in wide use before EPA decides how severely it impacts monarchs or threatens human health.

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed a copy of this reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 2, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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