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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION; et al., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; SCOTT PRUITT, in his official capacity as Administrator, Respondents, DOW AGROSCIENCES LLC, Respondent-Intervenor.	No. 17-70810 EPA No. EPA-HQ-OPP-2016-0594 Environmental Protection Admin ORDER

NATURAL RESOURCES DEFENSE COUNCIL, Petitioner, v. SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency; U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondents,	No. 17-70817 EPA No. EPA-HQ-OPP-2016-0594 Environmental Protection Admin

DOW AGROSCIENCES LLC,

Respondent-Intervenor.

Before: N.R. SMITH, WATFORD, and R. NELSON, Circuit Judges.

On October 15, 2014, the U.S. Environmental Protection Agency (EPA) issued a document titled "Final Registration of Enlist Duo™ Herbicide," along with a "Notice of Registration" (2014 order), registering Enlist Duo for use in six states on corn and soybean genetically engineered (GE) to be tolerant to 2,4-D and glyphosate. Petitioner Natural Resources Defense Council (NRDC) challenged that 2014 order. Petitioners National Family Farm Coalition, Beyond Pesticides, Center for Biological Diversity, Center for Food Safety, and Pesticide Action Network North America (NFFC Petitioners) also challenged that order in a separate petition for review. *Center for Food Safety v. EPA*, No. 14-73359 (9th Cir. Oct. 30, 2014). While those challenges were pending, EPA issued another document on March 31, 2015, titled "Decision to Amend Enlist Duo™ Herbicide Label to include additional states: Arkansas, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, Oklahoma, and North Dakota" (2015 order), amending the Enlist Duo registration to add use on pesticide-resistant GE crops (corn and soybean) in nine more states. The 2015 order does not include a separate "Notice of Pesticide

Registration." NRDC and the NFFC Petitioners also challenged the 2015 order. The Petitioners' challenges were consolidated into a single appeal on June 2, 2015.

On November 24, 2015, EPA moved that the 2014 and 2015 orders be remanded to the agency to consider information (that EPA had received after issuing the two orders) indicating that there may be "synergism" between Enlist Duo's active ingredients. In its motion, EPA represented to this court that "[t]o the extent that any interested party is not satisfied with any final action on remand, that party may obtain review of that agency action in this Court in accordance with FIFRA section 16, 7 U.S.C. § 136n." The court granted EPA's motion to remand the orders but denied EPA's accompanying request to vacate them.

Petitioners filed a motion to adjudicate the pending claims or to stay the mandate and retain jurisdiction, in fear that they would no longer be able to challenge the 2014 and 2015 orders if the court closed the case. In its response to Petitioners' motion, EPA asserted that "its decisions regarding Petitioners' arguments *are not yet final*." (Emphasis added). EPA further explicitly referred to the anticipated decision on remand as "the new final registration decision," and declared that "[t]o the extent the new registration decision relies on EPA's earlier analyses of issues raised during the original registration decisions . . . those analyses *would be subject to review in any challenge of the new final registration*

decision." (Emphasis added). Based on these EPA representations, we denied Petitioners' motion to adjudicate or stay the mandate. The case was then closed.

In 2017, EPA issued a document titled "Final Registration Decision of Enlist Duo Herbicide" (Final Registration Decision), along with an accompanying "Notice of Pesticide Registration" (2017 order). In the Final Registration Decision, EPA issued the anticipated new final decision regarding the 2014 and 2015 orders, declaring that "the agency has made the decision to maintain the previously approved uses of Enlist Duo on GE corn and soybean in 15 states with no changes to the original registration, as amended."[1]

Petitioners filed for review of this 2017 order. EPA argues that the 2017 order is the "actual order" and that the Final Registration Decision's statements reaffirming the earlier-challenged 2014 and 2015 orders are not part of the "order" subject to review in these petitions. EPA likewise asserts that the summary of the evidence, analysis, and statutorily required findings in the Final Registration Decision should be ignored as not part of the "order." It further argues that the 2017 "order" addresses only the new uses for Enlist Duo for GE corn and soybean

[1]The Final Registration Decision also amended the Enlist Duo registration to add use on pesticide-resistant corn and soybean in 19 additional states, and to add use on GE cotton in the thirty-four states for which Enlist Duo was now approved for use on corn and soybean.

in 19 additional states and GE cotton in 34 states. Thus, EPA concludes that Petitioners' challenges to the validity of the 2014 and 2015 orders are untimely.

Petitioners argue that the 2017 order necessarily includes everything in the Final Registration Decision and "incorporates, reaffirms, and expands" the 2014 and 2015 orders.

Even crediting some distinction between the Final Registration Decision and the 2017 order, we conclude that the 2017 order reissues the original Enlist Duo registration and amendment addressed in the 2014 and 2015 orders, thus making the full registration of Enlist Duo for GE corn, soybean and cotton for use in 34 states subject to our review. This conclusion is based on our review of the language of the 2017 order as informed by the Final Registration Decision.

First, the 2017 order states that "This Notice of Pesticide Registration supersedes the Notice of Pesticide Registration dated October 15, 2014." When informed by the statements in the Final Registration Decision, the fact that the 2017 order "supersedes" the 2014 order is consistent with our determination that the 2014 order previously remanded to EPA has now been finalized. We credit EPA's statement in the Final Registration Decision that, "EPA is issuing a new decision on the currently registered Enlist Duo for use on GE soybean and corn in 15 states, following the remand decision." This interpretation is further consistent

with EPA's prior representations to this court that we should not retain jurisdiction over the case during the voluntary remand because EPA's "de novo" reconsideration of the 2014 order (as amended in 2015) was "not yet final" and a "new final registration decision" would be issued following the remand.[2]

As EPA previously noted, "agency action must be final in order to be fit for judicial review." *See also Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). The terms of the 2017 order and the "Final" decision explaining its effects all suggest that the 2017 order takes final action as to EPA's consideration on remand of Enlist Duo's 2014 registration (and 2015 amendment).[3] Therefore, Petitioners' challenge to the 2017 order extends to the original registration and amendment addressed in the 2014 and 2015 orders. But, recognizing that the purpose of the earlier remand was to avoid considering the 2014 and 2015 orders on what EPA admitted might be an incomplete record, we

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[2]Based on these prior representations, EPA is also judicially estopped from asserting that Petitioners' challenges to Enlist Duo's registration and original amendment are untimely. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993–94 (9th Cir. 2012); *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992).

[3]The titles of the documents themselves confirm this. In 2014 EPA issued a "Final Registration" document, but in 2015 issued a document termed an amendment. Notably, the 2017 document is titled a "Final Registration," not an amendment.

review the 2017 order on the combined records of the 2014, 2015 and 2017 orders, all of which is incorporated into the 2017 order's record.

Second, the 2017 order also purports to extend the 2014 registration's (and that of the 2015 amendment) initial 2020 expiration date by two years. The 2017 order states, "This registration will automatically expire on January 12, 2022." Nothing suggests that this term is specific to the new uses on GE cotton in 34 states or GE corn and soybean in the additional 19 states. Indeed, in the Final Registration Decision, EPA states that as to the expiration dates for the 2014 and 2015 orders, "it would be appropriate to revise the original expiration date to 5 years from the date of the EPA's final decisions on these registrations." Accordingly, the 2017 order could not have been limited to adding new uses for GE corn and soybean in 19 additional states and on GE cotton in 34 states, as EPA asserts.[4]

In light of our determination that the scope of our review of the 2017 order incorporates all registered uses of Enlist Duo for GE corn, soybean, and cotton in 34 states, submission of this case is deferred pending further order of the court, and

[4]Accepting EPA's argument would seemingly invalidate any purported extension of the expiration date for the registration of Enlist Duo in the original 15 states—a result inconsistent with what the 2017 order purports to do by its terms, informed by the Final Registration Decision.

we request additional briefing. In their briefing, the parties should address all challenges to the initial registration (2014 order) and the original amendment (2015 order), as that registration and amendment has been reissued in the 2017 order—including challenges to all supporting documentation. The parties should also address what relief we should provide if Petitioners' claims are successful, "in whole or in part." The parties may reference in their supplemental briefs the arguments that have already been submitted to us in the original round of briefing in this case.

Accordingly, counsel for each Petitioner is directed to file a supplemental brief not to exceed 7,000 words within 60 days from the date of this order.

Counsel for Respondent and Intervenor is each directed to file a responsive brief not to exceed 7,000 words within 60 days from the date of the filing of Petitioners' briefs. Petitioners may each file reply briefs not to exceed 3,500 words within 30 days from the date of the filing of Respondent's brief.

All briefs shall conform to the format requirements of Rule 32(a)(4), (5) and (6) of the Federal Rules of Appellate Procedure.