

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL FAMILY FARM) No. 17-70810
COALITION, *et al.*,)

Petitioners,)

v.)

UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY *et al.*,)

Respondents,)

DOW AGROSCIENCES LLC,)

Respondent-Intervenor.)

NATURAL RESOURCES DEFENSE) No. 17-70817
COUNCIL, INC.,)

Petitioner,)

v.)

E. SCOTT PRUITT *et al.*,)

Respondents,)

DOW AGROSCIENCES LLC,)

Respondent-Intervenor.)

**PETITIONER NATURAL RESOURCES DEFENSE COUNCIL'S
OPPOSITION TO DOW AGROSCIENCES LLC'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Petitioner Natural Resources Defense Council (NRDC) opposes Respondent-Intervenor Dow AgroSciences LLC's (Dow's) motion to dismiss for lack of jurisdiction, No. 17-70810, ECF No. 16-1.

Dow's motion is premised on an unprecedented and textually unsupportable interpretation of 40 C.F.R. § 23.6, the U.S. Environmental Protection Agency's (EPA's) regulation governing timing for purposes of judicial review under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Section 16(b) of FIFRA states that a petition to review any order issued by the EPA after a public hearing¹ must be filed "within 60 days after the [order's] entry." 7 U.S.C. § 136n(b). 40 C.F.R. § 23.6 states, in turn, that "[u]nless the Administrator otherwise explicitly provides in a particular order, the "date of entry of an order" under FIFRA section 16(b) is "1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after [the order] is signed." 40 C.F.R. § 23.6.

Both EPA's Notice of Registration and Final Registration Decision for Enlist Duo were signed on January 12, 2017. *See* No. 17-70817, ECF No. 1-5, Exs. A & B. Neither document "explicitly provides" a "date of entry" other than the

¹ In this Court, registration decisions issued after EPA solicited and reviewed public comments qualify as orders that follow a "public hearing." *See, e.g., United Farm Workers of Am., AFL-CIO v. Adm'r, EPA*, 592 F.3d 1080, 1082-84 (9th Cir. 2010).

default date prescribed by 40 C.F.R. § 23.6. *See id.* Accordingly, based on a straightforward application of 40 C.F.R. § 23.6, EPA entered its registration order for Enlist Duo at 1:00 p.m. eastern standard time on January 26, 2017—fourteen days after the Notice of Registration and Final Registration Decision were signed on January 12, 2017. NRDC filed its petition fifty-four days later, on March 21, 2017—well within FIFRA section 16(b)’s sixty-day window.

Dow, however, insists that EPA “entered” its registration order two weeks earlier, on January 12, 2017, even though both the Notice of Registration and Final Registration Decision are silent about the date of entry. No. 17-70810, ECF No. 16-1 ¶ 7 (Mot.); No. 17-70817, ECF No. 1-5, Exs. A & B. Specifically, Dow infers that all EPA pesticide registrations are immediately effective; that EPA intended for its registrations to be reviewable as soon as they take effect; and that the January 12, 2017 “Date of Issuance” stated on the Notice of Registration therefore constitutes the “date of entry” for purposes of 40 C.F.R. § 23.6, even though the document itself does not say so. *See* Mot. ¶¶ 7-9. Laying inference upon inference, Dow thus argues that NRDC filed its petition eight days late. Mot. ¶ 4.

Dow’s circuitous argument cannot be reconciled with the plain language of 40 C.F.R. § 23.6, which states that the “date of entry” of an order is two weeks after it is signed “[u]nless the Administrator otherwise *explicitly* provides in a *particular* order.” 40 C.F.R. § 23.6 (emphases added). “The word ‘explicit’ means

‘unequivocal’ or ‘fully and clearly expressed or demonstrated,’ with nothing left that is ‘merely implied.’” *Utah ex rel. Utah Dep’t of Env’tl. Quality, Div. of Air Quality v. U.S. EPA*, 750 F.3d 1182, 1185 (10th Cir. 2014) (quoting *Webster’s New Universal Unabridged Dictionary* 681 (1996)) (interpreting similar timing regulation promulgated by EPA for the Clean Air Act); *see also* Merriam-Webster, *Definition of Explicit*, <https://www.merriam-webster.com/dictionary/explicit> (last accessed May 25, 2017) (using similar definition).

Dow’s argument fails out of the gate: the Notice of Registration and Final Registration Decision say nothing whatsoever about the “date of entry” for EPA’s decision to register Enlist Duo, and therefore do not “explicitly” change the default date of entry specified in EPA’s regulations. *See* No. 17-70817, ECF No. 1-5, Exs. A & B. At a minimum, to change the date of entry explicitly, EPA would need to use the words “date of entry” in the final order. And EPA would almost certainly need to cite the regulation establishing a default date of entry, to indicate explicitly that it was departing from that rule.

The byzantine explanation Dow offers undermines its motion to dismiss. Had EPA “explicitly” changed the default date of entry, as required in the regulation, it would not take ten pages of argument and seventy-five pages of attachments for Dow to prove it. EPA’s disagreement with Dow’s position also suffices to defeat the motion to dismiss. No. 17-70810, ECF No. 24. If EPA had

explicitly changed the default date of entry for the challenged order, it would have said so.

Past practice proves that EPA understands the definition of “explicit.” The agency has expressly departed from similar timing regulations under other environmental statutes when it intends to accelerate the reviewability of an order and change the default date for judicial review otherwise set by regulation. For example, when EPA sought to make a Clean Water Act permit immediately reviewable upon taking effect, the agency clearly stated that it was changing the issuance date (which was the relevant term there) for purposes of judicial review:

Under 40 CFR 23.2, actions such as today’s would by default be considered issued for purposes of judicial review two weeks after publication in the Federal Register. . . . EPA is . . . exercising its discretion under 40 CFR 23.2 to deem today’s permit “issued for purposes of judicial review” on the same date it becomes effective.

Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel for Alaska and Hawaii, 74 Fed. Reg. 7042, 7042 n.2 (Feb. 12, 2009); *see also Standards for the Use or Disposal of Sewage Sludge*, 60 Fed. Reg. 54,764, 54,764 (Oct. 25, 1995) (“[T]he Agency also is providing, pursuant to 40 CFR 23.2, that the rule is issued for the purpose of judicial review on the effective date.”).² These examples

² The Clean Water Act requires parties to file a petition for review “within 120 days from the date of such determination, approval, promulgation, issuance or

illustrate the kind of explicit language EPA uses when it wants to change the default date that starts the clock for judicial review. EPA does not make its decisions immediately reviewable through implication, as Dow argues.

Dow's position is that *all* pesticide registration decisions—not just the Enlist Duo registration challenged here—are immediately reviewable. This contravenes 40 C.F.R. § 23.6's plain instruction that departures from the default entry date set by the regulation must be made on a case-by-case basis. *See* 40 C.F.R. § 23.6 (providing that an order's entry date is two weeks after the date of signature, unless EPA provides a different date in a "particular order"). EPA made clear when it promulgated its timing rules that immediate judicial review would be the exception and not the norm. By setting an easily ascertainable time of entry for orders issued under several environmental statutes, including FIFRA,³ EPA sought to bring

denial." 33 U.S.C. § 1369(b)(1). EPA has promulgated a timing regulation under the Clean Water Act at 40 C.F.R. § 23.2, just as the agency has done under FIFRA, which states:

Unless the Administrator otherwise explicitly provides in a particular promulgation or approval action, the time and date of the Administrator's action . . . shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date that is two weeks after the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

³ The other statutes for which EPA has promulgated similar timing regulations are the Clean Water Act, 33 U.S.C. § 1369(b); the Clean Air Act, 42

greater fairness to “races to the courthouse,” in which parties relied on complex schemes to be the first to learn of, and file petitions for review challenging, new EPA orders. *See Judicial Review Under EPA-Administered Statutes; Races to the Courthouse*, 50 Fed. Reg. 7268, 7268 (Feb. 21, 1985). In response to a comment that litigants would nonetheless have to “prepare to race in all cases” because the Administrator could eliminate the deferral requirement, EPA stated it would be an “unusual case” in which EPA would make the rule immediately reviewable. *Id.* at 7269. Exempting the entire category of pesticide registration orders from FIFRA’s timing regulation, as Dow urges, would frustrate EPA’s goals of simplifying the filing process for legal challenges and limiting immediate judicial review to unusual cases.

In addition, courts have rejected the core premise of Dow’s argument—that an agency decision must be immediately reviewable once it is effective. In *Western Union Telegraph Co. v. FCC*, the D.C. Circuit held that “[i]t is not a principle of law that all agency action must be reviewable as soon as it is effective and ripe.” 773 F.2d 375, 377 (D.C. Cir. 1985). Like FIFRA section 16(b), the applicable statute in *Western Union* stated that a petition for review should be filed “within 60

U.S.C. § 7607(b); the Resource Conservation and Recovery Act, 42 U.S.C. § 6976; the Toxic Substances Control Act, 15 U.S.C. § 2618; the Safe Drinking Water Act, 42 U.S.C. § 300j-7(a); the Atomic Energy Act, 42 U.S.C. §§ 2239; 2344, and the Federal Food, Drug, and Cosmetic Act, 28 U.S.C. § 2344. *See also* 40 C.F.R. §§ 23.2-23.10 (filing regulations for these statutes).

days after [the challenged order's] entry.” *Id.* (quoting 28 U.S.C. § 2344). Other statutes and regulations further defined the date of entry for an FCC order as 3:00 p.m. eastern time the day after the order was published. *Id.* at 376 (citing 47 U.S.C. § 405 (1982) & 47 C.F.R. § 1.4(b) (1984)). Although the court assumed without deciding the FCC’s order was effective the date it was issued, it concluded it was statutorily barred from reviewing the order because the petitioner filed its challenge before the defined entry date. *Id.* (“Here the governing statutes . . . provide that review is unavailable until the date the Commission gives public notice, whether or not the order becomes effective and otherwise ripe before then . . .”). Here, as in *Western Union*, the effective date of the contested order does not govern the order’s date of entry.

Finally, as EPA acknowledges, Dow’s interpretation of FIFRA section 16(b) and 40 C.F.R. § 23.6 is at odds with the approach that both this Court and EPA have taken in a number of recent cases. No. 17-70810, ECF No. 24 at 3-5. This Court recently confirmed the timeliness of a petition to review a pesticide registration decision filed more than sixty days after EPA issued its decision but less than sixty days after 40 C.F.R. § 23.6’s date of entry. *See* Att. A (questioning timeliness of petition to review an EPA pesticide registration, where the petition was filed more than sixty days after issuance date); Att. B (concluding that petition to review EPA’s pesticide registration was “timely filed”). Similarly, EPA,

consistent with its objective to limit decisions that are immediately reviewable to the “unusual case,” has regularly opined—including in the previous Enlist Duo litigation—that its pesticide registrations are not entered under 40 C.F.R. § 23.6 until fourteen days after their issuance. *See* Att. C (EPA assertion that *Enlist Duo I* petition for review was premature under 40 C.F.R. § 23.6 because the lawsuit was filed less than fourteen days after the registration’s date of issuance); *see also* Att. D (EPA concurrence that petition for review to challenge Dicamba registration was timely). Like EPA’s final decision documents for its current registration of Enlist Duo, the final decision documents for these previous registration decisions were completely silent as to their entry date and included only a date of signature and/or a date of issuance. *Compare* Att. E (Dicamba registration decision), *and* Att. F (*Enlist Duo I* registration decision), *and* Att. G at 1 (*Enlist Duo I* registration notice), *with* No. 17-70817, ECF No. 1-5, Ex. B (*Enlist Duo II* registration decision) *and* No. 17-70817, ECF No. 1-5, Ex. A (*Enlist Duo II* registration notice). Thus, the entry date set by regulation applied. This Court should continue to follow 40 C.F.R. § 23.6’s plain language and find that a different entry date applies only when EPA “explicitly” provides one, which it did not do here.

For the foregoing reasons, this Court should deny Dow’s motion to dismiss.

Respectfully submitted this 25th day of May, 2017.

/s/ Margaret T. Hsieh

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 25, 2017, a true and correct copy of the foregoing OPPOSITION TO DOW AGROSCIENCES LLC'S MOTION TO DISMISS FOR LACK OF JURISDICTION was served on counsel of record via the Court's CM/ECF system.

Dated: May 25, 2017

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