IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

REPLY BRIEF IN RESPONSE TO PETITIONERS' RESPONSES TO MOTION TO DISMISS FOR LACK OF JURISDICTION

David B. Weinberg
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: 202-719-7000
Facsimile: 202-719-7049
dweinberg@wileyrein.com

Christopher Landau, P.C.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
Telephone: 202-879-5000
Facsimile: 202-879-5200
clandau@kirkland.com

Additional Counsel Listed on Signature Block
Attorneys for Intervenor Dow AgroSciences LLC

June 5, 2017

Intervenor Dow AgroSciences LLC (DAS) files this Reply Brief in Response to Petitioners' Responses to DAS' Motion to Dismiss for Lack of Jurisdiction (ECF Nos. 25, 27),[1] and states as follows:

1. Petitioners' responses to DAS' motion to dismiss for lack of jurisdiction are perplexing. In those responses, petitioners insist that a pesticide registration order that is immediately effective with respect to the registrant (like the one here) nonetheless is not ripe for purposes of judicial review (sought by challengers like them) for two weeks. Petitioners, of all people, should understand that such a regulatory hole—which EPA expressly and formally disavowed at the time it promulgated the relevant regulation, 40 C.F.R. § 23.6, *see* 50 Fed. Reg. 7268-69 (Feb 21, 1985) (Mot. Tab B)—makes no sense. But petitioners remarkably declare that it is DAS' position, that the effective date is the *same* for both the registrant and a potential challenger, that defies

[1] On June 2, 2017, DAS filed a separate Reply Brief in Response to Respondents' Response to DAS' Motion to Dismiss for Lack of Jurisdiction (ECF No. 24), which was filed two days earlier than petitioners' responses. Although DAS promptly moved to file a single consolidated reply brief on the later of the two due dates, *see* ECF No. 28, this Court did not rule on that motion prior to the due date for the first reply brief, which DAS accordingly was constrained to file, *see* ECF No. 36. This reply brief incorporates the earlier reply brief by reference.

"common sense." NFFC Opp. 1. To say that petitioners are pursuing a pyrrhic victory here would be an understatement.

2. Although petitioners are certainly free to take whatever legal position they wish, their arguments in support of their position are no more persuasive than respondents' arguments, which DAS has addressed. *See* ECF No. 36-1. Unlike respondents, however, petitioners take a stab at squaring their interpretation with the language of the regulation. According to petitioners, the "date of issuance" on the face of the challenged registration is not an "explicit" statement of the "date of entry" within the meaning of the regulation. *See* NRDC Opp. 2-3; CFS Opp. 9-10. But that is just word play. An "explicit" statement does not require the incantation of any particular magic words. Petitioners identify no reason why, in this context, "date of issuance" and "date of entry" are not synonymous. The registration here was concededly effective as of the date of issuance; no additional act of "entry" was thereafter required. Contrary to petitioners' assertion, there is nothing "byzantine" about DAS' position, NRDC Opp. 3: the agency "expressly provided" that the Enlist Duo registration would take effect immediately by putting an express "date of issuance"

of January 12, 2017 on the face of the registration (separate and apart from the data field noting the date on which the registration order was signed). It is petitioners and EPA who would create a byzantine system of bifurcated effective dates, with a resulting regulatory hole where agency action is immediately effective but not subject to judicial review for two weeks, even if imminent and irreparable harm is alleged.

3. The NRDC petitioners attack a straw man by asserting that DAS argues that "*all* pesticide registration decisions—not just the Enlist Duo registration challenged here—are immediately reviewable." NRDC Opp. 5 (emphasis in original). DAS makes no such general argument; rather, it all depends on whether the particular order specifies an effective date. Where, as here, EPA makes a pesticide registration immediately effective (by specifying an "issuance date" corresponding to the date the order is signed), such an immediately effective order is immediately reviewable in court. In contrast, where EPA fails to specify an immediate "issuance date," the default rule is that the order becomes effective two weeks after it is signed.

4. The NRDC petitioners attack yet another straw man by declaring that "courts have rejected the core premise of [DAS']

argument—that an agency decision *must* be immediately reviewable once it is effective." NRDC Opp. 6 (emphasis added; citing *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985)). Again, DAS never made any such general argument; it all depends on the relevant statute and regulation. Here, nothing in the relevant statute and regulation remotely suggests that an effective pesticide registration order is not reviewable for two weeks (and, again, EPA expressly disavowed such a regulatory hole when it promulgated the regulation, *see* 50 Fed. Reg. 7268-69 (Feb 21, 1985) (Mot. Tab B)). Congress and/or an agency are certainly free to create such a regulatory hole, but there is no basis to conclude that they did so here.

5. The NFFC petitioners, however, accuse DAS of "cherry-pick[ing]" language from the 1985 Federal Register." NFFC Opp. 10. According to the NFFC petitioners, "[r]ead in context, EPA's statement said nothing about making issuance dates of pesticide registrations the dates of entry for judicial review of such registrations; it merely acknowledged that courts have the discretion to decline deference to a deferred entry of order explicitly provided by EPA." *Id.* at 11. Insofar as that sentence is comprehensible, it is inexplicable. In the 1985

Federal Register, EPA grappled head-on with the very issue presented here: whether the default two-week delay for making agency action ripe for judicial review might lead to a regulatory hole in which the agency could "issue a rule that is immediately effective, with a deferred effective date, depriving affected persons of their right to preliminary relief on judicial review." 50 Fed. Reg. 7268-69 (Feb 21, 1985) (Mot. Tab B). The agency dismissed that concern as "theoretical," because "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." 50 Fed. Reg. 7268-69 (Feb 21, 1985) (Mot. Tab B). That is the situation here: the registration order for Enlist Duo was concededly effective on its date of issuance (January 12, 2017), but petitioners are asking this Court to interpret EPA's 1985 regulation precisely as EPA in 1985 recognized that "courts would *not*" interpret it. *Id.* (emphasis added).

6. Because petitioners cannot seriously contend that anything in the relevant statute or regulation supports their interpretation, they fall back on the argument that this issue is already water under the bridge. In particular, they assert that DAS "cites no case—and NFFC

Petitioners are unaware of any—where a court construed a pesticide registration's date of issuance or date of expiration to be an explicit date of entry for appellate review under 40 C.F.R. § 23.6," whereas "this Court has at least twice affirmed" their interpretation of that regulation. NFFC Opp. 4. That assertion is manifestly incorrect: this Court has never addressed this issue.

7. Petitioners' contrary assertion is based on (1) the fact that this Court "accepted" petitions challenging previous orders registering Enlist Duo after earlier petitions were voluntarily dismissed (and this jurisdictional issue was never raised), and (2) the fact that the Appellate Commissioner recently discharged a show-cause order on this issue in another pending challenge to a pesticide registration. *Id.* at 4-7. Neither one is remotely a merits resolution of this issue. The fact that this Court did not *sua sponte* flag this jurisdictional issue in response to petitioners' challenges to previous Enlist Duo registrations proves nothing: putting aside the fact that those challenges never reached a merits panel, it is axiomatic that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to

constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952) (same). Similarly unavailing is petitioners' reliance on an unpublished order by the Appellate Commissioner discharging an order to show cause why the petitions in another case should not be dismissed as untimely. That order is by no stretch of the imagination a "holding" of this Court; it is merely a preliminary and non-binding administrative determination. Because even an unpublished order by a three-judge motions panel does not establish the law of the case and is not binding on the merits panel, *see, e.g., United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994); *United States v. Houser*, 804 F.2d 565, 567-69 (9th Cir. 1986), it necessarily follows that an unpublished order by the Appellate Commissioner can have no greater effect.

8. In sharp contrast to respondents themselves, the NFFC petitioners (but not petitioner NRDC) contend that respondents' interpretation of the regulation is entitled to judicial deference. *See* NFFC Opp. 12. But EPA has never requested any such deference, presumably because it understands full well that an informal interpretation of the regulation advanced by Department of Justice

lawyers in the course of litigation is not agency action entitled to deference—especially where, as here, it contradicts the agency's formal interpretation of its own regulation at the time of promulgation. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("[A]n agency's interpretation of a ... regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view."). In any event, the "deference" issue need not detain this Court, because there is clearly no basis to afford an agency deference where, as here, the agency has not requested any such deference. *See*, *e.g.*, *Neustar, Inc. v. FCC*, __ F.3d __, 2017 WL 2294164, at *5 (D.C. Cir. May 26, 2017) (judicial deference to agency action is not jurisdictional and is thus forfeited if not requested by agency) (citing cases); *Massachusetts Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1369 (Fed. Cir. 2015) (same); *Scheidelman v. CIR*, 682 F.3d 189, 197 n.6 (2d Cir. 2012).

9. Finally, it is worth noting that petitioners took a gamble here insofar as they delayed filing their petitions for more than 60 days after the date of issuance of the challenged registration based on no more than informal statements by Department of Justice lawyers (and

in the face of contrary formal statements in the Federal Register). Petitioners tellingly do not make any equitable tolling argument, because (as DAS noted in its motion), such tolling is not available in this context. *See* Mot. ¶ 10 (citing, *inter alia*, *Utah v. Utah Dep't of Envt'l Quality v. U.S. E.P.A.*, 750 F.3d 1182, 1184-86 (10th Cir. 2014)). "The EPA stated that the petitions were not due until [more than 60 days after the relevant agency action], and [petitioners] naturally assumed that the EPA was correct. But it was not, and we cannot expand our jurisdiction to avoid hardships even when they are inequitable." *Utah*, 750 F.3d at 1186 (citing *Bowles v. Russell*, 551 U.S. 205, 213-14 (2007)). And here, there is nothing "inequitable" about enforcing the 60-day rule: nothing precluded petitioners from filing their petitions, out of an abundance of caution, more than 14 days but less than 60 days after the registration.

CONCLUSION

For the foregoing reasons, and those set forth in the motion (ECF No. 16-1) and in DAS' reply to respondents' response brief (ECF No. 36-1), this Court should dismiss the petitions for lack of jurisdiction.

June 5, 2017

Respectfully submitted,

/s/ *Christopher Landau*

Christopher Landau, P.C.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
Telephone: 202-879-5000
Facsimile: 202-879-5200
clandau@kirkland.com

Michael P. Foradas, P.C.
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
Telephone: 312-862-2000
Facsimile: 312-862-2200
mforadas@kirkland.com

Z. Payvand Ahdout
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
payvand.ahdout@kirkland.com

Stanley H. Abramson
Donald C. McLean
ARENT FOX LLP
1717 K Street, N.W.
Washington, DC 20006
Telephone: 202-857-6000
Facsimile: 202-857-6395
stanley.abramson@arentfox.com
donald.mclean@arentfox.com

David B. Weinberg
Roger H. Miksad
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: 202-719-7000
Facsimile: 202-719-7049
dweinberg@wileyrein.com
rmiksad@wileyrein.com

Attorneys for Intervenor Dow AgroSciences LLC

CERTIFICATE OF SERVICE

I, Christopher Landau, hereby certify that on June 5, 2017, I caused the foregoing **REPLY BRIEF IN RESPONSE TO PETITIONERS' RESPONSES TO 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:

George A. Kimbrell, Esq.
Sylvia Shih-Yau Wu, Esq.
CENTER FOR FOOD SAFETY
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

Paul H. Achitoff, Esq.
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, HI 96813
achitoff@earthjustice.org

John Brett Grosko, Esq.
Michele Walter, Esq.
U.S. DEPARTMENT OF JUSTICE
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044
brett.grosko@usdoj.gov
michele.walter@usdoj.gov

Margaret T. Hsieh, Esq.
NATURAL RESOURCES DEFENSE COUNCIL
404 W. 20th Street
New York, NY 10011
mhsieh@nrdc.org

Aaron Colangelo, Esq.
NATURAL RESOURCES DEFENSE COUNCIL
1152 15th Street, NW, Suite 300
Washington, DC 20005
acolangelo@nrdc.org

/s/ *Christopher Landau*
Christopher Landau, P.C.
Attorney for Intervenor
Dow AgroSciences LLC