

Case No. 19-70115

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

NATIONAL FAMILY FARM COALITION *et al.*,
Petitioners,

v.

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

and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**MOTION OF CROPLIFE AMERICA FOR
LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY'S RESPONSE TO PETITIONERS' EMERGENCY MOTION**

Of Counsel:

Rachel Lattimore
*Executive Vice President &
General Counsel*
Ashley Boles
Counsel
CropLife America
1156 15th Street NW, Ste. 400
Washington, DC 20005

Karen Ellis Carr
Stanley H. Abramson
Donald C. McLean
Kathleen R. Heilman
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
karen.carr@arentfox.com
Tel: (202) 715-8531

Counsel for Proposed Amicus Curiae CropLife America

INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-3, CropLife America (“CLA”) respectfully moves for leave to submit the attached brief as *amicus curiae* in support of the response of Respondent U.S.

Environmental Protection Agency (“EPA” or the “Agency”) to Petitioners’ emergency motion and the motions to intervene filed by Proposed Intervenor-Respondents E.I. du Pont de Nemours and Company and BASF Corporation (“Proposed Intervenor-Respondents”).

Pursuant to Circuit Rule 29-3, CLA contacted counsel for the parties in an effort to obtain their consent to this motion. EPA and Intervenor-Respondent Monsanto Company consent to CLA’s motion. Petitioners oppose this motion.

CLA is a national, non-profit trade association representing companies that develop, register, and sell pesticide products in the United States. CLA’s member companies produce most of the crop protection and pest management products regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.* CLA represents its members’ interests by, among other things, monitoring federal agency actions and related litigation of concern to the crop protection and pest control industry, and participating in such actions as appropriate.

CLA seeks leave to participate as *amicus curiae* because its members have a strong interest in ensuring that EPA retains its authority to oversee the orderly cancellation of registered pesticide products. EPA's exercise of this authority enables it to mitigate adverse impacts on human health and the environment, protect and enforce against unauthorized use, and provide clarity to CLA's members, their customers, and other stakeholders regarding sale, distribution, use, and disposal of pesticide products following termination of a pesticide registration. CLA can provide unique insight into the legal and policy issues raised by Petitioners' attempt to preclude EPA from exercising authority conferred on it by Congress to comprehensively regulate pesticide products from approval through cancellation and disposal.

ARGUMENT

This Court has broad discretion to allow participation of *amici curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds* by *Sandin v. Conner*, 515 U.S. 472 (1995). The "classic role" of *amici curiae* is three-fold: (1) to assist in a case of general public interest; (2) to supplement the efforts of counsel; and (3) to draw the court's attention to law that escaped consideration. *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). The Court may also exercise its discretion to grant amicus status

in order to avail itself of the benefit of “thorough and erudite legal arguments.”

Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987).

A. CLA Has a Substantial Interest in the Court’s Disposition of Petitioners’ and Proposed Intervenor-Respondents’ Motions.

CLA has a compelling interest in ensuring that EPA retains the broad authority conferred on it by Congress to regulate pesticides under FIFRA.

Petitioners’ requested relief—extinguishing the processes Congress and EPA have specified for pesticide cancellation and disposal—would negatively impact the rights and interests of CLA’s members who manufacture and distribute crop protection products, as well as the end users and others who invested in those products. It would create chaos in the agricultural market and hamper EPA’s ability to ensure the safe distribution, use, and disposal, and prevent the misuse, of the now-unregistered products already in the field.

CLA has a further interest in the Motions to Intervene filed by Proposed Intervenor-Respondents. *See* Dkt. Nos. 129, 130. EPA’s registration of a pesticide product under FIFRA operates as a license in which registrants have a property interest. *See, e.g., Anderson v. McCarthy*, No. 3:16-cv-00068, 2016 WL 2770544, at *4 (N.D. Cal. May 13, 2016) (at-risk pesticide registrations confer “a protectable interest”). Pesticide registrants obtain their registrations under FIFRA through substantial investment in the generation and submission of voluminous data, studies, and analyses to support their registrations and extensive participation in

EPA's registration processes under FIFRA. On June 3, 2020, this Court issued an opinion and judgment that vacated three pesticide registrations held by CLA members. It is critical that each such registrant, including Proposed Intervenor-Respondents who until this Court's June 3 order had no reasonable basis to conclude that their property interests were at issue, has an opportunity to participate in matters placing their registrations at risk.

CLA regularly participates in litigation before this Court and district courts in this Circuit in cases raising issues involving FIFRA that impact the rights of CLA members. *See, e.g., League of United Latin Am. Citizens v. Wheeler*, Nos. 19-71982, 19-71979, Dkt. No. 68 (9th Cir. Mar. 6, 2020) (pending CLA motion to file amicus brief in support of EPA); *Edwin Hardeman v. Monsanto Co.*, No. 19-16636, Dkt. No. 28 (9th Cir. Dec. 19, 2019); *League of United Latin Am. Citizens v. Wheeler*, No. 17-71636, Dkt. No. 138 (9th Cir. Nov. 13, 2018) (granting motions of CLA and others to file amicus briefs in support of EPA petition for rehearing en banc); *Nat'l Family Farm Coalition v. EPA*, No. 17-70810, Doc. ID 10946537, Dkt. No. 160 (9th Cir. May 8, 2019) (granting CLA's motion for leave to file amicus brief supporting respondents); *Ellis v. Housenger*, 252 F. Supp. 3d 800 (N.D. Cal. 2017) (as intervenor); *Anderson*, 2016 WL 2770544, at *4–5 (granting motion to intervene). The attached proposed brief will similarly allow this Court

to consider the potential ramifications of the Court's ruling on members of the regulated community.

B. CLA Will Provide Helpful Information to the Court.

The Court will be aided in its consideration of Petitioners' motion by CLA's substantial experience with FIFRA's cancellation process, including EPA's policy governing the use and disposal of existing stocks of pesticides no longer registered with EPA. CLA can provide a unique perspective on the disruptive consequences Petitioners' requested relief would have on manufacturers, users, and other members of the agricultural supply chain. CLA's proposed brief explains the importance of ensuring that EPA can exercise its comprehensive authority to implement FIFRA in a way that protects against unauthorized use, and facilitates safe and orderly disposal, following termination of a pesticide registration; the jurisdictional flaw in Petitioners' motion that renders this Court the incorrect forum; and the importance of enabling Proposed Intervenor-Respondents to defend their property interests in proceedings affecting their registrations.

CONCLUSION

For the foregoing reasons, CLA respectfully requests this Court to grant its motion for leave and accept the proposed amicus brief in support of EPA and Proposed Intervenor-Respondents.

June 16, 2020

Respectfully submitted,

/s/ Karen Ellis Carr

Karen Ellis Carr

Stanley H. Abramson

Donald C. McLean

Kathleen R. Heilman

ARENT FOX LLP

1717 K Street, NW

Washington, DC 20006

karen.carr@arentfox.com

stanley.abramson@arentfox.com

donald.mclean@arentfox.com

katie.heilman@arentfox.com

Tel: (202) 715-8531

*Counsel for Proposed Amicus Curiae
CropLife America*

Of Counsel:

Rachel Lattimore

Executive Vice President & General Counsel

Ashley Boles

Counsel

CropLife America

1156 15th Street NW, Suite 400

Washington, DC 20005

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) because this brief contains 1,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14 point.

/s/ Karen Ellis Carr
Karen Ellis Carr

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 June 16, 2020.

I certify that all participants in the case are registered as CM/ECF users and will receive service by the appellate CM/ECF system.

/s/ Karen Ellis Carr
Karen Ellis Carr

Case No. 19-70115

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

NATIONAL FAMILY FARM COALITION *et al.*,
Petitioners,

v.

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

and

MONSANTO COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**BRIEF OF *AMICUS CURIAE* CROPLIFE AMERICA
IN SUPPORT OF RESPONDENT UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY'S
RESPONSE TO PETITIONERS' EMERGENCY MOTION**

Of Counsel:

Rachel Lattimore
*Executive Vice President &
General Counsel*
Ashley Boles
Counsel
CropLife America
1156 15th Street NW, Ste. 400
Washington, DC 20005

Karen Ellis Carr
Stanley H. Abramson
Donald C. McLean
Kathleen R. Heilman
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
karen.carr@arentfox.com
Tel: (202) 715-8531

Counsel for Amicus Curiae CropLife America

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	vi
INTRODUCTION AND STATEMENT OF INTEREST.....	1
ARGUMENT	4
I. This Court Lacks Jurisdiction to Hear Petitioners’ Challenge to the Cancellation Order.	4
II. EPA Has Comprehensive Authority Under FIFRA to Oversee the Disposal and Use of Existing Stocks of Unregistered Pesticides, Including Following Vacatur	6
A. Relevant Statutory Framework	6
B. The Cancellation Order Is Consistent with EPA’s Authority Under FIFRA, Which EPA Has Reasonably Implemented Through Its Existing Stocks Policy	10
C. The Cancellation Order Is Consistent with Past Agency Practice and Ninth Circuit Precedent.....	13
III. CLA Supports BASF and DuPont’s Motions to Intervene	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bell v. Burson</i> , 402 U.S. 535 (1971).....	17
<i>Cal. Trucking Ass’n v. ICC</i> , 900 F.2d 208 (9th Cir. 1990)	14
<i>City & Cnty. of San Francisco v. U.S. Dep’t of Transp.</i> , 796 F.3d 993 (9th Cir. 2015)	11
<i>Ctr. for Biological Diversity v. EPA</i> , 847 F.3d 1075 (9th Cir. 2017)	4
<i>Ctr. for Biological Diversity v. EPA</i> , 861 F.3d 174 (D.C. Cir. 2017).....	5
<i>Ctr. for Biological Diversity v. EPA</i> , No. 11-cv-293, 2013 WL 1729573 (N.D. Cal. Apr. 22, 2013)	17
<i>FCC v. Pottsville Broad. Co.</i> , 309 U.S. 134 (1940).....	15
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17 (1952).....	15
<i>Indus. Safety Equip. Ass’n v. EPA</i> , 656 F. Supp. 852 (D.D.C. 1987), <i>aff’d</i> , 837 F.2d 1115 (D.C. Cir. 1988)	17
<i>Love v. Thomas</i> , 858 F.2d 1347 (9th Cir. 1988)	7
<i>Monsanto Co. v. Geertson Seed Farms</i> , 561 U.S. 139 160–61 (2010).....	15
<i>Nat. Res. Def. Council v. EPA</i> , 676 F. Supp. 2d 307 (S.D.N.Y. 2009)	14

<i>Organized Vill. of Kake v. U.S. Dep't of Agric.</i> , 795 F.3d 956 (9th Cir. 2015) (Christen, J., concurring)	14
<i>Pollinator Stewardship Council v. EPA</i> , 806 F.3d 520 (9th Cir. 2015)	13, 14
<i>Reckitt Benckiser, Inc. v. Jackson</i> , 762 F. Supp. 2d 34 (D.D.C. 2011).....	17
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984).....	7
<i>S. Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO</i> , 425 U.S. 800 (1976).....	15
<i>United Farm Workers of Am., AFL-CIO v. EPA</i> , 592 F.3d 1080 (9th Cir. 2010)	5, 6
<i>W. States Petroleum Ass'n v. EPA</i> , 87 F.3d 280 (9th Cir. 1996)	14
Statutes	
7 U.S.C. § 136(bb)	7
7 U.S.C. § 136(gg)	11
7 U.S.C. § 136a	7, 9
7 U.S.C. § 136a(a).....	10
7 U.S.C. § 136a(c).....	7, 8
7 U.S.C. § 136a-1	9
7 U.S.C. § 136c	7
7 U.S.C. § 136d.....	7, 8
7 U.S.C. § 136d(a)	8, 9
7 U.S.C. § 136d(b)	8

7 U.S.C. § 136j.....	7
7 U.S.C. § 136j(a)(1).....	7, 11, 12, 13
7 U.S.C. § 136j(a)(2)(G)	8, 11, 13
7 U.S.C. § 136j(a)(2)(K)	10
7 U.S.C. § 136k.....	7
7 U.S.C. § 136n.....	4
7 U.S.C. § 136n(b)	5
7 U.S.C. § 136q.....	7
7 U.S.C. § 136q(a)(2).....	10
Act of Oct. 21, 1972, Pub. L. No. 92-516, 86 Stat. 973	8
FIFRA Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654	9

Other Authorities

EPA, Final Cancellation Order for Three Dicamba Products (June 8, 2020), https://www.epa.gov/sites/production/files/2020-06/documents/final_cancellation_order_for_three_dicamba_products.pdf	2
EPA, Spirotetramat – Final Cancellation Order (Apr. 5, 2010), https://archive.epa.gov/epa/sites/production/files/2015-10/documents/spirotetramat-final-cancel-order-04-05-10.pdf	15
EPA, Sulfoxaflor – Final Cancellation Order (Nov. 12, 2015), https://www.epa.gov/sites/production/files/2015-11/documents/final_cancellation_order-sulfoxaflor.pdf	14
Existing Stocks of Pesticide Products; Statement of Policy, 56 Fed. Reg. 29,362 (June 26, 1991)	8, 12
Fed. R. App. P. 29(a)(4)(E).....	1
H.R. Rep. No. 100-939 (1988).....	9

Hearing of the Environment, Energy and Natural Resources
Subcommittee, Committee on Government Operations, 100th
Cong. 1st Sess. (July 9, 1987).....9

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*

CropLife America respectfully submits the following Corporate Disclosure Statement:

CropLife America is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

INTRODUCTION AND STATEMENT OF INTEREST¹

Amicus curiae CropLife America (“CLA”) is a national, non-profit trade association representing companies that develop, register, and sell pesticide products in the United States. CLA’s member companies produce most of the crop protection and pest management products regulated by Respondent-U.S. Environmental Protection Agency (“EPA”) under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.* CLA represents its members’ interests by, among other things, monitoring federal agency actions and related litigation of concern to the crop protection and pest control industry, and participating in such actions as appropriate.

CLA has a significant interest in this matter, as its membership comprises pesticide producers who rely on the comprehensive scheme Congress laid out under FIFRA to ensure that pesticides—like the dicamba products at issue here—are sold, distributed, and used in a manner that does not pose unreasonable adverse effects on humans and the environment. EPA’s authority to address existing stocks of pesticides is a crucial component of Congress’s intended framework and ensures

¹ This brief was not authored in whole, or in part, by counsel for a party, and no party or party’s counsel contributed money intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(a)(4)(E). No party or proposed intervenor has contributed funds in addition to the dues paid to CLA in the ordinary course of its membership.

that EPA's oversight covers the distribution, use, and disposal of pesticides that are no longer registered by EPA.

On June 3, 2020, this Court vacated the EPA registrations for three pesticide products containing the active ingredient dicamba, XtendiMax, Engenia, and FeXapan (the "June 3 Order"). The Court's vacatur made it unlawful to sell or distribute those products, a prohibition sufficiently broad to bar industry participants from returning or disposing of the products. Vacatur also eliminated the use restrictions imposed by the products' labels because, without additional action by EPA, FIFRA does not prohibit the use of unregistered pesticides. On June 8, 2020, consistent with its broad authority under FIFRA and thirty year-old policy, EPA issued a Final Cancellation Order to facilitate the disposition of existing stocks of the now-unregistered dicamba products (the "Cancellation Order").² In entering the Cancellation Order, EPA aimed to provide clarity to stakeholders in the agricultural community—including the registrants who are CLA's members—and to ensure that any post-vacatur distribution, use, and disposal of those products was orderly, lawful, and posed no unreasonable adverse effects on human health or the environment. Petitioners now challenge the

² The Cancellation Order is attached as Exhibit A to the Petitioners' motion and is available at https://www.epa.gov/sites/production/files/2020-06/documents/final_cancellation_order_for_three_dicamba_products.pdf.

Cancellation Order, arguing that it sanctions the “illegal” use of the unregistered dicamba products, in violation of the June 3 Order.

Petitioners are wrong, and their attack on the Cancellation Order is misguided and procedurally flawed. As a threshold matter, this Court is without jurisdiction to address the Petitioners’ challenge to the Cancellation Order. Under the plain language of FIFRA’s judicial review provision, any challenge to the Cancellation Order must be brought in District Court. This clear statutory directive should be the beginning and end of the Court’s consideration of Petitioners’ motion.

To the extent the Court reaches Petitioners’ arguments, CLA urges the Court to deny Petitioners’ motion. The Cancellation Order is fully consistent with both the broad mandate Congress conferred upon EPA to oversee pesticides at all phases of the product life cycle, including upon termination of registration, and with EPA’s long-standing Existing Stocks Policy that implements its authority over unregistered pesticides. The Cancellation Order is also supported by Ninth Circuit precedent and guided by sound public policy. This Court should reject Petitioners’ attempt to strip EPA of its authority to ensure that pesticides are used and disposed of in a manner that mitigates risks to human health and the environment. Without the Cancellation Order, stocks of dicamba products that remain in the supply chain could be misused with impunity, without regard to the

product label, and EPA would be without authority to stop it. This is not what Congress intended.

Finally, CLA’s members agree that any ruling by the Court on Petitioners’ motion will impact the pesticide registrations of *three* pesticide registrants: Intervenor-Respondent Monsanto Company and proposed Intervenor-Respondents BASF Corporation (“BASF”) and E.I. du Pont de Nemours and Company (“EID”). CLA supports BASF’s and EID’s intervention in this proceeding so that they may participate in any further litigation and have an opportunity to protect their property interests, which the June 3 Order has squarely placed at issue.

ARGUMENT

I. This Court Lacks Jurisdiction to Hear Petitioners’ Challenge to the Cancellation Order.

Petitioners’ challenge to EPA’s June 8 Cancellation Order—cloaked as an “emergency motion” under Circuit Rule 27-3—is procedurally defective and this Court lacks jurisdiction to hear it. As outlined by EPA and set forth below, the motion should be summarily denied on this ground.

FIFRA’s judicial review provision, Section 16, “bifurcates which claims may be brought before the district court and which claims must be presented to the court of appeals.” *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1088 (9th Cir. 2017); FIFRA Section 16; 7 U.S.C. § 136n. Only challenges to the validity of EPA orders issued “following a *public hearing*” may be brought in the Court of

Appeals. FIFRA Section 16(b) (emphasis added); 7 U.S.C. § 136n(b); *see also* June 3 Order at 22; *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 179 (D.C. Cir. 2017) (“[J]udicial review of a FIFRA order proceeds in one of two ways, depending on, *inter alia*, whether the EPA conducts a ‘public hearing’ before issuing its order”). Notice and comment, among other procedures, serves as a “public hearing” under FIFRA. *United Farm Workers of Am., AFL-CIO v. EPA*, 592 F.3d 1080, 1082–84 (9th Cir. 2010) (publication of notice and comment in the Federal Register constitutes a “public hearing” for the purposes of determining FIFRA jurisdiction). CLA and its members rely on the certainty and predictability of FIFRA’s judicial review provisions and expect that they will be enforced.

In its June 3 Order, this Court vacated EPA’s registrations for XtendiMax, Engenia, and FeXapan—three different pesticide products containing the active ingredient dicamba—and ordered the mandate to issue immediately, thereby concluding the action and divesting the Court of jurisdiction. On June 8, EPA issued the Cancellation Order to implement the Court’s mandate, consistent with its authority under FIFRA to provide an orderly process for the distribution, use, and disposal of existing stocks of the newly unregistered products. *See infra* Section II. EPA issued the Cancellation Order as a standalone final agency action and without notice and comment or other public hearing. Lest there be any doubt, EPA made clear that issuance of the Cancellation Order “did not follow a public

hearing” and is thus “judicially reviewable under FIFRA [Section] 16(a).”

Cancellation Order at 11 (emphasis added). Petitioners’ attempt to challenge in this Court a “decision” by the EPA Administrator “not following a hearing” should have been brought in District Court. *United Farm Workers*, 592 F.3d at 1082.

CLA therefore supports EPA’s argument that Petitioners’ motion should be denied for lack of jurisdiction in this Court.

II. EPA Has Comprehensive Authority Under FIFRA to Oversee the Disposal and Use of Existing Stocks of Unregistered Pesticides, Including Following Vacatur.

Petitioners seek “emergency” relief, arguing that the Cancellation Order violates the Court’s decision by permitting use of those products purportedly rendered “illegal” by the Court’s June 3 Order. Even assuming the Court has jurisdiction to decide it, Petitioners’ motion misapprehends FIFRA and EPA’s authority thereunder. The Cancellation Order falls squarely within the scope of authority Congress delegated to EPA under FIFRA and EPA’s exercise of that authority pursuant to settled Agency policy. It is also supported by important public policy concerns and is consistent with prior Ninth Circuit precedent. CLA supports EPA’s request that the Petitioners’ motion be denied.

A. Relevant Statutory Framework

Congress, through passage of FIFRA in 1947 and extensive revisions since then, envisioned that EPA would oversee a comprehensive regime for the

regulation of pesticides. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991–92 (1984). Congress’s intent remains clear: EPA is to exercise authority over the sale, distribution, and use of pesticides at all phases—from research and development, 7 U.S.C. § 136c, to registration, commercialization, sale, and distribution, *id.* §§ 136a, 136j, through termination of registrations and disposal, *id.* §§ 136d, 136k, 136q—in order to carry out its mandate to prevent unreasonable adverse effects on human health and the environment. Consistent with that mandate, Congress has over time expanded EPA’s authority over the sale, distribution, and use of pesticides no longer registered with EPA, including authority to provide—and enforce—an orderly process for their sale, distribution, use, and/or disposal. It is critical to EPA’s mission that this Court recognize EPA’s authority in this area.

Under FIFRA, all pesticide products must be registered by EPA before they can be distributed or sold in the United States. *Id.* §§ 136a(c)(5), 136j(a)(1); *see also Love v. Thomas*, 858 F.2d 1347, 1350 (9th Cir. 1988) (FIFRA “establishes an elaborate framework for the regulation of pesticide use in the United States” under which “[n]o pesticide may be sold or distributed unless it is registered with the EPA”). To obtain a pesticide registration, an applicant must submit extensive scientific data to EPA to demonstrate that use of the product in accordance with its label will not pose “unreasonable risk to man or the environment.” 7 U.S.C. §

136(bb). Through the product label, EPA establishes the scope of the registration and details the registered product's approved uses, applications, and directions for use. *See, e.g.*, 7 U.S.C. § 136a(c)(1)(C). “[U]se [of] any registered pesticide in a manner inconsistent with its labeling” is unlawful. *Id.* § 136j(a)(2)(G).

In addition to its authority to register products for sale and distribution for specific uses, Congress also authorized EPA to terminate registrations and to oversee the use and disposal of pesticides once they are no longer registered. *Id.* § 136d. Congress provided EPA with this authority under FIFRA Section 6, added through comprehensive amendments to FIFRA in 1972. Act of Oct. 21, 1972, Pub. L. No. 92-516, § 6, 86 Stat. 973. Section 6 empowers EPA to cancel the registration of an existing pesticide in certain circumstances, or to suspend the registration of a pesticide to prevent an imminent hazard. FIFRA § 6(a), (b); 7.U.S.C. § 136d(a), (b). Importantly here, Section 6 also authorizes EPA to enter an “existing stocks” order. Existing stocks are “stocks of a registered pesticide product” that “have been packaged, labeled, and released for shipment before the effective date of the action” causing the product to become unregistered. Existing Stocks of Pesticide Products; Statement of Policy, 56 Fed. Reg. 29,362, 29,362 (June 26, 1991).

Under an existing stocks order, the EPA Administrator may “permit the continued sale and use of existing stocks of a pesticide whose registration is

suspended or cancelled under this section [FIFRA Section 6], or section 136a [FIFRA Section 3] or 136a-1 [FIFRA Section 4] of this title, to such extent, under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of this subchapter.” FIFRA § 6(a)(1); 7 U.S.C. § 136d(a)(1).

In the 1980s, Congress became increasingly concerned with EPA’s ability to satisfactorily deal with potential adverse effects resulting from the storage, disposal, and transportation of pesticides whose registrations had been cancelled or suspended. *See, e.g., Hearing of the Environment, Energy and Natural Resources Subcommittee, Committee on Government Operations, 100th Cong. 1st Sess. (July 9, 1987) (citing cancellations of registrations for ethylene dibromide (EDB), 2,4,5-T, silvex, and dinoseb).* As initially conceived, EPA had the authority and financial responsibility to accept suspended or canceled pesticides and dispose of them at government expense. Congress added several key provisions to FIFRA in 1988 to expand EPA’s authority to oversee the sale, distribution, and use of pesticides whose registrations have been terminated by some means, including by authorizing EPA to take enforcement action against violations of storage, disposal, and transportation requirements. FIFRA Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654; *see also* H.R. Rep. No. 100-939 (1988) (to accompany S. 659). Specifically, Congress added (i) FIFRA Section 19, which makes clear that

existing stocks orders issued “under [Section 6]” may include “requirements and procedures” governing disposal, 7 U.S.C. § 136q(a)(2), and (ii) FIFRA Section 12(a)(2)(k), which authorized EPA to take enforcement action against violations of existing stocks orders under FIFRA Section 12, 7 U.S.C. § 136j(a)(2)(K). These additional authorities filled critical gaps in areas, described below, where EPA’s authority over newly unregistered pesticides had been lacking or unclear.

B. The Cancellation Order Is Consistent with EPA’s Authority Under FIFRA, Which EPA Has Reasonably Implemented Through Its Existing Stocks Policy.

EPA’s authority to address existing stocks of pesticides for which registrations have been cancelled is critical because FIFRA prohibits the *distribution or sale* of an unregistered pesticide but does not prohibit its *use*. FIFRA § 3(a); 7 U.S.C. § 136a(a). In fact, Congress omitted reference to “use” in the first sentence of Section 3(a) (making it unlawful to “distribute or sell” an unregistered pesticide) while including “use” in the second sentence (granting EPA authority to regulate “use” of unregistered pesticides in order to prevent unreasonable adverse effects):

Except as provided by this subchapter, no person in any State may **distribute or sell** to any person any pesticide that is **not registered** under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the **distribution, sale, or use** in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

Id. (emphasis added); *cf. City & Cnty. of San Francisco v. U.S. Dep’t of Transp.*, 796 F.3d 993, 999 (9th Cir. 2015) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). FIFRA’s enforcement provisions reinforce that use of unregistered pesticides is not unlawful: Section 12(a)(1) prohibits only the *distribution and sale* of unregistered products (not their use), and Section 12(a)(2)(g) prohibits only the “use” of a “*registered pesticide*” in a manner inconsistent with its labeling. 7 U.S.C. § 136j(a)(1), (a)(2)(G).

This framework presents several challenges in cases where previously registered products are rendered unregistered, irrespective of how the registration is terminated. Without an existing stocks order, end users of newly unregistered products would be free to use remaining stocks inconsistently with restrictions on the product label (which in the case of an unregistered pesticide is no longer enforceable). And because under FIFRA no party may “sell or distribute”—which includes “ship,” “deliver for shipment,” or “receive”—unregistered pesticides, *id.* § 136(gg), end users and others wishing to return existing stocks to the manufacturers or pursue other safe disposal options would be in violation of FIFRA. A comprehensive, enforceable order on existing stocks ensures that post-termination use, sale, or distribution of newly unregistered products are within the

scope of EPA's enforcement authority and that EPA is able to mitigate potential effects on human health and the environment.

Recognizing the need for greater regulatory clarity with respect to products whose registrations have been terminated, EPA in 1991 developed its Existing Stocks Policy. 56 Fed. Reg. 29,362. It describes how the Agency conducts, on a case-by-case basis, a risk benefit analysis that weighs the risk concerns presented by limited, phased-out use of pesticides that become unregistered against the societal, economic, and environmental benefits of such use. *Id.* at 29,364. Here, EPA issued the Cancellation Order in accordance with its long-standing Existing Stocks Policy in order to facilitate the orderly return and/or disposal and to prevent unauthorized use of existing stocks of XtendiMax, Engenia, and FeXapan.

The Cancellation Order is a reasonable implementation of EPA's authority under FIFRA and supported by important policy and practical considerations. Without the Cancellation Order there would be considerable confusion as to how to handle significant stores of the now-unregistered pesticide that have already been purchased for use this growing season. Under FIFRA's broad prohibition against the "distribution" of unregistered pesticides, 7 U.S.C. § 136j(a)(1), users would be prohibited from returning existing stocks to a seller or transporting them for disposal. This uncertainty would wreak havoc on the agricultural market. It would cause significant financial hardship to distributors and growers who

invested substantial sums in reliance on the registration—doubly for the growers forced to find alternative weed control measures or risk significant crop losses. *See* Brief of Proposed *Amici Curiae* American Farm Bureau Federation *et al.* Moreover, absent the Cancellation Order or other affirmative action by EPA, the agency would be powerless to prevent the use of now-unregistered pesticide products not in accordance with the previously operative label restrictions, which has the potential to adversely impact the environment. 7 U.S.C. § 136j(a)(1), (a)(2)(G); *see also* Petition for Rehearing at 7, *Pollinator Stewardship Council v. EPA*, No. 13-72346 (9th Cir. Oct. 26, 2015), ECF No. 60. Indeed, EPA observed in the Cancellation Order that it is “imperative” to ensure that existing stocks of the unregistered dicamba products are used consistently with previously approved labeling in order to avoid “unreasonable adverse effects on the environment.” Cancellation Order at 5.

C. The Cancellation Order Is Consistent with Past Agency Practice and Ninth Circuit Precedent.

The Cancellation Order is not only firmly rooted in EPA’s broad authority under FIFRA, it is also supported by precedent. EPA has routinely exercised its authority under FIFRA and its Existing Stocks Policy to oversee the orderly use and disposal of pesticides that become unregistered, including where a court—rather than a registrant or EPA—has directed termination of the registrations.

Indeed, this Court has previously recognized that EPA retains its existing stocks authority following vacatur. In *Pollinator Stewardship Council v. EPA*, EPA sought rehearing of a panel decision ordering vacatur of EPA’s registration for the pesticide sulfoxaflor. There, EPA argued that language in the decision suggesting that vacatur would prohibit all “use” was inconsistent with FIFRA Section 3(a) and would interfere with its ability to issue a cancellation order governing the disposal and use of existing stocks. The panel agreed, granted rehearing, and amended its decision to strike the references to prohibited “use” of unregistered sulfoxaflor. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 522 (9th Cir. 2015). EPA then issued a final cancellation order governing existing stocks of sulfoxaflor, which petitioners—including some common to this case—did not challenge.³ EPA, Sulfoxaflor – Final Cancellation Order (Nov. 12, 2015), https://www.epa.gov/sites/production/files/2015-11/documents/final_cancellation_order-sulfoxaflor.pdf. Petitioners’ motion here is directly at odds with this precedent, which it relegates to a footnote and attempts to distinguish by arguing that some approved uses for the dicamba products survived

³ Under Ninth Circuit precedent, EPA could not depart from prior policy and adopt a different interpretation of its authority without explanation. *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 971 (9th Cir. 2015) (Christen, J., concurring) (“[T]he law requires that the agency provide a reasoned explanation for changing course and adopting a position contradicted by its previous findings.”); *W. States Petroleum Ass’n v. EPA*, 87 F.3d 280, 285 (9th Cir. 1996); *Cal. Trucking Ass’n v. ICC*, 900 F.2d 208, 212 (9th Cir. 1990).

vacatur—a wholly inaccurate characterization. *See* EPA’s Response to Petitioners’ Emergency Motion, Dkt. 144, at 16–17.⁴

Moreover, it is not the role of a reviewing court to direct an Agency as to the proper procedure to take—or not to take—in response to vacatur. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 160–61 (2010) (reversing injunction upheld by this Court and concluding that a court cannot preemptively preclude agency from taking subsequent interim action “pursuant to the authority vested in the agency by law”); *see also FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (where court reviewing a Commission order granting a license not only held the order unlawful but directed that a condition in it be struck; the court “usurped an administrative function,” as “the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare”); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940) (“[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been

⁴ EPA’s Cancellation Order is also consistent with its approach in *Natural Resources Defense Council v. EPA*, 676 F. Supp. 2d 307 (S.D.N.Y. 2009), where the court vacated EPA registrations for the pesticide spirotetramat in light of a procedural defect in issuing the registrations. Following vacatur, EPA issued a cancellation order allowing for limited use and disposal of existing stocks of spirotetramat, provided the use was in accordance with the previously approved labeling. EPA, Spirotetramat – Final Cancellation Order (Apr. 5, 2010), <https://archive.epa.gov/epa/sites/production/files/2015-10/documents/spirotetramat-final-cancel-order-04-05-10.pdf>.

corrected, from enforcing the legislative policy committed to its charge.”); *S. Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 806 (1976) (“Court of Appeals did not give ‘due observance [to] the distribution of authority made by Congress’” when it ordered the NLRB to provide a specific remedy as opposed to simply vacating and remanding Board decision).

In short, Congress conferred on EPA broad authority to regulate pesticides from registration through cancellation and disposal. EPA—not the Court—decides how to implement vacatur and is entitled to deference in its analysis of the FIFRA statutory scheme it implemented through the Cancellation Order. And that analysis is sound: by employing its existing stocks authority EPA provided certainty to members of the regulated community, their customers, and to the public at large regarding appropriate handling of the dicamba products post-vacatur. This Court should decline Petitioners’ invitation to usurp EPA’s role and cast aside procedures Congress prescribed to protect the substantial interests of numerous stakeholders.

III. CLA Supports BASF and DuPont’s Motions to Intervene.

In the June 3 Order, this Court ordered vacatur of registrations held by Proposed Intervenor-Respondents EID and BASF for their FeXapan and Engenia products. Neither EID nor BASF were parties to the action at the time of the June

3 Order, raising significant due process and other issues. Those parties have expeditiously moved to intervene, and due process requires this Court to permit their intervention, enabling them to defend the registrations in which they have a well-recognized property interest.

A FIFRA registration operates as a product-specific license that confers upon the registrant certain legally protectable rights. *See Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 45 (D.D.C. 2011) (“A FIFRA registration is essentially a license to sell and distribute pesticide products in accordance with the terms of the registration and the statute.”). A registrant has a legally cognizable property interest in a pesticide registration issued to it by EPA. *Id.* at 36 (citing, *inter alia*, 7 U.S.C. § 136a(a), (c)–(e)); *Ctr. for Biological Diversity v. EPA*, No. 11-cv-293, 2013 WL 1729573, at *6–7 (N.D. Cal. Apr. 22, 2013) (“The applicants are owners of the pesticide registrations, and thus have property and financial interests in the registrations.”). This property interest cannot be annulled without due process of law. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971); *Indus. Safety Equip. Ass’n v. EPA*, 656 F. Supp. 852, 856 (D.D.C. 1987) (“It is well settled that an agency license can create a protectible [sic] property interest, such that it cannot be revoked without due process of law.”), *aff’d*, 837 F.2d 1115 (D.C. Cir. 1988).

CLA has a substantial interest in ensuring that pesticide registrants retain their ability to defend the rights and interests afforded them under FIFRA. For these reasons, CLA also supports the motions to intervene filed on June 12, 2020 by its members BASF and EID, whose legally protectable Engenia and FeXapan registrations were placed at issue by the Court's June 3 Order.

CONCLUSION

For the foregoing reasons, CLA respectfully requests that the Court deny Petitioners' motion and grant Proposed Intervenor-Respondents' motions to intervene.

June 16, 2020

Respectfully submitted,

/s/ Karen Ellis Carr
Stanley H. Abramson
Donald C. McLean
Karen Ellis Carr
Kathleen R. Heilman
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
stanley.abramson@arentfox.com
donald.mclean@arentfox.com
karen.carr@arentfox.com
katie.heilman@arentfox.com
Tel: (202) 715-8531

*Counsel for Amicus Curiae
CropLife America*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) because this brief contains 4,052 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).¹ I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14 point.

/s/ Karen Ellis Carr

Karen Ellis Carr

¹ This brief is consistent with numerous *amicus* briefs filed in and accepted by this Court in support of motions or responses to motions that have followed the type-volume limitation under Fed. R. App. P. 29(a)(5), 32(a)(7)(B), and Circuit Rule 32-1. *See, e.g., Pesticide Action Network N. Am. v. EPA*, No. 14-72794 (9th Cir. May 15, 2017), ECF No. 63; *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 84 (*amicus* brief in support of motion certified to contain 5,172 words); *United States v. Lynch*, No. 10-50219 (9th Cir. May 7, 2015), ECF No. 107 (*amicus* brief in support of motion certified to contain 4,197 words); *id.* (May 5, 2015), ECF No. 103 (*amicus* brief in support of motion certified to contain 4,191 words); *St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys.*, No. 14-35173 (9th Cir. June 27, 2014), ECF No. 46 (*amicus* brief in support of motion certified to contain 2,287 words); *All. for the Wild Rockies v. Salazar*, No. 11-35661 (9th Cir. Oct. 28, 2011), ECF No. 85 (*amicus* brief in support of response to motion certified to contain 2,023 words); *id.* (Oct. 24, 2011), ECF No. 78 (*amicus* brief in support of motion certified to contain 4,812 words); *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Mar. 1, 2011), ECF No. 312 (*amicus* brief in support of motion certified to contain 3,496 words); *Native Vill. of Point Hope v. Salazar*, No. 09-73942 (9th Cir. Jan. 6, 2010), ECF No. 18 (*amicus* brief in support of motion certified to contain 5,506 words).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 June 16, 2020.

I certify that all participants in the case are registered as CM/ECF users and will receive service by the appellate CM/ECF system.

/s/ Karen Ellis Carr
Karen Ellis Carr