

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Natural Resources Defense Council,	)	
Inc.,	)	
	)	
Petitioner,	)	No. 14-73353 (Consolidated
	)	with 15-71207, 15-71213,
	)	and 14-73359)
v.	)	
	)	
United States Environmental	)	
Protection Agency,	)	
	)	
Respondent,	)	
	)	
Dow AgroSciences, LLC,	)	
	)	
Respondent-Intervenor.	)	

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**RESPONSE TO RESPONDENTS’ MOTION FOR VOLUNTARY  
VACATUR AND REMAND**

Intervenor Dow AgroSciences, LLC (Dow) hereby responds to respondents’ “Motion for Voluntary Vacatur and Remand” [Dkt. 121-1].

In support of this response, Dow states as follows:

1. Respondents have filed a “Dr. Jekyll & Mr. Hyde” motion. Part of the motion is entirely uncontroversial—the request for a remand so that the Environmental Protection Agency (EPA) may analyze new

information that may bear on the pesticide registration at issue here. But part of the motion is entirely novel and unlawful—the agency’s request for this Court, without addressing the merits, summarily to vacate that registration.

2. Dow believes that the new information cited by respondents has no impact on the validity of the existing registration. But Dow has absolutely no problem with the requested remand to allow the agency to review that information, and hereby consents to such relief. Dow does not, and cannot, however, agree to the requested vacatur, which would circumvent a comprehensive regulatory scheme that specifies the agency’s powers and duties (and a registrant’s rights) with respect to an existing pesticide registration. Accordingly, this Court should limit its relief to a remand for the agency to exercise primary jurisdiction to review the new information and decide what additional steps, if any, are warranted. In the meantime, Dow will agree to stop sales of Enlist Duo, and to work out an appropriate agreement to that effect with the agency.

3. The premise of the motion is correct: “Agency decisions are not carved in stone,” and thus “an agency must consider the wisdom of

its policy on a continuing basis,’ for example, ‘in response to changed circumstances.” Mot. 6 (quoting *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). That is why it is appropriate for a court to remand a case to an agency where, as here, the agency requests an opportunity to review an earlier decision in light of new information. *See, e.g., California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

4. But an agency’s desire for an opportunity to review an earlier decision in light of new information provides no basis for either the agency or a court summarily to annul that decision. To the contrary, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, and agency regulations promulgated thereunder establish an “elaborate” and “comprehensive” scheme governing pesticide registration, which “grants enforcement authority to the EPA.” *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 530 (9th Cir. 2001); *Love v. Thomas*, 858 F.2d 1347, 1350 (9th Cir. 1988).

5. Under that scheme, a registrant, like Dow, has a legally cognizable property interest in a pesticide registration, which (as

respondents concede) “is a license that establishes the terms and conditions under which a pesticide may be lawfully sold, distributed, and used.” Resps.’ Mot. 3; *see also Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1133 (D.C. Cir. 2010) (“A FIFRA registration is a product-specific license describing the terms and conditions under which the product can be legally distributed, sold, and used.”) (citing 7 U.S.C. § 136a(a), (c)-(e)); *Center for Biological Diversity v. EPA*, No. 11-cv-293, 2013 WL 1729573, at \*6-7 (N.D. Cal. 2013) (“The applicants are owners of the pesticide registrations, and thus have property and financial interests in the registrations.”). Needless to say, that property interest cannot be annulled without due process of law. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971).

6. Congress recognized as much when it enacted FIFRA. That comprehensive regulatory scheme creates a detailed procedural mechanism for the agency to cancel or suspend an existing pesticide registration. In particular, FIFRA Section 6(b), 7 U.S.C. § 136d(b), specifies:

If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter ... the

Administrator may issue a notice of the Administrator's intent either —

(1) to cancel the registration or to change its classification together with the reasons (including the factual basis) for the Administrator's action, or

(2) to hold a hearing to determine whether or not its registration should be canceled or its classification changed.

Before the Administrator may cancel a registration, however, she must provide notice to the registrant and the public. *See id.* In addition, at least 60 days prior to that notice, she must provide notice of the proposed cancellation to the Secretary of Agriculture along with an analysis of the impact of the proposed cancellation on the agricultural economy. *See id.* She must also provide the registrant and other interested parties with a public administrative hearing. *See id.* Moreover, “[i]n taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation ... and shall include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy, and the Administrator shall publish in the Federal Register an analysis of such impact.” *Id.* Once all of the

agency's obligations under FIFRA's cancellation provisions have been met—and *only* once all of those obligations have been met—the Secretary may issue a final order of cancellation, which in turn is subject to judicial review to protect the registrant's property interest in the registration. *See id.* § 136n(b).

7. The regulatory scheme also provides for suspension as an alternative to cancellation of a registration. Thus, “[i]f the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, the Administrator may, by order, suspend the registration of the pesticide immediately.” 7 U.S.C. § 136d(c)(1). But there too, Congress carefully protected the rights of affected registrants by including key procedural protections in the suspension process: except in the event of an emergency, “no order of suspension may be issued under this subsection unless the Administrator has issued, or at the same time issues, a notice of intention to cancel the registration or change the classification of the pesticide ....” *Id.* The Administrator also must notify the registrant prior to any suspension, and such notice “shall include findings pertaining to the question of

‘imminent hazard.’” *Id.* The registrant, in turn, “shall then have an opportunity ... for an expedited hearing before the Administrator on the question of whether an imminent hazard exists.” *Id.* Once all of the agency’s obligations under FIFRA’s suspension provisions have been met—and *only* once all of those obligations have been met—the Secretary may issue a final order of suspension, which again is subject to judicial review to protect the registrant’s property interest in the registration. *See id.* § 136d(c)(4).

8. By asking this Court summarily to vacate the existing Enlist Duo registration, EPA is trying to short-circuit this regulatory scheme and abdicate the responsibilities Congress assigned to the agency. There is no basis in law or logic for this Court to vacate the registration: all that has happened is that EPA has informed this Court that it “is in receipt of new information regarding *potential* synergistic effects between” Enlist Duo’s active ingredients. Mot. 2 (emphasis added). While that new information may warrant “a voluntary remand in order to reconsider the Enlist Duo registration in light of the new information,” it provides no basis for a “vacatur of the registration.” *Id.*

9. EPA argues that it “cannot be sure, without a full analysis of the new information, that the current registration does not cause unreasonable effects to the environment, which is a requirement of the registration standard under FIFRA.” *Id.* But that is, at most, a reason for the agency to follow the established regulatory process for reviewing that information and taking whatever steps may be appropriate under the comprehensive regulatory regime. It is not a reason for EPA to bypass that regime altogether by asking this Court summarily to vacate the existing registration.

10. The cases cited by EPA in support of its request for vacatur are entirely inapposite. For example, EPA declares as a general matter that “[i]n environmental cases, to decide whether remand with or without vacatur is the appropriate remedy, a factor this Court considers is the extent to which vacatur would cause or prevent possible environmental harm.” Mot. 8 (citing *Pollinator Stewardship Council v. EPA*, \_\_\_ F.3d \_\_\_, 2015 WL 7003600, at \*12 (9th Cir. Nov. 12, 2015)). But in that case, this Court had reviewed the disputed agency action on the merits and concluded that it was contrary to law, *see Pollinator Stewardship Council*, 2015 WL 7003600, at \*7-11, and thus was



authorized to vacate the agency action, *see id.* at \*12. Here, in sharp contrast, this Court has never reviewed the disputed agency action on the merits and determined that it is unlawful. In light of Dow's legally protected interest in the matter, there is no basis for this Court summarily to vacate the agency's unreviewed registration decision just because the agency has so requested.

11. Indeed, this case is closely analogous to *Reckitt Benckiser*. There, as a result of a registrant's alleged failure to comply with certain risk mitigation measures imposed by EPA, the agency threatened to institute enforcement proceedings for alleged misbranding. The registrant, citing the procedural safeguards of FIFRA Section 6 cancellation proceedings, sought declaratory and injunctive relief to bar EPA from thereby circumventing the statutory cancellation regime. The court agreed, noting that Section 6 "establishes a detailed, multi-step process that EPA *must* follow when it wants to cancel or suspend a registration." *Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 42 (D.D.C. 2011) (emphasis in original); *see also id.* ("A pesticide product remains registered until EPA or the registrant cancels it pursuant to Section 6.") (quoting *Reckitt Benckiser*, 613 F.3d at 1133)). As the court

explained, “[t]he process imposes certain obligations on EPA before it may issue a notice of intent to cancel or a notice of intent to hold a hearing on cancellation, and it entitles the registrant to notice, a hearing and other procedural protections before EPA can make a final decision on cancellation.” *Id.* at 43. To allow EPA to seek to nullify a registration outside that process—either through a misbranding enforcement action or a request for “voluntary vacatur”—would allow the agency to “bypass[] cancellation proceedings’ and ‘effect[ively] cancel[] the registrations without following the regulatory procedures provided in Section 6.” *Id.* at 43 (quoting *Reckitt Benckiser*, 613 F.3d at 1133)); *see also id.* (“To interpret FIFRA to give EPA that authority not only renders Section 6 superfluous; it also allows EPA to avoid the rigorous cancellation process Congress provided for in the statute.”).

12. In short, EPA is improperly trying to abdicate the responsibility that Congress vested in the agency for cancelling or suspending pesticide registrations, and to nullify the corresponding procedural protections for Dow. Accordingly, this Court should limit the relief here to a remand for the agency to review the new information and decide what additional steps, if any, are warranted. In the

meantime, Dow will agree to stop sales of Enlist Duo, and to work out an appropriate agreement to that effect with the agency.

### CONCLUSION

For the foregoing reasons, this Court should grant the motion to remand, but deny the motion to vacate.

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**CERTIFICATE OF SERVICE**

I, Christopher Landau, P.C., hereby certify that I served the foregoing document by ECF on this 7th day of December 2015, which will result in service on all counsel of record.

*/s/ Christopher Landau*

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