Oral Argument Held on April 21, 2020

No. 19-70115

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

PETITIONERS' EMERGENCY MOTION TO ENFORCE THIS COURT'S VACATUR AND TO HOLD EPA IN CONTEMPT

RELIEF REQUESTED BY EARLIEST POSSIBLE DATE

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INTRODUCTION

Extraordinary events require extraordinary actions. EPA has defied this Court's decision, requiring Petitioners' emergency motion, pursuant to Circuit Rule 27-3. On June 3, this Court granted the petition for review and held that Respondent EPA violated FIFRA in registering the new over-the-top (OTT) uses for three dicamba products on soybean and cotton based on the strong record evidence of their drift harm. *Nat'l Family Farm Coal. v. EPA*, --- F.3d ---, 2020 WL 2901136 (9th Cir. June 3, 2020) (*NFFC*). As to remedy, the Court carefully weighed the impacts on growers of vacating the new uses against the drift harms of allowing the OTT use to continue and vacated, issuing its mandate concurrently to halt spraying immediately. *Id.* at *19-20. The Court's decision and remedy could not have been clearer.

Instead of simply admitting that vacatur means the OTT uses are unlawful and spraying is no longer allowed, EPA remained silent for five days, then opted to "mitigate"[1] the Court's decision, brazenly attempting to tailor the Court's vacatur to its liking, while in reality

[1] EPA, Press Release (June 5, 2020), https://www.epa.gov/newsreleases/epa-responds-ninth-circuit-vacatur-dicamba-registrations.

eviscerating it by making it prospective as to existing products until July 31, effectively the rest of the spraying season. EPA called this a "cancellation" order but it was actually a "continuing uses despite vacatur" order. EPA Admin Order (attached as Kimbrell Decl., Exhibit A).

Emergency relief is required to prevent off-field drift harms that will occur on millions of acres should spraying continue. First, while EPA can take new action after vacatur, such action must comply with FIFRA and this Court's Order. But here, EPA made *zero* attempt to address the Court's rulings or take an action consistent with them. Second and more fundamentally, EPA lacks authority to issue its "cancellation" order because there is nothing to cancel here; vacatur—which is wholly different from FIFRA pesticide cancellation—made null and void the 2018 new use decision allowing OTT dicamba spraying. And even if EPA could use its cancellation powers here, its premise for doing so—that the Court's Order vacated the entire three product registrations, leaving no lawful uses and that action is required to prevent indiscriminate use—is false. EPA absurdly interpreted this Court's remedy as creating unregulated OTT dicamba spraying, rather

than making it unlawful. This contortion allowed EPA to claim that conditions would be *worse* absent EPA's continuing use decision, because farmers after vacatur can spray without any restriction.

EPA has shown unconscionable disregard and contempt for this Court's order and the rule of law. In light of the immediate risk of harm from the continued use of dicamba and the short period of time between now and the end of the 2020 growing season, Petitioners request this Court to immediately enforce its June 3, 2020 Order through appropriate relief, instruct EPA that it cannot avoid the vacatur of OTT uses in the 2020 season using this unlawful method, and find EPA in contempt.

I. THE COURT HAS AUTHORITY TO ENFORCE ITS VACATUR.

This Court has inherent authority to manage its proceedings, vindicate its authority, and effectuate its decrees. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380 (1994) (recognizing courts' "inherent authority to appoint counsel to investigate and prosecute violation of a court's order.") (*citing Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). This inherent authority includes, if necessary, the power to recall its mandate "to prevent injustice" or "to

protect the integrity of [the court's] prior judgment" in extraordinary circumstances. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (citations omitted). The Court should enforce its vacatur and hold EPA in contempt for overriding it.

Here, there are very compelling circumstances requiring Court action: EPA defied this Court's remedy by brazenly authorizing the continuation of the very harms this Court held EPA underestimated or entirely failed to consider. *See Aerojet-General Corp. v. The American Arbitration Assoc.,* 478 F.2d 248, 254 (9th Cir.1973) ("[O]ne of the classic examples of [circumstances requiring clarification] is where the mandate does not fully express the intentions of the court" to ensure its proper enforcement.); *Dilley v. Alexander*, 627 F.2d 407, 408-411 (D.C. Cir. 1980) (where the Army unlawfully discharged two officers, finding "ample cause" to recall mandate to clarify the court's intent that the Army must reinstate the officers retroactive to their discharge).

Enforcement of the Court's remedy is necessary to prevent the onslaught of dicamba drift that will otherwise occur again. Preventing a repeat of the past three seasons was central to this expedited litigation, and the Court promptly issued the mandate specifically to end dicamba

OTT use by June 3. EPA's administrative order authorizes dicamba OTT spraying until July 31, 2020, guaranteeing drift damage throughout June and July, the peak period for such drift. ER0482 (incidents "continued to rise steadily throughout June and July, with most incidents reported in late-June, July, and August"); *NFFC*, 2020 WL 2901136, at *4-5 (discussing Professor Bradley's findings). EPA's action flies in the face of this Court's finding that cutting off later-season spraying was crucial to reducing drift damage in 2018. *Id.* at *6 (noting "substantial differences" in number of reported incidents between states that had cut-off dates and those that did not). And EPA made no attempt to address these harms before greenlighting them, in spite of this Court's finding that EPA had substantially underestimated the drift incidents and the extent of damage. *Id.* at *12-18.

Enforcing the vacatur is also critical to rectify EPA's continued disregard of the significant social, economic, and environmental harms of OTT dicamba use. In holding the OTT use approval unlawful, this Court explained that OTT dicamba use and resulting drift damage have "torn apart the social fabric of many farming communities," a "clear social cost" that "was likely to increase" absent vacatur. *Id.* at *18.

Continuing use imposed a heavy monopolistic cost, as more farmers plant defensively and lose their right to choose what seeds they plant. *Id.* at *17-18.

And as a result of EPA's order undermining and violating vacatur, the OTT uses will continue to cause a *16 million pound increase* in dicamba polluting the environment.[2] This includes the harm to literally hundreds of federally protected endangered species near dicamba-sprayed fields that now faces further threats to their survival as a result. ECF 37-2 at 5-6, 45-47. The Court vacated the new uses to put an immediate stop to these grave harms, and EPA has nonetheless authorized them to continue. Immediate enforcement of this Court's ruling and relief is imperative.

[2] USDA estimated 25 million pounds of dicamba would be used in 2020, ER1347; in its administrative order EPA estimates 4 million *gallons* (likely to downplay the perceived amount) which would roughly translate to 16 million pounds of active ingredient based on the conversion of gallons to pounds and dicamba being about half the formulation.

II. THE COURT SHOULD ENFORCE ITS REMEDY.

A. EPA's Administrative Order Flouts the Court's Decision.

EPA's administrative order violates this Court's vacatur, based on reasoning that this Court had squarely rejected, necessitating this Court to clarify and enforce its order to prevent harm and injustice.

First, EPA's position issued Monday evening is not new: it is a carbon copy of EPA's post-argument briefing that this Court rejected. EPA made the same erroneous argument then that vacatur *could not stop use* of existing stocks and that only it—EPA, not the Court—could address whether or how to stop existing stock use, in a further agency order implementing the Court's remedy on remand. *Compare* ECF 119 & 121 at 5-7 *with* June 8 administrative order. Petitioners explained why EPA's view of the scope of this case and of vacatur's effect on stopping use was wrong, and thus why its motion should be denied. ECF 123-1 at 1-3, 5-9, 10-13. The Court rejected EPA's arguments, but EPA has stubbornly gone ahead with its tactic anyway.[3]

[3] The Administrative Order acknowledges (at 2) EPA is putting forth the same argument the Court denied leave for it to bring, complaining it did not have the chance to "fully brief" it because the

EPA acts as if this Court merely remanded without vacating the unlawful registration decision, however, in *vacating*, the Court stated in no uncertain terms that it was "aware of the practical effects of our decision," which included the "adverse impact on growers who have already purchased DT soybean and cotton seeds and dicamba products for this year's growing season." *NFFC*, 2020 WL 2901136, at *19-20. The Court quoted EPA's prior representations to the Court regarding vacatur's effects: that those pesticides would be prohibited from further OTT use. *Id.* The Court went on to carefully distinguish legal *registration* from the now-vacated and illegal new *use*, again quoting EPA, explaining it was illegal to use registered dicamba products for the specific OTT uses. *Id.* ("using registered dicamba products" that are no longer registered "specifically for post-emergence use" is a violation of the label and FIFRA). The Court recognized "the difficulties" growers might have in finding alternatives, but based on EPA's substantial violations of law and the significant risks from continued use, vacated. There is no doubt the Court intended to halt harmful OTT uses, which

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Court denied its motion, apparently in willful denial that the Court has already rejected their position in its vacatur rationale.

is, after all, what this case was about. If that was not clear enough, the Court also denied EPA's motion to brief this issue further. *Id.* at *19.

Notably, while vacating, the Court did not also *remand*, indicating that there was nothing further in the way of rulemaking that EPA needed to do to implement its decision and address stopping use (contrary to what EPA has just done). *Id*. at 20. The Court also *sua sponte* issued the mandate immediately, showing its clear intent that use immediately halt as of the day of its decision. *Id; cf.* FRAP 41.

Despite all this, EPA did not simply confirm to regulated entities the plain intent of the Court's decision to halt OTT use. Rather, after doing nothing *for days* when asked if existing product use was unlawful, thereby stoking confusion from affected parties and states, EPA then flagrantly contravened this Court's opinion and vacatur by allowing continued use.

Second, from start to finish EPA's rationale for continuing OTT use shows utter disregard for this Court and its decision. EPA says that the Court immediately vacated "on the view" (Admin Order at 4) that EPA substantially underestimated risks, a view that EPA clearly disagrees with, but does not have the authority to override. EPA is

effectively editing the Court's decision to make the vacatur for existing product use prospective to July 31. EPA goes on to ignore all the Court's findings and holdings, and allows business-as-usual dicamba spraying on cotton and soy for the rest of the season.

For example, the administrative order addresses the risks and benefits of OTT use, the exact questions this Court addressed in its opinion. EPA purports to assess, *inter alia*, the "risks" and "benefits" "resulting from the use of the existing stocks," and the financial expenditures already made to purchase dicamba, all questions this Court directly resolved, but EPA nonetheless chose to reach a different conclusion. Admin Order at 4. These issues have been decided, and they cannot be re-litigated, let alone nullified in an administrative order.

As to the risks of continued OTT spraying of the existing 16 million pounds of dicamba this summer, EPA finds in two sentences that continuing use over the rest of 2020 would be worse if users are not required to follow the label. Admin Order at 5. This is based on what EPA surely knows is the entirely false premise that the entire label is null and void, as opposed to the OTT *use*. ECF 123-1 at 1-3, 5-9 & *infra* pp. 15-20.

And EPA's order *entirely ignores* the Court's finding that EPA "substantially understated the risks that it acknowledged," and "entirely failed to acknowledge other risks." These harms include: the acreage of DT seed usage; the complaints understating dicamba drift damage; quantification of the amount of damage to non-target plants caused by OTT dicamba applications; the substantial infeasibility of compliance with label restrictions; the anti-competitive effect of a DT seed monopoly or near-monopoly; and the social cost of tearing apart the social fabric of farming communities. *NFFC*, 2020 WL 2901136, at *10-19.

The same is true of benefits and costs. EPA relies on the same benefits as it did in approving the OTT new uses, Admin Order at 6, but the Court already held that EPA "failed to perform a proper analysis of the risks and resulting costs of the uses," including "enormous and unprecedented damage," and therefore lacked substantial evidence to support the OTT approval. *NFFC*, 2020 WL 2901136, at *18-19. EPA did the same in relying on costs to farmers who already purchased dicamba: the Court specifically addressed this and found such costs

outweighed by the substantial environmental, economic, and social risks of continuing use. *Id.* at *19-20.

B. EPA Lacks Authority to Issue a "Cancellation" Order Reviving the Use Just Vacated by the Court.

In the face of this Court's vacatur, EPA lacks the authority to allow continued existing OTT dicamba use through this disingenuous "cancellation" tactic. EPA's attempt flies in the face of the Court's Order, which rendered illegal any further OTT use of these pesticides as of June 3.

First, vacatur does not limit an agency from proposing a new action within the bounds of the law and the Court's order. EPA could try a wholly new use registration, applying FIFRA registration standards, with different restrictions, if supported by substantial evidence. Regardless, in any new proposed use decision, EPA will have to address the multiple legal violations the Court held and cannot just issue the *same* decision. *NFFC*, 2020 WL 2901136, at *19 (EPA's "fundamental flaws" in the 2018 OTT new uses decision were "so substantial that it is exceedingly unlikely that the same rule would be adopted on remand.") (internal quotations omitted).

Second, without a *new* basis for lawful use, EPA cannot unilaterally tailor the Court's vacatur to its own liking. EPA pretends the Court's vacatur is the agency's own pesticide cancellation, where it gets to decide things like when spraying stops and how. That is, EPA attempted to *revive the old*, now-nullified unlawful registration decision, zombie-like, and squeeze two more months and 16 million more pounds of dicamba spraying out of it. This it cannot do.

Judicial vacatur is *not* the same as pesticide cancellation. OTT dicamba use was not *cancelled*: the new uses were *vacated*. The differences between vacatur and pesticide cancellation under FIFRA are significant: FIFRA cancellation is subject to extensive rules and process that have nothing to do with a judicial order. *E.g.,* 40 C.F.R. Part 164. Vacatur is very different: setting aside or vacating voids the approval, returning the *status quo ante* before it was granted. 7 U.S.C. § 136n (reviewing court to "affirm[] or set aside[]" a challenged EPA order). Unless in the Court's equitable discretion it decides to remand without vacatur, or only apply vacatur prospectively,[4] it automatically would

[4] EPA could have argued in briefing for prospective vacatur, that is, that users who had already purchased their products by the date of the Court's decision should be allowed to use them. But it did not.

apply retroactively to cover products purchased earlier. *United States v. Goodner Bros. Aircraft*, 966 F.2d 380, 385 (8th Cir. 1992) ("[C]onsistent with the meaning of the word 'vacate,' we find that invalidation of the mixture rule applies retroactively."). Very simply, vacatur obliterates the unlawful OTT use approval; there is nothing left of the challenged use on which to undertake a further cancellation order.

FIFRA only allows EPA to issue "existing stocks" orders like it has tried here when EPA cancels or suspends a pesticide, not when a court vacates, and certainly not when a court vacates on the grounds set forth in this case. 7 U.S.C. § 136d(a)(1) (EPA "may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or cancelled …."). FIFRA does not confer on EPA the authority to allow existing stock use for a pesticide use that was never lawfully approved in the first instance and thus has *never been cancelled or suspended*.[5]

[5] EPA's reference to its 1991 existing stocks policy statement only confirms the difference. Admin Order at 4 (citing 56 Fed. Reg. 29362). That policy applies only to three categories of changes to a registration: "Changes requested *by a registrant*; changes imposed *by EPA* for failure to comply with various obligations imposed upon registrants; and changes imposed *by EPA* because of a determination by the Agency that use of the pesticide product results in unreasonable adverse effects to man or the environment." 56 Fed. Reg. at 29362 (emphases added). None of those categories apply here.

These dicamba OTT new uses cannot be subject to the post-registration cancellation process because they were not lawfully registered to begin with; the 2018 decision was unlawful. EPA cannot permit their continued sale and use.

Absent a stay of the Court's decision, EPA has no authority to allow continued distribution, sale, or use. EPA's attempt to circumvent the Court's vacatur command through continued use is contrary to the Court's mandate and FIFRA.

C. The Entire Underlying Rationale for EPA's Action Is False, Based on a Misinterpretation of This Court's Decision.

EPA's groundless rationale (again, the same as that in ECF 119 & 121) is as follows: a "cancellation" order was needed post-vacatur because vacatur by itself made the three products dangerous—completely unregistered—"rogue" pesticides. Admin Order at 1 (EPA considers the products "no longer registered" post vacatur). EPA claims vacatur is "read" or "viewed" to be "equivalent" to when it undertakes a pesticide cancellation. *Id.* at 3. Based on that (mis)equation, EPA goes on to assume that after a cancellation, EPA can only prohibit their sale or distribution, not their *use*. *Id* at 2. So for users who have already

bought the products before the June 3 vacatur, those products could be sprayed with abandon over soy and cotton fields the rest of summer, without any regulation or restriction. *Id.* at 3 ("persons holding stocks of these dicamba products would not be legally precluded from using those stocks without following label directions").

Thus EPA claims it was actually doing Petitioners a *favor*: EPA's Administrative Order extending OTT uses of existing stocks until July 31 under the old label instructions—despite the Court's holdings about the inadequacy of the label—was actually *more protective* than the agency simply confirming that the Court's vacatur made existing use unlawful as of June 3. The reasoning and result are beyond absurd.

To begin with, vacatur is very different from cancellation and not limited by it, as explained *supra*. But even for *cancellation*, EPA has it precisely backwards: the default is no use, not unregulated use. 7 U.S.C. § 136d(a)(1) (EPA "*may* permit the continued sale and use…") (emphasis added). When read in context, FIFRA clearly prohibits the use of unregistered pesticides. *See* 7 U.S.C. § 136a(a) ("[T]he Administrator may by regulation limit the distribution, sale, *or use* in any State of any pesticide that is not registered under this

subchapter…") (emphasis added). And EPA's interpretation leads to nonsensical results, such as it being allegedly unlawful for a user to return a pesticide for disposal, or that it would be lawful to apply it at five times the label rate. *See, e.g.*, *EEOC v. Commercial Office Prods.*, 486 U.S. 107, 120-21 (1988) (rejecting reading of statute that would lead to "absurd or futile results ... plainly at variance with the policy of the legislation as a whole").[6]

But here is the most critical point: the scenario EPA presents as the entire rationale for its administrative action, even assuming it is correct, is *irrelevant*, because the condition precedent—that the pesticides become rogue, "unregistered" pesticides after vacatur—is false. After vacatur of the OTT new use approvals, the products themselves did not become unregistered. They are also registered for *other different uses* on different crops, uses with their own specific conditions.

[6] EPA's view that it lacks authority to stop use is also belied by the fact it also has independent authority to issue a "stop sale, use, or removal" order prohibiting further use, 7 U.S.C. § 136k(a), which EPA admits but rejects. Admin Order at 3, 10.

For example, XtendiMax is also registered for use on conventional crops like asparagus, barley, and sorghum. *See* ER81-84 (listing other crops), ER105-114 (XtendiMax other approved uses and crops); ER200-209 (Engenia uses, for "conventional (non-dicamba tolerant) crops"); ER149-158 (same for FeXapan). These other uses were approved in *earlier agency decisions* entirely separate from the challenged 2018 decision. *See, e.g.,* ECF 123-2 & 123-3 (XtendiMax other uses, on May 1, 2014).[7] Those other uses were not at issue in this case, nor its remedy. Thus only *those new OTT uses for soy and cotton approved in the challenged decision were vacated*, not the *entire* registration and not all uses. *See NFFC*, 2020 WL 2901136, at *8-9.

EPA admits these other uses exist and were "permitted under the previously-approved labels." Admin Order at 6 n.3 (listing other crop uses). EPA also acknowledges that the 2016 and 2018 conditional registration decisions were for "post-emergent use on crops genetically

[7] M1768 is the alternative name for XtendiMax. ER4, ER25 (EPA Reg. #524-617). These uses were approved unconditionally, unlike the 2018 conditional approval of the new OTT uses challenged.

engineered to be dicamba tolerant," Admin Order at 1, not all uses of the products.[8]

The only way EPA's theory is correct is if the Court's vacatur to address *all these other uses*, despite this case not being about them. These other uses are not the cause of the harms the Court found and were registered prior to the challenged conditional new use decision, i.e., *not* the new uses at issue in the 2018 new use approval. EPA's view makes no sense.

Accordingly the Court should instruct EPA that the *only uses vacated were the new uses approved conditionally in the 2018 decision*: the OTT use of the products on dicamba-tolerant soybean and cotton. That clarifies that while the products will otherwise remain registered, vacatur prohibits the OTT uses on cotton and soybean from continuing

[8] *Pollinator Stewardship* involved registration of a new pesticide, and *all* uses of it. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015) ("Sulfoxaflor is a new insecticide … Dow asked the EPA to approve sulfoxaflor for use on a variety of different crops ….").
Unlike here, after vacatur of that registration, no lawful use remained, so EPA's theory would apply. Although there the use of "cancellation" to circumvent court vacatur of unlawful registration for existing stocks was unchallenged, it is nonetheless unlawful. *See supra.* The Court should stop EPA from getting around the law in this way, which has dangerous consequences for meaningful vacatur remedy.

this summer. A user *cannot* spray the registered pesticides over-the-top of cotton or soybean after vacatur without violating FIFRA since they are no longer registered for those particular OTT uses. And pesticides can only be used in ways for which they are (lawfully) registered. 7 U.S.C. § 136j(a)(2)(F) (unlawful to use a restricted use pesticide for all purposes other than those approved); *id.* § 136j(a)(2)(G) ("It shall be unlawful for any person … to use any registered pesticide in a manner inconsistent with its labeling."); *id.* § 136(ee) (definition of "to use any registered pesticide in a manner inconsistent with its labeling" includes "to use any registered pesticides in a manner not permitted by the labeling."). And with that the entire rationale for the agency's "cancellation" order evaporates, because the unlawful use risk EPA is purporting to address was already addressed by this Court.

III. THE COURT SHOULD HOLD EPA AND ADMINISTRATOR WHEELER IN CONTEMPT.

"Civil contempt is characterized by the court's desire to compel obedience to a court order or to compensate the contemnor's adversary for the injuries which result from the noncompliance." *U.S. v. Bright*, 596 F.3d 683, 695-96 (9th Cir. 2010). A court may hold a party in contempt upon a showing "by clear and convincing evidence that [the

nonmoving party] violated the [court order] beyond substantial compliance, and that the violation was not based on a good faith and reasonable interpretation of the [order]." *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir.1997). Once the moving party demonstrates noncompliance, the burden shifts to the contemnors to demonstrate substantial compliance. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983).

EPA and Administrator Wheeler should be found in contempt for not just failing to substantially comply with, but blatantly and intentionally violating the entirety of the Court's Order. *Supra* pp. 7-12. Rather than simply confirming that this Court vacated OTT uses of dicamba, EPA publicly stated that it was "assessing all avenues to mitigate the impact of the Court's decision on farmers."[9] Then it proceeded to allow business-as-usual OTT spraying, for existing product stocks. And EPA made no effort to address or correct the significant errors of law or the well-established harms continued spraying is sure to cause. EPA did not take any reasonable steps to comply with the Court's order, only actions to defy and ignore it. *See Stone v. City &*

[9] *See supra* n.1

Cnty. of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992) (substantial compliance means taking "all reasonable steps within [one's] power to insure compliance with [the] court's orders.").

Nor can EPA show that its action in defiance of this Court's Order was "a good faith and reasonable interpretation" of the Order. *Wolfard Glassblowing Co.*, 118 F.3d at 1322; *see supra* pp. 7-12, 15-20. The Court's decision and remedy was clear and unequivocal: it vacated the registration decision approving OTT uses without remanding to the agency for any further action on them. *NFFC*, 2020 WL 2901136, at *19-20. EPA acknowledged vacatur took immediate effect, Admin Order at 1, yet acted to delay its implementation. It cited potential "great economic hardship" on agricultural interests, *id.* at 6, even though the Court already recognized such impacts, but vacated the registration in spite of them, because they are outweighed by the overwhelming record evidence of drift damage and EPA's serious errors. *See supra* pp. 7-12.

Accordingly the Court should hold EPA and Administrator Wheeler in contempt. *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (civil contempt appropriate when party

disobeyed "a specific and definite court order by failure to take all reasonable steps within the party's power to comply").

IV. TO PROTECT ENDANGERED SPECIES, THE COURT SHOULD REACH PETITIONERS' ESA CLAIMS.

This Court did not reach the ESA claims because it already vacated based on its FIFRA holding and findings. Those included record findings of "substantial and undisputed" dicamba damage and a "high likelihood" that restrictions in the 2018 label "would not be followed" because they are "difficult if not impossible" to follow. *NFFC*, 2020 WL 2901136, at *2. Those same findings also underscore the grave threat to protected species. Given EPA's disregard of the Court's holding and remedy, and the imminent risk that more drift will harm endangered species, Petitioners ask the Court to reach the ESA claims and hold that EPA must consult on the adverse effects of dicamba OTT uses before continuing them.[10] Even if it does not go that far, at a minimum, the Court should weigh the ESA harms at stake in EPA's flouting of the

[10] Petitioners understand an ESA ruling could take more time and suggest that the Court could issue a summary decision with full opinion to follow. ECF 115-1 at 9-10.

Court's decision, allowing millions more pounds to be sprayed this summer.

With twisted and illogical reasoning, EPA claims continued OTT use is *more* protective, including for endangered species. Admin Order at 5. Petitioners addressed the errors in EPA's rationale above and they apply equally here: the boogieman of rogue use is not the baseline. *See supra* pp. 15-20. Vacating the OTT use decision and issuing the mandate forthwith should have resulted in *zero* OTT use on cotton and soybeans as of June 3 versus *allowing use* until July 31, thereby protecting wildlife as well as crops from dicamba damage.

EPA's blatant disregard for the Court's ruling likely will result in irreparable harm. Establishing "irreparable injury" to species protected by the ESA should not "be an onerous task" given "the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Harm is irreparable "because '[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult.'" *Nat'l Wildlife Fed'n . Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir.

2018) (*quoting FCC v. Rosboro Lumber*, 50 F.3d 781, 785 (9th Cir. 1995)).

Here, this Court found EPA "substantially understated" dicamba sprayed, remained "agnostic" to substantially under-reported damage, and refused to estimate off-field damage the record showed was "substantial and undisputed." *NFFC*, 2020 WL 2901136, at *2, 12. While the evidence focused on crop damage, it also showed damage to trees and other plants. *Id.* at *7, 14, 18-19. This is likely to damage ESA-protected plants and ESA-protected insects and pollinators that rely on dicamba-damaged plants for food or habitat, such as the Karner blue butterfly and rusty-patched bumble bee. ECF 35 at 55-57, A80-96. "[D]estroying wildlife habitat" constitutes irreparable harm. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-25 (D.C. Cir. 1987); *Or. Natural Desert Ass'n v. Tidwell*, No. 07-1871-HA, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010) ("habitat modification that is reasonably certain to injure an endangered species establishes irreparable injury" (*citing Defenders of Wildlife v. Bernal,* 204 F.3d 920, 925 (9th Cir. 2000)). Accordingly, the Court should reach Petitioners' ESA claims,

hold that the registrations are unlawful until EPA consults as required by the ESA, and vacate the registrations on ESA grounds as well.

CONCLUSION

It cannot be so easy to circumvent this Court's order. EPA cannot get away with allowing the spraying of 16 million more pounds of dicamba and resulting damage to millions of acres, as well as significant risks to hundreds of endangered species. Something else is at stake too: the rule of law. The Court must act to prevent injustice and uphold the integrity of the judicial process.

For these reasons Petitioners respectfully request this Court immediately enforce its June 3, 2020 decision through appropriate relief and instruct EPA that it cannot avoid the vacatur of OTT uses in the 2020 season using this unlawful method. And given the blatant disregard EPA showed for the Court's decision, Petitioners urge the Court to hold EPA in contempt.

Respectfully submitted this 11th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font.

I further certify that this brief complies with Rule 27(d)(2) of the Federal Rules of Appellate Procedure, because it contains 5,156 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ George A Kimbrell

GEORGE A. KIMBRELL

Oral Argument Held on April 21, 2020

No. 19-70115

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

DECLARATION OF GEORGE A. KIMBRELL IN SUPPORT OF PETITIONERS' EMERGENCY MOTION TO ENFORCE THIS COURT'S VACATUR AND TO HOLD EPA IN CONTEMPT

I, George Andreas Kimbrell, declare as follows:

1. I am an attorney admitted to practice in this Court, and represent the Petitioners in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of EPA's Final Cancellation Order for Three Dicamba Products (Xtendimax with Vaporgrip Technology, Engenia, and FeXapan), dated June 8, 2020, which was downloaded from EPA's website, https://www.epa.gov/ingredients-used-pesticide-products/final-cancellation-order-three-dicamba-products.

Executed on this 11th of June, 2020 in Portland, Oregon.

s/ George A. Kimbrell
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Exhibit A

Final Cancellation Order for Three Dicamba Products
(Xtendimax with Vaporgrip Technology, Engenia, and FeXapan)

Summary

This notice announces the Agency's issuance of a final cancellation order for three pesticide products (Xtendimax with Vaporgrip Technology, EPA Reg. No. 524-617, Engenia, EPA Reg. No. 7969-345, and FeXapan, EPA Reg. No. 352-913), containing the active ingredient dicamba pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. sections 136-136y. This order is issued in light of an order of the United States Court of Appeals for the Ninth Circuit vacating these three registrations. Pursuant to the Court's order EPA considers these products no longer to be registered as of the time of the order June 3, 2020. Therefore, with limited exceptions, it is a violation of FIFRA for any person to sell or distribute these products. This cancellation order provides for the disposition of existing stocks of Xtendimax, Engenia, and FeXapan already in the possession of persons other than the registrant at the time of the order on June 3, 2020, and existing stocks in the possession of the registrant as of the time of the order on June 3, 2020. This cancellation order authorizes limited distribution of existing stocks of Xtendimax, Engenia, and FeXapan by commercial applicators and authorizes all other sale or distribution of existing stocks only to facilitate return to the manufacturer or for proper disposal. This cancellation order prohibits any use of existing stocks that is inconsistent with the previously-approved product labeling and prohibits use beyond July 31, 2020.

Background

In 2016, EPA conditionally registered three dicamba-based herbicide products, Xtendimax, Engenia, and FeXapan (also referred to herein as "these dicamba products"), under section 3 of FIFRA, 7 U.S.C. 136a, for post-emergent use on crops genetically engineered to be dicamba tolerant. The registrations were subject to an automatic two-year expiration. Prior to expiration, in the fall of 2018, EPA extended those registrations to allow use until December 20, 2020.

On January 11, 2019, the National Family Farm Coalition, Pesticide Action Network North America, Center for Biological Diversity, and Center for Food Safety, petitioned in the United States Court of Appeals for the Ninth Circuit for review of EPA's 2018 decision extending the registrations of Xtendimax, Engenia, and FeXapan until December 20, 2020. *National Family Farm Coalition, et. al., v. EPA*, No. 19-70115. On June 3, 2020, the Court issued its opinion, finding that EPA's registrations of these dicamba products were not supported by substantial evidence and vacating the registrations. The vacatur became effective immediately on June 3, 2020, and as of that date Xtendimax, Engenia, and FeXapan became unregistered. Thus, absent further order as provided here, sale and distribution of existing stocks of these dicamba products would be a violation of FIFRA.[1]

[1] FIFRA and EPA's regulations provides certain minor exceptions where distribution an of unregistered pesticide is lawful, *e.g.*, certain transfers (*see* 40 CFR 152.30), experimental use (FIFRA section 5 and 40 CFR part 172). This cancellation order does not prohibit such transfers.

Agency Authority to Issue a Cancellation Order to Regulate Existing Stocks

Before addressing the appropriateness of allowing sale, distribution, or use of existing stocks of these dicamba products, we first address the threshold issue of whether the Agency has the authority to issue a cancellation order in the circumstances presented by the vacatur. EPA has consistently read FIFRA as allowing the Agency to issue a cancellation order whenever a pesticide that has been sold with the imprimatur of a registration has that registration terminated, by any mechanism. Distributors and end-users may have possession of stocks of a pesticide product purchased in good faith after EPA issued a registration permitting distribution of the product in commerce and establishing conditions pertaining to the use of the product. The issuance of a cancellation order allows the Agency to appropriately regulate distribution and use of those stocks under the authority of section 6(a)(1) of FIFRA.

Upon issuance of the Court's vacatur order, distributors and end-users had possession of stocks of these dicamba products lawfully purchased pursuant to EPA-issued registrations permitting the products' sale and distribution in commerce and establishing conditions pertaining to the use of the products. These existing stocks have the potential to cause unreasonable adverse effects to human health and the environment if their use, including disposal, is not conducted in accordance with the products' label and EPA regulations. The issuance of a cancellation order allows the Agency to appropriately regulate distribution and use of those existing stocks.

In the case of Xtendimax, Engenia, and FeXapan, the Court vacated the registrations immediately. On May 21, 2020, EPA requested leave to file information on how it planned to issue a cancellation order that would address existing stocks, but because the Court declined to allow the filing, the parties did not have the opportunity to fully brief the question of what should happen to existing stocks of those products that are already in the channels of trade (*i.e.*, material that has been released for shipment and is in the hands of sellers, distributors, or users). Section 3(a) of FIFRA (7 U.S.C. § 136a(a)) states "except as provided by [FIFRA], no person in any State may distribute or sell to any person any pesticide that is not registered under [FIFRA]." Therefore, in the absence of any action by EPA, most sale and distribution of the formerly-registered products is unlawful under FIFRA as of the time of the order on June 3, 2020. The term "distribute or sell" is defined broadly in FIFRA section 2(gg) (7 U.S.C. §136(gg)), and includes, among other things, any "shipment" of unregistered pesticide. Without action by EPA, the vacatur of the registrations has made illegal not just any sale, but any further movement of material currently in the hands of distributors, retailers, and end users, including their shipment for disposal or return to the registrants. FIFRA section 12(a)(l)(A) (7 U.S.C. §136u)(a)(l)(A)) makes it unlawful for any person to sell or distribute an unregistered pesticide, and subjects any seller/distributor to potential civil or criminal penalties under FIFRA section 14 (7 U.S.C. §1361).

There is no corresponding provision of FIFRA that prohibits *use* (as opposed to distribution or sale) of unregistered pesticides (*see* FIFRA section 12 (7 U.S.C. §136j)). Furthermore, section 12(a)(2)(G) (7 U.S.C. §136j(a)(2)(G)) only makes it a violation of FIFRA for any person to "use any *registered* pesticide in a manner inconsistent with its labeling" (emphasis added). There is no provision that requires that unregistered pesticides (including formerly-registered pesticides) be used according to their labels. Thus, in the absence of EPA

action, users of unregistered pesticides are not obligated to follow the labeling (which, for registered pesticides, prescribes enforceable conditions for using the particular pesticide, among other things) accompanying the product. Therefore, because these registrations are vacated, unless EPA takes action, persons holding stocks of these dicamba products would not be legally precluded from using those stocks without following label directions, including the restrictions intended to reduce off-target movement.

FIFRA authorizes EPA to issue enforceable orders governing the sale, distribution, and use of existing stocks of cancelled pesticides. Specifically, section 6(a)(l) of FIFRA (7 U.S.C. §136d(a)(l)) provides that: "The Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled under [sections 3, 4 or 6 of FIFRA] 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 [FIFRA]." Section 12(a)(2)(K) of FIFRA (7 U.S.C. §136j(a)(2)(K)) makes the failure to comply with a cancellation order enforceable under FIFRA. When EPA cancels a registration, EPA issues a cancellation order establishing enforceable terms and conditions for the disposition of existing stocks. Such orders can authorize sale or distribution that would otherwise be unlawful, and they can prohibit use that would otherwise be lawful. They can also contain limitations or conditions on the sale, distribution, or use that the Administrator determines to be appropriate. A limitation that EPA frequently applies to existing stocks is a condition that any authorization of use of such stocks is limited to use that is consistent with the previously-approved labeling accompanying the product.

The Xtendimax, Engenia, and FeXapan registrations were vacated by court order immediately, without any opportunity for a cancellation order to be issued by EPA. Nonetheless, the Agency believes that the Court's action in vacating the these dicamba registrations has been consistently viewed under FIFRA as equivalent to the cancellation of those registrations under FIFRA section 3 (7 U.S.C. §136a) (including any additional uses authorized under section 24(c) (7 U.S.C. §136v(c) of FIFRA), because the vacatur is based upon the lack of substantial evidence to support the registration under section 3 of FIFRA. EPA followed this same approach when registrations of sulfoxaflor were vacated by the United States Court of Appeals for the Ninth Circuit in 2015, and when registrations of spirotetramat were vacated by the U.S. District Court for the Southern District of New York in 2010. *See* Sulfoxaflor Final Cancellation Order (Nov. 12, 2015) https://www.epa.gov/sites/production/files/2015-11/documents/final_cancellation_order-sulfoxaflor.pdf; Spirotetramat Final Cancellation Order (April 5, 2010) https://archive.epa.gov/epa/sites/production/files/2015-10/documents/spirotetramat-final-cancel-order-04-05-10.pdf. *See also* Termilind Limited; Notice and Order of Revocation of Registrations, 62 Fed. Reg. 61890 (Nov. 19, 1997).[2]

[2] In similar situations, the Agency has considered proceeding via Stop Sale, Use, and Removal Order (SSURO) rather than a cancellation order but rejected this course of action. Section 136k(a) requires SSUROs to be " issued…to any person who owns, controls, or has custody" of the pesticide that is subject to the order and the order is effective as to that person only "after [the person] recei[ves] . . . that order." EPA interprets this language to require personal delivery to each such person. For such a widely used pesticide products such as these dicamba products,

In sum, EPA is using this cancellation order by virtue of its authority under FIFRA to establish provisions for the disposition of existing stocks of registrations found to be invalid. The Agency is therefore issuing this cancellation order under FIFRA section 3 and an existing stocks order under section 6 (7 U.S.C. §§136a and 136d).

Existing Stocks Determination

EPA issued in 1991 a policy statement outlining the considerations it generally applies in determining how to treat existing stocks in cancellation orders. *See* 56 Fed. Reg. 29362 (June 26, 1991). In general, if no significant risk concerns have been identified for a cancelled product, such as when a product is voluntarily cancelled, the policy statement suggests that the Agency will generally allow unlimited use of existing stocks, and unlimited sale by persons other than the registrant. A registrant will generally be allowed to continue to sell existing stocks for one year after the date cancellation is requested, or one year after the date the registrant has ceased to comply with the responsibilities that are placed upon registrants, whichever date is sooner. 56 Fed. Reg. at 29362, 29367.

If there are significant risk concerns associated with a cancelled pesticide, the policy statement states that the Agency will generally make a case-by-case determination as to whether to allow the continued sale or use of existing stocks of the pesticide. That determination, like the initial decision to register a pesticide, will focus on the social, economic, and environmental risks and benefits associated with such sale and use. But while the registration decision focuses almost exclusively on the risks and benefits associated with the use of the pesticide, the existing stocks determination is importantly different because it addresses finite and diminishing quantities of product already manufactured and in many cases widely distributed among persons unknown. Thus, EPA identified in the policy statement six factors it might consider in making such risk-benefit decisions, including: 1) the quantity of existing stocks at each level of the channels of trade; 2) the risks resulting from the use of the existing stocks; 3) the benefits resulting from the use of such stocks; 4) the financial expenditures users and others have already spent on existing stocks; 5) the risks and costs of disposal or alternative disposition of the stocks; and 6) the practicality of implementing restrictions on distribution, sale, or use of the existing stocks. 56 Fed. Reg. at 29364.

In considering how to apply the policy to these dicamba products, EPA recognizes that the immediate nature of the United States Court of Appeals for the Ninth Circuit's vacatur must be considered as well as the standard six factors it generally considers in regard to sale, distribution and use of existing stocks. These dicamba products' registrations were immediately vacated by judicial action where the Court found the registrations were not supported by substantial evidence. The Court vacated those registrations on the view that EPA substantially understated risks that it acknowledged and failed to acknowledge other risks. In light of the Court's reasoning for its vacatur, EPA is substantially restricting sale and distribution of existing stocks of these dicamba products. Even considering the immediate vacatur along with

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personal delivery would present enormous practical difficulties for EPA to ascertain the names and addresses of all such persons (including all end-users) and issue SSUROs to them, which the Agency does not believe is warranted in the instant circumstance.

consideration of the six factors identified in the 1991 Existing Stocks Policy, EPA concludes that distribution and use in certain narrow circumstances is supported.

As for more limited sale, distribution and use, EPA is taking into consideration the implications of the immediate vacatur on the country's agricultural industry. It is clear from the numerous unsolicited phone calls and emails that EPA has received since the issuance of the Court's decision, there is a real concern and potential for devastation to cotton and soybean crops that could result in a crisis for the industry.

U.S. Secretary of Agriculture Sonny Perdue commented on the importance and value of this tool: "Farmers across America have spent hard earned money on previously allowed crop protection tools. I encourage the EPA to use any available flexibilities to allow the continued use of already purchased dicamba products, which are a critical tool for American farmers to combat weeds resistant to many other herbicides, in fields that are already planted." June 4, 2020 (*See* https://www.usda.gov/media/press-releases/2020/06/04/secretary-perdue-statement-ninth-circuit-dicamba-decision)

The following is EPA's assessment of the factors typically considered in issuing an existing stocks order:

1) Quantities of existing stocks at each level of the channels of trade

There is ample evidence that existing stocks are present in growers' possession and throughout the channels of trade, and that the quantities are substantial as this is the height of the growing season. EPA has not yet been able to determine the exact quantities of existing stocks at each level of the channels of trade. From the information provided to EPA so far, it is our estimate that approximately 4 million gallons could be in the channels of trade. As articulated in a June 5, 2020 letter from the Agricultural Retailers Association stated:

> The immediate nature of the decision and mandate has already created chaos in our industry. No apparent thought or concern was given to practical supply chain realities or availability of alternative products at the last minute. The Court made no estimate of the damage and cost that would be inflicted on growers' ability to control weeds, the investments they had already made to that end, production plans of manufacturers to prepare for that demand, or the cost and inventory impacts to agricultural retailers and distributors.

2) The risks resulting from the use of the existing stocks

Even though the court found that the labels were difficult to follow, there is no dispute that use inconsistent with the labeling formerly approved by EPA would have greater potential to cause unreasonable adverse effects on the environment including to endangered species. Therefore, it is imperative that EPA issue this order and require that any use of these dicamba products moving forward is consistent with the previously approved labeling and can be enforced as such in order to prevent unreasonable adverse effects on the environment.

3) The benefits resulting from the use of existing stocks

The uses authorized by the Xtendimax, Engenia, and FeXapan registrations include many uses other than post-emergent use on dicamba-resistant soybeans and cotton.[3] Those uses do not present the same risks as the uses that were the basis for the Court's decision. These products continue to offer valuable benefits to users for these other previously-approved uses, and allowing these non-over-the-top uses provides substantially greater benefits to users and to society than disposal.

In regard to the post-emergent use on dicamba-tolerant crops, EPA has received numerous phone calls and emails since the Court's order concerning how essential these products are, and especially so as the growing season is underway. The Agency has considered the correspondence received to date and finds that the benefits resulting from the use of the products are considerable and well established, particularly for this growing season.

The following is an excerpt from a June 5, 2020 letter to EPA from BASF stating the following:

> As you are aware, US farmers have planted their crops and are now in the process of applying herbicide products to control weeds that if not controlled can have a devastating impact on both yield and quality. Specifically, Dicamba [over-the-top] products are specifically intended to control herbicide resistant weeds such as pigweed (*Palmer amaranth*) and marestail (*Conyza canadensis*) that are well known to have crippling financial impact on growers if not properly controlled. Our agricultural community is already suffering great economic hardship and significant uncertainty.

The American Farm Bureau Federation stated in a letter received by EPA on June 5, 2020 that farmers unable to use these dicamba products would be "abruptly expos[ed] to potentially billions of dollars in noxious weed damage."

In a June 7, 2020 letter to EPA, the National Cotton Council of America provided the Agency with the following information relating to the benefits its members achieve from the use of these products. More specifically they noted the following:

> RoundUp will be applied as well but that product will not control the RoundUp-resistant pigweed that can be controlled by dicamba. Control of resistant pigweed in some areas may have to be done manually at this stage, adding to the costs. Labor necessary for manual weed control is difficult to find, and even with available labor, effective control requires the chopping of large stalks and hauling the weeds from the field. Costs estimates run from at least $20 per acre to as much as $60 per acre if the labor is available.

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[3] Other uses permitted under the previously-approved labels include weed control in asparagus, conservation reserve programs, corn, fallow croplands, sorghum, grass grown for seed, hay, proso millet, pasture, rangeland, small grains, sod farms, and sugarcane.

> Pigweed that is resistant to RoundUp threatens the ability to farm in regions across the Cotton Belt. The fast growth of the plant, the production of about 700,000 seeds per plant, the height and density of the plants in fields without control, the costs and lack of availability of crews to hoe and remove the plants from fields, combined with the overwhelming seedbank already present would overwhelm the small profit level of production while steadily decreasing yield. The present state of crop production requires a small window of opportunity for a series of actions that must be completed on a timely basis. Pre-plant burndown, at-planting residuals, and post-planting over-the-top applications are required to achieve effective weed management. The few herbicide Modes of Action (MOA) viable for today's weed management are at risk due to resistance development. The loss of dicamba will result in a loss of herbicide control due to the lack of a MOA that forces overuse of the remaining MOAs.

4) The financial expenditures users and others have already spent on existing stocks

Farmers and commercial applicators have already made substantial financial expenditures in reliance on the registration of dicamba products for post-emergent use. The costs to farmers are not limited to their existing stocks of these dicamba products, but include other sunk costs made in expectation of the availability of these products (seed purchase, tilling, planting, etc.) as well as the lost opportunity to switch to a different crop or to another herbicide or weed management method. For example, in a June 5, 2020 letter, the American Soybean Association stated that growers have spent hundreds of millions of dollars on legally purchased product. They state that growers "stand to have their operations devastated . . . suffering doubly . . . First, through their investment of hundreds of millions of dollars in product which they may no longer be able to legally use; and secondly, through the potentially-billions of dollars in exposure to damaging weed – that may have few or no other treatment options."

In a letter received on June 5, 2020 by EPA, the American Farm Bureau Federation stated that farmers have often take out loans to cover the expenses:

> Many farmers have already made planting decisions to use dicamba tolerant crop systems and planned to use dicamba products in the very near future. These farmers invested substantial sums in the dicamba-resistant seeds in reliance on EPA's approval of dicamba on these crops. Without these products, not only are these substantial investments at risk, but farmers do not know how they will protect their crops.

In addition to already sunken costs into these dicamba products and the associated seed, the Southern Farm Bureau stated the "our farmers are dealing with ongoing adversities related to unstable markets and impacts from COVID-19." The expense of finding other weed management options would be exacerbated by difficulty of finding labor for hand weeding due to the COVID-19 pandemic.

EPA also received a letter from the Agricultural Retailers Association (ARA). This organization represents the interests of agricultural retailers and distributors across the United States. In its letter, ARA stated that the "retailers and growers will be scrambling to secure alternatives from insufficient supplied which will result in higher prices and even possible hoarding." ARA further noted the following:

> Many farmers had made plans to use over-the-top (OTT) application of dicamba to control post-emergent weeds, so manufacturers planned accordingly, and retailers stocked inventory in preparation for those applications. Growers invested in seed that is dicamba tolerant as part of this system. Now the retailers are stuck with warehouses of unusable product and there will likely not be sufficient supplies of alternate products available. Growers are now without options at the worst possible time in their production year. Those alternatives may not have even been manufactured, and what supply does exist is certainly not positioned in the supply chain for immediate use.

Additionally, EPA received a letter from the National Farmers Union expressing "the need for immediate guidance for America's family farmers on the use of Dicamba. It is planting season for many farmers who invested in Dicamba-resistant crops, and loosing [sic] access to these chemical formulations may pose risks to their crops."

On June 7, 2020, EPA received a letter from the National Cotton Council of America concerning the economic hardships created by the Court's order. Specifically, it stated:

> U.S. cotton farmers, preliminary analysis estimates that the direct loss in value of production totals approximately $400 million. The direct economic impact is based on USDA's current 2020 planted area estimate of 13.475 million acres of upland cotton. The analysis removes 590,000 cotton acres planted in Arkansas since the court decision came after the state-enforced cut-off date for dicamba applications. In addition, 45,000 acres of upland cotton planted in California are also not affected by the decision since there was no approval for use of dicamba in that state."
>
> Of the 12.840 million acres planted in the remaining 15 Cotton Belt states, it is estimated that approximately 75% of those acres are planted to dicamba-tolerant varieties. The 75% adoption rate reflects the recent trends from USDA's Cotton Varieties Planted report. Of the 9.630 million acres of dicamba-tolerant varieties, the baseline assumption is that 20% of those acres (or 1.926 million acres) could be susceptible to significant yield losses due to increased weed pressures. Research conducted prior to availability of dicamba-tolerant varieties reported a minimum 50% yield-loss in fields with resistant palmer amaranth (pigweed). Using a U.S. average yield of 730 pounds per planted acre, the yield decline on the impacted acres is 365 pounds, which translates into $208 of lost revenue based on USDA's projected cotton price of $0.57 per pound. That lost revenue on the impacted acres totals $401 million.

> Given the prevalence of RoundUp (glyphosate)-resistant pigweed, it is important to understand the risks to U.S. cotton production. If as many of 40% of the dicamba tolerant acres suffer a 50% yield loss, the lost revenue reaches $800 million.
>
> In addition to the revenue losses, cotton farmers face the additional costs of switching to another herbicide product. An initial analysis suggests that switching to Liberty (glufosinate) leads to an increase of $5.00/acre but without a 100% control of pigweed. Liberty is an alternative but less effective and not as reliable as the labeled dicamba. With cool temperatures at planting in some areas, the product does not provide effective control. Additionally, with larger pigweed plants, the control provided by Liberty decreases and becomes more erratic. Liberty is an important tool but not as the only choice. The continued availability of dicamba is imperative to avoid the loss of Liberty due to resistance development. In addition, it will take multiple applications to achieve good control provided by dicamba. If done by a custom applicator, an initial cost estimate is $7 to $10 per acre for the applicator.
>
> The economic damage caused associated with the vacatur of these dicamba products exacerbates an already tenuous economic situation for cotton farmers who are already facing depressed market prices due to ongoing trade tensions and the COVID-19 pandemic. Rural economies across the Coton Belt are reliant on the direct and downstream economic benefits of a healthy cotton economy. Without access to these dicamba products, the farms and businesses directly involved in the production, distribution and processing of cotton will be jeopardized. These farms and businesses employ more than 125,000 workers and produce direct business revenue of more than $21 billion.

The National Soybean Association further noted, "U.S. growers could suffer doubly from this ruling: first, through their investment of hundreds of millions of dollars in product which they may no longer be able to legally use; and secondly, through the potentially-billions of dollars in exposure to damaging weeds – that may have few or no other treatment options – they will now have to manage differently."

Finally, prohibiting use, as opposed to allowing limited use in accordance with label restrictions, would be particularly inequitable to users who purchased the dicamba products for uses other than the post-emergent use on dicamba-tolerant crops that was the basis for the Court's decision. Because the other uses do not present the same risks as the post-emergent use on dicamba-tolerant crops, there is no reason to prohibit these uses.

5) The risks and costs of disposal or alternative disposition of the stocks

Disposal entails substantial costs for management and transportation, as well as the disposal itself. Existing stocks held by dealers are likely to be intact, except for bulk containers. But disposal or return of product already in end users' hands may be neither feasible nor advisable. For example, users may possess containers of these dicamba product that have already

been opened and transporting them can create a greater risk of spillage. Opened containers also create additional burden when sent for disposal because proper disposal may require that the content be verified, adding additional expense. While some states provide programs for the free disposal of pesticides, such programs only shift the expense to states rather than users.

6) The practicality of implementing restrictions on distribution, sale, or use of the existing stocks

Tracking existing stocks held by pesticide dealers may be feasible, although likely to be imperfect. Tracking existing stocks held by end users is significantly more burdensome and far less accurate. Hard-pressed farmers who have made large investments in their existing stocks may be uncooperative with a cancellation order that requires disposal. Finally, as a general matter, EPA believes it a mistake to issue restrictions on existing stocks unless the holders of stocks are notified of the restrictions and are likely to comply with them. While EPA believes it likely that most pesticide dealers who hold existing stocks of Xtendimax, Engenia, and FeXapan, will learn of the restrictions on sale and distribution through this cancellation order, it is less likely that users who already hold existing stocks will be aware. It would be highly impractical to ensure that all users are notified and such notification would entail the devotion of significant governmental resources. EPA expects that users that are unaware of this cancellation order will continue to use the products consistent with their labeling because that is their regular practice when using pesticides. However, the immediate vacatur of the registration leaves EPA unable to enforce against use inconsistent with the labeling. EPA believes it is important to restore regulation of ongoing use as quickly as possible and individual notification to users would take significant time. Therefore, EPA has concluded that issuing individual stop sale, use and removal orders ("SSUROs") to all end users holding these dicamba products is unwarranted under the present facts.

Regarding the sale and distribution of existing stocks for disposal and return, EPA has taken these factors into account. To facilitate an orderly wind-down of these dicamba products EPA is allowing pesticide dealers end users who hold existing stocks to return them to the registrant or dispose of them in accordance with federal, state and local waste disposal requirements. A contrary interpretation of the vacatur order would mean that those existing stocks would be immovable in perpetuity in slowly deteriorating containers. Therefore, this cancellation order allows for distribution of all existing stocks for the purposes of return to the registrant or disposal, subject to conditions specified below.

EPA's decision regarding use of existing stocks of Xtendimax, Engenia, and FeXapan (and certain limited sales and distributions closely related to such use) takes into consideration the six factors identified in the 1991 existing stocks policy. Each of the six factors weighs heavily in support of allowing end users to use existing stocks of these dicamba products that are in their possession. But, to further reduce the potential for adverse effects, EPA is imposing a July 31, 2020 cut-off date for use of existing stocks.

EPA is aware that farmers may in some cases have purchased these dicamba products, which are restricted use pesticides (RUPs), and had them delivered to their farm for subsequent application by a commercial applicator. Commercial applicators themselves may have already

purchased these dicamba products in order to provide a service of applying them to farmers' crops in the upcoming weeks. Given the substantial financial expenditure already made in these situations along with the other factors discussed above, EPA considers it appropriate to allow 1) existing stocks of these dicamba products in the hands of users to be used until July 31, 2020 and 2) for existing stocks of these dicamba products in the hands of commercial applicators to be used until July 31, 2020 (including moved as necessary for such use, regardless of whether the movement is sale or distribution), both subject to conditions specified below.

Final Cancellation Order, Including Provisions for Existing Stocks

1. Pursuant to sections 3 and 6 of FIFRA, EPA hereby issues a final cancellation order for the dicamba registrations listed below. Any distribution, sale, or use of these products in a manner inconsistent with this order, including the provisions below regarding the disposition of existing stocks, will be considered a violation of section 12(a)(2)(K) and/or 12(a)(l)(A) of FIFRA. This order will remain in effect unless and until it is amended or withdrawn. The issuance of this order did not follow a public hearing. This is a final agency action, judicially reviewable under FIFRA 16(a) (7 U.S.C. §136n).

2. Existing Stocks. For purposes of this order, the term "existing stocks" is defined, consistent with EPA's existing stocks policy (56 FR 29362, June 26, 1991), as those stocks of the formerly registered pesticide products listed below which are currently in the United States and which were packaged, labeled, and released for shipment prior to the time of the order on June 3, 2020 effective date of the vacatur of the affected registrations. Pursuant to section 6(a)(1) of FIFRA, this cancellation order provides as follows:

a. *Distribution or sale by the registrant*. Distribution or sale by the registrant of all existing stocks of the products listed below is prohibited effective as of the time of the order on June 3, except for distribution for the purposes of proper disposal.

b. *Distribution or sale by persons other than the registrant*. Distribution or sale of existing stocks of the products listed below that are already in the possession of persons other than the registrant is permitted only for the purposes of proper disposal or to facilitate return to the registrant or a registered establishment under contract with the registrant, unless otherwise allowed below.

c. *Distribution or sale by commercial applicators*. For the purpose of facilitating use no later than July 31, 2020, distribution or sale of existing stocks of products listed below that are in the possession of commercial applicators is permitted.

d. *Use*. Use of existing stocks of products listed below inconsistent in any respect with the previously-approved labeling accompanying the product is prohibited. All use is prohibited after July 31, 2020.

3. List of Cancelled Products

Registrant	Product	Registration Number
Bayer	Xtendimax with Vaporgrip Technology	EPA Reg. No. 524-617
BASF	Engenia	EPA Reg. No. 7969-345
Corteva	FeXapan	EPA Reg. No. 352-913

Andrew R. Wheeler
Administrator
United States Environmental Protection Agency

Date

JUN 0 8 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s) 19-70115

Case Name Nat'l Family Farm Coal., et al. v. U.S. Envtl. Protection Agency

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

Court order recalling the mandate and to enforce the Court's June 3, 2020 vacatur of pesticide registrations for over-the-top uses by declaring that EPA cannot circumvent the June 3 ruling with its June 8, 2020 administrative order allowing the very same uses this Court vacated and to find that Respondents EPA and Andrew Wheeler have acted in contempt of this Court's ruling.

Relief is needed no later than *(date)*: Immediately

The following will happen if relief is not granted within the requested time:

There is ongoing spraying of 3 dicamba pesticide products that this Court found will cause "substantial and undisputed damage" to crops, trees, and other plant life in the landscape (which includes endangered plant species and endangered insects that rely on plants) and therefore the Court vacated these uses. EPA's June 8 administrative order allows approximately 16 million pds of more spraying, in defiance of the Court's vacatur, on cotton and soybeans in 34 states the entire growing season, until July 31, 2020. Family farmers who chose not to buy into the pesticide companies' genetically engineered seeds will be harmed again on millions of acres as they have been the last three seasons. So will hundreds of endangered species that live in and around the sprayed crop fields.

I could not have filed this motion earlier because:

EPA issued its administrative order at 7pm eastern on June 8. Petitioners have been working diligently to draft and file this emergency motion since then.

I requested this relief in the district court or other lower court: ○ Yes ◉ No

If not, why not:

This matter is under direct review to the Court of Appeals pursuant to Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b). Moreover, the relief is for enforcement of this Court's ruling and to hold EPA in contempt for disregarding it.

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: ◉ Yes ○ No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: June 10, 2020

By *(method)*: electronic mail

Position of other parties: Both other parties oppose the motion

Name and best contact information for each counsel/party notified:

Respondent EPA:
Sarah A. Buckley, sarah.buckley@usdoj.gov, (202) 616-7554
J. Brett Grosko, brett.grosko@usdoj.gov (202) 305-0342

Intervenor-Respondent Monsanto Co.:
Philip J. Perry, philip.perry@lw.com, (202) 637-2200

I declare under penalty of perjury that the foregoing is true.

Signature s/George A. Kimbrell **Date** Jun 11, 2020

(use "s/[typed name]" to sign electronically-filed documents)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 19-70115

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)*:

Petitioners' Emergency Motion to Enforce This Court's Vacatur and to Hold EPA in Contempt; Declaration of George A. Kimbrell in Support of Petitioners' Emergency Motion to Enforce This Court's Vacatur and to Hold EPA in Contempt; Exhibit A; and Rule 27-3 Certificate for Emergency Motion

Signature s/ George A. Kimbrell **Date** Jun 11, 2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov