UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOYBEAN ASSOCIATION, and PLAINS COTTON GROWERS, INC.,

Plaintiffs,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Federal Defendants, and

BASF CORPORATION, *et al.*

Defendant-Intervenors.

Case No.: 1:20-CV-03190

GROWERS' OPPOSITION TO FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

The Federal Defendants[1] (collectively, "EPA") and the Plaintiffs[2] (collectively, the "Growers") agree on this much: this case concerns "registrat[ion of] of three dicamba-based pesticides *under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")* for use 'over-the-top' of genetically modified cotton and soybean plants." Dkt. 57, EPA Motion to Dismiss at 1 ("EPA Motion") (emphasis added). More specifically, Growers challenge

[1] The Federal Defendants are the U.S. Environmental Protection Agency, EPA Administrator Michael S. Regan (automatically substituted for Andrew R. Wheeler under Federal Rule of Civil Procedure 25(d)), and Acting Division Director of EPA's Office of Pesticide Programs, Registration Division, Marietta Echeverria.
[2] The American Soybean Association and Plains Cotton Growers, Inc.

aspects of three FIFRA herbicide registrations, issued under FIFRA authority, implemented through FIFRA herbicide labels, in the form of FIFRA herbicide control measures, under FIFRA's judicial review provision. *See, e.g.*, Compl. ¶ 17.

Yet EPA casts amorphous pieces of Growers' challenges as Endangered Species Act ("ESA") "citizen-suit claims," just because those pieces—which EPA struggles to isolate—also involve ESA issues. This approach is misguided. While Growers' case implicates ESA questions, those questions flow from how EPA implemented ESA considerations (species protections) through *FIFRA* control measures (herbicide application rules) to regulate herbicide end users. Thus, because any ESA issues inhere in—and were incorporated into—the FIFRA final actions before the Court, FIFRA supplies subject-matter jurisdiction. EPA's arguments otherwise undermine FIFRA reviewability, overread the ESA citizen-suit provision, conflict with controlling case law, and let EPA game jurisdiction.

What is more, the Administrative Procedure Act ("APA") supplies subject-matter jurisdiction too. Because the heart of the Dicamba Decision is "made reviewable by statute"—FIFRA—any related questions are reviewable under the APA. 5 U.S.C. § 704. In fact, courts recognize a unique type of APA claim, a "maladministration" claim, in situations like this. Finally, EPA's ESA notice letter argument is misplaced—Growers provided ample, sufficient notice, even though they are not suing under the ESA citizen-suit provision. In short, because Growers' case does not depend on ESA jurisdiction, the Court should deny EPA's motion to dismiss.

REGULATORY AND JURISDICTIONAL BACKGROUND

FIFRA generally requires EPA to register or license an herbicide before it can be sold or distributed in the United States. *See* 7 U.S.C. § 136, et seq. If an herbicide "will perform

its intended function without unreasonable adverse effects on the environment," among other things, FIFRA dictates that EPA "shall register" it. 7 U.S.C. § 136a(c)(5). When registering an herbicide, FIFRA authorizes EPA to establish rules for herbicide use, including how and when a product may be used. *See* 7 U.S.C. § 136a. Thus, herbicide registrations usually contain several application guidelines, restrictions, and directions which EPA often refers to as herbicide "control measures." *See* Dkt. 50-1 at 4–5. EPA regulations require that "[e]very [herbi]cide product shall bear a label containing the information specified by the Act." *See* 40 C.F.R. § 156.10(a)(1). These label requirements are the legal requirements for farmers' use of the herbicide: when, where, and how much product, for example, a farmer can use. *See id.*

Congress provided a specialized review scheme for challenging actions taken by EPA under FIFRA, including registration decisions. For challenges to EPA's "refusal . . . to cancel or suspend a registration or change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law," FIFRA confers jurisdiction in "the district courts of the United States." 7 U.S.C. § 136n(a). For challenges "to the validity of any order issued by the Administrator following a public hearing," on the other hand, jurisdiction lies "in the United States court of appeals." 7 U.S.C. § 136n(b).

FIFRA's judicial review provision also "applies to 'all issues inhering in the [FIFRA registration] controversy," including issues arising under the ESA. *Dow AgroSciences LLC v. NMFS*, 637 F.3d 259, 265 (4th Cir. 2011) (holding that if an ESA-related "challenge to [a] BiOp inheres in the challenge to a final EPA order under FIFRA, it would be reviewable under FIFRA's judicial review provisions.") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357

U.S. 320, 336 (1958)). So when a claim under another statute is a "means to a broader end—a challenge to the validity of [an herbicide] registration order itself," FIFRA provides sufficient subject-matter jurisdiction to adjudicate any comingled issues arising under the other statute. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 187 (D.C. Cir. 2017) (applying this principle to ESA issues intertwined in a FIFRA registration).

EPA, like all federal agencies, must evaluate the potential impacts of its actions on threatened and endangered species and their "critical habitat" under the ESA. Specifically, EPA must ensure that a FIFRA herbicide registration will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *See* 16 U.S.C. § 1536(a)(2). Under that ESA analysis, EPA—under the umbrella of its broader FIFRA review—assesses whether the registration action "may affect" a listed species or habitat. *See* 50 C.F.R. § 402.14. If not, the ESA analysis ends. *See* 50 C.F.R. § 402.12. If, on the other hand, the registration "may affect" listed species or habitat, EPA must consult with either the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Services ("NMFS"). *See id.* §§ 402.13, 402.14. The outcome of that consultation is either a "not likely to adversely affect" finding—which ends ESA review—or a "likely to adversely affect" finding—which requires more robust "formal" consultation. *Id.*

Aggrieved parties seeking "to enjoin" EPA for an ESA-specific violation, "to compel" EPA to act on an ESA-specific basis, or sue EPA "alleg[ing] a failure" to perform an ESA-specific "act or duty" can avail themselves of the ESA's "citizen-suit provision." *See* 16 U.S.C. § 1540(g)(1). If a plaintiff intends on using that provision, it must first provide EPA (and others) a notice of intent to sue at least sixty days before filing suit. *Id.*

§1540(g)(2)(A)(i). But when ESA issues are "inextricably intertwined" with final actions issued under other statutes, including FIFRA, the underlying statute supplies jurisdiction for any related ESA challenges. *Ctr. for Biological Diversity*, 861 F.3d at 188.

Aggrieved parties can also challenge a federal agency's "maladministration" of the ESA, FIFRA, and other statutes. *See Bennett v. Spear*, 520 U.S. 154, 172–73 (1997). Maladministration claims, unlike ESA citizen suit claims for example, accuse an agency of mis-administering a statute, commonly by overregulating regulated entities. *Id.* at 176–77 (recognizing that a maladministration claim that an agency's ESA conclusions and conditions were "not necessary to protect [species]" was reviewable under the APA). Put differently, maladministration claims typically challenge an agency as *the regulator*, while citizen-suit claims usually challenge the agency as *the regulated party*. *See Conservation Force v. Salazar*, 699 F.3d 538, 543 (D.C. Cir. 2012) (distinguishing between "whether an agency is administering the ESA or is being regulated by it").

FACTUAL BACKGROUND

This lawsuit arises from three herbicide registrations that EPA issued last year. Specifically, EPA registered or amended its preexisting registration for XtendiMax with VaporGrip Technology, Tavium Plus VaporGrip Technology, and Engenia Herbicide (collectively, the "Dicamba Products"). *See* Dkt. 50, Am. Compl. ¶ 76; *see also* Dkt. 50-1. Four EPA documents form the heart of the challenged decision: EPA's Dicamba Memorandum (Dkt 50-1), the Engenia Registration (Dkt. 50-3), the Tavium Registration (Dkt. 50-4), and the XtendiMax Registration (Dkt. 50-5). Those documents also rely in part on, and incorporate by reference, an ESA Assessment. *See* Dkt. 50-10.

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