ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FARMWORKER ASSOCIATION OF FLORIDA, ENVIRONMENTAL WORKING GROUP, and CENTER FOR BIOLOGICAL DIVERSITY, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 21-1079

[PROPOSED] SUR-REPLY TO RESPONDENT EPA'S REPLY IN SUPPORT OF MOTION FOR REMAND WITHOUT VACATUR

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Respondent U.S. Environmental Protection Agency (EPA) raised two new matters in its Reply in Support of Motion for Remand Without Vacatur. Doc. #1897611 (May 6, 2021). First, it is disingenuous for EPA to suggest that this case is prudentially moot when it has not ceased its own admittedly illegal activity, and it recognizes that Florida's decision is not the final word because AgLogic intends to challenge it. If the Court were to dismiss on prudential mootness, Petitioners would be without a remedy should Intervenor AgLogic prevail in its challenge to Florida's decision. Second, recognizing this, EPA asks this court in the alternative to hold the case in abeyance until Florida decides. However, the moment Florida reverses its denial, without Petitioners' requested stay in place, sales of aldicarb for use in Florida on citrus can proceed. Lifting the abeyance at that time will be too late to render a decision to prevent harm to Petitioners, especially because EPA finally acknowledges in its reply that it has the discretion to allow the continued use of existing stocks that have been sold, even if a court later vacate its registrations.

Deciding whether a case is "prudentially moot" is based on "common sense or equitable considerations" requiring a "case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail." *In re Aov Indus.*, 792 F.2d 1140, 1147-48 (1986) (reaching the merits of two claims, while agreeing others were moot, because implementation of a bankruptcy plan was not

synonymous with consummation). Prudential mootness is only appropriate when a controversy is "so attenuated" or "it is so unlikely" that a court's grant of remedy would not actually relieve the injury. *Chamber of Commerce v. U.S. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 2009); *Penthouse Int'l, Ltd. v. Meese*, 39 F.2d 1011, 1019 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992).

First, this case is not moot because EPA has not ceased its admittedly, illegal conduct. Indeed, EPA asks this Court for remand without vacatur so that the illegal conduct may continue. Prudential mootness considerations usually arise when defendant has "ceased its allegedly illegal conduct and is reconsidering or has reconsidered the policy that created the harm in the first place." *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 264 (D.D.C. 2014) (explaining that the Service had not ceased its allegedly unlawful conduct, and ruling the issue was not moot because vacatur could halt the injury of excessive fishing). Courts are not obliged to "step aside" even if the case might become moot shortly by virtue of agency ceasing illegal action. *Crawford v. FCC*, 417 F.3d 1289, 1294-95, 368 U.S. App. D.C. 40 (D.C. Cir. 2005) (deciding case was not prudentially moot where FCC action had effectively mooted claim, but FCC's mooting decision had not technically become final); *see also Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 110 (D.D.C. 2011) (claim not moot where "effective remedy is possible and appropriate" because agency action at issue was still in force) (internal quotation

marks omitted)). In this case, the Service admits that it has not complied with the ESA, yet it only provides a nonbinding statement that it intends to revisit the decision at some undefined date, and has no schedule to do so. EPA Mot. for Remand Without Vacatur at 9-10, Doc. #1895080; *id*. at Att. 1, A11-13 (Declaration of Jan Matuszko ¶¶ 18-20). EPA's nonbinding statement is meaningless because EPA has not ceased the illegal activity, continuing to allow its admittedly unlawful registrations to stand now and into the future by virtue of asking for remand without vacatur.

EPA's reliance on *Chamber of Commerce* and *Penthouse* is misplaced because in both cases the alleged unlawful government activity had ceased. The Chamber of Commerce challenged an agency decision to provide funds to a consumer organization to participate in an administrative hearing, but the hearing had been completed and there was no likely continuing injury; therefore, the claims were moot. *Chamber of Commerce*, at 290-92. In *Penthouse*, the government had retracted a letter labelling Penthouse as pornography. 939 F.2d at 1018-19. Further, Penthouse could not identify any alleged injury that remained after retraction of the letter. *Id.* at 1019-20. Then, in *dicta*, the Court noted that even assuming some trace of continuing injury, it would not exercise its discretion to grant declaratory relief because it would avoid premature adjudication of a constitutional issue. *Id.* at 1020. Here, it is undisputed that EPA's admittedly unlawful registrations of

aldicarb for use on citrus in Florida are still in place and present an ongoing controversy.

Instead of ceasing its own, admittedly illegal conduct, EPA rests its prudential mootness argument on the Florida Department of Agriculture and Consumer Service's notice of denial of registration of aldicarb for use on citrus in Florida, arguing there is no risk of aldicarb use "at present." EPA Reply at 3. As it must, EPA acknowledges that AgLogic has stated to this Court that it intends to appeal the State of Florida's decision. *Id.* at 4. Harm is not too attenuated or speculative in this situation. Should AgLogic prevail in its challenge to Florida's decision, AgLogic could immediately sell its aldicarb products for use on citrus in Florida. These sales are not "hypothetical future sales," EPA Reply at 8; selling its products is the reason AgLogic sought registration in the first instance and is the reason it is challenging Florida's decision. If this Court were to dismiss on prudential mootness grounds at this time, EPA's unlawful decisions would still be in place, and Petitioners would be without any recourse to remedy their harms.

Second, EPA now seeks different relief—an abeyance of the case—which is a different pathway to the same result because it recognizes that AgLogic could prevail, putting Petitioners at risk of harm without recourse to prevent it. EPA at 4. If the case is held in abeyance, without Petitioners' requested stay of EPA's orders in place, again, once AgLogic prevails, it could immediately sell its aldicarb

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