
Nos. 17-70810, 17-70817

**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,
DOW AGROSCIENCES LLC,
Intervenor-Respondent,

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

ANDREW R. WHEELER, ET AL.,
Respondents,
DOW AGROSCIENCES LLC,
Intervenor-Respondent.

On Petition for Review of an Order of the Environmental Protection Agency

**INTERVENOR-RESPONDENT'S RESPONSE TO PETITION
FOR REHEARING *EN BANC***

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October 21, 2020

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INTRODUCTION

Petitioner National Family Farm Coalition (“NFFC”) seeks *en banc* review of only a fraction of the panel’s meticulous and comprehensive 60-page opinion in this case (Dkt. 233 Addendum, at 1-60 (“Op.”)), which rejected nearly every challenge brought by petitioners NFFC and Natural Resources Defense Council to the Environmental Protection Agency’s (“EPA”) final registration of Intervenor-Respondent Dow Agrosciences LLC’s (“Dow”) Enlist Duo™ herbicide. Abandoning any challenge under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), Petitioner challenges only narrow portions of the panel decision upholding EPA’s determination under the Endangered Species Act (“ESA”) that the Enlist Duo registration would have “no effect” on endangered species or their critical habitats triggering consultation obligations under the ESA.

The panel decision upholding EPA’s “no effect” determination was correct and rehearing *en banc* is unwarranted. EPA properly made “no effect” determinations for listed species within the action area, which foreclosed any obligation under the ESA to consult with the Fish & Wildlife Service (“FWS”) or National Marine Fisheries Service (“NMFS”). In so doing, EPA relied on the best scientific data available, using a methodology that the wildlife services agreed was appropriate and indeed “highly conservative.” *See* Op. 52-53. NFFC’s suggestion that EPA applied the wrong legal standard under the ESA is based principally upon

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