

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM
COALITION; FAMILY FARM
DEFENDERS; BEYOND PESTICIDES;
CENTER FOR BIOLOGICAL DIVERSITY;
CENTER FOR FOOD SAFETY;
PESTICIDE ACTION NETWORK NORTH
AMERICA,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; ANDREW R. WHEELER, in
his official capacity as
Administrator,

Respondents,

DOW AGROSCIENCES LLC,
Respondent-Intervenor.

No. 17-70810

EPA No.
EPA-HQ-OPP-
2016-0594

NATURAL RESOURCES DEFENSE
COUNCIL,
Petitioner,

v.

ANDREW R. WHEELER, in his official
capacity as Administrator of the
United States Environmental
Protection Agency; U.S.
ENVIRONMENTAL PROTECTION
AGENCY,
Respondents,

DOW AGROSCIENCES LLC,
Respondent-Intervenor.

No. 17-70817

EPA No.
EPA-HQ-OPP-
2016-0594

OPINION

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

Argued and Submitted May 16, 2019
Submission Withdrawn May 30, 2019
Resubmitted July 22, 2020
Portland, Oregon

Filed July 22, 2020

Before: N. Randy Smith, Paul J. Watford, and
Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Judge R. Nelson;
Dissent by Judge Watford

SUMMARY*

Environmental Protection Agency

The panel granted one petition for review, denied another petition for review, and remanded without vacatur to the Environmental Protection Agency (“EPA”) in actions challenging the EPA’s decisions to register Enlist Duo – a pesticide designed to kill weeds on corn, soybean, and cotton fields – in 2014, 2015, and 2017.

Enlist Duo combines two chemicals – 2,4-dichlorophenoxyacetic acid (“2,4-D”) choline salt and glyphosate.

The panel held that the petitions for review were timely. A petition for review challenging a pesticide registration order in a court of appeal must be filed within 60 days after entry of such order. Here, the 2017 Notice of Registration was signed on January 12, 2017. The panel held that because the “date of entry” was not “explicitly” provided in the Notice of Registration, the “date of entry” was “two weeks after ... [the Notice of Registration was] signed” – January 26, 2017. 40 C.F.R. § 23.6. The petitions filed 54 days later were therefore timely. 7 U.S.C. § 136n(b).

The panel next addressed petitioners’ Article III standing. First, concerning the claims under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), alleging that EPA misapplied FIFRA’s procedural

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

requirements and lacked substantial evidence in support of its decision that Enlist Duo's registration complied with those requirements, the panel held that petitioners National Resource Defense Council ("NRDC") and Center for Food Safety ("CFS"), based on their members' standing, both had associational standing to bring FIFRA claims. Because one petitioner from each petition had associational standing, the panel did not need to decide whether the other National Family Farm Coalition ("NFFC") petitioners had associational standing. Second, concerning the claims under the Endangered Species Act ("ESA"), alleging that EPA violated the ESA's consultation procedures in registering Enlist Duo, the panel held that because one of CFS's members had Article III standing, the organization also had associational standing to bring the ESA claims. In addition, the Article III standing of one NFFC petitioner made the ESA claims asserted by NFFC petitioners justiciable.

Turning to the merits, the panel considered petitioners' FIFRA claims. FIFRA is a regulatory scheme aimed at controlling the use, sale, and labeling of pesticides; and the mechanism used to further this aim is a process called "registration." Registration can be unconditional or conditional, and both types often involve "pesticide products."

The panel rejected NRDC's claim that the EPA incorrectly applied what NRDC believed to be the more lenient "conditional" registration standard rather than the more stringent "unconditional" standard when it registered Enlist Duo in 2014. First, the panel held that NRDC waived the argument. Second, even absent waiver, the panel held that NRDC's argument was not persuasive. The registration

documents supported the conclusion that EPA was applying the unconditional standard.

NFFC petitioners argued that EPA incorrectly applied FIFRA's "cause any unreasonable adverse effects" unconditional registration standard in its 2017 registration decision. EPA conceded that it cited the wrong standard, but the panel held that any error was harmless because the standard for unconditional registration was higher, not lower, than the standard for conditional registration. The panel held that the error did not show that EPA lacked substantial evidence to support its conclusions.

Petitioners argued that EPA lacked substantial evidence for its 2014, 2015, and 2017 registration decisions for four reasons. First, the panel agreed with petitioners that EPA failed to properly assess harm to monarch butterflies from increased 2,4-D use on milkweed in target fields. The panel held that given the record evidence suggesting monarch butterflies may be adversely affected by 2,4-D on target fields, EPA was required, under FIFRA, to determine whether any effect was "adverse" before determining whether any effect on the environment was, on the whole, "unreasonable." The panel concluded that EPA's failure to do so meant that its decision was lacking in substantial evidence on the issue. Second, the panel rejected the argument that EPA failed to consider that Enlist Duo would increase the use of glyphosate over time. The panel held that substantial evidence supported EPA's conclusion that neither the initial 2014 registration of Enlist Duo – nor the subsequent approvals for new use – will increase the overall use of glyphosate. Third, the panel rejected petitioners' contention that EPA failed to properly consider 2,4-D's volatility – i.e., its tendency to evaporate into a gas and drift to non-target plants. The panel held that EPA reasonably

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