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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Petitioners,

v.

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

Respondents,

MONSANTO COMPANY,

Respondent-Intervenor.

No. 19-70115

Environmental Protection Agency

OPINION

On Petition for Review of an Order of the
U.S. Environmental Protection Agency

Argued and Submitted April 21, 2020
San Francisco, California

Before: Michael Daly Hawkins, M. Margaret McKeown, and William A. Fletcher,
Circuit Judges.

Opinion by Judge W. Fletcher

American farmers have been using dicamba, a chemical herbicide, to combat weeds for more than fifty years. Dicamba is an effective weed killer, but its toxicity is not limited to weeds. It can kill many desirable broadleaf plants, bushes, and trees. It also has a well-known drawback. Dicamba is volatile, moving easily off a field onto which it has been sprayed. It can drift if the wind blows during application; it can drift if applied during temperature inversions; it can drift after application when it volatilizes, or turns to a vapor, during hot weather. As a result of its toxicity and its tendency to drift, dicamba had historically been used to clear fields, either before crops were planted or before newly planted crops emerged from the soil. This changed in 2017.

By the early 2000s, many weeds had developed a resistance to the widely used herbicide glyphosate, the main ingredient in Roundup brand-name products sold by the Monsanto Company (“Monsanto”). In response, Monsanto developed and patented genes that allowed soybean and cotton crops to tolerate dicamba. Concurrently, Monsanto and two other herbicide manufacturers reformulated dicamba herbicides in an attempt to make dicamba less volatile and therefore usable during the growing season. Their efforts culminated in 2016, when, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136 *et seq.*, the U.S. Environmental Protection Agency (“EPA”) granted conditional, two-year amended registrations to Monsanto and later the two other

agrochemical companies, approving their reformulated dicamba-based herbicides for over-the-top (“OTT”), or “post-emergent” use on dicamba-tolerant (“DT”) soybeans and cotton ahead of the 2017 growing season. The conditional registrations were to expire in late 2018.¹

On October 31, 2018, the EPA approved conditional registrations for the three dicamba-based herbicides for an additional two years. The EPA’s decision document announced that the EPA “will be granting requests by Bayer CropScience (formerly Monsanto Company), Corteva (formerly DuPont), and BASF to amend their existing conditional registrations that contain expiration dates of November 9, 2018, and December 20, 2018, respectively.” In the following week, the EPA issued conditional two-year amended registrations to Bayer for its “M1768 Herbicide,” also known as “XtendiMax With VaporGrip Technology” (“XtendiMax”); to Corteva for its “DuPont FeXapan Herbicide” (“FeXapan”); and to BASF for its “Engenia Herbicide” (“Engenia”).

The National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and Pesticide Action Network North America (“petitioners”) sought review of the October 31, 2018, decision upon which the registrations were

¹ For the convenience of the reader, we list here the key abbreviations used in this opinion. “Over-the-top” (dicamba use) is abbreviated “OTT.” “Dicamba-tolerant” (soybean and cotton) is abbreviated “DT.” The Office of Pesticide Programs (housed within the EPA) is abbreviated “OPP.”

based. Petitioners argue that the EPA’s decision violates both FIFRA and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

We hold that the EPA’s October 31, 2018, decision, and the conditional new-use registrations of XtendiMax, Engenia, and FeXapan for use on DT soybean and cotton that are premised on that decision, violate FIFRA. As we will explain in more detail below, FIFRA provides two requirements for conditional amendment of an existing registration. The EPA must determine that (i) the applicant has submitted “satisfactory data,” and (ii) the amendment will not “significantly increase the risk of any unreasonable adverse effect on the environment.” 7 U.S.C. § 136a(c)(7)(B). We need not decide whether substantial evidence supports a finding that the applicants submitted satisfactory data—although, as we discuss below, the data have several flaws—because we hold that the EPA substantially understated risks that it acknowledged and failed entirely to acknowledge other risks.

The EPA substantially understated three risks that it acknowledged. The EPA substantially understated the amount of DT seed acreage that had been planted in 2018, and, correspondingly, the amount of dicamba herbicide that had been sprayed on post-emergent crops. Further, the EPA purported to be agnostic as to whether formal complaints of dicamba damage under-reported or over-reported the actual damage, when record evidence clearly showed that dicamba

damage was substantially under-reported. Finally, the EPA refused to estimate the amount of dicamba damage, characterizing such damage as “potential” and “alleged,” when record evidence showed that dicamba had caused substantial and undisputed damage.

The EPA also entirely failed to acknowledge three other risks. The EPA entirely failed to acknowledge record evidence showing the high likelihood that restrictions on OTT dicamba application imposed by the 2018 label would not be followed. The EPA based its registration decision on the premise that the label’s mitigation measures would limit off-field movement of OTT dicamba. These measures became increasingly restrictive with each iteration of OTT dicamba labels. Record evidence shows that the restrictions on the 2016 and 2017 labels had already been difficult if not impossible to follow for even conscientious users; the restrictions on the 2018 label are even more onerous. Further, the EPA entirely failed to acknowledge the substantial risk that the registrations would have anti-competitive economic effects in the soybean and cotton industries. Finally, the EPA entirely failed to acknowledge the risk that OTT dicamba use would tear the social fabric of farming communities.

We therefore vacate the EPA’s October 31, 2018, registration decision and the three registrations premised on that decision. Because our vacatur is based on

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