Case 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,
Respondent-Intervenor.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioners,
v.
SCOTT PRUITT, et al.,
Respondents,
DOW AGROSCIENCES LLC,
Respondent-Intervenor.

On Petition for Review from the
United States Environmental Protection Agency

PETITIONERS' SUPPLEMENTAL REPLY BRIEF (Redacted)

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INTRODUCTION

No court has approved of an Endangered Species Act (ESA) "no effect" determination like the one Respondents seek this Court to sanction: no possible effect to even one of 531 listed species and 184 critical habitats from a toxin to be increased 200-600 percent, over nearly 200 million acres. And no court has affirmed EPA's use of its "interpretive policy" to set unilaterally "levels of concern" for adverse effect and rename them "no effect." The reason for both is the same: the approach is unlawful and the proper standard mandates consultation.

Whether Enlist Duo poses a "reasonable" risk of harm to listed species is not before the Court: EPA violated its separate procedural duty under the ESA § 7(a)(2) to consult the expert agency FWS to help "insure" spraying Enlist Duo over millions of acres did not jeopardize any of the hundreds of nearby imperiled species or their critical habitats. EPA has no discretion to create its own consultation standard; the ESA mandates consultation whenever Enlist Duo would have "any possible effect" on any listed species or habitat.

These and EPA's other violations of law compel vacatur.

I. THE REGISTRATION VIOLATED THE ESA.

A. EPA Receives No ESA Deference.

Respondents repeatedly pursue the Court's imprimatur based on broad "deference" and "discretion" rationale, but, unlike the expert wildlife agencies Congress assigned to implement the ESA, ECF 64-1 at 22-23, 29 & n.16, action agencies like EPA receive no ESA deference. *Trustees for Ala. v. Hodel*, 806 F.2d 1378, 1384 n.10 (9th Cir. 1986) (regulated agencies receive no deference in interpreting statutes regulating them); *Parola v. Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988); *Conservation Law Found. v. Ross*, 2019 WL 5549814, at *11 (D.D.C. Oct. 28, 2019) ("[I]t is not the *action* agency that is the expert as to its duties under the ESA ….").

Nor does EPA have "discretion" to interpret its ESA duties contrary to the statute: this Court does not "rubber-stamp … administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005). EPA violated the ESA's vital Section 7

requirements, ECF 64-1 at 16-31; ECF 175 at 9-12, as well as its core "institutionalized caution" policy, *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015).

B. *Karuk* Controls.

Karuk requires the panel to hold that EPA's "level of concern" standard is contrary to the lawful "may affect" standard. ECF 175 at 8-9. Respondents struggle mightily to avoid that result, but their efforts fail.

In *Karuk*, the Forest Service approved mining activities that "'might' cause disturbance of surface resources" without ESA consultation. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1013 (9th Cir. 2012) (en banc). While the agency took no position on whether "may affect" was met, the intervenor miners vigorously disputed the record showed the "may affect" threshold was met. *Id.* at 1027. The Court held the Forest Service violated its duty to consult, rejecting the intervenors' arguments. *Id.* at 1027-29. Because the Forest Service acknowledged the *potential* for disturbance, the "may affect" threshold was triggered "as a textual matter." *Id.* at 1027. Here, EPA acknowledged the same, ECF 64-1 at 31-32; ECF 120 at 13-16, *and* the

measure of harm applied was unlawfully higher, because EPA compared its estimates of potential exposure of listed species against "adverse" or "undesirable" levels, *id.*; ECF 175 at 10-13.

Respondents repeatedly (EPA at 40, 45) state/imply this is a "misreading" because *Karuk* was only about whether there was sufficient agency action. That is false:

> There are two substantive questions before us. The first is whether the Forest Service's approval of four NOIs to conduct mining in the Klamath National Forest is "agency action" within the meaning of Section 7 …. The second is whether the approved mining activities "may affect" a listed species or its critical habitat.

Karuk, 681 F.3d at 1011. The Court held affirmatively on both, and to address the second necessarily applied the "may affect" standard. *Id.* at 1027-30.

EPA (at 43, 45) is also wrong that *Karuk* "created" a "new rule." It simply enshrined *en banc* the established ESA standard, set for decades by the expert agencies, and relied on by this Court. ECF 64-1 at 15; 51 Fed. Reg. 19,926, 19,949 (1986); *Cal. ex rel. Lockyer v. USDA*, 575 F.3d 999, 1018 (9th Cir. 2009); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011); *e.g.*, *WildEarth Guardians v. Jeffries*, 370 F. Supp. 1208, 1231 (D. Or. 2019) (applying "any possible effect"

standard, reversing erroneous "no effect" determination for grey wolf because, despite not residing there, record showed they passed through the project area).

Respondents' reliance on the Forest Service's lack of position is irrelevant: the intervenors placed the question of the proper standard and whether it was met before the Court, and it was decided. ECF 64-1 at 30; ECF 120 at 31.

That the Forest Service did not affirmatively make an underlying "no effect" determination also makes no difference. There is only *one* ESA "no effect/may affect" standard; it does not change when an agency fails entirely to make any determination versus when an agency makes an arbitrary one. *See, e.g.*, ECF 165-1; *Ecology Rights Found. v. FEMA*, 384 F. Supp. 3d 1111, 1120-22 (N.D. Cal. 2019) (applying *Karuk* standard to hold "no effect" determination unlawful); *Native Ecosystems Council v. Krueger*, 946 F Supp. 2d 1060, 1078-79 (D. Mont. 2013) (same).

Nor does the standard of review change based on that difference. EPA is entitled to no deference for ESA assessments or conclusions. *See supra.* And under the APA standard of review that applies to ESA

claims, courts "shall" set aside unlawful agency action if the agency's determinations are "arbitrary and capricious," but also if they were made "not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). EPA's "no effect" determinations are arbitrary because they are actually "not likely to adversely affect" determinations, and thus fail to make a rationale connection between the "facts found and the conclusion made," *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). EPA also acted "contrary to law" by violating the ESA's legal standards, and without "procedure required by law" in failing to undertake the Section 7 consultation process. Each of these APA rationales apply here and would independently be sufficient to vacate.

EPA (at 44) argues *Karuk* is factually different because the Forest Service found "measureable effects," but it is undisputed EPA also found *measurable* effects for *every* species for which that it did a species-specific assessment. ECF 175 at 12-13 & n.10; ER654-678. The only difference is EPA discounted them and unlawfully declined consultation, because the measurements did not rise to EPA's self-determined LOC.

Unable to find support in the *Karuk* opinion, EPA (at 44) exhumes the briefing, citing a report it claims shows "concrete" impacts from the particular mining notices challenged. But what EPA cites is a literature summary speaking generally to the *potential* risks of suction dredge mining to salmon. *Karuk* (ECF 27 at 9-10) (listing "*potential* adverse impacts to aquatic habitats"); (dredge tailings "*can decrease* fish reproductive success"); ("fish *may be* induced to spawning on dredge tailings"); ("Dredging *could* frighten" steelhead) (emphases added). These statements are substantially similar to EPA's admissions about Enlist Duo's potential risks to ESA-protected species. ECF 64-1 at 31-32, 39-47.

Mimicking Respondents' mantra here, the miners argued the plaintiffs had to show actual harm: *Karuk* (ECF 36 at 27) (Tribe does not "identify any specific evidence of environmental harm or impact" from the mining); *id.* at 7 ("For all of the verbiage concerning *potential* impacts of suction dredge mining, the Tribe has never been able to identify a single incident" of harm); *id.* at 36 (thus record "devoid of any evidence" the "mining activities 'may affect' the coho salmon"). The *en banc* Court resoundingly rejected this notion. 681 F.3d at 1028.

Beyond that, Respondents bluster into ad hominem attacks, but their real disagreement is with *Karuk*'s binding holding. They pretend the Court did not mean what it held, but the language and intent is plain.

C. *Friends of Santa Clara* Is Inapposite.

Respondents (EPA at 42-43) rely heavily on *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906 (9th Cir. 2018),[1] but even they cannot claim *Santa Clara* somehow raises the established low consultation threshold established in *Karuk*.

In *Santa Clara*, plaintiffs challenged the Corps' "no effect determination" where its proposed project would, during storms, discharge materials containing dissolved copper into the Santa Clara River. 887 F.3d at 923. The Court affirmed because it was undisputed that the concentration of discharged dissolved copper would be *well-below* background levels *already* in the river and thus would not increase fish exposure. *Id.* at 924; *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 2015 WL 12659937, at *14-16 (C.D. Cal. June 30,

[1] Respondents' protestation Petitioners previously ignored *Santa Clara* is false. ECF 120 at 17 n.12 & 29; ECF 165-1.

2015) (district court explaining the discharges actually *lower* risk by diluting copper concentration).

Nothing indicates EPA's Enlist Duo approval would somehow *decrease* 2,4-D exposures for endangered species. The opposite: it is undisputed that the approval will massively *increase* 2,4-D between 200-600 percent. ER353, ER414, ER443. Nor does anything in *Santa Clara* authorize an agency to find "no effect" using unilaterally-determined risk thresholds designed only to measure adverse effects. ECF 175 at 10-16.

Overall, Respondents raised *no new case* that was not previously raised and shown to be inapposite or supportive of Petitioners. *See* ECF 120 at 28-32. No case—let alone "numerous cases"—has ever approved of EPA's RQ/LOC approach to "no effect," because it is unlawful.

D. The "No Effect" Determinations Are Arbitrary.

EPA offers no rebuttal to Petitioners' arguments about EPA's purported "no effect" determinations, and the record evidence that they are actually "not likely to adversely affect" determinations requiring consultation and expert concurrence. ECF 175 at 10-16.

Instead EPA (at 40, 43) repeats that Petitioners must show harm to endangered species to trigger "may affect," but in multiple briefing rounds has been unable to cite a single case in support. *Karuk*, 681 F.3d at 1028 (proof of harm unnecessary for procedural violation of Section 7). Petitioners, or this Court, are not required to make the very analysis that the expert agencies should have been allowed to make in the first instance. *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985) ("It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.").

Nor does EPA explain how the RQ/LOC approach accounts for potential *indirect* pesticide effects beyond mortality and chronic harm, like effects to species' behaviors or needs. ECF 175 at 14-15. EPA (at 50) objects to a NMFS biological opinion finding harm from pesticides to listed salmon, overturning EPA "no effect" determinations, but this Court "may consider evidence outside of the administrative record" in reviewing ESA claims. *Kraayenbrink*, 632 F.3d at 497. That example illustrates the real-world harms and routes left unexamined under EPA's unilateral approach. *Washington Toxics Coal. v. U.S. Dep't of*

Interior, 457 F. Supp. 2d 1158, 1184 (W.D. Wash. 2006) ("risk framework of FIFRA … does not equate to the survival and recovery framework of the ESA.").

Dow (at 20) notes that the listed animal species' LOCs are lower than for non-listed species, but an arbitrarily lowered LOC is still not "no effect." ER2529 (LOCs part of EPA's "interpretative policy"); ER18; ECF 175 at 11-13. EPA is still unilaterally setting "thresholds" of harm and mortality, not consulting for "any possible effect." ECF 175 at 12 & n.10 (listing examples for the few species for which EPA did any species-specific assessment). Dow also ignores that EPA applied the *same* LOC of 1.0 for ESA-listed and non-listed plants, and for chronic effects to all listed and non-listed animal taxa,[2] which makes no sense given ESA-listed species' precariousness.

E. The "Fields-Only" Action Area Violated the ESA.

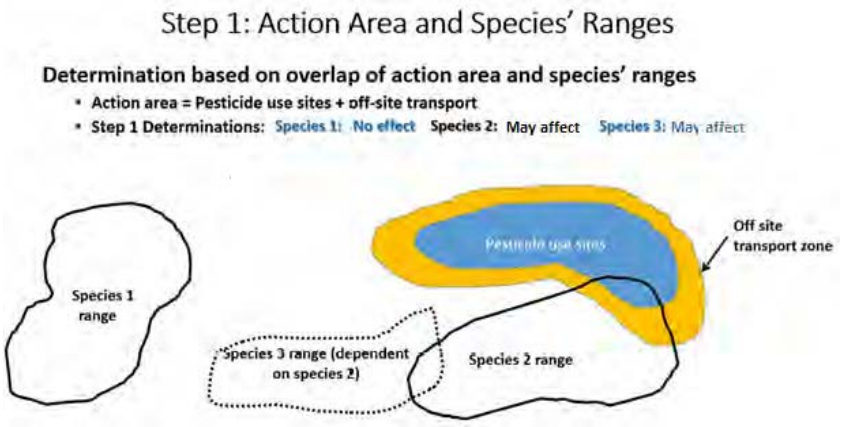
For hundreds of potentially affected species (all but 23 of the 531 EPA originally declared in the action area), EPA did *no* species-specific assessment, relying solely on chopping down its action area to just the

[2] ER2105-06 (LOC table for all species lists an identical chronic LOC of 1 for all listed and non-listed birds, mammals, and aquatic animals).

crops fields, despite admitting that some Enlist Duo *will leave* the fields due to runoff, drift, and other means. ECF 175 at 16-20.[3] EPA attempts no rebuttal to Petitioners' action area arguments. *See* ECF 192.

Contrary to Dow's view, an action area's scope must be "*all areas* to be affected directly or indirectly," 50 C.F.R. § 402.02(d) (emphasis added), not just the narrower parts EPA determines will be affected by Enlist drift at levels that EPA decides are "of concern." The expert agencies' definition is unambiguous: it *cannot* be "merely the immediate area" of the action, *id.*, which is precisely what EPA constricted it to be here: the crop fields alone, without the surrounding areas undisputedly subject to drift.

EPA itself has explained this:



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[3] EPA did the same for *nearly 200* designated critical habitats, applying a similarly unlawful standard. ECF 64-1 at 49-56.

Dow (at 21) seeks deference for EPA's interpretation, but it is not EPA's regulation to interpret. *Supra* p.1. EPA might have discretion in calculating how far a pesticide spreads (so long as supported by the record), but it may not assume it knows what impacts those acknowledged exposures might cause to ESA-protected species or habitat. *Bennett v. Spear*, 520 U.S. 154, 169 (1997) ("species and habitat investigations [under the ESA]" are not "within the action agency's expertise").[5]

Dow (at 22-23) tries to twist *Karuk*'s mitigation holding, but it speaks for itself: an agency's "attempt to reduce a possible adverse impact" is telling evidence that the action "may affect" species, requiring some consultation and concurrence, if the expert agency agrees with the mitigation's efficacy. 681 F.3d at 1028; *Swan View Coalition v. Weber*, 52 F. Supp. 3d 1133, 1145-46 (D. Mont. 2014) ("no

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[4] EPA, *Overview of the Draft Biological Evaluations (BEs) for the ESA Pilot Chemicals (Chlorpyrifos, Malathion, and Diazinon)* 14 (May 5, 2016), https://www.epa.gov/sites/production/files/2016-05/documents/public_webinar_overview_of_the_draft_bes_final.pdf.

[5] Dow cites *Friends of Wild Swan v. Weber*, but the Forest Service *did* informally consult. 767 F.3d 936, 950 (9th Cir. 2014).

effect" on endangered plant arbitrary and capricious because predicated on buffer mitigation) (applying *Karuk*).

F. Respondents' "Doomsday" Arguments Fail.

Respondents claim applying the proper consultation standard to pesticides would "grind" government to a halt (Dow at 23) but EPA has for numerous pesticides and the sky has not fallen. ECF 175 at 7. Legally *Karuk* rejected this exact argument. *Karuk* (ECF 36 at 38-39) (consultation would "virtually paralyze forest management"); *Karuk*, 681 F.3d at 1029 (explaining that "[t]he burden imposed by the consultation requirement need not be great" and "informal consultation need be nothing more than discussions and correspondence with the appropriate wildlife agency").[6]

Nor would applying the process endorsed by the National Academy of Sciences' (Academy), ECF 175 at 6, somehow "obliterate" (EPA at 44) EPA's ability to make a valid "no effect" determination. It just means once the "may affect" threshold is reached, EPA must

[6] EPA informally consulted for only one species (eskimo curlew); FWS concurred, showing consultation need not be burdensome, but notably did so *not* because Enlist Duo exposures would not be harmful, because the bird is presumed already extinct. SER432-434.

continue its process "in conjunction with and with the assistance of" the expert agency, as Congress intended. 16 U.S.C. § 1536(a)(2).

G. EPA Violated the ESA's Best Science Mandate.

EPA violated several fundamental consultation standards, *see supra/infra*, whether or not the Academy issued a seminal report on this topic; the Academy's report simply provides support and more context to those violations (and underscores why action agencies receive no deference).

But the report provides another independent ESA violation: EPA may not always have to follow the Academy, but it does have to comply with Section 7's best available science mandate, 7 U.S.C. § 1536(a)(2), and EPA violated it when it failed to apply the Academy's scientific recommendations rejecting its RQ/LOC approach. ECF 175 at 21-24.

EPA points to report pages mentioning concepts utilized in EPA's RQ/LOC approach, but after analyzing the usefulness and limitations of EPA's exposure modeling approach, the Academy rejected it: not only was it not the "best" science, it was not even "*defensible*" science. SBER034.

Nor did the Academy "cabin" (EPA at 48) its recommendations: while acknowledging there may be implementation "administrative and nonscientific hurdles," the next clause (omitted by EPA) concludes the scientifically sound approach "is *possible and necessary* to provide realistic, objective estimates of risk." *Id.* (emphasis added).

EPA offers no scientific explanation for sticking with its outdated approach, relying instead on the 2014 Interim Report (EPA at 41 n.21) where EPA restated its policy decision not to implement all aspects of the Academy's recommendations to all registrations immediately. But that same report explained: "[t]he expectation is that [the approach] can be incorporated into the risk assessment process on a 'day forward approach.'" 2014 Interim Report at 9. EPA's failure to explain why it still failed to implement the *2013* Academy's recommendations in *2017*—a many "day[s] forward" registration—is arbitrary and capricious. ECF 175 at 23. Nor does that report establish FWS "espoused" (EPA at 49) EPA's current position; it only states that "EPA intends" to ignore the Academy approach in favor of the outdated 2004 Overview for herbicide-tolerant crop uses. 2014 Interim Report at 22.

Dow (at 25) theorizes a spurious separation between "data" and "methodologies," but different methodologies produce different data and the Academy recommended generation of probabilistic data on species outcomes, rather than EPA's risk quotient (RQ) data and arbitrary LOCs. RQ values *are data* points, ratios of two numbers. ER71; SBER034 ("RQs are not scientifically defensible for assessing risks" to endangered species from pesticides; decisions should instead be based on the "probabilities of various possible outcomes"). EPA itself told Congress the Academy's charge was "to answer questions concerning the identification of the *best scientific data*" and methods for generating it. 2014 Interim Report at 4 (emphasis added).[7]

[7] Respondents cite *Santa Clara* (EPA at 42), which affirmed the Corps' decision relying on data specific to the Santa Clara River and on the steelhead trout, the species at issue, rather than data relating to municipal water and on salmon. 887 F.3d at 924-25. The Court explained that the ESA's best science requirement "'prohibits [an action agency] from disregarding available scientific evidence that is in some way better than the evidence it relies on.'" *Id.* at 924 (quoting *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). That is exactly what EPA did here.

H. EPA Failed to Consult on the Full Enlist Duo Formula.

Respondents (EPA at 51-56; Dow at 23-25) are wrong regarding whether EPA must consult on the whole formula. Petitioners have not waived this argument: it was raised in their opening supplemental brief (ECF 175 at 20-21) and Respondents had the opportunity to—and did—respond, and make no claims of prejudice. *United States v. Graves*, 925 F.3d 1036, 1039 (9th Cir. 2019) (court may consider issues that have been fully explored if respondent is not prejudiced). Petitioners also directly raised the issue in comments to EPA. ER421-24; ER439-42; ER1565-66; ER1724. Nor does this Court's order (ECF 166 at 8) expressly limit supplemental briefing to arguments already made, contrary to EPA's "interpretation."

Further, Petitioners have standing to assert the claim. Petitioners' members specifically refer to "Enlist Duo" and the risk this *whole* pesticide poses to ESA-listed species. Buse Decl. ¶¶ 1, 3, 12, 16-17; Crouch Decl. ¶ 12; Limberg Decl. ¶¶ 11, 18-20; Suckling Decl. ¶¶ 6-14. Nor has one petitioner already litigated this issue; contrary to EPA's misleading statements, no court-ordered settlement exists requiring

EPA to consult on glyphosate.[8] EPA's "intention" to do so does not obviate the need for a Court order requiring consultation. *Wash.Toxics Coal. v. EPA,* 2002 WL 34213031, at *9 (W.D. Wash. July 2, 2002) (EPA's "mere pledge to comply" with proposed consultation schedule did not moot plaintiff's Section 7 claim). Enlist Duo is the cause of Petitioners' harms, and a Court order to consult on the full Enlist Duo pesticide will redress them.

Indeed, EPA has *never* consulted on glyphosate, the most commonly used pesticide: all the more reason EPA needed to ensure that Enlist Duo—and *all* its combined ingredients—was fully evaluated to prevent jeopardy to imperiled species before its approval.

Independent of whether EPA complied with FIFRA as to the scope of its registration (NFFC agrees with NRDC that it did not), the ESA has different standards. Congress intended "agency action" to have a broad ESA definition, *Karuk*, 681 F.3d at 1020, and EPA must consult on the "*entire* agency action," *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). EPA's approval of Enlist *Duo* is the action here: EPA's

[8] Proposed Stipulated Partial Settlement Agreement, https://www.regulations.gov/document?D=EPA-HQ-OGC-2019-0478-0002.

segregation of one active ingredient from the "Duo" formula is illogical and illegal under the ESA.

II. THE REGISTRATION VIOLATED FIFRA.

Respondents strain to turn EPA's FIFRA violations into "technical" matters warranting deference, but they are straightforward legal violations warranting vacatur. ECF 175 at 24-31.

A. The Volatility Assessment Violated EPA Testing Requirements.

Petitioners demonstrated how each element of EPA's flawed volatility, or vapor drift, assessment—plant harm threshold, field volatility-flux, and PERFUM modeling estimates—rendered the agency's determination unsupported by substantial evidence. ECF 66 at 59-63; ECF 120 at 36-40; ECF 175 at 24-27. Unable to rebut, Respondents ignore or misrepresent Petitioners' arguments.

Despite multiple opportunities, neither Respondent disputes the lab and field studies relied upon violated EPA's own testing guidelines. ECF 120 at 37 & 40; ECF 175 at 25-26; *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 537 (9th Cir. 2015) (Smith, J., concurring) ("EPA does not refer to either guideline in describing the tests Dow conducted for sulfoxaflor. Instead, the EPA acknowledges that the semi-field

studies submitted for Tier 2 did *not* comport with OECD guidelines.") (emphasis in original). That alone renders the decision without substantial evidence.

With regards to the harm threshold, Respondents dodge Petitioners' treatment of EPA's attempted translation of the "Ouse" study's subjective plant damage guesstimates into growth/survival endpoints, rather than collecting the do-over vapor-phase study that would have directly measured those endpoints, as demanded by EPA scientists. ECF 120 at 37-39. Petitioners *did* discuss all of the "additional studies" Respondents erroneously claim (EPA at 38) Petitioners ignored. ECF 120 at 38-39 (six non-Good Laboratory Practices (GLP) literature studies). Nor do Respondents explain EPA's eventual decision to apply a harm threshold [redacted] higher than what their own scientists recommended. ECF 175 at 25-26.

Dow fails to address how its field study provides substantial evidence, when it failed to use label rates, an EPA testing standards violation. ECF 175 at 26; SER463 (EPA-identified deficiencies). Neither Respondent explains why they did not model 2,4-D vapor drift average-size cotton, corn, or soybean farms (1,090, 600, and 490 acres,

respectively). ECF 175 at 26-27 & n.22. Nor do they dispute that their modeling—whether Dow's 40-acre or EPA's putative 80-acre fields (EPA at n.18)—thus still greatly underestimated real-world off-field vapor concentrations.

And it does: EPA acknowledges PERFUM-modeled buffer zones increase with field size, ECF 175 at 26 n.21, which is true for PERFUM modeling of any pesticide. SBFER010 (major factors influencing buffer distances are flux rate, meteorological conditions, and "the size of the field"), SBFER77 ("buffer zones were higher with larger field sizes"). Hence 2,4-D vapor from an average 1,090 Enlist cotton farm will drift many times farther than PERFUM estimates for 40 or 80 acres, just as buffer distances increase roughly ten-fold for 40 vs. 1 acre fields. SBFER78-79. EPA's modeling did not simulate anything approaching real farming conditions and thus EPA has "no real idea" how far Enlist vapor drift moves off fields. *Pollinator Stewardship*, 806 F.3d at 532.

B. FIFRA Requires EPA to Support Its Label's Efficacy with Substantial Evidence, Including Tank Mix Provisions.

Unable to explain the inconsistent way the agency treated spray drift risks from tank mixing and synergy risks from tank mixing, EPA instead disavows (at 39) *any* legal requirement to account for tank mix

risks. Its (new) argument is belied by the statutory text, as well as its own actions.

Because EPA included tank mixing as part of Enlist Duo's label, it hinged its "no unreasonable adverse effects" determination on its supporting the adequacy of all those label measures with substantial evidence. 7 U.S.C. § 136a(c)(5)(B) (analyzing whether the registration complies with the standard, taking into account uses and use registrations set forth by the label). ER100 (Label: "DO NOT TANK-MIX ANY PRODUCT WITH Enlist Duo unless..."); ER30-36 (registration use restrictions) ER32 (tank mixing restrictions). EPA could no more fail to support the tank mixing provisions than it could fail to support with substantial evidence the efficacy of other mitigation/directions for use provisions. ER100-113.

Respondents misleadingly imply that, because a particular pesticide is not *currently* listed on Enlist Duo's tank mix website, it never will be, or will be addressed separately in the future. But tank mix products are continuously approved and added.[9] No future

[9] https://www.enlist.com/en/approved-tank-mixes/enlist-duo.html (listing approved mixtures, updated as of 11/7/2019).

oversight is required, so long as the registrant complies with the registration's tank mixing instructions, ER32,[10] which cover spray drift risks, but *not* synergistic risks, which, as Petitioners have explained, are different. ECF 175 at 28; ECF 120 at 44. The result: the registration approves future tank mixing of Enlist Duo with other pesticides, without any measures to ascertain or address potential synergistic effects before they are allowed.

Finally, Respondents claim it "irrelevant" that a major Enlist Duo selling point is its use with a third pesticide, glufosinate, but it is highly probative record evidence of intended future use of the tank mix, a cocktail which has known synergistic risks, yet EPA still failed to account for it. ECF 175 at 28-29. EPA's decision must be supported by substantial evidence in light of the *whole* record, 7 U.S.C. § 136n(b), and it is not.

[10] *Id.* (listed products "tested as required by [Enlist Duo Registration conditions] and found not to adversely affect the *spray drift* properties of Enlist Duo herbicide.") (emphasis added).

III. THE COURT SHOULD VACATE THE REGISTRATION.

Respondents have failed to meet their burden to show this is one of the rare circumstances equity demands remand without vacatur rather than the default remedy. ECF 175 at 31-36.

Neither Respondent addresses the first half of the remand without vacatur inquiry—the seriousness of the agency's violations—which must be weighed against any disruptive consequences. *Pollinator Stewardship*, 806 F.3d at 532; ECF 175 at 31-32 (explaining the seriousness of ESA and FIFRA violations and how this prong weighs strongly in favor of vacatur). Respondents thus have failed to carry their burden regarding this prong.

As to the disruptive consequences factor, Respondents offer only hyperbole of alleged "enormous" agricultural disruption. EPA (at 57) passes the evidentiary buck. ("As Dow will illustrate …."). Yet Dow (at 28) also offers no *actual evidence*, passing in turn to conclusory previous amici statements. ("As explained by amici …."). The evidence is sharply contrary: Enlist Duo has *not* been widely adopted, ER30, and growers have many viable alternatives, ECF 120 at 46 & n.27.

EPA declines to address the environmental consequences from vacatur, despite it being where this Court has focused this prong in environmental cases. *Pollinator Stewardship,* 806 F.3d at 532 (mooring decision to whether "[leaving] in place an agency action risks more environmental harm than vacating it"); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018) (same). Dow (at 29) does address environmental consequences, but in a manner that ironically *supports* vacatur: admitting Enlist Duo does not reduce the amount of glyphosate or *any other* herbicide being used, and making no effort to rebut the government findings that Enlist Duo will increase the 2,4-D in agriculture 200-600 percent. ER353; ER414; ER443. Nor does Dow offer any evidence to rebut Petitioners' showing that farmers have other less toxic, EPA-classified "reduced risk" options. ECF 120 at 46 & n.27.

EPA mistakes vacatur for an "injunction" (at 58), arguing Petitioners have a burden to show EPA will not re-register Enlist Duo or what new protective conditions must be put in place if it does. But the remedies are very different, including which party has the burden (Respondents), and it is not Petitioners' job (or the Court's) to do the

risk analysis the expert agencies must be given the chance to undertake during consultation. Regardless, any future registration would necessarily be very different in order to address EPA's legal violations, including: applying a lawful registration standard, supported by substantial evidence; and ESA consultation and use limits to protect ESA-species. Even more so than in *Pollinator Stewardship*, after vacatur "a different result *may* be reached," 806 F.3d at 532 (emphasis added). Nothing more is required.

Finally, EPA feebly attempts to distinguish *Pollinator Stewardship*, but this case is that one on steroids: there, only one "precarious" but not (yet) endangered type of insect (bees) were potentially at risk, and only one particular type of key study was missing. *Id.* at 526, 530 (discussing the missing studies on brood development and long-term colony health). Here, *hundreds* of *already endangered* species are at similar risk, EPA has failed to consult the expert agencies for *all* of those species, and *many* risks are left unanalyzed due to the failure to consult.

CONCLUSION

For these reasons Petitioners respectfully request the Court vacate the registration.

DATED: December 9, 2019.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has typeface of 14 points or more and contains 5000 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: December 9, 2019.

s/ George A. Kimbrell
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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