

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NATIONAL FAMILY FARM)
COALITION, <i>et al.</i> ,)
)
<i>Petitioners,</i>)
)
v.	Case No. 17-70810)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, <i>et al.</i> ,)
)
<i>Respondents,</i>)
)
DOW AGROSCIENCES, LLC,)
)
<i>Intervenor.</i>)
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)
NATURAL RESOURCES DEFENSE)
COUNCIL, INC.,)
)
<i>Petitioner,</i>)
)
v.	Case No. 17-70817)
)
SCOTT PRUITT, <i>et al.</i> ,)
)
<i>Respondents,</i>)
)
DOW AGROSCIENCES, LLC,)
)
<i>Intervenor.</i>)
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RESPONDENTS' RESPONSE TO INTERVENOR'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondents United States Environmental Protection Agency and Scott Pruitt, in his official capacity as Administrator (collectively "Respondents" or "EPA"), respectfully submit the following response to Intervenor Dow AgroSciences LLC's ("Dow") "Motion to Dismiss for Lack of Jurisdiction" based on Dow's interpretation of 40 CFR § 23.6. Dkt. 16-1. EPA takes no position on Dow's "Motion to Dismiss in Part or, In the Alternative, to Transfer In Part and Trigger Lottery." Dkt. 15-1.

1. Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136n(b), states that a petition for review by a court of appeals of an order issued following a public hearing, such as the Order at issue here, must be filed "within 60 days after the *entry* of such order" (emphasis added).

2. 40 C.F.R. § 23.6 states:

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of *entry* of an order issued by the Administrator following a public hearing *for purposes of section 16(b) [of FIFRA]* shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after it is *signed*.

(emphasis added).

3. The Order that is the subject of the Petitions for Review in this matter is the Notice of Registration for the Pesticide Product “Enlist Duo,” Document ID Number EPA-HQ-OPP-2016-0594-0661, available at www.regulations.gov. That Order was signed on January 12, 2017, and indicates a “Date of Issuance” of “1/12/2017.”

4. EPA has interpreted 40 C.F.R. § 23.6 to mean that a pesticide registration issued under section 3 of FIFRA, 7 U.S.C. § 136a, following a public hearing, such as the “Enlist Duo” registration, is effective for purposes of section 3 of FIFRA upon signature so that, for example, activities permitted by the registration, such as distribution or sale of the pesticide, may commence. However, the registration Order is “entered” for purposes of judicial review under section 16(b) of FIFRA two weeks after the date that it is signed per 40 C.F.R. § 23.6.

5. EPA has so interpreted 40 CFR § 23.6 on at least two prior occasions.

6. First, some of the same Petitioners who have filed the present Petitions for Review challenged a prior registration of Enlist Duo that was voluntarily remanded to EPA. *See Natural Resources Defense Council, Inc., et al., v. EPA*, (Case No. 14-73353, consolidated with 14-73359, 15-71207, and 15-71213) (9th Cir.) (“*Enlist Duo I*”). There, the Petitioners initially filed their

Petitions for Review *before* the date that was two weeks after the Order was signed. EPA counsel orally informed the Petitioners that their Petitions for Review were premature under 40 C.F.R. § 23.6, whereupon Petitioners withdrew their premature Petitions and re-filed after the date that was two weeks after the Order was signed. *See, e.g.*, Case No. 14-73359, Dkt. 1-1. The *Enlist Duo I* Order was the same form as the Order in the present matter; it was a Notice of Registration that was signed on October 15, 2014, and indicated a “Date of Issuance” of “10/15/2014.” *See* Document ID Number EPA-HQ-OPP-2014-0195-2416, available at www.regulations.gov. EPA took the position that the Order was effective for purposes of section 3 of FIFRA on October 15, 2014, but that it was s “entered” for purposes of judicial review under section 16(b) of FIFRA on October 29, 2014, per 40 C.F.R. § 23.6.

7. Second, in another case currently before this Court involving a different pesticide and some of the same Petitioners, *National Family Farm Coalition, et al., v. EPA, et al.* (Case No. 17-70196 (9th Cir.)), the Order issuing the registration was signed on November 9, 2016, and the Petition for Review was filed on January 20, 2017 (72 days after the Order was signed). This Court issued an Order to Show Cause why the Petition for Review was timely, and Petitioners responded by citing 40 C.F.R. § 23.6 and stating, in part, that “pursuant to 40

C.F.R. § 23.6, EPA’s decision was *final* as of 1:00 PM eastern time on November 23, 2016,” and that “counsel for Respondent EPA . . . concurs with Petitioners’ interpretation” Case No. 17-70196, Dkt. 12-1 (emphasis added). This Court discharged the Order to Show Cause, stating “petitioners provided the relevant statutory and regulatory provisions governing the calculation of time for judicial review, showing the petition for review was timely filed. *See* 7 U.S.C. § 136n(b), 40 C.F.R § 23.6.” Case No. 17-70196, Dkt. 23. Although EPA agrees that the Order was *entered for purposes of judicial review* on November 23, 2016, and that the Petition for Review was thus timely, it is EPA’s position that the registration was “*final*” *for purposes of section 3 of FIFRA* on the date that it was signed – November 9, 2016.

Respectfully submitted,

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DATED: May 23, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 23, 2017, a true and correct copy of the foregoing was served on counsel of record via email and the Court's CM/ECF system.

/s/ Michele L. Walter
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