

[ORAL ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

Respondent,

and

DOW AGROSCIENCES LLC,

Intervenor-Respondent.

No. 14-73353

CENTER FOR FOOD SAFETY, *et al.*,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Respondents,

and

DOW AGROSCIENCES LLC,

Intervenor-Respondent.

No. 14-73359

**PETITIONERS CENTER FOR FOOD SAFETY ET AL.'S
MOTION TO AMEND PETITION FOR REVIEW**

INTRODUCTION

Petitioners Center for Food Safety, National Family Farm Coalition, Pesticide Action Network North America, Beyond Pesticides, Environmental Working Group and Center for Biological Diversity (collectively Petitioners) hereby move to amend their Petition for Review in this case to include Respondent United States Environmental Protection Agency (EPA)'s March 31, 2015 decision to amend the agency's prior registration of the herbicide Enlist Duo—the registration challenged in Petitioners' original Petition for Review, ECF No. 1-2—to allow use of the herbicide in nine additional states (the Amended Approval). EPA's Amended Approval is attached hereto as Exhibit A; Petitioners' proposed Amended Petition for Review is attached hereto as Exhibit B.

The present case seeks judicial review of EPA's registration and approval of Enlist Duo, a new pesticide product containing the active ingredients 2,4-Dichlorophenoxyacetic acid (2,4-D) and glyphosate, produced by Intervenor-Respondent Dow, for use on Dow's genetically engineered 2,4-D- and glyphosate-resistant crops. EPA had announced its approval of the Enlist Duo product registration on October 15, 2014; the initial approval authorized the use of the herbicide in six Midwestern states¹ (the Original Approval). Concurrent with the Original Approval, EPA published for public comment an addendum

¹ EPA's October 15, 2014 initial registration approved the use of Enlist Duo in Illinois, Indiana, Iowa, Ohio, South Dakota, and Wisconsin.

assessment, proposing the use of Enlist Duo in ten additional states: Arkansas, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, Oklahoma, North Dakota, and Tennessee. EPA's Original Approval became final for purposes of judicial review on October 29, 2014. Petitioners timely filed the Petition for Review of that decision on October 30, 2014, alleging violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, and Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536.

On March 31, 2015, EPA granted the Amended Approval, extending the use of Enlist Duo on Dow's genetically engineered 2,4-D- and glyphosate-resistant crops in nine additional states.² In its decision, EPA specifically referred to the additional use approval of Enlist Duo as an amendment to the Original Approval. Ex. A, at 1 (“[EPA] is granting an amendment to the registration for Enlist DuoTM . . .”). EPA's latest amendment will expand the combined use of Enlist Duo to nine additional states, which EPA admitted may expose the herbicide to 167 listed threatened and endangered species with habitat in those states. Ex. A, at 2-3.

Petitioners hereby move to amend the Petition for Review to include EPA's Amended Approval. The present motion is proper because the challenged agency

² EPA amended the Enlist Duo registration to approve its use in nine additional states: Arkansas, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, Oklahoma, and North Dakota. EPA did not approve Enlist Duo for use in Tennessee.

actions are one and the same; the only difference is that EPA's March 31, 2015 action expanded the geographic scope of the Enlist Duo registration. Amendment of the Petition for Review is in the interest of judicial economy because EPA relied on "only one new evaluation" for its Amended Approval, and otherwise relied on the same rationale provided in its Original Approval, as well as virtually the same administrative record. *See* Ex. A, at 1. Finally, amendment is also appropriate under this Circuit's standards for an analogous motion to amend a complaint. Amending the Petition for Review will allow the Court and the parties to address the Original and Amended Approvals in one action, and will facilitate the timely and efficient resolution of these interrelated approvals.

I. EPA'S DECISION TO AMEND THE ENLIST DUO LABEL TO INCLUDE NINE ADDITIONAL STATES IS THE SAME ORDER AS THE ORIGINAL APPROVAL FOR PURPOSES OF REVIEW

Although Petitioners know of no explicit standard for determining a motion to amend a petition for review in this Circuit, the First Circuit's decision in *BASF Wyandotte Corp. v. Costle*, 582 F.2d 108 (1st Cir. 1978), supports amendment here. That court granted a petitioner's motion to amend its petition for review of an EPA 1976 interim regulation to include EPA's subsequent 1978 final regulation that arose out of the 1976 interim regulations. *Id.* at 108-09. The First Circuit held that when two orders arise from the "same or interrelated proceedings," they "should be considered the same order." *Id.* at 112.

BASF Wyandotte involved a challenge to EPA’s regulations setting effluent limitation guidelines for the pesticide industry. After EPA promulgated interim regulations in 1976, petitioner BASF filed a petition for review challenging the regulations. *Id.* at 110. Subsequently, in 1978, EPA published final regulations. *Id.* at 110. One day before EPA published the final regulations, Dow Chemical filed a petition for review challenging the final regulations in the Fifth Circuit. *Id.* Subsequently, petitioner BASF moved amend their prior petition for review to include the 1978 final regulations as well as the earlier interim regulations. *Id.* The First Circuit recognized that if it were to grant BASF’s motion to amend its petition, the amendment would date back to the time of the original filing and for purposes of 28 U.S.C. § 2112(a), and be heard in the First Circuit, the forum in which BASF originally filed its petition. *Id.*

In granting petitioner BASF’s motion to amend the petition to include the challenge to the subsequently published final regulations, the First Circuit considered “whether, for the purposes of 28 U.S.C. § 2112(a) the interim regulations and the final ones [were] ‘the same order.’” *Id.* at 110. The First Circuit agreed with the District of Columbia Circuit’s holding that “sequential regulations should be considered the same order if they arise from the ‘same or interrelated proceedings’” *Id.* at 112 (*quoting Pub. Serv. Comm’n for N.Y. v. Fed. Power Comm’n*, 472 F.2d 1270, 1272 (D.C. Cir. 1972)). Thus, the First

Circuit held that because the 1976 and 1978 regulations arose from the same administrative proceedings, they were the same order under 28 U.S.C. § 2112(a), and should be reviewed as part of the same petition for review. *Id.*

Here, EPA's Amended Approval similarly arises out of the "same or interrelated proceedings" as the Original Approval, and warrants amendment of the scope of review in this case. By EPA's own admission, the March 31, 2015 decision to approve the use of Enlist Duo in nine additional states is "an amendment" of the original Enlist Duo registration that Petitioners have already challenged. In issuing the Amended Approval, the agency relied on all assessments issued with the Original Approval, and prepared "only one new evaluation,"³ regarding risk to threatened and endangered species found in the additional states. Ex. A, at 1. Moreover, EPA did not solicit comments outside the scope of that one new evaluation. *Id.*, at 4. In short, the Amended Approval could not have occurred but for the Original Approval. The Court should consider the Original and Amended Approvals as the same order for purposes of judicial review, and grant Petitioners' Motion to Amend the Petition for Review.

³ EPA, *Addendum to 2,4-D Choline Salt Section 3 Risk assessment: Refined Endangered Species Assessment for Proposed New Uses on Herbicide-Tolerant Corn and Soybean for AR, KS, LA, MN, MS, MO, NE, ND, OK, TN* (Sept. 26, 2014) (attached hereto as Exhibit C).

II. JUDICIAL CONSIDERATIONS FOR AMENDING A COMPLAINT SUPPORT ALLOWING AMENDMENT OF PETITION HERE.

The standard for granting an analogous motion for leave to amend a complaint similarly supports granting this motion. Courts typically examine five factors when deciding whether leave to amend a complaint should be granted: undue delay, bad faith, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Petitioners have not previously moved to amend their Petition for Review, and none of the factors against amendment exist here.

First, Petitioners did not unduly delay in moving to amend the Petition for Review. EPA's Amended Approval became final for purposes of review on April 14, 2015, and now Petitioners move to amend the petition on April 20, 2015.

Second, there is no evidence of bad faith in Petitioners' proposed amendment. Courts interpret bad faith to mean tactics such as obligating opposing parties to respond to novel legal theories with little practical benefit to the plaintiff. *Cf. Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001) (plaintiff had history of dilatory tactics and proposed amendment had "doubtful value"); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1981). Here, Petitioners add no novel legal theories; rather they only amend this petition for review to include the entirety of EPA's approval, including

both the original Enlist Duo registration and the subsequent registration amendment.

Third, the proposed amendment will not result in substantial prejudice. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (holding that “[p]rejudice is the ‘touchstone of the inquiry under Rule 15(a)’” and carries the “greatest weight” in determining whether leave to amend should be granted) (citation omitted). EPA has yet to even produce the administrative record that would underlie this Court’s review of the Original Approval. As mentioned above, the Amended Petition for Review adds only EPA’s amendment extending use to additional states, which relied on all the same assessments on which EPA based the Original Approval, with just one additional assessment regarding impacts on additional federally listed species that may be affected if Enlist Duo were approved for use in the additional states. Petitioners bring no new claims, and amendment will not prejudice Respondents. *See Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 531 (N.D. Cal. 1989) (“prejudice” from need for additional discovery, delay in getting to trial, or added expense of responding to amended pleadings is normally not sufficient, alone, to deny leave to amend).

Finally, Petitioners’ proposed amendment is not futile. “[A] proposed amendment is *futile* only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.” *Miller*

v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (emphasis added).

Petitioners' proposed amendment is not futile where, as here, the additional claims have a likelihood of success on the merits. This proposed amendment is substantially similar to Petitioners' original Petition for Review, expanded only to apply to EPA's failure to consult the U.S. Fish and Wildlife Service regarding impacts to endangered species in the additional states, in addition to those in the original six states.

CONCLUSION

EPA's Amended Approval only amended the original registration of Enlist Duo to add nine additional approved states. The Amended Approval authorizing Enlist Duo for use in nine additional states is based on virtually the same administrative record, and is therefore the same order for purposes of judicial review.

For the foregoing reasons, Petitioners respectfully request the Court grant their motion to file the concurrently submitted Amended Petition for Review.

Respectfully submitted this 20th day of April, 2015.

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