

1 George A. Kimbrell (WSB 36050) (*Pro Hac Vice*)
2 Sylvia Shih-Yau Wu (CSB 273549) (*Pro Hac Vice*)
3 Meredith Stevenson (CSB 328712) (*Pro Hac Vice*)
4 Center for Food Safety
5 303 Sacramento Street, 2nd Floor
6 San Francisco, CA 94111
7 T: (415) 826-2770 / F: (415) 826-0507
8 Emails: gkimbrell@centerforfoodsafety.org
9 swu@centerforfoodsafety.org
10 mstevenson@centerforfoodsafety.org

11 Stephanie M. Parent (OSB 925908) (*Pro Hac Vice*)
12 Center for Biological Diversity
13 PO Box 11374
14 Portland, OR 97211
15 T: (971) 717-6404
16 Email: sparent@biologicaldiversity.org

17 *Counsel for Plaintiffs*

18 **THE UNITED STATES DISTRICT COURT**
19 **OF ARIZONA**

20 Center for Biological Diversity, et) Case No. CV-20-00555-DCB
21 al.,)
22) **PLAINTIFFS' MOTION FOR**
23 *Plaintiffs,*) **LEAVE TO FILE SECOND**
24) **AMENDED AND**
25 v.) **SUPPLEMENTAL**
26) **COMPLAINT**
27 United States Environmental)
28 Protection Agency, et al.,)
29)
30 *Defendants.*)
31 and)
32)
33 Bayer Cropsciences LP, et al.,)
34)
35 *Defendant-*)
36 *Intervenors.*)

1 Pursuant to Federal Rules of Civil Procedure 15(a)(2) and 15(d), and
2 Local Rule 15.1(b), Plaintiffs National Family Farm Coalition, Center for
3 Biological Diversity, Pesticide Action Network, and Center for Food Safety
4 (Plaintiffs) move for leave to file their Second Amended and Supplemental
5 Complaint. A strike-through copy of the Second Amended Complaint is
6 attached as Exhibit E. Plaintiffs seek leave to amend and supplement the
7 First Amended Complaint to allege facts regarding EPA's additional use
8 restrictions (Registration Amendments) for over-the-top use on dicamba on
9 genetically engineered cotton and soy instituted in Minnesota and Iowa on
10 March 15, 2022.

11 Plaintiffs conferred with Defendants and Intervenors by email on June
12 6, 2022. Intervenors take no position on the motion at this time, and EPA
13 takes no position and reserves its right to file a response.

14 **BACKGROUND**

15
16 Plaintiffs filed the original Complaint in this case on December 23,
17 2020, bringing claims under the Federal Insecticide, Fungicide and
18 Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, and the Administrative
19 Procedure Act (APA), 5 U.S.C. § 701 *et seq.* challenging EPA's October 27,
20 2020 decision to approve new use registrations for three dicamba products
21 and the Notices of Registrations (collectively, the Registration Actions). *See*
22 *Compl.*, Dec. 23, 2020, ECF No. 1. On May 3, 2021, this Court granted leave
23 for Plaintiffs to file their First Amended Complaint to include claims under
24 the Endangered Species Act (ESA) after Plaintiffs gave their mandatory
25 sixty-day Notice of Intent to sue for violations of Section 7(a)(2) of the ESA.
26 *See* 16 U.S.C. § 1540(g); Order, ECF No. 24. Plaintiffs filed their First
27 Amended Complaint on May 6, 2021. *Am. Compl.*, ECF No. 26-1.

1 On March 15, 2022, EPA approved the Registration Amendments to the
2 2020 registrations for Minnesota and Iowa. The Registration Amendments
3 followed EPA's December 2021 report on widespread dicamba damage in 29
4 of 34 states during the 2021 growing season. *See* Report, ECF No. 65; Pls.'
5 Mot. Lift Stay, ECF No. 66. The Registration Amendments set earlier
6 dicamba application cut-off dates: June 20 for Iowa; June 12 for areas of
7 Minnesota that lie south of Interstate 94; and June 30 for areas of Minnesota
8 north of I-94.¹ *See* Exs. F, G, H. The Registration Amendments also
9 prohibited applications in Minnesota at air temperatures over 85 degrees
10 Fahrenheit. *Id.*

11 This Motion is made based on the same events that gave rise to the
12 original Complaint, filed on December 23, 2020. *See* ECF No. 1. In the new
13 claim, Plaintiffs allege that EPA's March 15, 2022 decision to approve the
14 Registration Amendments lacked substantial evidence in violation of FIFRA.
15 *See* Exhibit E, Proposed Second Amended Complaint, ¶¶ 463-70.

16 Plaintiffs also allege additional facts in support of the original claims
17 and the new claim, which occurred after EPA's initial 2020 registrations. For
18 example, Plaintiffs support their ESA Claim 5 with new facts from EPA's
19 December 2021 report in which EPA admitted that nearly 300 incidents
20 occurred in counties where endangered species are found. *See* Exhibit E,
21 Proposed Second Amended Complaint ¶¶ 443, 452, 457, 460. And Plaintiffs
22 support their FIFRA Claims 1 and 2 with new information that the 2020
23 registrations damaged a least a million acres. *See id.* ¶¶ 336-57.

24
25 ¹ Press Release, EPA, EPA Approves Label Amendments that Further
26 Restrict the Use of Over-the-Top Dicamba in Minnesota and Iowa (March
27 15, 2022), [https://www.epa.gov/pesticides/epa-approves-label-amendments-
further-restrict-use-over-top-dicamba-minnesota-and-iowa](https://www.epa.gov/pesticides/epa-approves-label-amendments-further-restrict-use-over-top-dicamba-minnesota-and-iowa).

1 Plaintiffs' Motion is based on the Memorandum below, and all of the
2 pleadings, filings, and records in this proceeding, all other matters of which
3 the Court may take judicial notice, and any argument or evidence that may
4 be presented to or considered by the Court prior to its ruling.

5 **MEMORANDUM IN SUPPORT OF MOTION**

6 At issue in this case is Defendants' approvals of three dicamba products
7 for new and novel spraying, months after the Ninth Circuit held that EPA's
8 substantially similar prior registration action violated FIFRA. EPA's
9 December 2021 Report confirmed that dicamba continued to cause
10 widespread damage to crops, other plants, trees, and federally listed species
11 during the 2021 growing season. Plaintiffs seek to amend and supplement to
12 challenge EPA's Registration Amendments, which fail to address the
13 widespread damage found in EPA's December 2021 Report. *See* Exhibit E,
14 Proposed Amended Complaint, ¶¶ 463-70.

15 Plaintiffs seek to amend and supplement the First Amended Complaint
16 to include EPA's Registration Amendments based on Defendants' own Report
17 regarding the effectiveness of its use restrictions to prevent damage to
18 soybeans and other specialty crops during the 2021 growing season. Among
19 other challenges, Plaintiffs allege that EPA approved the Registration
20 Amendments while failing to account for the millions of acres damages in the
21 other 27 states that experienced damage in 2021; failing to consider and
22 assess how the same use restrictions it found insufficient in its December
23 2021 Report will now prevent unreasonable adverse effects on the
24 environment in Minnesota and Iowa; failing to account for the impossibility
25 of complying with the label instructions in real world farming conditions as it
26 found in the December 2021 Report; failing to consider and assess the anti-
27 competitive, monopolistic economic impacts of defensive dicamba-resistant

1 seed adoption, as described by academics as continuing in 2021; and failing to
2 consider and assess the continuing social impacts of dicamba drift, crop
3 damage, and defensive adoption on farming communities, as described in the
4 Report. Plaintiffs further allege that EPA unlawfully approved the
5 Registration Amendments without accounting for the harms to federally
6 listed species it described in its December 2021 Report.

7 In short, the Court should allow Plaintiffs to amend and supplement
8 the First Amended Complaint in this case to include a claim, and additional
9 facts to support the claim, that the Registration Amendments are contrary to
10 FIFRA and the ESA. Leave to amend shall be freely given, no party will be
11 unduly prejudiced by granting this Motion, amendment is not sought in bad
12 faith, and it is not futile. Therefore, justice requires that this Court grant
13 Plaintiffs' motion for leave to file the Second Amended Complaint.

14 15 **STANDARD OF REVIEW**

16 Federal Rule of Civil Procedure 15(a)(2) and District of Arizona Rule
17 15.1 allow for the amendment of pleadings with leave of court, or with the
18 opposing counsel's written consent, before trial. Federal Rule of Civil
19 Procedure 15(a)(2) further provides that "[t]he court should freely give leave
20 when justice so requires." *Id.*

21 Because Rule 15(a) instructs that leave to amend pleadings should be
22 "freely" given, the standard of review is liberal. Indeed, the Ninth Circuit has
23 instructed that the rule "should be interpreted with 'extreme liberality,'" *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (quoting
24 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)), and "[a]n outright
25 refusal to grant leave to amend without a justifying reason is . . . an abuse of
26 discretion." *Smith v. Constellation Brands, Inc.*, 2018 WL 991450, at *2 (9th
27

1 Cir. Feb. 21, 2018) (quoting *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d
2 522, 532 (9th Cir. 2008) and citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
3 A district court only has discretion to deny leave to amend “due to ...
4 repeated failure to cure deficiencies by amendments previously allowed,
5 undue prejudice to the opposing party by virtue of allowance of the
6 amendment, [and] futility of amendment.” *Id.* at *2 (quoting *Zucco Partners,*
7 *LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) and *Leadsinger,*
8 *Inc.*, 512 F.3d at 532). Among these factors, “prejudice to the opposing party
9 ... carries the greatest weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316
10 F.3d 1048, 1052 (9th Cir. 2003).

11 The Court “may permit [a] party to serve a supplemental pleading
12 setting forth transactions or occurrences or events which have happened
13 since the date of the pleading sought to be supplemented.” Fed. R. Civ. P.
14 15(d). Motions to supplement a pleading are evaluated by the same standard
15 as motions to amend under Rule 15(a). *Womack v. GEO Group, Inc.*, CV–12–
16 1524–PHX–SRB (LOA), 2013 491979 *5 (D. Ariz. Feb. 8, 2013) (noting that
17 the standard for supplementing a pleading under Rule 15(d) “is the same” as
18 the standard governing amendments under Rule 15(a)) (citations omitted).
19 Claims that accrue after the date of the initial complaint are properly
20 analyzed under Rule 15(d) as supplementation of a complaint rather than
21 amendment to a complaint, although as a practical matter the analysis
22 generally yields the same result. *U. S. use of Atkins v. Reiten*, 313 F.2d 673,
23 674 (9th Cir. 1963). Rule 15(d) provides the Court with broad discretion in
24 allowing a supplemental pleading as a tool of judicial economy and
25 convenience, and its use is favored. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir.
26 1988). Allowing supplementation is consistent with the “general purpose of
27 the Rules to minimize technical obstacles to a determination of the

1 controversy on its merits.” *Reiten*, 313 F.2d at 675.

3 ARGUMENT

4 I. Plaintiffs’ Proposed Amended Complaint Will Not Unduly Prejudice 5 Defendants.

6 “The party opposing amendment bears the burden of showing
7 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.
8 1987) (citation omitted). In this case, there have been significant
9 developments since Plaintiffs filed their First Amended Complaint on May 6,
10 2021. These developments warrant an amended and supplemental complaint,
11 and Defendants will not be unduly prejudiced if the new claim against the
12 Registration Amendments and additional information is allowed at this early
13 stage in the proceedings.

14 In determining undue prejudice, a court can “consider[] whether the
15 new amended claims would greatly change the parties’ positions in the
16 action.” *Trujillo v. Ametek, Inc.*, No. 315CV01394GPCAGS, 2017 WL
17 2670748, at *4 (S.D. Cal. June 21, 2017) (citations and internal quotation
18 marks omitted). Here, that is plainly not the situation as Plaintiffs are
19 merely amending to address the insufficiency of the Registration
20 Amendments to prevent adverse impacts on the environment in accordance
21 with EPA’s December 2021 Report. There are no changes in the parties’
22 positions, nor do Plaintiffs seek to add new parties. *See Union Pac. RR Co. v.*
23 *Nev. Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991) (“Amendments seeking
24 to add claims are to be granted more freely than amendments adding
25 parties.”). Therefore, none of the existing opposing parties will be unduly
26 prejudiced by the new claim or additional factual allegations. *See also*
27 *Martell v. Trilogy, Ltd.*, 872 F.2d 322, 326 (9th Cir. 1989) (when a suit is filed

1 in federal court, “defendant knows that the whole transaction described in it
2 will be fully sifted, by amendment if need be, and the form of the action ...
3 will not be confined to their first statement” (citations omitted)).

4 Nor are Defendants unduly prejudiced to the extent that Plaintiffs seek
5 to supplement the First Amended Complaint. Plaintiffs seek to update their
6 claims to accurately reflect events that have occurred since the time of the
7 filing of the First Amended Complaint due to changed circumstances during
8 that time. Rule 15(d) “is a useful device, enabling a court to award complete
9 relief, or more nearly complete relief, in one action, and to avoid the cost,
10 delay and waste of separate actions which must be separately tried and
11 prosecuted.” *Keith*, 858 F.2d at 473 (citation omitted); *see also William Inglis*
12 *& Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1057
13 (9th Cir. 1982) (“The purpose of Rule 15(d) is to promote as complete an
14 adjudication of the dispute between the parties as possible by allowing the
15 addition of claims which arise after the initial pleadings are filed.”). Here, the
16 proposed supplementation to challenge the Registration Amendments, which
17 occurred since the First Amended Complaint, is related to the current action
18 and claims. *Keith*, 858 F.2d at 474 (“While the matters stated in a
19 supplemental complaint should have some relation to the claim set forth in
20 the original pleading, the fact that the supplemental pleading technically
21 states a new cause of action should not be a bar to its allowance, but only a
22 factor to be considered by the court in the exercise of its discretion.”) (quoting
23 3 J. Moore, *Moore’s Federal Practice* ¶ 15.16[3] (1985)). Accordingly,
24 Defendants are not unduly prejudiced by the proposed amendment or
25 supplementation of the First Amended Complaint.

1 **II. Plaintiffs’ Proposed Amended Complaint Is Not Futile.**

2 “[A] proposed amendment is futile only if no set of facts can be proved
3 under the amendment to the pleadings that would constitute a valid and
4 sufficient claim or defense.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214
5 (9th Cir. 1988). Here, Plaintiffs seek to challenge EPA’s Registration
6 Amendments as in violation of Defendants’ duties under FIFRA and the ESA.
7 Among other things, Plaintiffs allege facts that demonstrate the widespread
8 damage during the 2021 growing season and harms to federally listed
9 species. Plaintiffs also allege that EPA admitted that any further restrictions
10 would render use restrictions infeasible, yet approved stricter use restrictions
11 in the Registration Amendments months later. These facts, and others, will
12 show that Defendants violated the ESA, APA, and FIFRA. Accordingly,
13 Plaintiffs should be afforded an opportunity to address their claims on the
14 merits.

15
16 **CONCLUSION**

17 For the reasons stated above, Plaintiffs respectfully ask the Court to
18 grant their Motion for Leave to File the Second Amended and Supplemental
19 Complaint.

1 Respectfully submitted this 7th day of June 2022,
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3 s/ George Kimbrell

4 GEORGE A. KIMBRELL (*Pro Hac Vice*)
5 SYLVIA SHIH-YAU WU (*Pro Hac Vice*)
6 MEREDITH STEVENSON (*Pro Hac Vice*)
Center for Food Safety
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
T: (415) 826-2770 / F: (415) 826-0507
7 Emails: gkimbrell@centerforfoodsafety.org
8 swu@centerforfoodsafety.org
mstevenson@centerforfoodsafety.org

9
10 STEPHANIE M. PARENT (*Pro Hac Vice*)
Center for Biological Diversity
11 PO Box 11374
Portland, OR 97211
12 T: (971) 717-6404
Email: sparent@biologicaldiversity.org

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14 *Counsel for Plaintiffs*
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