

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Center for Biological Diversity, et al.,

10 Plaintiffs,

11 v.

12 United States Environmental Protection  
13 Agency, et al.,

14 Defendants.

No. CV-20-00555-TUC-DCB

**ORDER**

15 Plaintiffs, Environmental Groups, filed this action on December 23, 2020. They  
16 challenge pesticide registration actions for dicamba by Defendant, the Environmental  
17 Protection Agency (EPA), pursuant to the Federal Insecticide, Fungicide and Rodenticide  
18 Act (“FIFRA”), 7 U.S.C. § 136 et seq., for use over soybean and cotton crops in thirty-four  
19 states, including Arizona (the registration actions) and rulemaking limiting states’ ability  
20 to place local restrictions on pesticide registrations under FIFRA Section 24(c). Plaintiffs  
21 allege that the registration actions are not supported by substantial evidence in violation of  
22 FIFRA and violate FIFRA’s unconditional registration standard. The Plaintiffs allege that  
23 the EPA failed to provide notice and comment for new uses in violation of FIFRA and the  
24 APA, failed to provide notice and comment for rulemaking in violation of the APA, and  
25 failed to consult and ensure against jeopardy/adverse habitat modification in violation of  
26 the ESA.

27 On May 3, 2021, Plaintiff filed the First Amended Complaint (FAC). On May 10,  
28 2021, the Court granted unopposed motions for intervention by dicamba manufacturers,

1 the Defendant Intervenors. The EPA answered on May 24, 2021; the Intervenors answered  
 2 on June 1, 2021. The parties filed a Joint Case Management Plan, but the scheduling  
 3 conference was vacated because motions were pending raising issues of jurisdiction and  
 4 venue. In the United States District Court in the District of Columbia (D.C.), end users of  
 5 dicamba, the Farmers, filed what is essentially the flip side to this case and challenge the  
 6 registrations as being too restrictive. Also, pending in the D. C. is an appellate case which  
 7 addresses both jurisdiction and the merits. The D.C. district court case has been stayed  
 8 pending a decision from the D.C. appellate court.

9 As alleged by Plaintiffs, the 2020 dicamba registrations required notice and public  
 10 hearings, which did not occur. This resulted in the jurisdictional cloud floating over the  
 11 case because in *Nat'l Family Farm Coalition v. EPA (NFFC II)*, 960 F.3d 120, 1132 (9<sup>th</sup>  
 12 Cir. 2020), the case that invalidated the 2018 revised, dicamba-registration actions, the  
 13 Ninth Circuit Court of Appeals exercised its jurisdiction to hear the claim based on  
 14 dicamba-registration public hearings held in 2016. As this Court explained in its prior  
 15 Order, "FIFRA provides two primary avenues for judicial review of EPA's actions: 1) the  
 16 courts of appeals have 'exclusive jurisdiction to affirm or set aside' orders that EPA issues  
 17 'following a public hearing,' 7 U.S.C. § 136n(b), and 2) district courts have jurisdiction to  
 18 hear challenges of all other 'final actions' that are 'not committed to the discretion of the  
 19 Administrator by law,' *id.* § 136n(a)." (Order (Doc. 64) at 2.) "All parties agree that the  
 20 FIFRA's plain language and case law supports jurisdiction in the federal district courts due  
 21 to the lack of a public hearing. (Motion to Determine Jurisdiction (Doc. 57) at 6.)

22 However, both plaintiffs in this case and the case before the D.C. district court filed  
 23 protective proceedings in the respective appellate courts. Because the D.C. case was filed  
 24 first, "[t]he Ninth Circuit Court of Appeals transferred its case to the District of Columbia  
 25 pursuant to Multidistrict Litigation (MDL) rules." *Id.* at 3. On November 15, 2021, this  
 26 Court stayed the case to afford time for the D.C. appellate court to issue a decision, which  
 27 while not precedentially binding it might "be persuasive in its own right." The Court stayed  
 28 this proceeding without addressing the question of jurisdiction or whether transfer of this

1 case to the D.C. district court “would best serve the interests of judicial efficiency.” *Id.* The  
2 Court denied both motions without prejudice to them being reurged, pending lifting of the  
3 stay. The Court ordered the Plaintiffs to file six-month status reports.

4 Since then, the Plaintiffs voluntarily dismissed the ninth circuit appellate  
5 proceeding; the dismissal was with prejudice, removing the Plaintiffs from all proceedings  
6 in the D.C. circuit. The status reports reflect that the EPA issued a Report of Information  
7 Re: Potential Future Regulatory Action (Doc. 65) on December 22, 2021. This Court  
8 understood the report to be an “initial step” by the EPA in evaluating all of its options for  
9 addressing future dicamba-related incidents. (Order (Doc. 74) at 2.) The Plaintiffs have,  
10 with every status report, asked this Court to lift the stay and find jurisdiction exists to decide  
11 the merits of the case. Where Plaintiffs previously asserted jurisdiction might lie in the  
12 appellate courts, they now argue like all the other parties that jurisdiction sits with the  
13 district courts. Jurisdiction is a question for each court to assess for itself; it is not an issue  
14 to be agreed upon by the parties.

15 The “federal courts are courts of limited jurisdiction and may only hear cases they  
16 have been authorized to hear by the Constitution and Congress. A party cannot waive a  
17 lack of subject matter jurisdiction.” *N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 40 F.  
18 Supp. 3d 1238, 1253–54 (C.D. Cal. 2014) (citing *Bender v. Williamsport Area School*  
19 *District*, 475 U.S. 534, 541 (1986)). “For that reason, every federal [ ] court has a special  
20 obligation to ‘satisfy itself ... of its [ ] jurisdiction ...’ even though the parties are prepared  
21 to concede it.” *Id.* “Challenges to subject matter jurisdiction cannot be waived and may be  
22 raised at any point in the proceeding.” *Miguel v. Country Funding Corp.*, 309 F.3d 1161,  
23 1164 (9<sup>th</sup> Cir. 1983) (*abrogated on other grounds*). “The defense of lack of subject  
24 matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss  
25 an action whenever it appears that the court lacks jurisdiction.” *Augustine v. United*  
26 *States*, 704 F.2d 1074, 1077 (9th Cir.1983).

27 This Court finds that under the express terms of FIFRA, jurisdiction exists in the  
28 district courts, not the appellate court. In the event the D.C. courts should issue a decision

1 regarding jurisdiction that is contrary to this Court's opinion, the matter may be revisited  
2 at any time.

3 The Court turns to Plaintiffs' request to lift the stay. The record reflects that the  
4 initial step by the EPA in evaluating all of its options for addressing future dicamba-related  
5 incidents, post the December 22, 2021, Report, resulted in two amended registrations in  
6 2022 for Minnesota and Iowa. The United States District Court in the D.C. has allowed  
7 plaintiffs in that case to amend the complaint to add the two 2022 amendments. The  
8 Plaintiffs in this case ask the same. There is no objection.

9 The Plaintiffs ask the Court to lift the stay, allow the amendment for a Second  
10 Amended Complaint (SAC) to add the 2022 use restrictions for Minnesota and Iowa, and  
11 move forward with the merits of the case. The Plaintiffs allege that the 2022 registration  
12 amendments simply add to the myriad of use restrictions that makes compliance  
13 impossible. The EPA has still done nothing to address the issues identified in *NFFC II* that  
14 invalidated the dicamba registrations or the problems identified in the December 22, 2021  
15 Report. All of the deficiencies alleged in the Plaintiffs' complaint remain, such as  
16 insufficient use restrictions to limit dicamba's volatility or the alleged outright "takes" to  
17 federally protected species. (Status Report (Doc. 75)). The D.C. district court case remains  
18 stayed and the appellate case is just now being fully briefed; final briefs were scheduled to  
19 be filed at the end of September. Even if the D.C. appellate court issues a decision on the  
20 merits, it is not binding here. Plaintiffs are not a party in either D.C. proceeding, which  
21 both raise issues that are not issues here. While there is potential for conflict between the  
22 D.C. proceedings and this case because the cases are the flip sides of each other's  
23 challenges, the issues resolved in the D.C. courts will not address nor necessarily resolve  
24 the issues raised in this case, especially the ESA claims.

25 The Defendants' response that nothing has changed since the case was stayed on  
26 November 15, 2021, rings hollow because the passage of time, approximately a full year,  
27 suggests the stay should be lifted. This is not a case involving private parties, like a contract  
28 dispute, where monetary damages can cure any injury. This case is of public concern,

1 involving environmental and endangered species protections and allegations against the  
2 agency charged with protecting the public's interests that it has failed to do so.

3 Based on the record currently before it, the Court finds no reason for this case to  
4 remain stayed. "[T]he power to stay proceedings is incidental to the power inherent in every  
5 court to control the disposition of the causes on its docket with economy of time and effort  
6 for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).  
7 A court's discretionary exertion of this power must be based on a weighing of the  
8 competing interests that will be affected by the granting or refusal to grant a stay. Among  
9 these competing interests are the possible damage which may result from the granting of a  
10 stay, the hardship or inequity which a party may suffer in being required to go forward,  
11 and the orderly course of justice measured in terms of the simplifying or complicating of  
12 issues, proof, and questions of law which could be expected to result from a stay. *CMAX,*  
13 *Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). A stay  
14 may be entered for the efficiency of a court's docket or because it is the fairest course for  
15 the parties to enter a stay, pending resolution of independent proceedings which bear upon  
16 the case. *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir.  
17 1979).

18 The efficiency of the Court's docket is no longer benefited by a continued stay of  
19 this matter. The pendency of the case will now exceed one year, which is the time frame  
20 generally needed to resolve a civil case before this Court. Continuing the stay is not the  
21 fairest course for the Plaintiffs nor the public and the hardship or inequity of requiring the  
22 Defendant to go forward in this case is less now than it was before because it has  
23 necessarily compiled the administrative record and honed its arguments given the D.C.  
24 appellate case on the merits has been fully briefed. The Court's lifting of the stay does not  
25 preclude any party from filing a motion for a stay to expand on the record currently before  
26 the Court or to raise arguments that are not readily apparent and were, therefore, not  
27 considered here.

28

1 In the Ninth Circuit, it is the rare circumstances when a litigant in one case will be  
 2 compelled to stand aside while a litigant in another settles the rule of law that will define  
 3 the rights of both. *Landis*, 299 U.S. at 255. It is an abuse of discretion to stay a case  
 4 indefinitely in the absence of a pressing need, *id.*; on one hand there is “inconvenience and  
 5 costs of piecemeal review” . . . “and the danger of denying justice by delay on the other.”  
 6 *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *see also Blue Cross &*  
 7 *Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir.  
 8 2007). The courts “must guard against depriving the processes of justice of their suppleness  
 9 of adaptation to varying conditions,” which can include stays inconveniencing the  
 10 individual in cases of extraordinary public moment, if the delay is “not immoderate in  
 11 extent and not oppressive in its consequences if the public welfare or convenience will  
 12 thereby be promoted.” *Id.* at 256. Moderation and public welfare are the guiding factors. As  
 13 the record now stands, the Court finds both cut in favor of lifting the stay. There is no  
 14 requirement for district court cases in different circuits to move lock-in-step or for them to  
 15 issue conforming decisions on the merits of the cases pending before them. To the same  
 16 extent that a decision by a court in the D.C. is not precedentially binding on this Court, any  
 17 decision by this Court is not binding there, but may be persuasive in its own right.

18 **Accordingly,**

19 **IT IS ORDERED** that the STAY IS LIFTED, and this case is returned to this  
 20 Court’s active docket.

21 **IT IS FURTHER ORDERED** that the Plaintiffs’ Motion to Amend the First  
 22 Amended Complaint (Doc. 77) is GRANTED.

23 **IT IS FURTHER ORDERED** that the Plaintiffs shall have 7 days from the filing  
 24 date of this Order to file the Second Amended Complaint.

25 **IT IS FURTHER ORDERED** that within 21 days of the filing date of this Order,  
 26 the parties shall file the joint motion for a protective order.

27 **IT IS FURTHER ORDERED** that within 30 days of the entry of the Protective  
 28 Order, the Defendants shall file the Administrative Record.

1           **IT IS FURTHER ORDERED** that the case management scheduling conference  
2 is reset to Tuesday, November 1, 2022, at 10:30 a.m. telephonically with the law clerk,  
3 Greer Barkley, for the Honorable David C. Bury.

4           Dated this 14th day of October, 2022.

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

A handwritten signature in black ink, appearing to read 'David C. Bury', is written over a horizontal line.

Honorable David C. Bury  
United States District Judge