

No. 19-70115

IN THE
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,
MONSANTO COMPANY,
Intervenor-Respondent,

and

E. I. DU PONT DE NEMOURS AND COMPANY,
Proposed Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**E.I. du PONT de NEMOURS AND COMPANY'S EMERGENCY MOTION
TO INTERVENE UNDER FEDERAL RULE OF APPELLATE
PROCEDURE 15(d) AND CIRCUIT RULE 27-3
RELIEF REQUESTED BY EARLIEST POSSIBLE DATE**

Kirsten L. Nathanson
David Y. Chung
Amanda S. Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com
*Counsel for Proposed Intervenor-
Respondent E.I. du Pont de Nemours and
Company*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, E.I. du Pont de Nemours and Company (“EID”) respectfully submits the following Corporate Disclosure Statement:

EID is a Delaware corporation wholly owned by Corteva, Inc., a publicly traded company. No other corporation holds a 10% or greater ownership interest in EID.

June 12, 2020

Respectfully submitted,

/s/ Kirsten L. Nathanson

Kirsten L. Nathanson

David Y. Chung

Amanda S. Berman

Tyler A. O’Connor

CROWELL & MORING LLP

1001 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 624-2887

knathanson@crowell.com

*Counsel for Proposed Intervenor-
Respondent E.I. du Pont de Nemours
and Company*

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following information is true and correct, as required by Circuit Rule 27-3:

1. Telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties.

Counsel for Proposed Intervenor-Respondent E.I. du Pont de Nemours and Company

Kirsten L. Nathanson
David Y. Chung
Amanda S. Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com

Counsel for Petitioners National Family Farm Coalition, et al.

George A. Kimbrell
Sylvia Shih-Yau Wu
Amy van Saun
Center for Food Safety
2009 NE Alberta St., Suite 207
Portland, OR 97211
T: (971) 271-7372
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org
avansaun@centerforfoodsafety.org

Stephanie M. Parent
PO Box 11374
Portland, OR 97211
T: (971) 717-6404
SParent@biologicaldiversity.org

Counsel for Respondents Environmental Protection Agency, et al.

Sarah A. Buckley
J. Brett Grosko
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Ph. (202) 616-7554 (Buckley)
Ph. (202) 305-0342 (Grosko)
Sarah.buckley@usdoj.gov
Brett.Grosko@usdoj.gov

Counsel for Intervenor-Respondents Monsanto Company

Philip J. Perry
Richard P. Bress
Stacey L. Van Belleghem
Andrew D. Prins
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
(202) 637-2200
philip.perry@lw.com

2. Facts showing the existence and nature of the emergency.

Proposed-Intervenor E.I. du Pont de Nemours and Company (“EID”) seeks to immediately intervene in this proceeding to protect its property interest in the U.S. Environmental Protection Agency registration of its product, known as DuPont FeXapan Herbicide (“FeXapan”). On June 3, 2020, this Court issued an opinion and judgment that vacated EID’s FeXapan registration. The Court issued the mandate concurrently with the opinion and judgment. EID is now unable to

sell its FeXapan product.

EID has an immediate interest in future proceedings, including on Petitioners' June 11, 2020 Emergency Motion to Enforce this Court's Vacatur and to Hold EPA in Contempt (ECF No. 127-1), and any other upcoming motion or rehearing practice. If EID's motion to intervene is not heard on an emergency basis, EID could lose the opportunity to participate and defend its property interest in the FeXapan product registration.

3. Explain why the motion could not have been filed earlier.

This issue is discussed in detail in the enclosed motion as part of the timeliness element of intervention. EID is seeking intervention within ten days of the vacatur of the FeXapan registration by this Court. As explained in the motion, EID had no reasonable basis to conclude that its property interest in FeXapan was at issue in this proceeding prior to the Court's action, and particularly during the 30-day window for intervention under Federal Rule of Appellate Procedure 15.

4. When and how counsel notified.

Proposed-Intervenor's counsel notified the Clerk's Office by email on the morning of June 12, 2020, and notified counsel for all Parties by email on June 11, 2020. Respondents and Respondent-Intervenor do not oppose this motion. Petitioners indicated they will oppose. Service will be made upon all Parties by means of electronic service through the Court's CM/ECF system.

5. Relief not sought in the district court.

The Petition for Review at issue in this case was filed directly in the court of appeals pursuant to Federal Rule of Appellate Procedure 15. Intervenor-Respondent therefore did not and could not seek relief in a district court.

June 12, 2020

Respectfully submitted,

/s/ Kirsten L. Nathanson
Kirsten L. Nathanson
David Y. Chung
Amanda Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com

*Counsel for Proposed Intervenor-
Respondent E.I. du Pont de Nemours
and Company*

EMERGENCY MOTION TO INTERVENE

E.I. du Pont de Nemours and Company (“EID”), requests to participate as an intervenor as soon as practicable in this petition for review proceeding under Federal Rule of Appellate Procedure 15(d) in support of Respondents. In particular, Petitioners filed an emergency motion late last evening seeking to further “enforce” this Court’s vacatur order, which, as explained below, includes EID’s protectable interest. EID respectfully requests sufficient time to assess Petitioners’ motion and any response.

INTRODUCTION

EID seeks leave to intervene for the purpose of protecting its property interest in the registration granted by the U.S. Environmental Protection Agency (“EPA”) for DuPont FeXapan Herbicide (“FeXapan”) and vacated by this Court in its June 3, 2020 decision. In 2019, Petitioners sought review of EPA’s decision on the “same pesticide product” – Monsanto Company’s XtendiMax – that was the subject of a prior petition for review proceeding brought by the same Petitioners (*National Family Farm Coalition, et al. v. U.S. Env’tl. Protection Agency*, No. 17-70196 (9th Cir.)). *See* ECF No. 1-6 at 2. Despite Petitioners’ clear intent to only challenge the “same pesticide product” as in their prior action, this Court’s June 3, 2020 decision vacated not just the XtendiMax registration, but also the registrations for two other products – BASF’s Engenia and EID’s FeXapan. The

Court's decision was issued without EID or BASF's participation in this proceeding, and without the benefit of the administrative record underlying EPA's approval of either company's products.

The decision directly harms EID as the registrant and manufacturer of FeXapan, as well as the many farmers across this country that are in the midst of the growing season and rely on EID's product. The panel decision also ordered the mandate to issue immediately, ensuring it would be difficult for the non-party registrants to protect their rights after the panel decision brought them into the case. EID now moves to intervene to allow it the opportunity to protect its interests in future proceedings, including in Petitioners' emergency motion.

PROCEDURAL AND REGULATORY BACKGROUND

This case came to the Court under section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* FIFRA is a "a comprehensive regulatory statute" that "regulate[s] the use, . . . sale and labeling[] of pesticides." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 437 (2005) (quotation marks and punctuation omitted). Before any pesticide can be sold or distributed in the United States, it must be registered under FIFRA. *See* 7 U.S.C. § 136a(a). A registration is issued to a specific registrant, for a specific formula, packaging, and label. *See* 40 C.F.R. § 152.3; 7 U.S.C. § 136a(c)(1)(C).

In 2016, EPA issued a registration for XtendiMax for use on dicamba-

tolerant soybean and cotton, and Petitioners submitted a Petition for Review in January 2017, challenging the XtendiMax registration. *See* Case No. 17-70196, ECF No. 1. EPA amended the XtendiMax registration later in 2017, and Petitioners amended their petition to seek review of the amended registration. *See* Case No. 17-70196, ECF Nos. 62, 68. The 2016 registration expired on its own terms on November 9, 2018. On November 1, 2018 EPA issued a *new* XtendiMax registration. Case No. 17-70196, ECF No 151. Petitioners' challenge was then moot. *See Nat'l Family Farm Coal. v. U.S. EPA*, 747 F. App'x 646, 647-648 (9th Cir. 2019). EPA issued new registrations for BASF's Engenia on November 2, 2018 and for EID's FeXapan on November 5, 2018.

On January 11, 2019, Petitioners filed the Petition in this proceeding, again challenging Monsanto's XtendiMax registration. Rule 15(a)(2)(C) requires petitions for review to "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2)(C). Petitioners cited their prior petition for review proceeding that had challenged the 2016 XtendiMax registration and amended 2017 registration, *see* ECF No. 1-6 at 2-3, and described their challenge in this proceeding as specifically relating to an EPA action that "extended two earlier registration decisions by EPA over *this same pesticide product*." *Id.* at 2 (emphasis added). Monsanto moved to intervene. *See* ECF No. 11 (Jan. 24, 2019). The Petition for Review did not mention EID, BASF, or EPA's registrations of Engenia

and FeXapan.

On April 29, 2020, after full briefing and oral argument, the panel directed supplemental briefing on the scope of Petitioners' challenge, ECF No. 111, notwithstanding the fact that EPA's principal brief had asserted the challenge was limited to the XtendiMax registration, ECF No. 48 at 12–13 n.3, and Petitioners did not object to this characterization in their reply brief or at oral argument. *See* ECF No. 72; Oral Argument Recording (Apr. 21, 2020). Petitioners submitted their supplemental brief less than one month ago, on May 13, 2020, arguing that their Petition for Review covered the separately issued BASF and EID registrations in addition to Monsanto's XtendiMax registration. *See* ECF No. 115-1 at 2–3 (May 13, 2020).

The panel issued its decision just over one week ago. It concluded that the Petition was a challenge to the October 2018 decision document that referenced the upcoming registrations of XtendiMax, Engenia, and FeXapan, and therefore “all three registrations are at issue in the petition.” *Nat'l Family Farm Coal. v. U.S. EPA*, No. 19-70115, 2020 WL 2901136, at *9 (9th Cir. June 3, 2020). The panel vacated all three registrations. As a result, EID is now unable to sell its FeXapan product. *See* Declaration of Diego Fonseca (“Fonseca Decl.”), ¶¶ 6, 8, 11-12.

Last night, Petitioners filed an Emergency Motion to Enforce This Court's Vacatur, contending that EPA's June 8, 2020 response to the panel decision is

unlawful. *See* ECF 127-1 (June 11, 2020). The relief Petitioners seek in that motion also directly impacts EID. EID seeks its own emergency relief from this Court in order to have party status and the ability to participate in all further aspects of this proceeding, including in the Court’s consideration of the Petitioners’ emergency request.

ARGUMENT

The Court should permit EID to intervene and protect its interests now that the Court has concluded that the EID’s FeXapan registration is part of this case. Federal Rule of Appellate Procedure 15(d) permits intervention in a petition for review proceeding where a proposed intervenor seeks to intervene “within 30 days after the petition for review is filed” and states an adequate “interest” and “grounds for intervention” in the appeal. Fed. R. App. P. 15(d). The Petition for Review, which specified that it related to the “same pesticide product” as Petitioners’ prior action, *i.e.* XtendiMax, did not provide EID reasonable notice that its FeXapan registration was subject to judicial review. EID has moved promptly – in fewer than ten days – to seek intervention following the panel’s decision. This Court has consistently allowed registrants to intervene in similar cases challenging pesticide registration decisions. *E.g., Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1081 n.3 (9th Cir. 2017); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015); *Natural Res. Def. Council v. EPA*, 735 F.3d 873, 875 (9th Cir.

2013); *Ctr. for Food Safety v. EPA*, No. 14-73359 (9th Cir. Dec. 11, 2014), ECF No. 12. The Court should do the same here for EID, particularly now that there is an Emergency Motion before the Court that directly implicates EID's interest.

STANDARD FOR INTERVENTION

Federal Rule of Appellate Procedure 15(d) does not specify a standard for intervention, but this Court looks to the principles underlying intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001); *see also Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (noting that “the policies underlying intervention [stated under Federal Rule of Civil Procedure 24] may be applicable in appellate courts”). The criteria for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) are:

(1) the motion must be timely; (2) the applicant must claim a significantly protectable interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (internal quotations omitted). This Court has instructed that Rule 24(a)(2) be interpreted “broadly in favor of proposed intervenors” to allow “parties with a practical interest in the outcome of a particular case to intervene.” *United States v.*

City of L.A., 288 F.3d 391, 397-98 (9th Cir. 2002) (citations omitted).

I. EID’S MOTION IS TIMELY UNDER THE CIRCUMSTANCES.

This Court can and should excuse the 30-day timeframe in Federal Rule of Appellate Procedure 15(d) under the unique and extraordinary circumstances in this proceeding and grant EID intervenor status. *See, e.g., Int’l Union of Operating Eng’rs, Local 18 v. NLRB*, 837 F.3d 593, 595-596 (6th Cir. 2016); *Zeigler Coal Co. v. Office of Workers’ Comp. Programs*, 490 F.3d 609, 610 n.1 (7th Cir. 2007). EID had no reasonable basis to conclude that the petition put its FeXapan registration at issue within the 30-day period, and it acted promptly after the Court vacated its FeXapan registration. Furthermore, EID’s intervention would be timely under the standards governing intervention outside the confines of Rule 15.

A. No Filings During The Rule 15(d) 30-Day Window Provided A Reasonable Basis For EID To Consider Intervention.

The Petition for Review did not mention EID or its FeXapan registration, providing EID with no basis to intervene within Rule 15(d)’s 30-day period. The Court’s order to vacate the FeXapan registration provides that basis now.

By its own terms, the Petition appeared to apply only to Monsanto’s XtendiMax registration. The Petition stated that the October 31, 2018 EPA decision it challenged was “intertwined with and extended two earlier registration decisions by EPA over *this same pesticide product.*” ECF 1-6 at 2 (emphasis added). The “two earlier registration decisions” referred to the Petitioners’ prior

challenge to XtendiMax’s 2016 and 2017 registrations, and Petitioners limited their challenge to the “same pesticide product” – XtendiMax – at issue in Petitioners’ earlier litigation in this Court. *See supra* at 3. It is reasonable to infer that Petitioners intended to challenge the “part” of EPA’s order that applied to XtendiMax. Fed. R. App. P. 15(a)(2)(C). There was no reasonable basis for EID to conclude that it should take action within Rule 15(d)’s 30-day period and move to intervene.

Petitioners’ filings within the 30-day window further confirmed that their Petition was only challenging the XtendiMax registration. Specifically, EPA sought a stay soon after the Petition was filed (during a government shutdown). Petitioners filed an opposition on January 15, 2019, well within the 30 day time-frame during which an interested party could have intervened, confirming that only “Monsanto’s dicamba pesticide” and “Monsanto’s XtendiMax” as the subject of the Petition. ECF No. 8 at 2, 6. Petitioners said nothing of EID or FeXapan. *See id.* An unopposed EPA motion filed on February 18, 2019 further assuaged any doubt that the Petition might be challenging any registration but Monsanto’s by explicitly stating that the “petition, filed on January 11, 2019, challenges EPA’s order . . . granting a conditional approval of pesticide registration for new uses of Movant-Intervenor Monsanto Company’s Xtendimax.” ECF No. 21 ¶ 1. These filings confirmed the plain language of the Petition and gave EID no basis or cause

to seek to intervene at the outset of the case.

In addition, the Administrative Record consisted of the documents before the agency in connection with EPA's Xtendimax approval. ECF 26-2 at 1-2; ECF 34-2 at 1-2. Petitioners did not argue that EPA also needed to compile the complete Administrative Record for the separate FeXapan registration. During briefing, Petitioners mentioned "competitor dicamba varieties approved by EPA for the same uses" in a footnote in their opening brief. ECF No. 35 at 2 n.4 (Aug. 13, 2019). EPA argued that this casual reference did not put Engenia or FeXapan within the scope of Petitioners' challenge. *See, e.g.*, ECF No. 48-1 at 12-13 & n.3 (Oct. 15, 2019). Petitioners did not respond in reply or at oral argument.

The panel's request for supplemental briefing on whether Petitioners intended to challenge the FeXapan and Engenia registrations is itself evidence that the Petition did not put EID on notice. If this Court was unsure of whether Petitioners were challenging the FeXapan and Engenia registrations after briefing and oral argument, then EID too can be excused for not being on notice within 30 days of the filing of the Petition that its registration was at issue before this Court. It was only on May 13, 2020, in response to this Court's inquiry that Petitioners explicitly claimed to be challenging EID's FeXapan registration along with Monsanto's XtendiMax registration. *See* ECF No. 115-1 at 2-3.

It was not until the panel issued its decision on June 3, 2020, that EID

received clear notice that the Court was putting its FeXapan registration at issue, and that its registration had been vacated, effective immediately, with no opportunity for EID to defend its property interest. The panel issued its decision a little over a week ago, and EID has acted swiftly to intervene. *Cf. United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-396 (1977).

Denying EID's intervention would be inequitable. The panel's belated decision that the Petition implicates EID's property interest in its FeXapan registration—after the ordinary 30-day period for intervention in Rule 15(d)—raises due process concerns. *See* Fonseca Decl. ¶¶ 5, 8; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This court has granted intervention in analogous circumstances when a proposed intervenor had a significant interest in the subject of the litigation and “had little reason to anticipate the breadth of the panel's holding.” *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016).

EID's request to intervene after the 30-day period in Rule 15(d) is reasonable and timely under these unusual and extraordinary circumstances that now include a post-mandate Emergency Motion to Enforce the Court's Vacatur.

B. EID's Intervention Is Timely Under Intervention Principles.

EID's motion is also timely under the ordinary rules governing intervention. Other than in petition for review cases, this Court “weigh[s] three factors in determining whether a motion to intervene is timely: (1) the stage of the

proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (internal quotation marks omitted). *See Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (granting intervention after panel decision). These factors support EID’s request here.

First, in this unique proceeding, EID’s intervention does not come at a “late stage” of the case. For a petition for review proceeding, this court’s review is the first stage, with the petition filed directly in the court of appeals, and subsequent stages of rehearing and potential further review await.

Second, EID’s intervention would not prejudice any party. Both Respondents and Intervenor-Respondent have indicated they do not oppose EID’s intervention and filed supplemental briefs arguing that EID was not on notice that the FeXapan registration might be at issue. *See* ECF No. 116 at 9. Furthermore, it is Petitioners who insisted in their supplemental briefing that EID’s registration was at issue in this case. Having flagged EID for this case last month, they cannot be surprised or prejudiced by EID’s participation.

Third, there is no “delay” – EID is seeking intervention within ten days of learning its property interest has been vacated by the Court. *See Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 934 F.2d 1092, 1095 (9th Cir. 1991). As explained above, EID lacked reasonable notice that its

FeXapan registration was at issue until the panel issued its decision. EID acted promptly and expeditiously when it received notice from the panel decision.

II. EID QUALIFIES FOR INTERVENTION UNDER ALL GOVERNING STANDARDS.

EID deserves to intervene in this appeal. As outlined above, this Court looks to the principles underlying intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure, which includes both intervention of right and permissive intervention. *See supra* at 6. EID qualifies under either set of standards, as explained below.

A. EID Satisfies The Standards To Intervene As Of Right.

In addition to the issue of timeliness discussed at length in Part I *supra*, intervention as of right under Rule 24(a) is warranted if the proposed intervenor demonstrates that (1) “it has a significant protectable interest relating to . . . the subject of the action;” (2) “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest;” and (3) “the existing parties may not adequately represent the applicant’s interest.” *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (internal citation omitted). This Court has instructed that Rule 24(a)(2) be interpreted “broadly in favor of proposed intervenors” to allow “parties with a practical interest in the outcome of a particular case to intervene.” *United States v. City of L.A.*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citations omitted).

EID satisfies these requirements. First, as the sole owner of the FeXapan registration vacated by this Court’s June 3, 2020 opinion, EID has a significantly protectable interest in the outcome of this case. Fonseca Decl. at ¶¶ 5, 8. This Court has ruled that it “[i]s generally enough [to support intervention] that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.” *Berg*, 268 F.3d at 818 (citation omitted). EID’s registration is a license protected by law in which EID has a property interest. *See, e.g.*, Memorandum and Order at 4, *Pesticide Action Network of N. Am. v. EPA*, No. 3:08-cv-01814-MHP (“PANNA”) (N.D. Cal. July 8, 2008), Dkt. No. 43 (FIFRA registrations “are essentially government licenses to produce, distribute and sell pesticides,” and they “constitute property”); *cf. Sierra Club v. EPA*, 995 F.2d 1478, 1485-86 (9th Cir. 1993) (holders of NPDES permits issued under the Clean Water Act have a protectable interest supporting intervention in cases challenging the permits), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d 1173 (9th Cir. 2011); 5 U.S.C. § 551(8) (“license” includes “the whole or a part of an agency permit, certificate, approval, registration . . . or other form of permission”).

Second, the “disposition of the action” has impaired EID’s “ability to protect its interest” in the registration of FeXapan. *Chamness*, 722 F.3d at 1121. The Panel’s vacatur of EID’s registration deprives EID of its property, denies EID the

immediate benefit of product sales, and jeopardizes its investment in FeXapan. *See* Fonseca Decl. ¶¶ 12-13. The risk of such consequences entitles EID to intervene. *See Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (“If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.”) (citing Fed. R. Civ. P. 24 advisory committee’s note).

Third, the existing parties do not adequately protect EID’s interests. Intervention is favored where representation of a proposed intervenor by a named party “may be” inadequate. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (internal quotations omitted). The burden of showing inadequacy is “minimal.” *Id.*; *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (“[the] burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate”), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d 1173 (9th Cir. 2011).

No party currently in this litigation will represent adequately EID’s interests. Petitioners, who seek to invalidate EID’s registration, plainly are not situated to represent EID’s interests. *See Charles Alan Wright et al.*, 7C *Federal Practice & Procedure* § 1909 (3d ed.) (explaining that parties whose interests “are adverse to the absentee” cannot adequately represent that absentee). Nor is Monsanto well-

suitable to the task. As the owner of a competing product, Monsanto does not have the same incentive to explain why the Panel should not have addressed EID's registration. And EPA's "general interest" in seeing its decision upheld "does not mean [the parties'] particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). Courts consistently have held that government agencies do not represent adequately the interests of private intervenors like EID. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003) ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.") (collecting cases); *see also United Farm Workers v. EPA*, No. 07-cv-3950, 2008 WL 3929140, at *2 (N.D. Cal. Aug. 26, 2008) ("Courts have recognized that . . . private companies like [the pesticide registrant] have a more parochial and financial interest not shared by the EPA.").

EID meets each of Rule 24's standards and should be granted intervention.

B. Alternatively, The Court Should Grant Permissive Intervention.

In the alternative, EID seeks leave for permissive intervention. Fed. R. Civ. P. 24(b)(1) authorizes permissive intervention when, upon the filing of a timely motion, the movant's claim or defense, and the main action, have a common question of law or fact. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) ("[A]ll that is necessary for permissive intervention is that

intervenor's claim or defense and the main action have a question of law or fact in common" as the rule "plainly dispenses with" the other requirements of intervention as of right), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Permissive intervention does not require a showing of inadequacy of representation or a direct interest in the subject matter of the action.

EID easily satisfies these requirements. As explained above, EID's motion will not cause undue delay or prejudice to the parties. Furthermore, EID seeks to defend the legality of the FeXapan registration, which the panel decision has linked with the XtendiMax registration as the focus of this case, thus providing a "common question of law." EID thus qualifies for permissive intervention as well.

CONCLUSION

EID requests that this Court grant this motion to intervene, and also provide sufficient time for EID to assess Petitioners' recently filed emergency motion.

June 12, 2020

Respectfully submitted,

/s/ Kirsten L. Nathanson

Kirsten L. Nathanson

David Y. Chung

Amanda Berman

Tyler A. O'Connor

CROWELL & MORING LLP

1001 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 624-2887

knathanson@crowell.com

*Counsel for Proposed Intervenor-
Respondent E.I. du Pont de Nemours and
Company*

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,779 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman Font.

/s/ Kirsten L. Nathanson
Kirsten L. Nathanson

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I filed the foregoing Emergency Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirsten L. Nathanson
Kirsten L. Nathanson

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL FAMILY FARM
COALITION; CENTER FOR FOOD
SAFETY; CENTER FOR BIOLOGICAL
DIVERSITY; PESTICIDE ACTION
NETWORK NORTH AMERICA,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; ANDREW WHEELER, in his official
capacity as Administrator,

Respondents,

MONSANTO COMPANY,

Respondent-Intervenor, and

E.I. du PONT de NEMOURS and COMPANY,

Proposed Respondent-Intervenor.

Case No. 19-70115

**DECLARATION OF DIEGO FONSECA IN SUPPORT OF
E.I. du PONT de NEMOURS and COMPANY’S MOTION TO INTERVENE**

I, Diego Fonseca, make the following declaration:

1. I am the U.S. Crop Protection Regulatory Leader for DuPont FeXapan Herbicide (“FeXapan”) at Corteva Agriscience (“Corteva”), also known as E.I. du Pont de Nemours and Company (“EID”). I have held this position since June 2018. In that capacity, I oversee all matters concerning the federal regulation of FeXapan

pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), the regulations promulgated and enforced thereunder by the U.S. Environmental Protection Agency (“EPA”), and other applicable federal laws and regulations. I make all statements in this declaration based on my personal knowledge.

2. I earned a Bachelor of Science in Agronomy Engineering from Universidad Nacional de Colombia in March 1981. I then earned a Master of Science Crop Protection from University of Reading, UK in September 1986.

3. Since October 1986, I have held various roles at Corteva. I worked as a Global Regulatory Leader and US Crop Protection Regulatory Leader at Corteva from 2000 until 2020. In that role, I was responsible for ensuring that Corteva’s herbicides complied with federal law. Prior to that, I held several roles as Field Scientist and Research & Development Manager in Colombia and Mexico. I also held the role of Development Manager of Herbicides in Latin America. Through my experience working at Corteva, I have developed extensive knowledge about the company’s scientific, regulatory, and commercial processes.

4. As the US Crop Protection Regulatory Leader for FeXapan, I am involved in, and have developed in-depth knowledge of, the regulatory approvals needed for FeXapan. I am also familiar with the production and sale of FeXapan, as well as the commercial and other types of damages EID would suffer if the

Petitioners in this case succeed at obtaining the relief they seek, and which the panel opinion granted, by setting aside EPA's registration of FeXapan.

5. EID is the holder of the registration FeXapan (EPA Reg. No. 352-913) with EPA, and it contains the active ingredient known as dicamba.

6. FeXapan is intended to provide effective, fast-acting control of weeds that negatively impact yield and quality of soybean grain and cotton. FeXapan offers considerable environmental and efficacy benefits.

7. Pesticides like FeXapan must be registered with EPA under FIFRA. Before registering a pesticide use, EPA reviews the data submitted to the agency and other available data to determine whether the use will cause "unreasonable adverse effects on the environment," including on humans. If EPA determines that the pesticide use will not cause unreasonable adverse effects on humans or the environment, EPA registers the use, amends the pesticide registration, and approves new labeling consistent with the use.

8. An EPA registration is a license that gives its owner the ability to legally sell the specific registered pesticide product. EID's FeXapan registration provides the legal basis for EID's entire U.S. dicamba business. This FeXapan registration is therefore a valuable property right for EID.

9. In July 2015, EPA granted a conditional two-year registration for FeXapan and two other pesticide products which contain the herbicide dicamba for

use on cotton and soybeans. On October 31, 2018, EPA announced it would issue amended conditional registrations for those same dicamba-based herbicides, including FeXapan, and that it would approve EID's application to extend the expiration date for FeXapan for an additional two years. EPA issued that approval on November 5, 2018.

10. EID has invested resources in stewardship and education programs to help ensure that FeXapan is used in a sustainable and responsible way. For example, we have technical bulletins and literature that provide instruction on proper use.

11. EID seeks to intervene in these proceedings to protect its investment in FeXapan, to avoid the competitive harm that may be visited upon EID if the registration is vacated, and to ensure that EID is able to market FeXapan to farmers and growers who urgently need this product.

12. Growers rely on FeXapan and other dicamba-based products. Since the original registration of FeXapan in 2015, EID has experienced robust sales of FeXapan in the United States. EID expects to generate significant revenues from the sale of FeXapan, capitalizing on the investments EID has made. If the vacatur of the 2018 conditional registration for FeXapan is sustained, EID would lose the opportunity to recoup its investments and farmers would be deprived of a valuable tool for fighting weeds.

13. EID has also invested significant human resources and financial capital to establish the capability to produce FeXapan. Thus, apart from the potential loss of sales, vacatur of the EPA registration for FeXapan would impair EID's ability to earn a return on its investment in production capability.

14. If FeXapan's registration is vacated, EID's reputation would likely be damaged, particularly among growers who rely on EID's products.

15. The potential economic and commercial impacts that I have described would affect EID as the registrant and manufacturer of FeXapan, but would not affect the EPA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 2020



Diego Fonseca