Case No. 21-71180

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY AND
CENTER FOR BIOLOGICAL DIVERSITY,
Petitioners,

v.

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

and

BASF CORPORATION,
Respondent-Intervenor.

On Petition for Review of an Order of the
United States Environmental Protection Agency

PETITIONERS' MOTION FOR SUMMARY VACATUR

CENTER FOR FOOD SAFETY
George A. Kimbrell
Amy van Saun
2009 NE Alberta St., Suite 207
Portland, OR 97211
T: (971) 271-7372
gkimbrell@centerforfoodsafety.org
avansaun@centerforfoodsafety.org

Counsel for Petitioners

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Center for Food Safety and Center for Biological Diversity (Petitioners) respectfully move this Court to summarily reverse and vacate the Environmental Protection Agency's (EPA) unlawful registration of trifludimoxazin, made in knowing violation of the Endangered Species Act (ESA). 9th Cir. R. 3-6(a)(1); Fed. R. App. P. 27. Respondents reserve their position and Respondent-Intervenor opposes this motion.

EPA intentionally disregarded its statutory duty under the ESA to insure, through consultation with expert wildlife agencies, that its registration of the pesticide trifludimoxazin does not jeopardize the existence of threatened and endangered species or adversely modify any of their designated critical habitat before issuing its registration. EPA freely acknowledges it did not assess impacts to endangered species or their habitat, in violation of the ESA. Respondents' violation is not a one-off but part of an abysmal track record of disregarding its ESA duties for pesticides unless ordered by courts. Even worse here, EPA's only analysis—under the less protective Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authority, not the ESA—showed that its

approved trifludimoxazin use even exceeds its own FIFRA "Levels of Concern" for non-target organisms, including fish and plants.

EPA knew what it was doing here: approving the spraying of a toxic biocide intended to harm life, knowing that among the non-target impacts would be harms to species on the verge of extinction. It is long settled under the ESA and this Court's controlling precedent that EPA must consult *before* authorizing pesticide spraying that may pose risks to endangered species. EPA's "clear error" here warrants summary vacatur of the registration.

Vacatur is the presumptive, default remedy and EPA cannot meet its heavy burden to show it is not warranted here. EPA's flagrant violation of ESA Section 7 consultation—referred to by this Court as the "heart" of the statute—weighs heavily in favor of vacatur. As to any disruptive consequences, when considering whether to vacate a flawed EPA action, this Court focuses on whether vacatur could result in environmental disruption, not economic harm. Here vacatur would not cause disruptive environmental consequences, just the opposite: allowing the registration of a toxic pesticide to remain in place risks harm to endangered species. Finally, where the statute violated is

meant to protect the environment as here, under this Court's precedent the inquiry's touchstone is the most environmentally beneficial relief, which here is unquestionably vacatur.

The D.C. Circuit recently granted summary vacatur in an analogous situation, for EPA's failure to comply with the ESA before registering the pesticide aldicarb, based on the "seriousness of the admitted error and the error's direct impacts on the merits of the EPA's registration decision." *Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021); *see* Fed. R. App. P. 32.1. A similar outcome is fully warranted here, as EPA's failure to comply with the ESA before approving trifludimoxazin constitutes clear error in violation of the statute and controlling precedent.

FACTUAL AND PROCEDURAL HISTORY

Respondent-Intervenor BASF applied for registration of the new pesticide active ingredient trifludimoxazin and the product Tirexor on September 25, 2018.[1] EPA opened a public comment docket on May 15, 2019. *Id.* at 4.

Trifludimoxazin is a contact herbicide,[2] a type of toxic chemical intended to kill weeds, but which is also toxic to a wide variety of other plant and animal life, known as "non-target" life in pesticide registration rubric.[3] EPA approved trifludimoxazin for nationwide spraying, with ground equipment or aircraft, on a wide variety of food crops including large scale commodity crops like corn, soybeans, peanuts, and wheat, as well as orchards of fruit and nut trees, and

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[1] Attach. 1, Memorandum Supporting Decision to Approve Registration for the New Active Ingredient, Trifludimoxazin (May 12, 2021), EPA-HQ-OPP-2018-0762-0030 ("Decision").

[2] Herbicides are a subclass of pesticide, and we hereafter use pesticide for consistency and clarity.

[3] Attach. 2, Ecological Risk Assessment for the New Active Ingredient Trifludimoxazin (Nov. 30, 2020), EPA-HQ-OPP-2018-0762-0013 ("Assessment").

rangelands. Decision at 7. EPA also approved use on non-agricultural sites, like tree plantations, landscaping, and native grass openings. *Id.*

EPA issued a proposed registration on December 10, 2020.[4] In the proposal EPA admitted it was not complying with its ESA obligations, explaining: "[t]he . . . assessment *does not* contain a specific endangered species analysis for any taxa and the Agency *has not made* effects determinations for specific listed species or designated critical habitat." *Id.* at 12 (emphases added). In the associated proposed FIFRA ecological risk assessment, EPA also states "effects determinations for federally listed threatened and endangered species are not made in this [assessment]." Assessment at 5. Overall, in the proposal EPA made no mention of any steps being taken to comply with the ESA.

Petitioners submitted comments on EPA's proposed registration.[5] Petitioner Center for Biological Diversity underscored the agency's

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[4] Attach. 3, Proposed Registration Decision for the New Active Ingredient, Trifludimoxazin, EPA-HQ-OPP-2018-0762-0017 ("Proposed Registration").

[5] Attach. 4, Response to Public Comments on EPA's Registration of the New Active Ingredient Trifludimoxazin at 1, EPA-HQ-OPP-2018-0762-0029 ("Comments Response").

failure to complete the necessary ESA evaluation and consultation.[6] EPA responded by admitting that "the risk assessment for trifludimoxazin does not include a complete ESA analysis and effects determinations for specific listed species or their designated critical habitat." Comments Response at 12.

EPA subsequently granted unconditional registration of trifludimoxazin and the product Tirexor on May 12, 2021. Decision. It did so despite determining in its FIFRA analysis that trifludimoxazin exposures exceed its own toxicity "Level of Concern" when used as approved for numerous organisms, including plants and fish. *Id.* at 13-14. EPA's "Level of Concern" was reached with drift beyond 1000 feet for terrestrial plants. *Id.* at 16. EPA concluded trifludimoxazin is "*highly toxic* to both vascular and non-vascular [aquatic] plants" and "*highly toxic* to terrestrial plants." *Id.* at 12-13 (emphases added). Further, because of its chemical nature, trifludimoxazin has increased chronic toxicity to fish in the presence of sunlight. *Id*. at 13. This

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[6] Attach. 5, Center for Biological Diversity Comments on New Active Ingredient Registration – Trifludimoxazin at 6-9, EPA-HQ-OPP-2018-0762-0026.

contributed to EPA again finding its own FIFRA "Level of Concern" exceeded for both freshwater and marine/estuarine fish for many uses of trifludimoxazin, including citrus, corn, rangeland, pecans, and soybeans. *Id.*

Petitioners timely filed this petition for review. ECF No. 1-4 (July 16, 2021). BASF intervened. ECF No. 10 (Aug. 13, 2021); ECF No. 15 (Aug. 23, 2021). On August 27, 2021, the Court ordered the parties to attempt mediation. ECF No. 18. The parties' settlement discussions subsequently broke down and Petitioners now file this motion.

JURISDICTION

This Court has jurisdiction under FIFRA, which provides for direct review in the courts of appeals of "any order issued by [EPA] following a public hearing." 7 U.S.C. § 136n(b); *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1131 (9th Cir. 2020) (*NFFC*). EPA provided a "public hearing" by providing notice and comment prior to the Registration. Decision at 17-18. Petitioners submitted comments and timely filed this petition for review. 7 U.S.C. § 136n(b), 40 C.F.R. § 23.6; Comments Response at 1; ECF No. 1-4.

Petitioners have standing. *Friends of Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The environmental interests at stake are germane to Petitioners' organizational missions,[7] and the agency's injuries to Petitioners' members can be redressed by this Court. *Id.* Because Petitioners' injuries are partially procedural (Section 7 consultation sets a strict procedure to ensure compliance with ESA's substantive commands, *see infra*), causation and redressability are relaxed. *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 910 (9th Cir. 2020); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Namely, all that is required is a "reasonable probability of the challenged action's threat to [Petitioners'] concrete interest," *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001), and that "the relief requested—that the agency follow the correct procedures—*may* influence the agency's ultimate decision . . ." *NFFC*, 966 F.3d at 910 (quoting *Salmon Spawning and Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (emphasis in original).

[7] Attach. 6, Kimbrell Decl.; Attach. 7, Hartl Decl.

Petitioners' members are injured by EPA's failure to fulfill its ESA obligations. EPA admits trifludimoxazin is highly toxic to many organisms, Decision at 13-14, and crops permitted for trifludimoxazin spraying overlap with the habitats and range of many ESA-protected species. *See* Attach. 8, Bradley Decl. (mapping overlap of trifludimoxazin-approved crops with critical habitat for eleven ESA-protected species).

Petitioners provide seven illustrative declarations from members with strong personal and professional interests in the environment and wildlife, which are injured by the Decision.[8] Specifically, Petitioners' members have environmental, professional, recreational, and aesthetic interests in seeing, studying, and protecting dozens of potentially harmed ESA-protected species—including multiple species and/or populations of endangered salmon, steelhead, sturgeon, and darters, as well as the endangered smalltooth sawfish—all of which are harmed by trifludimoxazin.

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[8] Attach. 9, Lininger Decl.; Attach. 10, Griswold Decl.; Attach. 11, Connor Decl.; Attach. 12, Curry Decl.; Attach. 13, Miller Decl.; Attach. 14, Townsend Decl.; Attach. 15, Williams Decl.

The required ESA procedures that EPA blatantly ignored here are "designed to protect these concrete interests." *NFFC*, 966 F.3d at 911. There is plainly a "reasonable probability" the Decision threatens Petitioners' interests and that ESA consultation "may influence" any future post-vacatur decision, because when EPA undertakes the required ESA analysis and process it may, at a minimum, include protective measures. *Hall*, 266 F.3d at 977; *NFFC*, 966 F.3d at 910.

STANDARD OF REVIEW

Courts grant summary reversal when they determine there was "clear error" requiring granting of the petition for review and reversal. 9th Cir. R. 3-6(a)(1); *Williams v. Hampton*, No. 19-56197, 2020 U.S. App. LEXIS 10473, at *1 (9th Cir. Apr. 2, 2020). Summary reversal is appropriate where the agency decision is "obviously controlled by precedent." *United States v. Hooten*, 693 F.2d 857, 858 (9th Cir. 1982) ("Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned.").

EPA violated the ESA if its failure to consult was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law," 5 U.S.C. §

706(2)(A), (D); *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). The ESA requires federal agencies consult the expert wildlife agencies before taking any action that "may affect" any protected species or critical habitat. 50 C.F.R. § 402.14(a); 16 U.S.C. § 1536(a)(2); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020-21 (9th Cir. 2012) (*en banc*).

If the Court holds EPA's trifludimoxazin registration was issued unlawfully, it should "set aside," or vacate the registration. 7 U.S.C. § 136n(b); 5 U.S.C. § 706(2)(A); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532-33 (9th Cir. 2015).

ARGUMENT

I. Defendants' Endangered Species Act Violation is Clear Error Beyond Dispute.

EPA's violation of its ESA Section 7 consultation duties for trifludimoxazin is "clear error" that is "obviously controlled by precedent," and thus warrants summary reversal. *Williams*, 2020 U.S. App. LEXIS at *1; *Hooten*, 693 F.2d at 858.

Section 7(a)(2) is the "heart" of the ESA. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). It mandates that "[e]ach federal agency" "insure" that its action—here, EPA registering trifludimoxazin—is not likely to either jeopardize any endangered species or adversely modify any designated "critical" habitat, by consulting with the agencies Congress designated as having expertise in determining effects on endangered species: U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Expert Agencies). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b).

Section 7(a)(2) reflects Congress's overarching intent to "give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). It

creates both substantive and procedural obligations for every federal agency, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007), establishing a process requiring EPA to evaluate a pesticide's effects "in consultation with and with the assistance of" the Expert Agencies. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(a). The consultation process is integral to "insuring" compliance with the ESA's substantive protections. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), *abrogated on other grounds by Cottonwood Env. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075 (9th Cir. 2015) ("[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.") (emphasis in original).

The first consultation step (and the only one at issue here) requires all "action agencies"—here EPA—to determine if their actions "may affect" a listed species or critical habitat. If an action agency makes a "may affect" determination, it must then insure, through consultation with the Expert Agencies, that the action is not likely to

cause jeopardy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13.

The "may affect" threshold triggering consultation is extremely low: "actions that have *any chance of affecting* listed species or critical habitat … *require* at least some consultation under the ESA." *Karuk Tribe*, 681 F.3d at 1027 (emphasis added); *Id.* ("Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.") (citation and quotation omitted). Here, EPA failed to take even this first step, to determine if its registration "may affect" any listed species, despite the ESA's command that this review and decision be made "at the earliest possible time." 50 C.F.R. § 402.14(a); *Karuk Tribe*, 681 F.3d at 1020.

If the low "may affect" threshold is met, EPA *must* consult with the Expert Agencies *before* acting. *Karuk Tribe*, 681 F.3d at 1027. Once consultation is initiated, EPA and the Expert Agencies are required to complete additional procedures which may result in the Expert Agencies recommending alternatives and mitigations to ensure against jeopardy to endangered species. *See* 50 C.F.R. §§ 402.13, 402.14.

Pesticides like trifludimoxazin are toxins intended to cause harm. Although designed to target particular weeds, trifludimoxazin is also harmful to many "non-target" organisms. Decision at 12-14 (concluding trifludimoxazin poses risk of chronic toxicity to fish in the presence of sunlight and is "highly toxic" to aquatic and terrestrial plants). EPA admits it failed to do any analysis of these risks to ESA-protected species. Comments Response at 12.

EPA cannot simply flout its ESA duties when making a registration decision. Rather, this Court has repeatedly held that EPA must comply with both FIFRA and the ESA when registering pesticides, and that FIFRA analysis does not, as a matter of law, substitute for the required separate and different ESA analysis. *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005) ("[A]n agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives").

Yet for decades, EPA has nonetheless ignored its ESA obligations when registering pesticides. *Washington Toxics*, 413 F.3d at 1029 (failure to consult for fifty-four pesticides); *Ellis v. Housenger*, 252 F.

Supp. 3d 800, 820 (N.D. Cal. 2017) (failure to consult for dozens of pollinator-harming pesticides); *Defenders of Wildlife v. Adm'r EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (strychnine registration violated ESA).[9]

EPA downplays its ESA violation in its comment responses by discussing its developing of procedures for assessing risks to endangered species and its progress for several other pesticides; EPA claims that it did not do an ESA analysis here since the agencies are purportedly still working to develop and implement those procedures. Comments Response at 11-12.

But this in no way excuses EPA from complying with the ESA for *this* pesticide approval. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 n.10 (D.C. Cir. 2017) ("[A]n agency may not duck its

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[9] *See also Ctr. for Biological Diversity v. EPA*, No. 3:11-cv-00293-JCS, Proposed Stipulated Partial Settlement Agreement and Order Entering Stipulated Partial Settlement Agreement, Dkts. 364, 366 (N.D. Cal. Oct. 2019) (deadlines for nine pesticides); *Ctr. for Biological Diversity v. EPA*, Consolidated Case No. 15-1054, Joint Motion for Order on Consent, Doc. # 1880656 (D.C. Cir. Jan 19, 2021) (deadlines for four pesticides); *Natural Resources Defense Council v. Wheeler*, Case No. 1:17-CV-02034-TSC, Order granting Motion to Approve Stipulated Partial Settlement, Dkt. 55 (D.D.C. Jan. 28, 2021) (deadline for pesticide); Hartl. Decl. ¶¶ 9, 14-16, 19; Miller Decl. ¶¶ 4-5.

consultation requirement, whether based on limited resources, agency priorities or otherwise."). EPA simply cannot 1) register pesticides first, and 2) put off any ESA analysis and subsequent restrictions to protected species until later when (if ever) they get around to it.

Rather, ESA analysis and consultation must take place at "the earliest possible time" and must be done "*before* engaging in any discretionary action that may affect a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1020 (emphasis added). EPA must satisfy its ESA obligations *prior to* decisions, including registrations. If EPA cannot comply with the law to ensure its actions do not jeopardize species on the brink of extinction, it simply must pause new pesticide decisions until it can fulfill its Congressional mandates.

Because EPA's knowing and well-established ESA violation is "clear error" that is "obviously controlled by precedent," *Williams*, 2020 U.S. App. LEXIS at *1; *Hooten*, 693 F.2d at 858, this Court should grant summary reversal.

II. Vacatur is the Proper Remedy.

Vacatur is the default, presumptive remedy for unlawful agency actions, including unlawfully approved pesticides. *NFFC*, 960 F.3d at 1145 (vacating dicamba registration); *Pollinator Stewardship*, 806 F.3d at 532 (vacating sulfoxaflor registration); *All. for the Wild Rockies v. U.S. Forest Serv.,* 907 F.3d 1105, 1121-22 (9th Cir. 2018) ("presumption of vacatur," unless defendants meet burden to show otherwise). Given this, directly opposite to injunctive relief, it is the Respondents, not Petitioners, who have the burden to show how or why anything *other* than vacating the unlawful registration is the appropriate remedy. *All. for the Wild Rockies,* 907 F.3d at 1121-22.

In contrast remand *without* vacatur is only appropriate in "limited circumstances," *Pollinator Stewardship*, 806 F.3d at 532, or "rare circumstances," *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n. 7 (9th Cir. 2010), and only if "equity demands," *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

To determine if the "limited" and "rare" remand without vacatur circumstances are present, this Court "weigh[s] the seriousness of the agency's errors against the disruptive consequences of an interim

change that may itself be changed." *NFFC*, 960 F.3d at 1144 (quoting *Pollinator Stewardship*, 806 F.3d at 532).

Vacatur is plainly warranted and appropriate here. First, EPA's knowing flouting of the ESA could not be more serious legal error, weighing heavily in favor of vacatur. EPA knowingly violated the *heart* of the ESA's statutory scheme, Section 7 consultation, putting at risk myriad endangered species. While EPA continues to place FIFRA registrations ahead of endangered species protection, Congress required the opposite: that agencies in EPA's shoes "afford[] endangered species the highest of priorities," and "give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth.*, 437 U.S. at 185, 194.

Second, regarding potential disruptive consequences, this Court emphasizes the analysis of the environmental harms that flow *from* vacatur itself. *NFFC*, 960 F.3d at 1145; *Pollinator Stewardship*, 806 F.3d at 532. The inquiry's touchstone is which outcome, vacatur or remand without, is more environmentally protective. *All. for the Wild Rockies*, 907 F.3d at 1122 (vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it").

Vacatur of the registration here does not risk environmental harm; rather, vacatur is necessary to avoid risk to endangered species.

A. The Intentional ESA Violation Weighs Heavily in Favor of Vacatur.

EPA's violation of the ESA is serious error that weighs heavily in favor of vacatur.

The seriousness of an agency legal error is logically related to the purposes of the statute violated. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542–43 (1987). The violation here is especially egregious where EPA *intentionally* violated Section 7, the "heart" of the ESA, one of the statute's most important protections. *W. Watersheds Project*, 632 F.3d at 495; *California ex rel. Lockyer v. U.S. Dept. of Agric.,* 575 F.3d 999, 1018 (9th Cir. 2009).

The Section 7 process EPA defied here is integral to ESA's entire scheme, "insuring" EPA implements the statute's substantive protections. *Thomas*, 753 F.2d at 764. There is no question that risks to ESA-protected species flow from EPA's flouting of Section 7 here, *see supra*, but even if there were questions, Congress spoke "in the plainest of words . . . adopting a policy which it described as 'institutionalized

caution'" with the ESA. *Tenn. Valley Auth.*, 437 U.S. at 194. Particularly given this "institutionalized caution," any ESA violation is a serious error weighing in favor of vacatur, let alone an intentional violation of the statutory scheme's most important process and protections.

EPA's trifludimoxazin registration shows disregard for Congressional intent to "afford first priority to the declared national policy of saving endangered species," *Tenn. Valley Auth.*, 437 U.S. at 185, and to "give the benefit of the doubt to the species," *Conner*, 848 F.2d at 1454. EPA's prioritization of pesticide registration over endangered species protection here is a serious violation of the ESA's letter and spirit, weighing heavily for vacatur.

EPA's knowing, intentional violation undermines Congress's unambiguous directive and intent in enacting the ESA, making vacatur especially appropriate. *Cal. Wilderness Coal. v. DOE*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."). Despite knowing both that it had a statutory duty to protect endangered species and to analyze risks to them before

registering this pesticide, and that the use of trifludimoxazin is toxic and may affect these species and their habitats, EPA proceeded with registering trifludimoxazin without ESA analysis and consultation anyway. This disregard of its Section 7 duties cuts to the quick of the statute. *Lockyer*, 575 F.3d at 1018; *Farmworker Ass'n of Fla.,* 2021 U.S. App. LEXIS 16882 at *2 ("Vacatur is further warranted in light of the seriousness of" the EPA's failure to comply with the ESA before expanding uses of pesticide).

For example, regarding fish, EPA is well aware that its failure to consult on pesticides can "kill or injure salmonids," including steelhead, and affects the future behavior and reproductive success of these listed species. *Wash. Toxics Coal.*, 413 F.3d at 1029; 65 Fed. Reg. 42,421, 42,473 (July 10, 2000). Here, despite the acknowledged risk to endangered salmonids and other fish already on the verge of extinction, which harms Petitioners,[10] EPA failed to consult on the harms to

[10] *See e.g.* Townsend Decl. ¶¶ 3-18 (interests in endangered salmonids, including Chinook salmon, steelhead, and bull trout); Connor Decl. ¶¶ 8-21 (interests in endangered Atlantic sturgeon); Lininger Decl. ¶¶ 8-16 (interests in endangered smalltooth sawfish); Williams Decl. ¶¶ 5-14

endangered fish or to any other protected species, in blatant disregard for its mandatory ESA duties.

B. The Second Prong Also Weighs Heavily in Favor of Vacatur.

First, while Respondents may allege financial loss from vacatur, the disruptive consequences prong of the vacatur test should focus on the underlying purposes of the statute—just like the seriousness of the error part of the inquiry—and thus should focus on *environmental* consequences, specifically the harm to species protected under the ESA. As this Court has repeatedly explained, when faced with "whether to vacate rulings by the EPA," such as the registration at issue here, this Court focuses on "possible environmental harm," and has "chosen to leave a rule in place when vacating would risk such harm." *Pollinator Stewardship*, 806 F.3d at 532; *NFFC*, 960 F.3d at 1144-45 ("[Courts] consider the extent to which either vacating or leaving the decision in place would risk environmental harm.").

(interests in endangered fishes, including Alabama sturgeon and amber darter).

When risks to endangered species are at issue, as here, this Court focuses on the harm to endangered species. *Cottonwood*, 789 F.3d at 1091 ("[T]he equities and public interest factors always tip in favor of the protected species."); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008) ("ESA's no-jeopardy mandate applies to every discretionary agency action—*regardless of the expense or burden its application might impose*.") (emphasis added and internal quotation marks omitted). Remand without vacatur is only justified where *vacatur itself* could result in harm to endangered species. *Idaho Farm Bureau*, 58 F.3d at 1405 (declining vacatur where doing so would endanger the critically endangered Spring Snail); *Nat. Res. Def. Council v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1136, 1143-44 (C.D. Cal. 2002) (discussing cases and rationale). And any alleged economic consequences alone that are not closely intertwined with environmental harm from vacatur (here, specifically risks to endangered species) are irrelevant to this Court's remedy inquiry.

The risk of harm to endangered species from EPA's ESA violation is evident from the few instances where EPA has actually done endangered species assessments for pesticides (nearly all court-ordered

or via settlement): the agency reaches "may affect" determinations for *vast numbers* of listed species and finds widespread harm, triggering consultation with the Expert Agencies.

For example, in its recent glyphosate ESA evaluation, EPA determined the pesticide "may affect" *100%* of ESA-protected plants and animals and that it is "likely to adversely affect" *93%* of them.[11] Similarly here, EPA is not only likely to reach the low "may affect" threshold, but also a "likely to adversely affect" finding for some number of listed species for trifludimoxazin, especially considering its known toxicity to fish and plants and its approval for widespread use. Trifludimoxazin is highly toxic to all types of plants, with risks from drift exceeding 1000 feet for terrestrial plants, and causes chronic toxicity in freshwater and marine fish. Decision 12-14. Because EPA approved trifludimoxazin use on a wide range of crops covering

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[11] Final National Level Listed Species Biological Evaluation for Glyphosate (Nov. 12, 2021), available at: https://www.epa.gov/endangered-species/final-national-level-listed-species-biological-evaluation-glyphosate#executive-summary.

hundreds of millions of acres,[12] there is likely to be extensive use in and near endangered species habitats. *E.g.* Bradley Decl. ¶¶ 6-16.

Accordingly, as explained above and established by EPA's own admissions, the better, safer outcome for the environment, and endangered species specifically, is unquestionably for this Court to vacate the registration.

Second, even if this Court were to consider potential economic impacts, they would be minimal: trifludimoxazin is a new pesticide and, as far as Petitioners are aware, not yet in commercial use. And users have many other options, including 20 "reduced risk" pesticides approved for one or more uses shared with trifludimoxazin.[13]

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[12] For example, EPA approved trifludimoxazin use on peanuts, tree nuts, soybeans, and cereal grains (excluding rice), which were grown on 4.9, 5.2, 189.1, and 267.4 million acres from 2016 to 2020, respectively. Bradley Decl. ¶ 5.

[13] U.S. EPA, Reduced Risk and Organophosphate Alternative Decisions for Conventional Pesticides, updated June 2018, https://www.epa.gov/pesticide-registration/reduced-risk-and-organophosphate-alternative-decisions-conventional. "Reduced risk" pesticides are those that EPA has classified as less toxic than general use pesticides like trifludimoxazin. So not only do users have other options, they have more environmentally friendly options. Examples of "reduced risk" alternatives to trifludimoxazin include: mesotrione for

In *NFFC*, the challenged pesticide, dicamba, was already in use across millions of acres, yet the court still vacated the registration. 960 F.3d at 1144-45. And in *Pollinator Stewardship Council*, the Court did not give any weight to allegations of dramatic financial harm, nor did it even find the allegations worth mentioning in its vacatur decision, instead finding vacatur was warranted because "leaving the EPA's registration of sulfoxaflor in place risks more potential environmental harm than vacating it." 806 F.3d at 532-33. Here the violations are *even more serious* because they go not to EPA's "primary mission" under FIFRA but to EPA's "priority" ESA duties "over" that pesticide mission. *Karuk Tribe*, 681 F.3d at 1020 (Congress required agencies to give endangered species priority over the primary missions of agencies).

ESA's overarching purpose of "institutionalized caution" places the well-being of endangered species over any alleged disruptions to a multi-national chemical company like BASF. *Cottonwood*, 789 F.3d at 1091. The situation here is much simpler than it was with the dicamba

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corn, oat, and sorghum; carfentrazone-ethyl for cereal grains; and saflufenacil for pome and citrus fruits and tree nuts. *Id.*

registration in *NFFC*, 960 F.3d at 1144-45, since Tirexor is not yet on the market and no farmers have purchased it in anticipation of the coming growing season; the same remedy should apply here.

Finally, EPA cannot justify skipping the crucial procedural step of complying with the ESA. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051-52 (D.C. Cir. 2021) ("[W]hen an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step."). This Court has similarly explained that alleged disruptive consequences should only be given weight when the agency can make the *exact same* decision after vacatur and remand. *Pollinator Stewardship*, 806 F.3d at 532 (inquiry is whether the "same rule would be adopted on remand"). However here it is exceedingly unlikely to impossible that EPA could ever justify knowingly flouting its Section 7 ESA duties nor reinstate the same registration decision: Any future registration after remand likely will be different—both substantively and procedurally, since it will have to incorporate an (1) effects determination by EPA, (2) the ESA consultation process for any species

that the registration "may affect," and (3) potentially a Biological Opinion from the Expert Agencies, with protections and use restrictions to safeguard imperiled species (or even a denial of registration for some uses).[14] If "a different result *may* be reached," that undermines any "disruptive consequences of an interim change that may itself be changed" and courts should vacate. *Pollinator Stewardship*, 806 F.3d at 532 (emphasis added). That is plainly the case here.

In sum, vacatur is fully warranted because the seriousness of EPA's flagrant violation of the ESA is not a decision EPA could justify on remand, nor could EPA make the exact same decision again. Nor does vacatur itself pose any risks to the environment or endangered species. Rather, as in *Pollinator Stewardship*, vacatur is warranted because leaving the registration in place risks potential harm to imperiled species. 806 F.3d at 532-33 ("given the precariousness of bee

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[14] For example, ESA compliance led EPA to cancel cuprous oxide uses likely to affect protected species. *Ctr. for Biological Diversity v. EPA*, Case No. 15-1054, EPA's Response Brief, Doc. 1912095, at 27-29 (D.C. Cir. Aug. 30, 2021).

populations, leaving the EPA's registration of sulfoxaflor in place risks more potential environmental harm than vacating it.").

CONCLUSION

EPA's intentional disregard for its ESA duties in registering trifludimoxazin is clear error, contrary to its Congressional mandate, and the violation risks irreparable harm to plants and wildlife on the verge of extinction. The proper outcome and remedy need not be delayed any further. The Court should grant summary reversal and vacatur.

Respectfully submitted on December 16, 2021,

/s/ George Kimbrell
George A. Kimbrell
Amy van Saun
2009 NE Alberta St., Suite 207
Portland, OR 97211
T: (971) 271-7372
gkimbrell@centerforfoodsafety.org
avansaun@centerforfoodsafety.org

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been printed in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with Fed. R. App. P. 27(d)(2) because it contains 5,193 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ George Kimbrell
George Kimbrell

CERTIFICATE OF SERVICE

I hereby certify that, on December 16, 2021, I electronically filed the foregoing PETITIONERS' MOTION FOR SUMMARY VACATUR 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.

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George Kimbrell