

Nos. 19-72109, 19-72280

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

**CENTER FOR FOOD SAFETY, CENTER FOR BIOLOGICAL  
DIVERSITY,**

*Petitioners,*

**V.**

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

*Respondents,*

**DOW AGROSCIENCES LLC,**

*Respondent-Intervenor.*

**POLLINATOR STEWARDSHIP COUNCIL, ET AL.,**

*Petitioners,*

**V.**

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

*Respondents,*

**DOW AGROSCIENCES LLC,**

*Respondent-Intervenor.*

**AMICUS BRIEF OF THE STATES OF CALIFORNIA, HAWAII,  
MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, NEW  
MEXICO, OREGON, VERMONT, AND WASHINGTON IN SUPPORT  
OF PETITIONERS**

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*Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520 (9th Cir.  
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**OTHER AUTHORITIES**

California Department of Pesticide Regulation, <i>California’s Managed Pollinator Protection Plan – MP3</i> (February 2018), available at <a href="https://www.cdpr.ca.gov/docs/enforce/pollinators/ca_managed_pollinator_protection_plan.pdf">https://www.cdpr.ca.gov/docs/enforce/pollinators/ca_managed_pollinator_protection_plan.pdf</a> .....	9
Closer SC Label (sulfoxaflor) (Nov. 18, 2019), available at <a href="https://www3.epa.gov/pesticides/chem_search/ppls/062719-00623-20191127.pdf">https://www3.epa.gov/pesticides/chem_search/ppls/062719-00623-20191127.pdf</a> .....	12
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Eric Lipton, <i>Interior Nominee Intervened to Block Report on Endangered Species</i> , N.Y. TIMES, Mar. 26, 2019, <a href="https://www.nytimes.com/2019/03/26/us/politics/endangered-species-david-bernhardt.html">https://www.nytimes.com/2019/03/26/us/politics/endangered-species-david-bernhardt.html</a> .....	17

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John Losey & Mace Vaughan, <i>The economic value of ecological services provided by insects</i> , 56 BIOSCIENCE 311, 316 (2006), available at <a href="https://academic.oup.com/bioscience/article/56/4/311/229003">https://academic.oup.com/bioscience/article/56/4/311/229003</a> .....	7
Laura Burkle, et al., <i>Plant-Pollinator Interactions over 120 Years: Loss of Species, Co-Occurrence, and Function</i> , 339 SCIENCE 1611 (2016), available at <a href="https://science.sciencemag.org/content/339/6127/1611">https://science.sciencemag.org/content/339/6127/1611</a> .....	8
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New York Department of Environmental Conservation, <i>New York State Pollinator Protection Plan</i> (June 24, 2016), available at <a href="https://www.dec.ny.gov/docs/administration_pdf/nyspollinatorplan.pdf">https://www.dec.ny.gov/docs/administration_pdf/nyspollinatorplan.pdf</a> .....	11
New York Department of Environmental Conservation, <i>New York State Pollinator Protection Plan Update</i> (June 2018), available at <a href="https://agriculture.ny.gov/system/files/documents/2019/06/pollinator-report.pdf">https://agriculture.ny.gov/system/files/documents/2019/06/pollinator-report.pdf</a> .....	11
Press Release, White House, <i>Fact Sheet: The Economic Challenge Posed by Declining Pollinator Populations</i> (June 20, 2014), available at <a href="https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/fact-sheet-economic-challenge-posed-declining-pollinator-populations">https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/fact-sheet-economic-challenge-posed-declining-pollinator-populations</a> .....	7, 8
<i>Protecting natural enemies and pollinators</i> , UNIVERSITY OF CALIFORNIA STATEWIDE INTEGRATED PEST MANAGEMENT PROGRAM, <a href="http://ipm.ucanr.edu/mitigation/protect_beneficials.html">http://ipm.ucanr.edu/mitigation/protect_beneficials.html</a> (last visited Aug. 14, 2020).....	9
<i>Science: Pollinators</i> , CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, <a href="https://wildlife.ca.gov/Science-Institute/Pollinators">https://wildlife.ca.gov/Science-Institute/Pollinators</a> (last visited Aug. 14, 2020).....	10
Travis A. Grout et al., <i>Neonicotinoid Insecticides in New York State: Economic Benefits and Risk to Pollinators</i> (June 23, 2020), <a href="https://pollinator.cals.cornell.edu/pollinator-research-cornell/neonicotinoid-report/">https://pollinator.cals.cornell.edu/pollinator-research-cornell/neonicotinoid-report/</a> .....	11

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Pesticide Registration Review; Proposed Interim Decisions for Several Pesticides; Notice of Availability, 85 Fed. Reg. 26682 (May 5, 2020)....	16
Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides, EPA Docket ID No. EPA-HQ-OPP-2019-0185-0084 (Mar. 12, 2020); Attorneys General of New Mexico, California, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Washington, Vermont, and the District of Columbia, Comment Letter on Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides, EPA Docket ID No. EPA-HQ-OPP-2019-0185-0068 (Aug. 15, 2019).....	17
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Amici, the States of California, Hawaii, Maryland, Minnesota, New Jersey, New York, New Mexico, Oregon, Vermont, and Washington (Amici States), respectfully submit this amicus curiae brief in support of Petitioners Center for Food Safety, Center for Biological Diversity, Pollinator Stewardship Council, American Beekeeping Federation, and Jeffrey S. Anderson (collectively Petitioners) pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2(a).

### **INTRODUCTION AND AMICI STATES' INTEREST**

Amici States submit this brief to explain the harms to our States of the Environmental Protection Agency's improper sulfoxaflor registration process and failure to comply with the Endangered Species Act (ESA). First, pollinators contribute billions of dollars to Amici States' economies and are keystone species in Amici States' ecosystems. Amici States administer an array of state programs to safeguard these environmental and economic interests. Yet, when EPA received applications to register sulfoxaflor, which poses risks to pollinators due to its toxicity, it denied Amici States and the public an opportunity to comment on the registration applications. This procedure deprived EPA of varied stakeholder perspectives necessary to make an informed registration decision. In so doing, EPA shifted the regulatory burden to Amici States, which have fewer resources and regulatory tools than EPA under the Federal Insecticide, Fungicide, and

Rodenticide Act (FIFRA). Second, EPA's noncompliance with the ESA in this case follows a troubling pattern of disregarding the ESA in pesticide actions.

Amici States urge the Court to vacate EPA's registration of sulfoxaflor and remand to the agency.

## ARGUMENT

Amici States provide their unique perspective on two issues central to this case. First, EPA's failure to allow the public, including Amici States, any opportunity to review or comment on the new registration application deprived EPA of the diverse perspectives needed to inform its decision. Second, EPA's violation of the ESA in this case follows a longstanding and troubling pattern of ESA noncompliance in pesticide actions.

### **I. EPA FAILED TO PROVIDE THE PUBLIC, INCLUDING AMICI STATES, AN OPPORTUNITY TO REVIEW AND COMMENT ON THE NEW APPLICATIONS FOR REGISTRATION, DEPRIVING EPA OF CRITICAL PUBLIC INPUT AND HARMING AMICI STATES' ENVIRONMENTAL AND ECONOMIC INTERESTS.**

#### **A. EPA's Lack of Notice or Comment Period Denied Amici States and the Public the Opportunity to Share Their Perspectives on the Registered Uses.**

EPA improperly denied Amici States and the public the opportunity to share their perspectives on the sulfoxaflor uses at issue here. In 2015, this Court vacated EPA's initial decision to register sulfoxaflor for many of these uses because EPA had failed to show that those uses would not unreasonably harm pollinators.

*Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015).

Following that decision, EPA issued no notices or other warnings that the registrant had reapplied to register uses on bee-attractive or blooming crops, or that EPA was considering registering new uses of sulfoxaflor that would cause direct pollinator exposure. But on July 12, 2019, EPA issued a notice, decision memorandum, and risk assessments for twelve new registrations of sulfoxaflor that also removed several pollinator-protective restrictions. *See* 2019 Sulfoxaflor Registration, Decision Memorandum, EPA Docket ID No. EPA-HQ-OPP-2010-0889-0570 (July 12, 2019). The decision was effective immediately, and EPA provided no advance notice or opportunity for public comment on its decision. *Id.*

FIFRA's notice and comment provision requires EPA to publish notice of any application to register new uses and solicit public comment. 7 U.S.C. § 136a(c)(4). Notably, EPA followed this procedure the first time it registered sulfoxaflor uses after this Court's 2015 decision. In 2016, registrant and Intervenor Dow Agrosciences, LCC reapplied for certain sulfoxaflor uses that would avoid pollinator exposure. 2016 Sulfoxaflor Application Notice, EPA Docket ID No. EPA-HQ-OPP-2010-0889-00407 (May 17, 2016). As required by 7 U.S.C. § 136a(c)(4), EPA published a notice of receipt and held a public comment period. 2016 Sulfoxaflor Application Notice, EPA Docket ID No. EPA-HQ-OPP-2010-0889-00407. After considering and responding to the comments it received, EPA decided to register the requested sulfoxaflor uses with certain

mitigation measures and restrictions. 2016 Sulfoxaflor Registration Decision, EPA Docket ID No. EPA-HQ-OPP-2010-0889-0563 (Oct. 14, 2016); 2016 Sulfoxaflor Registration Decision, Response to Public Comments, EPA Docket ID No. EPA-HQ-OPP-2010-0889-0564 (Oct. 14, 2016). Particularly given EPA's past compliance with FIFRA's notice and comment provision, Amici States expected EPA to similarly provide notice and an opportunity to comment on any future application to register sulfoxaflor uses vacated by this Court. Yet EPA did not do so, in violation of FIFRA.

EPA's failure to provide notice and comment also contravenes its own policy of providing public notice and comment on all "actions of significant interest." EPA, *Public Participation Process for Registration Actions*, <https://www.epa.gov/pesticide-registration/public-participation-process-registration-actions> (last visited Aug. 13, 2020). There is no doubt that its registration of sulfoxaflor uses that were previously challenged and vacated by this Court are "of significant interest."

EPA itself recognizes the importance of public input in these circumstances. According to EPA, its notice and comment policy "enhance[s] transparency" and benefits "[b]oth EPA and the public ... because public input helps inform risk assessment and risk management," which "improves understanding of risks and benefits, contributes to meaningful protective measures, and expands the public

dialogue on pesticide registration decisions.” *Id.* However, EPA ignored this policy when it issued the sulfoxaflor registrations here without notice and an opportunity for the public to comment.

**B. EPA’s Registration Decision Suffers from the Absence of Varied Stakeholder Input.**

The lack of public input taints EPA’s registration decision. Along with its registration decision, EPA released over two dozen new supporting documents, including risk assessments, summaries of sulfoxaflor’s alleged benefits, and evaluations of new studies submitted by sulfoxaflor’s manufacturer, Dow. *See* Sulfoxaflor Registration Docket, EPA Docket ID No. EPA-HQ-OPP-2010-0889. Because EPA neglected to solicit feedback through public notice and comment, EPA’s registration decision was improperly skewed and limited to only Dow’s submissions.

FIFRA includes notice and comment provisions to ensure EPA receives a variety of viewpoints from all stakeholders. 7 U.S.C. § 136a(c)(4); *see Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (“Notice requirements are designed ... to ensure that agency regulations are tested via exposure to diverse public comment.”). The dearth of varied perspectives is particularly problematic here because EPA’s registration decision was required to weigh sulfoxaflor’s benefits against its environmental harms. In EPA’s own words, the varied perspectives of the many stakeholders

who are impacted by EPA's decision, including Amici States, would have informed EPA's "understanding of risks and benefits." EPA, *Public Participation Process for Registration Actions*, <https://www.epa.gov/pesticide-registration/public-participation-process-registration-actions>. EPA's failure to provide notice and receive public comment for the challenged registrations thus guaranteed that its registration decision would rest on incomplete and one-sided information.

**C. EPA's Registration Decision Impacts Amici States' Economies, Ecosystems, and Pesticide Registration Reviews.**

Had EPA followed the required notice and comment process, it would have received valuable input from Amici States about pollinators' contributions to Amici States' economies and ecosystems. Instead, EPA's inadequate procedure needlessly shifts the regulatory burdens to states and is inconsistent with the cooperative federalism envisioned by FIFRA.

**1. EPA's Inadequate Sulfoxaflor Registration Process Undermines Amici States' Efforts to Address the Pollinator Crisis.**

Pollinators are critical to Amici States' ecosystems and economies, and Amici States dedicate significant resources to address the current pollinator crisis. When EPA considers any pesticide that could pose risks to pollinators, it is critical for EPA to have a complete picture of the pesticide's harms and benefits. Because EPA's inadequate review procedure here failed to consider information from all

stakeholders, it needlessly risks undermining Amici States' programs to prevent pollinator decline.

Pollinators are essential to state economies. Managed honeybees contribute over \$24 billion to state economies, and more than 2.5 million colonies of managed honeybees are responsible for \$15 billion of annual agricultural output.<sup>1</sup>

Pollination by native bees increases states' agricultural output by more than \$3 billion each year on top of managed bees' contributions, and crop yields increase substantially in areas with denser native bee populations.<sup>2</sup> Amici States' natural

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<sup>1</sup> Press Release, White House, *Fact Sheet: The Economic Challenge Posed by Declining Pollinator Populations* (June 20, 2014), available at <https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/fact-sheet-economic-challenge-posed-declining-pollinator-populations> ("White House Fact Sheet"); California Department of Pesticide Regulation, *California Neonicotinoid Risk Determination*, at 1 (July 2018), available at [https://www.cdpr.ca.gov/docs/registration/reevaluation/chemicals/neonicotinoid\\_risk\\_determination.pdf](https://www.cdpr.ca.gov/docs/registration/reevaluation/chemicals/neonicotinoid_risk_determination.pdf) ("CA Neonicotinoid Risk Determination").

<sup>2</sup> J.R. Reilly et al, *Crop production in the USA is frequently limited by a lack of pollinators*, 287 PROCEEDINGS OF THE ROYAL SOC'Y B, at Abstract (2020), available at <https://royalsocietypublishing.org/doi/pdf/10.1098/rspb.2020.0922>; Lucas Garibaldi et al., *Mutually beneficial pollinator diversity and crop yield outcomes in small and large farms*, 351 SCIENCE 388, Abstract (2016), available at <https://science.sciencemag.org/content/351/6271/388/tab-pdf>; John Losey & Mace Vaughan, *The economic value of ecological services provided by insects*, 56 BIOSCIENCE 311, 316 (2006), available at <https://academic.oup.com/bioscience/article/56/4/311/229003>.

ecosystems, many of which generate significant tourism revenue, also depend on pollinators—about 80% of wild plants rely on insect-mediated pollination.<sup>3</sup>

Today, pollinators' contributions to Amici States' economies and ecosystems are threatened by historically high loss rates. Average annual losses of commercial managed bee colonies in Amici States were 26% from 2012 to 2019, far above the historical average of about 10-15%.<sup>4</sup> Although studies of native bee populations are less common, available data suggests potentially catastrophic declines, especially in agricultural areas.<sup>5</sup> Pesticides are among the factors driving these declines.<sup>6</sup>

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<sup>3</sup> Jeff Ollerton, et al., *How many flowering plants are pollinated by animals?*, 120 OIKOS 321, 322-23 (2011), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1600-0706.2010.18644.x>.

<sup>4</sup> White House Fact Sheet. Average annual colony loss figure derived from the Bee Informed Partnership's National Management Survey data, available at <https://research.beeinformed.org/survey/>. The Bee Informed Partnership is a national collaboration of agricultural research labs and universities initially supported by the United States Department of Agriculture and the National Institute of Food and Agriculture.

<sup>5</sup> Insu Koh, et al., *Modeling the status, trends, and impacts of wild bee abundance in the United States*, 113 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 140, 141-42 (2016), available at <https://www.pnas.org/content/pnas/113/1/140.full.pdf>; Laura Burkle, et al., *Plant-Pollinator Interactions over 120 Years: Loss of Species, Co-Occurrence, and Function*, 339 SCIENCE 1611 (2016), available at <https://science.sciencemag.org/content/339/6127/1611>.

<sup>6</sup> White House Fact Sheet; CA Neonicotinoid Risk Determination at 1.



Because Amici States' economic prosperity depends on healthy populations of pollinators, Amici States expend significant resources to safeguard pollinators from pesticides and other threats. In California, for example, the California Department of Pesticide Regulation administers a comprehensive Managed Pollinator Protection Plan.<sup>7</sup> Programs include a system that allows beekeepers to be notified in advance of impending pesticide applications that could harm their bees,<sup>8</sup> integrated pest management techniques that use pesticides only as a last resort,<sup>9</sup> and designated citrus protection areas that prohibit applications of certain pesticides that are toxic to bees during bloom.<sup>10</sup> California's work also extends to

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<sup>7</sup> California Department of Pesticide Regulation, *California's Managed Pollinator Protection Plan – MP3* (February 2018), available at [https://www.cdpr.ca.gov/docs/enforce/pollinators/ca\\_managed\\_pollinator\\_protection\\_plan.pdf](https://www.cdpr.ca.gov/docs/enforce/pollinators/ca_managed_pollinator_protection_plan.pdf).

<sup>8</sup> Cal. Food & Agric. Code §§ 29040, 29042, 29043, 29101, 29102.

<sup>9</sup> *Protecting natural enemies and pollinators*, UNIVERSITY OF CALIFORNIA STATEWIDE INTEGRATED PEST MANAGEMENT PROGRAM, [http://ipm.ucanr.edu/mitigation/protect\\_beneficials.html](http://ipm.ucanr.edu/mitigation/protect_beneficials.html) (last visited Aug. 14, 2020).

<sup>10</sup> Cal. Code Regs. tit. 3, § 6656.

habitat preservation,<sup>11</sup> public education,<sup>12</sup> and species conservation.<sup>13</sup> Other Amici States similarly implement wide-ranging pollinator protection programs<sup>14</sup> and

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<sup>11</sup> See, e.g., *Monarch Butterfly and Pollinator Rescue Program*, CALIFORNIA WILDLIFE CONSERVATION BOARD, <https://wcb.ca.gov/Programs/Pollinators> (last visited Aug. 14, 2020) (incentives to farmers to plant pollinator-friendly vegetation in hedge rows and buffer strips); *Science: Pollinators*, CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, <https://wildlife.ca.gov/Science-Institute/Pollinators> (last visited Aug. 14, 2020) (guides for planting pollinator-friendly home gardens).

<sup>12</sup> *Grower and Beekeeper Collaboration*, CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, [https://www.cdpr.ca.gov/docs/enforce/pollinators/collaboration\\_brochure.pdf](https://www.cdpr.ca.gov/docs/enforce/pollinators/collaboration_brochure.pdf) (last visited Aug. 14, 2020); *Identify Hives and Register Apiary Locations*, CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, [https://www.cdpr.ca.gov/docs/enforce/pollinators/apiary\\_brochure.pdf](https://www.cdpr.ca.gov/docs/enforce/pollinators/apiary_brochure.pdf) (last visited Aug. 14, 2020); *What Pesticide Applicators Can Do to Help Protect Bees!*, CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, [https://www.cdpr.ca.gov/docs/enforce/pollinators/applicators\\_flyer.pdf](https://www.cdpr.ca.gov/docs/enforce/pollinators/applicators_flyer.pdf) (last visited Aug. 14, 2020); *What Pest Control Advisers Can Do to Help Protect Bees!*, CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, [https://www.cdpr.ca.gov/docs/enforce/pollinators/advisers\\_flyer.pdf](https://www.cdpr.ca.gov/docs/enforce/pollinators/advisers_flyer.pdf) (last visited Aug. 14, 2020) (educational materials disseminated to farmers and other stakeholders).

<sup>13</sup> *Monarch Butterfly and Pollinator Rescue Program*, CALIFORNIA WILDLIFE CONSERVATION BOARD, <https://wcb.ca.gov/Programs/Pollinators> (last visited Aug. 14, 2020) (program for monarch butterfly conservation); California Fish and Game Commission, Notice of Findings, Crotch Bumble Bee (*Bombus crotchii*), Franklin's Bumble Bee (*Bombus franklini*), Suckley Cuckoo Bumble Bee (*Bombus suckleyi*), and Western Bumble Bee (*Bombus occidentalis occidentalis*) (June 18, 2019), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=170351&inline> (designating four species of bumble bees as candidate species under the California Endangered Species Act).

<sup>14</sup> See, e.g., Md. Code. Agric. § 2-1801 (requiring Maryland agencies to publish and abide by pollinator habitat plans which require the use of pollinator-promoting best management practices and bar the use of pollinator-toxic pesticides except as required to protect public health); New York Department of Environmental

support research on the potential adverse effects of pesticides on pollinators, including from seed treatments.<sup>15</sup>

## **2. EPA’s Flawed FIFRA Process Passes the Regulatory Burden to States.**

Pesticide regulation under FIFRA involves a careful balance of federal and state authority. Adequate EPA pesticide reviews are central to maintaining FIFRA’s system of cooperative federalism. When EPA fails to carry out its duty to sufficiently mitigate the risks of pesticide use, it passes the burden to states, which then must expend their resources to augment follow-on state registration applications submitted with incomplete information.

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Conservation, *New York State Pollinator Protection Plan* (June 24, 2016), available at [https://www.dec.ny.gov/docs/administration\\_pdf/nyspollinatorplan.pdf](https://www.dec.ny.gov/docs/administration_pdf/nyspollinatorplan.pdf); New York Department of Environmental Conservation, *New York State Pollinator Protection Plan Update* (June 2018), available at <https://agriculture.ny.gov/system/files/documents/2019/06/pollinator-report.pdf>; H.B. 539 (Vt. 2016) (enacted) (establishing a Pollinator Protection Committee “to evaluate the causes and occurrence of reduced pollinator populations in the State and recommend measures the State can adopt to conserve and protect pollinator populations”); H.B. 3362 (Or. 2015) (enacted) (declaring a pollinator health emergency and directing the state Department of Agriculture and Oregon State University to develop a pollinator health outreach and education plan that will inform the public about best practices and other measures to reduce the adverse effects of pesticides on pollinators).

<sup>15</sup> See, e.g., Travis A. Grout et al., *Neonicotinoid Insecticides in New York State: Economic Benefits and Risk to Pollinators* (June 23, 2020), <https://pollinator.cals.cornell.edu/pollinator-research-cornell/neonicotinoid-report/>.

In general, under FIFRA, all pesticides must be federally registered before their use. 7 U.S.C. § 136a(a). Before registering a pesticide, EPA reviews human and environmental safety information to determine whether the pesticide will cause “unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5). EPA typically evaluates a proposed label and may require changes, including additional use restrictions and application instructions, which are designed to protect the public and the environment from dangers identified in the registration process. *See* 40 C.F.R. § 156.10; *see, e.g.*, Closer SC Label (sulfoxaflor), at 2 (Nov. 18, 2019), *available at* [https://www3.epa.gov/pesticides/chem\\_search/ppls/062719-00623-20191127.pdf](https://www3.epa.gov/pesticides/chem_search/ppls/062719-00623-20191127.pdf) (mitigation measures in user safety recommendations and environmental hazards sections).

Federal registrants may also be required to obtain state-level registration to permit the pesticide’s use in an individual state. *See, e.g.*, Cal. Food & Agric. Code § 12811. Many state laws contain prohibitions similar to FIFRA on pesticides that pose unreasonable environmental risks,<sup>16</sup> so EPA reviews set the foundation for state review. If EPA’s foundational review is inadequate, the process breaks down, forcing states to perform the jobs of both federal and state regulators to ensure that pesticides do not harm human or environmental health.

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<sup>16</sup> *See, e.g.*, Cal Food & Agric. Code §§ 12824, 12825.

Moreover, FIFRA preempts states from changing federally-approved pesticide labels. 7 U.S.C. § 136v(b). If a state determines that additional restrictions are necessary, it must undergo its own regulatory process that imposes restrictions via non-label enforcement mechanisms, such as formal regulation, local permit restrictions, or denial of registration.<sup>17</sup> These additional regulatory processes are often time- and resource-intensive and are typically unnecessary if EPA fulfills its obligations under FIFRA. Here, EPA's failure to solicit and consider the full spectrum of stakeholder views imposes additional burdens on Amici States' regulatory agencies, which must do so in the first instance themselves.

## **II. EPA'S FAILURE TO COMPLY WITH THE ESA IN THIS CASE WARRANTS VACATUR BECAUSE IT CONTINUES EPA'S TROUBLING PRACTICE OF REGISTERING PESTICIDES WITHOUT COMPLYING WITH THE ESA.**

EPA's sulfoxaflor registration decision also does not comply with the ESA. Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). As a first step, each federal agency must make an effects determination, meaning that it must

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<sup>17</sup> See, e.g., Cal. Code Regs. tit. 3, §§ 6400 (restricted materials), 6656 (citrus/bee protection area), 6960-70 (surface water protections).

“review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). If a federal agency action may affect a listed species or critical habitat, the agency must consult with the U.S. Fish and Wildlife Service to ensure the action will not jeopardize the continued existence of a listed species. *Id.*

Here, EPA expressly declined to conduct any ESA analysis prior to issuing its registration decision, conceding that it “has not made an effects determination for sulfoxaflor.” 2019 Sulfoxaflor Registration, Decision Memorandum, EPA Docket ID No. EPA-HQ-OPP-2010-0889-0570, at 10. Courts have held that EPA violates the ESA when, as here, it takes an action without making an effects determination at all. *See, e.g., Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005), *abrogated on other grounds as recognized in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089 (9th Cir. 2015). Thus, EPA’s registration of sulfoxaflor without conducting an ESA analysis is a clear violation of the ESA.

In lieu of preparing the required effects determination, EPA stated that it “is currently focusing most of its resources for assessing impacts to listed species on its registration review program for currently registered pesticides.” 2019 Sulfoxaflor Registration, Decision Memorandum, EPA Docket ID No. EPA-HQ-

OPP-2010-0889-0570, at 10. But being busy is not an excuse to flout the law.

EPA's unambiguous obligation under the ESA is to make an effects determination prior to registering a new pesticide. *Ctr. for Biological Diversity*, 861 F.3d at 188.

EPA's refusal to follow the ESA here is particularly troubling given its history of ignoring the ESA in pesticide registrations, its practice in recent pesticide registration reviews, and the federal government's broader efforts to circumscribe ESA pesticide evaluations. Over the past fifteen years, EPA has lost or settled several matters where it failed to conduct ESA consultation for a pesticide registration.<sup>18</sup> In all of these cases, EPA agreed or was ordered to engage in ESA consultation. In a recent and wide-ranging action, the Center for Biological Diversity and the Pesticide Action Network of North America filed a complaint alleging that EPA violated the ESA with respect to 35 different active ingredients. Fourth Amended Complaint, *Ctr. For Biological Diversity*, No. 3:11-cv-00293-JCS, ECF No. 305. In October 2019, after substantial motion practice and an appeal, EPA and the plaintiffs entered into a partial settlement in which

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<sup>18</sup> *Washington Toxics*, 413 F.3d at 1033; Proposed Stipulated Partial Settlement Agreement and Order Entering Stipulated Partial Settlement Agreement, *Ctr. for Biological Diversity v. EPA*, No. 3:11-cv-00293-JCS (N.D. Cal. Oct. 2019), ECF Nos. 364, 366; Order Approving Stipulated Injunction and Order, *Ctr. for Biological Diversity v. EPA*, No. 3:07-cv-02794-JCS, ECF No. 121 (N.D. Cal. May 17, 2010); Order Granting Summary Judgment, *Ctr. for Biological Diversity v. Leavitt*, No. 3:02-cv-01580-JSW, 2005 WL 2277030, at \*1 (N.D. Cal. Sept. 19, 2005).

EPA agreed to schedules for conducting ESA evaluations of eight pesticides, with schedules for the remaining twenty-seven pesticides to be determined by August 2021. Proposed Stipulated Partial Settlement Agreement and Order Entering Stipulated Partial Settlement Agreement, *Ctr. For Biological Diversity*, No. 3:11-cv-00293-JCS, ECF Nos. 364, 366.

Recent EPA registration review decisions have continued the practice of ignoring the ESA. FIFRA requires EPA to review registrations of active ingredients every fifteen years to account for new information about pesticides' benefits and environmental impacts. 7 U.S.C. § 136a(g)(1)(A). Typically, EPA will conduct registration reviews, release proposed decisions for public comment, and conclude the process with registration review decisions. *See* 40 C.F.R., Part 155, Subpart C. However, EPA's recent practice has been to release "interim registration review decisions," with their "interim" status based on the lack of any ESA analysis. For example, in May 2020, EPA issued proposed interim registration review decisions for 29 active ingredients, only six of which comply with the ESA (e.g., "no effects" determinations for organic active ingredients like flower oils). Pesticide Registration Review; Proposed Interim Decisions for Several Pesticides; Notice of Availability, 85 Fed. Reg. 26682 (May 5, 2020). EPA has provided no indication that it is actively working on ESA evaluations of



these active ingredients to remove the “interim” status of its registration review decisions.

Finally, the federal government has circumscribed ESA pesticide evaluations more broadly. For example, the Department of the Interior blocked release of a major ESA biological opinion by the U.S. Fish and Wildlife Service—the result of formal ESA consultation—finding that certain pesticides jeopardize the continued existence of over a thousand endangered species.<sup>19</sup> Moreover, EPA has adopted new procedures for evaluating pesticides under the ESA that substantially limit the data, scenarios, and methodologies scientists can consider.<sup>20</sup> Given this context, it is especially critical that this Court’s order vacate EPA’s decision with clear instructions that the ESA requires EPA to make an effects determination in all pesticide actions and conduct ESA consultation where applicable.

## CONCLUSION

EPA’s decision to register the challenged sulfoxaflor uses should be vacated.

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<sup>19</sup> Eric Lipton, *Interior Nominee Intervened to Block Report on Endangered Species*, N.Y. TIMES, Mar. 26, 2019, <https://www.nytimes.com/2019/03/26/us/politics/endangered-species-david-bernhardt.html>.

<sup>20</sup> Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides, EPA Docket ID No. EPA-HQ-OPP-2019-0185-0084 (Mar. 12, 2020); Attorneys General of New Mexico, California, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Washington, Vermont, and the District of Columbia, Comment Letter on Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides, EPA Docket ID No. EPA-HQ-OPP-2019-0185-0068 (Aug. 15, 2019).

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