

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

█████ █████ Individually and as
Independent Executrix of the Estate of
█████ █████ ██████████ Individually,
and ██████████ Individually,
Plaintiffs,

v.

Monsanto Company,
Defendant.

§ Civil Action No. 1:22-cv-209-RP
§
§ **Plaintiffs’ Response in Opposition to**
§ **Monsanto’s Motion *in Limine* No. 27:**
§
§ **To Exclude Evidence and Argument**
§ **Regarding the Ninth Circuit’s Decision in**
§ ***NRDC v. United States EPA* (Doc. 195).**
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I. Introduction

Monsanto moves “to exclude at trial any evidence or argument regarding the Ninth Circuit’s recent decision in *NRDC v. U.S. EPA*.”¹ Once again, Monsanto asks this Court to exclude relevant evidence that it does not like. Its motion should be denied.

II. The *NRDC* opinion vacating the EPA’s Interim Registration Decision is probative of the agency’s decision-making process, and this Court should take judicial notice of it.

Monsanto contends that *NRDC v. United States EPA* is irrelevant. In *NRDC*, the Ninth Circuit vacated the EPA’s 2020 interim registration of glyphosate, finding that the agency’s conclusion that the substance is not carcinogenic conflicts with the agency’s very own science. 38 F.4th 34, 62 (9th Cir. 2022).

The gist of the Ninth Circuit’s holding is that the neither the EPA’s own Office of Research and Development (ORD) nor its Scientific Advisory Panel (SAP) agrees with the conclusions of the agency’s Office of Pesticide Programs (OPP) that glyphosate is not likely carcinogenic. The Court summarized the disagreement as follows:

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¹ Doc. 195 at 1.

EPA's pesticide unit [(OPP)] made a preliminary determination that glyphosate was not likely to be carcinogenic and shared that determination with the [ORD]. In December 2015, ORD offered comments in response, including criticisms of the pesticide unit's approach to reviewing epidemiological studies – specifically, studies of human populations investigating whether glyphosate exposure causes cancer. . . . After stating its methodological concerns, ORD expressed disagreement with the pesticide unit's determination that glyphosate was “not likely to be carcinogenic.”

Id. at 42.

The ORD's criticisms did not change the EPA's overall conclusion, and in 2016 the agency defended its determination in “a draft paper entitled Glyphosate Issue Paper: Evaluation of Carcinogenic Potential.” *Id.* “The agency requested feedback on that draft from an EPA-commissioned Scientific Advisory Panel,” which was also critical of OPP's conclusions, noting that “the EPA evaluation does not appear to follow the [Cancer Guidelines] in several ways.” *Id.* (alteration in original) (quotation omitted). “Ultimately, the SAP was divided as to whether EPA's ‘not likely’ determination was appropriate.” *Id.* The misgivings of the ORD and the SAP notwithstanding, in 2020 the EPA issued its Interim Registration Review Decision, which announced that “there are no risks to human health from the current registered uses of glyphosate and that glyphosate is not likely to be carcinogenic to humans.” *Id.* at 43. Based on the disagreements within the agency, as well as its failure to follow its own procedures, the Ninth Circuit vacated the human-health portion of the Interim Decision. *Id.* at 62.

Monsanto's contention that these facts are *irrelevant* – while at the same time shouting from the rooftops that its product enjoys EPA approval – is frivolous. In the simplest terms, the ORD and at least half the SAP believe that glyphosate is a possible carcinogen. Further, the agency violated the Cancer Guidelines when it used “historical-control data . . . only to discount studies indicating that glyphosate may cause tumors.” *Id.* at 48. The jury should consider those facts because they bear upon the weight that it should afford the product's EPA registration. And because these facts are not subject to “reasonable dispute,” they are judicially noticeable. Fed. R. Evid. 201(b).

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III. Conclusion

This Court should take judicial notice of *NRDC*. At a minimum, it should take judicial notice of the facts underlying the court's decision to vacate the product's interim registration, which is indispensable for the trier of fact.

Dated: June 24, 2024

Respectfully submitted,



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