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October 29, 2021

Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, DC 20460

Submitted electronically via Office of the Administrative Law Judges E-Filing System and Federal eRulemaking Portal

RE: Formal Written Objections, Request for Evidentiary Hearing, and Request to Stay Tolerance Revocations: Chlorpyrifos (EPA-HQ-OPP-2021-0523)

To Whom It May Concern:

On behalf of the American Soybean Association (ASA), pursuant to the Federal Food, Drug, and Cosmetics Act (FFDCA) section 408(g) (21 U.S.C. 346a), I am writing to file formal objections regarding EPA's final rule issued on August 30, 2021, to revoke all tolerances for the insecticide chlorpyrifos (EPA-HQ-OPP-2021-0523). ASA represents more than 500,000 U.S. soybean farmers on domestic and international policy issues important to the soybean industry and has 26 affiliated state associations representing 30 soybean-producing states.

ASA has numerous concerns with the final rule as published. We believe it is inconsistent with federal statute, the Agency's own record on chlorpyrifos, and sound, science-based and risk-based regulatory practices. We also believe EPA has assumed certain factual errors in the rule that require an evidentiary hearing, which we request below. As a result of these issues and factual errors, we are concerned this rule will result in significant, irreparable harm to soybean growers. To prevent the unavoidable harm that will occur should the rule take effect, we further request EPA stay implementation of the rule until the Agency can formally review and respond to objections raised, including the factual errors ASA is seeking to address in our requested evidentiary hearing.

We would also like to point out that we view the objections listed below as supplemental to those ASA has already raised with other agricultural stakeholders in an objections letter posted to this docket and filed with the Office of the Administrative Law Judges (OALJ) dated October 19, 2021. ASA stands by and reaffirms the objections and stay request raised in that letter and seeks to raise additional concerns with the rule and highlight soybean-specific impacts in this objections letter.

Irreparable Harm to Soybean Producers, the Environment

We are greatly concerned this rule will cause significant, irreparable harm to soybean growers and the environment. Soybean growers rely on chlorpyrifos to control numerous insect pests, but some of the highest-benefit and most critical uses are to control soybean aphids and two-spotted spider mites (TSM) in the Upper Midwest. If left unchecked, these pests can cause up to 60 percent yield loss,¹ and in some cases transmit secondary viruses that can cause further crop damage. Soybean aphids and TSM pose a

¹ Hodgson, Erin. Iowa State University–Extension and Outreach. July 6, 2016. *Spider Mite Injury Confirmed in Soybean*. <u>https://crops.extension.iastate.edu/cropnews/2016/07/spider-mite-injury-confirmed-soybean</u>

serious threat to crops and are notoriously difficult to control. Aphid populations in the Upper Midwest have largely developed resistance to the pyrethroid class of insecticides, and very few control options exist for TSM. Chlorpyrifos is the only chemistry that reliably controls both aphids and TSM. If growers lose access to chlorpyrifos, as would occur from this rule, there is no one-to-one replacement scenario – growers will have to at a minimum spray two active ingredients to control these pests. This rule will increase growers' operational costs by requiring them to purchase more pest control products and will reduce their ability to be good environmental stewards by requiring the application of greater volumes of pesticides in the environment.

In our analysis, the most plausible replacement scenario is the use of dimethoate to control TSM and an application of a 4A mode of action (MOA) chemistry, such as imidacloprid, to control aphids. While dimethoate is registered for use on aphids, its record at controlling this pest is unreliable, therefore we do not believe growers will rely on it for this purpose.² While slightly outdated, for the sake of convenience we will use a 2017 analysis on the cost of insect control products to provide a conservative replacement scenario.³

Based on this 2017 estimate, a gallon of a chlorpyrifos product would cost a grower \$55.00. When assuming a standard application rate of one pint per acre, this results in a cost of \$6.88/acre treated. Under this analysis, a common dimethoate product will cost a grower \$47.00/gallon. When again assuming a common application rate of one pint per acre, the cost to the grower is \$5.88/acre treated. A common imidacloprid product in this analysis will cost a grower \$120.00/gallon. When assuming a label-directed application rate of 1.5 ounces/acre, the cost is approximately \$1.41/acre treated. Combining the costs of the dimethoate and imidacloprid treatments, a grower could expect to pay \$7.29/acre to control these two pests under a scenario without chlorpyrifos – a \$0.41 increase per crop acre treated than under the status quo with chlorpyrifos.

Considering EPA estimated in its November 2020 *Revised Benefits of Agricultural Uses of Chlorpyrifos* that U.S. soybean producers use chlorpyrifos on an estimated 3.08 million acres of soybeans annually, this cost is rapidly amplified.⁴ When extrapolated, U.S. soybean farmers in this conservative replacement scenario could expect see a \$1.26 million annual cost increase to protect their crops. Producers in states like Minnesota, North Dakota, and South Dakota, where these specific pest pressures are higher, will be disproportionally burdened by this impact.

And this scenario would only account for immediate replacement product costs. Growers use a variety of insecticides with multiple biochemical modes of action (MOA) to prevent insect pests from developing resistance to any one chemistry or MOA. By losing access to chlorpyrifos, as would result from this rule, growers will suffer the loss of a vital, effective pest management tool. As a result, growers will have to increasingly rely on the few other remaining chemistries, expediting insect resistance to those other tools and, over time, ultimately resulting in greater crop damage.

Finally, we are very concerned with requirements in the rule that would likely cause growers to lose significant volumes of food and feed product. The rule, after it takes full effect on February 28, 2022, will

² Potter, Bruce, Robert Koch, Phil Glogoza, Ian MacRae, Janet Knodel. University of Minnesota-Extension. July 31, 2017. "Pyrethroid resistant soybean aphids: What are your control options?" *Minnesota Crop News*. <u>https://blog-crop-news.extension.umn.edu/2017/07/pyrethroid-resistant-soybean-aphids.html</u>

³ University of Nebraska-Lincoln. N.D. 2017 Approximate Retail Price (\$) per Unit of Selected Insecticides for Field Crops. Accessed October 27, 2021. <u>https://cropwatch.unl.edu/2017-CW-News/2017-documents/insect-management/UNL-EC130-Insecticide-Prices-2017.pdf</u>

⁴ Mallampalli, Nikhil, Rebeccah Waterworth, and Derek Berwald. United States Environmental Protection Agency. Office of Chemical Safety and Pollution Prevention. November 18, 2020. *Revised Benefits of Agricultural Uses of Chlorpyrifos (PC#* 059101).

require holders of food to provide special channels of trade documents verifying any chlorpyrifos residues detected after that date were legal at the time of application and fall below the legal limit under the previously established tolerances. Foods that do not meet these requirements may be found adulterated. However, many soybean producers made chlorpyrifos applications prior to EPA's announcement of this action in August 2020, from which there will be detectable residues. Soybean growers and other producers could not have known at that time that special channels of trade documents would be required, and thus this retroactive requirement may force them to lose otherwise legal food and feed products.

Due to recent supply chain disruptions, many growers are finding themselves unable to ship harvested soybeans, which they are having to store in grain bins until shipments can be arranged in the months to come. Many of these shipments will likely go to market after the rule fully takes effect. If shipments occur after February 2022, residues are detected, and retroactively-required channels of trade documents are not available, growers could have significant volumes of produce seized by the Food and Drug Administration (FDA). A reasonably average-sized grain bin 36 feet in diameter and 18 feet high can hold approximately 58,600 bushels of soybeans.⁵ At the current market rate of approximately \$12.20/bushel, if these soybeans were found to be adulterated due to residue presence, an individual grower could suffer nearly \$715,000 in losses. Apply this experience to potentially hundreds or thousands of growers across the supply chain, and U.S. producers could be facing tens to hundreds of millions of dollars in losses of safe and otherwise legal food product, all because they fail to possess retroactively-required documents they could have had no way of knowing they would need at the time of application.

In summary, the soybean grower community stands to suffer immense, irreparable harm should this rule take effect. We object to the rule on these grounds, and request that EPA stay the rule's implementation to prevent these harms from occurring until the Agency can fully review and formally respond to objections.

Due Process Concerns

We are also greatly concerned growers and other stakeholders may have been denied sufficient opportunity to comment and object to this rule and on continued agricultural uses of chlorpyrifos. On October 12, 2021 – nearly six weeks after the rule had been published, and approximately three-quarters of the way through the legally required 60-day objection period – ASA staff discovered this docket on the Federal eRulemaking Portal was not open to accept comments. We immediately notified EPA of this finding, but it is unclear how long the Portal had not been open. The rule is very clear that objectors must file with both the Federal eRulemaking Portal and with EPA's Office of Administrative Law Judges (OALJ) e-filing system, but individuals seeking to object may not have had that opportunity.

The months of September and October, which was the window for filing objections to this rule, happen to be the primary harvest season and one of the busiest times of the year for U.S. soybean growers. If individual growers spared some of their very limited time to go online to the eRulemaking Portal and found the comment function disabled, they may not have had another opportunity to log on during this demanding season. If the Portal truly was disabled for several weeks, it is entirely possible numerous individuals would have been denied their legal right to object to this rule.

Moreover, ASA is concerned agricultural stakeholders will not have an opportunity to advocate for continued agricultural uses of chlorpyrifos during the registration review process. By issuing a final rule

⁵ Dorn, Tom. University of Nebraska-Lincoln. March 26, 2012. "How to Estimate Bushels in a Round Grain Bin." *CropWatch.* <u>https://cropwatch.unl.edu/how-estimate-bushels-round-grain-bin</u>

to revoke tolerances and the Agency indicating that it will not further consider agricultural uses as part of the ongoing registration review process,⁶ stakeholders have no mechanism to contend for continued agricultural uses. Behind closed doors without public input, EPA unilaterally and inappropriately decided to revoke all tolerances and has indicated it will cancel all agricultural uses. This is not how Congress intended the standard notice and comment process to occur when it enacted the Administrative Procedure Act. We object to the rule on the basis that we do not believe EPA has followed legal due process requirements to allow stakeholders sufficient time to object to this rule or advocate for continued agricultural uses of this pesticide.

Finding that Soybean Uses Pose Dietary Risk – Request for Evidentiary Hearing

We further object to this rule based on EPA's errant finding that the Agency cannot with reasonable certainty be confident that chlorpyrifos residues resulting from soybean uses do not pose an aggregate dietary risk warranting revocation. Pursuant to 40 CFR 178.27, we request EPA grant an evidentiary hearing to review this factual matter.

Through this rule, EPA is revoking all tolerances, including those for soybeans, citing as its justification for this action that the Agency "cannot determine that there is a reasonable certainty that no harm will result from aggregate exposure to residues, including all anticipated dietary (food and drinking water) exposures and all other exposures for which there is reliable information." Further, EPA has indicated it will formally cancel these uses in a separate rulemaking in the near future.⁷ We contend this underlying finding that soybean uses of chlorpyrifos might pose a potential dietary risk of concern – the very claim prompting the revocation action of this tolerance – is a factually inaccurate determination by EPA.

As part of its ongoing registration review process, EPA published a proposed interim decision (PID) for the re-registration of chlorpyrifos in December 2020. Under one scenario in the PID, EPA used a heightened 10X Food Quality Protection Act (FQPA) safety standard to ascertain uses that were reasonably certain not to result in harm under a new registration. In that scenario, EPA identified 11 high-benefit crop uses of chlorpyrifos, including soybeans, that "the agency has determined will not pose potential risks of concern with a Food Quality Protection Act (FQPA) safety factor of 10X and may be considered for retention."⁸ The Agency considered both food residue and drinking water risks in making this determination. As demonstrated, EPA's own career scientists have established elsewhere in its administrative record that they are reasonably certain soybean uses will not pose harm from aggregate dietary exposures. EPA's determination in this rule that soybean uses might pose an aggregate dietary risk and warrant revocation is factually inaccurate based on the Agency's own recent registration review determinations.

As ASA and others contend in our coalition objection letter dated October 19, 2021, the Court allowed EPA to retain uses of chlorpyrifos it was reasonably certain would not pose harm from aggregate dietary exposure. EPA also clearly has the legal authority to take that very action. ASA seeks an evidentiary hearing to dispute this underlying factual inaccuracy, from which our preferred remedy would be to rescind this rule in its entirety, or at a minimum have the rule modified to preserve soybean chlorpyrifos tolerances. Pursuant to 40 CFR 178.27(c), we will not be including a copy of EPA's December 2020 PID on chlorpyrifos, as we believe this document is an EPA document that is routinely available to any member of the public.

⁶ United States Environmental Protection Agency. Last Updated September 20, 2021. Frequent Questions about the Chlorpyrifos 2021 Final Rule. Accessed October 28, 2021. <u>https://www.epa.gov/ingredients-used-pesticide-products/frequent-guestions-about-chlorpyrifos-2021-final-rule</u>

⁷ Ibid.

⁸ United States Environmental Protection Agency. December 3, 2020. *Chlorpyrifos Proposed Interim Registration Review Decision Case Number 0100*. 40.

Conclusion

While we have previously filed objections with other agricultural stakeholder groups citing some concerns, the irreparable harms that this rule uniquely pose to soybean producers and our ability to be good environmental stewards compels us to file these supplemental objections. Also, because we believe significant factual errors contributed to determinations in this rulemaking that will result in harm to soybean growers, we request an evidentiary hearing to dispute these matters. We are also concerned that other growers and stakeholders, who may have their own objections with this rule, have not been given sufficient opportunity to state their objections or appeal for continued agricultural uses of chlorpyrifos. These are rights guaranteed by federal statutes. Until EPA can review and formally respond to these objections, including the underlying factual concerns ASA has raised for which we request an evidentiary hearing, we urge the Agency to stay this rule to prevent from occurring the significant, irreparable harms that it otherwise will inflict on U.S. soybean producers.

Sincerely yours,

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Kevin Scott President