

EXHIBIT 6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

Chlorpyrifos; Notice of Intent to Cancel
Pesticide Registrations

Docket Nos. FIFRA-HQ-2023-0001;
EPA-HQ-OPP-2022-0417

REQUEST FOR HEARING AND STATEMENT OF OBJECTIONS

by

**Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association,
American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative,
American Crystal Sugar Company, Minn-Dak Farmers Cooperative,
American Farm Bureau Federation, American Soybean Association,
Iowa Soybean Association, Minnesota Soybean Growers Association,
Missouri Soybean Association, Nebraska Soybean Association,
South Dakota Soybean Association, North Dakota Soybean Growers Association,
National Association of Wheat Growers, Cherry Marketing Institute,
Florida Fruit and Vegetable Association,
Georgia Fruit and Vegetable Growers Association, and
National Cotton Council of America**

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This Request for Hearing and Statement of Objections is submitted on behalf of the grower groups currently involved in litigation with the U.S. Environmental Protection Agency in the U.S. Court of Appeals for the Eighth Circuit¹ (Grower Petitioners) challenging EPA’s Final Rule² revoking all tolerances for chlorpyrifos, including the 11 food uses EPA deemed to be safe (the Safe Uses).³ The Grower Petitioners object to EPA’s recent notice of intent to cancel (NOIC)⁴ Gharda Chemicals International Inc.’s (Gharda’s) products Chlorpyrifos Technical (EPA Reg. No. 93182-3),⁵ Pilot 4E Chlorpyrifos Agricultural Insecticide (EPA Reg. No. 93182-7),⁶ and Pilot 15G Chlorpyrifos Agricultural Insecticide (EPA Reg. No. 93182-8).⁷ The Grower

¹ *Red River Valley Sugarbeet Growers Ass’n et al. v. Regan, et al.*, Nos. 22-1422, 22-1530 (8th Cir. filed Feb. 28, 2022) (*Red River Valley Sugarbeet Growers Ass’n et al.*).

² “Chlorpyrifos; Tolerance Revocations,” 86 Fed. Reg. 48,315 (Aug. 30, 2021) (the Final Rule) (Exhibit 1).

³ The Safe Uses of chlorpyrifos are the uses EPA unequivocally found to be safe in its Proposed Interim Registration Review Decision (PID) for Chlorpyrifos, Case Number 0100, December 2020 (Chlorpyrifos PID), EPA-HQ-OPP-2008-0850-0971 (Exhibit 2). These Safe Uses are the use of chlorpyrifos on alfalfa, apple, asparagus, cherry, citrus, cotton, peach, soybean, sugarbeet, strawberry, and wheat in specifically designated regions as set forth in EPA’s PID. Petitioners have challenged EPA’s revocation of the tolerances for the Safe Uses of chlorpyrifos.

⁴ EPA Notice “Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations,” 87 Fed. Reg. 76,474 (Dec. 14, 2022) (Exhibit 3).

⁵ A copy of the label for EPA Reg. No. 93182-3 can be found [here](#). (Exhibit 4).

⁶ A copy of the label for EPA Reg. No. 93182-7 can be found [here](#). (Exhibit 5).

⁷ A copy of the label for EPA Reg. No. 93182-8 can be found [here](#). (Exhibit 6).

Petitioners have urged EPA to immediately stay or withdraw the NOIC,⁸ and EPA rejected this request.⁹ The Grower Petitioners therefore request a hearing on the NOIC and these objections.

EPA's NOIC seeks a premature revocation of registrations for uses of an economically critical pesticide that EPA has unequivocally found to be safe. EPA announced this safety finding in the PID and has since that time reiterated to the public and to the Eighth Circuit that the Safe Uses present no risks of concern.¹⁰ Each of the registrants of chlorpyrifos have cancelled (or requested cancellation) of all food uses for chlorpyrifos other than the Safe Uses. Thus, the only action EPA proposes to take in the NOIC is to cancel Gharda's registrations for the Safe Uses. EPA's NOIC will cause unnecessary and irreparable harm to the Grower Petitioners.

The Grower Petitioners include the following entities:

Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, Missouri Soybean Association, Nebraska Soybean Association, South Dakota Soybean Association, North Dakota Soybean Growers Association, National Association

⁸ Letter from South Dakota Soybean Association and 18 additional Grower Groups, to The Honorable Michael S. Regan, Administrator, EPA, "Request for Stay/Withdrawal of EPA's Notice of Intent to Cancel Registrations for Chlorpyrifos" (Jan. 6, 2023) (Exhibit 7); Letter from Julie Gordon, President/Managing Director, Cherry Marketing Institute, to the Honorable Michael S. Regan, Administrator, EPA, "Request for Stay/Withdrawal of EPA's Notice of Intent to Cancel Registrations for Chlorpyrifos" (Jan. 9, 2023) (Exhibit 8).

⁹ Letter from Michael Goodis, Dir., Office of Pesticide Programs, EPA, to Grower Petitioners (Jan. 11, 2023) (Exhibit 9).

¹⁰ Brief of Respondents 12-13, *Red River Valley Sugarbeet Growers Ass'n et al.*, (8th Cir. July 26, 2022) (EPA Br.) (Exhibit 10).

of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, Georgia Fruit and Vegetable Growers Association, and the National Cotton Council of America.

The Grower Petitioners represent thousands of farmers around the country who need chlorpyrifos as a critical crop protection tool and who would be adversely affected by EPA's NOIC. The Grower Petitioners object to EPA's NOIC on multiple grounds, as described below.

I. EPA's Proposed Cancellation of Gharda's Registrations for the Safe Uses Is Contrary to Law Because it Would Interfere with the Jurisdiction of the U.S. Court of Appeals for the Eighth Circuit.

EPA's proposed cancellation of Gharda's registrations for the Safe Uses is contrary to law. EPA explains in its NOIC that its sole justification for cancelling the registrations of Gharda's products containing chlorpyrifos is the Agency's Final Rule revoking *all* tolerances for chlorpyrifos.¹¹ EPA explains that Gharda's chlorpyrifos products must be cancelled because they bear labeling for use on food crops, and, due to the lack of tolerances for residues of chlorpyrifos, these products pose unreasonable adverse effects on the environment under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹² In other words, EPA's position is that, because it has revoked all tolerances for chlorpyrifos, "chlorpyrifos residues in or on food are unsafe as a matter of law."¹³

However, the legality of the Final Rule is currently being decided by the Eighth Circuit. It is premature and contrary to law to cancel registrations for the Safe Uses ahead of the Eighth Circuit's decision. Commencing cancellation proceedings before the court has rendered a decision would unjustly interfere with the jurisdiction of the Eighth Circuit. The Eighth Circuit

¹¹ 87 Fed. Reg. at 76,474.

¹² *Id.* at 76,476.

¹³ *Id.* at 76,477.

will decide if EPA’s rule revoking chlorpyrifos tolerances is lawful and whether growers can resume using chlorpyrifos as outlined in EPA’s Safe Uses. EPA’s attempt to remove these products from the market now on the basis that the products are “unsafe as a matter of law” interferes with the Eighth Circuit’s pending decision on this very issue.

II. EPA’s Proposed Cancellation of Gharda’s Registrations Is Contrary to Law Because it Is Based on an Unlawful Rule.

EPA’s decision to cancel Gharda’s registrations is contrary to law because it is based on an unlawful rule—EPA’s Final Rule revoking all tolerances for chlorpyrifos.¹⁴ The Grower Petitioners have demonstrated that EPA’s Final Rule is unlawful on the following grounds.

First, EPA’s Final Rule is arbitrary and capricious because it disregards its own scientific evidence.¹⁵ EPA’s Final Rule reaffirmed its own scientific conclusions about any neurodevelopmental effects of chlorpyrifos. As discussed in the Petitioners’ opening brief, EPA

¹⁴ The Grower Petitioners hereby incorporate by reference the entirety of the Petitioners’ Opening Brief, *Red River Valley Sugarbeet Growers Ass’n et al.*, (8th Cir. May 24, 2022) (Pet’rs Br.) (Exhibit 11), and Reply Brief, *Red River Valley Sugarbeet Growers Ass’n et al.*, (8th Cir. Sept. 6, 2022) (Pet’rs Reply Br.) (Exhibit 12), submitted to the Eighth Circuit. These objections also incorporate by reference the objections filed by Grower Petitioners in response to EPA’s Final Rule revoking chlorpyrifos tolerances. Letter from Cassie Bladow, President, U.S. Beet Sugar Association, and Luther Markwart, Executive Vice President, American Sugarbeet Growers Association, to EPA, Office of Administrative Law Judges, “Objections to Decision Revoking All Chlorpyrifos Tolerances” (Oct. 29, 2021), EPA-HQ-OPP-2021-0523-0029 (U.S. Beet Sugar Ass’n & Am. Sugarbeet Growers Ass’n Objections) (Exhibit 13); Letter from Richard Gupton, Senior Vice President of Public Policy & Counsel, Agricultural Retailers Association, et al., to EPA, “Formal Written Objections and Request to Stay Tolerance Revocations: Chlorpyrifos” (Oct. 19, 2021), EPA-HQ-OPP-2021-0523-0007 (Exhibit 14); Letter from David Milligan, President, National Association of Wheat Growers (Oct. 28, 2021), EPA-HQ-OPP-2021-0523-0016 (Exhibit 15); Letter from Kevin Scott, President, American Soybean Association, “Formal Written Objections, Request for Evidentiary Hearing, and Request to Stay Tolerance Revocations: Chlorpyrifos” (Oct. 29, 2021), EPA-HQ-OPP-2021-0523-0022 (Exhibit 16); Letter from Kyle Harris, Director, Grower Relations, Cherry Marketing Institute, “Formal Written Objections and Request for Evidentiary Hearing for Chlorpyrifos Tolerance Revocation” (Oct. 29, 2021), EPA-HQ-OPP-2021-0523-0024 (Exhibit 17).

¹⁵ Pet’rs Br. 38.

found the data to be insufficient to show that there are neurodevelopmental effects below current regulatory requirements, and it maintained its longstanding 10 percent red blood cell acetylcholinesterase (RBC AChE) inhibition regulatory standard and applied the Food Quality Protection Act (FQPA) Safety Factor of 10X.¹⁶ EPA also updated its drinking water assessment in 2020 to be the most cutting-edge, sophisticated drinking water assessment yet, reflecting the most advanced methodologies for assessing drinking water exposures and risks. The assessment underwent extensive peer review. EPA analyzed risks from exposures from 11 high-benefit agricultural uses in certain regions where estimated drinking water concentrations of chlorpyrifos were below EPA's benchmark level of concern. The PID found that, based on the drinking water assessment, those uses were safe.¹⁷ And yet, EPA's Final Rule refuses to apply its own findings from its risk assessments and does not even dispute its scientific findings. Rather, EPA's refusal is based on a new legal interpretation that EPA contends required it to conclude that none of the existing tolerances was safe.¹⁸ EPA misstates the law, which nowhere justifies EPA's decision to ignore its safety finding for the Safe Uses. EPA's rejection of its own scientific evidence is arbitrary and capricious.

Second, EPA's Final Rule is arbitrary and capricious and contrary to law because it ignores the text of the law and the intent of Congress in FIFRA and the Federal Food, Drug, and Cosmetic Act (FFDCA). Based on the FFDCA's plain language, EPA was required to assess safety by not only considering currently registered uses but also by looking to anticipated exposures (a forward-looking mandate). EPA must also make safety determinations for each

¹⁶ *Id.* at 39.

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 42.

tolerance on an individual basis.¹⁹ EPA has authority to modify tolerances and thereby narrow uses if it finds based on scientific evidence that an existing tolerance is not safe. While EPA must look at aggregate exposures, the reference to aggregate exposure in the FFDCA means EPA must consider, in making individual tolerance determinations, all of the exposures a person is “anticipated” to encounter.²⁰ Therefore, EPA’s position in the Final Rule that all tolerances must rise or fall together, and that it is required to assess only currently registered uses, misreads the statute.²¹

Third, EPA’s Final Rule is contrary to law because EPA failed to harmonize its safety determination under the FFDCA with FIFRA. Instead, EPA took the unprecedented position that its actions under the two statutes are separate.²² EPA could have (and has in the past with other pesticides) coordinated its actions under the FFDCA with FIFRA by modifying tolerances or registrations accordingly.²³ EPA did not need to have cancellation and label amendment requests from all registrants in hand before acting on its safety finding.²⁴ EPA never gave registrants or the public notice of any such requirement, and in fact told Gharda that EPA would notify Gharda if it needed anything more than the written commitment Gharda had given EPA to voluntarily give up all but the Safe Uses. EPA never provided such notice to Gharda or, upon information and belief, to any other registrant. EPA should have followed its science and banned any food uses other than the Safe Uses, anticipating that regulated parties would follow the law and give

¹⁹ *Id.* at 43.

²⁰ Pet’rs Reply Br. 18.

²¹ Pet’rs Br. 45.

²² *Id.* at 48.

²³ *Id.* at 53.

²⁴ Pet’rs Reply Br. 19.

up uses made unlawful by a tolerance revocation.²⁵ EPA's failure to do so renders the Final Rule arbitrary, capricious, and contrary to law.

Fourth, EPA's Final Rule is arbitrary and capricious because it offers no reasoned explanation that addresses the relevant factors and evidence. EPA's reason for revoking all tolerances was the claim that it had no reason to believe that the registrations would be amended, and thus it was allegedly required to consider the safety of all currently registered uses collectively. This reasoning is contrary to the statute, contrary to EPA's prior practice, and contrary to logic.²⁶

Fifth, EPA's post-hoc rationalization that the PID finding was only a proposal, and therefore EPA was not required to consider it in the Final Rule, is wrong. EPA cannot disregard the scientific evidence before it simply because it may be revised later.²⁷ It was required to make decisions on tolerances based on available data and information regardless of whether it has been through notice and comment rulemaking.²⁸ EPA certainly treated its PID scientific findings as final in discussions with Gharda on a voluntary narrowing of uses consistent with the PID.²⁹ EPA's decision in the Final Rule to ignore the PID findings was arbitrary, capricious, and contrary to law.

Sixth, EPA incorrectly claims that the PID was based on a FIFRA-based analysis separate from the safety standard applicable to tolerances under the FFDCA.³⁰ Congress requires

²⁵ *Id.* at 20.

²⁶ Pet'rs Br. 55.

²⁷ *Id.* at 56.

²⁸ Pet'rs Reply Br. 8.

²⁹ Pet'rs Br. 60.

³⁰ Pet'rs Reply Br. 11-12.

the same safety standard for food use pesticides for both FIFRA and the FFDCA. The PID's safety finding was therefore directly applicable to EPA's decision concerning the safety of chlorpyrifos tolerances. Here again, EPA's post-hoc justification is arbitrary, capricious, and contrary to law.

Finally, EPA's argument that it lacked the necessary basis to act on its safety finding ignores the plain language of the statute and the undisputed facts. EPA had written commitments from Gharda to give up all uses other than the Safe Uses. EPA had a reasonable basis to expect modifications to chlorpyrifos registrations because the practical effect of tolerance revocation is a ban on the use of the pesticide.³¹ EPA did in fact receive voluntary cancellation requests of chlorpyrifos registrations once it issued its notice requesting the same, after revocation of the tolerances went into effect. If EPA needed any additional information in order to support modifying tolerances by revoking all but those for the Safe Uses, it had the statutory duty to obtain it from the registrants and the tools to compel production of such information.³² EPA's attempts to defend the Final Rule confirm that it was arbitrary, capricious and contrary to law.

For the reasons argued by Grower Petitioners to the Eighth Circuit, summarized above, the Final Rule is unlawful. Because EPA's NOIC relies on this unlawful rule, the NOIC is itself contrary to law.

III. EPA's Proposed Cancellation of Gharda's Registrations Is Arbitrary and Capricious Because it Is Contrary to the Evidence.

EPA's proposed cancellation of Gharda's registrations is arbitrary and capricious because it is contrary to the evidence. First, EPA has not presented any evidence that chlorpyrifos products are being sold or distributed for food uses. There is no evidence of a safety risk because

³¹ *Id.* at 23.

³² 21 U.S.C. § 346a(f).

there is no continuing sale or distribution of chlorpyrifos for use on food. Gharda is the only technical registrant of chlorpyrifos seeking to maintain a registration for chlorpyrifos, and even there only with respect to the Safe Uses. Moreover, Gharda clearly committed to EPA in March 2022 that its chlorpyrifos products would not enter the U.S. food supply while EPA's Final Rule remains under review by the Eighth Circuit. EPA's justification for cancelling Gharda's products on the basis that these products are allegedly unsafe is unsupported, as evidenced by the fact that the products are not being sold or distributed.

Second, EPA's cancellation of Gharda's products is contrary to EPA's own evidence that chlorpyrifos is safe for certain food uses. EPA's chlorpyrifos risk assessments³³ show that the Safe Uses are safe and meet the FQPA standard for safety set forth in FFDCA and applicable to registration review under FIFRA. EPA concluded that the Safe Uses meet the FQPA's safety standard using the 10X margin of safety and announced that finding in the 2020 PID.³⁴ There is no scientific evidence in the record to support any conclusion that the Safe Uses do not meet the applicable safety standard under FIFRA. EPA continues to agree that the Safe Uses are indeed safe.³⁵

Third, there is no evidence that the extreme step of registration cancellation is necessary to address EPA's purported concerns with certain food uses of chlorpyrifos. EPA has the information necessary to amend the chlorpyrifos registrations and labels in order to limit use of

³³ *Chlorpyrifos: Third Revised Human Health Risk Assessment for Registration Review*, (Sept. 22, 2020), EPA-HQ-OPP-2008-0850-0944 (Exhibit 18); Memorandum from Rochelle F.H. Bohaty, Ph.D., Senior Chemist, et al., EPA, to Patricia Biggio, Chemical Review Manager, et al., EPA, "Updated Chlorpyrifos Refined Drinking Water Assessment for Registration Review" (Sept. 15, 2020), EPA-HQ-OPP-2008-0850-0941 (Exhibit 19).

³⁴ Chlorpyrifos PID.

³⁵ EPA Br. 12-13; 87 Fed. Reg. 11,222, 11,241 (Feb. 28, 2022) (Exhibit 20).

chlorpyrifos to be consistent with the EPA's identified Safe Uses. EPA can and should amend, rather than cancel, Gharda's registrations.³⁶ EPA's failure to do so violates FIFRA section 6(b),³⁷ requiring EPA to consider restricting pesticide use as an alternative to cancellation.

Fourth, EPA's conclusion that cancellation of the registrations "is not anticipated to have any impacts on the agricultural economy"³⁸ is contrary to the evidence. The tolerances for the Safe Uses must be reinstated, as the Grower Petitioners have explained to the Eighth Circuit. Cancellation of the registrations would deprive Grower Petitioners of a critical crop protection tool that will cause significant crop losses and significant harm to the agricultural economy.

IV. EPA's Proposed Cancellation of Gharda's Registrations Is Arbitrary and Capricious because it Fails to Consider Important Aspects of the Problem.

EPA's proposed cancellation of Gharda's registrations is arbitrary and capricious because it fails to consider important aspects of the problem, including the extent to which EPA's decision would interfere with the Eighth Circuit's jurisdiction, the harm it would cause the Grower Petitioners, the lack of necessity for the cancellation, and the impact the cancellation would have on the economy.

A. EPA Fails to Consider the Extent to Which its Actions Would Interfere with the Jurisdiction of the Eighth Circuit.

EPA fails to consider the extent to which its cancellation of Gharda's registrations interferes with the jurisdiction of the Eighth Circuit. The Eighth Circuit is currently deciding the

³⁶ We note that these comments are relevant to the NOIC and not only to EPA's Final Rule revoking all chlorpyrifos tolerances because EPA's NOIC seeks to remove the last remaining chlorpyrifos products from the market, depriving growers from having access to chlorpyrifos in the future if the Eighth Circuit decides EPA's revocation of the tolerances for the Safe Uses is unlawful. EPA fails to justify why an NOIC is appropriate when it has the authority to amend registrations to remove the specific uses it determined to be unsafe.

³⁷ 7 U.S.C. § 136d(b).

³⁸ 87 Fed. Reg. at 76,478.

legality of EPA’s revocation of the tolerances for the Safe Uses. EPA’s preemptive cancellation of Gharda’s registrations will cause serious consequences for Grower Petitioners. A favorable decision from the Eighth Circuit would allow Grower Petitioners to use chlorpyrifos for the Safe Uses in the 2023 growing season. But cancellation of Gharda’s registrations for these Safe Uses would prevent Grower Petitioners from resuming use of chlorpyrifos in the upcoming growing season. The Grower Petitioners would have to wait years while registrants undertake the process to obtain new registrations for chlorpyrifos, all the while suffering the crop losses and year-on-year increases in pest pressure, as detailed in their sworn declarations before the Eighth Circuit.

B. EPA Fails to Consider the Harm this Action Would Cause the Petitioners and Other Growers.

EPA has failed to consider the substantial harm that growers are already facing and will continue to face by EPA’s attempt to keep chlorpyrifos off the market. EPA has found chlorpyrifos critical to the agricultural economy.³⁹ In many instances, there is no available substitute for the effective control of pests. Growers are in desperate need of chlorpyrifos for the 2023 growing season. The Grower Petitioners have demonstrated in their objections to EPA and in their attestations to the Eighth Circuit⁴⁰ the dire situation they are facing and will continue to suffer for the survival of their businesses and the crops they supply for U.S. consumers with the loss of chlorpyrifos.

EPA’s assumption that its NOIC will not have an impact on the economy, because chlorpyrifos tolerances have been revoked, is a fallacy. If the Eighth Circuit rules in favor of the

³⁹ EPA, “Revised Benefits of Agricultural Uses of Chlorpyrifos (PC# 059101),” (Nov. 18, 2020), EPA-HQ-OPP-2008-0850-0969 (Exhibit 21).

⁴⁰ Pet. for Review, Attachment 2, Exhibits A-W, Supporting Declarations of Grower Petitioners, *Red River Valley Sugarbeet Growers Ass’n et al.* (8th Cir. Feb. 28, 2022). We hereby incorporate by reference the entirety of Attachment 2, Exhibits A-W (Exhibit 22).

Grower Petitioners, and EPA has already cancelled all chlorpyrifos registrations, growers will have no chlorpyrifos products available to protect the crops at issue. Growers would have to wait for registrants to submit new registrations to EPA and obtain approvals from EPA prior to sale or distribution of the pesticide. As explained below, this hurdle would cause significant harm to growers and disruptions in the economy.

On average, 8.8 million acres of agricultural crops were treated with chlorpyrifos annually from 2014-2018, and EPA estimated the total annual economic benefit of chlorpyrifos to crop production to be \$19-130 million.⁴¹ In the state of North Dakota alone, the per acre benefits of chlorpyrifos could be as high as \$500 in parts of the state, leading the EPA-estimated high-end benefits over \$30 million overall nationwide.⁴² Therefore, the loss of chlorpyrifos has significant negative economic impacts for the agriculture industry.

The Grower Petitioners already suffer and will continue to suffer immediate, unrecoverable, significant irreparable harm in the form of economic losses and reputational damage unless EPA withdraws or stays this NOIC as soon as possible. The loss of chlorpyrifos as a pest management tool will result in substantially increased costs, lost profits, a larger environmental impact from the more frequent use of less effective alternatives, and decreased crop yields. All of these harms are compounded by the fact that growers reasonably relied on EPA's PID to plan for crop management, and several states took a measured approach to phase out uses of chlorpyrifos rather than immediately banning chlorpyrifos without a phase-out

⁴¹ *Id.*, Exhibit J at 3.

⁴² *Amicus Curiae Br. of the State of North Dakota in Support of Petitioners 16, Red River Valley Sugarbeet Growers Ass'n et al.* (8th Cir. June 1, 2022) (North Dakota *Amicus Br.*) (Exhibit 23).

period.⁴³ And growers and states face burdens of having to address the tons of “stranded” and unusable chlorpyrifos stocks remaining that will need to be disposed of.⁴⁴ EPA’s NOIC ignores these economic impacts.

1. Irreparable Harm to Sugarbeet Growers

For the sugarbeet industry, the estimated high-end benefits for the use of chlorpyrifos is \$32.2 million per year, and this is likely an underestimate.⁴⁵ Chlorpyrifos is the most effective control against the sugarbeet root maggot (SBRM) and flies, and in some cases is the *only* effective pesticide. The industry depends significantly on chlorpyrifos as a critical crop protection tool to meet the sugar demands of the U.S. economy.⁴⁶ EPA has acknowledged that the lack of alternatives to chlorpyrifos can lead to potential yield loss in sugarbeet crops. The continued loss of chlorpyrifos products would be devastating to sugarbeet growers because registered alternatives can only suppress but not control the SBRM or are only registered for use on adult flies and not larvae.

For one sugarbeet farm located in a “hot spot” with a high incidence of SBRM infestation, 65 percent of its annual revenue comes from sugarbeets, and 75 percent of its annual revenue comes from crops on which it applies chlorpyrifos.⁴⁷ The farm estimated that without chlorpyrifos unrecoverable losses could be up to \$200 per acre.⁴⁸ For another farm, where 50 percent of its annual revenue comes from crops on which it applies chlorpyrifos, it estimated

⁴³ *Id.*

⁴⁴ *Id.* at 26.

⁴⁵ U.S. Beet Sugar Ass’n & Am. Sugarbeet Growers Ass’n Objections.

⁴⁶ Pet. for Review, Attach. 2 Supporting Declarations of Grower Petitioners, Exhibit A at 4-5.

⁴⁷ *Id.*, Exhibit B at 3.

⁴⁸ *Id.* at 8.

unrecoverable losses of about \$60,000 per year of its sugarbeet crop alone.⁴⁹ Another cooperative estimated unrecoverable losses of up to \$30,000,000 per year for its members.⁵⁰ One cooperative estimated unrecoverable losses of approximately \$34,436,634 in 2022 for its grower members.⁵¹ Growers in this region cannot source sugarbeets from elsewhere because they cannot be shipped thousands of miles or be grown in other areas to make up for the losses.⁵² Another cooperative estimated unrecoverable losses of up to \$17,500,000 per year of its members.⁵³

The State of North Dakota found that there would be a reduction of 1,565 pounds of sugar per acre produced and \$201 per acre in revenue losses, resulting in \$20,904,000 in losses in North Dakota SBRM areas and \$18,395,642 in additional total production costs for a total of \$39,299,642 in losses.⁵⁴ And these losses will compound with every year of using less effective alternatives. Without chlorpyrifos, SBRM can decrease crop yields by as much as 45 percent.⁵⁵

Sugarbeet growers also face concerns about their healthy crops being impacted by being stored with crops from other farms that are damaged by destructive pests. Costs to sugarbeet growers are exacerbated by inflation, which has increased the cost of operating a farming business (fertilizer costs, fuel costs, chemical costs, and equipment costs) by over 30 percent.⁵⁶

⁴⁹ *Id.*, Exhibit E at 7.

⁵⁰ *Id.*, Exhibit F at 9.

⁵¹ *Id.*, Exhibit G at 11.

⁵² *Id.* at 15.

⁵³ *Id.*, Exhibit I at 10.

⁵⁴ North Dakota *Amicus* Br. 18-19.

⁵⁵ *Id.* at 22.

⁵⁶ Pet. for Review, Attach. 2 Supporting Declarations of Grower Petitioners, Exhibit B at 8.

In North Dakota, the sugarbeet industry is also suffering from impacts from extreme weather, early freezes, drought, and, in 2022, the latest spring on record caused by persistent cool and wet weather.⁵⁷

For these farms and many others, chlorpyrifos is the only tool that has been consistently effective at controlling SBRM. Alternatives require multiple applications and are less effective, resulting in increased costs and a larger environmental impact. The problem cannot be ameliorated through methods like crop rotation because it is not an effective substitute for chlorpyrifos for SBRM control. SBRM larvae overwinter in fields and emerge the next year.⁵⁸ Without chlorpyrifos use in the future, this will likely lead to greater harm every year as the population of destructive SBRM grows with each growing season.⁵⁹

Sugarbeet growers are also concerned that the loss of chlorpyrifos in the future will result in less protection for sugarbeets from symphylans, as chlorpyrifos is the only fully registered rescue option available in early spring to control symphylans.⁶⁰ One cooperative estimated that, if chlorpyrifos is not available, 25-33 percent of the sugarbeet seed production acreage will likely be affected, with up to a 50 percent loss of seed production.⁶¹ Further, the loss of chlorpyrifos will negatively impact sugarbeet growers not only economically but also through reputational harm, creating uncertainty regarding the safety of food products in commerce.⁶²

⁵⁷ North Dakota *Amicus* Br. 25.

⁵⁸ *Id.* at 24.

⁵⁹ Pet. for Review, Attach. 2 Supporting Declarations of Grower Petitioners, Exhibit B at 6.

⁶⁰ *Id.*, Exhibit C at 4.

⁶¹ *Id.*, Exhibit G at 14.

⁶² *Id.*, Exhibit C at 7.

2. Irreparable Harm to Soybean Growers

As the soybean industry has demonstrated, growers have relied on chlorpyrifos to control numerous insect pests, with the most critical uses being for the control of soybean aphids and two-spotted spider mites (TSM). These pests are notoriously difficult to control and can result in up to 60 percent yield loss.⁶³

Some of these pests can vector plant pathogenic viruses which can result in double-digit yield losses and, in rare instances, reduce yields greater than 90 percent.⁶⁴ There are only a limited number of options to control aphids and TSM, and removal of any options such as chlorpyrifos will result in rapid build-up of insecticide resistance to the remaining options.⁶⁵ For growers who lose access to chlorpyrifos, there is no one-to-one replacement, meaning that growers will have to spray at least two active ingredients to control these pests, increasing their purchase and application costs. Soybean farmers estimate over \$1.26 million in annual cost increases to protect their crops if they are forced to continue to use alternatives.⁶⁶

3. Irreparable Harm to Fruit Growers

For cherry growers, chlorpyrifos has been one of the most effective tools and, according to one Grower Petitioner, is used on almost all of its cherry tree acres.⁶⁷ And there is no equivalent replacement for chlorpyrifos. Chlorpyrifos is unique in that it is the only effective chemistry to protect the cherry industry from trunk borers. Chlorpyrifos is active on adult, egg, and larval stages of most trunk boring pests. EPA has even acknowledged that borers are a

⁶³ *Id.*, Exhibit K at 4.

⁶⁴ *Id.*, Exhibit M at 4.

⁶⁵ *Id.*

⁶⁶ *Id.*, Exhibit K at 6.

⁶⁷ *Id.*, Exhibit T at 3.

growing problem for which effective alternatives to chlorpyrifos are not available.⁶⁸ Tree loss from trunk borers can cost a grower \$300 per tree in lost revenue.⁶⁹ Chlorpyrifos has also been important for peach growers to protect against lesser peach tree borers, as well as apple growers to protect against scale, stink bugs, aphids, and borers in apple production.⁷⁰

Citrus growers in Florida also depend on chlorpyrifos. They currently face a dire situation with the growing problem citrus greening caused by the Asian citrus psyllid. The importance of chlorpyrifos in the management of citrus greening cannot be overemphasized. Already, the U.S. Department of Agriculture (USDA) reported in 2019 that citrus production overall in Florida has decreased by more than 74 percent since the introduction of the Asian citrus psyllid and the subsequent citrus greening infections.⁷¹ Asian citrus psyllids, rust mites, spider mites, broad mites, scales, and Diaprepes root weevils all cause economic damage to citrus in Florida. All of these pests are targeted directly and managed effectively by chlorpyrifos. Other alternatives are less effective, have increased costs, and result in lower crop yields.

4. Irreparable Harm to Wheat and Cotton Growers

Chlorpyrifos has been used on winter and spring wheat and allows growers the flexibility needed to address pest pressures.⁷² It has also been used to protect cotton crops from whitefly and late season cotton aphid infestations. If not controlled, the entire cotton chain is impacted from sugar excretions on the cotton from the pests. The resulting “sticky cotton” slows down the

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 5-6.

⁷⁰ *Id.*, Exhibit V at 4.

⁷¹ *Id.*, Exhibit U at 3.

⁷² *Id.*, Exhibit S at 3.

ginning process by up to 25 percent and will lower the grade and value of cotton. Over time, wheat and cotton growers will experience yield losses and increased costs.

As outlined above, grower groups will suffer immediate, irreparable harm in the form of significant yield losses, lost profits, and, consequently, lost jobs if they can no longer use chlorpyrifos to protect their crops. Chlorpyrifos is urgently needed because it has broad-spectrum effectiveness, has a relatively short persistence (making it less harmful to beneficial insects), and can be used in multiple delivery systems—all key attributes of an integrated pest management program.⁷³ The loss of chlorpyrifos will only expedite insect resistance to the few remaining alternatives and result in greater crop damage. These growers will also be forced to apply less effective alternatives in greater volumes, reducing their ability to be good environmental stewards.

C. EPA Fails to Consider That There Is No Purpose Served by Cancelling Gharda's Registrations.

EPA fails to consider that its proposed cancellation of Gharda's products does not serve the cited purpose. In fact, there is no legitimate purpose for cancelling Gharda's registrations. Chlorpyrifos cannot be used on food crops while the Eighth Circuit considers the validity of the Final Rule revoking all tolerances for chlorpyrifos. And, as stated previously, Gharda has committed to ensure chlorpyrifos product does not enter the U.S. food supply while EPA's Final Rule remains under review by the Eighth Circuit. EPA has not presented any evidence that chlorpyrifos products are being sold or distributed in violation of its revocation order. All EPA's NOIC accomplishes is prematurely revoking pesticide registrations for economically critical pesticide products on the basis of an unlawful Final Rule that the Grower Petitioners have asked

⁷³ *Id.*, Exhibit J at 4.

to be vacated. EPA's NOIC would create more barriers and delays for growers who will need access to chlorpyrifos products in the future.

D. EPA Fails to Consider the Impact on the Economy.

EPA fails to consider, as required by FIFRA section 6(b) for registration cancellations, “restricting [chlorpyrifos’s] use or uses as an alternative to cancellation” and fails to “take[] into account the impact” of cancellation of chlorpyrifos registrations “on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy.”⁷⁴ As demonstrated by the Grower Petitioners, the economic impact of the total removal of all chlorpyrifos registrations for all food uses is devastating for the crops that, based on EPA’s own evidence and safety finding for the Safe Uses, should not be restricted. While significant economic impacts are already being felt by growers, the harms will continue and be exacerbated with the cancellation of Gharda’s products, the sole remaining approved chlorpyrifos products for the Safe Uses. Rather than have growers go out of business and consumers be deprived of critical food supply, EPA can simply amend chlorpyrifos registrations to restrict the non-safe food uses and allow the safe food uses to continue to be approved.

V. EPA’s Proposed Cancellation of Gharda’s Registrations Is Arbitrary and Capricious and an Abuse of Discretion Because it Offers No Reasoned Analysis for the Agency’s Change in Course.

EPA’s proposed cancellation of Gharda’s registrations is arbitrary and capricious and an abuse of discretion because it fails to provide a reasoned analysis for its sudden shift in position. EPA fails to explain why it is deviating from historical precedent and procedures. The USDA Office of Pest Management Policy (OPMP) believes EPA can retain certain chlorpyrifos uses

⁷⁴ 7 U.S.C. § 136d(b).

that meet EPA's safety standard based on its PID—the Safe Uses.⁷⁵ EPA provides no analysis for why its drastic actions to cancel all registrations is appropriate when specific uses it has determined to be safe can be preserved. EPA also inappropriately brushes aside the comments and concerns from USDA.⁷⁶

VI. EPA's Refusal to Stay this Proceeding, Seeking Cancellation of Gharda's Registrations, Is Arbitrary, Capricious and Contrary to Law.

Petitioners in the Eighth Circuit, by letter dated January 6, 2023, asked EPA to withdraw or stay this proceeding in light of the pending Eighth Circuit litigation. Unfortunately, EPA rejected that request. As discussed, EPA's cancellation of Gharda's registrations would interfere with the jurisdiction of the Eighth Circuit and would force Grower Petitioners and other parties to needlessly expend additional resources fighting the cancellation while the Eighth Circuit litigation continues. Any cancellation of Gharda's registrations based upon the fact that tolerances have been revoked by EPA's Final Rule would become void upon an Eighth Circuit's ruling invalidating the Final Rule.

Because no use of chlorpyrifos can occur while the Final Rule is in effect, there is no legitimate purpose served by proceeding with cancellation of Gharda's registrations. EPA does not have reason to believe that chlorpyrifos is being sold or distributed in violation of the Final Rule. EPA waited to issue this NOIC for over nine months after Gharda's written commitment to ensuring its chlorpyrifos products do not enter the U.S. food supply. EPA's decision to issue the NOIC appears to be an attempt to interfere with the jurisdiction of the Eighth Circuit and the

⁷⁵ Letter from The Honorable Thomas J. Vilsack, Secretary, USDA, to The Honorable Rep. Vicky Hartzler (Sept. 20, 2022) (Exhibit 24).

⁷⁶ 87 Fed. Reg. at 76,478-79.

relief it might award Petitioners for EPA's unlawful Final Rule, rather than an action based on a legitimate concern about the unlawful sale and distribution of chlorpyrifos products for food use.

If the Eighth Circuit decides in favor of the Grower Petitioners, and growers can thereafter resume use of chlorpyrifos on the crops identified in the Safe Uses, cancelling Gharda's registrations will have unnecessarily created significant difficulties for growers in their ability to fight pests. It could take years before registrants of products containing chlorpyrifos apply for and obtain approval from EPA for new products or new food uses. In the meantime, growers will continue to suffer crop losses and/or increased costs of production.

The Grower Petitioners will suffer irreparable harm from EPA's cancellation of chlorpyrifos registrations for the Safe Uses. For the reasons set forth above, sound public policy supports a stay of the NOIC, and a stay would not harm public health or any public interest. The Grower Petitioners' objections to the NOIC are made in good faith and not frivolous. EPA should therefore stay the NOIC.⁷⁷

VII. Grower Petitioners Request a Hearing on EPA's Proposed Cancellation of Gharda's Registrations.

For the reasons outlined above, Grower Petitioners object to EPA's NOIC and request a hearing on EPA's cancellation of Gharda's registrations. The Grower Petitioners are adversely affected by EPA's NOIC and EPA's refusal to withdraw or stay that action. EPA should not proceed with cancelling Gharda's chlorpyrifos product registrations until the litigation pending before the Eighth Circuit is resolved. Neither should EPA cancel Gharda's chlorpyrifos registrations until EPA first complies with the requirements of FIFRA. For the reasons set forth

⁷⁷ *Cf.*, 21 C.F.R. § 10.35(e)(1)-(4).

above, cancellation of Gharda's registrations is unlawful, arbitrary, capricious, and an abuse of discretion.

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Respectfully submitted,

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