

Gharda Chemicals International, Inc. (“Gharda”) and 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, and Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America (“Growers” and together with Gharda, “Petitioners”) respectfully request that the Administrative Law Judge (“ALJ”) deny the Motion to Intervene filed on March 28, 2023, by League of United Latin American Citizens, Pesticide Action Network North America, Natural Resources Defense Council, California Rural Legal Assistance Foundation, Farmworker Association of Florida, Farmworker Justice, GreenLatinos, Labor Council for Latin American Advancement, Learning Disabilities Association of America, Pinos y Campesinos Unidos del Noroeste, Alianza Nacional de Campesinas, United Farm Workers, and United Farm Workers Foundation (“Proposed Intervenors”).

Petitioners oppose Proposed Intervenors’ Motion to Intervene¹ on the grounds that (1) intervention would unreasonably broaden the issues already being presented, and (2) the Proposed Intervenors lack standing to intervene.

¹ Proposed Intervenors’ Motion to Intervene, Docket No. FIFRA-HQ-2023-0001 (Mar. 28, 2023).

I. Background and Procedural History

Petitioners have challenged the Final Rule² underlying the Notice of Intent to Cancel (“NOIC”) as arbitrary and capricious in the Eighth Circuit Lawsuit³ because the Final Rule revoked all tolerances for chlorpyrifos, even though EPA found that tolerances for a subset of 11 uses (the “Safe Uses”) meet the aggregate exposure safety standard in the Federal Food, Drug, and Cosmetic Act (“FFDCA”). The Lawsuit has been fully briefed, and oral argument took place on December 15, 2022. A decision by the Eighth Circuit could be issued at any moment and could include vacatur of the Final Rule.

On December 14, 2022, the day before oral argument in the Lawsuit, the EPA issued the NOIC, proposing to cancel Petitioner Gharda’s registrations for chlorpyrifos products.

Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations, 87 Fed. Reg. 76,474 (Dec. 14, 2022). Petitioners urged EPA to stay or withdraw the NOIC in correspondence dated January 6, 2023, but EPA denied this request. On January 13, 2023, Petitioners submitted objections to the NOIC, and Gharda also submitted a request for a stay of the NOIC. EPA responded to Gharda’s stay request on February 22, 2023; on March 31, 2023, the ALJ issued the Order on Petitioner Gharda Chemicals International, Inc.’s Motion to Stay (“Order Denying Stay”).

Proposed Intervenors filed their Motion to Intervene on March 28, 2023, under 40 C.F.R. § 164.31 and § 164.60 to intervene in this administrative proceeding challenging EPA’s NOIC. Petitioners submitted a Preliminary Response to the Motion to Intervene on April 6, 2023, requesting the motion be held in abeyance pending Petitioners’ request for certification and

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

³ The Eighth Circuit is currently reviewing the legality of the Final Rule in the lawsuit captioned *Red River Valley Sugarbeet Growers Ass’n, et al. v. Regan, et al.*, Nos. 22-1422, 22-1530 (8th Cir.) (the “Lawsuit”).

appeal of the Order Denying Stay. On April 10, 2023, the ALJ issued an order denying Petitioners' Preliminary Response to Motion to Intervene Requesting Motion be Held in Abeyance and ordered that Petitioners file any substantive response to the Proposed Intervenors' Motion to Intervene within two days—by April 12, 2023.

Also on April 10, 2023, Petitioners filed a Request for Certification of Order Denying Stay for Appeal to Environmental Appeals Board (“EAB”) on the grounds that the ALJ’s order denying Petitioners’ stay involves an important question of law, the order denying the stay violates Petitioners’ Constitutional due process rights, and review of the order denying the stay by the EAB after a final judgment is issued by the ALJ would be inadequate or ineffective. This request is pending before the ALJ.

II. Standard for Intervention

In an action pursuant to FIFRA § 6, a motion for leave to intervene “must set forth the grounds for the proposed intervention, the position and interest of the movant in the proceeding and the documents to be filed pursuant to either § 164.22 or § 164.24.” 40 C.F.R. § 164.31(a). A motion for leave to intervene will be freely granted “only insofar as such leave raises matters which are pertinent to and do not unreasonably broaden the issues already presented.” 40 C.F.R. § 164.31(c).

III. Granting Intervention Would Unreasonably Broaden the Issues Already Presented By Improperly Allowing The Introduction of Science Issues Already Determined

As evidenced by the Motion to Intervene, Proposed Intervenors seek to unreasonably broaden the issues beyond those already presented in this proceeding. Proposed Intervenors intend to argue that the regulatory endpoint for chlorpyrifos that EPA used in the Final Rule was not appropriate. *See, e.g.*, Mot. to Intervene at 9 (“Proposed Intervenors will argue that EPA’s

use of an under protective regulatory endpoint in the Final Rule contravenes the FQPA’s health-based safety standard.”); *see also id.* at 14 (Proposed Intervenors suggest they will “present the same arguments they presented in their *unaddressed* objections to the Final Rule.”) (emphasis added).

However, in the Final Rule EPA did not change the current regulatory endpoint for chlorpyrifos, which has been in place for decades, or abandon in any way the science supporting it. *See* Petitioners’ Opening Brief at 29, *Red River Valley Sugarbeet Growers Ass’n*, Nos. 22-1422, 22-1530 (8th Cir. May 24, 2022), ID No. 5160660 (in the Final Rule, EPA reaffirmed its long-standing standard as the appropriate regulatory endpoint”).⁴ Proposed Intervenors now seek to go beyond this settled science and debate during the NOIC proceeding a scientific challenge to EPA’s long-held regulatory standard for chlorpyrifos. In deciding this motion, the ALJ risks opening the door to arguments, like as to the proper regulatory endpoint, that were not challenged as part of the litigation in the Eighth Circuit and should not now be raised in this proceeding. There is no basis for Proposed Intervenors to go beyond what EPA has confirmed for decades, including again in the Final Rule. To allow Proposed Intervenors’ arguments as to the regulatory endpoint and “unaddressed objections” would inject issues in the NOIC proceeding that should have been challenged in a federal court of appeals. *See* 21 U.S.C. § 346a(h) (setting forth requirements for seeking judicial review of the Final Rule). Proposed Intervenors would, therefore, seek to expand the issues that this Tribunal should consider when they have already waived challenge to those issues. For that reason alone, Proposed Intervenors’ Motion to Intervene must be denied.

⁴ Indeed, a primary focus of the Eighth Circuit Lawsuit is that EPA was arbitrary and capricious in ignoring its own science.

IV. Proposed Intervenors Lack Standing to Intervene In This Proceeding

Proposed Intervenors lack standing to intervene in the NOIC proceeding because the declarations used as support for Proposed Intervenors' standing are not tailored to address Gharda's registrations. The declarations were prepared in 2018 and 2019 to support the Ninth Circuit challenge to the tolerances for chlorpyrifos *generally* and are not limited to the registrations at issue in the NOIC. Following the Final Rule, there are no tolerances. This means that, as a matter of law, no food uses of chlorpyrifos can currently occur. Declarations provided with the Motion to Intervene seek to create standing in the context of food uses of chlorpyrifos being allowed, but now that food uses are not currently permitted, that cannot be the basis for Proposed Intervenors' standing in this proceeding. *See, e.g.*, Mot. to Intervene at Ex. 1, p. 65 (arguing that "food uses" of chlorpyrifos are causing harm to members of Proposed Intervenors). Proposed Intervenors' citation to the outdated declarations fails to account for the changed landscape since those declarations were prepared.

Proposed Intervenors fail to acknowledge the steps Gharda has taken to amend its registrations to conform to the Safe Uses, which illustrates that the recycled declarations from the Ninth Circuit are stale and insufficient to demonstrate a concrete interest at stake in this proceeding. Therefore, Proposed Intervenors lack standing to intervene in the NOIC proceeding.

V. Conclusion

For those reasons, Petitioners respectfully request that the ALJ deny Proposed Intervenors' Motion to Intervene in this proceeding.

This 12^h day of April, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2023, true and correct copies of the foregoing Opposition to Motion to Intervene was filed electronically with the EPA OALJ E-Filing System for the OALJ's E-Docket Database, with a copy via electronic mail to the following:

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