

17-71636

**United States Court of Appeals
for the Ninth Circuit**

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

Petitioners,

STATES OF NEW YORK, CALIFORNIA, HAWAII, MARYLAND, VERMONT,
WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, and the
DISTRICT OF COLUMBIA,

Intervenors,

v.

ANDREW WHEELER, Administrator, U.S. Environmental Protection Agency,
and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review of the Order of the Administrator of the
United States Environmental Protection Agency

**THE STATES' (1) MEMORANDUM IN OPPOSITION TO EPA'S MOTION TO DISMISS; AND
(2) CROSS-MOTION TO CONSOLIDATE THE PROCEEDING WITH A NEWLY-FILED
PETITION, STATE OF NEW YORK ET AL. V. WHEELER**

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PRELIMINARY STATEMENT

The Intervenor States of New York, California, Hawaii, Maryland, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia (together, the “States”), respectfully submit this memorandum in opposition to the motion of the U.S. Environmental Protection Agency (“EPA”) to dismiss this proceeding as moot.

Further, the States hereby cross-move to consolidate this proceeding with a petition titled *State of New York et al. v. Wheeler*, No. 19-71982, which was filed with the Court on August 7, 2019.

EPA’s motion to dismiss marks yet another attempt to avoid judicial review of its decision to allow continued use of the toxic pesticide chlorpyrifos on food, despite mounting scientific evidence and the previous conclusion of EPA’s own staff that the tolerances established by EPA in 2006 can no longer be found “safe,” as required by the Federal Food, Drug, and Cosmetic Act (“FFDCA”), 21 U.S.C. § 346a.

The Court should deny EPA’s motion and consolidate this proceeding with the newly filed petition identified above. The Court should also permit the consolidated proceeding to go forward on the record already before the Court in this proceeding, supplemented by the

few additional documents that the record for the consolidated proceeding would require, thereby facilitating swift resolution of the underlying dispute.

FACTUAL BACKGROUND

For procedural, factual, and legal background, the States respectfully refer the Court to their opening brief in this proceeding. (*See* ECF #55 at 22-44.) In addition, the following developments are directly relevant to the motions before the Court.

On June 5, 2017, New York, California, Maine, Massachusetts, Maryland, Vermont and Washington filed administrative objections to EPA's March 29, 2017 order denying a 2007 administrative petition that challenged the tolerances for chlorpyrifos that EPA had set in 2006. (ECF #39-1 at ER166-183.) A coalition of environmental and labor organizations filed a separate set of administrative objections. (ECF #39-1 at ER121-164.) Both sets of administrative objections raised purely legal challenges focusing on EPA's failure to comply with the FFDCA.

Also on June 5, 2017—within 60 days after publication of the March 29, 2017 EPA order—environmental and labor groups, including the League of United Latin American Citizens (together, “LULAC”),

commenced this original proceeding for judicial review of that order. (ECF #1-1.)

On July 5, 2017, New York, Maryland, Massachusetts, Vermont, Washington, and the District of Columbia moved for leave to intervene. (ECF #5.) California and Hawaii moved to intervene on February 6, 2018. (ECF #54.) Both intervention motions were granted. (ECF #s 31, 68.)

The States asked this Court to vacate EPA's order as arbitrary and capricious and contrary to law, and sought a writ of mandamus directing EPA to revoke all tolerances for chlorpyrifos within 60 days. (ECF#55 at 71; *see also* ECF #38-1 at 59 [LULAC Brief].) Alternatively, the States and LULAC asked the Court to issue a writ of mandamus directing EPA to rule on the objections by a date certain so that judicial review could proceed. (ECF #55 at 71-72; ECF #38-1 at 59.) In either event, the States asked the Court to retain jurisdiction. (ECF #55 at 72.)

A panel of this Court granted the States and LULAC full relief, vacating EPA's order and directing EPA to revoke all tolerances and cancel all registrations for chlorpyrifos. (ECF #111-1.) On EPA's petition (ECF #115-1), the Court granted rehearing en banc (ECF #145). By decision dated April 19, 2019, the Court ordered EPA to issue within

90 days a final decision on the administrative objections, which had by then been pending for over twenty-two months. (ECF #171 at 6.) The Court expressly did not decide “any other issue urged by the parties.” (ECF #171 at 6-7.) And the Court retained jurisdiction “over this and any related cases.” (ECF #171 at 7.)

On July 18, 2019, the 90th day after the en banc Court’s order, EPA issued a decision denying all objections. *See* 84 Fed. Reg. 35555 (Jul. 24, 2019). Although the FFDCA permits EPA to leave a pesticide tolerance in effect “*only* if the Administrator determines that the tolerance is safe,” 21 U.S.C. § 346a(b)(2)(A)(i) (emphasis added), EPA’s July 2019 order—like its March 2017 order—contained no safety finding.¹ Instead, EPA disavowed the prior conclusions of its own staff that chlorpyrifos could not currently be found safe, *see* 84 Fed. Reg. at 35564, 35566, and expressed its intent to maintain the chlorpyrifos tolerances in effect

¹ “Safe” means that “the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” 21 U.S.C. § 346a(b)(2)(A)(ii).

without a current finding of safety, possibly until October 2022, *id.* at 35561.

Even though the FFDCA places on EPA the burden of establishing that tolerances are safe and “ensur[ing] that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue,” 21 U.S.C. § 346a(b)(2)(C)(ii)(I), EPA’s July 2019 order attempted to shift that burden. The order stated that EPA was denying the objections because LULAC and the objecting States failed to provide “valid, complete and reliable data that set forth why the tolerances are *unsafe*.” 84 Fed. Reg. at 35562 (emphasis added).

The day after issuing the July 2019 order, EPA moved to dismiss this proceeding, arguing that EPA had “fully complied with this Court’s April 19, 2019 order, by issuing the Final Order Denying Objections” (ECF #174 at 4-5).

On August 7, 2019, six States that submitted administrative objections filed a new petition challenging EPA’s July order, *State of New York et al. v. Wheeler*, No. 19-71982. That petition was filed well within the 60 days afforded by 21 U.S.C. § 346a(h)(1) to obtain judicial review of

the EPA's July 2019 order. LULAC likewise challenged the July 2019 order in a new petition, No. 19-71979. The States are also informed and believe that LULAC will move to amend its petition in this proceeding to add a challenge to the July 2019 order.

ARGUMENT

THE COURT SHOULD DENY EPA'S MOTION TO DISMISS AS UNNECESSARY AND CONSOLIDATE THE PENDING PROCEEDING WITH THE STATE'S NEWLY FILED PROCEEDING

By deciding to “retain jurisdiction over this and any related cases” (ECF #171 at 7), the Court indicated that it sought to postpone review of the merits—i.e., whether EPA violated the FFDCA by allowing continued use of chlorpyrifos without a finding of safety—until after EPA had decided the administrative objections and thereby removed the asserted jurisdictional impediment to review. Now that EPA has finally decided the administrative objections, EPA's jurisdictional defense is academic, and this Court can and should proceed to review the legality of EPA's treatment of chlorpyrifos as expeditiously as possible.²

² This proceeding is not moot because the States and LULAC did not obtain all the relief sought, namely, review on the merits. See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

Moreover, EPA's motion would result in inefficient use of the Court's and the parties' resources. If successful, EPA's motion would require the parties to start from the beginning and reconstitute the record on review, thereby delaying resolution of this matter. Given EPA's long history of delay on chlorpyrifos, further devices to delay a final resolution should be rejected.

Instead, and as the Court likely anticipated, the States have now filed a related case for consolidation with this proceeding.³ The petition in that case squarely challenges EPA's July 2019 order, alleging among other things that, contrary to the FFDCA's mandate, the July 2019 order continues to allow the use of chlorpyrifos without a current finding that the pesticide is safe.

Consolidation of these matters would permit the consolidated proceeding to move forward on the existing record on review, supplemented by those record documents that post-date EPA's March 2017 order. For example, the administrative docket now reflects that

³ Because this Court retained jurisdiction over "any related cases" (ECF #171 at 7), the States' follow-up chlorpyrifos petition may—indeed, must—be heard by the Ninth Circuit.

responses were filed to LULAC's and the State's June 2017 administrative objections on May 7, 2019.⁴ And the record must now also include EPA's July 2019 order.

Accordingly, the States respectfully request that the Court deny EPA's motion to dismiss and grant the States' cross-motion to consolidate this proceeding with the petition titled *State of New York et al. v. Wheeler*, No. 19-71982, filed on August 7, 2019. As instructed by the Clerk's Office, the States are similarly moving for consolidation in *State of New York et al. v. Wheeler*.

⁴ The responses are dated August 27, 2018. EPA has not explained the discrepancy between the date on the document and the date it was docketed.

CONCLUSION

The Court should deny EPA's motion to dismiss and grant the States' cross-motion to consolidate.

Dated: Albany, New York
August 8, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULE OF APPELLATE
PROCEDURE 27 AND NINTH CIRCUIT RULE 27-1**

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1, the undersigned counsel hereby certifies that the foregoing (1) **MEMORANDUM IN OPPOSITION TO EPA'S MOTION TO DISMISS; AND (2) CROSS-MOTION TO CONSOLIDATE THE PROCEEDING WITH A NEWLY-FILED PETITION, *STATE OF NEW YORK ET AL. V. WHEELER*** complies with the volume limitations in that it is proportionately spaced, has a type-face of 14 points, and that the body of the document contains 1,473 words, as measured by the word processing system used in its preparation (Microsoft Word).

/s/ Frederick A. Brodie
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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2019, I served THE STATES' (1) MEMORANDUM IN OPPOSITION TO EPA'S MOTION TO DISMISS; AND (2) CROSS-MOTION TO CONSOLIDATE THE PROCEEDING WITH A NEWLY-FILED PETITION, *STATE OF NEW YORK ET AL. V. WHEELER* on the parties of record by filing it with the United States Court of Appeals for the Ninth Circuit via CM/ECF.

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