

NO. 17-71636

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

Petitioners,

v.

ANDREW WHEELER, Administrator, United States Environmental Protection
Agency, AND THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,

Respondents.

EPA'S MOTION TO DISMISS

INTRODUCTION

Respondents United States Environmental Protection Agency (“EPA”) and EPA Administrator Andrew Wheeler hereby ask this Court to dismiss the above-captioned action in full on the grounds that Petitioners’ challenge to EPA’s order entitled “Chlorpyrifos: Order Denying PANNA and NRDC’s Petition to Revoke Tolerances,” 82 Fed. Reg. 16,581 (Apr. 5, 2017) (hereinafter “Initial Denial Order”), and subsequent request for mandamus relief, is now moot in light of EPA’s final decision issued pursuant to 21 U.S.C. § 346a(g)(2)(C) on Petitioners’ administrative objections to EPA’s Initial Denial Order.

PROCEDURAL HISTORY

In 2007, Pesticide Action Network of North America (“PANNA”) and Natural Resources Defense Council (“NRDC”) petitioned EPA to revoke all tolerances under the Federal Food, Drug, and Cosmetic Act (“FFDCA”) and cancel all registrations for chlorpyrifos under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) (hereinafter the “Administrative Petition”). 82 Fed. Reg. at 16,583. EPA then resolved some of the claims raised. *Id.* at 16,583. In September 2014, PANNA and NRDC filed a petition for a writ of mandamus to force EPA to respond to the remaining claims. *See generally In re PANNA*, No. 14-72794 (9th Cir.). This Court ordered EPA to “issue either a proposed or final revocation rule or a full and final response” to the Administrative Petition by October 31, 2015. *In re PANNA*, 798 F.3d 809, 815 (9th Cir. 2015). In November 2015, EPA proposed to respond to the Administrative Petition by “revok[ing] all chlorpyrifos tolerances” 82 Fed. Reg. at 16,583. The Court then ordered EPA to take final action by March 31, 2017. *In re PANNA*, 808 F.3d 402, 402-03 (9th Cir. 2015); *In re PANNA*, 840 F.3d 1014, 1015 (9th Cir. 2016).

On March 29, 2017, EPA took action. It denied the Administrative Petition pursuant to 21 U.S.C. § 346a(d)(4)(A)(iii). 82 Fed. Reg. at 16,581. PANNA and NRDC then moved for further relief in the mandamus action. *In re PANNA*, Case No. 14-72794, Dkt. No. 55-1 (Apr. 5, 2017). This Court denied the motion. “Now that EPA has issued its denial, substantive objections must first be made through the

administrative process mandated by [the FFDCA].” *In re PANNA*, 863 F.3d 1131, 1132-33 (9th Cir. 2017) (citations omitted). Once EPA issues a final order, only then can the Court “consider the merits of EPA’s ‘final agency action.’” *Id.*

On June 5, 2017, Petitioners filed the underlying Petition for Review in this matter. On the same day, Petitioners filed with EPA administrative objections to the Initial Denial Order pursuant to 21 U.S.C. § 346a(g)(2)(A). Recognizing that this Court did not have jurisdiction to review the Initial Denial Order issued pursuant to 21 U.S.C. § 346a(d)(4)(A)(iii), EPA filed a Motion to Dismiss. *See* Dkt. No. 23. As explained in that Motion and subsequent briefing, the FFDCA did not give Courts of Appeal jurisdiction to review EPA’s orders denying petitions issued under 21 U.S.C. § 346a(d)(4)(A)(iii). *See* EPA Brief at 13-20 (Dkt. No. 69); Petition for Rehearing at 6-11 (Dkt. No. 115-1).

Although Petitioners did not file a Petition for Writ of Mandamus, in their opening brief, Petitioners argued that if the Court found it did not have jurisdiction to review EPA’s Initial Denial Order it should issue a writ of mandamus requiring EPA to issue a final decision on Petitioners’ administrative objections by a time certain. *See* Petitioner Brief at 50-59 (Dkt. No. 38).

On August 9, 2018, a panel of this Court held that it had jurisdiction to review EPA’s Initial Denial Order and found it to be unlawful. EPA sought rehearing *en banc*, which was granted, and the panel opinion was withdrawn. On April 19, 2019, this Court, sitting *en banc*, without determining whether it had jurisdiction to review

EPA’s Initial Denial Order, construed Petitioners’ brief as a petition for writ of mandamus, which it granted, and ordered EPA to “issue, no later than 90 days after the filing of this order, a full and final decision on LULAC’s objections pursuant to 21 U.S.C. § 346a(g)(2)(C).” Slip Op. at 6 (Dkt. No. 171). On July 18, 2019, EPA issued a decision on Petitioners’ administrative objections pursuant to 21 U.S.C. § 346a(g)(2)(C) entitled *Chlorpyrifos: Final Order Denying Objections to March 2017 Petition Denial Order* (“Final Order Denying Objections”), which is publicly available at <https://www.epa.gov/ingredients-used-pesticide-products/july-2019-final-order-denying-objections-march-2017-chlorpyrifos>.¹

ARGUMENT

I. Dismissal Is Appropriate as EPA Has Issued a Final Order Denying Objections and the Underlying Petition is Now Moot.

Dismissal of this matter is appropriate for several reasons. First, this Court *never* had jurisdiction to review the Initial Denial Order that is the subject of this Petition. Congress only authorized judicial review of specific agency actions in the FFDCA. *See NRDC v. Johnson*, 461 F.3d 164, 172 (2d Cir. 2006). Only EPA’s “[f]inal decision,” following an objections process in 21 U.S.C. § 346a(g), is subject to judicial

¹ For reasons explained in that Order, EPA has denied all the objections to the Initial Denial Order. EPA, however, is continuing to work expeditiously to complete the FIFRA chlorpyrifos registration review well in advance of the October 2022 deadline. In connection with that review, EPA has engaged in discussions with the chlorpyrifos registrants that could result in further limitations on use affecting the outcome of the registration review.

review. 21 U.S.C. § 346a(h)(1). But no language of the FFDCA grants jurisdiction to review an order issued under section 346a(d)(4)—such as the Initial Denial Order at issue in the underlying Petition—either before *or after* the administrative objections process. *See id.*

Second, dismissal is appropriate because EPA has fully complied with this Court’s April 19, 2019 order, by issuing the Final Order Denying Objections. That Order is now subject to judicial review under 21 U.S.C. § 346a(h)(1), should Petitioners, or other affected parties, wish to challenge it in this Court or another court with jurisdiction. However, the instant matter before the Court, Petitioners’ challenge to EPA’s Initial Denial Order and subsequent request for mandamus relief is now concluded and dismissal is appropriate.

Third, EPA’s Final Order Denying Objections represents EPA’s final and only judicially reviewable administrative decision on Petitioners’ request to EPA to revoke the tolerances for chlorpyrifos under the FFDCA. Accordingly, the underlying Petition for Review of the Initial Denial Order is now moot as the “issues presented [by Petitioners regarding the Initial Denial Order] are no longer live,” *Public Util. Commission of State of Cal. v. FERC*, 100 F. 3d 1451, 1458 (9th Cir. 1996) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

As this Court recognized in the *In re PANNA* matter, “mandamus proceedings . . . address[] the *timing*, not the *substance*, of EPA’s response.” *In re Pesticide Action Network N. Am.*, 863 F.3d at 1132. EPA has now issued its Final Order Denying

Objections in the time required by the Court. Accordingly, Petitioners' mandamus request is now moot because EPA has fully completed the administrative process contained within the FFDCA for the administrative petition to revoke the tolerances for chlorpyrifos under the FFDCA.

In sum, EPA has done what this Court has ordered it to do. Further, the Petition for Review of the Initial Denial Order – an order this Court never had jurisdiction to review – has been rendered moot by the Final Order Denying Objections. To the extent Petitioners want to challenge EPA's Final Order Denying Objections, the FFDCA requires such person to file a petition with the Court of Appeals asking for the order to be set aside in whole or in part, within 60 days after publication of the order issued under section 346a(g)(2)(C). 21 U.S.C. § 346a(h)(1). Section 346a(h)(2) of the FFDCA says that the court will have exclusive jurisdiction, “[u]pon the filing of such a petition.” *Id.* at § 346a(h)(2). Accordingly, this matter should be dismissed.

CONCLUSION

EPA respectfully requests that this matter be dismissed.

Dated: July 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 19, 2019, and that all participants in the case registered as CM/ECF users will receive service via the appellate CM/ECF system.

s/ Erica Zilioli