

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PLAINS COTTON GROWERS, INC.,

Petitioner,

vs.

ANDREW R. WHEELER, Administrator.
U.S. Environmental Protection Agency,

and

MARIETTA ECHEVERRIA, Acting
Division Director, U.S. Environmental
Protection Agency, Office of Pesticide
Programs, Registration Division,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

Case No.:

PETITION FOR REVIEW

Under Federal Rule of Appellate Procedure 15, Fifth Circuit Rule 15, 7 U.S.C. § 136n(b), 5 U.S.C. § 706, and 16 U.S.C. § 1536, Petitioner Plains Cotton Growers, Inc. hereby petitions this Court for review of the final actions taken by the United States Environmental Protection Agency (“EPA”) titled: the Engenia Herbicide Registration (the “Engenia Registration,” a true and correct copy of which is attached as **Exhibit A**), the A21472 Plus VaporGrip Technology Registration (the “Tavium Registration,” a true and correct copy of which is attached as **Exhibit B**), and the XtendiMax with VaporGrip Technology Registration (the “Xtendimax Registration,” a true and

correct copy of which is attached as **Exhibit C**).¹ EPA released the Engenia Registration, the Tavium Registration, and the XtendiMax Registration on October 27, 2020, and published the decisions and supporting documents to the Federal Docket Management System (Regulations.gov) under docket number EPA-HQ-2020-0492.

Petitioner submits that the Engenia Registration, the Tavium Registration, and the XtendiMax Registration violate the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), Endangered Species Act (“ESA”), and Administrative Procedures Act (“APA”) by imposing registration conditions that exceed statutory authority, are arbitrary and capricious, are an abuse of discretion, are not supported by substantial evidence when considered on the record as a whole, and are not otherwise in accordance with law. *See, e.g.*, 7 U.S.C. §§ 136(a), 136n(b); 5 U.S.C. § 706; 16 U.S.C. § 1536. Thus, Petitioner respectfully requests that this Court, if necessary, hold those registration conditions unlawful, remand the Engenia Registration, the Tavium Registration, the XtendiMax Registration, and supporting analyses and decision documents to Respondents without vacatur, hold the remainder of the Engenia Registration, the Tavium

¹ EPA supported those final actions with several analysis and decision documents: Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean (the “Dicamba Memorandum”, a true and correct copy of which is attached as **Exhibit D**); “Dicamba Use on Genetically Modified Dicamba-Tolerant (DT) Cotton and Soybean: Incidents and Impacts to Users and Non-Users from Proposed Registrations” (the “Incidents and Impacts Report,” a true and correct copy of which is attached as **Exhibit E**), “Consideration of Newly Submitted Mutagenicity Data and Human Health Risk Assessment Summary” (the “HRA Report,” a true and correct copy of which is attached as **Exhibit F**), “Dicamba DGA and BAPMA Salts – 2020 Ecological Assessment of Dicamba Use on Dicamba-Tolerant (DT) Cotton and Soybean Including Effects Determinations for Federally Listed Threatened and Endangered Species” (the “ESA Assessment,” a true and correct copy of which is attached as **Exhibit G**), Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba-Tolerant Cotton Production (the “Cotton Benefits Assessment,” a true and correct copy of which is attached as **Exhibit H**), and Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba-Tolerant Soybean Production (the “Soybean Benefits Assessment,” a true and correct copy of which is attached as **Exhibit I**).

Registration, the XtendiMax Registration, and the supporting analyses and decision documents lawful, award Petitioner its costs and reasonable attorneys' fees, and grant such further relief as may be just and proper.

This is a protective petition.² Petitioner believes that the challenged decisions are “judicially reviewable by the district courts of the United States,” rather than this Court, because the decisions did “not follow[] a hearing and [are] final action[s] of the [EPA] Administrator not committed to the discretion of the Administrator.” 7 U.S.C. § 136n(a). But out of an abundance of caution, particularly because FIFRA requires that challenges “to the validity of any order issued by the Administrator following a public hearing” be brought within sixty days, Petitioner submits this petition protectively, to preserve its claims. 7 U.S.C. 136n(b).

Dated: November 10, 2020

Respectfully submitted,

/s/ Edmund S. Sauer

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² Petitioner Plains Cotton Growers and the American Soybean Association jointly filed a district court challenge to the same agency decisions in the United States District Court for the District of Columbia. *See Am. Soybean Ass'n, et al. v. EPA, et al.*, No. 20-cv-03190 (D.D.C.). The American Soybean Association also filed protective petition in the United States Court of Appeals for the D.C. Circuit. *See Am. Soybean Ass'n v. EPA, et al.*, Case No. 20-1441 (D.C. Cir.). Because Plains Cotton Growers does not “reside[] or ha[ve] a place of business” in the District of Columbia, FIFRA requires that it file its protective petition here, in the circuit in which it resides and has a place of business. *See* 7 U.S.C. § 136n(b).

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

- Plains Cotton Growers, Inc. (Petitioner) – Plains Cotton Growers is a non-profit cotton producer organization comprised of regional cotton producers from across the Texas High Plains cotton production region. Plains Cotton Growers has no

parent companies and no publicly held company holds ten percent or greater ownership interest in Plains Cotton Growers.

- National Cotton Council (shares Plains Cotton Growers' financial interest)
- American Soybean Association (shares Plains Cotton Growers' financial interest)
- Sygenta Crop Protection, LLC (product registrant)
- BASF Corporation (product registrant)
- Bayer CropScience LP (product registrant)
- Bartholomew J. Kempf, Edmund S. Sauer, Kyle W. Robisch, and Bradley Arant Boult Cummings LLP (counsel for Plains Cotton Growers)
- United States Environmental Protection Agency (Respondent)
- Andrew Wheeler, Administrator, United States Environmental Protection Agency (Respondent)
- Marietta Echeverria, Acting Director, United States Environmental Protection Agency, Office of Pesticide Programs, Registration Division (Respondent)
- William Barr, Attorney General, U.S. Department of Justice (counsel for Respondents)
- David Fotouhi, General Counsel, United States Environmental Protection Agency (counsel for Respondents)
- Jeffrey Bossert Clark, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice (counsel for Respondents)

Dated: November 10, 2020

Respectfully submitted,

/s/ Edmund S. Sauer

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Review and Rule 26.1 Disclosure Statement on Respondents through First Class U.S. Mail, return receipt requested, to each of the following addresses on this 10th day of November 2020:

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/s/ Edmund S. Sauer
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