

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMMUNITY IN-POWER AND
DEVELOPMENT ASSOCIATION INC., et
al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

AMERICAN CHEMISTRY COUNCIL,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

No. 1:23-cv-2715-DLF/1:23-cv-3276-DLF
(consolidated)

Hon. Dabney L. Friedrich

**DEFENDANTS' RESPONSE IN OPPOSITION TO HEXION'S MOTION FOR
LEAVE TO INTERVENE AS A DEFENDANT**

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INTRODUCTION

Defendants U.S. Environmental Protection Agency and its Administrator, Michael Regan, (collectively, “EPA”) respectfully submit this opposition to Movant-Intervenor Hexion Inc.’s (“Hexion”) motion to permissively intervene under Fed. R. Civ. P. 24(b). *See* Mot., ECF No. 26. This litigation concerns EPA’s alleged failure to comply with nondiscretionary duties under the Toxic Substances Control Act (“TSCA”) to issue risk evaluations as to 22 chemicals. The parties have been diligently working to finalize a settlement, which would fully resolve the litigation through setting deadlines by which EPA must issue the 22 risk evaluations. If the parties are unable to settle and the cases are litigated, the sole issue before the Court would be remedy: setting appropriate deadlines by which EPA would comply with its mandatory, nondiscretionary duties. The litigation does not and will not concern the substance of any risk evaluations, nor bind EPA to a particular substantive outcome.

Mindful of the narrow scope of this litigation, the Court should deny Hexion’s motion to permissively intervene on multiple grounds. First, Hexion lacks standing because it has no legally protected interest in the outcome of this case and, as a result, no injury in fact. Its motion for intervention is based upon unsubstantiated assertions that EPA has not allowed for sufficient time to complete the formaldehyde risk evaluation. But Hexion concedes the risk evaluation is overdue and offers nothing that could rebut EPA’s own determinations regarding the appropriate deadline for the risk evaluation. Hexion’s ultimate interests concern the substance of EPA’s final formaldehyde risk evaluation, which EPA has not yet issued and this litigation does not address. Hexion may adjudicate those interests at the appropriate time. In the context of intervention as of right, the D.C. Circuit has rejected motions to intervene on similar grounds in *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013), and *In re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir. 2016). Second, Hexion has not made a case for permissive

intervention because its motion is untimely. Third, Hexion would not be prejudiced by denial as it has already submitted comments during the public notice process—comments that EPA has considered. But intervention would needlessly delay the resolution of this action. For all these reasons, Hexion’s motion fails.

STATEMENT OF FACTS

A. Statutory Background

In 1976, Congress enacted TSCA in part to prevent the unreasonable risks presented by certain chemical substances. *See* 15 U.S.C. §§ 2601–97. In its original state, TSCA provided EPA discretionary authority for reviewing chemical substances but did not provide a specific process or timeline for doing so. *Id.*; *see* 15 U.S.C. §§ 2604, 2606(a).

Congress amended TSCA in 2016, creating, among other things, a process requiring EPA to systematically prioritize chemicals based on their risk potential; evaluate the risks of high-priority chemicals; and ultimately regulate to remove any unreasonable risks EPA identifies. *See* Frank R. Lautenberg Chem. Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (June 22, 2016). In the “risk evaluation” phase, EPA must determine whether the chemical substance at issue presents an unreasonable risk of injury to health or the environment under the chemical’s conditions of use. 15 U.S.C. § 2605(b)(4)(A). A determination that a chemical *does not* present an unreasonable risk must be issued by order under section 2605(i)(1) and is a final action subject to judicial review. *Id.* §§ 2605(i)(1), 2618(a)(1)(A). A determination that a chemical *does* present unreasonable risk triggers the “risk management” phase in which EPA goes through a public rulemaking process whereby the Agency must impose requirements on the chemical substance as necessary to address the unreasonable risk. *Id.* § 2605(a)(1). EPA’s determination that a chemical substance presents an unreasonable risk is judicially reviewable at the same time as the ultimate risk management rulemaking. *Id.* §§ 2605(i)(2), 2618(a)(1)(A).

B. Factual and Procedural Background

The CIDA Plaintiffs filed their complaint on September 18, 2023, ECF No. 1. They allege that EPA has failed to perform non-discretionary duties under 15 U.S.C. § 2605(b)(4)(G) by failing to timely complete risk evaluations for 22 chemicals, including formaldehyde. Plaintiff American Chemistry Council (“ACC”) filed its complaint in Case No. 1:23-cv-3276 on December 13, 2023, ECF No. 1. ACC alleged the same claims as the CIDA Plaintiffs, but only as to two of the chemicals.

On January 16, 2024, Defendants moved to consolidate the two actions, ECF No. 21, which this Court granted in a January 17, 2024 Minute Order. Pursuant to this Court’s August 15, 2024 Minute Order, Defendants’ response to both complaints is presently due September 16, 2024, but EPA has moved unopposed for a 30-day extension. ECF No. 30. The parties have reached a tentative settlement and developed two proposed consent decrees. One consent decree proposed to set deadlines for EPA to complete risk evaluations for 20 chemicals (the “20-chemical CD”), including formaldehyde. The other consent decree proposed deadlines for EPA to complete risk evaluations for the remaining two chemicals. Both proposed consent decrees were published in the Federal Register for public comment on April 26, 2024. 89 Fed. Reg. 32424 (Apr. 26, 2024). The comment period closed on May 28, 2024. Defendants received comments, including from Hexion, on the 20-chemical CD, with adverse comments focusing on the deadline to act on the formaldehyde risk evaluation. EPA continues to review those comments and deliberate on next steps. The parties are attempting a global resolution and have not yet moved to enter either proposed CD. On August 30, 2024, Hexion moved to intervene for the sole purpose of opposing the 20-chemical CD. ECF No. 26.

STANDARD OF REVIEW

Fed. R. Civ. P. 24(b) states that on timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1)(A)-(B). Permissive intervention is “an inherently discretionary enterprise,” so decisions under Rule 24(b) are reviewed for abuse of discretion. *EEOC v. Nat’l Child.’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013) (noting the “wide latitude afforded” to district courts in denying permissive intervention because movants lacked standing and basis to intervene as of right).

ARGUMENT

The formaldehyde final risk evaluation is not the subject of this litigation. Rather, this deadline suit concerns solely EPA’s deadlines to issue risk evaluations, which Hexion does not contest were due on June 20, 2023. Mot. at 6. And while Hexion may have an interest in the outcome of the final formaldehyde risk evaluation, Hexion does not have a legally protectable interest in *when* that final risk evaluation is issued. Nor can Hexion rebut EPA’s own determinations regarding the appropriate deadline. Because Hexion has no legally protectable stake in the outcome of this litigation, it lacks standing and has not made out a case for permissive intervention.

I. Hexion has not established standing.

While “[i]t remains . . . an open question in this circuit whether Article III standing is required for permissive intervention.” *Def. of Wildlife v. Perciasepe*, 714 F.3d at 1327 (quoting

Section 4 Deadline Litig., 704 F.3d at 980),¹ nothing precludes the Court from considering standing. Here, Hexion fails to show standing, which requires a concrete and particularized injury in fact, traceable to the conduct complained of, and likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see also Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 438 (2017) (requiring standing for intervenors); *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) (requiring standing and declining to distinguish between plaintiffs and defendants). Here, Hexion has established no concrete injury that can be characterized as an invasion of a legally protected interest. To confer standing, an alleged injury must be “certainly impending to constitute injury in fact”; allegations of possible future injury cannot suffice. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) (“When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events . . . and those which predict a future injury that will result from present or ongoing actions . . .”). Moreover, the party invoking jurisdiction needs to show that it is “substantially likely” that each link in this multi-step causal chain would come to fruition. *Waterkeeper All., Inc. v. Regan*, 41 F.4th 654, 663 (D.C. Cir. 2022). While Hexion claims injury because EPA *may* fail to fulfill allegedly non-discretionary duties that it must complete when conducting the formaldehyde risk evaluation, Mot. at 11-12, 18-19, this is pure speculation regarding both the substance of the final formaldehyde risk evaluation and a hypothetical future risk management rule, neither of which presently exist. This wholly conjectural chain of speculative injuries arising out of future final agency action does not justify Hexion’s intervention in this action. *See*

¹ Other circuits have considered jurisdiction when determining whether to allow permissive intervention. *See, e.g., League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997).

Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *La. Env't Action Network v. Browner*, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (rejecting “multi-tiered speculation” as evidence of concrete injury).

Hexion also fails to allege any “procedural” injury. It does not dispute that the formaldehyde risk evaluation is overdue, Mot. at 6, and there is no basis for Hexion to rebut EPA’s own determinations regarding the appropriate deadline. Under such circumstances, the Court should deny intervention. *See Defs. of Wildlife v. Perciasepe*, 714 F.3d at 1324 (“That one rulemaking moves faster than another, however, does not mean that it results in procedural injury to [industry trade group’s] members.”); *see also Env’t Def. v. Leavitt*, 329 F. Supp. 2d 55, 68 (D.D.C. 2004).

This does not, however, leave Hexion without a remedy. If EPA finds that formaldehyde presents an unreasonable risk, the Agency will be required to promulgate a risk management rule. 15 U.S.C. § 2605(a)(1). As discussed below, that final rule will be judicially reviewable, and in the course of that review Hexion will be able to raise any procedural or substantive challenges it may have to the underlying risk evaluation. *Id.* §§ 2605(i)(2), 2618(a)(1)(A); *see also infra* II.C.

Despite Hexion’s characterization of its motion as intervening for the “limited purpose” of objecting to the proposed consent decree, Hexion should be required to establish standing. Hexion claims that it need not establish jurisdiction because it does not seek intervention to litigate a substantive claim or defense, but instead to object to and oppose entry of the 20-chemical CD as the deadline for EPA final action on the formaldehyde risk evaluation. Mot. at 10. But Hexion understates the limited nature of its proposed intervention. And the cases that Hexion cites to, which address moving to intervene for discrete reasons like to access documents,

are entirely inapposite. *See* Mot. at 10 (citing *EEOC*, 146 F.3d at 1047). Hexion seeks to assert a defense that is starkly different from defenses asserted by EPA. Although the parties have not yet moved for entry of the CD, if they were to, and Hexion were to oppose it on the grounds that the CD's proposed deadline for formaldehyde were too short, this could impede or derail settlement entirely. Thus, Hexion *would be* asserting an independent defense that EPA, the Defendant, has not asserted.

Given Hexion's complete failure to demonstrate any injury arising from the proposed deadline for action on formaldehyde, it is entirely appropriate for this Court to exercise its considerable discretion to deny the permissive intervention. *See In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d at 980 ("In view of this unresolved standing issue, however, we think it inappropriate to exercise our pendant jurisdiction." (quoting *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 32 (D.C. Cir. 2000))).

II. Hexion's motion is untimely.

Hexion seeks permissive intervention only, perhaps as an acknowledgment that it lacks a protectable legal interest and cannot meet the requirements to intervene as of right. Yet Hexion fails to meet even the looser requirements for permissive intervention. Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1), (b)(1)(B). Rule 24 requires a "timely motion" for both intervention as of right and permissive intervention. *Id.* at (a)-(b). If a motion to intervene is untimely, intervention must be denied and there is no need for the Court to address the other factors in the intervention analysis. *NAACP v. New York*, 413 U.S. 345, 365 (1973). The timeliness of an intervention motion:

[I]s to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which

intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.

Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001) (citation omitted).

Here, Hexion's request to intervene under Rule 24(b) should be denied as untimely. First, Hexion filed its motion too late, after the parties had already proposed a settlement. Second, Hexion lacks legitimate reasons for intervening. Third, intervention is not necessary to preserve Hexion's rights. Fourth, the parties will be prejudiced by intervention.²

A. Hexion's motion is too late.

Hexion moves to intervene nearly a year after the CIDA Plaintiffs filed suit. The parties have spent months negotiating two separate consent decrees, which, if the Court enters them, would fully resolve the consolidated actions. The proposed consent decrees were published in the Federal Register and subject to notice and comment. Thus, this case is nearly resolved, the public comment period is complete, and EPA is currently considering the comments received. The more advanced the stage of the proceeding, the weaker the argument for intervention. *See, e.g., Amador Cnty. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905 (D.C. Cir. 2014) ("the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties.") (citation omitted).

Hexion, however, contends that its motion is timely simply because EPA has not answered either Complaint. Mot. at 19. But, if at all relevant, that indicates that the parties' settlement discussions have advanced over the past year. Had settlement discussions dissolved,

² This last factor is addressed *infra* Arg. III. Fed. R. Civ. P. 24(b)(3) requires the Court to separately consider, apart from the timeliness question, whether "intervention will unduly delay or prejudice the adjudication of the original parties' rights."

EPA would have answered the Complaints, and the parties would be proceeding to summary judgment briefing.

If Hexion had a legitimate interest in this matter, that interest arose upon the filing of this suit in September 2023. Hexion's late attempt to derail resolution of this matter through the proposed Consent Decree should not be permitted. Hexion offers no reason for its delay in filing its motion, and for that reason alone the Court should find the motion untimely.

B. Hexion does not offer a legitimate reason for intervention.

Hexion's proposed defenses do not concern this litigation, which solely involves the appropriate deadlines for EPA's risk evaluations. Rather, Hexion focuses on its theoretical future disagreement with the future formaldehyde risk evaluation, which is not even final. *See also supra* Arg. I. Hexion's concerns about the mere possibility of a future adverse action are "insufficient to show the necessary impairment to [its] interests." *In re Idaho Conservation League*, 811 F.3d at 515.

Hexion proffers no legal support for its claim that it has an interest in EPA complying with the Agency's nondiscretionary duty. Hexion claims to object "solely to the proposed consent decree's arbitrary deadline of December 31, 2024 for finalization of the TSCA risk evaluation for Formaldehyde, which is less than five months away, is unreasonably short and will not allow EPA to conduct a proper risk evaluation in accordance with applicable TSCA standards." Mot. at 6. But whether EPA has sufficient time to conduct a proper risk evaluation is solely within EPA's purview to assess and decide. It is the agency that must explain its inability to comply with a nondiscretionary deadline. *See, e.g., Sierra Club v. Wheeler*, 330 F. Supp. 3d 407, 422 (D.D.C. 2018), *aff'd*, 956 F.3d 612 (D.C. Cir. 2020). And it is the agency that is best positioned to understand its legal obligations, budgetary commitments, and manpower

demands, needed to assess the overall reasonableness of the deadline for the agency. Hexion makes no legitimate argument that its intervention would ensure that EPA has adequate time to issue a legally sound risk evaluation. Its attempt to demonstrate that EPA cannot adequately represent the Hexion's interests simply highlights the fact that Hexion's interests are not relevant to the narrow issues raised in this litigation.

C. Intervention is not needed to preserve Hexion's interests.

Even if Hexion's interest in the substance of the formaldehyde risk evaluation were protectable here, the disposition of this case would not impair that interest. Regardless of when EPA complies with its statutory duty, whether voluntarily or under an order of this Court, that action would not affect Hexion's ability to protect its interest in a future final agency action. If EPA issues a formaldehyde risk evaluation and concludes that the substance presents no unreasonable risk of injury to health or the environment, that finding can be challenged as final agency action. 15 U.S.C. § 2605(i)(1). And if EPA finds that formaldehyde does present an unreasonable risk, that would trigger a risk management phase, and EPA must issue a risk management rule. *Id.* § 2605(c)(1). Hexion could challenge that rule along with the final formaldehyde risk evaluation at the appropriate time. *Id.* §§ 2605(i)(2); 2618(a)(1)(A). Notably, the outcome of this litigation will have no impact on Hexion's future interests because this Court lacks jurisdiction to adjudicate any future risk management rule, which may only be challenged upon proper petition to the appropriate Court of Appeals. *Id.* Denying intervention would therefore not preclude Hexion from adjudicating its actual interests.

III. Even if Hexion has met the standard for permissive intervention, the Court should exercise its discretion to deny the motion.

Even if Hexion has met the grounds for permissive intervention, the Court should deny intervention because Hexion fails to demonstrate that no party is prejudiced by its attempt to

derail resolution of this litigation at the eleventh hour. *See* Fed. R. Civ. P. 24(b)(1)(B). Indeed, intervention would prejudice the parties. The parties have an interest in resolving the litigation as expeditiously as possible and establishing deadlines for final risk evaluations instead of unnecessarily dragging out this litigation. Because Hexion has failed to establish any legally protectable interests, there are no interests that the existing parties cannot adequately protect. *See supra* Arg. I, II.B. EPA alone has an interest in the only issue before the Court—the deadline for action—and in ensuring that any deadline is reasonable and one that the Agency can meet.

Intervention would needlessly drag out resolution of this case. Hexion has already submitted comments through the public notice and comment process, comments that EPA has considered, and it appears that its anticipated opposition would largely duplicate those same comments. Nonetheless, if the parties were to move to enter the consent decree and Hexion filed an opposition, the parties would have to brief the motion and this Court would have to consider all briefing and potentially hold a hearing, which may delay final implementation of the consent decree. Under such circumstances, “intervention is likely to unduly delay the adjudication of the original parties’ rights[.]” *Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 8 (D.D.C. 2012), *aff’d in part, appeal dismissed in part sub nom. Defs. of Wildlife*, 714 F.3d at 1317 (quoting *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 236 (D.D.C. 2011)) (denying permissive intervention).

Hexion lacks standing to intervene, its motion is untimely, and even if it has met the standard for permissive intervention, intervention would prejudice the parties and cause delay. But denying the motion would not foreclose Hexion from pursuing its interests and claims at the

appropriate time. Accordingly, the Court should deny Hexion's motion for permissive intervention.

CONCLUSION

For the foregoing reasons, the Court should deny the motion.

Respectfully submitted,

Dated: September 13, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2024, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Sarah Izfar

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(consolidated)

Hon. Dabney L. Friedrich

**[PROPOSED] ORDER DENYING HEXION INC.’S MOTION FOR LEAVE TO
INTERVENE AS A DEFENDANT**

Upon consideration of Hexion Inc.’s Motion for Leave to Intervene as a Defendant,
Defendants’ response in opposition to the motion, as well as all other submissions and arguments
in opposition and support, the Court hereby **DENIES** Hexion Inc.’s motion.

Date: _____

Hon. Dabney L. Friedrich
United States District Judge