

EXHIBIT 7

76,474, 76,480 (Dec. 14, 2022). On January 13, 2023, Petitioner Gharda filed its Request for Hearing and Statement of Objections and Request for Stay (“Objections”). In the Objections, Petitioner Gharda requests a stay of any action by the EPA Office of Administrative Law Judges with respect to the NOIC, including but not limited to the conduct of a hearing, pending resolution of its challenge to the Agency’s rule revoking chlorpyrifos tolerances.¹ Objections at 12-13 (referring to *Red River Valley Sugarbeet Growers Ass’n v. Regan (RRVSGA)*, Nos. 22-1422, 22-1530 (8th Cir. argued Dec. 15, 2022) (challenging Chlorpyrifos: Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (the “Final Rule”)). That lawsuit is currently pending before the U.S. Court of Appeals for the Eighth Circuit. For the reasons set forth in more detail herein, Respondent respectfully requests that this Tribunal deny Petitioner Gharda’s request for a stay.

STANDARD OF REVIEW

In a recent matter, this Tribunal set forth its standard for reviewing a request to stay a proceeding pending the resolution of a matter before a U.S. Circuit Court of Appeals:

In deciding whether to stay a proceeding, EPA administrative law judges have considered the following factors: whether or not the stay will serve the interests of judicial economy,

¹ Respondent notes that a collection of grower groups (“Grower Petitioners”) also filed with this Tribunal a Request for Hearing and Statement of Objections dated January 13, 2023 (“Grower Petitioners’ Objections”). In Grower Petitioners’ Objections, Grower Petitioners argue that they “already suffer and will continue to suffer immediate, unrecoverable, significant irreparable harm in the form of economic losses and reputational damage unless *EPA* withdraws or stays this NOIC as soon as possible.” Grower Petitioners’ Objections at 12 (emphasis added). Grower Petitioners further argue that “sound public policy supports a stay of the NOIC, and a stay would not harm public health or any public interest...[t]he Grower Petitioners’ objections to the NOIC are made in good faith and not frivolous...[and] *EPA* should therefore stay the NOIC.” Grower Petitioners’ Objections at 21 (emphasis added).

It is unclear whether Grower Petitioners, in asserting that *EPA* should stay the NOIC, were requesting a stay by *EPA*, which is also identified as the Respondent in this action, or a stay by this Tribunal. To the extent the Grower Petitioners were referring to *EPA* as the Respondent in this matter, *see* Order to Respondent to Respond at 1, *EPA* has already declined to stay the NOIC, as Grower Petitioners acknowledge. *See* Grower Petitioners’ Objections at 2. To the extent the Grower Petitioners were asking this Tribunal to stay the NOIC, the Respondent has addressed their claims in this Response.

result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay, and of adverse effect on the judge's Docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing.

In the Matter of: Borla Performance Industries, Inc., Respondent, EPA Docket No. CAA-09-2020-0044, 2022 WL 887454, at *3 (ALJ, Mar. 15, 2022) (citing *John Crescio*, EPA Docket No. 5-CWA-98-004, 1999 WL 362862, at *1 (ALJ, Feb. 26, 1999) (Order on Joint Motion for Staying Proceedings)). This Tribunal further noted that “[a] federal trial court generally may not grant a stay so extensive that it is ‘immoderate or indefinite’ in duration, and a trial court abuses its discretion by issuing ‘a stay of indefinite duration in the absence of a pressing need,’”² and “[i]n determining whether to stay proceedings indefinitely, a ‘pressing need’ is identified by balancing interests favoring a stay against interests frustrated by a stay, but ‘[o]verarching this balancing is the court’s paramount obligation to exercise jurisdiction timely in cases before it.”³

Respondent disagrees with Petitioner Gharda to the extent that Gharda is asserting that the criteria at 21 C.F.R. § 10.35(e)(1)-(4) provide the standard of review for this stay request. See Objections at 13, n.9. Those regulations contain the factors that the U.S. Food and Drug Administration uses for determining whether to stay an administrative action under the Federal Food, Drug, and Cosmetic Act (“FFDCA”). Due to the similarity between FDA’s administrative process and EPA’s administrative process under the FFDCA, EPA has applied those criteria to evaluate whether to stay action under FFDCA section 408(g). *See, e.g.*, Chlorpyrifos; Final Order Denying Objections, Requests for Hearings, and Requests for a Stay of the August 2021 Tolerance Final Rule (the “Denial Order”), 87 Fed. Reg. 11,222 (Feb. 28, 2022); Carbofuran;

² *Id.* at *2 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255, 257 (1936)).

³ *Id.* (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)).

Final Tolerance Revocations, 74 Fed. Reg. 23,045, 23,088 (May 15, 2009). Those criteria are not relevant here, however, since this stay request is occurring in the context of a FIFRA cancellation proceeding, not an administrative action under the FFDCA. Even if those criteria did apply, Petitioner Gharda does not enumerate how exactly it has satisfied these criteria in its Objections, simply stating “[f]or reasons outlined herein, Gharda has satisfied these criteria here.” *Id.*

OBJECTIONS TO RESPONSE TO REQUEST FOR STAY

I. A Stay Would Unreasonably and Unnecessarily Delay Respondent’s Efforts to Timely Modify or Cancel Noncompliant Pesticide Registrations.

As noted above, one of the factors previously considered by this Tribunal in deciding whether to stay a proceeding is “whether or not the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort.” *See supra* pp. 2-3. Respondent acknowledges the potential of a stay of these proceedings pending the outcome of the Eighth Circuit litigation to conserve resources; however, Respondent notes that it is unclear when the Eighth Circuit will issue its decision in that matter and what that decision will be. It could be many months until the Eighth Circuit issues its decision, and if the court rules in favor of Respondent, Petitioner Gharda’s registrations subject to the NOIC will have remained in effect despite the fact that no tolerances for residues of chlorpyrifos exist. As discussed in this section, this potential is outweighed by the fact that the delay caused by such a stay would be both unreasonable and unnecessary.

A. The Ninth Circuit Ordered EPA to Cancel or Modify Pesticide Registrations Consistent with the Tolerance Rule.

Respondent has been working diligently since the revocation of the chlorpyrifos tolerances to comply with the Ninth Circuit’s mandate and to conform chlorpyrifos registrations

with the reality that food uses can no longer be maintained. Petitioner Gharda asserts that “there is no urgent need or other basis to proceed with the NOIC before the Eighth Circuit’s decision” pointing to the “15 months” between the issuance of the Final Rule and the issuance of the NOIC as evidence of a lack of urgency. Objections at 5. This assertion is contradicted by both the Agency’s track record of action on chlorpyrifos as well as the plain language of the Ninth Circuit’s order to Respondent to modify or cancel pesticide registrations consistent with its tolerance decision “in a timely fashion.” *League of United Latin Am. Citizens v. Regan (LULAC II)*, 996 F.3d 673, 704 (9th Cir. 2021).

In *LULAC II*, the Ninth Circuit found that the Agency had abdicated its statutory obligation to make a safety finding in its retention of chlorpyrifos tolerances and directed Respondent to take swift action on the chlorpyrifos tolerances and then to cancel or modify pesticide registrations consistent with that tolerance action “in a timely fashion.” *LULAC II* at 704. The Ninth Circuit pointedly and repeatedly expressed its frustration with the Agency’s history of delays with respect to chlorpyrifos;⁴ hence the court’s direction to Respondent to modify or cancel pesticide registrations “in a timely fashion” instead of an open-ended mandate. *See LULAC II*, 996 F.3d at 704.

Moreover, Respondent notes that the “15 months” statement is a red herring, as the Final Rule is not the appropriate reference point here. First, the Final Rule allowed the chlorpyrifos tolerances to remain in effect for six months—until February 28, 2022. Final Rule at 48,334. In addition, after the Final Rule was issued on August 30, 2021, the Agency had a statutory obligation to consider objections, hearing requests, and requests to stay the Final Rule, 21 U.S.C.

⁴ *See, e.g., LULAC II*, 996 F.3d at 678 (“[T]his delay tactic was a total abdication of the EPA’s statutory duty under the FFDCA.”), 702 (“Indeed, further delay would make a mockery, not just of this Court’s prior rulings and determinations, but of the rule of law itself.”), and 703 (“[T]he EPA’s time is now up.”).

§ 346a(g)(2), which Respondent satisfied via the Denial Order. The Denial Order completed the Agency's administrative process for the Final Rule. Once that process was complete and the tolerances were revoked, in early March 2022, the Agency sent letters to all chlorpyrifos registrants requesting that registrants voluntarily cancel chlorpyrifos registrations with food uses and/or amend registrations to remove such food uses. *See, e.g.*, Letter from U.S. Environmental Protection Agency to Ram Seethapathi, Gharda Chemicals International, Inc., (Mar. 1, 2022), Ex. 1. The Agency noted that if requests were not submitted, EPA would initiate cancellation proceedings by issuing a NOIC under section 6(b) of FIFRA. *Id.* at 2.

In response to those letters, nearly all chlorpyrifos registrants, with the exception of Petitioner Gharda, submitted requests to voluntarily cancel their chlorpyrifos registrations or terminate food uses and amend their registered products. Respondent has since been diligently processing those voluntary cancellation requests. Specifically, EPA has issued a final cancellation order cancelling 16 chlorpyrifos products⁵ and a notice of receipt of requests to voluntarily cancel 14 other chlorpyrifos products as well as to terminate food uses on 3 additional chlorpyrifos products.⁶

In contrast, in its March 30, 2022 letter seeking voluntary cancellation of certain registered chlorpyrifos food uses, Petitioner Gharda requested termination of some uses but expressed an intent to retain uses that the Agency proposed to retain in the 2020 Proposed Interim Registration Review Decision for Chlorpyrifos ("2020 PID"). Objections, Ex. 9 at 1.⁷ In

⁵ *See* Notice of Receipts of Requests to Voluntarily Cancel Certain Pesticide Registrations, 87 Fed. Reg. 25,256 (Apr. 28, 2022); Cancellation Order for Certain Chlorpyrifos Registrations, 87 Fed. Reg. 53,471 (Aug. 31, 2022); Chlorpyrifos; Amendment to Provisions for Disposition of Existing Stocks, 88 Fed. Reg. 5,332 (Jan. 27, 2023).

⁶ Chlorpyrifos; Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations and Amend Registrations To Terminate/Amend Certain Uses, 87 Fed. Reg. 76,191 (Dec. 13, 2022).

⁷ Respondent notes that this letter is identified in the Objections as Exhibit 9, *see, e.g.*, Objections at 7, but is identified in the exhibits themselves as Exhibit 4. *See* pp. 664-668 of the PDF file containing the exhibits to the Objections.

fact, Petitioner Gharda made clear to the Agency in that letter that it would not voluntarily submit the changes necessary for its product registrations to conform to the Final Rule because of its pending challenge to the Final Rule. *Id.* at 4. Also, on June 10, 2022 Petitioner Gharda submitted amended product labels to the Agency consistent with its intent to retain those food uses identified in the 2020 PID. Objections, Ex. 10. In light of the Ninth Circuit’s clear directive and Petitioner Gharda’s refusal to submit the necessary requests for voluntary cancellation and label amendments to bring its registrations into compliance with FIFRA and the FFDCFA, it was appropriate for Respondent to prepare and publish the NOIC. Accordingly, Respondent requests that this Tribunal allow this cancellation process to move forward.

B. The Eighth Circuit’s Actions to Date Do Not Support a Stay of this Cancellation Action.

Further underscoring that a stay of these proceedings would result in an unnecessary delay, the Eighth Circuit has already made clear that there is no reason for Respondent’s administrative process with respect to chlorpyrifos registrations to wait on the outcome of the litigation pending before it. Prior to merits briefing and oral argument in that matter, the petitioners in that case, including Petitioner Gharda, sought to stay implementation of the Final Rule “pending judicial review of that decision.” Petitioners’ Renewed Motion for a Partial Stay Pending Review (“Eighth Circuit Stay Motion”) at 27, *RRVSGA*, No. 22-1422 (8th Cir. Mar. 3, 2022), Entry ID 5132688, Ex. 2.

The plaintiffs in the *RRVSGA* litigation had a full opportunity to brief the issue before the Eighth Circuit, and included arguments similar to those being made before this Tribunal. *See, e.g.*, Eighth Circuit Stay Motion at 22, *RRVSGA*, No. 22-1422 (8th Cir. Mar. 3, 2022) (“[t]he threat of unrecoverable economic loss qualifies as irreparable harm”) and at 26 (“[t]he public interest...support[s] Petitioners’ request for a stay...the agricultural commodities grown by the

farmers represented here contribute significantly to the U.S. economy as a whole and to local communities in particular.”). The Agency responded that it would not be good public policy to allow unsafe tolerances to remain in place inconsistent with the safety standard in the FFDC while the litigation was pending.⁸ The Eighth Circuit rejected the plaintiffs’ stay request. Order Exercising Jurisdiction and Denying Motion for a Partial Stay Pending Review, *RRVSGA*, Nos. 22-1422 (8th Cir. Mar. 15, 2022), Entry ID 5136844, Ex. 3. Although the Eighth Circuit did not elaborate on its reasoning for denying the request for a stay of the Final Rule, the denial itself leaves the Final Rule in place and in full effect; thus, the status of the chlorpyrifos tolerances is that they remain revoked and not on hold. Consequently, it is appropriate to proceed with the cancellation and/or termination of food uses associated with those revoked tolerances.

II. An Indefinite Stay of this Proceeding Is Not Justified by a Pressing Need.

When assessing “whether to stay proceedings indefinitely,” this Tribunal has specified that it will seek to identify whether there is a “pressing need” for a stay by “balancing interests favoring a stay against interests frustrated by a stay.” *See supra* p. 3. While Petitioner Gharda requests a stay of further action on the NOIC “until the Eighth Circuit rules,” that time period is indefinite at the moment, since it is unclear when the Eighth Circuit might rule on the matter or what the next steps might be after the Eighth Circuit issues its order. It is also unclear whether Petitioner Gharda would employ a similar argument to further stay these proceedings pending appeal of an unfavorable decision by the Eighth Circuit. On balance of the interests here, Respondent believes that Petitioner Gharda has not demonstrated a pressing need for a stay.

⁸ *See, e.g.*, Respondents’ Opposition to Petitioners’ Motion for Stay Pending Review, *RRVSGA*, No. 22-1422 (8th Cir. Mar. 11, 2022), Entry ID 5135786, at 18 (“Petitioners have failed to demonstrate irreparable harm.”), 23 (“[g]ranteeing Petitioners’ stay request would also undermine judicial process and comity among sister circuits.”), and 23 (“[t]he public interest and balance of harms also weigh strongly in favor of denying Petitioners’ stay request.” Ex. 4.

Petitioner Gharda’s primary arguments in favor of a stay revolve around its claim that proceeding with this matter “would prejudice the rights of Gharda and others to obtain judicial relief from the Final Rule underlying the NOIC” and is “contrary to the Eighth Circuit’s exercise of jurisdiction over [chlorpyrifos] tolerances” are misplaced. Objections at 13. While, as noted above, Petitioner Gharda did not enumerate its arguments by reference to the standards in 21 CFR 10.35(e)(1)-(4) or those previously employed by this Tribunal, *see supra* pp. 3-4, these concerns are unfounded and do not establish a “pressing need” for a stay.

First, as discussed above, the Eighth Circuit has already denied Gharda’s requests to put the Final Rule on hold, which supports moving forward with the implementation of that Final Rule, including cancellation of food uses for chlorpyrifos. *See supra* pp. 7-8. Second, regardless of Petitioner Gharda’s attempt to muddy the waters, the concurrence of this cancellation proceeding while the challenge to the Final Rule is pending has no effect on the Eighth Circuit’s jurisdiction over that matter. The Final Rule and the NOIC are separate agency actions based on distinct statutory provisions and are properly before their respective tribunals.

The petitioners in the Eighth Circuit litigation – including Petitioner Gharda – have not been prejudiced in their ability to seek review of the Final Rule. The petitioners took full advantage of the administrative objections process under the FFDCA by filing objections, hearing requests, and requests to stay the Final Rule. Then, after Respondent denied those objections, petitioners filed two petitions in the Eighth Circuit seeking judicial review of that Denial Order pursuant to FFDCA section 408(h)(1),⁹ which were subsequently consolidated by the court.¹⁰ Pursuant to FFDCA section 408(h)(2), 21 U.S.C. § 346a(h)(2), the Eighth Circuit is

⁹ *See* Petition for Review, *RRVSGA*, No. 22-1422 (8th Cir. Feb. 28, 2022), Entry ID 5131400, Ex. 5; Petition for Review, *RRVSGA*, No. 22-1530 (8th Cir. Mar. 14, 2022), Entry ID 5136561, Ex. 6.

¹⁰ Order Granting Motion to Consolidate Cases 22-1422 and 22-1530, *RRVSGA*, Nos. 22-1422 and 22-1530 (8th Cir. Apr. 21, 2022), Entry ID 5149661, Ex. 7.

properly exercising its exclusive jurisdiction to affirm or set aside the Denial Order or Final Rule. Respondent is not seeking to usurp the jurisdiction of the Eighth Circuit regarding the Final Rule; to the contrary, the challenge to chlorpyrifos tolerances is – and should remain – within the exclusive jurisdiction of the Eighth Circuit.

The initiation of the NOIC under FIFRA does not impact the jurisdiction of the Eighth Circuit over the currently pending challenge; rather, it simply takes one more step to implement the Final Rule that the Eighth Circuit left in place pending its decision. Although the conclusion of this NOIC process could result in the cancellation of Petitioner Gharda’s registered food uses, that conclusion is entirely consistent with the fact that no tolerances for residues of chlorpyrifos exist. If tolerances for residues of chlorpyrifos are established in the future, Petitioner Gharda or any registrant that has voluntarily cancelled uses would need to follow the applicable process(es) for registration under FIFRA and the regulations promulgated thereunder. *See* 7 U.S.C. § 136a(c) and 40 C.F.R. part 152. In any event, Respondent does not believe that moving forward with this cancellation proceeding will prejudice Petitioner Gharda, since it is likely that the Eighth Circuit will issue its decision prior to the cancellation of the registrations in question. This is particularly so in light of the parties’ ability to appeal an initial decision or an accelerated decision of this Tribunal to the Environmental Appeals Board. 40 C.F.R. §§ 164.101, 164.102. The Environmental Appeals Board’s final decision and order is also subject to judicial review pursuant to FIFRA section 16(b). 7 U.S.C. § 136n(b). Respondent also notes that any decision of the Eighth Circuit and the implications, if any, of that decision for these proceedings can be taken into consideration at the time it is issued.

Furthermore, Grower Petitioners’ arguments that they will suffer “immediate, unrecoverable, significant irreparable harm in the form of economic losses and reputational

damage” in the absence of a stay of this proceeding are misplaced. The NOIC and the cancellation of chlorpyrifos food uses is simply an administrative process to implement the Final Rule, which revoked tolerances for residues of chlorpyrifos and rendered adulterated any food treated with chlorpyrifos after February 28, 2022. That is, any such harms alleged by Grower Petitioners would properly be attributable to the Final Rule, and not the NOIC which is the subject of these proceedings.

In contrast, there are significant public policy interests that would be frustrated by a stay. Delaying this cancellation proceeding would simply allow Gharda’s products to remain out of compliance with FIFRA for an indefinite period, which is inconsistent with public policy to bring violative products into compliance in a timely manner and with the Ninth Circuit’s order to cancel associated registrations “in a timely fashion”. *LULAC II* at 704.

Petitioner Gharda’s stay request places significant emphasis on its commitment to ensuring that its “chlorpyrifos product does not enter the U.S. food supply” and its assertion that Respondent has not demonstrated that “chlorpyrifos products are being distributed, sold, and/or used in a manner inconsistent with the Final Rule.” Objections at 7. It is true that chlorpyrifos products bearing labels for use on food cannot be distributed or sold at the current time as doing so would involve distribution of a misbranded pesticide and violate FIFRA section 12(a)(1)(E). 7 U.S.C. § 136j(a)(1)(E). As such, Respondent has provided guidance to the regulated community warning against distribution of such products.¹¹ Cancellation would provide clarity for disposition of these chlorpyrifos products and would allow for the movement of the product for disposal. *See* 40 C.F.R. § 152.30(f); *see also* Cancellation Order for Certain Chlorpyrifos

¹¹ *See* Frequent Questions about the Chlorpyrifos 2021 Final Rule, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/ingredients-used-pesticide-products/frequent-questions-about-chlorpyrifos-2021-final-rule> (last updated Feb. 1, 2023).

Registrations, 87 Fed. Reg. 53,471, 53,473 (Aug. 31, 2022) (discussing provisions for disposition of existing stocks of certain chlorpyrifos products). Notwithstanding this fact, Petitioner Gharda's arguments on this point miss the point. As discussed below, because the chlorpyrifos tolerances have been revoked, all food uses for chlorpyrifos must be terminated or chlorpyrifos products bearing food use labeling must be cancelled. Most chlorpyrifos registrants have submitted compliant cancellation and use termination requests already that the Agency is processing. Even if Petitioner Gharda's incomplete cancellation request were processed, impermissible food uses would remain registered on Petitioner Gharda's chlorpyrifos products. Those products therefore pose unreasonable adverse effects on the environment as a matter of law under FIFRA section 2(bb)(2) and cancellation is appropriate. 7 U.S.C. § 136(bb)(2). This NOIC has been issued in order to address Petitioner Gharda's registrations for which an inadequate cancellation request was submitted. FIFRA section 6(b) is straightforward; if the product or labeling does not comply with FIFRA or the pesticide causes unreasonable adverse effects on the environment, then a NOIC is appropriate. *See* 7 U.S.C. § 136d(b). The purpose of this statutory provision would thus be frustrated by a stay of the NOIC, as would the Agency's interest in ensuring compliance with FIFRA and preventing unreasonable adverse effects on the environment.

CONCLUSION

As discussed in more detail above, Respondent believes it is appropriate for the cancellation process for the three chlorpyrifos products listed in the NOIC to proceed without a stay. Doing so avoids unreasonable and unnecessary delay and is consistent with both the Agency's track record of action on chlorpyrifos as well as the actions of the Ninth Circuit and Eighth Circuit Courts of Appeals. Furthermore, the balancing of interests in this matter indicate

there is no pressing need to justify an indefinite stay of this cancellation proceeding. As a result, Respondent respectfully requests that this Tribunal deny Petitioner Gharda's (and Grower Petitioners') request for a stay.

Respectfully submitted,

Dated: February 22, 2023

/s/ Aaron Newell
Aaron Newell
Pesticides and Toxic Substances Law Office
Office of General Counsel
U.S. Environmental Protection Agency

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE TO REQUEST FOR STAY OF NOTICE OF INTENT TO CANCEL PESTICIDE REGISTRATIONS, dated February 22, 2023, was filed electronically with the U.S. Environmental Protection Agency, Office of Administrative Law Judges E-filing system.

I also certify that a true and correct copy of the foregoing RESPONSE TO REQUEST FOR STAY OF NOTICE OF INTENT TO CANCEL PESTICIDE REGISTRATIONS was served on Petitioners via electronic mail to:

Nash E. Long
Javaneh S. Tarter
HUNTON ANDREWS KURTH LLP
101 South Tryon Street, Suite 3500
Charlotte, NC 28280-0008
Telephone: (704) 378-4728
nlong@HuntonAK.com
jtarter@HuntonAK.com
Counsel for Petitioners Red River Valley Sugarbeet Growers Association, et al.

Donald C. McLean
Kathleen R. Heilman
ARENTFOX SCHIFF, LLP
1717 K Street, N.W.
Washington, DC 20006
Telephone: (202) 857-6000
donald.mclean@afslaw.com
katie.heilman@afslaw.com
Counsel for Petitioner Gharda Chemicals International, Inc.

Dated: February 22, 2023

/s/ Aaron Newell
Aaron Newell
Pesticides and Toxic Substances Law Office
Office of General Counsel
U.S. Environmental Protection Agency

Counsel for Respondent