UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products	)	
Gharda Chemicals International, Inc. and Red River Valley Sugarbeet Growers Association, et al.,	)	**Docket No. FIFRA-HQ-2023-0001**
Petitioners	)	

RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY TO PETITIONERS' OPPOSITION TO MOTIONS FOR ACCELERATED DECISION

The U.S. Environmental Protection Agency ("EPA," "Agency," or "Respondent") hereby requests[1] leave to file a reply to Petitioners' Omnibus Opposition to Respondent's Motion for Accelerated Decision and Intervenors' Motion for Accelerated Decision. Although neither 40 C.F.R. § 164.60 nor the Presiding Officer's June 5, 2023 Order Scheduling Hearing and Prehearing Procedures ("Scheduling Order") specifically provide for the filing of a reply to Petitioners' Responses,[2] Respondent requests that the Presiding Officer consider the attached Proposed Reply to Petitioners' Opposition to Motions for Accelerated Decision.

Petitioners have failed to present any evidence of a genuine issue of material fact for which an evidentiary hearing is warranted. Respondent's proposed reply is limited to the issues

[1] Pursuant to the Presiding Officer's June 5, 2023 Order Scheduling Hearing and Prehearing Procedures, Respondent contacted all other parties and determined that Petitioners object to the granting of the relief sought in this Motion for Leave to File Reply. Intervenors do not oppose.

[2] *Compare* 40 C.F.R. § 22.16 (providing 10 days for a movant to file a reply to any response to its written motion). *See also In re FIFRA Section 3(c)(2)(B) Notice of Intent to Suspend Dimethyl Tetrachloroterephthalate (DCPA) Technical Registration*, Order Scheduling Hearing and Prehearing Procedures at 4 (EPA June 3, 2022) (providing three business days to file a reply supporting a dispositive motion).

raised in the Petitioners' Opposition, *cf.* 40 C.F.R. § 22.16(b) and is being filed three days after receipt of the Opposition. Respondent believes that its proposed reply would assist this Tribunal in its decision-making; thus, Respondent would appreciate the opportunity to reply to Petitioners' assertions that there are "disputed facts" warranting a hearing in this proceeding. *See In re: Reckitt Benckiser LLC*, FIFRA Docket 661, Order Granting Leave to File Reply to Response to, and Brief in Support of, Motions for Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing (EPA May 22, 2013).

Respectfully submitted,

FORREST PITTMAN

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Dated: September 8, 2023

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RESPONDENT'S PROPOSED REPLY TO
PETITIONERS' OPPOSITION TO MOTIONS FOR ACCELERATED DECISION

The U.S. Environmental Protection Agency ("EPA," "Agency," or "Respondent") respectfully submits this proposed reply to Petitioners' Omnibus Opposition to Respondent's Motion for Accelerated Decision and Intervenors' Motion for Accelerated Decision ("Opposition"). Petitioners present no genuine issues of material fact in their Opposition that would warrant further proceedings in this matter. Accordingly, Respondent respectfully requests that this Tribunal grant Respondent's and Intervenors' Motions for Accelerated Decision and issue a cancellation order for Gharda Chemical Corporation's ("Gharda") chlorpyrifos products as proposed in the Notice of Intent to Cancel ("NOIC"). JX 1.

I. PETITIONERS PRESENT NO EVIDENCE SUPPORTING THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT FOR WHICH AN EVIDENTIARY HEARING IS WARRANTED.

As noted in Respondent's Motion for Accelerated Decision ("MAD"), "a party opposing a properly supported motion for accelerated decision is required to 'provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing:

the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case.'" *B.W.X. Techs., Inc.*, 9 E.A.D. 61, 76 (EAB 2000) (citation omitted). Petitioners have provided no such evidence in their Opposition; thus, it is appropriate for this Tribunal to grant the MAD and issue an order cancelling Gharda's chlorpyrifos registrations as proposed in the NOIC.

A. Objections to the Final Rule Are Not Genuine Issues of Material Fact in This Proceeding.

Petitioners spend the majority of their Opposition reiterating their objections to the Final Rule revoking tolerances, JX 3. *See* Opposition at 1-19. Indeed, much of the Opposition simply reiterates the statement provided by Gharda's CEO, Ram Seethapathi, and rehashes his grievances with the Final Rule. Without proffering any evidence to meet their burden, Petitioners simply repeat assertions that the Final Rule is "arbitrary and capricious" and "unlawfully revoked tolerances"; such assertions do not raise issues of material fact for this Tribunal. Moreover, Petitioners acknowledge that "the validity of the Final Rule . . . is currently under consideration by the Eighth Circuit." Opposition at 17-18. The Presiding Officer has already agreed and concluded, "[t]here may be, therefore, no overlap between the Eighth Circuit's review of issues related to the Final Rule and this Tribunal's review of the NOIC." Order on Motion to Stay at 6, Dkt. #10. Thus, any arguments the Petitioners proffer as a disputed material fact concerning the validity of the Final Rule itself, including the Agency's process for issuing that Final Rule, the conclusion by EPA to revoke all tolerance rather than just some tolerances, are not properly before this Tribunal and cannot provide a basis for an evidentiary hearing.

Further, Petitioners' assertion that the Final Rule cannot provide a basis for moving forward with the NOIC because that challenge is still pending before the Eighth Circuit is simply another request in their long list of requests to delay these proceedings until the Eighth Circuit

issues a decision in that litigation. As EPA noted in its MAD, the Eighth Circuit rejected the Petitioners' request for a stay of the Final Rule. RX 51. Consequently, the Final Rule revoking tolerances is effective. That means that tolerances are revoked and have been expired for almost two years. Consequently, EPA can take action to conform registrations to that reality in furtherance of its obligations under FIFRA and consistent with the Ninth Circuit's directive in LULAC. The potential costs of reregistering uses are not relevant to the question of whether food uses can remain registered if tolerances have been revoked. Petitioners' repeated requests to stay this proceeding until the Eighth Circuit issues a decision have been rejected by this Tribunal, Order on Motion to Stay, Dkt. #10, and by the Environmental Appeals Board, Order Denying Motion for Interlocutory Review at 6 (E.A.B. July 14, 2023). Petitioners present no new evidence to require reconsideration of that position.

Moreover, none of the Petitioners' arguments concerning EPA's process for issuing the NOIC have merit. First, EPA considered Gharda's voluntary cancellation request, JX 3 at 3. Second, consistent with its statutory obligations under FIFRA Section 6(b), 7 U.S.C. § 136d(b), EPA provided a copy of the NOIC to the U.S. Department of Agriculture (USDA) and published those comments and its response in the Federal Register (with the notice), *id*. at 5-7; assessed the impact to the agricultural economy of the cancellation of food uses for which tolerances have been revoked, *id*. at 5; and indicated an intention to consider alternatives to cancellation in the final action, *id*. at 5. Dissatisfaction with the outcome does not mean the process was flawed, and Petitioners provide no evidence that there is a genuine issue of material fact to warrant an evidentiary hearing.

B. Urgency is Not a Prerequisite for an Accelerated Decision.

Petitioners claim that accelerated decision is inappropriate because EPA provided a 180-day comment period on the notice EPA published of Gharda's voluntary cancellation request (JX

16). Opposition at 26. This assertion is a red herring. Petitioners fail to mention that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) imposes that 180-day comment period for pesticides registered for use on minor agricultural crops, unless waived by the registrant or EPA makes a finding that continued use will pose unreasonable adverse effects on the environment. 7 U.S.C. § 136d(f)(1)(C)(ii). Gharda could have, but did not, waive the 180-day comment period, expressly stating instead in its voluntary cancellation request, that it was "not requesting a waiver of the comment period." JX 8 at 3. As a result, and because the products were not supposed to be used on food due to the tolerance revocation and because of this ongoing NOIC proceeding, EPA published the notice with a 180-day comment period. JX 16 at 3.

In any event, nothing in EPA's regulations concerning accelerated decisions limits the issuance of those decisions to situations in which there is an urgent need. *See* 40 C.F.R. § 164.91. Rather, where "there is not genuine issue of any material fact and [ ] the respondent is entitled to judgment as a matter of law", an accelerated decision may be rendered. *Id*. at § 164.91(a)(7). And as demonstrated in Respondents' and Intervenors' Motions for Accelerated Decision, it is appropriate to issue an accelerated decision in this proceeding.

C. Petitioners' "Disputed Facts" Are Not Genuine Issues of Material Fact Warranting an Evidentiary Hearing in This Proceeding.

Petitioners claim that they dispute many facts in this proceeding, but none of their objections involve actual, material "disputed facts" for this proceeding. Petitioners "dispute" the fact that tolerances have been revoked because their challenge to the Final Rule remains pending and because they disagree with EPA's basis for the Final Rule, which again is not a fact material to this proceeding. Although Petitioners continue to protest the issuance of the Final Rule, as a legal matter, the Final Rule remains in effect and revoked all tolerances for chlorpyrifos. Petitioners' belief in their litigation position notwithstanding, Petitioners have not proffered—

and cannot proffer—any factual evidence that tolerances for chlorpyrifos still exist to cover residues on food (which is a question of law, not fact). EPA recognizes that Petitioners disagree with the basis for the Final Rule and the existence of the Final Rule, but neither of these points raise genuine issues of material fact for an evidentiary hearing before this Tribunal. These "disputed facts" are simply reassertions of challenges to the Final Rule and requests to delay this proceeding until the Eighth Circuit issues its decision.

Petitioners include a bulleted list of "facts that Petitioners emphatically dispute"—many of which are not even facts, just statements EPA has made with which Petitioners take issue—but none of which present a genuine issue of material fact for which an evidentiary hearing is necessary. Opposition at 25-26. Petitioners present no evidence, let alone any substantial or probative evidence, that any of their listed "disputed facts" warrant an evidentiary hearing.

Several bullets simply contain statements with which Petitioners disagree concerning EPA's characterization of the Final Rule.[1] Even acknowledging the disagreement here, none of these points provide a basis for an evidentiary hearing in this proceeding as challenges to the Final Rule are within the exclusive jurisdiction of the Eighth Circuit at this time. Several bullets

[1] *See* Petitioners' Opposition at 25-26, specifically: "EPA considered whether and how the Agency might modify tolerances by making a safety finding for a subset of uses."; "[T]here is no basis in the law for allowing food uses to remain on chlorpyrifos registered products."; EPA initiated discussions with Gharda "to evaluate whether there might be a basis for EPA to make a safety determination for some uses within the time period imposed by the court."; Following meetings and communications between EPA and Gharda, "EPA could not accept any of [Gharda's] proposals due to, among other factors, Gharda's repeated attempts to include many additional food uses for which EPA had no basis to make a safety finding and very long phase-out schedules for other uses."; Gharda's "communications with the Agency prior to the issuance of the Final Rule did not constitute enforceable 'commitments'."; "EPA did not have a sufficient basis to conclude that aggregate exposures from registered uses would be limited in order to support a safety determination as to some subset of chlorpyrifos tolerances."; EPA "could not make a safety finding to support leaving the current tolerances for residues of chlorpyrifos in place."; EPA found "that it could not determine that there was a reasonable certainty that no harm would result from aggregate exposure to chlorpyrifos residues."; It "would not be good public policy" to "allow unsafe tolerances to remain in place while [the Eighth Circuit Lawsuit] was pending."

address statements in the MAD concerning EPA's issuance of the NOIC,[2] which are not factual disputes but legal questions on which this Tribunal can render a judgment without an evidentiary hearing. One bullet appears to raise a factual question (whether chlorpyrifos is actually being used),[3] but this is not a material issue of fact for this tribunal since even if the product is not being used (and there are reports that it has been used, RX 63); the legal question is whether a product allowing use on food when tolerances have been revoked for those residues can remain registered. An evidentiary hearing on actual sale, distribution, or use would not reveal any material facts that are necessary to resolve this legal question. Another bullet simply calls into question Intervenor's quotation of the Ninth Circuit's directive in *League of United Latin Am. Citizens v. Regan ("LULAC")*, 996 F.3d 673 (9th Cir. 2021),[4] which speaks for itself and cannot in any measure of the imagination provide a basis for a material factual dispute for which an evidentiary hearing is necessary. And one bullet is just a general statement that there are no disputed material facts, which Petitioners say is itself a disputed fact.[5] There is nothing new in this list, no genuine issues of material fact, and Petitioners provide no evidence to the contrary.

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[2] *See id*., specifically: "The NOIC clearly considered the impact on the agricultural economy as required in FIFRA, Section 6(b)"; "The NOIC also clearly responded to USDA's comments" and "EPA did consider the statutory factors and USDA's comment."; "EPA performed" the required "analysis of the impacts of the cancellation on the agricultural economy."; "EPA did consider the economic impact of the NOIC."; Gharda did not provide "a viable alternative" to cancellation of all food uses.; Gharda submitted "some label amendments" but for only one of its two end-use products.

[3] *See id*., specifically: FIFRA regulates distribution, sale, and use of pesticide products, and EPA itself has raised a fact issue regarding whether any chlorpyrifos labeled for food use is being distributed, sold, or used. *Cf.* MAD at 16-17; RX 63. Petitioners still simply maintain that Gharda's "commitment to ensure that its chlorpyrifos product does not enter the market" precludes the Agency from taking administrative action to address pesticides out of compliance with FIFRA, as if such assertion carries any weight in the instant matter. Opposition at 21. EPA is under no obligation to agree to terms proposed by a registrant before making a determination under either FIFRA or the FFDCA.

[4] *See id*., specifically: The Ninth Circuit's "directive [was] to cancel food use registrations 'in a timely fashion'."

[5] *See id*., specifically: The sworn witness statements submitted by both Petitioners and Respondent "address either uncontested background facts or irrelevant issues."

Petitioner fails to meet its burden to provide any "substantial and probative" evidence that these statements represent "disputed facts" that entitle them to an evidentiary hearing.

D. Petitioners' Request for Additional Discovery Will Not Lead to Genuine Issues of Material Fact.

Petitioners assert that the NOIC should be decided on a fully developed record and indicate an intention to seek discovery of issues related to EPA's compliance with the FIFRA Section 6(b) process, including conducting an economic analysis of the impact on the agricultural economy and providing that analysis to the USDA, communications between EPA and the USDA, and consideration of alternatives to cancellation, and the Final Rule. None of this discovery is likely to yield factual information relevant to the question before this Tribunal, i.e., whether food uses can remain registered when tolerances have been revoked. This is a legal question, and none of Petitioners' suggested discovery will assist the Presiding Officer in reaching a conclusion. Consequently, this Tribunal should grant Respondent's and Intervenor's Motions for Accelerated Decision and issue an order cancelling Gharda's chlorpyrifos registrations as proposed in the NOIC.

II. CONCLUSION

Because Petitioners have failed to identify any genuine issues of material fact or raise any legitimate legal challenge to EPA's legal basis for the NOIC, Respondent respectfully requests that this Tribunal grant the Motion for Accelerated Decision and issue an order cancelling Gharda's chlorpyrifos registrations as proposed in the NOIC.

Respectfully submitted,

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Dated: September 8, 2023

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION FOR LEAVE TO FILE REPLY TO PETITIONERS' OPPOSITION TO MOTIONS FOR ACCELERATED DECISION and RESPONDENT'S PROPOSED REPLY TO PETITIONERS' OPPOSITION TO MOTIONS FOR ACCELERATED DECISION, dated September 8, 2023, were filed electronically with the U.S. Environmental Protection Agency, Office of Administrative Law Judges E-filing system, with a copy via electronic mail to the following:

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