EXHIBIT 4

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.	)	

ORDER DENYING PETITIONERS' REQUEST FOR CERTIFICATION TO THE ENVIRONMENTAL APPEALS BOARD

I. Background

This matter relates to the U.S. Environmental Protection Agency's ("Agency's") Notice of Intent to Cancel Pesticide Registrations for chlorpyrifos. Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations, 87 Fed. Reg. 76474-02 (Dec. 14, 2022) ("NOIC"). On January 13, 2023, Petitioner Gharda Chemicals International, Inc. ("Gharda") and a group of grower organizations styled the "Grower Petitioners" each filed objections to the NOIC and requested a hearing pursuant to Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136-136y, "FIFRA") to contest the registrations' cancellation. Gharda's Request for Hearing & Statement of Objections & Request for Stay (Jan. 13, 2023) ("Gharda Hearing Request"); Grower Petitioners' Request for Hearing & Statement of Objections (Jan. 13, 2023).

In connection with its Hearing Request, Gharda moved to stay this proceeding pending the outcome of related litigation before the U.S. Court of Appeals for the Eighth Circuit, namely *Red River Valley Sugarbeet Growers Ass'n v. Regan* ("*RRVSGA*"), Nos. 22-1422, 22-1530 (8th Cir.). Gharda Hr'g Req. 12–13. I denied Gharda's stay motion on March 31, 2023, finding that Gharda had failed to demonstrate a pressing need sufficient to justify its requested indefinite stay of this proceeding. Order on Petitioner Gharda Chemicals International, Inc.'s Motion to Stay (Mar. 31, 2023) ("Stay Order").

On April 10, 2023, Petitioners filed a request for certification to the Environmental Appeals Board, through which they sought leave to file an interlocutory appeal of the Stay Order. Petitioners' Request for Certification of Order Denying Stay for Appeal to Environmental Appeals Board (Apr. 10, 2023) ("Certification Request"). The Agency opposes the Certification Request. Respondent's Response to Request for Certification of Order Denying Stay for Appeal to Environmental Appeals Board (Apr. 20, 2023) ("Response"). For the reasons that follow, Petitioners' Certification Request is **DENIED**.

II. Standard for Certifying Orders for Interlocutory Appeal

The Rules of Practice that govern this proceeding allow for interlocutory review "only if the Administrative Law Judge [("ALJ")] certifies such orders or rulings for appeal, or . . . when the Environmental Appeals Board [("EAB")] determines, upon request of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests." 40 C.F.R. § 164.100. The ALJ may certify an order or ruling for appeal to the EAB only upon request from a party and only when:

> (a) The order or ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) either (1) an immediate appeal from the order and ruling will materially advance the ultimate termination of the proceeding or (2) review after the final judgment is issued will be inadequate or ineffective.

Id.

III. Party Arguments

Petitioners argue that certification is warranted pursuant to § 164.100 because:

> (i) the Order Denying Stay incorrectly determined that the requested stay was for an "indefinite duration" and that there is no "pressing need" for a stay when the available information is to the contrary; (ii) not allowing Petitioners a reply brief to clarify "indefinite duration" and "pressing need" in the exceptional circumstances involved in this matter erroneously deprived Petitioners of their due process rights; and (iii) postponing review of the Order Denying Stay until after the Petitioners have expended significant time and resources to arrive at a final judgment will be "inadequate or ineffective."

Petitioners' Reply in Support of Request for Certification 2–3 (Apr. 28, 2023) ("Reply").

The Agency counters that (i) no substantial grounds for difference of opinion exist as to whether Gharda's requested stay was indefinite in duration; (ii) because Petitioners fail to present the other side of the balancing test that applies to proposed stays of indefinite duration, they have failed to demonstrate substantial grounds for difference of opinion as to the results of that analysis; and (iii) Petitioners' due process argument fails because Petitioners' opening filings provided them a full and meaningful opportunity to be heard on the issue of the stay and because the Rules of Practice permit ALJs to forgo replies. Resp. 4–5, 7, 10.

IV. Analysis

As the Agency does not contest, post-judgment review of the Stay Order would be ineffective: Any benefits of a stay are necessarily lost by the time a case has proceeded to its conclusion. The sole issue before me, therefore, is whether Petitioners have shown that the Stay

Order "involves an important question of law or policy about which there is substantial ground for difference of opinion." I find that they have not.

Petitioners advance three possible "important questions" to justify certification: (1) whether the requested stay was indefinite in duration; (2) whether the evidence and argument presented in connection with Gharda's stay request demonstrated a "pressing need" for a stay; and (3) whether the undersigned's decision to forgo a reply as to Gharda's stay request violated Gharda's due process rights.[1] I address each issue in turn.

Indefinite duration. I agree with the Agency that whether Gharda's requested stay was of "indefinite duration" is not an important question of law or policy about which there is a substantial ground for difference of opinion. To begin, I disagree that this issue may be considered a "question of law or policy" at all, as opposed to a simple application of law to fact. *Cf. Ahrenholz v. Board of Trustees*, 219 F.3d 674, 676 (7th Cir. 2000) ("[T]he term 'question of law' does not mean the application of settled law to fact."). Petitioners disagree not with the legal standard that applies if their requested stay is indefinite in duration, but with whether that standard applies given the facts presented here. Nor does the question of what standard applies implicate any specific "policy" identified by Petitioners or identifiable by this Tribunal.

Regardless, I agree with the Agency that Petitioners have presented no *substantial* ground for difference of opinion on this issue. Petitioners posit that the requested stay *is* finite because it will end once the Eighth Circuit issues its decision, which is "imminent." Certification Req. 10; Reply 6. However, Petitioners fail to substantiate this claim of imminence. Petitioners' sole support for their assumed timeline is that they have advised the Eighth Circuit that they require a decision before the start of the 2023 growing season. Certification Req. 9. As the Agency observes, those pleas plainly have not spurred the *RRVSGA* panel to action as, according to the Petitioners themselves, the relevant 2023 growing season began over a month before this writing. Resp. 6–7 (citing Federal Rule of Appellate Procedure 28(j) Letter 2, *RRVSGA*, Nos. 22-1422, 22-1530 (8th Cir. Jan 18, 2023)). Petitioners' strong desire to receive a decision imminently is not evidence that the decision will soon materialize. The fact is that Petitioners simply do not know when the *RRVSGA* decision will issue. The proposed stay is therefore, by definition, indefinite. *See Indefinite*, Oxford English Dictionary (last accessed May 22, 2023), https://www-oed.com ("Of undetermined extent, amount, or number; unlimited."); *see also Borough of Naugatuck*, 1998 WL 743898, at *2 (ALJ Sept. 8, 1998) (Order Denying Certification for Interlocutory Appeal) (finding no substantial grounds for a difference of opinion as to interpretation of permit terms, because petitioner's interpretation "would require concluding that 'not at any time' means 'weekly or monthly average' and "[t]here are not substantial grounds for giving these words a meaning contrary to their plain import").

Pressing Need. Petitioners also fail to demonstrate that any of the alleged errors in the Stay Order's balancing of the factors mitigating for and against a stay constitute an "important question of law or policy about which there is substantial ground for difference of opinion." Petitioners first assert that the Stay Order errs in its failure to account for the Declaration of

[1] The Certification Request incorrectly assigns this alleged injury to all Petitioners. However, Grower Petitioners submitted no stay request in this action. *See generally* Grower Hr'g Req.

Stephanie H. Stephens ("Stephens Declaration"), Certification Req. Ex. 1. More specifically, Petitioners assert that:

> The Declaration of Stephanie H. Stephens was available to this Tribunal to review in making the determination on the request for stay because it was included in the materials related to the Eighth Circuit Lawsuit cited in Gharda's Objections and Request for Hearing. *See* Gharda's Req. for Hr'g and Statement of Objs. and Req. for Stay, n. 8, Ex. 7 (citing Pet'rs Reply Br., *Red River Valley Sugarbeet Growers Ass'n*, Nos. 22-1422, 22-1530 (8th Cir. Sept. 6, 2022) (ID No. 5195044)).

Certification Req. 6. Petitioners' argument is baseless. Petitioners seem to suggest that the Stephens Declaration was cited in Gharda's Hearing Request and that it was included among the approximately 950 pages of exhibits Gharda submitted therewith.[2] Any such claim would be incorrect,[3] and the undersigned cannot have erred in failing to consider material with which she was never presented.[4] *See* Resp. 8 n.8 (correctly observing that Gharda faced no impediment to citing the Stephens Declaration as part of its stay request). Petitioners' assertion that I should have considered the Stephens Declaration because I considered one of the Agency's *RRVSGA* filings is facile: The Agency included the referenced filing as an exhibit to its response to Gharda's stay request. *See* Stay Order 7 (citing Respondent's Resp. to Request for Stay of Notice of Intent to Cancel Pesticide Registrations ("Agency Stay Response"), Ex. 4 at 15).

Petitioners next assert that the Stay Order erroneously concluded that "'[c]ancellation would not erase' the background work to develop registrations that 'would fit Petitioners' wants and the Agency's public-health mandate,'" because the parties hereto actually have a poor working relationship in which Petitioners' wants have been ignored. Certification Req. 7–8.

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[2] Petitioners' wording of this argument is abstruse. It is possible Petitioners instead meant to contend that it was incumbent upon the Tribunal to seek out the Stephens Declaration on the *RRVSGA* docket because Petitioners cited to a separate document that appears on that docket or because Petitioners cited to that docket generally. If so, Petitioners are incorrect. The EAB has confirmed that administrative tribunals, like their judicial counterparts, have no duty to scour the record for un-cited support for a movant's position. *Rochester Pub. Utils.*, 11 E.A.D. 593, 599 (EAB Aug. 3, 2004) (Order Denying Review) ("It is not our duty in an adversarial proceeding to comb the record and make a party's argument for it."). It is beyond peradventure that this holds true for materials a party has both failed to cite and omitted from the record entirely.

[3] For abundant clarity: The Stephens Declaration appears nowhere among any of Petitioners' or the Agency's exhibits in support of their briefing on Gharda's stay request. In addition, contrary to the Certification Request's assertions, Certification Req. 6, Petitioners did not submit the Stephens Declaration to the Eighth Circuit with the *RRVSGA* merits reply brief that Gharda cited in its Hearing Request. As the Stephens Declaration itself confirms, it was instead filed as an attachment to the sealed Declaration of Ram Seethapathi that Petitioners filed in support of the Reply in Support of Petitioners' Motion for a Partial Stay Pending Review in that case. Stephens Decl. ¶ 2 ("I am making this declaration on behalf of Petitioner Gharda Chemicals International, Inc. (Gharda) in support of Petitioners' Reply in Support of Petitioners' Motion for A Partial Stay Pending Review."); *see* Motion to Seal a Document, *RRVSGA*, No. 22-1422 (Mar. 3, 2022) (ECF No. 5132908) (appending Stephens Declaration as Exhibit 5 to to-be-sealed Declaration of Ram Seethapathi).

[4] I address Petitioners' argument that they should have been permitted an opportunity to present this evidence in reply below.

Petitioners' argument is beside the point. The Stay Order's optimistic observation about Petitioners' wants was tangential to the material, undisputed point that the parties have engaged in substantial background work to arrive at lawful modified registrations for chlorpyrifos. While the parties' relationship may have suffered greatly in the process, Petitioners fail to present any evidence to refute the Stay Order's finding (derived in part from Gharda's own submissions) that the parties have, indeed, engaged in protracted negotiations related to modified chlorpyrifos registrations. Stay Order 6–7 (citing Gharda Hr'g Req. 6, 11). Petitioners also present no evidence or argument that the work that has previously been done on that score will somehow evaporate upon cancellation. Accordingly, Petitioners fail to demonstrate that this issue presents substantial grounds for disagreement in any relevant respect.

Finally, Petitioners claim that the "Grower Petitioners and their members have a 'pressing need' for chlorpyrifos in the current and future growing seasons to avoid unrecoverable losses and pest pressures," and that this interest justifies a stay. Certification Req. 8. Petitioners identify no legal error associated with, nor any policy implicated by, the Stay Order's contrary determination that any present such harm to Grower Petitioners is the result of the Final Rule, not cancellation. To the extent Petitioners mean to argue that the Stay Order erred in balancing the interests in favor of and mitigating against a stay, that cannot be considered a "question of law or policy."

Due Process. As to Petitioners' due process argument, Petitioners again do not articulate a "substantial" disagreement regarding whether they were entitled to a reply. Where a party has had a meaningful opportunity to lay out its position, courts have found no due process right to a reply. *See, e.g.*, *Nat'l Lab. Rels. Bd. v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952) ("The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement."). The Rules of Practice accordingly forgo replies as a matter of course. 40 C.F.R. § 164.60(b) (providing that "*any party may serve and file an answer to [a] motion*," but that "the movant shall, *if requested* by the Administrator, his designee, or the Administrative Law Judge, *serve and file reply papers*"). Gharda had an opportunity to lay out its position in its initial stay request; when it did so, its arguments and support were limited. Gharda Hr'g Req. 6, 12–13. The Agency's Response did not rely on information or evidence unknown to Petitioners, and Petitioners thereafter made no effort to request oral argument, reply, or reconsideration.

Nevertheless, to leave no doubt as to any due process concerns, in issuing this order the undersigned has *sua sponte* reconsidered the Stay Order, taking into account Petitioners' arguments in their Certification Request and supporting Reply. Nothing therein materially changes the Stay Order's conclusions. As noted above, Petitioners' attempts to cast the Eighth Circuit's decision timeline as a finite period fail. The pertinent question, therefore, is whether Petitioners have shown a "pressing need" for a stay, as "identified by balancing interests favoring a stay against interests frustrated by a stay," keeping in mind "'the court's paramount obligation to exercise jurisdiction timely in cases properly before it.'" *Borla Performance Indus., Inc.*, 2022 WL 887454, at *3 (ALJ, Mar. 15, 2022) (Order on Respondent's Motion to Stay the Proceedings) (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)).

The Stephens Declaration's cost projections, Petitioners' principal new support for their interest in a stay, do not alter my conclusion that Petitioners' anticipated harms are unlikely to materialize if this action is permitted to proceed. Petitioners offer no additional evidence as to the likelihood that the costs they anticipate—those of "reestablishing U.S. food uses and associated tolerances," Stephens Decl. ¶¶ 5, 6— will come due, which would be possible only if the Eighth Circuit failed to rule before cancellation became final. Nor do Petitioners address the comparative costs they would face from seeking the modifications to their registration that they have, themselves, indicated are necessary. *See* Stay Order 6–7 (citing Gharda Hr'g Req. 11). Indeed, the Stephens Declaration raises additional questions regarding Petitioners' anticipated costs. For example, the stated costs and timelines all relate to "registration of food uses *and associated tolerances*," and do not disaggregate the costs of registration. Stephens Decl. ¶¶ 5–6. The Stephens Declaration accordingly does not answer the question of what Petitioners' reregistration costs would be if the Eighth Circuit were to vacate the Final Rule after cancellation, thereby *restoring* the tolerances. And, although it offered no analysis supporting its decision to do so, it remains notable that the Eighth Circuit declined to stay the Final Rule pending litigation of *RRVSGA* even though (i) the Agency made clear to the court that it intended to begin cancellation proceedings based on the Final Rule; and (ii) Petitioners presented the court with the Stephens Declaration as evidence supporting a stay. *See* Agency Stay Resp. Ex. 3 (Eighth Circuit order denying stay in *RRVSGA*); Agency Resp. Ex. 4 at 8 (Agency response to *RRVSGA* petitioners' stay request, noting that "EPA has asked all chlorpyrifos registrants to voluntarily cancel their registered food uses and intends to commence involuntary cancellation proceedings for all registrations for which voluntary cancellation requests are not submitted."); *supra* note 3.

As to Petitioners' assertion that, if permitted a Reply, they would have proposed a stay with a defined term, I observe that to date Petitioners have failed to do so, and I reiterate that, given the Ninth Circuit imperative that serves as this case's backdrop, I consider it inappropriate to supply my own roadblocks to this action's progress. *See* Stay Order 2–3, 7 (discussing *League of United Latin Am. Citizens v. Regan* (*LULAC II*), 996 F.3d 673 (9th Cir. 2021)); *see also LULAC II*, 996 F.3d at 678 (ordering the Agency to justify or revoke chlorpyrifos tolerances within 60 days and "to correspondingly modify or cancel related FIFRA registrations for food use in a timely fashion"). For this and all the foregoing reasons, Petitioners' Certification Request is **DENIED**.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: May 22, 2023
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Petitioners' Request for Certification to the Environmental Appeals Board**, dated May 22, 2023, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Attorney-Advisor

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Dated: May 22, 2023
Washington, D.C.