

EXHIBIT 1

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

**In re FIFRA Section 6(b) Notice of Intent
to Cancel Pesticide Registrations for
Chlorpyrifos Products**)
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)
)
**Gharda Chemicals International, Inc., and
Red River Valley Sugarbeet Growers
Association, et al.,**)
)
)
Petitioners.)
)
_____)

Docket No. FIFRA-HQ-2023-0001

**PETITIONERS' REQUEST FOR CERTIFICATION OF ORDER DENYING STAY
FOR APPEAL TO ENVIRONMENTAL APPEALS BOARD**

Submitted by:

NASH E. LONG
HUNTON ANDREWS KURTH LLP
101 S. Tryon Street, Suite 3500
Charlotte, NC 28280
(704) 378-4728
nlong@huntonak.com

JAVANEH S. TARTER
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1500
jtarter@huntonak.com

*Attorneys for Petitioners Red River Valley Sugarbeet
Growers Association, et al.*

DONALD C. MCLEAN
KATHLEEN R. HEILMAN
MATILLE G. BOWDEN
ARENTFOX SCHIFF LLP
1717 K Street NW
Washington, DC 20006
(202) 857-6000
donald.mclean@afslaw.com
katie.heilman@afslaw.com
mattie.bowden@afslaw.com

*Attorneys for Petitioner Gharda
Chemicals International, Inc.*

Gharda Chemicals International, Inc. (“Gharda”) and Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, Missouri Soybean Association, Nebraska Soybean Association, South Dakota Soybean Association, North Dakota Soybean Growers Association, National Association of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, and Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America (“Growers” and together with Gharda, “Petitioners”) respectfully request that the Administrative Law Judge (“ALJ”) certify the ALJ’s March 31, 2023, order denying a stay of these proceedings (“Order Denying Stay”), pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and 40 C.F.R. § 164.100, for appeal to the Environmental Appeals Board (“EAB”).

I. Introduction

In its implementation of the Final Rule¹, EPA ignored its own science, leading to an arbitrary and capricious outcome. The Eighth Circuit is considering and will soon decide that contention. The U.S. Environmental Protection Agency (“EPA”) is now using this Notice of Intent to Cancel (“NOIC”) proceeding in a way never before conducted or contemplated and directly contrary to Petitioners’ fundamental rights that Congress provided to registrants and other stakeholders under FIFRA. *See* Gharda’s Req. for Hr’g and Statement of Objs. and Req. for Stay at 6, 9 (Jan. 13, 2023). Under these circumstances, a stay should be permitted for a reasonable period of time to permit the Eighth Circuit to issue a decision which may fully pre-

¹ *See* Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (“Final Rule”).

empt an outcome that would otherwise abridge Petitioners' rights. The Order Denying Stay, however, improperly denied Gharda's stay request by determining that the request was for a stay of "indefinite" duration which requires a "pressing need" that was not shown. The Order Denying Stay amounts to an important question of law, and delay of review by the EAB of the ALJ's determination on the requested stay until after the ALJ issues final judgment would be both inadequate and ineffective because the Petitioners would be forced to expend considerable time and resources to defend an NOIC proceeding that could be rendered moot by the Eighth Circuit's decision. The Order Denying Stay wrongly based the determination that the request for a stay did not demonstrate a "pressing need" on speculation, no evidentiary support, and a failure to consider the record at the Tribunal's disposal, and abused ALJ discretion in denying Petitioners the opportunity to reply to EPA's Response to the NOIC Stay Request, requiring immediate review by the EAB.

II. Background and Procedural History

Petitioners have challenged the Final Rule underlying the NOIC as arbitrary and capricious, in the lawsuit captioned *Red River Valley Sugarbeet Growers Ass'n, et al. v. Regan, et al.*, Nos. 22-1422, 22-1530 (8th Cir.) (the "Lawsuit"), because the Final Rule revoked all tolerances for chlorpyrifos, even though EPA found that tolerances for a subset of 11 uses (the "Safe Uses") meet the aggregate exposure safety standard in the Federal Food, Drug, and Cosmetic Act ("FFDCA"). The Lawsuit has been fully briefed, and oral argument took place on December 15, 2022. A decision by the Eighth Circuit could be issued at any moment and could include vacatur of the Final Rule.

On December 14, 2022, the day before oral argument in the Lawsuit, the EPA issued the NOIC, proposing to cancel Petitioner Gharda's registrations for chlorpyrifos products.

Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations, 87 Fed. Reg. 76,474 (Dec. 14, 2022). Petitioners urged EPA to stay or withdraw the NOIC in correspondence dated January 6, 2023, but EPA denied this request. On January 13, 2023, Petitioners submitted objections to the NOIC, and Gharda also submitted a request for a stay of the NOIC. On February 8, 2023, the ALJ ordered EPA to respond to Gharda’s stay request and *expressly disallowed Gharda the opportunity to reply*; EPA responded to Gharda’s stay request on February 22, 2023. On March 31, 2023, the ALJ issued the Order Denying Stay.

III. The Order Denying Stay

The Order Denying Stay states that “Gharda requests a stay for an indefinite duration because the time at which the Eighth Circuit will issue a decision in *RRVSGA* [Lawsuit] is unknown. A stay is therefore warranted only if there is a pressing need for one.” Order Denying Stay at 4. The Order Denying Stay further finds that “Gharda has not demonstrated a ‘pressing need’ for a stay of indefinite nature” because the NOIC proceeding does not “present[] any risk to the Eighth Circuit’s jurisdiction” and the ALJ is “unconvinced by Gharda’s arguments that, absent a stay, it may face unreasonable reregistration expenses or a protracted registration process.” Order Denying Stay at 6. The ALJ therefore denied the request for stay because of the “absence of a pressing need for an indefinite stay of this matter.” Order Denying Stay at 7.

IV. Standard for Request for Certification

The ALJ may certify an order for appeal to the EAB 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.

40 C.F.R. § 164.100.

V. The Order Denying Stay Involves an Important Question of Law

The first criteria in determining whether an order should be certified for interlocutory appeal under 40 C.F.R. § 164.100 is whether the order involves “an important question of law or policy about which there is substantial ground for difference of opinion.” 40 C.F.R. § 164.100. The Order Denying Stay presents an important question of law because it improperly made a determination that Gharda did not show a “pressing need” for a stay when the weight of the record is to the contrary, and because the Order Denying Stay wrongly characterized Gharda’s requested stay as being for an “indefinite” duration. These errors were compounded by the denial of a reply brief. As a result, and without EAB review now, the Petitioners will be forced to incur considerable time and expense to defend the NOIC proceeding.

a. The Order Denying Stay Incorrectly Finds There is No “Pressing Need” for a Stay

Contrary to the Order Denying Stay, Petitioners have shown a “pressing need” for a stay pending the Eighth Circuit determination on the Lawsuit. The Order Denying Stay reasons that Gharda will *not* be left at “square one” if it must “reregister” any of its products after registration cancellation that precedes an Eighth Circuit decision vacating the Final Rule as to the Safe Uses. However, the record before the ALJ demonstrates that Gharda will in fact be left at “square one” such that a “pressing need” exists to grant the requested stay.

The Order Denying Stay wrongly states that “Gharda *implies* that in the event of cancellation, it will be left at square one if it must reregister any products....This cannot be so. If Gharda prevails before the Eighth Circuit and then seeks wholesale reinstatement of its registrations, it will have as support the registrations’ immediate precedents and all associated evidence and findings. Nor will Gharda need to reinvent the wheel if it must newly seek *updated* registrations.” Order Denying Stay at 7 (emphasis added). The Order Denying Stay does not

cite any support for this conclusion that Gharda would not be “left at square one” as it relates to registering its products, and no such support exists in the record.

Gharda’s claim that it will have to retreat to “square one” is not “implied”—it is fully supported by the uncontested views of a 30-year expert on EPA pesticide registration issues who participated in negotiations with EPA on behalf of Gharda regarding its chlorpyrifos registrations. *See* Ex. 1, Decl. of Stephanie H. Stephens ¶ 6 (“If Gharda were to submit applications for registration of new food uses and associated tolerances after EPA revoked all tolerances and cancelled all food uses, it would take approximately 38 months from the time of submission of the applications until *possible* EPA approval. EPA’s fees for reestablishing U.S. food uses and associated tolerances would be approximately \$875,000.” (emphasis added)). This is not a “viable remedy” and makes it clear that, at great cost and delay, Gharda would have to start the FIFRA registration process anew in the event its registrations were cancelled in advance of an Eighth Circuit decision—*i.e.*, *back to “square one”*—and with no certainty of success. *Id.* ¶ 7.

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)). The Stephens Declaration is attached hereto as Exhibit 1. The Order Denying Stay demonstrates that this Tribunal reviewed at least some of the materials in the Eighth Circuit Lawsuit, as evidenced by the ALJ’s citation to the Department of Justice’s opposition to the stay request in the Lawsuit. *See* Order Denying Stay at 7 (citing Agency Resp.

Ex. 4 at 15 “Agency brief in opposition to stay request in *RRVSGA*, discussing Agency negotiations with Gharda regarding cancellation of chlorpyrifos registrations.”). But there is no indication whatsoever that the ALJ weighed the significance of the Stephens Declaration.

Even EPA admitted that in the event of registration cancellations, “Petitioner Gharda or any registrant would need to follow the applicable process(es) for registration under FIFRA and the regulations promulgated thereunder.” EPA Resp. to Req. for Stay of NOIC Pesticide Registrations at 10 (Feb. 22, 2023). This process described by EPA is exactly the back to “square one”, non-viable remedy that Ms. Stephens references in her declaration. *See* Ex. 1 ¶ 6. EPA has not challenged Ms. Stephens’ Declaration, either in the Eighth Circuit Lawsuit or in response to Gharda’s request to stay these proceedings. Indeed, EPA has offered no commitment whatsoever that it would reinstate any chlorpyrifos registrations immediately as to the Safe Uses if the registrations are cancelled and the Eighth Circuit subsequently vacates the Final Rule as to the Safe Uses.

The fact of the matter is that Gharda *would be* back to “square one” in the event its registrations were cancelled and the Eighth Circuit vacated the Final Rule as to the Safe Uses—no clearer case for “pressing need” could be made. There is no guarantee at all that EPA would swiftly—or ever—reinstate the registrations in the event of these circumstances, and EPA certainly does not commit to doing so in any of its filings submitted to this Tribunal or to the Eighth Circuit.

The Order Denying Stay also concludes, without any basis in the record, that “[c]ancellation would not erase” the background work to develop registrations that “would fit Petitioners’ wants and the Agency’s public-health mandate.” Order Denying Stay at 7. As showcased in the record, the discussions between Gharda and EPA that preceded the Final Rule

evidence that EPA’s actions have been more akin to a bait-and-switch, rather than an approach that “fit[s] Petitioners’ wants.” *See* Decl. of Ram Seethapathi in Support of Gharda’s Objs. to the Final Rule Revoking All Tolerances for Chlorpyrifos, EPA-HQ-OPP-2021-0523, ¶¶ 23, 26, 34, 36–37 (Nov. 10, 2021) (“in an effort to work cooperatively with EPA and believing it had little choice but to accept voluntary cancellation terms, Gharda committed to voluntarily cancel” certain crop uses; “EPA strongly implied during these discussions that the [Safe Uses] would remain in place as long as Gharda voluntarily cancelled all 1X uses”; EPA later advised Gharda that the voluntary cancellation of uses “were not sufficient for EPA’s ‘leadership’”; Gharda then “heard nothing further from EPA for weeks” and after significant discussions with EPA regarding the terms of voluntary cancellation of uses, “Gharda discovered a posting on EPA’s website announcing the August 2021 revocation of all tolerances for chlorpyrifos” and the next day the Final Rule was announced).

Further, and just as importantly, 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. In many instances, chlorpyrifos is the only pesticide that can effectively control pests that afflict the Grower Petitioners’ crops. *See* Petitioners’ Opening Brief at 30-31, *Red River Valley Sugarbeet Growers Ass’n et al.*, Nos. 22-1422, 22-1530 (8th Cir. May 24, 2022), ID No. 5160660 (“Petitioners’ Opening Brief”) (citing Grower Declarations).² Without effective pest control, the insects will multiply and crop losses will grow. For the fruit trees that will be lost due to the unavailability of chlorpyrifos, it can take up to 10 years to get a replacement tree into production. Petition for Review, *Red River Valley Sugarbeet Growers*

² The Grower Declarations are found at Attachment 2 to the Petition for Review, *Red River Valley Sugarbeet Growers Ass’n*, No. 22-1422, Exhibits A – W, ID No. 5131400.

Ass'n, No. 22-1422, Att. 2 (8th Cir. Feb. 28, 2022), ID No. 5131400, Ex. J (Crittenden Decl.) ¶¶ 14-15; *id.*, Ex. T (Harris Decl.) ¶¶ 10-13. EPA itself recognized the important role that chlorpyrifos plays in protecting the Grower Petitioners' crops, describing these uses as "high benefit" and "critical." Petitioners' Opening Brief at 40. Together, the Grower Petitioners' crops contribute approximately \$59 billion to the national economy every year. *Id.* at 31. The demonstrated safety of the Safe Uses of chlorpyrifos and the importance of these uses to Grower Petitioners and the agricultural economy has led the United States Department of Agriculture to oppose the cancellation of Gharda's registrations. *See* Petitioners' Rule 28(j) Submission, *Red River Valley Sugarbeet Growers Ass'n et al.*, Nos. 22-1422, 22-1530 (8th Cir. Dec. 14, 2022), ID No. 5227503, Ex. A at 76,2478, Ex. C at 3, and Ex. D. Therefore, Petitioners have shown a "pressing need" for the requested stay.

b. Gharda's Request is Not a Request of Indefinite Duration

The Order Denying Stay concludes that "Gharda requests a stay of indefinite duration because the time at which the Eighth Circuit will issue a decision in *RRVSGA* is unknown." Order Denying Stay at 4. However, this conclusion ignores the current posture of the Eighth Circuit Lawsuit. The case in the Eighth Circuit has been fully briefed, and oral argument took place on December 15, 2022. Petitioners have impressed upon the Eighth Circuit Court the need for a decision to be made before the 2023 growing season, to avoid irreparable harm if the Safe Uses are not permitted to be used. *See* Petitioners' Rule 28(j) Submission, *Red River Valley Sugarbeet Growers Ass'n*, Nos. 22-1422, 22-1530 (8th Cir. Jan. 18, 2023), ID No. 5237033.

Notably, the cases cited in the Order Denying Stay align with Gharda's request for a stay until the Eighth Circuit rules—a request of a reasonable duration. *See, e.g., Diomed, Inc. v. Total Vein Solutions, LLC*, 498 F.Supp.2d 385, 387 (D. Mass. 2007) (explaining that "a stay will most

likely be granted in situations likely to conserve judicial and party time, resources, and energy” and only denying the requested stay where the requesting party had already been “stalling” discovery for over a year); *In re Borla Performance Indus., Inc.*, EPA Docket No. CAA-09-2020-0044, 2022 EPA ALJ LEXIS 2 (ALJ, Mar. 15, 2022) (Order on Respondent’s Motion to Stay the Proceedings) (where a stay was requested pending the outcome of related D.C. Circuit litigation, but briefing had not yet concluded in the D.C. Circuit litigation, and the issue being decided by the D.C. Circuit was “not at all dispositive” of the issues before the ALJ). Here, a decision in the Lawsuit is likely imminent and therefore a stay pending that decision is not “indefinite.” Moreover, if the Eighth Circuit vacates the Final Rule as to the Safe Uses, that action should be dispositive as to the NOIC, saving the time and resources of this Tribunal. Finally, a stay could have been granted that would be subject to periodic review and reassessment, particularly given the pressing need as outlined above, *supra* § V(a), and would therefore not be “indefinite” as the Order Denying Stay determined.

VI. Review of the Order Denying Stay by the EAB After a Final Judgment is Issued by the ALJ Would be Inadequate or Ineffective

After the first prong of 40 C.F.R. § 164.00 is met, one of the following must also be met: “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.” 40 C.F.R. § 164.100. Here, review by the EAB after a final judgment is issued by the ALJ would be inadequate or ineffective, because Petitioners would have already been forced to pursue a costly and time-consuming defense to the NOIC. Further, EAB review of the stay request becomes moot if review is not afforded until after the ALJ issues a final judgment on the NOIC because the EAB cannot offer any remedy as to the stay request at that point.

VII. The Order Denying Stay Violates Petitioners' Due Process

The Order Denying Stay violates Petitioners' Constitutional due process rights because it was entered without affording Petitioners an opportunity to reply to EPA's response to the request for stay. Due process "requires that a person be given adequate notice and an opportunity to be heard in any proceeding where he or she may be deprived of life, liberty or property." *In the Matter of J.V. Peters & Co.*, 7 E.A.D. 77, 95 (E.P.A. April 14, 1997) (citing *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313-14 (1950)). In its response, EPA mischaracterizes the request as seeking a stay for an "indefinite" duration, and wrongly contends that there is no "pressing need" for a stay—both of these arguments were considered by the ALJ and incorporated into the Order Denying Stay without Petitioners having an opportunity to reply to those arguments and clarify the duration of the requested stay. EPA Resp. to Req. for Stay of NOIC Pesticide Registrations at 8–9; Order Denying Stay at 4.

On February 8, 2023, the ALJ issued an Order to Respondent to Respond ("Order to Respond"), which required EPA to respond to Gharda's request for a stay. The Order to Respond expressly states that "[n]o replies will be permitted." Order to Respond at 2. If Gharda had been permitted to reply to EPA's Response, it would have outlined why the requirement to demonstrate a "pressing need" for a stay was not applicable here and explained that Gharda's request was not for a stay of an "indefinite" duration. While the ALJ has discretion under 40 C.F.R. § 164.60(b) as to whether a reply brief is permitted, the ALJ did not appropriately exercise such discretion in denying Gharda the opportunity to submit a reply brief to clarify EPA's, and therefore the ALJ's, misunderstanding of Gharda's request. The NOIC proceedings seek a deprivation of Gharda's property, and Gharda was not afforded an opportunity to be heard

on EPA's arguments regarding the requested stay. Under these circumstances, Petitioners' rights to due process were violated.

VIII. Conclusion

For those reasons, Petitioners respectfully request that this Tribunal certify the Order Denying Stay for appeal to the EAB.

This 10th day of April, 2023,

S/ NASH E. LONG
NASH E. LONG
HUNTON ANDREWS KURTH LLP
101 S. Tryon Street, Suite 3500
Charlotte, NC 28280
(704) 378-4728
nlong@huntonak.com

JAVANEH S. TARTER
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1500
jtarter@huntonak.com

S/ DONALD C. MCLEAN
DONALD C. MCLEAN
KATHLEEN R. HEILMAN
MATILLE G. BOWDEN
ARENTFOX SCHIFF LLP
1717 K Street NW
Washington, DC 20006
(202) 857-6000
donald.mclean@afslaw.com
katie.heilman@afslaw.com
mattie.bowden@afslaw.com

*Attorneys for Petitioner Gharda
Chemicals International, Inc.*

Attorneys for Petitioners Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, Missouri Soybean Association, Nebraska Soybean Association, South Dakota Soybean Association, North Dakota Soybean Growers Association, National Association of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, and Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, true and correct copies of the foregoing Request for Certification was filed electronically with the EPA OALJ E-Filing System for the OALJ's E-Docket Database, with a copy via electronic mail to the following:

Aaron Newell
Angela Huskey
Office of General Counsel
Pesticides and Tox Substances Law Office
Environmental Protection Agency
Newell.aaron@epa.gov
Huskey.angela@epa.gov
Counsel for EPA

/s/ Donald C. McLean

Donald C. McLean