

**IN RE GHARDA CHEMICALS INTERNATIONAL, INC. &  
RED RIVER VALLEY SUGARBEET GROWERS  
ASSOCIATION, ET AL.**

FIFRA Appeal No. 23-02

***ORDER DENYING MOTION FOR INTERLOCUTORY REVIEW***

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Decided July 14, 2023

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Syllabus

Petitioners Gharda International, Inc. (“Gharda”) and a group of grower organizations filed with the Environmental Appeals Board (“Board”) a motion for appeal of an interlocutory order issued by an Administrative Law Judge (“ALJ”). The ALJ’s order denied a motion to stay proceedings under section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) to cancel the registration of the pesticide chlorpyrifos pending the outcome of litigation in which Petitioners challenge a final rule revoking food tolerances for chlorpyrifos. The ALJ also denied Petitioner’s request to certify the denial for interlocutory review.

Held: The Board finds that Gharda and the grower organizations’ request lacks exceptional circumstances that would warrant Petitioners’ request to upend the ordinary course of litigation to review an interlocutory order on appeal.

In the absence of a certification, the Board may undertake interlocutory review “when the Environmental Appeals Board 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 Board has not previously examined review of an interlocutory order under part 164. Because the Board previously has interpreted “exceptional circumstances” under part 22, (which uses similar language) the Board examines part 22 precedent as guidance. Exceptional circumstances under part 22 have stemmed from fact patterns that the appellate decision-maker finds compelling and essential to address prior to an initial decision. Here, nothing of that magnitude is present. Petitioners speculate that a “forthcoming” Eighth Circuit Court of Appeals opinion *may* result in overturning the Agency’s final revocation rule underlying the cancellation proceeding. But critically important on these facts is that EPA *must* comply with the mandate of the Ninth Circuit Court of Appeals to revoke or modify chlorpyrifos food tolerances and thereafter modify or cancel related FIFRA registrations for food use in a timely fashion.

In addition, any potential harm from the possibility of being forced to reregister pesticides after cancellation can be addressed on appeal after an initial decision by the ALJ. A cancellation would not be final until the Board declines review or issues a final order following the ALJ's decision. There are no exceptional circumstances warranting interlocutory review.

***Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.***

***Opinion of the Board by Judge Stein:***

Petitioners Gharda International, Inc. (“Gharda”) and a group of grower organizations<sup>1</sup> have filed with the Environmental Appeals Board (“Board”) a motion for appeal of an interlocutory order issued by Administrative Law Judge (“ALJ”) Christine Coughlin on March 31, 2023. Petitioners’ Motion for Appeal of Order Denying Stay to Environmental Appeals Board (June 1, 2023) (“Motion for Appeal”). In the proceeding before the ALJ, Gharda and the group of grower organizations challenge the U.S. Environmental Protection Agency’s (“EPA or Agency”) Notice of Intent to Cancel (“NOIC”) the registration of the pesticide chlorpyrifos under section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d. *See generally In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (ALJ filed Jan. 10, 2023).<sup>2</sup> EPA issued the NOIC after revoking food tolerances for chlorpyrifos through a rulemaking. Chlorpyrifos; Tolerance

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<sup>1</sup> The grower organizations are 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, Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America.

<sup>2</sup> The tolerance revocation and NOIC were issued following an order from the Ninth Circuit Court of Appeals that directed EPA to revoke or modify chlorpyrifos food tolerances and modify or cancel related FIFRA registrations. *League of United Latin Am. Citizens v. Regan*, 996 F.3d 673 (9th Cir. 2021).

Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021).<sup>3</sup> Petitioners are challenging the Agency's final rule on the food tolerances in the Eighth Circuit Court of Appeals. *Red River Valley Sugarbeet Growers Ass'n v. Regan*, Nos. 22-1422, 22-1530 (8th Cir. filed Feb. 28, 2022 & Mar. 14, 2022) (“RRVSGA”).<sup>4</sup>

Before the ALJ, Petitioners moved for a stay of the ALJ proceedings pending the litigation in the Eighth Circuit Court of Appeals. The ALJ denied Petitioners' stay motion. *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (ALJ Mar. 31, 2023) (Order on Petitioner Gharda Chemicals International, Inc.'s Motion to Stay). The ALJ then denied Petitioners' motion to certify to the Board for interlocutory review the ALJ's March 31, 2023 order denying Petitioners' request for a stay of proceedings. *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001 (ALJ May 22, 2023) (Order Denying Petitioners' Request for Certification to the Environmental Appeals Board). Petitioners subsequently filed with the Board a motion to appeal the ALJ's order denying the request for a stay. Motion for Appeal. EPA's Office of Pesticide Programs and Intervenors<sup>5</sup> oppose the motion. See EPA Response to Petitioner's Motion for Appeal of Order Denying Stay to Environmental Appeals Board (June 12, 2023) (“EPA Resp.”); Intervenors' Response in Opposition to Petitioners' Motion for Appeal (June 12, 2023) (“Intervenor Resp.”).

Administrative review of proceedings relating to cancellations of registration under FIFRA is governed by 40 C.F.R. part 164. 40 C.F.R. § 164.3.

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<sup>3</sup> Food safety tolerances are allowable quantities of “pesticide chemical residue in or on a food.” See 21 U.S.C. § 346a.

<sup>4</sup> The Eighth Circuit denied a request for a stay of the rule pending consideration of the case. *RRVSGA v. Regan*, No. 22-1422 (8th Cir. Mar. 15, 2022) (Order Exercising Jurisdiction & Denying Motion for a Partial Stay Pending Review).

<sup>5</sup> Intervenors are a group of thirteen health, farmworker, civil rights, and labor nonprofit organizations including the League of United Latin American Citizens, Pesticide Action Network North America, Natural Resources Defense Council, California Rural Legal Assistance Foundation, Farmworker Association of Florida, Farmworker Justice, GreenLatinos, Labor Council for Latin American Advancement, Learning Disabilities Association of America, Pineros y Campesinos Unidos del Noroeste, Alianza Nacional de Campesinas, United Farm Workers, and United Farm Workers Foundation. Intervenor Resp. at 1 n.1.

Where, as here, the ALJ has not certified an order for interlocutory review, review by the Board of the parties' request ordinarily must wait until the ALJ has issued an accelerated decision or the initial decision in the case. *Id.* § 164.100. In the absence of a certification, the regulations provide that the Board may undertake interlocutory review "when the Environmental Appeals Board determines, upon request of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests." *Id.* Because Gharda and the grower organizations' request does not meet the regulatory standard for granting interlocutory review when an ALJ denies certification of an interlocutory order under 40 C.F.R. § 164.100, the Board denies the motion.

While the Board has not previously considered the part 164 standard for interlocutory review upon request of a party, it has considered requests for interlocutory appeal under 40 C.F.R. part 22. Part 22 has a similar, but not identical, standard for interlocutory review upon request of a party. *Compare* 40 C.F.R. § 22.29(c) ("\* \* \* in exceptional circumstances, that to delay review would be contrary to the public interest") *with* 40 C.F.R. § 164.100 ("\* \* \* in exceptional circumstances, that delaying review would be deleterious to vital public or private interests"). Because the Board and its predecessor previously have interpreted "exceptional circumstances" under part 22, the Board will begin by examining part 22 precedent as guidance on whether exceptional circumstances are present here.

The Board has declined to find exceptional circumstances upon request of a party in cases where the issues raised in an interlocutory appeal could be adequately addressed in an appeal after an initial decision. *See In re MultiStar Indus., Inc.*, EPCRA Appeal No. 05-01 (EAB July 28, 2005) (Order Denying Request for Interlocutory Review) (denying request for interlocutory review where request failed to identify any alleged error by the ALJ that could not be addressed after the ALJ ruled on remaining issues); *In re Zoo Med Labs., Inc.*, FIFRA Appeal No. 99-10 (EAB Nov. 23, 1999) (Order Denying Motion for Interlocutory Review) (denying interlocutory review of order dismissing counts of complaint where the Board had authority to impose penalty for dismissed counts on appeal); *see also In re Microban Prods. Co.*, FIFRA Appeal No. 99-1 (EAB May 10, 1999) (Order Denying Motion for Interlocutory Review) (denying interlocutory review of order reducing the number of violations).

Where exceptional circumstances were found to exist, they stem from fact patterns that the appellate decision-maker finds compelling and essential to address prior to an initial decision. In *Chautauqua*, the Chief Judicial Officer determined that exceptional circumstances were present because the ALJ's order involved "fundamental" issues of first impression, implementing the ALJ's order called for

the release of confidential deliberative processes of the Agency, and allowing the proceeding to continue would drain EPA resources. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 619 (CJO 1991). The Chief Judicial Officer found that these factors *together* constituted exceptional circumstances justifying interlocutory review. *Id.* at 619. In *Thermex*, the Board determined that exceptional circumstances existed. *In re Thermex Energy Corp. & Richard W. Forsythe*, 4 E.A.D. 68, 70 (EAB 1992). The Board was concerned that an individual potentially responsible for pollution had been removed from an enforcement proceeding, contrary to the “public interest in vigorous and fully effective enforcement of the environmental laws.” *Id.* The Board was also concerned that the matter would proceed to hearing without the presence of a potentially liable individual in a case involving an insolvent corporation, necessitating a subsequent rehearing. *Id.*<sup>6</sup>

Here, nothing of the magnitude described in *Chautauqua* or *Thermex* is present. Petitioners speculate that a “forthcoming” Eighth Circuit opinion *may* result in overturning the Agency’s final revocation rule underlying the cancellation proceeding. Motion for Appeal at 4. But critically important on these facts is that EPA *must* comply with the mandate of the Ninth Circuit Court of Appeals to revoke or modify chlorpyrifos food tolerances and thereafter modify or cancel related FIFRA registrations for food use in a timely fashion. EPA Resp. at 5; *see also League of United Latin Am. Citizens v. Regan*, 996 F.3d 673, 703-704 (9th Cir. 2021). As the ALJ noted, the Ninth Circuit “carefully evaluated the extensive history that underlies the Final Rule, rebuked the Agency for its past delays, and directed the Agency to proceed apace with any warranted registration cancellations.” *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001, at 7 (ALJ Mar. 31, 2023) (Order on Petitioner Gharda Chemicals International, Inc.’s Motion to Stay). Granting interlocutory review upon request of a party in these circumstances would put the ALJ proceedings on hold based on a speculative future decision from the Eighth Circuit despite existing and contrary direction from the Ninth Circuit. The Board further observes that the Eighth Circuit itself denied

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<sup>6</sup> Petitioners cite *In re Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes*, Docket No. EPA-HQ-OPP-2007-0181, 2008 WL 4545096 (ALJ Oct. 6, 2008) (Order on EPA’s Motion for Interlocutory Appeal). ALJ cases are not precedential before the Board. *See In re Howmet Corp.*, 13 E.A.D. 272, 300-01 n.56 (EAB 2007). In any event, the only discussion of “exceptional circumstances” in *EBDC Fungicides* rejects applying that standard to the decision of whether to certify an order for interlocutory appeal. *EBDC Fungicides*, 2008 WL 4545096, at \*10.

Petitioners' request to stay the tolerance rule. *RRVSGA v. Regan*, No. 22-1422 (8th Cir. Mar. 15, 2022) (Order Exercising Jurisdiction & Denying Motion for a Partial Stay Pending Review).

Moreover, Petitioners' objections to the ALJ's order can be addressed in the normal course after the ALJ issues an initial decision. The Eighth Circuit heard oral argument on December 15, 2022, over six months ago. *RRVSGA v. Regan*, Nos. 22-1422, 22-1530 (8th Cir. argued Dec. 15, 2022). If Petitioners are correct that an Eighth Circuit decision is "forthcoming at any time," Motion for Appeal at 4, it is difficult to see how a cancellation will actually precede an Eighth Circuit decision. The ALJ hearing in this matter will not begin until January 8, 2024. *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, Docket No. FIFRA-HQ-2023-0001, at 2 (ALJ June 5, 2023) (Order Scheduling Hearing and Prehearing Procedures). Any final order concerning cancellation will not be issued until after the hearing. 87 Fed. Reg. 76,474, 76,475 (Dec. 14, 2022).<sup>7</sup> Further, cancellations are not final until the Board either declines review or issues a final order. 40 C.F.R. §§ 164.101, .103. Thus, any harm to Petitioners from allowing the proceedings to continue is speculative and there are several further steps and additional opportunities for Petitioners to make their case.<sup>8</sup>

Petitioners' two additional arguments likewise fail to demonstrate exceptional circumstances. First, Petitioners assert that the inability to file a reply to EPA's response to their request for a stay in the proceeding before the ALJ is a due process violation. Petition at 4. Granting a reply to a motion is discretionary under the rules governing FIFRA cancellation proceedings. 40 C.F.R. § 164.60(b). Denying such a request does not present exceptional circumstances and can in any event be reviewed after an initial decision. Second, Petitioners argue that carrying out a NOIC proceeding parallel to judicial review is an issue of first impression and thus presents exceptional circumstances. Petitioners' Reply in Support of Motion for Appeal of Order Denying Stay to Environmental Appeals Board 1 (June 16, 2023). We disagree. There is no per se rule that bars administrative adjudications

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<sup>7</sup> In some circumstances the ALJ can end the proceedings prior to a hearing. For example, the ALJ may render an accelerated decision in favor of EPA under certain circumstances. 40 C.F.R. § 164.91(a).

<sup>8</sup> By contrast, intervenor organizations point to the interest in getting existing stocks of chlorpyrifos out of circulation as soon as possible to avoid the possibility of application of chlorpyrifos to food. Intervenor Resp. at 4-5.

from proceeding at the same time as other litigation. Under Petitioners' theory, each time an ALJ issues an order that addresses a novel issue, exceptional circumstances would be met. Instead, the issue itself should be of a nature that presents exceptional circumstances, which is not present here. Both of these arguments can be addressed during the normal course of cancellation proceedings and Board review thereof.

In addition, any potential harm from the possibility of being forced to reregister pesticides after cancellation can be addressed on appeal after an initial decision by the ALJ. As noted above, the cancellation will not be final until the Board declines review or issues a final order following the ALJ's decision.

The dispute before the Board lacks exceptional circumstances that would warrant Petitioners' request to upend the ordinary course of litigation to review an interlocutory order on appeal. Nothing presented by Petitioners prevents the Board from reviewing the matter at the appropriate time and in the normal course of cancellation proceedings under 40 C.F.R. part 164. Accordingly, there are no exceptional circumstances warranting interlocutory review.<sup>9</sup>

For the reasons discussed above, the Board denies Petitioners' motion for interlocutory review of the ALJ's denial of a stay.<sup>10</sup>

So ordered.

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<sup>9</sup> We hold that exceptional circumstances are not present here and thus the Board declines to review the decision denying a stay. However, we also observe that Petitioners do not adequately explain why their interests are "vital," instead stating without elaboration that a delay will cause them to expend significant time and resources, Motion for Appeal at 5, and they need a stay to "avoid unrecoverable losses." Reply Br. at 2.

<sup>10</sup> The Board does not express any view as to the substantive merits of Petitioners' arguments relating to the NOIC.