

**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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| <b>In re Gharda Chemicals International, Inc.,<br/>and Red River Valley Sugarbeet Growers<br/>Association, et al.</b> | ) |                               |
|   | ) |                               |
|   | ) | <b>FIFRA Appeal No. 23-02</b> |
|   | ) |                               |
| <b>Docket No. FIFRA-HQ-2023-0001</b>  | ) |                               |
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|   | ) |                               |

**RESPONSE TO PETITIONERS’ MOTION FOR APPEAL OF  
ORDER DENYING STAY TO ENVIRONMENTAL APPEALS BOARD**

Respondent the U.S. Environmental Protection Agency (“EPA” or “Respondent”) hereby submits this Response to the Motion for Appeal of Order Denying Stay to Environmental Appeals Board (“EAB”) filed by Petitioners Gharda Chemicals International, Inc. and a collection of grower groups (collectively “Petitioners”) on June 1, 2023 (the “Motion for Appeal”). For the reasons set forth in more detail herein, Respondent respectfully requests that the EAB deny the Motion for Appeal.

**STANDARD OF REVIEW**

As set forth in the Rules of Practice governing hearings under FIFRA arising from notices of intent to cancel pesticide registrations, 40 C.F.R. part 164,

[w]hen an order or ruling is not certified by the Administrative Law Judge, it shall be reviewed by the Environmental Appeals Board only upon appeal from the initial or accelerated decision except 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.<sup>1</sup>

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<sup>1</sup> The Motion for Appeal cites also to 40 C.F.R. § 22.29. With respect to FIFRA matters, the Consolidated Rules of Practice in part 22 only govern administrative adjudicatory proceedings for the assessment of any administrative civil penalty under section 14(a) of FIFRA, 7 U.S.C. § 136l(a), which is not at issue in the proceedings before the ALJ. *See* 40 C.F.R. § 22.1(a)(1).

Furthermore, the Rules of Practice state that the interlocutory appeal will be decided by the EAB on the basis of the submission made to the Administrative Law Judge (“ALJ”), 40 C.F.R. § 164.100; therefore, Respondent incorporates by reference Respondent’s arguments made in the ALJ proceeding.<sup>2</sup>

### **OBJECTIONS TO MOTION FOR APPEAL**

Respondent requests that the EAB deny the appeal of the ALJ’s March 31, 2023 order denying a stay of the ALJ proceedings (“Order Denying Stay”). The proceeding before the ALJ is a straightforward administrative action to cancel registrations that allow food use despite the lack of tolerances to cover those residues. As such there are no “exceptional circumstances” to warrant review by the EAB nor would delaying the review of the Order Denying Stay be “deleterious to vital public or private interests” so as to justify an appeal. Petitioners have failed to provide a basis for their appeal under the applicable regulatory standard.

#### **I. Petitioners Fail to Establish the Existence of Exceptional Circumstances**

There are no exceptional circumstances in the proceeding before the ALJ, nor are there any exceptional circumstances concerning the Order Denying Stay to warrant review by the EAB. The proceedings regarding Gharda’s stay request before the ALJ to date have been routine; the legal issues have been straightforward and have not included any fundamental issues of first impression,<sup>3</sup> nor has the ALJ set or overturned any precedent.<sup>4</sup> In other words, there is nothing exceptional about the proceeding before the ALJ or concerning the Order Denying Stay.

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<sup>2</sup> See Motion for Appeal, Ex. 1-8.

<sup>3</sup> *In the Matter of: Chautauqua Hardware Corp.: Respondent*, 3 E.A.D. 616 at \*2-3 (E.P.A. 1991).

<sup>4</sup> See *In the Matter of: University of Delaware*, 1991 WL 165730 (E.P.A. 1991) (finding that no exceptional circumstances were apparent from the appellate record because, among other considerations, the ALJ ruling in question neither set nor overturned any precedent).

Petitioners' claim of exceptional circumstances appears to largely rely on their assertion that continuing with the ALJ proceedings *might* result in Petitioners expending resources in a manner that *could* be fruitless *if* the Eighth Circuit issues a specific type of decision in favor of Petitioners, *and* that decision is issued after an initial or accelerated decision by the ALJ in favor of Respondent and a final decision and order by the EAB (if any).<sup>5</sup> Setting aside the numerous contingencies in Petitioners' scenario, any stay that is tied to a separate proceeding could have a similar outcome, and Petitioners do not explain why (i) this particular circumstance is exceptional or (ii) the ALJ and/or EAB should be effectively barred from denying stays that are tied to separate proceedings.

Petitioners' sole basis for their claim of exceptional circumstances is grounded in their mischaracterization of a holding in *In the Matter of Chautauqua Hardware Corp.*: "exceptional circumstances' warranting EAB review exist where there will be a waste of resources."<sup>6</sup> Contrary to Petitioners' assertion, the Chief Judicial Officer ("CJO") in that matter did not find the existence of exceptional circumstances based solely on a mere waste of resources. The CJO was clear that three considerations "*together* provide[d] the 'exceptional circumstances' that ma[d]e interlocutory review appropriate": that certain discovery requests would reveal EPA's deliberative process, that unnecessarily complying with a broad discovery request would waste EPA resources, and that the case raised fundamental issues of first interpretation.<sup>7</sup>

Petitioners also repeat previous arguments that the ALJ wrongly determined that Petitioners' requested stay was for an indefinite duration and that there is no "pressing need" for

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<sup>5</sup> See Motion for Appeal at 5 ("Even the ALJ agrees that post-judgment review would be ineffective...thus, resulting in an enormous waste of resources to get to a judgment, which should not happen because a stay has been inappropriately denied.").

<sup>6</sup> Motion for Appeal at 5, citing *In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616 (E.P.A. 1991).

<sup>7</sup> *In the Matter of Chautauqua Hardware Corp.* at \*3 (emphasis added).

a stay and that the ALJ's failure to allow Petitioners to reply to Respondent EPA's Response to Stay Request is a due process violation. Motion for Appeal at 3-5. These are no more than restatements of arguments already advanced by Petitioners,<sup>8</sup> refuted by Respondent EPA,<sup>9</sup> and rejected by the ALJ.<sup>10</sup> Nowhere in the Motion for Appeal do Petitioners explain how the ALJ's determinations on these points give rise to exceptional circumstances, such that appeal to the EAB is warranted per 40 C.F.R. § 164.100. Petitioners raise no new arguments regarding these points in the Motion for Appeal, and their general dissatisfaction with the results of the ALJ's analysis does not by itself make these circumstances exceptional.

## **II. Petitioners Fail to Establish that Delaying Review of the Order Denying Stay Would be Deleterious to Vital Public or Private Interests.**

Petitioners' claims regarding private and public interests are also lacking. As to private interests, Petitioners argue that delaying review of the Order Denying Stay would be deleterious to their interests, but do not explain how (or even assert that) these interests are *vital*, as contemplated by 40 C.F.R. § 164.100. Nor do Petitioners explain how – if at all – delaying review would be deleterious to a vital interest of the Grower Petitioners. At this time, there are no tolerances covering residues of chlorpyrifos on food; staying the proceeding will not impact either Petitioner Gharda's interest in selling chlorpyrifos products or the Grower Petitioners' interest in applying chlorpyrifos. Regarding public interests, Petitioners inexplicably assert that “there is no dispute” that postponing review of the Order Denying Stay would be deleterious to

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<sup>8</sup> See, e.g., Motion for Appeal, Ex. 1 (Pet'rs' Req. for Certification of Order Den. Stay for Appeal to EAB) at 3, 5-10 and Ex. 3 (Pet'rs' Reply in Supp. of Req. for Certification of Order Den. Stay for Appeal to EAB) at 2-8.

<sup>9</sup> See, e.g., Motion for Appeal, Ex. 2 (Resp't's Resp. to Req. for Certification of Order Den. Stay for Appeal to EAB) at 3-10 and Ex. 7 (Resp't's Resp. to Req. for Stay of Notice of Intent to Cancel Pesticide Registrations) at 3, 8-12.

<sup>10</sup> See, e.g., Motion for Appeal, Ex. 4 (Order Den. Req. for Certification) at 3 (confirming that Petitioners sought a stay of indefinite duration) and 3-5 (finding that Petitioners failed to establish a pressing need for such a stay) and Ex. 8 (Order Denying Stay) at 4 (affirming that Petitioner Gharda sought a stay of indefinite duration, thereby requiring a pressing need) and 6-7 (denying Petitioner Gharda's stay request due to Petitioner Gharda's failure to establish a pressing need for an indefinite stay).

the public interests of efficiency in matters involving government agencies and expenditures.<sup>11</sup> Petitioners ignore that Respondent has repeatedly highlighted the public interests that militate *against* a stay of the ALJ proceedings and EAB review; specifically, EPA’s need to comply with the Ninth Circuit’s unequivocal directive to cancel chlorpyrifos food uses in a timely fashion, its responsibility to properly administer the law, and its interest in clarifying the disposition of chlorpyrifos products, all of which Respondent has discussed in detail in its filings in the proceedings before the ALJ.<sup>12</sup> In contrast to Petitioners’ position, Respondent asserts that there is a vital public interest in allowing the ALJ proceeding to continue.<sup>13</sup>

### CONCLUSION

As discussed in more detail above and in the briefings before the ALJ,<sup>14</sup> Respondent respectfully requests that the EAB deny the Motion for Appeal.

Respectfully submitted,

Dated: June 12, 2023

/s/ Aaron Newell  
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<sup>11</sup> Motion for Appeal at 5.

<sup>12</sup> *See, e.g.*, Motion for Appeal, Ex. 2 (Resp’t’s Resp. to Req. for Certification of Order Den. Stay for Appeal to EAB) at 8-9 and Ex. 7 (Resp’t’s Resp. to Req. for Stay of Notice of Intent to Cancel Pesticide Registrations) at 11-12.

<sup>13</sup> *See, e.g., In the Matter of: Thermex Energy Corporation & Richard W. Forsythe*, 4 E.A.D. 68 (EAB 1992) at \*2 (noting the “public interest in vigorous and fully effective enforcement of the environmental laws.”).

<sup>14</sup> *See supra* note 2.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing RESPONSE TO PETITIONERS' MOTION FOR APPEAL OF ORDER DENYING STAY TO ENVIRONMENTAL APPEALS BOARD, dated June 12, 2023 was filed electronically with the U.S. Environmental Protection Agency, Environmental Appeals Board E-filing system, with a copy via electronic mail to the following:

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Dated: June 12, 2023

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