

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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

**PETITIONERS’ REPLY IN SUPPORT OF MOTION FOR APPEAL OF ORDER
DENYING STAY TO ENVIRONMENTAL APPEALS BOARD**

Petitioners¹ hereby submit this Reply in support of their Motion for Appeal. Petitioners respectfully request that the EAB grant the Motion for Appeal, and review and vacate the ALJ’s March 31, 2023 Order Denying Stay.

I. Exceptional Circumstances Exist, and Delaying Review Would Be Deleterious to Vital Public and Private Interests

It will be deleterious to vital public or private interests if the EAB does not review the Order Denying Stay until *after* Petitioners have expended significant time and resources to arrive at a judgment by the ALJ. EPA argues there were factors in addition to wasted resources in the *Chautauqua Hardware*² case. But other key factors warranting review are present here as well, including: (1) both EPA and the ALJ already agree that post-judgement review would be ineffective³, and (2) review of the Order Denying Stay presents an issue of first impression because the tribunal has not addressed carrying out an NOIC proceeding while the underlying rule’s legality is challenged in parallel judicial review. *See* Pet’rs’ Reply in Support of Req. for Certification at 3, n. 1.

¹ Capitalized terms not defined herein are given the definitions in the Motion for Appeal of Order Denying Stay to Environmental Appeals Board (“Motion for Appeal”).

² *See In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616, 2-3 (EAB 1991) (“A waste of EPA resources would be a waste of taxpayers’ money and would therefore be contrary to the public interest.”).

³ Order Den. Req. for Certification at 2 (“As the Agency does not contest, post-judgment review of the Stay Order would be ineffective.”).

Moreover, it is undisputed that cancellation of Gharda's registrations would make it significantly more difficult to bring chlorpyrifos products back to market if the Eighth Circuit overturns the Final Rule. *See* Stephens Declaration⁴ ¶ 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."). Grower Petitioners and their members also have a vital interest in the EAB reviewing and vacating the Order Denying Stay, so that no cancellation can occur pending an Eighth Circuit decision, because Grower Petitioners have a demonstrated need for chlorpyrifos in current and future growing seasons to avoid unrecoverable losses.

II. There is No Risk to Public Interest & No Urgent Need For Registration Cancellation

Intervenors argue that growers who previously bought Gharda's products "might unwittingly apply chlorpyrifos to food crops." Intervenors' Resp. to Motion for Appeal at 4. EPA argues there is a public interest in cancelling chlorpyrifos food uses in a "timely fashion" and in "clarifying the disposition of chlorpyrifos products." EPA's Resp. to Motion for Appeal at 5. But both Intervenors and EPA fail to acknowledge that there is *no evidence* that Gharda's products are being used illegally on food or that chlorpyrifos is being distributed, sold, or otherwise placed in the stream of commerce for use on food. *See* Gharda's Objs. and Req. for Hr'g at 6-7. This is consistent with Gharda's previous commitment to EPA to "work[] to ensure that its chlorpyrifos product does not enter the U.S. food supply while EPA's revocation order

⁴ *See* Ex. 5 to Gharda's Req. for Hr'g and Statement of Objs. and Req. for Stay ("Gharda's Objs. and Req. for Hr'g") n.8, Ex. 7 (citing Pet'rs Reply Br., *Red River Valley Sugarbeet Growers Ass'n*, Nos. 22-1422, 22-1530 (8th Cir. Sept. 2, 2022) (ID No. 5194647) (citing Pet. App. 1795, Stephens Declaration)).

remains under review by the Eighth Circuit.” *Id.* at 7, Ex. 9. Respondents ignore the reality that Gharda’s products are not being misused in an inappropriate attempt to create a risk to the public warranting immediate cancellation of chlorpyrifos registrations.

Subsequent to Petitioners’ Motion for Appeal, EPA published a notice⁵ of Gharda’s request for voluntary cancellation of certain registrations’ uses. The voluntary cancellation seeks cancellation of all food uses except the 11 Safe Uses that are the subject of the Eighth Circuit litigation.⁶ In EPA’s notice, the Agency proposes a 180-day comment period before intending to grant Gharda’s request and implementing the voluntary cancellation. If, as EPA and Intervenors argue, there was a public interest in moving forward with the cancellation proceeding before the Eighth Circuit’s decision, EPA would not permit a 180-day comment period during which the chlorpyrifos registrations remain unchanged. EPA is essentially proposing the status quo with respect to the registrations, exactly what Petitioners seek by way of a stay of the cancellation proceeding while the Eighth Circuit makes its decision.

III. Conclusion

As discussed above, in Petitioners’ Motion to Appeal, and in the briefing before the ALJ, Petitioners respectfully request that the EAB review and vacate the Order Denying Stay.

This 16th day of June, 2023,

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⁵ See 88 Fed. Reg. 37,875, 37,877 (Jun. 9, 2023) available at <https://www.govinfo.gov/content/pkg/FR-2023-06-09/pdf/2023-12354.pdf>. Attached as Exhibit A is EPA’s filing before the ALJ of the Notice of Publication of Notice of Receipt of Request to Voluntarily Amend Registrations to Terminate Certain Uses, dated June 9, 2023.

⁶ It took EPA 14 months from the date of Gharda’s voluntary cancellation request (March 30, 2022) to publish the Federal Register notice of the voluntary cancellation request (June 9, 2023).

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, true and correct copies of the foregoing was filed electronically with the EAB E-Filing System for the EAB's E-Docket Database, with a copy via electronic mail to the following:

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