

EXHIBIT 3

**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.,)
)
Petitioners.)
)**

Docket No. FIFRA-HQ-2023-0001

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

Submitted by:

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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”) submit the following reply in support of their Request for Certification of the Order Denying Stay for Appeal to the Environmental Appeals Board (“Request for Certification”). 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”).

The Petitioners made their certification request not, as EPA contends, “to further delay these proceedings,” EPA Resp. to Req. for Certification (“Response”) at 2, but 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.” 40 C.F.R. § 164.100. EPA’s Response does not change these outcomes.

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—Constituting a Question of Law with Substantial Ground for Difference of Opinion

EPA does not challenge that an important question of law is presented by the determination in the Order Denying Stay that the requested stay was one of “indefinite duration” and not finding a “pressing need” to support such a stay. *See also In the Matter of: Request to Reduce Pre-Harvest Interval for EBDC Fungicide*, 2008 WL 4545096 (E.P.A. Oct. 6, 2008) (finding that “important questions of law and/or policy” exist where the issue “has been addressed in very few rulings in other cases” and has not been addressed in these particular circumstances)¹. In fact, EPA’s Response only disputes that there is substantial ground for difference of opinion.

In addition, EPA claims that Petitioners failed the balancing test used by this Tribunal to determine whether to grant the requested stay, but the use of such balancing test was wrong on two separate fronts. The Order Denying Stay first incorrectly determined that the requested stay

¹ The NOIC proceeding presents numerous issues of a novel, intertwined nature that do not appear to have been addressed in prior ALJ/EAB matters. Indeed, EPA’s Response demonstrates the entanglement between the Ninth Circuit decision, the impending Eighth Circuit decision in the Lawsuit, and proposed-intervenors’ request to intervene and argue science issues that are not at issue in these proceedings. *See* Pet’rs. Opp. to Mot. to Intervene. The Eighth Circuit Lawsuit has already been fully briefed, and oral argument took place on December 15, 2022—a decision by the Eighth Circuit could include vacatur of the Final Rule, the sole basis for the NOIC. Despite that the Eighth Circuit will soon decide the legality of the Final Rule, EPA has forged ahead and proposed to cancel Gharda’s registrations in the NOIC based solely on the effect of the Final Rule. A stay of the NOIC proceedings would avoid such entanglement of the issues.

was for an “indefinite duration.”² Second, even if the “pressing need” standard applied, which it only would for a stay of “indefinite duration”, the Order Denying Stay failed to adequately weigh the evidence supporting a “pressing need” for a stay, rendering use of the balancing test inappropriate.

a. EPA Does Not Seriously Contest the Pressing Need Demonstrated by the Stephens Declaration

While the ALJ found that Gharda would not be “back to square one” in the event that the registrations are cancelled and the Eighth Circuit³ later vacated the Final Rule⁴, the evidence—not considered by the Order Denying Stay—is clear that Gharda would incur significant cost and harm if its registrations are cancelled and would in fact be “back at square one” if it needs to re-register its chlorpyrifos products following an Eighth Circuit vacatur. *See* Req. for Certification at Ex. 1, Decl. of Stephanie H. Stephens ¶ 6 (Apr. 10, 2023) (“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.”). EPA avoids Petitioners’ arguments as to the harm that would be caused if the registrations are cancelled and the Final Rule is later vacated; instead, EPA relegates its attack on the Stephens’ Declaration to a

² Because the requested stay was not for an “indefinite duration,” a different standard applies. *See* Order Denying Stay at 4 (“When deciding motions to stay proceedings, this Tribunal’s judges have considered” factors including, *inter alia*, whether a stay will “eliminate any unnecessary expense and effort.”). Petitioners have met this standard. *See* Gharda’s Req. for Hr’g and Statement of Objs. and Req. for Stay at 12–13.

³ The Eighth Circuit is currently reviewing the legality of the Final Rule 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”).

⁴ *See* Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (“Final Rule”).

nineteen-line footnote that (1) does nothing to undermine the strength and veracity of this 30-year pesticide registration expert's views, and (2) makes no commitment whatsoever to reinstate Gharda's registrations immediately, *if at all*, if they are cancelled before an Eighth Circuit vacatur of the Final Rule. Indeed, EPA underscores the validity of the Stephens Declaration by asserting that "there are a number of variables associated with a potential registration scenario," EPA Resp. at 9 n.8, that could impact just how, whether, and when Gharda could ever get those registrations back. This again proves that Gharda would be "back to square one" in terms of the cost, time, and resources it would take to re-register its products.

EPA's Response cites to the PRIA Fee Category Table-Registration Division (RD)—New Active Ingredients (EPA Resp. at 8–9 n.8) for the proposition that Ms. Stephens' expert view on the length of time between submission of new chlorpyrifos registration applications and possible EPA approval (38 months) may be overstated by a few months. But EPA fails to note that it has renegotiated more than 60% of conventional pesticide PRIA deadlines, meaning that Ms. Stephens' Declaration may actually *underestimate* the waiting time that Petitioners would have to endure. Ex. 1, EPA, *PRIA Quarterly Stakeholder Meeting Presentation* at 18 (Apr. 13, 2023). Again, noticeably absent from EPA's Response is any commitment that Gharda's registrations would be immediately reinstated in the event of an Eighth Circuit vacatur that followed registration cancellation.

Further, while EPA may purport to raise its own competing interests against a stay of the NOIC proceedings, Petitioners' need for a stay clearly outweighs those interests. EPA argues that "allowing [chlorpyrifos] products to remain out of compliance with FIFRA for an indefinite period is inconsistent with public policy." EPA Resp. at 9. However, it is undisputed that there are currently no chlorpyrifos products used on food in the stream of commerce. Gharda's Req.

for Hr’g and Statement of Objs. and Req. for Stay at 6–7 (Jan. 13, 2023). EPA also argues that EPA’s need to comply with the Ninth Circuit’s directive to cancel uses in a “timely fashion” outweighs the Petitioners’ need for a stay. EPA Resp. at 9. However, EPA’s purported interests are significantly outweighed by Petitioners’ need for a stay—Grower Petitioners⁵ and their members have a pressing need to use chlorpyrifos products in the current and future growing seasons to avoid unrecoverable losses and pest pressures, and Gharda would be back to “square one” in the event its registrations are cancelled and the Eighth Circuit vacates the Final Rule as to the Safe Uses. EPA’s Response also ignores Petitioners’ argument that review of the Order Denying Stay now by the EAB is needed to avoid needless expense that will otherwise occur if review does not take place until after this matter is fully litigated before the ALJ.

b. Ground for Difference of Opinion Exists as to the Length of Petitioners’ Requested Stay

EPA’s Response demonstrates that ground for difference of opinion exists as to whether Petitioners’ requested stay was for an “indefinite duration”, which would determine whether the standard applied in the Order Denying Stay was appropriate. Petitioners believe that the requested stay is not ‘indefinite’ because it would be tied to the Eighth Circuit’s decision, which is imminent. EPA argues that the requested stay is ‘indefinite’ because “it is unclear when the Eighth Circuit might issue its decision or what that decision might be.” EPA Resp. at 5.⁶ EPA’s

⁵ EPA mistakenly claims that Growers did not object to the failure to stay the cancellation proceeding, but Growers plainly raised this in their objections to the NOIC. See Growers’ Req. for Hr’g and Statement of Objs. to NOIC at 20-21 (Jan. 13, 2023).

⁶ EPA also argues that Petitioners’ “failure to properly apply the balancing test required” or to “acknowledge the competing interests identified” by EPA shows that there is no substantial ground for difference of opinion. EPA Resp. at 10. To the contrary, the substantial ground for difference of opinion is actually *demonstrated* by EPA’s arguments related to the appropriate standard to be applied in the Order Denying Stay. In any event, the failure of the Order Denying Stay to properly weigh the harm demonstrated by the Stephens’ Declaration compounds the error of using the “pressing need” balancing test in the first place.

Response proves the difference of opinion that exists between Petitioners and EPA as to the length of Petitioners' requested stay. Because Petitioners have demonstrated both that the Order Denying Stay involves an important question of law, *see* Petitioners' Req. for Certification and *supra* § I, and that ground for difference of opinion exists as to the requested stay's duration, the ALJ should certify the Order Denying Stay for appeal to the EAB.

II. This Tribunal's Failure to Allow Petitioners to Reply Prejudiced Petitioners

This Tribunal failed to allow Petitioners to reply to EPA's response to Gharda's Request for Stay. Petitioners have been prejudiced by not having the opportunity to reply, and EPA's opposition to the request for certification demonstrates this further. Petitioners were not given an opportunity to elaborate on the harm identified in the Stephens Declaration, or the rationale that the requested stay was not for an indefinite duration, which they would have done if allowed to submit a reply.

EPA notes states that this Tribunal "reviewed the lengthy procedural history" of the Ninth Circuit case and Eighth Circuit Lawsuit, but fails to mention that the Order Denying Stay was silent on weighing the Stephens Declaration. EPA Resp. at 12. This is the exact issue that Petitioners would have addressed with the Tribunal, but they were not given the opportunity to do so.

EPA's opposition says that Petitioners should have included, in their original request for stay, any recommendations for the ALJ to fashion a stay that would be subject to periodic review and reassessment. EPA argues that the ALJ should not *sua sponte* devise and impose such a stay. Again, this is precisely why Petitioners needed an opportunity to reply—to address EPA's opposition to the requested stay, to clarify the reasons supporting a stay, and to recommend a stay with appropriate guardrails for periodic review and reassessment.

EPA further argues that, because Petitioners acknowledge the ALJ has discretion to allow a reply brief, Petitioners are barred from arguing that not being given the opportunity to reply constitutes a deprivation of Petitioners' due process rights. Petitioners are not foreclosed from identifying that this Tribunal abused its discretion by not allowing a reply brief. EPA's cancellation proceeding is not a simple, pro forma administrative process. This is a matter inextricably linked with the critical issues of administrative law that will be decided by the outcome of the Lawsuit in the Eighth Circuit. Moreover, as set forth in Gharda's Request for Hearing and Statement of Objections, EPA is attempting to use the NOIC in an unprecedented manner that ignores certain fundamental rights that Congress guaranteed to registrants and other stakeholders under FIFRA § 6. Gharda's Req. for Hr'g and Statement of Objs. and Req. for Stay at 12. Allowing a reply under such circumstances was critical. Petitioners were not afforded an opportunity to be heard on EPA's arguments regarding the requested stay, and therefore Petitioners' rights to due process were violated.

III. Review of the Order Denying Stay After a Final Judgment Will be "Inadequate or Ineffective"

EPA ignores, and cannot dispute, that postponing review of the Order Denying Stay until after the Petitioners have expended significant time and resources to arrive at a final judgment from this Tribunal will be "inadequate or ineffective." 40 C.F.R. § 164.100. If this matter is fully litigated in this Tribunal, it would require significant expense and resources. It would be prejudicial to allow EPA to use the NOIC proceedings to circumvent timely EAB review and force Petitioners to undergo the time consuming and costly processes attendant to the cancellation proceedings and, only then, have EAB review of the Order Denying Stay. It is simply undisputed that if the Tribunal issues an adverse determination on the NOIC, it would be "inadequate and ineffective" for the EAB to *then* review the Order Denying Stay because the

time and resources would have already been incurred to litigate the proceeding for which the stay was sought. Therefore, the EAB must review the Order Denying Stay now, to be effective and to adequately afford relief to Petitioners under these exceptional circumstances.

IV. Conclusion

For those reasons, and the reasons identified in the Request for Certification, Petitioners respectfully request that this Tribunal certify the Order Denying Stay for appeal to the Environmental Appeals Board.

This 27th day of April, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2023, true and correct copies of the foregoing Petitioners' Reply In Support Of 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:

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