EXHIBIT 2

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**

RESPONSE TO REQUEST FOR CERTIFICATION OF ORDER DENYING STAY FOR APPEAL TO ENVIRONMENTAL APPEALS BOARD

As directed by this Tribunal in its April 12, 2023 Order Setting Briefing Schedule on Petitioners' Request for Certification, Respondent the U.S. Environmental Protection Agency ("EPA," "Agency," or "Respondent") respectfully submits this Response to Petitioners' April 10, 2023 Request for Certification of Order Denying Stay for Appeal to Environmental Appeals Board.

On December 14, 2022, EPA published in the Federal Register a Notice of Intent to Cancel ("NOIC") the registrations of three pesticide products pursuant to section 6(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136d(b). Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations, 87 Fed. Reg. 76,474 (Dec. 14, 2022). In its January 13, 2023 Request for Hearing and Statement of Objections and Request for Stay ("Gharda's Objections"), Petitioner Gharda Chemicals International, Inc. ("Gharda") requested that this Tribunal stay any action with respect to the NOIC, including but not limited to

the conduct of a hearing, pending resolution of the Petitioners' challenge to the Agency's rule revoking chlorpyrifos tolerances. Gharda's Objections at 12-13 (referring to *Red River Valley Sugarbeet Growers Ass'n v. Regan*, Nos. 22-1422, 22-1530 (8th Cir. argued Dec. 15, 2022) [hereinafter *RRVSGA*] (challenging Chlorpyrifos: Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (the "Final Rule")). EPA opposed that request to stay this proceeding in its Response to Request for Stay of Notice of Intent to Cancel Pesticide Registrations filed February 22, 2023 ("EPA Response to Stay Request").

On March 31, 2023, this Tribunal denied Petitioner Gharda's stay request ("Order Denying Stay"), correctly finding that Petitioner Gharda failed to demonstrate a "pressing need" for a stay of indefinite duration.[1] Petitioner Gharda, along with a collection of grower groups[2] (collectively "Petitioners"), now seek to further delay these proceedings by requesting that this Tribunal certify the Order Denying Stay for appeal to the Environmental Appeals Board ("EAB"). *See* Petitioners' Request for Certification of Order Denying Stay for Appeal to Environmental Appeals Board (Apr. 10, 2023) ("Certification Request").

For the reasons set forth in more detail herein, Respondent respectfully requests that this Tribunal deny the Certification Request.

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,

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[1] *See* Order on Petitioner Gharda Chemicals International, Inc.'s Motion to Stay at 6-7.
[2] Several grower groups ("Grower Petitioners") also filed with this Tribunal a Request for Hearing and Statement of Objections on the NOIC dated January 13, 2023.

> [t]he Administrative Law Judge may certify an order or ruling for appeal to the Environmental Appeals Board 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. The Administrative Law Judge shall certify orders or rulings for appeal only upon the request of a party.

40 C.F.R. § 164.100.

OBJECTIONS TO CERTIFICATION REQUEST

As discussed in more detail in the EPA Response to Stay Request, Respondent believes that a stay of these proceedings is unnecessary, inconsistent with the directives of the Eighth and Ninth Circuit Courts of Appeals, and inappropriate since Petitioner Gharda failed to demonstrate a "pressing need" for a stay of these proceedings pending the issuance of a decision by the Eighth Circuit in *RRVSGA*. Similarly, Petitioners fail to demonstrate in the Certification Request that there is "an important question of law or policy about which there is substantial ground for difference of opinion," 40 C.F.R. § 164.100, such that certification to the EAB and further delay of these proceedings would be appropriate. Although Petitioners assert that this Tribunal's conclusion that Petitioner Gharda failed to demonstrate a "pressing need" for its request for an "indefinite" stay presents such a question, Petitioners' arguments focus solely on whether there is an important question of law, and do not include any analysis of whether there is "substantial ground for difference of opinion" about such a question, as contemplated by 40 C.F.R. § 164.100.[3] Furthermore, the Order Denying Stay was merely this Tribunal's application of the relevant standard of review for consideration of an indefinite stay. The applicable case law does

[3] *See*, *e.g.*, Certification Request at 3 ("The Order Denying Stay amounts to an *important question of law*, and delay of review by the EAB…") and 5 ("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.'") (emphases added).

not permit granting "a stay of indefinite duration in the absence of a pressing need," *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), and this Tribunal properly exercised its discretion when it determined that Petitioner Gharda failed to identify a pressing need for a stay.

First, Petitioners cannot escape that Petitioner Gharda's stay request is for a functionally indefinite duration, and that the Order Denying Stay was correct to therefore "balanc[e] interests favoring a stay against interests frustrated by a stay." Order Denying Stay at 4 (internal citations omitted). Second, Petitioners entirely omit any analysis of the interest balancing required by that standard of review. Petitioners focus exclusively on Petitioner Gharda's speculative need to re-register its products in the event of a particular decision from the Eighth Circuit and on Petitioners' potential economic losses, and fail to address the many countervailing interests raised by the Agency in the EPA Response to Stay Request and discussed by this Tribunal in the Order Denying Stay. Finally, Petitioners claim that this Tribunal's decision to disallow a reply to the EPA Response to Stay Request violates their Due Process rights, despite admitting that the ALJ has discretion to do so pursuant to 40 C.F.R. § 164.60(b). Certification Request at 11. The Grower Petitioners chose not to move this Tribunal for a stay,[4] and Petitioners now claim that their inability to "clarify" and "outline" Petitioner Gharda's arguments – which cited to the incorrect criteria for a stay and failed to enumerate how those criteria were satisfied – is a violation of Petitioners' right to due process. Petitioners had the full "opportunity to be heard 'at a meaningful time and in a meaningful manner'" as to the need for a stay of these proceedings, *In Re: J.V. Peters and Company, a Partnership, David B. Shillman, and Dorothy L. Brueggemeyer*, 7 E.A.D. 77, 95 (EAB 1997) (internal citations omitted), and this Tribunal

[4] *See* Order Denying Stay at 1, fn.2.

properly exercised its discretion under 40 C.F.R. § 164.60(b) to disallow a reply to the EPA Response to Stay Request.

I. This Tribunal Correctly Identifies Petitioners' Request as for a Stay of Indefinite Duration.

Petitioners argue that a decision in *RRVSGA* is "likely imminent," and therefore, a stay pending that decision is not "indefinite." Certification Request at 10. Petitioners do not cite to any authority for their assertion that a stay may not be considered "indefinite" simply because its duration is tied to the issuance of decision in a separate proceeding at some unspecified time in the future. On the contrary, as discussed below, courts have rejected stays of such vague duration.

As explained by Respondent in the EPA Response to Stay Request and affirmed by this Tribunal in the Order Denying Stay, it is unclear when the Eighth Circuit might issue its decision or what that decision might be. *See* EPA Response to Stay Request at 8 and Order Denying Stay at 4. It is also unclear what the next steps might be after the Eighth Circuit issues its order and whether Petitioners would make similar arguments to further delay these proceedings pending their appeal of what might well be an unfavorable decision. As a result, this Tribunal was correct to conclude that Petitioner Gharda's request was for a stay of indefinite duration and therefore to "balanc[e] interests favoring a stay against interests frustrated by a stay." Order Denying Stay at 4 (internal citations omitted).

Contrary to Petitioners' assertions, the cases cited by this Tribunal in the Order Denying Stay underscore that Petitioners seek a stay of indefinite duration, and that therefore a pressing need must exist. Petitioners misread *Diomed, Inc. v. Total Vein Sols., LLC* to suggest that the court in that matter only denied a stay where the requesting party had already been "stalling" discovery for over a year. Certification Request at 9-10 (internal citations omitted). While the

court indeed noted that plaintiff had complained about the defendant's "stalling," the court's analysis hinged on the sufficiency of the defendant's rationale for further delay rather than on the passage of some specific amount of time. *See Diomed, Inc. v. Total Vein Sols., LLC*, 498 F. Supp. 2d 385, 387 (D. Mass. 2007) ("Quite simply, [Defendant] has not articulated a sufficient reason to delay the adjudication of this action any further."). That court's emphasis on the movant's justification for a stay is similar to the "pressing need" standard properly employed by this Tribunal and, as discussed further below in Section II, that Petitioners have repeatedly failed to properly assess. Also, in *In the Matter of: Borla Performance Indus., Inc., Respondent*, this Tribunal found that the "contours of the stay" sought in that matter were too imprecise where it was unclear how long the Court of Appeals for the D.C. Circuit would need to consider briefs, consider issues raised at oral argument, and issue a decision. *In the Matter of: Borla Performance Indus., Inc., Respondent*, EPA Docket No. CAA-09-2020-0044, 2022 WL 887454, at *3 (ALJ, Mar. 15, 2022). As a result, this Tribunal found that such a stay would only be granted where there is a pressing need for one. *Id*. While briefing and oral argument have concluded in *RRVSGA*, it is similarly unclear how long the Eighth Circuit will need to consider the issues raised in oral argument and issue its decision. Nor is it apparent what that court's decision might be or how much time might be required to accommodate any necessary next steps resulting from that decision.

Petitioners note in support of their claim that an Eighth Circuit decision is "likely imminent" that they have impressed upon the Eighth Circuit the need for a decision prior to the 2023 growing season. Certification Request at 9 (*citing* Federal Rule of Appellate Procedure 28(j) Letter for *Red River Valley Sugarbeet Growers Association, et al. v. Michael Regan, et al.*, Nos. 22-1422 (lead), 22-1530, *RRVSGA* (8th Cir. Jan 18, 2023), Entry ID 5237033). Petitioners

fail to make clear, however, that Petitioners' Rule 28(j) submission making that request of the Eighth Circuit stated that the 2023 growing season commenced in March for many crops.[5] Since the Eighth Circuit has yet to issue its decision in *RRVSGA*, there is no reason to believe that a decision is imminent based on the Petitioners' request for a decision prior to the 2023 growing season.

Petitioners conclude by noting that "a stay could have been granted that would be subject to periodic review and reassessment." Certification Request at 10. This suggestion was not included in Petitioner Gharda's original stay request, and Petitioners provide no explanation for why this Tribunal should have *sua sponte* devised and imposed a reviewable stay of this nature based on the bare request included in Gharda's Objections. Furthermore, at this time, Petitioners propose no particular schedule or provide any details for their late-suggested review and reassessment. In any event, while appearing to suggest a stay of more limited duration, this suggestion would still ultimately result in a stay of indefinite duration because it would be inextricably tied to the issuance of an Eighth Circuit decision in *RRVSGA*,[6] and it remains unclear when the Eighth Circuit might issue its decision or what the next steps might be after the Eighth Circuit issues its order.

In light of the foregoing, Petitioners have failed to establish that there is substantial ground for difference of opinion as to the indefinite nature of Petitioners' stay request.

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[5] Federal Rule of Appellate Procedure 28(j) Letter for *Red River Valley Sugarbeet Growers Association, et al. v. Michael Regan, et al.* at 2, Nos. 22-1422 (lead), 22-1530, *RRVSGA* (8th Cir. Jan 18, 2023), Entry ID 5237033.

[6] *See Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 n.3 (11th Cir. 2000) (finding that an order for the parties to submit status reports on separate litigation "does not make the scope of a stay less indefinite."); *see also Landis*, 299 U.S. at 257 ("[A]n order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done.").

II. Petitioners' Arguments that a "Pressing Need" for a Stay Exists are Fatally Deficient.

As discussed in the Order Denying Stay, when determining whether to stay proceedings indefinitely, this Tribunal will identify a "pressing need" by "balancing interests favoring a stay against interests frustrated by a stay," with an overarching consideration of this Tribunal's obligation to "exercise jurisdiction timely in cases properly before it." Order Denying Stay at 4 (internal citations omitted). Petitioners completely disregard this balancing requirement, choosing instead to flatly assert that a pressing need for an indefinite stay exists because Petitioner Gharda *might* at some future point need to re-register the products subject to the NOIC and in light of certain economic hardships claimed by Petitioners once the products in question are cancelled. *See* Certification Request at 5-9.

As previously noted by Respondent, if the registrations subject to the NOIC are cancelled, and if tolerances for residues of chlorpyrifos are restored in the future, then Petitioner Gharda, like any other registrant seeking a pesticide registration, would need to follow the applicable process(es) for registration under FIFRA and the regulations promulgated thereunder, and would need to demonstrate that such uses meet the FIFRA standard.[7] While following those processes would necessarily be more burdensome to Petitioner Gharda than if none of the uses had ever been cancelled,[8] Petitioners' interest in avoiding the possibility that Petitioner Gharda

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[7] *See, e.g.*, EPA Response to Stay Request at 10.

[8] Petitioners make much of the fact that Respondent has not challenged the time and expense figures included in the Declaration of Stephanie H. Stephens and cited in the Certification Request. *See* Certification Request at 6-7. Petitioners do not explain why Petitioner Gharda deemed these arguments unworthy of inclusion in Petitioner Gharda's initial stay request and instead opted to simply note at the conclusion of a procedural history of the *RRVSGA* litigation that the "parties' principal briefs in [*RRVSGA*] are incorporated by reference here." Gharda Objections at 4. In any event, Respondent is unable to verify the figures provided by Ms. Stephens based on information currently available to Respondent. For example, Ms. Stephens claims that "it would take approximately 38 months from the time of submission" of applications for new food uses and tolerances until approval, Certification Request at 6, while the longest decision review timeline in the Pesticide Registration Improvement Act fee tables is 36 months. *See* PRIA Fee Category Table - Registration Division (RD) - New Active Ingredients,

might have to follow the same statutory and regulatory processes for registering uses as any other similarly situated registrant is significantly outweighed by the Agency's need to comply with the Ninth Circuit's unequivocal directive to cancel 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 EPA discussed in detail in the EPA Response to Stay Request.[9]

Notably, Petitioners do not even mention the Ninth Circuit's order to Respondent to modify or cancel pesticide registrations consistent with its tolerance decision "in a timely fashion," *League of United Latin Am. Citizens v. Regan*, 996 F.3d 673, 704 (9th Cir. 2021) [hereinafter *LULAC II*], much less argue that their speculative concerns about product registration warrant frustrating the intent of that court's unambiguous order. Nor do Petitioners address Respondent's points that allowing these products to remain out of compliance with FIFRA for an indefinite period is inconsistent with public policy, or that cancellation of the products in question would provide clarity for disposition of these products and allow for movement of these products for disposal. *See* EPA Response to Stay Request at 11-12.

Petitioners assign equal significance to their interest in avoiding "unrecoverable losses and pest pressures" due to the Grower Petitioners' inability to use chlorpyrifos on their crops. Certification Request at 8. However, as Respondent EPA explained in the EPA Response to

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available at https://www.epa.gov/pria-fees/pria-fee-category-table-registration-division-rd-new-active-ingredients. Ultimately, there are a number of variables associated with a potential registration scenario, such that the potential cost(s), applicable process(es), and timing are entirely speculative. For example, these costs and processes might vary depending on whether an applicant would seek to add a use to an existing registration or register a new product, whether the use remains registered on any other product, whether any new data might be necessary to assess the risks and benefits of a pesticide when the application is submitted, or whether any uses have previously been subject to cancellation. *See, e.g.,* 7 U.S.C. 136w-8; 40 C.F.R. part 152, subparts C and F. Respondent therefore does not have sufficient information to definitively calculate the time and expense Petitioner Gharda's speculative future application(s) might entail.

[9] *See* EPA Response to Stay Request at 8-12.

Stay Request, any such harms would be properly attributable to the Final Rule, not the NOIC which is the subject of these proceedings. EPA Response to Stay Request at 10-11. The NOIC and the cancellation of chlorpyrifos food uses is simply an administrative process to implement the Final Rule, and as this Tribunal noted, "there may be…no overlap between the Eighth Circuit's review of issues related to the Final Rule and this Tribunal's review of the NOIC." Order Denying Stay at 6. And even assuming *arguendo* that this Tribunal should take this interest into consideration, Petitioners again decline to balance this interest against those that would be frustrated by a stay and that have been clearly identified by Respondent in the EPA Response to Stay Request, as discussed above.

Ultimately, Petitioners' failure to properly apply the balancing test required by the applicable case law or to acknowledge the competing interests identified by the Respondent and affirmed by this Tribunal shows that there is no substantial ground for difference of opinion as to whether Petitioners have demonstrated a pressing need for a stay.

III. Petitioners Have Not Established a Due Process Violation.

Petitioners conclude by arguing that this Tribunal's decision to disallow a reply to the EPA Response to Stay Request violates their due process rights. *See* Certification Request at 11-12. Petitioners acknowledge, however, that this Tribunal has discretion to do so pursuant to 40 C.F.R. § 164.60(b). *Id*. at 11. Petitioners assert that if they were given a chance to reply, they could have "outlined" why the requirement to demonstrate a pressing need for a stay is not applicable, and "explained" their argument that their request was not for an "indefinite duration." *Id*.

As Petitioners note, 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." *Id*. (citations omitted). The EAB has also noted that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *In Re: J.V. Peters and Company*, 7 E.A.D. at 95 (*quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Furthermore, "due process is flexible and calls for such procedural protections as the particular situation demands." *In Re: J.V. Peters and Company*, 7 E.A.D. at 97 n.31 (*citing Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In light of those principles, Respondent EPA asserts that Petitioners were in fact afforded the opportunity to be heard at a meaningful time and in a meaningful manner via their requests for hearings and statements of objections in this matter, and that the circumstances of this proceeding and the Order Denying Stay did not call for further submissions from Petitioners regarding a stay. The Grower Petitioners chose not to ask this Tribunal to stay these proceedings in their hearing requests and objections.[10] Petitioner Gharda included a request for a stay, but asserted that an incorrect standard should govern. *See* EPA Response to Stay Request at 3-4, Order Denying Stay at 4. Furthermore, Petitioner Gharda declined to enumerate how exactly it satisfied its proposed criteria, simply stating that "[f]or reasons outlined herein, Gharda has satisfied these criteria here." Gharda's Objections at 13. Petitioners argue that they could have "outlined" and "explained" their arguments in a reply to the EPA Response to Stay Request but provide no explanation for why they did not outline and explain their arguments for a stay in their initial requests for hearings and statements of objections. Now, after Respondent EPA identified the correct standard and attempted to graft Petitioner Gharda's arguments for a stay onto that framework for purposes of rebuttal, Petitioners essentially argue that this Tribunal should have allowed Petitioners a "do-over" on their original stay request.

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[10] *See* Order Denying Stay at 1, 2.

This Tribunal has discretion to disallow replies per 40 C.F.R. § 164.60(b), as Petitioners acknowledge,[11] and this Tribunal appropriately considered the circumstances of this proceeding when it exercised that discretion to disallow a reply to the EPA Response to Stay. In addition to considering Petitioner Gharda's and Respondent's arguments for and against a stay, respectively,[12] this Tribunal reviewed the lengthy procedural history of *LULAC II* and *RRVSGA* and Respondent's ongoing efforts to address existing registrations of chlorpyrifos for food use to bring them in line with the Final Rule.[13] Petitioners had full opportunity to submit arguments in favor of a stay, and the arguments that Petitioners chose to submit were considered by this Tribunal and balanced against those put forth by Respondent in light of applicable legal requirements, including those giving this Tribunal discretion to disallow replies. There is ultimately no substantial ground for difference of opinion as to whether this Tribunal's resulting decision to disallow a reply to the EPA Response to Stay Request violates Petitioners' due process rights.

CONCLUSION

As discussed in more detail above, Respondent believes that Petitioners have failed to establish that the Order Denying Stay involves an important question of law or policy about which there is substantial ground for difference of opinion, as specified by 40 C.F.R. § 164.100. Petitioner Gharda's stay request is for an indefinite duration, and it was therefore proper for the Order Denying Stay to "balanc[e] interests favoring a stay against interests frustrated by a stay." Furthermore, Petitioners do not engage in the balancing required by that standard in their arguments that there is a "pressing need" for such a stay, and do not attempt to address the

[11] Certification Request at 11.
[12] Order Denying Stay at 5-6.
[13] *Id*. at 2-4.

interests that would be frustrated by a stay and that have already been clearly identified by Respondent. *See, e.g.*, EPA Response to Stay Request at 11-12. Finally, Petitioners' due process arguments are unavailing; this Tribunal's decision to disallow a reply to the EPA Response to Stay Request was well within the discretion afforded to it by 40 C.F.R. § 164.60(b), and Petitioners were afforded the opportunity to be heard at a meaningful time and in a meaningful manner in their requests for hearings and statements of objections in this matter. Ultimately, it is clear that Petitioners' goal is to further delay these proceedings based entirely on Petitioners' speculation of what an Eighth Circuit decision in *RRVSGA* might entail. As noted in the EPA Response to Stay Request,[14] Respondent has asserted that a delay in these proceedings is unnecessary and inappropriate, and as a result, Respondent respectfully requests that this Tribunal deny Petitioners' request to certify the Order Denying Stay for appeal to the EAB.

Respectfully submitted,

Dated: April 20, 2023

/s/ Aaron Newell
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[14] *See*, *e.g.*, EPA Response to Stay Request at 4.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE TO REQUEST FOR CERTIFICATION OF ORDER DENYING STAY FOR APPEAL TO ENVIRONMENTAL APPEALS BOARD, dated April 20, 2023, was filed electronically with the U.S. Environmental Protection Agency, Office of Administrative Law Judges E-filing system.

I also certify that a true and correct copy of the foregoing RESPONSE TO REQUEST FOR CERTIFICATION OF ORDER DENYING STAY FOR APPEAL TO ENVIRONMENTAL APPEALS BOARD was served on Petitioners via electronic mail to:

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