

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

<b>In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products</b>	)	
	)	
	)	
<b>Gharda Chemicals International, Inc., and Red River Valley Sugarbeet Growers Association, et al.,</b>	)	<b>ALJ Docket No. FIFRA-HQ-2023-0001</b>
	)	
	)	
<b>Petitioners.</b>	)	
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**PETITIONERS' MOTION FOR APPEAL OF ORDER DENYING STAY  
TO ENVIRONMENTAL APPEALS BOARD**

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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 motion for appeal to the Environmental Appeals Board (“Motion for Appeal”). Petitioners respectfully request that the Environmental Appeals Board (“EAB”) review the Administrative Law Judge’s (“ALJ”) 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.

#### **I. Standard for EAB Review**

Pursuant to 40 C.F.R. § 164.100 and 40 C.F.R. § 22.29, when an interlocutory order or ruling is not certified by the ALJ, it shall be reviewed by the EAB 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 EAB has explained that “exceptional circumstances” warranting interlocutory review include a resulting waste of resources, cases that raise fundamental issues of first impression, and where delaying resolution of the matter would be contrary to public interest. *In the Matter of Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes*, 2008 EPA ALJ LEXIS 32, 29 (2008); *In the Matter of*

*Chautauqua Hardware Corp.*, 3 E.A.D. 616 (EAB 1991); *In the Matter of Thermex Energy Corp.*, 4 E.A.D. 68 (EAB 1992). The EAB’s review of the Order Denying Stay shall be decided on the basis of the submissions made to the ALJ, 40 C.F.R. § 164.100, and Petitioners hereby incorporate by reference the arguments Petitioners made in the underlying proceeding. *See* Ex. 1 (Pet’rs’ Req. for Certification of Order Den. Stay for Appeal to EAB); Ex. 2 (Resp’t’s Resp. to Req. for Certification of Order Den. Stay for Appeal to EAB); Ex. 3 (Pet’rs’ Reply in Supp. of Req. for Certification of Order Den. Stay for Appeal to EAB); Ex. 4 (Order Den. Req. for Certification); Ex. 5 (Gharda Pet’r’s Req. for Hr’g and Statement of Objs. and Req. for Stay); Ex. 6 (Grower Pet’rs’ Req. for Hr’g and Statement of Objs.); Ex. 7 (Resp’t’s Resp. to Req. for Stay of Notice of Intent to Cancel Pesticide Registrations); Ex. 8 (Order Denying Stay).

**II. The Circumstances of this Matter Constitute “Exceptional Circumstances” for EAB Review**

For the reasons further detailed in Petitioners’ Request for Certification and Reply in Support of Request for Certification—(i) the Order Denying Stay wrongly determined that the requested stay was for an “indefinite duration” and that there is no “pressing need” for a stay; (ii) not allowing Petitioners a reply brief to clarify the requested stay deprived Petitioners of their due process rights; and (iii) delaying review of the Order Denying Stay until after Petitioners have expended significant time and resources to arrive at a final judgment would be “inadequate or ineffective” and deleterious to public interests— “exceptional circumstances” exist warranting EAB’s review of the Order Denying Stay. *See* Exs. 1, 3.

The Order Denying Stay denied Petitioners’ request for a stay of the Notice of Intent to Cancel (“NOIC”) proceeding. Petitioners had requested that the NOIC proceeding be stayed

pending a decision as to the legality of the Final Rule<sup>1</sup> underlying the NOIC proceeding in a lawsuit in the Eighth Circuit.<sup>2</sup> In denying the requested stay, the ALJ incorrectly determined that Petitioners' requested stay was for an "indefinite duration." But this is not the case when the Eighth Circuit lawsuit has been fully briefed and argued and the court's decision is forthcoming at any time. The ALJ also incorrectly determined that there is no "pressing need" for a stay, despite available information to the contrary. Specifically, the ALJ failed to consider the Declaration of Stephanie H. Stephens ("Stephens Declaration")<sup>3</sup> which clarified the time and expense involved if Petitioner Gharda's registrations are cancelled, the Eighth Circuit then remands or vacates the Final Rule, and Petitioner Gharda is forced to begin the registration process anew. The Stephens Declaration underscores the obvious point, made in Gharda's Objections (Ex. 5 at 6, 10), that it would be extremely costly and otherwise unfair to require Gharda to petition for a new registration if cancellation were to precede an Eighth Circuit remand or vacatur of the Final Rule.

Additionally, the ALJ's failure to allow Petitioners to reply to EPA's response to Gharda's Request for Stay prejudiced Petitioners in violation of their due process rights. Petitioners were not given an opportunity to elaborate on the harm identified in the Stephens Declaration, or to clarify that the requested stay was not for an indefinite duration. If Petitioners

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<sup>1</sup> See Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) ("Final Rule").

<sup>2</sup> Petitioners have challenged the Final Rule underlying the NOIC as arbitrary and capricious, in the lawsuit captioned *Red River Valley Sugarbeet Growers Ass'n, et al. v. Regan, et al.*, Nos. 22-1422, 22-1530 (8th Cir.).

<sup>3</sup> This declaration was available in the materials related to the Eighth Circuit litigation cited in Petitioner Gharda's Objections and Request for Hearing in the NOIC proceeding. See Ex. 5 Gharda's Req. for Hr'g and Statement of Objs. and Req. for Stay, 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)).

had been permitted to submit a reply, they would have recommended a stay with appropriate guardrails for periodic review and reassessment.

Further, postponing review of the Order Denying Stay until after the Petitioners have expended significant time and resources to arrive at a judgment by the ALJ will be deleterious to vital public or private interests. *See In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616 (EAB 1991) (“exceptional circumstances” warranting EAB review exist where there will be a waste of resources). There is no dispute that postponing review of the Order Denying Stay until after Petitioners have expended significant time and resources to fully litigate the NOIC proceeding would be deleterious to the interests of Petitioners, and the public interests of efficiency in matters involving government agencies and expenditures. Moreover, “[a]s the Agency does not contest, post-judgment review of the Stay Order would be ineffective: Any benefits of a stay are necessarily lost by the time a case has proceeded to its conclusion.” Ex. 4, Order Den. Req. for Certification at 2. Even the ALJ agrees that post-judgment review would be ineffective, *see id.*; thus, resulting in an enormous waste of resources to get to a judgment, which should not happen because a stay has been inappropriately denied. These exceptional circumstances warrant EAB review of the Order Denying Stay now in order to adequately afford relief to Petitioners.

### **III. Conclusion**

For those reasons, and the reasons identified in the briefing before the ALJ with respect to the Request for Certification, Petitioners respectfully request that the EAB review and vacate the Order Denying Stay.

This 1<sup>st</sup> day of June, 2023,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 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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