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.,	)	**Docket No. FIFRA-HQ-2023-0001**
Petitioners.	)	

ORDER ON PETITIONER GHARDA CHEMICALS INTERNATIONAL, INC.'S MOTION TO STAY

This matter relates to the U.S. Environmental Protection Agency's ("EPA's" or "Agency's") Notice of Intent to Cancel Pesticide Registrations for chlorpyrifos, which the Agency published to the Federal Register on December 14, 2022. Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations, 87 Fed. Reg. 76474-02 (Dec. 14, 2022) ("NOIC"). Through the NOIC, the Agency proposes to cancel three pesticide product registrations for products containing the insecticide chlorpyrifos. *Id.* The registrant for the noticed products, Gharda Chemicals International, Inc. ("Gharda"), and a group of grower organizations styled the "Grower Petitioners,"[1] each have filed objections to the NOIC and have requested a hearing pursuant to Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136-136y, "FIFRA") to contest the registrations' cancellation. Gharda's Request for Hearing & Statement of Objections & Request for Stay (Jan. 13, 2023) ("Gharda Hearing Request"); Grower Petitioners' Request for Hearing & Statement of Objections (Jan. 13, 2023) ("Grower Hearing Request").

In connection with its Hearing Request, Gharda moved to stay this proceeding pending the outcome of related litigation before the U.S. Court of Appeals for the Eighth Circuit.[2]

[1] The Grower Petitioners include: 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, Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America. Grower Hr'g Req. 1.

[2] The Grower Petitioners have not moved for this Tribunal to stay this proceeding. They do, however, contest the Agency's denial of their request to stay the NOIC as part of their Hearing Request. The Grower Petitioners'

Gharda Hr'g Req. 12–13. For the reasons that follow, Gharda's motion to stay is **DENIED**.

I. Background

This action serves as the latest in a series of disputes that have asked whether chlorpyrifos may be used safely in connection with food production. Loosely speaking, that series began when, in 2007, a pair of environmental organizations filed a petition asking the Agency to revoke all chlorpyrifos tolerances[3] on the grounds that even low levels of chlorpyrifos exposure can cause neurological harm to children. NOIC 76475. The Agency did not formally respond to the petition until 2017, and when it did so the Agency retained the tolerances without making a finding as to chlorpyrifos's safety. NOIC 76475–76. The dispute came before the Ninth Circuit Court of Appeals, which ruled that by retaining the chlorpyrifos tolerances without a safety finding, the Agency had abdicated its statutory duties. *League of United Latin Am. Citizens v. Regan (LULAC II)*, 996 F.3d 673, 678 (9th Cir. 2021). Not mincing words, the Court stated:

> In short, the EPA has spent more than a decade assembling a record of chlorpyrifos's ill effects and has repeatedly determined, based on that record, that it cannot conclude, to the statutorily required standard of reasonable certainty, that the present tolerances are causing no harm. Yet, rather than ban the pesticide or reduce the tolerances to levels that the EPA *can* find are reasonably certain to cause no harm, the EPA has sought to evade, through one delaying tactic after another, its plain statutory duties. The [Federal Food, Drug, and Cosmetic Act ("FFDCA")] permits no further delay. Accordingly, for the reasons that follow, the Court grants the petitions for review and orders the EPA within 60 days after the issuance of the mandate either to modify chlorpyrifos tolerances *and* concomitantly publish a finding that the modified tolerances are safe, including for infants and children – or to revoke all chlorpyrifos tolerances. The Court also orders the EPA to

objections to the Agency's stay denial are generally similar to Gharda's arguments in favor of staying this action and do not offer additional insight helpful to my decision here. *See* Grower Hr'g Req. 20–21 (Grower Petitioners' objections to Agency stay denial). Grower Petitioners also appear to argue that they are currently suffering irreparable harm as a result of the NOIC. Grower Hr'g Req. 12 ("The Grower Petitioners already suffer and will continue to suffer . . . significant irreparable harm in the form of economic losses and reputational damage unless EPA withdraws or stays this NOIC as soon as possible."). This cannot be so, as the noticed cancellations have not yet come into effect. NOIC 76477 (in the event of a timely hearing request, cancellation will come into effect only upon issuance of a final administrative order). Any present harms to the Grower Petitioners result from the rulemaking revoking tolerances for chlorpyrifos, Chlorpyrifos: Tolerance Revocations, 86 Fed. Reg. 48315-01 (Aug. 30, 2021) ("Final Rule"), and those alleged harms seemingly were not enough to convince the Eighth Circuit to stay that Rule. *See* Agency Resp. Ex. 3 (denying Petitioners' request to stay Final Rule).

[3] "Tolerances" are "threshold levels of pesticide residue that the [Agency] is reasonably certain will cause no harm." *League of United Latin Am. Citizens v. Regan* (*LULAC II*), 996 F.3d 673, 678 (9th Cir. 2021) (citing 21 U.S.C. § 346a(b)(1), (b)(2)(A)). The Federal Food, Drug, and Cosmetic Act ("FFDCA") provides that "any pesticide chemical residues in or on a food shall be deemed unsafe," unless a tolerance or exemption for such residues "is in effect." 21 U.S.C. § 346a(a)(1).

> correspondingly modify or cancel related FIFRA registrations for food use in a timely fashion consistent with the requirements of 21 U.S.C. § 346a(a)(1).

Id. With these marching orders, the Agency revisited the chlorpyrifos tolerances and, on August 30, 2021, issued a final rule revoking the tolerances entirely. Chlorpyrifos: Tolerance Revocations, 86 Fed. Reg. 48315-01 (Aug. 30, 2021) ("Final Rule").

The Petitioners here sought judicial review of the Final Rule from the Eighth Circuit, alleging *inter alia* that the Agency had needlessly revoked tolerances for a subset of safe uses. *Red River Valley Sugarbeet Growers Ass'n v. Regan* (*RRVSGA*), Nos. 22-1422, 22-1530 (8th Cir.). At the outset of that case, Petitioners asked the Eighth Circuit to stay the Final Rule pending the outcome of litigation. *RRVSGA*, No. 22-1422 (8th Cir. Mar. 3, 2022), Entry ID 5132688, Agency Resp. Ex. 2. The Eighth Circuit denied the requested stay without elaborating on its reasoning for doing so. Order Exercising Jurisdiction & Denying Motion for a Partial Stay Pending Review, *RRVSGA*, Nos. 22-1422 (8th Cir. Mar. 15, 2022), Entry ID 5136844, Agency Resp. Ex. 3. *RRVSGA* has since been fully briefed, and the Eighth Circuit heard oral argument on December 15, 2022. *RRVSGA*, Nos. 22-1422, 22-1530.

Meanwhile, having revoked the chlorpyrifos tolerances, the Agency proceeded to address existing FIFRA registrations of chlorpyrifos for food use. The Agency represents that after the administrative process for the Final Rule was complete, all chlorpyrifos product registrants except Gharda voluntarily cancelled their registrations or terminated food uses and amended their registered products. Agency Resp. to Request for Stay 6 (Feb. 22, 2023). After some attempts to negotiate voluntary cancellation or modification, the Agency moved forward with involuntary cancellation of Gharda's registrations. *Id.* at 6-7. On December 14, 2022, the Agency published the NOIC, which gave notice that the Agency planned to cancel three of Gharda's pesticide registrations for chlorpyrifos (the "Contested Registrations").[4] NOIC 76474. The NOIC states that the Contested Registrations, which continue to bear labeling for use on food crops, must be cancelled because the Final Rule revoked all chlorpyrifos tolerances, rendering chlorpyrifos products' use in connection with food production unsafe as a matter of law and leaving the registered products misbranded. NOIC 76476–77 (outlining bases for cancellation).

Petitioners asked the Agency to stay the NOIC pending *RRVSGA*'s resolution, and the Agency denied the request. *See, e.g.*, Grower Hr'g Req. Ex. 9 at 2 (Jan. 11, 2023 letter from Agency to Petitioners rejecting stay request). Petitioners then proceeded to file their Hearing Requests and Objections. Petitioners object to the NOIC on various grounds, including that it is based on the Final Rule, which Petitioners maintain to be unlawful, and that the Agency did not follow required processes before issuing the NOIC. Petitioners also fault the Agency for failing to stay the NOIC pending the outcome of litigation before the Eighth Circuit. Most relevant

[4] The Contested Registrations are: (i) EPA Reg. No. 93182–3 Chlorpyrifos Technical; (ii) EPA Reg. No. 93182–7 Pilot 4E Chlorpyrifos Agricultural Insecticide; and (iii) EPA Reg. No. 93182–8 Pilot 15G Chlorpyrifos Agricultural Insecticide. NOITC 76474.

here, Gharda asks me to do what the Agency would not and to stay these proceedings pending resolution of *RRVSGA*. Gharda Hr'g Req. 12–13.

II. Legal Standard on a Motion to Stay Proceedings

A stay of proceedings is in the discretion of the presiding judge. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). When deciding motions to stay proceedings, this Tribunal's judges have considered the following factors:

> whether or not the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay and of adverse effect on the judge's docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing.

Borla Performance Indus., Inc., EPA Docket No. CAA-09-2020-0044, 2022 WL 887454, at *3 (ALJ, Mar. 15, 2022) (Order on Respondent's Motion to Stay the Proceedings) (quoting *John Crescio*, EPA Docket No. 5-CWA-98-004, 1999 WL 362862, at *1 (ALJ, Feb. 26, 1999) (Order on Joint Motion for Staying Proceedings)). I will consider these same factors here to the degree they are relevant, bearing also in mind my duty in this matter to "take actions and decisions in conformity with statute or in the interests of justice." 40 C.F.R. § 164.40(d). !

Motions to stay should be granted when doing so will save judicial resources, but motions should also set forth sufficient reasons to delay the proceeding. *See Diomed, Inc. v. Total Vein Solutions, LLC*, 498 F. Supp. 2d 385, 386–87 (D. Mass. 2007). Moreover, a federal trial court generally may not grant a stay so extensive that it is "immoderate or indefinite" in duration, and a trial court may abuse its discretion by issuing "a stay of indefinite duration in the absence of a pressing need." *Landis*, 299 U.S. at 255, 257. "In determining whether to stay proceedings indefinitely, a 'pressing need' is identified by balancing interests favoring a stay against interests frustrated by a stay, but '[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it.'" *Borla Performance Indus., Inc.*, 2022 WL 887454, at *3 (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)).

In this proceeding, Gharda requests a stay for an indefinite duration because the time at which the Eighth Circuit will issue a decision in *RRVSGA* is unknown. A stay is therefore warranted only if there is a pressing need for one.[5]

[5] Gharda proposes that the appropriate standard is the one found in the U.S. Food and Drug Administration's ("FDA's") regulations, 21 CFR § 10.35(e), which include whether "(1) petitioner will suffer irreparable injury; (2) petitioner's case is not frivolous and pursued in good faith; (3) sound public policy grounds support a stay; and (4) delay from a stay is not outweighed by public health or other public interests." Gharda Hr'g Req. 13. The Agency correctly observes that the referenced regulations contain factors that the FDA uses to decide whether to stay an administrative action under the FFDCA. The NOIC gives rise to an action under FIFRA, not the FFDCA, and the regulatory factors Gharda cites do not control here.

III. Party Arguments

Gharda principally argues that a stay is warranted because continuing this action "would prejudice the rights of Gharda and others to obtain judicial relief from the Final Rule underlying the NOIC in the ongoing litigation" before the Eighth Circuit in *RRVSGA*. Gharda Hr'g Req. 13. Gharda claims that (1) acting on the NOIC would be contrary to the Eighth Circuit's jurisdiction in *RRVSGA*; (2) allowing this cancellation to go forward would undermine any victory Petitioners secure in the Eighth Circuit, because if the Agency succeeds here it is likely that the Agency would nevertheless require Gharda to seek a new registration, delaying growers' ability to restart use of chlorpyrifos products; and (3) in the same vein, if the Eighth Circuit vacates the Final Rule, Gharda will have wasted resources litigating this cancellation and/or petitioning for a new registration. *Id.* at 6, 13.

Gharda also argues that there is no urgent need to cancel the Contested Registrations, because they present no current threat to public health. Gharda notes that as of March 30, 2022, Gharda (1) requested the voluntary cancellation of all of its food use registrations for chlorpyrifos except for the subset of eleven uses at issue in *RRVSGA*; (2) recognized that "there can be no use, distribution, or sale of chlorpyrifos products for use on food by Gharda, its distributors and dealers, and other downstream uses"; and (3) "committed to working to ensure that its chlorpyrifos product does not enter the U.S. food supply while EPA's revocation order remains under review by the Eighth Circuit." Gharda Hr'g Req. 7. Gharda asserts that because no chlorpyrifos products approved for food uses are currently in the stream of commerce, cancellation is not necessary to protect against harmful exposures. Gharda Hr'g Req. 13. In addition to its safety arguments, Gharda claims that the Agency waited 15 months after the Final Rule before issuing the NOIC and suggests this delay underscores the lack of urgency for cancellation. Gharda Hr'g Req. 5.

Through its Response, the Agency disputes Gharda's position that a stay would avoid prejudice to the Petitioners. The Agency argues that this case presents no threat to the Eighth Circuit's jurisdiction, because cancellation represents a separate process governed by a separate statute. Agency Resp. 9–10. The Agency agrees that if new tolerances for chlorpyrifos residue are established in the future, Gharda and other potential registrants would need to apply for new registrations pursuant to FIFRA, but notes that the harms Gharda foresees from cancellation are unlikely to come to pass until after the Eighth Circuit has ruled in *RRVSGA*. *Id.* at 10. Finally, the Agency notes that the Eighth Circuit's own actions indicate that no stay is warranted here, as the court denied Petitioners' request to stay the Final Rule pending resolution of *RRVSGA*. *Id.* at 7–8.

The Agency also disputes Gharda's claim that there is no urgent need to undertake these proceedings. The Agency observes that the NOIC's timing, like that of the Final Rule, is the product of the Ninth Circuit's decision in *LULAC II*, which denounced the Agency's delay in addressing chlorpyrifos's potential health impacts and which directed the Agency, if consistent with its safety finding, to cancel or modify relevant pesticide registrations "in a timely fashion." Agency Resp. 11 (quoting *LULAC II*, 996 F.3d at 704). The Agency also argues that Gharda's victory in *RRVSGA* is not assured, "and if the court rules in favor of Respondent, Petitioner Gharda's registrations subject to the NOIC will have remained in effect despite the fact that no tolerances for residues of chlorpyrifos exist." Agency Resp. 4. The Agency rejects Gharda's

position that delaying cancellation will have no on-the-ground impacts, noting that the NOIC provides for disposition of existing stocks of the products for which cancellation is proposed and warns the public against distribution of those products. *Id.* at 11–12. And the Agency asserts that, from its perspective, FIFRA straightforwardly demands cancellation here, meaning the urgency here relates in part to the Agency's ability to properly administer the law. *Id.* at 12. Finally, the Agency denies Gharda's accusation that the Agency dawdled in filing the NOIC, emphasizing that the Final Rule left the chlorpyrifos tolerances in effect for six months—until February 28, 2022—and that the Agency's subsequent, unsuccessful back-and-forth with Gharda about voluntary cancellation did not conclude until July 2022. *Id.* at 5–6.

IV. Discussion

I find that Gharda has not demonstrated a "pressing need" for a stay of indefinite duration.

First, I disagree that this case presents any risk to the Eighth Circuit's jurisdiction. The FFDCA provides that once a petition for review of a final agency order revoking tolerances "or any regulation that is the subject of such an order" has been filed with the appropriate Circuit Court, "the court shall have exclusive jurisdiction to affirm or set aside the order or regulation complained of in whole or in part." 21 U.S.C. § 346a(h)(1), (2). Lest there be any doubt that the FFDCA forecloses secondary review of such an order or regulation, the statute further provides that "[a]ny *issue* as to which review is or was obtainable under this subsection shall not be the subject of judicial review under any other provision of law." *Id.* § 346a(h)(5) (emphasis added). Here, the Eighth Circuit has exercised jurisdiction over the *RRVSGA* petitioners' challenge to the Final Rule. Agency Resp. Ex. 3. There may be, therefore, no overlap between the Eighth Circuit's review of issues related to the Final Rule and this Tribunal's review of the NOIC. This does not mean the case at bar conflicts with the Eighth Circuit's jurisdiction; it simply limits the issues the parties may raise here.

Second, I am unconvinced by Gharda's arguments that, absent a stay, it may face unreasonable reregistration expenses or a protracted reregistration process. Gharda's Hearing Request contemplates that it will need to revise the Contested Registrations even if it succeeds before the Eighth Circuit. For example, Gharda states:

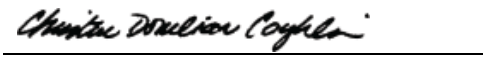
> To the extent Gharda's prior commitments before the Final Rule and submissions to EPA after the Final Rule are somehow insufficient to satisfy EPA that label changes consistent with EPA's safety finding can be accomplished . . . Gharda has submitted amended labels to EPA (included with this submission at Ex. 3) that once again limit food uses to the Safe Uses in the permitted geographic regions (that are the subject of the ongoing litigation) and also add application rate changes consistent with the PID safety finding. Gharda submits these changes to further demonstrate its commitment to conform its registrations to EPA's safety finding in the PID, despite that the changes proposed are based on information the Agency developed and has had in its possession for years.

Gharda Hr'g Req. 11. Gharda offers no explanation of how the cost of further negotiations over these necessary revisions would compare to reregistration. Furthermore, Gharda implies that in the event of cancellation, it will be left at square one if it must reregister any products. *See id.* at 13 (stating that if "Gharda must initiate the FIFRA registration and tolerance petition processes for chlorpyrifos anew" that would "destroy[] decades of investment"). This cannot be so. If Gharda prevails before the Eighth Circuit and then seeks wholesale reinstatement of its registrations, it will have as support the registrations' immediate precedents and all associated evidence and findings. Nor will Gharda need to reinvent the wheel if it must newly seek *updated* registrations. Gharda and the Agency appear to agree that they have undertaken significant background work to develop registrations that would fit Petitioners' wants and the Agency's public-health mandate. *E.g.* Gharda Hr'g Req. 6 (describing proposed label changes); Agency Resp. Ex. 4 at 15 (Agency brief in opposition to stay request in *RRVSGA*, discussing Agency negotiations with Gharda regarding cancellation of chlorpyrifos registrations). Cancellation would not erase those efforts; Gharda would be free to use them as a starting point in a later registration proceeding if one became necessary.

And *third* and finally, while I credit Gharda's claim that a stay might avoid some litigation costs if the Eighth Circuit restores the chlorpyrifos tolerances (and, of course, it might not), that possibility does not override the Ninth Circuit's imperative. The *LULAC II* court carefully evaluated the extensive history that underlies the Final Rule, rebuked the Agency for its past delays, and directed the Agency to proceed apace with any warranted registration cancellations. *LULAC II*, 996 F.3d at 678; *see also id.* at 703 ("[T]he EPA's egregious delay exposed a generation of American children to unsafe levels of chlorpyrifos. By remanding back to the EPA one last time, rather than compelling the immediate revocation of all chlorpyrifos tolerances, the Court is itself being more than tolerant. But the EPA's time is now up."). Given this background, I would not bar the path to cancellation indefinitely without a significant showing of likely harm.[6]

In the absence of a pressing need for an indefinite stay of this matter, the motion to stay is appropriately **DENIED**.

SO ORDERED.



Christine Donelian Coughlin
Administrative Law Judge

[6] I am mindful also that the Eighth Circuit declined to stay the Final Rule pending litigation of *RRVSGA*. While the court's single-sentence denial order offers no insight into its reasoning for doing so, Agency Resp. Ex. 3, the parties' briefing would have alerted the court that the Agency planned to begin involuntary cancellation proceedings imminently. *See, e.g.*, Agency Resp. Ex. 4 at 8 (Agency response to *RRVSGA* petitioners' stay request, noting that "EPA has asked all chlorpyrifos registrants to voluntarily cancel their registered food uses and intends to commence involuntary cancellation proceedings for all registrations for which voluntary cancellation requests are not submitted.").

Dated: March 31, 2023
Washington, D.C.

In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products, Docket No. FIFRA-HQ-2023-0001
Gharda Chemicals International, Inc., and Red River Valley Sugarbeet Growers Association, et al., Petitioners

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Petitioner Gharda Chemicals International, Inc.'s Motion to Stay**, dated March 31, 2023, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Dated: March 31, 2023
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