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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re FIFRA Section 6(b) Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products	)))))	FIFRA Docket No. 661

BRIEF AND MEMORANDUM IN SUPPORT OF RECKITT BENCKISER MOTION FOR AN EXPEDITED DETERMINATION THAT EPA'S EXISTING STOCKS DECISION IS WITHIN THE SCOPE OF THE HEARING

EPA's February 5, 2013 Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("Notice" or "NOIC") asserted, among other things, that (i) persons possessing existing stocks of cancelled products would not be able to sell through these existing stocks, and (ii) that this issue was not subject to review by the Administrative Law Judge in the cancellation proceeding ("Existing Stocks Determinations"). Do it Best Corp. ("Retailer"), and the Greater Cincinnati Northern Kentucky Apartment Association and the Louisville Apartment Association (collectively "Users") filed a Statement of Objections and Request for Hearing on March 5, 2013 to, among other things, specifically contest EPA's position barring the sell through of existing stocks of any cancelled products. Retailer and Users file this Brief and Memorandum in Support of Reckitt Benckiser's Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing ("Reckitt's Motion") to ensure that Retailer and Users can present their concerns and evidence on the Existing Stocks Determinations to the Administrative Law Judge ("ALJ").

INTRODUCTION

Retailer is a member-owned cooperative of close to 4000 retail hardware, lumber and building materials dealers across the country. These stores sell and distribute consumer rodenticide products, including some of the Reckitt products which are the subject of this hearing ("Reckitt Products"). Users are associations of apartment owners and managers who use some of the Reckitt Products for rodent control. The EPA Existing Stocks Determinations will have a dramatic effect on Retailer and on Users during the pendency of this proceeding.

The Reckitt Products are the most popular and best-known consumer rodenticides. Retailer needs to continue to stock and sell Reckitt Products during the course of this proceeding, since many customers want such products and all customers want a choice of products; moreover, continued sale of the Reckitt Products is legal during the course of this proceeding. *See* 78 Fed. Reg. 8123, 8126 (Feb. 5, 2013).

However, Retailer takes a substantial risk that the Reckitt Products may be cancelled at the completion of the cancellation process. If the EPA Existing Stocks Determinations are not subject to review in this proceeding, and cancellation is subsequently ordered, Retailer will be left at the completion of this proceeding with product inventory which cannot be sold, but instead must be disposed at a significant loss. ALJ review of EPA's Existing Stocks Determinations in this proceeding will reduce such uncertainty and will affect the behavior of Retailer regarding whether to continue to stock the Reckitt Products during the pendency of this proceeding. Similarly and consequently, ALJ review of the Existing Stocks Determinations will enable Users to continue to have access to the Reckitt Products while this proceeding is ongoing. Thus, both Retailer and Users have a significant interest in having the ALJ review EPA's position in this proceeding.

ARGUMENT

I. EPA Failed to Conduct the Risk Benefit Analysis Required in Existing Stocks Determinations under FIFRA and under Agency Policy.

EPA is required under FIFRA to undertake a risk-benefit analysis when it seeks to cancel a pesticide registration. *See* FIFRA § 6(b) (authorizing EPA to cancel a product that "generally causes unreasonable adverse effects on the environment") and FIFRA § 2(bb) (defining "unreasonable adverse effects on the environment" as requiring "taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.") Additionally, EPA policy prescribes a detailed risk-benefit methodology EPA must also follow when it seeks to bar the sale of existing stocks of a canceled product. *See* 56 Fed. Reg. 29362 (June 26, 1991) ("EPA Existing Stocks Policy").

Yet the NOIC provides scant evidence that EPA conducted the requisite analysis needed to comply either with FIFRA or with the EPA Existing Stocks Policy before making its Existing Stocks Determinations here. While EPA briefly discusses its rationale for its Existing Stocks Determinations in its Response to Reckitt's Motion ("EPA Response"),[1] arguments advanced for the first time in litigation have little credibility and merit no deference. *See, e.g., U.S. Steel Mining Co. LLP v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004) (stating that courts "do not afford deference to ad hoc positions of agencies adopted in reaction to the exigencies of litigation"). Moreover, the evidence in EPA's Response reduces to little more than the circular logic that a bar on sell through is per se justified for any product canceled in a Section 6(b) hearing, *see* EPA Response at 17, and a bald and unsubstantiated assertion that Reckitt's Products "will present significantly greater comparative risks than those presented by rodenticide

[1] Respondent's Response to Motion Regarding Whether Disposition of Existing Stocks of Cancelled Products is Within the Scope of the Proceeding, filed April 25, 2013.

products cancelled before the commencement of this proceeding." *Id.* at 20. EPA's utter failure to conduct the required risk benefit analysis is itself sufficient justification to place this issue squarely before the ALJ.

The EPA Response emphasizes the length of its decision-making process on rodenticide risks and regulation, *see* EPA Response at 2 ("Reckitt has been on notice since at least 2008 -- and arguably 1998 -- that these products do not meet the criteria for registration under FIFRA"), but fails to mention that the Agency never sought information about existing stocks issues during this entire period, in contravention of the EPA Existing Stocks Policy. *See* 56 Fed. Reg. at 29362, 29364. The EPA Existing Stocks Policy prescribes consideration of issues such as the quantity of existing stocks at each level of the market, risks resulting from the use of such stocks, benefits (including efficacy differentials), dollars already spent on existing stocks, and costs of disposal. *See id.* EPA did not request -- and so did not analyze -- any of this required information. Further, some of the information that the EPA Existing Stocks Policy directs the Agency to consider (such as the quantity of existing stocks in the channels of trade) can be determined only at the time that the ALJ makes a cancellation decision. EPA's decision to forego consideration of that necessary information suggests that its position is at best unsupported by necessary evidence and at worst retaliatory. It is precisely this kind of arbitrary and capricious Agency behavior that requires review by the ALJ.

Also, the sell-through of existing stocks is relevant in the cost-benefit analysis used to determine whether the products should be cancelled. The need for continued use of a product during a particular time or for a particular reason, the availability of alternative products, the comparative efficacy of alternative products, and the ease with which Retailer and Users can transition to those products are all important considerations in the benefits part of the

cancellation analysis. Similarly, the information gathered regarding the merits of cancellation will help inform the existing stocks determination. Thus, consideration of this information in the Section 6 hearing is essential, both for the benefit of the cancelation action itself and, if necessary, to address the related issue of sell-through.

Moreover, EPA's Response compares its decision-making on existing stocks of Toxaphene with its decision-making in this matter. *See* EPA Response at 22, n.15. What the discussion demonstrates, however, is that EPA has failed to conduct *any* meaningful analysis of existing stocks issues in this case. EPA states, for instance, that it concluded that use of existing Toxaphene stocks would be the most desirable means of disposal of such products. EPA then states "In contrast, EPA has concluded that the d-CON products at issue in this proceeding would pose greater risk to health and the environment if they were used than if they are disposed of as waste." *Id.* EPA provides no basis or documentation for how it reached this conclusion.

II. EPA May Not Incorporate a Bar on Sell Through of Existing Stocks in the NOIC and Then Unilaterally Exclude Existing Stocks From a Section 6 Hearing

FIFRA establishes unambiguously that the scope of a Section 6 hearing is established by the issues identified in the EPA Notice of Intent to Cancel <u>and</u> in the Registrant's Statement of Objections. *See* FIFRA § 6(d) (describing the scope of a Section 6(b) hearings as any "issues raised by the objections filed by the applicant"); *see also* 37 Fed. Reg. 9746, 9477 (May 11, 1972) ("The issues to be considered in the hearing are defined by the order of cancellation or suspension or denial of registration and the objections thereto filed by the registrants or applicant.").

Notwithstanding the clear language of FIFRA, EPA is now asserting the right -- contrary to longstanding principles of administrative law -- to decide which issues <u>included in its NOIC</u> will be subject to an administrative hearing. EPA goes to great lengths in its brief to defend this

extraordinary position; none of its arguments are persuasive. EPA argues that the holding of *In re Cedar Chemical Co.*, 2 E.A.D. 584, 1988 WL 525242 (June 9, 1988) somehow supports its position. *See* EPA Response at 2-5. However, EPA conspicuously fails to address the glaring factual differences between *Cedar Chemical* and this action. In *Cedar Chemical*, unlike here, the notice did not include a determination barring sell through of existing stocks. *See Northwest Food Processors Ass'n v. Reilly*, 886 F.2d 1075, 1078 (9th Cir. 1989) (noting that "The notice of intent to cancel did not even hint that [intervenors'] interests could be adversely affected by an existing stocks order resulting from the cancellation hearing.") Indeed, EPA strains to interpret *Cedar Chemical* to support its novel theory that EPA has unilateral authority to select what issues contained in a NOIC are reviewable by the ALJ. EPA cites approvingly the following excerpt from the case:

> Obviously, if an issue is identified in the cancellation notice, it fits within the framework of the proceeding and may be litigated in a hearing. In the present instance, the notice calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing.

Cedar Chemical at 588, n. 9 (quoted in EPA Response at 3-4). Because the notice in *Cedar Chemical* did not mention existing stocks at all, this excerpt logically can only stand for the well-established proposition that a party cannot litigate an issue not contained in the notice itself. The Administrator in *Cedar Chemicals* certainly could not have been stating that EPA has carte blanche to cherry pick the notice to decide what decisions in the notice are or are not subject to Section 6 review -- EPA's position here -- since the notice there did not mention existing stocks at all and those facts were not before him. For the same reason, EPA's inaccurate construction

of *Cedar Chemical* cannot be "settled law for the purposes of this proceeding," EPA Response at 5, because *Cedar Chemical* did not consider the issue of law present here.[2]

In a similar vein, EPA's argument that a party cannot expand the scope of a hearing through its Statement of Objections, EPA Response at 6-8, rebuts an argument that no party is asserting. EPA, not Reckitt or any other party in this case, decided to incorporate a determination on existing stocks into its Notice. Reckitt, as well as Retailer and Users, sought a hearing on existing stocks because EPA made this issue part of the NOIC.

EPA also asserts that it should be allowed to make its intentions on existing stocks known "as clearly and unambiguously as practicable," without subjecting its decision to administrative review. EPA Response at 12. These words have ominous overtones to Retailer and Users, since they suggest that EPA used this mechanism intentionally to send a strong signal to Reckitt's retailers and customers of the risk of continuing to sell and use Reckitt's Products. While it is plain to see the benefit to EPA of using the NOIC as a means of intimidation (which is consistent

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[2] EPA cites erroneously to a 40 year old law review article for the proposition that an ALJ may not reargue a decision made by an Agency. *See* Response Brief at 5, n.4 (citing Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 Admin.L. Rev. 9, 12-13 (1973)). In fact, this article supports the opposite proposition to that argued by the Agency. Zwerdling, the former Chief ALJ for the Federal Power Commission, provides observations on his career as an ALJ and points out: "Commonly, with respect to a substantial portion of the controverted issues which must be resolved in a contested case, the situation is one in which it cannot be said that there are clearly and admittedly controlling and binding precedents which are admittedly dispositive. One of the common reasons why issues must be litigated is that the parties are in dispute as to whether the cited precedents are applicable and controlling, in the context of the evidentiary facts in a given case. *This leaves wide areas requiring the exercise of the administrative law judge's judgment and discretion.*" *Id.* at 12-13 (emphasis added). The excerpt cited by EPA does not address a situation where an ALJ is subject to an Agency precedent from a prior ruling or binding policy, but only where the Agency has ruled "on a given matter" before the ALJ. *See id.* at 13. To the extent that this law review article is persuasive authority, it supports the proposition that the role of the ALJ is to exercise her discretion to resolve disputes where there is no binding precedent, precisely the case here. Moreover, the case EPA cites ostensibly in further support of its position stands only for the proposition -- not at issue here -- that an ALJ is not at liberty to reject a specific remand order from the head of the Agency. *See Iran Air v. Kugelman,* 996 F.2d 1253, 1262 (D.C. Cir. 1993).

with its preferential treatment of Settling Parties, noted below), this is not a lawful basis to escape Section 6 review. Indeed, EPA had a choice. It could include an existing stocks determination in the NOIC and face Section 6 review, or it could choose a less intimidating mechanism for conveying its intentions and avoid Section 6 review. But the Agency cannot opt for the method most likely to pressure Reckitt through its retailers and customers and simultaneously avoid the administrative review required by FIFRA.

Finally, EPA asserts -- with an almost imperious tone -- that the Agency alone has authority to decide what issues are subject to review, and the ALJ must abide by the Agency's determinations. EPA asserts that

> The ALJ's role in determining the scope of the proceeding is fundamentally adjudicative: *The ALJ is obliged to respect the texts she interprets and is prohibited from substituting her own judgment for that of the institutional authors.* If it were the case that the NOIC were silent or ambiguous in regard to existing stocks of cancelled products, and could reasonably be interpreted as placing in question the disposition of existing stocks, then the ALJ would indeed have authority to issue an order that the disposition of existing stocks is within the scope of the proceeding. However, the NOIC in this proceeding is neither silent nor ambiguous, nor amendable to interpretations as putting the disposition of existing stocks at issue. Reckitt's motion unabashedly asks the ALJ to disregard the express, unmistakable intent of the Respondent as to a policy decision duly delegated to the Respondent, and instead adopt a different policy choice.

Response Brief at 10-11 (emphasis added).

EPA, like all federal agencies, does not have this kind of unfettered power. EPA is governed by FIFRA, which mandates that cancellation decisions are subject to administrative review. Moreover, EPA rules establish clearly that the ALJ has authority to "hear and decide questions of facts, law, or discretion" and "to take actions and decisions in conformity with the statute or in the interests of justice." *See* 40 C.F.R. § 22.4(c)(6); 40 C.F.R. § 164.40(d). EPA's

protestations notwithstanding, the Agency may not avoid administrative review of its novel interpretation of an issue of first impression -- developed apparently in order to punish Reckitt for exercising its right to a hearing -- merely because it finds such review to be inconvenient. The ALJ is not "obliged to respect" such a sweeping and unaccountable definition of Agency authority.

III. EPA's Position Would Bar Any Public Comment or Administrative Review of the Existing Stocks Determinations

EPA's position, if not subject to ALJ review, would have the effect of barring any administrative review or public comment on the Existing Stocks Determinations. The Existing Stocks Determinations were not subject to public comment or review prior to issuance of the NOIC, and EPA is now asserting that they are not subject to review even under a duly constituted Section 6 hearing. The Agency has not received the input or comment of interested parties, and thus is proceeding with only a limited understanding of the consequences of its action. If indeed EPA prevails, there would be no administrative review of the Existing Stocks Determinations at all, and interested parties seeking to change or challenge the Agency's decision would have no alternative but costly federal court litigation. This is not in keeping with the intent or purpose of FIFRA, which established the cancellation process for the express purpose of allowing registrants and third parties to challenge EPA decisions on pesticides.

IV. EPA Has Unjustifiably Barred the Sell-Through of Reckitt's Products While Allowing the Sell-Through of Products with Comparable Risk

EPA has failed to justify its disparity between its recent treatment of parties that settled with EPA -- Liphatech and Spectrum ("the Settling Parties") -- rather than go through a cancellation hearing, and its treatment of Reckitt. In contrast to Reckitt, retailers will have unlimited sell-through rights for Liphatech's products, *see* 78 Fed. Reg. 11881, 11883 (Feb. 20,

2013), and Spectrum will be able to sell through its existing stocks until November 1, 2013, and its retailers will be able to sell through their existing stocks until September 1, 2014 (or the last date for which sales of Reckitt's Products remain permissible). *See* 78 Fed. Reg. 15949, 15950 (Mar. 13, 2013).

EPA makes three arguments to justify its disparate treatment of Reckitt. First, EPA asserts that, since Reckitt would be able to sell its products during the pendency of a hearing, which it estimates will last until 2014, Reckitt is being treated similarly to the Settling Parties. EPA Response at 19. This argument ignores the fact that Reckitt is allowed by statute to sell its products during the pendency of a hearing; EPA is not granting Reckitt anything on this point. Also, the length of the hearing is sheer speculation by EPA. The hearing could also be completed in 2013. Moreover, this argument does not address the unlimited sell through allowed for Liphatech's retailers.

Second, EPA asserts that, because Reckitt refused to settle with EPA, it should not be entitled to the benefits received by the settling parties. *See* EPA Response at 19, n.13. This argument, which essentially confirms that EPA sought to punish Reckitt for exercising its rights to contest cancellation, has no basis in FIFRA or in EPA policy as a ground to bar the sale of existing stocks. Finally, EPA contends that Reckitt's Products, while posing risks "comparable" to the other products, *see id.* at 20, nevertheless merit harsher treatment on sell-through merely because Reckitt has greater market share. *Id.* This argument also fails to address the unlimited sell through granted to Liphatech's retailers. This disparate treatment of Reckitt further justifies ALJ review of EPA's Existing Stocks Determination.

CONCLUSION

Consideration of EPA's Existing Stocks Determinations at the cancellation hearing is not only required by law, but is consistent with EPA policy on existing stocks, and is necessary to protect retailers and users of the products, and to provide them with an opportunity to express their views and concerns.

Dated: May 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2013, the original and two copies of the foregoing *Brief and Memorandum in Support of Reckitt Benckiser Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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I further certify that true and correct copies were sent by first class mail and e-mail to:

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