UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

MOTION TO FILE AN AMICUS CURIAE BRIEF AND MEMORANDUM OF THE AMERICAN CHEMISTRY COUNCIL BIOCIDES PANEL IN SUPPORT OF RECKITT BENCKISER LLC'S MOTION FOR AN EXPEDITED DETERMINATION

I. Motion for Leave To File an Amicus Curiae Brief

Pursuant to the Agency's Rules of Practice Governing Hearings,[1] the American Chemistry Council Biocides Panel ("Panel") moves that the Administrative Law Judge ("ALJ") accept the amicus memorandum set forth below in support of Reckitt Benckiser LLC's ("Reckitt") April 12, 2013 Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing. The Panel is composed of more than fifty (50) companies that manufacture and formulate antimicrobial pesticides and is among the principal associations of registrants in the antimicrobial industry. The Panel represents active ingredient manufacturers of end use products that span a broad range of antimicrobial uses, including uses in industrial processes, material preservation, marine antifouling, industrial water treatment, public health applications, and numerous other uses.

On February 5, 2013, EPA issued a Notice of Intent To Cancel ("NOIC") the registrations of twelve rodenticides.[2] In the NOIC, EPA stated not only that it would not allow

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1 40 C.F.R. § 164.31(d).

2 *See* Rodenticides; Notice of Intent To Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products, 78 Fed. Reg. 8123 (Feb. 5, 2013) [hereinafter *NOIC*].

the sale of existing stocks in the event of a cancellation, but also that it had "determined not to include existing stocks as an issue" in a section 6(b) hearing.[3]

The Panel agrees with Reckitt that FIFRA does not authorize EPA to omit the existing stocks issue from consideration as part of the statutorily mandated cancellation hearing under FIFRA section 6(b). Because this issue has already been thoroughly briefed—both by Reckitt, in its motion for an expedited determination (April 12, 2013); and by CropLife America, in its amicus curiae brief (April 26, 2013)—the Panel does not restate the legal arguments here. The Panel writes separately to emphasize the importance of allowing the administrative law judge presiding over a cancellation hearing to determine existing stocks issues.

Reckitt consents to the filing of the Panel's amicus memorandum. Prior to filing this motion the undersigned contacted EPA, which said it intends to oppose the motion. The Panel respectfully submits that the ALJ has discretion to grant permission to file under 40 C.F.R. § 164.31(d): "Unless all parties consent otherwise, an amicus curiae shall file its brief within the time allowed the party whose position the brief will support. Upon a showing of good cause, the Administrator or Administrative Law Judge may grant permission for later filing." The Panel only recently became aware of the dispute concerning the scope of the hearing and has moved promptly to prepare and file this motion. In the interest of ensuring a full record, the Panel respectfully submits that the ALJ should accept the amicus memorandum provided below because it highlights a particular risk associated with allowing EPA to remove the existing stocks issue from the scope of issues to be decided in the hearing. Because of its broad membership, the Panel is in a unique position to understand EPA's decision on hearing scope and its potential impacts. If EPA determinations as to existing stocks are shielded from review by an

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[3] *Id.* at 8126-27.

administrative law judge as part of a hearing under FIFRA section 6(b), there is a high probability that these decisions will be made without the benefit of important information on risk and benefit. Allowing EPA's Office of Pesticide Programs to exempt existing stocks determinations from the appropriate process provided by Congress has the potential to chill registrants' use of statutory hearing rights under FIFRA and may also result in serious economic impacts on companies throughout the supply chain.

II. Memorandum in Support of Reckitt's Motion

Cancellation of a pesticide registration requires consideration of numerous technical and economic factors. By providing a right to a hearing when EPA cancels a pesticide registration, FIFRA recognizes a need to consider information presented by registrants.[4]

Whether to allow sales of existing stocks requires similarly careful consideration. According to EPA policy, "[i]f a pesticide is cancelled under section 6(b) or section 6(e), FIFRA provides in section 6(a)(1) and (e) that the Administrator may permit the continued sale and use of existing stocks of the cancelled pesticide 'to such an extent, under such conditions, and for such uses as he may specify if he determines that such sale or use is not inconsistent with the purposes of FIFRA and will not have unreasonable effects on the environment.'"[5] EPA recognizes that in making an existing stocks determination, it is necessary to "apply the same risk/benefit considerations that are applicable to other agency actions under FIFRA . . . ."[6] This analysis includes such factors as the quantity of existing stocks, the risks and benefits resulting

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[4] *See* 6 U.S.C. § 136d(b) (Upon request, a section 6(b) hearing must be held "for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant . . . .").

[5] Existing Stocks of Pesticide Products; Statement of Policy, 56 Fed. Reg. 29362, 29363 (June 26, 1991) [hereinafter *Existing Stocks Policy*].

[6] *Id.*

from the use of existing stocks, the dollar amount users and others have already spent on existing stocks, the risks and costs of disposal or alternative disposition, and the practicality of implementing restrictions on distribution, sale, or use of existing stocks.[7] These fact-intensive determinations should be among the subjects considered by an administrative law judge in the course of a section 6(b) cancellation hearing under FIFRA.

When EPA removes the existing stocks determination from the scope of a section 6(b) hearing, it effectively deprives the registrant of an opportunity to contribute information relevant to the risk/benefit analysis, and the administrative law judge of the ability to make a determination based upon that complete record. Meanwhile, without the prospect of review, EPA has license to make existing stocks decisions without adequately considering the relevant factors.

Moreover, EPA's actions here are inconsistent with FIFRA regulations and with prior ALJ decisions affirming the bedrock principle that the ALJ has the authority to determine what issues are properly within the scope of a cancellation hearing. *See* 40 C.F.R. § 164.40(d) (asserting that the ALJ has the authority "to take actions and decisions in conformity with the statute or in the interests of justice."); *see also In re Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes ("EBDC")*, Docket No. EPA-HQ-OPP-2007-0181, Order Regarding Scope of Hearing at 9 (January 16, 2008) ("The ALJ generally has authority 'to hear and decide questions of fact, law or discretion' which includes questions of EPA's abuse of discretion.") (internal citations omitted); *see also* 5 U.S.C. § 557(c)(3)(A) (authorizing ALJs to make statements of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record."); *see also EBDC,* Order on

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[7] *Id.* at 29364.

EPA's Motion for Clarification and Consideration of Order Regarding Scope of Hearing at 19 (May 15, 2008) (citing 5 U.S.C. § 557(c)(3)(A) for authority of ALJ to decide questions of her own authority).

In this case, EPA issued the NOIC only after the U.S. District Court for the District of Columbia found that the Agency could not "bring a misbranding action in lieu of a cancellation proceeding," thus "effectively cancel[ing] the registrations without following the regulatory procedures provided in Section 6," including the opportunity for a hearing.[8] In anticipation that the registrant would request a hearing, EPA's Office of Pesticide Programs ("OPP") made a preemptive determination that "questions concerning the treatment of existing stocks" could not be raised at any cancellation hearing.[9] In fact, EPA often allows sales of existing stocks in the case of a voluntary cancellation while refusing to allow them when a registrant exercises its right to a section 6(b) hearing.[10] Thus, OPP seeks to reward registrants who forgo statutory rights and punish those who exercise those rights. The Panel submits that it is inconsistent with FIFRA for OPP to seek to use its handling of existing stocks to penalize registrants for availing themselves of the due process accorded by FIFRA.

EPA should not be permitted to abridge the hearing rights of registrants to present the risks and benefits posed by their products, especially since registrants are often in the best position to provide studies and other evidence concerning their products. By limiting the scope of section 6(b) hearings, EPA risks chilling the use of procedural rights that Congress expressly provided to FIFRA registrants. In addition, because existing stocks determinations made outside

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8 Reckitt Benckiser, Inc. v. Jackson, 762 F. Supp. 2d 34, 43 (D.D.C. 2011) (internal quotations omitted).

9 *See NOIC*, 78 Fed. Reg. 8123, 1826.

10 *See Existing Stocks Policy*, 56 Fed. Reg. 29,362, 29,365.

of a section 6(b) hearing necessarily are not based on complete information about risks, benefits, and costs, such determinations have a higher likelihood of placing undue economic burdens not just on registrants but also on distributors, retailers, and users of cancelled pesticide products who have reasonably relied on the availability of products already in the marketplace.

Conclusion:

The Panel respectfully submits that FIFRA authorizes EPA administrative law judges to determine handling of existing stocks in the context of a cancellation hearing and provides registrants with the right to introduce evidence relating to risks and benefits of allowing sales of existing stocks, not just risks and benefits related to continued registration. To avoid punitive or erroneous determinations, the question of whether to allow sales of existing stocks should be subject to the same degree of administrative review as any other issue in a cancellation proceeding under FIFRA section 6(b).

Dated: May 22, 2013

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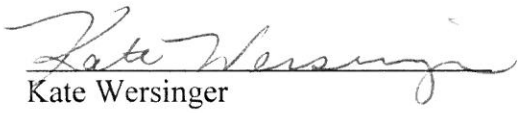
In the matter of Reckitt Benckiser LLC, et al., FIFRA Docket No. 661

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Leave to File an Amicus Curiae Brief and Memorandum in Support of Reckitt Benckiser LLC's Motion for an Expedited Determination, dated May 22, 2013, was served at the addresses listed below in the manner indicated.



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