UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of:	)	
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Reckitt Benckiser LLC, et al.,[1]	)	**FIFRA Docket No. 661**
	)	
Petitioners	)	

ORDER GRANTING LEAVE TO FILE REPLY TO RESPONSE TO, AND TO FILE BRIEF IN SUPPORT OF, MOTION FOR DETERMINATION THAT EPA'S EXISTING STOCKS DECISION IS WITHIN THE SCOPE OF THE HEARING

I. Reckitt Benckiser LLC's Motion for Leave to File a Reply

On April 30, 2013, Petitioner Reckitt Benckiser LLC ("Reckitt") filed a Motion for Leave to File a Reply Concerning Reckitt's Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing ("Motion to File Reply"). Reckitt states therein its request to file a reply to Respondent's Response, dated April 25, 2013, to Reckitt's Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing, dated April 12, 2013 ("Motion on Scope"). Reckitt argues that a reply to Respondent's Response is appropriate because "EPA has made new arguments not included in the Agency's [NOIC]," and "fairness requires that it have an opportunity to respond before this Tribunal reaches its decision on the Motion." Motion to File Reply at 1. The five new arguments, Reckitt states are: (1) EPA's contention that the language in Section 6 of FIFRA authorizes EPA to exclude existing stocks determinations from a Section 6 hearing; (2) EPA's arguments regarding the role of the prosecutorial staff and the NOIC in shaping the scope of the proceeding; (3) EPA's arguments regarding the judge's lack of authority to determine the scope of the hearing; (4) EPA's argument concerning the relevance of existing stocks in a Section 6 hearing; and (5) EPA's extensive discussion of the merits of its existing stocks decision. *Id.* at 1-2. Reckitt argues that each of these arguments were raised for the first time in Respondent's Response, and seeks seven days from the date of this Order to respond. *Id.* at 2.

On May 6, 2013, Respondent filed its Opposition to Reckitt Benckiser's Motion for Leave to File a Reply ("Opposition to Reply"), arguing therein that the procedural rules that govern this proceeding, set forth at 40 C.F.R. Part 164, Subparts A and B, 40 C.F.R. §§ 164.1-

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[1] The petitioners in this proceeding are Reckitt Benckiser LLC, Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do it Best Corp.

164.111 ("Rules"), do not provide a movant with the right to file a reply. Opposition to Reply at 1-2. Instead, Respondent argues, Section 164.60 of the Rules contemplates the filing of a reply when the presiding judge determines that the opportunity to file one is necessary for a reason such as fairness, or that a reply would provide additional information or argument that would benefit the decision-maker. *Id.* at 2. For reasons detailed in the Opposition to Reply, but not reiterated here, Respondent does not believe any such justification for the filing of a reply exists. *Id.* at 3-6.

II. Retailer and Users' Motion for Leave to File a Brief

On May 13, 2013, Petitioners Do it Best Corp., Louisville Apartment Association, and Greater Cincinnati Northern Kentucky Apartment Association (collectively, "Retailer and Users"), filed a Motion for Leave to File a Memorandum in Support of Reckitt's Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing ("Motion to File Brief"). Retailer and Users state therein that their response to Reckitt's April 12, 2013 motion is late because they did not retain counsel until May 7, 2013. Motion to File Brief at 1. Their attached 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 ("Brief") should be accepted into the record, Retailer and Users argue, because they have a substantial interest in this issue of scope, as noted in their hearing requests, and they have a unique and important perspective on the issue not otherwise represented by any other parties in this proceeding. *Id.* at 1-2. Retailer and Users note in the Motion to File Brief that Petitioner Reckitt consents to the filing of the Brief. *Id.* at 2.

On May 21, 2013, Respondent filed an opposition to Retailer and Users' Motion to File Brief ("Opposition to Brief"), asserting therein that none of the reasons advanced by the movants constitutes good cause for their failure to timely file their Brief or at least a motion for an extension of time. Opposition to Brief at 2, 5. Respondent argues that the Rules provide for enlargement of time after the expiration of a deadline only "where the failure to act was the result of excusable neglect," and that no such neglect exists here. *Id.* at 4-5; 40 C.F.R. § 164.6(b). Retailer and Users were promptly served with the motion, response, and other papers related to the existing stocks issue, yet their Motion to File Brief was filed "weeks beyond the time allotted pursuant to § 164.60(b)," Respondent states. Opposition to Brief at 2-4. As to Retailer and Users' proffered excuse that they had not retained counsel until May 7, 2013, Respondent rebuts that the Rules do not require any parties to retain an attorney or representative in order to file papers in this proceeding. *Id.* at 5.

III. Rules

The Rules provide that any party may file an answer to a motion "[w]ithin 10 days after service of any motion filed pursuant to this part," unless permitted otherwise. 40 C.F.R. §

164.60(b). Further, the Rules state that "[t]he movant shall, if requested by the . . . [ALJ], serve and file reply papers within the time set by the request," and that a decision on a motion shall, generally, "await the answering papers and reply papers if permitted." 40 C.F.R. § 164.60(b), (c). The Rules further permit the presiding judge, "for cause shown . . . in [her] discretion," to enlarge a given time period upon motion of a party where that party's failure to act was due to "excusable neglect." 40 C.F.R. § 164.6(b). Generally, the presiding judge is required under the Rules to "take actions and decisions in conformity with statute or in the interests of justice" and conduct the proceeding "in a fair and impartial manner." 40 C.F.R. § 164.40(c), (d).

IV. Discussion

Petitioner Reckitt has not claimed, much less shown, any unique need for an expedited ruling on its pending Motion. Developing a full record of arguments on the issues in this matter will help ensure maximum fairness to all parties throughout the proceeding and the highest quality of the decisions made by this Tribunal. The Rules provide the undersigned with the discretion to accept filings, regardless of the weight or credibility of the arguments therein, so that each party has ample opportunity to be fully heard. Therefore, in accordance with such discretion, in the interests of justice, and without prejudicing any party, Reckitt's Motion to File Reply is hereby **GRANTED**. Petitioner Reckitt Benckiser LLC shall file and serve its reply to Respondent's April 25, 2013 Response on or before **May 31, 2013**.[2] Respondent may file and serve a sur-reply on or before **June 7, 2013**.

For the same reasons and under the same authority listed above, the Retailer and Users' Motion to File Brief is also hereby **GRANTED**. The Brief filed by Petitioners Do it Best Corp., Louisville Apartment Association, and Greater Cincinnati Northern Kentucky Apartment Association on May 13, 2013, is hereby accepted into the record.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 22, 2013
Washington, D.C.

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[2] Because there is a mandatory furlough scheduled for May 24, 2013, for most employees of the U.S. Environmental Protection Agency, and due to the Memorial Day holiday on May 27, 2013, the seven-day period requested in Petitioner Reckitt's Motion to File Reply is extended.

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

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, copies of the foregoing **Order Granting Leave To File Reply To Response To, And To File Brief In Support Of, Motion For Determination That EPA's Existing Stocks Decision Is Within The Scope Of The Hearing,** issued May 22, 2013, were served at the addresses listed below in the manner indicated.

Maria Whiting-Beale for
Sybil Anderson
Office of Administrative Law Judges
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Dated: **May 22, 2013**

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