



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
REQUEST TO REDUCE PRE-HARVEST) **Docket No. EPA-HQ-OPP-2007-0181**
INTERVAL FOR EBDC FUNGICIDES)
ON POTATOES)
)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Rules of Practice for Applications Under Sections 3 and 18 to Modify Previous Cancellation or Suspension Orders, 40 C.F.R. Part 164, Subpart D, and the Rules of Practice in 40 C.F.R. Part 164 Subparts A and B provide guidance in this proceeding (Subparts A, B and D are hereinafter referred to as “Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement, and general guidance as to settlement of cases which are received by the Office of Administrative Law Judges is set forth in 40 C.F.R. § 22.18. If settlement discussions in this proceeding have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas an adjudication takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **October 19, 2007**, and attempt to reach an amicable resolution of this matter. EPA (“Respondent”) shall file a status report regarding settlement on or before **October 26, 2007**. If the case is settled, a Consent Agreement and Final Order signed by all parties should be filed no later than **December 28, 2007**, with a copy sent to the undersigned.

Should a Consent Agreement not be finalized on or before **December 28, 2007**, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Each party shall file with the Headquarters' Hearing Clerk and shall serve on all other parties and on the Presiding Judge:

(A) the names of the expert and other witnesses it intends to call at hearing, with a brief narrative summary of their expected testimony, or a statement that no witnesses are intended to be called;

(B) copies of all documents and exhibits it intends to introduce into evidence. Included among the documents produced shall be a curriculum vitae or résumé for each identified expert witness. The documents and exhibits shall be identified as "Respondent's" (EPA), "Applicant's" (EBDC Task Force), "Intervenor's" (NPC), or "Petitioner's" (NRDC) exhibit, as appropriate, and numbered with Arabic numerals (*e.g.*, "Respondent's Ex. 1"); and

(C) a statement of its views regarding the appropriate place of hearing and estimation of the time needed to present its direct case.

2. In addition, the EPA, EBDC Task Force, and the NPC shall submit the following as part of their Initial Prehearing Exchanges¹:

(A) copies of all documentary evidence which they allege is indicative that "substantial new evidence exists" in regard to the preharvest interval (PHI) which should apply to potatoes in those states which currently have and have had since the 1992 Cancellation Order a 14-day PHI;

(B) copies of all documentary evidence which they allege is indicative that "such substantial new evidence requires reversal or modification of the existing [1992] cancellation order" providing for a 14-day PHI on potatoes in certain states;

(C) a narrative statement indicating whether the EBDC Task Force or its members "through due diligence," could have discovered the "substantial new evidence" prior to issuance of the cancellation order" and all documentary evidence supporting the position made in the statement with regard thereto;

¹ To avoid submission of duplicative documents, the EPA, EBDC Task Force and/or NPC may file a joint prehearing exchange and/or rebuttal prehearing exchange, or may incorporate by reference some or all of the prehearing exchange exhibits of the other party or parties in their individual prehearing exchange.

(D) copies of all documentary evidence indicative of the “human and environmental risks found by the Administrator” in the 1992 Cancellation Order relating to the PHI on potatoes and the basis for the establishment in the 1992 Order of the 3 and 14-day PHIs with regard to EBDC containing pesticides applied to potatoes;

(E) copies of all documentary evidence indicative of the “cumulative effect of all past and present uses” of EBDC containing pesticides on potatoes, including the “requested use” involving a 3-day PHI, and “uses which may reasonably be anticipated to occur in the future as a result of granting the modification” to the Cancellation Order requested by the EBDC Task Force so as to shorten the PHI to 3-days on potatoes in states which currently have a 14-day PHI;

(F) copies of all documentary evidence indicative of the current status of late blight on potatoes in: (a) those states which currently have a 14-day PHI on EBDC containing pesticides applied to potatoes; (b) those states which currently have a 3-day PHI on EBDC containing pesticides applied to potatoes; and (c) generally nationwide.

(G) copies of all documentary evidence indicative of whether the occurrence of late blight has changed specifically in those states with either a 3 or 14-day PHI on EBDC containing pesticides applied to potatoes or nationwide since the initial Cancellation Order was issued in 1992;

(H) copies of all documentary evidence indicative of whether pesticides containing EBDCs are necessary to respond to late blight or whether alternative products, or processes or procedures could adequately address such disease and its spread;

(I) copies of all documentary evidence indicative of the dietary risks associated with EBDC use on potatoes or the lack thereof;

(J) copies of all documentary evidence regarding the adverse effects or risks to humans or the environment relating to reducing to 3-days the PHI on EBDC containing pesticides applied to potatoes or the lack thereof;

(K) copies of all documentary evidence regarding the “economic, social, and environmental costs and benefits” of the use of EBDC containing pesticides and specifically their use with a PHI of less than 14 days;

(L) a narrative statement as to whether the Administrator has established a “tolerance” in or on food for EBDC containing pesticides residue or their metabolites or degradation products such as ETU under 21 U.S.C. § 346a or otherwise, and if so, a statement as to what such tolerance level(s) is/are and the date such tolerances were established. If no such tolerances have been established, a statement as to the basis for the Agency not doing so;

(M) a narrative statement as to whether EBDC containing pesticides are “public health pesticides,” under FIFRA;

(N) copies of all documents submitted to EPA by the EBDC Task Force or others in support of a request to reduce the PHI on EBDC containing pesticides, and any and all other documents submitted by others to EPA in response to any such request; and

(O) copies of all documents the Agency relied upon to determine whether the EBDC Task Force's request to apply a 3-day PHI to EBDC containing pesticides nationwide was "meritorious."

To the extent that any sub-paragraph of this paragraph 2 of this Prehearing Order is fully addressed by material submitted in response to another subparagraph of this paragraph 2, the entity responding may simply reference that material rather than duplicating material already provided.

3. The NRDC shall also submit the following as part of its Prehearing Exchange:

(A) copies of all documents in support of the statements made in its letter of August 10, 2007 that the "applicant has failed to meet its burden of proof in establishing as a factual and scientific matter that any spread of late blight on potatoes is as extensive and serious as claimed;"

(B) copies of all documents in support of the statements made in its letter of August 10, 2007 that the "applicant has failed to meet its burden of proof in establishing as a factual and scientific matter that a substantial change in the incidence of late blight sufficient to support amendment of the 1992 cancellation has occurred since the cancellation order was issued;"

(C) copies of all documents in support of the statements made in its letter of August 10, 2007 that EBDCs are not necessary to respond to late blight and "[t]here are effective alternative methods of control;"

(D) copies of all documents in support of the statements made in its letter of August 10, 2007 that "EBDC use on potatoes causes unreasonably high risks of carcinogenic and adverse developmental, reproductive, thyroid and endocrine disruption effects in humans through dietary exposure to EBDC fungicides and their metabolites;"

(E) copies of all documents in support of the statements made in its letter of August 10, 2007 that the "applicant has failed to present substantial new evidence pertaining to the request to reduce the nationwide PHI on potatoes to 3 days;"

(F) copies of all documents in support of the position taken in its letter of August 10, 2007 that through due diligence, the applicant could have discovered what it purports to be

substantial new evidence related to the PHI on EBDC containing pesticides on potatoes prior to issuance of the cancellation order and the factual representations made therein including those regarding the tests the Applicant conducted in 1987 and submitted to EPA in 1988;

(G) copies of all documents in support of the statement made in its letter of August 10, 2007 that a “3-day PHI would violate the safety standard in FIFRA section 2(bb), 7 U.S.C. 136(BB);”

(H) copies of all documents it intends to present at the hearing, regarding the “human and environmental risks found by the Administrator in the cancellation determination” as stated in its letter of August 10, 2007; and

(I) copies of all documents it intends to present regarding the “cumulative effect of all past and present uses of EBDCs, including the requested use and uses which may reasonably be anticipated to occur in the future,” as stated in its letter of August 10, 2007.

To the extent that any sub-paragraph of this paragraph 3 of this Prehearing Order is fully addressed by material submitted in response to another subparagraph of this paragraph 2, NRDC may simply reference that material rather than duplicating material already provided.

4. EPA, EBDC Task Force and the NPC shall submit as part of their Rebuttal Prehearing Exchange(s) a statement and/or any documents in response to NRDC’s Prehearing Exchange submittals as to provisions 3(A) through 3(I) above.

The prehearing exchanges called for above shall be filed *in seriatim* fashion, pursuant to the following schedule:

- October 26, 2007** - EPA’s, EBDC Task Force’s and NPC’s Initial Prehearing Exchange(s) due
- December 15, 2007** - NRDC’s Prehearing Exchange, including any direct and/or rebuttal evidence due
- January 15, 2007** - EPA’s, EBDC Task Force’s, and NPC’s Rebuttal Prehearing Exchange(s) due

The parties are hereby advised that any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange. Any

amendments or supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange. See, 40 C.F.R. §164.50(b)

The parties are further advised that failure to strictly comply with this prehearing order or any other order of this tribunal can result in the entry of a default judgment against it or dismissal of the case with prejudice. **THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS OR THE REQUIREMENTS OF ANY OTHER ORDER. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.**

Prehearing exchange information required by this Order as well as all other pleadings or documents submitted in this case by the parties shall be filed with the EPA Headquarters' Hearing Clerk with additional copies sent to the Presiding Judge and served upon all other parties to this action.

Documents filed with the Headquarters' Hearing Clerk shall be addressed as follows:

Ms. Sybil Anderson,
Headquarters' Hearing Clerk
U.S. Environmental Protection Agency
Mail Code 1900
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Documents sent to the undersigned Presiding Judge shall be addressed as follows:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures, may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

Telephone contact may be made with the EPA's Office of Administrative Law Judges Senior Legal Assistant, Maria Whiting-Beale at (202) 564-6259 or Senior Staff Attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Senior Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests but does not guarantee the party's receipt of expedited courtesy copies.

Prior to filing any motion, the moving party is directed to contact each of the other parties to determine whether any party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other parties and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. A ten (10) day period is allowed for filing a response to motions with an additional three (3) days added thereto if the pleading is served by mail. Motions and responses

not filed in a timely manner will not be considered without motion for leave to file the document and a showing of good cause.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a party may submit a written request for an oral argument on the motion. Included in the request for oral argument shall be a statement as to the proposed appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions in order to minimize the expenditure of time and resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss, it shall be filed **within thirty days after the due date for the EPA's, EBDC Task Force's and NPC's Rebuttal Prehearing Exchange(s).**

Susan L. Biro
Chief Administrative Law Judge

Dated: September 19, 2007
Washington, D.C.