UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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2013 APR 26 PM 3:10

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**

UNOPPOSED MOTION TO FILE AN AMICUS CURIAE BRIEF AND MEMORANDUM OF AMICUS CROPLIFE AMERICA IN SUPPORT OF RECKITT BENCKISER LLC MOTION FOR AN EXPEDITED DETERMINATION

I. Motion to File an Amicus Curiae Brief

Pursuant to the Agency's General Rules of Practice Concerning Proceedings,[1] CropLife America moves that the Administrative Law Judge 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 ("Reckitt's Motion"). CropLife America is the national not-for-profit trade association representing the companies that develop, manufacture, formulate and distribute crop protection chemicals and plant science solutions for agriculture and pest management in the United States. Its member companies produce, sell and distribute virtually all the crop protection products, including pesticides, used by American farmers.

The Environmental Protection Agency's ("EPA" or "Agency") February 5, 2013, Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC") stated, in part, (1) that it would not permit "the continued sale and distribution of existing stocks of pesticide products cancelled pursuant to this Notice,"

[1] 40 C.F. R. § 164.31.

and (2) that "EPA has determined not to include existing stocks as an issue in this hearing." 78 Fed. Reg. 8123, 8126-27 (Feb. 5, 2013). CropLife America expresses no opinion on the Agency's determination not to allow the continued sale of existing stocks in the event of a final cancellation order. CropLife America, however, objects to the Agency's determination not to include existing stocks as an issue in the cancellation hearing; therefore, it supports Reckitt's Motion.

When a CropLife America member faces the prospect or threat that EPA will cancel one of its pesticide product registrations, it must decide whether to continue to sell, distribute or release for shipment the pesticide product to third parties, principally its distributors and retailers. Similarly, users must decide whether to purchase the product. If the Administrator elects not to permit the registrant, distributor or retailer to continue to sell existing stocks after a final cancellation order, then these parties may face severe economic hardships from the sudden post-cancellation cessation of sales or use of the cancelled pesticide. Such an effect is especially severe if the final cancellation order is entered during a time of seasonal pest control, such as the application of a herbicide in the spring to control weeds before a crop emerges. For this reason, CropLife America is concerned over any effort to abridge the right of a pesticide registrant to obtain a full and complete hearing on "relevant and material objections" raised by a registrant or other interested parties in their objections to an NOIC, including objections to the Agency's existing stocks determination. FIFRA § 6(d).

CropLife America respectfully submits that the acceptance of its amicus memorandum is desirable because it brings to the attention of the Administrative Law Judge legislative history of the existing stocks provision of the Federal Insecticide Fungicide and Rodenticide Act

("FIFRA").[2] This legislative history might otherwise not be brought to the attention of the Administrative Law Judge. As discussed below, Congress gave the Administrator the authority to permit the continued sale and use of existing stocks of a suspended or cancelled pesticide in 1972, as part of its amendment of the 1948 act. CropLife America's predecessor, the National Agricultural Chemicals Association ("NACA"), actively participated in the drafting and consideration of the 1972 amendments. Representatives of NACA testified before congressional committees in their consideration of FIFRA's amendments in 1971 and 1972.

Reckitt and EPA consent to the filing of CropLife America's amicus memorandum. The Agency provided its consent subject to its having an opportunity to reply. Accordingly, CropLife America requests that the Administrative Law Judge grant its motion to accept the amicus memorandum set forth below.

II. Memorandum in Support of Reckitt's Motion

The Legislative History of FIFRA § 6(a)(1):

Congress extensively amended FIFRA in 1972 through the Federal Environmental Pesticide Control Act of 1972 ("FEPCA").[3] Congress added § 6 which contains much of the Administrator's current authority to cancel and suspend pesticide registrations and the registrant's right to request a cancellation hearing in accordance with sections 6(b) and 6(d). Section 6(a)(1) required the Administrator to cancel the registration of any pesticide five years after its registration unless the registrant requested the Agency to continue the registration. In addition, section 6(a)(1) authorized the Administrator to permit the continued sale and use of existing stocks of a pesticide whose registration has been cancelled. Section 6(a)(1) gives the

[2] 7 U.S.C. § 136 et seq.

[3] Pub. Law 92-516.

Administrator the authority to issue an order providing relief concerning existing stocks of cancelled pesticides in those instances where no prior adjudicatory hearing has been held, such as voluntary cancellation of a pesticide pursuant to section 6(f). Nevertheless, this general authority does not give the Administrator the ability to exclude the issue of existing stocks from consideration in any instance where an adjudicatory hearing is held.

Section 6(b) authorized the Administrator to issue a notice of intent to either cancel a pesticide's registration or to hold a hearing to determine whether or not its registration should be cancelled. The notice would become final unless the registrant within 30 days requested a hearing. Section 6(d) provided that if a hearing is requested under § 6(b) the hearing would be held "for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties."

The bill to amend FIFRA that the House Committee on Agriculture recommended one year earlier in 1971 (H.R. 10729) did not contain an existing stocks provision. The existing stocks provision was added by the Senate Agriculture and Forestry Committee when it adopted an amendment in 1972 to, in part:

> (15) allow the Administrator to permit the continued sale or use of a pesticide whose registration is cancelled where not inconsistent with the purposes of the Act;
>
> S. Rep. No. 92-838 at page 11 (June 7, 1972)

There is no suggestion in FEPCA's legislative history that Congress intended to place the subject of existing stocks off limits during §6(b) cancellation hearings in the absence of the Agency's concurrence. The right of a registrant and other interested parties to raise concerns over existing stocks during a cancellation hearing was the subject of discussion and correspondence between Senator Henry Bellmon of the Senate Committee on Agriculture and

Forestry and EPA's Assistant Administrator for Categorical Programs, David Dominick, who on May 10, 1972, sent a letter to Senator Bellmon that stated in part:

> Dear Senator Bellmon: You may recall that during our discussion of H.R. 10729, … you were concerned that EPA have the flexibility to continue a registration for use during a growing season, even though we have determined after a hearing that the registration should be cancelled.
>
> I believe our present authority under H.R. 10729 is sufficiently flexible to permit an orderly phase-out where farmers have relied on a pesticide for use during an upcoming growing season. <u>It is open to registrants and user groups to raise at the hearing any question bearing on the benefits of using a product. Any showing of need for a pesticide during an upcoming season would be relevant and the statute would permit us to issue an order that would result in a label use for a given season or period of time or indeed in a certain geographical location.</u> It would be our policy to invoke this flexibility <u>on a showing by affected groups</u> that the particular chemical were needed for the growing season.
>
> While I am reasonably confident that we have such flexibility, (see attached memorandum), I think a few words to this effect in the Senate Committee Report could nail the situation down.
>
> * * *
>
> S. Rep. at 13-14. Emphasis added.

The Assistant Administrator's letter was included in the June 7, 1972, report of the Senate Committee on Agriculture and Forestry. (S. Rep. No. 92-838 at pages 13-14).[4]

There is no suggestion that Congress in 1972 intended that existing stocks issues could be addressed by a registrant or other interested parties in a cancellation hearing only if the Agency agreed. Rather, Congress intended that the objections-based scope of § 6(b) cancellations be broad and inclusive. Indeed, Congress in 1972, by incorporating the Assistant Administrator's

[4] The Conference Committee report that reconciled the House and Senate versions of H.R. 10729 simply noted that the reconciled bill "allows the Administrator to permit continued sale or use of a pesticide whose registration is cancelled where not inconsistent with the purposes of the Act." (Conference Report at 32).

letter into the legislative record of FEPCA, even made clear that it was the obligation of "registrants and user groups to raise at the hearing" the question of existing stocks.

The Scope of FIFRA 3(c)(2)(B) and 6(e) Hearings:

Congress further amended FIFRA in 1978. Among other amendments, Congress authorized the Administrator to issue conditional registrations (by adding § 3(c)(7)), and it authorized the Administrator to require registrants to submit additional data after registration (by adding § 3(c)(2)(B)). In both cases Congress authorized the Administrator to either conditionally register a pesticide or to continue an existing registration, as long as the registrant agreed to submit an item of data in the future.

If the registrant failed to commit to generate the additional data in the case of § 3(c)(2)(B), Congress authorized the Administrator to issue a notice of intent to suspend the registration. FIFRA§ 3(c)(2)(B). If the registrant failed to submit the required data in the case of a conditional registration, Congress amended § 6 to include subsection (e) that authorized the Administrator to cancel the conditional registration. In both cases, Congress provided that the suspension hearing (in the case of § 3(c)(2)(B)) and the cancellation hearing (in the case of § 6(e)) would be limited in scope to two issues: (1) whether the registrant failed to take action to secure the required data and (2) "whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this subchapter." FIFRA §§ 3(c)(2)(B); 6(f).

Section 3(c)(2)(B) suspension and section 6(e) cancellation hearings are triggered when the Agency believes a registrant has failed to comply with an obligation of registration. In contrast, a section 6(b) cancellation hearing, such as the one at issue, is triggered when the Agency has identified particular risk concerns, has announced its intention to cancel a

registration on the basis of such concerns, and a registrant or any other party adversely affected by the proposed cancellation notice requests such a hearing.[5]

By congressional design, the scope of section 3(c)(2)(B) suspension and section 6(e) cancellation hearings is more narrowly limited to whether the registrant complied with its registration obligations, and whether the Administrator's existing stocks determination is consistent with FIFRA.[6] In contrast, and also by congressional design, the scope of a section 6(b) cancellation hearing is broad and limited only by a registrant's objections to the NOIC.

Congress in 1972 chose *not* to limit the scope of a section 6(b) cancellation hearing by specifying those issues for consideration in such a hearing. Instead, the plain meaning of section 6(d) is that the scope of section 6(b) cancellation hearings includes the objections of interested parties to whatever subjects are addressed in an NOIC, such as any objections to the NOIC's existing stocks provisions.[7] A registrant has the right under FIFRA section 6(d) to object to an existing stocks determination made in an NOIC and obtain resolution of the issue in a section 6(b) cancellation hearing. It would be ironic if a registrant could not introduce evidence on existing stocks in an objections-based § 6(b) cancellation hearing, but could address

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[5] Interested parties requesting such hearings previously have included user groups. Both users and retailers of pesticide products clearly would be among the persons adversely affected by an existing stocks determination such as the one set forth in EPA's draft NOIC.

[6] *See* Statement of Douglas M. Costle, EPA Administrator, H.R. Rep. 95-663 at 61 (April 27, 1977) (stating that a Section 6(e) hearing "should be confined to whether or not the conditions were met and how existing stocks should be handled [because] Public resources should not be devoted to long, drawn-out cancellation procedures for these types of registrations.").

[7] A reasonable reading of S. Rep. 92-838 is that Congress intended that the registrant or interested party introduce evidence on existing stocks in a cancellation hearing regardless of whether and when the Administrator addresses the topic in the Notice of Intent to Cancel.

the subject in a § 3(c)(2)(B) suspension hearing or a § 6(e) conditional registration cancellation hearing, which Congress intended to be abridged.

Conclusion:

CropLife America respectfully submits that Congress in 1972 intended to include existing stocks issues within the scope of section 6(b) cancellation hearings. Congress stated squarely and plainly that the Administrative Law Judge shall "receive evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties." The Agency and Congress – by including the Agency's views in Senate Report No. 92-838 – made it clear that registrants and interested parties are free to raise their concerns about the sale, distribution and use of existing stocks in channels of trade following any final cancellation order. That Congress intended to include the subject of existing stocks in abridged conditional registration cancellation hearings under FIFRA § 6(e) and abridged suspension hearings under FIFRA § 3(c)(2)(B) further supports a finding that Congress intended to include the subject of existing stocks within the scope of the more complete section 6(b) cancellation hearings.

For the above reasons, CropLife America respectfully urges the Administrative Law Judge to grant Reckitt's Motion in order to obtain a full consideration of existing stocks issues during the cancellation hearing.

Respectfully submitted,

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April 26, 2013

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

Certificate of Service

I certify that the foregoing UNOPPOSED MOTION TO FILE AN AMICUS CURIAE BRIEF AND MEMORANDUM OF AMICUS CROPLIFE AMERICA IN SUPPORT OF RECKITT BENCKISER LLC MOTION FOR AN EXPEDITED DETERMINATION, dated April 26, 2013, was served at the addresses listed below in the manner indicated.

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