UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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2013 MAY -6 PM 1:14

In the Matter of:	)	
	)	
Reckitt Benckiser LLC, et al.	)	FIFRA Docket No. 661
	)	
EPA Reg. Nos. 3282-3, 3282-4, 3282-9, 3282-15, 3282-65, 3282-66, 3282-74, 3282-81, 3282-85, 3282-86, 3282-87, and 3282-88	)	

RESPONDENT'S OPPOSITION TO RECKITT BENCKISER'S MOTION FOR LEAVE TO FILE A REPLY

On April 12, 2013, Reckitt Benckiser LLC ("Reckitt") filed a motion for an expedited determination that the treatment of existing stocks of cancelled product is within the scope of this cancellation proceeding. The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") filed a response to Reckitt's motion on April 25, 2013. On April 30, 2013, Reckitt filed a motion for leave to file a reply to Respondent's response. For the reasons set forth below, Respondent respectfully submits that Reckitt's Motion for Leave to File a Reply should be denied.

The procedural Rules of Practice governing the conduct of this proceeding are codified at 40 CFR Part 164. Motions are governed by 40 CFR § 164.60. That section generally contemplates that each party will be heard from once on any particular motion. Section 164.60(b) provides that any party may file a timely response to a motion. That section does not,

however, provide the movant with a right to a reply. Instead, it provides that "[t]he movant shall, *if requested by the Administrator, his designee, or the Administrative Law Judge,* serve and file reply papers within the time set by the request." *Id.* (emphasis added).

Section 164.60 contemplates a reply only in situations where the adjudicator – in this case the Administrative Law Judge – determines that a reply opportunity is either necessary (for reasons such as ensuring a fair proceeding) or would provide additional information or argumentation that would benefit the decision-maker. Certainly if the Administrative Law Judge believes she would benefit from additional briefing on the issues raised in Reckitt's April 12 Motion for a Determination on Existing Stocks, Respondent has no objection whatsoever to her requesting that Reckitt file a reply. But Respondent does not believe that providing Reckitt with a reply opportunity under the circumstances presented here is necessary to ensure a fair proceeding, and Respondent does not believe it appropriate to provide Reckitt with a reply opportunity merely because Reckitt wishes to have the last word or wishes now to make an argument it neglected to make in its original motion.

To briefly recap the state of play in this proceeding on the existing stocks issue, Respondent in the Notice of Intent to Cancel (NOIC) stated very clearly that: 1) existing stocks issues are not required to be included in a cancellation proceeding; 2) existing stocks issues are only included in a cancellation proceeding if the NOIC identifies and includes existing stocks as an issue in the proceeding; and 3) existing stocks were specifically ***not*** being included as an issue in this rodenticide cancellation proceeding. 78 Fed. Reg. 8123, 8126. Although not required to do so, Respondent cited in the NOIC a prior decision of the Administrator and a Federal Circuit Court decision as support for its position.

Two months later, Reckitt filed a timely motion asking the Administrative Law Judge to rule that the disposition of existing stocks be included as an issue in this proceeding. Reckitt argued that it has a statutory right to a hearing on the disposition of existing stocks of cancelled product (Motion for Expedited Determination at 3); that Respondent lacks the authority to exempt existing stocks issues from the hearing (Motion for Expedited Determination at 5); that the Administrative Law Judge has the authority to issue an order making existing stocks a part of the hearing (Motion for Expedited Determination at 6); and that Respondent's position on existing stocks is inconsistent with case law and prior Agency actions (Motion for Expedited Determination at 9).

Respondent addressed all of Reckitt's arguments in its response filed on April 26. Respondent relied in its response primarily on language in FIFRA and the Rules of Practice for cancellation proceedings (codified in 40 CFR Part 164); the cases cited in the NOIC; the EBDC case cited by Reckitt in its motion; an additional administrative FIFRA case cited in the EBDC case (*In the Matter of Shell Oil Company*, 1 E.A.D. 517 (1979)) in which the Chief Judicial Officer discussed the role of an NOIC in establishing the scope of a cancellation proceeding;[1] and a 1991 EPA policy statement on existing stocks that was published in the Federal Register.

Reckitt asks in its Motion for Leave to File a Reply that it be permitted to address five specific "new" arguments Reckitt asserts Respondent did not include in the NOIC but instead advanced in its response to Reckitt's Motion for an Expedited Determination: Respondent's interpretation of section 6 of FIFRA; the role of the prosecutorial staff in shaping the scope of the cancellation hearing; the Administrative Law Judge's authority to determine the scope of the hearing; the relevance of existing stocks in a section 6 hearing; and whether Respondent's

[1] It should be no surprise to Reckitt that Respondent would refer to this case in its response. *Shell Oil* is prominently cited in footnote 9 of *Cedar Chemical*, 2 EAD 584, 1988 WL 525242 (June 9, 1988), which is itself cited in the NOIC as a primary authority for Respondent's legal position in the matter at hand. 78 FR 8126.

announced intentions with respect to the treatment of existing stocks are discriminatory and arbitrary.

As an initial matter, Respondent does not agree with Reckitt's presumption that the asserted "newness" of Respondent's arguments is an appropriate basis for allowing Reckitt the opportunity to file a reply brief. A movant is responsible for making all the arguments on which its motion will be judged in the brief it files with the motion, as § 164.60 gives movants no assurance of a second chance. Reckitt's Motion for Expedited Determination presents what are essentially questions of law, challenging the propriety of Respondent's decision that the disposition of existing stocks of cancelled product would not be within the scope of this proceeding, and there is no reasonable factual dispute regarding what action the Respondent has taken. When Reckitt chose to move for an expedited determination that disposition of existing stocks of cancelled product are within the scope of this proceeding, Reckitt was obliged to make its best case upon filing its motion. Respondent was under no obligation to assert in the NOIC all of the legal arguments it might make in the event that its determination that existing stocks not be a part of this proceeding might be challenged. Regardless of whether Reckitt failed to anticipate arguments Respondent would make when challenged, or whether Reckitt made a tactical choice to make an ambiguous challenge and withhold some arguments for rebuttal, Reckitt cannot claim that "fairness" entitles it to a second chance.

Moreover, while Respondent does not agree that "fairness" requires that Reckitt be given an additional reply opportunity to address every new argument that Respondent raised in its opposition to Reckitt's motion, most of the arguments Reckitt wishes to address were, in fact, identifiable in the existing stocks discussion in the NOIC. An argument does not become "new" simply because its proponent articulates it in greater detail when challenged; that Respondent has

elaborated on these arguments when challenged can hardly represent an unfair surprise to Reckitt.

Respondent submits that the first four of the five arguments identified by Reckitt all relate directly to the three-step rationale set forth in the NOIC: 1) existing stocks are not required to be included in a cancellation proceeding; 2) existing stocks are only included in a hearing if the NOIC provides that existing stocks will be an issue in the hearing; and 3) the rodenticide NOIC specifically provided that existing stocks would not be an issue in the proceeding. Moreover, the first four of the arguments identified by Reckitt flow directly from the text of *Cedar Chemical*, 2 E.A.D. 584 at nn. 7, 9 cited in the NOIC at 78 FR 8126. The *Cedar Chemical* decision: (1) interprets how the language of Section 6 of FIFRA bears on the question of whether there is a right to an existing stocks determination; (2) implicates the role of EPA prosecutorial staff in shaping the scope of a Section 6 cancellation hearing by likening the NOIC to a "complaint in any other administrative proceeding"; (3) discusses the proper "framework" for setting the scope of a Section 6 cancellation hearing; and (4) discusses the relationship between the NOIC and the governing "standard of relevance". Reckitt has not asserted, nor could it, that it did not know which offices in EPA developed the NOIC. So as to whether existing stocks could be raised as an issue in this cancellation proceeding, Reckitt should have been well aware that Respondent would take the position that the official delegated the authority to issue the NOIC has the authority to determine whether the disposition of existing stocks would be an issue that could be raised in this proceeding. It should similarly come as no surprise that Respondent would take the position that the exclusion of existing stocks from a cancellation proceeding is consistent with the statutory requirements of FIFRA.

The remaining "new" argument is Respondent's discussion of the merits of its (preliminary) existing stocks determination. In order to refute Reckitt's baseless assertions that Respondent's existing stocks determination was arbitrary, an abuse of discretion, and developed to "punish" Reckitt, Respondent addressed the particular examples Reckitt presented in its motion and their relationship to the instant case and published Agency policy. If the *nature* of the limitations Respondent intends to place on d-CON products cancelled pursuant to this proceeding were central to the resolution of Reckitt's April 12th motion, it might be appropriate to provide Reckitt an opportunity to respond. But the question at hand is not the appropriateness of any particular disposition of existing stocks of cancelled product, but whether the disposition of existing stocks of cancelled product is to be adjudicated in this proceeding, and the substantive merits of Respondent's preliminary existing stocks determination is irrelevant to the fair resolution of Reckitt's April 12th motion.

For the reasons discussed above, Respondent respectfully submits that Reckitt's Motion for Leave to File a Reply should be denied.

Respectfully submitted,

5/6/2013
Date

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Opposition To Reckitt Benckiser's Motion For Leave To File A Reply* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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