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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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 RESPONSE TO THE BRIEF OF THE GREATER CINCINNATI NORTHERN KENTUCKY APARTMENT ASSOCIATION, LOUISVILLE APARTMENT ASSOCIATION, AND DO IT BEST CORPORATION, AND THE AMICUS CURIE BRIEF OF THE AMERICAN CHEMISTRY COUNCIL BIOCIDES PANEL IN SUPPORT OF RECKITT'S MOTION FOR AN EXPEDITED DETERMINATION ON EXISTING STOCKS

On May 13, 2013, Greater Cincinnati Northern Kentucky Apartment Association, Louisville Apartment Association, and Do It Best Corporation ("Petitioners"), filed an untimely brief, accepted into the record by Order dated May 22, 2013, in support of the April 12, 2013, Reckitt Benckiser LLC ("Reckitt") Motion for an Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope of The Hearing ("Reckitt's Motion"). On May 21, 2013, the American Chemistry Council Biocides Panel ("ACCBP") filed an amicus brief in support of Reckitt's Motion. The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") submits that the arguments advanced by Petitioners and ACCBF are do not justify the granting of Reckitt's Motion.

I. RESPONSE TO PETITIONERS' ARGUMENTS

Petitioners present four arguments: (i) That EPA failed to conduct a risk-benefit analysis required by FIFRA and Agency policy; (ii) That the disposition of existing stocks of cancelled product is within the scope of this proceeding because it is raised in the notice of intent to cancel; (iii) That excluding the disposition of existing stocks of cancelled pesticides from the scope of a section 6(b) cancellation proceeding would bar public comment and administrative review required by FIFRA; and (iv) That Respondent has failed to justify alleged disparate treatment of Reckitt and other rodenticide registrants. None of these arguments has merit.

Reckitt's Motion argues in the alternative that a registrant has a right to a formal administrative adjudication regarding the disposition of existing stocks of a cancelled pesticide, that absent such a right, the Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC"), 78 Fed.Reg. 8123, 8126 (Feb. 5, 2013), puts the disposition of existing stocks of cancelled products at issue in this proceeding, and if not, that the Administrative Law Judge ("ALJ") can and should expand the scope of the proceeding to include the disposition of existing stocks of cancelled product. The controlling precedents are discussed in detail in *Respondent's Response To Motion Regarding Whether Disposition Of Existing Stocks Of Cancelled Products Is Within The Scope Of The Proceeding* (April 25, 2013)("Respondent's Brief"), but summarized here: First, the Administrator held in *In the Matter of Cedar Chemical Co., et al.*, 2 E.A.D. 584, 1988 WL 525242 (June 9, 1988) that FIFRA does not create any right to a hearing on the disposition of existing stocks of cancelled product, and this decision was upheld in *Northwest Food Processors Ass'n v. Reilly*, 886 F. 2d 1075 (9th Cir. 1989) *cert. denied* 497 U.S. 1004, 110 S.Ct. 3239, 111 L.Ed.2d 750 (1990). There

being no right to a hearing on the disposition of existing stocks of cancelled product, the next question is who sets the scope of a section 6(b) cancellation hearing. For the issue at hand, this question has been answered by the Chief Judicial Officer's decision in *In the Matter of Shell Oil Company, et al.*, 1 E.A.D. 517, 1979 WL 52074 (April 9, 1979)("matters falling outside the scope of the notice ... are of no relevance to the proceeding." 1 E.A.D. at 523-24). Although petitioners may attenuate the scope of the proceeding, they cannot expand it beyond the scope set forth in the NOIC. Respondent acknowledges the Administrative Law Judge's ("ALJ") authority to determine the scope of a cancellation proceeding,[1] however, when doing so, the ALJ acts in the common law tradition by interpreting the NOIC, the petitioners' objections, and the applicable laws, rather than exercising independent regulatory discretion in the inquisitional manner characteristic of the civil law tradition.[2] Given that the NOIC establishes the outer bounds of the scope of this proceeding, the final question is whether the NOIC includes the disposition of existing stocks of cancelled products within the potential scope of this proceeding. The NOIC answers this question in the negative, in plain and unmistakable English:

> "EPA has determined not to include existing stocks as an issue in this hearing. Instead, the only issues for hearing under this Notice are whether the subject products should be cancelled, or the applications should be denied."

78 Fed.Reg. 8123, 8126 (Feb. 5, 2013)

Petitioners' first argument, that Respondent failed to conduct a risk-benefit analysis required by FIFRA and Agency policy, has no bearing on the disputed scope of this proceeding, and thus is not supportive of Reckitt's Motion. Even if, for sake of argument, Petitioners were

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[1] *See Respondent's Response To Motion Regarding Whether Disposition Of Existing Stocks Of Cancelled Products Is Within The Scope Of The Proceeding*, at 9-11 (April 25, 2013).

[2] "Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. *** In a civil law system, ... the judge often brings the formal charges, investigates the matter, and decides on the case ..." School of Law (Boalt Hall), University of California at Berkeley, The Common Law and Civil Law Traditions, http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html

correct that Respondent had failed to perform a required risk-benefit analysis, such a failure would not influence whether a registrant has a right to a formal administrative adjudication regarding the disposition of existing stocks of a cancelled pesticide, or whether the NOIC put the disposition of existing stocks of cancelled products at issue in this proceeding, or whether the ALJ can expand the scope of the proceeding to include the disposition of existing stocks of cancelled product. Therefore, Petitioners' contention that Respondent failed to perform a required risk-benefit analysis is irrelevant and provides no support for Reckitt's Motion.

Even if Petitioners' contention that Respondent failed to perform a required risk-benefit analysis were relevant to Reckitt's Motion, it is erroneous, because Respondent has not failed to perform any required risk-benefit analysis. The Agency action at issue in Petitioners' first argument[3] is the announcement in section IV.B.2. of the NOIC that Respondent "does not intend to allow any such sale or distribution [of existing stocks of cancelled products] if this Notice results in the cancellation of such products." *Id.* Respondent's statement of its intentions with respect to any products that may later take on the status of "existing stocks" is necessarily provisional, advisory, and not a final agency action. Respondent is unaware of, and Petitioners have failed to identify, any statutory or regulatory provisions requiring Respondent to conduct a formal risk benefit analysis before making such a statement of future intent. Because this statement was merely a statement of Respondent's February 5, 2013, intention regarding a possible future action, Petitioners err in contending that Respondent failed to conduct an analysis

[3] Notwithstanding the definition of "Existing Stocks Determinations" on page 1 of Petitioners brief, a more rigorous analysis of Petitioners' brief suggests that Petitioners object to four separate decisions, although not all of Petitioners' arguments apply to each: (1) Respondent's determination that it has the authority to define the scope of a cancellation proceeding so as to include or exclude the disposition of existing stocks of cancelled product; (2) Respondent's decision to exclude the disposition of existing stocks of cancelled product from the scope of this particular proceeding; (3) Respondent's decision to announce in the NOIC its intentions regarding the disposition of existing stocks of cancelled product once they are cancelled; and (4) Respondent's current intentions regarding the disposition of existing stocks if products subject to this proceeding are, if fact, cancelled. Nothing in Petitioners' first argument suggests an effort to argue that a formal risk benefit analysis is a prerequisite to the decisions identified in (1) or (2) above, nor is Respondent aware of any authority supportive of such an argument.

required on February 5, 2013. Alternatively, to the extent that Petitioners argue that Respondent must conduct a formal risk-benefit analysis before issuing a section 6(a)(1) existing stocks order *after* the conclusion of this section 6(b) cancellation proceeding, that issue is neither ripe nor within the scope of this section 6(b) cancellation proceeding.

Petitioners' second argument, that the disposition of existing stocks of cancelled product is within the scope of this proceeding because the issue was raised in the NOIC, depends on distortions of both the NOIC and the applicable case law. Petitioners raise only one issue that is not already adequately refuted in Respondent's April 25, 2013, brief, so Respondent will not repeat those arguments here. Petitioners' attempt to distinguish *Cedar Chemical* by contending that the NOIC in the present case, unlike the notice at issue in *Cedar Chemical*, includes a "determination barring sell through of existing stocks." Petitioners' Brief at 6. Yet the present NOIC includes no such determination. The NOIC makes two separate statements regarding existing stocks. The first of these is a determination not to include existing stocks as an issue in this proceeding, which has legal consequences that affect people today. The second statement is Respondent's determination that upon cancellation "existing stocks of pesticide products cancelled pursuant to this Notice should not be permitted." 78 FR 8126-27. This second statement has no binding legal effect, either on the Agency or on any other person. In an attempt to distinguish *Cedar Chemical*, Petitioners mischaracterize Respondent's pre-hearing intentions regarding the prospective disposition of existing stocks of cancelled product as final agency actions with binding legal effect. But because neither the Agency nor any other person is bound by this statement, Petitioners' effort to distinguish *Cedar Chemical* fails.

Petitioners' third argument is that issuance of decisions regarding existing stocks of cancelled pesticides outside the setting of a section 6(b) cancellation proceeding would be

inconsistent with the intent and purpose of FIFRA. The contention that any particular public comment process or administrative review might be required or appropriate for a prospective agency action under FIFRA section 6(a)(1) is plainly beyond the scope of this section 6(b) cancellation proceeding. Regardless, Petitioners' contention – in essence, that Congress would not have allowed EPA to decide how to treat existing stocks of a cancelled pesticide without also subjecting that decision process to formal administrative adjudication – is unsupported by the statutory text and contrary to the applicable case law cited above.

Petitioners' fourth argument asserts that Respondent is treating Reckitt unfairly compared to two other rodenticide registrants who have agreed to voluntarily cancel or amend their rodenticide products to reduce those products' risks.[4] Respondent's actions were neither arbitrary nor capricious, as explained Respondent's April 25, 2013, brief, but even if they were, remedying such actions is not the purpose of this proceeding. The only purposes of this proceeding are to determine whether twelve specific pesticide products should be cancelled, and whether the applications for registration of two other pesticide products should be denied. Although it is irrelevant to those purposes, Petitioners' fourth argument does raise one point not expressly addressed in Respondent's April 25, 2013, brief that Respondent will clarify here. In exchange for the rodenticide registrant Liphatech, Inc. agreeing to voluntarily cancel certain registrations for products similar to those subject to this proceeding, Respondent agreed to allow retailers to continue to sell existing stocks of two cancelled Liphatech rodenticides until those stocks were exhausted. The quantities of the two Liphatech products in the channels of trade at

[4] It is curious that this purported unfairness to Reckitt relative to other rodenticide registrants would be part of the "unique perspectives on this issue which should be considered by the ALJ when deciding Reckitt's Motion" that Petitioners – a retailer and two pesticide users – claimed as justifying their untimely filing. (Petitioners' "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", at 2 (May 13, 2013).) One might have presumed that retailers and users would welcome any continued availability of existing stocks of the other registrants' cancelled rodenticides. Petitioners' unfairness argument raises the question of whether they truly represent their own interests in this proceeding, or whether they are merely cats' paws for Reckitt.

the time of the agreement were small, and Respondent reasonably expected that the quantities of existing stocks remaining in the channels of trade by the time a cancellation hearing for Liphatech (or for Reckitt) could be concluded would be negligible. The agreement between Respondent and Liphatech must be recognized as a compromise, and while not ideal from Respondent's perspective, it resulted in less exposure to Liphatech's products than likely would have resulted had no compromise been reached (and had Liphatech exercised its right to produce and sell product during the pendency of a cancellation hearing). Moreover, there is no disparate treatment because essentially the same compromise was available to Reckitt before the NOIC was issued, but Reckitt instead chose litigation.

II. RESPONSE TO ACCBP'S ARGUMENTS

ACCBP presents essentially two arguments: (i) That the decision regarding whether to allow sales of existing stocks of cancelled pesticides requires fact-intensive consideration of numerous technical and economic factors that should be made by an ALJ in a section 6(b) cancellation hearing during which the registrant can provide relevant information to assure a more complete record; and (ii) That without formal review by an ALJ, Respondent's decisions regarding existing stocks of cancelled pesticides may be inadequately informed and/or arbitrary and capricious. These arguments are without merit.

Although ACCBP cites several authorities regarding the general authority of the ALJ, ACCBP does not present any argument or authority directly addressing the core of Respondent's Brief, that FIFRA provides no right to a formal hearing on the disposition of existing stocks of cancelled product (Respondent's Brief at 2-5), that the NOIC sets the outer bounds of the scope of a proceeding (*id.* at 6-8) and that the NOIC does not include the disposition of existing stocks

of cancelled product within the scope of this proceeding (*id.* at 11-12). As ACCBP does not contest these legal positions, its first argument reduces to a policy argument for why the law should be different than it is. Respondent submits that such policy arguments are unavailing given the Administrator's decision in *In the Matter of Cedar Chemical Co., et al.*, 2 E.A.D. 584, 1988 WL 525242 (June 9, 1988)(holding that FIFRA does not create any right to hearing on the disposition of existing stocks of cancelled product), the Ninth Circuit decision in *Northwest Food Processors Ass'n v. Reilly*, 886 F. 2d 1075 (9th Cir. 1989) *cert. denied* 497 U.S. 1004, 110 S.Ct. 3239, 111 L.Ed.2d 750 (1990)(upholding the Administrator's decision in *Cedar Chemical*), and the Chief Judicial Officer's decision in *In the Matter of Shell Oil Company, et al.*, 1 E.A.D. 517, 1979 WL 52074 (April 9, 1979)("matters falling outside the scope of the notice ... are of no relevance to the proceeding." 1 E.A.D. at 523-24.)

Moreover, ACCBP's policy arguments are not persuasive. It does not make sense, from a public policy perspective, to further complicate the cancellation hearing process by adding additional technical and economic factors to the proceeding and decision that are not related to the issue to be decided in a cancellation proceeding: whether the use of a pesticide generally causes unreasonable adverse effects on the environment. The administrative record for a cancellation proceeding should not include any facts or arguments pertaining solely to the risks and benefits of existing stocks of the pesticide after cancellation, because what becomes of existing stocks of a pesticide once it has been cancelled is irrelevant to the question of whether that pesticide does or does not meet the FIFRA section 3(c)(5) registration criteria. Similarly, the risks and benefits of various sentencing options are irrelevant in determining whether a person has or has not committed a crime. Adding additional factors and issues cannot help but delay a final decision on whether the registrations should be cancelled; while delay might serve

the interests of particular pesticide registrants, it certainly does not benefit human health or the environment.

This is not to say that the disposition of existing stocks of a cancelled pesticide is unimportant, because it can be very important to society and the environment. But the case law reflects acceptance of the proposition that the purpose of a FIFRA section 6(b) cancellation proceeding can appropriately be limited to the determination of whether a pesticide product is or is not still eligible for registration, and not what will become of existing stocks of the pesticide once it is cancelled. Factors such as the quantities of existing stocks of a cancelled pesticide, their economic value, and the risks of various methods of disposal do not have a causal effect on the risks or benefits associated with *registration* of the pesticide, and therefore are not relevant to a finding that the pesticide should or should not be cancelled. If an ALJ determined that use of a pesticide product causes unreasonable risk, there are no conceivable facts related to the disposition of a quantity of existing stocks – were the product to be cancelled – that could justify a decision to allow continued registration and the consequent introduction of more of that pesticide product into commerce. Thus the administrative record for a section 6(b) cancellation proceeding is complete if it addresses all relevant issues in regard to the use of the product as registered; nothing pertaining solely to existing stocks of the cancelled pesticide is needed to make an adequate record to support a decision on whether or not a registration should be cancelled. Accordingly, it is appropriate that the administrative record for a section 6(b) cancellation decision be wholly separate from the record for a section 6(a)(1) existing stocks determination.

ACCBP's second argument is essentially that administrative review by an ALJ is necessary to prevent Respondent from arbitrary and capricious actions regarding existing stocks

of cancelled pesticides, and is essentially the same as Petitioners' fourth argument, discussed above. While Respondent maintains that its actions regarding existing stocks are consistent with the Existing Stocks Policy and have been neither arbitrary nor capricious, the issue itself is simply not relevant to this proceeding. A cancellation hearing is not a forum for general remedy of grievances, but rather a focused hearing for one specific statutory purpose: To determine whether certain specific pesticide products meet the criteria for registration set forth in FIFRA section 3(c)(5). The disposition of existing stocks of the products after cancellation is irrelevant to that determination, as is any process issue related to that disposition.

III. CONCLUSION

For the reasons discussed above, neither the Petitioners' brief nor the ACCBP's amicus brief offers any persuasive authority or rationale for the position that the disposition of existing stocks of cancelled products should be considered within the scope of this proceeding, and Reckitt's Motion should be denied.

Respectfully submitted,

5/31/2013
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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Response To The Brief Of The Greater Cincinnati Northern Kentucky Apartment Association, Louisville Apartment Association, And Do It Best Corporation In Support Of Reckitt's Motion For An Expedited Determination On Existing Stocks* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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